

SEPARATE OPINION OF JUDGE *AD HOC* KREČA

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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.

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.”

(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-

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.)

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 Antifascističko vijeće naroduoy slobodenja Hrvatske-Zboruk dokumenala 1944 (Od 1. Sijcnja do. 9 Sorbuja), Zagreb, 1970, p. 666.

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

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

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

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 *constitutio 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.)

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

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

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.

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-

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-

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

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-

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

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.)

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 prejudice 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 de-formalization of the means of expressing consent to be bound by a treaty.

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.

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*)).

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

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

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 at 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.)

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,

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;

- (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

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

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

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

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*.

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.*).

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.

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.)

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 Menschenrechte: 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

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

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

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-

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*

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

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

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

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.

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. Mwandighi* 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-

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

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.

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”

(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,

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

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

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*, *Juris-diction, 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.

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 exist *[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.

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

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

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;

- *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).

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.

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.)

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

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.

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.

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

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 préparatoires* 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).

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*

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

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

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-

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.

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

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).

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

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.)

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).

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).

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” (*Jelišić*, 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

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-general-a-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-poracana-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

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.)

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 skillfully 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-

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

“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

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-

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 Pavelić's 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

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*

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/cclnf-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=0CCIQ6AEwA#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.”

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 Matiče Hrvatska, Zagreb, p. 163).

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.)

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-

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&itemid=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-ustastvo-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-

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>)

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

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

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 Dis-solution 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

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.)

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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

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 (RTL) 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

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-Exupéry 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

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

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.)

ICTY, *Gotovina et al.*, IT-060-90, testimony of witness John William Hill, 27 May 2008, Transcript, p. 3751 ; emphasis added).

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.

.....

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 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 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.)

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*’.

“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

On the basis of the established facts, the Chamber finds that the killings upon which the Chamber heard

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.

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 ring-leaders 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.)

Photograph of Patriarch Pavle (Head of the Serbian Orthodox Church), published on these pages, is more pornographic than 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.)

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.*

.....

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 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

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.

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

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.