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YEAR 2014

Public sitting

held on Tuesday 11 March 2014, at 10 a.m., at the Peace Palace,

President Tomka 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 2014

Audience publique

tenue le mardi 11 mars 2014, à 10 heures, au Palais de la Paix,

sous la présidence de M. Tomka, 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	Tomka
	Vice-President	Sepúlveda-Amor
	Judges	Owada
		Abraham
		Keith
		Bennouna
		Skotnikov
		Cançado Trindade
		Yusuf
		Greenwood
		Xue
		Donoghue
		Gaja
		Sebutinde
		Bhandari
	Judges *ad hoc*	Vukas
		Kreća
	Registrar	Couvreur

Présents : M. Tomka, président
M. Sepúlveda-Amor, vice-président
MM. Owada
Abraham
Keith
Bennouna
Skotnikov
Cançado Trindade
Yusuf
Greenwood
Mmes Xue
Donoghue
M. Gaja
Mme Sebutinde
M. Bhandari, juges
MM. Vukas
Kreća, juges *ad hoc*

M. Couvreur, greffier

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The PRESIDENT: Good morning, please be seated. I declare open the sitting of the Court and this morning the Court will hear the continuation of Serbia's first round of oral argument. I give the floor to Professor Zimmermann to start. You have the floor, Sir.

Mr. ZIMMERMANN: Thank you, Mr. President.

I. INTRODUCTION

1. Mr. President, Members of the Court, as always, it is an honour to appear before the principal judicial organ of the United Nations. Mr. President, last week you heard Croatia refer to most serious violations of international humanitarian law taking place during the conflict in Croatia in 1991 and early 1992. This week you will hear further evidence of crimes committed against ethnic Serbs in Croatia, and I express my sympathy for all of the innocent victims on both sides of the conflict.

2. What you will hear today by my colleague Professor Tams and myself might, compared to these issues, at first glance, look like more technical questions. We will address questions related to the Court's temporal jurisdiction and the admissibility of Croatia's case as far as events prior to 27 April 1992 are concerned, as well as issues to Croatia's standing. These matters go however to the very heart of Croatia's case.

3. This was acknowledged by Professor Ivan Šimonović, Croatia's Agent at the time, in a statement made in 2006 to a representative of the United States Embassy in Zagreb, which in the meantime became publicly available. He stated that if the Court: [start slide] "will accept jurisdiction only beginning April 27, 1992, the date FRY was established . . . [that] would mean [that] the worst atrocities committed on Croatian territory (i.e. Vukovar) would not be considered, greatly weakening Croatia's case" [1]. [End slide]

4. Given this statement of the *former* Croatian Agent in this case, Professor Šimonović, it was striking to now hear the *current* Agent of Croatia light-handedly refer to this question as "a single remaining jurisdictional issue"[2] which, in her view, was "evident" anyhow[3].

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[1]Cable No. 06ZAGREB366 of 17 Mar. 2006 from the US Embassy in Zagreb to the US State Department, para. 7, available at: http://wikileaks.org/cable/2006/03/06ZAGREB366.html.

[2]CR 2014/5, p. 22, para. 25 (Crnić-Grotić).

[3]*Ibid.*

5. As the Court will recall, *all* of the events to which Croatia referred in its oral pleadings last week took place well before 27 April 1992 — the day the respondent State, Serbia, came into existence as a State under international law, or as Professor Šimonović himself put it, the day the FRY was established. And all those events obviously occurred well before the Respondent became bound by the Genocide Convention on that very same day, as determined by this Court.

6. Let me reiterate: Croatia has throughout last week not referred to *any* events that took place after 27 April 1992 as allegedly constituting genocidal acts.

7. Croatia's case is thus fully dependent, as far as the Court's jurisdiction *ratione temporis* is concerned, on a retroactive application of the Genocide Convention to such events.

8. Cumulatively, it also depends — as far as the admissibility of Croatia's case is concerned — on the possibility of attributing treaty violations to Serbia. Such alleged treaty violations however pre-date Serbia becoming a Contracting Party of the Genocide Convention.

9. Before addressing those matters one by one in more detail, let me first deal with some more general issues — issues which touch upon the very reason for which Croatia brought this genocide case in the first place.

10. [Start slide] It was again Professor Šimonović, Croatia's Agent, that was quite frank about this:

> "While B[osnia] [and] H[erzgegovina] filed its case in 1993 . . . Croatia did not file until 1999, and only then after being convinced by an American attorney that accusations of S[erbia] a[nd] M[ontenegro's] responsibility for genocide . . . on Croatian territory would paralyze cases against Croatians at the International Criminal Tribunal for the former Yugoslavia (ICTY)."[4]

Mr. President, is this a bona fide reason to bring a genocide case against another State before this Court? I submit to you that these words, again made by Croatia's former Agent, Professor Šimonović in these proceedings, ~~***they***~~ tell us a lot about Croatia's underlying motivation to start these proceedings. [End slide]

11. What is more is that this case was brought as late as 1999 — six years after Bosnia and Herzegovina had brought its case in 1993, and more than eight years after most, if not all, of the alleged acts had taken place.

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[4]Cable No. 06ZAGREB366 of 17 Mar. 2006 from the US Embassy in Zagreb to the US State Department, para. 8, available at: http://wikileaks.org/cable/2006/03/06ZAGREB366.html.

12. It was submitted to the Court despite the ICTY Prosecutor never having brought any genocide charges related to the conflict in Croatia, let alone such charges related to acts that occurred after 27 April 1992.

13. It was submitted, as shown, Croatia being fully aware that in order to even make a plausible claim of genocide, it would necessarily and under any circumstances have to rely on acts pre-dating 27 April 1992.

14. It is against this background that Croatia had necessarily to come up with a whole set of arguments, which could eventually enable the Court to consider events pre-dating the critical date, 27 April 1992, so as to deal with what the current Agent for Croatia has called a small "single remaining jurisdictional issue". This issue constitutes a crucial and, indeed, basic question. This issue is one the Court has to consider and decide *before* it concerns itself with the substance of Croatia's allegations relating to this period of time. And it is this issue that Professor Tams and myself will address this morning.

15. Mr. President, let me now introduce the contents of this morning's pleadings.

16. I will first lay out the structure and character of Serbia's *ratione temporis* objection. I will then move on to the basic jurisdictional parameters of this case and, finally, I will address issues of State succession.

17. My colleague, Professor Tams, will then continue dealing with questions relating to the lack of retroactivity of the Genocide Convention and he will also deal with Article 10 (2) of the International Law Commission's Articles on State Responsibility, to which we will refer to as the ILC Articles.

18. I will then conclude addressing, *inter alia*, the issue of Croatia's standing or, rather, the lack of standing, as far as events pre-dating 8 October 1991 are concerned**.**

II. STRUCTURE AND CHARACTER OF SERBIA'S *RATIONE TEMPORIS* OBJECTION

19. Mr. President, Members of the Court, let me begin by outlining Serbia's *ratione temporis* objection. In your 2008 Judgment you have clarified and confirmed the two-prong character of Serbia's objection *ratione temporis.* As you stated, it relates on the one hand to

> "*the Court's 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"[5].

20. On the other hand, it relates to the *admissibility of the claim in relation to fact*s that occurred before Serbia even came into existence as a State under the general rules of State responsibility[6].

21. Croatia, the Applicant, thus has to *cumulatively* establish two propositions. First, it has to establish that the Genocide Convention, and in particular its Art. IX, applies retroactively, as between the Parties, to acts prior to 27 April 1992.

22. Second, provided the Court's temporal jurisdiction were indeed of such a retroactive character, and it is not — so, if we assume that it is the case — still, Croatia has to further establish that such acts could then possibly be attributed to Serbia. It has to do so despite the fact that Serbia did not even exist as a State at the time at which the alleged acts took place.

23. The Court will have to make a finding on each of these two issues[7]. Let me reiterate: even if the Court were to ever find that acts pre-dating 27 April 1992 could be attributed to the Respondent, Croatia's case would still fail for the Court lacking jurisdiction *ratione temporis*.

24. And this now brings me to the basic jurisdictional parameters of this case.

III. BASIC JURISDICTIONAL PARAMETERS

A. Croatia's status as a party of the Genocide Convention

25. Let me start with Croatia's status vis-à-vis the Genocide Convention. There is agreement between the Parties that the Applicant, Croatia itself, only became bound by the Genocide Convention on 8 October 1991[8].

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[5] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia* v. *Serbia), Preliminary Objections, Judgment, I.C.J. Reports 2008*, p. 460, para.129; emphasis added.

[6] *Ibid.*

[7] *Ibid.*

[8] See, e.g., CR 2008/10, p. 29, para. 9 (Sands).

B. Serbia's status as a party of the Genocide Convention

26. [Start slide] As to the status of the Respondent, Serbia, vis-à-vis the Convention the Court has, in its 2008 Judgment in this case, confirmed that the respondent State, Serbia, only became bound by the Genocide Convention *as of 27 April 1992* when stating that, "*from that date onwards* [and that means 27 April 1992] the FRY would be bound by the obligations of a party in respect of all . . . conventions to which the SFRY had been a party"[9]. [End slide]

27. The Court also referred to "the fact that the FRY only became a State and a party to the Genocide Convention on 27 April 1992"[10].

28. And your determination stands fully in line with the determination already made by the Arbitration Commission for the Peace Conference on the Former Yugoslavia, the so-called Badinter Commission. In its Opinion No. 11, the Arbitration Commission for the Peace Conference on the Former Yugoslavia first determined that the relevant date of succession for each of the five successor States of the SFRY is the date at "which they became States"[11]. So, the Commission took the coming into existence as the State as the starting-point. It then continued — Arbitration Commission — then continued in finding that such determination constitutes "a question of facts". ~~***Having then considered the facts, T***~~he Arbitration Commission ***then*** considered the facts of the dissolution of the SFRY. And in light of these facts the Arbitration Commission then found, just like the Court — just like you — that, [start slide] "27 April 1992 must be considered the date of State succession in respect of the Federal Republic of Yugoslavia"[12]. [End slide]

29. Let me also note in passing that it was only then, as the Badinter Commission put it, that "the relevant international agencies . . . began to refer to 'the former SFRY', affirming that the process of dissolution had been completed"[13]. So it took again 27 April 1992 as a starting-point and so did the relevant international agencies as the Commission put it.

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[9] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia* v. *Serbia), Preliminary Objections, Judgment, I.C.J. Reports 2008*, pp. 454-455, para. 117; emphasis added.

[10] *Ibid.*, p. 458, para. 124.

[11] Opinion, No. 11, para. 3, *ILM* 1993, S. 1587.

[12] *Ibid.*, p. 1588, para. 7.

[13] *Ibid.*

30. And these relevant international agencies include the Security Council, which only after 27 April 1992, started referring to the "former Yugoslavia". As late as in the spring of 1992 the Security Council had still continued to refer to the "SFRY". Indeed — as is well-known to the Court — it was for the first time in September 1992 only, and thus after the determination made by the Arbitration Commission for the Former Yugoslavia in July 1992 — that the Security Council, in September 1992, determined that the SFRY had ceased to exist.

31. Contrary to what Croatia seems to suggest, a clear picture emerges: all relevant actors consider 27 April 1992 the date at which the Respondent came into existence as a State and the date it became bound by the Genocide Convention. This includes this Court, an arbitration commission specifically tasked to deal with the dissolution of the former Yugoslavia, as well as the international community at large. Let me now against this background consider the extent of the Court's jurisdiction *ratione materiae.*

C. Extent of the Court's jurisdiction *ratione materiae*

32. There is no doubt that the Court's jurisdiction *ratione materiae* is limited to consider violations of the Genocide Convention, given that the case was exclusively brought under Article IX of the Convention.

33. On frequent occasions the Court has drawn a sharp distinction between treaty-based prohibitions on the one hand, and those based on customary law on the other. This Court has laid down this principle as early as in its *Nicaragua* Judgment, and has since then confirmed it in the *Racial Discrimination* case between Georgia and the Russian Federation[14].

34. Most recently, the Court once again stressed and underlined this fundamental distinction — which Croatia probably would call a formalistic one — but you did so, and you did so most recently in your *Belgium* v. *Senegal* Judgment[15] which Croatia did not refer to. There, the Court, in *Belgium* v. *Senegal*, again very carefully distinguished between violations of the

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[14]See Rejoinder of Serbia (RS), paras. 58 *et seq.*, referring to cases such as *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Merits, Judgment, I.C.J. Reports 1986*, p. 94, paras. 177 and 179; *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia* v. *Russian Federation), Merits, Judgment, I.C.J. Reports 2011 (I)*, p. 100, para. 64.

[15]*Questions relating to the Obligation to Prosecute or Extradite (Belgium* v. *Senegal), Judgment, I.C.J. Reports 2012 (II).*

customary law prohibition of torture on the one hand, and violations of the Torture Convention on the other.

35. The Court also reconfirmed that in cases where the Court's jurisdiction is exclusively based on a compromissory clause such as Art. IX of the Genocide Convention, it is only treaty violations that it may consider — but not violations of any parallel norm of customary law. As the Court put it, in *Belgium* v. *Senegal* [start slide]: "the issue whether there exists an obligation for a State . . . under customary international law . . . is clearly distinct from any question of compliance with that State's obligations under the Convention against Torture . . ."[16]. That is what you said. [End slide]

36. In doing so the Court emphasized, in particular, following the Committee against Torture, that, [start slide] "'torture' for purposes of the Convention can only mean torture that occurs subsequent to the entry into force of the Convention"[17]. [End slide]

37. This holding is even more relevant since the compromissory clauses contained in Article IX Genocide Convention, respectively in Art. 30 Torture Convention, are, as far as relevant, identical in that they both encompass exclusively disputes between two or more State Parties concerning the interpretation or application of the respective Convention.

38. In line with your holding in *Belgium* v. *Senegal*, any eventual determination, by the Court, that Serbia is responsible for acts of genocide must therefore, given the Court's limited jurisdiction under Article IX Genocide Convention, necessarily relate to violations of the Genocide Convention. Such violations, however, to paraphrase your holding in *Belgium* v. *Senegal*, "can only mean genocide that occurs subsequent to the entry into force of the Genocide Convention as between the parties". It follows that in the case at hand the Court may only consider alleged acts of genocide having occurred after 27 April 1992.

39. And it may only consider alleged violations of the Genocide Convention — and not of the customary law prohibition of genocide. As you, Mr. President, put it already in 2008:

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[16] *Questions relating to the Obligation to Prosecute or Extradite (Belgium* v. *Senegal), Judgment, I.C.J. Reports 2012 (II)*, p. 445, para. 54.

[17] *Ibid.*, p. 457, para. 101; references omitted.

> "neither [the question] 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"[18].

40. Serbia fully agrees. On Friday, counsel for Croatia has attempted to sideline this argument when referring to the fact that Article IX of the Genocide Convention also mentions issues of State responsibility[19]. Obviously, it does~~, ***obviously***~~. But Article IX clearly refers to State responsibility for violations of the treaty only. This is already made abundantly clear by the reference, in Article IX, to Article III of the Convention. Besides, Article IX considers issues of State responsibility to fall within the general category of disputes relating to the application, interpretation and fulfilment of the Convention. This is confirmed, if there was need, by the use of the term "including" in Article IX of the Genocide Convention. Accordingly, the Court's jurisdiction under Article IX of the Genocide Convention does not extend beyond the substantive and temporal obligations arising under the Convention itself. My colleague and friend Professor Tams will come back to that later this morning.

