COUR INTERNATIONALE DE JUSTICE

RECUEIL DES ARRÊTS,
AVIS CONSULTATIFS ET ORDONNANCES

AFFAIRE RELATIVE À LA LICÉITÉ DE L'EMPLOI DE LA FORCE

(SERBIE-ET-MONTÉNÉGRO c. FRANCE)

EXCEPTIONS PRÉLIMINAIRES

ARRÊT DU 15 DÉCEMBRE 2004

2004

INTERNATIONAL COURT OF JUSTICE

REPORTS OF JUDGMENTS,
ADVISORY OPINIONS AND ORDERS

CASE CONCERNING LEGALITY OF USE OF FORCE

(SERBIA AND MONTENEGRO *v.* FRANCE)

PRELIMINARY OBJECTIONS

JUDGMENT OF 15 DECEMBER 2004

Mode officiel de citation:
Licéité de l'emploi de la force (Serbie-et-Monténégro c. France), exceptions préliminaires, arrêt, C.I.J. Recueil 2004, p. 575

Official citation:
Legality of Use of Force (Serbia and Montenegro v. *France), Preliminary Objections, Judgment, I.C.J. Reports 2004*, p. 575

ISSN 0074-4441
ISBN 92-1-070999-3

N° de vente:
Sales number **888**

15 DÉCEMBRE 2004

ARRÊT

LICÉITÉ DE L'EMPLOI DE LA FORCE
(SERBIE-ET-MONTÉNÉGRO c. FRANCE)
EXCEPTIONS PRÉLIMINAIRES

LEGALITY OF USE OF FORCE
(SERBIA AND MONTENEGRO *v.* FRANCE)
PRELIMINARY OBJECTIONS

15 DECEMBER 2004

JUDGMENT

INTERNATIONAL COURT OF JUSTICE

YEAR 2004

2004
15 December
General List
No. 107

15 December 2004

CASE CONCERNING LEGALITY OF USE OF FORCE

(SERBIA AND MONTENEGRO *v.* FRANCE)

PRELIMINARY OBJECTIONS

Case one of eight similar cases brought by the Applicant — Court to consider arguments put forward in this case as well as any other legal issue, including issues raised in other seven cases.

* *

Contentions by Respondents that case should be dismissed in limine litis *as a result of Applicant's changed attitude to Court's jurisdiction in its Observations.*

Whether Applicant's changed attitude amounts to discontinuance — Applicant expressly denied notice of discontinuance and wants the Court to decide upon its jurisdiction — Court unable to treat Observations as having legal effect of discontinuance — Court has power, ex officio, to put an end to a case in interests of proper administration of justice — Not applicable in present case.

Whether Applicant's position discloses substantive agreement on jurisdiction resulting in absence of dispute for purposes of Article 36, paragraph 6, of Statute — Distinction to be drawn between question of jurisdiction and right of party to appear before the Court under the Statute — Latter not a matter of consent — Court must reach its own conclusion.

Court cannot decline to entertain case because of a suggestion as to motives of one of the parties or because its judgment may have influence in another case.

Whether, in light of Applicant's contention that it was not party to the Genocide Convention until March 2001, the substantive dispute with the Respondent,

in so far as jurisdiction is founded on that Convention, has disappeared — Contention that Applicant has forfeited right of action and is estopped from pursuing the proceedings — No withdrawal of claims as to merits — Applicant cannot be held to have renounced its rights or to be estopped from continuing the action.

Court cannot dismiss case in limine litis.

* *

Questions of jurisdiction — Court's "freedom to select the ground upon which it will base its judgment" — Distinction between present proceedings and other cases — Applicant's right of access to Court under Article 35, paragraph 1, of Statute, challenged — If not party to Statute at time of institution of proceedings, subject to application of Article 35, paragraph 2, Applicant had no right to appear before Court — Court must determine whether Applicant meets conditions laid down in Articles 34 and 35 of Statute before examining conditions in Article 36 of Statute.

*

Break-up of Socialist Federal Republic of Yugoslavia in 1991-1992 — Declaration of 27 April 1992 and Note of same date from Permanent Representative of Yugoslavia to the United Nations, addressed to Secretary-General — Security Council resolution 757 of 30 May 1992 — Security Council resolution 777 of 19 September 1992 — General Assembly resolution 47/1 of 22 September 1992 — Legal Counsel's letter of 29 September 1992 regarding "practical consequences" of General Assembly resolution 47/1 — General Assembly resolution 47/229 of 29 April 1993.

Complexity and ambiguity of legal position of FRY within and vis-à-vis the United Nations during the period 1992-2000 — Absence of authoritative determination by competent United Nations organs.

Different positions taken within United Nations — Positions of Security Council and General Assembly — Resolution 777 (1992) and resolution 47/1 cannot be construed as conveying an authoritative determination of FRY's legal status — Position of FRY — Maintained claim of continuity of legal personality of SFRY as stated in Note of 27 April 1992 — Position of Secretariat — Adherence to practice prevailing prior to break-up of SFRY pending authoritative determination of FRY's legal status.

Reference by Court to "sui generis" *position of FRY in Judgment of 3 February 2003 in* Application for Revision *case — Term not prescriptive but merely descriptive of amorphous situation — No conclusion drawn by Court as to status of FRY vis-à-vis the United Nations in 2003 Judgment nor in incidental proceedings in other cases including Order on provisional measures in present case.*

FRY's sui generis *position came to end with admission to United Nations on 1 November 2000 — Admission did not have effect of dating back — New development clarified amorphous legal situation — Situation faced by Court manifestly different from that in 1999 — Applicant was not a Member of United Nations, hence not party to Statute, on 29 April 1999 when it filed Application.*

Court not open to Applicant, at date of filing of Application, under Article 35, paragraph 1, of Statute.

*

Question whether Court open to Applicant under Article 35, paragraph 2, of Statute — Contention by certain Respondents that Applicant may not rely on this text — Appropriate for Court to examine question.

Scope of Article 35, paragraph 2 — Determination by Court in provisional measures Order of April 1993 in Genocide Convention case that Article IX of the Genocide Convention "could . . . *be regarded prima facie as a special provision contained in a treaty in force*" *— Contentions by certain Respondents that "treaties in force" relates only to treaties in force when Statute came into force.*

Natural and ordinary meaning allows two different interpretations: treaties in force at time when Statute came into force and treaties in force at date of institution of proceedings — Object and purpose of Article 35 is to define conditions of access to Court: natural to reserve position in relation to treaties that might then exist, not to allow States to obtain access to Court by conclusion between themselves of any special treaty — First interpretation reinforced by examination of travaux préparatoires *— Substantially same provision in PCIJ Statute intended to refer to special provisions in Peace Treaties concluded after First World War — No discussion in* travaux *of ICJ Statute to suggest that extension of access to Court intended.*

Genocide Convention came into force after Statute — Not "treaty in force" within meaning of Article 35, paragraph 2 — Unnecessary to decide whether Applicant was party to Genocide Convention on 29 April 1999.

*

In view of Court's conclusion of lack of access to Court under either paragraph 1 or paragraph 2 of Article 35 of Statute, unnecessary for Court to consider Respondents' other preliminary objections.

* *

Distinction between existence of jurisdiction and compatibility of acts with

international law — Irrespective of whether Court has jurisdiction, Parties remain responsible for acts attributable to them that violate the rights of other States — In present case, having no jurisdiction, Court can make no finding on such matters.

JUDGMENT

Present: *President* SHI; *Vice-President* RANJEVA; *Judges* GUILLAUME, KOROMA, VERESHCHETIN, HIGGINS, PARRA-ARANGUREN, KOOIJMANS, REZEK, AL-KHASAWNEH, BUERGENTHAL, ELARABY, OWADA, TOMKA; *Judge* ad hoc KREĆA; *Registrar* COUVREUR.

In the case concerning legality of use of force,

between

Serbia and Montenegro,

represented by

Mr. Tibor Varady, S.J.D. (Harvard), Chief Legal Adviser at the Ministry of Foreign Affairs of Serbia and Montenegro, Professor of Law at the Central European University, Budapest, and Emory University, Atlanta,

as Agent, Counsel and Advocate;

Mr. Vladimir Djerić, LL.M. (Michigan), Adviser to the Minister for Foreign Affairs of Serbia and Montenegro,

as Co-agent, Counsel and Advocate;

Mr. Ian Brownlie, C.B.E., Q.C., F.B.A., Chichele Professor of Public International Law (Emeritus), University of Oxford, Member of the International Law Commission, member of the English Bar, member of the Institut de droit international,

as Counsel and Advocate;

Mr. Slavoljub Carić, Counsellor, Embassy of Serbia and Montenegro, The Hague,
Mr. Saša Obradović, First Secretary, Embassy of Serbia and Montenegro, The Hague,
Mr. Vladimir Cvetković, Third Secretary, International Law Department, Ministry of Foreign Affairs of Serbia and Montenegro,
Ms Marijana Santrač, LL.B., M.A. (Central European University),
Ms Dina Dobrković, LL.B.,

as Assistants;

Mr. Vladimir Srećković, Ministry of Foreign Affairs of Serbia and Montenegro,

as Technical Assistant,

and

the French Republic,

represented by

Mr. Ronny Abraham, Director of Legal Affairs, Ministry of Foreign Affairs,

as Agent;

Mr. Alain Pellet, Professor at the University of Paris X-Nanterre, member and former Chairman of the International Law Commission,

as Counsel and Advocate;

Ms Michèle Dubrocard, Legal Counsellor, Embassy of France in the Netherlands,

Mr. Pierre Bodeau, chargé de mission, Legal Affairs Department, Ministry of Foreign Affairs,

as Advisers,

THE COURT,

composed as above,

after deliberation,

delivers the following Judgment:

1. On 29 April 1999 the Government of the Federal Republic of Yugoslavia (with effect from 4 February 2003, "Serbia and Montenegro") filed in the Registry of the Court an Application instituting proceedings against the French Republic (hereinafter "France") in respect of a dispute concerning acts allegedly committed by France

> "by which it has violated its international obligation banning the use of force against another State, the obligation not to intervene in the internal affairs of another State, the obligation not to violate the sovereignty of another State, the obligation to protect the civilian population and civilian objects in wartime, the obligation to protect the environment, the obligation relating to free navigation on international rivers, the obligation regarding fundamental human rights and freedoms, the obligation not to use prohibited weapons, the obligation not to deliberately inflict conditions of life calculated to cause the physical destruction of a national group".

The Application invoked as a basis of the Court's jurisdiction Article IX of the Convention on the Prevention and Punishment of the Crime of Genocide, adopted by the United Nations General Assembly on 9 December 1948 (hereinafter "the Genocide Convention"), as well as Article 38, paragraph 5, of the Rules of Court.

2. On 29 April 1999, immediately after filing its Application, the Federal Republic of Yugoslavia also submitted a request for the indication of provisional measures pursuant to Article 73 of the Rules of Court.

3. On the same day, the Federal Republic of Yugoslavia filed Applications instituting proceedings and submitted requests for the indication of provisional measures, in respect of other disputes arising out of the same facts, against the Kingdom of Belgium, Canada, the Federal Republic of Germany, the Italian

Republic, the Kingdom of the Netherlands, the Portuguese Republic, the Kingdom of Spain, the United Kingdom of Great Britain and Northern Ireland and the United States of America.

4. Pursuant to Article 38, paragraph 4, and Article 73, paragraph 2, of the Rules of Court, on 29 April 1999 the Registrar transmitted signed copies of the Application and the request to the French Government.

5. In accordance with Article 43 of the Rules of Court, the Registrar sent the notification referred to in Article 63, paragraph 1, of the Statute of the Court, to all States appearing on the list of parties to the Genocide Convention held by the Secretary-General of the United Nations as depositary; the Registrar also sent to the Secretary-General the notifications respectively provided for in Article 34, paragraph 3, and Article 40, paragraph 3, of the Statute of the Court.

6. Since the Court included upon the Bench no judge of Yugoslav nationality, the Yugoslav Government exercised its right under Article 31 of the Statute and chose Mr. Milenko Kreća to sit as judge *ad hoc* in the case.

7. By Order of 2 June 1999 the Court, after hearing the Parties, rejected the request for the indication of provisional measures submitted in the present case by the Federal Republic of Yugoslavia on 29 April 1999. By Orders of the same date, the Court, after hearing the Parties, also rejected the requests for the indication of provisional measures in the nine other cases referred to in paragraph 3 and decided to remove from the List the cases against Spain and the United States of America.

8. By Order of 30 June 1999 the Court fixed 5 January 2000 as the time-limit for the filing of a Memorial by the Federal Republic of Yugoslavia and 5 July 2000 as the time-limit for the filing of a Counter-Memorial by France. On 4 January 2000, within the prescribed time-limit, the Federal Republic of Yugoslavia duly filed its Memorial, dated 5 January 2000, explaining that it had prepared a single Memorial covering this case and the seven other pending cases concerning *Legality of Use of Force*.

9. On 5 July 2000, within the time-limit fixed for the filing of its Counter-Memorial, France, referring to Article 79, paragraph 1, of the Rules, submitted preliminary objections relating to the Court's jurisdiction to entertain the case and to the admissibility of the Application. Accordingly, by Order of 8 September 2000, the Vice-President of the Court, Acting President, noted that by virtue of Article 79, paragraph 3, of the Rules, the proceedings on the merits were suspended, and fixed 5 April 2001 as the time-limit within which the Federal Republic of Yugoslavia might present a written statement of its observations and submissions on the preliminary objections made by France.

10. By letter of 18 January 2001 the Minister for Foreign Affairs of the Federal Republic of Yugoslavia, referring *inter alia* to certain diplomatic initiatives, requested the Court, for reasons stated in that letter, to grant a stay of the proceedings or to extend by 12 months the time-limit for the submission of observations by the Federal Republic of Yugoslavia on the preliminary objections raised by France. By letter of 5 February 2001 the Agent of France informed the Court that his Government was not opposed to the request by the Federal Republic of Yugoslavia.

By Order of 21 February 2001 the Court extended to 5 April 2002 the time-limit within which the Federal Republic of Yugoslavia might present a written

statement of its observations and submissions on the preliminary objections made by France.

11. By letter of 8 February 2002 the Agent of the Federal Republic of Yugoslavia, referring to "dramatic" and "ongoing" changes in Yugoslavia which had "put the [case] . . . in a quite different perspective", as well as to the decision to be taken by the Court in another case involving Yugoslavia, requested the Court, for reasons stated in that letter, to stay the proceedings or to extend for a further period of 12 months the time-limit for the submission by the Federal Republic of Yugoslavia of its observations on the preliminary objections raised by France. By letter of 22 February 2002 the Agent of France informed the Court that his Government was not opposed to the request by the Federal Republic of Yugoslavia.

By Order of 20 March 2002 the Court extended to 7 April 2003 the time-limit within which the Federal Republic of Yugoslavia might present a written statement of its observations and submissions on the preliminary objections made by France.

12. On 20 December 2002, within the time-limit as thus extended, the Federal Republic of Yugoslavia filed a written statement of its observations and submissions on the preliminary objections in the present case (hereinafter referred to as its "Observations") and filed an identical written statement in the seven other pending cases.

13. By letter of 5 February 2003 the Ambassador of the Federal Republic of Yugoslavia to the Netherlands informed the Court that, following the adoption and promulgation of the Constitutional Charter of Serbia and Montenegro by the Assembly of the Federal Republic of Yugoslavia on 4 February 2003, the name of the State of the Federal Republic of Yugoslavia had been changed to "Serbia and Montenegro".

14. By letter of 19 February 2003 the Agent of France presented certain comments of his Government regarding the Observations of the Federal Republic of Yugoslavia.

By letter of 28 February 2003 the Agent of Serbia and Montenegro presented comments in response to the letters from the respondent States containing their comments regarding the Observations.

15. Pursuant to Article 24, paragraph 1, of the Statute, on 25 November 2003 Judge Simma informed the President that he considered that he should not take part in the decision in the cases concerning *Legality of Use of Force*.

16. At a meeting held by the President of the Court on 12 December 2003 with the representatives of the Parties in the cases concerning *Legality of Use of Force (Serbia and Montenegro* v. *Belgium) (Serbia and Montenegro* v. *Canada) (Serbia and Montenegro* v. *France) (Serbia and Montenegro* v. *Germany) (Serbia and Montenegro* v. *Italy) (Serbia and Montenegro* v. *Netherlands) (Serbia and Montenegro* v. *Portugal) (Serbia and Montenegro* v. *United Kingdom)* in order to ascertain their views with regard to questions of procedure, the representatives of the Parties were invited to submit to the Court any observations which their Governments might wish to make, in particular on the following questions: organization of the oral proceedings; presence on the Bench of judges *ad hoc* during the preliminary objections phase; possible joinder of the proceedings (General List Nos. 105, 106, 107, 108, 109, 110, 111 and 113). In reply to the questions put by the President of the Court, the Agent of France cited his Government's need to produce new documents, in view of important

developments in the case since the filing of its preliminary objections, and stated that France was opposed to the proceedings being joined. The Agent of Serbia and Montenegro responded that his Government also considered that it needed to produce new documents. As regards the nomination of judges *ad hoc* by those respondent States not having a judge of their nationality upon the Bench, the Agent of Serbia and Montenegro explained that his Government no longer maintained its objection; the Agent further indicated that his Government was in favour of a joinder of all the proceedings in accordance with Article 47 of the Rules of Court. By letter of 18 December 2003 the Agent of Serbia and Montenegro confirmed the views thus expressed at the meeting of 12 December 2003.

17. By letter of 23 December 2003 the Registrar informed all the Parties to the cases concerning *Legality of Use of Force* of the Court's decisions on the issues discussed at the meeting of 12 December 2003. The Agents were informed that the Court had decided, pursuant to Article 31, paragraph 5, of the Statute, that, taking into account the presence upon the Bench of judges of British, Dutch and French nationality, the judges *ad hoc* chosen by the respondent States should not sit during the current phase of the procedure in these cases; it was made clear to the Agents that this decision by the Court did not in any way prejudice the question whether, if the Court should reject the preliminary objections of the Respondents, judges *ad hoc* might sit in subsequent stages of the cases. The Agents were also informed that the Court had decided that a joinder of the proceedings would not be appropriate at that stage. Finally, the Agents were informed that the Court had fixed 27 February 2004 as the time-limit for the filing of any new documents, and that such documents, which should only relate to jurisdiction and to admissibility, would be dealt with as provided for in Article 56 of the Rules of Court.

18. By a joint letter of 27 February 2004 the Agents of the respondent States in the cases concerning *Legality of Use of Force* indicated that their Governments wished to produce new documents pursuant to Article 56 of the Rules. In the absence of any objection by Serbia and Montenegro, to which the documents had been communicated in accordance with paragraph 1 of that Article, the Court decided that they would be added to the file of each case.

19. Pursuant to Article 53, paragraph 2, of its Rules, the Court, having consulted the Parties, decided that copies of the pleadings and documents annexed would be made accessible to the public on the opening of the oral proceedings.

20. Public sittings were held between 19 and 23 April 2004, at which the Court heard the oral arguments and replies of:

For Serbia and Montenegro: Mr. Tibor Varady,
Mr. Ian Brownlie,
Mr. Vladimir Djerić.

For France: Mr. Ronny Abraham,
Mr. Alain Pellet.

*

21. In the Application, the claims of Serbia and Montenegro were formulated as follows:

"The Government of the Federal Republic of Yugoslavia requests the International Court of Justice to adjudge and declare:

— by taking part in the bombing of the territory of the Federal Republic of Yugoslavia, the French Republic has acted against the Federal Republic of Yugoslavia in breach of its obligation not to use force against another State;
— by taking part in the training, arming, financing, equipping and supplying terrorist groups, i.e. the so-called 'Kosovo Liberation Army', the French Republic has acted against the Federal Republic of Yugoslavia in breach of its obligation not to intervene in the affairs of another State;

— by taking part in attacks on civilian targets, the French Republic has acted against the Federal Republic of Yugoslavia in breach of its obligation to spare the civilian population, civilians and civilian objects;

— by taking part in destroying or damaging monasteries, monuments of culture, the French Republic has acted against the Federal Republic of Yugoslavia in breach of its obligation not to commit any act of hostility directed against historical monuments, works of art or places of worship which constitute cultural or spiritual heritage of people;

— by taking part in the use of cluster bombs, the French Republic has acted against the Federal Republic of Yugoslavia in breach of its obligation not to use prohibited weapons, i.e. weapons calculated to cause unnecessary suffering;
— by taking part in the bombing of oil refineries and chemical plants, the French Republic has acted against the Federal Republic of Yugoslavia in breach of its obligation not to cause considerable environmental damage;
— by taking part in the use of weapons containing depleted uranium, the French Republic has acted against the Federal Republic of Yugoslavia in breach of its obligation not to use prohibited weapons and not to cause far-reaching health and environmental damage;

— by taking part in killing civilians, destroying enterprises, communications, health and cultural institutions, the French Republic has acted against the Federal Republic of Yugoslavia in breach of its obligation to respect the right to life, the right to work, the right to information, the right to health care as well as other basic human rights;

— by taking part in destroying bridges on international rivers, the French Republic has acted against the Federal Republic of Yugoslavia in breach of its obligation to respect freedom of navigation on international rivers;
— by taking part in activities listed above, and in particular by causing enormous environmental damage and by using depleted uranium, the French Republic has acted against the Federal Republic of Yugoslavia in breach of its obligation not to deliberately inflict on a national

group conditions of life calculated to bring about its physical destruction, in whole or in part;

— the French Republic is responsible for the violation of the above international obligations;
— the French Republic is obliged to stop immediately the violation of the above obligations vis-à-vis the Federal Republic of Yugoslavia;

— the French Republic is obliged to provide compensation for the damage done to the Federal Republic of Yugoslavia and to its citizens and juridical persons.

The Federal Republic of Yugoslavia reserves the right to submit subsequently accurate evaluation of the damage."

22. In the course of the written proceedings, the following submissions were presented by the Parties:

On behalf of the Government of Serbia and Montenegro,

in the Memorial:

"The Government of the Federal Republic of Yugoslavia requests the International Court of Justice to adjudge and declare:

— by the bombing of the territory of the Federal Republic of Yugoslavia, the Respondent has acted against the Federal Republic of Yugoslavia in breach of its obligation not to use force against another State;

— by using force against the Yugoslav army and police during their actions against terrorist groups, i.e. the so-called 'Kosovo Liberation Army', the Respondent has acted against the Federal Republic of Yugoslavia in breach of its obligation not to intervene in the affairs of another State;
— by attacks on civilian targets, and by inflicting damage, injuries and losses to civilians and civilian objects, the Respondent has acted against the Federal Republic of Yugoslavia in breach of its obligation to spare the civilian population, civilians and civilian objects;

— by destroying or damaging monasteries, monuments of culture, the Respondent has acted against the Federal Republic of Yugoslavia in breach of its obligation not to commit any act of hostility directed against historical monuments, works of art or places of worship which constitute cultural or spiritual heritage of people;

— by the use of cluster bombs, the Respondent has acted against the Federal Republic of Yugoslavia in breach of its obligation not to use prohibited weapons, i.e. weapons calculated to cause unnecessary suffering;
— by the bombing of oil refineries and chemical plants, the Respondent has acted against the Federal Republic of Yugoslavia in breach of its obligation not to cause considerable environmental damage;

— by the use of weapons containing depleted uranium, the Respondent has acted against the Federal Republic of Yugoslavia in breach of its

obligation not to use prohibited weapons and not to cause far-reaching health and environmental damage;

— by killing civilians, destroying enterprises, communications, health and cultural institutions, the Respondent has acted against the Federal Republic of Yugoslavia in breach of its obligation to respect the right to life, the right to work, the right to information, the right to health care as well as other basic human rights;

— by destroying bridges on international rivers, the Respondent has acted against the Federal Republic of Yugoslavia in breach of its obligation to respect State sovereignty;
— by activities listed above, and in particular by causing enormous environmental damage and by using depleted uranium, the Respondent has acted against the Federal Republic of Yugoslavia in breach of its obligation not to deliberately inflict on a national group conditions of life calculated to bring about its physical destruction, in whole or in part;
— by failures to prevent killing, wounding and ethnic cleansing of Serbs and other non-Albanian groups in Kosovo and Metohija, the Respondent has acted against the Federal Republic of Yugoslavia in breach of its obligations to ensure public safety and order in Kosovo and Metohija and to prevent genocide and other acts enumerated in Article III of the Genocide Convention;

— the Respondent is responsible for the violation of the above international obligations;
— the Respondent is obliged to stop immediately the violation of the above obligations vis-à-vis the Federal Republic of Yugoslavia;

— the Respondent is obliged to provide compensation for the damages, injuries and losses done to the Federal Republic of Yugoslavia and to its citizens and juridical persons.

The Government of the Federal Republic of Yugoslavia requests the International Court of Justice to settle the form and amount of the reparation, failing agreement between the Parties and to reserve, for this purpose, the subsequent procedure in this case."

On behalf of the French Government,

in the Preliminary Objections:

"For the reasons set out in this Memorial, and for any such others as might be put forward in the subsequent proceedings or raised *proprio motu*, the French Republic requests the International Court of Justice to decide:

— principally, that it lacks jurisdiction to rule on the Application filed by the Federal Republic of Yugoslavia, and
— in the alternative, that the Application is inadmissible."

On behalf of the Government of Serbia and Montenegro,

in its written statement of 20 December 2002 containing its observations and submissions on the preliminary objections presented by France:

"The Federal Republic of Yugoslavia requests the Court to decide on its jurisdiction considering the pleadings formulated in these Written Observations."

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

On behalf of the French Government,

at the hearing of 22 April 2004:

"For the reasons it has set out orally and in its written pleadings, the French Republic requests the International Court of Justice to:

— principally, remove the case from the List;
— in the alternative, decide that it lacks jurisdiction to rule on the Application filed by the Federal Republic of Yugoslavia against France; and,
— in the further alternative, decide that the Application is inadmissible."

On behalf of the Government of Serbia and Montenegro,

at the hearing of 23 April 2004:

"For the reasons given in its pleadings, and in particular in its Written Observations, subsequent correspondence with the Court, and at the oral hearing, Serbia and Montenegro requests the Court:

— to adjudge and declare on its jurisdiction *ratione personae* in the present cases; and
— to dismiss the remaining preliminary objections of the respondent States, and to order proceedings on the merits if it finds it has jurisdiction *ratione personae*."

* * *

24. The official title of the Applicant in these proceedings has changed during the period of time relevant to the present proceedings. On 27 April 1992, the Assembly of the Socialist Federal Republic of Yugoslavia adopted and promulgated the Constitution of "the Federal Republic of Yugoslavia". The State so named claimed to be the continuation of the Socialist Federal Republic of Yugoslavia, and as such to be entitled to continued membership in the United Nations. Inasmuch as this latter claim was not recognized by, *inter alia*, the Security Council and the General Assembly of the United Nations, these bodies initially referred to the Federal Republic of Yugoslavia as "the Federal Republic of Yugoslavia (Serbia and Montenegro)", and this term was also used in certain previous decisions of the Court. On 1 November 2000 the Applicant was admitted to membership in the United Nations under the name of "the Federal Republic of Yugoslavia"; and on 4 February 2003, the Federal Republic of Yugoslavia officially changed its name to "Serbia and Montenegro". In the present judgment, the Applicant will be referred to so far as possible as "Serbia and Montenegro", even when reference is made to

a procedural step taken before the change of name; in some instances, however, where the term in a historical context might cause confusion, the title in use at the relevant time will be employed.

25. The Court must first deal with a preliminary question that has been raised in each of the cases, including the present one, brought before it by Serbia and Montenegro concerning *Legality of Use of Force*. It has been argued by the Respondents in these cases that the Court could and should reject the claims of Serbia and Montenegro *in limine litis*, by removing the cases from the List; by a "pre-preliminary" or summary decision in each case finding that there is no subsisting dispute or that the Court either has no jurisdiction or is not called upon to give a decision on the claims; or by declining to exercise jurisdiction. Thus the contention for rejecting the Application *in limine litis* has been presented in different forms by the eight respondent States, and supported by various arguments, in order to achieve the same conclusion that, as a result of the changed attitude of the Applicant to the question of the Court's jurisdiction, expressed in its Observations (see paragraph 28 below), the Court is no longer required to adjudge and declare whether or not those objections to jurisdiction are well founded, but can simply dismiss the case, without enquiring further into matters of jurisdiction.

26. In addressing the question whether the case should be dismissed *in limine litis*, the Court will consider the arguments put forward in this case and any other legal issue which it deems relevant to consider with a view to arriving at its conclusion on this point, including the issues raised in the other cases referred to in paragraph 3 above.

27. In the original Applications instituting proceedings in this group of cases, Serbia and Montenegro invoked as the title of jurisdiction of the Court in each case Article IX of the Genocide Convention; in five cases it invoked its own acceptance of the jurisdiction of the Court under the optional clause of Article 36, paragraph 2, of the Statute, together with that of the respondent State; and in two of the cases, it also invoked a bilateral treaty between the respondent State concerned and the Kingdom of Yugoslavia. The Applications of Serbia and Montenegro of 29 April 1999 asserted, at least by implication, that the Court was then open to Serbia and Montenegro, under Article 35, paragraph 1, of the Court's Statute, on the basis that it was a Member of the United Nations and thus a party to the Court's Statute, by virtue of Article 93, paragraph 1, of the Charter. Subsequently, this was in fact expressly stated in the Memorial filed by Serbia and Montenegro.

28. However, in its Observations on the preliminary objections of each of the respondent States, filed on 20 December 2002, Serbia and

Montenegro claimed that "the acceptance of the Federal Republic of Yugoslavia as a new member of the United Nations on 1 November 2000" constituted a "new fact"; and on this basis it stated as follows:

> "As the Federal Republic of Yugoslavia became a *new* member of the United Nations on 1 November 2000, it follows that it was not a member before that date. Accordingly, it became an established fact that before 1 November 2000, the Federal Republic of Yugoslavia was not and could not have been a party to the Statute of the Court by way of UN membership."

In addition, as regards the question of jurisdiction of the Court under the Genocide Convention, Serbia and Montenegro in its Observations drew attention to its own accession to that Convention in March 2001, and stated that

> "[t]he Federal Republic of Yugoslavia did not continue the personality and treaty membership of the former Yugoslavia, and thus specifically, it was not bound by the Genocide Convention until it acceded to that Convention (with a reservation to Article IX) in March 2001".

In its submissions, however, Serbia and Montenegro did not ask the Court to rule that it had no jurisdiction but only requested the Court "to decide on its jurisdiction *considering the pleadings in these Written Observations*" (emphasis added).

29. The question whether Serbia and Montenegro was or was not a party to the Statute of the Court at the time of the institution of the present proceedings is a fundamental one (see paragraph 45 below). However, at this initial stage of its judgment, it is necessary for the Court to decide first on a preliminary question raised by the Respondents, namely whether in the light of the assertions by the Applicant quoted above coupled with the contentions of each of the respondent States, the Court should take a decision to dismiss the case *in limine litis*, without further entering into the examination of the question whether the Court has jurisdiction under the circumstances.

30. A number of arguments have been advanced by different Respondents as possible legal grounds that would lead the Court to take this course. One argument advanced by some of the respondent States is that the position of Serbia and Montenegro is to be treated as one that in effect results in a discontinuance of the proceedings which it has instituted. Discontinuance of proceedings by the Applicant is provided for in Article 89 of the Rules of Court, which contemplates the situation in which "the applicant informs the Court in writing that it is not going on with the proceedings . . .". However, Serbia and Montenegro has expressly

denied that its Observations were a notice of discontinuance, and has emphasized that it did not state that it was "not going on with the proceedings", but rather that it was requesting the Court to decide on the issue of jurisdiction. It has emphasized that it wants the Court to continue the case and to decide upon its jurisdiction, even though the decision that it seeks may result in a conclusion that there is no jurisdiction.

31. The role of the Court in a discontinuance procedure, whether by agreement between the parties (Article 88 of the Rules of Court) or at the initiative of the Applicant (Article 89) in the absence of any objection by the Respondent, is "simply to record it and to remove the case from its list" (*Barcelona Traction, Light and Power Company, Limited, Preliminary Objections, Judgment, I.C.J. Reports 1964*, p. 20). It may be true that the logical consequence of the contention of Serbia and Montenegro in its Observations could be that the case would go no further; but this would be the result of the Court's own finding and not the placing on record of a withdrawal by Serbia and Montenegro of the dispute from the Court's purview. The Court is therefore unable to treat the Observations of Serbia and Montenegro as having the legal effect of a discontinuance of the proceedings instituted by that State.

32. The question has been raised whether there is a procedure open to the Court itself, whereby the Court has ex officio the power to put an end to a case whenever it sees that this is necessary from the viewpoint of the proper administration of justice. Although the Rules of Court do not provide for such a procedure, there is no doubt that in certain circumstances the Court may of its own motion put an end to proceedings in a case. Prior to the adoption of Article 38, paragraph 5, of the Rules of Court, in a number of cases in which the application disclosed no subsisting title of jurisdiction, but merely an invitation to the State named as respondent to accept jurisdiction for the purposes of the case, the Court removed the cases from the List by order. By Orders of 2 June 1999, it removed from the List two cases brought by Serbia and Montenegro concerning *Legality of Use of Force* against Spain and the United States of America, on the ground that the Court "manifestly lack[ed] jurisdiction" (*I.C.J. Reports 1999 (II)*, pp. 773 and 925). The present case does not however fall into either of these categories.

33. Another argument for the removal of the case from the List which has been advanced in interpretation of the position of Serbia and Montenegro is that there is substantive agreement between the Parties on a "question of jurisdiction that is determinative of the case", and that as a result the dispute before the Court has disappeared. The Respondents have noted that the Court is asked by Serbia and Montenegro to determine the question of jurisdiction raised in the preliminary objections of the respondent States, in its exercise of the *compétence de la compétence* reflected in Article 36, paragraph 6, of the Statute. They have however

claimed that, in accordance with the well-established jurisprudence of the Court, "the Court is not compelled in every case to exercise [its] jurisdiction" (*Northern Cameroons, Judgment, I.C.J. Reports 1963*, p. 29); and that the Court has the power to decide to dispose of the case *in limine litis*. After all, "[t]here are inherent limitations on the exercise of the judicial function which the Court, as a court of justice, can never ignore" *(ibid.)*. It is emphasized in particular that "the Court can exercise its jurisdiction in contentious proceedings *only when a dispute genuinely exists between the parties*" (*Nuclear Tests (Australia* v. *France), Judgment, I.C.J. Reports 1974*, p. 271, para. 57; *Nuclear Tests (New Zealand* v. *France), Judgment, I.C.J. Reports 1974*, p. 477, para. 60; emphasis added).

34. In this argument before the Court, attention has been drawn to the specific terms of the provision in Article 36, paragraph 6, of the Statute, whereby "*[i]n the event of a dispute* as to whether the Court has jurisdiction, the matter shall be settled by decision of the Court" (emphasis added). It has thus been argued that it is common ground between the Parties that the Applicant was not a party to the Statute at the time of institution of the proceedings, and that there is therefore now no "dispute as to whether the Court has jurisdiction". On this basis, it has been suggested that

> "[f]or the Court to exercise jurisdiction on a basis which has been abandoned by the Applicant and which was always denied by the Respondent, would make a mockery of the principle that jurisdiction is founded on the consent of the parties".

35. On this point, however, it is the view of the Court that a distinction has to be made between a question of jurisdiction that relates to the consent of a party and the question of the right of a party to appear before the Court under the requirements of the Statute, which is not a matter of consent. The question is whether *as a matter of law* Serbia and Montenegro was entitled to seise the Court as a party to the Statute at the time when it instituted proceedings in these cases. Since that question is independent of the views or wishes of the Parties, even if they were now to have arrived at a shared view on the point, the Court would not have to accept that view as necessarily the correct one. The function of the Court to enquire into the matter and reach its own conclusion is thus mandatory upon the Court irrespective of the consent of the parties and is in no way incompatible with the principle that the jurisdiction of the Court depends on consent.

36. As noted above (paragraph 28), Serbia and Montenegro, after explaining why in its view it is questionable whether the Court has jurisdiction, has asked the Court simply "to decide on its jurisdiction" considering the pleadings formulated in its Observations. At the hearings, it insisted that it "wants the Court to continue the case and to decide upon its jurisdiction — and to decide on the merits as well, if it has jurisdiction". Serbia and Montenegro contends that "the position of the FRY

with regard to international organizations and treaties has been a most intricate and controversial matter", so that "[o]nly a decision of this Court could bring clarity".

37. The function of a decision of the Court on its jurisdiction in a particular case is solely to determine whether or not the Court may entertain that case on the merits, and not to engage in a clarification of a controverted issue of a general nature. A decision of the Court should have, in the words of the Judgment in the *Northern Cameroons* case, "some practical consequence in the sense that it can affect existing legal rights or obligations *of the parties*, thus removing uncertainty from *their* legal relations" (*I.C.J. Reports 1963*, p. 34; emphasis added); and that will be the proper consequence of the Court's decision on its jurisdiction in the present case.

38. It may be mentioned here briefly that some of the Respondents have implied that the attitude of Serbia and Montenegro might be influenced by the existence of a pending case concerning *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro)*, hereinafter referred to as "the *Genocide Convention* case". It is recalled that Serbia and Montenegro in 2002 sought a revision of a Judgment of 11 July 1996 on preliminary objections in that case, basing itself on arguments similar to those which are advanced in the present case concerning its status in relation to the United Nations (*Application for Revision of the Judgment of 11 July 1996 in the Case concerning* Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina *v.* Yugoslavia), Preliminary Objections *(Yugoslavia* v. *Bosnia and Herzegovina)*, hereinafter referred to as "the *Application for Revision* case"). The Court, by its Judgment of 3 February 2003, rejected this Application for revision of the earlier Judgment, on the ground that the necessary conditions specified in Article 61 of the Statute for revision of a judgment were not met in that case. In one of the other cases concerning *Legality of Use of Force*, the Respondent contends that there is no dispute between itself and the Applicant on jurisdiction; that if there is any subsisting dispute to which Serbia and Montenegro is party, it is the dispute with Bosnia and Herzegovina; and that the current proceedings "cannot be used to procure a favourable opinion [from the Court], for use in an entirely separate piece of litigation".

39. In the view of the Court, it cannot decline to entertain a case simply because of a suggestion as to the motives of one of the parties or because its judgment may have implications in another case.

40. Yet another argument advanced for reaching the conclusion that the Court would be justified in summarily disposing of the case without a jurisdictional decision relates to a proposition that the substantive dispute under the Genocide Convention, rather than the dispute over jurisdiction, has disappeared. It has been argued that Serbia and Montenegro,

by contending that it was not a party to the Genocide Convention until March 2001, is bound to recognize that the rights which it was asserting in its Application under that Convention had no legal basis, and that therefore any legal dispute between itself and the respondent States concerning these rights and obligations under the Convention has ceased to exist. That dispute is the sole dispute in the cases concerning *Legality of Use of Force*, including the present one, in which the only ground of jurisdiction relied on is Article IX of the Genocide Convention, and thus, in these cases, the whole dispute would have disappeared.

