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Adjudicating Genocide: Is the International Court of Justice Capable of Judging State Criminal Responsibility?

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Adjudicating Genocide: Is the International Court of Justice Capable of Judging State Criminal Responsibility?

Dermot Groome

Abstract

Last February, the International Court of Justice issued a judgement adjudicating claims by Bosnia and Herzegovina that Serbia breached the 1948 Genocide Convention – the case marks the first time a state has made such claims against another. The alleged genocidal acts were the same as those that have been the subject of several criminal trials in the Yugoslav Tribunal. The judgement contained several landmark rulings – among them, the Court found that a state, as a state, could commit the crime of genocide and the applicable standard of proof for determining state responsibility is comparable to the standard used in criminal trials. The Court, with these rulings, committed itself to the same essential task faced by the Yugoslav Tribunal – an examination of the states of mind of senior officials to determine if genocidal acts were committed with the intent to destroy a protected group. The work of the ad hoc tribunals for Yugoslavia and Rwanda has demonstrated that adjudicating genocide cases present several unique interpretative and analytical challenges. The Court, intended as a forum to resolve disputes between states, is ill-equipped to adjudicate issues traditionally reserved for criminal courts involving the examination of an individual's state of mind. Further, considerations of fairness prevent the Court from adjudicating the criminal culpability of individuals who are not before it. This article explores the methodology developed by the ICJ for adjudicating its first genocide case, its implications for future cases and draws the conclusion that such methodology forces the Court into a relationship that is dependent upon the work of other international criminal tribunals.

ADJUDICATING GENOCIDE: IS THE INTERNATIONAL COURT OF JUSTICE CAPABLE OF JUDGING STATE CRIMINAL RESPONSIBILITY?

*Dermot Groome**

Hopefully, the activities of these two judicial institutions of the United Nations [The International Court of Justice and the International Criminal Tribunal for the former Yugoslavia] . . . contribute in their respective fields to their common objective—the achievement of international justice—however imperfect it may be perceived.

Judge Peter Tomka, International Court of Justice

INTRODUCTION

On February 26, 2007, the International Court of Justice ("ICJ")¹ issued its judgment in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* ("ICJ Genocide Judgment"),² adjudicating claims by Bosnia and Herzegovina ("Bosnia") that Serbia had breached its obligations under the Convention on the Prevention and Punishment of the Crime of Genocide of 1948 ("Genocide Convention"). The case, filed by Bosnia against the Federal Republic of Yugoslavia ("FRY") in

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1. The International Court of Justice ("ICJ") was established by the Charter of the United Nations ("U.N.") in 1945 as the successor institution to the Permanent Court of International Justice and is the primary judicial organ of the United Nations. The ICJ has its own statute and rules and has the authority to give advisory opinions as well as settle controversial cases between states. By ratifying the U.N. Charter, Member States consent to the jurisdiction of the ICJ and have the right to bring disputes with other states before the ICJ. Some conventions, such as the Genocide Convention, have specific provisions referring disputes to the ICJ. See Convention on the Prevention and Punishment of the Crime of Genocide art. 9, Dec. 11, 1948, 78 U.N.T.S. 277 [hereinafter Genocide Convention]; U.N. Charter arts. 92-93; Statute of the International Court of Justice arts. 1, 36, 65, June 26, 1945, 33 U.N.T.S. 993 [hereinafter ICJ Statute].

2. Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Mont.) (Judgment of Feb. 26, 2007), available at <http://www.icj-cij.org/docket/files/91/13685.pdf> (last visited Mar. 20, 2008) [hereinafter ICJ Genocide Judgment].

1993, alleged that the widespread campaign of ethnic cleansing—focused most sharply against the Muslim population of Bosnia—constituted a breach of Serbia’s obligations under the Genocide Convention.³ The case marks the first time a State Party to that Convention has accused another state of perpetrating the crime of genocide. In reexamining old injuries, the ICJ’s judgment renewed controversy between the different ethnic groups about the continued existence of the joint political institutions created by the Dayton Peace Accords of 1995.⁴

The case had a long, complex procedural history complicated by continued conflict in the region and by the question of Serbia’s membership in the United Nations (“U.N.”) after the dissolution of Yugoslavia in 1992—a question that had significant jurisdictional implications for the case.⁵ After determining

3. Prior to its dissolution, the Socialist Federal Republic of Yugoslavia (“SFRY”) was comprised of six constituent republics: Serbia, Montenegro, Bosnia and Herzegovina, Croatia, Slovenia, and Macedonia. At the time of filing, Bosnia, Slovenia, Croatia, and Macedonia were recognized as independent countries, and the remaining Yugoslav states of Serbia and Montenegro were collectively referred to as the Federal Republic of Yugoslavia (“FRY”), having adopted this name in 1992. In 2003, the FRY changed its name to “Serbia and Montenegro.” After a referendum in May 2006, Montenegro dissolved its union with Serbia, leaving Serbia as the sole respondent. For the purposes of the Genocide Convention, Serbia accepted continuity between “Serbia and Montenegro” and the “Republic of Serbia.” For a full account of the name and identification of the respondent, see *id.* ¶¶ 67-79. For clarity, this Article will use the name “Serbia” to refer to the respondent at all stages of the proceedings.

4. See T.K. Vogel, *Bosnia-Herzegovina: Reaching a Breaking Point over Srebrenica*, RADIO FREE EUROPE, July 9, 2007, http://www.rferl.org/features/features_Article.aspx?m=07&y=2007&id=B4E3B429-A6CD-486A-ABF9-202B09345A81 (“The most recent campaign to scrap the entities [created by the Dayton Peace Accords in 1995] was prompted by a judgment in February, in which the International Court of Justice (ICJ) confirmed that the 1995 killings at Srebrenica did in fact constitute genocide.”).

5. In its final arguments before the Court, Serbia essentially claimed that the ICJ had no jurisdiction over it for two reasons: first, because Serbia was not the continuator state of the SFRY and thus did not “inherit” the SFRY’s obligations under the Genocide Convention, and second, because it was not the continuator of the SFRY, it did not “inherit” the SFRY’s membership in the U.N., and thus was not a party to the ICJ’s statute. See ICJ Genocide Judgment, *supra* note 2, ¶ 66. The issue of Serbia’s U.N. membership is complicated because following the dissolution of the SFRY, the FRY (Serbia and Montenegro) claimed to be the continuator of the SFRY and its membership in the U.N. On May 30, 1992, the U.N. Security Council adopted Resolution 757, which rejected the FRY’s claim to be the successor of Yugoslavia as “not be[ing] generally accepted.” S.C. Res. 757, pmbl., U.N. Doc. S/RES/757 (May 30, 1992). It further stated in Resolution 777 that the FRY could not automatically continue the SFRY’s membership and referred the matter to the General Assembly. See S.C. Res. 777, ¶ 1, U.N. Doc. S/RES/777 (Sept. 19, 1992). On September 22, 1992, the General Assembly adopted resolution 47/1, which affirmed that the FRY did not inherit the SFRY’s membership

that it did indeed have jurisdiction over Serbia, the ICJ went on to enter findings regarding Bosnia's allegations against Serbia. In summary, the ICJ found that Serbia, as a state, had neither committed genocide in Bosnia nor been complicit in the crime of genocide.⁶ The ICJ did conclude that Serbia, through its continued support of Bosnian Serbs in light of the probability that some of them would commit the crime of genocide, had "violated the obligation to prevent genocide . . . in respect of the genocide that occurred in Srebrenica in July 1995."⁷ The ICJ further concluded that Serbia's failure to transfer Ratko Mladić to the International Criminal Tribunal for the Former Yugoslavia ("ICTY") was a breach of the Genocide Convention.⁸ The judgment, which fell far short of the relief sought by Bosnia,⁹ was immediately criticized by observers who questioned not only the ICJ's findings, but its methodology, its analysis, and even the

and that it should "apply for membership in the United Nations." G.A. Res. 47/1, ¶ 1, U.N. Doc. A/RES/47/1 (Sept. 22, 1992). Serbia, maintaining that it continued the SFRY's membership, did not reapply for membership until 2000, when Vojislav Koštunica defeated Slobodan Milošević in the election for presidency of the federation. In 1996, without expressly considering issues related to the FRY's U.N. membership, the ICJ determined that it did have jurisdiction over the FRY. *See* Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Yugo.), 1996 I.C.J. 595, 609-10, 613 (July 11). In 1999, the FRY initiated an application before the ICJ alleging that eight Member States of NATO had violated international law by bombing Serbia that year. In 2004, the ICJ dismissed these claims, stating that "Serbia and Montenegro was not a Member of the United Nations [in 1999]." *Legality of Use of Force* (Serb. & Mont. v. Belg.), 2004 I.C.J. 279, 311 (Dec. 15). Faced with the apparent inconsistency of dismissing Serbia's claims against NATO on jurisdictional grounds and a finding of jurisdiction in the ICJ Genocide Judgment, the ICJ applied the principle of *res judicata* to its 1996 judgment finding jurisdiction in 1996. For additional information on the question of Serbia's membership in the United Nations, see Michael P. Scharf, *Musical Chairs: The Dissolution of States and Membership in the United Nations*, 28 CORNELL INT'L L.J. 29, 53 (1995) and Yehuda Z. Blum, *UN Membership of the "New" Yugoslavia: Continuity or Break?*, 86 AM. J. INT'L L. 830 (1992).

6. *See* ICJ Genocide Judgment, *supra* note 2, ¶ 471.

7. *See id.*

8. *See id.* The ICJ also found that "Serbia has violated its obligation to comply with the provisional measures ordered by the Court on 8 April and 13 September 1993 in this case, inasmuch as it failed to take all measures within its power to prevent genocide in Srebrenica in July 1995." *Id.*

9. The Bosnian government sought "full compensation for the damages and losses caused, in the amount to be determined by the court in a subsequent phase of the proceedings in this case." Memorial of the Government of the Republic of Bosnia and Herzegovina, Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Mont.) (Judgment of Feb. 26, 2007), at 294 (Apr. 15, 1994), available at <http://www.icj-cij.org/docket/files/91/8616.pdf> (last visited Mar. 20, 2008).

ICJ's capacity to adjudicate such a complex case.¹⁰

This Article explores the ICJ's methodology and its resulting analysis, and interprets both in relation to the parallel work of the ICTY. While the ICJ is to be commended for its efforts to give practical effect to the prohibitions of the Genocide Convention, its methodology and analysis fell short of the task before it, with the clearest example being its failure to assess, in any comprehensive way, the body of evidence that the prosecution introduced in the genocide case against Slobodan Milošević before the ICTY. At the end of the prosecution's case, the trial chamber, pursuant to Rule 98 *bis* of the ICTY's Rules of Procedure and Evidence, determined that the prosecution had introduced sufficient evidence upon which a reasonable trial chamber *could* be satisfied beyond a reasonable doubt that Milošević had committed the crime of genocide. Milošević's death ended the case, however, and denied the world a definitive, final judgment. The ICJ's failure to examine this body of evidence is tacit recognition of its inability to take on the role of a trial chamber adjudicating individual guilt—that is, to carefully explore complex testimony and evidence, and to make determinations regarding issues of individual criminal responsibility. This Article argues that the ICJ, through several of its rulings, committed itself to carrying out some of the same tasks as a criminal tribunal but that the ICJ was unable to independently complete the very task that it defined for itself. Instead, it has created a relationship of dependency—a relationship in which it will always have to wait upon, and defer to, international criminal tribunals adjudicating genocide cases before it can properly enter a judgment regarding state responsibility for the crime of genocide.

While the term "genocide" became part of the world's vo-

10. See Ruth Wedgwood, Op-Ed., *Bad Day for International Justice*, INT'L HERALD TRIB., Mar. 8, 2007, available at <http://www.iht.com/articles/2007/03/08/opinion/edwedge.php> ("Yet the International Court of Justice . . . fail[s] to explain why the deliberate slaughter of civilians in the riverside town of Brcko in 1992, meant to push Muslims away from the Sava River corridor or the torture and starvation of Muslim civilians in Foca, is different in kind from the Srebrenica murders meant to secure the Drina Valley It will take years of study to understand how that could be true [T]he International Court of Justice applies the demands of criminal proof to a civil case. The judges insist that even for civil liability, proof against Belgrade has to be 'fully conclusive' and 'incontrovertible,' with a level of certainty 'beyond any doubt.' This standard is well known when the jail door will shut, but it exceeds the demands of civil liability.").

cabulary during the Nazi campaign against six million Jews in World War II, it was only after the war that genocide became a legally enforceable crime. Targeting an entire group of people for destruction was recognized as being qualitatively different from the particular acts, all crimes in themselves, used to achieve that end. Although the crime of persecution covered acts that we now consider genocide, such a characterization did not adequately reflect the magnitude or unique character of this "crime of all crimes."¹¹ Raphael Lemkin fashioned the term "genocide" and indefatigably campaigned for its recognition as a distinct crime.¹² On December 11, 1946, the U.N. General Assembly adopted a resolution defining genocide as "a denial of the right of existence of entire human groups, as homicide is the denial of the right to live of individual human beings."¹³ Two years later, the Genocide Convention was adopted, unequivocally establishing genocide as an international crime and giving it a precise legal definition capable of enforcement. The crime of genocide would move from page to praxis when the ICTY and the International Criminal Tribunal for Rwanda ("ICTR") incorporated, almost verbatim, the definitional provisions of the Genocide Convention into their respective statutes and applied them to the unbridled inhumanity that scourged Rwanda and the former Yugoslavia in the early 1990s. Trials in the two ad hoc tribunals have now forged a body of nascent jurisprudence that has given tangible form and effect to Lemkin's quest to hold those who commit genocide individually responsible for their acts.¹⁴

In 1993, while the U.N. Security Council was considering taking the bold step of establishing an ad hoc tribunal for the former Yugoslavia under Chapter VII of the U.N. Charter,¹⁵ Bosnia initiated ICJ proceedings against the FRY, alleging that the FRY had perpetrated, and was continuing to perpetrate, the

11. GUÉNAËL METTRAUX, *INTERNATIONAL CRIMES AND THE AD HOC TRIBUNALS* 199 (2005).

12. See RAPHAËL LEMKIN, *AXIS RULE IN OCCUPIED EUROPE: LAWS OF OCCUPATION, ANALYSIS OF GOVERNMENT, PROPOSALS FOR REDRESS* 79 (1973).

13. G.A. Res. 96/1, U.N. Doc. A/RES/96/1 (Dec. 11, 1946).

14. Ralph Lemkin was a Holocaust survivor who coined the term "genocide" and was a tenacious advocate for its formal recognition as a distinct international crime. See LEMKIN, *supra* note 12, at 91.

15. See S.C. Res. 808, pmb., U.N. Doc. S/RES/808 (Feb. 22, 1993); S.C. Res. 827, pmb., U.N. Doc. S/RES/827 (May 25, 1993). Bosnia instituted proceedings against Serbia on March 20, 1993. See ICJ Genocide Judgment, *supra* note 2, ¶ 1.

crime of genocide against the non-Serb population of Bosnia.¹⁶ Within months the ICTY was established in the Hague, a short distance away from the ICJ; the two international courts would begin their parallel, yet distinct, efforts to give effect to the prohibitions embodied in the Genocide Convention. These related endeavors, in which the two courts would seek to determine both state and individual responsibility for crimes committed in Bosnia, would require the courts to interpret the language of the Genocide Convention and to develop standards and methodologies suitable to the task of applying it.

In the *ICJ Genocide Judgment* the ICJ explicitly recognized that it was treading the same ground as ICTY judges, which was described as an "unusual" feature of the case.¹⁷ But in coming years, this situation is apt to become the norm. As our system of international criminal justice leaves its adolescence and matures into an effective and predictable check on impunity (primarily through the International Criminal Court ("ICC")), it is likely that all credible allegations of genocide will be the subject of comprehensive investigations to determine individual responsibility. It seems equally likely that other countries will follow Bosnia's initiative and call upon the ICJ to intervene and adjudicate interstate violations of the Genocide Convention.¹⁸ In such circumstances, the parallel cases before the ICJ will most likely be commenced during the course of continuing criminal activity and before individual criminal accountability has authoritatively been determined in an international criminal tribunal. The resulting overlap in the work of the two international courts involved has the potential either to facilitate or to impede their work.¹⁹ One ICJ judge expressed the view, however, that it may

16. Bosnia sought to define the targeted group in negative terms: "non-Serb national, ethnical or religious group within, but not limited to, the territory of Bosnia and Herzegovina, including in particular the Muslim population." See *ICJ Genocide Judgment*, *supra* note 2, ¶ 66.

17. See *id.* ¶ 212.

18. After Bosnia filed its application in the ICJ, Croatia filed a similar application against Serbia, claiming that Serbia had breached the Genocide Convention with respect to crimes committed within the borders of Croatia. See *id.* ¶ 232; see also Press Release, International Court of Justice, Croatia Institutes Proceedings Against Yugoslavia for Violations of the Genocide Convention, Press Release 1999/38 (July 2, 1999) available at <http://www.icj-cij.org/presscom/index.php?pr=527&pt=1&p1=6&p2=1>.

19. Judge Tomka, in concluding his separate opinion, stated: "This Court and the ICTY have two different missions but one common objective The activity of the [ICJ] has thus complemented the judicial activity of the ICTY in fulfilling the Court's

be impossible for the ICJ to adjudicate state-versus-state claims alleging genocide absent a parallel international court.²⁰

I. GENOCIDE: ADJUDICATING THE CRIME OF CRIMES

The definitional element that most distinguishes genocide from other international crimes is its mens rea requirement that the perpetrator have the "intent to destroy in whole or in part a national, ethnical, racial or religious group, as such,"²¹ commonly referred to as the "special intent," or "*dolus specialis*," of genocide. Although the term "genocide" is popularly used to describe serious crimes committed on a discriminatory basis, its legal definition limits its prohibition to specified acts committed with the intent to destroy a particular protected group. The con-

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." Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Mont.) (Judgment of Feb. 26, 2007) (Separate Opinion of Judge Tomka), ¶ 73, available at <http://www.icj-cij.org/docket/files/91/13699.pdf> (last visited Mar. 20, 2008) [hereinafter ICJ Genocide Judgment (Separate Opinion of Judge Tomka)].

20. See *id.* ¶ 72 ("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."). Judge Tomka also recognized that "[w]ithout the work accomplished by the ICTY, it would have been much more difficult for the Court to discharge its role in the present case." *Id.*

21. Genocide Convention, *supra* note 1, art. 2. The full text of Article 2 of the Genocide Convention reads as follows:

In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

- (a) Killing members of the group;
- (b) Causing serious bodily or mental harm to members of the group;
- (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- (d) Imposing measures intended to prevent births within the group;
- (e) Forcibly transferring children of the group to another group.

Id. This language was incorporated without significant alteration into the International Criminal Tribunal for the former Yugoslavia ("ICTY") Statute, the International Criminal Tribunal for Rwanda ("ICTR") Statute, and the Rome Statute creating the International Criminal Court. See Statute of the International Criminal Tribunal for the Former Yugoslavia art. 4, May 25, 1993, 32 I.L.M. 1159 [hereinafter ICTY Statute]; Statute of The International Tribunal for Rwanda art. 2, Nov. 8, 1994, 33 I.L.M. 1598; Rome Statute of The International Criminal Court art. 6, July 17, 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute]. See generally M. CHERIF BASSIOUNI, INTRODUCTION TO INTERNATIONAL CRIMINAL LAW 138 (2003) (identifying other instruments defining genocide).

sequence of this requirement is that large-scale, grievous crimes committed on a discriminatory basis are not genocide unless it can be demonstrated that its perpetrators possessed the *dolus specialis* to destroy a protected group.²² This unique mens rea imposes an additional and heavy burden of proof upon the party claiming that particular crimes constitute genocide.

Genocide's elusive *dolus specialis*, coupled with a paucity of cases from which to take guidance, makes the crime difficult to investigate and adjudicate.²³ This notion of intent has presented an interpretive challenge for ICTY judges. In many cases the actus reus of genocide may be virtually indistinguishable from the actus reus of other serious international crimes, such as some forms of persecution as a crime against humanity.²⁴ Indeed, at the time of Nuremberg, the conduct prohibited by the Genocide Convention actually fell conceptually within the crime of persecution as a crime against humanity.²⁵ Although judges do, as a

22. On September 4, 2004, U.S. Secretary of State Colin Powell, appearing before the U.S. Senate Foreign Relations Committee, declared: "I concluded . . . that genocide has been committed in Darfur" Glenn Kessler & Colum Lynch, *U.S. Calls Killings in Sudan Genocide; Khartoum and Arab Militias Are Responsible, Powell Says*, WASH. POST, Sept. 10, 2004, at A1. Compare this with the conclusion of the commission appointed by the U.N. Secretary-General, chaired by Antonio Cassese, which found that while grave crimes (including killing, rape, and forced displacement) were committed by government forces, it could not be established that those actions constituted genocide.

[T]he crucial element of genocidal intent appears to be missing, at least as far as the central Government authorities are concerned. Generally speaking the policy of attacking, killing and forcibly displacing members of some tribes does not evince a specific intent to annihilate, in whole or in part, a group distinguished on racial, ethnic, national or religious grounds. Rather, it would seem that those who planned and organized attacks on villages pursued the intent to drive the victims from their homes, primarily for purposes of counter-insurgency warfare.

The Secretary-General, *Report of the International Commission of Inquiry on Darfur to the Secretary-General*, at 4, delivered to the Security Council, U.N. Doc. S/2005/60 (Jan. 25, 2005).

23. See STEVEN R. RATNER & JASON S. ABRAMS, ACCOUNTABILITY FOR HUMAN RIGHTS ATROCITIES IN INTERNATIONAL LAW: BEYOND THE NUREMBERG LEGACY 34 (1997).

24. In theory and in practice, there is little distinction between the actus reus of the crime of genocide and the most serious forms of persecution as a crime against humanity. In fact, there is no case in the ICTY or the ICTR in which genocide has been charged to the exclusion of the crime of persecution. Given the similarity of the underlying conduct and the inherently difficult burden of establishing genocide, prosecutors have exercised their charging discretion cautiously to couple the charge of persecution as a crime against humanity with genocide.

25. See Antonio Cassese, *Genocide*, in I THE ROME STATUTE OF THE INTERNATIONAL

matter of routine, draw logical and necessary inferences from the conduct of persons on trial, the conduct underlying genocide and other serious crimes are so similar as to present serious analytical difficulties. Of special note in this context is the determination whether a discriminatory crime was perpetrated against victims because of their membership in a group or was also intended as part of an effort to destroy the group itself.²⁶ Discerning such genocidal intent has been one of the greatest challenges faced by judges of the ad hoc tribunals.²⁷

The difficulties in establishing genocide are further complicated by the collective nature of the crime.²⁸ Historical manifestations of genocide have always involved large numbers of actors, with each contributing in varying degrees to the harm to the targeted group.²⁹ In a crime that necessarily involves the actions

CRIMINAL COURT: A COMMENTARY 335, 335 (Antonio Cassese, Paola Gaeta & John R.W.D. Jones eds., 2002).

26. With persecution, as with all crimes against humanity, the prosecution must establish that the defendant was aware that his particular crime was part of a broader criminal event—"a widespread or systematic attack directed against any civilian population." Rome Statute, *supra* note 21, art. 7. There is no burden that the actor intend any particular consequence on the targeted group as a group. See *Prosecutor v. Blaškić*, Case No. IT-94-14-T, Judgment, ¶ 207 (Mar. 3, 2000).

27. Consider the *Jelisić* case:

From this point of view, genocide is closely related to the crime of persecution, one of the forms of crimes against humanity set forth in Article 5 of the Statute. The analyses of the Appeals Chamber and the Trial Chamber in the *Tadić* case point out that the perpetrator of a crime of persecution, which covers bodily harm including murder, also chooses his victims because they belong to a specific human group. As previously recognised by an Israeli District Court in the *Eichmann* case and the Criminal Tribunal for Rwanda in the *Kayishema* case, a crime characterised as genocide constitutes, of itself, crimes against humanity within the meaning of persecution.

