



Human rights

- ❑ States of emergency were declared in both Guinea and Zimbabwe, with serious consequences for human rights in both cases.
- ❑ NGOs called for Guantanamo to be closed and the European Parliament approved a report denouncing the CIA's abuses in Europe in the fight against terrorism.
- ❑ The International Criminal Court identified the first two people to be accused of crimes committed in Darfur.
- ❑ The International Court of Justice acquitted the state of Serbia of genocide in Bosnia.

This chapter contains an analysis of the situation relating to human rights and basic freedoms, based on the monitoring of violations reported by non-governmental human rights organisations and inter-governmental organisations. The first section deals with human rights violations, the second with transitional justice, and the third includes an analysis of one of the most important issues of recent times, the recent judgement by the International Court of Justice in the case of *Bosnia v. Serbia* and the application of the Convention on Genocide.

7.1. Human rights violations

The following section contains information on the areas in which the efforts of NGOs have been focused and the work carried out by inter-governmental organisations around the world. Issues are analysed in order of the importance of the different events reported during the last three months.

a) States of emergency and abuses of power

During the last quarter, several states continued to resort to the imposition of a state of emergency as a response to political dissent or social protest. Particularly notable among the countries affected in this way were Guinea and Zimbabwe, where the respective governments imposed states of emergency in response to the strikes seen in both places, though in the case of Zimbabwe the effect was one of a *de facto* and undeclared state of siege. In **Guinea**, the violent response by the police and the armed forces against demonstrators left more than 120 people dead, with many arrests among union leaders, events that were heavily criticised by the UNHCHR and several NGOs, who called for an independent investigation of these crimes in order to prevent them from being treated with impunity, a call which the Guinean government ignored. In **Zimbabwe**, the *de facto* state of siege allowed the security forces to violate the freedom of movement and assembly of the inhabitants of Harare, and the subsequent response to the general strike led to the detention of union members and left more than 5,000 people injured. MONUC condemned the use of violence following the disturbances reported in **DR Congo**, which left 134 people dead as a result of the excessive use of force by the security forces during the various demonstrations held in the western province of Bas Congo.

Violent consequences were also reported during the last quarter as a result of action taken by the security forces in various countries. The World Organisation Against Torture (OMCT) reported that under the state of emergency in **Bangladesh**, 19 people (including a child) were killed by the security forces and the army, and that the country's armed forces had been given permission to enter any place and detain people on suspicion without any kind of detention order. For its part, the UNHCHR express deep concern at the violence reported in the Terai region in **Nepal**, which left more than 20 people dead after UN personnel on the ground had observed the excessive use of force by security agents. After making a visit to the **Philippines**, P. Alston, the UN Special Rapporteur on extra-judicial, summary and arbitrary executions remarked that a significant number of the extra-judicial executions committed in the Philippines could clearly be attributed to the armed forces.



Exceptional measures and human rights

While resorting to exceptional states of order has generally been the recourse of the more authoritarian governments around the world, we have lately seen an abuse of the adoption of exceptional measures by many states under the guise of the fight to combat terrorism.

The International Covenant on Civil and Political Rights authorises states unilaterally and temporarily to suspend some of the obligations by which they are bound under the Covenant, i.e. to decree states of exception. However, two fundamental conditions must be met: the situation must be exceptional and one that places the life of the population at risk, and the state must officially declare the state of exception in question. Although international law recognises the legality of a state of emergency, it imposes certain strict restrictions that require that any measures adopted as part of such an action are exceptional and temporary and must never override the right to life or the right not to be subject to torture or mistreatment.¹

States of emergency involve the creation by the state of an exceptional legal framework which generally means that the power of the executive, the security forces and the armed forces is increased, while judicial power, and with it control over the actions of government in respect of the law, is seriously weakened.

This increase in the number of states of exception represents a new interpretation of criminal law as a state instrument that can be used to respond to political or social demands that are beginning to assume particular importance in a given country. It also represents an attempt by certain states to create exceptional legislation that will justify actions which under the ordinary regulatory framework of a state of law would constitute serious human rights violations.

b) Independence of the judiciary and access to justice.

In Europe, the Council of Ministers of the European Council turned down the request for a new trial by Kurdish leader Ocalan, finding that his trial in Turkey had respected international standards, thus contradicting the judgement of the European Court of Human Rights, which had ruled in 2005 that his trial had not offered the necessary guarantees for the accused. This decision was criticised by M. Karayilan, one of the leaders of the PKK, who said that it was prejudicial to the democratic Kurdish movement. At the same time, the Council called on Montenegro to fight corruption and deal with the lack of independence in its judicial system.

