

INTERNATIONAL COURT OF JUSTICE

REPORTS OF JUDGMENTS,  
ADVISORY OPINIONS AND ORDERS

CASE CONCERNING APPLICATION OF  
THE CONVENTION ON THE PREVENTION AND  
PUNISHMENT OF THE CRIME OF GENOCIDE

(CROATIA *v.* SERBIA)

PRELIMINARY OBJECTIONS

**JUDGMENT OF 18 NOVEMBER 2008**

**2008**

COUR INTERNATIONALE DE JUSTICE

RECUEIL DES ARRÊTS,  
AVIS CONSULTATIFS ET ORDONNANCES

AFFAIRE RELATIVE À L'APPLICATION  
DE LA CONVENTION POUR LA PRÉVENTION  
ET LA RÉPRESSION DU CRIME DE GÉNOCIDE

(CROATIE *c.* SERBIE)

EXCEPTIONS PRÉLIMINAIRES

**ARRÊT DU 18 NOVEMBRE 2008**

Official citation:

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ARRÊT

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INTERNATIONAL COURT OF JUSTICE

YEAR 2008

2008  
18 November  
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18 November 2008

CASE CONCERNING APPLICATION OF  
THE CONVENTION ON THE PREVENTION AND  
PUNISHMENT OF THE CRIME OF GENOCIDE

(CROATIA *v.* SERBIA)

PRELIMINARY OBJECTIONS

JUDGMENT

*Present:* President HIGGINS; Vice-President AL-KHASAWNEH; Judges RANJEVA, SHI, KOROMA, PARRA-ARANGUREN, BUERGENTHAL, OWADA, SIMMA, TOMKA, ABRAHAM, KEITH, SEPÚLVEDA-AMOR, BENNOUNA, SKOTNIKOV; *Judges ad hoc* VUKAS, KREĆA; *Registrar* COUVREUR.

In the case concerning the application of the Convention on the Prevention and Punishment of the Crime of Genocide,

*between*

the Republic of Croatia,  
represented by

H.E. Mr. Ivan Šimonović, Ambassador, Professor of Law at the University of Zagreb Law Faculty,

as Agent;

H.E. Ms Andreja Metelko-Zgombić, Ambassador, Head of International Law Service, Ministry of Foreign Affairs and European Integration of the Republic of Croatia,

Ms Maja Seršić, Professor of Law at the University of Zagreb Law Faculty,

H.E. Mr. Frane Krnić, Ambassador of the Republic of Croatia to the Kingdom of the Netherlands,

as Co-Agents;

Mr. James Crawford, S.C., Whewell Professor of International Law, University of Cambridge, Barrister, Matrix Chambers,

Mr. Philippe Sands, Q.C., Professor of Law, University College London, Barrister, Matrix Chambers,

as Counsel and Advocates;

Mr. Mirjan Damaška, Sterling Professor of Law, Yale Law School,

Ms Anjolie Singh, Member of the Indian Bar,

as Counsel;

Mr. Ivan Salopek, Third Secretary of the Embassy of Croatia in the Netherlands,

Ms Jana Špero, Directorate for Co-operation with International Criminal Courts, Ministry of Justice,

as Advisers,

*and*

the Republic of Serbia,

represented by

Mr. Tibor Varady, S.J.D. (Harvard), Professor of Law at the Central European University, Budapest, and Emory University, Atlanta,

as Agent;

Mr. Saša Obradović, First Counsellor of the Embassy of Serbia in the Netherlands,

as Co-Agent;

Mr. Andreas Zimmermann, LL.M. (Harvard), Professor of Law at the University of Kiel, Director of the Walther-Schücking Institute,

Mr. Vladimir Djerić, LL.M. (Michigan), Attorney at Law, Mikijelj, Janković & Bogdanović, Belgrade, President of the International Law Association of Serbia,

as Counsel and Advocates;

H.E. Mr. Radoslav Stojanović, S.J.D., Ambassador of the Republic of Serbia to the Kingdom of the Netherlands, Professor at the Belgrade University School of Law,

H.E. Ms Sanja Milinković, LL.M., Ambassador, Head of the International Legal Service of the Ministry of Foreign Affairs of the Republic of Serbia,

Mr. Vladimir Cvetković, First Secretary of the Embassy of Serbia in the Netherlands,

Ms Jelena Jolić, M.Sc. (London School of Economics and Political Science),

Mr. Igor Olujić, Attorney at Law, Belgrade,

Mr. Svetislav Rabrenović, LL.M. (Michigan),

Mr. Christian J. Tams, LL.M., Ph.D. (Cambridge), Walther-Schücking Institute, University of Kiel,

Ms Dina Dobrković, LL.B.,  
as Advisers,

THE COURT,  
composed as above,  
after deliberation,

*delivers the following Judgment:*

1. On 2 July 1999, the Government of the Republic of Croatia (hereinafter “Croatia”) filed an Application against the Federal Republic of Yugoslavia (hereinafter “the FRY”) in respect of a dispute concerning alleged violations of the Convention on the Prevention and Punishment of the Crime of Genocide, approved by the General Assembly of the United Nations on 9 December 1948 (hereinafter “the Genocide Convention” or “the Convention”). The Application invoked Article IX of the Genocide Convention as the basis of the jurisdiction of the Court.

2. Pursuant to Article 40, paragraph 2, of the Statute of the Court, the Registrar immediately communicated a certified copy of the Application to the Government of the FRY; and, in accordance with paragraph 3 of that Article, all other States entitled to appear before the Court were notified of the Application.

3. Pursuant to the instructions of the Court under Article 43 of the Rules of Court, the Registrar addressed to States parties to the Genocide Convention the notification provided for in Article 63, paragraph 1, of the Statute. The Registrar also sent to the Secretary-General of the United Nations the notification provided for in Article 34, paragraph 3, of the Statute and subsequently transmitted to him copies of the written proceedings.

4. By an Order dated 14 September 1999, the Court fixed 14 March 2000 as the time-limit for the filing of the Memorial of Croatia and 14 September 2000 as the time-limit for the filing of the Counter-Memorial of the FRY.

5. By an Order dated 10 March 2000, the President of the Court, at the request of Croatia, extended the time-limit for the filing of the Memorial to 14 September 2000 and accordingly extended the time-limit for the filing of the Counter-Memorial of the FRY to 14 September 2001.

6. By a letter dated 26 May 2000, the Agent of Croatia requested the Court, for reasons stated in that letter, to extend by a further period of six months the time-limit for the filing of its Memorial. By a letter dated 6 June 2000, the Agent of the FRY informed the Court that his Government was not opposed to the request by Croatia on the condition that it would be granted the same extension for the filing of its Counter-Memorial.

7. By an Order dated 27 June 2000, the Court extended the time-limits to 14 March 2001 and 16 September 2002, respectively, for the filing of the Memorial of Croatia and the Counter-Memorial of the FRY. Croatia duly filed its Memorial within the time-limit thus extended.

8. Since the Court included upon the Bench no judge of the nationality of the Parties, each of them exercised its right under Article 31, paragraph 3, of the Statute to choose a judge *ad hoc* to sit in the case: Croatia chose Mr. Budislav Vukas and the FRY chose Mr. Milenko Kreća.

9. On 11 September 2002, within the time-limit provided for in Article 79, paragraph 1, of the Rules of Court as adopted on 14 April 1978, the FRY

raised preliminary objections relating to the Court's jurisdiction to entertain the case and to the admissibility of the Application. Accordingly, by an Order of 14 November 2002, the Court stated that, by virtue of Article 79, paragraph 3, of the Rules of Court as adopted on 14 April 1978, the proceedings on the merits were suspended, and fixed 29 April 2003 as the time-limit for the presentation by Croatia of a written statement of its observations and submissions on the preliminary objections raised by the FRY. Croatia filed such a statement within the time-limit thus fixed.

10. By a letter of 8 November 2002, the Government of Bosnia and Herzegovina requested to be furnished with copies of the pleadings and annexed documents in the case. Having ascertained the views of the Parties pursuant to Article 53, paragraph 1, of the Rules of Court, the President of the Court decided to grant that request. The Registrar communicated that decision to the Government of Bosnia and Herzegovina and to the Parties by letters of 11 December 2002.

11. By a letter dated 5 February 2003, the FRY informed the Court that, following the adoption and promulgation of the Constitutional Charter of Serbia and Montenegro by the Assembly of the FRY on 4 February 2003, the name of the State had been changed from the "Federal Republic of Yugoslavia" to "Serbia and Montenegro". Following the announcement of the result of a referendum held in Montenegro on 21 May 2006 (as contemplated in the Constitutional Charter of Serbia and Montenegro), the National Assembly of the Republic of Montenegro adopted a declaration of independence on 3 June 2006 (see paragraph 23 below).

12. By a letter dated 11 April 2007, the Registrar, in accordance with Article 69, paragraph 3, of the Rules of Court, asked the Secretary-General of the United Nations to inform him whether or not the United Nations intended to present observations in writing within the meaning of the said provision. In a letter dated 7 May 2007, the Secretary-General indicated that the United Nations did not intend to submit any such observations.

13. On 1 April 2008, the Co-Agent of Serbia provided the Registry with nine additional documents which it wished to produce in the case, under Article 56, paragraph 1, of the Rules of Court. By a letter dated 24 April 2008, the Agent of Croatia informed the Court that his Government had no objection to the production of these documents and that it wished, for its part, to produce two new documents. By the same letter, the Agent of Croatia requested that the Court call upon the Respondent, under Article 49 of its Statute and Article 62, paragraph 1, of the Rules of Court, to produce a certain number of documents. By a letter dated 29 April 2008, the Agent of Croatia provided additional information relating to the said request.

14. By a letter dated 2 May 2008, the Agent of Serbia informed the Court that his Government did not object to the production of the two new documents which Croatia wished to produce in the case. He further informed the Court of his Government's observations with regard to Croatia's request that the Court call upon the Respondent to produce a certain number of documents, and expressed, *inter alia*, "certain doubts as to whether the given request submitted at this stage of the proceedings and in this moment of time could serve the interests of a sound administration of justice".

15. On 6 May 2008, the Registrar notified the Parties that the Court had decided to authorize the production of the documents they wished to submit under Article 56 of the Rules of Court; these documents, accordingly, were

added to the case file. The Registrar further informed the Parties of the Court's decision not to accede, at this stage of the proceedings, to Croatia's request that the Court call upon the Respondent, under Article 49 of the Statute and Article 62, paragraph 1, of the Rules of Court, to produce a certain number of documents. He indicated to the Parties that the Court was not satisfied that the production of the requested documents was necessary for the purpose of ruling on preliminary objections. The Registrar also explained that the Court considered that Croatia had failed to provide sufficient reason to justify the great lateness of its request and that to accede to this request made at this very late juncture would, in addition, raise many practical problems.

16. By letters dated 6 May 2008, the Registrar informed the Parties that the Court asked them to address, during the hearings, the issue of the capacity of the Respondent to participate in proceedings before the Court at the time of filing of the Application, given the fact that the issue had not been addressed as such in the written pleadings.

17. Pursuant to Article 53, paragraph 2, of its Rules, the Court, after ascertaining the views of the Parties, decided that copies of the pleadings and documents annexed would be made available to the public at the opening of the oral proceedings.

18. Public sittings were held from 26 May to 30 May 2008, at which the Court heard the oral arguments and replies of:

*For Croatia:* H.E. Mr. Ivan Šimonović,  
H.E. Ms Andreja Metelko-Zgombić,  
Mr. Philippe Sands,  
Mr. James Crawford.

*For Serbia:* Mr. Tibor Varady,  
Mr. Vladimir Djerić,  
Mr. Andreas Zimmermann.

19. At the hearings, a question was put by a Member of the Court and replies given orally and in writing, in accordance with Article 61, paragraph 4, of the Rules of Court. Pursuant to Article 72 of the Rules of Court, Croatia presented written observations on the written reply received from Serbia.

\*

20. In its Application, the following claims were made by Croatia:

“While reserving the right to revise, supplement or amend this Application, and, subject to the presentation to the Court of the relevant evidence and legal arguments, Croatia requests the Court to adjudge and declare as follows:

- (a) that the Federal Republic of Yugoslavia has breached its legal obligations toward the people and Republic of Croatia under Articles I, II (a), II (b), II (c), II (d), III (a), III (b), III (c), III (d), III (e), IV and V of the Genocide Convention;
- (b) that the Federal Republic of Yugoslavia has an obligation to pay to the Republic of Croatia, in its own right and as *parens patriae* for its citizens, reparations for damages to persons and property, as well as to the Croatian economy and environment caused by the foregoing

violations of international law in a sum to be determined by the Court. The Republic of Croatia reserves the right to introduce to the Court at a future date a precise evaluation of the damages caused by the Federal Republic of Yugoslavia.”

21. In the written proceedings, the following submissions were presented by the Parties:

*On behalf of the Government of Croatia,*

in the Memorial:

“On the basis of the facts and legal arguments presented in this Memorial, the Applicant, the Republic of Croatia, respectfully requests the International Court of Justice to adjudge and declare:

1. That the Respondent, the Federal Republic of Yugoslavia, is responsible for violations of the Convention on the Prevention and Punishment of the Crime of Genocide:

(a) in that persons for whose conduct it is responsible committed genocide on the territory of the Republic of Croatia, including in particular against members of the Croat national or ethnical group on that territory, by

- killing members of the group;
- causing deliberate bodily or mental harm to members of the group;
- deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- imposing measures intended to prevent births within the group;

with the intent to destroy that group in whole or in part, contrary to Article II of the Convention;

(b) in that persons for whose conduct it is responsible conspired to commit the acts of genocide referred to in paragraph (a), were complicit in respect of those acts, attempted to commit further such acts of genocide and incited others to commit such acts, contrary to Article III of the Convention;

(c) in that, aware that the acts of genocide referred to in paragraph (a) were being or would be committed, it failed to take any steps to prevent those acts, contrary to Article I of the Convention;

(d) in that it has failed to bring to trial persons within its jurisdiction who are suspected on probable grounds of involvement in the acts of genocide referred to in paragraph (a), or in the other acts referred to in paragraph (b), and is thus in continuing breach of Articles I and IV of the Convention.

2. That as a consequence of its responsibility for these breaches of the Convention, the Respondent, the Federal Republic of Yugoslavia, is under the following obligations:

(a) to take immediate and effective steps to submit to trial before the appropriate judicial authority, those citizens or other persons within its jurisdiction who are suspected on probable grounds of having

committed acts of genocide as referred to in paragraph (1) (a), or any of the other acts referred to in paragraph (1) (b), in particular Slobodan Milošević, the former President of the Federal Republic of Yugoslavia, and to ensure that those persons, if convicted, are duly punished for their crimes;

- (b) to provide forthwith to the Applicant all information within its possession or control as to the whereabouts of Croatian citizens who are missing as a result of the genocidal acts for which it is responsible, and generally to co-operate with the authorities of the Republic of Croatia to jointly ascertain the whereabouts of the said missing persons or their remains;
- (c) forthwith to return to the Applicant any items of cultural property within its jurisdiction or control which were seized in the course of the genocidal acts for which it is responsible; and
- (d) to make reparation to the Applicant, in its own right and as *parens patriae* for its citizens, for all damage and other loss or harm to person or property or to the economy of Croatia caused by the foregoing violations of international law, in a sum to be determined by the Court in a subsequent phase of the proceedings in this case. The Republic of Croatia reserves the right to introduce to the Court a precise evaluation of the damages caused by the acts for which the Federal Republic of Yugoslavia is held responsible.

The Republic of Croatia reserves the right to supplement or amend these submissions as necessary.”

*On behalf of the Government of Serbia,*

in the preliminary objections:

“For the reasons advanced above, the Federal Republic of Yugoslavia is asking the Court:

to uphold the First Preliminary Objection and to adjudge and declare that it lacks jurisdiction over the claims brought against the Federal Republic of Yugoslavia by the Republic of Croatia.

*Or, in the alternative,*

- (a) to uphold the Second Preliminary Objection and to adjudge and declare that claims based on acts or omissions which took place before the FRY came into being (i.e. before 27 April 1992) are inadmissible;

*and*

- (b) to uphold the Third Preliminary Objection, and to adjudge and declare that specific claims referring to:

- taking effective steps to submit to trial Mr. Milošević and other persons;
- providing information regarding the whereabouts of missing Croatian citizens; and
- return of cultural property;

are inadmissible and moot.

The Respondent reserves its right to supplement or amend its submissions in the light of further pleadings.”

*On behalf of the Government of Croatia,*

in the written statement containing its observations and submissions on the preliminary objections raised by the FRY:

“On the basis of the facts and legal arguments presented in these Written Observations, the Republic of Croatia respectfully requests the International Court of Justice to reject the First, Second and Third Preliminary Objections of the FRY (Serbia and Montenegro) (with the exception of that part of the Second Preliminary Objection which relates to the claim concerning the submission to trial of Mr. Slobodan Milošević), and accordingly to adjudge and declare that it has jurisdiction to adjudicate upon the Application filed by the Republic of Croatia on 2 July 1999.”

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

*On behalf of the Government of Serbia,*

at the hearing of 29 May 2008:

“For the reasons given in its written submissions and its oral pleadings, Serbia requests the Court to *adjudge and declare*:

1. that the Court lacks jurisdiction,

*or, in the alternative:*

2. (a) that claims based on acts and omissions which took place prior to 27 April 1992 are beyond the jurisdiction of this Court and inadmissible;

*and*

(b) that claims referring to

- submission to trial of certain persons within the jurisdiction of Serbia,
- providing information regarding the whereabouts of missing Croatian citizens, and
- return of cultural property

are beyond the jurisdiction of this Court and inadmissible.”

*On behalf of the Government of Croatia,*

at the hearing of 30 May 2008:

“On the basis of the facts and legal arguments presented in our Written Observations, as well as those during these oral pleadings, the Republic of Croatia respectfully requests the International Court of Justice to:

- (1) *reject* the first, second and third preliminary objection of Serbia, with the exception of that part of the second preliminary objection which relates to the claim concerning the submission to trial of Mr. Slobodan Milošević, and accordingly to
- (2) *adjudge and declare* that it has jurisdiction to adjudicate upon the Application filed by the Republic of Croatia on 2 July 1999.”

\* \* \*

## I. IDENTIFICATION OF THE RESPONDENT PARTY

23. The Court has first to consider a question concerning the identification of the respondent Party before it in these proceedings. By a letter dated 3 June 2006, the President of the Republic of Serbia (hereinafter “Serbia”) informed the Secretary-General of the United Nations that, following the declaration of independence adopted by the National Assembly of the Republic of Montenegro,

“the membership of the state union Serbia and Montenegro in the United Nations, including all organs and organizations of the United Nations system, [would be] continued by the Republic of Serbia, on the basis of Article 60 of the Constitutional Charter of Serbia and Montenegro”.

He further stated that “in the United Nations the name ‘Republic of Serbia’ [was] to be henceforth used instead of the name ‘Serbia and Montenegro’” and added that the Republic of Serbia “remain[ed] responsible in full for all the rights and obligations of the state union of Serbia and Montenegro under the UN Charter”.

24. By a letter of 16 June 2006, the Minister for Foreign Affairs of Serbia informed the Secretary-General, *inter alia*, that “[t]he Republic of Serbia continue[d] to exercise its rights and honour its commitments deriving from international treaties concluded by Serbia and Montenegro” and requested that “the Republic of Serbia be considered a party to all international agreements in force, instead of Serbia and Montenegro”. By a letter of 30 June 2006, addressed to the Secretary-General, the Minister for Foreign Affairs confirmed the intention of Serbia to continue to exercise its rights and honour its commitments deriving from international treaties concluded by Serbia and Montenegro. He specified that “[a]ll treaty actions undertaken by Serbia and Montenegro w[ould] continue in force with respect to the Republic of Serbia with effect from 3 June 2006”, and that “all declarations, reservations and notifications made by Serbia and Montenegro w[ould] be maintained by the Republic of Serbia until the Secretary-General, as depositary, [were] duly notified otherwise”.

25. On 28 June 2006, by its resolution 60/264, the General Assembly admitted the Republic of Montenegro (hereinafter “Montenegro”) as a new Member of the United Nations.

26. By letters dated 19 July 2006, the Registrar requested the Agent of Croatia, the Agent of Serbia and the Minister for Foreign Affairs of Montenegro to communicate to the Court the views of their Governments on the consequences to be attached to the above-mentioned developments regarding the identity of the Respondent in the case. On the same date, similar letters were addressed to the Parties 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)*, which had been not only instituted but also heard on the merits before the independence of Montenegro.

27. By a letter dated 22 July 2006, the Agent of Serbia explained that, in his Government's opinion, "there [was] continuity between Serbia and Montenegro and the Republic of Serbia (on the grounds of Article 60 of the Constitutional Charter of Serbia and Montenegro)". He noted that the entity which had been Serbia and Montenegro "ha[d] been replaced by two distinct States, one of them [being] Serbia, the other [being] Montenegro". In those circumstances, the view of his Government was that "the Applicant ha[d] first to take a position, and to decide whether it wishe[d] to maintain its original claim encompassing both Serbia and Montenegro, or whether it [chose] to do otherwise".

28. By a letter dated 29 November 2006, addressed to the Court, the Chief State Prosecutor of Montenegro, after indicating her capacity to act as a legal representative of Montenegro, drew attention to the fact that, following the referendum held in Montenegro on 21 May 2006, the National Assembly of Montenegro had pronounced the independence of Montenegro. In the view of the Chief State Prosecutor, Montenegro had become an independent State with full international legal personality within its existing borders. She further stated that:

"The issue of international law succession of [the] State union of Serbia and Montenegro is regulated in article 60 of [the] Constitutional charter, and according to [that] article the legal successor of [the] State union of Serbia and Montenegro is the Republic of Serbia, which, as a sovereign state, [has] become [the] follower of all international obligations and successor in international organizations."

The Chief State Prosecutor concluded that, in the dispute before the Court, "the Republic of Montenegro may not have [the] capacity of respondent, [for the] above mentioned reasons".

29. On 26 February 2007 the Court gave judgment 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)*, in which it decided that Serbia remained a respondent in that case, "and at the date of [that] Judgment [was] indeed the only Respondent" (*Judgment, I.C.J. Reports 2007 (I)*, p. 76, para. 77).

30. By a letter dated 15 May 2008, the Agent of Croatia referred to Article 60 of the Constitutional Charter of Serbia and Montenegro and to paragraphs 76 and 77 of the 2007 Judgment. Given those circumstances, the Agent of Croatia confirmed that the proceedings instituted by Croatia on 2 July 1999 were "maintained against [the] Republic of Serbia as Respondent". He further noted that this conclusion was "without prejudice to the potential responsibility of [the] Republic of Montenegro and the possibility of instituting separate proceedings against it".

31. The Court observes that the facts and events on which the submissions of Croatia on the merits are based occurred at a period of time when Serbia and Montenegro were part of the same State.

32. The Court further notes that Serbia has accepted “continuity between Serbia and Montenegro and the Republic of Serbia” (see paragraph 27 above), and said that it would honour “its commitments deriving from international treaties concluded by Serbia and Montenegro” (see paragraph 24 above), which would include commitments under the Genocide Convention. Montenegro, on the other hand, is a new State admitted as such to the United Nations. It does not continue the international legal personality of the State union of Serbia and Montenegro.

33. As 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)*, the Court must recall the fundamental principle that no State may be subject to its jurisdiction without its consent; as the Court observed in the case of *Certain Phosphate Lands in Nauru (Nauru v. Australia)*, the Court’s “jurisdiction depends on the consent of States and, consequently, the Court may not compel a State to appear before it . . .” (*Preliminary Objections, Judgment, I.C.J. Reports 1992*, p. 260, para. 53). The question whether in this case such consent exists on the part of Serbia is one of the issues raised by the preliminary objections, the subject of the present Judgment. Montenegro made clear in its letter of 29 November 2006 (see paragraph 28 above) that it does not give its consent to the jurisdiction of the Court over it for the purposes of the present dispute. The events referred to above (see paragraphs 23-25 and 32) clearly show that Montenegro does not continue the legal personality of Serbia and Montenegro; it cannot therefore have acquired, on that basis, the status of Respondent in the present case. Furthermore, the Applicant did not in its letter of 15 May 2008 assert that Montenegro is still a party to the present case (see paragraph 30 above).

