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## Proving State Responsibility for Genocide: The ICJ in *Bosnia v. Serbia* and the International Commission of Inquiry for Darfur

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# Proving State Responsibility for Genocide: The ICJ in Bosnia v. Serbia and the International Commission of Inquiry for Darfur

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## **Abstract**

This Article discusses the Bosnia v. Serbia case and the Darfur Inquiry and asks whether, in coming to their respective decisions on Serbia and Sudan's responsibilities, the ICJ and the ICID did all that was required of them, especially under the law of State responsibility. This Article first considers whether, despite striking similarities in the circumstances of Darfur and Srebrenica, the ICID's decision that genocide did not occur in Darfur is credible, defensible and could withstand legal analysis under international law. The analysis here juxtaposes the ICID's findings with the ICJ's decision on the Srebrenica genocide.

## ARTICLES

# PROVING STATE RESPONSIBILITY FOR GENOCIDE: THE ICJ IN *BOSNIA v. SERBIA* AND THE INTERNATIONAL COMMISSION OF INQUIRY FOR DARFUR

*Ademola Abass\**

### INTRODUCTION

In the case *Bosnia v. Serbia*,<sup>1</sup> the International Court of Justice (“ICJ”) decided that Serbia had not committed genocide through its organs or persons whose acts engage its responsibility under customary international law. The Court, however, did find that genocide occurred in Srebrenica.<sup>2</sup> About two years before that decision, the International Commission of Inquiry for Darfur (“ICID” or the “Commission”) determined, somewhat similarly, that the Government of the Sudan had not pursued a policy of genocide.<sup>3</sup> The commission concluded that genocide did not occur in Darfur.<sup>4</sup>

Despite considerable synergy in the jurisprudence of both bodies on such issues as the standards for proving the *ultimo ratio* of the crime of genocide, *dolus specialis*, a close reading of the decisions raises serious questions of international law about

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1. Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Mont.) (Judgment of Feb. 26, 2007), available at <http://www.icj-cij.org/docket/files/91/13685.pdf> (last visited Feb. 12, 2008) [hereinafter *Bosnia v. Serbia* case].

2. See *id.* ¶ 297.

3. See generally Int’l Comm’n of Inquiry on Darfur [ICID], *Report of the International Commission of Inquiry on Darfur to the United Nations Secretary General*, U.N. Doc. S/2005/60 (Jan. 25, 2005), available at [http://www.un.org/News/dh/sudan/com\\_inq\\_darfur.pdf](http://www.un.org/News/dh/sudan/com_inq_darfur.pdf) [hereinafter *ICID Report*].

4. See Matthew Happold, *Darfur, the Security Council and the International Criminal Court*, 55 INT’L & COMP. L.Q. 226 (2006); see also Linnea D. Manashaw, *Genocide and Ethnic Cleansing: Why the Distinction? A Distinction in the Context of Atrocities Occurring in Sudan*, 35 CAL. W. INT’L L.J. 303 (2005). See generally GÉRARD PRUNIER, *DARFUR: THE AMBIGUOUS GENOCIDE* (2005).

proving State responsibility for genocide and, in particular, the application of the rules for attributing crimes to States.

This Article discusses the *Bosnia v. Serbia* case and the Darfur Inquiry and asks whether, in coming to their respective decisions on Serbia and Sudan's responsibilities, the ICJ and the ICID did all that was required of them, especially under the law of State responsibility. This Article first considers whether, despite striking similarities in the circumstances of Darfur and Srebrenica, the ICID's decision that genocide did not occur in Darfur is credible, defensible and could withstand legal analysis under international law. The analysis here juxtaposes the ICID's findings with the ICJ's decision on the Srebrenica genocide.

## I. THE DARFUR CRISIS

### A. *The International Commission of Inquiry on Darfur*

On September 18, 2004, the United Nations ("U.N.") Security Council, as part of its multifaceted efforts to resolve the Darfur crisis,<sup>5</sup> adopted Resolution 1564 under Chapter VII of the U.N. Charter, requesting the U.N. Secretary General to "rapidly establish an international commission of inquiry in order immediately to investigate reports of violations of international humanitarian law and human rights law in Darfur by all parties, to determine also whether or not acts of genocide have occurred."<sup>6</sup>

The ICID was comprised of Professor Antonio Cassese, former President of the International Criminal Tribunal for the Former Yugoslavia ("ICTY"), Mohamed Fayek, Hina Jilani, Dumisa Ntsebeza, and Therese Striggner-Scott,<sup>7</sup> and was to report back on its findings within three months of its inauguration.<sup>8</sup> On January 25, 2005, the Commission submitted an extensive report to the U.N. Secretary-General.<sup>9</sup> It found that war crimes and crimes against humanity occurred in Darfur.<sup>10</sup> On the specific question of whether genocide occurred in Darfur, the Commission was doubtful, holding that the Government of

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5. For an excellent account of Sudan's conflicts, see RUTH IYOB & GILBERT M. KHADIAGALA, *SUDAN: THE ELUSIVE QUEST FOR PEACE* (2006) and TIM NIBLOCK, *CLASS AND POWER IN SUDAN: THE DYNAMICS OF SUDANESE POLITICS, 1898-1985* (1987).

6. S.C. Res. 1564, ¶ 12, UN Doc. S/RES/1564 (Sept. 18, 2004).

7. See *ICID Report*, *supra* note 3, ¶ 2.

8. See *id.*

9. See *id.*

10. See *id.* ¶¶ 391-93.

the Sudan had not pursued a policy of genocide in Darfur.<sup>11</sup>

B. *Did Genocide Occur in Darfur? The International Commission of Inquiry on Darfur's ("ICID") Findings*

From the start, the ICID recognized that it was "not a judicial body,"<sup>12</sup> although it adopted an approach proper to a judicial body in classifying the facts according to international criminal law. However, given the "limitations inherent in its powers,"<sup>13</sup> the ICID decided not to comply with the standards normally adopted by criminal courts (proof of facts beyond a reasonable doubt),<sup>14</sup> or with those used by international prosecutors and judges in cases for the purpose of confirming indictments (that there must be a *prima facie* case).<sup>15</sup> Instead, the ICID stated "that the *most appropriate standard was requiring a reliable body of material consistent with other verified circumstances, which tends to show that a person may reasonably be suspected of being involved in the commission of a crime.*"<sup>16</sup>

The ICID examined reports compiled by independent bodies, interviewed several government officials and victims of Darfur atrocities, and evaluated accounts of the Government of Sudan and rebel groups.<sup>17</sup> Following an inspiring analysis of international law, the Commission concluded that "[s]ome elements emerging from the facts including the scale of atrocities and the systematic nature of the attacks, killing, displacement and rape, as well as racially motivated statements by perpetrators that have targeted members of the African tribes only, could be indicative of genocidal intent."<sup>18</sup> Nevertheless, the Commission stated that there were other more indicative elements that showed the lack of genocidal intent.<sup>19</sup> In support of this, it recounted the patterns of attacks on villages, and since these examples are vital to its conclusions, the facts of one of such attacks are reproduced as follows:

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11. *See id.* ¶¶ 489-522, 626-42.

12. *See id.* ¶ 14.

13. *See id.* ¶ 15.

14. *See id.*

15. *See id.*

16. *Id.* (emphasis added).

17. *See id.* ¶¶ 20-25.

18. *Id.* ¶ 513.

19. *See id.*

The fact that in a number of villages attacked and burned by both militias and Government forces the attackers refrained from exterminating the whole population that had not fled, but instead *selectively* killed groups of young men, is an important element. A telling example is the attack of 22 January 2004 on Wadi Saleh, a group of 25 villages inhabited by about 11,000 Fur. According to credible eye witnesses questioned by the Commission, after occupying the villages the Government Commissioner and the leader of the Arab militias that had participated in the attack and burning, gathered all those who had survived or who had not managed to escape into a large area. Using a microphone they selected 15 persons (whose names they read from a written list), as well as 7 *omdas*, and executed them on the spot. They then sent elderly men, all boys, many men and all women to a nearby village, where they held them for some time, whereas they executed 205 young villagers, who they asserted were rebels (*Torabora*). According to male witnesses interviewed by the Commission and who were among the survivors, about 800 persons were not killed (most young men of those spared by attackers were detained for some time in the Mukjar prison).<sup>20</sup>

From these facts the Commission therefore inferred that:

[T]he intent of the attackers *was not to destroy* an ethnic group as such, or part of the group. Instead, the intention was to murder all those men they considered as rebels, as well as forcibly expel the whole population so as to vacate the villages and prevent rebels from hiding among, or getting support from, the local populations.<sup>21</sup>

The Commission further alluded to other instances, which, it believed, rebutted any intent to commit genocide. In fact:

[P]ersons forcibly displaced from their villages are collected in IDP camps. In other words, the population surviving attacks on villages are *not killed outright*, so as to eradicate the group; they are rather forced to abandon their homes and live together in the areas selected by the Government. While this attitude of the Sudanese Government may be held to be in breach of international legal standards on human rights and international criminal law rules, it is not indicative of any

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20. *Id.* (emphasis added).

21. *Id.* ¶ 514 (emphasis added).

intent to annihilate the group.<sup>22</sup>

On the basis of the above reasoning, the Commission declared that:

[T]he Government of Sudan has not pursued a policy of genocide. Arguably, two elements of genocide might be deduced from the gross violations of human rights perpetrated by Government forces and the militias under their control. These two elements are: first, the *actus reus* consisting of killing, or causing serious bodily or mental harm, or deliberately inflicting conditions of life likely to bring about physical destruction; and, second, on the basis of a subjective standard, the existence of a protected group being targeted by the authors of criminal conduct. Recent developments have led to the perception and self-perception of members of African tribes and members of Arab tribes as making up two distinct ethnic groups. However, one crucial element appears to be missing, at least as far as the central Government authorities are concerned: genocidal intent. 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.<sup>23</sup>

The ICID's rationales for holding that genocide did not occur in Darfur, despite establishing that various forms of *actus reus* existed, are *viz*: (1) the attackers have refrained from "exterminating the whole population that have not fled, but instead selectively killed groups of young men;"<sup>24</sup> (2) the forcible expulsion of whole populations took place "so as to vacate the villages and prevent rebels from hiding among, or getting support from, the local populations."<sup>25</sup>

### C. Analysis of ICID's Findings

#### 1. Selective Actus Reus vs. Specific Intent

At first glance, the ICID's rationale that selective *actus reus*

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22. *Id.* ¶ 515 (emphasis added).

