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International Court of Justice

THE HAGUE

Cour internationale de Justice

LA HAYE

YEAR 2008

Public sitting

held on Monday 26 May 2008, at 10 a.m., at the Peace Palace,

President Higgins presiding,

***in the case concerning* Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia *v.* Serbia)**

VERBATIM RECORD

ANNÉE 2008

Audience publique

tenue le lundi 26 mai 2008, à 10 heures, au Palais de la Paix,

sous la présidence de Mme Higgins, président,

***en l'affaire relative à l'*Application de la convention pour la prévention et la répression du crime de génocide (Croatie c. Serbie)**

COMPTE RENDU

Present:	President	Higgins
	Vice-President	Al-Khasawneh
	Judges	Ranjeva
		Shi
		Koroma
		Parra-Aranguren
		Buergenthal
		Owada
		Simma
		Tomka
		Abraham
		Keith
		Sepúlveda-Amor
		Bennouna
		Skotnikov
	Judges *ad hoc*	Vukas
		Kreća
	Registrar	Couvreur

Présents : Mme Higgins, président
M. Al-Khasawneh, vice-président
MM. Ranjeva
Shi
Koroma
Parra-Aranguren
Buergenthal
Owada
Simma
Tomka
Abraham
Keith
Sepúlveda-Amor
Bennouna
Skotnikov, juges
MM. Vukas
Kreća, juges *ad hoc*

M. Couvreur, greffier

The Government of the Republic of Croatia is represented by:

H.E. Mr. Ivan Šimonović, Ambassador, Professor of Law at the University of Zagreb Law Faculty,

as Agent;

H.E. Ms Andreja Metelko-Zgombić, Ambassador, Head of International Law Service, Ministry of Foreign Affairs and European Integration,

Ms Maja Seršić, Professor of Law at the University of Zagreb Law Faculty,

H.E. Mr. Frane Krnić, Ambassador of the Republic of Croatia to the Kingdom of the Netherlands,

as Co-Agents;

Mr. James Crawford, S.C., Whewell Professor of International Law, University of Cambridge, and Barrister, Matrix Chambers,

Mr. Philippe Sands, Q.C., Professor of Law, University College London, and Barrister, Matrix Chambers,

as Counsel and Advocates;

Mr. Mirjan Damaska, Sterling Professor of Law, Yale Law School,

Ms Anjolie Singh, Member of the Indian Bar,

as Counsel;

Mr. Ivan Salopek, Third Secretary of the Embassy of the Republic of Croatia in the Kingdom of the Netherlands,

Ms Jana Špero, Ministry of Justice, Directorate for Co-operation with International Criminal Courts,

as Advisers.

The Government of the Republic of Serbia is represented by:

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Mr. Saša Obradović, First Counsellor of the Embassy of the Republic of Serbia in the Kingdom of the Netherlands,

as Co-Agent;

Le Gouvernement de la République de Croatie est représenté par :

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comme agent ;

S. Exc. Mme Andreja Metelko-Zgombić, ambassadeur, chef du service de droit international du ministère des affaires étrangères et de l'intégration européenne,

Mme Maja Seršić, professeur de droit à la faculté de droit de l'Université de Zagreb,

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comme conseils et avocats ;

M. Mirjan Damaska, professeur de droit, titulaire de la chaire Sterling, Yale Law School,

Mme Anjolie Singh, membre du barreau indien,

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Ms Sanja Milinković, LL.M., Ambassador, Head of the International Legal Service of the Ministry of Foreign Affairs of the Republic of Serbia,

Mr. Vladimir Cvetković, First Secretary of the Embassy of the Republic of Serbia in the Kingdom of the Netherlands,

Ms Jelena Jolić, M.Sc. (London School of Economics and Political Science),

Mr. Igor Olujić, Attorney at Law, Belgrade,

Mr. Svetislav Rabrenović, LL.M. (Michigan),

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M. Vladimir Cvetković, premier secrétaire à l'ambassade de la République de Serbie au Royaume des Pays-Bas,

Mme Jelena Jolić, M.Sc. (London School of Economics and Political Science),

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M. Christian J. Tams, LL.M., Ph.D. (Cambridge), Institut Walther-Schücking, Université de Kiel,

Mme Dina Dobrković, LL.B,

comme conseillers.

The PRESIDENT: Please be seated. The sitting is open.

The Court meets today to hear the oral statements of the Parties on the preliminary objections raised by the Respondent in the case concerning *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia* v. *Serbia)*.

Since the Court does not include upon the Bench a judge of the nationality of either of the Parties, both Parties have availed themselves of the right, under Article 31, paragraph 2, of the Statute, to choose a judge *ad hoc*. The Republic of Croatia chose Mr. Budislav Vukas. The Federal Republic of Yugoslavia chose Mr. Milenko Kreća.

Article 20 of the Statute provides that "[e]very Member of the Court shall, before taking up his duties, make a solemn declaration in open court that he will exercise his powers impartially and conscientiously". Pursuant to Article 31, paragraph 6, of the Statute, that same provision applies to judges *ad hoc*.

Although Mr. Kreća has been a judge *ad hoc* and made a solemn declaration in previous cases, Article 8, paragraph 3, of the Rules of Court provides that he must make a new declaration in the present case.

In accordance with custom, I shall first say a few words about the career and qualifications of each judge *ad hoc* before inviting him to make his solemn declaration.

Mr. Budislav Vukas, of Croatian nationality, holds a doctorate of law from the University of Zagreb where he has been a professor of public international law since 1977. He has held numerous other teaching positions around the world including at the Universities of Paris, Rome, Bologna and Boston, and has also taught a course concerning "States, Peoples and Minorities" at the Hague Academy of International Law. Mr. Vukas has represented his Government on various occasions including in the Sixth Committee of the United Nations General Assembly, at the Third United Nations Conference on the Law of the Sea and at the World Conference on Human Rights in Vienna. An eminent jurist, Mr. Vukas has combined his academic and diplomatic achievements with a career as an international judge. He was a member of the International Tribunal for the Law of the Sea during almost a decade and, as such, its Vice-President from 2002 until 2005. He is also a member of the Court of Conciliation and Arbitration within the Organization for Security and

Co-operation in Europe (OSCE). Mr. Vukas is further a member of numerous academic institutions including the *Institut de droit international*. In addition, he has published numerous works and articles on questions of international law, particularly in the field of the law of the sea, environmental law and international human rights law.

Mr. Milenko Kreća, of Serbian nationality, is well known to the Court, since he was already sitting as judge *ad hoc* in the case concerning *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro)* and in the ten cases concerning *Legality of Use of Force*. Mr. Kreća holds a Ph.D. degree in law from the School of Law of Belgrade University. He practised law as attorney prior to commencing his academic career at the Belgrade School of Law where he is Professor of Public International Law and holds a number of other important functions. He is, *inter alia*, Director of the Institute for Legal Studies and President of the Council of the Faculty. He also presides over a number of other national academic institutions. Mr. Kreća was on several occasions legal adviser to the Ministry of Foreign Affairs and the Government of the Federal Republic of Yugoslavia (FRY) and to other organs of the Republic of Serbia and the Federal Republic of Yugoslavia. Moreover, he was chosen as a judge *ad hoc* in a number of cases before the European Court of Human Rights and he is also an arbitrator of the Permanent Arbitration at the Commercial Chamber of the Republic of Serbia. Mr. Kreća is the author of numerous publications in the field of public international law.

In accordance with the order of precedence fixed by Article 7, paragraph 3, of the Rules of Court, I shall first invite Mr. Vukas to make the solemn declaration prescribed by the Statute and I request all those present to rise. Mr. Vukas.

Mr. VUKAS:

> «Je déclare solennellement que je remplirai mes devoirs et exercerai mes attributions de juge en tout honneur et dévouement, en pleine et parfaite impartialité et en toute conscience.»

The PRESIDENT: Thank you, Judge Vukas. Mr. Kreća.

Mr. KREĆA:

> "I solemnly declare that I will perform my duties and exercise my powers as judge honourably, faithfully, impartially and conscientiously."

The PRESIDENT: Thank you, Judge Kreća. Please be seated. The Court takes note of the solemn declarations made by Judges Vukas and Kreća and I declare them duly installed as judges *ad hoc* in the case concerning *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia* v. *Serbia)*.

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I shall now recall the principal steps of the procedure so far followed in this case. On 2 July 1999, the Government of the Republic of Croatia filed in the Registry of the Court an Application instituting proceedings against the Federal Republic of Yugoslavia in respect of a dispute concerning alleged violations of the Convention on the Prevention and Punishment of the Crime of Genocide, adopted by the General Assembly of the United Nations on 9 December 1948.

To found the jurisdiction of the Court, Croatia invoked in its Application Article IX of the Genocide Convention.

In accordance with instructions of the Court under Article 43 of the Rules of Court, the Registrar addressed to States parties to the Genocide Convention the notification provided for in Article 63, paragraph 1, of the Statute of the Court. The Registrar moreover sent to the Secretary-General of the United Nations the notification provided for in Article 34, paragraph 3, of the Statute and subsequently transmitted to him copies of the written pleadings.

By an Order dated 14 September 1999, the Court fixed 14 March 2000 as the time-limit for the filing of the Memorial of Croatia and 14 September 2000 as the time-limit for the filing of the Counter-Memorial of the Federal Republic of Yugoslavia.

By an Order dated 10 March 2000, the President of the Court, at the request of Croatia, extended the time-limit for the filing of the Memorial to 14 September 2000 and accordingly extended the time-limit for the filing of the Counter-Memorial of the Federal Republic of Yugoslavia to 14 September 2001.

By an Order dated 27 June 2000, the Court granted a further extension of the time-limits to 14 March 2001 and 16 September 2002, respectively, for the filing of the Memorial of Croatia and

the Counter-Memorial of the Federal Republic of Yugoslavia at the request of Croatia. Croatia duly filed its Memorial within the time-limit thus extended.

On 11 September 2002, within the time-limit set in Article 79, paragraph 1, of the Rules of Court as adopted on 14 April 1978, the Federal Republic of Yugoslavia raised preliminary objections relating to the Court's jurisdiction to entertain the case and to the admissibility of the Application. Consequently, by Order of 14 November 2002, the Court noted that, by virtue of Article 79, paragraph 3, of the Rules of Court, the proceedings on the merits were suspended, and fixed 29 April 2003 as the time-limit for the presentation by Croatia of a written statement of its observations and submissions on the preliminary objections raised by the Federal Republic of Yugoslavia. Croatia filed such a statement within the time-limits thus fixed.

Pursuant to Article 53, paragraph 1, of the Rules of Court, the Government of Bosnia and Herzegovina asked to be furnished with copies of the pleadings and documents annexed thereto. In accordance with the same provision, having ascertained the views of the Parties, the President of the Court decided to grant that request.

On 4 February 2003, following the promulgation of the Constitutional Charter of Serbia and Montenegro by the Assembly of the Federal Republic of Yugoslavia, the name of the State was changed from the "Federal Republic of Yugoslavia" to "Serbia and Montenegro".

On 3 June 2006, the President of Serbia informed the Secretary-General of the United Nations that, following the Declaration of Independence adopted by the National Assembly of the Republic of Montenegro, "the membership of the state union Serbia and Montenegro in the United Nations would be continued by the Republic of Serbia, on the basis of Article 60 of the Constitutional Charter of Serbia and Montenegro". By letter of 30 June 2006, addressed to the Secretary-General, the Minister for Foreign Affairs of Serbia specified that "all treaty actions undertaken by Serbia and Montenegro would continue in force with respect to the Republic of Serbia with effect from 3 June 2006", and that "all declarations, reservations and notifications made by Serbia and Montenegro would be maintained by the Republic of Serbia until the Secretary-General, as depositary, was duly notified otherwise".

By letters dated 19 July 2006, the Registrar requested the Agent of Croatia, the Agent of Serbia and the Minister for Foreign Affairs of the Republic of Montenegro to communicate to the

Court the views of their Governments on the consequences to be attached to the above-mentioned developments regarding the name of the Respondent in the case**.**

By a letter dated 22 July 2006, the Agent of Serbia explained that, in his Government's opinion, "there was continuity between Serbia and Montenegro and the Republic of Serbia (on the grounds of Article 60 of the Constitutional Charter of Serbia and Montenegro)". In those circumstances, the view of his Government was that "the Applicant had first to take a position, and to decide whether it wished to maintain its original claim encompassing both Serbia and Montenegro, or whether it chose to do otherwise".

By a letter dated 29 November 2006, addressed to the Court, the Chief State Prosecutor of the Republic of Montenegro, after indicating her capacity to act as a legal representative of the Republic of Montenegro, drew attention to the fact that the legal successor of the State union of Serbia and Montenegro was the Republic of Serbia and concluded that, in the dispute before the Court, "the Republic of Montenegro might not have the capacity of Respondent".

By letter dated 15 May 2008, the Agent of Croatia, referring to Article 60 of the Constitutional Charter of Serbia and Montenegro and to the decision of the Court in the case concerning *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro)*, confirmed that "the present proceedings were maintained against the Republic of Serbia as Respondent". He further noted that this conclusion was "without prejudice to the potential responsibility of the Republic of Montenegro and the possibility of instituting separate proceedings against it".

In light of the above-mentioned views communicated by the Parties on the matter, the Court has decided that the Respondent would henceforth be referred to as "Serbia" instead of "Serbia and Montenegro" for all purposes of the case.

By a letter dated 11 April 2007, the Registrar, in accordance with Article 69, paragraph 3, of the Rules of Court, asked the Secretary-General of the United Nations to inform him whether or not the United Nations intended to present observations in writing within the meaning of the said provision. In a letter dated 7 May 2007, the Secretary-General indicated that the United Nations did not intend to submit any such observations.

On 1 April 2008, Serbia provided the Registry with nine additional documents which it wished to produce in the case, under Article 56, paragraph 1, of the Rules of Court. By a letter dated 24 April 2008, the Agent of Croatia informed the Court that his Government had no objection to the production of these documents and that it wished, for its part, to produce two new documents. By the same letter, the Agent of Croatia requested that the Court call upon the Respondent, under Article 49 of its Statute and Article 62, paragraph 1, of the Rules of Court, to produce a certain number of documents. By letter dated 29 April 2008, the Agent of Croatia provided additional information relating to that request.

The Agent of Serbia subsequently informed the Court that his Government did not object to the production of the two new documents which Croatia wished to produce in the case. He further informed the Court of his Government's observations with regard to Croatia's request that the Court call upon the Respondent to produce a certain number of documents.

On 6 May 2008, the Registrar notified the Parties that the Court had decided to authorize the production of the documents they wished to submit under Article 56 of the Rules of Court. These documents, accordingly, were added to the case file. The Registrar further informed the Parties of the Court's decision not to accede to Croatia's request that the Court call upon the Respondent, under Article 49 of the Statute and Article 62, paragraph 1, of the Rules of Court, to produce a certain number of documents**.** The Court was not satisfied that the production of the requested documents was necessary for the purpose of ruling on the second preliminary objection put forward by the Respondent. Furthermore, the Court was of the view that Croatia had failed to provide sufficient reason to justify the lateness of its request and that acceding to the request at that stage of the proceedings would, in addition, raise many practical problems.

