COUR INTERNATIONALE DE JUSTICE

RECUEIL DES ARRÊTS,
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APPLICATION DE LA CONVENTION POUR LA PRÉVENTION ET LA RÉPRESSION DU CRIME DE GÉNOCIDE

(CROATIE c. SERBIE)

ARRÊT DU 3 FÉVRIER 2015

2015

INTERNATIONAL COURT OF JUSTICE

REPORTS OF JUDGMENTS,
ADVISORY OPINIONS AND ORDERS

APPLICATION OF THE CONVENTION ON THE PREVENTION AND PUNISHMENT OF THE CRIME OF GENOCIDE

(CROATIA *v.* SERBIA)

JUDGMENT OF 3 FEBRUARY 2015

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3 FÉVRIER 2015

ARRÊT

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JUDGMENT

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ABBREVIATIONS AND ACRONYMS

BiH	*Bosna i Hercegovina* (Bosnia and Herzegovina)
CHC	Croatian Helsinki Committee for Human Rights
FRY	Federal Republic of Yugoslavia
HV	*Hrvatska vojska* (Croatian army)
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
ILC	International Law Commission
JNA	*Jugoslovenska narodna armija* (Yugoslav People's Army)
MUP	*Ministarstvo unutrašnjih poslova* (Ministry of Interior)
RSK	*Republika Srpska Krajina* (Republic of Serb Krajina)
SAO	*Srpska autonomna oblast* (Serb Autonomous Region)
SAO SBWS	Serb Autonomous Region of Slavonia, Baranja and Western Srem
SDG	*Srpska dobrovoljačka garda* (Serbian Volunteer Guard)
SDS	*Srpska demokratska stranka* (Serb Democratic Party)
SFRY	Socialist Federal Republic of Yugoslavia
SNB	*Služba nacionalne bezbednosti* (National Security Service)
SRS	*Srpska radikalna stranka* (Serbian Radical Party)
TO	*Teritorijalna odbrana* (Territorial Defence Force)
UNPA	United Nations Protected Area
UNPROFOR	United Nations Protection Force
VJ	*Vojska Jugoslavije* (Yugoslav army)
VP	*Vojna policija* (military police)

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INTERNATIONAL COURT OF JUSTICE

YEAR 2015

2015
3 February
General List
No. 118

3 February 2015

APPLICATION OF THE CONVENTION ON THE PREVENTION AND PUNISHMENT OF THE CRIME OF GENOCIDE

(CROATIA *v.* SERBIA)

Historical and factual background.

Break-up of the SFRY and emergence of new States — Situation in Croatia — Establishment of Serb autonomous regions — Armed conflict from summer 1991 — Vance plan and deployment of United Nations Protection Force — Operations Flash and Storm in 1995.

*

Jurisdiction and admissibility.

Croatia's claim — Jurisdiction ratione temporis *regarding events before 27 April 1992 (date the FRY became party to the Genocide Convention) — Article IX of the Convention — Disputes "relating to the interpretation, application or fulfilment" of the Convention — Convention not retroactive — Question of applicability of Article 10 (2) of ILC Articles on State Responsibility — Question of succession to responsibility — Dispute exists concerning whether prior acts could engage responsibility of Serbia — Court has jurisdiction over entirety of Croatia's claim.*

Admissibility of claim — Admissibility of claim for acts before 27 April 1992 involves questions of attribution — Acts prior to 8 October 1991 (date Croatia became party to the Convention) pertinent to evaluation of alleged violations after that date — Not necessary to rule on these two admissibility questions until the Court has assessed the merits of the claim.

Serbia's counter-claim — Article 80, paragraph 1, of the Rules of Court as adopted on 14 April 1978 — Counter-claim is within the jurisdiction of the Court — Counter-claim is directly connected to claim in fact and law — Counter-claim admissible.

*

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Genocide Convention as applicable law — Definition of genocide in Article II of the Convention.

Dolus specialis *— Meaning and scope of "destruction" of group — Convention limited to physical or biological destruction — Evidence must establish an intent to destroy group in whole or in part — Meaning of destruction of group "in part" — Inference of* dolus specialis *through pattern of conduct.*

Actus reus *— Meaning and scope of acts listed in Article II of the Convention — Equivalence of terms "killing" and "meurtre" in Article II* (a) *— Requirement that serious bodily or mental harm in Article II* (b) *be such as to contribute to the physical or biological destruction of the group, in whole or in part — Forced displacement as* actus reus *of genocide under Article II* (c) *— Rape and other acts of sexual violence as* actus reus *of genocide under Article II* (d).

*

Burden of proof — For party alleging a fact to demonstrate its existence — Principle not an absolute one — Other party required to co-operate in provision of evidence in its possession — Reversal of burden of proof not appropriate in present case.

Standard of proof — Evidence must be "fully conclusive" — Court must be "fully convinced" that acts have been committed.

Methods of proof — ICTY findings of fact accepted as "highly persuasive" — Absence of charges of genocide in ICTY indictments — Probative value of various types of reports adduced in evidence — Evidential weight of individual statements annexed to written pleadings.

*

Principal claim.

Actus reus *of genocide.*

Article II (a) *of the Convention — Established that a large number of killings carried out by JNA and Serb forces in localities in Eastern Slavonia, Banovinal Banija, Kordun, Lika and Dalmatia — Large majority of victims were members of protected group —* Actus reus *established.*

Article II (b) *— Established that acts of ill-treatment, torture, sexual violence and rape perpetrated in localities in Eastern Slavonia, Western Slavonia and Dalmatia — Acts caused serious bodily or mental harm such as to contribute to the physical or biological destruction of protected group —* Actus reus *established.*

Article II (c) *— Acts of rape not on scale as to amount to infliction on the group of conditions of life calculated to bring about its physical destruction in whole or in part — Deprivation of food and medical care not of systematic or general nature — Expulsion, forced displacement and restrictions on movement not calculated to*

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result in physical destruction of group in whole or in part — Forced wearing of insignia of ethnicity cannot fall within scope of Article II (c) *— Looting of Croat property not calculated to result in physical destruction of group in whole or in part — Destruction and looting of cultural heritage cannot fall within scope of Article II* (c) *— Forced labour not calculated to result in physical destruction of group in whole or in part —* Actus reus *not established.*

Article II (d) *— Rape and acts of sexual violence committed — Not established that perpetrated to prevent births within group —* Actus reus *not established.*

Genocidal intent (dolus specialis) *— Part allegedly targeted — Croats living in identified regions formed substantial part of group — Pattern of conduct existed consisting in widespread attacks on localities with Croat populations from August 1991 — Requirement that intent to destroy the group, in whole or in part, must be only reasonable conclusion to be inferred from pattern of conduct — Context in which acts committed does not make it possible to infer such intent — Not established that perpetrators availed themselves of opportunities to destroy substantial part of protected group — Other factors invoked insufficient to show genocidal intent —* Dolus specialis *not established.*

No violation of the Convention established — Principal claim cannot be upheld — Court not required to pronounce on admissibility of principal claim for acts prior to 8 October 1991 — Court need not consider whether acts prior to 27 April 1992 attributable to SFRY — Court need not consider succession to responsibility.

*

Counter-claim.

Actus reus *of genocide.*

Question whether there was killing of civilians as a result of the shelling of Krajina towns — Analysis of Gotovina *case before ICTY — Indiscriminate shelling not established — No evidence of intentional killing of Serb civilians through shelling —* Actus reus *under Article II* (a) *of the Convention not established.*

Displacement of the Krajina Serb population — Displacement not calculated to bring about physical destruction, in whole or in part, of targeted group — Actus reus *under Article II* (c) *not established.*

Killing of Serbs fleeing in columns — Established that such killings took place — Actus reus *under Article II* (a) *established.*

Killing of Serbs remaining in United Nations protected areas — Factual findings of ICTY Trial Chamber must be accepted as "highly persuasive" — Established that such killings took place — Actus reus *under Article II* (a) *established.*

Ill-treatment of Serbs during and after Operation Storm — Analysis of Gotovina *case before ICTY — Established that acts causing serious*

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bodily or mental harm took place — Actus reus *under Article II* (b) *established.*

Large-scale destruction and looting after Operation Storm — Not calculated to bring about physical destruction, in whole or in part, of targeted group — Actus reus *under Article II* (c) *not established.*

Genocidal intent (dolus specialis) — *Brioni Transcript does not establish genocidal intent — Pattern of conduct — Distinction between ethnic cleansing and genocide — Acts not committed on a scale that could only reasonably point to existence of genocidal intent* — Dolus specialis *not established.*

No violation of the Convention established — Counter-claim cannot be upheld.

JUDGMENT

Present: *President* TOMKA; *Vice-President* SEPÚLVEDA-AMOR; *Judges* OWADA, ABRAHAM, KEITH, BENNOUNA, SKOTNIKOV, CANÇADO TRINDADE, YUSUF, GREENWOOD, XUE, DONOGHUE, GAJA, SEBUTINDE, BHANDARI; *Judges* ad hoc VUKAS, KREĆA; *Registrar* COUVREUR.

In the case concerning the application of the Convention on the Prevention and Punishment of the Crime of Genocide,

between

the Republic of Croatia,

represented by

Ms Vesna Crnić-Grotić, Professor of International Law, University of Rijeka,

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Ms Jana Spero, Head of Sector, Ministry of Justice,

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and

the Republic of Serbia,

represented by

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Mr. Igor Olujić, Attorney at Law, Belgrade,
Mr. Marko Brkić, First Secretary at the Ministry of Foreign Affairs,
Mr. Relja Radović, LL.M. (Novi Sad), LL.M. (Leiden (candidate)),

Mr. Georgios Andriotis, LL.M. (Leiden),

as Advisers,

THE COURT,

composed as above,

after deliberation,

delivers the following Judgment:

Institution of Proceedings, Notifications, Preliminary Objections and Filing of Written Pleadings on the Merits

1. The Court recalls that the procedural history of the case, from the date of its introduction on 2 July 1999 until 30 May 2008, was set out in detail in the Court's Judgment of 18 November 2008 on the preliminary objections raised by the Respondent (*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* (hereinafter the "2008 Judgment"), pp. 415-417, paras. 1-19). These details will not be reproduced in full in the present Judgment, but will be summarized in the following paragraphs.

2. 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

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Article IX of the Genocide Convention as the basis of the jurisdiction of the Court.

3. Under Article 40, paragraph 2, of the Statute of the Court, the Registrar immediately communicated a certified copy of the Application to the Government of the FRY; and, in accordance with paragraph 3 of that Article, all other States entitled to appear before the Court were notified of the Application.

4. Pursuant to the instructions of the Court under Article 43 of the Rules of Court, the Registrar addressed to States parties to the Genocide Convention the notification provided for in Article 63, paragraph 1, of the Statute. The Registrar also sent to the Secretary-General of the United Nations the notification provided for in Article 34, paragraph 3, of the Statute and subsequently transmitted to him copies of the written proceedings.

5. By an Order dated 14 September 1999, the Court fixed the time-limits for the filing of a Memorial by Croatia and a Counter-Memorial by the FRY. By Orders of 10 March 2000 and 27 June 2000, these time-limits, at the request of Croatia, were successively extended. The Memorial of Croatia was filed on 1 March 2001, within the time-limit finally prescribed.

6. Since the Court included upon the Bench no judge of the nationality of the Parties, each of them exercised its right under Article 31, paragraph 3, of the Statute to choose a judge *ad hoc* to sit in the case: Croatia chose Mr. Budislav Vukas and the FRY chose Mr. Milenko Kreća.

7. On 11 September 2002, within the time-limit provided for in Article 79, paragraph 1, of the Rules of Court as adopted on 14 April 1978 and applicable to this case, the FRY raised preliminary objections relating to the Court's jurisdiction to entertain the case and to the admissibility of the Application. On 25 April 2003, within the time-limit fixed by the Court by Order of 14 November 2002, Croatia filed a statement of its observations and submissions on those preliminary objections.

8. By a letter dated 5 February 2003, the FRY informed the Court that, following the adoption and promulgation of the Constitutional Charter of Serbia and Montenegro by the Assembly of the FRY on 4 February 2003, the name of the State had been changed from the "Federal Republic of Yugoslavia" to "Serbia and Montenegro". Following the announcement of the result of a referendum held in Montenegro on 21 May 2006 (as contemplated in the Constitutional Charter of Serbia and Montenegro), the National Assembly of the Republic of Montenegro adopted a declaration of independence on 3 June 2006, following which the "Republic of Serbia" (hereinafter "Serbia") remained the sole Respondent in the case (2008 Judgment, *I.C.J. Reports 2008*, pp. 421-423, paras. 23-34).

9. Public hearings were held on the preliminary objections from 26 to 30 May 2008. By its 2008 Judgment, the Court rejected the first and third preliminary objections raised by Serbia. It found 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 (*ibid.*, pp. 466-467, para. 146).

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10. By an Order dated 20 January 2009, the Court fixed 22 March 2010 as the time-limit for the filing of the Counter-Memorial of Serbia. The Counter-Memorial, filed on 4 January 2010, contained a counter-claim.

11. At a meeting held by the President of the Court with the representatives of the Parties on 3 February 2010, the Co-Agent of Croatia indicated that her Government did not intend to raise objections to the admissibility of Serbia's counter-claim as such, but wished to be able to respond to the substance of it in a Reply. The Co-Agent of Serbia stated that, in that case, his Government wished to file a Rejoinder.

12. By an Order dated 4 February 2010, the Court directed the submission of a Reply by Croatia and a Rejoinder by Serbia, concerning the claims presented by the Parties, and fixed 20 December 2010 and 4 November 2011 as the respective time-limits for the filing of those pleadings. The Court also instructed the Registrar to inform third States entitled to appear before the Court of Serbia's counter-claim, which was done by letters dated 23 February 2010. The Reply and the Rejoinder were filed within the time-limits thus fixed.

13. By a letter of 30 July 2010, Croatia asked the Court to request Serbia, pursuant to Article 49 of the Statute and Article 62, paragraph 1, of the Rules of Court, to produce certain documents. Between September 2010 and May 2011, Serbia furnished approximately 200 of the documents requested by Croatia.

By a letter dated 22 June 2011, Serbia, in turn, asked Croatia to provide it with certain documents. Following further exchanges of correspondence between the Parties, Serbia, by a letter of 22 May 2012, communicated to the Court a copy of a letter addressed to Croatia, in which it made various observations concerning the request by each Party for the other to produce documents. In particular, Serbia expressed concern that it had not yet received the documents requested from Croatia, whereas it had transferred, as soon as possible and without requiring a justification, all requested documents that could be found in its State archives; Serbia thus asked that Croatia fulfil its request for documents on the basis of reciprocity.

The Court subsequently received no further correspondence from the Parties regarding the documents that they requested from each other.

14. On 16 January 2012, at a meeting held by the President of the Court with the Agents of the Parties, the Co-Agent of Croatia stated that her Government wished to express its views on Serbia's counter-claim in writing a second time, in an additional pleading.

15. By an Order dated 23 January 2012, the Court authorized Croatia to submit such an additional pleading, and fixed 30 August 2012 as the time-limit for its filing. Croatia filed that pleading within the time-limit thus fixed, and the case was ready for hearing.

16. By a letter dated 14 March 2012, the Registrar, acting pursuant to Article 69, paragraph 3, of the Rules of Court, asked the Secretary-General of the United Nations to inform him whether the Organization wished to submit written observations under that provision. By a letter dated 4 April 2012, the Secretary-General stated that the Organization did not intend to submit any such observations.

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Organization of the Oral Proceedings and Accessibility to the Public of the Pleadings and Transcripts

17. By letters dated 30 August 2012, the Registrar requested the Parties to submit their views on the length of the hearings, and asked them to inform him whether they wished to call witnesses and/or experts. By a letter dated 19 September 2012, Serbia, *inter alia*, informed the Court that it was planning to call eight witnesses and witness-experts; for its part, Croatia, by a letter of 31 October 2012, *inter alia*, informed the Court that it was planning to call twelve witnesses and witness-experts.

18. By a letter dated 11 September 2012, Serbia informed the Court that the Croatian authorities had contacted at least two of the persons whose statements had been appended to its Rejoinder; those two individuals had subsequently gone back on their previous statements. By a letter dated 16 October 2012, the Registrar informed the Parties that the Court directed them to refrain from making contact with persons whose statements were appended to the pleadings of the other Party. Furthermore, in order to enable the Court to assess the consequences that it might have to draw from the contacts made by Croatian authorities, Croatia was requested to inform it of the total number of witnesses contacted, and of how the Croatian police had contacted them; Croatia was further requested to provide the Court with a full list of those persons, with their names and addresses. In case the Serbian authorities had also been in touch with persons whose statements had been appended to one of Croatia's pleadings, the Court sent a similar request to Serbia. By a letter dated 2 November 2012, Croatia explained that the Croatian police had been in contact with five of the persons whose statements had been appended to Serbia's Rejoinder; it provided their names and addresses, as well as a brief description of the manner in which they had been questioned. By a letter dated 26 November 2012, Serbia informed the Court that the Serbian authorities had never been in contact with persons whose statements had been appended to Croatia's pleadings.

19. On 23 November 2012 the President of the Court held a meeting with the representatives of the Parties to discuss the organization of the oral proceedings. At that meeting the Parties were encouraged to reach agreement on the procedure for the examination of witnesses and witness-experts.

20. By a letter dated 16 April 2013, Croatia informed the Court that the Parties had concluded an agreement on the method of examining witnesses and witness-experts, and Serbia confirmed this in a letter of 19 April 2013. That agreement provided, *inter alia*, that each Party would submit to the Court, not later than 15 July 2013, a list of witnesses and witness-experts that it wished to call, together with their authentic written statements, if such statements had not been annexed to the written pleadings. Each Party would then communicate to the Court, not later than 15 October 2013, the name of any witness or witness-expert called by the other Party that it did not wish to cross-examine. It was further agreed that a Party wishing to call a witness or witness-expert would submit a summary of the witness' testimony or the witness-expert's statement, which would then replace the examination-in-chief.

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21. By a letter dated 10 July 2013, Croatia informed the Court that it wished to propose changes to the agreement between the Parties referred to in the previous paragraph. In particular, it proposed the extension, from 15 July to 1 October 2013, of the time-limit for the communication, under Article 57 of the Rules of Court, of information regarding witnesses and witness-experts. By a letter dated 16 July 2013, Serbia informed the Court that it accepted Croatia's proposals. By letters of 17 July 2013, the Registrar informed the Parties that the Court had decided to extend to 1 October 2013 the time-limit for the communication under Article 57 of the Rules of Court of information regarding witnesses and witness-experts, and to extend to 15 November 2013 that relating to the communication by either Party of the names of any witnesses or witness-experts that it did not wish to cross-examine.

22. By a letter dated 8 August 2013, Serbia informed the Court that it wished to produce a new document pursuant to Article 56, paragraph 1, of the Rules of Court. Serbia also supplied the Court with an English translation of extracts from two documents which it described as being readily available (Article 56, paragraph 4, of the Rules of Court) in the original Serbian version. By a letter dated 10 September 2013, Croatia informed the Court that it did not object to the production of these three documents. By letters dated 20 September 2013, the Registrar informed the Parties that the Court had authorized Serbia to produce the new document that it wished to submit under Article 56, paragraph 1, of the Rules of Court, and that Serbia could refer to that document at the hearings; with respect to the other two documents, as they were "readily available", these had been added to the case file.

23. On 1 October 2013 the Parties communicated to the Court information concerning the persons whom they intended to call at the hearings, as well the written testimony and statements which had not been appended to their pleadings. Croatia stated that it wished to call nine witnesses and three witness-experts in support of its claim. For its part, Serbia announced that it was planning to call seven witnesses and one witness-expert in support of its counter-claim.

24. By a letter dated 14 November 2013, Croatia drew the Court's attention to the fact that, between 12 and 14 November 2013, the Serbian press had published three articles that might have implications for the witnesses and witness-experts called to testify in the proceedings. By letters of 21 November 2013, the Registrar informed the Parties of the Court's concerns, and reminded them of their obligation to maintain confidentiality in respect of the information contained in correspondence with the Court, in particular as regards the identity of potential witnesses and witness-experts.

25. By a letter dated 15 November 2013, Croatia informed the Court that it did not wish to cross-examine the witnesses and witness-expert of Serbia, on the understanding that they would not be called to testify before the Court, and that their evidence to the Court would be in the form of their written testimony or statements. Croatia added that, if this understanding was not correct, or if the Court itself wished to cross-examine Serbia's witnesses or witness-expert, it reserved the right to cross-examine them. By a letter of the same date, Serbia, for its part, informed the Court of the names of the five witnesses and one witness-expert of Croatia that it did not wish to cross-examine, thus implying that it did wish to cross-examine the four other witnesses and two other witness-experts announced by Croatia on 1 October 2013.

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26. On 22 November 2013 the President of the Court held a meeting with the Agents of the Parties in order to discuss further the organization of the oral proceedings. At that meeting the Parties agreed that it was unnecessary to have witnesses and witness-experts whom they did not intend to cross-examine come to the Court only to confirm their written testimony or statement unless the Court itself decided to put questions to them.

27. By a letter dated 13 December 2013, Serbia informed the Court of the approximate amount of time that it felt it would need in order to cross-examine the four witnesses and two witness-experts called by Croatia who were due to testify in court.

28. By a letter of that same date, Croatia informed the Court that the witnesses and witness-experts who would testify would all speak in Croatian, with the exception of one, who would speak in Serbian.

29. By letters dated 16 December 2013, the Registrar informed the Parties that, at this stage of the proceedings, the Court did not wish to question the witnesses and witness-experts that the Parties were not intending to cross-examine. At the same time, he further informed them that the Court wished to receive from them, by 20 January 2014, certain additional documents concerning their witnesses and witness-experts, and that, with respect to a document the production of which had been requested of Croatia, Serbia would have until 14 February 2014 to file any written observations that it wished to make on this document. By a letter dated 14 January 2014, Serbia provided the Court with the documents requested. By a letter of 22 January 2014, Croatia informed the Court that it would be transmitting the requested document slightly late. That document reached the Court on 31 January 2014. The original time-limit for any written observations on that document by Serbia was extended accordingly. By a letter dated 11 February 2014, Serbia indicated that it did not wish to present any such observations.

30. By a letter dated 30 December 2013, Croatia made certain observations on the procedure for the hearing of its witnesses and witness-experts, in particular with respect to the allocation of time for the said hearings and the order of presentation of the witnesses and witness-experts. By a letter dated 10 January 2014, Serbia presented its own observations on the matter.

31. By a letter dated 17 January 2014, the Registrar asked Croatia to state what arrangements it planned to make, pursuant to Article 70, paragraph 2, of the Rules of Court, for the interpretation into one of the Court's official languages of the evidence of witnesses and witness-experts who would be testifying in Croatian or Serbian. By a letter of the same date, Croatia informed the Registry of its arrangements in that regard; in that same letter Croatia asked the Court to take certain protective measures for two of its witnesses, consisting in particular of hearing their evidence in closed session and referring to them by pseudonyms.

32. Under Article 53, paragraph 2, of the Rules of Court, the Registrar requested the Parties, by letters dated 17 January 2014, to indicate their respective views on the question of making accessible to the public the written pleadings and documents annexed. By a letter dated 24 January 2014, Serbia informed the Court that, with certain exceptions, it consented to copies of its written pleadings and documents annexed being made accessible to the public on the opening of the oral proceedings. Croatia did not make its position known until later (see below, paragraphs 35 and following).

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33. By letters dated 7 February 2014, the Registrar informed the Parties of all the decisions taken by the Court concerning the precise details of the procedure for examining the four witnesses and two witness-experts called by Croatia who were due to testify in court (see paragraphs 25-31 above).

The Parties were thus advised that, after making the solemn declaration provided for in Article 64 of the Rules of Court, the witness or witness-expert would be asked to confirm his or her written testimony or statement, which would serve as the examination-in-chief. Serbia would then be given the opportunity to cross-examine the witness or witness-expert, after which Croatia could conduct a re-examination. Finally, there would be an opportunity for Members of the Court to put questions to the witness or witness-expert.

With regard to the protective measures requested for two of the witnesses, the Parties were informed that the Court had agreed to the use of pseudonyms when addressing these witnesses or referring to them; it had also agreed that these witnesses would be heard in closed session, with only Registry staff and members of the official delegations permitted to be present during their examination, and that two separate sets of documents would be produced (one reserved for confidential use by the Court and the Parties, and the other to be made public, with any information that might lead to the identification of the protected witnesses having been deleted).

The Parties were further informed that the Court had decided to prescribe the following measures to ensure the integrity of the testimony and statements of the witnesses and witness-experts: (i) the witnesses and witness-experts would have to remain out of court both before and after their testimony/statements; (ii) the written testimony/statements of witnesses and witness-experts announced by the Parties on 1 October 2013 (whether or not they appear at the hearings), as well as the verbatim records of the hearings at which the witnesses and witness-experts were examined, would be published only after the closure of the oral proceedings (in redacted form in the case of protected witnesses); (iii) the Parties would have to ensure that the witnesses and witness-experts did not have access to the evidence given by other witnesses and witness-experts before the closure of the oral proceedings; (iv) the Parties would further have to ensure that the witnesses and witness-experts would not be otherwise informed of the testimony/statements of other witnesses and witness-experts and that they would have no contact which could compromise their independence or breach the terms of their solemn declaration; (v) if the Court were to decide that, in general, the annexes to the main pleadings (containing a number of written testimonies on disputed events in the case) should be made available to the public, they would only be published after the closure of the oral proceedings; and (vi) the public could attend the examinations (except the closed sittings), but would be requested not to divulge the content of the testimony/statements until the oral proceedings had closed; the same would apply to the media, who would have to subscribe to a code of conduct under the terms of which they would be allowed to take photographs and make sound recordings, on the express condition that they did not make public the content of the testimony/statements before the oral proceedings had closed.

On the question of the broadcasting of the hearings, the Parties were notified, in the same letters, that the Court had decided that the examinations of the witnesses and witness-experts, whether or not protected, would not be broadcast on the Internet.

Lastly, since Croatia had still not indicated its position regarding the accessibility to the public of the pleadings and documents annexed thereto (see paragraph 32 above), it was again invited to make known its views on that matter.

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34. By a letter dated 14 February 2014, Serbia communicated to the Court a list of audio-visual and photographic materials that it intended to present during its oral arguments, as well as electronic versions of those documents. By letter dated 17 February 2014, Croatia transmitted to the Court electronic versions of the audio-visual materials on which it intended to rely during its oral arguments. By letter of 21 February 2014, Serbia asked Croatia to specify the source of some of the audio-visual materials transmitted; that information was provided by Croatia in a letter dated 26 February 2014. By letters dated 27 February 2014, the Registrar informed the Parties that the Court had decided that, during their oral presentations, they would be allowed to use the audio-visual and photographic materials that had been communicated to it.

35. By a letter dated 14 February 2014, Croatia indicated to the Court that it consented to the publication of its pleadings and documents annexed, provided they were published in redacted form and without a number of annexes, in order to ensure the anonymity of the victims and the individuals who provided it with written testimonies. Croatia suggested that the names of those persons appearing in its pleadings be replaced by their initials, and that their written testimonies and the lists of prisoners annexed to the said pleadings be withheld from publication. It added that Serbia should also be asked to redact its own pleadings in the same manner, in so far as they referred to those individuals. Finally, Croatia requested that those individuals should be referred to at the public hearings by their initials or the annex number where their written testimony appeared.

36. By letters dated 17 February 2014, the Registrar asked Serbia to indicate to the Court its views on the measures proposed by Croatia, adding that the final decision on these matters would rest with the Court. He also informed the Parties that, in principle, they were responsible for the production of redacted documents to be made accessible to the public. Croatia was finally asked to provide the redacted versions of its pleadings and documents annexed as it would like them to be published. In response to this request, Croatia, by a letter dated 18 February 2014, communicated to the Court redacted versions of its pleadings and annexes, in which (i) the names of victims and individuals who had provided it with written testimonies were replaced by initials, and (ii) the said written testimonies and the lists of prisoners were removed.

37. By letters of 18 and 25 February 2014, Serbia objected to Croatia's requests, made by the latter in its above-mentioned letter of 14 February 2014 (see paragraph 35 above) and repeated in a letter dated 20 February 2014, to redact the written pleadings and to refer to certain individuals in the public hearings by their initials or the annex number of their written testimony. In its letter dated 25 February 2014, Serbia argued that Croatia had not sufficiently explained why its pleadings and documents annexed had to be redacted in the manner proposed.

38. Regarding the publication of the written testimonies/statements of those witnesses and witness-experts announced on 1 October 2013 but who would not be appearing at the hearings (see paragraph 33 above), Croatia, in a letter dated 24 February 2014, stated that: (i) one of the witnesses had asked that his written testimony be published under a pseudonym and in redacted form; (ii) two witnesses had objected to the publication of their written testimonies; and (iii) one of the witnesses had passed away on 19 January 2014. In its letter of 25 Febru-

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ary 2014, Serbia stated that it did not object to the written testimony of the witness referred to in point (i) being published under a pseudonym and in redacted form, or to the written testimonies of the two witnesses referred to in point (ii) not being published, on the understanding that it would be for the Court to decide whether those written testimonies would remain in the case file. Lastly, Serbia indicated that it did not object to the publication of the written testimony of the deceased witness (point (iii)).

39. Following these various exchanges on the publication of the written pleadings, the Registrar, by letters dated 27 February 2014, informed the Parties of the latest decisions of the Court in this regard. The Parties were thus advised that the said pleadings would not be published on the opening of the oral proceedings, as more information was required by the Court before deciding exactly which documents should be redacted (and to what extent) or withheld from publication altogether. Furthermore, (i) if the pleadings and documents annexed were to be made accessible to the public, five annexes of Serbia's Rejoinder would be withheld from publication and the parts of Croatia's additional pleading referring to those annexes would be redacted accordingly; (ii) the lists of prisoners contained in the annexes to Croatia's pleadings would be redacted to delete the names of the individuals concerned, but those annexes would not be withheld from publication entirely; and (iii) the written testimonies of witnesses annexed to Croatia's pleadings would be made accessible to the public, unless compelling reasons required otherwise (for example, protection of the witnesses in question or national security issues). As regards the written testimonies of some witnesses announced by Croatia on 1 October 2013 but who would not be appearing at the hearings: (i) the written testimony of one of the witnesses would be published under a pseudonym and in redacted form; (ii) the written testimonies of two witnesses would be discarded if the individuals concerned continued to object to their publication even under a pseudonym and in redacted form; and (iii) the written testimony of the witness who had passed away would be published.

Croatia was further invited to specify the names of the individuals for whom publication of the unredacted pleadings and annexes thereto would pose a genuine security risk, and to identify the risk in question and the specific parts of its pleadings and annexes that should in its view be redacted. Once that information had been provided, the Court would decide which redactions were justified and which annexes should not be published.

40. In a letter dated 28 February 2014, Croatia commented on the decisions taken by the Court regarding the accessibility to the public of various documents and the conduct of the oral proceedings. In particular, it asked the Court to grant it additional time to redact in the manner prescribed the lists of prisoners contained in its annexes. It further indicated that it accepted the Court's decision to remove from the case file the evidence of the two witnesses who objected to their written testimony being published. However, it did not specify the names of the individuals for whom publication of the unredacted pleadings and documents annexed would pose a genuine security risk, identify the risk in question or the specific parts of its pleadings and annexes that it wished to be redacted.

41. By letters dated 3 March 2014, the Registrar informed the Parties that the Court had decided to grant Croatia's request for additional time to redact the lists of prisoners contained in its annexes and to specify the names of the individuals for whom publication of the unredacted pleadings and documents

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annexed would pose a genuine security risk. The Parties were also told that, pending the receipt of that information, any individuals whose written testimonies were annexed to Croatia's pleadings were to be referred to at the public sittings only by the annex number of these written testimonies.

42. By a letter dated 14 March 2014, Croatia provided the Court with redacted versions of the above-mentioned lists of prisoners. Referring to the recent decisions taken by the Court, Croatia also addressed the question of the publication of the Parties' written pleadings and documents annexed thereto. It stated in this respect that it did not have the resources to contact each and every one of the individuals named in the written testimonies annexed to its pleadings, in order to ascertain whether the publication of the testimony in which they were named would pose a genuine security risk for them, and on what basis. It therefore proposed the non-publication of the annexes, the publication of redacted versions of the pleadings, and making the full and unredacted pleadings available to the public only at the seat of the Court. By a letter dated 17 March 2014, Serbia objected to Croatia's proposals.

43. By letters dated 18 March 2014, the Registrar informed the Parties that the Court had decided that Croatia's pleadings and their annexes, as well as Serbia's pleadings, would be published in redacted form, to ensure the anonymity of the persons identified by Croatia (victims and individuals whose written testimonies were annexed to Croatia's pleadings). It was specified in the Registrar's letters that these redactions were to be limited to replacing full names by initials, and, exceptionally, when necessary to ensure the protection of the individuals concerned, to deleting other identifying information; with respect to Serbia's pleadings, it would fall on Croatia to identify very precisely the parts it deemed had to be redacted.

44. In a letter dated 24 March 2014, Croatia identified the parts of Serbia's pleadings which in its view had to be redacted. Croatia's letter was communicated to Serbia, which was asked to indicate whether it agreed to the suggested redactions and, if so, to provide electronic versions of its pleadings redacted pursuant to Croatia's suggestions. By a letter dated 27 March 2014, Serbia furnished such electronic versions of its pleadings. By a letter dated 28 March 2014, Croatia provided redacted versions of its pleadings and documents annexed thereto in electronic form.

45. Public hearings were held from 3 March to 1 April 2014, at which the Court heard the oral arguments and replies of:

For Croatia: Ms Vesna Crnić-Grotić,
Ms Andreja Metelko-Zgombić,
Ms Helen Law,
Mr. James Crawford,
Mr. Philippe Sands,
Sir Keir Starmer,
Ms Jana Spero,
Ms Blinne Ní Ghrálaigh,
Ms Maja Seršić,
Mr. Davorin Lapaš,
Ms Anjolie Singh.

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For Serbia: Mr. Saša Obradović,
Mr. William Schabas,
Mr. Andreas Zimmermann,
Mr. Christian Tams,
Mr. Novak Lukić,
Mr. Dušan Ignjatović,
Mr. Wayne Jordash.

46. The following witnesses and witness-experts were called by Croatia and heard at two public hearings and one closed hearing, held on 4, 5 and 6 March 2014: as witnesses, Mr. Franjo Kožul, Ms Marija Katić, Ms Paula Milić (pseudonym) and Mr. Ivan Krylo (pseudonym); and as witness-experts, Ms Sonja Biserko and Mr. Ivan Grujić. They were cross-examined by counsel for Serbia and re-examined by counsel for Croatia. Several judges put questions to the witnesses and witness-experts, who replied orally.

47. At the hearings, questions were put to the Parties by Members of the Court and replies given orally, in accordance with Article 61, paragraph 4, of the Rules of Court.

48. In accordance with the decisions of the Court (see paragraphs 33, 39 and 43 above), the following documents were made public at the close of the oral proceedings: redacted versions of the pleadings and their annexes; written testimonies of the witnesses (in redacted form for the protected witnesses) and written statements of the witness-experts; and verbatim records of the hearings at which the witnesses and witness-experts were examined (in non-redacted form, since neither the Parties nor the protected witnesses requested the Court to redact portions of the verbatim records of the hearing of protected witnesses).

*

Claims Made in the Application and Submissions Presented by the Parties

49. In its Application, the following claims were made by Croatia:

> "While reserving the right to revise, supplement or amend this Application, and, subject to the presentation to the Court of the relevant evidence and legal arguments, Croatia requests the Court to adjudge and declare as follows:
>
> *(a)* that the Federal Republic of Yugoslavia has breached its legal obligations toward the people and Republic of Croatia under Articles I, II *(a)*, II *(b)*, II *(c)*, II *(d)*, III *(a)*, III *(b)*, III *(c)*, III *(d)*, III *(e)*, IV and V of the Genocide Convention;
>
> *(b)* that the Federal Republic of Yugoslavia has an obligation to pay to the Republic of Croatia, in its own right and as *parens patriae* for its citizens, reparations for damages to persons and property, as well as to the Croatian economy and environment caused by the foregoing violations of international law in a sum to be determined by the Court. The Republic of Croatia reserves the right to introduce to the Court at a future date a precise evaluation of the damages caused by the Federal Republic of Yugoslavia."

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50. In the written proceedings, the following submissions were presented by the Parties:

On behalf of the Government of Croatia,

in the Memorial:

> "On the basis of the facts and legal arguments presented in this Memorial, the Applicant, the Republic of Croatia, respectfully requests the International Court of Justice to adjudge and declare:
>
> 1. That the Respondent, the Federal Republic of Yugoslavia, is responsible for violations of the Convention on the Prevention and Punishment of the Crime of Genocide:
>
> *(a)* in that persons for whose conduct it is responsible committed genocide on the territory of the Republic of Croatia, including in particular against members of the Croat national or ethnical group on that territory, by
>
> — killing members of the group;
> — causing deliberate bodily or mental harm to members of the group;
> — deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
> — imposing measures intended to prevent births within the group,
>
> with the intent to destroy that group in whole or in part, contrary to Article II of the Convention;
>
> *(b)* in that persons for whose conduct it is responsible conspired to commit the acts of genocide referred to in paragraph *(a)*, were complicit in respect of those acts, attempted to commit further such acts of genocide and incited others to commit such acts, contrary to Article III of the Convention;
>
> *(c)* in that, aware that the acts of genocide referred to in paragraph *(a)* were being or would be committed, it failed to take any steps to prevent those acts, contrary to Article I of the Convention;
> *(d)* in that it has failed to bring to trial persons within its jurisdiction who are suspected on probable grounds of involvement in the acts of genocide referred to in paragraph *(a)*, or in the other acts referred to in paragraph *(b)*, and is thus in continuing breach of Articles I and IV of the Convention.
>
> 2. That as a consequence of its responsibility for these breaches of the Convention, the Respondent, the Federal Republic of Yugoslavia, is under the following obligations:
>
> *(a)* to take immediate and effective steps to submit to trial before the appropriate judicial authority, those citizens or other persons within its jurisdiction who are suspected on probable grounds of having committed acts of genocide as referred to in paragraph (1) *(a)*, or any of the other acts referred to in paragraph (1) *(b)*, in particular Slobodan Milošević, the former President of the Federal Republic of Yugoslavia, and to

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ensure that those persons, if convicted, are duly punished for their crimes;

(b) to provide forthwith to the Applicant all information within its possession or control as to the whereabouts of Croatian citizens who are missing as a result of the genocidal acts for which it is responsible, and generally to co-operate with the authorities of the Republic of Croatia to jointly ascertain the whereabouts of the said missing persons or their remains;

(c) forthwith to return to the Applicant any items of cultural property within its jurisdiction or control which were seized in the course of the genocidal acts for which it is responsible; and

(d) to make reparation to the Applicant, in its own right and as *parens patriae* for its citizens, for all damage and other loss or harm to person or property or to the economy of Croatia caused by the foregoing violations of international law, in a sum to be determined by the Court in a subsequent phase of the proceedings in this case. The Republic of Croatia reserves the right to introduce to the Court a precise evaluation of the damages caused by the acts for which the Federal Republic of Yugoslavia is held responsible.

The Republic of Croatia reserves the right to supplement or amend these submissions as necessary."

in the Reply:

"On the basis of the facts and legal arguments presented in its Memorial and in this Reply, the Applicant respectfully requests the International Court of Justice to adjudge and declare:

1. That it rejects in its entirety the first submission of the Respondent, as to the inadmissibility of certain claims raised by the Applicant.

2. That the Respondent is responsible for violations of the Convention on the Prevention and Punishment of the Crime of Genocide:

(a) in that persons for whose conduct it is responsible committed genocide on the territory of the Republic of Croatia against members of the Croat national or ethnical group on that territory, by

— killing members of the group;
— causing deliberate bodily or mental harm to members of the group;

— deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
— imposing measures intended to prevent births within the group,

with the intent to destroy that group in whole or in part, contrary to Article II of the Convention;

(b) in that persons for whose conduct it is responsible conspired to commit the acts of genocide referred to in paragraph *(a)*, were complicit in respect of those acts, attempted to commit further such acts of genocide

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and incited others to commit such acts, contrary to Article III of the Convention;

(c) in that, aware that the acts of genocide referred to in paragraph *(a)* were being or would be committed, it failed to take any steps to prevent those acts, contrary to Article I of the Convention;

(d) in that it has failed to bring to trial persons within its jurisdiction who are suspected on probable grounds of involvement in the acts of genocide referred to in paragraph *(a)*, or in the other acts referred to in paragraph *(b)*, and is thus in continuing breach of Articles I and IV of the Convention.

3. That as a consequence of its responsibility for these breaches of the Convention, the Respondent is under the following obligations:

(a) to take immediate and effective steps to submit to trial before the appropriate judicial authority, those citizens or other persons within its jurisdiction who are suspected on probable grounds of having committed acts of genocide as referred to in paragraph (1) *(a)*, or any of the other acts referred to in paragraph (1) *(b)*, and to ensure that those persons, if convicted, are duly punished for their crimes;

(b) to provide forthwith to the Applicant all information within its possession or control as to the whereabouts of Croatian citizens who are missing as a result of the genocidal acts for which it is responsible, and generally to co-operate with the authorities of the Applicant to jointly ascertain the whereabouts of the said missing persons or their remains;

(c) forthwith to return to the Applicant any items of cultural property within its jurisdiction or control which were seized in the course of the genocidal acts for which it is responsible; and

(d) to make reparation to the Applicant, in its own right and as *parens patriae* for its citizens, for all damage and other loss or harm to person or property or to the economy of Croatia caused by the foregoing violations of international law, in a sum to be determined by the Court in a subsequent phase of the proceedings in this case. The Applicant reserves the right to introduce to the Court a precise evaluation of the damages caused by the acts for which the Respondent is held responsible.

4. That, in relation to the counter-claims put forward in the Counter-Memorial, it rejects in their entirety the fourth, fifth, sixth and seventh submissions of the Respondent on the grounds that they are not founded in fact or law.

The Applicant reserves the right to supplement or amend these submissions as necessary."

in the additional pleading filed on 30 August 2012:

"On the basis of the facts and legal arguments presented in its Memorial, its Reply and in this additional pleading, the Applicant respectfully requests the International Court of Justice to adjudge and declare:

1. That, in relation to the counter-claims put forward in the Rejoinder, it rejects in their entirety the fourth, fifth, sixth, seventh and eighth submis-

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sions of the Respondent on the grounds that they are not founded in fact or law.

The Applicant reserves the right to supplement or amend these submissions as necessary."

On behalf of the Government of Serbia,

in the Counter-Memorial:

"On the basis of the facts and legal arguments presented in this Counter-Memorial, the Republic of Serbia respectfully requests the International Court of Justice to adjudge and declare:

I

1. That the requests in paragraphs 1 *(a)*, 1 *(b)*, 1 *(c)*, 1 *(d)*, 2 *(a)*, 2 *(b)*, 2 *(c)* and 2 *(d)* of the Submissions of the Republic of Croatia as far as they relate to acts and omissions, whatever their legal qualification, that took place before 27 April 1992, i.e., prior to the date when Serbia came into existence as a State, or alternatively, before 8 October 1991, when neither the Republic of Croatia nor the Republic of Serbia existed as independent States, are inadmissible.

2. That the requests in paragraphs 1 *(a)*, 1 *(b)*, 1 *(c)*, 1 *(d)*, 2 *(a)*, 2 *(b)*, 2 *(c)* and 2 *(d)*, of the Submissions of the Republic of Croatia relating to the alleged violations of the obligations under the Convention on the Prevention and Punishment of the Crime of Genocide after 27 April 1992 (alternatively, 8 October 1991) be rejected as lacking any basis either in law or in fact.
3. Alternatively, should the Court find that the requests relating to acts and omissions that took place before 27 April 1992 (alternatively, 8 October 1991) are admissible, that the requests in paragraphs 1 *(a)*, 1 *(b)*, 1 *(c)*, 1 *(d)*, 2 *(a)*, 2 *(b)*, 2 *(c)* and 2 *(d)*, of the Submissions of the Republic of Croatia be rejected in their entirety as lacking any basis either in law or in fact.

II

4. That the Republic of Croatia has violated its obligations under the Convention on the Prevention and Punishment of the Crime of Genocide by committing, during and after the Operation Storm in August 1995, the following acts with intent to destroy as such the part of the Serb national and ethnical group living in the Krajina Region (UN Protected Areas North and South) in Croatia:

   — killing members of the group,
   — causing serious bodily or mental harm to members of the group, and
   — deliberately inflicting on the group conditions of life calculated to bring about its partial physical destruction.

5. Alternatively, that the Republic of Croatia has violated its obligations under the Convention on the Prevention and Punishment of the Crime of Genocide by conspiring to commit genocide against the part of the

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Serb national and ethnical group living in the Krajina Region (UN Protected Areas North and South) in Croatia.

6. As a subsidiary finding, that the Republic of Croatia has violated its obligations under the Convention on the Prevention and Punishment of the Crime of Genocide by having failed and by still failing to punish acts of genocide that have been committed against the part of the Serb national and ethnical group living in the Krajina Region (UN Protected Areas North and South) in Croatia.
7. That the violations of international law set out in paragraphs 4, 5 and 6 above constitute wrongful acts attributable to the Republic of Croatia which entail its international responsibility, and, accordingly,

(1) that the Republic of Croatia shall immediately take effective steps to ensure full compliance with its obligation to punish acts of genocide as defined by Article II of the Convention, or any other acts proscribed by Article III of the Convention committed on its territory before, during and after Operation Storm; and
(2) that the Republic of Croatia shall redress the consequences of its international wrongful acts, that is, in particular:

(a) pay full compensation to the members of the Serb national and ethnic group from the Republic of Croatia for all damages and losses caused by the acts of genocide;
(b) establish all necessary legal conditions and secure environment for the safe and free return of the members of the Serb national and ethnical group to their homes in the Republic of Croatia, and to ensure conditions of their peaceful and normal life including full respect for their national and human rights;

(c) amend its law on public holidays, remembrance days and non-working days, by way of removing the 'Day of Victory and Homeland Gratitude' and the 'Day of Croatian Defenders', celebrated on the fifth of August, as a day of triumph in the genocidal Operation Storm, from its list of public holidays.

The Republic of Serbia reserves its right to supplement or amend these submissions in the light of further pleadings."

in the Rejoinder:

"On the basis of the facts and legal arguments presented in the Counter-Memorial and this Rejoinder, the Republic of Serbia respectfully requests the Court to adjudge and declare:

I

1. That the requests in paragraphs 2 *(a)*, 2 *(b)*, 2 *(c)*, 2 *(d)*, 3 *(a)*, 3 *(b)*, 3 *(c)* and 3 *(d)* of the Submissions of the Republic of Croatia as far as they relate to acts and omissions, whatever their legal qualification,

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that took place before 27 April 1992, i.e., prior to the date when Serbia came into existence as a State, are inadmissible.

2. That the requests in paragraphs 2 *(a)*, 2 *(b)*, 2 *(c)*, 2 *(d)*, 3 *(a)*, 3 *(b)*, 3 *(c)* and 3 *(d)* of the Submissions of the Republic of Croatia relating to the alleged violations of the obligations under the Convention on the Prevention and Punishment of the Crime of Genocide after 27 April 1992 be rejected as lacking any basis either in law or in fact.

3. Alternatively, should the Court find that the requests relating to acts and omissions that took place before 27 April 1992 are admissible, that the requests in paragraphs 2 *(a)*, 2 *(b)*, 2 *(c)*, 2 *(d)*, 3 *(a)*, 3 *(b)*, 3 *(c)* and 3 *(d)* of the Submissions of the Republic of Croatia be rejected in their entirety as lacking any basis either in law or in fact.

II

4. That the Republic of Croatia has violated its obligations under the Convention on the Prevention and Punishment of the Crime of Genocide by committing, during and after Operation Storm in 1995, the following acts with intent to destroy the Serb national and ethnical group in Croatia, in its substantial part living in the Krajina Region (UN Protected Areas North and South), as such:

— killing members of the group;
— causing serious bodily or mental harm to members of the group; and
— deliberately inflicting on the group conditions of life calculated to bring about its physical destruction.

5. Alternatively, that the Republic of Croatia has violated its obligations under the Convention on the Prevention and Punishment of the Crime of Genocide by conspiring to commit genocide against the Serb national and ethnical group in Croatia, in its substantial part living in the Krajina Region, as such.
6. As a subsidiary finding, that the Republic of Croatia has violated its obligations under the Convention on the Prevention and Punishment of the Crime of Genocide by having failed and by still failing to punish acts of genocide that have been committed against the Serb national and ethnical group in Croatia, in its substantial part living in the Krajina Region, as such.
7. That the violations of international law set out in paragraphs 4, 5 and 6 above constitute wrongful acts attributable to the Republic of Croatia which entail its international responsibility, and, accordingly,

(1) that the Republic of Croatia shall immediately take effective steps to ensure full compliance with its obligation to punish acts of genocide as defined by Article II of the Convention, or any other acts proscribed by Article III of the Convention committed on its territory during and after Operation Storm; and

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(2) that the Republic of Croatia shall redress the consequences of its international wrongful acts, that is, in particular:

(a) pay full compensation to the members of the Serb national and ethnical group from the Republic of Croatia for all damages and losses caused by the acts of genocide;

(b) establish all necessary legal conditions and secure environment for the safe and free return of the members of the Serb national and ethnical group to their homes in the Republic of Croatia, and to ensure conditions of their peaceful and normal life including full respect for their national and human rights;

(c) amend its law on public holidays, remembrance days and non-working days, by way of removing the 'Day of Victory and Homeland Gratitude' and the 'Day of Croatian Defenders', celebrated on the fifth of August, as a day of triumph in the genocidal Operation Storm, from its list of public holidays.

III

8. That the requests in paragraphs 1 and 4 of the Submissions of the Republic of Croatia concerning the objections to the counter-claim be rejected as lacking any basis either in law or in fact.

The Republic of Serbia reserves its right to supplement or amend these submissions in the further proceedings."

51. At the oral proceedings, the following final submissions were presented by the Parties:

On behalf of the Government of Croatia,

at the hearing of 21 March 2014, at 10 a.m., with respect to Croatia's claim:

"On the basis of the facts and legal arguments presented by the Applicant, it respectfully requests the International Court of Justice to adjudge and declare:

1. That it has jurisdiction over all the claims raised by the Applicant, and there exists no bar to admissibility in respect of any of them.

2. That the Respondent is responsible for violations of the Convention on the Prevention and Punishment of the Crime of Genocide:

(a) in that persons for whose conduct it is responsible committed genocide on the territory of the Republic of Croatia against members of the Croat ethnic group on that territory, by:

— killing members of the group;
— causing deliberate bodily or mental harm to members of the group;

— deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;

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— imposing measures intended to prevent births within the group, with the intent to destroy that group in whole or in part, contrary to Article II of the Convention;

(b) in that persons for whose conduct it is responsible conspired to commit the acts of genocide referred to in paragraph *(a)*, were complicit in respect of those acts, attempted to commit further such acts of genocide and incited others to commit such acts, contrary to Article III of the Convention;

(c) in that, aware that the acts of genocide referred to in paragraph *(a)* were being or would be committed, it failed to take any steps to prevent those acts, contrary to Article I of the Convention;

(d) in that it has failed to bring to trial persons within its jurisdiction who are suspected on probable grounds of involvement in the acts of genocide referred to in paragraph *(a)*, or in the other acts referred to in paragraph *(b)*, and is thus in continuing breach of Articles I and IV of the Convention;

(e) in that it has failed to conduct an effective investigation into the fate of Croatian citizens who are missing as a result of the genocidal acts referred to in paragraphs *(a)* and *(b)*, and is thus in continuing breach of Articles I and IV of the Convention.

3. That as a consequence of its responsibility for these breaches of the Convention, the Respondent is under the following obligations:

(a) to take immediate and effective steps to submit to trial before the appropriate judicial authority, those citizens or other persons within its jurisdiction including but not limited to the leadership of the JNA during the relevant time period who are suspected on probable grounds of having committed acts of genocide as referred to in paragraph (2) *(a)*, or any of the other acts referred to in paragraph (2) *(b)*, and to ensure that those persons, if convicted, are duly punished for their crimes;

(b) to provide forthwith to the Applicant all information within its possession or control as to the whereabouts of Croatian citizens who are missing as a result of the genocidal acts for which it is responsible, to investigate and generally to co-operate with the authorities of the Applicant to jointly ascertain the whereabouts of the said missing persons or their remains;

(c) forthwith to return to the Applicant all remaining items of cultural property within its jurisdiction or control which were seized in the course of the genocidal acts for which it is responsible; and

(d) to make reparation to the Applicant, in its own right and as *parens patriae* for its citizens, for all damage and other loss or harm to person or property or to the economy of Croatia caused by the foregoing violations of international law, in a sum to be determined by the Court in a subsequent phase of the proceedings in this case. The Applicant reserves the right to introduce to the Court a precise evaluation of the damages caused by the acts for which the Respondent is held responsible."

at the hearing of 1 April 2014, at 10 a.m., in respect of Serbia's counter-claim:

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"On the basis of the facts and legal arguments presented by the Applicant, it respectfully requests the International Court of Justice to adjudge and declare:

That, in relation to the counter-claims put forward in the Counter-Memorial, the Rejoinder and during these proceedings, it rejects in their entirety the sixth, the seventh, the eighth and the ninth submissions of the Respondent on the grounds that they are not founded in fact or law."

On behalf of the Government of Serbia,

at the hearing of 28 March 2014, at 3 p.m., in respect of Croatia's claim and Serbia's counter-claim:

"On the basis of the facts and legal arguments presented in its written and oral pleadings, the Republic of Serbia respectfully requests the Court to adjudge and declare:

I

1. That the Court lacks jurisdiction to entertain the requests in paragraphs 2 *(a)*, 2 *(b)*, 2 *(c)*, 2 *(d)*, 2 *(e)*, 3 *(a)*, 3 *(b)*, 3 *(c)* and 3 *(d)* of the Submissions of the Republic of Croatia as far as they relate to acts and omissions, whatever their legal qualification, that took place before 27 April 1992, i.e., prior to the date when Serbia came into existence as a State and became bound by the Genocide Convention.

2. In the alternative that the requests in paragraphs 2 *(a)*, 2 *(b)*, 2 *(c)*, 2 *(d)*, 2 *(e)*, 3 *(a)*, 3 *(b)*, 3 *(c)* and 3 *(d)* of the Submissions of the Republic of Croatia as far as they relate to acts and omissions, whatever their legal qualification, that took place before 27 April 1992, i.e., prior to the date when Serbia came into existence as a State and became bound by the Genocide Convention, are inadmissible.

3. That the requests in paragraphs 2 *(a)*, 2 *(b)*, 2 *(c)*, 2 *(d)*, 2 *(e)*, 3 *(a)*, 3 *(b)*, 3 *(c)* and 3 *(d)* of the Submissions of the Republic of Croatia relating to the alleged violations of the obligations under the Convention on the Prevention and Punishment of the Crime of Genocide after 27 April 1992 be rejected as lacking any basis either in law or in fact.

4. In the further alternative that the requests in paragraphs 2 *(a)*, 2 *(b)*, 2 *(c)*, 2 *(d)*, 2 *(e)*, 3 *(a)*, 3 *(b)*, 3 *(c)* and 3 *(d)* of the Submissions of the Republic of Croatia as far as they relate to acts and omissions, whatever their legal qualification, that took place before 8 October 1991, i.e., prior to the date when Croatia came into existence as a State and became bound by the Genocide Convention, are inadmissible.

5. In the final alternative, should the Court find that it has jurisdiction concerning the requests relating to acts and omissions that took place before 27 April 1992 and that they are admissible, respectively that they are admissible insofar as they relate to acts and omissions that took place before 8 October 1991, that the requests in paragraphs 2 *(a)*, 2 *(b)*, 2 *(c)*, 2 *(d)*, 2 *(e)*, 3 *(a)*, 3 *(b)*, 3 *(c)* and 3 *(d)* of the Submissions of the Republic of Croatia be rejected in their entirety as lacking any basis either in law or in fact.

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II

6. That the Republic of Croatia has violated its obligations under Article II of the Convention on the Prevention and Punishment of the Crime of Genocide by committing, during and after Operation Storm in 1995, the following acts with intent to destroy the Serb national and ethnical group in Croatia as such, in its substantial part living in the Krajina Region:

— killing members of the group,
— causing serious bodily or mental harm to members of the group, and

— deliberately inflicting on the group conditions of life calculated to bring about its physical destruction.

7. Alternatively, that the Republic of Croatia has violated its obligations under Article III *(b)*, *(c)*, *(d)* and *(e)* of the Convention on the Prevention and Punishment of the Crime of Genocide through the acts of conspiracy, direct and public incitement and attempt to commit genocide, as well as complicity in genocide, against the Serb national and ethnical group in Croatia as such, in its substantial part living in the Krajina Region.

8. As a subsidiary finding, that the Republic of Croatia has violated its obligations under the Convention on the Prevention and Punishment of the Crime of Genocide by having failed and by still failing to punish acts of genocide that have been committed against the Serb national and ethnical group in Croatia as such, in its substantial part living in the Krajina Region.

9. That the violations of international law set out in paragraphs 6, 7 and 8 of these Submissions constitute wrongful acts attributable to the Republic of Croatia which entail its international responsibility, and, accordingly,

(1) That the Republic of Croatia shall immediately take effective steps to ensure full compliance with its obligation to punish acts of genocide as defined by Article II of the Convention, or any other acts enumerated in Article III of the Convention committed on its territory during and after Operation Storm;
(2) That the Republic of Croatia shall immediately amend its law on public holidays, remembrance days and non-working days, by way of removing the 'Day of Victory and Homeland Gratitude' and the 'Day of Croatian Defenders', celebrated on the fifth of August, as a day of victory in the genocidal Operation Storm, from its list of public holidays; and
(3) That the Republic of Croatia shall redress the consequences of its international wrongful acts, that is, in particular:

(a) Pay full compensation to the members of the Serb national and ethnical group from the Republic of Croatia for all damages and losses caused by the acts of genocide, in a sum and in a procedure to be determined by the Court in a subsequent phase of this case; and
(b) Establish all necessary legal conditions and secure environment for the safe and free return of the members of the Serb national and

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ethnical group to their homes in the Republic of Croatia, and to ensure conditions of their peaceful and normal life including full respect for their national and human rights."

* * *

I. Background

52. In these proceedings, Croatia contends that Serbia is responsible for breaches of the Genocide Convention committed in Croatia between 1991 and 1995. In its counter-claim, Serbia contends that Croatia is itself responsible for breaches of the Convention committed in 1995 in the "Republika Srpska Krajina", an entity established in late 1991 (for further details, see paragraphs 62-70 below). The Court will briefly set out the factual and historical background to the present proceedings, i.e., *(a)* the break-up of the Socialist Federal Republic of Yugoslavia in general and *(b)* the situation in Croatia in particular.

A. The Break-up of the Socialist Federal Republic of Yugoslavia and the Emergence of New States

53. Until the start of the 1990s, the Socialist Federal Republic of Yugoslavia ("SFRY") consisted of the Republics of Bosnia and Herzegovina, Croatia, Macedonia, Montenegro, Serbia and Slovenia; the Republic of Serbia itself included two autonomous provinces; Vojvodina and Kosovo.

54. 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 from the SFRY.

55. 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.

56. On 27 April 1992, "the participants of the Joint Session of the SFRY Assembly, the National Assembly of the Republic of Serbia and

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the Assembly of the Republic of Montenegro" adopted a declaration stating in particular:

> "1. 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 . . ." (United Nations doc. A/46/915, Ann. II.)

57. 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" (see also paragraph 76 below).

58. This claim by the FRY that it continued the legal personality of the SFRY was debated at length within the international community (in this regard, see *Application for Revision of the Judgment of 11 July 1996 in the Case concerning* Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina *v.* Yugoslavia), Preliminary Objections *(Yugoslavia* v. *Bosnia and Herzegovina), Judgment, I.C.J. Reports 2003*, pp. 15-23, paras. 28-48; *Legality of Use of Force (Serbia and Montenegro* v. *Belgium), Preliminary Objections, Judgment, I.C.J. Reports 2004 (I)*, pp. 303-309, paras. 58-74; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro), Judgment, I.C.J. Reports 2007 (I)*, pp. 80-83, paras. 91-97 ["the 2007 Judgment"]; 2008 Judgment, *I.C.J. Reports 2008*, pp. 426-427, paras. 45-49). As has been noted in the Judgments of the Court cited above, the Security Council, the General Assembly and several States rejected the claim that the FRY continued automatically the membership of the SFRY in the United Nations; the FRY nevertheless maintained this claim for several years. It was not until 27 October 2000 that Mr. Koštunica, the newly-elected President of the FRY, sent a letter to the Secretary-General requesting that the FRY be admitted to membership in the United Nations. On 1 November 2000, the General Assembly, by resolution 55/12, "*[h]aving*

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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".

59. On 4 February 2003, the FRY officially changed its name, becoming "Serbia and Montenegro". Following a referendum of 21 May 2006, in accordance with the Constitutional Charter of Serbia and Montenegro, the Republic of Montenegro declared its independence on 3 June 2006. By a letter dated 3 June 2006, Serbia informed the Secretary-General of the United Nations that, as provided for in Article 60 of the Constitutional Charter of Serbia and Montenegro, the latter's membership in the United Nations would be continued by the Republic of Serbia. Montenegro was admitted into the United Nations as a new member on 28 June 2006. In its Judgment of 18 November 2008 on preliminary objections, the Court found that Montenegro was not a party to the present proceedings, and that Serbia alone remained the Respondent in the case (*I.C.J. Reports 2008*, pp. 421-423, paras. 23-34; see paragraph 8 above).

B. The Situation in Croatia

60. 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 will focus now on the background to those events.

61. First, it should be noted that, according to the official census conducted by the Institute for Statistics of the Republic of Croatia at the end of March 1991, the majority of the inhabitants of Croatia (some 78 per cent) were 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. A significant part of that Serb minority lived close to the Republics of Bosnia and Herzegovina and Serbia. While the population in these frontier areas was a mixed one — consisting of Croats and Serbs — there was a majority of Serbs in certain localities. Towns and villages with Serb majorities existed in close proximity to towns and villages with Croat majorities.

62. In political terms, tensions between, on the one hand, the Government of the Republic of Croatia and, on the other, the Serbs living in Croatia and opposed to its independence, increased at the start of the 1990s. On 1 July 1990, elected representatives of the Serb Democratic Party in Croatia (SDS) formed the "Union of Municipalities of the Northern Dalmatia and Lika". On 25 July 1990, the Constitution of the Republic of Croatia was amended; in particular, a new flag and coat of arms were adopted which, according to Serbia, was perceived by the Serb minority as a sign of hostility towards them. On the same day, a Serb assembly and a "Serb National Council" (the executive organ of the assembly) were established at Srb, north of Knin; they proclaimed them-

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selves to be the political representatives of the Serb population of Croatia and declared the sovereignty and autonomy of the Serbs in Croatia. The "Council" then announced that a referendum would be held on the autonomy of the Croatian Serbs. In August 1990, the Croatian Government attempted to oppose this referendum; the Serb minority responded by erecting roadblocks. The referendum took place between 19 August and 2 September 1990; a substantial majority voted in favour of autonomy.

63. On 21 December 1990, Serbs in the municipalities of northern Dalmatia and Lika proclaimed the "Serb Autonomous Region of Krajina" ("SAO Krajina"). Two other "Serb autonomous regions" were established later: the "SAO Slavonia, Baranja and Western Srem" ("SAO SBWS") in February 1991, and the "SAO Western Slavonia" in August of that year.

64. On 22 December 1990, the Croatian Parliament adopted a new Constitution. According to Serbia, the Croatian Serbs considered that the adoption of this new Constitution deprived them of certain basic rights and removed their status as a constituent nation of Croatia.

65. On 4 January 1991, the SAO Krajina established its own internal affairs secretariat and police and State security services.

66. In spring 1991, clashes broke out between the Croatian armed forces and those of the SAO Krajina and other armed groups. The Yugoslav National army ("JNA") intervened — officially to separate the protagonists, but, according to Croatia, in support of the Krajina Serbs.

67. In a referendum organized on 12 May 1991 by the SAO Krajina, a majority of Serbs voted in favour of attaching the region to Serbia and staying in the SFRY. One week later, on 19 May 1991, Croatian voters, asked to pronounce by referendum on Croatia's independence from the SFRY, overwhelmingly approved it.

68. As explained above (see paragraph 55), Croatia declared its independence from the SFRY on 25 June 1991, and that declaration took effect on 8 October 1991.

69. By the summer of 1991, an armed conflict had broken out in Croatia, in the course of which the violations of the Genocide Convention alleged by Croatia in this case are claimed to have been committed (see paragraphs 200-442 below). At least from September 1991, the 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 (see paragraph 204 below) controlled around one-third of Croatian territory within its boundaries in the SFRY (in the regions of Eastern Slavonia, Western Slavonia, Banovina/Banija, Kordun, Lika and Dalmatia). These regions, as well as several towns and villages referred to in the present Judgment, are illustrated on the following sketch-map.

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70. On 19 December 1991, the Serbs of the SAO Krajina (which then comprised territories in Banovina/Banija, Kordun, Lika and Dalmatia) proclaimed the establishment of the "Republika Srpska Krajina" ("RSK"). Two months later, the SAO Western Slavonia and the SAO SBWS joined the RSK.

71. Negotiations in late 1991 and early 1992, backed by the international community and involving, *inter alia*, representatives of Croatia, Serbia and the SFRY, 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).

72. 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.

73. In the spring and summer of 1995, Croatia succeeded in re-establishing control over the greater part of the RSK following a series of military operations. 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 (see paragraphs 443-522 below). 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

A. Croatia's Claim

(1) Issues of jurisdiction and admissibility which remain to be determined following the 2008 Judgment

74. Serbia has raised a number of objections to the jurisdiction of the Court and to the admissibility of Croatia's claim. In its 2008 Judgment,

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Regions and Selected Localities Referred to by the Parties



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the Court rejected Serbia's first and third preliminary objections but concluded that Serbia's second preliminary objection did not possess, in the circumstances of the case, an exclusively preliminary character and so reserved decision thereon to the present phase of the proceedings (*I.C.J. Reports 2008*, p. 460, para. 130 and p. 466, para. 146 (point 4)). Before turning to address Serbia's second objection, the Court will first recall certain observations that it made in its 2008 Judgment.

75. In its 2008 Judgment, the Court dismissed Serbia's first preliminary objection in so far as it related to its capacity to participate in the present proceedings (*ibid.*, p. 444, para. 91, and p. 466, para. 146 (point 1)).

76. The Court also dismissed Serbia's first preliminary objection in so far as it related to the jurisdiction of the Court *ratione materiae*. It referred to the declaration made by the FRY on 27 April 1992 (the date on which the FRY was proclaimed as a State), which stated that

> "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 Socialist Federal Republic of Yugoslavia assumed internationally.
>
> At the same time, it is ready to fully respect the rights and interests of the Yugoslav Republics which declared independence. The recognition of the newly-formed states will follow after all the outstanding questions negotiated on within the Conference on Yugoslavia have been settled." (United Nations doc. A/46/915, Ann. II, quoted at *I.C.J. Reports 2008*, pp. 446-447, para. 98.)

The Court also referred to the Note sent that day by the Permanent Mission of Yugoslavia to the United Nations Secretary-General, which stated that

> "The Assembly of the Socialist Federal Republic of Yugoslavia, at its session held on 27 April 1992, promulgated the Constitution of the Federal Republic of Yugoslavia. Under the Constitution, on the basis of the continuing personality of Yugoslavia and the legitimate decisions by Serbia and Montenegro to continue to live together in Yugoslavia, the Socialist Federal Republic of Yugoslavia is transformed into the Federal Republic of Yugoslavia, consisting of the Republic of Serbia and the Republic of Montenegro.
>
> Strictly respecting the continuity of the international personality of the Socialist Federal Republic 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 interna-

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tional organizations and participation in international treaties ratified or acceded to by Yugoslavia." (United Nations doc. A/46/915, Ann. I, quoted at *I.C.J. Reports 2008*, p. 447, para. 99.)

The Court pointed out that the FRY had thus "clearly expressed an intention to be bound . . . by the obligations of the Genocide Convention" and concluded:

> "In the particular context of the case, the Court is of the view that the 1992 declaration must be considered as having had the effects of a notification of succession to treaties, notwithstanding that its political premise was different." (*I.C.J. Reports 2008*, p. 451, para. 111.)

77. The Court considered, however, that it was not in a position to rule upon Serbia's objection to jurisdiction and admissibility *ratione temporis*. This objection was that, in so far as Croatia's claim was based on acts and omissions alleged to have occurred before 27 April 1992, it fell outside the scope of Article IX of the Genocide Convention — and, accordingly, outside the jurisdiction of the Court — because it concerned events which preceded the date on which the FRY came into existence as a State and thus became capable of being a party to the Genocide Convention and that, in any event, that claim was inadmissible. With regard to this objection, the Court stated that:

> "In the view of the Court, the questions of jurisdiction and admissibility raised by Serbia's preliminary objection *ratione temporis* constitute two inseparable issues in the present case. The first issue is that of the Court's jurisdiction to determine whether breaches of the Genocide Convention were committed in the light of the facts that occurred prior to the date on which the FRY came into existence as a separate State, capable of being a party in its own right to the [Genocide] Convention; this may be regarded as a question of the applicability of the obligations under the Genocide Convention to the FRY before 27 April 1992. The second issue, that of admissibility of the claim in relation to those facts, and involving questions of attribution, concerns the consequences to be drawn with regard to the responsibility of the FRY for those same facts under the general rules of State responsibility. In order to be in a position to make any findings on each of these issues, the Court will need to have more elements before it." (*Ibid.*, p. 460, para. 129.)

78. The jurisdiction of the Court, and the admissibility of Croatia's claim, have therefore been settled by the 2008 Judgment so far as that claim relates to events alleged to have taken place as from 27 April 1992. Both jurisdiction and admissibility remain, however, to be determined in so far as the claim concerns events alleged to have occurred before that date. On those questions, the Parties remain in disagreement.

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(2) The positions of the Parties regarding jurisdiction and admissibility

79. With regard to the jurisdiction of the Court, Serbia maintains that events said to have occurred before 27 April 1992 cannot give rise to a dispute between itself and Croatia regarding the "interpretation, application or fulfilment" of the Genocide Convention and thus cannot fall within the scope of Article IX of the Convention. It maintains that a distinction has to be made between the obligations of the SFRY and those of the FRY. While the SFRY was a party to the Genocide Convention prior to 27 April 1992, it was only from that date that the FRY became a party to it. Serbia refers to Article 28 of the Vienna Convention on the Law of Treaties, which it maintains states a principle of customary international law. That Article provides:

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

According to Serbia, since the substantive provisions of the Genocide Convention cannot apply retroactively, events alleged to have occurred before the FRY became a party to the Convention cannot engage the responsibility of the FRY and, therefore, of Serbia.

80. With regard to the admissibility of Croatia's claim, Serbia advances two arguments. First, it maintains that events said to have occurred before the FRY came into existence as a State cannot be attributed to the FRY. In Serbia's view, any claim against Serbia in respect of such events must, therefore, be regarded as inadmissible. This argument is advanced as an alternative to the argument regarding jurisdiction. Secondly, Serbia contends, in the further alternative, that in so far as the claim relates to events said to have occurred before 8 October 1991 — the date on which Croatia came into existence as a State and became bound by the Genocide Convention — it must be regarded as inadmissible.

81. Croatia responds that the Court has jurisdiction over the entirety of its claim and that there is no bar to admissibility. For Croatia, the essential point is that the Genocide Convention was in force in the territories concerned throughout the relevant period, because the SFRY was a party to the Convention. According to Croatia, the FRY emerged directly from the SFRY, with the organs of the new State taking over the control of those of the old State during the course of 1991 when the SFRY was "in a process of dissolution" (the phrase used by the Arbitration Commission of the Conference on Yugoslavia in Opinion No. 1, 29 November 1991, 92 *International Law Reports (ILR)*, p. 162). On 27 April 1992, the FRY made a declaration which, as the Court determined in 2008, had the effect of a notification of succession (see para-

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graph 76 above) to the Genocide Convention and other treaties to which the SFRY had been party. Croatia maintains that there was, therefore, a continuous application of the Convention, that it would be artificial and formalistic to confine jurisdiction to the period from 27 April 1992, and that a decision to limit jurisdiction to events occurring on or after that date would create a "time gap" in the protection afforded by the Convention. Croatia points to the absence of any temporal limitation in the terms of Article IX of the Genocide Convention. At least by the early summer of 1991, according to Croatia, the SFRY had ceased to be a functioning State and what became the FRY was already a State *in statu nascendi*.

82. Croatia therefore relies on what it describes as the customary international law principle stated in Article 10 (2) of the International Law Commission's ("ILC") Articles on the Responsibility of States for Internationally Wrongful Acts, adopted in 2001. Article 10 (2) provides:

> "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."

According to Croatia, that principle is applicable to the facts of the present case with the result that the acts of the JNA and other armed groups controlled by the movement that later proclaimed the FRY as a State on 27 April 1992, even though they occurred before that date, must be regarded as acts of the FRY for the purposes of State responsibility. In the alternative, Croatia contends that if those acts should instead be attributed to the SFRY, the FRY succeeded to the responsibility of the SFRY for them.

83. Further, Croatia denies that its claim is inadmissible, to the extent that it relies upon events said to have occurred before 8 October 1991. It maintains that the Genocide Convention is not "a bundle of synallagmatic obligations" between parties but creates obligations *erga omnes*. It also emphasizes that the Convention was in force for the benefit of the population of Croatia at all relevant times.

* *

(3) The scope of jurisdiction under Article IX of the Genocide Convention

84. The Court begins by recalling 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

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> 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."

As the Court noted in its 2008 Judgment,

> "[t]he SFRY signed the Genocide Convention on 11 December 1948, and deposited an instrument of ratification, without reservation, on 29 August 1950; it is common ground between the Parties that the SFRY was thus a party to the Convention at the time in the 1990s when it began to disintegrate into separate and independent States" (*I.C.J. Reports 2008*, p. 446, para. 97).

Croatia deposited a notification of succession on 12 October 1992, which it considers took effect from 8 October 1991, the date on which it came into existence as a State. In its preliminary objections in the present proceedings, Serbia took the position that it became bound by the Genocide Convention only when the FRY deposited an instrument of accession containing a reservation to Article IX on 12 March 2001. However, as already noted, the Court held, in its 2008 Judgment, that the FRY became a party to the Convention on 27 April 1992 on the basis of the declaration and Note referred to in paragraph 76, above, and was thus bound by the obligations under the Convention (*ibid.*, p. 451, para. 111; pp. 454-455, para. 117).

85. The fact that the jurisdiction of the Court in the present proceedings can be founded only upon Article IX has important implications for the scope of that jurisdiction. That Article provides for jurisdiction only with regard to disputes relating to the interpretation, application or fulfilment of the Genocide Convention, including disputes relating to the responsibility of a State for genocide or for any of the other acts enumerated in Article III of the Convention. As the Court explained in its 2007 Judgment in the proceedings between Bosnia and Herzegovina and Serbia, in which Article IX was also the only basis for jurisdiction, Article IX confines the Court to disputes regarding genocide. The Court thus

> "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*." (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro), Judgment, I.C.J. Reports 2007 (I)*, p. 104, para. 147.)

That does not prevent the Court from considering, in its reasoning, whether a violation of international humanitarian law or international

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human rights law has occurred to the extent that this is relevant for the Court's determination of whether or not there has been a breach of an obligation under the Genocide Convention.

86. The Court must, however, recall — as it has done on previous occasions — that the absence of a court or tribunal with jurisdiction to resolve disputes about compliance with a particular obligation under international law does not affect the existence and binding force of that obligation. States are required to fulfil their obligations under international law, including international humanitarian law and international human rights law, and they remain responsible for acts contrary to international law which are attributable to them (see, e.g., *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo* v. *Rwanda), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 2006*, pp. 52-53, para. 127, and *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro), Judgment, I.C.J. Reports 2007 (I)*, p. 104, para. 148).

87. Furthermore, since Article IX provides for jurisdiction only with regard to "the interpretation, application or fulfilment of the Convention, including . . . the responsibility of a State for genocide or for any of the other acts enumerated in Article III", the jurisdiction of the Court does not extend to allegations of violation of the customary international law on genocide. It is, of course, well established that the Convention enshrines principles that also form part of customary international law. Article I provides that "[t]he Contracting Parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law". The Court has also repeatedly stated that the Convention embodies principles that are part of customary international law. That was emphasized by the Court in its 1951 Advisory Opinion:

> "The origins of the Convention show that it was the intention of the United Nations to condemn and punish genocide as 'a crime under international law' involving a denial of the right of existence of entire human groups, a denial which shocks the conscience of mankind and results in great losses to humanity, and which is contrary to moral law and the spirit and aims of the United Nations (resolution 96 (I) of the General Assembly, 11 December 1946). The first consequence arising from this conception is that the principles underlying the Convention are principles which are recognized by civilized nations as binding on States, even without any conventional obligation. A second consequence is the universal character both of the condemnation of genocide and of the co-operation required 'in order to liberate mankind from such an odious scourge' (Preamble to the Convention)
>
> . . . . . .
>
> The objects of such a convention must also be considered. The Convention was manifestly adopted for a purely humanitarian and

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> civilizing purpose. It is indeed difficult to imagine a convention that might have this dual character to a greater degree, since its object on the one hand is to safeguard the very existence of certain human groups and on the other to confirm and endorse the most elementary principles of morality." (*Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, I.C.J. Reports 1951*, p. 23.)

That statement was reaffirmed by the Court in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro)* (*Judgment, I.C.J. Reports 2007 (I)*, pp. 110-111, para. 161). In addition, the Court has made clear that the Genocide Convention contains obligations *erga omnes*. Finally, the Court has noted that the prohibition of genocide has the character of a peremptory norm *(jus cogens)* (*Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo* v. *Rwanda), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 2006*, pp. 31-32, para. 64).

88. Moreover, the above-mentioned *Congo* v. *Rwanda* Judgment explains:

> "The Court observes, however, as it has already had occasion to emphasize, that 'the *erga omnes* character of a norm and the rule of consent to jurisdiction are two different things' (*East Timor (Portugal* v. *Australia), Judgment, I.C.J. Reports 1995*, p. 102, para. 29), and that the mere fact that rights and obligations *erga omnes* may be at issue in a dispute would not give the Court jurisdiction to entertain that dispute.
>
> The same applies to the relationship between peremptory norms of general international law *(jus cogens)* and the establishment of the Court's jurisdiction: the fact that a dispute relates to compliance with a norm having such a character, which is assuredly the case with regard to the prohibition of genocide, cannot of itself provide a basis for the jurisdiction of the Court to entertain that dispute. Under the Court's Statute that jurisdiction is always based on the consent of the parties." *(Ibid.)*

In the present case, any jurisdiction which the Court possesses is derived from Article IX of the Genocide Convention and is therefore confined to obligations arising under the Convention itself. Where a treaty states an obligation which also exists under customary international law, the treaty obligation and the customary law obligation remain separate and distinct (*Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Merits, Judgment, I.C.J. Reports 1986*, p. 96, para. 179). Accordingly, unless a treaty discloses a different intention, the fact that the treaty embodies a rule of customary international law will not mean that the compromissory clause of the treaty enables disputes regarding the customary law obligation to be brought before the

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Court. In the case of Article IX of the Genocide Convention no such intention is discernible. On the contrary, the text is quite clear that the jurisdiction for which it provides is confined to disputes regarding the interpretation, application or fulfilment of the Convention, including disputes relating to the responsibility of a State for genocide or other acts prohibited by the Convention. Article IX does not afford a basis on which the Court can exercise jurisdiction over a dispute concerning an alleged violation of the customary international law obligations regarding genocide.

89. Accordingly, in order to establish that the Court 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 regarding these events is a dispute relating to the interpretation, application or fulfilment of the Genocide Convention. It is not enough that these events may have involved violations of the customary international law regarding genocide; the dispute must concern obligations under the Convention itself.

* *

(4) Serbia's objection to jurisdiction

(a) *Whether provisions of the Convention are retroactive*

90. It is for the Court, on the basis of the submissions of the Parties, and the arguments advanced in support thereof, to determine the subject-matter of the dispute before it. In the present case, 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.

91. Serbia maintains 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). Accordingly, Serbia contends that the dispute regarding those allegations cannot be held to fall within the scope of Article IX.

92. In response, Croatia refers to what it describes as a presumption in favour of the retroactive effect of compromissory clauses, which it maintains finds support in the Judgment of the Permanent Court of International Justice in the case of *Mavrommatis Palestine Concessions (Greece* v. *United Kingdom) (Judgment No. 2, 1924, P.C.I.J., Series A, No. 2*, p. 35), and to the absence of any temporal limitation in Article IX of the Genocide Convention.

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93. 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*" (*I.C.J. Reports 2008*, p. 458, para. 123; see also *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Yugoslavia), Preliminary Objections, Judgment, I.C.J. Reports 1996 (II)*, p. 617, para. 34). As will be seen, the absence of a temporal limitation in Article IX is not without significance but 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.

94. 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.

95. 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.

96. 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

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force for that State and certain treaties contain such an obligation. For example, the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity, 1968 (United Nations General Assembly resolution 2391 (XXIII); United Nations, *Treaty Series (UNTS)*, Vol. 754, p. 73), is applicable, according to its Article 1, to the crimes specified therein "irrespective of the date of their commission". Similarly, Article 2 (2) of the European Convention on the Non-Applicability of Statutory Limitations to Crimes against Humanity and War Crimes, 1974 (*European Treaty Series*, No. 82), provides that the Convention is applicable to offences committed before its entry into force in cases where the statutory limitation period had not expired at that time. 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.

97. 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. Thus, the representative of Czechoslovakia stated that the Convention should "include express provisions asserting the peoples' desire to punish all those who, *in the future*, might be tempted to repeat the appalling crimes which had been committed" (United Nations, *Official Documents of the General Assembly, Part I, Third Session, Sixth Committee, Minutes of the Sixty-Sixth Meeting*, UN doc. A/C.6/SR.66, p. 30; emphasis added). Similarly, the representative of the Philippines stated that "[i]t was therefore essential to provide for their punishment *in [the] future*" (*ibid., Minutes of the Ninety-Fifth Meeting*, UN doc. A/C.6/SR.95, p. 340; emphasis added) and the representative of Peru described the Convention then under negotiation as one "for the punishment of those who would be guilty of violating its provisions *in the future*" (*ibid., Minutes of the Hundred and Ninth Meeting*, UN doc. A/C.6/SR.109, p. 498; emphasis added). By contrast, in spite of the events immediately preceding the adoption of the Convention — to which many references were made — there was no suggestion that the Convention under consideration was intended to impose an obligation on States to punish acts of genocide committed in the past.

98. Finally, the Court recalls that in its recent Judgment in *Questions relating to the Obligation to Prosecute or Extradite (Belgium* v. *Senegal)* (*Judgment, I.C.J. Reports 2012 (II)*, p. 422), 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 sus-

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pected 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 (*I.C.J. Reports 2012 (II)*, p. 457, paras. 99-100).

99. In arguing that some of the substantive obligations imposed by the Convention are retroactive, Croatia focused upon the obligations to prevent and punish genocide. It is, however, the responsibility of a State under the Convention for the commission of acts of genocide that lies at the heart of Croatia's claim. The Court considers that in this respect also the Convention is not retroactive. To hold otherwise would be to disregard the rule expressed in Article 28 of the Vienna Convention on the Law of Treaties. There is no basis for doing so in the text of the Convention or in its negotiating history.

100. 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.

* *

101. Having reached that conclusion, the Court now 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. As the Court has already noted (see paragraph 82 above), Croatia advances two alternative grounds for concluding that it does so. Croatia relies, first, upon Article 10 (2) of the ILC Articles on State Responsibility, and, secondly, upon the law of State succession. The Court will consider each of these arguments in turn.

(b) *Article 10 (2) of the ILC Articles on State Responsibility*

102. Article 10 (2) of the ILC Articles on State Responsibility has already been quoted in paragraph 82, above. According to Croatia, that provision is part of customary international law. Croatia 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. During the course of 1991, according to Croatia, 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

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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.

103. 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.

104. 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."

In the present case, the FRY was not bound by the obligations contained in the Genocide Convention until it became party to that Convention. In its 2008 Judgment, the Court held that succession resulted from the declaration made by the FRY on 27 April 1992 and its Note of the same date (see paragraph 76, above). The date on which the notification of succession was made coincided with the date on which the new State came into existence. The Court has already found, in its 2008 Judgment, that the effect of the declaration and Note of 27 April 1992 was "that *from that date onwards* the FRY would be bound by the obligations of a

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party in respect of all the multilateral conventions to which the SFRY had been a party at the time of its dissolution" (*I.C.J. Reports 2008*, pp. 454-455, para. 117; emphasis added).

105. The FRY was, therefore, bound by the Genocide Convention only with effect from 27 April 1992. Accordingly, even if the acts prior to 27 April 1992 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. Article 10 (2) cannot, therefore, serve to bring the dispute regarding those acts within the scope of Article IX of the Convention. That conclusion makes it unnecessary for the Court 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.

* *

(c) *Succession to responsibility*

106. The Court therefore 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.

107. Croatia advances two separate grounds on which it claims the FRY succeeded to the responsibility of the SFRY. First, it claims that this succession came about as a result of the application of the principles of general international law regarding State succession. In this context, it relies upon the award of the arbitration tribunal in the *Lighthouses Arbitration between France and Greece, Claims No. 11 and 4*, 24 July 1956 (United Nations, *Reports of International Arbitral Awards (RIAA)*, Vol. XII, p. 155), which stated that the responsibility of a State might be transferred to a successor if the facts were such as to make it appropriate to hold the latter responsible for the former's wrongdoing. The tribunal considered that whether there would be a succession to responsibility would depend on the particular facts of each case. Croatia contends that the facts of the present case, in which the dissolution of the SFRY was a gradual process involving armed conflict between what became its

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successor States and in which one of the entities which emerged as a successor — the FRY — largely controlled the armed forces of the SFRY during the last year of the latter's formal existence, justify the succession of the FRY to the responsibility incurred by the SFRY for the acts of armed forces that subsequently became organs of the FRY. Secondly, Croatia argues that the FRY, by the declaration of 27 April 1992 already discussed, indicated not only that it was succeeding to the treaty obligations of the SFRY, but also that it succeeded to the responsibility incurred by the SFRY for the violation of those treaty obligations.

108. Serbia maintains that this alternative argument is a new claim introduced by Croatia only at the oral phase of the proceedings and is hence inadmissible. In the event that the Court decides that it can entertain it, Serbia argues that neither Article IX, nor the other provisions of the Genocide Convention, makes any provision for the transmission of responsibility by succession, so that any succession would have to be by operation of principles outside the Convention and a dispute regarding those principles would not therefore fall within the scope of Article IX. In any event, Serbia contends that there is no principle of succession to responsibility in general international law. It maintains that the *Lighthouses* case was concerned with the violation of private rights under a concession contract and is of no relevance to responsibility for alleged violations of the Genocide Convention. According to Serbia, the declaration of 27 April 1992 was concerned only with succession to the treaties themselves and not with succession to responsibility. Serbia further maintains that all issues of succession to the rights and obligations of the SFRY are governed by the Agreement on Succession Issues, 2001 (*UNTS*, Vol. 2262, p. 251), which lays down a procedure for considering outstanding claims against the SFRY. Finally, Serbia argues that the Court should, in any event, decline to exercise jurisdiction on the alternative basis advanced by Croatia, because of the principle enunciated by the Court in its Judgments in *Monetary Gold Removed from Rome in 1943 (Italy* v. *France, United Kingdom and United States of America) (Preliminary Question, Judgment, I.C.J. Reports 1954*, p. 19) and *East Timor (Portugal* v. *Australia) (Judgment, I.C.J. Reports 1995*, p. 90).

109. While the Court has made clear that an applicant may not introduce a new claim which has the effect of transforming the subject-matter of the dispute (*Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua* v. *Honduras), Judgment, I.C.J. Reports 2007 (II)*, p. 695, para. 108), it is not persuaded that, in advancing its argument regarding State succession, Croatia has introduced a new claim into the proceedings. The Court has already stated that the subject-matter of the dispute is whether or not Serbia is responsible for violations of the Genocide Convention (see paragraph 90 above), including those allegedly committed before 27 April 1992. The question whether Serbia is responsible for such alleged violations must be distinguished from the manner in which that responsibility is said to be

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established. Croatia initially maintained — and continues to advance as its principal argument — that the FRY (and, thus, Serbia) incurred responsibility for the conduct which Croatia contends violated the Convention, because that conduct was directly attributable to the FRY. However, Croatia also advances, as an alternative argument, that, if that conduct was attributable to the SFRY, then the FRY (and, consequently, Serbia) incurred responsibility on the basis of succession. Croatia has not, therefore, introduced a new claim but advanced, in support of its original claim, a new argument as to the manner in which Serbia's responsibility is said to be established. Moreover, that argument involves no new title of jurisdiction but concerns the interpretation and application of the title of jurisdiction invoked in the Application, namely Article IX of the Genocide Convention.

110. As noted at paragraph 77 above, the Court observed in 2008, when deciding that Serbia's objections to jurisdiction and admissibility *ratione temporis* did not possess an exclusively preliminary character, that the issues of jurisdiction and merits are closely related and the Court needed to have more elements before it in order to be in a position to make findings on each of those issues. Now that the Court, having received the further pleadings and heard the oral arguments of the Parties, is in possession of those additional elements, it can distinguish what has to be decided in order to determine the question of jurisdiction from those decisions which properly belong only to the merits.

111. In relation to jurisdiction, the question which has to be decided is confined to whether the dispute between the Parties is one which falls within the jurisdiction of the Court under Article IX of the Genocide Convention. That dispute will do so only if it is one concerning the interpretation, application or fulfilment of the Convention, which includes disputes relating to the responsibility of a State for genocide or for any of the other acts enumerated in Article III of the Convention.

112. Within the framework of the dispute, as analysed in paragraphs 90 and 109, above, 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:

(1) whether the acts relied on by Croatia took place; and, if they did, whether they were contrary to the Convention;
(2) if so, whether those acts were attributable to the SFRY at the time that they occurred and engaged its responsibility; and

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

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

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rejects Croatia's argument that Serbia has incurred responsibility, on whatever basis, for those acts.

113. What has to be decided in order to determine whether or not the Court 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 in the preceding paragraph falls within the scope of Article IX. The issues in dispute concern the interpretation, application and fulfilment of the provisions of the Genocide 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.

114. 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". Croatia's contention is that Serbia is responsible for the breaches of the Genocide Convention which it maintains were committed before 27 April 1992. On Croatia's principal argument, that responsibility results from the direct attribution of those breaches to the FRY, and thus to Serbia, while on Croatia's alternative argument (with which this part of the Judgment is concerned), responsibility is said to result from succession. 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. While Croatia's arguments regarding the third issue identified in paragraph 112 above raise serious questions of law and fact, those questions form part of the merits of the dispute. They would require a decision only if the Court finds that the acts relied upon by Croatia were contrary to the Convention and were attributable to the SFRY at the time of their commission.

115. It is true 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. As the Court explained in its 2007 Judgment in the *Bosnia and Herzegovina* v. *Serbia and Montenegro* case,

> "[t]he jurisdiction of the Court is founded on Article IX of the Genocide Convention, and the disputes subject to that jurisdiction are

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> those 'relating to the interpretation, application or fulfilment' of the Convention, but it does not follow that the Convention stands alone. In order to determine whether the Respondent breached its obligations under the Convention, as claimed by the Applicant, and, if a breach was committed, to determine its legal consequences, the Court will have recourse not only to the Convention itself, but also to the rules of general international law on treaty interpretation and on responsibility of States for internationally wrongful acts." (*I.C.J. Reports 2007 (I)*, p. 105, para. 149.)

The Court considers 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 referred to in the passage just quoted. The Convention itself does not specify the circumstances that give rise to the responsibility of a State, which must be determined under general international law. 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". 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, the Court's conclusion regarding the temporal scope of Article IX does not constitute a barrier to jurisdiction.

116. With regard to Serbia's arguments based on the Judgments in *Monetary Gold Removed from Rome in 1943 (Italy* v. *France; United Kingdom and United States of America)* (*Preliminary Question, Judgment, I.C.J. Reports 1954*, p. 19) and *East Timor (Portugal* v. *Australia)* (*Judgment, I.C.J. Reports 1995*, p. 90), the Court recalls that those Judgments concern one aspect of "the fundamental principles of its Statute . . . that it cannot decide a dispute between States without the consent of those States to its jurisdiction" (*ibid.*, p. 101, para. 26). In both *Monetary Gold* and *East Timor*, 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 principle discussed by the Court in the *Monetary Gold* case is therefore inapplicable

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(cf. *Certain Phosphate Lands in Nauru (Nauru* v. *Australia), Preliminary Objections, Judgment, I.C.J. Reports 1992*, pp. 261-262, para. 55).

117. Having concluded in its 2008 Judgment that the present dispute falls within Article IX of the Genocide Convention in so far as it concerns acts said to have occurred after 27 April 1992, the Court now finds that, to the extent that the dispute concerns acts said to have occurred before that date, it also falls within the scope of Article IX and that the Court therefore has jurisdiction to rule upon the entirety of Croatia's claim. In reaching that conclusion, 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 to be considered — to the extent necessary — in the following sections of this Judgment.

* *

(5) Admissibility

118. The Court therefore turns to 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.

119. Serbia's second alternative 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.

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B. Serbia's Counter-Claim

120. With regard to the counter-claim made by Serbia, Article 80, paragraph 1, of the Rules of Court as adopted on 14 April 1978, which, as the Court has already noted (see paragraph 7, above), is applicable to this case as the Application was submitted prior to 1 February 2001, provides that "[a] counter-claim may be presented provided that it is directly connected with the subject-matter of the claim of the other party and that it comes within the jurisdiction of the Court."

121. In its counter-claim, Serbia alleges that Croatia violated its obligations under the Genocide Convention by taking action, and failing to punish the action taken, against the Serb population in the Krajina region of Croatia. The 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. By the time that Operation Storm took place, both Croatia and the FRY had been parties to the Genocide Convention for several years. Croatia does not contest that the counter-claim thus falls within the jurisdiction of the Court under Article IX of the Genocide Convention.

122. With regard to the requirement that the counter-claim be directly connected with the subject-matter of the claim, Serbia maintains that the counter-claim raises "virtually identical legal issues related to the interpretation of the Genocide Convention . . . as well as related issues of State responsibility arising under the Convention and general international law" as those raised by the claim and that the claim and counter-claim relate to the same armed conflict and share "a common territorial and temporal setting". Croatia denies that the counter-claim is based on the same "factual complex" as the claim and highlights what it maintains are a number of significant differences between them, including the fact that the events to which the claim relates took place over a much wider geographical area and that most of them occurred more than two years before the events on which the counter-claim is based.

123. The Court notes, however, that Croatia does not submit that the counter-claim is inadmissible; the factual differences suggested by Croatia are invoked in support of its arguments on the merits of the counter-claim (something which will be considered in Part VI of this Judgment). 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, even if one accepts that the factual differences suggested by Croatia exist, 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

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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. As Article IX is the only basis for jurisdiction which has been advanced in respect of the counter-claim, the comments made in paragraphs 85 to 88 above are equally applicable to the counter-claim.

* * *

III. Applicable Law: The Convention on the Prevention and Punishment of the Crime of Genocide

124. The Genocide Convention, which is binding on the Parties, and the sole basis on which the Court has jurisdiction, is the law applicable to the present case. Accordingly, the Court can rule only on alleged breaches of that Convention (see paragraphs 85-88 above).

125. 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, the Court bases itself on the Convention, but also on the other relevant rules of international law, in particular those governing the interpretation of treaties and the responsibility of States for internationally wrongful acts. Moreover, as it observed in its Judgment of 18 November 2008 on the preliminary objections in the present case,

> "[i]n general the Court does not choose to depart from previous findings, particularly when similar issues were dealt with in the earlier decisions . . . unless it finds very particular reasons to do so" (*I.C.J. Reports 2008*, p. 449, para. 104).

In this connection, the Court recalls that, in its Judgment of 26 February 2007 in the *Bosnia and Herzegovina* v. *Serbia and Montenegro* case, it considered certain issues similar to those before it in the present case. It will take into account that Judgment to the extent necessary for its legal reasoning here. This will not, however, preclude it, where necessary, from elaborating upon this jurisprudence, in light of the arguments of the Parties in the present case.

126. In its final submissions, Croatia requests the Court to rule on Serbia's responsibility for alleged breaches of the Convention. According to the Applicant, a distinction must be drawn between the issue of Serbia's international responsibility for a series of crimes, which is a matter for the

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Court in this case, and that of individual responsibility for particular crimes, which it is the function of the International Criminal Tribunal for the former Yugoslavia ("ICTY") to determine.

127. For its part, Serbia points out that the Court's Judgment in 2007 was built upon the case law of the ICTY, and that its analysis used individual criminal responsibility rather than State responsibility as the starting-point.

128. The Court recalls that, in its 2007 Judgment, it observed that "if a State is to be responsible because it has breached its obligation not to commit genocide, it must be shown that genocide as defined in the Convention has been committed" (*I.C.J. Reports 2007 (I)*, p. 119, para. 180). It may consist of acts, attributable to the State, committed by a person or a group of persons whose individual criminal responsibility has already been established. But the Court also envisaged an alternative scenario, in which "State responsibility can arise under the Convention for genocide and complicity, without an individual being convicted of the crime or an associated one" (*ibid.*, p. 120, para. 182).

In either of these situations, the Court applies the rules of general international law on the responsibility of States for internationally wrongful acts. Specifically, Article 3 of the ILC Articles on State Responsibility, which reflects a rule of customary law, states that "[t]he characterization of an act of a State as internationally wrongful is governed by international law".

129. State responsibility and individual criminal responsibility are governed by different legal régimes and pursue different aims. The former concerns the consequences of the breach by a State of the obligations imposed upon it by international law, whereas the latter is concerned with the responsibility of an individual as established under the rules of international and domestic criminal law, and the resultant sanctions to be imposed upon that person.

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, in accordance with appropriate procedures. The Court will nonetheless take account, where appropriate, of the decisions of international criminal courts or tribunals, in particular those of the ICTY, as it did in 2007, 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.

130. Article II of the Convention defines genocide in the following terms:

"In the present Convention, genocide means any of the following

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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."

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.

131. The Court will begin by defining the intent to commit genocide, before analysing the legal issues raised by the acts referred to in Article II of the Convention.

A. The Mens Rea *of Genocide*

132. 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 (*I.C.J. Reports 2007 (I)*, p. 121, para. 187).

133. In the present case, the Parties differ (1) on the meaning and scope of "destruction" of a group, (2) on the meaning of destruction of a group "in part", and finally (3) on what constitutes the evidence of the *dolus specialis*.

(1) The meaning and scope of "destruction" of a group

(a) *Physical or biological destruction of the group*

134. Croatia argues that the required intent is not limited to the intent to physically destroy the group, but includes also the intent to stop it from functioning as a unit. Thus, according to Croatia, genocide as defined in Article II of the Convention need not take the form of physical destruction of the group. As evidence of this, it points out that some of the acts of genocide listed in Article II of the Convention do not imply the physical destruction of the group. By way of example, it cites "causing

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serious . . . mental harm to members of the group" (subparagraph *(b)* of Article II), and "forcibly transferring children of the group to another group" (subparagraph *(e)* of that Article).

135. Serbia, on the contrary, rejects this functional approach to the destruction of the group, taking the view that what counts is the intent to destroy the group in a physical sense, even if the acts listed in Article II may sometimes appear to fall short of causing such physical destruction.

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 (see Report of the *Ad Hoc* Committee on Genocide, 5 April to 10 May 1948, United Nations, *Proceedings of the Economic and Social Council, Seventh Session, Supplement No. 6*, UN doc. E/794; and United Nations, *Official Documents of the General Assembly, Part I, Third Session, Sixth Committee, Minutes of the Eighty-Third Meeting*, UN doc. A/C.6/SR.83, pp. 193-207).

It was accordingly decided to limit the scope of the Convention to the physical or biological destruction of the group (Report of the ILC on the Work of Its Forty-Eighth Session, *Yearbook of the International Law Commission*, 1996, Vol. II, Part Two, pp. 45-46, para. 12, quoted by the Court in its 2007 Judgment, *I.C.J. Reports 2007 (I)*, p. 186, para. 344).

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) *Scale of destruction of the group*

137. Croatia contends that the extermination of the group is not required according to the definition of genocide as set out in Article II of the Convention. It argues that there is a requirement to prove that the perpetrator intended to destroy the group, in whole or in part, and that that intent need not necessarily involve the extermination of the group. Croatia has even argued that a small number of victims who are members of the group would suffice, citing the *travaux préparatoires*, and in particular the draft amendment proposed by the French delegation to the Sixth Committee of the General Assembly (United Nations, *Official Documents of the General Assembly, Part I, 3rd Session, Sixth Committee,*

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Minutes of the Seventy-Third Meeting, pp. 90-91, doc. A/C.6/SR.73; and *ibid.*, *Annex to the Minutes of the Two-Hundred and Twenty-Fourth Meeting*, p. 22, doc. A/C.6/224), even though that proposal was ultimately withdrawn.

According to Serbia, extermination, as a crime against humanity, may be related to genocide in that both crimes are directed against a large number of victims. It accepts that, in order to demonstrate the existence of genocide, it is necessary to prove that the acts were committed with the intent to destroy the group physically. It argues, however, that, where there is evidence of extermination, "the deduction that the perpetrator intended the physical destruction of the targeted group will be much more plausible". Conversely, where there is no evidence of extermination, this deduction of genocidal intent "will be implausible, absent other compelling evidence".

138. The Court considers that Article II of the Convention, including the phrase "committed with intent to destroy", must be "interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose", as prescribed by customary law as reflected in Article 31 of the Vienna Convention on the Law of Treaties.

139. The Preamble to the Genocide Convention emphasizes that "genocide has inflicted great losses on humanity", and that the contracting parties have set themselves the aim of "liberat[ing] mankind from such an odious scourge". As the Court noted in 1951 and recalled in 2007, an object of the Convention was the safeguarding of "the very existence of certain human groups" (*Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, I.C.J. Reports 1951*, p. 23, and *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro), Judgment, I.C.J. Reports 2007 (I)*, p. 125, para. 194).

The Court recalls that, in 2007, it held that the intent to destroy a national, ethnic, racial or religious group as such is specific to genocide and distinguishes it from other related criminal acts such as crimes against humanity and persecution (*I.C.J. Reports 2007 (I)*, pp. 121-122, paras. 187-188).

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 to a particular group, but also to destroy the group itself in whole or in part.

(2) The meaning of destruction of the group "in part"

140. Croatia accepts that, according to the case law of the Court and of the international criminal tribunals, "the intent to destroy . . . in part" the

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protected group relates to a substantial part of that group. However, it objects to a purely numerical approach to this criterion, arguing that the emphasis should be on the geographical location of the part of the group, within a region, or a subregion or a community, as well as the opportunities presented to the perpetrators of the crime to destroy the group.

141. Serbia focuses on the criterion that the targeted part of the group must be substantial and on the established case law in that regard, while accepting that it might be relevant to consider the issue of opportunity.

142. 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. In this regard, it held in 2007 that "the intent must be to destroy at least a substantial part of the particular group" (*I.C.J. Reports 2007 (I)*, p. 126, para. 198), and that this is a "critical" criterion (*ibid.*, p. 127, para. 201). The Court further noted that "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" (*ibid.*, p. 126, para. 199) and that, accordingly, "[t]he area of the perpetrator's activity and control are to be considered" (*ibid.*, pp. 126-127, para. 199). Account must also be taken of the prominence of the allegedly targeted part within the group as a whole. With respect to this criterion, the Appeals Chamber of the ICTY specified in its Judgment rendered in the *Krstić* case that

> "[i]f a specific part of the group is emblematic of the overall group, or is essential to its survival, that may support a finding that the part qualifies as substantial within the meaning of Article 4 [of the ICTY Statute, paragraph 2 of which essentially reproduces Article II of the Convention]" (IT-98-33-A, Judgment of 19 April 2004, para. 12, reference omitted, cited in *I.C.J. Reports 2007 (I)*, p. 127, para. 200).

In 2007, the Court held that these factors would have to be assessed in any particular case (*ibid.*, p. 127, para. 201). It follows that, in evaluating whether the allegedly targeted part of a protected group is substantial in relation to the overall group, the Court will take into account the quantitative element as well as evidence regarding the geographic location and prominence of the allegedly targeted part of the group.

(3) Evidence of the dolus specialis

143. The Parties agree that the *dolus specialis* is to be sought, first, in the State's policy, while at the same time accepting that such intent will seldom be expressly stated. They agree that, alternatively, the *dolus specialis* may be established by indirect evidence, i.e., deduced or inferred from certain types of conduct. They disagree, however, on the number and nature of instances of such conduct required for this purpose.

144. Croatia considers that conduct of this kind may be reflected in the actions of a small number of identified individuals, whereas Serbia cites

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the Elements of Crimes, adopted pursuant to the Rome Statute of the International Criminal Court, which refer to "a manifest pattern of similar conduct directed against [the] group". The Respondent considers that this excludes the possibility of genocide being committed by a single individual or a small number of individuals.

145. In the absence of a State plan expressing the intent to commit genocide, it is necessary, in the Court's view, to clarify the process whereby such an intent may be inferred from the individual conduct of perpetrators of the acts contemplated in Article II of the Convention. In its 2007 Judgment, the Court held that

> "[t]he *dolus specialis*, the specific intent to destroy the group in whole or in part, has to be convincingly shown by reference to particular circumstances, unless a general plan to that end can be convincingly demonstrated to exist; and for a pattern of conduct to be accepted as evidence of its existence, it would have to be such that it could only point to the existence of such intent" (*I.C.J. Reports 2007 (I)*, pp. 196-197, para. 373).

The Parties have cited this passage of the Judgment, and they accept that intent may be inferred from a pattern of conduct, but they disagree on how this pattern should be characterized, and on the criterion by reference to which the Court should assess its existence.

146. Croatia considers that the above criterion, as defined in 2007, is excessively restrictive and not based on any precedent, and asks the Court to reconsider it. It points out that it has been unable to find any decision of an international court or tribunal since 2007 in which this criterion has been applied. It invites the Court to draw inspiration from the following passage in the ICTY Trial Judgment in the *Tolimir* case (currently under appeal) in order to modify the criterion laid down by it in 2007 regarding evidence of *dolus specialis*:

> "Indications of such intent are rarely overt, however, and thus it is permissible to infer the existence of genocidal intent based on 'all of the evidence taken together', as long as this inference is 'the only reasonable [one] available on the evidence'." (*Tolimir*, IT-05-88/2-T, Trial Chamber, Judgment of 12 December 2012, para. 745.)

According to Croatia, even where there may be other possible explanations for a pattern of conduct, the Court is bound to find that there was *dolus specialis* if it is fully convinced that the only reasonable inference to be drawn from that conduct is one of genocidal intent.

147. For its part, Serbia points out that, even though the ICTY Trial Chamber in the *Tolimir* case did not cite paragraph 373 of the Court's 2007 Judgment, its conclusion that the inference of genocidal intent must be "the only reasonable [one] available on the evidence" was consistent with that passage in the Court's Judgment. Serbia accordingly takes the view that the two approaches to the criterion of genocidal intent — the

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only possible inference (the line taken in the Court's 2007 Judgment), or the only reasonable inference (the ICTY's approach in its decision in the *Tolimir* case) — come to the same thing and are both equally stringent.

148. The Court recalls that, in the passage in question in its 2007 Judgment, it accepted the possibility of genocidal intent being established indirectly by inference. The notion of "reasonableness" must necessarily be regarded as implicit in the reasoning of the Court. Thus, to state that, "for a pattern of conduct to be accepted as evidence of . . . existence [of genocidal intent], it [must] be such that it could only point to the existence of such intent" amounts to saying that, in order to infer the existence of *dolus specialis* from a pattern of conduct, it is necessary and sufficient that this is the only inference that could reasonably be drawn from the acts in question. To interpret paragraph 373 of the 2007 Judgment in any other way would make it impossible to reach conclusions by way of inference. It follows that the criterion applied by the ICTY Trial Chamber in the Judgment in the *Tolimir* case is in substance identical with that laid down by the Court in its 2007 Judgment.

B. The Actus Reus *of Genocide*

149. The acts listed in Article II of the Convention constitute the *actus reus* of genocide. Such acts are proscribed in the context of genocide inasmuch as they are directed against the members of the protected group and reflect the intent to destroy that group in whole or in part. As the Court has already pointed out, such acts cannot be taken in isolation, but must be assessed in the context of the prevention and punishment of genocide, which is the object of the Convention.

150. The Court will review the categories of acts in issue between the Parties in order to determine their meaning and scope. It will begin by addressing the issue of whether acts committed during the course of an armed conflict must, in order to constitute the *actus reus* of genocide, be unlawful under international humanitarian law *(jus in bello)*.

(1) The relationship between the Convention and international humanitarian law

151. Both in the proceedings on the principal claim and in those on the counter-claim, the Parties debated the relationship between international humanitarian law and the Convention. They disagreed on the issue of whether acts which are lawful under international humanitarian law can constitute the *actus reus* of genocide.

152. On the principal claim, Serbia argued that acts committed by Serb forces occurred during what it described as "legitimate combat" with Croatian armed forces. Croatia replied that the Convention applied both

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in times of peace and in times of war and that, in any event, the attacks on Croat localities by the Serb forces had not been conducted in accordance with international humanitarian law.

On the counter-claim, Croatia recalled that the ICTY Appeals Chamber had held in *Gotovina* (IT-06-90-A, Appeals Judgment, 16 November 2012, hereinafter "*Gotovina* Appeals Judgment") that the shelling of Serb towns during Operation Storm had not been indiscriminate and hence was not contrary to international humanitarian law. Serbia, for its part, argued that, even if the Operation Storm attacks had been conducted in compliance with international humanitarian law, they could still constitute the *actus reus* of genocide.

153. The Court notes that the Convention and international humanitarian law are two distinct bodies of rules, pursuing different aims. The Convention seeks to prevent and punish genocide as a crime under international law (Preamble), "whether committed in time of peace or in time of war" (Art. I), whereas international humanitarian law governs the conduct of hostilities in an armed conflict and pursues the aim of protecting diverse categories of persons and objects.

The Court recalls that it has jurisdiction to rule only on violations of the Genocide Convention, and not on breaches of obligations under international humanitarian law (see paragraph 85 above). The Court is called upon here to decide a dispute concerning the interpretation and application of that Convention, and will not therefore rule, in general or in abstract terms, on the relationship between the Convention and international humanitarian law.

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

154. In subparagraphs *(a)* to *(e)* of Article II, the Convention lists the acts which constitute the *actus reus* of genocide. The Court will examine each in turn, 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 in this case.

(a) *Killing members of the group*

155. The Court notes that there is no disagreement between the Parties on the definition of killing in the sense of subparagraph *(a)* of Article II of the Convention.

156. The Court observes that the words "killing" and "meurtre" appear in the English and French versions respectively of subparagraph *(a)* of

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Article II of the Convention. For the Court, these words have the same meaning, and refer to the act of intentionally killing members of the group (*I.C.J. Reports 2007 (I)*, p. 121, para. 186 and *Blagojević and Jokić*, IT-02-60-T, Trial Chamber, Judgment of 17 January 2005, para. 642).

(b) *Causing serious bodily or mental harm to members of the group*

157. The Parties disagree on whether causing serious bodily or mental harm to members of the group must contribute to the destruction of the group, in whole or in part, in order to constitute the *actus reus* of genocide for purposes of Article II *(b)* of the Convention. Croatia argues that there is no need to show that the harm itself contributed to the destruction of the group. Serbia, on the other hand, contends that the harm must be so serious that it threatens the group with destruction.

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 Convention's *travaux préparatoires* confirm this interpretation. Thus the representative of the United Kingdom, in proposing an amendment to characterize the harm as "grievous" in the English version of the Convention, stated that "[i]t would not be appropriate to include, in the list of acts of genocide, acts which were of little importance in themselves and were not likely to lead to the physical destruction of the group". Upon the proposal of the representative of India, the term "grievous" was eventually replaced by the term "serious" in the English version of the Convention, without affecting the idea behind the proposal of the representative of the United Kingdom (United Nations, *Official Documents of the General Assembly, Part I, Third Session, Sixth Committee, Minutes of the Eighty-First Meeting*, UN doc. A/C.6/SR.81, pp. 175 and 179, and *ibid., Annex to Minutes of the Meetings*, UN doc. A/C.6/222, p. 21).

In its commentary on the Draft Code of Crimes against the Peace and Security of Mankind, the ILC adopted a similar interpretation according to which "[t]he bodily or the mental harm inflicted on members of a group must be of such a serious nature as to threaten its destruction in whole or in part" (Report of the ILC on the Work of Its Forty-Eighth Session, *Yearbook of the International Law Commission*, 1996, Vol. II, Part Two, p. 46, para. 14).

Finally, that is the interpretation of "serious harm" adopted by the ICTY, in particular in the *Krajišnik* case where the Trial Chamber ruled that the harm must be such "as to contribute, or tend to contribute, to the destruction of the group or part thereof" (IT-00-39-T, Judgment of 27 September 2006, para. 862; see also *Tolimir*, IT-05-88/2-T, Trial Chamber, Judgment of 12 December 2012, para. 738).

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The Court concludes that the serious bodily or mental harm within the meaning of Article II *(b)* of the Convention must be such as to contribute to the physical or biological destruction of the group, in whole or in part.

158. The Court recalls 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 (*I.C.J. Reports 2007 (I)*, p. 167, para. 300 (citing in particular the Judgment of the ICTY Trial Chamber, rendered on 31 July 2003 in the *Stakić* case, IT-97-24-T, and p. 175, para. 319).

159. The Parties also disagree on the meaning and scope of the notion of "causing serious mental harm to members of the group". For Croatia, this includes the psychological suffering caused to their surviving relatives by the disappearance of members of the group. It thus argues that Article II *(b)* has been the subject of a continuing breach in the present case, since insufficient action has been initiated by Serbia to ascertain the fate of individuals having disappeared during the events cited in support of the principal claim.

For the Respondent, this is not an issue covered by the Genocide Convention, but by human rights instruments, and falls outside the scope of the present case.

160. In the Court's view, 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) *Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction*

161. Deliberate infliction on the group of 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, covers methods of physical destruction, other than killing, whereby the perpetrator ultimately seeks the death of the members of the group (see, *inter alia*, *Stakić*, IT-97-24-T, Trial Chamber, Judgment of 31 July 2003, paras. 517 and 518). 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 (*Brđanin*, IT-99-36-T, Trial Chamber, Judgment of 1 September 2004, para. 691). Some of these acts were indeed alleged by the Parties in support of their respective claims, and those allegations will be examined by the Court later in the Judgment.

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The Parties disagree, however, on whether forced displacement should be characterized as "[d]eliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part", in the sense of Article II *(c)* of the Convention. They agree that the forced displacement of the population cannot constitute, as such, the *actus reus* of genocide within the meaning of subparagraph *(c)* of Article II of the Convention. However, Croatia argues that forced displacement, accompanied by other acts listed in Article II of the Convention, and coupled with an intent to destroy the group, is a genocidal act. For its part, Serbia maintains that neither the case law of the Court nor that of the ICTY has accepted that forced displacement can constitute genocide within the meaning of Article II of the Convention.

162. The Court recalls that, in its 2007 Judgment, it stated that

> "[n]either the intent, as a matter of policy, to render an area 'ethnically homogeneous', nor the operations that may be carried out to implement such policy, can *as such* be designated as genocide: the intent that characterizes genocide is 'to destroy, in whole or in part' a particular group, and deportation or displacement of the members of a group, even if effected by force, is not necessarily equivalent to destruction of that group, nor is such destruction an automatic consequence of the displacement" (*I.C.J. Reports 2007 (I)*, p. 123, para. 190; emphasis in original).

It explained, however, that

> "[t]his is not to say that acts described as 'ethnic cleansing' may never constitute genocide, if they are such as to be characterized as, for example, 'deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part', contrary to Article II, paragraph *(c)*, of the Convention, provided such action is carried out with the necessary specific intent *(dolus specialis)*, that is to say with a view to the destruction of the group, as distinct from its removal from the region . . . In other words, whether a particular operation described as 'ethnic cleansing' amounts to genocide depends on the presence or absence of acts listed in Article II of the Genocide Convention, and of the intent to destroy the group as such. In fact, in the context of the Convention, the term 'ethnic cleansing' has no legal significance of its own. That said, it is clear that acts of 'ethnic cleansing' may occur in parallel to acts prohibited by Article II of the Convention, and may be significant as indicative of the presence of a specific intent *(dolus specialis)* inspiring those acts." *(Ibid.)*

163. The Court has no reason here to depart from its previous conclusions. In order to determine whether the forced displacements alleged by

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the Parties constitute genocide in the sense of Article II of the Convention (subparagraph *(c)*, in particular), it will seek 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. The circumstances in which the forced displacements were carried out are critical in this regard.

(d) *Measures intended to prevent births within the group*

164. According to Croatia, rape and other acts of sexual violence can fall within subparagraph *(d)* of Article II of the Convention, which covers measures intended to prevent births within the group. In support of this contention, it refers to the observation of the Trial Chamber of the International Criminal Tribunal for Rwanda in the *Akayesu* case that the mental effects of rape could lead members of the group not to procreate. Croatia also cites the Trial Chamber's conclusion that, "in patriarchal societies where membership of a group is determined by the identity of the father", rape could be "an example of a measure intended to prevent births within a group" (ICTR-96-4-T, Trial Chamber 1, Judgment of 2 September 1998, paras. 507-508).

165. Serbia disputes the contention that rape and other acts of sexual violence can fall within the terms of Article II *(d)* of the Convention, unless they are of a systematic nature — which, it contends, is not the case here.

166. 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

167. In support of their respective claim and counter-claim, the Parties have alleged a number of facts which have been contested, to some degree, by one side or the other. The existence of the alleged facts must be established before applying the relevant rules of international law.

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168. The Court observes, however, that as regards the principal claim, the differences between the Parties relate less to the existence of the facts than to their characterization by reference to the Convention and, in particular, to the inferences to be drawn from them in respect of proof of specific intent *(dolus specialis)*.

169. The Parties have discussed at some length the burden of proof, the standard of proof and the methods of proof. The Court will consider these questions in turn.

A. The Burden of Proof

170. Croatia recognizes that the *actori incumbit probatio* principle should generally apply, but considers that in the present case, Serbia should co-operate in putting before the Court all relevant evidence in its possession concerning the facts relied on in support of the principal claim. The Respondent is best placed, in Croatia's view, to provide explanations of acts which are claimed to have taken place in a territory over which Serbia exercised exclusive control. Moreover, Serbia is said to have failed to offer explanations or produce evidence in rebuttal of the Applicant's claims. Croatia considers that the Court should draw adverse inferences from this in respect of Serbia.

171. For Serbia, Croatia is seeking, in this way, to reverse the burden of proof. It maintains that one party cannot be forced to give an explanation in response to the claims of the other party. It further contends that it has adequately rebutted Croatia's claims by giving explanations and producing reliable evidence.

172. The Court recalls that it is for the party alleging a fact to demonstrate its existence. This principle is not an absolute one, however, since "[t]he determination of the burden of proof is in reality dependent on the subject-matter and the nature of [the] dispute brought before the Court; it varies according to the type of facts which it is necessary to establish for the purposes of the decision of the case" (*Ahmadou Sadio Diallo (Republic of Guinea* v. *Democratic Republic of the Congo), Merits, Judgment, I.C.J. Reports 2010 (II)*, p. 660, para. 54). In particular, the Court has recognized that there may be circumstances in which the Applicant cannot be required to prove a "negative fact" (*ibid.*, p. 661, para. 55).

173. Whilst the burden of proof rests in principle on the party which alleges a fact, this does not relieve the other party of its duty to co-operate "in the provision of such evidence as may be in its possession that could assist the Court in resolving the dispute submitted to it" (*Pulp Mills on the River Uruguay (Argentina* v. *Uruguay), Judgment, I.C.J. Reports 2010 (I)*, p. 71, para. 163). In this regard, the Court recalls that, between September 2010 and May 2011, Serbia provided Croatia with approximately 200 documents requested by the latter (see paragraph 13 above).

174. 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. It is not for Serbia to prove a negative fact, for example the

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absence of facts constituting the *actus reus* of genocide within the meaning of Article II of the Convention in localities to which Croatia called the Court's attention.

175. Consequently, it is for Croatia to demonstrate the existence of the facts put forward in support of its claims, and the Court cannot demand of Serbia that it provide explanations of the facts alleged by the Applicant.

176. The same principles are applicable, *mutatis mutandis*, in respect of the counter-claim.

B. The Standard of Proof

177. The Parties agree on the fact that the standard of proof, laid down by the Court in its 2007 Judgment in the proceedings between Bosnia and Herzegovina and Serbia is applicable in the present case.

178. The Court, after recalling that "claims against a State involving charges of exceptional gravity must be proved by evidence that is fully conclusive (cf. *Corfu Channel (United Kingdom* v. *Albania), Merits, Judgment, I.C.J. Reports 1949*, p. 17)", added that it "requires that it be fully convinced that allegations made in the proceedings, that the crime of genocide or the other acts enumerated in Article III have been committed, have been clearly established. The same standard applies to the proof of attribution for such acts." (*I.C.J. Reports 2007 (I)*, p. 129, para. 209.)

179. Allegations similar to those examined in the 2007 Judgment have been made in the present dispute, both in the principal claim and in the counter-claim. Hence, in the present case, the Court will apply the same standard of proof.

C. Methods of Proof

180. 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 (*Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Uganda), Judgment, I.C.J. Reports 2005*, p. 200, para. 58).

181. The Court observes that certain facts at issue in the present case have formed the subject of proceedings before the ICTY, some of which are still pending, and that the Parties have made copious reference to documents arising from the proceedings of that Tribunal (indictments by the Prosecutor, decisions and judgments of the Trial Chamber, judgments of the Appeals Chamber, written and oral evidence).

182. The Parties agree, in general, on the evidential weight to be given to these various documents, following the approach adopted in the 2007 Judgment, according to which the Court "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 "any evalua-

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tion 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" (*I.C.J. Reports 2007 (I)*, p. 134, para. 223).

183. They differ, however, on the probative value to be attributed to the ICTY Prosecutor's decisions not to include a charge of genocide in an indictment, and on that to be accorded, respectively, to the judgment of the ICTY Trial Chamber in the case concerning *Gotovina et al.* (IT-06-90-T, Judgment of 15 April 2011, hereinafter the "*Gotovina* Trial Judgment") and the judgment of the Appeals Chamber in the same case.

184. 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 it drew the following distinction in its 2007 Judgment:

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

185. Croatia, which has contested this distinction, argues that the Court should not accord probative value to the Prosecutor's decisions not to include a charge of genocide in an indictment, since the Prosecutor has a discretionary power as to what charges, if any, to bring. The Prosecutor's decision, according to Croatia, might have been influenced by various factors, without it meaning that the facts in question do not, for the Prosecutor, constitute genocide, or that he or she has no evidence of their existence.

186. Serbia, for its part, recognizes that such a decision does not create an irrebuttable presumption, but considers that the Court should nonetheless accord it some degree of probative value.

187. The fact that the Prosecutor has discretion to bring charges does not call into question the approach which the Court adopted in its 2007 Judgment (see *ibid.*, reproduced at paragraph 184). The Court did not intend to turn the absence of charges into decisive proof that there had not been genocide, but took the view that this factor may be of significance and would be taken into consideration. In the present case, there is no reason for the Court to depart from that approach. 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

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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.

188. As regards the evidential weight to be given to the judgments of the ICTY in the *Gotovina* case, the Court will return to this question in due course when examining the counter-claim (see paragraphs 464-472 below).

189. The Court observes that in addition to materials from the ICTY, the Parties have made use of many other documents, from a variety of sources, and have discussed their evidential weight. In particular, they have referred to several reports from official or independent bodies, and to statements with diverse origins and content.

190. The Court recalls that it has held, with regard to reports from official or independent bodies, that their value

> "depends, among other things, on (1) the source of the item of evidence (for instance partisan, or neutral), (2) the process by which it has been generated (for instance an anonymous press report or the product of a careful court or court-like process), and (3) the quality or character of the item (such as statements against interest, and agreed or uncontested facts)" (*I.C.J. Reports 2007 (I)*, p. 135, para. 227).

191. It will consider the probative value of the reports in question on a case-by-case basis, in accordance with these criteria, when examining the merits of the claims.

192. The Court notes that Croatia annexed to its written pleadings numerous statements by individuals, some of whom were called to give oral testimony before the Court. Serbia asserts that many of the statements produced by Croatia are flawed in such a way as to call into question their probative value: certain statements are said not to have been signed by their authors or by the persons who took them, or not to specify the circumstances in which they were allegedly taken. In particular, it is claimed that some statements were taken by the Croatian police and that, as a consequence, they cannot be regarded as impartial and would not even be admissible before Croatian courts. Lastly, a large number of statements submitted by Croatia are said not to demonstrate a direct knowledge of the facts on the part of their authors, but to represent hearsay evidence.

193. Croatia acknowledges that some of the statements annexed to its Memorial were not initially signed by those who made them. It points out, however, that it collected a number of signatures at a later stage and appended the signed statements to its Reply. Croatia adds that some of the individuals who had not signed their statements have testified before the ICTY, and that their evidence given before the Tribunal was consis-

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tent with that contained in the unsigned statements. Lastly, Croatia considers that the hearsay evidence is relevant and should be assessed in the light of its content and the circumstances in which it was obtained.

194. During the oral proceedings, a Member of the Court put a question to the Parties concerning the probative value to be given to the various types of statements annexed to the Parties' written pleadings, according to whether or not the author had been called to give oral testimony and cross-examined by the opposing Party. In reply, Croatia maintained that all the statements had the same probative value, but that it was for the Court to determine what weight should be given to them, on the basis of the criteria set forth in the 2007 Judgment. Serbia, for its part, drew a distinction between the statements of individuals called to give oral testimony in these proceedings, whether or not they had been cross-examined, and the statements of individuals who were not so called. According to the Respondent, whereas the former should all be accorded the same probative value, the latter should be treated as out-of-court statements and assessed as such in light of the criteria established in the 2007 Judgment, in the same way as all other documentary evidence furnished by the Parties. Serbia stated that the Court should nonetheless give special attention to the evidence given before the ICTY and to testimonies before national courts. It added, finally, that the unsigned statements and those produced in unknown circumstances, as well as the statements prepared by official bodies whose impartiality had not been established, should be disregarded.

195. Another Member of the Court put a question to Croatia concerning the admissibility before Croatian courts of the unsigned statements attached to its Memorial. Croatia replied that statements taken by the police or other authorities were not necessarily signed and were not themselves admissible before Croatian courts. Croatia explained, however, that these formed the basis upon which an investigating judge could interrogate the individual concerned, giving rise to a signed statement that would be admissible before Croatian courts. Serbia indicated that if a party appeared before a court in the former Yugoslavia with an unsigned out-of-court statement, it would not be admitted into evidence.

196. The Court recalls that neither its Statute nor its Rules lay down any specific requirements concerning the admissibility of statements which are presented by the parties in the course of contentious proceedings, whether the persons making those statements were called to give oral testimony or not. The Court leaves the parties free to determine the form in which they present this type of evidence. Consequently, the absence of signatures of the persons who made the statements or took them does not in principle exclude these documents. However, the Court has to ensure that documents, which purport to contain the statements of individuals who are not called to give oral testimony, faithfully record the evidence actually given by those individuals. Moreover, the Court recalls

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that even affidavits will be treated "with caution" (*Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua* v. *Honduras), Judgment, I.C.J. Reports 2007 (II)*, p. 731, para. 244). In determining the evidential weight of any statement by an individual, the Court necessarily takes into account its form and the circumstances in which it was made.

197. The Court has thus held that it must assess "whether [such statements] were made by State officials or by private persons not interested in the outcome of the proceedings and whether a particular affidavit attests to the existence of facts or represents only an opinion as regards certain events" *(ibid.)*. On this second point, the Court has stated that "testimony of matters not within the direct knowledge of the witness, but known to him only from hearsay, [is not] of much weight" (*Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Merits, Judgment, I.C.J. Reports 1986*, p. 42, para. 68, referring to *Corfu Channel (United Kingdom* v. *Albania), Merits, Judgment, I.C.J. Reports 1949*, p. 17). Lastly, the Court has recognized that "in some cases evidence which is contemporaneous with the period concerned may be of special value" (*Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua* v. *Honduras), Judgment, I.C.J. Reports 2007 (II)*, p. 731, para. 244).

198. The Court recognizes the difficulties of obtaining evidence in the circumstances of the case. Nevertheless, it 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 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.

199. 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 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

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been corroborated by credible evidence. The Court will refer to these categories of statements subsequently when it examines Croatia's allegations.

* * *

V. Consideration of the Merits of the Principal Claim

200. The Court will now examine Croatia's claims relating to the commission of genocide between 1991 and 1995 in the regions of Eastern Slavonia, Western Slavonia, Banovina/Banija, Kordun, Lika and Dalmatia.

201. The Court will seek 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.

202. Only if the Court finds that there has been genocide within the meaning of Article II of the Convention will it consider the questions of the admissibility of the principal claim in respect of the acts prior to 8 October 1991 and whether any acts in respect of which the claim is held to be admissible can entail the responsibility of Serbia.

A. The Actus Reus *of Genocide*

(1) Introduction

203. 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 will focus 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.

204. Croatia's allegations refer to acts committed by the JNA and other entities (police and defence forces of the SAOs and the RSK — Territorial Defence Force (TO), units of the Ministry of the Interior (MUP), *Milicija Krajina* — and paramilitary groups) which are allegedly attributable to Serbia. Solely for the purpose of discussing the facts which form the subject of the principal claim, the Court will use the terms "Serbs" or "Serb forces" to designate entities other than the JNA, without prejudice to the question of the attribution of their conduct.

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205. 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. 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 will designate that group using the terms "Croats" or "protected group" interchangeably.

206. Croatia claims that acts constituting the *actus reus* of genocide within the meaning of Article II *(a)* to *(d)* of the Convention were committed by the JNA and Serb forces against members of the protected group as defined in the previous paragraph. The Court will consider these claims by referring in turn to the categories of acts laid down in Article II of the Convention and assessing whether they have been established to the standard set out in paragraphs 178 and 179.

207. Serbia acknowledges that war crimes, crimes against humanity and other atrocities were perpetrated against Croats by various armed groups, although it maintains that it has not been established that those crimes were committed with the intent to destroy the Croat group, in whole or in part, or that they are attributable to Serbia.

208. The Court notes that the ICTY found that, from the summer of 1991, the JNA and Serb forces had perpetrated numerous crimes (including killing, torture, ill-treatment and forced displacement) against Croats in the regions of Eastern Slavonia, Banovina/Banija, Kordun, Lika and Dalmatia (see, in particular, IT-95-13/1-T, Trial Chamber, Judgment of 27 September 2007 (hereinafter "*Mrkšić* Trial Judgment"); IT-95-11-T, Trial Chamber, Judgment of 12 June 2007 (hereinafter "*Martić* Trial Judgment"); IT-03-69-T, Trial Chamber, Judgment of 30 May 2013 (hereinafter "*Stanišić and Simatović* Trial Judgment")).

(2) Article II (a)*: killing members of the protected group*

209. Article II *(a)* of the Convention concerns the killing of members of the protected group. Croatia claims that large numbers of ethnic Croats were killed between 1991 and 1995 by the JNA and Serb forces in the regions of Eastern Slavonia, Western Slavonia, Banovina/Banija, Kordun, Lika and Dalmatia.

210. In response, Serbia contests the probative value of the evidence presented by Croatia. Further, while it acknowledges that many ethnic Croats were killed, it disputes that the killings were committed with genocidal intent or that such intent is attributable to it.

211. The Court will consider in turn Croatia's claims concerning killings perpetrated by the JNA and Serb forces in various localities.

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Region of Eastern Slavonia

(a) *Vukovar and its surrounding area*

212. Croatia attaches particular importance to the events which took place in Vukovar and its surrounding area in the autumn of 1991. According to the Applicant, the JNA and Serb forces killed several hundred civilians in that multi-ethnic city in Eastern Slavonia, situated on the border with Serbia and intended to become, under the plans for a "Greater Serbia", the capital of the new Serbian region of Slavonia, Baranja and Western Srem.

213. Croatia first asserts that, between the end of August and 18 November 1991, Vukovar was besieged and subjected to sustained and indiscriminate shelling, laying waste to the city. It alleges that between 1,100 and 1,700 people, 70 per cent of whom were civilians, were killed during that period. According to the Applicant, the attacks on Vukovar were directed not simply against an opposing military force, but also against the civilian population; moreover, those attacks are said to show that the aim of the JNA and Serb forces was the destruction of the Croats of Vukovar.

214. The Applicant then claims that hundreds of Croats were killed when the JNA and Serb forces moved forward to seize ground, burning, raping and killing as they did so.

215. Finally, Croatia contends that, following the fall of all districts of Vukovar on 18 November 1991, the JNA and Serb forces continued to target Croat survivors. In particular, it alleges that 350 Croat detainees at Velepromet and another 260 at Ovčara were killed after having been evacuated from Vukovar and from its hospital in particular.

216. In response to the accusations made against it, Serbia argues that, on the whole, the written statements provided by Croatia in support of its allegations do not fulfil the minimum evidentiary requirements. It further maintains that much of the evidence presented by Croatia is hearsay, contradictory, vague or from unreliable sources.

217. Serbia does not deny, however, that crimes were committed in Vukovar and its surrounding area. Nevertheless, it argues that the figures advanced by Croatia are very clearly exaggerated and that the Applicant has not (1) produced reliable evidence relating to the number of persons allegedly killed, (2) attempted to distinguish between the deaths resulting from a legitimate use of force and those resulting from criminal acts, (3) specified what proportion of the alleged victims were civilians and what proportion were combatants, and (4) demonstrated that all victims were of Croat ethnicity. Although Serbia admits that "incidents" occurred, it considers that it was an excess of violence which led to the commission of crimes, by a minority, and that those crimes were directed against members of the Croatian forces, who represented but a very small fraction of all those evacuated from Vukovar. Serbia adds that while the use

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of force by the assailants may have exceeded the needs of a normal military operation, and while it certainly caused grave suffering to the civilian population, regardless of ethnicity, there is nothing to suggest that the attack on Vukovar was carried out with the intent to destroy the Croat population as such.

