DECLARATION OF JUDGE XUE

1. Much to my regret, I have voted against the operative paragraph 1 of the Judgment regarding the Court's jurisdiction to entertain Croatia's claim in so far as it concerns acts prior to 27 April 1992. For the reasons explained below, I reserve my position with regard to the Court's finding that in the context of the present case it could found its jurisdiction on the basis of State succession to responsibility under Article IX of the Genocide Convention. I maintain the view that Serbia's second objection to jurisdiction *ratione temporis* and admissibility should be upheld.

I. Issues Left over by the 2008 Judgment

2. When the Court in the 18 November 2008 Judgment on Preliminary Objections (*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. 412 ("the 2008 Judgment")) drew the conclusion that Serbia's second jurisdictional objection did not possess an exclusively preliminary character, it primarily addressed Croatia's argument that Serbia as a State *in statu nascendi* was responsible for acts carried out by its officials and organs or otherwise under its direction and control before 27 April 1992. In that connection, the Court highlighted "two inseparable issues" for it to determine at the merits stage: the applicability of the obligations under the Genocide Convention to acts that occurred before the Federal Republic of Yugoslavia ("the FRY") came into existence as a separate State, and the question of attribution of such acts to the FRY for invoking its international responsibility under general international law (*ibid.*, p. 460, para. 129). In identifying these "two inseparable issues", the Court apparently had in mind the rules as stated in the International Law Commission's Articles on State Responsibility (Annex to General Assembly resolution 56/83, 12 December 2001, "the ILC Articles").

3. Under the ILC Articles, two conditions must be satisfied before international responsibility of a State can be invoked. First, there should be an internationally wrongful act in breach of international obligations which were effective and binding on the State at the time when the act occurred. Secondly, such act should be attributable to the State, constituting "an act of the State" ("Text of the Draft Articles with Commentaries thereto, Responsibility of States for Internationally Wrongful Acts:

General Commentary", *Yearbook of the International Law Commission (YILC)*, 2001, Vol. II, Part 2, UN doc. A/CN.4/SER.A/2001/Add.1, Arts. 1, 2, 4-11, 13, pp. 32-59, at p. 39, para. 4). With regard to the first condition, the ILC commentary on Article 2 states that reference to the breach of *an international obligation* rather than *a rule or a norm* of international law underscores that for the purposes of State responsibility, the relevant rule must be applicable to the responsible State in the specific case (*ibid.*, p. 36, para. 13; emphasis added). The commentary to Article 13 further clarifies that no retroactive application is intended in matters of State responsibility (*ibid.*, p. 57).

4. In the present proceedings, with regard to Croatia's claim that the FRY was a State *in statu nascendi* at the time when the alleged genocidal acts took place, the Court first set out to determine at which point of time the FRY became bound by the Convention, and whether the obligations to prevent and punish genocide under the Convention can be applied retroactively to the FRY before it became a party to the Convention.

5. Having examined the *travaux préparatoires* and the text of the Convention, the Court comes to the conclusion that, as is stated in the 2008 Judgment, Serbia was bound by the Convention with effect only from 27 April 1992. Even in respect of State responsibility, "the Convention is not retroactive". It underlines that "[t]o hold otherwise would be to disregard the rule expressed in Article 28 of the Vienna Convention on the Law of Treaties. There is no basis for doing so in the text of the Convention or in its negotiating history." (Judgment, para. 99.) With that conclusion, the issue of attribution becomes moot. The Court therefore does not see any need to further examine whether the FRY was or was not a State *in statu nascendi* at the time of the occurrence of the alleged acts, hence no question about the applicability of Article 10, paragraph 2, of the ILC Articles to the present case.

6. This legal finding, in my view, is conclusive to the two inseparable issues left over in the 2008 Judgment, therefore, Serbia's second jurisdictional objection should be upheld.

