Non-Corrigé
Uncorrected

CR 2008/10

International Court of Justice

THE HAGUE

Cour internationale de Justice

LA HAYE

YEAR 2008

Public sitting

held on Tuesday 27 May 2008, at 4.30 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 mardi 27 mai 2008, à 16 h 30, 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:

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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,

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

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

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Mme Dina Dobrković, LL.B,

comme conseillers.

The PRESIDENT: Please be seated. The sitting is open. The Court meets today to hear the first round of oral argument of Croatia. Before giving the floor to the Agent of Croatia, the Court feels the need to remind the Parties again that Practice Direction VI provides that where objections of lack of jurisdiction or of inadmissibility are considered, oral proceedings are to be limited to statements on the objections.

I now give the floor to His Excellency Mr. Ivan Šimonović, the Agent of Croatia.

Mr. ŠIMONOVIĆ:

A. Introduction

1. Madam President, honourable Members of the Court, this is the first time that Croatia appears before the Court. The Government of the Republic of Croatia has great respect for the Court's role in resolving disputes between States and in holding States accountable for their conduct. The possibility to resort to a highly qualified and impartial international court is vital for the maintenance of international peace, stability and the rule of law. It is an honour to represent Croatia as Agent before your Court.

B. The importance of this case for Croatia

2. Madam President, Members of the Court, the case Croatia seeks to bring before you involves genocide, the crime above all crimes. It involves State responsibility for genocide, politically sensitive relations in south-east Europe and a lot of factual evidence. And this is not just any evidence — it is evidence of human sufferings related to the genocide committed in Croatia from 1991 to 1995.

3. If Croatia could have dealt with the problems related to this case otherwise, it would certainly have done so, but unfortunately there seems to be no other way. We appeal to the Court's understanding and its full awareness that, for the submissions articulated in our Application, this Court is our last resort.

4. True, the International Criminal Tribunal for the former Yugoslavia has dealt with many individual atrocities committed during the hostilities. We do not underestimate its contribution. But in Croatia's view, these criminal proceedings have failed to clearly demonstrate the overall

framework within which individual atrocities were committed. Perhaps if Milošević's case had ended with his conviction and sentence, it might have been different. But it did not. The overall framework of events, the unique plan of creating a Greater Serbia out of territories seized from Croatia and from Bosnia and Herzegovina through ethnic cleansing of the non-Serb population has been addressed in some ICTY cases, but it has not been fully revealed. In Croatia's view, Milošević's plan of Greater Serbia, based on occupation and ethnic cleansing of parts of Croatia and Bosnia, included planned and systematic use of criminal acts against civilians, amounting to the practice of genocide where and when convenient (as this Court has already established in the case of Srebrenica).

5. In pursuing this case, Croatia is not only concerned with the past; it is concerned with the future as well. The establishment of the facts, their proper legal qualification and the establishment of legal responsibility for the consequences will lay the ground for sustainable peace, stability and good-neighbourly relations between the Republic of Croatia and Serbia, as well as for the common European future, invoked by the Respondent yesterday[1].

6. Madam President, Members of the Court, the purpose of my presentation today is to place our case on jurisdiction and admissibility in its factual and legal context and to indicate the presentations you will hear from my colleagues.

7. In reciting the course of events, I will not repeat the developments related to this case as presented by you, Madam President, as well as the Respondent. However, I cannot help but note that the diplomatic and forensic twists and turns of the Respondent have placed the Court in a position of exceptional difficulty.

8. But if I may say so, it would be odd and even bizarre if the Court were to hold in 2007 that it had jurisdiction over claims of genocide made against the respondent State in relation to events on one side of a boundary, yet in 2008 that it lacked jurisdiction over claims made against the same Respondent in relation to the related events that took place a couple of miles on the other side of the same boundary.

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[1]CR 2008/8, p. 20, paras. 16-17 (Varady).

C. The three preliminary objections

9. Let me now briefly refer to the Respondent's preliminary objections to the jurisdiction of the Court.

(a) *Jurisdiction* ratione personae

10. The Respondent's first preliminary objection is that the Court lacks jurisdiction *ratione personae*. As I have just pointed out, this cannot be right. You cannot have jurisdiction *ratione personae* in one year, and lack it the next year in relation to the very same State. You decided the Bosnian case: you should not refuse to decide the Croatian case as well.

11. My colleagues, Professors Sands and Crawford, will address the legal issues associated with your jurisdiction as well as the capacity of the Parties in the proceedings before the Court at the time of filing the Application. Let me, however, make some remarks on the issue of the *factual* connections between the Croatian and Bosnian genocide cases.

[Graphic 1 — Socialist Federal Republic of Yugoslavia]

12. Madam President, honourable Members of the Court, as you well know, the Socialist Federal Republic of Yugoslavia (SFRY) consisted of six republics and two autonomous provinces. On the screen and at tab 1 in your folders, they are displayed in different colours. During the process of dissolution of the SFRY all six republics became independent States. In this presentation I will focus on the interrelated fates of neighbouring States of Croatia and Bosnia and Herzegovina.

[Graphic 2 — Croatia and Bosnia and Herzegovina]

13. Croatia and Bosnia and Herzegovina are not only neighbours: due to historical contingencies, as you can see now on the screen, at tab 2, they share a long border and are interdependent in terms of transport, economy, politics and security. It is no surprise that during their history the fates of Croatia and Bosnia and Herzegovina have been intertwined. This was also the case during the dissolution and accompanying conflict in the former Yugoslavia, when they were victims of the same aggression and attempts to seize parts of their territory and to include them into the so-called "Greater Serbia". The occupied parts were subjected to ethnic cleansing that on certain occasions rose to the level of genocide committed with the relevant intent.

14. What I will present now is a short case study that clearly demonstrates that genocides in Croatia and Bosnia and Herzegovina were two sides of the same coin. If the Court accepted its jurisdiction for Bosnia and Herzegovina, it should accept it for Croatia as well.

[Graphic 3 — Area of responsibility of Banja Luka Corps]

15. The territory of SFRY was under the responsibility of different segments of the JNA — Yugoslav national army. The areas of responsibility did not coincide with the borders of the Republics. On the screen and at tab 3 you can see the area of responsibility of the JNA's Banja Luka corps, marked orange. It covered parts of Croatia and of Bosnia and Herzegovina.

[Graphic 4 — Prisoners from Hrvatska Kostajnica, Croatia, detained in Manjača, Bosnia and Herzegovina]

16. The genocidal activities in the area of responsibility of the JNA's Banja Luka corps have been widely reported. The border between Croatia and Bosnia did not represent any obstacle in this respect.

17. After the Banja Luka corps occupied Hrvatska Kostajnica, Croatia, in September 1991, the surrounding area was gravely affected. For example, in the neighbouring village of Kostrići, literally all villagers, the youngest being 3, the oldest being 93, were murdered solely because they were Croats[2]. In the Memorial we have also indicated that some prisoners from Hrvatska Kostajnica, Croatia, were detained in a JNA prisoners' camp in Manjača, Bosnia Herzegovina, as demonstrated on the screen, at tab 4[3]. In spring 1992, when Bosnia also became the victim of Serbian aggression, Croatian detainees were joined by Croats and Muslims from Bosnia and Herzegovina. They were molested and often killed by the same perpetrators, in the same period of time, as victims of the same overarching plan of creating Greater Serbia cleansed of non-Serbs, whether Croats from Croatia, or Croats and Muslims from Bosnia.

[Graphic 5 — Prisoners from Prijedor, Bosnia and Herzegovina, killed and buried in Hrvatska Kostajnica, Croatia]

18. Genocidal activities occurred in the area of responsibility of the Banja Luka corps, especially in the Prijedor area, along the border with Croatia. As demonstrated on the screen and on tab 5, in spring 1992, people fleeing from genocide in this area of Bosnia and Herzegovina were

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[2]Memorial of Croatia (MC), Vol. I, 2001, p. 260.