By letters dated 6 May 2008, the Registrar informed the Parties that the Court asked them to address, during the hearings, the issue of the capacity of the Respondent to participate in proceedings before the Court at the time of the filing of the Application, given the fact that the issue had not been addressed as such in the written pleadings.

Having ascertained the views of the Parties, the Court decided, in accordance with Article 53, paragraph 2, of its Rules, that copies of the pleadings and documents annexed would be

made accessible to the public on the opening of the oral proceedings. Further, in accordance with the Court's practice, the pleadings will be put on the Court's website from today.

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I note the presence at the hearing of the Agents, counsel and advocates of both Parties. In accordance with the arrangements on the organization of procedure which have been decided upon by the Court, the hearings will comprise a first and a second round of oral argument. Serbia, which raised the preliminary objections, will be heard first. The first round of oral argument will begin today. Each Party will dispose of a total of four-and-a-half hours. Serbia will present its arguments this morning until 1 o'clock and again this afternoon at 3 o'clock. Croatia will present its arguments tomorrow afternoon at 4.30 and on Wednesday 28 May 2008 at 10 a.m. The second round of oral argument will begin on Thursday and each Party will have a maximum time of three hours. Serbia will present its oral reply on Thursday 29 May 2008 at 10 a.m. For its part, Croatia will have the floor again to present its oral reply on Friday 30 May at 10 a.m.

I draw the attention of the Parties to the requirements of paragraph 1 of Article 60 of the Rules of Court, which provides as follows:

> "The oral statements made on behalf of each party shall be as succinct as possible within the limits of what is requisite for the adequate presentation of that party's contentions at the hearing. Accordingly, they shall be directed to the issues that still divide the parties, and shall not go over the whole ground covered by the pleadings, or merely repeat the facts and arguments these contain."

I should also recall in this regard that Practice Direction VI specifies that "[w]here objections of lack of jurisdiction or of inadmissibility are being considered, oral proceedings are to be limited to statements on the objections".

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I now give the floor to Mr. Tibor Varady, the Agent of the Republic of Serbia.

Mr. VARADY: Thank you very much.

INTRODUCTION

1. Madam President, distinguished Members of the Court. May it please the Court: it is, once again, an exceptional privilege to appear before this Court. I would like to express my sincere respect for our colleagues representing the Applicant. And, with your permission, I shall introduce my colleagues who will represent the Respondent during this oral hearing. With me are Professor Andreas Zimmermann as counsel and advocate, and Mr. Vladimir Djerić as counsel and advocate.

2. Starting our presentations, and for the sake of clarity, let me make some observations of an essentially technical nature, which pertain to names and designations. Both the Applicant and the Respondent are successor States of the former Socialist Federal Republic of Yugoslavia, the "SFRY"; we shall refer to the predecessor State as the "former Yugoslavia". Furthermore, as was stated by Madam President, at the time when the Application was submitted, the name of the Respondent was the Federal Republic of Yugoslavia or the "FRY". In February 2003 the FRY changed its name and became Serbia and Montenegro. In 2006, Serbia and Montenegro separated and became two distinct States. We believe that it is not contested any more that there was no continuity between the former Yugoslavia and the FRY. Also, we believe that it is not contested either that there *was* continuity between the FRY and Serbia and Montenegro. Likewise, it is not contested that there *is* continuity between Serbia and Montenegro and Serbia. We shall use all three designations regarding the Respondent — the "FRY", "Serbia and Montenegro", and "Serbia" — depending on the time period to which we are referring, and using the name which was official at the given moment.

3. Madam President, distinguished Members of the Court, this case is the final one in a sequence of cases born out of the conflicts which left a tragic imprint on the past decade in the former Yugoslavia. This hearing on jurisdiction takes place 12 years after the hearing on jurisdiction in the *Bosnia* case. These years have brought clarifications and put an end to legal ambiguities. A part of new, important developments took place during the period since we submitted our preliminary objections in 2002. Today, we sincerely hope that we can submit to

your attention a clear and straightforward matter. This has become possible because during past years a comprehensive assessment of facts were reached, and such assessments were made by competent international authorities. Organs of the United Nations, and this honoured Court in particular, have come into a position to formulate a definite characterization of the legal consequences of the dissolution of the former Yugoslavia. These new assessments and new characterizations permit us to submit some new arguments supporting our position. New information and new perspectives have reinforced our conviction that a scrutiny of the events in Croatia in the early 1990s is not the task of this honoured Court under Article IX of the Genocide Convention.

4. Let me mention, first of all, that today we know much more about the conflict itself with regard to which jurisdiction is asserted by our Croatian colleagues, and contested by us. Since the end of the conflict we have witnessed a process in which passions and myths gradually ceded place to facts. Information emerged from various sources, and within this process, the International Criminal Tribunal for the former Yugoslavia (the ICTY) has played a critical role. It has become evident that what happened just cannot be reduced to a simple picture showing one perpetrator and one victim of genocide. This cannot be done because there were victims and there were perpetrators on both sides; and this cannot be done because what happened in Croatia did imply crimes, did yield tragedies, but never reached the threshold of genocide.

5. Madam President, in our preliminary objections we endeavoured to explain that the conflict in Croatia was not a one-dimensional experience which could be reduced to the simple scheme of one villain and one victim. We referred to authoritative independent sources, citing among others a report of the United Nations High Commissioner for Refugees, which established that in the second half of 1995, the Croatian army "[l]aunched an attack that eventually forced more than 180,000 Serbs from Croatia to flee their homes in the Krajina region in the world's single largest exodus"[1].

6. During the years that have passed since our preliminary objections were submitted, the ICTY has nearly completed its work. Information has also become available from many other

[1]See the Office of the United Nations High Commissioner for Refugees, *Census of Refugees and other War-Affected Persons in the Federal Republic of Yugoslavia*, Belgrade 1996, p. 20 (Ann. 3 to the preliminary objections).

sources, including court proceedings both in Croatia and in Serbia. Let me mention at this point that while during the first years after the conflict court proceedings in Croatia and in Serbia were practically restricted to proceedings against actors from the other side, today we have consequential proceedings against Croats in Croatia and against Serbs in Serbia. Today it is even more evident that the reality was complex, it included shifting roles in different times and at different places.

7. Let me cite this time just one more assessment coming from a competent witness. Acting as a prosecution witness against Mr. Milošević, Mr. Galbraith, former United States Ambassador to Croatia stated:

> "Croatia engaged in much illegal and criminal behaviour in the course of Operation Storm. That included the . . . permitting of the systematic burning of the homes and property of the Serbian population after they had left. It included the killing of several hundred stragglers. It included efforts by Tudjman […], to prevent Serbs who were citizens of Croatia to return to their homes. We criticized this repeatedly, strongly, this illegal and immoral behaviour. We tried to reverse it. We imposed sanctions on Croatia . . ."[2]

8. Madam President, I have no reason not to add that in his testimony Mr. Galbraith also stated that it was the actions of Ratko Mladić, of the Krajina Serbs supported by Mr. Milošević, "[t]hat gave the Croatian Army the pretext to launch a war and created an environment in which it was difficult for any of the international powers to restrain the Croatians". What I am trying to say — and what seems to have become widely known — is that what happened simply cannot be reduced to a one-dimensional picture. Misdeeds of one side spurred misdeeds of the other side. At various times, different participants in the conflict got stronger — and those who were stronger inflicted more suffering.

9. Today, we also have a better picture of the exact dimensions of the crimes committed during the conflict. It has always been known that misdeeds did take place in Croatia. Some of them amounted to serious crimes. Today, we know more about the character and about the dimensions of these crimes — and we also know more about the perpetrators. But it has also become known that crimes committed against Croats did not reach — let alone pass — the threshold of genocide. What happened is not even prima facie genocide.

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[2]Prosecutor *v*. Milosevic, case No. IT-02-54, Trial Transcript, 26 June 2003, p. 23175.

10. It is well known that in connection with the Bosnian conflict, a number of Bosnian Serbs were indicted for the crime of genocide by the ICTY, and one of them (General Krstić) was also convicted. This honoured Court relied on this fact in its 2007 Judgment in the *Bosnia* case, giving credit to the findings of the ICTY. As far as events in Croatia are concerned, these have been scrutinized by the ICTY with equal attention as the events in Bosnia, but no one was convicted for genocide in Croatia. And not only that there has been no conviction, there was no indictment either. The prosecution of the ICTY indicted many persons for crimes committed in Croatia, but no one, not one single person has ever been indicted for genocide in connection with crimes committed in Croatia.

11. Let me say that it is not my intention to deny that the allegations submitted by our Croatian colleagues refer to true sufferings of Croats. New evidence and new scrutiny of evidence to which I have been referring have also confirmed that there were, indeed, Croatian sufferings, and that most of these were caused by misdeeds of Serbs. Crimes were undoubtedly committed. Croatian sufferings have dignity, and deserve respect — but this does not mean that they have to be qualified as genocide, let alone genocide attributable to the respondent State. Madam President, this is not a case in which after genocide was committed, the question arises whether justice may be pursued against a State as well, in addition to individual perpetrators. This is a case in which there was no genocide — and in which, in addition, essential preconditions for jurisdiction are not met.

12. Madam President, distinguished Members of the Court, turning to the specific requirements of jurisdiction, let me mention that in all cases born out of the Yugoslav conflicts, the question of jurisdiction was influenced by the most unorthodox process of dissolution of the former Yugoslavia. But there is a most important difference. In this case, we have a different perspective, because we can now look at issues in the possession of new information and conclusive clarifications. Today, we can rely on a clear, established and confirmed perception.

13. For a considerable period, the process of dissolution of the former Yugoslavia — which has a consequential bearing on the issue of jurisdiction — was highly controversial. Clarifications were delayed for much too long. Positions taken were sometimes tainted by inconsistencies and by a tantalizing absence of elucidation. This situation was appositely characterized by the Court in the 2004 *Legality of Use of Force* Judgments:

> "[T]he legal position of the Federal Republic of Yugoslavia within the United Nations and vis-à-vis that Organization remained highly complex during the period 1992-2000. In fact, it is the view of the Court that the legal situation that obtained within the United Nations during that eight-year period concerning the status of the Federal Republic of Yugoslavia, after the break-up of the Socialist Federal Republic of Yugoslavia, remained ambiguous and open to different assessments. This was due, *inter alia*, to the absence of an authoritative determination by the competent organs of the United Nations defining clearly the legal status of the Federal Republic of Yugoslavia vis-à-vis the United Nations." (*Legality of Use of Force (Serbia and Montenegro* v. *Belgium)*, *Preliminary Objections, Judgment*, p. 305, para. 64.)[3]

14. Madam President, this period of uncertainties and ambiguities, which lasted eight years, came to an end. What we have behind us now in this case is a new period of eight years, from 2000 to 2008, in which clarifications were indeed given. Within the eight years since 2000, a sound perception of the dissolution of the former Yugoslavia and of the status of the FRY was not only established but also stabilized and confirmed. This perception became dependable. In order to present a clear and unequivocal confirmation of this perception, let me cite once again the 2004 *Legality of Use of Force* Judgments, in which the Court stated:

> "[F]rom the vantage point from which the Court now looks at the legal situation, and in light of the legal consequences of the new development since 1 November 2000, the Court is led to the conclusion that Serbia and Montenegro was not a Member of the United Nations, and in that capacity a State party to the Statute of the International Court of Justice, at the time of filing its Application to institute the present proceedings before the Court on 29 April 1999." (*Ibid.*, p. 311, para. 79.)[4]

I believe that it is common ground that there was no change in the status of the FRY between 29 April 1999 and 2 July 1999, the date when the Application of Croatia was submitted. Our situation is exactly the same.

15. The clarifications which have emerged and became unequivocal give full support and confirmation to two arguments, each of which is sufficient to justify the objection that jurisdiction is lacking in this case. First, this Court has no jurisdiction because the Respondent was not a State party to the Statute and, hence, had no access to the Court at the relevant time, the time of the filing of the Application; and secondly, this Court has no jurisdiction because in the absence of

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[3]Exactly the same text can be found in the other 2004 *Legality of Use of Force* Judgments as well: in paragraph 63 of the cases with France, Canada, Italy, Netherlands, Portugal, and in paragraph 62 of the cases with Germany and the United Kingdom.

[4]Exactly the same text can be found in the other 2004 *Legality of Use of Force* Judgments as well: in paragraph 78 of the cases with France, Canada, Italy, the Netherlands, Portugal, and in paragraph 77 of the cases with Germany and the United Kingdom.

continuity, the Respondent did not remain bound by Article IX of the Genocide Convention, and it never became bound by Article IX in any possible way.

16. Madam President, let me mention one more circumstance which, I believe, has relevance for our considerations. The days of war have gone, and so has the intensive hatred between the two nations which paralyzed any co-operation and poisoned neighbourly relations. We have reached normalcy. It may still be delicate, it may still be frail, but it is normalcy. Both Croatia and Serbia have a similar vision of their future — and this is a future in the European Union. This also means that the applicant State and the respondent State are heading towards a future in community.

17. Normalization supposes steps taken to remedy what can be remedied, and to punish those who committed crimes. In other words, normalization implies a readiness to face the past. Let me point out in this connection the gesture of Serbian President Boris Tadić who expressed apologies in most unequivocal terms. He stated: "I am addressing apologies to all citizens of Croatia, and to everybody belonging to the Croatian nation on whom persons belonging to my nation inflicted misfortune . . ."[5] This statement was greeted with satisfaction in Croatia — and it was well received in Serbia as well. This afternoon, in the context of our third preliminary objection, we shall submit to your attention evidence of progress made in remedying the consequences of the conflict — such as return of cultural property, or finding information on missing persons. Most considerable progress has also been made in bringing the individual perpetrators of crimes to justice. Consequential cases against Croatian perpetrators are in progress in Croatia — such as the ongoing case against Croatian generals accused of war crimes against the civilian population in Medački džep. At the same time, consequential cases against Serbian perpetrators are in progress in Serbia. I shall mention as example the proceedings against those who have been indicted for war crimes in Ovčara. The most recent example are the proceedings in Belgrade against 12 persons accused of war crimes against Croatian civilians in Lovas, which process started about a month ago, on 17 April 2008. This trial is monitored by the OSCE, and it is attended by the families of the victims. Let me also point out that Croatian and Serbian authorities have co-operated in the preparation of these trials. We trust that this is the path we should follow.