34. The Court therefore concludes that Serbia is the sole Respondent in the case. The name of Serbia will thus be used when referring to the Respondent, except when it follows from the historical context that reference has to be made to the FRY or to Serbia and Montenegro.

\* \* \*

## II. GENERAL OVERVIEW OF THE ARGUMENTS OF THE PARTIES

35. In its Application dated 2 July 1999 the Government of Croatia, referring to acts which occurred during the conflict that took place between 1991 and 1995 in the territory of the former Socialist Federal Republic of Yugoslavia (hereinafter the “SFRY”), contended that the FRY had committed violations of the Genocide Convention. The Gov-

ernment of the FRY contested the admissibility of the Application as well as the jurisdiction of the Court under Article IX of the Genocide Convention on several grounds (see paragraphs 21 and 22 above).

The Court will now give a general overview of the arguments of the Parties before presenting them in more detail when examining the different preliminary objections raised by the Respondent.

36. With regard to the question which the Parties were invited by the Court to address (see paragraph 16 above), that of the capacity of the Respondent under Article 35 of the Statute to participate in the present proceedings, the Respondent claimed that it did not have such capacity, because, as the Court had confirmed in 2004 in the cases concerning *Legality of Use of Force*, it was not a Member of the United Nations until 1 November 2000 and therefore not party to the Statute at the time of filing of the Application on 2 July 1999. Croatia, however, argued that the FRY was a Member of the United Nations at the time of filing of the Application and that even if that was not the case, the status of Serbia within the United Nations in 1999 did not affect the present proceedings as the Respondent became a Member of the United Nations in 2000 and thereby validly gained capacity to take part in the present proceedings.

37. The Respondent raised a preliminary objection concerning the jurisdiction of the Court on the basis of Article IX of the Genocide Convention. In the Application, Croatia had maintained that both Parties were bound by the Genocide Convention as successor States of the SFRY. Serbia stated that the Court's jurisdiction in the present case, which was instituted on 2 July 1999, could not be based on Article IX of the Genocide Convention, in view of the fact that the FRY did not become bound by the Convention in any way before 10 June 2001, the date at which its notification of accession to the Genocide Convention became effective with a reservation regarding Article IX; thus Serbia had never become bound by Article IX of the Convention.

38. Serbia also contended that Croatia's Application was inadmissible so far as it refers to acts or omissions prior to the FRY's proclamation of independence on 27 April 1992. It stated that acts or omissions which took place before the FRY came into existence could not be attributed to it. Croatia stated that although Serbia's preliminary objection, as stated in its final submission 2 (a), is presented as an objection to the admissibility of the claim, in point of fact Serbia seemed to be arguing that the Court had no jurisdiction *ratione temporis* over acts or events occurring before 27 April 1992. In this regard, it referred to the Court's Judgment of 11 July 1996 in which the Court stated that there are no temporal limitations to the application of the Genocide Convention and to its exercise of jurisdiction under the said Convention, in the absence of reservations to that effect (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia)*, *Preliminary Objections, Judgment, I.C.J. Reports 1996 (II)*, p. 617,

para. 34). During the oral pleadings, Serbia maintained the alternative argument that the Court lacked jurisdiction *ratione temporis* for acts or events that occurred before 27 April 1992, the date it came into existence, on the grounds that this date was the earliest possible point in time at which the FRY could have become bound by the Genocide Convention (see paragraph 121 below).

39. Serbia maintained that Croatia's submission 2 (a) in its Memorial (paragraph 21 above) concerning the submission to trial of persons suspected of having committed acts of genocide (including Slobodan Milošević) was "inadmissible and moot". Serbia contended that "[t]he crimes ascribed to Mr. Milošević and others in relation to the territory of Croatia include[d] crimes against humanity, breaches of the Geneva conventions and violations of the laws or customs of war" but did not include genocide. Croatia accepted that its submission 2 (a) was now moot in respect of those persons who have been transferred to the ICTY, including Mr. Milošević. However, Croatia pointed out that a large number of persons who are responsible for what Croatia considers to constitute genocidal acts committed in its territory and who are claimed to be within the jurisdiction of Serbia have still not been handed over to the ICTY or to Croatia nor submitted to trial in Serbia.

40. Serbia asserted that Croatia's submission 2 (b) in its Memorial (paragraph 21 above), concerning missing persons, was "inadmissible and moot". Serbia maintained that this specific submission fell outside the scope of the Genocide Convention and, in addition, had become moot since the Government of the FRY had been co-operating with the Government of Croatia since 1995 with a view to establishing the whereabouts of Croatian citizens missing as a result of the armed conflict. Croatia affirmed that its submission relating to the whereabouts of missing persons did fall within the scope of the Genocide Convention. It maintained that Serbia had at its disposal information and documentation on a large number of missing persons. It added that a compromissory clause providing for the Court's jurisdiction — such as Article IX of the Genocide Convention — over a dispute about the interpretation and application of a treaty established the Court's jurisdiction to award appropriate remedies, and that the provision of information on the whereabouts of missing persons was an appropriate remedy.

41. Serbia finally claimed that Croatia's submission 2 (c) in its Memorial (paragraph 21 above), concerning return of cultural property was "inadmissible and moot". According to Serbia, it is inadmissible because jurisdiction with respect to alleged crimes of genocide cannot include property claims regarding objects of art. Croatia considered that its claim regarding the return of cultural property did fall within the scope of the Genocide Convention. In Croatia's view, it is recognized that genocide

may not only be committed through physical destruction of a group but also through destruction of a group's cultural identity.

42. The Court will examine these arguments in turn. It will first examine the question of the capacity of Serbia to take part in the present proceedings and will for this purpose briefly recall the series of events relating to the status, at successive periods, of the SFRY, the FRY and Serbia in relation to the United Nations.

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### III. BRIEF HISTORY OF THE STATUS OF THE FRY WITH REGARD TO THE UNITED NATIONS

43. In the early 1990s the SFRY, a founding Member State of the United Nations, comprised of Bosnia and Herzegovina, Croatia, Macedonia, Montenegro, Serbia and Slovenia, began to disintegrate. 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.

44. 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 particular:

" . . . . .

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.)

On the same date, the Permanent Mission of Yugoslavia to the United Nations sent a Note with a similar wording to the Secretary-General (see paragraph 99 below).

45. On 19 September 1992, the Security Council adopted resolution 777 (1992), in which it considered 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”; it further recommended to the General Assembly that it “decide that the FRY (Serbia and Montenegro) should apply for membership in the United Nations and that it shall not participate in the work of the General Assembly”.

46. On the recommendation of the Security Council, stated in its resolution 777 (1992), the General Assembly adopted resolution 47/1, on 22 September 1992, whereby it was decided that the FRY should apply for membership in the United Nations and that it should not participate in the work of the General Assembly.

47. 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 “request[ed] that [the Secretary-General] provide a legal explanatory statement concerning the questions raised” (United Nations doc. A/47/474).

48. 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, in substance, that “the only practical consequence” of resolution 47/1 was to prohibit the FRY from participating in the work of the General Assembly, but that it “neither terminates nor suspends Yugoslavia’s membership in the Organization”. He added that the situation thus created would be terminated by “[t]he admission to the United Nations of a new Yugoslavia” (see United Nations doc. A/47/485).

49. Considering this sequence of events, the Court in its Judgments of 15 December 2004 in the cases concerning the *Legality of Use of Force*, observed that

“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” (*Legality of Use of Force (Serbia and Montenegro v. Belgium), Preliminary Objections, Judgment, I.C.J. Reports 2004 (I)*, p. 308, para. 73);

and earlier the Court, in another context, had referred to the “*sui generis* position which the FRY found itself in” during the period between 1992 to 2000 (*ibid.*, citing *I.C.J. Reports 2003*, p. 31, para. 71).

50. This position, however, came to an end with a new development in 2000. On 27 October 2000, Mr. Koštunica, the newly elected President of the FRY, sent a letter to the Secretary-General requesting admission of the FRY to membership in the United Nations.

51. 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”.

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#### IV. RELEVANCE OF PREVIOUS DECISIONS OF THE COURT

52. Central to the present proceedings is the question of the status and position of the State known at the time of the filing of the Application as the FRY, in relation to the Statute of the Court and to the Genocide Convention. That question has been in issue in a number of previous decisions of the Court. 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)*, there were two decisions on requests for the indication of provisional measures (Orders of 8 April and 13 September 1993), a decision on preliminary objections (Judgment of 11 July 1996) and a decision on the merits (Judgment of 26 February 2007). 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*), the Court delivered a Judgment on 3 February 2003. In the set of cases concerning the *Legality of Use of Force* brought by the FRY against ten Member States of the North Atlantic Treaty Organization the Court rendered Judgments in eight of those cases on 15 December 2004 upholding preliminary objections on the ground of a lack of capacity on the part of the Applicant to appear before the Court. Both Parties to the present case have cited these various decisions in support of their respective contentions. It may be convenient at the outset for the Court to indicate to what extent it considers that these decisions may have weight for the purpose of deciding the matters now before it.

53. While some of the facts and the legal issues dealt with in those cases arise also in the present case, none of those decisions were given in proceedings between the two Parties to the present case (Croatia and Serbia), so that, as the Parties recognize, no question of *res judicata* arises (Article 59 of the Statute of the Court). To the extent that the decisions contain findings of law, the Court will treat them as it treats all previous decisions: that is to say that, while those decisions are in no way binding on the Court, it will not depart from its settled jurisprudence unless it finds very particular reasons to do so. As the Court has observed in the case concerning the *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening)*, while “[t]here can be no question of holding [a State] to decisions reached by

the Court in previous cases” which do not have binding effect for that State, in such circumstances “[t]he real question is whether, in [the current] case, there is cause not to follow the reasoning and conclusions of earlier cases” (*Preliminary Objections, Judgment, I.C.J. Reports 1998*, p. 292, para. 28).

54. Furthermore, here the Parties are not merely citing previous decisions of the Court which might be regarded as precedents to be followed in comparable cases. The previous decisions cited here referred to the question of the status of a particular State, the FRY, in relation to the United Nations and to the Statute of the Court; and it is that same question in relation to that same State that requires to be examined in the present proceedings at the instance, this time, of Croatia. It would require compelling reasons for the Court to depart from the conclusions reached in those previous decisions.

55. The Court will consequently bear in mind that in the proceedings in the course of which the above-cited Judgments and Orders were rendered (see paragraph 52 above), it was not the contention either of Bosnia and Herzegovina or, until 2002, of the FRY that the FRY was not a Member of the United Nations (and thus was not a party to the Statute), or that it was not a party to the Genocide Convention. It was only when the FRY, abandoning its claim to continue the United Nations membership of the SFRY, was admitted to the United Nations in 2000 that it advanced the opposite view, initially in its Written Statement, filed on 20 December 2002, on the Preliminary Objections submitted in the *Legality of Use of Force* cases. It was not until the written and oral proceedings in those cases that the Court heard an exchange of full argument between the parties on these points. The Court will consider in the present Judgment the grounds adopted for the conclusion to which it came, in those decisions, as regards the status of the Respondent.

56. There have also been suggestions in argument by Croatia before the Court that the previous cases mentioned above are relevant as showing, in particular, that Serbia as a party to those cases initially adopted and put forward a legal position from which it cannot now resile for purposes of the present case. This contention relates only to the question of the legal consequences to be drawn from the conduct of this State, and not strictly speaking to the effect or relevance of the above-cited case law.

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## V. PRELIMINARY OBJECTION TO THE JURISDICTION OF THE COURT

### (1) *Issues of capacity to be a party to the proceedings*

57. The first question to be addressed by the Court when examining the Respondent’s first preliminary objection is whether the Parties in the

present case satisfy the general conditions, under Articles 34 and 35 of the Statute, for capacity to participate in proceedings before the Court.

58. It should be recalled in this regard that, under Article 34, paragraph 1, of the Statute, “[o]nly States may be parties in cases before the Court”. Article 35, paragraph 1, moreover lays down that “[t]he Court shall be open to the States parties to the present Statute”. The latter provision is to be understood in the light of Article 93 of the Charter of the United Nations; paragraph 1 of that Article states that “[a]ll Members of the United Nations are *ipso facto* parties to the Statute of the International Court of Justice”, but provision is made in paragraph 2 by way of exception for cases in which a State not a Member of the United Nations may become a party to the Statute of the Court. In respect of States which are not parties to the Statute of the Court, as Members of the United Nations or otherwise, the position is governed by Article 35, paragraph 2, of the Statute. That paragraph on the one hand empowers the Security Council to lay down the conditions under which the Court shall be open to such States and on the other contains a reservation for “special provisions contained in treaties in force”. Pursuant to the authority thus conferred upon it, the Security Council adopted resolution 9 (1946) of 15 October 1946, providing in substance that the Court shall be open to any State not a party to the Statute which has previously deposited a declaration, either in respect of one or more particular matters or with a more general ambit, whereby the State undertakes to accept the jurisdiction of the Court in accordance with the Charter and to comply in good faith with the decisions of the Court.

59. It is neither disputed nor disputable in the present case that both Parties satisfy the condition laid down in Article 34 of the Statute: Croatia and Serbia are States for purposes of Article 34, paragraph 1.

60. It is not disputed nor is it open to doubt that, at the date it filed its Application, 2 July 1999, Croatia satisfied a condition under Article 35 of the Statute sufficient for the Court to be “open” to it: at that date it was a Member of the United Nations and, as such, therefore a party to the Statute of the Court.

61. On the other hand the Parties disagreed whether Serbia satisfies, for the purposes of the present case, the conditions under Article 35, paragraph 1 or paragraph 2, of the Statute and whether, in view of the foregoing, it has capacity to participate in the present proceedings before the Court.

62. Reduced to their essentials, the Parties’ positions on this point may be described as follows.

63. The Respondent contends that it was not a Member of the United Nations at the date the Application was filed and thus was not a party to the Statute of the Court on this basis — or on any other. The Court was therefore not “open” to it within the meaning of Article 35, paragraph 1, of the Statute, which should be applied as of the date of filing of the

Application, not any later date; accordingly, the fact that it later became a party to the Statute of the Court — in 2000, as a result of its admission to the United Nations — is irrelevant.

The Respondent further maintains that the Genocide Convention is not one of the “treaties in force” referred to in the proviso in Article 35, paragraph 2, since this term embraces only treaties in force at the date on which the Statute itself entered into force, as the Court recognized in its 2004 Judgments in the cases concerning *Legality of Use of Force*. It is moreover a fact that the Respondent has not made any declaration of the kind contemplated by Security Council resolution 9 (1946). Consequently, the Respondent argues, the Court is not “open” to it pursuant to Article 35, paragraph 2, either.

Finally, the Respondent contends that the same result obtains where the party failing to fulfil any of the conditions set out in Article 35 of the Statute in a particular case is the respondent as where that party is the applicant: that is to say that the Court is precluded from exercising jurisdiction over the dispute between the two parties.

64. The Applicant in the present case contests these arguments, its contention being essentially as follows.

First, the Respondent had in 1999 a status vis-à-vis the United Nations that was *sui generis*, such that, albeit not a full-fledged Member, it remained a party to the Statute of the Court and therefore had access to it pursuant to Article 35, paragraph 1, of the Statute.

The Applicant further contends that even assuming that the Respondent was not a party to the Statute when the proceedings were initiated, it undoubtedly became one as from 1 November 2000, when it was admitted to the United Nations, and is therefore now, a party, and that is sufficient to enable the Court to exercise jurisdiction over it. In this connection the Applicant cites the jurisprudence deriving from the 1924 Judgment in the case concerning *Mavrommatis Palestine Concessions* (*Judgment No. 2, 1924, P.C.I.J., Series A, No. 2, p. 34*). It also points out that its Memorial was filed on 1 March 2001, after the Respondent had been admitted to the United Nations, at a date when no objection to the institution of new proceedings could have been based on Article 35.

Finally, and again in the alternative, even if the Court were to consider that it is not “open” to the Respondent under Article 35, paragraph 1, of the Statute, it should hold that it is open under paragraph 2 of that Article. The Applicant maintains that the Genocide Convention is a “treaty in force” for purposes of Article 35, paragraph 2, making it possible for access to the Court to be given to States not parties to the Statute. The Applicant is well aware that the Court took the opposite position in its Judgments in 2004 in the *Legality of Use of Force* cases: it nevertheless asks the Court to reconsider, and modify the interpretation it then gave of the Statute provision in question, i.e., that “treaties in

force” did not embrace treaties dating from after the entry into force of the Statute.

65. Before proceeding with a more detailed analysis and examination of the Parties’ arguments briefly summarized immediately above, the Court feels that it should make a number of preliminary observations at this point. Most of them are drawn from decisions it has rendered in the last 15 years, a period during which the Court has had several opportunities to apply Article 34 and to interpret and apply Article 35 of the Statute, by reference in fact to the legal position of the State which is the Respondent in the present case.

66. It should first be observed that the question whether or not a State meets the conditions of Article 35 of the Statute can be regarded either as an issue relating to the Court’s jurisdiction *ratione personae* or as an issue preliminary to the examination of jurisdiction. The Court sees no need to settle this debate, any more than it felt obliged to do so in its earlier decisions (see, e.g., *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, *Judgment*, *I.C.J. Reports 2007 (I)*, p. 100, para. 136). Where the conditions of Article 35 are not met, the Court is without jurisdiction to adjudicate the dispute on the merits. From this standpoint, a Respondent raising an objection on the basis that the conditions of Article 35 have not been met must be deemed to be making a jurisdictional objection and, if the Court sustains the argument, its judgment will be a finding of lack of jurisdiction. Thus, Serbia is here asking the Court to decide, drawing on its arguments relating to its first preliminary objection, that it is without jurisdiction in the case.

67. Secondly, the issue arises whether the Court, if presented with both an objection based on one party’s lack of access to the Court and an objection based on lack of jurisdiction *ratione materiae*, — or indeed, which comes to the same thing, an objection to jurisdiction advancing both of these grounds — must necessarily examine the two questions in a prescribed order, so that it could not consider the second (jurisdiction *ratione materiae*) until after it has answered the first (access to the Court) in the affirmative.

The Court addressed this issue in its 2004 Judgments in the *Legality of Use of Force* cases (see, e.g., *Legality of Use of Force (Serbia and Montenegro v. Belgium)*, *Preliminary Objections, Judgment*, *I.C.J. Reports 2004 (I)*, pp. 298-299, para. 46). After pointing out that, as a general rule, it remained free to select the ground on which to base its judgment where several separate grounds were capable of leading to the same conclusion, and it therefore remained free to decide the order in which to deal with these questions, the Court determined that the position was otherwise in the matter before it. It stated that, where the applicant’s right to access to the Court has been challenged — as it had been — this

“fundamental question” had to be decided before any other, because, if the applicant was not a party to the Statute, the Court was not open to it and accordingly it could not “properly seise . . . the Court, whatever title of jurisdiction it might . . . invoke” (*Legality of Use of Force (Serbia and Montenegro v. Belgium), Preliminary Objections, Judgment, I.C.J. Reports 2004 (I)*, pp. 298-299, para. 46).

The Court therefore found it necessary in those cases first to examine the question of Serbia and Montenegro’s access to the Court, so as to determine whether the Court could “exercise its judicial function” in respect of that State, observing that it could then examine the issues involving jurisdiction *ratione materiae* and any other jurisdictional issues “[o]nly if the answer to that [first] question is in the affirmative”.

In the present case, even though no question arises as to seisin so far as the Applicant is concerned, the Court considers that here also it is appropriate first to examine the issues relating to application of Article 35 of the Statute.

68. Thirdly, the Court recalls that, as it pointed out in its Judgment of 26 February 2007 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)*, the question whether a State may properly appear before the Court, on the basis of the Statute, is “one which the Court is bound to raise and examine, if necessary, ex officio, and if appropriate after notification to the parties” (*I.C.J. Reports 2007 (I)*, p. 94, para. 122).

The first consequence of this is described as follows in that Judgment:

“if the Court considers that, in a particular case, the conditions concerning the capacity of the parties to appear before it are not satisfied, while the conditions of its jurisdiction *ratione materiae* are, it should, even if the question has not been raised by the parties, find that the former conditions are not met, and conclude that, for that reason, it could not have jurisdiction to decide the merits” (*ibid.*).

Obviously, it does not however follow that the Court is under an obligation to treat this question expressly in the reasoning in any judgment in which it rules on a preliminary objection to jurisdiction. If neither party has raised the issue and the Court finds that the conditions of Articles 34 and 35 are satisfied in the case, it may well choose to omit from the reasoning in the judgment any specific discussion of the point and to confine itself to responding to the arguments raised by the parties. It may also choose, if it finds appropriate, to deal with the point expressly in its reasoning.

If however the Court in a judgment on preliminary objections to jurisdiction rejects them and upholds jurisdiction, without saying anything on the question of access to the Court, the conclusion may be drawn that the

Court has perceived the conditions on access to have been satisfied. As the Court stated in 2007 in respect of its 1996 Judgment in the same case, dealing with the preliminary objections raised by the FRY:

“Since . . . the question of a State’s capacity to be a party to proceedings is a matter which precedes that of jurisdiction *ratione materiae*, and one which the Court must, if necessary, raise *ex officio* . . . this finding [that it had jurisdiction on the basis of Article IX of the Genocide Convention to adjudicate upon the dispute] must as a matter of construction be understood, by necessary implication, to mean that the Court at that time perceived the Respondent as being in a position to participate in cases before the Court.” (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, *I.C.J. Reports 2007 (I)*, pp. 98-99, para. 132.)

69. The Respondent in 1996 and in 2007 was the same State as is Respondent in the present case. The Court cannot but observe, however, that in the present case no implicit finding that Serbia has the necessary capacity to participate in the proceedings instituted by Croatia’s Application can be inferred from any previous judgment of the Court. The Judgment of 11 July 1996 on jurisdiction 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, Judgment, I.C.J. Reports 1996 (II)*, p. 595), to which the Court gave full effect as *res judicata* in its 2007 Judgment on the merits in the same case, does not of itself have any authority as *res judicata* in the present case. The question of the Respondent’s capacity must therefore be examined *de novo*, in the context of the dispute now before the Court.

The Respondent did not raise the question of its lack of capacity to participate in proceedings in its preliminary objections. The Court informed the Parties, by means of letters dated 6 May 2008 from the Registrar, of its wish to hear this issue addressed in the hearings and it was so addressed; the issue is now before the Court.

70. The last series of preliminary observations relates to the order in which the Court will now examine the various questions arising out of the application of Article 35 of the Statute in the present case.

71. As noted above, the Parties argued the question whether the Genocide Convention is a “treaty in force” for purposes of Article 35, paragraph 2, of the Statute. If the answer were in the affirmative, and provided that at the relevant date the Parties were bound vis-à-vis each other by this Convention, including Article IX — a point to be examined later in this Judgment —, it would follow that the Court was “open” to Serbia pursuant to Article 35, paragraph 2, even if Serbia was not a party to the Statute at that date and therefore did not satisfy the condition laid down in paragraph 1.

The Parties are in agreement that the Court addressed this question in its 2004 Judgments in the *Legality of Use of Force* cases and answered it in the negative. It did so on the basis of, *inter alia*, its examination of the *travaux préparatoires* of the provision, which led it to conclude that “treaties in force” referred only to treaties already in force at the entry into force of the Statute and not to treaties concluded subsequently, such as the Genocide Convention (see, e.g., *Legality of Use of Force (Serbia and Montenegro v. Belgium), Preliminary Objections, Judgment, I.C.J. Reports 2004 (I)*, pp. 318-324, paras. 100-114).