41. While Serbia fully acknowledges the prohibition of genocide under customary international law, the sole and exclusive focus of these proceedings can therefore be alleged violations of the Genocide Convention as a matter of treaty law. Croatia has, I am afraid to say, time and again, attempted to blur this crucial and most relevant distinction[20]. Croatia has done so in order to gloss over the deficiencies in its case specifically when it comes to events pre-dating 27 April 1992 and 8 October 1991 respectively.

42. The relevance of this fundamental distinction between treaty-related violations on the one hand, and violations of customary law on the other, as underlined by you, by this Court, in *Belgium* v. *Senegal*, is obvious for our case. In a case like ours brought under a compromissory clause, such as Article IX of the Genocide Convention, only the respective treaty is at issue. This stands in contrast to a case brought under the Optional Clause.

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[18] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia* v. *Serbia), Preliminary Objections, Judgment, I.C.J. Reports 2008;* separate opinion of Judge Tomka, p. 520, para. 13.

[19] CR 2014/12, p. 51, para. 39 (Crawford).

[20] Reply of Croatia (RC), paras. 7.5 and 7.10; CR 2008/11, para. 10 (Crawford).

43. Accordingly, in the *Nicaragua* case, which had been brought under Article 36 (2), the Court could consider violations of customary law once the Court had found that it was barred from addressing relevant treaty violations, such as violations of the United Nations Charter.

44. In cases like the one at hand however, based on a compromissory clause, the Court is limited to make a finding on treaty violations only. Any such determination presupposes however that the relevant treaty was applicable, as between the Parties, at the relevant time, whatever the customary nature of the underlying obligations.

D. Temporal scope of obligations under the Genocide Convention

45. That brings me to my next point which was again very forcefully clarified by your Judgment in the *Belgium* v. *Senegal* case which Croatia failed to mention.

46. While Professor Tams will deal with the lack of retroactive effect of the Genocide Convention more specifically let me just briefly mention that you confirmed in *Belgium* v. *Senegal* that the Torture Convention "applies only to facts having occurred after its entry into force for the State concerned"[21].

47. You did so after having determined that — just like the Genocide Convention — the Torture Convention has codified customary law and embodies rules of *jus cogens*[22].

48. And you did so being well aware that the Torture Convention contains provisions which are *mutatis mutandis* identical to Article I and Article XIV of the Genocide Convention[23]. It is however precisely those latter provisions on which Croatia relies in its attempt to argue in favour of a retroactive effect of the Genocide Convention.

49. And you did so referring to Article 28 of the Vienna Convention on the Law of Treaties, which was said to reflect customary law on the matter[24] — a provision Croatia even did not dare to mention.

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[21] *Questions relating to the Obligation to Prosecute or Extradite (Belgium* v. *Senegal), Judgment, I.C.J. Reports 2012 (II)*, p. 457, para. 100.

[22] *Ibid.*, p. 457, para. 99.

[23] See Arts. 2 and 31 Torture Convention respectively.

[24] *Questions relating to the Obligation to Prosecute or Extradite (Belgium* v. *Senegal), Judgment, I.C.J. Reports 2012 (II)*, p. 457, para. 99.

50. Serbia thus submits that the Court's jurisdiction in this case is limited to making findings on violations of the Genocide Convention only. And it further submits that the Respondent only became bound by the Convention as of 27 April 1992.

51. Mr. President, Members of the Court, Croatia, obviously being fully aware of these limitations has, last Friday**,** once again referred to your 1996 Judgment in the Bosnian case, and, in particular its paragraph 34[25]. In that case, as you will recall, the Court had made a rather broad finding as to the applicability *ratione temporis* of the Genocide Convention.

52. What Croatia has failed to mention, however, was that you have already addressed the relevance — or should I rather say irrelevance — of this holding for this case in your 2008 Judgment.

53. In your 2008 Judgment on jurisdiction and admissibility, this Court unequivocally confirmed that its holding in paragraph 34 of the 1996 Judgment on jurisdiction in the Bosnian genocide case has no bearing for the case at hand — and whatever counsel for Croatia had to say on the matter[26] cannot change your determination.

54. In your 2008 Judgment the Court not only stressed what is obvious, namely that the 1996 Judgment cannot, under Article 59 of the Court's Statute, constitute *res judicata* for the purpose of our case[27]. You went further and you found that the Court [start slide] "cannot draw from that judgment . . . [from the 1996 Judgment in the Bosnia case] any definitive conclusion as to the temporal scope of the jurisdiction [the Court] has under the [Genocide] Convention"[28]. [End slide]

55. In line with this statement, we submit that Croatia may thus not rely on your previous 1996 statement which, as you confirmed, was not dealing with facts pre-dating the moment the Respondent had come into existence[29].

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[25]CR 2014/12, p. 48, para. 32 (Crawford).

[26]CR 2014/12, p. 48, para. 32 (Crawford).

[27]*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia* v. *Serbia), Preliminary Objections, Judgment, I.C.J. Reports 2008*, p. 428, para. 53.

[28]*Ibid*., p. 458, para. 123.

[29]*Ibid*.

IV. ISSUES OF STATE SUCCESSION

56. Mr. President, Members of the Court, let me conclude by addressing issues of State succession. I will start with the alleged automatic succession of the Respondent to the Genocide Convention, which argument, somewhat suddenly, resurfaced last Friday[30]. I can be brief on the matter since the Court has heard extensive argument on the question on various occasions. Indeed most of those were related to the former Yugoslavia. On none of these occasions did the Court ever endorse the concept of automatic succession. You did not do so in your *Gabčikovo-Nagymaros* Judgment. And you did neither in the Bosnian case, nor in this case. Rather, in your 2008 Judgment you found that Serbia had unilaterally succeeded to the Genocide Convention by way of what you referr***ed*** to as a notification of succession[31].

57. But what is most telling is how you approached the matter in the *Racial Discrimination* case between Georgia and Russia, which again Croatia did not refer to, the ***CERD*** case between Georgia and Russia. As you will recall, the Soviet Union had ratified the International Convention on the Elimination of All Forms of Racial Discrimination (CERD) in 1969. After gaining independence in the early 1990s Georgia, as a successor State of the Soviet Union, did not, ~~***did not***~~ make a notification of succession. Instead it acceded (rather than succeeded) to the Convention as late as 1999. In its Application Georgia however then not only referred to acts of racial discrimination that were said to have occurred after 1999. Rather, Georgia also referred to instances of racial discrimination taking place ever since the early 1990s.

58. In your Judgment in this case you confirmed that "CERD [the Racial Discrimination Convention] [had] entered into force between the Parties on 2 July 1999"[32] only — and that was the time Georgia had ratified the Convention, had acceded to the Convention. As a matter of fact, the Court did not even consider the idea of Georgia having automatically succeeded to the Convention. The Court did so despite the obvious humanitarian character of CERD. And the Court did so being aware that the Racial Discrimination Convention, just like the Genocide Convention, embodies obligations *erga omnes* which are of a *jus cogens* character. Indeed, counsel

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[30]CR 2014/12, pp. 39-40, paras. 6-8 (Crawford).

[31]*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia* v. *Serbia), Preliminary Objections, Judgment, I.C.J. Reports 2008*, p. 455, para. 117.

[32]*Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia* v. *Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2011 (I)*, p. 81, para. 20.

for Georgia had not even argued automatic succession which in itself is quite telling I believe. Obviously applying the concept of automatic succession would have led to a completely different result as to the temporal application of the Racial Discrimination Convention as between Georgia and Russia. And yet the Court rejected such idea in *Georgia* v. *Russia*, a case Croatia has not addressed.

59. Besides, the assumption of automatic succession is also contradicted by State practice[33]. What is more is that Croatia itself has frequently and consistently accepted that successor States have *acceded* rather than *succeeded* even to human rights treaties and it has done so — it has accepted such accessions by successor States — also with regard to the Genocide Convention. ***A***nd Croatia never raised any objection to such accessions to the Genocide Convention by successor States occurring after Croatia itself had become a Contracting Party of the Genocide Convention[34].

60. In any case, the question of how Serbia eventually succeeded to the Genocide Convention is irrelevant since any such succession only dates back to the date of the succession. Said date has been defined in the two 1978 and the 1983 Vienna Conventions on State succession. Succession thus only dates back to the [start slide] "date upon which the successor State replaced the predecessor State in the responsibility for the international relations of the territory to which the succession of States relates"[35]. [End slide] That is the definition of the two Vienna Conventions.

61. That date, however, as confirmed by the judicial practice of the Badinter Commission, is, as far as the FRY/Serbia is concerned, 27 April 1992. Let me also note in passing, as already outlined in more detail in Serbia's written pleadings, that Serbia's predecessor State, the SFRY, was, until the spring of 1992, still very actively involved in international relations[36]. This again confirms that the relevant date of succession, namely when the FRY in turn became responsible for the foreign relations of its territory, is indeed the critical date, 27 April 1992.

62. This concludes the first part of my pleading for this morning. Let me summarize my arguments in two propositions:

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[33]See Preliminary Objections of Serbia (POY), p. 58 *et seq*.

[34]See POY, para. 3.73.

[35]See Art. 2 (1) lit e) of the 1978 Vienna Convention on State Succession in respect of Treaties, as well as Art. 2 (1) *d)* of the 1983 Vienna Convention on Succession of States in Respect of State Property, Archives and Debts.

[36]See, e.g., POY, para. 4.22.

63. Proposition 1 is, that in line with this Court's jurisprudence, you are only called upon in this case to make findings on violations of the Genocide Convention as a matter of treaty law. This presupposes that the Genocide Convention was in force as between the Parties at all relevant times.

64. Proposition 2 is, that your 2008 Judgment on jurisdiction, as well as the practice of the Badinter Commission and that of the international community at large, confirm that 27 April 1992 is the date at which the Respondent succeeded to the Genocide Convention.

65. Mr. President, I would now kindly request you to call upon Professor Tams to take the floor. He will first demonstrate in more detail that both the Genocide Convention generally, and its Article IX specifically, cannot be applied retroactively.

66. Thank you for your kind attention.

The PRESIDENT: Thank you very much, Professor Zimmermann and I now call on Professor Tams. You have the floor, Sir.

Mr. TAMS:

A. INTRODUCTION

1. Mr. President, Members of the Court, it is an honour and a privilege to address you for the first time, on behalf of the Republic of Serbia, and to do so in a case of such relevance. My presentation this morning continues the Respondent's argument relating to conduct pre-dating 27 April 1992. Professor Zimmermann has just introduced the main features of Serbia's position. As he has indicated, conduct pre-dating that date cannot form the basis of a judgment in the present case: it took place when the Respondent did not exist as a State and was not bound by the Genocide Convention.

2. My purpose this morning is to develop two aspects of this argument. First, I will speak about questions of retroactivity and I will show that the acts on which Croatia relies are not governed by the Genocide Convention *ratione temporis*. The second part of my presentation will introduce Serbia's argument relating to Article 10 (2) of the ILC Articles on State Responsibility, which Croatia relies on magically to "transfer" responsibility, for conduct occurring during 1991 and early 1992, to the State of Serbia.

3. Serbia's position on these two questions is based on well-established principles of international law and on the jurisprudence of this Court. Serbia asks you to follow your recent jurisprudence in cases such as *Belgium* v. *Senegal* and *Georgia* v. *Russia*, two cases that counsel for Croatia seemed to ignore in their pleadings but that we submit are highly instructive. And our submission proceeds from a central holding of your 2008 Judgment in the present case, namely the statement referred to already by Professor Zimmermann that [screen on]: "*from that date onwards* [27 April 1992] the FRY would be bound by the obligations of a party in respect of all the multilateral conventions to which the SFRY had been a party at the time of its dissolution"[37].

4. Mr. President, it may be worth noting that that holding was not what Serbia had hoped for in 2008. As you will recall, during the preliminary objections stage in this case, Serbia had disputed that the Declaration of 27 April 1992 amounted to a notification of succession. But of course it accepts the Court's holding and it accepts its two central implications. First, Serbia did succeed to the Genocide Convention. And second, it succeeded with effect from 27 April 1992. "[F]rom that date onwards", Mr. President — the terms are clear. They mean: bound by the Genocide Convention from 27 April 1992, but not prior to 27 April 1992. [Screen off]

5. And because this is so, because Serbia joined the Genocide Convention in April 1992, responsibility for breaches of the Genocide Convention pre-dating that date needs to be explained; Croatia needs to establish some link between conduct pre-dating April 1992 on the one hand, and the Genocide Convention (and *not* customary rules on genocide) on the other.

B. RETROACTIVITY

6. Mr. President, Members of the Court, "succession to responsibility" might have been one such link. After all, this case is about responsibility. And much of Croatia's diplomacy in the 1990s was an attempt to convince the international community that the FRY had *succeeded* the SFRY — and it was a successful attempt. Perhaps this case, if looked at properly, is really one of succession to responsibility. But Croatia carefully avoids the language of succession to responsibility.

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[37] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia* v. *Serbia), Preliminary Objections, Judgment, I.C.J. Reports 2008*, pp. 454-455, para. 117; emphasis added.

7. Mr. President, "retroactivity" might then be another angle. Serbia became bound in April 1992 but, of course, the Genocide Convention could provide for its retroactive application. But again, Croatia remains curiously circumspect on this point. To be sure, it applies the Convention to events of 1991 and early 1992 — it has done so for a whole week. Yet Croatia thinks this can be achieved without mentioning retroactivity. In fact, Professor Crawford tells us arguments about retroactivity are "misleading"[38].

8. Instead of arguing openly for retroactivity, Croatia uses a range of avoidance techniques. We are told that to apply the Genocide Convention to events of 1991 would not be a question of — to quote the Reply — "retroactivity properly so-called"[39]. Apparently this would be some lesser form of retroactivity — *not properly so-called.*

9. What is more, Croatia wants to have us believe that this lesser form of retroactivity can be presumed. Or how else should we understand Croatia's insistence that there is "no . . . temporal limitation" that would *restrict* the scope of the Genocide Convention, and that therefore the Convention governed the events of 1991?[40]

10. Finally, Croatia insists that Article IX — the compromissory clause applicable in the present case — covers events pre-dating April 1992. And again, miraculously, this is *not* a question of retroactivity. Mr. President, Croatia seems afraid of retroactivity.

11. In response to Croatia's avoidance strategies, permit me to restate Serbia's position in three propositions.

— First, notwithstanding its circumspect language, Croatia's argument depends on a claim of retroactivity — and that is, "retroactivity properly so called".

— Second, the Genocide Convention as a treaty does not apply retroactively.

— And third, no other result follows from Article IX of the Convention.

I will address these three propositions in turn.

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[38]CR 2014/12, p. 41, para. 12 (Crawford).

[39]Reply of Croatia (RC), para. 7.13.