218. The Court will first consider the allegations concerning those killed during the siege and capture of Vukovar. The Parties have debated the number of victims, their status and ethnicity and the circumstances in which they died. The Court need not resolve all those issues. It observes that, while there is still some uncertainty surrounding these questions, it is clear that the attack on Vukovar was not confined to military objectives; it was also directed at the then predominantly Croat civilian population (many Serbs having fled the city before or after the fighting broke out). Although the indictment in the *Mrkšić et al.* case did not contain a charge relating to the siege of Vukovar, the Trial Chamber found:

> "470. . . .The duration of the fighting, the gross disparity between the numbers of the Serb and Croatian forces engaged in the battle and in the armament and equipment available to the opposing forces and, above all, the nature and extent of the devastation brought on Vukovar and its immediate surroundings by the massive Serb forces over the prolonged military engagement, demonstrate, in the finding of the Chamber, that the Serb attack was also consciously and deliberately directed against the city of Vukovar itself and its hapless civilian population, trapped as they were by the Serb military blockade of Vukovar and its surroundings and forced to seek what shelter they could in the basements and other underground structures that survived the ongoing bombardments and assaults. What occurred was not, in the finding of the Chamber, merely an armed conflict between a military force and an opposing force in the course of which civilians became casualties and some property was damaged. The events, when viewed overall, disclose an attack by comparatively massive Serb forces, well armed, equipped and organized, which slowly and systematically destroyed a city and its civilian and military occupants to the point where there was a complete surrender of those that remained.
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> . . . . . .
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> 472. It is in this setting that the Chamber finds that, at the time relevant to the indictment, there was in fact, not only a military operation against the Croat forces in and around Vukovar, but also a widespread and systematic attack by the JNA and other Serb forces directed against the Croat and other non-Serb civilian population in the wider Vukovar area. The extensive damage to civilian property and civilian infrastructure, the number of civilians killed or wounded during the military operations and the high number of civilians displaced or forced to flee clearly indicate that the attack was carried out in an indiscriminate way, contrary to international law. It was an

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unlawful attack. Indeed it was also directed in part deliberately against the civilian population." (*Mrkšić* Trial Judgment, paras. 470 and 472; references omitted.)

219. The Chamber's findings confirm that numerous Croat civilians were killed by the JNA and Serb forces during the siege and capture of Vukovar (*ibid.*, paras. 468-469). Moreover, the Respondent admits that the fighting which occurred in Vukovar and its surrounding area caused grave suffering to the civilian population. Although Serbia has suggested that Serb civilians trapped in the city of Vukovar may also have been killed, the fact remains, as established before the ICTY, that many of the victims were Croat and that the attacks were chiefly directed against Croats and other non-Serbs (*ibid.*, paras. 468-469, 472). In addition, statements produced by Croatia, to which the Court can give evidential weight, support the Applicant's allegations concerning the killing of Croat civilians during the siege and capture of Vukovar.

220. The Court will now examine the allegations that Croats were killed after the surrender of Vukovar, in particular those relating to the events at Ovčara and Velepromet. In respect of Ovčara, the findings of the ICTY in the aforementioned *Mrkšić et al.* case largely substantiate Croatia's position. The Court thus notes that, according to the Trial Chamber, 194 persons suspected of involvement in the Croatian forces and evacuated from Vukovar hospital on the morning of 20 November 1991 were killed by members of Serb forces at Ovčara that same evening and night (20-21 November 1991) (*ibid.*, para. 509); it appears from this finding that almost all the victims were of Croat ethnicity (*ibid.*, para. 496), were considered to be prisoners of war and, for the most part, were sick or wounded (*ibid.*, para. 510).

Serbia takes note of the *Mrkšić* Trial Judgment and does not contest the fact that these killings were committed at Ovčara, adding that "[t]his was the gravest mass murder in which Croats were the victims during the entire conflict". The Respondent also acknowledges that the Higher Court in Belgrade convicted 15 Serbs for war crimes committed at Ovčara.

221. The ICTY also found that acts of ill-treatment occurred at Velepromet and that several individuals suspected of involvement in the Croatian forces were killed there by members of Serb forces, including at least 15 Croats (*ibid.*, paras. 163, 165, 167). Serbia notes the finding of the ICTY on this issue, but insists on the fact that the number of persons killed at Velepromet is far below the 350 alleged by the Applicant.

222. Finally, the Court observes that the statement of Mr. Franjo Kožul, called for oral testimony by Croatia and who appeared before the Court, also substantiates certain of the Applicant's allegations. Mr. Kožul states that he was evacuated from Vukovar hospital and taken to Velepromet, where he witnessed various acts of violence and, in particular, saw a

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member of the Serb forces holding the head of a prisoner he had decapitated, a claim which was not challenged by Serbia. The Court considers that it is therefore bound to give some evidential weight to this testimony. The statement of F. G. also provides evidence of the fact that decapitations occurred at Velepromet. This individual states that he was saved from decapitation at the last moment by a JNA officer, and that he saw "approximately fifteen decapitated bodies in [a] hole".

223. The Court concludes that Croat detainees were killed at Velepromet by Serb forces, although it is unable to determine the exact number. However, it takes note of the ICTY's finding that civilians detained at Velepromet and not suspected of involvement in the Croatian forces were evacuated to destinations in Croatia or Serbia on 20 November 1991 (*Mrkšić* Trial Judgment, para. 168).

224. In light of the foregoing, the Court concludes that it is established that killings were perpetrated by the JNA and Serb forces against Croats in Vukovar and its surrounding area during the siege and capture of Vukovar, and by Serb forces at the Ovčara and Velepromet camps.

(b) *Bogdanovci*

225. The Applicant claims that no fewer than 87 Croats were killed in the predominantly Croat village of Bogdanovci, approximately 8 km south-east of Vukovar, during and after the attacks carried out on the village on 2 October and 10 November 1991 by the JNA and Serb forces. In support of its arguments, Croatia produces a number of written statements.

226. One of the statements on which Croatia relies is that of Ms Marija Katić, who was called for oral testimony and appeared before the Court. In her written statement, Ms Katić names eight individuals who she says were killed by grenades thrown into the basement of a house on 2 October 1991, and a further three individuals who she believes were killed by firearms on the same day. She adds that another ten people were killed during the subsequent destruction of Bogdanovci.

227. Croatia also relies on an unsigned police record of an interview.

228. The Respondent disputes the probative value of the statements produced by Croatia in support of its allegations, on the grounds that they do not contain the signatures of the individuals said to have given them and, in some cases, that it is not even possible to identify the person or body to whom they were made. It further argues that these statements are based on hearsay evidence, are imprecise and contradict one another. Serbia contends that the events which occurred in Bogdanovci on 2 October and 10 November 1991 were part of a legitimate military operation and that Croatian forces were actively involved in the fighting, destroying tanks and armoured vehicles and inflicting heavy losses on the JNA and Serb forces. It admits in this regard that "[u]ndoubtedly horrible crimes

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were committed in that town", but argues that "once again, the pattern is combat and excesses arising therein".

229. The Court notes that many statements provided by Croatia were made several years after the events in Bogdanovci are alleged to have taken place and accordingly may be given only limited evidential weight. To those statements which do not constitute first-hand accounts of the events, the Court gives no evidential weight. In this regard, the Court notes that, although Ms Katić confirmed her account when testifying, it is not certain that she witnessed at first hand all the killings which she mentions. Finally, the Court recalls that no evidential weight can be given to an unsigned police record of an interview.

230. Taking account of Serbia's admission (see paragraph 228 above) and the evidence put before it, the Court concludes that a number of Croats were killed by the JNA and Serb forces in Bogdanovci on both 2 October and 10 November 1991, although it is unable to determine the exact number.

(c) *Lovas*

231. Croatia claims that dozens of people were killed by the JNA and Serb forces in Lovas, a predominantly Croat village situated approximately 20 km south-east of Vukovar, between October 1991 and the end of December 1991.

232. The Applicant states that the village was attacked by the JNA and Serb paramilitary forces, despite the fact that it offered no resistance, that there were no Croatian forces in the village and that its residents had given up their arms following an ultimatum from the JNA. According to Croatia, on 10 October 1991, at least 20 Croat civilians lost their lives during an artillery attack carried out by the JNA against the Croat-inhabited areas of the village. Others were subsequently massacred by Serb paramilitary groups and the JNA infantry, which stormed the village on the same day.

233. Croatia then contends that, one week after that attack, all the Croat males of fighting age were rounded up and tortured. According to the Applicant, 11 of them died as a result of the ill-treatment they received. Croatia goes on to claim that the following day, on 18 October 1991, some of the survivors were forced to march to a field, not far from the village. One man was executed en route because he was unable to keep up with the group, due to injuries inflicted the previous night. Once at the field, Serb forces ordered the prisoners to walk forward holding hands, and to sweep the ground with their feet, in order to clear the area of mines. One or more mines then exploded, before the Serb forces opened fire on the survivors. At least 21 men died during what has become known as the Lovas "minefield massacre". Finally, Croatia submits that, between 19 October 1991 and the beginning of 1992, the vio-

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lence against Croat civilians continued and a further 68 people were killed.

234. For its part, Serbia argues that the written statements relied on by the Applicant in support of its allegations that killings were committed in Lovas do not fulfil the minimum evidentiary requirements and that, in any event, they do not corroborate Croatia's claims, in particular because they show that there was Croatian resistance during the attack of 10 October 1991. Serbia concedes, nevertheless, that 14 individuals have appeared before a Belgrade court accused of killing 68 Croats from the village of Lovas, and that some of the alleged acts referred to during that trial "probably amount to war crimes and might also be deemed crimes against humanity"; it insists, however, that there is nothing to support an accusation of genocide.

235. The Court notes that some of the facts alleged by Croatia have been established before the ICTY. Thus, although the attack on Lovas was not referred to in the indictment in the *Mrkšić et al.* case, the Tribunal's Trial Chamber concluded that "Serb 'volunteers' in Lovas had attacked specific homes on 10 October 1991 killing 22 Croats" (*Mrkšić* Trial Judgment, para. 47).

236. With respect to the "minefield massacre", Croatia relies on various items of evidence in order to establish its allegations. In particular, the statement of Stjepan Peulić, a witness called by Croatia to give oral testimony but whom Serbia did not wish to cross-examine (see paragraph 25 above) and whose accounts have not been otherwise contradicted, may be given evidential weight. Mr. Peulić offers a first-hand account of being held throughout the night of 17 October 1991, with approximately 100 other Croats, and tortured. He states that the following day, they were further tortured, and ordered to go out to a field. On the road, he witnessed the killing of one Croat who could not keep up because of injuries sustained during the torture. He testifies that he was then ordered by Serb forces in mottled uniforms to walk through a field, holding hands with other detained Croats and sweeping for mines with their legs. He states that at "[a]round 11.00 hrs, when we activated the first mine, someone shouted 'Lie down' and we all probably did lie down, and the mentioned Serbo-Chetniks started firing at us fiercely from all their infantry weapons, and the shooting lasted for about 15 minutes". According to Mr. Peulić, an estimated 17 people were killed on the field, most of whom he recalled by name.

237. Croatia further relies on the indictment prepared by the War Crimes Prosecutor for the Belgrade District Court, issued against 14 Serbs accused of killings committed in Lovas, including the "minefield massacre". In a Judgment of 26 June 2012, the Higher Court of Belgrade convicted the 14 accused of war crimes. The Court notes, however, that this Judgment was quashed by the Belgrade Appeals Court in January 2014 due to shortcomings in the Higher Court's findings regarding the indi-

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vidual criminal responsibility of the accused, and that the accused must be retried. The Court takes the view that, in the absence of definitive findings, adopted by a court at the close of a rigorous process, it can give no evidential weight to the War Crimes Prosecutor's indictment.

238. Croatia also invokes another document from domestic judicial proceedings, namely the statement of Aleksandar Vasiljević, Chief of Security in the Federal Secretariat for National Defence from 1 June 1991 to 5 August 1992, given to the Belgrade Military Court in 1999. In that statement, Mr. Vasiljević mentions the fact that he was informed on 28 October 1991 not only of the "minefield massacre", but also of the execution of some 70 civilians in Lovas. The Court notes that this statement was made by a former JNA officer to a Serbian court in the context of a war crimes prosecution. Mr. Vasiljević also testified before the ICTY during the trial of Slobodan Milošević. His testimony before that Tribunal confirms his statement, in so far as he admits having been informed of the "minefield massacre". In the Court's view, this statement has some evidential weight.

239. In addition, Croatia relies on a documentary film produced by a Serbian television channel, in which individuals are interviewed and offer first-hand accounts of the "minefield massacre". Evidence of this kind and other documentary material (such as press articles and extracts from books) are merely of a secondary nature and may only be used to confirm the existence of facts established by other evidence, as the Court has previously explained:

> "[T]he Court regards them not as evidence capable of proving facts, but as material which can nevertheless contribute, in some circumstances, to corroborating the existence of a fact, i.e., as illustrative material additional to other sources of evidence." (*Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Merits, Judgment, I.C.J. Reports 1986*, p. 40, para. 62.)

In the present case, the Serbian television documentary does corroborate the evidence set out above.

240. Finally, the Court observes that Serbia does not deny that killings were committed in Lovas, but contests their characterization under the Convention (see paragraph 234 above). Taking all this evidence into account, the Court finds that it is established that Croat civilians were killed by the JNA and Serb forces in the village of Lovas between 10 October 1991 and the end of December 1991, although it is unable to determine their precise number.

(d) *Dalj*

241. According to the Applicant, a great number of Croats were killed in Dalj, a village situated to the north of Vukovar in which approximately

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one-fifth of the population was of Croat ethnicity. Croatia first contends that dozens of Croats died during the attack carried out by the JNA and Serb paramilitary groups on 1 August 1991: it alleges that civilians were directly targeted and that Croatian combatants were executed after they had surrendered. It further claims that several Croats captured at or taken to Dalj were murdered by Serb forces in the autumn of 1991. In response, Serbia states, as it does with respect to claims concerning other localities, that the evidence presented by Croatia is insufficient to establish its allegations. Although the Respondent appears to accept that a number of people were killed in Dalj, it argues that the Applicant has not shown that these were acts of genocide.

242. The Court notes that Croatia relies on several individual statements in order to establish its allegations. With respect to the killings allegedly carried out on 1 August 1991, certain of the statements relied on are not signed or confirmed; the others do not appear to provide a first-hand account of the killings alleged. The Court concludes that Croatia has not produced sufficient evidence to substantiate its claim that Croats were killed by the JNA and Serb forces on 1 August 1991.

With respect to the killings allegedly perpetrated later, in the autumn of 1991, the Court observes that the statement of B. I. was subsequently confirmed by this individual. B. I. states that, after having surrendered on 21 November 1991, he was put on a truck with others and driven to Dalj. On the way, 35 people were forced off the truck; he then heard gunshots and these people did not return. After having arrived in Dalj, he was taken out to a mass grave, in which he saw "many corpses", and watched as other Croats in his group were shot and fell into the grave. He was saved because the shots fired at him only hit his arm and an attempt to slit his throat with a knife also failed. The Court considers that it can rely on this statement by a person who provides a first-hand account.

243. Croatia has also produced exhumation reports which indicate that Croats, including Croatian combatants, were killed by firearms, without, however, specifying the circumstances of their deaths.

244. The Court further notes that in the *Stanišić and Simatović* Trial Judgment, currently under appeal on different grounds, the ICTY Trial Chamber found that some of the alleged crimes had been committed in this locality. In its Judgment, the Chamber concluded that, on or around 21 September 1991, members of a Serb paramilitary group killed ten people held at the police building in Dalj, eight of whom were Croats (*Stanišić and Simatović* Trial Judgment, paras. 419-420 and 975). The Chamber also found that 22 other detainees had been killed in this locality on 4 and 5 October 1991, and that 17 of those victims were Croat civilians (*ibid.*, paras. 432 and 975).

245. The evidence presented by Croatia, considered in the light of the findings of the ICTY in the *Stanišić and Simatović* Trial Judgment, is sufficient for the Court to conclude that members of the protected group

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were killed by Serb forces in the village of Dalj between September and November 1991.

Region of Western Slavonia

Voćin

246. Croatia claims that killings were committed by Serb forces against Croats in the village of Voćin (Podravska Slatina municipality), in which approximately one-third of the population was of Croat ethnicity. Relying on statements appended to its written pleadings, Croatia contends in particular that at least 35 Croats were killed between 12 and 14 December 1991 by Serb forces driven out of Voćin.

247. For its part, Serbia argues that the crimes allegedly committed throughout the Podravska Slatina municipality cannot be substantiated by the evidence in the case file, in particular because that evidence constitutes hearsay.

248. Croatia has referred to the statements appended to its written pleadings in order to support its allegations. Most of these statements are unsigned and were not otherwise confirmed; they will not be considered further. The Court observes that the statement of M. S. was subsequently confirmed by this individual. However, her evidence as to the killing of Croats by Serbs is hearsay. In particular, M. S. states that Serbs committed a massacre in Voćin on 13 December 1991, but she does not seem to have personally witnessed the killing of Croats as she hid in a shelter when the Serb forces attacked the Croats in the village. The Court finds that this evidence is insufficient to establish the killing of Croats in this locality.

249. In support of its allegation of a massacre in Voćin around 13 December 1991, Croatia also relies on the Report of a non-governmental organization, "Helsinki Watch", sent to Slobodan Milošević and General Blagoje Adžić on 21 January 1992 and based on investigations carried out by that organization (hereinafter the "Helsinki Watch Report"). According to the Report, Serb forces withdrawing from the villages of Hum and Voćin killed 43 Croats in December 1991. The Court recalls that the value of such documents depends on the source of the information contained therein, the process by which they were generated and their quality or character (see paragraph 190 above). In this regard, it notes that the basis for the report's findings on the alleged killings in Voćin is unclear, as it refers to unidentified eyewitnesses and autopsy reports that are not appended. The Court therefore concludes that this Report, on its own, is insufficient to prove Croatia's allegations.

At the hearings, Croatia also presented audio-visual materials (an excerpt from a BBC documentary and photographs taken from a book)

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showing victims alleged to have been killed during this massacre. The BBC documentary and photographs taken from the book *Mass Killing and Genocide in Croatia in 1991/92 : A Book of Evidence* show several bodies which are said to be the victims of the massacre at Voćin. As the Court has previously explained (see paragraph 239 above), this kind of evidence cannot, on its own, establish the facts alleged.

250. In the opinion of the Court, although the material before it raises grounds for grave suspicions about what occurred at Voćin, Croatia has not produced sufficient evidence to substantiate its claim that Croats were killed by Serb forces in that locality in December 1991.

Region of Banovina/Banija

(a) *Joševica*

251. Croatia claims that several Croats were killed by Serb forces in Joševica, a village situated in the Glina municipality and populated almost exclusively by Croats. It states that Serb paramilitary forces killed three villagers on 5 November 1991. On 16 December 1991, those Serb forces are said to have returned to the village and searched the houses one by one in order to slaughter Croat citizens; 21 people were reportedly killed in this way. According to the Applicant, the majority of Croats left the village following these killings; only ten stayed behind. Of those ten, four were then killed in 1992. The remaining Croats then left the village.

252. Serbia repeats its general assertion regarding flaws in the statements appended to Croatia's written pleadings (see paragraph 192 above). Serbia also states that the Applicant has not produced any detailed information in support of its claim that killings were perpetrated in 1992. Finally, it observes that no individual has been indicted or sentenced by the ICTY for the alleged crimes.

253. Croatia relies on statements in order to substantiate its allegations. Among them is that of Ms Paula Milić (pseudonym), who was called for oral testimony and appeared before the Court. The Court notes that, according to her statement, Ms Milić witnessed the killings committed on 5 November 1991 by Serb forces. This part of her statement was not contested by Serbia. Moreover, it is corroborated by the statement of I. S., who attests to having subsequently buried the three individuals named by Ms Milić. For these reasons, the Court considers that Ms Milić's testimony has evidential weight.

254. With respect to the alleged killings on 16 December 1991, Croatia provides a statement by A. S. Although this statement originally took the form of a police record, it has subsequently been confirmed by A. S., and the Court considers that it can give it evidential weight. A. S. describes Serb forces in mottled uniforms entering her home on 16 December 1991 and firing shots at her and others. While suffering from gunshot wounds,

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she crawled on her knees from one grandchild to another and to her cousin and she saw that they were all dead. A medical report is attached to the statement, confirming her gunshot wounds. Her evidence of killings on 16 December 1991 is corroborated by the statement of I. S., examined in the previous paragraph.

255. Croatia also relies on the Helsinki Watch Report (see paragraph 249 above). The relevant section of the Report describes the killing of Croats by Serb forces in Joševica in mid-December 1991. The ICTY referred to it in its Judgment in the *Martić* case (*Martić* Trial Judgment, para. 324, footnote 1002) before finding that Croats had been killed in the SAO Krajina in 1991, but that does not give the Report value as such. However, the Court notes that this Report confirms the evidence outlined above.

256. In light of the foregoing, the Court concludes that Croatia has established that Serb forces carried out killings of Croats in Joševica on 5 November 1991 and 16 December 1991. In contrast, Croatia has failed to provide sufficient evidence that killings were committed in 1992, the statements relied on in this regard being neither signed nor confirmed.

(b) *Hrvatska Dubica and its surrounding area*

257. Croatia claims that numerous Croats were killed by units of the JNA and Serb forces in the Hrvatska Kostajnica municipality, notably inhabitants of the villages of Hrvatska Dubica, Cerovljani and Baćin. In particular, the Applicant alleges that, in October 1991, 60 ethnic Croats from the surrounding villages were rounded up and held at the fire station in Hrvatska Dubica. They were then executed by a firing squad in a meadow close to Baćin and their bodies subsequently buried in a previously prepared mass grave.

258. In response, Serbia disputes the probative value of the evidence produced by Croatia. It notes, however, the conclusions of the ICTY Trial Chamber in the *Martić* case, in which it was found that a number of killings of Croats had taken place in this area.

259. The Court notes that several of the crimes whose perpetration has been alleged by the Applicant have been examined by the Chambers of the ICTY. In its Judgment rendered on 12 June 2007 in the *Martić* case, the Trial Chamber concluded that 41 civilians (the large majority Croats) from Hrvatska Dubica were executed on 21 October 1991 by Serb forces (*Martić* Trial Judgment, paras. 183, 354, 358). The Trial Chamber further found that nine civilians from Cerovljani and seven civilians from Baćin were executed on or around 20-21 October 1991 by the JNA or Serb forces, or a combination thereof, and that a further 21 inhabitants of Baćin were killed during the month of October 1991 by the JNA or Serb forces, or a combination thereof (*Martić* Trial Judgment, paras. 188-191,

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359, 363-365, 367). The ICTY Trial Chamber in the *Stanišić and Simatović* case reached the same conclusions concerning the victims from Hrvatska Dubica and Cerovljani (*Stanišić and Simatović* Trial Judgment, paras. 56-64 and 975).

260. These findings substantiate the evidence presented by Croatia before the Court. In particular, Croatia has produced the statement made before a Croatian court by Mr. Miloš Andrić (pseudonym), whom it called for oral testimony but whom Serbia did not wish to cross-examine. In his statement, Mr. Andrić indicates in particular that, following the Baćin massacre, he was present in person during the identification of the bodies in the mass grave; he states that civilians had been heaped in the grave, all crumpled, and that many of them had been beaten to death, struck on the head by blunt instruments.

261. The Court concludes that a significant number of Croat civilians were killed by the JNA and Serb forces in Hrvatska Dubica and its surrounding area during October 1991.

Region of Kordun

Lipovača

262. The Applicant alleges that the JNA seized the Croat-majority village of Lipovača at the end of September or the beginning of October 1991, causing most of its inhabitants to flee; only 16 Croats remained. It claims that seven Croat civilians were then killed by Serb forces on 28 October 1991, which led to the departure of a further four Croats from the village. According to Croatia, the five remaining Croats were subsequently killed on 31 December 1991. The Applicant points out that the ICTY Trial Chamber in the *Martić* case examined in detail the events which took place in Lipovača and concluded that seven Croat civilians had been killed by Serb forces at the end of October 1991 (*Martić* Trial Judgment, paras. 202-208).

263. The Respondent concedes that the ICTY's Judgment in the *Martić* case confirmed the killing of seven civilians by Serb paramilitary forces in Lipovača at the end of October 1991. It maintains, however, that the other alleged crimes have not been convincingly established.

264. The Court notes that the ICTY has examined the Lipovača killings in two judgments. In the *Martić* Trial Judgment, the Trial Chamber found that the seven individuals alleged by the Applicant to have been killed on 28 October 1991 had indeed been executed in Lipovača on or around that date after the arrival of Serb forces. It held that there was direct evidence of the Croat ethnicity of three of the victims and deduced from all the evidence available to it that the other four victims were also Croats (*ibid.*, para. 370). However, in the *Stanišić and Simatović* case, the Trial Chamber concluded that the Croat ethnicity of only three of the victims had been established (*Stanišić and Simatović* Trial Judgment, para. 67).

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265. In respect of the killings allegedly committed in December 1991, the *Martić* Trial Chamber found that the five persons named by the Applicant had been killed at some point during the occupation of the village by Serb forces, although the accused was not convicted of those killings because they were not listed in the indictment (*Martić* Trial Judgment, footnote 555). The *Stanišić and Simatović* Trial Chamber also concluded that those five individuals had been killed in Lipovača, but added that it could not determine who had committed these killings, and did not consider them any further (*Stanišić and Simatović* Trial Judgment, para. 68). In neither of these cases did the Trial Chamber rule on the ethnicity of the victims.

266. The only statement produced by Croatia in support of its allegation relating to the killings of 31 December 1991 is based on hearsay and does not, in the opinion of the Court, make it possible for the existence of the facts in question to be established. Consequently, the Court is unable to uphold the Applicant's claim that five Croats were killed on 31 December 1991.

267. The Court deduces however from the foregoing that it has been established that Serb forces killed at least three Croats on 28 October 1991 in Lipovača.

Region of Lika

(a) *Saborsko*

268. The Applicant states that the village of Saborsko, situated in the Ogulin municipality and populated predominantly by Croats, was surrounded and shelled by Serb paramilitary forces from the beginning of August 1991 until 12 November of the same year, when it was attacked by combined JNA and Serb paramilitary forces. According to Croatia, following aerial bombardments and sustained artillery and mortar fire, the JNA and Serb paramilitaries entered the village and began destroying property belonging to Croats and killing the remaining civilian population. Croatia points out that, in the *Martić* and *Stanišić and Simatović* cases, the ICTY examined in detail the events which took place in Saborsko.

269. Serbia recognizes that "most of the acts alleged to have taken place in Saborsko have been confirmed by the judgment[s] of the ICTY"; it adds, however, that they were not committed with genocidal intent.

270. Since Serbia does not dispute the existence of the alleged facts to the extent that they have been established before the ICTY, the Court will refer to the ICTY's conclusions. Thus, the Trial Chamber in the *Martić* case concluded that 20 people had been killed by the JNA and Serb forces on 12 November 1991, at least 13 of whom were civilians not taking an active part in the hostilities at the time of their death. The Chamber fur-

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ther found that the killings had been carried out with intent to discriminate on the basis of Croat ethnicity (*Martić* Trial Judgment, paras. 233-234, 379 and 383). In the *Stanišić and Simatović* case, the Trial Chamber confirmed the killings of nine Croats in Saborsko on 12 November 1991 by the JNA and Serb forces, but noted that it had received insufficient evidence on the circumstances in which the other 11 persons had been killed (*Stanišić and Simatović* Trial Judgment, paras. 102-107, 975). The Court also notes that certain statements produced by Croatia corroborate the findings of the ICTY.

271. In light of the foregoing, the Court concludes that it has been established that the JNA and Serb forces killed several Croats in Saborsko on 12 November 1991.

(b) *Poljanak*

272. Croatia claims that in 1991, the village of Poljanak (Titova Korenica municipality) had 160 inhabitants, 145 of whom were Croats. In the autumn of 1991, numerous Croat civilians from the village were allegedly killed by the JNA and Serb forces.

273. The Applicant relies in particular on the factual findings of the ICTY Trial Chamber in the *Martić* Judgment (*Martić* Trial Judgment, paras. 211-213 and 216-219) in claiming that, between September and November 1991, several attacks were carried out against civilians in Poljanak and its hamlet Vukovići.

274. Serbia acknowledges that, in the *Martić* Judgment, the ICTY Trial Chamber confirmed that a number of killings had been committed in Poljanak.

275. The Court observes that several of the crimes whose perpetration is alleged by the Applicant were examined by the ICTY Trial Chamber in its *Martić* Judgment. In particular, that Chamber concluded that:

— one Croat civilian had been killed on 8 October 1991 by the JNA and armed inhabitants (*ibid.*, paras. 212, 371, 377);
— on or around 14 October 1991, two Croat civilians had been found hanged in their homes, although it was not clear from the evidence whether these men had been murdered or committed suicide (*ibid.*, para. 212 and footnote 566);
— on 7 November 1991, seven Croat civilians had been lined up and executed by the JNA and armed inhabitants at the house of Nikola "Sojka" Vuković, while the latter had been shot from the window while he was lying sick in his bed (*ibid.*, paras. 214, 371, 377);
— finally, also on 7 November 1991, 20 Serb soldiers had surrounded a family home in Poljanak and then shot two Croat men, having separated them from the women and a boy (*ibid.*, paras. 216-218, 372, 377).

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276. The Court also notes that the Appeals Chamber in the *Martić* case concluded that the perpetrators of three of these murders (that committed on 8 October 1991 and the murders of two men on 7 November 1991) could not be identified with certainty and thus acquitted the accused of those crimes (IT-95-11-A, Judgment of 8 October 2008, paras. 200-201). However, it upheld the finding that the accused was responsible for the massacre of eight Croats on 7 November 1991 by the JNA and armed inhabitants (*ibid.*, paras. 204-206). Subsequently, the Trial Chamber in the *Stanišić and Simatović* case also concluded that the said massacre had been established (*Stanišić and Simatović* Trial Judgment, paras. 85 and 975). The Court notes that the ICTY's findings are not contested by Serbia. Consequently, it does not deem it necessary to examine the other evidence produced by Croatia, in particular the statements appended to its written pleadings.

277. The Court deduces from the foregoing that it has been established that several killings were perpetrated by the JNA and Serb forces in Poljanak against members of the protected group in November 1991.

Region of Dalmatia

(a) *Skabrnja and its surrounding area*

278. Croatia claims that, on 18 and 19 November 1991, the JNA and Serb forces killed dozens of Croat civilians in Skabrnja and the neighbouring village of Nadin, both located in the Zadar municipality of Dalmatia, and populated almost exclusively by ethnic Croats.

279. The Applicant alleges that, throughout September and October 1991, Skabrnja and Nadin were subjected to mortar fire and aerial bombardments with no military justification. It claims that, following the deaths of three civilians at the start of October, the majority of Skabrnja's inhabitants had been evacuated; most, however, had returned after a ceasefire agreement was signed on 5 November 1991. Croatia asserts that, in breach of that agreement, the JNA and Serb forces launched a full-scale aerial and ground assault on the two villages on 18 and 19 November 1991. According to the Applicant, after intensive shelling, infantry troops and heavily armed paramilitaries invaded Skabrnja; JNA tanks fired on houses, the school and a church, while Serb forces fired rocket launchers at dwellings.

280. Croatia maintains that, after occupying Skabrnja and Nadin, Serb forces attacked Croat civilians. It claims that those forces killed civilians who had hidden in the basements of their houses during the fighting. In particular, the Applicant invokes, in support of its allegations, the factual findings of the ICTY in the *Martić* and *Stanišić and Simatović* cases, pointing out that the Tribunal ruled that there had been a number of killings of Croat civilians in Skabrnja and Nadin.

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281. In response to the accusations made against it, Serbia does not deny that crimes were perpetrated in the two above-mentioned villages. It accepts that atrocities were committed against the civilian population and admits that the majority of the killings alleged by the Applicant have been confirmed by the ICTY's Trial Judgment in the *Martić* case. The Respondent argues, however, that fierce fighting occurred before the JNA and Serb forces entered the village of Skabrnja, resulting in heavy losses to those forces, and that some Croatian combatants were dressed in civilian clothing.

282. Croatia bases its allegations on the statement of Mr. Ivan Krylo (pseudonym), whom it called for oral testimony. Mr. Krylo appeared before the Court and was cross-examined by Serbia at a closed hearing (see paragraph 46 above). The Court notes that, in his written statement, Mr. Krylo states that a number of people had taken shelter in the basements of their homes during the fighting which took place in Skabrnja on the morning of 18 November 1991, and that, after invading the village, the JNA and Serb forces flushed those people out and shot several of them. Mr. Krylo further claims that he was taken prisoner along with other villagers, and detained and subjected to violence over the course of the following months. The Court notes that Serbia did not dispute that killings had been perpetrated against the inhabitants of Skabrnja. During Mr. Krylo's cross-examination, its questions focused on the fighting that preceded the capture of the village. The Respondent even accepted that "when the town surrendered to the Serb forces, there were atrocities committed on civilians".

283. The Court next observes that, in the *Martić* case, the Trial Chamber noted that around 50 people had been murdered by the JNA and Serb forces in Skabrnja and the surrounding villages, including Nadin, on 18 and 19 November 1991, observing that "the majority of the victims in Skabrnja . . . were of Croat ethnicity" (*Martić* Trial Judgment, paras. 386-391, 398); the Tribunal also found that 18 civilians had been murdered by the JNA and Serb forces in Skabrnja between 18 November 1991 and 11 March 1992 (*ibid.*, para. 392). The Court further observes that, in the *Stanišić and Simatović* case, the Trial Chamber held that 37 Croats had been murdered in Skabrnja on 18 November 1991 by the JNA and Serb forces (*Stanišić and Simatović* Trial Judgment, paras. 131-136, 975).

284. In light of the foregoing, the Court concludes that it has been established that killings were perpetrated by the JNA and Serb forces in Skabrnja and Nadin against members of the protected group between 18 November 1991 and 11 March 1992.

(b) *Bruška*

285. The Applicant alleges that, on 21 December 1991, Serb paramilitaries killed nine Croats in the village of Bruška, in the Benkovac municipality, which had a population that was approximately 90 per cent

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Croat. It adds that another Croat was murdered in June 1992. The Applicant points out that, in the *Martić* case, the ICTY Trial Chamber examined in detail the events which took place in Bruška and concluded that the nine individuals named had been killed on 21 December 1991 by the Krajina militia *(Milicija Krajine)*. The Chamber further concluded that those individuals were all civilians, not taking an active part in the hostilities at the time of their death, and that the killings had been carried out with intent to discriminate on the basis of Croat ethnicity (*Martić* Trial Judgment, paras. 400 and 403).

286. The Respondent accepts that the *Martić* Trial Chamber examined the events which took place in the Benkovac municipality and found that nine Croats had been killed in Bruška. It maintains, however, that the allegations concerning other crimes are not supported by sufficient evidence.

287. In respect of the killings of 21 December 1991, the Court finds, in light of the foregoing, that it has been conclusively established that the nine individuals named by the Applicant were killed on that day by the *Milicija Krajine*, and that those individuals are the same as those listed in the Judgment rendered by the ICTY in the *Martić* case, referred to above, and in the *Stanišić and Simatović* case (*Stanišić and Simatović* Trial Judgment, paras. 145-147).

288. With regard to the killing alleged to have been perpetrated in June 1992, the Court observes that this was not examined by the Trial Chamber in either the *Martić* case or the *Stanišić and Simatović* case. Furthermore, it notes that the statement produced by Croatia in support of this claim does not constitute a first-hand account of the events in question. In the Court's view, the Applicant has not proved that this killing took place.

(c) *Dubrovnik*

289. The Applicant claims that numerous Croat civilians were killed by the JNA in or around Dubrovnik, a town where 80 per cent of the population was of Croat origin. It states that, on 1 October 1991, the JNA instituted a blockade of Dubrovnik from land, sea and air, and that civilians were given an opportunity to leave the town at the end of that month. Thereafter, according to Croatia, all supplies were cut off and the town was bombarded with heavy artillery until the end of the year. The Applicant claims that 123 civilians from Dubrovnik were killed during the course of these events.

290. For its part, the Respondent argues that the evidence submitted by the Applicant cannot substantiate its allegations, because it is either inadmissible or it has no probative value. It also points out that the crimes allegedly committed in Dubrovnik were examined by two ICTY Trial Chambers in the *Jokić* and *Strugar* cases, and that those Chambers concluded that there had been a limited number of civilian victims.

291. The Court notes that only one of the statements produced on the subject of this locality describes a death which could be categorized as a

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killing within the meaning of Article II *(a)* of the Convention. This statement is not a first-hand account however and is insufficient, on its own, to prove Croatia's allegations.

292. The Applicant also has presented letters from the Croatian police in support of its claim regarding the number of victims. The Court observes that these were drawn up specifically for the purposes of the present case. As the Court has had occasion to observe in the past, it "will treat with caution evidentiary materials specially prepared for th[e] case and also materials emanating from a single source" (*Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Uganda), Judgment, I.C.J. Reports 2005*, p. 201, para. 61). Furthermore, these letters do not indicate the circumstances in which the 123 supposed victims were killed, nor whether they were Croats. As regards the other documents prepared by the Dubrovnik Police Department, although drawn up at the time of the events and not solely for the purposes of this case, they have not been corroborated by evidence from an independent source and appear only to refer to two deaths which might be categorized as killings within the meaning of Article II *(a)*.

293. In the *Jokić* and *Strugar* cases, it was established before the ICTY that two civilians had been killed during the unlawful shelling of the old town on 6 December 1991 (*Jokić*, IT-01-42/1-S, Trial Chamber, Sentencing Judgment of 18 March 2004, para. 27; *Strugar*, IT-01-42-T, Trial Chamber, Judgment of 31 January 2005 (hereinafter "*Strugar* Trial Judgment"), paras. 248, 250, 256, 259 and 289). In the *Strugar* case, the ICTY also found that at least one individual had been killed during the shelling of the town on 5 October 1991 (*ibid.*, para. 49).

294. The Court concludes from the foregoing that it has been established that some killings were perpetrated by the JNA against the Croats of Dubrovnik between October and December 1991, although not on the scale alleged by Croatia.

Conclusion

295. On the basis of the facts set out above, the Court considers it established 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. Furthermore, the evidence presented shows 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 (see paragraph 205), were committed, and that the *actus reus* of genocide specified in Arti-

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cle II *(a)* of the Convention has therefore been established. At this stage of its reasoning, the Court 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*

296. Croatia alleges that the JNA and Serb forces also inflicted serious bodily harm on Croats. Such harm is alleged to have taken the form of physical injury, ill-treatment and acts of torture, rape and sexual violence. Moreover, Serbia's failure to co-operate in the process of tracing and identifying missing persons is alleged to have caused their surviving relatives psychological pain constituting serious mental harm.

297. The Court will examine in turn Croatia's allegations concerning the various localities where acts causing serious bodily or mental harm to members of the protected group were allegedly perpetrated, after which it will address the alleged infliction of mental harm on the relatives of missing persons.

Region of Eastern Slavonia

(a) *Vukovar*

298. Croatia claims that, between August and December 1991 at Vukovar, the JNA and Serb forces injured Croat civilians and prisoners of war, subjected them to ill-treatment and torture, and also committed rape and sexual violence. For the purposes of the Court's analysis, Croatia's claims will be examined successively by reference to the various phases of the battle for Vukovar.

(i) *The shelling of Vukovar*

299. Croatia claims that, during the shelling of Vukovar by the JNA between 25 August and 18 November 1991, large numbers of Croat civilians were injured. According to Serbia, the only reason that the ICTY found the attack on Vukovar to have been unlawful was that it was partly directed against civilians. However, Serbia argues that the attack must be considered in the wider context of a lawful military operation against the Croatian armed forces.

300. The Court recalls that, in the *Mrkšić et al.* case, the ICTY found that large numbers of civilians had been injured by the JNA and Serb forces during the siege of Vukovar (*Mrkšić* Trial Judgment, para. 472, reproduced in paragraph 218 above).

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301. The Court regards the Tribunal's factual findings as sufficient to confirm that, during the attack on Vukovar and the surrounding area, the JNA and Serb forces injured a large number of Croat civilians, without it being necessary to determine their exact number.

(ii) *The capture of Vukovar and its surrounding area*

302. Croatia claims that, during the capture of Vukovar and the surrounding area, which took place between mid-September and mid-November 1991, the JNA and Serb forces perpetrated acts of ill-treatment, torture and rape against Croat civilians. They are also alleged to have deported Croat civilians to camps located in Serbia, where they were subjected to torture and ill-treatment.

303. Serbia disputes Croatia's allegations. It argues that they are unfounded, and that the statements presented by Croatia are mere hearsay and lack precision.

304. The Court notes that Croatia's allegations rely essentially on statements that were either signed or subsequently confirmed. Although some of these statements were made several years after the events in question, they are by victims or eyewitnesses of acts of ill-treatment, torture and rape. The Court gives evidential weight to these statements.

305. Accordingly, the Court finds that Croatia has shown that acts of ill-treatment, torture and rape were perpetrated against Croats by the JNA and Serb forces during the capture of Vukovar and the surrounding area.

(iii) *The invasion of Vukovar hospital and the transfers to Ovčara and Velepromet camps*

306. Croatia alleges that, on 19 and 20 November 1991, the JNA and Serb forces invaded the hospital at Vukovar where Croats had taken refuge and subsequently transferred them to camps at Ovčara and Velepromet, where they were ill-treated and tortured. Croatia further alleges that Croat women were raped at Velepromet.

307. Serbia admits that crimes were committed at Ovčara by Serb forces. However, it points out that, in the *Mrkšić et al.* case, the accused were not prosecuted for genocide, and that the ICTY characterized the crimes in question as war crimes.

308. Regarding the events at Ovčara, the Court notes that Serbia does not dispute that they took place. In the *Mrkšić et al.* case, the ICTY made the following findings on those events:

> "530. The Chamber is persuaded and finds that the beatings of prisoners of war from Vukovar hospital outside the hangar on 20 November 1991 were well capable of inflicting severe physical pain, and in very many cases they did so. They constitute the *actus reus* of torture. The Chamber is also satisfied that the acts of grave and per-

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sistent mistreatment to so many prisoners that occurred inside the hangar during the afternoon of 20 November 1991 were such as to constitute the *actus reus* of torture.

531. Turning to the *mens rea* requisite for the offence of torture the Chamber refers to the nature and duration of the beatings, the implements used by the perpetrators to inflict suffering, the number of persons attacking individual victims, the verbal threats and abuse occurring simultaneously with the beatings, and the terribly threatening atmosphere in which the victims were detained as they were beaten. All these factors indicate that the beatings outside and in the hangar were carried out intentionally

. . . . . .

536. Further, the Chamber is persuaded and finds that the beatings of prisoners of war from Vukovar hospital outside and inside the hangar on 20 November 1991 constitute the *actus reus* of cruel treatment. The Chamber is satisfied that these beatings were carried out with the requisite *mens rea* to constitute cruel treatment

. . . . . .

538. With respect to the *mens rea* requisite for cruel treatment, the Chamber accepts that in keeping the prisoners under constant threat of beatings and physical abuse, in creating an atmosphere of fear, in depriving the prisoners of food and water as well as toilet facilities, the direct perpetrators acted with the intent to cause physical suffering, or an affront to the detainees' human dignity, or in the knowledge that cruel treatment was a probable consequence of their acts, or with all or some of these intents. The Chamber finds that the intent requisite for cruel treatment has been established." (*Mrkšić* Trial Judgment, paras. 530, 531, 536 and 538.)

309. The Court notes that Serbia does not dispute the existence of the facts found by the ICTY. It considers that the Tribunal's findings are sufficient to establish that acts of ill-treatment and torture were perpetrated against Croats by certain members of the JNA and Serb forces at Ovčara.

310. Regarding the events at Velepromet, Croatia has produced a statement by Mr. Franjo Kožul, who appeared before the Court, and to whose testimony the Court has already given evidential weight (see paragraph 222 above). Mr. Kožul described scenes of ill-treatment. His testimony is corroborated by the findings of the ICTY in the *Mrkšić et al.* case. Although these facts were not referred to in the indictment, the Trial Chamber found that

"on 19 November 1991 some hundreds of non-Serb people were taken from the Vukovar hospital and transferred to the facility of Velepromet by Serb forces. Others arrived at Velepromet from elsewhere. At

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> Velepromet these people were separated according to their ethnicity and suspicion of involvement in the Croatian forces. The Chamber finds it established that interrogations of some of these people were conducted at Velepromet in the course of which the suspects were beaten, insulted or otherwise mistreated. A number of them were shot dead at Velepromet, some of them on 19 November 1991. The Chamber finds that many, if not all, of the persons responsible for the brutal interrogations and killings were members of the Serb TO or paramilitary units." (*Mrkšić* Trial Judgment, para. 167.)

Croatia has also produced a statement of an individual, B. V., who was taken from Velepromet to the JNA barracks and raped by five men. The Court considers that it must give this statement evidential weight.

311. The Court finds that Croatia has shown that acts of ill-treatment and rape were perpetrated against Croats by Serb forces at Velepromet.

(b) *Bapska*

312. Croatia claims that, from October 1991, the JNA and Serb forces perpetrated acts of ill-treatment and torture against the Croat inhabitants of Bapska, a village located 26 km south-east of Vukovar, with a population some 90 per cent of whom were Croats. The JNA and Serb forces also allegedly committed rape and other acts of sexual violence. Croatia has produced a number of statements in support of its allegations.

313. Serbia disputes the probative value of those statements.

314. Among the items produced by Croatia, the Court notes the signed statement of F. K., as well as those of A. S., J. K. and P. M., which were subsequently confirmed. The authors of those statements are victims of ill-treatment, as well as rape and other acts of sexual violence. The Court considers that it must give these statements evidential weight.

315. The Court accordingly finds that Croatia has established that, from October 1991 to January 1994 at Bapska, the JNA and Serb forces subjected members of the protected group to acts of ill-treatment and committed rape and other acts of sexual violence.

(c) *Tovarnik*

316. Croatia claims that, from September 1991 and continuing throughout the year 1992, the JNA and Serb forces perpetrated acts of ill-treatment, torture and sexual violence (including rape and castration) against Croats in the village of Tovarnik, located south-east of Vukovar and having a majority Croat population, and that Croats were transferred to Begejci camp, where they were tortured.

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317. Serbia contends that Croatia has failed to prove the perpetration of such acts at Tovarnik. It disputes the probative value of the statements produced by Croatia in support of its allegations.

318. The Court notes that Croatia mainly bases its allegations on statements appended to its written pleadings. The Court considers that it can give credence to several signed or confirmed statements. These statements were made by victims of acts of ill-treatment, or by persons having witnessed such acts, as well as acts of sexual violence perpetrated against Croats at Tovarnik.

319. The Court accordingly finds that Croatia has shown that acts of ill-treatment and sexual violence were perpetrated against Croats by the JNA and Serb forces at Tovarnik, in or around the month of September 1991. It finds in contrast that the allegations of rape have not been established.

(d) *Berak*

320. Croatia alleges that, between September and December 1991, the JNA and Serb forces perpetrated acts of ill-treatment against the Croat inhabitants of the village of Berak, located some 16 km from Vukovar and having a majority Croat population, and that those forces established a prison camp in the village, where Croats were allegedly tortured. Several instances of rape are also alleged.

321. Serbia maintains that Croatia has failed to provide sufficient evidence of the acts alleged by it. It contends that the statements produced by Croatia lack probative value. It further points out that the ICTY has not prosecuted or convicted any individuals for crimes committed at Berak.

322. Croatia bases its allegations on statements appended to its written pleadings. The Court considers that it can give credence to several statements which have been confirmed subsequently. These are accounts by victims of acts of ill-treatment or rape, or by individuals who witnessed such acts.

323. Croatia has also produced a report prepared by Stanko Penavić, Deputy Defence Commander of Berak at the time of the events in question, concerning the 87 persons held at Berak between 2 October and 1 December 1991. That report lists individuals injured or raped and corroborates the previous evidence.

324. The Court accordingly finds that Croatia has shown that acts of ill-treatment and rape were perpetrated against members of the protected group by Serb forces and the JNA at Berak between September and October 1991.

(e) *Lovas*

325. Croatia alleges that Serb forces perpetrated acts of torture, as well as rape and other acts of sexual violence against Croats in the village of Lovas between October 1991 and December 1991. Croats are also alleged

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to have been injured during the "minefield massacre" (see paragraph 233 above).

326. Serbia has disputed the probative value of the statements presented by Croatia, but admits that the suspected perpetrators of some of the acts alleged by Croatia are being prosecuted before Serbian courts. It argues, however, that these were not acts of genocide, but rather war crimes or crimes against humanity.

327. In support of its allegations, Croatia relies on the indictment prepared by the War Crimes Prosecutor for the Belgrade District Court, issued against 14 Serbs accused, *inter alia*, of ill-treatment and torture of Croat civilians at Lovas, to which the Court has already found that it cannot give any evidential weight in itself (see paragraph 237 above).

328. Croatia also relies on a number of statements, in particular that of Stjepan Peulić, a witness whom Serbia did not wish to cross-examine (see paragraph 25 above), to whose statement the Court has already given evidential weight (see paragraph 236 above). Mr. Peulić describes the ill-treatment suffered by him at the hands of Serb forces. Croatia also produces a statement by another victim of ill-treatment by Serb forces, to which the Court also gives evidential weight.

Regarding the allegations of rape, one of the statements is from an individual alleged to have been raped by a member of Serb forces, but it is neither signed nor confirmed. The Court considers that it cannot give it evidential weight. Another statement refers to rape of Croat women by Serb forces, but its author did not witness the events at first hand. The Court cannot give this statement any evidential weight.

329. Croatia further relies on a documentary film produced by a Serbian television channel, which includes descriptions of the "minefield massacre". While a documentary of this kind cannot in itself serve to prove the facts alleged (see paragraph 239 above), it does corroborate the previous evidence with respect to the allegations of ill-treatment.

330. In light of the foregoing, the Court finds that Croatia has established that acts of ill-treatment were perpetrated against members of the protected group by Serb forces at Lovas between October and December 1991. It considers that the allegations of rape and other acts of sexual violence have not been proved.

(f) *Dalj*

331. Croatia alleges that, following the occupation of the village of Dalj by the JNA as from 1 August 1991, Serb forces perpetrated acts of ill-treatment and torture against Croat civilians, and that Croat soldiers and civilians captured during the hostilities at Vukovar were transferred to Dalj, where they were tortured and raped.

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332. Serbia maintains that Croatia has failed to provide sufficient evidence of the facts which it alleges. It disputes the probative value of the statements produced by Croatia.

333. The Court notes that Croatia's allegations are based on statements by individuals. It observes that some of these are unsigned and were taken by the Croatian police, and cannot be relied on by the Court, for the reasons set out previously (see paragraph 198 above). Another statement was made by a victim of ill-treatment. It seems to have been made before a court in domestic judicial proceedings. However, it is neither signed, nor confirmed. The Court cannot give it any evidential weight. On the other hand, some statements were signed or subsequently confirmed. They are by victims of ill-treatment. The Court considers that it must give them evidential weight.

334. The Court notes that, in the *Stanišić and Simatović* case, the ICTY Trial Chamber found that

> "following the take-over of Dalj, civilians, policemen, as well as a person called Dafinić, who the Trial Chamber elsewhere found was an SNB member . . . engaged in looting of houses. In August 1991, Croats, including Zlatko Antunović, and Hungarians were detained by Milorad Stričević and the TO at the Dalj police station and were beaten by members of the SDG. In September 1991, the detainees of the Dalj police station were forced to engage in manual labour and were further beaten by the aforementioned. Members of the Prigrevica paramilitaries also participated in the beatings." (*Stanišić and Simatović* Trial Judgment, para. 528; reference omitted.)

335. The Court considers that these findings of the ICTY corroborate the statements produced by Croatia. The Court accordingly finds that Croatia has proved that, following the capture of Dalj in August 1991, Serb forces perpetrated acts of ill-treatment against Croats. On the other hand, it finds that the allegations of rape have not been proved.

Region of Western Slavonia

(a) *Kusonje*

336. Croatia claims that, on 8 September 1991, a group of Croat soldiers was ambushed and took refuge in the village of Kusonje, where they were captured and then tortured by Serb forces, before being killed.

337. Serbia disputes the probative value of the evidence produced by Croatia, and moreover observes that no individual has been prosecuted or convicted by the ICTY on account of acts committed at Kusonje.

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338. In support of its allegations, Croatia relies on two statements taken by the Croatian police, which are not signed or otherwise confirmed by the individuals allegedly having made these statements. The Court cannot give evidential weight to these statements.

339. The other evidence produced by Croatia consists of a list of dead civilians in the municipality of Pakrac and a video showing the exhumation of a mass grave; these do not concern the events alleged to have taken place on or around 8 September 1991 at Kusonje.

340. The Court accordingly considers that Croatia has failed to provide sufficient evidence that Serb forces perpetrated acts of torture at Kusonje on or around 8 September 1991.

(b) *Voćin*

341. Croatia alleges that, between August and December 1991 at Voćin, Serb forces subjected Croats to ill-treatment and torture, and raped Croat women.

342. Serbia disputes the probative value of the evidence presented by Croatia, describing it as hearsay. Serbia notes that Slobodan Milošević's indictment at the ICTY refers to the murder of 32 Croat civilians at Voćin on 13 December 1991 by Serb paramilitaries, but that there is no reference in any judgment or indictment of the ICTY to any of the other crimes.

343. The Court notes that Croatia's allegations rest essentially on statements. It observes that the statement by M. S. refers to ill-treatment of Croats by Serbs, but the author does not appear to have witnessed this directly. The Court thus cannot give the statement any evidential weight in this regard. A statement by a nurse, D. V., working in the clinic at Voćin also describes ill-treatment of Croats by Serb forces inside the clinic. This statement appears to have been made in the context of domestic judicial proceedings, but contains no details about the nature of the proceedings or the court where the statement was made. Moreover, the statement is not signed. The Court thus considers that it cannot give it any evidential weight. On the other hand, the statement by F. D. is signed, and can be given evidential weight as regards the allegations of ill-treatment. The author describes the acts of ill-treatment to which he and others with him were subjected at the hands of Serb forces in late August 1991. Serbia acknowledges, moreover, that his statement represents a first-hand account of ill-treatment and beatings. In his statement, F. D. also claims to have heard a woman screaming and assumed that she was being raped. However, it appears that he did not witness this alleged rape directly. Accordingly, the Court cannot give it evidential weight with respect to the allegations of rape.

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344. Croatia cites a publication entitled *The Anatomy of Deceit* by Doctor Jerry Blaskovich, in which he describes the torture suffered by a Croat at the hands of Serb forces. The Court recalls that a publication of this kind can only constitute secondary evidence and can only be used to corroborate facts established by other evidence (see paragraph 239 above). The Court is therefore unable to find, solely on the basis of this publication, that acts of torture were committed at Voćin by Serb forces.

345. Croatia also cites the Helsinki Watch Report. The Court notes that the section describing acts of ill-treatment and torture perpetrated by Serb forces at Voćin in late December 1991 relies on eyewitness testimony and autopsy reports. It recalls that the authors of the testimony are not identified, and that the autopsy reports are not appended to the Helsinki Watch Report (see paragraph 249 above). The Court is unable to conclude, on the basis of that Report alone, that acts of ill-treatment and torture were perpetrated by Serb forces at Voćin in December 1991.

346. In light of the above, the Court accordingly finds that Croatia has shown that acts of ill-treatment were perpetrated against Croats by Serb forces at Voćin in August 1991. It finds that Croatia has not proved its allegations of rape.

(c) *Dulovac*

347. Croatia contends that, from September 1991, Serb forces ill-treated and tortured (in particular mutilated) Croats living in the village of Dulovac, located in the municipality of Daruvar and with a Croat population of around 50 per cent. Serb forces also allegedly established a prison in the village's veterinary station and tortured villagers there, before transferring them to other camps.

348. Serbia disputes the probative value of the statements produced by Croatia in support of these allegations, and further points out that no individual has been prosecuted or convicted by the ICTY for crimes committed in the municipality of Daruvar.

349. The Court notes that Croatia relies on statements to which it can give evidential weight. This is the case, in particular, for two signed statements made, respectively, before a Croatian investigating judge and the representative of the Croatian Government in the Daruvar municipality, by victims of ill-treatment inflicted by the Serb forces.

350. While these statements do not substantiate all of Croatia's allegations, the Court concludes that Serb forces perpetrated acts of ill-treatment against Croats at Dulovac between September and December 1991.

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Region of Dalmatia

Knin

351. Croatia alleges that acts of ill-treatment, torture and sexual violence were perpetrated against Croats in detention centres located in the former hospital at Knin and in the barracks of the JNA 9th Corps.

352. Croatia produces *inter alia* two statements by victims of ill-treatment and torture perpetrated by Serb forces in the former hospital at Knin. One of these victims also witnessed acts of sexual violence, and his statement represents a first-hand account of the events in question. The Court considers that it can give these statements evidential weight.

353. The Court notes that this evidence is corroborated by the findings of the ICTY. Thus, in the *Martić* case, the ICTY found that between 120 and 300 persons were detained in the former hospital at Knin (for the period from mid-1991 to mid-1992), and between 75 and 200 persons were detained in the barracks of the JNA 9th Corps, amongst whom were Croat and non-Serb civilians, as well as members of the Croatian armed forces. The ICTY found that these persons had been subjected to ill-treatment by Serb forces or other individuals and that those acts had caused them serious physical and mental suffering. The Tribunal described these acts as torture and cruel and inhumane treatment, and noted that they had been committed with discriminatory intent based on ethnic origin (*Martić* Trial Judgment, paras. 407-415). The Tribunal also accepted that, at the former hospital at Knin, some of the prisoners were subjected to acts of sexual violence (*ibid.*, para. 288). In the *Stanišić and Simatović* case, the Trial Chamber made similar findings (*Stanišić and Simatović* Trial Judgment, paras. 387-390).

354. The Court considers that it has been established that acts of ill-treatment, torture and sexual violence were perpetrated against Croat civilians between mid-1991 and mid-1992, at detention centres located in the former hospital at Knin and the barracks of the JNA 9th Corps.

Missing persons

355. The Court notes that, late on in the oral proceedings, Croatia raised the argument that the psychological pain suffered by the relatives of missing persons constituted serious mental harm within the meaning of Article II *(b)* of the Convention.

356. The Court has accepted that the psychological pain suffered by the relatives of individuals who have disappeared in the context of an alleged genocide, as a result of the persistent refusal of the competent

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authorities to provide the information in their possession which would enable these relatives to establish with certainty whether and how the persons concerned died, can in certain circumstances constitute serious mental harm within the meaning of Article II *(b)* of the Convention (see paragraph 160 above). The Court acknowledges that in the present case, the relatives of individuals who disappeared during the events that took place on the territory of Croatia between 1991 and 1995 suffer psychological distress as a result of the continuing uncertainty which they face. However, Croatia has failed to provide any evidence of psychological suffering sufficient to constitute serious mental harm within the meaning of Article II *(b)* of the Convention.

357. The Parties debated the fate of missing persons. The Court notes that the Parties disagree on the number and ethnicity of the persons having disappeared. However, since it is not disputed that many individuals have disappeared, it is not for the Court to determine their precise number and ethnicity.

358. In reply to a question by a Member of the Court as to whether there had been any recent initiatives to ascertain the fate of missing or disappeared persons, the Parties stated that, following their agreement in 1995 at Dayton to co-operate in tracing missing persons, some progress had been made, but they admitted that this remained insufficient.

359. The Court notes 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. It notes 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.

Conclusion

360. In light of the foregoing, 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 as defined above (see paragraph 205) 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*

361. Croatia asserts that the JNA and Serb forces deliberately inflicted on the protected group conditions of life calculated to bring about its

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physical destruction in whole or in part, within the meaning of Article II *(c)* of the Convention, at a number of localities within Croatia. Croatia refers to acts of rape committed by the JNA and Serb forces. It claims that Croats were deprived of food and medical care. According to Croatia, the JNA and Serb forces instituted a policy of systematic expulsion of Croats from their homes and of forced displacement from the areas under their control. Croats are alleged to have been forced to display signs of their ethnicity. The JNA and Serb forces allegedly destroyed and looted Croat property and vandalized their cultural heritage. Finally, Croats are claimed to have been subjected to forced labour. The Court will examine in turn each of Croatia's various allegations.

Rape

362. Croatia alleges that multiple acts of rape were committed by the JNA and Serb forces against Croat women, both in various localities throughout Croatian territory and in camps.

363. In support of its allegations, Croatia relies on statements appended to its written pleadings. The Court notes that some of these statements constitute first-hand accounts of the events in question. It notes the statement by a member of Serb forces, contemporary with the facts, who confesses to acts of rape. However, that statement is neither signed nor confirmed. The Court cannot therefore give it any evidential weight. On the other hand, there are a number of direct, detailed accounts of rape by members of the JNA or Serb forces given by the victims. The Court considers that there is sufficient reliable evidence to establish that a number of instances of rape and other acts of sexual violence were perpetrated within the context of the conflict. It recalls that Croatia has established that acts of rape were committed in a number of localities in Eastern Slavonia and that they caused serious bodily and mental harm to members of the protected group (see paragraphs 305, 311, 315 and 324 above).

364. Nevertheless, it has not been shown that these occurrences were on such a scale as to have amounted also to inflicting conditions of life on the group that were capable of bringing about its physical destruction in whole or in part.

Deprivation of food

365. Croatia alleges that the JNA and Serb forces subjected Croats to food deprivation.

366. The Court notes that some of the statements produced by Croatia refer to occasional denials of food supplies to Croats. However, these statements do not suffice to show that such denials were of a systematic or general nature.

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367. Regarding Dubrovnik, the Court notes that in the *Strugar* case the ICTY found that

> "[b]ecause of the blockade that had been enforced by the JNA the population of Dubrovnik, including the Old Town, had been without normal running water and electricity supplies for some weeks and essential products to sustain the population, such as food and medical supplies, were in extremely short supply" (*Strugar* Trial Judgment, para. 176; reference omitted).

The Court considers that it has not been established that this restriction on food supplies was calculated to bring about the physical destruction in whole or in part of the Croat inhabitants of Dubrovnik, within the meaning of Article II *(c)* of the Convention.

368. The Court concludes that Croatia has not established that the JNA and Serb forces denied access by Croats to food supplies, thereby subjecting them to food deprivation in a manner capable of falling within the scope of Article II *(c)* of the Convention.

Deprivation of medical care

369. Croatia alleges that Croats were deprived of medical care.

370. The Court notes that Croatia's allegations rely on statements appended to its written pleadings which are not signed or confirmed by the declarants. This evidence cannot demonstrate a practice of a systematic or general nature.

371. In regard to Dubrovnik, the Court relies on the findings of the ICTY in the *Strugar* case cited above (see paragraph 367). The Court likewise recalls that it has not been established that the denial of medical supplies was imposed with the intention of causing the physical destruction, in whole or in part, of the Croat inhabitants of Dubrovnik.

372. The Court concludes that Croatia has failed to show deprivations of medical care such as to be capable of coming within the scope of Article II *(c)* of the Convention.

Systematic expulsion from homes and forced displacement

373. Croatia alleges that the JNA and Serb forces systematically expelled Croats from their homes and forcibly displaced them from the areas under their control throughout the Croatian territory.

374. The Court notes that, in the *Martić* case, the ICTY found that between 1991 and 1995, the JNA and Serb forces had deliberately created a coercive atmosphere in the SAO Krajina, and then in the RSK, with the aim of forcing the non-Serb population to leave that territory:

> "427. From August 1991 and into early 1992, forces of the TO and the police of the SAO Krajina and of the JNA attacked Croat-major-

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ity villages and areas, including the villages of Hrvatska Kostajnica, Cerovljani, Hrvatska Dubica, Baćin, Saborsko, Poljanak, Lipovača, Skabrnja and Nadin. The displacement of the non-Serb population which followed these attacks was not merely the consequence of military action, but the primary objective of it . . .

428. The Trial Chamber considers the evidence to establish beyond reasonable doubt that the systematic acts of violence and intimidation carried out, *inter alia*, by the JNA, the TO and the *Milicija Krajine* against the non-Serb population in the villages created a coercive atmosphere in which the non-Serb population did not have a genuine choice in their displacement. Based on this evidence, the Trial Chamber concludes that the intention behind these acts was to drive out the non-Serb population from the territory of the SAO Krajina

. . . . . .

430. With regard to the period from 1992 to 1995, the Trial Chamber has been furnished with a substantial amount of evidence of massive and widespread acts of violence and intimidation committed against the non-Serb population, which were pervasive through the RSK territory. The Trial Chamber notes, in particular, that during this time period there was a continuation of incidents of killings, beatings, robbery and theft, harassment, and extensive destruction of houses and Catholic churches carried out against the non-Serb population. These acts created a coercive atmosphere which had the effect of forcing out the non-Serb population from the territory of the RSK. As a consequence, almost the entire non-Serb population left the RSK . . .

431. Based on the substantial evidence referred to above, the Trial Chamber finds that due to the coercive atmosphere in the RSK from 1992 through 1995, almost the entire non-Serb population was forcibly removed to territories under the control of Croatia. The elements of the crime of deportation (Count 10) have therefore been met." (*Martić* Trial Judgment, paras. 427, 428, 430 and 431; references omitted.)

375. The ICTY reached similar findings in the *Stanišić and Simatović* case regarding the SAO Krajina (and then the RSK) and the SAO SBWS:

"997. The Trial Chamber recalls its findings . . . that from April 1991 to April 1992, between 80,000 and 100,000 Croat and other non-Serb civilians fled the SAO Krajina (and subsequently the Krajina area of the RSK). They did so as a result of the situation prevailing in the region at the time of their respective departures, which was created by a combination of: the attacks on villages and towns with substantial or completely Croat populations; the killings, use as human shields, detention, beatings, forced labour, sexual abuse, and other forms of harassment of Croat persons; and the looting and destruction of property. These actions were committed by the local Serb

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authorities and the members and units of the JNA (including JNA reservists), the SAO Krajina TO, the SAO Krajina Police, and Serb paramilitary units, as well as local Serbs and certain named individuals (including Milan Martić). The Trial Chamber notes that the persons fleeing were Croats and other non-Serbs and that their ethnicity thus corresponds to the charges in the indictment.

998. The Trial Chamber finds that the aforementioned acts caused duress and fear of violence such that they created an environment in which the Croats and other non-Serbs in the SAO Krajina had no choice but to leave. Therefore, the Trial Chamber finds that those who left were forcibly displaced. Considering the circumstances of the forcible displacement, and absent any indication to the contrary, the Trial Chamber finds that the displaced individuals were forced to leave an area in which they were lawfully present

. . . . . .

1049. The Trial Chamber recalls its findings . . . that between 1991 and 1992, the JNA, Šešelj's men, Serbian volunteers, local authorities, SRS, paramilitaries from Prigrevica, SNB, police, TO, a 'Special Unit', and the SDG launched attacks all over the SAO SBWS, causing thousands of people to flee. The Trial Chamber recalls that these attacks involved acts of forcible transfer, detentions, destruction of a Catholic church, looting, restriction of freedom, forced labour, beatings, killings, threats, and harassment. The Trial Chamber notes that a significant number of those people who fled were Croats, and other non-Serbs and concludes that their ethnicity thus corresponds to the charges in the indictment.

1050. The Trial Chamber considers that the aforementioned acts caused duress and fear of violence such that they created an environment in which the Croats and other non-Serbs had no choice but to leave. Therefore, the Trial Chamber finds that those who left were forcibly displaced. The Trial Chamber finds, having considered that those who were forcibly displaced were inhabitants of the SAO SBWS, absent any indication to the contrary, were lawfully present there." (*Stanišić and Simatović* Trial Judgment, paras. 997, 998, 1049 and 1050.)

376. In the Court's view, the findings of the ICTY show that the JNA and Serb forces carried out expulsions and forced displacements of Croats in the SAO Krajina (and then the RSK) and the SAO SBWS. The Court recalls that the forced displacement of a population does not, as such, constitute the *actus reus* of genocide within the meaning of Article II *(c)* of the Convention (see paragraph 162 above). Such characterization would depend on the circumstances in which the forced displacement was carried out (see paragraph 163 above). The Court notes that, in the present case, the forced displacement of the population is a consequence of the commis-

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sion of acts capable of constituting the *actus reus* of genocide, in particular as defined in Article II *(a)* to *(c)* of the Convention. However, the Court notes that there is no evidence before the Court enabling it to conclude that the forced displacement was carried out in circumstances calculated to result in the total or partial physical destruction of the group.

377. In these circumstances, the Court finds that Croatia has failed to show that the forced displacement of Croats by the JNA and Serb forces is capable of constituting the *actus reus* of genocide within the meaning of Article II *(c)* of the Convention.

Restrictions on movement

378. Croatia alleges that in many villages, the movements of Croats were restricted.

379. The Court refers to the findings of the Trial Chamber in the *Stanišić and Simatović* case, which state that between 1991 and 1992, the JNA and Serb forces imposed restrictions on the free movement of Croats living in the SAO Krajina (and then in the RSK) and the SAO SBWS (*Stanišić and Simatović* Trial Judgment, paras. 997 and 1049, reproduced at paragraph 375 above; see also paragraph 1250, not reproduced). The Court considers that these findings constitute sufficient evidence to substantiate Croatia's allegations.

380. The Court notes that the restrictions on the movement of the Croats were part of the creation of a climate of coercion and terror, with the aim of forcing those persons to leave the territories under the control of the JNA and Serb forces. The Court recalls that Article II *(c)* of the Convention refers only to conditions of life calculated to bring about the physical destruction of the group. It considers that restrictions on freedom of movement may undermine the social bond between members of the group, and hence lead to the destruction of the group's cultural identity. However, such restrictions cannot be regarded as calculated to bring about the group's physical destruction, which is the sole criterion in Article II *(c)* of the Convention. The Court accordingly concludes that the restrictions on movement imposed on Croats by the JNA and Serb forces do not constitute the *actus reus* of genocide within the meaning of Article II *(c)* of the Convention.

Forced wearing of insignia of ethnicity

381. Croatia alleges that, in certain localities, Croats were obliged to wear insignia of ethnicity, in the form of a white ribbon on their sleeves, or a white sheet attached to their houses.

382. The Court considers that the purpose of forcing individuals to wear signs of their membership of a group is to stigmatize the group's members. This enables the authors of such acts to identify the members of the group. The aim is not the immediate physical destruction of the group, but it may represent a preliminary step towards perpetration of the acts listed in Arti-

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cle II of the Convention against the group members thus identified. Consequently, forcing individuals to wear insignia of their ethnicity does not in itself fall within the scope of Article II *(c)* of the Convention, but it might be taken into account for the purpose of establishing whether or not there existed an intent to destroy the protected group, in whole or in part.

Looting of property belonging to Croats

383. Croatia alleges that Croat property was repeatedly looted in a number of localities.

384. The Court refers to the findings of the ICTY Trial Chamber in the *Stanišić and Simatović* case. According to the ICTY, between 1991 and 1992, the JNA and Serb forces looted the property of Croat and non-Serb civilians in the SAO Krajina (and then in the RSK) and in the SAO SBWS (*Stanišić and Simatović* Trial Judgment, paras. 997 and 1049, reproduced at paragraph 375 above; see also paragraph 1250, not reproduced). The Court considers that these findings suffice to substantiate the facts alleged by Croatia.

385. The Court is of the view, however, that it has not been established that such attacks on Croat property were intended to inflict on the Croat group "conditions of life calculated to bring about its physical destruction in whole or in part". Accordingly, the looting of Croat property by the JNA and Serb forces cannot constitute the *actus reus* of genocide within the meaning of Article II *(c)* of the Convention.

Destruction and looting of the cultural heritage

386. Croatia alleges that the JNA and Serb forces destroyed and looted assets forming part of the cultural heritage and monuments of the Croats.

387. The Court notes that in the *Babić* case, where the accused pleaded guilty, the ICTY found that the JNA and Serb forces had, between 1 August 1991 and 15 February 1992, established in the SAO Krajina a régime of persecutions designed to drive the Croat and other non-Serb populations out of the territory. These persecutions included the deliberate destruction of cultural institutions, historic monuments and sacred sites of the Croat and other non-Serb populations in various localities (IT-03-72-S, Trial Chamber, Sentencing Judgment of 29 June 2004 (hereinafter "*Babić* Trial Judgment"), para. 15). The Tribunal made similar findings in the *Martić* case, where it held that in 1991 and 1992, the JNA and Serb forces had destroyed churches and religious buildings in Croatian towns and villages located in the SAO Krajina, and then in the RSK (*Martić* Trial Judgment, paras. 324 and 327).

388. The Court recalls that it held in 2007 that

> "the destruction of historical, cultural and religious heritage cannot be considered to constitute the deliberate infliction of conditions of life calculated to bring about the physical destruction of the group.

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> Although such destruction may be highly significant inasmuch as it is directed to the elimination of all traces of the cultural or religious presence of a group, and contrary to other legal norms, it does not fall within the categories of acts of genocide set out in Article II of the Convention. In this regard, the Court observes that, during its consideration of the draft text of the Convention, the Sixth Committee of the General Assembly decided not to include cultural genocide in the list of punishable acts." (*I.C.J. Reports 2007 (I)*, pp. 185-186, para. 344.)

389. The Court considers that there is no compelling reason in the present case for it to depart from that approach. It accordingly finds that it is unnecessary to proceed any further with its examination of Croatia's allegations in order to establish the *actus reus* of genocide within the meaning of Article II *(c)* of the Convention.

390. The Court recalls, however, that it may take account of attacks on cultural and religious property in order to establish an intent to destroy the group physically (*ibid.*, p. 186, para. 344).

Forced labour

391. Croatia alleges that the JNA and Serb forces obliged Croats to perform forced labour in numerous localities.

392. The Court again refers to the findings of the ICTY Trial Chamber in the *Stanišić and Simatović* case. These show that between 1991 and 1992, the JNA and Serb forces obliged Croat civilians to perform forced labour in the SAO Krajina (and then in the RSK) and in the SAO SBWS (*Stanišić and Simatović* Trial Judgment, paras. 997 and 1049 reproduced above at paragraph 375; see also para. 1250, not reproduced).

393. The Court considers that these findings suffice to establish the facts alleged by Croatia. The Court takes the view that the characterization of forced labour as the *actus reus* of genocide within the meaning of Article II *(c)* of the Convention depends on the conditions under which that labour is carried out. In this regard, the Court notes that in the *Stanišić and Simatović* case, the ICTY Trial Chamber found that forced labour formed part of a series of actions aimed at the forced expulsion of the Croat population (*ibid.*, paras. 998 and 1050, reproduced above at paragraph 375). The Court finds in this instance that Croatia has not established that the forced labour imposed on the Croat population is capable of constituting the *actus reus* of genocide within the meaning of Article II *(c)* of the Convention.

Conclusion

394. The Court 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.

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(5) Article II (d)*: measures intended to prevent births within the group*

395. Croatia alleges that, as well as rape, the JNA and Serb forces committed other acts of sexual violence (in particular castrations) against Croats, constituting the *actus reus* of genocide within the meaning of Article II *(d)* of the Convention.

396. Serbia maintains that, in order to be regarded as measures intended to prevent births within the group, within the meaning of Article II *(d)* of the Convention, it is necessary for the rape and other acts of sexual violence to have been carried out systematically, whereas in the present case such acts were merely random incidents, and hence cannot constitute such measures.

397. The Court recalls that it has already found that Croatia has failed to provide sufficient evidence that acts of rape were carried out on such a scale that it can be said that they inflicted conditions of life on the group that were capable of bringing about its physical destruction in whole or in part (see paragraph 364 above). Similarly, Croatia has not provided sufficient evidence that rape was committed in order to prevent births within the group, within the meaning of Article II *(d)*. The Court will therefore concentrate on the other acts of sexual violence alleged by Croatia.

398. Croatia relies principally on statements appended to its written pleadings. The Court notes that several of these statements, which are signed or confirmed, are by victims or eyewitnesses of acts of sexual violence. They are mutually consistent and constitute first-hand accounts of the events in question. The Court considers that there is sufficiently reliable evidence that acts of sexual violence did indeed take place, in particular involving the targeting of the genitalia of Croat males. It recalls that the ICTY also established that acts of sexual violence were perpetrated by the JNA and Serb forces in the SAO Krajina (and then in the RSK) and in the SAO SBWS between 1991 and 1992 (*Stanišić and Simatović* Trial Judgment, para. 997, reproduced above at paragraph 375; see also para. 1250, not reproduced).

399. Nevertheless, Croatia has produced no evidence that the acts of sexual violence were perpetrated in order to prevent births within the group.

400. The Court accordingly 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*

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 pro-

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tected 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)

402. The *actus reus* of genocide having been established, the Court will now examine whether the acts perpetrated by the JNA and Serb forces were committed with intent to destroy, in whole or in part, the protected group as defined above (see paragraph 205).

403. Croatia contends that the crimes committed by the JNA and Serb forces represent a pattern of conduct from which the only reasonable conclusion to be drawn is an intent on the part of the Serbian authorities to destroy in part the Croat group. It maintains that the Croats living in the regions of Eastern Slavonia, Western Slavonia, Banovina/Banija, Kordun, Lika and Dalmatia targeted by those crimes constituted a substantial part of the protected group, and that the intent to destroy the protected group "in part", which characterizes genocide as defined in Article II of the Convention, is thus established.

404. The Court will begin by examining whether the Croats living in the above regions constituted a substantial part of the protected group. If so, it will then seek to determine whether the acts proved to have been committed by the JNA and Serb forces represented a pattern of conduct from which the only reasonable conclusion to be drawn is an intent on the part of the Serbian authorities to destroy "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?

405. According to Croatia, 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 targeted by the genocidal intent.

406. As the Court has already recalled (see paragraph 142 above), it must take account not only of the quantitative element, but also of the geographic location and prominence of the targeted part of the group in order to determine whether it constitutes a substantial part of the protected group.

Regarding the quantitative element, Croatia maintains that the target group was "the Croat population that was, at the relevant time, living in Eastern Slavonia, Western Slavonia, Banovina, Kordun, Lika, and Dalmatia, including those living as groups in individual villages". It provides data taken from the last official census carried out in 1991 in the SFRY, which is not disputed by Serbia. According to that data, the ethnic Croat population living in the regions of Eastern Slavonia, Western Slavonia,

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Banovina/Banija, Kordun, Lika, and Dalmatia in 1991 numbered between 1.7 and 1.8 million. It constituted slightly less than half of the ethnic Croat population living in Croatia. According to the 1991 census, the total population of Croatia was approximately 4.8 million persons, of which 78 per cent were ethnic Croats.

Regarding the geographic location of the part of the group concerned, the Court has already found (see paragraphs 295, 360 and 401 above) that the acts committed by the JNA and Serb forces in the regions of Eastern Slavonia, Western Slavonia, Banovina/Banija, Kordun, Lika and Dalmatia, targeted the Croats living in those regions, within which these armed forces exercised and sought to expand their control.

Finally as regards the prominence of that part of the group, the Court notes that Croatia has provided no information on this point.

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?

407. The Court will now examine whether Croatia has established the existence of a pattern of conduct from which the only reasonable conclusion to be drawn is an intent of the Serb authorities to destroy that substantial part of the group.

408. Croatia argues that the scale and consistent nature of the crimes committed by the JNA and Serb forces evince a clear intention to bring about the physical destruction of the Croats. It contends that these crimes constitute a pattern of conduct from which the only reasonable inference to be drawn is that the Serb leaders were motivated by genocidal intent. Croatia thus sets out a series of 17 factors which it believes, individually or taken together, could lead the Court to conclude that there was a systematic policy of targeting Croats with a view to their elimination from the regions concerned: (1) the political doctrine of Serbian expansionism which created the climate for genocidal policies aimed at destroying the Croat population living in areas earmarked to become part of "Greater Serbia"; (2) the statements of public officials, including demonization of Croats and propaganda on the part of State-controlled media; (3) the fact that the pattern of attacks on groups of Croats far exceeded any legitimate military objective necessary to secure control of the regions concerned; (4) contemporaneous video footage evidencing the genocidal intent of those carrying out the attacks; (5) the explicit recognition by the

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JNA that paramilitary groups were engaging in genocidal acts; (6) the close co-operation between the JNA and the Serb paramilitary groups responsible for some of the worst atrocities, implying close planning and logistical support; (7) the systematic nature and sheer scale of the attacks on groups of Croats; (8) the fact that ethnic Croats were constantly singled out for attack while local Serbs were excluded; (9) the fact that during the occupation, ethnic Croats were required to identify themselves and their property as such by wearing white ribbons tied around their arms and by affixing white cloths to their homes; (10) the number of Croats killed and missing as a proportion of the local population; (11) the nature, degree and extent of the injuries inflicted (through physical attacks, acts of torture, inhuman and degrading treatment, rape and sexual violence), "including injuries with recognizable ethnic characteristics"; (12) the use of ethnically derogatory language in the course of acts of killing, torture and rape; (13) the forced displacement of Croats and the organized means adopted to this end; (14) the systematic looting and destruction of Croat cultural and religious monuments; (15) the suppression of Croat culture and religious practices among the remaining population; (16) the consequent permanent and evidently intended demographic changes to the regions concerned; (17) the failure to punish the crimes which the Applicant alleges to be genocide.

409. All these elements indicate, according to Croatia, the existence of a pattern of conduct from which the only reasonable inference is an intent to destroy, in whole or in part, the Croat group.

410. Consequently, the Court will examine first whether the acts committed by the JNA and Serb forces form part of a pattern of conduct and, if so, it will then consider whether an intent to destroy the Croat group is the only reasonable conclusion that can be inferred from that pattern of conduct.

411. The Parties disagree on the existence of a pattern of conduct. Croatia considers that the scale, intensity and systematic nature of the attacks directed against the Croat population, based on the same *modus operandi*, demonstrate the existence of a pattern of conduct. According to Croatia, the JNA and Serb forces applied a massive use of force which can only be explained by an intent to destroy the group in whole or in part.

412. Serbia does not contest the systematic and widespread nature of certain attacks. However, it claims that these were intended to force the Croats to leave the regions concerned. In this regard, it cites the *Martić* and *Mrkšić et al.* cases, in which the ICTY found that the purpose of the attacks on the Croat population was to force it to leave.

Serbia points out that, in the *Martić* case, although the accused had not been charged with genocide, there was nothing to prevent the Trial Cham-

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ber from concluding that the attacks indicated an intent to persecute or to exterminate "or worse", but that it had not done so. Regarding the attack on Vukovar and the surrounding area, Serbia submits that, in the *Mrkšić et al.* case, the Trial Chamber found that the purpose of that attack was also to punish the town's Croat population, but not to destroy it.

Serbia maintains that the evidence "shows a multitude of patterns giving rise to inferences of combat and/or forcible transfer and/or punishment", but not genocide.

413. The Court considers that, of the 17 factors suggested by Croatia to establish the existence of a pattern of conduct revealing a genocidal intent, the most important are those that 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 (i.e., the third, seventh, eighth, tenth and eleventh factors identified in paragraph 408, above).

414. The Court notes that, in the *Mrkšić et al.* case, the ICTY Trial Chamber found that in Eastern Slavonia

> "the system of attack employed by the JNA typically evolved along the following lines
>
> > '*(a)* tension, confusion and fear is built up by a military presence around a village (or bigger community) and provocative behaviour; *(b)* there is then artillery or mortar shelling for several days, mostly aimed at the Croatian parts of the village; in this stage churches are often hit and destroyed; *(c)* in nearly all cases JNA ultimata are issued to the people of a village demanding the collection and the delivery to the JNA of all weapons; village delegations are formed but their consultations with JNA military authorities do not lead, with the exception of Ilok, to peaceful arrangements; with or without waiting for the results of the ultimata a military attack is carried out; and *(d)* at the same time, or shortly after the attack, Serb paramilitaries enter the village; what then follows varied from murder, killing, burning and looting, to discrimination'" (*Mrkšić* Trial Judgment, para. 43, citing the testimony of Ambassador Kypr of the European Community Monitoring Mission; reference omitted).

The Tribunal adopted similar conclusions in the *Martić* case:

> "[t]he area or village in question would be shelled, after which ground units would enter. After the fighting had subsided, acts of killing and violence would be committed by the forces against the civilian non-Serb population who had not managed to flee during the attack. Houses, churches and property would be destroyed in order to pre-

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vent their return and widespread looting would be carried out. In some instances the police and the TO of the SAO Krajina organized transport for the non-Serb population in order to remove it from SAO Krajina territory to locations under Croatian control. Moreover, members of the non-Serb population would be rounded up and taken away to detention facilities, including in central Knin, and eventually exchanged and transported to areas under Croatian control." (*Martić* Trial Judgment, para. 427; reference omitted.)

415. The Court likewise 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.

416. The findings of the Court 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*.

417. The Court recalls that, for a pattern of conduct to be accepted as evidence of intent to destroy the group, in whole or in part, it must be "such that it could only point to the existence of such intent" (*I.C.J. Reports 2007 (I)*, p. 197, para. 373). This signifies that, for the Court, intent to destroy the group, in whole or in part, must be the only reasonable inference which can be drawn from the pattern of conduct (see paragraph 148 above).

418. In its oral argument, Croatia put forward two factors which, in its view, should lead the Court to conclude that intent to destroy is the only reasonable inference to be drawn from the pattern of conduct previously established: 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 will examine these in turn.

(a) *Context*

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

420. Croatia claims that the acts committed by the JNA and Serb forces against Croats between 1991 and 1995 represented the implementation, by the Serb nationalists and leadership, of the objective of a "Greater Serbia". That entailed unifying those parts of the territories of the various entities of the SFRY in which ethnic Serbs were living. Croatia relies *inter*

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alia on a memorandum prepared in 1986 by the Serbian Academy of Sciences and Arts (hereinafter "the SANU Memorandum"), which allegedly contributed to the rebirth of the idea of a "Greater Serbia". Croatia contends that the destruction of the Croats in these areas, who were perceived as a threat to the Serb people, was necessary for the creation of "Greater Serbia". In this regard, the SANU Memorandum is claimed to have acted as a catalyst for the genocide of the Croats.

421. Serbia contests Croatia's historical approach and argues that it is conflating issues, since the idea of a "Greater Serbia" never implied an intent to commit genocide against the Croats.

422. 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 SANU Memorandum 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*.

423. The Court will seek to determine what aim was being pursued by the JNA and Serb forces when they committed acts that constitute the *actus reus* of genocide within the meaning of Article II *(a)* and *(b)* of the Convention, where those acts have been established before the Court.

424. The Court notes that the ICTY has stated the political objective being pursued by the leadership of the SAO Krajina and then the RSK, and shared with the leaderships in Serbia and in the Republika Srpska in Bosnia and Herzegovina as follows:

> "442. . . . The evidence establishes the existence, as of early 1991, of a political objective to unite Serb areas in Croatia and in BiH with Serbia in order to establish a unified territory. Moreover, the evidence establishes that the SAO Krajina, and subsequently the RSK, government and authorities fully embraced and advocated this objective, and strove to accomplish it in co-operation with the Serb leaderships in Serbia and in the RS in BiH.
>
> . . . . . .
>
> 445. From at least August 1991, the political objective to unite Serb areas in Croatia and in BiH with Serbia in order to establish a unified territory was implemented through widespread and systematic armed attacks on predominantly Croat and other non-Serb areas and through the commission of acts of violence and intimidation. In the Trial Chamber's view, this campaign of violence and intimidation against the Croat and non-Serb population was a consequence of the position taken by the SAO Krajina and subsequently the RSK leadership that co-existence with the Croat and other non-Serb population, in Milan Martić's words, 'in our Serbian territories of the SAO Krajina', was impossible. Thus, the implementation of the political objective to establish a unified Serb territory in these circumstances

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necessitated the forcible removal of the non-Serb population from the SAO Krajina and RSK territory. The Trial Chamber therefore finds beyond reasonable doubt that the common purpose of the [joint criminal enterprise] was the establishment of an ethnically Serb territory through the displacement of the Croat and other non-Serb population, as charged in Counts 10 and 11 [deportation and forcible transfer]." (*Martić* Trial Judgment, paras. 442 and 445; reference omitted.)

425. In its Trial Chamber Judgment in the *Babić* case, the ICTY, following the defendant's guilty plea, held that there had been a joint criminal enterprise whose objective

"was the permanent and forcible removal of the majority of Croat and other non-Serb populations from approximately one-third of Croatia through a campaign of persecutions in order to make that territory a Serb-dominated state" (*Babić* Trial Judgment, para. 34).

426. According to the ICTY, the leadership of Serbia and that of the Serbs in Croatia, *inter alia*, shared the objective of creating an ethnically homogeneous Serb State. That was the context in which acts were committed that constitute the *actus reus* of genocide within the meaning of Article II *(a)* and *(b)* of the Convention. However, the conclusion of the ICTY indicates that those acts 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. As the Tribunal found in the *Martić* case:

"427. From August 1991 and into early 1992, forces of the TO and the police of the SAO Krajina and of the JNA attacked Croat-majority villages and areas, including the villages of Hrvatska Kostajnica, Cerovljani, Hrvatska Dubica, Baćin, Saborsko, Poljanak, Lipovača, Skabrnja and Nadin. The displacement of the non-Serb population which followed these attacks was not merely the consequence of military action, but the primary objective of it

. . . . . .

430. With regard to the period from 1992 to 1995, the Trial Chamber has been furnished with a substantial amount of evidence of massive and widespread acts of violence and intimidation committed against the non-Serb population, which were pervasive throughout the RSK territory. The Trial Chamber notes, in particular, that during this time period there was a continuation of incidents of killings, beatings, robbery and theft, harassment, and extensive destruction of houses and Catholic churches carried out against the non-Serb population. These acts created a coercive atmosphere which had the effect of forcing out the non-Serb population from the territory of the RSK. As a consequence, almost the entire non-Serb population left the RSK . . .

431. Based on the substantial evidence referred to above, the Trial Chamber finds that due to the coercive atmosphere in the RSK from

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1992 through 1995, almost the entire non-Serb population was forcibly removed to territories under the control of Croatia." (*Martić* Trial Judgment, paras. 427, 430 and 431.)

427. The ICTY made similar findings in the *Stanišić and Simatović* Trial Judgment (paras. 997, 998, 1050 (reproduced at paragraph 375 above) and 1000, not reproduced).

428. 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.

429. As regards the events at Vukovar, to which Croatia has given particular attention, the Court notes that in the *Mrkšić et al.* case, 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:

"471. . . . The declaration by Croatia of its independence of the Yugoslav Federation and the associated social unrest within Croatia was met with determined military reaction by Serb forces. It was in this political scenario that the city and people of Vukovar and those living in its close proximity in the Vukovar municipality became a means of demonstrating to the Croatian people, and those of other Yugoslav Republics, the harmful consequences to them of their actions. In the view of the Chamber the overall effect of the evidence is to demonstrate that the city and civilian population of and around Vukovar were being punished, and terribly so, as an example to those who did not accept the Serb-controlled Federal Government in Belgrade, and its interpretation of the laws of SFRY, or the role of the JNA for which the maintenance of the Yugoslav Federation was a fundamental element in the continued existence of the JNA." (*Mrkšić* Trial Judgment, para. 471.)

It follows from the above, and from the fact that numerous Croats of Vukovar were evacuated (see paragraph 436 below), 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.

430. In the same case, the ICTY made findings as to the intent of the perpetrators of the ill-treatment inflicted on the prisoners of war at Ovčara, 20 November 1991:

"535. The Serb TO and paramilitary harboured quite intense feelings of animosity toward the Croat forces. The prisoners of war taken from Vukovar hospital and transported to Ovčara were representative of the Croat forces and, therefore, represented their enemy. The brutality of the beatings that took place at Ovčara on 20 November 1991 by the Serb TO and paramilitaries, and possibly by some JNA soldiers acting on their own account, is evidence of the hatred and the desire to punish the enemy forces. It is clear from this evidence, in the Chamber's finding, that acts of mistreatment outside and inside the hangar

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were intended to punish the prisoners for their involvement, or believed involvement, in Croat forces before the fall of Vukovar." (*Mrkšić* Trial Judgment, para. 535.)

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*

431. Croatia contends that the JNA and Serb forces systematically committed acts that constitute the *actus reus* of genocide within the meaning of Article II *(a)* to *(d)* of the Convention once the opportunity to do so was presented to them, i.e., when they attacked and occupied various Croat localities. According to Croatia, this factor demonstrates that their intention was to destroy the Croat group in whole or in part.

432. Serbia contests Croatia's approach. It refers to several instances of the JNA and Serb forces sparing Croats by not killing them. Moreover, it argues that the criterion of opportunity must be weighed against that of substantiality. For Serbia, the limited number of Croat victims, seen in the light of the opportunities for killing supposedly available to the JNA and Serb forces, cannot give rise to an inference that an intent to destroy was present.

433. The Court 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.

434. The Court 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. The Court 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 (see paragraph 377 above). Nonetheless, the Court recalls that the fact of forced displacement occurring in parallel to acts falling under Article II of the Convention may be "indicative of the presence of a specific intent *(dolus specialis)* inspiring those acts" (see paragraph 162 above quoting *I.C.J. Reports 2007 (I)*, p. 123, para. 190).

435. In the present case, 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

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(b) of the Convention. Those acts had an objective, namely the forced displacement of the Croats, which did not entail their physical destruction. The ICTY has estimated that between April 1991 and April 1992, between 80,000 and 100,000 persons fled the SAO Krajina (and then the RSK) (*Stanišić and Simatović* Trial Judgment, para. 997). 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.

436. 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 (*Mrkšić* Trial Judgment, paras. 157-160, 168, 204 and 207). 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 (*ibid.*, paras. 145-155). 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 (*ibid.*, para. 168). This shows that, in many cases, the JNA and Serb forces did not kill those Croats who had fallen into their hands.

437. 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 will make 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.

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438. Croatia points to activities of Serb paramilitaries as evidence of the *dolus specialis*. In particular, it relies upon a videotape of Zeljko Ražnatović or "Arkan", leader of a Serb paramilitary group known as the "Serbian Volunteer Guard" or "Arkan's Tigers", made during the siege of Vukovar on 1 November 1991, showing him instructing his forces to take care not to kill Serbs and saying that since Serbs were in the base-

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ments of buildings and the Croats were upstairs, rocket launchers should be used to "neutralize the first floor". Even if Arkan's actions were attributable to Serbia, this speech appears to be but one isolated phase in the very lengthy siege of Vukovar, a siege in which, as the Court has already found (see paragraphs 218-219, 301 and 305 above), the degree of violence used by attacking forces was excessive, and during which grave suffering was undoubtedly caused to the civilian population as Serbia acknowledged at least to some extent. It is difficult to infer anything from one isolated instance.

Croatia also relies upon the Report of a JNA security officer, dated 13 October 1991, which stated that Arkan's troops were "committing uncontrolled genocide and various acts of terrorism" in the greater area of Vukovar. The Serbian Assistant Minister of Defence was informed of the Report. Yet taking the Report as a whole, no justification or examples are given to support the use of the word "genocide".

439. Finally, the Court considers that the series of 17 factors invoked by Croatia do not lead to the conclusion that there was an intent to destroy, in whole or in part, the Croats in the regions concerned.

Conclusion on the dolus specialis

440. Thus, in the opinion of the Court, 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. 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 (see paragraph 187 above).

C. General Conclusion on Croatia's Claim

441. 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 incite-

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ment to commit genocide, and attempt to commit genocide also necessarily fail.

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

442. Consequently, the Court is 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

443. In its Counter-Memorial Serbia made a counter-claim containing a number of submissions. In its final version, as presented by the Agent of Serbia at the close of the public hearings, that counter-claim is reproduced *in extenso* in paragraph 51 of the present Judgment. It constitutes Section II of Serbia's final submissions, and contains four paragraphs numbered 6 to 9.

444. In substance, Serbia asks the Court to declare that Croatia has violated the Genocide Convention by committing against the Serb national and ethnical group living in Croatia, during and after Operation Storm in 1995, acts prohibited by Article II of the Convention, with intent to destroy that group as such, in whole or in part (paragraph 6 of the final submissions).

Alternatively, Serbia claims — and asks the Court to declare — that Croatia has committed acts amounting to conspiracy to commit genocide, incitement and attempt to commit genocide and complicity in genocide, within the meaning of Article III of the Convention (para. 7).

Additionally, Serbia asks the Court to declare that Croatia has violated its obligations under the Convention to punish the perpetrators of the acts referred to in the preceding paragraphs (para. 8).

Finally, Serbia asks the Court, having found that Croatia's international responsibility has been engaged, to order the latter to take a number of measures in order to ensure full compliance with its obligations under the Convention and to redress the injurious consequences of the internationally wrongful acts attributable to it (para. 9).

445. The Court will begin by examining the submissions set out in paragraph 6 of Serbia's final submissions. The result of this examination will largely condition the way in which it approaches the submissions set out in the subsequent paragraphs.

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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

446. Serbia claims that Croatia committed the following acts defined in Article II of the Convention as constituting genocide: killings of members of the national and ethnical group of Serbs living in Croatia (II *(a)*); causing serious bodily or mental harm to members of the same group (II *(b)*); deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part (II *(c)*), all of these acts having been committed with intent to destroy, in whole or in part, the group as such.

447. Two points were not disputed between the Parties, and may be regarded by the Court as settled.

448. 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, in the sense in which that expression is used in paragraph 198 of the Judgment rendered by the Court in 2007 in the case between Bosnia and Herzegovina and Serbia and Montenegro (see paragraph 142 above).

The Court therefore concludes that, if acts falling within the terms of Article II of the Convention were committed against the Krajina Serbs, and if they were perpetrated with intent to destroy that group of persons, it should accordingly find that the constituent elements of genocide were present, since the requirement of "intent to destroy at least a substantial part of the [national or ethnical] group" would be met (see *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro), Judgment, I.C.J. Reports 2007 (I)*, p. 126, para. 198).

449. 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.

It follows that these acts would be such as to engage Croatia's international responsibility if they were unlawful, simply because they were carried out by one or more of its organs. That would remain true, under the law governing the international responsibility of States, even if the author of the acts had acted contrary to the instructions given or exceeded his or her authority (see *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Uganda), Judgment, I.C.J. Reports 2005*, p. 242, para. 214). Thus the Court's consideration of the counter-claim presents no difficulty in terms of the attributability of the alleged unlawful

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acts to the State whose international responsibility is in issue (namely the Applicant).

450. On the other hand, 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.

451. It is these two questions that the Court will now examine. It will first seek to ascertain whether acts constituting the physical element of genocide — that is to say, acts falling within the categories defined in Article II of the Convention — were in fact committed (the issue of the *actus reus*). It will then proceed, if any of the acts in question have been established, to rule on the question of whether they were committed with genocidal intent (the issue of the *dolus specialis*).

(1) The actus reus *of genocide*

452. Serbia contends that Croatia committed various acts falling within the scope of subparagraphs *(a)*, *(b)* and *(c)* of Article II of the Genocide Convention, namely:

— indiscriminate shelling of Krajina towns, in particular Knin, allegedly resulting in the killing of Serb civilians within the meaning of subparagraph *(a)* of Article II;
— forced displacement of the Serb population of the Krajina, falling within the scope of subparagraph *(c)* of Article II;
— the killing of Serbs fleeing in columns the towns under attack, within the scope of subparagraph *(a)* of Article II;
— the killing of Serbs who remained, after Operation Storm, within UN-protected areas of the Krajina (UNPAs), acts which are also covered by subparagraph *(a)* of Article II;
— infliction of ill-treatment on Serbs during and after Operation Storm, within the scope of subparagraphs *(b)* and *(c)* of Article II;
— large-scale destruction and looting of Serb property during and after Operation Storm, within the scope of subparagraph *(c)* of Article II.

453. Serbia further cites administrative and other measures allegedly taken by Croatia to prevent Serbs having fled the Krajina during Operation Storm from subsequently returning home.

However, in the Court's view, this matter was not relied on by Serbia as evidence of the *actus reus* of genocide, but rather as evidence of specific intent to destroy the targeted group in whole or in part, in other words, to

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prove the *dolus specialis*. It will accordingly be discussed later, under point 2.

(a) *The evidence presented by Serbia in support of the facts alleged*

454. In support of its factual allegations, Serbia relies on a range of evidence from various sources, the bulk of which has been challenged by Croatia in terms of its relevance and credibility.

455. First, Serbia relies on publications by two non-governmental organizations, one Croatian, the other Serbian: the Croatian Helsinki Committee for Human Rights (hereinafter CHC), and the Veritas organization.

The first of these published a report in 2001 in Zagreb, entitled *Military Operation Storm and Its Aftermath*; the second has published a list of the victims of Operation Storm, which is regularly updated.

456. Croatia challenges the credibility of these two publications. It notes that they contain numerous errors, inaccuracies and inconsistencies, and that, moreover, the Veritas organization is neither independent nor impartial, in particular because its director held high office under several Governments of the RSK.

457. The Court agrees that neither the CHC Report nor that of Veritas possesses such evidential weight as to enable the Court to consider a fact proved solely on the basis of those documents; indeed, Serbia itself has admitted that the reports contain factual errors. However, the Court does not consider those documents as so lacking in informational value that they should be wholly disregarded. The Court may take account of the information they contain whenever it appears to corroborate evidence from other sources. This approach is similar to that taken by the ICTY Trial Chamber in relation to the CHC Report in the *Gotovina* case (*Gotovina* Trial Judgment, para. 50), to which the Court will return later in the present Judgment.

458. Serbia further bases its allegations on a number of other documents or testimonies, in particular: the Report on the situation of human rights in the territory of the former Yugoslavia of 7 November 1995, presented to the United Nations General Assembly and the Security Council by Mrs. Elisabeth Rehn, Special Rapporteur of the Commission on Human Rights, pursuant to resolution 1995/89 of the said Commission and decision 1995/920 of the Economic and Social Council; a Report from the non-governmental organization Human Rights Watch, entitled "Impunity for Abuses Committed during 'Operation Storm', and the Denial of the Right of Refugees to Return to the Krajina", dating from August 1996; the expert report of Mr. Reynaud Theunens, entitled "Croatian Armed Forces and Operation Storm", submitted by the Prosecutor's Office of the ICTY in the *Gotovina* case; the statements of witnesses before national courts in Serbia and Bosnia and Herzegovina regarding

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the events at issue in the present case; the testimony of individuals heard by the ICTY in the *Gotovina* case; and finally, the written statements of seven witnesses and a witness-expert presented by Serbia in the present case, in respect of whom Croatia waived its right of cross-examination.

459. The Court considers that it must give evidential weight to the first of the above-mentioned documents, by reason both of the independent status of its author, and of the fact that it was prepared at the request of organs of the United Nations, for purposes of the exercise of their functions. The Court notes that Croatia has not disputed the objective nature of that report, even though it does not agree with certain of its factual findings.

The Court will accord evidential weight to the statements by the eight individuals called by Serbia to testify before it. However, it should be emphasized that the fact that Croatia declined to cross-examine those witnesses in no sense implies an obligation on the Court to accept all of their testimony as accurate. Moreover, Croatia clearly stated that its decision not to cross-examine the witnesses did not mean that it accepted their testimonies as accurate; on the contrary, it expressed significant reservations in relation to some of them.

The other documents and testimony referred to in the preceding paragraph will be duly considered by the Court, without, however, being regarded as conclusive proof of the facts alleged.

460. Finally, the Parties cited extensively from the Trial and Appeals Chamber Judgments of the ICTY in the *Gotovina* case, while largely disagreeing on the conclusions to be drawn from them.

The Parties' disagreement actually relates to the first of Serbia's claims, namely that Croatia carried out indiscriminate shelling of the Krajina towns at the start of Operation Storm, thus causing numerous deaths among the civilian population.

The scope of the ICTY decisions in the *Gotovina* case will thus be examined below, in relation to the issue of whether that claim has been effectively established.

461. It suffices, at this stage, to recall that the fact that no high-ranking Croatian civilian or military officer has been found guilty of genocide by the ICTY — or indeed of any other charge — in relation to the events which took place during and after Operation Storm does not in itself preclude the Court from finding that Croatia's international responsibility is engaged for violation of the Genocide Convention (see in this regard *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro), Judgment, I.C.J. Reports 2007 (I)*, pp. 119-120, paras. 180-182). Likewise, the fact that the ICTY Prosecutor has never included a count of genocide in the indictments in cases relating to Operation Storm does not automatically mean that Serbia's counter-claim must be dismissed.

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Indeed, the Parties do not appear to disagree on these two propositions. Croatia, however, emphasizes that the absence of any conviction by the ICTY and, moreover, the absence of any prosecution for genocide in relation to Operation Storm greatly weakens the thesis underlying Serbia's counter-claim, namely that genocide was committed by the organs of Croatia.

(b) *Whether the acts alleged by Serbia have been effectively proved*

462. The Court will now examine the various categories of acts alleged by Serbia in support of its counter-claim, in order to ascertain whether, in each case, they have been proved on the basis of the evidence presented to the Court. It will do so following the order indicated in paragraph 452 above, namely: (i) killing of civilians as a result of the indiscriminate shelling of Krajina towns; (ii) forced displacement of the Serb population from the Krajina; (iii) killing of Serbs fleeing in columns from the towns under attack; (iv) killing of Serbs having remained in the areas of the Krajina protected by the United Nations; (v) infliction of ill-treatment on Serbs during and after Operation Storm.

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

463. According to Serbia, from the start of the military actions in connection with Operation Storm, Croatian armed forces indiscriminately shelled several towns and villages in the Krajina, an area with a majority Serb population, namely Knin, the most important town in the region, but also Benkovac, Obrovac, Gračac, Bosansko, Grahovo, Kijani, Kistanje, Uzdolje, Kovačić, Plavno, Polača and Buković.

The shelling was allegedly aimed both at military targets — where these existed — and the civilian population, causing a large number of deaths among civilians. According to the Respondent, in the municipality of Knin alone there were 357 deaths, including 237 civilians, many of them as a result of indiscriminate shelling. Moreover, according to Serbia the shelling was ordered with the intention of forcing the Serb population to flee the Krajina. This aspect, which relates to the second category of acts alleged by Serbia, namely the forced displacement of the Serb population, will be discussed in the following section.

According to Croatia, on the contrary, the shelling of Krajina towns was directed exclusively at military targets, and if it caused civilian casualties — the number of which, in any event, was far lower than that alleged by Serbia — that was not the consequence of any deliberate intent to target the civilian population, but solely of the proximity of military objectives to areas inhabited by that population. In support of its position, Croatia relies on the findings of the ICTY Appeals Chamber in the *Gotovina* case.

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464. Since the Parties draw essentially contrary conclusions from the decisions of the ICTY in the *Gotovina* case, and since those decisions are highly relevant for purposes of the present case, the Court will briefly discuss the proceedings before the ICTY in that case, and summarize the decisions rendered at first instance, and then on appeal.

465. The proceedings which resulted in those decisions were initiated by the ICTY Prosecutor in 2001 and 2006 against Ante Gotovina, Ivan Cermak and Mladen Markač, three Croat generals who had played various leading roles in August 1995 in connection with Operation Storm, the declared aim of which was to enable the Government of Croatia to regain control over the Krajina, then controlled by the authorities of the RSK.

The main charges against all three accused were persecution, killing and murder, deportation and forcible transfer of the population, cruel and inhumane acts and the wanton destruction of towns and villages.

In substance, the Prosecutor argued that Croatian armed forces had carried out indiscriminate artillery attacks on a large number of towns and villages in the Krajina, deliberately targeting civilian areas as well as military objectives. Those attacks had caused the deaths of large numbers of civilians, and the destruction of property unconnected with any military target, as well as the departure of the majority of the population, which had fled the shelled areas.

466. By its Judgment of 15 April 2011, the Trial Chamber acquitted General Cermak, but convicted Generals Gotovina and Markač, sentencing them to terms of imprisonment of 24 and 18 years respectively.

The Chamber held that these two 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.

The Trial Chamber accordingly found the two accused guilty of, *inter alia*, murder, deportation, persecution, destruction and inhumane acts (*Gotovina* Trial Judgment, paras. 2619, 2622).

467. 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 the operation, under the chairmanship of President Tudjman (that transcript will be discussed later in the present Judgment) and secondly, and above all, on the so-called "200 Metre Standard" (*ibid.*, paras. 1970-1995, 2305, 2311), 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

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civilian and military targets, and was therefore indiscriminate (*Gotovina* Trial Judgment, para. 1898).

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 (*ibid.*, paras. 1899-1906, 1917-1921, 1927-1933, 1939-1941).

468. In its Judgment of 16 November 2012 in the *Gotovina* case, the 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 (*Gotovina* Appeals Judgment, paras. 61, 64-65, 77-83, 93). 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) (*ibid.*, para. 158).

469. The Court recalls, as it stated in 2007, that it "should in principle accept as highly persuasive relevant findings of facts made by the Tribunal at trial, unless of course they have been upset on appeal" (see paragraph 182 above).

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.

470. Against this approach, Serbia argued that the findings of an ICTY Appeals Chamber should not necessarily be accorded more weight than those of a Trial Chamber. Indeed, according to Serbia, the members of the Appeals Chamber are appointed at random and vary from one case to another, so that they have no greater experience or authority than those of the Trial Chamber having ruled on the same case. Serbia argues that the main difference between the two benches appears to be that the former consists of five judges, whilst the latter is composed of three judges. Moreover, the decision of the Trial Chamber was unanimous

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when it convicted Gotovina and Markač, whereas the Appeals Chamber reached its decision to acquit them by a majority of three against two. Serbia points out that, overall, the majority of the judges having sat in the *Gotovina* case were of the view that the Croatian forces did engage in indiscriminate shelling of the four above-mentioned Krajina towns.

It would follow, according to Serbia, that in the particular circumstances of the present case the Court should not attach any greater importance to the findings of the Appeals Chamber than to those of the Trial Chamber, and should form its own view of the persuasiveness of the arguments accepted by each of the two benches.

471. 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.

472. 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, which will be subjected to a more detailed analysis below in relation to the existence of the *dolus specialis*. 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.

473. Serbia further argues that, even if the Court were unwilling to reject the finding of the Appeals Chamber that the artillery attacks on the Krajina towns were not indiscriminate, and thus lawful under international humanitarian law, that would not prevent it from holding that those attacks, conducted in the course of an armed conflict, 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.

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474. 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 (see paragraph 186 of the 2007 *Bosnia and Herzegovina* v. *Serbia and Montenegro* Judgment, which states that "'[k]illing' must be intentional", cited in the present Judgment at paragraph 156 above). 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.

475. 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*

476. Serbia contends that the mass exodus of Serbs from the Krajina, whose numbers it estimates at a total of between 180,000 and 220,000 persons, was a forcible one, resulting from a political plan deliberately designed by the Croatian authorities to force the population of Serb origin living in Croatia to leave and to be replaced by a population of Croat origin.

Croatia disputes this claim, arguing that the Serbs who left the Krajina during and immediately after Operation Storm did so because of the risk of violence commonly associated with an armed conflict, or of the fear generally instilled in them by the Croatian forces, but without being forced to do so by the latter. It further contends that "the 'exodus' of a

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majority of the Serb population was pursuant to a decision to evacuate taken by the 'RSK's' 'Supreme Defence Council'". Croatia cites the Judgment of the ICTY Appeals Chamber in *Gotovina*, in which the Chamber overturned the findings of the Trial Chamber that the Serb exodus had been provoked by unlawful attacks on the towns of Knin, Benkovac, Gračac and Obrovac.

477. The only question facing the Court is whether genocide was committed during Operation Storm. The forced displacement of a population, even if proved, would not in itself constitute the *actus reus* of genocide.

As the Court stated in its 2007 Judgment in the *Bosnia and Herzegovina* v. *Serbia and Montenegro* case,

> "[ethnic cleansing] can only be a form of genocide within the meaning of the Convention, if it corresponds to or falls within one of the categories of acts prohibited by Article II of the Convention. Neither the intent, as a matter of policy, to render an area 'ethnically homogeneous', nor the operations that may be carried out to implement such policy, can *as such* be designated as genocide . . . [the] deportation or displacement of the members of a group, even if effected by force, is not necessarily equivalent to destruction of that group . . . This is not to say that acts described as 'ethnic cleansing' may never constitute genocide, if they are such as to be characterized as, for example, 'deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part', contrary to Article II, paragraph *(c)*, of the Convention, provided such action is carried out with the necessary specific intent *(dolus specialis)*, that is to say with a view to the destruction of the group, as distinct from its removal from the region." (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro), Judgment, I.C.J. Reports 2007 (I)*, p. 123, para. 190; emphasis in the original.)

478. Combined with other elements, in particular with the commission of acts prohibited by Article II, the forced displacement of a population may contribute to the proof of genocidal intent (see paragraphs 162-163 above).

479. In the present case, 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. It further notes that the transcript of the Brioni meeting, to which it will return later (see paragraphs 501-507 below), 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

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population; they even to some extent predicated their military planning on such an exodus, which they considered not only probable, but desirable (see paragraph 504 below).

480. 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*

481. According to Serbia, the columns of Serbs fleeing their homes were targeted by artillery shelling and aerial bombardment, gunfire by infantry, and even attacks by Croatian civilians. It was in areas of Sector North that the majority of the attacks are alleged to have taken place. Serbia relies on testimony that, in the morning of 4 August 1995, that is to say, at the start of the attack on Knin, long convoys of refugees fleeing neighbouring municipalities were shelled as they passed through Knin. Serbia alleges that the roads followed by those convoys were deliberately shelled by Croatian forces, as were convoys of civilians fleeing Knin on 5 August. Serbia further cites Reports by Human Rights Watch and the CHC. According to the latter, on 6 August, Serbs had already formed a column fleeing the Croatian forces which had taken the towns of Knin, Obrovac and Benkovac in Sector South. Convoys of Serb refugees on other roads were allegedly also attacked, and there were likewise attacks on civilians near the towns of Glina and Živorac (on the road between Glina and Dvor), Maja and Cetingrad (in Sector North), as well as on Vrhovine and Petrovac (in Sector South). In support of its allegations, Serbia has also produced statements by 12 witnesses who testified before the courts of Serbia and Bosnia and Herzegovina.

Croatia denies these accusations. It asserts that civilians fleeing the towns and villages targeted by the military operation were passing through combat zones, so that they could have been victims of gunfire not specifically directed at them, and that the columns that were fired on also included both civilians and soldiers.

Croatia further asserts that almost all of the Respondent's allegations on this issue are based on the CHC Report, whose reliability it challenges.

482. The Court notes that the ICTY did not address the question of

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attacks on columns of fleeing Serbs. It must rule in this regard on the basis of the evidence presented to it by the Parties.

483. The Court finds that the evidence produced by Serbia is not entirely conclusive. As it has indicated, the Court cannot consider a fact proved solely on the basis of the Reports of CHC and Human Rights Watch (see paragraphs 457-459 above). The statements of witnesses before courts in Serbia and Bosnia and Herzegovina do not always demonstrate direct knowledge of the facts. In any event, this evidence leaves a substantial degree of doubt, in particular regarding the scale and origin of the attacks suffered by the columns of Serb refugees.

484. However, the Court considers that there is sufficient evidence to establish that such attacks did take place, and that they were in part carried out by Croatian forces, or with their acquiescence.

In this regard, the Court attaches some weight to the following passage from the Report of Mrs. Elisabeth Rehn, Special Rapporteur of the Commission on Human Rights, in which she stated the following concerning Operation Storm:

> "Fleeing civilians were subject to various forms of harassment, including military assaults and acts by Croatian civilians. On 8 August, a refugee column was shelled between Glina and Dvor, resulting in at least 4 dead and 10 wounded. A serious incident occurred in Sisak on 9 August, when a Croatian mob attacked a refugee column with stones, resulting in the injury of many persons. One woman subsequently died of her wounds. Croatian police watched passively until United Nations civilian police monitors showed up and prompted them to intervene. The Special Rapporteur met some Krajina refugees in Belgrade. They informed her of the tragic circumstances of their flight, which was particularly traumatic for children, the elderly, the sick and wounded." (United Nations doc. S/1995/933, p. 7, para. 18.)

The Court furthermore gives evidential weight to certain statements cited by Serbia from persons who directly witnessed such attacks and gave evidence before courts in Serbia and Bosnia and Herzegovina during the years following Operation Storm. In particular, Mr. Boris Martinović described how, having fled Glina following the shelling of that town between 4 and 7 August 1995, his refugee column joined another column fleeing Knin and the region of Kordun, and how the entire convoy was then shelled by the Croatian army near Brezovo Polje, and again near Gornji Zirovac. Similarly, Mr. Mirko Mrkobrad, who appeared as a witness in the present case, stated that he had been in a refugee column, which was shelled by Croat forces near a place called Ravno Rasce on 8 August 1995.

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485. 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*

486. Serbia contends that during Operation Storm, and after it had been officially terminated, Croatian units in the United Nations protected areas (UNPAs) within the RSK systematically carried out executions of Serb civilians and of soldiers who had laid down their arms. It alleges that, while the majority of the killings were committed in August 1995, they continued until the end of the year, during which time Croatian forces systematically massacred Serbs who had not fled the captured villages. The Respondent admits that, while the majority of killings which took place in Sector South are, in its view, now well established and recorded, the information available regarding those perpetrated in Sector North is more fragmentary. It maintains, however, that Croatian forces carried out systematic executions of Serb civilians having remained in the UNPAs both in the southern and in the northern sectors. It refers in particular to the findings of the Trial Chamber in the *Gotovina* case, which it says confirm that Croatian military units and special police continued to target the Serb civilian population of the Krajina after Operation Storm and committed more than 40 specified murders in August and September 1995.

Croatia disputes these allegations. It admits that crimes were committed against Serbs during Operation Storm and in its immediate aftermath, but contends that these were isolated acts, whose perpetrators have been convicted by the Croatian courts; on the contrary, there were no systematic killings of Serbs who had remained in the UNPAs. Croatia further challenges the reliability of the CHC Report, on which Serbia's allegations are largely founded.

487. The Court finds that the occurrence of summary executions of Serbs in the 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.

488. 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.

Thus, the Chamber considered it established that four Serbs were killed by one or more members of the Croatian special police on 7 August 1995 in Oraovac, Donji Lapac municipality (see *Gotovina* Trial Judgment, paras. 217-218), and that three people were killed by members of the Cro-

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atian army in Evernik municipality (two on 7 August 1995 in the village of Mokro Polje and one on or about 18 August in the village of Oton Polje) (*Gotovina* Trial Judgment, paras. 226-227, 231-232). It also regarded as proved the killing by members of the Croatian army of three people in the village of Zrmanja, Gračac municipality, in August and September 1995 (*ibid.*, paras. 246, 254-256), of one person in the village of Rudele, Kistanje municipality, at the start of August 1995 (*ibid.*, para. 312), and of one person in Kolarina, in the Benkovac municipality, on 28 September 1995 (*ibid.*, paras. 207, 1848). Lastly, it considered it established that a certain number of killings were committed in the municipalities of Knin and Orlič by Croatian military units and special police, with a total of 23 victims in Knin between 5 and 25 August 1995 (*ibid.*, paras. 313-481) and nine in Orlič on 6 August of the same year (*ibid.*, paras. 489-526). The Trial Chamber found that the victims were all civilians or people who had been detained or otherwise placed *hors de combat* (*ibid.*, paras. 1733, 1849).

489. While the Reports of the non-governmental organizations CHC and Veritas cannot be regarded as sufficiently credible to establish the numbers of Serb civilian victims in the UNPAs, their findings nonetheless corroborate other evidence that summary executions occurred. Moreover, Croatia itself has admitted that some killings did take place.

490. 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. Its reasoning, which is summarized above, was based on the fact that the Trial Chamber had erred in finding that the shelling of the "four towns" had been indiscriminate; that the shelling could not have been found to have been indiscriminate on the basis of the evidence before the Appeals Chamber; and that accordingly the existence of a joint criminal enterprise to expel the Krajina Serbs had not been established. In so ruling, the Appeals Chamber made no finding, because it had no need to do so, on the various individual acts of killing and ill-treatment noted — and regarded as proved — by the Trial Chamber. It should be emphasized in this regard that the task of the Appeals Chamber was to rule on the individual criminal responsibility of two high-ranking Croatian officials, and not on that of other members of the Croatian armed forces and police having committed crimes during Operation Storm, and — obviously — still less on the international responsibility of Croatia, which is the task incumbent upon this Court.

491. 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" (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Her-*

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zegovina v. *Serbia and Montenegro), Judgment, I.C.J. Reports 2007 (I)*, p. 134, para. 223).

492. In addition, the Court also notes that the Report presented by Mrs. Elisabeth Rehn to the General Assembly and the Security Council, which it has already cited, states the following:

> "Evidence gathered so far indicates that violations of human rights and humanitarian law which were committed during and after Operation Storm include the following:
>
> . . . . . .
>
> *(c)* Killing of remaining Serb civilians . . ." (United Nations doc. S/1995/933, p. 8, para. 23.)

493. 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. Those acts are "killings" constituting the *actus reus* of genocide.

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

494. Serbia alleges that, during and immediately after Operation Storm, a number of Serbs were ill-treated and tortured by Croatian forces. It relies on statements by several individuals having testified before courts in Serbia, as well as on the various available reports on Operation Storm. It also cites the findings of the Trial Chamber in the *Gotovina* case, which purportedly confirm that Croatian military units and special police carried out a large number of inhumane acts and acts of cruel treatment against Serbs throughout August and September 1995.

Croatia denies these charges. It contests both the probative value of the evidence produced by Serbia and the scale of the acts invoked. It insists that, in any event, it was never the intention of the Croatian leadership, and of President Tudjman in particular, to destroy the Krajina Serbs.

495. 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, and considered it as established that Serb civilians and soldiers who had laid down their arms were ill-treated by Croatian military units and special police in at least four towns in the Krajina; it describes these acts in detail in Section 4 of its Judgment.

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Thus, the Trial Chamber considered it established that a Serb civilian by the name of Konstantin Drča was arrested outside his home at around 4.30 p.m. on 11 August 1995 by people in uniform armed with automatic rifles, and transported to a house in Benkovac, where he was held until 15 March 1996. During his detention, members of the Croatian military police (VP) beat him several times and threatened to slit his throat (*Gotovina* Trial Judgment, para. 1111). The Chamber also found that, in Gračac, a civilian by the name of Bogdan Brkić was the victim of ill-treatment by members of the Croatian army (HV), who tied him to a tree, put some textiles underneath him, and set them alight, causing him pain (*ibid.*, para. 1120). In Knin, on 5 August 1995 and in the days that followed, ten Serbs were — often severely — beaten, threatened, injured and ill-treated by members of the Croatian military police and army (*ibid.*, paras. 316, 322, 476, 1136, 1138, 1141, 1146). The victims were civilians or soldiers who had laid down their arms. In Orlič, on 16 August 1995, members of Croatian military units or special police attempted to burn an elderly Serb woman (*ibid.*, para. 1158).

The Trial Chamber described these actions as "inhumane acts" and "cruel treatment" (*ibid.*, para. 1800). For the reasons given above, the Appeals Chamber did not upset those findings.

In her Report, the Special Rapporteur of the Commission on Human Rights included among the "violations of human rights and humanitarian law which were committed during and after Operation Storm", "[t]hreats and ill-treatment against the Serb minority population by Croatian soldiers and policemen and also by Croatian civilians" (United Nations doc. S/1995/993, p. 8, para. 23).

496. It is clear from the detailed description in the ICTY Trial Chamber Judgment in the *Gotovina* case 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.

In light of the preceding conclusion, the Court does not consider it 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*

497. Serbia contends that, during and immediately after Operation Storm, Croatian forces systematically looted and destroyed Serb houses. They are also alleged to have killed and burned livestock, polluted and destroyed wells and stolen stocks of firewood in Serb villages. Croatia

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disputes the scale of the acts alleged by Serbia and argues that, in any event, the Respondent has failed to show that the Croatian Government in any way planned, ordered, committed or encouraged such acts. Moreover, according to Croatia, such acts cannot constitute the *actus reus* of genocide within the meaning of Article II of the Convention.

498. 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*

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.

The Court must accordingly now determine whether the existence of the specific intent *(dolus specialis)* which characterizes genocide has been established in the present case.

(2) The genocidal intent (dolus specialis)

500. Serbia contends that the acts perpetrated by Croatia against the Serb population of the Krajina and allegedly falling within subparagraphs *(a)*, *(b)* and *(c)* of Article II of the Genocide Convention were committed with the intent of destroying the Krajina Serbs, a substantial part of the national and ethnical group of the Serbs in Croatia.

According to Serbia, the existence of that genocidal intent can be inferred, first, from the actual language of the transcript of the meeting held at Brioni on 31 July 1995, and secondly, and in any event, from the pattern of conduct that is apparent from the totality of the actions decided upon and implemented by the Croatian authorities during and immediately after Operation Storm — a pattern of conduct such that it can only denote the existence of genocidal intent.

(a) *The Brioni Transcript*

501. On 31 July 1995 a meeting of Croatia's top military leaders was held on the island of Brioni under the chairmanship of the President of the Republic of Croatia, Franjo Tudjman, in order to prepare Operation Storm, which was indeed launched a few days later.

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The full transcript of the discussions at that meeting, which were recorded, was produced before the ICTY during the *Gotovina* proceedings, then produced by Serbia before the Court for purposes of the present case. With a few isolated exceptions, the actual words of the participants are reproduced in that transcript.

502. According to Serbia, several passages from the transcript demonstrate the intention of the Croatian authorities, at the highest level, physically to eliminate the Krajina Serbs.

Serbia relies on the following passages.

At the start of the meeting President Tudjman is quoted as follows:

> "Therefore, we should leave the east totally alone, and resolve the question of the south and north.
>
> In which way do we resolve it? This is the subject of our discussion today. We have to inflict such blows that the Serbs will to all practical purposes disappear, that is to say, the areas we do not take at once must capitulate within a few days."

Later on in the discussion the Croatian President further stated: "And, particularly, gentlemen, please remember how many Croatian villages and town have been destroyed, but that's still not the situation in Knin today . . ."

At a later point, he continued:

> "But I said, and we've said it here, that they should be given a way out here . . . Because it is important that those civilians set out, and then the army will follow them, and when the columns set out, they will have a psychological impact on each other."

To which General Gotovina replied:

> "A large number of civilians are already evacuating Knin and heading towards Banja Luka and Belgrade. That means that if we continue this pressure, probably for some time to come, there won't be so many civilians just those who have to stay, who have no possibility of leaving."

A little later, the President's son, Miroslav Tudjman, stated: "[I]t is realistic to expect that when this is cleared and their forces [Serb armed forces] pulled out [from the Krajina] then they can prepare after ten days. In that time we will clear the entire area."

Finally, President Tudjman said: "[I]f we had enough [ammunition], then I too would be in favour of destroying everything by shelling prior to advancing."

503. Croatia disputes Serbia's interpretation of the Brioni Transcript. According to the Applicant, the Brioni discussions related exclusively to military and strategic issues: it was a matter of planning Operation Storm in the most effective way, rather than settling the fate of the Serb popula-

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tion living in Krajina. Only a biased reading of certain passages taken out of context could suggest — wrongly in Croatia's view — the existence of a plan aimed at destroying the civilian population. Croatia further contends that this was the conclusion of both the ICTY Trial Chamber and the Appeals Chamber in the *Gotovina* case in regard to the meaning and scope of the Brioni Transcript.

504. The Court is not persuaded by the arguments that Serbia seeks to derive from the Brioni Transcript.

In the Court's view, the passages quoted above, which are taken from the transcript of a meeting which lasted almost two hours, are far from demonstrating an intention on the part of the Croatian leaders physically to destroy the group of Croatian Serbs, or the substantial part of that group constituted by the Serbs living in Krajina.

President Tudjman's reference — on which Serbia places so much emphasis — to the aim of the Croatian forces being "to inflict such blows that the Serbs will to all practical purposes disappear" must be read in context, and specifically in light of what immediately follows: "that is to say, the areas we do not take at once must capitulate within a few days". Taken as a whole, that sentence is clearly more indicative of the designation of a military objective, rather than of the intention to secure the physical destruction of a human group.

The fact that the President subsequently asked the meeting to "remember how many Croatian villages and towns [had] been destroyed", while pointing out that this was "still not the situation in Knin", does not establish an intent on his part to destroy the Serb population of the Krajina.

Similarly, the concern expressed by the Croatian Head of State that the Serb civilians should be left with accessible escape routes, "[b]ecause it is important that those civilians set out, and then the army will follow them", in no way suggests any intent to destroy the Serb group as such, but is better understood as an aspect of military strategy. And it is clarified in particular by the final part of the same sentence: "and when the columns [of civilians and soldiers] set out, they will have a psychological impact on each other".

The same applies to General Gotovina's reply, where he foresees that there would not be many Serb civilians left in the area once the Croatian military offensive has begun, except for "those who have to stay, who have no possibility of leaving". Although not directly linked to any strategic considerations, that remark in no way suggests an intention physically to eliminate the Serb population.

Furthermore, the remark by Miroslav Tudjman ("When . . . their forces [have] pulled out, then they can prepare after ten days. In that time we will clear the entire area"), while containing a certain ambiguity, which the context cannot dispel, does not represent sufficiently persuasive evidence of a genocidal intent.

Finally, President Tudjman's statement that he would be "in favour of destroying everything by shelling prior to advancing" — if the Croat

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forces "had enough" ammunition — was made in the context of a discussion on the need to use the military resources available to those forces with restraint. It cannot be interpreted as reflecting an intent on the President's part to destroy the Krajina Serbs as such.

505. 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.

506. 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.

The Trial Chamber found that certain items in the transcript constituted evidence, together with other elements, of the existence of a concerted plan by the Croatian leaders to expel the Serb civilian population of the Krajina (the "joint criminal enterprise"). However, the Chamber found no evidence of an intention physically to destroy the group of the Krajina Serbs. In particular, with regard to the first remark of President Tudjman quoted above ("We have to inflict such blows that the Serbs will to all practical purposes disappear"), the Trial Chamber found that "when read in its context this particular statement focuses mainly on the Serb military forces, rather than the Serb civilian population" (*Gotovina* Trial Judgment, para. 1990).

As for the Appeals Chamber, it did not go nearly as far as the Trial Chamber, expressing itself as follows:

> "[O]utside th[e] context [of unlawful attacks], it was not reasonable to find that the only possible interpretation of the Brioni Transcript involved a [joint criminal enterprise] to forcibly deport Serb civilians. Portions of the Brioni Transcript deemed incriminating by the Trial Chamber can be interpreted, absent the context of unlawful artillery attacks, as inconclusive with respect to the existence of a [joint criminal enterprise], reflecting, for example, a lawful consensus on helping civilians temporarily depart from an area of conflict for reasons including legitimate military advantage and casualty reduction. Thus discussion of pretexts for artillery attacks, of potential civilian departures, and of provision of exit corridors could be reasonably interpreted as referring to lawful combat operations and public relations efforts. Other parts of the Brioni Transcript, such as Gotovina's claim that his troops could destroy the town of Knin, could be reasonably construed as using shorthand to describe the military forces stationed

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in an area, or intending to demonstrate potential military power in the context of planning a military operation." (*Gotovina* Appeals Judgment, para. 93.)

507. 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*

508. Serbia contends that, even if the Court were to find that the Brioni Transcript does not constitute evidence of Croatia's genocidal intent, and even if none of the acts alleged by the Respondent is in itself evidence of the existence of such intent, the acts and statements of the Croatian authorities taken as a whole, before, during and immediately after Operation Storm manifest a consistent pattern of conduct which can only show that those authorities were animated by a desire to destroy, in whole or in part, the group of Serbs living in Croatia. This is said to emerge, in particular, from the series of military operations conducted by Croatia from 1992 to 1995, during which Croatian forces allegedly committed war crimes and serious human rights violations against Serbs in Croatia. According to Serbia, this period was characterized by a policy of systematic discrimination against the Serbs, culminating in Operation Storm, which marked the point at which the campaign turned into one aimed at the actual destruction of the group.

509. Croatia vigorously disputes that assertion. It maintains that the purpose of all the acts and statements of the Croatian authorities cited by Serbia was strictly confined to regaining possession of areas under Serb control. It had first sought to achieve that aim by peaceful means, but eventually had no other choice but recourse to force. It considers that the evidence presented by Serbia is far from establishing a pattern of conduct such that it can only show an intention to destroy the protected group, in whole or in part.

510. In this regard, the Court recalls two findings from its Judgment rendered in the *Bosnia and Herzegovina* v. *Serbia and Montenegro* case (2007 Judgment), which it has already referred to earlier in the present Judgment, and which must now be regarded as solidly rooted in its jurisprudence.

First, what is generally called "ethnic cleansing" does not in itself constitute a form of genocide. Genocide presupposes the intent physically to destroy, in whole or in part, a human group as such, and not merely a desire to expel it from a specific territory. Acts of "ethnic cleansing" can

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indeed be elements in the implementation of a genocidal plan, but on condition that there exists an intention physically to destroy the targeted group and not merely to secure its forced displacement (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro), Judgment, I.C.J. Reports 2007 (I)*, p. 122, para. 190).

Secondly, for a pattern of conduct, that is to say, a consistent series of acts carried out over a specific period of time, to be accepted as evidence of genocidal intent, it would have to be such that it could only point to the existence of such intent, that is to say, that it can only reasonably be understood as reflecting that intent (see paragraphs 145-148 above).

511. In light of the two preceding propositions, Serbia's "pattern of conduct" argument cannot succeed. 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.

512. As has already been stated above, 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.

513. It is true that Serbia also cited, in its argument on Croatia's "pattern of conduct", the administrative measures imposed to prevent the Krajina Serbs from returning home. According to Serbia, these confirm the conclusion — which it asks the Court to draw — that the real target of Operation Storm was the Serb population.

514. In the Court's view, 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*

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.

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B. Discussion of the other Submissions in the Counter-Claim

(1) Alternative submissions

516. In the alternative, in the event that the Court does not uphold the principal submissions asking it to find that Croatia is internationally responsible for acts of genocide attributable to it, Serbia requests the Court to find that Croatia has violated its obligations under subparagraphs *(b)*, *(c)*, *(d)* and *(e)* of Article III of the Genocide Convention, namely its obligations not to commit acts constituting: "*(b)* Conspiracy to commit genocide; *(c)* Direct and public incitement to commit genocide; *(d)* Attempt to commit genocide; and *(e)* Complicity in genocide".

