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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 3 p.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 15 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

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The PRESIDENT: Please be seated. Mr. Djerić, you have the floor.

Mr. DJERIĆ: Thank you very much, Madam President.

Madam President, Members of the Court, to begin, I would just like to say that it has been brought to my attention that I made an unintentional mistake in my speech before the lunch break. In paragraph 10 I referred to the fact that Bosnia and Herzegovina was established in the spring of 1991. Of course, the correct date is the spring of 1992.

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

26. Coming back to my speech. Before the lunch break, I had begun discussing our second preliminary objection according to which the Application is inadmissible in the part relating to acts or omissions that occurred prior to 27 April 1992, the date on which the FRY, as the Respondent in the present case, came into being. The Applicant invoked Article 10, paragraph 2, of the ILC Articles on State Responsibility in order to tie the FRY to the events that occurred before it came into being. We have demonstrated that, as a matter of law, this provision is simply not applicable to the present case.

27. Further, we have demonstrated that the SFRY organs were not "*de facto* organs of the emerging FRY", as the Applicant claims, and that the SFRY, the former Yugoslavia, existed as subject of international law in 1991 and early 1992. At that time, the SFRY *did* conclude bilateral and multilateral treaties, *did* attend international conferences and meetings of international organizations, and *did* maintain diplomatic relations with other States. All this is evidence of the continued acceptance of the SFRY as a functioning State in 1991 and early 1992. Moreover, the federal organs of the former Yugoslavia, as well as their chief officers, were not exclusively Serbian, but included individuals from other constituent republics of the SFRY. In that regard, one cannot assume that there was continuity between the SFRY and the FRY, as the SFRY federal authorities were not identical with those of the FRY. In conclusion, it was the SFRY that performed governmental functions at that time and, consequently, the responsibility arising from its

acts and omissions can only be tied to the SFRY, the former Yugoslavia, and not to the FRY, Serbia and Montenegro, which came into being on 27 April 1992.

Whether this preliminary objection belongs to admissibility or to the merits

28. Madam President, now I would like to address the Applicant's argument that this preliminary objection "goes to the merits and does not raise issues of admissibility"[1]. In particular, the Applicant contends that our second preliminary objection is not concerned with any of the factors that would make it inappropriate for the Court to deal with the case, and that it consequently is not an admissibility objection[2].

29. However, the Respondent has never tried to justify its preliminary objection on the ground that it would be inappropriate for the Court to deal with the case. We have used the inadmissibility objection in order to bring to the Court a matter which shows the absence of personal jurisdiction, but cannot simply be equated with jurisdiction *ratione personae* since it raises a more fundamental question regarding the person of the Respondent: whether the Respondent existed before 27 April 1992 and whether a lawsuit can be brought against it for the events that occurred before it came into existence. This objection is an admissibility objection different from the objection related to the existence of jurisdiction *ratione temporis* under the Genocide Convention. In the Written Observations, the Applicant has failed to distinguish these two issues. However, the difference is clear if one, *arguendo*, considers the situation in which the Court would determine that it has the jurisdiction under the Genocide Convention extending to the period before the date on which the Respondent came into existence. This is only for the sake of argument: as Professor Zimmermann will demonstrate, the Genocide Convention cannot be applicable to events before 27 April 1992. But, even in this hypothetical case, the Application would still be inadmissible in relation to the claims that relate to the period before 27 April 1992, the date on which the Respondent came into existence. Moreover, let me add that in a part of the period to which the Applicant is trying to stretch jurisdiction, *none of the Parties existed*. Croatia became a State on 8 October 1991. Neither the Applicant nor the Respondent could have any rights or

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[1] Written Observations, paras. 3.5-3.9.

[2] *Ibid*., para. 3.8.

obligations before they came into existence. Claims relating to the acts that occurred before the Parties came into existence would have to be declared inadmissible even if the jurisdiction were established.

30. Madam President, regardless of how one classifies our second preliminary objection, it cannot be disputed that this objection falls under Article 79, paragraph 1, of the 1978 Rules which defined preliminary objections in the following way:

> "Any objection by the respondent to the jurisdiction of the Court or to the admissibility of the application, or *other objection* the decision upon which is requested before any further proceedings on the merits . . ." (Emphasis added.)

In line with this rule, the Court has taken the position that it will deal with any objection that needs to be resolved before proceeding to the merits, and not just with those regarding jurisdiction and admissibility (see, e.g,. *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya* v. *United Kingdom), Preliminary Objections, Judgment, I. C.J. Reports 1998,* p. 26, para. 47) — provided, of course, that they are of an exclusively preliminary nature. In any case, the Court has taken the position that a strict classification of preliminary objections was not deemed to be of "critical importance" (*Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984,* p. 429, para. 84).

31. Madam President, the second preliminary objection has an exclusively preliminary nature. We simply say that the Respondent was not in existence before 27 April 1992, and therefore not in existence at the time of the events that occurred prior to that date. The question of whether the FRY did or did not exist before 27 April 1992 has nothing to do with the question of the existence or non-existence of certain events that are alleged to have occurred prior to that date, which form the subject-matter of the Applicant's claim. The answer to the former question does not prejudge the latter.

32. As far as the question of attributability is concerned, the general rule is that conduct cannot be attributed to an entity that did not exist at the time when the conduct occurred. Under this rule responsibility of the FRY could not prima facie arise, and the Application would be prima facie inadmissible.

33. The only exception to this principle is formulated in Article 10, paragraph 2, of the ILC Articles on State Responsibility. However, we have demonstrated that this exception simply does not apply to the present case as a matter of law, and regardless of a possible dispute that may arise over facts of the case.

34. Moreover, even if the exception under Article 10, paragraph 2, would be applicable, *quid non*, it should be recalled that this provision is a rule of attribution, a secondary rule, whose application depends on the existence of a primary rule. Only if there is a primary rule imposing an international obligation on an insurrectional movement, the secondary rule of attribution, such as the one in Article 10, paragraph 2, could come into play. As the Court said in the *Gabčíkovo-Nagymaros* case,

> "A determination of whether a convention is or is not in force, and whether it has or has not been properly suspended or denounced, is to be made pursuant to the law of treaties. On the other hand, an evaluation of the extent to which the suspension or denunciation of a convention, seen as incompatible with the law of treaties, involves the responsibility of the State which proceeded to it, is to be made under the law of State responsibility." (*Gabčíkovo-Nagymaros Project (Hungary/Slovakia), Judgment, I.C.J. Reports 1997,* p. 38, para. 47.)

35. Since this is a case brought under Article IX of the Genocide Convention, the primary rule could only be the Genocide Convention. Whether the Genocide Convention was in force for the movement in question, and whether it could be a party to this convention is an issue of an exclusively preliminary nature. In other words, the issue here is not the one of attributability and merits, as the Applicant would like to frame it. Rather, the main issue is the existence of the primary rule, which in the present case necessarily means the existence of the title of jurisdiction, since the instrument containing the primary rule — the Genocide Convention — is the only conceivable title of jurisdiction. Therefore, as far as events that took place before the creation of the FRY are concerned, and provided that Article 10, paragraph 2, could be applicable, *quid non*, the Court would first have to deal with the question of whether the movement in the sense of this provision could, as a matter of principle, be a party to the Genocide Convention. In order to resolve this issue, the Court will not have to deal with any aspect of the merits. Neither will it have to discuss events that gave rise to the present claim, nor even to consider the existence of a "movement". This issue therefore cannot possibly prejudge the merits and is clearly of an

exclusively preliminary nature. Its resolution is necessary before any further proceedings on the merits.