Prosecutor v. Jelisić, Case No. IT-95-10-T, Judgment, ¶ 68 (Dec. 14, 1999) (footnotes omitted); see also GERHARD WERLE, PRINCIPLES OF INTERNATIONAL CRIMINAL LAW 254-55 (2005).

28. A report published by the Bosnian Serb government acting under pressure from the international community estimated that over 19,000 people participated in the massacres perpetrated in Srebrenica. See Nicholas Wood, *More Prosecutions Likely to Stem from New Srebrenica Report*, N.Y. TIMES, Oct. 6, 2005, at A15. The government conceded that it still employed approximately 900 of the named participants. See *id.*

29. See LEMKIN, *supra* note 12, at 79 ("[G]enocide . . . is intended . . . to signify a coordinated plan of different actions aiming at the destruction of essential foundations of the life of national groups, with the aim of annihilating the groups themselves. The objectives of such a plan would be disintegration of the political and social institutions, of culture, language, national feelings, religion, and the economic existence of national groups, and the destruction of the personal security, liberty, health, dignity, and even lives of the individuals belonging to such groups.").

and intentions of many individuals, it may be difficult to determine whose state of mind (in addition to that of the accused) is relevant to the inquiry.³⁰ In complex criminal acts that are the culmination of a multitude of persons, genocidal intent may be found in an equivalent multitude of places.³¹ While the simplest formulation would be characterized by senior state officials and every person contributing to the *actus reus* sharing the same genocidal intent, that is not the reality of this complex crime. It may be that the direct perpetrators harbor genocidal intent, whereas state officials do not. Conversely, the state's senior leaders may be the architects of a carefully calculated genocidal plan that employs a multitude of others as instrumentalities who themselves do not possess genocidal intent.³² For example, leaders may exploit nationalism to foment fear, causing an explosion of violence directed at the protected group but whose direct perpetrators lack the *dolus specialis* of genocide and are motivated by a misperceived need for self-defense. These leaders may, with genocidal intent, be relying on the traditional discipline of soldiers to gain their participation in an *actus reus* for which the soldiers themselves have no relevant *dolus specialis*.

30. The *Krstić* appeals chamber found that it could make a determination that genocidal intent was present despite a failure to identify those who harbored it. See *Prosecutor v. Krstić*, Case No. IT-98-33-A, Judgment, ¶ 34 (Apr. 19, 2004). Contrast this finding with the *Stakić* trial chamber, which expressed its unwillingness to conclude that Stakić shared in the genocidal intent of his political superiors without more evidence about their intent.

Having heard all the evidence, the Trial Chamber finds that it has not been provided with the necessary insight into the state of mind of alleged perpetrators acting on a higher level in the political structure than Dr. Stakić to enable it to draw the inference that those perpetrators had the specific genocidal intent. As a consequence, the Trial Chamber is unable to draw any inference from the vertical structure that Dr. Stakić shared the intent.

Prosecutor v. Stakić, Case No. IT-97-24-T, Judgment, ¶ 547 (July 31, 2003).

31. See METTRAUX, *supra* note 11, at 207 ("Thus, genocide, it is sometimes suggested, may only be committed by people holding high offices such as ministers or generals In fact, just as anyone may commit a crime against humanity, all other conditions being met, anyone can commit a genocidal offence" (footnotes omitted)).

32. See Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosn. & Herz. v. Serb. & Mont.*) (Judgment of Feb. 26, 2007) (Dissenting Opinion of Vice-President Al-Khasawneh), ¶ 48, available at <http://www.icj-cij.org/docket/files/91/13689.pdf> (last visited Mar. 20, 2008) [hereinafter ICJ Genocide Judgment (Dissenting Opinion of Vice-President Al-Khasawneh)] ("[G]enocide is definitionally a complex crime in the sense that unlike homicide it takes time to achieve, requires repetitiveness, and is committed by many persons and organs acting in concert.").

The complexity of these questions regarding genocidal intent, which the ICTY and ICTR often faced, was compounded by the particular setting of the *ICJ Genocide Judgment*. As a preliminary matter, the ICJ had to determine whether the Genocide Convention created not only individual, but also state, criminal responsibility. Despite the lack of an express provision in the Genocide Convention prohibiting states from committing genocide, the ICJ came to the conclusion that such a prohibition was implicit in the Genocide Convention's categorization of genocide as an international crime and that states, by agreeing to such a categorization, "must logically be undertaking not to commit the act so described."³³ This interpretation is incongruent, however, with the Nuremberg principle that "crimes against international law are committed by men, not by abstract entities,"³⁴ and several of the judges disagreed with the majority on this point. From their perspective, a state, as an abstract entity, was incapable of forming intent and of committing a crime in the penal sense.³⁵

33. See ICJ Genocide Judgment, *supra* note 2, ¶ 166. The Court was also led to this conclusion by States Parties' express obligation to prevent the commission of acts of genocide. "It would be paradoxical if States were thus under an obligation to prevent, so far as within their power, commission of genocide by persons over whom they have a certain influence, but were not forbidden to commit such acts through their own organs" *Id.* Finally, the Court interpreted the Genocide Convention's jurisdictional provisions ("including those [disputes] relating to the responsibility of a State for genocide") as providing for state liability for the commission of genocidal acts. See *id.* ¶ 169 (quoting Genocide Convention, *supra* note 1, art. 9). Several judges dissented from this view. See, e.g., Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Mont.) (Judgment of Feb. 26, 2007) (Joint Declaration of Judges Shi and Koroma), ¶ 4, available at <http://www.icj-cij.org/docket/files/91/13695.pdf> (last visited Mar. 20, 2008) [hereinafter ICJ Genocide Judgment (Joint Declaration of Judges Shi and Koroma)] ("[I]f the Convention was intended to establish an obligation of such grave import as one that could entail some form of criminal responsibility or punishment of a State by an international tribunal such as this Court for genocide, this would have been expressly stipulated in the Convention, but the Convention did not do so.").

34. 1 TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL: NUREMBERG, 14 NOVEMBER 1945-1 OCTOBER 1946 223 (1947); see also ICJ Genocide Judgment (Joint Declaration of Judges Shi and Koroma), *supra* note 33, ¶ 3 ("The object and purpose of the Genocide Convention is to prevent and to punish the crime of genocide, and, reflecting the Nuremberg principles, the Convention is directed against individuals and not the State."); RATNER & ABRAMS, *supra* note 23, at 26 ("Article IV, reflecting the Nuremberg principles, provides for individual responsibility, including that of government officials, for genocide.").

35. The problem is underscored by Judge Owada, who, in arguing that the Genocide Convention does not provide for State criminal responsibility, stated that "it is

Nevertheless, having determined that a state, in principle, could commit the crime of genocide, the ICJ obliged itself to determine not simply whether Serbia should be responsible for the conduct of its officials, but whether Serbia as a state possessed the requisite *dolus specialis* to commit genocide. Where, though, is the locus of the state's intent? The International Law Commission stated:

The State is a real organized entity, a legal person with full authority to act under international law. But to recognize this is not to deny the elementary fact that the State cannot act of itself. An "act of the State" must involve some action or omission by a human being or group: "States can act only by and through their agents and representatives."³⁶

clear that the Convention has rejected . . . an approach to hold the State directly to account for an international crime of genocide, on the ostensible ground that a State cannot commit a crime in the penal sense." Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Mont.) (Judgment of Feb. 26, 2007) (Separate Opinion of Judge Owada), ¶ 52, *available at* <http://www.icj-cij.org/docket/files/91/13697.pdf> (last visited Mar. 20, 2008). See also the joint declaration of Judges Shi and Koroma:

We entertain more than serious doubts regarding the interpretation given to the Genocide Convention in the Judgment to the effect that a State can be held directly to have committed the crime of genocide. . . . As an international criminal instrument, the convention envisages the trial and punishment of individuals for the crime of genocide. It does not impose criminal responsibility on the State as a State. Indeed, it could not have done so at the time it was adopted given that the notion of crime of State was not part of international law and even today general international law does not recognize the notion of the criminal responsibility of the State.

ICJ Genocide Judgment (Joint Declaration of Judges Shi and Koroma), *supra* note 33, ¶ 1. Judge Skotnikov disagreed with the majority's position that the Genocide Convention created an affirmative obligation not to commit genocide. He provides three reasons why it cannot: first, there can be no unstated obligations; second, the "unstated obligation" created by the majority is incompatible with the Convention, which confines itself to the criminal culpability of individuals; and third, according to general principles of international law, states cannot commit crimes; the majority's finding that a state can perpetrate genocide is inconsistent with the Convention in that there is no form of genocide that is not a crime, and hence the majority in effect "decriminalizes" the crime of genocide, transforming it into an "internationally wrongful act." See Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Mont.) (Judgment of Feb. 26, 2007) (Declaration of Judge Skotnikov), at 4, *available at* <http://www.icj-cij.org/docket/files/91/13705.pdf> (last visited Mar. 20, 2008) [hereinafter ICJ Genocide Judgment (Declaration of Judge Skotnikov)]. Judge Skotnikov also saw the majority's finding of state criminal liability as an unnecessary construction given the principle that a state can be held responsible any time a wrongful "act is committed by an individual capable of engaging State responsibility." See *id.* at 4-5.

36. International Law Commission, Apr. 23-June 1, 2001 & July 2-Aug. 10, 2001,

The corporate state entity possesses no capacity to formulate intent itself: its intent is manifest only in the demonstrable intentions of state actors with the *de jure* or *de facto* authority to engage the state's participation in the crime's *actus reus*. The ICJ developed a two-part test for deciding whether the genocidal acts could be attributed to a state, which indicated, in turn, where it would look for genocidal intent. The first part of the test involved determining "whether the acts of genocide . . . were perpetrated by 'persons or entities' having the status of organs of the [FRY] . . . under its internal law, as then in force."³⁷ Using this test, the ICJ examined the respondent's internal law to determine if any person or entity engaged in genocidal acts had a legal relationship with the FRY. In the absence of a direct legal relationship, the ICJ examined whether acts of genocide were perpetrated by persons or entities under the "effective control" of the state as that expression was defined in *Military and Paramilitary Activities in and Against Nicaragua*.³⁸

Having found that a state *qua* state can, in principle, commit the crime of genocide if those whose conduct is attributable to the state are individually responsible for genocide, the ICJ started down a path that would inevitably intersect and overlap with that of the ICTY. The ICJ would immerse itself in the same challenges faced by ICTY judges. It would need to determine the existence of *dolus specialis* in a collectively perpetrated crime and to distinguish between genocide and persecution as a crime against humanity.³⁹ In resolving the question of whether Serbia perpetrated genocide in Bosnia, the ICJ would examine the conduct and state of mind of several of those accused before the

Report of the International Law Commission on the Work of its Fifty-Third Session, ¶ 77, U.N. Doc. A/56/10 (citing German Settlers in Poland, Advisory Opinion, 1923 P.C.I.J. (ser. B) No. 6, at 22 (Sept. 10)).

37. ICJ Genocide Judgment, *supra* note 2, ¶ 386.

38. "It must however be shown that this 'effective control' was exercised, or that the State's instructions were given, in respect of each operation in which the alleged violations occurred, not generally in respect of the overall actions taken by the persons or groups of persons having committed the violations." *Id.* ¶ 400 (relying on the precedent established in *Military and Paramilitary Activities in and Against Nicaragua* (Nicar. v. U.S.), 1986 I.C.J. 14, 64-65 (June 27)).

39. Discerning whether an act is a crime against humanity or the crime of genocide is important because the ICJ has jurisdiction over cases of genocide but not over crimes against humanity. *Id.* ¶ 277 ("The killings outlined above may amount to war crimes and crimes against humanity, but the Court has no jurisdiction to determine whether this is so.").

ICTY. Most significantly, in reaching its conclusion that Serbia breached its duty to prevent the genocide in Srebrenica, the ICJ examined—and attributed to Serbia—Milošević's state of mind: "The FRY leadership, and President Milošević above all, were fully aware of the climate of deep-seated hatred which reigned between the Bosnian Serbs and the Muslims in the Srebrenica region."⁴⁰

Whereas the ICTY's Statute and Rules of Procedure and Evidence are specifically designed for inquiring into the minds of individuals, those of the ICJ, designed for a different purpose, are ill suited for exploring issues of individual criminal culpability. As a preliminary matter, and in this methodological void, the ICJ was confronted with the task of pronouncing on fundamental methodological issues such as the applicable standard of proof, apportionment of the burden of proof, and the types of evidence that could be properly considered. Since the ICJ realized that its determination of the applicable standards and methods would affect future genocide cases, it devoted a significant portion of its judgment to developing these methods. And as

40. *Id.* ¶ 438. Vice President Al-Khasawneh in his dissent also points to Milošević's state of mind as critical to the case.

General Mladić's decisive role in the Srebrenica genocide, the close relationship between General Mladić and President Milošević, the influential part President Milošević played in negotiations regarding Srebrenica (both before and after the genocide), and his own statements as set forth above, each taken alone, might not amount to proof of President Milošević's knowledge of the genocide set to unfold in Srebrenica. Taken together, these facts clearly establish that Belgrade was, if not fully integrated in, then fully aware of the decision-making processes regarding Srebrenica There can be no doubt that President Milošević was fully appraised of General Mladić's (and the Bosnian Serb army's) activities in Srebrenica throughout the takeover and massacres.

ICJ Genocide Judgment (Dissenting Opinion of Vice-President Al-Khasawneh), *supra* note 32, ¶ 51. Judge Keith, also dissenting, found that Serbia was complicit in the genocide in Srebrenica. He emphasized the centrality of Milošević's state of mind.

Given President Milošević's overall role in the Balkan wars and his knowledge, his specific relationship with General Mladić, and his involvement in the detail of the negotiations of 14 and 15 July, by that time he must have known of the change in plans made by the VRS command on 12 or 13 July and consequently he must have known that they had formed the intent to destroy in part the protected group. I am convinced that that knowledge of the Respondent is proved to the necessary standard stated by the Court in its judgment

Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Mont.) (Judgment of Feb. 26, 2007) (Declaration of Judge Keith), ¶ 15, *available at* <http://www.icj-cij.org/docket/files/91/13701.pdf> (last visited Mar. 20, 2008).

the dissent by the ICJ's vice-president made clear, methodology was not merely a matter of form but determined, in his view, the central substantive issues in the case. In Judge Al-Khasawneh's view, "had the Court followed more appropriate methods for assessing the facts, there would have been, in all probability, positive findings as to Serbia's international responsibility."⁴¹ Moreover, the flawed methodology adopted by the majority had a "profound" effect on the majority's ability to understand and appreciate the evidence before it.⁴² Given this context, my goal here is to explore the difficulties in adjudicating genocide cases and how the standards and methodology developed by the ICJ help define its relationship with the ICTY and with other international courts that may consider individual and state responsibility for genocide in the future. I will also consider how, in the future, such courts might better integrate their efforts to hold individuals and states *qua* states responsible for acts of genocide. Their respective methodologies must enable a court not only to adjudicate the specific claim before it, but to take into account, as necessary, the existence of a similar inquiry by another international court.

II. DEFINING THE METHODOLOGY

Historically, the issues raised by the ICJ's judgments have typically been fairly narrow and confined to a limited set of disputed facts. By contrast, the allegations against Serbia raised many contentious factual issues. In its effort to address the associated methodological complexities, the ICJ separated out three

41. ICJ Genocide Judgment (Dissenting Opinion of Vice-President Al-Khasawneh), *supra* note 32, ¶ 62. More specifically, Vice President Al-Khasawneh argued that:

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

Id. ¶ 31.

42. According to Vice President Al-Khasawneh:

Such involvement is supported, in my opinion, by massive and compelling evidence. My disagreement with the majority, however, relates not only to their conclusions but also to the very assumptions on which their reasoning is based and to their methodology for appreciating the facts and drawing inferences therefrom and is hence profound.

Id. ¶ 3.

categories of problems: burden of proof, standard of proof, and the types of admissible evidence.⁴³

A. *Burden of Proof*

In apportioning the burden of proof, the ICJ reaffirmed its general rule that the applicant bears the burden of proof for establishing its case and that a party asserting a particular fact bears the burden of establishing that fact.⁴⁴ Bosnia generally accepted this rule and provided the ICJ with a large volume of evidence in support of its claims. Bosnia also argued, however, for a variation of this general rule, especially given that the respondent had exclusive possession of highly probative evidence. Bosnia took the position that Serbia's refusal to produce unredacted copies of documents requested by Bosnia should have shifted the onus of proof to Serbia on several key issues.⁴⁵ In particular, the documents in question were from the FRY's Supreme Defence Council ("SDC"), the highest political body with de jure authority over the Yugoslav army. It met regularly during the course of the conflict and was comprised of the presidents of Yugoslavia (Zoran Lilić), Montenegro (Momir Bulatović), and Serbia (Milošević).⁴⁶ Minutes of the meetings were maintained, and the discussions between its members were stenographically recorded.

The SDC minutes appear on their face to be of the type of evidence that the ICJ has traditionally favored. In *Armed Activities on the Territory of the Congo*, the ICJ stated that "[i]t will prefer contemporaneous evidence from persons with direct knowledge. It will give particular attention to reliable evidence acknowledging facts or conduct unfavourable to the State"⁴⁷ The SDC

43. See ICJ Genocide Judgment, *supra* note 2, ¶ 203. The ICJ noted that despite increasing agreement between the parties, many of the allegations remained contested. See *id.* ¶ 202.

44. See *id.* ¶ 204 (citing *Military and Paramilitary Activities in and Against Nicaragua* (Nicar. v. U.S.), 1984 I.C.J. 392, 437 (Nov. 26)).

45. See *id.*

46. The Supreme Defence Council ("SDC") was the highest political body of the FRY having ultimate authority over the country's military personnel and resources. The council met regularly. The chief of the general staff, Momčilo Perišić, regularly reported on the activities of the military, and the council voted on many significant issues related to the military, including the promotion of officers and the use of military resources. The documents included verbatim transcripts of the meetings as well as minutes summarizing the issues they considered and the actions they took.

47. *Armed Activities on the Territory of the Congo* (Dem. Rep. Congo v. Uganda)

documents contained not only a contemporaneous account of discussions among the most senior political figures, but also, as suggested by Bosnia's representatives, information unfavorable to the Serb position before the ICJ. According to the ICJ's test for attributability, the SDC was the type of *de jure* state organ whose conduct and intent could be attributed to Serbia. Although the SDC documents were taken into evidence by the trial chamber in the ICTY case against Milošević, they were not made public. Nevertheless, some of the witness testimony provided indications of what those documents contained. For example, the trial chamber, in rendering its decision on a motion for a judgment of acquittal, made several references to the SDC, indicating the documents' relevance to the charge of genocide against Milošević.⁴⁸ The chamber mentioned Lilić's testimony that the SDC formalized the payment of all officers in the Bosnian Serb army in November 1993.⁴⁹ The chamber also mentioned evidence that the Yugoslav army and the Serb leadership received operational reports from the Bosnian Serb army;⁵⁰ that in some military documents the Bosnian Serb army and the Yugoslav army were referred to as "one army;"⁵¹ and that General Perišić, chief of the general staff of the Yugoslav army, regularly gave reports on the army's activities to SDC members.⁵²

Bosnia, recognizing the relevance of these documents in the Milošević trial, sought their admission in the proceedings before the ICJ. Bosnia argued that these documents provided contem-

(Judgment of Dec. 19, 2005), ¶ 61, *available at* <http://www.icj-cij.org/docket/files/116/10455.pdf> (last visited Jan. 26, 2008).

48. The *Milošević* trial chamber, while compelling production of the SDC minutes, granted protective measures requested by Serbia that they not be made public. In light of this decision, the *Milošević* trial chamber did not refer directly to the SDC minutes but instead referred to evidence given publicly about them by other witnesses.

49. See *Prosecutor v. Milošević*, Case No. IT-02-54-T, Decision on Motion for Judgment of Acquittal, ¶ 260 (June 16, 2004); see also Merdijana Sadović, *Could Key Records Have Altered ICJ Ruling?*, INST. FOR WAR & PEACE REPORTING, Mar. 9, 2007, http://www.iwpr.net/?p=tri&s=f&o=333964&apc_state=hsritri200703 (stating that "[t]estimonies of some witnesses at Milošević's trial—including former Yugoslav president Zoran Lilić—suggested the SDC records would have been very valuable for Bosnia's case. Lilić said the SDC decided in 1993 to formalise support for officers of the Bosnian Serb Army, VRS by establishing a body within the Yugoslav army called Personnel Centre 30.").

50. See *Prosecutor v. Milošević*, Case No. IT-02-54-T, Decision on Motion for Judgment of Acquittal, ¶ 258 (June 16, 2004) (citing the testimony of General Wesley Clark).

51. See *id.* ¶ 273.

52. See *id.* ¶ 260.

poraneous evidence of the thinking of FRY's most senior leaders, which was of "direct relevance to winning or losing the present case."⁵³ Serbia resisted, however, and provided only those portions of the documents that Serbia's co-agent claimed had not been "classified" by the SDC and the Council of Ministers of Serbia and Montenegro as "a matter of national security interest."⁵⁴ In the face of Serbia's steadfast refusal to produce the documents, Bosnia requested that the ICJ exercise its authority under Article 49 of the ICJ's Statute and order production of the unredacted versions of the SDC documents,⁵⁵ but the ICJ declined to do so.

Though the ICJ could have ordered that the documents be produced, it has no authority per se to physically compel such production. Its only recourse is to formally take into consideration the refusal as provided for in Article 49 of the ICJ's Statute.⁵⁶ For example, in the *Minquiers and Ecrehos* case between the United Kingdom and France involving competing claims of sovereignty over a group of islets and rocks in the Minquiers and Ecrehos group (off the coast of Jersey), the United Kingdom sought to rely on a judgment from the Royal Court of Jersey, issued in 1692. However, in view of the United Kingdom's inability to produce the judgment, the ICJ stated that "[a]s these documents are not produced, it cannot be seen on what ground the Judgment was based. It is therefore not possible to draw from this Judgment any conclusion supporting the British claim

53. ICJ Genocide Judgment, *supra* note 2, ¶ 205.

54. *Id.*

55. According to Bosnia's deputy agent:

Serbia and Montenegro should not be allowed to respond to our quoting the redacted SDC reports if it does not provide at the very same time the Applicant and the Court with copies of entirely unredacted versions of *all* the SDC shorthand records and of *all* of the minutes of the same. Otherwise, Serbia and Montenegro would have an overriding advantage over Bosnia and Herzegovina with respect to documents, which are apparently, and not in the last place in the Respondent's eyes, of direct relevance to winning or losing the present case. We explicitly, Madam President, request the Court to instruct the Respondent accordingly.

Id. According to Article 49 of the ICJ's Statute, "[t]he Court may, even before the hearing begins, call upon the agents to produce any document or to supply any explanations. Formal note shall be taken of any refusal." ICJ Statute, *supra* note 1, art. 49.

56. See GERALD FITZMAURICE, *THE LAW AND PROCEDURE OF THE INTERNATIONAL COURT OF JUSTICE* 576-77 (1986); see also Keith Highet, *Evidence and Proof of Facts*, in *THE INTERNATIONAL COURT OF JUSTICE AT A CROSSROADS* 355, 364 (Lori Damrosch ed., 1987).

to the Minquiers.”⁵⁷ In rendering its decision the ICJ formally noted that the document was not produced, and declined to adopt the British agent’s unsupported assertion.⁵⁸ In *Corfu Channel*, the United Kingdom sought to establish facts supported by a document (referred to as “XCU”) that it refused to produce, claiming that it contained naval secrets. The ICJ declined to draw any negative inference from the British agent’s refusal to obey the ICJ’s Article 49 order to produce the document, even though the document might have been inconsistent with other evidence before the ICJ.⁵⁹ While in neither case was the application of Article 49 determinative of the central legal or factual issues, in both cases it did affect the methodology employed by the ICJ.⁶⁰

The ICJ, in declining to order production of the documents in the *ICJ Genocide Judgment* proceedings, observed that Bosnia had made “ample use of” extensive documentation it received from the ICTY.⁶¹ The ICJ stated that “[a]lthough the Court has not agreed to either of the Applicant’s requests to be provided with unedited copies of the documents, it has not failed to note the Applicant’s suggestion that the Court may be free to draw its own conclusions.”⁶² If the ICJ had drawn a negative inference from Serbia’s failure to produce the SDC minutes, the burden of proof would have shifted to Serbia (at least in some way) to dis-

57. *Minquiers and Ecrehos* (Fr. v. U.K.), 1953 I.C.J. 47, 68 (Nov. 17).