[40]CR 2014/12, p. 43, para. 17 (Crawford); similarly RC, para. 7.2.

I. Croatia's argument as based on the retroactive application of the Genocide Convention

12. Mr. President, my first remark is prompted by Croatia's distinction between "retroactivity properly so called" and "lesser forms of retroactivity". [Screen on] In its Reply, Croatia says the real question the Court — and you will see it in front of you on the screen — is, "whether the Convention applies to the enforcement of responsibility in relation to genocide whenever occurring, or only in relation to genocide occurring after the entry into force of the Convention for the State concerned"[41].

13. This question, Croatia states, cannot be answered, "by reference to the presumption against retroactivity of treaties". And why not? Since, Croatia argues, since, "neither interpretation involves retroactivity properly so-called: [that is] the State is still only responsible for breach of an obligation in force for it at the time, and only for conduct attributable to it under international law"[42].

14. Mr. President, Members of the Court, this is a central passage of Croatia's argument. And yet it is one that entirely mischaracterizes the principles governing the temporal scope of treaty obligations. [Screen off] These principles, Serbia submits, can be taken from Article 28 of the Vienna Convention on the Law of Treaties, which — as this Court clarified in the recent *Belgium* v. *Senegal* case[43] — reflects customary international law. As that case makes clear, Article 28 not only establishes a presumption against retroactivity — and that is a point I will address shortly. More fundamentally, Article 28 also clarifies what international law means by retroactivity. [Screen on] This is what Article 28 says — you see it on the screen.

15. And you see immediately that there is not the slightest hint in Article 28 of Croatia's distinction between retroactivity proper and lesser forms of retroactivity. Article 28 formulates one concept of retroactivity. It asks whether a treaty obligation, "bind[s] a party in relation to acts or facts . . . which took place before the date of the entry into force of the treaty with respect to that party". If a treaty does this, then this, Mr. President, is retroactivity. Or, for the avoidance of doubt: this is retroactivity properly so-called.

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[41] RC, para. 7.13.

[42] RC, para. 7.13.

[43] *Questions relating to the Obligation to Prosecute or Extradite (Belgium* v. *Senegal), Judgment, I.C.J. Reports 2012 (II)*, p. 457, para. 100.

16. Mr. President, Members of the Court, if we return to the facts of the present case, it is obvious that Croatia argues for precisely this form of retroactivity. As your 2008 Judgment clarifies, Serbia succeeded to the Genocide Convention on 27 April: this, in the words of Article 28, is "the date of the entry into force of the treaty with respect to that party", Serbia. Yet for one week, you have heard Croatia rely on acts or facts — to use the language of Article 28 — that took place in 1991.

17. Mr. President, Members of the Court, I hesitate to state the obvious, the year 1991 and the first 117 days of the year 1992 — that is, the period between 1 January and 26 April 1992 — precede the *critical date*. Conduct during 1991 and early 1992, in the words of Article 28, "took place before the date of the entry into force of the treaty with respect to" Serbia. So what is it, Mr. President, Members of the Court, that Croatia asks for — if not for the retroactive application of a treaty? [Screen off]

18. Now, Mr. President, Croatia says it is not retroactivity properly so-called because Serbia, "is still only responsible for breach of an obligation in force for it at the time, and only for conduct attributable to it under international law"[44].

19. Yet this — as well as Professor Crawford's variation on the theme last week — are but smokescreens. Of course, Serbia has been bound by the Genocide Convention since April 1992. How else could this case have proceeded to the merits? How else, incidentally, could Serbia have brought a counter-claim? And of course Serbia cannot be held responsible for conduct not attributable to it. Not even counsel for Croatia claim that. But this is *not* what retroactivity is about: As Article 28 makes clear, retroactivity denotes the application of a treaty to "acts or facts . . . which took place before the date of the entry into force of the treaty with respect to that party". In so far as Croatia relies on conduct preceding 27 April 1992 — as it has done for a whole week — its argument depends on retroactivity — and no amount of evasion, and no false distinction between "proper" and "lesser" retroactivity, can obscure that important fact.

[44]RC, para. 7.13.

II. The Genocide Convention as such does not apply retroactively

20. Mr. President, Members of the Court, permit me to move on to Serbia's second proposition and discuss the temporal application of the Genocide Convention: does that Convention bind Serbia in relation to conduct that occurred in 1991, or in the first months of 1992? This is the main substantive issue on which the Parties disagree. Serbia's position is firmly anchored in Article 28, which Croatia wants us to think has nothing to do with our case. The text of that provision again is on the slide. [Screen on]

21. Mr. President, from the text, it is clear that international law is based on a presumption against retroactivity. That is why Article 28 begins in the negative — "unless a different intention appears from the treaty or is otherwise established". That is why it is entitled in the negative, "Non-retroactivity of treaties". And this is why Article 28 tells us how parties, exceptionally, can provide for retroactivity. So the presumption against retroactivity can be rebutted — it is but a presumption. But it is not rebutted easily. [Screen off] In fact, the ILC was quite clear about this. In its commentary to what was to become Article 28, it noted: "The general rule . . . is that a treaty is not to be regarded as intended to have retroactive effects unless such an intention is expressed in the treaty or is clearly to be implied from its terms."[45]

22. In his Fourth Report on the Law of Treaties, Sir Gerald Fitzmaurice had made the same point when he stated: "It is clear that only express terms or an absolutely necessary inference can produce such a result. *The presumption must always be against retroactivity*."[46]

23. Since 1969, this approach has been regularly endorsed, including in your Judgment in *Belgium* v. *Senegal*, in which you inquired whether anything, "in the Convention against Torture [the applicable treaty then] reveal[ed] an intention to require a State party to [take action in respect of] acts of torture that took place prior to its entry into force for that State"[47].

24. Mr. President, Members of the Court, Croatia's pleading ignores all this. Croatia asks whether "temporal limitations" are written into the Genocide Convention: and as it thinks there are none, it applies the Convention to events that took place in 1991. But in response, all that is

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[45] *Yearbook of the International Law Commission (YILC)*, 1966, Vol. II, p. 211, para. 1.

[46] Sir G. Fitzmaurice, 4th Report on the Law of Treaties, *YILC*, 1959, Vol. II, p. 74, para. 122; emphasis added.

[47] *Questions relating to the Obligation to Prosecute or Extradite (Belgium* v. *Senegal), Judgment, I.C.J. Reports 2012 (II)*, p. 457, para. 100.

required is to recite Sir Gerald Fitzmaurice: "The presumption must always be against retroactivity."[48] Or indeed recite your *Belgium* v. *Senegal* Judgment inquiring whether anything in the Torture Convention "reveal[ed] an intention" to provide for retroactivity[49]. Temporal limitations do not have to be written into a treaty — quite the opposite: retroactivity needs to be provided for.

25. And, Mr. President, this is so for a reason. Non-retroactivity is not a nuisance, not an obstacle. It is an important tool to ensure the operation of the law. States and the international community want clarity about the temporal scope of obligations; and non-retroactivity facilitates this. It provides for a clear point in time *from which onwards* a treaty binds a State. Because treaties typically apply non-retroactively, States can join treaty régimes without worrying whether at any point in the past, they may have breached the treaty. And this is important. Of course, as Professor Crawford says, States can decide to do things differently; they can draw up treaties that regulate the past and the future. And we can discuss whether the Genocide Convention is such a treaty — and I will discuss that in a minute. But I do not think we can seriously discuss that where the law is silent, it is non-retroactive. As a general rule, whatever we may think of the genocide, non-retroactivity is eminently sensible, and this is why Article 28 requires retroactivity to be provided for.

26. Mr. President, Members of the Court, so let us move on to the Genocide Convention then. Serbia submits that if we apply the test formulated by Article 28, Croatia's argument in favour of retroactivity falls apart. The drafters of the Genocide Convention simply did not intend the treaty to apply retroactively. No such intention was — in the words of the ILC — "expressed in the treaty". None of the 19 Articles of the Convention bears out Croatia's claim. So Croatia and Serbia agree on the principle; treaties can provide for retroactivity. To do so would have been possible. But the Genocide Convention does not do so. In other treaties, and the comparison makes this clear, States expressly provide for the obligations to govern past and future.

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[48]Sir G. Fitzmaurice, 4th Report on the Law of Treaties, *YILC*, 1959, Vol. II, p. 74, para. 122.

[49]*Questions relating to the Obligation to Prosecute or Extradite (Belgium* v. *Senegal), Judgment, I.C.J. Reports 2012 (II)*, p. 457, para. 100.

27. And to illustrate how such express retroactivity clauses look like, let me refer you to another treaty, the Convention on the Non-Applicability of Statutes of Limitations to War Crimes and Crimes Against Humanity[50]. As the title is pretty forbidding I will refer to it as the "Limitations Convention". This Convention, agreed in 1968, is meant to facilitate the prosecution of grave crimes, and it does this by excluding statutory limitations. It is an important document, which, incidentally, applies not only to war crimes, but also to genocide. And yet the difference between the two Conventions is striking. While the Genocide Convention is silent on the matter, Article I of the Limitations Convention explicitly provides for retroactivity. [Screen on] Its first article runs as follows: "No statutory limitations shall apply to the following crimes, irrespective of the date of their commission." And then follows the list of crimes covered by the Convention. This, Mr. President, is how a treaty can provide for retroactivity: unequivocally, clearly. The Genocide Convention does not include any clause remotely resembling Article I of the Limitations Convention. The drafters decided not to include one, and they did so deliberately. [Screen off]

28. Mr. President, instead, a careful reading suggests that the Genocide Convention should bind parties only with respect to future conduct. And in fact, the Convention's preamble, on which Professor Crawford relied, indicates as much: it gives expression to the parties' intention to "liberate mankind from such an odious scourge", that is, genocide. To liberate means "to set free"[51], with the clear implication that the Convention was meant to bring about a change for the future.

29. And, Mr. President, the same focus is clear from Article I, which emphasizes the duty to prevent genocide — which you addressed in the 2007 Judgment in the *Bosnia* case[52]. In that Judgment, at the merits stage of course, unlike here, questions of retroactivity did not come into play. And yet, the way you described the temporal scope of the duty to prevent is surely indicative. [Screen on] You clarified, and it is on the screen, that

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[50]754 United Nations, *Treaty Series (UNTS)* 73.

[51]See *New Oxford Dictionary of English* (second edition, revised, 2005): entry "liberate".

[52]*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia Herzegovina* v. *Serbia and Montenegro), Judgment, I.C.J. Reports 2007 (I)*, p. 43 (hereafter *Bosnia*).

> "a State's obligation to prevent, and the corresponding duty to act, arise at the instant that the State learns of, or should normally have learned of, the existence of a serious risk that genocide will be committed"[53].

30. Mr. President, on Friday Professor Crawford said this duty "is capable of encompassing genocide whenever occurring"[54]. Well, everything is possible. But let us pause and reflect whether what Professor Crawford suggests, to apply the duty of prevention of Article I to past events**,** is at all plausible? Not possible, plausible. Can we really, as Croatia wants the Court to believe, accept that a State joining the Genocide Convention should thereby accept a duty to stop — or rather: *to have stopped* — others from having committed genocide in the past, irrespective of where that crime was committed, and whenever a serious risk might have existed? Can we plausibly accept, to illustrate the implication of Croatia's construction, that Nigeria, when it acceded to the Convention in 2009, thereby accepted a duty to act against serious risks of genocide, say in the 1960s? Or let us think of another State? Did the United States, when it ratified the Genocide Convention in 1988, accept a duty to stop others — or rather: to have stopped others — from committing genocide in the 1950s or 1940s? If we try, Mr. President, we can perhaps agree with Professor Crawford that the duty to prevent is "*capable* of encompassing [past] genocide[s]". But Serbia submits that this is an absolutely implausible construction. Croatia stretches the Genocide Convention — if I may be permitted to adapt a term used by the Court — "well beyond breaking point"[55]. [Screen off]

31. Mr. President, similar points can be made with respect to other provisions, which Croatia chooses to ignore: Article VIII of the Genocide Convention encourages treaty parties to call upon the competent United Nations organs to take appropriate action to prevent or suppress genocide — was this plausibly meant to apply retroactively when the Convention entered into force for the first time in ~~*1950*~~1951? Article IV formulates a duty to punish "génocidaires", and deliberately uses the present tense: it speaks of persons *committing* genocide, not persons *having committed* genocide. As these provisions make clear, nothing in the text suggests that the Convention should bind parties with a view to past events.

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[53] *Bosnia, I.C.J. Reports 2007 (I)*, p. 222, para. 431.

[54] CR 2014/12, p. 45, para. 23 (Crawford).

[55] Cf. *Bosnia, I.C.J. Reports 2007 (I)*, p. 210, para. 406.

32. Mr. President, Members of the Court, under the scheme of Article 28, even in the absence of express clauses, treaties can of course apply retroactively if an intention to do so is, as Article 28 puts it "otherwise established". This is what Sir Gerald Fitzmaurice had in mind when speaking of an "an absolutely necessary inference"[56]. And some further guidance on when it would be "absolutely necessary" to draw such an inference is provided in the ILC's commentary. According to the Commission, commenting on what would become Article 28, retroactivity could be inferred if

> "the *very nature of the treaty* rather than its specific provisions indicates that it [the treaty] is intended to have certain retroactive effects"[57].

33. Mr. President, Members of the Court, this second exception, implied retroactivity, is a narrow one. The test is not whether retroactivity can somehow be read into a treaty, or whether it would be convenient to have a treaty applied retroactively. And given Croatia's insistence on the declaratory nature of the Convention, I would add that the test is most certainly not whether the treaty codified existing customary international law — you clarified precisely that point in *Belgium* v. *Senegal*. Instead, "the very nature of the treaty" has to mandate the treaty's retroactive application.

34. And Mr. President, the Commission's commentary provides us with some guidance as to which treaties are "by their very nature" retroactive. The commentary states that retroactivity could be inferred where a treaty regulates an earlier legal situation. And by way of example, commentary refers to Protocol XII to the Treaty of Lausanne of 1923, which was at stake in the *Mavrommatis* litigation. In that case, *Mavrommatis*, the PCIJ analysed Protocol XII and it said this Protocol had been

> "drawn up in order to fix the conditions governing the recognition and treatment by the contracting Parties of certain concessions granted by the Ottoman authorities *before the conclusion of the protocol*"[58].

So Protocol XII was concluded to regulate the past. And so, by its "very nature", it applied retroactively.

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

[57]*YILC*, 1966, Vol. II, pp. 212-213, para. 4.

[58]*Mavrommatis Concessions, P.C.I.J., Series A, No. 2*, p. 34; emphasis added.

35. Mr. President, Members of the Court, the Genocide Convention was not drawn up to regulate the past. It did not regulate the Holocaust; it was drawn up to prevent future holocausts. It codifies, as Croatia reminds us, an existing crime. But its focus is on prevention; on creating an international régime against genocide; and on allowing the States of the world, whatever their past, to join that régime. Croatia's construction of the Genocide Convention ignores all this.

