REVISION

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BACKGROUND

The 2007 judgment of the Hague's International Court of Justice (ICJ) in the case brought by the State of Bosnia against The State of Serbia alleging breaches of the Genocide Convention by Serbia was a disappointment to Bosnian Muslims. It found genocide established only by a late date in July 1995 and on the limited territory of the Srebrenica municipality; it rejected arguments that genocide had been in process since 1992; it did not hold Serbia responsible directly for such genocide as it found proved in July 1995 but only liable for having:

- violated the obligation to prevent genocide in respect of the genocide that occurred in Srebrenica in July 1995;
- violated its obligations by having failed to transfer Ratko Mladić, indicted for genocide and complicity in genocide, for trial by the International Criminal Tribunal for the former Yugoslavia…;
- violated its obligation ….. to take all measures within its power to prevent genocide in Srebrenica in July 1995.

Many outside observers found the judgment concerning and wondered whether it should be subject to the only method of review available, 'Revision' under Article 61 of the ICJ Statute.

[*ARTICLE 61*

1. *An application for revision of a judgment may be made only when it is based upon the discovery of some fact of such a nature as to be a*

decisive factor, which fact was, when the judgment was given, unknown to the Court and also to the party claiming revision, always provided that such ignorance was not due to negligence.

2. *The proceedings for revision shall be opened by a judgment of the Court expressly recording the existence of the new fact, recognizing that it has such a character as to lay the case open to revision, and declaring the application admissible on this Ground.*
3. *The Court may require previous compliance with the terms of the judgment before it admits proceedings in revision.*
4. *The application for revision must be made at latest within six months of the discovery of the new fact*
5. *No application for revision may be made after the lapse of ten years from the date of the judgment.]*

We both spoke about the issue in different settings since 2007, usually because we were asked to; we did, after all, have particular knowledge: Milošević was the only person from Serbia indicted at the ICTY to be charged with genocide in Bosnia; all others defendants from Serbia (Šešelj, Perišić, Simatović, Stanišić) indicted for crimes in Bosnia were not exposed, for reasons we never fully understood, to allegations of genocide.[1] Moreover, the end-of-prosecution-case Judgement in the Milošević trial of June 2004 confirmed that there was sufficient evidence to proceed with genocide charges not only for Srebrenica but for six other municipalities - Brčko, Prijedor, Sanski Most, Srebrenica, Bijeljina, Ključ, and Bosanski Novi. Evidence about these municipalities could offer, for the first time at a criminal trial, a fuller picture of the scope of a genocidal process connected geographically and over time to Belgrade. Our working experience, - as lead prosecutor and lead researcher in the Milošević trial - expertise and knowledge of the relevant evidence and processes marked

[1] GN left the ICTY after the Milošević case in 2006; NT stayed on until 2012 and, working on other cases – all including Serb perpetrators form RS, RSK and Serbia - and kept abreast of much of the ICTY evidence.

our academic and general interest in the conflicts of the former Yugoslavia, including the conflict in Bosnia.

Our advice – formal and informal - was always the same: revision would be difficult but could at least be attempted. Even if unsuccessful, a well formed application seeking revision would leave a full, formal, documentary record of the history of the conflict and of the crimes committed in BiH and of the challenge by the State of Bosnia to the ICJ decision.

- We offered our opinions via mass media and in private discussions. We did not do this because we are especially sympathetic to Bosnian Muslims as opposed to any other citizen of any other country.[2] We simply noted that, from our professional points of view, the 2007 ICJ Judgment looked as though it could be wrong as it was not based on the evidence that existed and still exists at the ICTY; and therefore should be reconsidered, although it is only reconsideration by 'revision' that is possible. Applying for a revision at the ICJ was never to be easy. But we thought it was necessary for many good reasons. First, because if there is a next step in a judicial process – whether an appeal or a revision – it should be used if the correctness of the first decision is doubted. A judicial process remains unfinished until all steps have been exhausted.
- Second, there is hardly any jurisprudence on the revision process at the ICJ, and none concerning revision of a genocide judgement. This would offer lawyers for Bosnia some considerable space and freedom for inventiveness and legal creativity.

[2] NT, born is Croatia, has long regarded herself Dutch; GN comes from the UK.