36. Madam President, only if the Genocide Convention as a whole, including its Article IX, was applicable *as treaty law* to the supposed "movement" that succeeded in establishing the FRY, *quid non*, then the acts of this movement could be properly submitted to the jurisdiction of this Court. We respectfully submit that this is not the case. It is submitted that any such movement could be bound by general rules of international law but not by the Genocide Convention to which only States can be parties. If there was no treaty obligation, consequently there could be no treaty breach[3].

37. Let me immediately add that all actors in the conflict were at all times bound by the *customary international law* prohibition of genocide. Thus, all individuals who breached this obligation would be criminally liable under international law, including before the ICTY. It is known however that no individual has ever been indicted for genocide against Croats in Croatia before the ICTY. The present case, does not deal with individual criminal responsibility, but concerns State responsibility. If one is to raise the possibility of State responsibility for a breach of a treaty on the basis of an *in statu nascendi* theory, one is due to answer, in the first place, the question of whether treaty law obligations were applicable to non-State actors.

38. In conclusion, the second preliminary objection is of an exclusively preliminary nature as it concerns the general rule that a State cannot be responsible for events that had occurred before it came into existence. Furthermore, the objection is also of an exclusively preliminary nature when it deals with the applicability of Article 10, paragraph 2, of the ILC Articles on State Responsibility. Even if the exception under Article 10, paragraph 2, would apply, *quid non*, its application would depend on the existence of a primary rule, which in the present case is also the only source of the Court's jurisdiction. Therefore, in this case, like in every case, the Court would have first to consider the jurisdictional title which is a matter of an exclusively preliminary nature. In that regard, the Respondent submits that a movement in the sense of Article 10, paragraph 2, of

[3]See Article 13 of ILC Articles on State Responsibility.

the ILC Articles on State Responsibility cannot possibly be a party to the Genocide Convention, which is the primary rule and the sole jurisdictional title in the present case.

39. Madam President, distinguished Members of the Court, with this I will conclude my presentation and I would like to thank you for your kind attention. Madam President, I would be grateful if you could call Professor Zimmermann to the Bar.

The PRESIDENT: Thank you, Mr. Djerić. I now call Professor Zimmermann.

Mr. ZIMMERMANN: Thank you, Madam President.

I. SCOPE OF JURISDICTION *RATIONE TEMPORIS*

1. Madam President, Members of the Court, I will now turn to the next issue, namely that the application by Croatia cannot be entertained to the extent that it refers to acts or omissions prior to 27 April 1992 because this honourable Court lacks jurisdiction *ratione temporis*.

2. Let me first reiterate, however, that this objection is raised in addition to the arguments which we have put forward so far and which have demonstrated that this Court does not have jurisdiction to hear this case *at all*.

3. This objection *ratione temporis* is also raised in addition to the argument that this Court already lacks jurisdiction *ratione personae* with regard to acts that occurred prior to 27 April 1992 — an argument my colleague Vladimir Djerić has developed beforehand.

4. With regard to the question whether, and if so to what extent, this Court may exercise jurisdiction vis-à-vis Serbia by virtue of Article IX of the Genocide Convention, it is essential to distinguish clearly two questions:

— *First*, when did Article IX of the Genocide Convention enter into force as between Croatia and Serbia, provided this Court should find that it indeed entered into force at all as between these two Parties regardless of the valid reservation Serbia has made as to Article IX of the Convention. In that regard, I will now demonstrate that the earliest possible point in time could have been 27 April 1992.

— *Second*, I will also demonstrate that the Genocide Convention including the jurisdictional clause contained in its Article IX cannot be applied with regard to acts which occurred *before*

Serbia came into existence as a State, and before it could therefore have become a party to the Convention, i.e., that it may not be applied with regard to acts that occurred before 27 April 1992.

5. With regard to the earliest possible point in time in which Serbia could have become bound by Article IX of the Genocide Convention, the starting-point is that Serbia (at that time named FRY) — that is the Respondent in this case — only came into existence on 27 April 1992. Thus, it is beyond doubt that — as my colleague Tibor Varady has already demonstrated — it did not exist as an international legal person beforehand.

6. The only way to find otherwise would be to consider Serbia to be identical with the former Socialist Federal Republic of Yugoslavia. But — as we all know — there is general agreement that this is not the case.

As a matter of fact, such claim of identity has always consistently and vigorously been contested by Croatia and the other successor States of the former Yugoslavia.

Furthermore, the fact that the FRY was admitted to the United Nations as a new Member has also proven — if need existed — that the FRY, now Serbia, is a successor State of the former Socialist Federal Republic of Yugoslavia, the so-called "former Yugoslavia".

Finally, Bosnia and Herzegovina, Croatia, the former Yugoslav Republic of Macedonia, the Republic of Slovenia and the FRY have entered into an "Agreement on Succession Issues" in which these States declare that they are — "in sovereign equality the five *successor* States to the former Socialist Federal Republic of Yugoslavia . . ."[4].

7. As a successor State to the former Yugoslavia, the FRY, now Serbia, could have — if ever — only become a Contracting Party to the Genocide Convention and thus could have only become bound by its Article IX, at the earliest at the time itself came into existence — and that indeed is 27 April 1992.

8. That fact is confirmed by the very practice of Croatia itself. Croatia stated with regard to its own situation — and I quote from the Croatian notification of succession concerning treaties entered into by the former Yugoslavia — that treaties of the former Yugoslavia to which it, Croatia,

[4]Agreement on Succession Issues Between the Five Successor States of the Former State of Yugoslavia, *ILM* 41 (2002), 3; emphasis added.

had succeeded by way of a notification of succession shall "take effect from 8 October, 1991, *the date on which the Republic of Croatia became independent*"[5].

9. Accordingly, even if one was *not* to follow our well-founded position that Serbia only became bound by the Genocide Convention when it acceded to it in 2001 and that it never became bound by its Article IX, the only possible point in time at which Serbia might have become bound by the Genocide Convention was — according to well-established practice and in the same way Croatia put it with regard to its own case in its own notifications of succession — the date on which the FRY, now Serbia, became an independent State — and that, indeed, is 27 April 1992.

10. Besides, in that regard the reaction of both, Bosnia and Herzegovina as well as that of Croatia itself, to the accession of the FRY and its reservation to Article IX of the Genocide Convention is quite telling.

11. Bosnia and Herzegovina stated in its objection of 27 December 2001: "the Federal Republic of Yugoslavia has effectively succeeded the former Socialist Federal Republic of Yugoslavia *as of 27 April 1992 (the date of the proclamation of the FRY) as a Party to the Genocide Convention*"[6]. And the Bosnian objection continued and stated that 27 April 1992 is "the day on which FRY became bound to *(sic!)* the Genocide Convention . . ."[7].

12. Quite similarly Croatia stated in its objection that the FRY, now Serbia, was bound by the Genocide Convention "since its emergence as one of the five equal successor states to the former Socialist Federal Republic of Yugoslavia"[8]. Let me quote again: "is bound *since its emergence as a successor state to the former Yugoslavia*"[9].

13. Indeed, in its Written Observations[10], Croatia itself confirms that the FRY, now Serbia, came into existence on the day a formal proclamation of the parliaments of Serbia and Montenegro was adopted to that end, that is on 27 April 1992.

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[5]United Nations Treaty Collection Database, *Multilateral Treaties Deposited with the Secretary-General, Status as at 31 December 2005,* Historical information, p. XII.

[6]United Nations Treaty Collection Database, *Multilateral Treaties Deposited with the Secretary-General, Status as at 31 December 2005*, Chap. IV, 1. p. 133, footnote 15; emphasis added**.**

[7]*Ibid*.

[8]*Ibid*.

[9]*Ibid*.

[10]Written Observations of the Republic of Croatia (hereafter "Written Observations"), para. 3.25.