[3]*Ibid.*, p. 259.

captured and murdered in Hrvatska Kostajnica, an occupied part of Croatia within the area of responsibility of the Banja Luka corps.

[Graphic 6 — Places of genocidal acts in the area of responsibility of Banja Luka Corps on both sides of the border]

19. Tab 6 shows sites of atrocities committed between 1991 and 1995 in the area of responsibility of the Banja Luka corps on both sides of the border[4]. They were committed in the area of responsibility of the same military unit, successively or even simultaneously, and are attributable to the same Respondent.

20. Madam President, Members of the Court, for all these reasons, it would be very strange to treat the jurisdiction of the Court differently for Croatia and Bosnia and Herzegovina. The point concerns not just the merits: it also concerns the underlying jurisdictional position. It is true that the Court decided on jurisdiction in its Judgment of 27 February 2007 on the basis of *res judicata*. But to decide that an issue is *res judicata* between the two States is not to accept, or even to hint, that the 1996 decision was wrong in substance. The Court has not so decided. It would — with all respect — be wrong to decide that now. It would be wrong for you to decide that Bosnia and Herzegovina exclusively had the protection of the Genocide Convention — that paradigm of a universal convention — during the 1990s. It would cast doubt not only on the correctness of your decisions of 1996 and 2003, but would also undermine that of 2007.

21. Moreover, it would do so exclusively for the benefit of the respondent State, and would not further any broader international public policy. Consistently throughout the 1990s the Respondent — the very State which made the declaration of 27 April 1992 — accepted that it was a party to the Genocide Convention and that it was bound by its obligations under the Convention. Now it claims all that was false and without effect, disavowing its own former conduct.

(b) ***Responsibility for the acts or omissions prior to 27 April 1992***

22. Madam President, honourable Members of the Court, the Respondent's second objection is that the Application is inadmissible as far as it refers to acts or omissions prior to 27 April 1992. First of all, I would like to make clear that this objection does not relate to numerous acts and

[4]Identification of sites is based on written pleadings of Croatia and Bosnia and Herzegovina.

omissions described in the Memorial that occurred on the occupied territories after 27 April 1992. The same applies to the Respondent's failure to bring to trial those responsible for crimes that have occurred prior to this date.

23. Secondly, in Croatia s view, this objection does not relate to the admissibility of the Application, but to the merits, namely whether Serbia is responsible for the acts and omissions listed in the Memorial or not, and therefore should be examined at the later stage of proceedings.

24. Thirdly and most importantly, the fact that forces under the same political leadership and under the same military command and control have been changing names cannot be a ground to avoid State responsibility. The Respondent has already indicated the transformation of names and legal frameworks of the present-day Serbia. Without repeating, I would just like to stress that the State responsibility for acts of this gravity cannot be avoided by a mere change of name.

25. Madam President, Members of the Court, Professor Crawford will deal tomorrow with the legal elements related to the second preliminary objection. Today, I would like briefly to address some important factual elements. Since the link between the present-day Republic of Serbia and the FRY is unchallenged by the Respondent, I will concentrate on the continuity of control between the rump SFRY and the FRY on behalf of the same political group: namely, Mr. Milošević and his collaborators.

26. In our Memorial we clearly demonstrated the process of Mr. Milošević's assuming control over the rump Socialist Federal Republic of Yugoslavia and its armed forces[5]. The continuity of political and military control between the rump SFRY and FRY is also reflected in the personal continuity of the political and military leaders.

27. The Respondent makes the argument that rump Yugoslavia was not Serb-dominated, because in 1991 the President of the collective Presidency, Mr. Stipe Mesić, and the Prime Minister, Mr. Ante Marković, were Croats[6]. The following facts — addressed in the Memorial — illustrate their real position:

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[5]MC, Vol. 1, 2001, Chaps. 2 and 3.

[6]Preliminary objections of the Federal Republic of Yugoslavia, 2002, pp. 101 and 110. See also CR 2008/8, p. 58, para. 11 (Djerić).

— On 11 September 1991, Mr. Mesić ordered the JNA, already involved in hostilities against Croatia, to return to their barracks. When this formally binding order of the Supreme Commander of the Armed Forces was ignored, the President of the Federal Executive Council Marković demanded the resignation of the Federal Defence Secretary Kadijević. Nothing happened[7].

— Both Mesić and Marković were targeted when meeting the President of Croatia in Zagreb on 7 October 1991. The rocket attack came from a JNA warplane. After the attack, which they survived by chance, they were unable to establish responsibility for the attack, and soon they withdrew from their high, but futile, offices[8].

— To add insult to injury, in October 1991, Mr. Mesić was denied his presidential salary as well as his per diem when attending an international peace conference in The Hague[9]. So much for his effective control!

28. In our written response to the Respondent's objections, we have further demonstrated the continuity and intensity of control of the same political and military forces within rump SFRY and FRY[10]. The evidence produced in the ICTY cases fully confirms our findings. At least since October 1991, the Serbian leadership headed by Mr. Milošević had effective control over all Serbian forces involved in the aggression and occupation of the Republic of Croatia[11].

(c) ***Admissibility and relevance of Croatia's submissions***

29. Madam President, Members of the Court, the third preliminary objection of the Respondent is that some of the Applicant's specific submissions are inadmissible and moot.

30. I wish that at least some of our submissions were moot, but they are not. Discussing this issue rightly belongs to the merits, but since it has been raised and extensively elaborated by the Respondent, I feel obliged to address it at least briefly.

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[7]MC, Vol. 1, 2001, pp. 64-65.

[8]WOC, 2003. p. 30.

[9]MC, Vol. 5, App. 4, p. 87.

[10]WOC, 2003. pp. 19-31.

[11]*Babić*, IT-03-72-S, Trial Chamber Judgment, 29 June 2004, para. 14, *Milošević*, IT-02-54-T, transcript, 3 Dec. 2002, pp. 13737, 13740 and 13744, *Milošević*, IT-02-54-T, Second Amended Indictment, 28 July 2004, paras. 25-26, *Martić*, IT-95-11-T, Judgment, 12 July 2007, paras. 141-142.

31. It is true that the Serbian authorities have shown some improvement related to the prosecution of war crimes, revealing information on missing persons, and in restitution of stolen cultural property. But besides being too late, it is too little.

32. Most of the well-documented crimes referred to in the Memorial have still not been prosecuted. Out of 74 perpetrators of various genocidal acts explicitly mentioned in our Memorial under their full names and names of witnesses and victims of their crimes, how many of those of them who live in Serbia have been prosecuted?

33. To the best of my knowledge, just a handful, if we include those prosecuted for the Lovas massacre in the process that started just a month ago. It seems plausible to think that the scheduling of these oral hearings has been a powerful incentive to start with the *Lovas* case. That is good, but besides being too late, it is too little. These few that have been prosecuted in Serbia are all low-ranking members of the armed forces. Of course, they have not been charged for genocide. But a number of perpetrators mentioned in the Memorial have been charged for genocide by the Croatian authorities, but are out of their reach, presumably in Serbia.

34. Madam President, Members of the Court, the Respondent states that the Croatian request to provide information as to the whereabouts of Croatian citizens missing as a result of acts of genocide has become moot. According to the Respondent, it is "moot because information which is available to Serbia has already been provided to Croatia"[12].

35. It is rather insensitive to the feelings of the families of the missing persons to proclaim that this request is moot. The Republic of Croatia is still looking for 1,185 missing persons, for whose disappearance the Serbian forces, under the command and control of Mr. Milošević, were responsible.