36. And in fact, Croatia is very open about this. In its written pleadings, it expressly states that the Convention would apply to World War II *génocidaires*[59]. I note that Professor Crawford did not reiterate that point when he spoke last week but it is made in the pleadings and, indeed, it seems to follow from Croatia's approach to retroactivity. But, if the Convention applies to World War II *génocidaires*, where would one stop? It would probably govern events during World War I as well — or indeed during the process of colonization. And while Croatia never says so expressly, presumably all this could be litigated before this Court — as could be questions relating to the duty to prevent genocide, which is capable, says Professor Crawford, of encompassing past events. Dismissing Serbia's concerns as "formalistic", Croatia advances an argument that would permit decade-old and century-old conflicts to be brought before this Court. Now, whether this would be desirable, I do not know and it does not matter. But it is most certainly not what the drafters of the Convention had in mind. *Nothing* in "the very nature of the treaty" — *la nature même du traité* — requires the Convention to be applied retroactively.

37. Mr. President, Croatia makes a separate argument. It emphasizes the importance of the international régime against genocide. And Professor Crawford on Thursday, I think, was emphatic on this point — on Friday, it is, I apologize: if my count is correct, he used *"erga omnes"* eight times to describe the obligations owed under the Genocide Convention. Serbia agrees: the core obligations imposed by the Convention are owed to the international community as a whole. In the coming days, Serbia will revert to the matter when presenting its counter-claim. However, for present purposes, I would want to make a separate point, and it is this: there is no automatic link between importance, or between *erga omnes* status for that matter, and retroactivity — just as *erga omnes* status does not, as such, create jurisdiction, as you clarified in

[59]RC, para. 7.11.

East Timor[60]. *Erga omnes* status is crucial for many things but it does not change the temporal scope of a treaty obligation. This follows without any doubt from your recent jurisprudence, and again it is *Belgium* v. *Senegal* — the case that Croatia would not mention.

38. Mr. President, in *Belgium* v. *Senegal*, just as in the present case, the Applicant emphasized the importance of the régime against torture, with a view to extending the temporal scope of the treaty. In your Judgment of 20 July 2012, less than two years ago, you dealt with the matter in some detail, and you rejected the Applicant's claim. And you rejected it precisely because there is no automatic link between the importance of treaty obligations and their temporal scope. You made clear that "the prohibition of torture . . . has become a peremptory norm *(jus cogens)*"[61], and you recognized its *erga omnes* or *erga omnes partes* status.

39. However, this did not affect the question of retroactivity. So having summarized evidence supporting the *jus cogens* status of the rules against torture, you went on to note that "nothing in the Convention against Torture reveals an intention to require a State party to [take action in respect of] acts of torture that took place prior to its entry into force for that State"[62].

40. Mr. President, Members of the Court, the proceedings between Belgium and Senegal did not concern the Genocide Convention, but a very similar treaty, another public order treaty: the Convention against Torture. And the Court's analysis — in a recent case concerning a very similar treaty, and in response to a similar argument — clarifies that the importance, or, if you want, the "public policy" implication of an obligation, does not, as such, trigger retroactive effects. This, precisely, is Serbia's position.

41. Mr. President, before I conclude on this point, let me add that, of course, the question dividing the Parties in the present case has been discussed before. Leading commentators have analysed whether the Genocide Convention should apply retroactively; and States have expressed their views on the matter. And tellingly, for them, matters are straightforward.

42. By way of illustration, permit me to refer you to Nehemiah Robinson's pioneering study on the Genocide Convention, first published in 1949, then republished in 1960: To Robinson, "it

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[60] *East Timor (Portugal* v. *Australia), Judgment, I.C.J. Reports 1995*, p. 90.

[61] *Questions relating to the Obligation to Prosecute or Extradite (Belgium* v. *Senegal), Judgment, I.C.J. Reports 2012 (II)*, p. 457, para. 99.

[62] *Ibid.*, para. 100.

could hardly be contended that the [Genocide] Convention binds the signatories to punish offenders for acts committed previous to its coming into force for the given country"[63].

43. Fifty years later, my colleague, Professor William Schabas, in his book on genocide**,** agreed: "There is nothing in the Genocide Convention to suggest 'a different intention' [in the sense of Article 28 VCLT] . . . 'The simple fact is that the Genocide Convention is not applicable to acts committed before its effective date.'"[64]

44. Mr. President, the views of Robinson and Schabas are shared by State parties. I will merely refer you to one example, but it is recent, and it is unequivocal: in 2010, the German Government said this, in the German Parliament — you see it on the screen: [screen on]

> "The Convention on the Prevention and Punishment of the Crime of Genocide of 9 December 1948 has entered into force on 12 January 1951. For the Federal Republic of Germany it has entered into force on 22 February 1955. [And here comes the crucial passage] *It does not possess retroactive effect.*"[65]

45. Mr. President, Members of the Court, could it be clearer? And, to return to the point I made earlier, were it otherwise, would Germany have ratified the Convention without a temporal reservation? Would other States responsible or accused of past atrocities have ratified the Convention? As the Court said in 1951, the drafters and the General Assembly wanted the Convention to be "definitely universal in scope" — "as many States as possible [said this Court] should participate"[66]. Professor Crawford on Friday emphasized the Convention's object and purpose. But the argument he put forward would undermine the drafters' vision of a treaty "definitely universal in scope". And it runs counter to generally-accepted principles governing the temporal scope of treaties — agreed in the ILC and at Vienna, applied since 1969 and regularly endorsed by this Court. Croatia's retroactivity claim must fail.

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[63]Robinson, *The Genocide Convention*, 1960, p. 114.

[64]W.A. Schabas, *Genocide in International Law*, 2008, p. 643; footnote omitted.

[65]See Deutscher Bundestag [German Federal Parliament] doc. No. 17/1956 (2010), p. 5; emphasis added. The German original reads: "Die Konvention über die Verhütung und Bestrafung des Völkermordes vom 9. Dezember 1948 ist am 12. Januar 1951 in Kraft getreten. Für die Bundesrepublik Deutschland ist sie seit dem 22. Februar 1955 in Kraft. Sie gilt nicht rückwirkend."

[66]*Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, I.C.J. Reports 1951*, p. 24.

III. Article IX of the Convention does not extend the Convention's temporal scope of application to events predating 27 April 1992

46. Mr. President, Members of the Court, I come to my third proposition: just as the Convention *as such* does not apply to events predating 27 April 1992, so there is nothing in its compromissory clause — Article IX — to change that result. What is true for the Convention's substantive obligations is true for its enforcement mechanism.

47. Croatia disagrees. In its Reply, it suggests that Article IX could be looked at separately. Jurisdictional provisions, says Croatia, are "subject to an autonomous interpretation"[67] ; they are governed by what Professor Crawford called on Friday "principles of treaty interpretation of particular relevance to compromissory clauses"[68].

48. But this, Mr. President, is contradicted by your jurisprudence and by the text of Article IX. To begin with the latter: Article IX establishes the Court's jurisdiction for disputes *"between the parties"*. Yet, that could not be, as Professor Zimmermann has explored, prior to 27 April 1992, a dispute *between the parties* about the interpretation, application or fulfilment of the Convention. The compromissory clause is not autonomous, it is part and parcel of the treaty. It shares its temporal scope.

49. Croatia ignores this. Instead, it invokes — again — *Mavrommatis*, which Professor Crawford says provides "strong support" for Croatia's view[69]. Mr. President, *Mavrommatis* is Croatia's favourite case. But even *Mavrommatis* only takes you so far. Serbia has addressed Croatia's argument at length in the Rejoinder. I will here merely make two very brief remarks.

50. The first concerns the special nature of the treaty applied in *Mavrommatis*, that is, Protocol XII. As I have mentioned earlier, *Mavrommatis*, exceptionally, concerned a treaty that — by its very nature — was retroactive. The Court said expressly that Protocol XII was meant to "extend to legal situations dating from a time previous to its own existence"[70]. It was a treaty purposefully drafted to regulate the past. Its substantive obligations, as the Court said, were

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[67]RC, para. 7.21.

[68]CR 2014/12, p. 47, para. 28 (Crawford).

[69]*Ibid.*

[70]*Mavrommatis Palestine Concessions, Judgment No. 2, 1924, P.C.I.J., Series A, No. 2*, p. 34.

backward-looking. That made it exceptional — and that was a key factor in interpreting the jurisdictional clause. Because why should a jurisdictional clause have precluded the purpose of the treaty — to regulate the past? That is the context — narrow and unusual — of the *Mavrommatis* pronouncement on which Croatia relies. But the present case is different — the Genocide Convention is not a treaty to regulate the past. So can the *Mavrommatis* statement on which Croatia relied really provide relevant guidance? Serbia submits that it cannot.

51. My second remark relates to the more immediate context of the *Mavrommatis* statement relied upon by Croatia. And again the point has been explored in the written pleadings. [Screen on] Mr. President, to recall, this, in essence, is the passage that Croatia referred to in support of its broad construction of compromissory clauses:

> "in cases of doubt, jurisdiction based on an international agreement embraces all disputes referred to it after its establishment . . ."[71]

52. But before jumping to conclusions, let us look at the three little dots: they are shown on the slide and let us see what they hide. So this, Mr. President, is the sentence immediately following — not cited by Croatia. The sentence runs as follows:

> "In the present case [*Mavrommatis*], this interpretation [the one relied upon by Croatia] appears to be indicated by the terms of Article 26 itself [the jurisdictional clause at stake] where it is laid down that 'any dispute whatsoever . . . which may arise' shall be submitted to the Court."[72]

53. In other words, for the Permanent Court, the retroactive effect of the compromissory clause flowed from its specific wording. In the words of Article 28 (of the Vienna Convention), a different intention "appear[ed] from the treaty". This narrow rationale was crucial; and again it suggests that *Mavrommatis* does not stand for any general proposition. It is of dubious relevance at best. [Screen off]

54. Mr. President, Members of the Court, there is another reason not to place too much emphasis on *Mavrommatis*, Croatia's favourite case. And it is this: in the 90 years that have passed since *Mavrommatis*, the particular statement quoted by Croatia — even if it supported Croatia's claim, which we say it does not — the particular statement has been overruled. And to appreciate how decisively it has been overruled, we need look no further than to the

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[71] *Mavrommatis Palestine Concessions, Judgment No. 2, 1924, P.C.I.J., Series A, No. 2*, p. 35.

[72] *Ibid.*

Georgian-Russian dispute about racial discrimination — the second case in the list of recent precedents that were notably absent from Croatia's pleadings. In that case, too, the Applicant relied on what might be called a "public order treaty", CERD (International Convention on the Elimination of All Forms of Racial Discrimination). The public order treaty contained a compromissory clause permitting the seising of the Court for disputes between the parties (Article 22 CERD). In that case, too, questions of jurisdiction *ratione temporis* arose, as one of the parties (Georgia), had only become bound in 1999, but wanted to rely on facts pre-dating 1999.

55. The Court therefore had to deal with a very similar situation, and its approach, we submit, is instructive. So what did the Court in *Georgia* v. *Russia* decide? Mr. President, in interpreting the scope of Article 22 CERD, the applicable compromissory clause, you were very clear. You said that before Georgia became bound by CERD in 1999, there could perhaps have been disputes about racial discrimination *generally* — but not about the interpretation and application of CERD. In order for you to have jurisdiction, both parties had to be bound by CERD when the disputed conduct took place — *and not, as Croatia argues, when the case was brought.* And you made this very clear. [Screen on] Even if before 1999, you said, there had been a dispute between Georgia and Russia about questions of racial discrimination generally, and I quote:

> "such dispute, though about racial discrimination, could not have been a dispute with respect to the interpretation or application of CERD, the only kind of dispute in respect of which the Court is given jurisdiction by Article 22 of that Convention"[73].

56. Mr. President, Members of the Court, in Serbia's submission, the same standard should be applied in the present case. So even if there existed a dispute between Croatia and Serbia about questions of genocide prior to April 1992, this would be insufficient for the purposes of Article IX. And to paraphrase your "Russian Georgian" Judgment, prior to April 1992, a dispute about genocide — and I am adapting the terms, but no more than a change of the treaty names is necessary — a dispute about genocide

> "could not have been a dispute with respect to the interpretation or application of [the Genocide Convention], the only kind of dispute in respect of which the Court is given jurisdiction by Article [IX] of that Convention"[74].

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[73] *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia* v. *Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2011 (I),* p. 100, para. 64.

[74] Cf. *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia* v. *Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2011 (I),* p. 100, para. 64.

57. If the Georgian-Russian case, comparable to the present one in so many respects, yields one lesson, then it is this: compromissory clauses do not extend the Court's jurisdiction backwards in time. Your *Georgia* v. *Russia* ruling is recent, it is crystal clear, and it concerns the compromissory clause of a public order treaty of major importance. Serbia submits it should guide you in your interpretation of Article IX. [Screen off]

58. Mr. President, Members of the Court, permit me to sum up and reiterate the three propositions Serbia puts to you:

— First, Croatia's claims, to the extent that they draw on evidence on acts and facts pre-dating 27 April 1992, presuppose the retroactive application of the Genocide Convention: retroactivity proper, even though Croatia is afraid of the term.

— Second, nothing in the Genocide Convention reveals an intention of the parties to bind themselves with a view to acts or facts pre-dating the entry into force of the Convention for a particular State.

— Third, Article IX of the Genocide Convention does not contradict that result. The Convention's compromissory clause is intended to facilitate ICJ litigation *between parties*. It does not introduce retroactivity through the back door.

59. Mr. President, this brings me to an end of my discussion of retroactivity. In the second part of my presentation, I intend to address a second weakness of Croatia's claim, namely its reliance on Article 10 (2) of the ILC Articles on State Responsibility. But, before doing so, ***perhaps*** you might consider whether this would be a convenient time for the usual coffee break.

The PRESIDENT: Thank you very much. Indeed, it is planned in your "Fahrplan" and you are following it as a German "Schnellzug" and so this is the moment for a 15-minute break. The hearing is suspended.

The Court adjourned from 11.20 a.m. to 11.35 a.m.

The PRESIDENT: Please be seated. The hearing is resumed and Professor Tams, you can continue, please.

Mr. TAMS: Thank you, Mr. President. Mr. President, Members of the Court, before the break I was discussing questions of retroactivity, hopefully not too much, Mr. President, ***in*** the nature of the German "Schnellzug" ***(***fast train***)***. With the Court's permission, I will now move on to a second aspect, a second weakness of Croatia's claim, namely Croatia's reliance on Article 10, paragraph 2, of the ILC Articles on State Responsibility. Before I begin, let me reiterate that while, as Professor Zimmerman said earlier this morning, by the very nature today's presentations concern technical aspects of law, this does not take, in any way, away from our profound respect for the victims on all sides of the conflict. Yet, as Professor Zimmerman also said, in proceedings based on such grave allegations — and that is a point made by the Serbian Agent yesterday — the fundamental principles governing the Court's jurisdiction need to be observed carefully. And in this light, I propose to now begin my discussion of Article 10 (2) of the Articles on State Responsibility.

