SEPARATE OPINION OF PRESIDENT TOMKA

Temporal scope of the Court's jurisdiction — Issues left open by the Court's 2008 Judgment on preliminary objections — Conclusion that the Court has jurisdiction in so far as Serbia is alleged to have succeeded to the responsibility of the SFRY not supported by text of Article IX or its travaux préparatoires *— Dispute must be between Contracting Parties and concern "the interpretation, application or fulfilment" of the Convention by those parties — Disputes "relating to the responsibility of a State for genocide" a subset of such disputes —* Travaux préparatoires *demonstrate that such disputes are those involving allegations that a State is responsible for acts of genocide perpetrated by individuals and attributable to it — Essential subject-matter of the dispute whether Serbia breached the Convention — Dispute regarding Serbia's succession to the SFRY's responsibility not a dispute about the interpretation, application or fulfilment of the Convention by Serbia — Only acts occurring subsequent to Serbia's becoming party to the Convention fall within the Court's jurisdiction under Article IX — Factual continuity and identity between actors during armed conflict in Croatia before and after 27 April 1992 not to be confused with situation in law — Court nonetheless able to consider events prior to 27 April 1992 in order to determine whether pattern of acts existed from which* dolus specialis *could be inferred.*

Admissibility of the claim — Monetary Gold *principle — Inapplicability of* Monetary Gold *principle in respect of non-existent predecessor States acceptable where there is agreement as to which successor States succeeded to the relevant obligations — Position complicated where uncertainty as to which successor States might ultimately bear responsibility — Decision on SFRY's responsibility may concern several successor States — Relevance of 2001 Agreement on Succession Issues.*

1. Although I share the conclusions of the Court on the merits of the claim brought by Croatia and the counter-claim raised by Serbia, I feel compelled to explain my position on the temporal scope of the Court's jurisdiction and to offer some remarks on the admissibility of the claim.

I. The Court's Jurisdiction *Ratione Temporis*

2. At the hearing in 2008 on preliminary objections, Serbia maintained its second objection, an alternative one, "that claims based on acts and omissions which took place prior to 27 April 1992 are beyond the jurisdiction of this Court and inadmissible" (*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. 420, para. 22). In its 2008 Judgment, the Court found that "the second preliminary objection submitted by the Republic of Serbia does not, in the circumstances of the case, possess an exclusively preliminary character" (*ibid.*, p. 466, para. 146 (4)). The Court identified "two inseparable issues" raised by Serbia's second preliminary objection:

> "The first issue is that of 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; this may be regarded as *a question of the applicability of the obligations under the Genocide Convention to the FRY* [*(sic)*!] *before 27 April 1992*. The second issue, that of admissibility of the claim in relation to those facts, and involving questions of attribution, concerns the consequences to be drawn with regard to *the responsibility of the FRY* for those same facts *under the general rules of State responsibility*." (*Ibid.*, p. 460, para. 129; emphasis added.)

It went on to explain that "[i]n order to be in a position to make any findings on each of these issues, the Court will need to have more elements before it" (*ibid.*, p. 460, para. 129).

3. In my separate opinion I respectfully, and not without regret, disagreed with the majority on this point. I expressed the view

> "that the question of 'consequences to be drawn from the fact that the FRY [now Serbia] became a State and a party to the Genocide Convention on 27 April 1992' is a legal question which should [have] be[en] decided already at [that] stage and for the answering of which there [was] no need of any further information" (*ibid.*, separate opinion of Judge Tomka, p. 521, para. 17).

I then noted that "[w]hat is conspicuous is that the Court does not even indicate what other elements it needs" *(ibid.)*.

4. There is no indication in today's Judgment as to what new elements the Court received which allowed it to rule on the issue of the temporal scope of its jurisdiction, which it found, in 2008, not to be of an exclusively preliminary character. It is not even clear how these "new elements", if any, assisted it in resolving the remaining jurisdictional issue. Rather, the Court adopts a legal construction which it could have adopted already in 2008, although I cannot subscribe to it for the reasons given in this opinion.