36. It is true that, as the Respondent proudly reports, after 2002 exhumations in Serbia have finally begun. Ever since 1998, Croatia has been requesting that, on the basis of bilateral agreements, but the exhumations only began after Croatia submitted its Memorial in 2001, and they are proceeding very slowly.

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[12]CR 2008/9, p. 25, para. 65 (Zimmerman).

37. The Respondent is also right that there are bilateral and multilateral instruments and mechanisms aimed at tracing missing persons and their whereabouts[13]. The problem is not lack of their existence, but lack of their efficiency.

38. Finally, it is really unclear how the Respondent can insist that all information which is available to Serbia has been provided to Croatia[14] taking into account the following:

— after many years of negotiations, forensic protocols have finally been revealed to Croatia, but only for the Vukovar area. For all other occupied areas of Croatia, we did not receive a single protocol;

— documentation of the Vukovar Hospital, captured in 1991, has still not been returned. After the existence of this documentation was unintentionally exposed by Serbian TV cameras, not even the Respondent denies its existence;

— at the meeting of the commissions to trace missing persons, ICTY proceedings are being systematically used as an excuse to provide relevant documentation.

39. In respect of cultural property, it is true that more than 25,000 objects have been returned from Serbia. However, an even larger number of objects, 27,942, have not yet been returned. This fact alone speaks enough not only of the extent of the war damages, but on the level of co-operation in this matter, as well.

40. Madam President, Members of the Court, let me conclude on the third preliminary objection. Our submissions are neither inadmissible, nor moot. To the contrary, the Genocide Convention continues to be violated by the Respondent every day: by failing to punish those responsible, by not revealing information on missing persons, and by not returning cultural property taken from Croatia during its occupation.

D. Outline of Croatia's pleadings

41. Let me finally outline for the Court the manner in which we propose to answer the Respondent's arguments of Monday.

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[13]CR 2008/9, p. 26, paras. 65 *et seq*.(Zimmerman).

[14]CR 2008/9, p. 25, para. 65 (Zimmerman).

42. First, my colleague Ambassador Andreja Metelko-Zgombić. She will show why Croatia was entitled to rely — as it did — on the reasoning of this Court in the 1996 decision on preliminary objections.

43. She will be followed by Professor Sands who will demonstrate that the Respondent was at all relevant times bound by the Genocide Convention in its entirety, including Article IX. He will clearly show that the Genocide Convention does not cease to apply when it is needed most — as the Respondent suggests. That will, Madam President, conclude our presentations this afternoon.

44. Tomorrow, Professor Crawford will show that — on the basis of the Genocide Convention as the applicable law — the respondent State is responsible vis-à-vis Croatia — as it was vis-à-vis Bosnia and Herzegovina — for any breaches of the Convention which have occurred since the beginning of the conflict which took place in Croatia. In effect, Professor Sands will show the continuity of the applicable law; Professor Crawford, the continuity of the Respondent's responsibility for breaches of that law.

45. Then we will deal with the issues of access to the Court, addressing Article 35, paragraphs 1 and 2, on which the Respondent has been conspicuously silent. Professor Sands will, with your permission, Madam President, return to show that, though against the will of other successor States, including Croatia, the Respondent undoubtedly had a special status within the United Nations throughout the 1990s. This *sui generis* status may not have amounted to full membership of the United Nations, but it was nevertheless sufficient to give it access to the Court in accordance with the applicable instruments and your own practice at that time.

46. Finally, Professor Crawford will argue that the Genocide Convention was — and still is — a "treaty in force" within the meaning of Article 35, paragraph 2, of the Court's Statute. He will also show that — whether or not other arguments are correct — all the conditions for the Court's jurisdiction were established as at 1 November 2000, and that the Court's jurisdiction, established at the latest at that point in time, was not lost as a result of any subsequent development.

47. Madam President, honourable Members of the Court, thank you for your attention.

48. I ask you now to call on my colleague, Chief Legal Adviser in the Ministry of Foreign Affairs, Ambassador Metelko-Zgombić, to continue Croatia's presentation.

The PRESIDENT: Thank you very much, Dr. Šimonović. I do now call Her Excellency Ambassador Metelko-Zgombić.

Ms METELKO-ZGOMBIĆ:

RELIANCE ON THE *BOSNIA AND HERZEGOVINA* V *SERBIA* CASE

1. Madam President, honourable Members of the Court, may it please the Court, it is my honour and privilege to appear before you on this first occasion to represent the Government of the Republic of Croatia in this important matter.

1. Introduction

2. My task today is to demonstrate that the essential facts of this case are so closely intertwined with those that arose in the case brought by Bosnia and Herzegovina (*Bosnia* case) that there can be no justification in law or policy from departing from this Court's finding that it had jurisdiction in that case. Contrary to the assertion of the Respondent that we heard yesterday, the decisions which you adopted in the *Bosnia* case in 1996, in 2003 and in 2007 are highly relevant for the present proceeding and can provide guidance for resolution of this case.

3. Madam President, the factual circumstances in these two cases are deeply connected. There was a single theatre of war; there were very close geographical, political, military and logistical links. It would be anomalous if these closely related events on both sides of the border were to be treated differently for jurisdictional purposes.

4. The legal circumstances are also similar. There is the same Respondent; almost the same period of time; the same basis of claim; the same basis for jurisdiction, the same absence — at the relevant time — of any jurisdictional reservation. No other case heard before this Court has been so interrelated and connected with the present case as is the *Bosnia* case.

5. The close connection can be seen in the temporal dynamics of this action taken in these two cases before this Court. The joint statement between the two Agents on their co-operation in

the proceedings before this Court was signed in 2000[15]. Croatia has paid attention to the decisions of the Court at each phase of the *Bosnia* case and has acted accordingly. When Croatia filed its Application and its Memorial, and at all times, it relied on the decisions of this Court in the *Bosnia* case. Consistency, legal security, predictability require that the Court adopt the same approach in these two cases.

6. And finally, the Respondent did not challenge its status under the Genocide Convention until after Croatia filed its Memorial. Only then did its approach change. Now the Respondent attempts to misuse its admission to the United Nations in 2000, which was a long-awaited and expected fact, to avoid its prior responsibility under the Genocide Convention to which — as Professor Sands will show — it was at all relevant times a party.

7. As a number of Members of this Court indicated in a joint declaration in the 2004 *NATO* cases, consistency is the essential of judicial reasoning. This is especially true, as those judges put it, "with regard to closely related cases" (*Legality of Use of Force (Serbia and Montenegro* v. *Belgium), Preliminary Objections, Judgment, I.C.J. Reports 2004,* p. 330: joint declaration of Vice-President Ranjeva and Judges Guillaume, Higgins, Koojimans, Al-Khasawneh, Buergenthal and Elaraby). Croatia respectfully invites the Court to adhere to this principle in this "closely related" case.

2. Similarity in factual circumstances

8. The factual circumstances of the present case belong to the merits. But in this stage of the proceeding, it is appropriate to draw the attention of the Court to some of the elements which make these two cases such "closely related" ones.

9. Both States, Croatia and Bosnia and Herzegovina, were victims of the same aggression and suffered from the same pattern of actions against them. After declaring their independence in 1991 and in 1992 they were attacked by the forces under the same command and control, consisting of remnants of the JNA under the control of the Respondent, as well as local Serbian territorial defence units under the same control. Self-proclaimed Serbian entities within Croatia — the so-called Republic of Srpska Krajina — and Bosnia and Herzegovina — the so-called

[15]Joint Statement by Ambassador Muhamed Sacirbey and Ambassador Ivan Simonovic, 12 June 2000, MC, Ann. 13.

Republika Srpska — collaborated on all issues. They ignored international borders: Croatia and Bosnia and Herzegovina became parts of a single large theatre of war.