14. Now, given that Serbia only came into existence as a State by 27 April 1992, it thus could have only become bound by the Genocide Convention and its Article IX, if ever, by that very date.

15. But if the FRY, now Serbia, had not even existed before 27 April 1992 as a State and thus could have not been a contracting party to the Genocide Convention beforehand, how could it then have conferred jurisdiction on the Court under Article IX of the Genocide Convention for acts prior to that date?

16. In that regard, it is first important to note that this issue was not settled by the Court in its 1996 Judgment on jurisdiction in the case brought by Bosnia and Herzegovina against the FRY which solely dealt with the possible retroactive effect of the Bosnian notification of succession.

17. In particular, it is relevant to note that the scope of jurisdiction vis-à-vis the FRY was not even argued by the parties. Even less so was it decided by the Court.

18. In paragraph 17 of its 1996 Judgment, the Court stressed this point when it stated that it was — at that time and as between the two parties, namely Bosnia and Herzegovina and the FRY — undisputed that "Yugoslavia" was a party to the Genocide Convention and that it was bound by its Article IX.

19. In our case, however, the situation is completely different:

— first, in sharp contrast to the situation of 1996, it is now clear and undisputed that Serbia is not identical to the State that had ratified the Genocide Convention without reservation in 1950;

— second, the FRY, now Serbia, has made a reservation as to its Article IX when it acceded to the Genocide Convention;

— third, it is therefore disputed by the Respondent, and indeed contradicted by facts, that Serbia *ever* became bound by Article IX of the Genocide Convention;

— fourth, during the proceedings leading to the 1996 Judgment, the only point argued by the FRY was that the Bosnian notification of succession could not have a retroactive effect as to the date of the independence of Bosnia and Herzegovina. On the other hand, the status of the FRY with regard to Article IX of the Genocide Convention was not argued since it was not disputed.

20. Madam President, Members of the Court, in 1996, the question whether the jurisdiction of the Court vis-à-vis Serbia could extend to alleged genocidal acts which have occurred before

27 April 1992 and before Serbia became a contracting party to the Genocide Convention was neither raised, nor was it even discussed, nor could it in any event be binding on the Parties in this case by virtue of Article 59 of the Court's Statute.

21. But what is then the relevance of the holding of the 1996 Judgment for our case? Following the logic of the 1996 Judgment, Croatia could — like Bosnia and Herzegovina — by notifying its succession become a contracting party to the Genocide Convention — this is not challenged by the Respondent. And — as Judge Shahabuddeen stated — a successor State which notifies its succession then becomes a party to the Genocide Convention "as from the date of its independence" (case concerning *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Yugoslavia), Preliminary Objections, Judgment, I.C.J. Reports 1996 (II)*; separate opinion of Judge Shahabuddeen, p. 636). Indeed — and I quote once more from his separate opinion — "the necessary consensual bond is completed when the successor State decides to avail itself of the undertaking by regarding itself as a party to the treaty" *(ibid.)*. Thus Croatia, by virtue of having notified its succession to the Genocide Convention, is to be considered — in the words of Judge Shahabuddeen — "as continuing *as from independence* any status which the predecessor had" (*ibid*., as to the situation of Bosnia and Herzegovina; emphasis added) and must then also be treated — again, in the words of Judge Shahabuddeen — "as having been a party to the Convention as *from the date of its independence*" (*ibid*., as to the situation of Bosnia and Herzegovina; emphasis added).

22. I assume there is consensus in this room in that regard. But it also necessarily implies that the very same considerations must then also apply vis-à-vis Serbia, since — as is acknowledged by Croatia — Serbia is one of five equal successor States to the former Yugoslavia.

23. Accordingly, like Bosnia and Herzegovina and like Croatia itself, Serbia — if ever it did become bound by Article IX of the Genocide Convention at all, *quid non* — could have only become bound by the Genocide Convention at the earliest as from the date it came into existence — and that, indeed, is 27 April 1992.

24. As a matter of fact, the consensual bond between Croatia and the newly established FRY, now Serbia, with regard to the Genocide Convention could have only been completed *after* the FRY was created — until that time such consensual bond could only exist and did exist between

Croatia and the then still existing Socialist Federal Republic of Yugoslavia. Such consensual bond could, however, not exist vis-à-vis a State that itself did not exist yet, and which therefore could not yet be a contracting party to the Genocide Convention and its Article IX, namely the FRY, now Serbia.

25. Thus, the required consensual bond could not and did not exist vis-à-vis Serbia before 27 April 1992 — since the FRY, now Serbia, itself was only created and came into existence on that very date. Therefore, Serbia cannot be subject to the Court's jurisdiction concerning acts that have occurred beforehand.

26. The only possibility to establish the status of Serbia as a contracting party to the Genocide Convention *for any point in time prior to 27 April 1992* would be to argue that Serbia continues the international legal personality of the former Yugoslavia — but one might assume that there is consensus in this Great Hall of Justice that this is not the case.

27. Madam President, honourable Members of this Court, accordingly, any finding that the Court has jurisdiction over Serbia as to acts that allegedly have taken place *before 27 April 1992* would entail applying the Genocide Convention and its Article IX retroactively for a period of time in which the Genocide Convention had not yet entered into force as between the parties — indeed for a period of time in which the Respondent did not even exist yet.

28. The Applicant wants us indeed to believe that the Genocide Convention and its Article IX would cover acts which occurred before the required consensual bond had been created between Croatia on the one hand and the FRY, now Serbia, on the other — yes, that it could cover acts which occurred before Serbia even existed as a State.

29. The question of a possible retroactive application of a given treaty is regulated by Article 28 of the Vienna Convention on the Law of Treaties, which can be taken as having enshrined the customary international law in the matter. Article 28 provides — and let me read it for the sake of convenience:

"**Article 28. Non-retroactivity of treaties**

> Unless a different intention appears from the treaty or is otherwise established, *its provisions do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the treaty with respect to that party*." (Emphasis added.)

30. And even before the Vienna Convention on the Law of Treaties was drafted, this Court had previously stated that a treaty may only be applied retroactively: "if there had been any special clause or any special object necessitating retroactive interpretation" (*Ambatielos (Greece* v. *United Kingdom), Preliminary Objection, Judgment, I.C.J. Reports 1952*, p. 40.)

31. Or, as Sir Gerald Fitzmaurice, then Special Rapporteur on the law of treaties of the International Law Commission put it: "It is clear that *only express terms or an absolutely necessary inference can produce such a result*. The presumption must always be against retroactivity."[11]

32. Thus, as a starting-point and as a matter of principle, treaties cannot be applied retroactively — and more particularly — can even less be applied vis-à-vis a State — like the FRY, now Serbia — that did not even exist during the period in question.

33. Given that the fundamental principle is that treaties are not to be applied retroactively, the burden of proof lies with the Applicant to demonstrate that the Genocide Convention falls into one of the two exceptions foreseen in Article 28 of the Vienna Convention on the Law of Treaties, *quid non*.

34. Madam President, Members of the Court, Croatia has not shouldered this burden. As a matter of fact, it has not even attempted to do so. Instead, what it simply did was to refer us to what the Court said in 1996. However, as we have demonstrated, the only question the Court was faced with; the Court was accordingly addressing and, the Court decided in 1996, was whether the notification of succession emanating from Bosnia and Herzegovina had the effect of making Bosnia and Herzegovina a party by the time of its independence — nothing more and nothing else.

35. Indeed, what Croatia seems to imply is that the Court was applying one of the exceptions provided for in Article 28 of the Vienna Convention on the Law of Treaties — but without even saying so. But it is very hard to believe that the Court did indeed want to apply one of the possible exceptions referred to in Article 28 of the Vienna Convention on the Law of Treaties without mentioning it.

