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RELATIONSHIP BETWEEN THE INTERNATIONAL COURT OF JUSTICE AND THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA IN RESPECT OF THE ADJUDICATION OF GENOCIDE

By opting for the approach based on the dichotomy of individual criminal responsibility for the act of genocide and the responsibility of the State in both the Bosnian and Croatian Genocide cases, the International Court of Justice enabled the establishment of a jurisprudential connection with the judgments of the International Criminal Tribunal for the Former Yugoslavia. After outlining the reasons for adopting such an approach, which are classified as both positive and negative, the author offers an extensive analysis of the differences between the ICJ and ICTY, stressing the necessity to take these differences into account when considering the interconnection between the “World Court” and the ICTY as a specialized tribunal. The paper focuses on the need for a balanced and critical approach to the jurisprudence of the ICTY as regards genocide, by differentiating between the Tribunal’s factual and legal findings. The author insists that a substantive criterion, not a formal one, must be applied with a view to the proper assessment of the factual findings of the Tribunal in accordance with the standards of judicial reasoning of the ICJ. As regards the treatment of the ICTY’s legal findings which relate to genocide, it is stressed that their uncritical acceptance would compromise the determination of the relevant rules of the Genocide Convention by the Court. Namely, the law applied by the ICTY as regards the crime of genocide is not equivalent to the relevant law established by the Convention and may be understood as its progressive development rather than its application.

Key words: *Genocide. International Court of Justice. International Criminal Tribunal for the Former Yugoslavia. Security Council Resolution 827.*

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1. INTRODUCTION

Following the filing of the Application against the FRY in the *Bosnian Genocide case*, on the basis of Article IX of the Genocide Convention, the International Court of Justice (ICJ) found itself on *terra incognita*. It had three possibilities at its disposal at the time:

(i) to pronounce itself incompetent, which was, perhaps, a solution closest to the letter of the Convention, although it contained a negative connotation in terms of the Court's judicial policy, implying that the World Court renounces making its contribution to the settlement of the disputes relating to the interpretation and application of the Convention constituting a part of *corpus juris cogentis*;

(ii) to pronounce itself competent to entertain the case, acting as a criminal court, some kind of a judicial counterpart to the French administrative court in a dispute of full jurisdiction (*le contentieux de pleine juridiction*). Legal obstacles for the Court to act in such a way do not exist. As a court of general jurisdiction it was in a position, like the courts in the continental judicial system which does not know the strict division into criminal and civil courts, to treat the issue of individual criminal responsibility for genocide as a preliminary part of the issue of the responsibility of a State for genocide. This possibility is additionally strengthened, representing even, in the light of logic and legal considerations, the most appropriate solution, in the frame of the *dictum* of the Court that a State, too, can commit genocide¹; or,

(iii) to opt for a middle-of-the-road position, limiting itself to the issue of State responsibility, without entering, at least not directly, into the area of individual criminal responsibility. Such position is essentially based on the dichotomy of individual criminal responsibility for the committed act of genocide/State responsibility, in terms of the general rules of responsibility of a State for wrongful acts. The logic of dichotomy *in concreto* implies, or may imply, the establishment of a jurisprudential connection with the judgments of the International Criminal Tribunal for the Former Yugoslavia (ICTY). Judge Tomka, in his Separate Opinion to the 2007 Judgment, outlined the rationale of this connection in terms:

“The International Court of Justice has no jurisdiction over the individual perpetrators of those serious atrocities. Article IX of the Genocide Convention confers on the Court jurisdiction to determine whether the Respondent complied with its obligations under the Genocide Convention. In making this determination in the present case, the Court was entitled to draw legal consequences from the judgments of the ICTY, par-

¹ Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosnia and Herzegovina v. Serbia and Montenegro*), Judgment, *I.C.J. Reports 2007*, 113 114, paras. 166 167.

ticularly those which dealt with charges of genocide or any of the other acts proscribed in Article III. Only if the acts of the persons involved in the commission of such crimes were attributable to the Respondent could its responsibility have been entailed. The activity of the Court has thus complemented the judicial activity of the ICTY in fulfilling the Court's role in the field of State responsibility for genocide, over which the ICTY has no jurisdiction. Hopefully, the activities of these two judicial institutions of the United Nations, the Court remaining the principal judicial organ of the Organization, contribute in their respective fields to their common objective – the achievement of international justice – however imperfect it may be perceived”.²

It appears that the Court opted for this third possibility and applied it both in the *Bosnian Genocide case* and in the case concerning *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Croatia v. Serbia).

2. REASONS UNDERLYING THE COURT'S APPROACH

It seems that the reasons underlying the choice of the Court for the third option are dual – positive and negative.

The main positive reasons could be the following:

primo, the crime of genocide, due to its specific collective nature, entails cumulatively the responsibility of individuals and that of the State;

secundo, it respects both the competence of the ICTY and the limitations on the judicial activity of the Court, which is, true, relatively limited to dealing with international responsibility for genocide;

tertio, enabling interconnecting international jurisdictions relating to genocide for the purpose of “[u]nity of substantive law as a remedy for jurisdictional fragmentation”.³

quarto, opening space for “integrating the mandate and methodologies of international courts”.⁴

² Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Separate Opinion of Judge Tomka, 351, para. 73.

³ E. Cannizzaro, “Interconnecting International Jurisdictions: A Contribution from the Genocide Decision of the ICJ”, *European Journal of Legal Studies* 1/2007.

⁴ D. Groome, “Adjudicating Genocide: is the International Court of Justice Capable of Judging State Criminal Responsibility?”, *Fordham International Law Journal* 31/2008, 976.

The negative reasons relate to the capability of the Court, in practical terms, to act as a criminal court and the avoidance of competing jurisdiction with the fellow court – the ICTY.

Although the Court “can and does have much to say on matters of criminal justice”,⁵ its proper judicial activity in genocide cases calls for institutional and methodological accommodation, in particular as regards evidential matters. It appears that the Court considered competing jurisdiction with the ICTY undesirable, not only because of the problems of principle regarding competing jurisdiction in the legal environment of the international community which does not know the judicial system *stricto sensu*, but also because of the fact that the ICTY was established by the Security Council on the basis of Chapter VII of the Charter of the United Nations.