5. I cannot fail to mention that what in the 2008 Judgment was for the Court "a question of the *applicability of the obligations* under the Genocide Convention *to the FRY* before 27 April 1992" (emphasis added, quoted above in paragraph 2 of this opinion) has now become for the

Court the question of whether "the responsibility of the *SFRY* had been engaged" and, if so, "whether the *FRY succeeded* to that responsibility" (Judgment, para. 112; emphasis added). I also note that while in the 2008 Judgment the Court indicated that it would have to deal, in the context of the admissibility of the claim in relation to facts prior to 27 April 1992, with "the consequences to be drawn with regard to the *responsibility of the FRY* for those same facts *under the general rules of State responsibility*" (emphasis added, quoted above in paragraph 2 of this opinion), in the present Judgment the issue of whether the FRY is responsible is to be determined by the rules of general international law on State *succession* (*ibid.*, para. 115) "if the responsibility of the SFRY had been engaged" (*ibid.*, para. 112).

6. The Court, earlier in this case, determined that Serbia became party to the Genocide Convention as of 27 April 1992 by way of succession, as the declaration adopted on that day and the Note from the Permanent Mission of Yugoslavia to the Secretary-General of the United Nations "had the effect of a notification of succession by the FRY to the SFRY in relation to the Genocide Convention" (*I.C.J. Reports 2008*, p. 455, para. 117). It follows that it is only from this day that the FRY (Serbia) has been bound by the Convention as a party to it in its own name.

7. However, the Court has now concluded that it has jurisdiction to consider acts occurring prior to 27 April 1992 and alleged to amount to violations of the Genocide Convention in so far as Serbia is said to have succeeded to the responsibility of the SFRY for such acts (Judgment, paras. 113-114 and 117). In this respect, the Judgment draws a distinction between "Croatia's principal argument" that Serbia is directly responsible for allegedly genocidal acts occurring prior to 27 April 1992 on the basis that they are attributable to it, and its "alternative argument" that Serbia's responsibility arises as a result of succession to the SFRY's responsibility (*ibid.*, para. 114). The Judgment rightly concludes that the FRY (and thus Serbia) was not bound by the Convention prior to 27 April 1992 and that, even if acts that occurred prior to this date were attributable to it, they cannot have amounted to a breach of the Convention by that State (*ibid.*, para. 105). The Court cannot therefore have jurisdiction over Croatia's claim in so far as it is based on the "principal argument" that the relevant acts occurring prior to that date are attributable to Serbia. It is only on the basis of Croatia's "alternative argument" that Serbia's responsibility results from succession to the responsibility of the SFRY that the Court concludes that its jurisdiction extends to acts prior to 27 April 1992.

8. For such conclusion, however, in my view, there is no support in either the text of Article IX or its *travaux préparatoires*. The issue before us is the interpretation of the compromissory clause which is contained in Article IX of the Genocide Convention. That provision reads as follows:

"Disputes between the Contracting Parties relating to the interpre-

> tation, application or fulfilment of the present Convention, including those relating to the responsibility of a State for genocide or for any of the other acts enumerated in Article III, shall be submitted to the International Court of Justice at the request of any of the parties to the dispute."

9. It is evident from the text of Article IX that the relevant dispute must be between the Contracting Parties[1]. Critically, the dispute must be about "the interpretation, application or fulfilment" of the Convention by *those* Contracting Parties[2]. It is more than doubtful that a compromissory clause such as Article IX would give the Court jurisdiction to determine a dispute between two Contracting Parties that is solely about the interpretation, application or fulfilment of the Convention by *another* State. It would completely undermine the logic behind such clauses — by virtue of which States give consent for *their* conduct to be adjudicated upon by a judicial tribunal — if the dispute were to relate to the interpretation, application or fulfilment of a given instrument by a third State.

10. The presence of the words "including those [disputes] relating to the responsibility of a State for genocide" does not alter this important conclusion. The word "including" makes it apparent that disputes "relating to the responsibility of a State for genocide" are a subset of those relating to "the interpretation, application or fulfilment" of the Convention. As the Court put it in the Bosnian *Genocide* case:

> "The word 'including' tends to confirm that disputes relating to the responsibility of Contracting Parties for genocide, and the other acts enumerated in Article III to which it refers, are comprised within a broader group of disputes relating to the interpretation, application or fulfilment of the Convention." (*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. 114, para. 169.)

One commentator similarly notes that "[t]he use of the verb 'to include' suggests that the scope of jurisdiction *ratione materiae* is not widened by the insertion of that particular provision"[3].