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[11] Fitzmaurice, G., "4th Report on the Law of Treaties", *Yearbook of the International Law Commission (YILC)*, 1959, Vol. II, p. 74, para. 122; emphasis added.

36. This attempt by Croatia to second-guess the Court's intention is further contradicted by the fact that:

— the parties, in 1996, had not argued this question at all;

— and by the further fact that Bosnia and Herzegovina itself — as is demonstrated by the Bosnian objection to the accession by the FRY, now Serbia, to the Genocide Convention I have previously referred to — that Bosnia takes the position that the Genocide Convention only applies between Bosnia and Herzegovina and Serbia at the earliest as from 27 April 1992;

— and further given that the FRY, now Serbia, only came into existence as a State by said date.

37. Instead, what the Court simply did in 1996 was to confirm that a notification of succession has the effect that the respective successor State shall be considered a party to the treaty from the date of the succession of States, that is, from the date it came into existence as a new State.

38. Madam President, Members of the Court, several eminent scholars have taken a clear-cut position specifically as to a possible retroactive application of the Genocide Convention.

39. Already in 1949, Nehemiah Robinson in his commentary on the Genocide Convention took the position that "it could hardly be contended that the Convention binds the signatories to punish offenders for acts committed previous to its coming into force for the given country . . ."[12]. And Robinson then continues specifically with regard to its Article IX: "Article IX could not be invoked, except for *acts of the State following the ratification of the Convention* . . ."[13].

40. And William Schabas specifically addresses the question whether the exception provided for in Article 28 of the Vienna Convention on the Law of Treaties may apply as to the Genocide Convention in his book on genocide:

> "According to Article 28 of the Vienna Convention on the Law of Treaties, '(u)nless a different intention appears from the treaty or is otherwise established, its provisions do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the treaty with respect to that party' . . . There is nothing in the Genocide Convention to suggest 'a different intention'. Therefore, '(t)he simple fact is that the Genocide Convention is not applicable to acts committed before its effective date'"[14].

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[12]Robinson, N., *The Genocide Convention*, 1960, Institute of Jewish Affairs, World Jewish Congress, p. 114.
[13]*Ibid*.
[14]Schabas, W., *Genocide in International Law*, 2000, p. 541.

And Schabas then also further continues: "the operative clauses of the Convention, *including Article IX,* can only apply to genocide committed subsequent to its entry into force with respect to a given State party"[15].

41. Croatia, however, attempts to rely on the object and purpose of the Genocide Convention which — in its view — necessitates a retroactive application of said Convention — an assumed retroactive application with regard to a time period in which the Respondent did not even exist as an international person.

42. But let us all first note that Article 28 of the Vienna Convention on the Law of Treaties does not refer to the object and purpose of a given treaty. Instead, it uses a significantly more stringent formula by requiring that such a intention must "appear from the treaty".

43. The only argument supporting the far-fetched Croatian interpretation of the jurisdictional clause contained in Article IX, which purports to apply it to acts which allegedly occurred while the Respondent did not yet exist, is an alleged time gap in the protection provided for by the Convention[16] — an argument that cannot however override basic principles of treaty law. Moreover, the Convention continued to apply as from the time Croatia came into existence as between Croatia on the one hand (as having already succeeded to the Genocide Convention) and the Socialist Federal Republic of Yugoslavia on the other. There was therefore no such alleged time gap whatsoever.

44. The fact that Article IX of the Genocide Convention cannot be applied retroactively is also confirmed by the drafting history of the Vienna Convention on the Law of Treaties itself, where the ILC explicitly stated in its commentary, particularly with regard to jurisdictional clauses: "when a jurisdictional clause is attached to the substantive clauses of a treaty as a means of securing their due application, the non-retroactivity principle may operate to limit *ratione temporis* the application of the jurisdictional clause"[17].

45. Finally, the approach proposed by the Applicant would lead to rather far-reaching and even almost absurd results. It would widely open the Court's jurisdictional gates, since it would

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[15] *Ibid*., emphasis added.

[16] Written Observations, para. 3.14.

[17] Draft Articles on the Law of Treaties with commentaries, adopted by the ILC at its Eighteenth Session, UNCLT, First and Second Sessions, Vienna, 26 March-24 May 1969 and 9 April-22 May 1969, *Official Record*, p. 32, para. 2.

provide for the possibility to bring before the Court all alleged acts of genocide committed by any of the by now 140 parties of the Genocide Convention, regardless of the question of whether they have been committed before or after the Genocide Convention had entered into force for the respective State or States.

46. As a matter if fact, if one were to follow Croatia's approach, the Court would have jurisdiction regardless of the question whether the respective State had even existed at the crucial time or not. One cannot but state that this would involve the opening of a Pandora's box — but the Genocide Convention simply does not constitute such a box.

47. It follows from the above, that neither the Genocide Convention generally, nor its Article IX, can be applied with regard to acts that have allegedly occurred before the FRY, now Serbia, came into existence as a State, namely, as of 27 April 1992.

48. Accordingly, this Court may in any event not exercise jurisdiction with regard to acts that occurred before the FRY, now Serbia, came into existence as a new State, that is that it may not exercise jurisdiction with regard to acts that occurred before the date I have now mentioned several times.

49. Madam President, honourable Members of the Court, let me now turn to our third preliminary objection which relates to some specific requests by the Applicant, namely those concerning the surrender of persons, the further request to provide information about missing persons, and finally, the request for the return of cultural property, all of which either do not come within the Court's jurisdiction under Article IX of the Convention, or are otherwise inadmissible. Let me first address the request of Croatia to submit certain persons to trial.

II. PRELIMINARY OBJECTION NO. 3

(a) *Surrender of persons*

50. Madam President, in its Written Observations, Croatia continues to claim that Serbia has failed to submit to trial those persons who, as Croatia claims, are suspected of having committed acts of genocide on the territory of Croatia and to ensure that those persons are being punished[18].

[18] Written Observations, para. 4.2.

The claim does not, however, come within the subject-matter jurisdiction of this Court for several reasons.

51. First, Croatia itself accepts in its Written Observations that its submission is moot with regard to those persons who have been transferred to the ICTY[19].

52. Yet, since 2000, five individuals accused of having committed crimes on the territory of Croatia were arrested in Serbia and transferred to the ICTY[20]. Serbia also co-operated in the voluntary surrender of seven more persons indicted for allegedly having committed crimes in Croatia[21].

53. As a matter of fact, there is only one person accused by the ICTY for crimes allegedly committed in Croatia, namely Goran Hadžić, an ethnic Serb from Croatia, who is still at large. There are, of course, controversial explanations of his whereabouts. Yet, what is uncontroversial is that Serbia transferred, or co-operated in the transfer of 12 out of 13 indictees.

54. It must also be noted that in the case of Mr. Hadžić, as actually in all other indictments relating to the war in Croatia, the ICTY indictment is limited to the commission of war crimes and crimes against humanity. Said indictment does neither include nor even refer to the crime of genocide[22].

55. Let me reiterate: no individual, including the only person still at large, accused of having committed crimes in Croatia was ever indicted by the ICTY for having committed acts of genocide.

56. The obligation to co-operate with the ICTY arising under Article VI of the Genocide Convention covers, however, as this Court has recently confirmed, solely co-operation with regard to persons accused of genocide (*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. 448). It is for this reason alone, that any alleged non-co-operation with the ICTY with regard to Goran Hadžić does not even prima facie come within the purview of possible

[19] *Ibid*., para. 4.5.

[20] These are Slobodan Milošević, Jovica Stanišić, Franko Simatović, Veselin Šljivancanin, and Vladimir Kovačević.