In principle, “interconnection” with a specialized tribunal such as the ICTY can be desirable and productive for the ICJ. However, it must not ignore the substantial differences between the two bodies and the proper effects deriving from these differences.

3. DIFFERENCES BETWEEN ICJ AND ICTY

The differences are many and range from those of a judicial nature and concerning the adjudicative function to judicial reasoning.

3.1. Differences relating to judicial nature

The International Court of Justice is a “World Court”, established in accordance with a general multilateral treaty as the principal judicial organ of the United Nations.

Although a principal organ of the United Nations, coexisting with the other principal organs of the world Organization on the basis of Article 7, paragraph 1 of the Charter, the International Court of Justice is primarily the “principal judicial organ”,⁶ and “[t]he formula ‘principal judicial organ’ stresses the independent status of the Court in the sense that it is not subordinate or accountable to any external authority in the exercise of its judicial functions”.⁷

The ICTY, for its part, is a specialized, criminal tribunal established by Resolution 827 of the Security Council, whose competence is limited

⁵ K. J. Keith, “The International Court of Justice and Criminal Justice”, *International and Comparative Law Quarterly* 59/2010, 895.

⁶ UN Charter, Art. 92.

⁷ S. Rosenne, *The Law and Practice of the International Court 1920–2005*, Vol. I, 2006, 141.

in all relevant aspects – *ratione materiae, ratione personae et ratione loci* – representing, basically, an “*ad hoc* measure” aiming to “contribute to the restoration and maintenance of peace”⁸ or, promoting the idea of selective justice *versus* universal justice as inherent in the very essence of law and the judiciary. In the light of that fact, the ICTY has, actually, been established as an subsidiary organ of the Security Council, which is also reflected, *inter alia*, in its function according to Security Council resolution 827. It raises the question of its legitimacy, to which no proper legal answer has been provided to this day. The ICTY itself, in the *Tadić* case, reacting to the argument of the defence that the tribunal was “not established by law”, as required, *inter alia*, by the International Covenant on Civil and Political Rights, pointed out that, in terms of the principle of *compétence de la compétence*, it had the inherent jurisdiction to determine its own jurisdiction.⁹

The position taken by the Appeals Chamber can hardly be considered satisfactory, for at least two reasons.

Primo, the principle of *compétence de la compétence* is not an omnipotent principle capable of transforming illegitimacy into legitimacy, illegality into legality or vice versa. It is simply a basic functional and structural principle inherent in any adjudicatory body, whether a regular court or any other body possessing adjudicatory powers. The principle is, as pointed out by United States Commissioner Gore in the *Betsey* case, “indispensably necessary to the discharge of any . . . duties” for any adjudicatory body.¹⁰

As such, the principle of *compétence de la compétence*, operating within the particular judicial structure, is neutral as regards the legitimacy or illegitimacy of the adjudicating body.

Secundo, even, if *arguendo*, the principle of *compétence de la compétence* is capable of serving as a basis of legitimacy of the ICTY, the finding of the Appeals Chamber in the *Tadić* case does not appear sufficient in that regard in the light of the fundamental principle – *nemo iudex in causa sua*. The proper forum for a proper assessment of legitimacy of the ICTY is the ICJ which, however, avoided explicit pronouncement in that regard (some other models of judicial review and of UN constitutional interpretation are also possible).¹¹

⁸ UN Security Council Resolution 827 (1993), Document S/RES/827, 25 May 1993, Preamble.

⁹ *Tadić*, IT 94 1, Appeals Chamber, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, paras. 18–19.

¹⁰ J. B. Moore (ed.), *International Adjudications, Ancient and Modern, History and Documents, Modern Series*, New York 1929, 183.

¹¹ See J. Alvarez, “Nuremberg Revisited: The *Tadić* Case”, *European Journal of International Law* 7/1996, 250.

3.2. Differences relating to adjudicatory functions

The differences as regards adjudicatory functions between the ICJ and the ICTY are particularly evident in relation to international peace and security.

The activity of the ICTY is strongly linked with international peace and security.

Security Council Resolution 827, establishing the ICTY, proceeded from the qualification that the situation in the territory of the former Yugoslavia “constitute[d] a threat to international peace and security” and that the establishment of the Tribunal “would contribute to the restoration and maintenance of peace”.¹² The Appeals Chamber, in the *Tadić case*, concluded that “the establishment of the International Tribunal *falls squarely within the powers of the Security Council under Article 41*”¹³ (emphasis added). The conclusion in *Tadić* has been substantiated in the *Milošević case* in which the Trial Chamber found that the establishment of the International Tribunal “is, in the context of the conflict in the country at that time, *pre-eminently a measure to restore international peace and security*”¹⁴ (emphasis added).

The instrumental nature of the ICTY is not a subjective perception of the Tribunal itself, but derives from the act by which it has been established. Resolution 827 provides, *inter alia*, that the establishment of the Tribunal, “in the particular circumstances of the former Yugoslavia”, as “an *ad hoc* measure by the Council”.¹⁵ Such perception of the nature of the Tribunal is also reflected in the timing of the establishment of the Tribunal by the Security Council. May 1993 was the apex of the conflict in the former Yugoslavia, so that the establishment of the Tribunal was a part of international peace operations backed by the authority and enforcement power of the Security Council. Therefore, it can be said that the “overall purpose of the tribunals [ICTY and ICTR] coincides with other forms of humanitarian intervention with respect to humanitarian concern for victims in conflict-ridden areas. The ICTY’s relationship with

¹² UN Security Council Resolution 827 (1993), Doc. S/RES/827, 25 May 1993, Preamble.

¹³ *Tadić*, para. 36.

¹⁴ *Milošević*, IT 02 54, Trial Chamber, Decision on Preliminary motions, 8 November 2001, para. 7; as an aside, such a conclusion could be controversial in light of the provision of Article 41 of the Charter, which a *limine* enumerates the powers of the Security Council proving that measures “may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations.”

