ANTÔNIO AUGUSTO CANÇADO TRINDADE

A RESPONSABILIDADE DO ESTADO SOB A CONVENÇÃO CONTRA O GENOCÍDIO: EM DEFESA DA DIGNIDADE HUMANA

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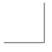
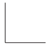
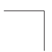
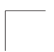

ANTÔNIO AUGUSTO CANÇADO TRINDADE
Juiz da Corte Internacional de Justiça; ex-Presidente da Corte Inter-Americana de Direitos Humanos; Professor Emérito de Direito Internacional da Universidade de Brasília; Professor Honorário da Universidade de Utrecht, e *Honorary Fellow* da Universidade de Cambridge; Membro do *Curatorium* da Academia de Direito Internacional da Haia, do *Institut de Droit International*, e da Academia Brasileira de Letras Jurídicas; Presidente da Sociedade Latino-Americana de Direito Internacional

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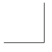
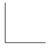
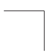
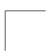

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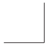
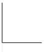
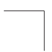
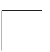

PARTE I

ESTUDO DE CASO - NOTA INTRODUTÓRIA:

O CASO DA *APLICAÇÃO DA CONVENÇÃO CONTRA O GENOCÍDIO* (Croácia *versus* Sérvia, 2015) E VOTO DISSIDENTE DO AUTOR, ANTÔNIO AUGUSTO CANÇADO TRINDADE

I. INTRODUÇÃO

Aos 03 de fevereiro de 2015, a Corte Internacional de Justiça (CIJ) emitiu sua Sentença no caso atinente à *Aplicação da Convenção contra o Genocídio* (de 1948), opondo a Croácia à Sérvia, depois de um tempo sem precedentes de 16 anos de trâmite do mesmo, a partir da interposição da demanda croata aos 02 de julho de 1999. Com esta última decisão, a CIJ concluiu o trabalho de adjudicação internacional das questões levadas a seu conhecimento atinentes às guerras nos Bálcãs ao longo da década de noventa. Tal adjudicação abarcou outra Sentença (de 2007), no caso referente à *Aplicação da Convenção contra o Genocídio*, opondo a Bósnia-Herzegovina à Sérvia, assim como um Parecer Consultivo (de 2010), sobre a *Declaração de Independência do Kossovo*[1].

As questões tratadas nestas duas Sentenças e neste Parecer Consultivo da CIJ, trazem à tona o princípio básico do respeito à dignidade da pessoa humana. Pelas razões expressadas em seguida, vi-me na obrigação de deixar registro de minha posição dissidente quanto ao decidido pela maioria da Corte na recente Sentença de 03.02.2015. Neste estudo de caso, procederei a um breve resumo da referida Sentença da CIJ no caso da *Aplicação da Convenção contra o Genocídio* (Croácia *versus* Sérvia), seguido de um resumo de minha Dissidência no mesmo, e de minhas considerações derradeiras a respeito. No Anexo seguinte consta, na íntegra, meu Voto Dissidente na Sentença da CIJ de 03.02.2015.

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1. Para uma avaliação deste Parecer Consultivo (de 22.07.2010), cf. A.A. Cançado Trindade, *El Derecho de Acceso a la Justicia en Su Amplia Dimensión*, 2ª. ed. rev., Santiago de Chile, Librotecnia, 2012, pp. 397-399; A.A. Cançado Trindade, *Los Tribunales Internacionales Contemporáneos y la Humanización del Derecho Internacional*, Buenos Aires, Ed. Ad-Hoc, 2013, pp. 179-180; A.A. Cançado Trindade, *El Principio Básico de Igualdad y No-Discriminación: Construcción Jurisprudencial*, Santiago de Chile, Librotecnia, 2013, pp. 354-485.

II. A SENTENÇA DA CORTE

Na recente Sentença de 03.02.2015, a CIJ começa por abordar a questão da jurisdição, assinalando que, em seu entender, esta se limita unicamente à Convenção contra o Genocídio, não podendo tomar em conta outras supostas violações graves sob o direito internacional, mesmo que sejam obrigações de normas peremptórias (jus cogens), mesmo que protejam valores essencialmente humanitários, e que gerem obrigações erga omnes. Em sua ótica, sua jurisdição é, pois, extremamente limitada, e não se estende tampouco a supostas violações do direito internacional consuetudinário atinente ao genocídio; limita-se tão somente às supostas violações das obrigações convencionais (pars. 84-89 e 102-105).

Por sua vez, a determinação da responsabilidade do Estado sob a Convenção contra o Genocídio (Artigo IX, base da jurisdição da CIJ) se dá com base em regras do direito internacional geral (pars. 124-131). Aos 27 de abril de 1992, a República Federal da Iugoslávia afirmou (em Nota enviada às Nações Unidas) sua continuidade - e das obrigações convencionais - em relação à predecessora República Socialista Federal da Iugoslávia. Em sua recente Sentença, a CIJ decidiu que mesmo atos ocorridos antes de 27.04.1992 recaem sob sua jurisdição para que possa avaliar e pronunciar-se sobre a demanda croata como um todo (paras. 106-119). A CIJ acrescentou que também a demanda reconvencional sérvia recaía sob sua jurisdição. As ocorrências constantes da demanda croata se referiam aos ataques sérvios, particularmente em 1991-1992, e os da demanda reconvencional sérvia se referiam em especial à chamada "Operação Tempestade" croata em 1995.

A CIJ passou então ao direito aplicável, a Convenção sobre a Prevenção e Repressão do Crime do Genocídio de 1948. A Corte assinalou que os redatores da Convenção de 1948 buscaram limitá-la tão somente a "destruição física ou biológica" do grupo em questão, excluindo o "genocídio cultural" (pars. 134-136). Ademais, a CIJ adota uma alta exigência para inferir o dolus specialis de um determinado padrão de conduta, ao estatuir que deve ser "a única inferência que se poderia razoavelmente fazer" dos atos em questão (pars. 143-148).

A CIJ mostrou-se ainda mais restritiva, ao avançar o seu entendimento no sentido de que a Convenção contra o Genocídio e o Direito Internacional Humanitário "dois ramos distintos de regras,

buscando fins diferentes", e não cabe a ela pronunciar-se sobre a relação entre ambos (pars. 151-153). Na linha de sua concepção, observou, quanto aos desaparecimentos de pessoas no cas d´espèce, que, ainda que estes crimes "possam causar sofrimento psicológico", para recaírem sob o artigo II(b) da Convenção contra o Genocídio seu "sofrimento deve ser tamanho, de modo a contribuir à destruição física ou psicológica do grupo, no todo ou em parte" (pars. 154-166).

Em seguida, a CIJ passou a abordar as questões probatórias. De imediato, a CIJ rechaçou qualquer possibilidade de distribuição ou reversão do ônus da prova, devendo cada uma das partes provar tudo o que diz. Insistiu, a seguir, em sua visão segundo a qual, em se tratando de acusações de "excepcional gravidade", como no presente caso, tudo o que é atinente ao crime de genocídio deve ser provado de forma "inteiramente conclusiva". Acrescentou a CIJ que o Tribunal Penal Internacional ad hoc para a Ex-Iugoslávia (TPII) tem evitado acusações de genocídio, em particular no tocante às hostilidades na Croácia. Ademais, a CIJ lançou dúvidas sobre as provas aduzidas pela Croácia (pars. 167-199).

As considerações seguintes da CIJ versaram sobre o actus reus de genocídio sob a Convenção de 1948. A CIJ iniciou por assinalar que não lhe parecia necessário examinar cada um dos incidentes mencionados na demanda croata de forma exaustiva: bastava, a seu ver, examinar exemplos de atos sistemáticos e vastos cometidos contra o grupo alvejado. A CIJ deu por comprovados assassinatos - pelo exército e forças sérvias - em larga escala contra o referido grupo, conformando o actus reus de genocídio sob o artigo II(a) da Convenção de 1948 (pars. 203-208).

O mesmo concluiu a CIJ em relação ao artigo II(b). No entanto, ao referir-se aos parentes de pessoas desaparecidas, a CIJ exigiu que o demandante deveria ter provado - o que a seu ver não o fez - que o sofrimento psicológico fosse suficiente para constituir um sério dano mental (pars. 296-360). Já em relação ao artigo II(c) e (d), tampouco, a seu ver, foi provada violação dos mesmos; os casos de estupros e outros atos de violência sexual, para a CIJ, não chegaram a constituir violações destas disposições (pars. 361-394 e 395-400). Em suma, o actus reus de genocídio se verificou, a seu ver, tão só em relação ao artigo II(a) e (b) (par. 401).

Passando do *actus reus* à intenção genocida (*dolus specialis*), a CIJ observou que houve, de fato, um padrão de ataques vastos contra a população croata, a partir de agosto de 1991, por parte do exército e forças (inclusive paramilitares) sérvios; no entanto, - prosseguiu, - só se poderia afirmar a intenção genocida se fosse ela a "única inferência razoável" a deduzir-se de tal padrão de conduta (pars. 402-440). A CIJ não considerou necessário examinar as origens político-históricas do conflito de 1991-1995, e minimizou o *Memorandum* da Academia Sérvia de Ciencias e Artes (de 1986).

Acrescentou que só se poderia deduzir, mesmo em relação aos atos que constituíam *actus reus* de genocídio sob o artigo II(a) e (b) da Convenção de 1948, que a seu ver não houve intenção da Sérvia de destruir os croatas, mas tão só de forçá-los a deixar as regiões atacadas, de modo a criar um "Estado sérvio etnicamente homogêneo". Mesmo o ataque a Vukovar, - acrescentou, - não passou de uma "resposta à declaração de independência da Croácia". A suposta intenção de destruir os croatas, a seu ver, não era, pois, a única conclusão razoável que se poderia deduzir do ataque ilegal a Vukovar, pois não havia *mens rea* de destruir fisicamente seus habitantes mas tão só de puni-los (pars. 419-430).

A CIJ prosseguiu assinalando que houve croatas que não foram mortos, e que a Croácia, a seu ver, não demonstrou que "uma parte substancial" de sua população havia sido destruída (pars. 431-437). Ademais, - continuou, - o Promotor do TPII nunca indiciou indivíduo algum por genocídio contra a população croata no contexto do conflito armado no território da Croácia no período de 1991-1995 (par. 440). Desse modo, a CIJ determinou que não houve qualquer tipo de responsabilidade da Sérvia sob a Convenção contra o Genocídio no presente caso, e, assim sendo, decidiu que a demanda croata devia ser inteiramente rejeitada (pars. 441-442).

No tocante à demanda reconvencional sérvia, a CIJ entendeu que os contra-ataques croatas (de 1995, como na "Operação Tempestade"), ainda que se enquadrassem (*actus reus*) no artigo II(a) da Convenção contra o Genocídio (pars. 462-499), não revelavam qualquer *dolus specialis* (pars. 500-515). A Sérvia não o provou. Desse modo, a CIJ determinou que não houve qualquer tipo de responsabilidade da Croácia sob a Convenção contra o Genocídio no presente caso, e,

assim sendo, decidiu que a demanda reconvencional sérvia devia ser inteiramente rejeitada (pars. 516-522).

Quanto às pessoas desaparecidas, a CIJ limitou-se a "encorajar" as partes a cooperar entre si para "oferecer reparação adequada às vítimas de tais violações"; não podia ir além disso, agregou, em razão do que percebia como os limites à sua jurisdição sob a Convenção contra o Genocídio (artigo IX) (par. 523). Por último, os três pontos resolutivos da Sentença da CIJ, adotada em 03.02.2015, ao final de 16 anos de trâmite do caso, foram, em suma, os seguintes: 1) exercer sua jurisdição para examinar a demanda croata, inclusive em relação a fatos anteriores a 27.04.1992; 2) rejeitar a demanda croata; e 3) rejeitar a demanda reconvencional sérvia.

III. A DISSIDÊNCIA DO AUTOR

Na ocasião, apresentei um extenso e contundente Voto Dissidente, composto de 19 partes, em que expus os fundamentos de minha posição dissidente, abarcando a metodologia adotada, o enfoque seguido, todo o raciocínio da Corte no tocante a questões de avaliação probatória e de substancia, além da conclusão da Corte quanto à demanda croata (ponto resolutivo 2). Ao iniciar meu Voto Dissidente, concentrei atenção no âmbito da solução do atual contencioso, ineludivelmente ligado ao imperativo da *realização da justiça*, no tocante a violações *graves* dos direitos humanos e do Direito Internacional Humanitário, sob a Convenção contra o Genocídio (de 1948), à luz de *considerações básicas de humanidade* (pars. 1-5).

Preliminarmente, destaquei a demora sem precedentes de 16 anos na adjudicação do cas d´espèce. Iniciado o trâmite do caso em 02.07.1999, no decorrer da primeira etapa da fase escrita do procedimento perante a CIJ, a Sérvia interpôs exceções preliminares (quanto à jurisdição e admissibilidade) em 11.09.2002, e a decisão da CIJ quanto às mesmas só foi emitida seis anos depois, em 18.11.2008. A segunda etapa da fase escrita do procedimento se estendeu por mais quatro anos, até 30.08.2012. As audiências públicas (fase oral) quanto ao mérito se efetuaram entre 03 de março e 01 de abril de 2014.

Durante todo este tempo, os vitimados esperaram, em vão, pela realização da justiça. Ponderei que "[p]aradoxalmente, quanto mais graves parecerem as violações do direito internacional, mais difícil e

prolongada parece tornar-se a tarefa da realização da justiça" (para. 14). Tais atrasos indevidos na realização da justiça em casos deste gênero se afiguram sumamente lamentáveis, particularmente da perspectiva das vítimas (justitia longa, vita brevis) (pars. 6-18).

Ao passar então à questão da jurisdição, adverti que, no presente caso opondo a Croácia à Sérvia, a responsabilidade não podia ser atribuída a um Estado extinto; houve uma continuidade pessoal, pela política (*policy*) e práticas no período das ocorrências (1991 em diante). Sendo a Convenção contra o Genocídio (1948) um tratado de direitos humanos (como amplamente reconhecido), o direito a reger a sucessão de Estados em tratados de direitos humanos se aplica (com sucessão *ipso jure*). Ao continuar, adverti ademais que não pode haver ruptura alguma na proteção estendida a grupos humanos pela Convenção contra o Genocídio em uma situação de dissolução de um Estado em meio a violência generalizada, quando mais se necessita da proteção.

Em uma situação do gênero, prossegui, há *sucessão automática*, e *aplicabilidade contínua*, da Convenção contra o Genocídio, que de outro modo ficaria privada de seus efeitos apropriados (*effet utile*). Uma vez estabelecida a jurisdição da Corte no início do procedimento, - acrescentei, - qualquer lapso ou mudança de atitude subsequente do Estado em questão não pode ter incidência alguma sobre tal jurisdição (*venire contra factum proprium non valet*). Ademais, reconhece-se a sucessão automática em tratados de direitos humanos na prática dos órgãos convencionais de supervisão das Nações Unidas (tais como, e.g., os Comitês de Direitos Humanos e de Eliminação de Todas as Formas de Discriminação Racial) (pars. 55-84).

A *essência* do presente caso, - acrescentei, - reside em questões *substantivas* relativas à interpretação e aplicação da Convenção contra o Genocídio, ao invés de questões de jurisdição/admissibilidade, como reconhecido pelas próprias partes litigantes no decorrer do procedimento. Enfatizei que a sucessão automática, e a continuidade das obrigações, da Convenção contra o Genocídio, constitui um *imperativo de humanidade*, de modo a assegurar a proteção de grupos humanos quando mais a necessitam (pars. 50-54).

Em minha percepção, o *princípio de humanidade* permeia toda a Convenção contra o Genocídio, orientada essencialmente aos grupos humanos; permeia todo o *corpus juris* de proteção de direitos humanos, que se orienta essencialmente às vítimas, abarcando também o Direito

Internacional dos Direitos Humanos (DIDH), o Direito Internacional Humanitário (DIH) e o Direito Internacional dos Refugiados (DIR), ademais do Direito Penal Internacional (DPI) contemporâneo (par. 84). O princípio de humanidade tem uma clara incidência na proteção dos direitos humanos, em particular em situações de *vulnerabilidade*, ou encontrando-se as pessoas até mesmo *indefesas* (pars. 58-65).

A própria Carta das Nações Unidas, - acrescentei, - professa a determinação de assegurar o respeito aos direitos humanos em todas partes; o princípio de humanidade, - na linha do pensamento jusnaturalista sedimentado (*recta ratio*), - permeia do mesmo modo o Direito das Nações Unidas (pars. 73-76). O princípio de humanidade tem, ademais, angariado reconhecimento judicial, por parte tanto dos tribunais internacionais contemporâneos de direitos humanos como dos tribunais penais internacionais (pars. 77-82). As violações graves de direitos humanos e os atos de genocídio, entre outras atrocidades, constituem violações de proibições absolutas do *jus cogens* (par. 83).

Em seguida, sustentei que a determinação da *responsabilidade do Estado* sob a Convenção contra o Genocídio não só foi o que se pretendeu por seus redatores (como o demonstram seus *travaux préparatoires*), mas também se encontra em conformidade com seu *rationale*, assim como com seu objeto e fim. A Convenção contra o Genocídio visa prevenir e sancionar o crime of genocídio, - que é contrário ao espírito e fins das Nações Unidas, - de modo a liberar a humanidade deste flagelo. Adverti que, tentar tornar a aplicação da Convenção contra o Genocídio uma tarefa impossível, deixaria a Convenção sem sentido, quase uma letra morta (par. 94).

Ao passar então a um exame detalhado da questão da prova (*standard of proof*), demonstrei que os tribunais internacionais de direitos humanos (a CtIADH e a CtEDH), em sua jurisprudência, *não* têm seguido um padrão de carga probatória rígida e altamente exigente em casos de violações graves dos direitos da pessoa humana; ao invés disso, têm recorrido a deduções e presunções factuais, assim como à reversão ou distribuição do ônus da prova (pars. 100-121). Lamentei que este desenvolvimento jurisprudencial não tenha sido levado em conta pela CIJ na presente Sentença (par. 124).

Acrescentei que, na mesma linha de rejeição de um padrão de carga probatória rígida e altamente exigente, os tribunais penais internacionais (*ad hoc*, para a Ex-Iugoslávia [TPII] e para Ruanda [TPIR]) têm, em sua

jurisprudência, mesmo na ausência de provas diretas, deduzido a prova de intenção genocida a partir de inferências factuais (pars. 125-139). Por sua vez, a CIJ, tanto no presente caso sob a Convenção contra o Genocídio como no caso anterior do *Genocídio Bósnio* (2007), parece ter aplicado um ônus probatório demasiado exigente e alto (para a determinação do genocídio), que não está em conformidade com a jurisprudência bem estabelecida a esse respeito, tanto dos tribunais penais internacionais como dos tribunais internacionais de direitos humanos (par. 142).

No fim das contas, - prossegui, - a referida intenção só pode ser deduzida, de fatores como "a existência de um plano geral ou *policy*, do ataque sistemático a determinados grupos humanos, da escala de atrocidades, do uso de linguagem depreciativa, dentre outros. As tentativas de impor um alto padrão de carga probatória de genocídio, e de desacreditar a apresentação de provas (e.g., declarações testemunhais) são extremamente lamentáveis, terminando por reduzir o genocídio a um crime quase impossível de determinar, e a Convenção contra o Genocídio quase a letra morta. Isto só pode gerar a impunidade dos perpetradores de genocídio, - tanto Estados como indivíduos, - e dissipar qualquer esperança de acesso à justiça por parte das vítimas de genocídio. *Lawlessness* tomaria o lugar do *rule of law*" (par. 143).

Acrescentei outra advertência contra o que se afigurava "uma lamentável desconstrução da Convenção contra o Genocídio", ao tentar caracterizar a situação "como uma de conflito armado, de modo a afastar o genocídio. Os dois não se excluem um ao outro" (par. 144). Em meu entender, "[d]evia a CIJ, na adjudicação do presente caso, ter mantido em mente a importância da Convenção contra o Genocídio como um tratado de direitos humanos da maior importância e sua significação histórica para a humanidade". Devia a CIJ ter decidido o presente caso, - prossegui, - "de forma alguma à luz da soberania estatal, mas sim do imperativo da salvaguarda da vida e integridade dos grupos humanos sob a jurisdição do Estado em questão, ainda mais quando se encontram em situações da mais completa vulnerabilidade, se não indefesos. A vida e a integridade da população prevalecem sobre as asserções de soberania estatal, particularmente diante dos maus usos desta última" (par. 145).

Observei, ademais, que a determinação dos fatos a que as Nações Unidas procederam, na época das ocorrências, contém importantes elementos conformando o padrão amplo e sistemático de destruição nos

ataques na Croácia: tal é o caso dos relatórios da antiga Comissão de Direitos Humanos da ONU (1992-1993) e dos relatórios da Comissão de Peritos do Conselho de Segurança (1993-1994). Tais ocorrências tiveram também repercussão na II Conferência Mundial das Nações Unidas sobre Direitos Humanos (1993), - como bem me recordo, por haver dela participado ativamente[2]. Tem também havido reconhecimento judicial (na jurisprudência do TPII - pars. 180-194) dos ataques vastos e/ou sistemáticos contra a população civil croata.

Procedi então a um exame detalhado do padrão amplo e sistemático de destruição, em minha percepção claramente estabelecido no presente processo diante da CIJ, que abarcou ataques indiscriminados contra a população civil, assassinatos em massa, tortura e violência física, expulsão sistemática dos lares (com êxodo massivo), e destruição da cultura de grupo. O padrão amplo e sistemático de destruição também compreendeu a prática de estupro e outros crimes de violência sexual, a revelar a necessidade e importância de uma *análise de gênero* (pars. 260-277).

Houve, ademais, - prossegui, - um padrão sistemático de pessoas desaparecidas. O desaparecimento forçado de pessoas é uma violação grave e *continuada* dos direitos humanos e do Direito Internacional Humanitário; com seus efeitos destrutivos, dá testemunho da expansão da noção de vítimas (de modo a compreender não só as pessoas desaparecidas, mas também seus parentes próximos, que não sabem de seu paradeiro). A situação criada requer um padrão probatório apropriado, e a reversão ou distribuição do ônus da prova, que não pode recair sobre os vitimados (paras. 313-318).

Aqui, uma vez mais, cabe tomar em conta - o que a CIJ não fez - a relevante jurisprudência dos tribunais internacionais de direitos humanos (a CtIADH e a CtEDH - paras. 300-310 e 313) a respeito da questão do desaparecimento forçado de pessoas. Em suma, - ponderei, - as provas apresentadas à CIJ no presente caso da *Aplicação da Convenção contra o Genocídio* estabelecem claramente, em minha percepção,

2. Cf., sobre a referida Conferencia Mundial e seu legado, A.A. Cançado Trindade, *Tratado de Direito Internacional dos Direitos Humanos*, 2ª. ed., vol. I, Porto Alegre, S.A. Fabris Ed., 2003, pp. 89-338; A.A. Cançado Trindade, *A Proteção dos Vulneráveis como Legado da II Conferência Mundial de Direitos Humanos (1993-2013)*, Fortaleza/Brasil, IBDH/IIDH/SLADI, 2014, pp. 13-356.

> "a ocorrência de assassinatos em massa de membros alvejados da população civil croata durante os ataques armados na Croácia, em meio a um padrão sistemático de violência extrema, abarcando também a tortura, detenção arbitrária, violências físicas, assaltos sexuais, expulsão dos lares e sua destruição, deslocamento forçado e transferência, deportação e humilhação, nas cidades e vilas atacadas. Não foi exatamente uma guerra, foi um ataque mortífero e devastador contra civis. Não se tratou apenas de \`uma pluralidade de crimes comuns´ que \`não podem, por si, constituir genocídio´, como alegou o advogado da Sérvia diante da Corte na audiência pública de 12.03.2014; tratou-se, antes, de um ataque devastador, uma pluralidade de atrocidades, que, por si mesma, por sua violência extrema e devastação, pode revelar a intenção de destruir (*mens rea* do genocídio)" (par. 237).

Acrescentei que as referidas violações graves de direitos humanos e do Direito Internacional Humanitário constituem violações do *jus cogens*, acarretando a responsabilidade do Estado e o dever de reparações às vítimas, consoante a ideia de *retidão* (em conformidade com a *recta ratio* do direito natural), subjacente à concepção do Direito (em sistemas jurídicos distintos - *Direito* / *Derecho* / *Diritto* / *Droit* / *Right* / *Recht*) como um todo (pars. 319-320). No presente caso, o padrão amplo e sistemático de destruição ocorreu em execução de um plano, com um conteúdo ideológico. A esse respeito, - prossegui, - ambas partes litigantes abordaram as origens históricas do conflito armado na Croácia, e o TPII examinou declarações periciais referentes ao caso. A CIJ não considerou necessário examinar a matéria, não obstante ter sido a incitação ideológica conducente à eclosão das hostilidades trazida ao seu conhecimento pelas partes litigantes, como um elemento essencial a uma compreensão apropriada do caso.

As provas apresentadas à Corte, relativas ao referido padrão amplo e sistemático de destruição, revelam que, com efeito, os ataques armados na Croácia não constituíram exatamente uma guerra, mas sim uma ofensiva mortífera e devastadora (cf. *supra*); uma de suas manifestações foi a prática de marcar os croatas nos braços com laços brancos, ou de colocar panos brancos nas portas de suas casas. Outra das manifestações foram os maus tratos por forças sérvias dos restos mortais dos croatas falecidos, e outras descobertas sucessivas

em numerosas fossas comuns (*mass graves*), ademais de ainda outras clarificações obtidas pelo interrogatório de testemunhas diante da Corte (em sessões tanto públicas como confidenciais) (pars. 360-395).

O padrão amplo e sistemático de destruição também se manifestou no deslocamento forçado de pessoas e na destruição de seus lares, e na sujeição das vítimas a condições de vida insuportáveis. Tal padrão de destruição, abordado como um todo, compreendeu também a destruição do patrimônio cultural e religioso (monumentos, igrejas, capelas, muralhas, dentre outros); seria artificial tentar dissociar a destruição física/biológica da cultural (pars. 408-422).

As provas apresentadas à Corte em relação a cidades ou vilas selecionadas e devastadas - Lovas, Ilok, Bogdanovic e Vukovar (na região da Slavonia Oriental), e Saborsko (na região de Lika), - demonstram ter-se estabelecido o *actus reus* de genocídio (artigo II(a), (b) e (c) da Convenção contra o Genocídio) (pars. 423-459). Ademais, pode-se deduzir das provas apresentadas (mesmo não sendo diretas) a intenção de destruir (*mens rea*) os grupos alvejados, no todo ou em parte **(**pars. 460-471**)**. A extrema violência na perpetração das atrocidades no padrão planejado de destruição dá testemunho de tal intenção de destruir. Em meu entendimento,

> "as avaliações probatórias não podem prescindir de preocupações axiológicas. Os valores humanos estão sempre presentes, como reconhecido pela emergência histórica do princípio, no processo, do *livre convencimento* (*libre convencimiento* / *conviction intime* / *libero convincimento*) do juiz. Os fatos e valores se encontram juntos, nas avaliações probatórias. A dedução da *mens rea / dolus specialis*, para a determinação da responsabilidade por genocídio, se efetua a partir do *livre convencimento* (*conviction intime*) de cada juiz, da consciência humana.
>
> Em última análise, a consciência se situa acima, e fala mais alto, do que qualquer *Diktat* voluntarista. As provas apresentadas diante da CIJ dizem respeito à *conduta como um todo* do Estado em questão, e não só à conduta de indivíduos, em cada crime examinado de modo isolado. O *dossier* do presente caso relativo à *Aplicação da Convenção contra o Genocídio* (Croácia *versus* Sérvia) contém prova

> irrefutável de um padrão amplo e sistemático de extrema violência e destruição (...)" (pars. 469-470).

Há, assim, - prossegui, - necessidade de *reparações* às vítimas e seus familiares (pars. 472-485), - um ponto importante que foi devidamente abordado pelas próprias partes litigantes perante a Corte, - a ser determinadas pela CIJ em uma etapa subseqüente do caso. O difícil caminho da *reconciliação* (pars. 486-493), em minha percepção, se inicia com o reconhecimento de que o padrão amplo e sistemático de destruição termina por vitimizar a todos, em ambos lados. Requer, ademais, o esclarecimento do paradeiro e restos mortais das pessoas desaparecidas. O próximo passo rumo à reconciliação reside no provimento de reparações (em todas as suas formas). A reconciliação também requer apologias adequadas, honrando a memória das vítimas. Outro passo das partes litigantes na mesma direção reside na identificação e entrega, uma à outra, de todos os restos mortais.

Ponderei então que a adjudicação de um caso como o presente revela a necessidade de ir mais além do enfoque estritamente interestatal, superando dogmatismos do passado, fontes de distorções. Como a Convenção contra o Genocídio se concentra nos *grupos de pessoas*, cabe dirigir a atenção às pessoas ou população em questão, consoante um enfoque humanista, à luz do princípio de humanidade (pars. 494-524). Ao interpretar e aplicar a Convenção contra o Genocídio, - agreguei, - deve-se voltar a atenção às vítimas, e não a susceptibilidades interestatais (pars. 494-496).

Em meu entendimento, a avaliação probatória da Corte e a determinação dos fatos do *cas d´espèce* deviam ser abrangentes, e não atomizadas. Todas as atrocidades, apresentadas à Corte, conformando o referido padrão de destruição, deviam ser tomadas em conta, - e não apenas uma amostra delas, - para a determinação da responsabilidade do Estado sob a Convenção contra o Genocídio (pars. 503-507). Crimes em ampla escala, - prossegui, - tais como o estupro e outros crimes de violência sexual, expulsão dos lares (e sua destruição), deslocamentos forçados, privação de alimentos e cuidados médicos, não podem ser minimizados (par. 500).

Em sua presente Sentença no caso da *Aplicação da Convenção contra o Genocídio*, - acrescentei, - a CIJ viu tão somente o que quis ver (o que não foi muito), tentando fazer crer que se tratava de um caso tão só de deslocamento forçado de pessoas. Ademais, como que

tentando convencer-se a si mesma da ausência de intenção genocida, a CIJ endossou o argumento do Estado demandado de que o próprio Promotor do TPII não acusou indivíduo algum de genocídio no contexto dos ataques armados na Croácia no período 1991-1995 (par. 505).

Ora, - retruquei, - isto não tem incidência alguma sobre a responsabilidade estatal, pois indivíduos outros que os indiciados poderiam ter sido responsáveis (como agentes estatais); ademais, as acusações podem vir a ser posteriormente confirmadas (como no caso de *R. Karadzic*, em meados de 2013), como abarcando genocídio. De todos modos, - agreguei, - em suas acusações, o Promotor do TPII exerce um poder *discricionário*, seu estatuto sendo inteiramente distinto do dos juízes internacionais; além disso, como já ressaltado, em relação à responsabilidade do Estado os padrões probatórios não são os mesmos que em relação à responsabilidade penal individual (par. 506).

Ressaltei, em seguida, que o aparato conceitual e o raciocínio da CIJ, quanto ao direito, deviam igualmente ser abrangentes, e não atomizados, de modo a assegurar o *effet utile* da Convenção contra o Genocídio (par. 508). Não se pode abordar os ramos que conformam o *corpus juris* da proteção internacional dos direitos da pessoa humana - DIDH, DIH, DIR e DPI - de modo compartimentalizado; há aproximações e convergências entre eles (pars. 509-511).

Recordei, a seguir, que a Convenção contra o Genocídio, que se orienta às vítimas, não pode ser abordada de forma estática, por ser um "instrumento vivo" (pars. 511-512 e 515). Sustentei que o DIH costumeiro e convencional hão de ser vistos propriamente em interação, e não ser mantidos separados um do outro. Uma violação das disposições substantivas da Convenção contra o Genocídio acaba sendo também uma violação também do direito internacional costumeiro sobre a matéria (par. 513). Ademais, - acrescentei, - tampouco se pode abordar separadamente os elementos inter-relacionados do *actus reus* e *mens rea* de genocídio.

Passei então à consideração dos princípios gerais do direito (*prima principia*), e em particular ao princípio de humanidade, de grande relevância ao direito internacional tanto convencional como costumeiro; tais *prima principia* atribuem uma ineludível dimensão axiológica ao ordenamento jurídico internacional (par. 517). Acrescentei que os tratados de direitos humanos - tais como a Convenção contra o Genocídio - têm uma hermenêutica própria, o que requer um enfoque abrangente

quanto aos fatos e ao direito, e não atomizado ou fragmentado, como o seguido pela maioria da Corte.

Permiti-me, então, advertir contra a postura da CIJ na presente Sentença - também refletida em sua anterior Sentença no caso do *Genocídio Bósnio* (2007), - de atribuir uma importância total ao *consentimento* estatal individual, situando-o lamentavelmente bem acima dos imperativos da realização da justiça no plano internacional. Em um domínio como o dos tratados de direitos humanos em geral, e da Convenção contra o Genocídio em particular, o direito internacional parece, mais do que voluntário, como verdadeiramente *necessário*, e os direitos protegidos e os valores humanos fundamentais se situam acima dos interesses do Estado ou de sua "vontade" (par. 516).

Agreguei que o imperativo da *realização da justiça* reconhece que a consciência (*recta ratio*) se situa acima da "vontade" (par. 518); o consentimento cede espaço à justiça objetiva. Reiterei que a Convenção contra o Genocídio se ocupa de grupos humanos em situações de grande vulnerabilidade, ou indefesos, e requer um enfoque centrado nas pessoas em grupos, nas vítimas (pars. 520-522). Assinalei, ademais, que o enfoque abrangente que sustento para a Convenção contra o Genocídio há que tomar em conta "*todo o contexto factual* do presente caso opondo a Croácia à Sérvia, - e não apenas uma amostra de ocorrências selecionadas em algumas municipalidades, como o faz a maioria da Corte" (par. 523).

O contexto factual como um todo, em minha avaliação, "revela claramente um padrão amplo e sistemático de destruição, - que a maioria da Corte parece ter muita dificuldade em tomar em conta, por vezes minimizando-o" (para. 523). Requer-se, em meu entendimento, uma consideração da matéria de modo abrangente e não atomizado, "com fidelidade ao pensamento humanista e tendo em mente o princípio de humanidade, que permeia todo o *corpus juris* do DIDH, DIH, DIR e DPI, incluindo a Convenção contra o Genocídio" (par. 523).

Acrescentei que minha posição dissidente encontra respaldo não apenas na avaliação dos argumentos avançados perante a Corte pelas partes litigantes (Croácia e Sérvia), mas "sobretudo em questões de princípio e em valores fundamentais, aos quais atribuo ainda maior importância". Assim sendo, vi-me na obrigação, "no fiel exercício da função judicial internacional, de deixar registrados os fundamentos

de minha própria posição dissidente no *cas d´espèce* no presente Voto Dissidente" (para. 524).

Em suma, - concluí, - na interpretação e aplicação da Convenção contra o Genocídio, os princípios fundamentais e os valores humanos exercem um papel relevante, primordial; há aqui o primado da preocupação com as vítimas da crueldade humana, pois, no final das contas, a *raison d´humanité* prevalece sobre a *raison d´État* (para. 547). Eis, em meu entendimento, o que a Corte Internacional *de Justiça* deveria ter decidido na Sentença presente sobre o caso atinente à *Aplicação da Convenção contra o Genocídio*.

IV. CONSIDERAÇÕES FINAIS

Como assinalei ao início do presente estudo de caso, o princípio básico do respeito à dignidade da pessoa humana permeia toda a matéria aqui tratada. Com efeito, nos últimos anos venho me empenhando em abrir o difícil caminho do acesso da pessoa humana à justiça no contencioso inter-estatal, próprio da CIJ[3]. A presente decisão majoritária da CIJ, neste caso da *Aplicação da Convenção contra o Genocídio* (Croácia *versus* Sérvia, 2015), somando-se à anterior decisão da CIJ no caso do *Genocídio Bósnio* (Bósnia-Herzegóvina *versus* Sérvia, 2007), dá testemunho do *summum jus, summa injuria*. Depois de longa espera, os vitimados perderam a última esperança de encontrar a justiça humana pelas atrocidades sofridas, da gravidade dos atos de genocídio.

Em outras ocasiões, - como em meus extensos Votos Dissidentes nos casos da *Aplicação da Convenção CERD*[4] (Geórgia *versus* Federação Russa, 2011), e das *Imunidades Jurisdicionais do Estado* (Alemanha *versus* Itália, com intervenção da Grécia, mérito, 2012)[5], - adverti *inter alia* que, ainda que o mecanismo da solução de controvérsias da CIJ tenha se mantido e estratificado, ao longo das décadas, como estritamente inter-estatal (por inércia mental), não há razão alguma para que o raciocínio da CIJ também o seja, ainda mais quando as Convenções em questão

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3. Cf., e.g., A.A. Cançado Trindade, "El Difícil Camino del Acceso de la Persona Humana a la Justicia en el Contencioso Interestatal ante la Corte Internacional de Justicia", 21 *Anuario Hispano-Luso-Americano de Derecho Internacional* (2013-2014) pp. 173-213.
4. Convenção para a Eliminação de Todas as Formas de Discriminação Racial (1965).
5. Cf. ambos Votos Dissidentes reproduzidos *in*: *Judge A.A. Cançado Trindade: The Construction of a Humanized International Law - A Collection of Individual Opinions (1991-2013)*, vol. 2, Leiden, Brill/Nijhoff, 2014, pp. 1173-1266 e 1399-1522, respetivamente.

- como a Convenção contra o Genocídio, e a Convenção CERD, entre outras, - vão bem mais além da ótica inter-estatal.

Tais Convenções, que forneceram a base jurisdicional da CIJ naqueles dois casos, concentram-se claramente nos seres humanos, na salvaguarda de seus direitos, na qual se resumem seu próprio *rationale*, assim como seu objeto e fim. Tal como assinalei em meu recente Voto Dissidente no caso Croácia *versus* Sérvia (2015), a aplicação das referidas Convenções requer a prevalência da *raison d´humanité* sobre a *raison d´État*, à luz do *princípio de humanidade* (pars. 504, 517 e 530). Efetivamente, em meu entendimento, não pode a CIJ fazer abstração disto, e fechar os olhos à gravidade das ocorrências, atendo-se às susceptibilidades interestatais e esquecendo-se da vulnerabilidade extrema dos seres humanos vitimados. Os Estados foram criados para os seres humanos, e não *vice-versa*.

A presente Sentença da CIJ de 03.02.2015 levou a uma lamentável *desconstrução* da Convenção contra o Genocídio, em relação à qual não pode haver aquiescência. Tal desconstrução se constata na atitude majoritária da Corte de: 1) impor um alto padrão de carga probatória de genocídio (sem paralelo na jurisprudencia dos tribunais internacionais contemporâneos), tornando o genocídio um crime quase impossível de determinar; 2) desacreditar a apresentação de provas em declarações testemunhais; 3) abster-se de examinar as ocorrências em todas as cidades ou vilas atacadas (a totalidade do contexto factual do caso), escolhendo para exame apenas algumas delas; 4) rechaçar a *mens rea* com base em um *Diktat*, sem qualquer explicação; 5) abster-se de examinar as origens históricas e causas do conflito, abordadas pelas partes litigantes; 6) subordinar o próprio *jus cogens* ao voluntarismo estatal; 7) referir-se às vertentes de proteção dos direitos da pessoa humana (DIDH, DIH, DIR, DPI) de forma atomizada e não conjunta e convergente; 8) separar o DIH convencional e costumeiro, ao invés de considerá-los em conjunto; 9) separar a Convenção contra o Genocídio e o DIH, ao invés de considerá-los em conjunto; 10) abordar separadamente, e não de forma inter-relacionada, o *actus reus* e a *mens rea* de genocídio; 11) minimizar os princípios gerais do direito (*prima principia*), em particular o princípio de humanidade; 12) concentrar-se na "vontade" estatal e não na realização da justiça e na necessidade de proteção das vítimas em situações de vulnerabilidade ou indefesas; e

13) rejeitar a demanda, ao invés de abrir nova etapa no procedimento de determinação das reparações de danos.

O enfoque exclusivamente interestatal, de cunho positivista-voluntarista seguido pela CIJ, tem levado a decisões que testemunham o *summum jus, summa injuria*. Não obstante a aparente indiferença da CIJ em relação à posição dos indivíduos como sujeitos do direito internacional, vários casos recentes, trazidos ao conhecimento da Corte, têm se referido precisamente à situação concreta de indivíduos ou grupos de indivíduos afetados, e não a questões abstratas de interesse exclusivo dos Estados litigantes *inter se*[6].

Exemplificam-no os casos, e.g., de *A.S. Diallo* (Guiné *versus* R.D. Congo, 2010-2012), *Aplicação da Convenção CERD* (Geórgia *versus* Federação Russa, 2010-2011), *Templo de Préah Vihéar* (Camboja *versus* Tailândia, 2011), *Questões Relativas à Obrigação de Julgar ou Extraditar* (Bélgica *versus* Senegal (2009-2012), *Imunidades Jurisdicionais do Estado* (Alemanha *versus* Itália, com intervenção da Grécia, 2010-2012), - assim como os dois mais recentes Pareceres Consultivos sobre a *Declaração de Independência do Kossovo* (2010), e sobre a *Revisão de Sentença do Tribunal Administrativo da OIT* (2012). Assim, a artificialidade do enfoque exclusivamente inter-estatal no arrazoado da CIJ é manifesta.

O resultado, - paradoxalmente nos casos de violações *graves* dos direitos humanos e do Direito Internacional Humanitário, assim como da Convenção contra o Genocídio, - não poderia ser outro: o lamentável divórcio entre o *direito* e a *justiça* (*summum jus, summa injuria*). Permito-me, a respeito, recordar que, em algumas de suas últimas páginas (*Escritos de Londres*, 1943), antes de sua morte prematura, Simone Weil assinalava que a noção de *direito* era alheia ao espírito dos antigos gregos, que para a mesma não encontravam palavras. Contentavam-se os antigos gregos, assim, em se concentrar na *justiça*[7].

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6. Cf. A.A. Cançado Trindade, "A Contribuição dos Tribunais Internacionais à Evolução do Direito Internacional Contemporâneo", *in*: *O Direito Internacional e o Primado da Justiça* (eds. A.A. Cançado Trindade e A.C. Alves Pereira), Rio de Janeiro, Edit. Renovar, 2014, pp. 18-19; A.A. Cançado Trindade, "A Century of International Justice and Prospects for the Future", *in*: *A Century of International Justice / Rétrospective d´un siècle de justice internationale et perspectives d´avenir* (eds. A.A. Cançado Trindade e D. Spielmann), Oisterwijk, Wolf Publs., 2013, pp. 4 e 8-9.
7. S. Weil, *Escritos de Londres y Últimas Cartas* [1942-1943], Madrid, Ed. Trotta, 2000, pp. 27-28, 31, 58 e 180.

O direito, implicando o domínio (como o da propriedade), passou a ser o legado subseqüente dos antigos romanos. Com o passar do tempo, o termo *direito* veio a mostrar-se bem mais cômodo (e assim preferido pelos que assumiam funções públicas) do que a *justiça*, que exige a responsabilidade e busca impedir o dano, e, em caso de ocorrido este, assegurar as devidas reparações às vítimas. Não há que passar despercebido que, já os "pais fundadores" do direito internacional, nos séculos XVI e XVII, cuidavam-se de assinalar o dever de reparação de danos[8].

Em nossos dias, os juspositivistas não se dão conta sequer dos perigos do descompasso entre o *direito* e a *justiça*, mesmo porque só conseguem enxergar o primeiro, em sua característica subserviência ao poder estabelecido. Os resultados têm sido lamentáveis, se não trágicos. Cabe-nos zelar constantemente para que *direito* e *justiça* não se apartem nem se choquem. Minha esperança é no sentido de que as novas gerações de estudiosos da matéria, na determinação de construção de um mundo melhor, não se deixem cegar pelo poder estabelecido, e mantenham-se sempre cientes de que é no pensamento jusnaturalista que a noção de *justiça* tem sempre ocupado uma posição central, orientadora de todo o *direito*. A *justiça* encontra-se, em suma, no princípio de todo direito, sendo, ademais, seu fim último.

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8. Cf., para um estudo geral, A.A. Cançado Trindade, "Prefacio", *in Escuela Ibérica de la Paz (1511-1694) - La Conciencia Crítica de la Conquista y Colonización de América* (eds. P. Calafate e R.E. Mandado Gutiérrez), Santander, Ed. Universidad de Cantabria, 2014, pp. 40-109.

Parte II

ANEXO DOCUMENTAL

CORTE INTERNACIONAL DE JUSTIÇA, CASO DA *APLICAÇÃO DA CONVENÇÃO CONTRA O GENOCÍDIO* (Croácia versus Sérvia, Sentença de 03.02.2015): VOTO DISSIDENTE DO JUIZ ANTÔNIO AUGUSTO CANÇADO TRINDADE / DISSENTING OPINION OF JUDGE ANTÔNIO AUGUSTO CANÇADO TRINDADE

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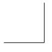
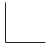
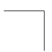
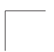

I. *PROLEGOMENA*

1. I regret not to share the position of the Court's majority as to the determination of the facts as well as the reasoning conducive to the three resolutory points, nor to its conclusion of resolutory point n. 2, of the Judgment it has just adopted today, 03 February 2015, in the present case concerning the *Application of the Convention against Genocide*, opposing Croatia to Serbia. My dissenting position encompasses the adopted methodology, the approach pursued, the whole reasoning in its treatment of issues of evidential assessment as well as of substance, as well as the conclusion on the Applicant's claim. This being so, I care to leave on the records the foundations of my dissenting position, given the considerable importance that I attach to the issues raised by Croatia and Serbia, in the course of the proceedings in the *cas d'espèce*, in respect of the interpretation and application of the 1948 Convention against Genocide, and bearing in mind that the settlement of the dispute at issue is ineluctably linked, as I perceive it, to the imperative of the *realization of justice*.

2. I thus present with the utmost care the foundations of my own entirely dissenting position on those aspects of the matter dealt with by the Court in the Judgment which it has just adopted, out of respect for, and zeal in, the faithful exercise of the international judicial function, guided above all by the ultimate goal precisely of the *realization of justice*. To this effect, I shall dwell upon the relevant aspects concerning the dispute brought before the Court which form the object of its present Judgment, in the hope of thus contributing to the clarification of the issues raised and to the progressive development of international law, in particular in the international adjudication by this Court of a case of the importance of the *cas d'espèce*, under the Convention against Genocide, in the light of fundamental considerations of humanity.

3. Preliminarily, I shall address the regrettable delays in the adjudication of the present case, and, as to jurisdiction, the automatic succession of the 1948 Convention against Genocide as a U.N. human rights treaty, and the continuity of its obligations, as an imperative of humaneness (principle of humanity). Once identified the essence of the present case, I shall consider State responsibility under the Convention against Genocide. My next line of considerations will centre on the standard of proof, in the case-law of contemporary international human rights tribunals as well as international criminal tribunals.

4. I shall then proceed to review the fact-finding and case-law on the factual context of the *cas d'espèce*, disclosing a widespread and systematic pattern of destruction, in relation to: a) massive killings, torture and beatings, systematic expulsion from homes and mass exodus, and destruction of group culture; b) rape and other sexual violence crimes committed in distinct municipalities; c) disappeared or missing persons. Next, I shall review the onslaught (not exactly war), in its multiple aspects, namely: a) plan of destruction (its ideological content); b) the imposed obligation of wearing white ribbons; c) the disposal of mortal remains; d) the existence of mass graves; e) further clarifications from the cross-examination of witnesses; f) the forced displacement of persons and homelessness; g) the destruction of cultural goods.

5. In sequence, I shall dwell upon the determination, under the Convention against Genocide, of the *actus reus* of genocide, in the widespread and systematic pattern of conduct of destruction (extreme violence and atrocities) in some devastated municipalities, as well as *mens rea* (proof of genocidal intent by inference). The path will then be paved, last but not least, for my considerations on the need of reparations, and on the difficult path to reconciliation, as well as to the presentation of my concluding observations (on evidential assessment and determination of the facts, as well as conceptual framework and reasoning as to the law), and, last but not least, the epilogue (recapitulation).

II. THE REGRETTABLE DELAYS IN THE ADJUDICATION OF THE PRESENT CASE

1. Procedural Delays

6. Looking back in time, I cannot avoid expressing my regret at the considerable delays in the adjudication of the present case concerning the *Application of the Convention against Genocide*, opposing Croatia to Serbia. The *Application Instituting Proceedings* was filed on 02.07.1999. The first time-limits fixed by the Court for the filing by the Parties of the *Memorial* and *Counter-Memorial* were, respectively, 14.03.2000 and 14.09.2000[9]. In a letter dated 25.02.2000, Croatia requested an extension of six months for filing its *Memorial*. The request for extension was not objected by Serbia, who also requested an extension of six months for

9 Cf. ICJ, Order of 14.09.1999.

the filing of its *Counter-Memorial*. The time-limit for filing the *Memorial* was thus extended to 14.09.2000 and, for the *Counter-Memorial*, to 14.09.2001[10].

7. In a letter dated 26.05.2000, Croatia requested that the Court extend by a further period of six months the time-limit for the filing of the *Memorial*. The request for extension was not objected by Serbia, who also requested an extension of six months for the filing of its *Counter-Memorial*. Thus, the Court further extended to 14.03.2001 the time-limit for filing the *Memorial* and to 16.09.2002 for the filing of the *Counter-Memorial*[11]. Croatia filed the *Memorial* on 14.03.2001 within the time-limit extended.

8. On 11.09.2002, within the time-limit so extended for the filing of the *Counter-Memorial*, Serbia filed certain *preliminary objections* as to jurisdiction and to admissibility. The proceedings on the merits were suspended, in accordance with Article 79(3) of the Rules of Court, and a time-limit for the filing of a written statement of Croatia's submission on the preliminary objections was fixed for 29.04.2003[12]. Hearings on preliminary objections were held half a decade later, from 26 to 30.05.2008. The Court delivered its Judgment on preliminary objections on 18.11.2008, finding, *inter alia*, that, subject to its finding on the second preliminary objection submitted by Serbia, it has jurisdiction pursuant to Article IX of the Genocide Convention to entertain the *Application* of Croatia.

9. Serbia then requested an equal time-limit of 18 months to file its *Counter-Memorial*, which was the time-limit granted for the filing of the *Memorial* of Croatia. The time-limit for the filing of the *Counter-Memorial* was fixed for 22.03.2010[13]. The *Counter-Memorial* of Serbia was filed, within the time-limit, on 04.01.2010, and it contained *counter-claims*. Croatia indicated (at meeting with the President on 03.02.2010) that it did not intend to raise objections to the admissibility of the counter-claims but wished to respond to the substance of the counter-claims in a *Reply*. Serbia thus indicated that it accordingly wished to file a *Rejoinder*.

10 Cf. Order of 10.03.2000.
11 Cf. Order of 27.06.2000.
12 Cf. Order of 14.11.2002.
13 Cf. Order of 20.01.2009.

10. Given that there were no objections by Croatia as to the admissibility of Serbia's counter-claims, the Court did not consider it necessary to rule definitively at that stage on the question as to whether the counter-claims fulfilled the conditions of Article 80(1) of the Rules of Court. The Court further decided that a *Reply* and *Rejoinder* would be necessary, and to ensure strict equality between the Parties (equality of arms / égalité des armes) it reserved the right of Croatia to file an additional pleading relating to the counter-claims. The Court thus fixed the time-limit for the filing of Croatia's *Reply* as 20.12.2010, and 04.11.2011 for the *Rejoinder* of Serbia[14].

11. Croatia filed its *Reply* within the time-limit and Serbia also filed its Rejoinder within the fixed time-limits. Both the *Reply* and *Rejoinder* contained submissions as to the claims and counter-claims. The Court authorized the submission by Croatia of an *Additional Pleading* relating to the counter-claims of Serbia, and fixed for 30.08.2012 the filing of such *Additional Pleading*, which was filed within the time-limit[15]. In light of the foregoing, the hearings on the merits were thus scheduled to take place – as they did – from 03 March to 01 April 2014.

12. These facts speak for themselves, as to the regrettable delays in the adjudication of the present case, keeping in mind in particular those who seek for justice. Unfortunately, as I have pointed out, on other recent occasions within this Court, *the time of human justice is not the time of human beings*. In my Dissenting Opinion in the case of *Questions Relating to the Obligation to Prosecute or Extradite* (provisional measures of protection, Belgium *versus* Senegal, Order of 28.05.2009), I pondered that

> "The time of human beings surely does not appear to be the time of human justice. The time of human beings is not long (*vita brevis*), at least not long enough for the full realization of their project of life. The brevity of human life has been commented upon time and time again, along the centuries; in his *De Brevitate Vitae*[16], Seneca pondered that, except for but a few, most people in his times departed from life while they were still preparing to live. Yet, the time of human justice is prolonged, not

14 Cf. Order of 04.02.2010.
15 Cf. Order of 23.01.2012.
16 Written sometime between the years 49 and 62.

> seldom much further than that of human life, seeming to make abstraction of the vulnerability and briefness of this latter, even in face of adversities and injustices. The time of human justice seems, in sum, to make abstraction of the time human beings count on for the fulfilment of their needs and aspirations.
>
> Chronological time is surely not the same as biological time. The time of the succession of events does not equate with the time of the briefness of human life. *Tempus fugit*. On its turn, biological time is not the same as psychological time either. Surviving victims of cruelty lose, in moments of deep pain and humiliation, all they could expect of life; the younger lose in a few moments their innocence forever, the elderly suddenly lose their confidence in fellow human beings, not to speak of institutions. Their lives become deprived of meaning, and all that is left, is their hope in human justice. Yet, the time of human justice does not appear to be the time of human beings" (paras. 46-47).

13. Shortly afterwards, in my Dissenting Opinion in the case concerning *Jurisdictional Immunities of the State* (counter-claim, Germany *versus* Italy, Order of 06.07.2010), I deemed it fit again to ponder, in relation to the inhuman conditions of the subjection of prisoners of war to forced labour, that

> "Not only had those victims to endure inhuman and degrading treatment, but later crossed the final limit of their ungrateful lives living with impunity, without reparation and amidst manifest injustice. The time of human justice is definitively not the time of human beings" (para. 118).

This holds true, once again, in the present case concerning the *Application of the Convention against Genocide* (Croatia *versus* Serbia), – involving grave breaches of international law, – where the aforementioned regrettable delays have extended for a virtually unprecedented prolongation of time (1999-2015), of over one and a half decades, despite the *vita brevis* of human beings.

2. *Justitia Longa, Vita Brevis*

14. Paradoxically, the graver the breaches of international law appear to be, the more time-consumingand difficult it becomes to

impart justice. To start with, all those who find themselves in this world are then promptly faced with a great enigma posing a lifelong challenge to everyone: that of understanding the *passing of time*, and endeavouring to learn how to live *within* it. Already in the late VIIIth or early VIIth century b.C., this mystery surrounding all of us was well captured by Homer in his *Iliad*:

> "Like the generations of leaves, the lives of mortal men.
> Now the wind scatters the old leaves across the earth,
> now the living timber bursts with the new buds
> and spring comes round again. And so with men:
> as one generation comes to life, another dies away"[17].

15. As if it were not enough, there is an additional enigma to face, that of the extreme violence and brutality with which human beings got used to relating to each other, century after century:

> "War – I know it well, and the butchery of men.
> Well I know, shift to the left, shift to the right
> my tough tanned shield. (...) I know it all, (...)
> I know how to stand and fight to the finish,
> twist and lunge in the war-god's deadly dance[18]. (...)
> (...) Now, as it is, the fates of death await us
> thousands poised to strike, and not a man alive
> can flee them or escape (...)[19]. (...)
> (...) We must steel our hearts. Bury our dead,
> with tears for the day they die, not one day more.
> And all those left alive, after the hateful carnage,
> (...) wretched mortals...
> like leaves, no sooner flourishing, full of the sun's fire,

17 Book VI, verses 171-175.
18 Book VII, verses 275-278 and 280-281.
19 Book XII, verses 378-380.

feeding on earth's gifts, than they waste away and die[20]. (...)

(...) My sons laid low, my daughters dragged away
and the treasure-chambers looted, helpless babies
hurled to the earth in the red barbarity of war...
(...) Ah for a young man
all looks fine and noble if he goes down in war,
hacked to pieces under a slashing bronze blade–
he lies there dead... but whatever death lays bare,
all wounds are marks of glory. When an old man's killed
and the dogs go at the grey head and the grey beard
and mutilate the genitals – that is the cruellest sight
in all our wretched lives!"[21].

16. Homer's narrative of human cruelty seems endowed with perennial contemporaneity, – especially after the subsequent advent of tragedy. This is the imprint of a true classic. Homer could well be describing the horrors in our times, or in recent times, e.g., in the wars in the former Yugoslavia along the nineties. There are, in the *Iliad*, murders, brutality, rape, pillage, slavery and humiliation; there are, in the present case of the *Application of the Convention against Genocide* (Croatia *versus* Serbia), murders, brutality, torture, beatings, enforced disappearances, looting and humiliation; from the late VIIIth century b.C. to the late XXth century, the propensity of human beings to treat each other with extreme violence has remained the same, and has even at times worsened.

17. This suggests that succeeding generations along the centuries, have not learned from the sufferings of their predecessors. The propensity of human beings to do evil to each other has accompanied them from the times of the *Iliad*, through those of the tragedies of Aeschylus and Sophocles and Euripides (IVth century b.C.), until the present, as illustrated by the *cas d'espèce*, concerning the *Application of the Convention against Genocide*. There is a certain distance from epic

20 Book XXI, verses 528-530.
21 Book XXII, verses 73-75 and 83-90.

to tragedy; yet, the former paved the way to the latter, and tragedy was then to find its own expression, and, ever since, has never faded away. Tragedy sought inspiration in the narrative of epic, but added to it something new: the human sentiment, the endurance of living and the human condition. Tragedy has been accompanying the human condition along the centuries.

18. It came to stay, performed throughout the centuries, time and time again, until our days. The war in the Balkans, portrayed in the present case opposing Croatia to Serbia, bears witness of that: it is tragic in its devastation. Yet, tragedy – which gave a new dimension to epic – was not focused only on destructiveness and the lessons to extract therefrom, but also on the *need for justice*. Aeschylus's *Oresteia* trilogy, and in particular the chorus in the *Eumenides*, can be recalled in this connection. Just as the passing of time has not erased the somber propensity of human beings to do evil to each other, the search for justice has likewise been long-lasting, as also illustrated by the *cas d'espèce*. This regrettably appears proper of the human condition, from ancient times to nowadays: perennial evil, *vita brevis*; justitia *longa*, *vita brevis*.

III. JURISDICTION: AUTOMATIC SUCCESSION TO THE GENOCIDE CONVENTION AS A HUMAN RIGHTS TREATY

1. Arguments of the Parties as to the Applicability of the Obligations under the Genocide Convention Prior to 27.04.1992

19. In its Application filed in 1999, Croatia invoked jurisdiction on the basis that the Socialist Federal Republic of Yugoslavia (SFRY) was a party to the Genocide Convention and that Serbia was bound by it as a successor State to the SFRY[22]. Both Parties, according to Croatia, were bound by the Genocide Convention as successor States of the SFRY[23]. The SFRY had become a Party to the Convention on 29.08.1950. In the light of the ICJ's finding in 2008 that its jurisdiction in the present case arises of succession to the Genocide Convention[24] rather than accession, Croatia has stressed the existence of a continuing obligation,

22 *Application*, para. 28.
23 ICJ, case of the *Application of the Convention against Genocide* (Croatia *versus* Serbia, Preliminary Objections), *ICJ Reports* (2008) para. 37 (hereinafter: "2008 Judgment").
24 2008 Judgment, para. 111.

rather than one newly entered into[25]. Croatia has thus submitted that the Genocide Convention accords jurisdiction to the Court over conduct before 27.04.1992; it has put forward an alternative ground for jurisdiction over conduct predating 27.04.1992, namely, Serbia's Declaration on that date[26].

20. Serbia, for its part, has acknowledged that it succeeded to the Genocide Convention with effect from 27.04.1992; in the light of the 2008 Judgment, it has asserted that it became bound by the Genocide Convention from 27.04.1992 onwards, but not prior to that date[27]. It has submitted that acts and omissions that took place before 27.04.1992 cannot entail its international responsibility, as it only came into existence on that date, and, accordingly, it was not bound by the Genocide Convention before then. Alternatively, it has argued that Croatia only came into existence on 08.10.1991 and cannot raise claims based on facts preceding its coming into existence[28].

21. It should be recalled that the ICJ, in 2008, examined only the effect of the Declaration and Note to the United Nations of 27.04.1992 (to which it attributed the effect of a notification of succession to treaties), and did not deem it necessary to examine the wider question of the application in this case of the general law relating to succession of States, nor the rules of international law governing State succession to treaties (including the question of *ipso jure* succession to some multilateral treaties)[29]. The Court's interpretation of the Declaration of 27.04.1992 was in itself sufficient for the purposes of establishing whether the respondent was bound by the Genocide Convention (with attention to Article IX) at the date of the institution of the proceedings. Be that as it may, now, in the merits phase, the question arises as to the applicability of the Genocide Convention to acts prior to 27.04.1992.

25 ICJ, doc. CR 2014/12, of 07.03.2014, p. 38, para. 4.
26 *Ibid*., p. 40, para. 9.
27 ICJ, doc. CR 2014/14, of 11.03.2014, p. 23, para. 4.
28 *Counter-Memorial*, paras. 206, 357-387.
29 2008 Judgment, para. 101.

2. Continuity of Application of the Genocide Convention (SFRY and FRY)

22. In deciding, in its Judgment of 2008 on preliminary objections, that Serbia became bound by the Convention from 27.04.1992 onwards[30], the Court joined to the merits the question of the applicability of the obligations under the Genocide Convention to the Federal Republic of Yugoslavia (FRY) before 27.04.1992[31]. In this regard, Serbia submitted, in the oral proceedings at the merits stage, that "the Court already decided, at the preliminary objections stage, that Serbia '*only*' became bound by the Convention 'as of April 1992'"[32]. However, the Court only dealt with the question of whether the conditions were met under Article 35 of the Statute for the purposes of determining whether the FRY had the capacity to participate in the proceedings before the Court *on the date of the Application*, namely, 02.07.1999[33].

23. The question was decided not on the basis of whether Serbia succeeded to the Genocide Convention *ipso jure*, but solely on the basis of the historical record and of the Declaration and Note of 27.04.1992[34]. Taking the view that the questions of jurisdiction and admissibility raised by Serbia's preliminary objection *ratione temporis* constituted "two inseparable issues" in that case, the Court expressly left the issue of the applicability of the obligations under the Genocide Convention to the FRY before 27.04.1992 open, to be decided at the merits stage of the *cas d'espèce*[35].

3. Continuity of the State Administration and Officials (SFRY and FRY)

24. While the FRY formally came into existence as a State on 27.04.1992, this proclamation only formalized a factual situation which had *de facto* arisen during the dissolution of the SFRY. Serbia considers that, until the proclamation of the dissolution of the SFRY, any act performed by individuals in the name of the SFRY may be attributable *only* to that entity. However, as the Badinter Commission recognized in its Opinion n. 1, from mid-1991 the SFRY ceased to operate as a functioning State and was authoritatively recognised

30 *Ibid*., para. 117.
31 *Ibid*., para. 129.
32 ICJ, doc. CR 2014/14, of 11.03.2014, p. 14, para. 26.
33 Cf. 2008 Judgment, paras. 60, 67, 69, 71, 78 and 95.
34 *Ibid*., para. 101.
35 *Ibid*., paras. 129-130.

as in a "process of dissolution". The dissolution was an extended process, completed on 04.07.1992, according to Opinion n. 8 of the Badinter Commission. This implies that, well before April 1992, the territory of the SFRY had already been divided, and Serbian leadership had effectively taken control of the principal organs of the former SFRY. This determination of the control of the political and military apparatus during this whole period is thus relevant.

25. Serbia cannot shift responsibility to an extinct State for the main reason that the personnel controlling the relevant organs in the interim period later assumed similar positions in the new government of the FRY. It was the same leadership which, from October 1991, – when the relevant organs of government and other federal authorities of the SFRY ceased to function, – became *de facto* organs and authorities of the new FRY, acting under Serbian leadership. The former State officials of the SFRY had close ties with the officials of Serbia and Montenegro (FRY). Serbia does not deny that these were the same people carrying out the same policies. In this regard, Croatia provides a list of political and military leaders which illustrates the *personal continuity of the policy and practices from 1991 onwards*, on the part of the Serbian authorities located in Belgrade[36]. Serbia has not challenged the list of political and military leaders, which attests this continuity and connections[37].

4. Law Governing State Succession to Human Rights Treaties: *Ipso Jure* Succession to the Genocide Convention

26. Serbia's conduct – contrary to its allegations – supports the applicability of the Genocide Convention to the FRY before 27.04.1992. It is here important to keep in mind, to start with, the law governing State succession to human rights treaties. In effect, leaving aside State succession in respect of *classic* treaties, it is generally accepted that certain types of treaties – such as human rights treaties – remain in force by reason of their special nature. It can be argued, in this connection, that the application of the Genocide Convention to the FRY, when it was *in statu nascendi*, that is, before 27.04.1992, is justified – to paraphrase the ICJ's Advisory Opinion of 1951 on the *Reservations to the Genocide Convention* (p. 23) – by the Convention's "special and

36 *Memorial*, Appendix 8.

37 One may refer to 7 of the 17 political and military leaders, listed in Appendix 8 to Croatia's *Memorial*.

important purpose" to endorse "the most elementary principles of morality", irrespective of questions of formal succession.