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[5]See B92 News, "Tadić apologizes to Croatian citizens", 24 June 2007, Available from: <http://www.b92.net/info/vesti/index.php?yyyy=2007&mm=06&dd=24&nav_id=252551>

18. Madam President, my colleagues and I would like to turn now towards a more detailed elaboration of specific issues which are in the focus of this hearing. We shall demonstrate that this Court has no jurisdiction, because two basic preconditions to jurisdiction are missing. We shall also demonstrate that claims based on acts and omissions which took place before the Respondent came into being are inadmissible. And we shall further demonstrate that the acts and omissions on which the claims are based do not even prima facie reach the threshold of genocide, and many of the specific claims have become moot and are, hence, for that reason too, inadmissible.

19. I shall now submit to you the schedule of our presentations. Our next speaker will be our counsel and advocate Mr. Djerić, to be followed by our counsel and advocate Professor Zimmermann. They shall address the arguments of Croatia advanced in their Written Observations regarding our first preliminary objection. After the break, I shall endeavour to summarize our arguments pertaining to our primary objection — the objection that this honoured Court has no jurisdiction. We are planning to have one more presentation before the lunch break: Mr. Vladimir Djerić will address our second preliminary objection. After the lunch break, Mr. Djerić will continue his speech and Professor Zimmermann will present some added arguments regarding our second preliminary objection, and he shall also present arguments regarding our third preliminary objection. After his speech I would like to add some concluding remarks.

Thank you very much for your attention — and I would like to ask you, Madam President, to give the floor to Mr. Djerić.

The PRESIDENT: Thank you, Professor Varady. And I do now give the floor to Mr. Djerić.

Mr. DJERIĆ: Thank you, Madam President.

PREVIOUS JUDGMENTS OF THE COURT SUPPORT THE OBJECTION THAT THERE IS NO JURISDICTION *RATIONE PERSONAE* IN THE PRESENT CASE

1. Members of the Court, it is a very great personal pleasure for me to have the honour once again of appearing before this honourable Court.

2. Madam President, in order to show that the Court does not have jurisdiction *ratione personae* in the present case, our first preliminary objection relies on two events — first, the FRY's

admission to the United Nations as a new Member State in 2000 and, secondly, its accession to the Genocide Convention in 2001, with a reservation to Article IX. These events conclusively clarified that the FRY was not a Member of the United Nations before 2000, and that the FRY did not continue the personality of the former Yugoslavia. The FRY had asked the Court to examine these two facts and draw appropriate jurisdictional consequences in all cases in which the FRY had been a party, regardless of its status as a respondent or applicant. In 2001 the FRY had filed an application for revision of the 1996 Judgment on jurisdiction in the *Bosnia* case. As is well known, in February 2003, the Court ruled that the FRY's Application did not fulfil the mandatory conditions for revision under Article 61 of the Statute and was accordingly inadmissible (*Application for Revision of the Judgment of 11 July 1996 in the Case concerning* Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina *v.* Yugoslavia), Preliminary Objections *(Yugoslavia* v. *Bosnia and Herzegovina), Judgment*, *I.C.J. Reports 2003*, pp. 31 and 32, paras. 72 and 75) (hereinafter *Revision*)).

3. The preliminary objections in the present case had been filed in September 2002, several months before the *Revision* Judgment was rendered, while the Applicant filed its Written Observations in April 2003, several months after the *Revision* Judgment. With respect to our first preliminary objection, the Written Observations almost entirely rely on the *Revision* Judgment. On five pages of text, the Applicant simply argued that the position adopted in the preliminary objections was identical to the FRY's position in the *Revision* case[6]; and that, essentially, the Court's reasoning in the *Revision* Judgment disposed of the preliminary objections in the present case, as well[7]. The Applicant also reiterated its earlier position from the Memorial that the question of the FRY's membership in the Genocide Convention had been resolved and confirmed by the 1996 Judgment in the *Bosnia* case, and then reconfirmed by the Court's pronouncements in the incidental proceedings in the *Legality of Use of Force* cases in 1999[8]. However, since the Written Observations were filed in 2003, the Court has addressed and resolved most of the points

[6]Written Statement of the Republic of Croatia of its Observations and Submissions on the Preliminary Objections by the Federal Republic of Yugoslavia (Serbia and Montenegro), 29 April 2003, paras. 2.6. and 2.8 (hereinafter: "Written Observations").

[7]Written Observations, paras. 2.12.-2.13.

[8]Written Observations, paras. 2.2 and 2.13.

raised in our preliminary objections. And, as I will now discuss in detail, the Court's pronouncements in subsequent cases demonstrate that the Applicant's interpretation of the earlier pronouncements of the Court in the cases involving the FRY, and, in particular in the *Revision* Judgment, is clearly erroneous.

The Applicant's reliance on the *Revision* Judgment is erroneous

4. Madam President, it is now quite clear that the Applicant's reliance exclusively on the *Revision* Judgment in answering our first preliminary objection was wrong. It was wrong because the *Revision* Judgment was above all about revision, and the fulfilment of the conditions for revision set in Article 61 of the Statute.

5. In the *Revision* Judgment itself, the Court was quite clear in saying that "the Court's decision is limited to the question whether the request satisfies the conditions contemplated by [Article 61 of] the Statute" (*ibid.*, p. 11, para. 16).

6. This was reiterated in the 2004 Judgments concerning the *Legality of Use of Force*, and then confirmed in 2007 in the merits Judgment in the *Bosnia* case. In the *Legality of Use of Force* the Court said that, in the *Revision* case, it was "concerned simply to establish whether the Federal Republic of Yugoslavia's Application for revision was admissible in conformity with the provisions of Article 61 of the Statute" (*Legality of Use of Force (Serbia and Montenegro* v. *Belgium), Preliminary Objections, Judgment*, p. 312, para. 85 (hereinafter "*Legality of Use of Force*")).

Therefore, the Court in the *Revision* Judgment, and here I quote again *Legality of Use of Force*, "did not have to say whether it was correct that Serbia and Montenegro had not been a party to the Statute or to the Genocide Convention in 1996" (*ibid.*, p. 313, para. 87).

Finally, the Court concluded that its pronouncements in the *Revision* Judgment

> "cannot however be read as findings on the status of Serbia and Montenegro in relation to the United Nations and the Genocide Convention; the Court had already implied that it was not called upon to rule on those matters, and that it was not doing so" (*ibid.*, p. 313, para. 88).

In 2007, in the *Bosnia* Judgment, the Court once again unequivocally confirmed that the *Revision* Judgment did not contain any finding on membership of the FRY in the United Nations at the relevant time, i.e., when the *Bosnia* case was instituted in 1993 (case concerning the *Application of*

the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. *Serbia and Montenegro*), Judgment of 26 February 2007, para. 113 (hereinafter *"Bosnia"*).

7. Therefore, it is clear that the *Revision* Judgment resolved neither the question of the status of the FRY in relation to the United Nations before its admission in 2000, nor the question of the status of the FRY in relation to the Genocide Convention before its accession in 2001. The Applicant's reliance on this Judgment in the context of the present proceedings is simply misplaced.

The question of access

8. Madam President, with your permission, I will now turn to the more specific points made in the Written Observations and will compare them with the position taken by the Court in the *Legality of Use of Force* and *Bosnia* Judgments. The Applicant has formulated the main issue in the present proceedings on preliminary objections in the following way: "[i]n relation to the issue of jurisdiction *ratione personae* in the present proceedings the Court has to address the question: was the FRY bound by the Genocide Convention on 2 July 1999"[9].

9. Here, we agree with the Applicant. But, we also have to add that before going into this question the Court has first to resolve whether or not it was open to the FRY at the time of the institution of the present proceedings, on 2 July 1999. According to the 2007 Judgment in the *Bosnia* case:

> "The Court however considers it necessary to emphasize that the question whether a State may properly come before the Court, on the basis of the provisions of the Statute, whether it be classified as a matter of capacity to be a party to the proceedings or as an aspect of jurisdiction *ratione personae*, is a matter which precedes that of jurisdiction *ratione materiae*, that is, whether that State has consented to the settlement by the Court of the specific dispute brought before it." (*Bosnia* Judgment, para. 122.)

The reason why the Court has first to examine whether it is open to each of the Parties was clearly stated in the *Legality of Use of Force* cases: "The Court can exercise its judicial function only in respect of those States which have access to it under Article 35 of the Statute." (*Legality of Use of Force, Preliminary Objections, Judgment*, p. 298, para. 46). In other words, if a party does not

[9]Written Observations, para. 2.8.

have access to the Court, any exercise of the Court's judicial function with respect to such party would be *ultra vires*. This is why the question of access, in the words of the Court is, "a fundamental one" (*ibid*., p. 293, para. 30). This is also why the Court examines the question of access *proprio motu*, irrespective of an initiative or attitude of the parties. The principle was most recently affirmed in the *Bosnia* case. The Court said:

> "The question is in fact one which the Court is bound to raise and examine, if necessary, ex officio, and if appropriate after notification to the parties. Thus if the Court considers that, in a particular case, the conditions concerning the capacity of the parties to appear before it are not satisfied, while the conditions of its jurisdiction *ratione materiae* are, it should, even if the question has not been raised by the parties, find that the former conditions are not met, and conclude that, for that reason, it could not have jurisdiction to decide the merits." (*Bosnia* Judgment, para. 122; see, also, *Legality of Use of Force (Serbia and Montenegro* v. *France*), *Preliminary Objections, Judgment,* p. 595, para. 50.)

10. The relevant moment in time when a party must have access, or the capacity to appear before the Court, is the moment when the proceedings are instituted. As the Court stated unequivocally: "The question whether Serbia and Montenegro was or was not a party to the Statute of the Court *at the time of the institution of the present proceedings* is a fundamental one." (*Legality of Use of Force*, *Preliminary Objections, Judgment,* p. 293, para. 30, emphasis added; see, also, p. 298, para. 46.)

11. Therefore, the first and preliminary question to be resolved in the present proceedings is whether the Respondent had access to the Court under Article 35 of the Statute at the time when the proceedings were instituted, on 2 July 1999. Only after it is established that, at that time, the FRY had access to the Court under the Statute, could one address the next question pertaining to jurisdiction *ratione personae*: whether the Respondent was bound by the Genocide Convention at the relevant time.

The FRY did not have access to the Court before 1 November 2000, including when the present proceedings were instituted

12. Madam President, the story of the FRY's status in the United Nations before 2000 is well known and has been subject to extensive examination by this Court. As Professor Varady already mentioned, in the 2004 *Legality of Use of Force* Judgments the Court held:

> "[F]rom the vantage point from which the Court now looks at the legal situation, and in light of the legal consequences of the new development since

> 1 November 2000, the Court is led to the conclusion that Serbia and Montenegro was not a Member of the United Nations, and in that capacity a State party to the Statute of the International Court of Justice, at the time of filing its Application to institute the present proceedings before the Court on 29 April 1999." (*Ibid.*, p. 310, para. 79).

Consequently, the Court ruled that it was not open to Serbia and Montenegro on the basis of Article 35, paragraph 1, of the Statute (*ibid.*, p. 314, para. 91). The Court also ruled that Serbia and Montenegro did not have access on the basis of Article 35, paragraph 2, because neither it sought access under the conditions laid down by the Security Council (*ibid.*, p. 315, para. 92), nor the Genocide Convention, as a purported basis of jurisdiction in this case, was one of the "treaties in force" within the meaning of this provision (*ibid.*, p. 324, para. 114).

13. Madam President, we submit that the Court's ruling that Serbia and Montenegro was not a Member of the United Nations and, as such, party to the Statute, is conclusive for the present case as well. It is conclusive not because it would represent *res judicata*, but because the issue is the same, and because the ruling regarding this issue was made after all relevant circumstances were finally clarified. As the Court itself said, this ruling was made "in light of the legal consequences of the new development since 1 November 2000", i.e., the admission of the FRY to the United Nations. In other words, the admission of the FRY to the United Nations on 1 November 2000 made it clear that the FRY was not a Member of the Organization before that time. This finding must equally apply to the present case.

14. Moreover, in the *Legality of Use of Force* cases the Court ruled that the FRY did not have the right to appear before it at the time the proceedings were instituted on 29 April 1999. We submit that nothing had changed over the next two months and three days until 2 July 1999, when Croatia brought this case before the Court. Simply, on both dates, the Court was not open to the FRY either on the basis of Article 35, paragraph 1, or on the basis of Article 35, paragraph 2, of the Statute. There had been no relevant intervening events in the two months that passed between the Application in the *Legality of Use of Force* cases and the Application in the present case. It is respectfully submitted that the law, as well as the principle of consistency, mandate that both these cases be resolved in the same way.

15. Madam President, it seems as if the Applicant holds that the admission of the FRY to the United Nations in November 2000 has no bearing whatsoever on the present case. In that, it relies on certain observations from the *Revision* Judgment and argues that the legal situation was

"precisely the same" in 1996, when the jurisdiction Judgment in the *Bosnia* case had been rendered, and in 1999 when the present proceedings were instituted[10]. According to the Applicant, this was the situation created by General Assembly resolution 47/1, which did not affect the right of the FRY to appear before the Court or its relation to the Genocide Convention[11]. Moreover, the Applicant claims that, "the Court also made it clear that any new fact and the situation resulting therefrom cannot have retroactive effect"[12].

16. It seems however that the Applicant misreads the *Revision* Judgment. This becomes obvious if one compares the Applicant's position with the Court's clarifications made in the *Legality of Use of Force* Judgments, and reiterated in the *Bosnia* case:

> "The Court . . . made its position clear that there could have been no retroactive modification of the situation in 2000, which would amount to a new fact, and that therefore the conditions of Article 61 were not satisfied. *This, however, did not entail any finding by the Court, in the revision proceedings, as to what the situation actually was*."[13] (*Legality of Use of Force, Preliminary Objections, Judgment*, p. 314, para. 89.)

17. Therefore, the *Revision* Judgment did not resolve the question of the status of the FRY in relation to the United Nations and the Genocide Convention. The question of the status of the FRY in relation to the United Nations and of its access to the Court before 2000 was resolved by the *Legality of Use of Force* Judgments which held that there had been no access.

18. In its Written Observations, the Applicant does not deal with this issue apart from relying on certain pronouncements in the *Revision* case, which, as I already discussed, were not intended to resolve the matter, but rather to describe it. But, in its Memorial, filed in 2001, the Applicant contended that the jurisdictional basis of its claim was the same as the one that had been accepted in the 1996 Judgment on jurisdiction in the *Bosnia* case and then, in a footnote, said that this jurisdictional basis "appears to have been" Article 35, paragraph 2, of the Statute[14].

19. However, the Applicant's reliance on Article 35, paragraph 2, is not in line with the position taken by the Court itself. First, it is clear, and has been confirmed by the Court, that the

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[10]Written Observations, para. 2.10.

[11]Written Observations, para. 2.11.

[12]Written Observations, para. 2.11.

[13]Also quoted in the *Bosnia* case, para. 112; emphasis added.

[14]Memorial, para. 6.04, and Note 1 therein.