In Africa, various NGOs made calls in favour of the independence of the judiciary as a guarantee of the required protection. The Observatory for the Protection of Human Rights Defenders complained about irregularities in the legal proceedings brought in **Ethiopia** against 131 people who had been detained as a result of the protests against the outcome of the elections and who had been accused of conspiracy and uprising². In **Uganda**, the International Commission of Jurists called on the authorities to respect the independence of the judiciary and stop the intimidation to which judges and lawyers were being subjected. The ICJ also complained about the failure by the police to implement the judgements handed down by the Supreme Court and demanded the release of the people whom the courts had ordered be freed.

The UN Special Rapporteur on the independence of judges and lawyers, L. Despouy, paid a visit to Asia and presented his preliminary conclusions on the **Maldives**. He stressed his concerns over the powers that the Constitution afforded the country's president in controlling jurisprudence, as well as expressing disquiet over a number of other issues, such as the fact that the majority of people detained in the country are tried without any assistance from legal counsel.

In Latin America, particular mention should be made of the report published by the UNHCHR's Office, which indicated that indigenous people in **Mexico** have problems in gaining access to justice

¹ General notes relating to Article 4 of the International Pact on Civil and Political Rights, relating to states of emergency.

² For more information, see http://www.omct.org/pdf/Observatory/2006/report/ethiopia_obs463-2_1106_eng.pdf?PHPSESSID=f959eb42944a2aae4ce7545dc2138c1f



and called for the rules and customs of these communities to be taken into account when justice is applied.

c) The fight against terrorism and human rights

Action by NGOs in this area started at the beginning of the year with calls for the closure of the **Guantanamo** detention centre and an end to five years of torture and detention. The NGOs involved recalled that in spite of repeated calls from the United Nations, the EU and other organisations demanding that the centre be closed, more than 400 people are still being held there indefinitely. Human Rights Watch classified the treatment received by the people detained by the CIA as “enforced disappearance”, calling on the US government to provide information on all the disappeared detainees who had at some point been in CIA custody. The NGO confirmed that these people may have been transferred to prisons in other countries, where they may continue to be under the effective control of the CIA, or that they may have been returned to their places of origin, including Algeria, Egypt, Libya and Syria, where terrorism suspects are routinely tortured³. During the course of the last three months, the USA accepted the solution offered by the Special Rapporteur on the Protection of Human Rights in the fight against terrorism, so that the treatment of detainees could be monitored.

During the last quarter, the **European Parliament approved the report denouncing CIA abuses in Europe in the fight against terrorism**. It called for an independent investigation and said that it did not believe that certain European governments did not know about the flights carrying illegal detainees that had stopped over at some of their airports. The report, which included a number of amendments aimed at easing criticism of the actions of the governments of Germany, Romania and Poland, pointed out that several European governments were violating one of the basic principles for the protection of human rights, the principle of *non-refoulement*, which prevents anyone from being sent to a country in which they could suffer serious human rights violations. Some NGOs indicated this as a first step in Europe becoming accountable for its complicity in these serious acts.

In **Russia**, the human rights organisation *Memorial* and the Moscow-based think tank *Demos* denounced the serious human rights violations caused by the Russian authorities’ anti-terrorist operations in Chechnya and the rest of the northern Caucasus. Russian and international NGOs, including Amnesty International, Human Rights Watch and the Moscow Helsinki Group, boycotted a human rights conference organised by the Chechen government in Grozny, a stance that was criticised by the authorities who described it as unconstructive and politically biased. The Council of Europe’s Human Rights Commissioner, T. Hammarberg, expressed concern over the human rights situation in the Republic and criticised the inability of the Chechen authorities to determine the whereabouts of thousands of disappeared people, along with the systematic use of torture as a way of obtaining false confessions. The Commissioner proposed the creation of a truth commission to determine responsibility for these abuses.

In Asia, the government of the **Philippines** approved a Human Security Law⁴ which is due to come into force in June. Its excessively vague definition of terrorism (as is frequently the case in this kind of legislation) could lead to abuses by the authorities. Among the provisions that most endanger respect for human rights are the discretionary powers granted to the police, who will be able to detain people without a warrant, send people to other countries in the event that their evidence is required as part of a terrorist investigation and commit people to 40 years’ imprisonment without any form of parole.

