# SEPARATE OPINION OF JUDGE *AD HOC* VUKAS

*Capacity of the Respondent — Application of the Genocide Convention — Jurisdiction of the Court* ratione temporis *— Existence of Serbia as a State — Nature of the acts of genocide —Missing Croatian citizens.*

While fully subscribing to the Court's conclusions in the operative clause (Judgment, para. 146), I would like to make clear my own reasoning that led me to those conclusions.

## 1. The Capacity of the Republic of Serbia to Participate in the Proceedings Instituted by the Application of the Republic of Croatia

1. In respect of the preliminary objection submitted by the Republic of Serbia concerning its capacity to participate in the proceedings instituted by the Application of the Republic of Croatia, I will not engage in a discussion of the various arguments advanced by either the Applicant or the Respondent. Nor will I take into account the various opinions concerning their legal personality and membership in the United Nations expressed by the Republic of Croatia and the Federal Republic of Yugoslavia (FRY) for political considerations in the first decade following the dissolution of the Socialist Federal Republic of Yugoslavia (SFRY). Finally, I will try to avoid an analysis of the various considerations made by the International Court of Justice (ICJ) in some of the previous cases heard by the Court.

2. I base my conclusion that the Respondent possessed the capacity to participate in the proceedings (on the basis of Article 35, paragraph 1, of the Statute of the Court, and Article 93, paragraph 1, of the Charter of the United Nations) on the date of the submission of the Application by the Republic of Croatia (2 July 1999) on official documents of the United Nations and the opinions of the competent organs of the world body.

*(a)* The practical consequence of Security Council resolution 777 of 19 September 1992 and General Assembly resolution 47/1 of 22 September 1992 was that the Federal Republic of Yugoslavia (Serbia and Montenegro) was not allowed to participate in the work of the General Assembly. As the State was not excluded from the activities which all the Members of the United Nations have, in the other organs of the Organization, the Court spoke of the "*sui generis* position which the FRY found itself in vis-à-vis the United Nations over

the period from 1992 to 2000, or its position in relation to the Statute of the Court . . .” (*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. 31, para. 71).

*(b)* The position of the FRY in relation to the Statute of the ICJ, at the time of the filing of Croatia's Application in the present case is indicated in the *Yearbook* of the Court. That is in the list of States Members of the United Nations (entitled to appear before the Court on the basis of their membership in the Organization), which included “Yugoslavia” (*I.C.J. Yearbook 1998-1999*, No. 53, p. 73). This volume of the *Yearbook* covers the period from 1 August 1998 to 31 July 1999. As in this period the SFRY no longer existed, following its dissolution in the years 1991 to 1992, the only State which the International Court of Justice could have meant under the name “Yugoslavia” was the FRY. Therefore, according to the *I.C.J. Yearbook*, the Republic of Croatia — also a Member of the United Nations at that point (from 22 May 1992) — was entitled to institute proceedings against the FRY on 2 July 1999.

3. Finally, if we consult an official document of the United Nations, published by the United Nations Information Service on 1 June 1993, we find “Yugoslavia” in the list of “United Nations Member States” (Note No. 27/Rev.1).

### 2. Jurisdiction *Rationae Materiae*

*(a)* Both Parties in this case, the Applicant and the Respondent, were parties to the Genocide Convention, without any reservation to its provisions, on 2 July 1999 — the date when the Government of the Republic of Croatia filed the Application against the Federal Republic of Yugoslavia in respect of a dispute concerning alleged violations of the Convention on the Prevention and Punishment of the Crime of Genocide (hereinafter: “the Genocide Convention”).

*(b)* The SFRY was a party to the Genocide Convention from its entry into force on 12 January 1951, as it signed the Convention on 11 December 1948, and deposited its instrument of ratification on 29 August 1950 (Human Rights, Status of International Instruments, United Nations doc. ST/HR/8, 1987, p. 178).

4. As a result of the process of disintegration of the SFRY, the Republic of Croatia became an independent State on 8 October 1991. Although generally willing to maintain the international obligations and rights of the former Federation, and to assume responsibility for international relations with respect to the territory of Croatia, it decided to take individual decisions on its succession in respect of each particular treaty con-

cluded by the SFRY. In view of this, on 12 October 1992 Croatia notified the Secretary-General of the United Nations (depositary of the Genocide Convention) of its decision to act as a successor concerning the ratification of the SFRY (without any reservation) in respect of the Genocide Convention. However, in the notification to the Secretary-General, it was stated that, in conformity with international practice, Croatia's succession should take effect from 8 October 1991 — the date of its independence when it assumed responsibility for its international relations (http://treaties.un.org/pages/showActionDetails.aspx?objid=0800000280028171). The succession of the Republic of Croatia in respect of the Genocide Convention has in no way been contested or limited since the notification of its succession.