- Third, as pointed out since 2007, there are many documents in the archives of the ICTY and MICT that remain protected from public view as a consequence of two important political deals between Carla del Ponte and Belgrade, dating from 2003 and 2005, which allowed Serbia to protect documents at ICTY trials that might hurt Serbia's interest at the ICJ in the genocide lawsuit brought in 1993 by BiH. We calculated that the BiH state could engage in a process of seeking to have those protected documents made available to the public and, more importantly, to use them for the revision. We are talking about hundreds of such documents – mostly acquired from Belgrade to be used in the Milošević, Perišić and Stanišić-Simatović trials.

Despite this, whenever advising we did not and could not, of course, assert that Serbia *was* responsible for genocide in law. We have always stressed the differences between historical, political and judicial justice. Legal / Judicial justice is the justice that is achieved at a court and confirmed through a judgment. Living as we do in 'rule of law' communities, such a conclusion could only come at the end of some form of judicial (or possibly quasi-judicial) process, such as revision by the ICJ of its 2007 decision might provide.

SOME FACTS ABOUT THE PREPARATION FOR THE REVISION:

We had addressed the issue through the media – in interviews, op-eds, TV appearances - and also in book chapters published by prominent publishers. We were in touch with President Haris Silajdžić during his tenure as President on several occasions from 2007 to 2010.

In October 2012, GN - along with some other lawyers - was invited to Sarajevo by *Pravda za Bosnu* Foundation (directly invited by Fadila Memišević and her colleagues) that manages a fund that can be used for a possible revision. The meeting was called to discuss the possibilities of applying for revision but ended with no forward plan and without follow up of any kind. After that we were in touch with President Bakir Izetbegović - directly in July 2015 and indirectly through his advisers and collaborators. He seemed to know little of the revision process when we met. We were surprised by the verbal hostility directed against Geoffrey Nice by his adviser Elvir Camdzic – especially so given the fact that we had never met before. As we discussed the revision, President Izetbegović, suggested to meet with Professor Sakib Softić, BiH's 'Agent' for ICJ litigation whom was in charge of revision. We met with him the following day, , when we advised him in person (and the same evening in a written form vial a long email) how he might proceed with preparation for the application.

This, however, remained one-way communication because we have had hardly any feed back or any meaningful exchange with any of the above. The President's adviser Dževad Mahmutović visited The Hague in December 2015, where we discussed the importance and modalities for a revision application. Dževad Mahmutović's visit to The Hague created an expectation that the President would move forward towards applying for a revision, as it was almost the latest possible moment to trigger the process. In absence of any meaningful follow-up, we sent President Izetbegović two written advices on the question of revision (December 2015 and June 2016) and, separately, one to Sakib Softić (July 2016), the 'Agent' though whom a state has to act at the ICJ. None of these advices was acknowledged in any way or acted up, so far as we could judge.

In December 2016 – by which time we had assumed nothing was going to be attempted – we were approached on a semi-commercial basis to advise a group of experts gathered at the Institute for War Crimes in Sarajevo and possibly to draft an application. Extraordinary complications followed, possibly driven by internal politics in which we have no interest. In the end it became quite clear that neither President Izetbegović nor Mr Softić, his agent, was prepared to act in any formal way as our client – indeed Mr Softić was forbidden from signing any agreement with us and was warned by The President to stay away from Geoffrey Nice. We were, nevertheless, pressed repeatedly in an informal setting through the semi-commercial relationship to provide a draft application to be merged with another unseen document being prepared by an American Professor David Sheffer, who was officially commissioned by President's office to draft the application for a revision. Once we understood that President Izetbegović would never engage us, we could not pretend to work as if we were representing the state. The only possible way to engage in the sensitive legal work as required for the ICJ is to have a formal contract with the client – in this case President Izetbegović. The group of people that engaged us, although led by right sort of motives, rather naively believed that whatever we would provide in the form of law or facts could be merged with the draft provided by Professor Sheffer some time in early January 2017 to President's office and provided only to Sakib Softić on confidential basis under condition not to be shown to us or anyone else. The expectation was that we would provide some draft which would then be merged without our retaining control to Sheffer's draft. Upon hearing it, we have made it absolutely clear to Mr. Softić and his collaborators at the War

Crimes Institute that given those circumstance we could only be advisors, but could not possibly draft an application without direct instructions from a client with whom we had to have a relationship of trust. By the nature of the revision process – only President Izetbegović – could have been a client. It is where our short-lived engagement via the Institute of War Crimes – that lasted some 18 days - had to come to an end in by 31 January.