27. In this respect, the ICJ's understanding of the object and purpose of the Convention, as set out in that *célèbre* Advisory Opinion, may here be recalled:

> "The origins of the Convention show that it was the intention of the United Nations to condemn and punish genocide as 'a crime under international law' involving a denial of the right of existence of entire human groups, a denial which shocks the conscience of mankind and results in great losses to humanity, and which is contrary to moral law and to the spirit and aims of the United Nations (Resolution 96(I) of the General Assembly, December 11th, 1946). The first consequence arising from this conception is that the principles underlying the Convention are principles which are recognized by civilized nations as binding on States, even without any conventional obligation. A second consequence is the universal character both of the condemnation of genocide and of the Cooperation required 'in order to liberate mankind from such an odious scourge' (Preamble to the Convention)"[38].

28. Moreover, the Court emphasized that the Convention, as indicated, has a "special and important purpose" to endorse "the most elementary principles of morality"[39]. The Court further stated that the principles of the Convention bind States "even without any conventional obligation" and that the Convention was intended to be "definitely universal in scope". In its Judgment on preliminary objections (of 11.07.1996) in the *Bosnia Genocide* case, the ICJ referred no less than three times to the special nature of the Genocide Convention as a universal human rights treaty, in order to found its jurisdiction. There was awareness around the bench as to the needs of protection of the segments of the populations concerned, and automatic succession to the Convention did not pass unnoticed[40].

38 ICJ, Advisory Opinion on *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, ICJ Reports* (1951) p. 23.

39 *Ibid.*, p. 23.

40 Cf. ICJ, case concerning the *Application of the Convention against Genocide* (Bosnia-Herzegovina *versus* Yugoslavia), Separate Opinions of Judges Shahabuddeen and Weeramantry, *ICJ Reports* (1996) pp. 634-637 and 645-655, respectively.

29. Nowadays, almost two decades later, it is about time to take this analysis further. It is clear that the Genocide Convention is not a synallagmatic bargain, whereby each State Party would bind itself to the other; it does not simply create rights and obligations between States Parties on a bilateral basis. As a human rights treaty, it sets up a mechanism of *collective guarantee*[41]. In my view, it is not sufficient to assert (or reassert), as the ICJ did almost two decades ago, that the 1948 Genocide Convention is a human rights treaty: one has, moreover, to extract the legal consequences therefrom (cf. *infra*).

30. In the present case concerning the *Application of the Convention against Genocide* (Croatia *versus* Serbia), the relevant conduct was that of the JNA (or under its direction and control), and the JNA was a *de facto* organ of the nascent Serbian State. It would be utterly artificial to argue that the Convention continued to bind the SFRY until it formally disappeared[42], becoming thus no longer able to respond for any breach of an international obligation. Such a break in the protection afforded by the Genocide Convention would not be consistent with the precise object of safeguarding the very existence of certain human groups, in pursuance of the most elementary principles of morality.

31. This applies even more cogently in a situation of dissolution of State amidst violence. After all, the consequences of the commission of grave violations of international law will, in most cases, continue to affect and victimize certain human groups even after the date of succession, and even more so when surrounded by violence. In such circumstance, it would be unjust for the victims if no responsibility could be vindicated for the commission of internationally wrongful acts and their consequences extended in time[43]. To argue that responsibility would vanish with the dissolution of the State concerned would render the Genocide Convention irrelevant. An internationally wrongful act and its continuing consequences cannot remain unpunished and without reparation for damages.

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41 On the notion of *collective guarantee*, proper to human rights treaties, cf. A.A. Cançado Trindade, *Tratado de Direito International dos Direitos Humanos* [*Treatise of International Law of Human Rights*], vol. II, Porto Alegre/Brazil, S.A. Fabris Ed., 1999, pp. 47-53.

42 In reality, the SFRY, in 1991 and 1992, was no longer exercising any direction or control of the JNA, and was already undergoing an irreversible process of dissolution.

43 Cf., in this sense, e.g., P. Dumberry, *State Succession to International Responsibility*, Leiden, Nijhoff, 2007, pp. 278, 283-284, 297, 366, 409, 411, 424-425 and 428.

32. The Genocide Convention, as a human rights treaty (as generally acknowledged), is concerned with *State* responsibility, besides individual responsibility. It should not pass unnoticed that human rights treaties have a hermeneutics of their own (cf. *infra*), and are endowed with a mechanism of collective guarantee. Moreover, the Genocide Convention implies the undertaking by each State Party to treat successor States as continuing (as from independence) any commitment and status which the predecessor State had as a Party to the Convention.

33. It may be recalled, in this regard, that, in the context of the present proceedings, the Badinter Commission emphasized the need for all human rights treaties to which the SFRY was party to remain in force with respect to all of its territories[44]. I am of the view that there is automatic State succession to universal human rights treaties[45], and that Serbia has succeeded to the Genocide Convention (under customary law), without the need for any formal confirmation of adherence as the successor State. In light of the declaratory character of the Convention and the need to secure the effective protection of the rights enshrined therein, the *de facto* organs of the nascent Serbia were bound by the Genocide Convention before 27.04.1992.

5. State Conduct in Support of Automatic Succession to, and Continuing Applicability of, the Genocide Convention (to FRY prior to 27.04.1992)

34. Serbia's conduct itself evidences the applicability to it of the multilateral conventions to which the SFRY had been a State Party at the time of its dissolution; its conduct itself provides evidence that it remained bound by them. In the particular circumstances of the present case, the FRY had, since 1992, claimed to possess the status of a

44 Arbitration Commission, EC Conference on Yugoslavia (Badinter, Chairman), *Opinion n. 1*, of 29.11.1991, 92 *International Law Reports*, p. 162.

45 In relation to international human rights instruments, cf. UN Human Rights Commission resolutions 1993/23, 1994/16 and 1995/18, doc. E/CN4/1995/80 p. 4; Human Rights Committee´s *General Comment* 26(61), doc. CCPR/C/21/Rev.1/Add.8/Rev.1. Cf. also, in relation to Bosnia and Herzegovina's succession to the ICCPR, Decision adopted by the Human Rights Committee on 07.10.1992, and discussion thereto, *in Official Records of the Human Rights Committee* 1992/93, vol. 1, p. 15.

State Party to the Convention against Genocide; thus, in its Declaration of 27.04.1992[46], it stated that

> "The [FRY], continuing the state, international legal and political personality of the [SFRY], shall strictly abide by all the commitments that the SFR[Y] assumed internationally."[47]

35. It follows that, by accepting that it was bound by all the obligations assumed by the SFRY, Serbia (the FRY) took expressly the position that the substantive obligations of the Convention against Genocide, like other obligations assumed by the SFRY, continued to apply without any temporal break, including before April 1992. It is important to note that, in its Declaration, the FRY did not expressly or implicitly exclude its intention to be bound by the Convention before the date of the Declaration (27.04.1992). It rather expressed an attitude of continuity at all relevant times, including with regard to obligations emanating from the Convention against Genocide. In this regard, it is useful to highlight that, in its official Note to the United Nations on the same date (27.04.1992), the FRY stated that:

> "Strictly respecting the continuity of the international personality of Yugoslavia, the [FRY] shall continue to fulfil all the rights conferred to, and obligations assumed by, the [SFRY] in international relations, including its membership

46 During the stage of preliminary objections in the present case, Serbia had disputed that the Declaration of 27.04.1992 amounted to a notification of succession. The Court however, rejected that claim and concluded that Serbia did succeed to the Genocide Convention on 27.04.1992: – "The Court, taking into account both the text of the declaration and Note of 27.04.1992, and the consistent conduct of the FRY at the time of its making and throughout the years 1992-2001, considers that it should attribute to those documents precisely the effect that they were, in the view of the Court, intended to have on the face of their terms: namely, that from that date onwards the FRY would be bound by the obligations of a party in respect of all the multilateral conventions to which the SFRY had been a party at the time of its dissolution, subject of course to any reservations lawfully made by the SFRY limiting its obligations". This was acknowledged by Counsel for Serbia at the hearings in the present proceedings; cf. UN doc. CR 2014/14, of 11.03.2014, p. 23, para. 4.

47 Joint Declaration of the SFRY Assembly, the National Assembly of the Republic of Serbia and the Assembly of the Republic of Montenegro, 27.04.1992, U.N. doc. A/46/915, Annex II.

> in all international organizations and participation in international treaties ratified or acceded to by Yugoslavia."[48]

36. It thus stems from these two documents (the 1992 Declaration and the official Note to the United Nations) that there was immediate and automatic succession, whereby Serbia (the FRY) deemed itself bound to become the successor State and to assume all obligations of the SFRY, including obligations ensuing from the Genocide Convention. In other words, Serbia (the FRY), by its own Declaration of 27.04.1992, stated clearly its engagement to succeed the SFRY as a State Party to the Convention against Genocide. This entails that Serbia was already bound by the obligations of the Convention in relation to acts that occurred before the date of its Declaration of 1992.

6. *Venire contra Factum Proprium Non Valet*

37. Thus, in the circumstances of the present case, the ICJ should bear in mind that Serbia (the FRY) itself recognized its commitment to continue its participation in international treaties ratified or acceded to by former Yugoslavia. The FRY's binding declaration strongly supports the continuing applicability of the obligations of the Convention against Genocide to the nascent Serbian State before 27.04.1992. Furthermore, it can be argued that the ICJ appears to have resolved this issue in its 2008 Judgment on preliminary objections in the *cas d'espèce*[49]. When the ICJ stated that "the 1992 declaration and Note had the effect of a notification of succession by the FRY to the SFRY in relation to the Genocide Convention", it seems that it thereby acknowledged that there was continuity as to the conventional obligations (between SFRY and FRY).

38. One decade later, the FRY's notification of accession of 06.03.2001 (deposited on 12.03.2001), after referring to the 1992 Declaration and to the subsequent admission of the FRY to the United Nations as a new Member, stated, however, that

> "the [FRY] has not succeeded on April 27, 1992, or on any later date, to treaty membership, rights and obligations of the [SFRY] in the Convention on the Prevention and

48 Note to the United Nations (addressed to the Secretary-General), of 27.04.1992, UN doc. A/46/915, Annex I.
49 ICJ, 2008 Judgment, para. 117.

> Punishment of the Crime of Genocide on the assumption of continued membership in the United Nations and continued state, international legal and political personality of the [SFRY] (...)"[50].

The notification of accession contained the following reservation:

> "'The [FRY] does not consider itself bound by Article IX of the Convention (...) and, therefore, before any dispute to which the [FRY] is a party may be validly submitted to the jurisdiction of the International Court of Justice under this Article, the specific and explicit consent of the FRY is required in each case.'"[51]

39. Be that as it may, this step was inconsistent with the status which Serbia (the FRY), since its Declaration of 1992, had been claiming to possess, namely, that of a State Party to the Convention against Genocide. By the end of the nineties, there remained no doubt that the FRY had assumed all the international obligations that had been entered into by the SFRY, including those pertaining to the respect for human rights[52]. It should further be noted that the FRY never contended before this Court, in the previous proceedings, that it was *not* a Party to the Convention against Genocide.

40. It was only when the FRY, abandoning its claim to continue the U.N. membership of the SFRY, was admitted to the United Nations in 2000, that it advanced the opposite view, initially in its *Written Observations*, filed on 18.12.2002, on the preliminary objections submitted in the *Legality of Use of Force* cases[53]. One cannot avail itself of a position *a contrario sensu* to the one earlier upheld, by virtue of a basic principle going as far back as classic Roman law: *venire contra*

50 *Ibid*., para. 116.
51 *Ibid*., para. 116.
52 The Declaration of 27.04.1992, whereby the formation of the FRY was proclaimed, "est l'acte qui a dans toutes ses dispositions insisté sur la continuité avec la RSFY. Son contenu souligne que le pays garde la subjectivité juridique et politique de l'ancien État et promet de respecter strictement ses obligations internationales"; M. Sahović, "Le droit international et la crise en ex-Yugoslavie", 3 *Cursos Euromediterráneos Bancaja de Derecho Internacional* (1999) p. 392.
53 The FRY requested the ICJ to decide on its jurisdiction considering that the FRY "did not continue the personality and treaty membership of the former Yugoslavia", and was thus "not bound by the Genocide Convention until it acceded to that Convention (with a reservation to Article IX) in March 2001".

factum proprium non valet. In any case, the ICJ, having concluded, at the preliminary objections stage, that the FRY was a Party to the Convention against Genocide, considered that it was not necessary to make a finding as to the legal effect of Serbia's notification of accession to the Convention (dated 06.03.2001).

41. In the light of the aforementioned, in my understanding Serbia's change of attitude can have no bearing upon the jurisdiction of the Court. In this regard, citing its own *jurisprudence constante,* the ICJ stated in 2008 that, if a title of jurisdiction is shown to have existed at the date of institution of proceedings, any subsequent lapse or withdrawal of the jurisdictional instrument is without effect on the jurisdiction of the Court[54]. Accordingly, the FRY, by way of its Declaration of 1992, bound itself as the successor State of the SFRY; this Declaration operated automatic succession. Serbia remained bound by the Convention against Genocide for acts or omissions having occurred prior to 27.04.1992. The ICJ has jurisdiction under the Convention in relation to those acts or omissions, and Croatia's claims in relation thereto are admissible.

7. Automatic Succession to Human Rights Treaties in the Practice of United Nations Supervisory Organs

42. Already in the early nineties, while the devastation was taking place in the Balkans, there was firm support, on the part of the United Nations supervisory organs, for automatic succession and continuing applicability of human rights treaties to successor States. Thus, in its resolution 1993/23, of 05.03.1993, the (former) U.N. Commission on Human Rights stated that successor States "shall succeed to international human rights treaties to which the predecessor

54 Cf., e.g., ICJ, *Nottebohm* case (Liechtenstein *versus* Guatemala – Preliminary Objection, Judgment), *ICJ Reports* (1953) p. 122; ICJ, case of *Military and Paramilitary Activities in and against Nicaragua* (Nicaragua *versus* United States of America – Merits, Judgment), *ICJ Reports* (1986) p. 28, para. 36; and ICJ, case concerning the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Croatia *versus* Serbia – Preliminary Objections), p. 445, para. 95. In this sense, as the ICJ stated in its Judgments in 2004 in the *Legality of Use of Force* cases, "the significance of this new development in 2000 is that it has clarified the thus far amorphous legal situation concerning the status of the Federal Republic of Yugoslavia *visàvis* the United Nations" (p. 1191, para. 78).

States have been parties and continue to bear responsibilities"[55]. After calling upon the continuity by successor States of fulfilment of "international human rights treaty obligations of the predecessor State"[56], the Commission urged successor States "to accede or to ratify those international human rights treaties to which the predecessor States were not parties"[57].

43. The following year, in its resolution 1994/16, of 25.02.1994, the Commission on Human Rights evoked the "relevant decisions of the Human Rights Committee [HRC] and the Committee on the Elimination of Racial Discrimination [CERD] on succession issues, in respect of international obligations in the field of human rights"[58]. It further welcomed the recommendation of the Vienna Declaration and Programme of Action, recently adopted by the II World Conference on Human Rights (1993), "to encourage and facilitate the ratification of, and accession or succession to, international human rights treaties and protocols"[59]. In the operative part of resolution 1994/16, the Commission, after emphasising "the special nature of the human rights treaties"[60] aimed at the protection of the rights of the human person, requested the U.N. supervisory organs of human rights treaties

> "to consider further the continuing applicability of the respective international human rights treaties to successor States, with the aim of assisting them in meeting their obligations"[61].

44. Once again, in its following resolution 1995/18, of 24.02.1995, the Commission on Human Rights evoked the relevant decisions and recommendations of HRC and CERD, as well as the aforementioned recommendation of the Vienna Declaration and Programme of Action adopted by the U.N. II World Conference on Human Rights (1993)[62].

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55 Third preambular paragraph.
56 Fifth preambular paragraph.
57 Operative part, para. 3.
58 Second preambular paragraph. – For an account of this aspect of the practice of the HRC and the CERD Committees in the nineties, cf. A.A. Cançado Trindade, *International Law for Humankind – Towards a New Jus Gentium*, *op. cit. infra* n. (67), pp. 472-475.
59 Fourth preambular paragraph.
60 Operative part, para. 2.
61 Operative part, para. 3.
62 Second and third preambular paragraphs.

And it again stressed "the special nature of the human rights treaties"[63], and it reiterated its request to the U.N. supervisory organs of human rights treaties to keep on considering "the continuing applicability of the respective human rights treaties to successor States", so as to assist them "in meeting their obligations"[64]. It is clear that, already at the time, in the early nineties, while the wars and devastation in the former Yugoslavia were taking place, the work at the United Nations in the present domain was being guided by basic considerations of humanity, rather than State sovereignty.

45. And it could hardly be otherwise. The "special nature" of human rights treaties – and the Genocide Convention is characterised as such, as a human rights treaty, – requires their continuing applicability, irrespective of the uncertainties of State succession. States themselves have acknowledged the special nature of human rights and humanitarian treaties, and have not objected to the understanding espoused by United Nations supervisory organs of their *continuing applicability, ipso jure*, to successor States. After all, the local populations cannot become suddenly deprived of any protection when they most need it, in cases of turbulent dissolution of a State, when considerations of humanity need to prevail over invocations of State sovereignty.

46. The U.N. Secretary-General, in his report to the U.N. General Assembly (of 19.10.1994), on the *Implementation of Human Rights Instruments*[65], recalled that, shortly after the II World Conference on Human Rights (Vienna, 14-25.06.1993), the 4th meeting of persons chairing the U.N. human rights conventional supervisory organs took steps towards the elaboration of "early warning measures and urgent procedures" aiming at the prevention of the occurrence, or recurrence, of grave violations of human rights; the chairpersons, moreover, welcomed the establishment, by the World Conference, of the post of U.N. High Commissioner for Human Rights (para. 12).

47. The U.N. Secretary-General, in his aforementioned report, then turned to the 5th meeting of chairpersons, where they espoused the view that their respective U.N. human rights treaties were "universal in nature and in application" (para. 13), and further stressed that "full and effective compliance" with their conventional obligations "is an

63 Operative part, para. 2.
64 Operative part, para. 3.
65 U.N. doc. A/49/537, of 19.10.1994, pp. 1-14.

essential component of an international order based on the rule of law" (para. 17). The Secretary-General added that the chairpersons endorsed his own initiative to urge States to "ratify, accede or succeed to those principal human rights treaties to which they are not yet a party" (para. 16).

48. It was further reported that their work on prevention of grave violations of human rights, including early warning and urgent procedures, continued (paras. 26-29). And the Secretary-General added, significantly, that the chairpersons were of the view that

> "successor States are automatically bound by obligations under international human rights instruments from their respective date of independence and (…) the respect of their obligations should not depend on a declaration of confirmation made by the new Government of the successor State" (para. 32).

49. For its part, the U.N. General Assembly, even earlier, in its resolution 47/121, of 18.12.1992, acknowledged, in relation to the "consistent pattern of gross and systematic violations of human rights" in the wars in the former Yugoslavia, – with its concentration camps and "mass expulsions of defenceless civilians from their homes", – that "ethnic cleansing" appeared to be not the consequence of war, "but rather its goal". And the U.N. General Assembly added that "the abhorrent practice of "ethnic cleansing" was "a form of genocide"[66]. The same General Assembly resolution, *inter alia*, urged the Security Council to consider recommending the establishment of an *ad hoc* international war crimes tribunal, – the ICTFY, – to try and punish those responsible for the perpetration of the atrocities[67].

IV. THE ESSENCE OF THE PRESENT CASE

1. Arguments of the Contending Parties

50. A careful examination of the arguments of the contending parties, in both the written and oral phases of the proceedings as to the merits in the present case of the *Application of the Convention against Genocide* (Croatia *versus* Serbia), reveals that the contending Parties,

66 Seventh and ninth preambular paragraphs.
67 Operative part, para. 10.

not surprisingly, devoted considerably more attention to the substance of the case (the merits themselves, in relation to Croatia's *main claim*) than to issues pertaining to jurisdiction/admissibility. These latter occupy only a small portion of the documents submitted by the contending parties, namely: a) in Croatia's *Memorial*, one chapter out of eight chapters, 7 pages (pp. 317-323) out of a total of 414 pages; b) in Serbia's *Counter-Memorial*, one chapter out of fourteen chapters, 50 pages (pp. 85-135) out of a total of 478 pages; c) in Croatia's *Reply*, one chapter out of twelve chapters, 26 pages (pp. 243-269) out of a total of 473 pages; and d) in Serbia's *Rejoinder*, one chapter out of eight chapters, 55 pages (pp. 39-93) out of a total of 322 pages.

51. As to the oral phase of the present proceedings as to the merits of the *cas d'espèce*, the same picture is disclosed. The arguments of the contending Parties, as expected, were rather brief on issues pertaining to jurisdiction/admissibility; the vast majority of their arguments focused on the substance of the *cas d'espèce* (the merits themselves, in relation to Croatia's *main claim*). May it be recalled that the public sittings before the Court extended for more than one month, having lasted from 03.03.2014 until 01.04.2014. In its first round of oral arguments, Croatia has dedicated not more than a part of one day of its pleadings to discuss in particular the specific question of jurisdiction[68]. And in its second round of oral arguments, Croatia has devoted only a small portion of pleadings to rebutting Serbia's arguments on jurisdiction[69].

52. For its part, in Serbia's first round of oral arguments, the bulk of the pleadings on questions of jurisdiction took place in just one session[70]. And, in its second round of oral arguments, Serbia has dedicated only a small part of its pleadings to a discussion of questions of jurisdiction[71]. It ensues from an examination of the contending parties' oral pleadings that the vast majority of their arguments concerned questions pertaining to the merits; they have devoted only a small portion of their pleadings (around two sessions each) to the issue of jurisdiction.

68 Cf. mainly ICJ, doc. CR 2014/12, of 07.03.2014, pp. 37-55. And cf. also ICJ, doc. CR 2014/5, of 03.03.2014, pp. 23-31; and ICJ doc. CR 2014/10, of 06.03.2014, pp. 32-49.
69 Cf. mainly ICJ, doc. CR 2014/20, of 20.03.2014, pp. 63-67. And cf. also ICJ, doc. CR 2014/21, of 21.03.2014, pp. 10-33.
70 Cf. mainly ICJ, doc. CR 2014/14, of 11.03.2014, pp. 10-69.
71 Cf. mainly ICJ, doc. CR 2014/22, of 27.03.2014, pp. 16-47.

2. General Assessment

53. The foregoing shows that the contending Parties, at this stage of the merits of the present case, in the written phase of proceedings, have seen no need to devote more than a very small portion of their arguments to questions of jurisdiction/admissibility. They have rightly focused on the *merits* of the case. Likewise, in the oral phase of proceedings, both Croatia and Serbia have concentrated their pleadings on *substantive* issues; the two contending parties have well captured the essence of the present case, pertaining to the interpretation and application of the Convention against Genocide, and not to State succession.

54. It has been the Court that seems to have misapprehended this, devoting considerable more attention, at this final stage of the adjudication of the present case, again to the issue of jurisdiction, which should have been decided some years ago. The ICJ, in the present Judgment on the merits of the *cas d'espèce*, concerning the *Application of the Convention against Genocide*, has devoted no less than 50 paragraphs to the jurisdiction issue, guarding small proportion in this respect.

V. AUTOMATIC SUCCESSION TO THE CONVENTION AGAINST GENOCIDE, AND CONTINUITY OF ITS OBLIGATIONS, AS AN IMPERATIVE OF HUMANENESS

1. The Convention against Genocide and the Imperative of Humaneness

55. Since the Court has done so in the present Judgment, I feel obliged, in the present Dissenting Opinion, to dwell upon the foundations of my own personal position in support of the automatic succession (*supra*) to the Convention against Genocide. It is generally acknowledged that the Genocide Convention is a human rights treaty: one of the legal consequences ensuing therefrom is the automatic succession to it and the continuity of its obligations.

56. As this Court itself indicated in its *célèbre* Advisory Opinion of 1951, States Parties to the 1948 Genocide Convention do not have individual interests of their own, but are rather *jointly* guided by the high ideals and basic considerations of humanity having led the United Nations to condemn and punish the international crime of genocide, which "shocks the conscience of mankind and results in

great losses to humanity", being contrary to the spirit and aims of the United Nations[72]. The fundamental principles underlying the Convention are "binding on States, even without any conventional obligation". The condemnation of genocide has a "universal character", with all the cooperation required "to liberate mankind from such an odious scourge", as stated in the preamble to the Convention (cf. *supra*).

57. This calls for the automatic succession to the Genocide Convention, with the continuity of its obligations; international responsibility for the grave wrongs done to segments of the population concerned survives State disruption and succession. To argue otherwise would militate against the object and purpose of the Genocide Convention, depriving it of its *effet utile*; it would thereby deprive the targeted "human groups" of any protection, when they most needed it, thus creating a void of protection which would render the Genocide Convention an almost dead letter.

58. The *corpus juris gentium* for the international safeguard of the rights of the human person is conformed by the converging trends of protection of the International Law of Human Rights, of the International Humanitarian Law, and of the International Law of Refugees[73]. The rights protected thereunder, in any circumstances, are not reduced to those "granted" by the State: they are *inherent to the human person*, and ought thus to be respected by the State. The protected rights are *superior and anterior to the State*, and must thus be respected by this latter, by all States, even in the occurrence of State disruption and succession. It has taken much suffering and sacrifice of succeeding generations to learn this. The aforementioned *corpus juris gentium* is people-oriented, victim-oriented, and not at all Statesovereignty oriented.

59. The 1948 Genocide Convention is *people-oriented*, rather than Statecentric: it is centred on human groups, whom it aims to protect. As contemporary history shows, in the event of dissolution of States the affected local populations become particularly vulnerable; that is the time when they stand most in need of the protection extended to them by human rights treaties, the Genocide Convention (to which their State had become a Party) being one of them. The fact remains

72 U.N., G.A. resolution 96(I), of 11.12.1946.

73 Cf. A.A. Cançado Trindade, *Derecho Internacional de los Derechos Humanos, Derecho Internacional de los Refugiados y Derecho Internacional Humanitario – Aproximaciones y Convergencias*, Geneva, ICRC, [2000], pp. 1-66.

that the *corpus juris gentium* of international protection of the rights of the human person, essentially victim-oriented, has been erected and consolidated along the last decades (almost seven decades) to the benefit of human beings, individually (like under the 1951 Convention on the Status of Refugees, the 1966 U.N. Covenant on Civil and Political Rights, the 1965 U.N. Convention for the Elimination of All Forms of Racial Discrimination) or in groups (like under the 1948 Convention against Genocide).

60. That *corpus juris gentium*, which forms, in my view, the most important legacy of the international legal thinking of the XXth century, cannot be undermined by the vicissitudes of State succession. The population – the most precious constitutive element of statehood – surely cannot be subjected to those vicissitudes, when State succession takes place amidst extreme violence. It is in those circumstances of the disruption of the State that the population concerned stands most in need of protection, such as the one afforded by the core Conventions of the International Law of Human Rights, the International Humanitarian Law, and the International Law of Refugees.

61. To attempt to withdraw their protection, rendering human beings, individually and in groups, extremely vulnerable, if not defenceless, would go against the letter and spirit of those Conventions. Moreover, when it comes to the Convention against Genocide, we find ourselves in the realm not only of conventional international law, but likewise of general or customary international law itself. As the ICJ perspicaciously pondered in its aforementioned Advisory Opinion of 1951, the principles underlying the Convention against Genocide are "binding on States, even without any conventional obligation"[74]. And it could not be otherwise, as, in my own conception, the *universal juridical conscience* is the ultimate *material* source of international law, the *jus gentium*[75].

62. It is indeed in times of violent State disruption – as that of the former Yugoslavia – that human beings, individually or in groups, stand in most need of protection. After all, States exist for human beings, and not vice-versa. To deprive human beings of international

74 *ICJ Reports* (1951) p. 23.
75 A.A. Cançado Trindade, *International Law for Humankind – Towards a New Jus Gentium*, 2nd. rev. ed., Leiden/The Hague, Nijhoff/The Hague Academy of International Law, 2013, ch. VI, pp. 139-161.

protection when they most need it, would go against the very foundations of contemporary international law, both conventional and customary, and would make abstraction of the *principle of humanity*, which permeates it. The *corpus juris gentium* of protection of human beings, in any circumstances, is – may I reiterate – essentially victim-oriented, while the outlook of State succession is ineluctably and strictly Statecentric.

63. Such outlook cannot at all be made to prevail in violent State disruption, entailing the discontinuity of that protection when it is most needed. The automatic succession to the Convention against Genocide is an *imperative of humaneness*. The *corpus juris gentium* of protection of the human person enshrines rights, which are *anterior and superior to the State*. They are listed, *inter alia*, in the *core Conventions* of the United Nations (the two Covenants on Human Rights of 1966; the Conventions for the Elimination of All Forms of Racial Discrimination, and of Discrimination against Women, of 1965 and 1979; the 1984 Convention against Torture; and the 1989 Convention on the Rights of the Child). Moreover, in the last decades international legal doctrine has endeavoured to identify a *hardcore* of universal human rights – non-derogable ones – which admit no restrictions, namely, the fundamental rights to life and to personal integrity, the absolute prohibition of torture and of cruel, inhuman or degrading treatment.

64. Contemporary international law is particularly sensitive to the pressing need of humane treatment of persons, in any circumstances, so as to prohibit inhuman treatment, by reference to humanity as a whole, in order to secure protection to all, even more so when they stand in situations of great vulnerability. *Humaneness* is to orient human behaviour in all circumstances, in times of peace as well as of disturbances and armed conflict. The *principle of humanity* permeates the whole *corpus juris* of protection of the human person, providing one of the illustrations of the approximations or convergences between its distinct and complementary trends (International Humanitarian Law, the International Law of Human Rights, and International Refugee Law), at the hermeneutic level, and also manifested at the normative and the operational levels[76].

76 Cf., on this particular point, e.g., A.A. Cançado Trindade, *Derecho Internacional de los Derechos Humanos, Derecho Internacional de los Refugiados y Derecho Internacional Humanitario – Aproximaciones y Convergencias*, *op. cit. supra* n. (65), pp. 1-66.

2. The Principle of Humanity in Its Wide Dimension

65. My own understanding is in the sense that the principle of humanity in endowed with a wide dimension: it applies in the most distinct circumstances, in times both of armed conflict and of peace, in the relations between public power and all persons subject to the jurisdiction of the State concerned. That principle has a notorious incidence when these latter are in a situation of vulnerability or great adversity, or even *defencelessness*, as evidenced by relevant provisions of distinct treaties conforming the International Law of Human Rights[77].

66. The United Nations Charter itself professes the determination to secure respect for human rights everywhere. Adopted in one of the rare moments of lucidity in the last century, it opens up its preamble by stating that

> "We, the peoples of the United Nations, determined to save succeeding generations from the scourge of war; (...) to reaffirm faith in fundamental human rights, in the dignity and worth of the human person (...); to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained; (...) have resolved to combine our efforts to accomplish these aims".

67. And the U.N. Charter includes, among the purposes of the United Nations, to solve problems of humanitarian character, and to promote and encourage respect for human rights for all (Article 1(3)). It determines that the General Assembly shall initiate studies and make recommendations for assisting in the realization of human rights for all (Article 13(1)(b)). It further states that, in order to create the "conditions of stability and wellbeing which are necessary for peaceful and friendly relations among nations", the United Nations shall promote "universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language or religion" (Article 55(c)).

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77 Thus, for example, at U.N. level, the 1990 International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, Article 17(1); the 1989 U.N. Convention on the Rights of the Child, (Article 37(b)). Provisions of the kind can also be found in human rights treaties at regional level, e.g., the 1969 American Convention on Human Rights, (Article 5(2); the 1981 African Charter on Human and Peoples' Rights (Article 5).

68. It is clear that the *principle of humanity* permeates the Law of the United Nations. It encompasses the whole *corpus juris* of the international protection of the human person, comprising its converging trends of International Humanitarian Law, International Law of Human Rights, and International Law of Refugees. In effect, when one evokes the principle of humanity, there is a tendency to consider it in the framework of International Humanitarian Law. It is beyond doubt that, in this framework, for example, civilians and persons *hors de combat* are to be treated with humanity. The principle of humane treatment of civilians and persons *hors de combat* is provided for in the 1949 Geneva Conventions on International Humanitarian Law[78]. Such principle, moreover, is generally regarded as one of customary International Humanitarian Law[79].

69. The principle of humanity, in line with the longstanding thinking of natural law, is an emanation of human conscience, projecting itself into conventional as well as customary international law. The treatment dispensed to human beings, in any circumstances, ought to abide by the *principle of humanity*, which permeates the whole *corpus juris* of the international protection of the rights of the human person (encompassing International Humanitarian Law, the International Law of Human Rights, and International Refugee Law), conventional as well as customary, at global (U.N.) and regional levels. The principle of humanity, usually invoked in the domain of International Humanitarian Law, thus extends itself also to that of International Human Rights Law[80].

70. In faithfulness to my own conception, I have, in recent decisions of the ICJ (and, earlier on, of the Inter-American Court of Human Rights as well), deemed it fit to develop some reflections on the basis of the

78 Common Article 3, and Articles 12(1)/12(1)/13/5 and 27(1); and their Additional Protocols I (Article 75(1)) and II (Article 4(1)).

79 For a study in depth, cf. ICRC, *Customary International Humanitarian Law* (eds. J.M. Henckaerts and L. DoswaldBeck), Geneva/Cambridge, Cambridge University Press, 2005, vol. I: *Rules*, pp. 3-621; vol. II, part I: *Practice*, pp. 3-1982; vol. II, part II: *Practice*, pp. 1983-4411.

80 Cf., to this effect, Human Rights Committee, General Comment n. 31 (of 2004), para. 11; and cf. also its General Comments n. 9 (of 1982), para. 3, and n. 21 (of 1992), para. 4. It may further be recalled that, in the aftermath of the II World War, the 1948 Universal Declaration of Human Rights proclaimed that "[a]ll human beings are born free and equal in dignity and rights" (Article 1).

principle of humanity *lato sensu*. I have done so, e.g., in my Dissenting Opinion (paras. 24-25 and 61) in the case of the *Obligation to Prosecute or Extradite* (Belgium *versus* Senegal, Request for Provisional Measures, Order of 28.05.2009), and in my Dissenting Opinion (paras. 116, 118, 125, 136-139 and 179)[81] in the case of *Jurisdictional Immunities of the State* (Counter-Claim, Germany *versus* Italy, Order of 06.07.2010), as well as in my lengthy Separate Opinion (paras. 67-96 and 169-217) in the Court's Advisory Opinion on *Accordance with International Law of the Declaration of Independence of Kosovo* (of 22.07.2010). I have likewise sustained the wide dimension of the principle of humanity in my lengthy Separate Opinion (paras. 93-106 and 107-142) in the ICJ's Judgment (of 30.11.2010) in the case *A.S. Diallo* (merits, Guinea *versus* D.R. Congo).

71. The ICJ has lately given signs – as I perceive them – of its preparedness to take into account the principle of humanity. Thus, in its Order of Provisional Measures of Protection of 18.07.2011, in the case of the *Temple of Preah Vihear*, the ICJ, in deciding *inter alia* to order the establishment of a provisional demilitarized zone around the Temple (part of the world's cultural and spiritual heritage) and its vicinity, it extended protection (as I pointed out in my Separate Opinion, paras. 66-113) not only to the territory at issue, but also to the local inhabitants, in conformity with the *principle of humanity* in the framework of the new *jus gentium* of our times (paras. 114-117). Territory and people go together.

72. Subsequently, in the recent case of the *Frontier Dispute* (Judgment of 16.04.2013), the contending parties (Burkina Faso and Niger) themselves expressed before the Court their concern, in particular with local nomadic and semi-nomadic populations, and assured that their living conditions would not be affected by the tracing of the frontier. Once again, as I pointed out in my Separate Opinion (paras. 90, 99 and 104-105), the *principle of humanity* seemed to have permeated the handling of the case by the ICJ.

81 In this lengthy Dissenting Opinion, my reflections relating to the principle of humanity are found particularly in its part XII, on human beings as the true bearers (*titulaires*) of the originally violated rights and the pitfalls of State voluntarism (paras 112-123), as well as in its part XIII, on the incidence of *jus cogens* (paras. 126-146), besides the Conclusions (mainly paras. 178-179).

3. The Principle of Humanity in the Heritage of Jusnaturalist Thinking

73. It should not pass unnoticed that the principle of humanity is in line with natural law thinking. It underlies classic thinking on humane treatment and the maintenance of sociable relationships, also at international level. Humaneness came to the fore even more forcefully in the treatment of persons in *situation of vulnerability, or even defencelessness*, such as those deprived of their personal freedom, for whatever reason. The *jus gentium*, when it emerged as amounting to the law of nations, came then to be conceived by its "founding fathers" (F. de Vitoria, A. Gentili, F. Suárez, H. Grotius, S. Pufendorf, C. Wolff) as regulating the international community constituted by human beings socially organized in the (emerging) States and coextensive with humankind, thus conforming the *necessary* law of the *societas gentium*.

74. The *jus gentium*, thus conceived, was inspired by the principle of humanity *lato sensu*. Human conscience prevails over the will of individual States. Respect for the human person is to the benefit of the common good[82]. This humanist vision of the international legal order pursued – as it does nowadays – a *peoplecentred outlook*, keeping in mind the *humane ends of the State*. The precious legacy of natural law thinking, evoking the right human reason (*recta ratio*), has never faded away; this should be stressed time and time again, particularly in face of the indifference and pragmatism of the "strategic" *droit d'*étatistes, so numerous in the legal profession in our days. The principle of humanity may be considered as an expression of the *raison d'humanité* imposing limits on the *raison d'*État[83].

75. States, created by human beings gathered in their social *milieu*, are bound to protect, and not at all to oppress, all those who are under their respective jurisdictions. This corresponds to the minimum ethical, universally reckoned by the international community of our times. At the time of the adoption of the Universal Declaration on 10.12.1948 (on the day following the adoption of the Convention against Genocide), one could hardly anticipate that a historical process of generalization of the international protection of human rights was being launched,

82 A.A. Cançado Trindade, *A Humanização do Direito Internacional*, Belo Horizonte/ Brazil, Edit. Del Rey, 2006, pp. 914, 172, 318-319, 393 and 408.
83 A.A. Cançado Trindade, *International Law for Humankind - Towards a New Jus Gentium*, *op. cit. supra* n. (67), pp. 150-152 and 275-285.

on a truly universal scale[84]. States are bound to safeguard the integrity of the human person from repression and systematic violence, from discriminatory and arbitrary treatment.

76. The conception of fundamental and inalienable human rights is deeply-engraved in the universal juridical conscience; in spite of variations in their enunciation or formulation, their conception marks presence in all cultures, and in the modern history of human thinking of all peoples[85]. The 1948 Universal Declaration warns that "disregard and contempt for human rights have resulted in barbarous acts which have outraged the conscience of mankind" (preamble, para. 2); it further warns that "it is essential, if man is not compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law" (preamble, para. 3). Moreover, it acknowledges that "recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world" (preamble, para. 1).

4. Judicial Recognition of the Principle of Humanity

77. May I now turn attention, however briefly, to the acknowledgment of the principle of humanity in the case-law of contemporary international tribunals. The fundamental principle of humanity has indeed met therein with full judicial recognition[86]. Its acknowledgment is found, e.g., in the *jurisprudence constante* of the IACtHR, which holds that it applies even more forcefully when

84 Throughout almost seven decades, of remarkable historical projection, the Declaration has gradually acquired an authority which its draftsmen could not have foreseen. This happened mainly because successive generations of human beings, from distinct cultures and all over the world, recognized in it a "common standard of achievement" (as originally proclaimed), which corresponded to their deepest and most legitimate aspirations.

85 Cf., e.g., A.A. Cançado Trindade, *Tratado de Direito International dos Direitos Humanos* [*Treatise of International Law of Human Rights*], vol. I, 1st. ed., Porto Alegre/Brazil, S.A. Fabris Ed., 1997, pp. 31-57; [Various Authors,] *Universality of Human Rights in a Pluralistic World* (Proceedings of the 1989 Strasbourg Colloquy), Strasbourg/Kehl, N.P. Engel Verlag, 1990, pp. 45, 57, 103, 138, 143 and 155.

86 Cf. A.A. Cançado Trindade, "Le déracinement et la protection des migrants dans le droit international des droits de l´homme", 19 *Revue trimestrielle des droits de l´homme* – Bruxelles (2008) pp. 289-328, esp. pp. 295 and 308-316.

persons are found in an "*exacerbated situation of vulnerability*"[87]. In my Separate Opinion in the Judgment of the IACtHR (of 29.04.2004) in the case of the *Massacre of Plan de Sánchez*, concerning Guatemala (one of a pattern of 626 massacres), I devoted a whole section (III, paras. 9-23) of it to the judicial acknowledgement of the principle of humanity in the recent case-law of the IACtHR as well as of the *ad hoc* International Criminal Tribunal for the Former Yugoslavia (ICTFY).

78. I pondered therein that the primacy of the principle of humanity is identified with the very end or ultimate goal of the Law, of the whole legal order, both national and international, in recognizing the inalienability of all rights inherent to the human person (para. 17). The same principle of humanity, – I concluded in the aforementioned Separate Opinion in the case of the *Massacre of Plan de Sánchez*, – also has incidence in the domain of International Refugee Law, as disclosed by the facts of the *cas d'espèce*, involving massacres and the State-policy of *tierra arrasada*, i.e., the destruction and burning of homes, which generated a massive forced displacement of persons (para. 23).

79. Likewise, the ICTFY has devoted attention to the principle of humanity in its Judgments, e.g., in the cases of *Mucić et alii* (2001) and of Čelebići (1998). In the *Mucić et alii* case (Judgment of 20.02.2001), the ICTFY (Appeals Chamber), pondered that both International Humanitarian Law and the International Law of Human Rights take as a "starting point" their common concern to safeguard human dignity, which forms the basis of their minimum standards of humanity (para. 149)[88].

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87 IACtHR, Judgments in the cases of *Maritza Urrutia versus Guatemala*, of 27.11.2003, para. 87; of *Juan Humberto Sánchez versus Honduras*, of 07.06.2003, para. 96; and of *Cantoral Benavides versus Peru*, of 18.08.2000, para. 90; and cf. case of *Bámaca Velásquez versus Guatemala*, of 25.11.2000, para. 150. – For a recent study on the protection of the vulnerable, cf. A.A. Cançado Trindade, *A Proteção dos Vulneráveis como Legado da II Conferência Mundial de Direitos Humanos (1993-2013)* [*The Protection of the Vulnerable as Legacy of the II World Conference on Human Rights (1993-2013)*], Fortaleza/Brazil, IBDH, 2014, pp. 13-356.

88 In fact, the principle of humanity can be understood in distinct ways; first, it can be conceived as a principle underlying the prohibition of inhuman treatment, established by Article 3 common to the four Geneva Conventions of 1949; secondly, the principle can be invoked by reference to humankind as a whole, in relation to matters of common, general and direct interest to it; and thirdly, the same principle can be employed to qualify a given quality of human behaviour (humaneness).

80. Earlier on, in the Čelebići case (Judgment of 16.11.1998), the ICTFY (Trial Chamber) qualified as *inhuman treatment* an intentional or deliberate act or omission which causes serious suffering (or mental or physical damage), or constitutes a serious attack on human dignity; thus, – the Tribunal added, – "inhuman treatment is intentional treatment which does not conform with the fundamental principle of humanity, and forms the umbrella under which the remainder of the listed 'grave breaches' in the Conventions fall"[89]. Subsequently, in the *T. Blaškić* case (Judgment of 03.03.2000), the ICTFY (Trial Chamber) reiterated this position[90].

81. Likewise, in its Judgment of 10.12.2003 in the *Obrenović* case, the ICTFY (Trial Chamber) stated that it is the "abhorrent discriminatory intent" that renders crimes against humanity "particularly grave" (para. 65). Evoking the Tribunal (Appeals Chamber)'s finding in the *Erdemović* case (Judgment of 07.10.1997), it added that, because of their "heinousness and magnitude", those crimes (against humanity)

> "constitute egregious attacks on human dignity, on the very notion of humaneness. They consequently affect, or should affect, each and every member of [human]kind, whatever his or her nationality, ethnic group and location" (para. 65)[91].

82. For its part, the *ad hoc* International Criminal Tribunal for Rwanda (ICTR) pondered, in the case of *J.P. Akayesu* (Judgment of 02.09.1998), that the concept of crimes against humanity had already been recognized well before the Nuremberg Tribunal itself (19451946). The Martens clause contributed to that effect; in fact, expressions similar to that of those crimes, invoking victimized humanity, appeared much earlier in human history[92]. The ICTR further pointed out, in the case *J. Kambanda* (Judgment of 04.09.1998), that in all periods of human history genocide has inflicted great losses to humankind, the victims

89 Paragraph 543 of that Judgment.

90 Paragraph 154 of that Judgment.

91 Those words were actually taken by the ICTFY (Trial Chamber) in the *Obrenović* case (para. 65), from a passage of the Joint Separate Opinion (para. 21) of Judges McDonald and Vohrah, in the ICTFY's Appeal Judgment in the aforementioned *Erdemović* case (1997).

92 Paragraphs 565-566 of that Judgment.

being not only the persons slaughtered but humanity itself (in acts of genocide as well as in crimes against humanity)[93].

5. Concluding Observations

83. There is, in sum, in contemporary (conventional and general) international law, a greater consciousness, in a virtually universal scale, of the principle of humanity. Grave violations of human rights, acts of genocide, crimes against humanity, among other atrocities, are in breach of absolute prohibitions of *jus cogens.* The feeling of *humaneness* permeates the whole *corpus juris* of contemporary international law. I have called this development, – *inter alia* in my Concurring Opinion (para. 35) in the Advisory Opinion (of 01.10.1999), of the IACtHR, on the *Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law*, – a historical process of a true *humanization* of International Law. The prevalence of the principle of humanity is identified with the ultimate aim itself of Law, of the legal order, both national and international.

84. By virtue of this fundamental principle, every person ought to be respected (in her honour and in her beliefs) by the simple fact of belonging to humankind, irrespective of any circumstance. In its application in any circumstances (in times both of armed conflict and of peace), in the relations between public power and human beings subject to the jurisdiction of the State concerned, the principle of humanity permeates the whole *corpus juris* of the international protection of the rights of the human person (encompassing International Humanitarian Law, the International Law of Human Rights, and International Refugee Law)[94], conventional as well as customary[95]. And it has further projected itself into the law of international organizations, – and in particular into the Law of the United Nations.

93 Paragraphs 15-16 of that Judgment. An equal reasoning is found in the Judgments of the same Tribunal in the aforementioned case *J.P. Akayesu*, as well as in the case *O. Serushago* (Judgment of 05.02.1999, para. 15).

94 Paras. 58, 60, 64, 69 and 79, *supra.*

95 Paras. 60 and 68-69, *supra.*

VI. THE CONVENTION AGAINST GENOCIDE AND STATE RESPONSIBILITY

1. Legislative History of the Convention (Article IX)

85. Turning now, in particular, to the 1948 Convention against Genocide, it appears from its *travaux préparatoires* that State responsibility for breaches of the Convention was in fact considered in the drafting of what was to become its Article X. This occurred in order to cope with amendments to the Draft Convention, which seemed to have "weakened" previous views on the responsibility of Heads of State. The insertion of a reference to State responsibility also appeared as an answer to the rejection, during the debates of the *travaux préparatoires*, of a "stronger" form of State liability for genocide related to what then was Draft Article V (and then became Article IV) of the Convention.

86. It may be recalled that, originally, Draft Article X (as prepared by the *Ad Hoc* Committee) did not contain the reference – found later on in what was to become Article IX of the Genocide Convention – to State responsibility for acts of genocide[96]. Article IX of the Genocide Convention, as it now stands, can be traced back to a joint amendment, proposed by Belgium and the United Kingdom, to what was then Article X. The proposed joint amendment to that provision was as follows:

> "Any dispute between the High Contracting Parties relating to the interpretation, application or fulfilment of the present Convention, *including disputes relating to the responsibility of a State* for any of the acts enumerated in articles II and IV, shall be submitted to the International Court of Justice at the request of any of the High Contracting Parties"[97].

87. The reasons for this insertion can be found in the discussions on the joint amendment in the VI Committee of the U.N. General Assembly.

96 Article X of the Draft Convention, as drawn up by the *Ad Hoc* Committee, used to read as follows: – "Disputes between the High Contracting Parties relating to the interpretation or application of this Convention shall be submitted to the International Court of Justice, provided that no dispute shall be submitted to the International Court of Justice involving an issue which has been referred to and is pending before or has been passed upon by competent international criminal tribunal". U.N. doc. E/794, p. 38.
97 U.N. doc. A/C.6/258, p. 1 [emphasis added].

The Delegate of the United Kingdom (Mr. Fitzmaurice) explained that both the United Kingdom and Belgium considered that the Convention would not be complete if it did not contemplate state liability for genocidal acts and other punishable offences provided for in the Convention[98]. In opposition to this amendment, another joint amendment was proposed by the USSR and France, without providing for obligatory reference to the ICJ with respect to the Convention; it only contemplated an optional reference mechanism.

88. The French Delegate (Mr. Chaumont) did not show any opposition towards the principle of liability, insofar as it was of a civil nature, and not criminal[99]. The Egyptian Delegate (Mr. Rafaat) also supported the principle of State liability, as no international mechanism of punishment existed[100]. But the proposed amendment also faced opposition from a few Delegations[101]. In addition, the Canadian Delegate (Mr. Lapointe), for his part, asked clarification from the U.K. Delegation as to the meaning intended to ascribe to "State responsibility",– whether it was criminal or civil,– having in mind in particular that the Committee, in its 93rd meeting, had rejected the idea of criminal State responsibility during discussions

98 UN doc. A/C.6/SR.103, p. 430.

99 *Ibid.*, p. 431.

100 *Ibid.*, p. 431. The Greek Delegate (Mr. Spiropoulos) raised an issue as to responsibility relating to cases where a State had its liability triggered for genocide: in such cases, responsibility for that State would involve indemnifying itself, as, in his view, individuals were not considered as right-holders in international law at those times; *ibid.*, p. 433.

101 The Philippines Delegate (Mr. Ingles) insisted on his opposition to the principle or criminal liability (which he posited earlier with respect to Article V), and further argued that, although the joint amendment was not explicitly included in the proposition, the very nature of the Convention, purported to punish genocide implied that liability would be criminal; this, in his view, would bring stigmatization of a whole State for acts committed only by its rulers or officials and not by the State itself, showing that responsibility of the State could not be possible; U.N. doc. A/C.6/SR.103, p. 433. The Delegation of Pakistan also expressed concern about the introduction of State liability in an international instrument which was mainly aimed at a criminal matter; he expressed his preference for the wording of article V when it referred to the "constitutionally responsible leaders"; ibid., p. 438. The Delegation of the USSR argued that the proposed joint amendment was only an intent to submit in a different manner an amendment to article V so as to introduce some form of criminal liability of the State; *ibid.*, p. 441.

related to article V[102]. The Bolivian Delegate (Mr. Medeiros) expressed his support for the U.K./Belgian amendment, finding it necessary[103].

89. For its part, the Haitian Delegation proposed a consequential amendment to the aforementioned joint amendment, which would add "or of any victims of the crime of genocide (groups of individuals)". This met the opposition of some Delegations, which argued that such amendment would imply a modification of the ICJ Statute. Yet, the Syrian Delegation considered that such consequential amendment was not contrary to the ICJ Statute, as in its view there was no reason for the signatory State to impede groups victims of genocide to seize the ICJ for such breaches. In support of its proposal, the Haitian Delegation asserted, *inter alia*, that States could be liable only directly towards the victims themselves, and not towards other States, for having committed genocide[104].

90. Some Delegations, such as those of the USSR and Poland, voiced concerns as to the effect of the reference to the ICJ of disputes relating to State liability under the Genocide Convention. The preoccupation was related to the possibility of Draft Article X (as then worded) precluding submission to the U.N. General Assembly or the Security Council of complaints with respect to genocidal acts[105]. The U.K. Delegate replied that submission to the ICJ could not in any way preclude submission before other competent organs of the U.N.[106]. And the U.K. Delegate concluded that, giving the ICJ jurisdiction for State liability arising out of breaches of the Genocide Convention was necessary in order to ensure an effective enforcement of the Convention, considering in particular the practical difficulties in prosecuting Heads of State[107].

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102 *Ibid*., pp. 438-439. The UK representative replied that the amendment was indeed referring to civil liability (international responsibility for violation of the Convention).
103 In the light of the decisions taken up by the Committee in the course its 97th meeting; *ibid*., p. 439.
104 Cf. U.N. doc. A/C.6/SR.103, p. 436.
105 Cf. U.N. doc. A/C.6/SR.103, *ibid*., p. 444.
106 *Ibid*., p. 444. Furthermore, in response to the criticism, he asserted that reference to the ICJ might be useless, as that Court would act too late in cases of genocide: genocide is a process, – he added, – and once it started being committed, a State Party could seize the Court; *ibid*., p. 444.
107 *Ibid*., p. 444.

91. The joint amendment was then adopted by 23 votes to 13, with 8 abstentions[108]. (Then) Article X, with other amendments, was adopted by 18 to 2, with 15 abstentions; it came to read as follows:

> "Any dispute between the High Contracting Parties relating to the interpretation, application or fulfilment of the present Convention, including disputes relating to the responsibility of a State for any of the acts enumerated in articles II and IV, shall be submitted to the International Court of Justice at the request of any of the parties to the dispute"[109].

This version of (then) Article X underwent minor changes, leading to the final version of what is now Article IX of the Convention against Genocide, which reads as follows:

> "Disputes between the Contracting Parties relating to the interpretation, application or fulfilment of the present Convention, including those relating to the responsibility of a State for genocide or for any of the other acts enumerated in article III, shall be submitted to the International Court of Justice at the request of any of the parties to the dispute".

2. Rationale, and Object and Purpose of the Convention

92. The determination of State responsibility under the Convention against Genocide is wellfounded, not only because this was intended by the draftsmen of the Convention, as its *travaux préparatoires* show (*supra*), but also because such determination is in line with the *rationale* of the Convention, as well as its object and purpose. Today, 66 years after its adoption, the Convention against Genocide counts on 146 States Parties; and the States which have not yet ratified, or acceded to it, are also aware that the prohibition of genocide is one likewise of general or customary international law. It is not conditioned by alterations in State sovereignty or vicissitudes of State succession; it is an absolute prohibition, belonging to the realm of *jus cogens*.

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108 *Ibid.*, p. 447.

109 U.N. doc. A/C.6/269, p. 1. Cf. also Article IX (as it then became), U.N. doc. A/760, p. 10.

93. The Convention against Genocide is meant to prevent and punish the crime of genocide, – which is contrary to the spirit and aims of the United Nations, – so as to liberate humankind from such an odious scourge. Nowadays, six and a half decades after the adoption of the Convention against Genocide, much more is known about that heinous international crime. "Genocide studies" have been undertaken in recent decades in distinct branches of human learning, attentive to an interdisciplinary perspective (cf. part XI, *infra*). They have shown that genocide has been committed in modern history in furtherance of State policies.

94. To attempt to make the application of the Genocide Convention to States an impossible task, would render the Convention meaningless, an almost dead letter; it would furthermore create a situation where certain State egregious criminal acts, amounting to genocide, would pass unpunished,– especially as there is at present no international Convention on Crimes against Humanity. Genocide is in fact an egregious crime committed under the direction, or the benign complicity, of the State and its apparatus[110]. Unlike what was assumed by the Nuremberg Tribunal in its *célèbre* Judgment (part 22, p. 447), States are not "abstract entities"; they have been concretely engaged, together with individual executioners (their so-called "human resources", acting on their behalf), in acts of genocide, in distinct historical moments and places.

95. They have altogether – individuals and States – been responsible for such heinous acts. In this context, individual and State responsibility complement each other. In sum, the determination of State responsibility cannot at all be discarded in the interpretation and application of the Convention against Genocide. When adjudicating a case such as the present one, concerning the *Application of the Convention against Genocide* (Croatia *versus* Serbia), the ICJ should bear in mind the importance of the Convention as a major human rights treaty, with all its implications and legal consequences. It should bear in mind the Convention's historic significance for humankind.

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110 The expert evidence examined by the ICTFY, for example, in the *S. Milošević* case (2004), maintained that the knowledge sedimented on the matter shows that State authorities are always responsible for a genocidal process; cf. part XIII of the present Dissenting Opinion, *infra*.

VII. STANDARD OF PROOF IN THE CASE-LAW OF INTERNATIONAL HUMAN RIGHTS TRIBUNALS

96. The case-law of international human rights tribunals is of central importance to the determination of the international responsibility of States (rather than individuals) for grave violations of human rights, and cannot pass unnoticed in a case like the present one, concerning the *Application of the Convention against Genocide*, opposing Croatia to Serbia. It cannot thus be overlooked by the ICJ, concerned as it is, like international human rights tribunals, with *State* responsibility, and not individual (criminal) responsibility.

1. A Question from the Bench: The Evolving Case-Law on the Matter

97. In the course of the oral proceedings in the present case, the contending parties were, however, referring only to the case-law of international criminal tribunals (concerned with *individual* responsibility), until the moment, in the Court's public sitting of 05.03.2014, that I deemed it fit to put the following question to both of them, on also the case-law of international human rights tribunals:

> "My question concerns the international criminal responsibility of individuals, as well as the international responsibility of States, for genocide. References have so far been made only to the case-law of international criminal tribunals (the ICTY and the ICTR), pertaining to individual international criminal responsibility. Do you consider that the case-law of international human rights tribunals is also of relevance here, for the international responsibility of States for genocide, as to standard of proof and attribution?"[111]

From then onwards, both Croatia and Serbia started referring, *comme il faut*, to the case-law of international human rights tribunals as well[112],– concerned as these latter are with the determination of State responsibility.

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111 Question put by Judge Cançado Trindade, *in*: ICJ, doc. CR 2014/8, of 05.03.2014, p. 59.

112 Croatia's responses, *in*: ICJ, doc. CR 2014/12, of 07.03.2014, p. 44, para. 20; and ICJ, doc. CR 2014/20, of 20.03.2014, pp. 14-16, paras. 8-9; Serbia's response, *in*: ICJ, doc. CR 2014/23, of 28.03.2014, pp. 50-52 para. 2736.

98. In addition to what the contending Parties argued in the proceedings of the present case concerning the *Application of the Convention against Genocide*, there is, in effect, a wealth of relevant indications as to the standard of proof (and reversal of the burden of proof), which should not pass unnoticed here. This is so, in particular, in the case-law of the Inter-American Court of Human Rights (IACtHR), in cases disclosing a systematic or widespread pattern of gross violations of human rights, where the IACtHR has resorted to factual presumptions.

99. Moreover, the IACtHR has held that it is the respondent State which is to produce the evidence, given the applicant's difficulty to obtain it and the respondent's access to it. There are indications to this effect also in the case-law of the European Court of Human Rights (ECtHR). Given the relevance of the case-law of international human rights tribunals for the determination of international *State* responsibility, it cannot at all be overlooked in the consideration of the *cas d'espèce*, in so far as the key issue of standard of proof is concerned. I thus care to proceed to its review.

2. Case-Law of the IACtHR

a) Cases Disclosing a Systematic Pattern of Grave Violations of Human Rights

100. The case-law of the IACtHR is particularly rich in respect of the standard of proof in cases disclosing a systematic pattern of grave violations of human rights. In the case of *Juan Humberto Sánchez versus Honduras* (Judgment of 07.06.2003), for example, the IACtHR determined the occurrence, in the respondent State, in the eighties and beginning of the nineties, of a systematic pattern of arbitrary detentions, enforced disappearances of persons, and summary or extra-judicial executions committed by the military forces (paras. 70(1) and 96-97), wherein the *cas d'espèce* is inserted (para. 80).

101. The IACtHR thus *inferred*, even in the absence of direct proofs, that the victim suffered cruel and inhuman treatment during the time of his detention (para. 98)[113], before his mortal remains were found.

113 Cf. also, to this effect, IACtHR, case *Bámaca Velásquez versus Guatemala* (Judgment of 25.11.2000), supra, para. 150; case *Cantoral Benavides versus Peru* (Judgment of 18.08.2000), paras. 83-84 and 89; and case of the "*Street Children*" (*Villagrán Morales and Others*) *versus Guatemala* (Judgment of 19.11.1999), para. 162.

The facts occurred at the time of the pattern of ill-treatment and torture and summary executions, leading the IACtHR to the presumption of the responsibility of the State for those violations in respect of persons under the custody of its agents (para. 99)[114]. This being so, – the Court added, – it was incumbent upon the respondent State to provide reasonable explanations on what occurred to the victim (paras. 100 and 135).

102. Other pertinent decisions of the IACtHR can here be recalled[115]. For example, in the case of the *Massacres of Ituango versus Colombia* (Judgment of 01.07.2006), the IACtHR, having found in the municipality at issue a systematic pattern of massacres (in 1996-1997) perpetrated by paramilitary groups, determined the responsibility of the State for "omission, acquiescence and collaboration" of the public forces (para. 132).

103. The IACtHR further found that State agents had "full knowledge" of the activities of paramilitary groups terrorizing the local population, and, far from protecting this latter, they omitted doing so, and even participated in the armed incursion into the municipality and the killings of local inhabitants by the paramilitaries (paras. 133 and 135). Within the context of this systematic pattern of violence, the respondent State incurred into grave violations of the rights of the victims under the American Convention on Human Rights (ACHR – paras. 136-138).

104. In the case of the *Masacre de Mapiripán versus Colombia* (Judgment of 15.09.2005), the IACtHR observed that, although the killings in Mapiripán (in midJuly 1997) were committed by members of paramilitary groups,

> "the preparation and execution of the massacre could not have been perpetrated without the collaboration, acquiescence and tolerance, manifested in various actions and omissions, of members of the Armed Forces of State,

114 Cf. also, in this sense, IACtHR, case *Bámaca Velásquez*, *cit. supra*, paras. 152-153; and case of the "*Street Children*" (*Villagrán Morales and Others*), *cit. supra*, para. 170.

115 Another example of *inference* of a summary or extra-judicial execution, in a context of a generalized or systematic pattern of crimes against humanity (in the period 1973-1990), victimizing the "civilian population" (with thousands of individual victims), is afforded by the IACtHR's Judgment (of 26.09.2006) in the case of *Almonacid Arellano and Others versus Chile* (paras. 96 and 103-104).

> including of its high officers in the zones. Certainly there are no documental proofs before this Tribunal that demonstrate that the State directed directly the execution of the massacre or that there existed a relation of dependence between the Army and the paramilitary groups or a delegation of public functions from the former to these latter" (para. 120).

105. The IACtHR then attributed to the respondent State the conducts of both its own agents and of the members of paramilitary groups in the zones which were "under the control of the State". The incursion of paramilitaries in Mapiripán, – it added, – had been planned for months, and was executed "with full knowledge, logistic previsions and collaboration of the Armed Forces", which facilitated the journey of the paramilitaries from Apartadó and Neclocí until Mapiripán "in zones which were under their control", and, moreover, "left unprotected the civilian population during the days of the massacre with the unjustified moving of the troops to other localities" (para. 120).

106. The "collaboration of members of the Armed Forces with the paramilitaries" was manifested in a pattern of "grave actions and omissions" aiming at allowing the perpetration of the massacre and the coverup of the facts in search of "the impunity of those responsible" (para. 121). The Court added that the State authorities who knew the intentions of the paramilitary groups to perpetrate a massacre to instil terror in the population, "not only collaborated in the preparation" of the killings, but also left the impression before public opinion that the massacre had been perpetrated by paramilitary groups "without its knowledge, participation and tolerance" (para. 121).

107. The IACtHR, discarding this pretension, and having established the links between the Armed Forces and the paramilitary groups in the perpetration of the massacre, determined that "the international responsibility of the State was generated by a pattern of actions and omissions of State agents and *particuliers*, which took place in a coordinated, parallel or organized way aiming at perpetrating the massacre" (para. 123).

108. In its Judgment (of 22.09.2006) in the case *Goiburú and Others versus Paraguay*, the IACtHR observed that that particular case was endowed with "a particular historical transcendence", as the facts had

occurred "in a context of a systematic practice of arbitrary detentions, tortures, executions and disappearances perpetrated by the forces of security and intelligence of the dictatorship of Alfredo Stroessner, in the framework of the Operation Cóndor" (para. 62).

109. That is to say, the grave facts are framed in the flagrant, massive and systematic character of the repression which the population was subjected to, at inter-State scale; in fact, the structures of State security were put into action in a coordinated way against the nations at trans-frontier level by the dictatorial governments concerned (para. 62). The IACtHR thus found that the context in which the facts occurred engaged and conditioned the international responsibility of the State in relation to its obligation to respect and guarantee the rights set forth in Articles 4, 5, 7, 8 and 25 of the ACHR (para. 63).

110. The illegal and arbitrary detentions or kidnapping, torture and enforced disappearances, – the IACtHR added, – were "product of an operation of policial intelligence", planned and executed, and covered up by members of the national police, "with the knowledge and by the order of the highest authorities of the government of General Stroessner, and, at least in the earlier phases of planification of the detentions or kidnappings, in close collaboration with Argentine authorities" (para. 87). Such was the *modus operandi* of the systematic practice of illegal and arbitrary detentions, torture and enforced disappearances verified in the epoch of the facts, in the framework of the Operation Cóndor (para. 87).

111. There was, moreover, a generalized situation of impunity of the grave violations of human rights that occurred, undermining the protection of the rights at issue. This IACtHR stressed the general obligation to respect and ensure respect for the rights set forth in the American Convention on Human Rights (Article 1(1)), wherefrom ensued the obligation to investigate the cases of violations of the protected rights.

