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

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

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“Hopefully, the activities of these two judicial institutions of the United Nations [The International Court of Justice and the International 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

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 judgment 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.

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I. INTRODUCTION

On February 26, 2007, the International Court of Justice (ICJ) issued its judgment 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 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. The case marks the first time a state party to the Genocide Convention has accused another state of perpetrating the crime of genocide. The Court’s judgment re-examined old injuries and

2 The International Court of Justice was established by the Charter of the United Nations in 1945 as a successor to the Permanent Court of International Justice and is the primary judicial organ of the United Nations. The Court has its own statute and rules and has the authority to give advisory opinions as well as settle controversial cases between states. UN member states, by ratifying the Charter of the UN consent to the jurisdiction of the Court and have the right to bring disputes with other states before the court. Some conventions such as the Genocide Convention have specific provisions referring disputes to the Court. See Article 93(1) of the UN Charter, Articles 1 and 36(1) of the Court’s Statute and Article 9 of the Genocide Convention.


4 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 ICJ Genocide Judgment ¶¶ 1 and 67-79. For clarity, this article will use the name “Serbia” to refer to the respondent at all stages of the proceedings.
has renewed controversy between the different ethnic groups about the continued existence of the joint political institutions created by the Dayton Peace Accords of 1995.\(^5\)

The case has a long and complex procedural history complicated by continued conflict in the region and by the question of Serbia’s membership in the United Nations after the dissolution of Yugoslavia in 1992 – a question with significant jurisdictional implications for the case.\(^6\) The Court ultimately resolved the jurisdictional question by


\(^6\) Serbia in its final arguments before the court essentially claimed that the ICJ had no jurisdiction over it for two reasons. First, that Serbia was not the continuator state of the SFRY and thus did not “inherit” SFRY’s obligations under the Genocide Convention. Secondly, because it was not the continuator of the SFY, it did not “inherit” SFY’s membership in the United Nations and thus was not a party to the Court’s statute – giving the ICJ no jurisdiction over it. The issue of Serbia’s UN membership is complicated by the fact that after the dissolution of the SFY, the FRY (Serbia and Montenegro) claimed to be the continuator of the SFY and its membership in the United Nations. On May 30, 1992 the UN Security Council adopted resolution 757 in which it rejected this claim as “not be[ing] generally accepted,” S.C. Res. 757, U.N. Doc. S/RES/757 (May 30, 1992). It further stated in resolution 777 stated that FRY could not automatically continue SFY’s membership and referred the matter to the General Assembly. S.C. Res. 777, U.N. Doc. S/RES/777 (Sept. 19, 1992). On September 22, the General Assembly adopted resolution 47/1 which affirmed that the FRY did not inherit the SFY’s membership 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 maintained that it continued SFY’s membership and 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 (Bosnia and Herzegovina v. Yugoslavia) Preliminary Objections, Judgment, 1996 I.C.J. ¶ 17 (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].” See e.g. Legality of Use of Force case (Serbia and Montenegro v. Belgium), Preliminary Objections Judgment,
determining that it did have jurisdiction over Serbia and went on to enter findings regarding Bosnia’s allegations against Serbia. In summary, the Court found that Serbia, as a state, had not committed genocide in Bosnia, nor was it complicit in the crime of genocide.\(^7\) The Court did conclude that Serbia had “violated the obligation to prevent genocide…in respect of the genocide that occurred in Srebrenica in July 1995,” given its continued support of Bosnian Serbs despite its awareness of the likelihood of that genocide could result.\(^8\) It further found, 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.\(^9\) Despite Bosnia’s stoic reaction to a judgement that fell far short of the relief it sought\(^10\) the Court’s judgment immediately occasioned commentary by observers who questioned the court’s findings, as well as its methodology, analysis and its capacity to even properly adjudicate such a complex case.\(^11\)

\(^7\) ICJ Genocide Judgment, ¶ 471.
\(^8\) ICJ Genocide Judgment, ¶ 471.
\(^9\) ICJ Genocide Judgment, ¶ 471. The Court 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.”
\(^10\) The government of Bosnia 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 Bosnia and Herzegovina.
\(^11\) See Ruth Wedgewood, Op-Ed, Bad Day for International Justice, Int’l Herald Trib., March 8, 2007, [http://www.iht.com/articles/2007/03/08/opinion/edwedge.php](http://www.iht.com/articles/2007/03/08/opinion/edwedge.php) (visited August 15, 2007). “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
This article explores the methodology of the Court and its resulting analysis and places the judgment in the context of the parallel work of the International Criminal Tribunal for the former Yugoslavia. While the Court’s efforts to give practical effect to the prohibitions of the 1948 Genocide Convention are commendable there is some merit to the criticism that its methodology and analysis fell short of the task before it. The clearest example being its failure to assess, in any comprehensive way, the body of evidence introduced by the prosecution in the genocide case against Milošević. At the end of the prosecution case the Milošević Trial Chamber, pursuant to Rule 98 bis of the Tribunals Rules of Procedure and Evidence, determined that the Prosecution had introduced sufficient evidence upon which a reasonable trial chamber could be satisfied beyond reasonable doubt that he had committed the crime of genocide. Milošević’s death, ended the case and denied the world a final judgment that would have answered the question more certainly. The ICJ’s failure to examine this body of evidence is tacit recognition of its inability to do what a Trial Chamber adjudicating individual guilt does – carefully explore complex testimony and evidence and make determinations regarding issues of individual criminal responsibility. This article sets out how the Court through several of its rulings committed itself to the some of the same essential tasks as a criminal tribunal and draws the conclusion that the court is unable to independently complete the very task it defines 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 vocabulary during the Nazi campaign against six million Jews and ethnic minorities in the Second World War, it was only after the war that it became a legally enforceable crime. Its criminalization was a response to the realization that targeting an entire of group of people for destruction was...
qualitatively different from the grievous crimes used to achieve this goal. Although the crime of persecution covered acts we now consider genocide such designation did not adequately reflect the magnitude or unique character of this ‘crime of crimes.’  

Ralph Lemkin fashioned the term ‘genocide’ and indefatigably campaigned for its recognition as a distinct crime. On December 11, 1946 the General Assembly of the United Nations 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.” Nearly 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 ICTR would incorporate, almost verbatim, the definitional provisions of the Genocide Convention into their respective statutes and apply 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 Ralph Lemkin’s quest to hold those who commit genocide individually responsible for their acts.

While the UN Security Council was considering taking the bold step in 1993 of establishing an ad hoc tribunal for the former Yugoslavia under Chapter VII of the UN Charter, Bosnia initiated proceedings before the ICJ against the FRY alleging that it had and was continuing to perpetrate the crime of genocide against the non-Serb population

13 See RAPHAEL LEMKIN, AXIS RULE IN OCCUPIED EUROPE: LAWS OF OCCUPATION, ANALYSIS OF GOVERNMENT, PROPOSALS FOR REDRESS 79 (1944).
15 Ralph Lemkin was a Yale law professor and Holocaust survivor who coined the phrase “genocide” and was a relentless advocate for its formal recognition as an international crime. See LEMKIN, supra note 13 at 91.
of Bosnia and Herzegovina.\textsuperscript{17} Within a few months the International Criminal Tribunal for the former Yugoslavia (ICTY) would be established a short distance away from the International Court of Justice and 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, seeking to determine both state and individual responsibility for crimes committed in Bosnia would require both to interpret the language of the Genocide Convention and to develop standards and methodologies suitable to the task of applying it.

The Court recognizing that it was treading the same ground as ICTY judges and described the situation as “unusual.”\textsuperscript{18} But in coming years as our system of international criminal justice leaves its adolescence and matures into an effective and predictable check on impunity, primarily through International Criminal Court, it is likely that all credible allegations of genocide will be the subject of a comprehensive investigation 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 violations of the Genocide Convention.\textsuperscript{19} These parallel cases before the ICJ will most likely be commenced during the course of continuing criminal activity and before individual criminal accountability can be determined in an international criminal tribunal creating overlap between the work of the two international courts. Overlap with the potential to facilitate or impede each other’s work.\textsuperscript{20} One ICJ judge expressed his view that it may be

\begin{itemize}
\item \textsuperscript{17} 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 Final Submissions of Bosnia, ICJ Oral Proceedings of April 24, 2006.
\item \textsuperscript{18} ICJ Genocide Judgment, ¶ 212.
\item \textsuperscript{19} 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.
\item \textsuperscript{20} ICJ Judge Tomka in concluding his separate opinion states, “This Court and the ICTY have two different missions but one common objective…The activity of the Court [ICJ] has thus complemented the judicial activity of the ICTY in fulfilling the Court’s role in the field of State responsibility for genocide, over which the ICTY has no jurisdiction. Hopefully, the activities of these two judicial institutions of the United Nations, the Court
\end{itemize}
impossible to adjudicate state v. state claims alleging genocide absent a parallel international court.\

II. 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,” 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. This requirement, that a particular actor have a specific intent means that genocide cannot exist in the abstract, absent a clear demonstration that its perpetrators possess the dolus specialis of genocide. Large-scale grievous crimes committed on a discriminatory basis are not genocide unless it can be 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.” ICJ Genocide Judgment, (Separate opinion of Judge Tomka, ¶ 73).

21 “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.” See ICJ Genocide Judgment, (separate opinion of Judge Tomka, ¶ 72). Judge Tomka also recognizes that “Without the work accomplished by the ICTY, it would have been much more difficult for the Court to discharge its role in the present case.”

22 Genocide Convention, Article 2 reads in full: “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.” This language was incorporated without significant alteration into Article 4 of the ICTY Statute, Article 2 of the ICTR Statute and Article 6 of the Rome Statute creating the International Criminal Court. See M. CHERIF BASSIOUNI, INTRODUCTION TO INTERNATIONAL CRIMINAL LAW 138-39 (2003).
demonstrated that its perpetrators were motivated to destroy a protected group. This unique \textit{mens rea} imposes an additional and heavy burden of proof upon the party claiming that particular crimes constitute genocide.

The somewhat elusive concept of the \textit{dolus specialis} of genocide coupled with a paucity of cases from which to take guidance make genocide a difficult crime to investigate and adjudicate. The \textit{dolus specialis} of genocide has presented an interpretive challenge for the judges of the ICTY – in many cases the \textit{actus reus} of genocide may be virtually indistinguishable from the \textit{actus reus} of other serious international crimes such as some forms of persecution as a crime against humanity. In fact, at the time of Nuremberg the conduct prohibited by the Genocide Convention fell

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\footnotesize
\textbf{23} On September 4, 2004, U.S. Secretary of State Colin Powell appearing before the US Senate Foreign Relations Committee declared: “I concluded -- that genocide has been committed in Darfur” Glenn Kessler & Colum Lynch, \textit{U.S. Calls Killings in Sudan Genocide}, Wash. Post, Sept. 10, 2004 at A01. Compare with conclusion of commission appointed by the Secretary-General and chaired by Antonio Cassesse, which found that while grave crimes including killing, rape and forced displacement were committed by government forces it could not be established that it 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. \textit{REPORT OF THE INTERNATIONAL COMMISSION OF INQUIRY ON DARFUR TO THE UNITED NATIONS SECRETARY-GENERAL, PURSUANT TO SECURITY COUNCIL RESOLUTION 1564 OF SEPTEMBER 18, 2004, at 5 (January 25, 2005) Available at www.un.org/News/dh/sudan/com_inq_darfur.pdf} (last visited Aug. 22, 2007).

\textbf{24} \textsc{Steven R. Ratner \& Jason S. Abrams, Accountability for Human Rights Atrocities in International Law: Beyond the Nuremberg Legacy} 34 (1997).

\textbf{25} In theory and in practice there is little distinction between the \textit{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.
\end{quote}
conceptually within the crime of persecution as a crime against humanity. While judges routinely draw logical and necessary inferences from the conduct of perpetrators the similarities between the underlying conduct constituting genocide and other serious crimes present analytical difficulties – it is most often unclear whether a discriminatory crime was perpetrated against a victim because of their membership in a group or was also intended to destroy the very existence of the group itself. Discerning the existence of genocidal intent in clearly persecutory acts has been one of the most difficult tasks faced by judges at the ad hoc tribunals.

The difficulties in establishing genocide are further complicated by the collective nature of the crime. Historical manifestations of genocide have always involved large numbers of actors each contributing in varying degrees to the harm occasioned the


While 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 against a civilian population”) 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, Judgement, ¶ 207 (March 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.” (footnotes omitted). Prosecutor v. Jelisić, Case No. IT-95-10-T, Judgement, ¶ 68 (Dec. 14, 1999). See GERHARD WERLE, PRINCIPLES OF INTERNATIONAL CRIMINAL LAW 254-255 (2005).

targeted group.\textsuperscript{30} In a crime that necessarily involves the actions 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.\textsuperscript{31} In complex criminal acts that are the culmination of a multitude of persons, genocidal intent may be found in an equivalent multitude of places.\textsuperscript{32} While the simplest formulation would imagine that senior state officials and every person contributing to the \textit{actus reus} share the same genocidal intent, that is not the reality of this complex crime. It may be that the direct perpetrator harbors genocidal intent while 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.\textsuperscript{33} Leaders may exploit nationalism to foment fear causing an explosion of violence directed at the protected group but whose direct perpetrators are motivated by a misperceived need for self-

\textsuperscript{30} “Generally speaking, genocide…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.” RALPH LEMKIN, \textit{supra} note 13, at 79.

\textsuperscript{31} The \textit{Krsti\v{c}} Appeals Chamber found that it could make a determination that genocidal intent was present despite a failure to identify those who harbored it. Prosecutor v. \textit{Krsti\v{c}}, Case No. IT-98-33-A, Judgment, ¶ 34 (April 19, 2004). Contrast this finding with the \textit{Staki\v{c}} Trial Chamber that expressed its willingness to conclude that \textit{Staki\v{c}} 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. Staki\v{c} to enable it to draw the inference that those perpetrators had the specific genocidal intent.” Prosecutor v. \textit{Staki\v{c}}, Case No. IT-97-24-T, Judgment ¶ 547 (July 31, 2003).

\textsuperscript{32} \textit{See} METTRAUX, \textit{supra} note 12 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).

\textsuperscript{33} See dissent of Judge 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.” ICJ Genocide Judgment (dissent of Judge Al-Khasawneh, ¶ 48).
defence and lack the *dolus specialis* of genocide. These same leaders may, with genocidal intent, also rely on the traditional discipline of soldiers to gain their participation in contributing to the *actus reus* of the crime while not harboring the requisite *dolus specialis* themselves.