The two Parties further agree that the position adopted by the Court in those cases does not have the force of *res judicata* in the present case, because those Judgments were rendered in different cases which did not involve the same parties.

The Parties however recognize that these findings have great bearing for the present case, as the Court does not depart from its settled jurisprudence unless it finds very particular reasons to do so.

On the basis of these shared premises, the Parties reach different conclusions: while Croatia invites the Court to reconsider its jurisprudence on this point and to correct the error which it claims was committed in 2004, Serbia asks the Court to maintain unchanged in the present case its interpretation of the clause “special provisions contained in treaties in force” in Article 35, paragraph 2.

72. The Court deems it appropriate in the present case to examine the question of Serbia’s access to the Court on the basis of Article 35, paragraph 1, before any examination on the basis of paragraph 2.

Only if the Court were to find that the Respondent was not a party to the Statute of the Court at the relevant time — to be determined below — and that, as a result, it did not satisfy the condition in paragraph 1, should the Court address the question whether the Respondent can derive its capacity to participate in the proceedings from the Genocide Convention, on the basis of “special provisions contained in treaties in force” within the meaning of paragraph 2.

73. The Court thus now turns to the question of whether Serbia is or was, at the pertinent time, a party to the Statute, which would suffice, in any event, to confer upon it the necessary capacity to participate in proceedings before the Court, in whatever role.

74. The starting-point for the reasoning should be the following two observations, which are not disputed by the Parties.

75. First, in its Judgments in 2004 in the *Legality of Use of Force* cases, the Court clearly determined the legal status of the FRY, now Serbia, over the period from the dissolution of the former SFRY to the admission of the FRY to the United Nations on 1 November 2000.

After recalling that the FRY’s position vis-à-vis the United Nations

had remained uncertain and controversial throughout that period, the Court itself having characterized it as *sui generis* in its Judgment on the *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), the Court recounted in detail the history of relations between the FRY and the United Nations from the dissolution of the former Yugoslavia until the State's admission as a Member of the United Nations on 1 November 2000.

That led the Court to conclude:

“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 . . . 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.

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.” (*Legality of Use of Force (Serbia and Montenegro v. Belgium), Preliminary Objections, Judgment, I.C.J. Reports 2004 (I)*, pp. 310-311, paras. 78-79).

76. There can be no doubt that for purposes of the present case the aforementioned Judgments of 2004 do not have force of *res judicata* on this — or any other — point, since they were given in different cases which did not involve the same parties, as has already been noted above with respect to another aspect of those Judgments (see paragraph 71).

Nevertheless, it is equally certain that they may be of relevance in the present instance, as, first, they address the legal position of the Respondent in the present case during a period — from 1992 to 2000 — covering the date of filing of the Application on which the Court must rule, and second as was recalled above (see paragraph 53), the Court departs from settled jurisprudence only if it is of the opinion that there are very particular reasons to do so.

That is the first consideration to be taken in account.

77. The second point is that, from 1 November 2000 and up to the date of the present Judgment, the Respondent is a party to the Statute by virtue of its status as a Member of the United Nations, that is to say pursuant to Article 93, paragraph 1, of the Charter, which automatically grants to all Members of the Organization the status of party to the Statute of the Court.

Thus, it is indisputable — and neither Party in its argument has suggested otherwise — that at the present time both Croatia and Serbia have access to the Court on the basis of Article 35, paragraph 1, of the Statute. It undoubtedly follows that a dispute between these two States could now be referred to the Court providing, of course, that there was a basis of jurisdiction *ratione materiae* allowing for submission of the dispute to the Court.

Thus, had Croatia's Application been filed on 2 November 2000, instead of 2 July 1999, no objection to jurisdiction could have been based on lack of access to the Court within the meaning of Article 35 of the Statute, and the Court would simply have had to ascertain whether there was a basis for jurisdiction *ratione materiae*, that is to say a legal nexus between the Parties such that each had consented to the jurisdiction of the Court to settle its dispute with the other.

78. This brings the Court to address an issue of particular importance in the present case: whether fulfilment of the conditions laid down in Article 35 of the Statute must be assessed solely as of the date of filing of the Application, or whether it can be assessed, at least under the specific circumstances of the present case, at a subsequent date, more precisely at a date after 1 November 2000.

79. In numerous cases, the Court has reiterated the general rule which it applies in this regard, namely: "the jurisdiction of the Court must normally be assessed on the date of the filing of the act instituting proceedings" (to this effect, see *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. 613, para. 26; *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. 26, para. 44).

Given that, as indicated above, fulfilment of the conditions of Article 35 governs the jurisdiction of the Court — whether or not this is seen as an element of jurisdiction *ratione personae* —, it is normally by reference to the date of the filing of the instrument instituting proceedings that it must be determined whether those conditions are met.

80. It is easy to see why this rule exists.

If at the date of filing of an application all the conditions necessary for the Court to have jurisdiction were fulfilled, it would be unacceptable for that jurisdiction to cease to exist as the result of a subsequent event. In the first place, the result could be an unwarranted difference in treatment between different applicants or even with respect to the same applicant, depending on the degree of rapidity with which the Court was able to examine the cases brought before it. Further, a respondent could deliberately place itself beyond the jurisdiction of the Court by bringing about an event or act, after filing of an application, as a result of which the conditions for the jurisdiction of the Court were no longer satisfied — for example, by denouncing the treaty containing the compromissory clause. That is why the removal, after an application has been filed, of an element on which the Court's jurisdiction is dependent does not and cannot have any retroactive effect. What is at stake is legal certainty, respect for the principle of equality and the right of a State which has properly seised the Court to see its claims decided, when it has taken all the necessary precautions to submit the act instituting proceedings in time.

Conversely, it must be emphasized that a State which decides to bring proceedings before the Court should carefully ascertain that all the requisite conditions for the jurisdiction of the Court have been met at the time proceedings are instituted. If this is not done and regardless of whether these conditions later come to be fulfilled, the Court must in principle decide the question of jurisdiction on the basis of the conditions that existed at the time of the institution of the proceedings.

81. However, it is to be recalled that the Court, like its predecessor, has also shown realism and flexibility in certain situations in which the conditions governing the Court's jurisdiction were not fully satisfied when proceedings were initiated but were subsequently satisfied, before the Court ruled on its jurisdiction.

82. In its Judgment of 30 August 1924 on the objection to jurisdiction raised by the Respondent in the *Mavrommatis Palestine Concessions* case, the Permanent Court of International Justice stated thus:

“it must . . . be considered whether the validity of the institution of proceedings can be disputed on the ground that the application was

filed before Protocol XII [annexed to the Treaty of Lausanne] had become applicable. This is not the case. Even assuming that before that time the Court had no jurisdiction because the international obligation referred to in Article 11 [of the Mandate for Palestine] was not yet effective, it would always have been possible for the applicant to re-submit his application in the same terms after the coming into force of the Treaty of Lausanne, and in that case, the argument in question could not have been advanced. Even if the grounds on which the institution of proceedings was based were defective for the reason stated, this would not be an adequate reason for the dismissal of the applicant's suit. The Court, whose jurisdiction is international, is not bound to attach to matters of form the same degree of importance which they might possess in municipal law. Even, therefore, if the application were premature because the Treaty of Lausanne had not yet been ratified, this circumstance would now be covered by the subsequent deposit of the necessary ratifications." (*Judgment No. 2, 1924, P.C.I.J., Series A, No. 2*, p. 34.)

Similarly, the Permanent Court said in the case concerning *Certain German Interests in Polish Upper Silesia*:

"Even if, under Article 23 [of the German-Polish Convention of 1922, the compromissory clause invoked in the case], the existence of a definite dispute were necessary, this condition could at any time be fulfilled by means of unilateral action on the part of the applicant Party. And the Court cannot allow itself to be hampered by a mere defect of form, the removal of which depends solely on the Party concerned." (*Jurisdiction, Judgment No. 6, 1925, P.C.I.J., Series A, No. 6*, p. 14.)

In the jurisprudence of the present Court, operation of the same idea is discernible in the *Northern Cameroons (Cameroon v. United Kingdom)* case (*Preliminary Objections, Judgment, I.C.J. Reports 1963*, p. 28), and in the case concerning *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, in the passage stating: "It would make no sense to require Nicaragua now to institute fresh proceedings based on the [1956] Treaty [of Friendship], which it would be fully entitled to do." (*Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984*, pp. 428-429, para. 83.)

Finally, the Court was confronted more recently with a comparable situation when it ruled on the preliminary objections 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, Judgment, I.C.J. Reports 1996 (II)*, p. 595). The Respondent argued that the Genocide Convention — the basis of jurisdiction — had only begun to apply to relations between the two Parties on 14 December 1995, the date when, pursuant to the Dayton-Paris

Agreement, they recognized each other, whereas the Application had been submitted on 20 March 1993, that is to say more than two-and-a-half years earlier.

The Court responded to that argument as follows:

“In the present case, even if it were established that the Parties, each of which was bound by the Convention when the Application was filed, had only been bound as between themselves with effect from 14 December 1995, the Court could not set aside its jurisdiction on this basis, inasmuch as Bosnia and Herzegovina might at any time file a new application, identical to the present one, which would be unassailable in this respect.” (*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. 614, para. 26.)

83. Croatia relies on this jurisprudence, which it contends can be directly transposed to the present case. If Serbia is bound by the Genocide Convention, including Article IX, as Croatia considers is the case, and, since the Respondent has been a party to the Statute of the Court since 1 November 2000, it follows that the Applicant could at any time file a new application, which would be unassailable in this respect. The reasoning of the Court in the aforementioned cases should, according to Croatia, lead it in this case also not to oblige the Applicant to bring fresh proceedings, so that it would disregard the fact that Serbia only became a party to the Statute after the proceedings had been instituted. In this respect, Croatia emphasizes the date on which it filed its Memorial, 1 March 2001.

84. Serbia disputes these arguments, contending that the jurisprudence in question is not applicable to the present case for two reasons. First, the Respondent notes that in all of the precedents cited it was not the respondent alone, which was unable to fulfil one of the conditions necessary for the Court to uphold jurisdiction at the date the proceedings were instituted, but this was not a point Serbia chose to rely on. Secondly and more importantly, according to Serbia, the jurisprudence cannot be applied where the unmet condition concerns the capacity of a party to participate in proceedings before the Court, in accordance with Articles 34 and 35 of the Statute, that is to say concerns a “fundamental question” which, as the Court stated in 2004, must be examined before any other issue of jurisdiction. Further, Serbia adds, the Court did not apply the “Mavrommatis doctrine” in its 2004 Judgments in the *Legality of Use of Force* cases, since, after finding that the Applicant was not a party to the Statute of the Court at the date the Applications were filed and did not therefore have the right of access to the Court, it held that it lacked jurisdiction, even though it mentioned the fact that the Applicant had been a Member of the United Nations since 1 November 2000. According to Serbia, this is explained by the fact that when the Court is seised of a case in which either the applicant or the respondent does not fulfil the

conditions of Articles 34 and 35 of the Statute, it cannot regard itself as having been “properly” seised and does not even possess the *compétence de la compétence*, that is to say the jurisdiction to determine whether it has jurisdiction to decide the merits of the dispute. In such a case, it would be confronted with an insuperable obstacle.

85. The Court observes that as to the first of these two arguments, given the logic underlying the cited jurisprudence of the Court deriving from the 1924 Judgment in the *Mavrommatis Palestine Concessions* case (*Judgment No. 2, 1924, P.C.I.J., Series A, No. 2*), it does not matter whether it is the applicant or the respondent that does not fulfil the conditions for the Court’s jurisdiction, or both of them — as is the situation where the compromissory clause invoked as the basis for jurisdiction only enters into force after the proceedings have been instituted. The Court sees no convincing reason why an applicant’s deficiency might be overcome in the course of proceedings, while that of a respondent may not. What matters is that, at the latest by the date when the Court decides on its jurisdiction, the applicant must be entitled, if it so wishes, to bring fresh proceedings in which the initially unmet condition would be fulfilled. In such a situation, it is not in the interests of the sound administration of justice to compel the applicant to begin the proceedings anew — or to initiate fresh proceedings — and it is preferable, except in special circumstances, to conclude that the condition has, from that point on, been fulfilled.

86. In the view of the Court, the second argument mentioned above warrants more detailed analysis.

First, it is true that all of the cited precedents concern cases where the initially unfulfilled condition related to jurisdiction *ratione materiae* or *ratione personae* in the narrow sense and not to the question of access to the Court, which has to do with a party’s capacity to participate in any proceedings whatever before the Court. Nevertheless, the Court cannot endorse the radical interpretation advanced by Serbia, namely that whenever it is seised by a State which does not fulfil the conditions of access under Article 35, or seised of a case brought against a State which does not fulfil those conditions, the Court does not even have the *compétence de la compétence*, the competence to decide whether or not it has jurisdiction. Nothing of the sort is to be found in the 2004 Judgments cited by Serbia during the hearings. In those Judgments, the Court did no more than indicate that the question of access to the Court was a “fundamental one” which needed to be examined before the others, and that if the Applicant did not fulfil the Article 35 conditions the Court had to deduce from that fact that it had not been “properly seised”. Not being “properly seised” does not mean that the Court lacks the competence necessary to decide on its own jurisdiction, in other words to decide whether it has been properly seised and whether the conditions necessary to allow it to hear the case on the merits have been satisfied. That is true where it is the

applicant which, as in the *Legality of Use of Force* cases, does not fulfil the conditions for access to the Court. It is true *a fortiori* when it is the respondent which allegedly does not meet those conditions since in such circumstances the act of seising the Court, performed by a State which does have access to the Court, is not at issue: that is the case in the present proceedings. The Court always possesses the *compétence de la compétence* (see Article 36, paragraph 6, of the Statute). In any event the Court notes that Serbia asks it in its principal submission to decide by a judgment that it lacked jurisdiction to entertain Croatia's Application.

87. More importantly, the Court cannot accept Serbia's argument that when the defect is that one party does not have access to the Court, it is so fatal that it can in no case be cured by a subsequent event in the course of the proceedings, for example when that party acquires the status of party to the Statute of the Court which it initially lacked.

As stated above, the question of access is clearly distinct from those relating to the examination of jurisdiction in the narrow sense. But it is nevertheless closely related to jurisdiction, inasmuch as the consequence is exactly the same whether it is the conditions of access or the conditions of jurisdiction *ratione materiae* or *ratione temporis* which are unmet: the Court lacks jurisdiction to entertain the case. It is always within the context of an objection to jurisdiction, as in the present case, that arguments will be raised before the Court regarding the parties' capacity to participate in the proceedings.

That being so, it is not apparent why the arguments based on the sound administration of justice which underpin the *Mavrommatis* case jurisprudence cannot also have a bearing in a case such as the present one. It would not be in the interests of justice to oblige the Applicant, if it wishes to pursue its claims, to initiate fresh proceedings. In this respect it is of no importance which condition was unmet at the date the proceedings were instituted, and thereby prevented the Court at that time from exercising its jurisdiction, once it has been fulfilled subsequently.

88. It is true that the Court apparently did not take account in its 2004 Judgments of the fact that Serbia and Montenegro had by that date become a party to the Statute: indeed, the Court found that it lacked jurisdiction on the sole ground that the Applicant did not have access to the Court in 1999, when the Applications were filed, without taking its reasoning any further.

89. But if the Court abided in those cases strictly by the general rule that its jurisdiction is to be assessed at the date of filing of the act instituting proceedings, without adopting the more flexible approach following from the other decisions cited above, that is justified by particular considerations relevant to those cases.

It was clear that Serbia and Montenegro did not have the intention of

pursuing its claims by way of new applications. That State itself argued before the Court that it was not, and never had been, bound by Article IX of the Genocide Convention, even though that was the basis for jurisdiction which it had initially invoked (e.g., *Legality of Use of Force (Serbia and Montenegro v. Belgium), Preliminary Objections, Judgment, I.C.J. Reports 2004 (I)*, pp. 292-293, para. 29). It is true that the Applicant in those cases had let it be known that it did not intend to discontinue the proceedings pending before the Court; but, given the legal position it was asserting from that time on as to the Genocide Convention, it was out of the question that, in the event of judgments rejecting its applications owing to its lack of access to the Court at the date the proceedings had been instituted, it would rely on the status it would then undoubtedly possess of party to the Statute of the Court to submit fresh applications identical in substance to the first. On this basis, and in the particular circumstances of those cases, there would have been no justification for the Court to disregard the FRY's initial lack of capacity to seise the Court, on the ground that the defect had been cured in the course of the proceedings. As stated above (see paragraph 85), it is concern for judicial economy, an element of the requirements of the sound administration of justice, which justifies application of the jurisprudence deriving from the *Mavrommatis* Judgment in appropriate cases. The purpose of this jurisprudence is to prevent the needless proliferation of proceedings. No such consideration obtained in 2004 to justify the Court departing at that time from the principle holding that its jurisdiction must be established at the date of filing of the applications. Indeed, Serbia and Montenegro took care not to ask the Court to do so; while Croatia is asking the Court to apply the jurisprudence of the *Mavrommatis* case to the present case, no such request was made, or could logically have been made, by the Applicant in 2004.

90. Two additional considerations lend weight to the conclusion that there is reason, in the circumstances of the present case, to look beyond the legal situation prevailing at the date of the Application.

First, while, as noted above (see paragraph 80), a State filing an application with the Court should normally be expected to demonstrate sufficient care to avoid doing so prematurely, it cannot be said that the Applicant in the current proceedings has shown any careless approach in this regard. At the date the Application was filed, the Respondent considered that it had the capacity to participate in proceedings before the Court, and its position in that respect was a matter of public knowledge. In April 1999, the FRY had filed Applications instituting proceedings against ten Member States of the North Atlantic Treaty Organization invoking Article IX as a basis of jurisdiction. The Applicant could therefore feel entitled to seise the Court on what at first sight seemed to be an appropriate basis of jurisdiction. It is of course true that, as stated above (see paragraph 67), questions of access to the Court, unlike those of consent to its jurisdiction, are not matters of the will of the parties. However, Croatia's conduct does not reflect any circumstances that would warrant

a particularly strict application by the Court of the jurisprudence described above.

Secondly, it should be noted that, while Croatia's Application — a short text comprising some ten pages — was filed on 2 July 1999, that is prior to the admission of the FRY to the United Nations on 1 November 2000, its Memorial on the merits, a document of 414 pages, was submitted on 1 March 2001, after that date.

Although it is not possible to equate the filing of a memorial with that of an instrument instituting proceedings, since by definition a memorial concerns proceedings which are already under way, it should be noted that the Memorial is of considerable importance, not just because it expounds the Applicant's arguments, but also because it specifies the submissions. While this cannot be considered a decisive element, it cannot be entirely ignored: if Croatia had submitted the substance of its Memorial, on 1 March 2001, in the form of a new application, as it could have done, no question with respect to Article 35 of the Statute would have arisen.

91. The Court accordingly concludes that on 1 November 2000 the Court was open to the FRY. Therefore, should the Court find that Serbia was bound by Article IX of the Convention on 2 July 1999, the date on which proceedings in the present case were instituted, and remained bound by that Article until at least 1 November 2000, the Court would be in a position to uphold its jurisdiction.

This question will be examined in the next section.

92. In view of the above finding, the question whether the conditions laid down in Article 35, paragraph 2, have been fulfilled (see paragraph 71 above) has no pertinence in the present case.

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## (2) *Issues of jurisdiction ratione materiae*

93. The Court now turns to the question of its jurisdiction *ratione materiae*, which forms the second aspect of the first preliminary objection submitted by Serbia requesting the Court to declare that it lacks jurisdiction. According to Serbia, this aspect is an element of jurisdiction *ratione personae*.

94. The basis of jurisdiction asserted by Croatia is Article IX of the Genocide Convention, which provides as follows:

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

It is common ground between the Parties that Croatia is, and has been at

all relevant times, a party to the Genocide Convention, and has not made any reservation excluding the application of Article IX. Croatia deposited a notification of succession with the Secretary-General of the United Nations on 12 October 1992. It asserted that it had already been a party prior thereto as a successor State to the SFRY from the date it assumed responsibility for its international relations with respect to its territory, namely from 8 October 1991. Serbia's objection is to the effect that it was not itself a party to that Convention at the date of filing of the Application instituting proceedings (2 July 1999); it maintains that it only became a party by accession in June 2001. Furthermore the notification of accession by the FRY, dated 6 March 2001 and deposited on 12 March 2001, contained a reservation to the effect that the FRY "does not consider itself bound by Article IX of the Convention" (see the text in paragraph 116 below). When the Secretary-General, the depositary of the Convention, notified States parties of the FRY's notification of accession, objections were made by Croatia (as well as by Bosnia and Herzegovina, and by Sweden); the ground of Croatia's objection was that the FRY "is already bound by the Convention since its emergence as one of the five equal successor States" of the former SFRY. Croatia also objected to the reservation made by the FRY to the application of Article IX of the Convention, on the grounds that in the view of Croatia it was "incompatible with the object and purpose of the Convention".

95. If, as Croatia contends, Serbia was already a party to the Genocide Convention at the date when the present proceedings were instituted, any change in the situation which might have been effected by the 2001 purported accession by the FRY or by the reservation attached to it could not deprive the Court of the jurisdiction already existing under Article IX of the Convention. The Court recalls that according to its established jurisprudence, if a title of jurisdiction is shown to have existed at the date of the institution of proceedings, any subsequent lapse or withdrawal of the jurisdictional instrument is without effect on the jurisdiction of the Court. The principle was established in the *Nottebohm* case (*Liechtenstein v. Guatemala*) (*Preliminary Objection, Judgment, I.C.J. Reports 1953*, p. 122), which related to an acceptance of compulsory jurisdiction (under the optional clause of Article 36, paragraph 2, of the Statute) which expired on a date subsequent to the institution of proceedings citing that acceptance as the basis of jurisdiction. It has subsequently been consistently applied (e.g., where a bilateral treaty relied on as jurisdictional basis had been terminated by the time the Court came to give judgment on the merits of the case (*Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, *Merits, Judgment, I.C.J. Reports 1986*, p. 28, para. 36)).

96. If therefore the FRY was a party to the Genocide Convention, including its Article IX, on 2 July 1999, the date on which proceedings were instituted, and if it continued to be bound by Article IX of the Con-

vention until at least 1 November 2000, the date on which the FRY became a party to the Statute of the Court, then, the Court today continues to have jurisdiction.

It is thus not necessary for the Court to make a finding as to any legal effect of the notification of accession to the Convention by Serbia dated 6 March 2001.

97. The reasons why it is disputed between the Parties whether Serbia was a party to the Convention on the date on which these proceedings were instituted are bound up with the history of the relationship to the Convention of, first, the SFRY, and, subsequently, of the Respondent.

The SFRY signed the Genocide Convention on 11 December 1948, and deposited an instrument of ratification, without reservation, on 29 August 1950; it is common ground between the Parties that the SFRY was thus a party to the Convention at the time in the 1990s when it began to disintegrate into separate and independent States. The process of disintegration of the SFRY, the appearance of its former constituent Republics as separate States, and the efforts of the FRY to have its claim to continue the State, international legal and political personality of the SFRY internationally recognized, have been described in detail in paragraphs 43 to 51 above and in a number of previous decisions of the Court (most recently 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)*, Judgment, I.C.J. Reports 2007 (I), pp. 79-80, paras. 88-99). In the present case, Croatia asserts first that the FRY was a party by succession to the Genocide Convention from the beginning of its existence as a State, since succession, unlike other modes of becoming bound by a treaty, is retrospective to the commencement of the successor State; it also relies, in support of its arguments in favour of jurisdiction, on a formal declaration adopted on behalf of the FRY on 27 April 1992, and an official Note of the same date transmitted with that declaration to the Secretary-General of the United Nations.

98. The declaration of 27 April 1992 was made in the name of “the representatives of the people of the Republic of Serbia and the Republic of Montenegro” and according to Serbia it was adopted by “an *ad hoc* body consisting of members of the Assembly of the SFRY, the National Assembly of the Republic of Serbia and of the Assembly of the Republic of Montenegro”; see also Ann. 13 to POS, heading; and signature clause. In that declaration the representatives stated 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.