[21] These are Vojislav Šešelj, Mile Mrkšić, Momčilo Perišić, Pavle Strugar, Miodrag Jokić, Milan Martić, and Miroslav Radić.

[22] Case No. IT-04-75-I, Prosecutor *v.* Goran Hadžić, Indictment dated 4 June 2004.

violations of the Genocide Convention. It does neither, therefore, come within the jurisdiction of this honourable Court under Article IX of the Convention.

57. Second, Croatia claims that Serbia is under an obligation to itself punish its nationals for alleged acts of genocide even when committed abroad, that is in Croatia[23]. This Court has however recently categorically confirmed, that the Genocide Convention generally, and its Article VI specifically, "only obliges the Contracting Parties to institute and exercise *territorial* criminal jurisdiction" (*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. 442; emphasis added).

The Court then continued in clear terms that the Convention "while it certainly *does not prohibit* States, with respect to genocide, from conferring jurisdiction on their criminal courts based on criteria other than where the crime was committed . . ., *it does not oblige them to do so*" (*ibid*., emphasis added).

58. It follows that Serbia cannot, not even prima facie, be charged with not having tried *before its own courts* those accused by Croatia of allegedly having committed acts of genocide outside the territory of Serbia, that is in Croatia. This is simply not an obligation arising under the Genocide Convention.

59. At the same time, it is also important to stress that Serbia has indeed initiated a significant number of criminal proceedings against individuals for other crimes, apart from genocide, committed during the armed conflict in Croatia, and Serbian courts have pronounced judgments indeed in those cases. It is also worth noting that Croatian and Serbian authorities have closely collaborated with regard to the prosecution of crimes committed in Croatia in a quite significant number of cases[24].

60. Yet, at any rate, this Court itself confirmed that in a case arising under Article IX of the Convention, it "is of course without jurisdiction . . . to declare that the Respondent has breached any obligations *other than those under the Convention*" (*ibid.*, para. 449).

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[23]Memorial, para. 7.100.

[24]See the heading *"Regional Cooperation"* at: http://www.tuzilastvorz.org.rs/html_trz/PREDMETI_ENG.htm.

61. Accordingly, even if this Court were to find generally that it has jurisdiction under Article IX of the Convention, *quid non*, this Court is hindered from exercising jurisdiction as to the allegation that Serbia has not punished individuals for having allegedly committed acts of genocide outside its own territory, that is on the territory of Croatia.

62. Third, Croatia seems to also claim that Serbia has violated the Genocide Convention by not handing over persons who have allegedly committed acts of genocide to Croatia itself[25]. Yet, Croatia has not even indicated where such obligation should possibly derive from, given that the only obligation to co-operate with regard to the punishment of persons accused of genocide is, as this Court has recently confirmed, to be found in Article VI of the Genocide Convention (*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. 443). This obligation is limited, however, to the co-operation with the international tribunal to which Article VI of the Convention makes reference.

63. It follows that any such alleged non-co-operation with Croatia does not even possibly amount to a violation of the Convention. Therefore, these claims do neither come within the jurisdiction of this Court arising under Article IX of the Convention.

(b) ***Missing persons***

64. Madam President, Members of the Court, let me now turn to our objection relating to the request of Croatia to provide information as to the whereabouts of Croatian citizens missing as a result of alleged acts of genocide.

65. We respectfully submit that — apart from the fact that the acts committed in Croatia do not even prima facie amount to genocide and that besides there is also a very significant number of persons of Serb ethnicity who are still missing as a consequence of the war in Croatia — the Croatian request has become moot because information which is available to Serbia has already been provided to Croatia.

[25] Written Observations, para. 4.6.

66. It is self-evident that Croatia's Written Observations dated 29 April 2003 could only take stock of the situation as it then existed. Ever since, however, both sides have even more significantly increased their co-operation as to the location and identification of missing persons.

67. *Inter alia,* between 2002 and 2007, exhumations have taken place in ten different places in Serbia in the presence of Croatian representatives[26], whereby more than 200 persons were identified[27] and as a result of which more than 70 bodies were transferred to the Republic of Croatia[28].

68. In March 2007, the two sides concluded that the previous series of exhumations "were carried out in accordance with the [previous] agreement, settled principles, working methodology and professional standards"[29].

69. Moreover, the parties put in place a system of "preliminary visits", whereby each side may request a visit of gravesites on the territory of the other side, if one side obtains information about the location of a possible gravesite where missing persons might be found[30]. As a matter of fact, some of these preliminary visits have already taken place upon Croatian requests[31].

70. In addition to the above-stated activities, that is the conduct of planned exhumations, identification and the transfer of mortal remains, Serbia has so far also acted upon various individual requests of Croatia concerning verification of information, exhumations and transfer of

[26]Sites where such exhumations took place include Novi Sad, Sremska Mitrovica, Indjija, Ruma, Šabac, Loznica, Belgrade, Smederevo, Pančevo and Kovin.

[27]Addendum to the Response Letter of the Commission for Humanitarian Issues and Missing Persons of Serbia and Montenegro (i.e. Republic of Serbia) to allegations made by the President of the Bureau for Detained and Missing Persons of the Republic of Croatia, Colonel Ivan Grujić, dated 14 Jan. 2008, p. 3 of the original text and p. 5 of the English translation.

[28]*Ibid.*

[29]Minutes from the meeting of the Commission for Missing Persons of the Government of Republic of Serbia and the Commission for Detained and Missing Persons of the Government of Republic of Croatia held on 13-14 March 2007 in Belgrade, p. 6 of the original text and p. 7 of the English translation.

[30]Addendum to the response letter of the Commission for Humanitarian Issues and Missing Persons of Serbia and Montenegro (i.e. Republic of Serbia) to allegations made by the President of the Bureau for Detained and Missing Persons of the Republic of Croatia, Colonel Ivan Grujić, dated 14 Jan. 2008, p. 6 of the original text and p. 10 of the English translation.

The existence of such an agreement has been confirmed by a statement given by Colonel Grujić after the joint meeting of the two Committees held on 13-14 March 2007, reported in *Glas javnosti* daily, Lists and exhumations will be a joint concern (*Spiskovi i eshumacije bice zajednicka briga*), 15 March 2007, available at: http://arhiva.glas-javnosti.co.yu/arhiva/2007/03/15/srpski/D07031402.shtml.

[31]Such visits took place at Sremska Kamenica and Sremski Karlovci.

mortal remains[32]. As part of such individualized activities alone, mortal remains of another 29 persons were transferred from Serbia to Croatia[33].

71. Finally, both Serbia and Croatia are participating in the work of the International Commission for Missing Persons. It was already in 2002 that the Commission for Humanitarian Issues and Missing Persons of the FRY signed an Agreement on Co-operation with this International Commission for Missing Persons with a view of having the latter "assist in addressing the issue of persons missing from the conflicts that took place in Croatia and in BiH between 1991 and 1995"[34]. In turn, Croatia only started exchanging data with said Commission sometime in 2005[35].

72. It is also worth noting that Croatia itself confirmed that this joint effort had a measurable impact on solving the problem of missing persons[36].

73. These facts alone make the Croatian request inadmissible. The request for the delivery of information as to the fate of missing persons is however also inadmissible for yet another reason.

74. Madam President, Members of the Court, both Parties have not only signed a "Protocol on Co-operation" containing an obligation to exchange data about missing persons[37], but have also concluded a formal Agreement on Normalization, Article 6 of which contains an *unconditional* and *unlimited* obligation to exchange all available information about missing persons.

75. Croatia now attempts to rely on your jurisprudence in the *Fisheries Jurisdiction* case in order to demonstrate that the above-mentioned bilateral agreements do not preclude the exercise of jurisdiction under Article IX of the Genocide Convention[38].

