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Summary
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Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)

Summary of the Judgment of 3 February 2015

Procedural history (paras. 1-51)

The Court recalls that, on 2 July 1999, the Government of the Republic of Croatia (hereinafter "Croatia") filed an Application against the Federal Republic of Yugoslavia (hereinafter "the FRY") in respect of a dispute concerning alleged violations of the Convention on the Prevention and Punishment of the Crime of Genocide (hereinafter the "Genocide Convention" or the "Convention"). The Convention was approved by the General Assembly of the United Nations on 9 December 1948 and entered into force on 12 January 1951. The Application invoked Article IX of the Genocide Convention as the basis of the jurisdiction of the Court.

On 11 September 2002, the Respondent raised preliminary objections relating to the Court's jurisdiction to entertain the case and to the admissibility of Croatia's Application.

By a letter dated 5 February 2003, the FRY informed the Court that its name had changed to "Serbia and Montenegro". Following the Republic of Montenegro's declaration of independence on 3 June 2006, the "Republic of Serbia" (hereinafter "Serbia") remained the sole Respondent in the case, as indicated by the Court in its Judgment of 18 November 2008 (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, hereinafter the "2008 Judgment"). In that Judgment, the Court rejected the first and third preliminary objections raised by Serbia. It found, however, that the second objection — that claims based on acts or omissions which took place before 27 April 1992, i.e., the date on which the FRY came into existence as a separate State, lay beyond its jurisdiction and were inadmissible — did not, in the circumstances of the case, possess an exclusively preliminary character and should therefore be considered in the merits phase. Subject to that conclusion, the Court found that it had jurisdiction to entertain Croatia's Application.

On 4 January 2010, Serbia filed a counter-claim.

Public hearings on the objection found in 2008 not to be of an exclusively preliminary character, as well as on the merits of Croatia's claim and Serbia's counter-claim, were held from 3 March to 1 April 2014.

I. BACKGROUND (paras. 52-73)

Before briefly setting out the factual and historical background to the present proceedings, the Court notes that, in these proceedings, Croatia contends that Serbia is responsible for breaches of the Genocide Convention committed in Croatia between 1991 and 1995, whereas, in its counter-claim, Serbia contends that Croatia is itself responsible for breaches of the Convention committed in 1995 in the "Republika Srpska Krajina" ("RSK"), an entity established in late 1991.

A. The break-up of the Socialist Federal Republic of Yugoslavia and the emergence of new States (paras. 53-59)

While recounting the break-up of the Socialist Federal Republic of Yugoslavia ("SFRY"), the Court recalls that, until the start of the 1990s, that entity consisted of the republics of Bosnia and Herzegovina, Croatia, Macedonia, Montenegro, Serbia and Slovenia. Following the death of President Tito, which occurred on 4 May 1980, the SFRY was confronted with an economic crisis lasting almost ten years and growing tensions between its different ethnic and national groups. Towards the end of the 1980s and at the start of the 1990s, certain republics sought greater powers within the federation, and, subsequently, independence.

Croatia and Slovenia declared themselves independent from the SFRY on 25 June 1991, although their declarations did not take effect until 8 October 1991. For its part, Macedonia proclaimed its independence on 17 September 1991, and Bosnia and Herzegovina followed suit on 6 March 1992. On 22 May 1992, Croatia, Slovenia, and Bosnia and Herzegovina were admitted as Members of the United Nations, as was the former Yugoslav Republic of Macedonia on 8 April 1993.

On 27 April 1992, "the participants of the Joint Session of the SFRY Assembly, the National Assembly of the Republic of Serbia and the Assembly of the Republic of Montenegro" adopted a declaration stating in particular:

> "The Federal Republic of Yugoslavia, continuing the state, international legal and political personality of the Socialist Federal Republic of Yugoslavia, shall strictly abide by all the commitments that the SFR of Yugoslavia assumed internationally . . . Remaining bound by all obligations to international organizations and institutions whose member it is . . ."

On the same date, the Permanent Mission of Yugoslavia to the United Nations sent a Note to the Secretary-General, stating, inter alia, that

> "[s]trictly respecting the continuity of the international personality of Yugoslavia, the Federal Republic of Yugoslavia shall continue to fulfil all the rights conferred to, and obligations assumed by, the Socialist Federal Republic of Yugoslavia in international relations, including its membership in all international organizations and participation in international treaties ratified or acceded to by Yugoslavia".

This claim by the FRY that it continued the legal personality of the SFRY was debated at length within the international community and rejected by the Security Council, the General Assembly and several States; the FRY nevertheless maintained it for several years. It was not until 27 October 2000 that the FRY sent a letter to the Secretary-General requesting that it be admitted to membership in the United Nations. On 1 November 2000, the General Assembly, by resolution 55/12, "[h]aving received the recommendation of the Security Council of 31 October 2000" and "[h]aving considered the application for membership of the Federal Republic of Yugoslavia", decided to "admit the Federal Republic of Yugoslavia to membership in the United Nations".

B. The situation in Croatia (paras. 60-73)

Having pointed out that the present case mainly concerns events which took place between 1991 and 1995 in the territory of the Republic of Croatia as it had existed within the SFRY, the Court analyses the background to those events. It thus notes that, in population terms, although the majority of the inhabitants of Croatia (some 78 per cent) were, according to the official census conducted in March 1991, of Croat origin, a number of ethnic and national minorities were also represented. In particular, some 12 per cent of the population was of Serb origin, and a significant part of that Serb minority lived close to the republics of Bosnia and Herzegovina and Serbia.

The Court observes that, in political terms, tensions between the Government of the republic of Croatia and the Serbs living in Croatia increased at the start of the 1990s. Shortly after Croatia's declaration of independence on 25 June 1991, an armed conflict broke out between, on the one hand, Croatia's armed forces and, on the other, forces opposed to its independence (namely forces created by part of the Serb minority within Croatia and various paramilitary groups, to which the Court refers collectively as "Serb forces", irrespective of the issue of attribution of their conduct). At least from September 1991, the Yugoslav National Army ("JNA") — which, according to Croatia, was by then controlled by the Government of the republic of Serbia — intervened in the fighting against the Croatian Government forces. By late 1991, the JNA and Serb forces controlled around one-third of the territory of the former socialist republic of Croatia (in the regions of Eastern Slavonia, Western Slavonia, Banovina/Banija, Kordun, Lika and Dalmatia).

The Court recalls that negotiations in late 1991 and early 1992, backed by the international community, resulted in the Vance plan (after Cyrus Vance, the United Nations Secretary-General's Special Envoy for Yugoslavia) and the deployment of the United Nations Protection Force ("UNPROFOR"). The Vance plan provided for a ceasefire, demilitarization of those parts of Croatia under the control of the Serb minority and SFRY forces, the return of refugees and the creation of conditions favourable to a permanent political settlement of the conflict. UNPROFOR — which was deployed in spring 1992 in three areas protected by the United Nations (the UNPAs of Eastern Slavonia, Western Slavonia and Krajina) — was divided into four operational sectors: East (Eastern Slavonia), West (Western Slavonia), North and South (these two latter sectors covered the Krajina UNPA).

The objectives of the Vance plan and of UNPROFOR were never fully achieved: between 1992 and the spring of 1995, the RSK was not demilitarized, certain military operations were conducted by both parties to the conflict, and attempts to achieve a peaceful settlement failed.

In the spring and summer of 1995, following a series of military operations, Croatia succeeded in re-establishing control over the greater part of the territory it had lost. Thus it recovered Western Slavonia in May through Operation "Flash", and the Krajina in August through Operation "Storm", during which the facts described in the counter-claim allegedly occurred. Following the conclusion of the Erdut Agreement on 12 November 1995, Eastern Slavonia was gradually reintegrated into Croatia between 1996 and 1998.

II. JURISDICTION AND ADMISSIBILITY (paras. 74-123)

A. Croatia's claim (paras. 74-119)

(1) Issues of jurisdiction and admissibility which remain to be determined following the 2008 Judgment (paras. 74-78)

Referring to its 2008 Judgment on the preliminary objections raised by Serbia, the Court recalls that, while the jurisdiction of the Court, and the admissibility of Croatia's claim, have been settled so far as that claim relates to events alleged to have taken place as from 27 April 1992, both jurisdiction and admissibility remain to be determined in so far as the claim concerns events alleged to have occurred before that date.

(2) The positions of the Parties regarding jurisdiction and admissibility (paras. 79-83)

The Court sets out the Parties' positions on the issues of jurisdiction and admissibility.

(3) The scope of jurisdiction under Article IX of the Genocide Convention (paras. 84-89)

The Court recalls that the only basis for jurisdiction which has been advanced in the present case is Article IX of the Genocide Convention. That Article provides:

> "Disputes between the Contracting Parties relating to the interpretation, 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."

The Court states that the fact that its jurisdiction can be founded only upon that Article has important implications for the scope of that jurisdiction: it implies that the Court has no power to rule on alleged breaches of other obligations under international law, not amounting to genocide, particularly those protecting human rights in armed conflict. That is so even if the alleged breaches are of obligations under peremptory norms, or of obligations which protect essential humanitarian values, and which may be owed erga omnes.

The Court further notes that the jurisdiction provided by Article IX does not extend to allegations of violation of the customary international law on genocide, even though it is well established that the Convention enshrines principles that also form part of customary international law. Referring to statements contained in its jurisprudence, the Court recalls that the said Convention contains obligations erga omnes and that the prohibition of genocide has the character of a peremptory norm (jus cogens).

The Court concludes that, in order to establish that it has jurisdiction with regard to the claim of Croatia relating to events alleged to have occurred prior to 27 April 1992, the Applicant must show that its dispute with Serbia concern obligations under the Convention itself.

(4) Serbia's objection to jurisdiction (paras. 90-117)

(i) Whether provisions of the Convention are retroactive (paras. 90-100)

The Court considers that 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. Thus stated, the dispute would appear to fall squarely within the terms of Article IX.

Serbia maintains however that, in so far as Croatia's claim concerns acts said to have occurred before the FRY became party to the Convention on 27 April 1992 (and the great majority of Croatia's allegations concern events before that date), the Convention was not capable of applying to the FRY (and, therefore, any breaches of it cannot be attributable to Serbia); Serbia deduces that the dispute regarding those allegations cannot be held to fall within the scope of Article IX. In response, Croatia refers to what it describes as a presumption in favour of the retroactive effect of compromissory clauses, and to the absence of any temporal limitation in Article IX of the Convention.

In its 2008 Judgment in the present case, the Court stated "that there is no express provision in the Genocide Convention limiting its jurisdiction ratione temporis". Although the absence of a temporal limitation in Article IX is not without significance, it is not, in itself, sufficient to establish jurisdiction over that part of Croatia's claim which relates to events said to have occurred before 27 April 1992. Article IX is not a general provision for the settlement of disputes. The jurisdiction for which it provides is limited to disputes between the Contracting Parties regarding the interpretation, application or fulfilment of the substantive provisions of the Genocide Convention, including those relating to the responsibility of a State for genocide or for any of the acts enumerated in Article III of the Convention. Accordingly, the temporal scope of Article IX is necessarily linked to the temporal scope of the other provisions of the Genocide Convention.

Croatia seeks to address that issue by arguing that some, at least, of the substantive provisions of the Convention are applicable to events occurring before it entered into force for the Respondent. Croatia maintains that the obligation to prevent and punish genocide is not limited to acts of genocide occurring after the Convention enters into force for a particular State but "is capable of encompassing genocide whenever occurring, rather than only genocide occurring in the future after the Convention enters into force for a particular State". Serbia, however, denies that these provisions were ever intended to impose upon a State obligations with regard to events which took place before that State became bound by the Convention.

The Court considers that a treaty obligation that requires a State to prevent something from happening cannot logically apply to events that occurred prior to the date on which that State became bound by that obligation; what has already happened cannot be prevented. Logic, as well as the presumption against retroactivity of treaty obligations enshrined in Article 28 of the Vienna Convention on the Law of Treaties, thus points clearly to the conclusion that the obligation to prevent genocide can be applicable only to acts that might occur after the Convention has entered into force for the State in question. Nothing in the text of the Genocide Convention or the travaux préparatoires suggests a different conclusion. Nor does the fact that the Convention was intended to confirm obligations that already existed in customary international law. A State which is not yet party to the Convention when acts of genocide take place might well be in breach of its obligation under customary international law to prevent those acts from occurring but the fact that it subsequently becomes party to the Convention does not place it under an additional treaty obligation to have prevented those acts from taking place.

There is no similar logical barrier to a treaty imposing upon a State an obligation to punish acts which took place before that treaty came into force for that State and certain instruments

contain such an obligation. The Court gives two examples: the first drawn from the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity, and the second from the European Convention on the same subject. In both those cases, however, the applicability of the relevant Convention to acts which occurred before it entered into force is the subject of express provision. There is no comparable provision in the Genocide Convention. Moreover, the provisions requiring States to punish acts of genocide (Articles I and IV) are necessarily linked to the obligation (in Article V) for each State party to enact legislation for the purpose of giving effect to the provisions of the Convention. There is no indication that the Convention was intended to require States to enact retroactive legislation.

The negotiating history of the Convention also suggests that the duty to punish acts of genocide, like the other substantive provisions of the Convention, was 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.

Finally, the Court recalls that in its recent Judgment in Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal), it held that the comparable provisions of the Convention against Torture, which require each State party to submit to their prosecuting authorities the cases of persons suspected of acts of torture, applied only to acts taking place after the Convention had entered into force for the State concerned, notwithstanding that such acts are considered crimes under customary international law.

The Court thus concludes that the substantive provisions of the Convention do not impose upon a State obligations in relation to acts said to have occurred before that State became bound by the Convention.

Having reached that conclusion, the Court turns to the question whether the dispute as to acts said to have occurred before 27 April 1992 nevertheless falls within the scope of jurisdiction under Article IX. Croatia advances two alternative grounds for concluding that it does so. It relies, first, upon Article 10 (2) of the ILC Articles on State Responsibility, and, secondly, upon the law of State succession.

