SEPARATE OPINION OF JUDGE SKOTNIKOV

Jurisdiction

1. According to paragraph 129 of the 2008 Judgment (*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), the Court needed to assess the merits in order to determine the two "inseparable issues" of jurisdiction and admissibility[1]. Yet, in the present Judgment, the determination that the Court has jurisdiction is made prior to examining any element of the merits and is detached from the issue of admissibility. I agree with this approach. It is clear from the well-established jurisprudence of the Court that the issues of jurisdiction and admissibility are undoubtedly separable and that jurisdiction must be, and has always been, decided first. Secondly, the issue of jurisdiction in the present case can be decided by the Court without examining the merits. Indeed, the Judgment does not rely on any element of the merits in order to determine jurisdiction. It is also worth noting that, in adopting this approach, the Court makes it clear that the issue of attribution under the general rules of State responsibility may not be conflated or combined with the issue of consent-based jurisdiction[2].

2. While I support the general approach of the Court in dealing with paragraph 129 of the 2008 Judgment, I am unable to agree with its con-

[1] Paragraph 129 of the 2008 Judgment provided as follows:

> "In the view of the Court, the questions of jurisdiction and admissibility raised by Serbia's preliminary objection *ratione temporis* constitute two inseparable issues in the present case. 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 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. In 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."

[2] *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*, dissenting opinion of Judge Skotnikov, pp. 547-548, para. 4.

clusion as to jurisdiction. In paragraph 117 of the Judgment, the Court states that

> "[h]aving concluded in its 2008 Judgment that the present dispute falls within Article IX of the Genocide Convention in so far as it concerns acts said to have occurred after 27 April 1992, the Court now finds that, to the extent that the dispute concerns acts said to have occurred before that date [the date on which the FRY came into existence], it also falls within the scope of Article IX and that the Court therefore has jurisdiction to rule upon the entirety of Croatia's claim"[3].

However, it is not sufficient that there is a dispute between the Parties that falls within the scope of Article IX. The existence of a dispute is a requisite element of jurisdiction. Yet, as the Court has stated on innumerable occasions, it is the fundamental principle of consent which forms the basis of jurisdiction. The Judgment completely disregards the issue of consent by confusing jurisdiction with applicable law. Paragraph 115 of the present Judgment seeks to rely on paragraph 149 of the 2007 Judgment in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro)* (*I.C.J. Reports 2007 (I)*, p. 105), even though this latter paragraph dealt with the identification of the applicable law beyond the Genocide Convention. This is undoubtedly a task which the Court must undertake once it has established that it has jurisdiction. Indeed, this is precisely what the Court does in the present Judgment; having found, erroneously, in my view, that it has jurisdiction, the Court goes on to make a statement, in paragraph 125, which is identical in substance to that made in paragraph 149 of the 2007 Judgment, stating, *inter alia*, that

> "[i]n ruling on disputes relating to the interpretation, application or fulfilment of the Convention, including those relating to the responsibility of a State for genocide, the Court bases itself on the Convention, but also on the other relevant rules of international law, in particular those governing the interpretation of treaties and the responsibility of States for internationally wrongful acts".

[3] The Court, in its 2008 Judgment, when considering Serbia's first preliminary objection, dealt not with the issue of whether the dispute fell within Article IX of the Genocide Convention, but rather with the question of whether Croatia had validly instituted proceedings against Serbia, in accordance with Article 35 of the Statute of the Court, given that the latter was not a Member of the United Nations as of the date of the filing of the Application (*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. 429-444, paras. 57-92), and with the question of whether Serbia was a party to the Genocide Convention at the date of the filing of the Application (*ibid.*, pp. 444-455, paras. 93-117). Serbia's third preliminary objection related to whether certain Croatian claims, concerning the submission of certain persons to trial, information on missing persons and the return of cultural property, had become moot (*ibid.*, pp. 460-465, paras. 131-144).

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However, identifying the law which would have been applicable if the Court had jurisdiction is no substitute for establishing that the Court has jurisdiction under Article IX of the Genocide Convention. The task before the Court in the present Judgment was either to identify the legal mechanism by which the FRY assumed obligations under the Genocide Convention before it came into existence, or to determine that no such legal mechanism existed.

3. Ultimately, the Court does neither. It merely suggests that obligations under the Genocide Convention might be applicable to the FRY before 27 April 1992 by virtue, as Croatia argues, of succession to responsibility. Then it transforms this preliminary issue into a question for the merits (see Judgment, para. 117), and goes on to consider whether acts contrary to the Genocide Convention took place prior to 27 April 1992. After answering this question in the negative, the Court does not return to the issue of succession to responsibility.

4. Had this issue been dealt with as a preliminary one, as it should have been, in order to demonstrate Serbia's consent to the Court's jurisdiction, the Court would have had to establish that the doctrine of succession to responsibility was part of general international law at the time of Serbia's succession to the Genocide Convention on 27 April 1992. This is, of course, an impossible task, since there is no jurisprudence or State practice to support this hypothesis.