FRY had never sought, or had, access to the Court under the conditions laid down by the Security Council in resolution 9 (1946) (*Legality of Use of Force, Preliminary Objections, Judgment*, p. 315, para. 92). Secondly, the Genocide Convention, which is invoked by the Applicant as the basis of jurisdiction in the present case, is not a treaty within the meaning of the "treaties in force" clause that could provide access to the Court under Article 35, paragraph 2. According to the Court, this clause applies "only to treaties in force at the date of the entry into force of the Statute, and not to any treaties concluded since that date" (*ibid.*, para. 113). On this basis, it was held that, even assuming that the FRY was a party to the Genocide Convention at the relevant time *(quid non)*, this was a treaty which entered into force after the entry into force of the Statute, and therefore Article 35, paragraph 2, could not provide the FRY with access to the Court under Article IX of the Genocide Convention (*ibid.*, para. 114).

20. As far as Article 35, paragraph 1, of the Statute, is concerned, I have already mentioned the Court's ruling in the 2004 *Legality of Use of Force* Judgments that it was not open to the FRY on this basis, because the FRY was not a Member of the United Nations and in that capacity a party to the Statute (*ibid.*, paras. 79 and 91). But at this point, I would like to add that much earlier, in 1999, shortly before instituting the present proceedings, Croatia expressly took the position that the FRY was not a party to the Statute of the Court, a position which is now contradicted by the Applicant. At tab 4 of your judges' folders you may find a joint letter dated 27 May 1999 from the permanent representatives of Bosnia and Herzegovina, Croatia, Slovenia and Macedonia to the United Nations addressed to the Secretary-General, which states the following:

> "Since a new application for membership in the United Nations, pursuant to Article 4 of the Charter of the United Nations, has not been made by the Federal Republic of Yugoslavia (Serbia and Montenegro) to date, and it has not been admitted to the United Nations, the Federal Republic of Yugoslavia therefore cannot be considered to be *ipso facto* a party to the Statute of the Court by virtue of Article 93, paragraph 1, of the Charter of the United Nations. Neither has the Federal Republic of Yugoslavia (Serbia and Montenegro) become a contracting party of the Statute of the Court under Article 93, paragraph 2, of the Charter, which states that a non-member State can only become a contracting party of the International Court of Justice's Statute under conditions set by the General Assembly on the recommendation of the Security Council on a case-by-case basis. Furthermore, the Federal Republic of Yugoslavia (Serbia and Montenegro) has not accepted the jurisdiction of the Court under the conditions provided for in Security Council resolution 9 (1946) and adopted

> by the Council by virtue of powers conferred on it by Article 35, paragraph 3, of the Statute of the Court."[15]

21. Madam President, this letter was signed by our learned colleague the Agent of Croatia, who was at the time the permanent representative of his country to the United Nations. This letter is straightforward and elaborate in saying that the mandatory conditions set forth in Article 35, paragraph 1, as well as in Article 35, paragraph 2, in relation to Security Council resolution 9, were not fulfilled.

22. This review of Croatia's position on the question of the FRY's status in relation to the Statute of the Court clearly shows that it did not consider Article 35, paragraph 1, as being applicable to the FRY. It also did not consider that the FRY accepted the jurisdiction of the Court in accordance with the conditions set forth by the Security Council under Article 35, paragraph 2. The only way in which the Applicant recognized the jurisdiction could have been established over the FRY was by the use of the "treaties in force" clause in Article 35, paragraph 2, of the Statute. However, this door was shut by the Court in 2004 when it ruled that this clause was not applicable to the Genocide Convention.

The Applicant's reliance on the 1996 Judgment on preliminary objections in the *Bosnia* case is erroneous

23. Madam President, the starting proposition both in Croatia's Memorial and in the Written Observations is that the Court already accepted that the FRY was bound by the Genocide Convention in the 1996 Judgment on jurisdiction in the *Bosnia* case[16]. However, according to Article 59 of the Statute, it is obvious that the 1996 Judgment, having been rendered in another case, cannot be regarded as *res judicata* and does not have binding force in the present case (see *Legality of Use of Force*, para. 80). At the same time, it cannot be denied that the 1996 Judgment has relevance, because the Applicants in both the *Bosnia* case and the present one invoked the same jurisdictional basis. In such a situation, as the Court said, it would be "simply appropriate . . . for the Court to consider whether there was an expressly stated finding in another case that would throw light on the matters before it" (*Application of the Convention on the Prevention and*

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[15]Letter dated 27 May 1999 from the permanent representatives of Bosnia and Herzegovina, Croatia, Slovenia and the former Yugoslav Republic of Macedonia to the United Nations addressed to the Secretary-General, United Nations doc. A/53/992 (7 June 1999).

[16]Written Observations, para. 2.2, quoting Memorial, para. 6.04.

Punishment of the Crime of Genocide (Bosnia and Herzegovina v. *Serbia and Montenegro)*, Judgment of 26 February 2007, p. 51, para. 135).

24. However, the 1996 Judgment did not contain any "expressly stated finding" with respect to the question of whether the FRY had access to the Court. It was silent on this issue. It was only in 2007 that the 1996 Judgment was construed to mean, by necessary implication, that the Court in 1996 *perceived* the FRY to be in the position to appear before it (*ibid.*, para. 132). For this reason, the 1996 Judgment simply does not contain findings that could provide guidance regarding the question of the FRY's access to the Court in the present case. Thus, the question of the Respondent's access to the Court should be examined by the Court, and not construed by way of analogy with an implicit finding that was read into the 1996 Judgment on jurisdiction "as a matter of logical construction" (*ibid.*, para. 135), as the Applicant would like to do.

25. With respect to the additional question of whether jurisdiction can be established on the basis of Article IX of the Genocide Convention, I would ask you to recall that the question of jurisdiction *in personam* regarding the FRY was not contested and was not even raised by the parties in the proceedings leading to the 1996 Judgment. For that reason, the Court did not have the benefit of hearing arguments and clarifications as is usual in adversarial proceedings. In its conclusions regarding jurisdiction *in personam*, the Court in 1996 noted that "it has not been contested that Yugoslavia was party to the Genocide Convention" (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Yugoslavia (Serbia and Montenegro)), Preliminary Objections, Judgment, I.C.J. Reports 1996 (II)*, p. 610, para. 17.)

26. It is therefore hard to see how the 1996 Judgment could "throw light" on the issue of linkage between the FRY and Article IX of the Genocide Convention in the present case, when this issue was not argued and was not elaborated at the time. Moreover, since the 1996 Judgment was rendered, the position of the FRY has been put in a new perspective and both the United Nations and the international community have clarified their positions. The analysis would have to take into account these developments and could not simply rely on a finding made in another case and in other proceedings in which the issue was not even argued.

27. Madam President, it is clear that the *Revision* Judgment and the 1996 Judgment on jurisdiction in the *Bosnia* case, which are two main points of support for the Applicant, cannot provide guidance for the resolution of the present case. In contrast to that, the *Legality of Use of Force* Judgments do take into account developments after 2000, and do contain express findings on the FRY's access to the Court. Moreover, these Judgments make it clear that the Applicant's construction of the *Revision* Judgment and of earlier pronouncements made by this Court is erroneous. It appears, however, that the Applicant based its argument entirely on this erroneous construction, which is evidenced by the fact that it has not even addressed our objections to the jurisdictional arguments contained in the Memorial, for example, as regards the issue of automatic succession or theory of acquired rights.

28. At the very end, in order to complete the picture, I would also like to mention the 2007 Judgment in the *Bosnia* case. For obvious reasons, the Applicant could not refer to it in the Written Observations. As is well known, this Judgment did not add new elements, and did not reconsider the issue of jurisdiction in the *Bosnia* case. It did, however, confirm the principles so clearly enunciated in the *Legality of Use of Force* Judgments: that the question of whether a State has capacity to be a party to proceedings before the Court is not a matter of consent of the parties, and that the Court is bound to raise and examine this issue, if necessary, ex officio. (See the *Bosnia* case, paras. 102 and 122.)

29. Madam President, let me conclude by saying that the Applicant's arguments on jurisdiction simply do not hold in light of the conclusive clarifications made by the Court regarding the Respondent's status in relation to the United Nations and the Statute of the Court before 2000. In the *Legality of Use of Force* cases, the Court held that the FRY did not have access to it in April 1999 as a party to the Statute under Article 35, paragraph 1. The Court also held that the FRY did not have access to it under Article 35, paragraph 2, of the Statute, since the Genocide Convention was not a "treaty in force" within the meaning of this provision. It is submitted that these rulings must govern the present case as well, because the Court's reasoning in the *Legality of Use of Force* cases necessarily applies to the present case. Therefore, the FRY did not fulfill the mandatory requirements regulating access to the Court at the relevant time when the present

proceedings were initiated on 2 July 1999, and the Court does not have the authority to deal with the case.

30. Madam President, Members of the Court, this brings my presentation to its end. I am grateful for your attention. Madam President, perhaps this is a good time to have a break.

The PRESIDENT: We could indeed, if it suited you, have a short break now or we could wait for half an hour after we have heard Mr. Zimmermann. Do I understand that it would be convenient to take the break now? Let us make a start with you, Mr. Zimmermann. Thank you very much indeed for your help to the Court, Mr. Djerić.

Mr. ZIMMERMANN: Thank you, Madam President. What I would propose, with your permission, that either I would go for the whole 30 minutes, or we have the break now, if that is convenient for the Court.

The PRESIDENT: You go for the 30 minutes.

Mr. ZIMMERMANN: Thank you, Madam President.

Madam President, Members of the Court, may it please the Court. Let me start by, once again, expressing my gratitude and honour to appear before this Court.

DECLARATION AND NOTE OF 27 APRIL 1992, AND ISSUES OF STATE SUCCESSION

I. Introduction

1. It is common ground between the Parties that Article IX of the Genocide Convention is the only alleged basis for the Court exercising jurisdiction in this case.

2. It is, however, well known that the FRY, when it acceded to the Genocide Convention in January 2001, entered a reservation to this very provision — a type of reservation which this Court has consistently upheld as not running counter to the very object and purpose of the Convention (see most recently case concerning *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo* v. *Rwanda), Jurisdiction of the Court and Admissibility of the Application,* Judgment of 3 February 2006, pp. 32-33, paras. 67–68), including in two cases brought by the FRY itself (see *Legality of Use of Force (Yugoslavia* v. *Spain), Order*

of 2 June 1999, I.C.J. Reports 1999, pp. 761 *et seq*., p. 772, para. 33, as well as *Legality of Use of Force (Yugoslavia* v. *United States of America), Order of 2 June 1999, I.C.J. Reports 1999*, pp. 916 *et seq*., p. 924, para. 25).

3. Being aware of this hurdle, the Applicant in its Written Observations attempted, first and foremost, to rely on the 2003 *Revision* Judgment in the *Bosnia* case. Yet, as my colleague Vladimir Djerić has just demonstrated, this is misleading since this Judgment, like other related Judgments, rendered ever since have never made any determination as to the status of the Respondent vis-à-vis the Genocide Convention.

4. In its Written Observations, Croatia also argued, however, that the Respondent is already bound by Article IX of the Genocide Convention since its emergence as a successor State of the former Yugoslavia[17] and that, besides, it had confirmed its succession to the Genocide Convention in a declaration of 27 April 1992[18].

5. It is against this background that I will now demonstrate that the FRY, now Serbia, has not become bound by Article IX of the Genocide Convention,

— neither by virtue of an alleged principle of automatic succession,

— nor by virtue of the above-mentioned declaration.

II. Issues of automatic treaty succession

6. Madam President, this part of my presentation dealing with the issue of automatic succession will be brief for various reasons.

7. First, Croatia itself had only devoted one single paragraph in its Memorial to this issue[19] and only hinted at it in its Written Observations[20].

8. Second, as we are all too well aware, the issue of automatic succession as to the Genocide Convention and its Article IX by Serbia has already been addressed in our preliminary objections[21] and there is certainly no need to reiterate all of the arguments then made.

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[17]Written Observations by the Republic of Croatia (hereafter "Written Observations"), para. 1.7.

[18]*Ibid*.

[19]Memorial of the Republic of Croatia (hereafter "Memorial"), para. 6.07.

[20]Written Observations, para. 1.7.

[21]Preliminary Objections of the Federal Republic of Yugoslavia (hereafter "Preliminary Objections"), paras. 3.52. *et seq*.

9. Let me remind you, however, of your decision in the case between the Democratic Republic of the Congo and Rwanda, where Article IX of the Genocide Convention was one of the alleged bases of jurisdiction (*Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo* v. *Rwanda), Jurisdiction of the Court and Admissibility of the Application*, Judgment of 3 February 2006). Belgium, the predecessor State of both the DRC and of Rwanda, had ratified the Genocide Convention in 1951 without any reservation.

10. By declaration dated 13 March 1952, Belgium had formally extended the territorial application of the Genocide Convention to both the territory which was then Belgian Congo and the trust territory of Rwanda-Urundi, Belgium then administered[22].

11. The Democratic Republic of the Congo, upon gaining independence, submitted a *declaration of succession* as to the Genocide Convention and accordingly, by virtue of that notification of succession, became bound by it and its Article IX as of 31 May 1962[23].

12. In contrast thereto, Rwanda instead *acceded* to the Genocide Convention in 1975. At the same time, as you know, Rwanda entered however a reservation as to Article IX of the Convention. Your 2006 Judgment not only mentions this *accession* by Rwanda, but also upholds the very possibility to enter an Article IX reservation (*Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo* v. *Rwanda), Jurisdiction of the Court and Admissibility of the Application, Judgment*, p. 33, para. 69). It thus upholds an Article IX reservation by a successor State on the territory of which the Genocide Convention had beforehand been applicable *without any such reservation*.

13. The Court has thereby, be it only implicit, rejected the very possibility of automatic succession generally, and automatic succession with regard to Article IX of the Genocide Convention specifically.

14. That brings me to my last, third, point with regard to the issue of automatic succession. Even if one were to accept that certain categories of treaties such as human rights treaties were, as a

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[22]See Note on territorial application, to be found at: <http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterIV/treaty1.asp.>

[23]*Ibid.*

matter of principle, subject to automatic succession, *quid non,* this rule would not extend to specific clauses granting jurisdiction to the Court.

15. We have already elaborated that point in our preliminary objections. It therefore suffices to remind you that this Court has, time and again, stressed the fundamental distinction between substantive obligations on the one hand, and compromissory clauses on the other (*ibid*., p. 32-33, paras. 67-69).

16. This distinction is also, I believe, of utmost relevance when it comes to the law of State succession. Even accepting, be it only *arguendo*, that the Genocide Convention would be subject to automatic succession, any such alleged automatic succession would accordingly only extend to provisions relating to substantive obligations and individual rights, but not to clauses providing for the jurisdiction of this honourable Court.