58. *See id.* at 68-69.

59. *See Corfu Channel* (U.K. v. Albania), 1949 I.C.J. 4, 32 (Apr. 9) (“The Court cannot, however, draw from this refusal to produce the orders any conclusions differing from those to which the actual events gave rise.”).

60. *See* HERSCH LAUTERPACHT, *THE DEVELOPMENT OF INTERNATIONAL LAW BY THE INTERNATIONAL COURT* 88 (1958) (“Although the injurious act neither involved *prima facie* the liability of the State nor shifted the burden of proof, the fact of the exclusive control of the State over its territory and the resulting frequent inability of the injured State to furnish direct proof, had a bearing upon the *methods* of proof.”)

61. *See* ICJ *Genocide Judgment*, *supra* note 2, ¶ 206. The ICJ’s imprecise reference to other material suggests that it considered the inferences it could draw from the other material to be a suitable alternative to the SDC documents (which included verbatim accounts of those vested with the ultimate state authority over Serbia’s involvement in events in Bosnia).

62. *Id.* “Formal note shall be taken of any refusal” in Article 49 suggests that there may be some negative inference drawn from a State Party’s refusal to produce—but in this case, having never formally called upon Serbia to produce these documents, the ICJ could not take such formal note and instead limited itself to taking formal note of Bosnia’s request for the documents, an action the Vice-President’s dissent states fails to meet the requirements of Article 49. *See* ICJ *Genocide Judgment* (Dissenting Opinion of Vice-President Al-Khasawneh), *supra* note 32, ¶ 35.

prove that unfavorable inference.⁶³ The majority's opinion never states precisely how it takes into account Serbia's refusal to produce the SDC minutes. Judge Al-Khasawneh's dissent points out that "no conclusions whatsoever were drawn from noting the Respondent's refusal to divulge the contents of the unedited documents."⁶⁴ He went on to express his view that "[i]t is a reasonable expectation that those documents would have shed light on the central questions of intent and attributability"⁶⁵ and that the ICJ, under Article 49, should either have shifted the burden of production to Serbia on issues related to the SDC or have permitted a more liberal use of inference when considering what the redacted portions might have revealed.⁶⁶

Bosnia's "ample use" of other ICTY evidence did not diminish the importance of the SDC documents—the SDC documents would not have been cumulative of other evidence but constituted an independent source of probative evidence. As the ICJ noted early in its opinion, the central issues of the *ICJ Genocide Judgment* had not yet been the subject of an ICTY judgment.⁶⁷ All of the ICTY judgments available to Bosnia examined the responsibility of Bosnian Serbs; those cases sought to establish, within the strict constraints of a criminal trial of individual responsibility, whether those particular individuals were responsi-

63. For a general explanation of how drawing inferences shifts the burden of proof before international courts, see MOJTABA KAZAZI, *BURDEN OF PROOF AND RELATED ISSUES: A STUDY ON EVIDENCE BEFORE INTERNATIONAL TRIBUNALS* 259-74 (1996).

64. ICJ Genocide Judgment (Dissenting Opinion of Vice-President Al-Khasawneh), *supra* note 32, ¶ 35.

65. *Id.*

66. *See id.* ("It would normally be expected that the consequences of the note taken by the Court would be to shift the *onus probandi* or to allow a more liberal recourse to inference as the Court's past practice and considerations of common sense and fairness would all demand. This was expressed very clearly by the Court in its *Corfu Channel* Judgment: 'On the other hand the fact of this exclusive territorial control exercised by a State within its frontiers has a bearing upon the methods of proof available to establish the knowledge of that State as to such events. By reason of this exclusive control, the other State, the victim of a breach of international law, is often unable to furnish direct proof of facts giving rise to responsibility. Such a State should be allowed a more liberal recourse to inferences of fact and circumstantial evidence.'"); *see also* SHABTAI ROSENNE, *THE LAW AND PRACTICE OF THE INTERNATIONAL COURT, 1920-1996*, at 1362 (1997) ("A formal instance of the invocation of Article 49 is found in the letter of 4 October 1951 to the French agent in the *U.S. Nationals in Morocco* case concerning the capacity in which the proceedings had been instituted. In the *Monetary Gold* case, the Court relied upon Article 49 in making its interlocutory order in connection with the preliminary question." (footnotes omitted)).

67. *See* ICJ Genocide Judgment, *supra* note 2, ¶ 206.

ble for the crimes with which they were charged. None of those judgments addressed the individual responsibility of senior Yugoslav leaders such as Milošević, Perišić, Bulatović, or Lilić.⁶⁸ The first trial to comprehensively examine issues directly germane to the ICJ inquiry was the *Milošević* case. The *Milošević* trial chamber ultimately found in its 98 *bis* Decision that a reasonable trier of fact could conclude from the prosecution evidence (including the SDC documents) that Milošević, president of Serbia and an SDC member, was a participant in a joint criminal enterprise with Bosnian Serb leadership and that “he shared with its participants the aim and intention to destroy a part of the Bosnian Muslims as a group.”⁶⁹ It is likely that the ICJ would have relied on the SDC documents had those been made public in the *Milošević* case. The ICJ’s reluctance to infringe on Serbia’s sovereignty by requiring it to produce the documents, or, in the alternative, to draw a negative inference from its failure to produce them, impugns the ICJ’s judgment and encourages speculation that the ICJ may have decided the case differently had it considered the SDC documents.

The ICJ compounded this error by drawing inferences from the absence of evidence that it likely would have had before it if Serbia produced the unredacted SDC documents. Without the benefit of the SDC documents, which were directly related to the culpability of senior Serbian officials for crimes in Bosnia, the ICJ drew speculative inferences from the absence of evidence in other ICTY trials, which *did not*. The clearest example relates to Srebrenica and the ICJ’s drawing of negative inferences from the lack of evidence concerning some factual issues pertaining to Serb involvement. While the issue of who may have given orders to the persons convicted of crimes in Srebrenica was relevant to the ICJ inquiry, it was not directly relevant in the Srebrenica trials the ICJ relied upon. The ICJ mistakenly assumed that if there were evidence of involvement by senior Serb officials, it would have been introduced in the several Srebrenica trials. On one

68. The only decision to consider the relationship of Yugoslavia to the events in Bosnia was the *Tadić* Jurisdictional Appeal, which considered whether the conflict was of an international character.

69. See *Prosecutor v. Milošević*, Case No. IT-02-54-T, Decision on Motion for Judgment of Acquittal, ¶ 288 (June 16, 2004). Judge Kwon dissented from this finding, although he did agree with the majority that genocide was a foreseeable consequence of the joint criminal enterprise.

particularly important point, the ICJ drew the conclusion that "no evidence has been presented" that General Mladić or other officers from the 30th Personnel Centre were "officers of the army of the Respondent In the absence of evidence to the contrary, those officers must be taken to have received their orders from the Republika Srpska or the VRS, not from the FRY."⁷⁰ In light of its decision not to order production of evidence that could have answered this question concerning FRY involvement, the ICJ's drawing an inference from the absence of evidence emphasizes the relationship between its apportionment of the burden of proof and the ultimate outcome in the *ICJ Genocide Judgment*.

B. *Standard of Proof*

One of the issues the ICJ faced was the quantum of proof required before it could enter a judgement in favor of the applicant. Bosnia suggested that the standard of proof be a "balance of probabilities."⁷¹ Serbia asserted that given the seriousness of the allegations, "a charge of such exceptional gravity against a State requires a proper degree of certainty. The proofs should be such as to leave no room for reasonable doubt."⁷² While Bosnia advocated for a standard commonly used to assess nonpenal civil responsibility for damages, Serbia claimed that the same standard of proof ordinarily applied in criminal trials was the most appropriate standard. The evidentiary gap that lies between these two standards is wide, making the ICJ's choice of which standard to apply one of the key factors determining the outcome of the case.⁷³

The ICJ opted for the higher standard of proof, referring to *Corfu Channel*, a 1949 case in which the United Kingdom sought relief against Albania when mines in the Corfu Strait detonated, damaging naval ships and killing dozens of sailors.

The Court has long recognized that claims against a State involving charges of exceptional gravity must be proved by evidence that is fully conclusive The Court requires that it

70. ICJ Genocide Judgment, *supra* note 2, ¶ 388.

71. *Id.* ¶ 208.

72. *Id.*

73. Given the significant strategic implications that the standard of proof has on how a party prepares and presents its case, deferring a decision on the applicable standard until the final judgment raises issues of fairness.

be fully convinced that allegations made in the proceedings, that the crime of genocide . . . [has] been committed The same standard applies to the proof of attribution for such acts.⁷⁴

Using a standard of proof equivalent to that of a criminal trial is logically consistent with the ICJ's understanding of its own task—to determine whether Serbia, as a state, had perpetrated the crime of genocide. A lesser burden of proof would have been at variance with its jurisprudence and incongruent with traditional standards of establishing criminal culpability. In the context of Bosnia's claims, the coupling of this high standard of proof with genocide's inexorable requirement of *dolus specialis* imposed a heavy burden on Bosnia to establish the individual criminal responsibility of actors (a task similar to that of the ICTY prosecutor seeking to establish individual responsibility) and to establish beyond a reasonable doubt that their actions were attributable to Serbia. This standard of proof has been criticized. Some scholars have argued that since the remedy did not include incarceration, but only declaratory and compensatory relief, the standard of proof should have been a simple balance of probabilities, or, in any event, one that was lower than that traditionally required for individual crimes.⁷⁵

From a practical perspective, in view of the similarity between the ICJ's factual inquiries and those in several parallel ICTY cases, adopting a different standard of proof would not have been feasible. Although using a lower standard of proof would have allowed the ICJ to recognize and adopt findings of ICTY judges, it would have put the ICJ in the position of conducting detailed reexamination of trial evidence whenever ICTY judges determined that the prosecution had failed to establish a crime beyond a reasonable doubt. ICTY judgments resulting in acquittals for genocide (or other crimes that could constitute the *actus reus* of genocide) leave open the possibility that evidence that fell below the threshold of "proof beyond reasonable doubt" would nevertheless satisfy the lower standard of "balance of probabilities." The ICJ, faced with this possibility, would have had to reexamine the relevant evidence in those trials and make

74. ICJ Genocide Judgment, *supra* note 2, ¶ 209. Later in the opinion, the ICJ stated that "it is not established beyond any doubt in the argument between the Parties whether the authorities of the FRY" *Id.* ¶ 422.

75. See Wedgwood, *supra* note 10.

its own assessments regarding credibility and reliability—a juridical task fraught with risk of inaccuracy and error, especially when evaluating witness testimony without the benefit of seeing the witness or having the opportunity to ask questions.

While an equivalent standard of proof between the two courts thus appears desirable, the application of such a standard—namely, beyond a reasonable doubt—presents its own set of difficulties. These difficulties raise the central question of whether the ICJ is capable of determining that the crime of genocide has been committed. Given a standard of proof equivalent to that of a criminal trial for an inquiry that obliges the ICJ to examine the states of minds of individuals not before it, one wonders how an applicant could ever meet that burden. While the *Milošević* trial has been widely criticized as taking too long, there have been no viable alternative procedures put forward that would more efficiently adjudicate such weighty matters to the appropriate standard of proof while observing the procedural protections required for a fair trial. Most ICTY trials, even those considered more efficiently run than the *Milošević* trial, took over a year to complete, even though the trial chamber was exclusively engaged in that matter. The structure of the ICJ, with its fifteen judges hearing every case that comes before it, lacks the practical capacity to engage in the detailed inquiries of the ICTY's three-judge trial chambers. Establishing the mens rea of a senior political figure, as well as a complex, evolving chain of co-perpetrators engaged in a genocidal campaign—and doing it all beyond a reasonable doubt—is a large and cumbersome task. In this case, the ICJ allotted Bosnia eighteen court sessions to present its case and gave Serbia the same amount of time to reply.⁷⁶

In cases such as *Corfu Channel*, which involved a relatively limited factual inquiry, the ICJ's procedures can accommodate the evidence necessary to establish such a high standard of

76. See Verbatim Record of Public Sitting, Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Mont.) (Judgment of Feb. 26, 2007), at 10 (Mar. 8, 2006), available at <http://www.icj-cij.org/docket/files/91/10523.pdf> (last visited Mar. 20, 2008); Verbatim Record of Public Sitting, Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Mont.) (Judgment of Feb. 26, 2007), at 10 (May 2, 2006), available at <http://www.icj-cij.org/docket/files/91/10767.pdf> (last visited Mar. 20, 2008).

proof. Resolving a case like the Bosnia genocide case, which involved allegations of thousands of individual crimes spanning more than three years, presents an adjudicatory challenge of a magnitude that overwhelms the ICJ's procedural capacity. The ICTY, often criticized for the size of the cases and the length of its trials, provides a benchmark for assessing the ICJ's ability to conduct a parallel inquiry encompassing contested events from several ICTY trials; for applying the same law regarding genocide; and for applying the same high standard of proof.

C. Methods of Proof

Bosnia adduced evidence from a variety of sources in support of its allegations of genocide. It relied on resolutions by the Security Council and General Assembly; reports by U.N. officials and subsidiary bodies (Secretary-General, General Assembly, Security Council, Security Council's Commission of Experts, Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities, and Special Rapporteur on Yugoslavia); judgments, decisions, and other documents from the ICTY, as well as evidence adduced during ICTY trials; and government publications, documents from nongovernmental organizations, media reports, articles, books, and witnesses and experts who appeared before the ICTY itself.⁷⁷

As a preliminary matter, the ICJ set out general rules for evaluating evidence proffered by the parties or requested by the ICJ. Its guidelines accept, with caution, materials prepared by the parties for the case and materials that came from a solitary source. The ICJ expressed its preference for evidence from contemporaneous accounts by people with direct knowledge. It stated that it would give "particular attention" to reliable evidence against the interest of the state that offers it.⁷⁸ In a reference to the type of evidence produced by ICTY trials, "[t]he Court moreover notes that evidence obtained by examination of persons directly involved, and who were subsequently cross-examined by judges skilled in examination and experienced in assessing large amounts of factual information, some of it of a

77. See ICJ Genocide Judgment, *supra* note 2, ¶ 211.

78. See *id.* ¶ 213 (citing Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14, 41 (June 27)).

technical nature, merits special attention.”⁷⁹

1. United Nations Reports and Resolutions

The ICJ placed particular reliance on a report submitted by the U.N. Secretary-General to the General Assembly in November 1999 entitled *The Fall of Srebrenica*.⁸⁰ The report is 113 pages long and details the U.N.’s involvement with Srebrenica from the period beginning with its designation as a “safe haven” by the Security Council on April 16, 1993, until the Security Council endorsed the Dayton Peace Accords on December 15, 1995. The ICJ, approving the methodology of the report, placed significant weight on its findings of facts and conclusions.⁸¹ The report was the first time the U.N. had made public an account of Srebrenica, pieced together from its personnel in the region, including Dutchbat soldiers and military observers assigned to the Srebrenica area.⁸² The ICJ stated that “[t]he care taken in preparing the report, its comprehensive sources and the independence of those responsible for its preparation all lend considerable authority to it. As will appear later in this Judgment, the Court has gained substantial assistance from this report.”⁸³ The

79. *Id.* (citing Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), 2005 I.C.J. 116, ¶ 61 (Dec. 19)).

80. The Secretary-General, *Report of the Secretary-General Pursuant to General Assembly Resolution 53/35: The Fall of Srebrenica*, delivered to the General Assembly, U.N. Doc. A/54/549 (Nov. 15, 1999) [hereinafter *The Fall of Srebrenica*].

81. See ICJ Genocide Judgment, *supra* note 2, ¶ 230. The ICJ referred to the Secretary-General’s summary of the report’s methodology:

This report has been prepared on the basis of archival research within the United Nations system, as well as on the basis of interviews with individuals who, in one capacity or another, participated in or had knowledge of the events in question. In the interest of gaining a clearer understanding of these events, I have taken the exceptional step of entering into the public record information from the classified files of the United Nations. In addition, I would like to record my thanks to those Member States, organizations and individuals who provided information for this report. A list of persons interviewed in this connection is attached as annex 1. While that list is fairly extensive, time, as well as budgetary and other constraints, precluded interviewing many other individuals who would be in a position to offer important perspectives on the subject at hand. In most cases, the interviews were conducted on a non-attribution basis to encourage as candid a disclosure as possible. I have also honoured the request of those individuals who provided information for this report on the condition that they not be identified.

See *id.* ¶ 228 (citing *The Fall of Srebrenica*, *supra* note 80, ¶ 8).

82. See *The Fall of Srebrenica*, *supra* note 80, at 57.

83. ICJ Genocide Judgment, *supra* note 2, ¶ 230.

ICJ proceeded to refer to the report dozens of times. The ICJ did not consider the possibility of bias, however, in that the report was prepared by Secretary-General Kofi Annan, who was the under-secretary-general in charge of peacekeeping operations during some of the period being examined.⁸⁴

The Srebrenica report was not the first report on Bosnia prepared under the auspices of the Secretary-General's office. In 1992, pursuant to Security Council Resolution 780, the Secretary-General was directed to form an impartial commission to investigate claimed violations of international law in the former Yugoslavia. This commission issued a comprehensive report gathering and analyzing large volumes of evidence and applying international law. The ICJ relied extensively on this report, known as the *Commission of Experts Report*.⁸⁵ The ICJ relied on this report in coming to its conclusions regarding several Serb prison camps in Bosnia, including Batković,⁸⁶ Omarska,⁸⁷ Trnopolje,⁸⁸ Keraterm,⁸⁹ Manjača,⁹⁰ Luka,⁹¹ and K-P Dom;⁹² regarding kill-

84. See *The Fall of Srebrenica*, *supra* note 80, ¶ 5. In *Armed Activities on the Territory of the Congo*, the ICJ stressed how important it was that such reports be "challenged by impartial persons for the correctness of what [they contain]." See *Armed Activities on the Territory of the Congo* (Dem. Rep. Congo v. Uganda), 2005 I.C.J. 116, ¶ 61 (Dec. 19).

85. The Secretary-General, *Final Report of the Commission of Experts Established Pursuant to Security Council Resolution 780 (1992)*, delivered to the Security Council, U.N. Doc. S/1994/674 (May 27, 1994) [hereinafter *Commission of Experts Report*].

86. See ICJ Genocide Judgment, *supra* note 2, ¶ 255 (citing *Commission of Experts Report*, *supra* note 85, Vol. V, Annex X, at 9); see also *id.* ¶ 307 (citing *Commission of Experts Report*, *supra* note 85, Vol. IV, Annex VIII & Annex X).

87. See *id.* ¶ 262 (citing *Commission of Experts Report*, *supra* note 85, Vol. IV, Annex VIII, at 222); see also *id.* ¶ 312 (citing *Commission of Experts Report*, *supra* note 85, Vol. IV, Annex VIII, at 207-22).

88. See *id.* ¶ 267 (citing *Commission of Experts Report*, *supra* note 85, Vol. IV, Annex V, at 10); see also *id.* ¶ 314 (citing *Commission of Experts Report*, *supra* note 85, Vol. IV, Annex VIII, at 251-253).

89. See *id.* ¶ 265 (citing *Commission of Experts Report*, *supra* note 85, Vol. I, Annex V, ¶ 445 & Vol. IV, ¶ 1932); see also *id.* ¶ 313 (citing *Commission of Experts Report*, *supra* note 85, Vol. IV, Annex VIII, at 225, 231, 233, 238).

90. See *id.* ¶ 270 (citing *Commission of Experts Report*, *supra* note 85, Vol. IV, ¶¶ 370-76); see also *id.* ¶ 315 (citing *Commission of Experts Report*, *supra* note 85, Vol. IV, Annex VIII, at 50-54).

91. See *id.* ¶ 271 (citing *Commission of Experts Report*, *supra* note 85, Vol. IV, Annex VIII, at 93, 101); see also *id.* ¶ 317 (citing *Commission of Experts Report*, *supra* note 85, Vol. IV, Annex VIII, at 93-97).

92. See *id.* ¶ 309 (citing *Commission of Experts Report*, *supra* note 85, Vol. IV, at 128-32).

ings in the Prijedor region⁹³ and sex crimes in the municipality of Zvornik;⁹⁴ and regarding Sarajevo,⁹⁵ the forced deportation of non-Serbs,⁹⁶ and the destruction of cultural property.⁹⁷

Although these two reports feature most prominently among the U.N. materials used by the ICJ, the ICJ also relied on other U.N. sources. The ICJ adopted some assertions contained in Security Council and General Assembly resolutions to resolve factual issues related to Prijedor,⁹⁸ Goražde,⁹⁹ Banja Luka,¹⁰⁰ Sanski Most,¹⁰¹ and Srebrenica.¹⁰² Despite this reliance on Security Council and General Assembly resolutions, the ICJ declined to give any weight to the Security Council's characterization of events in Bosnia as "genocide."¹⁰³ However, the ICJ did rely on the General Assembly's Resolution 50/193 of 1995 with respect to the commission of international crimes in Sarajevo, Tuzla, Bihać, and Goražde.¹⁰⁴ The ICJ's use of Security Council and General Assembly resolutions as evidence nevertheless gives evidentiary credibility to essentially political statements. Such use of those statements may have the unintended consequence of causing member states to be reluctant to make strong statements in U.N. resolutions out of fear that an international court may rely on those statements in the future.

93. See *id.* ¶ 257 (citing *Commission of Experts Report*, *supra* note 85, Vol. I, Annex III, at 154-55); see also *id.* ¶ 311 (citing *Commission of Experts Report*, *supra* note 85, Vol. V, Annex X, at 41).

94. See *id.* ¶ 305 (citing *Commission of Experts Report*, *supra* note 85, Vol. V, Annex IX, at 54).

95. See *id.* ¶ 247 (citing *Commission of Experts Report*, *supra* note 85, Vol. II, Annex VI, at 8); see also *id.* ¶¶ 323-24 (citing *Commission of Experts Report*, *supra* note 85, Vol. II, Annex VI, at 8, 17).

96. See *id.* ¶¶ 330-31 (citing *Commission of Experts Report*, *supra* note 85, Vol. I, Annex IV, at 55 et seq.).

97. See *id.* ¶ 337 (citing *Commission of Experts Report*, *supra* note 85, Vol. I, Annex IV, at 5, 9, 21 ff. & Annex V, at 106).

98. See *id.* ¶ 274 (citing S.C. Res. 819, U.N. Doc. S/RES/819 (Apr. 16, 1993), G.A. Res. 48/153, ¶¶ 5-6 U.N. Doc. A/RES/48/153 (Feb. 7, 1994), and G.A. Res. 49/196, ¶ 6, U.N. Doc. A/RES/49/196 (Mar. 10, 1995)).

99. See *id.* ¶ 275 (citing S.C. Res. 913, U.N. Doc. S/RES/913 (Apr. 22, 1994)).

100. See *id.* (citing S.C. Res. 941, U.N. Doc. S/RES/941 (Sept. 23, 1994) and S.C. Res. 1019, U.N. Doc. S/RES/1019 (Nov. 9, 1995)).

101. See *id.* (citing S.C. Res. 1019, U.N. Doc. S/RES/1019 (Nov. 9, 1995)).

102. See *id.* (citing S.C. Res. 1019, U.N. Doc. S/RES/1019 (Nov. 9, 1995)).

103. See G.A. Res. 47/147, ¶ 16, U.N. Doc. A/RES/47/147 (Apr. 26, 1993) (in which the Security Council characterized acts of ethnic cleansing as genocide).

104. See ICJ Genocide Judgment, *supra* note 2, ¶ 275 (citing G.A. Res. 50/193, ¶ 6, U.N. Doc. A/RES/50/193 (Mar. 11, 1996)).