SHORT HISTORY OF OUR SEMI-COMMERCIAL ENGAGEMENT

We started working at the War Crimes Institute in Sarajevo on 03 January 2017. On the next day, 04 January 2017, we were presented with a legal opinion on the status of Sakib Softić signed on 15 April 2016 having been requested by two representatives of the victims associations of BiH - Munira Subašić and Murat Tahrović. The legal advice was adamant that the agent in the original application process could not automatically be the agent for revision as it would be an entirely separate – new - process. Knowing or not knowing of the existence of this legal opinion, President Izetbegović gave an authorisation to Sakib Softić to start to work on the revision in May 2016, three weeks later.

We have wondered if the chronology of these steps is a coincidence?

The April 2016 legal opinion on Sakib Softić's position pretty much determined his status as the agent and that would lead to legal argument about whether an application of the revision could be lodged at all.

Additionally, any serious attempt to do work on the revision properly needed to have started at least eighteen months or at best two years before the deadline expiry of 26 February 2017. And lastly, if the application drafted by Professor David Sheffer - as commissioned by President Izetbegović – cannot be submitted by Sakib Softić because his status / position as Agent is not properly made out, the only person who could submit the application is President Bakir Izetbegović. He can do it himself or he can instruct the Ambassador in The Hague to make the application for him.

IS THERE STILL SOME HOPE?

We are alive to things being said by President Izetbegović about his intention to make an application for revision. We are unable to recognise – still less to confirm – the accuracy of any of the things said by him, or by those on his behalf, on the state of the revision preparations.

In light of recent history, we summarise and make public our views just in case they could assist those with a genuine interest in having the 2007 judgment revised. If President Izetbegović has someone drafting an application s/he is most welcome to consider what we write in case it is of use. However, any decision to adopt, and the responsibility for relying on, any of our views would have to be hers or his alone because, we must repeat, the President and his Agent have declined to create any formal relation with us and we cannot act as counsel or as representatives in any way for anyone unless properly instructed.

THE ICJ STATUTE, ARTICLE 61 – AN APPROACH

Our views have not been *discussed* with the President of with Mr Softić or any other Bosnia Government lawyer or researcher although they have been communicated to them some time ago. They come now in the form of a statement that media can publish; and they are just that – a media statement. No more. They most certainly do NOT constitute a legal opinion or an academic paper analysing available evidence.

The ICJ allows 'revision' to be sought within 10 years of a judgment if, a new 'decisive' fact not available to the court at the time of judgment is available and acted on within 6 months of discovery of the new fact. This process – the terms of which can be read in detail above by those interested – limits a party's ability to seek revision; and no revision of the three revisions attempted to date since 1945 has succeeded. The Terms of Article 61 are more obviously fitted to the circumstances of cases on which the ICJ is more often engaged: ruling on a permanent sea boundary, for example, where a critically important chart or agreement could come to light after judgment about the boundary, but within 10 years of the judgement, the 'new' document being relied on by the party seeking revision within 6 months of 'discovery'.

It is much much harder to see how Bosnia, in present circumstances, could meet the Article 61 test by any single new fact, especially given the geographical and temporal spread of the allegations Bosnia made against Serbia. It may be helpful to think of how *in theory* that might be possible if only to demonstrate - by the absurdity of that *in theory* possibility - the difficulties Bosnia faces simply because of the terms of Article 61. Imagine a document emanating from Milošević as President of Serbia in 1993 that expressed an intention of the Serbian Government to kill Bosnian Muslims

simply because they were Bosnian Muslims. Such a document might work to achieve revision but such a document would never exist, for a multitude of reasons not least because genocide as a crime comes into being in many ways usually over time but rarely as the result of a single decision announced by one individual or by a government. What other single possible document or piece of evidence could achieve what is required? It is very hard to conceive of one

To prove the genocide that the ICJ did not find proved in its 2007 judgment, Bosnia and – we imagine – Bosnian Muslims would hope to be able to rely on all additional evidence coming to light in one way or another since 2007. And there is a great deal of it: evidence in other ICTY trials continuing to date (and hereafter) – Stanišić-Simatović on retrial; Mladić trial evidence concluded but judgment outstanding; ICTY judgments and appeal judgments in cases since 2007 with appeals outstanding in Karadzić yet to be pronounced. Plus other evidence known of by newspapers and individuals and writers of books but not produced at trials; and yet further material known to exist but hidden from view by one country or another. Unhappily, on one reading of the three ICJ revision decisions to date, 'new facts' – 'decisive' new facts – for the purpose of revision *must* have existed *before* 2007. So all judgments of the ICTY given since 2007 might be counted as irrelevant even if the evidence supporting those judgments could be considered, assuming the evidence existed before 2007 in one way or another and had not been missed by the 2007 Bosnia legal team through negligence in its presentations to the ICJ.