41. It has also been suggested that Serbia and Montenegro has, by its conduct, either forfeited or renounced its right of action in the present case and is in any event now estopped from pursuing the present action in so far as that right of action is based on the Genocide Convention. More broadly, it is suggested that, by inviting the Court to find that it has no jurisdiction, the Applicant can no longer be regarded as pursuing the settlement by the Court of the substantive dispute.

42. The Court is unable to uphold these various contentions. As regards the argument that the dispute on jurisdiction has disappeared, Serbia and Montenegro has not invited the Court to find that it has no jurisdiction; while it is apparently in agreement with the arguments advanced by the Respondents in that regard in their preliminary objections, it has specifically asked in its submissions for a decision of the Court on the jurisdictional question. This question, in the view of the Court as explained above, is a legal question independent of the views of the parties upon it. As to the argument concerning the disappearance of the substantive dispute, it is clear that Serbia and Montenegro has by no means withdrawn its claims as to the merits. Indeed, these claims were extensively argued and developed in substance during the hearings on jurisdiction, in the context of the question of the jurisdiction of the Court under Article IX of the Genocide Convention. It is equally clear that these claims are being vigorously denied by the Respondents. It could not even be said under these circumstances that, while the essential dispute still subsists, Serbia and Montenegro is no longer seeking to have its claim determined by the Court. Serbia and Montenegro has not sought a discontinuance (see paragraph 31 above); and it has stated that it "wants the Court to continue the case and to decide upon its jurisdiction — and to decide on the merits as well, if it has jurisdiction". In the present circumstances, the Court is unable to find that Serbia and Montenegro has renounced any of its substantive or procedural rights, or has taken the position that the dispute between the Parties has ceased to exist. As for the argument based on the doctrine of estoppel, the Court does not consider that Serbia and Montenegro, by asking the Court "to decide on its jurisdiction" on the basis of certain alleged "new facts" about its own legal status vis-à-vis the United Nations, should be held to have forfeited

or renounced its right of action and to be estopped from continuing the present action before the Court.

43. For all these reasons, the Court cannot remove the cases concerning *Legality of Use of Force* from the List, or take any decision putting an end to those cases *in limine litis*. In the present phase of the proceedings it must proceed to examine the titles of jurisdiction asserted by the Applicant and the objections thereto advanced by the Respondents, and give its decision with respect to jurisdiction.

* * *

44. The Court accordingly turns to the questions of jurisdiction arising in the present case. The Application filed by Serbia and Montenegro on 29 April 1999 indicated that it was submitted "[o]n the basis of Article 40 of the Statute of the International Court of Justice and Article 38 of the Rules of Court". On the question of the legal grounds for jurisdiction of the Court, the Application stated that "[t]he Government of the Federal Republic of Yugoslavia invokes Article IX of the Convention on the Prevention and Punishment of the Crime of Genocide as well as Article 38, paragraph 5, of the Rules of Court". With regard to the second ground of jurisdiction thus invoked by the Applicant, the Court recalls that at the provisional measures stage, it found that "it is quite clear that, in the absence of consent by France, given pursuant to Article 38, paragraph 5, of the Rules, the Court cannot exercise jurisdiction . . . even prima facie" (*I.C.J. Reports 1999 (I)*, p. 373, para. 31). The Court notes that the Parties have not returned to this matter.

45. The Court notes that in several cases it referred to "its freedom to select the ground upon which it will base its judgment" (*Application of the Convention of 1902 Governing the Guardianship of Infants, Judgment, I.C.J. Reports 1958*, p. 62; *Application for Revision and Interpretation of the Judgment of 24 February 1982 in the Case concerning the* Continental Shelf (Tunisia/Libyan Arab Jamahiriya) *(Tunisia* v. *Libyan Arab Jamahiriya), Judgment, I.C.J. Reports 1985*, p. 207, para. 29; *Oil Platforms (Islamic Republic of Iran* v. *United States of America), Judgment, I.C.J. Reports 2003*, p. 180, para. 37).

By the same token, the Court in the past pointed out that when its jurisdiction is challenged on diverse grounds, it is free to base its decision on one or more grounds of its own choosing, in particular "the ground which in its judgment is more direct and conclusive" (*Certain Norwegian Loans (France* v. *Norway), Judgment, I.C.J. Reports 1957*, p. 25; see also *Aerial Incident of 27 July 1955 (Israel* v. *Bulgaria), Judgment, I.C.J. Reports 1959*, p. 127; *Aegean Sea Continental Shelf (Greece* v. *Turkey), Judgment, I.C.J. Reports 1978*, pp. 16-17, paras. 39-40, and *Aerial Incident of 10 August 1999 (Pakistan* v. *India), Jurisdiction, Judgment, I.C.J. Reports 2000*, p. 24, para. 26).

But in those instances, the parties to the cases before the Court were,

without doubt, parties to the Statute of the Court and the Court was thus open to them under Article 35, paragraph 1, of the Statute. That is not the case in the present proceedings in which an objection has been made regarding the right of the Applicant to have access to the Court. And it is this issue of access to the Court which distinguishes the present case from all those referred to above.

As the Court observed earlier (see paragraph 29 above), the question whether Serbia and Montenegro was or was not a party to the Statute of the Court at the time of the institution of the present proceedings is fundamental; for if it were not such a party, the Court would not be open to it under Article 35, paragraph 1, of the Statute. In that situation, subject to any application of paragraph 2 of that Article, Serbia and Montenegro could not have properly seised the Court, whatever title of jurisdiction it might have invoked, for the simple reason that Serbia and Montenegro did not have the right to appear before the Court.

The Court can exercise its judicial function only in respect of those States which have access to it under Article 35 of the Statute. And only those States which have access to the Court can confer jurisdiction upon it.

It is the view of the Court that it is incumbent upon it to examine first of all the question whether the Applicant meets the conditions laid down in Articles 34 and 35 of the Statute and whether the Court is thus open to it. Only if the answer to that question is in the affirmative will the Court have to deal with the issues relating to the conditions laid down in Article 36 of the Statute of the Court (see *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Yugoslavia (Serbia and Montenegro)), Provisional Measures, Order of 8 April 1993, I.C.J. Reports 1993*, pp. 11 *et seq.*, paras. 14 *et seq.*).

There is no doubt that Serbia and Montenegro is a State for the purpose of Article 34, paragraph 1, of the Statute. However, the objection was raised by certain Respondents (see paragraphs 48, 92, 95 and 96 below) that Serbia and Montenegro did not meet, at the time of the filing of its Application on 29 April 1999, the conditions set down in Article 35 of the Statute.

46. No specific assertion was made in the Application that the Court was open to Serbia and Montenegro under Article 35, paragraph 1, of the Statute of the Court, but it was later made clear that the Applicant claimed to be a Member of the United Nations and thus a party to the Statute of the Court, by virtue of Article 93, paragraph 1, of the Charter, at the time of filing of the Application. As indicated earlier (paragraph 27 above) this position was expressly stated in the Memorial filed by Serbia and Montenegro on 4 January 2000 (Memorial, Part III, paras. 3.1.17 and 3.1.18).

47. In each of the cases concerning *Legality of Use of Force*, a request for the indication of provisional measures of protection was submitted by

Serbia and Montenegro on the day of the filing of its Application, i.e. 29 April 1999 (see paragraphs 2 and 3 above). The Court, by Orders of 2 June 1999, rejected these requests (see paragraph 6 above), on the ground that it had no prima facie jurisdiction to entertain the Applications. In the instant case, it found that it was

> "not in a position to find, at this stage of the proceedings, that the acts imputed by Yugoslavia to the Respondent are capable of coming within the provisions of the Genocide Convention; and [that] Article IX of the Convention, invoked by Yugoslavia, cannot accordingly constitute a basis on which the jurisdiction of the Court could prima facie be founded in this case" (*I.C.J. Reports 1999 (I)*, p. 373, para. 28).

48. In the course of the proceedings on these requests in other cases, however, some of the Respondents raised the issue of whether the Applicant was a party to the Statute of the Court, and contended, for example, that

> "the Court's jurisdiction in this case cannot in any event be based, even prima facie, on Article 36, paragraph 2, of the Statute, for under this provision only 'States . . . parties to the . . . Statute' may subscribe to the optional clause for compulsory jurisdiction contained therein" (*Legality of Use of Force (Yugoslavia* v. *Belgium), I.C.J. Reports 1999 (I)*, p. 135, para. 31).

Reference was made, *inter alia*, to United Nations General Assembly resolution 47/1 of 22 September 1992, and it was contended that "'the Federal Republic of Yugoslavia is not the continuator State of the former Socialist Federal Republic of Yugoslavia' as regards membership of the United Nations" and that "not having duly acceded to the Organization, Yugoslavia is in consequence not a party to the Statute of the Court" *(ibid.)*.

49. Notwithstanding this contention by some of the Respondents, the Court did not, in the Orders on provisional measures, carry out any examination of it, confining itself to observing that in view of its findings on other aspects, for example, relating to the lack of prima facie jurisdiction *ratione temporis* under Article 36, paragraph 2, "the Court need not consider this question for the purpose of deciding whether or not it can indicate provisional measures in the present case" (*ibid.*, p. 136, para. 33).

50. In the instant case, however, France did not raise the question of access by Serbia and Montenegro to the Court under Article 35; and in its Order on the request for provisional measures in this case the Court did not refer to the point. Nor did France raise the matter in its preliminary objections or in the subsequent oral proceedings. However, as observed above (paragraph 45), the question whether Serbia and Montenegro was or was not a party to the Statute of the Court at the time of

the institution of the present proceedings is fundamental; for if it were not such a party, the Court would not be open to it under Article 35, paragraph 1, of the Statute. Furthermore, that question, as also observed above (paragraph 35), is independent of the views or wishes of the Parties; and the Court would thus have to enquire into the matter and reach its own conclusion irrespective of the attitude of the Parties. The Court will therefore proceed to examine the issue.

51. The Court notes that it is, and has always been, common ground between the Parties that Serbia and Montenegro has not claimed to have become a party to the Statute on any other basis than by membership in the United Nations. Therefore the question raised is simply whether or not the Applicant was a Member of the United Nations at the time when it instituted proceedings in the present case.

52. In addressing the question whether Serbia and Montenegro had access to the Court under Article 35, paragraph 1, of the Statute, the Court will consider the arguments put forward in this case and any other legal issue which it deems relevant to consider with a view to arriving at its conclusion on this point, including the issues raised in the other cases referred to in paragraph 3 above.

53. The Court will first recapitulate the sequence of events relating to the legal position of Serbia and Montenegro vis-à-vis the United Nations — events already examined, so far as was necessary to the Court, in the context of another case (see Judgment in the case concerning *Application for Revision, I.C.J. Reports 2003*, pp. 14-26, paras. 24-53).

54. In the early 1990s the Socialist Federal Republic of Yugoslavia, made up of Bosnia and Herzegovina, Croatia, Macedonia, Montenegro, Serbia and Slovenia, began to break up. On 25 June 1991 Croatia and Slovenia both declared independence, followed by Macedonia on 17 September 1991 and Bosnia and Herzegovina on 6 March 1992. On 22 May 1992, Bosnia and Herzegovina, Croatia and Slovenia were admitted as Members to the United Nations; as was the former Yugoslav Republic of Macedonia on 8 April 1993.

55. On 27 April 1992 the "participants of the joint session of the SFRY Assembly, the National Assembly of the Republic of Serbia and the Assembly of the Republic of Montenegro" adopted a declaration, stating in pertinent parts:

> "The representatives of the people of the Republic of Serbia and the Republic of Montenegro,
>
> Expressing the will of the citizens of their respective Republics to stay in the common state of Yugoslavia,
>
> . . . . . .

wish to state in this Declaration their views on the basic, immediate and lasting objectives of the policy of their common state, and on its relations with the former Yugoslav Republics.

. . . . . .

1. The Federal Republic of Yugoslavia, continuing the state, international legal and political personality of the Socialist Federal Republic of Yugoslavia, shall strictly abide by all the commitments that the SFR of Yugoslavia assumed internationally,

. . . . . .

Remaining bound by all obligations to international organizations and institutions whose member it is . . .” (United Nations doc. A/46/915, Ann. II.)

56. An official Note of the same date from the Permanent Mission of Yugoslavia to the United Nations, addressed to the Secretary-General of the United Nations, stated *inter alia* that:

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

Strictly respecting the continuity of the international personality of Yugoslavia, the Federal Republic of Yugoslavia shall continue to fulfil all the rights conferred to, and obligations assumed by, the Socialist Federal Republic of Yugoslavia in international relations, including its membership in all international organizations and participation in international treaties ratified or acceded to by Yugoslavia.” (United Nations doc. A/46/915, Ann. I.)

57. On 30 May 1992, the Security Council adopted resolution 757 (1992), in which, *inter alia*, it noted that “the claim by the Federal Republic of Yugoslavia (Serbia and Montenegro) to continue automatically the membership of the former Socialist Federal Republic of Yugoslavia in the United Nations has not been generally accepted”.

58. On 19 September 1992, the Security Council adopted resolution 777 (1992) which read as follows:

"*The Security Council,*

Reaffirming its resolution 713 (1991) of 25 September 1991 and all subsequent relevant resolutions,

Considering that the state formerly known as the Socialist Federal Republic of Yugoslavia has ceased to exist,

Recalling in particular resolution 757 (1992) which notes that 'the claim by the Federal Republic of Yugoslavia (Serbia and Montenegro) to continue automatically the membership of the former Socialist Federal Republic of Yugoslavia in the United Nations has not been generally accepted',

1. *Considers* that the Federal Republic of Yugoslavia (Serbia and Montenegro) cannot continue automatically the membership of the former Socialist Federal Republic of Yugoslavia in the United Nations; and therefore *recommends* to the General Assembly that it decide that the Federal Republic of Yugoslavia (Serbia and Montenegro) should apply for membership in the United Nations and that it shall not participate in the work of the General Assembly;

2. *Decides* to consider the matter again before the end of the main part of the forty-seventh session of the General Assembly." (United Nations doc. S/RES/777.)

The resolution was adopted by 12 votes in favour, none against, and 3 abstentions.

59. On 22 September 1992 the General Assembly adopted resolution 47/1, according to which:

"*The General Assembly,*

Having received the recommendation of the Security Council of 19 September 1992 that the Federal Republic of Yugoslavia (Serbia and Montenegro) should apply for membership in the United Nations and that it shall not participate in the work of the General Assembly,

1. *Considers* that the Federal Republic of Yugoslavia (Serbia and Montenegro) cannot continue automatically the membership of the former Socialist Federal Republic of Yugoslavia in the United Nations; and therefore decides that the Federal Republic of Yugoslavia (Serbia and Montenegro) should apply for membership in the United Nations and that it shall not participate in the work of the General Assembly;

2. *Takes note* of the intention of the Security Council to consider the matter again before the end of the main part of the forty-seventh session of the General Assembly." (United Nations doc. A/RES/47/1.)

The resolution was adopted by 127 votes to 6, with 26 abstentions.

60. On 25 September 1992, the Permanent Representatives of Bosnia and Herzegovina and Croatia addressed a letter to the Secretary-General, in which, with reference to Security Council resolution 777 (1992) and General Assembly resolution 47/1, they stated their understanding as follows: "At this moment, there is no doubt that the Socialist Federal Republic of Yugoslavia is not a member of the United Nations any more. At the same time, the Federal Republic of Yugoslavia is clearly not yet a member." They concluded that "[t]he flag flying in front of the United Nations and the name-plaque bearing the name 'Yugoslavia' do not represent anything or anybody any more" and "kindly request[ed] that [the Secretary-General] provide a legal explanatory statement concerning the questions raised" (United Nations doc. A/47/474).

61. In response, on 29 September 1992, the Under-Secretary-General and Legal Counsel of the United Nations addressed a letter to the Permanent Representatives of Bosnia and Herzegovina and Croatia, in which he stated that the "considered view of the United Nations Secretariat regarding the practical consequences of the adoption by the General Assembly of resolution 47/1" was as follows:

> "While the General Assembly has stated unequivocally that the Federal Republic of Yugoslavia (Serbia and Montenegro) cannot automatically continue the membership of the former Socialist Federal Republic of Yugoslavia in the United Nations and that the Federal Republic of Yugoslavia (Serbia and Montenegro) should apply for membership in the United Nations, the only practical consequence that the resolution draws is that the Federal Republic of Yugoslavia (Serbia and Montenegro) shall not *participate* in the work of the General Assembly. It is clear, therefore, that representatives of the Federal Republic of Yugoslavia (Serbia and Montenegro) can no longer *participate* in the work of the General Assembly, its subsidiary organs, nor conferences and meetings convened by it.
>
> On the other hand, the resolution neither terminates nor suspends Yugoslavia's *membership* in the Organization. Consequently, the seat and nameplate remain as before, but in Assembly bodies representatives of the Federal Republic of Yugoslavia (Serbia and Montenegro) cannot sit behind the sign 'Yugoslavia'. Yugoslav missions at United Nations Headquarters and offices may continue to function and may receive and circulate documents. At Headquarters, the Secretariat will continue to fly the flag of the old Yugoslavia as it is the last flag of Yugoslavia used by the Secretariat. The resolution does not take away the right of Yugoslavia to participate in the work of organs other than Assembly bodies. The admission to the United Nations of a new Yugoslavia under Article 4 of the Charter

will terminate the situation created by resolution 47/1." (United Nations doc. A/47/485; original emphasis.)

62. On 29 April 1993, the General Assembly, upon the recommendation contained in Security Council resolution 821 (1993) (couched in terms similar to those of Security Council resolution 777 (1992)), adopted resolution 47/229 in which it decided that "the Federal Republic of Yugoslavia (Serbia and Montenegro) shall not participate in the work of the Economic and Social Council".

63. As is clear from the sequence of events summarized in the above paragraphs (paragraphs 54-62), the legal position of the Federal Republic of Yugoslavia within the United Nations and vis-à-vis that Organization remained highly complex during the period 1992-2000. In fact, it is the view of the Court that the legal situation that obtained within the United Nations during that eight-year period concerning the status of the Federal Republic of Yugoslavia, after the break-up of the Socialist Federal Republic of Yugoslavia, remained ambiguous and open to different assessments. This was due, *inter alia*, to the absence of an authoritative determination by the competent organs of the United Nations defining clearly the legal status of the Federal Republic of Yugoslavia vis-à-vis the United Nations.

64. Within the United Nations, three different positions were taken on the issue of the legal status of the Federal Republic of Yugoslavia. In the first place, there was the position taken by the two political organs concerned. The Security Council, as an organ of the United Nations which under the Charter is vested with powers and responsibilities as regards membership, stated in its resolution 777 (1992) of 19 September 1992 that it "consider[ed] that the state formerly known as the Socialist Federal Republic of Yugoslavia has ceased to exist" and that it "[c]onsider[ed] that the Federal Republic of Yugoslavia (Serbia and Montenegro) cannot continue automatically the membership of the Socialist Federal Republic of Yugoslavia in the United Nations".

65. The other organ which under the Charter is vested with powers and responsibilities as regards membership in the United Nations is the General Assembly. In the wake of this Security Council resolution, and especially in light of its recommendation to the General Assembly that "it decide that the Federal Republic of Yugoslavia (Serbia and Montenegro) should apply for membership in the United Nations", the Assembly took the position in resolution 47/1 of 22 September 1992 that it "[c]onsider[ed] that the Federal Republic of Yugoslavia (Serbia and Montenegro) cannot continue automatically the membership of the former

Socialist Federal Republic of Yugoslavia in the United Nations". On that basis, it "decide[d] that the Federal Republic of Yugoslavia (Serbia and Montenegro) should apply for membership in the United Nations".

66. While it is clear from the voting figures (see paragraphs 58 and 59 above) that these resolutions reflected a position endorsed by the vast majority of the Members of the United Nations, they cannot be construed as conveying an authoritative determination of the legal status of the Federal Republic of Yugoslavia within, or vis-à-vis, the United Nations. The uncertainty surrounding the question is evidenced, *inter alia*, by the practice of the General Assembly in budgetary matters during the years following the break-up of the Socialist Federal Republic of Yugoslavia.

67. The following were the arrangements made with regard to the assessment of the Federal Republic of Yugoslavia for annual contributions to the United Nations budget, during the period between 1992 and 2000. Prior to the break-up of the Socialist Federal Republic of Yugoslavia, the rate of assessment for that State for 1992, 1993 and 1994 had been established in 1991 as 0.42 per cent (General Assembly resolution 46/221 of 20 December 1991). On 23 December 1992, the General Assembly, on the recommendation of the Fifth Committee, decided to adopt the recommendations of the Committee on Contributions that, *inter alia*, for 1992, Bosnia and Herzegovina, Croatia and Slovenia should pay seven-twelfths of their rates of assessment for 1993 and 1994, and that "their actual assessment should be deducted from that of Yugoslavia for that year" (United Nations doc. A/47/11, para. 64). By resolution 48/223 of 23 December 1993, the General Assembly determined that the 1993 rate of assessment of the former Yugoslav Republic of Macedonia, admitted to membership in the United Nations in 1993, should be deducted from that of Yugoslavia. The General Assembly also decided that the rate of assessment of the former Yugoslav Republic of Macedonia should be deducted from that of Yugoslavia for 1994. Following this practice, the rate of assessment for the contribution of Yugoslavia to the regular budget of the United Nations for the years 1995, 1996 and 1997 was determined to be 0.11, 0.1025 and 0.10 per cent respectively (General Assembly resolution 49/19 B of 23 December 1994), and for the next triennial period, the rate of assessment of Yugoslavia for the years 1998, 1999 and 2000 was determined to be 0.060, 0.034 and 0.026 per cent respectively (General Assembly resolution 52/215 A of 20 January 1998). (See further *I.C.J. Reports 2003*, pp. 22-23, paras. 45-47.)

68. Secondly, the Federal Republic of Yugoslavia, for its part, maintained its claim that it continued the legal personality of the Socialist Federal Republic of Yugoslavia. This claim had been clearly stated in the official Note of 27 April 1992 from the Permanent Mission of Yugoslavia to the United Nations addressed to the Secretary-General of the United

Nations (see paragraph 56 above). It was sustained by the Applicant throughout the period from 1992 to 2000 (see, for example, Memorial, Part III, paras. 3.1.3 and 3.1.17).

69. Thirdly, another organ that came to be involved in this problem was the Secretariat of the United Nations. In the absence of any authoritative determination on the legal status of the Federal Republic of Yugoslavia within, or vis-à-vis, the United Nations, the Secretariat, as the administrative organ of the Organization, simply continued to keep to the practice of the *status quo ante* that had prevailed up to the break-up of the Socialist Federal Republic of Yugoslavia in 1992, pending such a determination. This is illustrated by the practice of the Secretariat in its role in the preparation of the budget of the Organization for consideration and approval by the General Assembly. The "considered view of the United Nations Secretariat regarding the practical consequences of the adoption by the General Assembly of resolution 47/1" (United Nations doc. A/47/485), issued by the Under-Secretary-General and Legal Counsel on 29 September 1992 (see paragraph 61 above), should probably also be understood in the context of this continuation of the *status quo ante*.

70. By the same token, the position of the Secretary-General as reflected in the "Summary of Practice of the Secretary-General as Depositary of Multilateral Treaties", prepared by the Treaty Section of the Office of Legal Affairs and published at the beginning of 1996, was scrupulously to maintain the approach of following the existing practice on the basis of the *status quo ante*. As originally issued, that Summary contained a paragraph (paragraph 297) on the practice of the Secretariat on the break-up of a State party to a multilateral convention of which the Secretary-General was the depositary. It was there stated, *inter alia*, that "[t]he independence of the new successor State, which then exercises its sovereignty on its territory, is of course without effect as concerns the treaty rights and obligations of the predecessor State as concerns its own (remaining) territory". The example was given of the Union of Soviet Socialist Republics, and the text continued:

> "The same applies to the Federal Republic of Yugoslavia (Serbia and Montenegro), which remains as the predecessor State upon separation of parts of the territory of the former Yugoslavia. General Assembly resolution 47/1 of 22 September 1992, to the effect that the Federal Republic of Yugoslavia could not automatically continue the membership of the former Yugoslavia in the United Nations . . ., was adopted within the framework of the United Nations and the context of the Charter of the United Nations, and not as an indication that the Federal Republic of Yugoslavia

was not to be considered a predecessor State." (United Nations doc. ST/LEG/8; see also *I.C.J. Reports 2003*, p. 19, para. 38.)

This passage could be read as lending support to the claims of the Federal Republic of Yugoslavia. It was deleted by the Secretariat in response to the objections raised by a number of States that the text was contrary to the relevant Security Council and General Assembly resolutions and the pertinent opinions of the Arbitration Commission of the International Conference for Peace in Yugoslavia (see United Nations docs. A/50/910-S/1996/231, A/51/95-S/1996/251, A/50/928-S/1996/263 and A/50/930-S/1996/260).

71. A further example of the application of this approach is afforded by the way in which the Secretariat treated the deposit of the declaration by the Federal Republic of Yugoslavia recognizing the compulsory jurisdiction of the International Court of Justice dated 25 April 1999. On 30 April 1999 the Secretary-General issued a Depositary Notification informing Member States of that deposit (C.N.311.1999.TREATIES-1). Although on 27 May 1999 the Permanent Representatives of Bosnia and Herzegovina, Croatia, Slovenia and the former Yugoslav Republic of Macedonia sent a letter to the Secretary-General, questioning the validity of the deposit of the declaration recognizing the compulsory jurisdiction of the International Court of Justice by the Federal Republic of Yugoslavia (United Nations doc. A/53/992), the Secretariat adhered to its past practice respecting the *status quo ante* and simply left the matter there.

72. To sum up, all these events testify to the rather confused and complex state of affairs that obtained within the United Nations surrounding the issue of the legal status of the Federal Republic of Yugoslavia in the Organization during this period. It is against this background that the Court, in its Judgment of 3 February 2003, referred to the "*sui generis* position which the FRY found itself in" during the period between 1992 and 2000.

73. It must be stated that this qualification of the position of the Federal Republic of Yugoslavia as *"sui generis"*, which the Court employed to describe the situation during this period of 1992 to 2000, is not a prescriptive term from which certain defined legal consequences accrue; it is merely descriptive of the amorphous state of affairs in which the Federal Republic of Yugoslavia found itself during this period. No final and definitive conclusion was drawn by the Court from this descriptive term on the amorphous status of the Federal Republic of Yugoslavia vis-à-vis or within the United Nations during this period. The Court did not commit itself to a definitive position on the issue of the legal status of the Federal Republic of Yugoslavia in relation to the Charter and the Statute in its pronouncements in incidental proceedings, in the cases involving

this issue which came before the Court during this anomalous period. For example, in certain of the Orders of 2 June 1999 in the present cases on the request for the indication of provisional measures, the Court, after examining the contention that the Applicant was not a party to the Statute, stated that: "Whereas, in view of its finding . . . above, the Court need not consider this question for the purpose of deciding whether or not it can indicate provisional measures in the present case." (*Legality of Use of Force (Yugoslavia* v. *Belgium), I.C.J. Reports 1999 (I)*, p. 136, para. 33.)

74. This situation, however, came to an end with a new development in 2000. On 24 September 2000, Mr. Koštunica was elected President of the Federal Republic of Yugoslavia. In that capacity, on 27 October 2000 he sent a letter to the Secretary-General requesting admission of the Federal Republic of Yugoslavia to membership in the United Nations, in the following terms:

> "In the wake of fundamental democratic changes that took place in the Federal Republic of Yugoslavia, in the capacity of President, I have the honour to request the admission of the Federal Republic of Yugoslavia to membership in the United Nations *in light of the implementation of Security Council resolution 777 (1992)*." (United Nations doc. A/55/528-S/2000/1043; emphasis added.)

75. Acting upon this application by the Federal Republic of Yugoslavia for membership in the United Nations, the Security Council on 31 October 2000 "*recommend[ed]* to the General Assembly that the Federal Republic of Yugoslavia be admitted to membership in the United Nations" (United Nations doc. S/RES/1326). On 1 November 2000, the General Assembly, by resolution 55/12, "*[h]aving received* the recommendation of the Security Council of 31 October 2000" and "*[h]aving considered* the application for membership of the Federal Republic of Yugoslavia", decided to "admit the Federal Republic of Yugoslavia to membership in the United Nations".

76. As the letter of the President of the Federal Republic of Yugoslavia quoted above demonstrates, this action on the part of the Federal Republic of Yugoslavia signified that it had finally decided to act on Security Council resolution 777 (1992) by aligning itself with the position of the Security Council as expressed in that resolution. Furthermore the Security Council confirmed its own position by taking steps for the admission of the Federal Republic of Yugoslavia as a new Member of the United Nations, which, when followed by corresponding steps taken by the General Assembly, completed the procedure for the admission of a new Member under Article 4 of the Charter, rather than pursuing any course involving recognition of continuing membership of the Federal Republic of Yugoslavia in the United Nations.

77. This new development effectively put an end to the *sui generis* position of the Federal Republic of Yugoslavia within the United Nations, which, as the Court has observed in earlier pronouncements, had been fraught with "legal difficulties" throughout the period between 1992 and 2000 (cf. *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Yugoslavia (Serbia and Montenegro)), Provisional Measures, Order of 8 April 1993, I.C.J. Reports 1993*, p. 14, para. 18). The Applicant thus has the status of membership in the United Nations as from 1 November 2000. However, its admission to the United Nations did not have, and could not have had, the effect of dating back to the time when the Socialist Federal Republic of Yugoslavia broke up and disappeared; there was in 2000 no question of restoring the membership rights of the Socialist Federal Republic of Yugoslavia for the benefit of the Federal Republic of Yugoslavia. At the same time, it became clear that the *sui generis* position of the Applicant could not have amounted to its membership in the Organization.

78. In the view of the Court, the significance of this new development in 2000 is that it has clarified the thus far amorphous legal situation concerning the status of the Federal Republic of Yugoslavia vis-à-vis the United Nations. It is in that sense that the situation that the Court now faces in relation to Serbia and Montenegro is manifestly different from that which it faced in 1999. If, at that time, the Court had had to determine definitively the status of the Applicant vis-à-vis the United Nations, its task of giving such a determination would have been complicated by the legal situation, which was shrouded in uncertainties relating to that status. However, from the vantage point from which the Court now looks at the legal situation, and in light of the legal consequences of the new development since 1 November 2000, the Court is led to the conclusion that Serbia and Montenegro was not a Member of the United Nations, and in that capacity a State party to the Statute of the International Court of Justice, at the time of filing its Application to institute the present proceedings before the Court on 29 April 1999.

79. A further point to consider is the relevance to the present case of the Judgment in the *Application for Revision* case, of 3 February 2003. There is no question of that Judgment possessing any force of *res judicata* in relation to the present case. Nevertheless, the relevance of that judgment to the present case has to be examined, inasmuch as Serbia and Montenegro raised, in connection with its Application for revision, the same issue of its access to the Court under Article 35, paragraph 1, of the Statute, and the judgment of the Court was given in 2003 at a time when the new development described above had come to be known to the Court.

80. On 20 March 1993, the Government of the Republic of Bosnia and Herzegovina filed in the Registry of the Court an Application instituting

proceedings against the Government of the Federal Republic of Yugoslavia in respect of a dispute concerning alleged violations of the Convention on the Prevention and Punishment of the Crime of Genocide. The Application invoked Article IX of the Genocide Convention as the basis of the jurisdiction of the Court.

81. On 30 June 1995, the Federal Republic of Yugoslavia, referring to Article 79, paragraph 1, of the Rules of Court, raised preliminary objections concerning the admissibility of the Application and the jurisdiction of the Court to entertain the case. The Court, in its Judgment on Preliminary Objections of 11 July 1996, rejected the preliminary objections raised by the Federal Republic of Yugoslavia, and found *inter alia* that "on the basis of Article IX of the Convention on the Prevention and Punishment of the Crime of Genocide, it has jurisdiction to adjudicate upon the dispute" (*I.C.J. Reports 1996 (II)*, p. 623). The question of the status of the Federal Republic of Yugoslavia in relation to Article 35 of the Statute was not raised and the Court saw no reason to examine it.

82. However, in the wake of the new development in the legal status of the Federal Republic of Yugoslavia in 2000 mentioned above (paragraphs 74-76), the Federal Republic of Yugoslavia filed a new Application dated 23 April 2001 instituting proceedings, whereby, referring to Article 61 of the Statute of the Court, it requested the Court to revise the above-mentioned Judgment of 11 July 1996. In its Application the Federal Republic of Yugoslavia contended the following:

> "The admission of the FRY to the United Nations as a new Member on 1 November 2000 is certainly a new fact. It can also be demonstrated, and the Applicant submits, that this new fact is of such a nature as to be a decisive factor regarding the question of jurisdiction *ratione personae* over the FRY.
>
> After the FRY was admitted as new Member on 1 November 2000, dilemmas concerning its standing have been resolved, and it has become an unequivocal fact that the FRY did not continue the personality of the SFRY, was not a Member of the United Nations before 1 November 2000, was not a State party to the Statute, and was not a State party to the Genocide Convention . . .
>
> The admission of the FRY to the United Nations as a new Member clears ambiguities and sheds a different light on the issue of the membership of the FRY in the United Nations, in the Statute and in the Genocide Convention." (Judgment of 3 February 2003, *I.C.J. Reports 2003*, p. 12, para. 18.)

83. In its oral argument however, the Federal Republic of Yugoslavia explained that it did not invoke its admission to the United Nations in November 2000 as a decisive "new fact", within the meaning of Article 61 of the Statute, capable of founding its request for revision of the 1996 Judgment. In this context, the Federal Republic of Yugosla-

via referred to that admission and a letter of 8 December 2000 from the Under-Secretary-General and Legal Counsel of the United Nations to the Minister for Foreign Affairs of the Federal Republic of Yugoslavia, expressing the view that in respect of multilateral treaties deposited with the Secretary-General, "the Federal Republic of Yugoslavia should now undertake treaty actions, as appropriate, . . . if its intention is to assume the relevant legal rights and obligations as a successor State". The Federal Republic of Yugoslavia contended that its admission to the United Nations "as a new Member" as well as the Legal Counsel's letter of 8 December 2000 were

> "events which . . . revealed the following two decisive facts:
> (1) the FRY was not a party to the Statute at the time of the Judgment; and
> (2) the FRY did not remain bound by Article IX of the Genocide Convention continuing the personality of the former Yugoslavia".

84. In the proceedings on that Application instituted under Article 61 of the Statute, it was for the Federal Republic of Yugoslavia to show, *inter alia*, the existence of a fact which was, "when the judgment was given" on the preliminary objections of the Federal Republic of Yugoslavia, i.e. on 11 July 1996, "unknown to the Court and also to the party claiming revision", this being one of the conditions laid down by Article 61 of the Statute for the admissibility of an application for revision. The Court was at this stage concerned simply to establish whether the Federal Republic of Yugoslavia's Application for revision was admissible in conformity with the provisions of Article 61 of the Statute. If it had found that it was admissible, it would have given a judgment "expressly recording the existence of the new fact" in accordance with Article 61, paragraph 2, of the Statute, and further proceedings would have been held, in accordance with Article 99 of the Rules of Court, "on the merits of the application".

85. In the Judgment in the *Application for Revision* case, the Court found the Application for revision inadmissible. It is to be noted that the Court observed specifically that:

> "In advancing this argument, the FRY does not rely on facts that existed in 1996. In reality, it bases its Application for revision on the legal consequences which it seeks to draw from facts subsequent to the Judgment which it is asking to have revised. Those consequences, *even supposing them to be established*, cannot be regarded as facts within the meaning of Article 61. The FRY's argument cannot accordingly be upheld." (*I.C.J. Reports 2003*, pp. 30-31, para. 69; emphasis added.)

86. Thus the Court did not regard the alleged "decisive facts" specified

by Serbia and Montenegro as "facts that existed in 1996" for the purpose of Article 61. The Court therefore did not have to rule on the question whether "the legal consequences" could indeed legitimately be deduced from the later facts; in other words, it did not have to say whether it was correct that Serbia and Montenegro had not been a party to the Statute or to the Genocide Convention in 1996. It is for this reason that the Court included in its Judgment the words now italicized in the above quotation.

87. In its Judgment the Court went on to state that:

> "Resolution 47/1 did not *inter alia* affect the FRY's right to appear before the Court or to be a party to a dispute before the Court under the conditions laid down by the Statute . . . To 'terminate the situation created by resolution 47/1', the FRY had to submit a request for admission to the United Nations as had been done by the other Republics composing the SFRY. All these elements were known to the Court and to the FRY at the time when the Judgment was given. Nevertheless, what remained unknown in July 1996 was if and when the FRY would apply for membership in the United Nations and if and when that application would be accepted, thus terminating the situation created by General Assembly resolution 47/1." (*I.C.J. Reports 2003*, p. 31, para. 70.)

On the critical question of the Federal Republic of Yugoslavia's admission to the United Nations as a new Member, the Court emphasized that

> "General Assembly resolution 55/12 of 1 November 2000 cannot have changed retroactively the *sui generis* position which the FRY found itself in vis-à-vis the United Nations over the period 1992 to 2000, or its position in relation to the Statute of the Court and the Genocide Convention" (*ibid.*, para. 71).

These statements cannot however be read as findings on the status of Serbia and Montenegro in relation to the United Nations and the Genocide Convention; the Court had already implied that it was not called upon to rule on those matters, and that it was not doing so.

88. In the immediately following paragraph of the Judgment, the Court stated:

> "It follows from the foregoing that it has not been established that the request of the FRY is based upon the discovery of 'some fact' which was 'when the judgment was given, unknown to the Court and also to the party claiming revision'. The Court therefore concludes that one of the conditions for the admissibility of an application for revision prescribed by paragraph 1 of Article 61 of the Statute has not been satisfied." (*Ibid.*, para. 72.)

The Court thus made its position clear that there could have been no retroactive modification of the situation in 2000, which would amount to a new fact, and that therefore the conditions of Article 61 were not satisfied. This, however, did not entail any finding by the Court, in the revision proceedings, as to what that situation actually was.

89. Given the specific characteristics of the procedure under Article 61 of the Statute, in which the conditions for granting an application for revision of a judgment are strictly circumscribed, there is no reason to treat the Judgment in the *Application for Revision* case as having pronounced upon the issue of the legal status of Serbia and Montenegro vis-à-vis the United Nations. Nor does the Judgment pronounce upon the status of Serbia and Montenegro in relation to the Statute of the Court.