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[32]Addendum to the response letter of the Commission for Humanitarian Issues and Missing Persons of Serbia and Montenegro (i.e. Republic of Serbia) to allegations made by the President of the Bureau for Detained and Missing Persons of the Republic of Croatia, Colonel Ivan Grujić, dated 14 Jan. 2008, pp. 3 and 6 of the original text and pp. 4 and 9 of the English translation.

[33]Addendum to the response letter of the Commission for Humanitarian Issues and Missing Persons of Serbia and Montenegro (i.e. Republic of Serbia) to allegations made by the President of the Bureau for Detained and Missing Persons of the Republic of Croatia, Colonel Ivan Grujić, dated 14 Jan. 2008, p. 3 of the original text and p. 5 of the English translation.

[34]International Commission for Missing Persons, Republic of Serbia fact-sheet, available at: http://www.ic-mp.org/?page_id=27.

[35]Report of the Commission for Detained and Missing Persons of the Republic of Croatia on tracing detained and missing persons in the period from 1 Jan. 2004 through 1 March 2006, p. 14, available at: http://hidra.srce.hr/arhiva/10/7252/www.vlada.hr/Download/2006/03/09/147-3.pdf.

[36]See Report of the Commission for Detained and Missing Persons of the Republic of Croatia on tracing detained and missing persons in the period from 1 Jan. 2004 through 1 March 2006, *ibid*, p. 14, which states that: "its measurable impact [i.e. of exchange of blood analysis results] can be seen in the identification of the identity of 50 remains exhumed in Republic of Croatia, Bosnia and Herzegovina and Serbia and Montenegro".

[37]For further details see Preliminary Objections, para. 5.7.

[38]Written Observations, paras. 4.17-4.19.

76. Yet, there are significant differences, as compared to the situation as it arose under the interim agreement in the *Fisheries Jurisdiction* case.

77. First, unlike the British-Icelandic Agreement, the 1996 Croatian-Serbian Agreement on Normalization is unlimited in time. It does not even contain a termination clause.

78. Secondly, in the *Fisheries Jurisdiction* case, the Court based its reasoning on the fact that the interim agreement had been concluded pending a settlement of the dispute which was already *sub judice,* and where the parties were therefore expecting the Court to decide on the matter anyhow. In contrast thereto, the 1996 Agreement was concluded three years before the current case was even brought. This confirms the intention of both, Croatia and Serbia, to settle the matter of missing persons themselves once and for all and bring about a comprehensive settlement of the matter.

79. Finally, the Court in 1974 considered it as being particularly pertinent that the interim agreement had contained an express saving clause (*Fisheries Jurisdiction (United Kingdom* v. *Iceland), Merits, Judgment, I.C.J. Reports 1974*, p. 18, para. 37). This stands in sharp contrast to the case at hand, where Article 6 of the 1996 Normalization Agreement contains an unconditional intention of the parties to "*solve* the problem of missing persons" and to not only provide for some kind of interim agreement or arrangement.

80. Croatia is therefore barred from now raising the issue of missing persons as part of this case.

81. This result was further corroborated during a meeting of the heads of governments of Croatia and Serbia in November 2005. After said meeting, it was confirmed that with regard to the problem of missing persons both sides had "firm intentions to have problems *resolved through direct contacts*"[39].

82. Serbia therefore submits that Croatia's request for providing information about missing persons is inadmissible.

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[39]Website of the Government of the Republic of Croatia, Statements and Speeches of the President of the Government "The President of the Government of the Republic of Croatia Sanader with the President of the Government of the Republic of Serbia Kostunica, 23 Nov. 2005, available at: http://www.vlada.hr/hr/naslovnica/izjave_i_govori_predsjednika_vlade/2005/predsjednik_vlade_rh_sanader_s_predsjednikom_vlade_republike_srbije_kostunicom. Translation from the original; emphasis added.

83. Let me now move on to the last issue within this third preliminary objection, namely the Croatian request for a return of cultural property.

(c) ***Request for the return of cultural property***

84. Madam President, under Article IX of the Genocide Convention, this Court has solely jurisdiction to decide upon disputes relating to "the interpretation, application or fulfilment" of the Genocide Convention.

85. Thus the alleged acts, assuming they haven taken place and can be attributed to the Respondent, that is, the seizure and/or destruction of cultural property and their non-return, must constitute acts of genocide in order for the Court to be able to exercise jurisdiction under Article IX of the Convention.

86. Yet, this Court has recently confirmed that "the destruction of historical, cultural and religious heritage cannot be considered to constitute the deliberate infliction of conditions of life calculated to bring about the physical destruction of the group . . .[40].

87. Accordingly, this Court has also found that such acts do not "fall within the categories of acts of genocide set out in Article II of the Convention"[41].

88. Even less therefore does the request for the return of cultural property fall — *not even* prima facie — within the ambit of the Genocide Convention.

89. Besides, such request has also become moot and thus is to be also considered inadmissible.

90. In April 2002, the FRY and the Republic of Croatia signed an Agreement on Co-operation in the field of Culture and Education[42]. This agreement created an "Intergovernmental Commission for Restitution of Cultural Property of the Republic of Croatia and Serbia and Montenegro" in the framework of which ever since the return of cultural property originating in Croatia and located in Serbia as a result of the war was organized.

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[40] *Ibid*.

[41] *Ibid*.

[42] According to its Art. 18, para. 1, the Agreement entered into force as of 25 Feb. 2003. See declaration on entry into force of the Agreement between the Federal Republic of Yugoslavia and Republic of Croatia on Co-operation in the field of Culture and Cooperation, *Official Gazette* of the Republic of Croatia, International Agreements, No. 8/03. *Official Journal* of Serbia and Montenegro, International Agreements, No. 12/02.

91. On the whole, during the period between 2001 and 2007 alone, 25,199 objects were returned from Serbia to Croatia[43], including, but not limited to, art collections from Vukovar such as the so-called "Bauer collection", as well as objects of art and sacral objects belonging to catholic churches and to various orthodox churches — and this has indeed been confirmed by Croatian authorities[44].

92. Besides, there is not even a dispute between Croatia and Serbia as to the return of cultural property dislocated in connection with the armed conflict.

93. Madam President, it is well-settled jurisprudence of this Court that "a dispute is a disagreement on point of law or fact, a conflict of legal views or of interests between parties" (see *Mavrommatis Palestine Concessions, P.C.I.J. 1924, Series A, No. 2*, p. 6, 11; see also *Certain Property (Liechtenstein v. Germany), Preliminary Objections, Judgment, I.C.J. Reports 2005*, p. 18, para. 24).

94. Yet, the above-mentioned Croatian-Serbian Agreement on Co-operation in the field of Culture and Education provides in its Article 10 that the Parties shall return cultural property to one another in accordance with international law. Both Parties also agree that cultural property which has its rightful owners in Croatia must be returned to Croatia.

95. Thus, it is the considered view of Serbia that no dispute exists between the Parties in that regard, even more so since cultural property has to a large extent already been returned to Croatia by Serbia, which has rendered the request moot and thus inadmissible. Even if there was a dispute, it would not, however, as I have demonstrated, come within the scope of application of the Genocide Convention.

III. CONCLUSION

96. Madam President, Members of the Court, let me conclude.

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[43]Ministry of Culture of the Republic of Croatia, "Return of cultural property from Serbia to Croatia continues", 25 April 2007, available at: http://www.min-kulture.hr/novost/default.aspx?id=2935.