In **Latin America**, particular mention should be made of the OAS’s adoption of the Declaration of Panama on Protection Against Terrorism and the judgement handed down by the Inter-American Court of Human Rights ordering **Peru** to pay 20 million dollars to the families of 41 members of the

³ For more information, go to <http://hrw.org/reports/2007/us0207/>

⁴ For more information, go to <http://philippines.ahrchk.net/pdf/HumanSecurityActof2007.pdf>



Sendero Luminoso (Shining Path) organisation accused of terrorism. The Court found the country responsible for the extra-judicial executions carried out during a rebellion organised by the government itself in 1992. The Peruvian government heavily criticised the judgement and, in a public attempt to evade responsibility for these serious acts, recalled that the victims were members of a terrorist group. It even threatened not to recognise the court's jurisdiction in the future.

d) Freedom of expression and opinion

During the last three months, NGOs operating in Central Asia and Europe called on the authorities in **Turkmenistan** to put an end to their persecution of political opponents and free all political prisoners. The NGOs also suggested that the deteriorating situation as regards the freedom of expression in **Azerbaijan**, along with the risk of detention and the reprisals being carried out against journalists who are critical of the government or who report cases of corruption, could be an indication of the government's fear that the country is about to undergo the kind of political change seen recently in Georgia and Ukraine.

Some NGOs, including Amnesty International, Human Rights Watch and the International Helsinki Federation for Human Rights (IHF), called on the EU not to lift its sanctions against **Uzbekistan**, claiming that the internal state of repression is deteriorating as a result of the amendments to legislation governing the communications media, which increases official control over the sector. This request takes on particular importance if one bears in mind that it is the first time that the EU has partially suspended a partnership and cooperation agreement due to failure to comply with human rights⁵. In **Turkey**, civilian groups and the Special Rapporteur on the freedom of opinion and expression expressed their serious concerns over the killing of H. Dink, a respected journalist and intellectual, known for his critical pieces about a specific period in the country's history.

In Africa, Amnesty International denounced the legal problems faced by B. Sabbar, Secretary General of the Saharawi Association of Victims of Grave Human Rights Violations Committed by the State of Morocco and another member of the same association, due to their reports of human rights violations in the **Western Sahara** and their public support for the right to free determination. In **Eritrea**, some of the journalists detained during the wave of arrests that began at the beginning of November were released, though NGOs have warned that dozens of journalists remain in secret prisons enduring torture and inhumane conditions, a circumstance that caused the deaths of several of them last year. These organisations also complained that the journalists who have been freed are still subject to police surveillance in an attempt to stop them fleeing the country.

In Asia, dozens of journalists demonstrated in **Sri Lanka** to protest against the kidnapping and murder of people working in the country's media. They claim that Sri Lanka is one of the most dangerous countries in the world for journalists.

e) Economic, social and cultural rights

On the African continent, the dangerous working conditions in the medical sector in Zimbabwe led to an exodus of doctors and a four-week strike which in turn caused a crisis in terms of access to healthcare. It should be pointed out in this regard that decent working conditions for employees in sectors such as education, health, etc. represent a fundamental component in a state's obligation to comply with the social rights of its people, and this is therefore an area which should be paid particular attention by individual governments.⁶

A new legislative development that should be noted is the repeal by **South Africa** of the law prohibiting refugees and asylum-seekers from taking jobs in the country, a move that finally brings an end to the discrimination such people have suffered until now.

⁵ K. Roth, *Light and Shade in the Defence of Human Rights in 2005*, in Papers on International Issues. CIP, 2006

⁶ General remarks of the United Nations Committee for Economic, Social and Cultural Rights on the right to health and the right to education.



In Asia, Amnesty International and Human Rights Watch highlighted the conditions suffered by around 2.6 million domestic workers in **Indonesia**, who are forced to put up with very poor payment conditions, working days of up to 22 hours, sexual violence and enforced seclusion, while the country's government does nothing to stop this. These two organisations also denounced the discrimination faced by internal migrant workers in **China** in relation to the right to housing, health and education, as well as the serious working conditions they have to endure. As regards the most serious problem in the area of employment, forced labour, mention should be made of the agreement adopted by the ILO and the government of **Myanmar**, under which victims who have been subjected to this kind of work will be entitled to seek compensation. Finally, FIAN published a report in which it set out the violations of the right to food and the right to water that peasants were suffering in **India**.