The ICJ also relied on reports by the U.N. Special Rapporteur with respect to Sarajevo¹⁰⁵ and events in the town of Hambarine in Prijedor.¹⁰⁶ In addition to U.N. sources, the ICJ considered communications and documents from the U.S. Department of State related to the camps at Batković¹⁰⁷ and Keraterm,¹⁰⁸ and to crimes committed in the town of Zvornik.¹⁰⁹ The ICJ also relied on correspondence and witness reports from the Permanent Mission of Austria to the U.N. regarding conditions at the Keraterm prison camp,¹¹⁰ and benefited from reports issued by Helsinki Watch, a non-governmental organization, when making findings related to the mistreatment of women in K-P Dom¹¹¹ and conditions at the Keraterm camp.¹¹²

2. Media Reports

The ICJ placed varying degrees of weight on media reports, depending on its determination of each report's reliability. The ICJ cited a BBC production entitled *The Death of Yugoslavia*, a documentary comprised, in significant part, of news footage and contemporaneous interviews of many of the protagonists, including, among others, Milošević, Borisav Jović, and Vojislav Šešelj. This documentary assisted the ICJ in its findings regarding the crimes committed in Zvornik.¹¹³ Bosnia submitted an article

105. See *id.* ¶ 246 (citing U.N. Econ. & Soc. Council, Comm'n on Human Rights, *Fifth Periodic Report on the Situation of Human Rights in the Territory of the Former Yugoslavia*, ¶ 14, U.N. Doc. E/CN.4/1994/47 (Nov. 17, 1993) (submitted by Tadeusz Mazowiecki) and U.N. Econ. & Soc. Council, Comm'n on Human Rights, *Situation of Human Rights in the Territory of the Former Yugoslavia: Periodic Report*, ¶¶ 69-70, U.N. Doc. E/CN.4/1996/6 (July 5, 1995) (submitted by Tadeusz Mazowiecki)).

106. See *id.* ¶ 258 (citing The Secretary-General, *Report on the Situation of Human Rights in the Territory of the Former Yugoslavia Prepared by Mr. Tadeusz Mazowiecki, Special Rapporteur of the Commission on Human Rights, Pursuant to Paragraph 15 of Commission Resolution 1992/S-1/1 and Economic and Social Council Decision 1992/305*, ¶ 17, delivered to the Security Council and the General Assembly, U.N. Doc. S/24809, A/47/666 (Nov. 17, 1992)).

107. See *id.* ¶ 255 (citing a U.S. State Department Dispatch dated April 19, 1993).

108. See *id.* ¶ 265 (citing a U.S. State Department Dispatch dated March 5, 1993).

109. See *id.* ¶ 250 (citing *Commission of Experts Report*, *supra* note 85, which relied, in part, on a declassified U.S. State Department document).

110. See *id.* ¶ 265 (citing a letter from the Permanent Representative of Austria to the U.N. dated March 5, 1993); see also *id.* ¶ 313 (relying on witness accounts reported by the Permanent Mission of Austria to the U.N.).

111. See *id.* ¶ 309 (citing *Commission of Experts Report*, *supra* note 85, which relied, in turn, on a report by Helsinki Watch).

112. See *id.* ¶ 313.

113. See *id.* ¶ 250.

published in the French newspaper *Le Monde* that reported both the interim results of a joint World Health Organization–European Union study regarding sexual assaults against men and the finding of a non-governmental organization that approximately 5000 men had been sexually mistreated. The ICJ, however, summarily rejected the *Le Monde* article as unreliable, citing the secondary nature of its information and the preliminary nature of the underlying research.¹¹⁴

3. Public Statements of the Parties

The ICJ has, in the past, relied on statements made by parties that were against their self-interest.¹¹⁵ In this case, Bosnia argued that a particular statement by government officials bore great significance. In 2005, after a graphic video depicting Serbian paramilitaries executing six men and boys from Srebrenica was shown during the *Milošević* trial, the Serbian government issued the following statement: “Those who committed those crimes and the *ones who ordered and organized that massacre did not represent Serbia or Montenegro, but an undemocratic regime of terror and death*, which was opposed by the majority of people in Serbia and Montenegro.”¹¹⁶

Bosnia sought to rely on this statement as an admission by the current government that what occurred in Srebrenica constituted the crime of genocide and that the Milošević regime bore responsibility for committing it.¹¹⁷ In earlier decisions the ICJ relied significantly on statements by state officials that contradicted the state’s position before the ICJ.¹¹⁸ In *Military and Paramilitary Activities in and Against Nicaragua*, the United States

114. *See id.* ¶ 357.

115. *See Military and Paramilitary Activities in and Against Nicaragua* (Nicar. v. U.S.), 1986 I.C.J. 14, 41 (June 27).

116. *Serbia’s Ambiguous Response to Srebrenica*, RADIO FREE EUROPE, July 1, 2005, <http://www.rferl.org/reports/balkan-report/2005/07/20-010705.asp> (emphasis added).

117. *See ICJ Genocide Judgment*, *supra* note 2, ¶ 377.

118. In the *Temple of Preah Vihear* case, the ICJ placed significance on declarations made by government officials in 1950 consenting to the jurisdiction of the ICJ. *See Temple of Preah Vihear* (Cambodia v. Thailand), 1961 I.C.J. 17, 30-32 (May 26). In the subsequent judgment on the merits, the ICJ placed weight on statements made by the Thai prince and on a map tendered by Thailand indicating the contested temple was on Cambodian territory—despite the fact that this evidence contradicted the position of Thailand’s representatives in Court. *See Temple of Preah Vihear* (Cambodia v. Thailand), 1962 I.C.J. 6, 30-32 (June 15). In the *ICJ Genocide Judgment*, the Vice-President took the

withdrew from the proceedings. After considering what weight to place on public statements of U.S. officials—statements that were recorded in the media or by the organizations before which they were made—the ICJ decided to accept as evidence of admissions against self-interest.¹¹⁹

Nevertheless, the ICJ declined to rely on the preceding statement by Serb officials. The ICJ noted that the statement was of a political nature and “not intended as an admission . . . in complete contradiction to the submissions made by the Respondent before this Court, both at the time of the declaration and subsequently.”¹²⁰ The ICJ would not hold a party bound by a statement that the party did not intend to be legally binding against it.¹²¹ In reaching this conclusion, the ICJ ignored the possibility that authoritative statements made by senior officials

position that the context of the statement cut in favor of viewing the statement as an admission of responsibility.

To the extent that the effect of a unilateral act depends on the intent behind it and the context within which it was made, we need only consider this: the Serbian Government at the time was attempting to distance itself—as a new and democratic régime—from the régime which had come before it, in light of the revelation of horrible crimes committed by paramilitary units (the *Scorpions*) on national Serbian and international television. The intent was to acknowledge the previous régime’s responsibility for those crimes, and to make a fresh start by distancing the new régime therefrom. A clearer intention to ‘admit’ past wrongs cannot be had.

ICJ Genocide Judgment (Dissenting Opinion of Vice President Al-Khasawneh), *supra* note 32, ¶ 58.

119. See *Military and Paramilitary Activities in and Against Nicaragua* (Nicar. v. U.S.), 1986 I.C.J. 14, 41 (June 27) (“The material before the Court also includes statements made by representatives of States, sometimes at the highest political level The Court takes the view that statements of this kind, emanating from high-ranking official political figures, sometimes indeed of the highest rank, are of particular probative value when they acknowledge facts or conduct unfavourable to the State represented by the person who made them. They may then be construed as a form of admission.”). In this case the Nicaraguan government had offered statements by then president Ronald Reagan and then Secretary of State George P. Shultz.

120. ICJ Genocide Judgment, *supra* note 2, ¶ 378.

121. “Of course, not all unilateral acts imply obligation; but a State may choose to take up a certain position in relation to a particular matter with the intention of being bound - the intention is to be ascertained by interpretation of the act.” *Nuclear Tests* (N.Z. v. Fr.), 1974 I.C.J. 457, 472-73 (Dec. 20). The ICJ’s findings regarding the binding character of a unilateral declaration were not without controversy. Consider comments by Taslim O. Elias, the former president of the ICJ: “[P]ronouncements on the binding character of unilateral declarations by France would seem to be highly questionable and, in any case, not supported either by principle or by authority.” TASLIM O. ELIAS, *THE INTERNATIONAL COURT OF JUSTICE AND SOME CONTEMPORARY PROBLEMS* 118 (1983).

at unguarded moments have probative value if they contradict the carefully worded pleadings of the parties before the Court.

4. Evidence of a "Genocidal Pattern"

One of the ways that Bosnia sought to meet its burden of establishing the *dolus specialis* of genocide was through what it argued was a consistent pattern of criminal conduct over the course of several years.¹²² It maintained that the striking similarity of criminal conduct (which the ICJ recognized as constituting the *actus reus* of genocide) was best explained as being part of an overall genocidal plan.¹²³ However, the ICJ recognized that this reliance on pattern evidence represented a deliberate shift in focus from the *mens rea* of direct perpetrators to that of senior Bosnian Serb and Serb leaders.¹²⁴ Before considering the pattern evidence itself, the ICJ evaluated a document produced by the Bosnian Serb Assembly and introduced in several ICTY trials. The ICJ found that this document, entitled "Decision on the Strategic Goals of the Serbian People in Bosnia and Herzegovina" ("Strategic Goals"), represented an expression of the joint view of Radovan Karadžić and Milošević. That document set out in specific terms the goals of the Serb people in Bosnia and included the goal of separating the Serb people from the "other two ethnic communities."¹²⁵ The ICJ adopted the *Stakić* trial chamber's findings that the document failed to establish

122. See ICJ Genocide Judgment, *supra* note 2, ¶ 370 ("[I]t is not surprising that the picture of the takeovers and the following human and cultural destruction looks indeed similar from 1991 through 1999. These acts were perpetrated as the expression of one single project, which basically and effectively included the destruction in whole or in part of the non-Serb group, wherever this ethnically and religiously defined group could be conceived as obstructing the all-Serbs-in-one-State group concept.").

123. See *id.*

124. See *id.* ¶ 371.

125. The document set forth six primary goals for the Serb people:

1. Separation as a state from the other two ethnic communities.
2. A corridor between Semberija and Krajina.
3. The establishment of a corridor in the Drina River valley, i.e., the elimination of the border between Serbian states.
4. The establishment of a border on the Una and Neretva rivers.
5. The division of the city of Sarajevo into a Serbian part and a Muslim part, and the establishment of effective state authorities within each part.
6. An outlet to the sea for the Republika Srpska.

genocidal intent.¹²⁶

After rejecting the “Strategic Goals” document as evidence of an overall genocidal plan, the ICJ turned to the pattern evidence offered by Bosnia to establish genocidal intent. The ICJ declined to draw the inferences Bosnia suggested:

The *dolus specialis*, the specific intent to destroy the group in whole or in part, has to be convincingly shown by reference to particular circumstances, unless a general plan to that end can be convincingly demonstrated to exist; and for a pattern of conduct to be accepted as evidence of its existence, it would have to be such that it could only point to the existence of such intent.¹²⁷

The ICJ did two things in this passage. First, absent convincing proof of a clear overall genocidal plan, it would confine its consideration of whether a particular crime was committed with genocidal intent to evidence directly related to that particular criminal event. It would not draw inferences based on the similarities in the *modus operandi* of crimes or examine their temporal relationship. Absent proof of an overall plan, the ICJ would examine each crime in an isolated, disconnected fashion. Second, pattern evidence could be used to establish the existence of a genocidal plan only if that evidence excludes all other possibilities.¹²⁸ Given the similarity between the actus reus of persecution and the actus reus of genocide, coupled with the multiplicity of persons contributing to these collective crimes, it is unlikely that patterns emerging from the actus reus could ever *fully* negate the existence of the mens rea of other crimes. The ICJ’s effective disregard of pattern evidence marks an important methodological departure from the ICTY trial chambers, which have endorsed the importance of such evidence.¹²⁹ In the

126. See *id.* ¶ 372 (referring to Prosecutor v. Stakić, Case No. IT-97-24-T, Judgment, ¶¶ 546-61 (July 31, 2003)).

127. *Id.* ¶ 373.

128. See *id.* ¶¶ 373, 376.

129. See Prosecutor v. Brđanin, Case No. IT-99-36-T, Judgment, ¶ 704 (Sept. 1, 2004) (“[T]he specific intent for genocide can be inferred from ‘the facts, the concrete circumstances, or a ‘pattern of purposeful action.’”); Prosecutor v. Stakić, Case No. IT-97-24-T, Judgment, ¶ 526 (July 31, 2003) (“It is generally accepted, particularly in the jurisprudence of both this tribunal and the Rwanda Tribunal, that genocidal *dolus specialis* can be inferred either from the facts, the concrete circumstances, or ‘a pattern of purposeful action.’”); see also Prosecutor v. Jelisić, Case No. IT-95-10-A, Judgment, ¶ 47 (July 5, 2001) (“Proof of specific intent may, in the absence of direct explicit evi-

Milošević case, the ICTY's most closely related case, the trial chamber relied on pattern evidence in its decision denying a motion for a judgment of acquittal.¹³⁰ The ICC's Elements of Crimes includes, as a material element of genocide, the requirement that the "conduct took place in the context of a manifest pattern of similar conduct directed against that group or was conduct that could itself effect such destruction."¹³¹ This phrase operates as a threshold to ensure that only those crimes with at least the potential to bring about the destruction of the group, or a part of it, are the subject of an ICC prosecution.¹³²

The ICJ buttressed its decision to dismiss the applicant's reliance on pattern evidence by referring to the ICTY prosecutor's decision not to charge genocide consistently in those areas referred to by Bosnia's agents.¹³³ The ICJ incorrectly assumed that the prosecutor's exercise of discretion with respect to charging genocide reflects the probative value of pattern evidence. Despite its own conclusion that the crimes of Srebrenica constituted genocide, the ICJ noted that "[i]n the cases of a number of accused, relating to events in July 1995 in Srebrenica, charges of genocide or its related acts have not been brought"¹³⁴

dence, be inferred from a number of facts and circumstances, such as the general context, the perpetration of other culpable acts systematically directed against the same group, the scale of atrocities committed, the systematic targeting of victims on account of their membership of a particular group, or the repetition of destructive and discriminatory acts.").

130. See *Prosecutor v. Milošević*, Case No. IT-02-54-T, Decision on Motion for Judgment of Acquittal, ¶ 248 (June 16, 2004) ("The Trial Chamber notes that the number of killings and other acts of mistreatment in Bijeljina, Ključ and Bosanski Novi is lower than in the other four territories. However, it concludes, that by reason of the geographic contiguity of these three territories to the other four territories and the relative similarity in the period of time when both sets of territories were taken over, there is also sufficient evidence of a genocidal intent in relation to these three territories.").

131. See Assembly of States Parties to the Rome Statute of the International Criminal Court Official Records, 1st Sess., at 113, U.N. Doc. ICC-ASP/1/3 (Sept. 3-10, 2002) (listing the following elements of the crime of genocide by killing: "1. The perpetrator killed one or more persons"; "2. Such person or persons belonged to a particular national, ethnical, racial or religious group"; "3. The perpetrator intended to destroy, in whole or in part, that national, ethnical, racial or religious group, as such"; and "4. The conduct took place in the context of a manifest pattern of similar conduct directed against that group or was conduct that could itself effect such destruction"); see also WILLIAM A. SCHABAS, AN INTRODUCTION TO THE INTERNATIONAL CRIMINAL COURT 39 (2004) (noting that "[t]he Elements of Crimes adopted by the Assembly of States Parties take a slightly different perspective" with regard to the crime of genocide).

132. See Cassese, *supra* note 25, at 349.

133. See ICJ Genocide Judgment, *supra* note 2, ¶ 374.

134. *Id.* ¶ 375 (citing *Prosecutor v. Erdemović*, Case No. IT-96-22-T (completed));

5. Incorporating the Work of the ICTY

Bosnia sought to meet much of its burden by relying on the work of the ICTY. The engagement of the ICJ and ICTY in concurrent inquiries into the alleged genocide in Bosnia forced the two courts into a somewhat uncomfortable relationship—uncomfortable largely because of the lack of a formal legal relationship between them. The ICTY's Statute, like those of other tribunals, is silent with respect to any formal relationship between itself and the "World Court," or ICJ.¹³⁵ A former ICJ president envisaged that other tribunals and courts, in particular international criminal courts, could play an important part in an overall integrated system of international justice.¹³⁶

The absence of any formal relationship between the ICJ and the ICTY creates the potential for judgments that stand in conflict with each other. Decisions by the ICJ are final and cannot

Prosecutor v. Jokić, Case No. IT-02-60 (on appeal); Prosecutor v. Miletić and Gvero, Case No. IT-05-88; Prosecutor v. Perišić, Case No. IT-04-81 (pending); and Prosecutor v. Stanišić and Simatović, Case No. IT-03-69 (pending)). Only the last two cases involve persons who would pass the ICJ's test for attributability.

135. See R.Y. Jennings, *The Judiciary, International and National, and the Development of International Law*, 45 INT'L & COMP. L.Q. 5 (1996) ("There is no kind of structured relationship between most of them [ICJ and other tribunals generally]. There is not even the semblance of any kind of hierarchy or system . . . Suffice it to say that it is very difficult to try to make any sort of pattern, much less a structured relationship, of this mass of tribunals, whether important or petty."). Some commentators have suggested that the ICJ, as the "World Court," should be at the apex of any international justice system. See M.C.W. Pinto, *Pre-Eminence of the International Court of Justice*, in INCREASING THE EFFECTIVENESS OF THE INTERNATIONAL COURT OF JUSTICE 281, 283 (Connie Peck & Roy S. Lee eds., 1997) ("Thus is the stage set for a future hierarchy: the Court is placed constitutionally and unalterably at the apex of a judicial pyramid of evolving complexity, and we may conclude that any and all types of infractions of international law, even those currently falling within the competence of more recently created tribunals, could be brought within the capacious jurisdiction of the Court. All that would be required is for the disputing States to have referred the matter to the Court as a case for decision. There seems no jurisdictional obstacle to the Court's administering, for example, an international criminal law, and its judges, qualified as they are, are no less capable of determining and applying such rules as exist in the field than those of any other specialized 'purpose-built' judicial organ. The Treaties of Rome are still 'treaties and conventions in force' within the meaning of Article 36(1) of the Court's Statute . . .").

136. See Mohammed Bedjaoui, *Comments on the Report*, in THE INTERNATIONAL COURT OF JUSTICE: PROCESS, PRACTICE AND PROCEDURE PAGE, PAGE (D.W. Bowett ed., 1997) ("I might add with regard to the recent proliferation of judicial and quasi-judicial bodies at the international level, far from prejudicing the future activity of the Court in The Hague, may help to relieve the Court of certain particular categories of disputes, thus enabling it to focus on disputes of major political importance. These bodies include . . . the International Criminal Tribunal for the former Yugoslavia . . .").

be appealed further.¹³⁷ Similarly, judgments by the ICTY appeals chamber are final, leaving the parties no further recourse.¹³⁸ These two courts of last resort—one inquiring into individual criminal responsibility and the other into state responsibility based on the attributability of the criminal acts and states of mind of some of the same people accused before the ICTY—were considering many of the same events and applying essentially the same law, and it is possible that they might have rendered two inconsistent, yet final, judgments. Such an event would have undermined the international community's confidence in the work of one, or both, of the courts. Judge Skotnikov referred to this possibility in a separate declaration attached to the *ICJ Genocide Judgment*:

After having thus established in principle a possibility of arriving at conclusions different to those of this criminal tribunal as to whether or not genocide was committed, the Court proceeded to examine the allegations which had already been considered and decided on by the ICTY, thus putting itself potentially on a collision course with the Tribunal.¹³⁹

The ICJ majority noted that “[t]his case does however have an unusual feature. Many of the allegations before this Court have already been the subject of the processes and decisions of the ICTY.”¹⁴⁰ It is in this context that the ICJ paid great deference to the work of the ICTY judges and placed great weight on the judgments of the ICTY's appeals and trial chambers. This deference to the ICTY's work is also evidenced by the ICJ's hav-

137. See ICJ Statute, *supra* note 1, art. 60 (“The judgment is final and without appeal. In the event of dispute as to the meaning or scope of the judgment, the Court shall construe it upon the request of any party.”).

138. See Rules of Procedure and Evidence, International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, Extraordinary Plen. Sess., Rules 119-22, U.N. Doc. IT/32/Rev.40 (July 12, 2007), available at <http://www.un.org/icty/legal/doc-e/basic/rpe/IT032Rev40e.pdf> [hereinafter ICTY Rules of Procedure and Evidence] (affording the parties the right to request a review of the final judgment upon the discovery of new evidence that could have been a “decisive factor in reaching a decision”).

139. ICJ Genocide Judgment (Declaration of Judge Skotnikov), *supra* note 35, at 7. Judge Skotnikov goes on to state that “[t]his kind of collision of course has not occurred in practice. However, this does not make the Court's failure to strike a proper balance under the Genocide Convention between the Court's jurisdiction and that of a criminal tribunal any lesser.” *Id.*

140. ICJ Genocide Judgment, *supra* note 2, ¶ 212.

ing adopted all of the factual findings of ICTY judgments and all but one legal conclusion.

The sole, but important, legal ruling concerned the test to be applied for determining when the acts of a state's non-de jure organs can be attributed to the state itself. When considering whether the genocidal conduct in Srebrenica was attributable to Serbia, the ICJ applied the "effective control" test, a test the ICJ first articulated in *Military and Paramilitary Activities in and Against Nicaragua*.¹⁴¹ In its presentation to the ICJ, Bosnia questioned the merit of applying the "effective control" standard in the case of genocide and brought to the ICJ's attention the *Tadić* appeal judgment, in which the ICTY appeals chamber determined that the appropriate test for deciding whether the conflict was international in nature was whether the FRY exercised "overall control" over the Bosnian Serbs. That is, the appeals chamber determined that, in lieu of having to prove that the FRY exercised "effective control" during each individual operation during which crimes were committed, it was enough to establish that it exercised "overall control"—thereby rejecting the ICJ's standard in *Military and Paramilitary Activities in and Against Nicaragua*.¹⁴² The ICJ, after giving careful consideration to the appeals chamber's reasoning in *Tadić*, rejected it on the grounds that such a legal conclusion was not "indispensable" to that chamber's exercise of jurisdiction in adjudicating individual criminal responsibility. The ICJ reserved to itself the primacy to make determinations of general international law.¹⁴³ The ICJ allowed that "overall control" may be an appropriate standard for determining whether or not a conflict is international in nature for purposes of applying international humanitarian law but held that the more rigorous test of "effective control" is the

141. See *Military and Paramilitary Activities in and Against Nicaragua* (Nicar. v. U.S.), 1986 I.C.J. 14, 64-65 (June 27).

142. See *Prosecutor v. Tadić*, Case No. IT-94-1-A, Judgment, ¶ 120 (July 15, 1999) ("Consequently, for the attribution to a State of acts of these groups it is sufficient to require that the group as a whole be under the overall control of the State.").