11. The *travaux préparatoires* reveal that, as a result of the insertion of the words "including those [disputes] relating to the responsibility of a State for genocide" (in French: "y compris [les différends] relatifs à la

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[1] See *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. 519, para. 12.

[2] *Ibid.*

[3] Robert Kolb, "The Scope *Ratione Materiae* of the Compulsory Jurisdiction of the ICJ" in Paola Gaeta (ed.), *The UN Genocide Convention — A Commentary*, Oxford University Press, 2009, p. 468.

responsabilité d'un Etat en matière de génocide"), the Court's jurisdiction "includes [its] power . . . to determine international 'responsibility of a State for genocide' *on the basis of attribution to the State of the criminal act of genocide perpetrated by a person*" (*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)*, separate opinion of Judge Tomka, p. 345, para. 61; emphasis added).

12. As I have noted previously, the text of Article IX, as it refers to "responsibility of a State for genocide", lends itself — *prima vista* — to at least three possible readings[4].

13. The first one, that the provision can be understood as simply providing for the Court's jurisdiction to determine the responsibility of a State for breach of the obligations under the Convention, is too restrictive and difficult to retain in view of the principle of effectiveness in treaty interpretation. It would only state *expressis verbis* what is otherwise implied in every compromissory clause providing for the jurisdiction of the Court to adjudicate disputes regarding the application of a convention. As the Permanent Court of International Justice stated:

> "It is a principle of international law that the breach of an engagement involves an obligation to make reparation in an adequate form. Reparation therefore is the indispensable complement of a failure to apply a convention and there is no necessity for this to be stated in the convention itself. Differences relating to reparations, which may be due by reason of failure to apply a convention, are consequently differences relating to its application." (*Factory at Chorzów, Jurisdiction, Judgment No. 8, 1927, P.C.I.J., Series A, No. 9*, p. 21.)

In the words of this Court,

> "it would be superfluous to add [the phrase 'the responsibility of a State for genocide' into the compromissory clause] unless the Parties had something else in mind . . . It would indeed be incompatible with the generally accepted rules of interpretation to admit that a provision of this sort occurring in [a convention] should be devoid of purport or effect." (*Corfu Channel (United Kingdom* v. *Albania), Merits, Judgment, I.C.J. Reports 1949*, p. 24.)

14. The second possible reading, namely that the Court has jurisdiction to determine that a State has committed the crime of genocide, would imply the criminal responsibility of States in international law, a concept

[4] *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)*, separate opinion of Judge Tomka, p. 339, para. 53. I have already made, in more detail, the points that follow here in that separate opinion (pp. 339-340, paras. 54-56).

which has not been accepted in international law, but was rather opposed by a great number of States and was not retained by the International Law Commission when it finalized and adopted, in 2001, the text of the Draft Articles on Responsibility of States for Internationally Wrongful Acts.

15. The third reading of the clause, according to which the Court can determine the responsibility of a State on the basis of the attribution to that State of acts constituting the crime of genocide committed by its perpetrators, is then most plausible. This is so not only in view of the text of the clause, in particular having regard to the French text which speaks of "responsabilité d'un Etat en matière de génocide", and not "pour le génocide", but also the *travaux préparatoires*, which reflect a sometimes confusing debate in the Sixth Committee in 1948 when the text of the Convention was finalized.

16. The *travaux préparatoires* are discussed in detail in my previous separate opinion[5]. It is, however, worth highlighting that the United Kingdom had suggested an amendment to draft Article VII (the current Article VI) that provided that:

> "Where the act of genocide as specified by Articles II and IV is, or is alleged to be *the act of the State or Government itself or of any organ or authority of the State or Government*, the matter shall, at the request of any other party to the present Convention, be referred to the International Court of Justice, whose decision shall be final and binding. Any acts or measures found by the Court to constitute acts of genocide shall be immediately discontinued or rescinded and if already suspended shall not be resumed or reimposed."[6]

17. The amendment was later withdrawn in favour of a joint amendment with Belgium to Article X (the current Article IX)[7], which provided for disputes "between the High Contracting Parties relating to the interpretation, application or fulfilment of the present Convention, including disputes relating to the responsibility of a State for any of the acts enumerated in Articles II and IV" to be submitted to the International Court of Jus-

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[5] *I.C.J. Reports 2007 (I)*, separate opinion of Judge Tomka, pp. 332-345, paras. 40-61, in particular paragraphs 50-59 devoted to Article IX of the Genocide Convention.