In **Europe**, mention should be made this quarter of the publication of a report by the EU's European Monitoring Centre for Racism and Xenophobia, which denounced the discrimination that many European Muslims are experiencing in the areas of employment, education and housing. The report includes the important conclusion that the sense of exclusion is greater among the third generation than among the first.⁷

Economic, social and cultural rights, second degree rights: the case of Iraq

UNDP and the Iraqi government published a joint report in which they revealed some alarming figures. One third of all Iraqis are living in poverty and around 5% are living in conditions of extreme poverty⁸. The report stresses that living conditions for Iraqis have deteriorated considerably in comparison with the 1970s and 1980s, particularly as regards their social rights (fresh water, electricity, health services, employment, housing and access to quality education), and it emphasises the fact that the erosion of living conditions is contributing to the civil war in the country. The report also identifies differences in standards of living depending on region, with poverty greater in the south, followed by the centre and then the north of the country. It also reveals that poverty is three times worse in rural areas than in the cities.

This report demonstrates the consequences that the outbreak of a conflict has for social rights and the breeding ground that this creates for an upsurge in violence. Violations of social rights should be treated as violations of international law and a breach of a state's obligations. Treating civil and political rights as the only human rights violated in a conflict, and thus relegating violations of social rights to the level of one of the inevitable consequences of violent conflict implies a failure to respect one of the fundamental characteristics of human rights, i.e. that they are indivisible and inter-related and cannot be organised into any hierarchy. Referring to access to social services as a right assists strategies aimed at obtaining social justice and provides the opportunity to require states to comply with the legal obligations that they have contracted voluntarily at an international level. What is more important, it represents an instrument by which victims can enforce these rights.

7.2. Transitional justice

The concept of transitional justice refers to the inter-related processes of trial and accountability, the disclosure of the truth, compensation and institutional reform, all of which arise after a large-scale conflict and which contribute to the re-establishment of social relationships in the long term. The

⁷ The document entitled "*Muslims in the European Union: Discrimination and Islamophobia*", published at the end of December, includes information on incidents of xenophobia and the general situation facing Muslims based on research carried out in all EU member states between December 2005 and January 2006.

http://eumc.europa.eu/eumc/index.php?fuseaction=content.dsp_cat_content&catid=1

⁸ For more information, see <http://www.iq.undp.org/ubn/ubn.htm>



following section lists the most significant events that have occurred in this area over the last three months.

Current status of areas of transitional justice	
Africa	
Burundi	The government and the UN are discussing the future National Truth and Reconciliation Commission and the Special Court for Burundi.
Congo	The French High Court has invalidated the legal ruling of 2004 that annulled the case of the Brazzaville Beach disappeared, confirming the competence of the French courts to pursue and punish the perpetrators of the Brazzaville Beach massacre in 1999.
Liberia	The Truth and Reconciliation Commission postponed the opening of the trials planned for January in order to continue the public awareness process, to ensure that the people are properly informed before taking part in these trials.
Rwanda	Rwanda has freed more than 9,000 prisoners who were originally detained as a result of the 1994 genocide. This is the last wave of prisoners to be released under the presidential decree of 2003, since when around 60,000 prisoners have been released. The International Court for Rwanda confirmed the life sentence imposed on former finance minister E. Nindabahizi for the crimes of genocide and extermination.
Sierra Leone	According to the prosecutor at the Sierra Leone High Court, the death of S. H. Norman, former Foreign Minister and leader of the militia suspected of war crimes in Sierra Leone deprives the country of its right to see justice done. The UN Special Court for Sierra Leone announced that the trial of C. Taylor would begin on 4 June.
Sudan/Darfur	The Prosecutor at the International Criminal Court has named the first two people suspected of committing war crimes in Darfur. They are the current Minister for Humanitarian Affairs, Ahmed Haroun, who in 2003 and 2004 was Interior Minister, and Ali Muhammad Ali Abd-al Rahman, also known as Ali Kushayb, alleged leader of the Janjaweed militias and Colonel of the armed forces in Wadi Salih (West Darfur).
Sudan/Chad	The government announced a draft bill granting a general amnesty to militants and sympathisers of the FUCD armed opposition group, which has recently signed a peace agreement with the government.
Uganda	The LRA armed opposition group, which is taking part in peace negotiations with the Ugandan government, said that the charges brought against the heads of the LRA by the International Criminal Court were hindering a peace agreement with the Ugandan government.
America	
Colombia	S. Mancuso, the highest-profile and most investigated leader of the AUC paramilitary groups (Self-Defence Forces of Colombia) confessed to having ordered 15 massacres and is attributed with responsibility for the murder of 336 persons. This pronouncement was made as part of the application of the provisions of the Justice and Peace Act, though court sources and the families of the victims say that the acknowledged murders are just a fraction of those committed. Furthermore, the murder of a peasant leader who had denounced the appropriation of land by the paramilitaries raises serious questions over the guarantees that will allow victims to enforce their rights. Y. Izquierdo had no protection in spite of having asked for it on repeated occasions after receiving threats.
Haiti	A federal court in Miami ordered Colonel C. Dorélien, a former member of the Military High Command, to pay 4.3 million dollars for human rights violations including torture, extra-judicial executions and crimes against humanity.
Asia and the Pacific	
Afghanistan	The lower house of parliament approved a resolution on “National Stability and Reconciliation” which involves an amnesty for a large number of people responsible for human rights violations.
Cambodia	National and international organisations urged the extraordinary chamber of the Cambodian courts responsible for judging the Khmer Rouge to adopt internal procedural regulations that respect international standards and ensure the independence of the judiciary and the protection of both victims and accused.
Timor-Leste	The Truth and Friendship Commission has begun the first public trials in relation to the events that occurred in Timor-Leste before and after the independence referendum in 1999. Forum ASIA and Yayasan Hak complained that the working procedures used by the Truth and Friendship Commission could become an aid to impunity.
	The National Human Rights Commission created during the armed conflict has submitted a



