SEPARATE OPINION OF JUDGE TOMKA

Preliminary objections — Jurisdiction ratione temporis *— Whether the FRY could be bound by the Genocide Convention before 27 April 1992 — The Genocide Convention was applicable during the entire period of the armed conflict without interruption — Article IX of the Genocide Convention — Disputes relating to the interpretation or application of the Genocide Convention by the Contracting Parties thereto — Constituent units of the SFRY were not Contracting Parties to the Convention — Succession into responsibility of a predecessor State not within the jurisdiction of the Court — Responsibility for acts of an entity committed before it became a State and a Contracting Party not within the jurisdiction of the Court — Consequences of the FRY becoming party to the Convention on 27 April 1992 a matter to be determined at this stage of the proceedings.*

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1. This is a case which Croatia brought before the Court some eight years after the armed conflict in which it was involved with the Socialist Federal Republic of Yugoslavia (SFRY), and subsequently with the Federal Republic of Yugoslavia (FRY), broke out and four years after it ended, and during which, as Croatia alleges, violations of obligations under the Genocide Convention were committed. More than nine years have passed since the institution of proceedings on 2 July 1999. The Court only today determines that it has jurisdiction under Article IX of the Convention on the Prevention and Punishment of the Crime of Genocide (hereinafter "the Genocide Convention") to entertain Croatia's Application. Nevertheless, the Court still leaves open one aspect of its jurisdiction, which it considers together with the issue of admissibility, qualifying both of them as being of a *ratione temporis* character, when it finds that the second preliminary objection of Serbia, contending that the claims of Croatia based on acts and omissions which took place prior to 27 April 1992, are beyond the jurisdiction of the Court and inadmissible, "does not, in the circumstances of the case, possess an exclusively preliminary character" (Judgment, para. 146 (4)).

2. I am unable to subscribe either to this finding or its reasoning, and I have therefore voted against this conclusion while voting in favour of all the other conclusions reached by the Court. My negative vote calls for some explanation. With respect to other issues of jurisdiction, I can refer to the views I have already expressed in paragraphs 24 to 36 of my separate opinion in the case concerning the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and*

Herzegovina v. *Serbia and Montenegro)* (*Judgment, I.C.J. Reports 2007 (I),* pp. 323-331). My approach in that case does not differ from the approach now adopted by the majority in the present case.

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3. Serbia raised a preliminary objection "that claims based on acts and omissions which took place prior to 27 April 1992 are beyond the jurisdiction of this Court and inadmissible" (Judgment, para. 22), the reason being that those acts occurred prior to the establishment of the Federal Republic of Yugoslavia (Serbia and Montenegro). Serbia argues that the earliest possible point in time at which the Convention could be found to have entered into force between the FRY and Croatia was 27 April 1992. Serbia contends 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" (CR 2008/9, pp. 13-14, para. 4; emphasis in the original).

4. Croatia draws the attention of the Court to the fact that a similar issue of jurisdiction *ratione temporis* under the Genocide Convention was dealt with by the Court in the *Bosnia and Herzegovina* v. *Yugoslavia* case. Croatia relies on the 1996 Judgment in which the Court observed "that the Genocide Convention — and in particular Article IX — does not contain any clause the object or effect of which is to limit in such manner the scope of its jurisdiction *ratione temporis*", that the Court could only deal with events subsequent to the different dates on which the Convention became applicable between the FRY and Bosnia and Herzegovina and, moreover, "nor did the Parties themselves make any reservation to that end" (*I.C.J. Reports 1996 (II)*, p. 617, para. 34). Croatia recalls in particular the Court's finding in 1996 that "it has jurisdiction in [the *Bosnia and Herzegovina*] 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*" (*ibid.*; emphasis added). That conflict started in spring 1992, while the conflict in Croatia's territory had already begun in summer 1991.