3. The similarity in legal circumstances

10. The *Bosnia* and *Croatia* cases also have such close legal connections as to make them, in effect, juridically indistinguishable.

11. Croatia filed its Application in July 1999, and submitted its Memorial on 14 March 2001. By those dates the Court had long affirmed its jurisdiction in the *Bosnia* case. At both provisional measures phases, the Court concluded that it had prima facie jurisdiction, *both rationae personae* and *rationae materiae,* under Article IX of the Genocide Convention. The jurisdiction of the Court under Article IX of the Genocide Convention was confirmed in the 1996 Judgment, which enabled the Court to proceed to consider the merits of the case.

The Judgment of 1996 (*Bosnia* case)

12. In the oral pleadings yesterday, the Respondent admitted — as it had to — that in the 1996 Judgment the Court already concluded that the Respondent was bound by the Genocide Convention. The argument that this issue was not raised by the Parties, that is by the Respondent, is without any value. The FRY as the Respondent could have done it if it considered it necessary. Instead, taking no action, the Respondent confirmed its agreement with the then conclusion of the Court. And that is, among other reasons, why this finding of the Court in 1996 has particular value. Although any decision adopted by the Court between different parties cannot be regarded as *res judicata*, your findings are highly relevant. It is impossible to conceive that the same Respondent is considered to be bound by the Genocide Convention in one case and not in the other. You concluded that the Genocide Convention bound the respondent State. In so doing you relied on the formal declaration adopted at the time of the proclamation of the Federal Republic of Yugoslavia, on 27 April 1992.

13. In addition, you pointed out that the intention of the Respondent to remain bound by the international treaties to which the former Yugoslavia was party was confirmed and formally notified to the United Nations Secretary-General, who serves as the depositary of the United Nations treaties, by the officia1 Note of 27 April 1992 from the Permanent Mission of Yugoslavia.

You thus concluded that the Respondent was a party to the Genocide Convention on 20 March 1993, the date on which the Application in the *Bosnia* case was filed.

14. The Court also determined the scope of its jurisdiction *ratione temporis*. The Court observed that the Genocide Convention — and in particular Article IX — did not contain any clause the object or effect of which was to limit the scope of its jurisdiction *ratione temporis,* and the parties had made no reservation to that end. That is an important finding for this case: the Court ruled that it had jurisdiction to give effect to the Genocide Convention as regards acts occurring since the beginning of the conflict in Bosnia and Herzegovina. That finding alone should dispose of the Respondent's second preliminary objection.

15. After the 1996 Judgment and before any other changes of law or fact had taken place, Croatia filed its Application in this case on 2 July 1999. Nothing changed between 20 March 1993 and 2 July 1999. If this phase of the proceedings had been decided then, it may be presumed that the Court would have adopted the same approach as it did in 1996.

4. Intervening circumstances

16. What has happened since then? Nothing that was entirely unexpected. As you well observed, the only thing that remained unknown in 1996 was if and when the Respondent would apply for and obtain membership in the United Nations. So, pursuant to the relevant General Assembly and Security Council resolutions, the FRY was admitted to the United Nations in November 2000, as a new member State.

17. This long-awaited fact was, however, used by the Respondent to initiate various actions before this Court. Based on this new development, the Respondent filed an Application for revision of the 1996 Judgment in the *Bosnia* case and, subsequently, in 2002 it filed certain preliminary objections in the present proceedings.

The Judgment of 2003 (the *Bosnia* case)

18. Madam President, in February 2003, the Court rejected the Respondent's Application for revision of its Judgment in 1996. The Court concluded that no facts within the meaning of Article 61 of the Statute had been discovered since the adoption of the 1996 Judgment.

19. But it was *not* all about revision, as the Respondent asserted yesterday. The Court carefully examined the status of the Respondent in the light of the new developments (*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. 109), and the Court's findings are pertinent to the present proceedings.

20. This was the first time that the Court had the opportunity to reconsider its jurisdiction in the light of the admission of the Respondent to the United Nations. In fact, the Court was invited to do so by the Respondent.

21. The issue of access to the Court is one on which the Court should be satisfied throughout the whole proceedings, "even if the question has not been raised by the parties" (*ibid.*, para. 122), as you recalled in the 2007 Judgment. And this is exactly what happened in 2003. The situation was thoroughly examined and you found no grounds to decline jurisdiction.

22. In your *Revision* Judgment it was noted that when the 1996 Judgment was handed down, the situation obtained was that created by General Assembly resolution 47/1. The Court recalled that even at that time, in 1996, the Court was well aware of the ambiguous, *sui generis,* status that the Respondent enjoyed with the United Nations. You recalled that General Assembly resolution 47/1 did not affect the Respondent's right to appear before the Court or to be a party to a dispute before the Court. You noted that it did not affect the position of the Respondent in relation to the Genocide Convention as well (*Judgment, I.C.J. Reports 2003*, p. 31, para. 70). Serbia now challenges that ruling, by the back door.

23. In your 2003 Judgment you "froze" the Respondent's *sui generis* situation, which existed in the 1992-2000 period until its admission to the United Nations, and you made a firm point that:

> "General Assembly resolution 55/12 of 1 November 2000 cannot have changed retroactively the *sui generis* position which the FRY found itself in vis-à-vis the United Nations over the period 1992 to 2000, or its position in relation to the Statute of the Court and the Genocide Convention." (*Ibid*., p. 31, para. 71.)

24. It is true, as we heard yesterday from the Respondent, that the 2003 Judgment did not resolve the status of the Respondent in relation to the United Nations. But it is equally true that the 2003 Judgment made it clear that only what is relevant for the Respondent's status in the

1992-2000 period was the *sui generis* status of the Respondent which existed and that no later developments can influence that status.

25. In this way, you confirmed that the Respondent could appear before the Court between 1992 and 2000 and that this position cannot have been changed by its later admission to the United Nations in 2000. With great respect it is difficult to see on what basis you could now adopt a different approach in respect of the Application filed by Croatia during that earlier period. The facts and the law are identical.

The Judgment of 2004 (the *NATO* bombing cases)

26. In parallel to the proceedings in *Bosnia* and *Croatia* cases in which then the FRY was the Respondent, the FRY itself initiated a number of proceedings based on the Genocide Convention against some NATO member States. But it was clear as early as the filing of the Application in 1999 that the FRY was incapable of establishing any legal basis on which the Court could exercise jurisdiction.

27. The Application of the FRY in the *NATO* cases could indeed be considered a gross attempt to abuse the Genocide Convention. The fact that the FRY as the Applicant itself raised the issue of the Court's jurisdiction in those cases is notable: no applicant State had ever before made a jurisdictional objection to its own Application! But that is actually what happened in that case.

28. Madam President, I will not discuss the content of the 2004 Judgments; this will be dealt with by Professor Crawford tomorrow.

The Judgment of 2007 (*Bosnia* merits)

29. However, I should say something briefly about your Judgment of February 2007 in the *Bosnia* case. You confirmed your previous findings and decisions on jurisdiction adopted earlier in that case. You recalled that during this time the FRY enjoyed a *sui generis* status which included the right of access to the Court, and that this status could not be changed retroactively: thus you affirmed your position on jurisdiction.

30. But you said much more in your 2007 Judgment. You emphasized that no principle of *res judicata* would prevent the Court to re-examine whether a State may properly come before the Court if you had held it necessary. You explicitly stated that:

> "[I]f 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 *rationae 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." (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro)*, Judgment of 27 February 2007, para. 122.)

Having said that you proceeded to the merits.

31. By this explicit wording you both took a position on the Respondent's right to access the Court and upheld your previous position that the Respondent enjoyed the access to the Court. Otherwise, you would not have continued with the merits.