Nepal	report on the failure by both the government and the Maoists to implement the human rights provisions mentioned in the peace agreement. The Commission indicated that neither of the parties has provided information on the laying or storage of mines, the whereabouts of those they are detaining, the difficulties faced by displaced people trying to return to their homes and the lack of initiatives on either side as regards the creation of a Truth and Reconciliation Commission, as set out in the peace agreement.
Philippines	In response to the Melo Commission and the initial results published by the Special Rapporteur, the government presented a plan which included the creation of special courts to speed up the trials of the accused. However, not a single guilty verdict has been handed down to date, and the main obstacle to bringing an end to the political executions is the absence of any effective mechanism to protect witnesses from threats and intimidation.
Europe and Central Asia	
Serbia	The prosecutor at the International War Crimes Court for the former Yugoslavia, C. del Ponte, called on the EU to refrain from resuming talks with the government of Serbia until it hands over the people accused of responsibility for crimes against humanity.
Russia	An end was called to the amnesty announced in July by the Russian government for militants in Chechnya and the rest of the north Caucasus who had not committed serious crimes. The number of people who signed up to the amnesty is estimated at between 400 and 500, according to official sources. Some analysts have questioned the effectiveness of the amnesty as they believe that the people who responded were minor militants who performed support and maintenance roles, rather than key members of the armed resistance.

7.3. An important judicial ruling. The ICJ's judgement in the case of Bosnia v. Serbia.

The following section contains an analysis of one of the most important international judgements published during the last three months. This was the judgement by the International Court of Justice (ICJ) in the case of Bosnia and Herzegovina versus Serbia, over the application of the Convention for the Prevention and Punishment of the Crime of Genocide, which finally ended 14 years after Bosnia filed the action against Milosevic's government as a result of the campaign of ethnic cleansing carried out in Bosnia and Herzegovina. This analysis sets out the legal findings of the Court which led to the acquittal of the state of Serbia for the crime of genocide. It is interesting to note that in the event that the ICJ had found Serbia guilty, this would have been the first time that a state had been declared guilty of genocide rather than an individual or a group.

a) Facts

The facts examined by the Court related to an action filed by Bosnia and Herzegovina, in which it accused Serbia, as the legal successor to the former Yugoslavia, of genocide by committing extra-judicial executions, torture, kidnappings and arbitrary detentions during the Balkans War, the victims being mostly Muslims and Croats.

b) Jurisdiction

Before giving its findings on the merits of the case, the Court announced that it had the necessary jurisdiction under Article IX of the Convention for the Prevention and Punishment of Genocide, which regulates its power to try cases between states relating to the interpretation, application and performance of the Convention, including those relating to state responsibility in cases of genocide. It should be recalled that the International Court of Justice only hears cases between states and that, in the year in which it was created (1945), the only subject for whom international responsibility was recognised was the state, and individual persons could not therefore be either plaintiff or defendant.

