SEPARATE OPINION OF JUDGE SEBUTINDE

Jurisdiction ratione temporis *under Article IX of the Genocide Convention — Disagreement with paragraph (1) of the operative clause — The FRY (Serbia) cannot be bound by the Genocide Convention prior to 27 April 1992, the date when by succession it became a Contracting Party — Disputes under Article IX of the Genocide Convention must relate to the interpretation, application and fulfilment of the Convention by the Contracting Parties and in relation to acts attributable to those States — The SFRY to which the Applicant attributes the acts committed prior to 27 April 1992 is an entity no longer in existence and is no longer a Contracting Party — The responsibility of the FRY (Serbia), as one of the successor States, for acts committed prior to 27 April 1992 before it became a State or party to the Genocide Convention is not a matter within the Court's jurisdiction* ratione temporis *under Article IX.*

Caution required in drawing inference from or according evidential weight to a decision of an international criminal tribunal not to charge an individual with genocide — Under the ICTY Statute, the decision to investigate and prosecute is solely within the Prosecutor's discretion and prerogative with no obligation to disclose the reasons therefor — Unlike judicial decisions, the prosecutorial decision to include or exclude a particular charge against an individual is an executive one based on available prima facie evidence at the time and involves no general or definitive finding of fact — Prosecutorial discretion is influenced by a wide range of factors not connected to availability of evidence — Consequently, the Court should be cautious in placing any evidential weight on or drawing inference from the ICTY decision not to charge individuals with genocide arising out of the conflict in Croatia.

Introduction

1. I concur with the Court's decision rejecting both Croatia's claim and Serbia's counter-claim, and have in this regard voted in favour of points (2) and (3) of the operative paragraph. However, I have voted against point (1) of the operative paragraph in which the majority "[R]ejects the second jurisdictional objection raised by Serbia and finds that its jurisdiction to entertain Croatia's claim extends to acts prior to 27 April 1992" (para. 524) as I am unable to subscribe either to this finding or the reasoning behind it. In my view, and for the reasons contained in this opinion, Serbia's second preliminary objection to Croatia's claim should have been upheld.

2. A secondary issue on which I disagree with the majority, is one that does not affect the final outcome of the case but one which, nonetheless,

warrants elaboration, namely, the decision of the Court to give evidential weight to or draw an inference from a prosecutorial decision to charge or not to charge individuals for the crime of genocide before the International Criminal Tribunal for the former Yugoslavia (ICTY). In cases of this kind (i.e., cases involving allegations of genocide or grave violations of international criminal or humanitarian law that have already been the subject of the processes and decisions of an international criminal court) the International Court of Justice should, in my respectful view, be extremely cautious in giving any kind of weight to or drawing any inference from such a prosecutorial decision, in the absence of reasons for such decision. It is my considered opinion that, in the present Judgment, the inference that the Court draws from the absence of charges of genocide in certain ICTY indictments relating to the conflict in Croatia, without the Court having established the underlying reasons therefor, is highly speculative and can lead to undesirable conclusions. The contradictory manner in which the Judgment approaches this question only serves to further complicate the issue (see Judgment, paras. 187, 440 and 461). I elaborate my reasons below.

I. Serbia's Objection to the Court's Jurisdiction *Ratione Temporis* and to the Admissibility of Croatia's Claims

3. Serbia's second preliminary objection to Croatia's claims as stated in Serbia's final submission 2 *(a)* is that, "claims based on acts and omissions which took place prior to 27 April 1992 are beyond the jurisdiction of this Court and [are] inadmissible". According to Serbia, the bulk of the alleged acts of genocide comprising Croatia's claims (i.e., 112 out of 120 alleged acts), took place prior to 27 April 1992, before the FRY (Serbia) came into existence. Serbia thus contends that even if the Court were to find that acts pre-dating 27 April 1992 could be attributed to Serbia, Croatia's claim based on those acts would still fail for the Court lacking jurisdiction *ratione temporis*. Croatia rejects this argument in its entirety.

4. The Court, in its 2008 Judgment, noted that Serbia's second preliminary objection was an "objection to jurisdiction" on the one hand, and *"one going to the admissibility of the claims"*, on the other (*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. 456, para. 120; emphasis added). Observing that the objection entailed two interrelated issues, the Court stated as follows:

> "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." (*I.C.J. Reports 2008*, p. 460, para. 129.)

5. By a majority vote of eleven to six, the Court considered that Serbia's second preliminary objection "[did] not . . . possess an exclusively preliminary character", and that in the circumstances the Court could not decide on that objection *in limine litis* (*ibid.*, p. 466, para. 146). Thus, the Court reserved its decision thereon for the merits stage of the proceedings.