The same quandaries faced by the ICTY and ICTR in adjudicating the existence of genocidal intent take on an additional level of complexity when considering that as a preliminary matter, the ICJ had to determine whether the Genocide Convention not only created individual criminal responsibility, but also state criminal responsibility. The Court came to the conclusion that despite the lack of an express provision in the Genocide Convention prohibiting states from committing genocide, such a prohibition was implicit in the 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.”

This interpretation seems incongruent with the Nuremberg principle that “crimes against international law are committed by men, not by abstract entities.” Several of the judges disagreed with the majority on this point.

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34 ICJ Genocide Judgment, ¶ 166. The Court was also led to this conclusion by the express obligation for States parties 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 person over whom they have a certain influence, but were not forbidden to commit such acts through their own organs…” ICJ Genocide Judgment ¶ 166. Lastly, the Court interpreted Article IX of the Genocide’s jurisdictional provisions “including those [disputes] relating to the responsibility of a State for genocide,” as expressly providing for state liability for the commission of genocidal acts. See ICJ Genocide Judgment, ¶ 169. Several judges dissented from this view. See, e.g., ICJ Genocide Judgment, (Joint Declaration of Judges Shi and Koroma, ¶ 4), “[I]f the Convention was intended to establish and 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 n the Convention, but the Convention did not do so.”

35 Judgment of the International Military Tribunal, Trial of Major War Criminals, 1947, Vol. 1, p. 223). See ICJ Genocide Judgment, (Joint Declaration of Judges Shi and Koroma, ¶ 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.” See also RATNER & ABRAMS *supra* note, 24 at 26. “Article IV, reflecting the Nuremberg principles, provides for individual responsibility, including that of government officials, for genocide.”
believing that a state, as an abstract entity, could not form intent and could not commit a
crime in the penal sense.\textsuperscript{36}

Having determined that a state, in principle, could commit the crime of genocide, the
court bound itself to an inquiry of not simply whether Serbia should be responsible
for the conduct of its officials but whether Serbia as a state possessed the requisite
\textit{dolus specialis} to commit genocide. Where is the \textit{locus} of the state’s intent? The ILC states
“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

\begin{quote}
\textsuperscript{36} The problem is underscored by Judge Owada who in arguing that the Genocide
Convention does not provide for State criminal responsibility stated, “it is 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.” ICJ Genocide Judgment, (Separate Opinion of Judge Owada, ¶
52), (emphasis in original). 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 individual 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 De claration of
Judges Shi and Koroma, ¶ 1). \textit{See also}, Judge Skotnikov separate declaration. Judge
Skotnikov disagreed with the majority that the Genocide Convention created an
affirmative obligation not to commit genocide. He provides three reasons why it cannot:
1) there can be no unstated obligations; 2) the “unstated obligation” created by the
majority is incompatible with the Convention which confines itself to the criminal
culpability of individuals; and 3) 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 which is not a crime
and hence the majority in effect “decriminalizes” the crime of genocide transforming it
into an “internationally wrongful act.” Judge Skotnikov saw the majority’s finding of
state criminal liability as an unnecessary construction given the principle that a State can
be held responsible anytime a wrongful “act is committed by an individual capable of
engaging State responsibility.” ICJ Genocide Judgment, (Declaration of Judge Skotinov,
at 4).

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representatives.”  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 actus reus of the crime. The Court developed a two-part test for determining whether the genocidal acts could be attributed to a state and thus determined where it would look for genocidal intent. The first of these tests determines “whether acts of genocide...were perpetrated by ‘persons or entities’ having the status of organs of the Federal Republic of Yugoslavia ...under its internal law;”  Using this test, the court examined the internal law of the respondent to determine if any person or entity engaged in genocidal acts had a legal relationship to the Federal Republic of Yugoslavia. In the absence of a direct legal relationship, the Court examined whether acts of genocide were perpetrated by persons or entities under the “effective control” of the State as that term was defined in the Nicaragua v. United States case.

Having found that a state as “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 the work of the ICTY. The Court would fully immerse itself in the same challenges faced by ICTY judges in determining the existence of dolus specialis in a collectively perpetrated crime and the need to distinguish between genocide and persecution as a crime against

38 ICJ Genocide Judgment, ¶ 386.
39 “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.” ICJ Genocide Judgment, ¶ 400. The Court relied on the precedent established in the Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), 1986 I.C.J. 64, ¶ 115 (June 27).
humanity. In resolving the question of whether Serbia perpetrated genocide in Bosnia, the court, would examine the conduct and state of mind of several accused before the ICTY. Most significantly, the Court in reaching its conclusion that Serbia breached its duty to prevent the genocide in Srebrenica, examined and attributed to Serbia, Slobodan Milošević’s state of mind – ICTY’s most famous accused. “The FRY leadership, and President Milošević about all, were fully aware of the climate of deep-seated hatred which reigned between the Bosnian Serbs and the Muslims in the Srebrenica region.”

While the ICTY has a Statute and Rules of Procedure and Evidence specifically designed for inquiring into the minds of individuals, the ICJ’s Statute and Rules of Court, designed for a different purpose, are ill-suited for exploring issues of individual criminal culpability. The Court forced into this methodological void, had as a preliminary matter, the task of pronouncing on fundamental methodological issues such as the applicable

40 The importance of discerning when an act is a crime against humanity or the crime of genocide rises to a jurisdictional question in that the ICJ only has jurisdiction over genocide and not crimes against humanity. “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.” ICJ Genocide Judgment, ¶ 277.

41 ICJ Genocide Judgment, ¶¶ 438 & 372 respectively. Judge 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 apprised of General Mladić’s (and the Bosnian Serb army’s) activities in Srebrenica throughout the takeover and massacres.” ICJ Genocide Judgment, dissent of Judge Al-Khasawneh, ¶ 51. Judge Keith also, in dissenting from the majority and finding, that Serbia was complicit in the genocide in Srebrenica emphasizes 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
standard of proof, apportionment of the burden of proof and the types of evidence that could be properly considered. The Court, cognizant that its determination of the applicable standards and methods would impact future genocide cases, devotes considerable text in the judgment to developing these methods. Methodology, as made clear by the dissent of the Court’s vice president is not merely a matter of form but was, in his view, determinative of the essential 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.”

Judge Al-Khasawneh believes that the flawed methodology adopted by the majority had a “profound” effect on the majority’s ability to understand and appreciate the evidence before it. This article explores the difficulties in adjudicating genocide cases and how the standards and methodology developed by the ICJ, help define its relationship to the ICTY and other international courts that may consider individual and state responsibility for genocide in the future. The article considers questions related to how future efforts to hold individuals and states, as “states” responsible for acts of genocide might better integrate their efforts. Their respective methodologies must serve not only to adjudicate the specific claim before them but must take into account the existence of a similar inquiry before a different international court.

necessary standard stated by the Court in its Judgment.” ICJ Genocide Judgment, (Declaration of Judge Keith, ¶ 15).

42 ICJ Genocide Judgment, (Dissent of Judge Al-Khasawneh, ¶ 62). See also ¶ 31 “[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.”

43 ICJ Genocide Judgment, (Dissent of Judge Al Khasawneh, ¶ 3). “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.”

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III. DEFINING THE METHODOLOGY

The allegations leveled against Serbia raised a large number of contentious factual issues. Historically, many of the Court’s judgments have been confined to a relatively narrow field of disputed facts. Before engaging in a full discussion of the disputed facts the Court set out its methodology for resolving contested facts – a methodology it discussed in terms of the burden of proof, the standard of proof and the types of evidence it would consider.\(^\text{44}\)

**Burden of Proof**

The Court in apportioning the burden of proof reaffirmed its general rule that the applicant presenting a case must establish it and that a party asserting a particular fact bears the burden of establishing that fact.\(^\text{45}\) Bosnia generally accepted this rule and provided the court with a large volume of evidence in support of its claims. However, Bosnia did argue for a variation of this general rule and posited that special consideration should be given when the respondent had exclusive possession of highly probative evidence. Bosnia took the position that Serbia’s refusal to produce unredacted copies of documents it requested should have resulted in a shift of the onus of proof to Serbia on several key issues related to what it believed was in those documents.\(^\text{46}\) The documents in question were from the Supreme Defence Council (SDC) of the FRY, 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 President of Yugoslavia (Zoran Lilić), the President of Montenegro (Momir Bulatović), and the President of Serbia, (Slobodan Milošević).\(^\text{47}\) Minutes of the meetings were maintained and the discussion between its members was stenographically recorded.

\(^{44}\) ICJ Genocide Judgment, ¶ 202. The Court noted that despite increasing agreement between the parties there remained many contested allegations.

\(^{45}\) Id. at ¶ 204. Citing the case of U.S. v. Nicaragua as precedent.

\(^{46}\) Id. at ¶ 204.

\(^{47}\) The Supreme Defence Council 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
The SDC minutes appear on their face to be of the type of evidence that the Court has traditionally favored. In the Armed Activities on the Territory of Congo case the Court stated, “It 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.”48 Not only did the SDC documents contain a contemporaneous account of discussions among the most senior political figures but as suggested by the Bosnia representatives, they contained information unfavorable to the Serb position before the Court. According to the Court’s test of attributability the SDC was the type of de jure state organ whose conduct and intent could be attributable to Serbia. Although the SDC documents were before the Milošević Trial Chamber the Chamber did not make the documents. Despite this confidentiality afforded the documents there were some indications of what they contained in the testimony of other witnesses. The Milošević Trial Chamber in rendering its Decision on Motion for Judgment of Acquittal (Milošević 98 bis decision) made several references to the Supreme Defence Council indicating their relevance to the charge of genocide against Milošević.49 The Trial Chamber referred to Zoran Lilić’s testimony that the Supreme Defence Council formalized the payment of all officers in the Bosnian Serb army in November 1993.50 The court referred to evidence that the Yugoslav army and the Serb leadership received operational reports from the Bosnian Serb army,51 that in some military documents the Bosnian Serb Army and the Yugoslav army were referred to as 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 action they took.

49 The Milošević Trial Chamber while compelling production of the SDC minutes did grant protective measures requested by Serbia that they not be made public. In light of this decision, the court did not refer directly to the SDC minutes but did refer to evidence given publicly about them by other witnesses.
50 Prosecutor v. Milošević, Case No. IT-02-54-T, Decision on Motion for Judgment of Acquittal, ¶ 260 (June 16, 2004).
51 Id. at ¶ 258., citing the testimony of General Wesley Clark at T30375.
“one army” and that General Perišić, Chief of the General Staff of the Yugoslav Army regularly gave reports on the activities of the army to members of the Supreme Defence Council.

In Bosnia’s view this contemporaneous documentation of the state of mind of FRY’s most senior leaders was of “direct relevance to winning or losing the present case,” and sought their production. Serbia resisted, providing only portions of the documents Serbia’s Co-Agent claimed had not been “classified” by the Supreme Defence Council and the Council of Ministers of Serbia and Montenegro as “a matter of national security interest.” In the face of Serbia’s steadfast refusal to produce the documents Bosnia requested the Court to exercise its authority under Article 49 of the Court’s Rules and compel the production of the unredacted version of the SDC documents. The Court declined to exercise its statutory authority to order production of the contested documents.

52 Id. at ¶ 273.
53 Id. at ¶ 260. See also, Merdijana Sadović, Could Key Records Have Altered ICJ Ruling, Institute for War & Peace Reporting, March 9, 2007. Available at http://www.iwpr.net/?p=tri&s=f&o=333964&apc_state=henh (last visited, July 23, 2007). “Testimonies 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 formalize support for officers of the Bosnian Serb Army, VRS by establishing a body within the Yugoslav army called Personnel Centre 30.”
54 Second round of oral argument #%
55 ICJ Genocide Judgment, ¶ 205.
56 Article 49 of the ICJ’s Statute provides: “The 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.” See ICJ Genocide Judgment ¶ 205, quoting 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.” (emphasis in the original).
Had the Court ordered such production it has no actual authority to physically compel their production. Its only recourse in effect is to formally take into consideration the refusal as provided for in Rule 49 of the State.\(^{57}\) For example in the *Minquiers* case, a case between the United Kingdom and France to resolve a dispute arising over competing claims of sovereignty over a group of islets and rocks in the Minquiers and Ecrehos group (off the coast of Jersey), the U.K. sought to rely on a judgment from the Royal Court of Jersey issued in 1692 in support of its position. However, in light of the U.K.’s inability to produce the judgment the Court stated that, “As 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 to the Minquiers.”\(^{58}\) The Court in rendering its decision formally took note of the fact that the document was not produced and declined to adopt the unsupported assertion by the British agent.\(^{59}\) In the *Corfu Channel* case, the United Kingdom sought to establish facts, the evidence of which was a document (referred to as “XCU”) that they refused to produce after the Court invoked Article 49 claiming that the document was a naval secret. The Court declined to draw any negative inference from the British agent’s refusal to produce the document that might have been inconsistent with other evidence before it.\(^{60}\) While in neither case was the invocation of Article 49 determinative of the central issues of the case in both it did impact the methodology employed by the Court.\(^{61}\)


\(^{59}\) Id. at 25-26.

\(^{60}\) “The Court cannot, however, draw from this refusal to produce the orders any conclusions differing from those to which the actual events gave rise.” *Corfu Channel* (U. K. v. Albania), Judgment, 1949 I.C.J. 32 (April 9).