112. Thus, in cases of extra-judicial executions, enforced disappearances and other grave violations of human rights, the IACtHR considered that the prompt and *ex officio* investigation thereof should be undertaken, without delay, as a key element for the guarantee of the protected rights, such as the rights to life, to personal integrity, and to personal freedom (para. 88). In this case, – the IACtHR added,– the lack of investigation of the facts constituted a determining factor of

the systematic practice of violations of human rights and led to the impunity of those responsible for them (para. 90).

b) Cases Wherein the Respondent State Has the Burden of Proof Given the Difficulty of the Applicant to Obtain It

113**.** In the case *Velásquez Rodríguez versus Honduras* (Judgment of 29.07.1988), the IACtHR, in dwelling upon the standards of proof, began by acknowledging the prerogative of international tribunals to evaluate *freely* the evidence produced (para. 127). "For an international tribunal", – the IACtHR added, – "the criteria of assessment of proofs are less formal than in the national legal systems" (para. 128). There is a "special gravity" in the attribution of gross violations of human rights (such as enforced disappearances of persons) to States Parties to the ACHR, and the Court has this in mind (para. 129); yet, in such circumstances, direct proofs (testimonial or documental) are not the only ones that it can base itself upon. Circumstantial evidence (indicia and presumptions) can also be taken into account, whenever the Court can therefrom "infer consistent conclusions" on the facts (para. 130).

114. Such circumstantial evidence, – the IACtHR proceeded, – may become of special importance in cases of grave violations, such as enforced disappearances of persons, characterized by the intent to suppress "any element which may prove the kidnapping, the whereabouts and the fate of the victims" (para. 131). The IACtHR then warned that the international protection of the rights of the human person "is not to be confused with criminal justice", as States do not appear before the Court as subjects of a criminal legal action (para. 134).

115. Its goal, – it went on, – is not to impose penalties to those held culpable of violations of human rights, but rather provide for reparation to the victims for the damages caused by the States responsible for them (para. 134). In the legal process, here, "the defence of the State cannot rest upon the impossibility of the applicant to produce evidence which, in many cases, cannot be obtained without the cooperation of the State" concerned (para. 135), which "has the control of the means to clarify the facts occurred within its territory" (para. 136)[116].

116 In the case *Yatama versus Nicaragua* (Judgment of 23.06.2005), e.g., the IACtHR again deemed it fit to warn that, in cases before an international human rights tribunal, it may well occur that the applicant is faced with the impossibility to produce

3. Case-Law of the ECtHR

116. The case-law of the ECtHR, like that of other international tribunals, is built on the understanding of the *free* evaluation of evidence. In recent years, the ECtHR has been pursuing an approach which brings it closer to that of the IACtHR (*supra*). It so happened that, in its earlier decades, and until the late nineties, the ECtHR consistently invoked the standard of proof "beyond reasonable doubt"; yet, by no means the ECtHR understood it as meaning a particularly high threshold of standard of proof as the one required in domestic criminal law, in particular in common-law jurisdictions. The standard of proof "beyond reasonable doubt", as used by the ECtHR, was endowed with an autonomous meaning under the European Convention of Human Rights (ECHR), certainly less stringent than the one applied in national (criminal) proceedings as to the admissibility of evidence.

117. Criticisms to applying a high standard of proof were to emerge, within the ECtHR, from the bench itself, from dissenting Judges, as in, e.g., the cases of *Labita versus Italy* (Judgment of 06.04.2000) and *S. Veznedaroglu versus Turkey* (Judgment of 11.04.2000). The point was made therein that, to expect victims of grave violations of their rights to prove their allegations "beyond reasonable doubt" would place an unfair burden upon them, impossible to meet; such standard of proof, applicable only in "*criminal* culpability", is not so in "other fields of judicial enquiry", where "the standard of proof should be proportionate to the aim which the search for truth pursues"[117].

118. In their Joint Partly Dissenting Opinion in the case of *Labita versus Italy*, Judges Pastor Ridruejo, Bonello, Makarczyk, Tulkens, Strážnická, Butkevych, Casadevall and Zupančič lucidly stated that the standard of proof "beyond reasonable doubt" would be "inadequate", if not "illogical and even unworkable", when State authorities fail even to identify the perpetrators of the grave breaches allegedly inflicted upon the individual applicants. This, in their view, would unduly limit State responsibility. Whenever only the State authorities have

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evidence, "which can only be obtained with the cooperation" of the respondent State (para. 134).

117 ECtHR, case of *S. Veznedaroglu versus Turkey* (Judgment of 11.04.2000), Partly Dissenting Opinion of Judge Bonello, paras. 12-14.

exclusive knowledge of "some or all the events" that took place, the burden of proof should be shifted upon them (para. 1).

119. The dissenting Judges proceeded that the standard to be met by the applicants is lower if State authorities "have failed to carry out effective investigations and to make the findings available to the Court". And they added:

> "Lastly, it should be borne in mind that the standard of proof "beyond all reasonable doubt" is, in certain legal systems, used in criminal cases. However, this Court is not called upon to judge an individual's guilt or innocence or to punish those responsible for a violation; its task is to protect victims and provide redress for damage caused by the acts of the State responsible. The test, method and standard of proof in respect of responsibility under the Convention are different from those applicable in the various national systems as regards responsibility of individuals for criminal offences" (para. 1).

120. Thus, the nature of certain cases – of grave breaches of human rights – brought also before the ECtHR has made it clear that a stringent or too high a standard of proof would be unreasonable, e.g., when respondent States had entire control of the evidence or exclusive knowledge of the facts, and the alleged victims when in a particular adverse situation, of great vulnerability or even defencelessness. The ECtHR, like the IACtHR, admitted shifting the burden of proof (onto the respondent States) whenever necessary, as well as resorting to inferences (from circumstantial evidence) and factual presumptions, so as to secure procedural fairness, in the light of the principle of *equality of arms* (égalité des armes).

121. In its Judgment (of 18.09.2009) in the case of *Varnava and Others versus Turkey*, the ECtHR expressly stated that, even if one starts from the test of proof "beyond reasonable doubt", there are cases in which it cannot be applied too rigorously, and has to be mitigated (para. 182). Where the information about the occurrences at issue lie wholly, or in part, within the exclusive knowledge of the State authorities, – the ECtHR proceeded, – strong presumptions of fact will arise in respect of the injuries, the burden of proof then resting on the State authorities to provide a satisfactory and convincing explanation (para. 183). The

same takes place if the respondent State has exclusive knowledge of all that has happened (para. 184).

4. General Assessment

122. As I have just indicated in the present Dissenting Opinion, international human rights tribunals have not pursued a stringent and high threshold of proof in cases of grave violations of human rights; given the difficulties experienced in the production of evidence, they have resorted to factual presumptions and inferences, and have proceeded to the reversal of the burden of proof. The IACtHR has done so since the beginning of its jurisprudence, and the ECtHR has been doing so in more recent years. They both conduct the free evaluation of evidence.

123. The standard of proof they uphold is surely much less demanding than the corresponding one ("beyond a reasonable doubt") in domestic criminal law. This is so, with all the more reason, when the cases lodged with them disclose a pattern of widespread and systematic gross violations of human rights, and they feel obliged to resort, even more forcefully, to presumptions and inferences, to the ultimate benefit of the individual victims in search of justice. This important issue begins to attract the attention of expert writing in our days[118].

124. Regrettably, none of these jurisprudential developments was taken into account by the ICJ in the present Judgment. It my understanding, it could, and should, have done so, as the issue was addressed by the contending Parties, as from the moment in the proceedings I put a question to both of them in this respect (para. 97, *supra*). The ICJ preferred to stick to a stringent and high threshold of proof in the present case concerning the *Application of the Convention against Genocide* (2015), just as it had done eight years ago in the *Bosnian Genocide* case (2007). May I here only add that expert writing, dwelling upon the complementarity between State and individual responsibility

118 For updated studies on the subject, cf., as to the IACtHR, e.g., A.A. Cançado Trindade, *El Ejercicio de la Función Judicial Internacional - Memorias de la Corte Inter-Americana de Derechos Humanos*, 3rd ed., Belo Horizonte/Brazil, Edit. Del Rey, 2013, pp. 60-79 and 137-142; and cf., as to the ECtHR, e.g., M. O´Boyle and N. Brady, "Investigatory Powers of the European Court of Human Rights", 4 *European Human Rights Law Review* (2013) pp. 378-391.

for international crimes (despite their distinct regimes)[119], has likewise been attentive to the orientation and contribution of the case-law of international human rights tribunals (IACtHR and ECtHR, *supra*), particularly on the handling of evidence and the shifting of the burden of proof[120].

VIII. STANDARD OF PROOF IN THE CASE-LAW OF INTERNATIONAL CRIMINAL TRIBUNALS

125. May I now turn to the case-law of international criminal tribunals as to the standard of proof. Here we find that the intent to commit genocide can be proved by inference, whenever direct evidence is not available. In effect, requiring direct or explicit evidence of genocidal intent in all cases is neither in line with the case-law of international criminal tribunals nor is it practical or realistic. When there is no explicit evidence of intent, it can be inferred from the facts and circumstances. A few examples and references of relevant jurisprudence are provided herein in support of this point.

1. Inferring Intent from Circumstantial Evidence (Case-Law of the ICTR and the ICTFY)

126. In the jurisprudence of the *ad hoc* International Criminal Tribunal for Rwanda (ICTR), it has been established that intent to commit genocide can be inferred from facts and circumstances. Thus, in the *Rutaganda* case (Judgment of 06.12.1999), the ICTR (Trial Chamber) stated that "intent can be, on a case-by-case basis, inferred from the material evidence submitted to the Chamber, including the evidence which demonstrates a consistent pattern of conduct by the

119 Cf., e.g., B.I. Bonafè, *The Relationship between State and Individual Responsibilily for International Crimes*, Leiden, Nijhoff, 2009, pp. 11-255; A.A. Cançado Trindade, "Complementarity between State Responsibility and Individual Responsibility for Grave Violations of Human Rights: The Crime of State Revisited", *in International Responsibility Today – Essays in Memory of O. Schachter* (ed. M. Ragazzi), Leiden, M. Nijhoff, 2005, pp. 253-269; A. Nollkaemper, "Concurrence between Individual Responsibility and State Responsibility in International Law", 52 *International and Comparative Law Quarterly* (2003) pp. 615-640.
120 Cf., e.g., P. Gaeta, "Génocide d´État et responsabilité pénale individuelle", 111 Revue générale de Droit international public (2007) pp. 273-284, esp. p. 279; P. Gaeta, "On What Conditions Can a State Be Held Responsible for Genocide?", 18 *European Journal of International Law* (2007) p. 646.

Accused" (paras. 61-63)[121]. Likewise, in the *Semanza* case (Judgment of 15.05.2003), the ICTR (Trial Chamber) stated that a "perpetrator's *mens rea* may be inferred from his actions" (para. 313).

127. Furthermore, in the same line of thinking, in the *Bagilishema* case (Judgment of 07.06.2001), the ICTR (Trial Chamber) found that

> "evidence of the context of the alleged culpable acts may help the Chamber to determine the intention of the Accused, especially where the intention is not clear from what that person says or does. The Chamber notes, however, that the use of context to determine the intent of an accused must be counterbalanced with the actual conduct of the Accused. The Chamber is of the opinion that the Accused's intent should be determined, above all, from his words and deeds, and should be evident from patterns of purposeful action" (para. 63).

128. In the landmark case *Akayesu* case (Judgment of 02.09.1998), the ICTR (Trial Chamber) found that "intent is a mental factor which is difficult, even impossible to determine", and it held that "in the absence of a confession from the accused", intent may be inferred from the following factors: a) "general context of the perpetration" of grave breaches "systematically" against the "same group"; b) "scale of atrocities committed"; c) "general nature" of the atrocities committed "in a region or a country"; d) "the fact of deliberately and systematically targeting victims on account of their membership of a particular group, while excluding the members of other groups"; e) "the general political doctrine which gave rise to the acts"; f) grave breaches committed against members of a group specifically because they belong to that group; g) "the repetition of destructive and discriminatory acts"; and h) the perpetration of acts which violate, or which "the perpetrators themselves consider to violate the very foundation of the group", committed as part of "the same pattern of conduct" (paras. 521 and 523-524).

129. Shortly afterwards, in the *Kayishema and Ruzindana* case (Judgment of 21.05.1999), the ICTR (Trial Chamber) also stated that intent might be difficult to determine and that the accused's "actions, including circumstantial evidence", may "provide sufficient evidence of intent", and that "intent can be inferred either from words or deeds

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121 Cf. also the *Musema* case, ICTR Trial Chamber's Judgment of 27.01.2000, para. 167.

and may be demonstrated by a pattern of purposeful action". The ICTR (Trial Chamber) asserted that the following can be relevant indicators: a) "the number of group members affected"; b) "the physical targeting of the group or their property"; c) "the use of derogatory language toward members of the targeted group"; d) "the weapons employed and the extent of bodily injury"; e) "the methodical way of planning"; f) "the systematic manner of killing"; and g) "the relative proportionate scale of the actual or attempted destruction of a group" (paras. 93 and 527).

130. Later on, the ICTR (Appeals Chamber), in its Judgment of 07.07.2006 in the *S. Gacumbitsi* case, pondered that, as intent, by its nature, is "not usually susceptible to direct proof", it has to be inferred from relevant facts and circumstances, such as the systematic perpetration of atrocities against the same group, or the repetition of "destructive and discriminatory acts" (paras. 40-41). In a similar vein, the Appeals Chamber of the *ad hoc* International Criminal Tribunal for the former Yugoslavia (ICTFY) also asserted, in the *Jelisić* case (Judgment of 05.07.2001), that,

> "As to proof of specific intent, it may, in the absence of direct explicit evidence, be inferred from a number of facts and circumstances, such as the general context, the perpetration of other culpable acts systematically directed against the same group, the scale of atrocities committed, the systematic targeting of victims on account of their membership of a particular group, or the repetition of destructive and discriminatory acts" (para. 47).

The ICTFY (Appeals Chamber) further stated, in the *Krstić* case (Judgment of 19.04.2004), that, when proving genocidal intent on the basis of an inference, "that inference must be the only reasonable inference available on the evidence" (para. 41).

2. Standards of Proof: Rebuttals of the High Threshold of Evidence

a) R. Karadžić case (2013)

131. In its Judgment of 26.02.2007, in the case of the Application of the Convention against Genocide (Bosnia and Herzegovina versus Serbia and Montenegro), the ICJ, referring to the Keraterm camp in Prijedor, KP Dom in Foča, and Omarska in Prijedor, observed that,

having "carefully examined the criminal proceedings of the ICTY and the findings of its Chambers", it appeared that "none of those convicted were found to have acted with specific intent (dolus specialis)" (para. 277). Yet the ICTFY (Appeals Chamber), in its recent Judgment (of 11.07.2013) in the R. Karadžić case, found that "the question regarding Karadžić's culpability with respect to the crimes of genocide committed in the Municipalities remains open" (para. 116).

132. The ICTFY (Appeals Chamber), in this recent Judgment in the *R. Karadžić* case, reinstated the charges of genocide under count 1 of the indictment; it referred to seven municipalities of Bosnia-Herzegovina claimed as Bosnian Serb territory (para. 57), and mentioned the Keraterm camp in Prijedor, the KP Dom camp in Foča, and the Omarska camp in Prijedor (para. 48). It then observed:

> "The Appeals Chamber is satisfied that evidence adduced by the Prosecution, when taken at its highest, indicates that Bosnian Muslims and Bosnian Croats were subjected to conditions of life that would bring about their physical destruction, including severe overcrowding, deprivation of nourishment, and lack of access to medical care" (para. 49).

133. Further on, in its same Judgment of 11.07.2013, the ICTFY (Appeals Chamber) significantly stated:

> "The Appeals Chamber also recalls that by its nature, genocidal intent is not usually susceptible to direct proof. As recognised by the Trial Chamber, *in the absence of direct evidence, genocidal intent may be inferred from a number of facts and circumstances, such as the general context, the perpetration of other culpable acts systematically directed against the same group, the scale of atrocities committed, the systematic targeting of victims on account of their membership in a particular group, the repetition of destructive and discriminatory acts, or the existence of a plan or policy*"[122] (para. 80).

The ICTFY (Appeals Chamber) then saw it fit to add, in the same Judgment of 11.07.2013 in the *R. Karadžić* case, that, as to "factual findings and evidentiary assessments", that it was bound neither by the decisions of the Trial Chambers of the ICTFY itself, nor by those

122 [Emphasis added].

of the ICJ (para. 94). It thus made clear that it did not support the high threshold of evidence.

b) *Z. Tolimir* case (2012)

134. In another recent Judgment (of 12.12.2012), in the *Z. Tolimir* case, the ICTFY (Trial Chamber II) sustained that

> "Where direct evidence is absent regarding the 'conditions of life' imposed on the targeted group and calculated to bring about its physical destruction, a Chamber can be guided by 'the objective probability of these conditions leading to the physical destruction of the group in part' and factors like the nature of the conditions imposed, the length of time that members of the group were subjected to them, and characteristics of the targeted group such as its vulnerability" (para. 742).

135. The ICTFY (Trial Chamber II) proceeded that, as indications of the intent to destroy (*mens rea* of genocide) are "rarely overt", it is thus "permissible to infer the existence of genocidal intent" on the basis of the whole of the evidence, "taken together". It then added that

> "factors relevant to this analysis may include the general context, the perpetration of other culpable acts systematically directed against the same group, the scale of atrocities, the systematic targeting of victims on account of their membership in a particular group, or the repetition of destructive and discriminatory acts. The existence of a plan or policy, a perpetrator's display of his intent through public speeches or meetings with others may also support an inference that the perpetrator had formed the requisite specific intent" (para. 745).

136. In sum, even in the absence of direct evidence, genocidal intent may be inferred from circumstantial evidence, and the general context and pattern of extreme violence and destruction. May I add that concern with the needed protection of individuals and groups in situations of vulnerability form today – along the last two decades – the legacy of the II World Conference on Human Rights (1993)[123]. It should

123 Cf. A.A. Cançado Trindade, *A Proteção dos Vulneráveis como Legado da II Conferência Mundial de Direitos Humanos (1993-2013)* [*The Protection of the Vulnerable as Legacy of the II World Conference on Human Rights (1993-2013)*], *op. cit. supra* n. (79), pp. 13-356.

not pass unnoticed that this points nowadays to a wider convergence between the International Law of Human Rights, International Humanitarian Law and the International Law of Refugees, as well as International Criminal Law, taken together.

c) *S. Milošević* case (2004)

137. In the adjudication of the aforementioned *Bosnian Genocide* case (2007), the ICJ did not react negatively against Serbia's refusal to produce the (unredacted) documents of its Supreme Defence Council (SDC), as the Court apparently did not want to infringe upon Serbia's sovereignty. The ICJ insisted on its high threshold of evidence. For its part, the ICTFY (Trial Chamber), already in its Decision of 16.06.2004 (on motion for judgment of acquittal) in the *S. Milošević* case, had found that

> "there is sufficient evidence that genocide was committed in Brčko, Prijedor, Sanski Most, Srebrenica, Bijeljina, Ključ and Bosanski Novi and (...) that the Accused was a participant in a joint criminal enterprise, which included the Bosnian Serb leadership, the aim and intention of which was to destroy a part of the Bosnian Muslims as a group" (para. 289, and cf. also para. 288).

138. The final judgment never took place, due to the death of S. Milošević. Yet, although this Decision of the ICTFY Trial Chamber of 16.06.2004 had a bearing on the ICJ Judgment of 26.02.2007, the ICJ preferred not to give any weight to it[124]. The high standard of proof adopted by the ICJ, – criticized by a trend of expert writing, – finds justification in international individual criminal responsibility, facing incarceration, but *not* in international State responsibility, aiming only at declaratory and compensatory relief, where a simple *balance of evidence* would be appropriate, with a lower standard of proof than for international crimes by individuals[125].

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124 Cf. D. Groome, *op. cit. infra* n. (117), pp. 964-965.

125 Cf., to this effect, e.g., D. Groome, "Adjudicating Genocide: Is the International Court of Justice Capable of Judging State Criminal Responsibility?", 31 *Fordham International Law Journal* (2008) p. 933.

3. General Assessment

139. The jurisprudence of international criminal tribunals thus clearly holds that proof of genocidal intent may be inferred from the aforementioned factors (such as, *inter alia*, e.g., the plan or policy of destruction) pertaining to facts and circumstances. Even in the absence of direct proofs, the finding of those factors may lead to the inference of genocidal intent on the part of the perpetrators. In the present case of the *Application of the Convention against Genocide*, opposing Croatia to Serbia, the contending parties themselves have made arguments in relation to the question whether genocidal intent can be proven by inferences.

140. For example, Croatia argues that "[t]he Parties also appear to be in agreement that the Court (…) can draw proof of genocidal intent from inferences of fact"[126]. It further argues that Serbia "acknowledges in the *Counter-Memorial* [para. 135] that it is sometimes difficult to show by direct evidence the intent to commit genocide as the mental element of the crime. The Respondent goes on to refer to the possibility (…) of reliance on indirect evidence and drawing proof from inferences of fact"[127].

141. May it be recalled that, despite all the aforementioned indications from the case-law of the international criminal tribunals, – added to those from the case-law of international human rights tribunals, – the ICJ held, in this respect, in the earlier *Bosnian Genocide* case (2007), opposing Bosnia-Herzegovina to Serbia, that:

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

142. Keeping in mind the case-law of contemporary international tribunals on the matter (cf. sections V and VI, *supra*), the ICJ seems to have imposed too high a threshold of evidence (for the determination of genocide), which does not seem to follow the established case-law

126 Croatia's *Reply*, para. 2.11.
127 Croatia's *Reply*, para. 2.12.

of international criminal tribunals and of international human rights tribunals on standard of proof (cf. also *infra*). The ICJ seems to have set too high the standard of proof for finding the Serbian regime of the time of the war in Croatia complicit in genocide. Even when direct evidence is not available, the case-law of contemporary international tribunals holds that intent can be inferred on the basis of circumstantial evidence.

143. Ultimately, intent can only be inferred, from such factors as the existence of a general plan or policy, the systematic targeting of human groups, the scale of atrocities, the use of derogatory language, among others. The attempts to impose a high threshold for proof of genocide, and to discredit the production of evidence (e.g., witness statements) are most regrettable, ending up in reducing genocide to an almost impossible crime to determine, and the Genocide Convention to an almost dead letter. This can only bring impunity to the perpetrators of genocide, – States and individuals alike, – and make any hope of access to justice on the part of victims of genocide fade away. Lawlessness would replace the rule of law.

144. Another word of caution is to be added here against what may appear as a regrettable deconstruction of the Genocide Convention. One cannot characterize a situation as one of armed conflict, so as to discard genocide. The two do not exclude each other. In this connection, it has been pertinently warned that perpetrators of genocide will almost always allege that they were in an armed conflict, and their actions were taken "pursuant to an ongoing military conflict"; yet, "genocide may be a means for achieving military objectives just as readily as military conflict may be a means for instigating a genocidal plan"[128].

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

128 R. Park, "Proving Genocidal Intent: International Precedent and ECCC Case 002", 63 *Rutgers Law Review* (2010) pp. 169-170, and cf. pp. 150-152.

population prevail over contentions of State sovereignty, particularly in face of misuses of this latter.

146. History has unfortunately shown that genocide has been committed in furtherance of State policies. Making the application of the Genocide Convention to States Parties an almost impossible task, would render the Convention meaningless. It would also create a situation where certain State egregious criminal acts amounting to genocide would go unpunished, – even more so in the current absence of a Convention on Crimes against Humanity. Genocide is indeed an egregious crime committed - more often[129] than one would naively assume – under the direction or the benign complicity of the sovereign State and its apparatus.

129 Cf., in general, *inter alia*, e.g., Y. Ternon, *Guerres et génocides au XXe siècle*, Paris, Éd. Odile Jacob, 2007, pp. 9-379; B. Bruneteau, *Le siècle des génocides*, Paris, Armand Colin, 2004, pp. 5-233; B.A. Valentino, *Final Solutions – Mass Killing and Genocide in the Twentieth Century*, Ithaca/London, Cornell University Press, 2004, pp. 1-309; G. Bensoussan, *Europe – Une passion génocidaire*, Paris, Éd. Mille et Une Nuits, 2006, pp. 7-460; S. Totten, W.S. Parsons and I.W. Charny (eds.), *Century of Genocide – Eyewitness Accounts and Critical Views*, N.Y./London, Garland Publ., 1997, pp. 3-466; B. Kiernan, *Blood and Soil – A World History of Genocide and Extermination from Sparta to Darfur*, New Haven/London, Yale University Press, 2007, pp. 1-697; R. Gellately and B. Kiernan (eds.), *The Specter of Genocide – Mass Murder in Historical Perspective*, Cambridge, Cambridge University Press, 2010 [repr.], pp. 3-380; D. Olusoga and C.W. Erichsen, *The Kaiser´s Holocaust – Germany's Forgotten Genocide*, London, Faber & Faber, 2011, pp. 1-379; J.B. Racine, *Le génocide des Arméniens – Origine et permanence du crime contre l´humanité*, Paris, Dalloz, 2006, pp. 61-102; R.G. Suny, F.M. Göçek and N.M. Naimark (eds.), A *Question of Genocide*, Oxford, Oxford University Press, 2013, pp. 3-414; G. Chaliand and Y. Ternon, *1915, le génocide des Arméniens*, Bruxelles, Éd. Complexe, 2006 (reed.), pp. 3-199; I. Chang, *The Rape of Nanking – The Forgotten Holocaust of World War II*, London, Penguin Books, 1997, pp. 14-220; N.M. Naimark, *Stalin's Genocides*, Princeton/N.J., Princeton University Press, 2012 [repr.], pp. 1-154; E. Kogon, *L'État SS – Le système des camps de concentration allemands* [1947], [Paris,] Éd. Jeune Parque, 1993, pp. 7-447; L. Rees, *El Holocausto Asiático*, Barcelona, Crítica Ed., 2009, pp. 13-212; B. Kiernan, *Le génocide au Cambodge (1975-1979)*, Paris, Gallimard, 1998, pp. 7-702; B. Allen, *Rape Warfare – The Hidden Genocide in Bosnia-Herzegovina and Croatia*, Minneapolis/London, University of Minnesota Press, 1996, pp. 1-162; G. Prunier, *Africa´s World War – Congo, the Rwandan Genocide, and the Making of a Continental Catastrophe*, Oxford, Oxford University Press, 2010, pp. 1-468; K. Moghalu, *Rwanda´s Genocide – The Politics of Global Justice*, N.Y., Palgrave, 2005, pp. 1-236; J.P. Chrétien and M. Kabanda, *Rwanda – Racisme et genocide –* l´idéologie hamitique, Paris, Éd. Belin, 2013, pp. 7-361; S. Leydesdorff, *Surviving the Bosnian Genocide – The Women of Srebrenica Speak*, Bloomington/Indianapolis, Indiana University Press, 2011, pp. 1-229; M.W. Daly, *Darfur's Sorrow – A History of Destruction and Genocide*, Cambridge, Cambridge University Press, 2007, pp. 1-316.

147. The repeated mass murders and atrocities, with the extermination of segments of the population, pursuing pre-conceived plans and policies, coldly calculated, have counted on the apparatus of the State public power, with its bureaucracy, with its so-called material and human "resources". Historiography shows that the successive genocides and atrocities along the XXth century have in effect been committed pursuant to a plan, have been organized and executed as a State policy, by those who held power, with the use of euphemistic language in the process of *dehumanization* of the victims[130].

148. Widespread and systematic patterns of destruction have been carried out amidst ideological propaganda, without any moral assessment, blurring the sheer brutality and any responsibility, and erasing any guilt feeling. All was lost in the organic and totalitarian entity. Those mass murders have often been committed without any reparation to the next-of-kin of the fatal victims[131]. Furthermore, not all such mass atrocities have been taken before international tribunals. As to the ones that have been, in an international adjudication of a case concerning the application of the Convention against Genocide, making the elements of genocide too difficult to determine, would maintain the shadow of impunity, and create a situation of lawlessness, contrary to the object and purpose of that Convention.

130 Cf. further, part XIII of the present Dissenting Opinion, *infra*.

131 E. Staub, *The Roots of Evil – The Origins of Genocide and Other Group Violence*, Cambridge, Cambridge University Press, 2005 [reimpr.], pp. 78, 10, 19, 24, 29, 107, 109, 119, 121-123, 129, 142, 151, 183-187, 221, 225, 227 and 264; D. Muchnik and A. Garvie, *El Derrumbe del Humanismo – Guerra, Maldad y Violencia en los Tiempos Modernos*, Buenos Aires/Barcelona, Edhasa, 2007, pp. 36-37, 116, 128, 135-136, 142, 246 and 250. And cf. also, in general, *inter alia*, e.g., V. Klemperer, *LTI – A Linguagem do Terceiro Reich*, Rio de Janeiro, Contraponto Ed., 2009, pp. 11-424; D.J. Goldhagen, *Worse than War – Genocide, Eliminationism, and the Ongoing Assault on Humanity*, London, Abacus, 2012 [reed.], pp. 6-564; J. Sémelin, *Purificar e Destruir – Usos Políticos dos Massacres e dos Genocídios*, Rio de Janeiro, DIFEL, 2009, pp. 19-532; M. Kullashi, *Effacer l´autre – Identités culturelles et identités politiques dans les Balkans*, Paris, L'Harmattan, 2005, pp. 7-246; S. Matton, *Srebrenica – Un génocide annoncé*, Paris, Flammarion, 2005, pp. 21-420; P. Mojzes, *Balkan Genocides – Holocaust and Ethnic Cleansing in the Twentieth Century*, Lanham, Rowman & Littlefield Publs., 2011, pp. 34-229.

IX. WIDESPREAD AND SYSTEMATIC PATTERN OF DESTRUCTION: FACT-FINDING AND CASE-LAW

149. May I turn now to the fact-finding that was undertaken, and the reports that were prepared, *at the time those grave breaches of human rights and International Humanitarian Law were being committed*, conforming a systematic practice of destruction. I refer to the fact-finding and *Reports* prepared by the Special *Rapporteur* of the (former) U.N. Commission on Human Rights (1992-1993), as well as the fact-finding and *Reports* prepared by the U.N. Security Council's Commission of Experts (1993-1994). I shall seek to detect their elements which bear relevance for the consideration of the *cas d'espèce*.

1. U.N. (Former Commission on Human Rights) Fact-Finding Reports on Systematic Pattern of Destruction (1992-1993)

150. There are passages in the *Reports on the Situation of Human Rights in the Territory of the Former Yugoslavia*, of Special *Rapporteur* of the (former) U.N. Commission on Human Rights (Mr. T. Mazowiecki), which pertain to alleged crimes committed against Croat populations and by the Serb official or paramilitary entities. There are reported facts that assist in evidencing a systematic pattern of destruction during the armed attacks in Croatia in particular. The *Report* of 28.08.1992[132], for example, referred to the shops and businesses of ethnic Croats that were burned and looted (para. 12).

151. Other forms of intimidation, – it continued, – involved shooting at the houses of other ethnic groups and throwing explosives at them (para. 13). Attacks on churches and mosques were part of the campaign of intimidation (para. 16). Another tactic included "the shelling of population centres and the cutting off of supplies of food and other essential goods" (para. 16). Cultural centres were also targeted, and snipers shot "innocent civilians"; any movement "out of doors" was "hazardous" (paras. 17-18).

152. Detention of civilians was intended to put pressure on them to leave the territory (para. 23). That *Report* also referred to the existence of detention facilities containing between 10 to 100 prisoners in Croatia, and which were "under the control of the Government

132 U.N., doc. E/CN.4/1992/S1/9.

as well as territories under the control of ethnic Serbs" (para. 34). It added that the situation in which prisoners lived (including poor nutrition overcrowding and poor conditions of detention) was a real threat to their lives, and, in effect, prisoners have died of torture and mistreatment in Croatia (para. 39). The aforementioned *Report* further referred to the massive disappearances occurred in territories under the control of ethnic Serbs; in particular, 3,000 disappearances were reported following the fall of Vukovar, with people allegedly detained in camps before disappearing (para. 41).

153. The subsequent *Report* of 27.10.1992[133] expressed concern as to the need to investigate further the existence of mass graves in Vukovar and surrounding areas (para. 18). Generally speaking, this report stressed much more on Bosnia and Herzegovina than on Croatia. The following *Report*, of 17.11.1992[134], addressed the facts occurred in the United Nations Protected Areas (UNPAs). The Special *Rapporteur* stated that in the Krajina parts of UNPA sector South, murders, robberies, looting "and other forms of criminal violence often related to ethnic cleansing" took place (para. 78). People were only allowed to flee upon relinquishment of their properties. As to UNPA sector East, ethnic cleansing was undertaken by Serbian militias and local Serbian authorities, and people were subjected to extremely violent intimidation (para. 83). Furthermore, Catholic churches were destroyed (para. 84).

154. Moreover, that *Report* expressed concern with the disappearance of 2,000 to 3,000 people, following the fall of Vukovar in 1991; it referred to the potential mass grave in Ovčara close to Vukovar. On the site of the potential mass grave referred to, 4 bodies were found, but there might have been many more bodies, including some of the 175 Croatian patients who were evacuated from the Vukovar hospital and then disappeared; there might have been 8 other mass graves in the area (para. 86).

155. Last but not least, the *Report* of 17.11.1992 stated, in its conclusions, that "the continuation of ethnic cleansing is a deliberate effort to create a *fait accompli* in flagrant disregard of international commitments entered into by those who carry out and benefit from

133 U.N., doc. E/CN.4/1992/S1/10.
134 U.N., doc. A/47/666/S/24809.

ethnic cleansing" (para. 135). It is worth noticing that the *Report* referred to all those identified elements of extreme violence as a "policy" (para. 135).

156. The subsequent *Report* of 10.02.1993[135] likewise referred to an ethnic cleansing policy undertaken by local Serbian authorities and paramilitaries still taking place in some UNPAs, as disclosed by the constant harassment towards the non-Serbs who refused to flee, the destruction of churches and houses (para. 141). The following *Report*, of 17.11.1993[136], asserted that the organized massive ethnic cleansing of the Croats from the Republic of Krajina then became a "*fait accompli*" (para. 144), and crimes committed against Croats would generally fall into impunity (para. 145). In UNPA Sector South and the Pink Zones, there were only 1,161 Croats left (whereas there were 44,000 of them in the area in 1991. Killings, looting and confiscation of farm equipment were reported. Moreover, the same *Report* gave account of disappearances and killings that had been occurring in UNPA Sector North (paras. 151-152).

157. As to UNPA Sector East, the census of 1991 and 1993 evidenced that the Croat population in the area had dropped from 46% to 6%, while the Serb population arose from 36% to approximately 73% (para. 157). Intimidation acts and crimes were often directed at minorities, including killings, robbery and looting, forced recruitment in the armed forces, beatings, among others (para. 158). Furthermore, the *Report* of 17.11.1993 expressed concerns about discrimination against Croats when it comes to medical treatments and food distribution (para. 159). And the *Report* then referred to the "deliberate and systematic shelling of civilian objects in Croatian towns and villages" (para. 161).

158. The *Report* added that, according to Croatian sources, between April 1992 and July 1993, "Serbian shelling" caused "187 civilian deaths and 628 civilian injuries", and, between 1991 and April 1993, an estimated total of 210,00 buildings outside the UNPAs were either seriously damaged or destroyed, primarily as a result of shelling (para. 161). Parts of the Dalmatian coast areas

> "have sustained several hundred impacts. There have been numerous civilian deaths and injuries and extensive

135 U.N., doc. E/CN.4/1993/50.
136 U.N. doc. E/CN.4/1994/47.

> damage to civilian objects including schools, hospitals and refugee camps, as well as houses and apartments" (para. 162).
>
> There were cases of civilian objects, hospitals and refugee camps, seemingly "not situated in the proximity of a military object", which were nevertheless "deliberately shelled from Serbian positions within visual range of the targets" (para. 163). The Special *Rapporteur* received accounts of Croatian forces having also become engaged in "deliberate shelling of civilian areas" (para. 164). Violence breeds violence.

2. U.N. (Security Council's Commission of Experts) Fact-Finding Reports on Systematic Pattern of Destruction (1993-1994)

159. The Commission established by the U.N. Security Council resolution 780 (1992), of 06.10.1992, started in early November 1992 its fact-finding work on the international crimes perpetrated in the war in Croatia. By the time it concluded its work, by the end of May 1994, the Commission of Experts had issued four reports, namely: *Interim Report* (of 10.02.1993), *Report of a Mass Grave Near Vukovar* (of 10.01.1993), *Second Interim Report* (of 06.10.1993), and *Final Report* (of 27.05.1994). Each of them, and in particular the last one, contains accounts of the grave breaches of International Humanitarian Law, International Human Rights Law, International Refugee Law and International Criminal Law, committed during the war in Croatia. It is thus important to review the results of the fact-finding work of the Commission of Experts.

a) *Interim Report* (of 10.02.1993)

160. In his presentation of the first *Interim Report* of the Commission of Experts established by the Security Council, the (then) U.N. Secretary-General (B. BoutrosGhali) deemed it fit to stress out that, already in that first report, the Commission had already established that

> "Grave breaches and other violations of International Humanitarian Law have been committed, including wilful killing, 'ethnic cleansing' and mass killings, torture, rape,

pillage and destruction of civilian property, destruction of cultural and religious property, and arbitrary arrests"[137].

161. In effect, in its aforementioned *Interim Report*, the Commission of Experts, – bearing in mind the relevant conventional basis for its fact-finding[138], observed that "ethnic cleansing" – a "relatively new" expression – is "contrary to international law" (para. 55). And it added:

> "Based on the many reports describing the policy and practices conducted in the former Yugoslavia, 'ethnic cleansing' has been carried out by means of murder, torture, arbitrary arrest and detention, extra-judicial executions, rape and sexual assault, confinement of civilian population in ghetto areas, forcible removal, displacement and deportation of civilian population, deliberate military attacks or threats of attacks on civilians and civilian areas, and wanton destruction of property. Those practices constitute crimes against humanity and can be assimilated to specific war crimes. Furthermore, such acts could also fall within the meaning of the Genocide Convention" (para. 56).

The Commission of Experts then reported on "widespread and systematic rape and other forms of sexual assault" throughout the various phases of the armed conflicts (para. 58), as well as on mass executions, disappearances and mass graves during the war in Croatia (paras. 62-63).

b) ***Report of a Mass Grave Near Vukovar*** (of 10.01.1993)

162. The next report of the Commission of Experts focused specifically on the mass grave near Vukovar. A mass execution took place at the gravesite, and "the executioners sought to bury their victims secretly"; the grave contained some 200 bodies (item I). The mass grave was discovered by members of the UNPROFOR Civilian

137 U.N., document S/25274, of 10.02.1993, p. 1.

138 The 1949 Geneva Conventions of International Humanitarian Law (for "grave breaches") and Additional Protocol I, the 1907 Hague Convention IV and the Regulations on the Law and Customs of War on Land, the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, and the 1980 Convention on the Prohibitions and Restrictions on the Use of Certain Conventional Weapons and Protocols (paras. 37, 39 and 47).

Police (UNCIVPOL) and an international forensic team, in an area southeast of the farming village of Ovčara, near Vukovar. The Commission of Experts reported that "[t]he discovery of the Ovčara site is consistent with witness testimony of the disappearance of about 200 patients and medical staff members from the Vukovar Hospital during the evacuation of Croatian patients from that facility on 20 November 1991" (item II).

163. JNA soldiers and Serbian paramilitaries loaded a truck with groups of 20 men, beating them, and driving them away (to execution); at "intervals of about 15 to 20 minutes, the truck returned empty and another group was loaded onto it" (item II). A mass execution took place, and the mortal remains (of some 200 bodies) were then put in a clandestine mass grave. The Commission of Experts reiterated that "[t]he remote location of the grave suggests that the executioners intended to bury their victims secretly" (item III).

c) *Second Interim Report* (of 06.10.1993)

164. In its following report, the Commission of Experts again dwelt upon the mass execution at the grave site in Ovčara (para. 78). Besides mass killings, in its fact-finding missions, it found widespread violations of human rights in detention centres[139], including torture, beatings, and other forms of physical and psychological mistreatment (paras. 84-85). Furthermore, there was an "overall pattern" of rapes (330 reported cases), suggesting a "systematic rape policy"; among the factors pointing in this direction, – the Commission of Experts proceeded, –

> "is the coincidence in time between military action designed to displace civilian populations and widespread rape of the same populations. Group involvement of the members of the same military units in rape suggests command responsibility by commission or omission; in this respect, the manner in which this type of rape was conducted in multiple locations and within a fairly close period of time (mostly between May and December 1992) is also a significant factor. Another factor in this connection is the contemporaneous existence of other violations of international humanitarian law in a given region occurring

139 There were 353 reported detention centres (para. 35).

simultaneously in prison camps, in the battlefield and in the civilian regions of occupied areas" (para. 69).

165. The general framework was one of destruction, with findings of mass killings (in the Vukovar area), brutal mistreatment of prisoners, systematic sexual assaults, "ethnic cleansing", and destruction of property (paras. 9-10). There were thousands of "incidents of victimization" (para. 29), mostly against the civilian population (kidnapping or hostagetaking, forced eviction, imprisonment, rapes, torture, killings) (paras. 32 and 35). In the Vukovar area, there was abduction of civilians and personnel (some 200 persons) from the Vukovar Hospital, followed by their execution and burial in a mass grave at Ovčara (paras. 35 and 37). More than a war, it was an onslaught.

d) *Final Report* (of 27.05.1994)

166. The *Final Report* of the Commission of Experts gives a detailed account of the findings of the horrifying atrocities perpetrated against the targeted victims. In its presentation of the *Final Report*, the (then) U.N. Secretary-General (B. BoutrosGhali) drew attention to the "reported grave breaches" of International Humanitarian Law, committed "on a large scale", and "brutal and ferocious in their execution". He further drew attention to the Commission's "substantive findings on alleged crimes of 'ethnic cleansing', genocide and other massive violations of elementary dictates of humanity"[140]. As to "ethnic cleansing" and rape and sexual assault, he added that they have been carried out "so systematically that they strongly appear to be the product of a policy", which "may also be inferred from the consistent failure to prevent the commission of such crimes and to prosecute and punish their perpetrators"[141].

167. Throughout its *Final Report*, the Commission of Experts stressed its findings of *grave* breaches of International Humanitarian Law[142], mainly in Croatia and Bosnia-Herzegovina (paras. 45, 231, 253 and 311). It was attentive to detect the *systematicity* of victimization, disclosing a policy of persecution or discrimination (para. 84). At a certain point, the Commission dwelt upon the Convention against

140 U.N., document S/1994/674, of 27.05.1994, p. 1.
141 *Ibid*., pp. 1-2.
142 Articles 50/51/130/147 of the 1949 Geneva Conventions on International Humanitarian Law, and Articles 11(4) and 85 of the 1977 Additional Protocol I.

Genocide, adopted, – it recalled, – for "humanitarian and civilizing purposes", in order to safeguard the existence itself of certain human groups and to assert basic "principles of humanity" (para. 88). The Convention, it added, had a "historical evolutionary nature" (para. 89).

168. In the perpetration of those grave breaches, there was ample use of paramilitaries, and the chain of command was thus blurred (paras. 114, 120-122 and 128), so as intentionally to conceal responsibility (para. 124). In this way "ethnic cleansing" was conducted (to build the "Greater Serbia") as a "purposeful policy", terrorizing the civilian population, in order to remove ethnic or religious groups from certain geographic areas, moved at times by a "sense of revenge" (paras. 130-131). The areas were strategic, "linking Serbia proper with Serb-inhabited areas in Bosnia and Croatia" (para. 133).

169. The acts of violence, to remove the civilian population from those areas, were carried out with "extreme brutality and savagery", instilling terror, so that the persecuted would flee and never return. They included mass murder, torture and rape, other mistreatment of civilians and prisoners of war, using of civilians as human shields, indiscriminate killings, forced displacement, destruction of cultural property, attacks on hospitals and medical locations, burning and blowing up of houses, destruction of property (paras. 134-137).

170. The Commission of Experts also found frequency of shelling (para. 188) and a pattern of "systematic targeting" (para. 189). Such policy and practices of "ethnic cleansing" were carried out by members of distinct segments of Serbian society, such as members of the Serbian army, militias, special forces, police and individuals (paras. 141-142)[143], as illustrated by the destruction of the city of Vukovar in 1991 (para. 145). The Commission of Experts also singled out the attack on Dubrovnik, a city with no defence: it pondered that the destruction of cultural property therein could not at all be justified as a "military necessity" (paras. 289 and 293-294). The battle of Dubrovnik was criminal (para. 297); there was a deliberate attack on civilians and cultural property (paras. 299-300).

143 This generated further violence, – the Commission of Experts added, – and Croatian forces also engaged in such practices, though the Croatian authorities deplored them, indicating that they were not part of a governmental policy (para. 147).

171. The Commission of Experts then turned to the concentration camps: the living conditions in those camps were "appalling", with executions *en masse*, rapes, torture, killings, beatings and deportations (paras. 169-171). Concentration camps were the scene of "the worst inhumane acts", committed by guards, police, special forces and others (para. 223). Those atrocities were accompanied by "purposeful humiliation and degradation", a "common feature in almost all camps" (paras. 229-230(d)).

172. Men of "military age", – between the ages of 16 (or younger) and 60, – were separated from older men, women and children, and transferred to heavily guarded larger camps, where killings and brutal torture were committed (para. 230(i)). Prisoners in all camps were subjected to "mental abuse and humiliation". There was no hygiene, and soon there were epidemics. Prisoners nearly starved to death; "[o] ften sick and wounded prisoners" were "buried alive in mass graves along with the corpses of killed prisoners" (para. 230(p)).

173. The Commission of Experts proceeded, focusing on the practice of rape, not much reported for fear of reprisals, lack of confidence in justice, and the social stigma attached to it (paras. 233-234). The reported cases of rape occurred between the fall of 1991 and the end of 1993, most of them having occurred between April and November 1992 (para. 237). From the reported cases, five patterns of rape emerged, namely: a) rape as intimidation of the targeted group, involving individuals or small groups (para. 245); b) rape – sometimes in public – linked to the fighting in an area, involving individuals or small groups (para. 246); c) rape in detention camps (after the men were killed), followed at times by the murder of the raped women; d) rape as terror and humiliation, as part of the policy of "ethnic cleansing", keeping pregnant women detained until they could no longer have abortion (para. 248); and e) rape (in hotels or other facilities) for entertainment of soldiers, more often followed by the murder of the raped women (para. 249).

174. Rapes, amidst shame and humiliation, – the Commission proceeded, – were intended "to displace the targeted group from the region"; moreover, "[l]arge groups of perpetrators subject[ed] victims to multiple rapes and sexual assault" (para. 250). They ended up being "committed by all sides to the conflict" (para. 251); the patterns of rape (*supra*) suggest that "a systematic rape policy existed in certain areas" (para. 253).

175. The Commission concluded that practices of "ethnic cleansing", with rapes, were systematic, and appeared as a policy (also by omission – para. 313). Those grave breaches could thus be reasonably inferred from such "consistent and repeated practices" (para. 314). The Commission of Experts confessed to have been "shocked" by the high level of victimization and the manner in which these crimes were committed (para. 319).

3. Repercussion of Occurrences in the U.N. II World Conference on Human Rights (1993)

176. It should not pass unnoticed that the occurrences in the wars in former Yugoslavia had prompt repercussions in the II World Conference of Human Rights, held in Vienna in June 1993. Having participated in all stages of that U.N. World Conference, I well remember that the original intention was not to single out any country, but soon two exceptions were made, so as to address the situation of the affected populations in the on-going armed conflicts in the former Yugoslavia[144] and in Angola[145].

177. The special declarations on the two conflicts were adopted therein, on 24.06.1993. As to the former, the concern it expressed was directed to the occurrences in Bosnia and Herzegovina, and in particular at Goražde. An appeal to the U.N. Security Council accompanying the special declaration, referred to the attacks as "genocide". The declaration referred to that "tragedy", as "characterized by the naked Serbian aggression, unprecedented violations of human rights and genocide", being "an affront to the collective conscience of mankind" (3rd preambular paragraph). And it added that

> "The World Conference believes that the practice of ethnic cleansing resulting from Serbian aggression against the Muslim and Croat population in the Republic of Bosnia and Herzegovina constitutes genocide in violation of the

144 "Decision and Special Declaration on Bosnia and Herzegovina", *in Report of the U.N. Secretary-General on the II World Conference on Human Rights* (Vienna, 14-25.06.1993), in A/CONF.157/24 – part I, of 13.10.1993, p. 47.

145 "Special Declaration on Angola", *in Report of the U.N. Secretary-General on the II World Conference on Human Rights* (Vienna, 14-25.06.1993), in A/CONF.157/24 – part I, of 13.10.1993, p. 50.

Convention on the Prevention and Punishment of the Crime of Genocide" (8th preambular paragraph)[146].

178. Although the occurrences which attracted the attention of the U.N. World Conference in 1993 were the ones that were taking place in one particular locality, in the European continent, not so far away from Vienna (mainly in Goražde), they occurred likewise, and were to keep on occurring, in other parts of former Yugoslavia. The atrocities at issue formed part of a widespread and systematic pattern of destruction (cf. sections VIIIX, *infra*). They were committed pursuant to a plan; the chain of command (the Supreme Defence Council) and the perpetrators were the same, engaging State responsibility.

179. The final document adopted by the World Conference, – the Vienna Declaration and Programme of Action (1993), – clearly addressed the problem. The Declaration asserted that

> "The World Conference on Human Rights expresses its dismay at massive violations of human rights, especially in the form of genocide, "ethnic cleansing", and systematic rape of women in war situations, creating mass exodus of refugees and displaced persons. While strongly condemning such abhorrent practices, it reiterates the call that perpetrators of such crimes be punished and such practices immediately stopped" (part I, para. 28).

And the Programme of Action, for its part, added that

> "The World Conference on Human Rights calls on all States to take immediate measures, individually and collectively, to combat the practice of ethnic cleansing to bring it quickly to an end. Victims of the abhorrent practice of ethnic cleansing are entitled to appropriate and effective remedies" (part II, para. 24).

4. Judicial Recognition of the Widespread and/or Systematic Attacks against the Croat Civilian Population – Case-Law of the ICTFY

180. On successive occasions in its evolving case-law, the ICTFY has addressed the atrocities committed during the war in Croatia (1991-

146 "Special Declaration on Bosnia and Herzegovina", *in Report of the U.N. Secretary-General on the II World Conference on Human Rights* (Vienna, 14-25.06.1993), in A/CONF.157/24 – part I, of 13.10.1993, pp. 47-48.

1992), stressing that what occurred was not simply an armed conflict between opposing armed forces, but rather a devastation of villages and mass murder of their populations. References can be made, in this connection, e.g., to the ICTFY's findings in the cases of *M. Babić* (2004), *M. Martić* (2007), *Mrkšić and Radić and Šljivančanin* (2007), *Stanišić and Simatović* (2013).

a) *M. Babić* case (2004)

181. Thus, in its Judgment of 29.06.2004 in the *M. Babić* case, the ICTFY (Trial Chamber) found that the regime[147] that launched the armed attacks within Serbia, committed "the extermination or murder of hundreds of Croat and other non-Serb civilians" (para. 15), and did so "in order to transform that territory into a Serb-dominated State" (paras. 8 and 16). And the ICTFY (Trial Chamber) added significantly that

> "After the take-over, in cooperation with the local Serb authorities, the Serb forces established a regime of persecutions designed to drive the Croat and other non-Serb civilian populations from these territories. The regime, which was based on political, racial, or religious grounds, included the extermination or murder of hundreds of Croat and other non-Serb civilians in Dubića, Cerovljanji, Baćin, Saborsko, Poljanak, Lipovača, and the neighbouring hamlets of Škabrnja, Nadin, and Bruška in Croatia; the prolonged and routine imprisonment and confinement of several hundred Croat and other non-Serb civilians in inhumane living conditions in the old hospital and the JNA barracks in Knin, which were used as detention facilities; the deportation or forcible transfer of thousands of Croat and other non-Serb civilians from the SAO Krajina; and the deliberate destruction of homes and other public and private property, cultural institutions, historic monuments, and sacred sites of the Croat and other non-Serb populations in Dubića, Cerovljani, Baćin, Saborsko, Poljanak, Lipovača, and the neighbouring hamlets of Vaganac, Škabrnja, Nadin, and Bruška" (para. 15).

147 Together with Serbian forces, – including the JNA and TO units from Serbia, – in concert with Serbian authorities.

And the ICTFY (Trial Chamber) then concluded, in the aforementioned *Babić* case, on the basis of the factual statement and other evidence presented to it, that the execution (of the JCE) at issue "entailed a widespread or systematic attack directed against a civilian population", and "was carried out with discriminatory intent, on political, racial, or religious grounds" (para. 35).

b) *M. Martić* case (2007)

182. Likewise, in the *M. Martić* case, the ICTFY (Trial Chamber), in its Judgment of 12.06.2007, found that there had been a "widespread and systematic attack" (para. 352) against the Croat population, committed by the JNA, TO, Serbian police and Serbian paramilitaries, acting in concert; that attack involved "the commission of widespread and grave crimes" (para. 443), with "the goal of creating an ethnically Serb State" (para. 342). In its assessment, "[t]here is evidence of Croats being killed in 1991, having their property stolen, having their houses burned, that Croat villages and towns were destroyed, including churches and religious buildings, and that Croats were arbitrarily dismissed from their jobs" (para. 324). The attacks continued in 1992[148].

183. The ICTFY (Trial Chamber) further found that "numerous attacks were carried out on Croat majority villages by the JNA acting in cooperation with the TO and the Milicija Krajine" (para. 344), and that "[t]hese attacks followed a generally similar pattern, which involved the killing and removal of the Croat population" (para. 443). Moreover, – it added, – hundreds of Croat civilians were imprisoned and subjected to "severe mistreatment" (para. 349). It further determined that "widespread crimes of violence and intimidation and crimes against private and public property were perpetrated against the Croat population, including in detention facilities run by MUP forces of the SAO Krajina and the JNA" (para. 443).

184. By the end of the summer of 1991, – it added, – "the JNA became an active participant in Croatia on the side of the SAO Krajina" (para. 330). The ICTFY (Trial Chamber) also referred to the persecution, forced displacement, deportation and forcible transfer of the Croat population (civilians), and "further evidence that in 1991 Croats

148 It proceeded that "[d]uring 1992 on the territory of the RSK, there was a continuation of incidents of killings, harassment, robbery, beatings, burning of houses, theft, and destruction of churches carried out against the non-Serb population" (para. 327).

were killed by Serb forces in various locations in the SAO Krajina" (para. 426). There was, in sum,

> "evidence of a generally similar pattern to the attacks. The area or village in question would be shelled, after which ground unites would enter. After the fighting had subsided, acts of killing and violence would be committed by the forces against the civilian non-Serb population who had not managed to flee during the attack. Houses, churches and property would be destroyed in order to prevent their return and widespread looting would be carried out. (...) Moreover, members of the non-Serb population would be rounded up and taken away to detention facilities (...)" (para. 427).

185. Moreover, the ICTFY (Trial Chamber) referred to the cooperation and assistance with Serbia on the part of Milan Martić (third President of the so-called "RSK"); in this respect, the Trial Chamber stated that, "[t]hroughout 1992, 1993 and 1994, the RSK leadership, including Milan Martić, requested financial, logistical and military support from Serbia on numerous occasions, including directly from Slobodan Milošević" (para. 159). And, as to the political objective of the Serb leadership, the ICTFY (Trial Chamber) stated that,

> "[T]he President of Serbia, Slobodan Milošević, (...) covertly intended the creation of a Serb state. Milan Babić testified that Slobodan Milošević intended the creation of such a Serb State through the establishment of paramilitary forces and the provocation of incidents in order to allow for JNA intervention, initially with the aim to separate the warring parties but subsequently in order to secure territories envisaged to be part of a future Serb state" (para. 329).

186. The ICTFY (Trial Chamber) added that, as to the period 1991-1995, it had been furnished with "a substantial amount of evidence of massive and widespread acts of violence and intimidation committed against the non-Serb population (...)" (para. 430). It found *inter alia* that there had occurred widespread and systematic attacks "directed against the Croat and other non-Serb civilian population" in Croatia in the period 1991-1995, notwithstanding the presence of Croat forces in some areas (paras. 349-352).

c) *Mrkšić and Radić and* Šljivančanin case (2007)

187. In the case of *Mrkšić and Radić and Šljivančanin*, the ICTFY (Trial Chamber) made important findings (Judgment of 27.09.2007) as to the "complete command and full control" exercised by the JNA over the TOs and Serb paramilitaries, in "all military operations" (para. 89). In addressing the "devastation brought on Vukovar over the prolonged military engagement in 1991" (para. 8), the ICTFY (Trial Chamber) described, *inter alia*, how

> "in the evening and night hours of 2021 November 1991 the prisoners of war were taken in groups of 10 to 20 from the hangar at Ovčara to the site where earlier that afternoon a large hole had been dug. There, members of Vukovar TO and paramilitary soldiers executed at least 194 of them. The killings started after 21:00 hours and continued until well after midnight. The bodies were buried in the mass grave and remained undiscovered until several years later" (para. 252).

188. In the aforementioned Judgment in the case of *Mrkšić and Radić and Šljivančanin*, the ICTFY (Trial Chamber) again made important findings on the widespread and systematic attack directed against the civilian population in Vukovar. It stated, e.g., that, from 23.08.1991 to 18.11.1991,

> "the town of Vukovar and its surroundings were increasingly subjected to shelling and other fire: it came to be almost on a daily basis. The damage to the city of Vukovar was devastating. (…) A large Serb force comprising mainly well armed and equipped troops were involved in far greater numbers than the Croat forces. In essence, the city of Vukovar was encircled and under siege from Serb forces, including air and naval forces, until the Croat forces capitulated on 18 November 1991. By the beginning of November virtually none of the houses along the road from Vukovar to Mitnica were left standing above the cellar. The supply of essential services to the whole of Vukovar was disrupted. Electricity and water supplies and the sewage system all failed. The damage to civilian property was extensive. By 18 November 1991, the city had been more or less totally destroyed. It was absolutely

devastated. Those still living in the city had been forced to take shelter in cellars, shelters and the like" (para. 465)[149].

189. The ICTFY (Trial Chamber) then stated, in the same Judgment of 27.09.2007 in the *Mrkšić and Radić and Šljivančanin* case, that

> "The battle for Vukovar caused a large number of casualties, both dead and wounded, combatants and civilians. There can be no exact number for the wounded treated in Vukovar by Croat services, because the extremely difficult and improvised treatment facilities did not allow the luxury of thorough records. There is no overall evidence of the Serb forces' casualties. What remained of Vukovar hospital, together with a secondary nursing facility in a nearby cellar of a warehouse, dealt with most of the wounded, but there were other facilities in the Vukovar area. (...) Civilians, including women and children were amongst the wounded. While precise statistics were not maintained in the circumstances, the Chamber accepts as a reliable estimate that the casualties were 6075% civilian. A report (...) on 25 October 1991 from the medical director of the hospital noted that 1250 wounded had been admitted since 25 August with a further 300 dead on arrival" (para. 468).

190. And the ICTFY (Trial Chamber) significantly added that

> "There can be no question that the Serb forces were, in part, directing their attack on Vukovar (...). (...) [T]he Serb attack was also consciously and deliberately directed against the city of Vukovar itself and its hapless civilian population, trapped as they were by the Serb military blockade of Vukovar and its surroundings and forced to seek what shelter they could in the basements and other underground structures that survived the ongoing bombardments and assaults. *What occurred was*

149 In its aforementioned Judgment, the ICTFY (Trial Chamber) proceeded that "the Vukovar hospital, schools, public buildings, offices, wells, the water and electricity supply and roads were severely damaged during the conflict. All buildings were shelled, including the hospital, schools and kindergartens. Many wells were also targeted and destroyed. Most of the wells in Vukovar were privately owned, so houses with a water supply were among the first to be destroyed. From September to November 1991 there was no drinking water available, except from the remaining wells" (para. 466).

> *not, in the finding of the Chamber, merely an armed conflict between a military force and an opposing force in the course of which civilians became casualties and some property was damaged. The events, when viewed overall, disclose an attack by comparatively massive Serb forces, well armed, equipped and organised, which slowly and systematically destroyed a city and its civilian and military occupants to the point where there was a complete surrender of those that remained*. While the view is advanced before the Chamber that the Serb forces were merely liberating besieged and wronged Serb citizens who were victims of Croatian oppressiveness and discrimination, this is a significant distortion of the true position as revealed by the evidence, when reviewed impartially" (para. 470) [150].

d) *Stanišić and Simatović* case (2013)

191. Subsequently, in its Judgment of 30.05.2013 in the *Stanišić and Simatović* case, the ICTFY (Trial Chamber) found that, from April 1991 to April 1992, between 80,000 and 100,000 Croat and other non-Serb civilians fled the SAO Krajina, as a result of the situation then prevailing in that region,

> "which was created by a combination of: the attacks on villages and towns with substantial or completely Croat populations; the killings, use as human shields, detention, beatings, forced labour, sexual abuse, and other forms of harassment (including coercive measures) of Croat persons; and the looting and destruction of property. These actions were committed by the local Serb authorities and the members and units of the JNA (including JNA reservists), the SAO Krajina TO, the SAO Krajina Police (including Milan Martić), and Serb paramilitary units, as well as local Serbs as set out in the Trial Chamber's findings" (para. 404, and cf. para. 997).

192. The ICTFY (Trial Chamber) stressed that "[h]arassment and intimidation" of the Croat population were carried out "on a large scale":

150 [Emphasis added]. And cf., furthermore, part X(1) of the present Dissenting Opinion, *infra*.

> "Croats were killed in 1991, their property was stolen, their houses were burned, Croat villages and towns were destroyed, including churches and religious buildings, and Croats were arbitrarily dismissed from their jobs. During 1992 (...) there was a continuation on incidents of killings, harassment, robbery, beatings, burning of houses, theft and destruction of churches carried out against the non-Serb population. Throughout 1993 there were further reports of killings, intimidation and theft" (para. 153).

193. There were also cases of deportation and forcible transfer of groups of persons (paras. 996-1054); the ICTFY (Trial Chamber) further found that Serb Forces "committed deportation and forcible transfer of many thousands of Croats"; in such incidents "people were moved against their will or without a genuine choice", as

> "Serb Forces created an environment where the victims had no choice but to leave. This included attacks on villages and towns, arbitrary detention, killings, and ill treatment. These conditions prevailed during the days or weeks, and sometimes months, prior to people leaving. The Trial Chamber has also found that the crimes of murder, deportation, and forcible transfer constituted underlying acts of persecution as well" (para. 970).

194. It added that, "the persons targeted were primarily members of the civilian population" (para. 971). In the ICTFY (Trial Chamber)'s view, "the requirements of 'attack', 'widespread', and 'civilian population' have been met" (para. 971). The crimes were perpetrated in widespread armed attacks against the non-Serb civilian population, against undefended non-Serb villages, with systematic executions of non-Serb civilians, and destruction of mosques, churches, and homes of non-Serbs and other civilian targets (paras. 969-970). Those attacks, in the ICTFY (Trial Chamber)'s finding, were part of a pattern of destruction "against a civilian population", and "the perpetrators knew" that their acts were part of it (para. 972). In this widespread and systematic pattern of destruction, all such attacks were, as reckoned in the case-law of the ICTFY (*supra*) deliberate, intentional.

X. WIDESPREAD AND SYSTEMATIC PATTERN OF DESTRUCTION: MASSIVE KILLINGS, TORTURE AND BEATINGS, SYSTEMATIC EXPULSION FROM HOMES AND MASS EXODUS, AND DESTRUCTION OF GROUP CULTURE

195. An examination of the factual context, as a whole, of the *cas d'espèce*, discloses a widespread and systematic pattern of destruction, carried out in the villages brought to the attention of the Court in the course of the present proceedings. Such a pattern of destruction, as it will be shown next, encompassed massive killings, torture and beatings, systematic expulsion from homes and mass exodus, and destruction of group culture. After reviewing and assessing the occurrence of those crimes, I shall move on to other manifestations[151] of the widespread and systematic pattern of destruction in the attacked villages in Croatia.

1. Indiscriminate Attacks against the Civilian Population

196. In the factual context of the present case of the *Application of the Convention against Genocide* (Croatia *versus* Serbia), the question whether the population attacked was either civilian in its entirety or predominantly civilian, does not raise any jurisdictional issue, as crimes of genocide can be committed against any individual, whether civilian or combatant. In distinct contexts, the ICTFY (Trial Chambers), faced with the jurisdictional requirements also of crimes against humanity and war crimes, has clarified the meaning to be attached to "civilian population": in all instances, it has adopted a wide definition of what constitutes a civilian population, including, *inter alia*, individuals who performed acts of resistance[152].

151 Parts XI, XII and XIII of the present Dissenting Opinion, *infra*.
152 For example, in the *Tadić* case (Judgment of 07.05.1997), the ICTFY (Trial Chamber) held, as to the targeted civilian population, that "[t]he presence of certain non-civilians in their midst does not change the character of the population" (para. 638). It reiterated this point in the case *Kunarac, Kovać and Vuković* (Judgment of 22.02.2001, para. 425). In the case *Blaškić* (Judgment of 03.03.2000), it again held that the presence of individuals bearing arms in a resistance movement did not change the character of the civilian population (paras. 213-214). In the case *Kordić* and Čerkez (Judgment of 26.02.2001), it singled out the consistent adoption, by ICTFY Trial Chambers, of "a wide definition of what constitutes a civilian population" (para. 180). In the case *Martić* (Judgment of 12.06.2007), the ICTFY (Trial Chamber I), keeping in mind the size of the attacked civilian population, found that "the presence of Croatian armed forces and formations in the Škabrnja and Saborsko areas does not affect the civilian character of the attacked population" (para. 350). This was confirmed by the ICTFY

197. Moreover, in the *cas d'espèce*, the presence of Croatian armed forces and formations should not be used to distort the reality. The events that took place in Vukovar illustrate what was probably the case in other municipalities attacked in Croatia. As the ICTFY (Trial Chamber) stated in case *Mrkšić and Radić and* Šljivančanin ("*Vukovar Hospital*", Judgment of 27.09.2007), there was a "gross disparity between the numbers of the Serb and Croatian forces" engaged in the battle for Vukovar (para. 470).