5. I concur with the Court's view on the circumstances which distinguish the present case from the previous one, in which jurisdiction initially was decided in 1996. The Court now emphasizes that in the present case, "the Parties advanced arguments relating to the *consequences to be drawn from the fact that the FRY only became a State and a party to the Genocide Convention on 27 April 1992*" (Judgment, para. 124; emphasis added). I would add that that issue was not before the Court in 1996. No issue of the FRY being a party to the Genocide Convention was raised

by either party in the *Bosnia and Herzegovina* case; nor did the Court take any position with respect to the exact date on which the FRY became party to the Convention. The FRY persisted at that time in its claim in the United Nations that it continued the international legal personality of the former Yugoslavia. The Court limited itself to the conclusion that the Federal Republic of "Yugoslavia was bound by the provisions of the Convention on the date of the filing of the Application in the *[Bosnia and Herzegovina]* case, namely, on 20 March 1993" (*I.C.J. Reports 1996 (II)*, p. 610, para. 17). It reached that conclusion by briefly observing that "[t]he proceedings instituted before the Court are between two States whose territories are located within the former Socialist Federal Republic of Yugoslavia" *(ibid.)*. It then noted that the SFRY signed the Genocide Convention on 11 December 1948 and deposited its instrument of ratification, without reservation, on 29 August 1950. It further recalled a formal declaration adopted at the time of the proclamation of the FRY on 27 April 1992 stating that:

> "'The Federal Republic of Yugoslavia, 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.'" *(Ibid.)*

The Court, avoiding the issue of the claimed continuity of the international legal personality of the SFRY by the FRY, simply noted that:

> "This intention thus expressed by Yugoslavia to remain bound by the international treaties to which the former Yugoslavia was party was confirmed in an official Note of 27 April 1992 from the Permanent Mission of Yugoslavia to the United Nations, addressed to the Secretary-General. The Court observes, furthermore, that it has not been contested that Yugoslavia was party to the Genocide Convention." *(Ibid.)*

6. In the present case, as the Court summarises, "Serbia contended that, not having been a State before 27 April 1992, acts that occurred before that date cannot be attributed to it and that, not having been a party to the Convention, it could not have breached any obligation under it" (Judgment, para. 124).

7. The Court takes the view, without any explanation or justification, that "the question of the temporal scope of its jurisdiction is closely bound up with these questions of attribution, presented by Serbia as a matter of admissibility rather than of jurisdiction, and thus has to be examined in the light of these issues" *(ibid.)*. That assertion is question-begging. How can the question of jurisdiction (including its temporal scope), which relates to the consent of the Parties, be "closely bound" with the question of attribution of conduct, which belongs to the law of

State responsibility, and thus clearly to the merits phase? The Court only summarily addresses the issue of the attribution of acts that occurred prior to 27 April 1992, recalling the arguments of Croatia (Judgment, para. 125) and those of Serbia (*ibid.*, para. 126) to conclude that "the questions of jurisdiction and admissibility raised by Serbia's preliminary objection *ratione temporis* constitute two inseparable issues in the present case" (*ibid.*, para. 129). By briefly addressing the issues of attribution, which the Court sees as relating to the admissibility of the claim and for the ruling on which the Court feels a need to have more factual elements, the Court postpones its decision on the objection to its jurisdiction perceived by it as being of a *ratione temporis* character as well. That latter issue, in the view of the Court, concerns its jurisdiction

> "to determine whether breaches of the Genocide Convention were committed in the light of the facts that occurred *prior to the date on which the FRY came into existence as a separate State, capable* of being a party in its *own* right to the Convention" (*ibid.*; emphasis added).

The Court explains that this issue "may be regarded as a question of the applicability of the obligations under the Genocide Convention to the FRY before 27 April 1992" *(ibid.)*.

8. Croatia has always denied that the FRY continued the international legal personality of the SFRY. It consistently maintained that the FRY has been one of the five equal successors of the SFRY. Croatia argued that the FRY became a party to the Genocide Convention by succession, which "is retrospective to the commencement of the successor State" (CR 2008/11, p. 9, para. 8). It unambiguously stated that "[t]he Respondent was a party by succession to the Genocide Convention from the beginning of its existence as a State" (*ibid.*, para. 7).