23. *Id.* ¶ 518.

24. *Id.* ¶ 513.

25. *Id.* ¶ 514.

precludes genocidal intent in Darfur appears consistent with the international law jurisprudence on *dolus specialis*. In *Bosnia v. Serbia*, the ICJ stated, concerning the Srebrenica massacre, that “while ‘[t]he VRS<sup>26</sup> may have initially considered only targeting military men for execution, . . . [the] evidence shows, however, that a decision was taken, at some point, to capture and kill all the Bosnian Muslim men *indiscriminately*. No effort was made to distinguish the soldiers from the civilians.’”<sup>27</sup> Arguably, the Court’s reference to a subsequent decision by the Vojska Republike Srpske (“VRS”) to kill Bosnian Muslims *indiscriminately* seems to suggest that had the VRS confined its attack to Bosnian men of military age, the Court could have found, as did the ICID, that the actus reus did not manifest the intent to destroy the people in part or in whole.

The issue of whether the Darfur attackers killed all or some of their victims raises the question as to how many people have to be killed, and under what circumstances, for the act to manifest genocidal intent. To be sure, Article II of the Convention on the Prevention and Punishment of the Crime of Genocide, the defining matrix of genocide, is laconic and offers no insights into this nebulous phrase.<sup>28</sup> Nor are the *travaux préparatoires* any more helpful.<sup>29</sup>

Academic and judicial attempts to calibrate the meaning of “in whole or in part” have been steady and remarkable. A consensus has so far emerged that genocide does not imply the extermination of the whole population of the protected group. The crime “may be found to have been committed where the intent is to destroy the group within a geographically limited area.”<sup>30</sup> In the *Commentary to its Articles on the Draft Code of Crimes against the Peace and Security of Mankind*, the International Law Commission (“ILC”) noted, “[i]t is not necessary to intend to achieve the complete annihilation of a group from every corner of the globe.”<sup>31</sup> Nehemiah Robinson commented that the num-

26. The Serbian Army of Bosnia.

27. *Bosnia v. Serbia* case, *supra* note 1, ¶ 292 (emphasis added).

28. See Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277 (entered into force Jan. 12, 1951) [hereinafter Genocide Convention].

29. See Draft Convention on the Crime of Genocide, June 26, 1947, U.N. Doc. E/447, at 24 (prepared by the Secretary-General).

30. *Bosnia v. Serbia* case, *supra* note 1, ¶ 199.

31. *Report of the International Law Commission on the work of its forty-eighth session*, U.N.



ber of victims had to be substantial, even if it was left for the court to decide whether “the number was sufficiently large.”<sup>32</sup> Benjamin Whitaker contended that the term “in part” implied “a reasonably significant number, relative to the total of the group as a whole, or else a *significant section of a group* such as its leadership.”<sup>33</sup> In *Prosecutor v. Kayishema & Ruzindana*, the International Criminal Tribunal for Rwanda (“ICTR”) promoted the view that there must be “a considerable number” of victims for the crime to qualify as genocide,<sup>34</sup> while, in *Prosecutor v. Jelisić*, the ICTY preferred the formula “a substantial part,” although not a “very important part.”<sup>35</sup>

It can be argued that in deciding whether genocide occurred in Darfur, the ICID stretched the meaning of “in whole or in part” to a breaking point. In interpreting that phrase, the Commission should have determined whether a significant portion of the immediately endangered “part” (the military-aged Darfurians) of the wider protected group (the entire population of black Darfurians) was targeted. The relevant “part,” in this instance, should therefore be a significant part of the “whole” of the group *cornered by the killers*,<sup>36</sup> even if this forms but a fraction of the *whole* of the black Darfurian population.

It is possible that the military-aged men of Darfur may be no more than one hundred men out of approximately three million black Darfurians.<sup>37</sup> Killing sixty or seventy of the hundred fighters, with the full complement of *dolus specialis*, satisfies the requirement “in part or in whole” since the relevant “whole” here

GAOR, 51st Sess., Supp. (No. 10), U.N. Doc. A/51/10 (May 6 - July 26, 1996), *reprinted in* [1996] 2 Y.B. Int'l L. Comm'n 45, U.N. Doc. A/Cn.4/SER.A/1996/Add.1 (Part 2).

32. NEHEMIAH ROBINSON, *THE GENOCIDE CONVENTION: A COMMENTARY* 58 (1960).

33. U.N. Econ. & Soc. Council [ECOSOC], Sub-Comm. on Prevention of Discrimination & Protection Of Minorities, *Review of Further Development in the Fields with which the Sub-Commission has been Concerned: Revised and Updated Report on the Question of the Prevention and Punishment of the Crime of Genocide*, ¶ 29, U.N. Doc. E/CN.4/Sub.2/1985/6 (July 2, 1985) (*prepared by* Benjamin Whitaker) (emphasis added) [hereinafter *Whitaker Report*].

34. *Prosecutor v. Kayishema & Ruzindana*, Case No. ICTR 95-1-T, Judgment, ¶ 97 (May 21, 1999).

35. *Prosecutor v. Jelisić*, Case No. IT-95-10-T, Judgment, ¶¶ 81-82 (Dec. 14, 1999).

36. *See generally Whitaker Report, supra* note 33, ¶ 29.

37. The ratio of military-aged males in Sudan in relation to the rest of the population is approximately 1:8. *See* Cent. Intelligence Agency, *The World Factbook – Sudan*, <https://www.cia.gov/library/publications/the-world-factbook/geos/su.html> (last visited Feb. 12, 2008).

is not the entire three million blacks of Darfur, but the one hundred military-aged men targeted for elimination. Thus, with respect to the men killed at Wadi Saleh on the basis of their being rebels (“Tora Boras”),<sup>38</sup> the correct formulae that the ICID should have adopted in deciding the phrase “in part” should have been whether the eliminated people, selected from the captured part of the whole of the protected group at Wadi Saleh, formed such a substantial part of *that* group as to warrant its physical destruction by the elimination.

Had the Commission adopted this approach, the extermination of some 205 military-aged men at Wadi Saleh, on January 22, 2004,<sup>39</sup> might have satisfied the requirement of the specific intent to destroy “in part,” if this number formed a substantial part of the whole of all the military-aged men living in those villages. It was profoundly mistaken to conceive “in part,” in this context, relative to the “whole” of the black population of Darfur, or to preclude *dolus specialis* simply because the assailants made a selection of death candidates from a pre-determined list. Apart from being illogical, such an approach takes the wind out of the sail of the Genocide Convention altogether.

Interestingly, the ICJ was faced in *Bosnia v. Serbia* with exactly the same situation (originally dealt with by the ICTY in *Prosecutor v. Blagojević*) with regards to the fate of civilians under the protection of the United Nations Protection Force (“UNPROFOR”) at Potocari.<sup>40</sup> In an interesting exchange between General Ratko Mladić of the Serbian forces and a Dutch Colonel, who had come to negotiate safe passage of people under the UNPROFOR protection in the so-called “safe area,” General Mladić was reported to have said that the civilian population was not the target of his actions.<sup>41</sup> Yet despite the separation of the young, the old and the elderly from the rest of the population and notwithstanding admitted video evidence that the Srebrenica attackers did not intend to exterminate the whole population,<sup>42</sup> the Trial Chamber correctly held that specific intent existed. The Chamber said:

38. See *ICID Report*, *supra* note 3, ¶ 513.

39. See *id.*

40. See *Bosnia v. Serbia* case, *supra* note 1, ¶¶ 280-91.

41. See *id.* ¶ 286.

42. See *generally* *Prosecutor v. Blagojević*, Case No. IT-02-60-T, Judgment (Jan. 17, 2005).

[It] has no doubt that all these acts *constituted a single operation* executed with the intent to destroy the Bosnian Muslim population of Srebrenica. The Trial Chamber finds that the Bosnian Serb forces not only knew that the *combination* of the killings of men with the forcible transfer of women, children and elderly, would inevitably result in the physical disappearance of the Bosnian Muslim population of Srebrenica, but clearly intended through these acts to physically destroy this group.<sup>43</sup>

The ICJ also agreed with the ICTY Appeals Chamber's ruling in *Prosecutor v. Krstić*, that "the destruction of such a sizeable number of men would 'inevitably result in the physical disappearance of the Bosnian Muslim population at Srebrenica.'"<sup>44</sup>

Clearly, there is a striking similarity in these facts and those of Darfur. The elimination of the Tora Boras of Wadi Saleh had taken place along with other acts, such as the forcible relocation of women and children. The question therefore is, why does it matter in Darfur that those who killed innocent civilians did so after separating the boys from the men, the women from the elderly?

In the most recent attempt at clarifying the concept of "in whole or in part," the ICJ said, in *Bosnia v. Serbia*, that:

[T]he intent must be to destroy at least a substantial part of the particular group. That is demanded by the very nature of the crime of genocide: since the object and purpose of the Convention as a whole is to prevent the intentional destruction of groups, *the part targeted must be significant enough to have an impact on the group as a whole.*<sup>45</sup>

The ICJ's interpretation is particularly instructive since, by recognizing that genocide could be committed when the "part targeted [is] significant enough to have an impact on the group as a whole," the view corroborates the point earlier made that eliminating a substantial part of the military-aged black Darfurians could potentially amount to genocide. This interpretation seems to give the best effect to the purpose of the Genocide Convention and the nature of the crime itself and makes more sense in the context of Darfur. As the Court further noted, it

43. *Id.* ¶ 677 (emphasis added).

44. *Prosecutor v. Krstić*, Case No. IT-98-33-A, Judgment, ¶ 28 (Apr. 19, 2004).