198. The attack of "massive Serb forces", facing a "comparatively small and very poorly armed and organized Croatian forces", and bringing "devastation on Vukovar and its surroundings", – added the ICTFY, – was "consciously and deliberately directed against the city of Vukovar itself and its hapless civilian population, (...) forced to seek what shelter they could in the basements and other underground structures that survived the ongoing bombardments and assaults" (para. 470).

199. I have already referred, in the present Dissenting Opinion, to the ICTFY's finding of the widespread and systematic attacks by Serb forces against the Croat civilian population[153]. In addition to the passages already quoted of Judgment of 27.09.2007 of the ICTFY (Trial Chamber) in the *Mrkšić and Radić and Šljivančanin* case, may I here recall that, in that same Judgment, the ICTFY (Trial Chamber) proceeded that "[t]he terrible fate that befell the city and the people of Vukovar was but one part of a much more widespread action against the non-Serb peoples of Croatia and the areas of Croatia in which they were substantial majorities" (para. 471).

Appeals Chamber (Judgment of 08.10.2008) in the same case *Marti***ć** (para. 317). In the case *Popovi***ć** *et alii* (Judgment of 10.06.2010), the ICTFY (Trial Chamber II) held that the term "civilian population" is to be "interpreted broadly", referring to a population that is "predominantly civilian in nature", even if there are in in "members of armed resistance groups" (para. 1591). Again in the recent case *Staniši***ć and Župljanin** (Judgment of 27.03.2013), it pointed out that "the presence within the civilian population of individuals who do not come within the definition of civilians does not deprive the population of its civilian character" (para. 26); it again upheld the test of the "*predominantly* civilian nature" of the population (para. 26). It pursued the same approach in the case *Limaj, Bala and Musliu* (Judgment of 30.11.2005, para. 186), and in the case *Brđanin* (Judgment of 01.09.2004, para. 134).

153 Cf. part IX(4) of the present Dissenting Opinion, *supra*.

200. The ICTFY (Trial Chamber) added that, in its view, "the overall effect of the evidence is to demonstrate that the city and civilian population of and around Vukovar were being punished, and terribly so", for not having accepted "the Serb controlled Federal government in Belgrade", and for Croatia's declaration of independence (para. 471). The ICTFY (Trial Chamber) further stated that, what occurred,

> "was not, in the finding of the Chamber, merely an armed conflict between a military force and an opposing force in the course of which civilians became casualties and some property was damaged. The events, when viewed overall, disclose an attack by comparatively massive Serb forces, well armed, equipped and organised, which slowly and systematically destroyed a city and its civilian and military occupants to the point where there was a complete surrender of those that remained. While the view is advanced before the Chamber that the Serb forces were merely liberating besieged and wronged Serb citizens who were victims of Croatian oppressiveness and discrimination, this is a significant distortion of the true position as revealed by the evidence, when reviewed impartially" (paras. 470-471).

201. The ICTFY (Trial Chamber) found, in the case of *Mrkšić, Radić and* Šljivančanin ("*Vukovar Hospital"*), that what happened

> "was in fact, not only a military operation against the Croat forces in and around Vukovar, but also *a widespread and systematic attack* by the JNA and other Serb forces *directed against the Croat and other non-Serb civilian population* in the wider Vukovar area. The extensive damage to civilian property and civilian infrastructure, *the number of civilians killed or wounded during the military operations and the high number of civilians displaced or forced to flee clearly indicate that the attack was carried out in an indiscriminate way, contrary to international law.* It was an unlawful attack. Indeed it was also directed in part deliberately against the civilian population. The widespread nature of the attack is indicated by the number of villages in the immediate area around Vukovar which was damaged or destroyed and the geographical spread of these villages, as well as by the damage to the city of Vukovar itself. The systematic character of the attack is also evidenced by the JNA's

> approach to the taking of each village or town and the damage done therein and the forced displacement of those villagers fortunate enough to survive the taking of their respective villages" (para. 472)[154].

202. In effect, in the adjudication of distinct cases pertaining to the war in Croatia, the ICTFY has found a widespread and systematic pattern of extreme violence, victimizing the civilian population. The dossier of the present case of the *Application of the Convention against Genocide* (Croatia *versus* Serbia) contains elements revealing that pattern, planned and premeditated. The extreme violence went far beyond establishing military and administrative hegemony: it involved massive killings, brutal torturing and beatings of Croatian civilians, and the removal by force of the remaining ones from their villages. They were forced to sign documents attesting their "voluntary" consent that all their property should be left to the "SAO Krajina". Moreover, Serbian artillery was used to destroy all traces of Croatian architecture, culture and religion[155].

203. Such indiscriminate attacks against the civilian population in Croatia formed a pattern of extreme violence and destruction, as follows: a) first, prior to the occupation of a village, the JNA would send an ultimatum to the Croatian inhabitants to lay down their weapons, or else face the village levelled to the ground; at the same time, promises were made that the Croatian civilians would not be harmed if they did not offer armed resistance; b) secondly, the JNA would then engage in artillery attack, followed by its infantry of the JNA entering the village together with Serb paramilitary groups; c) thirdly, they would then, after capturing the village, embark on a campaign of terror, making it physically or psychologically impossible for the surviving Croatians to continue living there.

204. Even where there was not a complete destruction of the village, as, for example, in Poljanak, serious crimes were committed in that village, as the ICTFY recognized in the *M. Martić* case. Yet, those serious crimes have not been extensively depicted in the present Judgement, neither in respect of Poljanak, nor of other villages. As to Poljanak, there were also accounts of killings; for example, B.V. testified that his family

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154 [Emphasis added].

155 Cf. Croatia's *Application Instituting Proceedings*, para. 34, and *Memorial*, paras. 4.8-4.9.

was killed and he was heavily beaten, that chetniks searched houses in the village and set them on fire, and captured people, and he also witnessed killings[156]. Another witness, M.V., found two victims dead, with their heads smashed and the brains scattered around[157].

205. Similarly to Saborsko, it is significant to note that Serbia acknowledged that the ICTFY (Trial Chamber) in the *Martić* case "confirmed the killings in Poljanak and its hamlet Vuković"[158]. There were also accounts of houses having been burned in Poljanak. M.L. testified that prisoners were locked in a room in the camp Manjača, where "they did not get anything to eat or drink for 4 or 5 days, while being interrogated over and over, and were beaten and molested"[159]. B.V. testified that chetniks searched houses in Poljanak and set them on fire, and captured people[160].

2. Massive Killings

206. At the final stage of the attacks by the Serb armed forces, when a village was captured, a campaign of terror was launched, followed by mass and non-selective executions of Croatian civilians. The smaller remainder of the Croat population was subjected to variants of martial law, imprisonment, forced exile or deportation to camps; in some villages they were forced to display white ribbons, on their sleeves, as armbands, or white sheets attached to the doors of their houses[161]. During the occupation, many Croatians fled to the neighbouring towns, not yet captured, and some were killed in ambushes by Serb paramilitary units on the way.

207. In its Judgment of 2007 in the previous case of the *Application of the Convention against Genocide* (Bosnia and Herzegovina *versus* Serbia and Montenegro), the ICJ observed, as to the verification of a systematic pattern of destruction, that

> "It is not necessary to examine every single incident reported by the Applicant, nor it is necessary to make an exhaustive list of the allegations; the Court finds it

156 *Memorial*, Annex 387.
157 *Ibid.*, Annex 388.
158 *Counter-Memorial*, para. 861.
159 *Memorial*, Annex 385.
160 *Memorial*, Annex 387.
161 Cf. section XIII, *infra*, of the present Dissenting Opinion.

> sufficient to examine those facts that would illuminate the question of intent, or illustrate the claim by the Applicant of a pattern of acts committed against members of the group, such as to lead to an inference from such pattern of the existence of a specific intent (*dolus specialis*)" (para. 242).

208. Bearing in mind this consideration by the Court, I do not purport, nor is it necessary, in this Dissenting Opinion, to proceed to an analysis in depth of individual crimes, as anyway this is not an international criminal court. More important to me is the verification of a widespread and systematic pattern of destruction disclosed by those crimes, all over the villages that were attacked, as brought to the attention of the Court. Numerous crimes – revealing such pattern of destruction – have been described by witnesses, and others have been determined by the ICTFY itself, as indicated throughout the present Dissenting Opinion.

209. In effect, the dossier of the *cas d'espèce* indicates that criminal acts were committed in the various regions occupied by the Serbian forces. In the region of Eastern Slavonia, for example, the following villages are mentioned: Tenja, Dalj, Berak, Bogdanovci, Šarengrad, Ilok, Tompojevci, Bapska, Tovarnik, Sotin, Lovas, Tordinci, and Vukovar[162]. The wrongful acts evidencing the systematic pattern of destruction which occurred in Eastern Slavonia spread to the other regions of Western Slavonia, Banovina, Kordun, Lika and Dalmatia[163].

210. The first villages and civilian populations to be attacked were those of Dalj, Erdut and Aljmaš, at the beginning of August 1991. Between 28.09.1991 and 17.10.1991, the villages of Sotin, Ilok, Šarengrad, Lovas, Bapska and Tovarnik were captured by the JNA and Serb paramilitary groups. Killings were committed in pursuance of a systematic pattern of brutality, including the perpetration of massacres of entire families, or random murders to force Croats to flee[164]; the campaign culminated in the massacre at Vukovar (after 18.11.1991)[165].

162 Cf. *Memorial*, paras. 4.20-4.30, 4.31-4.37, 4.38-4.46, 4.47-4.55, 4.56-4.61, 4.62-4.72, 4.73-4.80, 4.81-4.93, 4.94-4.106, 4.107-4.115, 4.1164.132, 4.1334.138, and 4.1394.190, respectively.

163 Cf. *ibid*., paras. 5.3-5.64, 5.65-5.122, 5.123-5.186, and 5.187-5.241, respectively.

164 Cf. *ibid*., chapter 4.

165 Cf. *ibid*., para. 4.19.

211. Several mass graves were discovered (e.g., in the regions of Banovina, and Kordun and Lika), with little or no indication of who the victims were, or where they were originally from. Such mass graves were found out in the municipalities of Tenja, Dalj, Ilok, Sotin, Lovas, Tordinci, Ovčara, Vukovar, Pakrac, Lađevac, and Škabrnja[166]. Croatia pointed out that, by the time of the filing of its *Memorial* (March 2001), 61 mass graves had been found in Eastern Slavonia. Many of the mass graves, which then appeared were used as temporary burial sites only; the JNA often dug up the bodies and moved them to other parts of the occupied territory or of Serbia[167].

212. For its part, Serbia challenged the evidence presented by Croatia[168]; it contended that the killings of Croats by Serbian forces were not intended to destroy that group, and, accordingly, did not amount to genocide; on the other hand, it added, the killings of Serbs by Croatian forces were committed, in its view, with the intent to destroy the group as such[169]. Croatia replied that Serbia did not dispute that Croats were subjected to torture and to serious bodily and mental harm, on a systematic basis[170]. Serbia, for its part, did not dispute that serious bodily and mental harm was committed by Serbian forces against Croats during the war in Croatia between 1991 and 1995, but it further submitted that serious bodily and mental harm was also committed against Serbs by the Croatian forces[171].

213. A "*Book of Evidence*" included by Croatia in the *dossier* of the present case, titled *Mass Killing and Genocide in Croatia 1991/92*[172], identifies *four phases* in the war in Croatia, from the perspective of "civilian casualties and the destruction of Croatian villages and towns", namely:

> "In the *first phase* (JulyAugust 1991), the Serbian paramilitary troops armed by JNA had the predominant role. With the aid of JNA they attacked completely

166 *Memorial*, paras. 4.29, 4.35, 4.72, 4.107, 4.116, 4.138, 4.178, 4.188, 5.27, 5.77, 5.137, 5.146, and 5.226, respectively.
167 Cf. *ibid*., para. 4.07.
168 Cf. *Counter-Memorial*, paras. 660 and 663.
169 Cf. *ibid*., para. 48.
170 Cf. *Reply*, para. 9.47.
171 Cf. *Counter-Memorial*, para. 81.
172 *Mass Killing and Genocide in Croatia 1991/92: A Book of Evidence*, Zagreb, Ministry of Health of Croatia, 1992, pp. 1-207.

> unarmed Croatian villages, especially in the area of Banija and in the surrounding of Knin. At that time JNA still pretended to be creating bufferzones between the 'two sides in conflict'. However, the examples of Dalj, Kraljevčani, Dragotinci and Kijevo clearly show the active role of JNA using tanks and air force to destroy residential buildings regardless of the fact that there were no Croatian Police (MUP) or National Guard forces (ZNG). In the *second phase* of the war (September 1991), JNA undertook the conquest of larger areas in Croatia, and it conquered Kostajnica, Dubica, Petrinja, Drniš, Jasenovac, Okučani and Stara Gradiška. This is the phase when the Croatian army did not have adequate heavy artillery so that it could not even neutralize the aggressor. This resulted in a number of Croatian defeats, having as a consequence masses of refugees and displaced persons from the areas of Banija, Dalmacija and partly Slavonia. The following *third phase*, took place during October-November 1991, when JNA waged intensive total war using air force, heavy artillery and armored units on the line of the Greater Serbia border Virovitica-Karlovac-Karlobag. Established frontline made possible the stabilization of defense. Still, heavy artillery of JNA produced immense destruction of Croatian cities, including the cities at the seaside which were sealed off. In this period important Croatian cities, e.g., Vukovar, Slunj, Dubrovnik, were surrounded and suffered great damages or total destruction. (...) The last, *fourth phase* of the war, begins after the ceasefire of 03.01.1992. During April 1992 a dramatic escalation of artillery attacks occurred on a number of civilian targets, especially on Osijek, Vinkovci, Slavonski Brod, Županja, Karlovac, Zadar, Gospić and Nova Gradiška. This phase especially threatened the civilians, unprepared for artillery attacks. A new wave of refugees started as well. The endangered population still remains on the occupied territories. They were being forced away from their homes before the U.N. forces arrive"[173].

214. The document singles out, in the first phase of the onslaught, the destruction of homes, forcing the victims to flee away, or else to face death or brutalities. The unarmed residents of the villages attacked were forcefully displaced, and their homes were destroyed or

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173 *Ibid*., pp. 1 and 4.

plundered; they moved to more central and safer regions of Croatia. In the second phase, the JNA army itself launched fierce armed attacks, with artillery and fighter jets, against numerous villages and towns (e.g., Vukovar, Osijek, Vinkovci, Sisak, Karlovac, Pakrac, Lipik, Gospić, Otočac, Zadar, Šibenik, Dubrovnik, Petrinja, Nova Gradiška or Novska), with mass killings of civilians. The document adds that

> "Many women, children and elderly lost their lives in this manner, as thousands of private residences and public buildings were totally destroyed. Civilians died in their own homes, in schools, kindergartens, churches, hospitals, on their farms, while walking in the streets, riding bicycles or driving their cars. In short, no one was safe anywhere and there was literally no place to take refuge from the bombing and shelling"[174].

215. Systematic destruction of homes by close-range fire occurred extensively in, e.g., Vukovar, Osijek, Petrinja, Vinkovci and Gospić, among others. After the firing, by tanks, of private residences, "first at the upper floors, then at the ground floor (...), hand-grenades were thrown in the basement in which the owners or residents ha[d] sought refuge"[175]. Many of the mortal remains were left where they had fallen, and after some time could no longer be recovered (particularly in the regions of Banija, Kordun, Lika, and Eastern Slavonia, as well as the hinterland of Zadar and Šibenik, and Dubrovnik). Massacres of civilians occurred (e.g., in Voćin and Hum near Podravska Slatina, Obrovac, Benkovac, Knin, Škabrnja and Nadin), as "part of a planned genocide", in the occupied territories[176].

216. The "major cause" of civilian casualties – including children, women and the elderly – was "the indiscriminate and extensive artillery shelling of strictly civilian targets"[177]. There were also the "missing persons", – some 8,000-12,000 persons, according to the study. The International Committee of the Red Cross (ICRC) became involved in their search. There was, furthermore, the systematic destruction of "schools, hospitals, monuments, libraries and above all the Catholic

174 *Ibid.*, p. 4.
175 *Ibid.*, p. 7.
176 *Ibid.*, p. 6.
177 *Ibid.*, p. 6.

churches, a favourite target of the JNA artillery"[178]. Libraries, for example, were destroyed all over – for the sake of destruction – during the former Yugoslavia wars, – not only in the attacks in Croatia, but also in those in Bosnia-Herzegovina and in Kosovo[179], to the detriment of the populations concerned.

3. Torture and Beatings

217. The *dossier* of the present case concerning the *Application of the Convention against Genocide* contains numerous accounts of torture and beatings of members of the civilian population, by the time the military offensive was launched by the respondent State, and even before that. The Applicant's *Memorial*, in particular, is permeated with such accounts. There were reported cases of forced labour and torture and beatings (in Dalj, Berak, Bagejci, Bapska, Lovas, Tordinci, Vukovar, Vaganac, Kijevo, Vujići, Tovarnik, Knin)[180]; of extreme violence and psychological torture (in Sotin, Josevica, Lipovača, Šarengrad)[181]; of abduction and enforced disappearance (in Pakrac)[182]; of the use of civilians as "human shields" to "protect" Serb armed forces (in Bapska and Četekovac)[183], among other atrocities (in Kusonje, Podravska Slatina, Kraljevčani, Tovarnik, Joševica)[184].

218. Furthermore, in Poljanak, torture and beatings were likewise reported. According to M.L. , in Easter 1991 chetnik groups set an ambush to the workers of the Ministry of the Interior, and there was an armed clash where people were killed. The witness testified that prisoners were locked in a room in the camp "Manjača, where they did not get anything to eat or drink for 4 or 5 days, while being interrogated

178 *Ibid*., p. 7.
179 For an account, cf., *inter alia*, e.g., L.X. Polastron, *Livros em Chamas – A História da Destruição sem Fim das Bibliotecas* [*Livres en feu*], Rio de Janeiro, J. Olympio Edit., 2013, pp. 236-238.
180 Cf. *Memorial*, paras. 4.34-4.35, 4.38, 4.40, 4.85, 4.88-4.90, 4.124, 4.135-4.136, 4.168-4.169, 5.175, 5.212, and ICJ doc. CR 2014/10, of 06.03.2014, paras. 20 and 27, respectively.
181 Cf. *Memorial*, paras. 4.111, 4.50, 5.88 and 5.143, respectively.
182 Cf. *ibid*., para. 5.16, and ICJ doc. CR 2014/10, of 06.03.2014, para. 17.
183 Cf. *Memorial*, paras. 4.85 and 5.43, respectively.
184 Cf. *ibid*., paras. 5.27, 5.30, 5.98, 4.100, and ICJ doc. CR 2014/10, of 06.03.2014, p. 25, respectively.

over and over, and were beaten and molested"[185]. B.V. testified that his family members were killed and he was heavily beaten[186].

219. Beatings occurred in various ways, including with bats, wire, boots, chains, sticks and other objects[187]. On several occasions, torture and humiliation were followed by the murders of the victims (in Bogdanovci, Šarengrad, Tovarnik, Voćin)[188]. There were cases of suicides among Croats[189]. Croatia dwells upon a systematic pattern of destruction of the targeted victims, within which occurred physical and psychological torture and beatings, in various ways.

220. Serbia, for its part, in particular in its *Rejoinder*, acknowledged that many atrocities were committed against Croats during the conflicts[190], but it challenged the trustworthiness of evidences and documents presented by the applicant State, and in particular the reliability of witnesses statements. In Serbia's view, the tragic events described by the applicant State do not establish genocidal intent and specific intent to destroy; they establish, at most, – it adds, – that war crimes and crimes against humanity were committed, but not genocide[191].

221. Turning its attention to Vukovar, in the region of Eastern Slavonia, Croatia contended that, after the fall of Vukovar, high-ranking JNA officers aided and abetted the large-scale torture and murder of prisoners[192], such as those at Velepromet[193]. According to the Applicant, in Vukovar and other towns or villages, Croat civilians, often elderly people, unable or unwilling to flee, were subjected to extreme brutality, were tortured and killed by JNA soldiers, TOs and paramilitaries[194]. In

185 *Memorial*, Annex 385.
186 *Ibid*., Annex 387.
187 Cf., e.g., ICJ doc. CR 2014/10, of 06.03.2014, pp. 24-25.
188 *Memorial*, paras. 4.47-4.55, 4.56-4.59, 4.101, and ICJ doc. CR 2014/10, of 06.03.2014, p. 17, respectively.
189 Cf. ICJ doc. CR 2014/10, of 06.03.2014, p. 25.
190 Cf., e.g., ICJ doc CR 2014/13, of 10.03.2014, paras. 35; and *Rejoinder*, paras. 349, 360, 367-8, 381, 384 and 386.
191 Cf. *Rejoinder*, paras. 349, 360, 367-368, 381, 284 and 386; and ICJ, doc. CR 2014/13, of 10.03.2014, paras. 35.
192 ICJ, doc. CR 2014/5, of 03.03.2014, p. 43.
193 ICJ, doc. CR 2014/6, of 04.03.2014, p. 41.
194 *Ibid*., 45.

the Applicant's view, those atrocities were committed with the intent to destroy the Croat population in the targeted regions[195].

222. Croatia further asserted that, in Vukovar, Serbian forces carried out a sustained campaign of bombing and shelling; brutal killings and torture; systematic expulsion; and denial of food, water, electricity, sanitation and medical treatment. It adds that the Serb forces established torture camps to where Croats were taken[196], – Velepromet and Ovčara. According to the Applicant, the Serb forces had the opportunity to displace and not to destroy the surviving Vukovar Croats, but they were, instead, repeatedly tortured and executed[197].

223. In the *M. Martić* case, the ICTFY (Trial Chamber I) found (Judgment of 12.06.2007) that, in their attacks on Croat villages in the SAO Krajina, the Serbian armed forces left the villagers with "no choice but to flee", and those who stayed behind were promptly beaten and killed (para. 349). The attacked villages included Potkonije, Vrpolje, Glina, Kijevo, Drniš, Hrvatska Kostajnica, Cerovljani, Hrvatska Dubica, Baćin, Saborsko, Poljanak, Lipovača, Škabrnja, Nadin and Bruška; "grave discriminatory measures were taken against the Croat population" there (para. 349).

224. By and large, – the ICTFY (Trial Chamber I) proceeded in the *M. Martić* case, – there was a "widespread and systematic attack directed against the Croat and other non-Serb civilian population", both in Croatia and in Bosnia and Herzegovina (para. 352). The crimes of torture, and cruel and inhuman treatment, "were carried out with intent to discriminate on the basis of ethnicity" (paras. 411 and 413). There was a pattern of beatings, mistreatment and torture of detainees (paras. 414-416).

225. Six years later, in the *Stanišić and Simatović* case, the ICTFY (Trial Chamber I) likewise found (Judgment of 30.05.2013) that there was a "widespread attack" against the same civilian population to which the targeted persons belonged (paras. 971-972). The perpetrators' "discriminatory intent" was clear (para. 1250). The pattern of extreme violence included arbitrary detention, beatings, sexual assaults, torture, murders, use of derogatory language and insults, deportation

195 *Ibid.*, p. 45.
196 ICJ, doc. CR 2014/8, of 05.03.2014, pp. 29, 31 and 35.
197 *Ibid.*, p. 39.

and forcible transfer, – all on the basis of the ethnicity of the victims (paras. 970 and 1250). It should be kept in mind – may I add – that the prohibition of torture, in all its forms, is absolute, in any circumstances: it is a prohibition of *jus cogens*.

226. Last but not least, may I here further add that the ICTFY (Appeals Chamber), in its recent Judgment (of 11.07.2013) in the *R. Karadžić* case, rejected an appeal for acquittal, and reinstated genocide charges against Mr. R. Karadžić, for the brutalities committed against detainees: although the atrocities occurred in Bosnian municipalities, the pattern of destruction was the same as the one that took place in Croatian municipalities, and so were the targeted groups: besides Bosnian Muslims, also Bosnian Croats. As to the conditions of detention, the ICTFY (Appeals Chamber) found the occurrences of torture, cruel and inhuman treatment, rape and sexual violence, forced labour, and inhuman living conditions, with "failure to provide adequate accommodation, shelter, food, water, medical care or hygienic facilities" (para. 34). It further noted

> "evidence on the record indicating that Bosnian Muslim and/or Bosnian Croat detainees were kicked, and were violently beaten with a range of objects, including, *inter alia,* rifles and rifle butts, truncheons and batons, sticks and poles, bats, chains, pieces of cable, metal pipes and rods, and pieces of furniture. Detainees were often beaten over the course of several days, for extended periods of time and multiple times a day. Evidence on the record also indicates that in some instances detainees were thrown down flights of stairs, beaten until they lost consciousness, or had their heads hit against walls. These beatings allegedly resulted in serious injuries, including, *inter alia,* rib fractures, skull fractures, jaw fractures, vertebrae fractures, and concussions. Long-term alleged effects from these beatings included, *inter alia,* tooth loss, permanent headaches, facial deformities, deformed fingers, chronic leg pain, and partial paralysis of limbs" (para. 35).

4. Systematic Expulsion from Homes and Mass Exodus, and Destruction of Group Culture

227. In addition to mass killings, torture, beatings and other mistreatment, unbearable conditions of life were inflicted on the targeted

Croat population: there was systematic expulsion from homes, with the imposition of subsistence diet and reduction of essential medical treatment and supplies[198]. The targeted segments of the population were required to display signs of their ethnicity, and were denied food, water, electricity and medical treatment. Their movements were restricted, and they were subjected to repeated looting and to a regime of random and mass killings (*supra*), amidst brutalisation and extreme violence. Their cultural and religious monuments and the signs of their cultural heritage were destroyed or looted; the basis of their education was suppressed, so as to be replaced by education as Serbs[199].

228. There was expulsion or forced displacement of the Croat population of the villages of Tenja, Dalj, Berak, Bogdanovci, Šarengrad, Ilok, Tompojevci, Bapska, Tovarnik, Sotin, Lovas, and Tordinci, as well as Pakrac, Uskok, Donji, Gornji Varos, Pivare[200]; people were forced to sign statements relinquishing all rights to their property, and to embark on the mass exodus; those who did not do so, were subjected to a brutal regime of extreme violence. Croatia recalled that the ICTFY (Trial Chamber), in its Judgment (of 02.08.2001) in the *Krstić* case, found that

> "where there is physical or biological destruction there are often simultaneous attacks on the cultural and religious property and symbols of the targeted group as well, attacks which may legitimately be considered as evidence of an intent to physically destroy the group. In this case [*Krstić*], the Trial Chamber will thus take into account as evidence of intent to destroy the group the deliberate destruction of mosques and houses belonging to members of the group" (para. 580).

229. The ICJ itself cited this finding, in its Judgment of 2007 in the previous case of the *Bosnian Genocide* (para. 344). It is clear that the destruction of cultural and religious heritage, as occurred in the present case of the *Application of the Convention against Genocide*, pertaining to the armed attacks in Croatia, can be of significance *within the context* of

198 Cf., e.g., *Memorial*, paras. 4.23 and 5.30.

199 Cf. *ibid.*, paras. 4.60, 4.128, and 5.181.

200 Cf. *ibid.*, paras. 4.30-4.31, 4.37, 4.46-4.47, 4.61-4.64, 4.80, 4.93, 4.105, 4.107, 4.132-4.133, 5.14, 5.49, 5.79, 5.92, 5.93, 5.106, 5.121, 5.140, 5.141, 5.146, 5.148, 5.174, 5.181, 5.196, 5.202, 5.203, 5.204, 5.205, 5.210, 5.223 and 5.225.

the widespread and systematic pattern of destruction, as occurred in the *cas d'espèce*, opposing Croatia to Serbia. Such destruction of cultural and religious heritage is not to be simply dismissed *tout court*, as the ICJ has done in the present Judgment (paras. 129, 379, 385-386). It should have taken into due account the aforementioned pattern of destruction *as a whole* (encompassing destruction of cultural and religious sites), – as properly warned by the ICTFY in the *Krstić* case (*supra*).

230. In the present case, Serbia, for its part, retorted that, for the systematic expulsion of people from homes to fall under Article II(c) of the Genocide Convention, it must be part of a "manifest pattern", capable of effecting the physical destruction of the group, and not merely its displacement elsewhere; in its view, the Applicant failed to prove that the expulsion of Croats, where it has occurred, was accompanied by the intent to destroy that population[201]. In addition, Serbia minimized the relevance of the destruction of cultural and religious objects, saying that, in the drafting history of the Genocide Convention, the inclusion of attacks on cultural and religious objects under the rubric "cultural genocide" was discarded in the course of that drafting process[202].

231. On this point, may I here observe that, in his *Autobiography*, Raphael Lemkin, – who devoted so much energy to the coming into being of the 1948 Convention against Genocide, – warned that genocide has been "an essential part" of world history, it has followed humankind "like a dark shadow from early antiquity to the present"[203]. To him, a group can be destroyed as a group even when its members are not all destroyed, but its cultural identity is; genocide, to R. Lemkin, means also the destruction of a culture, impoverishing civilization. The destruction of the cultural identity of a group destroys ultimately its "spirit"[204]. R. Lemkin confessed that the idea of "cultural genocide" was "very dear" to him:

> "It meant the destruction of the cultural pattern of a group, such as language, the traditions, monuments,

201 Cf. *Counter-Memorial*, para. 84; and *Rejoinder*, para. 333.
202 Cf. *Rejoinder*, para. 335.
203 R. Lemkin, *Totally Unofficial – Autobiography* (ed. D.-L. Frieze), New Haven/London, Yale University Press, 2013, pp. 125 and 140.
204 *Ibid*., pp. 131, 138 and 168.

> archives, libraries, and churches. In brief: the shrines of a nation's soul"[205].

232. R. Lemkin much regretted that there was not support for this idea in the *travaux préparatoires* of the Genocide Convention, but he kept nourishing the hope that in the future an Additional Protocol to the Convention, on "cultural genocide", could be adopted. After all, – he added, – "the destruction of a group entails the annihilation of its cultural heritage or the interruption of the cultural contributions coming from the group"[206]. R. Lemkin was attentive to the writings of the "founding fathers" of international law (in the XVI XVIIth centuries), and expressed his admiration in particular to those of Bartolomé de Las Casas (and also of Francisco de Vitoria), for his defence, on the basis of natural law, of the rights of native populations against the abuses and brutalities of colonialism in the New World (which R. Lemkin called "colonial genocide")[207].

233. In this connection (destruction of a group's cultural heritage), the ICTFY (Trial Chamber), in its Decision (Review of Indictments, of 11.07.1996) in the case *R. Karadžić and R. Mladić*, observed that, in some cases,

> "humiliation and terror serve to dismember the group. The destruction of mosques or Catholic churches is designed to annihilate the centuries-long presence of the group or groups; the destruction of the libraries is intended to annihilate a culture which was enriched through the participation of the various national components of the population" (para. 94).

I shall come back to this point subsequently in the present Dissenting Opinion, when I address the destruction of cultural goods during the bombardments of Dubrovnik (October December 1991)[208].

205 *Ibid*., p. 172.
206 *Ibid*., pp. 172-173.
207 Cf. A. Dirk Moses, "Raphael Lemkin, Culture, and the Concept of Genocide", *in The Oxford Handbook of Genocide Studies* (eds. D. Bloxham and A. Dirk Moses), Oxford, Oxford University Press, 2010, pp. 26-27; and cf. A.A. Cançado Trindade, "Prefacio", *in Escuela Ibérica de la Paz (15111694) – La Conciencia Crítica de la Conquista y Colonización de América* (eds. P. Calafate and R.E. Mandado Gutiérrez), Santander, Ed. Universidad de Cantabria, 2014, pp. 72-73 and 98-99.
208 Cf. part XII(7) of the present Dissenting Opinion, *infra*.

234. In the already mentioned *Stanišić and Simatović* case, the ICTFY (Trial Chamber I) observed (Judgment of 30.05.2013) that the members of the local civilian population, when not killed, were marginalized, brutalized and forced to flee, "in order to establish a purely Serb territory", so that the attacked villages could afterwards "form part of a Greater Serbia" (para. 1250). The ICTFY (Trial Chamber) recalled "its findings on the actions (including attacks, killings, destruction of houses, arbitrary arrest and detention, torture, harassment, and looting) which occurred in the Saborsko region from June to November 1991" (para. 264). It upheld the initial "evidence of approximately 20,000 to 25,000 Croats and other non-Serbs" who were forcefully displaced from the SAO Krajina region by April 1992 (para. 264).

235. The ICTFY (Trial Chamber) then added, in the aforementioned *Stanišić and Simatović* case, that the total of those forcefully displaced persons considerably raised until April 1992; in its own words, "between 80,000 and 100,000 Croat and other non-Serb civilians fled the SAO Krajina", as a result of the situation created and then prevailing in the region, which was a combination of "the attacks on villages and towns with substantial or completely Croat populations; the killings, use as human shields, detention, beatings, forced labour, sexual abuse, and other forms of harassment of Croat persons; and the looting and destruction of property" (para. 404, and cf. para. 997)[209].

236. Furthermore, in its Judgment of 12.12.2012 in the *Z. Tolimir* case, the ICTFY (Trial Chamber II) drew attention to the need and importance of considering the forcible transfer of segments of the population in connection with other wrongful acts directed against the same targeted groups. It pondered that, proceeding in this way, it becomes clear that the disclosed pattern of destruction, – taking all the wrongful acts together, – is indicative of an intent to destroy all or part of the forcibly displaced population (paras. 739 and 748).

5. General Assessment

237. The evidence produced before the Court in the present case of the *Application of the Convention against Genocide* clearly establishes, in my perception, the occurrence of massive killings of targeted members of the Croat civilian population during the armed attacks in Croatia,

209 And cf. also part IX(4)(d) of the present Dissenting Opinion, *supra*.

amidst a systematic pattern of extreme violence, encompassing also torture, arbitrary detention, beatings, sexual assaults, expulsion from homes and looting, forced displacement and transfer, deportation and humiliation, in the attacked villages. It was not exactly a war, it was a devastating onslaught of civilians. It was not only "a plurality of common crimes" that "cannot, in itself, constitute genocide", as Counsel for Serbia argued before the Court in the public sitting of 12.03.2014[210]; it was rather an onslaught, a plurality of atrocities, which, in itself, by its extreme violence and devastation, can disclose the intent to destroy (*mens rea* of genocide)[211].

238. The atrocities were not seldom carried out with the use of derogatory language and hate speech. I find it important to stress the circumstances surrounding the attacked population, which was left in *a situation of the utmost vulnerability, if not defencelessness*; such situation constitutes, in my understanding, an aggravating circumstance. Later on in the present Dissenting Opinion, I shall return to the consideration of the crimes perpetrated, under the relevant parts of the provisions of Article II of the Convention against Genocide[212].

239. Last but not least, may I here add that, in this factual context, the expression "ethnic cleansing" seems to try to hide the extreme cruelty that it enshrines, in referring to the pursuance with the utmost violence of a forced removal of a targeted group from a given territory. I have already referred to the rather surreptitious way whereby "ethnic cleansing" penetrated legal vocabulary as a breach of international law (para. 47) in my Separate Opinion (para. 47) in the ICJ's Advisory Opinion on the *Declaration of Independence of Kosovo* (of 22.07.2010)

240. It so happens that such coerced or forced removal of a group from a territory, so as to render this latter ethnically "homogeneous", has not seldom been carried out – as the wars in the former Yugoslavia show – by means of killings, torture and beatings, forced labour, rape and other sexual abuses, expulsion from home and forced displacement and deportation (with mass exodus), destruction of cultural and religious sites. Thus, what had initially appeared to have been an *intent to expel* a group from a territory, may well have become,

210 Cf. ICJ doc. CR 2014/15, of 12.03.2014, p. 18, para. 22. And cf. also *Counter-Memorial*, para. 54.

211 Cf. part XV of the present Dissenting Opinion, *infra*.

212 Cf. part XIII of the present Dissenting Opinion, *infra*.

– as extreme violence breeds more and more violence, – an *intent to destroy* the targeted group.

241. "Ethnic cleansing" and genocide, rather than excluding each other, appear to be somehow overlapping[213]: with the growth of extreme violence, what at first appeared to be "ethnic cleansing" turns out to be genocide: the initial "intent to remove", degenerates into "intent to destroy", the targeted group. In such circumstances, there is no sense in trying to camouflage genocide with the use of the expression "ethnic cleansing". In some circumstances, such expression may well amount to genocide, as reckoned by the ECtHR in the *Jorgić versus Germany* case (Judgment of 12.07.2007)[214]. The ECtHR found it fit to ponder that, although there had been "many authorities" who "had favoured a narrow interpretation of the crime of genocide", now that are also "several authorities" who have construed the crime of genocide in a "wider way" (para. 113), as in the *Jorgić* case itself.

XI. WIDESPREAD AND SYSTEMATIC PATTERN OF DESTRUCTION: RAPE AND OTHER SEXUAL VIOLENCE CRIMES COMMITTED IN DISTINCT MUNICIPALITIES

242. May I now dwell upon the widespread and systematic pattern of destruction, in the form of rapes and other sexual violence crimes, systematically committed in several municipalities, as from the launching of the military campaign waged by Serbia against Croatia.

213 For a discussion, cf., *inter alia*, e.g., M. Grmek, M. Gjidara and N. Simac (orgs.), *Le nettoyage ethnique – Documents historiques sur une idéologie serbe*, [Paris,] Fayard, 2002, pp. 79, 26, 31, 33, 38, 212, 286, 293-294, 311-312, 324-325 and 336-337; J. Quigley, *The Genocide Convention – An International Law Analysis*, Aldershot, Ashgate, 2006, pp. 191-201; N.M. Naimark, *Fires of Hatred – Ethnic Cleansing in the TwentiethCentury Europe*, Cambridge (Mass.)/London, Harvard University Press, 2001, pp. 156-157, 164-165, 168-170, 174 and 183-184; Ph. Spencer, *Genocide since 1945*, London/N.Y., Routledge, 2012, pp. 11-12, 29 and 85-86; N. Cigar, *Genocide in Bosnia - The Policy of "Ethnic Cleansing"*, College Station, Texas A&M University Press, 1995, pp. 3-10, 22-37, 62-85 and 139-180; B. Lieberman, "`Ethnic Cleansing´ *versus* Genocide?", *in The Oxford Handbook of Genocide Studies* (eds. D. Bloxham and A. Dirk Moses), Oxford, Oxford University Press, 2010, pp. 42-60; C. Carmichael, *Ethnic Cleansing in the Balkans – Nationalism and the Destruction of Tradition*, London/N.Y., Routledge, 2002, pp. 2, 66, 112-114.

214 The applicant had alleged that the German courts did not have jurisdiction to convict him of genocide (committed in the villages of Bosnia-Herzegovina); the ECtHR found that the applicant's conviction of genocide by the German courts was not in breach of the ECHR (paras. 113-116).

The *dossier* of the *cas d'espèce*, concerning the *Application of the Convention against Genocide* (Croatia *versus* Serbia), contains in effect several accounts, presented to the ICJ, in the course of both the written and oral phases of the proceedings, of the perpetration of rapes of Croats in a number of municipalities. I shall now dwell upon this particular issue, first addressing the accounts rendered in the oral proceedings, and then those presented earlier on, in the course of the written phase. The path will then be paved for the presentation of my thoughts on other aspects of those atrocities, likewise deserving of close attention.

1. Accounts of Systematic Rape

a) Croatia's Claims

243. In its oral pleadings, Croatia argued that, in their "genocidal campaign" of "extreme brutality", during which "[e]ntire Croat communities were intentionally destroyed", the JNA and subordinate Serb forces "raped more Croat women than can be known", and "destroyed over 100,000 homes and over 1,400 Catholic buildings and places of worship"; they sent over 7,700 detained Croats to "detention camps in occupied parts of Croatia, Serbia, and other parts of the former Yugoslavia, and they forcibly deported over 550,000 others"[215]. Croatia next presented a narrative of rapes "accompanied by terrible ethnic abuse" occurred in Berak[216].

244. Croatia then explained that the first phase of that campaign, – the artillery attacks, – were intended to cause terror and "to compel Croats to abandon their villages"; yet, "the worst atrocities" were reserved for those who refused, or were unable to flee: they were "killed, tortured, raped and abused by the attacking Serb forces", with an intent to destroy the Croat population of the region. There was, in Croatia's perception, "a pattern of attack that was genocidal, in that it intended to destroy a part of the Croat population"[217].

245. Occurrences of torture and rape were reported in the villages of Lovas[218], Sotin[219], Bogdanovci – where paramilitaries massacred all

215 ICJ, doc. CR 2014/6, of 04.03.2014, p. 45, paras. 11 and 13.
216 *Ibid*., p. 60, para. 22.
217 ICJ, doc. CR 2014/8, of 05.03.2014, p. 17, para. 36.
218 Cf. *ibid*., p. 17, para. 36, and cf. ICJ, doc. CR 2014/10, of 06.03.2014, p. 23, para. 7.
219 Cf. ICJ, doc. CR 2014/8, of 05.03.2014, p. 22, para. 54.

or almost all of Croats remaining in the village[220], – and Pakrac[221], and across the region of Eastern Slavonia[222]. Croatia then focused on the raping and other atrocities which victimized the Croat population of Vukovar[223]; it contended that, at Velepromet, women and girls "did not escape brutal rapes"[224], as described in Croatia's pleadings[225]. And it added that

> "in the case of *Bosnia versus Serbia*, this Court distinguished between the destruction of a group on the one hand and its 'mere dissolution' on the other. To describe the four phases of events at Vukovar in 1991 – the colossal use of force by *overwhelmingly greater Serbian forces* to deprive the trapped inhabitants of their basic conditions of life, the killing, raping and dismembering by the advancing forces of those who remained, the staged removal to torture and death camps and the organized mass killing at Velepromet and Ovčara – to describe that as 'mere dissolution' of the Vukovar Croats is so to distort language as to render it meaningless"[226].

246. Croatia argued that "[m]ultiple and gang rapes of Croat women were commonplace", in order to "kill the seed of Croatia", as the perpetrators threatened[227]; this occurred in Siverić, Lovas, Vukovar, Sotin, Doljani, Bapska and Čakovci, Dalj, Gornji Popovac and Tovarnik, among other villages, at times even in the victims' homes. Sexual attacks often took place in the victims' homes, "with their relatives being forced to watch, adding an additional dimension of violation and degradation to the women's ordeals"[228]. In Tovarnik,

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220 Cf. *ibid*., p. 24, paras. 62-63.
221 Cf. ICJ, doc. CR 2014/10, of 06.03.2014, p. 13, para. 12.
222 Cf. *ibid*., pp. 25 and 27, paras. 67 and 71. In Croatia's account, in "different villages and towns across Eastern Slavonia, women were forced to act as 'comfort women' to members of the Serb forces"; ICJ, doc. CR 2014/10, of 06.03.2014, p. 23, para. 7.
223 Cf. ICJ, doc. CR 2014/8, of 05.03.2014, p. 31, para. 11, and cf. ICJ, doc. CR 2014/10, of 06.03.2014, p. 23, para. 7.
224 ICJ, doc. CR 2014/8, of 05.03.2014, p. 42, para. 61.
225 Cf. ICJ, doc. CR 2014/20, of 20.03.2014, p. 33, para. 20, and p. 53, para. 24.
226 ICJ, doc. CR 2014/8, of 05.03.2014, p. 48, para. 88.
227 Cf. ICJ, doc. CR 2014/10, of 06.03.2014, pp. 21-24, para. 4.
228 Cf. *ibid*., pp. 21-24, paras. 56.

there were also reported cases of castration of men[229]. Croatia added that

> "Raped women often feel ashamed and they do not even report such attacks. That was the case also in Croatia – the number of reported incidents hides much bigger figures of un-reported cases. Those attacks have left an enduring legacy of fear, trauma and shame undiminished by the passage of time"[230].

247. After stressing that "Croat women and girls were frequently the victims of ethnically targeted violence, including rape and gang rape", by members of the JNA, TO, Serbian police and paramilitaries, Croatia recalled that resolution 1820 (2008) of the U.N. Security Council noted that rape and other forms of sexual violence "can constitute war crimes, crimes against humanity or *a constitutive act with respect to genocide*"[231].

248. It further stressed the numerous accounts by numerous witnesses (direct victims or observers of those rapes and gang rapes), in several "towns, villages and hamlets that fell under occupation of the JNA and the Serb paramilitary forces", such as Berše, Brđani, Doljani, Joševica, Korenica, Kostajnički Majur, Kovačevac, Ljubotić and Lisičić, Novo Selo Glinsko, Parčić, Puljane, Šarengrad, Sekulinci, Smilčić, Sotin, Tenja, and Vukovar and many others[232]. Croatia then concluded, on this particular issue, that

> "The scale and pattern of killing, torture and rape has been disclosed by the evidence submitted by the Applicant, and that clearly, in our submission, makes out the *actus reus* of genocide within the meaning of Articles II(a) and (b) of the Genocide Convention. To argue otherwise, in our submission, is simply not to be credible.
>
> In addition, the conditions of life which were inflicted on the Croat population remaining in Serb-occupied territory, including systematic expulsion from homes, torture, rape and denial of food, access to water, basic

229 Cf. *ibid*., pp. 21-24, para. 8.
230 Cf. *ibid*., pp. 21-24, para. 3.
231 *Ibid*., p. 21, para. 2 [emphasis added].
232 Cf. *ibid*., p. 24, para. 9. On the brutalities of sexual abuses, cf. also *ibid*., p. 27, paras. 22-25 (in Vukovar).

> sanitation and medical treatment, were calculated to bring about its physical destruction as a group. This, too, amounted to genocide within the meaning of Article II(c) of the Convention.
>
> Finally, just this morning, you have heard in some detail the evidence of systematic rape of Croatian women and men, the sexual mutilation and castration of Croatian men, and the commission of other sex crimes which, when viewed in the context of the broader genocidal policies of the Serb forces, involved the imposition of measures to prevent births within the Croatian population. This, we say, falls squarely within the meaning of Article II(d)"[233].

b) Serbia's Response

249. For its part, Serbia, instead of addressing the issue of systematic practice of rape, tried to discredit the evidence produced by Croatia[234]. It did so, largely on the argument that most witness statements were unsigned[235], – a point already clarified to some extent by Croatia (*supra*). In any case, Serbia admitted, in general terms, the occurrence of "serious crimes" (cf. *supra*); in its own words,

> "the fundamental disagreement of the respondent State with the Applicant's approach to the unsigned statements and police reports does not mean that the Serbian Government denies that serious crimes were committed during the armed conflict in Croatia. Yes, the serious crimes were perpetrated against the members of the Croatian national and ethnic group. They were committed by groups and individuals of Serb ethnicity. It goes without saying that Serbia condemns such crimes, regrets that they were committed, and sympathizes profoundly with the victims and their families for the suffering that they have experienced.

233 *Ibid*., p. 54, paras. 16-18. – For other accounts, cf., e.g., ICJ doc. CR 2014/6, of 04.03.2014, p. 45; ICJ doc. CR 2014/8, of 05.03.2014, pp. 14, 25 and 39; and ICJ doc. CR 2014/10, of 06.03.2014, paras. 23-24.

234 Cf., e.g., ICJ, doc. CR 2014/13, of 10.03.2014, pp. 65-66, para. 43; ICJ, doc. CR 2014/22, of 27.03.2014, pp. 13-14, paras. 10-13.

235 Cf., e.g., ICJ, doc. CR 2014/13, of 10.03.2014, pp. 64-65, paras. 38 and 42.

The Higher Court in Belgrade has so far convicted and imprisoned 15 Serbs for the war crimes against prisoners of war at the farm Ovčara near Vukovar, and another 14 for the war crimes against civilians in the village of Lovas in Eastern Slavonia. The second judgment has recently been quashed by the Court of Appeal due to the shortcomings concerning the explanation of the individual criminal liability for each accused, and the trial must be held again. An additional ten cases for the war crimes committed by Serbs in Croatia have been concluded before the Higher Court in Belgrade. In total, 31 individuals of Serb nationality have so far been convicted and imprisoned, while there are others being accused. Investigations on several crimes are under way, including the crime in Bogdanovci.

Thus, despite the careless approach to the presentation of evidence by the Applicant, it is not in dispute that murders of Croatian civilians and prisoners of war took place during the conflict. This was established also in the ICTY Judgment against *Milan Martić*, who was convicted as the former Minister of Interior of the Republic of Serbian Krajina, as well as in the case *Mrkšić et al.*; the last case is also known as 'Ovčara'. In that notorious crime, the ICTY recorded 194 prisoners of war who were killed. This was the gravest mass murder in which Croats were the victims during the entire conflict"[236].

2. Systematic Pattern of Rape in Distinct Municipalities

251. As already indicated, the *dossier* of the present case, opposing Croatia to Serbia, contains reports of rapes of Croats in a number of municipalities. Several witnesses testified to having been raped, often multiple times, and by several perpetrators. It is also important to note

236 Cf. *ibid*., pp. 64-65, paras. 38-40. And Serbia added: – "If one carefully makes a review of all ICTY indictments in which the crimes against Croats were alleged, he or she will find many victims, indeed. There is no doubt that many Croats also died in the combat activities during the fiveyear conflict. Yet, from the point of view of the subject-matter of this case, those numbers of victims are of an entirely different magnitude than the many those killed in Srebrenica – or in Krajina – over the course of several days"; *ibid*., pp. 64-65, para. 41.

that the rapes were frequently accompanied by derogatory language and further violence, such as beatings and use of objects.

252. The examples provided, of testimonies regarding the continuous commission of rape in distinct municipalities, evidence a *widespread and systematic pattern of rape* of members of the Croatian population, inflicting humiliation upon the victims. These statements, next referred to, form part of the evidence submitted by Croatia, so as to illustrate the numerous allegations of rape across distinct municipalities and to demonstrate the systematic pattern of those grave breaches[237].

253. For example, in Lovas, it was alleged that paramilitaries routinely engaged in sexual violence against Croatians[238]. A.M. testified to being raped repeatedly and she reported that paramilitaries made a habit of collecting groups of Croatian women in the village in order to rape them[239]. Similarly, P.M. also testified to sexual abuse of Croatian men[240]. In Bapska, P.M. described that a Serbian soldier raped her and her 81 year old mother before he tore her navel with his bare hands[241]. In this village, there were also accounts of sexual violence against men, according to witness F.K.[242]. In Pakrac, H.H. described rape and torture of a victim before her ears were cut off and her skull shattered[243]. In a similar violent vein, there was, in Kraljevčani, a description of rape of a Croat woman, whose breasts were cut off[244].

254. Croatian women in the village of Tenja were routinely raped, along with having to labour in fields and gardens. For example, while K.C. was made to clean the police station, she was indecently assaulted by one of the officers; according to M.M., K.C.'s experience drove her to attempt suicide[245]. In the village of Berak, M.H., thus described her rape: – "(…) I was their special target because I had six sons and

237 Cf. also *Memorial*, paras. 5.30, 5.59, 5.88, 5.147, 5.157, 5.175, 5.209-5.210, 5.212 and 5.224; and cf. also *ibid*., paras. 4.25, 4.44-4.45, 4.60, 4.110, 4.113, 4.129, 4.131, 4.169, 4.185, 4.60, 5.147, 5.157, 5.212, 5.224. And cf. also *Reply*, paras. 5.35, 5.46, 5.54, 5.84.
238 *Memorial*, para. 4.129.
239 *Ibid*., Annex 108.
240 *Ibid*., Annex 101.
241 *Memorial*, para. 4.90.
242 *Ibid*., para. 4.91 and Annex 74.
243 *Ibid*., para. 5.17 and Annex 175.
244 *Ibid*., para. 5.98.
245 *Ibid*., para. 4.25.

they were threatening me because I had delivered six Ustashas"[246]. In this village, there were accounts of sexual assault against Croatian women. L.M. and M.H. were raped in front of a group of people, and throughout the night[247]. P.B. testified having been raped with brutality by seven JNA reservists with White Eagle marks[248].

255. In the village of Sotin, V.G. describes how on 30.09.1991 two soldiers came into her house and both raped her while holding a gun pointing at her. The next day, one of the soldiers who had raped her came back and raped her mother. After that, V.G. was forced to get down on her knees and was raped from behind[249]. Furthermore, R.G. described "sexual advantage" being taken of an elderly woman in Sotin, and S.L. also described other sexual abuses in Sotin[250]. As to Tovarnik, the document *Mass Killing and Genocide in Croatia 1991/92: A Book of Evidence* (pp. 107-108) also gives account of forced sexual abuses between Croat prisoners[251].

256. In the *dossier* of the present case, there are many accounts of rape and other sexual violence crimes that occurred, in particular, in the greater Vukovar area. Some examples have been provided by witness testimonies. For example, the Muslim JNA soldier, E.M., described rape and killing in his account of the JNA conduct in Petrova Gora (a suburb of Vukovar)[252]. A.S. testified how, on 16.09.1991, M.L., from Vukovar, told her that he was going to kill her: after insulting her, he raped her[253]. T.C. gave likewise an account of what took place in the suburb of Vukovar, Čakovci: R.I. entered her house and, threatening to kill her, tied her hands and raped her[254].

257. Velepromet was the backdrop of routine executions, torture, and rape often committed by multiple rapists. Women of Croatian nationality that were imprisoned in the Velepromet detention facility in Vukovar were taken to interrogations during which they were exposed to sexual abuse. Group rapes also allegedly took place. B.V.

246 *Ibid*., para. 4.44.
247 *Ibid*., para. 4.44.
248 *Memorial*, para. 4.45.
249 *Ibid*., para. 4.113, and Annex 94.
250 *Ibid*., paras. 4.101 and 4.111, respectively.
251 *Ibid*., para. 4.101.
252 *Memorial*, para. 4.153, and Annex 127.
253 *Ibid*., para. 4.155, and Annex 125.
254 *Ibid*., para. 4.156, and Annex 128.

was raped the second day on her arrival in the barracks; four soldiers raped her one after another on the floor of the office while insulting her and hitting her in the face. She testified how 15 Serbian soldiers took M.M. to the room next door to her and raped her in turns[255].

258. M.M. described how, on 18.11.1991, – the day of the occupation of Central Vukovar, – she and her family were taken to the Velepromet building, and later driven in buses to Šand Šabac (Serbia). Back in Vukovar, she described how she was raped by five men, one after another, from 9 p.m. until the morning. During the rape she was bleeding and was forced to sit on a beer bottle. This happened in front of her little sister, who was also sexually abused during two weeks and was continuously afraid[256]. Likewise, H.E. testified to daily rapes by Serbian police and army upon her arrival to prison. The rapes happened in the cell in front of other female prisoners. She also testified to beatings and mental abuse[257].

259. Witness T.C. stated that Chetniks "were maltreating, expelling, threatening, beating, raping and killing on a daily basis", and added that "Croats had white ribbons at our gate in order to enable Chetniks who were not from our village to recognize us"; she testified that she was raped[258]. In a similar vein, G.K. testified to having been maltreated and raped[259], and B.V. likewise testified to killings, rape and maltreatment, and added that she was raped by four men, having used derogatory language during the rape[260].

3. The Necessity and Importance of a Gender Analysis

260. The present case of the *Application of the Convention against Genocide* (Croatia *versus* Serbia), in my perception, can only be properly adjudicated with *a gender perspective*. This is not the first time that I take this position: in 2006, almost one decade ago, I did the same, in another international jurisdiction[261], given the circumstances of the

255 *Ibid.*, para. 4.185
256 *Memorial*, para. 4.169 and Annex 117.
257 *Ibid.*, Annex 116.
258 *Ibid.*, Annex 128.
259 *Ibid.*, Annex 130.
260 *Ibid.*, Annex 151.
261 Cf. IACtHR, case of the *Prison of Castro Castro*, concerning Peru, Judgment of 25.11.2006, Separate Opinion of Judge Cançado Trindade, paras. 58-74.

case at issue. Now, in 2015, an analysis of gender is, in my perception, likewise unavoidable and essential in the present case before the ICJ, given the incidence of a social-cultural pattern of conduct, disclosing systemic discrimination and extreme violence against women.

261. At the time that the wars in Croatia, and in Bosnia and Herzegovina, were taking place, with their abuses against women, the final documents of the U.N. II World Conference on Human Rights (Vienna, 1993) and the U.N. IV World Conference on Women (Beijing, 1995), paid due attention to the difficulties faced by women in face of cultural patterns of behaviour in distinct situations and circumstances[262]. Attention to the basic *principle of equality and non-discrimination* is of fundamental importance here. In the present case of the *Application of the Convention against Genocide* (Croatia *versus* Serbia), women as well as men, members of the targeted groups, were victimized, but women (of all ages) were brutalized in different ways and in a much greater proportion than men. Hence the great necessity of a gender perspective.

262. The widespread and systematic raping of girls and women, as occurred in the armed attacks in Croatia (and also in those in Bosnia and Herzegovina), had a devastating effect upon the victims. Girls were suddenly deprived of their innocence and childhood, despite their young age. This is extreme cruelty. Young and unmarried women were suddenly deprived of their project of life. This is extreme cruelty. The victims could no longer cherish any faith or hope in affective relations. This is extreme cruelty. Young or middle-aged women who, after having been raped, became pregnant, could not surround their maternity with care and due respect, given the extreme violence they had been, and continued to be, subjected to. This is extreme cruelty.

263. Middle-aged and older women, who had already constituted a family, had their personal and family life entirely destroyed. Even if they had physically survived, they must have felt like having become walking shadows[263]. This is extreme cruelty. There were also women who kept on being raped until dying. Were the ones who survived this ordeal "luckier" than the ones who passed the last threshold of life?

262 Cf. A.A. Cançado Trindade, *Tratado de Direito International dos Direitos Humanos* [*Treatise of International Law of Human Rights*], vol. III, Porto Alegre/Brazil, S.A. Fabris Ed., 2003, pp. 354-356.

263 To paraphrase Shakespeare, *Macbeth* (1605-1606), act V, scene V, verse 24.

None remained secure from acute pain[264]. The sacrality of life – before birth, during pregnancy, after birth, and along with what remained of human existence, – was destroyed with brutality.

264. What happened later, after the brutal raping with humiliation, to the children who were born of hatred? Do we know? What were the long-term effects of such pattern of destruction victimizing mainly women? Do we know? What happened to the sons and daughters of hatred? Do we know? The widespread and systematic raping of women in the *cas d'espèce* disclosed a pattern of extreme violence *in an inter-temporal dimension*. There were also the women who lost their children, or husbands, in the war, and those who did not have access to their mortal remains, having been thus deprived of their project of after-life.

265. Many centuries ago, Euripides depicted, in his tragedies *Suppliant Women*, *Andromache*, *Hecuba*, and *Trojan Women* (IVth century b.C.), the cruel impact and effects of war particularly upon women. Euripides' *Trojan Women*, for example, came to be regarded, in our times, as one of the greatest anti-war literary pieces of the antiquity, depicting its evil. Over four centuries later, Seneca wrote his own version of the tragedy *Trojan Women* (5062 A.D.), with a distinct outlook, but portraying likewise the anguish and sufferings that befell upon women. In the last decade of the XXth century, the cruel impact and effects of war upon women marked likewise presence in the facts of the present case of the *Application of the Convention against Genocide* (Croatia *versus* Serbia), disclosing the projection of evil in time, its perennity and omnipresence.

266. In the *cas d'espèce*, the degradation and humiliation of women by systematic rape and other sexual violence crimes (*supra*) did not exhaust themselves at the level of individual life. The atrocities they were subjected to, caused also (for those who survived) forced separation, and disruption of family life. The terrible sufferings inflicted by rapes allegedly for "ethnic cleansing", went far beyond that, to the destruction of the targeted groups themselves, to which the murdered and brutalized women belonged, – that is, to the realm of genocide.

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264 To paraphrase Sophocles, *Oedipus the King* (428-425 b.C.), verses 1528-1530.

267. May it be recalled that, in its landmark Judgment (of 02.09.1998) in the case *Akayesu*, the ICTR held precisely that gender-based crimes of rape and sexual violence, disclosing an intent to destroy, constituted genocide, and in fact destroyed the targeted group (para. 731). In determining the occurrence of genocide, the ICTR found that the pattern of rape with public humiliation and mutilation, inflicted serious bodily and mental harm on the women victims, and disclosed an intent to destroy them, their families and communities, the Tutsi group as a whole (paras. 731 and 733-734). The victimized women were degraded, – in the words of the ICTR, – as "sexual objects", and the extreme violence they were subjected to "was a step in the process of destruction" of their social group, – "destruction of the spirit, of the will to live, and of life itself" (para. 732).

268. For its part, the ICTFY (Trial Chamber), in its Decision (Review of Indictments, of 11.07.1996) in the case *R. Karadžić and R. Mladić*, stated that a pattern of sexual assaults began to occur even before the wars in Croatia and Bosnia and Herzegovina broke out, "in a context of looting and intimidation of the population". Concentration camps for rape were established, "with the aim of forcing the birth of Serbian offspring, the women often being interned until it was too late for them to undergo an abortion" (para. 64). Rapes – the ICTFY (Trial Chamber) proceeded – increased "the shame and humiliation of the victims and of the community"; the purpose "of many rapes was enforced impregnation" (para. 64).

269. Such crimes, of "systematic rape of women", purporting "to transmit a new ethnic identity" to the children, undermined "the very foundations of the group", dismembering it (para. 94). They "could have been planned or ordered with a genocidal intent" (para. 95). The ICTFY (Trial Chamber) held that "Radovan Karadžić and Ratko Mladić planned, ordered or otherwise aided and abetted in the planning, preparation or execution of the genocide perpetrated" in the centres of detention (para. 84).

270. In the present case of the *Application of the Convention against Genocide*, opposing Croatia to Serbia, due to the early mobilization of entities of the civil society, the figures concerning the systematic practice of destruction through rape were soon to become known. By the end of 1992, the estimates were that there had been, in the war in Croatia until then, approximately 12 thousand incidents of rape. Those

incidents rose up to 50 to 60 thousand incidents, in the whole period of 1991-1995, in the wars in the former Yugoslavia (both in Croatia and in Bosnia and Herzegovina).

271. But those are only rough estimates, as it was soon realized, – as acknowledged in expert writing[265], – that it was simply not possible to know with precision the total number of victims (of all ages) of that brutality, and the extent of destruction, perpetrated, with the intent to destroy the victimized families and the targeted social groups, in concentration camps (rape/death camps), in prisons and detention centres, and in brothels. The girls and women victimized were condemned to the utmost humiliation, and were dehumanized by the victimizers, simply because of their ethnic identity, for being who they were.

272. If this systematic pattern of rape was not a plurality of acts of genocide (for the destructive consequences it entailed), what then was it? What is genocide, if that is not? In the present Dissenting Opinion, I have already examined the findings (in 19921993), e.g., in the U.N. (former Commission on Human Rights) *Reports on the Situation of Human Rights in the Territory of the Former Yugoslavia* (*rapporteur*, T. Mazowiecki)[266], which should here be recalled.

273. In effect, those *Reports* contain references, *inter alia*, to the pattern of destruction by means of killings, torture, disappearances, rape and sexual violence. I thus limit myself to add here that the *Report* of 10.02.1993[267], e.g., states that the "[r]ape of women, including minors,

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265 Cf., *inter alia*, e.g., B. Allen, *Rape Warfare – The Hidden Genocide in Bosnia-Herzegovina and Croatia*, Minneapolis/London, University of Minnesota Press, 1996, pp. 65, 72, 76-77 and 104; [Various Authors,] *Women, Violence and War – Wartime Victimization of Refugees in the Balkans* (ed. V. NikolićRistanović), Budapest, Central European University Press, 2000, pp. 41, 43, 56-57, 80-82, 142 and 154; S. Fabijanić Gagro, "The Crime of Rape in the ICTY's and the ICTR's Case-Law", 60 *Zbornik Pravnog Fakulteta u Zagrebu* (2010) pp. 1310, 1315-1316 and 1330-1331; M. Ellis, "Breaking the Silence: Rape as an International Crime", 38 *Case Western Reserve Journal of International Law* (2007) pp. 226 and 231-234; S.L. RussellBrown, "Rape as an Act of Genocide", 21 *Berkeley Journal of International Law* (2003) pp. 351-352, 355, 363-364 and 371; R. Peroomian, "When Death is a Blessing and Life a Prolonged Agony: Women Victims of Genocide", *in Genocide Perspectives II – Essays on Holocaust and Genocide* (eds. C Tatz, P. Arnold and S. Tatz), Sydney, Brandl & Schlesinger / Australian Institute for Holocaust & Genocide Studies, 2003, pp. 314-315 and 327-330.

266 Cf. part IX of the present Dissenting Opinion, *supra*.

267 U.N., doc. E/CN.4/1993/50.

has been widespread in both conflicts" (para. 260) (the wars in Croatia and in Bosnia and Herzegovina). The systematic pattern of rapes was accompanied by other acts of extreme violence.

274. In the subsequent *Report* of 10.06.1994[268], the Special *Rapporteur* further referred to the "widespread terrorization" of the population by means of killings, destruction of homes, and commission of rapes by soldiers (para. 7) in their "relentless assaults" (para. 11). For its part, the U.N. (Security Council's) Commission of Experts, in its fact-finding reports of 1993-1994, – as I have already indicated in the present Dissenting Opinion, – likewise found the occurrence of a widespread and systematic pattern of rapes, – as well as torture and beatings, often followed by killings, spreading terror, shame and humiliation[269], disrupting family life and the targeted groups themselves. If this plurality of acts of extreme violence (with all its destructive consequences) was not genocide, what then was it?

275. In its recent Judgment of 11.07.2013, in the *R. Karadžić* case, the ICTFY (Appeals Chamber), in rejecting an appeal for acquittal, and reinstating genocide charges against Mr. R. Karadžić (para. 115), pointed out that it had found that "quintessential examples of serious bodily harm as an underlying act of genocide include torture, rape, and non-fatal physical violence that causes disfigurement or serious injury to the external or internal organs" (para. 33). The ICTFY (Appeals Chamber) took into due account the evidence of "genocidal and other culpable acts" on a large-scale and discriminatory in nature, such as killings, beatings, rape and sexual violence, and inhumane living conditions (paras. 34 and 99).