¹⁵ UN Security Council Resolution 827 (1993), Doc. S/RES/827, 25 May 1993, Preamble.

peacekeeping forces in Bosnia-Herzegovina during the Bosnian war indicates a critical juncture of judicial organs with military forces”.¹⁶

As such, the ICTY essentially represents a “non-military form of intervention by the international community”.¹⁷

Although there exists an indisputable nexus between law and peace, the instrumental role of the adjudicatory body in the establishment of peace hardly represents an inherent feature of judicial activity of the court of law. At least of the International Court of Justice.

Restoration of peace is pre-eminently a political matter achieved by way of measures which are *stricto sensu* non-legal or extra-legal. The notions of “peace” and “justice” do not necessarily coincide. More often than not, peace is achieved by means of unjust solutions. Moreover, law can even be an obstacle to the attainment of peace, as is shown by peace treaties. If the rules of the law of treaties were to be respected as regards peace treaties, the peace achieved through peace treaties could not be legally established because, as a rule, it is based on superiority on the battle-field; which is, in terms of the law of treaties, the essential lack of consent (*vice de consentement*).

The international practice “has developed two principal methods for settling international affairs and for dealing with international disputes. One is purely political. The other is legal. There are degrees of shading off between them, and various processes for the introduction of different types of third-party settlement. Because of this fundamental difference between the two approaches of settling international disputes, analogies from one to the other are false”.¹⁸

The role of the Court is manifested in its “bolstering of the structure of peace . . . through its advisory opinions, [as well as through judgments] through the confidence which it inspired, and through the encouragement which it gave to the extension of the law of pacific settlement, rather than through its disposition of particular disputes”.¹⁹

3.3. Judicial reasoning

It seems understandable that such a position of the Tribunal is also reflected in its judicial reasoning. In the interpretation of relevant legal rules, the Tribunal strongly, even decisively, relies on the respective interpretation of the Security Council and that of the chief administrative of-

¹⁶ H. Shinoda, “Peace building by the Rule of Law: An Examination of Intervention in the Form of International Tribunals”, *International Journal of Peace Studies* 7/2002.

¹⁷ *Ibid.*, 15.

¹⁸ S. Rosenne, 4 5.

¹⁹ M. Hudson, *International Tribunals: Past and Future*, 1944, 239.

ficer of the world Organization – the Secretary-General of the United Nations. By reasoning in this way, the Tribunal in fact conducts itself loyally towards its founder. There can be no objection to that in the light of the circumstances surrounding the establishment and adjudicatory function of the ICTY, but the question posed is whether such an approach fits within the standards of judicial reasoning of the Court.

In the *Blaškić* case, the Tribunal found the decisive argument relating to “existing international humanitarian law” in the assertions of the Security Council and the Secretary-General of the United Nations. The Tribunal stated *inter alia*:

“It would therefore be wholly unfounded for the Tribunal to now declare unconstitutional and invalid part of its jurisdiction which the Security Council, with the Secretary-General’s assent, has asserted to be part of existing international humanitarian law”.²⁰

The Tribunal found that in cases where there is no manifest contradiction between the Statute of the ICTY and the Report of the Secretary-General “the Secretary-General’s Report ought to be taken to provide an authoritative interpretation of the Statute”.²¹

The Tribunal is inclined to attach decisive weight to interpretative declarations made by Security Council members:

“In addressing Article 3 the Appeals Chamber noted that where interpretative declarations are made by Security Council members and are not contested by other delegations ‘they can be regarded as providing an authoritative interpretation’ of the relevant provisions of the Statute. Importantly, several permanent members of the Security Council commented that they interpret ‘when committed in armed conflict’ in Article 5 of the Statute to mean ‘during a period of armed conflict’. These statements were not challenged and can thus, in line with the Appeals Chamber Decision, be considered authoritative interpretations of this portion of Article 5.”²²

4. THE NEED FOR A BALANCED AND CRITICAL APPROACH TO THE JURISPRUDENCE OF THE ICTY

The presented reasons require a balanced and critical approach to the jurisprudence of the ICTY as regards genocide. Balanced in the sense of a clear distinction between factual and legal findings of the Tribunal.

²⁰ *Blaškić*, IT 95 14, Trial Chamber, Decision on the defence motion to strike portions of the amended indictment alleging “failure to punish” liability, 4 April 1997, para. 8.

²¹ *Tadić*, IT 94 1, Appeal Judgment, 15 July 1999, para. 295.

²² *Tadić*, IT 94 1, Trial Judgment, 7 May 1997, paras. 630 631.

4.1. Factual findings of the ICTY

The factual findings of the Tribunal are a proper point for the establishment of interconnection between two international jurisdictions which relate to genocide.

The methodology and techniques of a specialized, criminal judicial body constitute the basis of the high quality of factual findings of the Tribunal. The Court took cognizance of this, having found in the *Bosnian Genocide* case that it “should in principle accept as highly persuasive relevant findings of fact made by the Tribunal at trial”.²³ The heavy reliance on factual findings of the Tribunal is, moreover, based on a formal, and not a substantive, criterion. This clearly derives from the pronouncement that “the Court cannot treat the findings and determinations of the Trial Chamber as being on an equal footing with those of the Appeals Chamber. In cases of disagreement, it is bound to accord greater weight to what the Appeals Chamber Judgment says”.²⁴ In this sense, the position of the Tribunal as regards claims made by the Prosecutor can also be mentioned. The Court stated in a robust way that “as a general proposition the inclusion of charges in an indictment cannot be given weight”.²⁵ The proposition has been mitigated in the present Judgment by the qualification that “the fact that the ICTY Prosecutor has never included a count of genocide in the indictments in cases relating to Operation ‘Storm’ does not automatically mean that Serbia’s counter-claim must be dismissed”.²⁶

Reliance on ICTY factual findings must have precise limits. It cannot be considered as a formal verification of factual findings of the Tribunal nor as a simple rejection based on formal criteria.