517. 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 is 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.

It follows that the alternative submissions must be rejected.

(2) Subsidiary submissions

518. On a subsidiary basis, irrespective of whether the Court upholds its principal and alternative submissions, Serbia requests the Court to find that Croatia has violated its obligation to punish acts of genocide committed against the Serb ethnical and national group living in Croatia, an obligation incumbent upon it under Article VI of the Genocide Convention, which provides:

> "Persons charged with genocide or any of the other acts enumerated in Article III shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction."

519. 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, its subsidiary submissions must also necessarily be rejected.

(3) Submissions requesting the cessation of the internationally wrongful acts attributable to Croatia and reparation in respect of their injurious consequences

520. Serbia asks the Court to order Croatia immediately to take effective steps to comply with its obligation to punish the authors of the acts

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of genocide committed on its territory during and after Operation Storm, and to take various measures to make good the damage and loss caused by its violations of the Genocide Convention, in particular by compensating the victims.

521. Since the present Judgment has found that no internationally wrongful act in relation to the Genocide Convention has been committed by Croatia, these submissions must also be rejected.

General Conclusion on the Counter-Claim

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

* * *

523. The Court has already referred to the issue of missing persons (see paragraphs 357-359 above), in the context of its examination of the principal claim. It notes that individuals also disappeared during Operation Storm and its immediate aftermath. It can only reiterate 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

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;

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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.

Done in French and in English, the French text being authoritative, at the Peace Palace, The Hague, this third day of February, two thousand and fifteen, in three copies, one of which will be placed in the archives of the Court and the others transmitted to the Government of the Republic of Croatia and the Government of the Republic of Serbia, respectively.

(Signed) Peter TOMKA,
President.

(Signed) Philippe COUVREUR,
Registrar.

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.

(Initialled) P.T.
(Initialled) Ph.C.

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SEPARATE OPINION OF PRESIDENT TOMKA

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

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

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

I. The Court's Jurisdiction *Ratione Temporis*

2. At the hearing in 2008 on preliminary objections, Serbia maintained its second objection, an alternative one, "that claims based on acts and omissions which took place prior to 27 April 1992 are beyond the jurisdiction of this Court and inadmissible" (*Application of the Convention on*

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the Prevention and Punishment of the Crime of Genocide (Croatia v. *Serbia), Preliminary Objections, Judgment, I.C.J. Reports 2008*, p. 420, para. 22). In its 2008 Judgment, the Court found that "the second preliminary objection submitted by the Republic of Serbia does not, in the circumstances of the case, possess an exclusively preliminary character" (*ibid.*, p. 466, para. 146 (4)). The Court identified "two inseparable issues" raised by Serbia's second preliminary objection:

> "The first issue is that of the Court's jurisdiction to determine whether breaches of the Genocide Convention were committed in the light of the facts that occurred prior to the date on which the FRY came into existence as a separate State, capable of being a party in its own right to the Convention; this may be regarded as *a question of the applicability of the obligations under the Genocide Convention to the FRY* [*(sic)*!] *before 27 April 1992*. The second issue, that of admissibility of the claim in relation to those facts, and involving questions of attribution, concerns the consequences to be drawn with regard to *the responsibility of the FRY* for those same facts *under the general rules of State responsibility*." (*Ibid.*, p. 460, para. 129; emphasis added.)

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

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

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

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

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

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

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

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

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

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

"Disputes between the Contracting Parties relating to the interpre-

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

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

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

> "The word 'including' tends to confirm that disputes relating to the responsibility of Contracting Parties for genocide, and the other acts enumerated in Article III to which it refers, are comprised within a broader group of disputes relating to the interpretation, application or fulfilment of the Convention." (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro), Judgment, I.C.J. Reports 2007 (I)*, p. 114, para. 169.)

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

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

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[1] See *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia* v. *Serbia), Preliminary Objections, Judgment, I.C.J. Reports 2008*, separate opinion of Judge Tomka, p. 519, para. 12.

[2] *Ibid.*

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

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responsabilité d'un Etat en matière de génocide"), the Court's jurisdiction "includes [its] power . . . to determine international 'responsibility of a State for genocide' *on the basis of attribution to the State of the criminal act of genocide perpetrated by a person*" (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro), Judgment, I.C.J. Reports 2007 (I)*, separate opinion of Judge Tomka, p. 345, para. 61; emphasis added).

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

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

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

In the words of this Court,

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

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

[4] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro), Judgment, I.C.J. Reports 2007 (I)*, separate opinion of Judge Tomka, p. 339, para. 53. I have already made, in more detail, the points that follow here in that separate opinion (pp. 339-340, paras. 54-56).

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

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

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

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

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

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

[6] See United Nations doc. A/C.6/236 and Corr. 1, reproduced in Hirad Abtahi and Philippa Webb, *The Genocide Convention: The Travaux Préparatoires*, Brill, 2008, Vol. II, p. 1986; emphasis added; also *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro), Judgment, I.C.J. Reports 2007 (I)*, separate opinion of Judge Tomka, p. 337, para. 49.

[7] See United Nations doc. A/C.6/SR.100, reproduced in Hirad Abtahi and Philippa Webb, *The Genocide Convention: The Travaux Préparatoires*, *supra* note 6, p. 1714; also *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro), Judgment, I.C.J. Reports 2007 (I)*, separate opinion of Judge Tomka, p. 337, para. 49.

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

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

[8] See United Nations doc. A/C.6/258, reproduced in Hirad Abtahi and Philippa Webb, *The Genocide Convention: The Travaux Préparatoires*, *supra* note 6, p. 2004; also *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro), Judgment, I.C.J. Reports 2007 (I)*, separate opinion of Judge Tomka, p. 340, para. 57.

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

[10] *Ibid.*

[11] See *ibid.*, p. 1774; also *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro), Judgment, I.C.J. Reports 2007 (I)*, separate opinion of Judge Tomka, p. 341, para. 58.

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

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

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

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

> "The responsibility of a party for genocide and the other acts enumerated in Article III arises from *its failure to comply with the obligations imposed by the other provisions of the Convention*, and in particular, in the present context, with Article III read with Articles I and II." (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro), Judgment, I.C.J. Reports 2007 (I)*, p. 114, para. 169; emphasis added.)

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

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

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

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

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

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

[14] See *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia* v. *Serbia), Preliminary Objections, Judgment, I.C.J. Reports 2008*, separate opinion of Judge Tomka, p. 520, para. 13.

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

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

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

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

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

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

II. Admissibility: The *Monetary Gold* Principle

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

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

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

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

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

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

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

[16] *Gabčíkovo-Nagymaros Project (Hungary/Slovakia), Judgment, I.C.J. Reports 1997*, p. 7. See the Preamble to the Special Agreement excerpted at page 11 and also page 81, paragraph 151. See also *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia* v. *Serbia), Preliminary Objections, Judgment, I.C.J. Reports 2008*, separate opinion of Judge Tomka, p. 521, para. 14.

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

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

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

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

III. Concluding Remark

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

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

(Signed) Peter Tomka.

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SEPARATE OPINION OF JUDGE OWADA

1. I voted in favour of the Judgment as a whole, including subparagraphs (2) and (3) of the operative paragraph (para. 524), which concluded that both the principal claim of Croatia and the counter-claim of Serbia, respectively alleging that the other Party had violated the Convention on the Prevention and Punishment of the Crime of Genocide, have not been established, but voted against subparagraph (1) of the operative paragraph of the Judgment, which rejects the *ratione temporis* jurisdictional objection raised by Serbia in the present case.

2. It is to be recalled that in its earlier Judgment in the present case concerning *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia* v. *Serbia)* (*I.C.J. Reports 2008*, p. 412) at its preliminary objections phase in 2008 (hereinafter "2008 Judgment"), the Court, while rejecting the first preliminary objection submitted by Serbia, as well as the third preliminary objection submitted by Serbia, found that "the second preliminary objection submitted by the Republic of Serbia does not, in the circumstances of the case, possess an exclusively preliminary character" (*ibid.*, p. 466, para. 146). This latter finding of the Court in subparagraph (4) of the operative paragraph 146 was made in accordance with paragraph 7 of Article 79 of the Rules of Court, amended in 1978 (which corresponds to the present Article 79, paragraph 9, of the current Rules of Court), and applicable to the present case at the time of the filing of the Application by Croatia in 1999.

3. The language employed in this finding of the 2008 Judgment is taken from the provisions of Article 79, paragraph 7, of the 1978 Rules of Court, which were first introduced in the Rules of Court in 1972 when a major revision of the Rules of Court was effected. This revision of 1972 replaced the language of the original provision of Article 62, paragraph 5, in the old Rules of Court. (The revised language of the 1972 revision had subsequently been retained unchanged at the time of the 1978 revision of the Rules of Court as its Article 79, paragraph 7, which was applicable to the present case.)

4. The original Article 62, paragraph 5, which had been consistently maintained since the days of the Permanent Court of International Justice, provided as follows:

> "After hearing the parties the Court shall give its decision on the objection or shall join the objection to the merits. If the Court overrules the objection or joins it to the merits, it shall once more fix time-limits for the further proceedings."

5. The legal effects of the change in the 1972 revision on the language of the provision in question are not so apparent from the language intro-

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duced, especially in terms of whether it was meant to effect a substantive modification of the procedure to be followed by the Court or whether it was meant to be a purely drafting change without affecting the procedure to be followed. A careful examination of the circumstances surrounding this change, especially of the lively discussions that ensued on this issue of the joinder of the preliminary objections at the time of the Judgment in the *Barcelona Traction, Light and Power Company, Limited (Belgium* v. *Spain)* case at its Second Phase in 1970 (see, e.g., opinions attached to that Judgment by Judges Morelli, Tanaka, and Fitzmaurice) together with the examination of the unpublished *travaux preparatoires* of the 1972 revision of the Rules of Court, leads me to the conclusion that it was those discussions which triggered this change and that the change was designed with a view to giving the Court a greater degree of flexibility in dealing with the issue of preliminary objections than had hitherto been the case, in the face of conflicting positions expressed within the membership of the Court on how to deal with the issue of the joinder of preliminary objections to the merits. As one learned author suggested, the use of the new formula "the objection does not possess, in the circumstances of the case, an exclusively preliminary character" (current Rules of Court, Art. 79, para. 9)

> "[was an attempt] to satisfy those [judges] who felt that certain objections [to jurisdiction and to admissibility] do possess, at least in principle, an intrinsically preliminary character" (Shabtai Rosenne, *The Law and Practice of the International Court, 1920-2005*, Vol. II, p. 889).

However, the issue of the legal effect of the solution adopted upon the Court's procedure at the merits stage has been left unresolved as a "puzzle" not spelled out in the revised formulation of the Rule:

> "The puzzle which the new Rule sets is whether the effect of the new formulation is to abolish completely the option of joining an objection to the merits, in that way wiping out a virtually consistent case law itself corresponding to a widely felt need, or whether the holding in a judgment that the objection does not, in the circumstances possess an exclusively preliminary character simply means that at that stage it is not accepted as a preliminary objection. In that event such a finding could be the equivalent of joining it to the merits, perhaps in the technical sense of a plea in bar, if the party raising that objection were to be so minded, and requiring the Court to reach a decision on it before discussing the merits, which nonetheless would have been fully aired in the written pleadings." (*Ibid.*, pp. 889-890.)

6. An authoritative interpretation given by the Court on this point in subsequent decisions involving this issue came with the case concerning *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America)* (*I.C.J. Reports 1986*, p. 14), and the case

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concerning *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon* v. *Nigeria)* (*I.C.J. Reports 1998*, p. 275). The Judgment in the former case summarizes the rationale of the change in the new Rule on this point as follows:

> "in particular where the Court, if it were to decide on the objection, 'would run the risk of adjudicating on questions which appertain to the merits of the case or of prejudging their solution' [*Panevezys-Saldutiskis Railway, P.C.I.J., Series A/B, No. 75*, p. 56]. If this power was exercised, there was always a risk, namely that the Court would ultimately decide the case on the preliminary objection, after requiring the parties fully to plead the merits, — and this did in fact occur (*Barcelona Traction, Light and Power Company, Limited, Second Phase, I.C.J. Reports 1970*, p. 3). The result was regarded in some quarters as an unnecessary prolongation of an expensive and time-consuming procedure.
>
> . . . . . .
>
> The solution of considering all preliminary objections immediately and rejecting all possibility of a joinder to the merits had many advocates and presented many advantages. In the *Panevezys-Saldutiskis Railway* case, the Permanent Court defined a preliminary objection as one 'submitted for the purpose of excluding an examination by the Court of the merits of the case, and being one upon which the Court can give a decision without in any way adjudicating upon the merits' (*P.C.I.J., Series A/B, No. 76*, p. 22). If this view is accepted then of course every preliminary objection should be dealt with immediately without touching the merits, or involving parties in argument of the merits of the case . . . However that does not solve all questions of preliminary objections, which may, as experience has shown, be to some extent bound up with the merits. The final solution [was thus] adopted in 1972, and maintained in the 1978 Rules . . ." (*Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Merits, Judgment, I.C.J. Reports 1986*, p. 30, paras. 39-40.)

7. Although this explanation of the rationale for the change would seem to fall short of giving a complete answer to the "puzzle", it is my considered view that what all this amounts to in the context of the present case is that under the new 1978 Rule of Article 79, paragraph 7 (currently Article 79, paragraph 9), the Court, by declaring in the operative part of its 2008 Judgment with its binding force upon the Parties 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, subpara. (4)), is in effect 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] con-

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tain 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).

8. More specifically in the context of the present case, the 2008 Judgment explains the reasons for this decision as follows:

> "As set out above, Serbia's preliminary objection, as stated in its final submission 2 *(a)*, is presented as relating both to the jurisdiction of the Court and to the admissibility of the claim. The title of jurisdiction relied on by Croatia is Article IX of the Genocide Convention, and the Court has established above that Croatia and Serbia were both parties to that Convention on the date on which proceedings were instituted (2 July 1999). Serbia's contention is however that the Court has no jurisdiction under Article IX, or that jurisdiction cannot be exercised, so far as the claim of Croatia concerns 'acts and omissions that took place prior to 27 April 1992', i.e., that the Court's jurisdiction is limited *ratione temporis*. Serbia advanced two reasons for this: first, because the earliest possible point in time at which the Convention could be found to have entered into force between the FRY and Croatia was 27 April 1992; and secondly, because 'the Genocide Convention including the jurisdictional clause contained in its Article IX cannot be applied with regard to acts that occurred *before* Serbia came into existence as a State', and could thus not have become binding upon it. Serbia therefore contended that acts or omissions which took place before the FRY came into existence cannot possibly be attributed to the FRY." (2008 Judgment, p. 457, para. 121; emphasis in the original.)

9. Among the reasons for the decision of the Court on this point, though the 2008 Judgment (paras. 120 *et seq.*) does not exhaustively refer to all the elements raised by the Parties in the context of the second preliminary objection of Serbia, it specifies, referring to one of the relevant elements, as follows:

> "In its preliminary objections Serbia contended that '[a]cts or omissions which took place before the FRY came into existence cannot possibly be attributed to the FRY'; it denies that Croatia has been able to demonstrate that the FRY was a State *in statu nascendi*, and argues that that concept is 'evidently not appropriate for this case'. At the hearings it argued that the requirements of Article 10, paragraph 2, of the ILC Articles on State Responsibility are not fulfilled in respect of the claims made by Croatia against Serbia in the present case. It contended that Croatia has been unable to specify an identifiable 'insurrectional or other movement' in the territory of the SFRY

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as one that established the FRY which would fall within the definition of that Article.

In so far as Article 10, paragraph 2, of the ILC Articles on State Responsibility reflects customary international law on the subject, *it would necessarily require the Court, in order to determine if that rule is applicable to the present case and for purposes of a possible application, to enter into an examination of factual issues concerning the events leading up to the dissolution of the SFRY and the establishment of the FRY*. The Court notes further that for it to determine whether, prior to 27 April 1992, the FRY was a State *in statu nascendi* for purposes of the rule invoked would similarly involve enquiry into disputed matters of fact. *It would thus be impossible to determine the questions raised by the objection without to some degree determining issues properly pertaining to the merits.*" (2008 Judgment, p. 459, paras. 126-127; emphasis added.)

10. It is based on these reasonings that the 2008 Judgment concludes:

"[i]n order to be in a position to make any findings on each of these issues [of the Court's jurisdiction to determine whether breaches of the Genocide Convention were committed in the light of the facts that occurred prior to the date on which the FRY came into existence as a separate State and of admissibility of the claim in relation to those facts], *the Court will need to have more elements before it*" (*ibid.*, p. 460, para. 129; emphasis added).

11. In view of these circumstances, it is my opinion that the present Judgment has failed to carry out the task assigned to the Court by this instruction of the 2008 Judgment. While the Judgment expends more than 40 paragraphs in this section on jurisdiction and admissibility, much of it dealing with an extensive discussion on *what Article IX is not about*, such as the general issue of genocide under general international law, which obviously cannot confer title to jurisdiction under the Convention upon the Court, it has not addressed in substance all the issues that it should be concerned with, such as the analysis from the legal and factual points of view, of the doctrine of State succession in respect of international responsibility as argued by the Parties in support of or against the exercise of jurisdiction *ratione temporis* by the Court within the scope of the compromissory provision of Article IX of the Convention. These are the issues that the Court declared that it could not go into at the stage of preliminary objections but which should be examined in the context of the merits of the case, to the extent necessary for the purpose of determining the scope of the jurisdiction *ratione temporis* conferred by the Parties upon the Court under Article IX. In my view, this examination is the sole relevant point that has been assigned to the Court to examine at this stage, in order to ascertain the legal basis for the existence *vel non* of the

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consent of the parties under the Convention, which alone constitutes the basis for conferring jurisdiction on the Court in relation to this second objection of the Respondent.

12. In dealing with those 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. They are *(a)* the contention that the Genocide Convention, providing for *erga omnes* obligations, has retroactive effect; *(b)* the contention that what came to emerge as the Federal Republic of Yugoslavia (hereinafter "FRY") during the period 1991-1992 was an entity *in statu nascendi* born out of the then existing Socialist Federal Republic of Yugoslavia (hereinafter "SFRY") in the sense of Article 10, paragraph 2, of the ILC Articles on the Responsibility of States for Internationally Wrongful Acts (hereinafter "ILC Articles on State Responsibility"); and, *(c)* as an alternative to *(b)* above, the contention that 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.

13. With respect to the arguments advanced by the Applicant in its contentions *(a)* and *(b)*, the Judgment offers a careful analysis in substance, and has come out with the conclusion that 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. It must be noted that these conclusions of the Court have been reached as a matter of a legal analysis of the claimed principles of law applicable to the present case, without going into a detailed analysis of the surrounding facts relating to the alleged events as claimed by the Applicant.

14. With regard to arguments advanced by the Applicant in its contention *(c)*, by contrast, the Judgment has refrained from engaging in a parallel legal analysis into the validity in international law of the claimed principles as a source of the applicable law.

15. It is interesting to observe that the substantive examination of the facts surrounding the events which took place during the period prior to 27 April 1992 reveals, subsequently in a section which follows the section on jurisdiction and admissibility where the Judgment has somewhat categorically concluded without any examination of these facts and therefore in my view without offering any factual or legal basis for so concluding, 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" (Judgment, para. 117). It seems surprising that the Judgment came to this conclusion without even a preliminary examination of "the facts that occurred prior to the date on which the FRY came into existence as a separate State", as prescribed by the 2008 Judgment (2008 Judgment, p. 460, para. 129).

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16. Indeed, 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. 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. As this is the legal basis on which the Judgment has come to its final conclusion on the merits of this case, it can only do so after it has satisfied itself that it has jurisdiction on the basis of an examination of all relevant facts and law raised by the Respondent in its second preliminary objection. Nevertheless, the Judgment came to this final decision on the merits after declaring, *ex cathedra*, that it has jurisdiction *ratione temporis* on the ground 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" (Judgment, para. 117).

17. In justification of this 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 as relevant (*ibid.*, paras. 106 *et seq.*). It is true that the Judgment tries to disassociate itself from any position that might look like an endorsement of this doctrine, even on a prima facie basis or on the basis of plausibility. Moreover, the Judgment continues to base its whole 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 I hold a 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 (para. 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).

In spite of the Judgment's seemingly careful approach to the question of the doctrine of State succession in respect of international responsibility and in spite of its formal disclaimer, it would seem difficult to interpret the following 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

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Parties, or through the operation of rules of general international law under Article IX. After an examination of the current state of the law of State succession in respect of international responsibility, the Judgment goes on to say that:

> "It is true 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.* As the Court explained in its 2007 Judgment in the *Bosnia and Herzegovina* v. *Serbia and Montenegro* case,
>
> > '[t]he jurisdiction of the Court is founded on Article IX of the Genocide Convention, and the disputes subject to that jurisdiction are those 'relating to the interpretation, application or fulfilment' of the Convention, but it does not follow that the Convention stands alone. In order to determine whether the Respondent breached its obligations under the Convention, as claimed by the Applicant, and, if a breach was committed, to determine its legal consequences, the Court will have recourse not only to the Convention itself, but also to the rules of general international law on treaty interpretation and on responsibility of States for internationally wrongful acts.' (*I.C.J. Reports 2007 (I)*, p. 105, para. 149.)
>
> The Court considers 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 referred to in the passage just quoted." (Judgment, para. 115; emphasis added.)

18. This statement, however, is in conflict with the following statement in the 2008 Judgment which explains why the Court in that case decided that:

> "In so far as Article 10, paragraph 2, of the ILC Articles on State Responsibility reflects customary international law on the subject, it would necessarily require the Court, in order to determine if that rule is applicable to the present case and for purposes of a possible application, to enter into an examination of factual issues concerning the events leading up to the dissolution of the SFRY and the establishment of the FRY. The Court notes further that for it to determine whether, prior to 27 April 1992, the FRY was a State *in statu nascendi* for purposes of the rule invoked would similarly involve enquiry into disputed matters of fact. It would thus be impossible to determine the questions raised by the objection without to some degree determining issues properly pertaining to the merits." (2008 Judgment, p. 459, para. 127.)

While this passage is referring more specifically to the issue of Article 10, paragraph 2, of the ILC Articles on State Responsibility, and not

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to the issue of State succession in respect of international responsibility, nevertheless the same logic should apply to the examination of the parallel contentions raised by Croatia in defence of its claim for jurisdiction and admissibility in relation to the events prior to 27 April 1992, the date on which the Respondent became bound by the Genocide Convention as a party to it. The Court in that 2008 Judgment clearly states that "for [the Court] to determine whether, prior to 27 April 1992, the FRY was a State *in statu nascendi* for purposes of the rule invoked would similarly involve enquiry into disputed matters of fact" and that "[i]t would thus be *impossible to determine the questions raised by the objection without to some degree determining issues properly pertaining to the merits*" (*ibid.*; emphasis added).

19. I have no disagreement of substance with the general statement in the 2007 Judgment as quoted above (para. 17). However, it is abundantly clear from the context of that passage that the purpose of this statement is totally different from what the present Judgment is trying to argue in the paragraph in question (Judgment, para. 115). The intent and purpose of the 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. The intent of the present paragraph 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, which is confined to "[d]isputes . . . relating to the interpretation, application or fulfilment" of the Convention, to something which is not expressly stated by arguing that claimed rules of general international law—which the Judgment would seem to imply could cover the law of State succession in respect of international responsibility—could be relevant to, and form an essential part of the argument of the Applicant on, the "interpretation, application or fulfilment" of the Convention for the purposes of determining the scope of jurisdiction.

20. I could only accept such logic, if the validity of the doctrine in question under general international law were fully examined by the Judgment in the section on jurisdiction and its veracity — or at any rate its plausibility — established. Otherwise, this doctrine would be no more than an argument advanced by one of the Parties to the dispute, just as is the argument, again advanced by the same Party in the present case and rejected by the present Judgment, on the validity of the doctrine based on Article 10, paragraph 2, of the ILC Articles on State Responsibility (a provision relating to the issue of responsibility of States *in statu nascendi*). On this latter issue the Judgment expends detailed discussion, arriving at the conclusion that this argument of Croatia cannot provide a basis for jurisdiction of the Court within the scope of Article IX of the Convention (Judgment, para. 105).

21. It is thus my position that the conclusion of the present Judgment should have been based on an approach to pursue the path prescribed by the 2008 Judgment and examine to the extent necessary the relevant aspects, both of facts and law, of the merits of the case before arriving at

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the conclusion that the claim of the Applicant cannot be upheld on the merits. If the present Judgment were to follow the present structure of the Judgment of treating the jurisdictional issues first before treating any aspect of the merits, the Court can only do so after satisfying itself that it has the necessary jurisdiction on the basis of the consent of the Parties. This would have required the Court 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 my submission, the present Judgment has failed to do that.

(Signed) Hisashi OWADA.

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SEPARATE OPINION OF JUDGE KEITH

1. As my votes indicate, I agree with the conclusions the Court has reached. My purpose in preparing this opinion is to give further reasons in support of those the Court gives in rejecting Croatia's claim and Serbia's counter-claim. The issue I address is the failure of each Party to establish the existence of the specific intent which is an essential element of genocide — the intent to destroy in whole or in part the identified protected group. Accordingly, although I have studied the detail of the record relating to, and reached conclusions on, the claims made by each about the *actus reus*, I do not see the need to put into print my conclusions on those matters. The Court does, of course, rule on them, but in refraining I bear in mind the wise caution given by King Solomon 3,000 years ago — not everything that a man thinks must he say; not everything he says must he write; but most important not everything that he has written must he publish.

Croatia's Claim: The Specific Intent

2. As the Court indicates, Croatia contends that genocidal intent can be inferred from 17 factors (Judgment, para. 408), one of which ((5) in the Court's list) was added at the hearing to the list included in the written pleadings. At the hearing it repeated its original list of 16 factors. Each, says Croatia in its Memorial, filed in 2001, was sufficient to demonstrate genocidal intent; collectively they provide overwhelming evidence of that intent (Memorial of Croatia (hereinafter "MC"), paras. 8.16-8.17).

3. In its Reply, filed in 2010, that is after the Court's *Bosnia* Judgment in 2007 (hereinafter the "2007 Judgment"), Croatia quoted from that Judgment (*I.C.J. Reports 2007 (I)*, pp. 196-197, para. 373) the following passage set out in the present Judgment, paragraph 145:

> "The *dolus specialis*, the specific intent to destroy the group in whole or in part, has to be convincingly shown by reference to particular circumstances, unless a general plan to that end can be convincingly demonstrated to exist; and for a pattern of conduct to be accepted as evidence of its existence, it would have to be such that it could only point to the existence of such intent."

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Croatia raised no questions at all about that test, and submitted that the evidence it presented in the Memorial, as supplemented by the Reply, "can only point to a specific intent to destroy that part of the Croat population of Croatia living in areas claimed as Greater Serbia" (Reply of Croatia (hereinafter "RC"), para. 2.14). In the Reply, it repeated its contention that the listed factors "point to the *inevitable* conclusion that there was a systematic policy of targeting Croats with a view to their elimination from the regions concerned" (*ibid.*, para. 9.23 quoting para. 8.16 of the Memorial; emphasis added in the Reply). It was only in the second round of the hearing that Croatia pressed the argument that, because the test stated in 2007 was excessively restrictive and was not based on any precedent, the Court should reconsider it (CR 2014/20, p. 19).

4. Like the Court (Judgment, para. 148), I think that the element of reasonableness is implicit in what the Court said in 2007. It is to be recalled that the standard for drawing an inference was stated in the context in which the Court had stipulated that claims against a State involving charges of exceptional gravity, such as genocide, must be proved by evidence that is fully conclusive; the Court must be fully convinced (2007 Judgment, para. 209; see also paras. 277 and 422). If I may be allowed the comment, there is a danger in reading the words of one sentence or just one phrase in a judgment in isolation from its wider context, including the factual context.

5. Croatia, in support of its initial 16 points, in addition to citing evidence which is reviewed below, asserts that all but one of the points (the failure to prosecute the crimes which it alleges amount to genocide) have been substantially confirmed by judicial findings by the ICTY in proceedings brought against senior Serb officials. It does not however identify those findings. That assertion, along with the list, now of 17, was repeated at the hearing (CR 2014/12, pp. 19-21, paras. 26-28).

6. While those unspecified findings of the ICTY may help establish the facts falling within the paragraphs of Article II of the Convention, I do not see, given the lack of any indictments for genocide, let alone any convictions, how the findings can, as a general proposition, help establish the specific intent. At the hearing, Counsel for Croatia added this:

> "I am sorry to go through in a list form those factors with the Court, but it is important because the Applicant's submission is straightforward. While individual acts committed in the course of the campaign *might* — if considered in isolation — have been explained as 'common crimes' or as 'excesses' committed in the course of a

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> conflict, all of the factors relied on by the Applicant, *taken together*, point to the inevitable, overwhelming conclusion that there was a systematic policy of targeting Croats with a view to the elimination of groups of Croats (or parts of groups) as a community within the regions concerned. This establishes quite clearly the required element of a specific intent to destroy a protected group in whole or in part and/or complicity to commit, or failure to prevent, such destructive acts." (CR 2014/12, p. 21, para. 29, original emphasis.)

An alternative reasonable explanation of the points, individually or collectively, may also be available: the policy or intent was not to destroy in whole or in part the particular Croatian group but rather was to expel them from the proposed "Greater Serbia". As the Court ruled in 2007 (2007 Judgment, para. 190) and recalls in today's Judgment (para. 162), the intent to engage in the policy of "ethnic cleansing" and the operations carried out to implement it cannot as such demonstrate the necessary intent, a proposition which Croatia did not challenge (e.g., CR 2014/12, pp. 15-18, paras. 10-18). I now turn to consider each of the factors.

7. As the Judgment notes (para. 420), the first factor — "the political doctrine of Serb expansionism" — is essentially based on the SANU (Serbian Academy of Science and Arts) Memorandum of 1986 (Memorial of Croatia, Ann. 14) which Croatia claims contributed to the rebirth of the idea of a "Greater Serbia" encompassing parts of the existing Croatia and Bosnia and Herzegovina in which significant Serbian and ethnic populations lived. Slobodan Milošević, the Memorial asserts, was able to "harness and develop further the nationalist sentiments of which the Memorandum was an expression" (*ibid.*, paras. 2.43-2.50; the quote is from paragraph 2.49). In its Counter-Memorial, Serbia responds that "neither the SANU Memorandum nor the proposal for border change in the SFRY contained anything illegal, and that in any case they did not contain even an indication of the intent to destroy the Croats" (Counter-Memorial of Serbia (hereinafter "CMS"), para. 949). It also points to what it sees as the frailty of the evidence supporting the alleged link between the Memorandum and the war in Croatia (*ibid.*, para. 950).

8. The Memorandum describes itself as "a 1986 paper by a group of members of the Serbian Academy of Science and Arts on topical social issues of Yugoslavia". As the Court says, the Memorandum has no official status. While Croatia appeared to seek to link a statement of a Serbian politician, made during the war, to the Memorandum and its proposals (Reply of Croatia, paras. 3.34-3.40; CR 2014/10, p. 48, para. 38; cf. CR 2014/16, pp. 24-28, paras. 1-12), I do not see comments made years later by a prominent Serbian (Opposition) parliamentarian as giving it any official endorsement. Nothing in its 35 pages proposes illegal

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action, let alone genocidal acts, and Croatia does not point to any (see RC, paras. 3.9-3.13). The Memorandum and the related evidence do not support the Croatian contention. It does not, on my reading, have anything like the force and official character that the "Strategic Goals" Decision at issue in the *Bosnia* case had, and even that document, the Court ruled in 2007, did not establish the specific intent. Rather, the objectives of that decision were capable of being achieved by the displacement of population and the acquisition of territory (2007 Judgment, paras. 371-372). As well, the position taken by the expert called by Croatia who gave an account of the "Serbian national programme" contained no indication that the programme required or even envisaged the extermination of the Croats (CrY 2013/8, EW2 (Biserko)).

9. The second factor Croatia refers to is statements of public officials, including those made in State-controlled media. As developed at the hearings, this submission is supported by statements by Serbia in its Counter-Memorial that before 2000 Serbian nationalism was the leading political idea and that hate speech was abundant in the Serbian media at the end of the 1980s and during the 1990s (CR 2014/5, p. 32, para. 5 referring to CMS, paras. 423 and 434; see also para. 420; and more generally for Croatia CR 2014/5, pp. 32-42, paras. 4-37 and CR 2014/6, pp. 57-60, paras. 14-23; see also point 11 below, para. 17). Croatia has established that Serbian authorities engaged in dreadful hate speech. The demonization was extreme. An intention to destroy the relevant Croat groups in whole or in part is not the only reasonable inference to be drawn from such actions; rather they may manifest an intention to cause massive expulsions, as in fact happened.

10. Croatia, thirdly, refers to the attack on Vukovar. The colossal mismatch in troop numbers and capabilities reveals, it says, the true purpose of the attack on Vukovar (CR 2014/8, p. 34, para. 20). It contends that around 1,100-1,700 Vukovar Croats probably died during the shelling, and that only 7,500 of the original 21,500 Croat population of Vukovar returned. "For the others who survived, their displacement was permanent" (*ibid.*, p. 47, paras. 84-85; CR 2014/12, pp. 11-12; cf. CR 2014/24, p. 43, paras. 23-25). Serbia responds that while the use of force by the attacking forces may have exceeded the needs of a normal military operation and while it caused grave suffering to the civilian population (including Serbs), "there is nothing to suggest that the attack was carried out with the [necessary specific] intent" (CMS, para. 955; see also CR 2014/15, p. 22, paras. 32-33). Again, while there is real force in the Croatian contention about the use of excessive, indeed unlawful, force, as Serbia in part recognizes, and as was stated by the ICTY (*Prosecutor* v. *Mile Mrkšić*, IT-95-13/1-T, Trial Chamber Judgment,

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27 September 2007, paras. 470-472), that does not, in itself, establish genocidal intent.

11. Fourth, Croatia relies on a videotape of Arkan on 1 November 1991 as evidence of genocidal intent of those carrying out an attack. I agree with the Court (Judgment, para. 438) that this act does not help establish the specific intent.

12. Fifth, Croatia invokes the link between the JNA and certain Serb paramilitary units. But, I do not see any basis at all for finding in these relationships, if established, support for the only reasonable inference being that the specific intent to destroy in whole or in part the protected group existed. The link could, to the contrary, demonstrate an intent to expel Croats from the areas under attack.

13. Sixth, Croatia depends on the nature and scale of the attacks on Croatian civilians, a matter also emphasized in the discussion of the pattern of behaviour (*ibid.*, para. 413). No doubt, as ICTY decisions demonstrate, widespread and systematic attacks did occur (see e.g., CR 2014/12, p. 27, para. 54). In addition to *Mrkšić*, Counsel referred to *Martić* in which the Trial Chamber found the existence of a joint criminal enterprise with the purpose of establishing an "ethnically Serb territory" through the removal of Croatian and non-Serb population from the territory of the "SAO Krajina"/"RSK" (CR 2014/20, pp. 47, para. 8; *Prosecutor* v. *Milan Martić*, IT-95-11-T, Trial Chamber Judgment, 12 June 2007, paras. 445-446). But again, the purpose was to remove the group or a large part of it, not an intent to destroy the group in whole or in part.

14. No doubt, as Croatia contends for its seventh point, ethnic Croats were consistently singled out for attack (see the references in CR 2014/6, pp. 60-62, paras. 22-29). But, as the Court said in 2007, it is not enough to establish that members of the group had been deliberately and unlawfully killed (2007 Judgment, para. 187). And, as Serbia submits, in the circumstances of an armed conflict between two ethnic groups most of the victims are going to be from the other group (CMS, para. 960).

15. The "white ribbon" requirement, Croatia's eighth point, is to be seen in the same light. To repeat, the Serbian authorities demonized Croatians and engaged in dreadful hate speech. At the oral stage, Croatia developed the argument by referring to certain statements annexed to its Memorial and Reply (CR 2014/6, pp. 57-58, paras. 15-16). Many are subject to the questions raised in the Judgment about unsigned statements or statements prepared by the police (Judgment, paras. 192-199). Those which are not subject to those questions remain but they too are consistent with the policy of driving the Croatians out of the various regions.

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16. The ninth and tenth points are about the numbers of Croats killed, missing or injured, the consequences of Serbian action being seen as evidence of the intention with which the actions were planned and carried out. As Croatia acknowledged in an answer to a question from a judge, no established figure for the number of deaths exists (MC, p. 384; RC, para. 9.7; cf. CMS, paras. 963-969). But, even if its figures of 10,000-12,000 dead and 1,000 missing are accepted, that is a small proportion of the total Croatian population of Krajina and Eastern Slavonia. In respect of the latter, the 1991 census showed that over 400,000 Croats lived there before the conflict, and in one village, Tenja, in Krajina, where Croatia claimed 37 men were killed, the census records 2,813 Croatians as living there (MC, paras. 4.20, 4.28-4.29 and CMS, paras. 967-968). Even on Croatia's figures the total killed appears to be less than one per cent of the total population of the allegedly targeted group (12,000 out of 1.7 to 1.8 million). I emphasize that this is not for me a matter simply of calculation. Many illegal killings occurred in this war and in dreadful ways. But the proportions are significant for establishing genocidal intent (e.g., *Kayishema*, ICTR-95-I-T, Trial Chamber Judgment, 21 May 1999, para. 93). I do not consider these factors assist Croatia's case. They also go to the issue of opportunity which the Court considers when addressing the alternative way in which Croatia presented its argument on specific intent (Judgment, paras. 431-440).

17. The eleventh element is the use of ethnically derogatory language during acts of killing, torture and rape. Croatia supported this element by referring to several of the statements annexed to its pleadings, with anti-Croat sentiment being indicated by those making the statements being labelled as Ustashas (see notes to CR 2014/6, pp. 57-60). Even if those statements are accepted, they do no more than confirm that many Serbs with authority engaged in hate speech of a deplorable kind. I do not see them as evidencing genocidal intent at the standard required.

18. Serbia does not contest the twelfth matter — that a large part of the Croatian population was displaced from RSK (CMS, para. 975). But, to repeat, "ethnic cleansing" in itself does not show genocidal intent. In support of its argument under this head, Croatia invoked the *Martić* decision of the ICTY (RC, paras. 9.2, 9.7, 9.30 and 9.29-9.43) which, it claimed, decided that there was a joint criminal enterprise (JCE) among the Serb political and military leadership, the purpose of which was to "eradicate", by killing and removing, the Croat civilian population from about one-third of the territory of Croatia in order to transform that territory into an ethnically homogenous Serb-dominated State (*ibid.*,

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para. 9.2; see also para. 9.34). The Tribunal does not use the word "eradicate" in the critical paragraphs of its Judgment which Croatia cites. Rather, it recalls that certain attacks "followed a generally similar pattern which involved the killing *and removal* of the Croat population" (emphasis added). It then referred to widespread violence, intimidation, and crimes against private and public property perpetrated against the Croat population. All of these actions created an atmosphere of fear in which the further presence of Croats and other non-Serbs in these territories was made impossible. "In this respect the Trial Chamber has concluded that the displacement of its non-Serb population was not a mere side-effect but rather a primary objective of the attacks" (*Prosecutor* v. *Milan Martić*, IT-95-11-T, Trial Chamber Judgment, 12 June 2007, para. 443).

The Court (Judgment, para. 424) quotes the concluding paragraph which ends with this sentence:

> "The Trial Chamber therefore finds beyond reasonable doubt that the common purpose of the JCE was the establishment of an ethnically Serb territory through the displacement of the Croat and other non-Serb population, as charged in Counts 10 [deportation] and 11 [forcible transfer]." *(Ibid.)*

This finding, as I read it, is fully consistent with an overall Serbian intention to create a "Greater Serbia" not by killings but primarily by expulsions. It does not support Croatia's claim of the existence of genocidal intent.

19. The thirteenth and fourteenth factors are the systematic looting and destruction of Croatian cultural and religious monuments and the suppression of that culture and those practices among the remaining population. These allegations, to the extent that they are established (Serbia does not contest the first, CMS, para. 978, but on the second, see paragraph 979) are for me further evidence of the Serb demonization and denigration of the Croats. They do not by themselves evidence genocidal intent. In this context, the Court recalls that "cultural genocide" was not included in the list of punishable acts in the Convention which limited genocide to physical or biological destruction (2007 Judgment, para. 344).

20. The fifteenth matter is the alleged consequent, permanent and intended demographic changes. I have already dealt with this (para. 18 *supra*).

21. The sixteenth factor is Serbia's alleged failure to prosecute genocidal acts. An answer based on Article VI of the Genocide Convention is that there is such an obligation only if the acts were committed on Serbia's territory which does not appear to be the case here. The contention is also of course a circular one.

22. In addition to the 16 factors which it listed in its written pleadings, Croatia at the hearings also emphasized a report of the Chief of Security

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of the Republic Territorial Defence Staff in Belgrade dated 13 October 1991 which stated that Arkan's troops were "committing uncontrolled genocide and various acts of terrorism" in the greater area of Vukovar (RC, para. 9.86; CR 2014/6, pp. 25-26, para. 43; CR 2014/10, p. 15, para. 20; CR 2014/12, p. 34, para. 84 referring to the Reply of Croatia, Ann. 63; for Serbia's view, see CR 2014/23, pp. 68-71, paras. 17-30). The Serbian Assistant Minister of Defence was informed of the Report. The truncating of the quotation by Croatia, in both its written and oral argument, gives a seriously misleading impression since the sentence as a whole and the following two paragraphs read as follows:

> "In the greater area of Vukovar volunteer troops under the command of Arkan and Kum are committing uncontrolled genocide and various forms of terrorism, completely out of the control of the commands of the units carrying out combat activities in that area.
>
> According to unverified information, these two nationalistic leaders known in public as international criminals, are robbing and looting the property of the Croatian and Serbian citizens, 'awarding' the members of their units and are planning to form 'Special Units for the Defence of Serbia', all under the name of 'organized combat'.
>
> We estimate that this is a very dangerous and well-organized paramilitary group of considerable power. Sooner or later governmental bodies and armed forces will have to fight them. I suggest that this problem be raised at the level of the federal organs and official organs of the Republic of Serbia, and that the appropriate solutions be found and measures taken to prevent any harmful effects."

I agree with the Court (Judgment, para. 438) that the Report provides no evidence of the existence of the necessary specific intent being held by the relevant Serbian authorities. The use of the word "genocide" is an attribution to the actions of Arkan and his group by the Chief of Security, without reasons being given.

23. For the reasons I have given, I do not find that the only reasonable inference to be drawn from the list of 17 factors which Croatia assembles is that the Serbian authorities had the necessary specific intent, that is to destroy the relevant ethnic Croat groups in whole or in part.

24. I agree with the Court that the alternative argument made by Croatia at the hearings aimed at establishing the specific intent, based on context, patterns of behaviour and opportunity also fails (*ibid.*, paras. 411-440). As I indicate at the outset, because Croatia has failed, in my view, to establish this essential element of specific intent, I do not in this opinion address the detail of the evidence and submissions relating to the *actus reus*. I note only that Serbia concedes that in some cases the killings alleged by Croatia took place and that they were methodical, directed at civilians and driven by ethnicity (e.g., Rejoinder of Serbia (hereinafter

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"RS"), para. 392; CR 2014/13, pp. 64-66) and that the findings of the ICTY provide convincing evidence of acts falling within Article II *(a)* and *(b)* of the Convention.

SERBIA'S COUNTER-CLAIM: SPECIFIC INTENT

25. As the Court indicates (Judgment, para. 500), Serbia claims that the existence of the specific intent of destroying in whole or in part the Krajina Serbs could be inferred on two different bases — (1) the transcript of the Brioni meeting of the President who was Commander in Chief and his senior military officials, and (2) the totality of the actions of the Croatian authorities before, during and after Operation Storm. I give my attention to the first matter to support and supplement the reasoning given by the Court (*ibid.*, paras. 501-507).

26. On their face, the Brioni Minutes appear to be a nearly complete stenographic record of a meeting which lasted nearly two hours (CMS, Ann. 52). I quote the major passages cited by Serbia in the order in which they appear in the Minutes. For ease of reference I number those passages and refer only to the page numbers of the Minutes. I also include passages quoted by Croatia and some passages quoted by neither. The more extensive treatment, I think, is required if the inferences to be drawn from the Minutes are to be properly considered and determined.

(1) The President began by recalling their determination to undertake further operations and that they had been determined to start lifting the Bihać blockade from the west. He continued as follows:

> "However, the situation as it stands now is that the United Nations representatives, Akashi, Stoltenberg and the Serbs have deprived of us this reason, since they are in the process of withdrawing their forces from the Bihać area." (P. 1; CMS, Annex 52; RS, para. 696.)

(2) The next passage quoted by Serbia records the President saying this:

> "But if in the forthcoming days we are to undertake further operations, then Bihać can only serve as some sort of pretext and something of a secondary nature. We must inflict total defeat upon the enemy in the south and north, just so we understand each other, leaving the east aside for the time being." (P. 1; CMS, para. 1197 and Annex 52.)

(3) The next quotation appears a few lines later:

> "Therefore we should leave the east totally alone, and resolve the question of the south and the north.

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> In which way do we resolve [the question of the north and the south]? This is the subject of our discussion today. We have to inflict such blows that the Serbs will to all practical purposes disappear, that is to say, the areas we do not take at once must capitulate within a few days." (P. 2; on several occasions, the passage quoted ends with the word "disappear"; CMS, para. 1198 without the first sentence; see also the Croatian comment on the forms of quotation; RC, para. 11.43 and note 96.)

That is followed, after a few lines, by a passage quoted by Croatia:

> "Therefore our main task is not Bihać, but instead to inflict such powerful blows in several directions that the Serbian forces will no longer be able to recover, but will capitulate." (P. 2; RC, para. 11.43.)

(4) The President completed his introductory remarks in this way, a short time after:

> "I told Sarinić, [Minister of Foreign Affairs] that in principle we favour negotiations if they accept the conditions I have set out in my reply to Akashi [the UNSG's Special Representative to the former Yugoslavia and Chief of UNPROFOR/UNCRO], but that he will not head the delegation if the meeting is held. So we can do that, he will call today, and we can accept this as a mask, that we are accepting the talks, and even designate our own delegation, but let us discuss whether we will undertake an operation tomorrow or in the next few days to liberate the area from Banija to Kordun to Lika and from Dalmatia to Knin, and how to carry this out in three, four or at the very most eight days. Then only some minor enclaves will remain which would be forced to surrender." (P. 2; CMS, para. 1105; the quote does not however include the passage after "Knin".)

(5) Sometime later the President commented:

> "It's all very well that the Admiral is now supposed to close off their remaining three exits, but you are not providing them with an exit anywhere. There is no way out to go . . . to close it off). To pull about and flee, instead, you are forcing them to fight to the bitter end, which exacts a greater engagement and greater losses on our side. Therefore, let us also please take this into consideration [because it's true, they are absolutely demoralized, and just as they have started moving out of Grahovo and Glamoč, when we put pressure on them, now they are already partly moving out of Knin.] Accordingly, let us take into consideration, on a military level, the possibility of leaving them a way out somewhere, so they can pull out part of their forces . . ." (P. 7; CMS, para. 1200; the passage in square brackets was not included in the Counter-Memorial; see also CR 2014/24, p. 55, para. 89.)

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Admiral Domazet, an HV Rear Admiral, in a passage not quoted by Serbia, responded:

> "Mr. President, here is a way and two ways; that is why in planning the operation we left this road in this area. This is the Lika area, here where the Serbs are, it is by the Serbs. We are leaving a route here and they can get out. The second route is leaving them Dvor na Uni, because only at the final stage will we break through to Kostajnica, gradually advance and allow them to leave. We won't close it off. So there are two key routes." (P. 7.)

(6) A little later the President accepted in principle the views expressed and said this:

> "There is something still missing, and that is the fact that in such a situation when we undertake a general offensive in the entire area, even greater panic will break out in Knin than has to date. Accordingly we should provide for certain forces which will be directly engaged in the direction of Knin. And, particularly, gentlemen, please remember how many Croatian villages and towns have been destroyed, but that's still not the situation in Knin today . . . Therefore, we will have to resolve this with UNCRO, this matter as well, and so forth. But their counterattack from Knin and so forth, it would provide very good justification for this action and accordingly, we have the pretext to strike, if we can with artillery, you can . . . for complete demoralization . . . not just this . . . *[sic]*." (P. 10; CMS, para. 1204, Serbia quoted only the third sentence; CR 2014/24, p. 23, para. 43.)

(7) Gotovina spoke next: "It is difficult to keep [400 infantrymen heading towards Knin] on a leash." (P. 10; CR 2014/18, p. 36, para. 147; CR 2014/24, p. 23, para. 43.)

The next section of the Minutes referred to by the Parties follows some pages later:

(8) "PRESIDENT:

> Does anyone here have any new proposals or views as to when we can undertake such an overall operation? And you must plan it out. What DOMAZET has set out, but this has to be articulated in detail, what are the points, which are the axes from which we must take those points in order to completely vanquish the enemy later and force him to capitulate. But I've said, and we have said it here, that they should be given a way out here . . . Because it is important that those civilians set out, and then the army will follow them, and when the columns set out, they will have a psychological impact on each other." (P. 15; CR 2014/24, p. 22, para. 41.)

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"Ante GOTOVINA:

A large number of civilians are already evacuating Knin and heading towards Banja Luka and Belgrade. That means that if we continue this pressure, probably for some time to come, there won't be so many civilians just those who have to stay, who have no possibility of leaving." (P. 15.)

Croatia quoted the following statement by the President made about half way through the meeting:

"When you say you're going to block Gračac off, bear in mind that there can be a state of panic in Gračac, you have to enter as quickly as possible and report that you have entered, as well as all of you who will be involved, because that will have a psychological effect in such situations. The psychological effect of the fall of a town is greater than if you shell it for two days." (P. 18; RC, para. 11.47.)

(9) "Vladimir ZAGOREC:

Mr. President, we must open up a pocket for them. When they start to flee they will have to flee somewhere, they won't go towards Knin or Kostajnica, we must open up a pocket where they will flee — Dvor na Uni." (P. 20; CR 2014/18, p. 25, para. 89.)

(10) "If we had enough [ammunition], then I too would be in favour of destroying everything by shelling prior to advancing." (P. 22; CMS, para. 1204.)

(11) "PRESIDENT:

A leaflet of this sort — general chaos, the victory of the Croatian Army supported by the international community, and so forth. Serbs, you are already withdrawing, and so forth, and we are appealing to you not to withdraw, we guarantee . . . This means giving them a way out, while pretending to guarantee civil rights, etc." (P. 29; CMS, para. 1203; CR 2014/18, p. 26, para. 92.)

(12) "PRESIDENT:

Hold on, I'm going to Geneva to hide this, not to talk. I won't send a Minister, but the Assistant Foreign Minister. That's on Thursday.

So, I want to hide what we are preparing for the day after. And we can rebut any argument in the world about we didn't want to talk, but we only wanted what . . ." (P. 32; CMS, para. 1196.)

27. In its Counter-Memorial, Serbia quotes the passages set out at (2) and (3) above, emphasizing the last sentence of (3), and continues in this way:

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> "[i]t clearly follows that the goal of the forthcoming military action was not only to achieve military control over Krajina and its reintegration to Croatia, but 'to inflict such blows that the Serbs will to all practical purposes disappear'. It can be seen from the transcripts that none of the participants opposed such a plan but, after President Tudjman spoke, they discussed methods of how to implement it." (CMS, para. 1198.)

I think that is a serious misreading of that part of the Minutes. It gives no weight at all to the reference to leaving to the east alone — which provided a possible exit for the Serbian populations. And it takes no account of the closely following passage in which the emphasis is on the capitulation of the Serb *forces*. The Trial Chamber in *Gotovina* rejected the claim of the Prosecutor that the reference to making "Serbs disappear" was to the Serb civilians rather than to the Serb military forces (para. 1990); the statement focused mainly on the Serb military forces, rather than the Serb civilian population; as the Court notes, the Appeals Chamber did not even go that far (Judgment, para. 506). The frequent, truncated quotations of the passage under (3), ending at "disappear", also mislead. The "within a few days" element in that passage is also reflected in the last two lines of the passage (4), again words not quoted by Serbia. The Counter-Memorial does then recognize that Croatia would allow exits (para. 1200 quoting passage (5), but not fully). Serbia does not in this pleading or elsewhere give weight to the brief extent of Operation Storm, both in its planning, so far as it appears from the Brioni Minutes, and in fact. In the course of those few days, 200,000 Serbs were able to flee. President Tudjman had insisted on a number of occasions that they be left with ways out.

28. The remaining passages quoted above, with the exception of (9), are all about trying to recover the territory and to expel the Serbs, military as well as civilian, as quickly as possible. Other passages, not quoted above, emphasize that need for speed — e.g.:

> "President: How long would that first stage [seizing Ljinboro, placing Udbina under control] last?
> Davor Domazet: Two to three days." (CMS, Ann. 52, pp. 7-8.)

29. Also significant are the other references to causing greater panic; complete demoralization; the psychological effect of the fall of a town being greater than shelling it for two days; "we must be daring, in a situation of general demoralization" (*ibid.*, p. 14); and later a presidential reference to the operations being over in four days (*ibid.*, p. 24). Against that continuing emphasis on rapid action and expulsion rather than on an

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intention to engage in mass killing, I do not see the passage about ammunition (10), however shocking, as significant in establishing the necessary intent.

30. It is the case, as Serbia says, that Croatia's various actions — notably during and following Operation Storm — have led to a huge drop in the Serbian population in Croatia. Both Parties relied extensively on the 1991 census. It was also relied on in the proceedings leading to the 2007 Judgment in *Bosnia* v. *Serbia* (*I.C.J. Reports 2007 (I)*, p. 138, para. 232). The sets of figures do not appear to be in dispute. They give some sense of the massive displacement in both directions. But, as already noted (see para. 6 *supra*), the Court has earlier ruled and today confirms that "ethnic cleansing" in itself does not amount to genocide. The result actually achieved by Croatia is to be seen as confirming that the intention was to expel the greater part of the Serbian population from the area and not to destroy it in whole or in part.

31. To summarize, I read the Brioni Minutes as demonstrating:

(a) that the action was aimed at getting the Serb *forces* to capitulate;
(b) that departure routes into Serb controlled areas would be left to the east;
(c) an intention that a large proportion of the Serbian population would be displaced; and
(d) that the whole operation would be over in 3, 4, or at the very most 8 days.

32. To return to paragraph 1198 of the Counter-Memorial quoted in paragraph 27 above, I read the Minutes as indicating the goal of achieving military control over Krajina, Croatian territory after all, and its reintegration, and at the same time achieving a substantial removal of the local Serb communities. The goal was not to destroy in whole or in part that group. Accordingly, in my view, an essential element in the counter-claim, as originally presented, is not established.

33. I have nothing to add to the Court's discussion and rejection of Serbia's alternative contention (Judgment, paras. 508-514). It follows that I conclude that the counter-claim fails. For the reasons given earlier, I do not address in this opinion the evidence and submissions relating to the *actus reus*.

* * *

34. The record in this case, like that in the *Bosnia* case and in the many cases decided by the ICTY and by national courts, demonstrates that

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dreadful crimes and atrocities were committed in the region of former Yugoslavia in the early 1990s. The rejection by the Court in this case of both the claim and the counter-claim should not be allowed to obscure those facts. The rejections are to be explained by the limited jurisdiction of the Court under the Genocide Convention (e.g., Judgment, para. 85) in this case. The failure of each Party, in terms of the Convention, to establish that the other had the necessary specific intent does not affect in any way the clear findings, based on concessions by each Party, rulings of the ICTY and persuasive evidence that each side did commit serious crimes.

35. The Agent of Serbia made this acknowledgment in the course of the hearing before the Court:

> "Mr. President, the fundamental disagreement of the respondent State with the Applicant's approach to the unsigned statements and police reports does not mean that the Serbian Government denies that serious crimes were committed during the armed conflict in Croatia. Yes, the serious crimes were perpetrated against the members of the Croatian national and ethnic group. They were committed by groups and individuals of Serb ethnicity. It goes without saying that Serbia condemns such crimes, regrets that they were committed, and sympathizes profoundly with the victims and their families for the suffering that they have experienced.
>
> . . . . . .
>
> [I]t is not in dispute that murders of Croatian civilians and prisoners of war took place during the conflict." (CR 2014/13, pp. 64-65, paras. 38 and 40.)

He recognized that:

> "In that notorious crime [Ovčara], the ICTY recorded 194 prisoners of war who were killed. This was the gravest mass murder in which Croats were the victims during the entire conflict." *(Ibid.)*

36. The Agent of Croatia also acknowledged that crimes were committed against Serbs:

> "Croatia wishes to express to this Court its sincere desire to achieve full reconciliation with Serbia. Our Presidents, Mr. Mesić and Mr. Josipović, have expressed their sincere regret on behalf of the Croatian people for all crimes committed against Serbs — including in Operation Storm. They have done so on official visits to Belgrade. However, reconciliation must be based on historical facts.
>
> . . . . . .

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It is a fact that individual crimes were committed in the course of Operation Storm. Croatia deeply regrets the crimes committed and the pain caused to victims during the course of Croatia's liberation in Operation Storm. It has put in place structures to compensate the victims, and to provide redress through criminal and civil proceedings." (CR 2014/19, p. 17, paras. 20-21.)

(Signed) Kenneth KEITH.

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SEPARATE OPINION OF JUDGE SKOTNIKOV

Jurisdiction

1. According to paragraph 129 of the 2008 Judgment (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia* v. *Serbia), Preliminary Objections, Judgment, I.C.J. Reports 2008*, p. 460), the Court needed to assess the merits in order to determine the two "inseparable issues" of jurisdiction and admissibility[1]. Yet, in the present Judgment, the determination that the Court has jurisdiction is made prior to examining any element of the merits and is detached from the issue of admissibility. I agree with this approach. It is clear from the well-established jurisprudence of the Court that the issues of jurisdiction and admissibility are undoubtedly separable and that jurisdiction must be, and has always been, decided first. Secondly, the issue of jurisdiction in the present case can be decided by the Court without examining the merits. Indeed, the Judgment does not rely on any element of the merits in order to determine jurisdiction. It is also worth noting that, in adopting this approach, the Court makes it clear that the issue of attribution under the general rules of State responsibility may not be conflated or combined with the issue of consent-based jurisdiction[2].

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

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

> "In the view of the Court, the questions of jurisdiction and admissibility raised by Serbia's preliminary objection *ratione temporis* constitute two inseparable issues in the present case. The first issue is that of the Court's jurisdiction to determine whether breaches of the Genocide Convention were committed in the light of the facts that occurred prior to the date on which the FRY came into existence as a separate State, capable of being a party in its own right to the Convention; this may be regarded as a question of the applicability of the obligations under the Genocide Convention to the FRY before 27 April 1992. The second issue, that of admissibility of the claim in relation to those facts, and involving questions of attribution, concerns the consequences to be drawn with regard to the responsibility of the FRY for those same facts under the general rules of State responsibility. In order to be in a position to make any findings on each of these issues, the Court will need to have more elements before it."

[2] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia* v. *Serbia), Preliminary Objections, Judgment, I.C.J. Reports 2008*, dissenting opinion of Judge Skotnikov, pp. 547-548, para. 4.

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

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

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

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

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

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

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

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

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

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"(1) whether the acts relied on by Croatia [prior to the date on which the FRY came into existence] took place; and, if they did, whether they were contrary to the Convention;

(2) if so, whether those acts were attributable to the SFRY at the time that they occurred and engaged its responsibility; and

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

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

6. The Court decided in 2008 that:

> "[t]he first issue is that of the Court's jurisdiction to determine whether breaches of the Genocide Convention were committed in the light of the facts that occurred prior to the date on which the FRY came into existence as a separate State, capable of being a party in its own right to the Convention; *this may be regarded as a question of the applicability of the obligations under the Genocide Convention to the FRY before 27 April 1992*" (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia* v. *Serbia), Preliminary Objections, Judgment, I.C.J. Reports 2008*, p. 460, para. 129; emphasis added).

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

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

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of the FRY's capacity to appear before the Court, even though this was not mentioned at all in the 1996 Judgment[4] (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro), Judgment, I.C.J. Reports 2007 (I)*, pp. 98-102, paras. 132-140). The "necessary implication" of this "logical construction" of 2007 can be nothing other than that in 1996, the FRY, in the eyes of the Court, was a State party to the Court's Statute, and a Member of the United Nations, at the time of the filing of the relevant Application instituting proceedings, namely, 20 March 1993[5]. In the 2008 Judgment on preliminary objections in the present case, a novel idea was advanced, namely that, although the Court was open to the FRY only as of 1 November 2000, the date of its United Nations membership (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia* v. *Serbia), Preliminary Objections, Judgment, I.C.J. Reports 2008*, p. 444, para. 91), this did not matter, since Croatia could simply have refiled its Application of 2 July 1999 after 1 November 2000 (*ibid.*, pp. 429-444, paras. 57-92)[6]. In other words, that which was an insurmountable obstacle to the Court's jurisdiction in the *Legality of Use of Force* cases became a minor procedural issue in the present case.

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

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[4] See *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro), Judgment, I.C.J. Reports 2007 (I)*, declaration of Judge Skotnikov, pp. 366-367.

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

[6] See *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia* v. *Serbia), Preliminary Objections, Judgment, I.C.J. Reports 2008*, dissenting opinion of Judge Skotnikov, p. 546, para. 1.

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

Merits

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

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

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

[7] See *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro)*, *Judgment, I.C.J. Reports 2007 (I)*, declaration of Judge Skotnikov, pp. 370-375.

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

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

14. In the present case, in order to make a determination as to whether the crime of genocide and other acts enumerated in Article III of the Genocide Convention have been committed, instead of insisting on the Court's capacity to conduct its own enquiry to this end, it would have been sufficient to have taken notice of the relevant proceedings of the ICTY. These proceedings, of course, have never involved any charges of genocide in respect of events in Croatia. It is worth recalling that this Court has recognized that the ICTY is an international penal tribunal in accordance with Article VI of the Genocide Convention (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro), Judgment, I.C.J. Reports 2007 (I)*, p. 227, para. 445). Thus, in these proceedings, as in the *Bosnia and Herzegovina* v. *Serbia and Montenegro* case, the Court was in the "ideal" situation in that, for almost a quarter of a century now, there has been an international penal tribunal possessing jurisdiction with respect to the region in question and to the States involved[9]. As a matter

[8] Thankfully, the Court, in the present Judgment, does not return to the rather artificial and unnecessary notion featured in the 2007 Judgment of States themselves committing crimes punishable under the Genocide Convention (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro), Judgment, I.C.J. Reports 2007 (I)*, pp. 113-114, paras. 166-169).

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

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

(Signed) Leonid SKOTNIKOV.

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DISSENTING OPINION OF JUDGE CANÇADO TRINDADE

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*

I. *PROLEGOMENA*

1. I regret not to share the position of the Court's majority as to the determination of the facts as well as the reasoning conducive to the three resolutory points, nor to its conclusion of resolutory point No. 2, of the Judgment it has just adopted today, 3 February 2015, in the present case concerning the *Application of the Convention against Genocide*, opposing Croatia to Serbia. My dissenting position encompasses the adopted methodology, the approach pursued, the whole reasoning in its treatment of issues of evidential assessment as well as of substance, as well as the conclusion on the Applicant's claim. This being so, I care to leave on the records the foundations of my dissenting position, given the considerable importance that I attach to the issues raised by Croatia and Serbia, in the course of the proceedings in the *cas d'espèce*, in respect of the interpretation and application of the 1948 Convention against Genocide, and bearing in mind that the settlement of the dispute at issue is ineluctably linked, as I perceive it, to the imperative of the *realization of justice*.

2. I thus present with the utmost care the foundations of my own entirely dissenting position on those aspects of the matter dealt with by the Court in the Judgment which it has just adopted, out of respect for, and zeal in, the faithful exercise of the international judicial function, guided above all by the ultimate goal precisely of the *realization of justice*. To this effect, I shall dwell upon the relevant aspects concerning the dispute brought before the Court which form the object of its present Judgment, in the hope of thus contributing to the clarification of the issues raised and to the progressive development of international law, in particular in the international adjudication by this Court of a case of the importance of the *cas d'espèce*, under the Convention against Genocide, in the light of fundamental considerations of humanity.

3. Preliminarily, I shall address the regrettable delays in the adjudication of the present case, and, as to jurisdiction, the automatic succession of the 1948 Convention against Genocide as a UN human rights treaty, and the continuity of its obligations, as an imperative of humaneness (principle of humanity). Once identified the essence of the present case, I shall consider State responsibility under the Convention against Genocide. My next line of considerations will centre on the standard of proof, in the case law of contemporary international human rights tribunals as well as international criminal tribunals.

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4. I shall then proceed to review the fact-finding and case law on the factual context of the *cas d'espèce*, disclosing a widespread and systematic pattern of destruction, in relation to: *(a)* massive killings, torture and beatings, systematic expulsion from homes and mass exodus, and destruction of group culture; *(b)* rape and other sexual violence crimes committed in distinct municipalities; *(c)* disappeared or missing persons. Next, I shall review the onslaught (not exactly war), in its multiple aspects, namely: *(a)* plan of destruction (its ideological content); *(b)* the imposed obligation of wearing white ribbons; *(c)* the disposal of mortal remains; *(d)* the existence of mass graves; *(e)* further clarifications from the cross-examination of witnesses; *(f)* the forced displacement of persons and homelessness; *(g)* the destruction of cultural goods.

5. In sequence, I shall dwell upon the determination, under the Convention against Genocide, of the *actus reus* of genocide, in the widespread and systematic pattern of conduct of destruction (extreme violence and atrocities) in some devastated municipalities, as well as *mens rea* (proof of genocidal intent by inference). The path will then be paved, last but not least, for my considerations on the need of reparations, and on the difficult path to reconciliation, as well as to the presentation of my concluding observations (on evidential assessment and determination of the facts, as well as conceptual framework and reasoning as to the law), and, last but not least, the epilogue (recapitulation).

II. The Regrettable Delays in the Adjudication of the Present Case

1. Procedural Delays

6. Looking back in time, I cannot avoid expressing my regret at the considerable delays in the adjudication of the present case concerning the *Application of the Convention against Genocide*, opposing Croatia to Serbia. The Application instituting proceedings was filed on 2 July 1999. The first time-limits fixed by the Court for the filing by the Parties of the Memorial and Counter-Memorial were, respectively, 14 March 2000 and 14 September 2000[1]. In a letter dated 25 February 2000, Croatia requested an extension of six months for filing its Memorial. The request for extension was not objected by Serbia, who also requested an extension of six months for the filing of its Counter-Memorial. The time-limit for filing the Memorial was thus extended to 14 September 2000 and, for the Counter-Memorial, to 14 September 2001[2].

7. In a letter dated 26 May 2000, Croatia requested that the Court extend by a further period of six months the time-limit for the filing of the

[1] Order of 14 September 1999 (*I.C.J. Reports 1999 (II)*, p. 1105).
[2] Order of 10 March 2000 (*I.C.J. Reports 2000*, p. 3).

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Memorial. The request for extension was not objected by Serbia, who also requested an extension of six months for the filing of its Counter-Memorial. Thus, the Court further extended to 14 March 2001 the time-limit for filing the Memorial and to 16 September 2002 for the filing of the Counter-Memorial[3]. Croatia filed the Memorial on 14 March 2001 within the time-limit extended.

8. On 11 September 2002, within the time-limit so extended for the filing of the Counter-Memorial, Serbia filed certain *preliminary objections* as to jurisdiction and to admissibility. The proceedings on the merits were suspended, in accordance with Article 79 (3) of the Rules of Court, and a time-limit for the filing of a written statement of Croatia's submission on the preliminary objections was fixed for 29 April 2003[4]. Hearings on preliminary objections were held half a decade later, from 26 to 30 May 2008. The Court delivered its Judgment on preliminary objections on 18 November 2008, finding, *inter alia*, that, subject to its finding on the second preliminary objection submitted by Serbia, it has jurisdiction pursuant to Article IX of the Genocide Convention to entertain the Application of Croatia.

9. Serbia then requested an equal time-limit of 18 months to file its Counter-Memorial, which was the time-limit granted for the filing of the Memorial of Croatia. The time-limit for the filing of the Counter-Memorial was fixed for 22 March 2010[5]. The Counter-Memorial of Serbia was filed, within the time-limit, on January 2010, and it contained counter-claims. Croatia indicated (at a meeting with the President on 3 February 2010) that it did not intend to raise objections to the admissibility of the counter-claims but wished to respond to the substance of the counter-claims in a Reply. Serbia thus indicated that it accordingly wished to file a Rejoinder.

10. Given that there were no objections by Croatia as to the admissibility of Serbia's counter-claims, the Court did not consider it necessary to rule definitively at that stage on the question as to whether the counter-claims fulfilled the conditions of Article 80 (1) of the Rules of Court. The Court further decided that a Reply and Rejoinder would be necessary, and to ensure strict equality between the Parties (equality of arms/*égalité des armes*) it reserved the right of Croatia to file an additional pleading relating to the counter-claims. The Court thus fixed the time-limit for the filing of Croatia's Reply as 20 December 2010, and 4 November 2011 for the Rejoinder of Serbia[6].

[3] Order of 27 June 2000 (*I.C.J. Reports 2000*, p. 108).
[4] Order of 14 November 2002 (*I.C.J. Reports 2002*, p. 610).
[5] Order of 20 January 2009 (*I.C.J. Reports 2009*, p. 54).
[6] Order of 4 February 2010 (*I.C.J. Reports 2010 (I)*, p. 3).

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11. Croatia filed its Reply within the time-limit and Serbia also filed its Rejoinder within the fixed time-limits. Both the Reply and Rejoinder contained submissions as to the claims and counter-claims. The Court authorized the submission by Croatia of an additional pleading relating to the counter-claims of Serbia, and fixed for 30 August 2012 the filing of such additional pleading, which was filed within the time-limit[7]. In light of the foregoing, the hearings on the merits were thus scheduled to take place — as they did — from 3 March to 1 April 2014.

12. These facts speak for themselves, as to the regrettable delays in the adjudication of the present case, keeping in mind in particular those who seek for justice. Unfortunately, as I have pointed out, on other recent occasions within this Court, *the time of human justice is not the time of human beings*. In my dissenting opinion in the case of *Questions relating to the Obligation to Prosecute or Extradite (Belgium* v. *Senegal) (Provisional Measures, Order of 28 May 2009)*, I pondered that:

> "The time of human beings surely does not appear to be the time of human justice. The time of human beings is not long *(vita brevis)*, at least not long enough for the full realization of their project of life. The brevity of human life has been commented upon time and time again, throughout the centuries; in his *De Brevitate Vitae*[8], Seneca pondered that, except for but a few, most people in his times departed from life while they were still preparing to live. Yet, the time of human justice is prolonged, not seldom much further than that of human life, seeming to make abstraction of the vulnerability and briefness of this latter, even in the face of adversities and injustices. The time of human justice seems, in sum, to make abstraction of the time human beings count on for the fulfilment of their needs and aspirations.
>
> Chronological time is surely not the same as biological time. The time of the succession of events does not equate with the time of the briefness of human life. *Tempus fugit*. For its part, biological time is not the same as psychological time either. Surviving victims of cruelty lose, in moments of deep pain and humiliation, all they could expect of life; the young lose in a few moments their innocence forever, the elderly suddenly lose their confidence in fellow human beings, not to speak of institutions. Their lives become deprived of meaning, and all that is left is their hope in human justice. Yet, the time of human justice does not appear to be the time of human beings." (*I.C.J. Reports 2009*, p. 182, paras. 46-47.)

13. Shortly afterwards, in my dissenting opinion in the case concerning *Jurisdictional Immunities of the State (Germany* v. *Italy) (Counter-Claim, Order of 6 July 2010)*, I deemed it fit again to ponder, in relation to the

[7] Cf. Order of 23 January 2012 (*I.C.J. Reports 2012 (I)*, p. 3).
[8] Written sometime between the years 49 and 62.

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inhuman conditions of the subjection of prisoners of war to forced labour, that:

> "Not only had those victims to endure inhuman and degrading treatment, but later crossed the final limit of their ungrateful lives living with impunity, without reparation and amidst manifest injustice. The time of human justice is definitively not the time of human beings." (*I.C.J. Reports 2010 (I)*, p. 375, para. 118.)

This holds true, once again, in the present case concerning the *Application of the Convention against Genocide (Croatia* v. *Serbia)* — involving grave breaches of international law — where the aforementioned regrettable delays have extended for a virtually unprecedented prolongation of time (1999-2015), of over one and a half decades, despite the *vita brevis* of human beings.

2. Justitia Longa, Vita Brevis

14. Paradoxically, the graver the breaches of international law appear to be, the more time consuming and difficult it becomes to impart justice. To start with, all those who find themselves in this world are then promptly faced with a great enigma posing a life-long challenge to everyone: that of understanding the *passing of time*, and endeavouring to learn how to live *within* it. Already in the late seventh or early eighth century BC, this mystery surrounding all of us was well captured by Homer in his *Iliad*:

> "Like the generations of leaves, the lives of mortal men.
> Now the wind scatters the old leaves across the earth,
> now the living timber bursts with the new buds
> and spring comes round again. And so with men:
> as one generation comes to life, another dies away."[9]

15. As if it were not enough, there is an additional enigma to face, that of the extreme violence and brutality with which human beings got used to relating to each other, century after century:

> "War — I know it well, and the butchery of men.
> Well I know, shift to the left, shift to the right
> my tough tanned shield. (. . .) I know it all, (. . .)
> I know how to stand and fight to the finish,
> twist and lunge in the war-god's deadly dance[10]. (. . .)
> Now, as it is, the fates of death await us
> thousands poised to strike, and not a man alive
> can flee them or escape (. . .)[11].

[9] Homer, *The Iliad*, Book VI, verses 171-175.
[10] *Ibid.*, Book VII, verses 275-278 and 280-281.
[11] *Ibid.*, Book XII, verses 378-380.

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We must steel our hearts. Bury our dead,
with tears for the day they die, not one day more.
And all those left alive, after the hateful carnage,
(. . .) wretched mortals (. . .)
like leaves, no sooner flourishing, full of the sun's fire,
feeding on earth's gifts, than they waste away and die[12]. (. . .)
My sons laid low, my daughters dragged away
and the treasure-chambers looted, helpless babies
hurled to the earth in the red barbarity of war (. . .)
Ah for a young man
all looks fine and noble if he goes down in war,
hacked to pieces under a slashing bronze blade —
he lies there dead (. . .) but whatever death lays bare,
all wounds are marks of glory. When an old man's killed
and the dogs go at the grey head and the grey beard
and mutilate the genitals — that is the cruellest sight
in all our wretched lives![13]"

16. Homer's narrative of human cruelty seems endowed with perennial contemporaneity, especially after the subsequent advent of tragedy. This is the imprint of a true classic. Homer could well be describing the horrors in our times, or in recent times, e.g., in the wars in the former Yugoslavia during the nineties. There are, in the *Iliad*, murders, brutality, rape, pillage, slavery and humiliation; there are, in the present case of the *Application of the Convention against Genocide (Croatia* v. *Serbia)*, murders, brutality, torture, beatings, enforced disappearances, looting and humiliation; from the late eighth century BC to the late twentieth century, the propensity of human beings to treat each other with extreme violence has remained the same, and has even at times worsened.

17. This suggests that succeeding generations over the centuries, have not learned from the sufferings of their predecessors. The propensity of human beings to do evil to each other has accompanied them from the times of the *Iliad*, through those of the tragedies of Aeschylus and Sophocles and Euripides (fourth century BC), until the present, as illustrated by the *cas d'espèce*, concerning the *Application of the Convention against Genocide*. There is a certain distance from epic to tragedy; yet, the former paved the way to the latter, and tragedy was then to find its own expression, and, ever since, has never faded away. Tragedy sought inspiration in the narrative of epic, but added to it something new: the human sentiment, the endurance of living and the human condition. Tragedy has been accompanying the human condition throughout the centuries.

[12] Homer, *The Iliad*, Book XXI, verses 528-530.
[13] *Ibid.*, Book XXII, verses 73-75 and 83-90.

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18. It came to stay, performed throughout the centuries, time and time again, until our days. The war in the Balkans, portrayed in the present case opposing Croatia to Serbia, bears witness of that: it is tragic in its devastation. Yet, tragedy — which gave a new dimension to epic — was not focused only on destructiveness and the lessons to extract therefrom, but also on the *need for justice*. Aeschylus's *Oresteia* trilogy, and in particular the chorus in the *Eumenides*, can be recalled in this connection. Just as the passing of time has not erased the sombre propensity of human beings to do evil to each other, the search for justice has likewise been long-lasting, as also illustrated by the *cas d'espèce*. This regrettably appears proper of the human condition, from ancient times to nowadays: perennial evil, *vita brevis*; *justitia longa, vita brevis*.

III. Jurisdiction: Automatic Succession to the Genocide Convention as a Human Rights Treaty

1. Arguments of the Parties as to the Applicability of the Obligations under the Genocide Convention prior to 27 April 1992

19. In its Application filed in 1999, Croatia invoked jurisdiction on the basis that the Socialist Federal Republic of Yugoslavia (SFRY) was a party to the Genocide Convention and that Serbia was bound by it as a successor State to the SFRY[14]. Both Parties, according to Croatia, were bound by the Genocide Convention as successor States of the SFRY[15]. The SFRY had become a party to the Convention on 29 August 1950. In the light of the International Court of Justice's finding in 2008 that its jurisdiction in the present case arises of succession to the Genocide Convention[16] rather than accession, Croatia has stressed the existence of a continuing obligation, rather than one newly entered into[17]. Croatia has thus submitted that the Genocide Convention accords jurisdiction to the Court over conduct before 27 April 1992; it has put forward an alternative ground for jurisdiction over conduct predating 27 April 1992, namely, Serbia's declaration on that date[18].

20. Serbia, for its part, has acknowledged that it succeeded to the Genocide Convention with effect from 27 April 1992; in the light of the

[14] Application instituting proceedings, para. 28.
[15] *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. 424, para. 37 (hereinafter: the "2008 Judgment").
[16] 2008 Judgment, para. 111.
[17] CR 2014/12, of 7 March 2014, p. 38, para. 4.
[18] *Ibid.*, p. 40, para. 9.

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2008 Judgment, it has asserted that it became bound by the Genocide Convention from 27 April 1992 onwards, but not prior to that date[19]. It has submitted that acts and omissions that took place before 27 April 1992 cannot entail its international responsibility, as it only came into existence on that date, and, accordingly, it was not bound by the Genocide Convention before then. Alternatively, it has argued that Croatia only came into existence on 8 October 1991 and cannot raise claims based on facts preceding its coming into existence[20].

21. It should be recalled that the International Court of Justice, in 2008, examined only the effect of the declaration and Note to the United Nations of 27 April 1992 (to which it attributed the effect of a notification of succession to treaties), and did not deem it necessary to examine the wider question of the application in this case of the general law relating to succession of States, nor the rules of international law governing State succession to treaties (including the question of *ipso jure* succession to some multilateral treaties)[21]. The Court's interpretation of the declaration of 27 April 1992 was in itself sufficient for the purposes of establishing whether the respondent was bound by the Genocide Convention (with attention to Article IX) at the date of the institution of the proceedings. Be that as it may, now, in the merits phase, the question arises as to the applicability of the Genocide Convention to acts prior to 27 April 1992.

2. *Continuity of Application of the Genocide Convention (SFRY and FRY)*

22. In deciding, in its Judgment of 2008 on preliminary objections, that Serbia became bound by the Convention from 27 April 1992 onwards[22], the Court joined to the merits the question of the applicability of the obligations under the Genocide Convention to the Federal Republic of Yugoslavia (FRY) before 27 April 1992[23]. In this regard, Serbia submitted, in the oral proceedings at the merits stage, that "the Court already decided, at the preliminary objections stage, that Serbia *'only'* became bound by the Convention 'as of April 1992'"[24]. However, the Court only dealt with the question of whether the conditions were met under Article 35 of the Statute for the purposes of determining whether the FRY had the capacity to participate in the proceedings before the Court *on the date of the Application*, namely, 2 July 1999[25].

23. The question was decided not on the basis of whether Serbia succeeded to the Genocide Convention *ipso jure*, but solely on the basis of

[19] CR 2014/14, of 11 March 2014, p. 23, para. 4.
[20] Counter-Memorial of Serbia, paras. 206, 357-387.
[21] 2008 Judgment, para. 101.
[22] *Ibid.*, para. 117.
[23] *Ibid.*, para. 129.
[24] CR 2014/14, of 11 March 2014, p. 14, para. 26.
[25] 2008 Judgment, paras. 60, 67, 69, 71, 78 and 95.

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the historical record and of the declaration and Note of 27 April 1992[26]. Taking the view that the questions of jurisdiction and admissibility raised by Serbia's preliminary objection *ratione temporis* constituted "two inseparable issues" in that case, the Court expressly left the issue of the applicability of the obligations under the Genocide Convention to the FRY before 27 April 1992 open, to be decided at the merits stage of the *cas d'espèce*[27].

3. Continuity of the State Administration and Officials (SFRY and FRY)

24. While the FRY formally came into existence as a State on 27 April 1992, this proclamation only formalized a factual situation which had *de facto* arisen during the dissolution of the SFRY. Serbia considers that, until the proclamation of the dissolution of the SFRY, any act performed by individuals in the name of the SFRY may be attributable *only* to that entity. However, as the Badinter Commission recognized in its Opinion No. 1, from mid-1991 the SFRY ceased to operate as a functioning State and was authoritatively recognized as in a "process of dissolution". The dissolution was an extended process, completed on 4 July 1992, according to Opinion No. 8 of the Badinter Commission. This implies that, well before April 1992, the territory of the SFRY had already been divided, and Serbian leadership had effectively taken control of the principal organs of the former SFRY. This determination of the control of the political and military apparatus during this whole period is thus relevant.

25. Serbia cannot shift responsibility to an extinct State for the main reason that the personnel controlling the relevant organs in the interim period later assumed similar positions in the new government of the FRY. It was the same leadership which, from October 1991 — when the relevant organs of government and other federal authorities of the SFRY ceased to function — became *de facto* organs and authorities of the new FRY, acting under Serbian leadership. The former State officials of the SFRY had close ties with the officials of Serbia and Montenegro (FRY). Serbia does not deny that these were the same people carrying out the same policies. In this regard, Croatia provides a list of political and military leaders which illustrates the *personal continuity of the policy and practices from 1991 onwards*, on the part of the Serbian authorities located in Belgrade[28]. Serbia has not challenged the list of political and military leaders which attests this continuity and connections[29].

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[26] 2008 Judgment, para. 101.

[27] *Ibid.*, paras. 129-130.

[28] Memorial of Croatia, Appendix 8.

[29] One may refer to seven of the 17 political and military leaders, listed in Appendix 8 of Croatia's Memorial.

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4. Law Governing State Succession to Human Rights Treaties: Ipso Jure *Succession to the Genocide Convention*

26. Serbia's conduct — contrary to its allegations — supports the applicability of the Genocide Convention to the FRY before 27 April 1992. It is here important to keep in mind, to start with, the law governing State succession to human rights treaties. In effect, leaving aside State succession in respect of *classic* treaties, it is generally accepted that certain types of treaties — such as human rights treaties — remain in force by reason of their special nature. It can be argued, in this connection, that the application of the Genocide Convention to the FRY, when it was *in statu nascendi*, that is, before 27 April 1992, is justified — to paraphrase the International Court of Justice's Advisory Opinion of 1951 on the *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* (p. 23) — by the Convention's "special and important purpose" to endorse "the most elementary principles of morality", irrespective of questions of formal succession.

27. In this respect, the International Court of Justice's understanding of the object and purpose of the Convention, as set out in that *célèbre* Advisory Opinion, may here be recalled:

> "The origins of the Convention show that it was the intention of the United Nations to condemn and punish genocide as 'a crime under international law' involving a denial of the right of existence of entire human groups, a denial which shocks the conscience of mankind and results in great losses to humanity, and which is contrary to moral law and to the spirit and aims of the United Nations (Resolution 96 (I) of the General Assembly, 11 December 1946). The first consequence arising from this conception is that the principles underlying the Convention are principles which are recognized by civilized nations as binding on States, even without any conventional obligation. A second consequence is the universal character both of the condemnation of genocide and of the co-operation required 'in order to liberate mankind from such an odious scourge' (Preamble to the Convention)."[30]

28. Moreover, the Court emphasized that the Convention, as indicated, has a "special and important purpose" to endorse "the most elementary principles of morality"[31]. The Court further stated that the

[30] *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, I.C.J. Reports 1951*, p. 23.
[31] *Ibid.*

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principles of the Convention bind States "even without any conventional obligation" and that the Convention was intended to be "definitely universal in scope". In its Judgment on preliminary objections (of 11 July 1996) in the *Bosnia Genocide* case, the International Court of Justice referred no less than three times to the special nature of the Genocide Convention as a universal human rights treaty, in order to found its jurisdiction. There was awareness around the Bench as to the needs of protection of the segments of the populations concerned, and automatic succession to the Convention did not pass unnoticed[32].

29. Nowadays, almost two decades later, it is about time to take this analysis further. It is clear that the Genocide Convention is not a synallagmatic bargain, whereby each State party would bind itself to the other; it does not simply create rights and obligations between States parties on a bilateral basis. As a human rights treaty, it sets up a mechanism of *collective guarantee*[33]. In my view, it is not sufficient to assert (or reassert), as the International Court of Justice did almost two decades ago, that the 1948 Genocide Convention is a human rights treaty: one has, moreover, to extract the legal consequences therefrom (cf. *infra*).

30. In the present case concerning the *Application of the Convention against Genocide (Croatia* v. *Serbia)*, the relevant conduct was that of the JNA (or under its direction and control), and the JNA was a *de facto* organ of the nascent Serbian State. It would be utterly artificial to argue that the Convention continued to bind the SFRY until it formally disappeared[34], becoming thus no longer able to respond for any breach of an international obligation. Such a break in the protection afforded by the Genocide Convention would not be consistent with the precise object of safeguarding the very existence of certain human groups, in pursuance of the most elementary principles of morality.

31. This applies even more cogently in a situation of dissolution of State amidst violence. After all, the consequences of the commission of grave violations of international law will, in most cases, continue to affect and victimize certain human groups even after the date of succession, and even more so when surrounded by violence. In such circumstance, it would be unjust for the victims if no responsibility could be vindicated for the commission of internationally wrongful acts and their consequences

[32] Cf. case concerning the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Yugoslavia), Preliminary Objections, Judgment, I.C.J. Reports 1996 (II)*, separate opinions of Judges Shahabuddeen and Weeramantry, pp. 634-637 and 645-655, respectively.

[33] On the notion of *collective guarantee*, proper to human rights treaties, cf. A. A. Cançado Trindade, *Tratado de Direito Internacional dos Direitos Humanos* [*Treatise of International Law of Human Rights*], Vol. II, Porto Alegre/Brazil, S. A. Fabris Ed., 1999, pp. 47-53.

[34] In reality, the SFRY, in 1991 and 1992, was no longer exercising any direction or control of the JNA, and was already undergoing an irreversible process of dissolution.

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extended in time[35]. To argue that responsibility would vanish with the dissolution of the State concerned would render the Genocide Convention irrelevant. An internationally wrongful act and its continuing consequences cannot remain unpunished and without reparation for damages.

32. The Genocide Convention, as a human rights treaty (as generally acknowledged), is concerned with *State* responsibility, besides individual responsibility. It should not pass unnoticed that human rights treaties have a hermeneutics of their own (cf. *infra*), and are endowed with a mechanism of collective guarantee. Moreover, the Genocide Convention implies the undertaking by each State party to treat successor States as continuing (as from independence) any commitment and status which the predecessor State had as a party to the Convention.

33. It may be recalled, in this regard, that, in the context of the present proceedings, the Badinter Commission emphasized the need for all human rights treaties to which the SFRY was party to remain in force with respect to all of its territories[36]. I am of the view that there is automatic State succession to universal human rights treaties[37], and that Serbia has succeeded to the Genocide Convention (under customary law), without the need for any formal confirmation of adherence as the successor State. In light of the declaratory character of the Convention and the need to secure the effective protection of the rights enshrined therein, the *de facto* organs of the nascent Serbia were bound by the Genocide Convention before 27 April 1992.

5. State Conduct in Support of Automatic Succession to, and Continuing Applicability of, the Genocide Convention (to FRY prior to 27 April 1992)

34. Serbia's conduct itself evidences the applicability to it of the multilateral conventions to which the SFRY had been a State party at the time of its dissolution; its conduct itself provides evidence that it remained bound by them. In the particular circumstances of the present case, the FRY had,

[35] Cf., in this sense, e.g., P. Dumberry, *State Succession to International Responsibility*, Leiden, Nijhoff, 2007, pp. 278, 283-284, 297, 366, 409, 411, 424-425 and 428.

[36] Arbitration Commission, EC Conference on Yugoslavia (Robert Badinter, Chairman), Opinion No. 1, of 29 November 1991, 92 *International Law Reports*, p. 162.

[37] In relation to international human rights instruments, cf. UN Human Rights Commission resolutions 1993/23, 1994/16 and 1995/18, UN doc. E/CN4/1995/80 p. 4; Human Rights Committee's General Comment 26 (61), UN doc. CCPR/C/21/Rev.1/Add.8/Rev.1. Cf. also, in relation to Bosnia and Herzegovina's succession to the ICCPR, Decision adopted by the Human Rights Committee on 7 October 1992, and discussion thereto, *Official Records of the Human Rights Committee*, 1992-1993, Vol. 1, p. 15.

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since 1992, claimed to possess the status of a State party to the Convention against Genocide; thus, in its declaration of 27 April 1992[38], it stated that:

> "The [FRY], continuing the state, international legal and political personality of the [SFRY], shall strictly abide by all the commitments that the SFR[Y] assumed internationally."[39]

35. It follows that, by accepting that it was bound by all the obligations assumed by the SFRY, Serbia (the FRY) took expressly the position that the substantive obligations of the Convention against Genocide, like other obligations assumed by the SFRY, continued to apply without any temporal break, including before April 1992. It is important to note that, in its declaration, the FRY did not expressly or implicitly exclude its intention to be bound by the Convention before the date of the declaration (27 April 1992). It rather expressed an attitude of continuity at all relevant times, including with regard to obligations emanating from the Convention against Genocide. In this regard, it is useful to highlight that, in its official Note to the United Nations on the same date (27 April 1992), the FRY stated that:

> "Strictly respecting the continuity of the international personality of Yugoslavia, the [FRY] shall continue to fulfil all the rights conferred to, and obligations assumed by, the [SFRY] in international relations, including its membership in all international organizations and participation in international treaties ratified or acceded to by Yugoslavia."[40]

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[38] During the stage of preliminary objections in the present case, Serbia had disputed that the declaration of 27 April 1992 amounted to a notification of succession. The Court however, rejected that claim and concluded that Serbia did succeed to the Genocide Convention on 27 April 1992:

> "The Court, taking into account both the text of the declaration and Note of 27 April 1992, and the consistent conduct of the FRY at the time of its making and throughout the years 1992-2001, considers that it should attribute to those documents precisely the effect that they were, in the view of the Court, intended to have on the face of their terms: namely, that from that date onwards the FRY would be bound by the obligations of a party in respect of all the multilateral conventions to which the SFRY had been a party at the time of its dissolution, subject of course to any reservations lawfully made by the SFRY limiting its obligations." (2008 Judgment, par. 117.)

This was acknowledged by Counsel for Serbia at the hearings in the present proceedings; cf. CR 2014/14, of 11 March 2014, p. 23, para. 4.

[39] Joint declaration of the SFRY Assembly, the National Assembly of the Republic of Serbia and the Assembly of the Republic of Montenegro, 27 April 1992, UN doc. A/46/915, Annex II.

[40] Note to the United Nations (addressed to the Secretary-General), of 27 April 1992, *ibid.*

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36. It thus stems from these two documents (the 1992 declaration and the official Note to the United Nations) that there was immediate and automatic succession, whereby Serbia (the FRY) deemed itself bound to become the successor State and to assume all obligations of the SFRY, including obligations ensuing from the Genocide Convention. In other words, Serbia (the FRY), by its own declaration of 27 April 1992, stated clearly its engagement to succeed the SFRY as a State party to the Convention against Genocide. This entails that Serbia was already bound by the obligations of the Convention in relation to acts that occurred before the date of its declaration of 1992.

6. Venire Contra Factum Proprium Non Valet

37. Thus, in the circumstances of the present case, the International Court of Justice should bear in mind that Serbia (the FRY) itself recognized its commitment to continue its participation in international treaties ratified or acceded to by former Yugoslavia. The FRY's binding declaration strongly supports the continuing applicability of the obligations of the Convention against Genocide to the nascent Serbian State before 27 April 1992. Furthermore, it can be argued that the International Court of Justice appears to have resolved this issue in its 2008 Judgment on preliminary objections in the *cas d'espèce*[41]. When the International Court of Justice stated that "the 1992 declaration and Note had the effect of a notification of succession by the FRY to the SFRY in relation to the Genocide Convention", it seems that it thereby acknowledged that there was continuity as to the conventional obligations (between SFRY and FRY).

38. One decade later, the FRY's notification of accession of 6 March 2001 (deposited on 12 March 2001), after referring to the 1992 declaration and to the subsequent admission of the FRY to the United Nations as a new Member, stated, however, that

> "the [FRY] has not succeeded on April 27, 1992, or on any later date, to treaty membership, rights and obligations of the [SFRY] in the Convention on the Prevention and Punishment of the Crime of Genocide on the assumption of continued membership in the United Nations and continued state, international legal and political personality of the [SFRY] (. . .)"[42]

The notification of accession contained the following reservation:

> "The [FRY] does not consider itself bound by Article IX of the Convention (. . .) and, therefore, before any dispute to which the

[41] 2008 Judgment, para. 117.
[42] *Ibid.*, para. 116.

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> [FRY] is a party may be validly submitted to the jurisdiction of the International Court of Justice under this Article, the specific and explicit consent of the FRY is required in each case."[43]

39. Be that as it may, this step was inconsistent with the status which Serbia (the FRY), since its declaration of 1992, had been claiming to possess, namely, that of a State party to the Convention against Genocide. By the end of the nineties, there remained no doubt that the FRY had assumed all the international obligations that had been entered into by the SFRY, including those pertaining to the respect for human rights[44]. It should further be noted that the FRY never contended before this Court, in the previous proceedings, that it was *not* a party to the Convention against Genocide.

40. It was only when the FRY, abandoning its claim to continue the UN membership of the SFRY, was admitted to the United Nations in 2000, that it advanced the opposite view, initially in its written observations, filed on 18 December 2002, on the preliminary objections submitted in the *Legality of Use of Force* cases[45]. One cannot avail itself of a position *a contrario sensu* to the one earlier upheld, by virtue of a basic principle going as far back as classic Roman law: *venire contra factum proprium non valet*. In any case, the International Court of Justice, having concluded, at the preliminary objections stage, that the FRY was a party to the Convention against Genocide, considered that it was not necessary to make a finding as to the legal effect of Serbia's notification of accession to the Convention (dated 6 March 2001).

41. In the light of the aforementioned, in my understanding Serbia's change of attitude can have no bearing upon the jurisdiction of the Court. In this regard, citing its own *jurisprudence constante*, the International Court of Justice stated in 2008 that, if a title of jurisdiction is shown to have existed at the date of institution of proceedings, any subsequent lapse or withdrawal of the jurisdictional instrument is without effect on the jurisdiction of the Court[46]. Accordingly, the FRY, by way of its dec-

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[43] 2008 Judgment, para. 116.

[44] The declaration of 27 April 1992, whereby the formation of the FRY was proclaimed, "is the act which laid stress, in all its provisions, on continuity with the SFRY. Its content emphasizes that the country will keep the legal and political subjectivity of the former State and promises strict respect for its international obligations"; M. Sahović, "Le droit international et la crise en ex-Yougoslavie", 3 *Cursos Euromediterráneos Bancaja de Derecho Internacional* (1999), p. 392.

[45] The FRY requested the International Court of Justice to decide on its jurisdiction considering that the FRY "did not continue the personality and treaty membership of the former Yugoslavia", and was thus "not bound by the Genocide Convention until it acceded to that Convention (with a reservation to Article IX) in March 2001".

[46] Cf., e.g., *Nottebohm (Liechtenstein* v. *Guatemala), Preliminary Objection, Judgment, I.C.J. Reports 1953*, p. 122; *Military and Paramilitary Activities in and against Nicaragua*

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laration of 1992, bound itself as the successor State of the SFRY; this declaration operated automatic succession. Serbia remained bound by the Convention against Genocide for acts or omissions having occurred prior to 27 April 1992. The International Court of Justice has jurisdiction under the Convention in relation to those acts or omissions, and Croatia's claims in relation thereto are admissible.

7. Automatic Succession to Human Rights Treaties in the Practice of United Nations Supervisory Organs

42. Already in the early nineties, while the devastation was taking place in the Balkans, there was firm support, on the part of the United Nations supervisory organs, for automatic succession and continuing applicability of human rights treaties to successor States. Thus, in its resolution 1993/23, of 5 March 1993, the (former) UN Commission on Human Rights stated that successor States "shall succeed to international human rights treaties to which the predecessor States have been parties and continue to bear responsibilities"[47]. After calling upon the continuity by successor States of fulfilment of "international human rights treaty obligations of the predecessor State"[48], the Commission urged successor States "to accede or to ratify those international human rights treaties to which the predecessor States were not parties"[49].

43. The following year, in its resolution 1994/16, of 25 February 1994, the Commission on Human Rights evoked the "relevant decisions of the Human Rights Committee [HRC] and the Committee on the Elimination of Racial Discrimination [CERD] on succession issues, in respect of international obligations in the field of human rights"[50]. It further welcomed the recommendation of the Vienna Declaration and Programme of

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(Nicaragua v. *United States of America), Merits, Judgment, I.C.J. Reports 1986*, p. 28, para. 36; and case concerning the *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. 445, para. 95. In this sense, as the International Court of Justice stated in its Judgments in 2004 in the *Legality of Use of Force* cases, "the significance of this new development in 2000 is that it has clarified the thus far amorphous legal situation concerning the status of the Federal Republic of Yugoslavia vis-à-vis the United Nations" (p. 1191, para. 78).

[47] Third preambular paragraph.

[48] Fifth preambular paragraph.

[49] Operative part, para. 3.

[50] Second preambular paragraph. For an account of this aspect of the practice of the HRC and the CERD Committees in the nineties, cf. A. A. Cançado Trindade, *International Law for Humankind — Towards a New* Jus Gentium, *op. cit. infra* note 67, pp. 472-475.

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Action, recently adopted by the Second World Conference on Human Rights (1993), "to encourage and facilitate the ratification of, and accession or succession to, international human rights treaties and protocols"[51]. In the operative part of resolution 1994/16, the Commission, after emphasizing "the special nature of the human rights treaties"[52] aimed at the protection of the rights of the human person, requested the UN supervisory organs of human rights treaties "to consider further the continuing applicability of the respective international human rights treaties to successor States, with the aim of assisting them in meeting their obligations"[53].

44. Once again, in its following resolution 1995/18, of 24 February 1995, the Commission on Human Rights evoked the relevant decisions and recommendations of HRC and CERD, as well as the aforementioned recommendation of the Vienna Declaration and Programme of Action adopted by the UN Second World Conference on Human Rights (1993)[54]. And it again stressed "the special nature of the human rights treaties"[55], and it reiterated its request to the UN supervisory organs of human rights treaties to keep on considering "the continuing applicability of the respective human rights treaties to successor States", so as to assist them "in meeting their obligations"[56]. It is clear that, already at the time, in the early nineties, while the wars and devastation in the former Yugoslavia were taking place, the work at the United Nations in the present domain was being guided by basic considerations of humanity, rather than State sovereignty.

45. And it could hardly be otherwise. The "special nature" of human rights treaties — and the Genocide Convention is characterized as such, as a human rights treaty, — requires their continuing applicability, irrespective of the uncertainties of State succession. States themselves have acknowledged the special nature of human rights and humanitarian treaties, and have not objected to the understanding espoused by United Nations supervisory organs of their *continuing applicability, ipso jure*, to successor States. After all, the local populations cannot become suddenly deprived of any protection when they most need it, in cases of turbulent dissolution of a State, when considerations of humanity need to prevail over invocations of State sovereignty.

46. The UN Secretary-General, in his report to the United Nations General Assembly (of 19 October 1994), on the Implementation of Human Rights Instruments[57], recalled that, shortly after the Second

[51] Fourth preambular paragraph.
[52] Operative part, para. 2.
[53] *Ibid.*, para. 3.
[54] Second and third preambular paragraphs.
[55] Operative part, para. 2.
[56] *Ibid.*, para. 3.
[57] UN doc. A/49/537, of 19 October 1994, pp. 1-14.

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World Conference on Human Rights (Vienna, 14-25 June 1993), the fourth meeting of persons chairing the UN human rights conventional supervisory organs took steps towards the elaboration of "early warning measures and urgent procedures" aiming at the prevention of the occurrence, or recurrence, of grave violations of human rights; the chairpersons, moreover, welcomed the establishment, by the World Conference, of the post of UN High Commissioner for Human Rights (para. 12).

47. The UN Secretary-General, in his aforementioned report, then turned to the fifth meeting of chairpersons, where they espoused the view that their respective UN human rights treaties were "universal in nature and in application" (para. 13), and further stressed that "full and effective compliance" with their conventional obligations "is an essential component of an international order based on the rule of law" (para. 17). The Secretary-General added that the chairpersons endorsed his own initiative to urge States to "ratify, accede or succeed to those principal human rights treaties to which they are not yet a party" (para. 16).

48. It was further reported that their work on prevention of grave violations of human rights, including early warning and urgent procedures, continued (paras. 26-29). And the Secretary-General added, significantly, that the chairpersons were of the view that

> "successor States are automatically bound by obligations under international human rights instruments from their respective date of independence and (. . .) the respect of their obligations should not depend on a declaration of confirmation made by the new Government of the successor State" (para. 32).

49. For its part, the United Nations General Assembly, even earlier, in its resolution 47/121, of 18 December 1992, acknowledged, in relation to the "consistent pattern of gross and systematic violations of human rights" in the wars in the former Yugoslavia — with its concentration camps and "mass expulsions of defenceless civilians from their homes" — that "ethnic cleansing" appeared to be not the consequence of war, "but rather its goal". And the United Nations General Assembly added that "the abhorrent practice of 'ethnic cleansing'" was "a form of genocide"[58]. The same General Assembly resolution, *inter alia*, urged the Security Council to consider recommending the establishment of an *Ad Hoc* international war crimes tribunal — the ICTY — to try and punish those responsible for the perpetration of the atrocities[59].

[58] Seventh and ninth preambular paragraphs.
[59] Operative part, para. 10.

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IV. The Essence of the Present Case

1. Arguments of the Contending Parties

50. A careful examination of the arguments of the contending Parties, in both the written and oral phases of the proceedings as to the merits in the present case of the *Application of the Convention against Genocide (Croatia* v. *Serbia)*, reveals that the contending Parties, not surprisingly, devoted considerably more attention to the substance of the case (the merits themselves, in relation to Croatia's *main claim*) than to issues pertaining to jurisdiction/admissibility. These latter occupy only a small portion of the documents submitted by the contending Parties, namely: *(a)* in Croatia's Memorial, one chapter out of eight chapters, seven pages (pp. 317-323) out of a total of 414 pages; *(b)* in Serbia's Counter-Memorial, one chapter out of fourteen chapters, 50 pages (pp. 85-134) out of a total of 478 pages; *(c)* in Croatia's Reply, one chapter out of twelve chapters, 26 pages (pp. 243-269) out of a total of 473 pages; and *(d)* in Serbia's Rejoinder, one chapter out of eight chapters, 55 pages (pp. 39-93) out of a total of 322 pages.

51. As to the oral phase of the present proceedings as to the merits of the *cas d'espèce*, the same picture is disclosed. The arguments of the contending Parties, as expected, were rather brief on issues pertaining to jurisdiction/admissibility; the vast majority of their arguments focused on the substance of the *cas d'espèce* (the merits themselves, in relation to Croatia's *main claim*). May it be recalled that the public sittings before the Court extended for more than one month, having lasted from 3 March 2014 until 1 April 2014. In its first round of oral arguments, Croatia has dedicated not more than a part of one day of its pleadings to discuss in particular the specific question of jurisdiction[60]. And in its second round of oral arguments, Croatia has devoted only a small portion of pleadings to rebutting Serbia's arguments on jurisdiction[61].

52. For its part, in Serbia's first round of oral arguments, the bulk of the pleadings on questions of jurisdiction took place in just one session[62]. And, in its second round of oral arguments, Serbia has dedicated only a small part of its pleadings to a discussion of questions of jurisdiction[63]. It ensues from an examination of the contending Parties' oral pleadings that the vast majority of their arguments concerned questions pertaining to the merits; they have devoted only a small portion of their pleadings (around two sessions each) to the issue of jurisdiction.

[60] Cf. mainly CR 2014/12, of 7 March 2014, pp. 37-55. And cf. also CR 2014/5, of 3 March 2014, pp. 23-31; and CR 2014/10, of 6 March 2014, pp. 32-49.

[61] Cf. mainly CR 2014/20, of 20 March 2014, pp. 63-67. And cf. also CR 2014/21, of 21 March 2014, pp. 10-33.

[62] Cf. mainly CR 2014/14, of 11 March 2014, pp. 10-69.

[63] Cf. mainly CR 2014/22, of 27 March 2014, pp. 16-47.

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2. General Assessment

53. The foregoing shows that the contending Parties, at this stage of the merits of the present case, in the written phase of proceedings, have seen no need to devote more than a very small portion of their arguments to questions of jurisdiction/admissibility. They have rightly focused on the *merits* of the case. Likewise, in the oral phase of proceedings, both Croatia and Serbia have concentrated their pleadings on *substantive* issues; the two contending Parties have well captured the essence of the present case, pertaining to the interpretation and application of the Convention against Genocide and not to State succession.

54. It has been the Court that seems to have misapprehended this, devoting considerable more attention, at this final stage of the adjudication of the present case, again to the issue of jurisdiction, which should have been decided some years ago. The International Court of Justice, in the present Judgment on the merits of the *cas d'espèce*, concerning the *Application of the Convention against Genocide*, has devoted no less than 50 paragraphs to the jurisdiction issue, guarding small proportion in this respect.

V. Automatic Succession to the Convention against Genocide, and Continuity of Its Obligations, as an Imperative of Humaneness

1. The Convention against Genocide and the Imperative of Humaneness

55. Since the Court has done so in the present Judgment, I feel obliged, in the present dissenting opinion, to dwell upon the foundations of my own personal position in support of the automatic succession *(supra)* to the Convention against Genocide. It is generally acknowledged that the Genocide Convention is a human rights treaty; one of the legal consequences ensuing therefrom is the automatic succession to it and the continuity of its obligations.

56. As this Court itself indicated in its *célèbre* Advisory Opinion of 1951, States parties to the 1948 Genocide Convention do not have individual interests of their own, but are rather *jointly* guided by the high ideals and basic considerations of humanity having led the United Nations to condemn and punish the international crime of genocide, which "shocks the conscience of mankind and results in great losses to humanity", being contrary to the spirit and aims of the United Nations[64]. The fundamental principles underlying the Convention are "binding on States, even without any conventional obligation". The condemnation of genocide has a "universal character", with all the co-operation required "to

[64] UN, General Assembly resolution 96 (I), of 11 December 1946.

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liberate mankind from such an odious scourge", as stated in the Preamble to the Convention (cf. *supra*).

57. This calls for the automatic succession to the Genocide Convention, with the continuity of its obligations; international responsibility for the grave wrongs done to segments of the population concerned survives State disruption and succession. To argue otherwise would militate against the object and purpose of the Genocide Convention, depriving it of its *effet utile*; it would thereby deprive the targeted "human groups" of any protection, when they most needed it, thus creating a void of protection which would render the Genocide Convention an almost dead letter.

58. The *corpus juris gentium* for the international safeguard of the rights of the human person is conformed by the converging trends of protection of international law of human rights, of international humanitarian law, and of international law of refugees[65]. The rights protected thereunder, in any circumstances, are not reduced to those "granted" by the State: they are *inherent to the human person*, and ought thus to be respected by the State. The protected rights are *superior and anterior to the State*, and must thus be respected by this latter, by all States, even in the occurrence of State disruption and succession. It has taken much suffering and sacrifice of succeeding generations to learn this. The aforementioned *corpus juris gentium* is people-oriented, victim-oriented, and not at all State-sovereignty oriented.

59. The 1948 Genocide Convention is *people-oriented*, rather than State-centric: it is centred on human groups, whom it aims to protect. As contemporary history shows, in the event of dissolution of States the affected local populations become particularly vulnerable; that is the time when they stand most in need of the protection extended to them by human rights treaties, the Genocide Convention (to which their State had become a party) being one of them. The fact remains that the *corpus juris gentium* of international protection of the rights of the human person, essentially victim-oriented, has been erected and consolidated along the last decades (almost seven decades) to the benefit of human beings, individually (like under the 1951 Convention on the Status of Refugees, the 1966 UN Covenant on Civil and Political Rights, the 1965 UN Convention for the Elimination of All Forms of Racial Discrimination) or in groups (like under the 1948 Convention against Genocide).

60. That *corpus juris gentium*, which forms, in my view, the most important legacy of the international legal thinking of the twentieth century, cannot be undermined by the vicissitudes of State succession. The

[65] Cf. A. A. Cançado Trindade, *Derecho Internacional de los Derechos Humanos, Derecho Internacional de los Refugiados y Derecho Internacional Humanitario — Aproximaciones y Convergencias*, Geneva, ICRC, [2000], pp. 1-66.

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population — the most precious constitutive element of statehood — surely cannot be subjected to those vicissitudes, when State succession takes place amidst extreme violence. It is in those circumstances of the disruption of the State that the population concerned stands most in need of protection, such as the one afforded by the core Conventions of the international law of human rights, the international humanitarian law and the international law of refugees.

61. To attempt to withdraw their protection, rendering human beings, individually and in groups, extremely vulnerable, if not defenceless, would go against the letter and spirit of those Conventions. Moreover, when it comes to the Convention against Genocide, we find ourselves in the realm not only of conventional international law, but likewise of general or customary international law itself. As the International Court of Justice perspicaciously pondered in its aforementioned Advisory Opinion of 1951, the principles underlying the Convention against Genocide are "binding on States, even without any conventional obligation"[66]. And it could not be otherwise, as, in my own conception, the *universal juridical conscience* is the ultimate *material* source of international law, the *jus gentium*[67].

62. It is indeed in times of violent State disruption — as that of the former Yugoslavia — that human beings, individually or in groups, stand in most need of protection. After all, States exist for human beings, and not vice versa. To deprive human beings of international protection when they most need it, would go against the very foundations of contemporary international law, both conventional and customary, and would make abstraction of the *principle of humanity*, which permeates it. The *corpus juris gentium* of protection of human beings, in any circumstances, is — may I reiterate — essentially victim-oriented, while the outlook of State succession is ineluctably and strictly State-centric.

63. Such an outlook cannot at all be made to prevail in violent State disruption, entailing the discontinuity of that protection when it is most needed. The automatic succession to the Convention against Genocide is an *imperative of humaneness*. The *corpus juris gentium* of protection of the human person enshrines rights which are *anterior and superior to the State*. They are listed, *inter alia*, in the *core Conventions* of the United Nations (the two Covenants on Human Rights of 1966; the Conventions for the Elimination of All Forms of Racial Discrimination, and of Discrimination against Women, of 1965 and 1979; the 1984 Convention against Torture; and the 1989 Convention on the Rights of the Child). Moreover, in the last decades international legal doctrine has

[66] *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, I.C.J. Reports 1951*, p. 23.

[67] A. A. Cançado Trindade, *International Law for Humankind — Towards a New* Jus Gentium, 2nd rev. ed., Leiden/The Hague, Nijhoff/The Hague Academy of International Law, 2013, Chap. VI, pp. 139-161.

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endeavoured to identify a *hard core* of universal human rights — non-derogable ones — which admit no restrictions, namely, the fundamental rights to life and to personal integrity, the absolute prohibition of torture and of cruel, inhuman or degrading treatment.

64. Contemporary international law is particularly sensitive to the pressing need of humane treatment of persons, in any circumstances, so as to prohibit inhuman treatment, by reference to humanity as a whole, in order to secure protection to all, even more so when they stand in situations of great vulnerability. *Humaneness* is to orient human behaviour in all circumstances, in times of peace as well as of disturbances and armed conflict. The *principle of humanity* permeates the whole *corpus juris* of protection of the human person, providing one of the illustrations of the approximations or convergences between its distinct and complementary trends (international humanitarian law, the international law of human rights, and international refugee law), at the hermeneutic level, and also manifested at the normative and the operational levels[68].

2. The Principle of Humanity in Its Wide Dimension

65. My own understanding is in the sense that the principle of humanity is endowed with a wide dimension: it applies in the most distinct circumstances, in times both of armed conflict and of peace, in the relations between public power and all persons subject to the jurisdiction of the State concerned. That principle has a notorious incidence when these latter are in a situation of vulnerability or great adversity, or even *defencelessness*, as evidenced by relevant provisions of distinct treaties conforming to the international law of human rights[69].

66. The United Nations Charter itself professes the determination to secure respect for human rights everywhere. Adopted in one of the rare moments of lucidity in the last century, it opens up its Preamble by stating that:

> "We, the peoples of the United Nations, determined to save succeeding generations from the scourge of war; (. . .) to reaffirm faith in fundamental human rights, in the dignity and worth of the human person (. . .); to establish conditions under which justice and respect

[68] Cf., on this particular point, e.g., A. A. Cançado Trindade, *Derecho Internacional de los Derechos Humanos, Derecho Internacional de los Refugiados y Derecho Internacional Humanitario — Aproximaciones y Convergencias, op. cit. supra* note 65, pp. 1-66.

[69] Thus, for example, at UN level, the 1990 International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, Article 17 (1); the 1989 UN Convention on the Rights of the Child, (Art. 37 *(b)*). Provisions of the kind can also be found in human rights treaties at regional level, e.g., the 1969 American Convention on Human Rights, (Art. 5 (2)); the 1981 African Charter on Human and Peoples' Rights (Art. 5).

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for the obligations arising from treaties and other sources of international law can be maintained; (. . .) have resolved to combine our efforts to accomplish these aims."

67. And the UN Charter includes, among the purposes of the United Nations, to solve problems of humanitarian character, and to promote and encourage respect for human rights for all (Art. 1 (3)). It determines that the General Assembly shall initiate studies and make recommendations for assisting in the realization of human rights for all (Art. 13 (1) *(b)*). It further states that, in order to create the "conditions of stability and well-being which are necessary for peaceful and friendly relations among nations", the United Nations shall promote "universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language or religion" (Art. 55 *(c)*).

68. It is clear that the *principle of humanity* permeates the law of the United Nations. It encompasses the whole *corpus juris* of the international protection of the human person, comprising its converging trends of international humanitarian law, international law of human rights, and international law of refugees. In effect, when one evokes the principle of humanity, there is a tendency to consider it in the framework of international humanitarian law. It is beyond doubt that, in this framework, for example, civilians and persons *hors de combat* are to be treated with humanity. The principle of humane treatment of civilians and persons *hors de combat* is provided for in the 1949 Geneva Conventions on International Humanitarian Law[70]. Such a principle, moreover, is generally regarded as one of customary international humanitarian law[71].

69. The principle of humanity, in line with the long-standing thinking of natural law, is an emanation of human conscience, projecting itself into conventional as well as customary international law. The treatment dispensed to human beings, in any circumstances, ought to abide by the *principle of humanity*, which permeates the whole *corpus juris* of the international protection of the rights of the human person (encompassing international humanitarian law, the international law of human rights, and international refugee law), conventional as well as customary, at global (UN) and regional levels. The principle of humanity, usually invoked in the domain of international humanitarian law, thus extends itself also to that of international human rights law[72].

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[70] Common Article 3, and Articles 12 (1)/13/5 and 27 (1); and their Additional Protocols I (Art. 75 (1)) and II (Art. 4 (1)).

[71] For a study in depth, cf. ICRC, *Customary International Humanitarian Law* (eds. J.-M. Henckaerts and L. Doswald-Beck), Geneva/Cambridge, Cambridge University Press, 2005, Vol. I: *Rules*, pp. 3-621; Vol. II, Part I: *Practice*, pp. 3-1982; Vol. II, Part II: *Practice*, pp. 1983-4411.

[72] Cf., to this effect, Human Rights Committee, General Comment note 31 (of 2004), para. 11; and cf. also its General Comments, note 9 (of 1982), para. 3, and note 21 (of 1992), para. 4. It may further be recalled that, in the aftermath of the Second World

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70. In faithfulness to my own conception, I have, in recent decisions of the International Court of Justice (and, earlier on, of the Inter-American Court of Human Rights as well), deemed it fit to develop some reflections on the basis of the principle of humanity *lato sensu*. I have done so, e.g., in my dissenting opinion (paras. 24-25 and 61) in the case of the *Obligation to Prosecute or Extradite (Belgium* v. *Senegal) (Provisional Measures, Order of 28 May 2009, I.C.J. Reports 2009)*, and in my dissenting opinion (paras. 116, 118, 125, 136-139 and 179)[73] in the case of *Jurisdictional Immunities of the State (Germany* v. *Italy) (Counter-Claim, Order of 6 July 2010, I.C.J. Reports 2010 (I))*, as well as in my lengthy separate opinion (paras. 67-96 and 169-217) in the Court's Advisory Opinion on *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo* [hereinafter *Declaration of Independence of Kosovo*] (*ibid.*, p. 403). I have likewise sustained the wide dimension of the principle of humanity in my lengthy separate opinion (paras. 93-106 and 107-142) in the International Court of Justice's Judgment (of 30 November 2010) in the case *Ahmadou Sadio Diallo (Republic of Guinea* v. *Democratic Republic of the Congo), Merits*.

71. The International Court of Justice has lately given signs — as I perceive them — of its preparedness to take into account the principle of humanity. Thus, in its Order of Provisional Measures of Protection of 18 July 2011, in the case of the *Temple of Preah Vihear (Cambodia* v. *Thailand)*, the International Court of Justice, in deciding *inter alia* to order the establishment of a provisional demilitarized zone around the Temple (part of the world's cultural and spiritual heritage) and its vicinity, it extended protection (as I pointed out in my separate opinion, paras. 66-113) not only to the territory at issue, but also to the local inhabitants, in conformity with the *principle of humanity* in the framework of the new *jus gentium* of our times (paras. 114-117). Territory and people go together.

72. Subsequently, in the recent case of the *Frontier Dispute* (Judgment of 16 April 2013), the contending Parties (Burkina Faso and Niger) themselves expressed before the Court their concern, in particular with local nomadic and semi-nomadic populations, and assured that their living conditions would not be affected by the tracing of the frontier. Once again, as I pointed out in my separate opinion (paras. 90, 99 and 104-105), the *principle of humanity* seemed to have permeated the handling of the case by the International Court of Justice.

War, the 1948 Universal Declaration of Human Rights proclaimed that "[a]ll human beings are born free and equal in dignity and rights" (Art. 1).

[73] In this lengthy dissenting opinion, my reflections relating to the principle of humanity are found particularly in its Part XII, on human beings as the true bearers *(titulaires)* of the originally violated rights and the pitfalls of State voluntarism (paras. 112-123), as well as in its Part XIII, on the incidence of *jus cogens* (paras. 126-146), besides the Conclusions (mainly paras. 178-179).

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3. The Principle of Humanity in the Heritage of Jusnaturalist Thinking

73. It should not pass unnoticed that the principle of humanity is in line with natural law thinking. It underlies classic thinking on humane treatment and the maintenance of sociable relationships, also at international level. Humaneness came to the fore even more forcefully in the treatment of persons in *situation of vulnerability, or even defencelessness*, such as those deprived of their personal freedom, for whatever reason. The *jus gentium*, when it emerged as amounting to the law of nations, came then to be conceived by its "founding fathers" (F. de Vitoria, A. Gentili, F. Suárez, H. Grotius, S. Pufendorf, C. Wolff) as regulating the international community constituted by human beings socially organized in the (emerging) States and co-extensive with humankind, thus conforming to the *necessary* law of the *societas gentium*.

74. The *jus gentium*, thus conceived, was inspired by the principle of humanity *lato sensu*. Human conscience prevails over the will of individual States. Respect for the human person is to the benefit of the common good[74]. This humanist vision of the international legal order pursued — as it does nowadays — a *people-centred outlook*, keeping in mind the *humane ends of the State*. The precious legacy of natural law thinking, evoking the right human reason *(recta ratio)*, has never faded away; this should be stressed time and time again, particularly in face of the indifference and pragmatism of the "strategic" *droit d'étatistes*, so numerous in the legal profession in our days. The principle of humanity may be considered as an expression of the *raison d'humanité* imposing limits on the *raison d'Etat*[75].

75. States, created by human beings gathered in their social milieu, are bound to protect, and not at all to oppress, all those who are under their respective jurisdictions. This corresponds to the ethical minimum, universally reckoned by the international community of our times. At the time of the adoption of the Universal Declaration on 10 December 1948 (on the day following the adoption of the Convention against Genocide), one could hardly anticipate that a historical process of generalization of the international protection of human rights was being launched, on a truly universal scale[76]. States are bound to safeguard the integrity of the human person from repression and systematic violence, from discriminatory and arbitrary treatment.

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[74] A. A. Cançado Trindade, *A Humanização do Direito Internacional*, Belo Horizonte/Brazil, Edit. Del Rey, 2006, pp. 9-14, 172, 318-319, 393 and 408.

[75] A. A. Cançado Trindade, *International Law for Humankind — Towards a New* Jus Gentium, *op. cit. supra* note 67, pp. 150-152 and 275-285.

[76] Throughout almost seven decades, of remarkable historical projection, the declaration has gradually acquired an authority which its draftsmen could not have foreseen. This happened mainly because successive generations of human beings, from distinct cultures and all over the world, recognized in it a "common standard of achievement" (as originally proclaimed), which corresponded to their deepest and most legitimate aspirations.

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76. The conception of fundamental and inalienable human rights is deeply-engraved in the universal juridical conscience; in spite of variations in their enunciation or formulation, their conception marks presence in all cultures, and in the modern history of human thinking of all peoples[77]. The 1948 Universal Declaration warns that "disregard and contempt for human rights have resulted in barbarous acts which have outraged the conscience of mankind" (Preamble, para. 2); it further warns that "it is essential, if man is not compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law" (*ibid.*, para. 3). Moreover, it acknowledges that "recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world" (*ibid.*, para. 1).

4. Judicial Recognition of the Principle of Humanity

77. May I now turn attention, however briefly, to the acknowledgment of the principle of humanity in the case law of contemporary international tribunals. The fundamental principle of humanity has indeed met therein with full judicial recognition[78]. Its acknowledgment is found, e.g., in the *jurisprudence constante* of the Inter-American Court of Human Rights (IACtHR), which holds that it applies even more forcefully when persons are found in an *"exacerbated situation of vulnerability"*[79]. In my separate opinion in the Judgment of the IACtHR (of 29 April 2004) in the case of the *Massacre of Plan de Sánchez*, concerning Guatemala (one of a pattern of 626 massacres), I devoted a whole section (Part III, paras. 9-23) of it to the judicial acknowledgement of the principle of humanity in the recent case law of the IACtHR as well as of the *Ad Hoc* International Criminal Tribunal for the former Yugoslavia (ICTY).

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[77] Cf., e.g., A. A. Cançado Trindade, *Tratado de Direito Internacional dos Direitos Humanos* [*Treatise of International Law of Human Rights*], Vol. I, 1st ed., Porto Alegre/Brazil, S. A. Fabris Ed., 1997, pp. 31-57; [Various Authors], *Universality of Human Rights in a Pluralistic World* (Proceedings of the 1989 Strasbourg Colloquy), Strasbourg/Kehl, N. P. Engel Verlag, 1990, pp. 45, 57, 103, 138, 143 and 155.

[78] Cf. A. A. Cançado Trindade, "Le déracinement et la protection des migrants dans le droit international des droits de l'homme", 19 *Revue trimestrielle des droits de l'homme*, Brussels (2008), pp. 289-328, esp. pp. 295 and 308-316.

[79] IACtHR, Judgments in the cases of *Maritza Urrutia* v. *Guatemala*, of 27 November 2003, para. 87; of *Juan Humberto Sánchez* v. *Honduras*, of 7 June 2003, para. 96; and of *Cantoral Benavides* v. *Peru*, of 18 August 2000, para. 90; and cf. case of *Bámaca Velásquez* v. *Guatemala*, of 25 November 2000, para. 150. For a recent study on the protection of the vulnerable, cf. A. A. Cançado Trindade, *A Proteção dos Vulneráveis como Legado da II Conferência Mundial de Direitos Humanos (1993-2013)* [*The Protection of the Vulnerable as Legacy of the Second World Conference on Human Rights (1993-2013)*], Fortaleza/Brazil, IBDH, 2014, pp. 13-356.

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78. I pondered therein that the primacy of the principle of humanity is identified with the very end or ultimate goal of the law, of the whole legal order, both national and international, in recognizing the inalienability of all rights inherent to the human person (para. 17). The same principle of humanity — I concluded in the aforementioned separate opinion in the case of the *Massacre of Plan de Sánchez* — also has incidence in the domain of international refugee law, as disclosed by the facts of the *cas d'espèce*, involving massacres and the State policy of *tierra arrasada*, i.e., the destruction and burning of homes, which generated a massive forced displacement of persons (para. 23).

79. Likewise, the ICTY has devoted attention to the principle of humanity in its judgments, e.g., in the cases of *Mucić et alii* (2001) and of *Celebići* (1998). In the *Mucić et alii* case (Judgment of 20 February 2001), the ICTY (Appeals Chamber), pondered that both international humanitarian law and the international law of human rights take as a "starting point" their common concern to safeguard human dignity, which forms the basis of their minimum standards of humanity (para. 149)[80].

80. Earlier on, in the *Celebići* case (Judgment of 16 November 1998), the ICTY (Trial Chamber) qualified as *inhuman treatment* an intentional or deliberate act or omission which causes serious suffering (or mental or physical damage), or constitutes a serious attack on human dignity; thus, the Tribunal added, "inhuman treatment is intentional treatment which does not conform with the fundamental principle of humanity, and forms the umbrella under which the remainder of the listed 'grave breaches' in the Conventions fall"[81]. Subsequently, in the *Blaškić* case (Judgment of 3 March 2000), the ICTY (Trial Chamber) reiterated this position[82].

81. Likewise, in its Judgment of 10 December 2003 in the *Obrenović* case, the ICTY (Trial Chamber) stated that it is the "abhorrent discriminatory intent" that renders crimes against humanity "particularly grave" (para. 65). Evoking the Tribunal (Appeals Chamber)'s finding in the *Erdemović* case (Judgment of 7 October 1997), it added that, because of their "heinousness and magnitude", those crimes (against humanity)

> "constitute egregious attacks on human dignity, on the very notion of humaneness. They consequently affect, or should affect, each and

[80] In fact, the principle of humanity can be understood in distinct ways; first, it can be conceived as a principle underlying the prohibition of inhuman treatment, established by Article 3 common to the four Geneva Conventions of 1949; secondly, the principle can be invoked by reference to humankind as a whole, in relation to matters of common, general and direct interest to it; and thirdly, the same principle can be employed to qualify a given quality of human behaviour (humaneness).

[81] Paragraph 543 of that Judgment.

[82] Paragraph 154 of that Judgment.

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every member of [human]kind, whatever his or her nationality, ethnic group and location" (para. 65)[83].

82. For its part, the *Ad Hoc* International Criminal Tribunal for Rwanda (ICTR) pondered, in the case of *J.-P. Akayesu* (Judgment of 2 September 1998), that the concept of crimes against humanity had already been recognized well before the Nuremberg Tribunal itself (1945-1946). The Martens clause contributed to that effect; in fact, expressions similar to that of those crimes, invoking victimized humanity, appeared much earlier in human history[84]. The ICTR further pointed out, in the case *J. Kambanda* (Judgment of 4 September 1998), that in all periods of human history genocide has inflicted great losses to humankind, the victims being not only the persons slaughtered but humanity itself (in acts of genocide as well as in crimes against humanity)[85].

5. Concluding Observations

83. There is, in sum, in contemporary (conventional and general) international law, a greater consciousness, in a virtually universal scale, of the principle of humanity. Grave violations of human rights, acts of genocide, crimes against humanity, among other atrocities, are in breach of absolute prohibition of *jus cogens*. The feeling of *humaneness* permeates the whole *corpus juris* of contemporary international law. I have called this development, — *inter alia* in my concurring opinion (para. 35) in the Advisory Opinion (of 1 October 1999), of the IACtHR, on the *Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law* — a historical process of a true *humanization* of international law. The prevalence of the principle of humanity is identified with the ultimate aim itself of law, of the legal order, both national and international.

84. By virtue of this fundamental principle, every person ought to be respected (in her honour and in her beliefs) by the simple fact of belonging to humankind, irrespective of any circumstance. In its application in any circumstances (in times both of armed conflict and of peace), in the relations between public power and human beings subject to the jurisdiction of the State concerned, the principle of humanity permeates the whole *corpus juris* of the international protection of the rights of the human person (encompassing international humanitarian law, the inter-

[83] Those words were actually taken by the ICTY (Trial Chamber) in the *Obrenović* case (para. 65), from a passage of the joint separate opinion (para. 21) of Judges McDonald and Vohrah, in the ICTY's Appeal Judgment in the aforementioned *Erdemović* case (1997).

[84] Paragraphs 565-566 of that Judgment.

[85] Paragraphs 15-16 of that Judgment. An equal reasoning is found in the judgments of the same Tribunal in the aforementioned case *J.-P. Akayesu*, as well as in the case *O. Serushago* (Judgment of 5 February 1999, para. 15).

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national law of human rights, and international refugee law)[86], conventional as well as customary[87]. And it has further projected itself into the law of international organizations, and in particular into the law of the United Nations.

VI. The Convention against Genocide and State Responsibility

1. Legislative History of the Convention (Article IX)

85. Turning now, in particular, to the 1948 Convention against Genocide, it appears from its *travaux préparatoires* that State responsibility for breaches of the Convention was in fact considered in the drafting of what was to become its Article IX. This occurred in order to cope with amendments to the Draft Convention which seemed to have "weakened" previous views on the responsibility of Heads of State. The insertion of a reference to State responsibility also appeared as an answer to the rejection, during the debates of the *travaux préparatoires*, of a "stronger" form of State liability for genocide related to what then was Draft Article V (and then became Article IV) of the Convention.

86. It may be recalled that, originally, Draft Article X (as prepared by the *Ad Hoc* Committee) did not contain the reference — found later on in what was to become Article IX of the Genocide Convention — to State responsibility for acts of genocide[88]. Article IX of the Genocide Convention, as it now stands, can be traced back to a joint amendment, proposed by Belgium and the United Kingdom, to what was then Article X. The proposed joint amendment to that provision was as follows:

> "Any dispute between the High Contracting Parties relating to the interpretation, application or fulfilment of the present Convention, *including disputes relating to the responsibility of a State* for any of the acts enumerated in Articles II and IV, shall be submitted to the International Court of Justice at the request of any of the High Contracting Parties."[89]

87. The reasons for this insertion can be found in the discussions on the joint amendment in the Sixth Committee of the United Nations Gen-

[86] Paras. 58, 60, 64, 69 and 79, *supra*.

[87] Paras. 60 and 68-69, *supra*.

[88] Article X of the Draft Convention, as drawn up by the *Ad Hoc* Committee, used to read as follows:

> "Disputes between the High Contracting Parties relating to the interpretation or application of this Convention shall be submitted to the International Court of Justice, provided that no dispute shall be submitted to the International Court of Justice involving an issue which has been referred to and is pending before or has been passed upon by competent international criminal tribunal." UN doc. E/794, p. 38.

[89] UN doc. A/C.6/258, p. 1 (emphasis added).

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eral Assembly. The delegate of the United Kingdom (Mr. Fitzmaurice) explained that both the United Kingdom and Belgium considered that the Convention would not be complete if it did not contemplate State liability for genocidal acts and other punishable offences provided for in the Convention[90]. In opposition to this amendment, another joint amendment was proposed by the Union of Soviet Socialist Republics and France, without providing for obligatory reference to the International Court of Justice with respect to the Convention; it only contemplated an optional reference mechanism.

88. The French delegate (Mr. Chaumont) did not show any opposition towards the principle of liability, insofar as it was of a civil nature, and not criminal[91]. The Egyptian delegate (Mr. Rafaat) also supported the principle of State liability, as no international mechanism of punishment existed[92]. But the proposed amendment also faced opposition from a few delegations[93]. In addition, the Canadian delegate (Mr. Lapointe), for his part, asked clarification from the United Kingdom delegation as to the meaning intended to ascribe to "State responsibility"— whether it was criminal or civil— having in mind in particular that the Committee, in its 93rd meeting, had rejected the idea of criminal State responsibility during discussions related to Article V[94]. The Bolivian delegate (Mr. Medeiros) expressed his support for the United Kingdom/Belgian amendment, finding it necessary[95].

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[90] UN doc. A/C.6/SR.103, p. 430.

[91] *Ibid.*, p. 431.

[92] *Ibid.* The Greek delegate (Mr. Spiropoulos) raised an issue as to responsibility relating to cases where a State had its liability triggered for genocide: in such cases, responsibility for that State would involve indemnifying itself, as, in his view, individuals were not considered as right-holders in international law at those times; *ibid.*, p. 433.

[93] The Philippines delegate (Mr. Ingles) insisted on his opposition to the principle or criminal liability (which he posited earlier with respect to Article V), and further argued that, although the joint amendment was not explicitly included in the proposition, the very nature of the Convention, purported to punish genocide implied that liability would be criminal. This, in his view, would bring stigmatization of a whole State for acts committed only by its rulers or officials and not by the State itself, showing that responsibility of the State could not be possible; *ibid.*, p. 433. The delegation of Pakistan also expressed concern about the introduction of State liability in an international instrument which was mainly aimed at a criminal matter; he expressed his preference for the wording of Article V when it referred to the "constitutionally responsible leaders"; *ibid.*, p. 438. The delegation of the Union of Soviet Socialist Republics argued that the proposed joint amendment was only an intent to submit in a different manner an amendment to Article V so as to introduce some form of criminal liability of the State; *ibid.*, p. 441.