At the same time, it is ready to fully respect the rights and interests of the Yugoslav Republics which declared independence. The recognition of the newly-formed states will follow after all the outstanding questions negotiated on within the Conference on Yugoslavia have been settled . . .” (United Nations doc. A/46/915, Ann. II.)

99. Similarly, the Note of 27 April 1992 from the Permanent Mission of Yugoslavia to the Secretary-General of the United Nations contained the following:

“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.)

100. The FRY thus did not consider itself to be one of the successor States of the SFRY emerging from the dissolution of that State, but the sole continuing State, maintaining the personality of the former SFRY, with the implication that the other States formed from the former Yugoslavia were new States, though entitled to assert the rights of successor States. This policy of the FRY was maintained until a change of Government in 2000, and a subsequent application to the United Nations for admission as a new Member (see paragraphs 50-51 above and 116 below).

The 1992 declaration and Note should not of course be viewed in isolation; their effect must be assessed in the light of, in particular, the conduct of the FRY at the time of making of the declaration and subsequently, and that aspect will be examined below (paragraphs 114-117).

101. On the basis of the historical record, and of the declaration and Note of 27 April 1992, Croatia maintains that Serbia was a party to the Genocide Convention on 2 July 1999 on the same terms as the SFRY had been, namely without reservation, and that accordingly Article IX confers jurisdiction on the Court in the present case. In its Application,

Croatia based its arguments in this respect on the rules of international law concerning succession of States. In its Written Statement on the Preliminary Objections of Serbia, it invoked primarily the decision of the Court 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*), in which the status of the FRY vis-à-vis the United Nations has been in issue. In the course of the oral proceedings, it indicated that it was also relying in the alternative on the declaration and Note of 27 April 1992. It will be convenient to examine first this alternative argument based on the events of 1992, before proceeding, if necessary, to the wider question of the application in this case of the general law relating to succession of States, since if Croatia's contentions as to the effect of the declaration and Note are accepted, the need does not arise for the Court further to address the arguments put to it by the Parties concerning the rules of international law governing State succession to treaties including the question of *ipso jure* succession to some multilateral treaties.

102. Croatia submitted not only that Serbia was bound by the Genocide Convention from the beginning of the conflict between Bosnia and Herzegovina and the FRY, that is to say from a date prior to the 1992 declaration, but that the Court has confirmed that this was so on six occasions in the course of that period, namely in 1993 (twice), 1996, 1999, 2003 and 2007, i.e., in the Orders and Judgments 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)* on the requests for the indication of provisional measures (1993), on preliminary objections (1996) and on the merits (2007), in the Judgment on the *Application for Revision of the Judgment of 11 July 1996* in that case (2003), and in the Orders on the requests for the indication of provisional measures in the *Legality of Use of Force* cases (1999). Croatia submitted that to hold that the FRY was not bound by the Genocide Convention on 2 July 1999 "would reverse 15 years of jurisprudence and call into question the basis for the Court's decisions" in the case concerning *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* brought by Bosnia and Herzegovina.

103. Croatia argues that these decisions are relevant because the "solemn commitment" given by the FRY in the 1992 declaration has been relied on by the FRY itself in proceedings before this Court, and has been relied on by the Court, so that Croatia also was entitled to rely on it, and has done so. The significance of the attitude adopted by the FRY in previous proceedings will be examined below (see paragraph 114).

104. As for the Court itself, it was observed in paragraphs 52 to 56 above, these decisions do not have the status of *res judicata* in the present

proceedings. In general the Court does not choose to depart from previous findings, particularly when similar issues were dealt with in the earlier decisions, as in the current case, unless it finds very particular reasons to do so. It is on that basis therefore that the Court will consider the arguments of the Parties on the matters which, it is argued, were covered by those previous decisions.

105. The question what effects might, in law, result from the fact that Croatia might have thought it possible, in good faith, to rely on the commitment given in those documents, can be reserved for the present. The Court will first examine what was the nature and effect of the 1992 declaration and Note on the position of the FRY in relation to the Genocide Convention.

106. Serbia argues that the declaration of 27 April 1992 described in paragraph 98 above was not capable of constituting a notification of succession to the Genocide Convention, for three reasons. First, any notification of succession just like any other relevant treaty action must emanate, in order to be valid, from a person being able to represent the State concerned (cf. Article 7 of the Vienna Convention on the Law of Treaties). The 1992 declaration was however, Serbia contends, adopted by an *ad hoc* body consisting of members of the Assembly of the SFRY, the National Assembly of the Republic of Serbia, and of the Assembly of the Republic of Montenegro. Secondly, as confirmed by uniform depositary practice, specific notifications are necessary in order to bring about succession, in other words a notification of succession must specify precisely which treaty it is directed to; and the 1992 declaration was entirely general in its terms (“all the commitments that the SFR of Yugoslavia assumed internationally”). Thirdly, any notification of succession, in order to be an effective one, must be transmitted to the depositary; the 1992 declaration and Note were however transmitted to the Secretary-General of the United Nations (the depositary of the Genocide Convention) to be circulated as an official document of the General Assembly, and were thus clearly not addressed to him in his function as depositary.

107. In relation to the first point, the Court notes that the assembly that adopted the 1992 declaration was the same that “promulgated the Constitution of the Federal Republic of Yugoslavia”, as indicated in the Note of 27 April 1992 (see paragraph 99 above). In any event the Note transmitting the declaration to the Secretary-General of the United Nations, was formally communicated by the Chargé d’affaires a.i. of the Permanent Mission of Yugoslavia to the United Nations, and was accepted by the Secretary-General, and circulated as such as an official document of the General Assembly. While at the time objection was taken to the claim of the FRY to be the continuator of the SFRY, it was

not then suggested that that claim was not advanced by the appropriate representative body of the FRY, or conveyed to the Secretary-General by an unauthorized representative. Furthermore, as the Court will elaborate more fully below (see paragraphs 114-115), there can be no doubt, from the subsequent conduct of those charged with the affairs of the FRY, that the declaration was regarded by the State as made on its behalf, and the commitments contained in it were endorsed and accepted by the FRY.

108. In respect of the second argument, the Court must first consider whether the 1992 declaration and Note were “made in sufficiently specific terms in relation to the particular question” of acceptance to be bound by international treaty obligations (cf. *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda)*, *Jurisdiction and Admissibility, Judgment, I.C.J. Reports 2006*, pp. 28-29, para. 52). The Court notes that the 1992 declaration and Note did not merely state that the FRY would abide by certain commitments: it specified that these were the commitments “that the SFR of Yugoslavia assumed internationally” or “in international relations”. While the treaties contemplated were not specified by name, the declaration referred to a class of instruments which was perfectly ascertainable at the moment of making of the declaration: the treaty “commitments” binding on the SFRY at the moment of its dissolution. There is no doubt that the Genocide Convention was one of these “commitments”. While the practice of making declarations of succession to a treaty or treaties with an indication of the treaty or treaties to which they are intended to relate is of undoubted practical usefulness, the Court is unable to hold that international law regards as wholly ineffective an instrument that identifies by general reference the treaty to which it is addressed, rather than by designating it by its particular name.

109. In the view of the Court, there is a distinction between the legal nature of ratification of, or accession to a treaty, on the one hand, and on the other, the process by which a State becomes bound by a treaty as a successor State or remains bound as a continuing State. Accession or ratification is a simple act of will on the part of the State manifesting an intention to undertake new obligations and to acquire new rights in terms of the treaty, effected in writing in the formal manner set out in the Treaty (cf. Articles 15 and 16 of the Vienna Convention on the Law of Treaties). In the case of succession or continuation on the other hand, the act of will of the State relates to an already existing set of circumstances, and amounts to a recognition by that State of certain legal consequences flowing from those circumstances, so that any document issued by the State concerned, being essentially confirmatory, may be subject to less rigid requirements of form. Article 2 (g) of the 1978 Vienna Convention on Succession of States in respect of Treaties reflects this idea, defining a

“notification of succession” as meaning “in relation to a multilateral treaty, *any notification, however framed or named*, made by a successor State expressing its consent to be considered as bound by the treaty”. Nor does international law prescribe any specific form for a State to express a claim of continuity.

110. In respect of both the second and the third arguments advanced by Serbia, the Court notes that the 1992 declaration was not expressed in the terms of one of the recognized legal acts by which a State may become a party to a multilateral convention. It observes, however, that in order to constitute a valid and effective means by which the declaring State could assume obligations under the Convention, the declaration need not strictly comply with all formal requirements. For example, in the *North Sea Continental Shelf (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands)* cases, the Court recognized the possibility that a State that had not carried out the usual formalities (ratification, accession) to become bound by the régime of an international convention might nevertheless “somehow become bound in another way”, even though such a process was “not lightly to be presumed” to have occurred. This did not in the event prove to have happened in those cases (*Judgment, I.C.J. Reports 1969*, p. 25, paras. 27 and 28). In the present case, the Court has to consider whether the 1992 declaration and Note, coupled with other consistent conduct of Serbia, indicate such a unilateral acceptance of the obligations of the Genocide Convention, by a process equivalent, in the special circumstances of this case, to a succession to the SFRY as regards to the Convention.

111. For the purposes of the present case, the Court points out first and foremost that the FRY in 1992 clearly expressed an intention to be bound — or, consistently with the view of the legal situation it then held, to continue to be bound — by the obligations of the Genocide Convention. The FRY was then claiming to be the continuator State of the SFRY, but it did not repudiate its status as a party to the Convention even when it became apparent that that claim would not prevail, and that the FRY was regarded by other States, particularly by those that had emerged from the dissolution of the former Yugoslavia, as simply one of the successor States of the SFRY. In the particular context of the case, the Court is of the view that the 1992 declaration must be considered as having had the effects of a notification of succession to treaties, notwithstanding that its political premise was different. It is clear that the operative part of the 1992 declaration, the acceptance of “all the commitments that the Socialist Federal Republic of Yugoslavia assumed internationally”, had been drawn up in the light of its assertion, made in the declaration and in the Note of the Permanent Mission, of “the continuity of the international personality of Yugoslavia”, and this was linked with the claim of the FRY to continue the membership of the SFRY in the United

Nations. There was however no indication that the commitment undertaken would be conditional on acceptance of the claim of continuity. That claim did not in fact prevail. Nonetheless, the conduct of Serbia after the transmission of the declaration made it clear that it regarded itself bound by the Genocide Convention.

112. Serbia has however drawn the attention of the Court to Article XI of the Genocide Convention, which provides that:

“The present Convention shall be open until 31 December 1949 for signature on behalf of any Member of the United Nations and of any non-member State to which an invitation to sign has been addressed by the General Assembly.

The present Convention shall be ratified, and the instruments of ratification shall be deposited with the Secretary-General of the United Nations.

After 1 January 1950, the present Convention may be acceded to on behalf of any Member of the United Nations and of any non-member State which has received an invitation as aforesaid.

Instruments of accession shall be deposited with the Secretary-General of the United Nations.”

Serbia contends the following:

“Before it became a Member of the United Nations on 1 November 2000 as a new State, the Respondent was not even qualified to be a party to the Genocide Convention. Since it was not [prior to that date] a Member of the United Nations, it could only have become a party upon an invitation extended under Article XI. It is an undisputed fact that the FRY never received such an invitation.”

113. The Court observes that Article XI, according to its terms, does not exclude States not Members of the United Nations from being *parties* to the Genocide Convention, as Serbia suggests; it provides simply that non-signatory States may only *accede* to the Convention if they are United Nations Member States or States who have received an invitation from the General Assembly. The text does not make any reference to continuation of, or succession to, the treaty rights and obligations of a predecessor State, in the manner and on the conditions recognized in international law. In the case concerning the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, the question was raised whether a “Notice of Succession” to the Convention transmitted by Bosnia and Herzegovina was not to be treated as an accession, to which Articles XI and XIII of the Convention would apply. The Court held that Bosnia and Herzegovina had become a party to the Convention by way of succession, and concluded from this that “the question of the applica-

tion of Articles XI and XIII of the Convention does not arise” (*Preliminary Objections, Judgment, I.C.J. Reports 1996 (II)*), p. 612, para. 24).

114. The position adopted by the FRY itself in relation to the Convention has already been referred to, and is clearly conduct that must be taken into account by the Court. As early as 1993, in the context of the first request for the indication of provisional measures in the proceedings brought against it by Bosnia and Herzegovina, the FRY, while questioning whether the applicant State was a party to the Genocide Convention at the relevant dates, did not challenge the claim that it was itself a party, and itself presented a request for the indication of provisional measures, referring to Article IX of the Convention. On this basis, the Court in its Order found that “both Bosnia-Herzegovina and Yugoslavia are parties” to the Convention (*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. 16, para. 26), and cited the 1992 declaration and Note (*ibid.*, p. 15, paras. 22-23). Moreover, in the same case, at the preliminary objections stage, the FRY argued that the Genocide Convention had begun to apply to relations between the two Parties on 14 December 1995, as recalled above (see paragraph 82), having itself continued the rights and duties, under (*inter alia*) that Convention, established by the SFRY. Furthermore, on 29 April 1999 the FRY filed in the Registry of the Court Applications instituting proceedings against ten States Members of NATO, citing (*inter alia*) the Genocide Convention as title of jurisdiction (see, for example, *Legality of Use of Force (Serbia and Montenegro v. Belgium), Preliminary Objections, Judgment, I.C.J. Reports 2004 (I)*, pp. 283-284, para. 1).

115. This was still the situation when on 2 July 1999 Croatia filed the Application instituting the present proceedings. During the period between the making of the 1992 declaration and that date, neither the FRY nor any other State for which the issue might have had significance questioned that the FRY was a party to the Genocide Convention, without reservations; and no other event occurring during that period had any impact on the legal situation arising from the 1992 declaration. On 1 November 2000, the FRY was admitted as a new Member of the United Nations, as it had requested by a letter addressed to the Secretary-General by the President of the FRY dated 27 October 2000, “in light of the implementation of Security Council resolution 777 (1992)” (United Nations doc. A/55/528-S/2000/1043). As the Court observed in its Judgments in the cases concerning the *Legality of Use of Force*, “[t]his new development effectively put an end to the *sui generis* position of the Federal Republic of Yugoslavia within the United Nations . . .” (*Legality of Use of Force (Serbia and Montenegro v. Belgium), Preliminary Objections, Judgment, I.C.J. Reports 2004 (I)*, p. 310, para. 78). Nevertheless, the FRY did not at that time withdraw, or purport to withdraw, the dec-

laration and Note of 1992, which had been drawn up in the light of the contention that the FRY was continuing the legal personality of the SFRY. It did not, for example, suggest that the failure of that contention to gain acceptance had entailed the nullity of the declaration, or cessation of the commitment to the international obligations contemplated by it.

116. It was not until March 2001 that the FRY took any further step inconsistent with the status which it had since 1992 been claiming to possess, namely that of a State party to the Genocide Convention. On 12 March 2001 it deposited with the Secretary-General a notification of accession to the Genocide Convention, which, after referring to the 1992 declaration and to the subsequent admission of the FRY to the United Nations as a new Member, contained the following:

“Now it has been established that the Federal Republic of Yugoslavia has not succeeded on April 27, 1992, or on any later date, to treaty membership, rights and obligations of the Socialist Federal Republic of Yugoslavia in the Convention on the Prevention and Punishment of the Crime of Genocide on the assumption of continued membership in the United Nations and continued state, international legal and political personality of the Socialist Federal Republic of Yugoslavia . . .”

The notification of accession contained the following reservation:

“The Federal Republic of Yugoslavia does not consider itself bound by Article IX of the Convention . . . and, therefore, before any dispute to which the Federal Republic of Yugoslavia is a party may be validly submitted to the jurisdiction of the International Court of Justice under this Article, the specific and explicit consent of the FRY is required in each case.”

However, the Court notes also that on that same date, the FRY deposited with the Secretary-General of the United Nations declarations of succession to a large number of other multilateral conventions of which the Secretary-General is depositary. This practice of the FRY was fully consistent with that of the other former States emerging from the dissolution of the SFRY, which also saw themselves as successors to that State, and thus had, during the period from 1991 on, notified their succession to those conventions. There was indeed (other than the accession of the FRY to the Genocide Convention) only one exception to that very extensive and consistent body of practice.

117. In sum, in the present case the Court, taking into account both the text of the declaration and Note of 27 April 1992, and the consistent conduct of the FRY at the time of its making and throughout the years 1992-2001, considers that it should attribute to those documents precisely the effect that they were, in the view of the Court, intended to have on the face of their terms: namely, that from that date onwards the FRY

would be bound by the obligations of a party in respect of all the multi-lateral conventions to which the SFRY had been a party at the time of its dissolution, subject of course to any reservations lawfully made by the SFRY limiting its obligations. It is common ground that the Genocide Convention was one of these conventions, and that the SFRY had made no reservation to it; thus the FRY in 1992 accepted the obligations of that Convention, including Article IX providing for the jurisdiction of the Court and that jurisdictional commitment was binding on the Respondent at the date the present proceedings were instituted. In the events that have occurred, this signifies that the 1992 declaration and Note had the effect of a notification of succession by the FRY to the SFRY in relation to the Genocide Convention. The Court concludes that, subject to the more specific objections of Serbia to be examined below, it had, on the date on which the present proceedings were instituted, jurisdiction to entertain the case on the basis of Article IX of the Genocide Convention. That situation continued at least until 1 November 2000, the date on which Serbia and Montenegro became a Member of the United Nations and thus a party to the Statute of the Court.

Accordingly, there is no need to consider the contentions of Croatia based on more general issues relating to the rules of international law concerning succession of States to treaties, referred to in paragraph 101 above.

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### *(3) Conclusions*

118. The Court recalls that it held earlier in this Judgment (see paragraph 91) that the Respondent acquired the status of party to the Statute of the Court on 1 November 2000. The Court further held that if it could be established that the Respondent was also a party to the Genocide Convention, including Article IX, on the date of the institution of the proceedings and until at least 1 November 2000, and if consequently the Applicant would have been at liberty, had it so desired, to submit a fresh application identical in substance to the present Application, the conditions for the jurisdiction of the Court would be satisfied.

The Court has now found that the Respondent was bound by the Genocide Convention, including Article IX thereof, at the date of the institution of the proceedings and remained so bound at least until 1 November 2000.

119. Having established that the conditions for the Court's jurisdiction are met and without prejudice to its findings on the other preliminary objections submitted by Serbia, the Court concludes that the first preliminary objection, "that the Court lacks jurisdiction", must be rejected.

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VI. PRELIMINARY OBJECTION TO THE JURISDICTION OF THE COURT  
AND TO ADMISSIBILITY, *RATIONE TEMPORIS*

120. The Court therefore now turns to the second preliminary objection as stated in Serbia's final submission 2 (*a*), namely the objection that "claims based on acts and omissions which took place prior to 27 April 1992", that is to say prior to the formal establishment of the "Federal Republic of Yugoslavia (Serbia and Montenegro)", the name by which the present Serbia was formerly known, "are beyond the jurisdiction of this Court and inadmissible". The preliminary objection is thus presented as, at one and the same time, an objection to jurisdiction and one going to the admissibility of the claims. A distinction between these two kinds of objections is well recognized in the practice of the Court. In either case, the effect of a preliminary objection to a particular claim is that, if upheld, it brings the proceedings in respect of that claim to an end; so that the Court will not go on to consider the merits of the claim. If the objection is a jurisdictional objection, then since the jurisdiction of the Court derives from the consent of the parties, this will most usually be because it has been shown that no such consent has been given by the objecting State to the settlement by the Court of the particular dispute. A preliminary objection to admissibility covers a more disparate range of possibilities. In the case concerning *Oil Platforms (Islamic Republic of Iran v. United States of America)* the Court noted that:

"Objections to admissibility normally take the form of an assertion that, even if the Court has jurisdiction and the facts stated by the applicant State are assumed to be correct, nonetheless there are reasons why the Court should not proceed to an examination of the merits." (*Judgment, I.C.J. Reports 2003*, p. 177, para. 29.)

Essentially such an objection consists in the contention that there exists a legal reason, even when there is jurisdiction, why the Court should decline to hear the case, or more usually, a specific claim therein. Such a reason is often of such a nature that the matter should be resolved *in limine litis*, for example where without examination of the merits it may be seen that there has been a failure to comply with the rules as to nationality of claims; failure to exhaust local remedies; the agreement of the parties to use another method of pacific settlement; or mootness of the claim. If the Court finds that an objection "does not possess, in the circumstances of the case, an exclusively preliminary character" (Article 79, paragraph 7, of the Rules of Court as adopted on 14 April 1978), it will be dealt with at the merits stage. Challenges either to jurisdiction or to admissibility are sometimes in fact presented along with arguments on the merits, and argued and determined at that stage (cf. *East Timor (Portugal v. Australia)*, *Judgment, I.C.J. Reports 1995*, p. 92, para. 4; *Avena and Other Mexican*

*Nationals (Mexico v. United States of America)*, Judgment, *I.C.J. Reports 2004 (I)*, pp. 28-29, para. 24).

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

122. In that respect, Croatia has drawn the attention of the Court to the fact that a similar question of jurisdiction *ratione temporis* under the Genocide Convention in respect of the events in the former Yugoslavia was dealt with by the Court in the case concerning the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia)*, in response to two of the preliminary objections of the FRY. In that Judgment the Court found that

"Yugoslavia, basing its contention on the principle of the non-retroactivity of legal acts, has . . . asserted . . . that, even though the Court might have jurisdiction on the basis of the [Genocide] Convention, it could only deal with events subsequent to the different dates on which the Convention might have become applicable as between the Parties. In this regard, the Court will confine itself to the observation that the Genocide Convention — and in particular Article IX — does not contain any clause the object or effect of which is to limit in such manner the scope of its jurisdiction *ratione temporis*, and nor did the Parties themselves make any reservation to that end, either to the Convention or on [a later possible opportunity]. The Court thus finds that it has jurisdiction in this case to give effect to the Genocide Convention with regard to the relevant facts which have occurred *since the beginning of the conflict which took place in Bosnia and Herzegovina*." (*I.C.J. Report 1996 (II)*, p. 617, para. 34; emphasis added.)

Croatia argues that the same reasoning should also be applicable in the present case, and therefore invites the Court to dismiss the Serbian objection.

123. The Court observes however that the temporal questions to be resolved in the present case are not the same as those dealt with by the Court in 1996. At that time, the Court had merely to determine, first whether, at the date that the proceedings in the case were instituted, the Genocide Convention had become applicable between the FRY and Bosnia and Herzegovina, and secondly whether in the exercise of its jurisdiction it was limited to dealing only with events subsequent to the date or dates on which the Convention might thus have become applicable. That date was, or those dates were, in any event subsequent to the moment at which the FRY had come into existence and had thus become capable of being itself a party to the Convention. Therefore the finding of the Court that it had jurisdiction “with regard to the relevant facts which have occurred since the beginning of the conflict” (that is to say not merely facts subsequent to the date when the Convention became applicable between the parties) was not addressed to the question whether these included facts occurring prior to the coming into existence of the FRY. In the present case, the Court therefore cannot draw from that judgment (which, as already noted, does not have the authority of *res judicata* in the present proceedings) any definitive conclusion as to the temporal scope of the jurisdiction it has under the Convention. At the same time, the Court notes, as it did in 1996, that there is no express provision in the Genocide Convention limiting its jurisdiction *ratione temporis*.

124. Another circumstance distinguishing the present case from the case between Bosnia and Herzegovina and the FRY is that in the present case Serbia’s objection is presented as relating both to the Court’s jurisdiction and to matters of admissibility of the claims of Croatia. In particular, the Court notes that, in the present case, the Parties advanced arguments relating to the consequences to be drawn from the fact that the FRY only became a State and a party to the Genocide Convention on 27 April 1992, not only with regard to its jurisdiction but also with regard to the attribution to Serbia of acts that occurred before that date. Serbia contended that, not having been a State before 27 April 1992, acts that occurred before that date cannot be attributed to it and that, not having been a party to the Convention, it could not have breached any obligation under it. In the Court’s view the question of the temporal scope of its jurisdiction is closely bound up with these questions of attribution, presented by Serbia as a matter of admissibility rather than of jurisdiction, and thus has to be examined in the light of these issues. The Court therefore now turns to the aspect of the objection related to issues of attribution of acts that occurred prior to 27 April 1992.