Instead of a formal criterion, a substantive one must be applied with a view to the proper assessment of the factual finding of the Tribunal in accordance with the standards of judicial reasoning of the Court.

In addition to the general reasons which necessitate such an approach in the case at hand, of relevance could also be an additional reason which relates to the alleged connection between the institution of proceedings before the Court by Croatia and the treatment of Croatian citizens before the Tribunal, as claimed by Professor Zimmerman.²⁷ This claim was ultimately left unanswered by Croatia, nor has it been answered

²³ Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosnia and Herzegovina v. Serbia and Montenegro*), 134, para. 223.

²⁴ Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Croatia v. Serbia*), Judgment, 3 February 2015, para. 471.

²⁵ Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosnia and Herzegovina v. Serbia and Montenegro*), 132, para. 217.

²⁶ Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Croatia v. Serbia*), para. 461.

²⁷ CR 2014/14, 11 (Zimmermann).

by the ICTY itself, despite it having been made publicly in the Court's Great Hall of Justice.

4.2. Legal findings of the ICTY

In contrast to factual findings of the ICTY, the treatment of its legal findings which relate to genocide needs to be essentially different. The Court should not allow itself to get into the position of a mere verifier of legal findings of the Tribunal. For, it would thus seriously jeopardize its judicial integrity and, even, the legality of its actions in the disputes regarding the application of the Genocide Convention.

A number of cogent considerations necessitate a critical approach to the legal findings of the Tribunal.

In dealing with the disputes relating to genocide on the basis of Article IX of the Genocide Convention, the Court is bound to apply only the provisions of the Convention as the relevant substantive law. In that regard, the Judgment states *expressis verbis*:

“since Article IX provides for jurisdiction only with regard to ‘the interpretation, application or fulfillment of the Convention, including . . . the responsibility of a State for genocide or for any of the other acts enumerated in article III’, *the jurisdiction of the Court does not extend to allegations of violations of the customary international law on genocide*. It is, of course, well established that the Convention enshrines principles that also form part of customary international law. Article I provides that ‘[t]he Contracting Parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law’. The Court has also repeatedly stated that the Convention embodies principles that are part of customary international law. That was emphasized by the Court in its 1951 Advisory Opinion . . . That statement was reaffirmed by the Court in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro, Judgment, I.C.J. Reports 2007 (I), pp. 110–111, para. 161*”²⁸ (emphasis added).

The position of the ICTY as regards applicable substantive law seems different.

In its judgment in the Krstić case, which served as the basis for the Court's conclusion that genocide was committed in Srebrenica, the Trial Chamber stated that it “must interpret Article 4 of the Statute taking into account *the state of customary international law at the time the events in Srebrenica took place*”²⁹ (emphasis added).

²⁸ Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia), para. 87.

²⁹ *Krstić*, IT 98 33, Trial Chamber, Judgment, 2 August 2001, para. 541.

The Trial Chamber referred to a variety of sources in order to arrive at the definition of genocide that it applied:

“The Trial Chamber first referred to the codification work undertaken by international bodies. The Convention on the Prevention and Punishment of the Crime of Genocide . . . whose provisions Article 4 adopts verbatim, constitutes the main reference source in this respect. Although the Convention was adopted during the same period that the term ‘genocide’ itself was coined, the Convention has been viewed as codifying a norm of international law long recognised and which case-law would soon elevate to the level of a peremptory norm of general international law (*jus cogens*). The Trial Chamber has interpreted the Convention pursuant to the general rules of interpretation of treaties laid down in Articles 31 and 32 of the Vienna Convention on the Law of Treaties. As a result, the Chamber took into account the object and purpose of the Convention in addition to the ordinary meaning of the terms in its provisions. As a supplementary means of interpretation, the Trial Chamber also consulted the preparatory work and the circumstances which gave rise to the Convention. Furthermore, the Trial Chamber considered the international case-law on the crime of genocide, in particular, that developed by the ICTR. The Report of the International Law Commission (ILC) on the Draft Code of Crimes against Peace and Security of Mankind received particular attention. Although the report was completed in 1996, it is the product of several years of reflection by the Commission whose purpose was to codify international law, notably on genocide: it therefore constitutes a particularly relevant source for interpretation of Article 4. The work of other international committees, especially the reports of the Sub-Commission on Prevention of Discrimination and Protection of Minorities of the UN Commission on Human Rights, was also reviewed. Furthermore, the Chamber gave consideration to the work done in producing the Rome Statute on the establishment of an international criminal court, specifically, the finalised draft text of the elements of crimes completed by the Preparatory Commission for the International Criminal Court in July 2000. Although that document post-dates the acts involved here, it has proved helpful in assessing the state of customary international law which the Chamber itself derived from other sources. In this regard, it should be noted that all the States attending the conference, whether signatories of the Rome Statute or not, were eligible to be represented on the Preparatory Commission. From this perspective, the document is a useful key to the *opinio juris* of the States. Finally, the Trial Chamber also looked for guidance in the legislation and practice of States, especially their judicial interpretations and decisions.”³⁰

It appears that the fact that Article 4 of the ICTY Statute ad verbatim reproduces Articles II and III of the Genocide Convention does not

³⁰ *Ibid.*

automatically mean that the law of genocide as contemplated by the ICTY Statute is equivalent to the law of genocide established by the Convention. Article 4 of the Statute is but a provision of the Statute, which is itself a unilateral act of one of the political organs of the United Nations. As such, the provision cannot change its nature simply by reproducing the text of Articles II and III of the Convention, without any *renvoi* to the Genocide Convention. Consequently, interpretation of Article 4 of the Statute on the basis *inter alia* of the *travaux préparatoires* of the Convention, on which the ICTY amply draws, is essentially misleading. It reflects the difference in judicial reasoning between the ICJ and the ICTY.³¹

The interpretation of relevant provisions of the Convention can, however, be one thing and the application of these provisions quite another. Thus, the interpretation provided in paragraphs 87 and 88 of the Judgment appears to be in discrepancy with the positions of the Court in the *Bosnian Genocide* case, which, as the first case alleging acts of genocide dealt with by the ICJ, represents some sort of a judicial parameter in genocide cases before the Court.