(ii) Article 10 (2) of the ILC Articles on State Responsibility (paras. 102-105)

Article 10 (2) of the International Law Commission (ILC) Articles on Responsibility of States for Internationally Wrongful Acts reads as follows:

> "The conduct of a movement, insurrectional or other, which succeeds in establishing a new State in part of the territory of a pre-existing State or in a territory under its administration shall be considered an act of the new State under international law."

Croatia asserts that that provision is part of customary international law. It maintains that, although the FRY was not proclaimed as a State until 27 April 1992, that proclamation merely formalized a situation that was already established in fact, since, during the course of 1991, the leadership of the republic of Serbia and other supporters of what Croatia describes as a "Greater Serbia" movement took control of the JNA and other institutions of the SFRY, while also controlling their own territorial armed forces and various militias and paramilitary groups. This movement was eventually successful in creating a separate State, the FRY. Croatia contends that its claim in relation to events prior to 27 April 1992 is based upon acts by the JNA and those other armed forces and groups, as well as the Serb political authorities, which were attributable to that movement and thus, by operation of the principle stated in Article 10 (2), to the FRY.

Serbia counters that Article 10 (2) represents progressive development of the law and did not form part of customary international law in 1991-1992. It is therefore inapplicable to the present case. Furthermore, even if Article 10 (2) had become part of customary law at that time, it is not applicable to the facts of the present case, since there was no "movement" that succeeded in creating a new State. Serbia also denies that the acts on which Croatia's claim is based were attributable to an entity that might be regarded as a Serbian State in statu nascendi during the period before 27 April 1992. Finally, Serbia contends that even if Article 10 (2) were applicable, it would not suffice to bring within the scope of Article IX that part of Croatia's claim which concerns events said to have occurred before 27 April 1992. According to Serbia, Article 10 (2) of the ILC Articles is no more than a principle of attribution; it has no bearing on the question of what obligations bind the new State or the earlier "movement", nor does it make treaty obligations accepted by the new State after its emergence retroactively applicable to acts of the pre-State "movement", even if it treats those acts as attributable to the new State. On that basis, Serbia argues that any "movement" which might have existed before 27 April 1992 was not a party to the Genocide Convention and could, therefore, only have been bound by the customary international law prohibition of genocide.

The Court considers that, even if Article 10 (2) of the ILC Articles on State Responsibility could be regarded as declaratory of customary international law at the relevant time, that Article is concerned only with the attribution of acts to a new State; it does not create obligations binding upon either the new State or the movement that succeeded in establishing that new State. Nor does it affect the principle stated in Article 13 of the said Articles that: "An 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."

After recalling that, in the present case, the FRY was not bound by the obligations contained in the Convention before 27 April 1992, the Court explains that, even if the acts prior to that date on which Croatia relies were attributable to a "movement", within the meaning of Article 10 (2) of the ILC Articles, and became attributable to the FRY by operation of the principle set out in that Article, they cannot have involved a violation of the provisions of the Genocide Convention but, at most, only of the customary international law prohibition of genocide. According to the Court, that conclusion makes it unnecessary for it to consider whether Article 10 (2) expresses a principle that formed part of customary international law in 1991-1992 (or, indeed, at any time thereafter), or whether, if it did so, the conditions for its application are satisfied in the present case.

(iii) Succession to responsibility (paras. 106-117)

The Court next turns to Croatia's alternative argument that the FRY succeeded to the responsibility of the SFRY. This argument is based upon the premise that the acts prior to 27 April 1992 on which Croatia bases its claim were attributable to the SFRY and in breach of the SFRY's obligations under the Genocide Convention to which it was, at the relevant time, a party. Croatia then argues that, when the FRY succeeded to the treaty obligations of the SFRY on 27 April 1992, it also succeeded to the responsibility already incurred by the latter for these alleged violations of the Genocide Convention.

The Court considers that, within the framework of the present dispute, it is possible to identify a number of contested points. Thus, on Croatia's alternative argument, in order to determine whether Serbia is responsible for violations of the Convention, the Court would need to decide: (i) whether the acts relied on by Croatia took place; and, if they did, whether they were contrary to the Convention; (ii) if so, whether those acts were attributable to the SFRY at the time that they occurred and engaged its responsibility; and (iii) if the responsibility of the SFRY had been engaged, whether the FRY succeeded to that responsibility. While there is no dispute that many (though not all) of the acts relied upon by Croatia took place, the Parties disagree over

whether or not they constituted violations of the Genocide Convention. In addition, Serbia rejects Croatia's argument that Serbia has incurred responsibility, on whatever basis, for those acts.

The Court observes that what has to be decided in order to determine whether or not it possesses jurisdiction with regard to the claim concerning acts said to have taken place before 27 April 1992 is whether the dispute between the Parties on the three issues set out above falls within the scope of Article IX. In the Court's view, the issues in dispute concern the interpretation, application and fulfilment of the provisions of the Convention. There is no suggestion here of giving retroactive effect to the provisions of the Convention. Both Parties agree that the SFRY was bound by the Convention at the time when it is alleged that the relevant acts occurred. Whether those acts were contrary to the provisions of the 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 in Article IX.

So far as the third issue in dispute is concerned, the question the Court is asked to decide is whether the FRY — and, therefore, Serbia — is responsible for acts of genocide and other acts enumerated in Article III of the Convention allegedly attributable to the SFRY. Article IX provides for the Court's jurisdiction in relation to "[d]isputes . . . relating to the interpretation, application or fulfilment of the . . . Convention, including those relating to the responsibility of a State for genocide or for any of the other acts enumerated in article III". The Court notes that Article IX speaks generally of the responsibility of a State and contains no limitation regarding the manner in which that responsibility might be engaged.

The Court accepts that whether or not the Respondent State succeeds, as Croatia contends, to the responsibility of its predecessor State for violations of the Convention is governed not by the terms of the Convention but by rules of general international law. However, that does not take the dispute regarding the third issue outside the scope of Article IX. The fact that the application — or even the existence — of a rule on some aspect of State responsibility or State succession in connection with allegations of genocide may be vigorously contested between the parties to a case under Article IX does not mean that the dispute between them ceases to fall within the category of "disputes . . . relating to the interpretation, application or fulfilment of the [Genocide] Convention, including those relating to the responsibility of a State for genocide". The Court deduces from this that, since Croatia's alternative argument calls for a determination whether the SFRY was responsible for acts of genocide allegedly committed when the SFRY was a party to the Convention, its conclusion regarding the temporal scope of Article IX does not constitute a barrier to jurisdiction.

The Court goes on to explain that the principle it evoked in the Monetary Gold and East Timor cases does not apply in the present proceedings. In both of those cases, the Court declined to exercise its jurisdiction to adjudicate upon the application because it considered that to do so would have been contrary to the right of a State not party to the proceedings not to have the Court rule upon its conduct without its consent. That rationale has no application to a State which no longer exists, as is the case with the SFRY, since such a State no longer possesses any rights and is incapable of giving or withholding consent to the jurisdiction of the Court. So far as concerns the position of the other successor States to the SFRY, it is not necessary for the Court to rule on the legal situation of those States as a prerequisite for the determination of the present claim.

The Court thus concludes that, to the extent that the dispute concerns acts said to have occurred before 27 April 1992, it also falls within the scope of Article IX and the Court therefore has jurisdiction to rule upon the entirety of Croatia's claim. According to the Court, it is not necessary to decide whether the FRY, and therefore Serbia, actually succeeded to any responsibility that might have been incurred by the SFRY, any more than it is necessary to decide whether acts contrary to the Genocide Convention took place before 27 April 1992 or, if they did, to whom those acts were attributable; those questions are matters for the merits.

(5) Admissibility (paras. 118-119)

The Court focuses on the two alternative arguments advanced by Serbia regarding the admissibility of the claim. The first such argument is that a claim based upon events said to have occurred before the FRY came into existence as a State on 27 April 1992 is inadmissible. The Court recalls that it has already, in its 2008 Judgment, held that this argument involves questions of attribution. The Court observes that it is not necessary to determine these matters before it has considered on the merits the acts alleged by Croatia.

The second argument is that, even if a claim might be admissible in relation to events said to have occurred before the FRY came into existence as a State, Croatia could not maintain a claim in relation to events alleged to have taken place before it became a party to the Genocide Convention on 8 October 1991. The Court observes that Croatia has not made discrete claims in respect of the events before and after 8 October 1991; rather, it has advanced a single claim alleging a pattern of conduct increasing in intensity throughout the course of 1991 and has referred, in the case of many towns and villages, to acts of violence taking place both immediately prior to, and immediately following, 8 October 1991. In this context, what happened prior to 8 October 1991 is, in any event, pertinent to an evaluation of whether what took place after that date involved violations of the Genocide Convention. In these circumstances, the Court considers that it is not necessary to rule upon Serbia's second alternative argument before it has examined and assessed the totality of the evidence advanced by Croatia.

B. Serbia's counter-claim (paras. 120-123)

The Court recalls that, in order to be admissible, a counter-claim must fulfil two conditions (Article 80 of the Rules of Court). It must come within the jurisdiction of the Court and it must be directly connected with the subject-matter of the principal claim. The Court notes that Serbia's counter-claim relates exclusively to the fighting which took place in the summer of 1995 in the course of what was described by Croatia as Operation "Storm" and its aftermath, that by the time that Operation "Storm" took place both Croatia and the FRY had been parties to the Genocide Convention for several years, and that Croatia does not contest that the counter-claim thus falls within the jurisdiction of the Court under Article IX of the Genocide Convention.

Further, the Court considers that the counter-claim is directly connected with the claim of Croatia both in fact and in law. The legal basis for both the claim and the counter-claim is the Genocide Convention. Moreover, the hostilities in Croatia in 1991-1992 that gave rise to most of the allegations in the claim were directly connected with those in the summer of 1995, not least because Operation "Storm" was launched as a response to what Croatia maintained was the occupation of part of its territory as a result of the earlier fighting.

The Court therefore concludes that the requirements of Article 80, paragraph 1, of the Rules of Court are satisfied.

III. Applicable law: The Convention on the Prevention and Punishment of the Crime of Genocide (paras. 124-166)

The Court states that, in ruling on disputes relating to the interpretation, application or fulfilment of the Convention, including those relating to the responsibility of a State for genocide, it 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. It is for the Court, in applying the Convention, to decide whether acts of genocide have been committed, but it is not for the Court to determine the individual criminal responsibility for such acts. That is a task for the criminal courts or tribunals empowered

to do so. The Court will nonetheless take account, where appropriate, of the decisions of international criminal courts or tribunals, in particular those of the International Criminal Tribunal for the former Yugoslavia ("ICTY"), in examining the constituent elements of genocide in the present case. If it is established that genocide has been committed, the Court will then seek to determine the responsibility of the State, on the basis of the rules of general international law governing the responsibility of States for internationally wrongful acts.

The Court recalls that Article II of the Convention defines genocide in the following terms:

> "In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:
>
> (a) Killing members of the group;
>
> (b) Causing serious bodily or mental harm to members of the group;
>
> (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
>
> (d) Imposing measures intended to prevent births within the group;
>
> (e) Forcibly transferring children of the group to another group."

The Court observes that, according to that Article, genocide contains two constituent elements: the physical element, namely the act perpetrated or actus reus, and the mental element, or mens rea. Although analytically distinct, the two elements are linked. The determination of actus reus can require an inquiry into intent. In addition, the characterization of the acts and their mutual relationship can contribute to an inference of intent.

A. The mens rea of genocide (paras. 132-148)

The Court points out that the "intent to destroy, in whole or in part, a national, ethnical, racial or religious group as such" is the essential characteristic of genocide, which distinguishes it from other serious crimes. It is regarded as a dolus specialis, that is to say a specific intent, which, in order for genocide to be established, must be present in addition to the intent required for each of the individual acts involved.

1. The meaning and scope of "destruction" of a group (paras. 134-139)

(a) Physical or biological destruction of the group (paras. 134-136)

The Court notes that the travaux préparatoires of the Convention show that the drafters originally envisaged two types of genocide, physical or biological genocide, and cultural genocide, but that this latter concept was eventually dropped in this context. It was accordingly decided to limit the scope of the Convention to the physical or biological destruction of the group. It follows that "causing serious . . . mental harm to members of the group" within the meaning of Article II (b), even if it does not directly concern the physical or biological destruction of members of the group, must be regarded as encompassing only acts carried out with the intent of achieving the physical or biological destruction of the group, in whole or in part. As regards the forcible transfer of children of the group to another group within the meaning of Article II (e), this can also entail the intent to destroy the group physically, in whole or in part, since it can have consequences for the group's capacity to renew itself, and hence to ensure its long-term survival.

(b) The scale of destruction of the group (paras. 137-139)

Since it is the group, in whole or in part, which is the object of the genocidal intent, the Court is of the view that it is difficult to establish such intent on the basis of isolated acts. It considers that, in the absence of direct proof, there must be evidence of acts on a scale that establishes an intent not only to target certain individuals because of their membership of a particular group, but also to destroy the group itself in whole or in part.

2. The meaning of the destruction of the group "in part" (paras. 140-142)

Citing its previous case law, the Court recalls that the destruction of the group "in part" within the meaning of Article II of the Convention must be assessed by reference to a number of criteria. First, "the intent must be to destroy at least a substantial part of the particular group", and this is a "critical" criterion. Furthermore, "it is widely accepted that genocide may be found to have been committed where the intent is to destroy the group within a geographically limited area" and, accordingly, "[t]he area of the perpetrator's activity and control are to be considered". Account must also be taken of the prominence of the allegedly targeted part within the group as a whole. In particular, the Court must consider whether "a specific part of the group is emblematic of the overall group, or is essential to its survival".

3. Evidence of the dolus specialis (paras. 143-148)

The Court considers that, in the absence of a State plan expressing the intent to commit genocide, such an intent may be inferred from the individual conduct of perpetrators of the acts contemplated in Article II of the Convention. It goes on to explain that, in order to infer the existence of dolus specialis from a pattern of conduct, it is necessary that this is the only inference that could reasonably be drawn from the acts in question.