7. The Court's treatment of State succession to responsibility as a separate heading for the consideration of jurisdiction *ratione temporis*, in my opinion, is a questionable departure from the 2008 Judgment. Procedurally Croatia's alternative argument about the FRY's succession to the responsibility of the Socialist Federal Republic of Yugoslavia ("the SFRY") does raise a new claim for jurisdiction, a claim that is based on treaty obligations undertaken by a third party. When the Court has already concluded in the Judgment that even in respect of State responsibility the Convention is not retroactive, that claim is apparently related to the question of succession rather than responsibility.

8. Substantively, Croatia's two arguments are built on two different political premises, which are mutually exclusive in the context of the present case. In other words, Serbia should be treated either as a successor or as a continuator of the SFRY, but cannot be both at the same time, a point to be further discussed later. As that political premise can only be chosen one way or the other, once that premise is determined, one of Croatia's arguments would necessarily fall, so long as Serbia's responsibility is concerned. To illustrate that point further, the "two inseparable issues" as identified by the Court in the 2008 Judgment could be relevant and meaningful for the case only provided that the FRY is taken as a successor rather than a continuator of the SFRY. Of course, that is the position generally recognized, including by the Court and the Parties. Croatia's alternative argument, however, is presumably based on the continuity between the SFRY and the FRY. Given the bulk of the alleged acts concerned (most of them took place before 27 April 1992), this issue is so crucial for the case that Croatia's alternative argument should be dealt with at the same length as Croatia's principal argument. Late invocation of that argument by Croatia indeed raises the issue of procedural fairness for Serbia. As the Court stated in the *Legality of Use of Force* case, "the invocation by a party of a new basis of jurisdiction . . . at this late stage, when it is not accepted by the other party, seriously jeopardizes the principle of procedural fairness and the sound administration of justice" (*Legality of Use of Force (Yugoslavia* v. *Belgium), Provisional Measures, Order of 2 June 1999, I.C.J. Reports 1999 (I)*, p. 139, para. 44).

II. Political Premise of Serbia's Succession

9. The question of succession in the present case is a complicated issue. From 1992 to 2000, the FRY remained in a *sui generis* status, which gave rise to a series of legal questions regarding its standing, *locus standi*, before the Court. The political premise of Serbia's succession was much dictated, in my view, by the fact that its 1992 declaration and Note simultaneously sent to the Secretary-General of the United Nations were more often treated with political expediency than given consistent legal interpretation under international law in the light of the factual situation. Croatia's alternative argument in the present case once again brings the issue to the fore.

10. In its 1992 declaration and Note, the FRY publicly stated that it would "continue to fulfil all the rights conferred to, and obligations assumed by, the Socialist Federal Republic of Yugoslavia in international relations . . ." (2008 Judgment, p. 447, para. 99). It is upon this FRY's self-claimed continuity that Croatia relies to argue in favour of the FRY's succession to the responsibility of the SFRY.

11. In the 2008 Judgment, the Court states that "[i]n the particular context of the case, the Court is of the view that the 1992 declaration must be considered as having had the effects of a notification of succession to treaties, notwithstanding that its political premise was different" (2008 Judgment, p. 451, para. 111), and

> "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, subject of course to any reservations lawfully made by the SFRY limiting its obligations" (*ibid.*, pp. 454-455, para. 117; emphasis added).

While upholding the validity of the FRY's commitments to international obligations, the Court, however, does not indicate the legal consequences that are necessarily derived from the change of that political premise.

12. Under international law, the implication of the new political premise is arguably three-fold for the FRY. First of all, the FRY, being one of the successor States rather than the sole continuator of the SFRY, does not enjoy all the rights of its predecessor, nor does it continue to assume all of the SFRY's international obligations and responsibility as the same international personality. Secondly, such status will determine the confines of the FRY's treaty obligations in accordance with international law. Thirdly, its treaty relations with the other successor States will be governed by their agreement as well as general rules of treaty law.