32. In this way, in its 1996 Judgment the Court *perceived* the Respondent to be in a position to appear before the Court, but *confirmed* the Respondent's right to have access to the Court in its 2007 Judgment.

33. Croatia respectfully submits that the Court's ratification of its earlier approach in the 2007 Judgment is highly relevant to the present case.

The FRY's admission to United Nations membership in 2000

34. I come now to the FRY's submission as to the consequences of its admission to the United Nations, as a *new* Member on 1 November 2000. According to Serbia that change brought significant consequences. It is said to have changed the facts, so that the FRY did not continue the personality of the SFRY; so that the FRY was no longer to be treated as a Member of the United Nations before 1 November 2000; so that Serbia could not be treated as having been a party to the Court's Statute; so that it may be said that Serbia was not a party to the Genocide Convention. Serbia has created by itself, through its change of political position, and with allegedly retroactive effect, the very conditions on the basis of which it now attempts to show that the Court has no jurisdiction in this case. The difficulties are self-evident.

(a) ***The FRY's United Nations membership in 2000 has no effect on the Respondent's status of the party to the Genocide Convention***

35. Madam President, with such a changed position and by claiming that the Court had no jurisdiction in this matter lacking any basis in the Genocide Convention, the Respondent was doing

nothing less than seeking to escape responsibility for its actions committed in recent history which come within the scope of the Genocide Convention.

36. Madam President, Members of the Court, if ever a population needed to be protected by the Genocide Convention, it was in times such as those that pertained from late 1991. Professor Sands will return to this point. Let me simply say this now: how could it be justified to conclude that the Court would have jurisdiction to entertain a dispute in relation to facts arising on one side of the border, the Bosnian side, but that it would lack jurisdiction over related facts occurring at the same date just a few kilometres away, on the Croatian side. One has only to imagine this situation — this situation which actually occurred — to recognize the dangers of proceeding down this path.

37. The new, post-2000 attitude of the Respondent also runs contrary to the Respondent's own actions and behaviour. I can give three examples. First, in the 1992-2000 period the Respondent acted as a party to a number of the treaties to which the former SFRY was a party, including the Genocide Convention; indeed it insisted to be treated as such in various international conferences and fora. Second, the Respondent filed a counter-claim on the basis of the Court's finding of jurisdiction in the *Bosnia* case on the basis of the Genocide Convention. Third, the Respondent even filed a number of applications against NATO member States, in 1999, claiming that the Court had jurisdiction in these cases on the basis of the Genocide Convention. Later, having changed its political position and informing the Court that it no longer sought to rely on those grounds, it chose not to discontinue the cases but, rather, to ask the Court to decide on its jurisdiction.

38. Madam President, the FRY's formal admission as a Member of the United Nations in 2000 could not affect its legal status with regard to the SFRY's treaty obligations. The FRY was admitted as a new Member of the United Nations, not as a newly independent State which is free to choose the treaties it wants to be bound by. The Respondent adhered to this principle in all other treaties except the Genocide Convention. Its purported accession to the Genocide Convention, with a reservation on Article IX, can have no effect — as was stated in the objection deposited by Croatia with the Secretary-General. Certainly it can have no retroactive effect. With the dissolution of the former Yugoslavia, the FRY assumed the legal obligations of the former State, as

all other successor States as the former SFRY did. This fact was unequivocally and unconditionally confirmed in the diplomatic Note of 27 April 1992 communicated to the Secretary-General. Any possible formal insufficiencies of this Note to the United Nations, as alleged by the Respondent, if any existed, have been made irrelevant by the subsequent conduct of the Respondent.

(b) ***FRY's admission to the United Nations did not affect its sui generis status from 1992 to 2000***

39. In its oral pleadings, the Respondent claimed that acceptance of the FRY into membership of the United Nations ended the FRY's *sui generis* position in the United Nations and made clear that at the time of the filing of Croatia's Application Serbia was not a Member of the United Nations, not on that basis party to the Statute of the Court and consequently has no access to the Court. Those later developments should, in the Respondent's view, have retroactive effect.

40. It is true that the status of the Respondent in the 1992-2000 period was controversial. The Respondent said nothing new when it cited the content of the joint letter of 27 May 1999, signed by all other successor States of the former SFRY. This fact was also well known to the Court. The Court noted in the 2003 Judgment that other successor States "consistently objected to the FRY's claim that it continued the State and the international legal and political personality of the former SFRY" (*Judgment*, *I.C.J. Reports 2003*, p. 18, para. 35). Croatia, together with the other successor States, objected to any attempt of the Respondent to be treated differently from the other successor States; as the Court may be aware, those attempts continue in other forums, as may be convenient. By contrast Croatia's consistent aim was to achieve equal treatment of all successor States of the former SFRY.

41. However, what is really important in this context is that none of these actions resulted in clarifying the Respondent's status in 1992-2000. Due to the special political circumstances, the Respondent continued to enjoy at that time a *sui generis* status. This is something which the Respondent would now like to forget. This status enabled it to enjoy certain attributes of the United Nations membership, including access to the Court at the time. This is evident from General Assembly resolution 47/1 and from the letter of the Legal Counsel of 29 September 1992 (*ibid*., p. 16, paras. 29-30; p. 31, para. 70), from the conclusions of this Court as well as from the

very practice of this Court, which on numerous occasions allowed the appearance of the Respondent before it.

42. This is a well-established fact and no later developments can change it. We can only agree and support the conclusions of the Court as to the non-retroactive effect of these developments throughout its decisions in 2003 and 2007.

5. Conclusion

43. Madam President, Members of the Court, for all the reasons I have referred to, Croatia respectfully submits that the Court should reject the preliminary objections filed by Respondent and establish its jurisdiction in this case, as it did in the *Bosnia* case. I invite you now to call Professor Sands to the Bar. Thank you.

The PRESIDENT: Thank you, Ambassador Metelko-Zgombić. I do now call Professor Sands.

Mr. SANDS:

I. INTRODUCTION

1. Madam President, Members of the Court, it is a privilege for me to appear before you today on behalf of the Government of Croatia, in this important case.

2. My task at the close of this afternoon is to show that the respondent State — Serbia —was, at all relevant times, bound by the entirety of the Genocide Convention. That is, of course, a conclusion that should flow inexorably from a succession of judgments and orders of this Court over a period of nearly 15 years, and it may seem odd that we have to return to this issue at all in this case. But we do, for the reasons we heard yesterday. Serbia has put the relationship between the Respondent and the Convention at the very heart of this case. "The issue of jurisdiction", Serbia's Agent, Professor Varady, told the Court yesterday, "boils down to one question: that of the link between the Respondent and the Genocide Convention"[16]. Listening yesterday, it became abundantly clear what is Serbia's real target in these proceedings: it is the

[16]CR 2008/9, p. 34, para. 11 (Varady).

Court's recent Judgment in the *Bosnia* case. It wants a judgment in this case that will allow it to minimize, neutralize and — eventually — abandon the *Bosnia* Judgments of 2007 and 1996 as an anomaly.

3. So our submission on the Genocide Convention is straightforward: the Genocide Convention was in force between Croatia and the FRY on 2 July 1999, and its provisions were applicable to the territory of Croatia at all material times, from "the beginning of the conflict" and in relation to all acts of the FRY violating the Convention's strict requirements.

4. The essential facts are clear. In all material respects, as has been said, this case is identical to the *Bosnia and Herzegovina* case, in which the Court found, in 1996 and again in 2007, that it had jurisdiction and that there was no bar to access. The consequences of a different approach now — for the Convention, for the victims, for the international rule of law, and for this Court — needs no elaboration.