[44]Items returned include, as confirmed by Croatia itself, *inter alia*, apart from the already mentioned objects returned to the Vukovar City Museum, paintings from the Gallery of Fine Arts in Osijek, books and wedding certificates belonging to the Franciscan library in Churches of St. Phillip and Jakovo in Vukovar, returned in 2004; wooden sculptures belonging to the Naive Sculptors Art Colony in Ernestinovo, also returned in 2004; icons part of the iconostasis of the St. Georgius Church in Bobota near Vukovar, again returned in 2004; records belonging to the municipality of Gracanac, returned in 2005; several pieces belonging to the Zagreb Archeological Museum, returned in 2006, as well as finally the cross, icons and the two side doors, parts of the iconostasis (rood-screen) of the Bobota Church, returned in 2007; see Ministry of Culture of the Republic of Croatia, Return of cultural property from Serbia to Croatia continues, 25 April 2007, available at http://www.min-kulture.hr/novost/default.aspx?id=2935.

97. I have demonstrated that the Court, even if it were to find that it has jurisdiction at all, may not exercise jurisdiction with regard to acts that occurred before Serbia came into existence as a State, that is, with regard to acts prior to 27 April 1992.

98. Furthermore, I have also shown that Serbia has fulfilled its obligation to co-operate with the ICTY with regard to persons indicted for crimes committed in Croatia. Let me reiterate, however, once more, that none of these persons was ever indicted by the ICTY for genocide, and that besides, there is no obligation arising under the Genocide Convention to either surrender persons to another State, or to put them on trial for alleged acts of genocide *committed abroad*.

99. Serbia has also fully co-operated with Croatia with regard to the fate of missing persons. Besides, both States have agreed to solve the matter through direct contacts, which renders the respective request, which could in any way only apply to persons missing as a result of genocide, inadmissible.

100. Finally, the request for the return of cultural property does not come within the scope of application of the Genocide Convention. Besides, it has also become moot because Serbia has already returned such cultural property to Croatia.

Thank you very much for your kind attention.

The PRESIDENT: Thank you, Professor Zimmermann. We now call Professor Varady.

Mr. VARADY: Thank you very much.

CONCLUDING REMARKS

1. Madam President, distinguished Members of the Court, I would like now to submit to your attention a summary of our arguments presented this morning and this afternoon. Let me start with the arguments just presented by my colleague Professor Zimmermann regarding our third preliminary objection.

2. Professor Zimmermann demonstrated that a number of claims advanced by the Applicant cannot be entertained, not only because the Court lacks jurisdiction, but also because these claims are inadmissible, or moot, or both. The claim regarding "submission to trial of responsible persons" cannot be entertained because the alleged conduct — or inaction — is not even

prima facie covered by Article VI of the Genocide Convention. For one reason, Article VI requests co-operation with regard to persons accused of genocide — and no person was accused by the ICTY for genocide allegedly committed in Croatia. Furthermore the claim is moot, since Serbia has co-operated with the ICTY regarding persons indicted for crimes committed in Croatia. Serbia transferred, or co-operated in the transfer of 12 out of 13 indictees.

3. As far as missing persons are concerned, it is true that not every missing person has been found — and this applies to both Croats and Serbs. It is probably impossible to expect a 100 per cent success after an armed conflict. It is also true, however, that there is an ongoing successful co-operation between Croatia and Serbia regarding missing persons. Agreements have been signed with the stated aim to "solve the problem of missing persons". Significant results have been achieved. One could certainly discuss further improvement of the existing mechanisms, but this does not belong to the setting of proceedings under the Genocide Convention.

4. The same applies to issues raised in connection with cultural property. It is clear that cultural property should be restored to its rightful owners. But let me also say that the facts prove that considerable progress has, indeed, been made since the time of the Croatian Application. Among other things, between 2001 and 2007 only, 25,199 objects of cultural property were returned from Serbia to Croatia. There is an ongoing co-operation. In order to make myself clear, let me say that it is painful, and it is also shameful, that the devastations engendered by the conflict extended to culture as well. It is not my intention to mitigate, let alone to deny the significance of this. But again, this is not the subject-matter which can possibly belong to proceedings under Article IX of the Genocide Convention.

5. Turning to our second preliminary objection, I would first like to reiterate that the Respondent came into existence on 27 April 1992. The essence of the objection is that jurisdiction cannot possibly be extended to a time period preceding the existence of the Respondent. First of all, jurisdiction on the ground of Article IX of the Genocide Convention cannot be extended to events which took place before the Parties to the dispute were bound by Article IX. Furthermore, even if jurisdiction *could* be extended to events before a given State became bound, *quid non* — it cannot be extended to events before it came into existence as a State.

6. Madam President, our position is that the Respondent only became bound by the Genocide Convention in 2001, and it never became bound by Article IX. If one were to investigate which might be the hypothetical moment when the Respondent could have become a party to the Genocide Convention, the earliest possible moment is 27 April 1992. No earlier moment was alleged by the Applicant either. This is a hypothesis which we are strongly contesting. But even if one were to accept this hypothesis for the sake of argument, it could not lead to a retroactive application of the Genocide Convention to a period *before* 27 April 1992.

7. But even if we were to accept for the sake of argument two refuted propositions — one, that the Respondent became bound by the Genocide Convention on 27 April 1992, and the other one assuming that the Genocide Convention *could* apply retroactively —, the result sought by the Applicant would still not be reached. Claims preceding the existence of the Respondent are not admissible. The Applicant tried to overcome this hurdle by positing as a conceivable exception the conduct of a movement that succeeds in establishing a new State. The Applicant alleges that the fact pattern of the dissolution of the former Yugoslavia fits under Article 10 of the ILC Articles on State Responsibility.

8. But it does not fit. As was demonstrated by my colleague Vladimir Djerić, Article 10, paragraph 2 of the ILC Articles is simply not applicable to the facts of our case. The Convention was not in force with regard to the Respondent prior to 27 April 1992 — because the Respondent did not exist; and it could not have been in force with regard to some movement either because only *States* can be contracting parties to the Genocide Convention. Furthermore, the setting of the dissolution of the former Yugoslavia is not even comparable with the scenario contemplated in Article 10, paragraph 2. The conceptual framework is completely different. The FRY was not created as a result of decolonization, or secession, or following the success of an insurrectional or other revolutionary movement. Let me conclude that there is simply no conceivable basis on which the jurisdiction of this Court — assuming it had jurisdiction at all — could be extended to a time period preceding 27 April 1992.

9. Madam President, I would like now to turn to our first and primary preliminary objection. This objection is not restricted to some specific claims or some specific time period. It is our conviction that this honoured Court has no jurisdiction in this case. We have stated that our main

objection against jurisdiction rests on two major facts: one, the Respondent did not continue the personality and treaty status of the former Yugoslavia, and second, the Respondent was not a Member of the United Nations (and was not a party to the Statute) before 1 November 2000. We have pointed out that these facts have become generally accepted, and we offered as evidence statements of this Court, of competent United Nations authorities, and of the Parties themselves.

10. Madam President, the Respondent was not a Member of the United Nations, and was not a party to the Statute prior to 1 November 2000. This leads to the conclusion that there is no jurisdiction for two independent reasons. First, there is no jurisdiction because, not being a party to the Statute, the Respondent had no access to the Court at the time when the Application was submitted. The Statute establishes rights and obligations between parties to the Statute, and it also establishes competencies of the Court with regard to parties to the Statute. The Respondent was outside this scheme of rights, obligations and competencies when the Application was submitted. This Court could not have been validly seised either, since at the time of the Application, one of the Parties to the dispute — and hence the dispute — was outside the scope of the judicial authority of this Court.

11. Furthermore, there is no jurisdiction, because there is no basis for jurisdiction. In our case, the issue of the basis of jurisdiction boils down to one question: that of the link between the Respondent and the Genocide Convention. Our answer to this question is a straightforward one.