[6] See United Nations doc. A/C.6/236 and Corr. 1, reproduced in Hirad Abtahi and Philippa Webb, *The Genocide Convention: The Travaux Préparatoires*, Brill, 2008, Vol. II, p. 1986; emphasis added; also *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)*, separate opinion of Judge Tomka, p. 337, para. 49.

[7] See United Nations doc. A/C.6/SR.100, reproduced in Hirad Abtahi and Philippa Webb, *The Genocide Convention: The Travaux Préparatoires*, *supra* note 6, p. 1714; also *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)*, separate opinion of Judge Tomka, p. 337, para. 49.

tice[8]. The United Kingdom representative recalled that this new amendment "represented an attempt to combine the provisions of Article X as it stood with the essential features of the Belgian and United Kingdom amendments to Article VII, namely, the responsibility of States and an international court empowered to try them"[9]. Moreover, he outlined that he "had been impressed by the fact that all speakers had recognized that the responsibility of the State was almost always involved in all acts of genocide; the Committee, therefore, could not reject a text mentioning the responsibility of the State"[10]. Finally, he noted that "the responsibility envisaged by the joint Belgian and United Kingdom amendment was the international responsibility of States following a violation of the convention. That was civil responsibility, not criminal responsibility"[11].

18. It seems apparent that, while States were concerned by the prospect of the State being held *criminally* responsible[12], the intent behind Article IX was to allow disputes relating to violations by States of *their* obligations under the Convention[13] — committed through the acts of persons whose conduct was attributable to them — to be brought before the Court. Article IX, read as a whole and in the context of other provisions of the Convention, does not provide solid support for the Court's willingness to embark on an inquiry into Serbia's alleged responsibility by way of succession through just observing that Article IX "contains no limitation regarding the manner in which [a State's] responsibility might be engaged" (Judgment, para. 114). The *travaux préparatoires* point in a different direction: no one during the discussion leading to the adoption of the Convention ever mentioned the issue of succession. The intent was rather to allow the Court to consider disputes involving an allegation that the State is to be held responsible for genocide because the acts of its perpetrators are attributable to

[8] See United Nations doc. A/C.6/258, reproduced in Hirad Abtahi and Philippa Webb, *The Genocide Convention: The Travaux Préparatoires*, *supra* note 6, p. 2004; also *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)*, separate opinion of Judge Tomka, p. 340, para. 57.

[9] United Nations doc. A/C.6/SR103, reproduced in Hirad Abtahi and Philippa Webb, *The Genocide Convention: The Travaux Préparatoires*, *supra* note 6, p. 1762 (Fitzmaurice).

[10] *Ibid.*

[11] See *ibid.*, p. 1774; also *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)*, separate opinion of Judge Tomka, p. 341, para. 58.

[12] See, e.g., Christian J. Tams, "Article IX" in Christian J. Tams, Lars Berster and Björn Schiffbauer (eds.), *Convention on the Prevention and Punishment of the Crime of Genocide: Commentary*, Munich, C. H. Beck, 2014, p. 299.

[13] See also *ibid.*, pp. 299-300 ("there was little disagreement that, by virtue of Article IX, it would be possible to seek an ICJ judgment on whether States had complied with provisions of the Convention prohibiting acts of genocide").

the State, thus amounting to breaches of the Convention by the State itself.

19. This was the understanding of the Court in the Bosnian *Genocide* case, where it noted that:

> "The responsibility of a party for genocide and the other acts enumerated in Article III arises from *its failure to comply with the obligations imposed by the other provisions of the Convention*, and in particular, in the present context, with Article III read with Articles I and II." (*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. 114, para. 169; emphasis added.)

20. This is also the understanding of Article IX that is reflected in the Court's 2008 Judgment on preliminary objections, referred to above, in which it focused on the outstanding issues as relating to whether Serbia's responsibility for violations of the obligations under the Convention could have been engaged by acts attributable to it and committed prior to 27 April 1992. Indeed, this is the understanding of the Convention that is reflected in Croatia's claims submitted to the Court, namely that Serbia *itself* breached the Convention. Thus, in its initial Application, Croatia claimed "that the Federal Republic of Yugoslavia has breached *its legal obligations* toward the people and Republic of Croatia" under various provisions of the Convention (Judgment, para. 49; emphasis added). In its final submissions in the written pleadings, it likewise claimed that the Respondent "is responsible for violations of the Convention . . . *(a)* in that persons *for whose conduct it is responsible* committed genocide on the territory of the Republic of Croatia" (*ibid.*, para. 50; emphasis added). This submission was maintained in Croatia's final submissions presented at the close of the hearings (*ibid.*, para. 51). This is in my view the subject-matter of the dispute before the Court.