143. See ICJ Genocide Judgment, *supra* note 2, ¶ 403 ("As stated above, the Court attaches the utmost importance to the factual and legal findings made by the ICTY in ruling on the criminal liability of the accused before it and, in the present case, the Court takes fullest account of the ICTY's trial and appellate judgments dealing with the events underlying the dispute. The situation is not the same for positions adopted by the ICTY on issues of general international law which do not lie within the specific purview of its jurisdiction and, moreover, the resolution of which is not always necessary for deciding the criminal cases before it.").

more appropriate test for determining whether a state bears responsibility for crimes committed in another state.¹⁴⁴

The ICJ's willingness to place such significant weight on the jurisprudence of ICTY judgments is a reflection of its confidence in the methodology employed by the ICTY. The ICJ considered ICTY trials to be "rigorous" proceedings that include a presumption of innocence and high standard of proof, and reasoned that they are therefore suitable for serious consideration by the ICJ.¹⁴⁵ The ICJ enumerated other features of the ICTY's trial procedures that lent authority to its findings:¹⁴⁶

- The Tribunal respected the minimum guarantees of procedural fairness found in the International Covenant on Civil and Political Rights, including the right to counsel, to cross-examine witnesses, to call witnesses, and to remain silent.
- Accused are provided with pretrial disclosure, and they benefit from the prosecutor's obligation to disclose exculpatory material.¹⁴⁷
- The Tribunal has the authority to require member states of the United Nations to cooperate and produce evidence.
- The trial chambers may admit any relevant evidence and

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

145. *See id.* ¶ 220 ("The processes of the Tribunal leading to final findings are rigorous. Accused are presumed innocent until proved guilty beyond reasonable doubt. They are entitled to listed minimum guarantees (taken from the International Covenant on Civil and Political Rights), including the right to counsel, to examine witnesses against them, to obtain the examination of witnesses on their behalf, and not to be compelled to testify against themselves or to confess guilt.").

146. *See id.*

147. Rule 68(i) of the ICTY's Rules of Procedure and Evidence provides that "the Prosecutor shall, as soon as practicable, disclose to the Defence any material which in the actual knowledge of the Prosecutor may suggest the innocence or mitigate the guilt of the accused or affect the credibility of Prosecution evidence." ICTY Rules of Procedure and Evidence, *supra* note 138. This provision has been interpreted to include not only material directly impacting on the guilt or innocence of the accused, but material that may be helpful in the defense. *See* Prosecutor v. Delalić, Case No. IT-96-21, Decision on the Request of the Accused Hažim Delić Pursuant to Rule 68 for Exculpatory Information, ¶ 12 (June 24, 1997). "Exculpatory material within the meaning of Rule 68 of the Rules is such material which is known to the Prosecutor and which is favourable to the accused." *Id.*

are required to give a reasoned written opinion to which dissenting opinions may be appended.

- Each party has a right to appeal a trial chamber's judgment.

The ICJ concluded that it should in principle accept as highly persuasive relevant findings of fact made by the ICTY at trial, unless of course they have been upset on appeal. For the same reasons, any examination by the ICTY based on the facts as so found (for instance, about the existence of the required intent, or *dolus specialis* of genocide) is also entitled to due weight.¹⁴⁸

The ICJ stated its intention not only to accept findings of fact made by the ICTY judges, but also to give due weight to their conclusions of law, in particular with respect to the critical issue of genocidal intent.¹⁴⁹ Because there is no formal legal relationship between the two courts and the ICJ is not bound by ICTY judgments, the ICJ—rather than formally taking judicial notice of those judgments—considered them as “evidence,” and as evidence upon which it placed the greatest weight.

6. International Criminal Tribunal for the Former Yugoslavia Judgments

In deference to the ICTY, the ICJ adopted several determinations by the trial and appeals chambers of the “ultimate issues” from several cases. These ultimate findings involved both factual findings and legal conclusions that resolved primary issues in the trials.¹⁵⁰ The ICJ’s almost wholesale adoption of the ICTY’s fac-

148. See ICJ Genocide Judgment, *supra* note 2, ¶ 223.

149. See *id.*

As stated above, the Court attaches the utmost importance to the factual and legal findings made by the ICTY in ruling on the criminal liability of the accused before it and, in the present case, the court takes fullest account of the ICTY’s trial and appellate judgments dealing with the events underlying the dispute.

Id. ¶ 403.

150. Judge Tomka notes in his separate opinion:

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.

tual and legal findings with respect to the events of Srebrenica is the clearest example. The ICJ incorporated long passages of the *Krstić* trial judgment to set out its factual findings regarding Srebrenica¹⁵¹ and noted that while Serbia contested the number of people killed in Srebrenica, it did not “essentially question” the factual findings of the *Krstić* trial chamber.¹⁵²

The ICJ deferred to the findings of the ICTY judges to the extent that the factual issues contested by the parties paralleled those raised in the *Krstić* or *Blagojević* trials. The ICJ adopted the findings of both judgments that the killings and serious bodily harm caused to the victims of Srebrenica established the *actus reus* of genocide.¹⁵³ “The Court is fully persuaded that both killings within the terms of Article II(a) of the Convention, and acts causing serious bodily or mental harm within the terms of Article II(b) thereof occurred during the Srebrenica massacre.”¹⁵⁴

One of the key issues faced by the ICJ was whether the massacres arising out of Srebrenica were accompanied by the requisite *dolus specialis* of genocide and, if so, when it came into existence. This issue became especially important with respect to whether Serbia would have had sufficient notice of the impending genocide to withdraw their significant assistance to Bosnian

ICJ Genocide Judgment (Separate Opinion of Judge Tomka), *supra* note 19, ¶ 73.

151. The ICJ relied on the *Krstić* Trial Judgment’s summary of the facts:

The events surrounding the Bosnian Serb take-over of the United Nations (“UN”) “safe area” of Srebrenica in Bosnian and Herzegovina, in July 1995, have become well known to the world. Despite a UN Security Council resolution declaring that the enclave was to be “free from armed attack or any other hostile act,” units of the Bosnian Serb Army (“VRS”) launched an attack and captured the town. Within a few days, approximately 25,000 Bosnian Muslims, most of them women, children and elderly people who were living in the area, were uprooted and, in an atmosphere of terror, loaded onto overcrowded buses by the Bosnian Serb forces and transported across the confrontation lines into Bosnian Muslim-held territory. The military-aged Bosnian Muslim men of Srebrenica, however, were consigned to a separate fate. As thousands of them attempted to flee the area, they were taken prisoner, detained in brutal conditions and then executed. More than 7,000 people were never seen again.

ICJ Genocide Judgment, *supra* note 2, ¶ 278 (quoting Prosecutor v. *Krstić*, Case No. IT-98-33-T, Judgment, ¶ 1 (Aug. 2, 2001) (footnotes omitted)).

152. *See id.*

153. *Id.* ¶ 290 (quoting Prosecutor v. *Krstić*, Case No. IT-98-33-A, Judgment, ¶ 543 (Apr. 19, 2004) and Prosecutor v. *Blagojević*, Case No. IT-02-60-T, Judgment, ¶¶ 644-45 (Jan. 17, 2005)).

154. *Id.* ¶ 291.

Serb troops in Srebrenica.¹⁵⁵ To establish genocidal intent with respect to Srebrenica, Bosnia submitted a document referred to as "Directive 7," issued by Bosnian Serb President Karadžić on March 8, 1995, which stated that the purpose of the combat operations in the Srebrenica area was to create "an unbearable situation of total insecurity with no hope of further survival or life for the inhabitants of both enclaves."¹⁵⁶ Bosnia pointed to this as a clear articulation of the intent to "destroy in whole or in part" the Muslim population of Srebrenica. The ICJ thus rejected the prosecution's argument that Krstić's awareness of these directives and his implementation of them evidenced the *dolus specialis* of genocide. The ICJ adopted the "ruling of the Appeals Chamber in *Krstić* case that the directives were 'insufficiently clear' to establish specific intent (*dolus specialis*) on the part of the members of the Main Staff who issued them."¹⁵⁷ In the words of the appeals chamber, the most that the document did was to alert Krstić to the:

[M]ilitary plan to take over Srebrenica and Zepa, and to create conditions that would lead to the total defeat of the Bosnian Muslim military forces in the area, without whose protection the civilian population would be compelled to leave the area. It also alerted Radislav Krstić to the intention of the Main Staff to obstruct humanitarian aid to the civilians of Srebrenica so that their conditions would become unbearable and further motivate them to leave the area.¹⁵⁸

From this statement by the *Krstić* appeals chamber, the ICJ concluded that if such evidence was insufficiently clear to establish *dolus specialis* for one of the immediate commanders responsible for the Srebrenica massacre, then it could not establish *dolus specialis* for senior actors in Serbia.

Bosnia's representatives also submitted a military report from the Bratunac Brigade dated July 4, 1995, outlining the "fi-

155. *Id.*

156. *Id.* ¶ 280 (quoting Prosecutor v. Blagojević, Case No. IT-02-60-T, Judgment, ¶¶ 88-89 (Jan. 17, 2005)). This directive was later followed by "Directive 7.1" issued by General Mladić on March 31, 1995, which sought to implement "Directive 7" by conducting combat operations around the enclave. See Prosecutor v. Krstić, Case No. IT-98-33-A, Judgment, ¶¶ 88-89 (Apr. 19, 2004).

157. ICJ Genocide Judgment, *supra* note 2, ¶ 281. "The Court has already quoted . . . the passage from the Judgment of the Appeals Chamber in the *Krstić* case rejecting the Prosecutor's attempted reliance on the Directive given earlier in July." *Id.* ¶ 293.

158. Prosecutor v. Krstić, Case No. IT-98-33-A, Judgment, ¶ 90 (April 19, 2004).

nal goal” of the VRS. The document stated that the “enemy’s [Muslims occupying Srebrenica] life has to be made unbearable and their temporary stay in the enclave impossible so that they leave *en masse* as soon as possible, realizing that they cannot survive there.” The ICJ recalled some of the evidence of the *Blagojević* trial and adopted the trial chamber’s findings that “the object stated in the report, like the 1992 Strategic Objectives, does not envisage the destruction of the Muslims in Srebrenica, but rather their departure.”¹⁵⁹ The ICJ went on to follow the *Blagojević* court’s lead and to place little weight on those reports.¹⁶⁰ The ICJ reviewed the trial chambers’ judgments in both the *Krstić* and *Blagojević* cases and adopted their factual findings and legal conclusions regarding when *dolus specialis* was established.¹⁶¹

When there was not complete parity between the ultimate issues faced by the two courts, the ICJ adopted the legal tests distilled by ICTY judges in their efforts to interpret the law of genocide. Thus, in applying the Genocide Convention, the ICJ looked to the ICTY for guidance in interpreting the phrase “part of the group” and in developing relevant legal tests. The ICJ adopted a tripartite test for purposes of the Genocide Convention, with each criterion taken directly from an ICTY case.

The first criterion was “substantiality”—that is, “the intent must be to destroy at least a substantial part of the particular group.”¹⁶² The ICJ found that both the ICTY and the ICTR consistently imposed the requirement that the relevant portion of the entire group be significant enough to have an impact on the group as a whole.¹⁶³ The ICJ did add its view that this criterion

159. ICJ Genocide Judgment, *supra* note 2, ¶ 279.

160. *See id.*

161. The Court’s conclusion, fortified by the Judgements of the Trial Chambers in *Krstić* and *Blagojević* cases, is that the necessary intent was not established until after the change in the military objective and after the takeover of Srebrenica, on about 12 or 13 July. This may be significant for the application of the obligations of the Respondent under the Convention. The Court has no reason to depart from the Tribunal’s determination that the necessary specific intent (*dolus specialis*) was established and that it was not established until that time.

Id. ¶ 295 (parenthesis omitted).

162. *Id.* ¶ 198.

163. *See id.* (referring to Prosecutor v. Krstić, Case No. IT-98-33-A, Judgment, ¶¶ 8-11 (April 19, 2004) and Prosecutor v. Kayishema, Case No. ICTR-95-1-A, Judgment, Reasons (June 1, 2001)).

was the most important.¹⁶⁴ The second criterion concerns the geographic location of the targeted victims. The ICJ held that “genocide may be found to have been committed where the intent is to destroy the group within a geographically limited area,” the test used by the *Krstić* appeals chamber and the *Stakić* trial chamber.¹⁶⁵ The ICJ took the final criterion from the *Krstić* appeals judgment. It is a qualitative one looking to whether the portion of the entire group is either emblematic or essential to the survival of the entire group.¹⁶⁶

Another example in which the ICJ applied a legal test developed in the ICTY is the ICJ’s adoption of the legal rule that the protected group must be defined positively (that is, Muslims of Eastern Bosnia). Bosnia, recognizing that Bosnian Croats were in many cases subjected to the same treatment as Bosnian Muslims, had proposed that the group could be defined negatively by its ethnic characteristic (i.e., non-Serb).¹⁶⁷ The ICJ adopted

164. See *id.* ¶ 201 (“The above list of criteria is not exhaustive, but, as just indicated, the substantiality criterion is critical. They are essentially those stated by the Appeals Chamber in the *Krstić* case, although the Court does give this first criterion priority.”). This interpretation differs from the view held by some scholars that theoretically the killing of a small number could constitute the crime of genocide. See METTRAUX, *supra* note 11, at 236 (“From a numerical point of view, individual criminal responsibility for genocide covers a range which goes – theoretically – from a situation where one person is killed to vast criminal enterprises where thousands are put to death.”).

165. ICJ Genocide Judgment, *supra* note 2, ¶ 199.

166. *Id.* ¶ 200. The *Krstić* appeals chamber defined this qualitative criterion as follows:

The number of individuals targeted should be evaluated not only in absolute terms, but also in relation to the overall size of the entire group. In addition to the numeric size of the targeted portion, its prominence within the group can be a useful consideration. If a specific part of the group is emblematic of the overall group, or is essential to its survival, that may support a finding that the part qualifies as substantial within the meaning of Article 4.

Prosecutor v. *Krstić*, Case No. IT-98-33-A, Judgment, ¶ 12 (Apr. 19, 2004) (footnote omitted).

167. See Mohamed Elewa Badar, *From The Nuremberg Charter to the Rome Statute: Defining the Elements of Crimes Against Humanity*, 5 SAN DIEGO INT’L L.J. 73, 136 (2004).

Most notably, the jurisprudence of the Yugoslav Tribunal has interpreted the scope of the enumerated discriminatory grounds of persecution broadly. For example, groups and “non-groups” in the former Yugoslavia—that is, “Muslims” (Kupreskic case), “non-Croat” (Blaskic case), and “non-Serb” (Tadic case) can be the object of persecution. Thus, a discriminatory mental state against a group negatively defined can satisfy the “grounds” requirement under Article 5 of the Yugoslav Statute.

Id.

the conclusion of the *Stakić* appeals judgment that the targeted group must be defined positively.¹⁶⁸ In some instances, the ICJ adopted discrete factual findings of the ICTY when the ultimate questions presented by those trials were not directly relevant to the ICJ's inquiry. With respect to killings in and around the Prijedor region that were alleged to be violations of Article II(a) of the Genocide Convention, the ICJ adopted the findings of the *Brđanin* and *Stakić* trial chambers that "many people were killed during the attacks by the Bosnian Serb army on predominantly Bosnian Muslim villages and towns throughout the Prijedor municipality and several massacres of Muslims took place."¹⁶⁹ The ICJ also adopted the factual findings of the *Brđanin* trial chamber with respect to the killing of Bosnian Muslims and Croats in six Bosnian municipalities.¹⁷⁰

In evaluating Bosnia's claim that the repeated shelling and sniping in Sarajevo constituted a violation of Article II(a) of the Genocide Convention, the ICJ looked to the *Galić* case and adopted some of the trial chamber's factual findings.¹⁷¹ In assessing Bosnia's claim under Article II(c) with respect to Sarajevo, the ICJ relied on the trial and appeals judgments in that case.¹⁷² The ICJ not only adopted the explicit factual findings of

168. ICJ Genocide Judgment, *supra* note 2, ¶ 195 (citing Prosecutor v. Stakić, Case No. IT-97-24-A, Judgment, ¶¶ 20-28 (Mar. 22, 2006)).

169. *Id.* ¶ 261 (quoting Prosecutor v. Stakić, Case No. IT-97-24-T, Judgment, ¶ 544 (July 31, 2003)).

170. *See id.* ¶ 274 (quoting Prosecutor v. Brđanin, Case No. IT-99-36-T, Judgment, ¶ 465 (Sept. 1, 2004)). "In sum, the Trial Chamber is satisfied beyond reasonable doubt that, considering all the incidents described in this section of the judgement, at least 1669 Bosnian Muslims and Bosnian Croats were killed by Bosnian Serbs forces, all of whom were non-combatants." *Id.*

171. The Court adopts the *Galić* trial chamber's determination that civilians living in Sarajevo were the subject of attacks by Serb forces. *See id.* ¶ 248.

The Trial Chamber of the ICTY, in its Judgment of 5 December 2003 in the *Galić* case examined specific incidents in the area of Sarajevo, for instance the shelling of the Markale market on 5 February 1994 which resulted in the killing of 60 persons. The majority of the Trial Chamber found that 'civilians in ABiH-held areas of Sarajevo were directly or indiscriminately attacked from SRK-controlled territory during the Indictment Period, and that as a result and as a minimum, hundreds of civilians were killed and thousands others were injured,' the Trial Chamber further concluded that '[i]n sum, the majority of the Trial Chamber finds that each of the crimes alleged in the Indictment, crimes of terror, attacks in civilians, murder and inhumane acts, were committed by SRK forces during the Indictment Period.'

Id. (parentheses omitted).

172. "The Court notes that in the *Galić* case, the Trial Chamber of the ICTY found

Galić, but also adopted the inferences that the *Galić* trial chamber drew from these facts.¹⁷³

Bosnia alleged that the prisoner camps that Serbia maintained in Bosnia violated Article II(a) of the Genocide Convention. Although the relevant ICTY cases either did not include genocide charges or ended with an acquittal on the charge of genocide, the ICJ adopted many of the factual findings of the trial and appeals chambers. The ICJ adopted factual findings with respect to camps in Omarska,¹⁷⁴ Trnopolje,¹⁷⁵ Manjača, Keraterm,¹⁷⁶ K-P Dom,¹⁷⁷ Luka,¹⁷⁸ and Bošanski Samac.¹⁷⁹ For alle-

that the Serb forces (the SRK) conducted a campaign of sniping and shelling against the civilian population of Sarajevo." *Id.* ¶ 325 (referring to Prosecutor v. *Galić*, Case No. IT-98-29-T, Judgment, ¶ 583 (Dec. 5, 2003)).

173. The ICJ quoted the following passage from *Galić*:

[T]he attacks on civilians were numerous, but were not consistently so intense as to suggest an attempt by the SRK to wipe out or even deplete the civilian population through attrition . . . the only reasonable conclusion in light of the evidence in the Trial Record is that the primary purpose of the campaign was to instill in the civilian population a state of extreme fear.

Id. ¶ 328 (quoting Prosecutor v. *Galić*, Case No. IT-98-29-T, Judgment, ¶ 583 (Dec. 5, 2003)).

174. The ICJ adopted the findings of the *Tadić*, *Brđanin*, and *Stakić* chambers (with respect to the conditions at the Omarska camp) for the purpose of assessing Bosnia's claims under Article II(a) of the Genocide Convention, *see* ICJ Genocide Judgment, *supra* note 2, ¶ 263, and of the *Kvoška* trial chamber for assessing the claims under Article II(c) of the Genocide Convention, *see id.* ¶ 348.

175. The ICJ adopted the findings of the *Stakić* and *Brđanin* cases regarding the conditions at the Trnopolje camp in assessing Bosnia's Article II(a) claims. *See id.* ¶ 268. It adopted the findings of *Stakić* trial chamber with respect to the Article II(c) violations. *See id.* ¶ 350.

176. The Court adopted the findings of the *Sikirica* trial chamber with respect to conditions at the Keraterm camp that were alleged to be in violation of Article II(a) of the Genocide Convention, *see id.* ¶ 266, and the findings of the *Stakić* trial chamber for alleged violations of Article II(c) in Keraterm.

177. With respect to prisoner camps in Foča, the Court adopted the conclusions of the *Krnjelac* trial chamber in evaluating Bosnia's claims that the camp violated Article II(a) of the Genocide Convention. "The Trial Chamber is satisfied beyond reasonable doubt that all but three of the persons listed in Schedule C to the Indictment were killed at the KP Dom." *Id.* ¶ 254 (quoting Prosecutor v. *Krnjelac*, Case No. IT-97-25-T, Judgment, ¶ 330 (Mar. 15, 2002)). With respect to alleged violations of Article II(b) of the Genocide Convention, the Court relied on the findings of the *Kunarac* trial chamber. *See id.* ¶ 310. With respect to violations of Article II(c), the Court once again relied on the *Krnjelac* Trial Judgment. *See id.* ¶ 347.

178. With respect to the Luka camp, the Court adopted the conclusion not only that a number of people were killed, but also that the killings constituted a material element of genocide. *See id.* ¶ 272 (quoting Prosecutor v. *Jelišić*, Case No. IT-95-10-T, Judgment, ¶ 65 (Dec. 14, 1999)) ("[A]lthough the Trial Chamber is not in a position to establish the precise number of victims ascribable to Goran Jelišić for the period in the indictment, it notes that, in this instance, the material element of the crimes of geno-

gations regarding serious bodily and mental harm, including rape and other sexual crimes, as a violation of Article II(b) of the Genocide Convention, the ICJ adopted the findings of the *Kunarac* trial chamber that “many women were raped repeatedly by Bosnian Serb soldiers or policemen in the city of Foča.”¹⁸⁰ Many of the factual findings regarding the massacres at Srebrenica are constructed from excerpts taken directly from the *Blagojević* and *Krstić* cases, supplemented with references to the secretary-general’s 1999 report.

The ICJ adopted the *Brđanin* trial chamber’s findings that “there was willful damage done to both Muslim and Roman Catholic religious buildings and institutions in the relevant municipalities by Bosnian Serb forces,”¹⁸¹ and referred to an exhibit prepared by András Riedlmayer for the *Milošević* case describing his assessment of 392 cultural and religious sites.¹⁸² In deciding how such evidence of cultural destruction could be appropriately used, the ICJ:

[E]ndorse[d] the observation made in the *Krstić* case that “where there is physical or biological destruction there are often simultaneous attacks on the cultural and religious property and symbols of the targeted group as well, attacks which may legitimately be considered as evidence of an intent to physically destroy the group.”¹⁸³

7. Sentencing Judgments Following a Guilty Plea

The ICJ considered what weight to accord sentencing judgments issued after an accused pled guilty and admitted to some of the crimes contained in the indictment. The ICJ described

cide has been satisfied.”). With respect to conditions at the Luka camp, the Court refers to a section of the *Milošević* Decision on Motion for Judgment of Acquittal in support of its findings. “The conditions and treatment to which the detainees at Luka Camp were subjected were terrible and included regular beatings, rapes and killings.” *Id.* ¶ 273 (referring to Prosecutor v. Milošević, Case No. IT-02-54-T, Decision on Motion for Judgment of Acquittal, ¶ 159 (June 16, 2004)).

179. The Court relied on the findings of the *Simić* trial chamber in assessing the claims of a violation of Article II(c) in *Bosanski Samac*.

180. ICJ Genocide Judgment, *supra* note 2, ¶ 306 (referring to Prosecutor v. Kunarac, Case No. IT-96-23-T, Judgment, ¶¶ 574, 592 (Feb. 22, 2001)).

181. *Id.* ¶ 336 (quoting Prosecutor v. Brđanin, Case No. IT-99-36-T, Judgment, ¶ 640 (Sept. 1, 2004)).

182. *See id.* ¶ 339.

183. *Id.* ¶ 344 (quoting Prosecutor v. Krstić, Case No. IT-98-33-T, Trial Chamber Judgment, ¶ 580 (Aug. 2, 2001)).

how ICTY procedures require the trial chamber to determine whether a sufficient factual basis exists to support a conviction for a crime and also whether admissions made by the accused, as well as the plea itself, were voluntary, unequivocal, and fully informed. The ICJ found these pleas were sufficiently reliable when accompanied by a statement of agreed facts and that the sentencing judgment “may when relevant be given a certain weight.”¹⁸⁴ In some cases, the ICJ looked to the sentencing judgments and adopted discrete facts admitted by the accused during the plea process. With respect to the Sušica camp outside Vlasenica, the ICJ adopted the *Nikolić* trial chamber’s finding that “the Accused [Dragan Nikolić] persecuted Muslim and other non-Serb detainees by subjecting them to murders, rapes and torture as charged specifically in the Indictment.”¹⁸⁵ With respect to its assessment of Bosnia’s claim that the Serb prisoner camp at Manjaca was in violation of Article II(c) of the Genocide Convention, the ICJ adopted some of the factual findings contained in the *Plavšić* sentencing judgment.¹⁸⁶

8. ICTY Indictments

Bosnia sought to rely on ICTY-related material other than judgments of the trial and appeals chambers. These materials included indictments issued by the Office of the Prosecutor, various decisions by the trial and appeals chambers, and individual exhibits and testimony. The ICJ decided to place weight on some of these materials and summarily reject the evidentiary value of others.