45. *Bosnia v. Serbia* case, *supra* note 1, ¶ 198 (emphasis added).

may be that “the opportunity available to the alleged perpetrator [of genocide] is so limited that the substantiality criterion is not met.”<sup>46</sup>

The Genocide Convention does not specify how many deaths equal genocide, but it is not in doubt that huge numbers are not present with regard to Tora Boras of Wadi Saleh. The U.N. General Assembly regarded the massacre at Sabra and Shatila as genocide even though victims numbered only a few hundred.<sup>47</sup> International law requires, under the principle of *res magis valeat quam pereat*, that the rules of genocide should be interpreted in such a manner as to give them maximum legal effect.<sup>48</sup> In *Stakić*, the Trial Chamber of the ICTY indicated the need for caution, lest this strained approach—such as ICID took with regards to Darfur—might distort the definition of genocide.<sup>49</sup>

## 2. Actus Reus for Counterinsurgency Purposes

Aside from relying on the selective nature of Darfur killings, the ICID also sought to negate genocidal intent on the basis that the forcible sacking of villages in Darfur was committed for counterinsurgency purposes or in order to block villager support for rebels. But really, should it matter what motive one has for committing prohibited acts when determining genocide?

As an international law rule, motive neither justifies nor excuses genocide. The ICID recognized that “special intent must not be confused with motive, namely the particular reason that may induce a person to engage in criminal conduct. . . . From the viewpoint of criminal law, what matters is not the motive, but rather whether or not there exists the requisite special intent to destroy a group.”<sup>50</sup> Yet the ICID’s rationale under consideration could hardly be construed in any other way than it being a motive for the act. From the report, it is clear that it was partly the ICID’s reliance on this motive that led to its hasty conclusion that the actus reus did not manifest a genocidal intent. It was

46. *Id.* ¶ 199.

47. See G.A. Res. 37/123D, U.N. Doc. A/RES/37/123 (Dec. 16, 1982); see also Nsongurua J. Udombana, *An Escape from Reason: Genocide and the International Commission of Inquiry on Darfur*, 40 *INT’L LAW.* 41 (2006).

48. See *ICID Report*, *supra* note 3, ¶ 494.

49. See generally *Prosecutor v. Stakić*, No. IT-97-24-T, Judgment (July 31, 2003).

50. *ICID Report*, *supra* note 3, ¶ 493.

sheer pedantry, and nothing more pretentious, that the Commission attempted to distinguish between *reason* and *motive* from the facts of the Wadi Saleh murders. For all intents and purposes, the distinction is without a difference.

It may be the fact that the ICID had to conduct its inquiry while the conflict in Darfur unfolded that severely limited its ability to function accurately in regard to locating the specific intent to commit genocide in Darfur. Evidence of inaccuracy abounds in the Commission's report. In several passages, the Commission acknowledged the existence of *indiscriminate* attacks levelled by government forces and the Janjaweed. It confirmed that during many attacks, the joint team of the Sudanese Army and the Janjaweed militias said to their victims, "you are Tora Bora, the SLA are your families," "the Fur are slaves, we will kill them," "we are here to eradicate blacks (nuba)."<sup>51</sup> Nonetheless, the Commission chose to discount such evidence because the "victims did not differentiate between Government armed forces on the one hand, and militias, and other groups acting, or perceived to be acting, with the support of Government, on the other."<sup>52</sup> It is rather surprising that the ICID did not spot its farcical pedantry when some victims, questioned whether they could distinguish between soldiers and militias from the band of assailants, had responded: "for us, these are one and the same."<sup>53</sup> Apparently, in the universe of the ICID's logic, the victims of Darfur attacks would do better if they were able to, with a fine-toothed comb, distinguish between the various categories of assailants wielding dangerous weapons and about to exterminate them.

What remains to be said is that since the ICID could only investigate crimes that occurred either before it got into, or while operating in Darfur, such tailgating inquiry is always prone to accident. Had an on-site inquiry into the Bosnian genocide been conducted, and halted at the precise moment when the killing of Bosnian Muslims in Sarajevo, the Goražde, Luka and other camps took place,<sup>54</sup> the world would never have known that *dolus specialis* was only a very haul away, or indeed unfolding

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51. *Id.* ¶ 245.

52. *Id.* ¶ 246.

53. *Id.*

54. The ICJ found no specific intent with regards to the acts committed in these camps. See *Bosnia v. Serbia* case, *supra* note 1, ¶¶ 246-77.

at another corner of the Bosnian landscape, and genocide would never have been proved.

D. *Determining "Protected People" Under Article II of the Genocide Convention: What Is Wrong with the Objective Test?*

The ICID's work on whether the victims of Darfur attacks constituted a protected group under Article II of the Genocide Convention is sterling, and ordinarily merits no further comments. However, the Commission's rejection of the objective test, as the sole basis for determining what constitutes a "protected group" raises an interesting legal point worthy of consideration. As already noted, to establish genocide it must be proved that the prohibited act has been committed against a protected group, distinguishable from the attackers, with the specific intent to destroy them in whole or in part.<sup>55</sup> However, not only did the Genocide Convention offer no definition of "protected group," its *travaux préparatoires* reveal sharp disagreements among states as to what meaning to attribute to the phrase.<sup>56</sup>

The ICID first applied the objective test in order to ascertain whether the victims and attackers in Darfur constituted distinct groups.<sup>57</sup> Under this test, the Commission rejected that tribes *per se* could form the basis of a protected group,<sup>58</sup> except where tribes constitute a distinct "racial, national, ethnical or religious group."<sup>59</sup> Though it acknowledged that "in recent years the perception of differences [between Africans and Arabs] has heightened and has extended to distinctions that were earlier not the predominant basis for identity,"<sup>60</sup> the Commission ruled that the various tribes that have been the object of the attacks and killings "do not appear to make up ethnic groups distinct from the ethnic group to which persons or militias that attack them belong."<sup>61</sup> It reasoned that both the victims and the attack-

55. See *supra* note 23 and accompanying text.

56. See Lawrence J. Leblanc, *The United Nations Genocide Convention and Political Groups: Should the United States Propose an Amendment?*, 13 YALE J. INT'L L. 268, 271 (1988) (citing U.N. GAOR C.6, 75th mtg. at 115-16, U.N. Doc. A/633 (1948)).

57. See ICID Report, *supra* note 3, ¶ 508.

58. See *id.* ¶ 496.

59. *Id.*

60. *Id.* ¶ 510.

61. *Id.* ¶ 508.

ers:

[S]peak the same language (Arabic) and embrace the same religion (Muslim). In addition, also due to the high measure of intermarriage, they can hardly be distinguished in their outward physical appearance from the members of the tribes that allegedly attacked them. Furthermore, inter-marriage and coexistence in both social and economic terms, have over the years tended to blur the distinction between the groups. Apparently, the sedentary and nomadic character of the groups constitutes one of the main distinctions between them.<sup>62</sup>

Upon the application of the so-called subjective test however,<sup>63</sup> the Commission found that there exists subjective distinction between the victims and the crime perpetrators in Darfur as to constitute tribal difference for the purpose of the crime constituting genocide. It reasoned that:

If objectively the two sets of persons at issue do not make up two distinct protected groups, the question arises as to whether they may nevertheless be regarded as such subjectively, in that they perceive each other and themselves as constituting distinct groups. . . . The rift between tribes, and the political polarization around the rebel opposition to the central authorities, has extended itself to issue of identity. Those tribes in Darfur who support rebels have increasingly come to be identified as "African" and those supporting the government as the "Arabs." . . . For these reasons it may be considered that the tribes who were victims of attacks and killings subjectively make up a protected group.<sup>64</sup>

Surely, it is not easy to tell one tribal group from another where co-existence and commingling amongst various groups is commonplace and interactions have blunted formal sharp edges of cultural distinctions.<sup>65</sup> The nature of this problem is underscored, for instance, by the exceedingly complex Khmer Rouge's mass killings in Cambodia.<sup>66</sup> As Van Schaack has pointed out, "a close reading of the Genocide Convention leads to a surprising

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62. *Id.*

63. *See id.* ¶¶ 509-10.

64. *Id.* ¶¶ 509-12.

65. On the identification of this problem in the Rwanda case, see ALAIN DESTEXHE, *RWANDA AND GENOCIDE IN THE TWENTIETH CENTURY* 36 (1995).

66. *See infra* notes 68-70 and accompanying text.

and worrisome conclusion.”<sup>67</sup> This is because, as Fournet observes:

Although the Cambodian massacre perpetrated by the Khmer Rouge (1975-1978) is widely defined as genocide, most of the acts committed are in reality not covered by the Convention. Thus, some of the crimes committed by the Khmer Rouge would fall within the scope of the Convention while others would not, because the victims did not constitute a national, ethnic, racial, or religious group.<sup>68</sup>

Doubtless, the application of the subjective test to the Darfur situation proved tremendously useful to the ICID, the question remains whether, on its own, the objective test would not have sufficed in the circumstances. In *Prosecutor v. Akayesu*, the ICTR was faced with the problem of distinguishing between the Hutu *genocidaires* and their Tutsi victims.<sup>69</sup> The Trial Chamber acknowledged that the two groups shared so many similar features, such as color and culture, as to make distinguishing between them practically impossible.<sup>70</sup> Nevertheless, the tribunal held that the tribes were distinct because the Belgian colonizers established a system of identity cards differentiating between the two groups, and that this was confirmed by the self-perception of each group.<sup>71</sup> The Tribunal stated: “all the Rwandan witnesses who appeared before it invariably answered spontaneously and without hesitation the questions of the Prosecutor regarding their ethnic identity.”<sup>72</sup>

The Chamber further stated that what was required by the international rules on genocide was that the targeted group be “a stable and permanent group,”<sup>73</sup> “constituted in a permanent fashion and membership of which is determined by birth.”<sup>74</sup>

67. Beth Van Schaack, *The Crime of Political Genocide: Repairing the Genocide Convention Blind Spot*, 106 YALE L.J. 2259, 2261 (1997).

68. *Id.* The Khmer Rouge committed genocide against Buddhists (a religious group), and the Vietnamese community which was totally eradicated, with the Chinese and the Muslim Cham massacred. See generally CAROLINE FOURNET, INTERNATIONAL CRIMES: THEORIES, PRACTICE AND EVOLUTION 74 (2006).

69. See *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Judgment (Sept. 2, 1998).

70. See *id.* ¶ 102 n.56.

71. See *id.* ¶ 83. Writing about the Hutus and Tutsis, Alan Destexhe observes that “[t]here were certainly distinguishable *social categories* in existence before the arrival of the colonisers.” DESTEXHE, *supra* note 65, at 36 (emphasis added).