[94] *Ibid.*, pp. 438-439. The British representative replied that the amendment was indeed referring to civil liability (international responsibility for violation of the Convention).

[95] In the light of the decisions taken up by the Committee in the course its 97th meeting; *ibid.*, p. 439.

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89. For its part, the Haitian delegation proposed a consequential amendment to the aforementioned joint amendment, which would add "or of any victims of the crime of genocide (groups of individuals)". This met the opposition of some delegations, which argued that such an amendment would imply a modification of the ICJ Statute. Yet, the Syrian delegation considered that such a consequential amendment was not contrary to the ICJ Statute, as in its view there was no reason for the signatory State to impede groups victims of genocide to seize the International Court of Justice for such breaches. In support of its proposal, the Haitian delegation asserted, *inter alia*, that States could be liable only directly towards the victims themselves, and not towards other States, for having committed genocide[96].

90. Some delegations, such as those of the Union of Soviet Socialist Republics and Poland, voiced concerns as to the effect of the reference to the International Court of Justice of disputes relating to State liability under the Genocide Convention. The preoccupation was related to the possibility of Draft Article X (as then worded) precluding submission to the United Nations General Assembly or the Security Council of complaints with respect to genocidal acts[97]. The United Kingdom delegate replied that submission to the International Court of Justice could not in any way preclude submission before other competent organs of the United Nations[98]. And the United Kingdom delegate concluded that, giving the International Court of Justice jurisdiction for State liability arising out of breaches of the Genocide Convention was necessary in order to ensure an effective enforcement of the Convention, considering in particular the practical difficulties in prosecuting Heads of State[99].

91. The joint amendment was then adopted by 23 votes to 13, with 8 abstentions[100]. (Then) Article X, with other amendments, was adopted by 18 to 2, with 15 abstentions; it came to read as follows:

> "Any dispute between the High Contracting Parties relating to the interpretation, application or fulfilment of the present Convention, including disputes relating to the responsibility of a State for any of

[96] Cf. UN doc. A/C.6/SR.103, p. 436.
[97] Cf. *ibid.*, p. 444.
[98] *Ibid.* Furthermore, in response to the criticism, he asserted that reference to the International Court of Justice might be useless, as that Court would act too late in cases of genocide: genocide is a process, he added, and once it started being committed, a State party could seize the Court.

[99] *Ibid.*
[100] *Ibid.*, p. 447.

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> the acts enumerated in Articles II and IV, shall be submitted to the International Court of Justice at the request of any of the parties to the dispute."[101]

This version of (then) Article X underwent minor changes, leading to the final version of what is now Article IX of the Convention against Genocide, which reads as follows:

> "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."

2. Rationale, and Object and Purpose of the Convention

92. The determination of State responsibility under the Convention against Genocide is well-founded, not only because this was intended by the draftsmen of the Convention, as its *travaux préparatoires* show *(supra)*, but also because such determination is in line with the rationale of the Convention, as well as its object and purpose. Today, 66 years after its adoption, the Convention against Genocide counts on 146 States parties; and the States which have not yet ratified, or acceded to it, are also aware that the prohibition of genocide is one likewise of general or customary international law. It is not conditioned by alterations in State sovereignty or vicissitudes of State succession; it is an absolute prohibition, belonging to the realm of *jus cogens*.

93. The Convention against Genocide 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 such an odious scourge. Nowadays, six and a half decades after the adoption of the Convention against Genocide, much more is known about that heinous international crime. "Genocide studies" have been undertaken in recent decades in distinct branches of human learning, attentive to an interdisciplinary perspective (cf. Part XI, *infra*). They have shown that genocide has been committed in modern history in furtherance of State policies.

94. To attempt to make the application of the Genocide Convention to States is an impossible task, one which would render the Convention meaningless, an almost dead letter; it would furthermore create a situation where certain State egregious criminal acts, amounting to genocide, would pass unpunished — especially as there is at present no international convention on crimes against humanity. Genocide is in fact an egregious crime committed under the direction, or the benign complicity,

[101] UN doc. A/C.6/269, p. 1. Cf. also Article IX (as it then became), UN doc. A/760, p. 10.

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of the State and its apparatus[102]. Unlike what was assumed by the Nuremberg Tribunal in its *célèbre* Judgment (Part 22, p. 447), States are not "abstract entities"; they have been concretely engaged, together with individual executioners (their so-called "human resources", acting on their behalf), in acts of genocide, in distinct historical moments and places.

95. They have altogether — individuals and States — been responsible for such heinous acts. In this context, individual and State responsibility complement each other. In sum, the determination of State responsibility cannot at all be discarded in the interpretation and application of the Convention against Genocide. When adjudicating a case such as the present one, concerning the *Application of the Convention against Genocide (Croatia* v. *Serbia)*, the International Court of Justice should bear in mind the importance of the Convention as a major human rights treaty, with all its implications and legal consequences. It should bear in mind the Convention's historic significance for humankind.

VII. Standard of Proof in the Case Law of International Human Rights Tribunals

96. The case law of international human rights tribunals is of central importance to the determination of the international responsibility of States (rather than individuals) for grave violations of human rights, and cannot pass unnoticed in a case like the present one, concerning the *Application of the Convention against Genocide*, opposing Croatia to Serbia. It cannot thus be overlooked by the International Court of Justice, concerned as it is, like international human rights tribunals, with *State* responsibility, and not individual (criminal) responsibility.

1. A Question from the Bench: The Evolving Case Law on the Matter

97. In the course of the oral proceedings in the present case, the contending Parties were, however, referring only to the case law of international criminal tribunals (concerned with *individual* responsibility), until the moment, in the Court's public sitting of 5 March 2014, that I deemed it fit to put the following question to both of them, on also the case law of international human rights tribunals:

> "My question concerns the international criminal responsibility of individuals, as well as the international responsibility of States, for

[102] The expert evidence examined by the ICTY, for example, in the *Milošević* case (2004), maintained that the knowledge sedimented on the matter shows that State authorities are always responsible for a genocidal process; cf. Part XIII of the present dissenting opinion, *infra*.

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> genocide. References have so far been made only to the case law of international criminal tribunals (the ICTY and the ICTR), pertaining to individual international criminal responsibility. Do you consider that the case law of international human rights tribunals is also of relevance here, for the international responsibility of States for genocide, as to standard of proof and attribution?"[103]

From then onwards, both Croatia and Serbia started referring, *comme il faut*, to the case law of international human rights tribunals as well[104] — concerned as these latter are with the determination of State responsibility.

98. In addition to what the contending Parties argued in the proceedings of the present case concerning the *Application of the Convention against Genocide*, there is, in effect, a wealth of relevant indications as to the standard of proof (and reversal of the burden of proof), which should not pass unnoticed here. This is so, in particular, in the case law of the Inter-American Court of Human Rights (IACtHR), in cases disclosing a systematic or widespread pattern of gross violations of human rights, where the IACtHR has resorted to factual presumptions.

99. Moreover, the IACtHR has held that it is the respondent State which is to produce the evidence, given the applicant's difficulty to obtain it and the respondent's access to it. There are indications to this effect also in the case law of the European Court of Human Rights (ECHR). Given the relevance of the case law of international human rights tribunals for the determination of international *State* responsibility, it cannot at all be overlooked in the consideration of the *cas d'espèce*, in so far as the key issue of standard of proof is concerned. I thus care to proceed to its review.

2. Case Law of the IACtHR

(a) *Cases disclosing a systematic pattern of grave violations of human rights*

100. The case law of the IACtHR is particularly rich in respect of the standard of proof in cases disclosing a systematic pattern of grave violations of human rights. In the case of *Juan Humberto Sánchez* v. *Honduras* (Judgment of 7 June 2003), for example, the IACtHR determined the occurrence, in the respondent State, in the eighties and beginning of the

[103] Question put by Judge Cançado Trindade, in CR 2014/8, of 5 March 2014, p. 59.

[104] Croatia's responses, in CR 2014/12, of 7 March 2014, p. 44, para. 20; and CR 2014/20, of 20 March 2014, pp. 14-16, paras. 8-9; Serbia's response, in CR 2014/23, of 28 March 2014, pp. 50-52, paras. 27-36.

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nineties, of a systematic pattern of arbitrary detentions, enforced disappearances of persons, and summary or extrajudicial executions committed by the military forces (IACtHR, *Juan Humberto Sánchez* v. *Honduras*, Judgment of 7 June 2003, paras. 70 (1) and 96-97), wherein the *cas d'espèce* is inserted (*ibid.*, para. 80).

101. The IACtHR thus *inferred*, even in the absence of direct proof, that the victim suffered cruel and inhuman treatment during the time of his detention (*ibid.*, para. 98)[105], before his mortal remains were found. The facts that occurred at the time of the pattern of ill-treatment and torture and summary executions, lead the IACtHR to the presumption of the responsibility of the State for those violations in respect of persons under the custody of its agents (*ibid.*, para. 99)[106]. This being so — the Court added — it was incumbent upon the respondent State to provide reasonable explanations of what occurred to the victim (*ibid.*, paras. 100 and 135).

102. Other pertinent decisions of the IACtHR can here be recalled[107]. For example, in the case of the *Massacres of Ituango* v. *Colombia* (Judgment of 1 July 2006), the IACtHR, having found in the municipality at issue a systematic pattern of massacres (in 1996-1997) perpetrated by paramilitary groups, determined the responsibility of the State for "omission, acquiescence and collaboration" of the public forces (para. 132).

103. The IACtHR further found that State agents had "full knowledge" of the activities of paramilitary groups terrorizing the local population, and, far from protecting this latter, they omitted doing so, and even participated in the armed incursion into the municipality and the killing of local inhabitants by the paramilitaries (*ibid.*, paras. 133 and 135). Within the context of this systematic pattern of violence, the respondent State incurred into grave violations of the rights of the victims under the American Convention on Human Rights (ACHR) (*ibid.*, paras. 136-138).

104. In the case of the *Massacre of Mapiripán* v. *Colombia* (Judgment of 15 September 2005), the IACtHR observed that, although the killings in Mapiripán (in mid-July 1997) were committed by members of paramilitary groups,

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[105] Cf. also, to this effect, IACtHR, case *Bámaca Velásquez* v. *Guatemala* (Judgment of 25 November 2000), *supra*, para. 150; case *Cantoral Benavides* v. *Peru* (Judgment of 18 August 2000), paras. 83-84 and 89; and case of the *"Street Children" Villagrán Morales and Others* v. *Guatemala* (Judgment of 19 November 1999), para. 162.

[106] Cf. also, in this sense, *op. cit. supra* note 105, IACtHR, case *Bámaca Velásquez* v. *Guatemala*, paras. 152-153; and case of the *"Street Children" Villagrán Morales and Others* v. *Guatemala*, *op. cit. supra* note 105, para. 170.

[107] Another example of *inference* of a summary or extrajudicial execution, in a context of a generalized or systematic pattern of crimes against humanity (in the period 1973-1990), victimizing the "civilian population" (with thousands of individual victims), is afforded by the IACtHR's Judgment (of 26 September 2006) in the case of *Almonacid Arellano and Others* v. *Chile* (paras. 96 and 103-104).

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> "the preparation and execution of the massacre could not have been perpetrated without the collaboration, acquiescence and tolerance, manifested in various actions and omissions, of members of the State armed forces, including of its high officers in the zones. Certainly there is no documental proof before this Tribunal that demonstrates that the State directed the execution of the massacre or that there existed a relation of dependence between the army and the paramilitary groups or a delegation of public functions from the former to these latter." (IACtHR, *Massacre of Mapiripán* v. *Colombia*, Judgment of 15 September 2005, para. 120.)

105. The IACtHR then attributed to the respondent State the conduct of both its own agents and of the members of paramilitary groups in the zones which were "under the control of the State". The incursion of paramilitaries in Mapiripán, it added, had been planned for months, and was executed "with full knowledge, logistic previsions and collaboration of the armed forces", which facilitated the journey of the paramilitaries from Apartadó and Neclocí until Mapiripán "in zones which were under their control", and, moreover, "left unprotected the civilian population during the days of the massacre with the unjustified moving of the troops to other localities" *(ibid.)*.

106. The "collaboration of members of the armed forces with the paramilitaries" was manifested in a pattern of "grave actions and omissions" aiming at allowing the perpetration of the massacre and the cover-up of the facts in search of "the impunity of those responsible" (*ibid.*, para. 121). The Court added that the State authorities who knew the intentions of the paramilitary groups to perpetrate a massacre to instil terror in the population, "not only collaborated in the preparation" of the killings, but also left the impression before public opinion that the massacre had been perpetrated by paramilitary groups "without its knowledge, participation and tolerance" *(ibid.)*.

107. The IACtHR, discarding this pretension, and having established the links between the armed forces and the paramilitary groups in the perpetration of the massacre, determined that "the international responsibility of the State was generated by a pattern of actions and omissions of State agents and *particuliers*, which took place in a co-ordinated, parallel or organized way aiming at perpetrating the massacre" (*ibid.*, para. 123).

108. In its Judgment (of 22 September 2006) in the case *Goiburú and Others* v. *Paraguay*, the IACtHR observed that that particular case was endowed with "a particular historical transcendence", as the facts had occurred "in a context of a systematic practice of arbitrary detentions, tortures, executions and disappearances perpetrated by the forces of security and intelligence of the dictatorship of Alfredo Stroessner, in the framework of the Operation Condor" (para. 62).

109. That is to say, the grave facts are framed in the flagrant, massive and systematic character of the repression which the population was subjected to, at inter-State scale; in fact, the structures of State security were

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put into action in a co-ordinated way against the nations at trans-frontier level by the dictatorial governments concerned (IACtHR, *Goiburú and Others* v. *Paraguay*, Judgment of 22 September 2006, para. 62). The IACtHR thus found that the context in which the facts occurred engaged and conditioned the international responsibility of the State in relation to its obligation to respect and guarantee the rights set forth in Articles 4, 5, 7, 8 and 25 of the ACHR (*ibid.*, para. 63).

110. The illegal and arbitrary detentions or kidnapping, torture and enforced disappearances — the IACtHR added — were [the] "product of an operation of policial intelligence", planned and executed, and covered up by members of the national police, "with the knowledge and by the order of the highest authorities of the government of General Stroessner, and, at least in the earlier phases of planification of the detentions or kidnappings, in close collaboration with Argentine authorities" (*ibid.*, para. 87). Such was the *modus operandi* of the systematic practice of illegal and arbitrary detentions, torture and enforced disappearances verified in the epoch of the facts, in the framework of Operation Condor *(ibid.)*.

111. There was, moreover, a generalized situation of impunity of the grave violations of human rights that occurred, undermining the protection of the rights at issue. The IACtHR stressed the general obligation to ensure respect for the rights set forth in the American Convention on Human Rights (Art. 1 (1)), wherefrom ensued the obligation to investigate the cases of violations of the protected rights.

112. Thus, in cases of extrajudicial executions, enforced disappearances and other grave violations of human rights, the IACtHR considered that the prompt and ex officio investigation thereof should be undertaken, without delay, as a key element for the guarantee of the protected rights, such as the rights to life, to personal integrity, and to personal freedom (*ibid.*, para. 88). In this case — the IACtHR added — the lack of investigation of the facts constituted a determining factor of the systematic practice of violations of human rights and led to the impunity of those responsible for them (*ibid.*, para. 90).

(b) *Cases wherein the respondent State has the burden of proof given the difficulty of the applicant to obtain it*

113. In the case *Velásquez Rodríguez* v. *Honduras* (Judgment of 29 July 1988), the IACtHR, in dwelling upon the standards of proof, began by acknowledging the prerogative of international tribunals to evaluate *freely* the evidence produced (para. 127). "For an international tribunal", the IACtHR added, "the criteria of assessment of proof are less formal than in the national legal systems" (*ibid.*, para. 128). There is a "special gravity" in the attribution of gross violations of human rights (such as enforced disappearances of persons) to States parties to the ACHR, and the Court has this in mind (*ibid.*, para. 129); yet, in such circumstances,

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direct proof (testimonial or documental) is not the only means that it can base itself upon. Circumstantial evidence (indicia and presumptions) can also be taken into account, whenever the Court can therefrom "infer consistent conclusions" on the facts (IACtHR, *Velásquez Rodríguez* v. *Honduras*, Judgment of 29 July 1988, para. 130).

114. Such circumstantial evidence, the IACtHR proceeded, may become of special importance in cases of grave violations, such as enforced disappearances of persons, characterized by the intent to suppress "any element which may prove the kidnapping, the whereabouts and the fate of the victims" (*ibid.*, para. 131). The IACtHR then warned that the international protection of the rights of the human person "is not to be confused with criminal justice", as States do not appear before the Court as subjects of a criminal legal action (*ibid.*, para. 134).

115. Its goal, it went on, is not to impose penalties to those held culpable of violations of human rights, but rather provide for reparation to the victims for the damages caused by the States responsible for them *(ibid.)*. In the legal process, here, "the defence of the State cannot rest upon the impossibility of the applicant to produce evidence which, in many cases, cannot be obtained without the co-operation of the State" concerned (*ibid.*, para. 135), which "has the control of the means to clarify the facts occurred within its territory" (*ibid.*, para. 136)[108].

3. Case Law of the ECHR

116. The case law of the ECHR, like that of other international tribunals, is built on the understanding of the *free* evaluation of evidence. In recent years, the ECHR has been pursuing an approach which brings it closer to that of the IACtHR *(supra)*. It so happened that, in its earlier decades, and until the late nineties, the ECHR consistently invoked the standard of proof "beyond reasonable doubt"; yet, by no means the ECHR understood it as meaning a particularly high threshold of standard of proof as the one required in domestic criminal law, in particular in common-law jurisdictions. The standard of proof "beyond reasonable doubt", as used by the ECHR, was endowed with an autonomous meaning under the European Convention on Human Rights, certainly less stringent than the one applied in national (criminal) proceedings as to the admissibility of evidence.

[108] In the case *Yatama* v. *Nicaragua* (Judgment of 23 June 2005), e.g., the IACtHR again deemed it fit to warn that, in cases before an international human rights tribunal, it may well occur that the applicant is faced with the impossibility to produce evidence, "which can only be obtained with the co-operation" of the respondent State (para. 134).

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117. Criticisms to applying a high standard of proof were to emerge, within the ECHR, from the bench itself, from dissenting judges, as in, e.g., the cases of *Labita* v. *Italy* (Judgment of 6 April 2000) and *Veznedaroglu* v. *Turkey* (Judgment of 11 April 2000). The point was made therein that, to expect victims of grave violations of their rights to prove their allegations "beyond reasonable doubt" would place an unfair burden upon them, impossible to meet; such standard of proof, applicable only in "*criminal* culpability", is not so in "other fields of judicial enquiry", where "the standard of proof should be proportionate to the aim which the search for truth pursues"[109].

118. In their joint partly dissenting opinion in the case of *Labita* v. *Italy*, Judges Pastor Ridruejo, Bonello, Makarczyk, Tulkens, Strážnická, Butkevych, Casadevall and Zupančič lucidly stated that the standard of proof "beyond reasonable doubt" would be "inadequate", if not "illogical and even unworkable", when State authorities fail even to identify the perpetrators of the grave breaches allegedly inflicted upon the individual applicants. This, in their view, would unduly limit State responsibility. Whenever only the State authorities have exclusive knowledge of "some or all the events" that took place, the burden of proof should be shifted upon them (ECHR, *Labita* v. *Italy*, Judgment of 6 April 2000, para. 1).

119. The dissenting judges proceeded that the standard to be met by the applicants is lower if State authorities "have failed to carry out effective investigations and to make the findings available to the Court". And they added:

> "Lastly, it should be borne in mind that the standard of proof 'beyond all reasonable doubt' is, in certain legal systems, used in criminal cases. However, this Court is not called upon to judge an individual's guilt or innocence or to punish those responsible for a violation; its task is to protect victims and provide redress for damage caused by the acts of the State responsible. The test, method and standard of proof in respect of responsibility under the Convention are different from those applicable in the various national systems as regards responsibility of individuals for criminal offences." *(Ibid.)*

120. Thus, the nature of certain cases — of grave breaches of human rights — brought also before the ECHR has made it clear that a stringent or too high a standard of proof would be unreasonable, e.g., when respondent States had entire control of the evidence or exclusive know-

[109] ECHR, case of *Veznedaroglu* v. *Turkey* (Judgment of 11 April 2000), Application No. 32357/96, partly dissenting opinion of Judge Bonello, paras. 12-14.

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ledge of the facts, and the alleged victims when in a particular adverse situation, of great vulnerability or even defencelessness. The ECHR, like the IACtHR, admitted shifting the burden of proof (onto the respondent States) whenever necessary, as well as resorting to inferences (from circumstantial evidence) and factual presumptions, so as to secure procedural fairness, in the light of the principle of *equality of arms (égalité des armes)*.

121. In its Judgment (of 18 September 2009) in the case of *Varnava and Others* v. *Turkey*, the ECHR expressly stated that, even if one starts from the test of proof "beyond reasonable doubt", there are cases in which it cannot be applied too rigorously, and has to be mitigated (para. 182). Where the information about the occurrences at issue lie wholly, or in part, within the exclusive knowledge of the State authorities, the ECHR proceeded, strong presumptions of fact will arise in respect of the injuries, the burden of proof then resting on the State authorities to provide a satisfactory and convincing explanation (ECHR, *Varnava and Others* v. *Turkey*, Judgment of 18 September 2009, para. 183). The same takes place if the respondent State has exclusive knowledge of all that has happened (*ibid.*, para. 184).

4. General Assessment

122. As I have just indicated in the present dissenting opinion, international human rights tribunals have not pursued a stringent and high threshold of proof in cases of grave violations of human rights; given the difficulties experienced in the production of evidence, they have resorted to factual presumptions and inferences, and have proceeded to the reversal of the burden of proof. The IACtHR has done so since the beginning of its jurisprudence, and the ECHR has been doing so in more recent years. They both conduct the free evaluation of evidence.

123. The standard of proof they uphold is surely much less demanding than the corresponding one ("beyond a reasonable doubt") in domestic criminal law. This is so, with all the more reason, when the cases lodged with them disclose a pattern of widespread and systematic gross violations of human rights, and they feel obliged to resort, even more forcefully, to presumptions and inferences, to the ultimate benefit of the individual victims in search of justice. This important issue begins to attract the attention of expert writing in our days[110].

[110] For updated studies on the subject, cf., as to the IACtHR, e.g., A. A. Cançado Trindade, *El Ejercicio de la Función Judicial Internacional — Memorias de la Corte Interamericana de Derechos Humanos*, 3rd ed., Belo Horizonte/Brazil, Edit. Del Rey, 2013, pp. 60-79 and 137-142; and cf., as to the ECHR, e.g., M. O'Boyle and N. Brady, "Investigatory Powers of the European Court of Human Rights", 4 *European Human Rights Law Review* (2013), pp. 378-391.

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124. Regrettably, none of these jurisprudential developments was taken into account by the International Court of Justice in the present Judgment. It my understanding, it could, and should, have done so, as the issue was addressed by the contending Parties, as from the moment in the proceedings I put a question to both of them in this respect (para. 97, *supra*). The International Court of Justice preferred to stick to a stringent and high threshold of proof in the present case concerning the *Application of the Convention against Genocide* (2015), just as it had done eight years ago in the *Bosnian Genocide* case ("the 2007 Judgment"). May I here only add that expert writing, dwelling upon the complementarity between State and individual responsibility for international crimes (despite their distinct regimes)[111], has likewise been attentive to the orientation and contribution of the case law of international human rights tribunals (IACtHR and ECHR, *supra*), particularly on the handling of evidence and the shifting of the burden of proof[112].

VIII. Standard of Proof in the Case Law of International Criminal Tribunals

125. May I now turn to the case law of international criminal tribunals as to the standard of proof. Here we find that the intent to commit genocide can be proved by inference, whenever direct evidence is not available. In effect, requiring direct or explicit evidence of genocidal intent in all cases is neither in line with the case law of international criminal tribunals nor is it practical or realistic. When there is no explicit evidence of intent, it can be inferred from the facts and circumstances. A few examples and references of relevant jurisprudence are provided herein in support of this point.

1. Inferring Intent from Circumstantial Evidence (Case Law of the ICTR and the ICTY)

126. In the jurisprudence of the *Ad Hoc* International Criminal Tribunal for Rwanda (ICTR), it has been established that intent to commit

[111] Cf., e.g., B. I. Bonafè, *The Relationship between State and Individual Responsibility for International Crimes*, Leiden, Nijhoff, 2009, pp. 11-255; A. A. Cançado Trindade, "Complementarity between State Responsibility and Individual Responsibility for Grave Violations of Human Rights: The Crime of State Revisited", in *International Responsibility Today — Essays in Memory of O. Schachter* (ed. M. Ragazzi), Leiden, Nijhoff, 2005, pp. 253-269; A. Nollkaemper, "Concurrence between Individual Responsibility and State Responsibility in International Law", 52 *International and Comparative Law Quarterly* (2003), pp. 615-640.

[112] Cf., e.g., P. Gaeta, "Génocide d'Etat et responsabilité pénale individuelle", 111 Revue *générale de droit international public* (2007), pp. 273-284, esp. p. 279; P. Gaeta, "On What Conditions Can a State Be Held Responsible for Genocide?", 18 *European Journal of International Law* (2007), p. 646.

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genocide can be inferred from facts and circumstances. Thus, in the *Rutaganda* case (Judgment of 6 December 1999), the ICTR (Trial Chamber) stated that "intent can be, on a case-by-case basis, inferred from the material evidence submitted to the Chamber, including the evidence which demonstrates a consistent pattern of conduct by the accused" (paras. 61-63)[113]. Likewise, in the *Semanza* case (Judgment of 15 May 2003), the ICTR (Trial Chamber) stated that a "perpetrator's *mens rea* may be inferred from his actions" (para. 313).

127. Furthermore, in the same line of thinking, in the *Bagilishema* case (Judgment of 7 June 2001), the ICTR (Trial Chamber) found that

> "evidence of the context of the alleged culpable acts may help the Chamber to determine the intention of the accused, especially where the intention is not clear from what that person says or does. The Chamber notes, however, that the use of context to determine the intent of an accused must be counterbalanced with the actual conduct of the accused. The Chamber is of the opinion that the accused's intent should be determined, above all, from his words and deeds, and should be evident from patterns of purposeful action." (Para. 63.)

128. In the landmark case *Akayesu* case (Judgment of 2 September 1998), the ICTR (Trial Chamber) found that "intent is a mental factor which is difficult, even impossible to determine", and it held that "in the absence of a confession from the accused", intent may be inferred from the following factors: *(a)* "general context of the perpetration" of grave breaches "systematically" against the "same group"; *(b)* "scale of atrocities committed"; *(c)* "general nature" of the atrocities committed "in a region or a country"; *(d)* "the fact of deliberately and systematically targeting victims on account of their membership of a particular group, while excluding the members of other groups"; *(e)* "the general political doctrine which gave rise to the acts"; *(f)* grave breaches committed against members of a group specifically because they belong to that group; *(g)* "the repetition of destructive and discriminatory acts"; and *(h)* the perpetration of acts which violate, or which "the perpetrators themselves consider to violate the very foundation of the group", committed as part of "the same pattern of conduct" (paras. 521 and 523-524).

129. Shortly afterwards, in the *Kayishema and Ruzindana* case (Judgment of 21 May 1999), the ICTR (Trial Chamber) also stated that intent might be difficult to determine and that the accused's "actions, including circumstantial evidence", may "provide sufficient evidence of intent", and that "intent can be inferred either from words or deeds and may be demonstrated by a pattern of purposeful action". The ICTR (Trial Chamber) asserted that the following can be relevant indicators: *(a)* "the number of

[113] Cf. also the *Musema* case, ICTR Trial Chamber's Judgment of 27 January 2000, para. 167.

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group members affected"; *(b)* "the physical targeting of the group or their property"; *(c)* "the use of derogatory language toward members of the targeted group"; *(d)* "the weapons employed and the extent of bodily injury"; *(e)* "the methodical way of planning"; *(f)* "the systematic manner of killing"; and *(g)* "the relative proportionate scale of the actual or attempted destruction of a group" (ICTR, *Kayishema and Ruzindana*, Judgment of 21 May 1999, paras. 93 and 527).

130. Later on, the ICTR (Appeals Chamber), in its Judgment of 7 July 2006 in the *Gacumbitsi* case, pondered that, as intent, by its nature, is "not usually susceptible to direct proof", it has to be inferred from relevant facts and circumstances, such as the systematic perpetration of atrocities against the same group, or the repetition of "destructive and discriminatory acts" (paras. 40-41). In a similar vein, the Appeals Chamber of the *Ad Hoc* International Criminal Tribunal for the former Yugoslavia (ICTY) also asserted, in the *Jelisić* case (Judgment of 5 July 2001), that:

> "As to proof of specific intent, it may, in the absence of direct explicit evidence, be inferred from a number of facts and circumstances, such as the general context, the perpetration of other culpable acts systematically directed against the same group, the scale of atrocities committed, the systematic targeting of victims on account of their membership of a particular group, or the repetition of destructive and discriminatory acts." (Para. 47.)

The ICTY (Appeals Chamber) further stated, in the *Krstić* case (Judgment of 19 April 2004), that, when proving genocidal intent on the basis of an inference, "that inference must be the only reasonable inference available on the evidence" (para. 41).

2. Standards of Proof: Rebuttals of the High Threshold of Evidence

(a) Karadžić *case (2013)*

131. In its Judgment of 26 February 2007, in the case of the *Application of the Convention against Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro)*, the International Court of Justice, referring to the Keraterm camp in Prijedor, Kazneno-Popravní Dom in Foča, and Omarska in Prijedor, observed that, having "carefully examined the criminal proceedings of the ICTY and the findings of its Chambers", it appeared that "none of those convicted were found to have acted with specific intent *(dolus specialis)*" (para. 277). Yet the ICTY (Appeals Chamber), in its recent Judgment (of 11 July 2013) in the *Karadžić* case, found that "the question regarding Karadžić's culpability with respect to the crimes of genocide committed in the Municipalities remains open" (para. 116).

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132. The ICTY (Appeals Chamber), in this recent Judgment in the *Karadžić* case, reinstated the charges of genocide under count 1 of the indictment; it referred to seven municipalities of Bosnia-Herzegovina claimed as Bosnian Serb territory (para. 57), and mentioned the Kera-term camp in Prijedor, the Kazneno-Popravní Dom camp in Foča, and the Omarska camp in Prijedor (ICTY, *Karadžić*, Judgment of 11 July 2013, para. 48). It then observed:

> "The Appeals Chamber is satisfied that evidence adduced by the Prosecution, when taken at its highest, indicates that Bosnian Muslims and Bosnian Croats were subjected to conditions of life that would bring about their physical destruction, including severe overcrowding, deprivation of nourishment, and lack of access to medical care." (*Ibid.*, para. 49.)

133. Further on, in its same Judgment of 11 July 2013, the ICTY (Appeals Chamber) significantly stated:

> "The Appeals Chamber also recalls that by its nature, genocidal intent is not usually susceptible to direct proof. As recognized by the Trial Chamber, *in the absence of direct evidence, genocidal intent may be inferred from a number of facts and circumstances, such as the general context, the perpetration of other culpable acts systematically directed against the same group, the scale of atrocities committed, the systematic targeting of victims on account of their membership in a particular group, the repetition of destructive and discriminatory acts, or the existence of a plan or policy.*"[114] (*Ibid.*, para. 80.)

The ICTY (Appeals Chamber) then saw it fit to add, in the same Judgment of 11 July 2013 in the *Karadžić* case, that, as to "factual findings and evidentiary assessments", that it was bound neither by the decisions of the Trial Chambers of the ICTY itself, nor by those of the International Court of Justice (para. 94). It thus made clear that it did not support the high threshold of evidence.

(b) Tolimir *case (2012)*

134. In another recent Judgment (of 12 December 2012), in the *Tolimir* case, the ICTY (Trial Chamber II) sustained that:

> "Where direct evidence is absent regarding the 'conditions of life' imposed on the targeted group and calculated to bring about its physical destruction, a Chamber can be guided by 'the objective probability of these conditions leading to the physical destruction of the group in part' and factors like the nature of the conditions imposed, the length of time that members of the group were subjected to them, and

[114] Emphasis added.

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> characteristics of the targeted group such as its vulnerability." (ICTY, *Tolimir*, Judgment of 12 December 2012, para. 742.)

135. The ICTY (Trial Chamber II) proceeded that, as indications of the intent to destroy (*mens rea* of genocide) are "rarely overt", it is thus "permissible to infer the existence of genocidal intent" on the basis of the whole of the evidence, "taken together". It then added that

> "factors relevant to this analysis may include the general context, the perpetration of other culpable acts systematically directed against the same group, the scale of atrocities, the systematic targeting of victims on account of their membership in a particular group, or the repetition of destructive and discriminatory acts. The existence of a plan or policy, a perpetrator's display of his intent through public speeches or meetings with others may also support an inference that the perpetrator had formed the requisite specific intent." (*Ibid.*, para. 745.)

136. In sum, even in the absence of direct evidence, genocidal intent may be inferred from circumstantial evidence, and the general context and pattern of extreme violence and destruction. May I add that concern with the needed protection of individuals and groups in situations of vulnerability form today — for the last two decades — the legacy of the Second World Conference on Human Rights (1993)[115]. It should not pass unnoticed that this points nowadays to a wider convergence between the international law of human rights, international humanitarian law and the international law of refugees, as well as international criminal law, taken together.

(c) Milošević *case (2004)*

137. In the adjudication of the aforementioned 2007 Judgment, the International Court of Justice did not react negatively against Serbia's refusal to produce the (unredacted) documents of its Supreme Defence Council (SDC), as the Court apparently did not want to infringe upon Serbia's sovereignty. The International Court of Justice insisted on its high threshold of evidence. For its part, the ICTY (Trial Chamber), already in its decision of 16 June 2004 (on motion for judgment of acquittal) in the *Milošević* case, had found that

> "there is sufficient evidence that genocide was committed in Brčko, Prijedor, Sanski Most, Srebrenica, Bijeljina, Ključ and Bosanski Novi and (. . .) that the accused was a participant in a joint criminal enterprise, which included the Bosnian Serb leadership, the aim and inten-

[115] Cf. A. A. Cançado Trindade, *A Proteção dos Vulneráveis como Legado da II Conferência Mundial de Direitos Humanos (1993-2013)* [*The Protection of the Vulnerable as Legacy of the Second World Conference on Human Rights (1993-2013)*], *op. cit. supra* note 79, pp. 13-356.

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tion of which was to destroy a part of the Bosnian Muslims as a group" (ICTY, *Milošević*, decision of 16 June 2004, para. 289, and cf. also para. 288).

138. The final judgment never took place, due to the death of S. Milošević. Yet, although this decision of the ICTY Trial Chamber of 16 June 2004 had a bearing on the 2007 Judgment, the International Court of Justice preferred not to give any weight to it[116]. The high standard of proof adopted by the International Court of Justice — and criticized by a trend of expert writing — finds justification in international individual criminal responsibility, facing incarceration, but *not* in international State responsibility, aiming only at declaratory and compensatory relief, where a simple *balance of evidence* would be appropriate, with a lower standard of proof than for international crimes by individuals[117].

3. General Assessment

139. The jurisprudence of international criminal tribunals thus clearly holds that proof of genocidal intent may be inferred from the aforementioned factors (such as, *inter alia*, e.g., the plan or policy of destruction) pertaining to facts and circumstances. Even in the absence of direct proof, the finding of those factors may lead to the inference of genocidal intent on the part of the perpetrators. In the present case of the *Application of the Convention against Genocide*, opposing Croatia to Serbia, the contending Parties themselves have made arguments in relation to the question whether genocidal intent can be proven by inferences.

140. For example, Croatia argues that "[t]he Parties also appear to be in agreement that the Court (. . .) can draw proof of genocidal intent from inferences of fact"[118]. It further argues that Serbia "acknowledges in the Counter-Memorial [para. 135] that it is sometimes difficult to show by direct evidence the intent to commit genocide as the mental element of the crime". The Respondent goes on to refer to "the possibility (. . .) of reliance on indirect evidence and drawing proof from inferences of fact"[119].

141. May it be recalled that, despite all the aforementioned indications from the case law of the international criminal tribunals — added to those from the case law of international human rights tribunals — the International Court of Justice held, in this respect, in the earlier 2007 Judgment, opposing Bosnia-Herzegovina to Serbia, that:

"The *dolus specialis*, the specific intent to destroy the group in whole or in part, has to be convincingly shown by reference to par-

[116] Cf. D. Groome, *op. cit. infra* note 117, pp. 964-965.

[117] Cf., to this effect, e.g., D. Groome, "Adjudicating Genocide: Is the International Court of Justice Capable of Judging State Criminal Responsibility?", 31 *Fordham International Law Journal* (2008), p. 933.

[118] Reply of Croatia, para. 2.11.

[119] *Ibid.*, para. 2.12.

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ticular circumstances, unless a general plan to that end can be convincingly demonstrated to exist; and for a pattern of conduct to be accepted as evidence of its existence, it would have to be such that it could only point to the existence of such intent." (Para. 373.)

142. Keeping in mind the case law of contemporary international tribunals on the matter (cf. Sections V and VI, *supra*), the International Court of Justice seems to have imposed too high a threshold of evidence (for the determination of genocide), which does not seem to follow the established case law of international criminal tribunals and of international human rights tribunals on standard of proof (cf. also *infra*). The Court seems to have set too high the standard of proof for finding the Serbian regime in time of war in Croatia complicit in genocide. Even when direct evidence is not available, the case law of contemporary international tribunals holds that intent can be inferred on the basis of circumstantial evidence.

143. 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.

144. Another word of caution is to be added here against what may appear as a regrettable deconstruction of the Genocide Convention. One cannot characterize a situation as one of armed conflict, so as to discard genocide. The two do not exclude each other. In this connection, it has been pertinently warned that perpetrators of genocide will almost always allege that they were in an armed conflict, and their actions were taken "pursuant to an ongoing military conflict"; yet, "genocide may be a means for achieving military objectives just as readily as military conflict may be a means for instigating a genocidal plan"[120].

145. In adjudicating the present case, the International Court of Justice 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

[120] R. Park, "Proving Genocidal Intent: International Precedent and the ECCC Case 002", 63 *Rutgers Law Review* (2010), pp. 169-170, and cf. pp. 150-152.

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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 the face of misuses of this latter.

146. History has unfortunately shown that genocide has been committed in furtherance of State policies. Making the application of the Genocide Convention to States parties an almost impossible task, would render the Convention meaningless. It would also create a situation where certain State egregious criminal acts amounting to genocide would go unpunished — even more so in the current absence of a convention on crimes against humanity. Genocide is indeed an egregious crime committed — more often[121] than one would naively assume — under the direction or the benign complicity of the sovereign State and its apparatus.

147. The repeated mass murders and atrocities, with the extermination of segments of the population, pursuing pre-conceived plans and policies, coldly calculated, have counted on the apparatus of the State public power, with its bureaucracy, with its so-called material and human "resources". Historiography shows that the successive genocides and

[121] Cf., in general, *inter alia*, e.g., Y. Ternon, *Guerres et génocides au XX^e siècle*, Paris, Ed. Odile Jacob, 2007, pp. 9-379; B. Bruneteau, *Le siècle des génocides*, Paris, Armand Colin, 2004, pp. 5-233; B. A. Valentino, *Final Solutions — Mass Killing and Genocide in the Twentieth Century*, Ithaca/London, Cornell University Press, 2004, pp. 1-309; G. Bensoussan, *Europe — Une passion génocidaire*, Paris, Ed. Mille et Une Nuits, 2006, pp. 7-460; S. Totten, W. S. Parsons and I. W. Charny (eds.), *Century of Genocide — Eyewitness Accounts and Critical Views*, N.Y./London, Garland Publ., 1997, pp. 3-466; B. Kiernan, *Blood and Soil — A World History of Genocide and Extermination from Sparta to Darfur*, New Haven/London, Yale University Press, 2007, pp. 1-697; R. Gellately and B. Kiernan (eds.), *The Specter of Genocide — Mass Murder in Historical Perspective*, Cambridge University Press, 2010 [repr.], pp. 3-380; D. Olusoga and C. W. Erichsen, *The Kaiser's Holocaust — Germany's Forgotten Genocide*, London, Faber & Faber, 2011, pp. 1-379; J.-B. Racine, *Le génocide des Arméniens — Origine et permanence du crime contre l'humanité*, Paris, Dalloz, 2006, pp. 61-102; R. G. Suny, F. M. Göçek and N. M. Naimark (eds.), A *Question of Genocide*, Oxford University Press, 2013, pp. 3-414; G. Chaliand and Y. Ternon, *1915, le génocide des Arméniens*, Brussels, Ed. Complexe, 2006 (reed.), pp. 3-199; I. Chang, *The Rape of Nanking — The Forgotten Holocaust of World War II*, London, Penguin Books, 1997, pp. 14-220; N. M. Naimark, *Stalin's Genocides*, Princeton/N.J., Princeton University Press, 2012 [repr.], pp. 1-154; E. Kogon, *L'Etat SS — Le système des camps de concentration allemands* [1947], [Paris,] Ed. Jeune Parque, 1993, pp. 7-447; L. Rees, *El Holocausto Asiático*, Barcelona, Crítica Ed., 2009, pp. 13-212; B. Kiernan, *Le génocide au Cambodge (1975-1979)*, Paris, Gallimard, 1998, pp. 7-702; B. Allen, *Rape Warfare — The Hidden Genocide in Bosnia-Herzegovina and Croatia*, Minneapolis/London, University of Minnesota Press, 1996, pp. 1-162; G. Prunier, *Africa's World War — Congo, the Rwandan Genocide, and the Making of a Continental Catastrophe*, Oxford University Press, 2010, pp. 1-468; K. Moghalu, *Rwanda's Genocide — The Politics of Global Justice*, N.Y., Palgrave, 2005, pp. 1-236; J.-P. Chrétien and M. Kabanda, *Rwanda — Racisme et génocide — l'idéologie hamitique*, Paris, Ed. Belin, 2013, pp. 7-361; S. Leydesdorff, *Surviving the Bosnian Genocide — The Women of Srebrenica Speak*, Bloomington/Indianapolis, Indiana University Press, 2011, pp. 1-229; M. W. Daly, *Darfur's Sorrow — A History of Destruction and Genocide*, Cambridge University Press, 2007, pp. 1-316.

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atrocities over the twentieth century have in effect been committed pursuant to a plan, have been organized and executed as a State policy, by those who held power, with the use of euphemistic language in the process of *dehumanization* of the victims[122].

148. Widespread and systematic patterns of destruction have been carried out amidst ideological propaganda, without any moral assessment, blurring the sheer brutality and any responsibility, and erasing any guilty feeling. All was lost in the organic and totalitarian entity. Those mass murders have often been committed without any reparation to the next of kin of the fatal victims[123]. Furthermore, not all such mass atrocities have been taken before international tribunals. As to the ones that have been, in an international adjudication of a case concerning the application of the Convention against Genocide, making the elements of genocide too difficult to determine, would maintain the shadow of impunity, and create a situation of lawlessness, contrary to the object and purpose of that Convention.

IX. Widespread and Systematic Pattern of Destruction: Fact-Finding and Case Law

149. May I turn now to the fact-finding that was undertaken, and the reports that were prepared, *at the time those grave breaches of human rights and international humanitarian law were being committed*, conforming a systematic practice of destruction. I refer to the fact-finding and Reports prepared by the Special Rapporteur of the (former) UN Commission on Human Rights (1992-1993), as well as the fact-finding and reports prepared by the UN Security Council's Commission of Experts (1993-1994). I shall seek to detect their elements which bear relevance for the consideration of the *cas d'espèce*.

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[122] Cf. further, Part XIII of the present dissenting opinion, *infra*.

[123] E. Staub, *The Roots of Evil — The Origins of Genocide and Other Group Violence*, Cambridge University Press, 2005 [reimpr.], pp. 7-8, 10, 19, 24, 29, 107, 109, 119, 121-123, 129, 142, 151, 183-187, 221, 225, 227 and 264; D. Muchnik and A. Garvie, *El Derrumbe del Humanismo — Guerra, Maldad y Violencia en los Tiempos Modernos*, Buenos Aires/Barcelona, Edhasa, 2007, pp. 36-37, 116, 128, 135-136, 142, 246 and 250. And cf. also, in general, *inter alia*, e.g., V. Klemperer, *LTI — A Linguagem do Terceiro Reich*, Rio de Janeiro, Contraponto Ed., 2009, pp. 11-424; D. J. Goldhagen, *Worse than War — Genocide, Eliminationism, and the Ongoing Assault on Humanity*, London, Abacus, 2012 [reed.], pp. 6-564; J. Sémelin, *Purificar e Destruir — Usos Políticos dos Massacres e dos Genocídios*, Rio de Janeiro, DIFEL, 2009, pp. 19-532; M. Kullashi, *Effacer l'autre — Identités culturelles et identités politiques dans les Balkans*, Paris, L'Harmattan, 2005, pp. 7-246; S. Matton, *Srebrenica — Un génocide annoncé*, Paris, Flammarion, 2005, pp. 21-420; P. Mojzes, *Balkan Genocides — Holocaust and Ethnic Cleansing in the Twentieth Century*, Lanham, Rowman & Littlefield Publs., 2011, pp. 34-229.

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1. United Nations (Former Commission on Human Rights) Fact-Finding Reports on Systematic Pattern of Destruction (1992-1993)

150. There are passages in the "Reports on the Situation of Human Rights in the Territory of the former Yugoslavia", of the Special Rapporteur of the (former) UN Commission on Human Rights (Mr. Tadeusz Mazowiecki), which pertain to alleged crimes committed against Croat populations and by the Serb official or paramilitary entities. There are reported facts that assist in evidencing a systematic pattern of destruction during the armed attacks in Croatia in particular. The Report of 28 August 1992[124], for example, referred to the shops and businesses of ethnic Croats that were burned and looted (para. 12).

151. Other forms of intimidation, it continued, involved shooting at the houses of other ethnic groups and throwing explosives at them (Report of 28 August 1992, para. 13). Attacks on churches and mosques were part of the campaign of intimidation (*ibid.*, para. 16). Another tactic included "the shelling of population centres and the cutting off of supplies of food and other essential goods" (*ibid.*, para. 16). Cultural centres were also targeted, and snipers shot "innocent civilians"; any movement "out of doors" was "hazardous" (*ibid.*, paras. 17-18).

152. Detention of civilians was intended to put pressure on them to leave the territory (*ibid.*, para. 23). That Report also referred to the existence of detention facilities containing between 10 to 100 prisoners in Croatia, and which were "under the control of the Government as well as territories under the control of ethnic Serbs" (*ibid.*, para. 34). It added that the situation in which prisoners lived (including poor nutrition, overcrowding and poor conditions of detention) was a real threat to their lives, and, in effect, prisoners have died of torture and mistreatment in Croatia (*ibid.*, para. 39). The aforementioned Report further referred to the massive disappearances that occurred in territories under the control of ethnic Serbs; in particular, 3,000 disappearances were reported following the fall of Vukovar, with people allegedly detained in camps before disappearing (*ibid.*, para. 41).

153. The subsequent Report of 27 October 1992[125] expressed concern as to the need to investigate further the existence of mass graves in Vukovar and surrounding areas (para. 18). Generally speaking, this Report stressed much more on Bosnia and Herzegovina than on Croatia. The following Report, of 17 November 1992[126], addressed the facts occurred in the United Nations Protected Areas (UNPAs). The Special Rappor-

[124] UN doc. E/CN.4/1992/S-1/9.
[125] UN doc. E/CN.4/1992/S-1/10.
[126] UN doc. A/47/666/S/24809.

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teur stated that in the Krajina parts of UNPA Sector South, murders, robberies, looting "and other forms of criminal violence often related to ethnic cleansing" took place (para. 78). People were only allowed to flee upon relinquishment of their properties. As to UNPA Sector East, ethnic cleansing was undertaken by Serbian militias and local Serbian authorities, and people were subjected to extremely violent intimidation (para. 83). Furthermore, Catholic churches were destroyed (para. 84).

154. Moreover, that Report expressed concern with the disappearance of 2,000 to 3,000 people, following the fall of Vukovar in 1991; it referred to the potential mass grave in Ovčara close to Vukovar. On the site of the potential mass grave referred to, four bodies were found, but there might have been many more bodies, including some of the 175 Croatian patients who were evacuated from the Vukovar hospital and then disappeared; there might have been eight other mass graves in the area (para. 86).

155. Last but not least, the Report of 17 November 1992 stated, in its conclusions, that "the continuation of ethnic cleansing is a deliberate effort to create a fait accompli in flagrant disregard of international commitments entered into by those who carry out and benefit from ethnic cleansing" (para. 135). It is worth noticing that the Report referred to all those identified elements of extreme violence as a "policy" (para. 135).

156. The subsequent Report of 10 February 1993[127] likewise referred to an ethnic cleansing policy undertaken by local Serbian authorities and paramilitaries still taking place in some UNPAs, as disclosed by the constant harassment towards the non-Serbs who refused to flee, the destruction of churches and houses (para. 141). The following Report, of 17 November 1993[128], asserted that the organized massive ethnic cleansing of the Croats from the Republic of Krajina then became a "fait accompli" (para. 144), and crimes committed against Croats would generally fall into impunity (para. 145). In UNPA Sector South and the Pink Zones, there were only 1,161 Croats left (whereas there were 44,000 of them in the area in 1991. Killings, looting and confiscation of farm equipment were reported. Moreover, the same Report gave account of disappearances and killings that had been occurring in UNPA Sector North (paras. 151-152).

157. As to UNPA Sector East, the census of 1991 and 1993 evidenced that the Croat population in the area had dropped from 46 per cent to 6 per cent, while the Serb population arose from 36 per cent to approximately 73 per cent (para. 157). Intimidation acts and crimes were often

[127] UN doc. E/CN.4/1993/50.
[128] UN doc. E/CN.4/1994/47.

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directed at minorities, including killings, robbery and looting, forced recruitment in the armed forces, beatings, among others (para. 158). Furthermore, the Report of 17 November 1993 expressed concerns about discrimination against Croats when it comes to medical treatments and food distribution (para. 159). And the Report then referred to the "deliberate and systematic shelling of civilian objects in Croatian towns and villages" (para. 161).

158. The Report added that, according to Croatian sources, between April 1992 and July 1993, "Serbian shelling" caused "187 civilian deaths and 628 civilian injuries", and, between 1991 and April 1993, an estimated total of 210,000 buildings outside the UNPAs were either seriously damaged or destroyed, primarily as a result of shelling (para. 161). Parts of the Dalmatian coast areas

> "have sustained several hundred impacts. There have been numerous civilian deaths and injuries and extensive damage to civilian objects including schools, hospitals and refugee camps, as well as houses and apartments" (para. 162).

There were cases of civilian objects, hospitals and refugee camps, seemingly "not situated in the proximity of a military object", which were nevertheless "deliberately shelled from Serbian positions within visual range of the targets" (para. 163). The Special Rapporteur received accounts of Croatian forces having also become engaged in "deliberate shelling of civilian areas" (para. 164). Violence breeds violence.

2. United Nations (Security Council's Commission of Experts) Fact-Finding Reports on Systematic Pattern of Destruction (1993-1994)

159. The Commission established by the UN Security Council resolution 780 (1992), of 6 October 1992, started in early November 1992 its fact-finding work on the international crimes perpetrated in the war in Croatia. By the time it concluded its work, by the end of May 1994, the Commission of Experts had issued four reports, namely: "Interim Report" (of 10 February 1993), "Report of a Mass Grave Near Vukovar" (of 10 January 1993), "Second Interim Report" (of 6 October 1993), and "Final Report" (of 27 May 1994). Each of them, and in particular the last one, contains accounts of the grave breaches of international humanitarian law, international human rights law, international refugee law and international criminal law, committed during the war in Croatia. It is thus important to review the results of the fact-finding work of the Commission of Experts.

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(a) *Interim Report (of 10 February 1993)*

160. In his presentation of the first Interim Report of the Commission of Experts established by the Security Council, the (then) UN Secretary-General (B. Boutros-Ghali) deemed it fit to stress that, already in that first Report, the Commission had already established that:

> "Grave breaches and other violations of international humanitarian law have been committed, including wilful killing, 'ethnic cleansing' and mass killings, torture, rape, pillage and destruction of civilian property, destruction of cultural and religious property and arbitrary arrests."[129]

161. In effect, in its aforementioned "Interim Report", the Commission of Experts, bearing in mind the relevant conventional basis for its fact-finding[130], observed that "ethnic cleansing", a "relatively new" expression, is "contrary to international law" (para. 55). And it added:

> "Based on the many reports describing the policy and practices conducted in the former Yugoslavia, 'ethnic cleansing' has been carried out by means of murder, torture, arbitrary arrest and detention, extrajudicial executions, rape and sexual assault, confinement of civilian population in ghetto areas, forcible removal, displacement and deportation of civilian population, deliberate military attacks or threats of attacks on civilians and civilian areas, and wanton destruction of property. Those practices constitute crimes against humanity and can be assimilated to specific war crimes. Furthermore, such acts could also fall within the meaning of the Genocide Convention." ("First Interim Report", para. 56.)

The Commission of Experts then reported on "widespread and systematic rape and other forms of sexual assault" throughout the various phases of the armed conflicts (*ibid.*, para. 58), as well as on mass executions, disappearances and mass graves during the war in Croatia (*ibid.*, paras. 62-63).

[129] UN doc. S/25274, of 10 February 1993, p. 1.

[130] The 1949 Geneva Conventions of International Humanitarian Law (for "grave breaches") and Additional Protocol I, the 1907 Hague Convention respecting the Laws and Customs of War on Land and Its Annex: Regulations concerning the Laws and Customs of War on Land; the 1948 Convention on the Prevention and Punishment of the Crime of Genocide; the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict; and the 1980 Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects (paras. 37, 39 and 47).

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(b) *Report of a mass grave near Vukovar (of 10 January 1993)*

162. The next Report of the Commission of Experts focused specifically on the mass grave near Vukovar. A mass execution took place at the gravesite, and "the executioners sought to bury their victims secretly"; the grave contained some 200 bodies (item I). The mass grave was discovered by members of the UNPROFOR Civilian Police (UNCIVPOL) and an international forensic team, in an area south-east of the farming village of Ovčara, near Vukovar. The Commission of Experts reported that "[t]he discovery of the Ovčara site is consistent with witness testimony of the disappearance of about 200 patients and medical staff members from the Vukovar Hospital during the evacuation of Croatian patients from that facility on 20 November 1991" (item II).

163. JNA soldiers and Serbian paramilitaries loaded a truck with groups of 20 men, beating them, and driving them away (to execution); at "intervals of about 15 to 20 minutes, the truck returned empty and another group was loaded onto it" (item II). A mass execution took place, and the mortal remains (of some 200 bodies) were then put in a clandestine mass grave. The Commission of Experts reiterated that "[t]he remote location of the grave suggests that the executioners intended to bury their victims secretly" (item III).

(c) *Second Interim Report (of 6 October 1993)*

164. In its following Report (UN doc. S/26545), the Commission of Experts again dwelt upon the mass execution at the grave site in Ovčara (para. 78). Besides mass killings, in its fact-finding missions, it found widespread violations of human rights in detention centres[131], including torture, beatings, and other forms of physical and psychological mistreatment ("Second Interim Report", paras. 84-85). Furthermore, there was an "overall pattern" of rapes (330 reported cases), suggesting a "systematic rape policy"; among the factors pointing in this direction, the Commission of Experts proceeded,

> "is the coincidence in time between military action designed to displace civilian populations and widespread rape of the same populations. Group involvement of the members of the same military units in rape suggests command responsibility by commission or omission; in this respect, the manner in which this type of rape was conducted in multiple locations and within a fairly close period of time (mostly between May and December 1992) is also a significant factor. Another factor in this connection is the contemporaneous existence of other

[131] There were 353 reported detention centres (para. 35).

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violations of international humanitarian law in a given region occurring simultaneously in prison camps, in the battlefield and in the civilian regions of occupied areas." (Second Interim Report, para. 69.)

165. The general framework was one of destruction, with findings of mass killings (in the Vukovar area), brutal mistreatment of prisoners, systematic sexual assaults, "ethnic cleansing", and destruction of property (*ibid.*, paras. 9-10). There were thousands of "incidents of victimization" (*ibid.*, para. 29), mostly against the civilian population (kidnapping or hostage-taking, forced eviction, imprisonment, rapes, torture, killings) (*ibid.*, paras. 32 and 35). In the Vukovar area, there was abduction of civilians and personnel (some 200 persons) from the Vukovar Hospital, followed by their execution and burial in a mass grave at Ovčara (*ibid.*, paras. 35 and 37). More than a war, it was an onslaught.

(d) *Final Report (of 27 May 1994)*

166. The "Final Report" of the Commission of Experts gives a detailed account of the findings of the horrifying atrocities perpetrated against the targeted victims. In its presentation of the "Final Report", the (then) UN Secretary-General (B. Boutros-Ghali) drew attention to the "reported grave breaches" of international humanitarian law, committed "on a large scale", and "brutal and ferocious in their execution". He further drew attention to the Commission's "substantive findings on alleged crimes of 'ethnic cleansing', genocide and other massive violations of elementary dictates of humanity"[132]. As to "ethnic cleansing" and rape and sexual assault, he added that they have been carried out "so systematically that they strongly appear to be the product of a policy", which "may also be inferred from the consistent failure to prevent the commission of such crimes and to prosecute and punish their perpetrators"[133].

167. Throughout its "Final Report", the Commission of Experts stressed its findings of *grave* breaches of international humanitarian law[134], mainly in Croatia and Bosnia-Herzegovina (paras. 45, 231, 253 and 311). It was attentive to detect the *systematicity* of victimization, disclosing a policy of persecution or discrimination ("Final Report", para. 84). At a certain point, the Commission dwelt upon the Convention against Genocide, adopted — it recalled — for "humanitarian and civilizing purposes", in order to safeguard the existence itself of certain human

[132] UN doc. S/1994/674, of 27 May 1994, p. 1.
[133] *Ibid.*, pp. 1-2.
[134] Articles 50, 51, 130 and 147 of the 1949 Geneva Conventions on International Humanitarian Law, and Articles 11 (4) and 85 of the 1977 Additional Protocol I.

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groups and to assert basic "principles of humanity" (Final Report, para. 88). The Convention, it added, had a "historical evolutionary nature" (*ibid.*, para. 89).

168. In the perpetration of those grave breaches, there was ample use of paramilitaries, and the chain of command was thus blurred (*ibid.*, paras. 114, 120-122 and 128), so as intentionally to conceal responsibility (*ibid.*, para. 124). In this way "ethnic cleansing" was conducted (to build the "Greater Serbia") as a "purposeful policy", terrorizing the civilian population, in order to remove ethnic or religious groups from certain geographic areas, moved at times by a "sense of revenge" (*ibid.*, paras. 130-131). The areas were strategic, "linking Serbia proper with Serb-inhabited areas in Bosnia and Croatia" (*ibid.*, para. 133).

169. The acts of violence, to remove the civilian population from those areas, were carried out with "extreme brutality and savagery", instilling terror, so that the persecuted would flee and never return. They included mass murder, torture and rape, other mistreatment of civilians and prisoners of war, using of civilians as human shields, indiscriminate killings, forced displacement, destruction of cultural property, attacks on hospitals and medical locations, burning and blowing up of houses and destruction of property (*ibid.*, paras. 134-137).

170. The Commission of Experts also found frequency of shelling (*ibid.*, para. 188) and a pattern of "systematic targeting" (*ibid.*, para. 189). Such policy and practices of "ethnic cleansing" were carried out by members of distinct segments of Serbian society, such as members of the Serbian army, militias, special forces, police and individuals (*ibid.*, paras. 141-142)[135], as illustrated by the destruction of the city of Vukovar in 1991 (*ibid.*, para. 145). The Commission of Experts also singled out the attack on Dubrovnik, a city with no defence: it pondered that the destruction of cultural property therein could not at all be justified as a "military necessity" (*ibid.*, paras. 289 and 293-294). The battle of Dubrovnik was criminal (*ibid.*, para. 297); there was a deliberate attack on civilians and cultural property (*ibid.*, paras. 299-300).

171. The Commission of Experts then turned to the concentration camps: the living conditions in those camps were "appalling", with executions en masse, rapes, torture, killings, beatings and deportations (*ibid.*, paras. 169-171). Concentration camps were the scene of "the worst inhumane acts", committed by guards, police, special forces and others (*ibid.*, para. 223). Those

[135] This generated further violence, the Commission of Experts added, and Croatian forces also engaged in such practices, though the Croatian authorities deplored them, indicating that they were not part of a governmental policy (para. 147).

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atrocities were accompanied by "purposeful humiliation and degradation", a "common feature in almost all camps" (Final Report, paras. 229-230 *(d)*).

172. Men of "military age", between the ages of 16 (or younger) and 60, were separated from older men, women and children, and transferred to heavily guarded larger camps, where killings and brutal torture were committed (*ibid.*, para. 230 *(i)*). Prisoners in all camps were subjected to "mental abuse and humiliation". There was no hygiene, and soon there were epidemics. Prisoners nearly starved to death; "[o]ften sick and wounded prisoners" were "buried alive in mass graves along with the corpses of killed prisoners" (*ibid.*, para. 230 *(p)*).

173. The Commission of Experts proceeded, focusing on the practice of rape, which was not often reported for fear of reprisals, lack of confidence in justice, and the social stigma attached to it (*ibid.*, paras. 233-234). The reported cases of rape occurred between the fall of 1991 and the end of 1993, most of them having occurred between April and November 1992 (*ibid.*, para. 237). From the reported cases, five patterns of rape emerged, namely: *(a)* rape as intimidation of the targeted group, involving individuals or small groups (*ibid.*, para. 245); *(b)* rape — sometimes in public — linked to the fighting in an area, involving individuals or small groups (*ibid.*, para. 246); *(c)* rape in detention camps (after the men were killed), followed at times by the murder of the raped women (*ibid.*, par. 247); *(d)* rape as terror and humiliation, as part of the policy of "ethnic cleansing", keeping pregnant women detained until they could no longer have an abortion (*ibid.*, para. 248); and *(e)* rape (in hotels or other facilities) for entertainment of soldiers, more often followed by the murder of the raped women (*ibid.*, para. 249).

174. Rapes, amidst shame and humiliation, the Commission proceeded, were intended "to displace the targeted group from the region"; moreover, "[l]arge groups of perpetrators subject[ed] victims to multiple rapes and sexual assault" (*ibid.*, para. 250). They ended up being "committed by all sides to the conflict" (*ibid.*, para. 251); the patterns of rape *(supra)* suggest that "a systematic rape policy existed in certain areas" (*ibid.*, para. 253).

175. The Commission concluded that practices of "ethnic cleansing", with rapes, were systematic, and appeared as a policy (also by omission, *ibid.*, para. 313). Those grave breaches could thus be reasonably inferred from such "consistent and repeated practices" (*ibid.*, para. 314). The

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Commission of Experts confessed to have been "shocked" by the high level of victimization and the manner in which these crimes were committed (Final report, para. 319).

3. Repercussion of Occurrences in the United Nations Second World Conference on Human Rights (1993)

176. It should not pass unnoticed that the occurrences in the wars in the former Yugoslavia had prompt repercussions at the Second World Conference of Human Rights, held in Vienna in June 1993. Having participated in all stages of that United Nations World Conference, I remember well that the original intention was not to single out any country, but soon two exceptions were made, so as to address the situation of the affected populations in the ongoing armed conflicts in the former Yugoslavia[136] and in Angola[137].

177. The special declarations on the two conflicts were adopted therein, on 24 June 1993. As to the former, the concern it expressed was directed to the occurrences in Bosnia and Herzegovina, and in particular at Goražde. An appeal to the UN Security Council accompanying the special declaration, referred to the attacks as "genocide". The declaration referred to that "tragedy", as "characterized by the naked Serbian aggression, unprecedented violations of human rights and genocide", being "an affront to the collective conscience of mankind" (third preambular paragraph). And it added that:

> "The World Conference believes that the practice of ethnic cleansing resulting from Serbian aggression against the Muslim and Croat population in the Republic of Bosnia and Herzegovina constitutes genocide in violation of the Convention on the Prevention and Punishment of the Crime of Genocide."[138] (Eighth preambular paragraph.)

178. Although the occurrences which attracted the attention of the UN World Conference in 1993 were the ones that were taking place in one particular locality, in the European continent, not so far away from Vienna (mainly in Goražde), they occurred likewise, and were to keep on occurring, in other parts of former Yugoslavia. The atrocities at issue formed part of a widespread and systematic pattern of destruction (cf. Sections VIII-X, *infra*). They were committed pursuant to a plan; the chain of command (the Supreme Defence Council) and the perpetrators were the same, engaging State responsibility.

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[136] "Decision and Special Declaration on Bosnia and Herzegovina", in *Report of the UN Secretary-General on the Second World Conference on Human Rights* (Vienna, 14-25 June 1993), in A/CONF.157/24, Part I, of 13 October 1993, p. 47.

[137] "Special Declaration on Angola", in *ibid.*, p. 50.

[138] "Special Declaration on Bosnia and Herzegovina", in *ibid.*, pp. 47-48.

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179. The final document adopted by the World Conference — the Vienna Declaration and Programme of Action (1993) — clearly addressed the problem. The Declaration asserted that:

> "The World Conference on Human Rights expresses its dismay at massive violations of human rights, especially in the form of genocide, 'ethnic cleansing', and systematic rape of women in war situations, creating mass exodus of refugees and displaced persons. While strongly condemning such abhorrent practices, it reiterates the call that perpetrators of such crimes be punished and such practices immediately stopped." (Part I, para. 28.)

And the Programme of Action, for its part, added that:

> "The World Conference on Human Rights calls on all States to take immediate measures, individually and collectively, to combat the practice of ethnic cleansing to bring it quickly to an end. Victims of the abhorrent practice of ethnic cleansing are entitled to appropriate and effective remedies." (Part II, para. 24.)

4. Judicial Recognition of the Widespread and/or Systematic Attacks against the Croat Civilian Population — Case Law of the ICTY

180. On successive occasions in its evolving case law, the ICTY has addressed the atrocities committed during the war in Croatia (1991-1992), stressing that what occurred was not simply an armed conflict between opposing armed forces, but rather a devastation of villages and mass murder of their populations. References can be made, in this connection, e.g., to the ICTY's findings in the cases of *Babić* (2004), *Martić* (2007) *Mrkšić, Radić and Sljivančanin* (2007) and *Stanišić and Simatović* (2013).

(a) Babić *case (2004)*

181. Thus, in its Judgment of 29 June 2004 in the *Babić* case, the ICTY (Trial Chamber) found that the regime[139] that launched the armed attacks within Serbia, committed "the extermination or murder of hundreds of Croat and other non-Serb civilians" (para. 15), and did so "in order to transform that territory into a Serb-dominated State" (paras. 8 and 16). And the ICTY (Trial Chamber) added significantly that:

> "After the take-over, in co-operation with the local Serb authorities, the Serb forces established a regime of persecutions designed to drive the Croat and other non-Serb civilian populations from these territories. The regime, which was based on political, racial, or reli-

[139] Together with Serbian forces, including the JNA and TO units from Serbia, in concert with Serbian authorities.

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> gious grounds, included the extermination or murder of hundreds of Croat and other non-Serb civilians in Dubića, Cerovljanji, Baćin, Saborsko, Poljanak, Lipovača and the neighbouring hamlets of Skabrnja, Nadin, and Bruška in Croatia; the prolonged and routine imprisonment and confinement of several hundred Croat and other non-Serb civilians in inhumane living conditions in the old hospital and the JNA barracks in Knin, which were used as detention facilities; the deportation or forcible transfer of thousands of Croat and other non-Serb civilians from the SAO Krajina; and the deliberate destruction of homes and other public and private property, cultural institutions, historic monuments, and sacred sites of the Croat and other non-Serb populations in Dubića, Cerovljanji, Baćin, Saborsko, Poljanak, Lipovača and the neighbouring hamlets of Vaganac, Skabrnja, Nadin and Bruška." (ICTY, *Babić*, Judgment of 29 June 2004, para. 15.)

And the ICTY (Trial Chamber) then concluded, in the aforementioned *Babić* case, on the basis of the factual statement and other evidence presented to it, that the execution (of the JCE) at issue "entailed a widespread or systematic attack directed against a civilian population" and "was carried out with discriminatory intent, on political, racial, or religious grounds" (*ibid.*, para. 35).

(b) Martić *case (2007)*

182. Likewise, in the *Martić* case, the ICTY (Trial Chamber), in its Judgment of 12 June 2007, found that there had been a "widespread and systematic attack"(para. 352) against the Croat population, committed by the JNA, TO, Serbian police and Serbian paramilitaries, acting in concert; that attack involved "the commission of widespread and grave crimes" (para. 443), with "the goal of creating an ethnically Serb State" (para. 342). In its assessment, "[t]here is evidence of Croats being killed in 1991, having their property stolen, having their houses burned, that Croat villages and towns were destroyed, including churches and religious buildings, and that Croats were arbitrarily dismissed from their jobs" (ICTY, *Martić*, Judgment of 12 June 2007, para. 324). The attacks continued in 1992[140].

183. The ICTY (Trial Chamber) further found that "numerous attacks were carried out on Croat majority villages by the JNA acting in co-operation with the TO and the Milicija Krajine" (*ibid.*, para. 344), and that "[t]hese attacks followed a generally similar pattern, which involved the killing and removal of the Croat population" (*ibid.*, para. 443). Moreover, it added, hundreds of Croat civilians were imprisoned and subjected

[140] It proceeded that "[d]uring 1992 on the territory of the RSK, there was a continuation of incidents of killings, harassment, robbery, beatings, burning of houses, theft, and destruction of churches carried out against the non-Serb population" (*ibid.*, para. 327).

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to "severe mistreatment" (ICTY, *Martić*, Judgment of 12 June 2007, para. 349). It further determined that "widespread crimes of violence and intimidation and crimes against private and public property were perpetrated against the Croat population, including in detention facilities run by MUP forces of the SAO Krajina and the JNA" (*ibid.*, para. 443).

184. By the end of the summer of 1991, it added, "the JNA became an active participant in Croatia on the side of the SAO Krajina" (*ibid.*, para. 330). The ICTY (Trial Chamber) also referred to the persecution, forced displacement, deportation and forcible transfer of the Croat population (civilians), and "further evidence that in 1991 Croats were killed by Serb forces in various locations in the SAO Krajina" (*ibid.*, para. 426). There was, in sum,

> "evidence of a generally similar pattern to the attacks. The area or village in question would be shelled, after which ground units would enter. After the fighting had subsided, acts of killing and violence would be committed by the forces against the civilian non-Serb population who had not managed to flee during the attack. Houses, churches and property would be destroyed in order to prevent their return and widespread looting would be carried out. (. . .) Moreover, members of the non-Serb population would be rounded up and taken away to detention facilities (. . .)" (*Ibid.*, para. 427.)

185. Moreover, the ICTY (Trial Chamber) referred to the co-operation and assistance with Serbia on the part of Milan Martić (third President of the so-called "RSK"); in this respect, the Trial Chamber stated that, "[t]hroughout 1992, 1993 and 1994, the RSK leadership, including Milan Martić, requested financial, logistical and military support from Serbia on numerous occasions, including directly from Slobodan Milošević" (*ibid.*, para. 159). And, as to the political objective of the Serb leadership, the ICTY (Trial Chamber) stated that:

> "[T]he President of Serbia, Slobodan Milošević, (. . .) covertly intended the creation of a Serb state. Milan Babić testified that Slobodan Milošević intended the creation of such a Serb State through the establishment of paramilitary forces and the provocation of incidents in order to allow for JNA intervention, initially with the aim to separate the warring parties but subsequently in order to secure territories envisaged to be part of a future Serb state." (*Ibid.*, para. 329.)

186. The ICTY (Trial Chamber) added that, as to the period 1991-1995, it had been furnished with "a substantial amount of evidence of massive and widespread acts of violence and intimidation committed against the non-Serb population (. . .)" (*ibid.*, para. 430). It found *inter alia* that there had occurred widespread and systematic attacks "directed against the Croat and other non-Serb civilian population" in Croatia in the period 1991-1995, notwithstanding the presence of Croat forces in some areas (*ibid.*, paras. 349-352).

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(c) Mrkšić, Radić and Sljivančanin *case (2007)*

187. In the case of *Mrkšić, Radić and Sljivančanin*, the ICTY (Trial Chamber) made important findings (Judgment of 27 September 2007) as to the "complete command and full control" exercised by the JNA over the TOs and Serb paramilitaries, in "all military operations" (para. 89). In addressing the "devastation brought on Vukovar over the prolonged military engagement in 1991" (ICTY, *Mrkšić, Radić and Sljivančanin*, Judgment of 27 September 2007, para. 8), the ICTY (Trial Chamber) described, *inter alia*, how

> "in the evening and night hours of 20-21 November 1991 the prisoners of war were taken in groups of 10 to 20 from the hangar at Ovčara to the site where earlier that afternoon a large hole had been dug. There, members of Vukovar TO and paramilitary soldiers executed at least 194 of them. The killings started after 21:00 hours and continued until well after midnight. The bodies were buried in the mass grave and remained undiscovered until several years later." (*Ibid.*, para. 252.)

188. In the aforementioned Judgment in the case of *Mrkšić, Radić and Sljivančanin*, the ICTY (Trial Chamber) again made important findings on the widespread and systematic attack directed against the civilian population in Vukovar. It stated, e.g., that, from 23 August 1991 to 18 November 1991,

> "the town of Vukovar and its surroundings were increasingly subjected to shelling and other fire: it came to be almost on a daily basis. The damage to the city of Vukovar was devastating. (. . .) A large Serb force comprising mainly well armed and equipped troops were involved in far greater numbers than the Croat forces. In essence, the city of Vukovar was encircled and under siege from Serb forces, including air and naval forces, until the Croat forces capitulated on 18 November 1991. By the beginning of November virtually none of the houses along the road from Vukovar to Mitnica were left standing above the cellar. The supply of essential services to the whole of Vukovar was disrupted. Electricity and water supplies and the sewage system all failed. The damage to civilian property was extensive. By 18 November 1991, the city had been more or less totally destroyed. It was absolutely devastated. Those still living in the city had been forced to take shelter in cellars, shelters and the like."[141] (*Ibid.*, para. 465.)

[141] In its aforementioned Judgment, the ICTY (Trial Chamber) proceeded that

> "the Vukovar hospital, schools, public buildings, offices, wells, the water and electricity supply and roads were severely damaged during the conflict. All buildings were shelled, including the hospital, schools and kindergartens. Many wells were also targeted and destroyed. Most of the wells in Vukovar were privately owned, so houses with a water supply were among the first to be destroyed. From September to November 1991 there was no drinking water available, except from the remaining wells." (*Ibid.*, para. 466.)

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189. The ICTY (Trial Chamber) then stated, in the same Judgment of 27 September 2007 in the *Mrkšić, Radić and Sljivančanin* case, that:

> "The battle for Vukovar caused a large number of casualties, both dead and wounded, combatants and civilians. There can be no exact number for the wounded treated in Vukovar by Croat services, because the extremely difficult and improvised treatment facilities did not allow the luxury of thorough records. There is no overall evidence of the Serb forces' casualties. What remained of Vukovar hospital, together with a secondary nursing facility in a nearby cellar of a warehouse, dealt with most of the wounded, but there were other facilities in the Vukovar area. (. . .) Civilians, including women and children were amongst the wounded. While precise statistics were not maintained in the circumstances, the Chamber accepts as a reliable estimate that the casualties were 60-75 per cent civilian. A report (. . .) on 25 October 1991 from the medical director of the hospital noted that 1250 wounded had been admitted since 25 August with a further 300 dead on arrival." (ICTY, *Mrkšić, Radić and Sljivančanin*, 27 September 2007, para. 468.)

190. And the ICTY (Trial Chamber) significantly added that:

> "There can be no question that the Serb forces were, in part, directing their attack on Vukovar (. . .). [T]he Serb attack was also consciously and deliberately directed against the city of Vukovar itself and its hapless civilian population, trapped as they were by the Serb military blockade of Vukovar and its surroundings and forced to seek what shelter they could in the basements and other underground structures that survived the ongoing bombardments and assaults. *What occurred was not, in the finding of the Chamber, merely an armed conflict between a military force and an opposing force in the course of which civilians became casualties and some property was damaged. The events, when viewed overall, disclose an attack by comparatively massive Serb forces, well armed, equipped and organized, which slowly and systematically destroyed a city and its civilian and military occupants to the point where there was a complete surrender of those that remained.* While the view is advanced before the Chamber that the Serb forces were merely liberating besieged and wronged Serb citizens who were victims of Croatian oppressiveness and discrimination, this is a significant distortion of the true position as revealed by the evidence, when reviewed impartially." (*Ibid.*, para. 470.) [142]

(d) Stanišić and Simatović *case (2013)*

191. Subsequently, in its Judgment of 30 May 2013 in the *Stanišić and*

[142] [Emphasis added.] And cf., furthermore, Part X (1) of the present dissenting opinion, *infra*.

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Simatović case, the ICTY (Trial Chamber) found that, from April 1991 to April 1992, between 80,000 and 100,000 Croat and other non-Serb civilians fled the SAO Krajina, as a result of the situation then prevailing in that region,

> "which was created by a combination of: the attacks on villages and towns with substantial or completely Croat populations; the killings, use as human shields, detention, beatings, forced labour, sexual abuse and other forms of harassment (including coercive measures) of Croat persons; and the looting and destruction of property. These actions were committed by the local Serb authorities and the members and units of the JNA (including JNA reservists), the SAO Krajina TO, the SAO Krajina Police (including Milan Martić), and Serb paramilitary units, as well as local Serbs as set out in the Trial Chamber's findings." (ICTY, *Stanišić and Simatović*, Judgment of 30 May 2013, para. 404, and cf. para. 997.)

192. The ICTY (Trial Chamber) stressed that "[h]arassment and intimidation" of the Croat population were carried out "on a large scale":

> "Croats were killed in 1991, their property was stolen, their houses were burned, Croat villages and towns were destroyed, including churches and religious buildings and Croats were arbitrarily dismissed from their jobs. During 1992 (. . .) there was a continuation in incidents of killings, harassment, robbery, beatings, burning of houses, theft and destruction of churches carried out against the non-Serb population. Throughout 1993 there were further reports of killings, intimidation and theft." (*Ibid.*, para. 153.)

193. There were also cases of deportation and forcible transfer of groups of persons (*ibid.*, paras. 996-1054); the ICTY (Trial Chamber) further found that Serb forces "committed deportation and forcible transfer of many thousands of Croats"; in such incidents "people were moved against their will or without a genuine choice", as:

> "Serb forces created an environment where the victims had no choice but to leave. This included attacks on villages and towns, arbitrary detention, killings and ill treatment. These conditions prevailed during the days or weeks, and sometimes months, prior to people leaving. The Trial Chamber has also found that the crimes of murder, deportation and forcible transfer constituted underlying acts of persecution as well." (*Ibid.*, para. 970.)

194. It added that, "the persons targeted were primarily members of the civilian population" (*ibid.*, para. 971). In the ICTY (Trial Chamber)'s view, "the requirements of 'attack', 'widespread', and 'civilian population' have been met" *(ibid.)*. The crimes were perpetrated in widespread

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armed attacks against the non-Serb civilian population, against undefended non-Serb villages, with systematic executions of non-Serb civilians and destruction of mosques, churches and homes of non-Serbs and other civilian targets (ICTY, *Stanišić and Simatović*, Judgment of 30 May 2013, paras. 969-970). Those attacks, in the ICTY (Trial Chamber)'s finding, were part of a pattern of destruction "against a civilian population" and "the perpetrators knew" that their acts were part of it (*ibid.*, para. 972). In this widespread and systematic pattern of destruction, all such attacks were, as reckoned in the case law of the ICTY *(supra)* deliberate, intentional.

X. Widespread and Systematic Pattern of Destruction: Massive Killings, Torture and Beatings, Systematic Expulsion from Homes and Mass Exodus and Destruction of Group Culture

195. An examination of the factual context, as a whole, of the *cas d'espèce*, discloses a widespread and systematic pattern of destruction, carried out in the villages brought to the attention of the Court in the course of the present proceedings. Such a pattern of destruction, as it will be shown next, encompassed massive killings, torture and beatings, systematic expulsion from homes and mass exodus, and destruction of group culture. After reviewing and assessing the occurrence of those crimes, I shall move on to other manifestations[143] of the widespread and systematic pattern of destruction in the attacked villages in Croatia.

1. Indiscriminate Attacks against the Civilian Population

196. In the factual context of the present case of the *Application of the Convention against Genocide (Croatia* v. *Serbia)*, the question whether the population attacked was either civilian in its entirety or predominantly civilian, does not raise any jurisdictional issue, as crimes of genocide can be committed against any individual, whether civilian or combatant. In distinct contexts, the ICTY (Trial Chambers), faced with the jurisdictional requirements also of crimes against humanity and war crimes, has clarified the meaning to be attached to "civilian population": in all instances, it has adopted a wide definition of what constitutes a civilian population, including, *inter alia*, individuals who performed acts of resistance[144].

[143] Parts XI, XII and XIII of the present dissenting opinion, *infra*.

[144] For example, in the *Tadić* case (Judgment of 7 May 1997), the ICTY (Trial Chamber) held, as to the targeted civilian population, that "[t]he presence of certain non-civilians in

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197. Moreover, in the *cas d'espèce*, the presence of Croatian armed forces and formations should not be used to distort the reality. The events that took place in Vukovar illustrate what was probably the case in other municipalities attacked in Croatia. As the ICTY (Trial Chamber) stated in case *Mrkšić, Radić and Sljivančanin* (*"Vukovar Hospital"*, Judgment of 27 September 2007), there was a "gross disparity between the numbers of the Serb and Croatian forces" engaged in the battle for Vukovar (ICTY, *Mrkšić, Radić and Sljivančanin*, Judgment of 27 September 2007, para. 470).

198. The attack of "massive Serb forces", facing a "comparatively small and very poorly armed and organized Croatian forces", and bringing "devastation on Vukovar and its surroundings" — added the ICTY — was "consciously and deliberately directed against the city of Vukovar itself and its hapless civilian population (. . .) forced to seek what shelter they could in the basements and other underground structures that survived the ongoing bombardments and assaults" (*ibid.*, para. 470).

199. I have already referred, in the present dissenting opinion, to the ICTY's finding of the widespread and systematic attacks by Serb forces against the Croat civilian population[145]. In addition to the passages already quoted from the ICTY Judgment of 27 September 2007 (Trial Chamber) in the *Mrkšić, Radić and Sljivančanin* case, may I here recall that, in that same Judgment, the ICTY (Trial Chamber) proceeded that "[t]he terrible fate that befell the city and the people of Vukovar was but one part of a much more widespread action against the non-Serb peoples of Croatia and the areas of Croatia in which they were substantial majorities" (*ibid.*, para. 471).

200. The ICTY (Trial Chamber) added that, in its view, "the overall effect of the evidence is to demonstrate that the city and civilian population of and around Vukovar were being punished, and terribly so", for

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their midst does not change the character of the population" (para. 638). It reiterated this point in the case *Kunarac, Kovać and Vuković* (Judgment of 22 February 2001, para. 425). In the case *Blaškić* (Judgment of 3 March 2000), it again held that the presence of individuals bearing arms in a resistance movement did not change the character of the civilian population (paras. 213-214). In the case *Kordić and Cerkez* (Judgment of 26 February 2001), it singled out the consistent adoption, by ICTY Trial Chambers, of "a wide definition of what constitutes a civilian population" (para. 180). In the case *Martić* (Judgment of 12 June 2007), the ICTY (Trial Chamber I), keeping in mind the size of the attacked civilian population, found that "the presence of Croatian armed forces and formations in the Skabrnja and Saborsko areas does not affect the civilian character of the attacked population" (para. 350). This was confirmed by the ICTY Appeals Chamber (Judgment of 8 October 2008) in the same case *Martić* (para. 317). In the case *Popović et alii* (Judgment of 10 June 2010), the ICTY (Trial Chamber II) held that the term "civilian population" is to be "interpreted broadly", referring to a population that is "predominantly civilian in nature", even if there are "members of armed resistance groups" (para. 1591). Again in the recent case *Stanišić and Zupljanin* (Judgment of 27 March 2013), it pointed out that "the presence within the civilian population of individuals who do not come within the definition of civilians does not deprive the population of its civilian character" (para. 26); it again upheld the test of the "*predominantly* civilian nature" of the population (para. 26). It pursued the same approach in the case *Limaj, Bala and Musliu* (Judgment of 30 November 2005, para. 186), and in the case *Brđanin* (Judgment of 1 September 2004, para. 134).

[145] Cf. Part IX (4) of the present dissenting opinion, *supra*.

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not having accepted "the Serb controlled federal government in Belgrade", and for Croatia's declaration of independence (ICTY, *Mrkšić, Radić and Sljivančanin*, Judgment of 27 September 2007, para. 471). The ICTY (Trial Chamber) further stated that, what occurred,

> "was not, in the finding of the Chamber, merely an armed conflict between a military force and an opposing force in the course of which civilians became casualties and some property was damaged. The events, when viewed overall, disclose an attack by comparatively massive Serb forces, well armed, equipped and organized, which slowly and systematically destroyed a city and its civilian and military occupants to the point where there was a complete surrender of those that remained. While the view is advanced before the Chamber that the Serb forces were merely liberating besieged and wronged Serb citizens who were victims of Croatian oppressiveness and discrimination, this is a significant distortion of the true position as revealed by the evidence, when reviewed impartially." (*Ibid.*, paras. 470-471.)

201. The ICTY (Trial Chamber) found, in the case of *Mrkšić, Radić and Sljivančanin ("Vukovar Hospital")*, that what happened

> "was in fact, not only a military operation against the Croat forces in and around Vukovar, but also *a widespread and systematic attack* by the JNA and other Serb forces *directed against the Croat and other non-Serb civilian population* in the wider Vukovar area. The extensive damage to civilian property and civilian infrastructure, *the number of civilians killed or wounded during the military operations and the high number of civilians displaced or forced to flee clearly indicate that the attack was carried out in an indiscriminate way, contrary to international law.* It was an unlawful attack. Indeed it was also directed in part deliberately against the civilian population. The widespread nature of the attack is indicated by the number of villages in the immediate area around Vukovar which were damaged or destroyed and the geographical spread of these villages, as well as by the damage to the city of Vukovar itself. The systematic character of the attack is also evidenced by the JNA's approach to the taking of each village or town and the damage done therein and the forced displacement of those villagers fortunate enough to survive the taking of their respective villages." (*Ibid.*, para. 472.)[146]

202. In effect, in the adjudication of distinct cases pertaining to the war in Croatia, the ICTY has found a widespread and systematic pattern of extreme violence, victimizing the civilian population. The dossier of the present case of the *Application of the Convention against Genocide* contains elements revealing that pattern; planned and premeditated. The extreme violence went far beyond establishing military and administrative hegemony: it involved massive killings, brutal torturing and beatings of Croatian civilians, and the removal by force of the remaining ones from

[146] Emphasis added.

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their villages. They were forced to sign documents attesting their "voluntary" consent that all their property should be left to the "SAO Krajina". Moreover, Serbian artillery was used to destroy all traces of Croatian architecture, culture and religion[147].

203. Such indiscriminate attacks against the civilian population in Croatia formed a pattern of extreme violence and destruction, as follows: *(a)* firstly, prior to the occupation of a village, the JNA would send an ultimatum to the Croatian inhabitants to lay down their weapons, or else face the village levelled to the ground; at the same time, promises were made that the Croatian civilians would not be harmed if they did not offer armed resistance; *(b)* secondly, the JNA would then engage in artillery attack, followed by its infantry of the JNA entering the village together with Serb paramilitary groups; *(c)* thirdly, they would then, after capturing the village, embark on a campaign of terror, making it physically or psychologically impossible for the surviving Croatians to continue living there.

204. Even where there was not a complete destruction of the village, as, for example, in Poljanak, serious crimes were committed in that village, as the ICTY recognized in the *Martić* case. Yet, those serious crimes have not been extensively depicted in the present Judgment, neither in respect of Poljanak, nor of other villages. As to Poljanak, there were also accounts of killings; for example, B. V. testified that his family was killed and he was heavily beaten, that Chetniks searched houses in the village and set them on fire, and captured people, and he also witnessed killings[148]. Another witness, M. V., found two victims dead, with their heads smashed and the brains scattered around[149].

205. Similarly to Saborsko, it is significant to note that Serbia acknowledged that the ICTY (Trial Chamber) in the *Martić* case "confirmed the killings in Poljanak and its hamlet Vuković"[150]. There were also accounts of houses having been burned in Poljanak. M. L. testified that prisoners were locked in a room in the camp Manjača, where "they did not get anything to eat or drink for four or five days, while being interrogated over and over, and were beaten and molested"[151]. B. V. testified that Chetniks searched houses in Poljanak, set them on fire and captured people[152].

2. Massive Killings

206. At the final stage of the attacks by the Serb armed forces, when a village was captured, a campaign of terror was launched, followed by

[147] Application instituting proceedings, para. 34, and Memorial of Croatia, paras. 4.8-4.9.
[148] Memorial of Croatia, Annex 387.
[149] *Ibid.*, Annex 388.
[150] Counter-Memorial of Serbia, para. 861.
[151] Memorial of Croatia, Annex 385.
[152] *Ibid.*, Annex 387.

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mass and non-selective executions of Croatian civilians. The smaller remainder of the Croat population was subjected to variants of martial law, imprisonment, forced exile or deportation to camps; in some villages they were forced to display white ribbons, on their sleeves, as armbands, or white sheets attached to the doors of their houses[153]. During the occupation, many Croatians fled to the neighbouring towns, not yet captured, and some were killed in ambushes by Serb paramilitary units on the way.

207. In its 2007 Judgment in the *Application of the Convention against Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro)*, the International Court of Justice observed, as to the verification of a systematic pattern of destruction, that:

> "[I]t is not necessary to examine every single incident reported by the Applicant, nor is it necessary to make an exhaustive list of the allegations; the Court finds it sufficient to examine those facts that would illuminate the question of intent, or illustrate the claim by the Applicant of a pattern of acts committed against members of the group, such as to lead to an inference from such pattern of the existence of a specific intent *(dolus specialis)*." (Para. 242.)

208. Bearing in mind this consideration by the Court, I do not purport, nor is it necessary, in this dissenting opinion, to proceed to an in-depth analysis of individual crimes, as this is not an international criminal court. More important to me is the verification of a widespread and systematic pattern of destruction disclosed by those crimes, all over the villages that were attacked, as brought to the attention of the Court. Numerous crimes — revealing such pattern of destruction — have been described by witnesses, and others have been determined by the ICTY itself, as indicated throughout the present dissenting opinion.

209. In effect, the dossier of the *cas d'espèce* indicates that criminal acts were committed in the various regions occupied by the Serbian forces. In the region of Eastern Slavonia, for example, the following villages are mentioned: Tenja, Dalj, Berak, Bogdanovci, Sarengrad, Ilok, Tompojevci, Bapska, Tovarnik, Sotin, Lovas, Tordinci and Vukovar[154]. The wrongful acts evidencing the systematic pattern of destruction which occurred in Eastern Slavonia spread to the other regions of Western Slavonia, Banovina, Kordun, Lika and Dalmatia[155].

210. The first villages and civilian populations to be attacked were those of Dalj, Erdut and Aljmaš, at the beginning of August 1991. Between 28 Sep-

[153] Cf. Section XIII, *infra*, of the present dissenting opinion.

[154] Cf. Memorial of Croatia, paras. 4.20-4.30, 4.31-4.37, 4.38-4.46, 4.47-4.55, 4.56-4.61, 4.62-4.72, 4.73-4.80, 4.81-4.93, 4.94-4.106, 4.107-4.115, 4.116-4.132, 4.133-4.138, and 4.139-4.190, respectively.

[155] Cf. *ibid.*, paras. 5.3-5.64, 5.65-5.122, 5.123-5.186, and 5.187-5.241, respectively.

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tember 1991 and 17 October 1991, the villages of Sotin, Ilok, Sarengrad, Lovas, Bapska and Tovarnik were captured by the JNA and Serb paramilitary groups. Killings were committed in pursuance of a systematic pattern of brutality, including the perpetration of massacres of entire families, or random murders to force Croats to flee[156]; the campaign culminated in the massacre at Vukovar (after 18 November 1991)[157].

211. Several mass graves were discovered (e.g., in the regions of Banovina, and Kordun and Lika), with little or no indication of who the victims were, or where they were originally from. Such mass graves were found out in the municipalities of Tenja, Dalj, Ilok, Sotin, Lovas, Tordinci, Ovčara, Vukovar, Pakrac, Lađevac and Skabrnja[158]. Croatia pointed out that, by the time of the filing of its Memorial (March 2001), 61 mass graves had been found in Eastern Slavonia. Many of the mass graves, which then appeared were used as temporary burial sites only; the JNA often dug up the bodies and moved them to other parts of the occupied territory or of Serbia[159].

212. For its part, Serbia challenged the evidence presented by Croatia[160]; it contended that the killing of Croats by Serbian forces was not intended to destroy that group, and, accordingly, did not amount to genocide; on the other hand, it added, the killing of Serbs by Croatian forces was committed, in its view, with the intent to destroy the group as such[161]. Croatia replied that Serbia did not dispute that Croats were subjected to torture and to serious bodily and mental harm, on a systematic basis[162]. Serbia, for its part, did not dispute that serious bodily and mental harm was committed by Serbian forces against Croats during the war in Croatia between 1991 and 1995, but it further submitted that serious bodily and mental harm was also committed against Serbs by the Croatian forces[163].

213. A *Book of Evidence* included by Croatia in the dossier of the present case, titled *Mass Killing and Genocide in Croatia 1991/92*[164], identifies *four phases* in the war in Croatia, from the perspective of "civilian casualties and the destruction of Croatian villages and towns", namely:

> "In the *first phase* (July-August 1991), the Serbian paramilitary troops armed by JNA had the predominant role. With the aid of JNA

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[156] Cf. Memorial of Croatia., Chapter 4.

[157] Cf. *ibid.*, para. 4.19.

[158] *Ibid.*, paras. 4.29, 4.35, 4.72, 4.107, 4.116, 4.138, 4.178, 4.188, 5.27, 5.77, 5.137, 5.146, and 5.226, respectively.

[159] Cf. *ibid.*, para. 4.07.

[160] Cf. Counter-Memorial of Serbia, paras. 660 and 663.

[161] Cf. *ibid.*, para. 48.

[162] Cf. Reply of Croatia, para. 9.47.

[163] Cf. Counter-Memorial of Serbia, para. 81.

[164] *Mass Killing and Genocide in Croatia 1991/92: A Book of Evidence*, Zagreb, Ministry of Health of Croatia, 1992, pp. 1-207.

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they attacked completely unarmed Croatian villages, especially in the area of Banija and in the surrounding of Knin. At that time JNA still pretended to be creating buffer-zones between the 'two sides in conflict'. However, the examples of Dalj, Kraljevčani, Dragotinci and Kijevo clearly show the active role of JNA using tanks and air force to destroy residential buildings regardless of the fact that there were no Croatian Police (MUP) or National Guard forces (ZNG). In the *second phase* of the war (September 1991), JNA undertook the conquest of larger areas in Croatia, and it conquered Kostajnica, Dubica, Petrinja, Drniš, Jasenovac, Okučani and Stara Gradiška. This is the phase when the Croatian army did not have adequate heavy artillery so that it could not even neutralize the aggressor. This resulted in a number of Croatian defeats, having as a consequence masses of refugees and displaced persons from the areas of Banija, Dalmacija and partly Slavonia. The following *third phase*, took place during October-November 1991, when JNA waged intensive total war using air force, heavy artillery and armoured units on the line of the Greater Serbia border Virovitica-Karlovac-Karlobag. Established front-line made possible the stabilization of defence. Still, heavy artillery of JNA produced immense destruction of Croatian cities, including the cities at the seaside which were sealed off. In this period important Croatian cities, e.g., Vukovar, Slunj, Dubrovnik, were surrounded and suffered great damages or total destruction. (. . .) The last, *fourth phase* of the war, begins after the ceasefire of 3 January 1992. During April 1992 a dramatic escalation of artillery attacks occurred on a number of civilian targets, especially on Osijek, Vinkovci, Slavonski Brod, Zupanja, Karlovac, Zadar, Gospić and Nova Gradiška. This phase especially threatened the civilians, unprepared for artillery attacks. A new wave of refugees started as well. The endangered population still remains on the occupied territories. They were being forced away from their homes before the UN forces arrive."[165]

214. The document singles out, in the first phase of the onslaught, the destruction of homes, forcing the victims to flee, or else to face death or brutalities. The unarmed residents of the villages attacked were forcefully displaced, and their homes were destroyed or plundered; they moved to more central and safer regions of Croatia. In the second phase, the JNA army itself launched fierce armed attacks, with artillery and fighter jets,

[165] *Mass Killing and Genocide in Croatia 1991/92: A Book of Evidence*, Zagreb, Ministry of Health of Croatia, pp. 1 and 4.

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against numerous villages and towns (e.g., Vukovar, Osijek, Vinkovci, Sisak, Karlovac, Pakrac, Lipik, Gospić, Otočac, Zadar, Sibenik, Dubrovnik, Petrinja, Nova Gradiška or Novska), with mass killings of civilians. The document adds that:

> "Many women, children and elderly lost their lives in this manner, as thousands of private residences and public buildings were totally destroyed. Civilians died in their own homes, in schools, kindergartens, churches, hospitals, on their farms, while walking in the streets, riding bicycles or driving their cars. In short, no one was safe anywhere and there was literally no place to take refuge from the bombing and shelling."[166]

215. Systematic destruction of homes by close-range fire occurred extensively in, e.g., Vukovar, Osijek, Petrinja, Vinkovci and Gospić, among others. After the firing, by tanks, of private residences, "first at the upper floors, then at the ground floor (. . .), hand grenades were thrown in the basement in which the owners or residents ha[d] sought refuge"[167]. Many of the mortal remains were left where they had fallen, and after some time could no longer be recovered (particularly in the regions of Banija, Kordun, Lika and Eastern Slavonia, as well as the hinterland of Zadar and Sibenik and Dubrovnik). Massacres of civilians occurred (e.g., in Voćin and Hum near Podravska Slatina, Obrovac, Benkovac, Knin, Skabrnja and Nadin), as "part of a planned genocide", in the occupied territories[168].

216. The "major cause" of civilian casualties — including children, women and the elderly — was "the indiscriminate and extensive artillery shelling of strictly civilian targets"[169]. There were also the "missing persons", — some 8,000-12,000 persons, according to the study. The International Committee of the Red Cross (ICRC) became involved in their search. There was, furthermore, the systematic destruction of "schools, hospitals, monuments, libraries and above all the Catholic churches, a favourite target of the JNA artillery"[170]. Libraries, for example, were destroyed all over — for the sake of destruction — during the former Yugoslavia wars, — not only in the attacks in Croatia, but also in those in Bosnia-Herzegovina and in Kosovo[171], to the detriment of the populations concerned.

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[166] *Mass Killing and Genocide in Croatia 1991/92: A Book of Evidence*, Zagreb, Ministry of Health of Croatia, 1992, p. 4.

[167] *Ibid.*, p. 7.

[168] *Ibid.*, p. 6.

[169] *Ibid.*, p. 6.

[170] *Ibid.*, p. 7.

[171] For an account, cf., *inter alia*, e.g., L. X. Polastron, *Livros em Chamas — A História da Destruição sem Fim das Bibliotecas* [*Livres en feu*], Rio de Janeiro, J. Olympio Edit., 2013, pp. 236-238.

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3. Torture and Beatings

217. The dossier of the present case concerning the *Application of the Convention against Genocide* contains numerous accounts of torture and beatings of members of the civilian population, by the time the military offensive was launched by the respondent State, and even before that. The Applicant's Memorial, in particular, is permeated with such accounts. There were reported cases of forced labour and torture and beatings (in Dalj, Berak, Bagejci, Bapska, Lovas, Tordinci, Vukovar, Vaganac, Kijevo, Vujići, Tovarnik, Knin)[172]; of extreme violence and psychological torture (in Sotin, Josevica, Lipovača, Sarengrad)[173]; of abduction and enforced disappearance (in Pakrac)[174]; of the use of civilians as "human shields" to "protect" Serb armed forces (in Bapska and Cetekovac)[175], among other atrocities (in Kusonje, Podravska Slatina, Kraljevčani, Tovarnik, Joševica)[176].

218. Furthermore, in Poljanak, torture and beatings were likewise reported. According to M. L., during Easter 1991, Chetnik groups ambushed the workers of the Ministry of the Interior, and there was an armed clash where people were killed. The witness testified that prisoners were locked in a room in the camp "Manjača, where they did not get anything to eat or drink for four or five days, while being interrogated over and over and [they] were beaten and molested"[177]. B. V. testified that his family members were killed and he was heavily beaten[178].

219. Beatings occurred in various ways, including with bats, wire, boots, chains, sticks and other objects[179]. On several occasions, torture and humiliation were followed by the murders of the victims (in Bogdanovci, Sarengrad, Tovarnik, Voćin)[180]. There were cases of suicides among Croats[181]. Croatia dwells upon a systematic pattern of destruction of the targeted victims, within which occurred physical and psychological torture and beatings, in various ways.

220. Serbia, for its part, in particular in its Rejoinder, acknowledged that many atrocities were committed against Croats during the con-

[172] Cf. Memorial of Croatia, paras. 4.34-4.35, 4.38, 4.40, 4.85, 4.88-4.90, 4.124, 4.135-4.136, 4.168-4.169, 5.175, 5.212, and CR 2014/10, of 6 March 2014, paras. 20 and 27, respectively.

[173] Cf. Memorial of Croatia, paras. 4.111, 4.50, 5.88 and 5.143, respectively.

[174] Cf. *ibid.*, para. 5.16, and CR 2014/10, of 6 March 2014, para. 17.

[175] Cf. *ibid.*, paras. 4.85 and 5.43, respectively.

[176] Cf. *ibid.*, paras. 5.27, 5.30, 5.98, 4.100, and CR 2014/10, of 6 March 2014, p. 25, respectively.

[177] *Ibid.*, Annex 385.

[178] *Ibid.*, Annex 387.

[179] Cf., e.g., CR 2014/10, of 6 March 2014, pp. 24-25.

[180] Memorial of Croatia, paras. 4.47-4.55, 4.56-4.59, 4.101, and CR 2014/10, of 6 March 2014, p. 17, respectively.

[181] Cf. CR 2014/10, of 6 March 2014, p. 25.

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flicts[182], but it challenged the trustworthiness of evidence and documents presented by the applicant State, and in particular the reliability of witnesses statements. In Serbia's view, the tragic events described by the applicant State do not establish genocidal intent and specific intent to destroy; they establish, at most, it adds, that war crimes and crimes against humanity were committed, but not genocide[183].

221. Turning its attention to Vukovar, in the region of Eastern Slavonia, Croatia contended that, after the fall of Vukovar, high-ranking JNA officers aided and abetted the large-scale torture and murder of prisoners[184], such as those at Velepromet[185]. According to the Applicant, in Vukovar and other towns or villages, Croat civilians, often elderly people, unable or unwilling to flee, were subjected to extreme brutality, were tortured and killed by JNA soldiers, TOs and paramilitaries[186]. In the Applicant's view, those atrocities were committed with the intent to destroy the Croat population in the targeted regions[187].

222. Croatia further asserted that, in Vukovar, Serbian forces carried out a sustained campaign of bombing and shelling; brutal killings and torture; systematic expulsion; and denial of food, water, electricity, sanitation and medical treatment. It adds that the Serb forces established torture camps to where Croats were taken[188]; Velepromet and Ovčara. According to the Applicant, the Serb forces had the opportunity to displace and not to destroy the surviving Vukovar Croats, but they were, instead, repeatedly tortured and executed[189].

223. In the *Martić* case, the ICTY (Trial Chamber I) found (Judgment of 12 June 2007) that, in their attacks on Croat villages in the SAO Krajina, the Serbian armed forces left the villagers with "no choice but to flee", and those who stayed behind were promptly beaten and killed (ICTY, *Martić*, Judgment of 12 June 2007, para. 349). The attacked villages included Potkonije, Vrpolje, Glina, Kijevo, Drniš, Hrvatska Kostajnica, Cerovljani, Hrvatska Dubica, Baćin, Saborsko, Poljanak, Lipovača, Skabrnja, Nadin and Bruška; "grave discriminatory measures were taken against the Croat population" there *(ibid.)*.

224. By and large, the ICTY (Trial Chamber I) proceeded in the *Martić* case, there was a "widespread and systematic attack directed against the Croat and other non-Serb civilian population", both in Croatia and in

[182] Cf., e.g., CR 2014/13, of 10 March 2014, paras. 3-5; and Rejoinder of Serbia, paras. 349, 360, 367-368, 381, 384 and 386.
[183] Cf. Rejoinder of Serbia, paras. 349, 360, 367-368, 381, 384 and 386; and CR 2014/13, of 10 March 2014, paras. 3-5.
[184] CR 2014/5, of 3 March 2014, p. 43.
[185] CR 2014/6, of 4 March 2014, p. 41.
[186] *Ibid.*, p. 45.
[187] *Ibid.*
[188] CR 2014/8, of 5 March 2014, pp. 29, 31 and 35.
[189] *Ibid.*, p. 39.

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Bosnia and Herzegovina (ICTY, *Martić*, Judgment of 12 June 2007, para. 352). The crimes of torture, and cruel and inhuman treatment, "were carried out with intent to discriminate on the basis of ethnicity" (*ibid.*, paras. 411 and 413). There was a pattern of beatings, mistreatment and torture of detainees (*ibid.*, paras. 414-416).

225. Six years later, in the *Stanišić and Simatović* case, the ICTY (Trial Chamber I) likewise found (Judgment of 30 May 2013) that there was a "widespread attack" against the same civilian population to which the targeted persons belonged (ICTY, *Stanišić and Simatović*, Judgment of 30 May 2013, paras. 971-972). The perpetrators' "discriminatory intent" was clear (*ibid.*, para. 1250). The pattern of extreme violence included arbitrary detention, beatings, sexual assaults, torture, murders, use of derogatory language and insults, deportation and forcible transfer — all on the basis of the ethnicity of the victims (*ibid.*, paras. 970 and 1250). It should be kept in mind — may I add — that the prohibition of torture, in all its forms, is absolute, in any circumstances: it is a prohibition of *jus cogens*.

226. Last but not least, may I here further add that the ICTY (Appeals Chamber), in its recent Judgment (of 11 July 2013) in the *Karadžić* case, rejected an appeal for acquittal, and reinstated genocide charges against Mr. R. Karadžić, for the brutalities committed against detainees: although the atrocities occurred in Bosnian municipalities, the pattern of destruction was the same as the one that took place in Croatian municipalities, and so were the targeted groups: besides Bosnian Muslims, also Bosnian Croats. As to the conditions of detention, the ICTY (Appeals Chamber) found the occurrences of torture, cruel and inhuman treatment, rape and sexual violence, forced labour, and inhuman living conditions, with "failure to provide adequate accommodation, shelter, food, water, medical care or hygienic facilities" (ICTY, *Karadžić*, Judgment of 11 July 2013, para. 34). It further noted

> "evidence on the record indicating that Bosnian Muslim and/or Bosnian Croat detainees were kicked, and were violently beaten with a range of objects, including, *inter alia,* rifles and rifle butts, truncheons and batons, sticks and poles, bats, chains, pieces of cable, metal pipes and rods, and pieces of furniture. Detainees were often beaten over the course of several days, for extended periods of time and multiple times a day. Evidence on the record also indicates that in some instances detainees were thrown down flights of stairs, beaten until they lost consciousness, or had their heads hit against walls. These beatings allegedly resulted in serious injuries, including, *inter alia,* rib fractures, skull fractures, jaw fractures, vertebrae fractures, and concussions. Long-term alleged effects from these beatings included, *inter alia,* tooth loss, permanent headaches, facial deformities, deformed

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> fingers, chronic leg pain, and partial paralysis of limbs." (ICTY, *Karadžić*, Judgment of 11 July 2013, para. 35.)

4. Systematic Expulsion from Homes and Mass Exodus, and Destruction of Group Culture

227. In addition to mass killings, torture, beatings and other mistreatment, unbearable conditions of life were inflicted on the targeted Croat population: there were systematic expulsions from homes, the imposition of subsistence diets and the reduction of essential medical treatment and supplies[190]. The targeted segments of the population were required to display signs of their ethnicity, and were denied food, water, electricity and medical treatment. Their movements were restricted, and they were subjected to repeated looting and to a regime of random and mass killings *(supra)*, amidst brutalization and extreme violence. Their cultural and religious monuments and the signs of their cultural heritage were destroyed or looted; the basis of their education was suppressed, so as to be replaced by education as Serbs[191].

228. There was expulsion or forced displacement of the Croat population from the villages of Tenja, Dalj, Berak, Bogdanovci, Sarengrad, Ilok, Tompojevci, Bapska, Tovarnik, Sotin, Lovas, and Tordinci, as well as Pakrac, Uskok, Donji, Gornji Varos and Pivare[192]; people were forced to sign statements relinquishing all rights to their property, and to embark on the mass exodus; those who did not do so were subjected to a brutal regime of extreme violence. Croatia recalled that the ICTY (Trial Chamber), in its Judgment (of 2 August 2001) in the *Krstić* case, found that

> "where there is physical or biological destruction there are often simultaneous attacks on the cultural and religious property and symbols of the targeted group as well, attacks which may legitimately be considered as evidence of an intent to physically destroy the group. In this case [*Krstić*], the Trial Chamber will thus take into account as evidence of intent to destroy the group the deliberate destruction of mosques and houses belonging to members of the group." (ICTY, *Krstić*, Judgment of 2 August 2001, para. 580.)

229. The International Court of Justice itself cited this finding in its 2007 Judgment (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and*

[190] Cf., e.g., Memorial of Croatia, paras. 4.23 and 5.30.
[191] Cf. *ibid.*, paras. 4.60, 4.128, and 5.181.
[192] Cf. *ibid.*, paras. 4.30-4.31, 4.37, 4.46-4.47, 4.61-4.64, 4.80, 4.93, 4.105, 4.107, 4.132-4.133, 5.14, 5.49, 5.79, 5.92, 5.93, 5.106, 5.121, 5.140-5.141, 5.146, 5.148, 5.174, 5.181, 5.196, 5.202-5.205, 5.210, 5.223 and 5.225.

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Montenegro), Judgment, I.C.J. Reports 2007 (I), p. 185, para. 344). It is clear that the destruction of cultural and religious heritage, as occurred in the present case of the *Application of the Convention against Genocide*, pertaining to the armed attacks in Croatia, can be of significance *within the context* of the widespread and systematic pattern of destruction, as occurred in the *cas d'espèce*, opposing Croatia to Serbia. Such destruction of cultural and religious heritage is not to be simply dismissed *tout court*, as the International Court of Justice has done in the present Judgment (paras. 129, 379, 385-386). It should have taken into due account the aforementioned pattern of destruction *as a whole* (encompassing destruction of cultural and religious sites), as properly warned by the ICTY in the *Krstić* case *(supra)*.

230. In the present case, Serbia, for its part, retorted that, for the systematic expulsion of people from homes to fall under Article II *(c)* of the Genocide Convention, it must be part of a "manifest pattern", capable of effecting the physical destruction of the group, and not merely its displacement elsewhere; in its view, the Applicant failed to prove that the expulsion of Croats, where it has occurred, was accompanied by the intent to destroy that population[193]. In addition, Serbia minimized the relevance of the destruction of cultural and religious objects, saying that, in the drafting history of the Genocide Convention, the inclusion of attacks on cultural and religious objects under the rubric "cultural genocide" was discarded in the course of that drafting process[194].

231. On this point, may I here observe that, in his *Autobiography*, Raphael Lemkin, who devoted so much energy to the coming into being of the 1948 Convention against Genocide, warned that genocide has been "an essential part" of world history, it has followed humankind "like a dark shadow from early antiquity to the present"[195]. To him, a group can be destroyed as a group even when its members are not all destroyed, but its cultural identity is; genocide, to Lemkin, means also the destruction of a culture, impoverishing civilization. The destruction of the cultural identity of a group destroys ultimately its "spirit"[196]. Lemkin confessed that the idea of "cultural genocide" was "very dear" to him: "It meant the destruction of the cultural pattern of a group, such as language, the traditions, monuments, archives, libraries, and churches. In brief: the shrines of a nation's soul."[197]

232. Lemkin much regretted that there was not support for this idea in the *travaux préparatoires* of the Genocide Convention, but he kept nour-

[193] Cf. Counter-Memorial of Serbia, para. 84; and Rejoinder of Serbia, para. 333.
[194] Cf. Rejoinder of Serbia, para. 335.
[195] R. Lemkin, *Totally Unofficial — The Autobiography of Raphael Lemkin* (ed. D.-L. Frieze), New Haven/London, Yale University Press, 2013, pp. 125 and 140.
[196] *Ibid.*, pp. 131, 138 and 168.
[197] *Ibid.*, p. 172.

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ishing the hope that in the future an Additional Protocol to the Convention, on "cultural genocide", could be adopted. After all, he added, "the destruction of a group entails the annihilation of its cultural heritage or the interruption of the cultural contributions coming from the group"[198]. Lemkin was attentive to the writings of the "founding fathers" of international law (in the sixteenth and seventeenth centuries), and expressed his admiration in particular to those of Bartolomé de Las Casas (and also of Francisco de Vitoria), for his defence, on the basis of natural law, of the rights of native populations against the abuses and brutalities of colonialism in the New World (which Lemkin called "colonial genocide")[199].

233. In this connection (destruction of a group's cultural heritage), the ICTY (Trial Chamber), in its decision (Review of Indictments, of 11 July 1996) in the case *Karadžić and Mladić*, observed that, in some cases,

> "humiliation and terror serve to dismember the group. The destruction of mosques or Catholic churches is designed to annihilate the centuries-long presence of the group or groups; the destruction of the libraries is intended to annihilate a culture which was enriched through the participation of the various national components of the population." (ICTY, *Karadžić and Mladić*, decision of 11 July 1996, para. 94.)

I shall come back to this point subsequently in the present dissenting opinion, when I address the destruction of cultural goods during the bombardments of Dubrovnik (October-December 1991)[200].

234. In the already mentioned *Stanišić and Simatović* case, the ICTY (Trial Chamber I) observed (Judgment of 30 May 2013) that the members of the local civilian population, when not killed, were marginalized, brutalized and forced to flee, "in order to establish a purely Serb territory", so that the attacked villages could afterwards "form part of a Greater Serbia" (ICTY, *Stanišić and Simatović*, Judgment of 30 May 2013, para. 1250). The ICTY (Trial Chamber) recalled "its findings on the actions (including attacks, killings, destruction of houses, arbitrary arrest and detention, torture, harassment, and looting) which occurred in the Saborsko region from June to November 1991" (*ibid.*, para. 264). It upheld the initial "evidence of approximately 20,000 to 25,000 Croats and other non-Serbs" who were forcefully displaced from the SAO Krajina region by April 1992 *(ibid.)*.

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[198] R. Lemkin, *op. cit. supra* note 195, pp. 172-173.

[199] Cf. A. Dirk Moses, "Raphael Lemkin, Culture, and the Concept of Genocide", *The Oxford Handbook of Genocide Studies* (eds. D. Bloxham and A. Dirk Moses), Oxford University Press, 2010, pp. 26-27; and cf. A. A. Cançado Trindade, "Prefacio", *Escuela Ibérica de la Paz (1511-1694) — La Conciencia Crítica de la Conquista y Colonización de América* (eds. P. Calafate and R. E. Mandado Gutiérrez), Santander, Ed. Universidad de Cantabria, 2014, pp. 72-73 and 98-99.

[200] Cf. Part XII (7) of the present dissenting opinion, *infra*.

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235. The ICTY (Trial Chamber) then added, in the aforementioned *Stanišić and Simatović* case, that the total of those forcefully displaced persons considerably increased until April 1992; in its own words, "between 80,000 and 100,000 Croat and other non-Serb civilians fled the SAO Krajina", as a result of the situation created and then prevailing in the region, which was a combination of "the attacks on villages and towns with substantial or completely Croat populations; the killings, use as human shields, detention, beatings, forced labour, sexual abuse and other forms of harassment of Croat persons; and the looting and destruction of property" (ICTY, *Stanišić and Simatović*, Judgment of 30 May 2013, para. 404, and cf. para. 997)[201].

236. Furthermore, in its Judgment of 12 December 2012 in the *Tolimir* case, the ICTY (Trial Chamber II) drew attention to the need and importance of considering the forcible transfer of segments of the population in connection with other wrongful acts directed against the same targeted groups. It pondered that, proceeding in this way, it becomes clear that the disclosed pattern of destruction — taking all the wrongful acts together — is indicative of an intent to destroy all or part of the forcibly displaced population (ICTY, *Tolimir*, Judgment of 12 December 2012, paras. 739 and 748).

5. *General Assessment*

237. 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 March 2014[202]; 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)[203].

238. The atrocities were not seldom carried out with the use of derogatory language and hate speech. I find it important to stress the circumstances surrounding the attacked population, which was left in *a situation*

[201] And cf. also Part IX (4) *(d)* of the present dissenting opinion, *supra*.

[202] Cf. CR 2014/15, of 12 March 2014, p. 18, para. 22. And cf. also Counter-Memorial of Serbia, para. 54.

[203] Cf. Part XV of the present dissenting opinion, *infra*.

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of the utmost vulnerability, if not defencelessness; such situation constitutes, in my understanding, an aggravating circumstance. Later on in the present dissenting opinion, I shall return to the consideration of the crimes perpetrated, under the relevant parts of the provisions of Article II of the Convention against Genocide[204].

239. Last but not least, may I here add that, in this factual context, the expression "ethnic cleansing" seems to try to hide the extreme cruelty that it enshrines, in referring to the pursuance with the utmost violence of a forced removal of a targeted group from a given territory. I have already referred to the rather surreptitious way whereby "ethnic cleansing" penetrated legal vocabulary as a breach of international law (*I.C.J. Reports 2010 (II)*, p. 543, para. 47) in my separate opinion in the International Court of Justice's Advisory Opinion on the *Accordance with International Law of the Unilateral Declaration of Independence of Kosovo* (of 22 July 2010).

240. It so happens that such coerced or forced removal of a group from a territory, so as to render this latter ethnically "homogeneous", has not seldom been carried out — as the wars in the former Yugoslavia show — by means of killings, torture and beatings, forced labour, rape and other sexual abuses, expulsion from homes and forced displacement and deportation (with mass exodus) and the destruction of cultural and religious sites. Thus, what had initially appeared to have been an *intent to expel* a group from a territory, may well have become, as extreme violence breeds more and more violence, an *intent to destroy* the targeted group.

241. "Ethnic cleansing" and genocide, rather than excluding each other, appear to be somehow overlapping[205]: with the growth of extreme violence, what at first appeared to be "ethnic cleansing" turns out to be genocide: the initial "intent to remove", degenerates into "intent to destroy", the targeted group. In such circumstances, there is no sense in trying to camouflage genocide with the use of the expression "ethnic cleansing". In some circumstances, such an expression may well amount to genocide, as reckoned by the ECHR in the *Jorgić* v. *Germany* case (Judgment of 12 July

[204] Cf. Part XIII of the present dissenting opinion, *infra*.

[205] For a discussion, cf., *inter alia*, e.g., M. Grmek, M. Gjidara and N. Simac (orgs.), *Le nettoyage ethnique — Documents historiques sur une idéologie serbe*, Fayard, 2002, pp. 7-9, 26, 31, 33, 38, 212, 286, 293-294, 311-312, 324-325 and 336-337; J. Quigley, *The Genocide Convention — An International Law Analysis*, Aldershot, Ashgate, 2006, pp. 191-201; N. M. Naimark, *Fires of Hatred — Ethnic Cleansing in Twentieth-Century Europe*, Cambridge (Mass.)/London, Harvard University Press, 2001, pp. 156-157, 164-165, 168-170, 174 and 183-184; Ph. Spencer, *Genocide since 1945*, London/N.Y., Routledge, 2012, pp. 11-12, 29 and 85-86; N. Cigar, *Genocide in Bosnia — The Policy of "Ethnic Cleansing"*, College Station, Texas A & M University Press, 1995, pp. 3-10, 22-37, 62-85 and 139-180; B. Lieberman, "'Ethnic Cleansing' *versus* Genocide?", *The Oxford Handbook of Genocide Studies* (eds. D. Bloxham and A. Dirk Moses), Oxford University Press, 2010, pp. 42-60; C. Carmichael, *Ethnic Cleansing in the Balkans — Nationalism and the Destruction of Tradition*, London/N.Y., Routledge, 2002, pp. 2, 66, 112-114.

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2007)[206]. The ECHR found it fit to ponder that, although there had been "many authorities" who "had favoured a narrow interpretation of the crime of genocide", now there are also "several authorities" who have construed the crime of genocide in a "wider way" (*Jorgić* v. *Germany*, Judgment of 12 July 2007, para. 113), as in the *Jorgić* case itself.

XI. Widespread and Systematic Pattern of Destruction: Rape and Other Sexual Violence Crimes Committed in Distinct Municipalities

242. May I now dwell upon the widespread and systematic pattern of destruction, in the form of rapes and other sexual violence crimes, systematically committed in several municipalities, as from the launching of the military campaign waged by Serbia against Croatia. The dossier of the *cas d'espèce*, concerning the *Application of the Convention against Genocide*, contains in effect several accounts, presented to the International Court of Justice, in the course of both the written and oral phases of the proceedings, of the perpetration of rapes of Croats in a number of municipalities. I shall now dwell upon this particular issue, first addressing the accounts rendered in the oral proceedings, and then those presented earlier on, in the course of the written phase. The path will then be paved for the presentation of my thoughts on other aspects of those atrocities, likewise deserving of close attention.

1. Accounts of Systematic Rape

(a) *Croatia's claims*

243. In its oral pleadings, Croatia argued that, in their "genocidal campaign" of "extreme brutality", during which "[e]ntire Croat communities were intentionally destroyed", the JNA and subordinate Serb forces "raped more Croat women than can be known", and "destroyed over 100,000 homes and over 1,400 Catholic buildings and places of worship"; they sent over 7,700 detained Croats to "detention camps in occupied parts of Croatia, Serbia, and other parts of the former Yugoslavia, and they forcibly deported over 550,000 others"[207]. Croatia next presented a narrative of rapes "accompanied by terrible ethnic abuse" that occurred in Berak[208].

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[206] The applicant had alleged that the German courts did not have jurisdiction to convict him of genocide (committed in the villages of Bosnia-Herzegovina); the ECHR found that the applicant's conviction of genocide by the German courts was not in breach of the European Convention on Human Rights (paras. 113-116).

[207] CR 2014/6, of 4 March 2014, p. 45, paras. 11 and 13.

[208] *Ibid.*, p. 60, para. 22.

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244. Croatia then explained that the first phase of that campaign, the artillery attacks, were intended to cause terror and "to compel Croats to abandon their villages"; yet, "the worst atrocities" were reserved for those who refused, or were unable to flee: they were "killed, tortured, raped and abused by the attacking Serb forces", with an intent to destroy the Croat population of the region. There was, in Croatia's perception, "a pattern of attack that was genocidal, in that it intended to destroy a part of the Croat population"[209].

245. Occurrences of torture and rape were reported in the villages of Lovas[210], Sotin[211], Bogdanovci — where paramilitaries massacred all or almost all Croats remaining in the village[212] — and Pakrac[213], and across the region of Eastern Slavonia[214]. Croatia then focused on the raping and other atrocities which victimized the Croat population of Vukovar[215]; it contended that, at Velepromet, women and girls "did not escape brutal rapes"[216], as described in Croatia's pleadings[217]. And it added that,

> "in the case of *Bosnia* v. *Serbia*, this Court distinguished between the destruction of a group on the one hand and its 'mere dissolution' on the other. To describe the four phases of events at Vukovar in 1991 — the colossal use of force by *overwhelmingly greater Serbian forces* to deprive the trapped inhabitants of their basic conditions of life, the killing, raping and dismembering by the advancing forces of those who remained, the staged removal to torture and death camps and the organized mass killing at Velepromet and Ovčara — to describe that as 'mere dissolution' of the Vukovar Croats is so to distort language as to render it meaningless."[218]

246. Croatia argued that "[m]ultiple and gang rapes of Croat women were commonplace", in order to "kill the seed of Croatia", as the perpetrators threatened[219]; this occurred in Siverić, Lovas, Vukovar, Sotin, Doljani, Bapska and Cakovci, Dalj, Gornji Popovac and Tovarnik, among other villages, at times even in the victims' homes. Sexual attacks

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[209] CR 2014/8, of 5 March 2014, p. 17, para. 36.
[210] Cf. *ibid.*, p. 17, para. 36, and cf. CR 2014/10, of 6 March 2014, p. 23, para. 7.
[211] Cf. CR 2014/8, of 5 March 2014, p. 22, para. 54.
[212] Cf. *ibid.*, p. 24, paras. 62-63.
[213] Cf. CR 2014/10, of 6 March 2014, p. 13, para. 12.
[214] Cf. *ibid.*, pp. 25 and 27, paras. 67 and 71. In Croatia's account, in "different villages and towns across Eastern Slavonia, women were forced to act as 'comfort women' to members of the Serb forces"; *ibid.*, p. 23, para. 7.
[215] Cf. CR 2014/8, of 5 March 2014, p. 31, para. 11, and cf. CR 2014/10, of 6 March 2014, p. 23, para. 7.
[216] CR 2014/8, of 5 March 2014, p. 42, para. 61.
[217] Cf. CR 2014/20, of 20 March 2014, p. 33, para. 20, and p. 53, para. 24.
[218] CR 2014/8, of 5 March 2014, p. 48, para. 88.
[219] Cf. CR 2014/10, of 6 March 2014, pp. 21-24, para. 4.

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often took place in the victims' homes, "with their relatives being forced to watch, adding an additional dimension of violation and degradation to the women's ordeals"[220]. In Tovarnik, there were also reported cases of castration of men[221]. Croatia added that:

> "Raped women often feel ashamed and they do not even report such attacks. That was the case also in Croatia — the number of reported incidents hides much bigger figures of unreported cases. Those attacks have left an enduring legacy of fear, trauma and shame undiminished by the passage of time."[222]

247. After stressing that "Croat women and girls were frequently the victims of ethnically targeted violence, including rape and gang rape", by members of the JNA, TO, Serbian police and paramilitaries, Croatia recalled that resolution 1820 (2008) of the UN Security Council noted that rape and other forms of sexual violence "can constitute war crimes, crimes against humanity or *a constitutive act with respect to genocide*"[223].

248. It further stressed the numerous accounts by witnesses (direct victims or observers of those rapes and gang rapes), in several "towns, villages and hamlets that fell under occupation of the JNA and the Serb paramilitary forces", such as Berše, Brđani, Doljani, Joševica, Korenica, Kostajnički Majur, Kovačevac, Ljubotić and Lisičić, Novo Selo Glinsko, Parčić, Puljane, Sarengrad, Sekulinci, Smilčić, Sotin, Tenja, Vukovar and many others[224]. Croatia then concluded, on this particular issue, that:

> "The scale and pattern of killing, torture and rape has been disclosed by the evidence submitted by the Applicant, and that clearly, in our submission, makes out the *actus reus* of genocide within the meaning of Articles II *(a)* and *(b)* of the Genocide Convention. To argue otherwise, in our submission, is simply not to be credible.
>
> In addition, the conditions of life which were inflicted on the Croat population remaining in Serb-occupied territory, including systematic expulsion from homes, torture, rape and denial of food, access to water, basic sanitation and medical treatment, were calculated to bring about its physical destruction as a group. This, too, amounted to genocide within the meaning of Article II *(c)* of the Convention.
>
> Finally, just this morning, you have heard in some detail the evidence of systematic rape of Croatian women and men, the sexual

[220] Cf. CR 2014/10, of 6 March 2014, pp. 21-24, paras. 5-6.
[221] Cf. *ibid.*, para. 8.
[222] *Ibid.*, pp. 21-24, para. 3.
[223] *Ibid.*, p. 21, para. 2 [emphasis added].
[224] Cf. *ibid.*, p. 24, para. 9. On the brutalities of sexual abuses, cf. also *ibid.*, p. 27, paras. 22-25 (in Vukovar).

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> mutilation and castration of Croatian men, and the commission of other sex crimes which, when viewed in the context of the broader genocidal policies of the Serb forces, involved the imposition of measures to prevent births within the Croatian population. This, we say, falls squarely within the meaning of Article II *(d)*."[225]

(b) *Serbia's response*

249. For its part, Serbia, instead of addressing the issue of systematic practice of rape, tried to discredit the evidence produced by Croatia[226]. It did so, largely on the argument that most witness statements were unsigned[227], a point already clarified to some extent by Croatia *(supra)*. In any case, Serbia admitted, in general terms, the occurrence of "serious crimes" (cf. *supra*); in its own words,

> "the fundamental disagreement of the respondent State with the Applicant's approach to the unsigned statements and police reports does not mean that the Serbian Government denies that serious crimes were committed during the armed conflict in Croatia. Yes, the serious crimes were perpetrated against the members of the Croatian national and ethnic group. They were committed by groups and individuals of Serb ethnicity. It goes without saying that Serbia condemns such crimes, regrets that they were committed, and sympathizes profoundly with the victims and their families for the suffering that they have experienced.
>
> The Higher Court in Belgrade has so far convicted and imprisoned 15 Serbs for the war crimes against prisoners of war at the Ovčara farm near Vukovar, and another 14 for the war crimes against civilians in the village of Lovas in Eastern Slavonia. The second judgment has recently been quashed by the Court of Appeal due to the shortcomings concerning the explanation of the individual criminal liability for each accused, and the trial must be held again. An additional ten cases for the war crimes committed by Serbs in Croatia have been concluded before the Higher Court in Belgrade. In total, 31 individuals of Serb nationality have so far been convicted and imprisoned, while there are others being accused. Investigations on several crimes are under way, including the crime in Bogdanovci.
>
> Thus, despite the careless approach to the presentation of evidence by the Applicant, it is not in dispute that murders of Croatian civilians

[225] CR 2014/10, of 6 March 2014, p. 54, paras. 16-18. For other accounts, cf., e.g., CR 2014/6, of 4 March 2014, p. 45; CR 2014/8, of 5 March 2014, pp. 14, 25 and 39; and CR 2014/10, of 6 March 2014, paras. 23-24.

[226] Cf. e.g., CR 2014/13, of 10 March 2014, pp. 65-66, para. 43; CR 2014/22, of 27 March 2014, pp. 13-14, paras. 10-13.

[227] Cf. e.g., CR 2014/13, of 10 March 2014, pp. 64-65, paras. 38 and 42.

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and prisoners of war took place during the conflict. This was established also in the ICTY Judgment against Milan Martić, who was convicted as the former Minister of Interior of the Republic of Serbian Krajina, as well as in the case *Mrkšić et al.*; the last case is also known as 'Ovčara'. In that notorious crime, the ICTY recorded 194 prisoners of war who were killed. This was the gravest mass murder in which Croats were the victims during the entire conflict."[228]

2. Systematic Pattern of Rape in Distinct Municipalities

250. As already indicated, the dossier of the present case, opposing Croatia to Serbia, contains reports of rapes of Croats in a number of municipalities. Several witnesses testified to having been raped, often multiple times, and by several perpetrators. It is also important to note that the rapes were frequently accompanied by derogatory language and further violence, such as beatings and use of objects.

251. The examples provided, of testimonies regarding the continuous commission of rape in distinct municipalities, evidence a *widespread and systematic pattern of rape* of members of the Croatian population, inflicting humiliation upon the victims. These statements next referred to form part of the evidence submitted by Croatia so as to illustrate the numerous allegations of rape across distinct municipalities and to demonstrate the systematic pattern of those grave breaches[229].

252. For example, in Lovas, it was alleged that paramilitaries routinely engaged in sexual violence against Croatians[230]. A. M. testified to being raped repeatedly and she reported that paramilitaries made a habit of collecting groups of Croatian women in the village in order to rape them[231]. Similarly, P. M. also testified to sexual abuse of Croatian men[232]. In Bapska, P. M. described that a Serbian soldier raped her and her 81-year old

[228] Cf. CR 2014/13, of 10 March 2014, pp. 64-65, paras. 38-40. And Serbia added:

"If one carefully makes a review of all ICTY indictments in which the crimes against Croats were alleged, he or she will find many victims, indeed. There is no doubt that many Croats also died in the combat activities during the five-year conflict. Yet, from the point of view of the subject-matter of this case, those numbers of victims are of an entirely different magnitude than the many of those killed in Srebrenica — or in Krajina — over the course of several days." (CR 2014/22, of 27 March 2014, pp. 64-65, para. 41.)

[229] Cf. also Memorial of Croatia, paras. 5.30, 5.59, 5.88, 5.147, 5.157, 5.175, 5.209-5.210, 5.212 and 5.224; and cf. also *ibid.*, paras. 4.25, 4.44-4.45, 4.60, 4.110, 4.113, 4.129, 4.131, 4.169, 4.185, 4.60, 5.147, 5.157, 5.212, 5.224. See also Reply of Croatia, paras. 5.35, 5.46, 5.54, 5.84.

[230] Memorial of Croatia, para. 4.129.

[231] *Ibid.*, Annex 108.

[232] *Ibid.*, Annex 101.

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mother before he tore her navel with his bare hands[233]. In this village, there were also accounts of sexual violence against men, according to witness F. K.[234]. In Pakrac, H. H. described rape and torture of a victim before her ears were cut off and her skull shattered[235]. In a similar violent vein, there was, in Kraljevčani, a description of rape of a Croat woman, whose breasts were cut off[236].