9. The Court has determined that the FRY did indeed acquire the status of party to the Convention by a process that is to be regarded as succession. The Court came to the conclusion that "the 1992 declaration and Note had the effect of a notification of succession by the FRY to the SFRY in relation to the Genocide Convention" (Judgment, para. 117). Accordingly, the FRY became a party to the Genocide Convention at its "commencement" as a successor State. There is agreement that 27 April 1992 is that date. It has never been contested by any State (nor by Croatia) that the FRY became on that date a party to all those international conventions deposited with the Secretary-General of the United Nations to which it notified succession. The Genocide Convention is no exception.

10. There is no doubt that the Genocide Convention was binding on the SFRY since 12 January 1951, when it entered into force in accordance with Article XIII, until its dissolution and thus was applicable in respect of its entire territory (Article 29 of the Vienna Convention on the Law of Treaties codifying the relevant rule of customary international law; see also *Application of the Convention on the Prevention and Pun-*

ishment of the Crime of Genocide (Bosnia and Herzegovina v. *Yugoslavia), Preliminary Objections, Judgment, I.C.J. Reports 1996 (II)*, p. 610, para. 17). There was not a single day during the armed conflict which broke out in 1991 in the territory of the SFRY and ravaged until 1995 when the Convention would not have been applicable in that territory. This is so because, so long as the SFRY continued to exist, it remained party to the Genocide Convention and thus bound by its provisions. As its constituent republics gradually seceded from the Federation and declared independence, they became parties to the Convention on the basis of succession with effect from the date when these republics assumed responsibility for their international relations, Slovenia determining this date as being 25 June 1991, Croatia 8 October 1991, the former Yugoslav Republic of Macedonia 17 September 1991, and Bosnia and Herzegovina 6 March 1992. In the present case, the Court determined that the FRY (Serbia and Montenegro) became party to the Genocide Convention by succession, ascribing to the declaration of 27 April 1992 and the Note of the same date "the effect of a notification of succession by the FRY to the SFRY in relation to the Genocide Convention" (Judgment, para. 117).

Consequently, there was no hiatus or gap in the protection afforded by the Genocide Convention during the conflict, a concern expressed by counsel for Croatia (CR 2008/10, pp. 34-36, paras. 19-21) when addressing the arguments of Serbia regarding the temporal application of the Convention.

The aim of avoiding a *lacuna* in the applicability of the Genocide Convention in the context of violence accompanying the process of the SFRY's dissolution was stressed by several judges in their separate opinions 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, Judgment, I.C.J. Reports 1996 (II)*; separate opinion of Judge Shahabuddeen, p. 635; separate opinion of Judge Weeramantry, p. 651; and separate opinion of Judge Parra-Aranguren, p. 656).

The Convention was applicable at every moment during the prolonged armed conflict in the territory of the former SFRY, but it was to be applied by different States at different periods as the SFRY had been in the process of dissolution and its successor States, on different dates, gradually acquired international legal personality and the status of parties to the Convention from the very moment of their existence as sovereign States.

11. Therefore, the issue before the Court is not the retroactive application of the Genocide Convention. The issue is rather the interpretation of the compromissory clause contained in Article IX and the determination of the Court's jurisdiction thereby conferred.

12. Under Article IX of the Genocide Convention, the Court has jurisdiction to consider and adjudicate the "disputes between the Contracting Parties relating to the interpretation, application or fulfilment of the

present Convention, including those relating to the responsibility of a State for genocide". Croatia, relying on this provision, has brought before the Court the dispute with Serbia which, according to Croatia, "relates to the *interpretation and application* of the Genocide Convention" (Application, para. 30; emphasis added). The Court has determined, as the title of both the case under which it was entered in its General List and of the present Judgment indicate, that the case at hand concerns the application of the Convention. In order to fall within the ambit of Article IX of the Convention, the dispute must be about the interpretation or application of the Convention by the *Contracting Parties* to it, and not about the application of the Convention by the predecessor State of the Contracting Party to the Convention (although such predecessor State may have been, and in our case was, party to the Convention), nor about its application by an entity which was not the State party to the Convention and which only subsequently came into being as a State and became a party to it. The constituent units of the SFRY were not the Contracting Parties to the Convention, as only the SFRY itself had that status; the acts of its constituent units were considered as the acts of the SFRY.

