SEPARATE OPINION OF JUDGE OWADA

1. I voted in favour of the Judgment as a whole, including subparagraphs (2) and (3) of the operative paragraph (para. 524), which concluded that both the principal claim of Croatia and the counter-claim of Serbia, respectively alleging that the other Party had violated the Convention on the Prevention and Punishment of the Crime of Genocide, have not been established, but voted against subparagraph (1) of the operative paragraph of the Judgment, which rejects the *ratione temporis* jurisdictional objection raised by Serbia in the present case.

2. It is to be recalled that in its earlier Judgment in the present case concerning *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia* v. *Serbia)* (*I.C.J. Reports 2008*, p. 412) at its preliminary objections phase in 2008 (hereinafter "2008 Judgment"), the Court, while rejecting the first preliminary objection submitted by Serbia, as well as the third preliminary objection submitted by Serbia, found that "the second preliminary objection submitted by the Republic of Serbia does not, in the circumstances of the case, possess an exclusively preliminary character" (*ibid.*, p. 466, para. 146). This latter finding of the Court in subparagraph (4) of the operative paragraph 146 was made in accordance with paragraph 7 of Article 79 of the Rules of Court, amended in 1978 (which corresponds to the present Article 79, paragraph 9, of the current Rules of Court), and applicable to the present case at the time of the filing of the Application by Croatia in 1999.

3. The language employed in this finding of the 2008 Judgment is taken from the provisions of Article 79, paragraph 7, of the 1978 Rules of Court, which were first introduced in the Rules of Court in 1972 when a major revision of the Rules of Court was effected. This revision of 1972 replaced the language of the original provision of Article 62, paragraph 5, in the old Rules of Court. (The revised language of the 1972 revision had subsequently been retained unchanged at the time of the 1978 revision of the Rules of Court as its Article 79, paragraph 7, which was applicable to the present case.)

4. The original Article 62, paragraph 5, which had been consistently maintained since the days of the Permanent Court of International Justice, provided as follows:

> "After hearing the parties the Court shall give its decision on the objection or shall join the objection to the merits. If the Court overrules the objection or joins it to the merits, it shall once more fix time-limits for the further proceedings."

5. The legal effects of the change in the 1972 revision on the language of the provision in question are not so apparent from the language intro-

duced, especially in terms of whether it was meant to effect a substantive modification of the procedure to be followed by the Court or whether it was meant to be a purely drafting change without affecting the procedure to be followed. A careful examination of the circumstances surrounding this change, especially of the lively discussions that ensued on this issue of the joinder of the preliminary objections at the time of the Judgment in the *Barcelona Traction, Light and Power Company, Limited (Belgium* v. *Spain)* case at its Second Phase in 1970 (see, e.g., opinions attached to that Judgment by Judges Morelli, Tanaka, and Fitzmaurice) together with the examination of the unpublished *travaux preparatoires* of the 1972 revision of the Rules of Court, leads me to the conclusion that it was those discussions which triggered this change and that the change was designed with a view to giving the Court a greater degree of flexibility in dealing with the issue of preliminary objections than had hitherto been the case, in the face of conflicting positions expressed within the membership of the Court on how to deal with the issue of the joinder of preliminary objections to the merits. As one learned author suggested, the use of the new formula "the objection does not possess, in the circumstances of the case, an exclusively preliminary character" (current Rules of Court, Art. 79, para. 9)

> "[was an attempt] to satisfy those [judges] who felt that certain objections [to jurisdiction and to admissibility] do possess, at least in principle, an intrinsically preliminary character" (Shabtai Rosenne, *The Law and Practice of the International Court, 1920-2005*, Vol. II, p. 889).

However, the issue of the legal effect of the solution adopted upon the Court's procedure at the merits stage has been left unresolved as a "puzzle" not spelled out in the revised formulation of the Rule:

> "The puzzle which the new Rule sets is whether the effect of the new formulation is to abolish completely the option of joining an objection to the merits, in that way wiping out a virtually consistent case law itself corresponding to a widely felt need, or whether the holding in a judgment that the objection does not, in the circumstances possess an exclusively preliminary character simply means that at that stage it is not accepted as a preliminary objection. In that event such a finding could be the equivalent of joining it to the merits, perhaps in the technical sense of a plea in bar, if the party raising that objection were to be so minded, and requiring the Court to reach a decision on it before discussing the merits, which nonetheless would have been fully aired in the written pleadings." (*Ibid.*, pp. 889-890.)