276. More recently, in its Decision of 15.04.2014, in the *R. Mladić* case, the ICTFY (Trial Chamber I) rejected a defence motion for acquittal, and decided to continue trial on genocide charges. It took due note of the evidence produced on torture and prolonged beatings of detainees (pp. 20937-20938), of "large-scale" expulsions of non-Serbs (p. 20944), and of rape of young women and girls (the youngest one being 12 years old) (pp. 20935-20936 and 20939). Shortly afterwards (Decision of 24.07.2014), the ICTFY (Appeals Chamber) dismissed a

268 U.N., doc. E/CN.4/1995/4.
269 Cf. part IX of the present Dissenting Opinion, *supra*.

defence appeal and confirmed the Trial Chamber I's aforementioned decision (para. 29).

277.Last but not least, as it can be perceived from the selected examples of witness statements in the *cas d'espèce*, reviewed above, as to numerous occurrences of rape and other sexual violence crimes during the armed attacks in Croatia, and also in Bosnia and Herzegovina, that they appear intended to destroy the targeted groups of victims. In my perception, the brutality itself of the numerous rapes perpetrated bears witness of their intent to destroy. The victims were attacked in a situation of *the utmost vulnerability or defencelessness*. As from the launching of the Serbian armed attacks in Croatia, there occurred, in effect, a *systematic pattern of rape*, which can surely be considered under Article II(b) of the Genocide Convention (cf. *infra*).

XII. SYSTEMATIC PATTERN OF DISAPPEARED OR MISSING PERSONS

1. Arguments of the Parties concerning the Disappeared or Missing Persons

278. During the written phase of the proceedings of the *cas d'espèce*, both Croatia and Serbia referred to the issue of the disappeared or missing persons, persisting to date. In its *Memorial*, Croatia asked the Court to declare the obligation of the FRY to take all steps at its disposal to provide a prompt and full account to it of the whereabouts of each and every one of those missing persons, and, to that end, to work in cooperation with its own authorities[270]. Croatia further stated that "the establishment of the whereabouts of missing persons, often victims of genocide, is a painful process, but a necessary step for the sake of a better future"[271].

279. Croatia claimed that 1,419 persons were, at the date of the filing of its *Memorial* (of 01.03.2009), still missing and unaccounted for[272]. According to the information provided in 2009 by Croatia's Government Office for the Detained and Missing Persons, there appeared to be total of at least 886 still "missing persons" from the area of Eastern Slavonia[273]; moreover, the destiny of 511 persons from Vukovar remained still unknown at the time of the filing of

270 *Memorial*, para. 8.78, and cf. p. 414.
271 *Ibid.*, para. 1.14.
272 *Ibid.*, para. 1.09.
273 *Ibid.*, para. 4.06.

its *Memorial*[274]. By an *Agreement on Normalization of Relations*, signed between Croatia and FRY on 23.08.1996, the Parties undertook to "speed up the process of solving the question of missing persons" and to exchange all available information about those missing (Article 6)[275].

280. Subsequently, in its *Reply* (of 20.12.2010), Croatia facilitated an updated *List of Missing Persons* (of 01.09.2010), indicating a total of 1,024 missing persons[276]. According to the Applicant, on 2728.07.2010, "a meeting on missing persons" was held in Belgrade between Serbia's Commission for Missing Persons and Croatia's Commission for Detained and Missing Persons, under the auspices of the ICRC and the International Commission on Missing Persons. One of the issues then addressed was "the question of those detained on the territory of the Respondent"; in this respect, "representatives of the Respondent gave to the Applicant's representatives a list of 2,786 persons who were detained in Republic of Serbia in the period 1991-1992"[277].

281. Croatia then requested the Court to adjudge and declare that as a consequence of its responsibility for these breaches of the Convention, the Respondent is under the obligations "[t]o provide forthwith to the Applicant all information within its possession or control as to the whereabouts of Croatian citizens who are missing as a result of the genocidal acts for which it is responsible, and generally to cooperate with the authorities of the Applicant to jointly ascertain the whereabouts of the said missing persons or their remains"[278].

282. The two Parties elaborated further the question of the number of still missing persons at the oral proceedings. An expert called by Croatia observed that the data on the missing persons they exhumed "change from day to day", and whenever there is an exhumation, "the number of identified persons increases, and the number of missing persons then increases also"[279]. Croatia contended its efforts "to uncover the graves of the genocide victims" have been "hampered by Serbia's practice of removing and reburying victims during its

274 *Ibid*., para. 4.190.
275 *Ibid*., para. 2.160.
276 *Reply*, Annex 41.
277 *Ibid*., para. 2.54.
278 *Reply*, p. 472.
279 ICJ, doc. CR 2014/9, of 05.03.2014, p. 36.

occupation of the region, often in Serbia, in a vain attempt to cover up its atrocities"[280].

283. To date, – it proceeded, – 103 bodies have been repatriated from Serbia; furthermore, "whilst many of the victims of the genocide have now been accounted for, and their remains located, hundreds of Croats still remain missing. Twenty-three years later, Croatian families continue to mourn more than 850 missing people. The victims are still denied a proper burial and a dignified final resting place; and their families are still denied the opportunity to lay them to rest"[281]. Croatia further stated, with regard to mass graves, that, by July 2013, 142 mass graves had been discovered in Croatia, containing the bodies of 3,656 victims[282].

284. For its part, Serbia argued that the Croatian list of missing persons was confusing and unhelpful in clarifying the issues in the dispute. It added that the *Updated List of Missing Persons* (of 01.09.2010) contained data on 1,024 individuals, among whom many "victims of Serb ethnicity". Furthermore, it contained the names of Croats "who were missing in Bosnia and Herzegovina, as well as in some places that were under the full and exclusive control of the Croatian Governmental forces and far away from military operations". The aforementioned list also contained "the names of ethnic Croats who went missing during the offensive criminal Operations *Maslenica* and *Storm* which were undertaken by the Croatian Government"[283].

2. Responses of the Parties to Questions from the Bench

285. Given the contradictory information provided, Judge Cançado Trindade deemed it fit to put two questions to the contending Parties, in the public sitting before the Court of 14.03.2014. The two questions were formulated as follows:

> "1. Have there been any recent initiatives to identify, and to clarify further the fate of the disappeared persons still missing to date?

280 ICJ, doc. CR 2014/10, of 06.03.2014, p. 20, para. 44.
281 *Ibid*., p. 20, para. 45.
282 *Ibid*., para. 39.
283 *Rejoinder*, para. 7.

> 2. Is there any additional and more precise updated information that can be presented to the Court by both Parties on this particular issue of disappeared or missing persons to date?"[284].

286. In response to my questions, Croatia elaborated further on the issue of the fate of disappeared persons. In this respect, it recalled that Article II of the Convention enumerates amongst the list of genocidal acts the causing of "serious (...) mental harm to members of the group". The questions I put to both Parties drew the Applicant to the case-law on the disappearance of persons. Recalling the Judgments of the IACtHR in the case of *Velásquez Rodríguez versus Honduras* (of 29.07.1988) and of the ECtHR in the case of *Varnava versus Turkey* (of 18.09.2009), as well as the Decision of the U.N. Human Rights Committee in the case of *C.A. de Quinteros et alii* versus *Uruguay* (1990), Croatia claimed that disappearance has continuing consequences in several respects. In the light of that jurisprudence, Croatia claims that the

> "'serious (...) mental harm' being suffered by the relatives of the disappeared is a direct result of acts for which Serbia is either responsible for its own actions or for which it has a responsibility to punish under the [Genocide] Convention. In this way, the continuing failure of Serbia to account for the whereabouts of some 865 disappeared Croats is an act or acts falling within Article II(b) of the Convention"[285].

287. As for the requested additional, and more precise updated information, on the issue of disappeared or missing persons, Croatia answered that such information can be found in the updated *Book of Missing Persons on the Territory of the Republic of Croatia*, published by Croatia's Directorate for Detained and Missing Persons, in conjunction with the Croatian Red Cross and the ICRC. It informed that the book sets out detailed data on those who were still missing as of April 2012[286]; however, as the figures concerning the disappeared are being constantly updated, the numbers provided in the 2012 book are already out of date.

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284 Questions put by Judge Cançado Trindade to both Croatia and Serbia, *in*: ICJ, doc. CR 2014/18, of 14.03.2014, p. 69.

285 ICJ, doc. CR 2014/20, of 20.03.2014, p. 15, para. 10.

286 ICJ, doc. CR 2014/20, of 20.03.2014, pp. 34-35, paras. 22-25.

288. Still in response to my questions to both Parties (*supra*), Croatia further contacted the Directorate for Detained and Missing Persons, on Monday 17.03.2014, and provided the ICJ with the most up-to-date figures relating to persons killed during the course of Serbia's attacks on Croatian territory in 1991-1992, namely: a) the bodies of 3,680 persons who were buried irregularly have been exhumed from 142 mass graves and many more individual graves; b) of those, the bodies of 3,144 persons have been positively identified; c) however, 865 persons who disappeared during that period are still missing[287].

289. For its part, Serbia, in its response to the questions I put to both Parties (*supra*), stated that tracing missing persons "is a complex and long-lasting process of cooperation between two sides", on the basis of the 1995 Bilateral Agreement on Cooperation in Tracing Missing Persons and the 1996 Protocol on Cooperation between two State Commissions[288]. It added that it was "fully aware of its task in the process of tracing missing persons regardless of their nationality and ethnic origin. The interest of families of the missing persons is a joint interest of Serbia and Croatia. It is also the interest of humanity as a whole, and the Republic of Serbia is dedicated to that task"[289]. As for the number of missing persons, Serbia claims that the Serbian list of missing persons, received from the Serbian Commission for Missing Persons in the territory of Croatia, today contains 1,748 names[290].

290. Finally, as regards the argument of continuing violation, – it added, – disappearance itself is not an act of genocide, but it is equivalent to enforced disappearance, a crime against humanity. Serbia relied on the definition of "enforced disappearance" contained in the 2006 U.N. Convention for the Protection of All Persons from Enforced Disappearance, which refers to "abduction or any other form of deprivation of liberty by agents of the State" and then "followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person" (Article 2).

287 *Ibid*., pp. 34-35, paras. 22-25.

288 ICJ, *Preliminary Objections* of Serbia; Annex 53, p. 367.

289 ICJ, doc. CR 2014/24, of 28.03.2014, pp. 60-61, para. 10.

290 However, Serbia did not consider that list to be evidence of the crime, or of State responsibility, and referred to the *Veritas* list of direct victims of "Operation Storm"; cf. ICJ, doc. CR 2014/24, of 28.03.2014, pp. 60-62, paras. 6-10.

291. According to Serbia, enforced disappearance is not a continuing violation of the right to life, with which the acts in Article 2 of the 2006 Convention bear an analogy. The reason why it may be a continuing violation of human rights, according to Serbia, is that the family of the victim is subject to ongoing "mental harm", or because of the procedural obligation to investigate the crime. Serbia claims that, if the crime continues today as Croatia asserts, so must the intent. Croatia is "in error to attempt to force this issue into the frame of Article 2 of the Genocide Convention, essentially so that it can bolster its argument on temporal jurisdiction"[291].

3. Outstanding Issues and the Parties' Obligation to Establish the Fate of Missing Persons

292. In the light of the aforementioned, it is clear the issue of missing persons remains one of the key problems raised in the proceedings of the *cas d'espèce*. Admittedly, the Parties had the intention in 1995 to tackle this issue: it may be recalled that in 1995, in Dayton, Croatia and Serbia celebrated an agreement, the purpose of which was to establish the fate of all missing persons and to release the prisoners[292]. In pursuance to that agreement, a Joint Commission was established and some progress was made with respect to missing persons[293]. Yet, there remain a number of outstanding issues that still need to be resolved.

293. For example, the Parties disagree on the role of the Commission. Croatia claims that the Commission, contrary to what was agreed in 1995 that all missing persons who disappeared in Croatia fell within the competence of Croatian authorities, is currently seeking to act as representative of all missing persons of Serb ethnicity, including those who are citizens of Croatia[294]. Serbia responds that this is needed in

291 ICJ, doc. CR 2014/23, of 28.03.2014, pp. 43-45, paras. 10-12.
292 Agreement on Cooperation in Finding Missing Persons (Dayton, 17.11.1995).
293 From August 1996 till 1998 Croatia was given access to information, the so-called protocols, for 1,063 persons who were buried at the Vukovar New Cemetery, and these protocols helped in the identification of 938 people. In 2001, exhumations started with respect to unidentified bodies buried in the Republic of Serbia, at marked gravesites. The remains of 394 persons have been exhumed so far, but, regrettably, only 103 bodies have been handed over to Croatia. In 2013, one mass grave was discovered in Sotin, in Eastern Slavonia, with 13 bodies, as a result of information provided by Serbia. Cf. ICJ, doc. CR 2014/21, of 21.03.2014, pp. 36-38.
294 ICJ, doc. CR 2014/21, of 21.03.2014, p. 37, para. 10.

order to represent the un-reported 1,000 Serbs from Croatia in the list of missing persons provided by Croatia to the Court[295].

294. Moreover, Croatia contends that Serbia has not yet returned the documents seized by the JNA from the Vukovar hospital in 1991, which are considered essential for the identification of the persons removed from the hospital[296]. Only a small part of those documents was returned, when the President of Serbia (Mr. Boris Tadić) visited Vukovar in November 2010. Both Parties appear unsatisfied with the efforts and activities of each other in this regard[297]. The Court ought thus to ask the Parties to cooperate in good faith in order to resolve those outstanding issues.

295. As the ICJ stated, in this respect, in the *Nuclear Tests* cases (Australia and New Zealand *versus* France, 1974), one of "the basic principles governing the creation and performance of legal obligations, whatever their source, is the principle of good faith. Trust and confidence are inherent in international cooperation" (paras. 46 and 49). On another occasion, in the *North Sea Continental Shelf* cases (F.R. Germany *versus* Denmark and Netherlands, 1969), the ICJ further pondered that the contending Parties "are under an obligation so to conduct themselves that the negotiations are meaningful" (para. 85).

4 The Extreme Cruelty of Enforced Disappearances of Persons as a Continuing Grave Violation of Human Rights and International Humanitarian Law

296. The extreme cruelty of the crime of enforced disappearance of persons has been duly acknowledged in international instruments, in international legal doctrine, as well as in international case-law. It goes beyond the confines of the present Dissenting Opinion to dwell at depth on the matter, – what I have done elsewhere[298]. I shall, instead, limit myself to identifying and invoking some pertinent illustrations,

295 ICJ, doc. CR 2014/24, of 28.03.2014, pp. 60-61, paras. 6-10.
296 ICJ, doc. CR 2014/21, of 21.03.2014, p. 38, para. 11.
297 *Ibid*., p. 38, para. 11.
298 A.A. Cançado Trindade, "Enforced Disappearances of Persons as a Violation of *Jus Cogens*: The Contribution of the Jurisprudence of the Inter-American Court of Human Rights", 81 *Nordic Journal of International Law* (2012) pp. 507-536; A.A. Cançado Trindade, *Tratado de Direito International dos Direitos Humanos* [*Treatise of International Law of Human Rights*], vol. II, Porto Alegre/Brazil, S.A. Fabris Ed., 1999, pp. 352-358.

with a direct bearing on the proper consideration of the *cas d'espèce*, concerning the *Application of the Convention against Genocide* (Croatia *versus* Serbia).

297. May I begin by recalling that, in 1980, the former U.N. Commission on Human Rights decided to establish its Working Group on Enforced or Involuntary Disappearances[299], to struggle against that international crime[300], which had already received world attention, in 19781979, at both the U.N. General Assembly[301] and ECOSOC[302], in addition to the former U.N. SubCommission for the Prevention of Discrimination and Protection of Minorities[303]. Subsequently, the 1992 U.N. Declaration on the Protection of all Persons from Enforced Disappearance provided (Article 1), *inter alia*, that

> "1. An act of enforced disappearance is an offence to human dignity. It is condemned as a denial of the purposes of the Charter of the United Nations and as a grave and flagrant violation of the human rights and fundamental freedoms proclaimed in the Universal Declaration of Human Rights and reaffirmed and developed in international instruments in this field.
>
> 2. Any act of enforced disappearance places the persons subjected thereto outside the protection of the law and inflicts severe suffering on them and their families. It constitutes a violation of the rules of international law guaranteeing, *inter alia*, the right to recognition as a person before the law, the right to liberty and security of the person and the right not to be subjected to torture and other cruel, inhuman or degrading treatment or punishment. It also violates or constitutes a grave threat to the right to life".

298. Subsequently, the 2007 U.N. Convention for the Protection of All Persons from Enforced Disappearance referred, in its preamble (5th paragraph) to the "extreme seriousness" of enforced disappearance, which, – it added in Article 5, – when generating a

299 Resolution 20 (XXXVI), of 29.02.1980.

300 For an account of its work, cf. F. AndreuGuzmán, "Le Groupe de travail sur les disparitions forcées des Nations Unies", 84 *Revue internationale de la CroixRouge* (2002) n. 848, pp. 803-818.

301 Resolution 33/173, of 20.12.1978.

302 Resolution 1979/38, of 10.05.1979.

303 Resolution 5B (XXXII), of 05.09.1979.

"widespread or systematic practice", constitutes "a crime against humanity in applicable international law", with all legal consequences. The 2007 Convention further referred (3rd preambular paragraph) to relevant (and converging) international instruments of International Human Rights Law, International Humanitarian Law, and International Criminal Law.

299. Parallel to these developments at normative level, the grave violation of enforced disappearance of persons has been attracting growing attention in expert writing[304], which has characterized it as an extremely cruel and perverse continuing violation of human rights, extending in time, owing to the consequences of the original act (or arbitrary detention or kidnapping), causing a duration in the suffering and anguish, if not agony or despair, of all those concerned (the missing persons and their close relatives), given the non-disclosure of the fate or whereabouts of disappeared or missing persons. The extreme cruelty of enforced disappearances of persons as a continuing grave violation of human rights and International Humanitarian Law has, furthermore, also been portrayed, as widely known, in the final reports of Truth Commissions, in distinct continents.

300. Soon international human rights tribunals (IACtHR and ECtHR) came to be seized of cases on the matter, and began to pronounce on it. The case-law of the IACtHR on the matter is pioneering, and nowadays regarded as the one which has most

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304 Cf., *inter alia*, e.g., R.S. Berliner, "The Disappearance of Raoul Wallenberg: A Resolution is Possible", 11 *New York Law School Journal of International and Comparative Law* (1990) pp. 391-432; R. Broody and F. González, "*Nunca Más*: An Analysis of International Instruments on `Disappearances´", 19 *Human Rights Quarterly* (1997) pp. 365-405; C. Callejon, "Une immense lacune du droit international comblée des Nations Unies pour la protection de toutes les personnes contre les disparitions forcées", 17 *Revue trimestrielle des droits de l'homme* (2006) pp. 337-358; T. Scovazzi and G. Citroni, *The Struggle against Enforced Disappearance and the 2007 United Nations Convention*, Leiden, Nijhoff, 2007, pp. 1-400; G. Venturini, "International Law and the Offence of Enforced Disappearance", *in*: *Diritti Individuali e Giustizia Internazionale – Liber F. Pocar* (eds. G. Venturini and S. Bariatti), Milano, Giuffrè, 2009, pp. 939-954; L. Ott, *Enforced Disappearance in International Law*, Antwerp, Intersentia, 2011, pp. 1-294; M.L. Vermeulen, *Enforced Disappearance: Determining State Responsibility under the International Convention for the Protection of All Persons from Enforced Disappearance*, Utrecht, Intersentia, 2012, pp. 1-507; I. Giorgou, "State Involvement in the Perpetration of Enforced Disappearance and the Rome Statute", 11 *Journal of International Criminal Justice* (2013) pp. 1001-1021.

contributed to the progressive development on international law in respect of the protection of all persons from enforced disappearance[305]. In its early Judgment in the case of *Velásquez Rodríguez versus Honduras* (of 29.07.1988), the IACtHR drew attention to the complexity of enforced disappearance, as bringing about, concomitantly, continuing violations of rights protected under the ACHR, such as the rights to personal liberty and integrity, and often the fundamental right to life itself (Articles 7, 5 and 4).

301. It is, in sum, a grave breach of the States' duty to respect human dignity (paras. 149-158). It was in its landmark Judgments, one decade later, in the case of *Blake versus Guatemala* (of 1996-1999)[306], that the IACtHR dwelt upon, and elaborated, on the legal nature and consequences of enforced disappearances, its characteristic elements, the victimized persons, and the engagement of State responsibility in a temporal dimension.

302. The *Blake* case occurred within a systematic pattern of enforced disappearances of persons, State-planned, and perpetrated not only to "disappear" with persons regarded as "enemies", but also to generate a sense of utter insecurity, anguish and fear; it involved torture, secret execution of the "disappeared" without trial, followed by concealment of their mortal remains, so as to eliminate any material evidence of the crime and to ensure the impunity of the perpetrators.

303. In its Judgment on the merits (of 24.01.1998) in the *Blake* case, the IACtHR asserted that enforced disappearance of persons is a *complex, multiple and continuing violation of a number of rights* protected by the ACHR (rights to life, to personal integrity, to personal liberty), generating the State Party's duty to prevent, investigate and punish such breaches and, moreover, to inform the victim's next of kin of the missing person's whereabouts (paras. 54-58). In the IACtHR's view, the close relatives of the disappeared person were also victims, *in their own right*, of the enforced disappearance, in breach of the relevant provisions of the ACHR.

304. In my Separate Opinion appended to that Judgment of the IACtHR in the *Blake* case, I deemed it fit to stress that enforced

305 Cf., to this effect, e.g., T. Scovazzi and G. Citroni, *The Struggle against Enforced Disappearance..., op. cit. supra* n. (296), pp. 101, 132 and 398.

306 IACtHR, Judgments on preliminary objections (of 02.07.1996), merits (of 24.01.1998) and reparations (of 22.01.1999).

disappearance of persons was indeed a grave and complex violation of human rights, besides being a *continuing or permanent violation* until the whereabouts of the missing victims was established, as pointed out in the *travaux préparatoires* of the 1985 Inter-American Convention on Enforced Disappearance of Persons, and as acknowledged in Article III of the Convention itself (para. 9).

305. In the same Separate Opinion, I next warned against the undue fragmentation of the delict of enforced disappearance of persons, drawing attention to the fact that we were here before fundamental or non-derogable rights (paras. 12-14), and there was need to preserve the special character and the integrity of human rights treaties (paras. 16-22). And I proceeded:

> "We are, definitively, before a particularly *grave* violation of multiple human rights. Among these are *non-derogable* fundamental rights, protected both by human rights treaties as well as by International Humanitarian Law treaties[307]. The more recent doctrinal developments in the present domain of protection disclose a tendency towards the 'criminalization' of grave violations of human rights, – as the practices of torture, of summary and extra-legal executions, and of enforced disappearance of persons. The prohibitions of such practices pave the way for us to enter into the *terra nova* of the international *jus cogens*. The emergence and consolidation of imperative norms of general international law would be seriously jeopardized if one were to decharacterize the crimes against humanity which fall under their prohibition" (para. 15).

306. Still in respect to the legal nature and consequences of the enforced disappearance of persons, I added:

> "In a continuing situation proper to the enforced disappearance of person, the victims are the disappeared person (main victim) as well as his next of kin; the indefinition generated by the enforced disappearance

307 Cf., e.g., the provisions on fundamental guarantees of Additional Protocol I (of 1977) to the Geneva Conventions on International Humanitarian Law (of 1949), Article 75, and of the Additional Protocol II (of the same year), Article 4.

withdraws all from the protection of the law[308]. The condition of victims cannot be denied also to the next of kin of the disappeared person, who have their day-to-day life transformed into a true calvary, in which the memories of the person dear to them are intermingled with the permanent torment of his enforced disappearance. In my understanding, the complex form of violation of multiple human rights which the crime of enforced disappearance of person represents has as a consequence the *enlargement of the notion of victim* of violation of the protected rights" (paras. 32-38).

307. In my subsequent Separate Opinion in the *Blake versus Guatemala* case (reparations, Judgment of 22.01.1999), I insisted on the need to consolidate the "international regime against *grave* violations of human rights", in the light of the peremptory norms of international law (*jus cogens*) and of the corresponding obligations *erga omnes* of protection of the human being (para. 39). By means of such development, – I added, – one would "overcome the obstacles of the dogmas of the past", and the current inadequacies of the law of treaties, so as to get "closer to the plenitude of the international protection of the human being" (para. 40).

308. Other pertinent decisions of the IACtHR could be recalled, e.g., as to the need to overcome limitations or restrictions ratione temporis, given the legal nature of enforced disappearance (*supra*), the IACtHR's decisions also in the cases of *Trujillo Oroza versus Bolivia* (2000-2002), and of the *Sisters Serrano Cruz versus El Salvador* (2005); and, as to the aggravating circumstances of the grave breach of enforced disappearance, the IACtHR's decisions in the cases of *Bámaca Velásquez versus Guatemala* (2000-2002), of *Caracazo versus Venezuela* (1999-2002), of *Juan Humberto Sánchez versus Honduras* (2003), and of *ServellónGarcía et alii versus Honduras* (2006).

309. For its part, the ECtHR has also had the occasion to pronounce on aspects the matter at issue. For example, in its Judgment (of 10.05.2001) in the *Cyprus versus Turkey* case, it stressed the endurance of "agony" of the family members of the missing persons, for not knowing their whereabouts (para. 157). Shortly afterwards, in

308 Cf., in this sense, Article 1(2) of the U.N. Declaration on the Protection of All Persons against Enforced Disappearances.

its Judgment (of 18.06.2002) in the *Orhan versus Turkey* case, in again addressed, – as in earlier decisions, – the "vulnerable position" of the individuals concerned (paras. 406-410). Other pronouncements of the kind were made by the ECtHR in the cycle of cases (of last decade) arising out of the armed conflict in Chechnya.

310. In a particularly illustrative decision, the ECtHR, in its Judgment (of 18.09.2009) in the case of *Varnava and Others versus Turkey*, stated that a disappearance is

> "characterised by an ongoing situation of uncertainty and unaccountability in which there is a lack of information or even a deliberate concealment and obfuscation of what has occurred […]. This situation is very often drawn out over time, prolonging the torment of the victim's relatives. It cannot therefore be said that a disappearance is, simply, an 'instantaneous' act or event; the additional distinctive element of subsequent failure to account for the whereabouts and fate of the missing person gives rise to a continuing situation. Thus, the procedural obligation will, potentially, persist as long as the fate of the person is unaccounted for; the ongoing failure to provide the requisite investigation will be regarded as a continuing violation (...) This is so, even where death may, eventually, be presumed" (para. 148).

5. General Assessment

311. In the light of the aforementioned, in so far as the present case of the *Application of the Convention of Genocide* (Croatia *versus* Serbia) is concerned, one cannot thus endorse Serbia's view, expressed during the oral proceedings, whereby enforced disappearance may not be a continuing violation of the right to life as enshrined in Article II of the Genocide Convention. Serbia asserts that the reason why it might be a continuing violation of human rights is that the family of the victim is subject to ongoing mental harm, and this brings into play the prohibition of ill-treatment, or because of the procedural obligation to investigate the crime. According to Serbia, this issue "might belong in Strasbourg, but certainly not in The Hague"[309].

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309 ICJ, doc. CR 2014/23, of 28.03.2014, p. 44, para. 12.

312. Both the ICJ and the ECtHR in Strasbourg are concerned with *State* responsibility. Recent cases (such as the *Georgia versus Russian Federation* case, concerning the fundamental principle of equality and non-discrimination and the corresponding norms in distinct but converging international instruments) have been brought *before both the ICJ and the ECtHR*; the Hague Court and the ECtHR in Strasbourg do not exclude each other, as recent developments in the work of contemporary international tribunals have clearly been showing. This is reassuring for those engaged in the international protection of the rights of the human person, and the *justiciables* themselves.

313. The pioneering and substantial case-law of the IACtHR, together more recently with the case-law of the ECtHR, on the matter at issue, is essential for an understanding of the gravity of the crime of enforced disappearance of persons and of its legal consequences. As to its legal nature, the two aforementioned international human rights tribunals have asserted the complex and continuing violations of the protected rights, while disappearance lasts. In its ground-breaking decisions in the *Blake* case (1996-1998), the IACtHR established the *expansion of the notion of victims* in cases of disappearance, so as to comprise the missing person as well as their close relatives, *in their own right*. This has become *jurisprudence constante* of the IACtHR and the ECtHR on the issue.

314. May I add, in this connection, that the provisions of Article II(b) of the Convention against Genocide, referring to "serious (...) mental harm to members of the group", makes the connection with a continuing violation rather clear. As I pondered in my Dissenting Opinion in the case of the *Jurisdictional Immunities of the State* (Germany *versus* Italy, Greece intervening), "one cannot take account of inter-temporal law only in a way that serves one's interests in litigation, accepting the passing of time and the evolution of law in relation to certain facts but not to others, of the same *continuing* situation" (para. 17).

315. The fact that a close family member of the missing persons is a member of the same group, and is also subject to a continuing mental harm, prolonging indefinitely in time, together with the State concerned's failure to account for the missing persons, or to take reasonable steps to assist in the location of such persons, in my

perception, brings into play the prohibition of acts proscribed by the Genocide Convention, including the obligation to investigate.

316. May I further add, still in this connection, the relevance of the case-law of international human rights tribunals (in particular that of the IACtHR, since its start[310]), to the effect of applying a proper standard of proof, in cases of grave violations (such as enforced disappearances of persons, torture of *incommunicado* detainees, among others), when State authorities hold the monopoly of probatory evidence, and victims have no access to it, thus calling for a shifting of the burden of proof[311]. In cases of grave violations, such as enforced disappearances of persons, the burden of proof cannot certainly be made to fall upon those victimized by those violations (including, of course, the close relatives of the missing persons, who do not know their whereabouts).

317. The effects of enforced disappearances of persons upon the close relatives of missing persons are devastating. They destroy whole families, led into agony or despair. I learned this from my own experience in the international adjudication of cases of this kind. In the present Judgment, the ICJ does not seem to have apprehended the extent of those devastating effects. To require from close relatives, as it does (para. 160), further proof (of serious suffering), so as to fall under Article II(b) of the Genocide Convention, amounts to a true *probatio diabolica*!

318. The serious mental harm (Article II(b)) caused to those victimized can surely be presumed, and, in my view, there is no need to demonstrate that the harm itself contributed to the destruction of the targeted group. Yet, the Court requires such additional proof (para. 160 *in fine*). In doing so, it renders the determination of State responsibility for genocide, under Article II(b) of the 1948 Convention, and of its legal consequences (for reparations), an almost impossible task. The Court's outlook, portrayed in its whole reasoning throughout the present Judgment is State sovereignty-oriented, not people-oriented, as it should be under the Convention against Genocide, the applicable law in the *cas d'espèce*.

319. Last but not least, the point I have already made about the absolute prohibition (of *jus cogens*) of torture (para. 225, *supra*), in any circumstances, applies likewise to all the other grave violations of

310 Cf. part VII of the present Dissenting Opinion, *supra*.
311 Cf. parts VII-VIII of the present Dissenting Opinion, *supra*.

human rights and International Humanitarian Law which occurred in the attacks in Croatia, and that have been examined above, namely: massive killings, rape and other sexual violence crimes, enforced disappearance of persons, systematic expulsion from homes and forced displacement of persons (in mass exodus), destruction of group culture.

320. The prohibition of all those grave violations, like that of torture, in all its forms, is a prohibition belonging to the realm of *jus cogens*[312], the breach of which entails legal consequences, calling for reparations[313]. This is in line with the idea of *rectitude* (in conformity with the *recta ratio* of natural law), underlying the conception of Law (in distinct legal systems – *Droit* / *Right* / *Recht* / *Direito* / *Derecho* / *Diritto*) as a whole.

XIII. ONSLAUGHT, NOT EXACTLY WAR, IN A WIDESPREAD AND SYSTEMATIC PATTERN OF DESTRUCTION

1. Plan of Destruction: Its Ideological Content

321. The occurrence of a widespread and systematic pattern of destruction has been established in the present case concerning the *Application of the Convention against Genocide*, opposing Croatia to Serbia (cf. *supra*). The devastation pursued a plan of destruction, that was deliberately and methodically carried out: aerial bombardment, shelling, indiscriminate killings, torture and beatings, rape, destruction of homes and looting, forced displacement and deportation. The execution of the plan of destruction has already been reviewed (cf. *supra*), and in my view established in the *cas d'espèce*. The plan of destruction pursued by the Serbian attacks in Croatia had an ideological component, which goes back to the historical origins of the conflict.

312 Two contemporary international tribunals which, by their evolving case-law, have much contributed to the expansion of the material content of *jus cogens*, have been the IACtHR and the ICTFY; cf. A.A. Cançado Trindade, *International Law for Humankind – Towards a New Jus Gentium*, *op. cit. supra* n. (67), pp. 295-311; A.A. Cançado Trindade, "*Jus Cogens*: The Determination and the Gradual Expansion of Its Material Content in Contemporary International Case-Law", *in XXXV Curso de Derecho Internacional Organizado por el Comité Jurídico Inter-Americano – 2008*, Washington D.C., General Secretariat of the OAS, 2009, pp. 3-29.

313 Cf. part XVI of the present Dissenting Opinion, *infra*.

a) Arguments of the Contending Parties

322. The point was addressed, to a certain depth in the written phase of the present proceedings, particularly by Croatia. In its *Memorial*, it argued that a catalytic event in relation to the genocide allegedly perpetrated against the Croats was the appearance in 1986 of the *Memorandum by the Serbian Academy of Sciences and Arts* (the "*SANU Memorandum*"). The *Memorandum*, – it added, – which set forth a Serb nationalist reinterpretation of the recent history of the SFRY, carried great weight and reflected the then growing Serbian nationalist movement; it helped to give rise, in its view, to the circumstances for the perpetration of genocide in Croatia[314].

323. By emphasising the right of the Serbian people "to establish their full national and cultural integrity regardless of which republic or autonomous province they live in", the *Memorandum* provided the idea of a "Greater Serbia", including parts of the territory in Croatia and Bosnia and Herzegovina within which significant Serbian ethnic populations lived. Furthermore, the *SANU Memorandum* provided a detailed analysis of the "crisis" in the SFRY, and it established the idea that Serbia was "the only nation in Yugoslavia without its own state". It bypassed the political and geographical divisions enshrined in the 1974 Constitution[315].

324. Croatia stressed that the ideas proposed in the *Memorandum* were based on other views expressed by the Serbian intellectual community (including Serbian historians, scientists, writers and journalists) on how Serbs had been "tricked", "stinted", "killed", "persecuted even after being subjected to genocide". The *Memorandum* gained support from militant groups, prompting a nationalist campaign[316].

325. Croatia further argued that the ideas set out in the *SANU Memorandum* "gave vent to the theory that the Croatian people were collectively to blame for the large number of Serbs that were killed by the Ustashas during the period 1941-1945, and were, accordingly, by

314 *Memorial*, para. 2.43.
315 *Ibid.*, paras. 2.44-2.47.
316 According to Croatia, "[a]rticles appeared and speeches were given which promoted Serbian nationalism, demonized the Albanians, the Muslims and the Croats and invoked their genocidal tendencies, and validated the Chetnik movement"; *ibid.*, paras. 2.48-2.51.

their very nature, genocidal in character and adhering to a continuing genocidal intent against the Serbs"[317]. Croatia added that the JNA was transformed from an army of the SFRY into a "Serbian Army" promptly after the publication of the *Memorandum*[318].

326. Serbia, for its part, briefly responded, in its *Counter-Memorial*, to Croatia's arguments concerning the *Memorandum*. It claimed that they amounted to an "enormous exaggeration", given that the Serbs never had the intent to perpetrate genocide against Croats, and that the *Memorandum* never contemplated the occurrence of genocide[319]. Croatia retook the issue in its *Reply*, wherein it reiterated the importance of the *SANU Memorandum* for the perpetration of genocide.

327. It dismissed Serbia's claim of its arguments being an "enormous exaggeration", saying that they are supported by a number of independent sources, which also described the *Memorandum* as a "political bombshell". Croatia further stated that an expert report from the ICTFY, on the use of propaganda in the conflict at issue, came to the conclusion that it was the deliberate leaks of the SANU Memorandum that raised the issue of Serbian nationalism publicly (cf. *infra*).

328. Croatia insisted that the emergence of extreme Serbian nationalism was accompanied by the idea that the Croats had always had a genocidal intent against the Serbs, a theory – articulated in 1986 and then followed by Serbian historians and journalists – that claimed that the Croatian people were collectively to blame for the large number of Serbs who were killed by the "Ustasha" between 1941-45 (e.g., the concentration camp in Jasenovac), during the II world war, pursuant to a plan that had a continuing genocidal intent against the Serbs[320]. According to Croatia, various inflammatory articles published by the media contributed to this idea from 1986 to 1991[321].

329. Also during the oral phase of the present proceedings, Croatia reiterated its arguments (*supra*), whereas Serbia did not submit any substantial new argument in this respect. Croatia asserted that the publication of the *SANU Memorandum* in 1986 precipitated a period of extreme nationalist propaganda within Serbia, as from the premise

317 *Ibid.*, para. 2.52.
318 *Ibid.*, para. 3.03.
319 *Counter-Memorial*, para. 428.
320 *Reply*, paras. 3.10-3.12.
321 *Ibid.*, paras. 3.12-3.14.

that Serbia and the Serbs in the other Republics of the SFRY "were in a uniquely unfavourable position within the SFRY", and from the proposal of a review of the SFRY Constitution, so that autonomous provinces would become an integral part of Serbia, and the Federal State would be strengthened. Croatia also referred to an expert report (by Professor A. Budding), which referred to the *Memorandum* as "a political firestorm" because of its "inflammatory" language[322].

b) Examination of Expert Evidence by the ICTFY

330. As brought to the attention of the ICJ in the course of the proceedings of the present case (cf. *supra*), the ICTFY, in its decision of 16.06.2004 in the case *S. Milošević*, duly took into account expert evidence concerning the ideological component of the plan of destruction at issue. The first expert report presented to the ICTFY, compiled at the request of its Office of the Prosecutor, was titled "*Political Propaganda and the Plan to Create a 'State for All Serbs' – Consequences of Using the Media for UltraNationalist Ends*" (of 04.02.2003, by R. de la Brosse).

331. According to the expert report, the regime of Slobodan Milošević sought to take "total control over the media owned by the State or public institutions", restricting its freedom and "using all means to prevent it from informing people". Its control of the audio-visual media "began in 1986-1987 and was complete in the summer of 1991" (para. 27). The expert report proceeded that "[t]he media were used as weapons of war", in order to achieve "strategic objectives", such as "the capture of territories by force, the practice of ethnic cleansing, and the destruction of targets described as symbolic and having priority". The plan combined

> "propaganda, partial (and biased) information, false news, manipulation, non-coverage of certain events, etc. This entire arsenal would be mobilised to help justify the creation of a State for all Serbs (...).

322 ICJ, doc. CR 2014/5, of 03.03.2014, pp. 33-35. The *Memorandum*, Croatia reiterated, paved the way for the publication of articles in the Serbian media, referring to the alleged Croats' genocidal tendencies, and recalling the horrific crimes the Ustasha régime committed against the Serbs during the II world war (e.g., the concentration camp in Jasenovac); ICJ, doc. CR 2014/5, of 03.03.2014, p. 35; and cf. also ICJ, doc. CR 2014/12, of 07.03.2014, pp. 22-23.

> (...) [T]he terms 'Ustasha fascists' and 'cut-throats' were used to stigmatise the Croats and 'Islamic Ustashas' and 'Djihad fighters' to describe the Bosnian Muslims pejoratively. Systematic recourse to such key words imposed on the media by the Milošević regime undoubtedly provoked and nourished hateful behaviour toward the non-Serbian communities.
>
> (...) Systematic recourse to false, biased information and non-coverage of certain events made it possible to inspire and arouse hatred and fear among the communities. The media prepared the ground psychologically for the rise in nationalist hatred and became a weapon when the war broke out.
>
> (...) Historical facts were imbued with mystical qualities to be used as nationalist objectives so that the Serbian people would feel and express a desire for revenge directed at the prescribed enemies, the Croats and Muslims (...)" (paras. 28-31).

332. The expert report went on to state that, by the invocation of "the scars of the 1940 war" (para. 35), "the use of the media for nationalist ends and objectives formed part of a well-thought through plan" (para. 32). It added that the 1986 *SANU Memorandum* constituted an "encouragement" for "Serbian nationalism" (para. 40). The official propaganda drew on the historical sources of "Serbian mystique", with its victims and the injustices they suffered throughout history (paras. 46-49)[323]. State authorities sought to condition public opinion in order "to justify the upcoming war with Croatia" (para. 54, and cf. para. 61). "Disinformation" was used in order "to mislead or to conceal and misrepresent facts", and to make up "false news" (paras. 72 and 77).

333. The second expert report submitted (by the Prosecution) to the ICTFY in its decision in the case *S. Milošević* (2004), and referred to by Croatia in its oral pleadings in the present case before the ICJ, was titled "*Serbian Nationalism in the Twentieth Century*" (of 29.05.2002, by A. Budding). The expert report provided historical information and the factual context for the understanding of waking Serbian national

323 The media contributed to "demonising the other communities, especially the Kosovo Albanians, Croats and Bosnian Muslims" (para. 52).

awareness, and the sequence of events which led to the disintegration of the Yugoslav State and the outbreak of the wars in the region.

334. The expert report also referred to the 1986 *SANU Memorandum* (p. 32), explaining its origins and its consequences for the whole of former Yugoslavia (pp. 36-37). It characterized the *Memorandum* as "by far the most famous document in the modern Serbian national movement" (p. 36). Referring to the expert report, Croatia argued that the *Memorandum* set off "a political firestorm", and that it was "inflammatory because of the contrast between its complaints about the position of Serbia and Serbs within Yugoslavia and its 'vague and elliptical references to a possible post Yugoslav future'"[324]. According to the expert report,

> "Memorandum nije raspalio debatu u Jugoslaviji zato što je u njemu eksplicitno iznet srpski nacionalni program posle Jugoslavije – pošto i nije – već zbog kontrasta između detaljnih i preteranih primedbi na položaj Srbije unutar postojeće jugoslovenske države, koje su iznete u Memorandumu, kao i neodređenog pozivanja na moguću budućnost posle Jugoslavije (tvrdnja da Srbija mora 'jasno da sagleda svoje privredne i nacionalne interese kako je događaji ne bi iznenadili'). Autori Memoranduma su sugerisali da bi nacionalne alternative višenacionalnoj jugoslovenskoj državi mogle biti poželjne, ali su propustili da priznaju da bi njihovo stvaranje neizbežno podrazumevalo uništenje"[325].

335. In the same case of *S. Milošević*, the ICTFY also took into account the declaration of an expert witness (T. Zwaan), which is summed up in its decision of 16.06.2004. According to the ICTFY, the expert witness testified about "the importance of ideology and use of

324 ICJ, doc. CR 2014/5, pp. 33-35.

325 [Unofficial translation:]
"The Memorandum became an inflammatory element in the Yugoslav debate not because it explicitly set out a post-Yugoslav Serbian national programme – and indeed it did not – but rather because of the contrast between its detailed and exaggerated remarks on the position of Serbia within the existing Yugoslav State, and its vague and elliptical references to a possible post-Yugoslav future (the assertion that Serbia must 'look clearly at its economic and national interests, so as not to be caught by surprise by the course of events'). The authors of the Memorandum suggested that national alternatives to the multinational Yugoslav State would be desirable without acknowledging the destruction that their creation would inevitably entail" (p. 31).

propaganda" in processes "leading to the commission of genocide, involving various types of radical nationalism, which dehumanise the targeted group", also misusing "collective historical memory" to that end (para. 234). It added that "genocide is a crime of State", as

> "genocidal crimes never develop from the 'bottom up'; they are 'top down' affairs. Such crimes occur with the 'knowledge, approval and involvement of the State authorities'" (para. 234).

336. Yet a third expert report compiled for the ICTFY (at the request of its Prosecution), for its adjudication of the case of *S. Milošević* (2004), titled "*On the Aetiology and Genesis of Genocides and Other Mass Crimes – Targeting Specific Groups*" (of November 2003, by T. Zwaan), purported to consider, in a condensed way, the learning that exists nowadays in relation to genocide, from an interdisciplinary perspective. The expert report, at the end of the examination of the matter, reached the following findings:

> "Firstly, (...) genocide and other mass crimes targeting specific groups should be carefully distinguished from war and civil war, while at the same time one should recognise that situations of war of civil war may contribute in various ways to the development of genocidal processes.
>
> Secondly, it has been pointed out that genocidal crimes only develop and take place under conditions of serious and enduring crisis. A general model of the emergence of such crises has been presented in a very condensed form. Destabilisation of the state-society concerned, polarisation processes, depacification, and increasing use of violence are at the heart of such crises.
>
> Thirdly, in the course of the crisis a radical and ruthless political elite may succeed in taking over the State organisation. The political behaviour and decisions of this political leadership may be considered of decisive importance for the emergence of genocide. It has been argued that a genocidal process does not develop from 'bottom up', but that is typically a 'top down' development, although the precise involvement of the state may take different forms. One corollary is that the highest state authorities are always responsible for what

happens during the genocidal process, another corollary implies that "single" acts of genocide should be (also) considered against the background of the prevalent power and authority structure within the state-society concerned.

Fourthly, it has been emphasised that genocides may be best seen as (highly complex) processes, with a beginning, a structured course in which phases can be discerned, and an end – usually brought about by forceful external intervention. Furthermore, in trying to understand a genocidal process attention should be paid to the decisionmaking, the gradual emergence of planning and organisation, and the division of labour within the category of perpetrators.

Fifthly, it has been argued that ideology is also of crucial importance for genocide to emerge. Usually, varieties of radical nationalism will figure prominently. They contribute to the development of an extremist political climate; to the marking off of the groups or categories to be targeted; they legitimise, rationalise, and justify the genocidal process; and impart to the perpetrators a sense of direction, intent and purpose.

Sixthly, it has been underlined that every genocidal process should also be considered from the angle of the victims, who are typically chosen because of their supposed membership of a group or category targeted for persecution. It has been argued, moreover, that such groups are made increasingly vulnerable and defenceless through the process of persecution itself, that it is usually very difficult for them to foresee what is going to happen, and that their possible courses of (re)action are severely limited. Keeping their fate central in one's mind seems to be the best compass when studying, assessing and judging genocide" (pp. 38-39).

c) Ideological Incitement and the Outbreak of Hostilities

337. In effect, in the course of the proceedings, both contending Parties paid special attention to the origins and the factual background of the conflict in the Balkans in the present case concerning the *Application of the Convention against Genocide*. Both Croatia and Serbia expressed their awareness that the historical context helps to understand better

the causes that lead to the war in Croatia and its pattern of destruction. They expressed their views, in particular, in the written phase of the *cas d'espèce*. The applicant State contended that the devastation that took place in Croatia was a consequence of the exponential growth of Serbian nationalism in order to build a "Greater Serbia".

338. Thus, in its *Memorial*, Croatia provided an overview of the background of the dispute, deeming it essential to understand what happened, in order to bring justice and redress to the victims[326]. Focusing on the formation of the FRY, the rise of "Greater-Serbian" nationalism in the eighties and the rise of S. Milošević to power[327], Croatia argued that, although the inherent tensions (between ethnic groups) had been suppressed for many years, after President Tito's death, federal institutions were usurped by the new Serbian leadership (under S. Milošević), which aimed at establishing a Serbdominated Yugoslavia, or a "Greater Serbia", to include within its borders more than half of the territory of Croatia[328].

339. The Serbian State-controlled media – it proceeded – systematically demonized the targeted non-Serb ethnic groups, creating a climate conducive to genocide, inciting and justifying it[329]. After tension grew in Kosovo in 1981, – Croatia claimed, – Serb nationalists began to express their ideas more openly and frequently; it singled out the 1986 *SANU Memorandum*, as a manifesto setting forth a Serb nationalist reinterpretation of the recent history of the SFRY, which gave rise to a feeling of anger and revenge against Croats[330]. Moreover, according to Croatia, there was a large propaganda validating the Chetnik movement and their goals, and S. Milošević was able to capture such feelings and to promote himself as a defender of Serbian interests[331].

340. In its *Counter-Memorial*, Serbia submitted that much of what occurred in the Balkans in 1991-1995 was influenced by the atrocities

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326 *Memorial*, paras. 2.01-162 and 1.14.
327 *Ibid*., paras. 2.05-35, 2.36-59 and 2.60-84, respectively. As to the historical background (in the II world war), cf. *ibid*., paras. 2.08-2.09, and cf. para. 2.53.
328 *Ibid*., para. 1.26.
329 *Ibid*., para. 1.26.
330 *Ibid*., paras. 2.40, 2.43, 2.51-3 and 2.56. – The Croats were demonized and blamed for the deaths of Serbs during the II world war in concentration camps, and an instigated feeling of anger and revenge arose among the Serbs; according to Croatia, the 1986 *SANU Memorandum* was a key element to that end.
331 *Ibid*., paras. 2.54-6 and 2.60.

against Serbs in 1941-1945 and the rise of nationalism in the SFRY[332]. The events leading to the conflict of 1991-1995 and the conflict itself, according to Serbia, cannot be understood without taking this into account"[333]. Serbia further stated that there was a rise of nationalism in the SFRY, following Tito's death, among Serbians but also Croatians[334].

341. Serbia conceded that there were abundant hate speech and extreme nationalism demonstrations in Serbian media in the late eighties and along the nineties, but it claimed that such was the case also in Croatia. It did not contest that Serbian nationalists misused the recollections of past events, though it contended that the claims made in this regard by Croatia were not always accurate; it finally added that Serbian nationalism could not be held solely accountable for the conflict[335].

342. In its *Reply*, Croatia stated that, according to an expert report from the ICTFY, the *SANU Memorandum* sparked Serbian nationalism publicly[336], giving vent to the view that the Croatian people was collectively to blame for the large number of Serbs who had been killed by the Ustashas in 1941-1945[337]. It then rebutted the claims of revival of Croatian nationalism and of hate speech and discriminatory policies against the Serbs[338]. For its part, in its *Rejoinder*, Serbia contended that the historical background helps to understand the events which originated the war. It reaffirmed that the causes were not onesided and that the claims of Croatia were in its view inaccurate[339]; at last, it requested the ICJ to examine the history of the conflict from both the applicant's and the respondent's perspectives[340].

343. In the oral phase of the proceedings in the *cas d'espèce*, one of the witnessexperts (Ms. S. Biserko) specifically addressed the factual background of the conflict and the developments that led to the atrocities. She singled out the idea of a "Greater Serbia" reviving Serbian nationalism, with its propaganda; the aim of territorial

332 *Counter-Memorial*, paras. 397-426, and cf. paras. 397, 400, 409 and 419.
333 *Ibid.*, para. 419.
334 *Ibid.*, para. 422.
335 *Ibid.*, paras. 434-435, 420 and 424.
336 *Reply*, para. 3.11.
337 *Ibid.*, para. 3.12.
338 *Ibid.*, paras. 3.17-24.
339 *Rejoinder*, para. 35.
340 *Ibid.*, para. 36.

expansion; the rise of S. Milošević and its policies; and the media reports – between 1988 and 1991 – preparing Serbs for the forthcoming armed attacks in Croatia and Bosnia-Herzegovina[341].

344. The contending Parties themselves, in the course of the proceedings in the *cas d'espèce*, focused – each one in its own way – on the impact of hate speech. Croatia claimed that Serbia sponsored hate speech and propaganda in inciting genocide[342]. Hate speech, in its view, was an important factor in the preparations for the Serbian armed incursions in Croatia[343]. Serbia acknowledged that the media in the country – in the late eighties and along the nineties – constantly broadcasted hate speech, but claimed that such was also the case in Croatia[344].

345. Serbia admitted that hate speech was abundant in Serbian media at the end of the eighties and during nineties[345], but claimed that it was not confined to Serbia, and also existed in Croatia[346]. Croatia argued that, as from the early eighties, several Serbian newspapers ran inflammatory articles about the Ustasha concentration camp in Jasenovac, during the II world war[347]. Croatia challenged Serbia's claim that it had also promoted hate speech against the Serbs[348]. Serbia, for its part, attempted to minimize the proof of incitement to hatred[349].

346. In its oral arguments, Croatia referred, e.g., to S. Milošević's speech to the Serbian parliament in March 1991[350], and to the hate speech of the extremist Serb nationalist Z. Raznjatović (known as Arkan) against the Croats, constantly referred to as "Ustashas"[351]. Serbian newspapers, – it added, – ran inflammatory articles about the Ustasha concentration camp in Jasenovac, as a reference to the II world war crimes committed against the Serbs by the Ustasha regime[352].

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341 Cf. ICJ, CR 2014/7, of 04.03.2014.
342 *Memorial*, paras. 1.16, 2.04, 2.43-50, 2.51-53, 2.56-59, 2.63-66, 8.16 and 8.23-24.
343 *Ibid.*, para. 2.58.
344 Cf. *Counter-Memorial*, paras. 434-442.
345 Cf. *ibid.*, paras. 434-437, 439-442 and 953-954.
346 *Ibid.*, para. 439.
347 Cf. *Reply*, paras. 3.10-3.14, 3.26-3.27, 3.31-3.33, 3.131 and 9.52.
348 Cf. *ibid.*, paras. 3.26-3.27, and cf. para. 9.52.
349 Cf. *Rejoinder*, paras. 340-342.
350 Cf. ICJ, doc. CR 2014/5, of 03.03.2014, para. 20.
351 Cf. ICJ, doc. CR 2014/5, of 03.03.2014, para. 30; and cf. also *Memorial*, vol. 5, App. 3, pp. 64-65, paras. 43-45.
352 Cf. ICJ, doc. CR 2014/5, of 03.03.2014, para. 12.

347. Serbia, in turn, cited statements from Croatian press and politicians[353]. Croatia retorted that the examples cited by Serbia were in sharp contrast with the Serbian hate speech that emanated from Serbian State media and its most senior leaders[354]. It further insisted that the Serb population's fear against Croats was created by the hatespeech campaign against Croats and their demonization as "Ustasha[s]"[355].

348. In the present Judgment, the ICJ flatly dismissed an examination of the historical origins of the onslaught in the Balkans, in the following terms: – "The Court considers that there is no need to enter into a debate on the political and historical origins of the events that took place in Croatia between 1991 and 1995" (para. 412). Even without embarking on such an examination, the Court, e.g., dismissed the relevance of the *SANU Memorandum*, for having "no official standing" and for not proving *dolus specialis* (para. 412).

349. Yet, in the course of the proceedings in the *cas d'espèce*, that document was cited not to this effect, but only to explain the historical origins of the devastation in Croatia, which the Court found unnecessary to examine in the present Judgment. Once again, I regret not to be able to follow the Court's majority on the handling of this question either, and I lay on the records, in the present Dissenting Opinion, the reasons of my disagreement with the dismissive posture of the Court thereon, particularly bearing in mind that both contending Parties dwelt upon the issue in their arguments before the Court, and expected the Court to address it.

350. It is clear that a nationalistic (ethnic) ideology and propaganda, with their incitement to violence, were at the origins of the outbreak of the former Yugoslavia, having contributed to lead to the hostilities aggravated in the course of the widespread armed conflicts, and then to the "horrors" of the wars in the Balkans, "particularly those in Croatia and Bosnia-Herzegovina"[356]. In order to understand the factual context of a case under the Genocide Convention such as the present one opposing Croatia to Serbia, it is important to address its causes.

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353 Cf. *Counter-Memorial*, para. 438 and 440, and *Rejoinder*, paras. 633-635.
354 Cf. *Additional Pleadings*, para. 2.14.
355 Cf. ICJ, doc. CR 2014/19, of 18.03.2014, para. 28.
356 S. Letica, "The Genesis of the Current Balkan War", *in Genocide after Emotion – The Postemotional Balkan War* (ed. S.G. Meštrović), London/N.Y., Routledge, 1996, p. 91, and cf. pp. 92-112.

They have been addressed, before the Court, by the contending Parties themselves. Already in my Separate Opinion (paras. 46-47 and 220) in the ICJ's Advisory Opinion on the *Declaration of Independence of Kosovo* (2010), I pointed out the need to remain attentive to the historical origins of each humanitarian crisis.

351. An international conflict – a devastation – of the scale and gravity of the wars in the Balkans, *lodged with the ICJ under the Convention against Genocide*, cannot be properly examined in the void. The ICTFY did not do so, and, e.g., in the *S. Milošević* case (Trial Chamber, Decision of 16.06.2004), after studying that conflict as from its historical origins, took into account an expert report, – on the use of propaganda by the media in that conflict, – which determined that

> "a comparison between Serbian, Croatian, and Bosnian nationalist propaganda yielded the conclusion that Serbian propaganda surpassed the other two both in the scale and the content of the media messages put out" (para. 237).

352. In this way, hatred was widespread, and made its numerous victims. Villagers began to hate each other, sometimes their own former neighbours, solely on the basis of their ethnicity, without knowing exactly why. The consequences of this campaign of hatred were catastrophic, – as on so many other man-made devastations throughout the history of humankind, illustrative of the perennial presence of evil in the human condition (cf. *infra*).

353. Last but not least, with the outbreak of the armed attacks, there is an additional element for the examination of the campaign of extreme nationalism which should not pass unperceived here: the *unredacted Minutes* of the Supreme Defence Council (SDC) of the FRY, – the same unredacted *Minutes* that, in the earlier case concerning the Genocide Convention, were not made available to the ICJ, nor did the ICJ consider them indispensable, for its Judgment in the *Bosnian Genocide* case (2007). Today, eight years later, the unredacted transcripts of the SDC *Minutes* (1992-1996), as lately brought to the attention of the ICTFY, are publicly known.

354. It is not my intention to review them here, but only to refer briefly to two passages, with a direct bearing on the preceding considerations. The (short-hand) unredacted *Minutes* of the SDC, of 07.08.1992, referred to the violence of paramilitary formations, and

contained an instruction to dress paramilitaries with "uniforms of Yugoslav soldiers", and to give them weapons. And the unredacted *Minutes* of the SDC, of 09.08.1994, asserted that the Armies of Republika Srpska and of the Serbian Republic of Krajina "are armies of the Serbian people", and, "[t]herefore, they must serve the interests of the Serbian people as a whole"[357].

2. The Imposed Obligation of Wearing White Ribbons

355. In my perception, it is clear, from the atrocities already surveyed, that the *cas d'espèce*, concerning the *Application of the Convention against Genocide*, opposing Croatia to Serbia, is not exactly one of war, but rather of onslaught, in a widespread and systematic pattern of destruction (cf. *supra*). There are other aspects of it which, in the course of the proceedings, were also brought to the attention of the Court, and to which I turn attention now. One of them pertains to the obligation imposed upon targeted individuals to wear white ribbons.

356. In the written phase of the proceedings, Croatia claimed, in its *Memorial*, that, in some municipalities, the Croat population was required to identify themselves and their property with white ribbons or other distinctive marks[358]. It submitted various witness statements concerning this practice by Serbia[359]. On the basis of the probatory evidence (and witness statements), it appears that this practice of marking Croats with white ribbons was widespread; its *rationale* was to identify and single out Croats and subject them to varying degrees of humiliation, such as forced labour, violence, and limitation of their freedom of movement (e.g. by imposing curfews). According to Croatia,

> "[t]he local Croat population would be required to identify themselves and their property with white ribbons and other distinctive marks; they would be denied access to food, water, electricity and telecommunications and proper medical treatment; their movements would be restricted; they would be put to forced labour; their property would be destroyed

357 FRY/SDC, *Unredacted Transcripts of Minutes* (1992-1996), of 07.08.1992, and of 09.08.1994.
358 Cf.. *Memorial*, paras. 4.08, 4.60, 4.87 and 4.98. According to Croatia, this obligation to wear white ribbons occurred, e.g., in Šarengrad, Bapska and Sotin; *ibid*., para. 8.16.8.
359 *Memorial*, vol. 2(I), Annexes 53 (Šarengrad), 66 (Bapska), 76 (Tovarnik), 84 (Tovarnik); 101, 106 and 108 (Lovas), and 128 (Vukovar).

> or looted; Croatian cultural and religious monuments would be destroyed; and schools and other public utilities would be required to adopt Serbian cultural traditions and language"[360].

357. As to the aims of the practice of marking Croats with white ribbons, Croatia submitted that the local Serb "authorities" would establish their power and "would impose a regime of humiliation and dehumanisation on the remaining Croat population, who would be required to identify themselves and their property with white ribbons and other distinctive marks"[361]. Croatia argued that the majority of the Croat inhabitants of Antin, for instance, left the village, and the 93 Croats that remained there had to wear white ribbons on their sleeves; Croatia added that, at the time of the writing of its *Memorial*, it was still unknown what happened to 15 of them[362]. Another example was afforded by the village of Šarengrad, where 412 Croatian inhabitants stayed behind, and all remaining Croats in the village were forced to wear white ribbons[363].

358. In its oral pleadings, Croatia reiterated its allegations concerning the marking of the Croatian population. As to the fate of the Croats who were forced to identify themselves by wearing white ribbons, Croatia did not report a common fate, to all of them. It is not clear from its pleadings that absolutely *all* Croats wearing white ribbons were doomed to be exterminated[364]. Yet Croatia stated, in this connection, that

> "across the occupied communities and regions – not isolated incidents, numerous, set out in the pleadings – Croat civilians were forced to wear white ribbons, and ordered to adorn their homes with white rags. These were measures of ethnic designation. Thus earmarked, *they were ready targets for destruction*. In Bapska, Croats were forced to hang white ribbons on their doors by Serbs who shouted, 'Ustasha! We will kill you all' – in the witness statements. The Croat populations in Arapovac, Lovas,

360 *Memorial*, para. 8.60.
361 *Ibid*., para. 373.
362 *Ibid*., para. 4.17.
363 *Memorial*, para. 4.60.
364 Cf. ICJ, doc. CR 2014/9, of 05.03.2014, p. 35.

> Šarengrad, Sotin, Tovarnik and Vukovar, amongst other places, were forced to wear white bands by Serb forces"[365].

359. Croatia mainly referred to the fact that they were obliged to identify themselves with white ribbons to show that they were Croats; although their fate seems to have been diverse, the targeted individuals, once targeted, became more vulnerable. In this respect, in a response to a question I put, during the public sitting before the Court on 05.03.2014, a Croatia's expert witness stated that Croats

> "who were in the camps, were not thus marked (...). Such markings were used in several cases (…) – precisely in Lovas and Tovarnik – where we found victims in mass graves having these markings. And, according to the general information, it is known that in these locations, persons of Croat ethnicity were thus marked with white armbands"[366].

Thus, it appears from the evidence submitted in the present case that some of the Croats who were exterminated, were first marked with white ribbons, or armbands[367], or white sheets on the doors of their homes.

3. The Disposal of Mortal Remains

360. In the course of the proceedings in the present case, Croatia referred to various witness statements describing the mistreatment by Serbs of the mortal remains of the deceased Croats. There were many reported cases of corpses that were burnt, or else thrown into mass graves (cf. *infra*), and also occurrences in which they were shot (in Central Vukovar)[368], dismembered (in Berak)[369], and thrown into wells (in Glina), canals (in Lovas)[370] and rivers[371]. This was a way, – Croatia added, – to conceal the murders; excavators were used to transport the mortal remains[372].

365 ICJ, doc. CR 2014/6, of. 04.03.2014, p. 57 [emphasis added].
366 ICJ, doc. CR 2014/9, of 05.03.2014, p. 35.
367 It is not clear from the pleadings of Croatia that absolutely *all* Croats wearing white ribbons were doomed to be exterminated, cf. CR 2014/9, p. 35.
368 Cf. *Memorial*, para. 4.165.
369 Cf. *ibid.*, para. 4.42.
370 Cf. *ibid.*, para. 4.127.
371 Cf. *ibid.*, para. 5.80.
372 Cf. *ibid.*, para. 4.136.

361. For example, in the written phase of the present proceedings, it was further reported by Croatia that there were mortal remains that were simply burnt (in, e.g., Ervenik, Cerovljani, Hum/Podravska, Joševica)[373]. Croatia presented also several accounts of corpses that were disposed of, in a haphazard, if not careless way[374]. Corpses were found everywhere. Mortal remains were reported to have been a problem in Vukovar during the shelling: many corpses remained on the streets, in yards and basements; 520 deceased persons were transported by Croatians volunteers and soldiers for identification[375]. In Vukovije, according to a witness three corpses were found on the steps of a house[376]. A witness narrated that, in Tovarnik, there were 48 corpses lying on a road and in yards and their burial was not allowed[377].

362. I deem it fit to come back to a point I have made earlier on, in the present Dissenting Opinion (part II, *supra*). This scenario, of the disposal of unburied mortal remains, brings to the fore (at least in my mind), in an inter-temporal dimension, the tragedy of *Antigone*, by Sophocles, some 25 centuries ago. Antigone expresses her determination to defy the tyrannical decision of the powerful Creon to expose the corpse of her brother Polynices so as to rot on the battlefield; she announces that she will give her brother's mortal remains a proper burial, as she looks forward to her reunion one day with her deceased beloved relatives:

> "I shall bury him myself.
>
> And even if I die in the act, that death
>
> will be a glory. (...) I have longer

373 Cf. *Memorial*, paras. 5.215, 5.122, 5.41, 5.85 and 5.169-5.170, respectively.

374 A witness stated that he was responsible for collecting of the corpses of the killed Croatian civilians with a tractor; 24 were buried, but it was not possible to identify some of them; *Memorial*, para. 4.102. Another witness reports that he was also responsible for digging graves and transporting the deceased; ibid., para. 4.102. Another witness stated that she saw dead bodies on a trailer driving to the graveyard, where they were dropped into a hole and covered with an excavator; *ibid*., para. 4.122. It was reported that columns of JNA trucks were used to transport the remains of the deceased; only 5 corpses in Tordinci, and 9 in Antin, were left in the graves; *ibid*., para. 4.138.