17. This is due to the fact, that, if ever, any alleged automatic succession as to human rights treaties is based on the very idea that a given population had beforehand been able to rely on certain *individual rights* which should not be set aside due to the occurrence of an instance of State succession.

18. Article IX of the Genocide Convention, however, has no bearing whatsoever on individual rights, but rather, and exclusively so, regulates inter-State relations.

19. Madam President, let me therefore now move on to Croatia's second argument mentioned in its Memorial, and also alluded to in its Written Observations, namely that the declaration of 27 April 1992, communicated to the Secretary-General, could be treated as a notification of succession, allegedly confirming the FRY's succession with regard to the Genocide Convention.

III. Lack of a notification of succession by the FRY, now Serbia

20. Madam President, Members of the Court, with regard to its own status vis-à-vis the Genocide Convention, Croatia has, and rightly so I believe, taken the position that it became bound by the Genocide Convention by virtue of its declaration of succession which specifically referred to those individual treaties to which it wanted to succeed including the Genocide Convention[24].

[24]Memorial, para. 6.08.

21. Quite similarly, the FRY had, in 2001, also decided to *succeed* to certain treaties of the former Yugoslavia by submitting specific notifications of succession, while at the same time *acceding* to others: and this is completely in line with the practice of many other successor States, such as, for example, the practice of most of the successor States of the former USSR.

22. Let me just note in passing that, for example, Azerbaijan, Armenia, Georgia, Kazakstan, Kyrgyzstan, Moldova and Uzbekistan have all *acceded* — and not *succeeded* — to the Genocide Convention, notwithstanding the fact that the USSR had ratified the Convention in 1954[25]. It is also worth noting, and maybe more important, that Croatia itself has *not* objected to these accessions by various successor States of the former USSR.

23. However, Croatia claims that a Note dated 27 April 1992 sent to the United Nations to be circulated as a document of the General Assembly could be treated as, or be equivalent to, a notification of succession. This assertion is however inaccurate for several reasons.

24. First, as confirmed by uniform depositary practice, specific notifications are necessary in order to bring about succession. Thus, general "declarations" — even if they are declarations of succession, which is not even the case with regard to the 1992 declaration — cannot be considered to constitute valid or effective notifications of succession, if they do not refer to specific treaties.

25. As the Secretary-General of the United Nations puts it:

> "[I]t has always been the position of the Secretary-General . . . to record a succeeding State as a party to a given treaty solely on the basis of a formal document . . . *which should specify the treaty or treaties by which the State concerned recognizes itself to be bound*."[26] (Emphasis added.)

26. The same position is shared by other depositaries such as, *inter alia*, the Government of the United States and that of France[27].

27. In sharp contrast thereto, the declaration Croatia relies on in the case of the FRY simply did not refer to *any* specific treaty — and even less so mentioned the Genocide Convention.

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[25]See Preliminary Objections, para. 3.72.

[26]Summary of Practice of the Secretary-General as Depositary of Multilateral Treaties, ST/LEG/7/Rev. 1, p. 90.

[27]See CAHDI, *Depositary Practice of the United States in Relation to the Succession of States in Respect of Treaties*, CAHDI (93) 16, p. 2, as well as CAHDI, *La pratique de la France dépositaire de traités multilatéraux en matière de succession d'Etats*, CAHDI (94) 8, S. 2.

28. Second, any notification of succession just like any other relevant treaty action must emanate, in order to be valid, from a person being able to represent the State concerned — a principle codified by Article 7 of the Vienna Convention on the Law of Treaties.

29. Accordingly, the Secretary-General confirms in its Summary of Practice, that he or she will only consider a succeeding State as a party to a given treaty

> "on the basis of a formal document similar to instruments of ratification, accession, etc., that is, a notification emanating from the Head of State, the Head of Government or the Minister for Foreign Affairs"[28].

30. Yet, this was certainly not the case with regard to the declaration and the Note dated 27 April 1992.

31. Rather, the declaration was adopted by various parliamentary bodies without the approval by either a Head of State, a Head of Government or a Minister for Foreign Affairs. Neither was the declaration or the Note transmitted by a person possessing, and even less producing, full powers.

32. Besides, the declaration was not even adopted by a parliamentary body of the Respondent itself, the FRY, but rather by an *ad hoc* body consisting of members of the Assembly of the SFRY, the National Assembly of the Republic of Serbia, and of the Assembly of the Republic of Montenegro. The Note, in turn, simply reiterated the position previously adopted by this parliamentary body and merely requested the Secretary-General to circulate it as an official document of the General Assembly.

33. Finally, the declaration was simply meant to "state . . . views on . . . objectives of . . . policy . . ." rather than bring about legal effects and furthermore was, as the wording of both the declaration and the Note makes abundantly clear, based on the notion of continuity, identity, and was thus not intended, nor could it be understood as creating or confirming a succession to treaties.

34. Third, any notification of succession, in order to be an effective one, must be transmitted to the depositary.

35. Yet, the declaration and the Note were transmitted by a letter of 6 May 1992 which, while being addressed to the Secretary-General, asked the Secretary-General to circulate the

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[28]Summary of Practice of the Secretary-General as Depositary of Multilateral Treaties, ST/LEG/7/Rev. 1, p. 90.

declaration and the Note "*as an official document of the General Assembly*"[29]. They were thus clearly not addressed to him in his function as depositary. As a matter of fact, Croatia itself frequently stressed that the FRY had not notified the Secretary-General *in his capacity as depositary*, of its succession to treaties of the former SFRY[30].

36. Furthermore, neither third States including Croatia, nor this Court has ever considered the Note and the accompanying declaration as amounting to a declaration of succession, and even less so as an effective one.

37. Rather, Croatia itself has in the past consistently taken the principled position that the FRY, now Serbia, could only become bound by treaties previously entered into by the former Yugoslavia, if it was to make *formalized* and *specific* declarations of succession with regard to individual treaties.

38. More specifically, Croatia always insisted that the declaration and the Note of 27 April 1992 did not bring about a succession of the FRY as to the treaties of the former Yugoslavia. Pending such a specific note of succession the FRY, Serbia, was *not* — in the very perspective of Croatia itself — to be considered a Contracting Party of *any* treaty, the former Yugoslavia had previously entered into.

39. In 1994, two years after the 1992 declaration, Croatia stated that:

> "If [— and let me stress the 'if' —] if the Federal Republic of Yugoslavia (Serbia and Montenegro) expressed its intention to be considered . . . a party . . . to treaties of the predecessor State . . .) the Republic of Croatia would fully respect that notification of succession."[31]

40. In 1995, Croatia reconfirmed that position and stated:

> "Should [— and let me again highlight the fact that it is the conditional that was being used by Croatia —] should the Federal Republic of Yugoslavia (Serbia and Montenegro) express its intention to be considered a party . . . to the multilateral treaties of the predecessor State . . . the Republic of Croatia would take note of that notification of succession."[32]

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[29]United Nations doc. A/46/915; emphasis added.

[30]See, *e.g.*, 19th Meeting of States parties of the ICCPR, 8 Sept. 1994, Statement by Mr. Matesic, CCPR/SP/SR.19, para. 19, as well as letter dated 18 April 1995 from the permanent representative of Croatia to the United Nations addressed to the Secretary-General, A/50/160, p. 2; emphasis added; and letter dated 24 May 1995 from the Chargé d'affaires *a.i.* of the Mission of Croatia to the United Nations Office at Geneva, addressed to the Chairman of the Commission on Human Rights, E/CN.4/19967134, p. 2.

[31]United Nations doc. S/1994/198, of 19 Feb. 1994; emphasis added.

[32]United Nations doc. A/50/75-E/1995/10, of 31 Jan. 1995; emphasis added.

41. This approach was followed in various *fora* and particularly in the context of meetings of Contracting Parties to human rights treaties. I may refer you to our preliminary objections for further, quite numerous examples[33]

42. In its Memorial, Croatia — one might even say by a sudden — now argues the other way round[34]. In doing so, it however completely disregards its own previous behaviour — and it does so, I am afraid to say, on purpose.

43. This honourable Court did not take a position as to the alleged succession of the FRY, now Serbia, concerning the Genocide Convention when it rendered its Judgment on jurisdiction in the *Bosnia* case.

44. Rather, any pronouncement made by this Court as to the status of the FRY vis-à-vis the Genocide Convention was linked to the underlying assumption that the FRY had *remained* bound by Article IX of the Genocide Convention as being identical with and thereby continuing the treaty status of the former Yugoslavia.

45. This assumption, when seen from the present vantage point, proved to be an erroneous one, however, and besides, is shared by neither of the two parties.

46. Madam President, in 1996, the Court had, with regard to the legal status of the FRY vis-à-vis the Genocide Convention, simply referred to the fact that the former Yugoslavia had "signed the Genocide Convention on 11 December 1948 and deposited its instrument of ratification, without reservation, on 29 August 1950" (case concerning *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia Herzegovina* v. *Yugoslavia), Preliminary Objections, Judgment, I.C.J. Reports 1996 (II)*, p. 610, para. 17).

47. When analysing the legal status of the FRY, the Court did not even mention the issue of treaty succession, let alone decide it. Rather, this determination of "Yugoslavia" being a Contracting Party of the Genocide Convention was inherently linked to the issue of legal identity. That is why, in the very next sentence of its 1996 Judgment, the Court took note of the fact that the FRY had adopted a declaration which, at that time, was undoubtedly based on the very idea of identity. The Court referred to the fact that the FRY had taken the position that as

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[33]Preliminary Objections, paras. 3.81.-3.88.

[34]See Memorial, para. 6.07.

> "*continuing* the State, international legal and political personality of the Socialist Federal Republic of Yugoslavia, [it] shall strictly abide by all the commitments that the Socialist Federal Republic of Yugoslavia assumed internationally" (emphasis added).

The Court added that "[t]his intention *thus* expressed by Yugoslavia to *remain* bound by the international treaties to which the former Yugoslavia was a party was confirmed in an official Note of 27 April 1992 . . ." (*ibid.*, emphasis added). Let me stress the word *"thus"* and the words *"remain bound"*. It was accordingly the claimed identity which the Court took as a starting-point in 1996 for its finding on jurisdiction.

48. And this stands in sharp contrast to the treatment of Bosnia and Herzegovina, which, already at that time, was undoubtedly considered a successor State of the former Yugoslavia. In that regard, the Court found that Bosnia *became a party* to the Genocide Convention by virtue of having adopted a notification of succession (*ibid.*, pp. 611-612, paras. 19, 20, 23, 24).

49. The Court was therefore obviously very careful — very careful — in choosing the wording when it considered the treaty status of both, Bosnia and Herzegovina on the one hand, and the FRY on the other.

50. Had the Court wanted *not* to distinguish these two situations of Bosnia on the one hand and the FRY on the other, it could have stated with regard to both countries that the Convention *continues to be in force*[35].

51. The Court, however, was very vigilant not to blur the crucial distinction between a successor State, Bosnia and Herzegovina, on the one hand, and the FRY, which in turn was perceived as being identical with the former Yugoslavia on the other. The Court confirmed this distinction by using two different terms for two different legal situations: *"remain bound"*, where identity was perceived as being the correct description of a legal situation and *"become a party"*, where succession was contemplated.

52. If the Court had considered both Bosnia, as well as the FRY, to constitute successor States of the former Yugoslavia, it would have been more than logical to also use identical terms — yet, the Court did not, and it did so on purpose.

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[35]See Arts. 34 and 35 of the 1978 Vienna Convention on Succession of States in Respect of Treaties, where this formula is being used to cover both, treaty succession by a successor State, as well as ongoing treaty application by a predecessor State which continues to exist.

53. Indeed, the Court itself has in the meantime confirmed that the Note of 27 April 1992 was exclusively based on the claim of identity, and that accordingly the issue of succession simply did not arise. It stated that

> "the Federal Republic of Yugoslavia, for its part, maintained its claim that it continued the legal personality of the Socialist Federal Republic of Yugoslavia. This claim has been clearly stated in the official Note of 27 April 1992 . . ." (*Legality of the Use of Force (Serbia and Montenegro* v. *Belgium), Preliminary Objections, Judgment, I.C.J. Reports 2004,* p. 307, para. 69; emphasis added).

54. Finally, the crucial part of the 1996 Judgment, namely its paragraph 17, referred to the treaty status of "Yugoslavia". Yet, as we all know and as was confirmed by the Secretary-General of the United Nations, during the relevant period "the short-form name 'Yugoslavia' . . . *was used at that time to refer to the former Yugoslavia*"[36].

55. Madam President, I believe it has become clear that neither this honourable Court nor Croatia itself have ever considered the 1992 declaration and the ensuing Note as amounting to a declaration of succession or as bringing about succession.

IV. Conclusion

56. Madam President, Members of the Court, let me summarize.

57. Even assuming, *quid non*, that the Respondent can be a party in these current proceedings, it is not bound by Article IX of the Genocide Convention.

58. Contrary to Croatia's arguments, this Court has never made any determination that the FRY, now Serbia, may have become bound by Article IX of the Genocide Convention by virtue of applicable rules of State succession.

59. More specifically, neither did the FRY, now Serbia, automatically succeed to the Genocide Convention, nor did the declaration and the Note of 27 April 1992 bring about succession, nor could they have such an effect.

60. In the alternative, Serbia and Montenegro never succeeded *to Article IX* of the Genocide Convention by way of automatic succession, given its character as a clause providing for the judicial settlement of disputes.

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[36]Emphasis added; see United Nations Treaty Collection Database, *Multilateral Treaties Deposited with the Secretary-General,* Historical Information, Available from: <http://untreaty.un.org/ENGLISH/bible/englishinternetbible/historicalinfo.asp> under the heading "former Yugoslavia".

61. Accordingly, Serbia does believe that, apart from the fact that the Respondent is lacking the capacity to be a party in this case, the application should be also rejected because this honourable Court is lacking jurisdiction.

62. Madam President, Members of the Court, this brings me to the end of my presentation. Thank you.

The PRESIDENT: Thank you very much, Professor Zimmermann. The Court now briefly rises.

The Court adjourned from 11.40 to 11.55 a.m.

The PRESIDENT: Please be seated. Professor Varady, you have the floor.

Mr. VARADY: Thank you very much.

THE COURT HAS NO JURISDICTION IN THIS CASE — REITERATION OF THE BASIC ARGUMENTS ON JURISDICTION

The critical relevance of the fact that the FRY did not continue the personality of the former Yugoslavia and was not a Member of the United Nations before 1 November 2000

1. Madam President, distinguished Members of the Court, I would like now to summarize our first preliminary objection — the objection that this honoured Court has no jurisdiction in this case. Our other preliminary objections represent added arguments showing that the circumstances of the case exclude jurisdiction for a certain time period or for certain claims. In our first and main preliminary objection we are demonstrating that there are two independent reasons, each of which is sufficient to sustain the conclusion that there is no jurisdiction regarding any time period or any claim submitted by the Applicant.