6. An authoritative interpretation given by the Court on this point in subsequent decisions involving this issue came with the case concerning *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America)* (*I.C.J. Reports 1986*, p. 14), and the case

concerning *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon* v. *Nigeria)* (*I.C.J. Reports 1998*, p. 275). The Judgment in the former case summarizes the rationale of the change in the new Rule on this point as follows:

> "in particular where the Court, if it were to decide on the objection, 'would run the risk of adjudicating on questions which appertain to the merits of the case or of prejudging their solution' [*Panevezys-Saldutiskis Railway, P.C.I.J., Series A/B, No. 75*, p. 56]. If this power was exercised, there was always a risk, namely that the Court would ultimately decide the case on the preliminary objection, after requiring the parties fully to plead the merits, — and this did in fact occur (*Barcelona Traction, Light and Power Company, Limited, Second Phase, I.C.J. Reports 1970*, p. 3). The result was regarded in some quarters as an unnecessary prolongation of an expensive and time-consuming procedure.
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> The solution of considering all preliminary objections immediately and rejecting all possibility of a joinder to the merits had many advocates and presented many advantages. In the *Panevezys-Saldutiskis Railway* case, the Permanent Court defined a preliminary objection as one 'submitted for the purpose of excluding an examination by the Court of the merits of the case, and being one upon which the Court can give a decision without in any way adjudicating upon the merits' (*P.C.I.J., Series A/B, No. 76*, p. 22). If this view is accepted then of course every preliminary objection should be dealt with immediately without touching the merits, or involving parties in argument of the merits of the case . . . However that does not solve all questions of preliminary objections, which may, as experience has shown, be to some extent bound up with the merits. The final solution [was thus] adopted in 1972, and maintained in the 1978 Rules . . ." (*Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Merits, Judgment, I.C.J. Reports 1986*, p. 30, paras. 39-40.)

7. Although this explanation of the rationale for the change would seem to fall short of giving a complete answer to the "puzzle", it is my considered view that what all this amounts to in the context of the present case is that under the new 1978 Rule of Article 79, paragraph 7 (currently Article 79, paragraph 9), the Court, by declaring in the operative part of its 2008 Judgment with its binding force upon the Parties that "the second preliminary objection submitted by the Republic of Serbia does not, in the circumstances of the case, possess an exclusively preliminary character" (2008 Judgment, p. 466, para. 146, subpara. (4)), is in effect making a decision binding on the Parties, as well as on the Court itself, that "because [the issues raised in the preliminary objection in question] con-

tain both preliminary aspects and other aspects relating to the merits, they will have to be dealt with at the stage of the merits" (*Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Merits, Judgment, I.C.J. Reports 1986*, p. 31, para. 41).

8. More specifically in the context of the present case, the 2008 Judgment explains the reasons for this decision as follows:

> "As set out above, Serbia's preliminary objection, as stated in its final submission 2 *(a)*, is presented as relating both to the jurisdiction of the Court and to the admissibility of the claim. The title of jurisdiction relied on by Croatia is Article IX of the Genocide Convention, and the Court has established above that Croatia and Serbia were both parties to that Convention on the date on which proceedings were instituted (2 July 1999). Serbia's contention is however that the Court has no jurisdiction under Article IX, or that jurisdiction cannot be exercised, so far as the claim of Croatia concerns 'acts and omissions that took place prior to 27 April 1992', i.e., that the Court's jurisdiction is limited *ratione temporis*. Serbia advanced two reasons for this: first, because the earliest possible point in time at which the Convention could be found to have entered into force between the FRY and Croatia was 27 April 1992; and secondly, because 'the Genocide Convention including the jurisdictional clause contained in its Article IX cannot be applied with regard to acts that occurred *before* Serbia came into existence as a State', and could thus not have become binding upon it. Serbia therefore contended that acts or omissions which took place before the FRY came into existence cannot possibly be attributed to the FRY." (2008 Judgment, p. 457, para. 121; emphasis in the original.)

9. Among the reasons for the decision of the Court on this point, though the 2008 Judgment (paras. 120 *et seq.*) does not exhaustively refer to all the elements raised by the Parties in the context of the second preliminary objection of Serbia, it specifies, referring to one of the relevant elements, as follows:

> "In its preliminary objections Serbia contended that '[a]cts or omissions which took place before the FRY came into existence cannot possibly be attributed to the FRY'; it denies that Croatia has been able to demonstrate that the FRY was a State *in statu nascendi*, and argues that that concept is 'evidently not appropriate for this case'. At the hearings it argued that the requirements of Article 10, paragraph 2, of the ILC Articles on State Responsibility are not fulfilled in respect of the claims made by Croatia against Serbia in the present case. It contended that Croatia has been unable to specify an identifiable 'insurrectional or other movement' in the territory of the SFRY

as one that established the FRY which would fall within the definition of that Article.