c) A state's obligations under the Convention on Genocide

The Court explained that the obligations arising for states under the terms of the Convention consist of the obligation to prohibit and prevent genocide and the obligation to try people accused of



genocide (which includes the obligation to cooperate with the competent courts). One of the arguments put forward by Serbia was that in order for a state to be found responsible, it is essential that the responsibility of the individual perpetrator or perpetrators from which the state responsibility springs has first been legally proven. However, the Court found that it had the necessary competence to establish a state's responsibility directly, without needing prior judgements confirming the individual responsibility of the perpetrators, where the crimes have been committed by bodies, people or groups whose actions can be attributed to the state itself.

d) Serbia's responsibility for the crimes in Bosnia and Herzegovina

The Court found that "ethnic cleansing" can only be a form of genocide if it corresponds with one of the categories prohibited under the Convention on Genocide, and it began the process by examining whether the crimes committed constituted genocide, i.e. whether there was an intentional desire to destroy a particular group, in this case, Bosnian Muslims.

Given the seriousness of the charges faced by someone who is accused in a trial for genocide, the Court recalled the need for **high standards of evidence**. The evidence filed by Bosnia referred to a great extent to the decisions and documentation of the International Criminal Court for the former Yugoslavia (ICCY), which were accepted by the court. Bosnia also alleged that there were documents from the Serbian Supreme Defence Council that would have offered clarification as regards the issues of intention and responsibility. However, Serbia refused to hand these over to the Court. It is interesting to note here that, in its final judgement, the Court only mentioned Bosnia's request that the documents be produced and at no time mentioned Serbia's refusal to hand them over or the Court's request that a copy be provided.

As regards **intention**, the Court acknowledged that the victims of the mass murders in specific regions of Bosnia and Herzegovina and in detention camps were mainly Muslims and Croats, a fact that might suggest that they had been made a systematic target. However, the Court found that these acts did not constitute genocide because there was no evidence to show the intention behind these crimes, i.e. the desire to destroy the community as such. However, the Court did accept that these could be classed as crimes against humanity or war crimes, but it said that it lacked the necessary jurisdiction to determine this.

This reasoning is greatly at odds with the arguments contained in other judgements handed down by international criminal courts in which, in the absence of any explicit evidence, the proof required to determine whether or not the crime of genocide has been committed can be inferred from a set of facts and circumstances, the general context, the systematic targeting of victims based on their membership of a particular group and the seriousness and frequency of the crimes. The Vice President of the ICJ, Judge Al-Khasawneh, included a number of cases that illustrate this stance in a statement in which he expressed his disagreement with the judgement⁹.

However, the Court decided that intent could not be inferred solely from a pattern of atrocities committed against the same group, and it must therefore be proved through the use of facts or evidence that there was a deliberate plan. The Court also rejected one of the arguments put forward by Bosnia that the Strategic Objectives for the Republic set out by the Serbs in Bosnia and Herzegovina constituted evidence of the intent to commit genocide when seen together with the persistent patterns of behaviour.

⁹ In a number of cases (Akayesu, Rutaganda and Musema, among others), the International Court for Rwanda used the argument that it is possible to infer the intention of genocide in a particular act from a general context in which acts are systematically committed against the same group. The International Criminal Court for the former Yugoslavia and its Appeals Chamber maintained in the Jelisis and Krstic cases that the persistent description of behaviour as *ethnic cleansing* represents evidence of an element of genocide and that, in the absence of any proof, this constitutes direct evidence of the intention of committing genocide. The Court found that intent must be inferred from the *de facto* circumstances of the crime.



The Court also backed up its decision by the fact that the ICCY had not established that the crimes committed in Bosnia and Herzegovina (with the exception of those committed in Srebrenica) constituted genocide. However, it should be mentioned that the jurisdiction of this court only covers individual criminal responsibility and that the ICJ was examining the whole series of events, meaning that its area of investigation was broader, placing it in a better position to examine a persistent pattern of behaviour that was not limited to the actions of a single individual.

This refusal by the Court to find that genocide had been committed represents an implicit lack of recognition of the proceedings brought against Milosevic and the actions for genocide filed with the International Court for the former Yugoslavia.

e) Serbian responsibility for the crimes committed in Srebrenica.