5. Moreover, the Court clearly pointed towards rejection of the notion of succession to responsibility when it decided, both in its 2007 *Bosnia* Judgment and in its 2008 Judgment on preliminary objections in this case, that Montenegro, a successor State to Serbia and Montenegro (formerly the FRY), had not consented to the jurisdiction of the Court and could not be a Respondent in the respective cases (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro), Judgment, I.C.J. Reports 2007 (I)*, pp. 75-76, paras. 75-77; *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. 423, paras. 32-33). Likewise, the FRY (now Serbia) is a successor State to the SFRY. Like Montenegro, in respect of the State Union of Serbia and Montenegro, Serbia did not inherit the right to the international legal personality of the SFRY. Like Montenegro, Serbia did not accept responsibility in the present case for the conduct of its predecessor State, and thus did not consent to the Court's jurisdiction in respect of that State. In spite of this, the Court sees no jurisdictional problems in identifying the following questions that would need to be decided in order to determine whether Serbia is responsible for the alleged violations of the Genocide Convention:

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"(1) whether the acts relied on by Croatia [prior to the date on which the FRY came into existence] took place; and, if they did, whether they were contrary to the Convention;
(2) if so, whether those acts were attributable to the SFRY at the time that they occurred and engaged its responsibility; and

(3) if the responsibility of the SFRY had been engaged, whether the FRY succeeded to that responsibility" (Judgment, para. 112).

The fact that the Court limits itself to answering only the first question does not render this "three-step solution" any more tenable. I cannot see how this construction could possibly be justified by the Court's obvious observation that the SFRY, whose responsibility or lack thereof the Court is prepared to determine, "no longer exists . . . no longer possesses any rights and is incapable of giving or withholding consent to the jurisdiction of the Court" (*ibid.*, para. 116).

6. The Court decided in 2008 that:

> "[t]he 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 before 27 April 1992*" (*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).

In 2015, the Court simply does not make this determination, which, in 2008, it considered indispensable in order to address the question of jurisdiction raised by Serbia as its second preliminary objection. Thus, the Court fails to fulfil its duty to satisfy itself that it has jurisdiction (see, for example, *Jurisdictional Immunities of the State (Germany* v. *Italy: Greece intervening), Judgment, I.C.J. Reports 2012 (I)*, p. 118, para. 40).

7. By way of a final observation before turning to the merits, I would note the following: in 2004, in the *Legality of Use of Force* cases, the Court determined that the FRY lacked the capacity to appear before the Court, because it became a Member of the United Nations on 1 November 2000 and, thus, was not a State party to the Statute of the International Court of Justice as of 29 April 1999, the date of the filing of the Applications (see, for example, *Legality of Use of Force (Serbia and Montenegro* v. *Belgium), Preliminary Objections, Judgment, I.C.J. Reports 2004 (I)*, pp. 310-311, paras. 78-79). In 2007, the Court found that, in its 1996 Judgment on preliminary objections in the *Bosnia and Herzegovina* v. *Serbia and Montenegro* case, before reaching its decision on jurisdiction, it must have addressed, "as a matter of logical construction . . . by necessary implication", the issue

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of the FRY's capacity to appear before the Court, even though this was not mentioned at all in the 1996 Judgment[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)*, pp. 98-102, paras. 132-140). The "necessary implication" of this "logical construction" of 2007 can be nothing other than that in 1996, the FRY, in the eyes of the Court, was a State party to the Court's Statute, and a Member of the United Nations, at the time of the filing of the relevant Application instituting proceedings, namely, 20 March 1993[5]. In the 2008 Judgment on preliminary objections in the present case, a novel idea was advanced, namely that, although the Court was open to the FRY only as of 1 November 2000, the date of its United Nations membership (*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. 444, para. 91), this did not matter, since Croatia could simply have refiled its Application of 2 July 1999 after 1 November 2000 (*ibid.*, pp. 429-444, paras. 57-92)[6]. In other words, that which was an insurmountable obstacle to the Court's jurisdiction in the *Legality of Use of Force* cases became a minor procedural issue in the present case.

8. Thus, while addressing the above-mentioned cases arising from events related to the dissolution of the SFRY, the Court has created at least three "parallel universes". In one, the FRY was not a Member of the United Nations before 1 November 2000 (the 2004 Judgment on preliminary objections, *Legality of Use of Force*). In another, the FRY was a Member of the United Nations well before that date (the 2007 *Bosnia and Herzegovina* v. *Serbia and Montenegro* Judgment). In yet another, the FRY's membership of the United Nations at the time of the institution of proceedings, or, rather, the lack of it, is devoid of any consequences (the 2008 Judgment on preliminary objections, *Croatia* v. *Serbia*). In 2015, in the present Judgment, a fourth, very peculiar "parallel universe" has emerged — one in which the Court is agnostic as to whether the FRY may have been bound by obligations under the Genocide Convention before it came into existence as a State; this, however, does not prevent the Court from ruling on the part of the Croatian claim relating to the period when the FRY did not exist.

[4] 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)*, declaration of Judge Skotnikov, pp. 366-367.

[5] It is clear from the *Legality of Use of Force* Judgments that the Court first addressed the issue of Serbia's United Nations membership in 2004 only (see *Legality of Use of Force (Serbia and Montenegro* v. *Belgium), Preliminary Objections, Judgment, I.C.J. Reports 2004 (I)*, pp. 310-311, para. 79).