2. My colleagues have dealt with the arguments of the Applicant presented in its Written Observations, and I trust that it was demonstrated that the arguments of the Applicant cannot and do not refute our objections — and they cannot and do not justify jurisdiction in this case. In the previous presentation, Professor Zimmermann demonstrated that the arguments advanced or implied by the Applicant do not substantiate the only alleged basis of jurisdiction — reliance on Article IX of the Genocide Convention. My colleague Vladimir Djerić showed convincingly that our perception was not contradicted in the Judgment rendered in the *Bosnia* case, and that at the

same time our position received strong support in the Judgments which concluded the *Legality of Use of Force* cases. We shall now further demonstrate that the facts of *this case itself* show unequivocally that this Court has no jurisdiction.

3. In our written preliminary objections we have based our contestation of jurisdiction on two major facts. First, the FRY did not continue the personality of the former Yugoslavia, and second, the FRY was not a Member of the United Nations before 1 November 2000. These facts may have been blurred earlier, but they are practically not contested any more. In this case, we are facing the issue of jurisdiction after clarifications have been given, and after the period of ambiguities and legal uncertainties regarding the status of the FRY has come to an end. Another advantage we have in this case is that position regarding jurisdiction did not have to be taken, evaluations did not have to be made, while ambiguities still lasted and while indispensable clarifications were still missing.

4. Madam President, we believe that it is actually not contested any more that there was no continuity between the former Yugoslavia and the FRY. Likewise, we believe that it is actually not contested any more that the Respondent in this case only became a Member of the United Nations and a party to the Statute on 1 November 2000. Having this in mind, I shall restrict myself to restating only some essential points regarding the status of the FRY.

5. The FRY did not continue the international legal personality of the former Yugoslavia. It is a new State — just like other successor States of the former Yugoslavia, including Croatia. As a new State it had to seek admission in order to become a Member of the United Nations and of other international organizations; as a new State it had to submit notifications of succession or accession in order to become a party to treaties.

6. Madam President, the admission of the FRY to the United Nations was the last opportunity to concede — or at least to heed — some pre-existing membership or quasi-membership status. But the procedure of admission bears no trace or even hint of a pre-existing membership or quasi-membership status. There is no acknowledgment or hint of such a position in the application of the FRY seeking membership[37]. There is no acknowledgment or

[37]See the Application of the Federal Republic of Yugoslavia for Admission to Membership in the United Nations, United Nations doc. A/55/528-S/2000/1043 (30 Oct. 2000).

even hint of such a position in either the procedure or in the resolutions yielded by the procedure. This was noted and stressed by the Court in the *Legality of Use of Force* Judgments:

> "[T]he Security Council confirmed its own position by taking steps for the admission of the Federal Republic of Yugoslavia as a new Member of the United Nations, which, when followed by corresponding steps taken by the General Assembly, completed the procedure for the admission of a new Member under Article 4 of the Charter, rather than pursuing any course involving recognition of continuing membership of the Federal Republic of Yugoslavia in the United Nations." (*Legality of Use of Force (Serbia and Montenegro* v. *Belgium)*, *Preliminary Objections, Judgment,* p. 310, para. 77.)[38]

7. Upon admission, all countries greeted the FRY as a new Member. Croatia gave an added emphasis to this. It stated: "[w]e welcome the admission of the Federal Republic of Yugoslavia to the United Nations as its *newest* Member"[39].

8. Let me add, Madam President, that as we stated and repeated, when the issue of the status of the FRY *was* explicitly raised, and when necessary clarifications *were* available, this Court accorded a thorough scrutiny to the status of the FRY, and took an unequivocal position stating that "the Court is led to the conclusion that Serbia and Montenegro was not a Member of the United Nations, and in that capacity a State party to the Statute . . ." prior to April 1999" (*Legality of Use of Force (Serbia and Montenegro* v. *Belgium)*, *Preliminary Objections, Judgment,* p. 310, para. 79)[40].

9. The position adopted by United Nations organs, and by this Court, has also been the position taken and asserted by Croatia itself. In numerous statements addressed to international organizations and to States parties to treaties, Croatia has clearly rejected the proposition of continuity, and it also rejected the proposition that the FRY could have been a Member of the United Nations or a party to the Statute prior to November 2000. We offered in our preliminary objections several examples of such statements made by Croatia[41].

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[38]Exactly the same text can be found in the other 2004 *Legality of Use of Force* Judgments as well: in paragraph 76 of the cases with France, Canada, Italy, Netherlands, Portugal, and in paragraph 75 of the cases with Germany and the United Kingdom.

[39]United Nations, *Official Records of the General Assembly, Fifty-fifth Session, Plenary Meetings*, 48th Meeting, doc. A/55/PV.48 (1 November 2000), p. 26; emphasis added.

[40]Exactly the same text can be found in the other 2004 *Legality of Use of Force* Judgments as well: in paragraph 78 of the cases with France, Canada, Italy, Netherlands, and Portugal; and in paragraph 77 of the cases with Germany and the United Kingdom.

[41]We have referred to a number of such examples in our preliminary objections (see, for example, Anns. 33, 34, 35, 36 and 37 to the Preliminary Objections).

10. Let me mention that occasions on which Croatia repeated its denial of the proposition of continuity include those in which the question of the status of the FRY was raised *directly in connection with the jurisdiction of this Court*. As was referred to by my colleague Djerić, in a letter addressed to the Secretary-General dated 27 May 1999, Croatia — along with other successor States — protested against the notification of a declaration made by the FRY under Article 36, paragraph 2, of the Statute, arguing that the FRY could not make a valid declaration since it was *not* a Member of the United Nations and was *not* a party to the Statute. This time the context was exactly the question whether this Court was open to the FRY, whether the FRY was within the scope of application of the Statute. The letter states — and you may follow this in your judges' folder, tab 4:

> "Our respective Governments would like to express our disagreement with the content of the above-quoted notification. The notification can have no legal effect whatsoever, because the Federal Republic of Yugoslavia (Serbia and Montenegro) is not a State Member of the United Nations, nor is a State party to the Statute of the Court, that could make a valid declaration under Article 36, paragraph 2, of the Statute of the Court."[42]

11. Let me finally add that in this very case we are arguing, Croatia adopted exactly the same perception, and it stressed in the Memorial: "Neither Croatia nor any of the other Republics of the SFRY which became independent accept that the FRY was the 'continuation' in a legal sense of the SFRY."[43]

12. We have got to the point where ambiguous concepts and formulations are left behind. *Both the United Nations authorities and the Parties to this dispute* have spelled out a clear position and joint perception. It has become clear and uncontested that:

— first, no State continued the personality and membership rights of the former Yugoslavia; and

— second, the Respondent in this case was *not* a Member of the United Nations and was *not* a party to the Statute before 1 November 2000.

13. What follows from these facts? It follows that this honoured Court does not have jurisdiction in this case for two independent reasons. First, this Court does not have jurisdiction

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[42]Letter dated 27 May 1999 from the Permanent Representatives of Bosnia and Herzegovina, Croatia, Slovenia, and the former Yugoslav of Macedonia to the United Nations addressed to the Secretary-General, United Nations, doc. A/53/992 (7 June 1999).

[43]Memorial of the Republic of Croatia (hereinafter "Memorial"), para. 2.138, footnote 220.

because the Respondent *did not have access* to the Court at the relevant moment, that is on the date when the Application was submitted. Since the Respondent only became a Member of the United Nations and a party to the Statute on 1 November, and since the Application was submitted on 2 July 1999, the Court was not open to the Respondent at the relevant moment. The precondition for exercising its judicial function was not met. Second, this Court has no jurisdiction, because there is *no basis* for jurisdiction. The only alleged basis is Article IX of the Genocide Convention. The former Yugoslavia *was* a party to the Convention. After the dissolution of the former Yugoslavia, all successor States, with the exception of the FRY, undertook appropriate treaty action and became State parties to many treaties, including the Genocide Convention. The FRY espoused another perception, it insisted on continuity, and it did *not* undertake treaty actions regarding treaties to which the former Yugoslavia was a party. Continuity could have established the requisite link with other treaties. But it is now clear that there was no continuity — hence there was no link. The FRY did not remain bound by the Genocide Convention because it did not continue the treaty status of the former Yugoslavia: it only became bound in 2001 when it acceded to the Convention, but it never became bound by Article IX.

There is no jurisdiction, because the Court was not open to the Respondent at the relevant moment

14. Madam President, the Respondent was not a Member of the United Nations on 2 July 1999 — at the time when the Application was submitted. Hence, it was not a party to the Statute by the vehicle of United Nations membership. It has never been alleged — nor could it have been alleged — that the Respondent became a party to the Statute in any other way. There is one more conceivable way in which the Respondent could have met the formal conditions for access, and this would have been the acceptance of special conditions laid down by the Security Council. But again, it has never been alleged — nor could it have been alleged — that the Respondent would have, or could have, met the necessary formal conditions in this way. The Respondent had no access to the Court, thus the Court was not open to the Respondent at the relevant moment when the Application was submitted. This is a matter of undoubtedly critical importance.

15. As stated by Rosenne, only a State that meets the formal conditions establishing a legal link of the State to the Statute "[h]as access to the Court for any purpose or in any capacity whatsoever. The Court cannot entertain a contentious case against a respondent State that is not similarly qualified."[44] Rosenne puts in focus the Respondent, which is exactly the focus of our case. The logic extends, of course, to any party which has no access to the Court. The anchor of the authority of the Court is the Statute, and hence it is logical that the scope of the judicial function of this Court is limited to those parties that are parties to the Statute.

16. This was explicitly confirmed and underlined in the *Legality of Use of Force* Judgments. After qualifying the question "whether Serbia and Montenegro was or was not a party to the Statute of the Court at the time of the institution of the present proceedings" as a "fundamental one" (*Legality of Use of Force (Serbia and Montenegro v. Belgium)*, *Preliminary Objections, Judgment*, *I.C.J. Reports 2004*, p. 293, para. 30)[45], the Court takes the following unequivocal position: "The Court can exercise its judicial function only in respect to those States which have access to it under Article 35 of the Statute." (*Legality of Use of Force (Serbia and Montenegro v. Belgium)*, *Preliminary Objections, Judgment, I.C.J. Reports 2004*, p. 299, para. 46.)[46]

17. This is the logic which prompted the Court in the *Legality of Use of Force* cases to refuse jurisdiction because one of the Parties had no access to the Court at the time when the Application was submitted. This logic is obviously not restricted to any of the two Parties. If the Court can only exercise its judicial function in respect to those States which have access to it under Article 35 of the Statute, then the Court cannot exercise its judicial function with regard to a State which does not have access to it at the relevant moment, whichever State that is. In our case, the Respondent is the State that had no access; it was outside the scope of the authority of the Court at the relevant moment, and — as Rosenne states — "[t]he Court cannot entertain a contentious case against a respondent State . . ." that is not qualified to have access to the Court.

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[44]Rosenne, S., *The Law and the Practice of the International Court, 1920-2005,* 2006, p. 588.

[45]Exactly the same text can be found in the other 2004 *Legality of Use of Force* Judgments as well: in para. 29 of the cases with France, Canada, Italy, Netherlands, and Portugal; and in para.28 of the cases with Germany and the United Kingdom.

[46]Exactly the same text can be found in the other 2004 *Legality of Use of Force* Judgments as well: in para. 45 of the cases with France, Canada, Italy, Netherlands, and Portugal; and in para. 44 of the cases with Germany and the United Kingdom.

18. Madam President, the Respondent in this case was not qualified to have access to the Court under Article 35 of the Statute at the time of the institution of the proceedings. The Application did not and could not have drawn the Respondent within the ambit of the judicial authority of the Court. Accordingly, this Court cannot exercise jurisdiction in this case.

Now I would like to move to the issue of the basis of jurisdiction.

There is no jurisdiction, because there is no basis for jurisdiction

(a) ***Not only evidence, but even a clear allegation is missing with regard to the nature of the purported link between the Respondent and Article IX of the Genocide Convention***

19. Madam President, the only alleged basis of jurisdiction in this case is Article IX of the Genocide Convention. In order to be bound by Article IX, Serbia would have had to remain or become bound in some way. When I say Serbia, I understand that the focus of consideration extends to Serbia and Montenegro, and to the FRY. The point is that neither the FRY, nor Serbia and Montenegro, nor Serbia remained or became bound by Article IX.

20. This is why the Applicant has difficulties even in pointing out an alleged way in which, or some specific vehicle by which, the Respondent could have remained or become bound by Article IX. In the given situation, the Applicant has not been able to identify any specific link between the Respondent and Article IX. Instead, the Application, just as the Memorial and the Written Observations, only contains some broad phrases or hints which are actually avoiding reliance on a specific link.

21. Madam President, by the time when the Application was submitted, the treaty status of the FRY had already been subject to a long and complex debate in which Croatia had taken an active part, and in which specific allegations and perceptions had been confronted. In spite of this, instead of advancing exact arguments, the Application only offers a broad general formula, stating that: "Under the general principles and rules of international law, successor States continue to be bound by the treaty obligations of the predecessor States." (Application, para. 28.)

22. In the same vein, in its Memorial the Applicant offers the same broad explanation for the treaty status of both Croatia and of the FRY. It states: "During the dissolution of the SFRY, Croatia as well as other successor States, including the FRY, became bound by the terms of the

Genocide Convention."[47]. But the treaty status of both Croatia and of the FRY clearly cannot be explained by the same general formulation. The relevant facts are obviously different. It is, indeed, known and uncontested that Croatia became a party to the Genocide Convention by submitting a notification of succession to that Convention dated 27 July 1992, which was duly accepted by the depositary. But it is equally known and uncontested that the FRY did *not* submit such a notification of succession either "during the dissolution of the SFRY", or later.

23. The Memorial simply does not contain a plain allegation which would endeavour to explain how, by what vehicle, that the FRY remained or became bound by Article IX. In addition to the general formulation we just quoted, there are only some hints, which are not even elaborated into a clear contention — and which are mutually exclusive. It is mentioned that "the basic principle in this regard is laid down in the terms of Article 34 of the Vienna Convention on State Succession in Respect of Treaties . . ." (Memorial, para 6.07), which could be a hint at automatic succession; it is also mentioned that:

> "[i]t is generally accepted that the population of a territory entitled to enjoy the protection of certain human rights flowing from basic human rights treaties may not be deprived of such rights by the mere fact of the succession of a state in respect of that territory" (Memorial: 6.07),

without trying to explain how would this theory establish a link with Article IX. And in a footnote, it was added: "[t]he Note of 27 April 1992 referring to the FRY's proclamation can be treated as a notification of succession to the Genocide Convention" (Memorial, para 6.09, footnote 9). This time the hint is towards treaty action, rather than automatic succession.