B. The actus reus of genocide (paras. 149-166)

1. The relationship between the Convention and international humanitarian law (paras. 151-153)

The Court notes that the Convention and international humanitarian law are two distinct bodies of rules, pursuing different aims. The Court makes it clear that it is called upon here to decide a dispute concerning the interpretation and application of the Genocide Convention, and will not therefore rule, in general or in abstract terms, on the relationship between the Convention and international humanitarian law. It nonetheless points out that, in so far as both of these bodies of rules may be applicable in the context of a particular armed conflict, the rules of international humanitarian law might be relevant in order to decide whether the acts alleged by the Parties constitute genocide within the meaning of Article II of the Convention.

2. The meaning and scope of the physical acts in question (paras. 154-166)

The Court analyses the meaning to be given to the acts prohibited under Article II of the Convention, with the exception of "[f]orcibly transferring children of the group to another group" (subparagraph (e)), which is not relied on by either of the Parties to the case.

(a) As regards killing members of the group, within the meaning of subparagraph (a), the Court states that this means the act of "intentionally" killing members of the group.

(b) Concerning causing serious bodily or mental harm to members of the group, the Court considers that, in the context of Article II, and in particular of its chapeau, and in light of the Convention's object and purpose, the ordinary meaning of "serious" is that the bodily or mental harm referred to in subparagraph (b) of that Article must be such as to contribute to the physical or biological destruction of the group, in whole or in part. The Court goes on to explain that rape and other acts of sexual violence are capable of constituting the actus reus of genocide within the meaning of Article II (b) of the Convention. Furthermore, the Court considers that the persistent refusal of the competent authorities to provide relatives of individuals who disappeared in the context of an alleged genocide with information in their possession, which would enable the relatives to establish with certainty whether those individuals are dead, and if so, how they died, is capable of causing psychological suffering. The Court concludes, however, that, to fall within Article II (b) of the Convention, the harm resulting from that suffering must be such as to contribute to the physical or biological destruction of the group, in whole or in part.

(c) In relation to the deliberate infliction on the group of conditions of life calculated to bring about its physical destruction in whole or in part, the Court recalls that subparagraph (c) of Article II covers methods of physical destruction, other than killing, whereby the perpetrator ultimately seeks the death of the members of the group. Such methods of destruction include notably deprivation of food, medical care, shelter or clothing, as well as lack of hygiene, systematic expulsion from homes, or exhaustion as a result of excessive work or physical exertion. In order to determine whether the forced displacements alleged by the Parties constitute genocide in the sense of Article II of the Convention (subparagraph (c), in particular), the Court seeks to ascertain whether, in the present case, those forced displacements took place in such circumstances that they were calculated to bring about the physical destruction of the group.

(d) Finally, regarding measures intended to prevent births within the group, the Court considers that rape and other acts of sexual violence, which may also fall within subparagraphs (b) and (c) of Article II, are capable of constituting the actus reus of genocide within the meaning of Article II (d) of the Convention, provided that they are of a kind which prevent births within the group. In order for that to be the case, it is necessary that the circumstances of the commission of those acts, and their consequences, are such that the capacity of members of the group to procreate is affected. Likewise, the systematic nature of such acts has to be considered in determining whether they are capable of constituting the actus reus of genocide within the meaning of Article II (d) of the Convention.

IV. QUESTIONS OF PROOF (paras. 167-199)

The Parties having discussed at some length issues of the burden of proof, the standard of proof and the methods of proof, the Court proceeds to consider each of these questions in turn.

(a) Regarding the burden of proof, the Court recalls that it is for the party alleging a fact to demonstrate its existence, but that this principle is not an absolute one. However, it takes the view that, in the present case, neither the subject-matter nor the nature of the dispute makes it appropriate to contemplate a reversal of the burden of proof.

(b) As regards the standard of proof, the Court, citing its previous case law, recalls that claims against a State involving charges of exceptional gravity, as in the present case, must be proved by evidence that is fully conclusive, and emphasizes that it must be fully convinced that allegations made in the proceedings — that the crime of genocide or the other acts enumerated in Article III of the Convention have been committed — have been clearly established.

(c) Concerning methods of proof, the Court recalls that, in order to rule on the facts alleged, the Court must assess the relevance and probative value of the evidence proffered by the Parties in support of their versions of the facts.

In relation to documents from the proceedings of the ICTY, the Court, citing its own previous case law in the matter, recalls that it "should in principle accept as highly persuasive relevant findings of fact made by the Tribunal at trial, unless of course they have been upset on appeal", and that "any evaluation by the Tribunal based on the facts as so found for instance about the existence of the required intent, is also entitled to due weight". As regards the probative value of the ICTY Prosecutor's decisions not to include a charge of genocide in an indictment, the Court recalls that "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. But that cannot be taken as decisive proof of whether or not genocide has been committed. The Court notes that the persons charged by the Prosecutor included very senior members of the political and military leadership of the principal participants in the hostilities which took place in Croatia between 1991 and 1995. The charges brought against them included, in many cases, allegations about the overall strategy adopted by the leadership in question and about the existence of a joint criminal enterprise. In that context, the fact that charges of genocide were not included in any of the indictments is of greater significance than would have been the case had the defendants occupied much lower positions in the chain of command. In addition, the Court cannot fail to note that the indictment in the case of the highest ranking defendant of all, former President Milošević, did include charges of genocide in relation to the conflict in Bosnia and Herzegovina, whereas no such charges were brought in the part of the indictment concerned with the hostilities in Croatia.

With regard to reports from official or independent bodies, the Court recalls that their value depends, among other things, on (1) the source of the item of evidence, (2) the process by which it has been generated, and (3) the quality or character of the item.

Lastly, the Court turns to the numerous statements annexed by Croatia to its written pleadings. While recognizing the difficulties of obtaining evidence in the circumstances of the case, the Court nevertheless notes that many of the statements produced by Croatia are deficient. Thus, certain statements consist of records of interviews by the Croatian police of one or sometimes several individuals which are not signed by those persons and contain no indication that those individuals were aware of the content. Moreover, the words used appear to be those of the police officers themselves. The Court considers that it cannot accord evidential weight to such statements.

Other statements appear to record the words of the witness but are not signed. Some of these statements were subsequently confirmed by signed supplementary statements deposited with the Reply and can, therefore, be given the same evidential weight as statements which bore the signature of the witness when they were initially produced to the Court. In some cases, the witness in question has testified before the Court or before the ICTY and that testimony has confirmed the content of the original statement to which the Court can, therefore, also accord some evidential weight. However, the Court cannot accord evidential weight to those statements which are neither signed nor confirmed.

Certain statements present difficulties in that they fail to mention the circumstances in which they were given or were only made several years after the events to which they refer. The Court might nonetheless accord some evidential weight to these statements. Other statements are not eyewitness accounts of the facts. The Court states that it will accord evidential weight to these statements only where they have been confirmed by other witnesses, either before the Court or before the ICTY, or where they have been corroborated by credible evidence.

V. CONSIDERATION OF THE MERITS OF THE PRINCIPAL CLAIM
(paras. 200-442)

The Court seeks first to determine whether the alleged acts have been established and, if so, whether they fall into the categories of acts listed in Article II of the Convention; and then, should that be established, whether those physical acts were committed with intent to destroy the protected group, in whole or in part.

A. The actus reus of genocide (paras. 203-401)

1. Introduction (paras. 203-208)

The Court does not consider it necessary to deal separately with each of the incidents mentioned by the Applicant, nor to compile an exhaustive list of the alleged acts. It focuses on the allegations concerning localities put forward by Croatia as representing examples of systematic and widespread acts committed against the protected group, from which an intent to destroy it, in whole or in part, could be inferred: these are the localities cited by Croatia during the oral proceedings or in regard to which it called witnesses to give oral testimony, as well as those where the occurrence of certain acts has been established before the ICTY.

Recalling that, under the terms of Article II of the Convention, genocide covers acts committed with intent to destroy a national, ethnical, racial or religious group in whole or in part, the Court observes that, in its written pleadings, Croatia defines that group as the Croat national or ethnical group on the territory of Croatia, which is not contested by Serbia. For the purposes of its discussion, the Court chooses to designate that group using the terms "Croats" or "protected group" interchangeably.

2. Article II (a): killing members of the protected group (paras. 209-295)

In order to determine whether killings of members of the protected group, within the meaning of Article II (a) of the Convention, were committed, the Court examines evidence included in the case file concerning Vukovar and its surrounding area, Bogdanovci, Lovas and Dalj (region of Eastern Slavonia), Voćin (region of Western Slavonia), Joševica, Hrvatska Dubica and its surrounding area (region of Banovina/Banija), Lipovača (region of Kordun), Saborsko and Poljanak (region of Lika), and Škabrnja and its surrounding area, Bruška and Dubrovnik (region of Dalmatia).

Following its analysis, the Court considers it established not only that a large number of killings were carried out by the JNA and Serb forces during the conflict in several localities in Eastern Slavonia, Banovina/Banija, Kordun, Lika and Dalmatia, but that a large majority of the victims were members of the protected group, which suggests that they may have been systematically targeted. The Court notes that while the Respondent has contested the veracity of certain allegations, the number of victims and the motives of the perpetrators, as well as the circumstances of the killings and their legal categorization, it has not disputed the fact that members of the protected group were killed in the regions in question. The Court thus finds that it has been proved by conclusive evidence that killings of members of the protected group, as defined above, were committed, and that the actus reus of genocide specified in Article II (a) of the Convention has therefore been established. The Court adds that, at this stage of its reasoning, it is not required to draw up a complete list of the killings carried out, nor to make a conclusive finding as to the total number of victims.

3. Article II (b): causing serious bodily or mental harm to members of the group (paras. 296-360)

The Court then turns to the question of whether serious bodily or mental harm was caused to members of the group. It first examines the claims that Croats were the victims of physical injury, ill-treatment and acts of torture, rape and sexual violence in Vukovar and its surrounding area (particularly in the camps at Ovčara and Velepromet), Bapska, Tovarnik, Berak, Lovas and Dalj (region of Eastern Slavonia), in Kusonje, Voćin and Đulovac (region of Western Slavonia), and lastly in Knin (region of Dalmatia).

Secondly, the Court addresses Croatia's argument that the psychological pain suffered by the relatives of missing persons constituted serious mental harm. It takes the view, however, that Croatia has failed to provide evidence of psychological suffering sufficient to constitute serious mental harm within the meaning of Article II (b) of the Convention. The Court nonetheless observes that the Parties have expressed their willingness, in the interest of the families concerned, to elucidate the fate of those who disappeared in Croatia between 1991 and 1995. Noting Serbia's assurance that it will fulfil its responsibilities in the co-operation process with Croatia, the Court encourages the Parties to pursue that co-operation in good faith and to utilize all means available to them in order that the issue of the fate of missing persons can be settled as quickly as possible.

In conclusion, the Court considers it established that during the conflict in a number of localities in Eastern Slavonia, Western Slavonia, and Dalmatia, the JNA and Serb forces injured members of the protected group and perpetrated acts of ill-treatment, torture, sexual violence and rape. These acts caused such bodily or mental harm as to contribute to the physical or biological destruction of the protected group. The Court considers that the actus reus of genocide within the meaning of Article II (b) of the Convention has accordingly been established.

4. Article II (c): deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part (paras. 361-394)

The Court considers whether, as Croatia asserts, the JNA and Serb forces deliberately inflicted on the protected group conditions of life calculated to bring about its physical destruction in whole or in part, within the meaning of Article II (c) of the Convention. In order to do so, it examines the evidence provided concerning the allegations of rape, deprivation of food and medical care, the systematic expulsion of Croats from their homes and their forced displacement, restrictions on movement, Croats being forced to display signs of their ethnicity, the destruction and looting of Croat property, the vandalizing of their cultural heritage and their subjection to forced labour.

While recognizing that some of the alleged acts have been proven, the Court nonetheless concludes that Croatia has failed to establish that acts capable of constituting the actus reus of genocide, within the meaning of Article II (c) of the Convention, were committed by the JNA and Serb forces.

5. Article II (d): measures intended to prevent births within the group (paras. 395-400)

On the question of whether acts which might fall within the meaning of Article II (d) of the Convention were committed against the protected group, the Court finds that Croatia has failed to show that rapes and other acts of sexual violence were perpetrated by the JNA and Serb forces against Croats in order to prevent births within the group, and that, hence, the actus reus of genocide within the meaning of Article II (d) of the Convention has not been established.

Conclusion on the actus reus of genocide (para. 401)

The Court is fully convinced that, in various localities in Eastern Slavonia, Western Slavonia, Banovina/Banija, Kordun, Lika and Dalmatia, the JNA and Serb forces perpetrated against members of the protected group acts falling within subparagraphs (a) and (b) of Article II of the Convention, and that the actus reus of genocide has been established.

B. The genocidal intent (dolus specialis) (paras. 402-440)

The actus reus of genocide having been established, the Court examines whether the acts perpetrated by the JNA and Serb forces were committed with intent to destroy, in whole or in part, the protected group.

1. Did the Croats living in Eastern Slavonia, Western Slavonia, Banovina/Banija, Kordun, Lika and Dalmatia constitute a substantial part of the protected group? (Paras. 405-406)

In order to determine whether the Croats living in these regions constituted a substantial part of the protected group, the Court takes account not only of the quantitative element, but also of the geographic location and prominence of the targeted part of the group. As to the quantitative element, the Court notes that the ethnic Croats living in the regions in question constituted slightly less than half of the ethnic Croat population living in Croatia. Regarding the geographic location, it recalls that the acts committed by the JNA and Serb forces in the said regions targeted the Croats living there, within which these armed forces exercised and sought to expand their control. Finally, the Court notes that Croatia has provided no information as regards the prominence of that part of the group.

The Court concludes from the foregoing that the Croats living in the regions of Eastern Slavonia, Western Slavonia, Banovina/Banija, Kordun, Lika and Dalmatia constituted a substantial part of the Croat group.

2. Is there a pattern of conduct from which the only reasonable inference to be drawn is an intent of the Serb authorities to destroy, in part, the protected group? (Paras. 407-439)

The Court examines the 17 factors suggested by Croatia to establish the existence of a pattern of conduct revealing a genocidal intent — the most important of which concern the scale and allegedly systematic nature of the attacks, the fact that those attacks are said to have caused casualties and damage far in excess of what was justified by military necessity, the specific targeting of Croats and the nature, extent and degree of the injuries caused to the Croat population — as well as the findings of the ICTY Trial Chamber in the Mrkšić et al. case (Judgment of 27 September 2007) and the Martić case (Judgment of 12 June 2007).