72. *Akayesu*, Case No. ICTR-96-4-T, Judgment, ¶ 702.

73. *Id.*

74. *Id.* ¶ 511.



True, the Chamber noted that “a stable and permanent group” is an objective criterion, which needs to be completed with the subjective element of self-perception,<sup>75</sup> but such complementarity is not required where there are more cogent and compelling objective factors than stability and permanence. In the 1999 cases of *Nulyarimma v. Thompson* and *Buzzacott v. Hill*, the Australian Federal Court ruled that the Australian aboriginal tribes could constitute a racially and ethnically distinct group, on account of their ethnicity, religion, culture, language, and color.<sup>76</sup> In its report on the 1996 Draft Code of Crimes against the Peace and Security of Mankind, the ILC<sup>77</sup> “was of the view that the article [17 of the Draft Code] covered the prohibited acts when committed with the necessary intent against members of a tribal group.”<sup>78</sup> William Schabas regards the label “group” as flexible, enabling the Genocide Convention to apply to the destruction of entities that may not qualify as “minorities.”<sup>79</sup>

There is hardly any doubt—except obviously in the minds of the ICID members—that apart from ethnically distinct, (which the ICID confirmed), the victims and perpetrators of Darfur crimes constitute distinct tribes so that, in the absence of the subjective test, they could still have constituted a protected group under Article II. The attackers were Arabs; the attacked were Africans, with all the tell-apart features of color and creed in between. It would have been interesting to see how the black Darfurian victims of the crimes would have responded, had the ICID cared or opportuned to ask them, as the ICTR did with the Tutsis, questions about their self-perception. It is certainly bewildering that international tribunals would more readily accept a distinction of peoples on the basis of identity cards, while discountenancing cultural and physical differences as a cogent factor simply because the two concerned groups have commingled.

In concluding this Part, it must be said that the Commission’s reasoning (and, hence, decision as to whether genocide

75. *Id.* ¶ 702.

76. See *Nulyarimma v. Thompson* (1999)165 A.L.R. 621; *Buzzacott v. Hill* [1999] FCA 1192.

77. See generally *Report of the International Law Commission on the work of its forty-eighth session*, *supra* note 31.

78. *Id.* at 45.

79. See WILLIAM A. SCHABAS, *GENOCIDE IN INTERNATIONAL LAW: THE CRIMES OF CRIMES* 108 (2000).

occurred in Darfur) leaves too many wide cracks, especially when compared with the ICJ's judgment in *Bosnia v. Serbia*. There are good reasons to conclude that the Commission did not do all it should have done in determining whether genocide occurred in Darfur. Despite its limitations, and its avowed intention *not* to adopt the standards of a full criminal tribunal, the standards adopted by the ICID in determining whether genocide occurred in Darfur were both stifling and surrealistically high. No doubt, proving *dolus specialis* in the absence of conclusive evidence is difficult, and it behoves a criminal tribunal to ensure that the case is proved beyond reasonable doubts. Nonetheless, it is a cardinal principle of criminal law that circumstantial evidence is crucial in criminal prosecutions. In the *Jelisić* case, the ICTY Appeals Chamber ruled that:

As to proof of specific intent, it 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.<sup>80</sup>

## II. BOSNIA V. SERBIA AND THE CRIME OF GENOCIDE

### A. *Attributing Responsibility for Genocide: Serbia and the Srebrenica Massacre*

An analysis of the ICJ's decision on Serbia's responsibility for genocide in Bosnia must commence with a brief outline of the Bosnia/Herzegovina crisis and the latter's case before the ICJ.

*Bosnia v. Serbia*<sup>81</sup> arose from suits brought by the Republic of Bosnia and Herzegovina<sup>82</sup> on March 20, 1993, against the Federal Republic of Yugoslavia<sup>83</sup> with respect to a dispute concerning alleged violations of the Convention on the Prevention and

80. Prosecutor v. Jelisić, Case No. IT-95-10-A, Judgment, ¶ 47 (July 5, 2001).

81. See generally *Bosnia v. Serbia* case, *supra* note 1.

82. Later known simply as Bosnia and Herzegovina [hereinafter Bosnia]. See *id.* ¶ 1.

83. The Federal Republic of Yugoslavia was known as "Serbia and Montenegro" from February 4, 2003 onward, and was renamed Serbia on June 3, 2006, after Montenegro's independence. See *id.*

Punishment of the Crime of Genocide.<sup>84</sup> The applicant and the claimant were two of the six states and two autonomous provinces that formed what, until 1992, was known as the Social Federal Republic of Yugoslavia (“SFRY”). In addition to Serbia, SFRY consisted of Croatia, Macedonia, Slovenia, Montenegro, Bosnia and Herzegovina, and the autonomous provinces of Kosovo and Vojvodina.

For various reasons, the SFRY collapsed in 1991.<sup>85</sup> The events that led to the current suit started in October 1991, when, by a “sovereignty” resolution, the Parliament of Bosnia and Herzegovina declared its independence from the SFRY.<sup>86</sup> On October 24, 1991, the Serb Members of the Bosnian Parliament proclaimed a separate Assembly of the Serb Nation/Assembly of the Serb People of Bosnia and Herzegovina.<sup>87</sup> The latter, which had been renamed the Republika Srpska on August 12, 1992, declared independence from Bosnia and Herzegovina.<sup>88</sup> Following a referendum on March 1, 1992, Bosnia and Herzegovina formally declared its own independence from the SFRY.<sup>89</sup> The United States, the European Union, and the U.N. recognized the referendum vote on May 22, 1992.<sup>90</sup>

#### B. *Bosnia’s Case before the International Court of Justice (“ICJ”)*

In its application to the ICJ, Bosnia claimed that the Federal Republic of Yugoslavia (“FRY”):

[D]irectly, or through the use of its surrogates, has violated and is violating the Convention on the Prevention and Punishment of the Crime of Genocide, by destroying in part, and attempting to destroy in whole, national, ethnical or religious groups within the, but not limited to the, territory of the Republic of Bosnia and Herzegovina, including in particular, the Muslim population, by killing members of the group; causing deliberate bodily or mental harm to members of the group; deliberately inflicting on the group conditions of life

84. See generally Genocide Convention, *supra* note 28.

85. For an account of events leading to the collapse of the Social Federal Republic of Yugoslavia (“SFRY”), see generally John Borrell Zagreb, *Yugoslavia - The Old Demons Arise*, TIME, Aug. 6, 1990.

86. See *Bosnia v. Serbia* case, *supra* note 1, ¶¶ 231-34.

87. *Id.* ¶ 233.

88. *Id.*

89. *Id.* ¶ 234.

90. *Id.*

calculated to bring about its physical destruction in whole or in part; imposing measures intended to prevent births within the group.<sup>91</sup>

The massive killings and other crimes referred to in Bosnia's application occurred across the country,<sup>92</sup> but it was the massacre at Srebrenica that proved the most devastating not only to Bosnia and Herzegovina, but also the international community as a whole.<sup>93</sup>

The Srebrenica murders were perpetrated by the remaining elements of the Yugoslav army in Bosnia and Herzegovina, the VRS which, at this time, had been joined by Bosnian Serbs who were serving in the Yugoslav People's Army (*Jugo slovenska narodna armija*),<sup>94</sup> both forces allegedly acting under some form of direction from Belgrade, Serbia's capital.<sup>95</sup> The main issue for determination, therefore, was whether Serbia was responsible for the massacre. To answer this question, the Court had to determine whether the FRY army acted along with the Bosnian Serb armed forces in the massacre, and whether the FRY leadership had a hand in preparing, planning or in any way carrying out the massacres at Srebrenica in particular.

*C. Attributing the Srebrenica Genocide to Serbia:  
The ICJ's Findings*

The ILC Articles of Responsibility of States for Internationally Wrongful Acts ("ASRIWA") provides for three principal bases upon which the Srebrenica genocide could be attributed to Serbia. These are namely: conduct of organs which, according to the internal laws of Serbia, are organs of that State; conduct of entities which, although do not constitute organs of Serbia under its internal law, are nevertheless deemed to act on its behalf and are regarded as *de jure* organs of Serbia; conduct of entities which are neither organs of Serbia under its internal law, nor constitute its *de jure* organs, but which are, by virtue of operating under some control or instruction of Serbia or its *de jure*

91. *Id.* ¶ 65.

92. *Id.* ¶¶ 246-53.

93. *Id.* ¶¶ 278-97.

94. The Yugoslav National Army.

95. *See* *Bosnia v. Serbia* case, *supra* note 1, ¶ 238.

organs, are deemed as de facto organs of Serbia for the purpose of attribution.

### 1. Attributing the Conducts of Serbia's Organs *Simpliciter* and *De Jure*

Article 4(1) of the ASRIWA embodies the customary international law principle that “[t]he conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central government or of a territorial unit of the State.”<sup>96</sup> A State organ is defined as including “any person or entity which has that status in accordance with the internal law of the State.”<sup>97</sup> The first question is whether the FRY or its military, being indisputably an organ of Serbia under its internal law, took part in the Srebrenica massacre.

Although the Court found evidence of direct or indirect participation of Serbia “in military operations in Bosnia and Herzegovina in the years prior to the events at Srebrenica,”<sup>98</sup> it held that “[i]t has however not been shown that there was any such participation in relation to the massacres committed at Srebrenica.”<sup>99</sup> The Court then turned to Bosnia’s second claim that the VRS, including General Mladić, remained under the FRY military administration at the relevant time, and accordingly, “were de jure organs of [the FRY], intended by their superiors to serve in Bosnia and Herzegovina with the VRS.”<sup>100</sup> Serbia conceded that it was indeed responsible for the payment, promotion and pensions of some elements of the VRS. It nevertheless insisted that this did not include General Mladić, the principal character in the Srebrenica massacre.

In its judgment, the Court stated that even if it were to regard General Mladić as a VRS officer under Serbia’s administration, as alleged by Bosnia, it “does not consider that he would,

96. Int’l Law Comm. [ILC], 53rd Sess., *Responsibility of States for Internationally Wrongful Acts*, Ch.II, art. 4(1), U.N. Doc. A/CN.4/L.602/Rev.1 (July 26, 2001) [hereinafter *Responsibility of States*].

97. *Id.* art. 4(2).