\(^{61}\) “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.” HERSCH LAUTERPACHT, THE DEVELOPMENT OF INTERNATIONAL LAW BY THE INTERNATIONAL COURT 88 (1958).
The Court, in declining to compel production of the documents observed that Bosnia had access to extensive documentation from ICTY which it had made “ample use of.”\textsuperscript{62} The Court stated, “Although 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.”\textsuperscript{63} If the Court were to draw a negative inference from Serbia’s failure to produce the SDC minutes, there would have necessarily been some shift of the burden of proof to Serbia to disprove that unfavorable inference.\textsuperscript{64} The majority in its Judgment never states precisely how it takes Serbia’s refusal to produce the SDC minutes into account. Judge Al-Khasawneh points out in his dissent that “no conclusions whatsoever were drawn from noting the Respondent’s refusal to divulge the contents of the unedited documents.”\textsuperscript{65} He went on to express his view that “It is a reasonable expectation that those documents would have shed light on the central questions of intent and attributability,”\textsuperscript{66} In his view, the court under Article 49 should have either shifted the burden of production to Serbia on issues related to the Supreme Defence Council or have permitted a more liberal use of inference when considering what the redacted portions might have revealed.\textsuperscript{67}

\begin{itemize}
\item \textsuperscript{62} ICJ Genocide Judgment, ¶ 206. The court’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 the verbatim account of those vested with the ultimate state authority over Serbia’s involvement in events in Bosnia.
\item \textsuperscript{63} Id. at ¶ 206. “Formal note shall be taken of any refusal” in Article 49 suggests that there may be some negative inference drawn from a State parties refusal to produce – but in this case having never formally called upon Serbia to produce these documents the court could not take such formal note and instead limited itself to taking formal note of Bosnia’s request for the documents, an action the VP’s dissent states fails to meet the requirements of Article 49. See ICJ Genocide Judgment, (Dissent of Vice President Al-Khasawneh, ¶ 35.)
\item \textsuperscript{64} 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. 259-274 (1996).
\item \textsuperscript{65} ICJ Genocide Judgment, (Dissent of Judge Al-Khasawneh, ¶ 35).
\item \textsuperscript{66} Id. at ¶ 35.
\item \textsuperscript{67} Id. at ¶ 35. “It would normally be expected that the consequences of the note taken by the Court would be to shift the \textit{onus probandi} or to allow a more liberal recourse to
Bosnia’s use of other ICTY evidence did not diminish or make cumulative the documents from the Supreme Defence Council. As the court recognized early in its judgment the central issues of its case had not yet been the subject of an ICTY judgment.\footnote{68} All of the ICTY judgments available to Bosnia examined the responsibility of Bosnian Serbs – these cases sought to establish within the strict constraints of a criminal trial of individual responsibility whether that a particular individual was responsible for the crimes with which he or she was charged. None of these judgments concerned themselves with the individual responsibility of senior Yugoslav leaders such as Milošević, Perišić, Bulatović or Lilić.\footnote{69} 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 98bis decision that a reasonable trier of fact could conclude from the Prosecution evidence (including the SDC documents) that Slobodan Milošević, president of Serbia and a member of the Supreme Defence Council, 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 an 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.” Corfu Channel (U. K. v. Albania) 1949 I.C.J. 18 (April 9). See also, “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 instated. In the Monetary Gold case, the Court relied upon Article 49 in making its interlocutory order in connection with the preliminary question…..” SHABTAI ROSENNE, THE LAW AND PRACTICE OF THE INTERNATIONAL COURT 1920-1996 1362 (3d ed. 1997).\footnote{68} Get Cite for this

\footnote{69} 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.
It is likely that the ICJ would have relied on the SDC documents had it been a public exhibit in the Milošević case, its reluctance to infringe on the sovereignty of Serbia by requiring it to produce the documents from the SDC leaves a flaw in Court’s judgment and encourages speculation regarding how knowing what was contained in the documents might have affected their judgment.

The Court compounded this error by drawing inferences from the absence of evidence that it likely would have had before it if Serbia produced the unredacted documents in full. The Court without the benefit of the SDC documents drew inferences from the absence of evidence in trials that did not involve the culpability of senior state officials from Serbia. In doing so it substituted the direct evidence of the SDC with speculative inferences drawn from the absence of evidence in trials that did not deal with Serb involvement in the crimes in Bosnia. The clearest example of this relates to Srebrenica and the Court’s drawing of negative inferences from the lack of evidence with respect to some factual issues related to Serb involvement. While the issue of who may have given orders to the persons convicted of crimes in Srebrenica is relevant to the ICJ inquiry it was not directly relevant in those trials. The court mistakenly assumes that if there was evidence of involvement by senior Serb officials it would have been introduced in the several Srebrenica trials. On one particularly important point the court draws 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.”

The court in drawing an inference from the absence of evidence in light of its decision not to compel production of evidence that could have answered this question emphasizes the relationship between its apportionment of the burden of proof and the ultimate conclusion it reaches in the judgment.

70 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).
Standard of Proof

One of issues faced by the court was the quantum of proof required before the court could enter a judgement in favor of the applicant. Bosnia suggested that the standard of proof be a “balance of probabilities.” 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.” While Bosnia advocated for a standard commonly used to assess non-penal 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 and makes the court’s choice of standard all the more determinative to the outcome of the case.

The Court opted for the higher standard of proof referring to its judgment in the Corfu Channel case of 1949, a 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 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.” Using a standard of proof equivalent to that of a criminal trial is logically consistent with the Court’s understanding of its own task – to determine

71 ICJ Genocide Judgment ¶ 388.
72 ICJ Genocide Judgment, ¶ 208.
73 Id. at ¶ 208.
74 Given the significant strategic implications the standard of proof has to how a party prepares and presents its case, deferring a decision on the applicable standard until the final judgement raises issues of fairness.
75 ICJ Genocide Judgment, ¶ 209. See also, “The Court has long recognized that claims against a State involving charges of exceptional gravity must be proved by evidence that is fully conclusive. It requires that it be fully convinced that the allegations made in proceedings that the crime of genocide or the other acts enumerated in Article III have been committed, have been clearly established” (¶ ??). Later in the opinion in, in its
if 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 to 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 reserved for the ICTY Prosecutor) and establishing beyond doubt that their actions were attributable to Serbia. This standard of proof has been criticized. Some scholars have emphatically expressed their view that given that the remedy did not include incarceration but only declaratory and compensatory relief the proof should have been a simple balance of probabilities or certainly a standard that was less than that traditionally required before imposition of a criminal sentence.76

From a practical perspective the similarity between the Court’s inquiry and several parallel cases in the ICTY adopting a different standard of proof would not have been feasible. Although adopting a lower standard of proof would have allowed the Court to recognize and adopt findings of ICTY judges it would have put the Court in the position of conducting detailed re-examination of trial evidence whenever 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” may satisfy the lower standard of “balance of probabilities.” The court, faced with this possibility, would have to re-examine the relevant evidence in these trials, making 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 appears necessary its application presents its own set of difficulties. These difficulties raise the central discussion of ??, the court states: “In particular, it has not been established beyond any doubt in the argument between the Parties whether the authorities of the FRY…”(¶ ??)
question of whether the ICJ is capable of adjudicating whether 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 court to examine the states of minds of individuals not ordinarily before the court it is difficult to imagine that an applicant can ever theoretically meet that burden in the procedures employed by the ICJ. 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 for a Trial Chamber exclusively engaged in a single trial matter to complete. The structure of the ICJ with its 15 judges hearing every case that comes before it lacks the practical capacity to engage in the detailed inquiries of the three judge panels of the ICTY. 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 reasonable doubt it a large and cumbersome task. In this case the ICJ allotted Bosnia 18 court sessions to present its case and gave Serbia the same amount of time to reply.77

In cases such as the Corfu Channel case, cases that involve a relatively limited factual inquiry, the Court’s procedures can accommodate the evidence necessary to establish such a high standard of proof. Resolving a case like the Bosnia genocide case – a case that involves 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 ability of the ICJ procedures to conduct a parallel inquiry encompassing contested events from several ICTY trials, applying the same law regarding genocide and applying the same high standard of proof.

76 See Ruth Wedgewood, supra, note 11.
Methods of Proof

Bosnia adduced evidence from a variety of sources in support of its allegations of genocide. It relied on resolutions of the UN Security Council and General Assembly; reports by UN 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 Rappateur on Yugoslavia); judgments, decisions and other documents from the ICTY as well as evidence adduced during ICTY trials; government publications, documents from non-governmental organizations, media reports, articles, books and witnesses and experts who appeared before the Court.\(^78\)

As a preliminary matter, the court set out general rules for evaluating evidence proffered by the parties or requested by the court. Its guidelines accept, with caution, materials prepared by the parties for the case or materials that come from a solitary source. The Court expresses 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.\(^79\) 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 technical nature, merits special attention.”\(^80\)

UN Reports and Resolutions

The Court places particular reliance on a report submitted by the United Nations Secretary-General to the General Assembly in November 1999 entitled, “The Fall of

\(^78\) ICJ Genocide Judgment, ¶ 211.
\(^79\) Id. at ¶ 213, citing Military and Paramilitary Activities (Nicar. v. U.S.) Judgment, 1986 I.C.J. ¶64 (June 27).
\(^80\) Id. at ¶ 213 citing, Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda), Judgment, 2005 I.C.J. ¶ 61 (Dec. 19).
Srebrenica."\textsuperscript{81} The report comprised 113 pages and detailed the UN’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 Court, approving the methodology of the report, places significant weight on its findings of facts and conclusions.\textsuperscript{82} The report was the first time the UN 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.\textsuperscript{83} The Court states, “The 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.”\textsuperscript{84} The Court does go on in fact to refer to the report dozens of times. The Court, in accepting the report, does not consider the possibility of bias in that the report was prepared by Secretary-General Kofi Annan who


\textsuperscript{82} The court 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, 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 U.N. Doc. A/54/549, ¶ 8.

\textsuperscript{83} The Fall of Srebrenica, \textit{supra} note 81, at 57.

\textsuperscript{84} ICJ Genocide Judgment ¶ 230.
was the Under-Secretary-General in charge of Peacekeeping Operations during some of
the period being examined.\textsuperscript{85}

The Srebrenica report was not the first report on Bosnia prepared under the
auspices of the Secretary General’s office. In 1992, pursuant to UN Security Council
Resolution 780 the Security Council directed the Secretary-General 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 relies extensively on
this report known as the Commission of Experts Report.\textsuperscript{86} The Court relies on the
Commission of Experts Report in its findings related to several Serb prison camps in
Bosnia including: Batkovi\v{c},\textsuperscript{87} Omarska,\textsuperscript{88} Trnopolje,\textsuperscript{89} Keraterm,\textsuperscript{90} Manja\v{c}a,\textsuperscript{91} Luka,\textsuperscript{92}

\textsuperscript{85} The Fall of Srebrenica, \textit{supra} note 81, at 6. The Court in the \textit{Congo} case stressed the
importance of such reports being “challenged by impartial persons for the correctness of
what it contains.” Armed Activities on the Territory of the Congo (Democratic Republic

\textsuperscript{86} \textsc{Final Report of the Commission of Experts Established Pursuant to Security
Council Resolution 780 (1992), (Hereinafter, Report of the Commission of Experts),

\textsuperscript{87} ICJ Genocide Judgment, ¶ 255 citing Report of the Commission of Experts Vol. V,
Ann. X, p. 9 and ICJ Genocide Judgment ¶ 307 citing Report of the Commission of
Experts Vol. IV, Ann. VIII and Ann. X.

\textsuperscript{88} ICJ Genocide Judgment, ¶ 262 citing Report of the Commission of Experts Vol. II,
Ann. VI, p. 8 and ICJ Genocide Judgment, ¶ 312 citing Report of the Commission of

\textsuperscript{89} ICJ Genocide Judgment, ¶ 267 citing Report of the Commission of Experts Vol. IV,
Ann. V, p. 10 and ICJ Genocide Judgment, ¶ 314 citing Report of the Commission of

\textsuperscript{90} ICJ Genocide Judgment, ¶ 265 citing Report of the Commission of Experts Vol. I,

\textsuperscript{91} ICJ Genocide Judgment, ¶ 270 citing Report of the Commission of Experts Vol. IV, ¶¶
370-376 and ICJ Genocide Judgment, ¶ 315 citing Report of the Commission of Experts
Vol. IV, Ann. VIII, pp. 50-54

\textsuperscript{92} ICJ Genocide Judgment, ¶ 271, citing Report of the Commission of Experts Vol. IV,
Ann. VIII, pp. 93 and 101) and ICJ Genocide Judgment, ¶ 317 citing Report of the

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and K-P Dom. The Court relied on the Commission of Experts Report in making its findings regarding killings in the Prijedor region and sex crimes in the municipality of Zvornik. The Court also relied on the report extensively in drawing conclusions related to Sarajevo, the forced deportation of non-Serbs and the destruction of cultural property.

Although these two reports feature most prominently among UN materials the Court also relied on other UN sources. The Court adopted some assertions contained in Security Council and General Assembly resolutions to resolve factual issues related to Prijedor, Goražde, Banja Luka, Sanski Most and Srebrenica. While the court did rely on resolutions for their factual assertions it declined to give any weight to the

100 ICJ Genocide Judgment, ¶ 275 citing UNSC resolution 913 (1994);
Security Council’s characterization of events in Bosnia as ‘genocide.’ The Court relies on General Assembly resolution 50/193 (1995) with respect to Sarajevo, Tuzla, Bihać and Goražde. The Court’s use of UN Security Council and General Assembly resolutions as evidence gives evidential significance to essentially political statements. This may have the unintended consequence of causing reluctance among member states to make strong statements in UN resolutions out of fear that they may be relied upon by an international court in the future.

The Court also relies on reports by the UN Special Rapporteur with respect to Sarajevo and events in the town of Hambarine in Prijedor. In addition to UN sources the Court considered communications and documents from the United States State Department when making findings related to the camps at Batković and Keratern and crimes committed in the town of Zvornik. The Court also relied on the correspondence and witness reports from the Permanent Mission of Austria to the United Nations related to conditions at the Keratern prison camp and benefited from


107 ICJ Genocide Judgment, ¶ 258 citing Periodic Report of UN Special Rapporteur, November 1992, p. 8, ¶ 17(c)).

108 ICJ Genocide Judgment, ¶ 255 citing Dispatch of the United States State Department of April 19, 1993.

109 ICJ Genocide Judgment, ¶ 265 citing United States Dispatch of the State Department March 5, 1993.


111 ICJ Genocide Judgment, ¶ 265 citing Letter from the Permanent Representative of Austria to the United Nations dated March 5, 1993. See also para 313 in which the court
reports issued by Helsinki Watch, a non-governmental organization, when making findings related to the mistreatment of women in K-P Dom\textsuperscript{112} and conditions at the Keraterm camp.\textsuperscript{113}

\textit{Media Reports}

The Court placed varying degrees of weight on media reports reflecting its determination of the reliability of the individual pieces. The Court cited a BBC production entitled, “The Death of Yugoslavia” a documentary comprised in significant part by news footage and contemporaneous interviews of many of the protagonists including Slobodan Milošević, Borisav Jović, Vojišlav Šešelj and others. This documentary, assisted the court in making findings regarding the crimes committed in Zvornik.\textsuperscript{114} Bosnia submitted an article published in the French newspaper, \textit{Le Monde} reporting the interim results of a study by the World Health Organization and the European Union regarding sexual assaults against men as well as a report by a non-governmental organization claiming that approximately 5,000 men had been sexually mistreated. The Court summarily rejected this as a reliable source citing the secondary nature of its information and the preliminary nature of the underlying research.\textsuperscript{115}

\textit{Public Statements of the Parties}

The Court has, in the past, relied on statements made by the parties that were against their self interest.\textsuperscript{116} In this case, Bosnia argued that a particular statement by government officials bore great significance. In 2005, after a graphic video depicting the execution of seven men and boys from Srebrenica, by paramilitaries from Serbia the government of Serbia issued the following statement:

\begin{quote}
relies on witness accounts reported by the Permanent Mission of Austria to the United Nations. \\
\textsuperscript{112} ICJ Genocide Judgment, ¶ 309 citing Report of the Commission of Experts Vol. IV, pp. 128-132 which in turn relied on a report from Helsinki Watch. \\
\textsuperscript{113} ICJ Genocide Judgment, ¶ 313. \\
\textsuperscript{114} ICJ Genocide Judgment ¶ 251. \\
\textsuperscript{115} ICJ Genocide Judgment, ¶ 357. 
\end{quote}
Those who committed the killings in Srebrenica, as well as those who ordered and organized that massacre represented neither Serbia nor Montenegro, but an undemocratic régime of terror and death, against whom the great majority of citizens of Serbia and Montenegro put up the strongest resistance.  