To give an example, this one more realistic. Assume that in 1994/5 the Serbian government made a military record of one of the Bosnian Serb officers now convicted of genocide by the ICTY. The record was not accessible to the Bosnia

2007 trial team so it could not be said there was negligence in failure to produce it to the ICJ by 2007. The record comes to light in some way at some stage in the last 9 ½ years – perhaps in one of the ICTY trials. Assume – not the case, but assume – the Bosnia government of the day had instituted a programme for comprehensive review of all emerging material of possible relevance to the ICJ revision process. The officer's record was reviewed by those working on the review programme and they thought: 'good, valuable - but in itself not enough to count as decisive in a way that would lead to successful revision'. What should Bosnia do? Nothing? But it now knows of the document. Supposing a year later - but still within the 9½ years - another similar document relating to another Bosnian Serb officer comes to light and the review team now say: 'this is sufficient – lets launch an application'. They do and the ICJ says, 'Interesting but not enough to have just two of these records; maybe three would have been enough but not two – and in any case you have sat on the first record beyond the six-month period after you first discovered it'. One year later, still within the 9½ year period, a third similar record of a third Bosnian Serb officer emerges. Another application is made but Serbia and the court itself say: 'you can't rely on the first two records because you knew of them over 6 months ago and the third record on its own is not enough!'

Or, to reformulate roughly the same example assume, as actually the case, that the Bosnia government did nothing by way of reviewing emerging material that might have justified revision until the very last minute – starting say in 2015/2016. Assume that it then made a proper effort to review everything new and found these three military records. Could it not say that *in combination* they are <u>new</u> and decisive and should open the door to revision

and are first being relied on by Bosnia within the critical 6 months of its, Bosnia's, discovery of them?

There are many arguments for lawyers to enjoy, more of them superficially difficult for Bosnia than for Serbia. At the end of an application for revision it might have to be said – even by the court itself: 'Here is a case which, in the interests of justice generally as well as of Bosnia, merits a revision that the court, bound by its Statute, cannot deliver'.

Some arguments along the way would be almost entertaining to hear. For example, Serbia might argue – for and against itself – that a piece of evidence could indeed be decisive because it could show genocide but because it did indeed tend to prove genocide could not be relied on to prove genocide because it had not been acted within 6 month of discovery!

An alternative strategy could be – could *have* been had Bosnia acted in time – to confront all difficulties, lay them out and invite the court to say it must make its Statute work for the Genocide convention quite as much as it can work for disputes concerning, say, the law of the sea. The following arguments might, had they been discussed with us by Bosnian lawyers including the Agent himself, have found a place in any filing:

- There was no negligence by the 2007 Bosnia team in failing to rely on facts (evidence of facts in reality) technically available before 2007 but not used by the 2007 Bosnia legal team; the standard for negligence to be applied is that appropriate to the period 1993-2007 where Bosnia was in the process of emerging from grave conflict, where a new and

difficult constitution had been created (by Dayton), where ICTY cases were unfolding piecemeal and without any coherent ICTY indictment policy to help bodies such as the Bosnia Sate evaluate ICTY judgments as they emerged. So at first sight, and with no negligence manifest, each and every 'new' piece of evidence relevant to revision and existing before 2007 (thus nearly all 'new' evidence as nearly all evidence did indeed exist before 2007) should be available for consideration in revision.

- It must be allowed for new facts (in reality the evidence for new facts) to be 'cumulative' – i.e. a composition of more than one piece of evidence By way of example, if military records can be relied on in principle for revision then the complete body of additional military records beyond what was relied on in 2007 could be one new fact and it would not be necessary to attempt to single out a single officer's record as being sufficient for revision purposes (this is probably the easiest of the arguments Bosnia could make).
- Given that the ICJ statute makes no assumption about, or requirement for, the efforts to be made by a party seeking revision to find 'new facts', then Bosnia is quite entitled to wait until close to the end of the 10 year period before assessing all that is by then available and to identify 'new facts' for revision at that stage (plural facts if more than one 'new fact' topic could lead to revision as well as cumulative evidentially so far as each 'new fact' is concerned).
- Despite the three decisions to date by the ICJ dealing with revision applications, it may be possible to argue – in order to accord with common sense and justice – that events happening *after* the 2007 judgment, including in particular ICTY judgments delivered since then,