125. In its Memorial, Croatia referred to the temporal element and contended that “the fact that the FRY only formally proclaimed itself on 27 April 1992 does not mean that acts occurring prior to that date cannot

be attributed to it". It invoked what it referred to as a well-established principle that "a state *in statu nascendi* is responsible for conduct carried out by its officials and organs or otherwise under its direction and control". Croatia indicated that it relies on the rule stated in Article 10, paragraph 2, of the International Law Commission's Articles on the State Responsibility (Annex to General Assembly resolution 56/83, 12 December 2001, hereinafter referred to as "the ILC Articles on State Responsibility"), that "the conduct of a movement insurrectional or other which succeeds in establishing a new State shall be considered an act of the new State under international law".

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

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

128. The provision introduced into the Rules of Court in 1972, and constituting Article 79, paragraph 7, of the Rules adopted on 14 April 1978, was drafted, as the Court indicated in the case concerning *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, to make it clear that when preliminary objections are exclusively preliminary, they have to be decided upon immediately, "but if they are not, especially when the character of the objections is not exclusively preliminary because they contain both preliminary aspects and other aspects relating to the merits, they will have to be dealt with at the stage of the merits" (*Merits, Judgment, I.C.J. Reports 1986*, p. 31, para. 41; see also *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, I.C.J. Reports 1998, pp. 27-29.)*

129. In the view of the Court, the questions of jurisdiction and admissibility raised by Serbia's preliminary objection *ratione temporis* constitute two inseparable issues in the present case. The first issue is that of the Court's jurisdiction to determine whether breaches of the Genocide Convention were committed in the light of the facts that occurred prior to the date on which the FRY came into existence as a separate State, capable of being a party in its own right to the Convention; this may be regarded as a question of the applicability of the obligations under the Genocide Convention to the FRY before 27 April 1992. The second issue, that of admissibility of the claim in relation to those facts, and involving questions of attribution, concerns the consequences to be drawn with regard to the responsibility of the FRY for those same facts under the general rules of State responsibility. In order to be in a position to make any findings on each of these issues, the Court will need to have more elements before it.

130. In view of the above, the Court concludes that Serbia's preliminary objection *ratione temporis* does not possess, in the circumstances of the case, an exclusively preliminary character.

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#### VII. PRELIMINARY OBJECTION CONCERNING THE SUBMISSION OF CERTAIN PERSONS TO TRIAL; THE PROVISION OF INFORMATION ON MISSING CROATIAN CITIZENS; AND THE RETURN OF CULTURAL PROPERTY

131. Serbia's preliminary objection as stated in its final submission 2 (*b*), (hereinafter referred to as the "third objection") is that

"claims referring to submission to trial of certain persons within the jurisdiction of Serbia, providing information regarding the whereabouts of missing Croatian citizens and return of cultural property are beyond the jurisdiction of this Court and inadmissible".

In the objection as filed on 11 September 2002, it had been asserted that some of the Applicant's specific submissions are per se inadmissible and moot. Serbia has identified the claims in question as those made as submissions 2 (*a*), 2 (*b*) and 2 (*c*) advanced in the Memorial of Croatia. Despite this overall classification of the objection as being both to the jurisdiction of the Court and to the admissibility of certain claims, it appears that not all the contentions of Serbia in this respect are related to both aspects of the objection.

132. The Court notes that Croatia has asked the Court simply to reject

the third objection, though in relation to one matter it suggests that the point should be examined at the merits stage (see paragraphs 138 and 142 below). The Court recalls that it is required by Article 79, paragraph 7, of the 1978 Rules of Court either to “uphold the objection, reject it, or declare that the objection does not possess, in the circumstances of the case, an exclusively preliminary character”; and that this last course may be indicated, *inter alia*, when an objection contains “both preliminary aspects and other aspects relating to the merits” (*Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, *Merits, Judgment, I.C.J. Reports 1986*, p. 31, para. 41).

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(i) *Submission of persons to trial*

133. Submission 2 (a) in the Croatian Memorial requests the Court to find that Serbia is under an obligation:

“to take immediate and effective steps to submit to trial before the appropriate judicial authority, those citizens or other persons within its jurisdiction who are suspected on probable grounds of having committed acts of genocide as referred to in paragraph (1) (a), or any of the other acts referred to in paragraph (1) (b) [of the Submissions of Croatia], in particular Slobodan Milošević, the former President of the Federal Republic of Yugoslavia, and to ensure that those persons, if convicted, are duly punished for their crimes”.

Croatia’s claim is based on Articles I and VI of the Genocide Convention. By Article I, the Contracting Parties “undertake to prevent and punish” genocide; and Article VI provides that

“Persons charged with genocide or any of the other acts enumerated in article III shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction.”

Croatia thus contends that “the failure of the FRY . . . to submit all relevant persons for trial by a competent tribunal gives rise to its international responsibility”.

134. As regards the factual basis of this claim, the Court notes that Croatia has adjusted its submissions to take account of the fact that former President Slobodan Milošević had, since the presentation of the Memorial, been transferred to the International Criminal Tribunal for the former Yugoslavia (ICTY), and has since died. Furthermore, Croatia

accepts that this submission is now moot in respect of a number of other persons whom Serbia has transferred to the ICTY, but insists that there continues to be a dispute between Croatia and Serbia with respect to persons who have not been submitted to trial either in Croatia or before the ICTY in respect of acts or omissions which are the subject of these proceedings. As regards the ICTY, Serbia maintains, as a first basis of its objection, that as a matter of fact there is only one person still at large who has been accused by the ICTY of crimes allegedly committed in Croatia, and these accusations relate not to genocide but to war crimes and crimes against humanity. Croatia observes that a number of persons have been charged with genocide by the Croatian authorities, and that a number of perpetrators so charged are out of reach of the Croatian authorities, “presumably in Serbia”.

135. The second and third bases of Serbia’s objection to Croatian submission 2 (a) are as follows. Serbia observes that Croatia is asserting that Serbia is under an obligation under the Genocide Convention to punish its nationals for alleged acts of genocide committed in Croatia, that is to say outside Serbia’s own territory; it draws attention however to the finding made by the Court in 2007 (since the proceedings were instituted in this case) in its Judgment 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)*, that the Convention “only obliges the Contracting Parties to institute and exercise territorial criminal jurisdiction” (*I.C.J. Reports 2007 (I)*, pp. 226-227, para. 442). Serbia then objects further that Croatia is apparently claiming that Serbia has violated the Genocide Convention by failing in a duty to hand over persons who have allegedly committed acts of genocide, not to the ICTY, but to Croatia itself; and it argues that no such obligation is to be found in the Convention; in this respect, it again cites the Judgment 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)* (*ibid.*, p. 227, para. 443).

136. In the view of the Court, these issues are clearly matters of interpretation or application of the Genocide Convention, the role conferred on the Court by Article IX, and thus, contrary to the contention of Serbia in its objection, within the jurisdiction of the Court (cf. *Avena and Other Mexican Nationals (Mexico v. United States of America)*, *Judgment, I.C.J. Reports 2004 (I)*, pp. 31-32, para. 30).

The Court understands the first basis of Serbia’s submission to be essentially a matter of admissibility: it amounts to an assertion that, on the facts of the case as they now stand, the claim is moot, in the sense that Croatia has not shown that there are at the present time any persons charged with genocide, either by the ICTY or by the courts of Croatia, who are on the territory or within the control of Serbia. Whether that is correct will be a matter for the Court to determine when it examines the claims of Croatia on the merits. The

Court therefore rejects the objection and sees no remaining issue of admissibility.

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*(ii) Provision of information on missing Croatian citizens*

137. By submission 2 (*b*) advanced by Croatia, which is challenged by Serbia by its third preliminary objection, the Applicant asks the Court to find that Serbia is under an obligation

“to provide forthwith to the Applicant all information within its possession or control as to the whereabouts of Croatian citizens who are missing as a result of the genocidal acts for which [Serbia] is responsible, and generally to co-operate with the authorities of the Republic of Croatia to jointly ascertain the whereabouts of the said missing persons or their remains”.

Serbia has asserted in support of its objection to this submission that the relevant acts committed in Croatia do not amount to genocide, so that the obligations under the Genocide Convention do not apply. It has also drawn attention to co-operation between the two States concerning the location and identification of missing persons, both direct and in the context of the work of the International Commission for Missing Persons, and to the existence of bilateral treaty-instruments concluded by the two States imposing obligations to exchange data about missing persons. Croatia contends that these agreements do not preclude the exercise of the Court’s jurisdiction under Article IX of the Genocide Convention, and are in practice ineffective.

138. It does not appear that this submission of Croatia is regarded by Serbia as “beyond the jurisdiction of this Court” (see paragraph 131 above); it has been presented rather as a matter of mootness of the claim, a question of admissibility. It is not disputed that the Genocide Convention does not specifically prescribe a duty to provide information of the kind referred to, but Croatia has contended that its submission “falls squarely within [the terms of] the Genocide Convention”, and presented the matter in terms of an appropriate remedy for a continuing breach of the Convention by Serbia.

139. However, the question what remedies might appropriately be ordered by the Court in the exercise of its jurisdiction under Article IX of the Convention is one which is necessarily dependent upon the findings that the Court may in due course make of breaches of the Convention by the Respondent. As a matter which is essentially one of the merits, and one dependent upon the principal question of responsibility raised by the claim, this is not a matter that may be the proper subject of a preliminary objection. This conclusion is reinforced by the consideration that, in this

particular case, in order to decide whether an order in the terms of Croatian submission 2 (b) would be an appropriate remedy, the Court would have to enquire into disputed matters of fact. This it would have to do in order to establish whether or not, and in what circumstances, the co-operation as to the provision of information between the two States mentioned by Serbia has taken place, and whether this remedy might be held as resulting from the establishment of responsibility for breaches of the Convention. These issues are for the merits, and the Court concludes that the preliminary objection submitted by Serbia, so far as it relates to Croatian submission 2 (b), must be rejected.

\* \*

(iii) *Return of cultural property*

140. By submission 2 (c) advanced by Croatia, which is also challenged by Serbia by its third preliminary objection, the Applicant asks the Court to find that Serbia is under an obligation “forthwith to return to the Applicant any items of cultural property within its jurisdiction or control which were seized in the course of the genocidal acts for which it is responsible”. Serbia has argued that in this respect no dispute exists between the Parties, “even more so since cultural property has to a large extent already been returned to Croatia by Serbia”, so that the claim has become “moot and thus inadmissible”. It is less clear whether Serbia also disputes the jurisdiction of the Court to entertain that claim: it does argue that the acts complained of “must constitute acts of genocide in order for the Court to be able to exercise jurisdiction under Article IX of the Convention”, but not that the Court would have no jurisdiction to consider whether those acts do or do not constitute breaches of the Convention.

141. As already noted above, since proceedings were instituted in this case, the Court has given judgment 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)* (*I.C.J. Reports 2007 (I)*, p. 43); and Serbia has relied on that decision also in the context of the issue now under examination. In that case the Court found that there had been a “deliberate destruction of the historical, cultural and religious heritage of the . . . group [protected by the Convention]” (*ibid.*, p. 185, para. 344). However, the Court found that “[a]lthough such destruction may be highly significant inasmuch as it is directed to the elimination of all traces of the cultural or religious presence of a group, and contrary to other legal norms, it does not fall within the categories of acts of genocide set out in Article II of the Convention” (*ibid.*). As has already been indicated (see paragraphs 52-56 above), this decision does not have the force of *res judicata* in the present proceedings, but the

Court sees no reason to depart from its earlier finding on the general question of interpretation of the Convention in this respect. The Court will have to decide how these findings of law are to be applied, and what may be their effect in the present case.

142. Croatia however indicates that it perceives the alleged deliberate destruction and looting of cultural property in this case as part of a broader plan or pattern of activities aimed at the extinction of an ethnic group, and therefore within the purview of the Genocide Convention, and that accordingly an order for return of property taken in such circumstances is not *a priori* inadmissible; it suggests that whether or not such an order would be an appropriate remedy in this case is a matter to be determined at the merits stage.

143. However, as the Court has noted above, the question what remedies might appropriately be ordered by the Court is one which is necessarily dependent upon the findings that the Court may in due course make of breaches of the Genocide Convention by the Respondent; it is not a matter that may be the proper subject of a preliminary objection. As in the case of submission 2 (*b*), this conclusion is reinforced by the consideration that in order to decide whether an order in the terms of Croatian submission 2 (*c*) would be an appropriate remedy, the Court would have to enquire into disputed matters of fact, to establish whether or not a breach of an obligation deriving from the Genocide Convention had been established, and if so in what respects. The Court concludes that the preliminary objection submitted by Serbia so far as it relates to Croatian submission 2 (*c*) must be rejected.

\* \*

(iv) *Conclusion*

144. Serbia's third preliminary objection, as stated in its final submission 2 (*b*), addressed to Croatia's submissions 2 (*a*), 2 (*b*) and 2 (*c*), must therefore be rejected in its entirety.

\* \* \*

145. Having established its jurisdiction, the Court will consider the preliminary objection that it has found to be not of an exclusively preliminary character when it reaches the merits of the case. In accordance with Article 79, paragraph 7, of the Rules of Court as adopted on 14 April 1978, time-limits for the further proceedings will be fixed subsequently by the Court.

\* \* \*

## VIII. OPERATIVE CLAUSE

146. For these reasons,

THE COURT,

(1) By ten votes to seven,

*Rejects* the first preliminary objection submitted by the Republic of Serbia in so far as it relates to its capacity to participate in the proceedings instituted by the Application of the Republic of Croatia;

IN FAVOUR: *President Higgins; Vice-President Al-Khasawneh; Judges Buerenthal, Simma, Tomka, Abraham, Keith, Sepúlveda-Amor, Bennouna; Judge ad hoc Vukas;*

AGAINST: *Judges Ranjeva, Shi, Koroma, Parra-Aranguren, Owada, Skotnikov; Judge ad hoc Kreća;*

(2) By twelve votes to five,

*Rejects* the first preliminary objection submitted by the Republic of Serbia in so far as it relates to the jurisdiction *ratione materiae* of the Court under Article IX of the Convention on the Prevention and Punishment of the Crime of Genocide to entertain the Application of the Republic of Croatia;

IN FAVOUR: *President Higgins; Vice-President Al-Khasawneh; Judges Buerenthal, Owada, Simma, Tomka, Abraham, Keith, Sepúlveda-Amor, Bennouna, Skotnikov; Judge ad hoc Vukas;*

AGAINST: *Judges Ranjeva, Shi, Koroma, Parra-Aranguren; Judge ad hoc Kreća;*

(3) By ten votes to seven,

*Finds* that subject to paragraph 4 of the present operative clause the Court has jurisdiction to entertain the Application of the Republic of Croatia;

IN FAVOUR: *President Higgins; Vice-President Al-Khasawneh; Judges Buerenthal, Simma, Tomka, Abraham, Keith, Sepúlveda-Amor, Bennouna; Judge ad hoc Vukas;*

AGAINST: *Judges Ranjeva, Shi, Koroma, Parra-Aranguren, Owada, Skotnikov; Judge ad hoc Kreća;*

(4) By eleven votes to six,

*Finds* that the second preliminary objection submitted by the Republic of Serbia does not, in the circumstances of the case, possess an exclusively preliminary character;

IN FAVOUR: *President Higgins; Vice-President Al-Khasawneh; Judges Ranjeva, Buerenthal, Owada, Simma, Abraham, Keith, Sepúlveda-Amor, Bennouna; Judge ad hoc Vukas;*

AGAINST: *Judges Shi, Koroma, Parra-Aranguren, Tomka, Skotnikov; Judge ad hoc Kreća;*

(5) By twelve votes to five,

*Rejects* the third preliminary objection submitted by the Republic of Serbia.

IN FAVOUR: *President* Higgins; *Vice-President* Al-Khasawneh; *Judges* Ranjeva, Buergenthal, Owada, Simma, Tomka, Abraham, Keith, Sepúlveda-Amor, Bennouna; *Judge ad hoc* Vukas;

AGAINST: *Judges* Shi, Koroma, Parra-Aranguren, Skotnikov; *Judge ad hoc* Kreča.

Done in English and in French, the English text being authoritative, at the Peace Palace, The Hague, this eighteenth day of November, two thousand and eight, in three copies, one of which will be placed in the archives of the Court and the others transmitted to the Government of the Republic of Croatia and the Government of the Republic of Serbia, respectively.

(Signed) Rosalyn HIGGINS,  
President.

(Signed) Philippe COUVREUR,  
Registrar.

Vice-President AL-KHASAWNEH appends a separate opinion to the Judgment of the Court; Judges RANJEVA, SHI, KOROMA and PARRA-ARANGUREN append a joint declaration to the Judgment of the Court; Judges RANJEVA and OWADA append dissenting opinions to the Judgment of the Court; Judges TOMKA and ABRAHAM append separate opinions to the Judgment of the Court; Judge BENNOUNA appends a declaration to the Judgment of the Court; Judge SKOTNIKOV appends a dissenting opinion to the Judgment of the Court; Judge *ad hoc* VUKAS appends a separate opinion to the Judgment of the Court; Judge *ad hoc* KREČA appends a dissenting opinion to the Judgment of the Court.

(Initialled) R.H.

(Initialled) Ph.C.

SEPARATE OPINION OF VICE-PRESIDENT  
AL-KHASAWNEH

*Concurrence with result — Disagreement with reasoning — FRY lack of access erroneous reasoning — Traceable to 2004 Judgment — Source of confusion — Contradictions with 2007 not substantively resolved — Merely hidden by res judicata — Majority forced to rely on novel interpretation of Mavrommatis — New reasoning leads nowhere — Crucial element in Mavrommatis remains missing — Defect is not curable now because of loss of jurisdiction ratione materiae.*

I concur with the majority opinion that the Court possesses jurisdiction to decide the present case on the merits. I regret, however, that there are elements in the Court's reasoning with which I cannot agree. Believing those differences to be important enough to warrant an explanation, I append this separate opinion.

The Judgment is predicated on two premises neither of which I find convincing: first, that the Federal Republic of Yugoslavia (FRY) had no "access" to the Court from its inception on 27 April 1992 until its admission as a new Member of the United Nations on 1 November 2000; and second, that this defect — fundamental in the eyes of some — is nevertheless curable by the invocation of a somewhat unorthodox interpretation of the so-called *Mavrommatis* principle. The first of these elements of the Court's reasoning is not new. Its genesis is located in the 2004 case concerning the *Legality of Use of Force* Judgment(s) where the Court, departing from earlier closely-related jurisprudence (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia), Provisional Measures, Order of 13 September 1993, I.C.J. Reports 1993*; *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)*; *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*), drew, from the fact of the 2000 admission of the FRY to the United Nations as a "new Member", the inference that that fact clarified retroactively the hitherto amorphous status of FRY membership in the United Nations, revealing that it had not been

a United Nations Member in the period 1992-2000 and thus lacked the capacity (access) to appear before the Court.

I have already had occasion to discuss these jurisdictional issues in a somewhat lengthy and detailed manner (see dissenting opinion of Judge Al-Khasawneh (especially paras. 11-16) in the case concerning the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, *I.C.J. Reports 2007 (I)*, pp. 246-249), and no purpose would be served by repeating those arguments. Suffice it to say that in my respectful opinion the erroneous reasoning in the 2004 Judgment has been the source of much confusion and contradictions in the Court's judgments dealing with the aftermath of the disintegration of the former Socialist Republic of Yugoslavia (the SFRY).

In the 2007 Genocide Judgment (*ibid.*, pp. 96-101, paras. 129-138), where the Court upheld its jurisdiction (for the second time, the first being in 1996), the contradictions with the 2004 Judgment were not substantively resolved but merely obscured by the formalism of *res judicata*. In the present judgment, in which the Applicant is different, the ghost of the 2004 Judgment, freed from the shackles of *res judicata*, is back to haunt us, and rather than putting it this time to rest beyond revivication, the Court chose in fact to revive it, making it one of the premises on which the present Judgment is constructed. This is regrettable as the moral and logical implications of the collective disappearing act of the FRY for eight full years, while some of the most horrible crimes occurred, and in which its leaders were implicated, cannot represent a high point in the history of this Court.

Instead — and this leads me to the second premise on which this Judgment is predicated — the majority embarked on a novel interpretation of the so-called *Mavrommatis* principle (*Mavrommatis Palestine Concessions*, Judgment No. 2, 1924, *P.C.I.J., Series A, No. 2*, para. 34) according to which the Court would not insist on a new application if, at the time of institution of proceedings, a procedural defect curable by a subsequent action of the applicant existed. Of course, no other option was open to the majority given the inapplicability of *res judicata* and the choice they made with regard to maintaining the 2004 Judgment. Unfortunately, this new line of reasoning, based on *Mavrommatis*, was to prove exceedingly arduous and ultimately, in my respectful opinion, to lead nowhere.

A brief recollection of pertinent developments is useful: Croatia instituted proceedings on 2 July 1999, i.e., in the period during which the FRY was not, according to the logic of the 2004 Judgment and the present one, a United Nations Member, and hence lacked access to

the Court<sup>1</sup>; in November 2000 the FRY was admitted as a new Member to the United Nations thereby curing this lack of access and removing the obstacle to jurisdiction *ratione personae*; however a few months later, on 6 March 2001, the FRY undertook treaty action which included the depositing with the Secretary-General of the United Nations of an “instrument of accession” to the Genocide Convention. It has since maintained, in a reversal of its earlier position based on continuity, that it only became a party to that Convention by accession in June 2001. Jurisdiction *ratione materiae* was now lost because the FRY “instrument of accession” contained a reservation to the effect that the FRY “does not consider itself bound by Article IX of the Convention” (Judgment, para. 94). As the Judgment recalls in paragraph 94, Croatia objected on the ground that the FRY “is already bound by the Convention since its emergence as one of the five equal successor States’ of the former SFRY”. It goes without saying that if the FRY was not a successor but a continuator of the SFRY the “accession” would be equally invalid. For its part the Court, as recalled in paragraph 102 and as submitted by Croatia, affirmed on six occasions that the FRY was bound by the Genocide Convention in 1993 (twice), 1996, 1999, 2003, and 2007.

Be that as it may, what is of direct interest now is that unless the reservation pertaining *ratione materiae* to the Court’s jurisdiction is invalid, it would not be possible by any stretch of the legal imagination to invoke *Mavrommatis*. A crucial element in *Mavrommatis*, and in other cases which follow that old case (*Northern Cameroons (Cameroon v. United Kingdom)*, *Preliminary Objections, Judgment, I.C.J. Reports 1963; Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, *Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984; 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)*), is that a procedural defect is curable by subsequent action which is nevertheless deemed unnecessary in view of considerations of judicial economy. The situation in the present case is different. The reservation to Article IX introduced by the FRY in 2001 will act to bar such a subsequent action. Without the invalidation of the reservation to Article IX which the Judgment avoids, I cannot see how the *ratione materiae* element of the Court’s jurisdiction can be upheld on the basis of reasoning based on *Mavrommatis*.

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<sup>1</sup> Access as a non-Member under Article 35 (2) was also blocked by the interpretation given in 2004 to the phrase “treaties in force” (see pp. 318-324, paragraphs 99-114 of the case concerning *Legality of Use of Force (Serbia and Montenegro v. Belgium)*, *Preliminary Objections, Judgment, I.C.J. Reports 2004 (I)*).

I continue to believe that the FRY was a continuator of the SFRY until 2000 when, of its own volition, it became a successor State. I am also of the opinion that the FRY was bound by the Genocide Convention, including Article IX, by virtue of the ratification by the SFRY of the Convention, without reservation, on 29 August 1950. It is on these bases that I joined the majority in upholding the Court's jurisdiction notwithstanding my respectful, but profound, disagreement with their reasoning.