98. Bosnia v. Serbia case, *supra* note 1, ¶ 386.

99. *Id.*

100. *Id.* ¶ 387.

for that reason alone, have to be treated as an organ of the FRY for the purposes of the application of the rules of State responsibility."<sup>101</sup> According to the Court, the term "State organ," as used in customary international law and in Article 4 of ASRIWA, applies to "one or other of the individual or collective entities which make up the organization of the State and act on its behalf."<sup>102</sup>

## 2. Attributing the Conduct of Serbia's De Facto Organs

In addition to requesting the attribution of Serbia's organs under its internal law and its de jure organs, Bosnia also claimed that the VRS and the paramilitary entities active in Srebrenica, such as "the Scorpions," "the Tigers" and the "White Eagles" must be deemed, notwithstanding their apparent status, as "de facto organs" of the FRY, in particular at the time in question, so that all of their acts, and specifically the massacres in Srebrenica, must be considered attributable to the FRY, just as if they had been organs of that State under its internal law. The issue of "de facto organs" of State always arises whenever the Court has to determine whether it is possible in principle to attribute to a State the conduct of persons—or groups of persons—who, while they do not have the legal status of State organs, in fact act under such strict control by the State that they must be treated as its organs for purposes of the necessary attribution leading to the State's responsibility for an internationally unlawful act.

The ICJ turned to its jurisprudence in the *Military and Paramilitary Activities in and against Nicaragua*<sup>103</sup> for guidance. In that case, confronted with the question whether the United States could be held responsible for the activities of the Contras against the Nicaraguan government, the Court had stated that it first had to determine:

[W]hether or not the relationship of the contras to the United States Government was so much one of dependence on the one side and control on the other that it would be right to equate the contras, for legal purposes, with an organ of the United States Government, or as acting on behalf of

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101. *Id.* ¶ 388.

102. *Id.*; see JAMES CRAWFORD, *THE INTERNATIONAL LAW COMMISSION'S ARTICLES ON STATE RESPONSIBILITY, INTRODUCTION, TEXT AND COMMENTARIES* 94 (2002).

103. *Military and Paramilitary Activities (Nicar. v. U.S.)*, 1986 I.C.J. 14 (June 27).

that Government.<sup>104</sup>

According to this proposition, the two issues to be ascertained before conducts of de facto organs can be attributed to a State are *viz*: “complete dependence” on, and “control” of, the State over the concerned entities. In *Bosnia v. Serbia*, the Court stated that:

Persons or entities may, for purposes of international responsibility, be equated with State organs even if that status does not follow from internal law, provided that in fact the persons, groups or entities act in “complete dependence” on the State, of which they are ultimately merely the instrument.<sup>105</sup>

Turning first to the issue of dependence, the Court had to determine whether at the time in question, the persons or entities that committed the acts of genocide in Srebrenica had such ties with the FRY that they can be deemed to have been completely dependent on it. The Court held that “[a]t the relevant time . . . neither the Republika Srpska nor the VRS could be regarded as mere instruments through which the FRY was acting, and as lacking any real autonomy.”<sup>106</sup> Although it recognized that “political, military and logistical relations between the federal authorities in Belgrade and the authorities in Pale, between the Yugoslav army and the VRS, had been strong and close in previous years . . . and these ties undoubtedly remained powerful,”<sup>107</sup> the Court did not think this was strong enough to prove the total subjugation of the Republika Srpska by Serbia.

The Court said that the relations between the two were, “at least at the relevant time, not such that the Bosnian Serbs’ political and military organizations should be equated with organs of the FRY.”<sup>108</sup> It drew attention to the differences existing at the time between the Yugoslav and Bosnian Serb authorities over strategic options and held these to be at least:

[E]vidence that the latter had some qualified, but real, margin of independence. Nor, notwithstanding the very important support given the Respondent to the Republika Srpska, without which it could not have “conduct[ed] its crucial or

104. *Id.* at 62.

105. *Bosnia v. Serbia* case, *supra* note 1, ¶ 392.

106. *Id.* ¶ 394.

107. *Id.*

108. *Id.*

most significant military and paramilitary activities” . . . did this signify a total dependence of the Republika Srpska upon the Respondent.<sup>109</sup>

The second element in attributing conduct of de facto organs to States is control. This customary international law requirement is expressed in Article 8 of ASRIWA thus:

The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct.<sup>110</sup>

The purpose of the “control test” is not to decide whether the concerned entity or group of persons constitute, under Serbia’s internal law, its de jure or de facto organ, but whether the entity acts under the instruction of Serbia or its competent representatives. The effect of a positive determination implies that the FRY’s international responsibility would be incurred owing to the conduct of its own organs which gave instructions or exercised control relating to the commission of acts in breach of its international obligations. The main issue for consideration therefore is whether entities, which are incontestably FRY’s organs under its internal law, “originated the genocide by issuing instructions to the perpetrators or exercising direction or control, and whether, as a result, the conduct of the Respondent, having been the cause of the commission of acts in breach of its international obligations, constituted a violation of those obligations.”<sup>111</sup>

The basis of the control test principle is to be found in the ICJ’s *Nicaragua* judgment. Having rejected that the Contras were de facto organs of the United States, the Court stated that the responsibility of the United States could still arise if it were proved that it had itself “directed or enforced the perpetration of the acts contrary to human rights and humanitarian law alleged by the applicant State.”<sup>112</sup> The Court elucidated further, “[f]or this conduct to give rise to legal responsibility of the

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109. *Id.* The Court, using this same method, had determined that the “Scorpions” were not completely dependent on the Federal Republic of Yugoslavia. *See id.* ¶ 395.

110. *Responsibility of States, supra* note 96, art. 8.

111. *Bosnia v. Serbia case, supra* note 1, ¶ 397.

112. *Military and Paramilitary Activities (Nicar. V. U.S.)*, 1986 I.C.J. 14, 64 (June 27).



United States, it would in principle have to be proved that that State had *effective* control of the military or paramilitary operations in the course of which the alleged violations were committed.”<sup>113</sup>

In *Bosnia v. Serbia*, the Court rejected Bosnia’s contention that Serbia was in effective control of the VRS and the “Scorpions” or that Serbia’s organs issued such instructions to those entities as to warrant an attribution of their conducts to Serbia via its organs.

#### D. *Analysis of the ICJ’s Judgment on the Question of Serbia’s Responsibility*

##### 1. The “Effective Control Test” and *Bosnia v. Serbia*: A Round Peg in a Square Hole

In claiming that the VRS and the “Scorpions” were *de facto* organs of Serbia, Bosnia argued that, given the peculiar nature of genocide—that the crime may be composed of a considerable number of specific acts separate, to a greater or lesser extent, in time and space—an assessment of the “effective control” of Serbia on the concerned entities should be in relation to the *whole body* of operation carried out by the direct perpetrators of genocide and not the specific acts. Consequently, Bosnia proposed that the Court should apply the “overall control” test adopted by the ICTY in the *Tadić* case.<sup>114</sup>

The Court rejected Bosnia’s proposition on two grounds. First, it viewed a substitution of the “effective control” with “overall control” as entailing a lowering of the threshold of proof. As far as the Court was concerned:

[T]he particular characteristics of genocide do not justify the Court in departing from the criterion elaborated in . . . (*Nicaragua v. United States of America*). . . . The rules for attributing alleged internationally wrongful conduct to a State do not vary with the nature of the wrongful act in question in the absence of a clearly expressed *lex specialis*.<sup>115</sup>

The Court attempted to justify its position by asserting that “[t]his is the state of customary international law, as reflected in

113. *Id.* at 65 (emphasis added). Note that the word “effective” did not appear in Article 8 of ASRIWA. See *Responsibility of States*, *supra* note 96, art. 8.

114. Prosecutor v. Tadić, Case No. IT-94-1-T, Judgment (May 7, 1997).

115. *Bosnia v. Serbia* case, *supra* note 1, ¶ 401.

the ILC Articles on State Responsibility.”<sup>116</sup> But it is doubtful whether the Court’s approach exactly mirrors the state of customary international law or the provisions of Article 8 of ASRIWA. Certainly customary international law requires a State alleging that certain entities or persons act as de facto organs of another State to prove that the latter exercise some form of control over that entity. What customary international law does not do is cast the particular form of that control in stone and throw the chisel into the outer darkness. Nor do the provisions of Article 8 calibrate the nature of that control. It would have been thought, considering that the ASRIWA was adopted fifteen years after the *Nicaragua* decision, that the ILC would have been more specific had it not intended the *Nicaragua* “effective control test” to be amenable. On the contrary, certain members of the ILC addressed the possibility of there being varying degrees of sufficient control required in specific legal contexts.<sup>117</sup>

The jurisprudence of other international tribunals treats the required control with some degree of flexibility. In *Tadić*, the Appeals Chamber preferred “overall control” to “effective control” as the appropriate criterion for characterizing the armed conflict in Bosnia and Herzegovina as international, and for imputing the acts committed by Bosnian Serbs to the FRY under the law of State responsibility. The Chambers stated that:

The requirement of international law for the attribution to States of acts performed by private individuals is that the State exercise control over the individual. The *degree of control* may, however, *vary according to the factual circumstances of each case*. The Appeals Chamber fails to see why in each and every circumstance international law should require a high threshold for the test of control.<sup>118</sup>

In the *Celebici* case, the Appeals Chambers held that “[t]he ‘overall control’ test could thus be fulfilled *even* if the armed forces acting on behalf of the ‘controlling State’ had autonomous choices of means and tactics although participating in a com-

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116. *Id.*

117. See *Report of the International Law Commission on the work of its fiftieth session*, ¶ 395, U.N. GAOR, 53rd Sess., Supp. (No. 10), U.N. Doc. A/53/10 (Apr. 20–June 12, 1998; July 27–Aug. 14, 1998).