253. Croatian women in the village of Tenja were routinely raped, along with having to labour in fields and gardens. For example, while K. C. was made to clean the police station, she was indecently assaulted by one of the officers; according to M. M., K. C.'s experience drove her to attempt suicide[237]. In the village of Berak, M. H., thus described her rape: "(. . .) I was their special target because I had six sons and they were threatening me because I had delivered six Ustashas"[238]. In this village, there were accounts of sexual assault against Croatian women. L. M. and M. H. were raped in front of a group of people, and throughout the night[239]. P. B. testified having been raped with brutality by seven JNA reservists with White Eagle marks[240].

254. In the village of Sotin, V. G. describes how on 30 September 1991 two soldiers came into her house and both raped her while holding a gun pointing at her. The next day, one of the soldiers who had raped her came back and raped her mother. After that, V. G. was forced to get down on her knees and was raped from behind[241]. Furthermore, R. G. described "sexual advantage" being taken of an elderly woman in Sotin, and S. L. also described other sexual abuses in Sotin[242]. As to Tovarnik, the document *Mass Killing and Genocide in Croatia 1991/92: A Book of Evidence* (pp. 107-108) also gives account of forced sexual abuses between Croat prisoners[243].

255. In the dossier of the present case, there are many accounts of rape and other sexual violence crimes that occurred, in particular, in the greater Vukovar area. Some examples have been provided by witness testimonies. For example, the Muslim JNA soldier, E. M., described rape and killing in his account of the JNA conduct in Petrova Gora (a suburb

[233] Memorial of Croatia, para. 4.90.
[234] *Ibid.*, para. 4.91 and Annex 74.
[235] *Ibid.*, para. 5.17 and Annex 175.
[236] *Ibid.*, para. 5.98.
[237] *Ibid.*, para. 4.25.
[238] *Ibid.*, para. 4.44.
[239] *Ibid.*
[240] *Ibid.*, para. 4.45.
[241] *Ibid.*, para. 4.113, and Annex 94.
[242] *Ibid.*, paras. 4.101 and 4.111, respectively.
[243] *Ibid.*, para. 4.101.

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of Vukovar)[244]. A. S. testified how, on 16 September 1991, M. L., from Vukovar, told her that he was going to kill her. After insulting her, he raped her[245]. T. C. gave likewise an account of what took place in the suburb of Vukovar, Cakovci. R. I. entered her house and, threatening to kill her, tied her hands and raped her[246].

256. Velepromet was the backdrop of routine executions, torture, and rape often committed by multiple rapists. Women of Croatian nationality that were imprisoned in the Velepromet detention facility in Vukovar were taken to interrogations during which they were exposed to sexual abuse. Group rapes also allegedly took place. B. V. was raped the second day on her arrival in the barracks; four soldiers raped her one after another on the floor of the office while insulting her and hitting her in the face. She testified how 15 Serbian soldiers took M. M. to the room next door to her and raped her in turns[247].

257. M. M. described how, on 18 November 1991, the day of the occupation of Central Vukovar, she and her family were taken to the Velepromet building, and later driven in buses to Sand Sabac (Serbia). Back in Vukovar, she described how she was raped by five men, one after another, from 9 p.m. until the morning. During the rape she was bleeding and was forced to sit on a beer bottle. This happened in front of her little sister, who was also sexually abused during two weeks and was continuously afraid[248]. Likewise, H. E. testified to daily rapes by Serbian police and army upon her arrival to prison. The rapes happened in the cell in front of other female prisoners. She also testified to beatings and mental abuse[249].

258. Witness T. C. stated that Chetniks "were maltreating, expelling, threatening, beating, raping and killing on a daily basis", and added that "Croats had white ribbons at our gate in order to enable Chetniks who were not from our village to recognize us"; she testified that she was raped[250]. In a similar vein, G. K. testified to having been maltreated and raped[251], and B. V. likewise testified to killings, rape and maltreatment, and added that she was raped by four men, having used derogatory language during the rape[252].

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[244] Memorial of Croatia, para. 4.153, and Annex 127.
[245] *Ibid.*, para. 4.155, and Annex 125.
[246] *Ibid.*, para. 4.156, and Annex 128.
[247] *Ibid.*, para. 4.185
[248] *Ibid.*, para. 4.169, and Annex 117.
[249] *Ibid.*, Annex 116.
[250] *Ibid.*, Annex 128.
[251] *Ibid.*, Annex 130.
[252] *Ibid.*, Annex 151.

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3. The Necessity and Importance of a Gender Analysis

259. The present case of the *Application of the Convention against Genocide*, in my perception, can only be properly adjudicated with *a gender perspective*. This is not the first time that I take this position: in 2006, almost one decade ago, I did the same, in another international jurisdiction[253], given the circumstances of the case at issue. Now, in 2015, an analysis of gender is, in my perception, likewise unavoidable and essential in the present case before the International Court of Justice, given the incidence of a social-cultural pattern of conduct, disclosing systemic discrimination and extreme violence against women.

260. At the time that the wars in Croatia, and in Bosnia and Herzegovina, were taking place, with their abuses against women, the final documents of the UN Second World Conference on Human Rights (Vienna, 1993) and the UN IV World Conference on Women (Beijing, 1995), paid due attention to the difficulties faced by women in the face of cultural patterns of behaviour in distinct situations and circumstances[254]. Attention to the basic *principle of equality and non-discrimination* is of fundamental importance here. In the present case of the *Application of the Convention against Genocide*, women as well as men, members of the targeted groups, were victimized, but women (of all ages) were brutalized in different ways and in a much greater proportion than men. Hence the great necessity of a gender perspective.

261. The widespread and systematic raping of girls and women, as occurred in the armed attacks in Croatia (and also in those in Bosnia and Herzegovina), had a devastating effect upon the victims. Girls were suddenly deprived of their innocence and childhood, despite their young age. This is extreme cruelty. Young and unmarried women were suddenly deprived of their project of life. This is extreme cruelty. The victims could no longer cherish any faith or hope in affective relations. This is extreme cruelty. Young or middle-aged women who, after having been raped, became pregnant, could not surround their maternity with care and due respect, given the extreme violence they had been, and continued to be, subjected to. This is extreme cruelty.

262. Middle-aged and older women, who had already constituted a family, had their personal and family life entirely destroyed. Even if they had physically survived, they must have felt like having become walking

[253] Cf. IACtHR, case of *Miguel Castro Castro Prison* v. *Peru*, Judgment of 25 November 2006, separate opinion of Judge Cançado Trindade, paras. 58-74.

[254] Cf. A. A. Cançado Trindade, *Tratado de Direito International dos Direitos Humanos* [*Treatise of International Law of Human Rights*], Vol. III, Porto Alegre/Brazil, S. A. Fabris Ed., 2003, pp. 354-356.

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shadows[255]. This is extreme cruelty. There were also women who continued to be raped until dying. Were the ones who survived this ordeal "luckier" than the ones who passed the last threshold of life? None remained secure from acute pain[256]. The sacrality of life — before birth, during pregnancy, after birth, and along with what remained of human existence — was destroyed with brutality.

263. What happened later, after the brutal raping with humiliation, to the children who were born of hatred? Do we know? What were the long-term effects of such a pattern of destruction victimizing mainly women? Do we know? What happened to the sons and daughters of hatred? Do we know? The widespread and systematic raping of women in the *cas d'espèce* disclosed a pattern of extreme violence *in an inter-temporal dimension*. There were also the women who lost their children, or husbands, in the war, and those who did not have access to their mortal remains, having been thus deprived of their project of after-life.

264. Many centuries ago, Euripides depicted, in his tragedies *Suppliant Women*, *Andromache*, *Hecuba*, and *Trojan Women* (fourth century BC), the cruel impact and effects of war particularly upon women. Euripides' *Trojan Women*, for example, came to be regarded, in our times, as one of the greatest anti-war literary pieces of antiquity, depicting its evil. Over four centuries later, Seneca wrote his own version of the tragedy *Trojan Women* (50-62 AD), with a distinct outlook, but portraying likewise the anguish and sufferings that befell women. In the last decade of the twentieth century, the cruel impact and effects of war upon women marked likewise presence in the facts of the present case of the *Application of the Convention against Genocide*, disclosing the projection of evil in time, its perennity and omnipresence.

265. In the *cas d'espèce*, the degradation and humiliation of women by systematic rape and other sexual violence crimes *(supra)* did not exhaust themselves at the level of individual life. The atrocities they were subjected to, caused also (for those who survived) forced separation, and disruption of family life. The terrible sufferings inflicted by rapes allegedly for "ethnic cleansing", went far beyond that, to the destruction of the targeted groups themselves, to which the murdered and brutalized women belonged — that is, to the realm of genocide.

266. May it be recalled that, in its landmark Judgment (of 2 September 1998) in the case *Akayesu*, the ICTR held precisely that gender-based crimes of rape and sexual violence, disclosing an intent to destroy, constituted genocide, and in fact destroyed the targeted group (ICTR, *Akayesu*, Judgment of 2 September 1998, para. 731). In determining the occurrence of genocide, the ICTR found that the pattern of rape with public humilia-

[255] To paraphrase Shakespeare, *Macbeth* (1605-1606), Act V, Scene V, verse 24.
[256] To paraphrase Sophocles, *Oedipus the King* (428-425 BC), verses 1528-1530.

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tion and mutilation, inflicted serious bodily and mental harm on the women victims, and disclosed an intent to destroy them, their families and communities, the Tutsi group as a whole (ICTR, *Akayesu*, Judgment of 2 September 1998, paras. 731 and 733-734). The victimized women were degraded, in the words of the ICTR, as "sexual objects", and the extreme violence they were subjected to "was a step in the process of destruction" of their social group — "destruction of the spirit, of the will to live and of life itself" (*ibid.*, para. 732).

267. For its part, the ICTY (Trial Chamber), in its decision (Review of Indictments, of 11 July 1996) in the case *Karadžić and Mladić*, stated that a pattern of sexual assaults began to occur even before the wars in Croatia and Bosnia and Herzegovina broke out, "in a context of looting and intimidation of the population". Concentration camps for rape were established, "with the aim of forcing the birth of Serbian offspring, the women often being interned until it was too late for them to undergo an abortion" (ICTY, *Karadžić and Mladić*, decision of 11 July 1996, para. 64). Rapes — the ICTY (Trial Chamber) proceeded — increased "the shame and humiliation of the victims and of the community"; the purpose "of many rapes was enforced impregnation" (*ibid.*, para. 64).

268. Such crimes, of "systematic rape of women", purporting "to transmit a new ethnic identity" to the children, undermined "the very foundations of the group", dismembering it (*ibid.*, para. 94). They "could have been planned or ordered with a genocidal intent" (*ibid.*, para. 95). The ICTY (Trial Chamber) held that "Radovan Karadžić and Ratko Mladić planned, ordered or otherwise aided and abetted in the planning, preparation or execution of the genocide perpetrated" in the centres of detention (*ibid.*, para. 84).

269. In the present case of the *Application of the Convention against Genocide*, opposing Croatia to Serbia, due to the early mobilization of entities of the civil society, the figures concerning the systematic practice of destruction through rape were soon to become known. By the end of 1992, the estimates were that there had been, in the war in Croatia until then, approximately 12,000 incidents of rape. Those incidents rose up to 50,000-60,000 incidents, in the whole period of 1991-1995, in the wars in the former Yugoslavia (both in Croatia and in Bosnia and Herzegovina).

270. But those are only rough estimates, as it was soon realized — as acknowledged in expert writing[257] — that it was simply not possible to know with precision the total number of victims (of all ages) of that bru-

[257] Cf., *inter alia*, e.g., B. Allen, *Rape Warfare — The Hidden Genocide in Bosnia-Herzegovina and Croatia*, Minneapolis/London, University of Minnesota Press, 1996, pp. 65, 72, 76-77 and 104; [Various Authors], *Women, Violence and War — Wartime Victim-*

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tality, and the extent of destruction perpetrated with the intent to destroy the victimized families and the targeted social groups, in concentration camps (rape/death camps), in prisons and detention centres and in brothels. The girls and women victimized were condemned to the utmost humiliation, and were dehumanized by the victimizers, simply because of their ethnic identity.

271. If this systematic pattern of rape was not a plurality of acts of genocide (for the destructive consequences it entailed), what was it then? What is genocide, if that is not genocide? In the present dissenting opinion, I have already examined the findings (in 1992-1993), e.g., in the UN (former Commission on Human Rights) "Reports on the Situation of Human Rights in the Territory of the former Yugoslavia" (Rapporteur: T. Mazowiecki)[258], which should here be recalled.

272. In effect, those Reports contain references, *inter alia*, to the pattern of destruction by means of killings, torture, disappearances, rape and sexual violence. I thus limit myself to add here that the Report of 10 February 1993[259], states that the "[r]ape of women, including minors, has been widespread in both conflicts" (para. 260) (the wars in Croatia and in Bosnia and Herzegovina). The systematic pattern of rapes was accompanied by other acts of extreme violence.

273. In the subsequent Report of 10 June 1994[260], the Special Rapporteur further referred to the "widespread terrorization" of the population by means of killings, destruction of homes, and commission of rapes by soldiers (para. 7) in their "relentless assaults" (para. 11). For its part, the UN (Security Council's) Commission of Experts, in its fact-finding Reports of 1993-1994 — as I have already indicated in the present dissenting opinion, likewise found the occurrence of a widespread and systematic pattern of rapes — as well as torture and beatings, often followed by killings, spreading terror, shame and humiliation[261], disrupting family life and the targeted groups themselves. If this plurality of acts of extreme

ization of Refugees in the Balkans (ed. V. Nikolić-Ristanović), Budapest, Central European University Press, 2000, pp. 41, 43, 56-57, 80-82, 142 and 154; S. Fabijanić Gagro, "The Crime of Rape in the ICTY's and the ICTR's Case Law", 60 *Zbornik Pravnog Fakulteta u Zagrebu* (2010), pp. 1310, 1315-1316 and 1330-1331; M. Ellis, "Breaking the Silence: Rape as an International Crime", 38 *Case Western Reserve Journal of International Law* (2007), pp. 226 and 231-234; S. L. Russell-Brown, "Rape as an Act of Genocide", 21 *Berkeley Journal of International Law* (2003), pp. 351-352, 355, 363-364 and 371; R. Peroomian, "When Death Is a Blessing and Life a Prolonged Agony: Women Victims of Genocide", in *Genocide Perspectives II — Essays on Holocaust and Genocide* (eds. C. Tatz, P. Arnold and S. Tatz), Sydney, Brandl & Schlesinger/Australian Institute for Holocaust and Genocide Studies, 2003, pp. 314-315 and 327-330.

[258] Cf. Part IX of the present dissenting opinion, *supra*.

[259] UN doc. E/CN.4/1993/50.

[260] UN doc. E/CN.4/1995/4.

[261] Cf. Part IX of the present dissenting opinion, *supra*.

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violence (with all its destructive consequences) was not genocide, what was it then?

274. In its recent Judgment of 11 July 2013, in the *Karadžić* case, the ICTY (Appeals Chamber), in rejecting an appeal for acquittal, and reinstating genocide charges against Mr. R. Karadžić (ICTY, *Karadžić*, Judgment of 11 July 2013, para. 115), pointed out that it had found that "quintessential examples of serious bodily harm as an underlying act of genocide include torture, rape, and non-fatal physical violence that causes disfigurement or serious injury to the external or internal organs" (*ibid.*, para. 33). The ICTY (Appeals Chamber) took into due account the evidence of "genocidal and other culpable acts" on a large-scale and discriminatory in nature, such as killings, beatings, rape and sexual violence and inhumane living conditions (*ibid.*, paras. 34 and 99).

275. More recently, in its decision of 15 April 2014, in the *Mladić* case, the ICTY (Trial Chamber I) rejected a defence motion for acquittal, and decided to continue trial on genocide charges. It took due note of the evidence produced on torture and prolonged beatings of detainees (ICTY, *Mladić*, decision of 15 April 2014, pp. 20937-20938), of "large-scale" expulsions of non-Serbs (*ibid.*, p. 20944), and of rape of young women and girls (the youngest one being 12 years old) (*ibid.*, pp. 20935-20936 and 20939). Shortly afterwards (decision of 24 July 2014), the ICTY (Appeals Chamber) dismissed a defence appeal and confirmed the Trial Chamber I's aforementioned decision (*ibid.*, para. 29).

276. Last but not least, as it can be perceived from the selected examples of witness statements in the *cas d'espèce*, reviewed above, as to numerous occurrences of rape and other sexual violence crimes during the armed attacks in Croatia, and also in Bosnia and Herzegovina, that they appear intended to destroy the targeted groups of victims. In my perception, the brutality itself of the numerous rapes perpetrated bears witness of their intent to destroy. The victims were attacked in a situation of *the utmost vulnerability or defencelessness*. As from the launching of the Serbian armed attacks in Croatia, there occurred, in effect, a *systematic pattern of rape*, which can surely be considered under Article II *(b)* of the Genocide Convention (cf. *infra*).

XII. Systematic Pattern of Disappeared or Missing Persons

1. Arguments of the Parties concerning the Disappeared or Missing Persons

277. During the written phase of the proceedings of the *cas d'espèce*, both Croatia and Serbia referred to the issue of the disappeared or missing persons, persisting to date. In its Memorial, Croatia asked the Court

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to declare the obligation of the FRY to take all steps at its disposal to provide a prompt and full account of the whereabouts of each and every one of those missing persons, and, to that end, to work in co-operation with its own authorities[262]. Croatia further stated that "the establishment of the whereabouts of missing persons, often victims of genocide, is a painful process, but a necessary step for the sake of a better future"[263].

278. Croatia claimed that 1,419 persons were, at the date of the filing of its Memorial (of 1 March 2009), still missing and unaccounted for[264]. According to the information provided in 2009 by Croatia's Government Office for the Detained and Missing Persons, there appeared to be a total of at least 886 still "missing persons" from the area of Eastern Slavonia[265]; moreover, the destiny of 511 persons from Vukovar remained still unknown at the time of the filing of its Memorial[266]. By an Agreement on Normalization of Relations, signed between Croatia and FRY on 23 August 1996, the Parties undertook to "speed up the process of solving the question of missing persons" and to exchange all available information about those missing (Art. 6)[267].

279. Subsequently, in its Reply (of 20 December 2010), Croatia facilitated an updated List of Missing Persons (of 1 September 2010), indicating a total of 1,024 missing persons[268]. According to the Applicant, on 27-28 July 2010, "a meeting on missing persons" was held in Belgrade between Serbia's Commission for Missing Persons and Croatia's Commission for Detained and Missing Persons, under the auspices of the ICRC and the International Commission on Missing Persons. One of the issues then addressed was "the question of those detained on the territory of the Respondent"; in this respect, "representatives of the Respondent gave to the Applicant's representatives a list of 2,786 persons who were detained in the Republic of Serbia in the period 1991-1992"[269].

280. Croatia then requested the Court to adjudge and declare that as a consequence of its responsibility for these breaches of the Convention, the Respondent is under the obligations

> "[t]o provide forthwith to the Applicant all information within its possession or control as to the whereabouts of Croatian citizens who are missing as a result of the genocidal acts for which it is responsible, and generally to co-operate with the authorities of the Applicant to

[262] Memorial of Croatia, para. 8.78, and cf. p. 414.
[263] *Ibid.*, para. 1.14.
[264] *Ibid.*, para. 1.09.
[265] *Ibid.*, para. 4.06.
[266] *Ibid.*, para. 4.190.
[267] *Ibid.*, para. 2.160.
[268] Reply of Croatia, Annex 41.
[269] *Ibid.*, para. 2.54.

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jointly ascertain the whereabouts of the said missing persons or their remains"[270].

281. The two Parties elaborated further the question of the number of still missing persons at the oral proceedings. An expert called by Croatia observed that the data on the missing persons they exhumed "change from day to day", and whenever there is an exhumation, "the number of identified persons increases, and the number of missing persons then increases also"[271]. Croatia contended its efforts "to uncover the graves of the genocide victims" have been "hampered by Serbia's practice of removing and reburying victims during its occupation of the region, often in Serbia, in a vain attempt to cover up its atrocities"[272].

282. To date, it proceeded, 103 bodies have been repatriated from Serbia; furthermore, "whilst many of the victims of the genocide have now been accounted for, and their remains located, hundreds of Croats still remain missing. Twenty-three years later, Croatian families continue to mourn more than 850 missing people. The victims are still denied a proper burial and a dignified final resting place; and their families are still denied the opportunity to lay them to rest"[273]. Croatia further stated, with regard to mass graves, that, by July 2013, 142 mass graves had been discovered in Croatia, containing the bodies of 3,656 victims[274].

283. For its part, Serbia argued that the Croatian list of missing persons was confusing and unhelpful in clarifying the issues in the dispute. It added that the Updated List of Missing Persons (of 1 September 2010) contained data on 1,024 individuals, among whom many "victims of Serb ethnicity". Furthermore, it contained the names of Croats "who were missing in Bosnia and Herzegovina, as well as in some places that were under the full and exclusive control of the Croatian governmental forces and far away from military operations". The aforementioned list also contained "the names of ethnic Croats who went missing during the offensive criminal Operations Maslenica and Storm which were undertaken by the Croatian Government"[275].

2. Responses of the Parties to Questions from the Bench

284. Given the contradictory information provided, I deemed it fit to put two questions to the contending Parties, in the public sitting before

[270] Reply of Croatia, p. 472.
[271] CR 2014/9, of 5 March 2014, p. 36.
[272] CR 2014/10, of 6 March 2014, p. 20, para. 44.
[273] *Ibid.*, para. 45.
[274] *Ibid.*, para. 39.
[275] Rejoinder of Serbia, para. 7.

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the Court of 14 March 2014. The two questions were formulated as follows:

"1. Have there been any recent initiatives to identify, and to clarify further the fate of the disappeared persons still missing to date?

2. Is there any additional and more precise updated information that can be presented to the Court by both Parties on this particular issue of disappeared or missing persons to date?"[276]

285. In response to my questions, Croatia elaborated further on the issue of the fate of disappeared persons. In this respect, it recalled that Article II of the Convention enumerates amongst the list of genocidal acts the causing of "serious (. . .) mental harm to members of the group". The questions I put to both Parties drew the Applicant to the case law on the disappearance of persons. Recalling the Judgments of the IACtHR in the case of *Velásquez Rodríguez* v. *Honduras* (of 29 July 1988) and of the ECHR in the case of *Varnava* v. *Turkey* (of 18 September 2009), as well as the decision of the UN Human Rights Committee in the case of *C. A. de Quinteros et alii* v. *Uruguay* (1990), Croatia claimed that disappearance has continuing consequences in several respects. In the light of that jurisprudence, Croatia claims that the

> "'serious (. . .) mental harm' being suffered by the relatives of the disappeared is a direct result of acts for which Serbia is either responsible for its own actions or for which it has a responsibility to punish under the [Genocide] Convention. In this way, the continuing failure of Serbia to account for the whereabouts of some 865 disappeared Croats is an act or acts falling within Article II *(b)* of the Convention."[277]

286. As for the requested additional, and more precise updated information, on the issue of disappeared or missing persons, Croatia answered that such information can be found in the updated *Book of Missing Persons on the Territory of the Republic of Croatia*, published by Croatia's Directorate for Detained and Missing Persons, in conjunction with the Croatian Red Cross and the ICRC. It informed that the book sets out detailed data on those who were still missing as of April 2012[278]; however, as the figures concerning the disappeared are being constantly updated, the numbers provided in the 2012 book are already out of date.

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[276] Questions put by Judge Cançado Trindade to both Croatia and Serbia, in: CR 2014/18, of 14 March 2014, p. 69.

[277] CR 2014/20, of 20 March 2014, p. 15, para. 10.

[278] *Ibid.*, pp. 34-35, paras. 22-25.

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287. Still in response to my questions to both Parties *(supra)*, Croatia further contacted the Directorate for Detained and Missing Persons, on Monday 17 March 2014, and provided the International Court of Justice with the most up-to-date figures relating to persons killed during the course of Serbia's attacks on Croatian territory in 1991-1992, namely: *(a)* the bodies of 3,680 persons who were buried irregularly have been exhumed from 142 mass graves and many more individual graves; *(b)* of those, the bodies of 3,144 persons have been positively identified; *(c)* however, 865 persons who disappeared during that period are still missing[279].

288. For its part, Serbia, in its response to the questions I put to both Parties *(supra)*, stated that tracing missing persons "is a complex and long-lasting process of co-operation between two sides", on the basis of the 1995 Bilateral Agreement on Co-operation in Tracing Missing Persons and the 1996 Protocol on Co-operation between two State Commissions[280]. It added that it was

> "fully aware of its task in the process of tracing missing persons regardless of their nationality and ethnic origin. The interest of families of the missing persons is a joint interest of Serbia and Croatia. It is also the interest of humanity as a whole, and the Republic of Serbia is dedicated to that task."[281]

As for the number of missing persons, Serbia claims that the Serbian list of missing persons, received from the Serbian Commission for Missing Persons in the territory of Croatia, today contains 1,748 names[282].

289. Finally, as regards the argument of continuing violation, it added, disappearance itself is not an act of genocide, but it is equivalent to enforced disappearance, a crime against humanity. Serbia relied on the definition of "enforced disappearance" contained in the 2006 UN Convention for the Protection of All Persons from Enforced Disappearance, which refers to "abduction or any other form of deprivation of liberty by agents of the State" and then "followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person" (Art. 2).

290. According to Serbia, enforced disappearance is not a continuing violation of the right to life, with which the acts in Article 2 of the 2006 Convention bear an analogy. The reason why it may be a continuing violation of human rights, according to Serbia, is that the family of the victim is subject to ongoing "mental harm", or because of the procedural obligation to investigate the crime. Serbia claims that, if the crime contin-

[279] CR 2014/20, of 20 March 2014, pp. 34-35, paras. 22-25.

[280] Preliminary Objections of Serbia; Annex 53, p. 367.

[281] CR 2014/24, of 28 March 2014, pp. 60-61, para. 10.

[282] However, Serbia did not consider that list to be evidence of the crime, or of State responsibility, and referred to the *Veritas* list of direct victims of Operation Storm; cf. *ibid.*, pp. 60-62, paras. 6-10.

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ues today as Croatia asserts, so must the intent. Croatia is "in error to attempt to force this issue into the frame of Article 2 of the Genocide Convention, essentially so that it can bolster its argument on temporal jurisdiction"[283].

3. Outstanding Issues and the Parties' Obligation to Establish the Fate of Missing Persons

291. In the light of the aforementioned, it is clear the issue of missing persons remains one of the key problems raised in the proceedings of the *cas d'espèce*. Admittedly, the Parties had the intention in 1995 to tackle this issue: it may be recalled that in 1995, in Dayton, Croatia and Serbia celebrated an agreement, the purpose of which was to establish the fate of all missing persons and to release the prisoners[284]. In pursuance to that agreement, a Joint Commission was established and some progress was made with respect to missing persons[285]. Yet, there remain a number of outstanding issues that still need to be resolved.

292. For example, the Parties disagree on the role of the Commission. Croatia claims that the Commission, contrary to what was agreed in 1995 that all missing persons who disappeared in Croatia fell within the competence of Croatian authorities, is currently seeking to act as representative of all missing persons of Serb ethnicity, including those who are citizens of Croatia[286]. Serbia responds that this is needed in order to represent the unreported 1,000 Serbs from Croatia in the list of missing persons provided by Croatia to the Court[287].

293. Moreover, Croatia contends that Serbia has not yet returned the documents seized by the JNA from the Vukovar hospital in 1991, which are considered essential for the identification of the persons removed from the hospital[288]. Only a small part of those documents was returned, when the President of Serbia (Mr. Boris Tadić) visited Vukovar in November 2010. Both Parties appear unsatisfied with the efforts and activities of

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[283] CR 2014/23, of 28 March 2014, pp. 43-45, paras. 10-12.

[284] Agreement on Co-operation in Finding Missing Persons (Dayton, 17 November 1995).

[285] From August 1996 till 1998 Croatia was given access to information, the so-called protocols, for 1,063 persons who were buried at the Vukovar New Cemetery, and these protocols helped in the identification of 938 people. In 2001, exhumations started with respect to unidentified bodies buried in the Republic of Serbia, at marked gravesites. The remains of 394 persons have been exhumed so far, but, regrettably, only 103 bodies have been handed over to Croatia. In 2013, one mass grave was discovered in Sotin, in Eastern Slavonia, with 13 bodies, as a result of information provided by Serbia. Cf. CR 2014/21, of 21 March 2014, pp. 36-38.

[286] *Ibid.*, p. 37, para. 10.

[287] CR 2014/24, of 28 March 2014, pp. 60-61, paras. 6-10.

[288] CR 2014/21, of 21 March 2014, p. 38, para. 11.

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each other in this regard[289]. The Court ought thus to ask the Parties to co-operate in good faith in order to resolve those outstanding issues.

294. As the International Court of Justice stated, in this respect, in the *Nuclear Tests (Australia* v. *France) (New Zealand* v. *France)* cases (*I.C.J. Reports 1974*, pp. 253 and 457), one of "the basic principles governing the creation and performance of legal obligations, whatever their source, is the principle of good faith. Trust and confidence are inherent in international co-operation" (paras. 46 and 49). On another occasion, in the *North Sea Continental Shelf (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands)* cases (*I.C.J. Reports 1969*, p. 3), the International Court of Justice further pondered that the contending Parties "are under an obligation so to conduct themselves that the negotiations are meaningful" (*ibid.*, para. 85).

4. The Extreme Cruelty of Enforced Disappearances of Persons as a Continuing Grave Violation of Human Rights and International Humanitarian Law

295. The extreme cruelty of the crime of enforced disappearance of persons has been duly acknowledged in international instruments, in international legal doctrine, as well as in international case law. It goes beyond the confines of the present dissenting opinion to dwell at depth on the matter — what I have done elsewhere[290]. I shall, instead, limit myself to identifying and invoking some pertinent illustrations, with a direct bearing on the proper consideration of the *cas d'espèce*, concerning the *Application of the Convention against Genocide (Croatia* v. *Serbia)*.

296. May I begin by recalling that, in 1980, the former UN Commission on Human Rights decided to establish its Working Group on Enforced or Involuntary Disappearances[291], to struggle against that international crime[292], which had already received world attention, in 1978-1979, at both the United Nations General Assembly[293] and ECOSOC[294], in addition to the former UN Sub-Commission on the Prevention of Discrimination and Protection of Minorities[295]. Subsequently, the 1992 UN Declaration on the Protection of All

[289] CR 2014/21, of 21 March 2014, p. 38, para. 11.

[290] A. A. Cançado Trindade, "Enforced Disappearances of Persons as a Violation of *Jus Cogens*: The Contribution of the Jurisprudence of the Inter-American Court of Human Rights", 81 *Nordic Journal of International Law* (2012), pp. 507-536; A. A. Cançado Trindade, *Tratado de Direito Internacional dos Direitos Humanos* [*Treatise of International Law of Human Rights*], Vol. II, Porto Alegre/Brazil, S. A. Fabris Ed., 1999, pp. 352-358.

[291] Resolution 20 (XXXVI), of 29 February 1980.

[292] For an account of its work, cf. F. Andreu-Guzmán, "Le Groupe de travail sur les disparitions forcées des Nations Unies", 84 *Revue internationale de la Croix-Rouge* (2002), note 848, pp. 803-818.

[293] Resolution 33/173, of 20 December 1978.

[294] Resolution 1979/38, of 10 May 1979.

[295] Resolution 5B (XXXII), of 5 September 1979.

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Persons from Enforced Disappearance provided (Art. 1), *inter alia*, that:

> "1. An act of enforced disappearance is an offence to human dignity. It is condemned as a denial of the purposes of the Charter of the United Nations and as a grave and flagrant violation of the human rights and fundamental freedoms proclaimed in the Universal Declaration of Human Rights and reaffirmed and developed in international instruments in this field.
>
> 2. Any act of enforced disappearance places the persons subjected thereto outside the protection of the law and inflicts severe suffering on them and their families. It constitutes a violation of the rules of international law guaranteeing, *inter alia*, the right to recognition as a person before the law, the right to liberty and security of the person and the right not to be subjected to torture and other cruel, inhuman or degrading treatment or punishment. It also violates or constitutes a grave threat to the right to life."

297. Subsequently, the 2007 UN Convention for the Protection of All Persons from Enforced Disappearance referred, in its Preamble (fifth paragraph) to the "extreme seriousness" of enforced disappearance, which, it added in Article 5, when generating a "widespread or systematic practice", constitutes "a crime against humanity in applicable international law", with all legal consequences. The 2007 Convention further referred (third preambular paragraph) to relevant (and converging) international instruments of international human rights law, international humanitarian law and international criminal law.

298. Parallel to these developments at normative level, the grave violation of enforced disappearance of persons has been attracting growing attention in expert writing[296], which has characterized it as an extremely cruel and perverse continuing violation of human rights, extending in time,

[296] Cf., *inter alia*, e.g., R. S. Berliner, "The Disappearance of Raoul Wallenberg: A Resolution Is Possible", 11 *New York Law School Journal of International and Comparative Law* (1990), pp. 391-432; R. Broody and F. González, "*Nunca Más*: An Analysis of International Instruments on 'Disappearances'", 19 *Human Rights Quarterly* (1997), pp. 365-405; C. Callejon, "Une immense lacune du droit international comblée par la convention des Nations Unies pour la protection de toutes les personnes contre les disparitions forcées", 17 *Revue trimestrielle des droits de l'homme* (2006), pp. 337-358; T. Scovazzi and G. Citroni, *The Struggle against Enforced Disappearance and the 2007 United Nations Convention*, Leiden, Nijhoff, 2007, pp. 1-400; G. Venturini, "International Law and the Offence of Enforced Disappearance", in: *Diritti Individuali e Giustizia Internazionale — Liber F. Pocar* (eds. G. Venturini and S. Bariatti), Milan, Giuffrè, 2009, pp. 939-954; L. Ott, *Enforced Disappearance in International Law*, Antwerp, Intersentia, 2011, pp. 1-294; M. L. Vermeulen, *Enforced Disappearance: Determining State Responsibility under the International Convention for the Protection of All Persons from Enforced Disappearance*, Utrecht, Intersentia, 2012, pp. 1-507; I. Giorgou, "State Involvement in the Perpetration

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owing to the consequences of the original act (or arbitrary detention or kidnapping), causing a duration in the suffering and anguish, if not agony or despair, of all those concerned (the missing persons and their close relatives), given the non-disclosure of the fate or whereabouts of disappeared or missing persons. The extreme cruelty of enforced disappearances of persons as a continuing grave violation of human rights and international humanitarian law has, furthermore, also been portrayed, as widely known, in the final reports of Truth Commissions, in distinct continents.

299. Soon international human rights tribunals (IACtHR and ECHR) came to be seized of cases on the matter, and began to pronounce on it. The case law of the IACtHR on the matter is pioneering, and nowadays regarded as the one which has most contributed to the progressive development on international law in respect of the protection of all persons from enforced disappearance[297]. In its early Judgment in the case of *Velásquez Rodríguez* v. *Honduras* (of 29 July 1988), the IACtHR drew attention to the complexity of enforced disappearance, as bringing about, concomitantly, continuing violations of rights protected under the ACHR, such as the rights to personal liberty and integrity, and often the fundamental right to life itself (Arts. 7, 5 and 4).

300. It is, in sum, a grave breach of the States' duty to respect human dignity (IACtHR, *Velásquez Rodríguez* v. *Honduras*, Judgment of 29 July 1988, paras. 149-158). It was in its landmark judgments, one decade later, in the case of *Blake* v. *Guatemala* (of 1996-1999)[298], that the IACtHR dwelt upon, and elaborated, on the legal nature and consequences of enforced disappearances, its characteristic elements, the victimized persons, and the engagement of State responsibility in a temporal dimension.

301. The *Blake* case occurred within a systematic pattern of enforced disappearances of persons, State-planned, and perpetrated not only to "disappear" with persons regarded as "enemies", but also to generate a sense of utter insecurity, anguish and fear; it involved torture, secret execution of the "disappeared" without trial, followed by concealment of their mortal remains, so as to eliminate any material evidence of the crime and to ensure the impunity of the perpetrators.

302. In its Judgment on the merits (of 24 January 1998) in the *Blake* case, the IACtHR asserted that enforced disappearance of persons is a

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of Enforced Disappearance and the Rome Statute", 11 *Journal of International Criminal Justice* (2013), pp. 1001-1021.

[297] Cf., to this effect, e.g., T. Scovazzi and G. Citroni, *The Struggle against Enforced Disappearance . . ., op. cit. supra* note 296, pp. 101, 132 and 398.

[298] IACtHR, Judgments on preliminary objections (of 2 July 1996), merits (of 24 January 1998) and reparations (of 22 January 1999).

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complex, multiple and continuing violation of a number of rights protected by the ACHR (rights to life, to personal integrity, to personal liberty), generating the State party's duty to prevent, investigate and punish such breaches and, moreover, to inform the victim's next of kin of the missing person's whereabouts (IACtHR, *Blake*, Judgment of 24 January 1998, paras. 54-58). In the IACtHR's view, the close relatives of the disappeared person were also victims, *in their own right*, of the enforced disappearance, in breach of the relevant provisions of the ACHR.

303. In my separate opinion appended to that Judgment of the IACtHR in the *Blake* case, I deemed it fit to stress that enforced disappearance of persons was indeed a grave and complex violation of human rights, besides being a *continuing or permanent violation* until the whereabouts of the missing victims was established, as pointed out in the *travaux préparatoires* of the 1985 Inter-American Convention on Enforced Disappearance of Persons, and as acknowledged in Article III of the Convention itself (*ibid.*, para. 9).

304. In the same separate opinion, I next warned against the undue fragmentation of the delict of enforced disappearance of persons, drawing attention to the fact that we were here before fundamental or non-derogable rights (*ibid.*, paras. 12-14), and there was need to preserve the special character and the integrity of human rights treaties (*ibid.*, paras. 16-22). And I proceeded:

> "We are, definitively, before a particularly *grave* violation of multiple human rights. Among these are *non-derogable* fundamental rights, protected both by human rights treaties as well as by international humanitarian law treaties[299]. The more recent doctrinal developments in the present domain of protection disclose a tendency towards the 'criminalization' of grave violations of human rights, — as the practices of torture, of summary and extralegal executions, and of enforced disappearance of persons. The prohibition of such practices paves the way for us to enter into the *terra nova* of the international *jus cogens*. The emergence and consolidation of imperative norms of general international law would be seriously jeopardized if one were to decharacterize the crimes against humanity which fall under their prohibition." (*Ibid.*, para. 15.)

305. Still in respect to the legal nature and consequences of the enforced disappearance of persons, I added:

> "In a continuing situation proper to the enforced disappearance of person, the victims are the disappeared person (main victim) as well as his next of kin; the indefinition generated by the enforced disap-

[299] Cf., e.g., the provisions on fundamental guarantees of Additional Protocol I (of 1977) to the Geneva Conventions on International Humanitarian Law (of 1949), Article 75, and of the Additional Protocol II (of the same year), Article 4.

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> pearance withdraws all from the protection of the law[300]. The condition of victims cannot be denied also to the next of kin of the disappeared person, who have their day-to-day life transformed into a true calvary, in which the memories of the person dear to them are intermingled with the permanent torment of his enforced disappearance. In my understanding, the complex form of violation of multiple human rights which the crime of enforced disappearance of person represents has as a consequence the *enlargement of the notion of victim* of violation of the protected rights." (IACtHR, *Blake*, Judgment of 24 January 1998, paras. 32-38.)

306. In my subsequent separate opinion in the *Blake* v. *Guatemala* case (reparations, Judgment of 22 January 1999), I insisted on the need to consolidate the "international regime against *grave* violations of human rights", in the light of the peremptory norms of international law *(jus cogens)* and of the corresponding obligations *erga omnes* of protection of the human being (IACtHR, *Blake* v. *Guatemala*, Judgment of 22 January 1999, para. 39). By means of such development, I added, one would "overcome the obstacles of the dogmas of the past", and the current inadequacies of the law of treaties, so as to get "closer to the plenitude of the international protection of the human being" (*ibid.*, para. 40).

307. Other pertinent decisions of the IACtHR could be recalled, e.g., as to the need to overcome limitations or restrictions *ratione temporis*, given the legal nature of enforced disappearance *(supra)*, the IACtHR's decisions also in the cases of *Trujillo Oroza* v. *Bolivia* (2000-2002), and of the *Sisters Serrano Cruz* v. *El Salvador* (2005); and, as to the aggravating circumstances of the grave breach of enforced disappearance, the IACtHR's decisions in the cases of *Bámaca Velásquez* v. *Guatemala* (2000-2002), of *Caracazo* v. *Venezuela* (1999-2002), of *Juan Humberto Sánchez* v. *Honduras* (2003) and of *Servellón-García et alii* v. *Honduras* (2006).

308. For its part, the ECHR has also had the occasion to pronounce on aspects in the matter at issue. For example, in its Judgment (of 10 May 2001) in the *Cyprus* v. *Turkey* case, it stressed the continuation of "agony" of the family members of the missing persons in not knowing their whereabouts (para. 157). Shortly afterwards, in its Judgment (of 18 June 2002) in the *Orhan* v. *Turkey* case, it again addressed, as in earlier decisions, the "vulnerable position" of the individuals concerned (paras. 406-410). Other pronouncements of the kind were made by the ECHR in the cycle of cases (of the last decade) arising out of the armed conflict in Chechnya.

309. In a particularly illustrative decision, the ECHR, in its Judgment (of 18 September 2009) in the case of *Varnava and Others* v. *Turkey*, stated that a disappearance is

> "characterized by an ongoing situation of uncertainty and unaccountability in which there is a lack of information or even a deliberate

[300] Cf., in this sense, Article 1 (2) of the UN Declaration on the Protection of All Persons against Enforced Disappearances.

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concealment and obfuscation of what has occurred [. . .]. This situation is very often drawn out over time, prolonging the torment of the victim's relatives. It cannot therefore be said that a disappearance is, simply, an 'instantaneous' act or event; the additional distinctive element of subsequent failure to account for the whereabouts and fate of the missing person gives rise to a continuing situation. Thus, the procedural obligation will, potentially, persist as long as the fate of the person is unaccounted for; the ongoing failure to provide the requisite investigation will be regarded as a continuing violation (. . .) This is so, even where death may, eventually, be presumed." (Para. 148.)

5. General Assessment

310. In the light of the aforementioned, in so far as the present case of the *Application of the Convention of Genocide* is concerned, one cannot thus endorse Serbia's view, expressed during the oral proceedings, whereby enforced disappearance may not be a continuing violation of the right to life as enshrined in Article II of the Genocide Convention. Serbia asserts that the reason why it might be a continuing violation of human rights is that the family of the victim is subject to ongoing mental harm, and this brings into play the prohibition of ill-treatment, or because of the procedural obligation to investigate the crime. According to Serbia, this issue "might belong in Strasbourg, but certainly not in The Hague"[301].

311. Both the International Court of Justice and the ECHR in Strasbourg are concerned with *State* responsibility. Recent cases (such as the *Georgia* v. *Russian Federation* case, concerning the fundamental principle of equality and non-discrimination and the corresponding norms in distinct but converging international instruments) have been brought *before both the International Court of Justice and the ECHR*; the Hague Court and the ECHR in Strasbourg do not exclude each other, as recent developments in the work of contemporary international tribunals have clearly been showing. This is reassuring for those engaged in the international protection of the rights of the human person, and the *justiciables* themselves.

312. The pioneering and substantial case law of the IACtHR, together more recently with the case law of the ECHR, on the matter at issue, is essential for an understanding of the gravity of the crime of enforced disappearance of persons and of its legal consequences. As to its legal nature, the two aforementioned international human rights tribunals have asserted the complex and continuing violations of the protected rights, while disappearance lasts. In its ground-breaking decisions in the *Blake* case (1996-1998), the IACtHR established the *expansion of the notion of*

[301] CR 2014/23, of 28 March 2014, p. 44, para. 12.

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victims in cases of disappearance, so as to comprise the missing person as well as their close relatives, *in their own right*. This has become *jurisprudence constante* of the IACtHR and the ECHR on the issue.

313. May I add, in this connection, that the provisions of Article II *(b)* of the Convention against Genocide, referring to "serious (. . .) mental harm to members of the group", makes the connection with a continuing violation rather clear. As I pondered in my dissenting opinion in the case of the *Jurisdictional Immunities of the State (Germany* v. *Italy: Greece intervening)*, "one cannot take account of inter-temporal law only in a way that serves one's interests in litigation, accepting the passing of time and the evolution of law in relation to certain facts but not to others, of the same *continuing* situation" (*I.C.J. Reports 2012 (I)*, p. 186, para. 17).

314. The fact that a close family member of the missing persons is a member of the same group, and is also subject to a continuing mental harm, prolonging indefinitely in time, together with the State concerned's failure to account for the missing persons, or to take reasonable steps to assist in the location of such persons, in my perception, brings into play the prohibition of acts proscribed by the Genocide Convention, including the obligation to investigate.

315. May I further add, still in this connection, the relevance of the case law of international human rights tribunals (in particular that of the IACtHR, since its start[302]), to the effect of applying a proper standard of proof, in cases of grave violations (such as enforced disappearances of persons, torture of *incommunicado* detainees, among others), when State authorities hold the monopoly of probatory evidence, and victims have no access to it, thus calling for a shifting of the burden of proof[303]. In cases of grave violations, such as enforced disappearances of persons, the burden of proof cannot certainly be made to fall upon those victimized by those violations (including, of course, the close relatives of the missing persons, who do not know their whereabouts).

316. The effects of enforced disappearances of persons upon the close relatives of missing persons are devastating. They destroy whole families, led into agony or despair. I learned this from my own experience in the international adjudication of cases of this kind. In the present Judgment, the International Court of Justice does not seem to have apprehended the extent of those devastating effects. To require from close relatives, as it does (Judgment, para. 160), further proof (of serious suffering), so as to fall under Article II *(b)* of the Genocide Convention, amounts to a true *probatio diabolica*!

317. The serious mental harm (Art. II *(b)*) caused to those victimized can surely be presumed, and, in my view, there is no need to demonstrate

[302] Cf. Part VII of the present dissenting opinion, *supra*.
[303] Cf. Parts VII-VIII of the present dissenting opinion, *supra*.

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that the harm itself contributed to the destruction of the targeted group. Yet, the Court requires such additional proof (Judgment, para. 160 *in fine*). In doing so, it renders the determination of State responsibility for genocide, under Article II *(b)* of the 1948 Convention, and of its legal consequences (for reparations), an almost impossible task. The Court's outlook, portrayed in its whole reasoning throughout the present Judgment is State sovereignty-oriented, not people-oriented, as it should be under the Genocide Convention, the applicable law in the *cas d'espèce*.

318. Last but not least, the point I have already made about the absolute prohibition (of *jus cogens*) of torture (para. 225, *supra*), in any circumstances, applies likewise to all the other grave violations of human rights and international humanitarian law which occurred in the attacks in Croatia, and that have been examined above, namely: massive killings, rape and other sexual violence crimes, enforced disappearance of persons, systematic expulsion from homes, forced displacement of persons (in mass exodus) and destruction of group culture.

319. The prohibition of all those grave violations, like that of torture, in all its forms, is a prohibition belonging to the realm of *jus cogens*[304], the breach of which entails legal consequences, calling for reparations[305]. 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.

XIII. Onslaught, not Exactly War, in a Widespread and Systematic Pattern of Destruction

1. Plan of Destruction: Its Ideological Content

320. The occurrence of a widespread and systematic pattern of destruction has been established in the present case concerning the *Application of the Convention against Genocide*, opposing Croatia to Serbia (cf. *supra*). The devastation pursued a plan of destruction, that was deliberately and

[304] Two contemporary international tribunals which, by their evolving case law, have much contributed to the expansion of the material content of *jus cogens*, have been the IACtHR and the ICTY; cf. A. A. Cançado Trindade, *International Law for Humankind — Towards a New Jus Gentium*, *op. cit. supra* note 67, pp. 295-311; A. A. Cançado Trindade, "*Jus Cogens*: The Determination and the Gradual Expansion of Its Material Content in Contemporary International Case Law", in *XXXV Curso de Derecho Internacional Organizado por el Comité Jurídico Interamericano — 2008*, Washington D.C., General Secretariat of the OAS, 2009, pp. 3-29.

[305] Cf. Part XVI of the present dissenting opinion, *infra*.

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methodically carried out: aerial bombardment, shelling, indiscriminate killings, torture and beatings, rape, destruction of homes and looting, forced displacement and deportation. The execution of the plan of destruction has already been reviewed (cf. *supra*), and in my view established in the *cas d'espèce*. The plan of destruction pursued by the Serbian attacks in Croatia had an ideological component, which goes back to the historical origins of the conflict.

(a) *Arguments of the contending Parties*

321. The point was addressed, to a certain depth in the written phase of the present proceedings, particularly by Croatia. In its Memorial, it argued that a catalytic event in relation to the genocide allegedly perpetrated against the Croats was the appearance in 1986 of the Memorandum by the Serbian Academy of Sciences and Arts (the "SANU Memorandum"). The SANU Memorandum, it added, which set forth a Serb nationalist reinterpretation of the recent history of the SFRY, carried great weight and reflected the then growing Serbian nationalist movement; it helped to give rise, in its view, to the circumstances for the perpetration of genocide in Croatia[306].

322. By emphasizing the right of the Serbian people "to establish their full national and cultural integrity regardless of which republic or autonomous province they live in", the SANU Memorandum provided the idea of a "Greater Serbia", including parts of the territory in Croatia and Bosnia and Herzegovina within which significant Serbian ethnic populations lived. Furthermore, the SANU Memorandum provided a detailed analysis of the "crisis" in the SFRY, and it established the idea that Serbia was "the only nation in Yugoslavia without its own State". It bypassed the political and geographical divisions enshrined in the 1974 Constitution[307].

323. Croatia stressed that the ideas proposed in the Memorandum were based on other views expressed by the Serbian intellectual community (including Serbian historians, scientists, writers and journalists) on how Serbs had been "tricked", "stinted", "killed", "persecuted even after being subjected to genocide". The SANU Memorandum gained support from militant groups, prompting a nationalist campaign[308].

324. Croatia further argued that the ideas set out in the SANU Memorandum "gave vent to the theory that the Croatian people were collectively to blame for the large number of Serbs that were killed by the Ustashas during the period 1941-1945, and were, accordingly, by their very nature, genocidal in character and adhering to a continuing geno-

[306] Memorial of Croatia, para. 2.43.

[307] *Ibid.*, paras. 2.44-2.47.

[308] According to Croatia, "[a]rticles appeared and speeches were given which promoted Serbian nationalism, demonized the Albanians, the Muslims and the Croats and invoked their genocidal tendencies, and validated the Chetnik movement"; *ibid.*, paras. 2.48-2.51.

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cidal intent against the Serbs"[309]. Croatia added that the JNA was transformed from an army of the SFRY into a "Serbian army" promptly after the publication of the SANU Memorandum[310].

325. Serbia, for its part, briefly responded, in its Counter-Memorial, to Croatia's arguments concerning the Memorandum. It claimed that they amounted to an "enormous exaggeration", given that the Serbs never had the intent to perpetrate genocide against Croats, and that the SANU Memorandum never contemplated the occurrence of genocide[311]. Croatia retook the issue in its Reply, wherein it reiterated the importance of the SANU Memorandum for the perpetration of genocide.

326. It dismissed Serbia's claim of its arguments being an "enormous exaggeration", saying that they are supported by a number of independent sources, which also described the Memorandum as a "political bombshell". Croatia further stated that an expert report from the ICTY, on the use of propaganda in the conflict at issue, came to the conclusion that it was the deliberate leaks of the SANU Memorandum that raised the issue of Serbian nationalism publicly (cf. *infra*).

327. Croatia insisted that the emergence of extreme Serbian nationalism was accompanied by the idea that the Croats had always had a genocidal intent against the Serbs, a theory — articulated in 1986 and then followed by Serbian historians and journalists — that claimed that the Croatian people were collectively to blame for the large number of Serbs who were killed by the "Ustasha" between 1941-1945 (e.g., the concentration camp in Jasenovac), during the Second World War, pursuant to a plan that had a continuing genocidal intent against the Serbs[312]. According to Croatia, various inflammatory articles published by the media contributed to this idea from 1986 to 1991[313].

328. Also during the oral phase of the present proceedings, Croatia reiterated its arguments *(supra)*, whereas Serbia did not submit any substantial new argument in this respect. Croatia asserted that the publication of the SANU Memorandum in 1986 precipitated a period of extreme nationalist propaganda within Serbia, as from the premise that Serbia and the Serbs in the other Republics of the SFRY "were in a uniquely unfavourable position within the SFRY", and from the proposal of a review of the SFRY Constitution, so that autonomous provinces would become an integral part of Serbia, and the federal State would be strengthened. Croatia also referred to an expert report (by Professor A. Budding),

[309] Memorial of Croatia, para. 2.52.
[310] *Ibid.*, para. 3.03.
[311] Counter-Memorial of Serbia, para. 428.
[312] Reply of Croatia, paras. 3.10-3.12.
[313] *Ibid.*, paras. 3.12-3.14.

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which referred to the SANU Memorandum as "a political firestorm" because of its "inflammatory" language[314].

(b) *Examination of expert evidence by the ICTY*

329. As brought to the attention of the International Court of Justice in the course of the proceedings of the present case (cf. *supra*), the ICTY, in its decision of 16 June 2004 in the *Milošević* case, duly took into account expert evidence concerning the ideological component of the plan of destruction at issue. The first expert report presented to the ICTY, compiled at the request of its Office of the Prosecutor, was titled "Political Propaganda and the Plan to Create a 'State for All Serbs' — Consequences of Using the Media for Ultra-Nationalist Ends" (of 4 February 2003, by R. de la Brosse).

330. According to the expert report, the regime of Slobodan Milošević sought to take "total control over the media owned by the State or public institutions", restricting its freedom and "using all means to prevent it from informing people". Its control of the audio-visual media "began in 1986-1987 and was complete in the summer of 1991" (Report by R. de la Brosse, 4 February 2003, para. 27). The expert report proceeded that "[t]he media were used as weapons of war", in order to achieve "strategic objectives", such as "the capture of territories by force, the practice of ethnic cleansing, and the destruction of targets described as symbolic and having priority". The plan combined

> "propaganda, partial (and biased) information, false news, manipulation, non-coverage of certain events, etc. This entire arsenal would be mobilized to help justify the creation of a State for all Serbs.
>
> . . . . . .
>
> [T]he terms 'Ustasha fascists' and 'cut-throats' were used to stigmatize the Croats and 'Islamic Ustashas' and 'Djihad fighters' to describe the Bosnian Muslims pejoratively. Systematic recourse to such key words imposed on the media by the Milošević regime undoubtedly provoked and nourished hateful behaviour toward the non-Serbian communities.
>
> . . . . . .
>
> Systematic recourse to false, biased information and non-coverage of certain events made it possible to inspire and arouse hatred and

[314] CR 2014/5, of 3 March 2014, pp. 33-35. The Memorandum, Croatia reiterated, paved the way for the publication of articles in the Serbian media, referring to the alleged Croats' genocidal tendencies, and recalling the horrific crimes the Ustasha régime committed against the Serbs during the Second World War (e.g., the concentration camp in Jasenovac); CR 2014/5, of 3 March 2014, p. 35; and cf. also CR 2014/12, of 7 March 2014, pp. 22-23.

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fear among the communities. The media prepared the ground psychologically for the rise in nationalist hatred and became a weapon when the war broke out.

. . . . . .

Historical facts were imbued with mystical qualities to be used as nationalist objectives so that the Serbian people would feel and express a desire for revenge directed at the prescribed enemies, the Croats and Muslims (. . .)" (Report by R. de la Brosse, paras. 28-31.)

331. The expert report went on to state that, by the invocation of "the scars of the 1940 war" (*ibid.*, para. 35), "the use of the media for nationalist ends and objectives formed part of a well-thought through plan" (*ibid.*, para. 32). It added that the 1986 SANU Memorandum constituted an "encouragement" for "Serbian nationalism" (*ibid.*, para. 40). The official propaganda drew on the historical sources of "Serbian mystique", with its victims and the injustices they suffered throughout history (*ibid.*, paras. 46-49)[315]. State authorities sought to condition public opinion in order "to justify the upcoming war with Croatia" (*ibid.*, para. 54, and cf. para. 61). "Disinformation" was used in order "to mislead or to conceal and misrepresent facts", and to make up "false news" (*ibid.*, paras. 72 and 77).

332. The second expert report submitted (by the Prosecution) to the ICTY in its decision in the *Milošević* case (2004), and referred to by Croatia in its oral pleadings in the present case before the International Court of Justice, was titled "Serbian Nationalism in the Twentieth Century" (of 29 May 2002, by A. Budding). The expert report provided historical information and the factual context for the understanding of waking Serbian national awareness, and the sequence of events which led to the disintegration of the Yugoslav State and the outbreak of the wars in the region.

333. The expert report also referred to the 1986 SANU Memorandum (report by A. Budding, 29 May 2002, p. 32), explaining its origins and its consequences for the whole of former Yugoslavia (*ibid.*, pp. 36-37). It characterized the SANU Memorandum as "by far the most famous document in the modern Serbian national movement" (*ibid.*, p. 36). Referring to the expert report, Croatia argued that the SANU Memorandum set off "a political firestorm", and that it was "inflammatory because of the contrast between its complaints about the position of Serbia and Serbs within Yugoslavia and its 'vague and ellip-

[315] The media contributed to "demonizing the other communities, especially the Kosovo Albanians, Croats and Bosnian Muslims" (para. 52).

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tical references to a possible post-Yugoslav future'"[316]. According to the expert report:

> "Memorandum nije raspalio debatu u Jugoslaviji zato što je u njemu eksplicitno iznet srpski nacionalni program posle Jugoslavije — pošto i nije — već zbog kontrasta između detaljnih i preteranih primedbi na položaj Srbije unutar postojeće jugoslovenske države, koje su iznete u Memorandumu, kao i neodređenog pozivanja na moguću budućnost posle Jugoslavije (tvrdnja da Srbija mora 'jasno da sagleda svoje privredne i nacionalne interese kako je događaji ne bi iznenadili'). Autori Memoranduma su sugerisali da bi nacionalne alternative višenacionalnoj jugoslovenskoj državi mogle biti poželjne, ali su propustili da priznaju da bi njihovo stvaranje neizbežno podrazumevalo uništenje."[317]

334. In the same *Milošević* case, the ICTY also took into account the declaration of an expert witness (T. Zwaan), which is summed up in its decision of 16 June 2004. According to the ICTY, the expert witness testified about "the importance of ideology and use of propaganda" in processes "leading to the commission of genocide, involving various types of radical nationalism, which dehumanize the targeted group", also misusing "collective historical memory" to that end (ICTY, *Milošević*, 16 June 2004, para. 234). It added that "genocide is a crime of State", as "genocidal crimes never develop from the 'bottom up'; they are 'top down' affairs. Such crimes occur with the 'knowledge, approval and involvement of the State authorities'" *(ibid.)*.

335. Yet a third expert report compiled for the ICTY (at the request of its Prosecution), for its adjudication of the *Milošević* case (2004), titled "On the Aetiology and Genesis of Genocides and Other Mass Crimes — Targeting Specific Groups" (of November 2003, by T. Zwaan), purported to consider, in a condensed way, the learning that exists nowadays in relation to genocide, from an interdisciplinary perspective. The expert report, at

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[316] CR 2014/5, pp. 33-35.

[317] *[Unofficial translation]*

> "The Memorandum became an inflammatory element in the Yugoslav debate not because it explicitly set out a post-Yugoslav Serbian national programme — and indeed it did not — but rather because of the contrast between its detailed and exaggerated remarks on the position of Serbia within the existing Yugoslav State, and its vague and elliptical references to a possible post-Yugoslav future (the assertion that Serbia must 'look clearly at its economic and national interests, so as not to be caught by surprise by the course of events'). The authors of the Memorandum suggested that national alternatives to the multinational Yugoslav State would be desirable without acknowledging the destruction that their creation would inevitably entail." (*Ibid.*, p. 31.)

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the end of the examination of the matter, reached the following findings:

> "Firstly, (. . .) genocide and other mass crimes targeting specific groups should be carefully distinguished from war and civil war, while at the same time one should recognize that situations of war or civil war may contribute in various ways to the development of genocidal processes.
>
> Secondly, it has been pointed out that genocidal crimes only develop and take place under conditions of serious and enduring crisis. A general model of the emergence of such crises has been presented in a very condensed form. Destabilization of the State-society concerned, polarization processes, *de pacification*, and increasing use of violence are at the heart of such crises.
>
> Thirdly, in the course of the crisis a radical and ruthless political elite may succeed in taking over the State organization. The political behaviour and decisions of this political leadership may be considered of decisive importance for the emergence of genocide. It has been argued that a genocidal process does not develop from 'bottom up', but that is typically a 'top down' development, although the precise involvement of the State may take different forms. One corollary is that the highest State authorities are always responsible for what happens during the genocidal process, another corollary implies that 'single' acts of genocide should be (also) considered against the background of the prevalent power and authority structure within the State-society concerned.
>
> Fourthly, it has been emphasized that genocides may be best seen as (highly complex) processes, with a beginning, a structured course in which phases can be discerned, and an end — usually brought about by forceful external intervention. Furthermore, in trying to understand a genocidal process attention should be paid to the decision-making, the gradual emergence of planning and organization, and the division of labour within the category of perpetrators.
>
> Fifthly, it has been argued that ideology is also of crucial importance for genocide to emerge. Usually, varieties of radical nationalism will figure prominently. They contribute to the development of an extremist political climate; to the marking off of the groups or categories to be targeted; they legitimize, rationalize, and justify the genocidal process; and impart to the perpetrators a sense of direction, intent and purpose.
>
> Sixthly, it has been underlined that every genocidal process should also be considered from the angle of the victims, who are typically chosen because of their supposed membership of a group or category

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targeted for persecution. It has been argued, moreover, that such groups are made increasingly vulnerable and defenceless through the process of persecution itself, that it is usually very difficult for them to foresee what is going to happen, and that their possible courses of (re)action are severely limited. Keeping their fate central in one's mind seems to be the best compass when studying, assessing and judging genocide." (Report by T. Zwaan, November 2003, pp. 38-39.)

(c) *Ideological incitement and the outbreak of hostilities*

336. In effect, in the course of the proceedings, both contending Parties paid special attention to the origins and the factual background of the conflict in the Balkans in the present case concerning the *Application of the Convention against Genocide*. Both Croatia and Serbia expressed their awareness that the historical context helps to understand better the causes that lead to the war in Croatia and its pattern of destruction. They expressed their views, in particular, in the written phase of the *cas d'espèce*. The applicant State contended that the devastation that took place in Croatia was a consequence of the exponential growth of Serbian nationalism in order to build a "Greater Serbia".

337. Thus, in its Memorial, Croatia provided an overview of the background of the dispute, deeming it essential to understand what happened, in order to bring justice and redress to the victims[318]. Focusing on the formation of the FRY, the rise of "Greater-Serbian" nationalism in the eighties and the rise of S. Milošević to power[319], Croatia argued that, although the inherent tensions (between ethnic groups) had been suppressed for many years, after President Tito's death, federal institutions were usurped by the new Serbian leadership (under S. Milošević), which aimed at establishing a Serb-dominated Yugoslavia, or a "Greater Serbia", to include within its borders more than half of the territory of Croatia[320].

338. The Serbian State-controlled media — it proceeded — systematically demonized the targeted non-Serb ethnic groups, creating a climate conducive to genocide, inciting and justifying it[321]. After tension grew in Kosovo in 1981, Croatia claimed, Serb nationalists began to express their ideas more openly and frequently; it singled out the 1986 SANU Memorandum, as a manifesto setting forth a Serb nationalist reinterpretation of the recent history of the SFRY, which gave rise to a feeling of anger and

[318] Memorial of Croatia, paras. 2.01-2.162 and 1.14.
[319] *Ibid.*, paras. 2.05-2.35, 2.36-2.59 and 2.60-2.84, respectively. As to the historical background (in the Second World War), cf. *ibid.*, paras. 2.08-2.09, and cf. para. 2.53.
[320] *Ibid.*, para. 1.26.
[321] *Ibid.*

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revenge against Croats[322]. Moreover, according to Croatia, there was a large propaganda validating the Chetnik movement and their goals, and S. Milošević was able to capture such feelings and to promote himself as a defender of Serbian interests[323].

339. In its Counter-Memorial, Serbia submitted that much of what occurred in the Balkans in 1991-1995 was influenced by the atrocities against Serbs in 1941-1945 and the rise of nationalism in the SFRY[324]. The events leading to the conflict of 1991-1995 and the conflict itself, according to Serbia, cannot be understood without taking this into account[325]. Serbia further stated that there was a rise of nationalism in the SFRY, following Tito's death, among Serbians but also Croatians[326].

340. Serbia conceded that there were abundant hate speech and extreme nationalism demonstrations in Serbian media in the late eighties and during the nineties, but it claimed that such was the case also in Croatia. It did not contest that Serbian nationalists misused the recollections of past events, though it contended that the claims made in this regard by Croatia were not always accurate; it finally added that Serbian nationalism could not be held solely accountable for the conflict[327].

341. In its Reply, Croatia stated that, according to an expert report from the ICTY, the SANU Memorandum sparked Serbian nationalism publicly[328], giving vent to the view that the Croatian people were collectively to blame for the large number of Serbs who had been killed by the Ustashas in 1941-1945[329]. It then rebutted the claims of revival of Croatian nationalism and of hate speech and discriminatory policies against the Serbs[330]. For its part, in its Rejoinder, Serbia contended that the historical background helps to understand the events which originated the war. It reaffirmed that the causes were not one-sided and that the claims of Croatia were in its view inaccurate[331]; at last, it requested the International Court of Justice to examine the history of the conflict from both

[322] Memorial of Croatia, paras. 2.40, 2.43, 2.51-2.53 and 2.56. The Croats were demonized and blamed for the deaths of Serbs during the Second World War in concentration camps, and an instigated feeling of anger and revenge arose among the Serbs; according to Croatia, the 1986 SANU Memorandum was a key element to that end.
[323] *Ibid.*, paras. 2.54-2.56 and 2.60.
[324] Counter-Memorial of Serbia, paras. 397-426, and cf. paras. 397, 400, 409 and 419.
[325] *Ibid.*, para. 419.
[326] *Ibid.*, para. 422.
[327] *Ibid.*, paras. 434-435, 420 and 424.
[328] Reply of Croatia, para. 3.11.
[329] *Ibid.*, para. 3.12.
[330] *Ibid.*, paras. 3.17-24.
[331] Rejoinder of Serbia, para. 35.

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the Applicant's and the Respondent's perspectives[332].

342. In the oral phase of the proceedings in the *cas d'espèce*, one of the witness-experts (Ms S. Biserko) specifically addressed the factual background of the conflict and the developments that led to the atrocities. She singled out the idea of a "Greater Serbia" reviving Serbian nationalism, with its propaganda; the aim of territorial expansion; the rise of S. Milošević and its policies; and the media reports — between 1988 and 1991 — preparing Serbs for the forthcoming armed attacks in Croatia and Bosnia-Herzegovina[333].

343. The contending Parties themselves, in the course of the proceedings in the *cas d'espèce*, focused — each one in its own way — on the impact of hate speech. Croatia claimed that Serbia sponsored hate speech and propaganda in inciting genocide[334]. Hate speech, in its view, was an important factor in the preparations for the Serbian armed incursions in Croatia[335]. Serbia acknowledged that the media in the country — in the late eighties and during the nineties — constantly broadcasted hate speech, but claimed that such was also the case in Croatia[336].

344. Serbia admitted that hate speech was abundant in Serbian media at the end of the eighties and during the nineties[337], but claimed that it was not confined to Serbia, and also existed in Croatia[338]. Croatia argued that, as from the early eighties, several Serbian newspapers ran inflammatory articles about the Ustasha concentration camp in Jasenovac, during the Second World War[339]. Croatia challenged Serbia's claim that it had also promoted hate speech against the Serbs[340]. Serbia, for its part, attempted to minimize the proof of incitement to hatred[341].

345. In its oral arguments, Croatia referred, e.g., to S. Milošević's speech to the Serbian parliament in March 1991[342], and to the hate speech of the extremist Serb nationalist Z. Raznjatović (known as Arkan) against the Croats, constantly referred to as "Ustashas"[343]. Serbian newspapers, it added, ran inflammatory articles about the Ustasha concentration

[332] Rejoinder of Serbia, para. 36.
[333] Cf. CR 2014/7, of 4 March 2014.
[334] Memorial of Croatia, paras. 1.16, 2.04, 2.43-2.53, 2.56-2.59, 2.63-2.66, 8.16 and 8.23-8.24.
[335] *Ibid.*, para. 2.58.
[336] Cf. Counter-Memorial of Serbia, paras. 434-442.
[337] Cf. *ibid.*, paras. 434-437, 439-442 and 953-954.
[338] *Ibid.*, para. 439.
[339] Cf. Reply of Croatia, paras. 3.10-3.14, 3.26-3.27, 3.31-3.33, 3.131 and 9.52.
[340] Cf. *ibid.*, paras. 3.26-3.27, and cf. para. 9.52.
[341] Cf. Rejoinder of Serbia, paras. 340-342.
[342] Cf. CR 2014/5, of 3 March 2014, para. 20.
[343] Cf. *ibid.*, para. 30; and cf. also Memorial of Croatia, Vol. 5, App. 3, pp. 64-65, paras. 43-45.

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camp in Jasenovac, as a reference to the Second World War crimes committed against the Serbs by the Ustasha regime[344].

346. Serbia, in turn, cited statements from Croatian press and politicians[345]. Croatia retorted that the examples cited by Serbia were in sharp contrast with the Serbian hate speech that emanated from Serbian State media and its most senior leaders[346]. It further insisted that the Serb population's fear against Croats was created by the hate-speech campaign against Croats and their demonization as "Ustasha[s]"[347].

347. In the present Judgment, the International Court of Justice flatly dismissed an examination of the historical origins of the onslaught in the Balkans, in the following terms: "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." (Judgment, para. 422.) Even without embarking on such an examination, the Court, e.g., dismissed the relevance of the SANU Memorandum, for having "no official standing" and for not proving *dolus specialis (ibid.)*.

348. Yet, in the course of the proceedings in the *cas d'espèce*, that document was cited not to this effect, but only to explain the historical origins of the devastation in Croatia, which the Court found unnecessary to examine in the present Judgment. Once again, I regret not to be able to follow the Court's majority on the handling of this question either, and I lay on the records, in the present dissenting opinion, the reasons of my disagreement with the dismissive posture of the Court thereon, particularly bearing in mind that both contending Parties dwelt upon the issue in their arguments before the Court, and expected the Court to address it.

349. It is clear that a nationalistic (ethnic) ideology and propaganda, with their incitement to violence, were at the origins of the outbreak of the former Yugoslavia, having contributed to the hostilities aggravated in the course of the widespread armed conflicts, and then to the "horrors" of the wars in the Balkans, "particularly those in Croatia and Bosnia-Herzegovina"[348]. In order to understand the factual context of a case under the Genocide Convention such as the present one opposing Croatia to Serbia, it is important to address its causes. They have been addressed, before the Court, by the contending Parties themselves. Already in my separate opinion (*I.C.J. Reports 2010 (II)*, p. 543, paras. 46-47 and p. 610,

[344] Cf. CR 2014/5, of 3 March 2014, para. 12.

[345] Cf. Counter-Memorial of Serbia, para. 438 and 440, and Rejoinder of Serbia, paras. 633-635.

[346] Cf. Additional Pleadings, para. 2.14.

[347] Cf. CR 2014/19, of 18 March 2014, para. 28.

[348] S. Letica, "The Genesis of the Current Balkan War", *Genocide after Emotion — The Postemotional Balkan War* (ed. S. G. Meštrović), London/N.Y., Routledge, 1996, p. 91, and cf. pp. 92-112.

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para. 220) in the International Court of Justice's Advisory Opinion on the *Declaration of Independence of Kosovo* (2010), I pointed out the need to remain attentive to the historical origins of each humanitarian crisis.

350. An international conflict — a devastation — of the scale and gravity of the wars in the Balkans, *lodged with the International Court of Justice under the Convention against Genocide*, cannot be properly examined in the void. The ICTY did not do so, and, e.g., in the *Milošević* case (Trial Chamber, decision of 16 June 2004), after studying that conflict as from its historical origins, took into account an expert report on the use of propaganda by the media in that conflict which determined that

> "a comparison between Serbian, Croatian, and Bosnian nationalist propaganda yielded the conclusion that Serbian propaganda surpassed the other two both in the scale and the content of the media messages put out" (ICTY, *Milošević*, decision of 16 June 2004, para. 237).

351. In this way, hatred was widespread, and made its numerous victims. Villagers began to hate each other, sometimes their own former neighbours, solely on the basis of their ethnicity, without knowing exactly why. The consequences of this campaign of hatred were catastrophic, — as were so many other man-made devastations throughout the history of humankind and illustrative of the perennial presence of evil in the human condition (cf. *infra*).

352. Last but not least, with the outbreak of the armed attacks, there is an additional element for the examination of the campaign of extreme nationalism which should not pass unperceived here: the unredacted Minutes of the Supreme Defence Council (SDC) of the FRY, the same unredacted Minutes that, in the earlier case concerning the Genocide Convention, were not made available to the International Court of Justice, nor did the International Court of Justice consider them indispensable, for its 2007 Judgment. Today, eight years later, the unredacted transcripts of the SDC Minutes (1992-1996), as lately brought to the attention of the ICTY, are publicly known.

353. It is not my intention to review them here, but only to refer briefly to two passages, with a direct bearing on the preceding considerations. The (short-hand) unredacted Minutes of the SDC, of 7 August 1992, referred to the violence of paramilitary formations, and contained an instruction to dress paramilitaries with "uniforms of Yugoslav soldiers", and to give them weapons. And the unredacted Minutes of the SDC, of 9 August 1994, asserted that the armies of Republika Srpska and of the Serbian Republic of Krajina "are armies of the Serbian people", and, "[t]herefore, they must serve the interests of the Serbian people as a whole"[349].

[349] FRY/SDC, Unredacted Transcripts of Minutes (1992-1996), of 7 August 1992, and of 9 August 1994.

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2. The Imposed Obligation of Wearing White Ribbons

354. In my perception, it is clear, from the atrocities already surveyed, that the *cas d'espèce*, concerning the *Application of the Convention against Genocide*, opposing Croatia to Serbia, is not exactly one of war, but rather of onslaught, in a widespread and systematic pattern of destruction (cf. *supra*). There are other aspects of it which, in the course of the proceedings, were also brought to the attention of the Court, and to which I turn attention now. One of them pertains to the obligation imposed upon targeted individuals to wear white ribbons.

355. In the written phase of the proceedings, Croatia claimed, in its Memorial, that, in some municipalities, the Croat population was required to identify themselves and their property with white ribbons or other distinctive marks[350]. It submitted various witness statements concerning this practice by Serbia[351]. On the basis of the probatory evidence (and witness statements), it appears that this practice of marking Croats with white ribbons was widespread; its rationale was to identify and single out Croats and subject them to varying degrees of humiliation, such as forced labour, violence, and limitation of their freedom of movement (e.g. by imposing curfews). According to Croatia,

> "[t]he local Croat population would be required to identify themselves and their property with white ribbons and other distinctive marks; they would be denied access to food, water, electricity and telecommunications and proper medical treatment; their movements would be restricted; they would be put to forced labour; their property would be destroyed or looted; Croatian cultural and religious monuments would be destroyed; and schools and other public utilities would be required to adopt Serbian cultural traditions and language"[352].

356. As to the aims of the practice of marking Croats with white ribbons, Croatia submitted that the local Serb "authorities" would establish their power and "would impose a regime of humiliation and dehumanization on the remaining Croat population, who would be required to identify themselves and their property with white ribbons and other distinctive marks"[353]. Croatia argued that the majority of the Croat inhabitants of Antin, for instance, left the village, and the 93 Croats that remained there had to wear white ribbons on their sleeves; Croatia added that, at the

[350] Cf., Memorial of Croatia, paras. 4.08, 4.60, 4.87 and 4.98. According to Croatia, this obligation to wear white ribbons occurred, e.g., in Sarengrad, Bapska and Sotin; *ibid.*, para. 8.16.8.

[351] *Ibid.*, Vol. 2 (I), Annexes 53 (Sarengrad), 66 (Bapska), 76 (Tovarnik), 84 (Tovarnik); 101, 106 and 108 (Lovas), and 128 (Vukovar).

[352] *Ibid.*, para. 8.60.

[353] *Ibid.*, para. 3.73.

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time of the writing of its Memorial, it was still unknown what happened to 15 of them[354]. Another example was afforded by the village of Sarengrad, where 412 Croatian inhabitants stayed behind, and all remaining Croats in the village were forced to wear white ribbons[355].

357. In its oral pleadings, Croatia reiterated its allegations concerning the marking of the Croatian population. As to the fate of the Croats who were forced to identify themselves by wearing white ribbons, Croatia did not report a common fate, to all of them. It is not clear from its pleadings that absolutely *all* Croats wearing white ribbons were doomed to be exterminated[356]. Yet Croatia stated, in this connection, that

> "across the occupied communities and regions — not isolated incidents, numerous, set out in the pleadings — Croat civilians were forced to wear white ribbons, and ordered to adorn their homes with white rags. These were measures of ethnic designation. Thus earmarked, *they were ready targets for destruction.* In Bapska, Croats were forced to hang white ribbons on their doors by Serbs who shouted, 'Ustasha! We will kill you all' — in the witness statements. The Croat populations in Arapovac, Lovas, Sarengrad, Sotin, Tovarnik and Vukovar, amongst other places, were forced to wear white bands by Serb forces."[357]

358. Croatia mainly referred to the fact that they were obliged to identify themselves with white ribbons to show that they were Croats; although their fate seems to have been diverse, the targeted individuals, once targeted, became more vulnerable. In this respect, in a response to a question I put, during the public sitting before the Court on 5 March 2014, a Croatia's expert witness stated that Croats

> "who were in the camps, were not thus marked (. . .). Such markings were used in several cases (. . .) — precisely in Lovas and Tovarnik — where we found victims in mass graves having these markings. And, according to the general information, it is known that in these locations, persons of Croat ethnicity were thus marked with white armbands."[358]

Thus, it appears from the evidence submitted in the present case that some of the Croats who were exterminated, were first marked with white ribbons, or armbands[359], or white sheets on the doors of their homes.

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[354] Memorial of Croatia, para. 4.17.
[355] *Ibid.*, para. 4.60.
[356] CR 2014/9, of 5 March 2014, p. 35.
[357] CR 2014/6, of 4 March 2014, p. 57 [emphasis added].
[358] CR 2014/9, of 5 March 2014, p. 35.
[359] It is not clear from the pleadings of Croatia that absolutely *all* Croats wearing white ribbons were doomed to be exterminated, cf. CR 2014/9, p. 35.

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3. The Disposal of Mortal Remains

359. In the course of the proceedings in the present case, Croatia referred to various witness statements describing the mistreatment by Serbs of the mortal remains of the deceased Croats. There were many reported cases of corpses that were burnt, or else thrown into mass graves (cf. *infra*), and also occurrences in which they were shot (in Central Vukovar)[360], dismembered (in Berak)[361], and thrown into wells (in Glina), canals (in Lovas)[362] and rivers[363]. This was a way, Croatia added, to conceal the murders; excavators were used to transport the mortal remains[364].

360. For example, in the written phase of the present proceedings, it was further reported by Croatia that there were mortal remains that were simply burnt (in, e.g., Ervenik, Cerovljani, Hum/Podravska, Joševica)[365]. Croatia presented also several accounts of corpses that were disposed of, in a haphazard, if not careless way[366]. Corpses were found everywhere. Mortal remains were reported to have been a problem in Vukovar during the shelling: many corpses remained on the streets, in yards and basements; 520 deceased persons were transported by Croatians volunteers and soldiers for identification[367]. In Vukovije, according to a witness three corpses were found on the steps of a house[368]. A witness narrated that, in Tovarnik, there were 48 corpses lying on a road and in yards and their burial was not allowed[369].

361. I deem it fit to come back to a point I made earlier on, in the present dissenting opinion (Part II, *supra*). This scenario, of the disposal of unburied mortal remains, brings to the fore (at least in my mind), in an inter-temporal dimension, the tragedy of *Antigone*, by Sophocles, some 25 centuries ago. Antigone expresses her determination to defy the tyrannical decision of the powerful Creon to expose the corpse of her brother Polynices so as to rot on the battlefield; she announces that she will give

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[360] Cf. Memorial of Croatia, para. 4.165.

[361] Cf. *ibid.*, para. 4.42.

[362] Cf. *ibid.*, para. 4.127.

[363] Cf. *ibid.*, para. 5.80.

[364] Cf. *ibid.*, para. 4.136.

[365] Cf. *ibid.*, paras. 5.215, 5.122, 5.41, 5.85 and 5.169-5.170, respectively.

[366] A witness stated that he was responsible for collecting the corpses of the killed Croatian civilians with a tractor; 24 were buried, but it was not possible to identify some of them; Memorial of Croatia, para. 4.102. Another witness reports that he was also responsible for digging graves and transporting the deceased; *ibid.* Another witness stated that she saw dead bodies on a trailer driving to the graveyard, where they were dropped into a hole and covered with an excavator; *ibid.*, para. 4.122. It was reported that columns of JNA trucks were used to transport the remains of the deceased; only five corpses in Tordinci, and nine in Antin, were left in the graves; *ibid.*, para. 4.138.

[367] *Ibid.*, para. 4.152.

[368] *Ibid.*, para. 5.62. Elsewhere, a witness saw a corpse on a cargo truck; *ibid.*, para. 5.37.

[369] *Ibid.*, para. 4.97; and cf. CR 2014/8, of 5 March 2014, para. 51.

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her brother's mortal remains a proper burial, as she looks forward to her reunion one day with her deceased beloved relatives:

> "I shall bury him myself.
> And even if I die in the act, that death
> will be a glory. (. . .) I have longer
> to please the dead than please the living here (. . .).
> (. . .) What greater glory could I win
> than to give my own brother [a] decent burial?"[370]

362. As a self-inflicted death falls upon Antigone, disgrace promptly falls upon the despotic Creon as well. The chorus limits itself to say that "the sorrows of the house", as in ancient times, piles on "the sorrows of the dead", in such a way that "one generation cannot free the next"[371]. Love is "never conquered in battle", and is "alone the victor"[372]. And it warns that the "power of fate" is a "terrible wonder, neither wealth nor armies (. . .) can save us from that force"[373]. At the end, the "mighty blows of fate (. . .) will teach us wisdom"[374].

363. Sophocles' masterpiece has survived the onslaught of time, and has continued to inspire literary pieces in distinct ages. With the passing of time, *Antigone* became the symbol of resistance to the omnipotence of the rulers, as well as of the clash between natural law (defended by her) and positive law (represented by Creon). Its lesson has been captured by writers, and has become the object of philosophers' attention, over the centuries. In the mid-twentieth century, J. Anouilh wrote his own version of *Antigone*'s tragedy, with a distinct outlook, but likewise portraying the fatality that befell Antigone and the other characters. Anouilh's tragedy *Antigone* was originally published in 1942, and first performed in 1944, in Paris under Nazi occupation.

364. Over the centuries, the battlefield has been full of abandoned corpses, as depicted in so many writings (historical, philosophical and literary). It is against this abandonment that Antigone stands. She shows, from Sophocles' times to date, that the dead and the living are close to each other in many cultures, and ultimately in human conscience. The determination of Antigone to secure a proper burial of her brother's mortal remains brings the beloved dead closer to their living, and the beloved living closer to their dead. This perennial lesson is full of humanism. Against the imposition of calculations of *raison d'Etat*, Antigone resists and remains faithful to herself, upholding fundamental principles and the superior human values underlying them. She sets an example to be followed.

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[370] Sophocles, *Antigone*, verses 85-86, 88-89 and 561-562.
[371] *Ibid.*, verses 667 and 669-670.
[372] *Ibid.*, verses 879 and 890.
[373] *Ibid.*, verses 1045-1047 and 1050.
[374] *Ibid.*, verses 1469-1470.

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365. Nowadays, 25 centuries after Sophocles' *Antigone*, have the "blows of fate" taught us wisdom? I doubt it. Have the lessons of the sufferings of so many preceding generations been learned? I am afraid not. As the present case concerning the *Application of the Convention against Genocide* (shows, in situations of conflict, mortal remains continue to be treated with disdain (cf. *supra*). And the complaints go on and on. Croatia states that, in 1993, in Tordinci (Eastern Slavonia), corpses were removed from a mass grave and transported to an unknown place in Serbia[375]. In Glina, at least 10 people were killed, but no remains were found by the date of the submission of the Memorial[376]. Still in Glina, the mortal remains of nine civilians were exhumed (on 13 March 1996), but only six of them were identified[377]. Other mortal remains remain missing elsewhere[378].

366. Furthermore, in Karlovac, Croatia added, the corpses of five women and one man were removed to an unknown destination, and by the date of the submission of the Memorial they were not found, except the corpse of a woman (which was found in a box on the outskirts of the village of Banski Kovačevac) in the spring of 1992[379]. In its Reply, Croatia again evoked witness statements found in the Memorial; and it adds that, in Dalj, Croat civilians were prevented to flee (after 1 August 1991), and were forced to collect and bury the mortal remains of those killed in the attack[380].

367. In its arguments in the written phase of the present proceedings, Serbia did not expressly dismiss Croatia's claims on mortal remains and their mistreatment by Serb forces. It instead challenged the reliability of the evidence produced by Croatia, e.g., as to the number of corpses found in Velepromet (claimed by Croatia to be around a thousand)[381]. Then it contended, in its counter-claim, that Croatia was responsible for misdeeds against mortal remains of Serbs and for hiding evidence; it claims, e.g., that Croatian soldiers shot into the corpses of Serbs[382]. It evoked a witness statement that, in Glina, a total of 20 dead bodies were strewn all over the road and on the sides[383]. Another witness described that, near Zirovac, tanks were driven over dead bodies scattered on the road[384].

368. Serbia further claimed that, in Knin, bodies were removed from the streets in order to hide them from the United Nations; it added that the United Nations Protection Force (UNPROFOR)'s Canadian battal-

[375] Memorial of Croatia, para. 4.138, and cf. also para. 4.07.
[376] *Ibid.*, para. 5.93.
[377] Cf. *ibid.*, para. 5.83.
[378] Cf., e.g., *ibid.*, para. 5.179.
[379] *Ibid.*, para. 5.157.
[380] Cf. Reply of Croatia, para. 5.21.
[381] Cf. Counter-Memorial of Serbia, para. 736.
[382] Cf. *ibid.*, para. 1222.
[383] Cf. *ibid.*, para. 1248.
[384] Cf. *ibid.*, para. 1249.

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ion witnessed that Croatian forces were removing and burning corpses in order to hide evidence[385]. All this, it argued, was aimed at preventing that the precise number of victims could be determined[386]. In its Rejoinder, Serbia contended that on the road towards the bridge on the River Sava, there were many dead bodies of Serbs for about 3.5 km[387]. It added that Croatian forces removed any traces of dead bodies in order to conceal the extent of the alleged crimes committed[388], by first burning the bodies and then burying them[389]. Many dead bodies were seen lying on the streets in civilians' columns fleeing Knin [390].

369. For its part, Croatia, in the oral phase of the present proceedings, complained that it lacks information on the whereabouts of the remains of more than 840 Croatian citizens, still missing as the result of the attacks on civilians[391]; it added that Serbia still refuses to help locate their mortal remains[392]. It further referred to another witness statement that there were countless bodies lying in the streets in the residential area south of the Vuka River, which could not be buried because of the danger from shelling[393]. In the town centre by the Danube River, it proceeded, there were also corpses which remained unburied[394]. In Borovo Selo, it added, Serb paramilitaries killed 12 Croat police officers and mutilated their remains[395].

370. According to the Applicant, after the shelling of the city of Vukovar, dismembered bodies were seen lying in the rubble[396]; corpses lined the street[397]. In Velepromet, a witness describes 15 decapitated bodies by a hole in the ground[398]. Turning to the occurrences in Donji Caglić, Croatia stated that the corpses of civilians were buried in a trench, dug by a JNA vehicle[399]. In Siroka Kula, it added, 29 Croats were killed by the SAO Krajina and their corpses were thrown into burning houses[400]. Moreover, Croatia proceeded, a witness described that, around Lovas, Croats were used to clear minefields; mines would

[385] Counter-Memorial of Serbia, paras. 1262 and 1131.
[386] *Ibid.*, para. 1238.
[387] Cf. Rejoinder of Serbia, para. 652-4.
[388] Cf. *ibid.*, para. 654.
[389] Cf. *ibid.*
[390] Cf. *ibid.*, para. 760.
[391] CR 2014/5, of 3 March 2014, para. 6.
[392] CR 2014/6, of 4 March 2014, para. 40.
[393] Cf. CR 2014/8, of 5 March 2014, para. 13.
[394] Cf. *ibid.*, para. 14.
[395] *Ibid.*, para. 13.
[396] *Ibid.*, para. 32.
[397] *Ibid.*, para. 38.
[398] Cf. *Ibid.*, para. 57. Another witness, who was in Vukovar and was taken to Dalj, described a pit of corpses; cf. *ibid.* para. 77.
[399] Cf. Reply of Croatia, Vol. 1, para. 6.8; and cf. CR 2014/10, of 6 March 2014, para. 16.
[400] Cf. CR 2014/10, of 6 March 2014, para. 27.

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go offand there were dead bodies lying all over, and Serb forces were firing at them[401].

371. Croatia cited an agreement between Croatia and Serbia, concluded in 1995, whereby they established a Joint Commission in order, *inter alia*, to exhume and identify mortal remains of unidentified bodies. Croatia contended that the mortal remains of 394 persons have been exhumed, but only 103 bodies have been handed over to it[402]. Serbia retorted that "only 103" corpses have been returned to Croatia because only 103 DNA profiles have matched the DNA samples of the Croatian missing persons[403].

372. In the oral phase of the present proceedings, Serbia claimed that Croat forces disrespected the mortal remains of Serbs following the Operation Storm, and removed traces of the corpses that were lying in the roads[404]. Serbia added that the Croats shot at the bodies of dead Serbs[405], and also referred to occurrences of corpses having been burned by Croats[406]; five of them were found in Bijeli Klanac[407]. According to Serbia, five tractor drivers were killed by Croatian soldiers and their bodies were thrown into a river[408].

373. From time immemorial to the present, the proper disposal of mortal remains, particularly in situations of armed conflict or extreme violence and disruption of the social order, has been a perennial concern. It marked presence already in the minds of the "founding fathers" of the law of nations. One decade ago, in another international jurisdiction (IACtHR), in my separate opinion in the case of the massacre of the *Moiwana Community* v. *Suriname* (Judgment of 15 June 2005), I deemed it fit to ponder that:

> "It cannot pass unnoticed that an acknowledgement of the duties of the living towards their dead was, in fact, present in the very origins, and along the development, of the law of nations. Thus, to refer but to an example, in his treatise *De Jure Belli ac Pacis* (of 1625), H. Grotius dedicated Chapter XIX of Book II to the *right of burial (derecho de sepultura)*. Therein Grotius sustained that the right of burying the dead has its origin in the voluntary law of nations, and

[401] Cf. CR 2014/20, of 20 March 2014, p. 55, para. 33.
[402] CR 2014/21, of 21 March 2014, p. 37, para. 9.
[403] CR 2014/24, of 28 March 2014, pp. 60-61, para. 8.
[404] CR 2014/16, of 12 March 2014, p. 43, para. 3. Serbia cited statements in support of its claim; cf. *ibid.*, pp. 46-51. It further referred to a witness who was called to recognize his father's dead body but it was torched; the identification was only possible through DNA analysis; *ibid.*, p. 57, para. 52. Another witness found the mortal remains of a deceased beneath a burned family house after six months of the conflict in the area; *ibid.*, p. 59, para. 3.
[405] *Ibid.*, pp. 44-45, para. 10.
[406] *Ibid.*, p. 60, para. 11.
[407] CR 2014/17, of 13 March 2014, p. 44, para. 104.
[408] Cf. *ibid.*, p. 36, para. 80.

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all human beings are reduced to an equality by precisely returning to the common dust of the earth[409].

Grotius further recalled that there was no uniformity in the original funeral rites (for example, the ancient Egyptians embalmed, while most of the Greeks burned, the bodies of the dead before committing them to the grave; irrespective of the types of funeral rites, however, the right of burial was ultimately explained by the dignity of the human person[410]. Grotius further sustained that all human beings, including 'public enemies' *(enemigos públicos)* were entitled to burial, this being a precept of 'virtue and humanity.'"[411] (IACtHR, *Moiwana Community* v. *Suriname*, Judgment of 15 June 2005, paras. 60-61.)

374. Despite this long-lasting concern, mortal remains keep on being disrespected, as the present case concerning the *Application of the Convention against Genocide* shows. And this is not the only contemporary example of this sad disdain. This is so — as I further pointed out in my aforementioned separate opinion in the *Moiwana Community* case (*ibid.*, para. 63) — despite the fact that international humanitarian law provides for respect for the remains of the deceased. Article 130 of the 1949 IV Geneva Convention (on the Protection of Civilian Persons) requires all due care and respect with mortal remains. Article 34 of Protocol I of 1977 to the four Geneva Conventions of 1949 elaborates on the matter in greater detail; and

"the commentary of the International Committee of the Red Cross on that Article points out that the respect due to the remains of the deceased 'implies that they are disposed of as far as possible in accordance with the wishes of the religious beliefs of the deceased, insofar as these are known', and warns that 'even reasons of overriding public necessity cannot in any case justify a lack of respect for the remains of the deceased'"[412] *(ibid.)*.

4. The Existence of Mass Graves

375. In the proceedings in the *cas d'espèce*, Croatia submitted arguments in relation to mass graves discovered in various municipalities, both in its written and in its oral pleadings. It focused on the description of crimes committed in each municipality and the existence of mass graves

[409] H. Grotius, *Del Derecho de la Guerra y de la Paz* [1625], Vol. III (Books II and III), Madrid, Edit. Reus, 1925, p. 39, and cf., p. 55.

[410] *Ibid.*, pp. 43 and 45.

[411] *Ibid.*, pp. 47 and 49; and cf. H. Grotius, *De Jure Belli ac Pacis* [1625] (ed. B. M. Telders), The Hague, Nijhoff, 1948, p. 88 (abridged version).

[412] Y. Sandoz, C. Swinarski and B. Zimmermann (eds.), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, Geneva, ICRC/ Nijhoff, 1987, pp. 369 and 379.

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proving the commission of the crimes. It also submitted material evidence of mass graves, including photographs and colour plates of mass graves, as annexes to its pleadings.

376. The analysis of Croatia's arguments demonstrates that mass graves were common across many of the municipalities that it presented. Croatia submitted photographic and documentary evidence recording the findings made during the excavation of mass graves, as proof of the crimes that it alleges to have been committed. It seems, from the evidence and arguments examined, that the amount of mass graves in various municipalities supports the allegation that mass killings were committed against Croats.

377. In the course of the written phase of the present proceedings, Croatia developed its arguments concerning mass graves in its Memorial[413]. It submitted that, in total, 126 mass graves were found (at the time of the writing of the Memorial), of which 61 were in Eastern Slavonia[414]. Croatia mentioned mass graves found in various municipalities, including, e.g., villages in Eastern Slavonia: in Banovina, where 39 mass graves were discovered and 241 bodies have been exhumed (of which 175 have been identified)[415]; in Kordun and Lika, where 11 mass graves were found[416]; and in the village of Lovas. Croatia submitted arguments and information in relation to each mass grave. In relation to Vukovar, for example, Croatia submitted that most of Vukovar was completely destroyed and that the mass grave at Ovčara, where some 200 Croats were taken by Serbs from the Vukovar Hospital, summarily executed and then left in a shallow mass grave[417].

378. Still in respect of Vukovar, Croatia submitted that three mass graves were found: Ovčara, where 200 corpses were found (and 145 persons were identified); in Novo Groblje, 938 mortal remains were found (and 722 persons were identified); in Nova Street 10 mortal remains were found (and six persons were identified). A grave containing three corpses was found in Borovo Selo. Croatia submits that "[t]hese numbers are paralleled only in the Prijedor County in Bosnia and Herzegovina"[418]. In total, Croatia contended, 1,151 corpses were found in the mass graves in Vukovar[419].

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[413] Cf. Memorial of Croatia, Annexes 165-166. Cf. also *ibid.*, Vol. 3, Section 7 (Identified Mass Graves).

[414] *Ibid.*, para. 8.11.

[415] *Ibid.*, para. 5.77.

[416] *Ibid.*, para. 5.137.

[417] Cf. *ibid.*, para. 4.175. As to the Ovčara mass grave, Croatia refers to the Report on Evacuation of the Vukovar Hospital and the Mass Grave at Ovčara, UN Commission of Experts Established Pursuant to Security Council resolution 780 (1993), and Physicians for Human Rights, Reports of Preliminary Site Exploration of a Mass Grave Near Vukovar, Former Yugoslavia, and Appendices A-D (19 January 1993).

[418] *Ibid.*, para. 4.188.

[419] *Ibid.*

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379. At the time of the writing of the Memorial, Croatia further argued that, due to the operations of the Serb paramilitary groups and the JNA in the area of Western Slavonia, five mass graves were found, from which 20 bodies were exhumed and identified, and that almost all of the identified corpses were Croats[420]. Croatia added that, at the time of the writing of the Memorial,

> "sixty-one mass graves have been found in Eastern Slavonia (. . .) 2,028 people have been exhumed of whom 1,533 have been identified. In the Osijek-Baranja County, 171 persons were exhumed and 135 of them were identified. In the Vukovar Srijem County 1,857 persons were exhumed, and 1,418 of them were identified. Further mass graves are still being discovered. Moreover, many of the mass graves, which came into being in the relevant period, acted as temporary burial sites only."[421]

380. Croatia further submitted that "[t]he JNA often dug up the bodies and moved them to other parts of the occupied territory or Serbia. For example, dead bodies from the village of Tordinci were taken to Serbia and dead bodies from Tikveš were taken to Beli Manastir"[422]. In relation to Eastern Slavonia, for example, Croatia contended, as to the village of Tenja, that a mass grave was exhumed on the farm, and the remains of three persons were identified. In the village of Berak, in the region of Eastern Slavonia, a mass grave between Orolik and Negoslavci, in a valley called "Sarviz", was also found[423]. Croatia also reported exhumations of mass graves in Ilok[424]. In the village of Tovarnik, Croatia added, it was common for the Serb paramilitary groups to force Croats to bury their fellow dead, and it referred to a witness testimony confirming the existence of mass graves and numerous murders of Croatian civilians[425].

381. Similarly, at the time of the writing of the Memorial, in the village of Lovas, the mass grave of 68 people at the local graveyard was exhumed, and 67 were identified. As to the village of Tordinci, Croatia asserted that the corpses of

> "approximately 209 Croats [were] discovered near the Catholic Church. (. . .) The registrar of Tordinci was to list the people in the mass grave, but because of the number of corpses, he was unable to complete the task. Till today the identity of some of these persons is not known. In 1993, the bodies were removed from the grave and transported to an unknown place in Serbia. (. . .) Columns of JNA trucks were used to transport the remains of the dead and only five bodies of the inhabitants of Tordinci and nine inhabitants of the

[420] Memorial of Croatia, para. 5.04.
[421] *Ibid.*, para. 4.07.
[422] *Ibid.*
[423] *Ibid.*, para. 4.41.
[424] *Ibid.*, para. 4.72.
[425] *Ibid.*, para. 4.102; and cf. Annex 83.

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> village of Antin were left in the grave. These were subsequently exhumed and identified, while the others are still registered as missing."[426]

Furthermore, in relation to the village of Saborsko, Croatia submitted that "the village was completely obliterated and the population exterminated. Bodies of the murdered Croats were buried several days later in a mass grave prepared by an excavator"[427].

382. In its Reply, Croatia reiterated its arguments and updated the information submitted in its Memorial, including information about the location and exhumation of bodies[428] found since the filing of the Memorial. In its Reply, Croatia relied upon further sites of mass graves "as showing the context and breadth of the killings committed by the Serbian forces"[429]. Croatia also retorted Serbia's arguments as to an alleged lack of impartiality of the information obtained: it asserts that international entities, including the Office of the UN High Commissioner for Human Rights (UNHCHR), the Organization for Security and Co-operation in Europe (OSCE), and the Observation Commission of the European Community (in addition to the ICTY itself) were invited to observe the exhumation of mass graves in Croatia[430].

383. Further in its Reply, Croatia recalled that the ICTY also made findings in relation to mass graves in Croatia, in the *Mrkšić, Radić and Sljivančanin* case. In the words of the ICTY:

> "In the Chamber's finding, in the evening and night hours of 20-21 November 1991 the prisoners of war were taken in groups of 10 to 20 from the hangar at Ovčara to the site where earlier that afternoon a large hole had been dug. There, members of Vukovar TO and paramilitary soldiers executed at least 194 of them. The killings started after 21:00 hours and continued until well after midnight. The bodies were buried in the mass grave and remained undiscovered until several years later." (ICTY, *Mrkšić, Radić and Sljivančanin*, paras. 252-253.)[431]

384. Croatia further referred to the ICTY (Trial Chamber) findings in the *Martić* case in relation to mass graves. It found, e.g., that some persons from Cerovljani (it names them) were intentionally killed. It then recalled "the manner in which the victims from Hrvatska Dubica were rounded up and detained in the fire station" on 20 October 1991, and then killed on 21 October 1991 at Krečane near Baćin, and "buried in the mass grave at that location". The Trial Chamber considered that the crimes in Cerovljani were "almost identical" to those in Hrvatska Dubica,

[426] Memorial of Croatia, para. 4.138.
[427] *Ibid.*, para. 5.152.
[428] Cf. Reply of Croatia, Annexes 43-46.
[429] *Ibid.*, para. 5.12.
[430] *Ibid.*, para. 2.56.
[431] *Ibid.*, para. 5.80.

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"including that most of the victims were buried at the mass grave in Krečane". The Trial Chamber considered it "proven beyond reasonable doubt that these victims were civilians and that they were not taking an active part in the hostilities at the time of their deaths" (ICTY, *Martić*, para. 359)[432].

385. Serbia, for its part, submitted that some of the evidence, especially graphics called "mass graves", were prepared by Croatian official bodies[433]. In its view, evidence of mass graves was of "little worth", considering that

> "the exhumation reports do not provide evidence of genuinely mass graves of the sort found in Srebrenica, Rwanda and Eastern Europe following World War II. Rather, the burials seemed to be of relatively small clusters of deceased persons, dispersed throughout the various regions and municipalities of Slavonia."[434]

However, much as it tried to discredit the evidence, Serbia did not come to the point of denying the existence of mass graves.

386. In the course of its oral pleadings, Croatia reiterated its contentions in relation to the existence of mass graves, their location and the bodies found therein. It added that new mass graves were found more recently, e.g., the mass grave in Sotin, containing 13 corpses[435]. Croatia also argued, in relation to Eastern Slavonia, that, within a year of Serbia's occupation, the communities of the region had been destroyed and that

> "[t]he intent to destroy the Croat population is as clear as the figures are stark (. . .): 510 mass graves have since been discovered, containing the corpses of nearly 2,300 men, women and children; many others have been discovered in individual graves. More still are being discovered yearly."[436]

387. Croatia further recalled the statement of an expert witness during its oral pleadings (Mr. Grujić), who testified, *inter alia*, about mass graves. He stated that "[a]s regards exhumations and the discovery of mass graves, and the time of their creation", he had to say that "the first mass graves had

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[432] Reply of Croatia, para. 6.35. And cf. also ICTY (Trial Chamber), *Martić* case, paras. 364-367, as to atrocities committed in Baćin; paras. 202-208, as to Lipovača; and paras. 233-234, as to killings in Saborsko.

[433] Rejoinder of Serbia, para. 264.

[434] *Ibid.*, para. 349.

[435] CR 2014/8, p. 22, para. 55.

[436] *Ibid.*, p. 27, para. 71. Croatia then corrected this statement in the following terms:

> "What I intended to say was that a total of 510 mass and individual graves had been discovered in Eastern Slavonia containing almost 2,300 bodies. We have now checked the most up-to-date figures on the website of the Directorate for Missing and Detained Persons, and it is 71 mass graves, and 432 individual graves in Eastern Slavonia, giving a total of 503." (CR 2014/10, of 6 March 2014, p. 10.)

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come into existence as early as July 1991", and "were continually coming into existence still [in] the year 1992"[437]. He further asserted that the largest mass grave found is the one at the new Vukovar Cemetery, where there are 938 victims[438]. In an answer to a question that I posed, the witness stated that, in Lovas and Tovarnik, corpses of victims were found in mass graves having markings such as white bands on their arms, and that, "according to the general information, it is known that in these locations, persons of Croat ethnicity were thus marked with white armbands"[439] (cf. *supra*).

388. Croatia further stated, in respect of individual and mass graves, that, upon Serbia's withdrawal from the occupied areas of Croatia in 1995, "mass and individual graves containing the remains of Croat victims of the genocide began to be uncovered. These graves have been painstakingly excavated and recorded by [its] Directorate for Detained and Missing Persons"[440]. As to the numbers of victims in those graves[441], Croatia submitted that,

> "by July 2013, 142 mass graves [plate on] had been discovered in Croatia, containing the bodies of 3,656 victims. Three thousand, one hundred and twenty-one (3,121) of those have been identified. Twenty-seven (27) per cent of these 3,121 bodies were women, and 38.5 per cent of them were older than 60. Thirty-seven (37) minors were also identified."[442]

389. Croatia proceeded that, "[b]y December 2013, over 1,100 such graves have been identified across the formerly occupied territory of Croatia". Croatia added that its efforts to discover the graves have been hindered by "Serbia's practice of removing and reburying victims during its occupation of the region — often in Serbia — in a vain attempt to cover up its atrocities"[443]. In any case, the existence of mass graves had not been denied, and, towards the end of the nineties, such graves — in Croatia as well as in Bosnia and Herzegovina — were fully documented[444].

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[437] CR 2014/9, of 5 March 2014, p. 28.

[438] *Ibid.*, p. 29.

[439] *Ibid.*, p. 35.

[440] CR 2014/10, of 6 March 2014, p. 18.

[441] As to the definition of mass graves, Croatia contends that, since there is no universally accepted definition of a "mass grave" in international law, it thus follows the definition coined by the UN Special Rapporteur of the (former) Commission on Human Rights, appointed "to investigate first hand the human rights situation in the territory of the former Yugoslavia", who defined mass grave as a grave containing three or more bodies; cf. *ibid.*, p. 19, para. 42.

[442] *Ibid.*, p. 19.

[443] *Ibid.*, p. 20.

[444] On the results of the research on the matter, conducted in both Croatia and Bosnia and Herzegovina from 1992 to 1997, cf., e.g., *The Graves — Srebrenica and Vukovar* (eds. E. Stover and G. Peress), Berlin/Zurich/N.Y., Scalo Ed., 1998, pp. 5-334.

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5. Further Clarifications from the Cross-Examination of Witnesses

390. The information provided to the International Court of Justice in the course of the proceedings of the present case concerning the *Application of the Convention against Genocide* leaves it crystal clear, in my perception, that the attacks in Croatia were an onslaught, not exactly a war; there was a widespread and systematic pattern of destruction of the civilian population, of the villagers, on account of their ethnicity. In my perception, as extreme violence intensified, there was, clearly, an intent, not only to displace them forcefully from their homes, but also to destroy them. Further clarifications were provided by the cross-examination of witnesses, that I cared to undertake in the public and closed sittings before the International Court of Justice from 4 to 6 March 2014. Those additional clarifications pertain to three specific topics, namely: *(a)* acts of intimidation and extreme violence; *(b)* marking of Croats with white ribbons; *(c)* burials of mortal remains.

391. As to the first point, in the Court's public sitting of 4 March 2014, I asked the witness (Mr. Kožul) the following question: "What was the decisive factor for sorting the persons detained in Vukovar? Where and how was the selection carried out?" And he replied that they "knew that the army was coming to different parts of the cities. Because of that, we invited people to come to the hospital. Most of the separations took place in the hospital. The rest of the separations took place where people happened to be."[445] Next, in the Court's closed sitting of 6 March 2014, I asked the following question to the witness (Ms Milić), and she provided the following response:

> "— Did you know of, or do you remember, any initiative to contain, to avoid, or to stop the continued acts of violence reported in your statement? (. . .) Do you have knowledge of, or do you remember, any initiative to contain, to avoid, or to stop the continued acts of violence narrated in your statement?
>
> — I did not hear that there were any attempts to help or to defend us."[446]

392. In the International Court of Justice public sitting of 5 March 2014, I proceeded to the cross-examination on the issue of the marking of Croats with white ribbons, thus reported:

> "*Judge Cançado Trindade*: I thank the expert witness very much for his testimony. I have one particular question to ask.
>
> The Data on Victims contained in your statement refers, in Part 2 (paras. 6-9), to victims exhumed from mass and individual graves.

[445] CR 2014/7, of 4 March 2014, p. 20.
[446] CR 2014/11, of 6 March 2014, pp. 23-24.

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And Part 3 (paras. 10-13) refers to persons detained in camps, subjected, as stated in paragraph 13, to violence with 'the utmost level of cruelty'.

In respect of the former, that is, victims exhumed from mass and individual graves, it is mentioned in your statement (para. 8) that 'in certain locations in the Croatian Podunavlje, the killing of Croats who remained to live in their homes was preceded by their marking (white bands on the upper arms)'. To the best of your knowledge, (. . .) did this also happen in respect of the latter, that is, of those detained in camps? If so, did all those so marked have the same fate?

Mr. Grujić [witness]: Persons who were in the camps, were not thus marked as far as I know. Such markings were used in several cases that we have established — precisely in Lovas and Tovarnik — where we found victims in mass graves having these markings. And, according to the general information, it is known that in these locations, persons of Croat ethnicity were thus marked with white armbands."[447]

393. The other point on which further clarifications were obtained from the witnesses, that of burials of mortal remains, was the subject of the cross-examination that I deemed it fit to conduct in the International Court of Justice public sitting of 5 March 2014, reported as follows:

"*Judge Cançado Trindade*: (. . .) I thank the witness very much for her testimony, and I proceed to my questions, pertaining to the burying of the murdered people after the fall of Bogdanovci.

At the end of your statement (last paragraph) it is asserted that, after the destruction of the village of Bogdanovci, those who were buried in the so-called School Square were so 'in such a way that their bodies were wrapped in tents and buried with a bottle next to their bodies. These bottles contained the data of the dead persons'.

Ms Katić: Yes, the data were names and surnames of those persons.

Judge Cançado Trindade: Do you know if the burials described in your statement were attended by the close relatives of the deceased ones? Or were they buried by third persons? In that case, was there a disruption of family life and after-life in Bogdanovci? (. . .) I wonder whether the funerals were prepared and carried out by persons who belonged to the inner family circles of the deceased ones.

Ms Katić: The burials of our dead friends, I was the one to prepare the dead for the burial. In the medical corps, I would remove the clothes, I would put them either in tent halves, or in black sacks, and I would put that bottle containing the names and surnames. There was a young man, Ivica Simunović is his name, his brother was killed.

[447] CR 2014/9, of 5 March 2014, p. 35.

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> He would usually say a prayer, because we had no priest. We had some sacred water, we would sprinkle the dead. Branko Krajina was another person who would assist with the burials of those persons. But sometimes, it was not possible to take the dead bodies out of the places where they were, such as basements or garages. So, if it was not possible to remove the dead body, we would cover it with slack lime.
>
> *Judge Cançado Trindade*: Thank you for this clarification."[448]

394. These further clarifications which ensued from the cross-examination of witnesses in public and closed sittings before the Court, in addition to those lodged with it by means of affidavits, are further evidence of the widespread and systematic pattern of destruction which occurred in the attacks against the civilian population in Croatia which form the *dossier* of the *cas d'espèce*. To that evidence we can also add the findings of the ICTY, of the devastation that took place, in particular in the period 1991-1992, as examined in the course of the present dissenting opinion.

6. Forced Displacement of Persons and Homelessness

395. The case law of the ICTR, likewise, contains relevant indications as to the imposition of unbearable conditions of life upon the targeted groups. In the *Kayishema and Ruzindana* case (Judgment of 21 May 1999), for example, the ICTR adopted the interpretation whereby "deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part"[449] includes

> "methods of destruction which do not immediately lead to the death of members of the group. (. . .) [T]he conditions of life envisaged include rape, the starving of a group of people, reducing required medical services below a minimum, and withholding sufficient living accommodation for a reasonable period, provided the above would lead to the destruction of the group in whole or in part." (ICTR, *Kayishema and Ruzindana*, Judgment of 21 May 1999, para. 116.)

396. In the same vein, in the *Gacumbitsi* case (7 July 2006), the ICTR, after recalling that, in accordance with its jurisprudence, genocidal intent can be proven by inference from the facts and circumstances of a case (ICTR, *Gacumbitsi*, Judgment of 7 July 2006, para. 40), added that these latter could include "the general context", and

> "the perpetration of other culpable acts systematically directed against the same group, the scale of atrocities committed, the systematic tar-

[448] CR 2014/9, of 5 March 2014, pp. 22-23.
[449] Cf. Part XIII (4) of the present dissenting opinion, *supra*.

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geting of victims on account of their membership of a particular group, or the repetition of destructive and discriminatory acts" (ICTR, *Gacumbitsi*, Judgment of 7 July 2006, para. 41).

397. In effect, in the present case concerning the *Application of the Convention against Genocide*, those who were forcibly displaced, expelled from their homes (many of them destroyed), were subjected to unbearable conditions of life, or rather, of seeking to survive. It is not surprising that, in the course of the proceedings in the *cas d'espèce*, both Croatia, in its main claim, and Serbia, in its counter-claim, presented arguments in relation to refugees, albeit in different contexts.

398. As to its claim, Croatia contended that many atrocities were committed against refugees by Serb forces. It stated that nearly 7,000 refugees from neighbouring villages were established in Ilok[450], which was the initial site of refuge for Croats banished from other parts of the region of Eastern Slavonia; according to Croatia, a mass exodus took place from the town on 17 October 1991[451]. During the exodus, the refugees were exposed to humiliation and molestation by the JNA and paramilitary Serbian forces. Many properties were allegedly confiscated[452]. Croats who decided not to leave were subjected to physical and psychological harassment and even killing[453].

399. Croatia furthermore reports additional cases of harassment against Croatian refugees that were leaving Bapska after its occupation. It contends that around 1,000 Croats fled in the direction of Sid in Serbia, when they were stopped by Serb police and later imprisoned. Croatia states that some of them were used as "human shield" to protect Serb forces and others killed, while some others had to look for refuge in the surrounding woods[454]. According to Croatia, Croat refugees in Serb occupied territories were prevented to return home on a permanent basis[455]. It added that the "RSK" charged Croatian refugees who fought in the Croatian forces with various criminal offences and thus created obstacles for their return[456].

400. For its part, as to its counter-claim, Serbia also reported on attacks against Serb refugees on the part of Croatia: according to Serbia, refugee columns and fleeing individuals were targeted and attacked by Croatian forces during August 1995[457]. Serbia further claimed that Croatia imposed physical barriers to the return of Serb refugees, mainly by

[450] Memorial of Croatia, para. 4.64.
[451] *Ibid.*, para. 4.62.
[452] *Ibid.*, para. 4.65.
[453] *Ibid.*, para. 4.66.
[454] *Ibid.*, para. 4.85.
[455] Reply of Croatia, paras. 10.34 and 10.40.
[456] *Ibid.*, para. 10.42.
[457] Counter-Memorial of Serbia, paras. 1242-1257; cf. also Rejoinder of Serbia, paras. 745-761.

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destroying houses and properties[458], in addition to legal barriers, *inter alia*, by enacting laws to confiscate their properties[459].

401. Both Croatia and Serbia cited common legal efforts to address the issues of refugees[460], but each contending Party claimed they were violated by the opposing Party[461]. Thus, it can be concluded that both Parties have addressed, and acknowledged, the issue of attacks against refugees, and in more generic terms, the treatment of refugees by the opposing Party. In the present Judgment, the International Court of Justice referred to evidence produced before it, but in particular in relation to the counter-claim only[462]. Yet, the dossier of the present case clearly shows that there were refugees on *both* sides, under attacks or harassment and humiliation, as demonstrated by pleadings of *both* Parties.

402. If one considers, in the course of the proceedings of the present case, the depth of the arguments of the contending Parties in relation to the main claim as a whole, to try to put the counter-claim on an almost equal footing as the claim would seem, to a certain extent, unfair. Nothing would justify it, as there is a lack of proportion between them. In effect, the contending Parties have submitted voluminous evidence in relation to the claim including witness statements (both in the written and oral phases), photographs, mass graves data, and other important material evidence of the alleged genocide committed in Croatia. In contrast, the evidence submitted in support of the counter-claim does not seem comparable, in quantitative and qualitative terms.

403. In my perception, the evidence submitted by Croatia in support of its main claim is far more convincing in terms of the *actus reus* and *mens rea* of genocide. Likewise, the contending Parties' arguments, at both the written and oral phases of the proceedings, have dedicated far greater

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[458] Rejoinder of Serbia, paras. 773-774.

[459] *Ibid.*, paras. 775-780.

[460] Cf., *inter alia*, the role of UNPROFOR in securing the return of refugees and displaced persons to their homes, Memorial of Croatia, para. 2.125; the signature of the Dayton Agreement of 1995, addressing *inter alia* the issues of refugees, *ibid.*, para. 2.153-2.154. Cf. also the role of the UN Transitional Administration for Eastern Slavonia (UNTAES — established pursuant to Security Council resolution 1037 (1996), which had among its duties to enable all refugees and displaced persons to exercise the right of free return to their homes), *ibid.*, paras. 2.155-2.158. Cf., moreover, the Agreement on the Procedures for Return (addressing the issue of refugees), signed by Croatia, UNTAES, and the UN High Commissioner for Refugees (UNHCR) in 1997, *ibid.*, para. 2.157; and cf. further the Vance Plan of December 1991, in Reply of Croatia, paras. 10.12-10.24.

[461] Cf. Memorial of Croatia, paras. 2.129 and 2.148; Counter-Memorial of Serbia, para. 570; Rejoinder of Serbia, paras. 639-685. As to the Vance Plan, cf. Reply of Croatia, paras. 10.39-10.43. The mandate of the UNTAES, however, was considered a major success; cf. Memorial of Croatia, para. 2.158.

[462] Cf. paras. 458, 484 and 492.

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attention to the main claim than to the counter-claim. The evidence produced as to this latter[463] is, in contrast, far less convincing; this does not mean that war crimes were not committed, e.g., in the course of the "Operation Storm", with its numerous Serb (civilians) victims. The present Judgment of the International Court of Justice recounts aspects of the counter-claim (Part VI) that could have been considered in less extensive terms[464], without an apparently superficial attempt to address the claim and the counter-claim on an almost equal footing.

404. Last but not least, it is nowadays widely known that the problem of forced migrations assumed great proportions in the wars in the former Yugoslavia during the nineties, with thousands of refugees and displaced persons from Croatia, Bosnia-Herzegovina and Kosovo, successively. There are accounts and studies of the sufferings and almost unbearable conditions of life to which victims were exposed, not seldom with the separation and dissolution of families and the destruction of homes[465].

405. The humanitarian crisis of mass forced migrations began with a first wave of internally displaced persons (end of 1991), followed by waves of refugees from Croatia and Bosnia-Herzegovina (early 1992 onwards). It was estimated, half a decade later, that there were 180,000 internally displaced persons in Croatia, as well as 170,000 refugees from Bosnia-Herzegovina (over 80 per cent of them being Bosnian-Croats)[466]. Non-governmental organizations (NGOs) were engaged in assisting the voluntary repatriation or return of refugees to Croatia and Bosnia-Herzegovina. Mass forced migrations were another component of the widespread and systematic pattern of extreme violence and destruction in the wars in the Balkans during the nineties.

406. It cannot pass unnoticed here that, in its Decision of 11 July 1996, in the *Karadžić and Mladić* case, the ICTY (Trial Chamber), in reviewing the indictments, invoked the charge of genocide (ICTY, *Karadžić and Mladić*, decision of 11 July 1996, para. 6), and stressed the subhuman conditions of detention of civilians, with the occurrence of crimes (such as torture and rape of women inside the camps or at other places) (*ibid.*, para. 13); it further addressed the devastating effects of forced displace-

[463] E.g., in relation to Operation Storm (August 1995).

[464] There would, e.g., hardly be anything to add to what the International Court of Justice found, in the present Judgment, in relation to the transcript of the Brioni meeting of 31 July 1995 (paras. 501-507).

[465] Cf., *inter alia*, e.g., N. Mrvić-Petrović, "Separation and Dissolution of the Family", *Women, Violence and War — Wartime Victimization of Refugees in the Balkans* (ed. V. Nikolić-Ristanović), Budapest, Central European University Press, 2000, pp. 135-149; N. Mrvić-Petrović and I. Stevanović, "Life in Refuge — Changes in Socioeconomic and Familial Status", in *ibid.*, pp. 151-169.

[466] Cf., for an account, *inter alia*, P. Stubbs, *Displaced Promises — Forced Migration, Refuge and Return in Croatia and Bosnia-Herzegovina*, Uppsala/Sweden, Life & Peace Institute, 1999, pp. 1 and 21-22.

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ments and abandonment (meant to be definitive) of homes (ICTY, *Karadžić and Mladić*, decision of 11 July 1996, para. 14), and of expulsion and deportation (*ibid.*, paras. 16-17)[467].

7. *Destruction of Cultural Goods*

407. Earlier on in the present dissenting opinion, in examining the widespread and systematic pattern of extreme violence and destruction in the factual context of the *cas d'espèce*, I dwelt upon the destruction of group culture[468]. In addition to the examples already mentioned, I see it fit now to consider the shelling of Dubrovnik (October-December 1991), as it was the object of particular attention on the part of the contending Parties in the course of the proceedings of the present case.

(a) *Arguments of the contending Parties*

408. According to Croatia, Serb politicians were planning to include the city of Dubrovnik in Serbian territory; the JNA carefully planned and premeditated the attacks against the Old Town, and the indiscriminate shelling of Dubrovnik began on the 1 October 1991 and continued until December 1991; under fear, 34,000 were expelled from their homes, and the inhabitants who remained in the occupied surrounding villages were taken to camps and some were tortured[469]. There were also killings[470]. Supplies were cut off, while the town kept being bombarded with heavy artillery. Inhabitants were denied access to medical assistance, food and water. Mistreatments, physical and mental intimidation, and house destruction were routinely conducted[471].

409. Furthermore, Croatia added, there was a deliberate intent to destroy important symbols of Croatian culture; many cultural and sacral objects were destroyed in Dubrovnik, mainly in the Old Town: the JNA caused damage to at least 683 monuments, such as churches, chapels, city walls and others[472]. In its attacks against Dubrovnik, it proceeded, the JNA tried to destroy the town in a way that could not be justified by any principle of military necessity or logic, thus pointing to its genocidal

[467] It also addressed the "policy of 'ethnic cleansing'" (paras. 60-62, 90 and 93-95).

[468] Cf. Part X (4) of the present dissenting opinion, *supra*.

[469] Memorial of Croatia, paras. 2.77, 3.90 and 5.237.

[470] According to Croatia, some 161 civilians were killed, 272 wounded, and one is still missing; *ibid.*, para. 5.237.

[471] According to Croatia, 11 men from the villages of Bistroće and Beroje were brought to camp Morinje, where they were subjected to mistreatments of all sorts including torture; *ibid.*, para. 5.238. Some others were made prisoners and taken in "the camps Morinje, in Boka Kotorska and Bileća in Bosnia and Herzegovina, and some were beaten to death"; *ibid.*, para. 5.240.

[472] *Ibid.*, para. 5.241.

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intentions[473]. Croatia further referred to the ICTY (Appeals Chamber) Judgments relating to Dubrovnik, in the *Strugar* case (of 17 July 2008) and in *Jokić* case (of 30 August 2005), and claimed that the conduct in Dubrovnik was an attempt to commit genocide[474].

410. Serbia also referred to the ICTY's convictions and sentencing of M. Jokić and P. Strugar for the shelling of the Old Town of the city on 6 December 1991[475], and claimed that Croatia had failed to prove that any of the crimes were committed or attempted with genocidal intent. Serbia challenged the witness statements (for allegedly not fulfilling the requirements of affidavits)[476]. It added that the ICTY addressed the alleged crimes in the area of Dalmatia and concluded that they did not fulfil the requirements of extermination as crime against humanity (the killings were allegedly not committed on a large scale)[477]. In Serbia's view, no genocidal intent was demonstrated in relation to the events in Dubrovnik[478].

411. As to the differences concerning the number of victims, Croatia observed that the charges in the *Strugar* and *Jokić* cases pertained only to the attacks on Dubrovnik in December 1991 (commencing with the shelling on 6 December 1991), and did not give detailed consideration to the crimes committed in the period between 1 October 1991 and 5 December 1991, other than by way of background context. It added that the deaths in Dubrovnik occurred over a much longer period, and not solely as a result of the December attacks[479].

412. Croatia acknowledged that the *Jokić* and *Strugar* cases did not provide the exact number of victims killed by the attacks on Dubrovnik in October and November 1991, since the main focus was on the events of 6 December 1991; the charges in those two cases did not take into account the crimes committed between 1 October 1991 and 5 December 1991[480]. According to Croatia, both the *Jović* and *Strugar* cases support its claims that they refer to the factual background of what occurred in Dubrovnik, i.e., to the shelling of the Old Town of Dubrovnik[481].

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[473] Memorial of Croatia, para. 5.236.
[474] *Ibid.*, para. 8.27.
[475] Cf. Counter-Memorial of Serbia, para. 924.
[476] *Ibid.*, para. 920.
[477] *Ibid.*, paras. 994 and 927, and cf. paras. 923-924.
[478] *Ibid.*, para. 925.
[479] Cf. Reply of Croatia, para. 6.97. Croatia further noted that the ICTY itself referred to the shelling of Dubrovnik in both October and November 1991; cf. *ibid.*, paras. 6.99-6.105. And, according to the ICTY, "the evidence establishes that the shelling of the Old Town on 12 November was intense"; cf. *ibid.*, para. 6.100.
[480] Cf. *ibid.*, paras. 6.101-6.102.
[481] Cf. *ibid.*, paras. 6.98-6.105.

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413. Moreover, Croatia quoted the ICTY's *Strugar* decision, where it was stated that: *(a)* "the Old Town was extensively targeted by JNA"; *(b)* "no military firing points or other objectives, real or believed, in the Old Town were targeted by the JNA"; *(c)* as a consequence to the previous fact, "in the Chamber's finding, the intent of the perpetrators was to target civilians and civilian objects in the Old Town"; *(d)* the ICTY found as a fact that the JNA had carefully planned and premeditated the attack and it was not a spontaneous action[482].

414. Serbia retorted that Jokić and Strugar were not charged for crimes against humanity or genocide in those cases, and claimed that the attacks on Dubrovnik do not satisfy the requirements of genocide[483]. It further argued that the attacks were not authorized by the leadership of the JNA, and that there was no policy aimed at the destruction of the Croats[484]. In its view, the *Strugar* and *Jokić* cases do not contain evidence that the attacks on Dubrovnik were ordered or instructed by the leadership of Serbia[485].

(b) *General assessment*

415. As just seen, much of the debate between Croatia and Serbia was around the cases against M. Jokić and P. Strugar — JNA officials alleged to be responsible for the attacks of 6 December 1991 against Dubrovnik — before the ICTY. Yet, Dubrovnik was under heavy attack by the JNA not only on 6 December 1991, but for a much longer period, during which a number of concomitant occurrences took place during and after the attacks, namely, torture, transfer of prisoners, beatings and killings, disclosing altogether a pattern of extreme violence and destruction.

416. Serbia stated, as to occurrences in Dubrovnik, that there were no charges of genocide in the aforementioned cases in the ICTY[486]. But what can be the relevance of the absence of the charge of genocide for the present case opposing Croatia to Serbia before the International Court of Justice, as regards the occurrences in Dubrovnik, considering that different standards of proof apply (cf. *supra*) in cases pertaining to individual (domestic) criminal responsibility and to international State responsibility?

417. All groups and peoples have the right to the preservation of their cultural heritage, of their *modus vivendi*, of their human values. The

[482] Cf. Reply of Croatia, paras. 6.103-6.105.
[483] Cf. Rejoinder of Serbia, paras. 408 and 473.
[484] Cf. *ibid.*, para. 474.
[485] Cf. *ibid.*, para. 475.
[486] Cf. *ibid.*, paras. 403-404; and cf. Reply of Croatia, paras. 6.97-6.105.

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destruction of cultural goods, that occurred in the JNA bombardments of Dubrovnik, shows lack of and — worse still — disdain for, human values[487]. There was a deliberate destruction, by the JNA, of cultural goods in the old city of Dubrovnik (part of UNESCO's World Heritage List, inscription in 1979, extension in 1994); the discriminatory intent against the targeted group was manifest[488], as acknowledged in the case law of the ICTY.

418. In my perception, this form of destruction is indeed related to physical and biological destruction, as individuals living in groups cannot prescind from their cultural values, and, in any circumstances, in any circumstances (even in isolation), from their spiritual beliefs. Life itself, and the beliefs that help people face the mysteries surrounding it, go together. The right to life and the right to cultural identity go together, they are ineluctably intermingled. Physical and biological destruction is interrelated with the destruction of a group's identity as part of its life, its living conditions.

419. In a factual context disclosing a widespread and systematic pattern of destruction, can we, keeping in mind the victims, really dissociate physical/biological destruction from cultural destruction? In my perception, not at all; bearing in mind the relevance of culture, of cultural identity, to the safeguard of the right to life itself, the right to live with dignity. In this respect, I had the occasion to ponder, almost one decade ago, in another international jurisdiction, that:

> "The concept of culture — originated from the Roman *colere*, meaning to cultivate, to consider, to care for and to preserve, — was originally manifested in agriculture (care of the land). With Cicero, the concept came to be applied to matters of the spirit and the soul *(cultura animi)*. With the *passing of time*, it became associated with humanism, with the attitude of preserving and taking care of the things of the world, including those in the past. The peoples — human beings in their social milieu — faced with the mystery of life, develop and preserve their cultures in order to understand and relate with the outside world. Hence the importance of cultural identity as a component or aggregate of the fundamental right to life itself."[489]

[487] Cf. C. Bories, *Les bombardements serbes sur la vieille ville de Dubrovnik — La protection internationale des biens culturels*, Paris, Pedone, 2005, pp. 145 and 169-170, and cf. pp. 150-154.

[488] Cf. *ibid.*, pp. 150-157 and 161-163.

[489] IACtHR, case of the *Sawhoyamaxa Community* v. *Paraguay* (Judgment of 29 March 2006), separate opinion of Judge A. A. Cançado Trindade, para. 4.

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420. I have already pointed out, in the present dissenting opinion, that, in its case law, — e.g., its decision of 1996 in the *Karadžić and Mladić* case, — the ICTY was particularly attentive to the destruction of cultural and religious sites. And, in its Judgment of 2001 in the *Krstić* case, the ICTY properly warned that the pattern of destruction as a whole (including the destruction of cultural and religious heritage) is to be duly taken into account, as evidence of the intent to destroy the group[490].

421. The International Court of Justice, contrariwise, has in the present Judgment preferred to close its eyes to it, repeatedly remarking (Judgment, paras. 136, 388-389), in a dismissive way, that the destruction of cultural and religious heritage does not fall under the categories of acts of genocide set out in Article II of the Convention against Genocide. To attempt to dissociate physical/biological destruction from the cultural one, for the purpose of the determination of genocide, appears to me an artificiality. Whether one wishes to admit it or not, *body and soul come together*, and it is utterly superficial, clearly untenable, to attempt to dissociate one from the other. Rather than doing so, one has to extract the consequences ensuing therefrom.

XIV. *Actus Reus* of Genocide: Widespread and Systematic Pattern of Conduct of Destruction: Extreme Violence and Atrocities in some Municipalities

422. With the aforementioned considerations, I have completed the examination, in the present dissenting opinion, of all the components of the onslaught, in a widespread and systematic pattern of destruction, brought to the attention of the Court in the present case. The time has now come to examine the *actus reus* and the *mens rea*, in the factual context of the present case concerning the *Application of the Convention against Genocide*.

1. Preliminary Methodological Observations

423. Let me turn attention first to the element of *actus reus*. A careful examination of the arguments of the contending Parties, as well as witness statements, presented to the Court, discloses a systematic pattern of conduct of destruction, in the period of the armed attacks of Serb forces in Croatia, in particular in some selected municipalities, — namely, Lovas, Ilok, Bogdanovci and Vukovar (in the region of Eastern Slavonia), and Saborsko (in the region of Lika). The events occurred therein, as narrated in sequence, can, in my perception, be clearly examined in the light of the relevant provisions of the Convention against Genocide (in

[490] Cf. Part X (4) of the present dissenting opinion, *supra*.

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particular Article 2), to establish the *actus reus* of the crime of genocide (and also, in my understanding, the *mens rea* — *infra*).

424. In other villages, there was also a wide range of serious crimes committed, for example, in Poljanak, Dalj, Bapska, Tovarnik. I draw attention to these and other villages in other parts of the present dissenting opinion. But here, after reviewing the occurrences in all the affected villages, I am focusing only on the five selected villages: Vukovar, Saborsko, Ilok, Bogdanovci and Lovas, in view of their complete devastation amidst the extreme violence and the perpetration of atrocities therein, disclosing a widespread and systematic pattern of conduct of destruction (*actus reus*, to my mind together with *mens rea*).

425. It seems regrettable to me that the International Court of Justice did not address all the localities referred to by Croatia, and some villages or municipalities were excluded from the reasoning of the Court. Such is the case, e.g., of Ilok, which was devastated. The Court's Judgment seeks to explain its own approach as follows:

> "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 will focus on the claims 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." (Judgment, para. 203.)

426. This outlook of the Court, trying to explain its own selective choice of municipalities, seems unsatisfactory to me, given the Court's overall conclusion as to genocide, dismissing, *tout court*, *mens rea*, without giving its reasons for it. In this respect, the Court's Judgment should have examined all villages where Croatia claimed that serious crimes were committed. A more comprehensive, if not exhaustive, examination of the systematic pattern of conduct of destruction would have been appropriate — and indeed necessary — in a case of the importance of the *cas d'espèce*.