21. The fact that the focus of questions as to the responsibility of a State for genocide is on responsibility arising from breach of the Convention by that State also tends to confirm the point made above, that disputes relating to the "interpretation, application or fulfilment" of the Convention — of which disputes relating to State responsibility for genocide are a type — are disputes about the interpretation, application or fulfilment of the Convention *by those parties in dispute*. Thus, any dispute between contracting parties relating to State responsibility for genocide must arise from the alleged failure of one of those parties to properly interpret, apply or fulfil that Convention.

22. The Judgment attempts to skirt around the fact that Article IX only gives jurisdiction over disputes concerning the "interpretation, appli-

cation and fulfilment" of the Convention *by the contracting parties in dispute*. It acknowledges that the dispute in question in this case is between Croatia and Serbia but indicates that it appears "to fall squarely within the terms of Article IX" because "the essential subject-matter of the dispute is whether Serbia is responsible for violations of the Genocide Convention and, if so, whether Croatia may invoke that responsibility" (Judgment, para. 90).

23. In the first place, it is doubtful whether this accurately reflects the "essential subject-matter of the dispute". As has already been outlined, Croatia has never put forward a formal claim in its final submissions that Serbia's responsibility arose because it succeeded to the responsibility of the SFRY, with the relevant acts being attributable to the latter and amounting to a violation of the SFRY's obligations under the Convention. It is true that, rather late in the proceedings, Croatia put this forward as an *argument* (as indeed the Judgment acknowledges: see para. 109; emphasis added), in order to address the jurisdictional point, but this cannot change the dispute's essential characteristics, which relate to whether Serbia *breached* the Convention because the relevant acts alleged to amount to genocide are attributable to it.

24. But even if the "essential subject-matter of the dispute" were accurately characterized in the Judgment, the fact that Croatia has put Serbia's succession to responsibility in issue does not make that dispute, at least in so far as it relates to events prior to 27 April 1992, one about the "interpretation, application or fulfilment" of the Convention *by Serbia*[14]. In this respect, the Judgment sets out three issues that are, on Croatia's "alternative argument", in dispute (Judgment, para. 112). It suggests that these issues "concern the interpretation, application and fulfilment of the provisions of the Genocide Convention" (*ibid.*, para. 113). However, the first two issues relate to the application and fulfilment of the Genocide Convention *by the SFRY*, not the FRY, and the former's responsibility for alleged genocide. The third issue — whether the FRY (Serbia) succeeded to the SFRY's responsibility — cannot be characterized as a dispute relating to the "interpretation, application or fulfilment" of the Convention, nor as one "relating to the responsibility of a State for genocide" once the meaning of the latter phrase has been properly understood. This is because it does not relate to Serbia's obligations under the Convention and its failure to properly interpret, apply or fulfil them. I am not convinced that the compromissory clause in Article IX extends to questions of State succession to responsibility. The legal term "responsibility" does not include the concept of "succession". As the Court stated in the *Navigational Rights* case "the terms used in a treaty must be interpreted in light of what is determined to have been the parties' common intention, which is, by definition, contemporaneous with the treaty's conclusion"

[14] See *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.

(*Dispute regarding Navigational and Related Rights (Costa Rica* v. *Nicaragua), Judgment, I.C.J. Reports 2009*, p. 242, para. 63). The term "responsibility", as it appears from the discussions in 1948, was certainly not given by the Convention's drafters the meaning which the Court seems to be inclined to give it now for the particular purposes of this case. Nor can recourse to evolutive interpretation of the terms used in the Convention be of assistance as the term and concept "responsibility" is also at present a distinct one from the term and concept "succession" in international law. Matters relating to "succession to responsibility" are therefore beyond the jurisdiction *ratione materiae* provided for in Article IX of the Convention. Similarly, the second issue, as identified by the Court, namely, "whether [the acts contrary to the provisions of the Convention] were attributable to and thus engaged the responsibility of the SFRY [*(sic)*!]" cannot fall "squarely within the scope *ratione materiae* of the jurisdiction provided for in Article IX" (Judgment, para. 113) because it is not a dispute "between the Contracting Parties" relating to *their* "interpretation, application or fulfilment" of the Convention. The allegation is that the SFRY breached the Convention, and that claim could only have been brought, pursuant to Article IX of the Convention, against the SFRY itself.