The Court notes that there were similarities, in terms of the modus operandi used, between some of the attacks confirmed to have taken place. Thus it observes that the JNA and Serb forces would attack and occupy the localities and create a climate of fear and coercion, by committing a number of acts that constitute the actus reus of genocide within the meaning of Article II (a) and (b) of the Convention. Finally, the occupation would end with the forced expulsion of the Croat population from these localities.

The Court observes that its findings and those of the ICTY are mutually consistent and establish the existence of a pattern of conduct that consisted, from August 1991, in widespread attacks by the JNA and Serb forces on localities with Croat populations in various regions of Croatia, according to a generally similar modus operandi.

The Court recalls, however, that for a pattern of conduct to be accepted as evidence of intent to destroy the group, in whole or in part, such intent must be the only reasonable inference which can be drawn from the said pattern of conduct. It notes in this respect that in its oral argument, Croatia put forward two factors which, in its view, should lead the Court to arrive at such a conclusion: the context in which those acts were committed and the opportunity which the JNA and Serb forces had of destroying the Croat population. The Court examines these in turn.

(a) Context (paras. 419-430)

The Court analyses the context in which the acts constituting the actus reus of genocide within the meaning of subparagraphs (a) and (b) of Article II of the Convention were committed, in order to determine the aim pursued by the authors of those acts.

The Court considers that there is no need to enter into a debate on the political and historical origins of the events that took place in Croatia between 1991 and 1995. It notes that the Memorandum of the Serbian Academy of Sciences and Arts (SANU) cited by Croatia has no official standing and certainly does not contemplate the destruction of the Croats. It cannot be regarded, either by itself or in connection with any of the other factors relied on by Croatia, as an expression of the dolus specialis.

The Court addresses the findings of the ICTY. It notes that, according to the latter, the political objective being pursued by the leadership of the Serb Autonomous Region (SAO) of Krajina and then the RSK, and shared with the leaderships in Serbia and in the Republika Srpska in Bosnia and Herzegovina, was to unite Serb areas in Croatia and in Bosnia and Herzegovina with Serbia in order to establish a unified territory, and to establish an ethnically Serb territory through the displacement of the Croat and other non-Serb population through a campaign of persecutions.

The Court further notes that, according to the conclusions of the ICTY, the acts that constitute the actus reus of genocide within the meaning of Article II (a) and (b) of the Convention were not committed with intent to destroy the Croats, but rather with that of forcing them to leave the regions concerned so that an ethnically homogeneous Serb State could be created. The Court agrees with this conclusion.

The Court therefore concludes that Croatia's contentions regarding the overall context do not support its assertion that genocidal intent is the only reasonable inference to be drawn.

As regards the events at Vukovar, to which Croatia has given particular attention, the Court notes that the ICTY found that the attack on that city constituted a response to the declaration of independence by Croatia, and above all an assertion of Serbia's grip on the SFRY. It follows from this, and from the fact that numerous Croats of Vukovar were evacuated, that the existence of intent to physically destroy the Croatian population is not the only reasonable conclusion that can be drawn from the illegal attack on Vukovar. Finally, the Court adds that the conclusions of the ICTY indicate that the intent of the perpetrators of the ill-treatment at Ovčara was not to physically destroy the members of the protected group, as such, but to punish them because of their status as enemies, in a military sense.

(b) Opportunity (paras. 431-437)

The Court states that it will not seek to determine whether or not, in each of the localities it has previously considered, the JNA and Serb forces made systematic use of the opportunities to physically destroy Croats.

It considers, on the other hand, that the mass forced displacement of Croats is a significant factor in assessing whether there was an intent to destroy the group, in whole or in part. It recalls in this respect that it has previously found that Croatia has not demonstrated that such forced displacement constituted the actus reus of genocide within the meaning of Article II (c) of the Convention.

In the present case, the Court notes that, as emerges in particular from the findings of the ICTY, forced displacement was the instrument of a policy aimed at establishing an ethnically homogeneous Serb State. In that context, the expulsion of the Croats was brought about by the creation of a coercive atmosphere, generated by the commission of acts including some that constitute the actus reus of genocide within the meaning of Article II (a) and (b) of the Convention. Those acts had an objective, namely the forced displacement of the Croats, which did not entail their physical destruction. The Court finds that the acts committed by the JNA and Serb forces essentially had the effect of making the Croat population flee the territories concerned. It was not a question of systematically destroying that population, but of forcing it to leave the areas controlled by these armed forces.

Regarding the events at Vukovar, to which Croatia has given particular attention, the Court notes that, in the Mrkšić et al. case, the ICTY established several instances of the JNA and Serb forces evacuating civilians, particularly Croats. The ICTY further found that Croat combatants captured by the JNA and Serb forces had not all been executed. Thus, following their surrender to the JNA, an initial group of Croat combatants was transferred on 18 November 1991 to Ovčara, and then to Sremska Mitrovica in Serbia, where they were held as prisoners of war. Similarly, a group of Croat combatants held at Velepromet was transferred to Sremska Mitrovica on 19-20 November 1991, while civilians not suspected of having fought alongside Croat forces were evacuated to destinations in Croatia or Serbia. This shows that, in many cases, the JNA and Serb forces did not kill those Croats who had fallen into their hands.

The Court considers that it is also relevant to compare the size of the targeted part of the protected group with the number of Croat victims, in order to determine whether the JNA and Serb forces availed themselves of opportunities to destroy that part of the group. In this connection, Croatia put forward a figure of 12,500 Croat deaths, which is contested by Serbia. The Court notes that, even assuming that this figure is correct — an issue on which it makes no ruling — the number of victims alleged by Croatia is small in relation to the size of the targeted part of the group.

The Court concludes from the foregoing that Croatia has failed to show that the perpetrators of the acts which form the subject of the principal claim availed themselves of opportunities to destroy a substantial part of the protected group.

Conclusion on the dolus specialis (para. 440)

In its general conclusion on the dolus specialis, the Court finds that Croatia has not established that the only reasonable inference that can be drawn from the pattern of conduct it relied upon was the intent to destroy, in whole or in part, the Croat group. It takes the view that the acts constituting the actus reus of genocide within the meaning of Article II (a) and (b) of the Convention were not committed with the specific intent required for them to be characterized as acts of genocide.

The Court further notes that the ICTY prosecutor has never charged any individual on account of genocide against the Croat population in the context of the armed conflict which took place in the territory of Croatia in the period 1991-1995.

C. General conclusion on Croatia's claim (paras. 441-442)

It follows from the foregoing that Croatia has failed to substantiate its allegation that genocide was committed. Accordingly, no issue of responsibility under the Convention for the commission of genocide can arise in the present case. Nor can there be any question of responsibility for a failure to prevent genocide, a failure to punish genocide, or complicity in genocide.

In view of the fact that dolus specialis has not been established by Croatia, its claims of conspiracy to commit genocide, direct and public incitement to commit genocide, and attempt to commit genocide also necessarily fail.

Accordingly, Croatia's claim must be dismissed in its entirety.

The Court states that it is consequently not required to pronounce on the inadmissibility of the principal claim as argued by Serbia in respect of acts prior to 8 October 1991. Nor does it need to consider whether acts alleged to have taken place before 27 April 1992 are attributable to the SFRY, or, if so, whether Serbia succeeded to the SFRY's responsibility on account of those acts.

VI. CONSIDERATION OF THE MERITS OF THE COUNTER-CLAIM (paras. 443-523)

A. Examination of the principal submissions in the counter-claim: whether acts of genocide attributable to Croatia were committed against the national and ethnical group of Serbs living in Croatia during and after Operation "Storm" (paras. 446-515)

The Court begins by noting that two points were not disputed between the Parties, and may be regarded as settled. First, the Serbs living in Croatia at the time of the events in question — who represented a minority of the population — did indeed constitute a "national [or] ethnical" "group" within the meaning of Article II of the Genocide Convention, and the Serbs living in the Krajina region, who were directly affected by Operation "Storm", constituted a "substantial part" of that national or ethnical group. Secondly, the acts alleged by Serbia — or at least the vast majority of them — assuming them to be proved, were committed by the regular armed forces or police of Croatia.

The Court observes, on the other hand, that the Parties completely disagree on two key questions. First, Croatia denies that the greater part of the acts alleged by Serbia even took place; and secondly, it denies that those acts, even if some of them were proved, were carried out with intent to destroy, in whole or in part, the national or ethnical group of the Croatian Serbs as such. The Court addresses those two questions.

1. The *actus reus* of genocide (paras. 452-499)

(a) The evidence presented by Serbia in support of the facts alleged (paras. 454-461)

The Court analyses the evidence produced by Serbia and discusses the probative value it should be accorded.

(b) Whether the acts alleged by Serbia have been effectively proved (paras. 462-498)

(i) Killing of civilians as a result of the allegedly indiscriminate shelling of Krajina towns

The Court begins by summarizing the decisions of the ICTY in the Gotovina case, which it considers highly relevant for the purposes of the present case.

The Court thus notes that the ICTY Trial Chamber held that two of the defendants had taken part in a joint criminal enterprise aimed at the expulsion of the Serb civilian population from the Krajina, through indiscriminate shelling of the four towns of Knin, Benkovac, Obrovac and Gračac, the purpose of which — alongside any strictly military objectives — was to terrorize and demoralize the population so as to force it to flee. In order to reach this conclusion, the Trial Chamber relied, first, on certain documents, including the transcript of a meeting held at Brioni on 31 July 1995, just a few days before the launch of Operation "Storm", under the chairmanship of President Tudjman and secondly, and above all, on the so-called "200 Metre Standard", under which only shells impacting less than 200 metres from an identifiable military target could be regarded as having been aimed at that target, whilst those impacting more than 200 metres from a military target should be regarded as evidence that the attack was deliberately aimed at both civilian and military targets, and was therefore indiscriminate. Applying that standard to the case before it, the Trial Chamber found that the artillery attacks on the four towns mentioned above (but not on the other Krajina towns and villages) had been indiscriminate, since a large proportion of shells had fallen over 200 metres from any identifiable military target.

The Court then observes that the ICTY Appeals Chamber disagreed with the Trial Chamber's analysis and reversed the latter's decision. The Appeals Chamber held that the "200 Metre Standard" had no basis in law and lacked any convincing justification. The Chamber accordingly concluded that the Trial Chamber could not reasonably find, simply by applying that standard, that the four towns in question had been shelled indiscriminately. It further held that the Trial Chamber's reasoning was essentially based on the application of the standard in question, and that none of the evidence before the Court — particularly the Brioni Transcript — showed convincingly that the Croatian armed forces had deliberately targeted the civilian population. The Appeals Chamber accordingly found that the prosecution had failed to prove a "joint criminal enterprise", and acquitted the two accused on all of the counts in the indictment (including murder and deportation).

The Court recalls that it should in principle accept as highly persuasive relevant findings of facts made by the ICTY at trial, unless of course they have been upset on appeal. That should lead the Court, in the present case, to give the greatest weight to factual findings by the Trial Chamber which were not reversed by the Appeals Chamber, and to give due weight to the findings and determinations of the Appeals Chamber on the issue of whether or not the shelling of the Krajina towns during Operation "Storm" was indiscriminate.

The Court notes that Serbia argued that the findings of an ICTY Appeals Chamber should not necessarily be accorded more weight than those of a Trial Chamber, particularly in the circumstances of the Gotovina case. The Court rejects that argument however. Irrespective of the manner in which the members of the Appeals Chamber are chosen — a matter on which it is not for the Court to pronounce — the latter's decisions represent the last word of the ICTY on the cases before it when one of the parties has chosen to appeal from the Trial Chamber's Judgment. Accordingly, the Court cannot treat the findings and determinations of the Trial Chamber as being on an equal footing with those of the Appeals Chamber. In cases of disagreement, it is bound to accord greater weight to what the Appeals Chamber Judgment says, while ultimately retaining the power to decide the issues before it on the facts and the law.

The Court concludes from the foregoing that it is unable to find that there was any indiscriminate shelling of the Krajina towns deliberately intended to cause civilian casualties. It would only be in exceptional circumstances that it would depart from the findings reached by the ICTY on an issue of this kind. Serbia has indeed drawn the Court's attention to the controversy aroused by the Appeals Chamber's Judgment. However, no evidence, whether prior or subsequent to that Judgment, has been put before the Court which would incontrovertibly show that the Croatian authorities deliberately intended to shell the civilian areas of towns inhabited by Serbs. In particular, no such intent is apparent from the Brioni Transcript. Nor can such intent be regarded as incontrovertibly established on the basis of the statements by persons having testified before the ICTY Trial Chamber in the Gotovina case, and cited as witnesses by Serbia in the present case.

The Court observes that Serbia further argues that, even if the artillery attacks on the Krajina towns were not indiscriminate, and thus lawful under international humanitarian law, that would not prevent the Court from holding that those attacks were unlawful under the Genocide Convention, if they were motivated by an intent to destroy the Serb population of the Krajina, in whole or in part. In this connection, the Court explains that there can be no doubt that, as a general rule, a particular act may be perfectly lawful under one body of legal rules and unlawful under another. Thus it cannot be excluded in principle that an act carried out during an armed conflict and lawful under international humanitarian law can at the same time constitute a violation by the State in question of some other international obligation incumbent upon it. However, it is not the task of the Court in the context of the counter-claim to rule on the relationship between international humanitarian law and the Genocide Convention. The question to which it must respond is whether the artillery attacks on the Krajina towns in August 1995, in so far as they resulted in civilian casualties, constituted "killing [of] members of the [Krajina Serb] group", within the meaning of Article II (a) of the Genocide Convention, so that they may accordingly be regarded as constituting the actus reus of genocide. "Killing" within the meaning of Article II (a) of the Convention always presupposes the existence of an intentional element (which is altogether distinct from the "specific intent" necessary to establish genocide), namely the intent to cause death. It follows that, if one takes the view that the attacks were exclusively directed at military targets, and that the civilian casualties were not caused deliberately, one cannot consider those attacks, inasmuch as they caused civilian deaths, as falling within the scope of Article II (a) of the Genocide Convention.