13. In the present case, Croatia advances two arguments for Serbia's succession to the responsibility of the SFRY. First, Croatia argues that the armed forces of the SFRY which subsequently became the organs of the FRY largely controlled and conducted the alleged acts of genocide during the last year of the SFRY's formal existence, which thereby justifies the succession of the FRY to the responsibility of the SFRY. In that regard, it refers to the *Lighthouse Arbitration Award*, where the tribunal considered that whether there would be a succession to responsibility would depend on the *particular circumstances of each case* (*Lighthouses Arbitration between France and Greece, Claims No. 11 and 4*, 24 July 1956, 23 *ILR* 81, p. 92; United Nations, *Reports of International Arbitral Awards (UNRIAA)*, Vol. XII, p. 198; emphasis added). Secondly, Croatia contends that Serbia's international commitments made in the 1992 declaration and Note indicated not only that Serbia succeeded to the treaty obligations of the SFRY, but also that it succeeded to the responsibility incurred by the SFRY for the violation of those treaty obligations. Both of Croatia's arguments involve the political premise of Serbia's succession.

14. In regard to the first argument, the particular facts of the present case identified by the Court are as follows: the FRY is not a continuator

but one of the successor States of the SFRY. It succeeded to the Genocide Convention on the date of its proclamation and was, therefore, bound by it only with effect from 27 April 1992. Succession matters among the newly independent States that succeeded to the SFRY are governed by the Agreement on Succession Issues of 29 June 2001 (done in Vienna, entered into force on 2 June 2004; United Nations, *Treaty Series (UNTS)*, Vol. 2262, No. 40296, pp. 251-337). These matters are accepted by the successor States either through judicial decisions or by agreement, despite the factual continuity that purportedly existed between the FRY and the SFRY. It is against this factual background on the basis of the aforesaid political premise that the Court is called to interpret Article IX of the Genocide Convention so as to determine whether there is any legal ground in international law for the Court to found its jurisdiction with regard to acts that occurred before 27 April 1992.

15. As to Croatia's second argument with respect to Serbia's international commitments made in 1992, Croatia seems to forget the fact that it has refused to recognize the FRY as a continuator of the SFRY. Moreover, when Serbia eventually yielded to the position of the international community as well as that of the other successor States that it only succeeded to the SFRY and deposited its instrument of accession to the Genocide Convention to the United Nations Secretary-General with a reservation to Article IX of the Convention on 6 March 2001, Croatia objected to it on the ground that the FRY "is already bound by the Convention since its emergence as one of the five equal successor States" of the former SFRY (2008 Judgment, p. 445, para. 94). This fact shows that the political premise of Serbia's declaration and Note directly bears on the treaty relations between the Parties, particularly in relation to the Genocide Convention; upon that political premise, Serbia's declaration and Note means that its treaty relations with Croatia started from 27 April 1992.

III. Interpretation of Article IX of the Genocide Convention

16. In the Judgment the Court concludes that "[i]n the present case, any jurisdiction which the Court possesses is derived from Article IX of the Genocide Convention and is therefore confined to obligations arising under the Convention itself". In that regard, the meaning of the term "including those relating to the responsibility of a State for genocide" in Article IX is apparently decisive for the Court to determine whether or not, on Croatia's alternative argument, it has jurisdiction over the alleged acts in question.

17. The Court first rejects Serbia's contention that Croatia's claim for State succession is a new claim. It decides that since the essential subject-

matter of the dispute concerns Serbia's responsibility and Croatia's standing to invoke that responsibility, the dispute between the Parties in the present case falls squarely within the terms of Article IX (Judgment, para. 90). In the reasoning, it emphasizes that "[t]he question whether Serbia is responsible for such alleged violations must be distinguished from the manner in which that responsibility is said to be established". In its view, to invoke responsibility by direct attribution or to invoke responsibility on the basis of succession is just a difference in "manner". What the Court, however, fails to mention is that each of such "manners" concerns a matter of law that has to be initially decided by the Court for founding its jurisdiction. That is to say, the Court has to first determine whether State succession to responsibility falls within the terms of Article IX and, if so, in the context of the present case, whether or not Serbia should succeed to the responsibility of the SFRY. Only when these issues are settled, does the Court have the jurisdiction to address the merits of the case, but not the other way round.