*(Signed)* Awn AL-KHASAWNEH.

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JOINT DECLARATION OF JUDGES RANJEVA, SHI, KOROMA  
AND PARRA-ARANGUREN

*“Pre-preliminary” nature of access to the Court — The Court has already determined that the Respondent lacked access to it during the relevant time and has never definitively determined that Serbia had access — Reliance on the Mavrommatis case is misguided because Mavrommatis did not concern access to the Court, the issue in the present case is not procedural, the defect in the present case is not short-lived, and the defect in the present case concerns the Respondent rather than the Applicant — Jurisdiction must be assessed at the time of the filing of the Application — Fundamental importance of the equality of the Parties — The Applicant itself has previously argued that the Respondent lacked access — Consistency of Judgments — Jurisdiction cannot be founded on 1992 declaration — Jurisdiction lacking.*

1. We, as four remaining Members of the Court who took part in the 1996 proceedings on preliminary objections in the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia)* case, and one of whom also participated in the 1993 proceedings on the indication of provisional measures in that case, are constrained to point out that at no time between 1992 and 2000 did the Court ever *definitively* declare that Serbia — the Respondent in the present case — had the necessary access to bring a dispute before the Court. In fact, the Court deliberately avoided the issue of whether Serbia had access to it. In its 2004 Judgment on the *Legality of Use of Force (Serbia and Montenegro v. Italy)*, the Court held that at a time prior to 2000 Serbia lacked access to bring a case to the Court (*Preliminary Objections, I.C.J. Reports 2004 (III)*, p. 910, para. 114). We are therefore constrained to append the following declaration to this Judgment, which, in our opinion, not only lacks legal validity and consistency but is even *contra legem* and untenable. This Court is not entitled to exercise jurisdiction based on a *contra legem* interpretation of a convention, such as the United Nations Charter or the Statute of the Court. Any such Judgment cannot but be extra-legal. It is regrettable that this Court, as a court of law, should have taken such a position.

2. In our view, the crucial question which the Court has to determine in this phase of the proceedings is whether the Respondent, Serbia, had access to the Court at the relevant time, namely at the filing on 2 July 1999 of the Application alleging breaches of the Convention on the Prevention and Punishment of the Crime of Genocide. This question is both pre-preliminary to the issue of jurisdiction and also fundamental, as the

Court can exercise its judicial function only in respect of those States which have access to it.

3. Whether a State has the capacity under the Statute to be a party to proceedings before the Court is an issue of *primordial* importance, as it governs whether the Court may exercise jurisdiction over a dispute brought before it. Under the Court's Statute, a State must have access to the Court in order to participate in a contentious case; the Court's jurisdictional authority is limited to those States with access to it. (See *Legality of Use of Force (Serbia and Montenegro v. Belgium)*, *Preliminary Objections, Judgment, I.C.J. Reports 2004 (I)*, p. 295, para. 36, concluding that "[t]he function of the Court to enquire into the matter [of a party's access to the Court is]. . . mandatory upon the Court. . .").

4. In its Judgment in the *Legality of Use of Force (Serbia and Montenegro v. Belgium)* case, the Court reached the conclusion 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." (*Ibid.*, pp. 314-315, para. 91.)

Thus, if Serbia and Montenegro at the time of filing of its Application on 29 April 1999 was neither a Member of the United Nations nor a party to the Statute, and therefore did not have access to the Court under Article 35, paragraph 1, of the Statute, then it could not have had access to the Court in the present case when the Government of Croatia filed its Application on 2 July 1999. The Court's other Judgments dealing with parallel proceedings either support or, at the very least, do not contradict this finding. (See *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. 623, para. 47 (concluding that the Court had jurisdiction over the case without considering the question of access, which the Parties had not raised); *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 (concluding that the admission of the Federal Republic of Yugoslavia to the United Nations on 1 November 2000 "cannot have changed retroactively the *sui generis* position" of the Federal Republic of Yugoslavia within the Organization); *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, *Judgment, I.C.J. Reports 2007 (I)*, pp. 90-91, paras. 115-116 (find-

ing that the Court had jurisdiction over Serbia by virtue of the doctrine of *res judicata* as applied to the 1996 jurisdictional Judgment, without entering into an analysis of Serbia's status or access); and pp. 266-275, joint dissenting opinion of Judges Ranjeva, Shi and Koroma (emphasizing that the question of access to the Court had not been settled by the 1996 Judgment on jurisdiction in that case because it had not been specifically raised by the Parties; re-examining the question *de novo*; and concluding that the Federal Republic of Yugoslavia had not been a Member of the United Nations at the time the case was filed, and therefore had no access to the Court at the relevant time) (Judge Parra-Aranguren did not take part in that Judgment for reasons known to the Court.)

5. Thus, in none of its prior Judgments has the Court concluded definitively that Serbia and Montenegro had access to it in the period between 1992 and 2000, and in the *Legality of Use of Force* cases it concluded *definitively* that the State did not have such access. These findings notwithstanding, the Court has held in the present Judgment that it is entitled to exercise jurisdiction in this matter, even though at the filing of the Application on 2 July 1999 the Respondent was neither a Member of the United Nations nor a party to the Statute of the Court, and therefore lacked access to the Court. To reach its conclusion in the present case, the Court has relied on the *Mavrommatis Palestine Concessions* case, where the Permanent Court of International Justice held that a treaty defining certain procedural and substantive norms at issue (Protocol XII of the Treaty of Lausanne) could be applied to the dispute even though it had not come into force until after the Application was filed. According to that Judgment:

“Even assuming that before that time the Court had no jurisdiction because the international obligation referred to. . . was not yet effective, it would always have been possible for the applicant to re-submit his application in the same terms after the coming into force of the Treaty of Lausanne. . .” (*Judgment No. 2, 1924, P.C.I.J., Series A, No. 2, p. 34*).

The Judgment went on to state: “Even if the grounds on which the institution of proceedings was based were defective for the reason stated, this would not be an adequate reason for the dismissal of the applicant's suit” (*ibid.*), and then: “The Court, whose jurisdiction is international, is not bound to attach to matters of *form* the same degree of importance which they might possess in municipal law.” (*Ibid.*; emphasis added.) According to the present Judgment, the Court should thus consider that Serbia has access to it because, following the logic of the *Mavrommatis* case, Serbia's non-membership in the United Nations at the relevant time can be treated as a mere temporary procedural defect which was cured on 1 November 2000 when it became a new Member of the United Nations.

6. For the Court to conclude, on the basis of this *obiter dictum* in the *Mavrommatis* case, that the Respondent has access to it and it has jurisdiction over the Respondent is a misapplication of the Permanent Court's comment. The present case does not lend itself to the approach taken in *Mavrommatis*, because the *Mavrommatis* case did not concern access. Indeed, the Permanent Court did not consider, let alone decide, the issue of whether the State in question had access to the Court, nor did it rule on the status of a Member State. In fact, the *Mavrommatis* reasoning as applied in that case was not even technically concerned with the jurisdiction of the Permanent Court, which was based on Articles 26 and 11 of the Mandate for Palestine, not on Protocol XII. The Court determined it had jurisdiction based on Articles 26 and 11 of the Mandate (*Judgment No. 2, 1924, P.C.I.J., Series A, No. 2*, p. 29) before it even entered into its discussion of Protocol XII (*ibid.*, p. 34; see also *ibid.*, p. 31 (stating that Article 11 of the Mandate, not Protocol XII, is "the very clause from which the Court derives its jurisdiction")). Protocol XII served merely to complement the jurisdictional grant in Article 11 of the Mandate through the provision of additional procedural and substantive rules (*ibid.*, p. 31: "In this respect, the Protocol is the complement of the provisions of the Mandate in the same way as a set of regulations alluded to in a law indirectly form part of it."). The procedural defect at issue in *Mavrommatis*, therefore, did not concern an imperfection in the jurisdictional clause itself, and it certainly did not concern an issue of access to the Court.

7. Moreover, the issue in the present case is not "procedural" (concerning what a party has filed or could file), as it was in *Mavrommatis*, but is decidedly preliminary and fundamental (concerning the status of that party under the Charter of the United Nations and the Statute of the Court). A party can correct a procedural error, but cannot simply change a fundamental characteristic of the opposing party's legal status. This fact, which somehow escaped the attention of the majority, is somewhat obscured in the present case by the retrospective application of the *Mavrommatis* dictum to a situation which has since resolved itself (i.e., examining Serbia's status retrospectively). In fact, the logic of the *Mavrommatis* approach was meant to be applied prospectively, in particular to excuse *procedural* imperfections that the applicant could rectify *ex ante* by re-filing a corrected application. Such is not the situation in the present case, which involves, rather, a *fundamental* question which is only known to resolve itself *ex post*. In applying the *Mavrommatis* principle retroactively, the majority sets a dangerous precedent that threatens the finality of all of the Court's judgments, as any jurisdictional decision could be reopened further to new developments.

8. Further, *Mavrommatis* and all of its progeny dealt with very short-

lived defects. For example, in the Court's 1996 Judgment on Preliminary Objections in *Bosnia and Herzegovina v. Yugoslavia*, the procedural defect at issue was remedied after merely nine days (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia)*, I.C.J. Reports 1996 (II), p. 612, para. 24). To apply the same principle to a long-lasting defect like the one in the present case would create a jurisprudential slippery slope in respect of the Court's jurisdiction, to the detriment of judicial certainty and finality. If procedural defects could be rectified even years later, the Court's jurisdiction would be open to endless challenge, even with regard to cases long considered to have been definitively settled. The present Judgment proposes no limit to this uncertainty. *According to the Court's settled jurisprudence, its jurisdiction in a case must exist at the time of filing the Application.*

9. Additionally, the *Mavrommatis* procedural-defect approach has been applied where it has been the applicant or both parties, but not the respondent alone, which failed to fulfil one of the conditions necessary for the Court to find jurisdiction at the date the proceedings were instituted (see the present Judgment, para. 84). Where an application is imperfect and the applicant could perfect and merely re-file it, logically the *Mavrommatis* doctrine holds that the Court should not bar the application because of a mere procedural imperfection easily rectifiable by the applicant. For example, in the *Certain German Interests in Polish Upper Silesia* case, the Permanent Court emphasized that "the Court cannot allow itself to be hampered by a mere defect of form, *the removal of which depends solely on the Party concerned*" (*Jurisdiction, Judgment No. 6, 1925, P.C.I.J., Series A, No. 6*, p. 14; emphasis added). The present situation, in which the Respondent failed to fulfil one of the preconditions necessary for the Court to find jurisdiction at the date the proceedings were instituted, is entirely different, because the Court can in no way have known at the date of filing whether the Applicant would ever be in a position to file a procedurally correct Application. This depended on the status of the Respondent, which in turn depended on actions of the international community (in granting or withholding recognition of the Respondent as a Member State of the United Nations). Thus, the present case does not involve a "mere" procedural defect susceptible of correction in a fresh application made by the same party responsible for the defective instrument.

10. Instead of relying on the *Mavrommatis* case to uphold the Court's jurisdiction now that it is clear that the Respondent ultimately became a State with access to the Court, the Court should, with respect to this decidedly non-procedural matter, have determined whether, under its Statute and jurisprudence, the Parties had access to it at the relevant

time. Thus, the Court was required to proceed from the fundamental premise that the determination was to be made at the time Croatia filed its Application. As the Court rightly observes in the present Judgment, it has reiterated in numerous precedents that: “the jurisdiction of the Court must normally be assessed *on the date of the filing of the act instituting proceedings*” (para. 79; emphasis added, citing *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. 613, para. 26; *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. 26, para. 44). Yet, the Court in the present Judgment chose two different strategies to contravene this fundamental principle. First, it argued that jurisdiction could be reconsidered as of the date of the Court’s consideration of the case, stating:

“What matters is that, at the latest by the date when the Court decides on its jurisdiction, the applicant must be entitled, if it so wishes, to bring fresh proceedings in which the initially unmet condition would be fulfilled” (Judgment, para. 85).

As stated, this proposition would appear to be fundamentally self-contradictory. The majority is trying to have it both ways. It states, on the one hand, that it does not matter that the Court did not have jurisdiction *ratione personae* over Serbia when Croatia filed its Application, that it is just a matter of form, and that, since Serbia is a party to the Statute of the Court *now*, the Court can exercise jurisdiction. On the other hand, it states that it is irrelevant that Serbia later entered a reservation to Article IX of the Genocide Convention because what matters is that, at the time the Application was filed, this reservation did not yet exist. The Court cannot take one approach to jurisdiction on one issue and a different approach to jurisdiction on another issue in the same case.

Second, the Court also argued that jurisdiction could be reconsidered as of the date of the Memorial, concluding that because Croatia’s Application was “a short text comprising some ten pages” (*ibid.*, para. 90), while its Memorial, presented after Serbia gained access to the Court, was “a document of 414 pages” (*ibid.*), this somehow allows for reconsideration of access at the date of the Memorial because the Memorial thus breaks new ground. The Court’s jurisprudence does not support either of these alternative approaches. Despite these two attempts to change the date at which access to the Court is to be determined to either the date of the Memorial or the date of the Court’s consideration of the case, the fundamental premise remains — and the present Judgment acknowledges — that access to the Court is to be determined as of the date of the filing of the Application.

11. In a nutshell, when the Applicant instituted proceedings against the Respondent in 1999, the Respondent was not a party to the Statute of the Court and therefore had no access to the Court. This fact cannot be rectified by recourse to the approach taken by the Permanent Court in the *Mavrommatis* case.

12. In choosing to exercise jurisdiction in the present case, the Court will not only be in flagrant violation of the provisions of the United Nations Charter, the Statute of the Court, General Assembly resolution 47/1, and Security Council resolution 777, but will also be ignoring one of the fundamental principles of international justice, that of equality between the applicant and the respondent. Stating that the Court can exercise jurisdiction because the Respondent has subsequently been admitted to the United Nations, and that this thus validates the Application, is to ignore the fact that as a non-Member State of the United Nations and non-party to the Statute of the Court, Serbia and Montenegro was not entitled to institute proceedings before the Court against Croatia without the latter's consent. Indeed, when the Respondent in the present case attempted to do so against other States in the *Legality of Use of Force* cases, this Court ruled that the present Respondent as Applicant in those cases had no access to the Court and that the Court therefore could not exercise its jurisdiction.

13. It should also be noted that, indeed, the Applicant itself has previously taken the position that the Respondent lacked the capacity to participate in proceedings before the Court at the relevant time. In a letter addressed to the Secretary-General of the United Nations in May 1999, concerning the question of the Court's exercise of jurisdiction, the Applicant stated as follows:

“Since a new application for membership in the United Nations, pursuant to Article 4 of the Charter of the United Nations, has not been made by the Federal Republic of Yugoslavia (Serbia and Montenegro) to date, and it has not been admitted to the United Nations, the Federal Republic of Yugoslavia therefore cannot be considered to be *ipso facto* a party to the Statute of the Court by virtue of Article 93, paragraph 1, of the Charter of the United Nations. Neither has the Federal Republic of Yugoslavia (Serbia and Montenegro) become a contracting party of the Statute of the Court under Article 93, paragraph 2, of the Charter, which states that a non-member State can only become a contracting party of the International Court of Justice's Statute under conditions set by the General Assembly on the recommendation of the Security Council on a case-by-case basis. Furthermore, the Federal Republic of Yugoslavia (Serbia and Montenegro) has not accepted the jurisdiction of the Court under the conditions provided for in Security Council resolution 9 (1946) and adopted by the Council by virtue of powers conferred on it by article 35, paragraph 3, of the Statute of the Court.” (Letter dated 27 May 1999 from the Permanent Representatives of Bosnia

and Herzegovina, Croatia, Slovenia and the former Yugoslav Republic of Macedonia to the United Nations addressed to the Secretary-General, United Nations doc. A/53/992, 7 June 1999.)

14. In the light of the foregoing, for the Court now to decide that it has jurisdiction in this case is inconsistent not only with its earlier findings but also with the express position of the Applicant in this case at the relevant times. Hence, not only may this Judgment be seen as unjustified and even *contra legem*, but it is also in contradiction with the factual situation as previously characterized by the Applicant.

15. Finally, a point should be made about the consistency of the Court's judgments. On at least three occasions, the Court reiterates that decisions taken in previous proceedings (not involving exactly the same parties) are not *res judicata* under Article 59 of the Statute of the Court, but that the Court "will not depart from its settled jurisprudence unless it finds very particular reasons to do so" (Judgment, para. 53; see also paras. 54 and 76). The Court also notes that this is the position taken by both of the Parties to the present dispute (*ibid.*, para. 71). However, the present Judgment addresses this issue through weak attempts to distinguish the 2004 Judgment. First, it reasons that the Applicant in 2004 did not raise the issue of access while the Applicant in this case did (*ibid.*, paras. 88-89). This is unconvincing: access is not a condition which may be satisfied merely upon request by the applicant (and certainly not access for the opposing party!); rather, it is a fundamental characteristic that arises out of a party's status and is required by the Charter and the Statute of the Court. If Serbia lacked access to the Court in 2004, Croatia *absolutely cannot* provide it with access in the present case simply by making a request to the Court to that effect. The Court also attempts to distinguish the 2004 case by arguing that "[i]t was clear [in that case, contrary to the present case] that Serbia and Montenegro did not have the intention of pursuing its claims by way of new applications" (*ibid.*, para. 89). This assumption by the Court is also an unconvincing basis on which to rest such an important distinction, as the Court overlooks the fact that the Applicant could not file a new application because of Serbia's reservation to the Genocide Convention.

16. Since the Respondent in this case did not fulfil the conditions required to gain access to the Court at the time when the Applicant instituted proceedings in 1999, the Court cannot exercise a jurisdiction that has not been conferred on it. In other words, the conditions for the Court to exercise jurisdiction in this case — the concordance of jurisdiction *ratione personae*, *ratione materiae* and *ratione temporis* — were not met

and the Court, therefore, wholly lacked jurisdiction at the time and still lacks it today. This conclusion is also in conformity with General Assembly resolution 55/12, admitting Serbia and Montenegro to membership of the United Nations and by virtue of which Serbia and Montenegro became a party to the Statute. Consequently, the Court's present Judgment is not only *contra legem* and therefore inadmissible to provide a basis for the Court's jurisdiction, but it also contradicts the Court's jurisprudence. If the Respondent lacked access to the Court when it filed its Applications against some States in 1999, as the Court held in 2004, it cannot be deemed to have had access to the Court as Respondent when Croatia filed its Application against it, also in 1999.

17. In addition to our views on the foregoing issues concerning access, we also express concern regarding the Court's position on jurisdiction, which it concludes is established based on the declaration made on 27 April 1992 regarding commitments that "the SFR of Yugoslavia assumed internationally. . . [to remain] bound by all obligations. . ." (Judgment, para. 44). First, this declaration was made on the basis of a claimed State continuity which, as it turned out, was not accepted by the United Nations, including the Applicant, and thus such a declaration cannot form the basis of the Court's jurisdiction. Second, the Court's analysis of the validity of the declaration is based on a flawed premise. The Court states that the Federal Republic of Yugoslavia at the time of the declaration "was then claiming to be the continuator State of the SFRY, but it did not repudiate its status as a party to the Convention even when it became apparent that that claim would not prevail. . ." (*ibid.*, para. 111; emphasis added). The Court's statement is factually inaccurate. Quite the contrary — and as the Court even notes later in its Judgment (*ibid.*, para. 116) — on 6 March 2001 the Federal Republic of Yugoslavia specifically repudiated the 27 April declaration, stating that:

"Now it has been established that the Federal Republic of Yugoslavia has not succeeded on April 27, 1992, or on any later date, to treaty membership, rights and obligations of the Socialist Federal Republic of Yugoslavia in the Convention on the Prevention and Punishment of the Crime of Genocide. . .

THEREFORE, I am submitting on behalf of the Government of the Federal Republic of Yugoslavia this notification of accession to the Convention on the Prevention and Punishment of the Crime of Genocide. . ." (Notification of Accession to the Genocide Convention by the Federal Republic of Yugoslavia, 6 March 2001, *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. 25, para. 52).

Thus, not only did the Federal Republic of Yugoslavia repudiate the 27 April declaration, but its action of acceding to the Genocide Convention cannot but lead to the conclusion that it also accepted that it was not a party to the Genocide Convention during the relevant time. Third, even if, hypothetically, this declaration could provide a basis for the Court's jurisdiction, it would not be a complete basis because, as discussed in the beginning of this declaration, a fundamental pre-condition to its exercise — Serbia's access to the Court — has not been established.

18. In conclusion, because we are firmly convinced both that Serbia lacked access to the Court at the relevant time (and thus the Court lacked jurisdiction *ratione personae*) and that Serbia's 27 April declaration is not sufficient to give the Court jurisdiction, we conclude that the Court is wholly lacking jurisdiction to hear the case.

(Signed) Raymond RANJEVA.

(Signed) SHI Jiuyong.

(Signed) Abdul G. KOROMA.

(Signed) Gonzalo PARRA-ARANGUREN.

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## DISSENTING OPINION OF JUDGE RANJEVA

[Translation]

*Arbitral jurisdiction and judicial jurisdiction — The International Court of Justice and its role as a catalyst for scientific development of international law — Authority of jurisprudence — Solution of continuity and State succession and continuity of the jurisdictional solution — Transposal of Mavrommatis solution and reversal in case law — Consent to jurisdiction and status of the Respondent — Non-fulfilment of conditions for filing Application — Difference in treatment between Respondent and Applicant — Article 35 of the Statute: right to institute contentious proceedings — Article 34 of the Statute: limitation of access to States alone and definition of the legal status or position of States in proceedings: Applicant or Respondent — Principle of sovereign equality of parties to a dispute — No special treatment for Respondent — Consensual basis of jurisdiction — Difference vis-à-vis system of statutorily conferred jurisdiction — Jurisdiction *ratione materiae* — Argumentation strategies independent of proceedings — Declaration of succession by FRY — Croatian objection to claimed succession — Distinction between continuity of treaty obligations and discontinuity of legal personality of SFRY/FRY — Effect of this distinction on Article IX — Systemic links between 1948 Convention and United Nations system — Legally established consent to jurisdiction by Serbia lacking — Historical circumstances of Mavrommatis case jurisprudence — Specifics of mechanisms instituted by 1919 Peace Treaties — Law of resolving political crises.*

1. Rendering justice under the law in a judicial institution having universal jurisdiction is a particularly difficult exercise. The consistency of justice over the course of time can bring surprises. An arbitral court, unconstrained in its decisions, is responsible for its judgment only to the parties which have consented to its jurisdiction. A court of law, on the other hand, acts within the context of a concept of legal policy; it has a heritage to uphold embodied in its jurisprudence, which helps promote legal certainty and the consistency of the law. As one of the principal organs of the United Nations, the International Court of Justice enjoys operational autonomy while sharing in the objectives of the Organization, *inter alia*, through the practice of presenting an Annual Report on the Court's activities to the General Assembly. Moreover, the Court is recognized as having a specific mission, and one which is willingly attributed to it: to be a catalyst for the scientific development of international law. However, there are instances where, for scientific reasons or technical legal or judicial reasons, observers and commentators may note some inconsistency vis-à-vis a previous decision without there actually having been a reversal of any precedents. Reasons linked to various factors, particularly the conduct of the parties (subject-matter of claims, basic strategy, argumentation strategy, etc.) in the corresponding proceedings, can

lead to different solutions being devised. Such is the situation in the present case concerning *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)* vis-à-vis the case concerning *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)* (*Judgment, I.C.J. Reports 2007 (I)*, p. 43): transposing the solution chosen 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)* (*ibid.*, hereinafter *BHY*) is impossible from the legal standpoint because it challenges the whole underlying logic of the basis of the jurisdiction of the International Court of Justice: consent.