[6] 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*, dissenting opinion of Judge Skotnikov, p. 546, para. 1.

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9. I can only express my relief that this Judgment constitutes the concluding chapter in this strange and somewhat strained tale of curious jurisdictional constructions which, to borrow the words of the Court in a different but related context, "[are] not free from legal difficulties" (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide, (Bosnia and Herzegovina* v. *Yugoslavia (Serbia and Montenegro)), Provisional Measures, Order of 8 April 1993, I.C.J. Reports 1993*, p. 14, para. 18; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro), Judgment, I.C.J. Reports 2007 (I)*, pp. 97-98, paras. 130-131).

Merits

10. I maintain the view which I expressed in my declaration appended to the 2007 Judgment, that nothing in Article IX suggests that the Court is empowered to go beyond settling disputes relating to State responsibility for genocide and other acts enumerated in Article III of the Genocide Convention[7]. As to whether or not the crime of genocide or other Article III acts have been committed, the Court's role is limited by its lack of criminal jurisdiction. For this reason, the Court, for example, lacks the capacity to establish the existence of genocidal intent, since the Genocide Convention addresses genocidal intent solely in the context of a criminal procedure, as a necessary mental element of the crime of genocide and other acts contrary to the Convention. Of course, genocidal intent may be inferred from a pattern of events, yet this task remains one for a competent criminal tribunal (the ICTY in the present case). The Court's role is to determine whether it has been sufficiently established that acts proscribed by the Genocide Convention were committed (see paragraph 14 below). After making this determination, the Court must then continue to deal with its primary task of addressing the question of State responsibility for genocide.

11. In this Judgment, of course, the Court never comes to deal with this issue, since it concludes that genocide and other punishable acts referred to in Article III of the Convention did not take place. I agree with this conclusion, but I have doubts about the way in which the Court arrives at this finding.

12. When engaging in the exercise of determining the existence or non-existence of the *actus reus* and *dolus specialis* of the crime of genocide, the Court deals with matters which it is ill-equipped to resolve. It is curious that, in the sections devoted to consideration of the merits of the principal claim and counter-claim, reference is made to genocide, rather

[7] 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)*, declaration of Judge Skotnikov, pp. 370-375.

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than to the crime of genocide. This attempt to get around the fact that the Court does not have criminal jurisdiction cannot, of course, "decriminalize" genocide. It remains a crime under the Genocide Convention. True, when referring to State responsibility for genocide, the Convention's compromissory clause — Article IX — does not mention the word "crime". However, such language certainly does not transform the "Convention on the Prevention and Punishment of the Crime of Genocide" into something else. Rather, if anything, this is indicative of the premise that States cannot be held criminally responsible.

13. At the same time, it is axiomatic that States can be held responsible for genocide through the mechanism of attribution, as, in general, wherever international law criminalizes an act, a State can be held responsible if that criminal act is committed by individuals capable of engaging such responsibility. The rules of State responsibility in this respect are rather straightforward. Indeed, they are referred to as applicable law in the present Judgment (see paragraph 125)[8].

14. In the present case, in order to make a determination as to whether the crime of genocide and other acts enumerated in Article III of the Genocide Convention have been committed, instead of insisting on the Court's capacity to conduct its own enquiry to this end, it would have been sufficient to have taken notice of the relevant proceedings of the ICTY. These proceedings, of course, have never involved any charges of genocide in respect of events in Croatia. It is worth recalling that this Court has recognized that the ICTY is an international penal tribunal in accordance with Article VI of the Genocide 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. 227, para. 445). Thus, in these proceedings, as in the *Bosnia and Herzegovina* v. *Serbia and Montenegro* case, the Court was in the "ideal" situation in that, for almost a quarter of a century now, there has been an international penal tribunal possessing jurisdiction with respect to the region in question and to the States involved[9]. As a matter

[8] Thankfully, the Court, in the present Judgment, does not return to the rather artificial and unnecessary notion featured in the 2007 Judgment of States themselves committing crimes punishable under the Genocide 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)*, pp. 113-114, paras. 166-169).

[9] Hypothetically, there may be circumstances where no such tribunal exists but where, for instance, the parties agree that genocide did indeed take place; or where the occurrence of genocide is so manifest as not to require further elucidation, being, for example, reflected in an open State policy; or where the claims of genocide are manifestly concocted. In such circumstances, the Court could address the issue of State responsibility, or the lack thereof, without the risk of foraying into the field of criminal culpability. However, these and other hypotheticals should be left for another day, which, I sincerely hope, will never come. That is to say, I hope that no situation ever arises which would make this Court address the responsibility of a State for genocide.

of fact, the Court, in both cases, when making determinations as to whether the crime of genocide and other acts enumerated in Article III of the Convention have occurred, has largely relied on (indeed more than it has been prepared to acknowledge), and has never contradicted, the findings of the ICTY. Both now and in 2007, this reliance was decisive for the Court in reaching its conclusions as to whether or not genocidal acts were committed.

(Signed) Leonid SKOTNIKOV.

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