In the *Bosnian Genocide* case, conclusion of the Court that genocide was committed in Srebrenica was based on the ICTY Judgment in the *Krstić* case,³² which was decided by the ICTY on the basis of “customary international law at them time the events in Srebrenica took place”.³³

In connection with “customary law of genocide”, two legal questions are posed which, due to their specific weight, transcend the question of customary law of genocide, affecting the very understanding of custom, as one of the main sources of international law, and the relationship between the Genocide Convention and customary law emerging, or which could merge, following the adoption of the Convention.

The ICTY perception of custom as a source of international law is highly innovative, going well beyond the understanding of custom in the jurisprudence of the ICJ.

According to the well settled jurisprudence of the ICJ, which follows the provision of its Statute referring to “international custom, as evidence of a general practice accepted as law”,³⁴ custom is designed as a source based on two elements: general practice and *opinion iuri sine necessitatis*. As it pointed out in the Nicaragua case: “[b]ound as it is by

³¹ See, para. 3.3 above.

³² Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosnia and Herzegovina v. Serbia and Montenegro*), 163 166, paras. 292 297.

³³ *Krstić*, para. 541.

³⁴ Art. 38, para. 1 (b).

Article 38 of its Statute . . . the Court may not disregard *the essential role played by general practice*³⁵ (emphasis added).

The jurisprudence of the ICTY generally moves precisely in the opposite direction, giving the predominant role to *opinio juris* in the determination of custom³⁶ and, thus, showing a strong inclination towards the single element conception of custom!

In doing so, it considers *opinio juris* in a manner far removed from its determination by the Court. For, in order “to constitute the *opinio juris* . . . two conditions must be fulfilled. Not only must the acts concerned amount to a settled practice, but they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it”.³⁷ *Opinio juris* cannot be divorced from practice because “[t]he Court must satisfy itself that the existence of the rule in the *opinio juris* of States is confirmed by practice”.³⁸

The ICTY has often satisfied itself with “extremely limited case law” and state practice.³⁹

A large part of law qualified by the ICTY as customary law is based on decisions of municipal courts⁴⁰ which are of a limited scope in the jurisprudence of the Court.⁴¹ In case concerning *Certain German Interests in Polish Upper Silesia*, the Permanent Court stated that national judicial acts represent “facts which express the will and constitute the activities of States”.⁴²

Hidden under the surface of the general characteristic of the ICTY’s approach to customary law, which is dubious *per se*, is incoherence and subjectivism. It has been well noted that differently-composed Chambers of the ICTY have utilized different methods for identifying and interpreting customary law, even in the same case, including simply refer-

³⁵ Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment, *I.C.J. Reports 1986*, 97–98, para. 184.

³⁶ G. Mettraux, *International Crimes and the ad hoc Tribunals*, 2005, 13 fn. 4.

³⁷ North Sea Continental Shelf, Judgment, *I.C.J. Reports 1969*, 44, para. 77.

³⁸ Military and Paramilitary Activities in and against Nicaragua, 98, para. 184.

³⁹ A. Nollkaemper, “The Legitimacy of International Law in the Case Law of the International Criminal Tribunal for the former Yugoslavia” in: T.A.J.A. Vandamme, J.H. Reestman (eds.), *Ambiguity In the Rule of Law: The Interface between National and International Legal Systems*, 2001, 17.

⁴⁰ A. Nollkaemper, “Decisions of National Courts as Sources of International Law: An Analysis of the Practice of the ICTY” in G. Boas, W.A. Schabas (eds.), *International Criminal Law Developments in the Case Law of the ICTY*, 2003, 282.

⁴¹ H. Thirlway, *The Law and Procedure of the International Court of Justice: Fifty Years of Jurisprudence*, Vol. I, 2013, 248.

⁴² *Certain German Interests in Polish Upper Silesia Judgment*, 1926, *P.C.I.J., Ser. A, No. 7*, 19.

ring to previous ICTY decisions themselves as evidence of a customary rule.⁴³ In addition, the ICTY has failed to consistently and rigorously address the concepts of state practice and *opinio juris* by, *inter alia*, failing to refer to evidence of either, referring merely to the bulk existence of national legislation as evidencing custom without addressing *opinio juris* or framing policy or “humanity” related rationales as *opinio juris*.⁴⁴

The establishment of customary law in the ICTY resembles in many aspects a quasi-customary law exercise based on deductive reasoning driven by meta-legal and extra-legal principles. As can be perceived “many a Chamber of the *ad hoc* Tribunals have been too ready to brand norms as customary, without giving any reason or citing any authority for that conclusion”.⁴⁵ This has resulted in judicial law-making through purposive, adventurous interpretation,⁴⁶ although, according to the Secretary-General, on the establishment of the ICTY, the judges of the Tribunal could apply only those laws that were beyond doubt part of customary international law.⁴⁷ Being in substantial conflict with custom, as perceived by the ICJ, the ICTY perception of custom, applied in its jurisprudence, opens the way to a fragmentation of international criminal law and, even, general international law.⁴⁸

It is customary law to which is usually attributed the dynamic capacity in the development of treaty law, both as regards the scope of the established obligation and as regards its content. The question of modification of the substantive rules of the Convention in the form of custom is, as a rule, a neglected question although it seems to be of far-reaching importance.

Is custom capable of modifying a rule which belongs to *corpus juris cogentis*?

Given the inherent characteristics of customary law, on the one hand, and legal force of the rules of *corpus juris cogentis*, on the other, the answer to this question is necessarily negative.

The other side of the flexibility of custom, as a positive characteristic from the aspect of the creation of peremptory norms, is the fact that

⁴³ N. Arajärvi, *The Changing Nature of Customary International Law: Methods of Interpreting the Concept of Custom in International Criminal Tribunals*, 2014, 117.

⁴⁴ *Ibid.*, 118.

⁴⁵ G. Mettraux, 15.