C. RESPONSIBILITY FOR CONDUCT PRE-DATING 27 APRIL 1992 CANNOT BE TRANSFERRED TO SERBIA

60. Mr. President, Members of the Court, Croatia seeks to "by-pass" problems *ratione temporis* by arguing that responsibility incurred prior to April 1992 could be transferred to Serbia. In its written pleadings, it insists that, "responsibility is not limited to acts or omissions occurring only after the formal establishment of a state, but may also extend to conduct prior to that date"[75].

61. In the present instance, Croatia has relied on such a broad principle of — if I may call it that way — "responsibility by transfer" to justify that conduct pre-dating April 1992 would establish the responsibility of Serbia: not existing at the time as a State, not bound at the time by the Genocide Convention as the applicable treaty, but having responsibility transferred to it upon emergence as a State.

62. Mr. President, it is worth recalling the point I made earlier this morning: Croatia's argument for a transfer of responsibility is not presented as an argument about State succession to responsibility. In Professor Crawford's argument last week, succession mattered a lot — but even though the transition from the SFRY to the FRY is a case of State succession as we now know, for

[75]Written Statement of Croatia (WSC), para. 3.18.

Croatia this is without relevance for questions of responsibility. Instead, Croatia points us to what it sees as a short cut — and no doubt a convenient short cut: an alternative "transfer rule", which Croatia says can be derived from Article 10 (2) of the ILC's Articles on State Responsibility.

63. Mr. President, Members of the Court, Article 10 (2) is not only of dubious status; but on the face of it, does not fit our case. It is a rule of attribution, which does not transfer responsibility — and which most certainly does not entail the retroactive application of a treaty that otherwise would not apply. All this is in fact is clear from the text of the provision, which runs as follows: [Screen on] "The conduct of a movement, insurrectional or other, which succeeds in establishing a new State in part of the territory of a pre-existing State or in a territory under its administration shall be considered an act of the new State under international law."[76]

64. Mr. President, I will come back to details of that provision shortly. At this stage, let me make a preliminary point. And it is this. Mr. President, a moment's reflection is sufficient to realize that — however we interpret it — this is a highly unusual provision. Conduct that took place before a State existed is attributed to the new State *once emerged.* And unlike in the case of Article 11 of the ILC's text, this attribution does not depend on the State's adoption of the conduct, or acknowledgement. In the scheme of the ILC's text, which throughout is carefully tailored to address *State* conduct, and which accepts the public/private divide, Article 10 (2) is an "odd one out", that is justified only because of the unusual setting of insurgencies or struggles for national liberation. Yet in Croatia's argument, this odd and narrow rule effectively acts as a principle of automatic succession to responsibility and to jurisdiction. [Screen off]

65. Mr. President, this is a truly astonishing construction of a provision that, throughout the long ILC drafting process, received limited attention and that, but for Croatia, everyone emphasizes is highly exceptional. In Serbia's submission, Croatia's argument based on Article 10 (2) is to be rejected for three reasons:

— First, as of 1991 and early 1992 — the critical time for our purposes, for the purposes of this case — the rule now set out in Article 10 (2) did not reflect customary international law.

[76] Annex to General Assembly resolution 56/83, 12 Dec. 2001.

— Second, even if it applied as a matter of principle, the present case does not fit Article 10 (2) of the ILC Articles on State Responsibility. The conditions set out in that provision simply are not met: in particular, there was no "movement" that struggled with the predecessor State and that succeeded in establishing a new State.

— And third, even if Article 10 (2) applied and even if its conditions were met, this could still not establish Serbia's responsibility for violations of the Genocide Convention. As a rule of attribution, all Article 10 (2) of the ILC Articles can achieve is to attribute to Serbia conduct, by a movement, that took place before its emergence. What it surely cannot do, even if it applied, is to turn such conduct — movement conduct — into a breach, by Serbia, of the Genocide Convention.

66. Mr. President, of these three arguments, which are alternative arguments, each of them individually able to undermine Croatia's claim, I will address the first two. Professor Zimmermann will deal with the third one.

I. The content of Article 10 (2) ILC Articles did not, as of 1992, represent customary international law

67. Mr. President, the first point to make is that Article 10 (2) of the ILC Articles does not reflect customary international law as it stood at the relevant time, in 1991-1992. At that time, of course, Article 10 (2) did not exist: what existed was a draft provision with an uncertain future, draft Article 15 (2), provisionally adopted by the ILC in 1975, very much work in progress. It existed as one of two provisions dealing with the conduct of insurrectional movements: draft Article 15 (1) looked at insurgencies that overthrew the government within existing State structures; draft Article 15 (2) looked at the case that may be pertinent here, it looked at insurgencies that established a new State. In its written pleadings, Serbia set out in detail why the second of these provisions — draft Article 15 (2) — in 1991 did not reflect custom. There was simply no practice. In the most detailed study on the matter, published in 2006, that is well after the completion of the ILC's responsibility project, Dumberry rightly describes it as "more a doctrinal construction than one based on actual state practice"[77]. Even the ILC's Commentary

[77]Patrick Dumberry, "New State Responsibility for Internationally Wrongful Acts by an Insurrectional Movement", 17 *European Journal of International Law (EJIL)*, 2006, p. 612.

issued in 2001 reflects this. It describes Article 10 (2) as a "special case" that runs counter to the "general principle", "ampl[y] support[ed]" by practice, pursuant to which normally "acts of unsuccessful insurrectional movements are not attributable to the State"; and the Commentary also accepted that the special rule would apply in "exceptional circumstances" only[78]. Last year, Professor Crawford — that is 2013, 12 years after the completion of the ILC's project — Professor Crawford — when writing, not pleading — last year Professor Crawford said State practice was "relatively sparse"[79]. In Serbia's submission, what was true for post-2001, is beyond doubt for 1991. This is a rule of attribution without a solid basis in practice.

68. On Thursday, Professor Crawford dismissed Serbia's arguments and said we had not read the ILC's Commentary[80]. So what did he have to offer? He referred us to three decisions by mixed claims commissions: *French Company of Venezuelan Railroads*, 1902, the *Bolivar Railway Company*, 1903, and the *Pinson* claim of 1928[81]. But we only need to look a little more closely to realize that none of them provides support for Croatia's principle of transferred attribution. The three claims concerned two insurrections: the first two claims, *French Company of Venezuelan Railroads* and *Bolivar Railway Company* concerned the Venezuelan revolution of 1899; the third claim, the *Pinson* claim went back to the Mexican revolution of 1910. So what is their relevance here? All three claims concerned insurgencies within a State, not insurgencies that created a new State. The rebellion of 1899 brought a new government to power in Venezuela — but the State remained the same. Mexico was shaken by the revolution of the 1910s — but the State continued to exist. In the present proceedings, we are not dealing with insurgencies within a State; not with draft Article 15, paragraph 1. We are dealing, in Croatia's own claims, with a new State situation, draft Article 15, paragraph 2. So Professor Crawford's evidence is irrelevant for our case, in which the existing State was not preserved. And, with due respect, I would add that this follows from the ILC Commentary.

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[78] *YILC*, 2001, p. 50, paras. 1, 4 and 3 of the Commentary to Article 10.

[79] James Crawford, *State Responsibility: The General Part*, Cambridge University Press (CUP), 2013, p. 176.

[80] CR 2014/10, p. 40, para. 20 (Crawford).

[81] *Ibid.*

69. Mr. President, Members of the Court, there is a second, equally important point. Even if we assume that the principle underlying draft Article 15 , paragraph 2, reflected custom in 1991, we need to be mindful of its limitations. It is, in the words of the ILC, an "exceptional" rule after all; and it is useful to look at the scope of the purported exception. In this respect, Serbia's argument is that, if it existed at all, it was a rule covering insurrectional movements only. Croatia, throughout its pleadings, has emphasized that Article 10 (2) adopted in 2001 referred to "insurrectional or other movements". On Thursday, Professor Crawford said this distinguished Article 10, paragraph 2, from Article 10, paragraph 1 — and that the distinction was deliberate[82].

70. But Mr. President, let us look, again, more closely. True, Article 10, paragraph 2, speaks of "other movements". But let us not forget that for our purposes, the critical date is 1991, not 2001, not 2014; the critical provision is Article 15, paragraph 2, adopted provisionally by the ILC on first reading. So what types of movements did draft Article 15 , paragraph 2, cover? [Screen on] You see it on the slide — and you will see immediately that the reference is to "insurrectional movements" only. "The act *of an insurrectional movement* whose action results in the formation of a new State in part of the territory of a pre-existing State or in a territory under its administration shall be considered as an act of the new State." Insurrectional movements — no "other movements": this is how the ILC saw it during the first reading. This is where we stood in 1991. [Screen off]

71. So, let us move to 1998, seven years on, when Professor Crawford considered the matter in his First Report on State Responsibility as a Special Rapporteur. As is clear from the ILC Yearbook, and as a considerable number of you will recall from personal experience, the second reading of the State responsibility text provided an opportunity to simplify some of the provisions put forward by, or shaped by, Roberto Ago. And Professor Crawford did propose a simplified version of the proposed rule, the exceptional rule on attribution. And this is what, in 1998, he said should be the simplified rule codifying customary international law: [Screen on] "The conduct of an organ of an insurrectional movement whose action results in the formation of a new State shall be considered an act of the new State under international law."[83]

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[82] CR 2014/10, pp. 39-40, para. 19 (Crawford).

[83] *YILC*, 1998, Vol. II (1), p. 57.

72. Mr. President, again: "insurrectional movements" — no "other movement" in sight. This is 1998. This is Professor Crawford describing the state of the law as he perceived it in 1998. And when the Commission discussed Professor Crawford's first report, all the attention again focused on insurrections: would the term insurrectional movements cover national liberation movements? That was the biggest question. Or did they need a special rule? Should the status of insurgents be addressed, or was that beyond the scope of the Commission's work? At no point before the matter was referred to the ILC Drafting Committee in 1998 did the proposed rule of attribution cover anything other than insurrectional movements: not in Ago's draft Article 15 (2), not in Ago's report I may add, not in draft Article 15 (2), not in Professor Crawford's First Report, and not in the ILC debates of 1998. The term "other movements" on which Croatia places so much emphasis now was added in the Drafting Committee. And as Professor Crawford described it in 2013 in his book on State Responsibility, it was — his words — a "generic addition"[84], not a substantive change — I should be precise, "generic addition" is the term he uses — I would draw from that that it is not a substantive change. The term "other movements" was added to preserve the neutrality of the text. Neutral language not intended to change draft Article 15 (2) as adopted on first reading; but to make sure the text would be acceptable to members who felt one ought to distinguish insurrectional and national liberation movements. [Screen off]

73. And, Mr. President, as even counsel for Croatia will not dispute, this addition — "other movements" — could only be "generic", as international practice in one respect is very clear. Whatever you make of the practice in this field — which Professor Crawford says is "relatively sparse" and which we say is insufficient as of 1991 — whatever you make of that practice: surely it is practice relating to insurgencies and national liberation struggles only. The hypothetical discussion of the American Civil War in Ago's reports — an insurgency. The FLN and Algeria, relied on by Croatia in its pleadings — an insurgency. Mr. President, if practice on insurrectional and other movements as such is, as Professor Crawford says, "relatively sparse", it is non-existent as regards other movements that are not insurrectional and not national liberation movements.

[84]Crawford, *State Responsibility. The General Part*, CUP, 2013, p. 173.

74. Mr. President, Members of the Court, to conclude on this point, in its attempt to construe some broad "transfer principle", Croatia overstretches an exceptional, narrow and unusual provision that is "more doctrinal construction than based on practice". The rule was dubious at best in 1991. If it existed at all, the ILC's first reading text and Professor Crawford's First Report and the ILC's discussion make clear that it was a special rule addressing insurrections and national liberation struggles.

II. The conditions for the application of Article 10 (2) of the ILC Articles are not fulfilled

75. Mr. President, this brings me to my second point. Even if we accepted Croatia's argument and applied Article 10, paragraph 2 — including the "other movement", that is — the provision still would not transfer responsibility to Serbia. The conditions set out in Article 10, paragraph 2, the conditions making it a narrow and exceptional provision, simply are not met. Serbia has addressed this point in detail in the written pleadings, so I will limit myself to two observations here. First, there was no "movement" in the sense of Article 10, paragraph 2 — certainly no insurrectional movement, but no "other movement" either. And second, if there existed a movement, it did not succeed in establishing a new State.

76. Mr. President, Members of the Court, Article 10 (2) — even if taken at face value — is based on the idea that there is a "movement" which over time establishes a new State. This movement can be labelled — insurrectional, rebel, revolutionary; it can be a national liberation movement; and for the sake of the argument, we may even accept that it could be an "other" movement, "non-insurrectional" as it were. But a movement there has to be. And as the ILC Commentary makes abundantly clear, as a movement, it must have "structures and [an] organisation" that are "independent of those of the [predecessor] State"[85]. And not only that, Mr. President: equally importantly, the movement must be directed against the predecessor State — this is the rationale for the exceptional rule of attribution. Roberto Ago said so expressly: he felt the need for a special rule to cover instances in which an insurrectional movement was — and I quote Ago's Fourth Report — was "working *against* the territorial State"[86] — ***dirigé*** *contre*

[85] *YILC*, 2001, p. 50, para 4.

[86] Ago, Fourth Report, *YILC*, 1972, p. 129, para. 151; emphasis added.

l'état territorial. If that was not clear enough, perhaps we can turn to Professor Crawford's views on the matter, as they appear in his 2013 book — *State Responsibility. The General Part*. Discussing Article 10, and having stated the general rule that States are normally not responsible for acts of insurgents, Professor Crawford notes, and Serbia would submit, notes perceptively: "such a movement cannot be [normally] considered to be aligned to the interests of the State against which it is fighting"[87].

77. Mr. President, a movement with distinct structures, fighting a State — this is the essence of Article 10 (2) — if we accept it governs our case. And through years of pleadings, Croatia has been unable to tell us how the conditions of this purposefully narrow rule could be met. Sometimes, it simply ignored the problem. So, for example, in its written pleadings, Croatia stated that Article 10 (2) covered all "unconstitutional or irregular *activity* aimed at the separation or the dissolution of the State"[88]. So "activity" was the test — and that was no doubt convenient, because this allowed Croatia to add everything together: the JNA, Mr. Šešelj, paramilitaries, etc. But that is doomed to fail: Article 10 (2) simply is not a catch-all provision covering "activities", it is a narrow rule even if we accept Article 10 (2), requiring the conduct of a movement with distinct structures and an independent organization.

78. Mr. President, Members of the Court, tomorrow my colleagues, Mr. Lukic and Mr. Ignjatović, will refute Croatia's allegations in detail. They will show that, what Croatia describes as a coherent "Greater Serbia movement" really was anything but homogeneous, and possessed no distinct structures. Today, I will limit myself to making a separate point — and it is this: even if Croatia could identify a movement with distinct structures, this movement would still have to be — as Ago put it — "working against the territorial State"[89]. This, was essential; this is the rationale for the exceptional rule on attribution.

79. So if we apply this test, we would expect counsel for Croatia present evidence of the alleged Greater Serbia movement fighting the SFRY. Yet what is it that Croatia has presented this Court with last week? Throughout last week, Croatia was at pains to emphasize the links between

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[87]Crawford, *State Responsibility. The General Part*, CUP, 2013, 170.