In so far as Article 10, paragraph 2, of the ILC Articles on State Responsibility reflects customary international law on the subject, *it would necessarily require the Court, in order to determine if that rule is applicable to the present case and for purposes of a possible application, to enter into an examination of factual issues concerning the events leading up to the dissolution of the SFRY and the establishment of the FRY*. The Court notes further that for it to determine whether, prior to 27 April 1992, the FRY was a State *in statu nascendi* for purposes of the rule invoked would similarly involve enquiry into disputed matters of fact. *It would thus be impossible to determine the questions raised by the objection without to some degree determining issues properly pertaining to the merits.*" (2008 Judgment, p. 459, paras. 126-127; emphasis added.)

10. It is based on these reasonings that the 2008 Judgment concludes:

"[i]n order to be in a position to make any findings on each of these issues [of the Court's jurisdiction to determine whether breaches of the Genocide Convention were committed in the light of the facts that occurred prior to the date on which the FRY came into existence as a separate State and of admissibility of the claim in relation to those facts], *the Court will need to have more elements before it*" (*ibid.*, p. 460, para. 129; emphasis added).

11. In view of these circumstances, it is my opinion that the present Judgment has failed to carry out the task assigned to the Court by this instruction of the 2008 Judgment. While the Judgment expends more than 40 paragraphs in this section on jurisdiction and admissibility, much of it dealing with an extensive discussion on *what Article IX is not about*, such as the general issue of genocide under general international law, which obviously cannot confer title to jurisdiction under the Convention upon the Court, it has not addressed in substance all the issues that it should be concerned with, such as the analysis from the legal and factual points of view, of the doctrine of State succession in respect of international responsibility as argued by the Parties in support of or against the exercise of jurisdiction *ratione temporis* by the Court within the scope of the compromissory provision of Article IX of the Convention. These are the issues that the Court declared that it could not go into at the stage of preliminary objections but which should be examined in the context of the merits of the case, to the extent necessary for the purpose of determining the scope of the jurisdiction *ratione temporis* conferred by the Parties upon the Court under Article IX. In my view, this examination is the sole relevant point that has been assigned to the Court to examine at this stage, in order to ascertain the legal basis for the existence *vel non* of the

consent of the parties under the Convention, which alone constitutes the basis for conferring jurisdiction on the Court in relation to this second objection of the Respondent.

12. In dealing with those core issues of jurisdiction *ratione temporis* raised by the Respondent in its second preliminary objection, the present Judgment refers to three distinct arguments advanced by the Applicant at the merits phase of the present case. They are *(a)* the contention that the Genocide Convention, providing for *erga omnes* obligations, has retroactive effect; *(b)* the contention that what came to emerge as the Federal Republic of Yugoslavia (hereinafter "FRY") during the period 1991-1992 was an entity *in statu nascendi* born out of the then existing Socialist Federal Republic of Yugoslavia (hereinafter "SFRY") in the sense of Article 10, paragraph 2, of the ILC Articles on the Responsibility of States for Internationally Wrongful Acts (hereinafter "ILC Articles on State Responsibility"); and, *(c)* as an alternative to *(b)* above, the contention that the law of State succession in respect of international responsibility is applicable under the specific circumstances of the situation surrounding the SFRY and the FRY, where a special link existed between the SFRY and the FRY.

13. With respect to the arguments advanced by the Applicant in its contentions *(a)* and *(b)*, the Judgment offers a careful analysis in substance, and has come out with the conclusion that there is no valid basis, as a matter of law, that can provide the Court with jurisdiction *ratione temporis* to entertain the present case, in so far as it relates to acts that took place before 27 April 1992, the date on which the Respondent declared its independence to become a party to the Genocide Convention. It must be noted that these conclusions of the Court have been reached as a matter of a legal analysis of the claimed principles of law applicable to the present case, without going into a detailed analysis of the surrounding facts relating to the alleged events as claimed by the Applicant.

14. With regard to arguments advanced by the Applicant in its contention *(c)*, by contrast, the Judgment has refrained from engaging in a parallel legal analysis into the validity in international law of the claimed principles as a source of the applicable law.