⁴⁶ M. Swart, “Judicial Law making at the *ad hoc* Tribunals: The Creative Use of Sources of International Law and ‘Adventurous Interpretation’”, *Heidelberg Journal of International Law* 70/2010, 463 468, 475 478.

⁴⁷ UN Security Council, *Report of the Secretary General Pursuant to Paragraph 2 of Security Council resolution 808 (1993)*, Doc. S/25704, 3 May 1993, para. 34.

⁴⁸ See Mettraux, 15, citing the case concerning Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium), Judgment, *I.C.J. Reports* 2002, 3.

customary rules, as a rule, come into existence slowly and painstakingly. This fact, besides the vagueness and imprecision of custom, is a big handicap in relation to an international treaty, in particular at a time of rapid and all-embracing changes in the overall set of relations regulated by international law. In the words of Friedmann, “custom is too clumsy and slow moving a criterion to accommodate the evolution of international law in our time”⁴⁹.

Precisely because of this, the advantages of custom as a source of existing peremptory norms of general international law represent, at the same time, and in certain cases, also a difficulty, if not an obstacle, to the formulation of new peremptory norms or the modification of those already in existence.

Namely, the very mechanism of the creation of an international customary rule by way of permanent, continual repetition of certain behaviour, coupled with the *opinio juris*, is certainly not in full harmony with the status enjoyed by the peremptory norm of general international law; in particular in relation to consequences inherent in such a norm in relation to contrary acts undertaken by a State or a group of States. The customary rule implies certain regularity as a characteristic of particular forms of behaviour which constitute the being of the material element of custom; a regularity on the basis of which the subjects of international law perceive this practice as an expression of the obligatory rule of conduct. On the other hand, such regularity should have overall scope, that is, it must be included, directly or indirectly, in the practice of the overwhelming majority of member countries of the international community. In view of the fact that the custom came into being diffusely, general practice is achieved through the accumulation of varied individual and common behaviours and acts.⁵⁰

However, it follows from the character of a norm of *jus cogens* that all acts which are contrary to it are null and void *ab initio*. In other words, such practice does not possess legal validity; therefore it cannot represent a regular form of the coming into existence of a norm of *jus cogens superveniens* in the matter which is already covered by the cogent régime.

The inherent incapability of custom to modify the existing rule of *jus cogens* has been diagnosed in a subtle way by the International Law Commission. In the commentary to Draft Article 50,⁵¹ the Commission, having found that “it would be clearly wrong to regard even rules of *jus cogens* as immutable and incapable of modification . . .”, concludes that

⁴⁹ W. Friedmann, *The Changing Structure of International Law*, 1964, 122.

⁵⁰ See, Special Rapporteur M. Wood, “Second report on identification of customary international law”, International Law Commission, Doc. A/CN.4/672, 22 May 2014.

⁵¹ Article 53 of the Vienna Convention on the Law of Treaties.

“a modification of a rule of *jus cogens* would today most probably be effected through a general multilateral treaty . . .”⁵² (emphasis added).

Only “instant custom” would possess the proper capacity for modification of an existing *jus cogens* rule, a conception of custom that has not become part of positive law.

The perception of customary law developed by the ICTY is highly destructive as regards the normative integrity of international law. Being essentially a subjective perception of customary law divorced from its deeply rooted structure which derives from the Statute of the Court as part of the international *ordre public*, actually a judicial claim of custom contradictory not only *per se* but also *in se*, it generates diversity in the determination of customary law, including the rules of *jus cogens* of a customary nature.

It can be qualified as the most serious challenge to the construction of customary law in recent history of international law. Reducing “general practice” to isolated judgments of national courts or, even, to statements in the United Nations Security Council and deriving *opinio juris* from these acts, or, going even further, simply asserting that a certain rule is of a customary nature, not only contradicts the positive-legal conception of custom reflected in the jurisprudence of the Court, but also trivializes the will of the international community as a whole as the basis of obligations in international law, in particular obligations of a customary nature. In sum, the ICTY’s perception of customary law as a demonstration of judicial fundamentalism would seem to incarnate Lauterpacht’s metaphor of custom as a metaphysical joke.⁵³

The dangers of the ICTY’s perception of customary law can hardly be overestimated. The effects of such a perception are not limited to the judicial activity of the ICTY and other *ad hoc* bodies. For a number of reasons, including, *inter alia*, the inclination to deductive reasoning based on meta-legal and, even, extra-legal considerations, not even the Court is immune to such perception.

Furthermore, the pronouncement of the Court that a customary law of genocide existed before the adoption of the Genocide Convention is unclear.⁵⁴ The arguments on which relies the *conclusio* of the Court are not excessively persuasive. The arguments of the Court are basically:

⁵² United Nations Conference on the Law of Treaties, “Draft articles on the Law of Treaties with commentaries, adopted by the International Law Commission at its Eighteenth Session”, First and Second Sessions, Vienna, 26 March 24 May 1968 and 9 April 22 May 1969, Official Records, Documents of the Conference, 68, para. 4.

⁵³ H. Lauterpacht, “Sovereignty over Submarine Areas”, *British Yearbook of International Law* 27/1950, 394.

⁵⁴ See case concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia), paras. 87 and 88.

(i) that it is “well established that the Convention enshrines principles that also form part of customary international law”; and

(ii) that Article I provides that “the Contracting Parties confirm that genocide ... is a crime under international law”⁵⁵.

As far as the first argument is concerned, it is, in fact, a strong assertion which lacks precision and proper evidence. In its 1951 Advisory Opinion, the Court rightly found “denial of the right of existence of entire human groups”, which is *genus proximum* of genocide, contrary “to moral law and to the spirit and aims of the United Nations”⁵⁶ (emphasis added). It appears that, in the opinion of the Court, “the principles underlying the Convention are principles which are recognized by civilized nations . . .”, in essence, “most elementary principles of morality”.⁵⁷

Apart from the question as to whether there is equivalency between legal principles *stricto sensu* and “moral law” or the “most elementary principles of morality”, it appears that the latter are the guiding principles for the creation of legal rules on genocide, rather than legal rules *per se*. The term “customary law on genocide” necessarily implies only rules or rules and principles. Principles, no matter how fundamental they can be, cannot *per se* constitute any law whatsoever, including in respect of the law on genocide. Or, at least, not operational law or law in force.