The Court concludes for the foregoing reasons that it has not been shown that "killing[s] [of] members of the [protected] group", within the meaning of Article II of the Convention, were committed as a result of the artillery attacks on towns in that region during Operation "Storm" in August 1995.

(ii) Forced displacement of the Krajina Serb population

The Court notes that it is not disputed that a substantial part of the Serb population of the Krajina fled that region as a direct consequence of the military actions carried out by Croatian forces during Operation "Storm", in particular the shelling of the four towns referred to above. The transcript of the Brioni meeting makes it clear that the highest Croatian political and military authorities were well aware that Operation "Storm" would provoke a mass exodus of the Serb population; they even to some extent predicated their military planning on such an exodus, which they considered not only probable, but desirable. In any event, even if it were proved that it was the intention of the Croatian authorities to bring about the forced displacement of the Serb population of the Krajina, such displacement would only be capable of constituting the actus reus of genocide if it was calculated to bring about the physical destruction, in whole or in part, of the targeted group, thus bringing it within the scope of subparagraph (c) of Article II of the Convention. The Court finds that the evidence before it does not support such a conclusion. Even if there was a deliberate policy to expel the Serbs from the Krajina, it has in any event not been

shown that such a policy was aimed at causing the physical destruction of the population in question.

(iii) Killing of Serbs fleeing in columns from the towns under attack

The Court considers that there is sufficient evidence to establish that attacks on Serb refugee columns did take place, and that they were in part carried out by Croatian forces, or with their acquiescence.

The Court's conclusion is that killings were in fact committed during the flight of the refugee columns, even if it is unable to determine their number, and even though there is significant doubt as to whether they were carried out systematically. These killings, which fall within the scope of subparagraph (a) of Article II of the Genocide Convention, constitute the actus reus of genocide.

(iv) Killing of Serbs having remained in the areas of the Krajina protected by the United Nations

The Court finds that the occurrence of summary executions of Serbs in the United Nations protected areas (UNPAs) during Operation "Storm" and the following weeks has been established by the testimony of a number of witnesses heard by the ICTY in the Gotovina case. The Trial Chamber was sufficiently convinced by that evidence to accept it as proof that Croatian military units and special police carried out killings of Serbs in at least seven towns of the Krajina. Moreover, Croatia itself has admitted that some killings did take place. The Court notes that, although the Appeals Chamber overturned the Trial Chamber's Judgment, it did not reverse the latter's factual findings regarding the killings and ill-treatment of Serbs by members of the Croatian army and police. The Court accordingly considers that the factual findings in the Trial Chamber Judgment on the killing of Serbs during and after Operation "Storm" within the UNPAs must be accepted as "highly persuasive", since they were not "upset on appeal".

Basing itself on the jurisprudence of the ICTY and other evidence, the Court finds that acts falling within subparagraph (a) of Article II of the Genocide Convention were committed by members of the Croatian armed forces against a number of Serb civilians, and soldiers who had surrendered, who remained in the areas of which the Croatian army had taken control during Operation "Storm".

(v) Ill-treatment of Serbs during and after Operation "Storm"

The same considerations as those set out in the previous section regarding the allegations of killings of Serbs in the UNPAs lead the Court to the view that there is sufficient evidence of ill-treatment of Serbs. The ICTY Trial Chamber in the Gotovina case found that such acts had in fact taken place. The Court considers it established that many of the acts in question were at least of a degree of gravity such as would enable them to be characterized as falling within subparagraph (b) of Article II of the Genocide Convention. It states that it is not necessary, at this stage of its reasoning, to determine whether those acts, or certain of them, also amounted to "deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part" within the meaning of subparagraph (c) of Article II of the Convention.

(vi) Large-scale destruction and looting of Serb property during and after Operation "Storm"

The Court recalls that, in order to come within the scope of Article II (c) of the Genocide Convention, the acts alleged by Serbia must have been such as to have inflicted on the protected group conditions of life calculated to bring about its physical destruction in whole or in part. The Court finds that the evidence before it does not enable it to reach such a conclusion in the present case. Even if Serb property was looted and destroyed, it has in any event not been established that this was aimed at bringing about the physical destruction of the Serb population of the Krajina.

Conclusion as to the existence of the actus reus of genocide (para. 499)

In light of the above, the Court is fully convinced that, during and after Operation "Storm", Croatian armed forces and police perpetrated acts against the Serb population falling within subparagraphs (a) and (b) of Article II of the Genocide Convention, and that these acts constituted the actus reus of genocide.

2. The genocidal intent (dolus specialis) (paras. 500-515)

(a) The Brioni Transcript (paras. 501-507)

In the Court's view, the passages from the Brioni Transcript relied on by Serbia are far from demonstrating an intention on the part of the Croatian leaders physically to destroy the group of the Croatian Serbs, or the substantial part of that group constituted by the Serbs living in Krajina.

At most, the view might be taken that the Brioni Transcript shows that the leaders of Croatia envisaged that the military offensive they were preparing would have the effect of causing the flight of the great majority of the Serb population of the Krajina, that they were satisfied with that consequence and that, in any case, they would do nothing to prevent it because, on the contrary, they wished to encourage the departure of the Serb civilians. However, even that interpretation, assuming it to be correct, would be far from providing a sufficient basis for the Court to make a finding of the existence of the specific intent which characterizes genocide.

The Court further notes that this conclusion is confirmed by the way the Brioni Transcript was dealt with by the ICTY Trial and Appeals Chambers in their decisions in the Gotovina case.

In conclusion, the Court considers that, even taken together and interpreted in light of the contemporaneous overall political and military context, the passages from the Brioni Transcript quoted by Serbia, like the rest of the document, do not establish the existence of the specific intent (dolus specialis) which characterizes genocide.

(b) Existence of a pattern of conduct indicating genocidal intent (paras. 508-514)

The Court cannot see in the pattern of conduct on the part of the Croatian authorities immediately before, during and after Operation "Storm" a series of acts which could only reasonably be understood as reflecting the intention, on the part of those authorities, physically to destroy, in whole or in part, the group of Serbs living in Croatia. As the Court has already stated, not all of the acts alleged by Serbia as constituting the physical element of genocide have been factually proved. Those which have been proved — in particular the killing of civilians and the ill-treatment of defenceless individuals — were not committed on a scale such that they could only point to the existence of a genocidal intent. Finally, even if Serbia's allegations in regard to the

refusal to allow the Serb refugees to return home — allegations disputed by Croatia — were true, that would still not prove the existence of the dolus specialis: genocide presupposes the intent to destroy a group as such, and not to inflict damage upon it or to remove it from a territory, irrespective of how such actions might be characterized in law.

Conclusion regarding the existence of the dolus specialis, and general conclusion on the commission of genocide (para. 515)

The Court concludes from the foregoing that the existence of the dolus specialis has not been established. Accordingly, the Court finds that it has not been proved that genocide was committed during and after Operation "Storm" against the Serb population of Croatia.

B. Discussion of the other submissions in the counter-claim (paras. 516-521)

Since the Court has not found any acts capable of being characterized as genocide in connection with the events during and after Operation "Storm", it considers itself bound to conclude that Croatia did not breach its obligations under subparagraph (e) of Article III. Moreover, in the absence of the necessary specific intent which characterizes genocide, Croatia cannot be considered to have engaged in "conspiracy to commit genocide" or "direct and public incitement to commit genocide", or in an attempt to commit genocide, all of which presuppose the existence of such an intent.

The Court further concludes that, since Serbia has failed to prove the existence of an act of genocide, or of any of the other acts mentioned in Article III of the Convention, committed against the Serb population living in Croatia, there can be no breach of the obligation to punish under Article VI of that Convention.

Having found in the present Judgment that no internationally wrongful act in relation to the Genocide Convention has been committed by Croatia, the Court concludes that it is bound also to reject Serbia's submissions requesting the cessation of the internationally wrongful acts attributable to Croatia and reparation in respect of their injurious consequences.

General conclusion on the counter-claim (paras. 522-523)

For all of the foregoing reasons, the Court finds that the counter-claim must be dismissed in its entirety.

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Returning to the issue of missing persons already addressed in the context of its examination of the principal claim, the Court notes that individuals also disappeared during Operation "Storm" and its immediate aftermath. It reiterates its request to both Parties to continue their co-operation with a view to settling as soon as possible the issue of the fate of missing persons.

The Court recalls, furthermore, that its jurisdiction in this case is based on Article IX of the Genocide Convention, and that it can therefore only rule within the limits imposed by that instrument. Its findings are therefore without prejudice to any question regarding the Parties' possible responsibility in respect of any violation of international obligations other than those arising under the Convention itself. In so far as such violations may have taken place, the Parties

remain liable for their consequences. The Court encourages the Parties to continue their co-operation with a view to offering appropriate reparation to the victims of such violations, thus consolidating peace and stability in the region.

VII. OPERATIVE CLAUSE (para. 524)

For these reasons,

THE COURT,

(1) By eleven votes to six,

Rejects 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;

IN FAVOUR: Vice-President Sepúlveda-Amor; Judges Abraham, Keith, Bennouna, Cançado Trindade, Yusuf, Greenwood, Donoghue, Gaja, Bhandari; Judge ad hoc Vukas;

AGAINST: President Tomka; Judges Owada, Skotnikov, Xue, Sebutinde; Judge ad hoc Kreća;

(2) By fifteen votes to two,

Rejects Croatia's claim;

IN FAVOUR: President Tomka; Vice-President Sepúlveda-Amor; Judges Owada, Abraham, Keith, Bennouna, Skotnikov, Yusuf, Greenwood, Xue, Donoghue, Gaja, Sebutinde, Bhandari; Judge ad hoc Kreća;

AGAINST: Judge Cançado Trindade; Judge ad hoc Vukas;

(3) Unanimously,

Rejects Serbia's counter-claim.

President TOMKA appends a separate opinion to the Judgment of the Court; Judges OWADA, KEITH and SKOTNIKOV append separate opinions to the Judgment of the Court; Judge CANÇADO TRINDADE appends a dissenting opinion to the Judgment of the Court; Judges XUE and DONOGHUE append declarations to the Judgment of the Court; Judges GAJA, SEBUTINDE and BHANDARI append separate opinions to the Judgment of the Court; Judge ad hoc VUKAS appends a dissenting opinion to the Judgment of the Court; Judge ad hoc KREĆA appends a separate opinion to the Judgment of the Court.

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Separate opinion of President Tomka

Although President Tomka shares the conclusions of the Court on the merits of the claim and the counter-claim, in his separate opinion, he explains his views on the Court's temporal jurisdiction and on the admissibility of the claim.

He begins by noting that, in its 2008 Judgment on preliminary objections, the Court concluded that it required further elements to rule on the two issues raised by Serbia's second preliminary objection. In President Tomka's view, today's Judgment does not indicate what new elements the Court received that enabled it to resolve the remaining jurisdictional issue. Rather, the Court adopts a legal construction that it could have adopted in 2008. In addition, President Tomka notes that the issues raised by the Court in its 2008 Judgment differ from those addressed by the Court in this Judgment.

President Tomka highlights that Serbia was only bound by the Genocide Convention as a party to it in its own name from 27 April 1992. He agrees with the conclusion that even if acts occurring prior to this date were attributable to Serbia, they cannot have amounted to a breach of the Convention by it. President Tomka disagrees, however, that the Court's jurisdiction over Croatia's claim extends to acts occurring prior to 27 April 1992 and alleged to amount to violations of the Genocide Convention on the basis of Croatia's argument that Serbia succeeded to the responsibility of the SFRY for those acts.

In his view, neither the text nor the travaux préparatoires of Article IX of the Genocide Convention support the Court's conclusion in this respect.

President Tomka outlines that the relevant dispute under Article IX must be between Contracting Parties and must concern "the interpretation, application or fulfilment" of the Convention by those Contracting Parties. In his view, the presence of the words "including those [disputes] relating to the responsibility of a State for genocide" do not alter this conclusion. Rather, the word "including" makes it apparent that such disputes are a subset of those relating to "the interpretation, application or fulfilment" of the Convention. Moreover, the travaux préparatoires reveal that the inclusion within the Court's jurisdiction of disputes relating to "the responsibility of a State for genocide" was intended to allow the Court to consider allegations that a State is responsible for acts of genocide perpetrated by individuals and attributable to it, and which thus amount to breaches of the Convention by the State. President Tomka indicates that this is the understanding that is reflected in earlier decisions of the Court and in Croatia's submissions.

While the Judgment refers to the "essential subject-matter of the dispute" as being "whether Serbia is responsible for violations of the Genocide Convention and, if so, whether Croatia may invoke that responsibility", President Tomka is doubtful whether this accurately reflects the dispute's "essential subject-matter" as presented by Croatia in its Application and final submissions. In any event, he notes that a dispute regarding Serbia's succession to the responsibility of the SFRY is not one about "the interpretation, application or fulfilment" of the Convention by Serbia. In this respect, he notes that the first two of the three issues identified in the Judgment as being in dispute relate to the SFRY's application and fulfilment of the Convention. The third issue, relating to Serbia's alleged succession to responsibility, does not relate to Serbia's obligations under the Convention and its failure to properly interpret, apply or fulfil them. President Tomka is unconvinced that the compromissory clause in Article IX extends to questions of State succession to responsibility. He notes that the term "responsibility" was not given by the Convention's drafters the meaning given to it by the Court in this case and that it remains a distinct term and concept from that of "succession" in international law. He therefore regards matters

relating to succession to responsibility as beyond the jurisdiction ratione materiae provided for in Article IX of the Convention.

President Tomka notes that Croatia, among other States, denied the legal continuity between the FRY and SFRY and must bear the consequences of its position on that issue. As Serbia was not a party to the Genocide Convention until 27 April 1992, any dispute about acts occurring before that date cannot be about the interpretation, application or fulfilment of the Convention by Serbia and, in his view, the Court does not have jurisdiction over it.