12. The FRY did try to continue the personality of the former Yugoslavia, and made it clear that this would mean continuity in every respect, including United Nations membership, continued membership in all international organizations, and continued participation in treaties. But membership in the United Nations, in other international organizations and in treaties is not and cannot be a simple consequence of an allegation of continuity. Otherwise, more States could claim continuity after a dissolution, and it would yield chaos if such claims would result automatically in membership.

13. In order to demonstrate the difference between accepted and rejected claims to continuity, one cannot choose a better and closer example than a comparison between the treatment of two assertions: one of the FRY, the other of Serbia. In 2006, after the dissolution of Serbia and Montenegro, Serbia claimed continuity — just like the FRY did in 1992. Both claims were

asserting and stressing continuity, and both were considered by the United Nations and the international organizations as claims to continuity. But the claim of Serbia in 2006 was not opposed by Montenegro or by anybody else. It was signed by the President of the Republic of Serbia on 3 June 2006, and was confirmed by a letter of the Foreign Minister of Serbia of 16 June 2006[45]. Furthermore, the Secretary-General reacted to these letters on 20 June 2006, stressing that it is reacting "as depositary of multilateral treaties", and requested more specific language. The Secretary-General asked the Serbian Minister for Foreign Affairs to sign "at the earliest possible opportunity" a letter which would confirm that:

> "[a]ll treaty actions undertaken by Serbia and Montenegro will 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 will be maintained by the Republic of Serbia until the Secretary-General, as depositary, is duly notified otherwise".

After this, on 30 June 2006, the Minister for Foreign Affairs of Serbia sent a letter to the Secretary-General containing the exact formulation suggested by the Secretary-General[46]. The 2006 claim to continuity was accepted. Serbia did not have to submit any notification of succession or accession to any specific treaty; it simply continued the treaty status of Serbia and Montenegro. This was made evident in the United Nations Treaty Collection Database, where it is stated that "[a]ll relevant entries in . . . the publication *Multilateral Treaties Deposited with the Secretary-General* which read 'Serbia and Montenegro' will be modified to read 'Republic of Serbia'"[47].

14. In contrast to this, the claim to continuity contained in the 1992 declaration and Note was *not* signed by competent authorities. It was *not* addressed to the Secretary-General as depositary. It was *not* the subject of communication between the depositary and competent organs of the FRY. It contained a policy statement on continuity, which was not even specific enough as a declaration of continuity — what it purported to be — let alone as a notification of succession — what it

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[45]These letters were cited in the letter of the Court of 19 July 2006, sent to both Croatia and Serbia and Montenegro.

[46]United Nations Treaty Collection Database, *Multilateral Treaties Deposited with the Secretary-General, Status as at 15 November 2007*, *Historical Information*, Available from: <http://untreaty.un.org/ENGLISH/bible/englishinternetbible/historicalinfo.asp.

[47]Information Note regarding Serbia and Montenegro, United Nations Treaty Collection Database, 21 June 2006.

declined to be. Furthermore, it was opposed by all successor States, and by practically the whole international community. The 1992 claim to continuity was rejected.

15. Madam President, claims to continuity have to be accepted in order to be effective. It is common ground today that the 1992 assertion of continuity was rejected. This endeavour failed. Since no effect can be derived from the 1992 declaration and Note, if one takes them for what they are — assertions of continuity —, the Applicant tries to take them for what they are not. But this is simply not possible.

16. This is why — as it was mentioned earlier today — the reliance of the Applicant on the 1992 documents is indistinct and without elaboration. The remark in a footnote of the Memorial that the 1992 Note "can be treated as a notification of succession to the Genocide Convention", just as the remark in the Written Observations that the declaration "confirmed" that the FRY was bound by the Convention "since its emergence as one of the five equal successor States . . .", is without any foothold. Both lines of argument have been completely contradicted by the actual unfolding of events, and by the actual treatment of the treaty status of the Respondent. Let me also add that both lines of argument were completely contradicted by the Applicant itself.

17. Madam President, I would like now to demonstrate that Croatia had, indeed, addressed and had unequivocally rejected the suggestion that the 1992 declaration and Note could be interpreted in a way to bring about either treaty membership or membership in international organizations. Croatia did not say that these documents could be reinterpreted in order to have effect. Croatia said emphatically that these documents have no effect whatsoever. Let me refer to the letter of 16 February 1994[48], from the Permanent Representative of Croatia to the United Nations addressed to the Secretary-General. Professor Zimmermann already referred to this letter and we have included this letter in your judges' folder at tab 3. The letter starts by stressing that it is addressed to the Secretary-General "as the depositary of international conventions", and it elaborates a position of principle regarding the 1992 declaration and Note. In this letter, the proposition that the 1992 declaration and Note could possibly bring about treaty obligations was explicitly addressed, and it was emphatically rejected. On page 1, in the third

[48]Letter dated 16 Feb. 1994 from the Permanent Representative of Croatia to the United Nations addressed to the Secretary-General, United Nations doc. S/1994/198 (19 Feb. 1994).

paragraph, Croatia cites the sentences from both the 1992 declaration and the 1992 Note, which emphasize that on the basis of continuity, the FRY shall continue to fulfil rights and obligations of the former Yugoslavia "including its membership in all international organizations, and participation in international treaties".

18. In the sentence of the letter which immediately follows this citation — and you can follow it on page 1, in paragraph 4 — Croatia has categorically rejected this proposition. In the words of the Croatian representative:

> "The Republic of Croatia strongly objects to the pretension of the Federal Republic of Yugoslavia (Serbia and Montenegro) to continue the State, international, legal and political personality of the former Socialist Federal Republic of Yugoslavia."

19. On page 3, in the penultimate paragraph of the letter, Croatia even explains what could — instead of assertions of continuity — bring about treaty status, and makes it clear that only a formal treaty action could be accepted. Let me cite the letter again:

> "[I]f the Federal Republic of Yugoslavia (Serbia and Montenegro) expressed its intention to be considered, in respect of its territory, a party, by virtue of succession to the Socialist Federal Republic of Yugoslavia . . ., the Republic of Croatia would fully respect that notification of succession."[49]

20. Madam President, the position taken by Croatia — and eventually by the whole international community — prevailed, and the Respondent took appropriate treaty actions with regard to specific treaties. These treaty actions were duly noted and recognized. It is simply impossible to return now to the attempt which conclusively failed. It is just not possible to somehow rekindle the endeavour to establish "membership in all international organizations and participation in international treaties" by reliance on the 1992 declaration and Note — and to make them effective with regard to one single treaty chosen by the Applicant. Events took another course. The Respondent became a member of international organizations — including the United Nations — by way of applications which were accepted; and the Respondent became a party to specific treaties by way of notifications of succession or accession which were duly accepted. This is how the Respondent became bound by the Genocide Convention in 2001, with a valid reservation to Article IX. Article IX of the Genocide Convention cannot represent a basis for jurisdiction in this case.

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[49] *Ibid.*

21. Madam President, distinguished Members of the Court, our principal contention is that this honoured Court has no jurisdiction because the Respondent did not have access to the Court at the relevant moment, and because there is no basis for jurisdiction. We have also demonstrated that even if the Court had jurisdiction *quid non*, this could not possibly extend to events prior to the date when the Respondent came into existence — and this could not extend to the claims dealt with in our third preliminary objection.

This concludes our presentations for today. Thank you very much for your patience and for your kind attention.

The PRESIDENT: Thank you, Professor Varady. This marks the end of today's sitting and brings to a conclusion the first round of oral argument by Serbia. The Court will meet again at 4.30 p.m. tomorrow to hear the first round of oral argument of Croatia.

The Court now rises.

The Court rose at 4.20 p.m.