375 *Memorial*, para. 4.152.

376 *Memorial*, para. 5.62. Elsewhere, a witness saw a corpse on a cargo truck; ibid., para. 5.37.

377 Cf. *Memorial*, para. 4.97; and cf. ICJ, doc. CR 2014/8, of 05.03.2014, para. 51.

to please the dead than please the living here (...).

(...) What greater glory could I win

than to give my own brother decent burial? (...)"[378].

363. As self-inflicted death falls upon Antigone, disgrace promptly falls upon the despotic Creon as well. And the chorus limits itself to say that "the sorrows of the house", as in ancient times, piles on "the sorrows of the dead", in such a way that "one generation cannot free the next"[379]. Love is "never conquered in battle", and is "alone the victor"[380]. And it warns that the "power of fate" is a "terrible wonder, – neither wealth nor armies (...) can save us from that force"[381]. At the end, the "mighty blows of fate (...) will teach us wisdom"[382].

364. Sophocles' masterpiece has survived the onslaught of time, and has kept on inspiring literary pieces in distinct ages. With the passing of time, *Antigone* became the symbol of resistance to the omnipotence of the rulers, as well as of the clash between natural law (defended by her) and positive law (represented by Creon). Its lesson has been captured by writers, and has become object of attention of philosophers, along the centuries. In the mid-XXth century, e.g., J. Anouilh wrote his own version of *Antigone*'s tragedy, with a distinct outlook, but likewise portraying the fatality that befell upon Antigone, and the other characters. J. Anouilh's tragedy *Antigone* was originally published in 1942, and first performed in 1944, in Paris under nazi occupation.

365. Along the centuries, the battlefield is full of abandoned corpses, as depicted in so many writings (historical, philosophical and literary). It is against this abandonment that Antigone stands. She shows, from Sophocles' times to date, that the dead and the living are close to each other in many cultures, and ultimately in human conscience. The determination of Antigone to secure a proper burial of her brother's mortal remains brings the beloved dead closer to their living, and the beloved living closer to their dead. This perennial lesson is full of humanism. Against the imposition of calculations of *raison d'*État, Antigone resists and remains faithful to herself, upholding

378 Verses 8586, 8889 and 561-562.
379 Verses 667 and 669-670.
380 Verses 879 and 890.
381 Verses 1045-1047 and 1050.
382 Verses 1469-1470.

fundamental principles and the superior human values underlying them. She sets up an example to be followed.

366. Nowadays, 25 centuries after Sophocles' *Antigone*, have the "blows of fate" taught us wisdom? I doubt it. Have the lessons of the sufferings of so many preceding generations been learned? I am afraid not. As the present case concerning the *Application of the Convention against Genocide* (Croatia *versus* Serbia) shows, in situations of conflict, mortal remains continue to be treated with disdain (cf. *supra*). And the complaints go on and on. Croatia states that, in 1993, in Tordinci (Eastern Slavonia), corpses were removed from a mass grave and transported to an unknown place in Serbia[383]. In Glina, at least 10 people were killed, but no remains were found by the date of the submission of the *Memorial*[384]. Still in Glina, the mortal remains of 9 civilians were exhumed (on 13.03.1996), but only 6 of them were identified[385]. Other mortal remains remain missing elsewhere[386].

367. Furthermore, in Karlovac, – Croatia added, – the corpses of five women and one man were removed to an unknown destination, and by the date of the submission of the *Memorial* they were not found, except the corpse of a woman (which was found in a box on the outskirts of the village of Banski Kovačevac) in the spring of 1992[387]. In its *Reply*, Croatia again evoked witness statements found in the *Memorial*; and it adds that, in Dalj, Croat civilians were prevented to flee (after 01.08.1991), and were forced to collect and bury the mortal remains of those killed in the attack[388].

366. In its arguments in the written phase of the present proceedings, Serbia did not expressly dismiss Croatia's claims on mortal remains and their mistreatment by Serb forces. It instead challenged the reliability of the evidence produced by Croatia, e.g., as to the number of corpses found in Velepromet (claimed by Croatia to be around a thousand)[389]. Then it contended, in its counter-claim, that Croatia was responsible for misdeeds against mortal remains of

383 *Memorial*, para. 4.138, and cf. also para. 4.07.
384 *Ibid*. para. 5.93.
385 Cf. *Memorial*, para. 5.83.
386 Cf., e.g., *Memorial*, para 5.179.
387 Cf. *ibid*., para. 5.157.
388 Cf. *Reply*, para. 5.21.
389 Cf. *Counter-Memorial*, para. 736.

Serbs and for hiding evidences; it claims, e.g., that Croatian soldiers shot into the corpses of Serbs[390]. It evoked a witness statement that, in Glina, a total of 20 dead bodies were strewn all over the road and on the sides[391]. Another witness described that, near Žirovac, tanks were driven over the dead bodies scattered on the road[392].

369. Serbia further claimed that, in Knin, bodies were removed from the streets in order to hide them from the U.N.; it added that the United Nations Protection Force (UNPROFOR)'s Canadian battalion witnessed that Croatian forces were removing and burning corpses in order to hide evidences[393]. All this, – it argued, – was aiming at preventing that the precise number of victims could be determined[394]. In its *Rejoinder*, Serbia contended that on the road towards the bridge on the river Sava, there were many dead bodies of Serbs for about 3.5km[395]. It added that Croatian forces removed any traces of dead bodies in order to conceal the extent of the alleged crimes committed[396], by first burning the bodies and then burying them[397]. Many dead bodies were seen, in civilians' columns fleeing Knin, lying on the streets[398].

370. For its part, Croatia, in the oral phase of the present proceedings, complained that it lacks information on the whereabouts of the remains of more than 840 Croatian citizens, still missing as the result of the attacks on civilians[399]; it added that Serbia still refuses to help locating their mortal remains[400]. It further referred to another witness statement that there were countless bodies lying in the streets in the residential area south of the Vuka river, which could not be buried because of the danger from shelling[401]. In the town centre by the Danube river, – it proceeded, – there were also corpses which

390 Cf. *ibid.*, para. 1222.
391 Cf. *ibid.*, para. 1248.
392 Cf. *ibid.*, para. 1249.
393 *Counter-Memorial*, paras. 1262 and 1131.
394 *Ibid.*, para. 1238.
395 Cf. *Rejoinder*, para. 6524.
396 Cf. *ibid.*, para. 654.
397 Cf. *ibid.*, para. 654.
398 Cf. *ibid.*, para. 760.
399 ICJ, doc. CR 2014/5, of 03.03.2014, para. 6.
400 ICJ, doc. CR 2014/6, of 04.03.2014, para. 40.
401 Cf. ICJ, doc. CR 2014/8, or 05.03.2014, para. 13.

remained unburied[402]. In Borovo Selo, – it added, – Serb paramilitaries killed 12 Croat police officers and mutilated their remains[403].

371. According to the Applicant, after the shelling of the city of Vukovar, dismembered bodies were seen lying in the rubble[404]; corpses lined the street[405]. In Velepromet, a witness describes 15 decapitated bodies by a hole in the ground[406]. Turning to the occurrences in Donji Čaglić, Croatia stated that the corpses of civilians were buried in a trench, dug by a JNA vehicle[407]. In Široka Kula, – it added, – 29 Croats were killed by the SAO Krajina and their corpses were thrown into burning houses[408]. Moreover, – Croatia proceeded, – a witness described that, around Lovas, Croats were used to clear minefields; mines would go off and there were dead bodies lying all over, and Serb forces were firing at them[409].

372. Croatia cited an agreement between Croatia and Serbia, concluded in 1995, whereby they established a Joint Commission in order, *inter alia*, to exhume and identify mortal remains of unidentified bodies. Croatia contended that the mortal remains of 394 persons have been exhumed, but only 103 bodies have been handed over to it[410]. Serbia retorted that "only 103" corpses have been returned to Croatia because only 103 DNA profiles have matched the DNA samples of the Croatian missing persons[411].

373. In the oral phase of the present proceedings, Serbia claimed that Croat forces disrespected the mortal remains of Serbs following the Operation *Storm*, and removed traces of the corpses that were lying in the roads[412]. Serbia added that the Croats shot on the bodies of dead

402 Cf. *ibid*., para. 14.
403 *Ibid*., para. 13.
404 *Ibid*., para. 32.
405 *Ibid*., para. 38.
406 Cf. ICJ, doc. CR 2014/8, of 05.03.2014, para. 57. Another witness, who was in Vukovar and was taken to Dalj, described a pit of corpses; cf. *ibid*. para. 77.
407 Cf. *Reply*, vol. 1, para. 6.8; and cf. ICJ, doc. CR 2014/10, of 06.03.2014, para. 16.
408 Cf. ICJ, doc. CR 2014/10, of 06.03.2014, para. 27.
409 Cf. ICJ. doc. CR 2014/20, of 20.03.2014, p. 55, para. 33.
410 ICJ, doc. CR 2014/21, of 21.03.2014, p. 37, para. 9.
411 ICJ, doc. CR 2014/24, of 28.03.2014, pp. 60-61, para. 8.
412 ICJ, doc. CR 2014/16, of 12.03.2014, p. 43, para. 3. Serbia cited statements in support of its claim; cf. *ibid*., pp. 46-51. It further referred to a witness who was called to recognise his father's dead body but it was torched; the identification was only possible through DNA analysis; *ibid*., p. 57, para. 52. Another witness found the mortal

Serbs[413], and also referred to occurrences of corpses having been burned by Croats[414]; five of them were found in Bijeli Klanac[415]. According to Serbia, five tractor drivers were killed by Croatian soldiers and their bodies were thrown into a river[416].

374. From times immemorial up to the present, the proper disposal of mortal remains, particularly in situations of armed conflicts or extreme violence in the disruption of the social order, has been a perennial concern. It marked presence already in the minds of the "founding fathers" of the law of nations. One decade ago, in another international jurisdiction (IACtHR), in my Separate Opinion in the case of the massacre of the *Moiwana Community versus Suriname* (Judgment of 15.06.2005), I deemed it fit to ponder that

> "It cannot pass unnoticed that an acknowledgement of the duties of the living towards their dead was, in fact, present in the very origins, and along the development, of the law of nations. Thus, to refer but to an example, in his treatise *De Jure Belli ac Pacis* (of 1625), H. Grotius dedicated chapter XIX of book II to the *right of burial* ('*derecho de sepultura*'). Therein H. Grotius sustained that the right of burying the dead has its origin in the voluntary law of nations, and all human beings are reduced to an equality by precisely returning to the common dust of the earth[417].
>
> H. Grotius further recalled that there was no uniformity in the original funeral rites (for example, the ancient Egyptians embalmed, while most of the Greeks burned, the bodies of the dead before committing them to the grave; irrespective of the types of funeral rites, however, the right of burial was ultimately explained by the dignity of the human person[418]. H. Grotius further sustained that all human beings, including 'public enemies' ('*enemigos*

remains of a deceased beneath a burned family house after six months of the conflict in the area; *ibid*., p. 59, para. 3.

413 *Ibid*., pp. 44-45, para. 10.

414 *Ibid*., p. 60, para. 11.

415 ICJ, doc. CR 2014/17, of 13.03.2014, p. 44, para. 104.

416 Cf. *ibid*., p. 36, para. 80.

417 H. Grotius, *Del Derecho de la Guerra y de la Paz* [1625], vol. III (books II and III), Madrid, Edit. Reus, 1925, p. 39, and cf. p. 55.

418 *Ibid*., pp. 43 and 45.

> *públicos'*) were entitled to burial, this being a precept of 'virtue and humanity'"[419] (paras. 60-61).

375. Despite this long-lasting concern, mortal remains keep on being disrespected, as the present case concerning the *Application of the Convention against Genocide* (Croatia *versus* Serbia) shows. And this is not the only contemporary example of this sad disdain. This is so – as I further pointed out in my aforementioned Separate Opinion in the *Moiwana Community* case (para. 63) – despite the fact that International Humanitarian Law provides for respect for the remains of the deceased. Article 130 of the 1949 IV Geneva Convention (on the Protection of Civilian Population) requires all due care and respect with mortal remains. Article 34 of Protocol I of 1977 to the four Geneva Conventions of 1949 elaborates on the matter in greater detail; and

> "the commentary of the International Committee of the Red Cross on that Article points out that the respect due to the remains of the deceased 'implies that they are disposed of as far as possible in accordance with the wishes of the religious beliefs of the deceased, insofar as these are known', and warns that even reasons of overriding public necessity cannot in any case justify a lack of respect for the remains of the deceased'' "[420] (para. 63).

4. The Existence of Mass Graves

376. In the proceedings in the *cas d'espèce*, Croatia submitted arguments in relation to mass graves discovered in various municipalities, both in its written and in its oral pleadings. It focused on the description of crimes committed in each municipality and the existence of mass graves proving the commission of the crimes. It also submitted material evidence of mass graves, including photographs and colour plates of mass graves, as annexes to its pleadings.

377. The analysis of Croatia's arguments demonstrates that mass graves were common across many of the municipalities that it presented. Croatia submitted photographic and documentary

419 *Ibid.*, pp. 47 and 49; and cf. Hugonis Grotii, *De Jure Belli ac Pacis* [1625] (ed. B.M. Telders), The Hague, Nijhoff, 1948, p. 88 (abridged version).

420 Y. Sandoz, C. Swinarski and B. Zimmermann (eds.), *Commentary on the Additional Protocols of 08 June 1977 to the Geneva Conventions of 12 August 1949*, Geneva, ICRC/Nijhoff, 1987, pp. 369 and 379.

evidence recording the findings made during the excavation of mass graves, as proof of the crimes that it alleges to have been committed. It seems, from the evidence and arguments examined, that the amount of mass graves in various municipalities supports the allegation that mass killings were committed against Croats.

378. In the course of the written phase of the present proceedings, Croatia developed its arguments concerning mass graves in its *Memorial*[421]. It submitted that, in total, 126 mass graves were found (at the time of the writing of the *Memorial*), of which 61 were in Eastern Slavonia[422]. Croatia mentioned mass graves found in various municipalities, including, e.g., villages in Eastern Slavonia: in Banovina, where 39 mass graves were discovered and 241 bodies have been exhumed (of which 175 have been identified)[423]; in Kordun and Lika, where 11 mass graves were found[424]; and in the village of Lovas. Croatia submitted arguments and information in relation to each mass grave. In relation to Vukovar, for example, Croatia submitted that most of Vukovar was completely destroyed and that the mass grave at Ovčara, where some 200 Croats were taken by Serbs from the Vukovar Hospital, summarily executed and then left in a shallow mass grave[425].

379. Still in respect of Vukovar, Croatia submitted that three mass graves were found: Ovčara, where 200 corpses were found (and 145 persons were identified); in Novo Groblje, 938 mortal remains were found (and 722 persons were identified); in Nova Street 10 mortal remains were found (and 6 persons were identified). A grave containing three corpses was found in Borovo Selo. Croatia submits that "[t]hese numbers are paralleled only in the Prijedor County in Bosnia and

421 Cf. *Memorial*, Annexes 165 and 166. Cf. also *Memorial*, vol. 3, section 7 (Identified Mass Graves).

422 *Memorial*, para. 8.11.

423 *Ibid*., para. 5.77.

424 *Ibid*., para. 5.137.

425 Cf. *ibid*., para. 4.175. As to the Ovčara mass grave, Croatia refers to the *Report on Evacuation of the Vukovar Hospital and the Mass Grave at Ovčara*, U.N. Commission of Experts Established Pursuant to Security Council Resolution 780 (1993), and Physicians for Human Rights, *Reports of Preliminary Site Exploration of a Mass Grave Near Vukovar, Former Yugoslavia*, and Appendices A-D (19.01.1993).

Herzegovina"[426]. In total, – Croatia contended, – 1,151 corpses were found in the mass graves in Vukovar[427].

380. At the time of the writing of the *Memorial*, Croatia further argued that, due to the operations of the Serb paramilitary groups and the JNA in the area of Western Slavonia, 5 mass graves were found, from which 20 bodies were exhumed and identified, and that almost all of the identified corpses were Croats[428]. Croatia added that, at the time of the writing of the *Memorial*,

> "61 mass graves have been found in Eastern Slavonia (…) 2,028 people have been exhumed of whom 1,533 have been identified. In the OsijekBaranja County, 171 persons were exhumed and 135 of them were identified. In the Vukovar Srijem County 1,857 persons were exhumed, and 1,418 of them were identified. Further mass graves are still being discovered. Moreover, many of the mass graves, which came into being in the relevant period, acted as temporary burial sites only"[429].

381. Croatia further submitted that "[t]he JNA often dug up the bodies and moved them to other parts of the occupied territory or Serbia. For example, dead bodies from the villages Tordinci were taken to Serbia and dead bodies from Tikveš were taken to Beli Manastir"[430]. In relation to Eastern Slavonia, for example, Croatia contended, as to the village of Tenja, that a mass grave was exhumed on the farm, and the remains of three persons were identified. In the village of Berak, in the region of Eastern Slavonia, a mass grave between Orolik and Negoslavci, in a valley called "Šarviz", was also found[431]. Croatia also reported exhumations of mass graves in Ilok[432]. In the village of Tovarnik, – Croatia added, – it was common for the Serb paramilitary groups to force Croats to bury their fellow dead, and it referred to a witness testimony confirming the existence of mass graves and numerous murders of Croatian civilians[433].

426 *Memorial*, para. 4.188.
427 *Ibid*., para. 4.188.
428 *Ibid*., para. 5.04.
429 *Ibid*., para. 4.07.
430 *Ibid*., para. 4.07.
431 *Ibid*., para. 4.41.
432 *Ibid*., para. 4.72.
433 *Ibid*., para. 4.102; and cf. Annex 83.

382. Similarly, at the time of the writing of the *Memorial*, in the village of Lovas, the mass grave of 68 people at the local graveyard was exhumed, and 67 were identified. As to the village of Tordinci, Croatia asserted that the corpses of

> "approximately 209 Croats [were] discovered near the Catholic Church. (…) The registrar of Tordinci was to list the people in the mass grave, but because of the number of corpses, he was unable to complete the task. Till today the identity of some of these persons is not known. In 1993, the bodies were removed from the grave and transported to an unknown place in Serbia. (…) Columns of JNA trucks were used to transport the remains of the dead and only 5 bodies of the inhabitants of Tordinci and 9 inhabitants of the village Antin were left in the grave. These were subsequently exhumed and identified, while the others are still registered as missing"[434].

Furthermore, in relation to the village of Saborsko, Croatia submitted that "the village was completely obliterated and the population exterminated. Bodies of the murdered Croats were buried several days later in a mass grave prepared by an excavator"[435].

383. In its *Reply*, Croatia reiterated its arguments and updated the information submitted in its *Memorial*, including information about the location and exhumation of bodies[436] found since the filing of the *Memorial*. In its *Reply*, Croatia relied upon further sites of mass graves "as showing the context and breadth of the killings committed by the Serbian forces"[437]. Croatia also retorted Serbia's arguments as to an alleged lack of impartiality of the information obtained: it asserts that international entities, including the Office of the U.N. High Commissioner for Human Rights (UNHCHR), the Organization for Security and Cooperation in Europe (OSCE), and the Observation Commission of the European Community (in addition to the ICTFY itself) were invited to observe the exhumation of mass graves in Croatia[438].

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434 *Memorial*, para. 4.138.
435 *Ibid*., para. 5.152.
436 Cf. *Reply*, Annexes 43-46.
437 *Reply*, para. 5.12.
438 *Ibid*., para. 2.56.

384. Further in its *Reply*, Croatia recalled that the ICTFY also made findings in relation to mass graves in Croatia, in the *Mrkšić and Radić and* Šljivan*čanin* case. In the words of the ICTFY:

> "In the Chamber's finding, in the evening and night hours of 20/21 November 1991 the prisoners of war were taken in groups of 10 to 20 from the hangar at Ovčara to the site where earlier that afternoon a large hole had been dug. There, members of Vukovar TO and paramilitary soldiers executed at least 194 of them. The killings started after 2100 hours and continued until well after midnight. The bodies were buried in the mass grave and remained undiscovered until several years later" (paras. 215-253)[439].

385. Croatia further referred to the ICTFY (Trial Chamber) findings in the *Martić* case in relation to mass graves. It found, e.g., that some persons from Cerovljani (it names them) were intentionally killed. It then recalled "the manner in which the victims from Hrvatska Dubica were rounded up and detained in the fire station" on 20.10.1991, and then killed on 21.10.1991 at Krečane near Baćin, and "buried in the mass grave at that location". The Trial Chamber considered that the crimes in Cerovljani were "almost identical" to those in Hrvatska Dubica, "including that most of the victims were buried at the mass grave in Krečane". The Trial Chamber considered it "proven beyond reasonable doubt that these victims were civilians and that they were not taking an active part in the hostilities at the time of their deaths" (para. 359)[440].

386. Serbia, for its part, submitted that some of the evidence, especially graphics called "mass graves", were prepared by Croatian official bodies[441]. In its view, evidence of mass graves was of "little worth", considering that "the exhumation reports do not provide evidence of genuinely mass graves of the sort found in Srebrenica, Rwanda and Eastern Europe following World War II. Rather, the burials seemed to be of relatively small clusters of deceased persons, dispersed throughout the various regions and municipalities of

439 *Cit. in Reply*, para. 5.80.
440 *Cit. in Reply*, para. 6.35. And cf. also ICTFY (Trial Chamber), *Martić* case, paras. 364-367, as to atrocities committed in Baćin; paras. 202208, as to Lipovača; and paras. 233-234, as to killings in Saborsko.
441 *Rejoinder*, para. 264.

Slavonia"[442]. However, much as it tried to discredit the evidence, Serbia did not come to the point of denying the existence of mass graves.

387. In the course of its oral pleadings, Croatia reiterated its contentions in relation to the existence of mass graves, their location and the bodies found therein. It added that new mass graves were found more recently, e.g., the mass grave in Sotin, containing 13 corpses[443]. Croatia also argued, in relation to Eastern Slavonia, that, within a year of Serbia's occupation, the communities of the region had been destroyed and that "[t]he intent to destroy the Croat population is as clear as the figures are stark (…): 510 mass graves have since been discovered, containing the corpses of nearly 2,300 men, women and children; many others have been discovered in individual graves. More still are being discovered yearly"[444].

388. Croatia further recalled the statement of an expert witness during its oral pleadings (Mr. Grujić), who testified, *inter alia*, about mass graves. He stated that "[a]s regards exhumations and the discovery of mass graves, and the time of their creation", he had to say that "the first mass graves had come into existence as early as July 1991", and "were continually coming into existence still the year 1992"[445]. He further asserted that the largest mass grave found is the one at the new Vukovar Cemetery, where there are 938 victims[446]. In an answer to a question posed by Judge Cançado Trindade, the witness stated that, in Lovas and Tovarnik, corpses of victims were found in mass graves having markings such as white bands on their arms, and that, "according to the general information, it is known that in these locations, persons of Croat ethnicity were thus marked with white armbands"[447] (cf. *supra*).

442 *Ibid.*, para. 349.
443 ICJ, doc. CR 2014/8, p. 22, para. 55.
444 *Ibid.*, p. 27, para. 71. Croatia then corrected this statement in the following terms: "What I intended to say was that a total of 510 mass and individual graves had been discovered in Eastern Slavonia containing almost 2,300 bodies. We have now checked the most up-to-date figures on the website of the Directorate for Missing and Detained Persons, and it is 71 mass graves, and 432-individual graves in Eastern Slavonia, giving a total of 503"; ICJ, doc. CR 2014/10, of 06.03.2014, p. 10.
445 ICJ, doc. CR 2014/9, of 05.03.2014, p. 28.
446 *Ibid.*, p. 29.
447 *Ibid.*, p. 35.

389. Croatia further stated, in respect of individual and mass graves, that, upon Serbia's withdrawal from the occupied areas of Croatia in 1995, "mass and individual graves containing the remains of Croat victims of the genocide began to be uncovered. These graves have been painstakingly excavated and recorded by [its] Directorate for Detained and Missing Persons"[448]. As to the numbers of victims in those graves[449], Croatia submitted that

> "by July 2013, 142 mass graves [plate on] had been discovered in Croatia, containing the bodies of 3,656 victims. Three thousand, one hundred and twenty-one (3,121) of those have been identified. twenty-seven (27) per cent of these 3,121 bodies were women, and 38.5 per cent of them were older than 60. Thirty-seven (37) minors were also identified"[450].

390. Croatia proceeded that, "[b]y December 2013, over 1,100 such graves have been identified across the formerly occupied territory of Croatia". Croatia added that its efforts to discover the graves have been hindered by "Serbia's practice of removing and reburying victims during its occupation of the region – often in Serbia, – in a vain attempt to cover up its atrocities"[451]. In any case, the existence of mass graves had not been denied, and, towards the end of the nineties, such graves – in Croatia as well as in Bosnia and Herzegovina – were fully documented[452].

5. Further Clarifications from the Cross-Examination of Witnesses

391. The information provided to the ICJ in the course of the proceedings of the present case concerning the *Application of the*

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448 ICJ, doc. CR 2014/10, of 06.03.2014, p. 18.

449 As to the definition of mass graves, Croatia contends that, since there is no universally accepted definition of a "mass grave" in international law, it thus follows the definition coined by the U.N. Special *Rapporteur* of the (former) Commission on Human Rights, appointed "to investigate firsthand the human rights situation in the territory of the Former Yugoslavia", who defined mass grave as a grave containing three or more bodies; cf. *ibid*., p. 19, para. 42.

450 *Ibid*., p. 19.

451 *Ibid*., p. 20.

452 On the results of the research on the matter, conducted in both Croatia and Bosnia and Herzegovina from 1992 to 1997, cf., e.g., *The Graves – Srebrenica and Vukovar* (eds. E. Stover and G. Peress), Berlin/Zurich/N.Y., Scalo Ed., 1998, pp. 5-334.

Convention against Genocide (Croatia *versus* Serbia) leaves it crystal clear, in my perception, that the attacks in Croatia were an onslaught, not exactly a war; there was a widespread and systematic pattern of destruction of the civilian population, of the villagers, on account of their ethnicity. In my perception, as extreme violence intensified, there was, clearly, an intent, not only to displace them forcefully from their homes, but also to destroy them. Further clarifications were provided by the cross-examination of witnesses, that I cared to undertake in the public and closed sittings before the ICJ from 04 to 06 March 2014. Those additional clarifications pertain to three specific topics, namely: a) acts of intimidation and extreme violence; b) marking of Croats with white ribbons; c) burials of mortal remains.

392. As to the first point, in the Court's public sitting of 04.03.2014, I asked the witness (Mr. Kožul) the following question: – "What was the decisive factor for sorting the persons detained in Vukovar? Where and how was the selection carried out?" And he replied that they "knew that the army was coming to different parts of the cities. Because of that, we invited people to come to the hospital. Most of the separations took place in the hospital. The rest of the separations took place where people happened to be"[453]. Next, in the Court's closed sitting of 06.03.2014, I asked the following question to the witness (Ms. Milić), and she provided the following response:

> – "Did you know of, or do you remember, any initiative to contain, to avoid, or to stop the continued acts of violence reported in your statement? (...) Do you have knowledge of, or do you remember, any initiative to contain, to avoid, or to stop the continued acts of violence narrated in your statement?
>
> – I did not hear that there were any attempts to help or to defend us"[454].

393. In the ICJ public sitting of 05.03.2014, I proceeded to the cross-examination on the issue of the marking of Croats with white ribbons, thus reported:

453 ICJ, doc. CR 2014/7, of 04.03.2014, p. 20.
454 ICJ, doc. CR 2014/11, of 06.03.2014, pp. 23-24.

> "*Judge Cançado Trindade*: – I thank the expert witness very much for his testimony. I have one particular question to ask.
>
> The *Data on Victims* contained in your statement refers, in part 2 (paragraph 6-9), to victims exhumed from mass and individual graves. And part 3 (paragraph 10-13) refers to persons detained in camps, subjected, as stated in paragraph 13, to violence with 'the utmost level of cruelty'.
>
> In respect of the former, that is, victims exhumed from mass and individual graves, it is mentioned in your statement (paragraph 8) that "in certain locations in the Croatian Podunavlje, the killing of Croats who remained to live in their homes was preceded by their marking (white bands on the upper arms)". To the best of your knowledge, (...) did this also happen in respect of the latter, that is, of those detained in camps? If so, did all those so marked have the same fate?
>
> *Mr. Grujić* [witness]: – Persons who were in the camps, were not thus marked as far as I know. Such markings were used in several cases that we have established – precisely in Lovas and Tovarnik – where we found victims in mass graves having these markings. And, according to the general information, it is known that in these locations, persons of Croat ethnicity were thus marked with white armbands"[455].

394. The other point on which further clarifications were obtained from the witnesses, that of burials of mortal remains, was the subject of the cross-examination that I deemed it fit to conduct in the ICJ public sitting of 05.03.2014, reported as follows:

> "*Judge Cançado Trindade*: – (...) I thank the witness very much for her testimony, and I proceed to my questions, pertaining to the burying of the murdered people after the fall of Bogdanovci.
>
> At the end of your statement (last paragraph) it is asserted that, after the destruction of the village of Bogdanovci, those who were buried in the so-called School Square were so 'in such a way that their bodies were wrapped in

455 ICJ, doc. CR 2014/9, of 05.03.2014, p. 35.

tents and buried with a bottle next to their bodies. These bottles contained the data of the dead persons'.

Ms. Katić: – Yes, the data were names and surnames of those persons.

Judge Cançado Trindade: – Do you know if the burials described in your statement were attended by the close relatives of the deceased ones? Or were they buried by third persons? In that case, was there a disruption of family life and after-life in Bogdanovci? (...) I wonder whether the funerals were prepared and carried out by persons who belonged to the inner family circles of the deceased ones.

Ms. Katić: – The burials of our dead friends, I was the one to prepare the dead for the burial. In the medical corps, I would remove the clothes, I would put them either in tent halves, or in black sacks, and I would put that bottle containing the names and surnames. There was a young man, Ivica Šimunović is his name, his brother was killed. He would usually say a prayer, because we had no priest. We had some sacred water, we would sprinkle the dead. Branko Krajina was another person who would assist with the burials of those persons. But sometimes, it was not possible to take the dead bodies out of the places where they were, such as basements or garages. So, if it was not possible to remove the dead body, we would cover it with slack lime.

Judge Cançado *Trindade*: Thank you for this clarification"[456].

395. These further clarifications which ensued from the cross-examination of witnesses in public and closed sittings before the Court, in addition to those lodged with it by means of *affidavits*, are further evidence of the widespread and systematic pattern of destruction which occurred in the attacks against the civilian population in Croatia which form the *dossier* of the *cas d'espèce*. To that evidence we can also add the findings of the ICTFY, of the devastation that took place, in particular in the period 1991-1992, as examined in the course of the present Dissenting Opinion.

456 ICJ, doc. CR 2014/9, of 05.03.2014, pp. 22-23.

6. Forced Displacement of Persons and Homelessness

396. The case-law of the ICTR, likewise, contains relevant indications as to the imposition of unbearable conditions of life upon the targeted groups. In the *C. Kayishema and O. Ruzindana* case (Judgment of 21.05.1999), for example, the ICTR adopted the interpretation whereby "deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part"[457] includes

> "methods of destruction which do not immediately lead to the death of members of the group. (...) [T]he conditions of life envisaged include rape, the starving of a group of people, reducing required medical services below a minimum, and withholding sufficient living accommodation for a reasonable period, provided the above would lead to the destruction of the group in whole or in part" (para. 116).

397. In the same vein, in the *S. Gacumbitsi* case (Judgment of 07.07.2006), the ICTR, after recalling that, in accordance with its jurisprudence, genocidal intent can be proven by inference from the facts and circumstances of a case (para. 40), added that these latter could include "the general context", and

> "'the perpetration of other culpable acts systematically directed against the same group, the scale of atrocities committed, the systematic targeting of victims on account of their membership of a particular group, or the repetition of destructive and discriminatory acts'" (para. 41).

398. In effect, in the present case concerning the *Application of the Convention against Genocide* (Croatia *versus* Serbia), those who were forcibly displaced, expelled from their homes (many of them destroyed), were subjected to unbearable conditions of life, or rather, of seeking to survive. It is not surprising that, in the course of the proceedings in the *cas d'espèce*, both Croatia, in its main claim, and Serbia, in its counter-claim, presented arguments in relation to refugees, albeit in different contexts.

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457 Cf. part XIII 4 of the present Dissenting Opinion, *supra*.

399. As to its claim, Croatia contended that many atrocities were committed against refugees by Serb forces. It stated that nearly 7,000 refugees from neighbouring villages were established in Ilok[458], which was the initial site of refuge for Croats banished from other parts of the region of Eastern Slavonia; according to Croatia, a mass exodus took place from the town on 17.10.1991[459]. During the exodus, the refugees were exposed to humiliation and molestation by the JNA and paramilitary Serbian forces. Many properties were allegedly confiscated[460]. Croats who decided not to leave were subjected to physical and psychological harassment and even killing[461].

400. Croatia furthermore reports additional cases of harassment against Croatian refugees that were leaving Bapska after its occupation. It contends that around 1,000 Croats fled in the direction of Šid in Serbia, when they were stopped by Serb police and later imprisoned. Croatia states that some of them were used as "human shield" to protect Serb forces and others killed, while some others had to look for refuge in the surrounding woods[462]. According to Croatia, Croat refugees in Serb occupied territories were prevented to return home on a permanent basis[463]. It added that the 'RSK' charged Croatian refugees who fought in the Croatian forces with various criminal offences and thus created obstacles to their return[464].

401. For its part, as to its counter-claim, Serbia also reported on attacks against Serb refugees on the part of Croatia: according to Serbia, refugee columns and fleeing individuals were targeted and attacked by Croatian forces during August 1995[465]. Serbia further claimed that Croatia imposed physical barriers to the return of Serb refugees, mainly by destroying houses and properties[466], in addition to legal barriers, *inter alia*, by enacting laws to confiscate their properties[467].

458 *Memorial*, para. 4.64.
459 *Ibid.*, para. 4.62.
460 *Ibid.*, para. 4.65.
461 *Ibid.*, para. 4.66.
462 *Ibid.*, para. 4.85.
463 *Reply*, paras. 10.34 and 10.40.
464 *Ibid.*, para. 10.42.
465 *Counter-Memorial*, paras. 1242-1257; cf. also *Rejoinder*, paras. 745761.
466 *Rejoinder*, paras. 773-774.
467 *Ibid.*, paras. 775-780.

402. Both Croatia and Serbia cited common legal efforts to address the issues of refugees[468], but each contending Party claimed they were violated by the opposing Party[469]. Thus, it can be concluded that both Parties have addressed, and acknowledged, the issue of attacks against refugees, and in more generic terms, the treatment of refugees by the opposing Party. In the present Judgment, the ICJ referred to evidence produced before it, but in particular in relation to the counter-claim only[470]. Yet, the *dossier* of the present case clearly shows that there were refugees on *both* sides, under attacks or harassment and humiliation, as demonstrated by pleadings of *both* Parties themselves.

403. If one considers, in the course of the proceedings of the present case, the depth of the arguments of the contending Parties in relation to the main claim as a whole, to try to put the counter-claim on an almost equal footing as the claim would seem, to a certain extent, unfair. Nothing would justify it, as there is a lack of proportion between them. In effect, the contending Parties have submitted voluminous evidence in relation to the claim, – including witness statements (both in the written and oral phases), photographs, mass graves data, and other important material evidence of the alleged genocide committed in Croatia. In contrast, the evidence submitted in support of the counter-claim does not seem comparable, in quantitative and qualitative terms.

404. In my perception, the evidence submitted by Croatia in support of its main claim is far more convincing in terms of the *actus reus* and *mens rea* of genocide. Likewise, the contending Parties' arguments, at both the written and oral phases of the proceedings, have dedicated far greater attention to the main claim than to the counter-

468 Cf., *inter alia,* the role of UNPROFOR in securing the return of refugees and displaced persons to their homes, *in Memorial*, para. 2.125; the signature of the Dayton Agreement of 1995, addressing *inter alia* the issues of refugees, *in Memorial*, para. 2.153-4. Cf. also the role of the U.N. Transitional Administration for Eastern Slavonia (UNTAES – established pursuant to Security Council resolution 1037 (1996), which had among its duties to enable all refugees and displaced persons to exercise the right of free return to their homes), *in ibid.*, para. 2.155158. Cf., moreover, the Agreement on the Procedures for Return (addressing the issue of refugees), signed by Croatia, UNTAES, and the U.N. High Commissioner for Refugees (UNHCR) in 1997, *in ibid.*, para. 2.157; and cf. further the Vance Plan of December 1991, *in Reply*, paras. 10.12-24.

469 Cf. *Memorial*, paras. 2.129 and 2.148; Counter-*Memorial*, para. 570; Rejoinder, para. 639685. As to the Vance Plan, cf. *Reply*, para. 10.39-43. The mandate of the UNTAES, however, was considered a major success; cf. *Memorial*, para. 2.158.

470 Cf. paras. 458, 484 and 492.

claim. The evidence produced as to this latter[471] is, in contrast, far less convincing; this does not mean that war crimes were not committed, e.g., in the course of the "Operation Storm", with its numerous Serb (civilians) victims. The present Judgment of the ICJ recounts aspects of the counter-claim (part VI) that could have been considered in less extensive terms[472], without an apparently superficial attempt to address the claim and the counter-claim on an almost equal footing.

405. Last but not least, it is nowadays widely known that the problem of forced migrations assumed great proportions in the wars in the former Yugoslavia along the nineties, with thousands of refugees and displaced persons from Croatia, Bosnia-Herzegovina and Kosovo, successively. There are accounts and studies of the sufferings and almost unbearable conditions of life to which victims were exposed, not seldom with the separation and dissolution of families, and destruction of homes[473].

406. The humanitarian crisis of mass forced migrations began with a first wave of internally displaced persons (end of 1991), followed by waves of refugees from Croatia and Bosnia-Herzegovina (early 1992 onwards). It was estimated, half a decade later, that there were 180,000 internally displaced persons in Croatia, as well as 170,000 refugees from Bosnia-Herzegovina (over 80% of them being Bosnian-Croats)[474]. Non-governmental organizations (NGOs) were engaged in assisting the voluntary repatriation or return of refugees to Croatia and Bosnia-Herzegovina. Mass forced migrations were another component of the widespread and systematic pattern of extreme violence and destruction in the wars in the Balkans along the nineties.

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471 E.g., in relation to the "Operation Storm" (August 1995).

472 There would, e.g., hardly be anything to add to what the ICJ found, in the present Judgment, in relation to the transcript of the Brioni meeting of 31.07.1995 (paras. 501-507).

473 Cf., *inter alia*, e.g., N. MrvićPetrović, "Separation and Dissolution of the Family", *in Women, Violence and War – Wartime Victimization of Refugees in the Balkans* (ed. V. NikolićRistanović), Budapest, Central European University Press, 2000, pp. 135-149; N. MrvićPetrović and I. Stevanović, "Life in Refuge – Changes in Socioeconomic and Familial Status", *in ibid*., pp. 151-169.

474 Cf., for an account, *inter alia*, P. Stubbs, *Displaced Promises – Forced Migration, Refuge and Return in Croatia and Bosnia-Herzegovina*, Uppsala/Sweden, Life & Peace Institute, 1999, pp. 1 and 21-22.

407. It cannot pass unnoticed here that, in its Decision of 11.07.1996, in the *R. Karadžić and R. Mladić* case, the ICTFY (Trial Chamber), in reviewing the indictments, invoked the charge of genocide (para. 6), and stressed the subhuman conditions of detention of civilians, with the occurrence of crimes (such as torture and rape of women, inside the camps or at other places) (para. 13); it further addressed the devastating effects of forced displacements and abandonment (meant to be definitive) of homes (para. 14), and of expulsion and deportation (paras. 16-17)[475].

7. Destruction of Cultural Goods

408. Earlier on in the present Dissenting Opinion, in examining the widespread and systematic pattern of extreme violence and destruction in the factual context of the *cas d'espèce*, I have dwelt upon the destruction of group culture[476]. In addition to the examples already mentioned, I see it fit now to consider the shelling of Dubrovnik (OctoberDecember 1991), as it was object of particular attention on the part of the contending Parties in the course of the proceedings of the present case before the ICJ.

a) Arguments of the Contending Parties

409. According to Croatia, Serb politicians were planning to include the city of Dubrovnik into Serbian territory; the JNA carefully planned and premeditated the attacks against the Old Town, and the indiscriminate shelling of Dubrovnik began on the 01.10.1991, and continued until December 1991; under fear, 34,000 were expelled from their homes, and the inhabitants who remained in the occupied surrounding villages were taken to camps and some were tortured[477]. There were also killings[478]. Supplies were cut off, while the town kept being bombarded with heavy artillery. Inhabitants were denied access to medical assistance, food and water. Mistreatments, physical

475 It also addressed the "policy of 'ethnic cleansing'" (paras. 60-62, 90 and 93-95).

476 Cf. part X(4) of the present Dissenting Opinion, *supra*.

477 *Memorial*, paras. 2.77, 3.90 and 5.237.

478 According to Croatia, some 161 civilians were killed, 272 wounded, and one is still missing; ibid., para 5.237.

and mental intimidation, and house destruction were routinely conducted[479].

410. Furthermore, – Croatia added, – there was a deliberate intent to destroy important symbols of Croatian culture; many cultural and sacral objects were destroyed in Dubrovnik, mainly in the Old Town: the JNA caused damage to at least 683 monuments, such as churches, chapels, city walls, and others[480]. In its attacks against Dubrovnik, – it proceeded, – the JNA tried to destroy the town in a way that could not be justified by any principle of military necessity or logic, thus pointing to its genocidal intentions[481]. Croatia further referred to the ICTFY (Appeals Chamber) Judgments relating to Dubrovnik, in the *P. Strugar* case (of 17.07.2008) and in the *M. Jokić* case (of 30.08.2005), and claimed that the conduct in Dubrovnik was an attempt to commit genocide[482].

411. Serbia also referred to the ICTFY's convictions and sentencing of M. Jokić and P. Strugar for the shelling of the Old Town of the city on 06.12.1991[483], and claimed that Croatia had failed to prove that any of the crimes were committed or attempted with genocidal intent. Serbia challenged the witness statements (for allegedly not fulfilling the requirements of *affidavits*)[484]. It added that the ICTFY addressed the alleged crimes in the area of Dalmatia and concluded that they did not fulfil the requirements of extermination as crime against humanity (the killings were allegedly not committed on a large scale)[485]. In Serbia's view, no genocidal intent was demonstrated in relation to the events in Dubrovnik[486].

412. As to the differences concerning the number of victims, Croatia observed that the charges in the *P. Strugar* and the *M. Jokić* cases pertained only to the attacks on Dubrovnik in December 1991

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479 According to Croatia, eleven men from the villages of Bistroće and Beroje were brought to camp Morinje, where they were subjected to mistreatments of all sorts including torture; *ibid.,* para 5.238. Some others were made prisoners and taken in "the camps Morinje, in Boka Kotorska and Bileća in Bosnia and Herzegovina, and some were beaten to death"; *ibid.,* para 5.240.

480 *Ibid.*, para. 5.241.

481 *Memorial*, para 5.236.

482 *Ibid.*, para. 8.27.

483 Cf. *Counter-Memorial*, para. 924.

484 *Ibid.*, para 920.

485 *Ibid.*, paras. 994 and 927, and cf. paras. 923-924.

486 *Ibid.*, para 925.

(commencing with the shelling on 06.12.1991), and did not give detailed consideration to the crimes committed in the period between 01.10.1991 and 05.12.1991, other than by way of background context. It added that the deaths in Dubrovnik occurred over a much longer period, and not solely as a result of the December attacks[487].

413. Croatia acknowledged that the *M. Jokić* and *P. Strugar* cases did not provide the exact number of victims killed by the attacks on Dubrovnik in October and November 1991, since the main focus was on the events of 06.12.1991; the charges in those two cases did not take into account the crimes committed between 01.10.1991 and 05.12.1991[488]. According to Croatia, both cases *Jović* and *Strugar* support its claims that they refer to the factual background of what occurred in Dubrovnik, *i.e.*, to the shelling of the Old Town of Dubrovnik[489].

414. Moreover, Croatia quoted the ICTFY's *P. Strugar* decision, where it was stated that: a) "the Old Town was extensively targeted by JNA"; b) "no military firing points or other objectives, real or believed, in the Old Town were targeted by the JNA"; c) as a consequence to the previous fact, "in the Chamber's finding, the intent of the perpetrators was to target civilians and civilian objects in the Old Town"; d) the ICTFY found as a fact that the JNA had carefully planned and premeditated the attack and it was not an spontaneous action[490].

415. Serbia retorted that M. Jokić and P. Strugar were not charged for crimes against humanity or genocide in those cases, and claimed that the attacks on Dubrovnik do not satisfy the requirements of genocide[491]. It further argued that the attacks were not authorized by the leadership of the JNA, and that there was no policy aimed at the destruction of the Croats[492]. In its view, the *P. Strugar* and *M. Jokić* cases do not contain evidence that the attacks on Dubrovnik were ordered or instructed by the leadership of Serbia[493].

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487 Cf. *Reply*, para. 6.97. Croatia further noted that the ICTFY itself referred to the shelling of Dubrovnik in both October and November 1991; cf. *ibid.*, paras. 6.99-105. And, according to the ICTFY, "the evidence establishes that the shelling of the Old Town on 12 November was intense"; cf. *ibid.*, para. 6.100.

488 Cf. *ibid.*, paras. 6.101-102.

489 Cf. *ibid.*, paras. 6.98-6.105.

490 Cf. *ibid.*, paras. 6.103-105.

491 Cf. *Rejoinder*, paras. 408 and 473.

492 Cf. *ibid.*, para. 474.

493 Cf. *ibid.*, para. 475.

b) General Assessment

416. As just seen, much of the debate between Croatia and Serbia was around the cases against M. Jokić and P. Strugar – JNA officials alleged to be responsible for the attacks of 06.12.1991 against Dubrovnik – before the ICTFY. Yet, Dubrovnik was under heavy attack by the JNA not only on 06.12.1991, but for a much longer period, during which a number of concomitant occurrences took place during and after the attacks, namely, torture, transfer of prisoners, beatings and killings, disclosing altogether a pattern of extreme violence and destruction.

417. Serbia stated, as to occurrences in Dubrovnik, that there were no charges of genocide in the aforementioned cases in the ICTFY[494]. But what can be the relevance of the absence of the charge of genocide for the present case opposing Croatia to Serbia before the ICJ, as regards the occurrences in Dubrovnik, considering that different standards of proof apply (cf. *supra*) in cases pertaining to individual (domestic) criminal responsibility and to international State responsibility?

418. All groups and peoples have the right to the preservation of their cultural heritage, of their *modus vivendi*, of their human values. The destruction of cultural goods, as occurred in the JNA bombardments of Dubrovnik, shows lack of, and – worse still, – disdain for, human values[495]. There was a deliberate destruction, by the JNA, of cultural goods in the Old City of Dubrovnik (part of UNESCO's World Heritage List, inscription in 1979, extension in 1994); the discriminatory intent against the targeted group was manifest[496], – as acknowledged in the case-law of the ICTFY.

419. In my perception, this form of destruction is indeed related to physical and biological destruction, as individuals living in groups cannot prescind from their cultural values, and, in any circumstances, in any circumstances (even in isolation), from their spiritual beliefs. Life itself, and the beliefs that help people face the mysteries surrounding it, go together. The right to life and the right to cultural identity go together, they are ineluctably intermingled. Physical and biological

494 Cf. *Rejoinder*, paras. 403-404; and cf. *Reply*, paras. 6.97-6.105.
495 Cf. C. Bories, *Les bombardements serbes sur la vieille ville de Dubrovnik – La protection internationale des biens culturels*, Paris, Pédone, 2005, pp. 145 and 169-170, and cf. pp. 150-154.
496 Cf. *ibid*., pp. 150-157 and 161-163.

destruction is interrelated with the destruction of a group's identity as part of its life, its living conditions.

420. In a factual context disclosing a widespread and systematic pattern of destruction, can we, keeping in mind the victims, really dissociate physical/biological destruction from the cultural one? In my perception, not at all, bearing in mind the relevance of culture, of cultural identity, to the safeguard of the right to life itself, the right to live with dignity. In this respect, I had the occasion to ponder, almost one decade ago, in another international jurisdiction, that

> "The concept of culture, – originated from the Roman '*colere*', meaning to cultivate, to consider, to care for and to preserve, – was originally manifested in agriculture (the care with the land). With Cicero, the concept came to be applied to matters of the spirit and the soul (*cultura animi*). With the *passing of time*, it became associated with humanism, with the attitude of preserving and taking care of the things of the world, including those in the past. The peoples – human beings in their social *milieu*, – faced with the mystery of life, develop and preserve their cultures in order to understand and relate with the outside world. Hence the importance of cultural identity, as a component or aggregate of the fundamental right to life itself"[497].

421. I have already pointed out, in the present Dissenting Opinion, that, in its case-law, – e.g., its Decision of 1996 in the *R. Karadžić and R. Mladić* case, – the ICTFY was particularly attentive to the destruction of cultural and religious sites. And, in its Judgment of 2001 in the *Krstić* case, the ICTFY properly warned that the pattern of destruction as a whole (including the destruction of cultural and religious heritage) is to be duly taken into account, as evidence of the intent to destroy the group[498].

422. The ICJ, contrariwise, has in the present Judgment preferred to close its eyes to it, repeatedly remarking (paras. 136, 388-389), in a dismissive way, that the destruction of cultural and religious heritage does not fall under the categories of acts of genocide set out in Article II of the Convention against Genocide. To attempt to dissociate physical/

497 IACtHR, case of the *Sawhoyamaxa Indigenous Community versus Paraguay* (Judgment of 29.03.2006), Separate Opinion of Judge A.A. Cançado Trindade, para. 4.

498 Cf. part X(4) of the present Dissenting Opinion, *supra*.

biological destruction from the cultural one, for the purpose of the determination of genocide, appears to me an artificiality. Whether one wishes to admit it or not, *body and soul come together*, and it is utterly superficial, clearly untenable, to attempt to dissociate one from the other. Rather than doing so, one has to extract the consequences ensuing therefrom.

XIV. *ACTUS REUS* OF GENOCIDE: WIDESPREAD AND SYSTEMATIC PATTERN OF CONDUCT OF DESTRUCTION: EXTREME VIOLENCE AND ATROCITIES IN SOME MUNICIPALITIES

423. With the aforementioned considerations, I have completed the examination, in the present Dissenting Opinion, of all the components of the onslaught, in a widespread and systematic pattern of destruction, brought to the attention of the Court in the present case. The time has now come to examine the *actus reus* and the *mens rea*, in the factual context of the present case concerning the *Application of the Convention against Genocide* (Croatia *versus* Serbia).

1. Preliminary Methodological Observations

424. Let me turn attention first to the element of *actus reus*. A careful examination of the arguments of the contending Parties, as well as witness statements, presented to the Court, discloses a systematic pattern of conduct of destruction, in the period of the armed attacks of Serb forces in Croatia, in particular in some selected municipalities, – namely, Lovas, Ilok, Bogdanovci and Vukovar (in the region of Eastern Slavonia), and Saborsko (in the region of Lika). The events occurred therein, as narrated in sequence, can, in my perception, be clearly examined in the light of the relevant provisions of the Convention against Genocide (in particular Article 2), to establish the *actus reus* of the crime of genocide (and also, in my understanding, the *mens rea* – *infra*).

425. In other villages, there was also a wide range of serious crimes committed, for example, in Poljanak, Dalj, Bapska, Tovarnik. I draw attention to these and other villages in other parts of the present Dissenting Opinion. But here, after reviewing the occurrences in all the affected villages, I am focusing only on the five selected villages, – Vukovar, Saborsko, Ilok, Bogdanovci and Lovas, – in view of their

complete devastation amidst the extreme violence and the perpetration of atrocities therein, disclosing a widespread and systematic pattern of conduct of destruction (*actus reus,* to my mind together with *mens rea*).

426. It seems regrettable to me that the ICJ did not address all the localities referred to by Croatia, and some villages or municipalities were excluded from the reasoning of the Court. Such is the case, e.g., of Ilok, which was devastated. The Court's Judgment seeks to explain its own approach as follows:

> "The Court does not consider it necessary to deal separately with each of the incidents mentioned by the Applicant, nor to compile an exhaustive list of the alleged acts. It will focus on the claims concerning localities put forward by Croatia as representing examples of systematic and widespread acts committed against the protected group, from which an intent to destroy it, in whole or in part, could be inferred. These are the localities cited by Croatia during the oral proceedings or in regard to which it called witnesses to give oral testimony, as well as those where the occurrence of certain acts has been established before the ICTY" (para. 203).

427. This outlook of the Court, trying to explain its own selective choice of municipalities, seems unsatisfactory to me, given the Court's overall conclusion as to genocide, dismissing, *tout court*, *mens rea*, without giving its reasons for it. In this respect, the Court's Judgment should have examined all villages where Croatia claimed that serious crimes were committed. A more comprehensive, if not exhaustive, examination of the systematic pattern of conduct of destruction would have been appropriate – an indeed necessary – in a case of the importance of the *cas d'espèce*.

2. The Systematic Pattern of Acts of Destruction

428. The review of the evidence, and in particular witness statements, challenged in general terms by Serbia, reveal that many atrocities were committed in various municipalities. These atrocities range from arbitrary and large-scale killings of members of the Croat population (Article II(a) of the Genocide Convention); causing serious bodily or mental harm to members of the Croat population, including by cruel acts of violence (such as mutilation of limbs), torture and sexual violence (Article II(b) of the Genocide Convention); and deliberately

inflicting conditions of life to bring about the destruction of the Croat population and its elimination from the regions concerned, including destruction of towns and villages, systematic expulsion from homes (Article II(c) of the Convention).

429. Witness statements in relation to five municipalities refer to similar events having taken place in those municipalities. These acts, examined closely, demonstrate the consistent and systematic pattern of acts in breach of provisions of the Convention against Genocide, evidencing a genocidal plan. I thus proceed to a review of those breaches in the selected municipalities, as brought to the Court's attention.

3. Killing Members of the Croat Population (Article II(a))

430. "Killings of members of the group" is an act prohibited by the Genocide Convention, within the meaning of Article II(a). A violation of this provision requires evidence that the victim was killed by an unlawful act, with the intention to kill or to cause serious bodily harm which the perpetrator should reasonably have known might lead to death[499]. The question is thus whether the evidence submitted by the Parties, and in particular witness statements examined in the selected municipalities, support a finding that there were "killings of members of the group". Upon review of the evidence, it stems clearly that there were killings of members of the Croat group in various municipalities in Croatia. Such killings occurred by unlawful acts, with the intention to kill or cause serious bodily harm to the victims.

431. There are statements in the record of eyewitnesses concerning killings of members of the civilian population of Croatian nationality during the occupation of Lovas. The village was invaded and occupied by the JNA on 10.10.1991, after a 10-day heavy shelling by the JNA, causing the death of at least 23 Croat civilians[500]. During the attacks in occupied Lovas, defenceless civilian victims were killed: victims hid in the basements during attacks and Serbs tossed bombs in the basements[501]. Captured Croats were used as human shields to enter

499 Cf. *Memorial*, paras. 7.59-7.61, and *Counter-Memorial*, paras. 76-78.
500 Cf. ICJ, doc. CR 2014/12, of 07.03.2014, para. 59, p. 28; and ICJ, doc. CR 2014/8, of 05.03.2014, para. 23, p. 17.
501 Cf. witness statement of M.M., *in Memorial*, Annex 99.

Croats' houses[502]. Several men were taken and separated from their families, and were then executed[503].

432. In an episode which became known as the "*minefield massacre*", the JNA, on 17.10.1991, singled out all the Croat males in Lovas (around 100, aged between 18 and 65), of whom 50 were taken onto a minefield[504]. On their way, one of them was shot and killed by the Serbs forces because he was unable to keep up with the rest of the group, due to being stabbed in the leg during a session of torture in the previous night[505]. As soon as the members of the group arrived in the minefield, they were forced to hold each other's hands and to walk forward on the minefield[506].

433. A witness reported that, at a certain point, they saw some of the mines ahead of them. A young Croat man was pushed onto one of the mines, which immediately exploded and initiated a chain detonation of the mines around the area; according to the Applicant, the explosions immediately killed 21 people and left 12 wounded. Thereafter, Serb soldiers asked for the wounded to shout and raise their hands so that they could be helped. Witnesses described that, as soon as the wounded raised their hands and shouted for help, the Serb soldiers began to shoot and to kill them[507]. The dead bodies were taken to a mass grave[508].

434. Serbia acknowledged that "fourteen accused are currently standing trial before the Belgrade District Court for the alleged killing of 68 Croat victims from the village of Lovas"[509]. Moreover, in Ilok, for instance, there were also reports of killings of Croats by Serbs: for example, the statement of F.D. (who was kept in custody in Ilok from 01.11.1991 to 31.03.1992), reported brutal killings, including by beating to death[510].

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502 *Memorial*, para 4.126.

503 *Ibid.*, para 4.122.

504 ICJ, doc. CR 2014/10, of 06.03.2014, para. 24, p. 15.

505 Cf. *Memorial*, paras. 4.118-4.119 and 4.1234.126; and witness statements of S.P., Annex 97, and of P.V., Annex 95.

506 Cf. *Memorial*, para. 4.125; and witness statement of Z.T., Annex 102.

507 Cf. *ibid*., para. 4.125, and witness Statements of Z.T., Annex 102, and of L.S., Annex 98.

508 On the mass grave in Lovas, cf. *Memorial*, Annex 168B.

509 *Counter-Memorial*, para. 720.

510 *Memorial*, Annex 55.

435. In Bogdanovci, there were many accounts of killings of Croats during the occupation. Many Croats were allegedly murdered in their houses. Croats were killed while attempting to flee the village[511]. According to Croatia, many killings of Croats were committed while they were being forced to go outside their houses, or inside the houses when they would rather stay inside[512]. The village was occupied by paramilitaries and JNA on 10.11.1991 after it had been attacked by heavy artillery and infantry. Marija Katić[513], e.g., testified that the village was completely destroyed, and that "during the destruction ten people were killed, were buried in the so-called School Square in such a way that their bodies were wrapped in tents and buried with a bottle next to their bodies. These bottles contained the data of the dead persons"; other witnesses also reported killings of Croats and torture to death[514].

436. Likewise, in Saborsko, there is evidence of killings of Croats; there are accounts, e.g., of some men who were lined up and shot, and women who were shot in the back[515]. There are also accounts of bodies of Croats being buried in a mass grave[516]. According to M.M., "[a]fter the fall of Saborsko, nobody buried the dead people so they were all left on the places where they died. In the last 15 days, because of the arrival of the blue helmets, the army buried those people with excavators on the places where they got killed and the graves were marked with the crosses that had no names or surnames on them"[517]. As to the acts having taken place in Saborsko, Serbia significantly accepted that most of them had been confirmed by the judgment of the ICTFY[518].

437. There is, moreover, extensive evidence referring to killings of Croats in Vukovar[519]; according to the record, 1,700 persons were allegedly killed (70% civilian), and around 2,000 were killed after the occupation[520]. It stems from the case file that a concentration camp was established in Velepromet, to be later used for organized killings.

511 Cf. *Memorial*, para. 4.51, and cf. witness statements of A.T., *in Memorial*, Annex 39.
512 *Memorial*, para. 4.52, and Annexes 41 and 45.
513 *Ibid.*, Annex 40.
514 Cf. *Memorial*, Annexes 41 and 45.
515 Cf. *ibid.*, paras. 5.149-5.152.
516 Cf. *ibid.*, Annexes 364 and 365.
517 *Ibid.*, Annex 365.
518 *Counter-Memorial*, para. 841.
519 In relation to Vukovar, cf. *Memorial*, paras. 4.139-4.192.
520 *Ibid.*, para. 4.139.

According to a witness statement, about 50 people were executed in that camp before the final fall of Vukovar. The hospital of Vukovar was bombed with two 250 kg bombs[521].

438. In central Vukovar, e.g., executions took place[522]: grenades were thrown in houses and streets were covered with dead bodies. According to E.M.[523], everyday 4-5 people were killed by weapons or slaughtered. He stated that houses were set on fire, and added that, in Velepromet, there were mass executions of people (at least 50 corpses or even more). Another witness, F.G., reported having been cut on the forehead and having seen about 15 decapitated bodies in a hole and a garbage pit in Velepromet, and heads scattered; he also saw a man being decapitated[524]. In Ovčara, an alleged mass execution of 260 people took place, and they were buried in a mass grave[525]. Exhumation took place in 1996 and 145 bodies were identified, but the whereabouts of 60 of the patients taken from the hospital is still unknown[526].

439. Other civilians were taken from the hospital to Velepromet, – a warehouse which was basically a concentration camp, where 15,000 Croats were sent to during the occupation. In Velepromet, atrocities took place, including decapitation and killings. According to F.J., mass murders occurred in Velepromet[527]. Significantly, in relation to the greater Vukovar area, Serbia acknowledged that "[t]he ICTY has indicted several people for the crimes allegedly committed in Vukovar, but the number of deaths for which the accused are charged is significantly smaller than claimed by [Croatia]"[528].

440. In conclusion, it seems clear from the evidence that there was a consistent and systematic pattern of killings of Croats across the municipalities examined. All witness statements in relation to each village report killings, and the intention to kill, as part of the physical element of the crime. The examination of the case record and the corresponding evidence point to a systematic pattern of

521 *Ibid.*, para. 4.154.
522 *Ibid.*, paras. 4.164-4.167.
523 *Memorial*, Annex 126.
524 *Memorial*, Annex 121.
525 *Memorial*, para. 4.175.
526 *Ibid.*, para. 4.178.
527 *Memorial*, Annex 129.
528 *Counter-Memorial*, para. 741.

killings of Croats. There seems thus to be sufficient evidence of the *actus reus* of "killing members of the group" under Article II(a) of the Genocide Convention.

4. Causing Serious Bodily or Mental Harm to Members of the Group (Article II(b))

441. Article II(b) of the Genocide Convention prohibits "causing serious bodily or mental harm to members of the group"; as to the physical element of this prohibited act, the contending parties agree that serious bodily or mental harm does not need to be permanent and irremediable, and that sexual violence crimes can fall within the ambit of this provision[529]. Upon review of the evidence submitted by the Parties, – and in particular witness statements examined in the selected municipalities, – it stems clear that there occurred serious "bodily and mental harm" committed against members of the Croat population across various municipalities in Croatia.

442. Torture, beatings, maltreatment and sexual violence against Croats were common denominators in the evidence produced before the Court. As to Lovas, for example, there were accounts of torture, maltreatment and beatings as well as humiliation suffered therein; those accounts provide evidence of "serious bodily and mental harm" committed against members of the population. An illustration is the statement of witness P.V. concerning events during the occupation of Lovas[530]. She testified that they were held during the day in the "collective yard", and some were kept during the night. The witness reported beatings of those in captivity and torture: she stated that "[t]hey would beat the victims every morning in front of everyone". The witness reported having to disarm mines; she named some of the victims of torture whom she knew personally[531].

443. There was a series of testimonies of heavy beatings. Stjepan Peulić, e.g., testified about interrogation methods and cruel torture: – "Petronije slapped me repeatedly and then hit me with his boot in the chin, which left a scar and two teeth were broken; he continued beating me. At the same time, Ljuban Devetak started

529 Cf. *Memorial*, paras. 7.62-7.64, and *Counter-Memorial*, paras. 79-81.
530 *Memorial*, Annex 95.
531 *Memorial*, Annexes – vol. II, p. 284.

calling people, who were then taken out and beaten with iron tubes and stabbed with bayonets before us"[532]. The statements of P.M.[533] and J.K.[534] also referred to heavy beatings.

444. Similar brutalities were reported to have occurred in Ilok; for example, when thousands of Croatian civilians were leaving the city in a convoy, they were exposed to humiliation and molestation by the JNA and paramilitaries, who also robbed them. Croats that did not wish to leave their homes were subject to physical and psychological harassment, robbery and arbitrary detention. Witness P.V., e.g., reported living in fear to have to leave his home[535]. He stated that "[p] eople would work for days without any food or any compensation. The Serbs would humiliate us all the time. (…) We were not allowed to gather publicly. When we walked on the streets, for example, the Serbs (...) would hit us with rocks and insult us"[536]. Witness M.V.[537] also reported having been tortured for four years.

445. In Bogdanovci, there were also reported cases of torture and maltreatment of Croats. Heavy attacks causing serious bodily injury were also a common denominator in the witness statements. According to Marija Katić, there were artillery attacks every few days (as in August 1991), destroying family houses and farming objects. Witness M.B. also testified about cases of torture, including the stretching of a Croat on a tree in front of a church until he died[538]. Similar cases of bodily and mental harm were reported in Saborsko. A witness reported, e.g., that, in Saborsko, while the commanders were issuing the orders to kill the civilians, they used to say that these latter were all "Ustashas", and should all be killed[539].

446. In Vukovar, serious bodily and mental harm was also reported to have been committed. There were accounts of torture in Velepromet; civilians were mistreated and experienced mental distress. There were also accounts of sexual violence, humiliation and cutting

532 *Memorial*, Annex 97.
533 *Ibid.*, Annex 101.
534 *Ibid.*, Annex 104.
535 *Ibid.*, Annex 58.
536 *Memorial*, vol. II – Annex 58, p. 165.
537 *Ibid.*, Annex 59.
538 *Ibid.*, Annex 41.
539 *Memorial*, Annex 365, Statement of M.M..

of limbs. The narrative of witness Franjo Kožul, e.g., reports of bodily and mental harm having been inflicted upon Croats from Vukovar. He reported that he "could hear" shots, people screaming and sobbing, hits, beating, among other brutalities. He added that

> "As we entered the stable, we had to pass through cordon of men who beat us with everything, the cordon was about 30 meters long. They ordered me to make a list of people that were there, so I knew the number, I made a list of 1242 people, in alphabetical order. After some time I found out that in another stable were 480 men. They were offending us, beat us, maltreated us (…). During the first few days we were sitting and sleeping one over the other, on bare concrete. They would give us some water, one little slice of bread and some cheese, twice a day, and they beat us and tortured us 24 hours a day. I cannot describe all kinds of physical and psychological tortures, I would never imagine that people we lived with, and worked with would do that crime" [540].