90. For all these reasons, the Court concludes that, at the time of filing of its Application to institute the present proceedings before the Court on 29 April 1999, the Applicant in the present case, Serbia and Montenegro, was not a Member of the United Nations, and, consequently, was not, on that basis, a State party to the Statute of the International Court of Justice. It follows that the Court was not open to Serbia and Montenegro under Article 35, paragraph 1, of the Statute.

* * *

91. The Court will now consider whether it might be open to Serbia and Montenegro under paragraph 2 of Article 35, which provides that:

> "The conditions under which the Court shall be open to other States [i.e. States not parties to the Statute] shall, subject to the special provisions contained in treaties in force, be laid down by the Security Council, but in no case shall such conditions place the parties in a position of inequality before the Court."

The conditions of access provided for in this text were laid down by the Security Council in resolution 9 (1946); but Serbia and Montenegro has not invoked that resolution, nor brought itself within the terms laid down therein.

92. The Court notes that the Applicant, in the present case, has not in fact claimed that the Court is open to it under paragraph 2 of Article 35, but has based its right of access to the Court solely on paragraph 1 of the Article. However, in some of the cases concerning *Legality of Use of Force*, the Respondent has in its preliminary objections, or in oral argument, raised the question of the possible application of paragraph 2, in order to contend that Serbia and Montenegro may not rely upon that text. In this context, reference has been made to an Order of the Court in another case, in which the provisional view was expressed that Article IX of the Genocide Convention could be considered as a special provision

contained in a treaty in force. The Court is therefore of the view that in the circumstances of this case it is appropriate for it to examine the possible application of paragraph 2 of Article 35.

93. In its Order of 8 April 1993 in the *Genocide Convention* case, the Court, after quoting paragraph 2 of Article 35, stated that

> "the Court therefore considers that proceedings may validly be instituted by a State against a State which is a party to such a special provision in a treaty in force, but is not party to the Statute, and independently of the conditions laid down by the Security Council in its resolution 9 of 1946 (cf. *S.S. "Wimbledon", 1923, P.C.I.J, Series A, No. 1*, p. 6); whereas a compromissory clause in a multilateral convention, such as Article IX of the Genocide Convention relied on by Bosnia-Herzegovina in the present case, *could*, in the view of the Court, be regarded prima facie as a special provision contained in a treaty in force; whereas accordingly if Bosnia-Herzegovina and Yugoslavia are both parties to the Genocide Convention, disputes to which Article IX applies are in any event prima facie within the jurisdiction *ratione personae* of the Court" (*I.C.J. Reports 1993,* p. 14, para. 19; emphasis added).

In the further proceedings in that case, however, this point was not pursued; the Court rejected the preliminary objections raised by the Respondent in that case, one of them being that the Republic of Bosnia and Herzegovina had not become a party to the Genocide Convention. The Respondent however did not raise any objection on the ground that it was itself not a party to the Genocide Convention, nor to the Statute of the Court since, on the international plane, it had been maintaining its claim to continue the legal personality, and the membership in international organizations including the United Nations, of the Socialist Federal Republic of Yugoslavia, and its participation in international treaties. The Court, having observed that it had not been contested that Yugoslavia was party to the Genocide Convention (*I.C.J. Reports 1996 (II)*, p. 610, para. 17) found that it had jurisdiction on the basis of Article IX of that Convention.

94. As in respect of the questions of dismissal of the case *in limine litis* and access under paragraph 1 of Article 35 (see paragraphs 26 and 52 above), the Court will consider the arguments put forward in this case and any other legal issue which it deems relevant to consider, including the issues raised in the other cases referred to in paragraph 3, with a view to arriving at its conclusion regarding the possible access to the Court by Serbia and Montenegro under Article 35, paragraph 2, of the Statute.

95. A number of Respondents contended in their pleadings that the

reference to the "treaties in force" in Article 35, paragraph 2, of the Statute relates only to treaties in force when the Statute of the Court entered into force, i.e. on 24 October 1945. In respect of the observation made by the Court in its Order of 8 April 1993, quoted in paragraph 93 above, the Respondents pointed out that that was a provisional assessment, not conclusive of the matter, and considered that "there [were] persuasive reasons why the Court should revisit the provisional approach it adopted to the interpretation of this clause in the *Genocide Convention* case" (Preliminary Objections of Belgium, p. 73, para. 222). In particular they referred to the "evident focus of the clause in question on the peace treaties concluded after the First World War", and argued that to construe the phrase of Article 35, paragraph 2, of the Statute, "the special provisions contained in treaties in force", as meaning "*jurisdictional clauses contained in treaties in force*" (i.e., any treaties whatever) would "fundamentally undermine the scheme of the *Statute* and the distinction between access to the Court and the jurisdiction of the Court in particular cases". Such interpretation would, according to Belgium, "place States not party to the *Statute* in a privileged position as they would have access to the Court without any assumption of the obligations . . . required of States to which the Court is open" (Preliminary Objections of Belgium, p. 73, para. 223), or according to the United Kingdom "would . . . place them in a privileged position by giving them access to the Court without requiring them to meet the conditions normally imposed as a prerequisite to access to the Court" (Preliminary Objections of the United Kingdom, p. 40, para. 3.32).

96. During the oral proceedings these arguments were maintained and reiterated by certain Respondents. Belgium argued that "[t]he Application instituting proceedings . . . fell comprehensively outside the jurisdictional framework of the Court under Articles 35, 36 and 37 of the Statute at the point at which the proceedings were instituted". It elaborated further that "[i]n the *Genocide Convention* case, the controlling consideration is that the FRY did not contest jurisdiction on the ground that it was not a Member of the United Nations" and continued that Serbia and Montenegro "cannot rely on its acquiescence as respondent in one case in order to found jurisdiction as Applicant in this case". Belgium concluded that it "relie[d] on both the letter and the spirit of Article 35 of the Statute" and "[did] not acquiesce to the bringing of a claim against it by an applicant for whom the Court *was not open* at the relevant time" (emphasis added).

Italy observed that

> "the question is still whether the Court could . . . regard itself as having jurisdiction *ratione personarum* pursuant to Article 35, paragraph 2, because Serbia and Montenegro was allegedly a party to a 'treaty in force' laying down the jurisdiction of the Court".

Italy recalled the arguments on this issue in its second preliminary objection, and emphasized that,

> "[i]n particular, Italy maintained that the mere presence of a clause conferring jurisdiction in a treaty in force between two States, one of which, the Applicant, is not at the same time a party to the Statute, could not give that State the right to appear before the Court, unless it met the conditions laid down by the Security Council in its resolution No. 9 of 15 October 1946. This Serbia and Montenegro has not done and does not claim ever to have done."

97. The Court notes that the passage quoted above (paragraph 93) from the 1993 Order in the *Genocide Convention* case was addressed to the situation in which the proceedings were instituted against a State the membership of which in the United Nations and status of a party to the Statute was unclear. Bosnia and Herzegovina in its Application in that case maintained that "the Federal Republic of Yugoslavia (Serbia and Montenegro)" was a Member of the United Nations and a party to the Statute and at the same time indicated in the Application that the "continuity" of Yugoslavia with the former Socialist Federal Republic of Yugoslavia, a Member of the United Nations, "has been vigorously contested by the entire international community, . . . including by the United Nations Security Council . . . as well as by the General Assembly" (*I.C.J. Reports 1993*, p. 12, para. 15). The Order of 8 April 1993 was made in a different case; but as the Court observed in a previous case in which questions of *res judicata* and Article 59 of the Statute were raised, "[t]he real question is whether, in this case, there is cause not to follow the reasoning and conclusions of earlier cases" (*Land and Maritime Boundary between Cameroon and Nigeria (Cameroon* v. *Nigeria), Preliminary Objections, Judgment, I.C.J. Reports 1998,* p. 292, para. 28).

98. The Order of 8 April 1993 was made on the basis of an examination of the relevant law and facts in the context of incidental proceedings on a request for the indication of provisional measures. It would therefore now be appropriate for the Court to make a definitive finding on the question whether Article 35, paragraph 2, affords access to the Court in the present case, and for that purpose, to examine further the question of its applicability and interpretation.

99. The Court will thus proceed to the interpretation of Article 35, paragraph 2, of the Statute, and will do so in accordance with customary international law, reflected in Article 31 of the 1969 Vienna Convention on the Law of Treaties. According to paragraph 1 of Article 31, a treaty must be interpreted in good faith in accordance with the ordinary meaning to be given to its terms in their context and in the light of the treaty's object and purpose. Interpretation must be based above all upon the text

of the treaty. As a supplementary measure recourse may be had to means of interpretation such as the preparatory work of the treaty and the circumstances of its conclusion.

100. Article 35, paragraph 2, refers to "the special provisions contained in treaties in force", in the context of the question of access to the Court. Taking the natural and ordinary meaning of the words "special provisions", the reference must in the view of the Court be to treaties that make "special provision" in relation to the Court, and this can hardly be anything other than provision for the settlement of disputes between the parties to the treaty by reference of the matter to the Court. As for the words "treaties in force", in their natural and ordinary meaning they do not indicate at what date the treaties contemplated are to be in force, and thus they may lend themselves to different interpretations. One can construe those words as referring to treaties which were in force at the time that the Statute itself came into force, as was contended by certain Respondents; or to those which were in force on the date of the institution of proceedings in a case in which such treaties are invoked. In favour of this latter interpretation, it may be observed that the similar expression "treaties and conventions in force" is found in Article 36, paragraph 1, of the Statute, and the Court has interpreted it in this sense (for example, *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya* v. *United Kingdom), Preliminary Objections, Judgment, I.C.J. Reports 1998*, p. 16, para. 19). The expression "treaty or convention in force" in Article 37 of the Statute has also been read as meaning in force at the date proceedings were instituted (*Barcelona Traction, Light and Power Company, Limited, Preliminary Objections, Judgment, I.C.J. Reports 1964*, p. 27).

101. The object and purpose of Article 35 of the Statute is to define the conditions of access to the Court. While paragraph 1 of that Article opens it to the States parties to the Statute, paragraph 2 is intended to regulate access to the Court by States which are not parties to the Statute. The conditions of access of such States are, "subject to the special provisions contained in treaties in force", to be determined by the Security Council, with the proviso that in no case shall such conditions place the parties in a position of inequality before the Court. The Court considers that it was natural to reserve the position in relation to any relevant treaty provisions that might then exist; moreover, it would have been inconsistent with the main thrust of the text to make it possible in the future for States to obtain access to the Court simply by the conclusion between themselves of a special treaty, multilateral or bilateral, containing a provision to that effect.

102. The first interpretation, according to which Article 35, paragraph 2, refers to treaties in force at the time that the Statute came into force, is in fact reinforced by an examination of the *travaux préparatoires* of the text. Since the Statute of the Permanent Court of International

Justice contained substantially the same provision, which was used as a model when the Statute of the present Court was drafted, it will be necessary to examine the drafting history of both Statutes. The text proposed by the 1920 Committee of Jurists (as Article 32 of its draft) was as follows:

> "The Court shall be open of right to the States mentioned in the Annex to the Covenant, and to such others as shall subsequently enter the League of Nations.
>
> Other States may have access to it.
>
> The conditions under which the Court shall be open of right or accessible to States which are not Members of the League of Nations shall be determined by the Council, in accordance with Article 17 of the Covenant." (League of Nations, Permanent Court of International Justice, *Documents concerning the action taken by the Council of the League of Nations under Article 14 of the Covenant and the adoption by the Assembly of the Statute of the Permanent Court*, p. 78.)

103. During the consideration of this text by the Sub-Committee of the Third-Committee of the First Assembly Meeting of the League of Nations it was pointed out "that under the Treaties of Peace the Central Powers would often be Parties before the Court" and that "[t]he text of the draft does not take sufficient account of this fact" and it was proposed suppressing the first two paragraphs of the Article (*ibid.*, p. 141).

A question was raised "whether the Council might place conditions on the admission of Germany before the Court, for example in the case mentioned in Article 380 of the Treaty of Versailles" to which a negative response was given. Then the Chairman proposed to entrust a small committee with the task of drafting a new formula for Article 32 which

> "should act upon the three following principles, upon which the Sub-Committee was agreed:
>
> 1. The Council shall have the power of determining conditions for the admission before the Court of States which are not Members of the League of Nations.
> 2. The rights of the Parties before the Court are equal.
> 3. Account shall be taken of *Parties who may present themselves before the Court by virtue of the Treaties of Peace*." (*Ibid.*, p. 141; emphasis added.)

104. The Sub-Committee received from the three delegates entrusted with this task a proposal for a new text of Article 32 as follows:

> "*Article 32*
>
> 1st paragraph: No change.
>
> The conditions under which the Court shall be open to other States shall, subject to special provisions contained in treaties in force, be laid down by the Council.

> When a State which is not a Member of the League of Nations is a party to a dispute, the Court will fix the amount which that party shall contribute towards the expenses of the Court."

105. The Court notes that it is here, that for the first time in the legislative history of what later became Article 35, paragraph 2, the phrase "subject to the special provisions contained in treaties in force" appeared. It may safely be assumed that this phrase was inserted into the text as a response to principle 3 referred to above.

106. When the text was presented to the Sub-Committee, the Chairman recalled the proposal made at the previous meeting, to add to Article 32 a provision stating that, as far as party rights are concerned, all States are equal before the Court. In order to meet this objection of the Chairman and of the author of that proposal, one of the three co-authors of the proposed text of Article 32 suggested making the following addition to the second paragraph of Article 32:

> "The conditions under which the Court shall be open to other States shall, subject to the special provisions contained in treaties in force, be laid down by the Council, but in no case shall such provision place the parties in a position of inequality before the Court." (League of Nations, *op cit.*, p. 144.)

The second paragraph thus amended was adopted without any further discussion.

107. In the report presented to the Assembly by the Third Committee, it was stated that:

> "The wording of this Article [i.e. the original draft Article 32] seemed lacking in clearness, and the Sub-Committee has re-cast it in an effort to express clearly [that]
>
> . . . . . .
>
> The access of other States to the Court will depend either on the special provisions of the Treaties in force (for example the provisions of the Treaty of Peace concerning the right of minorities, labour, etc.) or else on a resolution of the Council." (*Ibid.*, p. 210.)

108. Before the Permanent Court of International Justice, the issue arose on two occasions. In the *S.S. "Wimbledon"* case (*1923, P.C.I.J., Series A, No. 1*, p. 6) the jurisdiction of the Court was founded on Article 386 of the Treaty of Versailles of 28 June 1919. When the proceedings were instituted in that case against Germany, that State was not a Member of the League of Nations nor was it mentioned in the Annex to the Covenant. A declaration by Germany accepting the jurisdiction of the Court was not considered as necessary, in light of the reservation contained in Article 35, paragraph 2, of the Statute which was intended, as shown above (paragraphs 103-105), to cover special provisions in the Peace Treaties.

In the case concerning *Certain German Interests in Polish Upper Silesia (1925, P.C.I.J., Series A, No. 6)*, the proceedings were instituted by Germany, before its admission to the League of Nations, against Poland on the basis of Article 23 of the Convention relating to Upper Silesia of 15 May 1922 and brought into force on 3 June 1922. The Court noted that Poland "[did] not dispute the fact that the suit has been duly submitted to the Court in accordance with Articles 35 and 40 of the Statute" (*ibid.*, p. 11). The Court, before rendering its judgment, considered the issue and

> "was of the opinion that the relevant instruments when correctly interpreted (more especially in the light of a report made by M. Hagerup at the First Assembly of the League of Nations) authorized it in accepting the German Government's application without requiring the special declaration provided for in the Council Resolution" (*Annual Report of the Permanent Court of International Justice (1 January 1922-15 June 1925), P.C.I.J., Series E, No. 1*, p. 261).

Further, it is to be noted that when the Court was discussing amendments of its Rules of Court a year later, two judges expressed the view that the exception in Article 35 "could only be intended to cover situations provided for by the treaties of peace" (*Acts and Documents (1926), P.C.I.J., Series D, No. 2, Add.*, p. 106). One of them explained that, in the case concerning *Certain German Interests in Polish Upper Silesia*,

> "the question then related to a treaty — the Upper Silesian Convention — drawn up under the auspices of the League of Nations which was to be considered as supplementary to the Treaty of Versailles. It was therefore possible to include the case in regard to which the Court had then to decide in the general expression 'subject to treaties in force', whilst construing that expression as referring to the peace treaties . . ." (*Ibid.*, p. 105.)

No other interpretation of the phrase at issue was advanced by any Member of the Court when in 1926 it discussed the amendment of its Rules.

109. When the Charter of the United Nations and the Statute of the Court were under preparation, the issue was first discussed by the United Nations Committee of Jurists. In the debate, some confusion apparently arose regarding the difference between a non-Member State which may become party to the Statute and one which may become party to a case before the Court. Some delegates did not make a clear distinction between adherence to the Statute and access to the Court. The debate mostly concentrated on the respective roles of the General Assembly and the Security Council in that context: there was some criticism that the Assembly was excluded from action under paragraph 2 of Article 35 (*Documents of the United Nations Conference on International Organi-*

zation, Vol. XIV, pp. 141-145). A proposal was made to adopt paragraph 2 as it stood, but some delegates continued to argue for a role of the Assembly to be recognized in that paragraph. The United Kingdom suggested that there might be inserted in paragraph 2, after the words "Security Council", the phrase "in accordance with any principles which may have been laid down by the General Assembly".

A proposal was then again made to adopt the Article as contained in the draft. Thereupon the delegate of France observed that "it lay within the power of the Council to determine conditions in particular cases but the actual practice had not given cause for criticism". He then continued:

> "The Council could not restrict access to the Court when the Assembly permitted it, but the Council could be more liberal in particular cases. The decision of the Assembly was actually the more important, and the Council could not go against it. The Council furthermore would have to take into account any existing treaties, and it could not prevent access to the Court when a State had a treaty providing for compulsory jurisdiction." (*Ibid.*, p. 144.)

He then proposed that Article 35 be adopted as it stood; no further substantive discussion followed, and Article 35 was adopted.

110. The report on the draft of the Statute of an International Court of Justice submitted by the United Nations Committee of Jurists to the United Nations Conference on International Organization at San Francisco noted in respect of Article 35 merely that:

> "Aside from the purely formal changes necessitated by references to The United Nations Organization instead of to the Covenant of the League of Nations, Article 35 is amended only in that, in the English text of paragraph 2, the word 'conditions' is substituted for the word 'provisions' and in paragraph 3, the word 'case' is substituted for the word 'dispute' which will assure better agreement with the French text." (*Ibid.*, p. 839.)

Since the draft Statute of this Court was based on the Statute of the Permanent Court of International Justice, the report did not indicate any change in respect of the scope of the applicability of Article 35, paragraph 2.

111. At the San Francisco Conference, the question here examined was not touched upon; the discussion of draft Article 35 focused mainly on a proposal by Egypt to insert a new paragraph 2 stating "[t]he conditions under which states not members may become parties to the Statute of the Court shall be determined in each case by the General Assembly upon recommendation of the Security Council" (*ibid.*, Vol. XIII, p. 484). In the debate in Committee IV/1 of the Conference,

> "[i]t was pointed out that the question as to what states are to be parties to the Statute should be decided in the Charter, while the

> question as to what states may appear before the Court in the case, once the Court is established, should be determined by the Statute" (*Documents of the United Nations Conference on International Organization*, Vol. XIII, p. 283).

The Egyptian proposal was not pursued but the essence of it was reflected in Article 93, paragraph 2, of the Charter.

112. The Court considers that the legislative history of Article 35, paragraph 2, of the Statute of the Permanent Court demonstrates that it was intended as an exception to the principle stated in paragraph 1, in order to cover cases contemplated in agreements concluded in the aftermath of the First World War before the Statute entered into force. However, the *travaux préparatoires* of the Statute of the present Court are less illuminating. The discussion of Article 35 was provisional and somewhat cursory; it took place at a stage in the planning of the future international organization when it was not yet settled whether the Permanent Court would be preserved or replaced by a new court. Indeed, the records quoted in paragraphs 109 to 111 above do not include any discussion which would suggest that Article 35, paragraph 2, of the Statute should be given a different meaning from the corresponding provision in the Statute of the Permanent Court. It would rather seem that the text was reproduced from the Statute of the Permanent Court; there is no indication that any extension of access to the Court was intended.

Accordingly Article 35, paragraph 2, must be interpreted, *mutatis mutandis*, in the same way as the equivalent text in the Statute of the Permanent Court, namely as intended to refer to treaties in force at the date of the entry into force of the new Statute, and providing for the jurisdiction of the new Court. In fact, no such prior treaties, referring to the jurisdiction of the present Court, have been brought to the attention of the Court, and it may be that none existed. In the view of the Court, however, neither this circumstance, nor any consideration of the object and purpose of the text, nor the *travaux préparatoires*, offer support to the alternative interpretation that the provision was intended as granting access to the Court to States not parties to the Statute without any condition other than the existence of a treaty, containing a clause conferring jurisdiction on the Court, which might be concluded any time subsequently to the entry into force of the Statute. As noted above (paragraph 101), this interpretation would lead to a result quite incompatible with the object and purpose of Article 35, paragraph 2, namely the regulation of access to the Court by States non-parties to the Statute. In the view of the Court therefore, the reference in Article 35, paragraph 2, of the Statute to "the special provisions contained in treaties in force" applies only to treaties in force at the date of the entry into force of the Statute, and not to any treaties concluded since that date.

113. The Court thus concludes that, even assuming that Serbia and Montenegro was a party to the Genocide Convention at the relevant

date, Article 35, paragraph 2, of the Statute does not provide it with a basis to have access to the Court, under Article IX of that Convention, since the Convention only entered into force on 12 January 1951, after the entry into force of the Statute (see paragraph 112 above). The Court does not therefore consider it necessary to decide whether Serbia and Montenegro was or was not a party to the Genocide Convention on 29 April 1999 when the current proceedings were instituted.

* * *

114. The conclusion which the Court has reached, that Serbia and Montenegro did not, at the time of the institution of the present proceedings, have access to the Court under either paragraph 1 or paragraph 2 of Article 35 of the Statute, makes it unnecessary for the Court to consider the other preliminary objections filed by the Respondents to the jurisdiction of the Court (see paragraph 45 above).

* * *

115. Finally, the Court would recall, as it has done in other cases and in the Order on the request for the indication of provisional measures in the present case, the fundamental distinction between the existence of the Court's jurisdiction over a dispute, and the compatibility with international law of the particular acts which are the subject of the dispute (see *Legality of Use of Force (Yugoslavia* v. *France), Provisional Measures, Order of 2 June 1999, I.C.J. Reports 1999 (I)*, p. 374, para. 35). Whether or not the Court finds that it has jurisdiction over a dispute, the parties "remain in all cases responsible for acts attributable to them that violate the rights of other States" (see *Fisheries Jurisdiction (Spain* v. *Canada), Jurisdiction of the Court, Judgment, I.C.J. Reports 1998*, p. 456, paras. 55-56; *Aerial Incident of 10 August 1999 (Pakistan* v. *India), Jurisdiction, Judgment, I.C.J. Reports 2000*, p. 33, para. 51). When, however, as in the present case, the Court comes to the conclusion that it is without jurisdiction to entertain the claims made in the Application, it can make no finding, nor any observation whatever, on the question whether any such violation has been committed or any international responsibility incurred.

* * *

116. For these reasons,

THE COURT,

Unanimously,

Finds that it has no jurisdiction to entertain the claims made in the Application filed by Serbia and Montenegro on 29 April 1999.

Done in French and in English, the French text being authoritative, at

the Peace Palace, The Hague, this fifteenth day of December, two thousand and four, in three copies, one of which will be placed in the archives of the Court and the others transmitted to the Government of Serbia and Montenegro and the Government of the French Republic, respectively.

(Signed) SHI Jiuyong,
President.

(Signed) Philippe COUVREUR,
Registrar.

Vice-President RANJEVA and Judges GUILLAUME, HIGGINS, KOOIJMANS, AL-KHASAWNEH, BUERGENTHAL and ELARABY append a joint declaration to the Judgment of the Court; Judge KOROMA appends a declaration to the Judgment of the Court; Judges HIGGINS, KOOIJMANS and ELARABY and Judge a*d hoc* KREĆA append separate opinions to the Judgment of the Court.

(Initialled) J.Y.S.
(Initialled) Ph.C.

DECLARATION OF JUDGE KOROMA

While I concur with the Court's findings in the operative paragraph of the Judgment, I nevertheless consider it important to stress the following.

What the Court was asked to determine and has, in fact, ruled on during this phase of the proceedings is the issue of *jurisdiction*.

The Applicant, the Government of Serbia and Montenegro, requested the Court, *inter alia*, to adjudge and declare in respect of its *jurisdiction ratione personae*.

The Government of France, *inter alia*, asked the Court to adjudge and declare that it lacked *jurisdiction* to rule on the Application filed by the Federal Republic of Yugoslavia.

Thus, neither Party called upon the Court to uphold its jurisdiction or asserted that it was entitled to enter into the merits of the case, but rather requested it to decide on its jurisdiction and to determine whether, as a matter of law, the Applicant was entitled to bring a claim before the Court. This Judgment is the response to the question about jurisdiction. As the Court has stated (para. 37), the function of a decision of the Court on its *jurisdiction* in a particular case is solely to determine whether or not it may entertain the case on the merits and not to make any determination on *substantive issues*. The Court is obliged to discharge this function before entering into the merits of a case. Moreover, this function to decide on its jurisdiction is both primary and imperative. It is at one and the same time both determined and limited by the Charter of the United Nations and the Statute of the Court. The Court cannot emancipate itself from this statutory requirement. It is therefore not only in conformity with the Statute of the Court but also by the force of logic that the point of departure for the Court in responding to that question would have to be the determination of its jurisdiction *ratione personae*.

It is within this paradigm that the Judgment should be understood: as a decision by the Court on its jurisdiction, without any position being taken on the merits of the dispute.

(Signed) Abdul G. Koroma.

SEPARATE OPINION OF JUDGE HIGGINS

Removal from the List other than for reasons of discontinuance — Inherent powers of the Court — Inherent powers not limited to two existing examples — Reasons why this case should have been removed from the List — Inappropriate for Judgment to have pronounced on Article 35, paragraph 2, of Statute.

1. The Court in its Judgment finds that the Observations of Serbia and Montenegro have not had the legal effect of discontinuance of proceedings under the Rules (para. 31). I agree. It is clear that the Applicant has declined to "discontinue", and that "discontinuance" as envisaged in the Rules is dependent on the consent of the Parties.

2. The Court further observes that:

> "Prior to the adoption of Article 38, paragraph 5, of the Rules of Court, in a number of cases in which the application disclosed no subsisting title of jurisdiction, but merely an invitation to the State named as respondent to accept jurisdiction for the purposes of the case, the Court removed the cases from the List by order. By Orders of 2 June 1999, it removed from the List two cases brought by Serbia and Montenegro concerning *Legality of the Use of Force* against Spain and the United States of America, on the ground that the Court 'manifestly lack[ed] jurisdiction' (*I.C.J. Reports 1999*, pp. 773 and 925)." (Judgment, para. 32.)

3. The Court then observes that "[t]he present case does not however fall into either of these categories". The Court thus appears to regard these as a closed list of categories for the removal of cases from the List (other than where discontinuance has occurred), and to suggest that no removal from the List was open to the Court in the present case as the facts do not fall within the existing two examples.

4. A case may be discontinued by the applicant alone and an order issued to remove it from the List (*Denunciation of the Treaty of 2 November 1865 between China and Belgium, Order of 25 May 1929, P.C.I.J., Series A, No. 18; Legal Status of the South-Eastern Territory of Greenland, Order of 11 May 1933, P.C.I.J., Series A/B, No. 55*, p. 157; *Protection of French Nationals and Protected Persons in Egypt, Order of 29 March 1950, I.C.J. Reports 1950*, p. 59; *Electricité de Beyrouth Company, Order of 29 July 1954, I.C.J. Reports 1954*, p. 107; *Aerial Incident of 27 July 1955 (United Kingdom* v. *Bulgaria), Order of 3 August 1959,*

I.C.J. Reports 1959, p. 264; *Aerial Incident of 27 July 1955 (United States of America* v. *Bulgaria), Order of 30 May 1960, I.C.J. Reports 1960*, p. 146; *Barcelona Traction, Light and Power Company, Limited, Order of 10 April 1961, I.C.J. Reports 1961*, p. 9; *Trial of Pakistani Prisoners of War, Order of 15 December 1973, I.C.J. Reports 1973*, p. 347; *Border and Transborder Armed Actions (Nicaragua* v. *Costa Rica), Order of 19 August 1987, I.C.J. Reports 1987*, p. 182; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Order of 26 September 1991, I.C.J. Reports 1991*, p. 47; *Border and Transborder Armed Actions (Nicaragua* v. *Honduras), Order of 27 May 1992, I.C.J. Reports 1992*, p. 222; *Passage through the Great Belt (Finland* v. *Denmark), Order of 10 September 1992, I.C.J. Reports 1992*, p. 348; *Maritime Delimitation between Guinea-Bissau and Senegal, Order of 8 November 1995, I.C.J. Reports 1995*, p. 423; *Vienna Convention on Consular Relations (Paraguay* v. *United States of America), Order of 10 November 1998, I.C.J. Reports 1998*, p. 426; *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Burundi), Order of 30 January 2001, I.C.J. Reports 2001*, p. 3; *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Rwanda), Order of 30 January 2001, I.C.J. Reports 2001*, p. 6).

5. There is a comparable, and analogous, practice relating to discontinuance upon the agreement of the parties, removal from the List being effected by order. Among the many examples are *Delimitation of the Territorial Waters between the Island of Castellorizo and the Coasts of Anatolia, Order of 26 January 1933, P.C.I.J., Series A/B, No. 51*, p. 4; *Compagnie du Port, des Quais et des Entrepôts de Beyrouth and Société Radio-Orient, Order of 31 August 1960, I.C.J. Reports 1960*, p. 186; *Certain Phosphate Lands in Nauru (Nauru* v. *Australia), Order of 13 September 1993, I.C.J. Reports 1993*, p. 322; *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya* v. *United Kingdom), Order of 10 September 2003, I.C.J. Reports 2003*, p. 149; *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya* v. *United States of America), Order of 10 September 2003, I.C.J. Reports 2003*, p. 152.

6. The Court has also declined to proceed with cases in circumstances other than discontinuance under the Rules. The Permanent Court terminated interim measures proceedings in the *Prince von Pless Administration* case, on the grounds that the request made by Germany in its Application had ceased to have any object (*Order of 11 May 1933, P.C.I.J., Series A/B, No. 54*, p. 150). And in the *Northern Cameroons* case, the Court declined to proceed further with a case for what it saw as reasons of judicial propriety (*Preliminary Objections, Judgment, I.C.J. Reports 1963*, p. 29). In the *Nuclear Tests* cases, the Court did not regard itself as constrained by the fact that Australia and New Zealand

had not, after the French announcement of the conclusion of its testing, discontinued the proceedings under Article 74 of the 1972 Rules. The Court stated that "this does not prevent the Court from making its own independent finding" (*Nuclear Tests (Australia* v. *France), Judgment, I.C.J. Reports 1974*, p. 270, para. 54; *Nuclear Tests (New Zealand* v. *France), Judgment, I.C.J. Reports 1974*, p. 476, para. 57) and it determined that "the object of the claim has been achieved by other means" — i.e., means other than litigation (*Nuclear Tests (Australia* v. *France), Judgment, I.C.J. Reports 1974*, p. 271, para. 55; *Nuclear Tests (New Zealand* v. *France), Judgment, I.C.J. Reports 1974*, p. 476, para. 58).

7. In a pertinent dictum the Court stated that it saw:

> "no reason to allow the continuance of proceedings which it knows are bound to be fruitless. While judicial settlement may provide a path to international harmony in circumstances of conflict, it is none the less true that the needless continuance of litigation is an obstacle to such harmony." (*Nuclear Tests (Australia* v. *France), Judgment, I.C.J. Reports 1974*, p. 271, para. 58; *Nuclear Tests (New Zealand* v. *France), Judgment, I.C.J. Reports 1974*, p. 477, para. 61.)

In both the *Northern Cameroons* and *Nuclear Tests* cases, the Court decided not to adjudicate further and did not issue a formal order.

8. In its Orders of 2 June 1999 (*Legality of Use of Force (Yugoslavia* v. *United States of America), Provisional Measures, Order of 2 June 1999, I.C.J. Reports 1999*, p. 916; *Legality of Use of Force (Yugoslavia* v. *Spain), Provisional Measures, Order of 2 June 1999, I.C.J. Reports 1999*, p. 761) the Court had removed the cases from the List after hearings on provisional measures, on the grounds that the Court manifestly lacked jurisdiction. And, as was recognized in the Judgment at paragraph 32, prior to the formulation of Article 38, paragraph 5, of the Rules of Court, there were cases removed from the List because the application was merely an invitation to the respondent.

9. These were actions by the Court in the exercise of its inherent powers. The precedents on removal from the List cited by the Court — where from the outset no subsisting title of jurisdiction has been disclosed, or where the Court manifestly lacked jurisdiction — do not constitute two exclusive categories within which the Court has to fall if it wishes to exercise its inherent powers in the absence of discontinuance. There is nothing in the case law that so suggests. Indeed, it is hard to know what might be the legal source of a right to remove cases from the List provided only that this would be limited to these two examples.

10. The Court's inherent jurisdiction derives from its judicial character and the need for powers to regulate matters connected with the adminis-

tration of justice, not every aspect of which may have been foreseen in the Rules. It was on such a basis that the Permanent Court had admitted the filing of preliminary objections to jurisdiction even before this possibility was regulated by the Rules of Court. The Court stated that it was "at liberty to adopt the principle which it considers best calculated to ensure the administration of justice" (*Mavrommatis Palestine Concessions, Judgment No. 2, 1924, P.C.I.J., Series A, No. 2*, p. 16). The power of the Court to identify remedies for any breach of a treaty, in a case where jurisdiction was based solely upon the treaty concerned, has been regarded as within the Court's inherent powers in the *Corfu Channel* case (*Assessment of Amount of Compensation, Judgment, I.C.J. Reports 1949*, p. 244) and in the *LaGrand (Germany* v. *United States of America)* case (Memorial of the Federal Republic of Germany, Vol. I, 16 September 1999, para. 3.60).

11. The very occasional need to exercise inherent powers may arise as a matter *in limine litis*, or as a decision by the Court not to exercise a jurisdiction it has, or in connection with the conduct or the merits of a case. The judges who jointly dissented in the *Nuclear Tests* cases did not challenge the existence of such inherent powers. They asserted that their use "must be considered as highly exceptional and a step to be taken only when the most cogent considerations of judicial propriety so require" (*Nuclear Tests (Australia* v. *France), Judgment, I.C.J. Reports 1974*, p. 322, para. 22, joint dissenting opinion). Understandably, these judges were particularly concerned that the exercise of the power to decide *proprio motu* should not be exercised without affording an applicant the opportunity to submit counter arguments, as this was not consonant with the due administration of justice. In the present instance, the issue of whether the case should be removed from the List was fully canvassed before the Court.

12. Thus the real question is not whether the Applicant has or has not "discontinued" the case, nor whether the present circumstances are exactly identical to the few examples where the Court itself has removed a case from the List (examples which will, in their turn, have been "new" at the relevant time and not falling into any previously established category). The question is whether the circumstances are such that it is reasonable, necessary and appropriate for the Court to strike the case off the List as an exercise of inherent power to protect the integrity of the judicial process.

I believe the answer is in the affirmative.

13. The starting point for discontinuance is Article 38, paragraph 2, of the Rules of Court, whereby the applicant "shall specify as far as possible the legal grounds upon which the jurisdiction of the Court is said to be based". The Court may, in certain circumstances, allow these grounds of jurisdiction to be enlarged, and it may also occur that an applicant later prefers to proceed on the basis of one specified ground rather than another. Nonetheless, for all the flexibility built in to Article 38, para-

graph 2, of the Rules, the obligation contained in it is a continuing one. An applicant which on Monday specifies two bases of jurisdiction for the case it wishes the Court to decide, and on Thursday informs the Court that these are not, after all, grounds on which it relies, cannot be said on Saturday to be in conformity with Article 38, paragraph 2. It has put itself out of conformity with Article 38, paragraph 2, and the fact that it at the same time declines to "discontinue" the case under Article 88 or 89 of the Rules is irrelevant to that fact.

14. No more is the position of the Applicant who resiled from specified heads of jurisdiction without proffering others rendered in compliance with the Rules by virtue of asking the Court "to decide on its jurisdiction" in the light of these changes of position (Judgment, para. 28). Such a request is totally outside of the contemplation of the Rules. Yet this is what has occurred in this case. On 24 April 1999 the then Federal Republic of Yugoslavia filed its Application instituting proceedings against various States, invoking as the basis of the Court's jurisdiction Article 36, paragraph 2, of the Statute of the Court, as well as Article IX of the Convention on the Prevention and Punishment of the Crime of Genocide. On 20 December 2002, Serbia and Montenegro formally stipulated that it was not a party to the Statute of the Court before 1 November 2000 — and that at the time of its initial Application, it was not bound by the Genocide Convention.

15. Having thus put itself in a position incompatible with Article 38, paragraph 2, of the Rules, Serbia and Montenegro did not inform the Court it was discontinuing the case under Article 89 of the Rules, but rather "asked the Court to decide on its jurisdiction". It was in fact in no position to make such a request of the Court, and these events alone are sufficient, in my view, for the Court to have used its inherent powers to ensure orderly conduct of its judicial function, and to have removed the cases from the List.

16. In the event, the disorderly nature of the course now being followed by Serbia and Montenegro was compounded. In response to its initial claims on the merits against the various respondent States, in the eight cases allowed to proceed by the Court beyond the initial hearings on provisional measures, preliminary objections were lodged. For the ensuing three years no response was made to these objections — and indeed, when extremely brief Written Observations were eventually made, they did not even attempt to counter or otherwise respond to the substantive arguments contained in the preliminary objections of the Respondents. Instead, the Applicant resiled from its previously stated grounds of jurisdiction and simply suggested that "the Court decide". This incoherent manner of proceeding is not, in my view, compatible with sound judicial procedures, which are designed to be fair to all parties concerned, and it provided further grounds for which the appropriate response of the Court would have been to remove the cases from the List.

17. The regrettable history of events in this case falls within the circumstances described by the Court in the *Northern Cameroons (Cameroon* v. *United Kingdom)* case:

> "There are inherent limitations on the exercise of the judicial function which the Court, as a court of justice, can never ignore. There may thus be an incompatibility between the desires of an applicant, or, indeed, of both parties to a case, on the one hand, and on the other hand the duty of the Court to maintain its judicial character. The Court itself, and not the parties, must be the guardian of the Court's judicial integrity." (*Preliminary Objections, Judgment, I.C.J. Reports 1963*, p. 29.)