[88]RC, para. 7.59; emphasis added.

[89]Ago, Fourth Report, *YILC*, 1972, p. 129, para. 151.

the alleged Greater Serbia movement and the SFRY. Upon Croatia's own pleading, the Greater Serbia movement, if it existed, did not struggle against the predecessor State — quite the opposite. On Monday, Professor Crawford emphasized the "alignment" between the alleged Greater Serbia movement and the SFRY — and he used that very term, "alignment"[90]. So it may be useful to cite again how, writing about State responsibility in 2013, Professor Crawford described the essence of Article 10. He he said that Article 10 is an exception because normally, "*a movement cannot be considered to be aligned to the interests of the State against which it is fighting*"[91].

80. And Serbia says precisely that: Article 10 (2) is not intended to cover instances in which the movement and the predecessor State are aligned. It is an exception that covers struggles, as Roberto Ago said, between a movement and a State. Croatia is trying to show alignment in order to establish Serbia's responsibility for conduct that can otherwise not be attributed. But precisely that logic defeats its claim based on Article 10 (2). The alleged Greater Serbia movement was not a movement in the sense of Article 10 (2): not an insurgency, not a revolutionary force, not an "other movement" fighting a State.

81. Mr. President, Members of the Court, during the break-up of Yugoslavia, many factions fought for different aims; many wanted to break up the SFRY — and ultimately succeeded; many wars were fought on many fronts, with horrible results that we have heard about in the past week, and that we will hear about in the coming days. The history has been covered in detail. But Croatia's own pleading undermines the idea that there would have been a fight between the alleged Greater Serbia movement and the SFRY. In its attempt to establish some "responsibility by transfer", Croatia ignores the conditions under which the ILC, in 2001, was prepared to admit a narrow and exceptional rule of attribution for "non-State conduct". And it is forced to re-write history.

82. Mr. President, Members of the Court, this brings me to my last point on Article 10 (2). It relates to another important condition set out in the provision, which again goes to its heart: in order, exceptionally, for movement conduct to be attributed to the State, the movement must have — and I quote Article 10 (2) — "succeed[ed] in establishing a new State" — *parvient à créer*

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[90]CR 2014/5, p. 46, para. 10 (Crawford).

[91]Crawford, *State Responsibility. The General Part*, CUP, 2013, 170; emphasis added.

un nouvel Etat. If the movement does not succeed in doing so, even the most ardent supporters of the principle underlying Article 10 (2) agree there is no basis of attribution. From the beginning of the ILC's discussion, this has been treated as a crucial aspect; and we have a very clear idea of what the Commission had in mind. For Roberto Ago — writing in 1972, introducing the draft provision — a rule was desirable because where the movement had — his words — "triumphed", the predecessor State was displaced[92] and the rule of attribution ***was*** needed. The ILC's commentary — in the context of paragraph 1, admittedly, but in a passage of general validity for Article 10 — speaks of a movement "having triumphed"[93] — this is the 2001 commentary. And, this is not an accident; this is the rationale for having an exceptional rule in the first place.

83. Against that background, Mr. President, we may be permitted to ask: where is that "triumph"? Where is this triumphant movement that had fought the SFRY with a view to breaking away from it? Again, Croatia is curiously quiet on this: perhaps it thinks of the Serbian leaders who, for a decade, claimed identity with the SFRY. But can you succeed in establishing a new State — as Article 10 requires — without desiring to do so? Can you triumph over a predecessor State while claiming to be identical with it? Or, if we focus on the alleged Greater Serbia movement: where is its triumph? Where is the new State that that movement had successfully established, fighting the predecessor State? A quick glance at the map is sufficient to see that the alleged Greater Serbia movement has not been successful in creating a new State. In fact, few movements in recent European history can have been as unsuccessful, few movements can have failed as spectacularly. Professor Crawford on Thursday was firm that "[t]he Court must take account of realities, not [of] fictions"[94]. But if we look at the map, and if we take for fact what Croatia considers to be ambitions of the Greater Serbia movement: Where is the triumph, of that movement? Where is reality, and where is fiction? Croatia's argument on Article 10 (2) is difficult to square with any, even any plausible, assessment of history.

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[92] Ago, Fourth Report, *YILC*, 1972, p. 131, para. 157.

[93] *YILC*, 2001, p. 51, para. 7.

[94] CR 2014/10, p. 42, para. 24 (Crawford).

D. CONCLUDING COMMENTS

84. Mr. President, Members of the Court, to conclude on this aspect, none of the essential requirements set out in Article 10 (2) are met. In its quest for some principle permitting the transfer of responsibility, Croatia overstretches a narrow rule of attribution. Croatia can neither point to a movement which sought separation from the SFRY, nor can it show how such a movement may have been successful. In other words, even if we assume that the rule set out in Article 10 (2) can be applied to the present case, which Serbia submits it cannot because, as of 1991, there was insufficient support for it and all the support that may have existed referred to insurrectional movements: but, even if we apply Article 10 (2) as it stands, then, Mr. President, Members of the Court, the text of that provision needs to be taken seriously. And Croatia's construction simply does not do that — just as, if I may come back to the first part of my presentation — Croatia does not seriously engage with the legal rules governing the temporal scope of treaties.

85. Mr. President, Members of the Court, this concludes my presentation this morning. I thank you for your kind attention. May I now ask you, Mr. President, to give the floor to Professor Zimmermann who will complete the Serbian argument on Article 10 (2).

The PRESIDENT: Thank you very much, Professor Tams and I invite Professor Zimmermann to take the floor and to continue. You have the floor, Sir.

Mr. ZIMMERMANN: Monsieur le président, merci. J'espère bien ne pas apparaître comme un TGV quand je commence maintenant la deuxième partie de mon argument.

A. ART. 10 (2) OF THE ILC ARTICLES ON STATE RESPONSIBILITY CANNOT PROVIDE FOR SERBIA'S RESPONSIBILITY FOR VIOLATIONS OF THE GENOCIDE CONVENTION NOR CAN IT ENDOW THE COURT WITH JURISDICTION AS TO ACTS PRE-DATING APRIL 27, 1992 UNDER ART. IX OF THE GENOCIDE CONVENTION

I. Introduction

1. Mr. President, Members of the Court, Professor Tams has already demonstrated that the rule underlying Article 10 (2) of the ILC Articles, as it stands, does not constitute customary international law, or at least did not at the relevant time in 1991/1992.

2. Besides, he has also shown that the dissolution of the SFRY does not match the scenario contemplated in Article 10 (2).

3. This alone lays Croatia's arguments based on Article 10 (2) of the ILC Articles to rest. And yet, there is an even more fundamental weakness in Croatia's reliance on Article 10 (2) of the ILC Articles that I will now address. This will further illustrate why the Court is not in a position to consider any acts that occurred prior to 27 April 1992 when exercising its jurisdiction based exclusively on Article IX of the Genocide Convention, in the case at hand.

4. In particular, I will demonstrate why, first and in any case, the rule contained in Article 10 (2) of the ILC Articles cannot provide for Serbia's responsibility for violations of the Genocide Convention when it comes to acts pre-dating 27 April 1992. Second, I will show why Article 10 (2) can neither serve to overcome the jurisdictional hurdles inherent in the temporal limitations of Article IX of the Genocide Convention.

II. Art. 10 (2) of the ILC Articles State Responsibility cannot provide for Serbia's responsibility for violations of the Genocide Convention allegedly committed prior to 27 April 1992

5. Mr. President, as previously mentioned, there is no doubt that genocide is prohibited under customary international law. Yet, as confirmed by this Court in *Belgium* v. *Senegal* to which I have already made reference, in the case at hand it is — to reiterate the obvious — only violations of the Genocide *Convention* as such that the Court can consider and decide upon. This is due to the jurisdictional basis under which this case has been brought by Croatia itself.

6. The point I will now address is whether the principle of Article 10 (2) of the ILC Articles, if ever it were applicable, may provide for Serbia's responsibility for violations of the Genocide Convention as to acts pre-dating April 1992 and that despite the lack of retroactivity of the Genocide Convention demonstrated by Professor Tams. And to provide you with the short answer: this, Article 10 (2) of the ILC Articles — even if it were applicable — cannot do. Article 10 (2) is not a magical key.

7. In its written pleadings, Serbia has already quite extensively addressed the matter[95]. In its oral presentation Croatia has attempted to reply to those arguments[96] but, as I will show, was misrepresenting the function and effect of Article 10 (2) of the ILC Articles.

8. At the very least, there seems to be agreement now between the Parties that Article 10 (2) of the ILC Articles is a mere rule of attribution, and indeed an extraordinary, special, limited one. As counsel for Croatia put it: [start slide] "Article 10 [ILC Articles] is a special rule of *attribution* dealing with a specific situation, which explains its placement after Article 9, another such special rule [of attribution]."[97] [End slide]

9. I could not agree more. Accordingly, the question whether a violation has been committed is to be answered by the respective primary rule which itself also defines its applicability *ratione temporis*.

10. In our case, it is thus the Genocide Convention, the relevant treaty only, rather than the norm on attribution, that defines the point in time, after which a violation of that very treaty could have been committed.

11. Let me provide you with an example which will make this obvious.

12. Let us assume that State A ratifies the Genocide Convention. Accordingly, under Article XIII of the Convention, State A only becomes bound by the Convention 90 days later.

13. Let us further assume that during this 90-day period — pending the entry into force of the Convention for State A — the Convention is not yet in force for State A — in this period, the army of State A commits acts of genocide. Obviously the army is an organ of State A under Article 4 of the ILC Articles.

14. I take it that we all agree that no violation of the Genocide *Convention* has taken place for which State A could then be held responsible, since State A was not yet bound by the Convention during that period. State A could be only held responsible for a violation of the Genocide Convention if, indeed, the Convention were to apply retroactively. Yet, as shown by Professor Tams, it does not.

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[95]Counter-Memorial of Serbia (CMS), paras. 320-350; Rejoinder of Serbia (RS), paras. 180-184.

[96]CR 2014/ 12, pp. 42-44, paras. 13-17 (Crawford).

[97]CR 2008/12, pp. 46-46, para. 25 (Crawford); emphasis added.

15. The same would be true for acts of genocide committed by persons acting under the direction or effective control of State A during that same period. Again, we assume the treaty is not yet in force, we are within that 90-day period. Article 8 of the ILC Articles, again a norm on attribution, can neither extend backwards the applicability of the Genocide Convention, nor indeed that of any other treaty. Attribution simply cannot do that.

16. And the same principle then also applies to all other norms on attribution. And, as you will recall, counsel for Croatia agrees that Article 10 (2) indeed constitutes a norm on attribution[98]. Article 10 (2) [ILC Articles] can thus neither provide for a retroactive effect of the Genocide Convention. Indeed, Croatia has not come up with any argument why Article 10 (2) — as yet another norm on attribution — should be treated differently from, let us say, Article 4 or Article 8 of the ILC Articles.

17. Obviously, State A could be held responsible, in my example, for violations of the parallel customary-law-based prohibition of genocide even before the Genocide Convention has entered into force for State A: that is obvious. But, as shown earlier this morning, issues of State responsibility for violations of *customary law* are not before the Court in this case, in a case brought under Article IX ~~***of a treaty***~~, of the Genocide Convention. As you have confirmed in your jurisprudence, the Court lacks jurisdiction to consider violations of customary law in a case brought exclusively under a compromissory clause such as Article IX of the Genocide Convention. And you did so as late as in *Belgium* v. *Senegal*.

18. And this result is confirmed by the very specific system of the 1977 Additional Protocol I to the Geneva Conventions. Said Protocol specifically provides for the possibility that certain insurrectional movements, national liberation movements, may subject themselves to specific treaty obligations by way of a unilateral declaration. By that they make treaty obligations applicable even before a new State is being created and itself becomes a contracting party of the Protocol.

19. Mr. President, counsel for Croatia has attempted to show that Article 10 (2) ILC Articles was meant by the ILC to also apply were the State concerned was not yet bound by the respective primary rule[99] — in our case the Genocide Convention.

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[98]CR 2008/12, pp. 46-46, para. 25 (Crawford).

[99]CR 2014/12, pp. 42-44, paras. 13-17 (Crawford).

20. Let me therefore, subsequent to our written pleadings, take you through the work of the ILC. Contrary to what counsel for Croatia argued[100], the ILC's work confirms that Article 10 (2) ILC Articles, even if taken at face value, presupposes that the relevant primary obligations, and that in our case can only be obligations under the Genocide Convention, were in force for the State concerned at the time the alleged treaty violations were committed. [Screen on]

21. As early as 1972, Special Rapporteur Ago stressed the mere attributive function of what was to become Article 10 (2): he stated that, "references are often made to international responsibility of the State for the wrongful acts of a successful insurrectional movement, whereas what is in fact involved is the attribution of those acts to the State . . ."[101] [Screen off]

22. In 1998, Special Rapporteur Crawford confirmed this view when stating that indeed, and these are his words, a "distinction . . . had to be made between attribution and violation of obligation"[102].

23. Mr. President, again, I could not agree more. Yet, on the one hand the alleged "greater Serbia nationalist movement", as a non-State entity, and as the movement allegedly covered by Article 10 (2), could not have become bound and was not bound by the Genocide Convention, the only relevant norm for our purposes. Obviously, the Genocide Convention is only open for ratification by States.

24. What is more, the Genocide Convention was not yet applicable vis-à-vis Serbia prior to 27 April 1992. Indeed, how could it be otherwise since Serbia only came into existence by April 1992, and as was confirmed by this Court in 2008, following Opinion No. 11 of the Arbitration Commission for the Former Yugoslavia, Serbia only became bound by the Genocide Convention by that very date.

25. Yet, if the only relevant primary norm at stake — the Genocide Convention — was at the relevant time in force *neither* for the alleged movement *nor* for the State concerned — how can then alleged violations of the treaty — which was not in force for anybody, neither for Serbia, nor for the movement — be attributed to the Respondent?

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[100]CR 2014/12, pp. 42-44, paras. 13-17 (Crawford).

[101]Fourth Report on State Responsibility, Special Rapporteur Ago, *YILC*, 1972, Vol. II, p. 145, para. 196.

[102]Summary Records, *YILC*, 1998, Vol. I, p. 248, para. 50 (Crawford).

26. Accordingly, Article 10 (2) ILC Articles presupposes that a violation of international law was committed by the movement which is then attributed to the State that later comes into existence. However, such violations may then accordingly only consist of violations of customary international law in force prior to the creation of the new State. This, as mentioned, is confirmed by the very special case of Article 1 (2) of Additional Protocol I of the Geneva Conventions. There, a national liberation movement itself may enter into treaty commitments, violations of which would then eventually have to be attributed to the new State under Article 10 (2). Yet, said specific system, as an exception, proves the rule.