25. Having consistently denied the continuity between the legal personality of the SFRY and Serbia, Croatia must bear the consequences of its legal position on this issue[15]. It is accepted that Serbia did not become a party to the Convention until 27 April 1992 and any dispute about acts said to have occurred before that date cannot therefore be about the interpretation, application or fulfilment of that Convention by Serbia which has appeared before the Court as the Respondent. It did not have obligations under the Convention as a party to it prior to 27 April 1992. In my view, therefore, only acts, events and facts which occurred on the dates subsequent to Serbia's becoming party to the Convention fall within the jurisdiction of the Court under Article IX of the Genocide Convention.

26. This conclusion, however, does not prevent the Court from considering acts which occurred prior to 27 April 1992 without formally ruling on their conformity with the obligations which were, from the point of view of international law, the obligations of the SFRY. The obligations of the SFRY under the Convention could have been breached by any of its organs, irrespective of their place in the constitutional structure of the SFRY, or any person whose acts were attributable to that State. There was undoubtedly a certain factual continuation and identity between those who were actors in the period of armed conflict which raged in Croatia both before and after

[15] See also *I.C.J. Reports 2008*, separate opinion of Judge Tomka, p. 522, para. 18.

27 April 1992. But this factual continuity and identity should not be confused with the situation in law, where the thesis of discontinuity between the SFRY and the FRY in the end prevailed in view of the position taken by some "key players" in the international community and the States, including Croatia, which were earlier republics constituting the former SFRY. Nonetheless, as the Court had to determine, in relation to acts which were committed *after* 27 April 1992, whether those acts were committed with the necessary intent *(dolus specialis)*, the Court could have looked at the events occurring prior to that date in order to determine whether the later acts fell within a particular pattern from which the intent could be inferred.

27. Hence, despite my position on the limitation of the Court's jurisdiction *ratione temporis*, I was not prevented from joining my colleagues on the Bench in looking at those acts and events preceding 27 April 1992 and joining them in their overall conclusion that the Croatian claim of genocide having been committed during the armed conflict in its territory must be rejected.

II. Admissibility: The *Monetary Gold* Principle

28. Even if one accepts the Court's conclusion on its jurisdiction, serious questions arise as to the admissibility of Croatia's claim. As has been noted, the Judgment takes the position that it is within the Court's jurisdiction, as conferred by Article IX, for it to consider alleged breaches of the Convention by the SFRY where Serbia is said to be responsible for those breaches by way of succession to responsibility. The Court is thereby indicating its readiness to rule on the responsibility of the SFRY, a State that is no longer in existence and is not before the Court, as a necessary precursor to determining the responsibility of the Respondent State that is presently before the Court. Stated in such terms, this is rather an unusual position for the Court to take.

29. In the *Monetary Gold* case, the Court found that it could not rule on a claim brought by Italy against France, the United Kingdom and the United States of America where a third State, Albania, was not before the Court. The Court considered that:

> "To adjudicate upon the international responsibility of Albania without her consent would run counter to a well-established principle of international law embodied in the Court's Statute, namely, that the Court can only exercise jurisdiction over a State with its consent." (*Monetary Gold Removed from Rome in 1943 (Italy* v. *France, United Kingdom and United States of America), Preliminary Question, Judgment, I.C.J. Reports 1954*, p. 32.)

30. It noted that "Albania's legal interests would not only be affected by a decision, but would form the very subject-matter of the decision" *(ibid.)* and accordingly declined to exercise its jurisdiction in respect of

the claim. As the Court noted in the *Nauru* case, "the determination of Albania's responsibility was a prerequisite for a decision to be taken on Italy's claims" (*Certain Phosphate Lands in Nauru (Nauru* v. *Australia), Preliminary Objections, Judgment, I.C.J. Reports 1992*, p. 261, para. 55).