15. It is interesting to observe that the substantive examination of the facts surrounding the events which took place during the period prior to 27 April 1992 reveals, subsequently in a section which follows the section on jurisdiction and admissibility where the Judgment has somewhat categorically concluded without any examination of these facts and therefore in my view without offering any factual or legal basis for so concluding, that "to the extent that the dispute concerns acts said to have occurred before [27 April 1992], it also falls within the scope of Article IX" (Judgment, para. 117). It seems surprising that the Judgment came to this conclusion without even a preliminary examination of "the facts that occurred prior to the date on which the FRY came into existence as a separate State", as prescribed by the 2008 Judgment (2008 Judgment, p. 460, para. 129).

16. Indeed, even a cursory examination of the material contained in Section V of the Judgment dealing with the "Consideration of the Merits of the Principal Claim" persuades us that all of the requirements mentioned in the three-stage process listed in paragraph 112 have to be examined in order for the Court to be able to decide on the applicability *vel non* of the law of State succession in respect of international responsibility as a plausible basis for establishing the jurisdiction of the Court to determine whether Serbia is responsible for violations of the Convention. If one examines each of these requirements in the context of the facts of the case, it seems clear that the attempt of the Applicant has to fail at the first stage of this process, to the extent that the acts relied on by Croatia, even assuming that they were committed by the SFRY, were found not to fall within the category of acts contrary to the Convention. As this is the legal basis on which the Judgment has come to its final conclusion on the merits of this case, it can only do so after it has satisfied itself that it has jurisdiction on the basis of an examination of all relevant facts and law raised by the Respondent in its second preliminary objection. Nevertheless, the Judgment came to this final decision on the merits after declaring, *ex cathedra*, that it has jurisdiction *ratione temporis* on the ground that "to the extent that the dispute concerns acts said to have occurred before [27 April 1992], it also falls within the scope of Article IX and . . . the Court therefore has jurisdiction to rule upon the entirety of Croatia's claim" (Judgment, para. 117).

17. In justification of this conclusion of the Court on the jurisdictional objection *ratione temporis* raised by Serbia, the Judgment makes a reference to the doctrine of State succession in respect of international responsibility as relevant (*ibid.*, paras. 106 *et seq.*). It is true that the Judgment tries to disassociate itself from any position that might look like an endorsement of this doctrine, even on a prima facie basis or on the basis of plausibility. Moreover, the Judgment continues to base its whole argument on a highly debatable position of the Court in its earlier Judgment on preliminary objections relating to the scope and the legal implications of the declaration made by the FRY on 27 April 1992. This is an issue in respect of which I hold a dissenting view to the position taken by the Court in its 2008 Judgment (2008 Judgment, p. 451, para. 111) and confirmed in the present Judgment (para. 76) as it is in contradiction with the jurisprudence established by the Court in the cases concerning the *Legality of Use of Force* (see, for example, *Legality of Use of Force (Serbia and Montenegro* v. *Belgium), Preliminary Objections, Judgment, I.C.J. Reports 2004 (I)*, p. 279).

In spite of the Judgment's seemingly careful approach to the question of the doctrine of State succession in respect of international responsibility and in spite of its formal disclaimer, it would seem difficult to interpret the following thesis that lies crucially at the heart of the logic of the Judgment as anything else than an effort to link the logic of the Judgment, in whatever neutral a manner as it may be, with this doctrine, as a factor relevant for providing the Court with the jurisdiction *stricto sensu* under the Convention by consent, either through some consent, implied, of the

Parties, or through the operation of rules of general international law under Article IX. After an examination of the current state of the law of State succession in respect of international responsibility, the Judgment goes on to say that:

> "It is true that whether or not the Respondent State succeeds, as Croatia contends, to the responsibility of its predecessor State for violations of the Convention is governed not by the terms of the Convention but by rules of general international law. *However, that does not take the dispute regarding the third issue outside the scope of Article IX.* As the Court explained in its 2007 Judgment in the *Bosnia and Herzegovina* v. *Serbia and Montenegro* case,
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> > '[t]he jurisdiction of the Court is founded on Article IX of the Genocide Convention, and the disputes subject to that jurisdiction are those 'relating to the interpretation, application or fulfilment' of the Convention, but it does not follow that the Convention stands alone. In order to determine whether the Respondent breached its obligations under the Convention, as claimed by the Applicant, and, if a breach was committed, to determine its legal consequences, the Court will have recourse not only to the Convention itself, but also to the rules of general international law on treaty interpretation and on responsibility of States for internationally wrongful acts.' (*I.C.J. Reports 2007 (I)*, p. 105, para. 149.)
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> The Court considers that the rules on succession that may come into play in the present case fall into the same category as those on treaty interpretation and responsibility of States referred to in the passage just quoted." (Judgment, para. 115; emphasis added.)