must be capable themselves of being relied on by Bosnia. The terminology of article 61 ('…..*based upon the discovery of some fact of such a nature as to be a decisive factor, which fact was, when the judgment was given, unknown to the Court and also to the party claiming revision…..'),* requires that a new fact was not known when judgment was given; a post judgment determination by another court inevitably meets that condition as it had not happened by the date of the ICJ judgment. Article 61 does not state specifically that the new fact existed by the date of judgment; that inference has been read into the Statute and it may be possible to argue for a wider interpretation.

None of these arguments is other than difficult and I have no idea whether, had there been discussion with other lawyers, one or more of them might be eliminated. Unhappily, no effort was made by any Bosnia lawyer to whom these ideas have been offered to engage in discussion, they all preferring, it seems, to carry on pursuing the simplest of 'single fact + 6-month limit' interpretations and to find no piece of evidence that meets that simple test (evidence described by some in Bosnia as a 'golden bullet' – an unappealing metaphorical image in the circumstances). So the reader / viewer must recognise that the possible arguments above are still very much 'first draft' ideas. The person who engaged us semi-commercially was invited to add experienced ICJ lawyers to the *ad hoc* team he suggested he was creating, but that was not possible for him and we carried on with no constructive assistance on the legal arguments.

Difficult though the arguments would be they undoubtedly have the advantage of being on the right side of justice. Making them would exemplify some basic

rules of any and every legal process: 'if you try you *may* fail; if you don't try you *will* fail; if you try and fail you *may* be able to try again, by appeal, revision or in some other way. If you don't try no one will try for you'. For the ICJ to reject all these arguments might be for the court to recognise that it is unsuited to dealing with the worst of human tragedies that could come its way in a manner to serve justice and that the state (and those they represent) should look elsewhere. Even such an outcome could, it will be thought by many, be better than having done absolutely nothing and could, perhaps, justify other routes to a better decision on Serbia's direct involvement in genocide in Bosnia than the ICJ has delivered.

And that leads to two other points before we turn to the 'new facts' that might have been relied on for purposes of seeking revision.

First, all of his could have been discussed openly and candidly one, two, three years ago. Thee was no need for the Bosnia state to do nothing and then, as is suggested by some now, to assert that it genuinely has everything in hand when it seems to have been driven into action for fear of being suspected by its people of having done too little. Indeed, the whole exercise of seeking evidence and arguments for revision could have been made public years ago because many individuals may have evidence of great potential relevance but not known publicly. Some formerly involved in crimes may have been waiting for ages for the moment to reveal truths of value for history and their fellow citizens – such truth-telling is by no means unknown although the Bosnia State seems to have done little or nothing to encourage it. And these first-draft legal arguments could have been considered without disadvantage by making them public. Maybe the ICJ itself could have been confronted before the end of the

10-year period with the difficulties Bosnia could see coming by an application seeking guidance on how Article 61 should be interpreted. It has to be remembered that citizens are less afraid or in awe than once they may have been of the legal systems that serve them and those systems should be responsive to requests for help when asked. By inactivity Bosnia has now to ask for assistance in relation to the Statue at the very last minute.

Second, the State of Bosnia may in fact have decided for good political reasons that pursuing revision was a bad idea. It could be a decision easy enough to understand as justice does, from time to time, properly yield to other priorities, especially to peace (amnesty for war criminals, however unattractive, is a standard example where the balance of benefits of granting an amnesty or allowing a possible war criminal sanctuary in another state favours setting aside the 'imperative' of securing justice). But such a decision needed to be made publicly in the interests of the bereaved of those killed in what may have been genocide. Only in that way could those bereaved move ahead to find elsewhere the resolution they presently seek from a successful revision process: perhaps through a proper truth commission; possibly through the Bosnia government giving support to civil actions being brought in Serbia's courts, and so on. To have made such a decision for less good reasons – bending the knee to Serbia at the instigation of a great power, for example - would be more problematic. But there is no evidence of any such decision-making process and the Bosnia public has to believe that its government genuinely, and as its political choice, wants revision to be launched.

If despite all we have heard the government has evidence – new 'facts' unknown to us - that will achieve revision, we will be only too pleased.