2. *The Systematic Pattern of Acts of Destruction*

427. The review of the evidence, and in particular witness statements, challenged in general terms by Serbia, reveal that many atrocities were committed in various municipalities. These atrocities range from arbitrary and large-scale killings of members of the Croat population (Article II *(a)* of the Genocide Convention); causing serious bodily or mental harm to members of the Croat population, including by cruel acts of violence (such as mutilation of limbs), torture and sexual violence (Article II *(b)* of the Genocide Convention); and deliberately inflicting conditions

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of life to bring about the destruction of the Croat population and its elimination from the regions concerned, including destruction of towns and villages, systematic expulsion from homes (Article II *(c)* of the Convention).

428. Witness statements in relation to five municipalities refer to similar events having taken place in those municipalities. These acts, examined closely, demonstrate the consistent and systematic pattern of acts in breach of provisions of the Convention against Genocide, evidencing a genocidal plan. I thus proceed to a review of those breaches in the selected municipalities, as brought to the Court's attention.

3. Killing Members of the Croat Population (Article II (a)*)*

429. "Killings of members of the group" is an act prohibited by the Genocide Convention, within the meaning of Article II *(a)*. A violation of this provision requires evidence that the victim was killed by an unlawful act, with the intention to kill or to cause serious bodily harm which the perpetrator should reasonably have known might lead to death[491]. The question is thus whether the evidence submitted by the Parties, and in particular witness statements examined in the selected municipalities, support a finding that there were "killings of members of the group". Upon review of the evidence, it stems clearly that there were killings of members of the Croat group in various municipalities in Croatia. Such killings occurred by unlawful acts, with the intention to kill or cause serious bodily harm to the victims.

430. There are statements in the record of eyewitnesses concerning killings of members of the civilian population of Croatian nationality during the occupation of Lovas. The village was invaded and occupied by the JNA on 10 October 1991, after a 10-day heavy shelling by the JNA, causing the death of at least 23 Croat civilians[492]. During the attacks in occupied Lovas, defenceless civilian victims were killed: victims hid in the basements during attacks and Serbs tossed bombs in the basements[493]. Captured Croats were used as human shields to enter Croats' houses[494]. Several men were taken and separated from their families, and were then executed[495].

431. In an episode which became known as the *"minefield massacre"*, the JNA, on 17 October 1991, singled out all the Croat males in Lovas (around 100, aged between 18 and 65), of whom 50 were taken onto a

[491] Cf. Memorial of Croatia, paras. 7.59-7.61, and Counter-Memorial of Serbia, paras. 76-78.

[492] Cf. CR 2014/12, of 7 March 2014, p. 28, para. 59, and CR 2014/8, of 5 March 2014, p. 17, para. 23.

[493] Cf. witness statement of M. M., in Memorial of Croatia, Annex 99.

[494] *Ibid.*, para. 4.126.

[495] *Ibid.*, para. 4.122.

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minefield[496]. On their way, one of them was shot and killed by the Serb forces because he was unable to keep up with the rest of the group, due to being stabbed in the leg during a torture session the previous night[497]. As soon as the members of the group arrived in the minefield, they were forced to hold each other's hands and to walk forward on the minefield[498].

432. A witness reported that, at a certain point, they saw some of the mines ahead of them. A young Croat man was pushed onto one of the mines, which immediately exploded and initiated a chain detonation of the mines around the area; according to the Applicant, the explosions immediately killed 21 people and left 12 wounded. Thereafter, Serb soldiers asked for the wounded to shout and raise their hands so that they could be helped. Witnesses described that, as soon as the wounded raised their hands and shouted for help, the Serb soldiers began to shoot and to kill them[499]. The dead bodies were taken to a mass grave[500].

433. Serbia acknowledged that "fourteen accused are currently standing trial before the Belgrade District Court for the alleged killing of 68 Croat victims from the village of Lovas"[501]. Moreover, in Ilok, for instance, there were also reports of killings of Croats by Serbs: for example, the statement of F. D. (who was kept in custody in Ilok from 1 November 1991 to 31 March 1992), reported brutal killings, including by beating to death[502].

434. In Bogdanovci, there were many accounts of killings of Croats during the occupation. Many Croats were allegedly murdered in their houses. Croats were killed while attempting to flee the village[503]. According to Croatia, many killings of Croats were committed while they were being forced to go outside their houses, or inside the houses when they would rather stay inside[504]. The village was occupied by paramilitaries and JNA on 10 November 1991 after it had been attacked by heavy artillery and infantry. Marija Katić[505], e.g., testified that the village was completely destroyed, and that "during the destruction ten people were killed, were buried in the so-called School Square in such a way that their bodies were wrapped in tents and buried with a bottle next to their bodies. These bottles contained the data of the dead persons"; other witnesses also reported killings of Croats and torture to death.[506]

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[496] CR 2014/10, of 6 March 2014, para. 24, p. 15.

[497] Cf. Memorial of Croatia, paras. 4.118-4.119 and 4.123-4.126; and witness statements of S. P., Annex 97, and of P. V., Annex 95.

[498] Cf. *ibid.*, para. 4.125; and witness statement of Z. T., Annex 102.

[499] Cf. *ibid.*, para. 4.125, and witness statements of Z. T., Annex 102, and of L. S., Annex 98.

[500] On the mass grave in Lovas, cf. *ibid.*, Annex 168B.

[501] Counter-Memorial of Serbia, para. 720.

[502] Memorial of Croatia, Annex 55.

[503] Cf. *ibid.*, para. 4.51, and cf. witness statements of A. T., in *ibid.*, Annex 39.

[504] *Ibid.*, para. 4.52, and Annexes 41 and 45.

[505] *Ibid.*, Annex 40.

[506] Cf. *ibid.*, Annexes 41 and 45.

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435. Likewise, in Saborsko, there is evidence of killings of Croats; there are accounts, e.g., of some men who were lined up and shot, and women who were shot in the back[507]. There are also accounts of bodies of Croats being buried in a mass grave[508]. According to M. M.,

> "[a]fter the fall of Saborsko, nobody buried the dead people so they were all left on the places where they died. In the last 15 days, because of the arrival of the blue helmets, the army buried those people with excavators on the places where they got killed and the graves were marked with the crosses that had no names or surnames on them"[509].

As to the acts having taken place in Saborsko, Serbia significantly accepted that most of them had been confirmed by the judgment of the ICTY[510].

436. There is, moreover, extensive evidence referring to killings of Croats in Vukovar[511]; according to the record, 1,700 persons were allegedly killed (70 per cent civilian), and around 2,000 were killed after the occupation[512]. It stems from the case file that a concentration camp was established in Velepromet, to be later used for organized killings. According to a witness statement, about 50 people were executed in that camp before the final fall of Vukovar. The hospital of Vukovar was bombed with two 250 kg bombs[513].

437. In central Vukovar, e.g., executions took place[514]: grenades were thrown in houses and streets were covered with dead bodies. According to E. M.[515], every day 4-5 people were killed by weapons or slaughtered. He stated that houses were set on fire, and added that, in Velepromet, there were mass executions of people (at least 50 corpses or even more). Another witness, F. G., reported having been cut on the forehead and having seen about 15 decapitated bodies in a hole and a garbage pit in Velepromet, and heads scattered; he also saw a man being decapitated[516]. In Ovčara, an alleged mass execution of 260 people took place, and they were buried in a mass grave[517]. Exhumation took place in 1996 and 145 bodies were identified, but the whereabouts of 60 of the patients taken from the hospital is still unknown[518].

438. Other civilians were taken from the hospital to Velepromet, a warehouse which was basically a concentration camp, where 15,000 Cro-

[507] Cf. Memorial of Croatia, paras. 5.149-5.152.
[508] Cf. *ibid.*, Annexes 364-365.
[509] *Ibid.*, Annex 365.
[510] Counter-Memorial of Serbia, para. 841.
[511] In relation to Vukovar, cf. Memorial of Croatia, paras. 4.139-4.192.
[512] *Ibid.*, para. 4.139.
[513] *Ibid.*, para. 4.154.
[514] *Ibid.*, paras. 4.164-4.167.
[515] *Ibid.*, Annex 126.
[516] *Ibid.*, Annex 121.
[517] *Ibid.*, para. 4.175.
[518] *Ibid.*, para. 4.178.

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ats were sent during the occupation. In Velepromet, atrocities took place, including decapitations and killings. According to F. J., mass murders occurred in Velepromet[519]. Significantly, in relation to the greater Vukovar area, Serbia acknowledged that "[t]he ICTY has indicted several people for the crimes allegedly committed in Vukovar, but the number of deaths for which the accused are charged is significantly smaller than claimed by [Croatia]"[520].

439. In conclusion, it seems clear from the evidence that there was a consistent and systematic pattern of killings of Croats across the municipalities examined. All witness statements in relation to each village report killings, and the intention to kill, as part of the physical element of the crime. The examination of the case record and the corresponding evidence point to a systematic pattern of killing of Croats. There seems thus to be sufficient evidence of the *actus reus* of "killing members of the group" under Article II *(a)* of the Genocide Convention.

4. Causing Serious Bodily or Mental Harm to Members of the Group (Article II (b)*)*

440. Article II *(b)* of the Genocide Convention prohibits "causing serious bodily or mental harm to members of the group". As to the physical element of this prohibited act, the contending Parties agree that serious bodily or mental harm does not need to be permanent and irremediable, and that sexual violence crimes can fall within the ambit of this provision[521]. Upon review of the evidence submitted by the Parties, and in particular witness statements examined in the selected municipalities, it is clear that there occurred serious "bodily and mental harm" committed against members of the Croat population across various municipalities in Croatia.

441. Torture, beatings, maltreatment and sexual violence against Croats were common denominators in the evidence produced before the Court. As to Lovas, for example, there were accounts of torture, maltreatment and beatings as well as humiliation suffered therein; those accounts provide evidence of "serious bodily and mental harm" committed against members of the population. An illustration is the statement of witness P. V. concerning events during the occupation of Lovas[522]. She testified that they were held during the day in the "collective yard", and some were kept during the night. The witness reported beatings of those in captivity and torture: she stated that "[t]hey would beat the victims every morning in front of everyone". The witness reported having to dis-

[519] Memorial of Croatia, Annex 129.
[520] Counter-Memorial of Serbia, para. 741.
[521] Cf. Memorial of Croatia, paras. 7.62-7.64, and Counter-Memorial of Serbia, paras. 79-81.
[522] *Ibid.*, Annex 95.

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arm mines; she named some of the victims of torture whom she knew personally[523].

442. There was a series of testimonies of heavy beatings. Stjepan Peulić, e.g., testified about interrogation methods and cruel torture:

> "Petronije slapped me repeatedly and then hit me with his boot in the chin, which left a scar and two teeth were broken; he continued beating me. At the same time, Ljuban Devetak started calling people, who were then taken out and beaten with iron tubes and stabbed with bayonets before us."[524]

The statements of P. M.[525] and J. K.[526] also referred to heavy beatings.

443. Similar brutalities were reported to have occurred in Ilok; for example, when thousands of Croatian civilians were leaving the city in a convoy, they were exposed to humiliation and molestation by the JNA and paramilitaries, who also robbed them. Croats that did not wish to leave their homes were subject to physical and psychological harassment, robbery and arbitrary detention. Witness P. V., e.g., reported living in fear to have to leave his home[527]. He stated that

> "[p]eople would work for days without any food or any compensation. The Serbs would humiliate us all the time. (. . .) We were not allowed to gather publicly. When we walked on the streets, for example, the Serbs (. . .) would hit us with rocks and insult us."[528]

Witness M. V.[529] also reported having been tortured for four years.

444. In Bogdanovci, there were also reported cases of torture and maltreatment of Croats. Heavy attacks causing serious bodily injury were also a common denominator in the witness statements. According to Marija Katić, there were artillery attacks every few days (as in August 1991), destroying family houses and farming objects. Witness M. B. also testified about cases of torture, including the stretching of a Croat on a tree in front of a church until he died[530]. Similar cases of bodily and mental harm were reported in Saborsko. A witness reported, e.g., that, in Saborsko, while the commanders were issuing the orders to

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[523] Memorial of Croatia, Vol. II, Annexes, p. 284.
[524] *Ibid.*, Annex 97.
[525] *Ibid.*, Annex 101.
[526] *Ibid.*, Annex 104.
[527] *Ibid.*, Annex 58.
[528] *Ibid.*, Vol. II, Annex 58, p. 165.
[529] *Ibid.*, Annex 59.
[530] *Ibid.*, Annex 41.

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kill the civilians, they used to say that these latter were all "Ustashas", and should all be killed[531].

445. In Vukovar, serious bodily and mental harm was also reported to have been committed. There were accounts of torture in Velepromet; civilians were mistreated and experienced mental distress. There were also accounts of sexual violence, humiliation and cutting of limbs. The narrative of witness Franjo Kožul, e.g., reports of bodily and mental harm having been inflicted upon Croats from Vukovar. He reported that he "could hear" shots, people screaming and sobbing, hits, beating, among other brutalities. He added that:

> "As we entered the stable, we had to pass through a cordon of men who beat us with everything, the cordon was about 30 metres long. They ordered me to make a list of people that were there, so I knew the number, I made a list of 1242 people, in alphabetical order. After some time I found out that in another stable were 480 men. They were offending us, beat us, maltreated us (. . .). During the first few days we were sitting and sleeping one over the other, on bare concrete. They would give us some water, one little slice of bread and some cheese, twice a day, and they beat us and tortured us 24 hours a day. I cannot describe all kinds of physical and psychological tortures, I would never imagine that people we lived and worked with would do that crime." [532]

446. In a similar vein, witness H. E. testified to daily rapes by Serbian police and army officers upon her arrival to prison. The rapes happened in the cell in front of other female prisoners. She also testified to beatings and mental abuse[533]. Likewise, M. M. also testified to repeated sexual violence, maltreatment and mental distress: she was taken with her two-month-old baby and six-year-old sister to Serbia, and then to Vukovar, where they were both raped repeatedly by local Serbs. She testified to the killing of her husband and the mental harm she suffered. She reported that she had to perform forced labour, and, if she did not work, she would not have any food. She also testified about having been tortured, and about repeated rapes by several men, lasting for hours (and in front of her little sister who was very afraid all the time), and with the use of objects causing heavy bleeding[534].

447. Witness T. C. stated that Chetniks "were maltreating, expelling, threatening, beating, raping and killing on a daily basis. They were harshly terrorizing us. All our men, who were capable of work, were taken to camps". Some of them were ordered to keep on "digging up

[531] Memorial of Croatia, Annex 365, Statement of M. M.
[532] *Ibid.*, Annex 114.
[533] *Ibid.*, Annex 116.
[534] *Ibid.*, Annex 117.

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holes"; they "never returned to their homes", and no one learned anything about them anymore. The witness testified that she was raped, and further stated that "Croats had white ribbons at our gate in order to enable Chetniks who were not from our village to recognize us" [535].

448. In conclusion, it stems clearly from the evidence in the case file that, across the municipalities examined, victims suffered serious bodily and mental harm in the form of torture, mistreatment, beatings, sexual violence, psychological distress and forced labour. These accounts were not isolated events; they were repeated in testimonies of witnesses from different municipalities. The aforementioned evidence a systematic pattern of the prohibited acts of destruction, demonstrating the physical element of the acts prohibited under Article II *(b)* of the Genocide Convention.

5. Deliberately Inflicting on the Group Conditions of Life Calculated to Bring about Its Physical Destruction in Whole or in Part (Article II (c)*)*

449. "Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part" is a prohibited act under Article II *(c)* of the Genocide Convention. As to the physical element *(actus reus)*, Serbia recognized that systematic expulsion from homes can fall within the scope of this provision, if such action is carried out with genocidal intent and forms part of a manifest pattern of conduct that is capable of effecting the physical destruction of the group, and not simply its displacement elsewhere[536]. Thus, the question left is whether, upon analysis of the case file, and in particular witness statements examined in the selected municipalities, it can be concluded that there was a violation of Article II *(c)* of the Convention.

450. Those witness statements referred to, in addition to rape and sexual violence, also to deprivation of food and basic conditions of life; they also reported on deportation from entire regions. In Lovas, e.g., there were measures which caused the fleeing of Croats, such as the destruction of homes and deportations. According to J. K., before the occupation Lovas had 1700 residents, 94 per cent of whom were Croats; later on, "they settled around 1500 Serbs" there, and, in "the occupied Lovas there remained about 100 Croats, 25 people in mixed marriages and 144 Serbs from Lovas. The settlers arrived in cars or tractors and they moved into our houses with the permission of the housing commission"[537].

[535] Memorial of Croatia, Annex 128.
[536] Cf. Counter-Memorial of Serbia, paras. 83-84, and Rejoinder of Serbia, para. 333.
[537] Memorial of Croatia, Annex 104, p. 316.

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451. In Ilok, the statement of P. V. reported of being forced to leave his house and remaining in fear to have to leave it; he added that

> "[p]eople would work for days without any food or any compensation. The Serbs would humiliate us all the time. (. . .) We were not allowed to gather publicly. When we walked on the streets for example the Serbs would spit on us from the church, they would hit us with rocks and insult us." [538]

In relation to Ilok, it is significant to note that even Serbia itself acknowledged that "[t]he Prosecutor of the ICTY charged Slobodan Milošević for deportation or forcible transfer of inhabitants from Ilok" [539]. Likewise, in Bogdanovci, there were accounts of civilians being forced to leave, and the occupation was designed to decimate the population of the village through destruction of the houses, farms and their infrastructure, and churches. It appears that the occupation was designed to make the life of Croats impossible. The experience of D. B. is illustrative of how the attack made life in Bogdanovci impossible [540].

452. The village of Saborsko, likewise, appeared to have been completely destroyed. According to the testimony of M. M., the intention was "to clean" ethnically the village [541]. In the same vein, A. S. stated that bombs were thrown from a plane on the village and houses and churches were set on fire; the witness further testified to people taking goods from Saborsko [542]. Similarly, M. M. testified that "[a]fter Saborsko was attacked, Nedjeljko Trbojević called 'Kičo', during the action of 'cleaning', went from house to house and he threw bombs", and "burnt a few houses with rocket launchers" [543].

453. It may be recalled that Serbia acknowledged that the Judgment of the ICTY (Trial Chamber) in the *Martić* case confirmed the November 1991 attack on the village, and "most of the acts alleged to have taken place in Saborsko" [544]. As to Vukovar, there were, likewise, accounts of attempts to destroy all signs of Croatian life and culture in the city, destruction of property and heavy bombings. The majority of the people of the city stayed in basements for three months and common shelters, and many got killed while trying to get food, water and other supplies [545].

454. D. K. was in Vukovar until he was wounded; then he was loaded into a bus and deported to Serbia. He testified about the living conditions

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[538] Memorial of Croatia, Annex 58.
[539] Counter-Memorial of Serbia, para. 693.
[540] Memorial of Croatia, Annex 45.
[541] *Ibid.*, Annex 365.
[542] *Ibid.*, Annex 364.
[543] *Ibid.*, Annex 365.
[544] Counter-Memorial of Serbia, paras. 840-841.
[545] Memorial of Croatia, para. 4.151.

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in Stajićevo and Sremska Mitrovica[546]; victims had inhumane living conditions, with very little food supply[547]. B. V. reported not having anything to eat day and night[548]. And L. D. stated that "houses were on fire, grenades were falling and killing people. The Serbs had sent their women and children to Serbia earlier and the men stayed in Vukovar to slaughter us Croats"[549]. In sum, there is evidence produced before the Court that breaches of Article II *(c)* of the Genocide Convention were committed, within a systematic pattern of extreme violence, aiming at deliberately inflicting conditions of life designed to bring about the physical destruction of the targeted groups of Croats, in whole or in part.

6. General Assessment of Witness Statements and Conclusions

(a) *Witness statements*

455. The witness statements in relation to each of the selected municipalities — namely, Lovas, Ilok, Bogdanovci, Saborsko and Vukovar — all refer to similar occurrences in each of those municipalities. All witness statements have been analysed, including those statements that were unsigned by witnesses. All converge to similar occurrences which fall under Article II of the Convention against Genocide. I consider even witness statements that are unsigned relevant for the assessment of events that occurred in the aforementioned municipalities, given that they are in the same line as those statements that are signed. The totality of witness testimonies (signed and unsigned), read together, provide substantial evidence of the crimes perpetrated in those municipalities, in breach of Article II of the Convention against Genocide.

456. In the same line of thinking, I have deemed it relevant to examine the acts alleged to have occurred in *all* municipalities for which Croatia submitted evidence, rather than single out one or another specific municipality, so as to determine whether there was a systematic pattern of destruction. In the present case, the Court, instead of looking at a selected sample of incidents, as it has done, should rather have examined the totality of criminal acts committed during the entire military campaign against Croatia, brought to its attention in the *cas d'espèce*, to determine whether a systematic pattern of conduct of destruction amounting to genocide occurred. The reference to incidents at given municipalities serves to illustrate the general pattern of destruction.

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[546] These are localities in Serbia, where there appears to have been camps where some Croats were taken to.

[547] Memorial of Croatia, Annex 138.

[548] *Ibid.*, Annex 151.

[549] *Ibid.*, Annex 143.

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(b) *Conclusions*

457. In my perception, the witness statements in their totality provide evidence of the widespread and systematic pattern of destruction that occurred in those municipalities plagued by extreme violence. The widespread and systematic pattern of destruction, as established in the present case, consisted of the widespread and systematic perpetration of the aforementioned wrongful acts (grave breaches) falling under the Convention against Genocide.

458. They comprised, as seen above, killing members of the Croat (civilian) population (Art. II *(a)*), causing serious bodily or mental harm to members of targeted groups (Art. II *(b)*), and deliberately inflicting on the groups concerned conditions of life calculated to bring about their physical destruction in whole or in part (Art. II *(c)*). It appears that it can be concluded, on the basis of atrocities committed in the selected municipalities, that the *actus reus* of genocide of Article II *(a)*, *(b)* and *(c)* of the Convention against Genocide has been established.

XV. *Mens Rea* of Genocide: Proof of Genocidal Intent by Inference

459. May I now, at this stage of my dissenting opinion, move from *actus reus* of genocide to the element of *mens rea* (intent to destroy) under the Convention against Genocide, as applied in the present case. In the course of the proceedings of the *cas d'espèce*, the contending Parties themselves presented arguments as to the issue whether genocidal intent can be proven by inferences[550]. From a cumulative analysis of the dossier of the *cas d'espèce* as a whole, in my perception the intent to destroy the targeted groups, in whole or in part, can be inferred from the evidence submitted (even if not direct proof). The extreme violence in the perpetration of atrocities bears witness of such intent to destroy.

460. The widespread and systematic pattern of destruction across municipalities, encompassing massive killings, torture and beatings, enforced disappearances, rape and other sexual violence crimes, systematic expulsion from homes (with mass exodus), provides the basis for inferring a genocidal plan with the intent to destroy the targeted groups, in whole or in part, in the absence of direct evidence. In effect, to require direct evidence of genocidal intent in all cases is not in line with the jurisprudence of international criminal tribunals, as we shall see next.

[550] Cf., e.g., Croatia's argument in Reply of Croatia, para. 2.11, invoking Serbia's acknowledgment in Counter-Memorial of Serbia, para. 135 (difficulty to obtain direct evidence, and reliance on indirect evidence, with inferences therefrom); Reply of Croatia, para. 2.12.

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1. International Case Law on Mens Rea

461. When there is no direct evidence of intent, this latter can be inferred from the facts and circumstances. Thus, in the *Akayesu* case (Judgment of 2 September 1998), the ICTR (Trial Chamber) held that the intent to commit genocide requires that acts must be committed against members of a group specifically because they belong to that group (para. 521). A couple of jurisprudential illustrations to this effect can here be referred to. For example, the ICTY (Appeals Chamber) asserted, in the *Jelisić* case (Judgment of 5 July 2001), that,

> "[a]s to proof of specific intent, it may, in the absence of direct explicit evidence, be inferred from a number of facts and circumstances, such as the general context, the perpetration of other culpable acts systematically directed against the same group, the scale of atrocities committed, the systematic targeting of victims on account of their membership of a particular group, or the repetition of destructive and discriminatory acts" (para. 47).

The ICTY further stated, in the *Krstić* case (Judgment of 19 April 2004), that, when proving genocidal intent based on an inference, "that inference must be the only reasonable inference available on the evidence" (para. 41).

462. Again, in the jurisprudence of the ICTR, it has been established, in the same vein, that intent to commit genocide can be inferred from facts and circumstances. In the *Rutaganda* case, e.g., the ICTR (Trial Chamber, Judgment of 6 December 1999) stated that: "[I]ntent can be, on a case-by-case basis, inferred from the material evidence submitted to the Chamber, including the evidence which demonstrates a consistent pattern of conduct by the accused"[551] (paras. 61-63). Likewise, in the *Semanza* case, the ICTR (Trial Chamber, Judgment of 15 May 2003) stated that a "perpetrator's *mens rea* may be inferred from his actions" (para. 313).

463. Furthermore, in the *Bagilishema* case, the ICTR (Trial Chamber, Judgment of 7 June 2001) found that

> "evidence of the context of the alleged culpable acts may help the Chamber to determine the intention of the accused, especially where the intention is not clear from what that person says or does. The Chamber notes, however, that the use of context to determine the intent of an accused must be counterbalanced with the actual conduct of the accused. The Chamber is of the opinion that the accused's intent should be determined, above all, from his words and deeds, and should be evident from patterns of purposeful action." (Para. 63.)

[551] And cf. also, ICTR, case *Musema*, Judgment of 27 January 2000, para. 167.

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464. In this regard, in the landmark case of *Akayesu*, the ICTR (Trial Chamber, Judgment of 2 September 1998) found that "intent is a mental factor which is difficult, even impossible to determine", and it decided that, "in the absence of a confession from the accused", intent may be inferred from the following factors: *(a)* "the general context of the perpetration of other culpable acts systematically directed against that same group", whether committed "by the same offender or by others"; *(b)* "the scale of atrocities committed"; *(c)* the "general nature" of the atrocities committed "in a region or a country"; *(d)* "the fact of deliberately and systematically targeting victims on account of their membership of a particular group, while excluding the members of other groups"; *(e)* "the general political doctrine which gave rise to the acts"; *(f)* "the repetition of destructive and discriminatory acts"; and *(g)* "the perpetration of acts which violate, or which the perpetrators themselves consider to violate the very foundation of the group — acts which are not in themselves covered by the list (. . .) but which are committed as part of the same pattern of conduct" (paras. 523-524).

465. In the case of *Kayishema and Ruzindana*, the ICTR (Trial Chamber, Judgment of 21 May 1999) stated that intent might be difficult to determine and that the accused's "actions, including circumstantial evidence, however may provide sufficient evidence of intent", and that "intent can be inferred either from words or deeds and may be demonstrated by a pattern of purposeful action". The ICTR (Trial Chamber) affirmed that the following can be relevant indicators: *(a)* the number of group members affected; *(b)* physical targeting of the group or their property; *(c)* use of derogatory language toward members of the targeted group; *(d)* weapons employed and extent of bodily injury; *(e)* methodical way of planning; *(f)* systematic manner of killing; and *(g)* relative proportionate scale of the actual or attempted destruction of a group (paras. 93 and 527).

466. In the light of the foregoing, the jurisprudence of international criminal tribunals holds that proof of genocidal intent may be inferred from facts and circumstances, and provides some guidelines to that effect, even in the absence of documentary evidence. Factual elements which can be taken into account for that inference are, e.g., indications of premeditation, of the existence of a State policy or plan, the repetition of atrocities against the same targeted groups, the systematic pattern of extreme violence against, and destruction of, vulnerable or defenceless groups of individuals.

2. General Assessment

467. In the light of the foregoing, the International Court of Justice seems to have imposed too high a threshold for the determination of *mens rea* of genocide, which does not appear in line with the *jurisprudence con-*

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stante of international criminal tribunals on the matter. The International Court of Justice has pursued, and insisted upon pursuing, too high a standard of proof for the determination of the occurrence of genocide or complicity in genocide. In my understanding, *mens rea* cannot simply be discarded, as the International Court of Justice does in the *cas d'espèce*, on the basis of an *a priori* adoption of a standard of proof — such as the one the International Court of Justice has adopted — entirely inadequate for the determination of State responsibility for grave violations of the rights of the human person, individually or in groups.

468. The Court cannot simply say, as it does in the present Judgment, that there has been no intent to destroy, in the atrocities perpetrated, just because it says so[552]. This is a *diktat*, not a proper handling of evidence. This *diktat* goes against the voluminous evidence of the material element of *actus reus* under the Convention against Genocide (Art. II), wherefrom the intent to destroy can be inferred. This *diktat* is unsustainable, it is nothing but a *petitio principii* militating against the proper exercise of the international judicial function. *Summum jus, summa injuria. Mens rea*, the *dolus specialis*, can only be *inferred*, from a number of factors.

469. 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 taken from the *conviction intime* of each judge, from human conscience.

470. Ultimately, conscience stands above, and speaks higher than, any wilful *diktat*. The evidence produced before the International Court of Justice 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* contains irrefutable evidence of a widespread and systematic pattern of extreme violence and destruction, as already examined in the present dissenting opinion.

471. Such a widespread and systematic pattern of extreme violence and destruction encompassed massive killings, torture, beatings, rape and

[552] The Court did the same, eight years ago, in its 2007 Judgment: after finding it "established that massive killings of members of the protected group occurred" (*I.C.J. Reports 2007 (I)*, p. 154, para. 276), it added that it was not "conclusively established" that those "massive killings" had been carried out "with the specific intent *(dolus specialis)* on the part of the perpetrators to destroy, in whole or in part, the group as such" (*ibid.*, p. 255, para. 277) — because it said so, without any explanation. Cf., likewise, paras. 440-441 of the present Judgment.

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other sex crimes, enforced disappearances of persons, expulsion from homes and looting, forced displacement and humiliation[553] *(supra)*. The facts conforming with this pattern of destruction have been proven, in international case law and in UN fact-finding[554] *(supra)*. Even in the absence of direct proof, genocidal intent *(mens rea)* can reasonably be inferred from such a planned and large-scale pattern of destruction, systematically directed against the same targeted groups.

XVI. The Need of Reparations: Some Reflections

472. The widespread and systematic pattern of destruction in the factual context of the *cas d'espèce* discloses, ultimately, the ever-lasting presence of evil, which appears proper to the human condition, in all times. It is thus understandable that it has attracted the concern of, and has presented challenges to, legal thinking, in our times and previous centuries, as well as other branches of knowledge (such as, e.g., history, psychology, anthropology, sociology, philosophy and theology, among others). It has a marked presence in literature as well. This long-standing concern, over centuries, has not, however, succeeded to provide an explanation of evil.

473. Despite the endeavours of human thinking, through history, we have not been able to rid humankind of evil. Like the passing of time, the ever-lasting presence of evil is yet another mystery surrounding human beings, wherever and while they live. Whenever individuals purport to subject their fellow human beings to their "will", placing this latter above conscience, evil is bound to manifest itself. In one of the most learned writings on the problem of evil, R. P. Sertillanges ponders that the awareness of evil and the anguish emanated therefrom have marked presence in all civilizations. The ensuing threat to the future of humankind has accounted for the continuous presence of that concern throughout the history of human thinking[555].

474. Religions were the first to dwell upon the problem of evil, which came also to be considered by philosophy, history, psychology, social sciences and literature. Over the centuries, human thinking has always acknowledged the need to examine the problem of evil, its incidence in human relations, in the world wherein we live, without losing faith in human values[556]. Despite the perennial quest of human thinking to find answers to the problem of evil, going as far back as the *Book of Job*, or

[553] Parts IX, X and XI of the present dissenting opinion, *supra*.
[554] Part IX of the present dissenting opinion, *supra*.
[555] R. P. Sertillanges, *Le problème du mal — l'histoire*, Paris, Aubier, 1948, pp. 5-412.
[556] *Ibid.*, pp. 5-412.

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even further back, to the *Genesis* itself[557], not even theology has found an explanation for it that is satisfactory to all.

475. In a devastation, such as the one of the factual context of the present case concerning the *Application of the Convention against Genocide*, the damage done to so many persons, thousands of them, was truly an irreparable one. There is no *restitutio in integrum* at all for the fatal direct victims, the memory of whom is to be honoured. As for the surviving victims, reparations, in their distinct forms, can only *alleviate* their suffering, which defies the passing of time. Yet, such reparations are most needed, so as to render living — or surviving atrocities — bearable. This should be constantly kept in mind.

476. The determination of breaches of Article II of the Convention against Genocide (cf. *supra*) renders inescapable the proper consideration of reparations. In effect, in the course of the proceedings, both contending Parties, in their written and oral arguments, have made claims for reparation for genocide allegedly committed by each other. Croatia's main arguments in this respect are found in its Memorial, where it began by arguing that, although the Convention contains no specific provision concerning the consequences of a violation by a party, breaches of international obligations entail the obligation to make full reparation. In this sense, Croatia claimed that if Serbia[558] was found to be internationally responsible for the alleged violations of the Genocide Convention, it must make full reparation for material and immaterial damage[559].

477. Croatia has in fact requested the Court to reserve this issue "to a subsequent phase of the proceedings", as in previous cases. A declaratory judgment by the International Court of Justice of Serbia's responsibility, it added, would already provide a primary means of satisfaction, stressing the importance of the obligations enshrined in the Genocide Convention, and underscoring the rule of law and the respect for fundamental human rights. To Croatia, such a declaratory judgment would also "assist in the process of setting the historical record straight", and would thereby "contribute towards reconciliation over the longer term"[560].

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[557] Cf., *inter alia*, e.g., M. Neusch, *L'énigme du mal*, Paris, Bayard, 2007, pp. 7-193; J. Maritain, *Dio e la Permissione del Male*, 6th ed., Brescia, Edit. Morcelliana, 2000, pp. 9-100; E. Fromm, *Anatomía de la Destructividad Humana*, Mexico/Madrid/Buenos Aires, Siglo XXI Edit., 2009 [reimpr.], pp. 11-468; P. Ricœur, *Evil — A Challenge to Philosophy and Theology*, London, Continuum, 2007, pp. 33-72; P. Ricœur, *Le mal — Un défi à la philosophie et à la théologie*, Geneva, Ed. Labor et Fides, 2004, pp. 19-65; C. S. Nino, *Juicio al Mal Absoluto*, Buenos Aires, Emecé Edit., 1997, pp. 7-292; A. Morton, *On Evil*, N.Y./London, Routledge, 2004, pp. 1-148; T. Eagleton, *On Evil*, New Haven/London, Yale University Press, 2010, pp. 1-163; P. Dews, *The Idea of Evil*, Oxford, Wiley-Blackwell, 2013, pp. 1-234.

[558] FRY, at the beginning of the proceedings.

[559] Memorial of Croatia, para. 8.75.

[560] *Ibid.*, paras. 8.75-8.77.

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478. Croatia has further asked the Court to declare Serbia's obligation to take all steps at its disposal to provide an immediate and full account to Croatia of the whereabouts of missing persons, and to order Serbia to return cultural property which was stolen in the course of the genocidal campaign. Furthermore, Croatia has claimed that, as a consequence of Serbia's illegal conduct, it is entitled to obtain full reparation for the damages caused and for the losses suffered, in particular for the wrongful acts connected to the Serbian genocidal campaign, as described in its Memorial[561].

479. Compensation, it has added, is "due for all damage caused to the physical and moral integrity and well-being of the citizens of Croatia". Croatia then concludes that, "in a case relating to genocide, where there has been a massive loss of life and untold human misery has been caused", *restitutio* will never wipe out the consequences of the illegal act; it thus claims also for satisfaction for the damages suffered[562]. At last, in its final submissions read at the end of the oral proceedings, Croatia has repeated its request for reparation[563].

480. Serbia, for its part, responded briefly to those arguments on reparation, having stated first that they appear hypothetical, as, in its view, its responsibility for genocide cannot be engaged. As to the claim for compensation when *restitutio* in kind is not possible, Serbia has contended that Croatia was trying to get compensation for all possible damages which might have been caused by the war in Croatia. It has added that Croatia's claims for reparation were not to be determined by the International Court of Justice, whose jurisdiction concerns only possible violations of the Convention against Genocide[564].

481. Serbia has also submitted a request for reparation, in relation to its counter-claim, as stated in its Counter-Memorial. It has requested the International Court of Justice to adjudge and declare Croatia's responsibility to "redress the consequences of its international wrongful acts" and in particular to provide full compensation for "all damages and losses caused by the acts of genocide"[565]. In its final submissions in relation to the counter-claim, read at the end of the oral proceedings, it reiterated its request[566].

482. It should not pass unnoticed that both contending Parties have requested reparation for alleged acts of genocide be determined by the International Court of Justice in a subsequent phase of the case. The International Court of Justice should, in my understanding, have found, in relation to Croatia's claim, that acts of genocide were committed, for the reasons expressed in the present dissenting opinion. Accordingly, Croatia's request for reparation should have been entertained by the

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[561] Memorial of Croatia, paras. 8.78-8.79. Cf. also Application instituting proceedings, pp. 18-20; Memorial of Croatia, p. 414; and Reply of Croatia, p. 472.

[562] Memorial of Croatia, paras. 8.80-8.84.

[563] Cf. CR 2014/21, of 21 March 2014, pp. 40-41.

[564] Counter-Memorial of Serbia, paras. 1059-1068.

[565] *Ibid.*, p. 471; cf. also Rejoinder of Serbia, p. 322.

[566] Cf. CR 2014/24, of 28 March 2014, p. 64.

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Court, and the International Court of Justice should thus have reserved the issue of the determination of reparation to a separate phase of the proceedings in this case, as requested by the Applicant.

483. In this respect, it may be recalled that, in the recent case *Ahmadou Sadio Diallo (Republic of Guinea* v. *Democratic Republic of the Congo)* the International Court of Justice examined, during the merits phase, the violations of the international human rights conventions invoked by Guinea[567]. In its Judgment of 30 November 2010, the International Court of Justice held that the Democratic Republic of the Congo had violated certain obligations contained in those conventions, namely, Articles 9 and 13 of the UN Covenant on Civil and Political Rights, and Articles 6 and 12 of the African Charter on Human and Peoples' Rights, in addition to Article 36 (1) *(b)* of the Vienna Convention on Consular Relations[568]. The International Court of Justice accordingly held, in relation to reparation, that:

> "In the light of the circumstances of the case, in particular the fundamental character of the human rights obligations breached and Guinea's claim for reparation in the form of compensation, the Court is of the opinion that, in addition to a judicial finding of the violations, reparation due to Guinea for the injury suffered by Mr. Diallo must take the form of compensation."[569]

484. In this respect, the Court reserved for a subsequent phase of the proceedings the question of compensation for the injury suffered by Mr. A. S. Diallo[570]. In that phase of reparations, the International Court of Justice then adjudicated the question of the compensation owed by the Democratic Republic of the Congo to Guinea for the damages suffered by the victim, Mr. A. S. Diallo, and delivered its Judgment on the issue on 19 June 2012[571]. In my extensive separate opinion (paras. 1-101), I examined the matter in depth, and upheld, *inter alia*, that the ultimate *titulaire* or beneficiary of the reparations ordered by the International Court of Justice was the human person victimized, rather than his State of nationality.

485. In the present Judgment in the case relating to the *Application of the Convention against Genocide*, had the Court found — which it regrettably did not — that the respondent State incurred breaches of the Genocide Convention, it should have opened a subsequent phase of the proceedings, for the adjudication of the reparations (in its distinct forms) due, ultimately to the victims (human beings) themselves. In recent years, the challenges posed by the determination of reparations in the most

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[567] *Ahmadou Sadio Diallo (Republic of Guinea* v. *Democratic Republic of the Congo), Merits, Judgment, I.C.J. Reports 2010 (II)*, p. 639.

[568] *Ibid.*, paras. 73-74, 85 and 97.

[569] *Ibid.*, para. 161.

[570] Cf. *ibid.*, p. 693, resolutory points 7-8.

[571] Cf. *I.C.J. Reports 2012 (I)*, p. 324.

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complex situations, have begun to attract scholarly attention; yet, we are still — surprisingly as it may seem — in the infancy of this domain of international law.

XVII. The Difficult Path to Reconciliation

486. In the violent conflicts which form the factual context of the present case opposing Croatia to Serbia, the numerous atrocities committed (torture and massive killings, extreme violence in concentration camps, rape and other sexual violence crimes, enforced disappearances of persons, expulsions and deportations, unbearable conditions of life and humiliations of various kinds, among others), besides victimizing thousands of persons, made hatred contaminate everyone, and decomposed the social milieux. The consequences, in long-term perspective, are, likewise, and not surprisingly, disastrous, given the resentment transmitted from one generation to another.

487. Hence the importance of finding the difficult path to reconciliation. In my understanding, the first step is the acknowledgment that a widespread and systematic pattern of destruction ends up dismantling everyone, the oppressed (victims) and the oppressors (victimizers). From the times of the *Iliad* of Homer until nowadays, the impact of war and destruction upon human beings has been constantly warning them as to the perennial evil surrounding humanity, and yet lessons of the past have not been learned.

488. In a penetrating essay (of 1934), Simone Weil, one of the great thinkers of the last century, drew attention to the utterly unfair demands of the struggle for power, which ends up victimizing everyone. From Homer's *Iliad* to date, individuals, indoctrinated and conditioned for war and destruction, have become objects of the struggle for domination. There occurs "the substitution of the ends by the means", transforming human life into a simple means, which can be sacrificed; individuals become unable to think, and abandon themselves entirely to "a blind collectivity", struggling for power (the end)[572].

489. The distinction between "oppressors and oppressed", Weil aptly observed, almost loses meaning, given the "impotence" of all individuals in face of the "social machine" of destruction of the spirit and fabrication of the inconscience[573]. The consequences, as shown by the present case concerning the *Application of the Convention against Genocide* generate long-lasting resentment.

[572] S. Weil, *Reflexiones sobre las Causas de la Libertad y de la Opresión Social*, Barcelona, Ed. Paidós/Universidad Autónoma de Barcelona, 1995, pp. 81-82, 84 and 130.

[573] *Ibid.*, pp. 130-131; S. Weil, *Réflexions sur les causes de la liberté et de l'oppression sociale*, Paris, Gallimard, 1955, pp. 124-125, and cf. pp. 114-115 and 144.

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490. The next step in the difficult path to reconciliation, lies in the provision of reparations — in all its forms — to the victims. Reparations *(supra)* are, in my understanding, essential for advancing in the long and difficult path to reconciliation, after the tragedy of the wars in the former Yugoslavia in the nineties. In the framework of reparations, besides the judicial (declaratory) acknowledgment of the breaches of the Genocide Convention, there are other measures to pursue the path to reconciliation.

491. In this connection, may I single out that, in a particularly enlightened moment of the long oral proceedings in the present case concerning the *Application of the Convention against Genocide*, in the public sitting before the Court of 10 March 2014, the Agent of Serbia took the commendable step of making the following statement:

> "In the name of the Government and the People of the Republic of Serbia, I reiterate the sincere regret for all victims of the war and of the crimes committed during the armed conflict in Croatia, whatever legal characterization of those crimes is adopted, and whatever the national and ethnic origin of the victims. Each victim deserves full respect and remembrance."[574]

492. The path to reconciliation is certainly a difficult one, after the devastation of the wars in the Balkans. The contending Parties are surely aware of it. In the same public sitting before the International Court of Justice, of 10 March 2014, the Agent of Serbia further asserted that:

> "The cases in which Serbia was a party were of an exceptional gravity: these were cases born out of the 1990s conflicts in the former Yugoslavia, which left tragic consequences to all Yugoslav peoples and opened important issues of State responsibility. This case is the final one in that sequence. In this instant case Serbia expects — more than in any of its previous cases — that suffering of the Serb people should also be recognized, get due attention, and a remedy.
>
> Today it is well known that the conflict in Croatia was followed by grave breaches of international humanitarian law. There is no doubt that Croats suffered a lot in that conflict. This case is an opportunity for all of us to remind ourselves of their tragedy (. . .). However, the Croatian war caused grave sufferings to Serbs as well (. . .)"[575]

493. Croatia, for its part, contends that one of the remedies it seeks is the return of the mortal remains of the deceased to their families[576]. It reports that at least 840 bodies[577] are still missing as the result of the

[574] CR 2014/13, of 10 March 2014, para. 5.
[575] *Ibid.*, paras. 2-3.
[576] Memorial of Croatia, para. 1.10 and 1.37.
[577] CR 2014/5, of 3 March 2014, para. 6.

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alleged genocidal acts carried out by Serb forces. Croatia claims that Serbia has not been providing the required assistance to carry on the searches for those mortal remains and their identification. The contending Parties' identification and return of all the mortal remains to each other is yet another relevant step in the path towards reconciliation. I dare to nourish the hope that the present dissenting opinion may somehow, however modestly, serve the purpose of reconciliation.

XVIII. Concluding Observations: The Need of a Comprehensive Approach to Genocide under the 1948 Convention

494. Contrary to what contemporary disciples of Jean Bodin and Thomas Hobbes may still wish to think, the Peace Palace here at The Hague was not built and inaugurated one century ago to remain a sanctuary of State sovereignty. It was meant to become a shrine of international justice, not of State sovereignty. Even if the mechanism of settlement of contentious cases by the Permanent Court of International Justice/International Court of Justice has remained a strictly inter-State one, by force of mental inertia, the nature and subject-matters of certain cases lodged with the Hague Court over the last nine decades have required of it to go beyond the strict inter-State outlook[578]. The artificiality of the exclusively inter-State outlook, resting on a long-standing dogma of the past, has thus been made often manifest, and increasingly so.

495. More recently, the contentious cases wherein the Court's concerns have had to go beyond the strict inter-State outlook have further increased in frequency[579]. The same has taken place in the two more recent Advisory Opinions of the Court[580]. Half a decade ago, for example, in my separate opinion in the International Court of Justice's Advisory Opinion

[578] For a study of this issue, cf. A. A. Cançado Trindade, "A Contribuição dos Tribunais Internacionais à Evolução do Direito Internacional Contemporâneo", in: *O Direito Internacional e o Primado da Justiça* (eds. A. A. Cançado Trindade and A. C. Alves Pereira), Rio de Janeiro, Edit. Renovar, 2014, pp. 3-89, esp. pp. 18-20, 46-47, 51, 64 and 68.

[579] E.g., the case on *Questions relating to the Obligation to Prosecute or Extradite (Belgium* v. *Senegal)* (2009-2012), pertaining to the principle of universal jurisdiction under the UN Convention against Torture; the case of *Ahmadou Sadio Diallo (Republic of Guinea* v. *Democratic Republic of the Congo)* (1998-2012) on detention and expulsion of a foreigner; the case of the *Jurisdictional Immunities of the State (Germany* v. *Italy: Greece intervening)* (2008-2012); the case of the *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia* v. *Russian Federation)* (2008-2011); the *Request for Interpretation of the Judgment of 15 June 1962 in the Case concerning the* Temple of Preah Vihear (Cambodia *v.* Thailand) *(Cambodia* v. *Thailand)* (2011-2013).

[580] On the *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo* (2010), and on a *Judgment No. 2867 of the Administrative Tribunal of the International Labour Organization upon a Complaint Filed against the International Fund for Agricultural Development* (2012), respectively.

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on the *Declaration of Independence of Kosovo* (of 22 July 2010), I deemed it fit to warn against the shortcomings of the strict inter-State outlook (*I.C.J. Reports 2010 (II)*, p. 599, para. 191), and stressed the need, in face of a humanitarian crisis in the Balkans, to focus attention on the *people* or *population concerned* (*ibid.*, paras. 53, 65-66, 185 and 205-207), in pursuance of a humanist outlook (*ibid.*, paras. 75-77 and 190), in the light of the principle of humanity (*ibid.*, para. 211)[581].

496. The present case concerning the *Application of the Convention against Genocide* provides yet another illustration of the pressing need to overcome and move away from the dogmatic and strict inter-State outlook, even more cogently. In effect, the 1948 Convention against Genocide, adopted on the eve of the Universal Declaration of Human Rights, is not State-centred, but rather *people-centred*. The Convention against Genocide cannot be properly interpreted and applied with a strict State-centred outlook, with attention turned to inter-State susceptibilities. Attention is to be kept on the *justiciables*, on the victims — real and potential victims — so as to impart justice under the Genocide Convention.

1. Evidential Assessment and Determination of the Facts

497. I thus regret not to be able to share at all the Court's reasoning in the *cas d'espèce*, nor its conclusion as to the Applicant's claim. To start with, the Court's *evidential assessment* and *determination of the facts* are atomized and not comprehensive. It chooses some municipalities (cf. Judgment, para. 203) and describes summarily some occurrences therein. Its examination of the facts is rather aseptic[582]. Not surprisingly, the International Court of Justice fails to characterize the pattern, as a whole, of the atrocities committed, as being widespread and systematic.

498. The Court has taken note of atrocities — such as summary executions and decapitations — perpetrated in Vukovar and its surrounding area, admitted by the Respondent (*ibid.*, paras. 212-224). It has taken note of massacres, *inter alia*, e.g., in Lovas (*ibid.*, paras. 231-240) and in Bogdanovci, admitted by Serbia (*ibid.*, paras. 225-230). It has taken note of other massacres, *inter alia*, e.g., in Saborsko (*ibid.*, paras. 268-271), in Poljanak (*ibid.*, paras. 272-277), in Hrvatska Dubika and its surrounding area (*ibid.*, paras. 257-261). Yet, this is just a sample of the atrocities that were committed in the *cas d'espèce*.

[581] In that same separate opinion, I also drew attention to the expansion of international legal personality and capacity, as well as international responsibility (*I.C.J. Reports 2010 (II)*, p. 617, para. 239), in contemporary international law.

[582] Already in my separate opinion (*I.C.J. Reports 2010 (II)*, p. 610, para. 219) in the International Court of Justice's Advisory Opinion on the *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, I had warned against an aseptic examination of the facts.

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499. In addition to the localities cited by the International Court of Justice in the present Judgment, there are numerous other localities wherein atrocities occurred in the regions of Eastern Slavonia, Western Slavonia, Banovina/Banija, Kordun, Lika and Dalmatia, brought to the attention of the Court by Croatia, which were not cited or addressed directly in the present Judgment of the Court. Not surprisingly, the Court fails to establish a widespread and systematic pattern of destruction with the intent to destroy, without any satisfactory explanation why it has chosen this path for the examination of the facts.

500. In the present Judgment, the International Court of Justice takes note of the findings of the ICTY (in its Judgments in the cases of *Mrkšić, Radić and Sljivančanin* [*"Vukovar Hospital"*], 2007; *Martić*, 2007; and of *Stanišić and Simatović*, 2013) that

> "from the summer of 1991, the JNA and Serb forces had perpetrated numerous crimes (including killing, torture, ill-treatment and forced displacement) against Croats in the regions of Eastern Slavonia, Banovina/Banija, Kordun, Lika and Dalmatia" (Judgment, para. 208).

Yet, apart from massive killings, the Court fails to characterize other crimes as having been committed also on a large scale, conforming a widespread and systematic pattern of destruction. From time to time the Court minimizes the scale of crimes such as rape and other sexual violence crimes (*ibid.*, para. 364), expulsion from homes and forced displacements (*ibid.*, para. 376), deprivation of food and medical care (*ibid.*, paras. 366 and 370).

501. Even an international criminal tribunal such as the ICTY, entrusted with the determination of the international criminal responsibility of individuals, has been attentive to a comprehensive approach to evidence in order to determine genocidal intent. This particular point has recently been made by the ICTY (Appeals Chamber) in the *Karadžić* case (Judgment of 11 July 2013), where it warned that:

> "Rather than considering separately whether an accused intended to destroy a protected group through each of the relevant genocidal acts, a trial chamber should consider whether all of the evidence, taken together, demonstrates a genocidal mental state." (Para. 56.)

502. The ICTY (Appeals Chamber) further asserted, in the same *Karadžić* case, that, "by its nature, genocidal intent is not usually susceptible to direct proof" (ICTY, *Karadžić*, Judgment of 11 July 2013, para. 80). This being so, it added,

> "in the absence of direct evidence, genocidal intent may be inferred from a number of facts and circumstances, such as the general context, the perpetration of other culpable acts systematically directed against the same group, the scale of atrocities committed, the system-

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atic targeting of victims on account of their membership in a particular group, the repetition of destructive and discriminatory acts, or the existence of a plan or policy" (ICTY, *Karadžić*, Judgment of 11 July 2013, para. 80).

503. In face of the task of the determination of the international responsibility of States — with which the International Court of Justice is entrusted — is all the more reason one is to pursue a comprehensive approach to evidence. Contemporary international human rights tribunals which, like the International Court of Justice, are also entrusted with the determination of the international responsibility of States, know well, from their own experience, that respondent States tend to withhold the monopoly of evidence of the atrocities perpetrated and attributable to them.

504. It is thus not surprising that, in their evolving case law, addressed to by the contending Parties, but entirely overlooked by the International Court of Justice's Judgment in the present case, international human rights tribunals have rightly avoided a high threshold of proof, and have applied the distribution or shifting of the burden of proof[583]. In the determination of facts in cases of the kind (pertaining to grave breaches), they have remained particularly aware of the primacy of concern with fundamental rights inherent to human beings over concern with State susceptibilities. After all, the *raison d'humanité* prevails over the *raison d'Etat*.

505. In the present Judgment in the case concerning the *Application of the Convention against Genocide*, the International Court of Justice has seen only what it wanted to see (which is not much), trying to make one believe that the targeted groups were simply forced to leave the territory claimed as Serb (para. 426, and cf. para. 435). As if trying to convince itself of the absence of genocidal intent, the International Court of Justice has further noted — making its own the argument of Serbia[584] — that the ICTY Prosecutor has never charged any individuals for genocide in the context of the armed attacks in Croatia in the period 1991-1995 (Judgment, para. 440).

506. This does not at all have a bearing upon State responsibility. Individuals other than the ones charged, could, as State agents, have been responsible; indictments can be confirmed (as in the *Karadžić* case in mid-2013), so as to encompass genocide; and, in his indictments, the Prosecutor exerts a *discretionary* power, its statute being entirely distinct from that of international judges. In any case, in respect of State responsibility, as I have already pointed out, the standards of proof are not the same as in respect of individual criminal responsibility.

[583] Cf. Part VII of the present dissenting opinion, *supra*.
[584] Cf. Counter-Memorial of Serbia, para. 944.

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507. Even if we do not know — and will never know — the total amount of victims who were tortured or raped (they were numerous), all the facts, taken together, conform, in my perception, a widespread and systematic pattern of destruction, under the Genocide Convention, as examined in the present dissenting opinion. They are *facts of common knowledge (faits de notoriété publiquelfatos de conhecimento público e notoriolhechos de conocimiento público y notoriolfatti notori [di comune esperienza])*, which thus do not need to be subjected to a scrutiny pursuant to a high threshold of proof, depriving the Genocide Convention of its *effet utile*, in the determination of State responsibility.

2. Conceptual Framework and Reasoning as to the Law

508. The Court's *conceptual framework* and *reasoning as to the law* are likewise atomized and not comprehensive. First of all, its reading of the categories of acts of genocide under the Convention against Genocide (Art. II) is as strict as it can possibly be. The Court, furthermore, considers separately the interrelated elements of *actus reus* and *mens rea* of genocide, applying a high threshold of proof, which finds no parallel in the evolving case law of international criminal tribunals as well as international human rights tribunals. This ends up rendering, regrettably, the determination of State responsibility for genocide under the Convention an almost impossible task, and the Convention itself an almost dead letter. The way is thus paved for the lack of legal consequences, and for impunity for the atrocities committed.

509. The Court's conceptual framework and reasoning as to the law are, furthermore, atomized also in its perception of each branch of international law on its own — even those branches that establish regimes of protection of the rights of the human person — namely, the international law of human rights (ILHR), international humanitarian law (IHL), and the international law of refugees (ILR). The Court thus insists in approaching even IHL and international criminal law (ICL) in a separate and compartmentalized way.

510. In its insistence on its atomized approach, in separating, e.g., the Genocide Convention from IHL (Judgment, para. 153), the Court fails to perceive that the Genocide Convention, being a human rights treaty (as generally acknowledged), converges with international instruments which form the *corpus juris* of human rights. They all pertain to the determination of State responsibility. Some grave breaches of IHL may concomitantly be breaches of the Genocide Convention.

511. This atomized approach, in several aspects, appears static and anti-historical to me, for it fails to grasp the evolution of international legal thinking in respect of the remarkable expansion, over the last decades, of international legal personality and capacity, as well as inter-

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national responsibility, a remarkable feature of the contemporary *jus gentium*. Contrary to what the International Court of Justice says in the present Judgment, there are, in my perception, approximations and convergences between the three trends of protection of the rights of the human person (ILHR, IHL, ILR)[585], in addition to contemporary ICL.

512. Moreover, contemporary ICL nowadays is also concerned with the situation of the victims. The Convention against Genocide, for its part, being *people-oriented*, is likewise concerned with the *victims* of extreme human cruelty. The Convention is not separated (as the Court assumes) from other branches of safeguard of the rights of the human person; it rather converges with them, in seeking to protect human dignity. The Genocide Convention, by itself, bears witness of the approximations or convergences between ICL and the ILHR.

513. Last but not least, the Court's reasoning is, moreover, atomized also in its counter-position of customary and conventional IHL itself (Judgment, paras. 79 and 88-89, *supra*). In my understanding, customary and conventional IHL are to be properly seen in interaction, and are not to be kept separated from each other, as the Court attempts to do. After all, there is no violation of the substantive provisions of the Genocide Convention which is not, at the same time, a violation of customary international law on the matter as well. The atomized approach of the Court, furthermore, fails to recognize the great importance — for both conventional and customary international law — of the general principles of law, and in particular of the principle of humanity.

514. The determination of State responsibility for genocide calls for a comprehensive outlook, rather than an atomized one, as pursued by the International Court of Justice. As I pointed out earlier on, in the present dissenting opinion, the Genocide Convention is generally regarded as a human rights treaty, and human rights treaties have a hermeneutics of their own (para. 32), and are endowed with a mechanism of collective guarantee (para. 29). The proper hermeneutics of the Genocide Convention is, in my understanding, necessarily a comprehensive one, and not an atomized or fragmented one, as pursued by the International Court of Justice in the present Judgment, as well as in its prior 2007 Judgment.

515. Each international instrument is a product of its time, and exerts its function continuously by being applied as a "living instrument". I have carefully addressed this particular point, in detail, in respect of human rights treaties, in my extensive dissenting opinion (paras. 167-185) in the case concerning the *Application of the International Convention on the*

[585] Paras. 58, 60, 64, 69, 79 and 84, *supra*.

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Elimination of All Forms of Racial Discrimination (Georgia v. *Russian Federation) (Judgment, I.C.J. Reports 2011 (I))*.

516. In my dissenting opinion, I warned against the posture of the International Court of Justice in the *CERD Convention* case, also reflected in the present Judgment of the International Court of Justice (para. 85), as well as in its prior 2007 Judgment, of ascribing an "overall importance" to individual State *consent*, "regrettably putting it well above the imperatives of the realization of justice at international level" (*I.C.J. Reports 2011 (I)*, para. 44). The CERD Convention, like other human rights treaties, I continued, contains obligations of "an essentially objective character, implemented collectively", and showing that, in this domain of protection, international law appears, more than voluntary, as "indeed necessary" (*ibid.*, paras. 63 and 72). The protected rights and fundamental human values stand above State "interests" or its "will" (*ibid.*, paras. 139 and 162).

517. The proper hermeneutics of human rights treaties, — I proceeded in the same dissenting opinion, — moves away from "a strict State-centred voluntarist perspective" and from the "exaltation of State consent", and seeks guidance in fundamental principles *(prima principia)*, such as the principle of humanity, which permeates the whole corpus juris of the ILHR, IHL, ILR and ICL (*ibid.*, paras. 209-212). Such *prima principia* confer to the international legal order "its ineluctable axiological dimension"; they conform its *substratum*, and convey the idea of an *objective* justice, in the line of jusnaturalist thinking (*ibid.*, para. 213).

518. Only in this way, I added, can we abide by "the imperative of the *realization of justice* at international level", acknowledging that "*conscience stands above the will*" (*ibid.*, para. 214). And I further warned in my aforementioned dissenting opinion that:

> "The Court cannot remain hostage of State consent. It cannot keep displaying an instinctive and continuing search for State consent, (. . .) to the point of losing sight of the imperative of realization of justice. The moment State consent is manifested is when the State concerned decides to become a party to a treaty, such as the human rights treaty in the present case, the CERD Convention. The hermeneutics and proper application of that treaty cannot be continuously subjected to a recurring search for State consent. This would unduly render the letter of the treaty dead, and human rights treaties are meant to be living instruments, let alone their spirit." (*Ibid.*, para. 198.)

519. The present Judgment of the Court again misses the point, and fails to render a service to the Genocide Convention. In a case pertaining to the

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interpretation and application of this latter, the Court even makes recourse to the so-called *Monetary Gold* "principle"[586], which has no place in a case like the present one, and which does not belong to the realm of the *prima principia*, being nothing more than a concession to State consent, within an outdated State voluntarist framework. In face of the pursuance of this outlook, I wonder whether the Genocide Convention has any future at all . . .

520. The Convention, essentially *people-centred*, will have a future if attention is rightly turned to its rationale, to its object and purpose, keeping in mind the principle *ut res magis valeat quam pereat*, so to secure to it the appropriate effects *(effet utile)*, and, ultimately, the realization of justice. Already for some time, attention has been drawn to the shortcomings of the Convention against Genocide as originally conceived, namely: *(a)* the narrowing of its scope, excluding cultural genocide and massive slaughter of political and social groups; *(b)* the much lesser attention to prevention of genocide, in comparison with its punishment[587]; *(c)* the weakening of provisions for enforcement, with concern for State sovereignty taking precedence over concern for protection against genocide[588].

521. From the adoption of the Genocide Convention in 1948 until our days, the vulnerability or defencelessness of targeted groups has continued, just as much as the reluctance of States to deal with the matter and protect them against genocide under the Convention has persisted. This discloses, as I have already pointed out in the present dissenting opinion, the manifest inadequacy of examining genocide from a strictly inter-State outlook, with undue deference to State sovereignty. After all, as I have already stressed, the Genocide Convention is *people-oriented.*

522. Genocide, which occurs at the intra-State level, calls for a people-centred outlook, focused on victims surrounded by extreme vulnerability. There are, among genocide scholars, those who are sensitive enough and support a generic concept, so as not to leave without protection any segment of victims of "genocidal wars" or "genocidal massacres"[589], even beyond the Genocide Convention. It is not my intention here to dwell

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[586] Even if only to dismiss it (Judgment, para. 116).

[587] As transposed, historically, from domestic into international criminal law.

[588] Cf. L. Kuper, *International Action against Genocide*, London, Minority Rights Group (Report No. 53), 1982, pp. 9, 11 and 13-14; G. J. Andreopoulos, "Introduction: The Calculus of Genocide", in *Genocide: Conceptual and Historical Dimensions* (ed. G. J. Andreopoulos), Philadelphia, University of Pennsylvania Press, 1994, pp. 2-3 and 6-17; M. Lippman, "Genocide: The Crime of the Century — The Jurisprudence of Death at the Dawn of the New Millenium", 23 *Houston Journal of International Law* (2001), pp. 477-478, 487, 503-506, 523-526 and 533.

[589] Cf., e.g., L. Kuper, "Other Selected Cases of Genocide and Genocidal Massacres: Types of Genocide", in *Genocide — A Critical Bibliographic Review* (ed. I. W. Charny), London, Mansell Publ., 1988, pp. 155-171; L. Kuper, "Theoretical Issues Relating to Genocide: Uses and Abuses", in *Genocide: Conceptual and Historical Dimensions*, *op. cit. supra* note 588, pp. 32-37 and 44; I. W. Charny, "Toward a Generic Definition of Genocide", in *ibid.*, pp. 64-78, 84-85 and 90-92.

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upon such a generic concept or definition; distinctly, I concentrate, more specifically, on the comprehensive outlook, that I sustain, of genocide *under the 1948 Convention.*

523. Such a comprehensive outlook takes into due 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. That whole factual context, in my 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. All the aforesaid, in my own understanding, further calls for a comprehensive, rather than atomized, consideration of the matter, faithful to humanist thinking and keeping in mind the principle of humanity[590], which permeates the whole of the ILHR, IHL, ILR and ICL, including the Genocide Convention.

524. From all the preceding considerations, it is crystal clear that my own position, in respect of the aforementioned points — of evidential assessments as well as of substance — which form the object of the present Judgment of the International Court of Justice on the case concerning the *Application of the Convention against Genocide*, stands in clear opposition to the view espoused by the Court's majority. 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.

XIX. Epilogue: A Recapitulation

525. I deem it fit, at this final stage of my dissenting opinion, as an epilogue, to recapitulate all the points of my dissenting position, expressed herein, for the sake of clarity, and in order to stress their interrelatedness. *Primus:* Prolonged delays — such as the unprecedented one of 16 years in the *cas d'espèce* — in the international adjudication of cases of the kind are most regrettable, in particular from the perspective of the victims; paradoxically, the graver the breaches of international law appear to be, the more time consuming and difficult it becomes to impart justice.

526. *Secundus:* 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). *Tertius:* The 1948 Genocide Convention being a human rights treaty (as gen-

[590] Cf. Part V of the present dissenting opinion, *supra.*

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erally acknowledged), the law governing State succession to human rights treaties applies (with *ipso jure* succession). *Quartus:* 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.

527. *Quintus:* 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)*. *Sextus:* 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. *Septimus:* Automatic succession to human rights treaties is reckoned in the practice of United Nations supervisory organs.

528. *Octavus:* The essence of the present case lies on substantive issues pertaining to the interpretation and application of the Genocide Convention rather than on issues of jurisdiction/admissibility, as acknowledged by the contending Parties themselves in the course of the proceedings. *Nonus:* Automatic succession to, and continuity of obligations of, the Genocide Convention, is an imperative of humaneness so as to secure protection to human groups when they stand most in need of it.

529. *Decimus:* 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). *Undecimus:* The principle of humanity has a clear incidence in the protection of human beings, in particular in situations of *vulnerability* or *defencelessness*.

530. *Duodecimus:* The United Nations Charter itself professes the determination to secure respect for human rights everywhere; the principle of humanity — in line with the long-standing jusnaturalist thinking *(recta ratio)* — permeates likewise the law of the United Nations. *Tertius decimus:* 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.

531. *Quartus decimus:* 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. *Quintus decimus:* 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

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from this scourge. To attempt to make the application of the Genocide Convention an impossible task, would render the Convention meaningless, an almost dead letter.

532. *Sextus decimus:* International human rights tribunals (IACtHR and ECHR), 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. *Septimus decimus:* International criminal tribunals (ICTY and ICTR) have, in their jurisprudence, even in the absence of direct proof, drawn proof of genocidal intent from inferences of fact.

533. *Duodevicesimus:* The fact-finding undertaken by the United Nations, at the time of the occurrences, contains important elements conforming with the widespread and systematic pattern of destruction in the attacks in Croatia: such is the case of the reports of the former UN Commission on Human Rights (1992-1993) and of the reports of the Security Council's Commission of Experts (1993-1994). *Undevicesimus:* Those occurrences also had repercussion in the UN Second World Conference on Human Rights (1993). There has also been judicial recognition (in the case law of the ICTY) of the widespread and/or systematic attacks against the Croat civilian population.

534. *Vicesimus:* Such widespread and systematic pattern of destruction, well-established in the present proceedings before the International Court of Justice, 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. *Vicesimus primus:* That widespread and systematic pattern of destruction also comprised rape and other sexual violence crimes, which disclose the necessity and importance of a gender analysis.

535. *Vicesimus secundus:* There was, furthermore, a systematic pattern of disappeared or missing persons. 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.

536. *Vicesimus tertius:* 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

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recta ratio of natural law), underlying the conception of law (in distinct legal systems — *Droit/Right/Recht /Direito/Derecho/Diritto*) as a whole.

537. *Vicesimus quartus:* In the present case, the widespread and systematic pattern of destruction took place in pursuance of a plan, with an ideological content. In this respect, both contending Parties addressed the historical origins of the armed conflict in Croatia, and the ICTY examined expert evidence of it. The International Court of Justice 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.

538. *Vicesimus quintus:* 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. *Vicesimus sextus:* 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. *Vicesimus septimus:* 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).

539. *Vicesimus octavus:* 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. *Vicesimus nonus:* 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.

540. *Trigesimus:* 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. *Trigesimus primus:* 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 proof). The extreme violence in the perpetration of atrocities in the planned pattern of destruction bears witness of such intent to destroy. The inference of *mens rea* cannot prescind from axiological concerns, and is undertaken as from the *conviction intime (livre convencimento/libre convencimiento/libero convincimento)* of each judge, as from human conscience.

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541. *Trigesimus secundus:* There is thus need of reparations to the victims — an issue which was duly addressed by the contending Parties themselves before the Court — to be determined by the International Court of Justice in a subsequent phase of the case. *Trigesimus tertius:* The difficult path to reconciliation 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.

542. *Trigesimus quartus:* The adjudication of a case like the present one shows the need to go beyond the strict inter-State outlook. The Genocide Convention is *people-centred*, 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. In interpreting and applying the Genocide Convention, attention is to be turned to the victims, rather than to inter-State susceptibilities.

543. *Trigesimus quintus:* 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 with 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. *Trigesimus sextus:* 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.

544. *Trigesimus septimus:* 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. 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.

545. The Genocide Convention, which is *victim-oriented*, cannot be approached in a static way, as it is a "living instrument". *Trigesimus octavus:* 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. *Trigesimus nonus:* Furthermore, the interrelated elements of *actus reus* and *mens rea* of genocide cannot be approached separately either.

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546. *Quadragesimus:* General principles of law *(prima principia)*, and in particular the principle of humanity, are of great relevance to both conventional and customary international law. Such *prima principia* confer an ineluctable axiological dimension to the international legal order. *Quadragesimus primus:* 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.

547. *Quadragesimus secundus:* The imperative of the *realization of justice* acknowledges that conscience *(recta ratio)* stands above the "will". Consent yields to objective justice. *Quadragesimus tertius:* The Genocide Convention is concerned with human groups in situations of vulnerability or defencelessness. In its interpretation and application, fundamental principles and human values exert a relevant role. *Quadragesimus quartus:* 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'Etat*. *Quadragesimus quintus:* These are the foundations of my firm dissenting position in the *cas d'espèce*; in my 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*.

(Signed) Antônio Augusto CANÇADO TRINDADE.

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DECLARATION OF JUDGE XUE

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

I. Issues Left over by the 2008 Judgment

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

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

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

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

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

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

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

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

II. Political Premise of Serbia's Succession

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

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

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

> "from that date *onwards* the FRY would be bound by the obligations of a party in respect of all the multilateral conventions to which the SFRY had been a party at the time of its dissolution, subject of course to any reservations lawfully made by the SFRY limiting its obligations" (*ibid.*, pp. 454-455, para. 117; emphasis added).

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

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

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

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

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

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

III. Interpretation of Article IX of the Genocide Convention

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

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

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

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

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

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

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

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

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

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

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

24. Lastly, in response to Serbia's argument on the basis of the Judgments in *Monetary Gold* and *East Timor*, the Court rejects the applicability of the *Monetary Gold* rule that the Court cannot decide a dispute between States without the consent of those States to jurisdiction to the present case (*Monetary Gold Removed from Rome in 1943 (Italy* v. *France, United Kingdom and United States of America), Preliminary Question, Judgment, I.C.J. Reports 1954*, p. 32; *East Timor (Portugal* v. *Australia), Judgment, I.C.J. Reports 1995*, p. 101, para. 26). It states that the rationale behind the *Monetary Gold* rule has no application to a State which ceases to exist, no longer possessing any rights, thus by its nature, incapable of giving or withholding consent to the jurisdiction of the Court.

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

> "the FRY would be bound by the obligations of a party in respect of all the multilateral conventions to which the SFRY had been a party at the time of its dissolution, *subject of course to any reservations lawfully made by the SFRY limiting its obligations*" (2008 Judgment, pp. 454-455, para. 117; emphasis added).

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

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

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IV. "Time Gap" in the Protection

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

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

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

(Signed) Xue Hanqin.

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DECLARATION OF JUDGE DONOGHUE

1. I have voted in favour of all operative paragraphs of the Judgment and I agree in most respects with the Court's reasoning. In this declaration, I offer observations about the parts of the Judgment that discuss the *actus reus* of genocide, both with respect to Croatia's claim and with respect to Serbia's counter-claim.

2. I begin by addressing the written witness statements submitted by Croatia and the Court's evaluation of them. As the Judgment indicates, there are many deficiencies in those statements. Even if the Court had set aside every witness statement, however, there would be no change in the Court's conclusions as to the principal claim. The factual findings of the International Criminal Tribunal for the former Yugoslavia ("ICTY"), taken together with Serbia's admissions, amply establish that Croats were the victims of intentional killings and of acts causing serious bodily and mental harm. Serbia has admitted that the evidence establishes the *actus reus* of genocide, both generally (CR 2014/15, p. 13, para. 10 (Schabas)) and, as is detailed in the Judgment, in respect of many particular localities. The geographic breadth of the ICTY findings and of Serbia's admissions also convincingly establishes a pattern of conduct by the Yugoslav National Army (*Jugoslovenska narodna armija* ("JNA")) and Serb forces. Croatia's claim fails not because of deficiencies in the witness statements, but because genocidal intent is not the only inference that can reasonably be drawn from the pattern of conduct. Nonetheless, the statements and the Court's analysis of them merit a brief comment.

3. In past cases, the Court has provided guidance about the criteria that it uses to evaluate witness statements. It considers whether a witness is disinterested, giving greater weight to testimony of someone who has nothing to gain or to lose, as well as to statements against interest (*Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Merits, Judgment, I.C.J. Reports 1986*, pp. 42-43, para. 69). The Court distinguishes between facts within the witness's personal knowledge, on the one hand, and speculation or repetition of information learned from others (sometimes called "hearsay") on the other hand (*ibid.*, p. 42, para. 68). The Court gives particular weight to statements that are contemporaneous with the events at issue (*Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua* v. *Honduras), Judgment, I.C.J. Reports 2007 (II)*, p. 731, para. 244). These evaluative criteria are reaffirmed today (Judgment, paras. 196-197).

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4. The Court can apply these criteria only if a statement includes sufficient information to permit analysis. What, then, are the elements that should be included in a written witness statement? The Statute and Rules of Court provide little guidance about the form or content of such statements. As to a witness who will appear in Court, however, the Rules require certain basic information, including the name, nationality and residence of the witness, and a declaration that the testimony is the truth (Articles 57 and 64 of the Rules of Court). This information is also necessary for the evaluation of the probative value of a written statement. In this regard, I draw attention to Article 4, subparagraph 5, of the International Bar Association (IBA) Rules on the Taking of Evidence in International Arbitration of 29 May 2010 (which addresses written witness statements). That provision calls for basic information similar to that required by Articles 57 and 64 of the Rules of Court (including name, residence, affirmation of truth, signature, and date and place of the signature).

5. Of course, to evaluate the probative value of a particular statement, it is necessary to look beyond these matters of form and to scrutinize the content of each statement. The IBA Rules are again instructive. They call for information about the relationship between the witness and the parties, which can shed light on whether the witness is disinterested, and they require that a statement contain a full and detailed description of the facts and of the source of the witness's information. Such a description permits a court or tribunal to evaluate the reliability of the evidence (for example, whether the witness was in a position to see or hear events clearly) and whether the witness had direct knowledge of events that are the subject of the testimony (as opposed to having heard of events from others).

6. The evaluative criteria described in the preceding paragraphs are not new and are not peculiar to this Court. An enumeration of minimum requirements for the form and content of written witness statements (along the lines of Articles 57 and 64 of the Rules of Court or of Article 4 of the IBA Rules) certainly could provide more precise guidance to parties. Even without such an enumeration, however, it should come as no surprise that a witness statement that lacks the information that the Court needs in order to apply established evaluative criteria will not be effective in proving a party's allegations.

7. This leads me to an observation about the way the Court evaluates the witness statements submitted by Croatia in the course of deciding whether the evidence establishes the *actus reus* of genocide in particular localities. As I see it, the localities analysed by the Court can be grouped into two categories, in light of the kind of evidence available to the Court.

8. The first category comprises those localities as to which the case file includes ICTY factual findings and Serbia's admissions, as well as, in some instances, witness statements. For each of these localities, the Court

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finds that the evidence establishes the *actus reus* of genocide. These conclusions stand on solid ground. The evidence meets Croatia's burden of proof and satisfies the high standard of proof that governs this case; it "clearly establishes" the *actus reus* of genocide and is "fully convincing" (Judgment, para. 178), whether or not witness statements are taken into account.

9. The second category comprises those localities as to which the case file does not include ICTY factual findings or Serbia's admissions. For these localities, Croatia relies heavily on witness statements. The Court's central inquiry in respect to these statements is whether they are signed and whether the evidence contained therein is based on a witness's first-hand knowledge (as opposed to hearsay). In a few instances, deficiencies in the relevant witness statements (for example, lack of signature or hearsay) lead to the conclusion that the *actus reus* of genocide is not established. For most localities in this second category, however, the Court concludes that the relevant statements are signed and are based on the witness's first-hand knowledge. Repeatedly, the Court indicates that statements that meet these two conditions are to be accorded "evidential weight" ("valeur probante"). I agree that signed statements that are based on first-hand knowledge can have probative value, and thus can support a party's allegations. I am troubled, however, that the Court's analysis seems to leap from the refrain that a statement deserves "evidential weight" to a finding that the *actus reus* of genocide is established. Only after taking into account evaluative criteria additional to signature and first-hand knowledge (such as the location of the witness in relation to the events in question, whether the witness is disinterested, and the circumstances of an interview) is it possible to conclude that statements are fully convincing and that they clearly establish the *actus reus* of genocide, as required by the governing standard of proof. It is therefore unfortunate that the Judgment is inconsistent in the extent to which it sets out the Court's analysis of the elements of particular witness statements that are the basis for the conclusion that the *actus reus* of genocide is established or not, and that it omits citations to the relevant parts of the case file. The obscurity of the Court's reasoning invites questions about whether the Court is faithful to its stated standard of proof. Moreover, because ICTY factual findings and Serbia's admissions clearly establish both the *actus reus* of genocide and the alleged pattern of conduct by the JNA and Serb forces, the Court could have avoided locality-by-locality pronouncements as to the *actus reus* of genocide in respect to localities in this second category.

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10. As regards the counter-claim, I offer one comment on the Court's analysis regarding the *actus reus* of genocide. I address here the Court's conclusion that civilian deaths resulting from the shelling of Knin are not "killing[s]" within the meaning of subparagraph *(a)* of Article II of the Convention (Judgment, paras. 474-475), which the Court has interpreted to extend only to intentional killings (*ibid.*, para. 156; case concerning the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro), Judgment, I.C.J. Reports 2007 (I)*, p. 121, para. 186).

11. I have no quarrel with the Court's conclusion that it is unable to find that the civilian deaths in Knin were the result of indiscriminate shelling (Judgment, para. 472). However, I disagree with the suggestion (*ibid.*, para. 474) that the term "killing", as used in subparagraph *(a)* of Article II, does not extend to deaths resulting from attacks that are directed exclusively at military targets and that do not deliberately target civilians. It is certainly possible for the deaths resulting from such attacks to be intentional killings, even if the attack did not deliberately target civilians. Depending on the particulars, such killings may or may not be lawful under the law of armed conflict and that distinction could bear on the evaluation of evidence as to genocidal intent. At the stage of examining whether deaths comprise the *actus reus* of genocide, however, I consider it sufficient for the Court to decide whether the killings were intentional.

12. This observation does not affect my agreement with the Court's more general conclusions as to the counter-claim: the evidence proves the *actus reus* of genocide but the counter-claim fails because genocidal intent has not been proven.

(Signed) Joan E. DONOGHUE.

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SEPARATE OPINION OF JUDGE GAJA

1. The Judgment rendered in 2007 on the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro)* (*I.C.J. Reports 2007 (I)*, p. 43) concerned events that had occurred in Bosnia. It does not formally bind the Court in the present proceedings. However, it would be unreasonable for the Court to adopt a different approach to the interpretation and application of the Genocide Convention when considering events of a similar character which had taken place in the same years in nearby areas in the former Yugoslavia. Thus, it is quite understandable that the Court uses with regard to events in Croatia the same criteria contained in the 2007 Judgment on issues such as the definition of genocide, the material acts covered by this definition and the required mental element. The slight difference in the formulation of the rule on evidence in the present Judgment, which now specifies the need to make a "reasonable" inference of the intention of genocide, is not intended as a modification of the standard previously used (Judgment, para. 148).

It may be worth noting, however, that both the 2007 Judgment and the present Judgment 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 appear to be underrated and will be discussed in the following paragraphs.

2. One aspect concerns the *definition of genocide*. This may at first seem strange since Article II of the Genocide Convention applies to the commission of genocide both by individuals and by States. I agree with the Court's view that for States "the obligation to prevent genocide necessarily implies the prohibition of the commission of genocide" (*I.C.J. Reports 2007 (I)*, p. 113, para. 166). A State could hardly infringe an obligation to prevent genocide more directly than by itself committing genocide.

It is well known that, in order to define genocide, the statutes of the international criminal tribunals simply reproduce Article II of the Genocide Convention (Article 4 of the Statute of the International Criminal Tribunal for the former Yugoslavia (ICTY); Article 2 of the Statute of the International Criminal Tribunal for Rwanda (ICTR); Article 6 of the Rome Statute of the International Criminal Court (ICC)).

While it would seem logical to give to the definition of genocide the same meaning with regard to State responsibility and the criminal responsibility of individuals, there are reasons for the international criminal tri-

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bunals to adopt a restrictive approach to the definition which are not applicable when one considers State responsibility.

According to Article 22 (2) of the ICC Statute, "[t]he definition of a crime shall be strictly construed" and "[i]n case of ambiguity . . . shall be interpreted in favour of the person being investigated, prosecuted or convicted". A similar approach, implying a "strict construction", was taken by a Trial Chamber of the ICTY in *Delalić* (Judgment of 16 November 1998, IT-96-21-T, para. 411). With regard to the definition of genocide, a Trial Chamber of the ICTR found in *Kayishema* that "if a doubt exists, for a matter of statutory interpretation, that doubt must be interpreted in favour of the accused" (Judgment of 21 May 1999, ICTR-95-1-T, para. 103).

A restrictive approach to the definition of genocide may also be found in the "Elements of Crimes", adopted by the Assembly of States Parties in order to "assist" the ICC in the interpretation and application of the relevant provisions of the Rome Statute (Art. 9). According to these Elements, for genocide to be committed it is necessary that "[t]he conduct took place in the context of a manifest pattern of similar conduct directed against that group or was conduct that could itself effect such destruction". Since the adoption of the Elements of Crimes does not embody a "subsequent agreement between the parties regarding the interpretation" of the Genocide Convention according to Article 31, paragraph 3 *(a)*, of the Vienna Convention on the Law of Treaties, it does not affect the extent of State responsibility for genocide.

Moreover, unlike the Court's jurisdiction under Article IX of the Genocide Convention, the jurisdiction of international criminal tribunals extends to crimes against humanity and serious breaches of international humanitarian law. These crimes in part overlap with genocide and are generally easier to prove. This has caused the Prosecutor sometimes to refrain from charging genocide and also the tribunals to take a restrictive approach to finding that genocide had occurred.

It is noteworthy that in *Krstić*, one of the few instances where the ICTY found that genocide had been committed, the Appeals Chamber observed:

> "The gravity of genocide is reflected in the stringent requirements which must be satisfied before this conviction is imposed. These requirements — the demanding proof of specific intent and the showing that the group was targeted for destruction in its entirety or in substantial part — guard against a danger that convictions for this crime will be imposed lightly." (Judgment of 19 April 2004, IT-98-33-A, para. 37.)

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3. Determining the existence of the *mental element of genocide* may lead to different conclusions with regard to individuals and the State for which they may be acting.

The United Nations Commission of Inquiry on Darfur found that, while the Sudanese governmental authorities did not possess an intent to destroy an ethnic group in whole or in part, single individuals belonging to the Sudanese army or paramilitaries could have had that intent (Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General, 25 January 2005, paras. 520-521). The reverse hypothesis may also occur. While it would be difficult to infer from the act of an individual his or her intent to target a substantial part of a group, a number of State organs or other individuals acting for a State may produce a pattern of conduct from which a governmental policy concerning the destruction of a group could be inferred. In relation to the events in Srebrenica, the Appeals Chamber of the ICTY stated in *Krstić* that:

> "The Trial Chamber found, and the Appeals Chamber endorses this finding, that the killing was engineered and supervised by some members of the Main Staff of the VRS. The fact that the Trial Chamber did not attribute genocidal intent to a particular official within the Main Staff may have been motivated by a desire not to assign individual culpability to persons not on trial here. This, however, does not undermine the conclusion that Bosnian Serb forces carried out genocide against the Bosnian Muslims." (Judgment of 19 April 2004, IT-98-33-A, para. 35; footnote omitted.)

Moreover, identifying the individuals who committed specific acts may be problematic and therefore impede prosecution. However, when the acting persons are at least identified as State organs or as acting for the State, a finding of State responsibility for genocide may be warranted.

In any case, establishing that an individual or organ committed certain acts with genocidal intent is not a precondition for finding that a State committed genocide. The following passage in the 2007 Judgment may contain some ambiguity, but does not suggest the existence of such a precondition. The Court only said that "if an organ of the State, or a person or group whose acts are legally attributable to the State, commits any of the acts proscribed by Article III of the Convention, the international responsibility of that State is incurred" (*I.C.J. Reports 2007 (I)*, p. 119, para. 179). The further developments contained in the present Judgment (paras. 128-129) on this issue do not fully remove the ambiguity, but also do not point to a precondition.

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4. The main difference between international criminal responsibility and State responsibility for genocide concerns the *standard of proof*. In international criminal proceedings, as in criminal proceedings in general, the evidence against the accused is often required to be "beyond all reasonable doubt". This standard was set with regard to genocide by the Trial Chamber of the ICTR in *Akayesu* (Judgment of 2 September 1998, ICTR-96-4-T, para. 530) and in *Rutaganda* (Judgment of 6 December 1999, ICTR-96-3-T, para. 398) and by the Trial Chamber of the ICTY in *Jelisić* (Judgment of 14 December 1999, IT-95-10-T, para. 108). In the latter Judgment the Chamber also stated that "the benefit of the doubt must always go to the accused" *(ibid.)*.

With regard to the evidence relating to the intent to commit genocide, the 2007 Judgment of the Court used a similar approach. The Court found that:

> "The *dolus specialis*, the specific intent to destroy the group in whole or in part, has to be convincingly shown by reference to particular circumstances, unless a general plan to that end can be convincingly demonstrated to exist; and for a pattern of conduct to be accepted as evidence of its existence, it would have to be such that it could only point to the existence of such intent." (*I.C.J. Reports 2007 (I)*, pp. 196-197, para. 373; see also Judgment, paras. 145 and 148.)

The Court went on to say that the "broad" proposition advanced by the applicant State (Bosnia and Herzegovina) concerning intent was "not consistent with the findings of the ICTY relating to genocide or with the actions of the Prosecutor" (*I.C.J. Reports 2007 (I)*, p. 197, para. 374).

In the 2007 Judgment a variety of expressions were used to describe the required standard of proof. The Court said that it had to be "fully convinced that allegations made in the proceedings, that the crime of genocide or the other acts enumerated in Article III have been committed, have been clearly established"; this also "applies to the proof of attribution for such acts" (*ibid.*, p. 129, para. 209; see also Judgment, paras. 178-179). With regard to a breach of the obligations "to prevent genocide and to punish and extradite persons charged with genocide", the Court observed that there was the need of "proof at a high level of certainty" (*I.C.J. Reports 2007 (I)*, p. 130, para. 210). The Court also found that one condition for the responsibility for complicity in genocide was not fulfilled

> "because it [was] not established *beyond any doubt* in the argument between the Parties whether the authorities of the FRY supplied — and continued to supply — the VRS leaders who decided upon and carried out those acts of genocide with their aid and assistance, at a time when those authorities were clearly aware that genocide was about to take place or was under way" (*ibid.*, p. 218, para. 422; italics added).

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In substance, although different wording was used, the Court applied the same standard of "beyond all reasonable doubt" that the ICTY and the ICTR apply with regard to individual crimes. This was confirmed by a remark made by President Higgins in her presentation in November 2007 of the Court's jurisprudence to the Sixth Committee of the General Assembly. After quoting paragraph 209 of the Judgment, she noted that:

> "There have been some curious comments by observers as to this being a 'higher' or 'lower' standard than 'beyond reasonable doubt'. It is simply a *comparable* standard, but employing terminology more appropriate to a civil, international law case." (Speech by H.E. Judge Rosalyn Higgins, President of the International Court of Justice, to the Sixth Committee of the General Assembly, 2 November 2007.)

One of the reasons for requiring such a standard of proof for issues of State responsibility was found by the Court in the "exceptional gravity" of the charges involving the commission of genocide (*I.C.J. Reports 2007 (I)*, p. 129, para. 209). The Court referred *(ibid.)* to the passage in the *Corfu Channel* Judgment where, in view of "allegations short of conclusive evidence" of a minefield having been laid by two Yugoslav vessels, the Court said: "A charge of such exceptional gravity against a State would require a degree of certainty that has not been reached here." (*Corfu Channel (United Kingdom* v. *Albania), Merits, Judgment, I.C.J. Reports 1949*, p. 17.) Also with regard to the alleged breach of obligations to prevent genocide and to punish and extradite persons charged with genocide, the Court linked the standard of proof with the "seriousness of the allegation" (*I.C.J. Reports 2007 (I)*, p. 130, para. 210). The present Judgment adopts "the same standard of proof" (para. 179).

However, it would be difficult to explain why the seriousness of the alleged wrongful act and its connection with international crimes should make the establishment of international responsibility more difficult. As was pointed out by the Eritrea-Ethiopia Claims Commission in two of its decisions dated 1 July 2003:

> "The Commission does not accept any suggestion that, because some claims may involve allegations of potentially criminal individual conduct, it should apply an even higher standard of proof corresponding to that in individual criminal proceedings. The Commission is not a criminal tribunal assessing individual criminal responsibility. It must instead decide whether there have been breaches of international law based on normal principles of state responsibility. The possibility that particular findings may involve very serious matters does not

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change the international law rules to be applied or fundamentally transform the quantum of evidence required." (*RIAA*, Vol. XXVI, p. 41, para. 47, and p. 88, para. 38.)

5. The difference in approach that should be taken with regard to State responsibility, on the one hand, and individual criminal responsibility, on the other, may not be very substantial. However, it is not insignificant. It may provide a greater opportunity for a State to assert before the Court a claim that another State committed genocide.

(Signed) Giorgio GAJA.

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SEPARATE OPINION OF JUDGE SEBUTINDE

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

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

Introduction

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

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

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

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

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

4. The Court, in its 2008 Judgment, noted that Serbia's second preliminary objection was an "objection to jurisdiction" on the one hand, and *"one going to the admissibility of the claims"*, on the other (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia* v. *Serbia), Preliminary Objections, Judgment, I.C.J. Reports 2008*, p. 456, para. 120; emphasis added). Observing that the objection entailed two interrelated issues, the Court stated as follows:

> "The first issue is that of the Court's jurisdiction to determine whether breaches of the Genocide Convention were committed in the light of the facts that occurred prior to the date on which the FRY

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> came into existence as a separate State, capable of being a party in its own right to the Convention; this may be regarded as a question of the applicability of the obligations under the Genocide Convention to the FRY before 27 April 1992. The second issue, that of admissibility of the claim in relation to those facts, and involving questions of attribution, concerns the consequences to be drawn with regard to the responsibility of the FRY for those same facts under the general rules of State responsibility. In order to be in a position to make any findings on each of these issues, the Court will need to have more elements before it." (*I.C.J. Reports 2008*, p. 460, para. 129.)

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

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

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

> "*from that date onwards* the FRY [Serbia] would be bound by the obligations of a party in respect of all the multilateral conventions to which the SFRY had been a party at the time of its dissolution, subject of course, to any reservations lawfully made by the SFRY limiting its obligations. It is common ground that the Genocide Convention was one of these conventions, and that the SFRY had made no reservation to it; thus the FRY in 1992 accepted the obligations of that Convention . . . In the events that have occurred, this signifies that the 1992 declaration and Note had the effect of a notification of succession by the FRY to the SFRY in relation to the Genocide Convention." (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia* v. *Serbia), Preliminary Objections, Judgment, I.C.J. Reports 2008*, pp. 454-455, para. 117; emphasis added.)

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

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

10. Secondly, it must be recalled that Croatia's claim is solely based on treaty law and that the jurisdiction of this Court is founded on consent of States parties. In the present case, Serbia recognized the jurisdiction of the Court under the Genocide Convention with effect from the date it became a party to that Convention *and not before* (see *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia* v. *Serbia), Preliminary Objections, Judgment, I.C.J. Reports 2008*, p. 455, para. 117). Thus, although Article IX of the Genocide Convention (the compromissory provision from which the Court in this case derives its jurisdiction) contains no limitations *ratione temporis*, there is nothing in the Convention to suggest an intention to give it retroactive effect. Moreover, that provision must be construed in light of the whole Convention and in conformity with the Vienna Convention on the Law of Treaties, 1969 (VCLT), the Vienna Convention on Succession of States in Respect of Treaties, 1978 (VCSSRT), and the ILC Draft Articles on Responsibility of States for Internationally Wrongful Acts (2001) ("ILC Articles"). Article 28 of the VCLT provides that:

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

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

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

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

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

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

> "to the extent that the dispute concerns acts said to have occurred before [27 April 1992] [i.e., before Serbia became a party to the Convention], it also falls within the scope of Article IX and that the Court therefore has jurisdiction to rule upon the entirety of Croatia's claim" (*ibid.*, para. 117).

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

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

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

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

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

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

1. Prosecutorial discretion

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

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

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

2. The Prosecutor's prerogative to charge

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

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

3. Distinguishing individual criminal responsibility and State responsibility

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

(*Signed*) Julia SEBUTINDE.

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SEPARATE OPINION OF JUDGE BHANDARI

Introduction

1. I have voted with the majority on all three operative clauses of the present Judgment. However, with respect to the second operative clause, i.e., the rejection of Croatia's principal claim, I wish to qualify and expand upon the rationales for my vote. In so doing, I shall take the present opportunity to expound upon certain reservations I continue to harbour regarding the analysis employed at various points throughout that portion of the Judgment with respect to issues which, in my respectful view, have received inadequate — or even incorrect — attention.

2. At the outset, I wish to underscore that the principal reason for my rejection of Croatia's claim is that the Applicant has failed, in my considered opinion and after having carefully scrutinized the entire evidentiary record in these proceedings, to satisfy the minimum standard of credible evidence required by this Court in its prior jurisprudence (in particular the *Bosnia* Judgment of 2007[1], which dealt with claims of a highly similar nature) in relation to the *dolus specialis* of genocide. In this regard, I take specific note of Croatia's near complete inability to substantiate most of the figures it has averred in terms of number of victims as a consequence of the hostilities that occurred in the regions and during the period at issue. Moreover, I recall that it is a well-settled principle of law that the graver the offence alleged, the higher the standard of proof required for said offence to be established in a court of law. Consequently, I am not "fully convinced" (Judgment, para. 178) that the *only inference available from the evidence on record* is that attacks against ethnic Croats on the territory of Croatia between 1991 and 1995 were perpetrated with the requisite genocidal intent. Thus, although I concur with the majority that the *actus reus* of genocide has been conclusively satisfied with respect to many of the localities averred by Croatia, the Applicant's inability to prove that the *mens rea* of genocide — which, by its very nature, constitutes a charge "of exceptional gravity" *(ibid.)* — has been "clearly established" *(ibid.)* is necessarily fatal to Croatia's entire cause of action.

[1] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro), Judgment, I.C.J. Reports 2007 (I)*, p. 43 (hereafter the "*Bosnia* Judgment").

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3. Indeed, during the oral hearings phase of these proceedings, in response to a question posed by another Member of the Court, Croatia was compelled to concede that many of its written witness statements would have been inadmissible in a domestic Croatian court of law, to which Serbia responded that such statements would have been likewise inadmissible in the domestic courts of the former Yugoslavia (Judgment, para. 195). Moreover, in response to a question that I posed to the Parties, Croatia maintained that the Court enjoyed a free hand in determining what weight should be given to them, based on established Court jurisprudence pertaining to out-of-court documents (*ibid.*, para. 194). The sum total of these exchanges is that it stands to reason that a party to proceedings before the Court cannot expect to have documents that would be inadmissible before the courts of its own country, and which bear marked deficiencies when assessed using the standards applied in this forum, admitted for proof of their contents; *especially* where the matter to be proved is as grave as the crime of genocide.

4. In reaching this conclusion, I share the majority's sensitivity to "the difficulties of obtaining evidence in the circumstances of th[is] case" (*ibid.*, para. 198), wherein proof had to be gleaned from a *postbellum* context where the juridical infrastructure and other cornerstones of government and civil society typically relied upon by litigants appearing before this Court have been rendered largely absent or at least severely compromised by years of brutal war, massive displacements of populations and other seismic socio-political upheavals. Indeed, so Herculean are these obstacles that I must confess to having harboured a fleeting temptation to relax my approach to the methods of proof obtaining before the instant proceedings, specifically with respect to the documentary evidence adduced by Croatia, much of which admittedly lacks the indicia of reliability normally demanded of documents presented before a judicial body. However, the allure of adopting an elastic approach to Croatia's documents was, to my mind, definitively quelled by the countervailing consideration that the crime of genocide, being "an odious scourge"[2] that is "condemned by the civilized world"[3], carries with it such grievous moral opprobrium that a judicial finding as to its existence can only be countenanced upon the most credible and probative evidence. Consequently, despite the sympathy I have expressed herein regarding the extraordinary evidentiary hurdles faced by the Parties to these proceedings, I ultimately share the majority's finding "that many of the statements produced by Croatia are deficient" (*ibid.*, para. 198), that these deficiencies are irremediable, and that the remainder of the Applicant's evidence has failed to conclusively demonstrate *the only conclusion to be drawn from the evidence it has proffered* is that there existed genocidal intent against the targeted group in question during the time period averred.

[2] Convention on the Prevention and Punishment of the Crime of Genocide ("Genocide Convention"), Preamble.

[3] *Ibid.*

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5. This premise having been established, I take note of the fact that in spite of the serious evidentiary deficiencies in Croatia's case, the majority has elected to assess whether the claims of the Applicant, taken at their highest, could nevertheless evince genocidal intent[4]. Following this lead, and notwithstanding my conclusion that Croatia's charges of genocide have failed on evidentiary grounds, I intend to profit from the present opportunity in making certain observations and critiques to the analysis adopted by the majority on the issue of *dolus specialis*, assuming, *arguendo* (as the majority has done), that Croatia's case may be taken at its highest.

6. In brief, it is my respectful view that the Court should have used the present Judgment to lay down clearer guidelines on three principal issues. First, I believe the Court could have provided a better and clearer treatment as to what constitutes genocidal intent. Second, given the proliferation of international criminal tribunals over the past two decades and the consequent exponential expansion of jurisprudence emanating from these juridical bodies, I believe the majority has been derelict in not more fully canvassing the available authorities to provide clear parameters to distinguish between genocide and the oft closely intertwined offences of extermination and/or persecution as a crime against humanity. Third and finally, I believe that the 17 factors advanced by Croatia in support of its contention that genocide occurred deserved a more comprehensive response than the majority's approach of selecting, without any apparent reasoned explanation, five factors deemed "most important" to Croatia's claim of genocidal intent (Judgment, para. 413). I believe that a superior treatment of

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[4] See Judgment, para. 437:

> "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 will make no ruling* — the number of victims alleged by Croatia is small in relation to the size of the targeted part of the group." (Emphasis added.)

See also, *ibid.*, para. 213:

> "Croatia first asserts that, between the end of August and 18 November 1991, Vukovar was besieged and subjected to sustained and indiscriminate shelling, laying waste to the city. It alleges that between 1,100 and 1,700 people, 70 per cent of whom were civilians, were killed during that period."

See also, *ibid.*, para. 218:

> "The Court will first consider the allegations concerning those killed during the siege and capture of Vukovar. *The Parties have debated the number of victims, their status and ethnicity and the circumstances in which they died. The Court need not resolve all those issues.* It observes that, while there is still some uncertainty surrounding these questions, it is clear that the attack on Vukovar was not confined to military objectives; it was also directed at the then predominantly Croat civilian population (many Serbs having fled the city before or after the fighting broke out)." (Emphasis added.)

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these topics would have been commensurate with the Court's function as not only the principal judicial organ of the United Nations but as a "World Court" from which other international and domestic courts and tribunals seek guidance as a legal authority of the highest order.

Genocidal Intent and the "Substantiality" Criterion

7. For ease of reference, I reproduce the relevant sections of the Genocide Convention in which the substantive provisions of the crime of genocide are enshrined:

> "Article 1: The Contracting Parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish.
>
> Article 2: 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."

As the foregoing text illustrates, the *chapeau* of Article II of the Genocide Convention defines genocide as "any of the following acts committed with intent to destroy, in whole *or in part*, a national, ethnical, racial or religious group, as such" (emphasis added). The fact that the Convention expressly envisages situations where a group may be targeted for destruction "in part" naturally gives rise to the thorny question of when exactly the targeted "part" meets the threshold for genocidal intent. Because the Convention is silent on this point, in the *Bosnia* Judgment the Court relied upon the jurisprudence of the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR), as well as International Law Commission (ILC) Commentary, to conclude that "part" of the "group" for the purpose of Article II requires an intent "to destroy at least a *substantial* part of the particular group"[5].

[5] *Bosnia* Judgment, p. 126, para. 198; emphasis added.

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8. While the "substantiality" criterion enunciated in the *Bosnia* Judgment has been reaffirmed in the instant Judgment (in somewhat modified form, a subject to which I intend to return in short order), this has been done rather tersely and in a way that, in my view, fails to lay down clear parameters that would provide guidance to future adjudicative bodies grappling with this concept. The majority, has also, I fear, neglected to so much as consider possibly relevant jurisprudential developments emanating from the *ad hoc* international criminal tribunals in the intervening eight years since the issuance of the *Bosnia* Judgment. Therefore, in the hopes of elucidating this standard for the sake of posterity, I intend to revisit the *Bosnia* formula to see how that test has been applied in practice by other tribunals in recent years, so as to juxtapose such developments with how the majority has employed said formula in the instant Judgment.

The Legal Test Enunciated in the Court's *Bosnia* Judgment of 2007

9. As has been correctly observed in the present Judgment, in the *Bosnia* Judgment of 2007, the Court "considered certain issues similar to those before it in the present case" (Judgment, para. 125). On that occasion, the Court expounded the relevant test for determining what constitutes a "part" of the targeted group for the purpose of analysing genocidal intent as follows:

> "[T]he Court refers to *three matters relevant to the determination of 'part' of the 'group'* for the purposes of Article II [of the Genocide Convention]. In the *first* place, the intent must be to destroy at least a *substantial part* of the particular group. That is demanded by the very nature of the crime of genocide: since the object and purpose of the Convention as a whole is to prevent the intentional destruction of groups, the part targeted must be significant enough to have an impact on the group as a whole. *That requirement of substantiality is supported by consistent rulings of the ICTY and the International Criminal Tribunal for Rwanda (ICTR)* and by the Commentary of the ILC to its Articles in the draft Code of Crimes against the Peace and Security of Mankind.
>
> *Second*, the Court observes that 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 . . . As the ICTY Appeals Chamber has said . . . the *opportunity* available to the perpetrators is significant. *This criterion of opportunity must however be weighed against the first and essential factor of substantiality*. It may

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be that the opportunity available to the alleged perpetrator is so limited that the substantiality criterion is not met. The Court observes that the ICTY Trial Chamber has indicated the need for caution, lest this approach might distort the definition of genocide [. . .]

A *third* suggested criterion is *qualitative* rather than quantitative. The Appeals Chamber in the *Krstić* case [noted that]

'. . . In addition to the numeric size of the targeted portion, its *prominence* within the group can be a useful consideration. If a specific part of the group is *emblematic of the overall group, or is essential to its survival*, that may support a finding that the part qualifies as substantial . . .'

Establishing *the 'group' requirement will not always depend on the substantiality requirement alone although it is an essential starting-point. It follows in the Court's opinion that the qualitative approach cannot stand alone*. The Appeals Chamber in *Krstić* also expresses that view."[6]

The Court concluded its remarks by noting that "[t]he above list of *criteria is not exhaustive*, but, as just indicated, *the substantiality criterion is critical*. They are essentially those stated by the Appeals Chamber in the *Krstić* case, although *the Court does give this first criterion priority*."[7] Thus, in the *Bosnia* case the Court fastened a tripartite formula, which it indicated was open to future expansion and elaboration, for determining whether a "part" of a group has been targeted with genocidal intent; according to which the criterion of "substantiality" was pre-eminent in that calculus.

10. While the *Bosnia* formula did not draw any bright lines around the contours of what constitutes genocidal intent toward "a part" of the targeted group, it would appear plain from that Judgment and the jurisprudence of the international criminal tribunals that a "substantial" part of the targeted group need not constitute the *majority* thereof, and that there *is no numeric threshold* for discerning a substantial part of the group.

The Legal Test Enunciated in the Present Judgment

11. The pertinent analysis of the law on genocidal intent vis-à-vis "a part" of the targeted group is presented in the present Judgment as follows:

"The Court recalls that *the destruction of the group 'in part' within the meaning of Article II of the Convention must be assessed by refer-*

[6] *Bosnia* Judgment, pp. 126-127, paras. 198-200 (internal citations omitted; emphasis added).
[7] *Ibid.*, p. 127, para. 201; emphasis added.

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ence to a number of criteria. In this regard, it held in 2007 that 'the intent must be to destroy at least a substantial part of the particular group' [. . .], and that this is a 'critical' criterion. The Court further noted that '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 that, 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. With respect to this criterion, the Appeals Chamber of the ICTY specified in its Judgment rendered in the *Krstić* case that '[i]f a specific part of the group is emblematic of the overall group, or is essential to its survival, that may support a finding that the part qualifies as substantial . . .'.

In 2007, the Court held that these factors would have to be assessed in any particular case. [. . .] It follows *that, in evaluating whether the allegedly targeted part of a protected group is substantial* in relation to the overall group, *the Court will take into account the quantitative element as well as* evidence regarding *the geographic location* and *prominence* of the allegedly targeted part of the group." (Judgment, para. 142 (internal citations omitted; emphasis added).)

What I find immediately striking from this slightly rebranded iteration of the tripartite test promulgated by the Court in the *Bosnia* Judgment is that, one fleeting reference to the "critical" nature of the "substantiality" criterion (now renamed "the quantitative element") notwithstanding, the rigidly hierarchical structure of the *Bosnia* test, whereby the numerosity of the targeted population was clearly superordinate to the other, supplementary criteria of "opportunity" (now dubbed "the geographic location") and the "qualitative factor" (now dubbed the "prominence" of the targeted group) has been jettisoned in favour of a more equal balancing effort. My distinct impression that the stratification inherent in the *Bosnia* formula has been mollified by the present Judgment (a jurisprudential evolution I applaud) draws further support from the consistently flexible and egalitarian manner in which the Court has *applied* these three factors to the facts at bar, wherein I cannot discern any noticeable supremacy afforded the quantitative element (see, generally, Judgment, paragraphs 413-441).

12. As I shall undertake to demonstrate at a later juncture in this opinion, I believe that this adapted substantiality test has practical consequences for the manner in which the majority has applied the assessment of genocidal intent in the present Judgment, specifically with respect to the events occurring in the city of Vukovar and its environs.

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POST-*BOSNIA* JURISPRUDENCE OF THE ICTY AND ICTR

13. As noted above, in the present Judgment the Court has recalled and reaffirmed the tripartite formula for genocidal intent enunciated in *Bosnia* as the approach to be followed in the present case, though not without a significant restructuring of the normative order of the test to be employed. This is naturally consonant with the principle that while no prior judgment of this Court constitutes binding precedent *sensu stricto*[8], "[i]n general the Court does not choose to depart from previous findings, particularly when similar issues were dealt with in the earlier decisions . . . unless it finds very particular reasons to do so" (Judgment, para. 125). As I have noted above, in *Bosnia* the Court explicitly acknowledged the contributions of the ICTY and ICTR in shaping the test that it adopted to assess genocidal intent vis-à-vis a "part" of a targeted group[9]. Consequently — and bearing in mind the nearly eight years that have passed since the promulgation of this Court's *Bosnia* formula — it would seem to me only natural and appropriate to examine whether the jurisprudence of those tribunals in the intervening years reveals any evolution in how the "substantiality" component of genocidal *dolus specialis* has been applied in recent litigious contexts. Such an endeavour is not only consonant with the *Bosnia* Judgment's pronouncement that the criteria enunciated therein were "not exhaustive"[10] and therefore presumably subject to future elucidation, but is also faithful to the present Judgment's self-admonition that the Court will "take account, where appropriate, of the decisions of international criminal courts or tribunals, in particular those of the ICTY, as it did in 2007, in examining the constituent elements of genocide in the present case" (*ibid.*, para. 129). In a similar vein, I recall the draft Judgment's avowal that while it will rely on the *Bosnia* Judgment "to the extent necessary for its legal reasoning[, t]his will not . . . preclude it, where necessary, from elaborating upon this jurisprudence" (*ibid.*, para. 125).

14. In my respectful view, because the legal standard for genocidal intent has a necessarily vague and dynamic character, it was incumbent upon the Court to fully canvass recent developments in the law to determine how the *Bosnia* formula (as restated in the present Judgment) has been applied in other juridical institutions tasked with applying that test.

[8] ICJ Statute, Article 59: "The decision of the Court has no binding force except between the parties and in respect of that particular case."

[9] *Bosnia* Judgment, p. 126, para. 198.

[10] *Ibid.*, p. 127, para. 201.

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I regret to say that in my estimation the present Judgment has neither fully nor properly canvassed the current jurisprudential standard of genocidal intent emanating from the ICTY and the ICTR. For this reason, I shall now conduct a survey of recent trends in the case law of those tribunals on this subject in an attempt to glean insights as to the present state of the law in this area. As I shall expound hereunder, I take the position that these recent jurisprudential trends would tend to suggest that a pattern of killings such as has been averred in relation to the events that occurred in Croatia between 1991 and 1995[11], and in particular with respect to the region of Eastern Slavonia and the greater Vukovar area, *may* be more indicative of genocidal intent than the majority has acknowledged.

The *Tolimir* ICTY Trial Chamber Judgment

15. On 12 December 2012, the Trial Chamber of the ICTY issued its judgment in the case of *Tolimir* (currently under appeal), in which it provided a comprehensive treatment of the substantiality criterion of genocidal intent. The Trial Chamber recalled that

> "[t]he term 'in whole or in part', relates to the requirement that the perpetrator intended to destroy at least a substantial part of a protected group. While *there is no numeric threshold of victims required*, the targeted portion must comprise 'a significant enough [portion] to have an impact on the group as a whole'. *Although the numerosity of the targeted portion in absolute terms is relevant to substantiality, this is not dispositive*; other relevant factors include the numerosity of the targeted portion in relation to the group as a whole, the prominence of the targeted portion and whether the targeted portion of the group is emblematic of the overall group, or is essential to its survival, as well as the area of the perpetrators' activity, control and reach."[12]

These observations made repeated reference to the same section of the analysis contained in the *Krstić* Judgment of the ICTY Appeals Chamber that was relied upon by this Court when it adopted its tripartite test for genocidal intent in the *Bosnia* Judgment.

[11] For the avoidance of any doubt, I recall that while I have found that Croatia's claim fails on evidentiary grounds, I am taking the present opportunity, as the majority has done, to assess Croatia's case taken at its highest.

[12] *Prosecutor* v. *Tolimir*, Trial Judgment, 12 December 2012, para. 749 (internal citations omitted; emphasis added).

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16. After summarizing these widely accepted elements of the law on genocidal intent, the Trial Chamber in *Tolimir* further recalled a passage from an earlier judgment of the ICTY Trial Chamber in the case of *Jelisić*[13], which was cited approvingly in a passage of the *Krstić* Appeals Judgment[14] that was referenced favourably by the Court in the *Bosnia* Judgment[15]. As the *Tolimir* Trial Chamber recalled:

> "The *Jelisić* Trial Chamber held that as well as consisting of the desire to exterminate a very large number of members of the group, genocidal intent may also consist of the desired destruction *of a more limited number of persons selected for the impact that their disappearance would have on the survival of the group* as such."[16]

The Trial Chamber then made the following further observations about the *Jelisić* Trial Judgment:

> "The *Jelisić* Trial Chamber cited the Final Report of the Commission of Experts formed pursuant to Security Council Resolution 780 which found
>
> '[i]f essentially the total leadership of a group is targeted, it could also amount to genocide. Such leadership includes political and administrative leaders, religious leaders, academics and intellectuals, business leaders and others — the totality per se may be a strong indication of genocide *regardless of the actual numbers killed*. A corroborating argument will be the fate of the rest of the group. The character of the attack on the leadership must be *viewed in the context of the fate or what happened to the rest of the group. If a group has its leadership exterminated, and at the same time or in the wake of that, has a relatively large number of the members of the group killed or subjected to other heinous acts, for example deported on a large scale or forced to flee*, the cluster of violations ought to be considered in its entirety in order to interpret the provisions of the Convention in a spirit consistent with its purpose.'. . .
>
> The Commission of Experts Report stated, further, that
>
> '[s]imilarly, the extermination of a group's law enforcement and military personnel may be a significant section of a group in that it renders the group at large defenceless against other abuses of a similar or other nature, particularly if the leadership is being eliminated as well. Thus the intent to destroy the fabric of a society through the extermination of its leadership, *when accompanied by*

[13] *Prosecutor* v. *Jelisić*, Trial Judgment, 14 December 1999, para. 82.
[14] *Prosecutor* v. *Krstić*, Appeals Judgment, 19 April 2004, para. 8 and fn. 10.
[15] *Bosnia* Judgment, p. 126, para. 198.
[16] *Prosecutor* v. *Tolimir*, Trial Judgment, 12 December 2012, para. 749; citing *Prosecutor* v. *Jelisić*, Trial Judgment, 14 December 1999, para. 82.

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> *other acts of elimination of a segment of society*, can also be deemed genocide.'"[17]

17. The Trial Chamber then proceeded to apply this more flexible concept of substantiality to the factual circumstances of that case, which involved, *inter alia*, the killing of *three* prominent members of the Bosnian Muslim population of Zepa enclave in Eastern Bosnia and Herzegovina ("BiH"). As the Trial Chamber recalled, Zepa was a village situated approximately 20 kilometres from Srebrenica that had a population of less than 3,000 inhabitants prior to the war, but which saw its population swell to as many as 10,000 people by July 1995, as Bosnian Muslims from other surrounding areas in Eastern BiH sought refuge from the prevailing hostilities, such that "[d]uring the conflict the population of Zepa consisted entirely of Bosnian Muslims"[18].

18. Regarding the three individuals killed, the Trial Chamber made the following observations:

> "The three leaders were Mehmed Hajrić, the Mayor of the municipality and President of the War Presidency, Colonel Avdo Palić, Commander of the ABiH Zepa Brigade . . . and Amir Imamović, the Head of the Civil Protection Unit. They were, therefore, among the most prominent leaders of the enclave . . . [T]hose responsible for killing Hajrić, Palić and Imamović targeted them because they were leading figures in the Zepa enclave at the time that it was populated by Bosnian Muslims. *These killings should not be viewed in isolation* . . . it is significant to consider the connection between the VRS operations in Srebrenica and Zepa. The respective attacks and takeovers of the enclaves were synchronized by the [same] leadership and included the same forces. The takeover of Zepa enclave followed less than two weeks after the capture of Srebrenica, during a time in which the news of the murders of thousands of Bosnian Muslim men was starting to spread. *While the individuals killed were only three in number, in view of the size of Zepa, they constituted the core of its civilian and military leadership*. The mayor, who was also a religious leader, the military commander and the head of the Civil Protection Unit, especially during a period of conflict, were key to the survival of a small community. Moreover, the killing of Palić, who at this time enjoyed a special status as the defender of the Bosnian Muslim population of Zepa, had a symbolic purpose for the survival of the Bosnian Muslims of Eastern BiH. While the majority accepts that the Bosnian Serb Forces did not kill the entirety of the Bosnian Muslim leadership of Zepa . . . it does not consider this to be a factor against

[17] *Prosecutor* v. *Tolimir*, Trial Judgment, 12 December 2012, fn. 3138; emphasis added; citing Final Report of the Commission of Experts Established pursuant to Security Council Resolution 780 (1992), UN doc. S/1994/674, ("Commission of Experts Report"), para. 94.

[18] *Prosecutor* v. *Tolimir*, Trial Judgment, 12 December 2012, paras. 598-599.

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> its determination that *the acts of murder against these three men constitutes genocide*."[19]

The Trial Chamber then proceeded to reach the following further conclusions:

> "In accordance with the *Jelisić* Trial Chamber's finding in which it relied on the Commission of Experts Report the Majority also takes into account the fate of the remaining population of Zepa; *their forcible transfer immediately prior to the killing of these three leaders is a factor which supports its finding of genocidal intent. To ensure that the Bosnian Muslim population of this enclave would not be able to reconstitute itself, it was sufficient in the case of Zepa to remove its civilian population, destroy their homes and their mosque, and murder its most prominent leaders* . . . The Majority has no doubt that the murder of [these three leaders] was a case of deliberate destruction of a limited number of persons selected for the impact that their disappearance would have on the survival of the group as such."[20]

19. I acknowledge that these conclusions — which were subject to a dissenting opinion and are currently awaiting a judgment from the ICTY Appeals Chamber — must be treated with a requisite degree of caution. Such limitations having been duly conceded, in my view the passages cited above from the *Tolimir* Trial Judgment nevertheless evince a concerted departure from the narrower ambit of the tripartite test adopted by this Court in the *Bosnia* Judgment. Given that the present Judgment has likewise determined to apply the *Bosnia* formula in a more flexible manner that places less emphasis on the primacy of the quantitative element, I am both surprised and disheartened by the majority's refusal to make any mention of the most recent judicial pronouncement of the ICTY on this highly pertinent and substantively fluid area of law.

20. Specifically, the *Tolimir* Judgment's finding of genocide where only three killings were proven marks a clear and unambiguous departure from the *Bosnia* formula's dogged insistence that the numerosity of the victims of predicate acts under Article II of the Genocide Convention be considered a pre-eminent factor in the substantiality equation. Rather, *Tolimir* presents a rather striking example of a case where not only were the three individuals killed low in *absolute* terms, but against the backdrop of a homogeneous religious community of approximately 10,000 it is dubious to suggest that their deaths could constitute a high *relative* "numerosity in relation to the group as a whole"[21]. Rather, in finding genocidal intent, the *Tolimir* Trial Chamber placed heavy emphasis on the prominence of the targeted population and the fact that the

[19] *Prosecutor* v. *Tolimir*, Judgment, 12 December 2012, paras. 778-780; emphasis added.
[20] *Ibid.*, paras. 781-782; emphasis added.
[21] *Ibid.*, para. 749.

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attackers exercised complete control over the enclave during the period in question.

21. Finally, what cannot be overlooked is that apart from three killings, the gravamen of the atrocities perpetrated at Zepa constituted the complete forcible transfer of its entire Bosnian Muslim population, a community of thousands, away from that enclave and into Bosnian-controlled territory. While *Tolimir* certainly did not go so far as to pronounce that the "ethnic cleansing" of these thousands of Bosnian Muslims from Zepa enclave (in conjunction with means taken to ensure their non-return, such as destruction of homes and places of worship) constituted genocide per se, it did clearly and unequivocally affirm that this mass displacement of the civilian population, when combined with the very limited targeted killing of prominent local leaders, constituted an attempt to *physically destroy* a significant part of the Bosnian Muslim group of Eastern BiH, *by depriving that community of the means of reconstituting itself within that geographical area*. On this final point, it would appear to be a clear evolution of the position adopted by this Court in the *Bosnia* Judgment as to what constitutes "physical destruction" of the group for the purpose of Article II of the Genocide Convention, where it was held that

> "*[i]t will be convenient at this point to consider what legal significance the expression ['ethnic cleansing'] may have [under the Genocide Convention]*. It is in practice used, by reference to a specific region or area, to mean 'rendering an area ethnically homogeneous by using force or intimidation to remove persons of given groups from the area'. . . It does not appear in the Genocide Convention; indeed, a proposal during the drafting of the Convention to include in the definition 'measures intended to oblige members of a group to abandon their homes in order to escape the threat of subsequent ill-treatment' was not accepted . . . *It can only be a form of genocide within the meaning of the Convention, if it corresponds to or falls within one of the categories of acts prohibited by Article II of the Convention. Neither the intent, as a matter of policy, to render an area 'ethnically homogeneous', nor the operations that may be carried out to implement such policy, can as such be designated as genocide* . . . As the ICTY has observed, while

> 'there are obvious similarities between a genocidal policy and the policy commonly known as 'ethnic cleansing'. . . [a] clear distinction must be drawn between physical destruction and mere dissolution of a group. The expulsion of a group

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> or part of a group does not in itself suffice for genocide.'"[22]

In the present Judgment, this relationship has been revisited in the following terms:

> "The Court recalls that, in its 2007 Judgment, it stated that
>
> '[n]either the intent, as a matter of policy, to render an area 'ethnically homogeneous', nor the operations that may be carried out to implement such policy, can *as such* be designated as genocide: the intent that characterizes genocide is 'to destroy, in whole or in part' a particular group, and *deportation or displacement of the members of a group, even if effected by force, is not necessarily equivalent to destruction of that group, nor is such destruction an automatic consequence of the displacement.* [. . .]'
>
> It explained, however, that:
>
> '[t]his is not to say that acts described as 'ethnic cleansing' may never constitute genocide, if they are such as to be characterized as, for example, 'deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part', contrary to Article II, paragraph *(c)*, of the Convention, provided such action is carried out with the necessary specific intent *(dolus specialis)*, that is to say with a view to the destruction of the group, *as distinct from its removal from the region* . . . In other words, whether a particular operation described as 'ethnic cleansing' amounts to genocide depends on the presence or absence of acts listed in Article II of the Genocide Convention, and of the intent to destroy the group as such. In fact, in the context of the Convention, the term 'ethnic cleansing' has no legal significance of its own. That said, it is clear that acts of 'ethnic cleansing' may occur in parallel to acts prohibited by Article II of the Convention, and may be significant as indicative of the presence of a specific intent *(dolus specialis)* inspiring those acts.'" (Judgment, para. 162 (internal citations omitted; emphasis added).)

22. In my respectful view, the ICTY Trial Chamber in *Tolimir* has burst open the tight confines of the dictum promulgated in *Bosnia* and reaffirmed in the present Judgment. By finding that the confluence of killing three prominent community leaders (which constitute genocidal acts as per Article II *(a)* of the Convention) in parallel to massive acts of

[22] *Bosnia* Judgment, pp. 122-123, para. 190 (internal citations omitted; emphasis added).

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ethnic cleansing (which are non-genocidal atrocities per se; see Judgment, para. 162) was sufficient to characterize *the entire series of events occurring at Zepa as possessing genocidal intent*, the Trial Chamber clearly went above and beyond this Court in *Bosnia* and the present Judgment, if not in its application of the letter of the applicable law, then clearly in its appreciation of the spirit thereof. Stated differently, there is no indication in *Tolimir* that the approximately 10,000 denizens of Zepa enclave who were forcibly removed from the area and prevented from returning were targeted for physical or biological destruction as envisaged by Article II of the Convention. Rather, the Trial Chamber *found that their permanent removal from that geographical area* (in conjunction with the destruction of a diminutive core of its civil and military leadership) was enough to constitute "physical or biological" destruction under the terms of Article II of the Convention. This cannot but be described as a clear departure from the Court's analysis in *Bosnia* and certain other judgments rendered by the ICTY upon which the Court in *Bosnia* relied. Not only has the quantitative element that featured so prominently in *Bosnia* been eschewed, but the *Tolimir* Judgment has clearly pushed the boundaries of what constitutes physical or biological destruction by expressly incorporating non-fatal *geographical* concerns. In other words, according to my reading of *Tolimir* the Trial Chamber clearly found that genocidal intent was established not because the approximately 10,000 Bosnian Muslims of Zepa enclave were targeted for elimination per se, but rather because they were targeted for elimination *from that specific location.*

23. Granted, the majority's reticence to adopt a *Tolimir*-style approach may be readily (and defensibly) explained by considerations such as the fact that the case remains under appeal and that the finding of genocide at Zepa was linked (although obliquely) to the now widely recognized genocide that was perpetrated by the same attackers at Srebrenica some 20 kilometres away and mere days beforehand. Nevertheless, in my respectful view, to ignore *Tolimir* completely constitutes a failure by the majority to heed its own undertaking to "take account, where appropriate, of the decisions of international criminal courts or tribunals, in particular those of the ICTY, as it did in 2007, in examining the constituent elements of genocide in the present case" (Judgment, para. 129). I shall return to this aspect of the *Tolimir* precedent when dissecting the present Judgment's treatment of Croat victims during the siege of Vukovar and its aftermath (see *infra*).

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THE *POPOVIĆ* ICTY TRIAL CHAMBER JUDGMENT

24. In the *Popović* case, the Trial Chamber of the ICTY provided an analysis on the substantiality component in relation to the killing of several thousand Bosnian Muslim men at Srebrenica enclave in Eastern Bosnia and Herzegovina in July 1995. It is to be recalled that both the Court and several Trial and Appeals Chambers of the ICTY have consistently held that the massacre at Srebrenica constituted genocide. Consequently, while the *Popović* Trial Chamber's finding of genocidal intent in relation to the Srebrenica massacre is not in itself a novel jurisprudential development, in expounding this notion the Trial Chamber made the following noteworthy remarks:

> "The Trial Chamber finds that the Muslims of Eastern Bosnia constitute a substantial component of the entire group, Bosnian Muslims. As has been found by the Appeals Chamber, although the size of the Bosnian Muslim population in Srebrenica before its capture . . . was a small percentage of the overall Muslim population of BiH at the time, the import of the community is not appreciated solely by its size. *The Srebrenica enclave was of immense importance to the Bosnian Serb leadership because: (1) the ethnically Serb state they sought to create would remain divided and access to Serbia disrupted without Srebrenica;* (2) most of the Muslim inhabitants of the region had, at the relevant time, sought refuge in the Srebrenica enclave and the elimination of the enclave would accomplish the goal of eliminating the Muslim presence in the entire region; and *(3) the enclave's elimination despite international assurances of safety would demonstrate to the Bosnian Muslims their defenceless and be 'emblematic' of the fate of all Bosnian Muslims.*"[23]

25. In my respectful view, the first and third factors enumerated by the Trial Chamber in *Popović* may have warranted consideration when conducting an assessment of genocidal intent in the present Judgment, particularly with reference to the attack on Vukovar municipality. Regarding the first factor, I note that the Judgment has recalled that:

> "Croatia attaches particular importance to the events which took place in Vukovar and its surrounding area in the autumn of 1991. According to the Applicant, the JNA and Serb forces killed several hundred civilians in that multi-ethnic city in Eastern Slavonia, *situated on the border with Serbia and intended to become, under the*

[23] *Prosecutor* v. *Popović et al.*, Trial Judgment, 10 June 2010, para. 865; emphasis added.

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> *plans for a 'Greater Serbia', the capital of the new Serbian region of Slavonia, Baranja and Western Srem.*" (Judgment, para. 212; emphasis added.)

This averred emblematic significance of Vukovar can be further inferred from the findings of the ICTY Trial Chamber in *Mrkšić*, as accepted by the Court in the instant Judgment, which found that during the approximately three-month siege of Vukovar:

> "The duration of the fighting, the gross disparity between the numbers of the Serb and Croatian forces engaged in the battle and in the armament and equipment available to the opposing forces and, above all, *the nature and extent of the devastation brought on Vukovar and its immediate surroundings by the massive Serb forces over the prolonged military engagement, demonstrate, in the finding of the Chamber, that the Serb attack was also consciously and deliberately directed against the city of Vukovar itself and its hapless civilian population*, trapped as they were by the Serb military blockade of Vukovar and its surroundings and forced to seek what shelter they could in the basements and other underground structures that survived the ongoing bombardments and assaults. What occurred was not, in the finding of the Chamber, merely an armed conflict between a military force and an opposing force in the course of which civilians became casualties and some property was damaged. The events, when viewed overall, disclose an attack by comparatively massive Serb forces, well armed, equipped, and organized, *which slowly and systematically destroyed a city and its civilian and military occupants* to the point where there was a complete surrender of those that remained . . .
>
> It is in this setting that the Chamber finds that, at the time relevant to the Indictment, there was in fact, not only a military operation against the Croat forces in and around Vukovar, but *also a widespread and systematic attack by the JNA and other Serb forces directed against the Croat and other non-Serb civilian population in the wider Vukovar area* . . ."[24]

In my view, this sustained, ethnically discriminatory attack, aimed in part at the slow and systematic destruction of the Croat civilian populace of Vukovar, provides implicit evidence of its strategic importance in terms of allowing the expansionist policy of "Greater Serbia" to gain a pivotal foothold within Croatian territory, and thus heightens the prominence of the Vukovar Croat subgroup when assessing genocidal intent vis-à-vis that municipality and its environs.

26. Regarding the third criterion enunciated in *Popović*, I recall that the evacuation of Vukovar hospital on 20 November 1991, through which many Croats were interned at nearby concentration camps and subse-

[24] Judgment, para. 218; citing *Mrkšić*, paras. 470 and 472.

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quently killed, severely beaten and/or otherwise subjected to serious forms of physical and psychological abuse, was conducted in violation of the Zagreb Agreement, which purported to allow for the safe evacuation of those internally displaced Vukovar Croats who had sought refuge at the local hospital under the supervision of neutral international monitors. I believe that the deliberate and cynical manner in which this international agreement was violated, to the grave detriment of those who made the assumption that a widely publicized agreement would guarantee their safety, allows for the inference that the sorry plight of the victims from Vukovar hospital and those subsequently interned in concentration and death camps, could certainly, to paraphrase *Popović*, "demonstrate to the Vukovar Croats their defencelessness and be emblematic of the fate of all ethnic Croats on Croatian territory".

THE *NIZEYIMANA* ICTR TRIAL CHAMBER JUDGMENT

27. In the *Nizeyimana* case, the accused was convicted at trial for genocide in relation to, *inter alia*, the killing of Rosalie Gicanda, a member of the targeted Tutsi ethnic group and former Queen of Rwanda. In applying the substantiality criterion of genocidal intent, the Trial Chamber stressed that

> "[t]he fact *that this operation targeted one Tutsi in particular in no way impacts the conclusion that the perpetrators possessed the intent to destroy at least a substantial part of the Tutsi ethnic group.* The Chamber reiterates that this killing must be viewed in the context of the targeted and systematic killing of Tutsis perpetrated . . . in Butare [town] around this time. Moreover, *the symbolic importance of the killing of Gicanda as a means of identifying the enemy is also relevant.*"[25]

In that regard, the Trial Chamber noted that it had "no doubt that the murder of Gicanda . . . who was a symbol of the former [Tutsi] monarchy, *was killed in order to set a striking example that Tutsis, as well as Hutus sympathetic to the plight of the Tutsis, were the enemy*"[26]. The Trial Chamber further stressed the nexus between this particular attack and the significantly increased violence against Tutsi civilians in Butare town following an incendiary speech by the President of Rwanda on 19 April 1994 in which he exhorted the population to seek out and kill Tutsis.

28. In relation to a separate incident, the Trial Chamber found that the killing of one Pierre Claver Karenzi, a Tutsi lecturer at a local university

[25] *Prosecutor* v. *Nizeyimana*, Trial Judgment, 19 June 2012, para. 1530; emphasis added.
[26] *Ibid.*, para. 1511; emphasis added.

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who was considered "a prominent figure in Butare" town also constituted genocide. Again the Trial Chamber found that

> "*Karenzi's murder is also emblematic* of the systematic nature in which Tutsi civilians were identified and killed on an ongoing basis at roadblocks manned by . . . soldiers in Butare town. Consequently, *while this incident only resulted in the killing of one Tutsi, the Chamber has no doubt that the physical perpetrator acted with the specific intent to destroy at least a substantial part of the Tutsi group*."[27]

Once again the Trial Chamber found that this attack was linked to the broader context of significantly increased targeted killings of the Tutsi ethnic group in Butare town around that time in the wake of the President's speech.

29. Finally, the Trial Chamber found genocidal intent in relation to another incident where two Tutsi civilians were killed and another seriously injured at a military roadblock. As the Trial Chamber reasoned,

> "*[w]hile these attacks only resulted in the deaths of two Tutsis and the serious bodily harm of a third, the Chamber has no doubt that the perpetrators acted with the intent to destroy at least a substantial part of the Tutsi group. These attacks were emblematic of the systematic nature in which Tutsi civilians were identified and killed on an ongoing basis* at this roadblock and others manned by . . . soldiers in Butare town."[28]

What is particularly noteworthy about this specific finding of genocidal intent is the Trial Chamber's determination that the attack on the three Tutsi victims was "emblematic" of the overall group *not* because of the *individual prominence of the victims within the community* (there was no evidence on record to suggest such a conclusion), but rather because the attack on them embodied a *modus operandi for the systematic destruction of the Tutsi group in Butare town generally*. In other words, Tutsis at the roadblock were "emblematic" of the overall group not because of *who they were*, but rather *the manner in which they were attacked*. While indicia of "prominence" through the *modus operandi* of the attack may be gleaned from the killings of Gicanda and Karenzi, the fact that the victims of this third attack did not hold any prominent positions within the Tutsi community only further underscores the point. Consequently, I find these exemplars from the *Nizeyimana* Trial Judgment to signal a clear departure from what was envisaged by the "qualitative approach" in the Court's *Bosnia* Judgment (and subsequently rebranded as the "prominence" of the targeted group in the instant Judgment), and believe that the present Judgment's analysis would have been enriched by a consideration of this recent,

[27] *Prosecutor* v. *Nizeyimana*, Trial Judgment, 19 June 2012, para. 1530; emphasis added.

[28] *Ibid.*, para. 1521; emphasis added.

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pertinent jurisprudential development on the law of genocidal *dolus specialis*.