27. Indeed, this understanding of Article 10 (2) ILC Articles supposing the applicability of the relevant primary rule at the time the violation is being committed was already underlined by one member of the ILC, now a member of the Bench. As Judge Bennouna most aptly stated in 1998: "C'est le problème de la succession de responsabilité: the problem was one of the succession of responsibility."[103]

28. Yet, this requires that responsibility has been incurred in the first place. That in turn presupposes that the primary rule was in force at the relevant time. And for the purpose of these proceedings the only relevant primary rule is the Genocide Convention. Yet, even if ever there has been a relevant movement in our case, it could have never been, and never has been, a Contracting Party of the Convention and could thus not commit violations thereof. Nor has the Convention been in force for the Respondent at the relevant time either.

29. In 1998, Special Rapporteur Crawford — unlike today it seems to me — still shared this view — and indeed the position taken by Serbia on the matter — when stating that he, "was very close to Mr. Bennouna"[104], since, and then he continues, [screen on] "the article [draft Article 15 as it then stood, as you will recall] was concerned with the general problem of the attribution of responsibility and not with the question of the primary rules which the State or the insurrectional movement might have broken"[105]. [Screen off] That has to be decided by the primary rule.

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[103]Summary Records, *YILC*, 1998, Vol. I, p. 252, para. 19 (Bennouna).

[104]*Ibid*., p. 253, para. 36 (Crawford).

[105]*Ibid*.

30. Accordingly, there was agreement in the ILC that Article 10 (2) was not meant to extend responsibility backwards in time.

31. That allows me to address Croatia's general argument as to the alleged technical and formalistic character of Serbia's approach on the matter[106].

32. In short, Croatia argues that Serbia's understanding of Article 10 (2) would lead to a situation where a seceding State could never be held responsible for acts of genocide, committed by the eventually successful insurrectional movement in the wake of secession.

33. Members of the Court, I am afraid to say that Croatia must have gotten it wrong. As the Court has confirmed, and rightly so, genocide is prohibited under customary international law[107]. This prohibition is obviously not only binding upon States but also upon non-State actors such as insurrectional movements and besides, this customary law provision is also applicable at all relevant times. The issue of retroactivety does not come up. Accordingly, provided a movement commits acts of genocide, and if we assume for a minute that Article 10 (2) ILC Articles is to be indeed considered a codification of customary law, the State that comes out of such a movement is then responsible for violations of international law committed by such movement since their acts would then be attributed to the newly created State.

34. And such responsibility could then be implemented through the regular mechanisms of State responsibility. Obviously, proceedings before this Court are an efficient and important method of enforcing such obligations. But, as Part III of the ILC Articles and general international law confirms there are also other ways of implementing State responsibility through States or the international community at large, including the recourse to counter-measures.

35. And besides, this of course does not preclude the ICJ, provided the Court has jurisdiction for example under Article 36 (2) under the optional clause, to also judge upon such responsibility for violations of customary law, for violations of the customary law prohibition of genocide committed by the movement and attributed to the new State — if we assume in the first place that the Article 10 (2) is *customary* law, anyhow.

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[106]CR 2008/13, para. 28 (Crawford).

[107]*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)*, p. 110, para. 161.

36. In our case, however, the Court's jurisdiction is limited, under Article IX, to determining violations of a certain treaty only, namely the Genocide Convention. Accordingly the Court — as confirmed in *Belgium* v. *Senegal* — may not consider possible violations of customary law, as serious as they might have been.

37. Indeed, and let us not get that wrong, what Croatia, in guise of its arguments based on Article 10 (2), thus wants the Court to do is to set aside the fundamental principle that the Court's jurisdiction is consent based. Croatia portrays such reliance by Serbia on State consent as the fundamental basis of the Court's exercise of jurisdiction as being formalistic in nature.

38. And, as you are aware, the Court has stressed, time and again, that substantive international law on the one hand, and the Court's jurisdiction on the other, are clearly two different matters. As the Court has put it:

> "there is a fundamental distinction between the question of the acceptance by States of the Court's jurisdiction and the conformity of their acts with international law. Whether or not States have accepted the jurisdiction of the Court, they are required to fulfil their obligations under . . . international law, including international humanitarian and human rights law, and they [States] remain responsible for acts attributable to them which are contrary to international law."[108]

39. And, Mr. President, it is simply this fundamental principle, and this fundamental principle only, that Serbia is asking the Court to apply in the case at hand.

40. This scope of application of the principle underlying Article 10 (2) I have just outlined is confirmed by the fact that State practice and decisions by arbitral tribunals on which both, the ILC's work, which led to Article 10 (2), as well as relevant academic writing, have been based, refer exclusively to situations where violations of customary law had been committed. Treaty violations committed prior to the creation of the State concerned by such insurrectional movements, to be then attributed to a State, were never considered, and indeed how could it be otherwise.

41. It is also this understanding of Article 10 (2) that is fully in line with the general set-up, structure and content of the overall ILC Articles on State Responsibility.

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[108] *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. 52-53, para. 127.

42. For one, it is this understanding that is in line with the parallel case of Article 11, which, similar to Article 10 (2), also covers a case of *ex post facto* attribution. With regard to what became Article 11, then Special Rapporteur Crawford stated in 1998: [start slide]

> "It should be stressed that the proposed rule is one of attribution only. In respect of conduct which has been adopted, it will always be necessary to consider whether the conduct *contravenes the international obligations of the adopting State at the relevant time*."[109]

And, that is the time the conduct took place. And the same principle applies to Article 10 (2). [End slide]

43. And, it is also this understanding of Article 10 (2) that is in line with the intertemporal law principle which the ILC has embraced from the very beginning of its work on State responsibility[110] — a principle now reflected in Article 13. It is also telling that Article 10 (2) was not listed as an exception to this rule — neither by the then Special Rapporteur on the matter and counsel for Croatia in his recent book on State responsibility, nor by the ILC in its commentary on Article 13.

44. Accordingly, Article 10 (2) cannot provide for Serbia's responsibility for violations of the Genocide *Convention* — the only relevant primary obligations at issue — committed prior to 27 April 1992. And, that holds true, even if we were to assume *arguendo* that Article 10 (2) has codified customary law and is applicable in our case.

III. Article 10 (2) of the ILC Articles on State Responsibility cannot endow the Court with jurisdiction as to acts pre-dating 27 April 27 1992 under Article IX Genocide Convention

45. Mr. President, with your permission, I will now move on to the relationship between Article 10 (2) and the Court's jurisdiction under Article IX. As I will show, Article 10 (2) which serves only to *attribute* the behaviour of a given group of persons to a State, cannot — even if it were applicable — stretch the Court's jurisdiction backwards in time.

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[109] First Report on State Responsibility, Special Rapporteur Crawford, *YILC*, 1998, p. 55, para. 282; emphasis added.

[110] J. Crawford, *State Responsibility: The General Part*, CUP, 2013, p. 244.

46. Indeed, what Croatia is attempting to do, and wants the Court to believe, is that you can convert a norm on attribution, that is, a secondary norm of the law of State responsibility, into a compromissory clause of its own.

47. Yet, as the titles of both the General List entry and the 2008 Judgment indicate, the case at hand concerns exclusively the application of the Genocide Convention[111]. In order to fall within the ambit of Article IX, the dispute must accordingly be about the interpretation or application of the Genocide Convention by *Contracting Parties* to it — that is alleged violations of the Genocide Convention *by Serbia* after it came into existence in April 1992. ***T***his case, as indicated, is not about the application of the Genocide Convention by the SFRY, or by a movement which was not yet a State party to the Convention prior to this date, and indeed not even a State[112].

48. Croatia thus perceives Article 10 (2) as a magic key that widely opens the Court's jurisdictional gates, which otherwise only open once a State comes into existence, and to the extent only that it accepts a given compromissory clause such as Article IX.

49. If indeed we were to take Croatia's approach seriously, it would have major repercussions for the Court's jurisdictional scheme. In Croatia's view it would serve to overcome deliberate restrictions in jurisdictional provisions. To test that argument, we can look at ***a*** hypothetical case — but one that could very well arise in this Great Hall of Justice.

50. Mr. President, Members of the Court, assume a new State — perhaps South Sudan — upon independence, accepts the Court's jurisdiction under the Optional Clause of Article 36 (2). But, let us further assume South Sudan does ***so*** with respect to future conflicts only — its optional clause deliberately is *not* retroactive, it contains a reservation in this regard. This would be a case which, in Serbia's submission, is relatively close to the present one. Could the new State — South Sudan — now be brought before this Court for violations of international law committed during its insurrectional struggle for violations of international law committed by the insurrectional movement that brought about the creation of South Sudan?

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[111] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia* v. *Serbia), Preliminary Objections, Judgment, I.C.J. Reports 2008*; *separate opinion of Judge Tomka*, p. 520, para. 12.

[112] *Ibid.*

51. It seems obvious that in such a scenario the Court would lack jurisdiction *ratione temporis*. The Court would lack jurisdiction because the title of jurisdiction had no retroactive effect given the limitation to that effect in South Sudan's Article 36 (2) declaration. It also seems obvious that Article 10 (2) of the ILC Articles cannot alter this result. Article 10 (2) cannot serve as a magic key to overcome the limitation as to the Court's temporal jurisdiction contained in South Sudan's declaration accepting the Court's jurisdiction.

52. In the very logic of Croatia's argument, however, the Court should indeed be in a position to nevertheless exercise jurisdiction vis-à-vis South Sudan. It should do so despite the temporal limitation contained in South Sudan's declaration. The Court should simply do so by virtue of the principle underlying Article 10 (2) of the ILC Articles. To paraphrase Croatia pleadings: "the only question is whether their conduct [that is, of the officials of South Sudan in *statu nascendi*] is attributable to [South Sudan]"[113].

53. Indeed, in Croatia's view, it would suffice "that the conduct . . . was already governed by international law"[114]. This would suffice in Croatia's view to overcome the temporal limitation contained in South Sudan's Article 36 (2) declaration.

54. Serbia submits that Article 10 (2) cannot overcome a temporal reservation in an Article 36 (2) declaration. If that is true, however, it must follow that Article 10 (2) of the ILC Articles can neither overcome a similar temporal limitation inherent in a compromissory clause, such as Article IX of the Genocide Convention. Croatia has to rely on retroactivity of Article IX of the Genocide Convention.

55. At best, the principle underlying Article 10 (2) of the ILC Articles, if ever it has codified customary law on the matter and if ever it was applicable to the case at hand, might provide for some limited substance-matter responsibility for violations of customary law. But it cannot expand the Court's jurisdiction *ratione temporis*.

56. What accordingly is brought out is that Article 10 (2), as a simple rule of attribution, can neither expand backwards the applicability of the Genocide Convention, nor can it broaden the Court's temporal jurisdiction.

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[113] See, *mutatis mutandis*, RC, para. 7.65.

[114] *Ibid*.

57. Mr. President, Members of the Court, let me now move on to Croatia's argument based on the declaration adopted on 27 April 1992 which, contrary to Croatia's contention, can neither provide for a transfer of State responsibility from the SFRY to Serbia nor for the Court's jurisdiction when it comes to events prior to the critical date.

B. THE 27 APRIL 1992 DECLARATION CANNOT EFFECT A TRANSFER OF STATE RESPONSIBILITY FROM THE SFRY TO THE FRY/SERBIA

58. It was for the first time in 2010 that Croatia, in an unveiled attempt to construe the Court's jurisdiction and the admissibility of its claim concerning facts pre-dating the critical date, came up with the catch-all idea that a declaration adopted on that day by parliamentarians of the SFRY, and of its constituent Republics of Serbia and of Montenegro, could bring about the State responsibility of the FRY/Serbia for each and every alleged violation of international law that had occurred before that date, and involving organs of its predecessor State, the SFRY.

59. This was 11 years after Croatia had brought the case, and 18 years after the declaration had been made. That alone is telling.

60. In its written pleadings, Serbia has already quite extensively addressed this argument based on the 27 April declaration[115]. Let me thus, at this juncture, first reiterate that any such reliance on the declaration, when it comes to matters of State responsibility, stands in sharp contrast to the Court's own understanding of the declaration — your understanding of the declaration, as laid down in your 2008 Judgment[116].

61. More specifically, the Court limited the effect of the declaration — I quote from your 2008 Judgment — "as having had the effects of a *notification of succession to treaties*"[117].

62. Accordingly, the Court found, that, by virtue of the declaration, Serbia only became bound by the respective treaty *ad futurum* but not as, by the same token, also assuming State responsibility for alleged treaty violations of its predecessor State that had occurred allegedly *in the past.*

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[115]RS, paras. 201 *et seq.*

[116]See RS, paras. 206-211.

[117]*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia* v. *Serbia), Preliminary Objections, Judgment, I.C.J. Reports 2008*, p. 451, para. 111; emphasis added.

63. The Court stated that it attributes to the declaration [start slide] "the effect that . . . *from that date onwards* the FRY would be bound by the obligations *of a party* in respect of all the multilateral conventions to which the SFRY had been a party at the time of its dissolution . . ."[118].

64. Had the Court, as claimed by Croatia, really wanted to interpret the declaration in such an overbroad manner, as Croatia claims, it would not have specifically referred to the FRY as being bound "by the obligations *of a party*"[119] — yet that is what the Judgment stated.

65. Put otherwise, the Judgment did *not* state that the FRY would be bound by the obligations of the SFRY *in toto* — in general — including obligations under applicable rules of State responsibility. Had that really been the case — as now claimed by Croatia —, the Court would have certainly referred to the FRY as having become bound by the obligations of the SFRY as such — *at large*. Yet, this is not what your Judgment said and what your Judgment meant.

66. What is more, the Court limited the effects of the declaration to the FRY becoming bound by the Genocide Convention "*from that date onwards*"[120] only. There is no hint in the Judgment whatsoever that the Court wanted to endow the declaration with some kind of retroactive effect. Nor is there any hint of the Court's understanding that the FRY had wanted to assume *ex post facto* obligations under the law of State responsibility, the SFRY, ***its*** predecessor State, had eventually previously incurred. [End slide]

67. Finally, if Croatia's simplistic "one-fits-all" understanding of the 1992 declaration was correct — if that was a correct understanding of the declaration — it would be hard to understand, to say the least, why the Court in 2008, after a ten-page discussion of the legal effects of the declaration[121], still found that it would need to have more elements before it[122] before it would be able to decide the question whether Serbia can be held responsible for acts that occurred prior to April 1992.

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[118] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia* v. *Serbia), Preliminary Objections, Judgment, I.C.J. Reports 2008*, pp. 454-455, para. 117; emphasis added.

[119] *Ibid.*

[120] *Ibid.*

[121] *Ibid.*, pp. 446-455, paras. 98-117.

[122] *Ibid.*, p. 460, para. 129.

68. Rather, provided Croatia's novel and disingenuous interpretation of the legal effects of the declaration was correct, the Court could have — and indeed should have — in 2008, simply rejected Serbia's third preliminary objection. Serbia would have then been bound; Serbia would have assumed State responsibility**.** ***T***hat would have been the end of the matter. Yet, this is not what the Court did in 2008 and that is why, I am afraid to say, Croatia's interpretation of the legal effects of the 1992 declaration is simply not compatible with the very logic of your 2008 Judgment in the case.