The second argument is based on the meaning of the word “confirm”. As it is only possible to confirm something that exists, the Genocide Convention would express the already constituted law of genocide or, in a technical sense, it would represent codification of customary law of genocide.

However, there may be a different interpretation. For, it seems that the subject of “confirmation” is something else and not customary law of genocide.

On 11 December 1946 the United Nations General Assembly adopted resolution 96 (I) on the Crime of Genocide which, *inter alia*, “Affirms that *genocide is a crime under international law* which the civilized world condemns, and for the commission of which principals and accomplices – whether private individuals, public officials or statesmen, and whether the crime is committed on religious, racial, political or any other grounds – are punishable” (emphasis added).

The Preamble of the Genocide Convention states, *inter alia*, that “the Contracting Parties, having considered *the declaration* made by the General Assembly of the United Nations in its resolution 96 (I) dated 11

⁵⁵ *Ibid.*, para.87.

⁵⁶ Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, *I.C.J. Reports 1951*, 23.

⁵⁷ *Ibid.*

December 1946 that *genocide is a crime under international law*” (emphasis added).

It could be said that the relation between resolution 96 (I) and the Genocide Convention is the embryo of the two-phase legislative activity which *tractu temporis* turned into a model for the creation of general multilateral treaty regimes in United Nations practice (*exempli causa*, General Assembly resolution 1962 (XVIII), Declaration of Legal Principles Governing the Activities of States in the Exploration and Use of Outer Space, 13 December 1963; Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies 1967; General Assembly resolution 217 (III), A Universal Declaration of Human Rights, 10 December 1948; International Covenant on Civil and Political Rights 1966; International Covenant on Economic, Social and Cultural Rights 1966). In this model, resolutions of the United Nations General Assembly, adopted unanimously or by the overwhelming majority, declare the general principles relating to the particular subject, these principles become part of international public policy, and are finally transformed into binding legal rules in the form of general international treaty, thus constituting what has been referred to by Judge Alvarez as “international legislation”.⁵⁸

If, *arguendo*, customary law of genocide existed before the adoption of the Genocide Convention, it is unclear on what practice, in particular general practice, it was based? The Court did not indicate any evidence of the corresponding practice before the adoption of the Convention.

Moreover, the question may be posed why the corresponding practice, if it was constituted, was not respected by the Nuremberg and the Tokyo Tribunals which were established precisely at the time when that practice must have been constituted?

Does the thesis that customary law of genocide existed before the adoption of the Convention suggest that the Nuremberg and the Tokyo Tribunals were unaware of/it or did they, perhaps, intentionally ignore it?

5. CONCLUSION

Uncritical acceptance of the legal findings of the ICTY, essentially its verification, could result in compromising the determination of the relevant rules of the Genocide Convention by the Court.

⁵⁸ Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, *I.C.J. Reports 1951*, Dissenting Opinion of Judge Alvarez, 49.

There exists a reason of an objective nature which produces, or may produce, a difference between the law of genocide embodied in the Genocide Convention and the law of genocide applied by the *ad hoc* tribunals.

The law applied by the ICTY as regards the crime of genocide cannot be considered equivalent to the law of genocide established by the Convention. In this regard, the jurisprudence of the ICTY can be said to be a progressive development of the law of genocide enshrined in the Convention, rather than its actual application. Article 4 of the ICTY Statute is but a provision of the Statute as a unilateral act of one of the main political organs of the fact that it does not contain any *renvoi* to the Genocide Convention, the provision cannot change its nature simply by reproducing the text of Article II of the Convention.

It is not surprising therefore that in the jurisprudence of the Court as regards the law on genocide there exist a discrepancy between the interpretation of the relevant provisions of the Convention expressing as a rule the letter of the Convention, and its application based on *in toto* acceptance of the ICTY's decision, that goes in the other direction.

I shall give two examples that concern the crucial provisions of the Convention.

The first example relates to the nature of the destruction of the protected group.

The Court notes that, in the light of the *travaux préparatoires*, the scope of the Convention is limited to the physical and biological destruction of the group.⁵⁹ The finding is consistently implemented in the Judgment as a whole.

Exempli causa the considers that “in the context of Article II, and in particular of its *chapeau*, and in light of the Convention's object and purpose, the ordinary meaning of ‘serious’ is that the bodily or mental harm referred to in subparagraph (b) of that Article must be such as to contribute to the physical or biological destruction of the group . . .”.⁶⁰

However, “destruction” as applied by ICTY in the *Krstić* and *Blagojević* cases, is a destruction in social terms rather than in physical and biological terms.

In the *Krstić* case the Trial Chamber found, inter alia, that the destruction of a sizeable number of military aged men “would inevitably result in the physical disappearance of the Bosnian Muslim population at Srebrenica”,⁶¹ since “their spouses are unable to remarry and, conse-

⁵⁹ Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia), para. 136.

⁶⁰ *Ibid.*, para. 157, see also paras. 160, 163.

⁶¹ *Krstić*, IT 98 33, Trial Judgment, 2 August 2001, para. 595.

quently, to have new children”.⁶² Such a conclusion, reflects rather the idea of a social destruction, rather than a physical or biological one.

The perception of destruction in social terms is even more emphasized in the *Blagojević* case. The Trial Chamber applied “[a] broader notion of the term ‘destroy’, encompassing also ‘acts which may fall short of causing death’”,⁶³ an interpretation which does not fit with the understanding of destruction in terms of the Genocide Convention. In that sense, the Trial Chamber finds support in the Judgment of the Federal Constitutional Court of Germany, which held *expressis verbis* that

“the statutory definition of genocide defends a supra-individual object of legal protection, i.e. the *social* existence of the group [and that] the intent to destroy the group . . . extends beyond physical and biological extermination . . . The text of the law does not therefore compel the interpretation that the culprit’s intent must be to exterminate physically at least a substantial number of members of the group”⁶⁴ (emphasis and ellipses in original).