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. In earlier decisions of the Court it has placed significant reliance on statements by state officials that contradict the state’s position before the court. In the Nicaragua case the United States withdrew from the proceedings and the Court had to consider what weight to place on public statements of US officials. The Court considered these public statements which were recorded in the 

118 ICJ Genocide Judgment, ¶ 377.
119 In Temple of Preah Vihear case the ICJ placed significance on declaration made by government officials in 1950 consenting to the jurisdiction of the ICJ. Temple of Preah Vihear (Cambodia v. Thailand), Preliminary Objections, Judgment, 1961 I.C.J. 30-32 (May 26). In the later judgment on the merits the Court placed weight on statements made by the Thai prince and a map tendered by Thailand indicating the contested temple was on Cambodian territory despite the fact that it contradicted the position of its representatives in Court. Temple of Preah Vihear (Cambodia v. Thailand), Judgment, 1962 I.C.J. 30-32 (June 15). The Vice President in the ICJ Genocide case took the view that context of the statement mitigated 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, (Dissent of Judge Al-Khasawneh, ¶ 58).
media and by the organizations before which they were made and relied on them as admissions against self interest.¹²⁰

The Court, however, declined to rely on the statement by Serb officials stating that it 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.”¹²¹ The Court would not hold a party bound by a statement which the party did not intend to be legally binding against it.¹²² In reaching this conclusion, the Court forgoes the possibility that authoritative statements made by senior officials at an unguarded moment have probative value if they contradict the carefully worded pleadings of the parties before the Court.

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.¹²³ It maintained that that the striking similarity

¹²⁰ “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.” Military and Paramilitary Activities (Nicar. v. U.S.) Judgment, 1986 I.C.J. ¶ 64 (June 27). In this case the Nicaraguan government had offered a statements by then president Ronald Regan and then Secretary of State George P. Shultz.
¹²¹ ICJ Genocide Judgment, ¶ 378.
¹²² “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 (New Zealand v. France), Judgment, 1974 I.C.J. ¶ 47 (Dec. 20). The Court’s findings regarding the binding character of a unilateral declaration was not without controversy. See comments by former President of the ICJ, Taslim O. Elias, “Pronouncements 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).
¹²³ “[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
of criminal conduct (which the court recognized as constituting the *actus reus* of genocide) was best explained as being part of an overall genocidal plan.\(^\text{124}\) The Court 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.\(^\text{125}\) Before considering the pattern evidence itself the court evaluated a document produced by the Bosnian Serb Assembly and introduced in several ICTY trials that the court deemed relevant to this focus on senior Serb leaders. The Court found that this document entitled, “Decision on the Strategic Goals of the Serbian People in Bosnia and Herzegovina,” represented an expression of the joint view of Radovan Karadžić and Slobodan Milošević. That document set out in specific terms the goals of the Serb people in Bosnia and included the goal to separate the Serb people from the “other two ethnic communities”\(^\text{126}\). The court adopted the *Stakić* Trial Chamber’s findings that the document failed to establish genocidal intent.\(^\text{127}\)

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

\[\begin{align*}
\text{perpetrated as the expression of on 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.} & \text{ ICJ Genocide Judgment \(\|\) 370.} \\
\text{124} & \text{ ICJ Genocide Judgment, \(\|\) 370.} \\
\text{125} & \text{ ICJ Genocide Judgment, \(\|\) 371.} \\
\text{126} & \text{ The document set forth six primary goals of 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.” ICJ Genocide Judgment, \(\|\) 372.}
\end{align*}\]
accepted as evidence of its existence, it would have to be such that it could only point to the existence of such intent.” The Court in this passage does two things. First, absent convincing proof of a clear overall genocidal plan, it will confine its consideration of whether a particular crime was committed with genocidal intent to evidence directly related to that particular criminal event. It will not draw inferences based on the similarities in the modus operandi of crimes or examine their temporal relationship. This draws a clear threshold upon which absent establishing an overall plan the court will examine each crime in an isolated disconnected fashion. Second, the existence of a genocidal plan can only be established to the satisfaction of the court with pattern evidence if that pattern evidence excludes all other possibilities. Given the similarity between the actus reus of persecution and the actus reus of genocide and 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. Nevertheless, ICTY Trial Chambers have endorsed the importance of pattern evidence and ICJ’s disregard of it marks an important methodological difference. In the Milošević case, ICTY’s most closely related case, the Trial Chamber relied on pattern evidence in its Decision Denying the Motion for a Judgment of Acquittal.

128 ICJ Genocide Judgment, ¶ 373.
129 ICJ Genocide Judgment, ¶¶ 373 and 376
130 Prosecutor v. Brđanin, Case No. IT-99-36-T, Judgment, ¶ 704 (September 1, 2004). “Proof of intent may be inferred from the facts, the concrete circumstances, or a pattern of purposeful action;” See also, Prosecutor v. Stakić, Case No. IT-97-24-T, Judgment, ¶ 526 (July 31, 2003); See also Prosecutor v. Krstić, Case No. IT-98-33-A, Judgment, ¶ 34 (April 19, 2004). “[Intent] may, in the absence of direct explicit evidence, 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.” See also Prosecutor v. Jelisić, Case No. IT-95-10-A, Judgment, ¶¶ 55-56 (July 5, 2001).
131 The Trial Chamber notes that the number of killings and other acts of mistreatment in Bijeljina, Kljuc 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
Elements of Crimes for the ICC includes, as a material element of genocide, “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.” 132 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. 133

The Court buttresses its decision to dismiss the Applicant’s reliance on pattern evidence by referring to the Prosecutor’s decision not to charge genocide consistently in those areas referred to by Bosnia’s agents. 134 The Court incorrectly assumes that the prosecutor’s exercise of discretion with respect to charging genocides reflects the probative value of pattern evidence. The Court does this despite its conclusion that the crimes of Srebrenica constituted genocide and notes, “In 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…” 135

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.” Prosecutor v. Milošević, Case No. IT-02-54-T, Decision on Motion for Judgment of Acquittal, ¶ 248 (June 16, 2004).

132 See, e.g., ICC elements, Article 6(a) 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. 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.” (emphasis added). See also WILLIAM SCHABAS, AN INTRODUCTION TO THE INTERNATIONAL CRIMINAL COURT, 2 ED., 39 (2004).


134 ICJ Genocide Judgment, ¶ 374.

135 See ICJ Genocide Judgment ¶ 375 citing, Prosecutor v. Erdemović, Case No. IT-96-22-T, (completed); Prosecutor v. Jokić Case No. IT-02-60, (on appeal); Prosecutor v. Milić and Gvero Case No. IT-05-88; Prosecutor v. Perišić, Case No. IT-04-8,1 (pending) and Prosecutor v. Stanišić and Simatović, Case No. IT-03-69 (pending). Only the last two cases involve person who would pass the Court’s test for attributability.
Incorporating the work of the Yugoslav Tribunal (ICTY)

Bosnia sought to meet much of its burden by relying on the work of the ICTY. The ICJ and ICTY engaged in concurrent inquiries into the alleged genocide in Bosnia forces the two courts into a somewhat uncomfortable relationship – uncomfortable largely because of the lack of a formal legal relationship between them. The Statute of the ICTY like those of other tribunals is silent with respect to any formal relationship between itself and the “World Court” – the ICJ. A former president of the ICJ 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 “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.” Robert Jennings, The Judiciary, International and National, and the Development of International Law, 45 Int’l and Comp. Law Qrtly. 5 (1996). Some commentators have suggested that the ICJ, as the “World Court” should be at the apex of any international justice system. “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. . . .” M.C.W. Pinto, Preeminence of the International Court of Justice, in INCREASING THE EFFECTIVENESS OF THE INTERNATIONAL COURT OF JUSTICE 283 (ed. Connie Peck & Roy S. Lee, 1997).

137 “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 . . . .” Mohammed Bedjaoui (then president of the ICJ), Comments on the Report, in THE INTERNATIONAL COURT OF JUSTICE: PROCESS, PRACTICE AND PROCEDURE (D.W. Bowett ed., 1997)
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 be appealed further. 138 Similarly, judgments by the Appeal Chamber of ICTY are final and the parties have no further recourse to contest them. 139 These two courts of last resort, one inquiring into individual criminal responsibility and one into state responsibility based on the attributability of the criminal acts and state of mind of some of the people accused before the ICTY senior leaders are both examining many of the same events and applying essentially the same law are juxtaposed in a way that creates the potential that they might render two inconsistent, yet final judgements. Such an event would undermine the international community’s confidence in the work of one or both of the courts. Judge Skotnikov referred to this in a separate declaration attached to the 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.” 140

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.” 141 It is in this context that the ICJ pays great deference to the work of the ICTY judges and places great weight on the judgements of the Appeals and Trial Chambers. This deference to the work of the ICTY is evidenced by the fact that

138 Article 60 of the ICJ Statute provides, “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.”

139 Rules 119 - 122 of the ICTY Rules of Procedure and Evidence afford 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.”

140 ICJ Genocide Judgment, (Declaration of Judge Skotnikov, at 7). Continuing “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.” ICJ Genocide Judgment, (Declaration of Judge Skotnikov, at 7). See also BASSOUNI, supra note, 22 at 684.
the court adopted all of the factual findings of ICTY judgments and all but one legal finding.

The sole, but important legal ruling concerns the test to be applied for determining when the acts of non-de jure organs of the state can be attributed to the state itself. When considering whether the genocidal conduct in Srebrenica was attributable to Serbia it applied the “effective control” test, a test the ICJ first articulated in the Military and Paramilitary Activities case. The court after giving careful consideration to the Appeals Chamber reasoning in the Tadić case determined that it was unnecessary to prove that the FRY exercised “effective control” during each individual operation during which crimes were committed but rather that it exercised “overall control” thereby rejecting the ICJ’s determination in the Nicaragua case. The Court, after giving careful consideration to the Appeals Chamber reasoning in Tadić, rejected it on the grounds that such a legal finding was not “indispensable” to the Tadić Chamber’s exercise of jurisdiction in adjudicating individual criminal responsibility. The Court reserved to itself the primacy to make determinations of general international law. The Court allowed that the “overall control” may be an appropriate standard for determining

141 ICJ Genocide Judgment ¶ 212.
143 “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.” Prosecutor v. Tadić, Case No. IT-94-1-A, Judgement ¶ 120 (July 15, 1999).
144 ICJ Genocide Judgment ¶ 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.”
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 more
appropriate test for determining whether a State bears responsibility for crimes
committed in another state.\footnote{ICJ Genocide Judgment, ¶ 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.”}

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 Court considers ICTY trials “rigorous” proceedings which include a
presumption of innocence and high standard of proof and are therefore suitable for
serious consideration by the Court.\footnote{ICJ Genocide Judgment, ¶ 220.} The Court enumerated other features of ICTY’s
trial procedures which authority to its findings:\footnote{ICJ Genocide Judgment, ¶ 220.}

\begin{enumerate}
\item 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 the right to remain silent.

\item Accused are provided with pre-trial disclosure and benefit from the
  obligation of the prosecutor to disclose exculpatory material.\footnote{Under Rule
  68(i) of the ICTY RPE provides “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.” This provision has been interpreted to include not
  only material directly impacting on the guilt or innocence of the accused but material
  which may be helpful in the defense. See Prosecutor v. Delalić \textit{et al}, Case No. IT-96-21,
  Decision On The Request Of The Accused Hažim Delič 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 . . . .”}
\end{enumerate}
c. The Tribunal has the authority to require Member States of the United Nations to cooperate and produce evidence.

d. The Trial Chambers may admit any relevant evidence and is required to give a reasoned written opinion to which dissenting opinions may be appended.

e. Each party has a right to appeal the judgment of the Trial Chamber.

The Court concludes, “that it should in principle accept as highly persuasive relevant findings of fact made by the Tribunal at trial, unless of course they have been upset on appeal. For the same reasons, any examination by the Tribunal based on the facts as so found for instance about the existence of the required intent [dolus specialis of genocide], is also entitled to due weight.”149 The court states its intention to not only accept findings of fact made by the ICTY judges but to also give due weight to their conclusions of law, in particular with respect to the critical issue of genocidal intent.150 Because there is no formal legal relationship between the two courts and the ICJ is not bound by the precedents of the ICTY the court rather than formally taking judicial notice of the ICTY’s judgments considered them as “evidence,” evidence upon which it places the greatest weight.

**ICTY Judgments**

The ICJ in deference to the ICTY adopted several determinations by the Trial and Appeal chambers of the ‘ultimate issues’ from several cases. These ultimate findings involved both factual findings and legal conclusions that resolve a primary issue in the trial.151 The Court’s almost wholesale adoption of the factual and legal findings of ICTY

149 ICJ Genocide Judgment, ¶ 223.

150 ICJ Genocide Judgment, ¶ 223. See also ¶ 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 ICTY’s trial and appellate judgments dealing with the events underlying the dispute.”

151 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
with respect to the events of Srebrenica is the clearest example. The court incorporates long passages of the Krstić Trial Judgment to set out its factual findings regarding Srebrenica. The ICJ noted that while Serbia did contest the number of people killed in Srebrenica it did not “essentially question” the factual findings of the Krstić Trial Chamber.