ONE PARTICULAR PROBLEM

There are, of course, many relevant documents held by Serbia, Montenegro, possibly by Croatia and Kosovo and certainly by the many non-Balkan countries involved in the conflicts of that 1990s that are hidden and regarded by the countries concerned as secret. Whether secrecy is really justified is something that only future generations may be able to test, assuming they are by then still interested. Included within these secret archives, however, are some documents that *are* known to exist *and* to be relevant to the question of Serbia's direct involvement in the commission of genocide in Bosnia. Two examples will explain the problem; there are many other less obvious examples.

First, the Supreme Defence Council Records were produced in part to the ICTY but those parts were subject to heavy redactions of the most interesting passages so far as the public viewing of them was concerned. Unhappily, the ICJ declined to require sight of the redacted parts which only became publicly available in 2011 in the course of the Perišić trial (and which might themselves be part of range of evidence that could qualify as a 'new fact' - see below). But records of several SDC meetings – notably meetings in the critical year 1995 – were not produced at all or were produced only in the form of a short minute rather than in the form of the stenographic record that is known to have been prepared.

Second, The VJ military records of Bosnian Serb Officers, convicted before and after 2007 for the crime of genocide in Srebrenica and Žepa at the ICTY, who

were paid, promoted and pensioned by the SDC in Serbia have not been provided in full so that the true status of these officers – whom the ICJ in 2007 declined to find were organs of the state of Serbia – has never been properly tested. These protected pages might still be not made public by ICTY, other courts or Serbia.

Should Bosnia have tried to get these documents in the course of the last 9 years and 11 months and should it have gone to the ICJ to seek an order from that court to help with its revision? The court might have declined – just as it declined to order Serbia to produce to it, the ICJ, un-redacted versions of the SDC records that had been produced to the ICTY along with the stenographically recorded versions of the meetings for which only minutes had been provided? The ICJ might have declined saying this had never been tried before. But – note the obvious 'rules' of litigation above – 'if you do not try you will most certainly fail' and these documents that are known to exist could well be of immense value to any revision process. Had these steps been taken but without success would Bosnia have been able to argue – as a 'new decisive fact' – that Serbia has persisted in hiding documents of obvious significance and that this fact allows the ICJ to draw far stronger inferences than it did in 2007 (an issue touched upon in the judgment of the ICJ majority in 2007 and in the powerful dissenting part of the opinion of the Vice President of the ICJ at the time, Judge al Khasanweh).

MISSED OPPORTUNITIES TO ACT FROM 2007 to 2017

In the years since the 2007 Judgment several major developments and events revealed pre-2007 facts that might have been used as 'triggers' for a revision application:

- April 2007 disclosure of the political nature of the protection of the SDC (VSO) between Carla del Ponte and Belgrade by Geoffrey Nice in Jutarnji list and New York Times. Neither the Croatian Prime Minster Ivo Sanader nor Haris Silajdžlć, the then Bosniak member of the BiH Presidency – addressed the UN Security Council about the improper political deals with Belgrade or requested that all protected document be disclosed to the public. Success with making the protected documents available might have led to Bosnia making an application for revision right away.
- January 2010 disclosure on Federal Television in BiH of other Belgrade documents from the 1990s given protection from disclosure to the public as part of a deal between del Ponte and Rasim Ljajić, made in 2005. No action followed and documents remained obscured from the public and from the ICJ.
- 2010 Tomašica multiple mass grave discovery of the extent of the mass graves, making the 1992 crimes in the Prijedor area unquestionably part of - and the start of – a process that started in the North of BiH (Krajina and Posavina Corridor) and ended in 1995 in the East of BiH (Podrinje) and that could qualify as genocidal;
- March 2011 disclosure to the public of the protected SDC documents in the Momčilo Perišić trial, now without protection – i.e. no longer blacked out in significant parts.

- 2011 ICTY Judgment and Conviction of Vlastimir Đorđević, a Serb MUP official who was found guilty of crimes in Kosovo; significantly the judgment confirmed that the Scorpions unit committed crimes at two locations on the territory of Kosovo in 1999 and was subordinated to the Serbian MUP at the time of the Kosovo crimes; The same unit had also committed crimes in Godinjske bare in 1995;
- 2013 Popović *et al*. Judgment adding three more Bosnian Serb officers -paid, promoted and pensioned by VJ, i.e. by Belgrade/Serbia (Vujadin Popović, Radivoje Miletić and Drago Nikolić) - to the list of those convicted by the ICTY of genocide for Srebrenica killings;
- 2015 ICTY appeal judgment confirming the genocide conviction of Zdravko Tolimir for Srebrenica genocide as well as for genocide in Žepa. This was for the first time that a genocide conviction related to a town other than Srebrenica.