6. In my view, Serbia's second objection poses insurmountable obstacles to the admissibility of Croatia's claim relating to acts that allegedly took place before 27 April 1992, i.e., *before* the FRY or Serbia became a party to the Genocide Convention. Whilst I agree with the Court's view in the 2008 Judgment that "there is no express provision in the Genocide Convention limiting its jurisdiction *ratione temporis*" (*ibid.*, p. 458, para. 123), I am of the view that certain findings of the Court in that Judgment, as well as the facts of this case, dictate against the view expressed by the majority in the present Judgment that "its jurisdiction to entertain Croatia's claim extends to acts prior to 27 April 1992" (para. 524). The following are my reasons.

7. First, the Court authoritatively determined in its 2008 Judgment that Serbia had, by way of succession, become a party to the Genocide Convention on 27 April 1992. The Court stated that

> "*from that date onwards* the FRY [Serbia] 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. It is common ground that the Genocide Convention was one of these conventions, and that the SFRY had made no reservation to it; thus the FRY in 1992 accepted the obligations of that Convention . . . In the events that have occurred, this signifies that the 1992 declaration and Note had the effect of a notification of succession by the FRY to the SFRY in relation to the Genocide Convention." (*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.)

8. The Court's conclusion in 2008 implies that with effect from 27 April 1992, the FRY (Serbia) took on a separate identity, distinct from that of its predecessor (the SFRY), the latter having ceased to exist immediately before that date. The Court recognized the fact that Serbia's claim of continuity as originally formulated in the 27 April 1992 declaration had been rejected by the international community which insisted that Serbia could not continue the membership of the former Yugoslavia at the United Nations but had to apply for fresh membership in its own right as required by Security Council resolution 777 (1992) and General Assembly resolution 47/1. It was after Serbia complied with this requirement that the new State was admitted to the United Nations on 1 November 2000.

9. In light of this finding alone, the notion that the FRY (Serbia) could conceivably assume responsibility for the wrongful acts of its predecessor State (SFRY), seems untenable. That notion seems even more untenable when one considers that in the Agreement on Succession Issues concluded by the former Yugoslav Republics of Croatia, Slovenia, Bosnia and Herzegovina and Macedonia on 29 June 2001 and accepted by Serbia and Montenegro, all the five Republics consider themselves as "being in sovereign equality [as] successor States to the former Socialist Federal Republic of Yugoslavia".

10. Secondly, it must be recalled that Croatia's claim is solely based on treaty law and that the jurisdiction of this Court is founded on consent of States parties. In the present case, Serbia recognized the jurisdiction of the Court under the Genocide Convention with effect from the date it became a party to that Convention *and not before* (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*, p. 455, para. 117). Thus, although Article IX of the Genocide Convention (the compromissory provision from which the Court in this case derives its jurisdiction) contains no limitations *ratione temporis*, there is nothing in the Convention to suggest an intention to give it retroactive effect. Moreover, that provision must be construed in light of the whole Convention and in conformity with the Vienna Convention on the Law of Treaties, 1969 (VCLT), the Vienna Convention on Succession of States in Respect of Treaties, 1978 (VCSSRT), and the ILC Draft Articles on Responsibility of States for Internationally Wrongful Acts (2001) ("ILC Articles"). Article 28 of the VCLT provides that:

> "Unless a different intention appears from the treaty or is otherwise established, its provisions do not bind a party in relation to any act or fact which took place or any situation which ceased to exist *before the date of the entry into force* of the treaty with respect to that party." (Emphasis added.)

11. Similarly, Article 23 of the VCSSRT which deals with the effects of a notification of succession such as the one contained in Serbia's declaration provides that:

> "(1) Unless the treaty otherwise provides or it is otherwise agreed, a newly independent State which makes a notification of succession under Article 17 or Article 18, paragraph 2, shall be considered a party to the treaty *from the date of the succession* of States or from the date of entry into force of the treaty, whichever is the later date." (Emphasis added.)

12. Furthermore, Article 13 of the ILC Articles provides that "[a]n act of a State does not constitute a breach of an international obligation unless the State is bound by the obligation in question at the time the act occurs".

13. Applying the above principles to the Genocide Convention, it is clear that the Court's jurisdiction under Article IX extends only to acts that occurred subsequent to the entry into force of the Convention as between the parties. This view is supported by recent jurisprudence of the Court, for example in *Georgia* v. *Russian Federation* and in *Belgium* v. *Senegal*. In my view, by concluding that the Court's jurisdiction to entertain Croatia's claim "extends to acts prior to 27 April 1992" (Judgment, para. 524), the majority of the Court accorded to Article IX of the Convention a retroactive construction; one not supported by the above cardinal principles. I am also not persuaded by the reasoning given in the present Judgment in support of such a conclusion. That construction in effect presupposes that the Court has jurisdiction to deal with issues of State succession to obligations of the SFRY which may have arisen as a consequence of breaches of the Convention when the SFRY was still in existence; which issues may have been relevant if the Court had in 2008 deemed Serbia to be a continuator of the SFRY rather than a successor State.