To the extent that the factual issues contested by the parties paralleled those raised in the Krstić or Blagojević trials the court deferred to the findings of the ICTY judges. The ICJ adopted the findings of both the Krstić and Blagojević judgments finding that the killings and serious bodily harm caused to the victims of Srebrenica established the actus reus of genocide. “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.”

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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. ICJ Genocide Judgment, (Separate opinion of Judge Tomka, ¶ 73).

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 condition and then executed. More that 7,000 people were never seen again.” ICJ Genocide Judgment ¶ 278 quoting Prosecutor v. Krstić, Case No. IT-98-33-T, Judgment, ¶ 1 (footnotes omitted).

ICJ Genocide Judgment, ¶ 278.


ICJ Genocide Judgment ¶ 290.
One of the key issues faced by the ICJ was whether the massacres arising out of Srebrenica were accompanied by the requisite \textit{dolus specialis} of genocide and, if so, when it came into existence. This issue became particularly important with respect to whether Serbia would have had sufficient notice of the impending genocide to withdraw their significant assistance to Bosnian Serb troops in Srebrenica.\footnote{ICJ Genocide Judgment, ¶ 291.} To establish genocidal intent with respect to Srebrenica Bosnia submitted a document referred to as “Directive 7” that was issued by the Bosnian Serb president Radovan Karadžić on March 8, 1995 and stated that the purpose of combat operations in the Srebrenica area were to create, “an unbearable situation of total insecurity with no hope of further survival or life for the inhabitants of both enclaves.”\footnote{ICJ Genocide Judgment ¶ 280 Prosecutor v. Blagojević, Case No. IT-02-60-T, Judgement, ¶¶ 88-89 (Jan. 17, 2005). This directive was later followed by “Directive 7.1” issued by General Mladić on March 31, 1995 sought to implement Directive 7 by conducting combat operations around the enclave. \textit{See} Prosecutor v. Krstić, Case No. IT-98-33-A, Judgment, ¶¶ 88-89 (April 19, 2004).} 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 rejected this assertion deferring to the Krstić Appeals Chamber’s finding that the directives were “insufficiently clear” to establish specific intent. The court rejected the Prosecution’s argument that the Krstić’s awareness of these directives and his implementation of them evidenced the \textit{dolus specialis} of genocide. The Court in finding that the text of the document was also consistent with the expulsion of Srebrenica’s Muslim inhabitants adopts the “ruling of the Appeals Chamber in \textit{Krstić} case that the directives were “insufficiently clear” to establish specific intent (\textit{dolus specialis}) on the part of the members of the Main Staff who issued them.”\footnote{ICJ Genocide Judgment ¶ 281. \textit{See also} ¶ 293. “The Court has already quoted … the passage from the Judgment of the Appeals Chamber in the \textit{Krstić} case rejecting the Prosecutor’s attempted reliance on the Directive given earlier in July…”} In the view of the Appeals Chamber, at most, the document altered Krstić to the “military 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.” 159 The ICJ concludes from this 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 “final goal” of the VRS which included the phrase, “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 rehearsed 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.” 160 The court went on to follow the lead of the Blagojević court and place little weight on these reports. 161 The court reviewed the judgments of the Trial Chambers in both the Krstić and Blagojević cases and adopted their factual findings and legal conclusions regarding when dolus specialis was established. 162

In instances in which 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. The Court in applying the Genocide Convention necessarily had to consider its interpretation of the phrase “part of the group.” The Court looked to ICTY judges for guidance regarding the interpretation of this phrase and the

160 ICJ Genocide Judgment, ¶ 279.
161 Id. at ¶ 279.
162 ICJ Genocide Judgment, ¶ 295 “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 (¶ 423 below). The Court has no
tests they developed for divining it. The Court adopted three criteria for determining whether a targeted group constitutes a “part of the group” for purposes of the Genocide Convention – each criteria taken directly from an ICTY case.

The first criterion is one of “substantiality,” “the intent must be to destroy at least a substantial part of the particular group.” The Court finds that both the ICTY and the ICTR consistently imposed the requirement that the portion of the entire group be significant enough to have an impact on the group as a whole. The court does add its view that this criteria is the most important. The second criterion examines the geographic location of the part of the group that was targeted. The Court held that “genocide may be found to have been committed where the intent is to destroy the group within a geographically limited area,” adopting the test used by the Krstić Appeals Chamber and the Stakić Trial Chamber. The Court takes the final criterion from the Krstić Appeals Judgment. This criterion is a qualitative one looking to whether the portion of the entire group is emblematic or essential to the survival of the overall group.

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.”


165 ICJ Genocide Judgment ¶ 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 12, 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.”

166 ICJ Genocide Judgment ¶ 199.

167 Id. at ¶ 200. The Krstić Appeals Chamber defined this qualitative criterion as such, “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,
Another example in which the court applied a legal test developed in the ICTY is the Court’s adoption of the legal rule that the protected group must be defined positively (i.e. Muslims of Eastern Bosnia). Bosnia, recognizing that Bosnia Croats were in many cases subjected to the same treatment as Bosnian Muslim had proposed that the group could be defined negatively by its ethnic characteristic (i.e., non-Serb). The court adopted the conclusion of the Stakić Appeals Judgment that targeted group must be defined positively. In some instances, the Court adopted discrete factual findings of ICTY when the ultimate questions presented by those trials were not directly relevant to ICJ’s inquiry. With respect to killings in and around the Prijedor region alleged to be violations of II(a) of the Genocide Convention the Court adopted the findings of the Brdanin 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.” The Court also adopted the factual findings of the Brdanin case with respect to the killing of Bosnian Muslims and Croats in six Bosnian municipalities.

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 Court looked to

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 (April 19, 2004) (footnote omitted).

168 There is some support of this position in the Commission of Experts report chaired by Cherif Bassiouni which states, “[#% get cite from Metraux #%]  
171 ICJ ¶ 274 quoting Prosecutor v. Brdanin, Case No. IT-99-36-T, Judgment, ¶ 465 (September 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.”
the Galić case and adopted some of the Trial Chamber’s factual findings. In assessing Bosnia's claim under Article II(c) with respect to Sarajevo the court relied on the Trial and Appeals Judgements of the Galić case. The court not only adopted the explicit factual findings of Galić but also adopted the inferences that the Galić Chamber drew from these facts.

Bosnia alleged that the Serb prisoner camps it maintained in Bosnia violated Article II(a), of the Genocide Convention. Despite the fact that the relevant ICTY cases either did not include genocide charges or the accused was acquitted of genocide the court adopted many of the factual findings of the Trial and Appeals chambers. The Court adopted factual findings with respect to camps in Omarska, Trnopolje, Manjača,

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172 The Court adopts the Galić Trial Chambers determination that civilians living in Sarajevo were the subject of attacks by Serb forces. ICJ Genocide Judgment, ¶ 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” Prosecutor v. Galić, Case No. IT-98-29-T, Judgment, ¶ 591 (Dec. 5, 2003), 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 – crime of terror, attacks in civilians, murder and inhumane acts – were committed by SRK forces during the Indictment Period,” Id. at ¶ 600.

173 “The Court notes that in the Galić case, the Trial Chamber of the ICTY found that the Serb forces (the SRK) conducted a campaign of sniping and shelling against the civilian population of Sarajevo” ICJ Genocide Judgment, ¶ 325, referring to Prosecutor v. Galić, Case No. IT-98-29-T, Judgment, ¶ 583 (Dec. 5, 2003).

174 The court 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.” ICJ Genocide Judgment, ¶ 328, quoting Prosecutor v. Galić, Case No. IT-98-29-T, Judgment, ¶ 583 (Dec. 5, 2003).

175 The Court adopted the findings of the Tadić, Brđanin, and Stakić chambers with respect to the conditions at the Omarska camp for the purposes of assessing Bosnia’s claims under Article II(a) of the Genocide Convention. ICJ Genocide Judgment, ¶ 263.
Keraterm, 177 K-P Dom, 178 Luka 179 and Bošanski Samac. 180 With respect to allegations regarding serious bodily and mental harm including rape and other sexual crimes as a violation of II(b) the court adopted the findings of the Kunarac Trial Chamber that “many women were raped repeatedly by Bosnian Serb soldiers or policemen in the city of

and the Kvočka Trial Chamber in assessing the claims under Article II(c) of the Genocide Convention. ICJ Genocide Judgment, ¶ 348.

176 The Court adopted the findings of the Stakić and Brđanin cases regarding the conditions at the Trnopolje camp in assessing Bosnia’s Article II(a) claims. ICJ Genocide Judgment ¶ 268. It adopted the findings of Stakić Trial Chamber with respect to the Article II(c) violations. (ICJ Genocide Judgment ¶ 350.

177 The Court adopted the findings of the Sikirica Trial Chamber with respect to conditions at Keraterm camp alleged to be in violation of Article II (a) of the Genocide Convention, (ICJ Genocide Judgment ¶ 266 and the Stakić Trial Chamber’s findings for alleged violations of Article II(c) in Keraterm.

178 With respect to prisoner camps in Foča the court adopted the conclusions of the Krnojelac 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. ICJ Genocide Judgment, ¶ 254 quoting Prosecutor v. Krnojelac, Case No. IT-97-25-T, Judgment, ¶ 330 (March 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 (ICJ ¶ 310). With respect to violations of Article II(c) the court once again relied on the Krnojelac Trial Judgment, ICJ Genocide Judgment ¶ 347.

179 With respect to the Luka camp the court adopted the conclusion not only with respect to the fact that a number of people were killed but also that the killings constituted a material element of genocide. ICJ Genocide Judgment, ¶ 272, quoting Prosecutor v. Jelisić, 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 Jelisić for the period in the indictment, it notes that, in this instance, the material element of the crimes of genocide has been satisfied.” The Court with respect to the Luka camp interestingly refers to a section of the Milošević Decision on Motion for Judgment of Acquittal in support of its findings regarding the conditions at the Luka camp. “The conditions and treatment to which the detainees at Luka Camp were subjected were terrible and included regular beatings, rapes and killings. ICJ Genocide Judgment, ¶ 273 referring to Prosecutor v. Milošević, Case No. IT-02-54-T, Decision on Motion for Judgment of Acquittal, ¶ 159 (June 16, 2004).

180 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.
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 Court adopted the Brđanin Trial Chambers findings that “there was wilful damage done to both Muslim and Roman Catholic religious buildings and institutions in the relevant municipalities by Bosnian Serb forces,” and referred to an exhibit prepared by András Riedlmayer for the Milošević case describing his assessment of 392 cultural and religious sites. With respect to how such evidence of cultural destruction could be appropriately used the Court “endorse[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.”

Sentencing judgment following a guilty plea

The court also 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 Court describes how ICTY procedures require the Trial Chamber to determine whether a sufficient factual basis exists to support a conviction for a crime as well as that admissions made by the accused and the plea itself were made voluntary, unequivocal and fully informed. The court found these pleas were sufficiently reliable when accompanied by a statement of agreed facts and sentencing judgment “may when relevant be given a certain weight.” In some cases, the Court looked to the sentencing judgements and adopted discrete facts admitted by the accused during the plea process.

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183 ICJ Genocide Judgment ¶ 339.
184 Id. at ¶ 344.
185 Id. at ¶ 224.
With respect to the Sušica camp outside Vlasenica the Court adopted the 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”. 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 court adopted some of the factual findings contained in Plavšić sentencing judgment.

**ICTY Indictments**

Bosnia also sought to rely on ICTY related material other than judgements of the Trial and Appellate chambers. These included indictments issued by the Office of the Prosecutor, various decisions by the Trial and Appeals Chambers and individual exhibits and testimony. The Court considered the weight it would give these different categories of materials ultimately deciding to place weight on some and summarily rejecting others.

The Bosnian government relied in part on indictments issued by the ICTY Prosecutor. Rule 47 of the ICTY RPE 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 facie evidence.” While there are arguments to be made that allegations drafted by an independent prosecutor and submitted for review by an independent judge who determines that prima facie evidence exists should be accorded some weight, the Court is clear that it considers the lack of the accused’s participation is a fundamental obstacle to giving indictments any consideration. The Court rejected Bosnia’s reliance on indictments and accorded the allegations contained in them no weight characterizing them as “allegations made by one

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186 ICJ Genocide Judgment ¶ 252 quoting, Nikolić, IT-94-2-S, ¶ 67. 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 GC. See ICJ ¶ 346.
188 Id. at ¶ 218.
party.”\textsuperscript{189} The court noted that after an indictment is confirmed the prosecution may decide to withdraw genocide charges or the charge may be dismissed at trial, therefore, “as a general proposition the inclusion of charges in an indictment cannot be given weight.”\textsuperscript{190} While the court declined to give any evidential weight to the charges included in an indictment it did consider significant the Prosecutor’s decision not to include the charge of genocide in several indictments, such as the \textit{Stanišić} and \textit{Perišić} indictments.\textsuperscript{191} Drawing inferences from the Prosecutor’s exercise of discretion is a serious methodological flaw absent some clear authoritative statement by the Prosecutor why she exercised her discretion in a particular way. Article 16 of the Tribunal’s Statute establishes the Office of the Prosecutor as an independent arm of the ICTY with broad discretionary power to make determinations regarding who to charge and what crimes they should be charged with. Unlike many continental systems the prosecutor is not required to submit all charges supported by \textit{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 efficient use of limited resources. This is particularly true in the case of genocide in which the evidentiary burden is so great upon the prosecutor is not unreasonable for her to limit charges in an indictment to strike the balance between appropriately reflecting the gravity of the

\textsuperscript{189} \textit{Id.} at ¶ 217. Article 19(1) of the Tribunal’s Statute provides: “The judge of the Trial Chamber to whom the indictment has been transmitted shall review it. If satisfied that a \textit{prima facie} case has been established by the Prosecutor, he shall confirm the indictment. If not so satisfied, the indictment shall be dismissed. Rule 47(B) of the Tribunal’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.” 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.”

\textsuperscript{190} ICJ Genocide Judgment, ¶ 217.