*(c)* In the course of the dissolution of the SFRY, two Republics, which had been members of the former Federation — Montenegro and Serbia — united in the Federal Republic of Yugoslavia on 27 April 1992 and wanted to be considered as continuing "the State, international legal and political personality of the Socialist Federal Republic of Yugoslavia" (United Nations, doc. A/46/915, Ann. II, para. 1). The contents of this declaration by the competent body of the FRY (the National Assembly of the Republic of Serbia and the Assembly of the Republic of Montenegro) were officially stated in the Note of 27 April 1992 from the Permanent Mission of Yugoslavia to the Secretary-General of the United Nations (depositary of the Genocide Convention):

> "Strictly respecting the continuity of the international personality of Yugoslavia, the Federal Republic of Yugoslavia shall continue to fulfil all the rights conferred to, and obligations assumed by, the Socialist Federal Republic of Yugoslavia in international relations, including its membership in all international organizations and participation in international treaties ratified or acceded to by Yugoslavia." (United Nations doc. A/46/915, Ann. I.)

5. The above-mentioned declaration and Note thus confirm that the FRY became a party to the Genocide Convention as a successor of the SFRY. It became a party without any reservation, just like the SFRY, and that was its status in respect of the Convention on 2 July 1999, the date when Croatia filed its Application instituting proceedings.

6. All the subsequent acts of the FRY in respect of the Genocide Convention in 2001 (rejection of the effects of the 1992 declaration, new notification of accession, including the reservation in respect of Article IX of the Convention) cannot have any effect in respect of the jurisdiction *ratione materiae* of the Court in relation to the FRY in the present case.

3. PRELIMINARY OBJECTION TO THE JURISDICTION OF THE COURT AND TO ADMISSIBILITY *RATIONE TEMPORIS*

*(a)* The first reason advanced by Serbia concerning the limitation of the jurisdiction of the Court *ratione temporis* is based on application of the Genocide Convention between the FRY and Croatia. According to counsel for Serbia, 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 [CR 2008/9, p. 13 (Zimmermann)].

7. However, application of the Genocide Convention to the Respondent before 27 April 1992 is not governed by the declaration of the FRY of its succession in respect of the ratification of the Convention by the SFRY on the one hand, and the notification of succession by the Republic of Croatia on the other, and the relation between these rather new parties to the Genocide Convention.

8. The Convention had to be applied by Croatia, as well as by Montenegro and Serbia, long before 27 April 1992, as its contents became a part of Yugoslav municipal law back in 1951. Article 210, paragraph 2, of the 1974 Constitution of the SFRY provided that "[i]nternational treaties which have been promulgated shall be directly applied by the courts of law" (*The Constitution of the Socialist Federal Republic of Yugoslavia, Jugoslovenski pregled*, Belgrade, 1989, p. 107). Therefore, violation of the Convention by all natural and legal persons in Yugoslavia, all organs of the State and federal units of Yugoslavia (Bosnia and Herzegovina, Croatia, Macedonia, Montenegro, Serbia and Slovenia) was prohibited.

9. Since the dissolution of the Federal Republic of Yugoslavia in 2006, it has become even clearer that the Respondent is in fact the same subject as the Socialist Republic of Serbia in the SFR of Yugoslavia. Given the circumstances of the dissolution of the FRY, Croatia confirmed that the proceedings it instituted on 2 July 1999 were "maintained against [the] Republic of Serbia as Respondent". However, the Agent of Croatia noted that this conclusion was "without prejudice to the political responsibility of [the] Republic of Montenegro and the possibility of instituting separate proceedings against it" (letter dated 15 May 2008 by the Agent of Croatia; Judgment, para. 30).

*(b)* The second reason for objecting to the jurisdiction of the Court and to the admissibility *ratione temporis*, is the opinion of Serbia that "the Genocide Convention including the jurisdictional clause contained in its Article IX cannot be applied with regard to acts that occurred *before* Serbia came into existence as a State", and could thus not have become binding upon it before 27 April 1992 [CR 2008/9, pp. 13-14 (Zimmermann)].

10. In respect of this objection of Serbia, I have two remarks. The first concerns the date when Serbia came into existence as a State, and the second deals with the nature of the relevant acts, and the time when they occurred.

*(b)* (i) 27 April 1992 is not the date when "Serbia came into existence as a State". It is the date when two former Yugoslav Republics — Montenegro and Serbia — formally established the State called "The Federal Republic of Yugoslavia". But Serbia was a State long before that date.

11. As mentioned previously, Serbia was one of the Yugoslav Republics. Although the six Republics were called "states" in the Federal Constitution of the SFRY (Art. 3), they were federal units forming the Yugoslav Federation. However, the situation changed in the 1990s. As stated in paragraph 43 of the present Judgment "[I]n the early 1990s the SFRY . . . began to disintegrate". The reason for this was not only the variety of concepts concerning the future of Yugoslavia, but more particularly the use of force against two of its component units — Slovenia and Croatia. As a consequence thereof, Croatia and Slovenia declared independence on 25 June 1991, followed by Macedonia on 17 September 1991, and Bosnia and Herzegovina on 19 October 1991. Taking into account these events, the Arbitration Commission — an expert body of the Conference on Yugoslavia (convened by the European Community) — on 29 November 1991 concluded "that the Socialist Federal Republic of Yugoslavia is in the process of dissolution" (Opinion No. 1, adopted on 29 November 1991 and made public on 7 December 1991; *International Legal Materials*, Vol. 31, (1992) p. 1497).