II. THE GENOCIDE CONVENTION WAS IN FORCE FOR BOTH PARTIES AT ALL RELEVANT TIMES

5. The temporal issue is clear: the Convention was continuously in force for both Parties at all relevant times. Continuity is a *sine qua non* if the Convention's objectives are to be achieved. The Court's approach, as long ago as 1951, remains very relevant (*Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, *Advisory Opinion, I.C.J. Reports 1951*, p. 15). The Convention is not just an ordinary instrument, that can wane in or out of application in moments of great turmoil and trauma. Its Article 1 confirms an *existing* obligation, that genocide is an international crime to be prevented. In 1951, the Court concluded that it was the firm intention of the United Nations "to condemn and punish genocide" because it shocks the conscience of mankind. It was a Convention, said the Court, for which "one cannot speak of individual advantages or disadvantages to States, or of the maintenance of a perfect contractual balance between rights and duties" (*ibid*., p. 23). And, of course, in that Opinion, the Convention's principles were recognized as binding on States, "even without any conventional obligation". This 1951 Opinion has been cited at length and frequently in the Court's Orders and Judgments of 1993, 1996, 2003 and 2007 (see, *inter alia, I.C.J. Reports 1993*, p. 23, para. 49; *I.C.J. Reports 1996*, pp. 611-612 and 616; *I.C.J. Reports 2003*, p. 29 and the *Application of the Convention on the*

Prevention and Punishment of the Crime of Genocide, Judgment of 26 February 2007, paras. 161 and 194). There can be no doubt about the special importance of the 1948 Convention, and the need for its broadest possible application, over time and in space.

6. The Genocide Convention was in force, without reservation, for both States, at all relevant times. Serbia's contention — that the Court has no jurisdiction because the FRY only became a party to the Genocide Convention by its "instrument of accession" of 12 March 2001, with a reservation to Article IX — is deeply unattractive. Unattractive because it ignores what the Court has said; unattractive because the claim appears motivated by the intent of circumventing the Convention's applications when it was needed most. In objecting to the FRY's purported "act of accession", Sweden made the point that the reservation to Article IX was "too late" and "null and void" and that is surely correct.

7. The crucial date, for the purposes of this jurisdiction phase, is 2 July 1999. On that date Croatia and the FRY were both bound by the totality of the Genocide Convention including Article IX. They were bound as successor States to the SFRY from the date of its dissolution and nothing the FRY did after 2 July 1999 could change that.

8. The chronology is clear. The SFRY signed the Genocide Convention on 11 December 1948. On 29 August 1950 it deposited its instrument of ratification, without reservation. From that day on the Convention applied to the entire territory of the SFRY, including all of what was to become the FRY (Serbia) and Croatia. So long as the SFRY continued to exist, it remained bound by the terms of the Genocide Convention. From the time of its dissolution the emerging successor States became bound.

9. Croatia succeeded to the Genocide Convention by notification of succession dated 12 October 1992, with effect from 8 October 1991, it was when Croatia assumed responsibility for its territory. The intention behind that notification was to confirm the avoidance of any gap — in time or in place — in the Convention's application[17]. That period, the autumn of 1991, was also the time when Mr. Milosevic assumed control of — and responsibility for — rump Yugoslavia, that is fully set out in Croatia's Memorial. Over the next seven years, there were no material

[17]Bosnia-Herzegovina, Slovenia, and the Former Yugoslav Republic of Macedonia made similar notifications.

changes of fact or law. No State, not even the Respondent, objected to Croatia's succession to the Convention. As this Court has noted in the *Bosnia and Herzegovina* case, there is nothing that impedes a State from becoming a party to the Convention by means of succession (*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)*, p. 611, para. 20, and p. 612, para. 24; see also, separate opinion of Judge Parra-Aranguren, p. 656, para. 2).

10. On 27 April 1992, the FRY made an important proclamation. It stated that the FRY "continuing the State, international legal and political personality of the Socialist Federal Republic of Yugoslavia, *shall strictly abide by all the commitments* that the Socialist Federal Republic of Yugoslavia assumed internationally". Professor Zimmerman now said yesterday that the declaration should have no effect because it lacked form. It was issued by the wrong people, or by the wrong body[18]. This is a truly curious argument. The decision to honour the SFRY's international treaties was confirmed by an official Note from the Respondent's Permanent Mission to the United Nations, on the very same day[19]. The declaration has been relied on by the Respondent in proceedings before this Court. The Court itself has relied on the declaration (*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)*, p. 610, para. 17). Croatia is entitled to rely on the declaration. Serbia cannot now seek to wriggle out of a solemn commitment that it gave so many years ago and on which it, the Court and Croatia have all relied.

11. Indeed the Court concluded well before 2 July 1999 that the FRY was a party to the Genocide Convention. *First*, in June 1993, in its first provisional measures Order in the *Bosnia and Herzegovina* case, the Court proceeded on the basis that the SFRY had been a party to the Genocide Convention and the FRY was then a party to the Genocide Convention (*Application of*

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[18]CR 2008/8, p. 37, paras. 28-35.

[19]For the text of the declaration and the Note to the United Nations, see *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. 14-15).

the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. *Yugoslavia), Provisional Measures, Order of 8 April 1993, I.C.J. Reports 1993*, p. 14, paras. 21-22, and p. 16, para. 26). *Second*, in its Judgment of 1996, the Court confirmed that the FRY was bound by the provisions of the Convention on the date of the filing of Bosnia and Herzegovina's Application (20 March 1993) (*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)*, p. 610, para. 17). And then *third*, on 2 June 1999, just one month before Croatia filed its Application, in its Order on provisional measures in the *Legality of Force* cases, the Court noted that it was undisputed that Yugoslavia was a party to the Genocide Convention without reservation (*Legality of Use of Force (Yugoslavia* v. *Belgium), Provisional Measures, Order of 2 June 1999, I.C.J. Reports 1999 (I)*, p. 137, para. 37; *ibid., (Serbia and Montenegro* v. *Belgium)*, *Preliminary Objections*, Judgment of 15 December 2004, p. 324, para. 114)[20]. Nothing changed between that date and 2 July 1999.

12. Croatia took account of the provisional measure Orders and the 1996 Judgment. It relied on the Court's reasoning as authoritative. It had a reasonable expectation that the Court would, following a principle of judicial certainty, adopt the same reasoning in future cases where the facts in issue were, to all intents and purposes, identical. It is difficult to see how the Court might now conclude that Bosnia and the FRY were parties to the Genocide Convention in July 1999 but that Croatia and the FRY were not. The FRY's later admission to the United Nations, and its purported "accession" to the Geneva Convention after Croatia filed its Memorial, cannot effect a retrospective change.

13. Indeed, the Court's consistency on this vital point has been maintained. In the 2003 *Revision* Judgment the Court concluded that United Nations General Assembly resolution 47/1 (1992) did not "affect the position of the FRY in relation to the Genocide Convention" (*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*

[20]In its preliminary objections Judgment of 2004, finding that it had no jurisdiction, the Court did not decide on whether the FRY was a party to the Genocide Convention in April 1999 when those proceedings were instituted.

Herzegovina), Judgment, I.C.J. Reports 2003, p. 31, para. 70). Similarly, it ruled that resolution 55/12 adopted in 2000 "cannot have changed retroactively the position [of the FRY] in relation to . . . the Genocide Convention" (*ibid.*, para. 71). On this point there was no change of position in the 2004 Judgment (*Legality of Use of Force (Serbia and Montenegro* v. *Netherlands)*, *Preliminary Objections*, Judgment of 15 December 2004, p. 1055, para. 113). And in the 2007 Judgment, the Court concluded that the principle of *res judicata* precluded "any reopening of its 1996 Judgment" (*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. 140). Despite these crystal clear rulings, Serbia persisted yesterday in having another go at reopening the issue. Indeed it spent a great deal more time — and much more argument — on the Genocide Convention than it did on Article 35 of the Statute that it barely touched on. In your letter of 6 May 2008, Madam President, the Court asked the Parties to argue the issue of access. The Court did not invite the Parties to address argument on the Genocide Convention. Yet that became the focus of argument yesterday, and that says much about Serbia's true objectives in these proceedings.