118. *Tadić*, Case No. IT-94-1-A, Judgment, ¶ 117 (second emphasis added).

mon strategy along with the ‘controlling State.’”<sup>119</sup>

Interestingly, in its commentary on Article 8, the ILC did not oppose the position taken by the ICTY Appeals Chamber in *Tadić*. All the Chamber did was to indicate that the ICTY’s judgment was *ultra vires* because its mandate “is directed to issues of individual criminal responsibility, not State responsibility, and the question in that case concerned not the responsibility but the applicable rules of international humanitarian law.”<sup>120</sup> Even then, this observation—which the ICJ endorsed in *Bosnia v. Serbia*—appears misplaced because the ICTY had indeed framed its question in *Tadić* as one of responsibility.<sup>121</sup> In any case, the ILC accepted that “it is a matter for *appreciation in each case* whether particular conduct was or was not carried out under the control of a State, to such an extent the conduct controlled should be attributed to it.”<sup>122</sup>

Decisions of international tribunals in *Yeager v. Islamic Republic of Iran*<sup>123</sup> and *Starret Housing Corp. v. Government of the Islamic Republic of Iran*<sup>124</sup> regard the control test as context-specific. And in *Loizidou v. Turkey*,<sup>125</sup> a case concerning a Greek Cypriot’s claim that Turkish soldiers prevented her from accessing her property in Northern Cyprus, the European Court of Human Rights recognized that effective control could be exercised *directly or indirectly*.<sup>126</sup>

The main problem with the “control” test adopted by the ICJ in *Bosnia v. Serbia* is that it practically made nonsense of the very essence of the attributability principle. There is a major difference between *Bosnia v. Serbia* and the *Nicaragua* case that made the application of the “effective control” test wholly unsuitable to the former. As the ICJ itself noted in the *Nicaragua* case, the United States and the Contras shared the same objectives—namely the overthrowing of the Nicaraguan government. There is no doubt that the Contras could have achieved this objective without committing war crimes or crimes against humanity.

119. Prosecutor v. Delalić (“Celebici Case”), Case No. IT-96-21-A, Judgment, ¶ 47 (Feb. 20, 2001) (emphasis added).

120. CRAWFORD, *supra* note 102, at 112.

121. *Tadić*, Case No. IT-94-1-A, Judgment, ¶ 98.

122. CRAWFORD, *supra* note 102, at 112 (emphasis added).

123. (1987) 17 Iran-U.S.C.T.R. 92, 103.

124. (1983) 4 Iran-U.S.C.T.R. 122, 143.

125. 310 Eur. Ct. H.R. (ser. A) ¶ 62 (1995).

126. *Id.*

Therefore, in order to attribute crimes against humanity in furtherance of this objective to the United States, it was only plausible for the Court, and fair to the United States, that the crimes themselves should be the object of United States control.

The difficulty with an indiscriminate application of the *Nicaragua* control test soon emerged in *Bosnia v. Serbia*, where, unlike *Nicaragua*, the shared objective is the commission of international crimes. As the Vice-President of the Court, Judge Al-Khasawneh noted in his dissent:

When . . . the shared objective is the commission of international crimes, to require both control over the non-State actors and the specific operations in the context of which international crimes were committed is too high a threshold. The inherent danger in such an approach is that it gives States the opportunity to carry out criminal policies through non-state actors or surrogates without incurring direct responsibility therefore.<sup>127</sup>

It is thus clear that the ILC and the ICTY's positions reflect, to a greater extent than the ICJ, the state of customary international law on the modality of control to be proved in respect of an allegation of de facto organs of States.

## 2. The Court's Treatment of Evidence: The Particular Case of the Supreme Defence Council Documents

One of the most intriguing aspects of the Court's judgment in *Bosnia v. Serbia* is undoubtedly the manner in which the Court treated salient provisions of its own Statute, especially with respect to materials that went to the core of the case before it. In an interesting episode, Bosnia drew the Court's attention to the existence of "redacted" sections of documents of the Supreme Defence Council of Serbia and requested the ICJ to ask that Serbia furnish it with unedited versions of the documents.<sup>128</sup> Had the Court obliged Bosnia, Serbia's non-compliance would have entitled the Court to make "[f]ormal note . . . of refusal."<sup>129</sup> But despite its power to do so under Article 49 of its Statute and Article 62(2) of the Rules of the Court, the Court declined Bos-

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127. *Bosnia v. Serbia* case, *supra* note 1, ¶ 39 (dissenting opinion of Vice-President Al-Khasawneh).

128. *See id.* ¶¶ 205-06.

129. *Id.* ¶ 205.

nia's request. The Court gave as its reason the fact that "the Applicant has extensive documentation and other evidence available to it, especially from the readily accessible ICTY records."<sup>130</sup> To compound this befuddlement, the Court stated, in paragraph 206 of its judgment, that "[a]lthough [it] 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."<sup>131</sup>

In his dissenting opinion, Judge Al-Khasawneh highlighted the untowardness of the Court's response to Bosnia's request:

In addition to this completely unbalanced statement that does not meet the requirement of Article 49, no conclusions whatsoever were drawn from noting the Respondent's refusal to divulge the contents of the unedited documents. It would normally be expected that the consequences of the note taken by the Court would be to shift the *onus probandi* or to allow a more liberal recourse to inference as the Court's past practice and considerations of common sense and fairness would all demand.<sup>132</sup>

The Court's handling of Bosnia's request that Serbia be required to disclose such vital materials was, to say the least, utterly strange. Surely, as the Court stated in *Nicaragua*, "it is the litigant seeking to establish a fact who bears the burden of proving it."<sup>133</sup> But this rule somehow assumes that the litigant has access to the evidential materials that bear on the alleged fact. This obviously was not the case in this instance. It is in recognition that a State's total control of its evidential materials may significantly affect another's ability to prove its claim against the former that a State, which has been denied such access, is entitled to draw more liberal inferences from the refusal.

In the *Corfu Channel* case, the Court stated that:

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, the victim of a breach of international law,

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130. *Id.* ¶ 206.

131. *Id.*

132. *Id.* ¶ 35 (dissenting opinion of Vice-President Al-Khasawneh).

133. *Military and Paramilitary Activities (Nicar. V. U.S.)*, 1984 I.C.J. 392, 437 (Nov. 26).

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. This indirect evidence is admitted in all systems of law, and its use is recognized by international decisions. It must be regarded as of special weight when it is based on a series of facts linked together and leading logically to a single conclusion.<sup>134</sup>

The Court in *Bosnia v. Serbia* should have granted Bosnia's request, even if Serbia would refuse, with the consequence that Bosnia be allowed to liberally draw its references while the Court takes a formal note of the refusal. But what happened was that the Court declined Bosnia's request, ignored the principle allowing Bosnia to draw liberal references and, more curiously, reserved for itself, ostensibly at Bosnia's suggestion, the right to "draw its own conclusions."<sup>135</sup> Article 49 of the ICJ Statute provides that "a formal note should be taken of any refusal" and not of the Applicant's suggestions.<sup>136</sup>

Whatever made the ICJ refuse to apply Article 49 procedures to an issue so fundamental to the case before it must remain, at this time, conjectural. Be that as it may, it is one thing for the Court to refuse to exercise its constitutional powers despite a pressing need to do so, but it is quite another thing for it to resort to shifty reasoning to excuse such behavior: it is even more troubling that the Court would so glaringly incorrectly apply the provision of its own Statute on the back of it all.

### 3. Determining the Genocidal Intent of Serbia: Looking for a Needle in a Haystack

One major tension point in the *Bosnia v. Serbia* decision is with regards to how the Court went about precluding the genocidal intent of Serbia. Bosnia had implored the Court to infer the genocidal intent of Serbia from the pattern of acts committed against several groups in several parts of Bosnia and Herzegovina.<sup>137</sup> Bosnia referred to the Decision on Strategic Goals issued on May 12, 1992 by Momèilo Krajišnik, as President of the National Assembly of Republika Srpska, which allegedly showed

134. *Corfu Channel (U.K. v. Alb.)*, 1949 I.C.J. 4, 18 (Apr. 9) (emphasis added).

135. *Bosnia v. Serbia* case, *supra* note 1, ¶ 205.

136. *See id.* ¶ 35 (dissenting opinion of Vice-President Al-Khasawneh).

137. *See id.* ¶¶ 252-56, 262-73, 307-10, 312-18.

that the objectives defined in that document represented the joint view of President Milošević of Serbia and President Karadžić of Republika Srpska.<sup>138</sup>

There is no doubt that, given the grave nature of genocide and the implication of placing the responsibility for it on a State's shoulders, there is a need for the Court to be strict in how it characterizes these acts, especially given disagreement about how to interpret the strategic goal at issue here. What is interesting, however, is the basis upon which the Court refused to infer the specific intent to commit genocide from the consistent pattern of conduct in Bosnia and Herzegovina.

The Court gave two reasons for rejecting Bosnia's contention. The first ground concerns Bosnia's argument that it was a joint strategic goal of Serbia and Republika Srpska to "drive our enemies by force of war from their homes."<sup>139</sup> The Court stated that the applicant's argument "does not come to terms with the fact that an essential motive of much of the Bosnian Serb leadership—to create a larger Serb State, by a war of conquest if necessary—did not necessarily require the destruction of the Bosnian Muslims and other communities, but their expulsion."<sup>140</sup> The Court noted further that:

The 1992 objectives, particularly the first one, were capable of being achieved by the displacement of the population and by territory being acquired, actions which the Respondent accepted . . . as being unlawful since they would be at variance with the inviolability of borders and the territorial integrity of a State which has just been recognized internationally.<sup>141</sup>

Surely the Court was not required to give an assessment of the military strategy of the Bosnian Serbs, but to determine whether the pattern of acts committed by the latter manifested a genocidal intent. The Court's response was thus tantamount to replacing concrete evidence with hypothetical considerations of what *might* have been. If the simple goal of Serbia was to simply establish a State of Serbia, as the Court claimed, how then does one account for all the killings that took place? Would such be a necessary means for accomplishing that goal?

138. *See id.* ¶ 371.

139. *Id.* ¶ 372.