13. Under the rule of customary international law codified in Article 4 of the ILC Articles on Responsibility of States for Internationally Wrongful Acts, the conduct of an organ of a territorial unit of the State (and both Croatia and Serbia were territorial or constituent units of the SFRY) is considered as an act of the State, attributed to this State and thus engaging the international responsibility of that State, if it is not in conformity with what is required by an international obligation resting upon that State. When that State ceases to exist, as was the case of the SFRY which disintegrated in the process of dissolution which was completed before summer 1992, as stated in Opinion No. 8 of 4 July 1992 issued by the Arbitration Commission of the Conference on Yugoslavia (*International Legal Materials*, 1992, Vol. XXXI, p. 1523), the issue of succession to responsibility may arise. Similarly, when a territorial unit of a predecessor State succeeds in its effort to secede and establishes itself as a separate State, the issue of the responsibility of the separate State for acts which were committed by the organs of that entity before it established itself as a State with international legal personality may arise. But clearly, regarding these two issues, neither that of succession into responsibility of the predecessor State nor that of the responsibility of an entity for acts committed before it became a State — and thus could have become a party to the Genocide Convention — fall within the jurisdiction of the Court under Article IX of the Genocide Convention. That jurisdiction covers "disputes between the Contracting Parties relating to the interpretation, application or fulfilment of the . . . Convention" by its Contracting Parties. The FRY, now continuing as Serbia, became a Contracting Party on 27 April 1992.

14. The situation in *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)* was different. There, although the relevant acts occurred before the dissolution of Czechoslovakia, the Court was given the jurisdiction and *specifically* asked in the Special Agreement (Art. 2), concluded by Hungary and Slovakia on 7 April 1993, "whether the Czech and Slovak Federal Republic was entitled to proceed, in November 1991, to the 'provisional solution' and to put into operation from October 1992 this system" (*Judgment, I.C.J. Reports 1997*, p. 11, para. 2). It is to be noted that the acts, despite in reality being performed on the ground by Slovak authorities, were always considered by the Court as those of Czechoslovakia (*ibid.*, pp. 46-57, paras. 60-88) and, in relation to them, the Court refers to Czechoslovakia and not to Slovakia in the operative clause (*ibid.*, p. 82, para. 155 (1) B and C). When the Court addressed the issue of the consequences of its Judgment, as it was asked in Article 2, paragraph 2, of the Special Agreement, it recalled that: "According to the Preamble of the Special Agreement, the Parties agreed that Slovakia is the sole successor State of Czechoslovakia in respect of rights and obligations relating to the Gabčíkovo-Nagymaros Project." (*Ibid.*, p. 81, para. 151.) The Court therefore considered that:

> "Slovakia thus may be liable to pay compensation not only for its own wrongful conduct but also for that of Czechoslovakia, and it is entitled to be compensated for the damage sustained by Czechoslovakia as well as by itself as a result of the wrongful conduct of Hungary." *(Ibid.)*

15. In the present case, the Court was not given jurisdiction by the FRY to consider the acts of the predecessor State, the SFRY. Nor is Serbia the sole successor of the SFRY; it is one of the five equal successors of the SFRY.

16. Although the Court rightly says that "in the present case, the Parties advanced arguments relating to the consequences to be drawn from the fact that the FRY only became a State and a party to the Genocide Convention on 27 April 1992" (Judgment, para. 124), it avoids drawing such conclusions, justifying its convenient choice by a need to have more elements before it (*ibid.*, para. 129).