31. The Judgment makes it clear that the Court's jurisdiction is dependent, in relation to those acts occurring prior to 27 April 1992, on Croatia's argument that Serbia succeeded to the responsibility of the SFRY for acts of genocide contrary to the Genocide Convention. A determination as to the responsibility of the SFRY is therefore an essential prerequisite to a determination of whether Serbia's responsibility is engaged.

32. However, in so far as the SFRY is concerned, the Court has opined that the *Monetary Gold* principle is inapplicable in this case because the SFRY has ceased to exist (Judgment, para. 116). This may be an acceptable position to take where — as in the *Gabčíkovo-Nagymaros Project* case[16] — there is an agreement as to which of the successor States will succeed to the relevant obligations of the State that has ceased to exist. However, the position becomes more complicated where there is uncertainty as to which of a number of States might ultimately bear responsibility for the acts of a predecessor State[17]. In this case, as has already been noted, Serbia is only one of five equal successor States to the SFRY. A decision as to the international responsibility of the SFRY may well have implications for several, if not each, of those successor States, depending on what view is taken on the question of the allocation of any such responsibility as between them. This is particularly the case in light of the fact that the 2001 Agreement on Succession Issues between the five successor States provides that "[a]ll claims against the SFRY which are not otherwise covered by this Agreement shall be considered by the Standing Joint Committee established under Article 4" (United Nations, *Treaty Series*, Vol. 2262, p. 251, Ann. F, Art. 2). It can be no answer that

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[16] *Gabčíkovo-Nagymaros Project (Hungary/Slovakia), Judgment, I.C.J. Reports 1997*, p. 7. See the Preamble to the Special Agreement excerpted at page 11 and also page 81, paragraph 151. See also *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. 521, para. 14.

[17] See James Crawford, *State Responsibility: The General Part*, Cambridge University Press, 2013, pp. 666-667, discussing the *Gabčíkovo-Nagymaros Project* case:

> "[E]ven if there had been no agreement that Slovakia would succeed to Czechoslovakia's rights and obligations under the treaty, and even if Hungary's allegations of internationally wrongful acts against Czechoslovakia was considered the very subject matter of the dispute, there seems no question that the Court would have applied the *Monetary Gold* principle to protect the legal interests of a State no longer in existence. On the other hand, if a bilateral dispute between Hungary and the Czech Republic had required the Court to determine whether or not Slovakia was the sole successor state to Czechoslovakia in respect of some particular matter, the Court might well have decided that it was prevented from acting by the *Monetary Gold* principle."

the Court has ultimately found that there was no breach of the Convention and accordingly the SFRY's responsibility was not engaged.

33. Nonetheless, it bears emphasis that the operation of the *Monetary Gold* principle will serve to limit the effects of the Judgment in this case. The Court will be unable to exercise jurisdiction under Article IX, or any other Convention which contains a clause providing for the jurisdiction of the Court, over claims brought by one State party to the Convention against another State party that are based on alleged breaches by a third State that — for whatever reason — is not before the Court, where that third State remains in existence. This Judgment is therefore strictly confined to its unusual facts and should not be taken as a precedent that compromissory clauses will normally be subject to such novel interpretations, nor that the Court will generally be prepared to rule on the responsibility of States not before it.

III. Concluding Remark

34. This case illustrates the limits of the Court's judicial power, which remains based on State consent. Where many States continue not to recognize its jurisdiction generally, but only in compromissory clauses contained in certain multilateral conventions, then some claims, like the ones in this case, are framed in such a way as to make them fall within the scope of such a convention. But the threshold to prove them might be too high, like in the case of genocide. The fact that the Court has rejected the claim of Croatia and the counter-claim of Serbia should not be viewed as the Court not having seen the tragedy which unfolded in the process of the disintegration of the former Yugoslavia. In fact, the Court has acknowledged that many atrocities were committed during the armed conflict. What the Parties failed to prove was the presence of genocidal intent when these atrocities were perpetrated. Had the Court been endowed with more general jurisdiction, the claims could have been framed differently.

35. It is to be hoped that more States will, in the future, recognize the Court's jurisdiction much more broadly. The challenge for the Court remains to strengthen the confidence of States not only by its display of objectivity, impartiality and independence, but also by strictly interpreting the provisions which confer jurisdiction on it. It can do that by focusing its inquiries on *whether* jurisdiction has been conferred on it, rather than by endeavouring to find ways *how* to assume it.

(Signed) Peter Tomka.