30. Applying the *Nizeyimana* precedent to the facts at bar, I would note that the present Judgment recalls that the *Mrkšić* Trial Chamber found that the attacks in Eastern Slavonia generally followed a consistent pattern:

> "[T]he system of attack employed by the JNA typically evolved along the following lines: *(a)* tension, confusion and fear is built up by a military presence around a village (or bigger community) and provocative behaviour; *(b)* there is then artillery or mortar shelling for several days, mostly aimed at the Croatian parts of the village; in this stage churches are often hit and destroyed; *(c)* in nearly all cases JNA ultimata are issued to the people of a village demanding the collection and the delivery to the JNA of all weapons; village delegations are formed but their consultations with JNA military authorities do not lead . . . to peaceful arrangements;. . . *(d)* at the same time, or shortly after the attack, Serb paramilitaries enter the village; what then follows varied from murder, killing, burning and looting, to discrimination."[29]

The Judgment also recalled that in the *Martić* case, the ICTY Trial Chamber made similar findings regarding the pattern of attacks perpetrated by Serb forces in Croatia:

> "[T]he area or village in question would be shelled, after which ground units would enter. After the fighting had subsided, acts of killing and violence would be committed by the forces against the civilian non-Serb population who had not managed to flee during the attack. Houses, churches and property would be destroyed in order to prevent their return and widespread looting would be carried out. In some instances the police and the TO of the SAO Krajina organized transport for the non-Serb population in order to remove it from SAO Krajina territory to locations under Croatian control. Moreover, members of the non-Serb population would be rounded up and taken away to detention facilities, including in central Knin, and eventually exchanged and transported to areas under Croatian control."[30]

After considering, *inter alia*, these findings from the ICTY, the present Judgment concludes that:

> "The Court likewise 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

[29] Judgment, para. 414, citing *Mrkšić* Trial Judgment, para. 43.
[30] *Ibid.*, para. 427.

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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 findings of the Court 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*." (Judgment, paras. 415-416.)

31. Bearing this established pattern of conduct throughout various parts of the territory of Croatia in mind, I would further recall that the Applicant has presented the siege of Vukovar as representing a paradigmatic example of the *modus operandi* outlined above. As counsel for Croatia stated during the oral hearing phase of this case,

> "*[W]hat happened at Vukovar was repeated again and again across Eastern Slavonia and across Croatia as a whole in the course of this conflict*. This pattern may have varied from village to village, town to town and across different regions. But, properly analysed, the 'pattern' discloses that there was an intention to 'destroy' a part of the Croat group in question. The artillery or mortar shelling was wholly disproportionate and, in places, such as Vukovar, essentially destroyed the entire city. And the murderous attacks were never intended as part of the mere expulsion of a part of the Croat group in question."[31]

Consequently, I believe that in view of the *Nizeyimana* Trial Judgment, the Judgment's analysis with respect to substantiality could have been enhanced by considering the *modus operandi* of the attack on Vukovar, being a microcosm for the manner in which a much wider conflict was waged, for the purpose of assessing whether the "prominence" of the Vukovar Croats could factor into the calculus as to whether they were targeted with genocidal intent.

The *Hategekimana* ICTR Trial Chamber Judgment

32. In the case of *Hategekimana*, the accused was convicted, *inter alia*, of genocide for the murder of *three* Tutsi women *during an attack on their home* by militia and soldiers. In determining genocidal intent, the Trial Chamber noted that in addition to the fact that the three women were singled out because of their ethnicity, the Chamber had received "extensive evidence . . . about the targeting of Tutsi civilians in Butare [province] following the speech of interim President Sindikubwabo on 19 April 1994", which resulted in "*many Tutsi civilians being killed in their*

[31] CR 2014/8, p. 47 (Starmer); emphasis added.

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homes over the course of many days". The Chamber found that "[g]iven the scale of the killings *and their context*, the only reasonable inference is that the assailants [who killed the women] possessed the intent to destroy in whole or in part a substantial part of the Tutsi group"[32]. Once again we see an example where an attack against a targeted group that resulted in a comparatively low *absolute* and *relative* number of victims was nevertheless deemed to possess genocidal intent, due at least in part to the *modus operandi* of the manner in which they were killed.

The *Munyakazi* ICTR Trial Chamber Judgment

33. In the case of *Munyakazi*, the accused was convicted of genocide for, *inter alia*, an attack on a parish that killed between 60 and 100 Tutsi refugees. The Trial Chamber observed that the attack occurred the day after a much larger attack on a different parish where approximately 5,000 to 6,000 Tutsis were killed by the same group of perpetrators. Considering both attacks as a whole, the Trial Chamber found genocidal intent for a substantial part of the Tutsi ethnic group[33]. This finding of genocide evokes many parallels with the ICTY Trial Chamber's finding of genocide in relation to Zepa enclave in the *Tolimir* Judgment, which also featured an attack on one geographic area where a relatively small number of victims were killed (Zepa) but which was closely linked, in terms of geography, time, and the identity of the perpetrators, to a previous, considerably more sizeable attack (Srebrenica).

Other ICTR Trial Chamber Judgments

34. In keeping with the pattern demonstrated above, since the Court's issuance of the *Bosnia* Judgment in 2007, the ICTR has made findings of genocide in relation to scenarios where "the quantitative element" (to use the nomenclature adopted by the present Judgment) figured far less prominently in the calculus as to whether the attacks were perpetrated with genocidal intent than a strict application of the *Bosnia* formula would dictate. In this regard, we see that genocidal intent in several instances was inferred in large part due to the geographic profile of the *situs* of the attack and/or the prominence of the victims (whether said prominence was measured in terms of personal standing in the

[32] *Prosecutor* v. *Hategekimana*, Trial Judgment, 6 December 2010, para. 673; emphasis added.

[33] *Prosecutor* v. *Munyakazi*, Trial Judgment, 5 July 2010, paras. 496, 499-500.

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community of the victim or the *modus operandi* of how the attack unfolded)[34]. In sum, what we see is a clearly more flexible application of genocidal *dolus specialis* that would tend to challenge the pre-eminence afforded the substantiality criterion in the *Bosnia* case.

35. For the avoidance of any doubt, I wish to underscore my recognition that there are obviously significant contextual differences between the crimes prosecuted in relation to Croatia before the ICTY (and, by extension, the subject-matter presently before the Court) and those relating to Rwanda before the ICTR, not the least of which is the sheer disparity in scale of the atrocities that occurred during the course of the respective conflicts. Hence I recall that Croatia's case — taken at its highest — is that the hostilities that form the backdrop to the present Judgment resulted in *12,500 Croat deaths*, whereas *conservative estimates* of the carnage in Rwanda posit that at least *half a million ethnic Tutsis and moderate Hutus were killed* during the course of the genocide that unfolded in that country in 1994 — a genocide, which, it should be noted, was the subject of an express finding of judicial notice by the ICTR Appeals Chamber[35]. Indeed, I recall that the Court stipulated in the present Judgment that it would give particular preference to jurisprudence emanating from the ICTY (see *supra*, paragraph 13, citing paragraph 129 of the Judgment), and I understand this perfectly sensible decision to be motivated in large part by the plain fact that the cases before the ICTY involve much closer historical, socio-political and legal issues to those presented in the case at bar than cases appearing before the ICTR.

36. In sum, while I am by no means advocating the wholesale importation of ICTR case law into the jurisprudence of this Court, my concern lies with what I find to be essentially the complete disregard of the most prolific judicial body to have interpreted and applied the Genocide Convention in the course of human history. With the greatest of respect to my learned colleagues, failure to so much as consult this ample body of jurisprudence, to my mind, constitutes a failure by the Court in its duty and its undertaking to keep abreast of the most recent and pertinent developments in the law of genocide in the present Judgment.

[34] See, e.g., *Prosecutor* v. *Nsengimana*, Trial Judgment, 17 November 2009, paras. 834-836; *Prosecutor* v. *Renzaho*, Trial Judgment, 14 July 2009, paras. 768-769; *Prosecutor* v. *Rukundo*, Trial Judgment, 27 February 2009, paras. 72, 74, 76; *Prosecutor* v. *Nchamihigo*, Trial Judgment, 12 November 2008, paras. 333-336, 346-347, 354, 357.

[35] This landmark decision was delivered by the Appeals Chamber on Prosecutor's Appeal on Judicial Notice, dated 16 June 2006, in the trial of *Prosecutor* v. *Karemera, Ngirumpatse and Nzirorera*, ICTR-98-44AR73 (C).

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CONCLUSION ON THE COURT'S TREATMENT OF POST-*BOSNIA* JURISPRUDENCE OF THE ICTY AND ICTR

37. In view of the observations above, I believe that the jurisprudence of the *ad hoc* international criminal tribunals in the years following the issuance of this Court's *Bosnia* Judgment demonstrate a dilution of the rigidly hierarchical tripartite formula for discerning genocidal intent as promulgated in that precedent, whereby the numerosity of the targeted population was clearly designed to serve as the pre-eminent concern in any such calculus. As I have noted above, while there are traces of a mollified approach to be found in the Judgment's gentle refastening of the *Bosnia* formula into a more egalitarian weighing of the three criteria to be applied in the present Judgment, in my respectful view it was incumbent upon the Court to take the further step of explicitly acknowledging and engaging the recent, pertinent jurisprudential developments presented by the ICTY and ICTR in this area of law and to incorporate, if and where appropriate, any evolutions to the *Bosnia* test that are not only strictly necessary for the disposition of the merits of the present dispute, but which may elucidate the development this legal area has undergone over the past eight years. In other words, even if it were not appropriate or even correct to *apply* such precedents to the facts at bar, in my considered opinion it was *certainly* appropriate to at least *consider* such key developments, if only to explain why they ought to be distinguished from the present case. Such an approach, I suggest, would be wholly commensurate with the Court's role as a pre-eminent global judicial forum to which other international dispute resolution mechanisms turn in search of guidance on such important and arcane points of law. Consequently, I regret that the majority has missed a prime opportunity to improve the clarity and authority of this area of public international law.

THE MAJORITY'S CONCLUSIONS ON GENOCIDAL INTENT IN THE PRESENT JUDGMENT

38. In assessing whether the targeted group was "substantial" for purposes of the *chapeau* of Article II of the Genocide Convention, the Judgment recalls Croatia's submission

> "that *the Croats living in the regions of Eastern Slavonia, Western Slavonia, Banovina/Banija, Kordun, Lika and Dalmatia* [who were targeted for destruction by JNA and affiliated Serb forces] *constituted a substantial part of the protected group*, and that the intent to destroy the protected group 'in part', which characterizes genocide as defined

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in Article II of the Convention, is thus established" (Judgment, para. 403; emphasis added).

The Judgment also recalls that "[i]n its written pleadings, Croatia defines [the overall protected] group [at issue in its Claim] as *the Croat national or ethnical group on the territory of Croatia*, which is not contested by Serbia" (see *ibid.*, para. 205; emphasis added). Relying on official census data from 1991 — the year in which the hostilities that are the subject-matter of the present dispute commenced — adduced by Croatia, and uncontested by Serbia, the Judgment finds that "the ethnic Croat population living in the [identified] regions . . . numbered between 1.7 and 1.8 million [individuals . . . and] constituted slightly less than half of the ethnic population living in Croatia" (see *ibid.*, para. 406). The Judgment further concludes "that acts committed by JNA and Serb forces in the [identified] regions . . . targeted the Croats living in those regions, within which these armed forces exercised and sought to expand their control" *(ibid)*. While the majority also found that "as regards the prominence of that part of the group, the Court notes that Croatia has provided no information on this point" *(ibid.)* — a conclusion I do not share, and to which I shall return presently — "[t]he Court [nevertheless] concludes from the foregoing that the Croats living in the [identified] regions . . . constituted a substantial part of the Croat group" *(ibid.)*. Despite my misgivings about the majority's pronouncement as to the ostensible lack of evidence regarding the prominence of the Croat ethnic group at issue, I am in full agreement with the majority's general conclusion that the part of the ethnic Croat group identified by the Applicant constituted a substantial part of the overall Croat ethnic group living within the territory of Croatia during the relevant period.

39. It is to be further recalled that the Judgment concludes that:

> "The Court is fully convinced that, in [the] various [identified] localities . . . the JNA and Serb forces perpetrated against members of the protected group acts falling within subparagraphs *(a)* [killing members of the group] and *(b)* [causing serious bodily or mental harm to members of the group] of Article II of the Convention, and that the *actus reus* of genocide has been established." (*Ibid.*, para. 401.)

I am also in complete agreement with the majority on this point. Where I depart from the majority is in *the manner of reasoning through which it has arrived at its conclusion that* "[t]he 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" (*ibid.*, para. 440). While I again recall that I have joined the majority in rejecting Croatia's claim that genocide was committed against the targeted Croat population *on evidentiary grounds*, given that the majority has elected to take Croatia's case at its highest prior to dismissing it, I shall proceed to make certain observations and critiques

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regarding its approach to the analysis of genocidal *dolus specialis* as pertains to Croatia's allegations.

The Geographic Area Considered by the Majority when Assessing *Dolus Specialis*

40. As I have noted, *supra*, the Judgment characterizes Croatia's delimitation of the relevant "part" of the ethnic Croat group as being "the Croats living in the regions of Eastern Slavonia, Western Slavonia, Banovina/Banija, Kordun, Lika and Dalmatia" (Judgment, para. 403). While I agree with this conclusion as pertains to these six geographical locales, I am also mindful of the fact that the gravamen of Croatia's case focused heavily on the specific region of Eastern Slavonia, and in particular the city of Vukovar and its environs. As counsel for Croatia submitted during the oral hearing phase of this case:

> "*Even when judged against the other atrocities detailed by the Applicant before this Court . . . the events in Vukovar plumbed new depths.* Serbian forces carried out a sustained campaign of shelling; systematic expulsion; denial of food, water, electricity, sanitation and medical treatment; bombing; burning; brutal killings and torture *which reduced the city to rubble and destroyed its Croat population.* It started with roadblocks and ended with torture camps and mass execution. In human terms, the scar will never heal.
>
> The events at Vukovar are significant and they are known around the world. They deserve to be examined in context, in detail and in full."[36]

This heavy reliance by Croatia on the events at Vukovar throughout this case is even conceded by Serbia when it acknowledges in its written Rejoinder that "*[t]he most significant episodes in Eastern Slavonia took place in Vukovar*, and these attract the bulk of the discussion in the Reply, as they did in the Memorial and Counter-Memorial"[37]. Indeed, on more than one occasion it has been expressly recognized by the Court in the present Judgment that "Croatia has given particular attention" to "the events at Vukovar" in pursuing its claims in this case (Judgment, paras. 429 and 436).

41. Moreover, there is clear precedent from this Court that an analysis of genocidal intent may be confined to a geographic area notably smaller than the six expansive regions considered by the present Judgment, *even if the Applicant framed its cause of action with respect to a wider geograph-*

[36] CR 2014/8, pp. 28-29, paras. 1-2 (Starmer); emphasis added.
[37] Rejoinder of Serbia, para. 370; emphasis added.

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ical area. This was of course precisely what occurred in the 2007 *Bosnia* Judgment, wherein the Court made a finding of genocide solely with respect to Srebrenica, a Bosnian Muslim enclave consisting of upwards of 30,000 people where more than 7,000 military-aged Bosnian Muslim men were systematically rounded up and executed while the remaining population of approximately 25,000 Bosnian Muslims — mostly women, children and the elderly — were ethnically cleansed from the enclave[38]. It is to be recalled that *this isolated finding of genocide was made in spite of the Applicant Bosnia and Herzegovina's much broader allegations of genocide*, which included events in the capital city of Sarajevo, as well as acts that occurred at various other municipalities and camps spread across the territory of BiH.

42. In view of these considerations, my ensuing remarks shall confine themselves to the majority's analysis of genocidal intent regarding the events at Vukovar. While I must reiterate, for the sake of absolute clarity, that it is not my contention that genocidal intent was established with respect to the events occurring on Croatian soil between 1991 and 1995 (including Vukovar), I steadfastly believe that the majority has failed to fully and properly canvass the events at Vukovar, being as they are the cornerstone of Croatia's case in the instant proceedings, and thus I intend to present additional considerations that I believe the majority was remiss in failing to consider when determining whether genocide was perpetrated against the Vukovar Croats.

The Siege of Vukovar

43. During the oral hearing phase of these proceedings, Croatia cited uncontested census statistics indicating that in 1991 Vukovar "had a population of just over 21,000 Croats [and] 14,500 Serbs"[39], whereas "[e]ven after the peaceful reintegration of the region, only 7,500 of the original 21,500 Croat population of Vukovar in 1991 have ever returned to the city"[40]. Counsel for Croatia further averred that during the siege of Vukovar that lasted from August to November 1991, between 1,100 and 1,700 Croats were killed, whereas after the fall of the city and the ensuing occupation by JNA and Serb forces, an additional 2,000 Croats were killed[41]. I recall and share the majority's conclusion that the Croat population in all six geographic regions relied upon by the Applicant constitutes a substantial part of the overall Croat ethnic group within the

[38] *Bosnia* Judgment, p. 155, para. 278, citing *Krstić* Trial Judgment, para. 1.

[39] CR 2014/8, p. 29, para. 7 (Starmer).
[40] *Ibid.*, p. 47, para. 85 (Starmer).
[41] CR 2014/12, p. 11 (Starmer).

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territory of Croatia. However, I further recall my remarks above that there is clear precedent for considering a much smaller geographic and demographic area for the purpose of determining whether that subgroup constitutes a "substantial" part of the overall group, and hence conclude that the Vukovar Croats *in and of themselves* — in addition to their inclusion in "the substantial" subgroup comprising the six geographic regions as recognized by the Judgment — constituted a substantial part of the overall ethnic Croat group within the geographical territory of Croatia during the relevant period. In this regard, I would recall the Court's characterization of what constituted a "substantial" part of the targeted group in question from the following passage of the *Bosnia* Judgment, in which certain conclusions of the ICTY Appeals Chamber in the *Krstić* case were adopted:

> "The Court now turns to the requirement of Article II that there must be the intent to destroy a protected 'group' in whole or in part . . . the Court recalls the assessment it made earlier in the Judgment of the persuasiveness of the ICTY's findings of facts and its evaluation of them . . . Against that background it turns to the findings in the *Krstić* case . . . in which the Appeals Chamber endorsed the findings of the Trial Chamber in the following terms.
>
> > 'In this case, having identified the protected group as the national group of Bosnian Muslims, *the Trial Chamber concluded that the part . . . targeted was the Bosnian Muslims of Srebrenica*, or the Bosnian Muslims of Eastern Bosnia. This conclusion comports with the guidelines outlined above. The size of the Bosnian Muslim population in Srebrenica prior to its capture by the VRS forces in 1995 amounted to approximately forty thousand people. This represented not only the Muslim inhabitants of the Srebrenica municipality but also many Muslim refugees from the surrounding region. *Although this population constituted only a small percentage of the overall Muslim population of Bosnia and Herzegovina at the time, the importance of the Muslim community of Srebrenica is not captured solely by its size.*'
>
> The Court sees no reason to disagree with the concordant findings of the Trial Chamber and the Appeals Chamber.
>
> The Court concludes that the acts committed at Srebrenica falling within Article II *(a)* and *(b)* of the Convention *were committed with the specific intent to destroy in part the group of the Muslims of Bosnia and Herzegovina* as such; and accordingly that these were acts of genocide, committed by members of the VRS in and around Srebrenica from about 13 July 1995."[42]

[42] *Bosnia* Judgment, p. 166, paras. 296-297 (internal citations omitted); emphasis added.

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44. Setting aside the different *conclusions* as to whether genocidal intent was proven in the *Bosnia* Judgment versus the present Judgment, on the issue of *how* substantiality was assessed, I believe it would have been entirely appropriate, given, *inter alia*, the size of the ethnic Croat population of Vukovar, the Judgment's recognition that during the siege and capture of the city the attack was "directed at the then predominantly Croat civilian population (many Serbs having fled the city before or after the fighting broke out)"[43] — which, to my mind, rendered the city a *de facto* ethnic Croat enclave — and finally its emblematic importance to the ethnic Croat population within Croatia generally (for reasons of military strategic importance as a key focal point in the expansive strategy of "Greater Serbia", as expounded *supra*), for the majority to have conducted a specialized analysis of the attack on Vukovar. While I acknowledge that the attack on Vukovar and its aftermath was considered as part of an overarching *mélange* of factors when evaluating whether genocidal intent existed with respect to the six geographic territories identified in Croatia's pleadings, in my respectful view such an analysis lacks clarity and coherency and would have been improved by an explicit, separate examination of the events at Vukovar.

45. As I have painstakingly underscored throughout this opinion, it is my definitive conclusion that Croatia has failed to satisfy the minimum standard of credible evidence required by this Court to allow me to be "fully convinced" that a finding of genocidal intent vis-à-vis the protected ethnic Croat group is the only reasonable inference to be drawn from the evidentiary record proffered by the Applicant. Indeed, when pressed by a Member of the Court during the oral hearing phase, counsel for Croatia made the critical concession that the number of victims it was alleging was difficult to ascertain with precision[44], which I find to epitomize the many probative shortcomings of the Applicant's cause of action. This position having been reaffirmed, and again following the majority's election to take Croatia's figures at their highest, I am somewhat puzzled by the lack of analysis as to why the averred killing of upwards of 3,000 eth-

[43] Judgment, para. 218:

> "The Court will first consider the allegations concerning those killed during the siege and capture of Vukovar. The Parties have debated the number of victims, their status and ethnicity and the circumstances in which they died. The Court need not resolve all those issues. It observes that, while there is still some uncertainty surrounding these questions, it is clear that the attack on Vukovar was not confined to military objectives; *it was also directed at the then predominantly Croat civilian population (many Serbs having fled the city before or after the fighting broke out)*." (Emphasis added.)

[44] CR 2014/12, pp. 11-12 (Starmer).

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nic Croats in Vukovar out of a pre-war population of 21,500 would not constitute sufficient physical destruction of the group pursuant to Article II *(a)* of the Convention to satisfy the "quantitative element" as adopted by the present Judgment. While there may be good reasons for such a negative finding, the paucity of analysis conducted by the majority to this end is discouraging.

46. In addition to my misgivings regarding the majority's application of the quantitative element regarding the number of Vukovar Croats allegedly killed during and after the siege of that city, Croatia has presented a series of 17 contextual factors which, in its estimation,

> "constitute a pattern of conduct from which the only reasonable inference to be drawn is that the Serb leaders were motivated by genocidal intent . . . [and which], individually or taken together, could lead the Court to conclude that there was a systematic policy of targeting Croats with a view to their elimination from the regions concerned" (Judgment, para. 408).

Consequently, "[a]ll these elements indicate, according to Croatia, the existence of a pattern of conduct from which the only reasonable inference is an intent to destroy, in whole or in part, the Croat group" (*ibid.*, para. 409). For ease of reference, these factors have been reproduced in their totality at paragraph 408 of the present Judgment.

47. In the Judgment, the majority has determined

> "that of the 17 factors suggested by Croatia to establish the existence of a pattern of conduct revealing a genocidal intent . . . the most important are those that 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 (i.e., the third, seventh, eighth, tenth and eleventh factors identified [by Croatia])" (*ibid.*, para. 413).

Regrettably, the majority provides no *ratio* for this critical distinction, and consequently excludes as "less important", without any justification, factors such as "the political doctrine of Serbian expansionism which created the climate for genocidal policies aimed at destroying the Croat population living in areas earmarked to become part of 'Greater Serbia' [Croatia's first factor]", "the statements of public officials, including demonization of Croats and propaganda on the part of State-controlled media [Croatia's second factor]", "the explicit recognition by the JNA that paramilitary groups were engaging in genocidal acts [Croatia's fifth factor]"; and "the fact that during the occupation, ethnic Croats were required to identify themselves and their property as such by wearing

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white ribbons tied around their arms and by affixing white cloths to their homes [Croatia's ninth factor]", to name a few (see Judgment, para. 408).

48. While an exhaustive treatment of how these factors may be, contrary to the view of the majority, "more important" in deciphering genocidal intent lies beyond the scope of the present opinion, I must admit I find myself flummoxed by some of these exclusions. One need only look to readily available historical examples to find scenarios where such factors clearly and unequivocally played a major role in inciting and perpetuating incipient and ongoing genocides. To that end, I would briefly recall the Nazi expansionist political doctrine of *Lebensraum* (which would fall neatly under the rubric of Croatia's first factor) and their ghettoization of marginalized groups through the forced wearing of religiously denoted attire (e.g., armbands bearing the "Star of David") for the Jews of occupied Europe (for which one can find many commonalities in Croatia's ninth factor). To take a more recent historical example, I would note the undeniable role played by popular media (especially radio) up to and during the Rwandan genocide in the promotion of a demagogic "Hutu Power" ideology that sought to vilify and ostracize the Tutsi ethnic minority population through the ubiquitous use of the epithet of *"inyenzi"* (cockroaches) and other comparable slurs (which aligns with Croatia's second factor). In each of these three examples, the averred acts are not, strictly speaking, genocidal per se in accordance with Article II of the Genocide Convention, but for the majority to rather summarily dismiss their potency as precursors to or indicia of genocidal intent is, to my mind, both puzzling and troubling. Finally, how "the explicit recognition of genocidal intent of those carrying out the acts" (Croatia's fifth factor) does not figure prominently into the equation of genocidal intent is simply beyond me.

The Distinction between Criminal Intent and Motive

49. In the present Judgment "the Court notes that in the *Mrkšić* case, the ICTY found that the attack on [Vukovar] constituted a response to the declaration of independence by Croatia, and above all an assertion of Serbia's grip on the SFRY" (see para. 429). The Judgment then reproduces the following block quotation from *Mrkšić* in support of this conclusion:

> "The declaration of Croatia of its independence of the Yugoslav Federation and the associated social unrest within Croatia was met with determined military reaction by Serb forces. *It was in this political*

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> *scenario that the city and people of Vukovar and those living in close proximity in the Vukovar municipality became a means of demonstrating to the Croatian people, and those of other Yugoslav Republics, the harmful consequences of their actions.* In the view of the Chamber *the overall effect of the evidence is to demonstrate that the city and civilian population of and around Vukovar were being punished, and terribly so, as an example to those who did not accept the Serb-controlled Federal Government in Belgrade.*"[45]

As a brief aside, the quoted passage from *Mrkšić*, which forms part of the uncontested evidentiary record in this case, is positively laden with explicit references to the emblematic nature of the Vukovar Croats vis-à-vis the remainder of the ethnic Croat population, thus only further weakening the majority's assertion that Croatia "has provided no information" as to "the prominence of that part of the group" of the ethnic Croat population that it contends was targeted for genocide[46].

50. However, returning to the point under consideration, the majority relies on the quoted passage from *Mrkšić* to conclude that

> "[i]t follows from the above, and from the fact that numerous Croats of Vukovar were evacuated . . . that the existence of intent to physically destroy the Croat population is not the only reasonable inference that can be drawn from the illegal attack on Vukovar" (Judgment, para. 429).

In my view, this line of reasoning appears to conflate the distinct legal concepts of *motive* and *intent* in finding that the "punishment" of the Vukovar Croats could *preclude* a finding that they were targeted with genocidal intent. To this end I would recall the language of the ICTY Appeals Chamber in the *Krnojelac* Judgment, which recalled

> "its case law in the *Jelisić* case which, with regard to the specific intent required for the crime of genocide, set out 'the necessity to distinguish specific intent from motive. *The personal motive of the perpetrator of the crime of genocide may be, for example*, to obtain personal economic benefits, *or political advantage or some form of power*. The existence of a personal motive *does not preclude the perpetrator from also having the specific intent to commit genocide*'."[47]

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[45] *Mrkšić* Trial Judgment, para. 471; emphasis added.

[46] Judgment, para. 406. While the Judgment was referring more generally to the ethnic Croat population in the six geographical areas of Croatia alleged by the Applicant, it stands to reason that Vukovar, being not only situated within the areas contemplated but constituting the gravamen of Croatia's case, would constitute at least *some evidence* of the prominence of at least a part of the targeted group in question.

[47] *Prosecutor* v. *Krnojelac*, Appeals Judgment, 17 September 2003, para. 102; emphasis added.

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Similar language for this proposition can be found in a number of other Judgments pronounced by the ICTY[48] and ICTR[49]. In view of this distinction, I find the Judgment's analysis of the motivation underlying the attack on Vukovar to be problematic, as it fails to account for the possibility, as clearly stipulated in the aforementioned authorities, that genocidal *intent* may exist *simultaneously* with other, *ulterior motives*. In this regard, I would recall the finding in *Popović* that the massacre at Srebrenica enclave was in part motivated by the strategic advantage of uniting a "Greater Serbia". Never was it suggested that this tactical motivation precluded the attack from possessing genocidal intent. Consequently, I am unpersuaded by the Judgment's dismissal of genocidal intent vis-à-vis Vukovar based on the finding that the attack was animated by political and/or retributive motives, and respectfully but firmly believe that the majority has committed a basic error of law in finding that the existence of a punitive motive for the attack on Vukovar precludes genocidal intent as "the only reasonable inference that can be drawn from the illegal attack" (Judgment, para. 429).

Discretion of the ICTY Prosecutor in Laying a Charge of Genocide

51. I recall that in the *Bosnia* Judgment, the Court determined that:

> "[A]s a general proposition the inclusion of charges in an indictment cannot be given [evidentiary] 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."[50]

No legal authority whatsoever is cited for the rationale underlying the disparate probative weight that the Court decided to afford the ICTY Prosecutor's decision to include or exclude a charge of genocide in an indictment,

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[48] See, e.g., *Prosecutor* v. *Blaškić*, Appeals Judgment, 29 July 2004, para. 694.

> "*Mens rea* is the mental state or degree of fault which the accused held at the relevant time. Motive is generally considered as that which causes a person to act. The Appeals Chamber has held that, as far as criminal responsibility is concerned, motive is generally irrelevant in international criminal law . . ."

[49] See, e.g., *Prosecutor* v. *Karera*, Trial Judgment, 7 December 2007, para. 534. ("The perpetrator need not be solely motivated by a genocidal intent and having a personal motive will not preclude such a specific intent.")

[50] *Bosnia* Judgment, p. 132, para. 217.

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nor does the *Bosnia* Judgment offer any reasoned explanation for this distinction. Indeed, in my respectful view such a distinction is unsustainable as a matter of basic logical construction, and in contrast to the majority I find myself drawn to the poignant submission of counsel for Croatia, who argued during the oral hearing phase of this case that in accordance with the prevailing rules of procedure obtaining at that tribunal,

> "[T]he judicial arm of the ICTY will review each indictment, including the charges that *have* been included, and has the power to dismiss any count not supported by the evidence. But the judicial arm has no way of reviewing the charges that have *not* been included, or the reasons for non-inclusion. It would therefore be illogical to afford greater evidential weight to an unreviewable decision without reasons *not* to include a charge, than the reviewable decision to *include* a charge."[51]

Moreover, I believe that Croatia has raised cogent arguments exposing the various political, logistical and other constraints that may animate an exercise of prosecutorial discretion not to lay a criminal charge, including: (1) the availability (or lack thereof) of evidence at the onset of proceedings; (2) the focus of a criminal prosecution on individual accused, often in relation to very circumscribed crime sites, rather than the much broader question of State responsibility for genocide encompassing large geographical expanses; (3) the lack of any obligation falling on the ICTY Prosecutor to provide reasons for not laying a charge; (4) the need to selectively employ the finite resources of that Tribunal, especially in view of the massive institutional constraints imposed by the United Nations Security Council's imposition of a "Completion Strategy" mandating the completion of all the Tribunal's work by fixed dates; and (5) the fact that whereas decisions to include a charge are subject to judicial review, decisions not to include a charge are not[52].

52. In light of these trenchant insights, and in view of the Court's pronouncement in *Bosnia* that the lack of probative value for a decision to lay a charge of genocide constitutes "a general proposition" rather than a definite rule, in my respectful view the jurisprudence of this Court would be fortified by a more expansive treatment of this subject. Alas, given the opportunity to clarify the Court's position concerning prosecutorial discretion in the present Judgment, the majority has apparently elected to demur. Instead of a reasoned account that explains the distinction, the Judgment makes the following pronouncement:

[51] CR 2014/6, p. 39 (Starmer); emphasis in original.
[52] *Ibid.*, pp. 33-42 (Starmer).

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> "*The fact that the Prosecutor has discretion to bring charges does not call into question the approach which the Court adopted in its 2007 Judgment* . . . The Court did not intend to turn the absence of charges into decisive proof that there had not been genocide, but took the view that this factor may be of significance and would be taken into consideration. *In the present case, there is no reason for the Court to depart from that approach.* 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.*" (Judgment, para. 187; emphasis added.)

Not only does this purported defence of the *Bosnia* distinction skirt the central issue by failing to provide a single rationale as to why the decision to *include* a charge of genocide in an indictment ought to be given differential weight than a decision to *exclude* such a charge, but the example of the *Milošević* case relied upon by the Judgment to prove its point in fact tends to defeat its own position. As that juxtaposition plainly illustrates, if *the decision not to charge Milošević with genocide* in respect of crimes committed in respect of Croatia is noteworthy, then surely the same must be said of *the corollary decision to charge him with genocide* in respect of crimes committed in Bosnia and Herzegovina. To my mind, these are two sides of the same coin and the draft's failure to make heads or tails of its quizzical distinction, by invoking a litany of irrelevant considerations, leaves me unmoved.

53. In sum, through its belaboured attempt to justify the distinction regarding the differential probative value afforded the inclusion or exclusion of charges of genocide in an indictment, which to this day fails to cite a single germane legal authority and which poignantly avoids engaging any of the Applicant Croatia's arguments, the majority has not, to my satisfaction, explained the logically and legally problematic distinction it first iterated in the *Bosnia* Judgment and has now reiterated in the present Judgment. I can only express my regret at this missed opportunity.

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Conclusion

54. For the reasons I have explained at length throughout the course of this opinion, while I share the majority's conviction that the Applicant Croatia has not discharged its evidentiary burden in relation to the second operative clause of this Judgment, I have felt compelled to voice my many (and at times strenuous) objections to the manner in which the majority has treated the issue of genocidal intent as regards the claims put forward by Croatia. Given my tepid support for the second operative clause, which is based primarily on evidentiary concerns, there are many aspects of the reasoning employed by the Judgment en route to the conclusion contained in that dispositive paragraph that I would distance myself from as a jurist. Perhaps most disconcerting is that the foregoing does not constitute an exhaustive exposition of my dissatisfaction with the Judgment's approach to genocidal *dolus specialis*, but merely a survey of some of my more salient concerns.

(Signed) Dalveer Bhandari.

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DISSENTING OPINION OF JUDGE *AD HOC* VUKAS

As I shared the Court's conclusion in its Judgment of 18 November 2008, I attached only a separate opinion in order to make clear my personal reasoning that led me to support the conclusions of the Court. However, in respect of the present Judgment, I have delivered a dissenting opinion as I am against the Court's rejection of Croatia's claim concerning the violations of the Convention on the Prevention and Punishment of the Crime of Genocide by the Republic of Serbia against members of the Croat ethnic group on the territory of the Republic of Croatia.

I. Jurisdiction and Admissibility

1. In its 2008 Judgment, the Court rejected two of Serbia's preliminary objections to the jurisdiction of the Court. However, it concluded that Serbia's preliminary objections *ratione temporis* did not possess, in the circumstances of the case, an exclusively preliminary character. These preliminary objections concerned the inadmissibility of the claims of the Republic of Croatia, based on acts or omissions which took place before the Federal Republic of Yugoslavia came into being (*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. 419, para. 21 (point 2)). Therefore, the Court reserved the decision thereon to the present phase of proceedings (*ibid.*, p. 460, para. 130 and p. 466, para. 146 (point 4)).

2. For the determination of the jurisdiction of the Court in respect of Serbia, at that time the "Federal Republic of Yugoslavia" (FRY), what is very important is the declaration made by the FRY on 27 April 1992 (the date on which the FRY was proclaimed a State) which stated that:

> "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 Socialist Federal Republic of Yugoslavia assumed internationally." (United Nations doc. A/46/915, Ann. II, quoted in *ibid.*, p. 446, para. 98.)

The correct interpretation of the above statement concerning the continuation of the "international legal and political personality" of the SFRY, means that the FRY succeeded also as to the responsibility for acts committed by the SFRY. It follows from that general principle that

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the FRY also succeeded to the responsibility already incurred by the SFRY for the alleged violations of the Genocide Convention before 27 April 1992.

In addition to this legal explanation of the responsibility of the FRY, it is useful to recall that the real leaders of the SFRY, in its last years, were the persons that formally proclaimed the establishment of the FRY on 27 April 1992.

II. Consideration of the Merits of the Principal Claim

3. On the basis of the analysis of the arguments/documents submitted by the Parties,

> "the Court considers it established 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. Furthermore, the evidence presented shows that a large majority of the victims were members of the protected group, which suggests that they may have been systematically targeted . . . The Court thus finds that it has been proved by conclusive evidence that killings of members of the protected group . . . were committed, and that the *actus reus* of genocide specified in Article II *(a)* of the Convention has therefore been established." (Judgment, para. 295.)

Furthermore, the Court considers 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." (*Ibid.*, para. 360.)

Summing up the two above-mentioned conclusions, the Court found that in the mentioned localities in Croatia 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 (*ibid.*, para. 401).

4. However, in respect of its final conclusion concerning the relation of the acts committed against the Croat population in the mentioned areas and the Convention, the Court decided

> "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

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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 will make 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.

. . . . . .

Thus, in the opinion of the Court, 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. 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." (Judgment, paras. 437 and 440.)

5. However, the quoted conclusion of the Court has not taken into account two important elements related to the acts committed against the Croat group. The first has already been mentioned in its own text: it has not taken into account the number of Croatian victims of acts specified in Article II *(b)* of the Convention. The second is the fact that the prominence of the victims within a national group cannot be interpreted in a restricted manner as in the Court's text (*ibid.*, para. 437). Namely, "prominent", "significant" or "substantial" can have various meanings. According to the latest, and one of the best books on the Convention on Genocide, published in 2014 by C. Tams, L. Berster and B. Schiffbauer, "substantial" can mean "a number of circumstantial aspects like the strategic importance of the group-members' area of settlement"[1]. This interpretation is especially important in respect of the acts of the JNA and Serb forces in Croatia. Namely, the geographical map of Croatia (reproduced in the main Judgment) confirms that almost all the genocide acts mentioned in the documents and statements of Croatia were committed in two regions most important for the establishment of a Greater Serbia: the Eastern Slavonia border of Croatia with Serbia, and in Lika and Dalmatia. The first area was most important in preventing the extension of the Republic of Serbia to the eastern area of the Republic of Croatia, and the second was dangerous for the existence of the so-called "Republika Srpska Krajina". For that reason, as I mentioned in the course of the deliberations of the Court, I cannot agree with the conclusion that "Cro-

[1] Christian J. Tams, Lars Berster and Björn Schiffbauer, *Convention on the Prevention and Punishment of the Crime of Genocide: A Commentary*, C. H. Beck/Hart/Nomos, 2014, p. 149, para. 133.

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atia 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" (Judgment, para. 437) and that "Croatia has failed to substantiate its allegation that genocide was committed" (*ibid.*, para. 441).

6. In conformity with my conviction concerning the commission of genocide on the territory of the Republic of Croatia against members of the Croat ethnic group, I am of the opinion that the Court had to confirm Croatia's claims related to the commission of that crime. The Application of Croatia requested the Respondent to take immediate and effective measures against everybody who was included in the commission of acts of genocide. Extremely important is also the requirement of the Republic of Croatia that Serbia should provide to the Applicant all information within its possession or control as to the whereabouts of Croatian citizens who are missing as a result of the genocide acts for which it is responsible.

It would also be correct to make reparation to Croatia and its citizens for the damages caused by the Respondent as well as returning to the Applicant all remaining items of cultural property within the jurisdiction of the Respondent, which were seized in the genocide acts for which it is responsible (*ibid.*, para. 51).

III. Consideration of the Merits of the Counter-Claim

7. Establishing its independence, Croatia has tried — individually and with international support — to unite its entire population, which has been a difficult and important historical task. However, part of its population of Serb nationality did not accept the independence of Croatia and gradually established its own *quasi* State — the *Republika Srpska Krajina* (RSK) inside Croatia!

For five years the Government of the Republic of Croatia tried to prevent the establishment of Krajina as a part of the Belgrade Republic of Serbia. As all the peaceful efforts of Croatia were rejected by Krajina, the leaders of the Republic of Croatia decided at the beginning of August 1995 to use force in order to eliminate the Republic of Serb Krajina from the natural and peaceful development of the Republic of Croatia. As the RSK had not enough support from Belgrade, in five days the Croatian forces eliminated the Krajina armed forces from Croatia. As in all armed conflicts, there were victims on both sides. Not only among the members of the armies, but also on the side of the civilian population.

Many civilians left Croatia, but they are now returning to their homes. The Government of the Republic of Croatia does everything possible in

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the present difficult economic situation to enable the Serbs from Croatia to return to their cities, villages and homes.

(Signed) Budislav VUKAS.

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SEPARATE OPINION OF JUDGE *AD HOC* KREĆA

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Having great respect for the Court, it is for me a matter of regret to find necessary to avail myself of the right to express a separate opinion based on the considerations that follow.

I. Legal Background

1. The background part of the Judgment in the case at hand comprises two parts: "A. The break-up of the Socialist Federal Republic of Yugoslavia and emergence of new States"; and "B. The situation in Croatia".

It consists almost entirely of a statement of facts of a historical and political nature, neglecting at the same time the relevant legal facts which, in my opinion, not only should constitute a part of the "background", but without which the causes of the Yugoslav crisis and the civil war in Croatia can hardly be understood. The only relevant legal fact stated in the "background" part of the Judgment is the assertion of the Respondent that the "Croatian Serbs considered that the adoption of this new Constitution [of Croatia on 22 December 1990] deprived them of certain basic rights and removed their status as a constituent nation of Croatia" (Judgment, para. 64).

The relevant legal facts, together with other facts, can only be helpful in the creation of a full picture of the background of the case.

1. Constitutional Concept of the Yugoslav State and of Croatia as a Federal Unit

2. The legal facts relate to the domestic law of the Socialist Federal Republic of Yugoslavia (SFRY) and that of the Socialist Republic of Croatia in force during the relevant period.

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In a case like the one at hand, domestic law is highly relevant.

3. The original international legal norm of self-determination of peoples is both incomplete and imperfect, at least when it concerns subjects entitled to self-determination in multi-ethnic States and their exercise of external self-determination infringing upon the territorial integrity of a State. Given its incompleteness, the original norm of self-determination of peoples is rendered inapplicable in its respective parts to certain practical situations and constitutes a sort of decorative, empty normative structure. Interested entities often refer to it, but it can function only outside the legal domain, as a convenient cover for an eminently political strategy, based on opportuneness and the balance of power.

This implies a need to see the norm of the right to external self-determination in States composed of more than one people as a complex norm consisting of two parts: on the one hand, original international legal norms of the right of peoples to external self-determination, and, on the other, relevant parts of the internal law of the given State. In this context, the original international legal norm of the right of peoples has the role of a general, permissive norm, which assumes an operative character, the property of a norm which may become effective in the event that the internal law of a multi-ethnic State has stipulated the right to external self-determination if it defines the entitlement to it, as well as the procedure for its exercise. In other words, the relevant provisions of internal law are *ad casum* an integral part of the norm of the right of peoples to external self-determination. Only in this way does the original international legal norm of the right to external self-determination become applicable at the level of the fundamental premise of the rule of law.

The necessity for such a relationship between international and internal laws is rightfully suggested by the following:

> "If the rule of law is to be made effective in world affairs it must cover a wide range of increasingly complex transactions which are governed partly by international and partly by municipal law . . . It is therefore important that international courts and tribunals should be in a position, when adjudicating upon complex international transactions, to apply simultaneously the relevant principles and rules of international law and the provisions of any system of municipal law which may be applicable to the particular transaction . . . One of the essential functions of international law and international organization is to promote the rule of law within as well as among nations, for only on the basis of the rule of law within nations can the rule of law among nations develop and be made secure. International courts and tribunals can contribute to this result more effectively if the extent to which the interpretation and application of municipal law in the course of their work is a normal and necessary incident of international adjudication on complex transactions is more fully understood."

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(C. Wilfred Jenks, *The Prospects of International Adjudication*, 1964, p. 547.)

4. Thus, in the present case, this is not a matter of a conflict between a norm of international law and a norm of internal law, a type of case adjudicated by several international courts (*Greco-Bulgarian "Communities", Advisory Opinion, 1930, P.C.I.J., Series B, No. 17*, p. 32; *Free Zones of Upper Savoy and the District of Gex, Order of 19 August 1929, P.C.I.J., Series A, No. 22*, p. 167; *Treatment of Polish Nationals and Other Persons of Polish Origin or Speech in the Danzig Territory, Advisory Opinion, 1932, P.C.I.J., Series A/B, No. 44*, p. 24), but rather of the application of an international norm of a complex structure, namely a norm that incorporates relevant norms of internal law relating to external self-determination. I am of the view that, in this case, the reasoning of the Court in the case concerning *Brazilian Loans* (1929) is relevant.

In that case, the Court pointed out, *inter alia*, that:

> "Once the Court has arrived at the conclusion that it is necessary to apply the municipal law of a particular country, there seems no doubt that it must seek to apply it as it would be applied in that country. It would not be applying the municipal law of a country if it were to apply it in a manner different from that in which that law would be applied in the country in which it is in force.
>
> It follows that the Court must pay the utmost regard to the decisions of the municipal courts of a country, for it is with the aid of their jurisprudence that it will be enabled to decide what are the rules which, in actual fact, are applied in the country the law of which is recognized as applicable in a given case. If the Court were obliged to disregard the decisions of municipal courts, the result would be that it might in certain circumstance apply rules other than those actually applied; this would seem to be contrary to the whole theory on which the application of municipal law is based.
>
> Of course, the Court will endeavour to make a just appreciation of the jurisprudence of municipal courts. If this is uncertain or divided, it will rest with the Court to select the interpretation which it considers most in conformity with the law. But to compel the Court to disregard that jurisprudence would not be in conformity with its function when applying municipal law." (*Brazilian Loans, Judgment No. 15, 1929, P.C.I.J., Series A, No. 21*, p. 124.)

5. Yugoslavia, both the Kingdom of Yugoslavia and the federal Yugoslavia constituted after the Second World War, were multinational States in the factual and constitutional sense.

6. The first constitution of the Yugoslav State — the Constitution of the Kingdom of Serbs, Croats and Slovenes, promulgated on 28 June 1921, stipulated that the Kingdom "is a State of Serbs, Croats and Slo-

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venes, a constitutional, parliamentary and hereditary monarchy. The official State name is: Kingdom of Serbs, Croats and Slovenes." Article 3 of the Constitution provided that the "official language of the Kingdom will be Serb-Croat-Slovenian".

7. The Constitution of the Kingdom of Yugoslavia of 3 September 1931 did not indicate *expressis verbis* its constitutive peoples. They were mentioned only indirectly, as, for example, in the provision of Article 3 of the Constitution stipulating that the "official language of the Kingdom will be Serb-Croat-Slovenian".

8. The resolution constituting Yugoslavia on the federal principle, approved by the Second Conference of the Anti-Fascist Council of National Liberation of Yugoslavia on 29 November 1943, said *inter alia*,

> "By virtue of the right of each people to self-determination including the right to separation or unification with other peoples . . . the *Anti-Fascist Council of National Liberation of Yugoslavia passes the following*:
>
> RESOLUTION
>
> . . . . . .
>
> (2) To effectuate the principle of sovereignty of the peoples of Yugoslavia, . . . Yugoslavia is being constructed and will be constructed on the federal principle which will secure full equality to Serbs, Croats, Slovenians, Macedonians and Montenegrins." (Emphasis added.)

9. The Declaration on Basic Rights of Peoples and Citizens of the Democratic Croatia, adopted at the Third Assembly of State Anti-Fascist Council of National Liberation of Croatia on 9 May 1944 stipulated in Article I that "Croatian and Serbian people in Croatia are completely equal" (Decision on building up Yugoslavia on the federal principle, *Official Gazette* [of DFI], No. 1/1945).

At its last meeting ZAVNOH (The State Anti-Fascist Council of National Liberation of Croatia) changed its name to the National Parliament of Croatia.

10. The first Constitution of the Federal Yugoslavia of 1946, in its Article 1, defined the Federal Peoples' Republic of Yugoslavia as

> "*a federal peoples' State in the form of a Republic, a community of peoples who have expressed their will, based on the right to self-determination*, including the right to separation to live together in a federal State" (emphasis added).

11. In the second Constitution of 1963, the Federation was defined as a: "Federal State freely unified *and equal peoples* and a Socialist Democratic community based on the rule of working people and self-government." (Emphasis added.)

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Article 1 of the Constitution of Croatia of 1963 qualified it as "a State Socialist democratic community *of peoples* of Croatia, based on the rule of working people and self-government" (emphasis added).

12. The Constitution of the SFRY of 1974 begins with Chapter I of the Basic Principles, which was worded as follows:

> "*The peoples of Yugoslavia, starting from the right of each nation to self-determination*, including the right to secession, on the grounds of their will freely expressed in the joint struggle of all peoples and nationalities in the national liberation war and socialist revolution . . . have created a socialist federal community of working peoples — the Socialist Federal Republic of Yugoslavia."

In Chapter VII of the "Basic Principles", it is stated, *inter alia* that the Socialist Federal Republic of Yugoslavia (SFRY) upholds:

> "— the right of each people freely to determine and build its social and political order by ways of and means freely chosen;
> — the right of people to self-determination and national independence and the right to wage a liberation war, in pursuit of their causes;
> — regard for generally accepted norms of international law."

The Constitution of the SFRY in its operative part, defined it as a

> "*federal State, a state community of freely united peoples and their socialist republics* . . . based on the rule and self-management of the working class and of all working people and the socialist self-managed democratic community of working people and citizens and equal peoples and nationalities" (Article 1 of the Constitution).

13. The 1974 Constitution of the Socialist Republic of Croatia laid down, in Article 1, paragraph 2, that: "The Socialist Republic of *Croatia is the national State of the Croatian people, the State of the Serbian people in Croatia* and the State of all nationalities living in it."[1]

In the practice and legal terminology of the SFRY, the word "nationalities" denoted national minorities. The rationale of this terminological substitution led to the perception of the expression "national minorities" as a pejorative one.

14. It seems clear that a consistently undeniable fact underlies the broad spectrum of changes that have affected the Yugoslav State since its inception in 1918, functioning as a point of departure, explicit or implicit,

[1] Zemaljsko Antifascisticko vijece naroduoy slobodenja Hrvatske-Zboruk dokumenala 1944 (Od 1. Sijcnja do. 9 Sorbuja), Zagreb, 1970, p. 666.

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of all constitutional solutions: *that is that Yugoslavia has primarily been a community of peoples since its birth.*

The subject of changes was the number of constitutive peoples (in the constitutional practice and the theory of constitutional law of federal Yugoslavia, the term "constituent nations" is the synonym of the term "peoples" equipped with the right to self-determination). At the moment of its inception in 1918, Yugoslavia was a community of three constitutive peoples (Serbs, Croats and Slovenes). The Federal Constitution of 1946 recognized the status of constitutive peoples of Macedonians and Montenegrins, who used to be regarded as parts of the Serbian national *corps*. Finally, the Constitution of 1963 included Muslims in the rank of constitutive peoples.

15. Federal Yugoslavia was formed under the resolution of the Second Conference of the Anti-Fascist Council of National Liberation of Yugoslavia in 1943, *as a community of sovereign and equal peoples, while subsequent constitutional intervention created republics, as federal units.* Thus, like the rest of the republics, Croatia was formally brought into being by its Constitution of 1946, although temporary authorities had been created by the ZAVNOH resolution in 1944.

16. *In the light of constitutional solutions the qualification of Croatia as a union of nations,* personal sui generis, *is the closest to the real state of affairs*. Such a qualification was justified by several facts of fundamental importance.

Firstly, in the light of both norms and facts, Croatia was a community of two peoples, Croats and Serbs, as well as a *community* of nationalities (national minorities).

Secondly, the SFRY Constitution of 1974 and the Constitution of the Socialist Republic of Croatia promulgated the same year, defined the right to self-determination as a subjective, collective right *of* peoples. Such a provision was consigned in earlier constitutions. It derives from the very nature of the matter. The subject entitled to self-determination is, by definition, a people. It is yet another question that as the right to self-determination is exercised on the given territory, the consequences of the exercised right to self-determination are territorialized. Overlapping of the right to self-determination and territorialization occurs, as a rule, *in single-people communities, and it follows that formulations which recognize the right to a territorial entity* are colloquial formulations. However, in multi-ethnic communities composed of two or more peoples provided with equal rights, a territory is exclusively an area where equal rights of self-determination are exercised.

Thirdly, in the light of the relevant constitution provisions, both federal and that of Croatia, it seems clear that *Croatia*, as a federal unit, was not equipped with a right to self-determination that would include the right to secession. The Yugoslav federal units possessed no

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right to secession, for that right was absolutely reserved for constitutive peoples.

Fourthly, the constitutional system of the Socialist Republic of Croatia designed the right to self-determination as a collective, subjective right of Croatian and Serb people in Croatia, which is, by its nature, inalienable. However, the Constitution of Croatia of 1990 deprived the Serbs in Croatia of the status of a people equipped with the right to self-determination and illegally transformed them into a national minority.

The proposal to resolve the controversies surrounding the exercise of the right to external self-determination *constitutione artis*, namely via a corresponding constitutional revision, was contained in the "Concept for the Future Organization of the State Proposed by a Working Group Comprising Representatives of All the Republics as a Basis for Further Talks between the Republican President and the State Presidency".

Starting from the basic premise that:

> "The Yugoslav State community, seen as a Federal State of equal citizens and equal peoples and their republics [footnote commentary: Kasim Trnka from Bosnia and Herzegovina proposed that the republics be placed first] and as a democratic State, will be founded on human and civil rights and liberties, the rule of law and social justice",

the "Concept" contains a part entitled "Proposed Procedure for Dissociation from Yugoslavia" which reads:

> "In connection with initiatives in certain republics for secession from Yugoslavia, that is, the 'disunion' of the country, and in view of the general demand for a peaceful, democratic and constitutional resolution of the constitutional crisis, the question of procedure arises with regard to the possible realization of these initiatives. The aim of the initiatives is the withdrawal of certain republics from the Socialist Federal Republic of Yugoslavia. They are based on the permanent and inalienable right of peoples to self-determination and should be constitutionally regulated. The right of peoples to self-determination, as one of the universal rights of modern law, is set out in the basic principles of the SFRY Constitution. However, the realization of the right of peoples to secession, which includes the possibility of certain republics' withdrawal from the SFRY, is not regulated by the SFRY Constitution. It is therefore necessary to amend the SFRY Constitution in order to create a basis for exercising this right. Revision of the SFRY Constitution on these lines should be based on the democratic nature of the entire process of statement of views, the equality of the Yugoslav people, the protection of fundamental human and civil rights and freedoms, and the principle of the peaceful resolution of all disputes. In keeping with the above, appropriate amendments should be made to the SFRY Constitution which would in a general manner regulate the procedure for the execution of the right of

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peoples to secession and thereby the withdrawal of certain republics from the SFRY.

The amendments to the SFRY Constitution should express the following commitments:

1. The right to launch the initiative for a certain republic to withdraw from the SFRY is vested in the Assembly of the respective republic, except if otherwise regulated by the republican constitution.
2. A decision on the initiative is taken at a referendum at which the free, direct and secret voting of all citizens of the republic is ensured.
3. During the preparations for the referendum, the public and voters will be informed objectively and on time of the importance and the consequences of the referendum.
4. The referendum will be monitored by representatives of the Assembly of Yugoslavia and, possibly, representatives of other republics and interested international institutions.
5. A decision will be deemed adopted if it receives more than one half of the votes of all registered voters.
6. In republics populated by members of several Yugoslav nations, the necessary majority will be established for each Yugoslav nation separately. If one nation votes against, all settlements in which this nation is predominant and which border on the remaining territory of Yugoslavia and can constitute its territorial compactness will remain part of the SFRY. [. . .]
8. The Assembly of the republic will inform the public and the Assembly of Yugoslavia of the result of the referendum, and will submit to the Assembly of Yugoslavia a proposal to adopt a constitutional enactment on the withdrawal of the respective republic from the SFRY, in accordance with the will of the people expressed at the referendum.
9. The Assembly of Yugoslavia acknowledges the legality and legitimacy of the expressed will of the people and members of nations, and instructs the Federal Government to carry out the necessary preparations for the adoption of the enactment on withdrawal from the SFRY.

In this context, the Federal Government is obligated to:

(a) prepare a proposal for the division of jointly created values and the property of the federation (movable and immovable property) in the country and abroad registered as the property of the federation; international obligations and claims; assets of the National Bank of Yugoslavia; foreign currency, commodity and monetary reserves of the federation, property of the Yugoslav People's Army, archives of Yugoslavia, certain infrastructure facilities, licenses and other rights and obligations ensuing from ratified international conventions. The Federal Government proposal would also include issues relating to citizenship, pension

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and other rights of citizens and the like. This requires the establishment of common responsibility for the obligations and guarantees of the SFRY toward foreign countries;

(b) propose to the Assembly of Yugoslavia the manner of the election and authorization of a parity body or committee which will prepare a proposal for the division of rights and obligations and submit it to the Assembly of Yugoslavia;

(c) prepare proposals for the territorial demarcation and the frontiers of the future States and other issues of importance for formulating the enactment on withdrawal.

10. On the basis of the Federal Government proposals regarding material and territorial issues, the Assembly of Yugoslavia will formulate, with the consent of the republican assemblies, a constitutional enactment (constitutional law) on withdrawal from the SFRY which, among other things, establishes:

— citizens' right of choice (term and manner in which citizens will state their choice in the event of territorial changes), and the obligation to ensure just compensation for change of residence);
— the obligation to provide judicial protection of the rights of citizens, legal entities and members of certain nations (compensation for damages resulting directly from the execution of the right to withdrawal, etc.);
— the obligation to harmonize certain laws and other enactments with changes in the structure of the SFRY;
— supervision and control of the enforcement of determined obligations;
— other issues which must be resolved by the time of the definitive disassociation (judiciary, environment protection, joint ventures and the like);
— the transitional period and the moment of disassociation from the SFRY. If the result of the referendum is negative, the same initiative may be launched after the expiry of a period of five years." (*Focus*, Special Issue, January 1992, pp. 31-33.)

17. The proposal offered the peaceful change, the possibility of resolving the crisis *constituzione artis*, for the exercise of right to self-determination should be carried out according to the following pattern:

"Whether the federation dissolves into two or more States also brings into focus the doctrine of self-determination in the form of secession. *Such a dissolution may be the result of an amicable and constitutional agreement or may occur pursuant to a forceful exercise of secession. In the latter case, international legal rules may be pleaded in aid, but the position would seem to be that (apart from recognized colonial situations) there is no right of self-determination applicable to independent States that would justify the resort to secession.*" (M. N. Shaw, *International Law*, 2008, p. 218; emphasis added.)

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2. Decisions of the Constitutional Court of the SFRY

18. The Constitutional Court of the SFRY was designed as the guardian of constitutionality and legality in the legal system of the SFRY. It consisted of a President and thirteen judges elected according to the following formula: two from each Republic and one from each autonomous province (Article 381 of the Constitution of the SFRY).

19. The Federal Executive Council (the Government of the SFRY), headed by Croat Ante Markovic, instituted proceedings before the Constitutional Court of Yugoslavia for the assessment of the constitutionality of the Declaration on the Proclamation of Sovereign and Independent Republic of Croatia (*Narodne novine* — Official Journal of the Republic of Croatia, No. 31/91).

In the view of the Government of the SFRY,

> "the Declaration on the Proclamation of Sovereign and Independent Republic of Croatia, in particular its Parts III, IV and V are not [. . .] in accordance with the Constitution of the SFRY and is contrary to the federal laws regulating the fields of national defence, security, foreign affairs and public administration because the right to self-determination, including the right to secession, can be realized only under the conditions, via the procedure and in the manner determined by agreement of all the Republics, in accordance with the Constitution of the SFRY".

19.1. Part III of the Declaration on the Proclamation of Sovereign and Independent Republic of Croatia stated *inter alia*:

> "The Republic of Croatia guarantees to Serbs in Croatia and to all national minorities living on its territory respect for all human and civil rights, particularly freedom of speech and the cultivation of their own languages and promotion of their cultures, and freedom to form political organizations
>
> . . . . . .
>
> The Republic of Croatia in its capacity of the legal successor of the former Socialist Federal Republic of Yugoslavia guarantees to all States and international organizations that it will fully and conscientiously exercise all rights and perform all obligations in the part relating to the Republic of Croatia."

Part IV of the Declaration said:

> "The Constitutions of the Federal People's Republic of Yugoslavia and of the Socialist Federal Republic of Yugoslavia granted the Republic of Croatia the right to self-determination and secession.
>
> Being established as an independent and sovereign State, the Republic of Croatia, which has up till now realized part of its sovereign

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rights together with the other constituent Republics and Autonomous Provinces of the Socialist Federal Republic of Yugoslavia, is now changing its status and its State-law relations with the Federal Republic of Yugoslavia, and agrees to take part in its individual institutions and functions of common interest conducive to the disassociation process.

In the course of the disassociation process it is necessary to establish the rights and obligations, i.e., the share of the Republic of Croatia in the total movable and immovable property and in the rights of the former Socialist Federal Republic of Yugoslavia.

By proclaiming the Constitutional Decision on Independence, the Republic of Croatia has started the process of disassociation from other Republics of the SFRY, and wants to terminate this process as soon as possible in a democratic and peaceful manner respecting the interests of all Republics and Autonomous Provinces making up the SFRY.

By the Constitutional Decision the present borders of the Republic of Croatia have become State borders with other Republics and with the countries adjoining the former Socialist Federal Republic of Yugoslavia

. . . . . .

Only laws which have been adopted by the Sabor of the Republic of Croatia shall apply on the territory of the Republic of Croatia, with the exception of the federal regulations which have not been repealed pending the termination of the disassociation process

. . . . . .

Federal agencies may not operate on the territory of the Republic of Croatia unless given specific and temporary authority by the Government of the Republic of Croatia.

The Republic of Croatia shall withdraw its representatives from the Federal Chamber of the SFRY Assembly, as its term expired and its existence rendered unnecessary in the process of disassociation."

In the Part V of the Declaration, it was stated *inter alia*:

"The Republic of Croatia recognizes full sovereignty and subjectivity under international law of the States which come into existence as a result of the disassociation from the SFRY with the existing boundaries of the SFRY and within the boundaries among themselves, as laid down in the present Constitution or as decided agreement among them."

20. The position of the Constitutional Court as regards disputed parts of the declaration was as follows:

"The provisions of Articles 1 and 2 of the Constitution of the SFRY provide for that the Socialist Federal Republic of Yugoslavia is a

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Federal State, as the State community of voluntarily united nations and their Republics, as well as of the Autonomous Provinces of Vojvodina and Kosovo — which are constituent parts of Serbia — which consists of: the Socialist Republic of Bosnia and Herzegovina, the Socialist Republic of Macedonia, the Socialist Republic of Slovenia, the Socialist Republic of Serbia, as well as the SAP Vojvodina and Kosovo which are constituent parts of the Socialist Republic of Serbia, the Socialist Republic of Croatia and the Socialist Republic of Montenegro.

The provisions of Article 5 of the Constitution of the SFRY provide for that the territory of the SFRY is a single united whole; that it consists of the territories of the socialist republics, and that the frontiers of the SFRY may not be altered without the consent of all the Republics and Autonomous Provinces.

Alterations of the boundaries of the SFRY are decided upon by the Federal Chamber of the Assembly of the SFRY in accordance with the provisions of Article 283, paragraph 4, and Article 285, paragraph 6.

The Constitutional Court of Yugoslavia, proceeding from the mentioned provisions of the Constitution of the SFRY, assessed that Parts III, sections 2 and 4, IV, sections 2 to 10 and V of the Declaration on the Proclamation of [a] Sovereign and Independent Republic of Croatia — are not in conformity with the Constitution of the SFRY."

The Court devoted due regard to the right to self-determination. It stated:

"Parts III, sections 2 and 4, IV, sections 2 to 10 and Part V of the disputed declaration are based on the understanding of the Assembly of the Republic of Croatia as regards the right of the Croatian people to self-determination, including the right to secession.

The rationale of the mentioned provisions of the Declaration on the Proclamation of a Sovereign and Independent Republic of Croatia is not, in the opinion of the Constitutional Court of Yugoslavia, only in the expression of the right of the Croatian people to self-determination, including the right to secession. The import of the disputed declaration is the proclamation of the Republic of Croatia an independent State which is not a constituent part of the SFRY, as a Federal State and a State community of voluntarily united peoples and their republics, a proclamation of the State community of the Yugoslav nations and their republics a non-existent community, proclamation of federal laws null and void on the territory of the Republic of Croatia, prevention of the functioning of federal bodies on the territory of the Republic of Croatia within the jurisdiction of these bodies and ignorance of certain federal institutions.

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> The right of peoples of Yugoslavia to self-determination, including the right to secession, established by the Constitution of the SFRY, may not, in the opinion of the Constitutional Court of Yugoslavia, be realized by unilateral acts of peoples and/or acts of the assemblies of their Republics. This right can only be realized under the conditions and in the manner to be determined, in accordance with the Constitution of the SFRY, with the consent of each people and its republic individually, and all of them together. Although the procedure for the realization of the right to self-determination including the right to secession, has not been defined by the Constitution of the SFRY, this does not mean that this right may be realized on the grounds of unilateral acts relating to the realization of that right."

21. At its meeting held on 13 November 1991, the Constitutional Court, pursuant to the provision of Article 375, paragraph 1, subparagraph 4, of the Constitution of the SFRY, adopted the decision that:

> "The provisions of Part III, sections 2 and 4, Part IV, sections 2 to 10 and Part V of the Declaration on the Proclamation of Sovereign and Independent Republic of Croatia (*Narodne novine* (Official Journal of the Republic of Croatia), No. 31/91) are abolished." (Decision II-U-No. 123/91 of 13 November 1991.)

22. The Federal Executive Council instituted also proceedings before the Constitutional Court of Yugoslavia for the assessment of the constitutionality of the decision of the Assembly of the Republic of Croatia on the breakup of State-legal connection with the SFRY (*Narodne novine* (Official Journal), No. 53/91).

The Council considered

> "that the said decision is not in conformity with the Constitution of the SFRY and that the breakup of the State-legal connections is possible only between independent and sovereign States having recognized international legal personality, but not between a constituent part of a sovereign State and that State".

23. The decision of the Assembly of the Republic of Croatia determined that the Republic of Croatia, as of 8 October 1991, broke up its State-legal connections on the basis of which, in common with other republics and provinces, it had constituted the SFRY up to that date; denied the legitimacy and legality of all bodies of the Federation; recognized, on a reciprocal basis, the independence and sovereignty of the other republics of the former SFRY; guaranteed and ensured the basic rights of man and national minorities, as guaranteed by the Universal Declaration of Human Rights and other international documents; and expressed the readiness to enter into inter-State associations with other States.

24. The Constitutional Court found that

> "the decision of the Assembly of the Republic of Croatia on the breakup of its State-legal connection with the SFRY is not in con-

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formity with the Constitution of the SFRY. The Constitutional Court of Yugoslavia based this decision on the fact that, according to the Constitution of the SFRY, the Republic of Croatia is one of the constituent Republics of the SFRY of which it consists as a State community. That is why it cannot, by any unilateral act of its own, breakup State-legal connections with the federal State of which it is a part nor can it, by such an act, change the status of the Republic established by the Constitution of the SFRY, leave the State community of the SFRY and change the boundaries of the SFRY.

The Constitutional Court of Yugoslavia bases its assessment also on the fact that the disputed decision, contrary to the Constitution of the SFRY, denies the legitimacy and legality of the federal bodies, and refuses to recognize all legal acts of the federal bodies. The Constitution of the SFRY determines which common interests are realized within the Federation and which of these common interests the Federation realizes through the federal bodies; consequently, the relations in the Federation cannot be altered by a unilateral act or denied its rights and obligations determined by the Constitution of the SFRY nor can the federal bodies be denied legitimacy and legality. Likewise, it is not possible to deny recognition and validity of legal acts of the federal bodies because these acts are binding and valid on the whole territory of the SFRY." (Decision II-U-No. 194/91 of 25 December 1991 published in the *Official Gazette* of the SFRY, No. 12/92.)

25. It should be emphasized that both decisions were adopted by the Court in its full composition, as prescribed by the Constitution, with only a judge from Slovenia not taking part in adopting the decisions.

* *

26. The set out legal facts provide a different picture of the so-called "Greater Serbia" project, which, by the way, has never been a policy of the FRY and Serbia. The so-called "Greater Serbia" project is rather a myth or abuse in the circumstances of the Yugoslav crisis.

The term was adopted from the political programme of the Serbian politician I. Garašanin who, in the mid-nineteenth century, wrote "Nacertanije" ("Draft Plan"), which was a programme on the unification of Serbs on the basis of the principle of nationalities, a principle that served as the legal ground for the constitution of European national States like Germany and Italy. In both theory and practice, as a national ideology and real policy, a similar notion of a national State existed in the past of every nation in Europe.

27. During the Yugoslav crisis the substance of the "Greater Serbia" concept, if accepted as relevant, amounted to a possibility of the expan-

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sion of the FRY/Serbia based on the outcome of the exercise by Serbs living outside Serbia of their right to self-determination.

The primary political objective of the FRY and the Serbs in Croatia was the safeguarding of Yugoslavia as a common home for Serbs. This objective is fully understandable if one has in mind that more than a third of Serbs lived outside the borders of the Federal Republic of Yugoslavia. The territorial expansion of the FRY/Serbia figured as a possibility whose realization would depend on the outcome of self-determination of the Serbs in Croatia and Bosnia and Herzegovina. The possibility as regards Croatia was not realized primarily because of the fact that:

> "The achievement of independence by . . . Croatia . . . can be seen as a revolutionary process that has taken place beyond the control of existing body of laws . . . Self-determination has operated at the level of political rhetoric, as a set of political principles legitimizing the secession." (A. Cassese, "Self-Determination of Peoples and the Recent Break-up of USSR and Yugoslavia" in R. Macdonald (ed.), *Essays in Honour of Wang Tieya*, 1994, pp. 141-144.)

II. Jurisdictional Issues

1. Validity in Time Complex In Casu

28. The Court's approach to the validity in time complex is highly relaxed, in particular if one has in mind that the scope of its jurisdiction *ratione temporis* is a key jurisdictional issue in the present case. The question which, in the circumstances surrounding the case, necessarily affects also the two primary forms of the jurisdiction of the Court — jurisdiction *ratione personae et ratione materiae* (see paras. 50-54 below). The Court did not decide from which date the Genocide Convention can be considered binding for the Applicant, and from which date the Genocide Convention can be considered applicable between the Parties. It did not tackle at all the question of the date until which the Convention was in force in relation to the SFRY, although, *inter alia*, it dealt with the question as to whether the acts on which Croatia relied are "attributable to the SFRY at the time of their commission" (Judgment, para. 114). Without these parameters a proper treatment of the preliminary objection of Serbia *ratione temporis* seems a difficult, if not an impossible task. It comes as no surprise that the Court has not decided the Respondent's other preliminary objection in accordance with Article 79, paragraph 9, of the Rules of the Court and its well established jurisprudence, but treated the issue of jurisdiction *ratione temporis* and the related issue of admissibility as accessory consequence of the decision as regards the principal claim and counter-claim (see paras. 56 and 59 below). The intrinsic meaning of such an action of the Court is far-reaching — it ignores the fundamental

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principle on which the Court's jurisdiction is based, i.e., the principle of consent.

1.1. From which date is the Genocide Convention in force as regards the Parties individually?

29. Within the set of issues relating to the validity in time of the provisions of the Genocide Convention, one issue, on which the Parties had opposing opinions *ab initio*, was resolved by the Judgment of the Court in the preliminary objections phase, i.e., the issue of since when the Respondent can be considered as bound by the provisions of the Convention. In its Judgment on the preliminary objections raised by Serbia the Court found that, by combined effect of the declaration and Note of 27 April 1992 and the consistent conduct at the time of its making and through the years 1992-2000, the FRY is considered as bound by the Genocide Convention "from that date (27 April 1992) onwards" (*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* (hereinafter "2008 Judgment"), pp. 454-455, para. 117). In that part, the Judgment of the Court possesses *res iudicata* effects.

30. However, the Judgment did not provide the answer to the question as to when Croatia acquired the status of a party to the Convention. The Court addressed the issue in a general way stating that "Croatia deposited a notification of succession with the Secretary-General of the United Nations on 12 October 1992" (2008 Judgment, p. 445, para. 94). The Judgment states further that "[Croatia] asserted that it had already been a party prior thereto as a successor State to the SFRY from the date it assumed responsibility for its international relations with respect to the territory, namely from 8 October 1991" *(ibid.)*. It is up to the Court to determine precisely the date, one of the two mentioned, since when Croatia can be considered a party to the Genocide Convention.

31. In its 2008 Judgment, the Court did not, in fact, tackle the claim of Croatia, but simply presented, in its paragraph 94, the position of Croatia.

In the light of the relevant circumstances, it appears that Croatia's claim is based on:

Primo, its notification on succession.

In a letter dated 27 July 1992, received by the Secretary-General on 4 August 1992 and accompanied by a list of multilateral treaties deposited with the Secretary-General, the Government of the Republic of Croatia notified that:

> "[The Government of] . . . the Republic of Croatia has decided, based on the Constitutional Decision on Sovereignty and Independ-

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ence of the Republic of Croatia of 25 June 1991 and the Decision of the Croatian Parliament in respect of the territory of the Republic of Croatia, by virtue of succession of the Socialist Federal Republic of Yugoslavia of 8 October 1991, to be considered a party to the conventions that Socialist Federal Republic of Yugoslavia and its predecessor States (the Kingdom of Yugoslavia, Federal People's Republic of Yugoslavia) were parties, according to the enclosed list.

In conformity with the international practice, [The Government of the Republic of Croatia] would like to suggest that this take effect from 8 October 1991, the date on which the Republic of Croatia became independent."

Secundo, the depositary records for the Genocide Convention draw a distinction between the date of notification deposit and the date of effect. The date of the deposit of notification of succession is, according to the depositary practice for the Genocide Convention, the date on which the State deposited notification in reality, whereas the date of effect is the expression of the consent of the State to be bound by the Convention prior to that date, from the moment when it assumed responsibility for its international relations with respect to its territory. In that sense, the information in respect of the succession of the former federal units of the SFRY to the Genocide Convention is coinciding, excepting Yugoslavia/Serbia.

	Action	Date of Notification/ Deposit	Date of Effect
Bosnia and Herzegovina	Succession	29 December 1992	6 March 1992
Croatia	Succession	12 October 1992	8 October 1991
Montenegro	Succession	23 October 2006	3 June 2006
Slovenia	Succession	6 July 1992	25 June 1991
the former Yugoslav Republic of Macedonia	Succession	18 January 1994	17 November 1991
Yugoslavia (Serbia)	Accession	12 March 2001	10 June 2001

(See https://treaties.un.org/pages/showDetails.aspx?objid=0800000280027fac.)

Tertio, in its written pleadings Serbia "does not contest that Croatia could become a contracting party to the Genocide Convention by submitting a declaration of succession and that Croatia could thereby become a

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contracting party thereof, effective 8 October 1991" (Counter-Memorial of Serbia, para. 370).

32. If the date of effect of a convention, as in the case at hand, is prior to the date of the deposit of notification of succession, then undoubtedly retroactivity is at work. For, notification of succession, as defined by the Vienna Convention on Succession of States in Respect of Treaties (1978), means "in relation to a multilateral treaty, any notification, however framed or named, made by a successor State *expressing its consent* to be considered as bound by the treaty" (Article 2 *(g)* of the Convention, emphasis added). In this way the successor State expresses its consent to be considered as bound as from the date X which is later in relation to the date Y as the "date of effect" being, in fact, the date of entry of the treaty into force for that State. This appears to be a clear case of retroactive effect. However, retroactivity in this case is of a *sui generis* nature, for it relates to the successor State individually.

33. The basis of retroactive effect of the Genocide Convention in this particular case is in the combined effect of Croatia's notification of succession and the consent of third States. The conclusion relies on two parts:

(i) the connection that exists between the rules on succession with respect to international treaties and the rules of treaty law; and
(ii) the meaning of the instrument of "notification of succession".

It is natural that the succession of States with respect to treaties has the closest links with the law of treaties itself and could be regarded as dealing with particular aspects of participation in treaties, the conclusion of treaties and the application of treaties.

Special Rapporteur Humphrey Waldock described these links as follows:

> "the Commission could not do otherwise than examine the topic of succession with respect to treaties within the general framework of the law of treaties . . . the principles and rules of the law of treaties seemed to provide a surer guide to the problems of succession with respect to treaties than any general theories of succession" (*Yearbook of the International Law Commission (YILC)*, 1968, Vol. I, p. 131, para. 52).

Or, as stated by O'Connell:

> "The effect of a change of sovereignty on treaties is not a manifestation of some general principle or rule of State succession, but rather a matter of treaty law and interpretation." (D. P. O'Connell, *The Law of State Succession*, 1956, p. 15.)

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The determination of "notification of succession" given in Article 2 *(g)* of the Vienna Convention on Succession of States in Respect of Treaties, as well as the practice of States in the matter, cast serious doubts as to the possibility of "notification of succession" as an instrument, per se, that acts as a means of binding by treaty.

The Vienna Convention on the Law of Treaties (1969) stipulates in Article 11 (means of expressing consent to be bound by a treaty): "The consent of a State to be bound by a treaty may be expressed by signature, exchange of instruments constituting a treaty, ratification, acceptance, approval or accession, or by any other means *if so agreed.*" (Emphasis added.)

The formulation of Article 11 of the Vienna Convention on the Law of Treaties does not exclude the *possibility* of notification of succession being understood as a means of expressing approval to be bound by a treaty. The operationalization of this possibility implies, however, the agreement of the parties for, in the light of treaty law as expressed in Article 11 of the Convention, "notification of succession" undoubtedly comes under "*any other means*" of expressing consent to be bound by a treaty, but is conditioned by the phrase "if so agreed". From this viewpoint, *"notification of succession" as a unilateral act of the State, constitutes a basis for a collateral agreement in simplified form between the new State and the individual parties to its predecessor's treaties.* Thus "notification of succession" actually represents an abstract, generalized form of the new State's consent to be bound by the treaties of the predecessor State — a form of consent which is, in each particular case, realized in conformity with the general rule of the law of treaties on expression of consent to be bound by a treaty contained in Article 11 of the Vienna Convention on the Law of Treaties and prescribed by provisions of the concrete treaty.

An exception to the general rule according to which consent of the successor State to be bound by a treaty has to be expressed *ad casum* in conformity with Article 11 of the Vienna Convention on the Law of Treaties could be envisaged in the event that, outside and independently of the Convention, there exists a generally accepted rule according to which "notification of succession" is considered a specific means of binding new States by treaties. Grounds for such an interpretation are also provided by Article 73 of the Vienna Convention on the Law of Treaties: "The provisions of the present Convention shall not prejudge any question that may arise in regard to a treaty from a succession of States . . ."

There is no credible evidence that such a rule exists. The Vienna Convention on the Law of Treaties which is, by its nature, a combination of codification and progressive development, does not make any mention in its Article 11 (means of expressing consent to be bound by a treaty) of "notification of succession" as such a means. This is particularly conspicuous in view of the fact that Article 11 is built on the premise of deformalization of the means of expressing consent to be bound by a treaty.

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Since succession per se is not and cannot be an independent method of expressing consent to be bound by a treaty, it follows that "notification of succession" can only be a descriptive notion, a collective term for various forms of expression of consent of a new State to be bound by a treaty. As pointed out by Professor Annie Gruber:

> "Since it is a unilateral act, the legal effect of which cannot depend solely on the will of the author of the act, a unilateral declaration of succession may be considered to contain a sort of personal proposition which third States may accept or reject." (A. Gruber, *Le droit international de la succession d'Etats*, 1986, p. 221.)

Finally, Article 9 of the Vienna Convention on Succession of States in Respect of Treaties clearly states:

> "Obligation or rights under treaties in force in respect of a territory at the date of a succession of States do not become the obligations or rights of the successor State or of other States parties to those treaties by reason only of the fact that the successor State has made a unilateral declaration providing for the continuance in force of the treaties in respect of its territory."

That in particular terms means that Croatia's notification of succession constitute an offer which the parties to the Convention are free to accept or reject. Only acceptance by the parties to the Convention could create treaty *nexus* between a State that make a notification and other States parties to the Convention.

1.2. From which date can the Genocide Convention be considered as applicable between the Parties?

Scenario one

34. The determining of the date on which the Convention came into force in relation to the FRY/Serbia and Croatia does not solve the issue of validity in time of the Convention *in casu*, but rather constitutes only a part of that set of issues. The fact that the Genocide Convention is binding on both Parties *in casu* is one thing, whereas its applicability in terms of time between the Parties is quite another in the circumstances surrounding the case.

The status of Croatia and the FRY/Serbia as parties to the Convention only determines the jurisdictional title *in casu* and does not solve the issue of its temporal scope because the dates from which the parties are considered as bound by the Convention do not coincide.

Croatia can be considered a contracting party to the Convention as from 8 October 1991, while Serbia can be considered a contracting party as from 27 April 1992.

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35. The jurisdiction of the Court *in casu* is based on Article IX of the Genocide Convention. In contrast to the substantive provisions of the Convention which are, by their nature, integral ("Third Report on the Law of Treaties" by G. Fitzmaurice, *YILC*, 1958, Vol. II; United Nations doc. A/CN.4/115, Art. 18, p. 27, para. 2), collective obligations towards the international community as a whole (*Barcelona Traction, Light and Power Company, Limited (Belgium* v. *Spain), Second Phase, Judgment, I.C.J. Reports 1970*, p. 3), Article IX of the Convention, as a standard compromissory clause, is a bilateral obligation between the parties.

As regards the substantive obligation of the Convention, the will of the contracting parties, taken individually, is only a constitutive element of the will of the international community as a whole, as a basis of its peremptory nature. As such, substantive obligations of the Genocide Convention are binding on States "even without any conventional obligations" (*Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, I.C.J. Reports 1951*, p. 23). Consequently, any new State is *a priori* subject to these rules since they express the universal interest of the international community as a whole.

It might be concluded that, having in mind that nature of the principles underlying the Genocide Convention, the then Secretary-General Dag Hammarskjöld warned the Congolese authorities during the United Nations' operations in that country that the principles of the Convention must be held to govern even a new State and to apply to subordinate political authorities within the Congolese State (*Annual Report of the Secretary-General 1960-1961*, General Assembly, Sixteenth Session, Supp. No. 1, p. 11; H. Waldock, "General Course on Public International Law", *Recueil des cours de l'Académie de droit international de La Haye*, 1962, Vol. 106, p. 228).

In contrast to its substantive provisions, the provision of Article IX of the Convention, being of a contractual nature, operates on the *inter partes* level, within the reciprocity principle.

Accordingly, in relation to Article IX of the Convention, a multitude of bilateral links is constituted between the parties to the Genocide Convention depending on the consent of the parties. In other words, the obligations of the parties to the Convention as regards Article IX are not "self-existent, absolute and inherent" (G. Fitzmaurice, "Third Report on the Law of Treaties", *YILC*, 1958, Vol. II; United Nations doc. A/CN.4/115, Art. 19, p. 28), but relative, extrinsic, depending on the consent. The distinction is, in the ILC Articles on State Responsibility, derived in explicit terms. In contrast to collective obligations embodied in multilateral treaties, the International Law Commission notes that there exist obligations in multilateral treaties where "performance in a given situation involves a relationship of a bilateral character between two parties" (Commentary to Art. 42 *(a)*).

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As far as the bilateral relationship, or bundles of bilateral relations, between the parties to a multilateral treaty, reciprocity and mutuality may be regarded as an essential principle of international law (a good example, in addition to the one which we are discussing, is the requirement of consent by other States to reservations to multilateral treaties).

1.3. Application of the principle in casu

36. The jurisdiction of the Court in the case at hand is based on Article 36, paragraph 1, of the Statute of the Court which reads:

> "The jurisdiction of the Court comprises all cases which the parties refer to it and all matters specially provided for in the Charter of the United Nations or *in treaties and conventions in force.*" (Emphasis added.)

When jurisdiction is based on paragraph 1 of Article 36:

> "the Court is empowered only to apply the specific treaty. Where it is based on paragraph 2, the Court's jurisdiction may allow it and even require it to have recourse to rules of customary international law which resemble the rules of a treaty but which exist independently of the treaty, if for any reason that treaty is excluded from the scope of the jurisdiction of the Court in that particular case." (S. Rosenne, *The Law and Practice of the International Court: 1920-2005*, 4th ed., Vol. II, 2006, pp. 648-649, referring in a footnote to *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Merits, Judgment, I.C.J. Reports 1986*, p. 38, para. 56.)

As the Genocide Convention is the only jurisdictional title in the case at hand, the date on which the Convention came into force as regards Croatia and the FRY/Serbia is of paramount importance. For, proceedings between these two parties may be validly instituted only during the currency of the title of jurisdiction (*Northern Cameroons (Cameroon* v. *United Kingdom), Preliminary Objections, Judgment, I.C.J. Reports 1963*, p. 29).

It appears that the Genocide Convention came into force as regards Croatia and the FRY/Serbia on different dates — 8 October 1991 in relation to Croatia and 27 April 1992 in relation to the FRY/Serbia.

In the light of the principle of reciprocity and mutuality, it follows that the Genocide Convention is applicable between Croatia and the FRY/Serbia as from 27 April 1992 as the later date, limiting the jurisdiction of the Court *ratione temporis* to acts and situations after that date.

The pattern of such legal reasoning was demonstrated by the Court in the *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia* v. *Russian Federation)* case. In that case, the specific treaty was the Convention on Elimination of Racial

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Discrimination which provides, in its Article 22, that: "Any dispute between two or more States Parties with respect to the interpretation or application of this Convention . . . shall, at the request of any of the parties to the dispute, be referred to the International Court of Justice for decision . . .".

Since the Convention entered into force as regards Russia on 4 February 1969 and as regards Georgia on 2 July 1999, the Court concluded that "CERD entered into force between the Parties on 2 July 1999" (*Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia* v. *Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2011 (I)*, p. 81, para. 20).

Scenario two

37. This scenario is based on the principle that mutual recognition is needed for establishment of treaty nexus between the contracting parties to the Convention. The principle derives from the contractual nature of the jurisdictional clauses operating on the *inter partes* level, within the limits of the reciprocity. In that regard, international treaty law is a sort of *vinculum iuris*, a legal relationship between States which recognize each other.

38. As stated by Sir Robert Jennings and Sir Arthur Watts:

> "Generally, a situation which is denied recognition, and the consequences directly flowing from it, will be treated by non-recognizing States as without international legal effect." (*Oppenheim's International Law*, 9th edition, 1992, p. 199.);

and

> "The non-recognized Government will not be regarded by non-recognizing States as competent to make its State a party to a multilateral treaty, or to act on behalf of the State in legal proceedings." (*Ibid.*, p. 198.)

Kelsen, although starting from the consideration that "the legal act of recognition is the establishment of a fact" (H. Kelsen, "Recognition in International Law — Theoretical Observations", in L. Gross (ed.), *International Law in the Twentieth Century*, 1969, p. 592) finds that:

> "The new State starts its legal existence with its declaration of statehood but it exists only for itself, not in relation to other States. This is a typical border case. In order to become a subject of international law in relation to other States, the new State has also to be recognized as such by these other States, but the old State, too, in its relation to the new State is a State, in the sense of international law, only if the new State recognizes it as such. Therefore mutual recognition is necessary." (*Ibid.*, p. 593.)

A similar opinion is represented by Hersch Lauterpacht. According to the learned author and judge, recognition "marks the beginning of the

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international rights and duties of the recognized community" (*Oppenheim's International Law: A Treatise*, 8th ed., 1955, p. 128).

39. Such considerations are not unknown to the jurisprudence of the Court. In the *Certain German Interests in Polish Upper Silesia* case, the Permanent Court stated *inter alia*:

> "Poland is not a contracting Party either to the Armistice Convention or to the Protocol of Spa. At the time of the conclusion of those two Conventions, Poland was not recognized as a belligerent by Germany; it is, however, only on the basis of such recognition that an armistice could have been concluded between those two Powers.
>
> The Principal Allied Powers had, it is true, recognized the Polish armed forces as an autonomous, allied and co-belligerent (or belligerent) army. This army was placed under the supreme political authority of the Polish National Committee with headquarters in Paris. Without considering the question what was as this moment the political importance of this Committee, the Court observes that these facts cannot be relied on as against Germany, which had no share in the transaction." (*Certain German Interests in Polish Upper Silesia, Judgment No. 7, 1926, P.C.I.J., Series A, No. 7*, pp. 27-28.)

Judge Skubiszewski, in his dissenting opinion in the *East Timor* case, found that "[r]ecognition leads to the validation of factual control over territory and *to the establishment of corresponding rights*" (*East Timor (Portugal* v. *Australia), Judgment, I.C.J. Reports 1995*, dissenting opinion of Judge Skubiszewski, p. 265, para. 131; emphasis added).

In the *Bosnian Genocide* Case, the Court refrained from giving a clear answer to the question with the explanation:

> "For the purposes of determining its jurisdiction in this case, the Court has no need to settle the question of what the effects of a situation of non-recognition may be on the contractual ties between parties to a multilateral treaty. It need only note that, even if it were to be assumed that the Genocide Convention did not enter into force between the Parties until the signature of the Dayton-Paris Agreement, all the conditions are now fulfilled to found the jurisdiction of the Court *ratione personae* [. . .]
>
> In the present case, even if it were established that the Parties, each of which was bound by the Convention when the Application was filed, had only been bound as between themselves with effect from 14 December 1995, the Court could not set aside its jurisdiction on this basis . . ." (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Yugoslavia), Preliminary Objections, Judgment, I.C.J. Reports 1996 (II)*, pp. 613-614, para. 26.)

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It should be noted, however, that the pronouncement of the Court relates to jurisdiction *ratione personae* — not to jurisdiction *ratione temporis*.

40. Recent practice confirms that the recognition of a State determines the critical date as regards the beginning of the international rights and duties of the recognized community vis-à-vis recognizing State by establishing a necessary treaty *nexus* between them. *Exempli causa*, Switzerland, having recognized Slovenia and Croatia on 15 January 1992, declared that the treaties formerly concluded with Yugoslavia shall henceforth be applicable to bilateral relations (*Revue suisse de droit international et européen*, 1993, p. 709).

The same pattern of reasoning underlines the decision of the Supreme Court of the Federal Republic of Germany of 18 December 1959:

> "The Contracting Parties which are already bound by a multilateral convention can be bound by the accession of another State entity only to the extent that the latter is a subject of international law as far *as they themselves are concerned* . . . Any entity which exists *in fact* requires, in addition, the *recognition* of its existence in some form . . . In relation to other States which do not recognize it as a subject of international law, such an entity cannot be a party to a treaty, let alone become a party merely by a unilateral declaration, as e.g., by accession to a multilateral convention, thus conferring upon itself the status of a subject of international law in relation to States which do not recognize it." (*International Law Reports*, Vol. 28, 1959, pp. 87-88; emphasis in original.)

41. In the letter dated 5 April 1994 from the *chargé d'affaires* A.I. of the Permanent Mission of Yugoslavia to the United Nations, addressed to the Secretary-General as the depositary of international conventions, the Federal Republic of Yugoslavia stated, *inter alia*, that:

> "Croatia, no doubt, is a successor State and the Federal Republic of Yugoslavia does not deny that. The term 'successor State', however, implies exclusively the change of sovereignty in a part of the territory of the Yugoslav Federation in the sense of the transformation of that part of the territory into an independent State. The very act of the change of territorial sovereignty is not automatically linked to the transfer of the rights and obligations of the Federation to the seceded part, since such a transfer implies legality of the territorial change, i.e., that the territorial change has been carried out in conformity with the principles of positive international law." (United Nations doc. S/1994/398, 5 April 1994.)

The statement makes the distinction between succession taken in terms of territorial change (*de facto* succession) and succession as the transmission of rights and obligations from predecessor State(s) (*de iure* succession) elaborated in the doctrine of international law (H. Kelsen,

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Dictionnaire de la terminologie du droit international, Vol. 42, p. 314; D. P. O'Connell, *The Law of State Succession*, 1956, pp. 3, 6; K. Zemanek, "Die Wiener Konvention über die Staatennachfolge in Verträge", *Ius Humanitatis: Festschrift für Alfred Verdross*, 1980, p. 719; M. Jones, "State Succession in Matter of Treaties", *British Yearbook of International Law*, Vol. 24, 1947, pp. 360-361) and embodied in Article 6 of the Vienna Convention on Succession of States in Respect of Treaties. Article 6, entitled "Cases of Succession of States covered by the present Convention", specifies that the Convention "applies only to the effects of a succession of States occurring in conformity with the international law and, in particular, the principles of international law embodied in the Charter of the United Nations".

42. The mutual recognition took place only on the day the Dayton Agreement was signed, i.e., 14 December 1995 or, alternatively, on 23 August 1996, the date when the Agreement on Normalization of Relations between the Republic of Croatia and the Federal Republic of Yugoslavia was signed (*Narodne novine*. Međunarodni ugovor br. 10/96).

Article 1 of the Agreement stipulates: "The Contracting Parties shall respect each other as independent, sovereign and equal States within their international borders."

43. The fact that the Respondent asserted during the proceedings that the Convention is applicable between the Parties as from 27 April 1992 is not of decisive importance in the view of the fact that "the establishment or otherwise of jurisdiction is not a matter for the parties but for the Court itself" (*Fisheries Jurisdiction (Spain* v. *Canada), Jurisdiction of the Court, Judgment, I.C.J. Reports 1998*, p. 450, para. 37).

The Court must "always be satisfied that it has jurisdiction, and must if necessary go into that matter *proprio motu*" (*Appeal Relating to the Jurisdiction of the ICAO Council (India* v. *Pakistan), Judgment, I.C.J. Reports 1972*, p. 52, para. 13).

1.4. By which date was the Genocide Convention in force as regards the SFRY?

44. It is hardly necessary to recall that two elements determine the validity in time of a treaty or of a particular rule:

(i) the moment of its entering into force; and
(ii) the moment of its termination *in toto* or of its particular rule, as Article IX of the Convention.

The latter element is of special relevance as regards the SFRY as a State party to the Genocide Convention in the circumstances surrounding the case. *Sedes materiae* of the dispute in the light of the Applicant's claim is determined by the Court in the following terms:

"(1) whether the acts relied on by Croatia took place; and, if they did, whether they were contrary to the Convention;

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(2) if so, whether those acts were attributable to the SFRY at the time that they occurred and engaged its responsibility; and

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

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." (Judgment, para. 112.)

The only logical and legally founded conclusion is that the SFRY was bound by the Convention until the moment when the process of its dissolution was complete.

That necessarily brings into focus the responsibility of the SFRY, for the predominant number of acts which the Applicant considers as acts of genocide took place before 27 April 1992 when the Respondent was established as a State.

The Court is right in stating that "the SFRY was bound by the Convention at the time when it is alleged that the relevant acts occurred" (*ibid.*, para. 113). However, this is only one aspect of the issue of the temporal validity of the Genocide Convention as regards the SFRY. The other aspect of the issue is the moment until which the SFRY was bound by the provisions of the Genocide Convention.

The answer seems simple. As dissolution of a State means that it no longer has legal personality (Conference for Peace in Yugoslavia, Arbitration Commission, Opinion 8, point (2)), it appears that when the process of dissolution of the SFRY was completed, its status as a State party to treaties was terminated *ipso facto*.

45. The reasoning of the Court is designed in terms of retroactivity, both of the substantive provisions of the Genocide Convention and of Article IX, although this is denied by the Court (see, *inter alia*, Judgment, paras. 95, 98, 99).

Pointing out that "the temporal scope of Article IX is necessarily linked to the temporal scope of the other provisions of the Genocide Convention" (*ibid.*, para. 93), which are not retroactive (*ibid.*, para. 99), the Court points, however, to its dictum in its 1996 and 2008 Judgments, which is obviously based on the assumption of retroactivity.

In its 1996 Judgment, the Court determined:

"it remains for the Court to specify the scope of that jurisdiction *ratione temporis*. In its sixth and seventh preliminary objections, Yugoslavia, basing its contention on the principle of the non-retroactivity of legal acts, has indeed asserted as a subsidiary argument that, even though the Court might have jurisdiction on the basis of the Convention, it could only deal with events subsequent to the different dates on which the Convention might have become applicable as

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> between the Parties. In this regard, the Court will confine itself to the observation that the Genocide Convention — and in particular Article IX — does not contain any clause the object or effect of which is to limit in such manner the scope of its jurisdiction *ratione temporis*, and nor did the Parties themselves make any reservation to that end, either to the Convention or on the occasion of the signature of the Dayton-Paris Agreement. The Court thus finds that it has jurisdiction in this case to give effect to the Genocide Convention with regard to the relevant facts which have occurred since the beginning of the conflict which took place in Bosnia and Herzegovina. This finding is, moreover, in accordance with the object and purpose of the Convention as defined by the Court in 1951 and referred to above. As a result, the Court considers that it must reject Yugoslavia's sixth and seventh preliminary objections." (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Yugoslavia), Preliminary Objections, Judgment, I.C.J. Reports 1996 (II)*, p. 617, para. 34; reference omitted.)

It is perfectly true that the Genocide Convention does not contain "express provision . . . limiting its jurisdiction *ratione temporis*" (2008 Judgment, para. 123). However, this is not the real issue at hand. The real issue is whether the Convention contains a provision that *excludes* the application of the general rule of international law regarding the non-retroactivity of treaties, embodied in Article 28 of the Vienna Convention on the Law of Treaties.

The substantive reason concerns the very specific approach of the Court to the temporal scope of the Genocide Convention in the *Bosnian Genocide* case. The reasoning of the Court seems to be an inversion of the logic incorporated in Article 28 of the Convention on the Law of Treaties; it rests upon the presumption of retroactivity in contrast to Article 28 which is based on presumption of non-retroactivity.

Therefore, "the presumption was reversed: absent some express reservation, the temporal limitation did not apply" (R. Kolb, *The International Court of Justice*, 2013, p. 423).

Thus, "[c]ompromissory clauses (and, perhaps, generally, jurisdictional clauses in treaties) are . . . aligned with the regime of the optional clause" *(ibid.)*. In the light of the jurisprudence of the Court, it may be understood as retrospective effects of the title of jurisdiction (i.e., application of a jurisdictional clause in view of the events and acts prior to its entry into force) rather than retroactive effects of the jurisdictional clause at the time when it was not yet in force.

The conclusion regarding the assumption of retroactivity in the 1996 Judgment becomes even more evident if the context is taken into

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consideration. The dictum cited above is actually the response to the sixth and seventh preliminary objection raised by Yugoslavia. Basing its contention on the principle of non-retroactivity for legal acts, Yugoslavia had indeed asserted, as a subsidiary argument, that, even if the Court might have jurisdiction on the basis of the Convention, it could only deal with events subsequent to the different dates on which the Convention might have become applicable as between the Parties.

45.1. In fact, the Court essentially accepted the Applicant's interpretation that:

> "Croatia responds that the Court has jurisdiction over the entirety of its claim and that there is no bar to admissibility. For Croatia, the essential point is that the Genocide Convention was in force in the territories concerned throughout the relevant period, because the SFRY was a party to the Convention. According to Croatia, the FRY emerged directly from the SFRY, with the organs of the new State taking over the control of those of the old State during the course of 1991 when the SFRY was 'in a process of dissolution' (the phrase used by the Arbitration Commission of the Conference on Yugoslavia in Opinion No. 1, 29 November 1991, 92 *International Law Reports (ILR)*, p. 162). On 27 April 1992, the FRY made a declaration which, as the Court determined in 2008, had the effect of a notification of succession to the Genocide Convention and other treaties to which the SFRY had been party. Croatia maintains that there was, therefore, a continuous application of the Convention, that it would be artificial and formalistic to confine jurisdiction to the period from 27 April 1992, and that a decision to limit jurisdiction to events occurring on or after that date would create a 'time gap' in the protection afforded by the Convention. Croatia points to the absence of any temporal limitation in the terms of Article IX of the Genocide Convention. At least by the early summer of 1991, according to Croatia, the SFRY had ceased to be a functioning State and what became the FRY was already a State *in statu nascendi*." (Judgment, para. 81.)

In that sense, the Applicant is correct because, in the light of the Applicant's assertions, it is not a matter of retroactivity in the technical sense, but in the sense of the "continuous application of the Convention".

The Applicant's assertion of the "continuous application of the Convention" is based on:

(i) the rules on succession to responsibility; and
(ii) the attribution of alleged acts of genocide to Serbia on the basis of Article 10 (2) of the Rules on the Responsibility of States.

In order for the Court to act in the frame of the rule on non-retroactivity, it was necessary for it, before entering into the merits of the case, to establish that the Applicant's assertions relating to the rules on succession

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to responsibility and attribution on the basis of Article 10 (2) were well-founded, that is, that they constituted part of the applicable substantive law *in casu*.

If established as part of the applicable substantive law, those rules would produce retroactive effects independently of Article 28 of the Vienna Convention on the Law of Treaties, as a proper consequence of effects of the rules themselves.

2. *Nature and Effects of the Second Preliminary Objection of the Respondent*

46. In its Judgment on Preliminary Objections, the Court found, *inter alia*, that "the Respondent was bound by the Genocide Convention, including Article IX thereof, at the date of the institution of the proceedings and remained so bound at least until 1 November 2000" (2008 Judgment, p. 455, para. 118) and "if consequently the Applicant would have been at liberty, had it so desired, to submit a fresh application identical in substance to the present Application, the conditions for the jurisdiction of the Court would be satisfied" *(ibid.)*. It appears that the Court, by adopting this conclusion, established its jurisdiction *ratione personae* and *ratione materiae*.

47. The Court, however, did not pronounce itself as regards Serbia's preliminary objection *ratione temporis*, having found that this objection "does not possess, in the circumstances of the case, an exclusively preliminary character" (*ibid.*, p. 460, para. 130). The objection *ratione temporis* in the circumstances surrounding the case triggers the issues of jurisdiction and admissibility as two inseparable issues:

> "In the view of the Court, the questions of jurisdiction and admissibility raised by Serbia's preliminary objection *ratione temporis* constitute two inseparable issues in the present case. The first issue is that of the Court's jurisdiction to determine whether breaches of the Genocide Convention were committed in the light of the facts that occurred prior to the date on which the FRY came into existence as a separate State, capable of being a party in its own right to the Convention; this may be regarded as a question of the applicability of the obligations under the Genocide Convention to the FRY before 27 April 1992. The second issue, that of admissibility of the claim in relation to those facts, and involving questions of attribution, concerns the consequences to be drawn with regard to the responsibility of the FRY for those same facts under the general rules of State responsibility. In order to be in a position to make any findings on each of these issues, the Court will need to have more elements before it." (*Ibid.*, p. 460, para. 129.)

48. The situation is one characterized by Judge Fitzmaurice as the distinction between jurisdiction and admissibility. Discussing the issue of retroactivity, Judge Fitzmaurice said:

> "But an unsuccessful jurisdictional plea leaves open the possibility that a finding on the ultimate merits may still be excluded through a

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> decision given against the substantive admissibility of the claim." (G. Fitzmaurice, *The Law and Procedure of the International Court of Justice*, Vol. II, 1986, p. 439.)

Thus, "substantive admissibility may arise as an issue *after* jurisdiction has been established".

49. The temporal element of the jurisdiction of the Court *in casu* is to be regarded as part of the issue of jurisdiction *ratione personae* primarily, producing a corresponding effect on the jurisdiction of the Court *ratione materiae*. It, in fact, determines the scope of jurisdiction, both *ratione personae et ratione materiae*.

50. The temporal scope of jurisdiction *ratione personae* in the case at hand is highly specific. Usually, jurisdiction *ratione personae* means that the parties to the case are parties to the Statute or have undertaken the obligations of a party to the Statute at the time of institution of proceedings. In other words, "[i]t is necessary that the parties be under the obligation to accept the jurisdiction of the Court at the time at which the determination of the existence of that obligation has to be made, normally the date of the institution of the proceedings" (S. Rosenne, *The Law and Practice of the International Court: 1920-2005*, 4th ed., Vol. II, 2006, p. 562).

51. *In casu*, the question is whether or not FRY/Serbia was a State at all before 29 April 1993, in the sense of a subject of international law, suitable to be equipped with the capacities for the establishment of the jurisdiction of the Court *ratione personae*. That is the fundamental question which precedes, both in terms of logic and law, the issue of jurisdiction, constituting a segment of *ius standi in iudicio*. For, the status of a party to the Statute or non-party to the Statute, which has undertaken the obligations as regards jurisdiction of the Court *ratione personae* is absolutely reserved for States as legal persons in terms of international law. If one or both parties to the case are not States as legal persons in terms of international law, the establishment of jurisdiction of the Court is an impossible mission, because a litigation before the Court implies *ius standi* before the Court as a pre-condition for the establishment of the jurisdiction of the Court (see e.g., *Legality of Use of Force (Serbia and Montenegro* v. *Netherlands), Preliminary Objections, Judgment, I.C.J. Reports 2004 (III)*, p. 1030, para. 45).

52. The temporal element *in casu* extends its relevance also to the jurisdiction of the Court *ratione materiae*, since the limitation of the Court's jurisdiction *ratione personae* produces corresponding effects on its jurisdiction *ratione materiae*. For, jurisdiction *ratione materiae* necessarily implies that events which give rise to the reference to the Court occurred during the space of time in respect to which jurisdiction *ratione personae* exists.

53. The combined effects of temporal limitations of the jurisdiction of the Court *ratione personae* and *ratione materiae* may have, as a consequence, the disappearance of the dispute before the Court in part or *in toto*.

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The substance of the international dispute consists of the two cumulative elements — personal and material. The generally accepted definition of a dispute, which the Court gave in the *Mavrommatis Palestine Concessions* case represents, in fact, only the material element of the concept of "international dispute". In order to qualify "a disagreement over a point of law or fact, a conflict of legal views or of interests", which is evident in this specific case, as an "international dispute", another, formal, element is indispensable, i.e., that the parties in the "disagreement or conflict" be States in the sense of international public law.

Article IX of the Genocide Convention stipulates the competence of the Court regarding "disputes between the Parties". The term "Parties", as it obviously results from Article XI of the Convention, means States, either members or non-members of the United Nations. The term "State" is not used either *in abstracto* in the Genocide Convention, or elsewhere; it means a concrete entity which combines in its personality the constituting elements of a State, determined by international law. The pretention of an entity to represent a State, and even recognition by other States, is not, in the eyes of the law, sufficient, on its own, to make it a State within the meaning of international law.

54. The following statement of Judge Fitzmaurice seems to rest on common sense and cogent legal consideration:

> "since the . . . State did not exist as such at the date of these acts and events, these could not have constituted, in relation to it, an international wrong, nor have caused it an international injury. An act which did not, in relation to the party complaining of it, constitute a wrong at the time it took place, obviously cannot *ex post facto* become one . . . [T]he . . . State was not then one [i.e., a Member of the United Nations], nor even, over most of the relevant period, in existence as a State and separate international *persona*." (*Northern Cameroons (Cameroon* v. *United Kingdom), Preliminary Objections, Judgment, I.C.J. Reports 1963*, separate opinion of Judge Fitzmaurice, p. 129.)

Responsibility, as a legal notion, does not exist *in se* and *per se*. It is necessarily linked with the rights and obligations of the State as a legal person in terms of international law. As the Court stated: "Responsibility is the necessary corollary of a right." (*Barcelona Traction, Light and Power Company, Limited (Belgium* v. *Spain), Second Phase, Judgment, I.C.J. Reports 1970*, p. 33, para. 36); and "Thus it is the existence or absence of a right, belonging to [a State] and recognized as such by international law, which is decisive for the problem . . ." *(ibid.)*.

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3. *Treatment of Preliminary Objections to Jurisdiction and Admissibility* In Casu

55. The general approach of the majority of the Court to the issue of the preliminary objection *ratione temporis* raised by Serbia, as well as to the arguments of the Parties *pro* and *contra* in that regard or in connection with that issue, has been expressed succinctly in two conclusions:

Primo

> "Having concluded in its 2008 Judgment that the present dispute falls within Article IX of the Genocide Convention in so far as it concerns acts said to have occurred after 27 April 1992, the Court now finds that, to the extent that the dispute concerns acts said to have occurred before that date, it also falls within the scope of Article IX and that the Court therefore has jurisdiction to rule upon the entirety of Croatia's claim. In reaching that conclusion, 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." (Judgment, para. 117.)

Secundo

> "It follows from the foregoing that Croatia has failed to substantiate its allegations 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." (*Ibid.*, para. 441.)

56. The applied methodology cannot be denied a certain judicial elegance which served, in fact, to sweep under the carpet the complex issue of the admissibility of the claim in relation to the facts that occurred prior to the date on which the FRY came into existence as a separate State, involving, in addition, questions of attribution, and to link it with the issue as to whether the principal claim and counter-claim are founded in law and fact.

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Qualifying tacitly the issue of admissibility of the claim not as incidental to, but rather as coincident with, the principal claim, the majority reduced the fundamental issue of the jurisdiction of the Court to the level of a technical question, and the jurisdictional decision to some kind of accessory consequence of the decision as regards the principal claim and counter-claim. In this way, the procedure as established by the law of the Court has been turned on its head.

57. In the case at hand, such a reduction does not produce material consequences for the outcome of the dispute. However, this fact does not amnesty or vindicate the action undertaken by the majority. Although designed *ad casum*, its implications as regards future jurisprudence of the Court cannot *a priori* be excluded.

58. The preliminary objection of Serbia *ratione temporis* has been qualified by the Court as an objection which "does not possess, in the circumstances of the case, an exclusively preliminary character" (2008 Judgment, para. 130).

What is the inherent meaning of this qualification? Does it suggest that an objection which does not possess, in the circumstances of the case, an exclusively preliminary character loses its preliminary quality and gives the Court discretionary powers to act in accordance with the broadly conceived and undefined formula "as good administration of justice requires"? The answer to this question, it appears, has to be negative.

58.1. The qualification that "the objection does not possess, in the circumstances of the case, an exclusively preliminary character" implies that the objection in issue does "possess, at least in principle, an intrinsic preliminary character, which may only be partially affected by the circumstances of the case" (E. J. de Aréchaga, "The Amendments to the Rules of Procedure of the International Court of Justice", *American Journal of International Law*, Vol. 67, 1973, p. 15). *Ratio legis* of the introduction of objections having no exclusively preliminary character in the nomenclature of the decisions of the Court as regards preliminary character in Article 79 of the Rules of Court primarily concerns practical effects in a case when the Court, on the basis of provision of Article 62 of the 1946 Rules of Court, used its power to join an objection to the merits "whenever the interests of the good administration of justice require it" (*Panevezys-Saldutiskis Railway, Order of 30 June 1938, P.C.I.J., Series A/B, No. 75*, p. 56; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Merits, Judgment, I.C.J. Reports 1986*, p. 29, para. 39). When

> "the character of the objections is not exclusively preliminary because they contain both preliminary aspects and other aspects relating to the merits, they will have to be dealt with at the stage of merits. This approach . . . *tends to discourage the unnecessary prolongation of proceedings at the jurisdictional stage.*" (*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; emphasis added.)

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58.2. The characterization of the particular objection does not deprive the objection of its preliminary character. As observed by Judge Aréchaga, who was one of the architects of the revision of the 1972 Rules, the concrete qualification means that "the objection that has been raised by a party as preliminary is so intertwined with elements pertaining to the merits that a hearing of those issues would siphon off into the preliminary stage the whole of the case" (E. J. de Aréchaga, *op. cit.*, p. 17) with the risk of "adjudicating on questions which appertain to the merits of the case or of prejudging their solution" (*Panevezys-Saldutiskis Railway, Preliminary Objections, Order of 30 June 1938, P.C.I.J., Series A/B, No. 75*, p. 56).

In other words, the fact that the objection, in the circumstances of the case, does not possess an exclusively preliminary character, does not deprive it of its material content in the sense of challenging the jurisdiction of the Court, in whole or in part. Or, as Rosenne says, there is "a formal distinction between the objection as a shell . . . and its material content" (S. Rosenne, *The Law and Practice of the International Court: 1920-2005*, 4th ed., Vol. II, 2006, p. 894). As such, it must be pronounced by the Court in the final judgment before pronouncement on the principal claim.

The treatment of such an objection that was found to be not exclusively preliminary in nature at the merits phase does not mean that the objection has been incorporated in the *meritum* of the dispute, but simply that the Court must bring decision on the objection within the merits phase as a jurisdictional issue. The ratio of the transfer of the objection from the preliminary objection phase to the merits phase is not the consequence of the change in its jurisdictional nature, but of relation to cognition of the facts, and law indispensable for a decision on an eminently jurisdictional matter. The Court itself in the 2008 Judgment stated, *inter alia*, that:

> "In order to be in a position to make any findings on each of these issues, [the issue of its jurisdiction, as regards facts that occurred prior to 27 April 1992 and the issue of admissibility of the claim] *the Court will need to have more elements before it.*" (2008 Judgment, p. 460, para. 129; emphasis added.)

58.3. Such a solution is dictated, it appears, by the nature of the jurisdiction of the Court. The issue of jurisdiction is of fundamental importance for the judicial activity of the Court, being a *questio iuris* (*Border and Transborder Armed Actions (Nicaragua* v. *Honduras), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1988*, p. 76, para. 16) and a matter of the international public order (intervention of Judge M. Yovanovitch, Preliminary Session of the Court, *Preparation of the Rules of Court of 30 January-24 March 1922*) *P.C.I.J., Series D, No. 2*, p. 59; R. Monaco, "Observations sur la hiérarchie des sources du droit international", *Völkerrecht als Rechtsordnung Internationale Gerichtsbarkeit Mensenrechte: Festschrift für H. Mosler*, 1983, pp. 607-608).

The importance of the issue necessitates that "[t]he Court must . . . always be satisfied that it has jurisdiction, and must if necessary go into

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that matter *proprio motu*" (*Appeal Relating to the Jurisdiction of the ICAO Council (India* v. *Pakistan), Judgment, I.C.J. Reports 1972*, p. 52, para. 13).

Even the 2008 Judgment, which is *res iudicata* for the Court, stated in the "Conclusion" that it "will consider the preliminary objection that it has found to be not of an exclusively preliminary character *when it reaches the merits of the case*" (2008 Judgment, p. 465, para. 145; emphasis added).

58.4. The Court adjudicates on the issue of its jurisdiction through operation of the principle *compétence de la compétence*. The power of the Court to determine whether it has jurisdiction *in casu*, emanating from the general principle of *compétence de la compétence*, should be distinguished from the corresponding power of the Court to determine the extent of its jurisdiction.

The extent of jurisdiction of the Court is not a matter to be decided on the basis of the principle of *compétence de la compétence* solely as a functional norm, but on the basis of substantive norms of the Statute defining the scope of the exercise of the judicial function of the Court. In that regard, the basic norm of the consensual nature of the Court's jurisdiction — some sort of a constitutional norm of the law of the Court, and of international tribunals as well — is of relevance.

Already in its Judgment No. 2, the Permanent Court of International Justice clearly established the limits of its jurisdiction by stating that "the Court, bearing in mind the fact that its jurisdiction is limited, that it is invariably based on . . . consent . . . and only exists in so far as this consent has been given" (*Mavrommatis Palestine Concessions, Judgment No. 2, 1924, P.C.I.J., Series A*, p. 16).

59. By deciding that, in view of the absence of genocide in terms of Article II of the Convention, there is no need for the Court to enter into consideration of the objection, the majority linked the issue of jurisdiction with the principal claim and thus made a Copernican turnaround, paradoxical in the light of the relevant rules of the law of the Court, running counter to the general rule that, without established jurisdiction, the Court not only cannot determine the case, but cannot even hear it.

The adoption of a decision on the jurisdictional issue in the merits phase is an act, indeed a condition for the determination of the principal claim.

59.1. A proper pattern of treatment of a preliminary objection not having, in the circumstances of the case, an exclusively preliminary character, is demonstrated in the *Land and Maritime Boundary* case. The Court, following the well-established jurisprudence on the issue, stated, *inter alia*:

> "The Court would first observe that its finding in its Judgment of 11 June 1998 on the eight preliminary objection of Nigeria that that preliminary objection did 'not have, in the circumstances of the case, an exclusively preliminary character" (*I.C.J. Reports 1998*, p. 326, para. 118 (2)) requires it to deal now with the preliminary objection

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before proceeding further on the merits. That this is so follows from the provision on preliminary objections adopted by the Court in its Rules in 1972 and retained in 1978, which provide that the Court is to give a decision

> 'by which it shall either uphold the objection, reject it, or declare that the objection does not possess in the circumstances of the case, an exclusively preliminary character. If the Court rejects the objection or declares that it does not possess an exclusively preliminary character, it shall fix time-limits for the further proceedings.' (Rules of Court, Art. 79, para. 7.)

(See *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya* v. *United Kingdom), Preliminary Objections, Judgment, I.C.J. Reports 1998*, pp. 27-28, paras. 49-50; *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya* v. *United States of America), Preliminary Objections, Judgment, I.C.J. Reports 1998*, pp. 132-134, paras. 48-49; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Merits, Judgment, I.C.J. Reports 1986*, p. 30, para. 40.) Since Nigeria maintains its objection, the Court must now rule on it." (*Land and Maritime Boundary between Cameroon and Nigeria (Cameroon* v. *Nigeria: Equatorial Guinea intervening), Judgment, I.C.J. Reports 2002*, p. 420, para. 237.)

4. Succession to Responsibility as a Purported Rule of General International Law

60. The impression is that the Court qualified succession to responsibility as a rule of general international law with amazing ease. It found that "the rules on succession . . . come into play in the present case *fall into the same category as those on treaty interpretation and responsibility of States referred to*" in the Judgment of the Court in the *Bosnia and Herzegovina* v. *Serbia and Montenegro* case (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro), Judgment, I.C.J. Reports 2007 (I)*, hereinafter "2007 Judgment") (Judgment, para. 115; emphasis added).

61. The Court gives no indication of any source of international law that would vindicate the qualification that the rules of succession of States to responsibility pertain to the *corpus* of rules of general international law. Noting the arguments of the Parties concerning succession to responsibility as *status controversiae*, the Court only points to the reliance of the Applicant on

> "the award of the arbitration tribunal in the *Lighthouses Arbitration between France and Greece, Claims Nos. 11 and 4*, 24 July 1956 (United

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> Nations, *Reports of International Arbitral Awards (RIAA)*, Vol. XII, p. 155; *International Law Reports (ILR)*, Vol. 23, 1956, p. 81), which stated that the responsibility of a State might be transferred to a successor if the facts were such as to make it appropriate to hold the latter responsible for the former's wrongdoing" (Judgment, para. 107).

It appears, in the light of the relevant facts, that the Court, by taking such a position, is heading precisely in the direction opposite to that contained in its own dictum in the *Fisheries Jurisdiction* case: "the Court, as a court of law, cannot render judgment *sub specie legis ferendae*, or anticipate the law before legislator has laid it down" (*Fisheries Jurisdiction (United Kingdom* v. *Iceland), Merits, Judgment, I.C.J. Reports 1974*, pp. 23-24, para. 53; *Fisheries Jurisdiction (Federal Republic of Germany* v. *Iceland), Merits, Judgment, I.C.J. Reports 1974*, p. 192, para. 45).

62. Arbitral jurisprudence as regards succession to responsibility offers only a few isolated decisions. Seemingly they stand on diametrically opposed positions.

The paradigm of succession to responsibility represents, in essence, the French claim in the *Agios Nikolaos* case within the *Lighthouses Arbitration* (Claim No. 11, United Nations, *RIAA*, Vol. XII, pp. 161 *et seq.* p. 190; *ILR*, Vol. 23, 1956, pp. 81 *et seq.*, pp. 88-90) in which the claim relating to the construction of lighthouses at Spada and Elaphonissi was dismissed.

The position of the arbitration was expressed in clear terms:

> "In view of this division between the three parties concerned of the responsibility for the events of 1903 to 1908, the Tribunal sees no real reason to saddle, after the event, Greece, who had absolutely nothing to do with the dealings between those parties, with this responsibility, in whole or in part. Not even the part of the general responsibility for the events of 1903 to 1908 to be imputed to the autonomous State of Crete can be regarded as having devolved upon Greece. Such a transmission of responsibility is not justified in the present case either from the particular point of view of the final succession of Greece to the rights and obligations of the concession in 1923/1924 — if only for the reason that the said events took place outside the scope of the concession — or from the more general point of view of its succession in 1913 to the territorial sovereignty over Crete." (*Ibid.*, p. 89.)

The paradigm of non-succession to responsibility is expressed also in the *Brown* case in which the United States claim against Great Britain, based on succession to responsibility, was disallowed by the Anglo-

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American Claims Commission in November 1923 (United Nations, *RIAA*, Vol. VI, p. 120).

63. The *sedes materiae* of the decision in the *Agios Nikolaos* case seems clear. The Award stated, *inter alia*:

> "In the present case, we are concerned with the violation of a term of a contract by the legislative power of an autonomous island State the population of which had for decades passionately aspired to be united, by force of arms if necessary, with Greece, which was regarded as the mother country — a violation which was recognized by the State itself as constituting a breach of the concession contract, which was effected in favour of a shipping company belonging to the same mother-country, which was endorsed by the latter as if it had been a regular transaction and which was eventually continued by her, even after the acquisition of territorial sovereignty over the island in question. In these circumstances, the Tribunal can only come to the conclusion that Greece, having adopted the illegal conduct of Crete in its recent past as autonomous State, is bound, as successor State, to take upon its charge the financial consequences of the breach of the concession contract." (*ILR*, Vol. 23, 1956, p. 92.)

The Court further stated that "the Greek Government with good reason commenced by recognizing its own responsibility" *(ibid.)*.

64. In the light of the facts of the case, it appears that the qualification of the decision as the expression of the acceptance of succession to responsibility is exaggerated. For, the last fact tends to speak in favour of the perception of the responsibility of Greece as a "direct responsibility for tort of her own" (J. H. W. Verzijl, *International Law in Historical Perspective*, Part VII, 1974, p. 223). The position of the arbitral tribunal appears to be an *obiter dictum* rather than a precedent *stricto sensu*.

Besides the intrinsic reasons which make relative the scope of the decision taken in the *Agios Nikolaos* case, also relevant in the case at hand are some extrinsic reasons.

Primo, the *Lighthouse Arbitration* considered disputes between natural and legal persons, on the one hand, and a territorial State, on the other, disputes which, in particular in the continental legal tradition, appertain to international private law, rather than international public law. The legal basis in a dispute is provided, as a rule, by concessionary contracts. As the Court stated in the *Anglo-Iranian Oil Co.* case, the concessionary contract signed between the Government of a State and of a foreign oil company:

> "has a single purpose: the purpose of regulating the relations between that Government and the Company in regard to the concession. *It*

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> *does not regulate in any way the relations between the two Governments [the Government and the Company's national State]* . . . The fact that the concessionary contract was reported to the Council . . . does not convert its terms into the terms of a treaty by which [a Government] is bound vis-à-vis [another Government]" (*Anglo-Iranian Oil Co. (United Kingdom* v. *Iran), Preliminary Objection, Judgment, I.C.J. Reports 1952*, p. 112; emphasis added).

Secundo, jurisdiction of arbitration courts and mixed commissions is, as a rule, based on arbitral compromises. That fact, *per se*, imposes certain limits on the scope of adopted decisions. In the *Barcelona Traction* case, the Court clearly determined its position in respect of jurisprudence of arbitration courts and mixed claims commissions as regards their impact on general international law. The Court stated:

> "However, in most cases the decisions cited rested upon the terms of instruments establishing the jurisdiction of the tribunal or claims commission and determining what rights might enjoy protection; they cannot therefore give rise to generalization going beyond the special circumstances of each case. Other decisions, allowing or disallowing claims by way of exception, are not, in view of the particular facts concerned, directly relevant in the present case." (*Barcelona Traction, Light and Power Company, Limited (New Application: 1962) (Belgium* v. *Spain), Second Phase, Judgment, I.C.J. Reports 1970*, p. 40, para. 63.)

Tertio, the jurisprudence of the Court, as a rule, does not recognize the quality of juridical precedent to decisions of arbitral tribunals.

It is pointed out that "[s]pecific references in the decisions of the Court to the jurisprudence of arbitral tribunals have in the past been extremely rare", and "in fact partake more of the nature of a reference to State practice than that of recourse to a judicial precedent" (H. Thirlway, *The Law and Procedure of the International Court of Justice: Fifty Years of Jurisprudence*, Vol. I, 2013, p. 248).

65. In addition to cases from arbitral practice, the issue of succession to responsibility is the subject of doctrinal opinions and, in the form of an exception to the general rule, of Article 10 (2) of the International Law Commission Articles on State Responsibility.

65.1. In the light of the *status versiae et controversiae* in the case at hand — whether the FRY succeeded to alleged responsibility of the SFRY for acts and omissions contrary to the Genocide Convention — these would hardly seem applicable. The opinions expressed in that regard are a doctrinal plea for the formulation of a comprehensive doctrine of succession to responsibility rather than an all-embracing and comprehensive doctrine *per se*.

Namely, the focus of the theory of succession to responsibility is on the responsibility for delictual debts, as a rule in the relations between the

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State and physical or legal personalities which possess specific characteristics. It is based on the doctrine of acquired rights *(droits acquis)*, understood as the rights held by private citizens at the time of succession to sovereignty (see *German Settlers in Poland, Advisory Opinion, 1923, P.C.I.J., Series B, No. 6*, p. 36).

Besides the doctrine of acquired rights, the appropriate support is the passage of rights and obligations principle and the principle of international servitudes (M. J. Volkovitsch, "Righting Wrongs: Towards a New Theory of State Succession to Responsibility for International Delicts", *Columbia Law Review*, Vol. 92, 1992, pp. 2162-2214). In addition to the principles of international law, support for succession to responsibility can also be found in borrowing from internal law in the form of the principle of unjust enrichment (*ibid.*, p. 2210; P. Dumberry, *State Succession to International Responsibility*, 2007, p. 263).

65.2. The said principles are, by their nature, unsuitable to uphold the idea of responsibility *in personam*, such as responsibility for violation of the Genocide Convention, although they carry certain weight as regards responsibility *in rem*.

Responsibility *in personam* is too much linked with the legal identity and continuity of the State which makes it difficult to ascertain it in terms of *ipso iure* succession to responsibility without prejudice to the fundamental principles of equality and independence of States.

The legal identity and continuity of a State appears to be the powerful argument in favour of the general principle of *action personalis moritur cum persona*.

65.3. It is no coincidence that the perception of the notion of legal identity and continuity on the part of the supporters of succession to responsibility well exceeds the generally accepted meaning of that notion. It is said, *exempli causa* that: "'successor States' are those nations *which take over the international identity of 'Predecessor States'*" (M. J. Volkovitsch, *op. cit.*, p. 2164, fn. 1; emphasis added), although the notions "successor State(s)" and "predecessor State" are mutually exclusive. Or, in the elaborated concept of "shared identity", which is, in fact, the negation of legal identity and continuity as usually understood, the crucial role is given to the notion of "organic substitution", according to which, even in the case where succession took place, "organic forces" or "constitutive elements" of the predecessor State (its territory and its population) survive its disintegration, being only affected, but not extinguished (P. Dumberry, *State Succession to International Responsibility*, 2007, pp. 49-50). The concept implies that the successor State is equipped with an identity similar to that held by the predecessor State. Precisely "shared identity" justifies the transfer of any responsibility that existed at the time of the succession.

65.4. It appears that the concept of "organic substitution" fails to take into account the element of legal identity and continuity as the very substance of international personality in the frame of territorial changes. It

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reduces the State to its physical attributes (territory, population), which are also possessed by territorial non-State entities devoid of the quality of subjects in terms of international law.

"Shared identity" as the product of the concept of "organic substitution" portrays new States as a specific mix of the successor State and the continuator State expressed in percentage share, because each of them possesses a part of the territory and population of the predecessor State. It contains an element of legal absurdity, which is, perhaps, best illustrated in the case when, after separation of any part(s) of its territory, the predecessor State continues to exist, both States, the predecessor State and the newly emerged successor State possess identity — the successor State with its predecessor State, whereas the predecessor State, retains its own.

To sum up, it seems clear that, in the present phase of development, succession to responsibility *in personam* is not a part of the *corpus* of general international law. Insurmountable legal obstacles lie, to use the International Law Commission explanation, in the fact that entitlement "to invoke State responsibility (exists) when an obligation owed to that State *individually* was breached" (Draft Articles on State Responsibility Adopted by the Commission on First Reading, 1996, Report of the International Law Commission on the Work of Its Forty-Eighth Session, 6 May-26 July 1996, General Assembly Official Records, United Nations doc. A/51/10, in relation to Article 42 *(a)*; emphasis in original). In the present context, *individually* means the State as an individual legal personality, equipped with its own rights and obligations.

Succession to responsibility *in personam* is not *stricto sensu* legally possible. As regards this kind of responsibility, it could be said that applicable is the parallel with "an incoming tenant [who] is bound by the obligations of his predecessor who has been evicted, or a son by the obligations of his parent" (T. Baty, "The Obligations of Extinct States", *Yale Law Journal*, Vol. 35, 1925-1926, p. 434), at least when speaking about violations of the rules of international criminal law based on the principle of subjective responsibility. Even if responsibility of a State for acts or omissions of another State is established on the basis of consented succession to responsibility, it is not *stricto sensu* a matter of succession to responsibility as subjective, of the *intuitu personae* category, but of assuming the *consequences* of responsibility in a proper form.

5. Rule in Article 10 (2) of the Articles on the Responsibility of States for Internationally Wrongful Acts as a Purported Rule of General International Law

66. In the commentary to Article 10 (2) of the Articles on State Responsibility it is stated, inter alia, that "*[a]rbitral decisions, together*

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with State practice and the literature, indicate a general acceptance of the two positive attribution rules in Article 10" (J. Crawford, *The International Law Commission's Articles on State Responsibility — Introduction, Text and Commentaries*, 2002, p. 119, para. 12).

The two positive attribution rules to which this refers are attribution of the "conduct of an insurrectional movement which becomes the new Government of a State" (para. 1 of Art. 10) and attribution of the "conduct of a movement, insurrectional or other, which succeeds in establishing a new State" (para. 2 of Art. 10).

66.1. Consequently, it is a matter of two distinct rules (Counsel of Croatia said that there is "very good reason to cover both situations") (Reply of Croatia, para. 7.54) by the practice relating to Article 10 as a whole. This position is, however, questionable in view of the differences which exist between these situations.

In case of revolutionary change of Government, the State remains the identical subject of international law, responsible on the basis of the fact that "it represented *ab initio* a changing national will, crystallizing in the fully successful result" (*Bolivar Railway Company*, United Nations, *RIAA*, 1903, Vol. IX, p. 445). Basically, its responsibility derives from the general principle underlying the rule provided by Article 27 of the Vienna Convention on the Law of Treaties, which stipulates that "[a] party may not invoke the provisions of its internal law as justification for its failure to perform a treaty". Consequently, in the case of change of Government, responsibility of the State is genuine, does not imply any transfer of responsibility because in question is the same and identical State in terms of legal personality, a personality with unimpaired rights and obligations. In a colloquial sense, as opposed to the legal one, it is possible to speak only of a transfer of responsibility from one Government to another Government.

As regards "a movement, insurrectional or other which succeeds in establishing a new State", the situation is entirely different. A new State is a new legal person in terms of international law, whose corpus of rights and obligations does not coincide with the rights and obligations of its parent State, but is determined on the basis of the rules of succession of States. From a legal point of view, responsibility of the new State is essentially an issue of the law of succession rather than an issue of State responsibility. Or, a combination of both. It is logical to presume that this is the reason why it is pointed out that "Article 10 concerns the special case of responsibility . . ." (J. Crawford, *op. cit.*, p. 93, para. 8).

66.2. An additional reason against the treatment of paragraphs 1 and 2 of Article 10 as a whole is of a formal nature and concerns the postulates of legal logic. Basically, such a treatment would imply analogy or extensive interpretation of paragraph 1.

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Analogy and extensive interpretation, as legal vehicles, are used in case of the existence of lacunae which are thus filled in by a rule which has not originally been created for the concrete situation/or relation, or by interpretation of the existing rule as if it were created for that specific situation.

In the concrete case there are no lacunae — the conduct of "insurrectional movement which [become] a new Government" and movements "insurrectional or other, which [succeed] in establishing a new State" are regulated by two distinct rules expressed in paragraphs 1 and 2 of Article 10; hence, a rational and legal basis for the application of analogy or extensive interpretation of paragraph 1 is non-existent.

It appears, however, that the arbitral awards referred to in the Commentary to Article 10 of the Draft Articles on State Responsibility relate to different objects (the general principle of non-responsibility for rebellions (J. Crawford, *op. cit.*, p. 116); the principle that liability could be established in the case of a lack of good faith or negligence in suppressing an insurrection *(ibid.)*; and, the responsibility for successful revolutionary/insurrectional movements (*ibid.*, p. 113)).

The only cases which relate to the concrete issue are stated in paragraph 14 of the Commentary (*ibid.*, p. 120), including the explanation that "more recent decisions and practice do not, on the whole, give any reason to doubt the propositions contained in Article 10". It appears, however, that such a characterization is, in terms of law, wishful thinking rather than a respectable argument.

The decision in *Minister of Defence, Namibia* v. *Mwandinghi* 1992 (2) seems to involve the liability of the newly independent State for actions of the predecessor State. But, it is based on a constitutional provision, Article 140 (3) of the Republic of Namibia, which states that the said Republic inherited liability for "anything done" by the predecessor State (see *ILR*, Vol. 91, 1991, p. 341).

Although based on municipal and constitutional law, the decision discussed some elements of international law. However, the position of the court at the first instance appears to be contrary to the rule contained in paragraph 2 of Article 10. The court found that "in international law a new State is not liable for the delicts committed by its predecessor" (*ibid.*, p. 353).

On appeal, the reasoning of the court was founded on constitutional interpretation exclusively (*ibid.*, p. 361).