140. *Id.*

141. *Id.*

The Court's second argument for rejecting Bosnia's claim arose from the weight the Court attached to the ICTY's decision regarding a similar claim. The Court stated that the applicant's proposition "is not consistent with the findings of the ICTY relating to genocide or with the actions of the Prosecutor, including decisions not to charge genocide offences in possibly relevant indictments, and to enter into plea agreements."<sup>142</sup> Should the fact that the ICTY did not infer genocidal intention from patterns of acts be fatal to Bosnia's claim? The ICTY only had jurisdiction, as the Court itself recognized, with determining the responsibility of individual perpetrators.<sup>143</sup> The Tribunal was therefore only concerned with acts emanating from specific circumstances and not the general pattern of acts as would undoubtedly be the case were it to be primarily concerned with determining State responsibility. Nor is the ICTY's allowing the withdrawal of some of the genocide cases pending before it of any exceptional relevance. As Judge Al-Khasawneh argues, "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."<sup>144</sup>

What the Court should have done—but which it did not do—was to consider the trend of international tribunals' jurisprudence on inferring genocidal intent from circumstantial evidence. In *Krstić*, the ICTY Appeals Chamber held that "when direct evidence of genocidal intent is absent, the intent may still be inferred from the factual circumstances of the crime."<sup>145</sup> The ICTR Appeals Chamber affirmed what the Trial Chamber stated in *Prosecutor v. Rutaganda* that:

It is possible to deduce the genocidal intent inherent in a particular act charged from the general context of the perpetration of other culpable acts systematically directed against the same group, whether these acts were committed by the same offender or by others. Other factors, such as the scale of atrocities committed, their general nature, in a region or a country, or furthermore, the fact of deliberately and systematically targeting victims on account of their membership of a

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142. *Id.* ¶ 374.

143. *See id.* ¶ 403.

144. *See id.* ¶ 42 (dissenting opinion of Vice-President Al-Khasawneh).

145. *Prosecutor v. Krstić*, Case No. IT-98-33-A, Judgment, ¶ 34 (Apr. 19, 2004).



particular group, while excluding the members of other groups, can enable the Chamber to infer the genocidal intent of a particular act.<sup>146</sup>

Although the Chamber was not prepared to accept mere anti-Tutsi utterances or simply being affiliated to an extremist anti-Tutsi group as *sine qua non* for establishing *dolus specialis*, it indicated that such facts might, nonetheless, facilitate proof of specific intent.<sup>147</sup> The Chamber also held in *Prosecutor v. Musema* that “in practice, intent can be, on a case-by-case basis, inferred from the material evidence submitted to the Chamber, including the evidence which demonstrates a consistent pattern of conduct by the Accused.”<sup>148</sup> Finally in *Kayishema* the Chamber stated that:

The perpetrator’s actions, including circumstantial evidence, however may provide sufficient evidence of intent . . . . The Chamber finds that the intent can be inferred from words or deeds and may be demonstrated by a pattern of purposeful action. In particular, the Chamber considers evidence such as the physical targeting of the group or their property; the use of derogatory language toward members of the targeted group; the weapons employed and the extent of bodily injury; the methodical way of planning, the systematic manner of killing. Furthermore, the number of victims from the group is also important.<sup>149</sup>

There is no shortage of cases in which international tribunals have inferred genocidal intent from facts and circumstances of the case in the absence of a paper trail directly linking States or individuals with international crimes. True, the ICJ is not bound by decisions of other tribunals—or of its own indeed—but, as Judge Rosalyn Higgins recently pointed out, there is the danger that international courts and tribunals may be speaking babbles where they do not respect each other’s decision.<sup>150</sup> This is par-

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146. *Prosecutor v. Rutaganda*, Case No. ICTR-96-3-T, Judgment, ¶ 398 (Dec. 6, 1999).

147. *See Prosecutor v. Rutaganda*, Case No. ICTR-96-3-A, Judgment, ¶ 525 (May 26, 2003).

148. *Prosecutor v. Musema*, Case No. ICTR-96-13-T, Judgment, ¶ 167 (Jan. 27, 2000).

149. *Prosecutor v. Kayishema & Ruzindana*, Case No. ICTR-95-1-T, Judgment, ¶ 93 (May 21, 1999).

150. *See Rosalyn Higgins, A Babel of Judicial Voices? Ruminations from the Bench*, 55 INT’L & COMP. L.Q. 791 (2006).

ticularly so where considerations of plausibility, coherence and consistency dictate such steps.

#### 4. The Court's Treatment of Serbia's "Evidence"

The last issue to consider in this Section is the manner in which the ICJ treated Serbia's statements and the impact it had on the Court's judgment. Although the Court's decision is ridden with instances of the Court's showing a disconcerting readiness to accept Serbia's claims on face value, this Section deals with one particular example that highlights the incongruous nature of this approach.

In its claim that Serbia violated Article III(a) of the Genocide Convention, Bosnia claimed that Serbia had formally accepted responsibility for the crime of genocide that Bosnia alleged against it.<sup>151</sup> In justification, Bosnia referred to an official declaration made by the Council of Ministers of Serbia on June 15, 2005, following the showing on a Belgrade television channel on June 2, 2005, of a video-recording of the murder by a paramilitary unit of six Bosnian Muslim prisoners.<sup>152</sup>

The declaration generally condemned the killing in Srebrenica, but in a crucial part, it stated that the perpetrators and the organizers did not represent Serbia or Montenegro, "but an undemocratic regime of terror and death, against whom the majority of citizens of Serbia and Montenegro put up the strongest resistance."<sup>153</sup> Directly in issue here is the implication of this sentence on Serbia's responsibility. The Ministers acknowledged the crime but placed the responsibility for it, not on the new government of Serbia, but on the fallen administration under Milošević.

In its response to Bosnia's claim that the statement "be regarded as a form of admission and as having decisive probative force regarding the attributability to the Yugoslav State of the Srebrenica massacre,"<sup>154</sup> the Court said that this declaration was of a political nature and was "not intended as an admission, which would have had a legal effect in complete contradiction to the submissions made by the Respondent before this Court, both

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151. See *Bosnia v. Serbia case*, *supra* note 1, ¶ 377.

152. See *id.*

153. *Id.*

154. *Id.*

at the time of the declaration and subsequently.”<sup>155</sup>

Of course the Court is entitled to attach whatever weight it deems fit to evidential materials pleaded before it. The question though is whether the Court should, with such ease, dismiss what appears to be a clear statement of admission by the top echelon of the Serbian government? In the *Nuclear Tests* case,<sup>156</sup> the Court stated that unilateral acts, in particular by highly placed government officials, can have binding legal consequences. There the Court also stated that intentions must be considered in the context of which statements were made and not *in vacuo*.<sup>157</sup> In *Bosnia v. Serbia*, the Court neither accepted that the Ministers’ statement had any consequential legal effect on Serbia’s responsibility nor showed any serious consideration of the particular context in which the statement was made.

### III. ATTRIBUTING RESPONSIBILITY TO SUDAN

When considering the ICID’s decision on Sudan’s responsibility for genocide, the first question to ask is why did the commission decide to determine Sudan’s responsibility for a crime it did not find to have been committed in the first place?

The answer to this question is not quite obvious from the ICID report or from its mandate which had clearly intended that the duty to ascertain those who are responsible for the crime only arose *after*, not regardless of whether, the crime was found to have been committed.

It may be that the ICID’s conviction that “[o]ne should not rule out the possibility that in some instances *single individuals*, including Government officials, may entertain a genocidal intent,”<sup>158</sup> compelled it to categorically, though legally inexpediently, exempt the Government of Sudan collectively from responsibility. But this then raises another curiosity: if the Commission contemplated, as it clearly did, the possibility of a subsequent discovery of genocidal intent (implying a subsequent finding that genocide was committed in Darfur), and individual

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155. *Id.* ¶ 378.

156. *Nuclear Tests (N.Z. v. Fr.)*, 1974 I.C.J. 457, 473 (Dec. 2).

157. *Id.* at 474; *see also* *Bosnia v. Serbia* case, *supra* note 1, ¶ 57 (dissenting opinion of Vice-President Al-Khasawneh).

158. *ICID Report*, *supra* note 3, ¶ 520 (emphasis in original).

government members might yet be implicated, why the hasty exonerated of the government as a whole?

Whatever may be the reasons for the ICID's somewhat tawdry decision to ascertain Sudan's responsibility for a crime it did not find to have been committed or pronounce on the innocence of the State despite being aware of the possibility of future indictment of some of its officials, that does not preclude an examination of how precisely the Commission went about the task.

#### A. *Attributing the Darfur Crime to Sudan under State Responsibility Law*

The question of attributing genocide to Sudan arises, as with the ICJ, under Articles 4 and 8 of ASRIWA.<sup>159</sup> The issue here is to determine whether the conduct of the Sudanese regular army, widely alleged to have participated in many of the crimes against the African tribes in Darfur, is attributable to the State. Additionally, it is important to inquire whether the Darfur non-State actors, such as the dominant Arab militias, the Janjaweed and the Popular Defence Forces ("PDF"), act as de facto or de jure organs of Sudan for the purpose of attribution.

##### b. The Link Between the Sudanese Government, the Janjaweed and the Popular Defence Forces ("PDF")

On January 28, 2004, the Sudanese Minister of Defense formally clarified the relationship between the different entities active in Darfur and the Government of the Sudan.<sup>160</sup> The Minister differentiated between "rebels," the "Janjaweed," the "Popular Defence Forces," the "tribal militias," such as the Fur tribe, and the "Nahayein" of the Zaghawa.<sup>161</sup> He stated that the "PDF are volunteers who *aid the armed forces* but the Janjaweed are 'gangs of armed bandits' with which the government has no relations whatsoever."<sup>162</sup>

In a stark contrast to his Minister's distancing of the Janjaweed from the Government of the Sudan, President Bashir, speaking to the people of Kulbus—a town rebels had failed to overrun in December 2003, stated "[o]ur priority from now on is

159. See CRAWFORD, *supra* note 102 at 94-113.

160. See ICID Report, *supra* note 3, ¶ 118.

161. See *id.*

162. *Id.*

to eliminate the rebellion, and any outlaw is our target. . . . We will use the army, the police, the *mujahedeen*, the *horsemen* to get rid of the rebellion.”<sup>163</sup> In an even more revealing episode, the Minister of Justice told an ad hoc delegation of the Committee on Development and Cooperation of the European Parliament during its visit in February 2004:

[T]he Government made a sort of relationship with the *Janjaweed*. Now the *Janjaweed* abuse it. I am sure that the Government is regretting very much any sort of commitments between them and the Government. We now treat them as outlaws.”<sup>164</sup>

There is no contradiction in the accounts of the various Sudanese government officials on the nature of the relationship between the Government of the Sudan and the *Janjaweed*, the only militia the Government has always denied involvement with. The President’s speech, acknowledging that the *horsemen* (*Janjaweed*) were an instrument of government, was given in December 2003, just after the rebels’ failed attempt to overrun Kulbus.<sup>165</sup> The referred breakdown in the Government-*Janjaweed* relationship must thus have taken place shortly after that episode since the Minister for Defense’s statement distancing the Government from the *Janjaweed* was given on January 28, 2004, just about a month before the Minister of Justice formally announced that although there was a relationship between them *before*, the government *now* treated the *Janjaweed* as outlaws.<sup>166</sup> By April 24th, the Minister for Foreign Affairs added “[t]he government may have turned a blind eye toward the militias . . . [b]ecause those militias are targeting the rebellion.”<sup>167</sup>

Apart from the copious admissions that the *Janjaweed* acted as an instrument of the Government of the Sudan, the ICID

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163. *Id.* ¶ 119. The horsemen are the *Janjaweed*. The term *Janjaweed* derived from “*Jinn*,” meaning evil spirit and “*Jawad*,” connoting mounted rider (used for both horseman and camel-riders). Literally, the *Janjaweed* are “evil spirits on horsebacks” “who looted and ransacked settled villages in what was originally of tribal disputes between nomadic Arabs and settled African farmers over land and grazing rights.” Ayesha Kajee, *Darfur Stereotyping Fraught with Danger*, AFRICA REP. NO. 81, (OCT. 31, 2006), available at <http://www.saiia.org.za/modules.php?op=modload&name=News&file=article&sid=997>.