\textsuperscript{191} \textit{Id.} at ¶ 217, “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.”
accused’s conduct and meeting timelines set by the Security Council or criticism that the cases take too long.192

The Court cites several examples in which it draws an inference from the Prosecutor’s decision to not include Genocide as one of the charges in the indictment. 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 is responsible for the crimes in Srebrenica based upon his position of authority over the troops that directly engaged in the crimes. The indictment against Perišić alleges that he failed to punish Mladić and other soldiers under his effective control after learning about their genocidal acts in Srebrenica. Under the jurisprudence of the Tribunal, Perišić’s command responsibility arises not out of his direct or indirect participation in the crime but arises out of his failure to prevent or punish those persons over which he exercises effective control who themselves have engaged in criminal activity. According to the jurisprudence of the tribunal the 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 prosecution’s theory of Perišić’s criminal liability for Srebrenica arises out of his

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) (partially dissenting opinion of Judge Shahabudeen). “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 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, 12 at 297 (footnotes 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. R. 75 (2005).
command responsibility and not that he himself possessed genocidal intent and directly participated in the crimes at Srebrenica. There has yet to be a case in which an accused has been found guilty of genocide based solely on command responsibility. A case seeking to assert such a theory would be controversial and require extensive litigation. While the prosecution’s charging decisions may say a great deal about its theory of liability with respect to Perišić as an individual, drawing inferences from the failure to charge him with genocide, absent a clear statement of reasons by the prosecution, is speculative and unreliable.

The ICJ, by attributing weight to this exercise of prosecutorial discretion makes a somewhat risky assumption that the underlying rationale is based on evidentiary considerations related to the strength of the case and are therefore relevant to its inquiry. While it is possible that the set of issues are related, 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 Court by assuming the issues involved in prosecuting a genocide charge against Perišić are equivalent to the issues presented by Bosnia’s case before the ICJ runs the risk of incorrectly ascribing meaning to the Prosecutor’s exercise of her discretion.194 Should a final judgment in the Perišić case determine that some of direct perpetrators of Srebrenica were subordinates of his (and thus meet the ICJ’s test of attributability), then this coupled with findings in the Krstić and Blagojević cases that the direct perpetrators harbored genocidal intent would cast doubt on the accuracy of the

194 See dissent of Judge Al-Khasawneh, “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, (Dissent of Judge Al-Khasawneh, ¶ 42).
ICJ’s Judgment.\textsuperscript{195} It is noteworthy, that on at least one occasion a Trial Chamber suggested that the Prosecutor amend the original indictment to include a charge of genocide. In the Nikolić case, the Prosecutor’s first confirmed indictment, the Trial Chamber asked the Prosecutor to consider including the charge of genocide after reviewing evidence during a Rule 61 hearing.\textsuperscript{196}

The ICJ also considered what weight it would place on a more detailed process of reviewing an indictment provided for in Rule 61 of the ICTY Rules of Procedure and Evidence. In its early years, before the list of pre-trial detainees grew the tribunal employed an additional procedure for the review of some indictments. This procedure, conducted pursuant to Rule 61 of the RPE requires the prosecution to produce evidence in court in support of the indictment and for the entire Trial Chamber to deliberate and 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. The ICJ recognized that there is significant judicial involvement in this process and that live witnesses were called by the prosecution but declined to give them consideration because of the absence of the accused and in light of the lesser standard of proof employed in such proceedings – that being “that reasonable grounds exist for belief that the accused has committed crimes charged.”\textsuperscript{197}

Despite this, the court relies on the findings of two Rule 61 hearings conducted at the ICTY. The court relied on the Nikolić “Rule 61 Review of the Indictment” to

\textsuperscript{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 Guardian, Sept. 23, 2007, \texttt{http://www.guardian.co.uk/yugo/article/0,,2175184,00.html} (visited Sept. 24, 2007).


\textsuperscript{197} ICJ Genocide Judgment, ¶ 218.
establish sexual and other mistreatment of women at the Sušica camp and its environs.\textsuperscript{198} The court also adopted the findings of the Karadžič and Mladić Rule 61 hearing with respect to the expulsion of civilians from large regions in Bosnia,\textsuperscript{199} and with respect to the destruction of cultural and religious heritage in the Banja Luka area.\textsuperscript{200}

\textit{Trial Chamber’s Decision on an Accused’s Motion for Acquittal at the end of the Prosecution Case.}

The Court also 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\textit{ bis} of the ICTY RPE. A “98\textit{ 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 which the defendant may then choose to answer by presenting evidence or argument. The underlying rationale is that given the prosecution’s burden of proof and 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 case. The court must make some assessment of reasonable inferences and facts that can be deduced from the evidence and therefore requires the court to tread the somewhat elusive line between the respective roles of the judge and fact-finder (jury).\textsuperscript{201} In the “jury-less” trials

\textsuperscript{198} Id. at ¶ 308.
\textsuperscript{200} ICJ Genocide Judgment ¶ 336.
\textsuperscript{201} Galbraith, 73 Crim. 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 concludes that the prosecution evidence, taken at its highest, is such that a jury properly directed could not properly convict on it, it is his duty, on a submission being made, to stop the case. (b) Where however the prosecution evidence is such that its strength or weakness depends on the
of the ICTY the motion has served more as a tool of trial management allowing the Chamber to “prune” the historically large cases by identifying those portions of the indictment that are not sufficiently supported by evidence and which the accused need not respond to.

The applicable standard of proof for a 98 bis decision is that the court must grant the motion wherever a reasonable trier of fact could not base a conviction on the evidence presented, conversely it must be denied where there is sufficient evidence upon which a Trial Chamber could enter a conviction. Of critical importance to this standard is that the Trial Chamber could convict and not that it would convict. A Chamber’s decision at this stage does not bind it in its judgment and it is theoretically possible that if after denying the motion the accused decides not to present any evidence the Chamber could still find the accused not guilty. The ICJ points this fact out by referring to the Krajìšnik case as an example in which the Trial Chamber acquitted the accused of genocide after having dismissed his mid-trial motion for acquittal. The ICJ considered this difference in standard of proof as incompatible with the standard of “fully conclusive” the Court deemed appropriate for its judgment. The Court states that it cannot give weight to any of the rulings arising out of these 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.” Despite this language, the ICJ interestingly enough cites findings made by the Milošević Trial Chamber in its 98 bis

view to be taken 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 on which the 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.”


203 ICJ Genocide Judgment, ¶ 209.

204 ICJ Genocide Judgment ¶ ??: 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.
decision in support of two conclusions it draws not directly related to the central question of dolus specialis.\textsuperscript{205}

The Court’s decision not to rely on 98bis decisions has particular significance to the case because the Milošević case, the case with the greatest parity with the ICJ case, was the subject of such a decision. On June 16, 2004 the Milošević Trial Chamber issued its Decision on Motion for Judgment of Acquittal. Of the all the ICTY cases the Court considered, the Milošević case, had it come to judgment, is perhaps the most relevant to the Court’s inquiry. Milošević held the position of president of Serbia between 1989 and 1997 and the president of the FRY from 1997 to 2000.\textsuperscript{206} Having been charged with the crime of genocide in Bosnia there is a great deal of parity between the Milošević indictment and the Bosnia’s application before the ICJ. The court recognized several times in the judgment the relevance of Slobodan 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 is perhaps the central question to the Court’s inquiry. Given the ICJ’s demonstrable reliance on ICTY jurisprudence it is certain that the Court would have placed similar reliance on a final judgment in the Milošević case if his death had not terminated the proceedings. Had Mr. Milošević been acquitted of genocide it would have been difficult for the Court to enter a finding that Serbia, as a state, was criminally liable. It is likely that a final determination of his individual responsibility would have been largely dispositive of the primary issues before the ICJ. Although the Court states that it will not place any weight on the Milošević 98 bis decision had the Milošević Trial Chamber dismissed the genocide charge it would have been reasonable for the Court to have relied on the findings of the Trial Chamber.

\textsuperscript{205} The Court relied on the Milošević 98 bis Decision for findings related to the Luka Camp. ICJ Genocide Judgment ¶ 273, referring to Prosecutor v. Milošević, Case No. IT-02-54-T, Decision on Motion for Judgment of Acquittal, ¶¶ 159 (June 16, 2004). The Court also relied in part on this decision for its findings regarding Manjača Camp. ICJ Genocide Case at ¶ 315 referring to Prosecutor v. Milošević, Case No. IT-02-54-T, Decision on Motion for Judgment of Acquittal, ¶¶ 178.

\textsuperscript{206} Prosecutor v. Milošević, Case No. IT-02-54-T, Indictment, ¶ 3, 4 (Nov. 22, 2001)(Bosnia).
His 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 Court faced. Unfortunately, his untimely death before the conclusion of the trial denied the international community a judgment in the case and the Court the benefit of a reasoned opinion by the Trial Chamber charged with evaluating the evidence. Given the parity between the central issues of the Milošević case and the ICJ Genocide case it merits a closer examination of what a the Milošević Trial Chamber’s 98 bis decision says about the evidence of genocide and the relationship of Serbia to the crimes committed in Bosnia. While Rule 98 bis has undergone several significant amendments to its procedural methodology its standard of proof as reflected in the jurisprudence of the Tribunal has evolved into a clear benchmark.\textsuperscript{207} The standard of proof applicable to the court’s determination was first set forth in the Delalić case, one of the earliest trials in ICTY. The Appeals Chamber in that case stated, “[t]he 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.”\textsuperscript{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.”\textsuperscript{209}

\textsuperscript{207} Rule 98bis 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.” 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 court 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.”\textsuperscript{208} Prosecutor v. Delalić, \textit{et al.} Case No. IT-96-21-A, Judgment, ¶ 434 (Feb. 20, 2001). \textsuperscript{209} Prosecutor v. Kunarac, \textit{et al.} Case No. IT-96-23-T & IT-96-23/1-T, Decision on Motion for Acquittal, ¶ 10 (July 3, 2000).
Milošević, consistent with his position since his arraignment that the Tribunal itself was not legitimately constituted, declined to make this motion himself and the Amici Curiae were directed by the Chamber to make it on his behalf. The Chamber summarized the Amici’s motion with respect to the genocide charge as, “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 the third category of a joint criminal enterprise and command responsibility, as alleged in the Bosnia Indictment.”\textsuperscript{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.\textsuperscript{211} The Chamber, in light of the indictment and the procedural history of the Bosnia indictment against Slobodan Milošević confined its deliberations on the 98\textit{bis} to nine Bosnian municipalities.\textsuperscript{212}

\textsuperscript{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 \textit{bis} ¶¶ 161 and 162. 

\textsuperscript{211} The Amici Curiae asserted the following: 

“161. The following submissions are made in relation to the mens rea of the crime of genocide and the forms of liability with which the Accused is charged. 

... 

It is submitted that: (a) there is no evidence that the Accused possessed the requisite “special intent” required to commit the crime of genocide. (b) there has been no evidence of acts and/or conduct of the Accused which could be interpreted as declarations of a intention to commit genocide. (c) the crimes in Schedules A, B and C of the Bosnia Indictment, if proved, do not provide evidence of specific intent for the crime of genocide by their scale or context, which was primarily territorial in nature. (d) In respect of Article (7)(1) liability, 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. Prosecutor v. Milošević, Case No. IT-02-54-T, Decision on Motion for Judgment of Acquittal, ¶¶ 161-162 (June 16, 2004).

\textsuperscript{212} These municipalities were: Brčko, Prijedor, Srebrenica, Bijeljina, Kotor Varos, Ključ, Sanški Most and Bošanski Novi. See Prosecutor v. Milošević, Case No. IT-02-54-T, Decision on Motion for Judgment of Acquittal, ¶ 138 (June 16, 2004).
The Trial Chamber divided its analysis into answering five distinct questions:  

i. Was there evidence supporting a finding that a Trial Chamber could be satisfied beyond reasonable doubt that Milošević was a member of joint criminal enterprise that had the aim and intention of destroying in whole or in part Bosnian Muslims as a group?  

ii. 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 reasonably foreseeable consequence of that joint criminal enterprise?  

iii. Could a Trial chamber be satisfied to the appropriate standard that Milošević aided or abetted the crime of genocide?  

iv. Could a Trial Chamber be satisfied that Milošević was complicit in the commission of the crime of genocide?  

v. 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.  

The Trial Chamber in denying the motion found that:  

“[o]n the basis of the inferences 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  

\[^{213}\text{Id. at ¶ 141.}\]
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 centers and elsewhere, and the targeting of persons essential to the survival of the Muslims as a group are all factors that point to genocide.”

The Trial Chamber, after evaluating the evidence related to Kotor Varos determined that there was insufficient evidence of genocide there.

The first part of the Chamber’s analysis of the prosecution case focused on evidence indicating that Milošević was “The Leader of All Serbs” both for Serbs in Serbia proper as well as in Bosnia and Croatia. The Trial Chamber drew the conclusion that “[t]he Accused was the dominant political figure in Serbia and he had profound influence over the Bosnian Serb political and military authorities.” In support of this conclusion the court referred to the testimony of Milan Babić the president of the Serbian Krajina who was alleged to be a member of the joint criminal enterprise with Milošević. The court also referred to the evidence of one of Milošević’s closest political allies in the Communist Party of Yugoslavia, Borislav Jović 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.” The court also referred to the testimony of the American Ambassador to Croatia Peter Galbraith who

\[214\] Id. at ¶ 246.
\[215\] Id. at ¶ 246. The Chamber went on to note that although 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 to the other four municipalities that genocide was established. Id. at ¶ 248.
\[216\] Id. at ¶ 248.
\[217\] Id. at ¶ 257, quoting Dr. Michael Williams at transcript T23073.
\[218\] 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 other ICTY cases.
\[219\] Id. at ¶ 256.
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 court considered evidence of Milošević’s own public statements and actions. It recalled Milošević’s statement on January 15, 1991 that any dissolution of Yugoslavia that resulted in Serbs living outside a unified state was unacceptable.\(^{221}\) On March 16, 1991, months before the outbreak of the conflict former Yugoslavia, Milošević publicly urged Serbs in the former Yugoslavia to be united and claimed he 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 and Croatia.\(^{222}\) In March 1991, at a secret meeting in Karadjordjevo, Milošević and Tudman, the president of Croatia, agreed to divide Bosnia along ethnic lines and annex larges portions of it to Croatia and Serbia allowing the possibility that Muslims could live in an enclave between them.\(^{223}\) The Chamber recalled evidence that in July 1991, Babić, Karadžič and Milošević had a conversation in which Karadžič claimed he would chase Muslims into the river valleys in order to connect Serbs living in Bosnia.\(^{224}\) The Trial Chamber relied on the evidence of Hrvoje Sarinic (senior politician and aide of Tudman) 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

\(^{220}\) Id. at ¶ 249, quoting testimony of Ambassador Galbraith.