However, President Tomka indicates that this does not prevent the Court from considering acts prior to 27 April 1992, without formally ruling on their conformity with the SFRY's obligations. He acknowledges that there may have been a certain factual identity between the actors involved in the armed conflict in Croatia both before and after 27 April 1992. However, he notes that this factual identity should not be confused with the situation in law, where ultimately the thesis of discontinuity between the SFRY and FRY prevailed. Nonetheless, President Tomka considers that the Court, in determining whether acts occurring after 27 April 1992 were committed with the necessary dolus specialis, could have looked at events taking place before that date in order to determine whether a pattern of acts existed from which the requisite intent could be inferred.

President Tomka also raises concerns with respect to the admissibility of Croatia's claim. He observes that the Court in this case indicates its readiness to rule on the responsibility of the SFRY, a State which is not before it, as a precursor to determining the responsibility of Serbia. President Tomka notes the Court's position that the Monetary Gold principle is inapplicable here because the SFRY is no longer in existence. He accepts that this might be an appropriate position to take where there is an agreement as to which of the successor States will take responsibility for the acts of a predecessor State, as in the Gabčíkovo-Nagymaros case. However, he regards the situation as more complicated where there is uncertainty as to which of a number of States might bear responsibility for the acts of a predecessor State. Highlighting that Serbia is only one of five equal successor States to the SFRY, he notes that a finding as to the SFRY's responsibility could have implications for several, or each, of those successor States, depending on what view is taken on the allocation of responsibility as between them. He notes in this respect that the 2001 Agreement on Succession Issues provides for outstanding "claims against the SFRY" to be "considered by the Standing Joint Committee established" by that Agreement.

However, President Tomka emphasizes that the Monetary Gold principle will serve to limit the effects of the Judgment in this case to its unusual facts. He concludes with the observation that where States only recognize the Court's jurisdiction in a limited way, claims such as the ones in this case are framed so as to make them fall within the scope of a given convention. President Tomka notes that the Court in this case recognized that many atrocities were committed, but that the Parties failed to prove the presence of genocidal intent. He indicates that if the Court had been granted a more general jurisdiction, the claims could have been framed differently.

Separate opinion of Judge Owada

In his separate opinion, Judge Owada states that, although he voted in favour of the Judgment as a whole, he has not been able to associate himself with the conclusion reached by the Court in subparagraph (1) of the operative paragraph (paragraph 524) of the Judgment, which rejects the ratione temporis jurisdictional objection raised by Serbia in the present case.

Judge Owada recalls that the Court, in its earlier Judgment in the present case ("2008 Judgment") held that "the second preliminary objection submitted by the Republic of Serbia does not, in the circumstances of the case, possess an exclusively preliminary character" (2008 Judgment, p. 466, para. 146). Judge Owada points out that this decision was taken in

accordance with paragraph 7 of Article 79 of the Rules of Court, amended in 1978 (which corresponds to Article 79, paragraph 9, of the current Rules of Court). Judge Owada goes on to examine the origin of the text of that Article by reference to the discussions at the time of the Judgment in the Barcelona Traction, Light and Power Company, Limited case at its Second Phase in 1970 and the unpublished travaux preparatoires of the 1972 revision of the Rules of Court. Judge Owada then turns his attention to the authoritative interpretation of that Article of the Rules of Court given by the Court subsequently, in particular in the case concerning Military and Paramilitary Activities in and against Nicaragua (I.C.J. Reports 1986, p. 14). In Judge Owada's view, in light of the history of the Rules of Court and this authoritative interpretation, the decision by the Court in subparagraph (4) of paragraph 146 of its 2008 Judgment must be read as making a decision, binding on the Parties, as well as on the Court itself, that "because [the issues raised in the preliminary objection in question] contain both preliminary aspects and other aspects relating to the merits, they will have to be dealt with at the stage of the merits" (Military and Paramilitary Activities in and against Nicaragua, (Nicaragua v. United States of America), Merits, Judgment, I.C.J. Reports 1986, p. 31, para. 41). Judge Owada finds that the present Judgment has failed to carry out the task assigned to the Court by this instruction of the 2008 Judgment.

Judge Owada recalls that in dealing with the core issues of jurisdiction ratione temporis raised by the Respondent in its second preliminary objection, the present Judgment refers to three distinct arguments advanced by the Applicant at the merits phase of the present case. Judge Owada endorses the Court's approach in dealing with the first and second of these contentions, the first of which is that the Genocide Convention, providing for erga omnes obligations, has retroactive effect and the second of which is that what came to emerge as the FRY during the period 1991-1992 was an entity in statu nascendi born out of the then existing SFRY in the sense of Article 10, paragraph 2, of the ILC Articles on State Responsibility. Judge Owada accepts that with respect to the arguments advanced by the Applicant in relation to these two contentions, the Judgment offers a careful analysis in substance. Judge Owada therefore endorses the Court's conclusion that on the basis of these two contentions there is no valid basis, as a matter of law, that can provide the Court with jurisdiction ratione temporis to entertain the present case, in so far as it relates to acts that took place before 27 April 1992, the date on which the Respondent declared its independence to become a party to the Genocide Convention.

Judge Owada parts ways with the Court in relation to its treatment of the third contention advanced by the Applicant, according to which the law of State succession in respect of international responsibility is applicable under the specific circumstances of the situation surrounding the SFRY and the FRY, where a special link existed between the SFRY and the FRY.

On that latter point, Judge Owada begins by recalling that in justification of the conclusion of the Court on the jurisdictional objection ratione temporis raised by Serbia, the Judgment makes a reference to the doctrine of State succession in respect of international responsibility (paragraphs 106 et seq.).

However, Judge Owada notes that even a cursory examination of the material contained in Section V of the Judgment dealing with the "Consideration of the Merits of the Principal Claim" persuades us that all of the requirements mentioned in the three-stage process listed in paragraph 112 have to be examined in order for the Court to be able to decide on the applicability vel non of the law of State succession in respect of international responsibility as a plausible basis for establishing the jurisdiction of the Court to determine whether Serbia is responsible for violations of the Convention. Judge Owada states that if one examines each of these requirements in the context of the facts of the case, it seems clear that the attempt of the Applicant has to fail at the first stage of this process, to the extent that the acts relied on by Croatia, even assuming that they were committed by the SFRY, were found not to fall within the category of acts contrary to the Convention.

Judge Owada admits that the Judgment tries to disassociate itself from any position that might look like an endorsement of the doctrine of State succession in respect of international responsibility, even on a prima facie basis or on the basis of plausibility. However, in Judge Owada's view, in spite of the Judgment's seemingly careful approach to that doctrine and in spite of its formal disclaimer, it would seem difficult to interpret the thesis that lies crucially at the heart of the logic of the Judgment as anything else than an effort to link the logic of the Judgment, in whatever neutral a manner as it may be, with this doctrine, as a factor relevant for providing the Court with the jurisdiction stricto sensu under the Convention by consent, either through some consent, implied, of the Parties, or through the operation of rules of general international law under Article IX.

Judge Owada is unconvinced by the reasoning leading the Court to find that "the rules on succession that may come into play in the present case fall into the same category as those on treaty interpretation and responsibility of States" (paragraph 115). Judge Owada observes that the Court reaches this conclusion after referring to a general statement in the 2007 Judgment as quoted in paragraph 115 of the present Judgment. However, Judge Owada finds that the intent and purpose of that passage in the 2007 Judgment is to restrictively define the scope of the jurisdiction conferred by the consent of the parties under Article IX of the Convention. In contrast, Judge Owada observes, the intent of paragraph 115 would appear to be to expand the scope of the jurisdiction of the Court conferred by the consent of the parties under Article IX of the Convention by arguing that the law of State succession in respect of international responsibility could be relevant to the "interpretation, application or fulfilment" of the Convention for the purposes of determining the scope of jurisdiction.

Judge Owada also observes that the Judgment continues to base its argument on a highly debatable position of the Court in its earlier Judgment on Preliminary Objections relating to the scope and the legal implications of the declaration made by the FRY on 27 April 1992. This is an issue in respect of which Judge Owada affirms his dissenting view to the position taken by the Court in its 2008 Judgment (2008 Judgment, p. 451, para. 111) and confirmed in the present Judgment (paragraph 76) as it is in contradiction with the jurisprudence established by the Court in the cases concerning the Legality of Use of Force (see, for example, Legality of Use of Force (Serbia and Montenegro v. Belgium), Preliminary Objections, Judgment, I.C.J. Reports 2004 (I), p. 279).

Judge Owada finally takes the view that the present Judgment should have pursued the path prescribed by the 2008 Judgment and examined the relevant aspects, both of facts and law, of the merits of the case before arriving at the conclusion that the claim of the Applicant cannot be upheld on the merits. According to Judge Owada, even under the present structure of the Judgment, the Court would have been required to examine the legal validity of all the alleged rules of international law advanced by the Applicant, including those relating to State succession in respect of international responsibility, as a means to establish the legal basis for enabling the Court to exercise jurisdiction with regard to the merits. In Judge Owada's submission, the present Judgment has failed to do that.

Separate opinion of Judge Keith

1. Judge Keith prepared his separate opinion to give further reasons in support of those given by the Court for its conclusions that the Applicant and the Respondent had each failed to establish the necessary intent, that is, the intent to destroy in whole or in part the particular protected group as such.

2. In respect of Croatia, Judge Keith gave particular attention to the 17 factors which it said demonstrated that intent singly or collectively. In respect of the counter-claim presented by Serbia

he examined the details of the minutes of the meeting held by the Croatian military leadership, minutes which Serbia contended showed the existence of that specific intent.

3. Given his conclusions on the essential elements, Judge Keith did not consider it necessary to express his views on the existence of the criminal acts alleged by each Party, beyond noting in respect of those matters the Parties' concessions and, in the principal claim, convincing findings of the ICTY.

Separate opinion of Judge Skotnikov

Judge Skotnikov, in his separate opinion, disagrees with the Court's conclusion that it has jurisdiction to rule upon the entirety of the claim brought by Croatia, in so far as this conclusion relates to acts said to have occurred before 27 April 1992 (the date on which the FRY itself came into existence). He points out, in this connection, that the Court, when deciding on jurisdiction, was required to either identify the legal mechanism by which the FRY (now Serbia) assumed obligations under the Genocide Convention before it came into existence or to determine that no such legal mechanism existed. Instead, it merely suggests that obligations under the Genocide Convention might be applicable to the FRY before 27 April 1992 by virtue of succession to responsibility. This preliminary issue is then transformed into a question for the merits. After answering in the negative the question of whether acts contrary to the Genocide Convention took place prior to 27 April 1992, the Court does not return to the issue of succession to responsibility. 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 an impossible task since there is no jurisprudence or State practice to support this hypothesis.

Judge Skotnikov recalls that, when considering the second preliminary objection which is addressed in the present Judgment, the Court had, in 2008, reserved as indispensable the "question of the applicability of the obligations under the Genocide Convention to the FRY before 27 April 1992" (Preliminary Objections, Judgment, (Croatia v. Serbia), para. 129). In 2015, the Court simply leaves without answer this question. Thus, the Court fails to fulfil its duty to satisfy itself that it has jurisdiction.

Before turning to the merits, Judge Skotnikov notes that, while addressing 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 (as implied in 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.

On the merits, Judge Skotnikov maintains his view that nothing in Article IX of the Genocide Convention suggests that the Court is empowered to go beyond settling disputes relating to State responsibility. As to whether or not the crime of genocide or other acts enumerated in Article III of the Convention have been committed, the Court's role is limited by its lack of criminal jurisdiction. The Court's role is to determine whether it has been sufficiently established that acts proscribed by the Genocide Convention were committed. After making this

determination, the Court must then continue to deal with its primary task of addressing the question of State responsibility for genocide.

Judge Skotnikov notes that the Court never approaches this task, since it concludes that genocide and other punishable acts referred to in Article III of the Convention did not take place. While he agrees with this conclusion, he is of the view that, instead of insisting on the Court's capacity to conduct its own enquiry (which the Court is ill-equipped to do), it would have been sufficient to have taken notice of the relevant proceedings of the ICTY, which have never involved any charges of genocide in respect of events in Croatia.

Dissenting opinion of Judge Cançado Trindade

1. In his Dissenting Opinion, composed of 19 parts, Judge Cançado Trindade presents the foundations of his personal dissenting position, pertaining to the Court's decision, encompassing the adopted methodology, the approach pursued, the whole reasoning in its treatment of issues of evidential assessment as well as of substance, in addition to the Court's conclusion on the Applicant's claim.

2. He begins his Dissenting Opinion by drawing attention (part I) to the framework of the settlement of the dispute at issue, ineluctably linked to the imperative of the realization of justice, in particular in the international adjudication by the Court of cases of the kind, pertaining to grave breaches of human rights and of International Humanitarian Law, under the Convention against Genocide, in the light of fundamental considerations of humanity.

3. Preliminarily, Judge Cançado Trindade draws attention (part II) to the unprecedented delays of 16 years in the cas d'espèce: he ponders that, "[p]aradoxically, the graver the breaches of international law appear to be, the more time-consuming and difficult it becomes to impart justice" (para. 14). He finds such prolonged delays in the international adjudication of cases of the kind most regrettable, in particular from the perspective of the victims (justitia longa, vita brevis).

4. Turning to the issue of jurisdiction (part III), Judge Cançado Trindade observes that, in the cas d'espèce, opposing Croatia to Serbia, responsibility cannot be shifted to an extinct State; there is personal continuity of policy and practices in the period of occurrences (1991 onwards). The 1948 Convention against Genocide being a human rights treaty (as generally acknowledged), the law governing State succession to human rights treaties applies (with ipso jure succession). There can be no break in the protection afforded to human groups by the Genocide Convention in a situation of dissolution of State amidst violence, when protection is most needed.

5. In a situation of this kind, there is automatic succession to, and continuing applicability of, the Genocide Convention, which otherwise would be deprived of its appropriate effects (effet utile). Once the Court's jurisdiction is established in the initiation of proceedings, any subsequent lapse or change of attitude of the State concerned can have no bearing upon such jurisdiction (venire contra factum proprium non valet). Moreover, automatic succession to human rights treaties is reckoned in the practice of United Nations supervisory organs (such as, e.g., the HRC and the CERD Committees).