* * *

18. In paragraph 39 of the Judgment, the Court states that it "cannot decline to entertain a case simply because of a suggestion as to the motives of one of the parties or because its judgment may have implications in another case". Some observations in response to this statement have been made in paragraph 12 of the joint declaration of seven judges. In that context it is also necessary to make some observations on the remarkable attention given by the Court to Article 35, paragraph 2, of the Statute. This provision had, of course, never been invoked by the Applicant during the period when it relied on its original grounds of jurisdiction. The Applicant's irregular request of 20 December 2002 to the Court was "to decide on its jurisdiction considering the pleadings formulated in these Written Observations". These Written Observations contained no invocation of Article 35, paragraph 2, as an alternative ground of jurisdiction — yet, going beyond what the Applicant requested in the present case, the Court has devoted some 23 paragraphs to laying the grounds for a finding that Article 35, paragraph 2, of the Statute could not have been an alternative basis for allowing access to the Court in respect of the Genocide Convention so far as Serbia and Montenegro is concerned. This exercise was clearly unnecessary for the present case. Its relevance can lie, and only lie, in another pending case. I believe the Court should not have entered at all upon this ground in the present case.

* * *

19. Because I am of the firm view that grounds *ratione personae* should not have been chosen for the disposition of this case (for reasons elaborated in the joint declaration of seven judges), it is not my intention here to offer my own views as to the arguments that the Court advances to support its findings on this ground. It suffices to say that, while General Assembly resolution 55/12 of 1 November 2000, admitting the

Federal Republic of Yugoslavia as a new State, necessarily clarifies the legal situation *thereafter*, it remains debatable whether "from the vantage point from which the Court now looks at the legal situation", the "new development in 2000 . . . has clarified the thus far amorphous legal situation concerning the status of the Federal Republic of Yugoslavia vis-à-vis the United Nations" *at the relevant time* (Judgment, para. 78).

20. It was said by Judge Lachs in 1992 that, while the various major organs of the United Nations do each have their various roles to play in a situation or dispute, they should act

> "in harmony — though not, of course, in concert — and that each should perform its functions with respect to a situation or dispute, different aspects of which appear on the agenda of each, without prejudicing the exercise of the other's powers" (*Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya* v. *United Kingdom), Provisional Measures, Order of 14 April 1992, I.C.J. Reports 1992*, p. 27, separate opinion of Judge Lachs).

The Court, in purporting to find an *ex post facto* clarification of the situation as it was in 1992-2000, notwithstanding that the General Assembly and Security Council had in all deliberation felt the objectives of the United Nations were best met by legal ambiguity, seems to have ignored that wise dictum.

(Signed) Rosalyn HIGGINS.

SEPARATE OPINION OF JUDGE KOOIJMANS

Reason for adding separate opinion to joint declaration — Issue of prima facie jurisdiction in 1999 Orders on provisional measures — Position of Yugoslavia in period 1992-2000 not substantiated in Judgment — Implication for other pending cases in which Applicant is party — Consistency with earlier case law ignored by the Court.

Options open to the Court — Dismissal in limine litis *— Inconsistency of Applicant's behaviour with regard to jurisdictional grounds — Application no longer meets requirement of Article 38, paragraph 2, of Rules of Court — Inherent powers of the Court to strike case from General List — Judicial policy and sound administration of justice.*

1. With full conviction, I have subscribed to the joint declaration of seven members of the Court. I strongly feel that the Court, in the present Judgment, has failed to meet the criteria for a sound judicial policy, as spelled out in paragraph 3 of the joint declaration, by basing itself on the argument that Serbia and Montenegro has no access to the Court, and that the Court consequently lacks jurisdiction *ratione personae*.

2. My present point of view may seem slightly surprising to those who remember the separate opinion I appended to the Court's Orders of 2 June 1999 on provisional measures in the same cases. There, I said that the Court's reasoning in basing itself on prima facie lack of jurisdiction *ratione temporis* was flawed from a logical point of view (*Legality of Use of Force (Yugoslavia* v. *Belgium), Provisional Measures, I.C.J. Reports 1999 (I)*, p. 173, para. 2).

I was of the view that the decisions taken in 1992 by the competent organs of the United Nations, with regard to the continued membership of the Federal Republic of Yugoslavia and the events which had taken place thereafter, had raised serious doubts as to whether the Federal Republic of Yugoslavia was capable of accepting the compulsory jurisdiction of the Court as a party to the Statute, and that such doubts as a matter of logic take precedence over other controversies with regard to the Court's jurisdiction. I therefore felt that, in respect of its finding that it had no prima facie jurisdiction, the Court should have based itself on the argument that the Applicant had doubtful *locus standi*, and thus that there was a lack of jurisdiction *ratione personae*, rather than on the ground of lack of jurisdiction *ratione temporis*. (I agreed with the Court's finding that with regard to the Genocide Convention it had no prima

facie jurisdiction *ratione materiae*.)

3. The Court took an approach different to the one I had suggested. It opted for an approach that, in my view, was defensible and legally sound, even if I preferred another approach from a logical point of view (paragraph 30 of my opinion). The approach taken by the Court in 1999 has now been abandoned in favour of the one suggested by me at the time (see Judgment, para. 45). Far from being elated by this change of approach, however, I feel concerned for a number of reasons, which are mentioned in the joint declaration and elaborated upon in the following paragraphs.

4. First, in 1999, I certainly did not assume that the issue of the Court's jurisdiction *ratione personae* was an open and shut case. I explicitly stated: "[n]ot for a moment do I contend that the Court already at the present stage of the proceedings should have taken a definitive stand on what I called earlier a thorny question" (*Legality of Use of Force (Yugoslavia* v. *Belgium), Provisional Measures, I.C.J. Reports 1999 (I)*, p. 178, para. 21). I went on to refer to the dossier on the Federal Republic of Yugoslavia's continued membership of the United Nations as being full of legal complications, and was of the opinion that a thorough analysis and careful evaluation of the Federal Republic of Yugoslavia's status was required at a later stage of the proceedings (*ibid*, p. 178, paras. 21 and 22). I am, however, not persuaded by the Court's conclusion in the present Judgment that this analysis and evaluation have convincingly demonstrated that the events of 2000 have "clarified the thus far amorphous legal situation concerning the status of the Federal Republic of Yugoslavia vis-à-vis the United Nations" (para. 78). Although this finding is undoubtedly correct as far as the situation after the admission of the Federal Republic of Yugoslavia to the United Nations is concerned (this admission did indeed bring to an end its *sui generis* position vis-à-vis the United Nations), the Judgment does not make clear what the legal effects of this "amorphous" situation were in the period 1992-2000. The reader is left with the statement — in itself not uncontroversial — that the *sui generis* position of the Federal Republic of Yugoslavia cannot have amounted to its membership in the Organization (para. 77).

5. The Court's finding does not seem to be based on a thorough analysis and careful evaluation of, *inter alia*, the legal effects of the statements made and positions taken by the Federal Republic of Yugoslavia before 2000, in particular its note of 27 April 1992 to the United Nations, in which it — admittedly on the presumption of the continuity of the "international personality of Yugoslavia" — unilaterally committed itself to

fulfil all the rights conferred on, and obligations assumed by, the Socialist Federal Republic of Yugoslavia in its international relations, including its membership in all international organizations and participation in international treaties ratified or acceded to by Yugoslavia. Have these commitments become meaningless (at least partially), merely as a result of its admission to the United Nations as a new Member and the negation of the presumption of continuity implicit therein; and if so, on what grounds? Have the "thick clouds which have packed around Yugoslavia's membership in the United Nations" (an expression I used in my 1999 opinion, para. 27) been fully dissipated by the Federal Republic of Yugoslavia's belated decision to act as a successor State to the Socialist Federal Republic of Yugoslavia, leaving it in a legal vacuum for the period 1992-2000 as far as its relationship vis-à-vis the United Nations and thus its participation in certain treaties — in particular the Genocide Convention — is concerned? In this respect, the Judgment does not give the reader much by way of clarification.

6. Second, as regards the potential impact of the 1999 Orders on other cases before the Court, in particular the 1993 case concerning the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro)*, it deserves mention that in 1999 both the Applicant and the Respondents (with the possible exception of Portugal) considered themselves to be party to the Genocide Convention, which had been found by the Court in 1996 to be the only basis of jurisdiction in the *Genocide Convention* case. An impact of the orders on provisional measures in the instant cases on the *Genocide Convention* case was therefore not foreseeable and — to say the least — not very probable.

7. All this changed, however, when in 2000 a new Government came into power in Belgrade. This Government no longer considered the Federal Republic of Yugoslavia to be the continuation of the former Socialist Federal Republic of Yugoslavia, and it decided to apply for membership of the United Nations as a successor State. Moreover, it was of the view that the Federal Republic of Yugoslavia, at the time of its inception in 1992, had not been a party to the Genocide Convention, but only became a party after its accession to the Convention on 6 March 2001.

8. These new perceptions in Belgrade led the Government to submit an Application to the Court containing a Request for Revision of the 1996 Judgment on preliminary objections in the *Genocide Convention*

case on the basis of the "newly discovered facts" mentioned in the previous paragraph.

The Court gave its decision rejecting the Federal Republic of Yugoslavia's Application for Revision in a Judgment dated 3 February 2003, in which I did not participate. As recalled in paragraph 10 of the joint declaration, the Court found that "resolution 47/1 did not *inter alia* affect the Federal Republic of Yugoslavia's right to appear before the Court . . . under the conditions laid down by the Statute", and that the Federal Republic of Yugoslavia's *sui generis* position vis-à-vis the United Nations during the period 1992-2000 cannot have been changed retroactively by its admission to the United Nations in 2000 (*Application for Revision of the Judgment of 11 July 1996 in the Case concerning* Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina *v.* Yugoslavia), Preliminary Objections *(Yugoslavia* v. *Bosnia and Herzegovina), I.C.J. Reports 2003*, p. 31, paras. 70 and 71).

9. The arguments made by Serbia and Montenegro in the *Application for Revision* case and in the present cases are virtually identical, and thus establish a close link between the *Genocide Convention* case and the present cases. Such a link did not exist in previous phases of the proceedings in these cases. It is, therefore, all the more remarkable that, in spite of the fact that this link is now undeniable, the Court, in its present Judgment, has chosen an approach which is not in line with the approach taken in 1999 and 2003 and which inevitably has implications for the *Genocide Convention* case.

The Court's statement that it "cannot decline to entertain a case simply . . . because its judgment may have implications in another case" (Judgment, para. 39) may be correct in general terms, but must be deemed to lack the prudence and care which are called for in situations where a variety of options exists.

10. Third, the decisions taken by the Court in the 1999 Orders on provisional measures and in the 2003 Judgment in the *Application for Revision* case and its reasoning therein are part of the Court's case law. As we say in the joint declaration: "[c]onsistency is the essence of legal reasoning". In my view, this consistency in reasoning in the Court's case law is of paramount importance and dwarfs any misgivings I personally may have or may have had with regard to each and every argument used, as long as I do not consider them legally untenable.

11. Although I do not consider the Court's reasoning in the instant cases legally untenable, I have, in some respects, serious doubts as to its correctness; moreover, I find it judicially unsound for the reasons given in the joint declaration and in the preceding paragraphs. What seemed to me to be a logical ground for determining lack of *prima facie jurisdiction*

does not automatically qualify as a proper ground for the *definitive* determination of the issue of jurisdiction.

* * *

12. The views expressed in my separate opinion appended to the 1999 Orders on provisional measures and my perception of them in the light of today's circumstances are, however, not the only reason why I deemed it necessary to add a separate opinion to the joint declaration. I also wish to indicate which of the options open to the Court and referred to in paragraph 2 of the joint declaration would, in my view, have been the better one.

13. These options were three in number. The first is the one chosen by the Court in its Judgment and is based on its jurisdictional considerations *ratione personae*. The second is the approach followed by the Court in 1999, which was founded on a lack of prima facie jurisdiction *ratione temporis* and *ratione materiae*.

The third option would have been dismissal of the case *in limine litis*. This option is explicitly rejected in the Judgment, but it would have been my preference. I therefore find it useful to set out my views; they are not necessarily shared by other colleagues who have signed the joint declaration and who might have chosen the second option, which is also plausible and conceivable for good reasons but with regard to which the Court has not explicitly expressed itself.

14. The option of dismissal *in limine litis* logically precedes the other two and it is therefore with good reason that the Court has dealt with it first. Similarly, the relevant question has correctly been defined as

> "whether in the light of the assertions by the Applicant . . . coupled with the contentions of each of the respondent States, the Court should take a decision to dismiss the case *in limine litis*, without further entering into the examination of the question whether the Court has jurisdiction under the circumstances" (Judgment, para. 29).

15. I do not intend to deal with all the arguments given by the Court in the relevant part of the Judgment (paras. 27-43), which contain mainly a reply to the contentions of the Respondents. In a number of respects, I agree with what is said by the Court; that is true particularly when it states: "in certain circumstances the Court may of its own motion put an end to proceedings in a case" (para. 32). I am, however, of the view that the Court has refrained from exercising this *proprio motu* competence in a well-considered way, and regrettably has confined itself first and foremost to responding to the arguments of the Parties in order to ultimately

conclude that "[f]or all these reasons, [it] cannot remove the cases . . . from the [General] List, or take any decision putting an end to those cases *in limine litis*" (para. 43). Though the Court explicitly stated that, apart from the arguments of the Parties, it would also consider "any other legal issue which it deems relevant" (para. 26), there is hardly any evidence that it has done so. In the following, I will try to demonstrate that such an approach would nevertheless have been the most appropriate one.

16. In its final submissions, Serbia and Montenegro asked the Court to "adjudge and declare on its jurisdiction *ratione personae* in the present cases" (CR 2004/23, p. 38). Such a request is highly unusual. Normally, the applicant asks the Court to find *that* it has jurisdiction, not *whether* it has jurisdiction.

17. The first time that Serbia and Montenegro asked the Court to decide *on* its jurisdiction was when it submitted its Written Observations on the preliminary objections of the Respondents on 20 December 2002. In its Observations, Serbia and Montenegro summarily stated that, at the time of the filing of its Applications in 1999, it had neither been a party to the Statute nor to the Genocide Convention, thereby implying that the Court could not base its jurisdiction on either Article 36, paragraph 2, of the Statute or Article IX of the Genocide Convention, which were the bases of jurisdiction it had invoked in its 1999 Applications.

18. Serbia and Montenegro explicitly stated in a letter to the Court, dated 28 February 2003, that its Written Observations did not represent a notice of discontinuance, and reiterated its request to decide on the Court's jurisdiction "considering the pleadings formulated in the Written Observations". What is striking — although perhaps not surprising in view of the litigation tactics of Serbia and Montenegro with regard to the various cases before the Court in which it is a party, as either applicant or respondent — is that these Observations did not in any way refer to an alternative basis of jurisdiction replacing the ones presented in 1999 but no longer maintained by the Applicant.

19. It was only during the oral pleadings that the Applicant raised the "key question" whether the *sui generis* position vis-à-vis the United Nations (mentioned by the Court in the Judgment in the *Application for Revision* case of 3 February 2003 and thus three weeks before the sending of the letter to the Court) could have provided the link between the new State and international treaties, in particular the Statute of the Court and the Genocide Convention. In this respect, it is noteworthy that the Agent for Serbia and Montenegro did not give any suggestion as to how this could have happened. He merely stated that the question required a definitive answer and that only a decision of the Court could bring clarity. "A judgment on jurisdiction based on the elucidation of the position of the Federal Republic of Yugoslavia between 1992 and 2000 could create an *anchor point of orientation.*" (CR 2004/14, pp. 26-27,

paras. 63-64; emphasis added.)

20. Article 38, paragraph 2, of the Rules of Court states, *inter alia*, that "[t]he application shall specify *as far as possible* the legal grounds upon which the jurisdiction of the Court is said to be based" (emphasis added). The Applications of 29 April 1999 met this requirement by explicitly mentioning Article 36, paragraph 2, of the Statute and Article IX of the Genocide Convention (supplemented in the cases against Belgium and the Netherlands by letter of 12 May 1999, referring to compromissory clauses in two bilateral conventions of 1930 and 1931 respectively).

In its Written Observations, filed on 20 December 2002, the Applicant abandoned these jurisdictional grounds as being pertinent at the date the Applications were filed without replacing them by another basis for the Court's jurisdiction (the Observations were silent as regards the two bilateral treaties).

21. Therefore, Serbia and Montenegro's Applications, as supplemented by its Written Observations of 20 December 2002, no longer meet the first requirement of Article 38, paragraph 2, of the Rules of Court. That fact in itself, however, does not provide the Court with a ground to remove the cases from the List. The provision that the Application shall specify the legal grounds of jurisdiction was included in 1936; in order to distinguish the requirements of paragraph 2 from those of paragraph 1, which were prescribed by the Statute itself, the words "as far as possible" were used (see G. Guyomar, *Commentaire du Règlement de la Cour internationale de Justice*, 1983, pp. 234 *et seq.*). In contrast to the requirements of paragraph 1, non-compliance with those of paragraph 2 does not lead *eo ipso* to non-admissibility. These requirements "were imposed on the Parties by the Court simply because they were helpful to it, but represented a mere recommendation" (*ibid.*, p. 235 *[translation by the Registry]*). Likewise, Rosenne is of the view that "an application will not be rejected *in limine* only because such specification [of the jurisdictional grounds] is omitted" (*The Law and Practice of the International Court 1920-1996*, 1997, p. 705).

22. Serbia and Montenegro's contention that only discontinuance in conformity with Articles 88 and 89 of the Rules of Court may yield a removal of a case from the List without a judgment on jurisdiction or on the merits (CR 2004/14, p. 18, para. 29) is, however, not correct. The fact that the Rules only speak of removing a case from the List by unilateral action of the applicant (Art. 89) or joint action by the parties (Art. 88) cannot deprive the Court of its inherent power, as master of its own procedure, to strike *proprio motu* a case from the List. This is also recognized by Rosenne who, in this respect, refers to the general powers of the Court under Articles 36 and 48 of the Statute (*op. cit.*, p. 1478). This

power is not related to the intention of the parties but to the judicial task of the Court. This is borne out by the Court's reasoning in the Orders in the cases brought by the Federal Republic of Yugoslavia against Spain and the United States of America, where it said that

> "within a system of consensual jurisdiction, to maintain on the General List a case upon which it appears certain that the Court will not be able to adjudicate on the merits would most assuredly not contribute to the *sound administration of justice*" (*Legality of Use of Force (Yugoslavia* v. *Spain), Provisional Measures, I.C.J. Reports 1999 (II)*, p. 773, para. 35; emphasis added).

Such power has to be used sparingly and only as an instrument of judicial policy to safeguard the integrity of the Court's procedure. The present cases, however, are without precedent and can truly be called exceptional.

23. The Court was, in my opinion, perfectly entitled to issue such an order in the instant cases on the basis of the fact that the Applicant has not provided the Court with any plausible information as to the basis of its jurisdiction. It is not for the Court to ascertain in the preliminary phase of a case whether it has jurisdiction if the applicant fails to substantiate in any persuasive manner what the basis for that jurisdiction could be, and after it has explicitly admitted that the initial grounds it invoked are no longer valid. Nor is it the Court's task to provide a party, which asks for the elucidation of an observation made by the Court in a judgment in another case to which it was also a party, with "an anchor point of orientation", as this would be tantamount to rendering an advisory opinion or giving an interpretation of a judgment in circumstances and under conditions not warranted by the Statute.

24. It is incompatible with the respect due to the Court for a party not to provide it with any substantive argument for the speculation that it might have jurisdiction while explicitly withdrawing the previously adduced jurisdictional grounds. It is not in conformity with judicial propriety and a sound judicial policy to render a fully reasoned judgment on jurisdiction when the Applicant bases its request to do so on grounds which can only be called inadequate. The Applicant can, therefore, be held to its statement that there are no recognized or generally accepted grounds of jurisdiction.

25. In the second round of the oral pleadings, the Agent for France stated that

> "the party against whom the application is brought is not required to prove that there is no basis for jurisdiction, which would require it — and it would be absurd to ask this of it — as a matter of course to examine all possible bases" (CR 2004/21, p. 13, para. 22).

What is true for the Respondent is also true for the Court and even more so. The fact that the Court has the duty under certain circumstances to ascertain *proprio motu* that it *has* jurisdiction cannot, by *a contrario* reasoning, be turned into an obligation to explore grounds for its jurisdiction which have not been invoked by the Applicant. As Rosenne states:

> "There can be no doubt that the choice of a title of jurisdiction is as much a political act as a decision to institute proceedings, and the Court is following its usual attitude when faced with political questions of that character not to substitute itself for the party concerned. It is for this reason that a principle such as *curia jura novit* cannot appropriately be applied by the Court *proprio motu* to substitute a title of jurisdiction which has not been invoked for another . . ." (*Op. cit.*, p. 956.)

Neither does the Court have to rule on a title of jurisdiction which has not been claimed.

26. In view of the fact that the Applicant has failed to demonstrate, and has not even made an effort to demonstrate, that the Court has jurisdiction, I am of the opinion that the Court should have decided *in limine litis* to remove the eight cases from the General List.

(Signed) Pieter H. KOOIJMANS.

SEPARATE OPINION OF JUDGE ELARABY

The issue of FRY membership in the United Nations — Access to the Court under Article 35, paragraph 1 — Scope of reference in Article 35, paragraph 2, to "treaties in force" — The Vienna Convention on Succession of States in respect of Treaties — The Genocide Convention.

I. Introductory Remarks

In addition to the joint declaration, which reflects my disagreement with the grounds which led the Court to conclude that it had no jurisdiction in the instant case, I deem it necessary to elaborate further on some aspects. At the outset, I would like to emphasize that regardless of the conclusion that the Court reaches on the issue of jurisdiction, and notwithstanding the fact that the Judgment is confined to deciding on jurisdiction, the Court, as the principal judicial organ of the United Nations, is always called upon to uphold the law of the Charter. The Court, however, confined its conclusion in the instant case to noting, in paragraph 115 of the Judgment, that:

> "When, however, as in the present case, the Court comes to the conclusion that it is without jurisdiction to entertain the claims made in the Application, it can make no finding, nor any observation whatever, on the question whether any such violation has been committed or any international responsibility incurred."

On this point I am inclined to favour the balance reached by the Court in the *Fisheries Jurisdiction* case, where it held that:

> "55. There is a fundamental distinction between the acceptance by a State of the Court's jurisdiction and the compatibility of particular acts with international law. The former requires consent. The latter question can only be reached when the Court deals with the merits, after having established its jurisdiction and having heard full legal argument by both parties.
>
> 56. Whether or not States accept the jurisdiction of the Court, they remain in all cases responsible for acts attributable to them that violate the rights of other States." (*Fisheries Jurisdiction (Spain* v. *Canada), Jurisdiction of the Court, Judgment, I.C.J. Reports 1998,* p. 456.)

II. Access to the Court under Article 35, Paragraph 1

1. The Court finds that it has no jurisdiction in this case because the Federal Republic of Yugoslavia (FRY)[1] did not have access to the Court at the time it filed its Application. The first ground upon which the Court makes this finding is Article 35, paragraph 1, of the Statute of the Court.

2. Article 35, paragraph 1, provides that "[t]he Court shall be open to the States parties to the present Statute". Under Article 93, paragraph 1, of the United Nations Charter, all "Members of the United Nations are *ipso facto* [States] parties". The Court holds that the FRY was not a State party to the Statute because the FRY was not a Member of the United Nations at the time it filed its Application in the instant case, and therefore, in the view of the Court, the Court was not "open" to the FRY. Because, in my view, the FRY *was* a Member of the United Nations when it filed its Application, I disagree.

3. Prior to its fragmentation, the Socialist Federal Republic of Yugoslavia (SFRY) consisted of six republics: Serbia, Croatia, Bosnia and Herzegovina, Macedonia, Slovenia, and Montenegro. On 25 June 1991, Croatia and Slovenia both declared independence, followed by Macedonia on 17 September 1991, and Bosnia and Herzegovina on 6 March 1992. On 22 May 1992, Croatia, Slovenia and Bosnia and Herzegovina were admitted as Members of the United Nations. The "Former Yugoslav Republic of Macedonia" was admitted to membership in the United Nations on 8 April 1993.

4. The FRY came into being on 27 April 1992. On that date, a joint session of the National Assembly of the Republic of Serbia and the Assembly of the Republic of Montenegro proclaimed a new constitution of the "Federal Republic of Yugoslavia", and also adopted a Declaration. The preamble of the Declaration claimed to reflect the common will of the citizens of Serbia and Montenegro "to stay in the common State of Yugoslavia", and also provided that:

> "The Federal Republic of Yugoslavia, continuing the state, international, legal and political personality of the [Socialist Federal Republic] of Yugoslavia, shall strictly abide by all the commitments that the Socialist Federal Republic of Yugoslavia assumed internationally.
>
> . . . . . .
>
> Remaining bound by all obligations to international organisations

[1] On 4 February 2003, the Federal Republic of Yugoslavia officially changed its name to "Serbia and Montenegro" (FRY-SM).

> and institutions whose member it is, the Federal Republic of Yugoslavia shall not obstruct the newly formed states to join these organisations and institutions, particularly the United Nations and its specialised agencies."[2]

5. The Declaration was brought to the attention of the United Nations by a Note of the same date informing the Secretary-General that

> "[s]trictly respecting the continuity of the international personality of Yugoslavia, the Federal Republic of Yugoslavia shall continue to fulfil all the rights conferred to, and obligations assumed by, the Socialist Federal Republic of Yugoslavia in international relations, including its membership in all international organizations and participation in international treaties ratified or acceded to by Yugoslavia"[3].

At that time, April 1992, no resolution purporting to oppose or undermine the FRY's assertion was adopted by any competent United Nations organ and the FRY's membership was not challenged. This fact suggests that the FRY was at the time considered to be a United Nations Member.

6. In September 1992, the Security Council and the General Assembly each adopted a resolution declaring "that the Federal Republic of Yugoslavia (Serbia and Montenegro) cannot continue automatically the membership of the former Socialist Federal Republic of Yugoslavia in the United Nations"[4]. These resolutions did not suspend the membership of the FRY in the United Nations in accordance with Article 5 of the Charter. Nor did either resolution have the effect of expelling the FRY from the United Nations in accordance with Article 6 of the Charter. Earlier, the Council, on 30 May 1992, had adopted a resolution[5] imposing economic and other sanctions on the FRY — meaning that the conditions for invoking the provisions of Article 6 existed — yet the FRY was not expelled.

7. This fact was recognized by the United Nations Legal Counsel, who on 29 September 1992, addressed a letter to the Permanent Representatives of Croatia and Bosnia and Herzegovina, in which the "considered

[2] Declaration of the Joint Session of the SFRY, Republic of Serbia and Republic of Montenegro Assemblies, 27 April 1992, United Nations doc. S/23877, Annex, p. 2.

[3] United Nations doc. A/46/915, Ann. I, p. 2.
[4] United Nations docs. S/RES/777 and A/RES/47/1.
[5] United Nations doc. S/RES/757.

view of the United Nations Secretariat regarding the practical consequences of the adoption by the General Assembly of resolution 47/1" was stated to be as follows:

> "While the General Assembly has stated unequivocally that the Federal Republic of Yugoslavia (Serbia and Montenegro) cannot automatically continue the membership of the former Socialist Federal Republic of Yugoslavia in the United Nations and that the Federal Republic of Yugoslavia (Serbia and Montenegro) should apply for membership in the United Nations, the only practical consequence that the resolution draws is that the Federal Republic of Yugoslavia (Serbia and Montenegro) shall not *participate* in the work of the General Assembly. It is clear, therefore, that representatives of the Federal Republic of Yugoslavia (Serbia and Montenegro) can no longer *participate* in the work of the General Assembly, its subsidiary organs, nor conferences and meetings convened by it.
>
> On the other hand, the resolution neither terminates nor suspends Yugoslavia's *membership* in the Organization . . . The resolution does not take away the right of Yugoslavia to participate in the work of organs other than Assembly bodies."[6]

8. In addition, the United Nations Secretariat continued to list "Yugoslavia" as a Member of the United Nations after September 1992. "Yugoslavia" also maintained other attributes of membership in the Organization including its flag, seat and nameplate in the General Assembly. The FRY was allowed to maintain the Yugoslav Permanent Mission to the United Nations and to circulate and receive documents. And "Yugoslavia" continued to be listed in the annual "Scale of Assessments" approved by the General Assembly for the contributions of Member States to the United Nations budget[7].

9. Thus, the only practical consequence of the relevant resolutions was that the FRY was unable to participate in the work of the General Assembly and its subsidiary organs, conferences and meetings. They left untouched its relationship with the Security Council and with this Court. As the Court found in the 2003 *Application for Revision* case,

> "Resolution 47/1 did not *inter alia* affect the FRY's right to

[6] United Nations doc. A/47/485, Annex, pp. 2-3; original emphasis.

[7] In a series of resolutions, the General Assembly fixed a new rate of assessment for "Yugoslavia" of 0.11, 0.1025 and 0.10 per cent for the years 1995, 1996 and 1997 respectively (United Nations doc. A/RES/49/19B) and 0.060, 0.034 and 0.026 per cent for the years 1998, 1999 and 2000 respectively (United Nations doc. A/RES/52/215A).

> appear before the Court or to be a party to a dispute before the Court under the conditions laid down by the Statute." (*Application for Revision of the Judgment of 11 July 1996 in the Case concerning* Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina *v.* Yugoslavia), Preliminary Objections *(Yugoslavia* v. *Bosnia and Herzegovina), Judgment, I.C.J. Reports 2003*, p. 31, para. 70.)

Indeed, the FRY actively participated in proceedings before this Court: it responded to claims with counter-claims; it submitted preliminary objections, and it appointed an *ad hoc* judge to participate in the Court's deliberations. All these actions confirmed that the FRY was considered a Member of the United Nations and a party to the Statute.

10. The International Criminal Tribunal for the former Yugoslavia (ICTY), when it also considered the question whether the FRY was a member of the United Nations during this period, reached the same conclusion. It held that:

> "Resolution 47/1 did not deprive the FRY of all the attributes of United Nations membership: the only practical consequence was its inability to participate in the work of the General Assembly, its subsidiary organs, conferences or meetings convened by it. Apart from that, it continued to function as a member of the United Nations in many areas of the work of the United Nations . . . Thus, while the FRY's membership was lost for certain purposes, it was retained for others . . . The proper approach to the issue of the FRY membership of the United Nations in the period between 1992 and 2000 is not one that proceeds on a[n] *a priori,* doctrinaire assumption that its exclusion from participation in the work of the General Assembly necessarily meant that it was no longer a member of the United Nations. As the FRY membership was neither terminated nor suspended by General Assembly resolution 47/1, it is more appropriate to make a determination of its United Nations membership in that period on an empirical, functional and case-by-case basis."[8]

Applying this "functional" approach, the Trial Chamber concluded that "the FRY was in fact a member of the United Nations both at the time of the adoption of the [ICTY] Statute in 1993 and at the time of the commission of the alleged offences in 1999"[9].

11. The FRY's formal admission to the United Nations on 1 Novem-

[8] *Prosecutor* v. *Milan Milutinović,* Case No. IT-99-37-PT, Decision on Motion Challenging Jurisdiction, 6 May 2003, paras. 37-38, *appeal dismissed,* Case No. IT-99-37-AR72.2, Decision of 12 May 2004 (internal citations omitted).

[9] *Ibid.*, para. 39.

ber 2000[10], as was found in the 2003 *Application for Revision* case,

> "*cannot have* changed retroactively the *sui generis* position which the FRY found itself in vis-à-vis the United Nations over the period 1992 to 2000, or its position in relation to the Statute of the Court" (*Application for Revision of the Judgment of 11 July 1996 in the Case concerning* Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina *v.* Yugoslavia), Preliminary Objections *(Yugoslavia* v. *Bosnia and Herzegovina), Judgment, I.C.J. Reports 2003*, p. 31, para. 71; emphasis added).

12. Again the ICTY Chamber reached the same conclusion when it held that:

> "the formal admission of the FRY to membership in 2000 in no way invalidates [the] finding that the FRY retained sufficient indicia of membership during that period to be amenable to the regime of the Security Council resolutions adopted under the United Nations Charter for the maintenance of international peace and security"[11].

13. The Court has now characterized the FRY's *sui generis* position as one that "could not have amounted to its membership in the Organization" (Judgment, para. 77) and held that the FRY's admission to the United Nations in 2000 "did not have and could not have had, the effect of dating back to the time when the Socialist Federal Republic of Yugoslavia broke up and disappeared" *(ibid.)*. This, in my view, lacks a solid legal basis. Whereas the Security Council and General Assembly were acting in a political capacity when the relevant resolutions were adopted, the Court, throughout the various phases of the cases related to the former Yugoslavia, should have consistently stated and applied the appli-

---

[10] On 27 October 2000, the President of the FRY addressed a letter to the Secretary-General requesting admission of the FRY to membership, stating that

> "[i]n the wake of fundamental democratic changes that took place in the Federal Republic of Yugoslavia, in the capacity of President, I have the honour to request the admission of the Federal Republic of Yugoslavia to membership in the United Nations in light of the implementation of Security Council resolution 777 (1992)" (United Nations doc. A/55/528-S/2000/1043, Annex).

As a result, on 1 November 2000, the General Assembly adopted resolution 55/12, stating that "*[h]aving received* the recommendation of the Security Council of 31 October 2000 that the Federal Republic of Yugoslavia should be admitted to membership in the United Nations" and "*[h]aving considered* the application for membership of the Federal Republic of Yugoslavia", it "*[d]ecides* to admit the Federal Republic of Yugoslavia to membership in the United Nations".

[11] *Prosecutor* v. *Milan Milutinovic,* Case No. IT-99-37-PT, Decision on Motion Challenging Jurisdiction, 6 May 2003, para. 44, *appeal dismissed,* Case No. IT-99-37-AR72.2, Decision of 12 May 2004.

cable law. This approach would have yielded an outcome consistent with the law of the Charter and the established practice of the United Nations and, I believe, would have led the Court to find that the FRY was a member of the United Nations when, in 1999, it filed its application in the instant case. Therefore, the Court should have concluded that it was open to the FRY under Article 35, paragraph 1.

III. Access to the Court under Article 35, Paragraph 2

1. The FRY did not invoke Article 35, paragraph 2, of the Court's Statute as a basis for the Court's jurisdiction. The Court decided *proprio motu* to address it[12], holding that the FRY, as a non-party to the Statute, could not invoke a treaty which entered into force after the entry into force of the Statute as a basis for access to the Court under Article 35, paragraph 2. I have explained the reasons for my disagreement with the Court's conclusion that the FRY was not a Member of the United Nations in 1999. However, assuming that it was a non-Member, I also cannot agree that it would not have access to the Court under the provisions of Article 35, paragraph 2.

2. Article 35, paragraph 2, of the Court's Statute provides that:

> "The conditions under which the Court shall be open to other States shall, subject to the special provisions contained in treaties in force, be laid down by the Security Council, but in no case shall such conditions place the parties in a position of inequality before the Court."

3. There are two questions relevant to an Article 35, paragraph 2, examination: first, whether a "treaty in force" may provide a basis for the Court's jurisdiction instead of, rather than in combination with, compliance with the requirements laid down by the Security Council in its resolution 9 of 1946; and second, whether the Genocide Convention can be considered a "treaty in force".

---

[12] Although the Court is free to decide the issues submitted to it by the Parties for reasons other than those advanced by the Parties, it is undesirable as a matter of judicial policy for the Court to raise *proprio motu* a legal argument that is not determinative of one of the Applicant's submissions, unless there are "compelling considerations of international justice and of development of international law which favour a full measure of exhaustiveness" on the matter. Compare *Oil Platforms (Islamic Republic of Iran* v. *United States of America), I.C.J. Reports 2003*, p. 232, para. 27, separate opinion of Judge Higgins ("it is unlikely to be 'desirable' to deal with important and difficult matters, which are gratuitous to the determination of a point of law put by the Applicant in its submissions") with Lauterpacht, *The Development of International Law by the International Court*, 1982, p. 37.

4. In respect of the first question, I agree with the Court's previous finding that

> "proceedings may validly be instituted by a State against a State which is a party to such a special provision in a treaty in force, but is not party to the Statute, and *independently of* the conditions laid down by the Security Council in its resolution 9 of 1946" (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Provisional Measures, Order of 8 April 1993, I.C.J. Reports 1993*, p. 14, para. 19; emphasis added)[13].

5. In regard to the second question, I agree with the Court's previous finding that "Article IX of the Genocide Convention . . . could . . . be regarded prima facie as a special provision contained in a treaty in force [so as to come] prima facie within the jurisdiction *ratione personae* of the Court" *(ibid.)*. The Court now holds, however, that "treaty in force" means a "treaty in force at the time that the Court's Statute came into force", and therefore concludes that the Genocide Convention, having come into force after the Court's Statute, does not give the FRY access to the Court under Article 35, paragraph 2.

6. The Court begins its analysis of Article 35, paragraph 2, by noting that

> "[a]s for the words 'treaties in force', in their natural and ordinary meaning they do not indicate at what date the treaties contemplated are to be in force, and thus they may lend themselves to different interpretations. One can construe those words as referring to treaties which were in force at the time that the Statute itself came into force, as was contended by certain Respondents; or to those which were in force on the date of the institution of proceedings in a case in which such treaties are invoked. In favour of this latter interpretation, it may be observed that the similar expression 'treaties and conventions in force' is found in Article 36, paragraph 1, of the Statute, and the Court has interpreted it in this sense . . . The expression 'treaty or convention in force' in Article 37 of the Statute has also been read as meaning in force at the date proceedings were instituted." (Judgment, para. 100; internal citations omitted.)

---

[13] See also League of Nations, Records of the First Assembly, Meetings of the Committees, Third Committee, Annex 7, *Report Submitted to the Third Committee by M. Hagerup on behalf of the Sub-Committee*, p. 532:

> "The access of other [non-members of the League of Nations] States to the Court will depend *either on* the special provisions of the Treaties in force (for example the provisions of the Treaties of Peace concerning the rights of minorities, labour, etc.) *or else on* a resolution of the Council." (Emphasis added.)

7. Even assuming — without deciding[14] — that the Court is correct in holding that the term "treaties in force" should be given a more restrictive interpretation than the interpretation it is given when it appears in Articles 36 and 37, in my view the interpretation adopted by the Court — limiting "treaties in force" to treaties in force at the time the Court's Statute came into force — is unduly restrictive.

8. The Court's interpretation of "treaties in force" is primarily based on statements in the *travaux préparatoires* of the Statute of the Permanent Court of International Justice (PCIJ), which contained the original, and substantially identical, provision. These statements suggest to the Court that when considering the term "treaties in force" in Article 35, paragraph 2, the provision's drafters had in mind the peace treaties with former First World War enemy States (who were not Members of the League of Nations and would otherwise not have access to the Court) concluded before the entry into force of the Court's Statute.