12. The conclusion on the "process of dissolution" of the SFRY by the Arbitration Commission was based on the opinion that "the essential organs of the Federation . . . no longer meet the criteria of participation and representativeness inherent in a Federal State" and on the fact that "the recourse to force has led to armed conflict between the different elements of the Federation which has caused the death of thousands of people . . ." (*ibid.*, pp. 1496-1497).

13. Taking into account the decision of four former Yugoslav Republics to proclaim and defend their independence, the European Community decided to play an active role in respect of the recognition of new States on the territory of the dissolving SFRY. On 16 December 1991, the Council of the European Communities adopted two instruments containing guidelines/conditions for the recognition of new States in Eastern Europe: the declaration on "Guidelines on the Recognition of the New States in Eastern Europe and the Soviet Union" and the declaration on Yugoslavia (*ibid.*, pp. 1485-1487). Four Republics, which had been members of the SFRY, asked the member States of the European Community to recognize them as independent States: Bosnia and Herzegovina,

Croatia, Macedonia and Slovenia met the necessary conditions for their recognition, contained in the two above-mentioned instruments. The consequence of that opinion was the recognition of those former Yugoslav Republics as independent States by the European States as of mid-January 1992, followed by recognition by States in all other regions.

14. Only in respect of Bosnia and Herzegovina was the Commission of the opinion that the will of the peoples of that Republic to constitute the Republic of Bosnia and Herzegovina as a sovereign and independent State should be clarified, possibly by means of a referendum. The proposed referendum was held on 29 February 1992 and 1 March 1992 and contributed to the beginning of the war in Bosnia and Herzegovina.

15. Two Republics of the former SFRY — Montenegro and Serbia — did not initiate the procedure established by the European Community for their recognition as independent States. The desire of these two Republics was to be considered as continuing "the state, international legal and political personality of the Socialist Federal Republic of Yugoslavia" (United Nations doc. A/46/915, Ann. II).

16. However, the political decision of Serbia not to proclaim independence, and not to request recognition by the European Community, does not mean that in the meantime it did not possess the characteristics of a sovereign State. For the purpose of this text, I will not analyse the extent to which the Government of Serbia (headed by Slobodan Milošević) controlled the remaining organs of the SFRY and its army, but there is no doubt that there was no power limiting the sovereign leadership of Serbia in its rule over the population and territory of Serbia. Therefore, Serbia was a State, which did not seek recognition as such by the international community for political reasons. As mentioned previously, it wanted to be considered as continuing the "international legal and political personality of the Socialist Federal Republic of Yugoslavia". In this venture Serbia was helped by Montenegro, and these two former Yugoslav Republics on 27 April 1992 established the Federal Republic of Yugoslavia (Judgment, para. 99).

17. In any event, it is necessary to stress that, even in the period before the establishment of the FRY, Serbia was obliged to prevent and punish the crime of genocide, as the provisions of the Genocide Convention had for a long time before the 1990s formed a part of general customary international law of a peremptory nature *(jus cogens)*.

*(b)* (ii) Serbia's principal argument in respect of the lack of jurisdiction of the Court *ratione temporis* is the contention that acts or omissions which took place before the FRY came into existence (27 April 1992), cannot be attributed to the FRY [Preliminary

Objections of the Federal Republic of Yugoslavia (PO), para. 4.1]. In addition to the facts presented above concerning the existence of the Respondent (Serbia) before 27 April 1992, the main argument against this contention lies in the nature of certain of the "acts and omissions" which are qualified as "genocide" in the Genocide Convention. That is to say that only some of them occur instantaneously; most are the result of criminal activity over a longer time frame. Thus, for example, according to Article II *(c)* of the Genocide Convention, genocide means "[d]eliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part". The majority of the acts to be dealt with in the present case took place in 1991. However, the suffering of the thousands of persons who disappeared in various detention facilities continued in the following years. The establishment of the FRY on 27 April 1992 was neither the beginning nor the end of many acts of genocide.

*(c)* Having dealt with the various reasons advanced by Serbia as a preliminary objection to the jurisdiction of the Court and to admissibility *rationae temporis*, I feel obliged to repeat the Court's comment that "there is no express provision in the Genocide Convention limiting its jurisdiction *ratione temporis*" (Judgment, para. 123).

## 4. Preliminary Objection to the Admissibility of Claims relating to the Submission of Certain Persons to Trial, Provision of Information on Missing Croatian Citizens and Return of Cultural Property

18. While I share in the conclusions of the Court in rejecting this preliminary objection, I would like to stress the major importance of one of the requests by Croatia: the one concerning information on missing Croatian citizens. Thus, notwithstanding the existing co-operation between Serbia and Croatia concerning the location and identification of missing persons, a request from the Court to Serbia to provide all the information within its purview as to the whereabouts of Croatian citizens would be an act of great value for the missing persons and the members of their families.

*(Signed)* Budislav Vukas.