6. The essence of the present case, — Judge Cançado Trindade adds, — lies on substantive issues pertaining to the interpretation and application of the Convention against Genocide, rather than on issues of jurisdiction/admissibility (part IV), as acknowledged by the contending Parties themselves in the course of the proceedings. He stresses that automatic succession to, and

continuity of obligations of, the Convention against Genocide, is an imperative of humaneness (part V), so as to secure protection to human groups when they stand most in need of it.

7. In Judge Cançado Trindade's perception, the principle of humanity permeates the whole Convention against Genocide, which is essentially people-oriented; it permeates the whole corpus juris of protection of human beings, which is essentially victim-oriented, encompassing also the International Law of Human Rights (ILHR), International Humanitarian Law (IHL) and the International Law of Refugees (ILR), besides contemporary International Criminal Law (ICL) (para. 84). The principle of humanity has a clear incidence in the protection of human beings, in particular in situations of vulnerability or defencelessness (paras. 58-65).

8. The United Nations Charter itself, — he proceeds, — professes the determination to secure respect for human rights everywhere; the principle of humanity, — in line with the longstanding jusnaturalist thinking (recta ratio), — permeates likewise the Law of the United Nations (paras. 73-76). The principle of humanity, furthermore, has met with judicial recognition, on the part of contemporary international human rights tribunals as well as international criminal tribunals (paras. 77-82). Grave violations of human rights and acts of genocide, among other atrocities, are in breach of absolute prohibitions of jus cogens (para. 83).

9. Judge Cançado Trindade sustains that the determination of State responsibility under the Genocide Convention not only was intended by its draftsmen (as its travaux préparatoires show), but also is in line with its rationale, as well as its object and purpose (part VI). The Genocide Convention is meant to prevent and punish the crime of genocide, — which is contrary to the spirit and aims of the United Nations, — so as to liberate humankind from this scourge. He warns that to attempt to make the application of the Genocide Convention an impossible task, would render the Convention meaningless, an almost dead letter (para. 94).

10. Judge Cançado Trindade then proceeds to a detailed examination of the issue of the standard of proof. He demonstrates that international human rights tribunals (the IACtHR and the ECtHR), in their jurisprudence, have not pursued a stringent and high threshold of proof in cases of grave breaches of the rights of the human person; they have resorted to factual presumptions and inferences, as well as to the shifting or reversal of the burden of proof (paras. 100-121). He regrets that this jurisprudential development was not taken into account by the ICJ in the present Judgment (para. 124).

11. And he adds that, in the same line of rebutting a high threshold of evidence, international criminal tribunals (the ICTFY and the ICTR) have, in their jurisprudence, even in the absence of direct proofs, drawn proof of genocidal intent from inferences of fact (paras. 125-139). The ICJ, both in the present case and earlier on, in the Bosnian Genocide case (2007), appears to have imposed too high a threshold of evidence (for the determination of genocide), not in line with the established case-law of international criminal tribunals and of international human rights tribunals on standard of proof (para. 142). After all, — Judge Cançado Trindade proceeds, —

> "Ultimately, intent can only be inferred, from such factors as the existence of a general plan or policy, the systematic targeting of human groups, the scale of atrocities, the use of derogatory language, among others. The attempts to impose a high threshold for proof of genocide, and to discredit the production of evidence (e.g., witness statements) are most regrettable, ending up in reducing genocide to an almost impossible crime to determine, and the Genocide Convention to an almost dead letter. This can only bring impunity to the perpetrators of genocide, — States and individuals

alike, — and make any hope of access to justice on the part of victims of genocide fade away. Lawlessness would replace the rule of law" (para. 143).

12. He adds another word of caution "against what may appear as a regrettable deconstruction of the Genocide Convention", in attempting to characterize a situation "as one of armed conflict, so as to discard genocide. The two do not exclude each other" (para. 144). In his view,

> "In adjudicating the present case, the ICJ should have kept in mind the importance of the Genocide Convention as a major human rights treaty and its historic significance for humankind. A case like the present one can only be decided in the light, not at all of State sovereignty, but rather of the imperative of safeguarding the life and integrity of human groups under the jurisdiction of the State concerned, even more so when they find themselves in situations of utter vulnerability, if not defencelessness. The life and integrity of the population prevail over contentions of State sovereignty, particularly in face of misuses of this latter" (para. 145).

13. Judge Cançado Trindade further observes that the fact-finding undertaken by the United Nations, at the time of the occurrences (part IX), contains important elements conforming the widespread and systematic pattern of destruction in the attacks in Croatia: such is the case of the reports of the former U.N. Commission on Human Rights (1992-1993) and of the reports of the Security Council's Commission of Experts (1993-1994). Those occurrences also had repercussion in the U.N. II World Conference on Human Rights (1993), as he well remembers. There has also been judicial recognition (in the case-law of the ICTFY — paras. 180-194) of the widespread and/or systematic attacks against the Croat civilian population.

14. Judge Cançado Trindade then proceeds to a detailed examination of the widespread and systematic pattern of destruction, in his view well-established in the present proceedings before the ICJ, which encompassed indiscriminate attacks against the civilian population, with massive killings, torture and beatings, systematic expulsion from homes (and mass exodus), and destruction of group culture (part X). That widespread and systematic pattern of destruction also comprised rape and other sexual violence crimes (part XI), which disclose the necessity and importance of a gender analysis (paras. 260-277).

15. There was, furthermore, — he continues, — a systematic pattern of disappeared or missing persons (part XII). Enforced disappearance of persons is a continuing grave breach of human rights and International Humanitarian Law; with its destructive effects, it bears witness of the expansion of the notion of victims (so as to comprise not only the missing persons, but also their close relatives, who do not know their whereabouts). The situation created calls for a proper standard of evidence, and the shifting or reversal of the burden of proof, which cannot be laid upon those victimized (paras. 313-318).

16. Here, again, it is important to take note — which the ICJ has not done — of the important case-law of international human rights tribunals (the IACtHR and the ECtHR — paras. 300-310 and 313) on this particular issue of enforced disappearance of persons. In sum, — Judge Cançado Trindade observes, —

> "The evidence produced before the Court in the present case of the Application of the Convention against Genocide clearly establishes, in my perception, the occurrence of massive killings of targeted members of the Croat civilian population

> during the armed attacks in Croatia, amidst a systematic pattern of extreme violence, encompassing also torture, arbitrary detention, beatings, sexual assaults, expulsion from homes and looting, forced displacement and transfer, deportation and humiliation, in the attacked villages. It was not exactly a war, it was a devastating onslaught of civilians. It was not only 'a plurality of common crimes' that 'cannot, in itself, constitute genocide', as Counsel for Serbia argued before the Court in the public sitting of 12.03.2014; it was rather an onslaught, a plurality of atrocities, which, in itself, by its extreme violence and devastation, can disclose the intent to destroy (mens rea of genocide)" (para. 237).

17. He adds that the aforementioned grave breaches of human rights and of International Humanitarian Law amount to breaches of jus cogens, entailing State responsibility and calling for reparations to the victims. This is in line with the idea of rectitude (in conformity with the recta ratio of natural law), underlying the conception of Law (in distinct legal systems — Droit / Right / Recht / Direito / Derecho / Diritto) as a whole (paras. 319-320).

18. In the present case, the widespread and systematic pattern of destruction took place in pursuance of a plan, with an ideological content (part XIII (1)). In this respect, — Judge Cançado Trindade proceeds, — both contending Parties addressed the historical origins of the armed conflict in Croatia, and the ICTFY examined expert evidence of it. The ICJ did not find it necessary to dwell upon this; yet, the ideological incitement leading to the outbreak of hostilities was brought to its attention by the contending Parties, as an essential element for a proper understanding of the case.

19. The evidence produced before the Court, concerning the aforementioned widespread and systematic pattern of destruction, shows that the armed attacks in Croatia were not exactly a war, but rather an onslaught (cf. supra); one of its manifestations was the practice of marking Croats with white ribbons, or armbands, or of placing white sheets on the doors of their homes (part XIII (2)). Another manifestation was the mistreatment by Serb forces of the mortal remains of the deceased Croats, and other successive findings in numerous mass graves, added to further clarifications obtained from the cross-examination of witnesses before the Court (in public and closed sittings) (part XIII (3)-(5)).

20. The widespread and systematic pattern of destruction was also manifested in the forced displacement of persons and homelessness, and subjection of the victims to unbearable conditions of life (part XIII (6)). That pattern of destruction, approached as a whole, also comprised the destruction of cultural and religious heritage (monuments, churches, chapels, city walls, among others); it would be artificial to attempt to dissociate physical/biological destruction from the cultural one (part XIII (7)).

21. The evidence produced before the Court in respect of selected devastated villages — Lovas, Ilok, Bogdanovci and Vukovar (in the region of Eastern Slavonia), and Saborsko (in the region of Lika), — shows that the actus reus of genocide (Article II (a), (b) and (c) of the Genocide Convention) — has been established (part XIV). Furthermore, the intent to destroy (mens rea) the targeted groups, in whole or in part, can be inferred from the evidence submitted (even if not direct proofs) (part XV). The extreme violence in the perpetration of atrocities in the planned pattern of destruction bears witness of such intent to destroy. And Judge Cançado Trindade adds:

> "In my understanding, evidential assessments cannot prescind from axiological concerns. Human values are always present, as acknowledged by the historical emergence of the principle, in process, of the conviction intime (livre convencimento / libre convencimiento / libero convincimento) of the judge. Facts and values come

> together, in evidential assessments. The inference of mens rea / dolus specialis, for the determination of responsibility for genocide, is undertaken as from the conviction intime of each judge, as from human conscience.
>
> Ultimately, conscience stands above, and speaks higher than, any wilful Diktat. The evidence produced before the ICJ pertains to the overall conduct of the State concerned, and not to the conduct only of individuals, in each crime examined in an isolated way. The dossier of the present case concerning the Application of the Convention against Genocide (Croatia versus Serbia) contains irrefutable evidence of a widespread and systematic pattern of extreme violence and destruction (...)" (paras. 469-470).

22. There is thus, — he proceeds, — need of reparations to the victims (part XVI), — an issue which was duly addressed by the contending Parties themselves before the Court, — to be determined by the ICJ in a subsequent phase of the case. The difficult path to reconciliation (part XVII), in Judge Cançado Trindade's view, starts with the acknowledgment that the widespread and systematic pattern of destruction ends up victimizing everyone, on both sides. The next step towards reconciliation lies in the provision of reparations (in all its forms). Reconciliation also calls for adequate apologies, honouring the memory of the victims. Another step by the contending Parties in the same direction lies in the identification and return of all mortal remains to each other.

23. The adjudication of a case like the present one shows the need to go beyond the strict inter-State outlook. Judge Cançado Trindade sustains that the Genocide Convention is people-centered, and there is need to focus attention on the people or population concerned, in pursuance of a humanist outlook, in the light of the principle of humanity (part XVIII). In interpreting and applying the Genocide Convention, — he adds, — attention is to be turned to the victims, rather than to inter-State susceptibilities (paras. 494-496).

24. In Judge Cançado Trindade's view, the Court's evidential assessment and determination of the facts of the cas d'espèce has to be comprehensive, and not atomized. All the atrocities, presented to the Court, conforming the aforementioned pattern of destruction, have to be taken into account, not only a sample of them, for the determination of State responsibility under the Genocide Convention (paras. 503-507). Large-scale crimes, such as rape and other sexual violence crimes, expulsion from homes (and homelessness), forced displacements, deprivation of food and medical care, cannot be minimized (para. 500).

25. Judge Cançado Trindade stresses that the Court's conceptual framework and reasoning as to the law have likewise to be comprehensive, and not atomized, so as to secure the effet utile of the Genocide Convention (para. 508). The branches that conform the corpus juris of the international protection of the rights of the human person — ILHR, IHL, ILR and ICL — cannot be approached in a compartmentalized way; there are approximations and convergences among them (paras. 509-511).

26. He recalls that the Genocide Convention, which is victim-oriented, cannot be approached in a static way, as it is a "living instrument" (paras. 511-512 and 515). Judge Cançado Trindade sustains that customary and conventional IHL are to be properly seen in interaction, and not to be kept separately from each other. A violation of the substantive provisions of the Genocide Convention is bound to be a violation of customary international law on the matter as well (para. 513). Furthermore, — he proceeds, — the interrelated elements of actus reus and mens rea of genocide cannot be approached separately either.

27. He then turns to general principles of law (prima principia), and in particular the principle of humanity, of great relevance to both conventional and customary international law; such prima principia confer an ineluctable axiological dimension to the international legal order (para. 517). He adds that human rights treaties — such as the Genocide Convention — have a hermeneutics of their own, which calls for a comprehensive approach as to the facts and as to the law, and not an atomized or fragmented one, as pursued by the Court's majority.

28. Judge Cançado Trindade warns against the posture of the ICJ in the present Judgment — also reflected in its prior Judgment in the Bosnian Genocide case (2007), — of ascribing an overall importance to individual State consent, regrettably putting it well above the imperatives of the realization of justice at international level. In a domain such as the one of human rights treaties in general, and the Genocide Convention in particular, international law appears, more than voluntary, as indeed necessary, and the protected rights and fundamental human values stand above State interests or its "will" (para. 516).

29. The imperative of the realization of justice acknowledges that conscience (recta ratio) stands above the "will" (para. 518); consent yields to objective justice. Judge Cançado Trindade reiterates out that the Genocide Convention is concerned with human groups in situations of vulnerability or defencelessness; it calls for a people-centered outlook, focused on the victims (paras. 520-522). He further warns that the comprehensive outlook that he sustains to the Genocide Convention is to take into account "the whole factual context of the present case opposing Croatia to Serbia, — and not only just a sample of selected occurrences in some municipalities, as the Court's majority does" (para. 523).