9. However, there is evidence from the discussion of the Statute's drafters that such a narrow interpretation is not warranted. The peace treaties were considered to encompass all "Treaties of Peace dealing with the rights of minorities, labour, etc."[15] including any "Treaties other than the German Treaty [that] form[ed] part of the general peace settlement"[16] and provided for judicial dispute settlement. This interpretation was confirmed in 1926 when the Court was considering amendments to the Court's Rules. At this juncture it was stated that Article 35 related to "*situations provided for* by the treaties of peace" (*1926, P.C.I.J., Series D, No. 2, Add., Acts and Documents*, p. 106; emphasis added). And "it was decided . . . not to lay down, once and for all, in what cases" such treaties

[14] The Court's interpretation conflicts with the prior jurisprudence of the Permanent Court in the *Certain German Interests in Polish Upper Silesia* case, in which the Permanent Court impliedly construed the expression "treaties in force" as meaning any treaty in force at the time when the case was brought before the Court *(P.C.I.J., Series A, No. 6)*. See also statement of Registrar Ake Hammarskjöld:

> "The Council's Resolution of May 17th, 1922, would have no bearing on cases submitted to the Court under a general treaty; for any State which was a party to a general treaty might then, without making any special declaration [as required by the Security Council resolution], be a party before the Court. The only case, therefore, in which the Council's resolution applied was that in which a suit was brought before the Court by special agreement." (*1926, P.C.I.J., Series D, No. 2, Add.*, Revision of the Rules of the Court, p. 76.)

[15] League of Nations, Records of the First Assembly, Plenary Meetings, Twentieth Plenary Meeting, Annex A, *Reports on the Permanent Court of [International] Justice Presented by the Third Committee to the Assembly*, 1920, p. 463.

[16] Secretariat of the League of Nations, Memorandum on the Different Questions Arising in Connection with the Establishment of the Permanent Court of International Justice, reprinted in PCIJ, Advisory Committee of Jurists, *Documents Presented to the Committee Relating to Existing Plans for the Establishment of a Permanent Court of International Justice*, 1920, p. 17.

might provide non-League Members access to the Court[17].

10. Indeed, there were numerous treaties and conventions connected with the Peace Settlement of 1919, including labour treaties adopted by the International Labour Conference, treaties regarding the various mandates approved by the Council of the League of Nations, and treaties concerning the protection of minorities[18].

11. By analogy, in the context of the Statute of the International Court of Justice drafted in the aftermath of the Second World War, the Genocide Convention can be considered a treaty connected with the peace settlement. Barely a year after the end of the war, there was already a General Assembly resolution[19] mandating the Economic and Social Council to prepare a draft convention prohibiting genocide as a crime against international law. The Convention was the first post-war treaty in the area of human rights and was considered to be the United Nations' first concrete legal response to the Holocaust. The philosophy, object and purpose of the Convention as a whole are a direct outcome of the tragic events of the Second World War. Thus, when the Convention was drafted, it was stressed that

> "Having regard to the troubled state of the world, it was essential that the convention should be adopted as soon as possible, before the memory of the barbarous crimes which had been committed faded from the minds of men."[20]

12. The fact that the Genocide Convention came into force after the Statute of the Court does not change this conclusion. The PCIJ drafters clearly contemplated that the treaties "in force" under Article 35 included not only those that were already in force, but also treaties granting non-League Members access to the Court which were still in draft form and under negotiation[21].

13. This is confirmed in the Permanent Court's jurisprudence in the *Certain German Interests in Polish Upper Silesia* case *(P.C.I.J., Series A, No. 6)*. In this case, Germany, a non-League Member, was the applicant

---

[17] Report of the Registrar of the Court, reprinted in *1936, P.C.I.J., Series D, No. 2, 3rd Add.*, p. 818: "It was decided . . . not to lay down, once and for all, in what cases declarations were required (question of the Peace Treaties)."

[18] See M. Hudson, *The Permanent Court of International Justice 1920-1942*, 1972, pp. 439-444 (giving examples).

[19] United Nations doc. A/96 (I) (11 December 1946).

[20] United Nations, *Official Records of the General Assembly, Committees, Third Session, Part I*, Sept.-Dec. 1948, Vol. 4, *Report of the Economic and Social Council*, Sixth Committee, Legal Questions, Sixty-third Meeting (1948), p. 5.

[21] Secretariat of the League of Nations, Memorandum on the Different Questions Arising in Connection with the Establishment of the Permanent Court of International Justice, *op. cit.*, p. 17.

and the PCIJ's jurisdiction was derived from the German-Polish Convention relating to Upper Silesia, which was concluded *after* the adoption of the PCIJ Statute. Poland did not dispute the fact that the suit had been duly submitted to the Court under Article 35, and the Court found itself, on the basis of the treaty alone — (Germany had not complied with the conditions laid down by the Council of the League of Nations) — able to exercise jurisdiction over the parties to the case.

14. When the PCIJ considered the revision of its Rules in 1926, Judge Anzilotti explained that the *German Interests* case

> "related to a treaty — the Upper Silesian Convention — *drawn up under the auspices of the League of Nations which was to be considered as supplementary to* [a First World War Peace Treaty,] the Treaty of Versailles. It was therefore possible to include the case in regard to which the Court had then to decide in the general expression 'subject to treaties in force', whilst construing that expression as referring to the peace treaties."[22]

Similarly, being the first major human rights convention drawn up *under the auspices of the United Nations*, the Genocide Convention can be considered *supplementary to* the Second World War peace treaties and consequently comes within the definition of Article 35's "treaties in force" even though it entered into force after the Statute of the Court.

15. As an additional argument, I believe that even if one adopts the Court's interpretation of "treaties in force" as encompassing only those treaties which, like the Peace Treaties, were in force before the Statute of the Court came into force[23], a special, broader interpretation of the expression is appropriate in a case which, like the present case, involves a multilateral treaty of a universal character which is intended to remedy violations of *jus cogens*. On this point, I subscribe to the view of Professor Sienho Yee, that in cases involving *jus cogens*, there is a special need

> "to . . . resolv[e] disputes . . . as soon as possible. As treaties may not override *jus cogens*[24], they should not hinder efforts to remedy violations of *jus cogens*. Accordingly, the phrase 'treaties in force' should be given the broadest scope so as to facilitate any consenting

[22] Minutes of Meeting of the PCIJ on 21 July 1926 on amending its Rules of Court, at *1926, P.C.I.J., Series D, No. 2, Add., Acts and Documents*, p. 105; emphasis added.

[23] The Court notes in paragraph 112 that, in the context of the present Court, there were no such treaties in force prior to the Statute.

[24] Vienna Convention on the Law of Treaties, Art. 53. See also Ian Brownlie, *Principles of Public International Law*, 4th ed., 1990, pp. 512-515.

sovereign State to utilise the Court to resolve any disputes involving *jus cogens*."[25]

16. Thus, even if the PCIJ drafters primarily had in mind the special category of existing peace treaties, to the exclusion of all others, their original intent should give way, in the context of the ICJ Statute, to a broader interpretation of "treaties in force" that includes multilateral treaties addressing *jus cogens* violations which have largely emerged in the post-Second World War era.

17. Because of the overriding importance of such treaties to the progressive development of international law and the maintenance of peace, they are, and should be, subject to a special interpretation. Cf. Article 60, paragraph 5, of the Vienna Convention on the Law of Treaties (non-applicability of treaty termination rules to "provisions relating to the protection of the human person contained in treaties of a humanitarian character"); the Court's Advisory Opinion on *Reservations to the Genocide Convention* (limiting ability of States to enter reservations to the Genocide Convention) (*Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, I.C.J. Reports 1951*, p. 24), and Order on counter-claims in the *Application of the Genocide Convention* case (limiting applicability of reciprocity rules in context of Genocide Convention) (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Counter-Claims, Order of 17 December 1997, I.C.J. Reports 1997*, p. 258, para. 35).

18. In sum, the Genocide Convention and other treaties that either relate to the peace settlement following the Second World War or are aimed at redressing violations of *jus cogens* should be interpreted as "treaties in force" under Article 35, paragraph 2, as long as they are in force at the time an application is instituted before the Court.

IV. Jurisdiction under the Genocide Convention

1. The Court found that the FRY did not have access to the Court and the Court did not therefore consider it necessary to decide whether the FRY was or was not a party to the Genocide Convention at the time it filed its Application. In my view, the FRY did have access to the Court under the provisions of Article 35 and I shall proceed to

[25] S. Yee, "The Interpretation of 'Treaties in Force' in Article 35 (2) of the Statute of the ICJ", 47 *ICLQ* 884, 903 (1998).

examine the Genocide Convention as a basis for the Court's jurisdiction[26].

2. During the period 1992-2000, the treaty obligations of the SFRY extended to each of the successor States. This is true regardless of whether or not the FRY was a member of the United Nations during this period. As the Court notes in paragraph 70, the United Nations Office of Legal Affairs in its "Summary of Practice of the Secretary-General as Depositary of Multilateral Treaties" published in 1996, concluded that the legal effects of General Assembly resolution 47/1 were limited to the framework of the United Nations and did not affect the rules of treaty succession:

> "[A]fter the separation of parts of the territory of the Union of Soviet Socialist Republics (which became independent States), the Union of Soviet Socialist Republics (as the Russian Federation) continued to exist as a predecessor State, and all its treaty rights and obligations continued in force in respect of its territory. The same applies to the Federal Republic of Yugoslavia (Serbia and Montenegro), which remains as the predecessor State upon separation of parts of the territory of the former Yugoslavia. General Assembly resolution 47/1 of 22 September 1992, to the effect that the Federal Republic of Yugoslavia could not automatically continue the membership of the former Yugoslavia in the United Nations . . . was adopted within the framework of the United Nations and the context of the Charter of the United Nations, and not as an indication that the Federal Republic of Yugoslavia was not to be considered a predecessor State."[27]

3. Indeed, during this period, the FRY continued to claim that it was a successor State to the SFRY and that, as such, it was bound by all the treaty obligations of the predecessor State. On 27 April 1992, the FRY submitted a note to the Secretary-General in which it declared explicitly

[26] The FRY argued in relation to all eight Respondents that the Court had jurisdiction *ratione personae* under the Genocide Convention. Because I find that the Court did not have jurisdiction *ratione materiae*, I will not proceed to consider the alternative grounds raised by the FRY in relation to particular respondent parties.

[27] United Nations doc. ST/LEG/8. The passage was later

> "deleted by the Secretariat in response to the objections raised by a number of States that the text was contrary to the relevant Security Council and General Assembly resolutions and the pertinent opinions of the Arbitration Commission of the International Conference for Peace in Yugoslavia" (Judgment, para. 70, citing United Nations docs. A/50/910-S/1996/231, A/51/95-S/1996/251, A/50/928-S/1996/263 and A/50/930-S/1996/260).

that it would respect the obligations assumed by the SFRY:

> "Strictly respecting the continuity of the international personality of Yugoslavia, the Federal Republic of Yugoslavia shall continue to fulfil all the rights conferred to, and obligations assumed by, the Socialist Federal Republic of Yugoslavia in international relations, including its membership in all international organizations and participation in international treaties ratified or acceded to by Yugoslavia."[28]

4. Under applicable rules of international law, the FRY would have succeeded to these treaties even in the absence of such a declaration because a successor State that separates from a predecessor State is not entitled, upon separation, to disavow the treaty obligations of the predecessor State. The entitlement to pick and choose treaty obligations applies only *to newly independent* States in conformity with Article 17, paragraph 1, of the Vienna Convention on Succession of States in respect of Treaties. Article 17, paragraph 1, provides that

> "a newly independent State may, by a notification of succession, establish its status as a party to any multilateral treaty which at the date of the succession of States was in force in respect of the territory to which the succession of States relates".

Article 34 of the Vienna Convention, on the other hand, provides that

> "[w]hen a part or parts of the territory of a State separate to form one or more States, whether or not the predecessor State continues to exist:
>
> *(a)* any treaty in force at the date of the succession of States in respect of the entire territory of the predecessor State continues in force in respect of each successor State so formed[, and]
>
> *(b)* any treaty in force at the date of the succession of States in respect only of that part of the territory of the predecessor State which has become a successor State continues in force in respect of that successor State alone"[29].

5. Thus, there is a difference in international law between a newly independent State and a successor State. A newly independent State is required upon independence to clarify its legal position regarding treaties in conformity with the "clean slate" doctrine codified in Article 17 of the Vienna Convention. In the case of the separation of States, on the other hand, the successor State automatically assumes the treaty obligations of the predecessor.

6. This rule of succession to treaties applies to new States and is

[28] United Nations doc. A/46/915, Ann. I, p. 2.

[29] Vienna Convention on Succession of States in respect of Treaties, Art. 34, para. 1.

entirely independent of the issue of a State's membership in the United Nations. By way of example, when Switzerland was admitted to the United Nations, it was considered a new Member, though not a newly independent State. It did not therefore have to clarify its legal position with respect to treaties. Conversely in the FRY's case, it succeeded to the SFRY's treaty obligations in 1992 regardless of the status of its membership in the United Nations at that time. The existence of the FRY dates back to 1992, not to 2000, and this is a point on which, in my view, the Court should have made the distinction. Oscar Schachter underlined this distinction when he stated that:

> "a separated state which was not a colony is presumed to succeed to the treaty obligations and rights of the predecessor state unless this result would be incompatible with the object of the treaty. The experience thus far with respect to the cases of the former Soviet Union and the former Yugoslavia supports a general presumption of continuity. That presumption would not, however, apply to membership in the United Nations or other general international organizations that provide for the election of new members."[30]

7. Article 34 of the Vienna Convention should be considered reflective of customary law on succession to treaties. It is indisputable that certain provisions in the Vienna Conventions on treaties "are declaratory of customary [international] law" (*Gabčíkovo-Nagymaros Project (Hungary/Slovakia), Judgment, I.C.J. Reports 1997*, p. 62, para. 99)[31] and recent State practice, for instance in respect of the successors of Czechoslovakia and the SFRY, lends support to this proposition in respect of the rules of succession. This is all the more true in cases involving succession to human rights treaties. In the words of my learned colleague Judge Weeramantry,

> "[it] . . . seems to me to be a principle of contemporary international law that there is automatic State succession to so vital a human rights convention as the Genocide Convention . . . [The] reasons [for applying the principle of automatic succession] apply with special force to treaties such as the Genocide Convention . . . leaving no room for doubt regarding automatic succession to such treaties." (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Yugoslavia),*

[30] O. Schachter, "State Succession: The Once and Future Law", 33 *Va. J. Int'l Law* 257 (1992-1993).

[31] See also *Digest of United States Practice in International Law*, 1980, p. 1041 n. 43 (United States State Department Legal Adviser expressing opinion that the rules of the Vienna Convention on Succession of States in respect of Treaties were "generally regarded as declarative of existing customary law".

> *Preliminary Objections, Judgment, I.C.J. Reports 1996 (II)*, pp. 654, 645, separate opinion of Judge Weeramantry; see also *ibid.*, pp. 634-637, separate opinion of Judge Shahabuddeen (recognizing that allowing a suspension of the operation of the Genocide Convention would be incompatible with the object and purpose of the treaty, and others which, like it, exist to safeguard the fundamental rights and freedoms of the individual and endorse the most elementary principles of morality).)

8. When the FRY was formally admitted as a Member of the United Nations in 2000, this did not affect its legal status as successor to the SFRY's treaty obligations. It was admitted as a new Member of the United Nations, but in my view, not as a newly independent State, because its separation from the SFRY and its assumption of the legal obligations as a successor State took place on 27 April 1992.

9. As a result, the letter of 8 December 2000 from the United Nations Legal Counsel to the FRY, in which he stated that, in his view,

> "the Federal Republic of Yugoslavia should now undertake treaty actions, *as appropriate*, in relation to the treaties concerned, if its intention is to assume the relevant legal rights and obligations as a successor State" (*Application for Revision of the Judgment of 11 July 1996 in the Case concerning* Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina *v.* Yugoslavia), Preliminary Objections *(Yugoslavia* v. *Bosnia and Herzegovina), Judgment, I.C.J. Reports 2003*, p. 24, para. 51 (citing Application of Yugoslavia, Ann. 27; emphasis added)

must be read in context: it was a routine letter which the United Nations Secretariat addresses to all new Members regardless of the particular circumstances of their admission. The FRY was a State in existence since 1992 and not a newly independent State. The appropriate characterization would have been that the FRY was a successor State, as repeatedly acknowledged by the FRY when it declared that it succeeded to the SFRY's legal obligations on 27 February 1992.

10. The Court acknowledged this in the 2003 *Application for Revision* case, when it emphasized

> "that General Assembly resolution 55/12 of 1 November 2000 [admitting the FRY as a Member] cannot have changed retroactively the *sui generis* position which the FRY found itself in vis-à-vis the United Nations over the period 1992 to 2000, or its position in relation to the Statute of the Court and the Genocide Convention. Furthermore, the letter of the Legal Counsel of the United Nations

dated 8 December 2000 cannot have affected the FRY's position in relation to treaties.

The Court also observes that, in any event, the said letter did not contain an invitation to the FRY to accede to the relevant conventions, but rather to 'undertake treaty actions, as appropriate, . . . as a successor State'." (*I.C.J. Reports 2003*, p. 31, para. 71.)

11. In its 1996 Judgment on preliminary objections in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Yugoslavia)*, the Court left open the question whether it accepted the automatic succession argument, and confined its Judgment to noting that:

"Without prejudice as to whether or not the principle of 'automatic succession' applies in the case of certain types of international treaties or conventions, the Court does not consider it necessary, in order to decide on its jurisdiction in this case, to make a determination on the legal issues concerning State succession in respect to treaties which have been raised by the Parties." (*I.C.J. Reports 1996 (II)*, p. 612, para. 23.)

The time has come for the Court to answer this question and, in my view, the answer should have been that:

(a) the FRY succeeded to the Genocide Convention on 27 April 1992, and
(b) the FRY was not a newly independent State required to establish its status vis-à-vis multilateral treaties. Thus, it is bound by Article IX of the Convention.

12. Because, in my view, the FRY succeeded to the Genocide Convention in 1992, the FRY's purported accession — and reservation — to the Convention in March 2001 must be declared void *ab initio*. The Court, should, in my view, have concluded that the FRY has been bound since 1992 to assume all the legal obligations of the SFRY, including those flowing from the Genocide Convention. Such a conclusion would have been consistent with:

— The FRY's declaration of succession in 1992;
— Article 34 of the Vienna Convention on Succession of States in respect of Treaties;
— the position taken by the FRY prior to 1 November 2000; and
— the Court's prior jurisprudence. (*Ibid.*, pp. 617, 621, paras. 34, 41.)

13. Thus the Court should have followed the rationale that it adopted in 1996 in respect to Bosnia, that

"[s]ince the Court has concluded that Bosnia and Herzegovina could become a party to the Genocide Convention *as a result of a succes-*

> *sion*, the question of the application of Articles XI and XIII of the Convention does not arise" (*I.C.J. Reports 1996 (II)*, p. 612, para. 24; emphasis added)

and made the same finding in respect of the FRY. The FRY became a party to the Genocide Convention "as a result of a succession" and as a result the Convention provides a basis for the Court's jurisdiction *ratione personae*.

14. When considering its jurisdiction *ratione materiae*, the Court must ascertain whether the breaches of the Genocide Convention alleged by the FRY-SM are capable of falling within the provisions of that Convention (*Oil Platforms (Islamic Republic of Iran* v. *United States of America), Preliminary Objection, Judgment, I.C.J. Reports 1996 (II)*, p. 803). Article IX of the Convention provides the Court with jurisdiction over disputes "relating to the interpretation, application or fulfilment" of the Convention, including disputes "relating to the responsibility of a state for genocide". Genocide, in turn, is defined in Article II of the Convention as the "intent to destroy, in whole or in part, a national, ethnical, racial or religious group" through certain acts, including the use of force.

15. Aside from the question of whether the acts of NATO are imputable to each respondent State, the facts alleged by the FRY-SM, even if substantiated on the merits, do not satisfy the element of specific intent necessary to constitute genocide. Genocide, as defined in the Convention, requires evidence that force was used with "an intent to destroy" a certain defined group, and the Court should not accept the FRY-SM's invitation to lower the *mens rea* bar set by the Convention by holding that the requirement of genocidal intent is satisfied as long as genocidal consequences were "readily foreseeable". As a result, the Court, in my view, lacks jurisdiction *ratione materiae*.

V. Conclusion

The FRY had every right to claim the continuity of the legal personality of its predecessor with respect of the territory of Serbia and Montenegro. In the FRY's case, however, the competent United Nations organs opted to disregard the law of the Charter. The legal consequences of the FRY's *"sui generis"* status vis-à-vis the United Nations — it was excluded from participating in certain activities of specified organs but was never expelled — were not, in my view, properly addressed by the Court. As the principal judicial organ of the United Nations, the Court's function under Article 38 of its Statute is to decide disputes in accordance with international law. It has been in a position more than once in the last decade to set the record straight regarding the legal status of the FRY's membership in accordance with the Charter of the United Nations.

Yet the Court, in holding that it "is led to the conclusion that Serbia and Montenegro was not a Member of the United Nations . . . at the time of filing its Application" did not address in a comprehensive manner "the legal situation [regarding the FRY's membership status], which was shrouded in uncertainties" (Judgment, para. 78).

For this and other reasons set out in my opinion, I disagree with the findings of the Court regarding the interpretation of Article 35, paragraph 1, which the joint declaration correctly describes as being "at odds" with the Court's previous judgments and orders. I also do not agree with the grounds chosen by the Court to reach its decision that it lacks jurisdiction or its substantive conclusions on the scope of Article 35, paragraph 2. Moreover I find that the approach adopted by the Court casts an unnecessary shadow of doubt on the *Genocide Convention* case which has been on the docket of the Court since 1993.

However, because I consider that the Court does not have jurisdiction *ratione materiae*, I find myself in agreement with the *dispositif* contained in paragraph 116 of the Judgment, which states that the Court "*[f]inds* that it has no jurisdiction to entertain the claims made in the Application filed by Serbia and Montenegro on 29 April 1999". I was therefore able to vote in favour of the Judgment.

(Signed) Nabil ELARABY.

SEPARATE OPINION OF JUDGE KREĆA

TABLE OF CONTENTS

Although I agree with the above Judgment as a whole, I wish to make my position clear in regard not only to certain points with which I fully agree but also to some reservations which I have as to the reasoning and the ultimate findings.

Due, on the one hand, to the substantial similarity and, in more than one issue, identical nature of the arguments forwarded by the respondent States and, on the other, to the lack of time to do proper justice to the cases, the text of my opinion is designed to cover *mutatis mutandis* all eight cases.

* * *

I. *Locus standi in judicio* of Serbia and Montenegro

1. Locus standi *and Its Relationship to Jurisdiction* ratione personae

1. In its original meaning[1], the expression *"locus standi in judicio"* implies the right of a person to appear or to be heard in such-and-such proceedings (*Jowitt's Dictionary of English Law*, 2nd ed., Vol. 2, p. 1115), or, as regards the present Court, the right of a person *lato sensu* to appear or to be heard in proceedings before the Court.

The right to appear before the International Court of Justice, due to the fact that it is not a fully open court of law, is a limited right. The limitations exist in two respects. *Primo*, the right is reserved for States (Statute, Art. 34, para. 1). Consequently, it does not belong to other juridical persons or physical persons. *Secundo*, as far as States are concerned, only States parties to the Statute of the Court possess the right referred to, being as Members of the United Nations *ipso facto* parties to the Statute of the Court or by accepting conditions pursuant to Article 35, paragraph 2, of the Statute. States non-parties to the Statute can acquire this right on condition that they accept the general jurisdiction of the Court in conformity with Security Council resolution 9 (1946).

From the substantive point of view, this right is a personal privilege *(privilegia favorabile)* of the State which, by accepting the Statute of the Court, has recognized the Court as a judicial body equipped with *jus dicere*. It is the consequence of the burden — or *privilegia odiosa* — consisting in fulfilment of the conditions prescribed.

[1] Even in the jurisprudence of the Court the expression is sometimes used as a descriptive one. *Exempli causa*, in the case concerning *Barcelona Traction, Light and Power Company, Limited*, the Court used it to denote right of "a government to protect the interests of shareholders as such" which was in effect the matter of legal interest independent of the right of Belgium to appear before the Court (*Preliminary Objections, Judgment, I.C.J. Reports 1964*, p. 45). On the contrary, in the *South West Africa* cases the Court has drawn a clear distinction between "standing before the Court itself", i.e., *locus standi*, and "standing in the ... phase of ... proceedings (*South West Africa, Second Phase, I.C.J. Reports 1966*, p. 18, para. 4).

Locus standi before the Court cannot, however, be taken as synonymous to the jurisdiction of the Court. It is, by its nature, a preliminary condition or presumption for the jurisdiction of the Court or its competence. In this sense it is appropriate to speak about general jurisdiction and special jurisdiction or competence of the Court. By possessing *locus standi* a State automatically recognizes general jurisdiction of the Court.

In order to be able to speak about special jurisdiction or competence *in casu*, however, it is necessary that, besides the right to appear before the Court, there should exist a specific *basis* of jurisdiction. And it is on these grounds that States submit a concrete dispute or type of disputes to the Court for solution.

In other words, having in mind the fact that the Court is not only a court of law whose jurisdiction is of an optional nature, but, at the same time, a partly open court, it can be said that double consent of States is necessary in order for the Court to establish its competence *in casu:*

(i) consent that the Court is "an organ instituted for the purpose of *jus dicere*" (dissenting opinion by Dr. Daxner, *Corfu Channel, I.C.J. Reports 1948*, p. 39). This consent is expressed indirectly, by joining the membership of the United Nations, or directly, by a non-Member of the United Nations either by adhering to the Statute of the Court or by accepting the general jurisdiction of the Court in conformity with Security Council resolution 9 (1946) as a preliminary condition, and
(ii) consent that the Court is competent to deal with the particular dispute or type of disputes, which is made through relevant jurisdictional bases within Article 36 of the Statute as a substantive but qualified condition[2].

2. The notions *locus standi in judicio* and jurisdiction *ratione personae* cannot, despite certain extrinsic similarities, be taken as synonymous.

The element shared in common by these two notions is that they represent processual conditions on whose existence is dependent the validity

[2] As stated by the Court "under the system of the Statute the seising of the Court by means of an Application is not *ipso facto* open to all States parties to the Statute, it is only open to the extent defined in the applicable Declarations" (*Nottebohm, Preliminary Objection, Judgment, I.C.J. Reports 1953*, p. 122). It should be noted also that the Court in the *Legality of the Use of Force* case found

> "[w]hereas the Court, under its Statute, *does not automatically have jurisdiction over legal disputes between States parties to that Statute or between other States to whom access to the Court has been granted* . . . whereas the Court can therefore exercise jurisdiction only between States parties to a dispute *who not only have access to the Court but also have accepted the jurisdiction of the Court*, either in general form or for the individual dispute concerned" (*Provisional Measures, I.C.J. Reports 1999 (I)*, p. 370, para. 19; emphasis added).

of the actual proceedings before the Court; both with respect to incidental proceedings and the *merits*, and with respect to the bringing of the dispute to the Court's decisions in the proceedings. And there the common ground between the two notions essentially ends and room for differences emerges.

The difference between the two is, first of all, of a conceptual nature. *Locus standi* is a condition which has to do with parties, whereas jurisdiction *ratione personae* — as an element of the jurisdiction of the Court — is a condition which has to do with the Court itself. Also, the question of *locus standi* as of antecedent nature is a pre-preliminary question which "should be taken in *advance* of any question of competence" (*Northern Cameroons, I.C.J. Reports 1963*, p. 105, separate opinion of Sir Gerald Fitzmaurice; emphasis in the original), whereas jurisdiction *ratione personae* is a question of competence, or special jurisdiction of the Court *stricto sensu*. Furthermore, a lack of *locus standi* cannot, as a rule, be overcome in the proceedings while a lack of jurisdiction *ratione personae* is surmountable since the parties may confer jurisdiction upon the Court in the course of the proceedings or perfect it (for instance, by expressing agreement or by *forum prorogatum*). The difference derives from the fact that jurisdiction is governed by the law in force between the parties, while *locus standi* is governed by objective rules of the Statute having a constitutional nature.

The seemingly identical nature of these two notions is, apparently, mostly due to a tacit equalization of the processual contact between the Court and the parties to the dispute — and of the litigious relationship. As there are no separate, preliminary proceedings for establishing the existence of processual conditions for the validity of the proceedings (except the administrative action of the Registry in the case of applications submitted by non-State subjects), the existence of processual conditions is established during the actual proceedings whose validity depends on the existence of these conditions. This takes place more often than not during the proceedings on preliminary objections which is why the rare cases of *locus standi* are subsumed under jurisdiction *ratione personae*.

2. *Issue of United Nations Membership and* locus standi *of Serbia and Montenegro*

3. The *locus standi* of Serbia and Montenegro in the present proceedings before the Court is closely, and, I would say, organically, linked with its membership in the United Nations, due to the fact that Serbia and Montenegro could not be considered as being party to the Statute apart from being a Member State of the United Nations as well as the fact that its *locus standi* cannot be based on conditions set forth in Article 35, paragraph 2, of the Statute of the Court.

4. In normal circumstances, the legal consequences of admission of a

State to membership in the United Nations are clear and do not require special elaboration. At the moment of its admission to membership a State becomes a bearer of the rights and obligations stipulated in the United Nations Charter, among which of particular relevance in the matter at hand is the status of a party to the Statute of the Court. However, the circumstances surrounding the case at hand could hardly be termed normal. More precisely, the Applicant, Serbia and Montenegro, was admitted to membership in the Organization on the basis of the proper procedure. But this was done without its status in the Organization being previously established in explicit terms either by the political organs of the United Nations or by the Court.

5. United Nations General Assembly resolution 47/1 is unclear in substance and contradictory *per se*. Assessing its substance in the case concerning *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro)* (hereinafter referred to as *"Genocide Convention"*), the Court found that "the solution adopted is not free from legal difficulties" (*Provisional Measures, Order of 8 April 1993, I.C.J. Reports 1993*, p. 14, para. 18). The situation was additionally complicated by the subsequent practice of the United Nations organs "characterized by pragmatism and flexibility rather than a strict adherence to the procedures" prescribed by the Charter (Contributor (Christian Tams) on Article 6 (margin note 25) in B. Simma (ed.), *The Charter of the United Nations, A Commentary*, 2nd ed., Vol. I, 2002, pp. 213-214). In 1993 Professor Rosalyn Higgins wrote that "[t]he outcome has been anomalous in the extreme" (R. Higgins, "The New United Nations and Former Yugoslavia", *International Affairs*, Vol. 69, No. 3 (July 1993), p. 479). It can, therefore, be concluded that, until the admission of Serbia and Montenegro to membership in the Organization on 1 November 2000, the political organs of the United Nations had not determined the status of Serbia and Montenegro in the United Nations in a clear and unequivocal manner.

6. From 1993 onwards the Court was faced with the question of Serbia and Montenegro's membership in the United Nations a number of times. The relevant findings of the Court relating to this particular question can, generally, be divided into: *primo*, findings of the Court which, by their formal, extrinsic characteristics, could be qualified as "avoiding positions" and, *secundo*, the *obiter dicta* of the Court which contain certain elements or indications of a substantive approach to the matter at hand.

(a) *Findings of the Court based on "avoiding position"*

7. In its Order of 2 June 1999 the Court stated that it "need not consider this question for the purpose of deciding whether or not it can indicate provisional measures in the present case" (*I.C.J. Reports 1999 (I)*, p. 136, para. 33). What we have here is a slightly modified formulation

expressing "avoiding position" of the Court with regard to the question of "whether or not Yugoslavia is a Member of the United Nations, and as such a party to the Statute of the Court" (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Yugoslavia (Serbia and Montenegro)), Provisional Measures, Order of 8 April 1993, I.C.J. Reports 1993*, p. 14, para. 18) which the Court used several times in the disputes to which Serbia and Montenegro is a party in the proceedings before the Court. The correctly interpreted formulation, regardless of modification in the specific cases, suggests the conclusion that the Court reserved the right to state its definitive position on the relevant question in the later phases of the proceedings.

It is easy to conclude that such a finding of the Court represents a delay of the answer to the question "whether or not Yugoslavia is a Member of the United Nations, and as such a party to the Statute of the Court" *(ibid.)*. However, the question appears which are, in the circumstances of the case, the intrinsic meanings of the delay.

8. On the basis of the Application of the Federal Republic of Yugoslavia (hereinafter referred to as the "FRY") filed in the Registry of the Court on 29 April 1999, the Court was seised and on the basis of a request for the indication of provisional measures the Court instituted the proper proceedings. Was the Court, in the light of the relevant provisions of the Statute, in a position to be seised? Furthermore, was it in a position to institute proceedings for the indication of provisional measures, if the Federal Republic of Yugoslavia had not been a Member of the United Nations in the relevant period? Nor indeed had the FRY accepted the general jurisdiction of the Court in conformity with Security Council resolution 9 (1946) pursuant to Article 35, paragraph 2, of the Statute of the Court.

The answer to this question is obviously in the negative, having in mind that, in the optic of a court of law with limited access, it is essential to fulfil the relevant preliminary condition — to acquire *locus standi* — as a prerequisite for taking litigious actions before the Court.

9. The Court was thus faced with a choice among possible solutions in view of the fact that there existed at least a doubt regarding the legal position of Yugoslavia diagnosed already in 1993 (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Yugoslavia (Serbia and Montenegro)), Provisional Measures, Order of 8 April 1993, I.C.J. Reports 1993*, p. 14, para. 18):

(i) to ask for an authentic interpretation of resolution 47/1 from the General Assembly as the competent organ of the United Nations;

(ii) to make its own interim determination of the matter either by directing, on the basis of paragraph 2 of Article 38 of the Rules of Court, that the first pleading should be addressed to the

matter[3] or by instituting pre-judicatory proceedings on the basis of Article 48 of the Statute; and

(iii) to resort to the judicial presumption of the right of Yugoslavia to appear before the Court.

And the Court made the choice to rely on the presumption that Yugoslavia was a Member of the United Nations and as such entitled to appear before the Court (see dissenting opinion of Judge Vereshchetin appended to the Judgment of 3 February 2003 in the case concerning *Application for Revision of the Judgment of 11 July 1996 in the Case concerning* Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina *v.* Yugoslavia), Preliminary Objections *(Yugoslavia* v. *Bosnia and Herzegovina), Judgment, I.C.J. Reports 2003*, p. 41, para. 4 (hereinafter referred to as the *"Application for Revision"*); separate opinion of Judge Koroma, *ibid.*, p. 36, para. 9).

(b) *Judicial presumptions*

10. Judicial presumption, along with legal presumption[4], is one of the

[3] In the Order of 30 June 1999 the Court noted Belgium requested

"that the question of the jurisdiction of the Court and of the admissibility of the Application in this case should be separately determined before any proceedings on the merits" (*Legality of Use of Force (Yugoslavia* v. *Belgium), Order of 30 June 1999, I.C.J. Reports 1999 (II)*, p. 989).

For,

"the fact that the various provisions regulating the incidental jurisdiction are included in the Statute . . . serves to supply a general consensual basis, through a State's being a party to the Charter and Statute, which are always part of the title of jurisdiction and always confer rights and impose obligations on its parties in relation to the Court and it's activities. But *if it is obvious that the Court lacks all jurisdiction to deal with the case on the merits, then it automatically follows that it will lack all incidental jurisdiction whatsoever*." (Shabtai Rosenne, *The Law and Practice of the International Court 1920-1996*, Vol. II, 1997, pp. 598-599; emphasis added.)

[4] Better known than judicial presumptions, legal presumptions *(praesumptio juris)* are widely applied in international law. International tribunals are used to resort to proof by inferences of fact *(présomption de fait)* or circumstantial evidence (*Corfu Channel, Merits, Judgment, I.C.J. Reports 1949*, p. 18). For legal presumption in the practice of the Inter-American Court of Human Rights, see T. Buergenthal, R. Norris and D. Shelton, *Protecting Human Rights in the Americas, Selected Problems*, 2nd ed., 1986, pp. 130-132 and pp. 139-144. The practice of international courts abounds in presumptions based on general principles of international law, whether positive as presumption of good faith (*exempli causa, Mavrommatis Jerusalem Concessions, Judgment No. 5, 1925, P.C.I.J., Series A, No. 5*, p. 43) or negative as presumption of abuse of right (*Certain German Interests in Polish Upper Silesia, Merits, Judgment No. 7, 1926, P.C.I.J., Series A, No. 7*, p. 30; *Free Zones of Upper Savoy and the District of Gex, Second Phase, 1930, P.C.I.J., Series A, No. 24*, p. 12; *Corfu Channel, Merits, Judgment, 1949, I.C.J. Reports 1949*, p. 119, dissenting opinion of Judge Ecer). The special weight they possess in the interpretation of treaties since the function of interpretation of treaties is to discover "what was, *or what may reasonably be presumed to have been*, the intention of the parties to a treaty when they concluded it" (Harvard Law School, *Research in International Law, Part III, Law of Treaties*, Art. 19, p. 940; emphasis added).

main sorts of presumption in international law. It means that a certain fact or state of affairs, even though it has not been proved, is taken by an international tribunal as truthful. As such it does not necessarily coincide with, or is not equivalent to, the fact or the state of affairs.

As far as the reasoning of the existence of judicial presumption is concerned, considerations of a practical nature are prevalent.

Judicial presumption is a weapon to avoid waiting to get to know precisely the facts and situation on which is dependent the existence, content or cessation of the right that would have adverse consequences for interested subjects or that would render difficult due course of legal proceedings.

The law, however much it tends to establish the truth and to be truthful, actually pays more attention to finding useful and suitable solutions for the given situations rather than allowing, in an attempt to establish truth as such, the rights and obligations that exist to fall through or to be harmed.

11. As a sort of presumption, the judicial presumption bears some specific features differing it from legal presumption *(praesumptio juris)*.

Two principal features of judicial presumption should be mentioned in that regard.

Primo, judicial presumption is, as a rule, a natural, factual presumption *(praesumptio facti vel homine)* having no basis in the particular rules that constitute the law of the international tribunal or the law it is applying. It is an inherent element of the legal reasoning of the international tribunal in the interpretation and application of the rules of law.

Secundo, in contrast to legal presumption which can be irrefutable *(praesumptio juris et de jure)*, the judicial presumption as a natural or factual one is, by definition, of refutable nature. Their refutable nature is, however, a specific one.

Bearing in mind that it is a part of the reasoning of the international tribunal, it cannot be refutable in the sense in which that is the case of legal presumption. Judicial presumption, as such, is in fact capable of being abandoned or replaced by the international tribunal.