164. *ICID Report*, *supra* note 3, ¶ 119.

165. *See id.*

166. *See id.* ¶¶ 118-20.

167. *Id.* ¶ 119.

found many proofs of that relationship in the several joint actions taken by the Sudan's army and the militias.<sup>168</sup> In its consideration of the question of legal responsibility for acts committed by the Janjaweed, the ICID stated that:

The "Janjaweed" to whom most victims refer in the current conflict are Arab militias that raid the villages of those victims. . . . These militias frequently operate with, or are supported by, the Government, as evidenced both by consistent witness testimonies describing Government forces' support during the attacks, the clear patterns in attacks conducted across Darfur . . . and by the material gathered by the Commission concerning the recruitment, arming and training of militias by the Government.<sup>169</sup>

The ICID legally distinguished the involvement of the Government in the activities of the Janjaweed, on the one hand, and with the PDF, on the other.<sup>170</sup> The Commission regard the Janjaweed as a *de facto* organ of the Sudan. It stated that:

When militias attack jointly with the armed forces, it can be held that they act under the effective control of the Government, consistently with the notion of control set out in 1999 in *Tadić (Appeal)*. . . . Thus they are acting as *de facto* State officials of the Government of Sudan.<sup>171</sup>

In contradistinction from the Janjaweed, the Commission viewed the PDF as a *de jure* organ of the Sudan because that entity has "a legislative basis under Sudanese law."<sup>172</sup> But where "militias are incorporated in the PDF and wear uniforms, they acquire, from the viewpoint of international law the status of organs of the Sudan."<sup>173</sup>

Upon the application of the "effective control test," errone-

168. See The Secretary-General, *Report of the Secretary-General on the Sudan*, U.N. Doc. S/2005/57 (Jan. 31, 2005); *Report of the Security Council Mission to the Sudan and Chad, 4-10 June 2006*, U.N. Doc. S/2006/433 (June 22, 2006); see also BROOKINGS INST., *DARFUR, WAR CRIMES, THE INTERNATIONAL CRIMINAL COURT, AND THE QUEST FOR JUSTICE* (2005). For a history of Darfur and its conflicts, see Yousef Takana, *Effects of Tribal Strife in Darfur*, in *PERSPECTIVES ON TRIBAL CONFLICTS IN SUDAN* 195 (Adam Al-Zein Mohamed & Al-Tayeb Ibrahim Weddai eds., Universities of Khartoum: Institute of Afro-Asian Studies, 1998); INTERNATIONAL CRISIS GROUP ("ICG"), *DARFUR RISING: SUDAN'S NEW CRISIS*, 16 (ICG Africa Report No. 76, 2004).

169. *ICID Report*, *supra* note 3, ¶ 121.

170. *See id.* ¶ 124.

171. *Id.* ¶ 123.

172. *Id.* ¶ 108.

173. *Id.* ¶ 124.

ously referred to by the Commission to have been laid down in *Tadić* (this case applied the “overall control test”), the Commission found that “the large majority of attacks on villages conducted by the militia have been undertaken with the acquiescence of State officials.”<sup>174</sup> It also established various joint killings undertaken by the militias and the Government forces,<sup>175</sup> and instances in which the PDF, being a de jure organ of the State, actually armed, instructed and controlled the militias. In particular, the Commission recorded an instance of such mass killings, jointly undertaken by the government forces and the Janjaweed, in paragraph 272 of its report, the attack on Surra.<sup>176</sup> It chronicled “very credible, detailed and consistent account[s] of the attack, in which more than 250 persons were killed, including women and a large number of children. . . . The *Janjaweed* and the Government forces attacked jointly in the early hours of the morning.”<sup>177</sup>

Having established that there existed a relationship between the Government of the Sudan and the militias, and that the PDF was a de jure organ of Sudan under its internal law, and that these groups’ activities, upon proof, were attributable to Sudan, the next question for the Commission was whether, in light of all these, the Government was responsible for genocide.

As already noted in Part I of this Article, the ICID did not find genocide to have occurred in Darfur, thus, the question of attributability should never have arisen at all. But then, in considering whether genocide occurred, the Commission took the extraordinary step of pronouncing formally on the question of Sudan’s responsibility,<sup>178</sup> probably under the impression that it could not determine the question of genocide without dealing with Sudan’s responsibility. If that was the case, the fact that the ICJ managed to separate the two issues nullifies that assumption.

In any case, the Commission’s rationale for excluding the Government of the Sudan collectively from the responsibility are the same as those it relied on in its ruling that genocide did not occur in Darfur, save two specific rationales considered below.

The ICID stated that the lack of genocidal intent by the

174. *Id.* ¶ 125.

175. *See id.* ¶¶ 155, 240, 242-43, 246.

176. *See id.* ¶ 272.

177. *Id.*

178. *Id.* ¶¶ 518-22.

State was manifested since villages with a mixed composition (African and Arab tribes) were not attacked.<sup>179</sup> Examples of such villages include Abaata, in the north-east of Zelingi, and Western Darfur, consisting of Zaghawa and members of Arab tribes.<sup>180</sup> Additionally, in paragraph 517, the Commission referred to the evidence given by one survivor of an attack on the Jabir village who claimed that he did not resist when attackers took 200 camels from him, and that although they beat him up, they did not shoot him dead.<sup>181</sup> From this account, the Commission concluded that “[c]learly, in this instance the special intent to kill a member of a group to *destroy the group as such* was lacking, the murder being only motivated by the desire to appropriate cattle belonging to the inhabitants of the village[!]”<sup>182</sup>

The two instances clearly show the illogicality in some of the ICID’s rationales for exculpating Sudan from responsibility. Surely, common sense should have dictated to the Commission that if the intent of the attackers was to destroy blacks, surely the assailants would not attack villages comprising blacks and Arabs. Not attacking those mixed villages should actually have been one of the strongest indicators of a genocidal intent. And to simply base a conclusion of this magnitude on the simple evidence of one man—who might have been left for dead after severe beating or simply lucky to escape with his life—is not only farcical but outrageously ludicrous.

### CONCLUSION

In *Bosnia v. Serbia* and the Darfur Inquiry, both the ICJ and the ICID had an opportunity—and a great one for that matter—to, for the first time, determine whether States have committed genocide. Both returned a negative verdict. The tragedy of these decisions does not lie in their finding negatively for the question: there can be, and there must be no assumptions about outcomes of judicial trial or inquiries; the problem is with the rather confounding manners in which both bodies addressed the issue.

For the ICJ, the Court very nearly subrogated itself to Serbia

179. *Id.* ¶ 516.

180. *Id.*

181. *Id.* ¶ 517.

182. *Id.* (emphasis in original).



on many occasions, substituting its own hypothesis for the credible evidence before it. When not doing just that, the Court was preoccupied with rather strangely applying the provisions of its Statute (such as Articles 49 and 62 of its Rules).

It is beyond doubt that grave crimes were committed in Darfur, and if no genocide was indeed committed in that crisis, such a conclusion cannot be safely drawn from the rather dubious logic of the ICID. In sympathy, the ICID had considerable constraints limiting its ability, scope and ascertainment of evidence. But then, in dealing with the evidence it did get, it chose to focus on the most ridiculous examples to either rebut the existence of genocide or exempt Sudan from responsibility. Despite finding numerous "indiscriminate killings" across Darfur, the Commission chose a single incident of Wadi Saleh where the killing had been selective to rebut genocidal intent to destroy in part or in whole. If the Commission believed there might yet be a case of genocide against some individual State officials in the future, why the blanket exculpation of the Government of the Sudan from responsibility? The Commission understood clearly that motive had no relevance to genocide. Yet it accepted that the destruction of villages and vile attacks were purely for counterinsurgency purposes and to steal cattle from the owners.

Whether there are extraneous pressures on the ICJ and the ICID to return the kind of verdict they returned on the question of the responsibility of Serbia and Sudan, as some have claimed, is not a question that can easily be answered,<sup>183</sup> at least formally. But no one should be naïve to assume that genocide falls into the category of crimes the responsibility for which courts or inquiry commissions can have free rein to determine. As Professor Fein observed in 1979:

The perpetrators (of genocide) played a role in the world system as clients or allies of a major power . . . the class of victims had earlier been excluded from the universe of obligation of the perpetrator. . . . In most cases . . . the assault against the victim must be classified as retributive genocide . . . viewed by perpetrators as reprisals against the authority of the dominant class. . . . In no case did another State which had the potential leverage to threaten or impose sanctions use its

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183. See Udombana, *supra* note 47.

power against a client or ally to thwart the murders.<sup>184</sup>

Whether the decisions in *Bosnia v. Serbia* and the Darfur Inquiry regarding State responsibility were thus a necessitous but unholy marriage of the law and real politik is a question only time can answer.

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184. See WARREN FREEDMAN, GENOCIDE: A PEOPLE'S WILL TO LIVE 76 (1992).