30. That whole factual context, in his assessment, "clearly discloses a widespread and systematic pattern of destruction, — which the Court's majority seems to be at pains with, at times minimizing it, or not even taking it into account" (para. 523). This calls — Judge Cançado Trindade adds — for "a comprehensive, rather than atomized, consideration of the matter, faithful to humanist thinking and keeping in mind the principle of humanity, which permeates the whole of the ILHR, IHL, ILR and ICL, including the Genocide Convention" (para. 523). And he adds:

> "My dissenting position is grounded not only on the assessment of the arguments produced before the Court by the contending parties (Croatia and Serbia), but above all on issues of principle and on fundamental values, to which I attach even greater importance. I have thus felt obliged, in the faithful exercise of the international judicial function, to lay the foundations of my own dissenting position in the cas d'espèce in the present Dissenting Opinion" (para 524).

31. In sum, — Judge Cançado Trindade concludes, — in the interpretation and application of the Convention against Genocide, fundamental principles and human values exert a relevant role; there is here the primacy of the concern with the victims of human cruelty, as, after all, the raison d'humanité prevails over the raison d'État (para. 547). In his understanding, this is what the International Court of Justice should have decided in the present Judgment on the case concerning the Application of the Convention against Genocide.

Declaration of Judge Xue

Judge Xue reserves her 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. She maintains the view that Serbia's second objection to jurisdiction ratione temporis and admissibility should be upheld and she voted against the operative paragraph 1 of the Judgment.

I. Issues left over by the 2008 Judgment

On the "two inseparable issues" left over by the 2008 Judgment, Judge Xue observes that the Court's conclusions that Serbia was bound by the Convention with effect only from 27 April 1992 and that the Genocide Convention is not retroactive even in respect of State responsibility are conclusive legal findings. She is of the opinion that, therefore, Serbia's second jurisdictional objection should be upheld.

The Court's treatment of State succession to responsibility as a separate heading for the consideration of jurisdiction ratione temporis, in her opinion, is a questionable departure from the 2008 Judgment. Procedurally, Croatia's alternative argument about Serbia'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.

Substantively, given the bulk of the alleged acts concerned (most of them took place before 27 April 1992), the issue of succession 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.

II. Political premise of Serbia's succession

Judge Xue points out that the question of succession in the present case is a complicated issue. From 1992 to 2000, Serbia remained in a sui generis status, which gave rise to a series of legal questions regarding its standing before the Court. In her view, the political premise of Serbia's succession was much dictated by the fact that its 1992 declaration and Note were more often treated with political expediency than given consistent legal interpretation under international law in the light of the factual situation.

While upholding the validity of Serbia's commitments to international obligations, the Court in the 2008 Judgment, however, does not indicate the legal consequences that are necessarily derived from the change of that political premise.

Under international law, in her view, the implication of the new political premise is arguably threefold for Serbia. First of all, Serbia, 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 Serbia'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.

In the present case, both of Croatia's arguments for Serbia's succession to the responsibility of the SFRY involve the political premise of Serbia's succession. As Serbia 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. 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.

III. Interpretation of Article IX of the Genocide Convention

On the interpretation of Article IX, Judge Xue believes that the Court should 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.

Judge Xue observes that 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. While 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.

Judge Xue emphasizes that, 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. 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.

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. 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.

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

IV. "Time gap" in the protection

Finally, Judge Xue wishes to add one word on Croatia's argument that a decision to limit jurisdiction to events after 27 April 1992 would create a "time gap" in the protection afforded by the Convention. While, from the viewpoint of human rights protection, that is obviously a strong and appealing argument, the jurisdiction of the Court, in the present case, has to be "confined to obligations arising under the Convention itself" and 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.

Judge Xue further points out 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. Ultimately, it is national measures that will play the major role in preventing genocide and punishing perpetrators of genocidal crimes. At the international level, in the situation related to the present case, 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 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.

Declaration of Judge Donoghue

Judge Donoghue agrees with the Court's conclusions regarding both the claim and the counter-claim. She comments on the parts of the Judgment that discuss the actus reus of genocide.

As to the claim, Judge Donoghue addresses the written witness statements submitted by Croatia. She believes that written witness statements should contain basic identifying information (including name, nationality, residence and date and place of signature), as well as sufficient information to permit evaluation of the reliability of the evidence (e.g., relationship between the witness and the parties, detailed description of the facts, source of the witness's information). Many statements submitted by Croatia are deficient, although this is not the basis for the Court's rejection of Croatia's claim. Judge Donoghue also notes that the Court relies heavily on witness statements when it considers whether the actus reus of genocide is established in some localities, especially when there are no relevant ICTY factual findings or admissions by Serbia. Recalling the high standard of proof that governs this case, she considers it unfortunate that the Court does not consistently explain the reasons for its conclusion that the actus reus exists (or does not exist) in a particular locality.

In connection with the counter-claim, Judge Donoghue addresses the Court's examination of the question whether there were intentional killings during the shelling of Knin. She agrees that the Court does not have a basis to find that civilian deaths in Knin were the result of indiscriminate shelling. However, she disagrees with the suggestion in the Judgment that the term "killing", as used in subparagraph (a) of Article II of the Genocide Convention, does not extend to deaths resulting from attacks that are directed exclusively at military targets and that do not deliberately target civilians.

Separate opinion of Judge Gaja

This Judgment understandably follows the approach taken by the Court in 2007 in its Judgment on the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro). Both Judgments use the same or a similar legal framework when considering issues relating to the responsibility of States for the commission of acts of genocide and the criminal responsibility of individuals for genocide. Certain aspects that are specific to State responsibility are underrated.

International criminal tribunals tend to apply a restrictive definition of genocide. A restrictive definition can also be found in the Elements of Crimes adopted by the Assembly of States Parties to the Rome Statute. The reasons for a restrictive definition are not applicable to issues of State responsibility.

The mental element of genocide may be easier to identify when considering State responsibility, which does not presuppose finding that an individual or organ committed certain acts with genocidal intent.

In criminal matters the standard of proof which is usually applied is that responsibility should be established beyond all reasonable doubt. The same standard appears to be too strict when applied to State responsibility. The "exceptional gravity" of the charges involving the commission of genocide should not make the establishment of international responsibility of a State more difficult.

Separate opinion of Judge Sebutinde

Judge Sebutinde concurs with the Court's conclusions in paragraphs 2 and 3 of the Operative Clause of the Judgment. She, however, disagrees with paragraph 1 thereof. In her opinion, the Court's jurisdiction ratione temporis under Article IX of the Genocide Convention is limited to handling disputes relating to the interpretation, application and fulfilment of the Convention by the Contracting Parties and in relation to acts attributable to those States, in this case, Croatia and Serbia. This is because of the cardinal principle of international law that unless a different intention appears from the treaty or is otherwise established, the provisions of a treaty 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 (Art. 28 of the Vienna Convention on the Law of Treaties). In the present case, the FRY Serbia cannot be bound by the Genocide Convention prior to 27 April 1992 when by succession it became a Contracting Party. 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. Consequently, the responsibility of the FRY Serbia, (being one of five successor States to the SFRY along with the republics of Croatia, Slovenia, Bosnia and Herzegovina, and Macedonia) for acts committed by a predecessor State prior to 27 April 1992, i.e., before Serbia became a State or a party to the Genocide Convention, is not a matter within the Court's jurisdiction ratione temporis.

Judge Sebutinde further disagrees with the decision of the Court to accord evidential weight to a decision of the International Criminal Tribunal for the former Yugoslavia (ICTY) not to charge any individual with genocide in relation to the conflict in Croatia, as being further indication of the fact that no genocide ever took place in Croatia. In her view, such a decision is dangerously based on pure speculation, as the Court did not ascertain the reasons behind such a prosecutorial decision. Under the ICTY Statute, the decision to investigate and prosecute is solely within the Prosecutor's discretion and prerogative, with no accompanying 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 evidence available at the time of drafting the indictment 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 including cost and length of the trial, manageability and availability of witnesses. Furthermore, the questions which this Court and the ICTY are tasked to consider concern two completely different régimes and their answers are not determinative of each other. While the ICTY is concerned with individual criminal responsibility for the commission of particular crimes, this Court is tasked with assessing State responsibility for failure to prevent or punish the alleged perpetrators of an accumulation of crimes that might have been committed with genocidal intent. In the latter case, it is not necessary to identify each and every individual perpetrator of the crimes, before the Court can draw its conclusions. 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. Consequently, the Court should be cautious in placing any evidential weight or inference on the ICTY decision not to charge individuals with genocide arising out of the conflict in Croatia in the absence of reasons for such a prosecutorial decision.

Separate opinion of Judge Bhandari

1. Judge Bhandari has voted with the majority with respect to all three operative clauses of the present Judgment. However, with respect to the second operative clause — the rejection of Croatia's claim of genocide against Serbia — while he concurs with the majority's conclusion that the actus reus of genocide was committed against ethnic Croats during the relevant time period, he remains unconvinced that Croatia has discharged its burden to substantiate its claims by way of the minimum credible evidence required by the Court to allow him to be fully convinced that the only reasonable conclusion available is that such acts were perpetrated with genocidal mens rea.

2. Judge Bhandari then elaborates upon his concerns and misgivings regarding the analysis employed by the majority as to the existence or not of genocidal dolus specialis. In sum, he finds that the majority: (1) failed to lay down clear parameters and guidance to address the issue of genocidal intent, specifically with respect to the "substantiality" criterion; (2) has not taken into proper consideration the developments of the jurisprudence of international criminal tribunals on the issue of genocidal intent after the issuance of the Court's Bosnia Judgment of 2007; and (3) failed to properly address and respond to the 17 factors enumerated by Croatia as being capable of establishing genocidal intent.

3. While conducting a survey of recent jurisprudence from the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR), Judge Bhandari notes certain developmental trends in the law of the "substantiality" criterion of genocidal intent, and regrets the silence of the majority in the face of this pertinent jurisprudential evolution. While Judge Bhandari recognizes that the Court has the prerogative to not rely on such jurisprudence, he is nevertheless of the view that the majority missed an opportunity to clarify this arcane area of public international law and hence distinguish the law of genocide from other grave offences, such as crimes against humanity.

4. Throughout his analysis, Judge Bhandari expands upon these misgivings by focusing on how the majority has treated the events that occurred in the Croatian city of Vukovar from August to November 1991, and by applying some of the developments from the ICTY and ICTR to that particular aspect of the conflict. In paying special attention to the events of Vukovar, Judge Bhandari notes that these events formed the cornerstone of the Applicant's claim and thus, he believes, deserved greater attention than they received from the Court in the present Judgment.

5. Finally, Judge Bhandari explains his dissatisfaction with the majority's reasoning that the events of Vukovar could not constitute genocidal intent because they were animated by a desire to, inter alia, "punish" the local Croat population. In his view, such an approach conflates the distinct legal concepts of motive and intent. Judge Bhandari also takes exception to what he believes to be the illogical and legally unsound distinction the majority has drawn in allowing a decision of the ICTY Prosecutor not to lay a charge of genocide in an indictment to be afforded some probative value, while negating any evidentiary weight to a corollary decision of the Prosecutor to include a charge of genocide in an indictment.

Dissenting opinion of Judge ad hoc Vukas

Judge ad hoc Vukas starts by noting that the content of the Judgment of the International Court of Justice in the case concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia) must be read in the context of the historic and present political circumstances. Namely, the clear elements and characteristics of genocide,

committed in some areas of Croatia by the Yugoslav People's Army and Serb forces, have been neglected by the Court, because they were committed a quarter of a century ago, and their confirmation could hamper the present efforts to include the Republic of Serbia into the European Union.

In Judge ad hoc Vukas's view, although the Operation "Storm" was held in August 1995, it was only after the Application of the Republic of Croatia (submitted in 1999) that Serbia came to the conclusion that genocide was committed against the Serbs in Croatia many years before the Croatian Application.

According to Judge ad hoc Vukas, generally speaking, the Judgment of the International Court of Justice delivered at a public sitting on 3 February 2015 expresses more the view of the necessity of good relations between Croatia and Serbia, than of the duty to punish those responsible for genocide.

Judge Vukas accordingly voted against the Judgment and delivered his dissenting opinion.

Separate opinion of Judge ad hoc Kreća

Although termed a separate opinion, the opinion of Judge Kreća contains both concurring and dissenting elements.

The opinion of Judge Kreća is dissenting in so far as it relates to the jurisdictional issue in the case (i.e., Serbia's second preliminary objection). Judge Kreća is particularly concerned by the highly relaxed approach of the Court to its jurisdiction ratione temporis and the lack of a decision in relation to the vital issues of: from which date the Genocide Convention can be considered binding for the Applicant; from which date it can be considered applicable between the Parties; and until which date it can be considered binding for the SFRY. Judge Kreća finds that this lax approach ignores the fundamental principle of consent. In particular, by treating the second preliminary objection of Serbia, concerning the admissibility of the claim, coincidentally with the principal claim, the Court reduces a key jurisdictional decision to some kind of accessory consequence. He expresses concern for the future implications of such an approach to the jurisdiction of the Court.

Concerning the relationship between the SFRY and the FRY, in terms of State responsibility, the opinion of Judge Kreća strongly rejects any notion that rules on State succession to responsibility form part of international law, as well as the relevance of Article 10 (2) of the Articles on the Responsibility of States for Internationally Wrongful Acts to the circumstances of the case. He also rejects any possible retroactive application of the Genocide Convention, both of its compromissory clause (Article IX) and its substantive provisions.

In relation to substantive law, Judge Kreća agrees that genocide within the terms of the Genocide Convention has largely not been proven.

He considers that the Court, for the most part, has engaged in an interpretation of the Genocide Convention which appropriately reflects its spirit and letter, although he expresses some concerns regarding the interrelationship between the jurisprudence of the ICJ and that of the ICTY, demanding that the Court take a balanced and critical approach to the jurisprudence of the ICTY with respect to genocide.

Judge Kreća is of the opinion that terrible atrocities and crimes were committed by both sides in the tragic civil war in Croatia, but that these crimes rather fit within the framework of crimes against humanity and war crimes and do not fall within the scope of the Genocide Convention.

However, in relation to the issue of incitement to genocide, Judge Kreća dissents in that he considers that the relationship of the régime of Croatian President Tudjman to the Ustasha ideology justifies a finding that direct and implicit incitement to genocide was committed by the Applicant.

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