69. Indeed, it is only an understanding of the 1992 declaration in line with your 2008 Judgment as amounting — at most — to a declaration of succession with regard to the Genocide Convention that is in line with the Court's entire series of decisions since 1993, dealing with the former Yugoslavia. As early as 1996, the Court stated that the intention underlying the declaration was to express a willingness to remain a contracting party of the treaties of the SFRY — but the 1996 Judgment did not elaborate on other matters. As the Court put it then — and as acknowledged by Croatia itself[123], the declaration expressed [start slide] the "intention . . . by Yugoslavia [was] *to remain bound by the international treaties* to which the former Yugoslavia was party"[124]. [End slide] The Court then confirmed this limited understanding of the declaration in its 2007 Judgment in the *Bosnia* case[125].

70. And it was exactly in the same vein that the Court in 2008 — as mentioned — interpreted the effect of the declaration solely "as having had the effects of a notification of succession to treaties"[126] ~~***only***~~. Accordingly "from that date onwards" rather than retroactively — as claimed by Croatia — Serbia "would be bound by the obligations *of a party*" [127] in respect of, *inter alia*, the Genocide Convention.

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[123]Reply of Croatia (RC), para. 7.74.

[124]*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; emphasis added.

[125]*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)*, p. 93, para. 121.

[126]*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia* v. *Serbia), Preliminary Objections, Judgment, I.C.J. Reports 2008*, p. 451, para. 111.

[127]*Ibid.*, p. 455, para. 117; emphasis added.

71. Mr. President, what is more is that, in light of your jurisprudence and the work of the ILC on the matter, the said declaration for several reasons does not amount to a legally-binding, unilateral declaration with the content Croatia claims[128].

72. For one, under the Court's jurisprudence, for a unilateral declaration to be binding it must emanate from a head of State, a head of Government or a minister for foreign affairs[129] or, at least, by some member of government with a technical portfolio within the purview of their respective ministry[130]. This is — to state the obvious — not the case: the declaration was adopted by a group of parliamentarians of a State that was on the verge of dissolving, and those of two of its sub-entities.

73. Besides, second, any such declaration must, to use the words of the ILC, "[i]n the case of doubt as to the scope of the obligations resulting from such a declaration . . . be interpreted in a restrictive manner"[131]. And this is true, to again quote the ILC, "in particular when the unilateral declaration has no specific addressee"[132]. And, besides, one must also take into account — this is again the ILC — you must take "account . . . [of] all the circumstances in which the act occurred"[133].

74. Yet, it seems far-fetched to assume that the authors of the declaration had wanted to formally acknowledge State responsibility of Serbia/FRY, for acts that had occurred prior to the adoption of the declaration, and prior to the creation of the FRY.

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[128]See also RS, paras. 201 *et seq.*

[129]*Nuclear Tests (Australia* v. *France), Judgment, I.C.J. Reports 1974*, p. 269, paras. 49-51; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Yugoslavia), Preliminary Objections, I.C.J. Reports 1996 (II)*, pp. 621-622, para. 44; *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo* v. *Belgium), Judgment, I.C.J. Reports 2002*, p. 21, para. 53; see also *Legal Status of Eastern Greenland (Denmark* v. *Norway), Judgment, 1933, P.C.I.J., Series A/B, No. 53*, p. 71.

[130]Case concerning *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo* v. *Rwanda), Jurisdiction and Admissibility, I.C.J. Reports 2006*, p. 27, para. 46.

[131]Principle 7 of the ILC Guiding Principles applicable to unilateral declarations of States capable of creating legal obligations, UN doc. A/61/10, p. 368.

[132]ILC Commentary to Principle 7 of the ILC Guiding Principles applicable to unilateral declarations of States capable of creating legal obligations, UN doc. A/61/10, p. 377, para. 2.

[133]*Frontier Dispute (Burkina Faso* v. *Republic of Mali), Judgment, I.C.J. Reports 1986*, p. 574, para. 40; see also *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo* v. *Rwanda), Jurisdiction and Admissibility, I.C.J. Reports 2006*, p. 29, para. 53; and *Nuclear Tests (Australia* v. *France; New Zealand* v. *France), I.C.J. Reports 1974*, p. 269, para. 51, and p. 474, para. 53.

75. Finally, third, in order to evaluate the legal effects of a unilateral declaration, it is necessary to take "account of the reactions to which they gave rise"[134] and whether the State relying on it took "cognizance of [the] commitments undertaken"[135].

76. Croatia, however, from the very time the declaration had been adopted, continuously and uniformly took the position that it did *not* entail legal consequences, and that it could not even make the FRY a contracting party to the treaties the SFRY had entered into.

77. How can Croatia, then, now argue that it relied *bona fide* on the FRY incurring State responsibility for alleged violations of such treaties — and even for those pre--dating the time the declaration was made?

78. Mr. President, I am afraid to say that this adds to the artificial character of Croatia's jurisdictional case to which I had referred in the very beginning of my pleading this morning: 11 years after bringing the case before the Court and 18 years after the declaration was adopted, Croatia suddenly — and for obvious reasons — ascribes the declaration both the character of a legally binding unilateral declaration and a far-reaching and almost unlimited content.

79. Accordingly, the declaration can neither be attributed with the legal effects Croatia wants it to have. As in the case of Article 10 (2), the declaration neither amounts to a magic key that could unlock the jurisdictional gates of the Peace Palace.

80. Mr. President, let me now say a couple of sentences on the issue of alleged "continuous violations".

C. ALLEGED "CONTINUOUS VIOLATIONS" UNDER THE GENOCIDE CONVENTION

81. Contrary to what counsel for Croatia has pleaded[136], Serbia has already fully addressed the issue of "continuous violations" in its written pleadings[137], in particular when it comes to the obligation to prevent and punish genocide. I can thus be brief.

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[134]Principle 3 of the ILC Guiding Principles applicable to unilateral declarations of States capable of creating legal obligations, UN doc. A/61/10, p. 368.

[135]ILC Commentary to Principle 3 of the ILC Guiding Principles applicable to unilateral declarations of States capable of creating legal obligations, UN doc. A/61/10, p. 372, para. 3.

[136]CR 2014/12, p. 47, para. 26 (Crawford).

[137]RS, paras. 230 *et seq.*

82. For one, the obligation of Serbia to prosecute, put on trial and eventually punish, persons allegedly having committed genocide only encompasses acts of genocide committed in Serbia itself[138]. Croatia does not make that claim.

83. Besides, States under Article VI of the Genocide Convention only have to co-operate with the ICTY to the extent the person concerned is accused of genocide[139]. Mr. President, as everybody is aware in this room, nobody has ever been indicted for genocide ***in Croatia*** by the ICTY.

84. Finally, this Court confirmed in its *Bosnia* Judgment that the obligation to prevent genocide is not governed by Article 14 (2) of the ILC Articles, but instead is governed by Article 14 (3)[140]: it is simply not a continuing violation.

85. What is more is that the Court, again in your *Belgium* v. *Senegal* Judgment, which Croatia did not refer to, had a chance to confirm that, "nothing in the Convention against Torture reveals an intention to require a State party to criminalize . . . acts of torture that took place *prior to its entry into force for that State*, or to establish its jurisdiction over such acts . . ."[141].

86. Why should this then be different for the Genocide Convention? And finally, Mr. President, the Court in *Belgium* v. *Senegal* did not even find it necessary to discuss the issue whether th***is*** obligation~~s~~ to punish torture possesses a continuous character.

87. That brings me to my last issue, namely that of Croatia's standing.

D. CROATIA'S LACK OF STANDING CONCERNING ACTS PRE-DATING 8 OCTOBER 1991

88. Both in its written and oral pleadings, Croatia has on frequent occasions alleged violations of the Genocide Convention by Serbia not only for a time period pre-dating Serbia's becoming a party thereof. Croatia also has referred to acts pre-dating Croatia itself becoming a party of the Genocide Convention, i.e. acts pre-dating 8 October 1991. This includes *inter alia* the

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[138]See *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)*, p. 226, para. 442.

[139]*Ibid.*, p. 227, para. 443.

[140]*Ibid.*, p. 222, para. 431.

[141]*Questions relating to the Obligation to Prosecute or Extradite (Belgium* v. *Senegal), Judgment, I.C.J. Reports 2012 (II)*, p. 457, para. 100; emphasis added.

events in Eastern Slavonia in the summer and early fall of 1991[142] of which we have heard last week.

89. This raises the obvious question of Croatia's standing. Last Friday, we listened very carefully and with great interest when counsel for Croatia addressed the matter but were surprised that counsel again did not deal at all with your most recent and most relevant holding on the issue: it is again your 2012 *Belgium* v. *Senegal* Judgment.

90. There, as the Court is obviously aware, while making specific reference to the Genocide Convention and to the Court's 1951 Advisory Opinion[143], the Court first found that the prohibition of torture — just like the prohibition of genocide — forms, "part of customary international law and it has become a peremptory norm *(jus cogens)*"[144] entailing obligations *erga omnes partes* within the meaning of your famous *Barcelona Traction* jurisprudence[145].

91. Notwithstanding ***in*** *Belgium* v. *Senegal*, the Court still found that a contracting party is only, [screen on] — and you see it on the screen — "entitled, *with effect from . . . the date when it became party to the Convention*, to request the Court to rule on . . . compliance with . . . obligation[s arising under the Convention]"[146]. [Screen off]

92. Mr. President, Croatia is disregarding your most recent jurisprudence on the matter where you have further elaborated the concept of *erga omnes partes* obligations.

93. In line with this jurisprudence, Croatia, having become a party to the Genocide Convention as of 8 October 1991, only has standing to request the Court to rule on Serbia's compliance with its obligations under the Genocide Convention from that date onwards — and that is 8 October 1991. Indeed, given that Croatia — unlike Belgium in *Belgium* v. *Senegal* — only came into existence as a State by that date, the Court's considerations in *Belgium* v. *Senegal* must even apply *a fortiori*.

94. Or, as Sir Gerald Fitzmaurice put it much more eloquently in *Northern Cameroons*:

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[142]See, e.g., CR 2014/8, pp. 15 *et seq.*, paras. 15 *et seq.* (Ní Ghrálaigh).

[143]*Questions relating to the Obligation to Prosecute or Extradite (Belgium* v. *Senegal), Judgment, I.C.J. Reports 2012 (II)*, p. 449, para. 68.

[144]*Ibid.*, p. 457, para. 99.

[145]*Ibid.*, p. 449, para. 68.

[146]*Ibid.*, p. 458, para. 104; emphasis added.

> "[S]ince the Applicant State did not exist as such at the date of these acts or events, these could not have constituted, in relation to it, an international wrong, nor have caused it an international injury. An act which did not, in relation to the party complaining of it, constitute a wrong at the time it took place, obviously cannot *ex post facto* become one."[147]

95. Mr. President, I have nothing to add to Sir Gerald Fitzmaurice's statement.

96. Mr. President, Members of the Court, let me end this part of my presentation with addressing the alleged time gap that is said to arise if one were to follow Serbia's approach[148].

E. THE SO-CALLED "TIME GAP" ARGUMENT

97. For one, as already mentioned by one Member of this Court[149], it is Serbia's predecessor State, the SFRY as a contracting party of the Genocide Convention, that eventually incurred responsibility for violations of the Genocide Convention by its organs as long as it existed — and provided such violations took place in the first place. It is then for the specific rules of State succession to responsibility, as *lex specialis*, to provide for a transfer of these obligations to the respective successor State.

98. And it is those obligations of the SFRY — succeeded by a given successor State — that may then be implemented and enforced by the regular mechanisms of international law.

99. What is more, assuming *arguendo* that Article 10 (2) of the ILC Articles would apply to the case at hand — and it does not, as shown by Professor Tams — and, if indeed, Article 10 (2) were applicable, it would lead to the attribution of violations of customary law — including obviously also violations of the customary law prohibition of genocide — committed by an insurrectional movement and attributable to the new State to be created. A successor State could thus, even with regard to events during transitional periods, be held responsible.

100. And it seems obvious that the Court could then decide upon those two issues — succession to responsibility, and attribution under Article 10 (2) if applicable — the Court could decide those issues, provided it has jurisdiction *inter alia* under Article 36 (2) of the Court's Statute. Yet, even if eventually the Court might not be in a position to exercise jurisdiction for lack

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[147] *Northern Cameroons (Cameroon* v. *United Kingdom), Judgment, I.C.J. Reports 1963*; separate opinion of Judge Sir Gerald Fitzmaurice, p. 129.

[148] CR 2014/12, pp. 37-38, paras. 1-3 (Crawford).

[149] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia* v. *Serbia), Preliminary Objections, Judgment, I.C.J. Reports 2008*; separate opinion of Judge Tomka, pp. 518-519.

of consent by the Parties, the Parties still remain bound by their obligations under international law as the Court itself has pointed out on frequent occasions, and as I have mentioned previously.

101. Mr. President, Members of the Court, there simply is no time gap in protection vis-à-vis acts of genocide even in times of transition, contrary to what Croatia pleaded.

F. CONCLUSION

102. Mr. President, Members of the Court, this brings me to the end of our presentation of today. We have shown that — for a whole set of reasons — the Court, acting on the basis of Article IX, is not in a position to judge upon events that occurred before 27 April 1992 or, at least before 8 October 1991 — and there is no need to repeat them one by one.

103. What is important to note, however, is that this case was brought more than four years after the conflict in Croatia had ended; it was brought eight years after the worst atrocities had taken place.

104. It was brought as a case concerning an armed conflict that, by now, has ended almost 20 years ago.

105. It was brought on the basis of Article IX of the Genocide Convention as the sole jurisdictional basis — a treaty which only entered into force, as between the Parties, as this Court has determined, on 27 April 1992.

106. It was brought, Mr. President, Members of the Court, by Croatia, in order to have the Court rewrite and reverse the jurisprudence of both, that of international criminal tribunals, as shown by Professor Schabas, and it was brought, more importantly, in order to have you rewrite your jurisprudence on the crime of genocide developed in your landmark Judgment in the Bosnian case.

107. And in order to reach this goal, Croatia also wants you to rewrite and reverse your jurisprudence on the Court's jurisdiction and the admissibility of claims most recently confirmed in your Judgments in *Georgia* v. *Russia* and in *Belgium* v. *Senegal*.

108. If that attempt by Croatia was to be successful both, on substance, but more specifically with regard to issues of jurisdiction and admissibility, the gates of the Peace Palace would be pushed wide open, inviting claims to be brought concerning events that date back a long time ago.

109. Let me again quote Sir Gerald Fitzmaurice in *Northern Cameroons*, who, in a similar context, noted that if such an attempt were ever to be successful, "there would be no limit to the antiquity of the matters in respect of which claims could constantly be made, and perpetually be liable to be re-opened"[150]. Thank you, Mr. President, Members of the Court, for your kind attention.

The PRESIDENT: Thank you very much, and this brings to an end to this presentation by Serbia. The Court will meet again tomorrow morning at 10 a.m. to hear the continuation of Serbia's first round of oral argument. Thank you.

The Court is adjourned.

The Court rose at 1 p.m.

[150] *Northern Cameroons (Cameroon* v. *United Kingdom), Preliminary Objections, Judgment, I.C.J. Reports 1963*; separate opinion of Judge Sir Gerald Fitzmaurice, p. 130.