NEW FACTS – THE POSSIBLITIES

Had the Bosnia Government established a proper unit sufficiently early to prepare for making an application for revision – and if Bosnia had been able to obtain guidance from the ICJ on how the Statute, and in particular the 6 month rule, should be interpreted in the unprecedented circumstances of dealing with possible revision of a Genocide Convention case where new material was emerging all the time – then a number of new 'new decisive facts' might have arisen for consideration. And each potential 'new decisive fact' would have to be tested against *all* evidence on the same general topic available to the ICJ in 2007 because of the strict requirement that the 'new fact' really is new.

As it is and without a research team and in an impossibly short period of time several candidates for being 'new decisive facts' can be identified. They can be no more than 'candidate new decisive facts' because the detailed exploration of what was available to the ICJ in 2007 has not been done.

1. All the officers found guilty of genocide in Bosnia were in service of the VJ and were *de facto / de jure* organs of Serbia (Composition of new evidence to support this new fact would include such additional military records as have already emerged)
2. Scorpions were de facto and the *de jure* organs of the Serbian government - Ministry of Internal Affairs and its agents – before, during, and after killings of young men from Srebrenica (range of new evidence).
3. Expert evidence on aetiology of mass crimes shows that absence of direct evidence of control by political leadership of genocidal and similar crimes is in no way determinative of whether control by leadership can be confirmed and that a pattern of conduct is sufficient for establishing effective control.
4. Tomašica mass grave reveals scale of mass killings consistent with genocide in 1992 wider in geographical spread (NOT just Srebrenica and Žepa in 1995), earlier in time and greater in number than known to the Court of the ICJ in 2007.
5. Serbia state's 'admission' of June 2005 shown by contemporaneous documents to be confession by a state of the state's guilt of genocide for all purposes [dependent on evidence to come].
6. Pages of military records of officers withheld from public view or withheld altogether by Serbia would reveal reality of officers being organs of Serbia not VRS. Significant parts of the military records of VRS officers were withheld from public view at the ICTY because Serbia aimed to block truth from the ICJ. Serbia's justification for withholding documents on grounds of "vital state interest" (otherwise unrecognised in law as a reason to claim privilege from disclosure of relevant documents) is an assertion that reflects this objective.
7. Direct combat involvement of the VJ and the Serbian MUP at the battlefields of BiH, in the period from 1992-1995 demonstrates reality of Serbia actually being party to the war, a reality that supports all other bases for revision.

8. Documents show that Serbia has been a party to the war in Bosnia as confirmed in writing in a letter signed by the Serbian Minister of Justice for the purpose of Ejup Ganić's extradition case in London

Many of the above arguments and issues for discussion have been raised with those from Bosnia who have approached us and were raised by us with the President in person in July 2015 and in the letters we sent him subsequently. We have also suggested that Bosnia's leaving things so late means that a proper application for revision cannot possibly be made now (and has, indeed, been impossible to achieve for some months given the lack of preparation and resources etc.) However, an application might be made in summary form provided the Bosnia government is willing to explain why it did so little over the last ten years and to seek from the ICJ extra time in which to prepare a proper application.

No one from Bosnia to whom we made this suggestion likes it. All seem, perhaps for different reasons, to want to save Bosnia as a state from the embarrassment of confessing to its own shortcomings by doing so little and so late.

Further, the ICJ itself might understand the difficulties facing Bosnia in the past decade and might not want to be cast as a court that cannot respond to human needs and human difficulties simply because they are not as straightforward to resolve as drawing on the map of an ocean a line to mark out who gets the oil and gas beneath the waves.

We continue to hope, above all, that whoever may be drafting an application for President Izetbegović does have a single piece of evidence constituting a

New Decisive Fact sufficient to achieve success with an application for revision. But if she / he does not, then we hope the President may consider all the above, and particularly the last point: confession is something leaders ask of their subjects and rarely of themselves. But confession can be good for the soul - and in this case could be good for those whom a leader must represent.

Sir Geoffrey Nice QC
Dr Nevenka Tromp
The Hague
Sunday, 12 February 2017