In its submissions to the ICJ, Bosnia relied, in part, on indictments issued by the ICTY prosecutor. Rule 47 of the ICTY’s Rules of Procedure and Evidence states, in relevant part: “Every indictment drafted by the Prosecutor must be reviewed by a judge who examines the allegations contained in the indictment and reviews the evidence the prosecutor submits in support of it to ensure that each allegation is adequately supported with *prima*

184. *Id.* ¶ 224.

185. *Id.* ¶ 252 (quoting Prosecutor v. Nikolić, Case No. IT-94-2-S, Sentencing Judgment, ¶ 67 (Dec. 18, 2003)). The Court also relied on the *Nikolić* sentencing judgment in its evaluation of Bosnia’s claims with respect to violations of Article II(c) of the Genocide Convention. *See id.* ¶ 346.

186. *See id.* ¶ 351 (citing Prosecutor v. Krstić, Case No. IT-98-33-T, Judgment, ¶ 48 (Aug. 2, 2001)).

facie evidence.”¹⁸⁷ One may well argue that some weight should be given to allegations that are drafted by an independent prosecutor and then submitted for review by an independent judge who determines that there is *prima facie* evidence supporting those allegations. Nevertheless, the ICJ is clear that it considers the lack of the accused’s participation to be a fundamental obstacle to giving indictments any evidentiary weight.¹⁸⁸ The ICJ rejected Bosnia’s reliance on indictments and accorded the allegations contained in them no weight, characterizing them as “allegations made by one party.”¹⁸⁹ The ICJ noted that after an ICTY indictment is confirmed, the prosecution may decide to withdraw genocide charges or the charge may be dismissed at trial, and that “as a general proposition the inclusion of charges in an indictment cannot be given weight.”¹⁹⁰ While the ICJ thus declined to give any evidentiary weight to the charges included in indictments, it did consider significant the prosecutor’s decision not to include the charge of genocide in several indictments, such as the *Stanišić* and *Perišić* indictments.¹⁹¹ Drawing inferences from the prosecutor’s exercise of discretion is a serious methodological flaw, however, absent some clear authoritative statement by the prosecutor why she exercised her discretion in a particular way. Article 16 of the ICTY’s Statute establishes the Office of the Prosecutor as an independent arm with broad discretionary power to make determinations regarding

187. ICTY Rules of Procedure and Evidence, *supra* note 138.

188. *See* ICJ Genocide Judgment, *supra* note 2, ¶ 218.

189. *Id.* ¶ 217. Article 19(1) of the ICTY’s Statute provides: “The judge of the Trial Chamber to whom the indictment has been transmitted shall review it. If satisfied that a *prima facie* case has been established by the Prosecutor, he shall confirm the indictment. If not so satisfied, the indictment shall be dismissed.” ICTY Statute, *supra* note 21, art. 19(1). Rule 47(B) of the ICTY’s Rules of Procedure and Evidence provides: “The Prosecutor, if satisfied in the course of an investigation that there is sufficient evidence to provide reasonable grounds for believing that a suspect has committed a crime within the jurisdiction of the Tribunal, shall prepare and forward to the Registrar an indictment for confirmation by a Judge, together with supporting material.” ICTY Rules of Procedure and Evidence, *supra* note 138. Rule 47(E) provides: “The reviewing Judge shall examine each of the counts in the indictment, and any supporting materials the Prosecutor may provide, to determine, applying the standard set forth in Article 19, paragraph 1, of the Statute, whether a case exists against the suspect.” *Id.*

190. ICJ Genocide Judgment, *supra* note 2, ¶ 217.

191. *See id.* (“What may however be significant is the decision of the Prosecutor, either initially or in an amendment to an indictment, not to include or to exclude a charge of genocide.”).

who to charge and what crimes they should be charged with. Unlike many continental systems the prosecutor is not required to submit all charges that are supported by *prima facie* evidence. The prosecutor is within the proper exercise of her authority to make charging decisions on such varied grounds as her assessment of the evidence in her possession and the efficient use of limited resources. These concerns are especially important in the case of genocide, where the evidentiary burden upon the prosecutor is so great that she may need to limit charges in an indictment in order to strike a balance between appropriately reflecting the gravity of the accused's conduct and meeting timelines set by the Security Council (or avoiding criticism that the individual cases take too long).¹⁹²

The ICJ cites several examples in which it draws inferences from the prosecutor's decisions not to include genocide in particular indictments. But such inferences are necessarily speculative and unreliable. An examination of the indictment against Momčilo Perišić, former head of the Yugoslav Army, reveals that the *Perišić* case is primarily a case of command responsibility and rests largely on the theory that Perišić was responsible for the crimes in Srebrenica because of his position of authority over the troops that directly engaged in the crimes. The indictment against Perišić alleged that he failed to punish Mladić and other soldiers under his effective control after learning about their genocidal acts in Srebrenica. Under the ICTY's jurisprudence, Perišić's command responsibility arises not out of his direct or indirect participation in the crime, but out of his failure to prevent or punish those persons over whom he exercised effective control and who themselves engaged in criminal activity. This doctrine of command responsibility does not impute the criminal intent of the subordinate, but instead punishes the intentional failure to punish subordinates who commit crimes.¹⁹³ The

192. See generally Ralph Zacklin, *The Failings of Ad Hoc International Tribunals*, 2 J. INT'L CRIM. JUST. 541 (2004) (criticizing the high cost of international criminal trials).

193. Command responsibility "mak[es] the commander guilty for failing in his supervisory capacity to take the necessary corrective action after he knows or has reason to know that his subordinate was about to commit the act or had done so." *Prosecutor v. Hadžihasanović*, Case No. IT-01-47-AR72, Decision on Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility, ¶ 32 (July 16, 2003) (J. Shahabuddeen, partially dissenting).

Command or superior responsibility pursuant to Articles 7(3) and 6(3) of the Statutes is not a form of vicarious responsibility, nor is it direct responsibility

prosecution's theory of Perišić's criminal liability for Srebrenica therefore does not require that he possessed genocidal intent himself or directly participated in the crimes at Srebrenica. Since no accused has yet been found guilty of genocide based solely on command responsibility, a case seeking to assert such a theory would be controversial and generate protracted litigation.

The ICJ, by attributing weight to the exercise of prosecutorial discretion, assumed without foundation that the underlying rationale was based on evidentiary considerations related to the strength of the case and was therefore relevant to the ICJ's own inquiry. Absent a clear statement of reasons by the prosecutor, there are many reasons why a prosecutor might employ her discretion to not charge genocide; drawing conclusions from these charging decisions is an uncertain endeavor. The ICJ, by assuming the issues involved in prosecuting a genocide charge against Perišić were essentially equivalent to those presented by Bosnia's case before the ICJ, ran the risk of radically misinterpreting the exercise of prosecutorial discretion before the ICTY.¹⁹⁴ Should a final judgment in the *Perišić* case determine that some of the direct perpetrators of Srebrenica were Perišić's subordinates (and thus meet the ICJ's test of attributability), then that result, coupled with findings in the *Krstić* and *Blagojević* cases that the direct perpetrators harbored genocidal intent, would cast doubt on the accuracy of the *ICJ Genocide*

for the acts of subordinates. Neither is it helpful to refer to it as a form of responsibility for "negligence" as this is likely to lead to confusion of thought. Command responsibility, pursuant to Articles 7(3) and 6(3) of the Statutes, is responsibility for the commander's own acts or omissions in failing to prevent or punish the crimes of his subordinates whom he knew or had reason to know were about to commit serious crimes or had already done so.

METTRAUX, *supra* note 11, at 297 (citations omitted); see also Allison Marston Danner & Jenny S. Martinez, *Guilty Associations: Joint Criminal Enterprise, Command Responsibility, and the Development of International Criminal Law*, 93 CAL. L. REV. 75 (2005).

194. The Tribunal only has jurisdiction to judge the individual criminal liability of particular persons accused before it, and the relevant evidence will therefore be limited to the sphere of operations of the accused. In addition, prosecutorial conduct is often based on expediency and therefore no conclusions can be drawn from the prosecution's acceptance of a plea bargain or failure to charge a particular person with genocide. While the Court is intent on adopting the burden of proof relevant to criminal trials, it is not willing to recognize that there is a fundamental distinction between a single person's criminal trial—and a case involving State responsibility for genocide.

ICJ Genocide Judgment (Dissenting Opinion of Vice-President Al-Khasawneh), *supra* note 32, ¶ 42.

Judgment.¹⁹⁵ It is noteworthy that on at least one occasion, a trial chamber suggested (without success) that the prosecutor amend the original indictment to include a charge of genocide: after reviewing the evidence during a Rule 61 hearing (for more on such hearings, see below) in the *Nikolić* case (the prosecutor's first confirmed indictment), the trial chamber asked the prosecutor to consider including the charge of genocide.¹⁹⁶ The prosecutor's refusal, despite the evidence as reviewed by the trial chamber, indicates the complexity of decisions as to which charges should be included in indictments.

The more detailed process of reviewing an indictment under Rule 61 of the ICTY's Rules of Procedure and Evidence also came under ICJ scrutiny. In the ICTY's early years, before the list of pretrial detainees grew, the ICTY employed an additional procedure for the review of some indictments. This Rule 61 procedure requires the prosecution to produce evidence in court to support the indictment and to enable the trial chamber to determine if there are reasonable grounds to believe the accused committed the crimes contained in the indictment. The most notable of these hearings were in the *Karadžić* and *Mladić* cases, during which the trial chamber heard considerable evidence regarding the events in Srebrenica. Although the ICJ recognized that judges were actively involved in this process and that the prosecution called live witnesses, it declined to give these Rule 61 hearings evidentiary consideration because of the absence of the accused and also because of the lesser standard of proof employed in the hearings—namely, that “reasonable grounds exist for belief that the accused has committed crimes charged.”¹⁹⁷

Despite its general position on Rule 61 hearings, the ICJ relied on the findings of two such hearings: the one in *Nikolić*,

195. But crucial trials are outstanding or still in process Above all, Momcilo Perisic—Milosevic's most senior general—is also due for trial. It is a critical case, because a conviction would establish Serbia's direct involvement in the genocide, in stark counterpoint to a ruling by the International Court of Justice, which rejected a case by the Bosnian government against Serbia for its involvement in genocide.

Ed Vulliamy, *War Crime Lawyers Fight UN on Top Job*, THE OBSERVER, Sept. 23, 2007, <http://www.guardian.co.uk/yugo/article/0,,2175184,00.html>.

196. See *Prosecutor v. Nikolić*, Case No. IT-94-2-R61, Review of Indictment Pursuant to Rule 61, ¶ 34 (Oct. 20, 1995).

197. ICJ Genocide Judgment, *supra* note 2, ¶ 218.

concerning the sexual and other mistreatment of women at the Sušica camp and its environs,¹⁹⁸ and the ones in *Karadžić* and *Mladić*, concerning the expulsion of civilians from large regions in Bosnia¹⁹⁹ and the destruction of cultural and religious heritage in the Banja Luka area.²⁰⁰

9. Trial Chamber's Decision on an Accused's Motion for Acquittal at the End of the Prosecution Case

The ICJ considered what weight, if any, it could give to a trial chamber's decision on a motion for acquittal at the end of the prosecution case pursuant to Rule 98 *bis* of the ICTY's Rules of Procedure and Evidence. A "98 *bis* motion" is roughly equivalent to that made in common-law criminal trials at the end of the prosecution case—sometimes referred to as the "no case to answer motion." Traditional common-law criminal procedure entitles a defendant to a decision on whether, as a matter of law, the prosecution has presented a legally sufficient case that the defendant may then choose to answer by presenting evidence or argument. The underlying rationale is that in view of the prosecution's burden of proof and the high standard of proof of criminal trials, if there is insufficient evidence for a jury to convict at the conclusion of the prosecution case, the defendant should not have to defend himself and risk conviction based upon the jury's perception of the defense's case. The court must make some assessment of reasonable inferences and facts that can be deduced from the evidence—which requires the court to tread the somewhat elusive line between the respective roles of the judge and fact finder, the jury.²⁰¹ In the judge-only trials of the

198. *See id.* ¶ 308.

199. *See id.* ¶ 332 (quoting *Prosecutor v. Karadžić & Mladić*, Case Nos. IT-95-5-R61 & IT-95-18-R61, Review of the Indictment Pursuant to Rule 61 of the Rules of Procedure and Evidence, ¶ 216 (July 11, 1996)).

200. *See id.* ¶ 336.

201. *See R. v. Galbraith*, (1981) 73 Cr. App. R. 124, at 125, 127.

(1) If there is no evidence that the crime alleged has been committed by the defendant, there is no difficulty. The judge will of course stop the case. (2) The difficulty arises where there is some evidence but it is of a tenuous character, for example because of inherent weakness or vagueness or because it is inconsistent with other evidence. (a) Where the judge comes to the conclusion that the prosecution evidence, taken at its highest, is such that a jury properly directed could not properly convict upon it, it is his duty, upon a submission being made, to stop the case. (b) Where however the prosecution evidence is such that its strength or weakness depends on the view to be taken

ICTY, the motion has served more as a tool of trial management, one that allows the chamber to “prune” cases (historically, quite large) by identifying those portions of the indictment that are not sufficiently supported by evidence to demand a response by the accused.

The applicable standard of proof for a 98 *bis* decision is that the trial chamber must grant the motion wherever a reasonable trier of fact could not base a conviction on the evidence presented; conversely, the motion must be denied where there is sufficient evidence upon which a trial chamber could enter a conviction. The critical idea here is that the chamber *could* convict, not that it *would* convict. A chamber’s decision at this stage does not determine its final judgment, and it is theoretically possible that for the chamber to deny the motion, for the accused to present no evidence, and for the chamber still to find the accused not guilty. In this context the ICJ notes that the *Krajišnik* case was one in which the trial chamber acquitted the accused of genocide after having dismissed his midtrial motion for acquittal.²⁰² The ICJ considered this difference in standard of proof as incompatible with the standard of “fully conclusive” that the ICJ deemed appropriate for its judgment.²⁰³ The ICJ stated that it could not give weight to any of the rulings arising out of those motions, “[b]ecause the judge or the Chamber does not make definitive findings at any of the four stages described The standard of proof which the court requires in this case would not be met.”²⁰⁴ Despite this language, the ICJ cites findings made by the *Milošević* trial chamber in its 98 *bis* decision in support of two conclusions that it reached on matters not directly related to the

of a witness’s reliability, or other matters which are generally speaking within the province of the jury and where on one possible view of the facts there is evidence upon which a jury could properly come to the conclusion that the defendant is guilty, then the judge should allow the matter to be tried by the jury.

Id. at 127.

202. ICJ Genocide Judgment, *supra* note 2, ¶ 219 (referring to Prosecutor v. Krajišnik, Case No. IT-00-39-T, Judgment, ¶¶ 867-69 (Aug. 2, 2001) and transcript of August 19, 2005 at 17112-32).

203. *See id.* ¶ 209 (asserting the “fully conclusive” evidentiary standard).

204. *Id.* ¶ 219. It is not clear from the language of the judgment what view the Court would have taken of the evidentiary weight where a 98 *bis* motion was granted. The granting of the motion is equivalent, in effect, to an acquittal after trial and would appear to be worthy of careful consideration in the Court’s judgment.

central question of *dolus specialis*.²⁰⁵

The ICJ's decision not to rely (at least in general) on 98 *bis* decisions was of some significance because it would influence the ICJ's handling of the 98 *bis* decision of June 16, 2004, in the *Milošević* case—the case that most closely paralleled, and arguably had the most relevance to, the ICJ case. Milošević was president of Serbia from 1990 to 1997 and of the FRY from 1997 to 2000.²⁰⁶ Given that Milošević had been charged before the ICTY with the crime of genocide in Bosnia, there is much common ground between the *Milošević* indictment and Bosnia's application before the ICJ. The ICJ was well aware of the relevance of Milošević's state of mind. As president of the respondent country during the relevant period, the question of whether he possessed the *dolus specialis* of genocide was perhaps the central question of the ICJ's inquiry. In view of the ICJ's demonstrable reliance on ICTY jurisprudence, it is certain that the ICJ would have placed similar reliance on a final judgment in the *Milošević* case if his death had not terminated the proceedings. Had Milošević been acquitted of genocide, it would have been difficult for the ICJ to enter a finding that Serbia, as a state, was liable for genocide. More generally, it is likely that a final determination concerning his individual responsibility would have been largely dispositive of the primary issues before the ICJ. Moreover, although the ICJ stated that it would not place any weight on the *Milošević* 98 *bis* Decision, had the *Milošević* trial chamber dismissed the genocide charge in that decision, it would have been reasonable for the ICJ to have relied on the underlying findings.

Milošević's participation in the conflict in Bosnia, as well as his state of mind accompanying that participation, could well have been dispositive of many of the issues the ICJ faced. Unfortunately, his untimely death before the trial's conclusion not only denied the international community a judgment in the case, it also denied the ICJ the benefit of a reasoned opinion by

205. The Court relied on the *Milošević* 98 *bis* Decision for findings related to the Luka Camp. *See id.* ¶ 273 (referring to Prosecutor v. Milošević, Case No. IT-02-54-T, Decision on Motion for Judgment of Acquittal, ¶¶ 159, 160-68 (June 16, 2004)). The Court also relied, in part, on this decision for its findings regarding Manjača Camp. *See id.* ¶ 315.

206. *See* Prosecutor v. Milošević, Case No. IT-02-54-T, Indictment, ¶¶ 3, 4 (Nov. 22, 2001).

the ICTY trial chamber responsible for evaluating the evidence. Nevertheless, given the parity between the central issues of the *Milošević* case and the *ICJ Genocide Judgment*, the ICTY trial chamber's *Milošević* 98 *bis* decision merits close attention for what it says about the evidence of genocide and the relationship of Serbia to the crimes committed in Bosnia.

Rule 98 *bis* has undergone several significant amendments to its procedural methodology and has evolved, through the ICTY's jurisprudence, into a clear and useful procedural milestone.²⁰⁷ The standard of proof applicable to the ICTY's 98 *bis* determinations was first set forth in the *Delalić* case, one of the ICTY's earliest trials. The appeals chamber in that case stated, "The test applied is whether there is evidence (if accepted) upon which a reasonable tribunal of fact *could* be satisfied beyond reasonable doubt of the guilt of the accused on the particular charge in question."²⁰⁸ The *Kunarac* trial chamber put this standard as the "prosecution needs only to show that there is evidence upon which a reasonable tribunal of fact *could* convict, not that the Trial Chamber itself *should* convict."²⁰⁹

Milošević, consistent with his position since his arraignment that the ICTY itself was not legitimately constituted, declined to make this motion himself; the amici curiae were consequently directed by the chamber to make it on his behalf. The chamber

207. Rule 98 *bis* in its current formulation provides: "At the close of the Prosecutor's case, the Trial Chamber shall, by oral decision and after hearing the oral submissions of the parties, enter a judgement of acquittal on any count if there is no evidence capable of supporting a conviction." ICTY Rules of Procedure and Evidence, *supra* note 138. The rule underwent a significant amendment on December 8, 2004. The previous version of the rule (and version that applied to the *Milošević* case) required that this determination by the Tribunal be done in writing and upon written motion of the parties. It provided:

(A) An accused may file a motion for the entry of judgement of acquittal on one or more offences charged in the indictment within seven days after the close of the Prosecutor's case and, in any event, prior to the presentation of evidence by the defence pursuant to Rule 85 (A) (ii). (B) The Trial Chamber shall order the entry of judgement of acquittal on motion of an accused or *proprio motu* if it finds that the evidence is insufficient to sustain a conviction on that or those charges.

See *Prosecutor v. Kvočka*, Case No. IT-98-30/1-T, Decision of Defence Motions for Acquittal, n.3 (Dec. 15, 2000).

208. *Prosecutor v. Delalić*, Case No. IT-96-21-A, Judgment, ¶ 434 (Feb. 20, 2001).

209. *Prosecutor v. Kunarac*, Case No. IT-96-23-T & IT-96-23/1-T, Decision on Motion for Acquittal, ¶ 10 (July 3, 2000).

summarized the amici's motion with respect to the genocide charge as follows:

There is no evidence that the Accused planned, instigated, ordered, committed, or otherwise aided and abetted in the planning, preparation, or execution of a genocide or any genocidal acts, or that he was complicit in such, and that the *mens rea* requirement for establishing the crime of genocide is incompatible with the *mens rea* requirement for the third category of a joint criminal enterprise and command responsibility, as alleged in the Bosnia Indictment.²¹⁰

The amici (like the respondent before the ICJ) asserted as their primary argument that the prosecution had failed to establish the *dolus specialis* of genocide.²¹¹ The trial chamber, in light of the indictment and the procedural history of the Bosnia indictment against Milošević, confined its deliberations on the 98 *bis* motion to nine Bosnian municipalities.²¹²

The chamber presented its analysis in relation to five distinct questions:

1. Was there evidence supporting a finding that a Trial Chamber could be satisfied beyond reasonable doubt that Milošević was a member of a joint criminal enterprise that had the aim and intention of destroying in whole or in part Bosnian Muslims as a group?
2. Could a Trial Chamber be satisfied to the appropriate standard that Milošević was a member of a joint criminal enterprise with the aim and intention to commit crimes other than genocide but for which genocide was a reasonably foreseeable consequence of that joint criminal enterprise?

210. Prosecutor v. Milošević, Case No. IT-02-54-T, Decision on Motion for Judgment of Acquittal, ¶ 5 (June 16, 2004) (summarizing Amici Curiae Motion for Judgment of Acquittal Pursuant to Rule 98 *bis* ¶¶ 161-62).

211. The amici curiae asserted the following:

(1) There is no evidence that the Accused possessed the "special intent" required to commit the crime of genocide. (2) There has been no evidence of acts and/or conduct of the Accused which could be interpreted as declarations of an intention to commit genocide. (3) The crimes in Schedules A, B and C of the Bosnia Indictment, if proved, do not provide evidence of the specific intent for the crime of genocide by their scale or context, which was primarily territorial in nature.

Prosecutor v. Milošević, Case No. IT-02-54-T, Decision on Motion for Judgment of Acquittal, ¶ 117 (June 16, 2004).

212. These municipalities were Brčko, Prijedor, Srebrenica, Bijeljina, Kotor Varos, Ključ, Sanski Most, and Bošanski Novi. *See id.* ¶ 138.

3. Could a Trial chamber be satisfied to the appropriate standard that Milošević aided or abetted the crime of genocide?
4. Could a Trial Chamber be satisfied that Milošević was complicit in the commission of the crime of genocide?
5. Could a Trial Chamber be satisfied that Milošević knew or had reason to know that subordinates of his were about to commit or had committed the crime of genocide and he failed to take appropriate measures to prevent the genocide or to punish the perpetrators thereof?²¹³

In denying the motion the trial chamber found:

On the basis of the inference that may be drawn from this evidence, a Trial Chamber could be satisfied beyond reasonable doubt that there existed a joint criminal enterprise, which included members of the Bosnian Serb leadership, whose aim and intention was to destroy a part of the Bosnian Muslim population, and that genocide was in fact committed in Brcko, Prijedor, Sanski Most, Srebrenica, Bijeljina, Ključ and Bosanski Novi. The genocidal intent of the Bosnian Serb leadership can be inferred from all the evidence. . . . The scale and pattern of the attacks, their intensity, the substantial number of Muslims killed in the seven municipalities, the detention of Muslims, their brutal treatment in detention centres and elsewhere, and the targeting of persons essential to the survival of the Muslims as a group are all factors that point to genocide.²¹⁴

The trial chamber also determined, after evaluating the evidence related to Kotor Varos, that there was insufficient evidence of genocide there.²¹⁵

In analyzing the prosecution's case, the trial chamber focused first on evidence indicating that Milošević was "The Leader of All Serbs," including those in Serbia proper and those in Bosnia and Croatia.²¹⁶ The chamber concluded that the "Accused was the dominant political figure in Serbia and he had

213. *See id.* ¶ 141.