In its legal reasoning the international tribunal abandons it, or replaces it, by other presumption. In the strict sense, only those findings or decisions of the international tribunal that are based on judicial presumptions are refutable. However, they lose the *ratio* of their existence when the international tribunal identifies the controversial matter which constitutes the subject of judicial presumption. Then they drop by themselves because they are deprived of their subject. But even then, it is the duty of the international tribunal to refute, in the proper proceedings, its own finding or decision based on a presumption.

12. So-called "prima facie jurisdiction" is, in fact, a good illustration

of judicial presumptions. The expression "prima facie jurisdiction" is a somewhat artificial combination of the modal-prima facie and of the object-jurisdiction. The modal is, in the particular context, also the qualitative, having in mind that "prima facie" in the legal reasoning of the Court implies "not conclusive", "not definitively". In its grammatical meaning the expression "prima facie jurisdiction" suggests the existence of a distinct jurisdiction, that is, as reflecting a division of the jurisdiction of the Court. Understood in this sense, the division of jurisdiction has no foundation in the Statute or Rules of Court, or in the legal logic, for that matter. The expression "prima facie ascertainment of jurisdiction" seems to be more appropriate. Basically, it means a prima facie case, a case established by prima facie evidence. On that basis the Court assumed jurisdiction reserving the subsequent procedure for further, including the conclusive, decision.

13. In the substantive meaning, the so-called avoiding position of the Court in the light of the relevant circumstances of the case is something more than, and different from, simply delay. The avoiding position of the Court could not be reduced to delay considering, first of all, the fact that the question of the FRY's status vis-à-vis the United Nations and the Statute of the Court concerns its very ability to appear before the Court. It is hard to imagine that the Court, as the guardian of its Statute, in responding to this crucial question, could have been content with simply delay. The avoiding position of the Court has two aspects: the intrinsic or substantive one, reflected in the presumption regarding the FRY's membership in the United Nations, and the extrinsic, formal one which boils down to a delay.

14. The presumption of membership of Yugoslavia in the United Nations in the circumstances that existed prior to 1 November 2000 provided the only possible basis for seisin of the Court.

The right of a party to appear before the Court is the prerequisite of a valid seisin. Seisin of the Court is not, nor can it be, an automatic consequence of the act of a State taken with the objective of its seisure (such an act would be more appropriate to term "seising"; see Sir Gerald Fitzmaurice, *The Law and Procedure of the International Court of Justice*, Vol. II, 1986, p. 440, footnote 2). If, *arguendo*, one would accept the opposite view, it is unclear why the Court would not be seised also in the case of acts taken by other persons — physical or juridical — who, pursuant to the Statute, are not entitled to appear before the Court.

An effective seisin of the Court is the condition short of which the Court can hardly exercise the powers conferred upon it by the Statute. These powers the Court must exercise

> "whenever it *has been regularly seised* and whenever it has not been shown, on some other ground, that it lacks jurisdiction or that the

claim is inadmissible" (*Nottebohm, Preliminary Objection, Judgment, I.C.J. Reports 1953*, p. 122; emphasis added).

The Court, in fact, would not be able to deal with the claim if it were not regularly seised. As the Court stated:

> "When an Application is filed *at a time when the law in force between the parties entails the compulsory jurisdiction of the Court* . . . the filing of the Application is merely the condition required *to enable the clause of compulsory jurisdiction to produce its effects* in respect of the claim advanced in the Application. *Once this condition has been satisfied, the Court must deal with the claim*; it has jurisdiction to deal with all its aspects, whether they relate to jurisdiction, to admissibility or to the merits." (*Nottebohm, Preliminary Objection, Judgment, I.C.J. Reports 1953*, p. 123; emphasis added.)

15. Judicial presumptions, being refutable *per definitionem*, are subject to verification. In principle, such presumptions as to *locus standi* of the parties are verified by the Court ex officio or upon objection of the party.

In this (these) particular case(s) it should be pointed out that the preliminary objections of all the respondent States regarding the jurisdiction of the Court *ratione personae* are of a specific nature. Although mainly named as objections to the jurisdiction *ratione personae*, they in fact challenged the validity of the seisin of the Court. Moreover, four of the respondent States (namely, Portugal, Germany, the Netherlands and Italy) requested, in similar terms, the Court in their final submissions to adjudge and declare that Yugoslavia "has no *locus standi* before the Court" or that "the FRY is not entitled to appear before the Court". In other words, they called in question the very existence of the "case" before the Court.

(c) *Effective and valid seisin*

16. It appears that a distinction has to be made between an "effective seisin" and a "valid seisin" of the Court.

Effective seisin of the Court is, as a rule, based on prima facie appreciation of the right of the party or parties to appear before the Court.

The prima facie appreciation of the right of the party or parties to appear before the Court, in contrast to the appreciation of the basis of jurisdiction, seems to be relaxed due primarily to the fact that today almost all States are Members of the United Nations. Accordingly, it appears that in the practice of the Court it is assumed that the fulfilment of the conditions specified in Article 38, paragraphs 1, 2 and 3, and Article 39, paragraphs 1 and 2, of the Rules of Court enables effective seisin of the Court.

The effective seisin is, in the absence of separate proceedings designed to deal with conditions for the validity of the proceedings, including the question of *locus standi*, before the very institution of a proceeding, a

necessary procedural step enabling the Court to deal, *inter alia*, with the validity of its seisin.

In contrast, valid seisin in regard to the question of *locus standi* means that it is conclusively established by the Court that parties to a dispute have fulfilled the necessary precondition to be entitled to appear before the Court, i.e., that they have recognized in the proper way — by being a party to the Statute of the Court or by the declaration pursuant to resolution 9 (1946) of the Security Council — the general jurisdiction of the Court. It is that relevant point in time in which parties to a dispute become parties to the dispute before the Court.

In that regard, the relationship between effective seisin and valid seisin could be compared with the relationship between the so-called prima facie jurisdiction and jurisdiction considered as conclusively established.

Accordingly, if the expression "effective seisin" or "regular seisin" is used to denote validity of the seisin of the Court, it should be understood as relating to the formal aspect of its validity only, not to the substantive one.

(d) Obiter dictum *containing elements or indications of substantive approach*

17. In the *Application for Revision* case the Court, considering General Assembly resolution 55/12 of 1 November 2000, points out, *inter alia*, that it

> "cannot have changed retroactively the *sui generis* position which the FRY found itself in vis-à-vis the United Nations over the period 1992 to 2000, or its position in relation to the Statute of the Court and the Genocide Convention. Furthermore, the letter of the Legal Counsel of the United Nations dated 8 December 2000 cannot have affected the FRY's position in relation to treaties." (*Judgment, I.C.J. Reports 2003*, p. 31, para. 71.)

It is easy to go along with the findings that, as a rule, General Assembly resolutions, including the resolution in question, do not have retroactive effect. But this finding of the Court can hardly be said to be very useful. Because of the object of the exclusion of retroactive effect of General Assembly resolution 55/12 in the aforementioned *obiter* — i.e. a *"sui generis* position which the FRY found itself in vis-à-vis the United Nations over the period 1992 to 2000 . . ." — which is obviously unclear and vague. In the quoted formulation the phrase *"sui generis"* is linked to the substantive "position" which, in this particular context, has a highly unclear and technical meaning. Has it been used as a synonym or a substitute for the word "membership" or the term "membership rights and obligations" or, to express, for that matter, the factual relationship between the Applicant and the Organization? If it has the meaning of *"sui generis"* membership, it is difficult to fathom which elements of

membership from the abstract point of view, or which concrete elements of presumed membership of the Federal Republic of Yugoslavia, would provide the basis of the qualification that what is involved here is *"sui generis"* membership? Namely, it is worth noting that the United Nations Charter makes no mention of *"sui generis"* membership, obviously a kind of amalgamation of "membership" and "non-membership". So, the terms such as this one represent rather an attempt of sorts to conceptualize something that is non-existent as a notion, and not an appropriate expression of positive legal substance — the more so, if one has in mind the absence of *a limine* or *exempli causa* elements of "membership" or non-membership" in the world Organization.

It is true, however, that in paragraph 70 of the Judgment of 3 February 2003 in the *Application for Revision* case it is stated that

> "Resolution 47/1 did not *inter alia* affect the FRY's right to appear before the Court . . . under the conditions laid down by the Statute. Nor did it affect the position of the FRY in relation to the Genocide Convention." (*Judgment, I.C.J. Reports 2003*, p. 31, para. 70.)

This particular *dictum* seems to be an assertion rather than a proper legal reasoning. More specifically, it is unclear what is actually the legal basis, in the light of the controversy regarding the status of the Applicant in the United Nations, for "the FRY's right to appear before the Court" *(ibid.)*. Is it based on its being a United Nations Member State which is *ipso facto* a party to the Statute of the Court, or under the conditions specified in Article 35, paragraph 2, of the Statute of the Court and Security Council resolution 9 (1946)?

18. It is unclear how the *obiter* about the "*sui generis* position" of the FRY vis-à-vis the United Nations came to find a place in the Court's Judgment in the *Application for Revision* case. In that case the Court was faced with the issue whether the admission of the FRY to the United Nations *as such* is a "new fact" in the sense of Article 61 of the Statute. The Court itself stressed that:

> "In reality, [the FRY] bases its Application for revision on the legal consequences which it seeks to draw from facts subsequent to the Judgment which it is asked to have revised. *Those consequences, even supposing them to be established, cannot be regarded as facts within the meaning of Article 61.* The FRY's argument cannot accordingly be upheld." (*Application for Revision of the Judgment of 11 July 1996 in the Case concerning* Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina *v.* Yugoslavia), Preliminary Objections *(Yugoslavia* v. *Bosnia and Herzegovina), Judgment, I.C.J. Reports 2003*, p. 30, para. 69; emphasis added.)

What is striking is that the Court formulated its *obiter* after almost ten years of the "avoiding position" approach to the issue, although the issue of membership of the FRY in the United Nations was *ab initio* of fundamental importance for the jurisdiction of the Court in all disputes in which the FRY is involved as a party before the Court. Having that in mind, it could hardly be objected to by the Court that, throughout that period, it found it necessary, in any of the proceedings unfolding before it successively, to make interim determination upon the issue in explicit terms for the purposes of the pending proceedings. However, the Court failed to do so *until the admission of the FRY to the United Nations*, when the matter was resolved definitely. That comes as a surprise in itself.

19. The objective meaning of the insistence on the *sui generis* position of Serbia and Montenegro vis-à-vis the United Nations in the period from 1992 to 2000, as considered in paragraph 70 of the Judgment in the *Application for Revision* case, amounts in the existing circumstances to an attempt to revise the decision taken by the main political organs of the United Nations. Or in terms of legal notions, it amounts to the creation of a *fictio leges*.

20. The qualifications of the status of the Applicant in the United Nations as "*sui generis* membership", "*de facto* working status", etc., are deprived of legal substance in terms of the Charter. The Charter of the United Nations does not recognize such forms of "membership" or "non-membership" or a mixture thereof. These syntagmas constitute rather an attempt — based on analogy with membership in terms of the Charter — of a notional conceptualization of observer status of a non-Member based on Article 2, paragraph 6, and Article 35, paragraph 2, of the Charter, or of the status of non-State entities, such as national liberation movements, or of observer status of regional organizations and groups of States pursuant to Article 52, paragraph 1, of the Charter of the United Nations. In the qualitative sense, the meaning of the syntagmas such as "*sui generis* membership" or "*de facto* working status" would mean, in fact, reduced membership rights or the privileged position of some non-Members.

Such a meaning can hardly be brought in accordance either with the provisions of the Charter of the United Nations which regulate membership rights and obligations, or with the fundamental principle of sovereign equality of States enshrined in Article 2, paragraph 1, of the Charter of the United Nations.

The provisions of the Charter, as far as the relationship of the Organization vis-à-vis States is concerned, have been formulated in terms of the dichotomy Member States/non-Member States. *Tertium quid* simply does not exist. Chapter II of the United Nations Charter ("Membership") points out only the division into the original Members of the United

Nations and the subsequently admitted Members of the Organization, a division which has no substantive meaning in terms of membership rights and duties, but only that of historical record.

Article 2 of the Charter of the United Nations, setting out the principles on which the Organization and its Members are based and shall act, provides in paragraph 1 that "[t]he Organization is based on the principle of the sovereign equality of all its Members".

The principle contained in Article 2, paragraph 1, of the Charter constitutes *ratione materiae* a narrow application of the "basic legal concept of State sovereignty in customary international law" (*Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Merits, Judgment, I.C.J. Reports 1986*, p. 111, para. 212; hereinafter referred to as *"Nicaragua"*), with legal force equal to that of the principle expressed in paragraph 2 of the same Article determined by the Court as being "not only a principle of customary international law but also a fundamental or cardinal principle of such law" (*ibid.*, p. 100, para. 190).

The principle of the sovereign equality of States as a universal principle belonging to *corpus juris cogentis* operates with the United Nations Charter on two levels:

(i) in the relationship between the Member States, with the exception of the permanent members of the Security Council, as the principle of equal membership rights and obligations, and
(ii) in the relationship between non-Member States and the Organization, as the principle of equal rights and obligations non-Members before the appropriate organs of the Organization as stipulated by Article 35, paragraph 2, of the Charter.

In other words, the peremptory nature of the principle of sovereign equality of States would not suffer a reduction in the *corpus* of rights and obligations of an individual Member in relation to the *corpus* of rights and obligations of a Member State as such on the basis of the Charter; nor indeed would it entail enlarged rights and obligations of an individual non-Member State over and above the extent of the rights and obligations of non-Member States envisaged by the Charter.

The fact that the *exercise* of certain membership rights by a Member State may be suspended on the basis of Article 5 of the Charter is another matter. The suspension of membership rights and privileges on the basis of Article 5 does not encroach upon the principle of equal membership rights and privileges in view of the fact that it leaves unaffected both the legal basis, and the membership rights and privileges, restricting only the exercise of the membership rights and privileges until the removal of suspension. However, the suspension of membership rights may, in special circumstances, lead to a violation of the fundamental principle of equality of Member States in the proceedings before the Court (for instance, if a suspended Member is precluded from taking part in the work of organs of the Organization, or in the procedures established, whose findings or

statements serve as evidence in the proceedings before the Court).

The disappearance of a Member State as a subject of international law leads *ipso facto* to the cessation of membership in the Organization of the United Nations. Since membership rights and obligations are a substantive effect of membership in the Organization, there exists an equal sign between the disappearance of a State and the cessation of all its membership rights and obligations. (An exception to this are the rights and obligations embodied in the Charter which have an *erga omnes* or a peremptory character and which, from the legal aspect, are not *membership* rights and obligations.)

21. The proper judicial presumption has been applied by the Court in the proceedings for the indication of provisional measures.

Namely, the finding of the Court that "the declarations made by the Parties under Article 36, paragraph 2, of the Statute do not constitute a basis on which the jurisdiction" was grounded in the limitation *ratione temporis* contained in Yugoslavia's declaration recognizing the compulsory jurisdiction of the Court (*Legality of Use of Force (Yugoslavia* v. *Belgium), Provisional Measures, Order of 2 June 1999, I.C.J. Reports 1999 (I)*, p. 135, para. 30). Consequently, the Court did not call in question the validity of Yugoslavia's declaration recognizing the compulsory jurisdiction of the Court pursuant to Article 36, paragraph 2, of the Statute, as such, but the temporal modality of its application in the light of the reciprocity condition.

It appears that Judge Kooijmans was right in noting that:

> "How can the Court say that there is no need to consider the question of the validity of Yugoslavia's declaration whereas at the same time it concludes that this declaration, taken together with that of the Respondent, cannot constitute a basis of jurisdiction? *This conclusion surely is based on the presumption of the validity of Yugoslavia's declaration*, at least for the present stage of the proceedings. If such a presumption does not exist, the Court should at least have said that it accepts that validity purely *arguendo* since, even if it had been valid, it would not have had the capability to confer jurisdiction on the Court in view of the limitation *ratione temporis* in the Applicant's declaration." (*Legality of Use of Force (Yugoslavia* v. *Belgium), Provisional Measures, Order of 2 June 1999, I.C.J. Reports 1999 (I)*, p. 177, para. 16, separate opinion of Judge Kooijmans; emphasis added.)

Reciprocity has nothing to do with the validity of a declaration as a jurisdictional instrument, having in mind that it is limited in its effect to the temporal scope of the obligation covered by the declaration. It is capable of producing effect only limiting jurisdiction to the common ground

accepted by both parties, as stated by the Court in the *Interhandel* case:

> "Reciprocity enables the State which has made the wider acceptance of the jurisdiction of the Court to rely upon the reservations to the acceptance laid down by the other Party. *There the effect of reciprocity ends.*" (*Preliminary Objections, Judgment, I.C.J. Reports 1959*, p. 23; emphasis added.)

Having in mind the provisions of Article 36, paragraph 2, of the Statute of the Court, and considering that Yugoslavia did not accept the jurisdiction of the Court on the basis of Security Council resolution 9 (1946), it transpires that the presumption of the validity of Yugoslavia's declaration only *ratione materiae* is a narrowed presumption of the membership of Yugoslavia in the United Nations.

22. The Court furthermore resorted to the presumption of the legal identity and continuity of the FRY when referring to the Genocide Convention, and found that it lacks jurisdiction due to the fact that genocidal intent on the part of the respondent States has not been proved.

In other words, the Court found that, *in casu*, there exists, at least, prima facie jurisdiction *ratione personae* — on the basis of the contractual *nexus* between the Applicant and the Respondent in the framework of the Genocide Convention — and the lack of jurisdiction *ratione materiae* on the basis of the Convention was ascribed by the Court to the fact that genocidal intent, as an element of the crime of genocide, has not been made probable.

It is obvious that the finding of the Court regarding the FRY as a party to the Genocide Convention was based in the formal declaration of the FRY of 22 April 1992, confirmed in an official Note of 27 April 1992 from the Permanent Mission of Yugoslavia to the United Nations addressed to the Secretary-General to the effect that:

> "The Federal Republic of Yugoslavia, continuing the State, international legal and political personality of the Socialist Federal Republic of Yugoslavia, shall strictly abide by all the commitments that the Socialist Federal Republic of Yugoslavia assumed internationally." (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Yugoslavia), Preliminary Objections, Judgment, I.C.J. Reports 1996 (II)*, p. 610, para. 17.)

The rules of interpretation of unilateral acts of States, accurately and clearly set out in the *Fisheries Jurisdiction (Spain* v. *Canada)* case as "declarations . . . are to be read as a whole" and "interpreted as a unity" (*Jurisdiction of the Court, Judgment, I.C.J. Reports 1998*, p. 454, para. 47; p. 453, para. 44), indicate that unilateral acts "must be interpreted as [they stand], having regard to the words actually used" (*Anglo-Iranian*

Oil Co., Preliminary Objection, Judgment, I.C.J. Reports 1952, p. 105), with "certain emphasis on the intention of the . . . State" (*Fisheries Jurisdiction (Spain* v. *Canada), Jurisdiction of the Court, Judgment, I.C.J. Reports 1998*, p. 454, para. 48).

It is difficult, on the basis of these rules of interpretation of unilateral acts of States, or even on the basis of any of them taken individually, to draw a conclusion that the intention of Yugoslavia was to "strictly abide by all the commitments that the Socialist Federal Republic of Yugoslavia assumed internationally" (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Yugoslavia), Preliminary Objections, Judgment, I.C.J. Reports 1996 (II)*, p. 610, para. 17) without reliance on, or on some other basis, except the legal identity and continuity with the Socialist Federal Republic of Yugoslavia (hereinafter referred to as the "SFRY"). (It is also disputable whether the declaration of 27 April 1992 could be taken as a unilateral act *creating* legal obligations at all. As the Court clearly stated in the *Nuclear Tests* cases "[w]hen it is the intention of the State making the declaration that it should become bound according to its terms, that intention confers on the declaration the character of a legal undertaking" (*Nuclear Tests (Australia* v. *France), Judgment, I.C.J. Reports 1974*, p. 267, para. 43; *Nuclear Tests (New Zealand* v. *France), Judgment, I.C.J. Reports 1974*, p. 472, para. 46). Thus all depends on the intention of the State and it is up to the Court to "form its own view of the meaning and scope intended by the author of a unilateral declaration which may create a legal obligation" (*Nuclear Tests (Australia* v. *France), Judgment, I.C.J. Reports 1974*, p. 269, para. 48; *Nuclear Tests (New Zealand* v. *France), Judgment, I.C.J. Reports 1974*, p. 474, para. 50). It seems crystal clear from the text of the declaration that the intention of Yugoslavia was not that it should become bound by obligations of the former SFRY but to *remain* bound by "all obligations to international organizations and institutions whose member it is".)

Having in mind that, after the adoption of the Constitution of 27 April 1992, Yugoslavia did not express its consent to be bound by the Genocide Convention in the way stipulated by Article XI of the Convention and nor did it issue the notification of succession, it is obvious that the only basis for Yugoslavia to be considered a party to the Genocide Convention before 12 March 2001 is the legal identity and continuity of the SFRY in the domain of multilateral treaties.

23. It seems clear that the aforementioned Court's presumptions were not, in the circumstances surrounding the overall status of the FRY, of a violent nature *(violentia praesumptio)*. *A contrario*, the finding that the solution adopted by General Assembly resolution 47/1 "is not free from legal difficulties" (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Yugo-*

slavia (Serbia and Montenegro)), Provisional Measures, Order of 8 April 1993, I.C.J. Reports 1993, p. 14, para. 18) would be devoid of substance.

Having in mind the relevant circumstances that existed until the admission of Yugoslavia to membership in the United Nations, expressing relative balance in terms *pro et contra*, it might be said that those presumptions lie between light presumptions *(praesumptiones facti vel hominis leves)* and probable presumptions *(praesumptiones facti vel hominis graves)*.

3. The Legal Consequences of the Admission of the FRY to the United Nations

24. The FRY claimed legal identity and continuity with the SFRY until the year 2000. Although, in my view, the FRY, in the light of the relevant rules of international law — rules which are not quite clear and crystallized, true — possessed the right to legal identity and continuity with the SFRY, the continuity claim of the FRY, considered on the basis of eminently political reasons, has not been accepted. This fact, when speaking about the status of the FRY in the United Nations, is reflected in the status which might be, very approximately, qualified as a kind of irregular *de facto* suspension of membership rights on the model of "vacant seat". A model which, in relation to the FRY, was originally applied in the Organization for Security and Co-operation in Europe (OSCE).

25. At the end of the year 2000 the FRY, in the relevant context, did two things:

(i) renounced the continuity claim and accepted the status of the successor State of the former SFRY; and
(ii) proceeding from a qualitatively new legal basis — as the successor State — submitted the application for admission to membership in the United Nations.

26. The State, as a notion of international law, comprises two elements, i.e., possesses two faces:

(i) statehood in the sense of the relevant attributes such as a defined territory, stable population and sovereign power;

(ii) legal personality, i.e., the status of a subject of international law equipped with a *corpus* of rights and obligations. The legal personality of the FRY, in the light of the relevant circumstances surrounding it, can be either of an inferential, derivative nature — based on the legal identity and continuity with the SFRY — or of an inherent, original nature — based on the status of a new State.

27. By submitting the application for admission to membership in the United Nations, Yugoslavia not only renounced the claim to legal iden-

tity and continuity but claimed at the same time to be accepted as a new State in the sense of some other, different legal personality — a successor State versus partial continuation of the former SFRY — from the one claimed until the year 2000. In fact, it accepted the claim qualified as the claim of the international community made at the moment of the formal proclamation of the FRY in April 1992. A claim which, however, the relevant international organizations as well as States, acting *in corpore* as members of the organizations or individually, did not implement in either the formal or the substantive sense. Instead, they opted for solutions based on pragmatic political considerations rather than on considerations based on international law. Hence, a legal "Rashomon" about the legal character of Yugoslavia was created — it is a new State or the old State? — and about its status in the United Nations — is it a Member of the United Nations or not?

28. The admission of Yugoslavia to membership of the United Nations from 1 November 2000 also meant the acceptance of the claim of Yugoslavia to be accepted as a new State in the sense of a new international personality different from its hybrid and controversial personality in the period 1992-2000. The claim was accepted by way of a series of collateral agreements in a simplified form, or a general collateral agreement in a simplified form, between the FRY, on the one hand, and the Member States of the United Nations and the world Organization itself, on the other, embodied tacitly in the letter and spirit of General Assembly resolution 55/12 and subsequent consistent practice of the Organization (*exempli causa*, the letter of the Under-Secretary-General and Legal Counsel of the United Nations of 8 December 2000[5] and the list of Member States with dates of their admission to the United Nations (United Nations Press Release ORG/1317 updated 18 December 2000). The subject of the series of collateral agreements, or of the general collateral agreement, is in fact recognition of the FRY as a new personality, a personality of the successor State of the former SFRY, and, in that capacity,

[5] The letter of the Under-Secretary-General and Legal Counsel of the United Nations of 8 December 2000 relating to one of the relevant legal consequences of the admission of the FRY in the United Nations in the capacity of a successor State is basically of the administrative nature. In that regard, it should be stressed that in its 1996 Judgment dealing with the question of Bosnia and Herzegovina's participation in the Genocide Convention, the Court *noted* that

> "Bosnia and Herzegovina became a Member of the United Nations following the decisions adopted on 22 May 1992 by the Security Council and the General Assembly, bodies competent under the Charter. Article XI of the Genocide Convention opens it to "any Member of the United Nations'; *from the time of its admission to the Organization, Bosnia and Herzegovina could thus become a party to the Convention.*" (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Yugoslavia), Preliminary Objections, Judgment, I.C.J. Reports 1996 (II)*, p. 611, para. 19; emphasis added.)

its admission to the world Organization as a Member. Thus, Yugoslavia, although being the "old State" in the sense of statehood, was universally recognized as a "new State" in the sense of its international legal personality. In view of the fact that recognition of a State has *ex definitione* retroactive effect, it necessarily follows that all pronouncements and decisions taken relate to the FRY claiming continuity with the SFRY. And, as far as the FRY after the year 2000 is concerned, its legal existence as a new international legal personality started in November 2000 by its admission to membership of the United Nations.

29. General Assembly resolution 55/12 is not an ordinary resolution. Resolutions on the admission of a State to the United Nations, as distinct from recommendation, have a character of decision. Namely,

> "the functions and powers conferred by the Charter on the General Assembly are not confined to discussion, consideration, the initiation of studies and the making of recommendations; they are not merely hortatory. Article 18 [of the Charter] deals with *'decisions'* of the General Assembly 'on important questions'. These 'decisions' do indeed include certain recommendations, *but others have dispositive* force and effect. *Among these latter decisions*, Article 18[6] includes suspension of rights and privileges of membership, expulsion of Members . . . In connection with the suspension of rights and privileges of membership and expulsion from membership [Articles 5 and 6], it is the Security Council which has only the power to recommend and *it is the General Assembly which decides and whose decision determines status.*" (*Certain Expenses of the United Nations (Article 17, Paragraph 2, of the Charter), Advisory Opinion, I.C.J. Reports 1962*, p. 163; emphasis added.)

Consequently, "[t]he decisions of the General Assembly would not be reversed by the judgment of the Court" (*Northern Cameroons, Preliminary Objections, Judgment, I.C.J. Reports 1963*, p. 33), for in the structure of the United Nations the Court does not possess "the ultimate authority to interpret the Charter" (*Certain Expenses of the United Nations (Article 17, Paragraph 2, of the Charter), Advisory Opinion, I.C.J. Reports 1962*, p. 168).

[6] Article 18 of the Charter enumerates, *inter alia*, "the admission of new Members to the United Nations".

The determination made by the competent organs of the United Nations entails the legal consequences. The admission of the FRY to the United Nations as a Member from 1 November 2000 has two principal consequences in the circumstances of the cases at hand:

(i) with respect to the admission of Yugoslavia as a Member as from 1 November 2000, it can be said, though somewhat descriptively, that what is involved here is the admission "as a new Member". This expression indicates its temporal status in relation to the Members admitted on an earlier date;

(ii) the admission of Yugoslavia as a Member as from 1 November 2000 qualified *per se* its status vis-à-vis the United Nations before that date. It seems clear that, in the light of the decisions taken by the competent organs of the United Nations, this status could not be a membership status. *A contrario*, Yugoslavia could not have been admitted as a Member as from 1 November 2000. Just as it is impossible for things to be black and white at the same time, Yugoslavia could not have been either a Member and a non-Member in the period 1992-2000.

30. In the case at hand the Court was faced with several preliminary objections of the Respondent, concerning both the special jurisdiction of the Court in all three aspects *(ratione personae, ratione materiae, ratione temporis)*, the admissibility of the Applicant's claims and the general jurisdiction of the Court (*locus standi* of Serbia and Montenegro).

Having found that there is a lack of jurisdiction, the Court based its decision, essentially, on the absence of *locus standi* of Serbia and Montenegro. It appears that it has chosen the right path.

In the choice of the ground on which the Court is basing its lack of jurisdiction, the Court enjoys a certain discretion — *discretio legalis* — whose limits are determined by common sense and overriding legal considerations emanating from the very nature of the judicial function. In that regard, the Court has produced a general formula in the *Certain Norwegian Loans* case, stating that "the Court is free to base its decision on the ground which in its judgment is more direct and conclusive" (*Judgment, I.C.J. Reports 1957*, p. 25).

The Court puts the formula in concrete terms depending on the circumstances of each particular case in order to determine the ground which, objectively, has priority, both in terms of commonsense and in the sense of legal considerations, in relation to the other grounds raised.

In concreto, it appears that *locus standi* of Serbia and Montenegro deserves absolute priority in relation to the other grounds raised.

The priority emanates from the very nature of *locus standi* as the *pre-*

condition, in contrast to the other grounds raised representing the *conditions* of the special jurisdiction of the Court in all the three aspects raised, on which to base the jurisdiction of the Court *in casu*. As such it alone is sufficient and capable, independently of other grounds raised, of producing direct and conclusive effect on the jurisdiction of the Court. None of the relevant aspects of the special jurisdiction of the Court *(ratione personae, ratione materiae, ratione temporis)*, as well as special jurisdiction itself, possesses this capability. For, if Serbia and Montenegro does not have *locus standi*, then any discourse about them is devoid of any substance. It seems to be a proper application of the legal principle, being also a principle of common sense, *a majori ad minus*.

Furthermore, it should not be taken as irrelevant that the choice made by the Court corresponds to the purpose that the Respondent, as well as the Applicant, attached to the issue of *locus standi* of Serbia and Montenegro in their pleadings before the Court and final submissions respectively.

31. In the light of these considerations, especially under sections 1 and 3 of this part, I am of the opinion that the formulation of the *dispositif* explicitly linked to the absence of *locus standi* of Serbia and Montenegro would be more appropriate considering the circumstances of the cases. The same effect could be produced by simply adding the adjective "general" to the word "jurisdiction". Not only because the question of *locus standi* was *sedes materiae* of these proceedings, but because such a formulation would naturally derive what the Court said dealing with particular basis of jurisdiction invoked (*exempli causa*, Judgment, paras. 45, 78 and 90). In the formulation accepted it appears that the *dispositif* and reasoning of the Court are not, at least, sufficiently coherent.

II. The Grounds Invoked by the Respondents for Rejecting the Application *in limine litis*

1. Implicit Discontinuance as a contradictio in adiecto

32. The arguments of the Respondents, specifically elaborated by France, tended to move in the direction of termination of the proceedings on the basis of something that might be termed "implicit discontinuance".

Namely, it was contended that "the Federal Government of Yugoslavia could . . . have made the choice — the simple, reasonable choice — to *discontinue the proceedings. This was not the case, at least not explicitly.*" (CR 2004/12, p. 6, paras. 3 and 4; emphasis added.) Commenting on the Written Observations of the Federal Republic of Yugoslavia, counsel for France finds that "[t]his looks very much like a discontinuance that will not speak its name" (*ibid.*, p. 8, para. 9 *[translation by the Registry]*).

Discontinuance, as designed by Articles 88 and 89 of the Rules of Court, is comprised of two constitutive elements taken cumulatively: the will of the parties and the proper process.

The will of the parties represents normative substance of discontinuance as designed in Articles 88 and 89 of the Rules, serving as the legal basis on which the discontinuance may be effected. By way of "the will of the parties" discontinuance reflects the structural principle of consensual jurisdiction in contentious cases according to which the Court cannot discontinue or withdraw a case on behalf of the parties, if the parties do not wish so. Viewed in that sense, the will of the parties is an overriding condition for discontinuance within the meaning of Articles 88 and 89 of the Rules.

The modalities of expression of the will differ. In accordance with Article 88 of the Rules, agreement of the parties is required and, in the light of Article 89, paragraph 2, the absence of the objection of the respondent which, in fact, constitutes the presumption of acquiescence, is of relevance.

The proper process aimed at discontinuance implies the actions of the party (or parties), as well as an order of the Court. The discontinuance process, in terms of Articles 88 and 89 of the Rules, bears a dual characteristic: *primo*, in view of substantial meaning of the will of the parties the order of the Court represents a neutral act of the Court, an act whose "main object . . . is to provide a procedural facility, or rather . . . to reduce the process of discontinuance to order" (*Barcelona Traction, Light and Power Company, Limited, Preliminary Objections, Judgment, I.C.J. Reports 1964*, p. 19); *secundo*, Article 88, paragraph 1, of the Rules provides that "the parties, either jointly or separately, notify the Court *in writing*" (emphasis added), while Article 89, paragraph 1, stipulates that "the applicant informs the Court *in writing*" (emphasis added). The Court effectuated it through an order with reference to Article 48 of the Statute and Article 88 or 89 of the Rules respectively.

33. *In concreto*, the eventual discontinuance would, in the light of the relevant circumstances of the case, have to be based on the provision of Article 89, paragraph 2, of the Rules of Court which provides as follows:

> "If, at the time when the notice of discontinuance is received, the respondent has already taken some step in the proceedings, the Court shall fix a time-limit within which the respondent may state whether it opposes the discontinuance of the proceedings. If no objection is made to the discontinuance before the expiration of the time-limit, acquiescence will be presumed and the Court shall make an order officially recording the discontinuance of the proceedings and directing the removal of the case from the list. If objection is made, the proceedings shall continue."

However, none of the elements of discontinuance, both those concerning the will of the parties and those concerning the proper process, embodied in that provision are met.

Serbia and Montenegro, as the Applicant, clearly and unambiguously expressed the will not to discontinue the proceedings. In his concluding remarks during the oral hearing, the Agent of Serbia and Montenegro repeatedly pointed out that the Applicant "did not discontinue the proceedings" (CR 2004/23, p. 16, para. 21; p. 18, para. 27; p. 20, para. 34). As such, it is obvious that Serbia and Montenegro could not have submitted notice of discontinuance to the Court as provided for by Article 89, paragraph 2, of the Rules. Some respondent States (the United Kingdom, the Netherlands and France), true, saw notice of discontinuance in the Written Observations of Serbia and Montenegro of 18 December 2002. The Applicant, in its reply to those contentions contained in a letter dated 28 February 2003 from the Agent of Serbia and Montenegro, stresses that "the Written Observations of 18 December 2002 do not represent such a notice of discontinuance". As the will of the Applicant to discontinue the proceedings *in concreto* simply does not exist, there are no elements for forming the will of the parties as the basis of discontinuance. The statement of the Respondent regarding the discontinuance of the proceedings is, in this case, irrelevant and could be qualified as an invitation or a proposal to the Applicant to proceed to the discontinuance process provided for in Article 89, paragraph 2, of the Rules of Court.

34. The provisions of Articles 88 and 89 of the Rules, as a part of the procedural law of the Court, are binding rules both upon the parties and upon the Court itself. Although created by the Court, the relevant procedural rules, as legal rules, possess an objective existence, imposing the restraints that the Court itself must observe. The Court has no power to modify the operation of Article 89 of the Rules *ad casum*. Such a conclusion, it seems to me, clearly derives both from the nature of the procedural rules, as legal rules, and from the legislative history of the Rules of Court. The proposals that it should assume such a power were rejected with the explanation that "the parties were entitled to have a reliable guarantee of the stability of the rules of procedure" (Sixth Meeting of 19 May 1934, *P.C.I.J., Series D, No. 2* (3rd add.), p. 38).

It is true that, in contrast to Articles 93 to 97 of Part III of the Rules, the provisions of Article 89 can be modified or supplemented by the parties *inter se* in accordance with Article 101 of the Rules of Court, which provides:

> "The parties to a case may jointly propose particular modifications or additions to the rules contained in the present Part (with the exception of Articles 93 to 97 inclusive), which may be applied by the Court or by a Chamber if the Court or the Chamber considers them appropriate in the circumstances of the case."

But the Parties to the present dispute have not had recourse to the possibility offered by the provisions of Article 101.

35. In the light of the provisions of Article 89 of the Rules of Court "implicit discontinuance" would be *contradictio in adiecto*. "Implicit discontinuance" is in irreconcilable collision both with the explicit intention of the Applicant to continue the proceedings and with the formal nature of the discontinuance process. It would, in the circumstances of the case at hand, imply that the Court renounce the ministerial function which basically belongs to it in the construction of discontinuance on the basis of Article 89. Accordingly, the order on discontinuance, too, which, pursuant to Article 89 of the Rules, is of a declaratory nature (Article 89 determines the function of the order on discontinuance as "officially recording the discontinuance of the proceedings"; in that sense, a perfectly coherent jurisprudence of the Court has also been formed[7]) would assume the features of a constitutive act.

36. The respondent States, in formulating the thesis of "implicit discontinuance", seem to have been inspired by the reasoning of the Court in the cases concerning *Nuclear Tests (Australia* v. *France)* and *Nuclear Tests (New Zealand* v. *France)*. However, the relevant facts of the *Nuclear Tests* cases do not offer ground for any analogy whatsoever with this particular case.