The Court referred to the cases heard by the ICCY and defined the Srebrenica massacre as genocide, accepting on this occasion that the intention was to destroy a particular group. However, the Court found that Serbia was not responsible for committing acts of genocide and had only violated its obligation to prevent such acts.

The Court also found that there was no evidence that Serbia had taken an active part in the planning or execution of the massacres. In spite of this statement, the ICJ accepted that in the years running up to the events in Srebrenica, Serbia joined Bosnian Serbs in joint military operations in Bosnia and Herzegovina, and it also acknowledged that there had been financial support for some officers in the army of the Republika Srpska (VRS). However, it found that this did not automatically grant it the status of a body belonging to the former Yugoslavia. It was on this point that the Court based its finding that Serbia had violated its obligation to prevent the genocide because it had failed to use its influence to prevent the crimes.

Nevertheless, it is not very convincing to argue that the state is responsible because it did not influence the decisions of the Republika Srpska, and then to fail to cite this same power and influence as evidence of Serbia's participation or at least complicity in the events that followed.

Finally, the Court also found that Serbia had violated its obligation to cooperate with the international criminal courts, demanding that it hand over both Mladic and Karadzic to the ICCY.

Evidence presented by Bosnia

In addition to numerous reports from the United Nations, the International Court for the former Yugoslavia and NGOs, all aimed at providing evidence of Serbia's responsibility, Bosnia presented two pieces of evidence that deserve particular attention.

Bosnia presented a document in which a police officer from the Republika Srpska referred to the **scorpions (Serbian paramilitary groups) as a unit of the Serbian Interior Ministry**. Bosnia argued that there were close political and economic links between the Serbian government and the authorities in Republika Srpska and that in this case there was a unified and common ethnic and ideological objective. Serbia replied that this was a copy and not an original document. The Court carried out an examination to establish the relationship between the scorpions and the state of Serbia and found that it could not confirm that they were a legal Serbian body. Once again, the Court decided not to base its findings on the decisions handed down by the ICCY in the Tadic and Celebici cases, which found that a state may have control over a group or armed force, even in the event that the armed force acting in the name of the "controlling state" forms its own independent decisions and tactics, so long as they both take part in a common strategy.

Another piece of evidence filed by Bosnia was a TV broadcast made by the scorpions showing the execution of Muslims, and the subsequent **statement from representatives of the government of Serbia** that what had happened in Srebrenica was the responsibility of the former regime, which it classified as anti-democratic. The court regarded this statement as political, and found that one could not use it to infer Serbia's responsibility for the massacres in Srebrenica. In setting out this argument, the Court once again made a U-turn and failed to respect its own earlier decisions, such as the judgement handed down in the Nicaragua v. USA case, in which the Court found that statements made by high-ranking political officials have a high evidentiary value when they



acknowledge facts that are prejudicial to the state they represent, and may represent a form of admitting such facts. In this case, the intention of the statement in question was to distance the current regime from acts committed by the former regime, implying an implicit acknowledgement of guilt for crimes committed in the past.

f) Conclusions

The judgement handed down by the International Court is one whose arguments cheapen the interpretation of the international rules on the prohibition of genocide. Faced with the seriousness of these events (more than 8,000 people murdered and systematic patterns of human rights violations), the Court opted for an entirely sterile interpretation of the law, choosing to shelter behind an absence of the element of intent in order to avoid describing the atrocities committed in Bosnia as genocide. Even though it acknowledged that these events could be classified as crimes against humanity or war crimes (which do not require this element of intent), the Court argued that it had no jurisdiction and chose to avoid making any pronouncement on the consequences of this classification as far as Serbia's responsibility was concerned.

The only obligation that Serbia violated, according to the Court, was its obligation to prevent the genocide in Srebrenica, but even then it did not require Serbia to pay any compensation. The absence of any charges relating to this violation turns this judgement into a mere pronouncement, and the Court would seem to have forgotten that a state's responsibility by omission has the same legal value and is equally serious as violation by commission¹⁰.

The result is a selective interpretation of the law that ignores the rights of the victims and makes use of a strictly technical legal argument that leaves a state unpunished for acts that should at least have been classified as crimes against humanity. More seriously, it opens up an even wider gulf between victims and the international courts charged with administering justice.

¹⁰ Chapter III of the Draft Articles on the responsibility of states for internationally wrongful acts, adopted by the International Law Commission in its 53rd period of sessions (A/56/10) and attached by the General Assembly to its Resolution 56/83 of 12 December 2001.