214. *Id.* ¶ 246.

215. *See id.* ¶ 247. Although the chamber went on to note that the number of killings and other criminal acts directed at the Muslim populations of Bijeljina, Ključ, and Bosanski Novi was lower than the other four regions in which genocide was alleged, it concluded, based on the geographic and temporal relationship of those municipalities to the other four, that there was sufficient evidence of genocidal intent. *See id.* ¶ 248.

216. *Id.*, ¶ 248.

profound influence over the Bosnian Serb political and military authorities.”²¹⁷ In support of this conclusion, the chamber referred to the testimony of Milan Babić, the president of the Serbian Krajina, who was alleged to have been a member of the joint criminal enterprise with Milošević;²¹⁸ of Borislav Jović, one of Milošević’s closest political allies in the Communist Party of Yugoslavia, who testified that “[t]his period of our history was marked, without any doubt, by [the Accused]. In every sense, he was the key figure, the main actor in this Serbian tragedy;”²¹⁹ and of Peter Galbraith, the American ambassador to Croatia, who believed Milošević was “the architect of a policy of creating Greater Serbia [the goal to unite Serbs living throughout several states of the former Yugoslavia into a single enlarged Serb state].”²²⁰

The trial chamber also considered evidence of Milošević’s own public statements and actions. As recalled by the chamber, Milošević stated on January 15, 1991, that any dissolution of Yugoslavia that resulted in Serbs living outside a unified state was unacceptable.²²¹ Shortly thereafter, on March 16—months before the outbreak of the conflict in Bosnia—Milošević publicly urged Serbs throughout the former Yugoslavia to unite, and ordered the mobilization of special police forces to defend the interests of Serbs living outside Serbia—an unequivocal admission that forces under his control and authority were sent into Bosnia.²²² In the same month, at a secret meeting in Karadjordjevo, Milošević and Tuđman, the president of Croatia, agreed to di-

217. *Id.*, ¶ 257.

218. Milan Babić was named as a member of the joint criminal enterprise in the *Milošević* indictment. After pleading guilty to crimes against humanity, he testified in the *Milošević* case as well as in other ICTY cases. See *Prosecutor v. Milošević*, Case No. IT-02-54-T, Second Amended Indictment, ¶ 7 (July 28, 2004).

219. *Prosecutor v. Milošević*, Case No. IT-02-54-T, Decision on Motion for Judgment of Acquittal, ¶ 256 (June 16, 2004).

220. *Id.* ¶ 249 (quoting testimony of Ambassador Galbraith).

221. See *id.* ¶ 251.

222. See *id.* ¶ 250. In paragraph 389 of the ICJ Genocide Judgment, the Court considered whether the Scorpions who were captured on video executing six men and boys from Srebrenica were a de jure organ of the State. The court noted that:

Applicant has claimed that incorporation occurred by a decree of 1991 (which has not been produced as an Annex) The Court observes that, while the single State of Yugoslavia was disintegrating at that time, it is the status of the “Scorpions” in mid-1995 that is of relevance to the present case.

ICJ Genocide Judgment, *supra* note 2, ¶ 389.

vide Bosnia along ethnic lines and to annex large portions of it to Croatia and Serbia, creating the possibility that Muslims could live in an enclave between them.²²³ In July 1991, Babić, Karadžić, and Milošević had a conversation in which Karadžić claimed he would chase Muslims into the river valleys in order to link up Serbs living in Bosnia.²²⁴ The chamber relied on the evidence of Hrvoje Sarinic (senior politician and aide of Tuđman) that on November 12, 1992, Milošević told him, "I am telling you frankly that with Republika Srpska in Bosnia, which will sooner or later become part of Serbia, I have resolved ninety percent of Serbia's national question."²²⁵ In this context, Milošević manipulated the Serbian media to further nationalist interests with propaganda, severely limiting independent media outlets.²²⁶

The trial chamber also took into account the testimony of two U.N. officials. David Harland, the U.N. civil and political affairs officer in Sarajevo, and Charles Kirudja, a delegate of the special representative of the U.N. secretary-general in Belgrade (who, in this capacity, had approximately six meetings with Milošević). Between 1993 and 1999, as established through Harlan's evidence, Serbia provided an uninterrupted, base level of support to Bosnian Serbs, including the Bosnian Serb Army.²²⁷ Kirudja was struck by Milošević's command of the detail and knowledge of the matters discussed at their meetings. There was no need to meet with the FRY President at the time Zoran Lilić—it was necessary only to meet with Milošević.²²⁸ Kirudja referred to a report that he wrote on May 16, 1995, recording his contemporaneous impression that Milošević played a "solo role in the negotiations" sponsored by the U.N. in an attempt to end the conflict.²²⁹ Harland testified that when U.N. representatives found themselves at an impasse in their direct negotiations with Bosnian Serb leaders, they would go to Belgrade to negotiate directly with Milošević, who could bring about

223. Prosecutor v. Milošević, Case No. IT-02-54-T, Decision on Motion for Judgment of Acquittal, ¶ 252 (June 16, 2004).

224. *Id.* ¶ 253.

225. *Id.* ¶ 254.

226. *Id.* ¶ 255.

227. *See id.* ¶ 258.

228. *See id.* ¶ 278.

229. *Id.*

results in Bosnia.²³⁰ At the meeting called on April 22, 1994 to deal with an impending crisis in Goražde, Milošević, in the presence of U.N. officials, directed Karadžić to remove obstacles that had been placed in front of a U.N. humanitarian aid convoy in Rogatica; Karadžić complied, and the obstacles were removed.²³¹

The chamber referred to General Wesley Clark's testimony that during a meeting that he and Ambassador Richard Holbrooke had with Milošević, Holbrooke asked Milošević whether he should deal with him or directly with the Bosnian Serb leaders. Milošević replied, "with [me] of course."²³² During other negotiations Milošević mapped out his preferred way of implementing an agreement that he unilaterally made with the delegation—namely, to present the agreement as a referendum in Serbia proper. When they asked Milošević why he would call a referendum in Serbia proper to vote on an agreement pertaining to Bosnia, Milošević stated that Bosnian Serbs would obey the will of the Serb people.²³³ General Clark also noted that during the Dayton peace talks Milošević and he reviewed computerized topographical maps of Bosnia while negotiating territorial boundaries in Bosnia. Clark testified that Milošević had an intimate knowledge of all the contested areas in Bosnia and was able to make binding commitments regarding Bosnian territory unilaterally and without consultation with the Bosnian Serb representatives.²³⁴ When Clark was having difficulty getting the Bosnian Serb delegates to sign schedules and subsidiary agreements, Milošević told him that his initials were sufficient to bind the Serb side, and he went on to promise that he would obtain the signatures of the other delegates later.²³⁵

In finding that there was sufficient evidence upon which a trial chamber could convict Milošević of genocide, the trial chamber also reviewed evidence illuminating the close relationship between the Yugoslav and the Bosnian Serb armies. The trial chamber referred to evidence that the "Bosnian Serb military emphasized that the chain of command really ran to Bel-

230. *See id.* ¶ 274.

231. *See id.* ¶ 276.

232. *Id.* ¶ 279 (quoting General Wesley Clark).

233. *Id.*

234. *See id.* ¶ 282.

235. *See id.* ¶ 283.

grade.”²³⁶ The chamber recalled the testimony of General Philippe Morillon, commander of U.N. peacekeepers in Bosnia, that he “was absolutely convinced that Belgrade continued to exercise its authority on Ratko Mladić.”²³⁷ The chamber referred to a cease-fire agreement brokered by Secretary of State Cyrus Vance and Lord Carrington. The agreement, entitled “Cessation of Hostilities Agreement,” called for an end to hostilities in Croatia and was signed by Milošević in November 1991. Ambassador Herbert Okun, who participated in the negotiations that led to this cease-fire and witnessed the signing, recalled that the international negotiators understood Milošević to have sufficient authority and control over paramilitary forces and irregular troops to be able to enforce his promise that they would cease hostile activities. Okun relayed how Milošević, true to his word and signature, was able to bring a halt to hostile acts by Serb paramilitary and irregular units and that such cessation lasted for some period of time afterward.²³⁸

The *Milošević* trial chamber also relied on evidence of the logistical and material support that Serbia provided the Bosnian Serbs. A report dated September 1992, signed by Mladić, recounted how the Yugoslav Army, when it officially withdrew from Bosnia in the spring of 1992, left Bosnia Serbs with an essentially complete army fully staffed and fully equipped.²³⁹ The chamber referred to the recorded minutes of the fiftieth session of the Republika Srpska assembly held in April 1995, just three months before the massacre in Srebrenica. In that session, Mladić reported that over the course of the conflict, 89.4% of the 9185 tons of infantry ammunition consumed by the Bosnian Serb army, 34.4% of the 18,151 tons of artillery ammunition, and 52.4% of the 1336 tons of anti-aircraft ammunition was provided by the Yugoslav army.²⁴⁰ When Milošević commented on the level of support provided the Bosnian Serbs at the Third Congress in 1996, he stated:

As regards the resources spent for weapons, ammunition and other needs of the Army of *Republika Srpska* and the Republic

236. *Id.* ¶ 258 (quoting David Harland, U.N. Civil Affairs and Political Affairs Officer in Sarajevo from 1993 until 1999).

237. *Id.* ¶ 268.

238. *See id.* ¶ 275.

239. *See id.* ¶ 259.

240. *See id.* ¶ 261.

of Serbian Krajina, these expenditures constituted a state secret and because of state interests could not be indicated in the Law on the Budget, which is a public document. The same applies to the expenditures incurred by providing equipment . . . for the security forces and special anti-terrorist forces in particular . . . and this was not made public because it was a state secret, as was everything else that was provided for the Army of the *Republika Srpska*.²⁴¹

With respect to cooperation between the Yugoslav and Bosnian Serb armies, the trial chamber referred to the testimony of Dr. Michael Williams, the United Nations Protection Force Director of Information for Yasushi Akashi, the U.N. special representative between 1994 and 1995, and to their conclusion that Serbs had access to newly improved radar and air defense equipment in Sarajevo and northwestern Bosnia.²⁴² The chamber recalled how Clark relayed to General Perišić, chief of staff of the Yugoslav Army, his conclusion that Perišić was allowing the Bosnian Serb Army to receive radar and air defense information directly from Yugoslavia's air defense systems, and cautioned him to disconnect the two air defense systems.²⁴³

The trial chamber relied on evidence that until February 28, 2002, the salaries of all officers of the Bosnian Serb army were paid by the Yugoslav Army through an administrative unit, the "30th Personnel Centre," established for that purpose.²⁴⁴ The chamber recounted the testimony of a radar control officer in the Bosnia Serb Army during the war: he received no compensation or benefits from the Bosnian Serb Army, but only from the 30th Personnel Centre.²⁴⁵ This soldier, using the pseudonym B-127, described how despite his regular presence in Bosnia, the only identification that he was issued between 1992 and 1995 was that of an officer of the Yugoslav Army. It was not until after the Dayton Peace Accords in 1995 that he was first issued a separate identification card for the Bosnian Serb Army and instructed to show it to any international forces that requested identifica-

241. *Id.* ¶ 262 (quoting exhibit no. 427, tab 3, at 2 (statement by Milošević regarding a ruling of District Court in Belgrade on his detention, dated April 2, 2001)).

242. *Id.*

243. *See id.*

244. *Id.* ¶ 260.

245. *See id.*

tion.²⁴⁶ Another soldier, who appeared under the pseudonym B-1804, testified that although he served in Bosnia in a Bosnian Serb Army unit, he was considered a member of the Yugoslav Army. The Yugoslav Army paid this soldier and other members of the unit, provided them with medical care, and made decisions regarding their promotion (upon the recommendation of their superiors in the Bosnian Serb Army, who themselves were members of the Yugoslav Army attached to the 30th Personnel Centre).²⁴⁷

The trial chamber referred to the prosecution's military expert, who testified about formal military plans drawn up jointly by the Bosnian Serb and Yugoslav armies,²⁴⁸ and provided details about a resupply operation, known as the "Izvor" plan. The chamber referred to the evidence of a military analyst who reviewed a large number of documents in the prosecution's evidence collection—many documents captured by Bosnian Federation forces from Bosnian Serb Army command posts. A number of these documents described a close working relationship between the two armies. This analyst also pointed to documentary evidence of the Yugoslav Army's direct involvement in the Bosnia conflict in eastern Bosnia in 1993 and 1995, in Sarajevo between 1993 and 1994, and in Western Bosnia in 1994.²⁴⁹

One soldier, B-174, from the Yugoslav Army candidly testified about his direct participation in serious crimes committed in Bosnia. He described a Yugoslav Army operation in which he and his unit crossed into Bosnia in January of 1993. Before crossing the border they were ordered to remove any patches on their uniforms that would identify them as members of the Yugoslav Army, and to replace them with Bosnian Serb Army patches (which they were given). Once across the border, they were joined by members of the Yugoslav Army's 63rd Parachute Brigade, and together they launched an attack on the Bosnia Muslim-majority village of Skelane, near Srebrenica. He described in detail how houses and farms were set on fire to frighten people from their homes. These people fled into a horseshoe formation created by the Yugoslav troops just outside the village. As

246. *See id.* ¶ 269.

247. *See id.* ¶ 264.

248. *See id.* ¶ 270.

249. *See id.* ¶¶ 270-72.

the frightened people fled into the hollow of the formation B-174 and his unit opened fire on them with automatic weapons. He described one particular member of his unit who did what other Yugoslav soldiers would not—execute the children by slicing their throats with a knife.²⁵⁰

In assessing Milošević's knowledge of the crimes in Bosnia, the trial chamber referred to evidence that Milošević demanded that he be kept informed of all that was going on.²⁵¹ The chamber referred to a member of the "Contact Group," who said that he saw Milošević and Ratko Mladić in Serbia on July 7, 1995, just before Srebrenica fell. Four days later a code cable to Milošević stated that "the [Bosnian Serb Army] is likely to separate the military-age men from the rest of the population."²⁵² This cable arrived prior to the time that the *Krstić* appeals chamber determined that the *dolus specialis* of genocide was clearly established. The *Milošević* trial chamber recalled the pointed question that General Clark put to Milošević regarding why, if he had such influence over Bosnian Serbs, he allowed Mladić to commit the crimes he did at Srebrenica. Milošević replied, "Well, General Clark, I told him not to do it but he didn't listen to me."²⁵³ Clark recounted how he was stunned by this admission because it demonstrated Milosevic's foreknowledge of Mladić's plans for the male Muslim population of Srebrenica.²⁵⁴ After reviewing the evidence produced at trial, the trial chamber concluded:

[T]hat there is sufficient evidence that genocide was committed in Brčëko, Prijedor, Sanski Most, Srebrenica, Bijeljina, Ključ and Bosanski Novi and . . . that there is sufficient evidence that the Accused [Milošević] was a participant in a joint criminal enterprise, which included the Bosnian Serb leadership, the aim and intention of which was to destroy a part of the Bosnian Muslims as a group.²⁵⁵

While this determination by the trial chamber carries none of the weight of a final judgment regarding the evidence, it does indicate that there was sufficient evidence for a reasonable trial chamber to potentially convict Milošević of genocide. Given the

250. See generally *id.* ¶ 263.

251. See *id.* ¶ 285.

252. *Id.* ¶ 284.

253. *Id.* ¶ 280.

254. See *id.*

255. *Id.* ¶ 289.

similarity between the issues in the *Milošević* case and Bosnia's claim of genocide before the ICJ, this body of evidence had similar potential for the ICJ case.

For the reasons articulated earlier—specifically, with respect to the different standards of proof involved—the ICJ decided to place no reliance on the findings of the *Milošević* trial chamber in its 98 *bis* decision.²⁵⁶ However, given the *Milošević* trial chamber's finding that there was sufficient evidence upon which a court could find Milošević guilty of the crime of genocide, and given the parity between the *Milošević* case and the ICJ case, a thorough inquiry into Bosnia's claims before the ICJ required the ICJ to examine the evidence referred to in the *Milošević* 98 *bis* decision to adjudicate the case before it.

Since an ICTY trial chamber, after a full hearing of the prosecution evidence and cross-examination by Milošević, determined that there was ample evidence upon which a trial chamber could make a finding directly relevant to the ICJ inquiry at a standard equivalent to the ICJ's articulated standard, the ICJ should have conducted its own examination of this evidence. Such a review was all the more compulsory in view of the *Milošević* trial chamber's finding that the evidence could establish not only that Milošević, by himself, could be convicted of the crime of genocide, but that he was a member of a joint criminal enterprise comprised of other senior members of the FRY government²⁵⁷ similarly engaged in genocidal crimes against the Bosnian Muslim population.

The *Milošević* 98 *bis* decision and the ICJ's failure to evaluate that body of evidence bring into focus the different strengths and weaknesses of their respective efforts to enforce the prohibitions of the Genocide Convention. A body of evidence that *could* lead a reasonable trier of fact to conclude beyond a reasonable doubt that the head of state of the respondent had committed

256. Interestingly, the Court does adopt the *Milošević* trial chamber's findings regarding conditions at the Manjača camp. *ICJ Genocide Judgment*, *supra* note 2, ¶ 315 (quoting *Prosecutor v. Milošević*, Case No. IT-02-54-T, Decision on Motion for Judgment of Acquittal, ¶ 178 (June 16, 2004)).

257. The *Milošević* indictment named the following people as members of the joint criminal enterprise: Radovan Karadžić, Momcilo Krajišnik, Biljana Plavšić, Ratko Mladić, Borisav Jović, Branko Košić, Veljko Kadijević, Blagoje Adžić, Milan Martić, Jovica Stanišić, Franko Simatović, Radovan Stojičić, Vojislav Šešelj, and Zeljko Ražnatović. See generally *Prosecutor v. Milošević*, Case No. IT-02-54-T, Indictment (Nov. 22, 2001).

the crime of genocide is of major import. Yet the ICTY's efforts to adjudicate the criminal responsibility of an individual were thwarted by the untimely death of the accused, and the ICJ's efforts to determine state criminal responsibility were thwarted by its inability to adjudicate issues of individual criminal responsibility. The world is left without a final adjudication, without a final judicial assessment of evidence that could support a finding not only that Milošević was guilty of genocide but that Serbia bore criminal responsibility as well. The fact that the ICJ did not, and perhaps could not, properly assess that body of evidence highlights its limited capacity to adjudicate claims under the Genocide Convention.

III. *INTEGRATING THE MANDATE AND METHODOLOGIES OF INTERNATIONAL COURTS*

The Bosnia genocide case was the first time that the ICJ was called upon to adjudicate a claim under the Genocide Convention. Although the ICJ had the benefit of the ICTY's parallel work adjudicating the responsibility of senior individuals, the work of that tribunal, with the death of Milošević, was incomplete and left a gap that the ICJ could fill only by engaging in its own determination of the core factual and legal issues—issues that the Milošević trial and appeals chambers would have resolved with the precision of a criminal process. Before considering the relationship between the ICJ and other international criminal tribunals, it is worth giving separate attention to the ICJ's legal and practical capacity for adjudicating cases involving the culpable responsibility of particular individuals.

The ICJ's legal authority to make findings of fact and law with respect to whether senior political leaders have committed genocide can arise only from the ICJ's Statute and the referral clause of the Genocide Convention. The ICJ's interpretation of the Genocide Convention that a state, as a state, can perpetrate the crime of genocide is distinct from the question of whether the ICJ can, in the course of adjudicating state responsibility, properly make determinations of the individual responsibility of senior state officials. Article 9 of the Genocide Convention, which gives the ICJ competence over disputes arising out of the Genocide Convention, does not explicitly refer to the adjudica-

tion of criminal responsibility—whether individual or state.²⁵⁸ While the Genocide Convention does define the essential elements of genocide and makes clear that senior political leaders and constitutional rulers are not immune from prosecution for genocide,²⁵⁹ it contains no explicit provision for adjudicating the crime itself and instead leaves to the contracting parties the task of devising their own mechanisms for prosecuting and punishing those who commit genocide. The Genocide Convention also leaves it to them to decide how best to incorporate the prohibitions embodied in the Genocide Convention into their national criminal justice systems (consistent with their own constitutions).²⁶⁰

It is against this background that the ICJ decided that its own legal competence included the ability to independently determine issues of individual criminal responsibility in the process of adjudicating state criminal responsibility. While it recognized the value of the work conducted by the criminal tribunals, the ICJ did not acknowledge either a legal or practical dependence on them. The ICJ, without setting out a legal basis, granted itself “the capacity” to make “final determinations” of the *mens rea* of persons alleged to have committed crimes—a task ordinarily reserved for criminal courts.²⁶¹ The ICJ itself created this new competence to engage in a juridical function not expressly or implicitly provided for in the Genocide Convention.²⁶²

258. Article 9 of the Genocide Convention provides:

Disputes between Contracting Parties related to the interpretation, application or fulfillment 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.

Genocide Convention, *supra* note 1, art. 9.

259. Article 4 of the Genocide Convention provides, in full: “Persons committing genocide or any of the other acts enumerated in article III shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals.” *Id.* art. 4.

260. Article 5 of the Genocide Convention provides: “The Contracting Parties undertake to enact, in accordance with their respective Constitutions, 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.” *Id.* art. 5.

261. See ICJ Genocide Judgment, *supra* note 2, ¶ 181.

262. Instead, the Court adopted a position according to which it can itself make a determination as to whether or not genocide was committed without a distinct decision by a court or tribunal exercising criminal jurisdiction. The

The Genocide Convention is clear regarding which courts should be empowered to hear genocide cases. With respect to establishing criminal culpability, Article 6 provides that individual criminal responsibility “shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction.”²⁶³ The phrase an “international penal tribunal” is a reference to the work of the International Law Commission, which at the time was engaged in the task of trying to establish an international criminal court—an effort that regrettably stalled during the Cold War.²⁶⁴ This express referral of any adjudication of the Genocide Convention’s criminal prohibitions to national and international penal courts is an implicit recognition that the specialized methodology and procedural protections of penal courts are essential to adjudicating criminal responsibility for genocide. The referral in Article 9 of the Genocide Convention to courts other than the ICJ is an express recognition of the ICJ’s inability to properly inquire and adjudicate issues of individual responsibility.²⁶⁵ It is likely, however, that the drafters failed to consider that establishing state responsibility for genocide necessarily requires some determination of whether senior state officials had, as individuals, violated the

Judgment offers no explanation as to the legal basis of this position. Rather the Court constructs for itself ‘the capacity’ to do so (Judgment, paragraph 181), which is nowhere to be found in the Genocide Convention.

ICJ Genocide Judgment (Declaration of Judge Skotnikov), *supra* note 35, at 6.

263. Genocide Convention, *supra* note 1, art. 6.

The Court simply cannot establish individual responsibility for the crime of genocide by persons capable of engaging a State’s responsibility since it lacks criminal jurisdiction. In particular, by reason of the lack of criminal jurisdiction, the Court cannot establish the existence or absence of genocidal intent, since nothing in the Genocide Convention indicates that it deals with genocidal intent in any other sense than it being a requisite part, a mental element, of the crime of genocide.

ICJ Genocide Judgment (Declaration of Judge Skotnikov), *supra* note 35, at 6.

264. Benjamin B. Ferencz, *International Crimes against the Peace*, Feb. 1, 2008, <http://www.benferencz.org/arts/4.html>.

265. Article 9 of the Genocide Convention states:

Disputes between the Contracting Parties relating to the interpretation, application or fulfillment 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.

Genocide Convention, *supra* note 1, art. 9.

prohibitions of the Genocide Convention. And because adjudicating state responsibility for genocide requires adjudicating issues of individual criminal responsibility, and because the ICJ lacks the capacity to properly adjudicate such issues, the ICJ would inescapably be drawn into a relationship of dependency in relation to courts engaged in the adjudication of individual guilt.