\* \* \*

2. As far as the first preliminary objection relating to the Court's jurisdiction to adjudicate Croatia's claim is concerned, I regretfully cannot accept the decision of the majority. I must emphasize, however, that this does not mean that I believe that Serbia has any ground not to answer for violations of the Convention on the Prevention and Punishment of the Crime of Genocide under international law, in so far as such violations may be established. It is that the submission of the case to the Court by Croatia was inappropriate.

3. So far as the international legal status of Serbia in relation to the Socialist Federal Republic of Yugoslavia (SFRY) is concerned, the Court has adopted the solution of continuity in order to accept the continuity of the Court's solution in the *BHY* case. By basing itself upon the principle of State succession in order to justify the continuity of the treaty obligation under the 1948 Convention, the Court has accepted the solution of continuity, which means a break in the continuity of the legal personality from the SFRY to Serbia. That choice, however, ignores the solution in the *BHY* case, which, on the contrary, was based on the continuity of the legal personality from the SFRY to Serbia. This contradiction prompted the majority to rely, in error, on the jurisprudence of the *Mavrommatis* case (*Judgment No. 2, 1924, P.C.I.J., Series A, No. 2*), and thus ignore the golden rule that the jurisprudence of the Court is based on consent.

4. The present Judgment will elicit a wide range of comments: it constitutes a reversal of case law regarding conditions of access to the Court. Thus, as the Judgment recalls, it is at the date when an application is filed that the jurisdictional capacity of the Court is assessed; at that critical date, all the conditions necessary for the exercise of its jurisdiction must be fulfilled in all respects. For the sake of the sound administration of justice, the present Judgment, in referring to the jurisprudence of the *Mavrommatis* case calls that firmly established rule into question. In other words, failure to fulfil all the conditions of jurisdiction no longer leads inevitably to the Court's lack of jurisdiction. Such situations are not unknown underforum *prorogatum* whereby a State accepts jurisdiction

after an application has been submitted to the Court; the absence of consent constitutes a defect which can be overcome by potestative initiative, that is to say, at the discretion of the respondent State. Considerations concerning the sound administration of justice (explicit indication of consent to jurisdiction by the party which had not initially indicated such consent and procedural efficiency) explain why this open solution has been upheld in *forum prorogatum* case law.

5. However, in the present instance, the circumstances are entirely different, since what is missing is not the consent which can be confirmed in a potestative manner, but the capacity itself of the State (that of Serbia in this instance), not to access the Court as an applicant, but to be brought before it as a respondent. On two occasions, the Court has refused to grant the Federal Republic of Serbia and Montenegro (Yugoslavia) the right to be a party to a dispute before the Court (see the cases concerning *Legality of Use of Force* in 2004 (*I.C.J. Reports 2004 (I, II, III)*), pp. 279-1450) and the case concerning *Application for Revision of the Judgment of 11 July 1996* (*I.C.J. Reports 2003*, p. 7)). Its admission to the United Nations did not have a retroactive effect; it could not rectify its *sui generis* status following the break-up of the Socialist Federal Republic of Yugoslavia (SFRY) and prior to its admission in 2000 as a new State. In addition to judicial revisionism on the link between the status of State party to the Statute of the International Court of Justice and membership of the United Nations, the present Judgment calls into question the very conditions in which the Court exercises its jurisdiction.

6. Although strictly speaking we cannot talk about *res judicata*, the present Judgment favours the continuity of the jurisprudence of the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)* case, which is supported by an extensive body of decisions on both procedural issues and the legal merits, in order to dismiss the solution adopted in the *Application for Revision of the Judgment of 11 July 1996*, Preliminary Objections case in 2003 and the *Legality of Use of Force* cases in 2004. As a result, there is a lack of consistency and clarity in the work of the Court and a misunderstanding of the nature of the jurisdictional function within the United Nations system. I must therefore regretfully express my dissent from the decision of the majority in the present case.

7. As far as the facts and the conduct of the legal actors in the present proceedings are concerned, the Judgment should have emphasized the specific elements which differentiate the present case from the case concerning the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*. First, prior to its admission to the United Nations, the Federal Republic of Yugoslavia claimed unequivocally its continuity from the SFRY, whereas it now objects to the Court's jurisdiction on the

ground that its admission as a new State had no retroactive effect. Leaving aside any ethical or moral considerations, where two separate cases are concerned, is there any obligation in law for a State to be consistent in or faithful to its arguments? Second, unlike *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. 595 (hereinafter the *Bosnia* case), the Court could not overlook or set aside the protest by Croatia in 1994 whereby it challenged the claims to continuity made by the Federal Republic of Yugoslavia. Indeed, in a letter dated 16 February 1994 addressed to the Secretary-General by its Permanent Representative, Croatia stated that it:

“*strongly objects* to the pretention of the Federal Republic of Yugoslavia (Serbia and Montenegro) to continue the state, international, legal and political personality of the former Socialist Federal Republic of Yugoslavia.

. . . . .  
[I]f the Federal Republic of Yugoslavia . . . expressed its intention to be considered, in respect of its territory, a party, by virtue of succession to the Socialist Federal Republic of Yugoslavia, to treaties of the predecessor State, with effect from 27 April, . . . as a new State, . . . the Republic of Croatia would fully respect that notification of succession.” (Doc. S/1994/198, 19 February 1994.)

In 1996, in the *Bosnia* case, the Federal Republic of Yugoslavia did not raise as a preliminary objection the issue of the *sui generis* Member State status that had been attributed to it. Lastly, does the link between its status as a Member of the United Nations or as a State party to the Statute of the International Court of Justice and its access to the Court as a respondent correspond to the pursuit of the sound administration of justice?

8. The Court’s decisions of 2003 and 2004 in the *Legality of Use of Force* and *Application for Revision of the Judgment of 11 July 1996* cases constitute the expression of the most recent state of the law concerning the relationship between the status of Member State of the United Nations and access to the Court in the event of a dispute. They were not called into question directly or indirectly by the latest judgment dating from 2007, when the final finding regarding the Court’s lack of jurisdiction was supported unanimously by the Members of the Court; but the difference in their views, on the other hand, had to do with the area on which the Court’s decision was made: a question more of appropriateness than of legality. Unlike *ad hoc* arbitral courts, it is considered imperative for the Court to abide by its own case law to assure certainty in legal relationships between States. The issue in the present proceedings concerns the distinction to be drawn between access as an applicant, which has been

the subject of past decisions, and the bringing of a respondent before the Court, on which no previous decisions have been rendered.

9. The first aspect of this problem lies in the difference in treatment which the present decision attributes to the Respondent vis-à-vis the Applicant. A State may be brought before the Court, notwithstanding a complete failure to fulfil the conditions for *locus standi* at the critical date when the Application was filed. This difference in treatment affects the principle of equality of the parties in regard to the rules of procedure and the application of identical basic rules. As for the equality of the parties in regard to the rules of procedure, they have the right to be judged in the same conditions: that is to say, that they must fulfil the same conditions of access to the Court (in this case, to be the Respondent) and must comply with the same rules of procedure, irrespective of their status as applicant or respondent. As far as equality in the application of identical basic rules for the proceedings is concerned, the question is whether, under the law respecting States before the International Court of Justice, the act of refusing to be called as respondent following a unilateral application constitutes an injustice.

10. On closer examination, the difference in treatment between the applicant and the respondent may lack any direct basis, inasmuch as it concerns a general principle of procedural law. It is difficult not to link the principle of the equality of rights and conditions of the applicant and the respondent to the provisions of Article 34 of the Statute of the Court, the terms of which must be considered in comparison with those of Article 35. Article 34 stipulates, “Only States may be parties in cases before the Court.” The provisions recalled in Articles 35 and 34 in the French version of the Statute — which is the original text, as was noted in the Judgment in the *LaGrand* case (“It might however be argued, having regard to the fact that in 1920 the French text was the original version . . .” (*I.C.J. Reports 2001*, p. 502, para. 100)) — make a distinction between “*La Cour est ouverte aux Etats parties au présent Statut*” (“The Court shall be open to the States parties to the present Statute”) (Article 35) and “*Seuls les Etats ont qualité pour se présenter devant la Cour*” (“Only States may be parties in cases before the Court”) (Article 34). The difference between the Court being open and the right to be a party lies in the fact that the first provision concerns the authorization or faculty to bring a case before the Court or to initiate contentious proceedings, whereas the second concerns the condition or capacity in which a State may be involved in contentious proceedings. Article 35 only addresses the issue of the access of a State to the forum of the Court: that is its capacity to bring a case and act within specific proceedings. A State which comes before the Court as an applicant must establish that it has a right, vis-à-vis the respondent, with respect to its claim. Article 34, for its part, addresses two issues: first, limiting access to the Court to States and excluding other rights holders under international law which are not States and, second, by use of the word “*qualité*” the Statute considers the capacity or function of the rights holder accessing the Court: that is, the

legal condition of States in proceedings as applicant or respondent as the case may be. The combined interpretation of these two points leads to compliance with the principle of the sovereign equality of States and a differentiation of their legal circumstances depending on the capacity in which they appear in the case, as respondent or applicant, such being the function that entitles them to take part in the proceedings. The inescapable consequences of this are, first, equality of standing in respect of access and, second, exclusion of any specific, different treatment that would place the respondent at a disadvantage.

11. The lack of any specific provisions concerning the respondent, which would be the counterpart of Article 35, can be explained by the consensual nature of the basis of the Court's jurisdiction. In a system of statutorily conferred jurisdiction, justice must be conducted in such a way that all potential litigants can find a court to resolve their dispute; the statutes and functioning of the court régime provide for the right to justice to be exercised. The dispute is put before the court with jurisdiction at the applicant's initiative, thereby making it necessary for his adversary to take part in proceedings; the legal bonds between the two parties cannot then be set within a contractual or consensual framework. In other words, in the framework of legal relationships within which the powers and obligations of the parties to the case are defined, one of the parties is obliged to appear before the court without any requirement for his prior consent.

12. On the other hand, in a system based on consent to jurisdiction, such as that established under Article 36 of the Statute, a State is entitled to refuse to be brought before the International Court of Justice without its consent. This principle accounts for the importance of objections regarding jurisdiction and admissibility in the conduct of proceedings. As far as the law of procedure on merits is concerned, this principle explains the lack of provisions on abuse of process and frivolity. Similarly, this is why there is no counterpart to Article 35 of the Statute concerning the respondent. Once the same conditions as those required of the applicant have been fulfilled, it is for the participants to establish consent to jurisdiction, in particular the consent of the respondent. In view of the importance of the respondent's consent for the connection between the parties in dispute to be established, Article 34 and, in particular, its first paragraph are linked to the issue of jurisdiction *ratione personae*, an interpretation which we can note is borne out by the *travaux préparatoires* of the Advisory Committee of Jurists (see B. Schenk von Stauffenberg, *Statut et Règlement de la Cour permanente de Justice internationale: éléments d'interprétation*, Carl Heymanns Verlag, Berlin, 1934, pp. 217 *et seq.*).

13. Despite these considerations, the Judgment has chosen to interpret the silence of previous decisions in a very specific way: to safeguard and justify the case law of the Judgment of the 2007 case against critics. Indeed the Judgment engages in a justification of the 2007 case law in a surreal context: defending the implausible from the real facts. As the judges present at the time of the 1996 Judgment and still sitting in 2007

stated in their joint opinion, nothing can be deduced from the silence of the 1996 Judgment on capacity to appear before the Court. The unease is further heightened when, for lack of objective arguments, the Judgment turns as a last resort to an *ipse dixit* justifying the possibility for the Court to refrain from furnishing any explanation on a point which can be raised ex officio, even if that point calls into question the very foundation of contentious proceedings before the Court since it is preliminary to even the preliminary proceedings! This was an irrelevant and, in any event, inconclusive debate on the issue addressed in the course of the present case.

14. One must wonder if the Judgment in the present case has not arrived at the same conclusions as the arbitral tribunals of the International Centre for Settlement of Investment Disputes (ICSID) in the *Southern Pacific Properties (Middle East) Limited v. Arab Republic of Egypt* (1985) and *Asian Agricultural Products Limited (AAP) v. Sri Lanka* (1990) cases. The arbitral tribunals referred to the condition linked to the consent of the two parties for putting the dispute before the ICSID and interpreted their acceptance of ICSID dispute settlement methods in broad terms. The arbitral tribunals did not have to be overly strict because there was evidence of an incipient indication of consent; one cannot then talk of a simple logical legal conclusion.

15. The consensual nature of the basis of jurisdiction means that jurisdiction must always be debated and established by means of a judicial procedure. It cannot be solely “scientific”, that is, justified by logical considerations. This is a precautionary principle. Jurisdiction must not be established by attributing a greater meaning to the relevant elements of fact and law than they possess.

16. For these reasons, the Judgment is mistaken in the difference in treatment it attributes to the conditions for a State to be a party before the Court depending on whether that State is the applicant or the respondent.

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17. The jurisdiction *ratione materiae* raises the issue of the history of the status of the Federal Republic of Yugoslavia vis-à-vis the United Nations and the consequences thereof on the *sui generis* position of the Federal Republic of Yugoslavia and on the status of Serbia with respect to Article IX of the Genocide Convention. In the circumstances of the present case, unlike the solution chosen in the *Bosnia* case, the Judgment’s approach is open to criticism because it lacks a basis in order to be credible.

18. Quite properly, the Judgment has sought to ensure consistency by transposing vertically the solution from the precedent of the *Bosnia* proceedings on the merits. However, by avoiding a careful examination of the particular or specific aspects of the present case, the Judgment is

lacking in rigour, given the axiom that each case is unique in facts and in law.

19. To one preliminary question the Judgment brings no answer. Can a party which has been a respondent in previous proceedings submit new arguments contrary to those it has put forward in the past? Examination of the present case reveals that the dispute concerns the same question of law: violation of the Genocide Convention. It also relates to similar facts: the after-effects of the break-up of the SFRY. As for what is at issue in the case, the Applicant's claims seek the same redress as those submitted in the *Bosnia* case. The dispute following the break-up of the SFRY fed upon itself. In the circumstances of the present case, a joinder of the proceedings under the terms of Article 47 of the Rules of Court might have been an option for the Court, since it is not inconceivable even without the consent of the parties. When the Croatian Application was filed the *Bosnia* case was still pending and the Court would not have been obliged to deliver largely identical judgments, when the context in this instance is complex. The distinct and independent approaches to the cases concerning *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)* and *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)*, along with the lack of a decision to join the proceedings, give the Parties to the second case full control over their strategies of argumentation regarding their own status. For its part, the Court can draw no advantage from the decision 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)* in adjudicating the case concerning *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)* as to the rights of the Parties which can submit their own claims and support their own arguments of fact and law. The Court must, in particular, provide substantive reasons for its findings on the specific arguments advanced in the present case.

20. Three acts punctuating the evolving understanding of the legal status of Serbia from 1992 should have given rise to a more detailed examination: first, the declaration of continuity made by the Federal Republic of Yugoslavia; second, the Croat objection in 1994 to the continuity claimed by the Federal Republic of Yugoslavia; and finally, the admission of the Federal Republic of Yugoslavia to the United Nations as a new Member State after the suspension of its participation in the United Nations General Assembly. The combined effect of those three acts has prompted the Court, since 1992, to talk of a *sui generis* situation, more out of linguistic convenience than by reference to a pre-established legal category. Consequently, there is reason to supplement the Judgment's analysis, even if it means arriving at different conclusions.

21. The declaration of continuity made by the Federal Republic of

Yugoslavia actually represents a notification of succession and falls within the framework of the requirements of the Convention on Succession of States in respect of Treaties; it is binding upon it. This aspect is of no interest in the present case. As for the Convention on the Prevention and Punishment of the Crime of Genocide, the *erga omnes* nature of the obligations which it lays down is acknowledged as the consequence of the basis of those provisions in customary law.

22. The crux of the problem concerns the scope of Croatia's 1994 objection to the continuity claimed by the Federal Republic of Yugoslavia on the fate of Article IX in the jurisdictional relationship between the two Parties in dispute. The Court cannot regard these unilateral acts as mere scraps of paper and must attribute legal consequences to them.

23. In relations between Croatia and the Federal Republic of Yugoslavia the difficulty stems from the letter from the Permanent Representative of Croatia to the United Nations dated 16 February 1994. This official document was mistakenly not taken into consideration in the Judgment as a basis for the decision on the issue of State succession that arose in the litigious relationship between the Parties. As stated in that document,

“if the Federal Republic of Yugoslavia (Serbia and Montenegro) expressed its intention to be considered, in respect of its territory, a party, by virtue of succession, to the Socialist Federal Republic of Yugoslavia, to treaties of the predecessor State, with effect from 27 April 1992, the date on which the Federal Republic of Yugoslavia (Serbia and Montenegro), as a new State, assumed responsibility for its international relations, the Republic of Croatia would fully respect that notification of succession” (doc. S/1994/198 (1994)).

24. The subject-matter of the letter was a protest against the declaration of 27 April 1992 by the Federal Republic of Yugoslavia. It constituted an objection entering a reservation to the claim of continuity. On closer analysis, various aspects must be emphasized: first, a rejection of the continuity of the personality of the SFRY by the Federal Republic of Yugoslavia; next an acceptance of the continuity of the treaty obligations *ratione loci*: that is the applicability to the territory of the Federal Republic of Yugoslavia of treaty obligations for which a succession had taken place; and, lastly, a formal notice to the Federal Republic of Yugoslavia to accept Croatia's offer. The Croat letter means that, having been informed of the declaration of succession of April 1992, the Republic of Croatia considered that, with respect to treaty ties between the Croats and the Serbs, the letter is binding upon it vis-à-vis the Federal Republic of Yugoslavia within the terms which Croatia established therein: a continuity of treaty obligations combined with a clause of territorial applicability. However, any notion of the continuity of the personality of the State is ruled out, par-

ticularly as far as the organic and institutional dimensions vis-à-vis the United Nations are concerned.

25. It is in this specific and unqualified context that the issue of the fate of the dispute settlement clause in Article IX lies. An initial conclusion cannot be avoided: the declaration in question is binding upon its author and lays down the legal framework of its relationship with Serbia within the context of the present case. Furthermore, as the dispute settlement clause is severable from the system of obligations of the Genocide Convention, it must be addressed independently inasmuch as there is reason to apply specific rules to the indication of consent to jurisdiction, which must be established explicitly and not implicitly, that is, based on logical conclusions. In the present case, a doubt about continuity is justified given, on the one hand, the systemic ties which the Judgment itself recalls between the 1948 Convention and participation in the United Nations system — irrespective of the continuity of the substantive ties of obligation under multilateral treaties — and, on the other hand, the organic link between the Court and the United Nations system. In view of the distinction drawn by Croatia in its 1994 letter in response to the 1992 declaration by the Federal Republic of Yugoslavia, it is not demonstrated that Croatia accepted the jurisdictional clause with respect to the other Party or that it can be binding upon Croatia in the jurisdictional context of the present case. This possibly surprising conclusion must be drawn because of the consensual nature of the basis of jurisdiction, since the International Court of Justice is not a court of statutorily conferred jurisdiction, whose sphere of competence can be interpreted broadly.

26. For these reasons Article IX does not fall within the scope of succession in relations between Croatia and Serbia.

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27. In the present case, the extension of the jurisprudence of the *Mavrommatis* case with respect to the Respondent is open to criticism since, at the date when the Application was filed, the Respondent did not fulfil the conditions required to appear before the Court. It is not unknown for applications instituting proceedings to be validated after they have been filed, as the Judgment rightly recalls: *forum prorogatum*, for example, corresponds to just such a situation, serving as the underlying basis for jurisdiction. This occurs when a State accepts the jurisdiction of the ICJ after the case has been brought. The reasons for this practice were explained by the Court in the case concerning *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France)*.

28. In the present instance the problem lies in the fact that at the date of filing of the Application, the Respondent did not fulfil the conditions required of a State in order to appear before the Court. The Judgment, in transposing the *infans conceptus pro nato habetur* principle in the sense that the proceedings are regarded as having been instituted according to

the rules providing that the applicant fulfilled all of the conditions required, has held that for reasons relating to the sound administration of justice the subsequent admission of Serbia to the United Nations validated the circumstances and conditions of the filing of the Application. Evidently, for reasons of procedural economy and with a not very formalistic view of the law of international disputes, nothing is said to stand in the way of the fulfilment of the conditions for submitting a case to the Court being assessed at the date when all of those conditions have been met. In the present instance, the admission of Serbia and Montenegro to the United Nations in 2000 represented the solution. The important thing was not to oblige the Applicant to file a new Application once again in the same case, with the same subject-matter, the same claim, the same reason and against the same State. However, the Court's finding on the first preliminary objection can be criticized, even if we were to assume that the Court had jurisdiction. For this reason, the Judgment relies on the jurisprudence of the *Mavrommatis* case.

29. The content of the *Mavrommatis* principle has been abundantly discussed in the Judgment. However, the conclusion at which that decision arrived cannot be accepted owing to the lack of a rigorous analysis of the *Mavrommatis* ruling and the subsequent judgments referred to.

30. An analysis should have been made of the passage quoted in paragraph 82 rather than a simple recollection of the finding of the Permanent Court of International Justice. The overall procedural economy is justified by a number of points which are put forward:

- the condition that was missing, which concerned the incomplete nature of the international obligation under Article 11 of the Mandate for Palestine: it had been established but had not at that point entered into force. On reading the Judgment, nothing suggests that that obligation might have been of an irreversible nature;
- the discretionary or potestative nature of the Applicant's initiative to submit its Application again;
- insufficient grounds for dismissing the initial Application.

31. An analysis of the jurisprudence of the *Mavrommatis* case prompts the following comments. First, the case was brought before the Permanent Court of International Justice by way of a special agreement. Such a consensual means of submitting a case presumes a lack of absolute defects of a kind that would call into question the choice of court made by common agreement. Second, the corrective initiative lay within the powers of the Applicant. This aspect was repeated in the subsequent decisions mentioned in the present Judgment. Thus in the *Certain German Interests in Polish Upper Silesia* case (*Jurisdiction, Judgment No. 6, 1925, P.C.I.J., Series A, No. 6*), the Judgment talks of unilateral action on the part of the applicant Party. Lastly, the defect marring the regularity of the submission of the case to the Court lay within the exclusive responsibility of the party concerned, that is, the Applicant.

32. A conclusion can be drawn: the conditions indicated by the *Mav-*

*rommatis* Judgment do not exist in the present case. First, the question does not concern the jurisdiction *ratione personae* of the Court, but an issue preliminary to jurisdiction: the right or obligation to be able to be brought before the Court as a respondent. This is a preliminary point of law. Indeed, if the condition governing appearance before the Court is not fulfilled, there is ultimately no dispute capable of judicial resolution. Second, the defect noted when the Application was filed concerned the status of the Respondent in the proceedings, a matter beyond the power of the Applicant. Lastly, the initiative to fulfil the missing condition lies outside the powers of the Applicant; control over that which is preliminary to the preliminary issue of jurisdiction comes under a different order of authority, one which is beyond both the Court and the parties. For these reasons, transposing the principles of the jurisprudence in the *Mavrommatis* case constitutes an error of fact and of law.

33. Finally, it is not without interest to recall the reasons of judicial and jurisprudential policy underlying the *Mavrommatis* Judgment.