18. The Court, instead of going through the *travaux préparatoires* and the text of the Convention, as it does previously, simply gives a rather general interpretation to the term of State responsibility in Article IX. A quick perusal of the drafting history of the Convention can tell that the State parties did not intend to give the term such a broad meaning. For example, the delegate of the United States stated that if the responsibility in Article IX "referred to treaty violations, the United States delegation must emphasize that the word [responsibility] added nothing to the meaning of the article" ("Continuation of the Consideration of the Draft Convention on Genocide" [E/794]: Report of the Economic and Social Council [A/633], Third Session of the General Assembly, Part I, Legal Questions, Sixth Committee, Summary of Records of Meetings, United Nations General Assembly Sixth Committee Third Session, Hundred and Thirty-First Meeting, 1 December 1948, UN doc. A/C.6/SR.131, p. 690). There is no record showing that that understanding was not accepted or was opposed to by the other State parties.

19. Moreover, it is difficult to establish, either from the drafting history or the substantive provisions of the Convention, that the term of State responsibility in Article IX also includes State succession to responsibility. As is pointed out in the Judgment, nothing in the text of the Genocide Convention or the *travaux préparatoires* suggests that the Convention can be applied retroactively; it was only intended to apply to acts taking place in the future and not to be applicable to those which had occurred during the Second World War or at other times in the past (Judgment, para. 97). When the State parties unequivocally precluded retroactive effect to the Convention and remained dubious about State responsibility for violations of the Convention, it would be much more unlikely that they would agree to import State succession to responsibility into the terms of Article IX.

20. Under Article IX of the Convention, the Court is not called to settle *any dispute* that concerns interpretation, application and fulfilment of the Convention, but a dispute that should directly relate to the rights and obligations of the parties. It always has to first ascertain whose obligations are allegedly breached and who has the right to invoke international responsibility for that breach. In the judicial settlement process that is the condition of *locus standi*, regardless of the nature of the obligations, synallagmatic or *erga omnes*. Likewise, the Court is not called to settle any dispute that concerns State responsibility, but a dispute that may engage the responsibility of the parties to the dispute. The conditions for entailing State responsibility are governed by general international law. Unless and until such conditions are satisfied, no State responsibility can be invoked.

21. As is stated previously, one of the conditions for invoking State responsibility is that international obligations concerned must exist as valid between the parties at the time when the alleged acts occurred. This principle is reaffirmed in the recent Judgment of the Court, where the Court stated that its jurisdiction *ratione temporis* is limited only to acts that occurred subsequent to the entry into force of the relevant treaty between the parties (*Questions relating to the Obligation to Prosecute or Extradite (Belgium* v. *Senegal), Judgment, I.C.J. Reports 2012 (II)*, pp. 457-458, paras. 100-105). This ruling dictates that in the present case the Court's jurisdiction based on Article IX should not extend to acts that occurred before the Convention was applicable between Croatia and Serbia as two States parties, a point that is confirmed by the Court in its consideration of Croatia's principal argument.

22. When the Court sets out to determine whether the alleged acts of genocide relied on by Croatia against Serbia were attributable to the SFRY and thus engaged its responsibility, its consideration, regardless of the ultimate finding, is necessarily based on the presumption in favour of succession to responsibility and the presumption that Serbia may succeed to the responsibility of the SFRY for the latter's violation of the obligations under the Convention. Thus, the Convention is actually applied retroactively to Serbia.

23. Although the rules of State responsibility have developed considerably since the adoption of the Genocide Convention, little can be found about State succession to responsibility in the field of general international law. As is observed,

> "State succession is an area of uncertainty and controversy. Much of the practice is equivocal and could be explained on the basis of special agreement or of rules distinct from the concept of legal succession. Indeed, it is possible to take the view that not many settled rules have yet emerged." (James Crawford, *Brownlie's Principles of Public International Law*, 8th edition, Oxford University Press, 2013, p. 424.)