III. SUCCESSION TO TREATIES — GENERAL

14. The Court's approach is consistent with the principles reflected in Article 34 of the 1978 Vienna Convention on State Succession in Respect of Treaties[21]. The former SFRY ratified this treaty on 28 April 1980, and Croatia and the FRY became parties by succession[22]. Article 34 deals with the Succession of States in cases of separation of parts of a State, makes it clear that when a part of the territory of a State separate to form one or more States, whether or not the predecessor State continues to exist, "*(a)* any treaty in force at the date of the succession of States in respect of the entire territory of the predecessor State continues in force in respect of each successor State so formed".

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[21] *UNTS*, Vol. 1946, p. 3. Entered into force on 6 November 1996.

[22] Croatia (on 22 October 1992) and the FRY (on 12 March 2001) became parties by succession. http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterXXIII/treaty2.asp (accessed 17 March 2008).

15. This rule is of particular importance for treaties such as the Genocide Convention. The representative of the then Soviet Union put it very well in 1977[23]. He said:

> "[T]reaties of a universal character were of paramount importance for the whole international community, and particularly for newly independent States. It was therefore in the interests of not only [those] states, but also of the international community as a whole that a treaty of universal character should not cease to be in force when a new State attained independence." (*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 Weeramantry, p. 649.)

It is hard to think of any treaty with a more universal character than the Genocide Convention.

IV. SUCCESSION TO HUMAN RIGHTS TREATIES

16. It is generally accepted that the population of a territory that has enjoyed the protection of certain 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[24]. The importance of this principle — in policy and in law — lies in the sad fact that massive human rights violations often occur during the times of severe political instability that accompany State succession. There is an obvious interest in the continuity of these obligations: non-respect for human rights during times of succession exacerbate tension, atrocity and refugee flows, and endangers international peace and security. The principle applies to all aspects of such treaties, including their dispute settlement provisions such as Article IX. We noted with interest the effort yesterday by Serbia to somehow decouple Article IX from the rest of the Convention[25]. But we noted with *equal interest*, Madam President, that Serbia provided no authority in support of that troubling proposition. The continuity of obligations under human rights treaties — and their mechanisms for enforcement — is of fundamental importance at those times.

17. Indeed, it is a principle that has been insisted upon by organs of international organizations and by treaty-monitoring bodies[26]. Between 1993 and 1995 the United Nations

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[23]24th Meeting, 22 April 1977, *Official Records*, Vol. 1, p. 164, para. 2.

[24]See e.g., M. Kamminga, "State Succession in respect of Human Rights Treaties" 7 *EJIL (1996)* 469 with references to State practice and doctrine.

[25]See for example CR 2008/8, p. 34, paras. 14-15; p. 41, paras. 57-58, 60 (Zimmerman); CR 2008/8, p. 48, paras. 19 *et seq*, para. 36 (Varady).

[26]See for example M. Kamminga, "State Succession in respect of Human Rights Treaties" 7 *EJIL (1996)* 469 with references to State practice and doctrine.

Commission on Human Rights adopted three successive resolutions on this very subject, at the instance of the Russian Federation. These unanimous resolutions recognized the "special nature" of human rights treaties and their "continuing applicability" to successor States. The United Nations Commission called on successor States that had not yet done so "to *confirm* to appropriate depositaries *that they continue to be bound* by obligations under international human rights treaties"[27]. And that same approach has been taken by the supervisory bodies of human rights treaties. Indeed, in 1994, the Fifth Meeting of chairpersons of human rights treaties bodies declared that successor States are "automatically bound" by human rights obligations, from independence without need for any declaration of confirmation by the new Government of the successor State[28].

18. Judge Weeramantry has noted the particular pertinence of these principles for the Genocide Convention (*Judgment, I.C.J. Reports 1996 (II)*; separate opinion of Judge Weeramantry, p. 645). It would be "most dangerous", he wrote, to view the breaking-up of a State as clearing the decks of human rights treaties and obligations of the predecessor State (*ibid.*, p. 651). And we say it is difficult to disagree with that proposition, or to see a basis on which the continued application of the Genocide Convention to a particular territory should not also be connected to a right of access to this Court: because this Court is, after all, the ultimate guardian of the rights and obligations set forth in the Convention. The FRY succeeded to the Convention, including its Article IX.

V. THERE CANNOT BE ANY HIATUS IN THE PROTECTION AFFORDED BY THE GENOCIDE CONVENTION

19. Madam President, Members of the Court, I turn now to the issue of the temporal application of the Genocide Convention, on which Serbia devoted considerable time yesterday[29]. In the Judgment in the case of *Bosnia and Herzegovina*, finding that the Convention did not contain

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[27]Resolutions 1993/23, 1994/16 and 1995/18 cited in the Preliminary Report, Mr. Menno T. Kamminga, "Human Rights Treaties And State Succession", UNIDEM Seminar, "The Status Of International Treaties On Human Rights", Coimbra (Portugal), 7-8 October 2005, at http://www.venice.coe.int/docs/2005/CDL-UD(2005)013rep-e.asp (accessed 17 March 2008) (emphasis added).

[28]Report of the Fifth Meeting of Persons Chairing the Human Rights Treaty Bodies:. 19/10/94 A/49/537. (Chairpersons Meeting).

[29]See, for example, CR 2008/9, p. 13, paras. 1-49 (Zimmerman).

a clause limiting temporal jurisdiction, the Court rejected the Respondent's argument that would have resulted in a gap in the protection afforded by the Convention. The Court ruled that "it has jurisdiction in this case to give effect to the Genocide Convention with regard to the relevant facts which have occurred *since the beginning of the conflict* which took place in Bosnia and Herzegovina" (*Judgment, I.C.J. Reports 1996 (II),* p. 617, para. 34; emphasis added).

20. Why would that same principle not also be applicable in the present case? Since the Genocide Convention has been applicable to the entire territory of the former SFRY, continuously since 1950, on what basis could it be said that it was not applicable at all times during the conflict, including the period prior to 27 April 1992? To adopt a different approach now would introduce massive uncertainty into the law. It would *raise* questions about the applicability of this and many other such conventions for other conflicts in the future. Indeed, it would *undermine* the *very* notion of the rule of law. Of course, neither Party had, as of July 1999, made a reservation purporting to limit the jurisdiction *ratione temporis* of the Court: and in this respect we refer to Judge Shahabuddeen's powerful statement made in 1996. He said that the application of the Convention from the beginning of the conflict would avoid an "inescapable time-gap in the protection which the Genocide Convention previously afforded to all of the 'human groups' comprised in the former Socialist Federal Republic of Yugoslavia" (*Judgment, I.C.J. Reports 1996 (II)*; separate opinion of Judge Shahabuddeen, p. 635); "more general arguments as to succession to treaties may be put aside in favour of an approach based on the special characteristics of the Genocide Convention" (*ibid*., p. 634). His conclusion is equally compelling and applicable in this case. As is Judge Parra-Aranguren's emphasis of the principle that the rules on termination or suspension of a treaty as a consequence of breach "do not apply to provisions relating to the protection of the human person contained in treaties of a humanitarian character" (*ibid.*; separate opinion of Judge Parra-Aranguren, p. 657. This issue was also referred to in the separate opinion of Judge Elaraby in *Legality of Use of Force (Serbia and Montenegro* v. *Belgium)*, *Preliminary Objections, Judgment, I.C.J. Reports 2004*, p. 363, para. 17.)