The *Nuclear Tests* cases have not been discontinued on the basis of

---

[7] Cases concerning *Factory at Chorzów, Order of 25 May 1929, P.C.I.J., Series A, No. 19*, p. 13; *Delimitation of the Territorial Waters between the Island of Castellorizo and the Coasts of Anatolia, Order of 26 January 1933, P.C.I.J., Series A/B, No. 51*, p. 6; *Losinger, Order of 14 December 1936, P.C.I.J., Series A/B, No. 69*, p. 101; *Borchgrave, Order of 30 April 1938, P.C.I.J., Series A/B, No. 73*, p. 5; *Appeals from Certain Judgments of the Hungaro/Czechoslovak Mixed Arbitral Tribunal, Order of 12 May 1933, P.C.I.J., Series A/B, No. 56*, p. 164; *Legal Status of the South-Eastern Territory of Greenland, Order of 11 May 1933, P.C.I.J., Series A/B, No. 55*, p. 159 (in this case the Court took note that Norway and Denmark had withdrawn their respective applications); *Prince von Pless Administration, Order of 2 December 1933, P.C.I.J., Series A/B, No. 59*, pp. 195-196; *Polish Agrarian Reform and German Minority, Order of 2 December 1933, P.C.I.J., Series A/B, No. 60*, pp. 202-203; *Aerial Incident of 27 July 1955 (United States of America* v. *Bulgaria), Order of 30 May 1960, I.C.J. Reports 1960*, pp. 146-148; *Barcelona Traction, Light and Power Company, Limited, Order of 10 April 1961, I.C.J Reports 1961*, pp. 9-10; *Trial of Pakistani Prisoners of War, Order of 15 December 1973, I.C.J. Reports 1973*, pp. 347-348; *Border and Transborder Armed Actions (Nicaragua* v. *Costa Rica), Order of 19 August 1987, I.C.J. Reports 1987*, pp. 182-183; *Passage through the Great Belt (Finland* v. *Denmark), Order of 10 September 1992, I.C.J. Reports 1992*, pp. 348-349; *Vienna Convention on Consular Relations (Paraguay* v. *United States of America), Order of 10 November 1998, I.C.J. Reports 1998*, p. 427.

The acquiescence of respondent State has been presumed in the case concerning *Protection of French Nationals and Protected Persons in Egypt, Order of 29 March 1950, I.C.J. Reports 1950*, p. 60.

On the basis of a unilateral act of the applicant, discontinuance has been effectuated in the cases concerning *Denunciation of the Treaty of 2 November 1865 between China and Belgium, Order of 25 May 1929, P.C.I.J., Series A, No. 18*, p. 7; *Trial of Pakistani Prisoners of War, Order of 15 December 1973, I.C.J. Reports 1973*, p. 348.

Articles 88 and 89 of the Rules. The Court, in fact, terminated the proceedings in those cases due to *the lack of object of the Application*, following its reasoning in the *Northern Cameroons* case (*Preliminary Objections, Judgment, I.C.J. Reports 1963*, p. 38). The Court found, *inter alia*, that "[t]he object of the claim having clearly disappeared, there is nothing on which to give judgment" (*Nuclear Tests (Australia* v. *France), Judgment, I.C.J. Reports 1974*, p. 272, para. 59) and that

> "[t]he conclusion at which the Court has arrived . . . does not mean *that it is itself* effecting a compromise of the claim; the Court is merely ascertaining the object of the claim and the effect of the Respondent's action" (*ibid.*, p. 270, para. 54; emphasis added).

It is obvious in this particular case that the object of the Application stands as defined at the moment of instituting the proceedings, causing the real dispute before the Court, whereas the respondent State did not take any action nor assumed any commitment whereby the objective of the Applicant would have been accomplished. (See the objective of the Applicant, Judgment, para. 21.)

2. The Congruence of the Statements of Facts by the Parties and the Duty of the Court to Examine its Jurisdiction ex officio

37. In their preliminary objections all the Respondents have found, *inter alia*, that the Applicant was neither a Member of the United Nations nor party to the Statute of the Court, and accordingly did not have access to the Court at the time of submission of its Application, as *sine qua non* condition of the Court's jurisdiction.

The Applicant for its part, contended that it was admitted to the United Nations on 1 November 2000 as a new Member and furthermore that it was not bound by the Statute pursuant to Article 93, paragraph 2, of the United Nations Charter; nor did it issue a declaration as contemplated in Article 35, paragraph 2, of the Statute of the Court.

38. The Respondent contended that, due to the fundamental change of its position regarding membership in the United Nations and its status as a party to the Genocide Convention respectively, Serbia and Montenegro should be estopped from continuing the proceedings on the preliminary objections. The contention seems to be dubious for the following reasons. *Primo*, the doctrine of estoppel is basically founded on the maxim *allegans contraria non est audiendus*. It could not be taken, however, that, by claiming continuity of the membership in the United Nations, the Applicant has made a representation on the faith of which the Respondent has changed its own position suffering some prejudice. As a matter of fact, by changing its position regarding membership in the United Nations and its status as a party to the Genocide Convention, the Applicant has acted *against* the case it instituted before the Court. Of key importance is the

question whether the change has taken place on a basis of caprice or a litigation opportunity or, indeed, as an expression of accommodation to the real state of affairs created without the Applicant's active participation, which it could not resist. *Secundo*, estoppel, even supposing it to be established *in casu*, cannot operate against the question of *locus standi* as a constitutional requirement of the Statute establishing the objective limit of exercise of the judicial function of the Court. *Tertio*, it appears that the Respondent influenced, or could have influenced, the Applicant's position in relation to the two relevant jurisdictional facts: membership of the Applicant of the United Nations and its status as a party to the Genocide Convention. Acting as a Member State of the United Nations, the Respondent voted for the legally contradictory General Assembly resolution 47/1. It must have been aware of the strong elements of political instrumentality contained in the resolution. Besides, the Respondent has not dissociated itself from the subsequent practice of the United Nations organs. The Respondent's position — that the Applicant is one of five equal successors of the SFRY — is, in the circumstances of this particular case, in conflict with the treatment of the Applicant as a party to the Genocide Convention. It is a matter of public knowledge that, until 12 March 2001, the Applicant had not expressed its consent to be bound by the Convention in accordance with Article XI of the Convention, nor did it, for that matter, issue notification of succession. In the absence of any rules of positive international law on automatic succession, the only basis to consider the Applicant as a party to the Genocide Convention is in its legal identity and continuity with the SFRY.

39. It is indisputable that the statements of facts by the Parties relating to the status of the Applicant in the United Nations as well as to the Statute of the Court coincide at this phase of the proceedings. (It would be difficult to claim *in concreto* that this amounts to the acceptance or recognition by the Applicant of the Respondent's statement of facts. Recognition or acceptance is a volitional act, the expression of the intention of one party to bow to the allegations of the other party. Rather, what is involved here is a concurrence of the statements of facts by the parties, having in mind that the Applicant formulated its own statement of facts concerning the relevant matter, practically with an identical content, already at the time of the "Initiative to the Court to reconsider *ex officio* jurisdiction over Yugoslavia" (4 May 2001) and in the case concerning *Application for Revision*.)

It could not be taken for granted, however, that the concurrence or even the recognition of the statement of facts as presented by the Respondent, on the part of the Applicant, is determinative of the case and that it removes *per se* the need to examine the jurisdiction of the Court.

(a) *Aspect of the legal logic*

40. Concurrence or recognition, direct or indirect, of the statement of facts of one party to the proceedings only determines the content of *praemisae minor* of the Court's syllogism whose *conclusio* is the ruling on the justification of the preliminary objection. Understood in this sense, concurrence or recognition of the statement of facts does not determine, or at least does not determine in full, the law that the Court should apply — *praemisae major*.

If the concurrence of the statement of facts of the parties had an automatic effect on the jurisdiction of the Court, then the parties, and not the Court, would be deciding, in the substantive sense, the relevant law that regulates the jurisdiction of the Court. And such an outcome would mean a departure from the principle, deriving from the very essence of the judicial function, i.e., that the Court is the sole judge of its jurisdiction.

(b) *Normative aspect*

41. In view of the fact that "the establishment or otherwise of jurisdiction is not a matter for the parties but for the Court itself" (*Fisheries Jurisdiction (Spain* v. *Canada), Jurisdiction of the Court, Judgment, I.C.J. Reports 1998*, p. 450, para. 37; also, individual opinion of President McNair in the jurisdiction phase of the case concerning *Anglo-Iranian Oil Co.* in which he stated that "[a]n international tribunal cannot regard a question of jurisdiction solely as a question *inter partes*" (*Preliminary Objection, Judgment, I.C.J. Reports 1952,* pp. 116-117)), the dispute of the parties regarding the jurisdiction in the preliminary objection phase is not a necessary condition for the Court to address the issue of jurisdiction.

Preliminary objections raised by a party are only a tool, a procedurally designed weapon for the establishment of the jurisdiction of the Court, *suo nomine et suo vigore*, for it is under an obligation to do so ex officio. The legal meaning of the proceedings on preliminary objection has been defined by the Court in the case concerning *Rights of Minorities in Upper Silesia (Minority Schools)* (hereinafter referred to as *"Minority Schools"*), as follows:

> "the raising of an objection by one Party *merely draws the attention of the Court to an objection to the jurisdiction which it must* ex officio *consider*" (*Rights of Minorities in Upper Silesia (Minority Schools), Judgment No. 12, 1928, P.C.I.J., Series A, No. 15*, p. 23; emphasis added).

Or, as stated by the Court in the *Genocide Convention* case:

> "[t]he Court must, in each case submitted to it, verify whether it has jurisdiction to deal with the case . . . [S]uch objections as are raised

> by the Respondent may *be useful to clarify* the legal situation." (*Preliminary Objections, Judgment, I.C.J. Reports 1996 (II)*, p. 622, para. 46; emphasis added.)

Accordingly, the establishment of the jurisdiction by the Court *in casu* is not necessarily linked with the dispute as to jurisdiction. If the duty of the Court to verify its jurisdiction in each particular case exists regardless of the preliminary objection as such, then the pleadings of the parties in the proceedings are not *a fortiori* of decisive importance in that sense. If as Shabtai Rosenne, commenting on the case concerning *Monetary Gold Removed from Rome in 1943* (hereinafter referred to as *"Monetary Gold"*), says:

> "[t]he fact that an objection is made does not mean — in the eyes of the Court — that the Court is being asked not to determine the merits of the claim under any circumstances" (Shabtai Rosenne, *The Law and Practice of the International Court, 1920-1996*, Vol. II (Jurisdiction), p. 863),

then the contrary is equally valid, i.e., that the Court is being asked not to determine the merits of the claim if an objection to the preliminary objection is not made. In that sense, an extensive practice of the Court has been established.

The *dictum* of the Court in the case concerning the *Appeal Relating to the Jurisdiction of the ICAO Council* (hereinafter referred to as *"ICAO Council"*) could represent a synthesis of that practice: "[t]he Court must however always be satisfied that it has jurisdiction, and must if necessary go into that matter *proprio motu*" (*Judgment, I.C.J. Reports 1972,* p. 52, para. 13). This is also reflected in the opinions of judges. (In the case concerning *Mavrommatis Palestine Concessions*, Judge Moore in his dissenting opinion stated "even though the parties be silent, the tribunal, if it finds that competence is lacking, is bound of its own motion to dismiss the case" (*Judgment No. 2, 1924, P.C.I.J., Series A, No. 2*, p. 58); in the *Minority Schools* case, Judge Huber in his dissenting opinion found that the Court "must *ex officio* ascertain on what legal foundation it is to base its judgment upon the claims of the Parties" (*Judgment No. 12, 1928, P.C.I.J., Series A, No. 15*, p. 54); and in the case concerning the *Free Zones of Upper Savoy and the District of Gex*, Judge Kellogg pointed out in his observations attached to the Order of 6 December 1930 that it was not necessary that the question of jurisdiction be raised by one of the parties, since "[i]t may and should be raised by the Court on its own initiative, as was done in the Eastern Carelia case" (*Order of 6 December 1930, P.C.I.J., Series A, No. 24*, p. 43).)

42. The question of the jurisdiction of the Court bears two dominant features: *(a)* the question of jurisdiction of the Court is a *questio juris*; and *(b)* the question of jurisdiction of the Court is a matter of international public order.

(a) As a *questio juris*[8] the jurisdiction of the Court is within the scope of the principle *jura novit curia*. In the case concerning *Territorial Jurisdiction of the International Commission of the River Oder* (hereinafter referred to as *"River Oder"*) the Polish Government did not contend that the Barcelona Convention had not been ratified by Poland until the oral proceedings. The six respondents asked the Court to reject the Polish contention *a limine*, for having been submitted at such an advanced stage of the proceedings. The Court dismissed the objection as untenable for "[t]he fact that Poland has not ratified the Barcelona Convention not being contested, it is evident that the matter is purely one of law such as the Court . . . should examine *ex officio*" (*Judgment No. 16, 1929, P.C.I.J., Series A, No. 23*, p. 19).

Being bound by law, the Court is not bound by the arguments of the parties. This follows clearly from the principle *jura novit curia* addressed by the Court in its Judgments in the cases concerning *Fisheries Jurisdiction (United Kingdom* v. *Iceland)* and *Fisheries Jurisdiction (Federal Republic of Germany* v. *Iceland)*:

> "The Court . . . as an international judicial organ, is deemed to take judicial notice of international law, and is therefore required in a case falling under Article 53 of the Statute, *as in any other case*, to consider on its own initiative all rules of international law which may be relevant to the settlement of the dispute . . . for the law lies within the judicial knowledge of the Court." (*Merits, Judgment, I.C.J. Reports 1974*, p. 9, para. 17; *ibid.*, p. 181, para. 18; emphasis added.)

The principle has also been confirmed in the *Nicaragua* case by a *dictum* that

> "[f]or the purpose of deciding whether the claim is well founded in law, the principle *jura novit curia* signifies that the Court is not solely dependent on the argument of the parties before it with respect to the applicable law" (*Merits, Judgment, I.C.J. Reports 1986*, p. 24, para. 29; cf. *"Lotus", Judgment No. 9, 1927, P.C.I.J., Series A, No. 10*, p. 31);

consequently, the rule according to which a party seeking to assert a fact

---

[8] "The existence of jurisdiction of the Court in a given case is . . . not a question of fact, but a question of law to be resolved in the light of the relevant facts." (*Border and Transborder Armed Actions (Nicaragua* v. *Honduras), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1988*, p. 76, para. 16.)

The question of the Court's jurisdiction is

> "necessarily an antecedent and independent one — an objective question of law — which cannot be governed by preclusive considerations capable of being so expressed as to tell against either Party — or both Parties" (*Appeal Relating to the Jurisdiction of the ICAO Council, Judgment, I.C.J. Reports 1972*, p. 54, para. 16 *(c)*).

must bear the burden of proving it "has no relevance for the establishment of the Court's jurisdiction" (*Fisheries Jurisdiction (Spain* v. *Canada), Jurisdiction of the Court, Judgment, I.C.J. Reports 1998*, p. 450, para. 37).

(b) The disposition of the parties, although being the dominant principle in the proceedings before the Court, suffers limitations.

These limitations derive from the objective rules of the Statute and the Rules of Court defining the nature and limits of the Court's judicial action. As constitutional norms (R. Monaco, "Observations sur la hierarchie des sources du droit international", *Festschrift für Hermann Mosler*, 1983, pp. 607-608) or as *règles préceptives* (intervention of Judge M. Yovanovitch, Preliminary Session of the Court, *P.C.I.J., Series D, No. 2*, p. 59), these rules transcend the disposition of the parties and pertain to the international public order.

As a matter of international public order superior to the will of the parties the question of jurisdiction need not necessarily be raised by the parties themselves but the Court can and should examine it ex officio. (Cf. *Territorial Jurisdiction of the International Commission of the River Oder, Judgment No. 16, 1929, P.C.I.J., Series A, No. 23*, pp. 18-19; *Fisheries Jurisdiction (United Kingdom* v. *Iceland), Jurisdiction of the Court, Judgment, I.C.J. Reports 1973*, p. 7, para. 12; p. 54, para. 13; *Prince von Pless Administration, Order of 4 February 1933, P.C.I.J., Series A/B, No. 52*, p. 15; *Factory at Chorzów, Jurisdiction, Judgment No. 8, 1927, P.C.I.J., Series A, No. 9*, p. 32.)

43. In the practice of the Court the expressions ex officio and *proprio motu* are used as interchangeable, although there exist differences in the meaning of these two expressions. The expression *"proprio motu"* implies the discretionary authority of the Court to take action on its own initiative. The action taken by the Court "ex officio" is an expression of the duty of the Court by virtue of its judicial function. The exclusion of the discretion of the Court relates to the action itself and does not touch upon the freedom of the Court in respect of the ruling.

The linking element of these two expressions is of a negative nature and is reflected in the fact that it is about the actions which the Court takes or may take irrespective of the will and the processual actions of the parties.

The genuine difference in the meaning of these two expressions is overcome in some *dicta* of the Court by adding the qualification "must" to the expression *"proprio motu"* as in, for example, the Court's Judgment in the *ICAO Council* case (*Judgment, I.C.J. Reports 1972*, p. 52, para. 13). Thus, in fact, the Court's own motion is qualified as the obligation and the action *proprio motu* deprives it of discretion and turns it into action ex officio.

44. As *questio juris* pertaining to the public order, jurisdiction is determined by the decision of the Court, formal or informal, on the basis of the principle of *compétence de la compétence*. In the context of the case at

hand, it is necessary to distinguish between the general principle of *compétence de la compétence* and its narrow normative projection expressed in Article 36, paragraph 6, of the Statute. Namely, some of the Respondents have asserted that specific terms in Article 36, paragraph 6, of the Statute provide that "*in the event of a dispute* as to whether the Court has jurisdiction, the matter shall be settled by the decision of the Court" (counsel for the United Kingdom, CR 2004/10, p. 10; emphasis in the original; counsel for France, CR 2004/12, p. 12).

(c) *Principle* compétence de la compétence

45. The general principle of *compétence de la compétence* represents a basic structural and functional principle inherent to 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 (1797), "indispensably necessary to the discharge of any . . . duties" for any adjudicatory body (J. B. Moore (ed.), *International Adjudications, Ancient and Modern, History and Documents, Modern Series*, Vol. IV, p. 183).

As such the principle is confirmed in the Court's jurisprudence. In the *Nottebohm* case, the Court stated *inter alia*:

> "Paragraph 6 of Article 36 merely adopted, in respect of the Court, a rule consistently accepted by general international law in the matter of international arbitration. Since the *Alabama* case, it has been generally recognized, following the earlier precedents, that, in the absence of any agreement to the contrary, an international tribunal has the right to decide as to its own jurisdiction and has the power to interpret for this purpose the instruments which govern that jurisdiction . . .
>
> . . . . . .
>
> Consequently, the Court has not hesitated to adjudicate on the question of its own jurisdiction in cases in which the dispute which had arisen in this respect went beyond the interpretation and application of paragraph 2 of Article 36. In the Corfu Channel case (Judgment of April 9th, 1949, *I.C.J. Reports 1949*, pp. 23-26 and 36), the Court adjudicated on a dispute as to whether it had jurisdiction to assess the amount of compensation, a dispute which related to the interpretation of a Special Agreement; in the Ambatielos case (Judgment of July 1st, 1952, *I.C.J. Reports 1952*, p. 28), the Court adjudicated upon a dispute as to its jurisdiction which related to the interpretation of a jurisdictional clause embodied in a treaty; in both cases the dispute as to the Court's jurisdiction related to paragraph 1 and not to paragraph 2 of Article 36.
>
> Article 36, paragraph 6, suffices to invest the Court with power to adjudicate on its jurisdiction in the present case. *But even if this were*

> *not the case, the Court, 'whose function is to decide in accordance with international law such disputes as are submitted to it'* (Article 38, paragraph 1, of the Statute), *should follow in this connection what is laid down by general international law. The judicial character of the Court and the rule of general international law referred to above are sufficient to establish that the Court is competent to adjudicate on its own jurisdiction in the present case.*" (*Preliminary Objection, Judgment, I.C.J. Reports 1953*, p. 119-120; emphasis added.)

Being one of the relevant features establishing its judicial nature, the power of the Court to determine whether it has jurisdiction, emanating from the general principle *compétence de la compétence*, is an inherent right and duty of the Court knowing no limitations (cf. *Electricity Company of Sofia and Bulgaria, Judgment, 1939, P.C.I.J., Series A/B, No. 77*, pp. 102-103, dissenting opinion of Judge Urrutia). The Court exercises its inherent power from the institution of the proceedings until its end with a view to establishing whether it possesses jurisdiction or not in the particular case. (In reality, the Court proceeds to exercise its inherent power in two ways: *(a)* by ascertaining the existence of processual requirements for jurisdiction through prima facie assessment, being substantively a judicial presumption of jurisdiction or *(b)* by adopting a formal decision on the jurisdiction. In that sense, the power of the Court to determine whether it has jurisdiction in a given case seems absolute, considering that the Court, even when declaring that it has no jurisdiction *in casu*, exercises that inherent power.)

46. Apart from its expression in Article 36, paragraph 6, the general principle of *compétence de la compétence*, has found its expression in several provisions of the Statute. Article 53, paragraph 2, of the Statute provides that "[t]he Court must . . . satisfy itself, not only that it has jurisdiction . . . but also that the claim is well founded in fact and law". In the *Fisheries Jurisdiction* cases, the Court stated, *inter alia*, that "Article 53 of the Statute both entitles the Court and, in the present proceedings, *requires* it to pronounce upon the question of its jurisdiction" (*Jurisdiction of the Court, Judgment, I.C.J. Reports 1973*, p. 22, para. 45, and p. 66, para. 45; emphasis added).

The application of the general principle of *compétence de la compétence* can be seen also in part of the provisions of Article 41 of the Statute authorizing the Court to indicate provisional measures *proprio motu*.

The rules of the law of the Court deriving from the general principle of *compétence de la compétence* are also rules in Article 32, paragraph 2, of the Rules of Court, as well as Article 38, paragraph 5. The fact that in both cases the relevant role is played by the Registry of the Court does not affect the nature of the rules.

In its application the principle is not restricted to the contentious pro-

cedure. It is equally relevant also in the advisory procedure. As the Court stated in the case concerning *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, "it is incumbent on the Court *to satisfy itself that the conditions governing its own competence to give the opinion requested are met*" (*Advisory Opinion, I.C.J. Reports 1996 (I)*, p. 83, para. 29; emphasis added). The substantive analogy between the contentious and the advisory procedures (in the *Status of Eastern Carelia* case the Court stated that it was the right and obligation of the Court to examine its own jurisdiction in advisory as well as in contentious cases (Report by the Registrar (June 1933), *P.C.I.J., Series D, No. 2* (3rd add.), p. 837) in this particular matter has its foundation in the provision of Article 68 of the Statute. The Court must in every request for an advisory opinion assure itself of its jurisdiction. It is not absolved from doing so by assuming that a request for an opinion is determinative of the Court's power to give opinion on the particular question. (Cf. Shabtai Rosenne, "The Advisory Competence of the International Court of Justice", *Revue de droit international, de sciences diplomatiques et politiques* (A. Sottile, Geneva), January-March 1952, No. 1, p. 33; Georg Schwarzenberger, "Trends in the Practice of the World Court", *Current Legal Problems*, Vol. 4, 1951, p. 27.)

47. The power of the Court to determine whether it has jurisdiction *in casu*, emanating from the general principle of *compétence de la compétence*, should be distinguished from the corresponding power of the Court to determine the *extent* of its jurisdiction.

The extent of jurisdiction of the Court is not a matter to be decided on the basis of the principle of *compétence de la compétence* solely as a functional norm, but on the basis of substantive norms of the Statute defining the scope of exercise of the judicial function of the Court. In that regard, the basic norm of the consensual nature of the Court's jurisdiction, some sort of a constitutional norm of the law of the Court and international tribunals as well, is of relevance.

Already in its Judgment No. 2, the Permanent Court of International Justice clearly established the limits of its jurisdiction by stating that "the Court, bearing in mind the fact that its jurisdiction is limited, that it is invariably based on . . . consent . . . and only exists in so far as this consent has been given" (*Mavrommatis Palestine Concessions, 1924, P.C.I.J., Series A, No. 2*, p. 16).

48. Article 36, paragraph 6, of the Statute is a narrow, restrictive expression of the general principle of *compétence de la compétence*. The application of the principle of *compétence de la compétence* expressed in Article 36, paragraph 6, presupposes a dispute as to whether the Court has jurisdiction. Hence the Court, acting on the basis of Article 36, paragraph 6, of the Statute, both logically and from the normative aspect, is not in a position to raise a question of its jurisdiction ex officio. Basically, the Court then, exercising its judicial function, only adjudicates the disputes as to its jurisdiction ex officio. It is here that, *strictissimo sensu*, lies

the normative meaning of the principle of *compétence de la compétence* as expressed in Article 36, paragraph 6, of the Statute.

In practice there were cases where the Court, in the jurisdictional phase of the proceedings, *proprio motu*, raised the question not raised by parties. For instance, in the *Interhandel* case the Court applied *proprio motu* the objection to its jurisdiction *ratione temporis* to the alternative claim (*Preliminary Objections, Judgment, I.C.J. Reports 1959*, p. 22). Such an approach of the Court could be qualified as the overlapping of the general and the particular, i.e., of the general principle of *compétence de la compétence* and its narrower expression embodied in Article 36, paragraph 6, of the Statute.

49. It is doubtful whether the application of Article 36, paragraph 6, of the Statute is excluded, as the respondent States asserted, in the present case, *in toto*. It seems obvious that it depends on whether the statements of parties concerning the facts coincide entirely.

That is not the case. Namely, the statements of the Parties coincide only partially, relating mainly to the jurisdiction of the Court *ratione personae*, or, to be more precise, to the status of the Applicant in relation to the Statute of the Court.

If the statements of the Parties appear to be founded in this matter, the conclusion affects only the jurisdiction of the Court according to Article 36, paragraph 2, of the Statute, but does not necessarily — without knowing the finding of the Court on the meaning of the expression "the special provisions contained in treaties in force" in Article 35, paragraph 2, of the Statute — affect the jurisdiction of the Court as set forth in Article IX of the Genocide Convention.

Regarding the Genocide Convention as a "treaty in force" at the time of submission of the Application, there is, however, a real — though latent — hidden dispute between the Parties. The Applicant contended that it became a party to the Genocide Convention by accession on 12 March 2001, while the Respondents implicitly allowed that the Applicant was a party at the time of submission of the Application.

Finally, the positions of the Parties were directly and completely opposed regarding the jurisdiction of the Court *ratione materiae* and *ratione temporis*.

50. The principle *compétence de la compétence* in its integral form — comprising both the general principle and its expression in Article 36, paragraph 6, of the Statute — is a judicial weapon which achieves a double objective:

Primo, it allows the Court to establish its jurisdiction as the application of the basis or constitutional norm of the consensual nature *in casu* either ex officio or upon objection to its jurisdiction. At the same time, it gives the Court a legal basis to check, in the development of the proceedings, its judicial presumptions on its jurisdiction, until a conclusive, definitive

finding on its jurisdiction. Acting in that way, in the conditions of non-existence of multi-tier judiciary in the international community, the Court *de facto* acts as a *sui generis* appellate court in the question of jurisdiction.

Secundo, in a litigation as tripartite processual relation, it is a judicial weapon by which the Court not only solves the dispute on jurisdiction, but the challenge to its own decision on the jurisdiction taken in the preliminary objection phase either ex officio or at the request of a party in the revision procedure.

Therefore, it could be said that the principle of *compétence de la compétence* in its integral expression enables the Court to ascertain in every phase of the proceedings, according to the circumstances and degree of knowledge, its jurisdiction as the basis and framework of the proper administration of justice.

51. The Court, when using its right and performing its duties on the basis of the principle of *compétence de la compétence*, acts, basically, in three ways:

(i) it decides ex officio in the proceedings of preliminary objections in the dispute between the parties as to jurisdiction;

(ii) it raises *proprio motu* the question of jurisdiction (or, as it is sometimes said, imprecisely, "raises an objection to jurisdiction", for it cannot object to jurisdiction as the determination of the matter is in its exclusive domain), requesting the parties to act pursuant to Article 79, paragraph 6, of the Rules or, acting itself in accordance with Article 38, paragraph 5, of the Rules. The *proprio motu* action of the Court is the technical realization of the right and duty of the Court to ascertain ex officio its competence; and

(iii) the ex officio examination of the jurisdiction as an autonomous judicial action which does not rely on the actions of the parties. The very examination of jurisdiction, apart from the decision of the Court on jurisdiction, being some sort of organic judicial action, inherent element of the legal reasoning of the Court, must not be exercised in a due form, but in a manner the Court finds appropriate.

3. The Effect on the Dispute of the Congruence of Views between the Parties as to Jurisdiction

52. In this regard, the assertions made by the Respondents have two meanings (cf. CR 2004/6, pp. 15-17; CR 2004/7, pp. 10-12; CR 2004/10, p. 7; CR 2004/12, p. 12):

— that just as the existence of a dispute is a preliminary condition for the continuation of the proceedings on the merits phase, so is the

dispute as to jurisdiction a condition for the continuation of the proceedings on preliminary objections; and
— that agreement between the parties as to a question of jurisdiction is determinative of the case, and that, as a result, the dispute before the Court has disappeared.

(a) *The existence of a dispute as to jurisdiction as a preliminary condition for the continuation of the proceedings on preliminary objections*

53. The equalization between the proceedings on the merits and the proceedings on preliminary objection would be highly doubtful. Namely, it ignores the specific features of judicial activity of the Court in the jurisdictional phase of the proceedings, features which derive from the nature of the question of jurisdiction. ("The Court finds that Italy's acceptance of jurisdiction is one thing, while her raising of a legal issue on jurisdiction is quite another." (*Monetary Gold Removed from Rome in 1943, Preliminary Question, Judgment, I.C.J. Reports 1954*, p. 29.) The practical outcome of such equalization would consist of the treatment of the question of jurisdiction as *quaestio facti* and as a matter *inter partes* which is in sharp contradiction with its true nature (see paragraphs 40-44 of this opinion).

54. It is based on the idea of the transplantation of the rule regarding "the existence of a dispute [as] the primary condition for the Court to exercise its judicial function" (*Nuclear Tests (New Zealand* v. *France), Judgment, I.C.J. Reports 1974*, p. 476, para. 58) in the merits phase of a case into the incidental proceedings of the preliminary objections. This transplantation is however impossible taking into consideration the very nature of the question of jurisdiction. It is directly aimed against the inherent right and duty of the Court to determine its jurisdiction. In that regard, the formulation of the relevant provisions of the Rules of Court concerning preliminary objections is indicative. Paragraph 2 of Article 79 of the Rules provides in imperative (wording) formulation that "the preliminary objection *shall set out* the facts and the law on which the objection is based" (emphasis added) whereas paragraph 3 of Article 79 provides, *inter alia*, that "the other party *may present* a written statement of its observations and submissions" (emphasis added). The asymmetrical relations between the provisions of Article 79 of the Rules — obligations *stricti juris* of the Respondent on the one hand, and a right of the Applicant on the other — represent an indirect expression of a different nature of the proceedings on the merits and that of the incidental proceedings on preliminary objection (Article 49 of the Rules establishes the duties of the parties regarding the Memorial and Counter-Memorial symmetrically).

55. There is a substantive symmetry in the relevant elements of the case in hand and the *Monetary Gold* case. In the latter case, Great

Britain, in its final Submission No. 1 *(b)* contended that, by raising the preliminary objection, the

> "Application . . .
>
> . . . . . .
>
> *(b)* has been in effect withdrawn or cancelled by Italy" (*Preliminary Question, Judgment, I.C.J. Reports 1954*, p. 25; see also *ibid.*, p. 30).

However, the Court found that "[t]he raising of the Preliminary Question by Italy cannot be regarded as equivalent to a discontinuance" (*ibid.*, p. 30). As to the Submission contending that the Italian Application should be held to be "invalid and void" *(ibid.)*, the Court found that

> "it is enough to state that the Application, if not invalid at the time it was filed, cannot subsequently have become invalid by reason of the preliminary question which Italy raised with regard to the Court's jurisdiction in this case" *(ibid.)*.

(b) *The congruence of views between the Parties as to jurisdiction and the alleged disappearance of the dispute on the merits*

56. The contention that there exists a substantive *nexus* between the dispute as to jurisdiction and the dispute on the merits is, in the light of the uniform jurisprudence of the Court on the issue of a legal dispute, even more surprising. The relevant constituent elements of the legal dispute seem to be clearly presented in the case at hand.

The contents of the Application, the Memorial, the Preliminary Objections and other relevant materials, create a clear picture of the situation in which "two sides hold clearly opposite views concerning the question of the performance or non-performance of certain treaty obligations" (*Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First Phase, Advisory Opinion, I.C.J. Reports 1950*, p. 74; hereinafter referred to as *"Interpretation of Peace Treaties"*) as well as the performance of obligations under general international law embodied in the United Nations Charter (Memorial of 5 January 2000, pp. 301-346). The Applicant charges the Respondents that by "bombing of Yugoslav territory" (Memorial, p. 301, para. 2.1.1.) they violated a number of its international obligations including not only in the international treaties in force, but also in the Charter of the United Nations. The Respondents denied the charge.

57. By denying the charges, the Respondents, within the limits and the range determined by the stage of the procedure, elaborate diametrically opposite legal concepts according to which the bombing of the territory of the Federal Republic of Yugoslavia was carried out *lege artis*, in con-

formity with the concept of the so-called humanitarian intervention, as well as by obeying the rules of humanitarian law. This constitutes the second qualifying condition for the existence of the legal dispute — "that the claim of one party is *positively opposed* by the other" (*South West Africa, Preliminary Objections, Judgment, I.C.J. Reports 1962*, p. 328; emphasis added). Acting in the above-mentioned manner, the Respondents have gone out of the reach of a simple denial of the Applicant's charges and set the matter on the level of a conflict of legal views, the conflict of which is *in concreto* total and absolute.

58. The issue of the existence of a dispute on the merits possesses its temporal dimension. As the Court stated in the case concerning *Nuclear Tests (Australia* v. *France)* "[t]he dispute brought before [the Court] must therefore continue to exist at the time when the Court makes its decision" (*Judgment, I.C.J. Reports 1974*, p. 271, para. 55).

A dispute in existence in the proceedings before the Court may, in general, disappear in two ways:

(a) by withdrawing the Application; and
(b) if the object of the claim has been achieved by other means, as *exempli causa*, when "a State has entered into a commitment concerning its future conduct" which made the dispute disappear (*Nuclear Tests (Australia* v. *France), Judgment, I.C.J. Reports 1974*, p. 272, para. 60).

None of the above-mentioned has happened in the cases at hand.

It is true that the Respondent's contention was not that the Application has been withdrawn, but that the Applicant abandoned the basis of jurisdiction making "a mockery of the principle that jurisdiction is founded on the consent of the parties" (CR 2004/10, p. 11); some "kind of *forum prorogatum*" in the negative sense (CR 2004/12, p. 12).

Apart from the nature of the question of jurisdiction (see paragraphs 40-44 of this opinion), it should be noted that as far as abandonment itself is concerned the Court cannot infer from the arguments of the parties that a claim was abandoned. As stated in the case concerning *Certain Norwegian Loans*, "[a]bandonment cannot be presumed or inferred; it must be declared expressly" (*Judgment, I.C.J. Reports 1957*, p. 26).

59. The real question one is faced with concerns the relationship between the Application and the arguments of the Parties.

In the process of determination of the legal disputes, the Court bases itself on the Application and final Submissions, as well as other pertinent evidence as emphasized in the cases concerning *Nuclear Tests (Australia* v. *France)* (*Judgment, I.C.J. Reports 1974*, pp. 262-263) and *Fisheries Jurisdiction (Spain* v. *Canada), Jurisdiction of the Court* (*Judgment, I.C.J. Reports 1998*, p. 449, para. 31).

The expression "other pertinent evidence" is a collective term for various forms of expressing intention of the parties relevant for the determination of the dispute submitted to the Court. In the existing

circumstances, taking into consideration claims and arguments of the Respondents, various written and oral pleadings placed before the Court in the proceedings on the preliminary objections are of particular interest.

The crucial question which seems to be imposing itself *in casu* is the relationship between the Application and the submission, on the one hand, and the arguments of the Parties, on the other. This question should especially be considered in the context whether the Application and submissions can be either derogated, completely or partially, by the arguments of the Applicant, or in fact be substituted by them.

I believe that the answer to the question is rather negative for several reasons:

(i) The Application as a whole, including especially the submissions, represents a basic parameter for the determination of the dispute. The Court resorts to "other pertinent evidence" (*Fisheries Jurisdiction (Spain* v. *Canada), Jurisdiction of the Court, Judgment, I.C.J. Reports 1998*, p. 449, para. 31), which in the present case is the written and oral pleadings placed before the Court, in case of "uncertainties or disagreements . . . with regard to the real subject of the dispute with which the Court has been seised, or to the exact nature of the claims submitted to it." (*ibid.*, p. 448, para. 29.)

(ii) Therefore, written and oral pleadings as such are an accessory means rather than a subsidiary basic parameter for the determination of the dispute, which the Court resorts to in case of an unclear or imprecise nature of the Application as a whole. Furthermore,

> "when the claim is not properly formulated because the submissions of the parties are inadequate, the Court has no power to 'substitute itself for them and formulate new submissions simply on the basis of arguments and facts advanced' (*P.C.I.J., Series A, No. 7*, p. 35)" (*Nuclear Tests (New Zealand* v. *France), Judgment, I.C.J. Reports 1974*, p. 466, para. 30).

(iii) The written pleadings and oral pleadings as such, *excluding the submissions*, are basically arguments of the parties. Arguments of the parties together with their contentions as reasons or statements made for or against the matter are of highly relative value in jurisdictional phases of the proceedings before the Court, taking into consideration that the Court is not bound by them and that it, in fact, possesses "the power to exclude" them (cf. *Fisheries Jurisdiction (Spain* v. *Canada), Jurisdiction of the Court, Judgment, I.C.J. Reports 1998*, p. 449, para. 32). The value of the arguments and contentions of the parties is framed in terms of "*indications* of what the party was asking the Court to decide" (cf. *ibid.*; emphasis added).

(iv) The arguments and contentions of the parties do not appertain to

the submission of the party. The difference in meaning of the French word "conclusion" and the English word "submission" reflected in the circumstances that the latter "can extend to the arguments advanced and the grounds invoked, and not merely to the precise demand made of the Court" has been resolved in a manner that "the Court has developed a consistent pattern of case-law on this aspect, basing itself on the narrower meaning" (Shabtai Rosenne, *The Law and Practice of the International Court, 1920-1996*, Vol. III (Procedure), p. 1266).

60. Due to the autonomous standing of the notion of "dispute" in international obligation, its determination possesses certain specific characteristics. Basically, they derive from the fact that "dispute between States" is not automatically "dispute before the Court" even in the case where the States followed the rules of the law of the Court regarding the institution of proceedings.

Regarding the determination of a "dispute before the Court", in the proceedings instituted by Application, roles are assigned to the Applicant and the Court itself. The role of the Applicant is referred to as the "presentation" or "formulation of the dispute" (see *Fisheries Jurisdiction (Spain* v. *Canada), Jurisdiction of the Court, Judgment, I.C.J. Reports 1998*, pp. 447-448, paras. 29 and 30) by acts which are designed by the Statute and the Rules of Court as duties of the Applicant (Statute, Art. 40, para. 1; Rules of Court, Art. 38, paras. 1 and 2). As far as the Court is concerned, by executing its judicial function it is its role to determine the dispute dividing the parties as well as to identify the object of the claim.

What is *in concreto* the intrinsic legal meaning of the word "determination"?