18. This statement, however, is in conflict with the following statement in the 2008 Judgment which explains why the Court in that case decided that:

> "In so far as Article 10, paragraph 2, of the ILC Articles on State Responsibility reflects customary international law on the subject, it would necessarily require the Court, in order to determine if that rule is applicable to the present case and for purposes of a possible application, to enter into an examination of factual issues concerning the events leading up to the dissolution of the SFRY and the establishment of the FRY. The Court notes further that for it to determine whether, prior to 27 April 1992, the FRY was a State *in statu nascendi* for purposes of the rule invoked would similarly involve enquiry into disputed matters of fact. It would thus be impossible to determine the questions raised by the objection without to some degree determining issues properly pertaining to the merits." (2008 Judgment, p. 459, para. 127.)

While this passage is referring more specifically to the issue of Article 10, paragraph 2, of the ILC Articles on State Responsibility, and not

to the issue of State succession in respect of international responsibility, nevertheless the same logic should apply to the examination of the parallel contentions raised by Croatia in defence of its claim for jurisdiction and admissibility in relation to the events prior to 27 April 1992, the date on which the Respondent became bound by the Genocide Convention as a party to it. The Court in that 2008 Judgment clearly states that "for [the Court] to determine whether, prior to 27 April 1992, the FRY was a State *in statu nascendi* for purposes of the rule invoked would similarly involve enquiry into disputed matters of fact" and that "[i]t would thus be *impossible to determine the questions raised by the objection without to some degree determining issues properly pertaining to the merits*" (*ibid.*; emphasis added).

19. I have no disagreement of substance with the general statement in the 2007 Judgment as quoted above (para. 17). However, it is abundantly clear from the context of that passage that the purpose of this statement is totally different from what the present Judgment is trying to argue in the paragraph in question (Judgment, para. 115). The intent and purpose of the passage in the 2007 Judgment is to restrictively define the scope of the jurisdiction conferred by the consent of the parties under Article IX of the Convention. The intent of the present paragraph would appear to be to expand the scope of the jurisdiction of the Court conferred by the consent of the parties under Article IX of the Convention, which is confined to "[d]isputes . . . relating to the interpretation, application or fulfilment" of the Convention, to something which is not expressly stated by arguing that claimed rules of general international law—which the Judgment would seem to imply could cover the law of State succession in respect of international responsibility—could be relevant to, and form an essential part of the argument of the Applicant on, the "interpretation, application or fulfilment" of the Convention for the purposes of determining the scope of jurisdiction.

20. I could only accept such logic, if the validity of the doctrine in question under general international law were fully examined by the Judgment in the section on jurisdiction and its veracity — or at any rate its plausibility — established. Otherwise, this doctrine would be no more than an argument advanced by one of the Parties to the dispute, just as is the argument, again advanced by the same Party in the present case and rejected by the present Judgment, on the validity of the doctrine based on Article 10, paragraph 2, of the ILC Articles on State Responsibility (a provision relating to the issue of responsibility of States *in statu nascendi*). On this latter issue the Judgment expends detailed discussion, arriving at the conclusion that this argument of Croatia cannot provide a basis for jurisdiction of the Court within the scope of Article IX of the Convention (Judgment, para. 105).

21. It is thus my position that the conclusion of the present Judgment should have been based on an approach to pursue the path prescribed by the 2008 Judgment and examine to the extent necessary the relevant aspects, both of facts and law, of the merits of the case before arriving at

the conclusion that the claim of the Applicant cannot be upheld on the merits. If the present Judgment were to follow the present structure of the Judgment of treating the jurisdictional issues first before treating any aspect of the merits, the Court can only do so after satisfying itself that it has the necessary jurisdiction on the basis of the consent of the Parties. This would have required the Court to examine the legal validity of all the alleged rules of international law advanced by the Applicant, including those relating to State succession in respect of international responsibility, as a means to establish the legal basis for enabling the Court to exercise jurisdiction with regard to the merits. In my submission, the present Judgment has failed to do that.

(Signed) Hisashi OWADA.