21. There must be no gaps in the application of the Genocide Convention. There *can* be no gaps. There *are* no gaps. The points made yesterday by Professor Zimmermann relating to the temporal application of the Convention were essentially the same as those made, more than ten

years ago, by the FRY in the *Bosnia* case. They were disposed of by the Court at paragraph 34 of its 1996 Judgment. Now, it may be that certain points he raised go to issues of attribution, and they might have to be decided at the merits phase: Professor Crawford will deal more with this. But we have heard no reason from the Respondent for the Court to depart from the approach that it took in 1996, when it concluded that the Convention contained no clause that limited its scope of application *ratione temporis*, that neither party had made any reservation to that end, and that a broad temporal finding was consistent with the Convention's object and purpose. For a Convention such as this, where we are dealing with a treaty that has a declaratory character and that applies universal law, it is surely correct that the principle that there can be no temporal gap must apply irrespective of the character or the nature of the succession.

VI. SERBIA'S CONDUCT DEMONSTRATES THAT IT WAS BOUND BY THE GENOCIDE CONVENTION

22. Madam President, Members of the Court, after many years of adopting one approach in proceedings before this Court, the Respondent abruptly changed tack, and yesterday it maintained its new argument. Contrary to the approach adopted by the Court, it now contends that it only became a party to the Genocide Convention in March 2001.

23. Yet as long ago as April 1992 it affirmed it would strictly abide by all the commitments assumed internationally by the SFRY[30]. That plainly — to our reading and obviously the Court's — included the Genocide Convention. It has come before you, in this room, as a Respondent and as an Applicant. It has actively participated in the case of *Bosnia and Herzegovina*. It has twice sought provisional measures. It has responded to claims with counter-claims. It has appointed a judge *ad hoc* and, until its change of position in 2001, it made numerous assertions and unambiguous declarations as to its being a party to the Genocide Convention. Croatia was entitled to rely on the position adopted by the FRY in July 1999, and we say it is entitled to rely on it again today.

24. There was no ambiguity in the Respondent's position towards the Convention up to the end of 2000. *Then* the Government changed. *Then* new policies were applied: and *then* the FRY

[30]FRY, declaration of 27 April 1992, para. 1 (in Serbia judges' folder, tab 1).

gave up its claim to be a continuator State and sought United Nations membership; it purportedly acceded to the Genocide Convention, with a reservation; it filed a revision Application before this Court and it withdrew its jurisdictional basis for the *NATO* cases. And *now* it argues that its earlier declaration — and subsequent endorsement — was simply without any effect or consequence. It wants all of its actions from 1992 to 2000, a period of eight years, to be treated by this Court as having been erased.

25. Madam President, Members of the Court, this is not an attractive argument. Whatever the consequences of the FRY's formal admission as a Member of the United Nations in 2000 — and that is a matter I will return to deal with tomorrow — that did not affect its legal status as a successor to the SFRY's treaty obligations. With the dissolution of the SFRY — a development that occurred as a process, as Serbia acknowledged yesterday[31] — it assumed the legal obligations as a successor State of the SFRY (see *Legality of Use of Force (Serbia and Montenegro* v. *Belgium)*, *Preliminary Objections, Judgment, I.C.J. Reports 2004*; separate opinion of Judge Elaraby, p. 367, para. 8, to this effect).

VII. SERBIA'S RESERVATION DOES NOT HAVE RETROACTIVE EFFECT

26. And finally, I turn to the consequences of the FRY's purported accession to the Genocide Convention. Croatia filed its Memorial on 1 March 2001. That date is significant, Madam President, as Professor Crawford will in due course explain. A few days later, by a Notification of 6 March 2001, deposited with the Secretary-General of the United Nations, the FRY purported to accede to the Genocide Convention — with effect from 12 March 2001) (for the text of the Notification of Accession see *Application for Revision of the Judgment of 11 July 1996, Judgment, I.C.J. Reports 2003*, pp. 24-25). The Notification was accompanied by a reservation to Article IX, purporting to exclude the jurisdiction of the Court absent the specific and explicit consent of the FRY in each case.

[31] See, for example, CR 2008/8, p. 57, para. 10 (Djeric).

27. Croatia objected. It did so on the grounds that as a successor State to the SFRY, the FRY was already bound by the Convention[32], and it expressly objected to the FRY's purported reservation to Article IX[33]. It is striking that on the very day the FRY purported to "accede" to the Genocide Convention, it notified its "succession" to a great number of conventions deposited with the Secretary-General of the United Nations. It selected from all of the treaties and conventions deposited with his office just one instrument — the Genocide Convention — in relation to which it deposited an instrument of accession with a reservation (*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, separate opinion of Judge Tomka, paras. 34 and 35).

28. These considerations all point in one direction only: the Court should not attach any legal effect to the FRY's notification of accession to the Genocide Convention. We submit that it should instead proceed on the basis it has always done that the FRY and now Serbia is bound by the Convention, on the basis of the operation of the customary rule of *ipso jure* succession (*ibid*.; see also *Legality of Use of Force (Serbia and Montenegro* v. *Belgium), Preliminary Objections, Judgment, I.C.J. Reports 2004*; separate opinion of Judge Elaraby, p. 368, para. 12).

VIII. CONCLUSION

29. Madam President, Members of the Court, Yugoslavia's declarations and conduct over the last 15 years have been somewhat contradictory. However, in relation to the critical date — 2 July 1999 — the facts stand undisputed and the law is crystal clear. Professor Varady, Serbia's distinguished Agent, said that the issue of jurisdiction "boils down to one question: the link

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[32]FRY's Preliminary Objections, Ann. 7, p. 35. Other States that objected to this accession included Bosnia and Sweden, see *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*, p. 25.

[33]*Ibid*. Croatia stated:

> The Government of the Republic of Croatia further objects to the reservation made by the [FRY] in respect of Article IX of the [Genocide Convention], and considers it to be incompatible with the object and purpose of the Convention. The Government of the Republic of Croatia considers the Genocide Convention to be fully in force and applicable between the Republic of Croatia and the [FRY], including Article IX.
>
> The Government of the Republic of Croatia deems that neither the purported way of becoming a party to the Genocide Convention *ex nunc* by the [FRY], nor its purported reservation, have any legal effect regarding the jurisdiction of the [ICJ] with respect to the pending proceedings initiated before the [ICJ] by the Republic of Croatia against the [FRY] pursuant to the Genocide Convention.

between the Respondent and the Genocide Convention"[34]. On that one question — the key question — the Court has been clear and we hope that it will continue to be clear. As to the situation on 2 July 1999, three conclusions can be drawn:

— first, both States were parties to the Convention, without reservation;

— second, there were no temporal or spatial limitations that could preclude the Convention from imposing rights and obligations on the Parties from the beginning of the conflict, and at all times thereafter; and

— third, the belated Serbian reservation of March 2001 could not and does not have retroactive effect.

30. Madam President, Members of the Court, let us take Professor Varady at face value: if he fails to persuade you on his one key question — the relationship between the Respondent and the Genocide Convention — then on his own terms Serbia's jurisdictional arguments collapse. We do not see how Serbia's argument on the Genocide Convention can succeed without doing untold damage to the international rule of law. I thank you, Madam President, for your kind attention and this concludes my presentation and Croatia's submissions for this afternoon.

The PRESIDENT: Thank you, Professor Sands. Thus Croatia's submissions for the day are concluded and the Court will resume at 10 a.m. tomorrow for the continuation of Croatia's submissions in the first round.

The Court now rises.

The Court rose at 6 p.m.

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[34] CR 2008/9, p. 34, para. 11 (Varady).