To date, in none of the codified rules of general international law on treaty succession and State responsibility, State succession to responsibility was ever contemplated (see *YILC*, 1963, Vol. II, Working Paper submitted by Mr. Lachs, p. 298; *ibid.*, 2001, Vol. I, Comments by Mr. Tomka, Chairman of the Drafting Committee, p. 101, para. 101, Comments by Mr. Pellet, p. 120, para. 52; Art. 39, Vienna Convention on Succession of States in Respect of Treaties of 23 August 1978, entered into force on 6 November 1996, *UNTS*, Vol. 1946, No. 33356, pp. 3-29). Rules of State responsibility in the event of succession remain to be developed.

24. Lastly, in response to Serbia's argument on the basis of the Judgments in *Monetary Gold* and *East Timor*, the Court rejects the applicability of the *Monetary Gold* rule that the Court cannot decide a dispute between States without the consent of those States to jurisdiction to the present case (*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; *East Timor (Portugal* v. *Australia), Judgment, I.C.J. Reports 1995*, p. 101, para. 26). It states that the rationale behind the *Monetary Gold* rule has no application to a State which ceases to exist, no longer possessing any rights, thus by its nature, incapable of giving or withholding consent to the jurisdiction of the Court.

25. In light of the overall context of the case, this reasoning seems a convenient way to address the issue. When a State ceases to exist, it does not necessarily mean that all its rights and obligations simultaneously cease to exist. In the present case, the SFRY's status to treaties was indeed succeeded by the FRY, as the Court states in the 2008 Judgment that

> "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, *subject of course to any reservations lawfully made by the SFRY limiting its obligations*" (2008 Judgment, pp. 454-455, para. 117; emphasis added).

Therefore, the question in the present situation is not whether the SFRY is capable or not of giving its consent to the jurisdiction of the Court. Rather, the relevant question should be whether or not Article IX of the Convention provides a legal basis for the Court to exercise jurisdiction on disputes concerning State succession to responsibility. If not, there is no consent, on the part of the SFRY, the FRY, and indeed any State party to the jurisdiction of the Court, both *ratione materiae* and *ratione temporis*, on such disputes. In that regard, it is the principle of consent under the Statute of the Court that should come into play.

26. In conclusion, notwithstanding the caution given in the Judgment, the approach taken by the Court in resolving the current dispute may, in my view, create serious implications that the Court does not intend to have for future treaty interpretation.

IV. "Time Gap" in the Protection

27. Before I close my remarks on the question of jurisdiction, I wish to add one word on Croatia's argument about the "time gap" in the protection. Croatia claims that a decision to limit jurisdiction to events after 27 April 1992 would create a "time gap" in the protection afforded by the Convention. From the viewpoint of human rights protection, that argument is obviously very strong and appealing. However, when Croatia seeks legal protection from the Court on the basis of Article IX of the Convention and invokes Serbia's responsibility under the Convention, the jurisdiction of the Court has to be "confined to obligations arising under the Convention itself", and has to be confined to those that are undertaken by Serbia. This kind of "time gap", if any, could occur not only in the event of State succession, but also with any State before it becomes a party to the Convention. That is the limit of treaty régime.

28. That said, it should also be emphasized that the jurisdiction of the Court is just one of the means available for the fulfilment of the Convention. Moreover, when a State opts out of the clause of Article IX when it ratifies or accedes to the Convention, it does not mean that the people of that State party will not obtain the protection of the Convention. Obliged under the Convention, the State parties should, first and foremost, enact national legislation for the prevention and punishment of genocide and other acts enumerated in Article III of the Convention at the national level. Ultimately, it is these national measures that will play the major role in preventing genocide and punishing perpetrators of genocidal crimes.

29. At the international level, in the situation related to the present case, an *ad hoc* criminal tribunal, i.e., the International Criminal Tribunal for the former Yugoslavia (ICTY) was established to bring to justice those responsible for crimes committed during the course of the SFRY's dissolution process, despite the fact that the SFRY had ceased to exist. Although individual criminal responsibility and State responsibility are distinct, protection and justice thus accorded are equally important. Whether Serbia should be held responsible for the SFRY's alleged breach of its international obligations under the Convention can only be adjudged in accordance with international law.

(Signed) Xue Hanqin.