17. I consider that the question of "consequences to be drawn from the fact that the FRY became a State and a Party to the Genocide Convention on 27 April 1992" is a legal question which should be decided already at this stage and for the answering of which there is no need of any further information. In reality, the Court, in the space of the 15 years between 1993 and 2008, had to deal repeatedly with issues relating to the legal status of the FRY and its participation in the Genocide Convention, and all necessary information has been put before it. What is conspicuous is that the Court does not even indicate what other elements it needs. The legal issue which Serbia raised before the Court is not case-specific, but rather of general application. In my conscience, I am unable to follow the course of action

adopted by the majority and respectfully and not without regret disagree.

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18. The conclusion I reach is a consequence of the fact that the FRY (now Serbia) is one of the successor States of the SFRY, the position always maintained by Croatia. Had the FRY continued the international legal personality of the SFRY, the question of the Court's jurisdiction to consider acts committed before 27 April 1992 could not have been relevant.

Furthermore, as Croatia noted, the argument of Serbia is "limited only to some of the 'gravest incidents' — such as the atrocities in Vukovar and the shelling of Dubrovnik — which occurred between 25 August 1991 and the end of that year" (Written Statement of Croatia, 29 April 2003, p. 11, para. 3.2).

19. The conclusion on the scope of the Court's jurisdiction, based on the interpretation of the compromissory clause contained in Article IX of the Convention, does not amount to the exclusion of responsibility of those who committed so many serious atrocities during the armed conflict in the territory of Croatia. Nor does that conclusion prevent the responsibility of the State to which the acts of the perpetrators of such atrocities may be attributed. As the Court has reminded on a number of occasions (see e.g., *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo* v. *Rwanda), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 2006*, pp. 50-51, para. 123), there is a fundamental distinction between the acceptance by States of its jurisdiction (and the scope thereof) and the conformity of their acts with international law. States remain responsible for acts attributable to them which are contrary to international law although such acts may have been committed during the period over which the jurisdiction of the Court does not extend.

20. May I add that a number of persons were indicted by the Prosecutor of the International Criminal Tribunal for the former Yugoslavia for atrocities committed in Vukovar and Dubrovnik in order to establish individual criminal liability for their commission. Some of those cases have been completed (*Jokić* (case IT-01-42/1 "Dubrovnik"); *Strugar* (case IT-01-42 "Dubrovnik")); some closed due to the death of the accused (*Slobodan Milošević* (case IT-02-54 "Kosovo, Croatia and Bosnia"); *Dokmanović* (case IT-95-13a "Vukovar Hospital")); another is pending before the Appeal Chamber (*Mrkšić et al.* (case IT-95-13/1 "Vukovar Hospital")); yet another is at the trial stage (*Šešelj* (case IT-03-67)); finally, in another case, one accused is still at large (*Hadžić* (case IT-04-75)). The case of one accused (*Kovačević* (case IT-01-42/2 "Dubrovnik")) was referred by the ICTY to the Republic of Serbia. Other cases have been dealt with by national judicial authorities. However, one cannot but notice that no accused was charged by the Prosecu-

tor of the ICTY of a crime of genocide or the other acts enumerated in Article III of the Genocide Convention in relation to the tragic events which occurred in the territory of Croatia. They were charged with violations of the laws or customs of war (war crimes) and/or with crimes against humanity.

21. It remains to be seen how Croatia wishes to establish before this Court, whose procedure is not criminal, that the crime of "genocide has been perpetrated, and that the FRY is responsible for genocide" (Memorial of Croatia, p. 8, para. 1.17), despite the fact that the ICTY "has not . . . issued indictments against those persons most responsible for genocide in Croatia" (*ibid.*, p. 3, para. 1.07). But this matter is for the merits, which hopefully will not take nine more years to resolve and thus to close this unfortunate and painful chapter in Croatian-Serbian relations.

(Signed) Peter TOMKA.