Thus perceived, the term “destruction”, in the genocide definition can encompass the forcible transfer of population.⁶⁵

The finding contradicts the *dictum* of the Court that “deportation or displacement of the members of a group, even effected by force, is not necessarily equivalent to destruction of that group, nor is such destruction an automatic consequence of the displacement”.⁶⁶

Those findings of the ICTY served as a basis for the *conclusio* of the Court that Genocide was committed in Srebrenica.⁶⁷

In addition, fortunately, the subjective character of destruction in a sociological sense is clearly shown precisely by the case of Srebrenica. One of the key arguments of the Tribunal in the *Krstić* case and the *Blagojević* case was that “destruction of a sizeable number of military aged men would inevitably result in the physical disappearance of the Bosnian Muslim population in Srebrenica”.⁶⁸

Life, however, proved the Tribunal’s prediction wrong. Following the conclusion of the Dayton Agreement, the Muslim community in Srebrenica was reconstituted, so that today the number of the members of the two communities – the Muslim and the Serbian – is equalized. This is

⁶² *Krstić*, IT 98 33, Appeal Judgment, 19 April 2004, para. 28.

⁶³ *Blagojević and Jokić*, IT 02 60, Trial Judgment, 17 January 2005, para. 662.

⁶⁴ *Blagojević et. al.*, IT 02 60, Trial Judgment, 17 January 2005, para. 664.

⁶⁵ *Ibid.*, para. 665.

⁶⁶ Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosnia and Herzegovina v. Serbia and Montenegro*), para. 190.

⁶⁷ *Ibid.*, paras. 296 297.

⁶⁸ *Krstić*, IT 98 33, Trial Judgment, 2 August 2001, para. 595.

also evidenced by the fact that a representative of the Muslim community was elected Mayor at the last elections.

The other example relates to the relevance of customary law on genocide in disputes before the Court based on Article IX of the Genocide Convention.

In the present Judgment, the Court devoted considerable attention to the customary law on genocide and made proper conclusions in clear and unequivocal terms.

The Court stated in strong words that:

“[t]he fact that the jurisdiction of the Court in the present proceedings can be founded only upon Article IX has important implications for the scope of that jurisdiction. That Article provides for jurisdiction only with regard to disputes relating to the interpretation, application or fulfilment of the Genocide Convention, including disputes relating to the responsibility of a State for genocide or for any of the other acts enumerated in Article III of the Convention”.⁶⁹

The statement is supported by the following reasoning:

“any jurisdiction which the Court possesses is derived from Article IX of the Genocide Convention and is therefore confined to obligations arising under the Convention itself. Where a treaty states an obligation which also exists under customary international law, the treaty obligation and the customary law obligation remain separate and distinct (*Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, *Merits, Judgment, I.C.J. Reports 1986*, p. 96, para. 179). Accordingly, unless a treaty discloses a different intention, the fact that the treaty embodies a rule of customary international law will not mean that the compromissory clause of the treaty enables disputes regarding the customary law obligation to be brought before the Court. In the case of Article IX of the Genocide Convention no such intention is discernible. On the contrary, the text is quite clear that the jurisdiction for which it provides is confined to disputes regarding the interpretation, application or fulfilment of the Convention, including disputes relating to the responsibility of a State for genocide or other acts prohibited by the Convention. Article IX does not afford a basis on which the Court can exercise jurisdiction over a dispute concerning alleged violation of the customary international law obligations regarding genocide”.⁷⁰

It should be noted that the position of the Court in that regard was couched in a similar, although more general, way, in the *Bosnian Genocide* case.

The Court stated that:

⁶⁹ Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosnia and Herzegovina v. Serbia and Montenegro*), para. 85.

⁷⁰ Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Croatia v. Serbia*), para. 88.

“[t]he jurisdiction of the Court in this case is based solely on Article IX of the Convention”.⁷¹

True, the Court continued:

“[t]he jurisdiction of the Court is founded on Article IX of the Convention, and the disputes subject to that jurisdiction are those ‘relating to the interpretation, application or fulfilment’ of the Convention, but it does not follow that the Convention stands alone. In order to determine whether the Respondent breached its obligation under the Convention, as claimed by the Applicant, and, if a breach was committed, to determine its legal consequences, the Court will have recourse not only to the Convention itself, but also to the rules of general international law on treaty interpretation and on responsibility of States for internationally wrongful acts”.⁷²

However, it seems clear that the rules of general international law on treaty interpretation, for its object *in concreto*, can have only the Genocide Convention itself. These rules, as rules of interpretation of the Convention, cannot introduce through the back door customary law on genocide as applicable substantive law. As far as the rules on the responsibility of states for internationally wrongful acts, things seem to be equally clear. For, being essentially the secondary rules, the rules on the responsibility of states are “incapable” of modifying the substance of the primary rules contained within the Genocide Convention.

However, the ICTY’s Judgment in the *Krstić* case was based, as the Tribunal stated *expressis verbis*, on “customary international law at the time the events in Srebrenica took place”.⁷³

It appears that the Court, having found that it “sees no reason to disagree with the concordant findings of the Trial Chamber and the Appeals Chamber”⁷⁴ in the *Krstić* and the *Blagojević* cases, has, in light of its pronouncement in paragraphs 87 and 88 of the Judgment, exceeded its jurisdiction, since Article IX confers jurisdiction *only* with respect to the “interpretation, application or fulfilment of the Convention . . . [and] the jurisdiction of the Court *does not extend to allegations of violation of the customary international law on genocide*”⁷⁵ (emphasis added) so that “Article IX *does not afford a basis* on which the Court can exercise jurisdiction over a *dispute concerning alleged violation of the customary international law obligations regarding genocide*”⁷⁶ (emphasis added).

⁷¹ Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), 104, para. 147.

⁷² *Ibid.*, para. 149.

⁷³ *Krstić*, IT 98 33, Trial Chamber, Judgment, 2 August 2001, para. 541.

⁷⁴ Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), 166, para. 296.

⁷⁵ Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia), para. 87.

⁷⁶ *Ibid.*, para. 88.