Even if the ICJ's assumption of the difficult task of adjudicating issues of individual criminal responsibility rested on firmer legal footing than suggested above, its procedures make it ill suited for the task. The unique procedures of a criminal trial are designed not only to protect the rights of an individual accused of a crime, but to define a methodology that has been historically proven to yield accurate determinations of whether crimes have been committed. The ICJ's procedures, designed for a different purpose, are incapable of engaging in such a detailed inquiry or yielding as reliable a result. Having two international courts—one designed for resolving interstate disputes and one designed for adjudication of individual criminal responsibility—creates the potential that the two courts will reach inconsistent results. Had the ICJ made a determination “beyond doubt” that Milošević possessed the *dolus specialis* of genocide and thus that Serbia, as a state, has perpetrated the crime of genocide, those factual/legal determinations would have almost complete parity with those of the ICTY and would have improperly transgressed upon the competence of that tribunal. Any “final determinations” regarding Milošević's *mens rea* (with respect to the genocidal acts perpetrated in Bosnia) prior to the final judgment of the *Milošević* trial chamber would have created difficulties for the trial chamber; it is likely that the ICJ's would have conflicted in material ways with the trial chamber's judgment resulting from a more detailed inquiry. And if the judgments of the ICJ and the trial chamber had been inconsistent on the matter of Milošević's commission of genocidal acts, the international community would rightly have been confused.

The ICJ's serving as a venue for determining criminal responsibility seems incongruous with the ICJ's inability to initiate a case absent a formal complaint by a State Party. Consider, hypothetically, that the aggressor state perpetrating the genocide was completely successful and that the targeted group no longer existed. If another State Party did not initiate a claim on behalf

of the targeted group, the ICJ would not have any jurisdiction itself to initiate a case (before itself) to assess the state's criminal liability.²⁶⁶ The ICJ, unlike a criminal tribunal with an independent prosecutor, could be shackled by its own procedures and be prevented from embarking on an inquiry into something as important as allegations that a state is perpetrating the crime of genocide.

Once the inquiries were initiated before the two courts—and despite the similarity between the issues that the courts would face—their inquiries were largely shaped by the differences in their respective statutes. While the ICTY's statute created the office of an independent prosecutor to investigate claims made by parties on all sides of the conflict, the allegations before the ICJ were formulated by the parties to the conflict themselves in their claims and counterclaims. The burden of investigating and gathering evidence for the ICJ was not undertaken by a well-resourced independent office of the prosecutor but left to the two interested parties.

The introduction of evidence in international criminal tribunals, while under somewhat more liberal rules of evidence than national systems, is still rigorous compared to the procedures employed by the ICJ.²⁶⁷ Despite the ICJ's status as the "world court," much of its procedure bears an air of informality, with parties engaging the process in "letters" (versus motions) culminating in oral hearings that lack many of the procedural and evidentiary formalities of a criminal trial in the ICTY.²⁶⁸

The ICJ does have, at least theoretically, some capacity to

266. Article 36 of the Convention provides, in relevant part: "The jurisdiction of the Court comprises all cases which the parties refer to it and all matters specially provided for in the Charter of the United Nations or in treaties and conventions in force." *Id.* art. 36. "The Statute appears to presume that there will be, but not specifically to require that there should be, at least two parties to a contested proceeding." See C. WILFRED JENKS, *THE PROSPECTS OF INTERNATIONAL ADJUDICATION* 125 (1964); see also SHABTAI ROSENNE, *THE WORLD COURT: WHAT IT IS AND HOW IT WORKS* 74 (1962).

267. It became apparent early on that it would be difficult if not impossible for the Court [ICJ] to assert anything approaching stringent rules of evidence relating to the substance of what was produced, and it has applied practically no rules of propriety or admissibility in connection with documentary evidence. The absence of rules restricting the length of documents has long been associated with the perceived freedom of sovereign states to present their cases before the Court howsoever they see fit.

Hightet, *supra* note 56, at 357.

268. ROSENNE, *supra* note 66, at 1381.

secure the evidence necessary to decide issues of criminal culpability; several articles of the ICJ's statute enable it to obtain evidence for itself. The ICJ has the power to apply directly to governments who are not parties to serve notices upon persons in possession of evidence.²⁶⁹ It can require agents of the parties before it to produce documentary evidence²⁷⁰ and can call upon the parties to produce evidence.²⁷¹ The ICJ can *proprio motu* visit locations related to the case in order to obtain evidence itself.²⁷² While in theory these provisions give the ICJ some of the mechanisms available to an international prosecutor or international criminal court to secure evidence, the ICJ's customary practice has been to exercise these powers infrequently and to depend upon the parties for the production of evidence.²⁷³ And while the ICJ has some authority to secure possession of evidence, it lacks many of the mechanisms found in national systems.²⁷⁴

Even if the ICJ and ICTY had equivalent powers to secure evidence, some commentators have observed that the ICJ has been reluctant to fully engage in the task of finding facts.²⁷⁵ Other commentators have suggested, instead, that the ICJ's capacity to establish facts is limited by its procedures and methods.²⁷⁶ The ICJ's work has generally not been thereby impeded,

269. See ICTY Statute, *supra* note 21, art. 44.

270. *Id.* art. 49.

271. *Id.* art. 62.

272. *Id.* art. 66.

273. "The most significant impediment to the ability of the Court to function decisively in evidentiary questions is of course that it possesses no power to order production." Highet, *supra* note 56, at 357.

274. "Similarly, the International Court has none of the powers of an internal court to obtain evidence through letters rogatory and the like, or any power of subpoena, or to order discovery, unless they should be specifically conferred on it." ROSENNE, *supra* note 66, at 1345.

275. [A]lthough the Court has broad flexibility and wide powers in matters relating to evidence, it has not in fact used them to their full potential If the litigator's commonplace is correct—that, in the long run, the facts are always the most important part of any lawsuit—any lack of confidence, resulting from reaction (justified or not) to the *Nicaragua* case, about the Court's handling of evidence and facts would be serious indeed. If this proves true, the Court's broad powers, particularly in the area of evidence, may well continue to remain relatively unused and untested and the promise and power of the Court will continue to be regrettably untried.

Highet, *supra* note 56, at 374-75.

276. Yet Judge Manley Hudson wrote years ago that: "Issues of fact are seldom tried before the Court, and where a question of fact arises the Court must usually base its finding on statements made on behalf of the parties either in

however, since many of its contentious cases have presented complex legal questions arising from a relatively simple set of facts.²⁷⁷ In those cases in which factual determinations are made, they are most often made on the basis of indirect evidence.²⁷⁸ Some commentators have suggested that the ICJ would benefit from delegating the fact-finding component of its task to a commission designed for that purpose, thereby limiting itself to applying the law to the commission's factual findings.²⁷⁹

In her introductory remarks before reading a summary of the ICJ's judgment in the *ICJ Genocide Judgment*, the ICJ's president, Judge Roslyn Higgins, observed that allegations of genocide necessitated a detailed and challenging factual inquiry by the ICJ.²⁸⁰ In this case it was called upon to consider the state of

the documents of the written proceedings or in the course of oral proceedings."

Id. at 356 (quoting M. HUDSON, *THE PERMANENT COURT OF INTERNATIONAL JUSTICE 1920-1942*, at 565 (1943)).

277. "However, the natural subject-matter of the types of cases which have been presented before the Court—and the proof of the type of facts which constitute violations or breaches of international obligations—do not normally require detailed investigation into, or resolution of, difficult questions of fact." *Id.* at 372.

278. When one considers in particular the various affirmative determination of fact issues in the *Nicaragua* case, it is noticeable how few of them were in fact decided by direct evidence of any kind This quick overview of factual findings made in the *Nicaragua* case suffices to show how substantially the Court in reality relied upon indirect or inferential methods of proof such as admissions and failures to make specific denial, public knowledge supported by governmental publications, or notoriety of press reports which were not corrected by officials.

Id. at 373-74 (citations omitted).

279. "Other ways of inducing governments to have recourse to adjudication may exist. One would be to promote the use of fact-finding commissions or commissions of enquiry confined purer to the facts of a case without entry upon the law." Sir Gerald Fitzmaurice, *Enlargement of the Contentious Jurisdiction of the Court*, in 2 *THE FUTURE OF THE INTERNATIONAL COURT OF JUSTICE* 461, 490 (1976); see also RUDOLPH L. BINDSCHEDLER, *Report, JUDICIAL SETTLEMENT OF INTERNATIONAL DISPUTES* 144 (1974) ("[I]t may be argued that it is preferable to submit a case to a special non-judicial body when the facts and their elucidation are paramount.").

Finally, the Court could also consider modifying its Rules to provide for special masters for findings of fact, in a manner similar to U.S. Supreme Court practice in instances of its original jurisdiction. This would not be inconsistent with the Statute and could be based upon the unused provision for assessor contemplated by the statute and the Rules. Assessors could be combined with the use of experts (as in *Corfu Channel*) to effectively "shrink," the Court from its normally somewhat impressive dimensions and render the consideration of evidentiary matters more direct, precise, and controlled.

Hight, *supra* note 56, at 372 (citations omitted).

280. This was an extremely fact-intensive case. The hearings lasted for two-

mind of senior state officials. Such inquiries are not without precedent; in the past, the ICJ has had to consider what the intentions of senior state officials were.²⁸¹ In such cases, the ICJ looked to documentary evidence and public statements for evidence of the knowledge and intent of state officials with respect to boundaries,²⁸² covert military activities,²⁸³ and the existence of maritime mines.²⁸⁴ In all of these cases, the statements of senior state officials, while ultimately used to establish findings against the state, were not clear admissions of criminal responsibility. The precise and exacting requirements of the *dolus specialis* of genocide necessitate unequivocal statements by state officials indicating their genocidal intent. Anything less than a clear unequivocal statement, no matter how thinly veiled, would fall short of what is needed to establish genocidal intent. Although some state officials have, in the past, been surprisingly forthcoming about their genocidal intentions, it is unlikely that in our present world—in which several heads of state and other senior officials have already been tried before international criminal courts—they will be so candid about their intentions.²⁸⁵ Absent such an

and-half-months, witnesses were examined and cross-examined, and the Parties each submitted thousands of pages of documentary evidence. About one third of the Judgment is devoted to analyzing this evidence and making detailed findings as to whether alleged atrocities occurred and, if so, whether there was the specific intent on the part of the perpetrators to destroy in whole or in part the protected group, identified by the Court as the Bosnian Muslims. It is this specific intent, or *dolus specialis*, that distinguishes genocide from other crimes. In this case, it was not enough for the Applicant to show that, for example, deliberate unlawful killings of Bosnian Muslims occurred. Something more was required—proof that the killings were committed with the intent to destroy the group to which the victims belonged.

Roslyn Higgins, Pres. ICJ, Statement to the Press by H.E. Judge Rosalyn Higgins, President of the International Court of Justice, February 26, 2007, <http://www.icj-cij.org/court/index.php?pr=1898&pt=3&p1=1&p2=3&p3=1>.

281. See *Military and Paramilitary Activities in and Against Nicaragua* (Nicar. v. U.S.) 1986 I.C.J. 60 (June 27); *Temple of Preah Vihear* (Cambodia v. Thailand), Judgment, 1962 I.C.J. 31 (June 15); *Corfu Channel* (U.K. v. Albania), 1949 I.C.J. 16 (Apr. 9).

282. See *Temple of Preah Vihear* (Cambodia v. Thailand), 1962 I.C.J. 31 (June 15).

283. See *Military and Paramilitary Activities in and Against Nicaragua* (Nicar. v. U.S.), 1986 I.C.J. 60 (June 27).

284. See *Corfu Channel* (U.K. v. Albania), 1949 I.C.J. 18 (Apr. 9).

285. Henry Morgenthau Sr., the U.S. ambassador to the Ottoman Empire (1913–16) recorded the words of Mehmet Talaat Pasha, the Ottoman minister of the interior (1913–17), referring to the campaign against the Armenians:

“It is no use for you to argue,” Talaat answered, “we have already disposed of three quarters of the Armenians; there are none at all left in Bitlis, Van, and Erzeroum. The hatred between the Turks and the Armenians is now so in-

unequivocal public statement that was recorded in a way that renders its authenticity undisputed, the ICJ, in its effort to establish the mens rea of a state official, would have to rely on the testimony of witnesses. The calling of witnesses concerning matters of fact remains an unusual, though not unprecedented, occurrence in ICJ proceedings.²⁸⁶ Even if a sufficient number of such witnesses were called to testify, they would not be challenged by the person alleged to have made the statement—something with significant implications for both the fairness and the accuracy of the proceedings. Citing the lack of involvement of the accused, the ICJ has declined to rely on a number of ICTY proceedings even when there has been significant judicial involvement in the process.

The procedures provided for in the ICJ's statute and rules are noticeably different from those of a criminal tribunal in that they lack any of the procedural protections afforded those accused of crimes—protections that are common to most modern legal systems. Article 34(1) of the ICJ's statute provides that "[o]nly states may be parties in cases before the Court." This article makes clear that individuals whose conduct and mens rea are adjudicated by the ICJ (with a view toward establishing the responsibility of states) have no right of appearance before the ICJ. Those individuals may, indeed, be found to have perpetrated the crime of genocide without ever having had the opportunity to defend themselves against such allegations. It is difficult to contemplate a way in which the ICJ could fairly determine that a senior FRY leader participated in the crimes in Bosnia with the requisite *dolus specialis* absent a prior determination of that person's guilt by the ICTY or an opportunity for that person to appear before the ICJ to defend against such serious

tense that we have got to finish with them. If we don't, they will plan their revenge."

HENRY MORGENTHAU JR., *AMBASSADOR MORGENTHAU'S STORY* 337-38 (1918); see also Gary J. Bass, *At Saddam's Trial, the Law Is Just Part of the Picture*, WASH. POST, Jan. 18, 2004, at B03.

"Very few people in history would say publicly they were about to commit a genocide," says Dermot Groome, the prosecutor leading the Bosnia genocide case against Milosevic. Instead, Groome said, prosecutors try to show a pattern of targeted slaughter, "so that the chamber can infer that the only explanation for these acts was a genocidal intent."

286. SHABTAI ROSENNE, *THE WORLD COURT: WHAT IT IS AND HOW IT WORKS* 127 (1989).

allegations. The ICTY itself has been reticent in issuing judgments that can be read broadly to implicate persons who were not before the Tribunal. The *Krstić* appeals chamber recognized this problem when it pondered why the trial chamber asserted that those perpetrating the crimes at Srebrenica possessed genocidal intent, but then failed to identify them. The appeals chamber suggested that the trial chamber recognized the unfairness of identifying someone in this way outside of a criminal trial and without an opportunity to confront the evidence.²⁸⁷ If a senior state official did so choose to meet such allegations against him or her and was granted an opportunity to do so, the court in question would be obligated to ensure that the procedural protections of the International Covenant on Civil and Political Rights and regional human rights instruments were observed.

In undertaking the adjudication of issues of individual criminal responsibility, the ICJ conducted what amounted to a trial *in absentia* of senior state officials. While the ICJ cannot deprive senior state officials of their liberty, a judgment finding that a senior state official committed the crime of genocide would invariably have a harsh impact on that person. The ICJ—not being a criminal court but charged with the task of determining individual responsibility—cannot properly or fairly inquire into the states of mind of the senior officials whose states of mind were essential to the ICJ’s determination.²⁸⁸ As such, the ICJ can only conduct its work after issues of their individual responsibility have been fairly established in a criminal trial. The ICJ should and must wait until such final judgments are rendered

287. The fact that the Trial Chamber did not attribute genocidal intent to a particular official within the Main Staff may have been motivated by a desire not to assign individual culpability to persons not on trial here. This, however, does not undermine the conclusion that Bosnian Serb forces carried out genocide against the Bosnian Muslims.

Prosecutor v. *Krstić*, Case No. IT-98-33-A, Judgment, ¶ 35 (Apr. 19, 2004).

288. However, nothing in Article IX suggests that the Court is empowered to go beyond settling disputes, relating to State responsibility and to actually conduct an enquiry and make a determination whether or not the crimes of genocide was committed. The Court simply cannot establish individual responsibility for the crime of genocide by persons capable of engaging a State’s responsibility since it lacks criminal jurisdiction. In particular, by reason of the lack of criminal jurisdiction, the Court cannot establish the existence or absence of genocidal intent, since nothing in the Genocide Convention indicates that it deals with genocidal intent in any other sense than it being a requisite part, a mental element, of the crime of genocide.

ICJ Genocide Judgment (Declaration of Judge Skotnikov), *supra* note 35, at 6.

before it commences its work on the merits. To do otherwise is to place the work of the ICJ and other international criminal courts in possible conflict with each other.²⁸⁹

Unfortunately, because of the death of Milošević, the ICJ did not have the option of waiting for a judgment in the ICTY's *Milošević* case. That case was the first and only ICTY case to focus on the same central question of genocidal intent. The conflict in the former Yugoslavia was a series of complex crimes committed in a multitiered environment by multitudes of perpetrators not always sharing the same intent. In the context of Srebrenica, many actors contributed to the tragic events there. Against this sort of factual background, the ICTY has inescapably begun its work by examining the conduct of the perpetrators most immediately associated with the crimes and then continued upward toward those most responsible.²⁹⁰ That is, absent documentary evidence of the type left behind by the Nazis indicating the involvement of senior officials in genocidal acts, prosecutors must necessarily begin by identifying the direct perpetrators and look upward on the ladder of ever-increasing responsibility to determine the identity of the central architects of the crimes. In the case of Srebrenica, the first ICTY conviction was of Erdemović, who directly participated in the Srebrenica massacre and manned one of the machine guns outside the town. Building on what was learned from that case and on continued investigations, the next set of cases examined the culpability of the commanders present in the Srebrenica area: Krstić and Obrenović. Building on the work of those investigations, Milošević was finally indicted for the crimes in Srebrenica in 2001, seven years after the ICTY was established. The *Milošević* trial chamber would have been the first trial chamber to comprehensively examine the evidence relevant to the allegation that a senior Serb state official—namely, its president—was a participant in the crime of genocide.²⁹¹

289. "This kind of collision of course has not occurred in practice. However, this does not make the Court's failure to strike a proper balance under the Genocide Convention between the Court's jurisdiction and that of a criminal tribunal any lesser." *Id.* at 7.

290. See generally RICHARD GOLDSTONE, *FOR HUMANITY: REFLECTIONS OF A WAR CRIMES PROSECUTOR* (2000).

291. The Court recognized this fact:

The Respondent has emphasized that in the final judgments of the Chambers of the ICTY relation to genocide in Srebrenica, none of its leaders have been

Perhaps the ICJ had considered waiting until the *Milošević* case had reached its conclusion. A survey of the ICTY's cases reveals that its remaining cases are unlikely to have resulted in judgments that would have directly addressed the issues addressed in the *ICJ Genocide Judgment*. The trial chamber's judgment in the *Milošević* case with respect to the genocide charges in Bosnia would have been highly relevant and, given the ICJ's significant reliance on other ICTY judgments, might well have been dispositive of the ICJ case. Milošević's death and the resulting termination of the case foreclosed that possibility. Of the other senior Yugoslav indictees awaiting trial, General Perišić and Jovica Stanišić, neither has been charged with genocide. Consequently, although the possibility exists that relevant findings of fact will emerge from the judgments in those cases, neither trial chamber has any obvious reason to deal directly with the question of the *dolus specialis* of genocide.

It will prove helpful to return briefly to consider the *Milošević* trial chamber 98 *bis* decision and the evidence it evaluated in the process. Judges making determinations under that rule do not assess the credibility and reliability of prosecution witnesses and exhibits. Instead, the judges consider that evidence in a favorable light to the prosecution. While the ICJ might have had the capacity to review the ICTY's evidence used to authenticate documentary evidence, witness testimony is different. Judges largely rely on their commonsense impression of witnesses to determine their credibility. In its 98 *bis* decision, the *Milošević* trial chamber cited General Clark's recounting of a conversation with Milošević in which he communicated his own advance knowledge of the crimes to be committed in Srebrenica. In its final judgment the trial chamber would have made specific findings with respect to Clark's credibility and reliability. Is it possible for the ICJ to reexamine all of the prosecution witnesses or to view the videotapes of the ICTY trial? This duplicative task would have consumed a great deal of the ICJ's time. The ICJ's own rules provide little guidance as to the evaluation of witness

found to have been implicated. The Applicant does not challenge that reading, but makes the point that that issue has not been before the ICTY for decision. The Court observes that the ICTY has indeed not up to the present been directly concerned in final judgments with the question whether those leaders might bear responsibility in that respect.

ICJ Genocide Judgment, *supra* note 2, ¶ 408.

testimony.²⁹² Trying to make determinations of credibility in the absence of the witness is a speculative task that, when attempted with respect to core issues of a case, strains our conceptions of what judges can appropriately do when adjudicating such cases.

Can the ICJ's failure to comprehensively review the *Milošević* evidence be traced to the ICJ's recognition that the task was impossible? The ICJ was ill equipped to engage in the type of in-depth inquiry that a criminal court engages in routinely. Since none of the witnesses were being heard live, there was no opportunity for the ICJ to pose questions to the witnesses directly. For these and other reasons, it seems that the factual issues were more apt to be properly explored and more soundly adjudicated in the setting of an international criminal trial. The ICJ risked the delegitimizing effect of issuing a judgment under its proceedings that would potentially be undermined by the more comprehensive exploration of the same issues by an international criminal trial. In sum, while the ICJ can build upon the work of international criminal tribunals, it is unlikely that the ICJ can satisfactorily adjudicate such difficult issues independently.

CONCLUSION

The ICJ—in making its determination that a state, as a state, could perpetrate the crime of genocide, and in recognizing that a state's capacity to form genocidal intent exists only in the minds of senior officials capable of attaching state liability—committed itself to engaging in an inquiry traditionally reserved for international criminal tribunals. The ICJ adopted a standard of proof equivalent to a criminal trial and placed upon the applicant essentially the same burden of proof as borne by an international prosecutor. In so doing, the ICJ aligned its work closely to that of international criminal tribunals. While the ICJ did not specifically undertake the task of adjudicating individual guilt, its final determination with respect to state criminal responsibility for genocide required that it adjudicate core issues of individual criminal responsibility identical to those faced by an interna-

292. "The Rules do not convey with any precision what system should be applied for the examination of witnesses and experts, nor do they contain anything on the function of the Court, beyond its general control." ROSENNE, *supra* note 66, at 1347.

tional criminal tribunal sitting in judgment of a senior state official.

The ICJ's methodology, as set out in its Statute, was designed to resolve interstate disputes and remains ill suited to explore issues of individual criminal culpability. Making final determinations regarding the states of mind of senior state officials without giving those persons the right to participate in the proceedings, to question the evidence against them, or to provide a defense to the allegations raises troubling questions with regard to both the accuracy of the result and the procedural fairness of the process. The ICJ's reliance on the ICTY's work in adjudicating individual criminal responsibility is evidence of its recognition that international criminal tribunals are better suited to this task. The ICJ's failure to comprehensively review the body of evidence presented during the prosecution case against Milošević—and which the trial chamber determined could support a conviction of Milošević for genocide—demonstrates the impossibility of its conducting its own review and evaluation of such a large body of evidence.

Absent a relevant body of jurisprudence generated by an international criminal tribunal or court engaged in a parallel inquiry into individual responsibility for genocide, the ICJ is unable to conduct its own independent inquiry into state criminal responsibility. In the *ICJ Genocide Judgment*—its first judgement enforcing the 1948 Genocide Convention—the ICJ has thus created, in effect, a relationship of dependency upon the work of other international criminal courts. Given the likelihood that future allegations of genocide will be brought not only before the ICJ, but the ICC, the relationship between the ICJ and the ICTY as defined by the *ICJ Genocide Judgment* will also, no doubt, come to define the relationship between the ICJ and the ICC. We may expect a State Party to initiate a claim of genocide in the ICJ shortly after any such alleged conduct takes place and long before any final determination of individual criminal responsibility in an international criminal tribunal. The ICJ—dependent upon the work of other tribunals—will necessarily have to wait upon their final judgments.