14. The Judgment correctly analyses the provisions of the Genocide Convention in paragraphs 90 to 99 in light of its *travaux préparatoires* and the Court's jurisprudence, before concluding that its substantive provisions "do not impose upon a State obligations in relation to acts said to have occurred before that State became bound by the Convention" (*ibid.*, para. 100). In light of such an unequivocal conclusion, I find untenable the position that the majority adopts thereafter, finding that

> "to the extent that the dispute concerns acts said to have occurred before [27 April 1992] [i.e., before Serbia became a party to the Convention], 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" (*ibid.*, para. 117).

15. The majority view is premised upon two grounds: first, that the dispute between the Parties concerns "the interpretation, application and fulfilment of the provisions of the Genocide Convention", including "the responsibility of a State for genocide" as required by Article IX. The second ground is that the question whether or not the acts complained of by Croatia were contrary to the Genocide Convention and if so, whether they were attributable to and thus engaged the responsibility of the SFRY, "are matters falling squarely within the scope *ratione materiae* of the jurisdiction provided for by Article IX" (Judgment, para. 113). In my view, both grounds are irrelevant in assessing the Court's jurisdiction *ratione temporis* under Article IX of the Convention. First, the dispute referred to in Article IX must be between Contracting Parties, in this case, Serbia and Croatia. The SFRY, to which Croatia attributes the acts complained of, is no longer in existence and is no longer a Contracting Party. Secondly, the dispute envisaged under that Article must concern the interpretation, application and fulfilment of the Convention by the Contracting Parties. In the present case, it should concern Serbia's responsibility for acts directly attributable to that State as a Contracting Party, and not to the SFRY, a predecessor State. In this regard, the majority reasoning and conclusion introduces subtle issues of State succession to responsibility into Article IX, which interpretation, in my respectful opinion, is not supported by the Convention. For all the above reasons, I disagree with the majority. This brings me to the second point of my separate opinion.

II. The Inference to Be Drawn from a Prosecutorial Decision not to Charge Individuals for Genocide

16. The probative value to be accorded to various documents emanating from judgments of the International Criminal Tribunal for the former Yugoslavia (ICTY) was discussed by the Court in its 2007 Judgment (*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. 43). While those findings must be read in light of the "broad measure of agreement between the Parties" on this point and the fact that the findings are not *res judicata* for the present case, Croatia and Serbia have generally accepted them in the present proceedings. In particular, the Court stated regarding charges included or excluded in an indictment, as follows:

> "The Applicant placed some weight on indictments filed by the [ICTY] Prosecutor. But the claims made by the Prosecutor in the indictments are just that — allegations made by one party. They have still to proceed through the various phases outlined earlier. The Pros-

> ecutor may, instead, decide to withdraw charges of genocide or they may be dismissed at trial. Accordingly, as a general proposition the inclusion of charges in an indictment cannot be given weight. What may however be significant is the decision of the Prosecutor, either initially or in an amendment to an indictment, not to include or to exclude a charge of genocide." (*I.C.J. Reports 2007 (I)*, p. 132, para. 217.)

17. The implication of the above statement by the Court, is that the decision of a prosecutor *not* to include a charge of genocide in an ICTY indictment may assist in disproving the existence of the responsibility of a State for acts of genocide. This is a proposition with which I do not agree. Certainly in the present Judgment, the majority appears, in one part, to have placed some weight on the fact that "the ICTY Prosecutor has never charged any individual on account of genocide [committed] against the Croat population in the context of the armed conflict which took place" (Judgment, para. 440), while, in another passage, the Court states that "[t]he Court did not intend to turn the absence of charges into decisive proof that there had not been genocide, but took the view that this factor may be of significance and would be taken into consideration" (*ibid.*, para. 187). Apart from the problematic fact that these two passages appear to apply two different evidential standards, my view is that this Court should be cautious in attaching *any* evidential weight to or drawing inferences from such decisions, essentially for the reasons thoroughly explained by Croatia in its oral submissions in this case. Those reasons, with which I agree, relate mainly to the inherently discretionary nature of prosecutorial decisions and to the fundamental distinction between individual criminal responsibility for specific crimes under international humanitarian law, on the one hand, and State responsibility for a series of wrongful acts committed by multiple actors, under the Genocide Convention, on the other. For ease of reference those reasons are summarized below.