In a substantive sense, determination of a dispute is to a certain extent expressed as verification of a dispute as presented or formulated by the applicant. The only case when the determination of the matter by the Court is autonomous *in toto*, deprived of any substantive connection to the application, is the situation when the Court considers that the real dispute between the parties does not exist. Verification in the sense of authentication or confirmation of the dispute as presented by the applicant may occur as either total or partial — in which case it is possible to make a difference between a "real dispute" and a "dispute as presented or formulated". Such a substantive determination of the term "determination of the real dispute" is based on the fact that the application — together with the final submissions and other pertinent evidence — represents a basic parameter for the determination of a real dispute. The expression "irrespective of the nature and subject of the dispute laid before the Court in the present case" (*South West Africa, Preliminary Objections, Judgment, I.C.J. Reports 1962*, p. 328) is not used in the meaning outside the application but irrespective of arguments of the parties regarding the nature and subject of the dispute. The very essence

of the determination process lies in its objectivity as to whether there exists an international dispute (*Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First Phase, Advisory Opinion, I.C.J. Reports 1950*, p. 74).

Even though objectivity is not a personal but a qualitative characteristic, it includes *in concreto* an assessment of the constitutive elements of the legal disputes rather than a construction or a negation of legal disputes. Constitutive elements of the dispute are, in fact, criteria that ought to be tested in order to "be shown that the claim of one party is positively opposed by the other" (*South West Africa, Preliminary Objections, Judgment, I.C.J. Reports 1962*, p. 328).

61. If an organic link between the controversy on the jurisdictional issue and the existence of a dispute in a case indeed existed, then the Court, for instance, could not entertain a case in the event of a respondent's non-appearance in the proceedings. The fact remains that the position of the Applicant in the proceedings is an unusual one, but not unprecedented. It can be compared precisely with the position of Italy in the *Monetary Gold* case where Italy, as the applicant State, raised the preliminary objection to the jurisdiction of the Court. The Court, assessing such a position of Italy, said:

> "The Court finds that Italy's acceptance of jurisdiction is one thing, while her raising of a legal issue on jurisdiction is quite another. It cannot be inferred from the making of the Preliminary Objection that Italy's acceptance of jurisdiction has become less complete or less positive than was contemplated in the Washington Statement." (*Preliminary Question, Judgment, I.C.J. Reports 1954*, p. 29.)

Moreover, the Court came to this conclusion in the reply to the submission of the United Kingdom, which, by its content, precisely corresponds with Italy's submission in the present case. Namely, the Court finds that, "[n]or can the Court accept the contention in the final Submission No. 1 *(b)* of the United Kingdom that the Application has been in effect withdrawn and cancelled by Italy" (*ibid.*, p. 30).

62. That the absence of a specific dispute on jurisdiction does not deprive the Court's decision of its judicial character is also confirmed by the jurisprudence of the Court. In the *Monetary Gold* case, Italy, as the Applicant, submitted to the Court what it termed a "Preliminary Question" in substantially identical terms as the first request of Serbia and Montenegro. At the time Italy requested the Court to "adjudicate on the preliminary question of its jurisdiction to deal with the merits of the claim set forth under No. 1 of the Submissions of the Application" (*Judgment, I.C.J. Reports 1954*, p. 23). The first request in the final submissions of Serbia and Montenegro, as Applicant, has been formulated in the following terms, where it requests the Court "to adjudge and declare

on its jurisdiction *ratione personae* the present cases" (CR 2004/23, p. 38, para. 34). Consequently, in both cases the applicant States asked the Court not to declare that it has jurisdiction, but only to rule on its jurisdiction.

63. The request of the Applicant to the Court to rule on its jurisdiction *ratione personae* possesses specific justification in the circumstances of the present cases. These circumstances make relative the qualification of the Applicant's request regarding the jurisdiction of the Court *ratione personae* as an abstract one. They present it in a different light, i.e., as a request incorporated in the reality of the Court's jurisprudence on the matter, some sort of reminder to the Court to act in accordance with its own findings. Namely, faced with the question — whether or not Yugoslavia is a Member of the United Nations and as such a party to the Statute of the Court — the Court found, in the provisional measures phase of the proceedings, that it "need not consider this question for the purpose of deciding whether or not it can indicate provisional measures in the present case" (*Legality of Use of Force (Yugoslavia* v. *Belgium), Order of 2 June 1999, I.C.J. Reports 1999 (I)*, p. 136, para. 33; see also CR 2004/23, p. 38, para. 34). The finding, being only a slight modification of the formulation used in the Order of 8 April 1993 in the *Genocide Convention* case, implies the right, and obligation at the same time, of the Court to pronounce upon it in a later phase of the proceedings and, it is easy to agree, it seems to me, that there is no more proper phase in which to do so than the preliminary objection phase.

4. Legal Interest of the Applicant in the Proceedings

64. Some of the respondent States (*exempli causa*, Portugal (CR 2004/9, p. 9)) argued that by requesting the Court to decide that it has no jurisdiction to adjudicate on the merits, Serbia and Montenegro showed that it has no legal interest in settling the dispute before the Court.

Grosso modo, legal interest of the Applicant can be defined as specific interest to demand judicial intervention, considering that otherwise the Applicant would suffer some unjust prejudice and (or) would not be able to protect its violated rights on the basis of international law.

In order to be qualified as a relevant legal interest, the interest of the Applicant needs to fulfil several conditions:

(a) To be of legal nature. Economic, political or other non-legal interest as such is not enough considering the fact that the jurisdiction of the Court is reserved for legal disputes.

(b) To be concrete. This condition implies that the intervention of the Court, either positively or negatively, reflects on the *corpus* of rights and duties of the parties, real or presumed, prescribed by international law.

(c) To be of personal nature. This concerns the personal dimension of the previous condition to be concrete. In fact, the interest needs to be related to the subjective right of the applicant whereas the advisory opinion of the Court given on the concrete legal question may be abstract, deprived of a personal dimension. Personal dimension of the legal interest serves as *differentia specifica* between a general interest which lies behind an *actio popularis* and a specific interest.

These elements form the essence of the concept of the legal interest based upon which is *legitimatio ad processum(qualité pour agir)*, which is independent of the ability of a State to appear before the Court: it is an expression of a concrete legal relation between the applicant and the subject-matter of the dispute.

Legal interest of the applicant should be objectively determined particularly considering the fact that by instituting the proceedings before the Court, the applicant demonstrates a subjective perception of its legal interest in the matter.

Determination of the legal interest of the applicant is *ex rerum natura* closely connected and intertwined with the determination of legal dispute, taking into consideration that the dispute is in fact based on the opposing attitudes of the parties in relation to a certain conflict of interests. Therefore, what was emphasized regarding the determination of the legal disputes applies *mutatis mutandis* to the basic parameters for the determination of the legal interest of the applicant.

The party entitled to the subjective right, claiming the violation of a concrete right to which the other party is positively opposed, is in possession *eo ipso* of a legal interest. In that case the presumption of legal interest is applied. Legal interest is, in fact, incorporated into the very essence of the concept of subjective right.

65. The Applicant, as well as the Respondent, is a State party to a number of multilateral treaties in force, non-observance of which is being attributed by the Applicant to the Respondent. Considering the fact that the parties acquire mutual subjective rights and obligations by the international treaty, the party whose subjective right has been violated is entitled to claim the protection of its right (cf. *Barcelona Traction, Light and Power Company, Limited, Second Phase, Judgment, I.C.J. Reports 1970*, p. 45, para. 80; p. 46, para. 86). The existence of the subjective right would no longer have its *ratio* in case the entitled party did not possess legal interest for its protection. The presumption of legal interest of the State entitled to the subjective right is strongly supported by another reason deriving from the very nature of the modern international community. Due to the general prohibition on self-redress, the State whose rights have been violated does not have at its disposal an efficient and legal means for the protection of its subjective rights. Therefore, it would in fact be convenient to assume the existence of the legal interest in every particular case of accusation of the violation of the

rules of international law, either conventional or customary, as a sort of *actio condemnatoria* in the proceedings before the Court

The position of multilateral and bilateral treaties containing compromissory clauses is rather specific. The compromissory clause *per se et a priori* proves the existence of the legal interest of the party and therefore need not be either presumed or proved *(action attitrée)*. Considered *stricti juris*, the right to legal protection in the case of a compromissory clause is not deduced from the legal interest of the applicant, but derives directly from the compromissory clause as a treaty provision.

* * *

66. Summary removal as such might constitute an administrative action of the Court, either *proprio motu* or at the request of the Respondent to reject the Application *in limine litis*. In either case the validity of summary removal is, to say the least, of a dubious nature.

Summary removal as an action of the Court *proprio motu* has lost the *ratio* of its existence by the introduction of Article 38, paragraph 5, of the Rules of Court. Until then, it had been applied as a kind of extorted action of the Court in circumstances in which one State sues another without any existing title of jurisdiction and, in fact, called upon that State to accept the jurisdiction of the Court *ad hoc*[9]. *Cessante ratione, cessat ipsa lex*.

In the circumstances of effective seisin of the Court, summary removal at the request of the Respondent to the Court to reject the Application *in limine litis* is unacceptable. As such, summary removal would be in sharp contradiction with the duty of the Court to examine ex officio the ques-

[9] Thus, the Court found itself in the situation of having to make a choice between Scilla and Haribda — or to allow the "case" to figure on the General List as a pending case for an indefinite period of time or to resort to the removal of the "case" from the General List as was done in a number of cases: *Treatment in Hungary of Aircraft and Crew of United States of America (United States of America* v. *Hungary), Order of 12 July 1954, I.C.J. Reports 1954*, pp. 99-101, and *Treatment in Hungary of Aircraft and Crew of United States of America (United States of America* v. *Union of Soviet Socialist Republics), Order of 12 July 1954, I.C.J. Reports 1954*, pp. 103-105; *Aerial Incident of 10 March 1953, Order of 14 March 1956, I.C.J. Reports 1956*, pp. 6-8; *Aerial Incident of 4 September 1954, Order of 9 December 1958, I.C.J. Reports 1958*, pp. 158-161; *Aerial Incident of 7 November 1954, Order of 7 October 1959, I.C.J. Reports 1959*, p. 276-278; *Antarctica (United Kingdom* v. *Argentina), Order of 16 March 1956, I.C.J. Reports 1956*, pp. 12-14, and *Antarctica (United Kingdom* v. *Chile), Order of 16 March 1956, I.C.J. Reports 1956*, pp. 15-17.

In the light of Article 38, paragraph 5, what the Court might do *proprio motu*, in specific circumstances and before effective seisin, is to take the initiative in removing a case from the General List which, in fact, is done in accordance with Article 88 or 89 of the Rules of Court. As a point of illustration, mention can be made of the case concerning *Maritime Delimitation between Guinea-Bissau and Senegal, Order of 8 November 1995, I.C.J. Reports 1995*, p. 423.

tion of its jurisdiction *in casu* on the basis of the general principle of *compétence de la compétence*. Having in mind the nature of the duty of the Court to examine ex officio its jurisdiction in the case at hand, it might even be said that summary removal in such circumstances would have the meaning of a kind of denial of justice.

Consequently, by the adoption of Article 38, paragraph 5, of the Rules of Court, "removal" acquires its appropriate meaning as simple removal as an accessory effect of declining jurisdiction by the Court's judicial decision[10].

III. The Issue of the Composition of the Court

67. The fundamental difference between the composition of the Court in the provisional measures phase of the proceedings, on the one hand, and its make-up in the preliminary objections phase of the proceedings, on the other, is noticeable. It calls for comments as a matter of principle.

During the provisional measures phase of the proceedings nine out of a total of ten respondent States had judges sitting on the Bench of the Court, irrespective of whether these were national judges (France, Germany, the Netherlands, the United Kingdom and the United States of America) or judges *ad hoc* (Belgium, Canada, Italy and Spain). Among the respondent States having no judge of their nationality on the Bench, only Portugal has not designated its judge *ad hoc*. The Applicant, for its part, had one judge *ad hoc* on the Bench.

In the preliminary objections phase, the Bench underwent a significant change. At the opening of the public sitting held on 19 April 2004, the President of the Court stated, *inter alia*, that

> "[b]y letters dated 23 December 2003, the Registrar informed the Parties that the Court had decided . . . that the judges *ad hoc* chosen by the respondent States should not sit during the current phase of the procedure in these cases" (CR 2004/6, p. 6).

He also noted that "Judge Simma had previously considered that he should not take part in the decision of these cases and had so informed [the President] in accordance with Article 24 of the Statute" (*ibid.*, p. 7).

Thus, during the preliminary objections phase the Bench included three national judges on the side of the respondent States and one *ad hoc* judge on the side of the Applicant.

It is interesting to note that the Court, in adopting relevant decisions,

[10] It might be mentioned in passing that the practice for the "removal clause" to be included at all into the *dispositif* of a judgment of the Court is open to question; not only because of the fact that, as a rule, a case which has been completed is removed automatically from the General List of pending cases, but also because of the nature of the judicial decision of the Court which concerns the parties to the dispute rather than a matter that, basically, concerns the internal functioning of the Court.

failed to provide an explanation in more detail, both with respect to particular decisions concerning the composition of the Court in the proceedings on preliminary objections and with respect to the substantial change in the two successive phases of the proceedings.

In the provisional measures phase the Court, acting on the objections raised by the Applicant relating to the nominations of judges *ad hoc* by four respondent States, settled for a succinct formulation that the nominations were "justified in the present phase of the case"[11]. The Court was somewhat more specific in the relevant decision relating to its own make-up in the preliminary objections phase. Even though, in contrast to the provisional measures phase, the Applicant raised no objections regarding the participation of judges *ad hoc* chosen by the respondent States. In deciding that "the judges *ad hoc* chosen by the respondent States should not sit during the current phase of the procedure" (CR 2004/6, p. 6), the Court invoked the fact of "the presence on the Bench of judges of British, Dutch and French nationality" (CR 2004/6, p. 6).

68. From the terse formulation relating to the acceptance of the nominations of judges *ad hoc* by four respondent States in the provisional measures phase one could infer that the Court, in adopting the decision that their nominations were justified, relied on the grammatical interpretation of the provision of Article 31, paragraph 3, of the Statute. Namely, Article 31, paragraph 3, provides that "[i]f the Court includes upon the Bench no judge of the nationality of the parties, each of these parties may proceed to choose a judge". In other words, the Court followed the logic that the independent and inherent right of a party to choose a judge *ad hoc* on the basis of Article 31, paragraph 3, of the Statute, was not subject to any particular restrictions in this particular case. The Applicant founded its objection to the nomination of the judges *ad hoc* by four respondent States on the contention that they are parties in the same interest and that, consequently, paragraph 5 of Article 31 of the Statute should have been applied. The Court, in its decision does not deal specifically with this contention of the Applicant, although the decision itself implies that the Court rejected it.

69. The absence of an explanation leaves room for assumptions. One of them, it seems to me, that merits attention rests on the interpretation of the expression "several parties in the same interest" (Statute, Art. 31, para. 5). It has been said that

> "Article 31, which uses a form of wording in the singular, 'applies separately to each case on the Court's List'. 'In the presence of two

[11] *Legality of Use of Force (Yugoslavia* v. *Belgium), Order of 2 June 1999, I.C.J. Reports 1999 (I)*, p. 130, para. 12; *Legality of Use of Force (Yugoslavia* v. *Canada), Order of 2 June 1999, I.C.J. Reports 1999 (I)*, p. 265, para. 12; *Legality of Use of Force (Yugoslavia* v. *Italy), Order of 2 June 1999, I.C.J. Reports 1999 (I)*, p. 487, para. 12; *Legality of Use of Force (Yugoslavia* v. *Spain), Order of 2 June 1999, I.C.J. Reports 1999 (II)*, p. 767, para. 12.

> separate cases between two sets of parties *(even if one party is common to both cases)*, Article 31, paragraph 5, has no application'." (H. Thirlway, "The Law and Procedure of the International Court of Justice, 1960-1989 (Part Eleven)", *The British Year Book of International Law*, 2000, p. 167, emphasis added, citing joint declaration of Judges Bedjaoui, Guillaume and Ranjeva in *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya* v. *United Kingdom), Preliminary Objections, Judgment, I.C.J. Reports 1998*, p. 40.)

It appears that the interpretation is far too narrow and, in the light of the meaning and in particular of the application of Article 31, paragraph 5, of the Statute, arbitrary because it implies an indissoluble organic link between "parties in the same interest" and formal joinder, which is obviously not the case. The Court may find that the parties are in the same interest without having recourse to joinder. Moreover, it is said that "the 'same interest' provisions apply" only "in the case of the choice of judges *ad hoc*" (G. Guillaume, "La 'cause commune' devant la Cour internationale de Justice", *Liber Amicorum — Mohammed Bedjaoui* (Emile Yakpo and Tahar Boumedra, eds.), 1999, p. 330 *[translation by the Registry]*). The jurisprudence of the Court was also formed in this sense[12].

Consequently, the provision of Article 31, paragraph 5, of the Statute according to which the parties in the same interest shall be reckoned as one party only, cannot be understood as being tantamount to joinder. Although the same interest of the parties constitutes an element of the notion of joinder, taken *per se* it neither constitutes formal joinder nor can be considered identical to it. Joinder implies that the parties in the same interest are reckoned as one party in the totality of their procedural position which, in addition to the appointment of a single judge *ad hoc* includes also one set of pleadings and a single judgment.

The parties in the same interest, in the sense of Article 31, paragraph 5, of the Statute, are reckoned as one party in a restricted, functional sense versus the process position of parties in its totality in the event of the issue of joinder, and that is the choice of judges *ad hoc*. The formulation according to which "several parties in the same interest . . . shall . . . be reckoned as one party only" (Statute, Art. 31, para. 5) is made not for the

[12] *Exempli causa*,

> "in the *Fisheries Jurisdiction* cases, the Court did not join the cases, and rendered two distinct series of judgments, both on jurisdiction and on the merits. However, that did not prevent it from regarding the United Kingdom and Germany as being 'in the same interest' during the initial phase of the procedure." (G. Guillaume, "La 'cause commune' devant la Cour internationale de Justice", *Liber Amicorum — Mohammed Bedjaoui*, 1999, pp. 330, 334-335 *[translation by the Registry]*).

purpose of a joinder but "for the purpose of the preceding provisions" (Statute, Art. 31, para. 5) of Article 31 regulating equalization of the parties before the Court.

If we continue for a moment to use the terminology of joinder, we could possibly qualify the parties in the same interest, in the sense of Article 31, paragraph 5, of the Statute, as a kind of small or procedural joinder substantively and functionally linked with the choice of judges *ad hoc* on the basis of the provisions of Article 31 of the Statute of the Court.

70. The fundamental difference in the composition of the Court in the provisional measures phase as against the preliminary objections phase could be defended with the argument that in the provisional measures phase the Court was not in a position to ascertain the positions of the respondent States vis-à-vis the demands of the Applicant. The argument bears a certain weight but it should not be overestimated in this particular case for two reasons at least. *Primo*, the question of the composition of the Court is a matter of public order (in the Advisory Opinion case concerning *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)* (hereinafter referred to as *"Namibia"*), Vice-President Ammoun pointed out in his separate opinion that it relates to "the rule of . . . very equality which the Statute seeks to safeguard through the institution of judges *ad hoc*" (*I.C.J. Reports 1971*, p. 68)) possessing "absolute logical priority" (*ibid.*, p. 25, para. 36; see also *Western Sahara, Order of 22 May 1975, I.C.J. Reports 1975*, pp. 7-8; *Western Sahara, Advisory Opinion, I.C.J. Reports 1975*, p. 17-18, para. 13). *Secundo*, the indication for consideration of the same interest of the respondent States was provided in the Application itself which related to all the ten respondent States with identical statements of facts and law. The Application itself offered the basis for a prima facie appreciation of the facts and law for the treatment of "the appointment of a judge *ad hoc* . . . as a preliminary matter" (*Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971*, p. 25, para. 36). *Tertio*, the urgency of the proceedings for interim measures could hardly be deemed to have been an obstacle to such proceedings in this particular case, because the proceedings for interim measures themselves lasted over 30 days, counting from the date of submission of the request to the date of the rendering of the order.

71. The decision regarding the composition of the Court in both phases, the provisional measures phase and the preliminary objections phase, was adopted informally, being intimated to the Parties by the Registrar. (The Court has thus departed from the practice established in the *South West Africa* cases (cf. *Order of 18 March 1965, I.C.J. Reports 1965*, p. 3) in which the decision about the composition of the Court was adopted in the

form of an order.) This practice possessed certain inherent advantages, both formal and those of a substantive nature. As far as the formal advantages are concerned, it is difficult to understand that the issue of composition of the Court is regulated informally, at least when more delicate and controversial cases are in question, whereas issues, such as the appointment of experts of the Court (cf. *Corfu Channel, Order of 19 November 1949, I.C.J. Reports 1949*, p. 237; *Delimitation of the Maritime Boundary in the Gulf of Maine Area, Appointment of Expert, Order of 30 March 1984, I.C.J. Reports 1984*, p. 165), the appointment of experts to assist the parties to implement a judgment (cf. *Frontier Dispute, Nomination of Experts, Order of 9 April 1987, I.C.J. Reports 1987*, p. 7), or decisions on a request for an inspection *in loco* (cf. *South West Africa, Order of 29 November 1965, I.C.J. Reports 1965*, p. 9; *Gabèíkovo-Nagymaros Project (Hungary/Slovakia), Order of 5 February 1997, I.C.J. Reports 1997*, p. 3) are dealt with through a formal order. Although there is no difference in the legal effect of decisions adopted informally or in the legal effect of those adopted in a formal manner, the manner in which a decision of the Court is embodied bears the meaning of an implicit evaluation of the issues being the object of the decision. This practice is all the more surprising having in mind that the question of the composition of the Court is not a purely procedural matter, but, in cases such as the case in hand, a matter of public order that indirectly concerns the principle of equality of States as one of the fundamental principles of international law which falls within *corpus juris cogentis*.

Also indisputable, it seems to me, are the substantive advantages of making decisions on the composition of the Court in a formal manner. They emanate from the very structure of the order, in particular from the special considerations that the Court had in mind making the order and reasons justifying a particular decision on the composition of the Court. Thus, an easier and more reliable interpretation of the decision of the Court is enabled and, equally important, a consolidation of jurisprudence of the Court on the matter.

72. The decision of the Court by which three respondent States (Belgium, Canada and Italy) have been denied the extension of the appointments of their judges *ad hoc* in the preliminary objections phase, and denying Portugal the right to appoint a judge *ad hoc*, is based on Article 31, paragraph 5, of the Statute which provides that "[s]hould there be several parties in the same interest, they shall, for the purpose of the preceding provisions, be reckoned as one party only. Any doubt upon this point shall be settled by the decision of the Court."

(a) As regards Belgium, Canada and Italy, the Court adopted the relevant decision "pursuant to Article 31, paragraph 5, of the Statute, *taking into account the presence on the Bench of judges of British, Dutch and French nationality*" (CR 2004/6, pp. 6-7; emphasis added). The interpretation of this explanation of the Court's decision inevitably leads to the conclusion that the Court considered not only Belgium, Canada and Italy

as parties in the same interest, but also France, the Netherlands and the United Kingdom.

The effect of Article 31, paragraph 5, of the Statute obviously could not have been the deprivation of Belgium, Canada and Italy's right, "reckoned as one party only", to have upon the Bench a single judge *ad hoc*, but of the extension of the appointments of judges *ad hoc* which they had appointed individually in the provisional measures phase. The deprivation was legally founded only if the Court had found that these three respondent States, together with France, the Netherlands and the United Kingdom, were in the position of "parties in the same interest". The argument of the Court is suggestive of this but not explicit, because it only referred to the "presence on the Bench of judges of British, Dutch and French nationality" (CR 2004/6, p. 6) as *ratio* of exclusion of the right of Belgium, Canada and Italy to choose a single judge *ad hoc* without saying that all of them were parties in the same interest. A direct *nexus* between these two matters — on the one hand, the deprivation of the three respondent States, having no judge of their nationality on the Bench, of their right to choose a single judge *ad hoc*, and, on the other hand, the presence on the Bench of judges of the nationality of the three other respondent States, having judges of their nationality on the Bench — is only possible to establish on the basis of the same interest position of all these respondent States.

(b) As far as Germany is concerned, as Judge Simma had considered that he should not take part in the decision in this case, Germany, on the basis of Article 37, paragraph 1, of the Rules of Court became "entitled to choose a judge *ad hoc* within a time-limit to be fixed by the Court, or by the President". The Court, however, decided that the entitlement under Article 37 is non-existent *in casu* "pursuant to Article 31, paragraph 5, of the Statute" (CR 2004/6, p. 7). In other words, the Court subsumed the position of Germany in this particular matter under Article 37, paragraph 2, of the Rules of Court which provides that "*[p]arties in the same interest shall be deemed not to have a judge of one of their nationalities* . . . if the Member of the Court . . . is or becomes unable to sit" (emphasis added).

Consequently, the Court, proceeding from the "same interest" provision embodied in Article 31, paragraph 1, of the Statute and elaborated in Article 37, paragraphs 1 and 2, of the Rules of Court, by its decision notified to the Parties by letters of the Registrar dated 23 December 2003, took the position that all eight respondent States are parties in the same interest.

73. The decision of the Court produced equalization effects in the composition of the Bench between the Applicant, on the one hand, and the Respondents, on the other.

The equalization effects are expressed on two levels:

(i) on the level of the relation between the applicant State and those

respondent States having no national judge upon the Bench. Unlike the provisional measures phase, full equalization was realized in the preliminary objections phase in accordance with the perfectly coherent jurisprudence of the Court, thanks to the decision of the Court. (Cf. joint declaration of Judges Bedjaoui, Guillaume and Ranjeva, *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya* v. *United Kingdom), Preliminary Objections, Judgment, I.C.J. Reports 1998*, pp. 34-39);

(ii) on the level of the relation between the applicant State and those respondent States having Members of their nationality upon the Bench. On this level partial equalization has been realized given the fact that Judge Simma had decided not to take part in the decision in the case, and the Court's decision that Germany, pursuant to Article 31, paragraph 5, of the Statute was not entitled to choose a judge *ad hoc*.

Thus the relation between the applicant State and the respondent States having Members of their nationality upon the Bench suffered a change in the concrete matter in comparison with the composition of the Court in the procedure on provisional measures — three respondent States (France, the Netherlands and the United Kingdom) have their national judges upon the Bench and the applicant State has a judge *ad hoc* on the Bench.

Can such a solution be considered tenable in law and justice? The answer to this question, it seems to me, is in the negative rather than in the positive.

In the construction of Article 31, paragraphs 1 to 5, of the Statute, the arithmetical equality of the numbers of judges upon the Bench having the nationality of the parties, in the relevant variants of the relation between the number of national judges (Art. 31, para. 1), national judges and judges *ad hoc* (Art. 31, para. 2) or judges *ad hoc* mutually (Art. 31, para. 3), figures as an expression of equality of the parties. Although equality of the parties is not exhausted in the arithmetical equality, it seems incontestable that, in the relations among States as sovereign political units, the arithmetical equality is an important constitutive element of equality: *a contrario*, the provisions of Article 31, paragraphs 1 to 5, of the Statute as such would be devoid of substance.

It is obvious that *in concreto* this arithmetical equality is non-existent despite the fact that the respondent States are parties in the same interest. What is involved, in fact, is but one example of inequality of the parties, inequality that comes about due to grammatical interpretation of Article 31, paragraph 4, of the Statute.

For as Judge Guillaume notes, referring to Article 31, paragraph 4, of the Statute,

"This provision guaranteed equality between the parties where

> neither had a national on the Bench. Thus in such cases, whether there is a plurality of applicants, or of respondents, or of both, only one judge *ad hoc* is chosen to sit on each side.
>
> The system worked equally well where the Court included a judge of the nationality of one of the parties and the latter objected to a plurality of applicants or respondents acting in the same interest and not having a judge of their own nationality present on the Bench. Here again, equality was effectively guaranteed.
>
> On the other hand, the system was more open to criticism where on one side there were several States with judges of their nationality on the Bench, whereas on the other there was only one judge, or even merely a judge *ad hoc*." (G. Guillaume, "La 'cause commune' devant la Cour internationale de Justice", *Liber Amicorum — Mohammed Bedjaoui* (Emile Yakpo and Tahar Boumedra, eds.), 1999, pp. 328-329; emphasis added.)

It follows, consequently, that in the event of conflict between the principle of permanence of the Court and equality of parties "the authors of the Statute and Rules accorded priority to the principle of the permanence of the Court", having restricted the application of the principle of equality of parties "in regard to choice of judges *ad hoc* to situations where the 'common interest' provisions apply" (*ibid.*, p. 330 *[translation by the Registry]*).

Such a state of affairs is hardly tenable. The deficiencies of the solutions enshrined in the Statute and in the Rules of Court cannot constitute a basis for a derogation of the fundamental principle of equality of parties. The principle of equality of parties is but one ingredient, a constitutive element of a broader principle of sovereign equality of States. Although the Statute and the Rules of Court are, by their nature, *jus specialis* designed to regulate the work of the Court, it cannot be accepted that they authorize, as such, the Court to disregard the relevant norms of general international law. And, as the Statute itself determines, the Court's function "is to decide in accordance with international law" (Statute, Art. 38, para. 1). Especially as concerns contemporary international law which, unlike international law that was in effect at the time of drawing up of the Statute of the Permanent Court of International Justice, recognizes *jus cogens* the rules of overriding importance that, by definition, brook no competition of incongruous rules. And the principle of sovereign equality of States is undoubtedly a rule that belongs to *corpus juris cogentis*.

74. The issue of the realization of the overriding rule of equality of States in regard to the composition of the Bench is, basically, an issue of a technical, derivative nature. There are two ways that seem to be appro-

priate, independently or in combination, depending on the circumstances of a particular case. One of them boils down to the exemption of a Member or Members of the Court in the event that there exists inequality between the litigant parties in multiple cases in which one party is comprised of two or several States whose judges sit in the Court. Whereas the other party is composed of a State (or States) that do not have national judges or have a smaller number of national judges as compared to the other side. In such a case a solution could be found within the co-ordinates of the proposal submitted at the time of the revision of the Rules of Court in 1926, according to which:

> "Where one of the parties is represented by two or more States having judges present on the Bench, only one of those judges, to be chosen by the States in question, may take part in the proceedings and judgment in the case." (*Statut et Règlement de la Cour permanente de Justice internationale — Eléments d'interprétation*, Carl Heymanns Verlag, Berlin, 1934, p. 189, cited in G. Guillaume, "La 'cause commune' devant la Cour internationale de Justice", *Liber Amicorum — Mohammed Bedjaoui* (Emile Yakpo and Tahar Boumedra, eds.), 1999, p. 329. *[Translation by the Registry.]*)

Two objections could be raised with respect to this way of solving the issue. The first is that it implies revision of Article 31, paragraph 1, of the Statute. The objection is justified, but only partially, having in mind that, by the application of Article 24, paragraph 2, of the Statute, it is possible to achieve equalization even without a formal revision of the Statute. The circumstances that two or more States whose judges sit in the Court — States that are parties in the same interest — can be regarded by the President of the Court as a "special reason" for having recourse to the authority being at their disposal on the basis of Article 24, paragraph 2, of the Statute. It is difficult, however, to imagine that a broader application of this provision of the Statute is feasible, not only because of the principle of permanence of the function of a Member of the Court, but also because of the requirement relating to the minimal number of judges constituting the Court (Statute, Art. 25, para. 2). Still, the possibilities offered by this provision of the Statute should not be underestimated, especially if the principle of permanence is interpreted systematically, without the ingredients of a fetish. In that sense, the principle of permanence of the Court is of a relative nature, not only because of the provision of the Statute stipulating that a third of judges shall be elected every third year (Statute, Art. 13), but also because of the fact that a judge or judges may be prevented from sitting on the Bench for factual or legal reasons (Statute, Art. 23, para. 3, and Art. 24, para. 1).

The other manner would consist in giving the right to a party having no judge of its nationality on the Bench to nominate more than one judge *ad hoc* if equalization cannot be achieved in some other way. There exist no substantive obstacles in the Statute to this manner of equalization. The fact that Article 31, paragraph 2, of the Statute refers to the right of

"any other party" (i.e., a party other than the party which has a judge of its nationality) to "choose a person to sit as judge" in the singular, cannot be regarded as a ban on "any other party" to choose more than one judge *ad hoc*. Article 31, paragraph 2, of the Statute is, both by diction and by the terms used, designed individualistically, i.e., one party (having a judge of its nationality on the Bench)/other party (party other than the party having a judge of its nationality on the Bench). When multiple cases, such as the cases at hand, are involved, the said provision should be interpreted teleologically.

A contrario, it remains unclear how equalization, as an expression and manner of ensuring the fundamental principle of equality of States, could be achieved. For it should be borne in mind that it is not only about nominal equality between parties, considering that even a quick look at the voting practice in the Court shows that differences between national judges and judges *ad hoc* in the cases in which States of their nationalities were involved are not so significant as usually presumed.

75. The schedule of public hearings in the eight cases concerning the *Legality of Use of Force* held from 19 April 2004 to 23 April 2004, taken *per se* and in particular in connection with the decision of the Court relating to the composition of the Court in these cases, represents a specific and unusual approach of the Court.

Prima facie, the schedule of public hearings reflects the idea of consolidation of separate proceedings in the sense of a logical order of the hearings. More precisely, during the first round of pleadings on the preliminary objections held on 19 and 20 April, all eight respondent States submitted their pleadings, whereas the Applicant did so on 21 April 2004. The schedule was basically applied to the second round of pleadings, so that 22 April 2004 was reserved for the eight respondent States and 23 April 2004 for the Applicant. However, a couple of things contradict a simple equalization of this schedule of public hearings with the consolidation of separate proceedings. *Primo*, the schedule departs from the logical and normal practice that after the pleading of one respondent State, who raised preliminary objections, there follows the pleading of the Applicant, bearing in mind that a separate pleading is in question. It is possible to argue that eight respondent States were in question, so that the schedule of public hearings in the form in which it is designed was meant to avoid possible duplication in the arguments of the Parties, in particular that of the Applicant. Leaving aside the fact that such reasoning implies also substantive similarity or identity of pleadings of the respondent States, it is clear already from a quick reading of the official records of pleadings that, as designed, the schedule of public hearings did not exclude duplication of arguments. *Secundo*, the order of pleadings of the respondent States does not correspond to their order in the List of pending cases. Moreover, it is in contrast also with the order of pleadings of the respondent States in the provisional measures phase of the cases.

The Court decided at the time that after Yugoslavia, as the applicant State, the respondent States should make their presentations in English alphabetical order (International Court of Justice, Press Release 99/19 of 7 May 1999), which is also the order of the cases in the official name of the cases on the Court's List of pending cases. This would not merit too much attention by itself. It could simply be a matter of convenience — if it were not followed also by grouping of the respondent States in the schedule of public hearings. Thus, within the framework of the first round of oral pleadings, the morning session of the Court on 19 April 2004 was reserved for Belgium and the Netherlands. Also, the morning session of the following day was reserved for Germany, France and Italy. Although the Court offered no explanation for the reasons for such a grouping, which cannot be taken as unusual, it is reasonable to assume that the Court relied, among other things, also on different jurisdictional claims pointed out by the applicant State. (Namely, with respect to Belgium and the Netherlands, the Applicant presented also additional titles of jurisdiction, i.e., Article 4 of the Convention of Conciliation, Judicial Settlement and Arbitration between Belgium and the Kingdom of Yugoslavia dated 25 March 1930, and Article 4 of the Treaty of Judicial Settlement, Arbitration and Conciliation between the Netherlands and the Kingdom of Yugoslavia dated 11 March 1931.) On the other hand, the process position of Germany, France and Italy is characterized by the fact that these three respondent States have not made a declaration of acceptance of the compulsory jurisdiction of the Court under Article 36, paragraph 2, of the Statute. *Tertio*, there has appeared an intriguing coincidence of the said grouping of the respondent States in the schedule of public hearings and of the composition of the Court derived from it, a composition that would completely fit in with the principle of equality of parties. If, *ex hypothesi*, joinder has been established for groups of cases in accordance with the schedule of public hearings held on 19 and 20 April 2004 (joinder for Belgium and the Netherlands, a second for Germany, France and Italy, and a third for the United Kingdom, Portugal and Canada), then the relation between the Applicant and the groups of respondent States included in the said joinders would be brought to the point of full equality of the Parties as far as the composition of the Court is concerned.

* * *

76. The question of *locus standi* of Serbia and Montenegro before the Court, or its jurisdiction, is one thing, and the question of the legality of use of force is another.

Due to the inherent features of the jurisdiction of the Court — the consensual nature coupled with limited access — the Court was not in a position to make a pronouncement with regard to the legality of use of force in these particular cases.

This fact testifies by itself to the delicate position in which the Court, as the world Court, may find itself.

The Court, whose function is "to decide in accordance with international law" (Statute, Art. 38, para. 1) disputes as are submitted to it is, in these particular cases, hindered in a way in carrying out its function in regard to the issue that certainly cannot be regarded as an ordinary one.

The question of the use of force in relations between States in an ontological issue of the international order. It is a watershed of the primitive *de facto* order that is governed by the elements of constellation of powers and opportunism, and of the *de jure* international order embodied in the rule of law.

On this occasion it seems appropriate to observe that we are witnessing a cacophony of voices, coming as a rule from the circle of powerful and influential States, to the effect that the sovereignty of States is just history. As far as international law and the Court, as its organ, are concerned, it is painful and surprising to realize that, among the advocates of limited sovereignty, there can hardly be found those supporting a limitation of sovereignty in, probably, the only aspect where limitation of sovereignty — irrespective of the will of the States — corresponds with the idea of a legally organized international community. Namely, that disputes between States should be solved before the Court and not on the battlefield.

The *ratio* of existence of international law rests in its implementation, especially when it comes to rules that have an overriding character. Hence, one can understand the calls, or perhaps entreaties, addressed to the Court that

> "Yugoslavia was at least entitled to deliberation on the merits of its claim . . . rather than being brushed off on a jurisdictional technicality" (Anthony D'Amato in "Review of the ICJ Order of June 2, 1999 on the Illegality *[sic]* of Use of Force Case", as found in "Kosovo & Yugoslavia: Law in Crisis", a presentation of Jurist (source: http://jurist.law.pitt.edu/amato1.htm at 22 November 2004)).

It remains for the Court, fettered by the strong rules of its jurisdiction, to appeal, if at all, to the Parties, somewhat quixotically, to be aware of their responsibilities under international law, following the practice in some previous cases (*exempli causa, Fisheries Jurisdiction (Spain* v. *Canada), Jurisdiction of the Court, Judgment, I.C.J. Reports 1998*, p. 456, para. 56) or to address the matter even in a more qualified manner.

(Signed) Milenko KREĆA.