447. In a similar vein, witness H.E. testified to daily rapes by Serbian police and army officers upon her arrival to prison. The rapes happened in the cell in front of other female prisoners. She also testified to beatings and mental abuse[541]. Likewise, M.M. also testified to repeated sexual violence, maltreatment and mental distress: she was taken with her two months old baby and six years old sister to Serbia, and then to Vukovar, where they were both raped repeatedly by local Serbs. She testified to the killing of her husband and the mental harm she suffered. She reported that she had to perform forced labour, and, if she did not work, she would not have any food. She also testified about having been tortured, and about repeated rapes by several men, lasting for hours (and in front of her little sister who was very afraid all the time), and with the use of objects causing heavy bleeding[542].

448. Witness T.C. stated that Chetniks "were maltreating, expelling, threatening, beating, raping and killing on a daily basis. They were harshly terrorizing us. All our men, who were capable of work, were taken to camps". Some of them were ordered to keep on

540 *Ibid.*, Annex 114.
541 *Ibid.*, Annex 116.
542 *Ibid.*, Annex 117.

"digging up holes"; they "never returned to their homes", and no one learned anything about them any more. The witness testified that she was raped, and further stated that "Croats had white ribbons at our gate in order to enable Chetniks who were not from our village to recognize us" [543].

449. In conclusion, it stems clearly from the evidence in the case file that, across the municipalities examined, victims suffered serious bodily and mental harm in the form of torture, mistreatment, beatings, sexual violence, psychological distress and forced labour. These accounts were not isolated events; they were repeated in testimonies of witnesses from different municipalities. The aforementioned evidence a systematic pattern of the prohibited acts of destruction, demonstrating the physical element of the acts prohibited under Article II(b) of the Genocide Convention.

5. Deliberately Inflicting on the Group Conditions of Life Calculated to Bring about Its Physical Destruction in Whole or in Part (Article II(c))

450. "Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part" is a prohibited act under Article II(c) of the Genocide Convention. As to the physical element (*actus reus*), Serbia recognized that systematic expulsion from homes can fall within the scope of this provision, if such action is carried out with genocidal intent and forms part of a manifest pattern of conduct that is capable of effecting the physical destruction of the group, and not simply its displacement elsewhere[544]. Thus, the question left is whether, upon analysis of the case file, and in particular witness statements examined in the selected municipalities, it can be concluded that there was a violation of Article II(c) of the Convention.

451. Those witness statements referred to, in addition to rape and sexual violence, also to deprivation of food and basic conditions of life; they also reported on deportation from entire regions. In Lovas, e.g., there were measures which caused the fleeing of Croats, such as the destruction of homes and deportations. According to J.K., before the occupation Lovas had 1700 residents, 94% of whom were Croats;

543 *Ibid*., Annex 128.
544 Cf. *Counter-Memorial*, paras. 83-84, and *Rejoinder*, para. 333.

later on, "they settled around 1500 Serbs" there, and, in "the occupied Lovas there remained about 100 Croats, 25 people in mixed marriages and 144 Serbs from Lovas. The settlers arrived in cars or tractors and they moved into our houses with the permission of the housing Commission" [545].

452. In Ilok, the statement of P.V. reported on being forced to leave his house and remaining in fear to have to leave it; he added that

> "[p]eople would work for days without any food or any compensation. The Serbs would humiliate us all the time. (…) We were not allowed to gather publicly. When we walked on the streets for example the Serbs would spit on us from the church, they would hit us with rocks and insult us" [546].

In relation to Ilok, it is significant to note that even Serbia itself acknowledged that "[t]he Prosecutor of the ICTY charged Slobodan Milošević for deportation or forcible transfer of inhabitants from Ilok"[547]. Likewise, in Bogdanovci, there were accounts of civilians being forced to leave, and the occupation was designed to decimate the population of the village through destruction of the houses, farms and their infrastructure, and churches. It appears that the occupation was designed to make the life of Croats impossible. The experience of D.B. is illustrative of how the attack made life in Bogdanovci impossible[548].

453. The village of Saborsko, likewise, appeared to have been completely destroyed. According to the testimony of M.M., the intention was "to clean" ethnically the village[549]. In the same vein, A.Š. stated that bombs were thrown from a plane on the village and houses and churches were set on fire; the witness further testified to people taking goods from Saborsko[550]. Similarly, M.M. testified that "[a]fter Saborsko was attacked, Nedjeljko Trbojević called 'Kičo', during the action of 'cleaning', went from house to house and he threw bombs", and "burnt a few houses with rocket launchers"[551].

545 *Memorial*, Annex 104, p. 316.
546 *Ibid.*, Annex 58.
547 *Counter-Memorial*, para. 693.
548 *Memorial*, Annex 45.
549 *Ibid.*, Annex 365.
550 *Ibid.*, Annex 364.
551 *Ibid.*, Annex 365.

454. It may be recalled that Serbia acknowledged that the Judgment of the ICTFY (Trial Chamber) in the *M. Martić* case confirmed the November 1991 attack on the village, and "most of the acts alleged to have taken place in Saborsko"[552]. As to Vukovar, there were, likewise, accounts of attempts to destroy all signs of Croatian life and culture in the city, destruction of property and heavy bombings. The majority of the people of the city stayed in basements for three months and common shelters, and many got killed while trying to get food, water and other supplies[553].

455. D.K. was in Vukovar until he was wounded; then he was loaded into a bus and deported to Serbia. He testified about the living conditions in Stajićevo and Sremska Mitrovica[554]; victims had inhumane living conditions, with very little supply of food[555]. B.V. reported not having anything to eat day and night[556]. And L.D. stated that "houses were on fire, grenades were falling and killing people. The Serbs had sent their women and children to Serbia earlier and the men stayed in Vukovar to slaughter us Croats"[557]. In sum, there is evidence produced before the Court that breaches of Article II(c) of the Genocide Convention were committed, within a systematic pattern of extreme violence, aiming at deliberately inflicting conditions of life designed to bring about the physical destruction of the targeted groups of Croats, in whole or in part.

6. General Assessment of Witness Statements and Conclusions

a) Witness Statements

456. The witness statements in relation to each of the selected municipalities, – namely, Lovas, Ilok, Bogdanovci, Saborsko and Vukovar, – all refer to similar occurrences in each of those municipalities. All witness statements have been analysed, including those statements that were unsigned by witnesses. All converge to similar occurrences which fall under Article II of the Convention against Genocide. I

552 *Counter-Memorial*, paras.840-841.
553 *Memorial*, para. 4.151.
554 These are localities in Serbia, where there appears to have been camps where some Croats were taken to.
555 *Ibid.*, Annex 138.
556 *Ibid.*, Annex 151.
557 *Ibid.*, Annex 143.

consider even witness statements that are unsigned relevant for the assessment of events occurred in the aforementioned municipalities, given that they are in the same line as those statements that are signed. The totality of witness testimonies (signed and unsigned), read together, provide substantial evidence of the crimes perpetrated in those municipalities, in breach of Article II of the Convention against Genocide.

457. In the same line of thinking, I have deemed it relevant to examine the acts alleged to have occurred in *all* municipalities for which Croatia submitted evidence – rather than single out one or another specific municipality, – so as to determine whether there was a systematic pattern of destruction. In the present case, the Court, instead of looking at a selected sample of incidents, as it has done, should rather have examined the totality of criminal acts committed during the entire military campaign against Croatia, brought to its attention in the *cas d'espèce*, to determine whether a systematic pattern of conduct of destruction amounting to genocide occurred. The reference to incidents at given municipalities serves to illustrate the general pattern of destruction.

b) Conclusions

458. In my perception, the witness statements in their totality provide evidence of the widespread and systematic pattern of destruction that occurred in those municipalities plagued by extreme violence. The widespread and systematic pattern of destruction, as established in the present case, consisted of the widespread and systematic perpetration of the aforementioned wrongful acts (grave breaches) falling under the Convention against Genocide.

459. They comprised, as seen above, killing members of the Croat (civilian) population (Article II(a)), causing serious bodily or mental harm to members of targeted groups (Article II(b)), and deliberately inflicting on the groups concerned conditions of life calculated to bring about their physical destruction in whole or in part (Article II(c)). It appears that it can be concluded, on the basis of atrocities committed in the selected municipalities, that the *actus reus* of genocide of Article II(a), (b) and (c) of the Convention against Genocide has been established.

XV. *MENS REA* OF GENOCIDE: PROOF OF GENOCIDAL INTENT BY INFERENCE

460. May I now, at this stage of my Dissenting Opinion, move from *actus reus* of genocide to the element of *mens rea* (intent to destroy) under the Convention against Genocide, as applied in the present case. In the course of the proceedings of the *cas d'espèce*, the contending Parties themselves presented arguments as to the issue whether genocidal intent can be proven by inferences[558]. From a cumulative analysis of the *dossier* of the *cas d'espèce* as a whole, in my perception the intent to destroy the targeted groups, in whole or in part, can be inferred from the evidence submitted (even if not direct proofs). The extreme violence in the perpetration of atrocities bears witness of such intent to destroy.

461. The widespread and systematic pattern of destruction across municipalities, encompassing massive killings, torture and beatings, enforced disappearances, rape and other sexual violence crimes, systematic expulsion from homes (with mass exodus), provides the basis for inferring a genocidal plan with the intent to destroy the targeted groups, in whole or in part, in the absence of direct evidence. In effect, to require direct evidence of genocidal intent in all cases is not in line with the jurisprudence of international criminal tribunals, as we shall see next.

1. International Case-Law on *Mens Rea*

462. When there is no direct evidence of intent, this latter can be inferred from the facts and circumstances. Thus, in the *Akayesu* case (Judgment of 02.09.1998), the ICTR (Trial Chamber) held that the intent to commit genocide requires that acts must be committed against members of a group specifically because they belong to that group (para. 521). A couple of jurisprudential illustrations to this effect can here be referred to. For example, the ICTFY (Appeals Chamber) asserted, in the *Jelisić* case (Judgment of 05.07.2001), that,

> "As to proof of specific intent, it may, in the absence of direct explicit evidence, be inferred from a number of facts and circumstances, such as the general context, the

558 Cf., e.g., Croatia's argument *in Reply*, para. 2.11, invoking Serbia's acknowledgment *in Counter-Memorial*, para. 135 (difficulty to obtain direct evidence, and reliance on indirect evidence, with inferences therefrom); *Reply*, para. 2.12.

> perpetration of other culpable acts systematically directed against the same group, the scale of atrocities committed, the systematic targeting of victims on account of their membership of a particular group, or the repetition of destructive and discriminatory acts" (para. 47).

The ICTFY further stated, in the *Krstić* case (Judgment of 19.04.2004), that, when proving genocidal intent based on an inference, "that inference must be the only reasonable inference available on the evidence" (para. 41).

463. Again, in the jurisprudence of the ICTR, it has been established, in the same vein, that intent to commit genocide can be inferred from facts and circumstances. In the *Rutaganda* case, e.g., the ICTR (Trial Chamber, Judgment of 06.12.1999) stated that: "[I]ntent can be, on a case-by-case basis, inferred from the material evidence submitted to the Chamber, including the evidence which demonstrates a consistent pattern of conduct by the Accused"[559] (paras. 61-63). Likewise, in the *Semanza* case, the ICTR (Trial Chamber, Judgment of 15.05.2003) stated that a "perpetrator's *mens rea* may be inferred from his actions" (para. 313).

459. Furthermore, in the *Bagilishema* case, the ICTR (Trial Chamber, Judgment of 07.06.2001) found that

> "evidence of the context of the alleged culpable acts may help the Chamber to determine the intention of the Accused, especially where the intention is not clear from what that person says or does. The Chamber notes, however, that the use of context to determine the intent of an accused must be counterbalanced with the actual conduct of the Accused. The Chamber is of the opinion that the Accused's intent should be determined, above all, from his words and deeds, and should be evident from patterns of purposeful action" (para. 63).

464. In this regard, in the landmark case of *Akayesu,* the ICTR (Trial Chamber, Judgment of 02.09.1998) found that "intent is a mental factor which is difficult, even impossible to determine", and it decided that, "in the absence of a confession from the accused", intent may be inferred from the following factors: a) "the general context of the

559 And cf. also, ICTR, case *Musema,* Judgment of 27.01.2000, para. 167.

perpetration of other culpable acts systematically directed against that same group", whether committed "by the same offender or by others"; b) "the scale of atrocities committed"; c) the "general nature" of the atrocities committed "in a region or a country"; d) "the fact of deliberately and systematically targeting victims on account of their membership of a particular group, while excluding the members of other groups"; e) "the general political doctrine which gave rise to the acts"; f) "the repetition of destructive and discriminatory acts"; and g) "the perpetration of acts which violate, or which the perpetrators themselves consider to violate the very foundation of the group – acts which are not in themselves covered by the list (...) but which are committed as part of the same pattern of conduct" (paras. 523-524).

465. In the case of *Kayishema and Ruzindana,* the ICTR (Trial Chamber, Judgment of 21.05.1999) stated that intent might be difficult to determine and that the accused's "actions, including circumstantial evidence, however may provide sufficient evidence of intent," and that "intent can be inferred either from words or deeds and may be demonstrated by a pattern of purposeful action". The ICTR (Trial Chamber) affirmed that the following can be relevant indicators: a) the number of group members affected; b) physical targeting of the group or their property; c) use of derogatory language toward members of the targeted group; d) weapons employed and extent of bodily injury; e) methodical way of planning; f) systematic manner of killing; and g) relative proportionate scale of the actual or attempted destruction of a group (paras. 93 and 527).

466. In the light of the foregoing, the jurisprudence of international criminal tribunals holds that proof of genocidal intent may be inferred from facts and circumstances, and provides some guidelines to that effect, even in the absence of documentary evidence. Factual elements which can be taken into account for that inference are, e.g., indications of premeditation, of the existence of a State policy or plan, the repetition of atrocities against the same targeted groups, the systematic pattern of extreme violence against, and destruction of, vulnerable or defenceless groups of individuals.

2. General Assessment

467. In the light of the foregoing, the ICJ seems to have imposed too high a threshold for the determination of *mens rea* of genocide, which

does not appear in line with the *jurisprudence constante* of international criminal tribunals on the matter. The ICJ has pursued, and insisted upon pursuing, too high a standard of proof for the determination of the occurrence of genocide or complicity in genocide. In my understanding, *mens rea* cannot simply be discarded, – as the ICJ does in the *cas d'espèce*, – on the basis of an *a priori* adoption of a standard of proof – such as the one the ICJ has adopted – entirely inadequate for the determination of State responsibility for grave violations of the rights of the human person, individually or in groups.

468. The Court cannot simply say, – as is does in the present Judgment, – that there has been no intent to destroy, in the atrocities perpetrated, just because it says so[560]. This is a *Diktat,* not a proper handling of evidence. This *Diktat* goes against the voluminous evidence of the material element of *actus reus* under the Convention against Genocide (Article II), wherefrom the intent to destroy can be inferred. This *Diktat* is unsustainable, it is nothing but a *petitio principii* militating against the proper exercise of the international judicial function. *Summum jus, summa injuria*. *Mens rea*, the *dolus specialis*, can only be *inferred*, from a number of factors.

469. In my understanding, evidential assessments cannot prescind from axiological concerns. Human values are always present, as acknowledged by the historical emergence of the principle, in process, of the *conviction intime* (*livre convencimento / libre convencimiento / libero convincimento*) of the judge. Facts and values come together, in evidential assessments. The inference of *mens rea / dolus specialis*, for the determination of responsibility for genocide, is undertaken as from the *conviction intime* of each judge, as from human conscience.

470. Ultimately, conscience stands above, and speaks higher than, any wilful *Diktat*. The evidence produced before the ICJ pertains to the *overall conduct* of the State concerned, and not to the conduct only of individuals, in each crime examined in an isolated way. The

560 The Court did the same, eight years ago, in its Judgment of 2007 in the *Bosnian Genocide* case: after finding it "established that massive killings of members of the protected group occurred" (para. 276), it added that it was not "conclusively established" that those "massive killings" had been carried out "with the specific intent (*dolus specialis*) on the part of the perpetrators to destroy, in whole or in part, the group as such" (para. 277), – because it said so, without any explanation. Cf., likewise, paras. 440-441 of the present Judgment.

dossier of the present case concerning the *Application of the Convention against Genocide* (Croatia *versus* Serbia) contains irrefutable evidence of a widespread and systematic pattern of extreme violence and destruction, as already examined in the present Dissenting Opinion.

471. Such widespread and systematic pattern of extreme violence and destruction encompassed massive killings, torture, beatings, rape and other sex crimes, enforced disappearances of persons, expulsion from homes and looting, forced displacement and humiliation[561] (*supra*). The facts conforming this pattern of destruction have been proven, in international case-law and in U.N. fact-finding[562] (*supra*). Even in the absence of direct proofs, genocidal intent (*mens rea*) can reasonably be inferred from such planned and large-scale pattern of destruction, systematically directed against the same targeted groups.

XVI. THE NEED OF REPARATIONS: SOME REFLECTIONS

472. The widespread and systematic pattern of destruction in the factual context of the *cas* d´espèce discloses, ultimately, the ever-lasting presence of evil, which appears proper to the human condition, in all times. It is thus understandable that it has attracted the concern of, and has presented challenges to, legal thinking, in our times and previous centuries, as well as other branches of knowledge (such as, e.g., history, psychology, anthropology, sociology, philosophy and theology, among others). It has marked presence in literature as well. This longstanding concern, along centuries, has not, however, succeeded to provide an explanation for evil.

473. Despite the endeavours of human thinking, along history, it has not been able to rid humankind of it. Like the passing of time, the ever-lasting presence of evil is yet another mystery surrounding human beings, wherever and while they live. Whenever individuals purport to subject their fellow human beings to their "will", placing this latter above conscience, evil is bound to manifest itself. In one of the most learned writings on the problem of evil, R.P. Sertillanges ponders that the awareness of evil and the anguish emanated therefrom have marked presence in all civilizations. The ensuing threat to the future of

561 Parts IX, X and XI of the present Dissenting Opinion, *supra*.
562 Part IX of the present Dissenting Opinion, *supra*.

human kind has accounted for the continuous presence of that concern throughout the history of human thinking[563].

474. Religions were the first to dwell upon the problem of evil, which came also to be considered by philosophy, history, psychology, social sciences, and literature. Along the centuries, human thinking has always acknowledged the need to examine the problem of evil, its incidence in human relations, in the world wherein we live, without losing faith in human values[564]. Despite the perennial quest of human thinking to find answers to the problem of evil, – going as far back as the *Book of Job*, or even further back, to the *Genesis* itself[565], – not even theology has found an explanation for it, satisfactory to all.

475. In a devastation, such as the one of the factual context of the present case concerning the *Application of the Convention against Genocide*, the damage done to so many persons, thousands of them, was truly an irreparable one. There is no *restitutio in integrum* at all for the fatal direct victims, the memory of whom is to be honoured. As for the surviving victims, reparations, in their distinct forms, can only *alleviate* their suffering, which defies the passing of time. Yet, such reparations are most needed, so as to render living – or surviving atrocities – bearable. This should be kept constantly in mind.

476. The determination of breaches of Article II of the Convention against Genocide (cf. *supra*) renders inescapable the proper consideration of reparations. In effect, in the course of the proceedings, both contending Parties, in their written and oral arguments, have made claims for reparation for genocide allegedly committed by each other. Croatia's main arguments in this respect are found in its *Memorial*, where it began by arguing that, although the Convention contains

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563 R.P. Sertillanges, *Le problème du mal* – l´histoire, Paris, Aubier, 1948, pp. 5-412.

564 *Ibid*., pp. 5-412.

565 Cf., *inter alia*, e.g., M. Neusch, *L'énigme du mal*, Paris, Bayard, 2007, pp. 7 193; J. Maritain, *Dio e la Permissione del Male*, 6th. ed., Brescia, Edit. Morcelliana, 2000, pp. 9-100; E. Fromm, *Anatomía de la Destructividad Humana*, Mexico/Madrid/Buenos Aires, Siglo XXI Edit., 2009 [reimpr.], pp. 11-468; P. Ricoeur, *Evil – A Challenge to Philosophy and Theology*, London, Continuum, 2007, pp. 33-72; P. Ricoeur, *Le mal – Un défi à la philosophie et à la théologie*, Genève, Éd. Labor et Fides, 2004, pp. 1-965; C.S. Nino, *Juicio al Mal Absoluto*, Buenos Aires, Emecé Edit., 1997, pp. 7-292; A. Morton, *On Evil*, N.Y./London, Routledge, 2004, pp. 1-148; T. Eagleton, *On Evil*, New Haven/London, Yale University Press, 2010, pp. 1-163; P. Dews, *The Idea of Evil*, Oxford, WileyBlackwell, 2013, pp. 1-234.

no specific provision concerning the consequences of a violation by a Party, breaches of international obligations entail the obligation to make full reparation. In this sense, Croatia claimed that if Serbia[566] was found to be internationally responsible for the alleged violations of the Genocide Convention, it must make full reparation for material and immaterial damage[567].

477. Croatia has in fact requested the Court to reserve this issue "to a subsequent phase of the proceedings", as in previous cases. A declaratory judgment by the ICJ of Serbia's responsibility, – it added, – would already provide a primary means of satisfaction, stressing the importance of the obligations enshrined in the Genocide Convention, and underscoring the rule of law and the respect for fundamental human rights. To Croatia, such declaratory judgment would also "assist in the process of setting the historical record straight", and would thereby "contribute towards reconciliation over the longer term"[568].

478. Croatia has further asked the Court to declare Serbia's obligation to take all steps at its disposal to provide an immediate and full account to Croatia of the whereabouts of missing persons, and to order Serbia to return cultural property which was stolen in the course of the genocidal campaign. Furthermore, Croatia has claimed that, as a consequence of Serbia's illegal conduct, it is entitled to obtain full reparation for the damages caused and for the losses suffered, in particular for the wrongful acts connected to the Serbian genocidal campaign, as described in its *Memorial*[569].

479. Compensation, – it has added, – is "due for all damage caused to the physical and moral integrity and well-being of the citizens of Croatia". Croatia then concludes that, "in a case relating to genocide, where there has been a massive loss of life and untold human misery has been caused", *restitutio* will never wipe out the consequences of the illegal act; it thus claims also for satisfaction for the damages

566 FRY, at the beginning of the proceedings.
567 *Memorial*, para. 8.75.
568 *Ibid*., paras. 8.75-8.77.
569 *Ibid*., paras. 8.78-8.79. Cf. also *Application*, pp. 18-20; Memorial, p. 414; and *Reply*, p. 472.

suffered[570]. At last, in its final submissions read at the end of the oral proceedings, Croatia has repeated its request for reparation[571].

480. Serbia, for its part, responded briefly to those arguments on reparation, having stated first that they appear hypothetical, as, in its view, its responsibility for genocide cannot be engaged. As to the claim for compensation when *restitutio* in kind is not possible, Serbia has contended that Croatia was trying to get compensation for all possible damages which might have been caused by the war in Croatia. It has added that Croatia's claims for reparation were not to be determined by the ICJ, whose jurisdiction concerns only possible violations of the Convention against Genocide[572].

481. Serbia has also submitted a request for reparation, in relation to its counter-claim, as stated in its *Counter-Memorial*. It has requested the ICJ to adjudge and declare Croatia's responsibility to "redress the consequences of its international wrongful acts" and in particular to provide full compensation for "all damages and losses caused by the acts of genocide"[573]. In its final submissions in relation to the counter-claim, read at the end of the oral proceedings, it reiterated its request[574].

482. It should not pass unnoticed that that both contending Parties have requested that reparation for alleged acts of genocide be determined by the ICJ in a subsequent phase of the case. The ICJ should, in my understanding, have found, in relation to Croatia's claim, that acts of genocide were committed, for the reasons expressed in the present Dissenting Opinion. Accordingly, Croatia's request for reparation should have been entertained by the Court, and the ICJ should thus have reserved the issue of the determination of reparation to a separate phase of the proceedings in this case, as requested by the Applicant.

483. In this respect, it may be recalled that, in the recent case *A.S. Diallo* (Guinea *versus* D.R. Congo, 20102012) the ICJ examined, during the merits phase, the violations of the international human rights Conventions invoked by Guinea[575]. In its Judgment of 30.11.2010, the ICJ

570 *Memorial*, paras. 8.80-8.84.
571 Cf. ICJ, doc. CR 2014/21, of 21.03.2014, pp. 40-41.
572 *Counter-Memorial,* paras. 1059-1068.
573 *Ibid.*, p. 471; cf. also *Rejoinder*, p. 322.
574 Cf. ICJ, doc. CR 2014/24, of 28.03.2014, p. 64.
575 *A.S. Diallo* (merits, Guinea *versus* D.R. Congo), *ICJ Reports* (2010) p. 639.

held that the D.R. Congo had violated certain obligations contained in those Conventions, namely, Articles 9 and 13 of the U.N. Covenant on Civil and Political Rights, and Articles 6 and 12 of the African Charter on Human and Peoples' Rights, in addition to Article 36(1)(b) of the Vienna Convention on Consular Relations[576]. The ICJ accordingly held, in relation to reparation, that:

> "In the light of the circumstances of the case, in particular the fundamental character of the human rights obligations breached and Guinea's claim for reparation in the form of compensation, the Court is of the opinion that, in addition to a judicial finding of the violations, reparation due to Guinea for the injury suffered by Mr. Diallo must take the form of compensation"[577].

484. In this respect, the Court reserved for a subsequent phase of the proceedings the question of compensation for the injury suffered by Mr. A.S. Diallo[578]. In that phase of reparations, the ICJ then adjudicated the question of the compensation owed by the D.R. Congo to Guinea for the damages suffered by the victim, Mr. A.S. Diallo, and delivered its Judgment on the issue on 19.06.2012[579]. In my extensive Separate Opinion (paras. 1-101), I examined the matter in depth, and upheld, *inter alia*, that the ultimate *titulaire* or beneficiary of the reparations ordered by the ICJ was the human person victimized, rather than his State of nationality.

485. In the present case Judgment in the case relating to the *Application of the Convention against Genocide*, opposing Croatia to Serbia, had the Court found – which it regrettably did not – that the respondent State incurred in breaches of the Genocide Convention, it should have opened a subsequent phase of the proceedings, for the adjudication of the reparations (in its distinct forms) due, ultimately to the victims (human beings) themselves. In recent years, the challenges posed by the determination of reparations in the most complex situations, have begun to attract scholar attention; yet, we are still – surprisingly as it may seem – in the infancy of this domain of international law.

576 *Ibid.*, paras. 73, 74, 85 and 97.
577 *Ibid.*, para. 161.
578 Cf. *ibid.*, p. 693, resolutory points 7 and 8.
579 Cf. *ICJ Reports* (2012) p. 324.

XVII. THE DIFFICULT PATH TO RECONCILIATION

486. In the violent conflicts which form the factual context of the present case opposing Croatia to Serbia, the numerous atrocities committed (torture and massive killings, extreme violence in concentration camps, rape and other sexual violence crimes, enforced disappearances of persons, expulsions and deportations, unbearable conditions of life and humiliations of various kinds, among others), besides victimizing thousands of persons, made hatred contaminate everyone, and decomposed the *social milieux*. The consequences, in long-term perspective, are, likewise, and not surprisingly, disastrous, given the resentment transmitted from one generation to another.

487. Hence the importance of finding the difficult path to reconciliation. In my understanding, the first step is the acknowledgment that a widespread and systematic pattern of destruction ends up dismantling everyone, the oppressed (victims) and the oppressors (victimizers). From the times of the *Iliad* of Homer until nowadays, the impact of war and destruction upon human beings has been constantly warning them as to the perennial evil surrounding humanity, and yet lessons of the past have not been learned.

488. In a penetrating essay (of 1934), Simone Weil, one of the great thinkers of last century, drew attention to the utterly unfair demands of the struggle for power, which ends up victimizing everyone. From Homer's *Iliad* to date, individuals, indoctrinated and conditioned for war and destruction, have become objects of the struggle for domination. There occurs "the substitution of the ends by the means", transforming human life into a simple means, which can be sacrificed; individuals become unable to think, and abandon themselves entirely to "a blind collectivity", struggling for power (the end)[580].

489. The distinction between "oppressors and oppressed", – S. Weil aptly observed, – almost loses meaning, given the "impotence" of all individuals in face of the "social machine" of destruction of the spirit and fabrication of the inconscience[581]. The consequences, as shown by the present case concerning the *Application of the Convention*

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580 S. Weil, *Reflexiones sobre las Causas de la Libertad y de la Opresión Social*, Barcelona, Ed. Paidós/Universidad Autónoma de Barcelona, 1995, pp. 81-82, 84 and 130.

581 *Ibid.*, pp. 130-131; S. Weil, *Réflexions sur les causes de la liberté et de l´oppression sociale*, Paris, Gallimard, 1955, pp. 124-125, and cf. pp. 114-115 and 144.

against Genocide, opposing Croatia to Serbia, are disastrous, and, as I have just pointed out, generate long-lasting resentment.

490. The next step, in the difficult path to reconciliation, lies in the provision of reparations – in all its forms – to the victims. Reparations (*supra*) are, in my understanding, essential for advancing in the long and difficult path to reconciliation, after the tragedy of the wars in the former Yugoslavia in the nineties. In the framework of reparations, besides the judicial (declaratory) acknowledgment of the breaches of the Genocide Convention, there are other measures to pursue the path to reconciliation.

491. In this connection, may I single out that, in a particularly enlightened moment of the long oral proceedings in the present case concerning the *Application of the Convention against Genocide* (Croatia *versus* Serbia), in the public sitting before the Court of 10.03.2014, the Agent of Serbia took the commendable step of making the following statement:

> "In the name of the Government and the People of the Republic of Serbia, I reiterate the sincere regret for all victims of the war and of the crimes committed during the armed conflict in Croatia, whatever legal characterization of those crimes is adopted, and whatever the national and ethnic origin of the victims. Each victim deserves full respect and remembrance"[582].

492. The path to reconciliation is certainly a difficult one, after the devastation of the wars in the Balkans. The contending parties are surely aware of it. In the same public sitting before the ICJ, of 10.03.2014, the Agent of Serbia further asserted that

> "The cases in which Serbia was a party were of an exceptional gravity: these were cases born out of the 1990s conflicts in the former Yugoslavia, which left tragic consequences to all Yugoslav peoples and opened important issues of State responsibility. This case is the final one in that sequence. In this instant case Serbia expects – more than in any of its previous cases – that suffering of the Serb people should also be recognized, get due attention, and a remedy.

582 ICJ, doc. CR 2014/13, of 10.03.2014, para. 5.

> Today it is well known that the conflict in Croatia was followed by grave breaches of international humanitarian law. There is no doubt that Croats suffered a lot in that conflict. This case is an opportunity for all of us to remind ourselves of their tragedy (...). However, the Croatian war caused grave sufferings to Serbs as well (...)"[583].

493. Croatia, for its part, contends that one of the remedies it seeks is the return of the mortal remains of the deceased to their families[584]. It reports that at least 840 bodies[585] are still missing as the result of the alleged genocidal acts carried out by Serb forces. Croatia claims that Serbia has not been providing the required assistance to carry on the searches for those mortal remains and their identification. The contending parties' identification and return of all the mortal remains to each other is yet another relevant step in the path towards reconciliation. I dare to nourish the hope that the present Dissenting Opinion may somehow, however modestly, serve the purpose of reconciliation.

XVIII. CONCLUDING OBSERVATIONS: THE NEED OF A COMPREHENSIVE APPROACH TO GENOCIDE UNDER THE 1948 CONVENTION

494. Contrary to what contemporary disciples of Jean Bodin and Thomas Hobbes may still wish to keep on thinking, the Peace Palace here at The Hague was not built and inaugurated one century ago to remain a sanctuary of State sovereignty. It was meant to become a shrine of international justice, not of State sovereignty. Even if the mechanism of settlement of contentious cases by the PCIJ/ICJ has remained a strictly inter-State one, by force of mental inertia, the nature and subject-matters of certain cases lodged with the Hague Court along the last nine decades have required of it to go beyond the strict inter-State outlook[586]. The artificiality of the exclusively inter-State outlook, resting on a longstanding dogma of the past, has thus been made often manifest, and increasingly so.

583 *Ibid*., paras. 23.
584 *Memorial*, para. 1.10 and 1.37.
585 ICJ, doc. CR 2014/5, of 03.03.2014, para. 6.
586 For a study of this issue, cf. A.A. Cançado Trindade, "A Contribuição dos Tribunais Internacionais à Evolução do Direito Internacional Contemporâneo", *in*: *O Direito Internacional e o Primado da Justiça*" (eds. A.A. Cançado Trindade and A.C. Alves Pereira), Rio de Janeiro, Edit. Renovar, 2014, pp. 3-89, esp. pp. 18-20, 46-47, 51, 64 and 68.

495. More recently, the contentious cases wherein the Court's concerns have had to go beyond the strict inter-State outlook have further increased in frequency[587]. The same has taken place in the two more recent Advisory Opinions of the Court[588]. Half a decade ago, for example, in my Separate Opinion in the ICJ's Advisory Opinion on the *Declaration of Independence of Kosovo* (of 22.07.2010), I deemed it fit to warn against the shortcomings of the strict inter-State outlook (para. 191), and stressed the need, in face of a humanitarian crisis in the Balkans, to focus attention on the *people* or *population concerned* (paras. 53, 65-66, 185 and 205-207), in pursuance of a humanist outlook (paras. 75-77 and-190), in the light of the principle of humanity (para. 211)[589].

496. The present case concerning the *Application of the Convention against Genocide* (Croatia *versus* Serbia) provides yet another illustration of the pressing need to overcome and move away from the dogmatic and strict inter-State outlook, even more cogently. In effect, the 1948 Convention against Genocide, – adopted on the eve of the Universal Declaration of Human Rights, – is not State-centered, but rather *people-centered*. The Convention against Genocide cannot be properly interpreted and applied with a strict State-centered outlook, with attention turned to inter-State susceptibilities. Attention is to be kept on the *justiciables*, on the victims, – real and potential victims, – so as to impart justice under the Genocide Convention.

1. Evidential Assessment and Determination of Facts

497. I thus regret not to be able to share at all the Court's reasoning in the *cas d'espèce*, nor its conclusion as to the Applicant's claim. To start with, the Court's *evidential assessment* and *determination of the facts*

587 E.g., the case on *Questions Relating to the Obligation to Prosecute or Extradite* (2009-2013), pertaining to the principle of universal jurisdiction under the U.N. Convention against Torture; the case of *A.S. Diallo* (2010) on detention and expulsion of a foreigner; the case of the *Jurisdictional Immunities of the State* (2010-2012); the case of the *Application of the International Convention on the Elimination of All Forms of Racial Discrimination* (2011); the case of the *Temple of Preah Vihear* (2011-2013).

588 On the *Declaration of Independence of Kosovo* (2010), and on a *Judgment of the ILO Administrative Tribunal upon a Complaint Filed against the IFAD* (2012), respectively.

589 In that same Separate Opinion, I also drew attention to the expansion of international legal personality and capacity, as well as international responsibility (para. 239), in contemporary international law.

are atomized and not comprehensive. It chooses some municipalities (cf. para. 203) and describes summarily some occurrences therein. Its examination of the facts is rather aseptic[590]. Not surprisingly, the ICJ fails to characterize the pattern, as a whole, of the atrocities committed, as being widespread and systematic.

498. The Court has taken note of atrocities – such as summary executions and decapitations – perpetrated in Vukovar and its surrounding area, admitted by the Respondent (paras. 212-224). It has taken note of massacres, *inter alia*, e.g., in Lovas (paras. 231-240) and in Bogdanovci, admitted by Serbia (paras. 225-230). It has taken note of other massacres, *inter alia*, e.g., in Saborsko (paras. 268-271), in Poljanak (paras. 272-277), in Hrvatska Dubika and its surrounding area (paras. 257-261). Yet, this is just a sample of the atrocities that were committed in the *cas d'espèce*.

499. In addition to the localities cited by the ICJ in the present Judgment, there are numerous other localities wherein atrocities occurred, – in the regions of Eastern Slavonia, Western Slavonia, Banovina/Banija, Kordun, Lika and Dalmatia, – brought to the attention of the Court by Croatia, which were not cited or addressed directly in the present Judgment of the Court. Not surprisingly, the Court fails to establish a widespread and systematic pattern of destruction with the intent to destroy, without any satisfactory explanation why it has chosen this path for the examination of the facts.

500. In the present Judgment, the ICJ takes note of the findings of the ICTFY (in its Judgments in the cases of *Mrkšić and Radić and Šljivančanin* ["*Vukovar Hospital*"], 2007; and of *M. Martić*, 2007; and of *Stanišić and Simatović*, 2013) that

> "from the summer of 1991, the JNA and Serb forces had perpetrated numerous crimes (including killing, torture, ill-treatment and forced displacement) against Croats in the regions of Eastern Slavonia, Banovina/Banija, Kordun, Lika and Dalmatia" (para. 208).

Yet, apart from massive killings, the Court fails to characterize other crimes as having been committed also on a large scale,

590 Already in my Separate Opinion (para. 219) in the ICJ's Advisory Opinion on the *Declaration of Independence of Kosovo* (2010), I had warned against an aseptic examination of the facts.

conforming a widespread and systematic pattern of destruction. From time to time the Court minimizes the scale of crimes such as rape and other sexual violence crimes (para. 364), expulsion from homes and forced displacements (para. 376), deprivation of food and medical care (paras. 366 and 370).

501. Even an international criminal tribunal such as the ICTFY, entrusted with the determination of the international criminal responsibility of individuals, has been attentive to a comprehensive approach to evidence in order to determine genocidal intent. This particular point has recently been made by the ICTFY (Appeals Chamber) in the *R. Karadžić* case (Judgment of 11.07.2013), where it warned that

> "Rather than considering separately whether an accused intended to destroy a protected group through each of the relevant genocidal acts, a trial chamber should consider whether all of the evidence, taken together, demonstrates a genocidal mental state" (para. 56).

502. The ICTFY (Appeals Chamber) further asserted, in the same *R. Karadžić* case, that, "by its nature, genocidal intent is not usually susceptible to direct proof" (para. 80). This being so, – it added, –

> "in the absence of direct evidence, genocidal intent may be inferred from a number of facts and circumstances, such as the general context, the perpetration of other culpable acts systematically directed against the same group, the scale of atrocities committed, the systematic targeting of victims on account of their membership in a particular group, the repetition of destructive and discriminatory acts, or the existence of a plan or policy" (para. 80).

503. In face of the task of the determination of the international responsibility of States, – with which the ICJ is entrusted, – with all the more reason one is to pursue a comprehensive approach to evidence. Contemporary international human rights tribunals, – which, like the ICJ, are also entrusted with the determination of the international responsibility of States, – know well, from their own experience, that respondent States tend to withhold the monopoly of evidence of the atrocities perpetrated and attributable to them.

504. It is thus not surprising that, in their evolving case-law, – addressed to by the contending Parties, but entirely overlooked by the ICJ's Judgment in the present case, – international human rights tribunals have rightly avoided a high threshold of proof, and have applied the distribution or shifting of the burden of proof[591]. In the determination of facts in cases of the kind (pertaining to grave breaches), they have remained particularly aware of the primacy of concern with fundamental rights inherent to human beings over concern with State susceptibilities. After all, the *raison d'humanité* prevails over the *raison d'*État.

505. In the present Judgment in the case concerning the *Application of the Convention against Genocide*, the ICJ has seen only what it wanted to see (which is not much), trying to make one believe that the targeted groups were simply forced to leave the territory claimed as Serb (para. 426, and cf. para. 435). As if trying to convince itself of the absence of genocidal intent, the ICJ has further noted – making its own the argument of Serbia[592] – that the ICTFY Prosecutor has never charged any individuals for genocide in the context of the armed attacks in Croatia in the period 1991-1995 (para. 440).

506. This does not at all have a bearing upon State responsibility. Individuals other than the ones charged, could, as State agents, have been responsible; indictments can be confirmed (as in the case of *R. Karadžić*, in mid-2013), so as to encompass genocide; and, in his indictments, the Prosecutor exerts a *discretionary* power, its statute being entirely distinct from that of international judges. In any case, in respect of State responsibility, – as I have already pointed out, – the standards of proof are not the same as in respect of individual criminal responsibility.

507. Even if we do not know, – and will never know, – the total amount of victims who were tortured or raped (they were numerous), all the facts, taken together, conform, in my perception, a widespread and systematic pattern of destruction, under the Genocide Convention, as examined in the present Dissenting Opinion. They are *facts of common knowledge* (*faits de notoriété publique / fatos de conhecimento público e notorio / hechos de conocimiento público y notorio / fatti notori* [*di comune esperienza*]), which thus do not need to be subjected to a scrutiny pursuant

591 Cf. part VII of the present Dissenting Opinion, *supra*.
592 Cf. *Counter-Memorial*, para. 944.

to a high threshold of proof, depriving the Genocide Convention of its *effet utile*, in the determination of State responsibility.

2. Conceptual Framework and Reasoning as to the Law

508. The Court's *conceptual framework* and *reasoning as to the law* are likewise atomized and not comprehensive. First of all, its reading of the categories of acts of genocide under the Convention against Genocide (Article II) is as strict as it can possibly be. The Court, furthermore, considers separately the interrelated elements of *actus reus* and *mens rea* of genocide, applying a high threshold of proof, which finds no parallel in the evolving case-law of international criminal tribunals as well as international human rights tribunals. This ends up rendering, regrettably, the determination of State responsibility for genocide under the Convention an almost impossible task, and the Convention itself an almost dead letter. The way is thus paved for the lack of legal consequences, and for impunity for the atrocities committed.

509. The Court's conceptual framework and reasoning as to the law are, furthermore, atomized also in its perception of each branch of international law on its own, – even those branches that establish regimes of protection of the rights of the human person, – namely, the International Law of Human Rights (ILHR), International Humanitarian Law (IHL), and the International Law of Refugees (ILR). The Court thus insists in approaching even IHL and International Criminal Law (ICL) in a separate and compartmentalized way.

510. In its insistence on its atomized approach, in separating, e.g., the Convention against Genocide from IHL (para. 153), the Court fails to perceive that the Genocide Convention, being a human rights treaty (as generally acknowledged), converges with international instruments which form the *corpus juris* of human rights. They all pertain to the determination of State responsibility. Some grave breaches of IHL may concomitantly be breaches of the Genocide Convention.

511. This atomized approach, in several aspects, appears static and antihistorical to me, for it fails to grasp the evolution of international legal thinking in respect of the remarkable expansion, along the last decades, of international legal personality and capacity, as well as international responsibility, – a remarkable feature of the contemporary *jus gentium*. Contrary to what the ICJ says in the present Judgment,

there are, in my perception, approximations and convergences between the three trends of protection of the rights of the human person (ILHR, IHL, ILR)[593], in addition to contemporary ICL.

512. Moreover, contemporary ICL nowadays is also concerned with the situation of the victims. The Convention against Genocide, for its part, being *people-oriented*, is likewise concerned with the *victims* of extreme human cruelty. The Convention is not separated (as the Court assumes) from other branches of safeguard of the rights of the human person; it rather converges with them, in seeking to protect human dignity. The Genocide Convention, by itself, bears witness of the approximations or convergences between ICL and the ILHR.

513. Last but not least, the Court's reasoning is, moreover, atomized also in its counter-position of customary and conventional IHL itself (paras. 79 and 88-89, *supra*). In my understanding, customary and conventional IHL are to be properly seen in interaction, and are not to be kept separated from each other, as the Court attempts to do. After all, there is no violation of the substantive provisions of the Genocide Convention which is not, at the same time, a violation of customary international law on the matter as well. The atomized approach of the Court, furthermore, fails to recognize the great importance – for both conventional and customary international law – of the general principles of law, and in particular of the principle of humanity.

514. The determination of State responsibility for genocide calls for a comprehensive outlook, rather than an atomized one, as pursued by the ICJ. As I pointed out earlier on, in the present Dissenting Opinion, the Genocide Convention is generally regarded as a human rights treaty, and human rights treaties have a hermeneutics of their own (para. 32), and are endowed with a mechanism of collective guarantee (para. 29). The proper hermeneutics of the Genocide Convention is, in my understanding, necessarily a comprehensive one, and not an atomized or fragmented one, as pursued by the ICJ in the present Judgment, as well as in its prior Judgment of 2007 in the *Bosnian Genocide* case.

515. Each international instrument is a product of its time, and exerts its function continuously by being applied as a "living instrument". I have carefully addressed this particular point, in detail, in respect of

593 Paras. 58, 60, 64, 69, 79 and 84, *supra*.

human rights treaties, in my extensive Dissenting Opinion (paras. 167-185) in the case concerning the *Application of the International Convention on the Elimination of All Forms of Racial Discrimination - CERD* (Georgia *versus* Russian Federation, Judgment of 01.04.2011).

516. In that Dissenting Opinion, I warned against the posture of the ICJ in the *CERD Convention* case, – also reflected in the present Judgment of the ICJ (para. 85), as well as in its prior Judgment in the *Bosnian Genocide* case (2007), – of ascribing an "overall importance" to individual State *consent*, "regrettably putting it well above the imperatives of the realization of justice at international level" (para. 44). The CERD Convention, like other human rights treaties, – I continued, – contains obligations of "an essentially objective character, implemented collectively", and showing that, in this domain of protection, international law appears, more than voluntary, as "indeed necessary" (paras. 63 and 72). The protected rights and fundamental human values stand above State "interests" or its "will" (paras. 139 and 162).

517. The proper hermeneutics of human rights treaties, – I proceeded in the same Dissenting Opinion, – moves away from "a strict State-centered voluntarist perspective" and from the "exaltation of State consent", and seeks guidance in fundamental principles (*prima principia*), such as the principle of humanity, which permeates the whole corpus juris of the ILHR, IHL, ILR and ICL (paras. 209-212). Such *prima principia* confer to the international legal order "its ineluctable axiological dimension"; they conform its *substratum*, and convey the idea of an *objective* justice, in the line of jusnaturalist thinking (para. 213).

518. Only in this way, – I added, – can we abide by "the imperative of the *realization of justice* at international level", acknowledging that "*conscience stands above the will*" (para. 214). And I further warned in my aforementioned Dissenting Opinion that

> "The Court cannot remain hostage of State consent. It cannot keep displaying an instinctive and continuing search for State consent, (...) to the point of losing sight of the imperative of realization of justice. The moment State consent is manifested is when the State concerned decides to become a party to a treaty, – such as the human rights treaty in the present case, the CERD Convention. The hermeneutics and proper application of that treaty cannot be continuously subjected to a recurring search for State consent. This would unduly render the letter

of the treaty dead, and human rights treaties are meant to be living instruments, let alone their spirit" (para. 198).

519. The present Judgment of the Court again misses the point, and fails to render a service to the *Convention against Genocide*. In a case pertaining to the interpretation and application of this latter, the Court even makes recourse to the so-called *Monetary Gold* "principle"[594], which has no place in a case like the present one, and which does not belong to the realm of the *prima principia*, being nothing more than a concession to State consent, within an outdated State voluntarist framework. In face of the pursuance of this outlook, I wonder whether the Genocide Convention has any future at all...

520. The Convention, essentially *people-centered*, will have a future if attention is rightly turned to its *rationale*, to its object and purpose, keeping in mind the principle *ut res magis valeat quam pereat*, so to secure to it the appropriate effects (*effet utile*), and, ultimately, the realization of justice. Already for some time, attention has been drawn to the shortcomings of the Convention against Genocide as originally conceived, namely: a) the narrowing of its scope, excluding cultural genocide and massive slaughter of political and social groups; b) the much lesser attention to prevention of genocide, in comparison with its punishment[595]; c) the weakening of provisions for enforcement, with concern for State sovereignty taking precedence over concern for protection against genocide[596].

521. From the adoption of the Genocide Convention in 1948 until our days, the vulnerability or defencelessness of targeted groups has continued, just as much as the reluctance of States to deal with the matter and protect them against genocide under the Convention has persisted. This discloses, – as I have already pointed out in the present Dissenting Opinion, – the manifest inadequacy of examining genocide from a strictly inter-State outlook, with undue deferences to

594 Even if only to dismiss it (para. 116).

595 As transposed, historically, from domestic into international criminal law.

596 Cf. L. Kuper, *International Action against Genocide*, London, Minority Rights Group (Report n. 53), 1982, pp. 9, 11 and 13-14; G.J. Andreopoulos, "Introduction: The Calculus of Genocide", *in Genocide: Conceptual and Historical Dimensions* (ed. G.J. Andreopoulos), Philadelphia, University of Pennsylvania Press, 1994, pp. 23 and 617; M. Lippman, "Genocide: The Crime of the Century – The Jurisprudence of Death at the Dawn of the New Millenium", 23 *Houston Journal of International Law* (2001) pp. 477-478, 487, 503-506, 523-526 and 533.

State sovereignty. After all, as I have already stressed, the Genocide Convention is *people-oriented*.

522. Genocide, which occurs at intra-State level, calls for a people-centered outlook, focused on the victims, surrounded by extreme vulnerability. There are, among genocide scholars, those who are sensitive enough and support a generic concept, so as not to leave without protection any segment of victims of "genocidal wars" or "genocidal massacres"[597], even beyond the Genocide Convention. It is not my intention here to dwell upon such generic concept or definition; distinctly, I concentrate, more specifically, on the comprehensive outlook, that I sustain, of genocide *under the 1948 Convention*.

523. Such comprehensive outlook takes into due account the *whole factual context* of the present case opposing Croatia to Serbia, – and not only just a sample of selected occurrences in some municipalities, as the Court's majority does. That whole factual context, in my assessment, clearly discloses a widespread and systematic pattern of destruction, – which the Court's majority seems to be at pains with, at times minimizing it, or not even taking it into account. All the aforesaid, in my own understanding, further calls for a comprehensive, rather than atomized, consideration of the matter, faithful to humanist thinking and keeping in mind the principle of humanity[598], which permeates the whole of the ILHR, IHL, ILR and ICL, including the Genocide Convention.

524. From all the preceding considerations, it is crystal clear that my own position, in respect of the aforementioned points – of evidential assessments as well as of substance – which form the object of the present Judgment of the ICJ on the case concerning the *Application of the Convention against Genocide*, stands in clear opposition to the view espoused by the Court's majority. My dissenting position is grounded not only on the assessment of the arguments produced before the Court by the contending parties (Croatia and Serbia), but above all on

597 Cf., e.g., L. Kuper, "Other Selected Cases of Genocide and Genocidal Massacres: Types of Genocide", *in Genocide – A Critical Bibliographic Review* (ed. I.W. Charny), London, Mansell Publ., 1988, pp. 155-171; L. Kuper, "Theoretical Issues Relating to Genocide: Uses and Abuses", *in Genocide: Conceptual and Historical Dimensions*, *op. cit. supra* n. (588), pp. 32-37 and 44; I.W. Charny, "Toward a Generic Definition of Genocide", *in ibid.*, pp. 64-78, 84-85 and 90-92.

598 Cf. part V of the present Dissenting Opinion, *supra*.

issues of principle and on fundamental values, to which I attach even greater importance. I have thus felt obliged, in the faithful exercise of the international judicial function, to lay the foundations of my own dissenting position in the *cas d'espèce* in the present Dissenting Opinion.

XIX. EPILOGUE: A RECAPITULATION

525. I deem it fit, at this final stage of my Dissenting Opinion, as an epilogue, to recapitulate all the points of my dissenting position, expressed herein, for the sake of clarity, and in order to stress their interrelatedness. *Primus*: Prolonged delays – such as the unprecedented one of 16 years in the *cas d'espèce* – in the international adjudication of cases of the kind are most regrettable, in particular from the perspective of the victims; paradoxically, the graver the breaches of international law appear to be, the more time-consumingand difficult it becomes to impart justice.

526. *Secundus*: In the *cas d'espèce*, opposing Croatia to Serbia, responsibility cannot be shifted to an extinct State; there is personal continuity of policy and practices in the period of occurrences (1991 onwards). *Tertius*: The 1948 Convention against Genocide being a human rights treaty (as generally acknowledged), the law governing State succession to human rights treaties applies (with *ipso jure* succession). *Quartus*: There can be no break in the protection afforded to human groups by the Genocide Convention in a situation of dissolution of State amidst violence, when protection is most needed.

527. *Quintus*: In a situation of this kind, there is automatic succession to, and continuing applicability of, the Genocide Convention, which otherwise would be deprived of its appropriate effects (*effet utile*). *Sextus*: Once the Court's jurisdiction is established in the initiation of proceedings, any subsequent lapse or change of attitude of the State concerned can have no bearing upon such jurisdiction. *Septimus*: Automatic succession to human rights treaties is reckoned in the practice of United Nations supervisory organs.

528. *Octavus*: The essence of the present case lies on substantive issues pertaining to the interpretation and application of the Convention against Genocide, rather than on issues of jurisdiction/admissibility, as acknowledged by the contending Parties themselves in the course of the proceedings. *Nonus*: Automatic succession to, and continuity of

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

529. *Decimus*: The principle of humanity permeates the whole Convention against Genocide, which is essentially *people-oriented*; it permeates the whole *corpus juris* of protection of human beings, which is essentially *victim-oriented*, encompassing also the International Law of Human Rights (ILHR), International Humanitarian Law (IHL) and the International Law of Refugees (ILR), besides contemporary International Criminal Law (ICL). *Undecimus*: The principle of humanity has a clear incidence in the protection of human beings, in particular in situations of *vulnerability* or *defencelessness*.

530. *Duodecimus*: The United Nations Charter itself professes the determination to secure respect for human rights everywhere; the principle of humanity, – in line with the longstanding jusnaturalist thinking (*recta ratio*), – permeates likewise the Law of the United Nations. *Tertius decimus*: The principle of humanity, furthermore, has met with judicial recognition, on the part of contemporary international human rights tribunals as well as international criminal tribunals.

531. *Quartus decimus*: The determination of State responsibility under the Genocide Convention not only was intended by its draftsmen (as its *travaux préparatoires* show), but also is in line with its *rationale*, as well as its object and purpose. *Quintus decimus*: The Genocide Convention is meant to prevent and punish the crime of genocide, – which is contrary to the spirit and aims of the United Nations, – so as to liberate humankind from this scourge. To attempt to make the application of the Genocide Convention an impossible task, would render the Convention meaningless, an almost dead letter.

532. *Sextus decimus*: International human rights tribunals (IACtHR and ECtHR), in their jurisprudence, have not pursued a stringent and high threshold of proof in cases of grave breaches of the rights of the human person; they have resorted to factual presumptions and inferences, as well as to the shifting or reversal of the burden of proof. *Septimus decimus*: International criminal tribunals (ICTFY and ICTR) have, in their jurisprudence, even in the absence of direct proofs, drawn proof of genocidal intent from inferences of fact.

533. *Duodevicesimus*: The fact-finding undertaken by the United Nations, at the time of the occurrences, contains important elements conforming the widespread and systematic pattern of destruction in the attacks in Croatia: such is the case of the reports of the former U.N. Commission on Human Rights (1992-1993) and of the reports of the Security Council's Commission of Experts (1993-1994). *Undevicesimus*: Those occurrences also had repercussion in the U.N. II World Conference on Human Rights (1993). There has also been judicial recognition (in the case-law of the ICTFY) of the widespread and/or systematic attacks against the Croat civilian population.

534. *Vicesimus*: Such widespread and systematic pattern of destruction, wellestablished in the present proceedings before the ICJ, encompassed indiscriminate attacks against the civilian population, with massive killings, torture and beatings, systematic expulsion from homes (and mass exodus), and destruction of group culture. *Vicesimus primus*: That widespread and systematic pattern of destruction also comprised rape and other sexual violence crimes, which disclose the necessity and importance of a gender analysis.

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

536. *Vicesimus tertius*: The aforementioned grave breaches of human rights and of International Humanitarian Law amount to breaches of *jus cogens*, entailing State responsibility and calling for reparations to the victims. This is in line with the idea of *rectitude* (in conformity with the *recta ratio* of natural law), underlying the conception of Law (in distinct legal systems – *Droit* / *Right* / *Recht* / *Direito* / *Derecho* / *Diritto*) as a whole.

537. *Vicesimus quartus*: In the present case, the widespread and systematic pattern of destruction took place in pursuance of a plan, with an ideological content. In this respect, both contending Parties addressed the historical origins of the armed conflict in Croatia, and the

ICTFY examined expert evidence of it. The ICJ did not find it necessary to dwell upon this; yet, the ideological incitement leading to the outbreak of hostilities was brought to its attention by the contending Parties, as an essential element for a proper understanding of the case.

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

539. *Vicesimus octavus*: The widespread and systematic pattern of destruction was also manifested in the forced displacement of persons and homelessness, and subjection of the victims to unbearable conditions of life. *Vicesimus nonus*: That pattern of destruction, approached as a whole, also comprised the destruction of cultural and religious heritage (monuments, churches, chapels, city walls, among others). It would be artificial to attempt to dissociate physical/biological destruction from the cultural one.

540. *Trigesimus*: The evidence produced before the Court in respect of selected devastated villages – Lovas, Ilok, Bogdanovci and Vukovar (in the region of Eastern Slavonia), and Saborsko (in the region of Lika), – shows that the *actus reus* of genocide (Article II(a), (b) and (c) of the Genocide Convention) – has been established. *Trigesimus primus*: Furthermore, the intent to destroy (*mens rea*) the targeted groups, in whole or in part, can be inferred from the evidence submitted (even if not direct proofs). The extreme violence in the perpetration of atrocities in the planned pattern of destruction bears witness of such intent to destroy. The inference of *mens rea* cannot prescind from axiological concerns, and is undertaken as from the *conviction intime (livre convencimento / libre convencimiento / libero convincimento*) of each judge, as from human conscience.

541. *Trigesimus secundus*: There is thus need of reparations to the victims, – an issue which was duly addressed by the contending

Parties themselves before the Court, – to be determined by the ICJ in a subsequent phase of the case. *Trigesimus tertius*: The difficult path to reconciliation starts with the acknowledgment that the widespread and systematic pattern of destruction ends up victimizing everyone, on both sides. The next step towards reconciliation lies in the provision of reparations (in all its forms). Reconciliation also calls for adequate apologies, honouring the memory of the victims. Another step by the contending Parties in the same direction lies in the identification and return of all mortal remains to each other.

542. *Trigesimus quartus*: The adjudication of a case like the present one shows the need to go beyond the strict inter-State outlook. The Genocide Convention is *people-centered*, and there is need to focus attention on the people or population concerned, in pursuance of a humanist outlook, in the light of the principle of humanity. In interpreting and applying the Genocide Convention, attention is to be turned to the victims, rather than to inter-State susceptibilities.

543. *Trigesimus quintus*: The Court's evidential assessment and determination of the facts of the *cas d'espèce* has to be comprehensive, and not atomized. All the atrocities, presented to the Court, conforming the aforementioned pattern of destruction, have to be taken into account, not only a sample of them, for the determination of State responsibility under the Genocide Convention. *Trigesimus sextus*: Large-scale crimes, such as rape and other sexual violence crimes, expulsion from homes (and homelessness), forced displacements, deprivation of food and medical care, cannot be minimized.

544. *Trigesimus septimus*: The Court's conceptual framework and reasoning as to the law have likewise to be comprehensive, and not atomized, so as to secure the *effet utile* of the Genocide Convention. The branches that conform the *corpus juris* of the international protection of the rights of the human person – ILHR, IHL, ILR and ICL – cannot be approached in a compartmentalized way; there are approximations and convergences among them.

545. The Genocide Convention, which is *victim-oriented*, cannot be approached in a static way, as it is a "living instrument". *Trigesimus octavus*: Customary and conventional IHL are to be properly seen in interaction, and not to be kept separately from each other. A violation of the substantive provisions of the Genocide Convention is bound to be a violation of customary international law on the matter as

well. *Trigesimus nonus*: Furthermore, the interrelated elements of *actus reus* and *mens rea* of genocide cannot be approached separately either.

546. *Quadragesimus*: General principles of law (*prima principia*), and in particular the principle of humanity, are of great relevance to both conventional and customary international law. Such *prima principia* confer an ineluctable axiological dimension to the international legal order. *Quadragesimus primus*: Human rights treaties (such as the Genocide Convention) have a hermeneutics of their own, which calls for a comprehensive approach as to the facts and as to the law, and not an atomized or fragmented one.

547. *Quadragesimus secundus*: The imperative of the *realization of justice* acknowledges that conscience (*recta ratio*) stands above the "will". Consent yields to objective justice. *Quadragesimus tertius*: The Genocide Convention is concerned with human groups in situations of vulnerability or defencelessness. In its interpretation and application, fundamental principles and human values exert a relevant role. *Quadragesimus quartus*: There is here the primacy of the concern with the victims of human cruelty, as, after all, the *raison d'humanité* prevails over the *raison d'*État. *Quadragesimus quintus*: These are the foundations of my firm dissenting position in the *cas d'espèce*; in my understanding, this is what the International Court *of Justice* should have decided in the present Judgment on the case concerning the *Application of the Convention against Genocide*.

(signed) Antônio Augusto CANÇADO TRINDADE
Judge

PARTE III

ADDENDUM

ATOS DE GENOCÍDIO E CRIMES CONTRA A HUMANIDADE: REFLEXÕES SOBRE A COMPLEMENTARIDADE DA RESPONSABILIDADE INTERNACIONAL DO INDIVÍDUO E DO ESTADO

I. EXPANSÃO DA RESPONSABILIDADE INTERNACIONAL

A evolução do direito internacional contemporâneo nas últimas décadas vem dando mostras da expansão da *personalidade* jurídica internacional (abarcando os Estados, povos, indivíduos e a humanidade como um todo), - à qual se junta a *capacidade* jurídica internacional, - assim como da *responsabilidade* internacional. No entanto, esta evolução histórica continua em curso, buscando superar obstáculos ou vazios dogmáticos do passado. Com a expansão já consolidada da responsabilidade jurídica internacional, nos últimos anos tem se advertido para dificuldades encontradas particularmente na expansão da responsabilidade internacional. A adjudicação das violações dos direitos inerentes à pessoa humana têm consolidado as *obrigações dos Estados* (no Direito Internacional dos Direitos Humanos) de respeitar e fazer respeitar tais direitos, com suas consequências jurídicas (dever de prover reparações, em todas suas formas, às vítimas)[599].

As *obrigações dos indivíduos* passam a ser reconhecidas (e.g., no Direito Penal Internacional), mas as consequências do descumprimento das obrigações internacionais por parte dos distintos sujeitos do direito internacional vêm sendo tratados na doutrina jurídica de modo insuficiente, e as respostas judiciais têm sido insatisfatórias, e nem sempre adequadas[600]. Efetivamente, a determinação da responsabilidade penal

599 Cf. A.A. Cançado Trindade, *El Ejercicio de la Función Judicial Internacional - Memorias de la Corte Inter-Americana de Derechos Humanos*, 3ª. ed., Belo Horizonte, Edit. Del Rey, 2013, Anexo IV (reparações), pp. 327-354.

600 Cf., *inter alia*, e.g., A. Bleckmann, "General Theory of Obligations under Public International Law", 38 *German Yearbook of International Law* (1995) pp. 27 e 36-39; M.G. Bullard, "Child Labor Prohibitions Are Universal, Binding, and Obligatory Law: The Evolving State of Customary International Law Concerning the Unempowered Child

internacional do indivíduo e da responsabilidade internacional do Estado não se autoexcluem, mas se complementam, e de modo ainda mais cogente quando os indivíduos perpetradores das atrocidades (atos de genocídio, crimes contra a humanidade, violações graves dos direitos humanos e do Direito Internacional Humanitário) atuam como agentes do Estado ou executam políticas estatais criminais. Nestas circunstancias, os Estados em questão são tão responsáveis como os indivíduos perpetradores.

Com esta ótica e neste propósito, pode-se proceder a uma releitura da jurisprudência dos tribunais penais internacionais (*ad hoc* e "mistos" ou "híbridos"[601]) contemporâneos. Há nela elementos que nos permitem buscar e identificar *aproximações e convergências* entre o Direito Internacional dos Direitos Humanos e o Direito Penal Internacional, levando à constatação da coexistência e complementaridade das mencionadas responsabilidades do Estado e do indivíduo, reveladoras da expansão da responsabilidade internacional em nossos tempos. Tais elementos se encontram, e.g., nas relações entre os indivíduos integrantes da linha de comando e a execução de políticas criminais do(s) Estado(s).

Com efeito, em meu Voto Dissidente na recente Sentença da CIJ (de 03.02.2015) no caso da *Aplicação da Convenção contra o Genocídio*, ponderei que a determinação da responsabilidade do Estado (a par da do indivíduo) sob a Convenção de 1948 está em conformidade com os *travaux préparatoires* daquela Convenção, com o seu *rationale*, e com seu objeto e fim, recaindo a proibição do genocídio no domínio do *jus cogens* (pars. 85-92). Os estudos sobre o genocídio e o conhecimento acumulado nas últimas décadas sobre a matéria têm revelado que "o genocídio tem sido cometido na história moderna na execução de políticas estatais" (pas. 93). E acrescentei:

> "Tentar tornar a aplicação da Convenção contra o Genocídio aos Estados uma tarefa impossível, deixaria a Convenção sem sentido, uma quase letra morta; criaria ademais uma situação em que determinados atos criminais odiosos estatais, equivalendo a genocídio, ficariam impunes, -

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Laborer", 24 *Houston Journal of International Law* (2001) pp. 144, 146, 151, 158-159, 162, 167 e 171-172.