\(^{221}\) Id. at ¶ 251.

\(^{222}\) Id. at ¶ 250. In paragraph 389 of the ICJ Genocide Judgment the Court considers whether the Scorpions who were captured on video executing six men and boys from Srebrenica were a \textit{de jure} organ of the State. The court notes 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.”

\(^{223}\) Id. at ¶ 252.

\(^{224}\) Id. at ¶ 253.
resolved ninety percent of Serbia’s national question.” Lastly, the Trial Chamber referred to how Milošević manipulated the Serbian media to further nationalist interests with propaganda, severely limiting independent media outlets. The Trial Chamber recalled the evidence of David Harland, the UN Civil and Political Affairs Officer in Sarajevo, that between 1993 and 1999 Serbia provided an uninterrupted base-level of support to Bosnian Serbs, including the Bosnian Serb Army. Charles Kirudja was a delegate of the Special Representative of the UN Secretary-General in Belgrade and in this capacity had approximately six meetings with Milošević. Kirudja was struck by Milošević’s command of the detail and knowledge of the matters discussed at these meetings. “There was no need to meet with the FRY President at the time Zoran Lilić – it was necessary only to meet with Milošević.” The witness referred to a report he wrote on May 16, 1995 recording his contemporaneous impression that Milošević played a “solo role in the negotiations” sponsored by the UN in an attempt to end the conflict. Harland testified that when faced with an emergency situation and direct negotiations with Bosnian Serbs leaders were at an impasse they would go to Belgrade to negotiate directly with Milošević who could bring about results in Bosnia. At a meeting called on April 22, 1994 to deal with an impending crisis in Goražde, Milošević, in the presence of UN officials, directed Karadžić to remove obstacles that had been placed in front of an UN humanitarian aid convoy in Rogatica – Karadžić complied and the obstacles were removed.

The Chamber referred to General Wesley Clark’s testimony that during a meeting that he and Ambassador Richard Holbrooke had with Milošević, Holbrook asked Milošević whether he should deal with him or directly with the Bosnian Serb leaders.

225 Id. at ¶ 254, quoting statement of Mr. Sarinic, exhibit 641, tab 2, ¶ 25; T. 31267-31268.
226 Id. at ¶ 255.
227 Id. at ¶ 258.
228 Id. at ¶ 278.
229 Id. at ¶ 278.
230 Id. at ¶ 274.
Milošević replied – “with [me] of course.”

During other negotiations Milošević mapped out his preferred way of implementing an agreement he unilaterally made with the delegation – it was 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.

Clark also relayed events from the Dayton Peace Talks describing a time when Milošević and he reviewed computerized topographical maps of Bosnia while negotiating territorial boundaries in Bosnia. Clark spoke of Milošević’s intimate knowledge of all of the contested areas in Bosnia and was able to unilaterally and without consultation with the Bosnian Serb representatives make binding commitments regarding Bosnian territory. 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 – he went on to promise that he would obtain the signatures of the other delegates later.

The Trial Chamber in finding that there was sufficient evidence upon which a Trial Chamber could convict Milošević of genocide also reviewed evidence illuminating the close relationship between the Yugoslav and the Bosnian Serb armies. The Trial Chamber referred to evidence that “[t]he Bosnian Serb military emphasized that the chain of command really ran to Belgrade.” The Trial Chamber recalled the evidence of General Phillipe Morrillon, commander of UN Peacekeepers in Bosnia that he “was absolutely convinced that Belgrade continued to exercise its authority on Ratko Mladić.” The Chamber referred to a cease-fire agreement brokered by Secretary Cyrus Vance and Lord Carrington. The agreement entitled “Cessation of Hostilities

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231 Id. at ¶ 276.
232 Id. at ¶ 279, quoting Wesley Clark.
233 Id. at ¶ 279.
234 Id. at ¶ 282.
235 Id. at ¶ 283.
236 Id. at ¶ 258, quoting: David Harland, UN Civil Affairs and Political Affairs Officer in Sarajevo from 1993 until 1999.
Agreement” called 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 how 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 a period of time afterward.  

The Milošević Trial Chamber also relied on evidence of the logistical and material support that Serbia provided the Bosnian Serbs. In a report dated September 1992, signed by Ratko Mladić, Mladić recounted how Yugoslav Army, when it officially withdrew from Bosnia in the spring of 1992, it left Bosnia Serbs with an essentially complete army fully staffed and fully equipped. The court referred to the recorded minutes of the 50th Assembly session of the Republika Srpska held in April 1995 just three months before the massacre in Srebrenica. In that session, General Mladić reported that over the course of the conflict 91.4% of the 9,185 tons of infantry ammunition consumed by the Bosnian Serb army was provided by the Yugoslav army. Mladić went on to report that over 34% of the 18,151 tons of artillery ammunition was supplied by the Yugoslav army and 52.4% of the 1,336 tons of anti-aircraft ammunition was provided by the Yugoslav army. When Milošević commented on the level of support provided the Bosnian Serbs after his arrest in 2001, he stated,

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

\footnote{Id. at ¶ 268.}
\footnote{Id. at ¶ 275.}
\footnote{Id. at ¶ 259.}
equipment…for the security forces and special anti-terrorists 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.\textsuperscript{241}

With respect to cooperation between the Yugoslav and Bosnian Serb armies the court referred to the testimony of Michael Williams, the UNPROFOR Director of Information for Yasushi Akashi the UN Special Representative between 1994 and 1995 and their conclusion that Serbs had access to newly improved radar and air defence equipment in Sarajevo and North-Western Bosnia.\textsuperscript{242} The Chamber recalled how General Clark relayed to General Momčilo Perišić, Chief of Staff of the Yugoslav Army, his conclusion that Perišić was allowing the Bosnian Serb Army to receive radar and air defence information directly from Yugoslavia’s air defence systems and cautioned him to disconnect the two air defence systems.\textsuperscript{243}

The Trial Chamber relied on evidence that all of the officers of the Bosnian Serb army were paid their salary by the Yugoslav Army up until February 28, 2002, through an administrative unit of the Yugoslav Army established for this purpose – this unit was called the “30\textsuperscript{th} Personnel Centre.”\textsuperscript{244} The Chamber recounted the trial testimony of a radar control officer in the Bosnia Serb Army during the war that he did not receive any compensation or benefits from the Bosnian Serb Army but from the 30\textsuperscript{th} Personnel Centre of the Yugoslav Army directly.\textsuperscript{245} This soldier using the pseudonym B-174 described how despite his regular presence in Bosnia the only identification 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 when he was first issued a separate identification card for

\begin{footnotesize}
\begin{enumerate}
\item Id. at ¶ 261.
\item Id. at ¶ 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).
\item Id. at ¶ 258.
\item Id. at ¶ 258.
\item Id. at ¶ 260.
\item Id. at ¶ 260.
\end{enumerate}
\end{footnotesize}
the Bosnian Serb Army and instructed to show this new identification to any international forces that may request identification.\footnote{Id. at ¶ 269.} Another soldier who appeared under the pseudonym “B-1804” testified that although he served in Bosnia in a Bosnian Serb Army unit he considered himself a member of the Yugoslav Army. He and other members of the unit were all paid by the Yugoslav Army, they received medical care from the Yugoslav Army, and decisions regarding their promotion were made by the Yugoslav Army upon the recommendation of their superiors in the Bosnian Serb Army (who themselves were members of the Yugoslav Army attached to the 30\textsuperscript{th} Personnel Centre of the Yugoslav Army).\footnote{Id. at ¶ 264.}

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 providing details about a re-supply operation.\footnote{Id. at ¶ 270. (This plan was called the Izvor plan.)} The Trial 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 VJ’s direct involvement in the Bosnia conflict in eastern Bosnia in 1993 and 1995, in Sarajevo between 1993 and 1994 and in Western Bosnian in 1994.\footnote{Id. at ¶ 270. (This plan was called the Izvor plan.)}

One soldier from the Yugoslav Army candidly testified about his direct participation in serious crimes committed in Bosnia. In his evidence, B-174, 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 identifying 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 63\textsuperscript{rd} Parachute Brigade and together they
launched an attack on the Bosnia Muslim 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 horse-shoe formation created by the Yugoslav troops
just outside the village. As 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 and
executed the children by slicing their throats with a knife.\textsuperscript{250}

In assessing Milošević’s knowledge of the crimes in Bosnia, the Chamber referred
to evidence that the Accused demanded that he be kept informed of all that was going
on.\textsuperscript{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. A code
cable to Milošević on July 11, 1995 stated that the BSA [Bosnian Serb Army] is likely to
separate the military-age men from the rest of the population,”\textsuperscript{252} This cable arrived
prior to the time the Krstić Appeals Chamber determined that the \textit{dolus specialis}
of genocide was clearly established. The Milošević Trial Chamber recalled the pointed
question General Wesley Clark put to Milošević regarding why if he had such influence
over Bosnian Serbs he allowed Ratko 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.”\textsuperscript{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.\textsuperscript{254} After reviewing the evidence produced at trial the Trial Chamber
concluded “that there is sufficient evidence that genocide was committed in Brcko,
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

\textsuperscript{249} Id. at ¶¶ 270-272.
\textsuperscript{250} Id. at ¶ 263.
\textsuperscript{251} Id. at ¶ 285.
\textsuperscript{252} Id. at ¶ 284.
\textsuperscript{253} Id. at ¶ 280.
\textsuperscript{254} Id. at ¶ 280.
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 point to the fact that there was sufficient evidence for a reasonable Trial Chamber to potentially convict Milošević of genocide. Given the similarity between the issues in the Milošević case and Bosnia’s claim of genocide before the ICJ this body of evidence had a like potential for the ICJ case.

For the reasons articulated early the Court could place any reliance on the findings of the Milošević Trial Chamber in the 98 bis decision. The different standards of proof prevented the possibility of placing any weight on the findings of the Milošević Trial Chamber.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 it to examine the evidence referred to in the 98 bis decision to adjudicate the case before it.

In light of an ICTY trial chamber, after 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 commensurate with its articulated standard, the ICJ should have conducted its own examination of this evidence. The Milošević Trial Chamber’s finding that the evidence could establish not only that Milošević alone could be convicted of the crime of genocide but was a member of a joint criminal enterprise comprised of other senior members of the FRY government257 similarly engaged in genocidal crimes against the

255 Id. at ¶ 289.
256 Interestingly the Court does adopt the Milošević Trial Chamber’s findings regarding conditions at the Manjača camp. ICJ Genocide Case, ¶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 names the following people as members of the joint criminal enterprise: Radovan Karadžić, Momcilo Krajišnik, Biljana Plavšić, Ratko Mladić, Borisav Jović, Branko Koštić, Veljko Kadijević, Blagoje Adžić, Milan Martić,
Bosnian Muslim population makes such a review of the evidence all the more compulsory.

The Milošević Trial Chamber’s 98 bis ruling and the ICJ’s failure to evaluate this body of evidence brings into focus the different strengths and weaknesses of their respective efforts to enforce the prohibitions of the Genocide Convention. The existence of 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 the crime of genocide is an important body of evidence. 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 properly adjudicate issues of individual criminal responsibility. The world is left without a final adjudication, without a final judicial assessment of evidence which could support a finding that not only Milošević was guilty of genocide but that Serbia bore criminal responsibility as well. The fact that the ICJ did not, and perhaps could not have properly assessed this body of evidence highlights its limited capacity to adjudicate claims under the Genocide Convention.

IV. INTEGRATING THE MANDATE AND METHODOLOGIES OF INTERNATIONAL COURTS

The Bosnia Genocide case was the first time the ICJ was called upon to adjudicate a claim under the Genocide Convention. Although the court had the benefit of the ICTY’s parallel work adjudicating the responsibility of senior individuals that work, with the death of Slobodan Milošević, was incomplete and left a gap that the ICJ could only fill by engaging in its own determination of 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 bears considering the ICJ’s legal and practical capacity

for adjudicating such independently – absent the existence of an international court adjudicating the responsibility of individuals.

The ICJ’s legal authority to make findings of fact and law with respect to whether senior political leaders have committed genocide can only arise from its own Statute and the referral clause of the Genocide Convention. The Court’s interpretation of the Genocide Convention to conclude that a state, as a state, can perpetrate the crime of genocide is distinct from the question of whether the ICJ can properly make determinations of the individual culpability of senior state officials in adjudicating state responsibility. Article 9 of the Genocide Convention, which gives the ICJ competence over disputes arising out of the Convention does not explicitly refer to the adjudication of criminal responsibility – either individual or state.\(^{258}\) While the 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 does not make any 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 Convention defers to the state parties decisions regarding how best to incorporate the prohibitions embodied in the Genocide Convention into their national criminal justice systems in a way that is consistent with their own constitution.\(^{260}\) It makes no express provision for how a determination of individual responsibility for genocide is to be made. The ICJ delineated the boundaries

\(^{258}\) 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.”

\(^{259}\) Article 4 of the Convention provides in full, “Persons committing genocide or any of the other acts enumerated in article 3 shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals.”

\(^{260}\) Article 5 of the 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 3.”
of its own legal competence to include 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 of criminal tribunals it does not acknowledge either a legal or practical dependence on them. The Court, without setting out a legal basis, grants itself “the capacity” to make ‘final determinations’ of the mens rea of persons alleged to have committed crimes – a task ordinarily reserved to a criminal court.\textsuperscript{261} The Court creates this new competence to engage in a juridical function not expressly or implicitly provided for in the Genocide Convention.\textsuperscript{262}

The 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.”\textsuperscript{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.\textsuperscript{264} This express referral of any adjudication of the 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

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\textsuperscript{261} ICJ Genocide Judgment, ¶ 181.
\textsuperscript{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 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, 6).
\textsuperscript{263} “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 6).
adjudicating criminal responsibility for genocide. The express referral in Article 9 of the 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 – it is likely 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 prohibitions of the Genocide Convention. 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 of individual responsibility the ICJ is drawn into a relationship of dependency between the ICJ and those 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 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 serve to define a methodology that has historically proved to yield accurate determinations of whether a crime has 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 inter-state disputes and one designed for adjudication of individual criminal responsibility, creates the potential that the two courts will reach inconsistent results. Had the Court made a determination, ‘beyond doubt’ that Milošević possessed the dolus specialis of genocide and thus 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 the Tribunal. Any ‘final determinations regarding Milošević’s mens rea with respect to the genocidal acts perpetrated in Bosnia prior to the Milošević Trial’

\[264 \text{#check and cite}\]

\[265 \text{Article 9 of the Genocide Convention states, “Disputes between the Contracting Parties relating to the interpretation, application or fulfillment of the present Convention, including those relating to the responsibility of a State for genocide or for any of the other acts enumerated in article III, shall be submitted to the International Court of Justice at the request of any of the parties to the dispute.”}\]
Chamber issuing its judgment would have created difficulties for the Trial Chamber. The Court’s findings would likely have been in conflict in material ways with the Trial Chamber’s judgment resulting from a more detailed inquiry. Had Milošević ultimately been acquitted of genocide the international community would rightly be confused.