The decision in *Ontario Ltd.* v. *Crispus Kiyonga and Others* is also of little, if any relevance, to the issue at hand. The case considered whether a contract concluded with a rebel movement seeking to overthrow the Government could be enforceable against the Government when that movement subsequently seized power. The applicant claims that the con-

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tract was not illegal and that once the revolution succeeded, the actions of the revolutionary movement were validated. The Government argued that the revolutionary movement did not have any legal personality until they achieved power and thus they could not have entered into the contract and could not, at that time, have signed a contract binding on the Government of Uganda. The Judgment is based entirely on municipal contract law and does not refer to international law. It upholds the above claims of the Ugandan Government. The essential finding is that:

> "It is true that for a contract to be binding it must be between persons existing at the time the contract is made: *Kelner* v. *Baxter* (1866) LR 2 CP 174. The case is also authority for the legal proposition that a person or persons cannot act as an agent of a non-existent principal because an act which cannot be done by a principal cannot be done by him through an agent. Again at common law there are contracts which are illegal in the sense that they are entered into to commit crimes, and they are enforceable." (44123 *Ontario Ltd.* v. *Crispus Kiyonga and Others* (1992) 11 Kampala LR 14, pp. 20-21; *ILR*, Vol. 103, p. 259, p. 266 (High Court, Uganda).)

67. In the Commentary of the International Law Commission, together with State practice and arbitral decisions, literature is also cited as an indicator of general acceptance of the rules contained in Article 100 (J. Crawford, *op. cit.*, p. 119, para. 12).

The Commentary, however, mentions only one Article which concerns insurrectional movements which succeed in establishing a new State (H. Atlam, "International Liberation Movement and International Responsibility", in B. Simma and M. Spinedi (eds.), *United Nations Codification of State Responsibility*, 1987, p. 35).

The Arbitral Tribunal in the *Lighthouse Arbitration* stressed the unsatisfactory nature of the theoretical analysis of the issue, speaking, moreover, of the "chaotic state of authoritative writings" (*Lighthouses Arbitration between France and Greece, Claims Nos. 11 and 4*, 24 July 1956 (United Nations, *RIAA*, Vol. XII, p. 155; 23 *ILR* 81, p. 91). Dumberry, the author of a unique systematic work on the issue of succession to international responsibility (P. Dumberry, *State Succession to International Responsibility*, 2007), in concluding a comprehensive research into the responsibility of an insurrectional movement that succeeds in establishing a new State says:

> "The work of the International Law Commission and doctrine has long considered as well-established principle of international law the fact

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that whenever an insurrectional movement succeeds in creating a new State, the new State should be held responsible for obligations arising from internationally wrongful acts committed by the insurrectional movement against third States during the armed struggle for independence. The new State should remain responsible for acts which took place before its independence because there is a 'structural' and 'organic' continuity of the legal personality of what was then a rebel movement and what has since successfully become a new independent State.

The somehow surprising result of the research outlined here is the limited State practice which can be found in support of this principle. Thus, State practice ultimately consists of one *obiter dictum* by an internal United States compensation commission and one sentence taken from a legal opinion discussing the likely consequences arising from uncertain future events. Even the several French municipal court decisions, which held that the new State of Algeria was (in principle) responsible for the internationally wrongful acts committed by the FLN before 1960, had limited concrete implications since Algeria was in fact not a party to any of these proceedings." (P. Dumberry, "New State Responsibility for Internationally Wrongful Acts by an Insurrectional Movement", *European Journal of International Law*, Vol. 17, 2006, p. 620.)

In assessing the legal force of the Articles on State Responsibility, it should be born in mind that the International Law Commission recommended to the General Assembly simply to "take note" of these Articles, with the caveat that at a later stage the General Assembly should consider the adoption of a Convention (Report of the International Law Commission 2001, United Nations doc. A/56/10, paras. 67, 72, 73). The General Assembly followed this suggestion "without prejudice to the question of their future adoption or other appropriate action". It took this decision without a vote, in the Sixth Committee, as well as in the Plenary.

Consequently, the Articles on the Responsibility of States are, by their nature, closest to the doctrinary codification by a prestigious body of international lawyers such as the International Law Commission. *They have no binding force by themselves, but they can possess it indirectly via customary law to the extent to which they express it.*

General Assembly resolution 59/35 (2004) entrusted the United Nations Secretariat with the task of producing a compilation of express references to the Articles on Responsibility of States for Internationally Wrongful Acts and their commentaries in international judicial practice (see General Assembly resolution 56/83 (2001) and General Assembly resolution 59/35 (2004)). It is an extremely important task which should demonstrate the reaction of international courts and tribunals in terms of its perception of the Articles as expressing positive law or not.

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Even more useful in this respect is perhaps the study prepared by the British Institute of International and Comparative Law, which is considerably more extensive in its scope *ratione materiae*. It comprises not only international judicial practice, but

> "it includes references to the Articles made in the separate or dissenting opinions of judges of both the International Court of Justice and other bodies . . . it aims to provide a greater amount of context to instances of express reference . . . it aims to provide some comment upon, and where appropriate, criticism of, the way in which the Articles have been applied in specific instances . . . it includes the most important instances of reliance on the Articles by domestic courts." (Simon Olleson, *The Impact of ILC's Articles on Responsibility of States for Internationally Wrongful Acts*, Preliminary Draft, British Institute of International and Comparative Law, 2003, p. iv.)

Moreover, the study "aims to provide a survey not only of express reference to the Articles, but also to the most important judicial pronouncements (in particular those of the International Court of Justice), which, although made without express reference to the Articles, are relevant to matters falling within their subject-matter and which are therefore relevant to an assessment of the impact of the Articles since the adoption" *(ibid.)*. (See also "Responsibility of States; Compilation of Decisions of International Courts, Tribunals and other Bodies", *Report of the Secretary-General*, United Nations doc. A/62/62 and Add. 1; D. Caron, "The ILC Articles on State Responsibility: The Paradoxical Relationship between Form and Authority", *American Journal of International Law*, Vol. 96, 2002, pp. 857, 863-866, 857).

The conclusion of the study is that, contrary to the largest number of the Articles on which the jurisprudence of courts, international and national' and the practice of States, strongly relies, in respect of Articles 10 as a whole "[t]here appears to have been no international judicial reference to Article 10" (*ibid.*, p. 95) nor any other instances referring to Article 10 *(ibid.)*

6. *Applicable Substantive Law* In Casu *in the Light of Rules on Interpretation of Treaties*

68. Even if, *arguendo*, succession to responsibility is supposed to be a part of general international law, this would not automatically mean that it is a part of the applicable law *in casu*.

In order to be considered as such, rules on succession to responsibility must be, pursuant to Article 31 (3) *(c)* of the Vienna Convention on the Law of Treaties, "relevant rules of international law applicable in the relations between the parties".

69. Article IX of the Genocide Convention is a special treaty-oriented compromissory clause producing a "presumption of confinement"

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(W. M. Reisman, "The Other Shoe Falls: The Future of Article 36 (1) Jurisdiction in the Light of Nicaragua", *American Journal of International Law*, Vol. 81, 1987, p. 170) in the sense that, as a jurisdictional title, it determines substantive law to be applied (positive aspect) and excludes, in principle, as applicable substantive law, other than that determined by it (negative aspect).

It can be said that this type of clause determines the *principal or primary rules* of the treaty to which the compromissory clause is attached (L. Bartels, "Jurisdiction and Applicable Law Clauses: Where Does a Tribunal Find the Principal Norms Applicable to the Case before It?" in Y. Shany and T. Broude (eds.), *Multi-Sourced Equivalent Norms in International Law*, 2011, pp. 117-120; M. Papadaki, "Compromissory Clauses as the Gatekeepers of the Law to Be 'Used' in the ICJ and PCIJ", *Journal of International Dispute Settlement*, Vol. 5, 2014, pp. 573 *et passim*) which the Court applies *ad casum*. Its effects naturally derive from the consensual and limited jurisdiction of the Court.

70. The consensual and limited jurisdiction of the Court cannot but reflect upon the substantive law which the Court applies. This fact expresses the essential difference between international courts and domestic courts, the latter which, representing the State *imperium* in the judicial sphere, apply the formal sources of law *ex lege*, independently of the will of the parties. The power of the parties to limit applicable substantive rules, being a part of the Statute of the Court, possesses the constitutional character in the law governing the Court's judicial activity. The strong form of the exercise of this power is the provision of Article 38, paragraph 2, of the Statute of the Court, on the basis of which the parties can, on the basis of agreement, give the power to the Court to decide a case *ex aequo et bono*. Narrower by scope and, implicitly, by form, are jurisdictional titles granted in instruments such as compromissory clauses or special agreements.

71. The special treaty-oriented compromissory clauses do not exclude *per se* the application of the legal rules contained in sources mentioned in Article 38 of the Statute of the Court. Such exclusion would be incompatible with the judicial function of the Court as a court of law which adopts decisions in accordance with international law. Moreover, such effects are logically and legally impossible, having in mind that the Court, by applying the law referred to in a compromissory clause, acts, in fact, in accordance with the provision of paragraph 1 *(a)* of Article 38 of the Statute.

The effects of treaty-oriented compromissory clauses are not designed in terms of exclusion/inclusion dichotomy, but in terms of determining priority of the rules from various sources which concern or may concern the subject-matter of the dispute and of the function of the rules of international law other than the rules embodied in the treaty to which a compromissory clause is attached.

In this sense, in contrast to the principal or primary rules representing applicable substantive law *in casu*, there are incidental norms (L. Bartels,

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op. cit., p. 117) which comprise metanorms, constructive and conflicting norms (M. Papadaki, *op. cit.*, pp. 580-592). Metanorms imply "rules that govern the validity and interpretation of the rules of the treaty", whereas constructive norms constitute "the logical presuppositions and the necessary logical consequences" of the principal or primary rules (D. Anzilotti, *Cours de droit international*, trans. G. C. Gidel, 1929, pp. 106-107, as translated into English by M. Papadaki, *op. cit.*). Conflicting norms, for their part, concern "conflicting norm extraneous to the compromissory clause–containing treaty" whose application is a "result of the application of the metanorms of conflict resolution" like *lex specialis* or *lex posterior* whose function is, generally speaking, to determine "the interpretation, validity and applicability of any given principal norms" (L. Bartels, *op. cit.*, p. 119).

Consequently, whereas the principal norms of substantive law are linked with the subject-matter of the dispute, possessing specific normative content relevant to the adjudicative process, incidental norms have structural-functional significance which enables a proper interpretation and application of the principal norms.

72. The dichotomy of the principal/incidental norms reconciles two, prima facie, opposing premises — consensual and limited jurisdiction of the Court and the nature of the judicial function of the Court as an organ of international law. In the optic of this dichotomy, it seems clear that the substantive law referred to by the compromissory clause is not a self-contained regime, but a relevant part of international law as a whole operating, together with other relevant parts of international law, on the basis of a proper distribution of functions. Moreover, the normative integrity and consistency of international law is safeguarded precisely by the operation of metanorms relating to the validity of legal acts.

73. The part of jurisprudence of the Court based on special, treaty-oriented compromissory clauses, generally follows the theoretical division of primary and incidental norms, and their role in the process of determination.

A good illustration is the 2007 Judgment in the *Bosnian Genocide* case which, in respect of this particular matter, is virtually identical to the case at hand.

As regards applicable substantive law, the position of the Court is clear. The Court, *inter alia*, stated:

> "The jurisdiction of the Court in this case is based solely on Article IX of the Convention. All the other grounds of jurisdiction invoked by the Applicant were rejected in the 1996 Judgment on jurisdiction (*I.C.J. Reports 1996 (II)*, pp. 617-621, paras. 35-41). It follows that the Court may rule only on the disputes between the Parties to which that provision refers. The Parties disagree on whether the Court finally decided the scope and meaning of that provision in its 1996 Judgment and, if it did not, on the matters over which the Court

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> has jurisdiction under that provision. The Court rules on those two matters in following sections of this Judgment. It 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*." (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro) Judgment, I.C.J. Reports 2007 (I)*, p. 104, para. 147.)

In other words, the Court diagnosed applicable substantive law or the principal norms in the Genocide Convention as indicated by Article IX of the Convention, pointing out "the fundamental distinction between the existence and binding force of obligations arising under international law and the existence of a court or tribunal *with jurisdiction to resolve disputes about compliance with those obligations*" (*ibid.*, para. 148; emphasis added).

The Court, then, continues to consider applicable law *lato sensu* finding out that:

> "The jurisdiction of the Court is founded on Article IX of the Convention, and the disputes subject to that jurisdiction are those 'relating to the interpretation, application or fulfilment' of the Convention, *but it does not follow that the Convention stands alone.*" (*Ibid.*, p. 105, para. 149; emphasis added.)

and concludes:

> "In order to determine whether the Respondent breached its obligation under the Convention, as claimed by the Applicant, and, if a breach was committed, to determine its legal consequences, the Court will have recourse not only to the Convention itself, but also *to the rules of general international law on treaty interpretation and on responsibility of States for internationally wrongful acts.*" (*Ibid.*; emphasis added.)

74. It seems clear that "the rules of general international law on treaty interpretation and on responsibility of States for internationally wrongful acts", as the rules which "stand" alongside the Genocide Convention, fully correspond with metanorms and constructive norms, respectively, as the forms of incidental or auxiliary norms (see paras. 69 and 71 above).

75. It appears clear that succession to responsibility is not a part of primary substantive law contained in the Genocide Convention. Responsibility of a State for the committed crime is a constructive norm in the

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sense of "logical presuppositions and necessary logical consequences of norms established" (D. Anzilotti and G. C. Gidel, *Cours de droit international*, 1929, pp. 106-107, as translated into English by M. Papadaki, *op. cit.*) by a treaty, in the case at hand the Convention on Genocide. Or, more precisely, as a constructive norm, the rules of State responsibility are "the logical presuppositions not of the primary rules *per se,* but of their effectiveness" (M. Papadaki, *op. cit.*, p. 586). The special position of constructive norms is well-established in the jurisprudence of the Court. It is expressed in a general way in the dictum of the Court in the *Chorzow Factory* case: "Reparation . . . is the indispensable complement of a failure to apply a convention and there is no necessity for this to be stated in the Convention itself." (Case concerning the *Factory at Chorzow, Jurisdiction, Judgment No. 8, 1927, P.C.I.J., Series A, No. 9*, p. 13.)

Moreover, in the Genocide Convention "responsibility" is included in the compromissory clause, which, due to the fact that responsibility is, *ex natura*, the constructive norm, possesses thus only a declaratory effect.

76. Responsibility of a State is one thing and succession to responsibility is another. Suffice it to say that, whereas the rules on responsibility are secondary rules, the rules on succession are a part of the *corpus* of primary norms whose violation entails activation of the rules on responsibility.

77. As such, supposed rules of succession to responsibility are not "relevant rules" of international law applicable *in casu.* "Relevant rules" in terms of Article 31, paragraph 3 *(c)*, of the Vienna Convention on the Law of Treaties "can be taken as an indication that analogy to rules of international law other than *directly applicable to the subject-matter* of the case were to be excluded" (H. J. Uibopuu, "Interpretation of Treaties in the Light of International Law: Art. 31, para. 3 *(c)* of the Vienna Convention on the Law of Treaties", *Yearbook of the Association of Attenders and Alumni: Hague Academy of International Law*, Vol. 40, 1970, p. 4; emphasis added). "Relevant" means that the rules "concerns the *subject-matter of the treaty term at issue*" (M. E. Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties*, 2009, p. 433; emphasis added; see also *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti* v. *France), Judgment, I.C.J. Reports 2008*, p. 219, para. 113).

78. In the circumstances surrounding the case, two relevant conclusions can be drawn:

(i) that the alleged rules on succession to responsibility are not primary substantive rules in the sense of the Genocide Convention; and

(ii) that, having in mind that they are not a part of secondary rules, they do not form a legal union with the rules on responsibility so that *in casu* they do not constitute constructive norms.

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79. The only possible form of succession to responsibility in the circumstances surrounding the case, could be succession to the responsibility of SFRY *ex consensu*.

On 29 June 2001, Bosnia and Herzegovina, the Republic of Croatia, the Republic of Macedonia, the Republic of Slovenia and the Federal Republic of Yugoslavia, concluded in Vienna, under the auspices of the International Conference on the former Yugoslavia, an Agreement on succession issues.

The Parties have concluded the Agreement, as stated in the Preamble, "being in sovereign equality the five successor States to the former Socialist Federal Republic of Yugoslavia".

Article 1 of Annex F of the Agreement provides that "[a]ll rights and interests which belonged to the SFRY and which are not otherwise covered by the Agreement . . . shall be shared among the successor States . . ." The Article is interpreted as a provision "in favour of the transfer of the *right to reparation* from the predecessor State to the successor States". (P. Dumberry, *op. cit.*, p. 121, fn. 293; emphasis in original).

Article 2 of Annex F stipulates:

> "All claims against the SFRY which are not otherwise covered by this agreement shall be considered by the Standing Joint Committee established under Article 4 of this agreement. The successor States shall inform one another of all such claims against the SFRY."

Sir Arthur Watts, special negotiator for succession issues, whose proposal is actually incorporated into the text of the Agreement on succession issues, indicates that

> "it was understood by all concerned (at least, if it wasn't, it should have been!) that Articles 1 and 2 of Annex F included within their scope such items of international responsibility as might exists *[sic]*, whether involving outstanding claims by the SFRY against other States (Art. 1) or outstanding claims by other States against the SFRY (Art. 2)" (P. Dumberry, *op. cit.*, p. 121, fn. 294, referring to a letter from Sir Arthur Watts on file with the author).

7. The Issue of the Indispensable Third Party

80. Even if, *arguendo qua non*, there exists a rule of general international law and *ipso iure* succession to responsibility, it seems inapplicable in the circumstances surrounding the case.

Succession to responsibility is not a simple movement of responsibility from the predecessor State towards the successor State, an automatic transfer of responsibility from old to new State(s).

It presupposes two relevant legal facts established in a proper judicial action of the Court.

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Primo, that the alleged genocidal acts have been committed on the territory of the Applicant; and

Secundo, that such acts can be attributed to the SFRY according to "criteria, standards and principles, including, in addition to common sense, national and international rules" (*YILC*, 1989, Vol. II, pp. 51-52).

Only upon establishing these legal facts can the "succession issue" be brought in focus in terms of the transfer of established responsibility of the SFRY for alleged genocidal acts to the FRY/Serbia. The issue of responsibility of the SFRY is, consequently, of the preliminary, antecedent nature in relation to the alleged responsibility of the FRY/Serbia.

81. Therefore, the alleged responsibility of the SFRY represents the very subject-matter of the decision of the Court in the dispute between Croatia and the FRY/Serbia. In that part, it appears that the Court does not have jurisdiction because, as stated by the Court in *Land, Island and Maritime Frontier Dispute*, expressing the well-established, fundamental rule as regards its jurisdiction, "continuance of proceedings in the absence of a State whose [interests] would be 'the very subject-matter of the decision'" is not allowed (*Land, Island and Maritime Frontier Dispute (El Salvador/Honduras), Application for Permission to Intervene, Judgment, I.C.J. Reports 1990*, pp. 115-116, para. 55, referring to the case of *Monetary Gold Removed from Rome in 1943 (Italy* v. *France; United Kingdom and United States of America), Preliminary Question, Judgment, I.C.J. Reports 1954*, p. 32).

The Court thus confirmed the so-called *Monetary Gold* principle which rests on the difference between the "legal interest" in a dispute and the "subject-matter" of a dispute or its part. The dictum of the Court is as follows:

> "To adjudicate upon [this objection] without . . . consent would run counter to a well-established principle of international law embodied in the Court's Statute, namely, that the Court can only exercise jurisdiction over a State with its consent." *(Ibid.)*

The fact that in the present case, a third State's legal interests would not only be affected by a decision, but would form "the very subject-matter of the decision", does not make it possible for the Court to be authorized by Article 62 of the Statute to continue the proceedings even in the absence of the third State concerned.

Nor can Article 59 of the Statute be invoked since

> "the decision of the Court in a given case only binds the parties to it and in respect of that particular case. This rule . . . rests on the assumption that the Court is at least able to render a binding decision. Where . . . the vital issue to be settled concerns the international responsibility of a third State, the Court cannot, without the consent

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of that third State, give a decision on that issue binding upon any State, either the third State, or any of the parties before it" (*I.C.J. Reports 1954*, p. 33).

82. Considering that the "indispensable third party" principle derives from the fundamental principle of consent, the application of the principle *in casu* could be objected to by recalling the argument that the SFRY has given its consent to the jurisdiction of the Court by ratifying the Convention in 1948 without expressing reservation regarding Article IX of the Convention.

Such an objection would, however, be deprived of sense. The SFRY became extinct as a State in 1992 and, with the extinction of a State, all its rights and obligations cease as its own rights and obligations.

83. Moreover, the indispensable third-party rule would relate to the Republic of Macedonia up until 1 December 1991, the date of the proclamation of Macedonia as an independent State, and to Bosnia and Herzegovina up until 29 February and 1 March 1992 — the dates of the proclamation of Bosnia and Herzegovina as an independent State, because they were parts of the SFRY prior to these dates.

III. Substantive Law Issues

1. Relationship between the ICJ and the ICTY in respect of the Adjudication of Genocide

84. Following the filing of the Application against the FRY in the *Bosnian Genocide* case, on the basis of Article IX of the Genocide Convention, the Court found itself on *terra incognita*. It had three possibilities at its disposal at the time:

(i) to pronounce itself incompetent, which was, perhaps, a solution closest to the letter of the Convention, although it contained a negative connotation in terms of the Court's judicial policy, implying that the World Court renounces making its contribution to the settlement of the disputes relating to the interpretation and application of the Convention constituting a part of *corpus juris cogentis*;

(ii) to pronounce itself competent to entertain the case, acting as a criminal court, some kind of a judicial counterpart to the French administrative court in a dispute of full jurisdiction *(le contentieux de pleine juridiction)*. Legal obstacles for the Court to act in such a way do not exist. As a court of general jurisdiction it was in a position, like the courts in the continental judicial system which does not know the strict division into criminal and civil courts, to treat the issue of individual criminal responsibility for genocide as a preliminary part of the issue of the responsibility of a State for genocide. This possibility is additionally strengthened, representing even, in the light of logic and legal considerations, the most appropriate solution, in the frame

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of the dictum of the Court that a State, too, can commit genocide (2007 Judgment, pp. 113-114, paras. 166-167); or,

(iii) to opt for a middle-of-the-road position, limiting itself to the issue of State responsibility, without entering, at least not directly, into the area of individual criminal responsibility. Such position is essentially based on the dichotomy of individual criminal responsibility for the committed act of genocide/State responsibility, in terms of the general rules of responsibility of a State for wrongful acts. The logic of dichotomy *in concreto* implies, or may imply, the establishment of a jurisprudential connection with the ICTY judgments. Judge Tomka, in his separate opinion to the 2007 Judgment, outlined the rationale of this connection in [these] terms:

> "The International Court of Justice has no jurisdiction over the individual perpetrators of those serious atrocities. Article IX of the Genocide Convention confers on the Court jurisdiction to determine whether the Respondent complied with its obligations under the Genocide Convention. In making this determination in the present case, the Court was entitled to draw legal consequences from the judgments of the ICTY, particularly those which dealt with charges of genocide or any of the other acts proscribed in Article III. Only if the acts of the persons involved in the commission of such crimes were attributable to the Respondent could its responsibility have been entailed.
>
> The activity of the Court has thus complemented the judicial activity of the ICTY in fulfilling the Court's role in the field of State responsibility for genocide, over which the ICTY has no jurisdiction. Hopefully, the activities of these two judicial institutions of the United Nations, the Court remaining the principal judicial organ of the Organization, contribute in their respective fields to their common objective — the achievement of international justice — however imperfect it may be perceived." (*Ibid.*, separate opinion of Judge Tomka, p. 351, para. 73.)

85. It appears that the Court opted for this third possibility and applied it both in the *Bosnian Genocide* case and in the case at hand.

It seems that the reasons underlying the choice of the Court for the third option are dual — positive and negative.

The main positive reasons could be the following:

— *primo*, the crime of genocide, due to its specific collective nature, entails cumulatively the responsibility of individuals and that of the State;

— *secundo*, it respects both the competence of the ICTY and the limitations on the judicial activity of the Court, which is, true, relatively limited to dealing with international responsibility for genocide;

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— *tertio*, enabling interconnecting international jurisdictions relating to genocide for the purpose of "[u]nity of substantive law as a remedy for jurisdictional fragmentation" (E. Cannizzaro, "Interconnecting International Jurisdictions: A Contribution from the Genocide Decision of the ICJ", *European Journal of Legal Studies*, Vol. 1, 2007);

— *quarto*, opening space for "integrating the mandate and methodologies of international courts" (D. Groome, "Adjudicating Genocide: Is the International Court of Justice Capable of Judging State Criminal Responsibility?", *Fordham International Law Journal*, Vol. 31, 2008, p. 976).

The negative reasons relate to the capability of the Court, in practical terms, to act as a criminal court and the avoidance of competing jurisdiction with the fellow court — the ICTY.

Although the Court "can and does have much to say on matters of criminal justice" (K. J. Keith, "The International Court of Justice and Criminal Justice", *International and Comparative Law Quarterly*, Vol. 59, 2010, p. 895), its proper judicial activity in genocide cases calls for institutional and methodological accommodation, in particular as regards evidential matters. It appears that the Court considered competing jurisdiction with the ICTY undesirable, not only because of the problems of principle regarding competing jurisdiction in the legal environment of the international community which does not know the judicial system *stricto sensu*, but also because of the fact that the ICTY was established by the Security Council on the basis of Chapter VII of the Charter of the United Nations.

86. In principle, "interconnection" with a specialized tribunal such as the ICTY can be desirable and productive for the International Court of Justice. However, it must not ignore the substantial differences between the two bodies and the proper effects deriving from these differences.

The differences are many and range from those of a judicial nature and concerning the adjudicative function to judicial reasoning.

86.1. The International Court of Justice is a "World Court", established in accordance with a general multilateral treaty as the principal judicial organ of the United Nations.

Although a principal organ of the United Nations, co-existing with the other principal organs of the world organization on the basis of Article 7, paragraph 1, of the Charter, the International Court of Justice is primarily the "principal judicial organ" (UN Charter, Art. 92), and "[t]he formula 'principal judicial organ' stresses the independent status of the Court in the sense that it is not subordinate or accountable to any external authority in the exercise of its judicial functions" (S. Rosenne, *The Law and Practice of the International Court: 1920-2005*, 2006, 4th ed., Vol. I, p. 141).

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The ICTY, for its part, is a specialized, criminal tribunal established by resolution 827 of the Security Council, whose competence is limited in all relevant aspects — *ratione materiae, ratione personae* and *ratione loci* — representing, basically, an "*ad hoc* measure" aiming to "contribute to the restoration and maintenance of peace" (UN Security Council resolution 827, doc. S/RES/827, 25 May 1993, Preamble) or, promoting the idea of selective justice *versus* universal justice as inherent in the very essence of law and the judiciary. In the light of that fact, the ICTY has, actually, been established as a subsidiary organ of the Security Council, which is also reflected, *inter alia*, in its function according to Security Council resolution 827 (see para. 86.2 below). It raises the question of its legitimacy, to which no proper legal answer has been provided to this day. The ICTY itself, in the *Tadić* case, reacting to the argument of the defence that the tribunal was "not established by law", as required, *inter alia*, by the International Covenant on Civil and Political Rights, pointed out that, in terms of the principle of *competence de la competence*, it had the inherent jurisdiction to determine its own jurisdiction (*Tadić*, IT-94-1, Appeals Chamber, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, paras. 18-19).

The position taken by the Appeals Chamber can hardly be considered satisfactory, for at least two reasons.

Primo, the principle of *competence de la competence* is not an omnipotent principle capable of transforming illegitimacy into legitimacy, illegality into legality or vice versa. It is simply a basic functional and structural principle inherent in any adjudicatory body, whether a regular court or any other body possessing adjudicatory powers. The principle is, as pointed out by United States Commissioner Gore in the *Betsey* case, "indispensably necessary to the discharge of any . . . duties" for any adjudicatory body (J. B. Moore (ed.), *International Adjudications, Ancient and Modern, History and Documents*, Modern Series, Vol. IV, p. 183).

As such, the principle of *competence de la competence*, operating within the particular judicial structure, is neutral as regards the legitimacy or illegitimacy of the adjudicating body.

Secundo, even, if *arguendo*, the principle of *competence de la competence* is capable of serving as a basis of legitimacy of the ICTY, the finding of the Appeals Chamber in the *Tadić* case does not appear sufficient in that regard in the light of the fundamental principle — *nemo iudex in causa sua*. The proper *forum* for a proper assessment of legitimacy of the ICTY is the ICJ which, however, avoided explicit pronouncement in that regard (some other models of judicial review and of UN constitutional interpretation are also possible, see J. Alvarez, "Nuremberg Revisited: The *Tadić* Case", *European Journal of International Law*, Vol. 7, 1996, p. 250).

86.2. The differences as regards adjudicatory functions between the ICJ and the ICTY are particularly evident in relation to international peace and security.

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The activity of the ICTY is strongly linked with international peace and security.

Security Council resolution 827, establishing the ICTY, proceeded from the qualification that the situation in the territory of the former Yugoslavia "constitute[d] a threat to international peace and security" and that the establishment of the Tribunal "would contribute to the restoration and maintenance of peace" (UN Security Council resolution 827, doc. S/RES/827, 25 May 1993, Preamble). The Appeals Chamber, in the *Tadić* case, concluded that "the establishment of the International Tribunal *falls squarely within the powers of the Security Council under Article 41*" (*Tadić*, IT-94-1, Appeals Chamber, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, para. 36; emphasis added) (as an aside, such a conclusion could be controversial in light of the provision of Article 41 of the Charter, which *a limine* enumerates the powers of the Security Council proving that measures "may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations"). The conclusion in *Tadić* has been substantiated in the *Milošević* case in which the Trial Chamber found that the establishment of the International Tribunal "is, in the context of the conflict in the country at that time, *pre-eminently a measure to restore international peace and security*" (*Milošević*, IT-02-54, Trial Chamber, Decision on Preliminary Motions of 8 November 2001, para. 7; emphasis added).

The instrumental nature of the ICTY is not a subjective perception of the Tribunal itself, but derives from the act by which it has been established. Resolution 827 provides, *inter alia*, that the establishment of the Tribunal, "in the particular circumstances of the former Yugoslavia", as "an *ad hoc* measure by the Council" (UN Security Council resolution 827, doc. S/RES/827, 25 May 1993, Preamble). Such perception of the nature of the Tribunal is also reflected in the timing of the establishment of the Tribunal by the Security Council. May 1993 was the apex of the conflict in the former Yugoslavia, so that the establishment of the Tribunal was a part of international peace operations backed by the authority and enforcement power of the Security Council. Therefore, it can be said that

> "the overall purpose of the tribunals [ICTY and ICTR] coincides with other forms of humanitarian intervention with respect to humanitarian concern for victims in conflict-ridden areas. The ICTY's relationship with peacekeeping forces in Bosnia-Herzegovina during the Bosnian war indicates a critical juncture of judicial organs with military forces." (H. Shinoda, "Peace-Building by the Rule of Law: An Examination of Intervention in the Form of International Tribunals", *International Journal of Peace Studies*, Vol. 7, 2002.)

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As such, the ICTY essentially represents a "non-military form of intervention by the international community" (*International Journal of Peace Studies*, Vol. 7, 2002, p. 15).

Although there exists an indisputable *nexus* between law and peace, the instrumental role of the adjudicatory body in the establishment of peace hardly represents an inherent feature of judicial activity of the court of law. At least of the International Court of Justice.

Restoration of peace is pre-eminently a political matter achieved by way of measures which are *stricto sensu* non-legal or extra-legal. The notions of "peace" and "justice" do not necessarily coincide. More often than not, peace is achieved by means of unjust solutions. Moreover, law can even be an obstacle to the attainment of peace, as is shown by peace treaties. If the rules of the law of treaties were to be respected as regards peace treaties, the peace achieved through peace treaties could not be legally established because, as a rule, it is based on superiority on the battle-field; which is, in terms of the law of treaties, the essential lack of consent *(vice de consentement)*.

The international practice

> "has developed two principal methods for settling international affairs and for dealing with international disputes. One is purely political. The other is legal. There are degrees of shading off between them, and various processes for the introduction of different types of third-party settlement. Because of this fundamental difference between the two approaches of settling international disputes, analogies from one to the other are false." (S. Rosenne, *The Law and Practice of the International Court: 1920-2005*, 2006, 4th ed., pp. 4-5.)

The role of the Court is manifested in its "bolstering of the structure of peace . . . through its advisory opinions, [as well as through judgments] through the confidence which it inspired, and through the encouragement which it gave to the extension of the law of pacific settlement, rather than through its disposition of particular disputes" (M. Hudson, *International Tribunals: Past and Future*, 1944, p. 239).

86.3. It seems understandable that such a position of the Tribunal is also reflected in its judicial reasoning. In the interpretation of relevant legal rules, the Tribunal strongly, even decisively, relies on the respective interpretation of the Security Council and that of the chief administrative officer of the world Organization — the Secretary-General of the United Nations. By reasoning in this way, the Tribunal in fact conducts itself loyally towards its founder. There can be no objection to that in the light of the circumstances surrounding the establishment and adjudicatory function of the ICTY, but the question posed is whether such an approach fits within the standards of judicial reasoning of the Court.

86.3.1. In the *Blaškić* case, the Tribunal found the decisive argument relating to "existing international humanitarian law" in the assertions of

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the Security Council and the Secretary-General of the United Nations. The Tribunal stated *inter alia*:

> "It would therefore be wholly unfounded for the Tribunal to now declare unconstitutional and invalid part of its jurisdiction which the Security Council, with the Secretary-General's assent, has asserted to be part of existing international humanitarian law." (*Blaškić*, IT-95-14, Trial Chamber, Decision on the defence motion to strike portions of the amended indictment alleging "failure to punish" liability of 4 April 1997, para. 8.)

86.3.2. The Tribunal found that in cases where there is no manifest contradiction between the Statute of the ICTY and the *Report of the Secretary-General* "the Secretary-General's Report ought to be taken to provide an authoritative interpretation of the Statute" (*Tadić*, IT-94-1, Appeal Judgment, 15 July 1999, para. 295).

86.3.3. The Tribunal is inclined to attach decisive weight to interpretative declarations made by Security Council members:

> "In addressing Article 3 the Appeals Chamber noted that where interpretative declarations are made by Security Council members and are not contested by other delegations 'they can be regarded as providing an authoritative interpretation' of the relevant provisions of the Statute. Importantly, several permanent members of the Security Council commented that they interpret 'when committed in armed conflict' in Article 5 of the Statute to mean 'during a period of armed conflict'. These statements were not challenged and can thus, in line with the Appeals Chamber Decision, be considered authoritative interpretations of this portion of Article 5." (*Tadić*, IT-94-1, Trial Judgment, 7 May 1997, para. 631.)

1.1. The need for a balanced and critical approach to the jurisprudence of the ICTY

87. The presented reasons require a balanced and critical approach to the jurisprudence of the ICTY as regards genocide. Balanced in the sense of a clear distinction between factual and legal findings of the Tribunal.

1.1.1. *Factual findings of the ICTY*

88. The factual findings of the Tribunal are a proper point for the establishment of interconnection between two international jurisdictions which relate to genocide.

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The methodology and techniques of a specialized, criminal judicial body constitute the basis of the high quality of factual findings of the Tribunal. The Court took cognizance of this, having found in the *Bosnian Genocide* case that it "should in principle accept as highly persuasive relevant findings of fact made by the Tribunal at trial" (2007 Judgment, p. 134, para. 223). The heavy reliance on factual findings of the Tribunal is, moreover, based on a formal, and not a substantive, criterion. This clearly derives from the pronouncement that "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" (Judgment, para. 471). In this sense, the position of the Tribunal as regards claims made by the Prosecutor can also be mentioned. The Court stated in a robust way that "as a general proposition the inclusion of charges in an indictment cannot be given weight" (2007 Judgment, p. 132, para. 217). The proposition has been mitigated in the present Judgment by the qualification that "the fact that the ICTY Prosecutor has never included a count of genocide in the indictments in cases relating to Operation Storm does not automatically mean that Serbia's counter-claim must be dismissed" (Judgment, para. 461).

89. Reliance on ICTY factual findings must have precise limits. It cannot be considered as a formal verification of factual findings of the Tribunal nor as a simple rejection based on formal criteria.

Instead of a formal criterion, a substantive one must be applied with a view to the proper assessment of the factual finding of the Tribunal in accordance with the standards of judicial reasoning of the Court.

In addition to the general reasons which necessitate such an approach in the case at hand, of relevance could also be an additional reason which relates to the alleged connection between the institution of proceedings before the Court by Croatia and the treatment of Croatian citizens before the Tribunal, as claimed by Professor Zimmermann (CR 2014/14, p. 11). This claim was ultimately left unanswered by Croatia, nor has it been answered by the ICTY itself, despite it having been made publicly in the Court's Great Hall of Justice.

1.1.2. *Legal findings of the ICTY*

90. In contrast to factual findings of the ICTY, the treatment of its legal findings which relate to genocide needs to be essentially different. The Court should not allow itself to get into the position of a mere verifier of legal findings of the Tribunal. For, it would thus seriously jeopardize its judicial integrity and, even, the legality of its actions in the disputes regarding the application of the Genocide Convention.

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A number of cogent considerations necessitate a critical approach to the legal findings of the Tribunal.

90.1. In dealing with the disputes relating to genocide on the basis of Article IX of the Genocide Convention, the Court is bound to apply only the provisions of the Convention as the relevant substantive law. In that regard, the Judgment states *expressis verbis*:

> "since Article IX provides for jurisdiction only with regard to 'the interpretation, application or fulfilment of the Convention, including . . . the responsibility of a State for genocide or for any of the other acts enumerated in Article III', *the jurisdiction of the Court does not extend to allegations of violations of the customary international law on genocide*. It is, of course, well established that the Convention enshrines principles that also form part of customary international law. Article I provides that '[t]he Contracting Parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law'. The Court has also repeatedly stated that the Convention embodies principles that are part of customary international law. That was emphasized by the Court in its 1951 Advisory Opinion . . .
>
> That statement was reaffirmed by the Court in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro) (Judgment, I.C.J. Reports 2007 (I)*, pp. 110-111, para. 161)." (Judgment, para. 87; emphasis added.)

The position of the ICTY as regards applicable substantive law seems different.

In its judgment in the *Krstić* case, which served as the basis for the Court's conclusion that genocide was committed in Srebrenica, the Trial Chamber stated that it "must interpret Article 4 of the Statute taking into account *the state of customary international law at the time the events in Srebrenica took place*" (*Krstić*, IT-98-33, Trial Chamber, Judgment, 2 August 2001, para. 541; emphasis added).

The Trial Chamber referred to a variety of sources in order to arrive at the definition of genocide that it applied:

> "The Trial Chamber first referred to the codification work undertaken by international bodies. The Convention on the Prevention and Punishment of the Crime of Genocide . . . whose provisions Article 4 adopts *verbatim*, constitutes the main reference source in this respect. Although the Convention was adopted during the same period that the term 'genocide' itself was coined, the Convention has been viewed as codifying a norm of international law long recognized and which case law would soon elevate to the level of a peremptory norm of general international law *(jus cogens)*. The Trial Chamber has interpreted the Convention pursuant to the general rules of interpretation of treaties laid down in Articles 31 and 32 of the Vienna Convention

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on the Law of Treaties. As a result, the Chamber took into account the object and purpose of the Convention in addition to the ordinary meaning of the terms in its provisions. As a supplementary means of interpretation, the Trial Chamber also consulted the preparatory work and the circumstances which gave rise to the Convention. Furthermore, the Trial Chamber considered the international case law on the crime of genocide, in particular, that developed by the ICTR. The Report of the International Law Commission (ILC) on the Draft Code of Crimes against Peace and Security of Mankind received particular attention. Although the report was completed in 1996, it is the product of several years of reflection by the Commission whose purpose was to codify international law, notably on genocide: it therefore constitutes a particularly relevant source for interpretation of Article 4. The work of other international committees, especially the reports of the Sub-Commission on Prevention of Discrimination and Protection of Minorities of the UN Commission on Human Rights, was also reviewed. Furthermore, the Chamber gave consideration to the work done in producing the Rome Statute on the establishment of an international criminal court, specifically, the finalized draft text of the elements of crimes completed by the Preparatory Commission for the International Criminal Court in July 2000. Although that document post-dates the acts involved here, it has proved helpful in assessing the state of customary international law which the Chamber itself derived from other sources. In this regard, it should be noted that all the States attending the conference, whether signatories of the Rome Statute or not, were eligible to be represented on the Preparatory Commission. From this perspective, the document is a useful key to the *opinio juris* of the States. Finally, the Trial Chamber also looked for guidance in the legislation and practice of States, especially their judicial interpretations and decisions." (*Krstić*, IT-98-33, Trial Chamber, Judgment, 2 August 2001, para. 541; footnotes omitted.)

90.2. It appears that the fact that Article 4 of the ICTY Statute *ad verbatim* reproduces Articles II and III of the Genocide Convention does not automatically mean that the law of genocide as contemplated by the ICTY Statute is equivalent to the law of genocide established by the Convention. Article 4 of the Statute is but a provision of the Statute, which is itself a unilateral act of one of the political organs of the United Nations. As such, the provision cannot change its nature simply by reproducing the text of Articles II and III of the Convention, without any *renvoi* to the Genocide Convention. Consequently, interpretation of Article 4 of the Statute on the basis *inter alia* of the *travaux preparatoires* of the Convention, on which the ICTY amply draws, is essentially misleading. It reflects the difference in judicial reasoning between the ICJ and the ICTY (see, para. 86.3 above).

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90.2.1. The interpretation of relevant provisions of the Convention can, however, be one thing and the application of these provisions quite another. Thus, the interpretation provided in paragraphs 87 and 88 of the Judgment appears to be in discrepancy with the positions of the Court in the *Bosnian Genocide* case, which, as the first case alleging acts of genocide dealt with by the International Court of Justice, represents some sort of a judicial parameter in genocide cases before the Court.

In the *Bosnian Genocide* case, *conclusio* of the Court that genocide was committed in Srebrenica was based on the ICTY judgment in the *Krstić* case, (2007 Judgment, pp. 163-166, paras. 292-297) which was decided by the ICTY on the basis of "customary international law at the time the events in Srebrenica took place" (*Krstić*, IT-98-33, Trial Chamber, Judgment, 2 August 2001, para. 541).

91. In connection with "customary law of genocide", two legal questions are posed which, due to their specific weight, transcend the question of customary law of genocide, affecting the very understanding of custom, as one of the main sources of international law, and the relationship between the Genocide Convention and customary law emerging, or which could merge, following the adoption of the Convention.

91.1. The ICTY perception of custom as a source of international law is highly innovative, going well beyond the understanding of custom in the jurisprudence of the ICJ.

According to the well settled jurisprudence of the ICJ, which follows the provision of its Statute referring to "international custom, as evidence of a general practice accepted as law" (Art. 38, para. 1 *(b)*), custom is designed as a source based on two elements: general practice and *opinio iuri sive necessitatis*. As it pointed out in the *Nicaragua* case: "[b]ound as it is by Article 38 of its Statute . . . the Court may not disregard *the essential role played by general practice*" (*Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Merits, Judgment, I.C.J. Reports 1986*, pp. 97-98, para. 184; emphasis added).

The jurisprudence of the ICTY generally moves precisely in the opposite direction, giving the predominant role to *opinio juris* in the determination of custom (G. Mettraux, *International Crimes and the* ad hoc *Tribunals*, 2005, p. 13, fn. 4) and, thus, showing a strong inclination towards the single element conception of custom!

In doing so, it considers *opinio juris* in a manner far removed from its determination by the Court. For, in order "to constitute the *opinio juris* . . . two conditions must be fulfilled. Not only must the acts concerned amount to a settled practice, but they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it" (*North Sea Continental Shelf (Federal Republic of Germany/Denmark; Federal Republic of*

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Germany/Netherlands), Judgment, I.C.J. Reports 1969, p. 44, para. 77). *Opinio juris* cannot be divorced from practice because "[t]he Court must satisfy itself that the existence of the rule in the *opinio juris* of States is confirmed by practice" (*Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Merits, Judgment, I.C.J. Reports 1986*, p. 98, para. 184).

The ICTY has often satisfied itself with "extremely limited case law" and State practice (A. Nollkaemper, "The Legitimacy of International Law in the Case Law of the International Criminal Tribunal for the former Yugoslavia" in: T. A. J. A. Vandamme and J. H. Reestman (eds.), *Ambiguity in the Rule of Law: The Interface between National and International Legal Systems*, 2001, p. 17).

A large part of law qualified by the ICTY as customary law is based on decisions of municipal courts (A. Nollkaemper, "Decisions of National Courts as Sources of International Law: An Analysis of the Practice of the ICTY" in G. Boas and W. A. Schabas (eds.), *International Criminal Law Developments in the Case Law of the ICTY*, 2003, p. 282) which are of a limited scope in the jurisprudence of the Court (H. Thirlway, *The Law and Procedure of the International Court of Justice: Fifty Years of Jurisprudence*, Vol. I, 2013, p. 248). In the case concerning *Certain German Interests in Polish Upper Silesia*, the Permanent Court stated that national judicial acts represent "facts which express the will and constitute the activities of States" (*Merits, Judgment No. 7, 1926, P.C.I.J., Series A, No. 7*, p. 19).

91.2. Hidden under the surface of the general characteristic of the ICTY's approach to customary law, which is dubious per se, is incoherence and subjectivism. It has been well noted that differently-composed Chambers of the ICTY have utilized different methods for identifying and interpreting customary law, even in the same case, including simply referring to previous ICTY decisions themselves as evidence of a customary rule (N. Arajärvi, *The Changing Nature of Customary International Law: Methods of Interpreting the Concept of Custom in International Criminal Tribunals*, 2014, p. 117). In addition, the ICTY has failed to consistently and rigorously address the concepts of State practice and *opinio juris* by, *inter alia*, failing to refer to evidence of either, referring merely to the bulk existence of national legislation as evidencing custom without addressing *opinio juris* or framing policy or "humanity" related rationales as *opinio juris* (*ibid.*, p. 118).

92. The establishment of customary law in the ICTY resembles in many aspects a quasi-customary law exercise based on deductive reasoning driven by meta-legal and extra-legal principles. As can be perceived "many a Chamber of the *ad hoc* Tribunals have been too ready to brand norms as customary, without giving any reason or citing any authority for that conclusion" (G. Mettraux, *International Crimes and the* Ad Hoc *Tribunals*, 2005, p. 15). This has resulted in judicial law-making through purposive, adventurous interpretation (M. Swart, "Judicial Law-Making

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at the *Ad Hoc* Tribunals: The Creative Use of Sources of International Law and 'Adventurous Interpretation'", *Heidelberg Journal of International Law*, Vol. 70, 2010, pp. 463-468, 475-478), although, according to the Secretary-General, on the establishment of the ICTY, the judges of the Tribunal could apply only those laws that were beyond doubt part of customary international law (UN Security Council, *Report of the Secretary-General Pursuant to Paragraph 2 of Security Council resolution 808 (1993)*, United Nations doc. S/25704, 3 May 1993, para. 34). Being in substantial conflict with custom, as perceived by the ICJ, the ICTY perception of custom, applied in its jurisprudence, opens the way to a fragmentation of international criminal law and, even, general international law (see G. Mettraux, *op. cit.*, p. 15 citing *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo* v. *Belgium), Judgment, I.C.J. Reports 2002*, p. 3).

93. It is customary law to which is usually attributed the dynamic capacity in the development of treaty law, both as regards the scope of the established obligation and as regards its content. The question of modification of the substantive rules of the Convention in the form of custom is, as a rule, a neglected question although it seems to be of far-reaching importance.

Is custom capable of modifying a rule which belongs to *corpus juris cogentis*?

Given the inherent characteristics of customary law, on the one hand, and legal force of the rules of *corpus juris cogentis*, on the other, the answer to this question is necessarily negative.

The other side of the flexibility of custom, as a positive characteristic from the aspect of the creation of peremptory norms, is the fact that customary rules, as a rule, come into existence slowly and painstakingly. This fact, besides the vagueness and imprecision of custom, is a big handicap in relation to an international treaty, in particular at a time of rapid and all-embracing changes in the overall set of relations regulated by international law. In the words of Friedmann, "custom is too clumsy and slow moving a criterion to accommodate the evolution of international law in our time" (W. Friedmann, *The Changing Structure of International Law*, 1964, p. 122).

Precisely because of this, the advantages of custom as a source of existing peremptory norms of general international law represent, at the same time, and in certain cases, also a difficulty, if not an obstacle, to the formulation of new peremptory norms or the modification of those already in existence.

94. Namely, the very mechanism of the creation of an international customary rule by way of permanent, continual repetition of certain behaviour, coupled with the *opinio juris*, is certainly not in full harmony with the status enjoyed by the peremptory norm of general international law; in particular in relation to consequences inherent in such a norm in relation to contrary acts undertaken by a State or a group of States. The

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customary rule implies certain regularity as a characteristic of particular forms of behaviour which constitute the being of the material element of custom; a regularity on the basis of which the subjects of international law perceive this practice as an expression of the obligatory rule of conduct. On the other hand, such regularity should have overall scope, that is, it must be included, directly or indirectly, in the practice of the overwhelming majority of member countries of the international community. In view of the fact that the custom came into being diffusely, general practice is achieved through the accumulation of varied individual and common behaviours and acts (see Special Rapporteur M. Wood, "Second report on identification of customary international law", International Law Commission, doc. A/CN.4/672, 22 May 2014).

However, it follows from the character of a norm of *jus cogens* that all acts which are contrary to it are null and void *ab initio*. In other words, such practice does not possess legal validity; therefore it cannot represent a regular form of the coming into existence of a norm of *jus cogens superveniens* in the matter which is already covered by the cogent régime.

95. The inherent incapability of custom to modify the existing rule of *jus cogens* has been diagnosed in a subtle way by the International Law Commission. In the commentary to Draft Article 50 (Article 53 of the Vienna Convention on the Law of Treaties), the Commission, having found that "it would be clearly wrong to regard even rules of *jus cogens* as immutable and incapable of modification . . .", concludes that "a modification of a rule of *jus cogens* would today most probably *be effected through a general multilateral treaty* . . ." (United Nations Conference on the Law of Treaties, "Draft Articles on the Law of Treaties with Commentaries, Adopted by the International Law Commission at Its Eighteenth Session", First and Second Sessions, Vienna, 26 March-24 May 1968 and 9 April-22 May 1969, Official Records, Documents of the Conference, p. 68, para. 4; emphasis added).

Only "instant custom" would possess the proper capacity for modification of an existing *jus cogens* rule, a conception of custom that has not become part of positive law.

96. The perception of customary law developed by the ICTY is highly destructive as regards the normative integrity of international law. Being essentially a subjective perception of customary law divorced from its deeply rooted structure which derives from the Statute of the Court as part of the international *ordre public*, actually a judicial claim of custom contradictory not only *per se* but also *in se*, it generates diversity in the determination of customary law, including the rules of *jus cogens* of a customary nature.

97. It can be qualified as the most serious challenge to the construction of customary law in the recent history of international law. Reducing "general practice" to isolated judgments of national courts or, even, to statements in the United Nations Security Council and deriving *opinio juris* from these acts, or, going even further, simply asserting that a certain rule is of a customary nature, not only contradicts the positive-legal conception of custom reflected in the jurisprudence of the Court, but also trivial-

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izes the will of the international community as a whole as the basis of obligations in international law, in particular obligations of a customary nature. In sum, the ICTY's perception of customary law as a demonstration of judicial fundamentalism would seem to incarnate Lauterpacht's metaphor of custom as a metaphysical joke (H. Lauterpacht, "Sovereignty over Submarine Areas", *British Yearbook of International Law*, Vol. 27, 1950, p. 394).

The dangers of the ICTY's perception of customary law can hardly be overestimated. The effects of such a perception are not limited to the judicial activity of the ICTY and other *ad hoc* bodies. For a number of reasons, including, *inter alia*, the inclination to deductive reasoning based on meta-legal and, even, extra-legal considerations, not even the Court is immune to such perception.

98. Furthermore, the pronouncement of the Court that a customary law of genocide existed before the adoption of the Genocide Convention is unclear (see Judgment, paras. 87 and 88). The arguments on which relies the *conclusio* of the Court are not excessively persuasive. The arguments of the Court are basically: (i) that it is "well established that the Convention enshrines principles that also form part of customary international law"; and (ii) that Article I provides that "the Contracting Parties confirm that genocide . . . is a crime under international law" (Judgment, para. 87).

98.1. As far as the first argument is concerned, it is, in fact, a strong assertion which lacks precision and proper evidence. In its 1951 Advisory Opinion, the Court rightly found "denial of the right of existence of entire human groups", which is *genus proximum* of genocide, contrary "to *moral law and to the spirit and aims of the United Nations*" (*Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, I.C.J. Reports 1951*, p. 23; emphasis added). It appears that, in the opinion of the Court, "the principles underlying the Convention are principles which are recognized by civilized nations . . .", in essence, "most elementary principles of morality" *(ibid.)*.

Apart from the question as to whether there is equivalency between legal principles *stricto sensu* and "moral law" or the "most elementary principles of morality", it appears that the latter are the guiding principles for the creation of legal rules on genocide, rather than legal rules per se. The term "customary law on genocide" necessarily implies only rules or rules and principles. Principles, no matter how fundamental they can be, cannot per se constitute any law whatsoever, including in respect of the law on genocide. Or, at least, not operational law or law in force.

98.2. The second argument is based on the meaning of the word "confirm". As it is only possible to confirm something that exists, the Genocide Convention would express the already constituted law of genocide or, in a technical sense, it would represent codification of customary law of genocide.

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However, there may be a different interpretation. For, it seems that the subject of "confirmation" is something else and not customary law of genocide.

On 11 December 1946, the United Nations General Assembly adopted resolution 96 (I) on the Crime of Genocide which, *inter alia*:

> "Affirms that *genocide is a crime under international law* which the civilized world condemns, and for the commission of which principals and accomplices — whether private individuals, public officials or statesmen, and whether the crime is committed on religious, racial, political or any other grounds — are punishable" (emphasis added).

The Preamble of the Genocide Convention states, *inter alia*, that "the Contracting Parties, having considered *the declaration* made by the General Assembly of the United Nations in its resolution 96 (I) dated 11 December 1946 *that genocide is a crime under international law*" (emphasis added).

It could be said that the relation between resolution 96 (I) and the Genocide Convention is the embryo of the two-phase legislative activity which *tractu temporis* turned into a model for the creation of general multilateral treaty regimes in United Nations practice (*exempli causa*, General Assembly resolution 1962 (XVIII), Declaration of Legal Principles Governing the Activities of States in the Exploration and Use of Outer Space, 13 December 1963; Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies 1967; General Assembly resolution 217 (III), A Universal Declaration of Human Rights, 10 December 1948; International Covenant on Civil and Political Rights 1966; International Covenant on Economic, Social and Cultural Rights 1966). In this model, resolutions of the United Nations General Assembly, adopted unanimously or by the overwhelming majority, declare the general principles relating to the particular subject, these principles become part of international public policy, and are finally transformed into binding legal rules in the form of general international treaty, thus constituting what has been referred to by Judge Alvarez as "international legislation" (*Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, I.C.J. Reports 1951*, dissenting opinion of Judge Alvarez, p. 49).

99. If, *arguendo*, customary law of genocide existed before the adoption of the Genocide Convention, it is unclear on what practice, in particular general practice, it was based? The Court did not indicate any evidence of the corresponding practice before the adoption of the Convention.

Moreover, the question may be posed why the corresponding practice, if it was constituted, was not respected by the Nuremberg and the Tokyo

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Tribunals which were established precisely at the time when that practice must have been constituted?

Does the thesis that customary law of genocide existed before the adoption of the Convention suggest that the Nuremberg and the Tokyo Tribunals were unaware of/it or did they, perhaps, intentionally ignore it?

1.2. Compromising effects on the Court's jurisprudence on genocide

100. Uncritical acceptance of the legal findings of the ICTY, essentially its verification, could result in compromising the determination of the relevant rules of the Genocide Convention by the Court.

There exists a reason of an objective nature which produces, or may produce, a difference between the law of genocide embodied in the Genocide Convention and the law of genocide applied by the *ad hoc* tribunals.

The law applied by the ICTY as regards the crime of genocide cannot be considered equivalent to the law of genocide established by the Convention. In this regard, the jurisprudence of the ICTY can be said to be a progressive development of the law of genocide enshrined in the Convention, rather than its actual application. Article 4 of the ICTY Statute is but a provision of the Statute as a unilateral act of one of the main political organs of the fact that it does not contain any *renvoi* to the Genocide Convention, the provision cannot change its nature simply by reproducing the text of Article II of the Convention.

101. It is not surprising therefore that in the jurisprudence of the Court as regards the law on genocide there exist a discrepancy between the interpretation of the relevant provisions of the Convention expressing as a rule the letter of the Convention, and its application based on *in toto* acceptance of the ICTY's decision, that goes in the other direction.

I shall give two examples that concern the crucial provisions of the Convention.

102. The first example relates to the nature of the destruction of the protected group.

The Court notes that, in the light of the *travaux préparatoires,* the scope of the Convention is limited to the physical and biological destruction of the group (Judgment, para. 136). The finding is consistently implemented in the Judgment as a whole.

Exempli causa 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 . . ." (*ibid.*, para. 157, see also paras. 160, 163).

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103. However, "destruction" as applied by ICTY in the *Krstić* and *Blagojević* cases, is a destruction in social terms rather than in physical and biological terms.

In the *Krstić* case the Trial Chamber found, *inter alia*, that the destruction of a sizeable number of military aged men "would inevitably result in the physical disappearance of the Bosnian Muslim population at Srebrenica" (*Krstić*, IT-98-33, Trial Judgment, 2 August 2001, para. 595), since "their spouses are unable to remarry and, consequently, to have new children" (*ibid.*, Appeal Judgment, 19 April 2004, para. 28). Such a conclusion, reflects rather the idea of a social destruction, rather than a physical or biological one.

The perception of destruction in social terms is even more emphasized in the *Blagojević* case. The Trial Chamber applied "[a] broader notion of the term 'destroy', encompassing also 'acts which may fall short of causing death'" (*Blagojević and Jokić*, IT-02-60, Trial Judgment, 17 January 2005, para. 662), an interpretation which does not fit with the understanding of destruction in terms of the Genocide Convention. In that sense, the Trial Chamber finds support in the judgment of the Federal Constitutional Court of Germany, which held *expressis verbis* that

> "the statutory definition of genocide defends a *supra*-individual object of legal protection, i.e., the *social* existence of the group [and that] the intent to destroy the group . . . extends beyond physical and biological extermination . . . The text of the law does not therefore compel the interpretation that the culprit's intent must be to exterminate physically at least a substantial number of members of the group." (*Ibid.*, para. 664; emphasis and ellipses in original.)

Thus perceived, "the term 'destruction', in the genocide definition can encompass the forcible transfer of population" (*ibid.*, para. 665).

104. The finding contradicts the dictum of the Court that "deportation or displacement of the members of a group, even effected by force, is not necessarily equivalent to destruction of that group, nor is such destruction an automatic consequence of the displacement" (2007 Judgment, para. 190).

Those findings of the ICTY served as a basis for the *conclusio* of the Court that genocide was committed in Srebrenica (*ibid.*, paras. 296-297).

In addition, fortunately, the subjective character of destruction in a sociological sense is clearly shown precisely by the case of Srebrenica. One of the key arguments of the Tribunal in the *Krstić* case and the *Blagojević* case was that "destruction of a sizeable number of military aged men would inevitably result in the physical disappearance of the

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Bosnian Muslim population in Srebrenica" (*Krstić*, IT-98-33, Trial Judgment, 2 August 2001, para. 595).

Life, however, proved the Tribunal's prediction wrong. Following the conclusion of the Dayton Agreement, the Muslim community in Srebrenica was reconstituted, so that today the number of the members of the two communities — the Muslim and the Serbian — is equalized. This is also evidenced by the fact that a representative of the Muslim community was elected Mayor at the last elections.

105. The other example relates to the relevance of customary law on genocide in disputes before the Court based on Article IX of the Genocide Convention.

In the present Judgment, the Court devoted considerable attention to the customary law on genocide and made proper conclusions in clear and unequivocal terms.

The Court stated in strong words that

> "[t]he fact that the jurisdiction of the Court in the present proceedings can be founded only upon Article IX has important implications for the scope of that jurisdiction. That Article provides for jurisdiction only with regard to disputes relating to the interpretation, application or fulfilment of the Genocide Convention, including disputes relating to the responsibility of a State for genocide or for any of the other acts enumerated in Article III of the Convention." (Judgment, para. 85.)

The statement is supported by the following reasoning:

> "any jurisdiction which the Court possesses is derived from Article IX of the Genocide Convention and is therefore confined to obligations arising under the Convention itself. Where a treaty states an obligation which also exists under customary international law, the treaty obligation and the customary law obligation remain separate and distinct (*Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Merits, Judgment, I.C.J. Reports 1986*, p. 96, para. 179). Accordingly, unless a treaty discloses a different intention, the fact that the treaty embodies a rule of customary international law will not mean that the compromissory clause of the treaty enables disputes regarding the customary law obligation to be brought before the Court. In the case of Article IX of the Genocide Convention no such intention is discernible. On the contrary, the text is quite clear that the jurisdiction for which it provides is confined to disputes regarding the interpretation, application or fulfilment of the Convention, including disputes relating to the responsibility of a State for genocide or other acts prohibited by the Convention. Article IX does not afford a basis on which the Court can exercise jurisdiction over a dispute concerning alleged violation of the customary international law obligations regarding genocide." (Judgment, para. 88.)

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It should be noted that the position of the Court in that regard was couched in a similar, although more general, way, in the *Bosnian Genocide* case.

The Court stated that: "[t]he jurisdiction of the Court in this case is based solely on Article IX of the Convention" (2007 Judgment, p. 104, para. 147).

True, the Court continued:

> "The jurisdiction of the Court is founded on Article IX of the Convention, and the disputes subject to that jurisdiction are those 'relating to the interpretation, application or fulfilment' of the Convention, but it does not follow that the Convention stands alone. In order to determine whether the Respondent breached its obligation under the Convention, as claimed by the Applicant, and, if a breach was committed, to determine its legal consequences, the Court will have recourse not only to the Convention itself, but also to the rules of general international law on treaty interpretation and on responsibility of States for internationally wrongful acts." (*Ibid.*, p. 105, para. 149.)

However, it seems clear that the rules of general international law on treaty interpretation, for its object *in concreto*, can have only the Genocide Convention itself. These rules, as rules of interpretation of the Convention, cannot introduce through the back door customary law on genocide as applicable substantive law. As far as the rules on the responsibility of States for internationally wrongful acts, things seem to be equally clear. For, being essentially the secondary rules, the rules on the responsibility of States are "incapable" of modifying the substance of the primary rules contained within the Genocide Convention.

106. However, the ICTY's Judgment in the *Krstić* case was based, as the Tribunal stated *expressis verbis*, on "customary international law at the time the events in Srebrenica took place" (*Krstić*, IT-98-33, Trial Chamber, Judgment, 2 August 2001, para. 541).

It appears that the Court, having found that it "sees no reason to disagree with the concordant findings of the Trial Chamber and the Appeals Chamber" (2007 Judgment, p. 166, para. 296) in the *Krstić* and the *Blagojević* cases, has, in light of its pronouncement in paragraphs 87 and 88 of the Judgment, exceeded its jurisdiction, since Article IX confers jurisdiction *only* with respect to the "interpretation, application or fulfilment of the Convention . . . [and] the jurisdiction of the Court *does not extend* to *allegations of violation of the customary international law on genocide*" (Judgment, para. 87; emphasis added) so that "Article IX *does not afford a basis* on which the Court can exercise jurisdiction over a *dispute concerning alleged violation of the customary international law obligations regarding genocide*" (*ibid.*, para. 88; emphasis added).

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2. Was Genocide Committed in Croatia?

107. The essence of the crime of genocide lies in destruction, in whole or in part, of a national, ethnical, racial or religious group as such.

108. A genocidal act can exist only under conditions defined by the body of law established by the Convention. Acts enumerated in Article II, in subparagraphs *(a)* to *(e)*, are not genocidal acts in themselves, but only the physical or material expression of specific, genocidal intent. In the absence of a direct *nexus* with genocidal intent, acts enumerated in Article II of the Convention are simply punishable acts falling within the purview of other crimes, *exempli causa* war crimes or crimes against humanity.

109. Genocide as a distinct crime is characterized by the subjective element — intent to destroy a national, ethnical, racial and religious group as such — an element which represents the *differentia specifica* distinguishing genocide from other international crimes with which it shares substantially the same objective element 41. In the absence of that intent, whatever the degree of atrocity of an act and however similar it might be to the acts referred to in the Convention, that act can still not be called genocide. (*Official Records of the General Assembly, Third Session, Part I, Sixth Committee*, 69th meeting.)

110. It appears that four elements are distinguishable within genocidal intent: *(a)* the degree of the intent; *(b)* destruction; *(c)* a national, ethnical, racial or religious group; *(d)* in whole or in part. Although separate, the four elements make up a legal whole characterizing in their cumulative effect, genocidal intent as the subjective element of the crime of genocide. The absence of any of them disqualifies the intent from being genocidal in nature. As a legal unity, these elements, taken *in corpore*, demonstrate that genocidal intent is not merely something added to physical acts capable of destroying a group of people. It is an integral, permeating quality of these acts taken individually, a quality that transforms them from simple punishable acts into genocidal acts. In other words, such intent is a qualitative feature of genocide distinguishing it from all other crimes, indeed its constituent element *stricto sensu*.

The ICTR followed the same pattern of reasoning as that described above.

In the *Kanyarukiga* case, the Trial Chamber stated, *inter alia*, that

> "[t]o support a conviction for genocide, the bodily or mental harm inflicted on members of a protected group must be of such a serious nature as to threaten the destruction of the group in whole or in part" (*Kanyarukiga*, ICTR-02-78-T, Trial Judgment, 1 November 2010, p. 158, para. 637; see also *Ndahimana*, ICTR-01-68-T, Trial Judgment, 30 December 2011, p. 173, para. 805).

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111. In the case at hand, so called quantitative criteria in terms of the sheer size of the group and its homogenous numerical composition seems applicable, since no Party adduced evidence suggesting application of the qualitative criteria contemplating the destruction of the elite of the leadership of the group.

As a rule, the quantitative criteria is presented in the form of a "substantial" part which means "a large majority of the group in question" (*Jelisić*, IT-95-10, Trial Judgment, 14 December 1999, p. 26, para. 82). The ICTY emphasizes that:

> "The numeric size of the targeted part of the group is the necessary and important starting-point. The number of individuals targeted should be evaluated not only in absolute terms, but also in relation to the overall size of the entire group." (*Krstić*, IT-98-33-A, Appeal Judgment, 19 April 2004, para. 12; see also, *Brđanin*, IT-99-36-T, Trial Judgment, 1 September 2004, para. 702; *Tolomir*, IT-05-88/2-T, Trial Judgment, 12 December 2012, para. 749; *Blagojević and Jokić*, IT-02-60-T, Trial Judgment, 17 January 2005, para. 668.)

112. Croatia claims that there were over 12,500 victims killed (CR 2014/6, p. 45, para. 13). It should be noted that evidence concerning ethnic structure of victims as well as numbers of victims killed in the capacity of members of military units in military operations is lacking. Having in mind the object of destruction that characterizes the crime of genocide, its specific collective character, such evidence would be of crucial importance. The genocide is directed against a number of individuals as a group or at them in their collective capacity not *ad personam* as such.

The International Law Commission stated that:

> "The prohibited (genocidal) act must be committed against an individual because of his membership in a particular group and as an incremental step in the overall objective of destroying the group . . . the intention must be to destroy the group 'as such', meaning as a separate and distinct entity, and not merely some individuals because of their membership in a particular group." (Official Records of the General Assembly, Fifty-First Session, Supplement No. 10, United Nations doc. A/51/10/1556, p. 88.)

112.1. Even if, *arguendo qua non*, all the victims concerned were killed because of the membership in the Croat national or ethnic group, the number of 12,500 victims could hardly represent a "substantial part" of the Croat national and ethnic group. In the relevant period, according to the data from the census in Croatia in 1991, there 3,736,356 persons of Croatian nationality (http://bs.wikipedia.org/wiki/Popis_stanovni%C5%A1tva_u_Hrvatskoj_1991).

112.2. Of relevance as regards the element of *dolus specialis* is the fact that the Chief of Staff of the First Military Region, operating in Vukovar

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and, generally, Eastern Slavonia, was General Andrije Silić, a Croat (later appointed as the Inspector-General of the armed forces, JNA) (http://www.dnevno.hr/vijesti/hrvatska/79367-popis-generala-jna-iz-hrvatske-samo-sedam-ih-se-pridruzilo-hv-u.html).

112.3. General Anton Tus, Croat, was Head of the Yugoslavian air force during the battle for Vukovar. As *The Croatian Weekly for Culture, Science and Social Issues* wrote he "just twenty days before the fall of Vukovar has changed the way" and was promoted to the First Chief of the General Staff of the Croatian armed forces (http://www.hrvatski-fokus.hr/index.php/hrvatska/3812-anton-tus-sada-popuje-a-samo-20-dana-prije-pada-vukovara-odabrao-je-stranu).

It should be born in mind that in the Croatian armed formations were between ten and twenty thousand Serbs (http://www.jutarnji.hr/davor-butkovic--i-srbi-su-branili-hrvatsku/901195/).

113. Serbia, for its part, claims that:

(i) the overall number of Serbs victims is 6,381 (Counter-Memorial, Anns., Vol. V, Ann. 66, List of Serbs victims on the territory of Croatia 1990-1998; Statement of witness-expert Savo Strbac (4.2.2.); Updated list of Serb victims, publicly available on the website of D.I.C. Veritas (http://www.veritas.org.rs/srpske-zrtve-rata-i-poraca-na-podrucju-hrvatske-i-bivse-rsk-1990-1998-godine/spisak-nestalih/);

(ii) victims killed during and after "Operation Storm": 1,719 (CR 2014/13, p. 15, para. 16, (Obradović) referring to the Veritas publicly available list of the victims of Operation Storm (http://www.veritas.org.rs/wp-content/uploads/2014/02/Oluja-direktne-zrtve-rev2014.pdf).

According to the data from the census in Croatia in 1991, on its territory there lived 581,663 persons of the Serbian national and ethnic group. It appears that the number of individuals killed in relation to the actual size of the Serbian national and ethnic group in Croatia, does not satisfy the "substantial part" standard.

As regards "Operation Storm" it seems to be rather "ethnic cleansing" than genocide in terms of the Genocide Convention.

As stated by the Court in the *Bosnian Genocide* case:

> "Neither the intent, as a matter of policy, to render an area 'ethnically homogenous', nor the operations that may be carried out to implement such policy, can *as such* be designated as genocide: the intent that characterizes genocide is 'to destroy, in whole or in part' a particular group, and deportation or displacement of the members of a group, even if effected by force, is not necessarily equivalent to destruction of that group, nor is such destruction

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an automatic consequence of the displacement." (2007 Judgment, p. 123, para. 190.)

114. In conclusion, it seems indisputable that terrible atrocities and crimes were committed by both sides in the tragic civil war in Croatia, but, in the light of the relevant rules of the Genocide Convention, they cannot be characterized as the crime of genocide. They rather fall within the purview of war crimes or crimes against humanity as evidenced, *inter alia*, by the jurisprudence of the ICTY.

3. Issue of Incitement to Genocide

115. The matter on which I respectfully disagree concerns incitement to genocide. In my opinion, the relationship of the regime of President Tudjman to the Ustasha ideology and the legacy of the Nezavisna Država Hrvatska (NDH), followed by numerous acts and omissions, justifies finding that direct and implicit incitement to genocide was committed (*Akayesu*, ICTR-96-4-T, Trial Judgment, 2 September 1998, para. 557).

3.1. Issue of incitement to genocide as inchoate crime

3.2. Incitement in terms of Article III (c) *of the Convention*

116. Under the Convention, direct and public incitement is defined as a specific punishable act by Article III *(c)*. With respect to such punishable act, three elements are of relevance: incitement, direct and public.

117. In common law systems, incitement is defined as encouraging or persuading another to commit an offence (A. Ashworth, *Principles of Criminal Law*, 1995, p. 462). Threats and other forms of pressure also constitute a form of incitement *(ibid.)*. Civil law systems regard public and direct incitement in the following terms:

> "Anyone, who whether through speeches, shouting or threats uttered in public places or at public gatherings or through the sale or dissemination, offer for sale or display of written material, printed matter, drawings, sketches, paintings, emblems, images or any other written or spoken medium or image in public places or at public gatherings, or through the public display of placards or posters, or through any other means of audio-visual communication, having directly provoked the perpetrators(s) to commit a crime or misdemeanour, shall be punished as an accomplice to such a crime or misdemeanour." (French Penal Code, Law No. 72-546 of 1 July 1972 and Law No. 85-1317 of 13 December 1985 (unofficial translation) cited in *Akayesu*, ICTR-96-4-T, Trial Judgment, 2 September 1998, para. 555, fn. 124.)

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118. In the draft Genocide Convention formulated by the *Ad hoc* Committee, public incitement is defined as incitement in the shape of

> "'public speeches or . . . the press . . . the radio, the cinema or other ways of reaching the public' while incitement was considered private when 'conducted through conversations, private meetings or messages'" (Commentary on Articles Adopted by the Committee, United Nations doc. E/AC 25W.I, 27 April 1948, p. 2).

The International Law Commission characterized incitement as public where it is directed at "a number of individuals in a public place or to members of the general public at large by such means as the mass media, for example radio or television" *(ibid.)*.

Only public incitement has been interpreted by the international courts as being an inchoate offence. Public incitement is dangerous because it "leads to the creation of an atmosphere of hatred and xenophobia and entails the exertion of influence on people's minds" (W. K. Timmermann, "Incitement in International Criminal Law", *International Review of the Red Cross*, Vol. 88, December 2006, p. 825).

In the jurisprudence of the ICTR, reference has repeatedly been made to the creation of the particular state of mind in the audience that would induce its members to commit genocidal acts.

119. Direct incitement seems to have been defined in the *Akayesu* case. The tribunal noted that direct implies: "that the incitement assume a direct form and specifically provoke another to engage in a criminal act, and that more than mere vague and indirect suggestion goes to constitute direct incitement" (*Akayesu*, ICTR-96-4-T, Trial Judgment, 2 September 1998, para. 557). And, further that

> "the direct element of incitement should be viewed in the light of its cultural and linguistic content . . . The Chamber further recalls that incitement may be direct, and nonetheless implicit. Thus, at the time the Convention on Genocide was being drafted, the Polish delegate observed that it was sufficient to play skilfully on mob psychology by casting suspicion on certain groups, by insinuating that they were responsible for economic or other difficulties in order to create an atmosphere favourable to the perpetration of the crime." *(Ibid.)*

In determining whether certain statements are likely to incite genocide, the context is extremely important. The ICTR stated, *inter alia*, that

> "the meaning of a message can be intrinsically linked to the context in which it *[sic]* is formulated. In the opinion of the Appeals Chamber, the Trial Chamber was correct in concluding that it was appropriate to consider the potential impact in context — notably, how the message would be understood by its intended audience — in deter-

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> mining whether it constituted direct and public incitement to commit genocide." (*Nahimana et al.*, ICTR-99-52-A, Appeal Judgment, 28 November 2007, para. 711.)

The principal consideration is the meaning of the word use in the specific context:

> "It does not matter that the message may appear ambiguous to another audience or in another context. On the other hand, if the discourse is still ambiguous even when considered in its context, it cannot be found beyond reasonable doubt to constitute direct and public incitement to commit genocide." (*Ibid.*, para. 701.)

There is, of course, a difference where such statements are made by officials: "these will be more likely in actual fact to promote genocide than similar statements made by individuals who do not command the same degree of authority . . . Furthermore, such statements may provide evidence of an actual desire to promote genocide." (T. Mendel, *Study on International Standards relating to Incitement to Genocide or Racial Hatred*, for the United Nations Special Adviser on the Prevention of Genocide, April 2006, pp. 64-65.)

3.3. Ustasha ideology as a genocidal one

120. Two special features characterize the Ustasha ideology in this particular context. *Primo*, the teaching about the ethnic descent of the Croats and, *secundo*, the perception of Croatia as a State. In the ideology of the Ustasha movement these two features are organically, inseparably linked.

121. In contrast to the teaching about the Slavic origin of the Croats, advocated by progressive Croatian intellectuals and politicians at the beginning of the nineteenth century (see e.g., A. Trumbić, *Hrvatska seljačka stranka* (Croatian Peasant Party)), the proponents of the Ustasha ideology maintained that the Croats were of Aryan descent.

As observed by the well-known Croatian historian Nevenko Bartulin, Professor at the Faculty of Philosophy in Split, in his doctoral dissertation entitled "The ideology of nation and race: the Croatian Ustasha regime and its policies toward minorities in the Independent State of Croatia, 1941-1945", defended at the University of New South Wales (2006), the Ustasha teaching about the Croatian ethnicity was decisively influenced by I. von Suedland (1874-1933) and by Professor Milan Sufflay (1879-1931).

Suedland, which is, in fact, the assumed name of the Croatian historian and sociologist Ivo Pilar, taught that

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> "the Croats had preserved the 'Nordic-Aryan' heritage of their Slavic ancestors far more than the Serbs, who had interbred, to a large degree, with the Balkan-Romanic Vlachs . . . The Serbs . . . had apparently inherited their predominant physical features of black hair, dark eyes and dark skin from the Vlachs and Pilar thought that these traits were, in turn, probably the result of Vlach admixture with Gypsies." (N. Bartulin, *op. cit.*, pp. 176-177.)

Physiognomic differences between the Croats and the Serbs are accompanied, according to Pilar, by the essential differences in the social role of these two peoples. He considers

> "the Vlachs, as the core of the Serbian people, *to be detriment to the social harmony and progress of States in which they lived.* They were a race of destructive pastoral nomads and bandits . . . that the Serbs were accomplished traders . . . In contrast, the Croats were characterized by the values and virtues of their nobility, which was the only hereditary aristocracy in the Balkans . . ." (*Ibid.*, pp. 177-178; emphasis added.)

Such a qualification is further extended to the present-day Greeks whom he sees as "the descendants of Slavs and Albanians" and, as such, "worthless people of mixed bloods 'who didn't have the material and moral strength' — to inherit the mantle of successor to the Roman Empire" (*ibid.*, p. 178).

It seems that Sufflay was primarily concerned with vindicating chauvinism, which necessarily derives from the teaching about the Croats as a superior Aryan race. Croatian nationalism, according to him, is absolutely positive because it possesses "higher ethical motives, namely, defence of Western civilization" (M. Sufflay, *Characteristics of the Croatian Nation and Croatia in the Light of World History and Politics: Twelve Essays*, reprint, Nova hrvatska povjesnica, Zagreb, 1999, pp. 40-41). As such, it is not a local nationalism, but rather a "loyal service to the White West" *(ibid.)*.

122. The teaching about the Aryan descent of Croats, their racial superiority, necessarily bore upon the Ustasha concept of the Croatian State. The leader of the Ustasha movement, Ante Pavelić, in the document entitled "The Principles of the Ustasha Movement", published in 1933, mentioned 17 principles which "became the dogma for Ustasha members . . . and form the core around which the legal-constitutional system (if one could call it that) of the Independent State of Croatia would be based" (N. Bartulin, *op. cit.*, p. 164).

A certain number of these principles are of special relevance. The first principle is that "the Croatian nation is a self-contained ethnic unit, it is a nation in its own right and from an ethnic perspective is not identical with any other nation nor is it a part of, or a tribe of, any other nation". The seventh principle states that the Croats maintained their State

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throughout the centuries up until the end of the First World War and that they therefore have the right to "restore their own Croatian State on their whole ethnic and historic territory" with the right to use all methods (principle 8).

Principle 11 says that "no one who is not by descent and blood a member of the Croatian nation can decide on Croatian State and national matters". Principle 14, on the other hand, provides that an individual has no specific rights as he/she only counts as a part of the whole, meaning "nation and State" (see Victor Novak, *Magnum crimen*, 2011, pp. 723-724).

The Croatian State, according to Pavelić, ought to be based on the theory of historic statehood, while denying the right of peoples to self-determination. At the meeting of the HSP youth of September 1928 held in Zagreb, Pavelić explicitly pointed out that the Croats do not need President Wilson's right to self-determination because "we have our historic State right and according to that right we seek that Croatia becomes free" (Jareb, *Political Recollections and Work of Dr. Branimir Jelić*, Cleveland, Mirko Samija, 1982, p. 251; N. Bartulin, *op. cit.*, pp. 165-166). The theory of the historic State right, as the basis of independent Croatia, gave rise to Ustasha-oriented lawyers viewing the State as a notion which consists of "the territory, the nation and State right" (for example, Professor Fran Milobar, Jareb, *op. cit.*, p. 253; N. Bartulin, *op. cit.*, p. 156).

The meaning of the historical right title is that the Croats "had exclusive rights to the territory that encompassed the NDH, despite the sizeable number of non-Croats on this territory" (*ibid.*, p. 275).

123. As far as internal organization is concerned, independent Croatia, in the Ustasha ideological vision, ought to be founded on the "Führerprinzip", because "all authorities in the NDH were answerable to the 'Poglavnik', while he answered only to 'history and his own conscience'" (*ibid.*, p. 279; Slaven Pavlić, "Tko je tko in NDH" ("Who's Who in the Independent State of Croatia"), *Hrvatska 1941-1945*, Zagreb, Minerva, 1997, p. 477). The reception of the model of government of Nazi Germany was explained as being due to the deficiencies of the democratic principle which "almost ruined the world by abolishing the distinction between good and evil, in other words, democracy was held responsible for moral relativization" (D. Zanko, "Etička osnova ustaštva" ("The ethnic basis of the Ustasha ideology"), *Ustaški godišnjak 1943 (Ustasha Yearbook 1943)*, p. 187).

124. It seems clear that the Croatian State, based on the Ustasha ideology, rested on the logic of genocide. It was a copied Nazi ideology *ratione loci* limited to parts of the then Kingdom of Yugoslavia.

Only on the basis of a genocidal paradigm was it possible for the Ustasha ideology to create an ethnically clean State of superior Aryan people, with the Serbs and the Jews who lived in the same space being regarded as socially destructive and a "detriment to the social harmony and prog-

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ress of States in which they lived". Without that paradigm, the creation of an Ustasha Croatian State was simply not possible:

> "The Ustasha genocide was underlined by two principal aims. One was to establish a Croatian nation-State for the first time in modern history, and secondly, to simultaneously 'remove the ethnic, racial and religious minorities that the Ustashe considered both alien and a threat to the organic unity of the Croatian nation'." (N. Bartulin, *op. cit.*, p. 11.)

These two aims are not only organically linked, but, moreover, the realization of the first aim necessarily implies the removal of national groups which do not fit in the matrix of the Aryan Croatian nation. If the non-Croatian ethnic and religious groups are "both alien and a threat to the organic unity of the Croatian nation" why should they at all be preserved? (in other words, the obliteration of such groups can be inferred from the very essence of the Ustasha ideology). As far as the Serbs are concerned, genocidal logic was explained. As academician Viktor Novak, a leading Croatian historian after the Second World War noted, the main Ustasha ideologist and No. 2 of the Independent State of Croatia, Mile Budak, set out, at the big assembly in Gospić, the genocidal formula in the following words: "We will kill one part of the Serbs, will dislocate the other part and will convert the rest into Catholic religion and thus have them assimilated into the Croats" (quoted by Viktor Novak, *Magnum Crimen*, Gambit, Jagodina, 2011, pp. 786-787).

The Ustasha ideology is, in its substance, a genocidal plan to destroy the Serb national group in Croatia and parts of the territory of the Kingdom of Yugoslavia, which, in the Ustasha perception, constitute parts of Greater Croatia.

3.4. The establishment of the NDH — the Ustasha ideology becomes State policy

125. The Ustasha State, the so-called Independent State of Croatia, was formally proclaimed in Zagreb on 10 April 1941 in Pavelićs name and by the "will of our ally" (i.e., Germany) comprised territories of historic Croatia with Međumurje, Slavonia, Dalmatia, Bosnia and Herzegovina and the big part of Vojvodina (Fikreta Jelić-Butić, *Ustaše i Nezavisna Država Hrvatska 1941-1945 (Ustasha and the Independent State of Croatia)*, Sveučilišna naklada Liber, Zagreb, 1977, p. 67).

126. Following the proclamation of the NDH a number of measures were taken with a view to the realization of the Ustasha ideology in relation to Serbs, Jews and Roma. These measures can be divided into two groups. One group of measures comprised legislative measures, whereas the other group were institutional measures, meaning the creation of structures for their implementation. These two kinds of interrelated measures were supposed to create a "clean Croatian State space" that was to

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enable the existence of a "clean Croatian nation". The vital condition for achieving this aim was the "extermination" primarily of Serbs and Jews who were declared "the greatest enemies of the Croatian people", consequently "there is no place for them in Croatia" (Fikreta Jelić-Butić, *op. cit.*, p. 158).

127. The establishment of concentration camps took place in two phases.

In the first phase the so-called "reception camps" were established, i.e., places of temporary stay of the arrested, mainly Serbs, from which they were deported to concentration camps (*ibid.*, p. 185). The arrested persons, as formulated in the "Legal provision on the sending of objectionable and dangerous persons to forcible stay in reception camps and forced-labour camps", were "objectionable persons who were a threat to the public order and security or persons which could endanger peace and calm of the Croatian people or the achievements of the liberation struggle of the Croatian Ustasha Movement" (*Narodne novine*, 26 November 1941).

The second phase was the setting up of concentration camps or death camps. There were a considerable number of death camps in Ustasha Croatia (Mirko Veršen, *Ustasha Camps*, Zagreb, 1966, pp. 29-36). The establishment of these camps took place soon after the proclamation of the NDH and, in fact, they were the first concentration camps in Europe, set up before the concentration camps in Nazi Germany.

128. The accurate number of killed persons in these camps has not been established. The reason for this was by and large the lack of will on the part of the authorities after the end of the Second World War to establish precisely and to make known the number of perished people and thus avoid triggering inter-ethnic differences and frictions. The slogan "Brotherhood and Unity" of "Yugoslav" peoples proclaimed and strictly adhered to by J. B. Tito, who saw it as the condition of the survival of Yugoslavia — quite rightly as it turned out — was not to be impaired in any way whatsoever.

However, it seems indisputable that several hundred thousands of people were killed in Jasenovac. According to the data of the Croatian Regional Commission for the establishment of crimes committed by the occupiers and their helpers, it is reckoned that the number of victims ranges between 500,000-600,000 (Fikreta Jelić-Butić, *op. cit.*, p. 187). Encyclopaedia Britannica, in the article entitled "Fascism", states that the Croatian fascists in the German puppet state of Croatia, "in a campaign of genocide, killed about 250,000 Serbs in Croatia and 40,000 Jews" (http://www.britannica.com/EBchecked/topic/202210/fascism/219386/Sexism-and-misogyny).

A number of sources assert that 600,000 people, including Serbs (the overwhelming majority), Jews and Roma were murdered at Jasenovac (http://www.holocaustresearchproject.org/othercamps/jasenovac.html; *Jasenovac: Proceedings of the First International Conference and Exhibit*

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on the Jasenovac Concentration Camps, 29-31 October 1997, Kingsborough Community College of the City University of New York, Dallas Publishing, p. 20; Robert Rozett and Shmuel Spector, *Encyclopedia of the Holocaust*, p. 280; http://www.museumoffamilyhistory.com/ce/cc/nf-camps-jasenovac-01.htm; Padraic Kenney, *The Burdens of Freedom: Eastern Europe since 1989*, p. 94; http://www.balkanstudies.org/blog/holocaust-deniers-us-state-department; David Birnbaum, *Jews, Church and Civilization*, Vol. VI; https://books.google.rs/books?id=SDW5owdrHbIC&pg=PA165&lpg=PA165&dq=Jasenovac+600+000+murdered&source=bl&ots=3vliR5EeiO&sig=Bco48GL6ePjbfwpmFSn7k6eZb9g&hl=en&sa=X&ei=Mo3VZbMLajhywOh5oGAAQ&ved=0CCIQ6AEwAjgU#v=onepage&q=Jasenovac%20600%20000%20murdered&f=false; http://www.ag-friedensforschung.de/regionen/jugoslawien/jasenovac.html; http:// www.holocaustchronicle.org/staticpages/414.html).

On the occasion of the International Day of Holocaust Remembrance, the Croatian Parliament held a meeting which included a programme suited to the occasion on 27 January 2014. In addition, to a good number of officials and public figures, the commemoration was also attended by representatives of religious communities, as well as by the Croatian President Ivo Josipović and Prime Minister Zoran Milanović who, in addition to the Speaker of Parliament, Josip Leko, also delivered a speech:

> "In his speech, Prime Minister Zoran Milanović observed that this should be an opportunity for political speeches rather than commemorative ones 'in a low sense of the word', because what happened 70 years ago is an everlasting story about the fight between good and evil, between a moral individual and an immoral society. He reminded those present of the fact that anti-Semitism did not appear overnight; that everything that was said about the Jews before the Holocaust could be considered as hatred speech.
>
> He also recalled the fact that horrible things had happened in Croatia in 1941, not only to the Jews but also to the Serbs before them.
>
> Until April 1941 there were no mass executions in Europe on account of different religious belief or racial origins. This situation changed in April of that year following the establishment of the Independent State of Croatia in which, within a few weeks, mass killings of people of different religions and nationalities began. The mass executions of Serbs started first and were soon followed by the killings of Jews. It was only at the end of June 1941 that mass executions started in East Europe, primarily the executions of Jews. That was not yet the time of concentration camps. That was a time of mass killings with firearms which, as it soon turned out, could not satisfy the high technological standards of the executioners. We all know what followed soon after."

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In his speech, the Speaker of the Parliament of Croatia, Josip Leko, pointed out that:

> "One could say that Nazi brutalities began already in the first days of Hitler's dictatorship and continued twelve full years; however, the real proportions of that unprecedented, planned in detail, and systematically carried out policy of annihilation became visible only at the end of the Second World War following the access of the Allied troops to the 'death factories', the largest of which was the concentration camp of Auschwitz-Birkenau. One of these frightening pages of the past, the darkest, most inhumane pages of the past, is the death camp of Jasenovac created on the model of the notorious Nazi concentration camps."

3.5. President Tudjman's Croatia and the legacy of the NDH

129. In the construction of Croatia, the legacy of the NDH could not be left aside because that legacy, as was repeatedly pointed out in unison and almost ritually, is a part of the "thousand-year-old national independence and the existence of the State of the Croatian people". Moreover, although by its emergence and nature, it was a puppet State, Pavelić's NDH was in effect the first Croatian State since the year 1102, when the medieval Croatian State came under the rule of Hungary.

It appears that strong elements of the legacy of the NDH were not alien to the Croatian State in the period 1990-1995.

130. President Tudjman clearly determined his perception of the Croatian State. His statements are of special importance because he was the unquestionable political authority during his lifetime. He was regarded as "the Messiah of the Croatian people". Misha Glenny notes that Tudjman, at his inauguration as the President, was introduced with these words: "On this day (Palm Sunday) Christ triumphant came to Jerusalem. He was greeted as a messiah. Today our capital is the new Jerusalem. Franjo Tudjman has come to his people." (M. Glenny, *The Fall of Yugoslavia*, 1992.)

For Tudjman, the Croatian State implies an ethnic State based on historical right. In that regard, even genocide in history had some positive consequences, such as

> "[bringing] about ethnic homogenization of some peoples, leading to more harmony in the national composition of the population and State borders of individual countries, thus also having possible positive impact on developments in the future, in the sense of fewer reasons of fresh violence and pretexts for the outbreak of new conflicts and international friction" (F. Tudjman, *Wastelands in Historical Reality*, Nakladni Zavod Matiće Hrvatska, Zagreb, p. 163).

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Hence, even Ustasha Croatia was "not only a quisling organization and a fascist crime, but was also an expression of the Croatian nation's historic desire for an independent homeland" (Z. Silber and A. Little, *Yugoslavia: Death of a Nation*, 1997, pp. 82-87). The last American Ambassador to the SFRY, Warren Zimmermann, portrayed President Tudjman's relations with Serbs in the following way:

> "Mike Einik and I raised with him or his aides every piece of information that came to us about abuses of the civil rights of Serbs, in hopes that his Government would crack down on the offences and bring the offenders to book. With a few individual exceptions, he was unresponsive. I urged him to visit Jasenovac, the notorious World War II Croatian concentration camp where tens of thousands of Serbs and other [victims] had perished, as Willy Brandt had gone to Yad Vashem in Israel in an act of contrition for the Holocaust. He refused . . .
>
> But toward Croatia's Serbian population he rejected any gesture that smacked of reconciliation, co-operation, or healing . . .
>
> Tudjman always seemed to me on the brink of becoming a slightly ridiculous operetta figure. But this impression was contradicted by the ruthlessness with which he pursued Croatian interests as he saw them." (W. Zimmermann, *Origins of a Catastrophe: Yugoslavia and Its Destroyers — America's Last Ambassador Tells What Happened and Why*, 1996, pp. 76-77.)

130.1. The meaning of President Tudjman's policy did not go unnoticed. The American expert in geopolitics, Samuel Huntington, also warned that the Ustasha acts of violence were the key factor which prompted the reaction of the Serbian minority and thus predetermined the course of events during the disintegration of the SFRY. "The conflicts between Serbs and Croats, for example, cannot be attributed to demography, but only partly to history, because these nations lived relatively peacefully, one beside the other, until the Croatian Ustasha killed Serbs in the Second World War", says Huntington. The relationship characterized by a lack of tolerance towards Serbs enjoyed at that time the support of an important ally of the Ustasha NDH — Nazi Germany. During the meeting between Ante Pavelić and Adolf Hitler, in connection with the "Serbian question", Hitler pronounced a sentence which was probably prepared in advance and, hence, particularly stressed: "If the Croatian State desires to be really strong, it will have to pursue nationally intolerant policy for 50 years, because excessive tolerance in these questions causes only damage." (S. P. Huntington, *The Clash of Civilizations*, 1996, p. 261.)

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130.2. The attention was brought to all these facts in 2009 by the Slovene State Council, the other Chamber of the Slovene Parliament, which even adopted a separate statement in connection with the cherishing of the attainments of the NDH in the neighbouring country, which provoked numerous strong reactions. Namely, in the course of the debate concerning the ratification of the accession of Croatia to the NATO Alliance, the Slovene State Council adopted, at its 13th meeting, a statement to the effect that Croatia should be aware of responsibility for the respect for the basic values expected of NATO membership. As an aggravating circumstance for the accession to NATO membership, the neighbouring country was reproached for "the attitude of Croatia towards NDH tradition", in view of the fact that "the NDH is to this day a constitutive part of the Croatian national conscience" ("Hrvaška: Gre za škandalozno obtozbo", 24ur, 24 January 2009, dostupno preko: http://www.24ur.com/novice/svet/hrvaska-gre-za-skandalozno-obtozbo.html).

130.3. The mayor of Split, the largest city in Dalmatia, reacted in connection with the meeting organized in Split on 11 January 2014 by the second-largest political party in Croatia, the HDZ (Croatian Democratic Union), founded by President Tudjman, on the occasion of the celebration of its 24th anniversary.

Mayor Baldasar, *inter alia*, says:

> "The messages uttered in Split take us, as a society, several steps back and do not contribute in any way whatsoever to constructive solutions aimed at a better present and a better future of citizens who are preoccupied with quite concrete problems; problems for which not a single solution has been offered by Mr. Karamarko and others. The Ustasha greetings at public gatherings, hatred speech and manipulation of historical facts do not reflect patriotism nor care for the well-being of Croatia and its citizens. Therefore, I wish that the Split HDZ, as well as the HDZ as a whole, celebrate the next anniversary in a more dignified and more decent way befitting to a political party calling itself democratic." (http://www.dnevno.hr/vijesti/hrvatska/111419-baldasar-porucio-hadezeovcima-iduci-put-k, 12 January 2014.)

131. Special value in that regard possesses statements of high officials and leading politicians in Croatia as regards President Tudjman's policy (*Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Merits, Judgment, I.C.J. Reports 1986*, p. 41, paras. 64-65, p. 43, para. 70, and p. 47, para. 78; *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Uganda), Judgment, I.C.J. Reports 2005*, pp. 206-207, para. 78).

131.1. Ivica Račan, former leader of the SDP (Party of Democratic Reform), now the ruling party of Croatia, and Prime Minister of Croatia from 2000-2003, characterized Tudjman's Party, HDZ (Croatian Demo-

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cratic Union), as the "party of dangerous intentions" because it "invokes the ghost of the NDH". Račan's endeavour to draw attention to the unacceptability of resurrection of the achievements of the NDH did not fall on fertile ground; the majority of the Croatian public, at least judging by the great support enjoyed by the HDZ for many years, did not reject Tudjman's pronouncements nor did it recognize anything negative in his ideology (http://www.hvatski-fokus.hr/index-php?option=com-content&view=article&id=1556:prije-dvadeset-godina-ivica-raan-hdz-je-stranka-opasnih-namjera-10&catid=22:feljtoni&itemd=46).

132. The distinguished Croatian journalist and publisher Slavko Goldstein, a founder of the Croatian Social Liberal Party and the party's first leader, said that "the Ustasha regime was an abortive semblance of a legal State, a poorly organized combination of legality and wild chaos". He further said that "[f]or understandable reasons, in the historical memory of the Serbian people, the Ustasha NDH has never been and will never be anything but a fascist crime, slaughterhouse of the Serbs in Croatia and Bosnia and Herzegovina" (Slavko Goldstein, *1941: Godina koja se vraća (1941: The Year that Keeps Returning)*, book review available at: www.nybooks.com/books/imprints/collections/1941-the-year-that-keeps-returning).

133. The first Minister of the Interior of the Republic of Croatia, and one of the closest associated to President Tudjman, Josip Boljkovac, claims "the Ustasha ideology is still alive in Croatia". He claims that this "must be a serious warning" and that it is "tragic that the Ustasha ideology is coming back to Croatia; that members of the SKOJ (Union of Communist Youth of Yugoslavia), organizers of the 1941 uprising against fascism, are being tried" ("Boljkovac: Ustastvo I dalje zivu u Hrvatskoj", *Glas Istre*, 6 January 2014, dostupno preko: http://www.glasistre.hr/vijesti/hrvatska/boljkovac-ustasvo-i-dalje-zivu-u-hrvatskoj-436319).

The realization of the idea of an ethnically clean Croatia does not tolerate restrictions of any kind, tacitly according to the then President of Croatia, Stjepan Mesić. What is essential is to achieve the aim. In a speech to Croatian expatriates in Australia, delivered in the early 1990s, he says:

> "You see, in the Second World War, the Croats won twice and we have no reason to apologize to anyone. What they ask of the Croats the whole time, 'Go kneel in Jasenovac, kneel here . . .' We don't have to kneel in front of anyone for anything! We won twice and all the others only once. We won on 10 April when the Axis Powers recognized Croatia as a State and we won because we sat after the war, again with the winners, at the winning table." ("Croatian leader's speech glorifying World War Two pro-Nazi State widely condemned", Text of Report in English by Croatian news agency HINA, BBC Monitoring Europe, 10 December 2006, a video of the speech in the orig-

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inal Serbo-Croatian can be viewed at http://emperor.vwh.net/croatia/MesicVideo.wmv)[2].

3.6. State symbols and other acts

134. Every State autonomously determines its symbols, i.e., signs by which it is recognized. The choice of State symbols is a matter of option, a strictly internal domain of the State.

Under the December 1990 amendments to the Constitution, as a new State symbol was adopted the HDZ party flag with šahovnica, a red and white chequerboard pattern "[that] was . . . employed by the Ustasha regime and which the Croatian Serbs considered as 'footprint of the Ustashe'" (Marcus Tanner, *Croatia: A Nation Forged in War*, 1997, p. 223). To "many Jews, Serbs and others, it is a symbol almost as hateful as the swastika" (S. Kinzer, "Pro-Nazi Rulers' Legacy Still Lingers for Croatia", *The New York Times*, 31 October 1993). Tudjman's régime "also renamed the police into 'redarstvo' which had Ustasha connotations, renamed streets and public places after World War II generals" (C. Bennett, *Yugoslavia's Bloody Collapse: Causes, Course and Consequences*, 1995, p. 141).

Furthermore, at President Tudjman's proposal, the Croatian parliament adopted a

> "new currency and call[ed] it *kuna*, which was the name of the national currency of the Ustasha period. A prominent Croatian Jew, Slavko Goldstein, wrote in a newspaper's commentary that the decision 'will awaken very deep feelings of antagonism in a not-small

[2] As far as the reaction to this statement of President Mesić, Jared Israel, in *Encyclopedia of the Holocaust* states:

> "Despite the political significance of this video, both in terms of understanding the Serbian-Croatian conflict over the past sixteen years and judging the sincerity of Croatian President Mesić's current claim to abhor Ustasha politics, and despite the fact that three leading Croatian TV newspeople were suspended for broadcasting the video and subsequently reinstated, following an uproar in Croatia, despite these highly newsworthy events, and despite the fact that some of the main international news agencies — including Associated Press, Agence France Presse, ANSA and BBC Monitoring — all covered this story, nevertheless, out of the thousands of English, French, German, Italian, Spanish and Dutch newspapers and TV news stations archived by the Lexis-Nexis media search engine, we could find only one — the Dutch newspaper, *Dagblad van het Noorden* — that even mentioned the scandal." (http://de-construct.net/e-zine/?p=361)

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portion of the population for whom these associations are extremely painful'." (C. Bennett, *op. cit.*)

The names of streets and institutions were changed, i.e., instead of the names from the period of Yugoslavia, newly-given names are associated with Ustasha Croatia. Immediately after Tudjman's coming to power, an elementary school in Zagreb was renamed after Mile Budak, Minister of Justice under the Ustasha State, the main Ustasha ideologist and author of the formula for the solution of the Serb question. Budak fled from Zagreb on 6 May 1945, but was handed over to Tito's Yugoslavia by the English authorities on 18 May 1945. As a war criminal Budak was sentenced to death. As can be seen from the decision of the Croatian Minister of Public Administration, Arsen Banko, about the removal of the "names of streets given in honour of a senior Ustasha official", there still remain streets named after Mile Budak in ten cities and local districts (*Danas*, Croatian edition, 3 January 2014). The decision met with opposition, so that the final decision will be made by the competent municipal court. It is interesting to note that the Association for the Promotion of Local Government and Self-Rule requested already in April 2011 that the street in Slavonski Brod named after Dr. Mile Budak be renamed; the City Council, however, refused with the explanation that the change would entail considerable financial costs.

135. Upon Tudjman's rise to power, a plaque in memory of Mile Budak was raised in Sveti Rok, whereas another plaque in memory of Juraj Francetić, Commander of the notorious Black Legion and Ustasha Commissioner for Bosnia and Herzegovina responsible for the massacre of Bosnian Serbs and Jews was put up in Slunj. Both memorials were removed in 2004 by the decision of the Croatian Government with the explanation that the fixing of the plaques was "contrary to the original basic principles of the Constitution of the Republic of Croatia and that it harms the reputation and interests of the Republic of Croatia" (*Hrvatska riječ*, 10 March 2013). However, in January 2005, another memorial to J. Francetić and Mile Budak was built in the outskirts of Split (E. Pond, *Endgame in the Balkans: Régime Change, European Style*, 2006, pp. 135-136). The 13th and the 14th battalions of the Croatian Defence Forces were also named after Francetić, as well as a military unit of the Croatian Defence Council which was active in central Bosnia and Herzegovina in 1993 (C. Shrader, *The Muslim-Croat Civil War in Central Bosnia: A Military History, 1992-1994*, 2003). The "Victims of Fascism Square" in Zagreb was renamed the "Square of Croatian Giants".

Ambassador Zimmermann noted that:

"By changing street names that had previously honoured victims of fascism and reviving the traditional Croatian flag and coat of arms last used during the 1941-1945 Ustaše dictatorship, the Croatian Government contributed to the resurrection of this grotesque period in

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> the minds of Serbs." (W. Zimmermann, *Origins of a Catastrophe: Yugoslavia and Its Destroyers — America's Last Ambassador Tells What Happened and Why*, 1996, p. 75.)

136. The glorification of the Ustasha ideology (Ustaštvo) and its prominent members was accompanied by the destruction of the symbols of the anti-fascist struggle.

In the period from 1990-2000, most of the symbols of the anti-fascist struggle were devastated in Croatia. Over 3,000 of them were demolished, damaged or removed (http://www.slobodnaevropa.org./content/article/703313.html).

Croatian anti-fascist Juraj Hrženjak, participant in the People's Liberation War, is one of the authors of the monograph entitled "The Destruction of the Anti-Fascist Monuments in Croatia 1990-2000". Hrženjak notes, *inter alia*, that 2,904 destroyed or desecrated memorials, busts and mass graves have been listed. He says that one should add to this number "about 500 memorials which could not be recorded due to the fact that the extremist Right was in power in these areas; that due to this fact our veterans who wanted to put them on the list were exposed to threats, sometimes even threats with death" (http://www.dw.de/sramna-epizoda-hrvatske-istorije-16044052).

137. The requests by the Association of Anti-Fascists for the "safeguarding of memorials as heritage usually come up against a wall of silence" *(ibid.)*.

A very small number of devastated anti-fascist memorials have been repaired. Among those that have been restored is the monument to the leader of the Anti-Fascist Movement, Josip Broz Tito, in his native place of Kumrovec and the memorial plaque in the Ustasha concentration camp Jadovno. According to the words of Croatian President I. Josipović, who attended the commemoration in Jadovno, "between 30,000 and 40,000 persons were killed there during the war" (*Jutarnji list hr.*, 26 June 2010). The restoration of the anti-fascist memorials seems, however, to meet with numerous obstacles.

138. The Croatian daily newspaper with the highest circulation, *Jutarnji list*, published a text entitled: "We spend 350 million kunas annually for the military of the NDH." The text says, *inter alia*, that the Parliament of the Republic of Croatia adopted amendments to the Law on Pension and Disability Insurance in 1993

> "which provide for that each year of service that the members of the NDH armed forces, called in that law the 'homeland army', spent in the NDH armed formations counts as two years of service. The same criterion is applicable to the years which the members of these forces spent in captivity as POWs after 16 May 1945. The amendments to the legislation bear the signature of the then Speaker of the House of

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> Deputies, Stjepan Mesić." (http://www.jutarnji.hr/za-vojnike-ndh-godisnje-placamo-350-milijuna-kuna/1134285/)

On the basis of the said law "more than 13,000 members of the Ustasha units, Poglavnik's (i.e., Pavelićs) Life Guard(s), World War Two Domobrans (home guardsmen) and paramilitary policemen, as well as members of their family entitled to pension after the death thereof, are on the files of the Social Security Bureau" at present *(ibid.)*. The amount of 350 million kunas (about 45 million euros) is allocated annually for the members of the armed forces *(ibid.)*.

In contrast, Croatia has never investigated where and/or in whose hands ended up gold and other valuable objects plundered during the persecutions and pogroms of Serbs and Jews. The fate of the property of persecuted Serbs and Jews has not been established, nor has anyone succeeded in getting the Croatian authorities after 1991 to include this question on the agenda. And it was precisely in these years that the Croatian President, Franjo Tudjman intensively worked on the project of revitalization, toleration and glorification of the Ustasha ideology in today's Croatia. Susan Woodward, in her book entitled *Balkan Tragedy* thus came to the conclusion that the

> "revisionist history of the Croatian leader Franjo Tudjman relating to the genocide committed against Serbs, Jews and Roma during the existence of the Independent State of Croatia in the period from 1941-1945, became politically dangerous at the moment when the election of Tudjman as President was financially supported mostly by the rightist *émigrés* from that period, who brought with them the State symbols, as well as when special taxes were imposed on Serbs who had summer houses in Croatia (but not on other persons from some other republics)" (S. L. Woodward, *Balkan Tragedy: Chaos and Dissolution after the Cold War*, 1995, p. 229).

3.7. Statements of Croatia's officials in the light of the jurisprudence of the ICTR regarding incitement

Dr. Franjo Tudjman, President of the Republic of Croatia, during the first election campaign in 1989:

"Thank God my wife is neither a Serb nor a Jew." (Counter-Memorial, Ann. 51; emphasis added.)

Dubravko Horvatić Croatian academic and writer, in his article *Matoš o Srbiji* published in

The Prosecutor v. *Tharcisse Muvunyi*

"[T]he Chamber recalls that: (1) Witness FBX testified that Muvunyi told them that even if people refused to hand over the Tutsis in hiding, they had to do so because when a snake wraps itself around a calabash, you have to kill the snake and break the calabash; (2) Witness AMJ testified that Muvunyi said that babies born to Tutsi girls married to Hutu men after 6 April had to be killed like

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the daily newspaper *Večernj list*, Zagreb, 17 June 1992:

"Matoš [Croatian poet] taught both his contemporaries and generations to come what Serbia is and what it is like. On reading him today, we discover that the experience tells us how much Matoš was right in saying that Serbia is the winner of the 'world championship of killing and serious crimes'. . . However, by stripping the mask off Serbia he has enormously helped us to learn the lesson that is particularly relevant today: *in order for Croats and other nations to be able to survive, Serbia must be totally and utterly defeated.*" (Counter-Memorial, Ann. 51; emphasis added.)

Dr. Franjo Tudjman:

"And there can be no return to the past, to the times when they the *Serbs were spreading cancer in the heart of Croatia, cancer which was destroying the Croatian national being and which did not allow the Croatian people to be the master in its own house* and did not allow Croatia to lead an independent and sovereign life under this wide, blue sky and within the world community of sovereign nations." (Croatian President Franjo Tudjman's Speech on "Freedom Train" Journey after Driving 250,000 Serbian civilians from the Krajina Section of Yugoslavia, BBC Summary of World Broadcasts, 28 August 1995; emphasis added.)

snakes are killed; (3) Witness CCP testified that Muvunyi said that Tutsis were comparable to snakes and had to be killed; and (4) Witness CCP testified that Muvunyi used a Rwandan proverb to the effect that *the Tutsi girls that had been 'married' to Hutu men should die in a forest in a faraway place*.

Accordingly, the Chamber notes that all four witnesses testified that Muvunyi used Kinyarwanda proverbs to urge the audience to kill Tutsis, and that three Prosecution witnesses recalled that *Muvunyi used proverbs comparing Tutsis to snakes to urge the crowd to kill Tutsis*.

The Chamber also notes the evidence of Evariste Ntakirutimana, a sociolinguist who was accepted as an expert witness for the Prosecution.

. . . . . .

Ntakirutimana's evidence is that *a proverb is a sentence, which may summarize an entire context; it is an attempt to say the most possible through the least possible words. Proverbs are universally accepted truths, so they are employed in an attempt to summarize a message into a universally accepted fact that everyone should be aware of or admit to.*

. . . . . .

[T]he use of a proverb makes it easier for such an audience to understand the meaning of what is being conveyed; it reduces the distance between the person who is speaking and the target of the message. Ntakirutimana also stated that speakers during the Rwandan war avoided calling the adversary, the Tutsi, by its real name to

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Metaphor used by Croatian Minister of Foreign Affairs, Hrvoje Sarinić in his conversation with the US Ambassador Mr. Peter Galbraith, when they, after Operation Storm, discussed the opportunities for Serbs to come back to their homes in Krajina.

According to Galbraith, who testified in *Gotovina*, Sarinić said the following: "We cannot accept them to come back. They are cancer in the stomach of Croatia." (*Gotovina et al.*, testimony of witness Peter Galbraith, 23 June 2008, Transcripts, p. 4939.)

National, Ethnic and Religious Hatred — context in which Operation Storm was conducted

Croatian philosopher Zarko Puhovski, described this context clearly in his statement recorded in the documentary "Storm over Krajina". He said:

"We are talking here about a large number of incidents which were influenced by motions. But these incidents, *these motions had been prepared for years through propaganda, from television to the president of the country and all public factors. In Croatia, which convinced the Croatian population and especially the soldiers that the Serbs are guilty as such and they should be punished as such.*" (*Gotovina et*

avoid interference or intervention by foreigners.

For example, *the term 'snake' is utilized to show that there should be no pity when dealing with the Tutsi.* Ntakirutimana testified that *a calabash is a container of great value, in which milk is stored. Consequently, the proverb 'when a snake twirls around a calabash, the calabash must be broken in order to destroy the snake' conveys the meaning that if you have a precious object that comes under threat, you may have to sacrifice the object rather than sacrifice yourself.*

. . . . . .

In giving such a speech, the Chamber finds that there is no reasonable doubt that Muvunyi intended to *incite the audience to commit acts of genocide*. The Chamber further finds that the Prosecution has proven beyond all reasonable doubt that Muvunyi *possessed the requisite intent to destroy the Tutsi group as such.*" (*Muvunyi*, ICTR-00-55A-T, Trial Judgment, 11 February 2010, paras. 120-128; emphasis added.)

The Prosecutor v. *Clément Kayishema*

The Effects of Extremist Ideology Disseminated Through the Mass Media

"Military and civilian official *[sic]* perpetuated ethnic tensions prior to 1994. *Kangura* newspaper, established after the 1990 RPF invasion, *Radio Television Mille Colline (RTLM) and other print and electronic media took an active part in the incitement of the Hutu population against the Tutsis. Kangura* had published the 'Ten Commandments' for the Hutus in

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1991, *al.*, Transcripts, 13 February 2009, p. 15901; emphasis added.)

Miro Bajramovic:

"My name is Miro Bajramovic and I am directly responsible for the death of 86 people . . . I killed 72 people with my own hands, among them nine were women. *We made no distinction, asked no questions, they were 'Chetniks' [Serbs], and our enemies.*" (Interview with Miro Bajramovic, *Feral Tribune*, Split, Croatia, 1 September 1997; emphasis added.)

Miro Bajramovic:

"We did not separate Serb civilians and soldiers from each other. If we found a rifle hidden in his/her house, we considered him/her a Chetnik. *Serbs at the time could not survive,* because there is a saying: wherever we trod, the grass does not grow again." *(Ibid.)*

"*When I recall all that torturing, I wonder how they managed to think of all those methods*. For example, the most painful is to stick little pins under the nails and to connect it to the three-phase current; nothing remains of a man, but ashes."

"After all, we knew that they would all be killed, so it did not matter if we hurt him more today or tomorrow." *(Ibid.)*

1991, which stated that *the Tutsis were the enemy*. In addition, according to witnesses, in 1991 ten military commanders produced a full report that answered the question *how to defeat the enemy in the military, media and political domains.* These witnesses also testified that in September 1992 the military issued a memorandum, based on the 1991 report, which also defined 'the enemy' as the Tutsi population, thereby transferring the hostile intentions of the RPF to all Tutsis. According to one report, prior to 6 April, the public authorities did not openly engage in inciting the Hutus to perpetrate massacres. On 19 April however, the President of the Interim Government, told the people of Butare to 'get to work' in the Rwandan sense of the term by using their machetes and axes.

. . . . . .

The dissemination and acceptance of such ideas was confirmed by a Hutu policeman to Prosecution witness Patrick de Saint-Exupéry, a journalist reporting for the French newspaper *Le Figaro*. De Saint-Exupery remarked that the policeman had told him how they killed Tutsis 'because they were the accomplices of the RFF' and that *no Tutsis should be left alive*.

. . . . . .

In summary, the Trial Chamber finds that *the massacres of the Tutsi population indeed were 'meticulously planned and systematically co-ordinated' by top-level Hutu extremists in the former Rwandan government at the time in question.* The *widespread nature* of the attacks and the sheer number of those who perished within

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Sime Djodan, Special Envoy of the Croatian President Franjo Tudjman, in his speech at a traditional competition in Sinj held in August 1991: "The Serbs had pointed heads and probably also small brains." (Counter-Memorial, Ann. 51.)

Krešimir Dolenčić, Director of Gavella Theatre in Zagreb, 12 November 1991:

"*Beasts from the East stand no chance*. A monkey smashes everything around the house and it is all the house and it is all the same to the animal whether it smashed a glass or a Chinese vase, because it is unable to tell the difference. *There is no way that the monkey has any chance in the fight against the human.* There will always be a way to put it to sleep and place it in a cage where it belongs . . . The distinction between us and them is like between computers of the first and the fifth generation. *They should either be held in captivity or destroyed, because nothing better could be expected of them.* There could not be much talk or negotiations with them. I am convinced that *their culture is below the primitive level, since primitive cultures can be interesting and rich spiritually.*" (Counter-Memorial, Ann. 51; emphasis added.)

Miro Bajramovic:

"*We worked in two groups*, one was in charge of taking just three months is compelling evidence of this fact. This plan could not have been implemented without the participation of militias and the *Hutu population who had been convinced* by these extremists that *the Tutsi population*, in fact *was the enemy* and responsible for the downing of President Habyarimana's airplane.

The cruelty with which the attackers killed, wounded and disfigured their victims indicates that the propaganda unleashed on Rwanda had the desired effect, namely the destruction of the Tutsi population. The involvement of the peasant population in the massacres was facilitated also by their misplaced belief and confidence in their leadership, and an understanding that the encouragement of the *authorities to guaranteed [sic] them impunity to kill the Tutsis and loot their property.*

Final reports produced estimated the number of the victims of the genocide at approximately 800,000 to one million, nearly one-seventh of Rwanda's total population. These facts combined prove the special intent requirement element of genocide. Moreover, there is ample evidence to find that the *overwhelming majority of the victims of this tragedy were Tutsi civilians* which leaves this Chamber satisfied that *the targets of the massacres were 'members of a group'*, in this case an ethnic group. In light of this evidence, the Trial Chamber finds a *plan of genocide existed* and perpetrators executed this plan in Rwanda between April and June 1994."

Kayishema's Utterances

"Kayishema's utterances, as well as utterances by other individuals under

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them to Velesajam, and the other of taking them further. I mostly attended arrests, because I am a rhetoric and I tried to be civil on such occasions. I always told prisoners that I was only doing my job." (Interview with Miro Bajramovic, *Feral Tribune*, Split, Croatia, 1 September 1997.)

Franjo Tudjman:

"And, particularly, gentlemen, *please remember how many Croatian villages and towns have been destroyed,* but that's still not the situation in Knin today . . ." (Minutes of the Meeting held by the President of the Republic of Croatia, Dr. Franjo Tudjman, with Military Officials, on 31 July 1995, Brioni, Counter-Memorial, Ann. 52, p. 11; emphasis added.)

Croatian Defence Minister, Spegelj, stated in 1991:

"Listen to the Commander. First, your entire Command will be defeated, *no one will survive, we will spare no one.* Give up all illusion of raising alarm." (Memorial, Ann. 148; emphasis added.)

Witness John William Hill further added that he talked to some Croatian soldiers in front of the United Nations camp who told him that *"they were going to kill all the Serbs"* (see his direction before, during and after the massacres, *also demonstrate the existence of his specific intent. Tutsis were called 'Inkotanyi' meaning an RPF fighter or an enemy of Rwanda. Inyenzi meaning cockroach. They also were referred to as filth or dirt.* Witness WW testified how she heard the Tutsi were being referred to as *'dirt'* when Kayishema told *Bourgmestre* Bagilishema that *'all the dirt has to be removed'* referring to the Tutsis who had sought shelter in the communal office. During the attacks at the Stadium, Kayishema called the Tutsis: *'Tutsi dogs'* and *'Tutsis sons of bitches'* when instigating the attackers to kill the Tutsis gathered there.

. . . . . .

Several witnesses who survived the massacres at the Complex heard Kayishema say *'go to work'* or *'get down to work'* which, as many witnesses affirmed, meant to begin killing the Tutsis. Other witnesses testified to having heard the attackers, including members of the *Interahamwe*, who were *de facto* under Kayishema's control, sing songs about exterminating the Tutsi.

. . . . . .

In sum, for all the reasons stated above the Chamber finds beyond a reasonable doubt that *Kayishema had the intent to destroy the Tutsi group in whole or in part* and, in pursuit of that intent, carried out the acts detailed below." (*Kayishema et al.*, ICTR-95-1-T, Trial Judgment, 21 May 1999, paras. 279, 281, 289-291, 538-540; emphasis added.)

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ICTY, *Gotovina et al.*, IT-060-90, testimony of witness John William Hill, 27 May 2008, Transcript, p. 3751; emphasis added).

Witness Božo Suša stated that he had seen and heard a Croatian army officer who on 5 August, entering Knin on the main road, had ordered his soldiers to *"shoot them all at random"*. The execution of Serb refugees, on two tractors was conducted immediately after.

The evidence is corroborated by a statement of *one Croatian war veteran* who was interviewed by Croatian daily *"Jutarnji list"* in 1998. He stated:

"The plan was to clean everything up as soon as possible. *Some will get out, and we'll waste the others . . . there were no civilians for us*; they were simply all enemies . . . It was an unwritten order that there were no prisoners of war to be taken but, for the sake of saving our face before world public opinion, a very small number of prisoners of war were nonetheless left alive." (Rejoinder of Serbia, para. 720; emphasis added.)

"As a result of these widespread and systematic unlawful acts during the Croatian military operation, the Medak Pocket became *uninhabitable*. The villages of the Pocket were destroyed, thereby depriving the

The Prosecutor **v.** *J. Kajelijeli*

"The Chamber found that at a meeting on the evening of 6 April 1994 following the death of the President of the Republic of Rwanda, at the canteen next to the Nkuli Commune Office, the Accused addressed those persons present — who were all of Hutu ethnic origin — saying to them *'you very well know that it was the Tutsi that killed — that brought down the Presidential plane. What are you waiting for to eliminate the enemy?'* The Chamber found that by 'the enemy' the Accused meant the Tutsi ethnic group.

. . . . . .

The Chamber found that a woman who was thought to be Tutsi and her son were singled out at a roadblock in front of Witness GDQ's house on 8 April 1994, and subsequently killed by an *Interahamwe* named Musafiri. Kanoti, a Hutu man who was also present, and accompanying these victims, was not killed. The Accused was present at the roadblock during this event and was heard saying, *'No Tutsi should survive at Mukingo'*.

The Chamber found that, on 8 April 1994, the Accused and the *Interahamwe* were inspecting bodies and searching for survivors. Witness GBH pleaded with the Accused to stop the killings, however, in the words of GBH, the Accused responded by saying *'that it was necessary to continue, look for those or hunt for those who had survived'*.

On the basis of the established facts, the Chamber finds that the killings upon which the Chamber heard

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Serbian civilian population of their home and livelihood." (ICTY, *Ademi and Norac,* IT-01-46 and IT-04-76, Consolidated Indictment, para. 50; emphasis added.)

"In the whole Krajina region houses were burning and even today, more than five weeks after the last battles, they are still burning. Destroying big complex[es] of non-Croat properties can lead to the conclusion that this was not done only by mobs and that the whole affair was tolerated by the Croatian Government . . . *[The] result will be an efficient impediment of the Serb return to their houses and it will also create more difficulties for people to settle down again in this region* . . ." (Emphasis added.)

Marjan Jurić, Deputy in the Croatian Parliament, at a session held on 1-3 August 1991:

"But I am asking these same Serbs whether it will dawn on them when they — and I am just wondering — and I'm not making a statement [sic!] — *whether they would come to their senses if ten civilians were executed for one killed policeman or if a hundred civilians were killed for one soldier!*

This is something that my Christian, Catholic faith would not allow me, because Father Stanko Bogeljic has taught me that there is one commandment

evidence as occurring in Mukingo, Nkuli and Kigombe Communes, were, at all relevant times pleaded in the Indictment, systematically directed against Tutsi civilians. *The words and deeds* of the Accused show clearly that he directed and participated in those killings with the specific *intent to destroy the Tutsi ethnical group.*" (*Kajelijeli*, ICTR-98-44A-T, Trial Judgment, 1 December 2003, paras. 819, 826-828; emphasis added.)

The Prosecutor v. *Callixte Kalimanzira*

"The Chamber recalls that *a call to defend oneself against the enemy is not intrinsically illegitimate*, particularly when the 'enemy' is clearly restricted to the RPF to *the exclusion of Tutsi civilians*. In this case, however, the Chamber finds that when exhorting those manning the Kajyanama roadblock to carry arms in order to 'defend' themselves against 'the enemy' who might pass through, Kalimanzira was understood to be calling for the killing of the Tutsis, and that he intended to be understood as such. *The slapping and abduction of the unarmed man emphasized Kalimanzira's exhortation and effect on his audience*. The incitement was disseminated in a public place — the roadblock — to an indeterminate group of people — those present to man it and anyone else watching or listening. *Kalimanzira exhibited here, and elsewhere, an intent to destroy the Tutsi group*. As such, the Chamber finds Kalimanzira guilty beyond reasonable doubt for committing Direct and Public Incitement to Commit Genocide at the Kajyanama roadblock in late April 1994.

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in those ten commandments: 'thou shall not kill', and it does not allow me to say that this is right, but it would be right for me if ten Serb intellectuals would get the sack in Zagreb, Rijeka, Split or Osijek for every policeman killed. For, intellectuals cannot go to the woods. They are not like those ignorant Banija peasants who could go to bed without washing their feet for a month! Intellectuals must be sacked, because Chetnik ringleaders live in the big cities and we must prevent it . . . *Our Almighty God has created at the same time both good people and a lot of vermin. One such vermin is the moth which, when let into the closet, in fact when it comes into it, eats at the shirt, then it turns to the pullover; it eats and eats until it has eaten everything away. The same is true of those who came to us as our guest-workers.*" (Deputy Jurić ended his speech with a raised hand in a fascist-style salute, Counter-Memorial, Ann. 51; emphasis added.)

Zvonimir Sekulin, Editor-in-Chief of *Hrvatski Vijesnik*, in his interview published in the magazine *Globus*, Zagreb, on 9 September 1994:

"Considering that the *Hrvatski Vijesnik* really runs a column entitled 'hard-core Serb pornographic pages', I also admit that this newspaper is in part pornographic as the Serbs themselves are pornography.

. . . . . .

The Chamber therefore finds that in late May or early June 1994, Kalimanzira attended a public meeting at the Nyabisagara football field where he thanked the audience for their efforts *at getting rid of the enemy*, but warned them not to grow complacent, to remain armed at all times, and exhorted the crowd to keep searching for enemies hidden in the bush or in other persons homes, which they did. *He also instructed them to destroy the homes of dead Tutsis and plant trees in their place, which they did.* In the context of these particular instructions, which have little to do with military combat, and BCZ's understanding of Kalimanzira's words, the Chamber finds that *'the enemy' meant any Tutsi.*

The Chamber finds that Kalimanzira's call for further elimination of Tutsis in hiding was direct, leading clearly to immediate and commensurate action. It was disseminated in a public place to a large public audience. *By instructing the people present to kill any surviving Tutsis, demolish their homes, and wipe out any traces of their existence, there is no reasonable doubt that Kalimanzira intended to incite the audience present to commit acts of genocide.* Kalimanzira exhibited here, and elsewhere, an intent to destroy the Tutsi group. The Chamber therefore finds Kalimanzira guilty beyond reasonable doubt of committing direct and public incitement to commit genocide at the Nyabisagara football field in late May or early June 1994." (*Kalimanzira*, ICTR-05-88-T, Trial Judgment, 22 June 2009, paras. 589, 613-614; emphasis added.)

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Photograph of Patriarch Pavle (Head of the Serbian Orthodox Church), published on these pages, is more pornographic that the photos of the biggest whores . . . [name] wrote that *I said that some people were vermin. But I say that only the so-called Serbian people are vermin."* (Counter-Memorial, Ann. 51; emphasis added.)

Franjo Tudjman:

"We have to inflict such blows that the Serbs will, *to all* practical purposes *disappear*, that is to say, the areas we do not take at once must capitulate within a few days." (Minutes of the Meeting held by the President of the Republic of Croatia, Dr. Franjo Tudjman, with military officials, on 31 July 1995, Brioni, p. 2, Counter-Memorial, Ann. 52; emphasis added.)

The Logbook notes "*our artillery was hitting the column* pulling from Petrovac to Grahovo, the score is excellent, the *Chetniks have many dead and wounded* . . ." (ICTY, *Gotovina et al.*, IT-060-90, Reynaud Theunes, Expert Report: Croatian Armed Forces and Operation Storm, Part II, p. 189; emphasis added.)

The Prosecutor v. *Simon Bikindi*

"When heading towards Kayove, Bikindi used the public address system to *state that the majority population, the Hutu, should rise up to exterminate the minority, the Tutsi.* On his way back, Bikindi used the same system to ask if people had been killing Tutsi *who were referred to as snakes.*

. . . . . .

The Chamber finds that both statements, broadcast over loudspeaker, were made publicly. The Chamber also finds that *Bikindi's call on 'the majority' to 'rise up and look everywhere possible' and not to 'spare anybody' immediately referring to Tutsis as the minority unequivocally constitutes a direct call to destroy the Tutsis ethnic group.* Similarly, the Chamber considers that Bikindi's address to the population on his way back from Kayove, asking 'Have you killed the Tutsis here?' and *whether they had killed the 'snakes'* is a *direct call to kill Tutsis, pejoratively referred as 'snakes'.* In the Chamber's view, it is inconceivable that, *in the context of widespread killings* of the Tutsi population that prevailed in June 1994 in Rwanda, *the audience to whom the message was directed*, namely those standing on the road, could not have immediately *understood its meaning and implication.* The Chamber therefore finds that Bikindi's statements through loudspeakers on the main road between Kivumu and Kayove constitute direct and public incitement to commit genocide.

Based on the words he proffered and the manner he disseminated his

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Miro Bajramovic:

"T. Mercep was commander of Poljane . . . He knew about each execution, because he was a commander and was a very charismatic person. He told us several times: *'Tonight you have to clean all these shits.' This meant that all prisoners should be executed. The order for Gospic was to perform 'ethnic cleansing'* so we killed directors of post offices and hospitals, a restaurant owner and many other Serbs. Executions were performed by shooting at point blank range since we did not have much time. I repeat, orders from the headquarters were to reduce the percentage of Serbs in Gospic." (Interview with Miro Bajramovic, *Feral Tribune*, Split, Croatia, 1 September 1997; emphasis added.)

Franjo Tudjman:

"[I]n view if the situation created by the liberation of occupied territories affecting the demographic picture, there is a need to make military units one of the most effective elements, which can happen if we *properly solve one of the most effective postulates of State politics in dealing with our essential problem of today, namely, [the] demographic situation in Croatia.* That was why I invited to this meeting the message, the Chamber finds that Bikindi deliberately, *directly and publicly incited the commission of genocide with the specific intent to destroy the Tutsi ethnic group.*" (*Bikindi*, ICTR-01-72-T, Trial Judgment, 2 December 2008, paras. 281, 423-424; emphasis added.)

The Prosecutor v. *Jean-Paul Akayesu*

"The Chamber further recalls that incitement can be direct, and nonetheless, implicit." (Para. 557.)

. . . . . .

"(iii) It has been established that Akayesu then clearly urged the population to unite in order *to eliminate what he termed the sole enemy: the accomplices of the Inkotanyi.*

(iv) On the basis of consistent testimonies heard throughout the proceedings and the evidence of Dr. Ruzindana, appearing as expert witness on linguistic matters, the Chamber is satisfied beyond a reasonable doubt that *the population understood Akayesu's call as one to kill the Tutsi.* Akayesu himself was fully aware of the impact of his speech on the crowd and of the fact that his call to fight against the accomplices of the Inkotanyi would be construed as a call to kill the Tutsi in general.

. . . . . .

(vii) The Chamber is of the opinion that there is a causal relationship between Akayesu's speeches at the gathering of 19 April 1994 and the ensuing widespread massacres of Tutsi in Taba.

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Vice-Premier and the Minister responsible for reconstruction and development, Dr. Radić, to present, at the opening of this debate, the present demographic situation because of the deployment of military commands, military districts, brigade stationing, military training institutions, etc. It may be effective and useful to resolve that situation where we have reinforced or at least should reinforce Croatian *dom*, like in Istria, and in other places the more so because it is not so much about changing the composition today as to *populate some places and areas.* Minister Radić explained how they should proceed:

'I conclude, therefore, that red and blue areas should promptly, and as a matter of priority, be *populated by Croats, as far as possible*. These areas are marked, including Zrinska Gora, which I skipped for the time being, and areas such as Lapac and Knin, namely the hinterland and the Herzegovina region, which should be given secondary priority, and this empty area in Lika as much as possible . . .'" (Minutes of the Meeting held by the President of the Republic of Croatia, Dr. Franjo Tudjman, with Military Officials, 23 August 1995, Zagreb, pp. 01325991;

From the foregoing, the Chamber is satisfied beyond a reasonable doubt that, *by the above-mentioned speeches made in public and in a public place, Akayesu had the intent to directly create a particular state of mind in his audience necessary to lead to the destruction of the Tutsi group, as such.* Accordingly, the Chamber finds that the said acts constitute the crime of direct and public *incitement to commit genocide*, as defined above." (*Akayesu*, ICTR-96-4-T, Trial Judgment, 2 September 1998, paras. 557, 673-674; emphasis added.)

The Prosecutor v. *Aloys Simba*

"Simba was physically present at two massacre sites. He provided traditional weapons, guns, and grenades to attackers poised to kill thousands of Tutsi. Simba was aware of the targeting of Tutsi throughout his country, and as a former military commander, he knew what would follow when he urge the armed assailants *'to get rid of the filth'*. The only reasonable conclusion, even accepting his submissions as true, is that at that moment, he acted *with genocidal intent*." (*Simba*, ICTR-2001-76-T, Trial Judgment, 13 December 2005, para. 418; emphasis added.)

The Prosecutor v. *Alfred Musema*

"According to the witness, Musema addressed those who had convened in Kinyarwanda, telling them to rise together and fight their enemy the Tutsis and deliver their country from the enemy. Questions were put to him by the crowd, asking what would be their rewards considering that they

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01325993-01325997; Counter-Memorial, Ann. 53, pp. 4-7; emphasis added.)

might lose their lives in this war. Musema answered that there would be no problem in finding rewards, *that the unemployed would take jobs of those killed, and that they would appropriate the lands and properties of the Tutsis*." (*Musema*, ICTR-96-13-T, Trial Judgment, 27 January 2000, para. 373; emphasis added.)

(Signed) Milenko KREĆA.

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