601 Ou "internacionalizados", e.g., para Serra Leoa, Timor-Leste, Kossovo, Bósnia--Herzegóvina, Camboja e Líbano.

> sobretudo por não haver atualmente nenhuma Convenção internacional sobre Crimes contra a Humanidade. O genocídio é efetivamente um crime hediondo cometido sob a direção, ou cumplicidade complacente, do Estado e seu aparato[602]. A contrário do que presumiu o Tribunal de Nuremberg em seu célebre Julgamento (parte 22, p. 447), os Estados não são "entidades abstratas"; tem estado concretamente engajados, juntamente com perpetradores individuais (seus assim-chamados "recursos humanos", agindo em seu nome), em atos de genocídio, em momentos históricos e lugares distintos.
>
> Tanto os indivíduos como os Estados têm, conjuntamente, sido responsáveis por tais atos hediondos. Neste contexto, a responsabilidade do indivíduo e do Estado são complementares. Em suma, a determinação da responsabilidade do Estado não pode de modo algum ser descartada na interpretação e aplicação da Convenção contra o Genocídio. Ao adjudicar um caso como o presente, relativo à *Aplicação da Convenção contra o Genocídio* (Croácia *versus* Sérvia), a CIJ deveria ter em mente a importância da Convenção como um relevante tratado de direitos humanos, com todas as suas implicações e consequências jurídicas. Deveria ter em mente a significação histórica da Convenção para a humanidade" (pars. 94-95).

É altamente preocupante constatar que genocídios têm sido cometidos em todas as eras da história da humanidade. Como poderei em meu referido Voto Dissidente, dos tempos da *Ilíada* de Homero, das tragédias de Ésquilo e Sófocles e Eurípides, até os nossos dias, é impressionante constatar a extrema crueldade com que os seres humanos têm tratado seus semelhantes, inflingindo-lhes o mal (pars. 14-18, 265 e 487-489). Genocídios têm sido cometidos em distintos continentes, desde a antiguidade até o presente.

Alguns exemplos da constatação e reconhecimento judicial de sua ocorrência na atualidade podem aqui ser evocados, sem o propósito de ser exaustivo, mas tão só ilustrativo. A existência dos tribunais

602 As declarações periciais examinadas pelo TPII, por exemplo, no caso *S. Milosević* (2004), assinalaram que o conhecimento sedimentado sobre a matéria demonstra que as autoridades estatais são sempre responsáveis por um processo genocida; cf. parte XIII do presente Voto Dissidente, *infra*.

internacionais contemporâneos, torna mais factível esta constatação, em distintos continentes, com atenção voltada às já mencionadas coexistência e complementaridade da responsabilidade internacional do indivíduo e do Estado.

II. RESPONSABILIDADES DO INDIVÍDUO E DO ESTADO: CONSTRUÇÃO JURISPRUDENCIAL

1. Ocorrências no Continente Europeu

Assim, no tocante à devastação das guerras nos Bálcãs durante a década de noventa, já no caso *D. Tadic* (Sentença de 15.07.1999, Sala de Recursos), o Tribunal Penal Internacional *ad hoc* para a Ex-Iugoslávia (TPII) houve por bem estender seu exame do caso também à estrutura de poder e comando do exército sérvio e das forças armadas da República Srpska (VJ/JNA e VRS), sob as ordens de Belgrado[603]. No caso *M. Milutinovic, N. Sainovic, D. Ojdanic, N. Pavkovic, V. Lazarevic e S. Lukic*[604] (Sentença de 26.02.2009, 1ª. Sala), o TPII cotejou as responsabilidades dos indivíduos na linha de comando com as do Presidente S. Milosevic como "Comandante Supremo" do exército sérvio (consoante as decisões do Conselho Supremo de Defesa – SDC), e com o papel e os poderes do SDC propriamente dito[605].

No caso *M. Martic* (Sentença de 12.06.2007, 1ª. Sala), o TPII examinou, *inter alia*, a cooperação da liderança (incluindo M. Martic) da República Srpska com a Sérvia, e o apoio financeiro e logístico e militar desta recebido[606], e o "objetivo político" da liderança sérvia sob a Presidência de R. Milosevic (pars. 329-338). E, no recente caso *N. Sainovic, N. Pavkovic, V. Lazarevic e S. Lukic* (Sentença de 23.01.2014, Sala de Recursos) o TPII tomou em conta as ordens do Presidente S. Milosevic aos associados nas hostilidades militares - e nos crimes cometidos - no Kossovo em 1998-1999[607].

Até o presente (abril de 2015), o TPII já condenou cinco indivíduos pelo crime de genocídio: R. Krstic, V. Popovic, L. Beara, D. Nikolic

603 Pars. 150-152, 154-156 e 167.

604 Em que apenas o primeiro foi inocentado, e os demais cinco foram condenados.

605 Pars. 255, 257, 260, 433, 440, 468, 482 e 485.

606 Pars. 159-160 e 442-446.

607 Pars. 836-839 e 881.

e Z. Tolimir. Suas condenações[608] se referem às execuções em massa de homens e jovens bósnios muçulmanos (em idade de combate), em Srebrenika, em julho de 1995. Na condenação de R. Krstic, o TPII entendeu que sua atuação, como vice-comandante do *Drina Corps* do exército bósnio-sérvio (VRS), era imputável à Sérvia, por ser o VRS um órgão de facto da Sérvia (República Federal da Iugoslávia). Sua condenação (de 19.04.2004, Sala de Recursos) teve, assim, incidência na própria responsabilidade do Estado. O TPII também deu por estabelecida a existência de um plano, da "liderança política e/ ou militar do VRS", para "remover permanentemente a população bósnia muçulmana de Srebrenika, uma vez tomado o enclave"[609]. A execução em massa dos bósnios muçulmanos em Srebrenika também foi perpetrada consoante um "plano"[610].

Do mesmo modo, no caso *V. Popovic*, o TPII deu por estabelecido (1ª. Sala, Sentença de 10.06.2010) que havia um plano "da liderança política e militar bósnia-sérvia" de eliminar os homens e jovens (em idade de combate) de Srebrenika e Zepa, e de remover pela força a população muçulmana[611], o TPII também determinou que os ataques subsequentes contra a população civil em Srebrenika e Zepa foram perpetrados consoante a diretiva 7 (de março de 1995) do "Comando Supremo" (de R. Karadzic)[612]. Tais decisões vêm de ser mantidas pela Sala de Recursos do TPII (Sentença de 30.01.2015), que vem de condenar V. Popovic por genocídio.

Também no caso *Z. Tolimir*, o TPII (1ª. Sala, Sentença de 12.12.2012) estatuiu que o massacre genocida de Srebrenika de 1995 seguiu um plano, que também previa a remoção forçada da população por "órgãos militares e do Estado" da passagem de veículos de assistência humanitária[613]. Outros elementos se encontram na jurisprudência do TPII, em minha percepção também vinculando a responsabilidade individual à do Estado, em condenações outras que por genocídio.

608 Sentenças de 19.04.2004 (R. Krstic), 30.01.2015 (V. Popovic, L. Beara e D. Nikolic) e 12.12.2012 (Z. Tolimir). A única Sentença ainda pendente de recurso é a de Z. Tolimir.
609 TPII (1ª. Sala, Sentença de 02.08.2001), paras. 28 e 612. e cf. paras. 52 e 452.
610 *Ibid*., pars. 87 e 427.
611 Pars. 199 e 1306.
612 Pars. 760, 762, 767, 775-776 e 1085.
613 Pars. 1013, 1046, 1069 e 1071.

Assim, por exemplo, no caso *M. Martic*, - que organizava a "cooperação" (que existia desde o início de 1991) entre os bósnios-sérvios e a Sérvia, - o TPII (1ª. Sala, Sentença de 12.06.2007) determinou a estreita cooperação existente entre as lideranças da República Srpska na Bósnia-Herzegóvina e da Sérvia, com vistas a unir as áreas sérvias na Croácia e na Bósnia à Sérvia; determinou, ademais, o propósito criminal comum de S. Milosevic, R. Karadzic e R. Mladic de unificar tais territórios por meios criminosos[614]. Tais decisões foram mantidas pela Sala de Recursos do TPII (Sentença de 08.10.2008).

Pode-se ainda recordar, no tocante ao caso *M. Mrksic, M. Radic e V. Sljivancanin* (2007), - também conhecido como caso do *Hospital de Vukovar*, - que tanto M. Mrksic como V. Sljivancanin eram oficiais (responsáveis por crimes de guerra) do exército JNA, órgão *de jure* da República Socialista Federal da Iugoslávia, predecessora da República Federal da Iugoslávia e da Sérvia. A JNA engajou-se no ataque feroz a Vukovar, e permitiu que paramilitares (associados) torturassem e assassinassem prisioneiros croatas detidos em Ovcara, em situação de extrema vulnerabilidade. Enfim, os casos *M. Milutinovic et allii* (Sentença de 26.02.2009) e *N. Sainovic et alii* (Sentença de 23.01.2014) se referiam a um padrão vasto e sistemático de crimes cometidos em Kossovo (em 1998-1999) contra civis kosovares-albaneses, sob instruções do Presidente S. Milosevic em Belgrado. Aqui, uma vez mais, seria inviável tentar dissociar a responsabilidade penal individual da correspondente responsabilidade do Estado.

No caso inacabado de *S. Milosevic*[615], ex-Presidente da Sérvia, o TPII (1ª. Sala, Decisão de 16.06.2004) viu-se diante de acusações (em três seções) relativas a ocorrências na Croácia, Bósnia-Herzegóvina e Kossovo. O TPII, em sua Decisão de 2004, concentrou-se sobretudo nas acusações atinentes aos crimes perpetrados na Bósnia, e determinou a existência da intenção genocida por parte da liderança bósnia-sérvia (R. Karadzic - par. 240). O Presidente sérvio S. Milosevic era "o arquiteto da política de criar uma Grande-Sérvia", e "pouco ocorria sem o seu conhecimento e envolvimento", e sua manipulação dos meios de comunicação sérvios para impor uma propaganda nacionalista (paras. 249 e 255, e cf. pars. 235-237).

614 Pars. 141-142, 159, 442-444 e 446.

615 O julgamento teve início em 12.02.2002, e o procedimento terminou em 14.03.2006, devido à morte do acusado em 11.03.2006.

Quanto à relação entre o Presidente S. Milosevic e as autoridades político-militares bósnias-sérvias, o TPII assinalou a autoridade e influência de S. Milosevic sobre R. Karadzic, e a assistência militar prestada pelo exército sérvio (JNA) aos bósnios-sérvios, e os vínculos estreitos entre eles (pars. 258-274 e 276, e cf. par. 282). Entendeu que os sucessivos crimes por eles cometidos os levariam a cometer também genocídio de parte dos bósnios muçulmanos como um grupo (par. 292). S. Milosevic tinha conhecimento de tudo, e nada fez para impedir ou evitar a ocorrência de genocídio em distintas localidades[616], e punir seus perpetradores (par. 309). Tais ocorrencias demonstram, em minha percepção, de que não há aqui como dissociar a responsabilidade individual da responsabilidade do Estado.

Quase uma década antes, já em sua Decisão de 11.07.1996, o TPII (1ª. Sala) determinou, no caso *R. Karadzic e R. Mladic*, que os crimes contra membros de determinados segmentos da população civil seguiam o mesmo padrão, eram "planificados e organizados a nível estatal", tendo como "objetivo comum", pela "limpeza étnica", de um novo Estado "etnicamente puro" (par. 90). Tais atos constituíam crimes contra a humanidade, cometido em escala ampla e de modo sistemático (par. 91). Posteriormente as acusações contra R. Karadzic e R. Mladic foram ampliadas, de modo a abarcar atos de genocídio (cf. *supra*). As responsabilidades dos indivíduos e do Estado afiguram-se aqui inter-relacionadas.

2. Ocorrências no Continente Africano

Passando do continente europeu ao continente africano, é de conhecimento geral que coube ao Tribunal Penal Internacional *ad hoc* para Ruanda (TPIR) a primeira determinação judicial (1ª. Sala, Julgamento de 02.09.1998) a qualificar as ocorrências em Ruanda em 1994 como genocídio contra os Tutsis, no caso de *J.-P. Akayesu*, ex-prefeito da comuna de Taba. O extermínio dos Tutsis, como hoje se sabe, ocorreu por toda parte em Ruanda, inclusive em igrejas, hospitais e escolas, causando cerca de 800 mil a um milhão de vítimas[617]. Tanto genocídio como crimes contra a humanidade foram

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616 O TPII citou especificamente as áreas de Brcko, Prijedor, Sanski Most, Srebrenika, Bijeljina, Kljuc e Bosanki Novi.
617 L. Aspegren e J.A. Williamson, "The Rwanda Tribunal and Genocide", *in From Human Rights to International Criminal Law - Studies in Honour of an African Jurist, the*

perpetrados pelos hutus contra os tutsis, em ampla escala, e de modo continuado e sistemático, inclusive "em zonas sob o controle de forças governamentais"; entre os perpetradores, estavam inclusive "membros da guarda presidencial"[618].

Houve abundância de provas no sentido de que o genocídio e crimes contra a humanidade vitimando o grupo tutsi (em razão de sua origem) foram perpetrados pelos hutus "de forma concertada, planificada, sistemática e metódica"[619]; as vítimas, em sua grande maioria, eram não-combatentes, incluindo mulheres e crianças[620]. Foi o que determinou, uma vez criado, o próprio TPIR, que reconheceu a necessidade de situar as ocorrências no contexto da própria história de Ruanda[621]. O envolvimento direto das autoridades administrativas locais no genocídio em Ruanda foi demonstrado pelo TPIR no célebre caso *J.-P. Akayesu*, a cuja Sentença passo a seguir a dedicar atenção.

Com efeito, na referida Sentença de 02.09.1998 no caso *J.-P. Akayesu*, o TPIR (1ª. Sala) demonstrou que o genocídio dos tutsis foi organizado e planejado pelas próprias autoridades públicas, pelos membros da RAF (facção em conflito com a RPF) e pelas forças políticas que sustentavam o poder dos hutus. Os prefeitos das comunas (como J.-P. Akayesu) tinham grande poder local, que normalmente obedeciam suas ordens (pars. 74 e 77), ainda que excedessem seus poderes (como, e.g., a de mandar prender rivais ou oponentes políticos - par. 76). O TPIR encontrou explicação para as ocorrencias de 1994 - os massacres dos tutsis - na própria história de Ruanda (pars. 78-129). O genocídio, - afirmou o TPIR, - foi cometido em Ruanda em 1994 contra os tutsis como um grupo (em razão de sua origem e não por

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Late Judge L. Kama (eds. E. Decaux, A. Dieng e M. Sow), Leiden, Nijhoff, 2007, pp. 204-205, 218 e 221-222.

618 *Ibid.*, p. 209.

619 *Ibid.*, pp. 211-212 e 215. O próprio Conselho de Segurança das Nações Unidas, depois de apreciar o relatório, nesse sentido, sobre a *Situação dos Direitos Humanos em Ruanda* (de 25.05.1994), do *rapporteur* especial da antiga Comissão de Direitos Humanos da ONU (R. Degni-Ségui), - qualificando as ocorrências de genocídio, - adotou sua resolução 935(1994), de 01.07.1994, expressando sua profunda preocupação com as violações vastas e flagrantes do Direito Internacional Humanitário, incluindo atos de genocídio, cometidos em Ruanda; ibid., pp. 210-211.

620 *Ibid.*, p. 217.

621 Cf. *ibid.*, p. 215.

estarem engajados no conflito[622]); "meticulosamente organizado", teve os próprios "massacres centralmente organizados e supervisionados", e foi instigado pelos meios de comunicação (para. 126).

Os Tutsis, em sua maioria, - agregou o TPIR, eram não-combatentes, inclusive "milhares de mulheres e crianças" indefesas (par. 128). Houve "atrocidades irrefutáveis" cometidas em Ruanda, e particularmente na comuna de Taba (par. 129). O prefeito de Taba, J.-P. Akayesu, não só tinham conhecimento destas atrocidades, como as testemunhou e até mesmo incitou publicamente e ordenou as vastas matanças (com o uso de *machetes* lá ocorridas), inclusive de refugiados e professores, massacrados por serem tutsis (pars. 313-314, 641-642, 361, 707, 709, 716, 718 e 729). A *Interahamwe* assassinou numerosos anciãos, mulheres e crianças (par. 355); numerosas mulheres Tutsis foram sistematicamente estupradas (par. 706).

De todas estas ocorrências, "não só na comuna de Taba", mas generalizada "em toda Ruanda", ficou claro que se podia - concluiu o TPIR - inferir a intenção genocida, o cometimento do genocídio contra o grupo tutsi em Ruanda em 1994 (pars. 728 e 730). Agregou o TPIR (1ª. Sala, Sentença de 02.09.1998) que os estupros e violência sexual que vitimaram as mulheres tutsi constituíram genocídio (par. 731), e destacou o extremo sofrimento por eles causado: observou o TPIR que era este "um dos piores meios de causar dano" nas vítimas. E acrescentou o TPIR que os estupros e violência sexual

> "eram cometidos tão só contra as mulheres tutsi, tendo sido muitas delas sujeitadas às piores humilhações públicas, mutiladas, e estupradas várias vezes, não raro em público (...) e por mais de um agressor. Tais estupros resultaram na destruição física e psicológica das mulheres tutsi, de suas famílias e suas comunidades. A violência sexual era parte integrante do processo de destruição, alvejando especificamente as mulheres tutsi e contribuindo em particular a sua destruição e à destruição do grupo tutsi como um todo" (par. 731).

Pode-se aqui constatar, com clareza, o engajamento da responsabilidade penal do indivíduo (J.-P. Akayesu), assim como

622 Para o TPIR, o conflito pode ter facilitado a execução do genocídio (par. 127); no entanto, - acrescentou, - o genocídio foi "fundamentalmente diferente do conflito" (par. 128).

da responsabilidade do Estado, pelas ocorrências que conformaram o genocídio em Ruanda em 1994. A condenação de J.-P. Akayesu por genocídio foi em seguida confirmada pelo TPIR (Sala de Recursos, Sentença de 01.06.2001 - par. 143). A este caso somam-se outros, igualmente revelando, em minha percepção, a coexistência e complementaridade da responsabilidade penal internacional individual e a responsabilidade internacional do Estado.

Em outro caso, o de Jean *Kambanda*, o TPIR (Sentença de 04.09.1998) viu-se diante das confissões do próprio ex-Primeiro Ministro de Rwanda (J. Kambanda) de sucessivos crimes cometidos, inclusive de genocídio, durante os ataques vastos e sistemáticos contra a população civil tutsi, vitimando inclusive mulheres e crianças, que buscavam refúgio em lugares como as prefeituras, igrejas, escolas e estádios (pars. 39 e 39(i)). Esta política de extermínio era controlada pelo governo, e o próprio Primeiro Ministro J. Kambanda confessou ter exercido sua autoridade *de jure* e *de facto* sobre os funcionários públicos e militares perpetradores dos crimes (par. 39(ii)).

Participou J. Kambanda de reuniões com prefeitos de planejamento dos massacres, e demitiu o prefeito de Butare por ter se oposto aos mesmos, designando um novo prefeito para assegurar os massacres também na comuna de Butare (par. 39(iii)). O Primeiro-Ministro emitiu em que apoiou e encorajou os *Interahamwe* na perpetração dos assassinatos em massa dos segmentos populacionais tutsi, e assumiu responsabilidade por suas ações (par. 39(v)). Estimulou as alas jovens treinadas pela RAF (Forças Armadas de Ruanda) a participar nos massacres, e determinou a distribuição de armas e munições (par. 39(iv) e (xi)).

O Primeiro Ministro J. Kambanda confessou ademais ter feito uso dos meios de comunicação para incitar a população a cometer os massacres dos tutsis, tendo apoiado, neste propósito, a *Radio-Télévision Libre des Mille Collines* (RTLM) para que continuasse a instigar as atrocidades, e declarado que considerava a RTLM "uma arma indispensável na luta contra o inimigo" (par. 39(vii)). Visitou as prefeituras de várias comunas (e.g., as de Butare, Gitarama, Gikongoro, Gisenyi e Kibuye), encorajando os prefeitos e a população a cometer mais massacres (par. 39(viii)). Fez o mesmo em discursos em reuniões públicas em várias partes de Ruanda (par. 39(x)).

Confessou ademais ter testemunhado pessoalmente os massacres dos tutsis (par. 39(xii)).

Ao tomar nota das confissões do ex-Primeiro Ministro J. Kambanda, o TPIR (1ª. Sala, Sentença de 04.09.1998) aceitou-as, e deu por estabelecido que ele cometeu genocídio e crimes contra a humanidade (par. 40(1)-(5)). Dois anos depois, na Sentença 10.10.2000, o TPIR (Sala de Recursos) confirmou a determinação da 1ª. Sala, da perpetração de genocídio e crimes contra a humanidade no caso de Jean *Kambanda*. No *cas d´espèce*, resulta claríssima, em minha percepção, a inter-relação entre a responsabilidade penal internacional do ex-Primeiro Ministro de Ruanda e a responsabilidade internacional do Estado.

No caso conhecido como dos *Meios de Comunicação* (caso de *F. Nahimana, J.-B. Barayagwiza e H. Ngeze*), o TPIR condenou os três indiciados por genocídio, pelo papel que exerceram no controle dos meios de comunicação em Ruanda (*RTLM* e *Kangura*), nas emissões de incitamento ao ódio étnico e extermínio dos segmentos tutsis da população. Segundo o TPIR, o governo de Ruanda não impediu que os meios de comunicação - em particular a *RTLM* - transmitissem mensagens incitando aos atos de genocídio. Foi o que determinou o TPIR (1ª. Sala, Sentença de 03.12.2003, par. 951), que ademais afirmou que as emissões conclamavam ao extermínio do "grupo étnico tutsi", tido como "inimigo" (par. 949).

Formou-se uma "ideologia política" de ódio (par. 951), incitando ao uso de *machetes* para exterminar os tutsis (par. 950). Um dos três condenados, J.-B. Barayagwiza, era inclusive Diretor de Assuntos Políticos do Ministério das Relações Exteriores de Ruanda (par. 6) e líder do partido político CDR no poder (par. 976), e participou - agregou o TPIR - na própria organização do extermínio dos tutsis (par. 1067). Posteriormente, o TPIR (Sala de Recursos, Sentença de 28.11.2007) confirmou sua condenação, por ter planificado, incitado e dirigido os atos de violência dos militantes do partido CDR e dos *Impuzamugambi* no extermínio dos tutsis, inclusive com o fornecimento de armas (pars. 882-883, 886 e 959-960).

Ademais da jurisprudência do TIPR acima assinalada, um estudo recente da matéria também detecta a participação de agentes do Estado, e de milícias sob seu controle, no genocídio em Ruanda, na execução da "política governamental genocida" de exterminar os

tutsis[623]. O próprio TPIR constatou a participação de oficiais públicos no extermínio, e.g., também nos casos *Kayishema e Ruzindana* (Sentença de 21.05.1999) e *Musema* (Sentença de 27.01.2000), sobre as ocorrências na comuna de Bisesero e Kibuye[624]. Aqui, novamente, se configuram conjuntamente, a meu ver, tanto a responsabilidade penal individual como a responsabilidade do Estado.

A par das referidas decisões do TPIR, também relatos de sobreviventes e testemunhas das trágicas ocorrências em Ruanda em 1994 deram conta de que o genocídio foi detalhadamente preparado por muito tempo, envolvendo os governantes e suas milícias[625]. Houve incitação, a exemplo das emissões da *Radio-Télévision Libre des Mille Collines*, instigando à violência extrema[626]. Os numerosos massacres contra os Tutsis deixaram um quadro da mais completa devastação, com milhares de cadáveres empilhados nas ruas das comunas ou boiando nos rios e lagos[627].

Outro tribunal penal internacional a dar sua contribuição à matéria em apreço tem sido a Corte Especial de Serra Leoa (CESL - tribunal "internacionalizado" ou "híbrido" ou "misto"), no caso *Charles Taylor* (2013), primeiro ex-Chefe de Estado (desde o Tribunal de Nuremberg) a ser julgado e condenado por crimes de guerra e crimes contra a humanidade. Como Presidente da Libéria, seus atos eram imputáveis ao Estado; com efeito, fez ele uso de sua posição, do aparato estatal e dos recursos público, para encorajar e dar assistência ao cometimento dos crimes contra a população civil de Serra Leoa, como determinou a CESL.

Com efeito, em sua Sentença de 18.05.2012, a CESL (1ª. Sala) constatou uma política e estratégia (da RUF/AFRC) de campanha de terror para a perpetração dos crimes, em ampla escala, contra a população civil de Serra Leoa (pars. 6905 e 6911). Envolvia ela a provisão de armas e pessoal militar para a perpetração das atrocidades[628], - que incluíram assassinatos, estupros e escravidão sexual, raptos, trabalho

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623 L. Aspegren e J.A. Williamson, "The Rwanda Tribunal and Genocide", *in op. cit. supra* n. (19), pp. 219-220.
624 *Ibid.*, pp. 218-221.
625 J.A. Berry e C.P. Berry (eds.), *Genocide in Rwanda - A Collective Memory*, Washington D.C., Howard University Press, 1999, pp. 3, 5 e 53.
626 *Ibid.*, p. 87.
627 *Ibid.*, p. 17.
628 Pars. 6913, 6916 e 6920-6921, 6928, 6931, 6936, 6947-6949, 6865, 6967 e 6969.

forçado, amputações, recrutamento de crianças-soldados (par. 6905). Nos pontos resolutivos, a CESL concluiu pela perpetração dos crimes contra a humanidade de assassinatos em massa, estupros e escravidão sexual (par. 6994).

Na Sentença seguinte, de 30.05.2012, a CESL se concentrou nos "fatores agravantes", a saber: o fato de terem sido os crimes cometidos em igrejas, mesquitas, escolas e hospitais; de terem sido cometidos de modo extraterritorial, no país vizinho Serra Leoa pelo então Presidente da Libéria; de serem as vítimas pessoas inocentes (pars. 26-29 e 95-96). Acrescentou a CESL que o então Presidente Ch. Taylor era também membro do Comitê dos Cinco (em seguida dos Seis) do ECOWAS, que integrava o processo pelo qual a comunidade internacional buscava trazer a paz à Serra Leoa. Ao invés de contribuir ao mesmo, traiu-o, ao apoiar as operações militares criminosas de destruição (incorrendo em um "*betrayal of public trust*"), o que constituiu "um fator agravante de muito peso" (pars.

97-99 e 102-103). Ademais, valeu-se o então Presidente da Libéria da campanha de terror, da devastação e do sofrimento infligido à população de Serra Leoa para obter lucros financeiros no suprimento de diamantes do país vizinho, outro "fator agravante" (pars. 98-99).

Enfim, na Sentença condenatória de 26.09.2013, a CESL (Sala de Recursos) reiterou estes pontos[629], e acrescentou que, embora Ch. Taylor, então Presidente da Libéria, "nunca estivesse fisicamente presente em Serra Leoa", suas ações em escala extraterritorial prolongaram o sofrimento infligido à população de Serra Leoa (par. 679), e, além de causarem tanto dano às vítimas e seus familiares imediatos, alimentaram um conflito que tornou-se uma ameaça à paz e segurança internacionais na sub-região do sudoeste da África (par. 683). Ainda que a CESL tivesse se concentrado na responsabilidade penal internacional do Presidente Ch. Taylor, abstendo-se de caracterizar a ação estatal como "criminal", deixando esta tarefa a cargo de outros tribunais internacionais com "autoridade sobre os Estados" e encarregados de "interpretar o direito da responsabilidade do Estado" (par. 456), a correlação entre uma e outra ficou clara (cf. *supra*).

A CESL (Sala de Recursos) observou, ademais, que os Estados têm contraído "obrigações para impedir e punir indivíduos por

629 Pars. 678, 684-685 e 687.

violações graves do Direito Internacional Humanitário mediante tratados que têm se tornado direito consuetudinário estabelecendo a responsabilidade penal individual por tais violações" (par. 457). Recordou que os próprios Estados têm criado tribunais internacionais "para punir crimes de guerra, crimes contra a humanidade e genocídio" (par. 463); ela própria (a Sala de Recursos da CESL) se via obrigada a aplicar também o "direito internacional consuetudinário existente" sobre a matéria (par. 464). Ainda que um tribunal internacional - como a CESL - se concentre na determinação da responsabilidade penal internacional do indivíduo, deixando a determinação da responsabilidade internacional do Estado a outro tribunal internacional (dotado de jurisdição para isto), as circunstâncias das ocorrências na devastação em Serra Leoa (*supra*) deixam clara a impossibilidade de dissociar uma responsabilidade da outra.

Reconhece-se hoje que uma significativa contribuição da jurisprudência da CESL reside em sua adjudicação de casos de recrutamento de crianças-soldados (menores de 15 anos), usadas para participar ativamente nas hostilidades[630]. Pela primeira vez, foi tal crime processado por um tribunal penal internacional, a CESL (caso *S. Hinga Norman*, Decisão de 31.05.2004), em uma contribuição ao Direito Internacional Humanitário[631]. Assinalou a CESL a proibição de direito internacional consuetudinário desse recrutamento forçado de crianças-soldados (que já existia bem antes do desenrolar das ocorrências em meados de 1996), aplicável não só às forças armadas mas também a atores não-estatais[632].

3. Ocorrências no Continente Americano

Passando do continente africano ao continente americano, em meus Votos Individuais na Corte Inter-Americana de Direitos Humanos (CtIADH), a partir do caso *Myrna Mack Chang versus Guatemala* (Sentença de 18.09.2003), passei a examinar o que denominei de "*complementaridade entre a responsabilidade internacional dos Estados e a responsabilidade penal internacional dos indivíduos*", tal como consta em meu Voto Arrazoado

630 O. Njikam, *The Contribution of the Special Court for Sierra Leone to the Development of International Humanitarian Law*, Berlin, Duncker & Humblot, 2013, pp. 74, 109, 204-205, 207 e 210.
631 *Ibid.*, pp. 176, 197, 213, 217, 282 e 284.
632 *Ibid.*, p. 212.

naquele caso (pars. 14-20). Observei que era próprio da evolução do direito internacional contemporâneo, fortalecendo-o (a exemplo da adoção do Estatuto do TPI), a *criminalização* das violações *graves* dos direitos humanos e do Direito Internacional Humanitário; com isto, a comunidade internacional se insurgia contra a impunidade (pars. 14-17 e 35-40). Não há como tentar eludir o crime de Estado, a consciência jurídica universal despertou enfim para isto (pars. 25-32). Aqui se configura a responsabilidade internacional agravada, - agreguei, - com todas as consequências jurídicas para as reparações (pars. 41-55).

Logo depois, em meu Voto Arrazoado no caso do *Massacre de Plan de Sánchez versus Guatemala* (Sentença de 29.04.2004), permiti-me recordar que o próprio *Relatório* final da *Comissão de Esclarecimento Histórico* (CEH) da Guatemala registrou 626 massacres cometidos pelas forças do Estado (exército apoiado por paramilitares) durante os ataques armados; 95% dos massacres foram perpetrados, com extrema crueldade, entre 1978 e 1984, e 90% em áreas habitadas sobretudo pelo povo maia. O massacre de Plan de Sánchez foi um deles, situado na "estratégia estatal destinada a destruir um grupo grupo étnico" (pars. 2-4).

Em seu referido *Relatório* intitulado *Guatemala - Memoria del Silencio*, - acrescentei, - a CEH se referiu à ocorrência de violações graves de direitos humanos, de "atos de genocídio" contra membros dos povos maia-ixil, maia-achi, maia-k´iche´, maia-chuj e maia-q´anjob´al. No entender da CEH, os vitimados de tais atos de genocídio foram sobretudo os membros "mais vulneráveis" das comunidades maias (especialmente crianças e idosos), e tais atrocidades comprometiam tanto a responsabilidade individual de los "autores intelectuais ou materiais" dos "atos de genocídio" como a "responsabilidade do Estado", por serem tais crimes, em sua maioria, - na expressão da CEH, - "producto de una política preestablecida por un comando superior a sus autores materiales" (par. 5)

Ponderei, a seguir, que, o fato de a CtIADH carecer de *jurisdição* para se pronunciar sobre "atos de genocídio" sob a Convenção Americana sobre Direitos Humanos, não eximia o Estado demandado de sua *responsabilidade* pelas ocorrências (pars. 7-8). Depois de debruçar-me sobre a responsabilidade internacional *agravada* (pars. 24-28) e o princípio de humanidade (pars. 9-23), retomei a questão da existência dos crimes de Estado (pars. 34-36) e da coexistência da

responsabilidade internacional do Estado e do indivíduo. Sobre tal coexistência e complementaridade, ponderei o seguinte:

> "Não me parece haver impedimento jurídico algum para a determinação *concomitante* da responsabilidade internacional do Estado e a responsabilidade penal dos indivíduos nos termos anteriormente assinalados (par. 25, *supra*), no tocante à Convenção Americana, revelando a interação entre os ordenamentos jurídicos internacional e nacional, no presente domínio de proteção dos direitos humanos. (...) No plano estritamente internacional, subsiste, não obstante, um desenvolvimento insuficiente da matéria, refletido na atitude persistente de tratar a responsabilidade internacional do Estado e a responsabilidade penal dos indivíduos de forma separada e compartimentalizada.
>
> Na atual etapa de desenvolvimento insuficiente da matéria, os tribunais internacionais de direitos humanos (as Cortes Europeia e Inter-Americana, e futuramente a Africana) se concentram na primeira (a responsabilidade internacional do Estado), ao passo que os tribunais penais internacionais *ad hoc* (para a Ex-Iugoslávia e para Ruanda) e o Tribunal Penal Internacional (TPI) voltam-se à segunda (a responsabilidade penal internacional dos indivíduos). Mas a responsabilidade internacional do Estado e a do indivíduo são complementares. A Convenção Americana sobre Direitos Humanos, ao concentrar-se na responsabilidade internacional do Estado por violações dos direitos por ela protegidos, não se exime, no entanto, de assinalar - em seu nem sempre recordado artigo 32(1)[633] - que `toda pessoa tem deveres para com a família, a comunidade e a humanidade´.
>
> A reação às violações graves e sistemáticas dos direitos humanos e do Direito Internacional Humanitário constitui em nossos dias uma legítima preocupação da comunidade internacional como um todo; tal reação se impõe com ainda maior força quando as vítimas são vulneráveis e indefesas (como no presente caso do *Massacre de Plan de Sánchez*), e a estrutura do poder público encontra-se deformada e posta a serviço da repressão e não da busca do

633 Sobre a correlação entre deveres e direitos.

> bem comum. A responsabilidade penal internacional do indivíduo, em meu entendimento, não exime a do Estado; as duas coexistem, sendo este reconhecimento de crucial importância para a erradicação da impunidade. Tanto o Estado como seus agentes são destinatários diretos de normas do direito internacional contemporâneo; a conduta de ambos é prevista e regida por este último, devendo, pois, tanto o Estado como seus agentes responder pelas consequências de seus atos e omissões" (pars. 37-39)[634].

Posteriormente, em meu Voto Arrazoado no caso *Goiburú e Outros versus Paraguai* (Sentença de 22.09.2006), atinente às atrocidades da chamada "Operação Cóndor" no Cone Sul da América Latina[635], voltei a examinar os "elementos para uma aproximação à complementaridade entre o Direito Internacional dos Direitos Humanos e o Direito Penal Internacional" (pars. 34-53), destacando cinco elementos, a saber: a) a personalidade jurídica internacional do indivíduo; b) a complementaridade entre a responsabilidade internacional do Estado e a do indivíduo; c) a conceituação dos crimes contra a humanidade; d) a prevenção e a garantia de não-repetição; e) a justiça reparatória na confluência do Direito Internacional dos Direitos Humanos e do Direito Penal Internacional.

Observei que "os crimes contra a humanidade situam-se na confluência entre o Direito Penal Internacional e o Direito Internacional dos Direitos Humanos", e expus minhas razões (pars. 42, e cf. pars. 39-43). E insisti nas aproximações entre estes dois ramos do direito de proteção, e na complementaridade entre a responsabilidade internacional do Estado e a responsabilidade penal internacional do indivíduo (par. 39). Para os propósitos das presentes reflexões, limito-me a referir-me tão só ao primeiro dos elementos assinalados, de relevância para uma abordagem da referida complementaridade.

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634 E agreguei que, "apesar de terem os fatos ocorrido há 22 anos atrás, permanecem seguramente vivos na memória dos sobreviventes. Os anos de silencio e humilhação, face às dificuldades de localização dos cemitérios clandestinos e da exumação dos cadáveres do massacre, e da prolongada denegação de justiça, não lograram apagar a memória dos sobreviventes do ocorrido em Plan de Sánchez no dia 18 de julho de 1982" (par. 40).

635 Para um estudo de caso a respeito, cf. A.A. Cançado Trindade, *Évolution du Droit international au droit des gens - L´accès des particuliers à la justice internationale: le regard d'un juge*, Paris, Pédone, 2008, pp. 132-144 e 151-184.

Tal elemento reside na condição jurídica do indivíduo como "sujeito tanto *ativo* (Direito Internacional dos Direitos Humanos) como *passivo* (Direito Penal Internacional) do Direito Internacional, ou seja, como titular de direitos e portador de obrigações que emanam diretamente do Direito Internacional. A condição do indivíduo como tal representa, como tenho assinalado em numerosos escritos, o legado mais precioso da ciência jurídica a partir de meados do século XX[636]" (par. 35). Em relação ao TPII e ao TPIR, - agreguei, - o Tribunal Penal Internacional (TPI) permanente "representa um avanço no tocante em particular à presença e participação das vítimas no curso de seu procedimento"[637] (par. 36), por ser

> "um significativo ponto de confluência entre o Direito Penal Internacional contemporâneo e o Direito Internacional dos Direitos Humanos. Já não se trata de uma justiça tão só punitiva ou sancionatória, mas, ademais, também reparatória (Estatuto de Roma, artigo 75), e prevendo distintas formas e modalidades de reparação (Regulamento do TPI, regra 98), tanto individuais como coletivas. Em nada surpreende que, em seus primeiros pronunciamentos, - no caso *Th. Lubanga Dyilo* e a investigação da *situação na República Democrática do Congo*[638], - tenha o TPI feito referência expressa à rica jurisprudência da Corte Inter-Americana[639]. O Direito Internacional dos Direitos Humanos e o Direito Penal

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636 Cf., *inter alia*, A.A. Cançado Trindade, "International Law for Humankind: Towards a New *Jus Gentium* - General Course on Public International Law (Part I)", 316 *Recueil des Cours de l'Académie de Droit International de la Haye* (2005) caps. IX-X, pp. 252-317; A.A. Cançado Trindade, *El Derecho Internacional de los Derechos Humanos en el Siglo XXI*, 2a. ed., Santiago, Editorial Jurídica de Chile, 2006, pp. 319-376; A.A. Cançado Trindade, *El Acceso Directo del Individuo a los Tribunales Internacionales de Derechos Humanos*, Bilbao, Universidad de Deusto, 2001, pp. 9-104; A.A. Cançado Trindade, *Tratado de Direito Internacional dos Direitos Humanos*, vol. III, Porto Alegre/Brasil, S.A. Fabris Ed., 2003, pp. 447-497.

637 Estatuto de Roma, artigos 68 e 75, e Regulamento, regras 16, 89 e 90-93, - acrescida da criação da Unidade de Vítimas e Testemunhas (Estatuto, artigo 43(6), e Regulamento, regras 16-19), e do Fundo Fiduciário para as Vítimas (Estatuto, artigo 79, e Regulamento, regra 98).

638 Cf. ICC (Pre-Trial Chamber I), doc. ICC-01/04, de 17.01.2006, pp. 14-15, 29 e 34; de 31.03.2006, p. 12; e de 31.07.2006, pp. 8-9.

639 Referências aos casos, e.g., *Blake versus Guatemala*, 1998; *Meninos de Rua versus Guatemala*, 1999; *El Amparo versus Venezuela*, 1996; *Neira Alegría versus Perú*, 1996; *Paniagua Morales versus Guatemala*, 2001; *Baena Ricardo e Outros versus Panamá*, 2001, entre outros.

Internacional contemporâneo podem aqui se reforçar mutuamente, em benefício último dos seres humanos.

A consolidação da personalidade penal internacional dos indivíduos, como sujeitos ativos assim como passivos do direito internacional, fortalece a responsabilidade (*accountability*) no Direito Internacional por abusos perpetrados contra os seres humanos. Desse modo, os indivíduos também são portadores de deveres sob o Direito Internacional, o que reflete a consolidação de sua personalidade jurídica internacional[640]. Desenvolvimentos na personalidade jurídica internacional e na responsabilidade internacional se dão *pari passu*, e toda esta evolução dá testemunho da formação da *opinio juris communis* no sentido de que a gravidade de determinadas violações dos direitos fundamentais da pessoa humana afeta diretamente valores básicos compartilhados pela comunidade internacional como um todo[641]" (pars. 37-38).

4. Ocorrências no Continente Asiático

Passando, enfim, ao continente asiático, no tocante à jurisprudência da Câmara Especial nas Cortes do Camboja (CECC - Corte Especial do Camboja), o caso de *Nuon Chea e Khieu Samphan* ilustra o papel exercido por altas autoridades públicas nas atrocidades cometidas pelo regime de Pol Pot no Camboja (1975-1979). Nuon Chea exerceu vários cargos públicos, inclusive como Ministro da Propaganda e Informação, dentre outras funções na alta hierarquia do regime do Partido Comunista do Kampuchea (CPK). Assim o assinalou a CECC, em sua recente Sentença (de 07.08.2014 - par. 9); também Khieu Samphan exerceu funções e posições distintas - como, e.g., Presidente do Presídio Estatal - no regime do CPK (par. 10).

640 H.-H. Jescheck, "The General Principles of International Criminal Law Set Out in Nuremberg, as Mirrored in the ICC Statute", 2 *Journal of International Criminal Justice* (2004) p. 43.

641 Cf., e.g., A. Cassese, "Y a-t-il un conflit insurmontable entre souveraineté des États et justice pénale internationale?", *in Crimes internationaux et juridictions internationales* (eds. A. Cassese e M. Delmas-Marty), Paris, PUF, 2002, pp. 15-29; e cf., em geral, [Vários Autores], *La Criminalización de la Barbarie: La Corte Penal Internacional* (ed. J.A. Carrillo Salcedo), Madrid, Consejo General del Poder Judicial, 2000, pp. 17-504.

Os líderes do CPK - prosseguiu a CECC - deslocaram à força as populações, de cidades e vilas a áreas rurais, e procederam à "reeducação" dos "maus elementos" e à eliminação dos "inimigos", tendo em sua mira determinados grupos, como os chamam, os vietnamitas, os budistas e os oficiais do *ancien régime* (par. 102). Os crimes cometidos, em grande escala e de modo sistemático, contra a população civil cambojana, incluíram assassinatos, deslocamento forçado, extermínio, desaparecimentos forçados de pessoas, perseguição política. Tais atrocidades vitimaram centenas de milhares de civis em todo o Camboja, e geraram fluxos maciços de refugiados nos países vizinhos (pars. 193, 546-547 e 553-554).

As atrocidades foram perpetradas na execução de um plano de políticas estatais, impostas pelo Partido único (CPK - pars. 193 e 195). À violenta evacuação da população, de Phnom Penh e outras cidades, seguiram-se os crimes mencionados[642]. Ademais, numerosas vítimas - além das assassinadas - morreram nas estradas, de enfermidades, de falta de água e alimentos, de falta de assistência médica e higiene (pars. 556, 558 e 560). A CECC estatuiu que os oficiais e soldados do *Khmer Rouge* cometeram crimes contra a humanidade (par. 643), em seu afã de implementar sua "revolução socialista" no Camboja (pars. 777-778 e 804). Tratava-se - acrescentou a CECC - de "políticas criminais" do regime do CPK, que não se importava com as condições infra-humanas de vida da população, em uma afronta à dignidade humana; recorria sem escrúpulos ao uso da força, em uma campanha de terror de perseguições "de base política" (par. 805).

A CECC agregou que Nuon Chea participou, na cúpula do Partido único, desde o início, da formulação da política de deslocamento forçado da população seguido de crimes, para evacuar as áreas urbanas e "coletivizar" as "zonas liberadas" (pars. 842-843). Segundo esta política estatal, os "traidores" seriam "liquidados" (pars. 844-846). Na cúpula do Partido único (CPK), Nuon Chea conduziu "sessões de doutrinação" para a execução dos crimes (pars. 853-854). A CECC condenou, então, Nuon Chea, por crimes contra a humanidade (pars. 877-878, 883, 887, 904 e 906-907), "cometidos na execução das instruções do Partido" (par. 888), e acrescentou que

642 Pars. 630, 645, 683-686, 805, 842, 860-861 e 867-868.

> "Nuon Chea, juntamente com Pol Pot, exerceram o poder decisório último do Partido, e usaram a autoridade *de jure* e *de facto* para instruir as tropas e soldados do *Khmer Rouge* de menor hierarquia a cometer crimes de assassinato, extermínio, perseguição política e outros atos desumanos de deslocamento forçado e ataques contra a dignidade humana" (par. 884, e cf. par. 887).

A CECC, em seguida, determinou que Khieu Samphan também planejou e cometeu crimes contra a humanidade (pars. 996-997). Tanto Nuon Chea como Khieu Samphan estavam plenamente cientes das políticas que resultariam na ampla escala de tais crimes, em meio à doutrinação para eliminar os "inimigos" do regime do *Khmer Rouge* (pars. 1040-1041). Neste caso de *Nuon Chea e Khieu Samphan*, a responsabilidade penal de ambos afigura-se relacionada à responsabilidade estatal.

Já há cerca de uma década, ao concluir a investigação no caso de *Nuon Chea e Khieu Samphan*, a CECC identificou (*Ordonnance* de 15.09.2010) a existência de um plano da liderança do CPK, posto em prática, de extermínio - com *actus reus* e *mens rea* de genocídio - dos integrantes dos grupos cham (um grupo étnico e religioso) e vietnamita (pars. 1336 e 1343). Numerosas vítimas foram exterminadas em ampla escala, de forma deliberada e sistemática, por pertencerem a tais grupos (pars. 1337-1340 e 1344-1347).

Assim, a par do extermínio dos cambojanos "inimigos" do regime do *Khmer Rouge*, este último buscou, em relação aos integrantes do grupo cham, destruir também sua cultura, tradições e idioma, destruí-los por completo (pars. 1341-1342). E, no tocante aos vietnamitas, o regime de Pol Pot buscou destrui-los também pela propaganda (do CPK) de guerra anti-vietnamita, a incitação ao ódio, a perseguição e a escalada de deportações, além dos assassinatos em massa (pars. 1348-1349). Tratava-se de políticas estatais, relacionadas com a responsabilidade penal dos indivíduos em questão (nos altos escalões da liderança do CPK).

No caso de *Kaing Guek Eav (Camarada Duch)*, Diretor do sinistro Centro de Detenção S-21 (e áreas em seus arredores), a CECC determinou (Sentença de 26.07.2010) sua responsabilidade pelo estabelecimento do mesmo com uma "função criminal", e pela prática (no período de 1975-1979) de extrair confissões, mediante

interrogatório e tortura, seguidos de trabalho forçado e execuções, dos que se suspeitava serem "inimigos" do regime do CPK (pars. 23-24, 111, 514 e 520-521). Muitos detidos, quando não executados, morriam de enfermidades, falta de nutrição e "dor física e psicológica, em meio ao "medo extremo" (par. 597). Comentou a CECC que se utilizavam "políticas stalinistas" (par. 110).

Os ataques contra a população cambojana, - agregou a CECC, - ocorreram paralelamente ao conflito armado entre o Camboja e o Vietnã, e o CPK atacou seus próprios nacionais, tidos como "inimigos" do regime do *Khmer Rouge*; os que terminavam detidos na prisão S-21 provinham de "todas as partes do país e de todos os setores da sociedade cambojana" (pars. 322-323). A CECC afirmou ser o Camarada Duch "criminalmente responsável dos crimes "de caráter hediondo e particularmente chocante" de tortura e execução (nas cercanias de Phnom Pehn) de mais de 12,200 vítimas (par. 597).

Na Sentença subsequente (de 03.02.2012), a CECC (Sala de Recursos) confirmou as condenações (pars. 1-2, 376) por crimes contra a humanidade (par. 7). Agregou a CECC que constituíam "fatores agravantes" as "condições deploráveis" em que se encontravam os detidos antes das execuções (pars. 375-376), e o fato de que o Camarada Duch valeu-se de sua posição central de liderança na prisão S-21 para "abusar" no "treinamento, ordens e supervisão do pessoal na tortura e execução sistemáticas de prisioneiros" (par. 377). No entender da CECC, tal crueldade "situa este caso entre os mais graves diante dos tribunais penais internacionais" (par. 376). Neste caso do *Camarada Duch*, uma vez mais, afiguram-se inter-relacionadas a responsabilidade penal individual e a responsabilidade estatal.

III. COMPLEMENTARIDADE DA RESPONSABILIDADE INTERNACIONAL DO INDIVÍDUO E DO ESTADO

Não obstante a contribuição da construção jurisprudencial em curso sobre a matéria (*supra*), o tratamento da questão central da complementaridade da responsabilidade internacional do indivíduo e do Estado por parte da doutrina jusinternacionalista permanece insuficiente, se não insatisfatório. Consideravelmente maior atenção deveria ter já sido dispensada à questão. Parte da doutrina mostra-se disposta a buscar uma aproximação entre as responsabilidades individual e do Estado, mas experimenta dificuldades por não conseguir

desvencilhar-se da visão estadocêntrica - atada a dogmas do passado - do ordenamento jurídico internacional[643]. Ainda assim, diante de circunstancias *agravantes*, logra estabelecer aquela aproximação entre a responsabilidade penal do indivíduo e a responsabilidade estatal agravada[644].

Outra corrente doutrinária admite as responsabilidades concomitantes to Estado e do indivíduo por crimes de guerra ou crimes contra a paz (atinentes - segundo ela - às relações interestatais), mas se mostra inteiramente hesitante em admiti-las conjuntamente em relação a atos de genocídio, dada a suposta impossibilidade de um Estado de se tornar responsável penalmente[645], distintamente de um indivíduo. As duas responsabilidades, - prossegue ela, - são de natureza diferente; em casos "excepcionais", pode-se admitir que um mesmo ato ilícito possa dar origem às duas responsabilidades, a do Estado e a do indivíduo (atuando como agente estatal)[646].

Em minha percepção, a incongruência desta corrente doutrinária resulta sobretudo de seu enfoque estritamente interestatal, ainda que se trate de uma convenção como a Convenção contra o Genocídio de 1948. Não pode esta ser adequadamente abordada com as atenções voltadas às susceptibilidades interestatais. A referida Convenção se orienta aos seres humanos, aos grupos humanos vitimados, real ou potencialmente. No decorrer de dois procedimentos prolongados dos dois casos perante a CIJ atinentes à Convenção contra o Genocídio (Bósnia-Herzegóvina *versus* Sérvia, 2007; e Croácia *versus* Sérvia, 2015), a CIJ, superando hesitações, entendeu que a referida Convenção se estende também à determinação da responsabilidade estatal.

Em meu Voto Dissidente na recente Sentença da CIJ de 03.02.2015 no caso da *Aplicação da Convenção contra o Genocídio* (Croácia *versus* Sérvia), sustentei que a determinação da responsibility do Estado não só foi o que buscaram os redatores daquela Convenção (como seus *travaux préparatoires* revelam, mas está também em linha com seu *rationale*, assim

643 Cf. B.I. Bonafè, *The Relationship between State and Individual Responsibility for International Crimes*, Leiden, Nijhoff, 2009, pp. 7, 66-67 e 125.
644 *Ibid*., pp. 17-18, 31, 37, 79, 131-133, 135, 144-145 e 253-255.
645 C. Dominicé, "La question de la double responsabilité de l´État et de son agent", *in Liber Amicorum Judge M. Bedjaoui* (eds. E. Yakpo e T. Boumedra), The Hague, Kluwer, 1999, pp. 144-148 e 150-152.
646 Cf. *ibid*., pp. 156-157.

como seu objeto e fim (pars. 85-95). A Convenção contra o Genocídio visa prevenir e sancionar o crime de genocídio, - que é contrário ao espírito e propósitos das Nações Unidas, - de modo a liberar a humanidade desse flagelo. Adverti que tentar tornar a aplicação da referida Convenção uma tarefa impossível a tornaria sem sentido, uma quase letra morta (par. 94).

A própria Carta das Nações Unidas, - recordei, - professa a determinação de assegurar o respeito aos direitos humanos em toda parte; o princípio de humanidade, - na linha do secular pensamento jusnaturalista (*recta ratio*), - permeia desse modo o Direito das Nações Unidas (pars. 73-76). Ademais, - agreguei, - o princípio de humanidade tem angariado reconhecimento judicial, por parte tanto dos tribunais internacionais de direitos humanos como dos tribunais penais internacionais (pars. 77-82). As violações graves dos direitos humanos e os atos de genocídio, entre outras atrocidades, violam as proibições absolutas do *jus cogens* (par. 83).

Outra corrente doutrinária, mais esclarecida que a anteriormente mencionada, recorda de início que a própria conceituação dos crimes internacionais decorre de evolução do direito internacional geral ou costumeiro, e não mais se pode negligenciar o fato de que tanto indivíduos como Estados podem ter sua responsabilidade engajada por crimes internacionais. No caso dos crimes mais hediondos, como atos de genocídio e crimes contra a humanidade, indivíduos contam com os recursos do Estado para executar suas políticas criminais[647]. As responsabilidades dos indivíduos e do Estado encontram-se comprometidas, e a determinação da responsabilidade do Estado é particularmente importante para assegurar as reparações adequadas às vítimas.

A evolução neste sentido (ainda que a responsabilidade estatal seja tida como "civil") vem sendo reforçada pelo advento das proibições absolutas do *jus cogens*[648]. Cabe ademais ter em mente que as Convenções de Direito Internacional Humanitário - que são também direito internacional consuetudinário - devem ser cumpridas

647 É inegável que os Estados podem tornar-se responsáveis por crimes internacionais, tanto por ação como por omissão; V.-D. Degan, "Responsibility of States and Individuals for International Crimes", *in International Law in the Post-Cold War World – Essays in Memory of Li Haopei* (eds. Sienho Yee e Wang Tieya), Routledge, London/N.Y., 2001, pp. 203-204, 209, 221 e 223.

648 *Ibid*., pp. 203-204 e 207-208, e cf. p. 220.

em todas e quaisquer circunstancias, em benefício de todas as pessoas protegidas. O foco encontra-se na pessoa humana, e não nos Estados em suas relações recíprocas. Efetivamente não se trata de normas reduzidas à reciprocidade das relações interestatais, mas de normas imperativas de salvaguarda da integridade da pessoa humana, que recaem no domínio das responsabilidades tanto dos Estados como dos indivíduos[649].

O próprio Direito Internacional Humanitário transcendeu a obsoleta visão interestatal, e dela se liberou, ao dar maior ênfase - à luz do princípio de humanidade - às pessoas protegidas e à responsabilidade pela violação de seus direitos. As pessoas protegidas não são um simples objeto de regulamentação, mas sujeitos do direito internacional[650]. É o que se depreende claramente do fato de as quatro Convenções de Genebra de 1949 proibirem firmemente os Estados Partes derrogações - por acordos especiais - das regras nelas enunciadas, e em particular restringir os direitos das pessoas protegidas nelas consagrados[651]. Com efeito, o impacto das normas do Direito Internacional dos Direitos Humanos vem, já por longo tempo, tendo repercussões no *corpus juris* e aplicação do Direito Internacional Humanitário[652].

Ainda sobre a complementaridade da responsabilidade internacional do indivíduo e do Estado, cabe manter em mente que os Estados cometem crimes por meio de indivíduos (não apenas seus agentes em todos os níveis hierárquicos, mas inclusive mercenários recrutados); a responsabilidade de ambos se compromete (por ação ou omissão), tornando-se aqui necessária a luta contra a impunidade

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649 Cf., neste sentido: A.A. Cançado Trindade, *Derecho Internacional de los Derechos Humanos, Derecho Internacional de los Refugiados y Derecho Internacional Humanitario - Aproximaciones y Convergencias*, Genebra, CICV, [2000], pp. 1-66; L. Condorelli, "Responsabilité étatique et responsabilité individuelle pour violations graves du droit international humanitaire", *in Man´s Inhumanity to Man - Essays on International Law in Honour of A. Cassese* (eds. L.C. Vorah *et alii*), The Hague, Kluwer, 2003, pp. 214, 216 e 218-219.

650 As Convenções de Genebra de 1949 se basearam nos direitos das pessoas protegidas (e.g., Convenção III, artigos 14 e 78; Convenção IV, artigo 27).

651 Convenções I, II e III, artigo 6; e Convenção IV, artigo 7.

652 A.A. Cançado Trindade, "The Emancipation of the Individual from His Own State - The Historical Recovery of the Human Person as Subject of the Law of Nations", *in Human Rights, Democracy and the Rule of Law - Liber Amicorum L. Wildhaber* (eds. S. Breitenmoser *et alii*), Zürich/Baden-Baden, Dike/Nomos, 2007, pp. 155-156.

pelas atrocidades perpetradas[653]. Em suma, a coexistência da responsabilidade internacional do indivíduo e do Estado é hoje reconhecida pela maior parte da doutrina contemporânea.

Os Estados contam com indivíduos para perpetrar crimes internacionais, e os indivíduos contam com o aparato estatal para fazê-lo (a partir da planificação, sobretudo em se tratando de genocídio e crimes contra a humanidade). Cabe recordar, a respeito, que a Comissão de Direito Internacional (CDI) das Nações Unidas, ao retomar em 1984, uma iniciativa de três décadas antes, de elaborar seu Projeto de Código de Crimes contra a Paz e a Segurança da Humanidade, ponderou que, ainda que tivesse inicialmente em mente a responsabilidade penal de indivíduos, esta se configurava sem prejuízo da responsabilidade internacional dos Estados[654]. Não surpreendentemente, o referido Projeto de Código, adotado enfim em 1996, dispôs sobre as responsabilidades tanto do indivíduo (artigo 2) quanto do Estado (artigo 4)[655].

No entanto, a conceitualização desta conjugação de responsabilidades não é uniforme. Para alguns, as duas responsabilidades se complementam, mas cada uma delas mantém sua autonomia[656]; para outros, a complementaridade de ambas vai mais além (Estados e indivíduos sendo sujeitos plenos do direito internacional), deslocando-se a ênfase às vítimas, e ao dever de reparação dos danos a elas causados[657], para pôr fim à impunidade e assegurar a realização da justiça.

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653 Cf. M. Kamto, "Responsabilité de l´État et responsabilité de l´individu pour crime de génocide - quels mécanismes de mise-en-oeuvre?", *in Génocide(s)* (eds. K. Boustany e D. Dormoy), Bruxelles, Bruylant/Éd. Université de Bruxelles, 1999, pp. 489-490, 492, 495-496, 500 e 509.

654 Cf. ILC, *The Work of the International Law Commission*, 8a. ed., vol. I, N.Y., U.N., 2012, p. 103.

655 Cf. ILC, *The Work of the International Law Commission*, 8a. ed., vol. II, N.Y., U.N., 2012, pp. 305-306.

656 P.-M. Dupuy, "International Criminal Responsibility of the Individual and International Responsibility of the State", *in The Rome Statute of the International Criminal Court: A Commentary* (eds. A. Cassese, P. Gaeta e J.R.W.D. Jones), vol. II, Oxford, Oxford University Press, 2002, pp. 1086-1089, 1091-1093 e 1095-1099.

657 A.A. Cançado Trindade, "Complementarity between State Responsibility and Individual Responsibility for Grave Violations of Human Rights: The Crime of State Revisited", *in International Responsibility Today - Essays in Memory of O. Schachter* (ed. M. Ragazzi), Leiden, M. Nijhoff, 2005, pp. 253, 256-260, 262 e 269.

IV. CONSIDERAÇÕES FINAIS

Os avanços na justiça internacional são algo auspicioso, que não pode admitir retrocessos. A expansão da jurisdição internacional em nossos dias faz-se acompanhar *pari passu* da expansão da personalidade (e capacidade) e responsabilidade internacionais. A complementaridade das responsabilidades internacionais do indivíduo e do Estado é algo ineludível. Podemos melhor apreciar esta evolução se nos detivermos em sua perspectiva histórica, e constatarmos que a barbárie tem estado presente em toda a história da humanidade: civilização e barbárie são duas faces da mesma moeda[658]. Assim sendo, os avanços na justiça internacional hão de ser preservados e cultivados, para que não haja retrocessos.

Como visto anteriormente, tanto o TPII como o TPIR, tanto a CESL como a CECC, determinaram, em distintos continentes, a responsabilidade de indivíduos, na mais alta hierarquia do poder público dos Estados em questão, por genocídio e/ou crimes contra a humanidade. Os *interna corporis* da CESL e da CECC chegam inclusive a buscar, em particular, - no legado do Tribunal de Nuremberg, - o juízo daqueles mais responsáveis por tais crimes[659]. Não há que esquecer que, afinal, o Tribunal de Nuremberg condenou, por crimes contra a humanidade, comandantes e altos funcionários do regime do Terceiro *Reich*, assim como entidades criminosas do mesmo (como, e.g., a SS e a Gestapo)[660]. As atrocidades da II guerra mundial foram perpetradas em execução de uma política estatal de extermínio de seres humanos.

Nos últimos anos, os tribunais penais internacionais "híbridos" ou "mistos" têm, com isto, a meu ver contribuído, juntamente com o TPII e o TPIR, à aproximação das responsabilidades internacionais do indivíduo e do Estado no direito internacional contemporâneo. Nesse sentido, o que não dizer, por exemplo, dos casos do ex-Presidente Charles Taylor, do ex-Primeiro Ministro Jean Kambanda, de autoridades públicas como J.-P. Akayesu e Nuon Chea (braço direito do líder Pol Pot) e Camarada Duch, do caso inacabado do Presidente

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658 A.A. Cançado Trindade, *Os Tribunais Internacionais e a Realização da Justiça*, Rio de Janeiro, Edit. Renovar, 2015, pp. 69-137.
659 S. Linton, "Cambodia, East Timor and Sierra Leone: Experiments in International Justice", 12 *Criminal Law Forum* (2001) pp. 199 e 219, e cf. pp. 229, 236-237 e 244-245.
660 Cf., e.g., P. Roland, *Os Julgamentos de Nuremberg - Os Nazistas e Seus Crimes contra a Humanidade*, São Paulo, M.Books, 2013, pp. 23, 31, 73, 95, 99, 109, 137, 2013 e 203.

S. Milosevic, dos atuais processos contra R. Karadzic e R. Mladic, dos dirigentes da Operação Cóndor no Cone Sul, dentre outros?

A aproximação das responsabilidades internacionais do indivíduo e do Estado por crimes internacionais é de grande importância também para o tratamento adequado da questão das *reparações* às vítimas e seus familiares. A consideração da responsabilidade tão só do indivíduo - separadamente da estatal - leva a dificuldades quase intransponíveis (como as hoje enfrentadas pelo TPI), geradas pela assimetria entre a responsabilidade individualizada e a natureza coletiva de crimes como o genocídio e os crimes contra a humanidade, com suas numerosas vítimas[661]. Há que ter sempre em mente que, não raro, os indivíduos condenados agiram como agentes do Estado, fizeram uso de seus recursos e atuaram em seu nome. Ao se considerar também a responsabilidade do Estado, esta última inclusive viabiliza as reparações[662].

O fato de terem os tribunais penais internacionais (*ad hoc* e "híbridos" ou "mistos") condenado, por genocídio e crimes contra a humanidade, agentes estatais, autoridades públicas nos mais altos escalões do poder estatal[663], demonstra claramente, em meu entender, a inter-relação da responsabilidade individual com a responsabilidade estatal. Assim, em nada surpreende que o labor daqueles tribunais, de determinação da responsabilidade penal internacional dos indivíduos, tenha sido marcado, de meados da década de noventa até o presente, por uma certa tensão com as prioridades dos Estados, que insistem em sua visão estatocêntrica do ordenamento jurídico internacional, mesmo em face da meta professada de construção de uma "cultura de responsabilidade" ligada à paz e à justiça no plano internacional[664].

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661 E. Dwertmann, *The Reparation System of the International Criminal Court - Its Implementation, Possibilities and Limitations*, Leiden, Nijhoff, 2010, pp. 4-5, 53 e 295-297.
662 E não de forma bastante limitada, como através do *Trust Fund* para as vítimas; cf. *ibid*., pp. 67-68, 71 e 76. Para um estudo geral da matéria, a partir da posição das vítimas (e de seus direitos), cf. Luke Moffett, *Justice for Victims before the International Criminal Court*, London/N.Y., Routledge, 2014, pp. 1-289.
663 Cf., sobre este ponto, [Vários Autores,] *Prosecuting Heads of State* (eds. E.L. Lutz e C. Reiger), Cambridge, Cambridge University Press, 2009, pp. 1-293.
664 Cf., sobre este último ponto, e.g., B. Broomhall, *International Justice and the International Criminal Court: Between Sovereignty and the Rule of Law*, Oxford, Oxford University Press, 2003, pp. 185-186 e 189-192.

Esta tensão em nada impede seguir adiante no labor de realização da justiça. Se apreciarmos em conjunto todas as vertentes de proteção da pessoa humana no direito internacional contemporâneo, - o Direito Internacional dos Direitos Humanos, o Direito Internacional Humanitário e o Direito Internacional dos Refugiados, somados ao Direito Penal Internacional, - em suas aproximações e convergências[665], nos daremos conta de que no novo *jus gentium* de nossos tempos a centralidade é da pessoa humana, e não dos Estados. Só assim poderemos nos desvencilhar das perigosas distorções do prisma estritamente estatista, com suas consequências nefastas. Os avanços na justiça internacional constituem hoje um patrimônio jurídico de todos os povos, e em última análise da própria comunidade internacional como um todo.

665 Cf. A.A. Cançado Trindade, *Derecho Internacional de los Derechos Humanos, Derecho Internacional de los Refugiados y Derecho Internacional Humanitario - Aproximaciones y Convergencias*, Ginebra, CICV, [2000], pp. 1-66.

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