The problem of the Court as a venue for determining criminal responsibility seems incongruous with the Court’s inability to initiate a case absent a formal complaint by another state party. Consider, hypothetically, that the aggressor state perpetrating the genocide was completely successful and the targeted group no longer existed. If another state party did not initiate a claim on behalf of the targeted group the Court would not have any jurisdiction to itself initiate a case before it to assess the criminal liability of the state.\textsuperscript{266} The Court unlike a criminal tribunal with an independent prosecutor could be shackled by its own procedures preventing it from embarking on an inquiry into something as important as allegation that a state is perpetrating the crime of genocide.

Once an inquiry has been initiated and despite the similarity between the issues that both courts would face the inquiry would be largely shaped by the differences in their statutes. While the ICTY statute created an office of an independent prosecutor to investigate claims made by parties on all sides of the conflict the allegations before the ICJ were formed 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 criminal tribunals while under somewhat more liberal rules of evidence than national systems is still rigorous compared to the

\footnotesize{\textsuperscript{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 provide for in the Charter of the United Nations or in treaties and conventions in force.” See C. Wilfred Jenks, The Prospects of International Adjudication 125 (1964). “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 also, Shabtai Rosenne, The World Court: What It Is and How It Works 74 (1962)}
procedures employed by the ICJ.\footnote{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” rather than motions culminating in an oral hearing that lacks many of the procedural and evidentiary formalities of a criminal trial in the ICTY.\footnote{268}

The ICJ does have, at least theoretically, some capacity to secure the evidence necessary to decide these issues of criminal culpability. According to the Court’s statute there are several articles which enable the Court to obtain evidence for itself. It has the power to apply directly to governments who are not parties to serve notices upon persons in possession of evidence.\footnote{269} It can require agents of the parties before it to produce documentary evidence\footnote{270} and call upon the parties to produce evidence.\footnote{271} The Court can \textit{proprio motu} visit locations related to the case in order to obtain evidence itself.\footnote{272} While these provisions in theory give the Court some of the mechanisms available to an international prosecutor or international criminal court to secure evidence the customary practice of the ICJ has been to exercise these powers infrequently and depend upon the parties for the production of evidence itself.\footnote{273} And while the Court has some authority to secure evidence it lacks many of the mechanisms found in national systems.\footnote{274}

\footnote{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 associate with the perceived freedom of sovereign states to present their cases before the Court howsoever they see fit.” Hight, \textit{supra} note 57, at 357.

\footnote{268}ROSENNE, LAW \& PRACTICE OF INTERNATIONAL COURT, \textit{supra} note 67, at 1381.

\footnote{269}ICJ Statute, Article 44.

\footnote{270}ICJ Statute, Article 49

\footnote{271}ICJ Statute, Article 62

\footnote{272}ICJ Statute, Article 66

\footnote{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.” Hight, \textit{supra} note 57 at 357.

\footnote{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
Even with equivalent powers to secure evidence some commentators have observed that the court has been reluctant to fully engage in the task of finding facts. Other commentators have suggested that its capacity to establish facts is limited by its procedures and methods. This has traditionally not impeded the work of the court because many of contentious cases that it has decided have presented complex legal questions arising from a relatively simple set of facts. In those cases in which factual determinations are made they are most often made on the basis of indirect evidence.

order discovery, unless they should be specifically conferred on it.” ROSENNE, LAW & PRACTICE OF INTERNATIONAL COURT, supra note 67, at 1345.

"[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 are 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 57, at 374-75 (footnotes omitted).

"Yet Judge Manley Hudson wrote years ago that: “[i]ssues 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 the documents of the written proceedings or in the course of oral proceedings.” Keith Hight, supra note 57, at 357 quoting, M. HUDSON, THE PERMANENT COURT OF INTERNATIONAL JUSTICE 1920-1942, 565 (1943).

"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. . . .” Hight, supra note 57, at 372-373 (footnotes omitted).

“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.
Some commentators have suggested that the Court would benefit from delegating the fact-finding component of its task to a commission designed for that purpose and limiting itself to applying the law to the commission’s factual findings. The President of the Court, Judge Roslyn Higgins, recognized in her introductory remarks before reading a summary of the Court’s judgment how genocide necessitated a detailed and challenging factual inquiry by the court.

In this case the Court was called upon to consider the state of mind of senior state officials. The Court has, in the past has had to consider what the intentions of senior state officials were not corrected by officials.” Hight, supra note 57, at 373-374 (footnotes omitted).

279 “Other ways of inducing governments to have recourse to adjudication may exist. One would be to promote the use of fact-finding commission or commissions of enquiry confined purer to the facts of a case without entry upon the law.” Gerald Fitzmaurice, Enlargement of the Contentious Jurisdiction of the Court, in 2 The Future of the International Court of Justice 490 (Leo Gross ed., 1976). See also Rudolph L. Bindschedler, Report, in, Judicial Settlement of International Disputes 144 (Max Planck Institute, 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.” See also, Hight, “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 57, at 372 (footnotes omitted).

280 “This was an extremely fact-intensive case. The hearings lasted for two-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.” Statement of President Roslyn Higgins, Statement to the Press by H.E. Judge Rosalyn Higgins, President of the International Court of
officials were. In these cases, the court looked to documentary evidence and public statements for evidence of the knowledge and intent of state officials with respect to boundaries, covert military activities and the existence of maritime mines. For the most part, the court has relied on hearsay sources to establish the knowledge and intent of government officials. The statements of senior state officials in all of these cases, 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 an unequivocal statement by a state official indicating their genocidal intent. Anything less that a clear unequivocal statement, no matter how thinly veiled, would fall short of what is needed to establish genocidal intent. While 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 underlying intentions. Absent such an unequivocal public statement


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


285 In the Nicaragua case the court did rely on an affidavit of then Secretary of State, George Schultz, which was appended to the U.S. submission.

286 Henry Morgenthau Sr., the U.S. Ambassador to the Ottoman Empire (1913-1916) recorded the words of Mehmet Talaat Pasha, the Ottoman Minister of the Interior (1913-1917) 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 intense 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, The Washington Post, B03 (January 18, 2004) ‘‘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,
that was recorded in a way that its authenticity is undisputed, the court, in its effort to establish the mens rea of a state official, would have to rely on the testimony of witnesses. The calling of fact witnesses remains a relatively novel though not unprecedented occurrence in the ICJ proceedings.\textsuperscript{287} Even if a sufficient number of fact 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 accuracy of the proceedings. The Court declined to rely on a number of ICTY proceedings despite judicial involvement in the process citing the lack of involvement of the accused.

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) provides that “Only states may be parties in cases before the Court.” This article makes clear that the individual who can attach state responsibility and whose conduct and mens rea is adjudicated by the court has no right of appearance before the court. They are placed in the shadow of a finding by the ICJ that they perpetrated the crime of genocide without ever having the opportunity to defend against such an allegation. It is difficult to contemplate a way in which the ICJ could fairly determine that a senior leader of the FRY 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 court to defend against such serious allegations? The ICTY itself has been reticent in issuing judgments that can be read broadly to implicate persons who are not before the tribunal. The Krstić Appeals Chamber recognized this when they pondered why the Trial Chamber asserted that those who perpetrated 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 without an opportunity to confront the evidence. If a senior state official did so choose to meet allegations against him or her and was granted an opportunity to do so the court would be obliged to ensure that the procedural protections of the International Covenant on Civil and Political Rights (ICCPR) and regional human rights instruments were observed.

The Court in undertaking the adjudication of issues of individual criminal responsibility conducts what amounts to a trial in absentia of senior state officials. While the ICJ cannot deprive the senior state official of his or her liberty, a judgment finding that the senior state official committed the crime of genocide would invariably have a punitive impact on that person. The Court, not being a criminal court, charged with the task of determining individual responsibility, cannot properly or fairly inquire into the state of mind of the senior officials whose state of mind is essential to its determination. As such, the Court can only conduct its work after issues of their individual responsibility have been fairly established in a criminal trial. The Court should and must wait until such final judgments are rendered before it can commence its

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“...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 (April 19, 2004).

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“...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, 6).
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.\textsuperscript{290}

Unfortunately for the ICJ, with the death of Milošević the ICJ did not have the option of waiting for a judgment in the Milošević case. The Milošević case was the first, and perhaps the only case in the ICTY 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 multi-tiered environment by multitudes of perpetrators not always sharing the same intent. In the context of Srebrenica many actors contributed to the tragic events there. A general trend or truism about the ICTY’s work has been that it necessarily began its work examining the conduct of the perpetrators most immediately associated with the crimes worked upward toward those most responsible.\textsuperscript{291} Absent documentary evidence of the type left behind by the Nazi’s 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 every-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 manned one of the machine guns outside Srebrenica. Building on what was learned from that case and continued investigations the next set of cases examined the culpability of the commanders present in the Srebrenica area, Krstić, Obrenović. Building on the work of these investigations Milošević was finally indicted for the crimes in Srebrenica in 2001, seven years after the establishment of the Tribunal. The Milošević Trial Chamber would have been the first Trial Chamber to comprehensively examine the evidence relevant to

\textsuperscript{290} “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.” ICJ Genocide Judgment, (Declaration of Judge Skotnikov, 7.)

\textsuperscript{291} RICHARD GOLDSTONE, FOR HUMANITY: REFLECTIONS OF A WAR CRIMES PROSECUTOR #% (2000) #% get quote Goldstone’s book

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the allegation that a senior Serb state official, namely its president was a participant in the crime of genocide.\textsuperscript{292}

Perhaps the court had considered waiting until the Milošević case had reached its conclusion. A survey of the cases reveals that it is unlikely that any of the remaining cases would have resulted in judgments that would have directly addressed those faced by the Court. While 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 court’s significant reliance on other ICTY judgments in general might well have been dispositive of the ICJ case. His death and termination of the case foreclose this possibility. Of the other senior Yugoslav indictees awaiting trial, General Momčilo Perišić, and Jovica Stanišić, neither has been charged with genocide, so although the possibility exists that relevant findings of fact will emerge from the judgments in these cases there is no reason for either Trial Chamber to deal directly with the question of the \textit{dolus specialis} of genocide.

Returning to the body of evidence that the Milošević Trial Chamber evaluated under 98 bis. The judges in making their determination under Rule 98 bis do not assess the credibility and reliability of prosecution witnesses and exhibits. The judges consider this evidence in a light favorable to the prosecution. While the ICJ might be able to review evidence authenticating documentary evidence a judges largely rely on their common sense impression of witnesses to determine the credibility of a witness. The Milošević Trial Chamber cited General Clark’s recounting of a conversation with Milošević suggesting he had advance knowledge of the crimes in Srebrenica. In its final judgment the Trial Chamber would have made findings with respect to Clark’s credibility and reliability. Is it possible for the ICJ to re-examine all of the prosecution witnesses or

\textsuperscript{292} 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 if its leaders have been 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, ¶ 408.
view the video-tapes of the trial? A duplicative task that would consume a great deal of the Court’s time. The Court’s own rules provide little guidance as to the evaluation of witness testimony.\textsuperscript{293} Trying to make determinations of credibility in the absence of the witness is a speculative task and when attempted with respect to core issues of a case strains our conceptions of what judges can appropriately do when adjudicating such cases.

Is the court’s failure to comprehensive review the Milošević evidence recognition of the impossibility of the task? The ICJ is ill-equipped to engage in the type of in depth inquiry that a criminal trial engages in routinely. Since none of the witnesses are being heard live there is no opportunity for the court to pose questions to the witnesses directly. For these and other reasons it seems that these issues are more apt to be properly explored and more soundly adjudicated in the setting of an international criminal trial. The court risks the de-legitimizing effect of issuing a judgment under its proceedings that is undermined by the more comprehensive exploration of the issue likely to be had at an international criminal trial. While the ICJ can build upon the work of international criminal tribunals it is unlikely that it can satisfactorily adjudicate such difficult issues independently.

V. CONCLUSION

The International Court of Justice, in making its determination that a state, as a state, could perpetrate the crime of genocide and recognizing that the capacity of a state to form genocidal intent exists only in the minds of senior officials capable of attaching state liability has committed itself to engaging in an inquiry traditionally reserved to international criminal tribunals. The Court’s adoption of a standard of proof equivalent to a criminal trial and placing upon the applicant essentially the same burden of proof as born by an international prosecutor aligns its work closely to that of international

\textsuperscript{293} “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, LAW & PRACTICE OF INTERNATIONAL COURT, \textit{supra} note 67, at 1347.
criminal tribunals. While the court has not undertaken the task of adjudicating individual
guilt its final determination with respect to state criminal responsibility for genocide
requires it to adjudicate core issues of individual criminal responsibility identical to those
faced by an international tribunal sitting in judgment of a senior state official.

The ICJ’s methodology as set out in its Statute was designed to resolve inter-state
disputes and is ill-suited to explore issues of individual criminal culpability. Making
final determinations regarding the state of mind of senior state officials without giving
those persons the right to participate in the proceedings, question the evidence against
them or provide a defense to the allegations raises troubling questions regarding the
accuracy of the result and procedural fairness of the process. The Court’s reliance on
ICTY’s work in adjudicating individual criminal responsibility is evidence of its
recognition that international criminal tribunals are better suited to this task. Its 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 it 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 Court is unable to conduct its own independent inquiry into state criminal
responsibility. The ICJ has thus in this its first judgement enforcing the 1948 Genocide
Convention has created a relationship of dependency upon the work of other international
criminal courts. Given the likelihood that future allegations of genocide will not only be
brought before the ICJ but the ICC as well the relationship between the ICJ and the ICTY
as defined by the Bosnia Genocide case will also 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 the alleged conduct takes place and long before any final determination of
individual criminal responsibility in a international criminal tribunal has occurred. The
ICJ dependent upon the work of other tribunals will necessarily have to wait upon their
final judgments.