24. Madam President, the Applicant also submitted that its position was supported by the Preliminary Objections Judgment of 11 July 1996 of this Court in the *Bosnia* case, and by the fact that in April 1999 the FRY instituted proceedings against ten NATO States relying, *inter alia*, on Article IX of the Genocide Convention[48]. Yet again, Croatia avoided to say what specific linkage with Article IX could actually be supported by these cases.

25. In the Written Observations of 29 April 2003, in addition to reference to two related cases, the only argument advanced by the Applicant is a reference to the Croatian objection to our

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[47]See Memorial, para 6.6.

[48]See Memorial, para 6.09.

notification of accession to the Genocide Convention. In this objection, Croatia repeated its initial formulation, which actually avoids rather than gives an explanation. It stated that the FRY "[i]s already bound by the Convention since its emergence as one of the five equal successor States to the former Socialist Federal Republic of Yugoslavia". A reference to the declaration of 27 April 1992 was added[49]. This time, this Declaration is, however, not qualified as a "notification of succession" (as was done in the Memorial), but instead as a "confirmation" of the allegation that the FRY was "[a]lready bound by the Convention since its emergence as one of the five equal successor States". Once again, what is missing is taking a position, choosing a theory, offering at least a hypothesis as to how exactly did the Respondent remain or become bound by Article IX, and what was in effect "confirmed" by the 1992 declaration.

26. Madam President, if the FRY was bound by Article IX of the Genocide Convention, it must have become bound in some way. The conceivable ways in which the FRY may have become or remained bound are limited, and they are mutually exclusive. The FRY could have either remained bound continuing the personality of the former Yugoslavia, or it may have became bound by way of treaty action, or by way of automatic succession. It has become common ground that the FRY did not continue the personality of the former Yugoslavia, hence it did not remain bound by any treaty by way of continuity. My colleague Andreas Zimmermann showed convincingly that the link was not established by either automatic succession or by way of the 1992 declaration and Note. The truth is simply that the Respondent never remained or became bound by Article IX.

b) *It is now an unequivocal fact, and a matter of public record that the Respondent only became bound by the Genocide Convention in 2001 — and that it never became bound by Article IX*

27. Madam President, the proposition that the Respondent at some point remained or became bound by Article IX of the Genocide Convention has not been substantiated by evidence. Not only has this not been proven, this proposition has not even been tied to any specific hypothesis.

28. Before it became a Member of the United Nations on 1 November 2000 as a new State, the Respondent was not even qualified to be a party to the Genocide Convention. Since it was not

[49]Written Observations of the Republic of Croatia, 29 April 2003, para. 1.7.

a Member of the United Nations, it could only have become a party upon an invitation extended under Article XI. It is an undisputed fact that the FRY never received such an invitation. When the Respondent became a Member of the United Nations — and thus became qualified to become a party to the Genocide Convention without the invitation required by Article XI — the Respondent acceded to the Genocide Convention on 12 March 2001 as a new State party. It acceded with a reservation to Article IX — and hence it never became bound by Article IX. This is, indeed, a matter of public record.

29. Madam President, distinguished Members of the Court, between 1992 and 2001 "Yugoslavia" was listed as a party to the Genocide Convention, indicating that this State became a party in 1950 by way of ratification[50]. It is clear that this State was not the FRY, which came into being in 1992. By now, competent United Nations authorities, including the Secretary-General, have made explicit and clear-cut pronouncements to the effect that between 1992 and 2000, the designation "Yugoslavia" represented a reference to the former Yugoslavia. Croatia has adhered to the same position, stressing repeatedly and consistently that the designation "Yugoslavia" could only refer to the former Yugoslavia[51].

30. It is important to add that while espousing the position that the reference to "Yugoslavia" can only be a reference to the *former Yugoslavia*, during the whole period between 1992 and 2000, Croatia never made any motion, never had any suggestion to the effect that the *FRY*, *rather than "Yugoslavia"*, should be listed as a party to the Genocide Convention. Croatia rather accepted the fact that, according its own perception, the FRY is not considered to be a party. There can be only one reason for this. The suggestion that the *FRY* might be a party to any treaty — including the Genocide Convention — without having submitted a notification of succession would have clearly contradicted the basic position and endeavours of Croatia. It would have contradicted the persistent Croatian endeavour to block the efforts of the former Government of the FRY to

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[50]See *Status of the Convention on the Prevention and Punishment of the crime of Genocide: Report of the Secretary-General*, United Nations docs. A/49/408 (20 Sept. 1994), A/51/422 (27 Sept. 1996), A/53/565 (2 Nov. 1998) and A/55/207 (18 July 2000).

[51]See, for example, in the letter dated 2 August 1995 from the Chargé d'affaires *a.i.* of the Permanent Mission of Croatia to the United Nations, addressed to the Secretary-General, it was stressed:

> "The designation of 'Yugoslavia' as a State within the framework of the United Nations can only be interpreted by us as relating to the former Socialist Federal Republic of Yugoslavia, a State that was a founding member of the United Nations . . ." (United Nations doc. A/50/333-S/1995/659, 7 Aug. 1995).

continue the membership of the former Yugoslavia in treaties and in international organizations, and to force the FRY to seek admission as a new State and to deposit treaty actions as other successor States did.

31. If any ambiguities remained, these were dispelled by the letter of the Legal Counsel of 8 December 2000 — it is in our judges' folder at tab 5. In this letter, which was evidently designed to clarify the treaty status of the FRY, the Legal Counsel invited the FRY to "[u]ndertake treaty actions, as appropriate, in relation to the treaties concerned, if its intention is to assume the relevant legal rights and obligations as a successor State"[52]. The FRY opted to succeed to a number of conventions — several hundred, actually. As far as the Genocide Convention was concerned, the FRY opted not to succeed. Instead, as a new Member of the United Nations, relying on a possibility offered under Article XI (3) of the Genocide Convention to all Members of the United Nations, the FRY decided to *accede* to this Convention. This was accepted by the Secretary-General in a letter of 21 March 2001. It is stated in the letter that the Convention will enter into force for the FRY "on the ninetieth day of the date of deposit of the instrument, i.e., on 10 June 2001". The Secretary-General also stressed that "[d]ue note has been taken of the reservation contained in the instrument"[53].

32. By June 2001, the Convention had been ratified or acceded to by 132 countries, and in addition, three States had signed the Convention. Out of 132 States parties to the Genocide Convention, only three objected to the accession of the FRY. Two of these three are Croatia and Bosnia and Herzegovina, the States that have been trying to establish the jurisdiction of the Court relying on the hypothesis that the FRY was bound by Article IX of the Convention at the time when their lawsuits were initiated. The third country is Sweden, which in fact seems to have adhered to the theory of continuity, suggesting that the FRY should be bound from the date the Convention entered into force for the former Yugoslavia, which is 1950[54].

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[52]The letter of the Legal Counsel of the United Nations addressed to the Minister for Foreign Affairs of the Federal Republic of Yugoslavia, dated 8 Dec. 2000 — submitted with our Preliminary Objections as Ann. 23.

[53]Letter of the Secretary-General of 21 March 2001 — Ann. 6 of our Preliminary Objections.

[54]Communication made on 2 April 2002, Multilateral Treaties Deposited with the Secretary General, Status as at 15 Nov. 2007, Chap. VII Human Rights, Convention on the Prevention and Punishment of Genocide, note 28.

33. The essence of the matter is that by an overwhelming majority — 129 to 3 — States parties to the Genocide Convention, just as the depositary, accepted the fact that the FRY acceded to the Genocide Convention on March 2001 and that it made a valid reservation to Article IX. Today, the depositary lists Serbia as a State party that became a party to the Genocide Convention by accession on 12 March 2001, and with a reservation to Article IX. This is a matter of public record[55]. There is no basis for jurisdiction in this case.

Conclusion

34. Madam President, this honoured Court has no jurisdiction in this case for two consequential reasons. First, there is no jurisdiction because the Respondent did not have access to the Court at the relevant moment. Second, there is no *basis* for jurisdiction. Either of these two reasons is sufficient in itself to decline jurisdiction.

35. It is not contested any more, and it is a matter of public record that the Respondent was not a party to the Statute and had no access to the Court on 2 July 1999 when the Application was submitted. The Respondent only became a party to the Statute on 1 November 2000. At the critical time when the authority of the Court to proceed regarding specific parties had to be established, the Respondent was clearly and simply outside the ambit of the judicial function of the Court. A basic precondition for jurisdiction is missing.

36. Another reason that this Court has no jurisdiction in this case is that there is no basis for jurisdiction. The jurisdiction of this Court is based on consent. There is no consent in this case. The only alleged basis is Article IX of the Genocide Convention. The Applicant is, indeed, bound by Article IX, but the Respondent is not. Croatia did not even allege, let alone prove, any specific way in which Serbia could have remained or become bound by Article IX. At the same time we have shown that there is no conceivable way in which Serbia could have remained or become bound by Article IX. Furthermore, it is a matter of public record that the Respondent acceded to the Genocide Convention as a new State in 2001, and became a new State party to this Convention with a valid reservation to Article IX. There is no consent, there is no basis for jurisdiction, hence

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[55]United Nations Treaty Collection Database, Multilateral Treaties Deposited with the Secretary General, Status as at 15 Nov. 2007, Chap. VII Human Rights, Convention on the Prevention and Punishment of Genocide, Available from: <http://untreaty.un.org/English/treaty.asp>; [Accessed on 22 March 2008].

another essential precondition is missing. Let me repeat that this honoured Court has no jurisdiction in this case.

37. Madam President, distinguished Members of the Court, from our first and main preliminary objection we would like to move now to our second preliminary objection. Our aim is to demonstrate not only that there is no jurisdiction, but also that in this specific case, jurisdiction cannot even hypothetically extend to a certain period — and this is the period before the Respondent came into existence. I would like to ask you, Madam President, to give the floor to my colleague Vladimir Djerić. Thank you very much.

The PRESIDENT: Thank you, Professor Varady. I now give the floor to Mr. Djerić.

Mr. DJERIĆ:

SECOND PRELIMINARY OBJECTION: INADMISSIBILITY OF APPLICATION AS FAR AS IT RELATES TO EVENTS PRIOR TO 27 APRIL 1992

Introduction

1. Madam President, distinguished Members of the Court. I will now deal with our second preliminary objection — that the Application is inadmissible as far as it refers to acts or omissions prior to 27 April 1992. This objection is based on the principle that responsibility for a certain event may only be tied to those persons that existed when the event in question took place. Since the FRY did not exist before 27 April 1992, it cannot be held responsible for the events that occurred before that date. Being aware of this principle, the Applicant has already in the Memorial tried to find a way around it by relying on the concept of a State *in statu nascendi*, and alleging that the FRY was *in statu nascendi* already in mid-1991, although it came into being almost one year later, on 27 April 1992[56]. As a matter of law, the Applicant relied on Article 10 of the ILC Articles on State Responsibility, which in paragraph 2 provides that conduct of an insurrectional movement which succeeds in establishing a new State shall be considered an act of the new State under international law[57].

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[56]See, e.g., Memorial, para. 1.22.

[57]See "Responsibility of States for Internationally Wrongful Acts", General Assembly resolution 56/83 of 12 Dec. 2001, United Nations doc. A/RES/56/83, Annex (hereinafter: "ILC Articles on State Responsibility"), Art. 10, para. 2.

2. At this point, I would first like to note that Article 10, paragraph 2, is a rule concerning attribution of responsibility and, as such, comes into play only if there is also an applicable international obligation whose breach could entail international responsibility[58]. This, in turn, immediately raises the issue of applicability of the Genocide Convention *as treaty law* to acts of an insurrectional or other movement. I will turn to this point later when discussing whether our second preliminary objection has an exclusively preliminary nature.

3. Secondly, supposing *arguendo* that Article 10, paragraph 2, could conceivably apply, the Applicant's reliance on it is misplaced in the present case. As the ILC Commentary makes clear, Article 10, paragraph 2, applies in the situations of secession or decolonization, in which an "insurrectional or other movement" succeeds in establishing a new State[59]. However, neither Serbia nor Montenegro wanted to secede, and neither was a colony. The setting in which this provision operates is therefore radically different from the one in which the FRY was established[60]. Obviously, one would have to disregard the fundamentals of the situation that obtained in 1991 if one is to apply Article 10, paragraph 2, with respect to the Respondent in the present case.

The SFRY existed as a subject of international law in 1991 and early 1992 and its organs continued to function

4. Madam President, the essence of the Applicant's account of events preceding the establishment of the FRY on 27 April 1992 is that from mid-1991 the SFRY ceased to operate as a functioning State, while its organs, in particular the SFRY army, "ceased to function as such and became *de facto* organs and authorities of the emerging FRY (Serbia and Montenegro) acting under the direct control of the Serbian leadership"[61]. In the Applicant's view, these organs formed a part of "the Serbian nationalist movement that ultimately succeeded in establishing the FRY (Serbia and Montenegro) as a new State . . ."[62].

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[58] *Ibid.*, Art. 2.

[59] "Draft Articles on Responsibility of States for International Wrongful Acts, with commentaries", *YILC, 2001*, Vol. II, Part Two, p. 51, para. 8.

[60] Preliminary Objections, paras. 4.8-4.13.

[61] Written Observations, para. 3.33.

[62] *Ibid*.

5. The Respondent must challenge this account. First, the Applicant sweepingly contends that from mid-1991 the SFRY ceased to operate as a functioning State. However, it was not before 29 November 1991 that the Badinter Arbitration Commission was able to conclude that "the Socialist Federal Republic of Yugoslavia is in the process of dissolution"[63] while as late as 4 July 1992 it concluded that the SFRY had dissolved[64]. Similarly, the United Nations Security Council, which had been dealing with the crisis in the SFRY since September 1991[65], was careful not to use the expression "former Yugoslavia" before its resolution 752 (1992) adopted on 15 May 1992[66].

6. Madam President, there is ample evidence that the SFRY, despite challenges, was regarded as a functioning State and subject of international law until the end of 1991, and even in 1992. This is evidenced by its treaty actions, by its attendance at international conferences and meetings of international organizations, as well as by its diplomatic relations with other States.

7. The SFRY undertook various treaty actions in the second half of 1991, which were recognized and accepted as valid by other States and international organizations. For example:

— on 1 July 1991, an agreement was signed between the SFRY and the United States Government concerning the programme of the United States Peace Corps in the SFRY[67];

— on 4 October 1991, an agreement relating to environment management of the Cres-Lošinj Archipelago (located in today's Croatia) was signed and entered into force between the SFRY and the International Bank for Reconstruction and Development[68];

— on 27 November 1991, the Governments of the SFRY and Romania signed a Protocol on exchange of goods and services in 1992[69];

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[63]See Badinter Arbitration Commission, Opinion No. 1, *ILM,* Vol. 31, No. 6, p. 1494 (1992); for the French text, see Ann. 11 to the Preliminary Objections.

[64]See Badinter Arbitration Commission, Opinion No. 8, *ILM,* Vol. 31, No. 6, p. 1521 (1992).