1. Prosecutorial discretion

18. Under Article 16 (1) of the ICTY Statute, responsibility is vested in the ICTY Prosecutor for the investigation and prosecution of crimes. The ICTY Prosecutor, like any other prosecutor, has a wide discretion both in commencing and conducting an investigation, and in relation to the charges to be included in an indictment. In exercising that discretion, the Prosecutor is not obligated to reveal the reasons behind the decisions he or she takes, not even to the Defence. Under Article 18 (1) of the ICTY Statute, the ICTY Prosecutor may initiate investigations ex officio or on the basis of information from any source. It is for the Prosecutor to access the available evidence and decide whether there is a sufficient (prima facie) basis to proceed. Thus, from the very outset, it is the available evidence *at that stage* that will influence the investigations and, in turn, influence any prosecutorial decision about the charge. Furthermore, since the

jurisdiction of the ICTY is over individuals, it is also inevitable that any investigation started by the ICTY Prosecutor must focus on the activities of one or more identified individuals. Such an investigation is based on available evidence at the time and involves no general or definitive finding of fact. It is from the outset an investigation into an individual or individuals, intended to ascertain whether there is prima facie evidence to charge *them* with any offence. In that sense, the investigation will follow a relatively narrow course.

19. Furthermore, the discretion of a prosecutor also operates at other levels. For example, it is plain that neither the ICTY Statute nor the ICTY Rules of Procedure and Evidence impose an obligation on the Prosecutor either to investigate or to prosecute. Nor is there an obligation to pursue the most serious charges available on the totality of the evidence in any given case. The Prosecutor is free to characterize the conduct of an accused under any appropriate heading. In international law, the vast majority of crimes are very serious but not all can be pursued. The ICTY, in the *Mucić* case, emphasized the breadth of prosecutorial discretion as to investigations and indictments and the "finite human and financial resources" available which means that the Prosecutor "cannot realistically be expected to prosecute every offender". This principle applies equally in respect of the choice of charge. The reality is that a very wide range of factors may influence the discretion to prosecute which cannot have any material significance for the determination of issues before this Court. These include cost, length, manageability, availability of witnesses and sometimes availability of the accused. It is not uncommon for a prosecutor to decide not to bring charges against an individual, not because a conclusion has been reached on the basis of the evidence but, much more pragmatically, on the basis that a key witness is unable or unwilling to provide the necessary evidence, either at all, or on conditions acceptable to the Court. No sensible inference about the commission of a crime can be drawn from that set of circumstances.

2. The Prosecutor's prerogative to charge

20. Secondly, unlike the position in some domestic jurisdictions, the ICTY Prosecutor is under no obligation to give reasons for decisions whether or not to charge particular persons or particular crimes; and as a matter of fact, the ICTY Prosecutor has not done so in any case relevant to the issues before this Court. There is therefore simply no way of telling whether the Prosecutor reached a considered evaluation that particular events did not amount to the crime of genocide or, alternatively, whether charges were not brought for some other wholly unrelated

reason. In that regard, the evidential significance of such a decision should be minimal, since the Prosecutor's decisions are not judicial but executive in status, and involve no definitive finding of fact.

3. Distinguishing individual criminal responsibility and State responsibility

21. Lastly, a decision to prosecute an individual may well be made for reasons wholly unconnected to the question of State responsibility for violation of the Genocide Convention. More fundamentally than that, the ICTY and this Court are asked to address entirely different legal questions; the answers to which should not be determinative of each other. The ICTY is concerned with individual responsibility for particular crimes, not State responsibility for an accumulation of crimes. The ICTY's scope of inquiry is limited to the operations of one accused in relation to each charge. That represents a small segment or puzzle-piece in the much larger picture that this Court is asked to consider, namely, the cumulative impact on a protected group of a series of crimes, systematically perpetrated on a large section of the population, over a wide geographical area, by a large number of perpetrators, some or all of whom cannot be identified and brought to justice before the ICTY for their part in events. This Court is able to, and must, take a global view of all the evidence, including findings already made by the ICTY. It also has before it, and is able to rule on, additional evidence that was not the subject of charges before the ICTY. For example, the total destruction of the city of Vukovar and its civilian population was not charged in the *Mrkšić* indictment; nor were the killings and torture at Velepromet. Also before this Court are findings of genocidal forcible displacement by the Croatian national courts in cases such as *Koprivna* and *Velimir*, along with convictions by the Belgrade District Court War Crimes Chamber of Serbian perpetrators of atrocities in Croatia. This Court is in a far better position than the ICTY Prosecutor, and indeed the ICTY itself, to assess whether the totality of the crimes committed amounted to genocide. In conclusion, the International Court of Justice should, in my respectful view, be extremely cautious in giving any kind of weight to a prosecutorial decision to charge or not charge a particular individual for a particular crime or crimes, in the absence of reasons for such a decision.

(*Signed*) Julia SEBUTINDE.