[65]See Security Council resolution 713 (1991) of 25 Sept. 1991.

[66]Security Council resolution 752 (1992) of 15 May 1992.

[67]Agreement between the Federal Executive Council of the Assembly of the Socialist Federal Republic of Yugoslavia and the Government of the United States of America concerning the Program of the United States Peace Corps in the Socialist Federal Republic of Yugoslavia, dated 1 July 1991.

[68]See METAP Grant Agreement (Environment Management Project) between Socialist Federal Republic of Yugoslavia and International Bank for Reconstruction and Development, dated 4 Oct. 1991, and the facsimile cover sheet and message from the World Bank/IFC/MIGA dated 11 Oct. 1991.

[69]See Protocol between the Federal Executive Council of the Assembly of the Socialist Federal Republic of Yugoslavia and the Government of Romania on Trade in Goods and Services, dated 27 Nov. 1991.

— on 1 December 1991, the SFRY became a party to the Convention on the Civil Aspects of International Child Abduction[70].

8. The SFRY also continued to take part in diplomatic conferences and meetings. For example, on 16 and 17 December 1991, the SFRY participated at a conference held here in The Hague, in order to adopt the European Energy Charter, which was on that occasion signed by European States including the SFRY[71]. In December 1991, the SFRY still chaired the Co-ordinating Bureau of Non-Aligned Countries in New York, whose members on 13 December 1991 adopted a "Statement on the situation in Yugoslavia". The statement, *inter alia*, said that "[w]ithout prejudice to, and pending agreement on a lasting political solution, they denounced all attempts aimed at undermining the sovereignty, territorial integrity and *international legal personality* of Yugoslavia"[72].

9. The position taken by various States in their conduct of diplomatic relations with the SFRY also constitutes important evidence of the SFRY's existence and functioning as subject of international law in 1991 and early 1992. Thus, foreign diplomatic missions to the SFRY continued to function, while new Heads of Missions continued to be accredited by notifications to the SFRY Presidency. For example, a new Ambassador of the USSR/Russian Federation was accredited by a letter dated 5 November 1991, signed by its Head of State at the time, Mr. Mikhail Gorbachev[73]; the Indonesian Ambassador was accredited by a letter dated 15 January 1992, signed by Mr. Soeharto, President of Indonesia[74].

10. All this is evidence of the simple fact that the SFRY continued to be recognized as a State with an effective government much later than the Applicant would like to admit. Of course, no one can deny that the process of dissolution had already begun, but it is also clear that this was *a process* which was by no means completed by the end of 1991 and in early 1992. It was only in

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[70]See http://hcch.e-vision.nl/index_en.php?act=conventions.statusprint&cid=24.

[71]See http://www.encharter.org/fileadmin/user_upload/document/EN.pdf#page=211 .

[72]United Nations doc. S/23289 (1991) (emphasis added).

[73]See letter from Mr. Mikhail Gorbachev, President of the USSR, to the Presidency of the SFRY, dated 5 Nov. 1991.

[74]See letter from Mr. Soeharto, President of Indonesia, to the Presidency of the SFRY dated 15 Jan. 1992.

spring of 1991 that Bosnia and Herzegovina was established as an independent State, and the FRY was established on 27 April 1992.

11. Madam President, I will now turn to the Applicant's claim that the SFRY organs, in particular the SFRY army, the federal army, became "*de facto* organs of the emerging FRY"[75]. This, however, has not been substantiated by the Applicant. Moreover, it should be said that, at that time, the SFRY organs consisted, and in many cases were under the leadership, of officers from all six constituent republics, including Croatia. Some of the key offices, such as the President of the collective Head of State, Prime Minister, Minister for Foreign Affairs, and the Minister of Defence were held by persons whose territorial or ethnic origin was in Croatia[76]. It is hard to perceive these individuals to be acting as *de facto* organs of the emerging FRY (Serbia and Montenegro).

12. At this point, let me add that the reason why we refer to the ethnic and territorial origin of officials in the SFRY is to show that the federal organs and their chief officers were not exclusively Serbian, and included individuals from other constituent republics of the former Yugoslav federation, for much longer than the Applicant would like to admit. This is, of course, not to say that political affiliation and conduct of individuals necessarily depend on their ethnic origin, although in times of ethnic conflicts such as the one in the former Yugoslavia, this unfortunately seems to be the prevailing reality.

13. Moreover, even according to the Applicant's account of events given in the Memorial and Written Observations — which, for the record, the Respondent is challenging — the highest officers of the SFRY army did not appear as "acting under the direct control of the Serbian leadership", as alleged by the Applicant[77]. For example, the Applicant quotes the diary of the Serbian member of the SFRY Presidency, Borisav Jovic, in order to support its allegation, but it is exactly this source which shows that the Serbian leadership had to *ask* the generals "to give us a precise answer on whether they will conduct a redeployment of the military"[78]. The question is,

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[75]Written Observations, para. 3.33.

[76]Preliminary Objections, paras. 4.20-4.36.

[77]See Memorial, para. 8.40, and Written Observations, para. 3.33.

[78]Memorial, para. 3.34 (quoting Borisav Jovic's diary, entry for 20 June 1991).

obviously, why would the Serbian leadership have to enquire about the steps the military intended to take if the military was under its direct control, and why would the Serbian leadership have to wait for an answer from them — why not simply issue orders?

14. Madam President, in this context, I would like to note that the Applicant in its Written Observations has drawn sweeping conclusions from certain testimonies given in the course of the ICTY proceedings[79]. The Respondent denies these conclusions, while it will not at this stage enter into a more detailed assessment of the testimonies which is a matter for the merits. At this moment, it will suffice to say that these testimonies are among themselves contradictory with respect to the nature of ties between the Republic of Serbia, the SFRY army and the Serbs in Croatia, while also contradicting the Applicant's claims. Thus, according to the testimony of the former Prime Minister of the Krajina Government in 1991, Serbian President Milosevic was *de facto* Commander-in-Chief of the federal army[80]. This is contrasted with a testimony of General Đorđević, relating to the situation in autumn 1991, that Serbian President Milosevic "[i]n some issues . . . even was in disagreement" with the Federal Ministry of Defence[81]. Further, according to this testimony, it was the SFRY Presidency, the Federal Presidency, that ordered Serbia and Montenegro to provide material support for the SFRY army[82], which apparently contradicts the Applicant's contention that the SFRY organs were under the direct control of Serbia[83].

15. Of course, I do not intend to go into further analysis and assess probative value of these testimonies (see case concerning the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro*), Judgment of 26 February 2007, paras. 216-223). I would rather like to point out that it is important to appreciate the difference between political alliances and structured movements that may or may not fall under Article 10, paragraph 2, of the ILC Articles on State Responsibility. It is uncontested that a political alliance was being formed between the SFRY army, on the one hand, and the

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[79]Written Observations, para. 3.26-3.27.

[80]*Ibid.*, Annexes, Vol. 2, Ann. 5, p. 87 (testimony of witness Milan Babic).

[81]*Ibid.*, Annexes, Vol. 2, Ann. 10, p. 159, para. 78 (testimony of witness Milosav Đorđević).

[82]*Ibid*., p. 148, para. 24.

[83]Written Observations, para. 3.33.

leaderships of Serbia and Montenegro and their representatives in the federal organs of the SFRY, on the other hand. However, it is one thing to speak of a political alliance, and quite another to prove the existence of a structured movement with a specified purpose that is required for the application of Article 10, paragraph 2.

The question of identity between the SFRY and the FRY

16. Madam President, the Applicant says that the question of continuity between the movement and the Government of the new State is what matters in the context of Article 10, paragraph 2, of the ILC Articles on State Responsibility[84]. In this regard, the Applicant claims that there was:

> "considerable *de facto* continuity in personnel and policies between a number of significant organs of the SFRY once they had fallen into the hands of the Serbian leadership and those of the FRY (Serbia and Montenegro) following its formal creation in April 1992"[85].

17. In the preliminary objections, we have demonstrated that no identity can be assumed between the SFRY and the FRY, as key office holders were not exclusively of Serb origin, and while the SFRY organs continued to function during 1991 and even in early 1992[86].

18. In response, the Applicant complains that it did not argue *de facto* identity between the SFRY and the FRY[87], but this is hard to reconcile with its contention that there was "considerable *de facto* continuity" between a number of significant organs of the SFRY and the FRY. We submit that such "*de facto* continuity" of the significant organs is but another name for continuity or identity between the SFRY and the FRY.

19. We have provided evidence that such identity or *de facto* continuity between the SFRY and the FRY did not exist. The Applicant responds that we focused "upon organs whose functioning is wholly irrelevant to the claims at hand"[88]. We respectfully disagree. At this preliminary stage, our focus is on the question of personality of the Respondent and whether a claim could be raised against the Respondent for events that occurred before it came into existence.

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[84]Written Observations, para. 3.37.

[85]*Ibid.*, para. 3.40.

[86]Preliminary Objections, paras. 4.14.-4.36.

[87]Written Observations, para. 3.43.

[88]*Ibid.*, para. 3.47.

In that regard, it is crucial to resolve the issue of whether the SFRY continued to exist as subject of international law until 27 April 1992, and in particular in 1991. If the SFRY did exist, then the conduct should be attributable to it. The existence of the SFRY was expressed through activity of its various organs. We submit that it would be wrong to focus solely on those organs whose conduct may be subject to claims at hand, because here we are not dealing with the conduct itself — which is a matter for the merits — but with the question of whether the SFRY existed at a certain moment in time or not. The issue here is the existence of the statehood of the SFRY, and this is precisely the reason why examples of the SFRY foreign service and the Constitutional Court are not irrelevant, but constitute clear evidence that this State was still in existence in 1991 and in early 1992.

20. Madam President, in the preliminary objections we have also dealt with the SFRY presidency, its Government, and the SFRY army. The Applicant apparently considers these organs to be relevant for the present case, and claims that they, in particular the SFRY army, were "a *de facto* administration of Serbia", under the control of the "Serbian nationalist movement"[89]. However, as we have demonstrated in the preliminary objections, the Presidency and the Government did function in 1991, and were during the course of that year headed also by individuals coming from Croatia[90]. This is the reason why the Applicant has to find another foothold for its theory and claims that these individuals coming from Croatia — the President of the Presidency, and the Prime Minister, respectively — "were nominally in positions of authority" and "stripped of all effective power" by the middle of 1991[91].

21. However, on 25 June 1991, the SFRY Prime Minister did sign a decision adopted by the federal government (the Federal Executive Council) pursuant to which the federal police took part in an action to return control over the border crossings in Slovenia that had been seized by the Slovenian authorities[92]. Furthermore, as explained in the preliminary objections, both the Prime Minister and the President of the Presidency clearly performed their functions when they, together

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[89] *Ibid.*, paras. 3.43 & 3.33.

[90] Preliminary Objections, paras. 4.17-4.36.

[91] Written Observations, para. 3.48.

[92] See *Official Gazette of the SFRY*, No. 47/1991 (25 June 1991).

with representatives of the Republics, on 1 September 1991 signed a ceasefire agreement to stop armed conflicts in Croatia[93]. As for the federal Prime Minister, he continued to head the federal government and sign its decisions until December 1991, which is clear from various issues of the SFRY *Official Gazette*[94]. It is evident therefore that these individuals did exercise their powers as the SFRY organs much longer than the Applicant would like to admit. If, however, they held their offices only "nominally", as the Applicant claims, the question is why would they accept such position?

22. As far as the SFRY army is concerned, the Applicant fails to explain the apparent contradiction between the contention that the army was a part of the "Serbian nationalist movement" and the fact that some of the most prominent generals were of non-Serb origin. For example, during the whole of 1991, the top army commander was a general who originated from Croatia and is of a mixed ethnic origin[95], while his deputy was a Slovene. During that same year, the air force was commanded by a general who later went on to fight on the Croatian side, and then was succeeded as the air force commander by another general of Croat origin. It is rather difficult to see how they could be participants in a "Serbian nationalist movement" as the Applicant contends.

23. Madam President, the Applicant further claims that there was a continuity between the office holders in the relevant organs of the SFRY and in the relevant organs of the FRY, and on that basis claims that the FRY should bear the responsibility for acts of the SFRY organs[96]. In support of this claim, the Applicant relies on a list of "personal continuity: 1991-2001", produced as an annex to the Memorial[97]. It is unclear on the basis of which criteria this relatively short list was assembled. It contains merely 17 names of politicians, soldiers, and policemen. This list may be indicative of a continuity between the SFRY and the FRY in so far as it contains names of ten

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[93]Preliminary Objections, para. 4.21.

[94]See, e.g., "Decision on determining the border crossings on which customs officers carry pistols and on conditions for keeping and carrying pistols in the exercise of tasks and affairs", dated 17 Dec. 1991, *Official Gazette of the SFRY*, No. 95/1991; also, various acts entitled "Decision on appointment of ambassador in the Federal Secretariat for Foreign Affairs" dated 30 Oct. 1991, *Official Gazette of the SFRY*, No. 88/1991; "Decision on the amendment of the decision on classification of goods on forms of export and import" dated 20 Nov. 1991, *Official Gazette of the SFRY*, No. 86/1991.

[95]Preliminary Objections, para. 4.33.

[96]Written Observations, para. 3.39-3.40 and 3.45.

[97]See *ibid.*, para. 3.39, and Memorial, para. 8.45 and App. 8.

high-ranking officers of the SFRY army that subsequently continued their service in the FRY army. Many other officers of the SFRY army also continued their service in the FRY army, but many others continued their service in other armies on the territory of the former Yugoslavia, including in the Croatian army. Apart from the ten military officers on the list, none of the other listed individuals was an official of the SFRY who continued to be an official of the FRY, although they may have been politically active or held offices at different occasions during the relevant time. In conclusion, it is hard to see how these individuals could indicate continuity between the SFRY and the FRY organs.

24. The lack of personal continuity between the SFRY and the FRY can be illustrated by a comparison of the persons who headed what Croatia terms "significant organs" of each of these States — the presidency and the government. The last President of the SFRY was from Croatia, while the first President of the FRY was from Serbia, an individual who did not hold any official function in the SFRY. Similarly, the last Prime Minister of the SFRY was from Croatia, while the first Prime Minister of the FRY was an émigré coming from the United States who did not hold any official function in the SFRY.

25. In conclusion, the SFRY was not the same as the FRY. The continuity cannot be assumed, as the SFRY federal authorities were not identical with those of the FRY and Serbia and Montenegro. This is also evidenced by a rejection of the FRY's claim to such continuity by the international community. Finally, the SFRY authorities also could not be regarded as *de facto* organs of Serbia and Montenegro.

Madam President, with this we would conclude our morning presentations.

The PRESIDENT: Thank you very much, Mr. Djerić. The Court will now rise and will resume for the continuation of Serbia's presentations at 3 o'clock this afternoon.

The Court rises.

The Court rose at 12.55 p.m.