34. Particular attention must be paid to the limitation of the obligation of declaration to the Applicant. It is on the basis of the *travaux préparatoires* of 1920 and the jurisprudence of the S.S. “*Wimbledon*” case (*Judgments, 1923, P.C.I.J., Series A, No. 1*) that we can envisage the limitation of the provisions of the first paragraph to the Applicant, without there being corresponding rules for the Respondent. How, in the absence of a valid dispute settlement clause, can a State be brought before the Court on the sole basis that the Applicant fulfils all the conditions laid down by the Statute? The interpretation of the provisions of Article 35 in terms of limiting the conditions of access to applicant States parties flows from the overall structure of the Versailles Peace Treaties. The *travaux préparatoires* amply demonstrated that paragraphs 1 and 2 viewed as a whole were aimed specifically at the former Central Powers, the defeated States, which could not, particularly in 1919-1920, seek to claim equal rights with the victors. To restate the remarks made by Sir Cecil Hurst and the commentary by von Stauffenberg, as well as the *travaux préparatoires* of the Statute, within the general context of the 1919 Peace Treaties, two considerations must be emphasized. First, there was greater likelihood of the defeated States (Germany and the other Central Powers) appearing before the Court as respondents. Second, within the context of those treaties, it was difficult to confer upon the defeated States a right to claim equal rights with the victors; so far as the defeated States were concerned, it was not absurd to regard the Permanent Court of International Justice as possessing something similar to statutorily conferred jurisdiction within the system of the 1919 Peace Treaties. In the context of the United Nations Charter, the fundamental principle of the sovereign equality of States renders any departure from such equality contrary to the principles of the new world order. One might thus wonder if, from the perspective of a solution to a crisis falling under Chapter VII of the Charter, Serbia has been treated as a defeated State, comparable to Germany in 1919. The Court should have resolved

this question of law. These considerations explain the limits of a very narrow interpretation of Article 35 with a view to its general application.

35. As far as the *S.S. "Wimbledon"* case is concerned, it will be recalled that it was brought before the Permanent Court of International Justice pursuant to Article 386 of the Treaty of Versailles. Germany, which had yet to become a Member of the League of Nations at that point, was the Respondent. A declaration was not considered necessary for two reasons: (1) the special reservation in Article 35, paragraph 2, specifically concerns the provisions of the Peace Treaty (see the drafting history of the article); (2) the article only mentions applicant parties, whereas Germany was the Respondent, a possibility which had not been foreseen at Versailles.

36. The link between the Versailles Peace Treaties of 1919 and the mechanism established by the provisions of Articles 34 and 35 of the Statute of the Permanent Court of International Justice, carried over in the Statute of the present Court, reveals the political dimension of the project: the judicial rights of defeated States are not treated on a basis of equality with those of other States.

*(Signed)* Raymond RANJEVA.

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## DISSENTING OPINION OF JUDGE OWADA

*The legal significance of the 2004 Judgment and of the 2007 Judgment — The applicability of the so-called “Mavrommatis principle” to the present case — The jurisprudence of the Court on the Mavrommatis principle as a principle relating to consent to jurisdiction — The scope of the Mavrommatis principle not covering any and all “procedural defects” in proceedings before the Court — The capacity to appear before the Court as an issue to be determined at the time of the act instituting proceedings — The irrelevance of applicant/respondent distinction for the purposes of access to the Court.*

1. I have voted against the part of the operative clause of the Judgment in the present case in which the Court rejects the first preliminary objection submitted by the Republic of Serbia in so far as it relates to its capacity to participate in the proceedings instituted by the Application of the Republic of Croatia and finds that it has jurisdiction to entertain the Application (Judgment, para. 146 (1) and (3)). For the reasons set out below, I am of the view that the Court is not competent to entertain the present case submitted by the Republic of Croatia, since the Respondent, the Republic of Serbia, lacked the capacity to participate in the present proceedings at the time when the Applicant, the Republic of Croatia, filed an Application to institute the proceedings against the Respondent before the Court.

I. THE LEGAL SIGNIFICANCE OF THE 2004 JUDGMENT AND OF THE 2007 JUDGMENT

2. In its 2004 Judgments in the cases concerning *Legality of Use of Force* (hereinafter referred to as the “NATO” cases; *I.C.J. Reports 2004 (I, II, III)*, pp. 279-1450) the Court held that “it ha[d] no jurisdiction to entertain the claims made in the Application filed by Serbia and Montenegro on 29 April 1999” (*ibid.*, p. 328, para. 129). This conclusion of the Court was based on its finding on Article 35, paragraph 1 and paragraph 2, of the Statute of the Court.

First, in relation to Article 35, paragraph 1, the Court found 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” (*ibid.*, pp. 314-315, para. 91).

On that ground, it held that “the Court was not open to Serbia and Montenegro under Article 35, paragraph 1, of the Statute” (*Legality of Use of Force, I.C.J. Reports 2004 (I)*, p. 315, para. 91).

Second, with regard to Article 35, paragraph 2, the Court also found that “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” (*ibid.*, p. 324, para. 113). On that ground it held that “Article 35, paragraph 2, of the Statute does not provide [the Applicant] with a basis to have access to the Court, under Article IX of [the Genocide] Convention” (*ibid.*, p. 324, para. 114).

3. In its 2007 Judgment in the case concerning the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)* in which the same question of the capacity of Serbia and Montenegro to be a party to the proceedings was at issue, this time as respondent, in application of Article 35, paragraph 1, of the Statute, the Court stated as follows:

“The Court . . . considers it necessary to emphasize that the question whether a State may properly come before the Court, on the basis of the provisions of the Statute, whether it be classified as a matter of capacity to be a party to the proceedings or as an aspect of jurisdiction *ratione personae*, is a matter which precedes that of jurisdiction *ratione materiae*, that is, whether that State has consented to the settlement by the Court of the specific dispute brought before it. The question is in fact one which the Court is bound to raise and examine, if necessary, *ex officio*, and if appropriate after notification to the parties. Thus if the Court considers that, in a particular case, the conditions concerning the capacity of the parties to appear before it are not satisfied, while the conditions of its jurisdiction *ratione materiae* are, it should, even if the question has not been raised by the parties, find that the former conditions are not met, and conclude that, for that reason, it could not have jurisdiction to decide the merits.” (*I.C.J. Reports 2007 (I)*, p. 94, para. 122.)

Having enunciated in this way the basic principle relating to the essential nature of the capacity of the parties to participate in the proceedings before the Court under Article 35, paragraph 1, of the Statute, the Court in that case nevertheless came to the following conclusion:

“The Court stated [in its 1996 Judgment on the present *Genocide Convention* case, Preliminary Objections] that ‘Yugoslavia was bound by the provisions of the [Genocide] Convention on the date of the filing of the Application in the present case’ (*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),

and found 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’ (*ibid.*, p. 623, para. 47 (2) (a)) . . . [T]his finding must as a matter of construction be understood, by necessary implication, to mean that the Court at that time perceived the Respondent as being in a position to participate in cases before the Court. On that basis, it proceeded to make a finding on jurisdiction which would have the force of *res judicata*.” (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, *Judgment, I.C.J. Reports 2007 (I)*, pp. 98-99, para. 132.)

With regard to the difference between that case and the *NATO* cases, the Court had the following to say:

“That the FRY had the capacity to appear before the Court in accordance with the Statute was an element in the reasoning of the 1996 Judgment which can — and indeed must — be read into the Judgment as a matter of logical construction. That element is not one which can at any time be reopened and re-examined, for the reasons already stated above. As regards the passages in the 2004 Judgments relied on by the Respondent, it should be borne in mind that the concern of the Court was not then with the scope of *res judicata* of the 1996 Judgment, since in any event such *res judicata* could not extend to the proceedings in the cases that were then before it, between different parties. It was simply appropriate in 2004 for the Court to consider whether there was an expressly stated finding in another case that would throw light on the matters before it. No such express finding having been shown to exist, the Court in 2004 did not, as it has in the present case, have to go on to consider what might be the unstated foundations of a judgment given in another case, between different parties.” (*Ibid.*, pp. 99-100, para. 135.)

4. It is clear that in the present case between Croatia and Serbia no such “express finding” constituting *res judicata* exists, such as that which led the Court in 2007 to affirm its jurisdiction to entertain the case. Whatever may have been the precise reasoning of the Court in 1996, when it decided 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” (*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. 623, para. 47 (2) (a)), it is clear that this decision on the point of jurisdiction constituted *res judicata* for the 2007 Judgment. It is for this reason that I agreed with the majority in the 2007 Judgment that the Court, as a court of law which can only function in strict observance

of the procedural requirements prescribed in its Statute and Rules, must be held in law, at any rate by construction, to have concluded that the conditions prescribed in Article 34 and Article 35 respectively have been satisfied, including the *locus standi* of the parties.

In the midst of the “amorphous . . . situation” that prevailed as of 1996 (see *Legality of Use of Force (Serbia and Montenegro v. Belgium)*, *Preliminary Objections, Judgment, I.C.J. Reports 2004 (I)*, p. 310, para. 79; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, *Judgment, I.C.J. Reports 2007 (I)*, p. 98, para. 131) regarding the precise legal status of the Federal Republic of Yugoslavia (hereinafter referred to as the “FRY”) in relation to the United Nations, which the 2004 Judgment later came to analyse in great detail, it may well be that the Court at the time of its 1996 Judgment refrained from digging deep into the analysis of the legal standing of the Respondent and was satisfied, as far as that case was concerned, with the fact that neither of the Parties disputed the capacity of the Respondent to appear before the Court. Be that as it may, what is decisive is the fact that, as a result, this issue of *locus standi* of the Respondent, as far as that case was concerned, must be construed in law as finally settled, constituting *res judicata*.

5. It is important to note, however, as the present Judgment declares in no ambiguous terms, that this conclusion of the 2007 Judgment on this point does not constitute *res judicata* for the present case. Neither of course does the 2004 Judgment in this respect. What is crucial, however, is that by the time of the 2004 Judgment, as contrasted to the time of the 1996 Judgment, this amorphous legal situation that prevailed at the time of the 1996 Judgment had been clarified through the developments since November 2000, when the FRY was admitted as a new Member of the United Nations in accordance with the procedures prescribed for the admission of States as new Members. The 2004 Judgment, which was not bound by what the Court had decided in 1996 as *res judicata*, assessed this legal situation which had by then become clear and came to the only logical conclusion as cited above in paragraph 2 of this opinion. This conclusion that Serbia lacked access to the Court can be considered an “express finding” within the meaning of paragraph 135 of the 2007 Judgment cited above in paragraph 3 of this opinion. Following the Court’s reasoning expressed therein, when a relevant express finding does exist in another case with different parties, the Court must “go on to consider what might be the unstated foundations of [that] judgment” (*ibid.*, p. 100, para. 135). The Court in the present case, therefore, must consider the unstated foundations that led to the express finding in the *NATO* cases, even though that finding is not *res judicata* in the present case. In other words, the Court in 2004 did not have to consider the 1996 Judgment involving different parties because the 1996 case did not reach an “express finding” as to access (the finding on access is only implicit from the finding on

jurisdiction), but the Court in the present case must consider the foundations for the 2004 finding as to access because it is express.

6. It is against these complex elements to be taken into account in relation to the legal status of the FRY (now Serbia in the present proceedings) in relation to the United Nations and consequently to the Court, that the Court has to look at the issue of *locus standi* of the Respondent in the present proceedings which were instituted in 1999. It should be emphasized that the Court came to its conclusion in 2004 on exactly the same question of *locus standi* of the FRY, though as Applicant at that time, in the proceedings filed in 1999. If the reasoning for that finding is to be respected in the absence of particular reasons to depart from it, the Court must conclude in the present proceedings that the FRY did not have the *locus standi* to appear before the Court, unless there is a contrary prior finding which binds the Court as *res judicata* emanating from a judgment in the same case, as it was the case with the 2007 Judgment. There is no such finding that constitutes *res judicata* in the present case. This is the crucial difference between the 2007 Judgment in the *Bosnia and Herzegovina v. Serbia and Montenegro* case and the present *Croatia v. Serbia* case.

7. On the basis of this reasoning, however, there are two further questions that the Court has to answer before reaching its final conclusion. First is the question of whether the subsequent admission in November 2000 of the FRY to the United Nations — which has had the effect of making the FRY from that time onwards *ipso facto* a party to the Statute of the Court in accordance with Article 93, paragraph 1, of the Charter of the United Nations — has brought about a change in the legal status of the FRY in the present proceedings with regard to its *locus standi* in the context of Article 35, paragraph 1, of the Statute. Second is the question of whether the fact that the FRY/Serbia is the Respondent in the present case, whereas it was the Applicant in the 2004 *NATO* cases should make a legal difference that justifies distinguishing the present case from the *NATO* cases.

## II. THE APPLICABILITY OF THE *MAVROMMATIS* PRINCIPLE

8. On the first point, the present Judgment takes the position that this subsequent admission of the FRY to the United Nations is indeed a legally relevant factor to be considered. On that basis the present Judgment comes to the conclusion that, in accordance with the principle enunciated by the Permanent Court of International Justice in the case concerning *Mavrommatis Palestine Concessions* (*Judgment No. 2, 1924, P.C.I.J., Series A, No. 2*, hereinafter referred to as the “*Mavrommatis* case”) the requirement under Article 35, paragraph 1, concerning the capacity of the Respondent to appear before the Court is now to be regarded as satisfied.

In the present case, the basic thrust of the Applicant's argument is that

“[t]he *Mavrommatis* principle is the principle that provided that when four substantial elements [one: seisin; two: basis of claim; three: consent to jurisdiction; four: access to the Court] are united at any given time, the order in which this occurred is a pure matter of form and does not affect [the Court's] jurisdiction” (CR 2008/11, p. 34, para. 8).

Against this, Serbia responds by pointing out that “the conclusion suggested by the Applicant is based on the assumption that the Court was validly seised [but that] this assumption simply does not exist in our case” (CR 2008/12, p. 19, para. 34). More substantively, however, it argues that not every procedural shortcoming can be disregarded in the light of later developments. The Respondent claims, as summarized in the present Judgment, that

“the jurisprudence [of the *Mavrommatis* case] cannot be applied where the unmet condition concerns the capacity of a party to participate in proceedings before the Court, in accordance with Articles 34 and 35 of the Statute, that is to say concerns a ‘fundamental question’ which, as the Court stated in 2004, must be examined before any other issue of jurisdiction” (Judgment, para. 84).

The present Judgment, in answer to the argument advanced by the Respondent, states as follows:

“the question of access is clearly distinct from those relating to the examination of jurisdiction in the narrow sense. But it is nevertheless closely related to jurisdiction, inasmuch as the consequence is exactly the same whether it is the conditions of access or the conditions of jurisdiction *ratione materiae* or *ratione temporis* which are unmet: the Court lacks jurisdiction to entertain the case. It is always within the context of an objection to jurisdiction, as in the present case, that arguments will be raised before the Court regarding the parties' capacity to participate in the proceedings.” (*Ibid.*, para. 87.)

9. With regard to this argument of the Judgment, two points have to be raised. The first point is that the Judgment mixes two fundamentally different issues, both relating to the Court's function relating to its “exercise of jurisdiction”. One is the issue of whether the Court, as a court of law given a specific mandate to exercise its competence to entertain cases, is *competent to entertain the case* in question within the mandate given to it by its constitutional instrument, i.e., the Statute of the Court. This is the essence of the question of *locus standi* of parties. This question is

legally separate from, and logically preceding, the second question of whether in a given situation the parties have given the Court the jurisdictional basis to entertain the case — a question of jurisdiction properly so-called which in the case of international jurisdiction, in contrast to municipal jurisdiction, is primarily determined by the will of the parties in a particular case to grant such competence to the Court. The first issue, which is independent of the parties, has nothing to do with the second issue relating to the existence and the scope of jurisdiction, which is dependent on the will of the parties. Therefore the thesis advanced by the Applicant that all these different elements that constitute jurisdiction of the Court are of the same legal character and that “the order in which this occurred is a pure matter of form and does not affect [the Court’s] jurisdiction” does not hold (CR 2008/11, p. 34, para. 8).

10. It may be true that in the *Mavrommatis* case, the Court did not make this fundamental distinction sufficiently clear. It should be pointed out, however, that in that case the Court was clearly operating in an area where only the elements relating to the second issue were in issue. Thus the pertinent part of the *Mavrommatis* Judgment states:

“[I]t must . . . be considered . . . whether the validity of the institution of proceedings can be disputed on the ground that the application was filed before Protocol XII had become applicable. This is not the case. Even assuming that before that time the Court had no jurisdiction because the international obligation referred to in Article II was not yet effective, it would always have been possible for the applicant to re-submit his application in the same terms after the coming into force of the Treaty of Lausanne, and in that case, the argument in question could not have been advanced. Even if the grounds on which the institution of proceedings was based were defective for the reason stated, this would not be an adequate reason for the dismissal of the applicant’s suit. The Court, whose jurisdiction is international, is not bound to attach to matters of form the same degree of importance which they might possess in municipal law. Even, therefore, if the application were premature because the Treaty of Lausanne had not yet been ratified, this circumstance would now be covered by the subsequent deposit of the necessary ratifications.” (*Mavrommatis Palestine Concessions, Judgment No. 2, 1924, P.C.I.J., Series A, No. 2, p. 34.*)

11. The oft-quoted dictum of the *Mavrommatis* case that “[t]he Court, whose jurisdiction is international, is not bound to attach to matters of form the same degree of importance which they might possess in municipal law” and that therefore, “[e]ven . . . if the application were premature because the Treaty of Lausanne had not yet been ratified, this circumstance would now be covered by the subsequent deposit of the necessary ratifications” has almost acquired a life of its own, going beyond its lim-

ited sphere of application and has come to be understood too often as a principle of generalized application. A perusal of the *Mavrommatis* Judgment and its related documents would reveal, however, that the statement was made in the much more specific context of that case, relating to the very narrow issue of the jurisdictional nexus between the instrument in dispute (Protocol XII of the Treaty of Lausanne) and the compromissory clause that was invoked by the Applicant as the basis of jurisdiction (Article 26 of the Mandate).

12. The dispute between the Applicant (Greece as the State of nationality of Mr. Mavrommatis, a concessionaire in Palestine) and Respondent (the United Kingdom, the Mandatory Power for Palestine under the League of Nations) hinged upon the implementation of Article 11 of the Mandate in question, which in turn was linked to the interpretation of certain provisions of Protocol XII of the Treaty of Lausanne that dealt with the issue of concessions that had been granted by the Ottoman Empire. In the Judgment the Court made its position clear that “Protocol XII was drawn up in order to fix the conditions governing the recognition and treatment by the contracting Parties of certain concessions granted by the Ottoman authorities before the conclusion of the Protocol” and accepted that “the Protocol guarantees the rights recognised in it against any violation regardless of the date at which it may have taken place” (*Mavrommatis Palestine Concessions, Judgment No. 2, 1924, P.C.I.J., Series A, No. 2, p. 34*).

13. It is true that at the stage of the written pleadings, the Respondent in the case did refer to the Protocol in the following carefully guarded language:

“The Concessions Protocol [i.e., Protocol XII] cannot technically come into operation in Palestine until the Treaty of Peace with Turkey comes into force, i.e., until the moment of the first deposit of the ratifications of that instrument.

His Britannic Majesty’s Government have endeavoured and will continue to endeavour to conform themselves strictly to the obligations which they undertake in this Protocol, but they respectfully submit that *until the instrument has come into operation in Palestine it would be premature for an international tribunal to entertain complaints as to its infringement or as to its meaning and effect*. His Majesty’s Government, therefore, reserve all their rights as regards the extent to which Mr. Mavrommatis and his concessions are entitled to benefit by its provisions.” (*Acts and Documents Relating to Judgments and Advisory Opinions Given by the Court, P.C.I.J., Series C, No. 5-I, Documents Relating to Judgment No. 2, The Mavrommatis Palestine Concessions, Preliminary Objection to the Jurisdiction of the Court and Preliminary Counter-Case Filed by the British Government, pp. 446-447; emphasis added.*)

However, at the stage of the oral pleadings in the public sitting held on

15 July 1924 — a date which was still before the entry into force of the Protocol XII in question — the Respondent did not raise this point that the Protocol was not in operation when developing the argument that the Court had no jurisdiction. It merely stated that “there is nothing in the Concessions Protocol [XII] . . . which provides any tribunal which is to decide questions arising under it” (*P.C.I.J., Series C, No. 5-I*, p. 77). In fact, the agent for the Respondent even went further and stated that

“The dispute about which I have been addressing you this morning is, in my opinion, and I trust also in that of the Tribunal, not a dispute relating to the Mandate, but one relating solely to the Concessions Protocol which is attached to the Treaty of Lausanne. That is a matter upon which, if there had arisen any genuine difference of opinion between the Greek and the British Governments and if the Greek Government has come to the British Government and said: Will you agree to refer it to arbitration; will you agree to refer to the Permanent Court of International Justice this dispute between us as to the meaning of that contractual engagement by which we are both bound, the answer of the British Government would have been Yes. Both Governments are bound by the Protocol and both have set their hand to the provision that figures in Article 13 of the Covenant of the League.” (*Ibid.*, p. 42.)

This shows not only that the issue of whether the Application had been premature because of the unratified status of the Protocol was not insisted upon by the Respondent but also that this issue was regarded by the Respondent as irrelevant to its argument as the basis of its preliminary objection.

14. It is not quite clear why the *Mavrommatis* Judgment made its oft-quoted dictum in this situation despite its mootness to the case. What is clear, nevertheless, is that the *Mavrommatis* case cannot constitute an authority for holding, as the present Judgment declares, that “it is of no importance which condition was unmet at the date the proceedings were instituted, and thereby prevented the Court at that time from exercising its jurisdiction, once it has been fulfilled subsequently” (Judgment, para. 87). It may be conceded, as the Judgment states, that the issue of capacity of the Parties’ access to the Court is “closely related to jurisdiction” (*ibid.*) in a general sense that the former is the prerequisite to the latter and thus linked thereto, but this fact cannot alter the legal situation that it is a question which is essentially distinct in its legal nature from jurisdiction. The issue of jurisdiction concerns whether and at what point the legal nexus between the parties on the basis of consent given comes into operation. By contrast, the issue of capacity has nothing to do with the legal nexus between the parties. As the review of jurisprudence in the following section will show, cases where the *Mavrommatis* precedent was invoked concerned only the issue of consent to jurisdiction, an area that has rightfully been allowed a certain level of flexibility for the basic reason that it is always

consent which can create the basis of competence of the Court in international jurisdiction. None of these cases concerned the issue of capacity or access, which is a fundamental question of legal status beyond the consent of the parties.

### III. EXAMINATION OF PAST PRECEDENTS

15. As I made clear earlier, it is my view that what is more fundamental about this so-called “*Mavrommatis* principle” is the scope of its application. In light of the avowed rationale of the principle that certain procedural defects in the jurisdictional consent of the parties present at the time of application can be cured by subsequent actions after the institution of the proceedings, the principle cannot extend to the issue of *locus standi* of the parties, an issue which is legally distinct from and logically precedent to jurisdictional consent. It is useful in this respect to examine all the cases following the *Mavrommatis* case — in any event the *Mavrommatis* case does not have much relevance to the so-called “*Mavrommatis* principle”, as demonstrated above — in which the principle has been referred to, either *eo nomine* or by implication, by one or other of the parties. There have been altogether eight cases, including the *Mavrommatis* case, in the past<sup>1</sup>. It should be pointed out that in all these cases, the point at issue was whether the jurisdictional basis for the Court’s exercise of jurisdiction that was not complete at the time of the filing of the Application could be cured through subsequent developments.

(1) *The case concerning Certain German Interests in Polish Upper Silesia (Germany v. Poland), Jurisdiction*

16. In this case the Respondent raised an objection to the Court’s jurisdiction based on the compromissory clause in the bilateral treaty between the Applicant and the Respondent — Article 23 of the Conven-

<sup>1</sup> These other seven cases are: *Certain German Interests in Polish Upper Silesia (Germany v. Poland), Jurisdiction, Judgment No. 6, 1925, P.C.I.J., Series A, No. 6*; *Northern Cameroons (Cameroon v. United Kingdom), Preliminary Objections, Judgment, I.C.J. Reports 1963*; *Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain), Preliminary Objections, Judgment, I.C.J. Reports 1964*; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984*; *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)*; *Gabčíkovo-Nagymaros Project (Hungary/Slovakia), Judgment, I.C.J. Reports 1997*; *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 2006*.

tion of Geneva — contending that one of the conditions for the exercise of jurisdiction by the Court, i.e., “differences of opinion respecting the construction and application of Articles 6 to 22” had not been fulfilled (*Certain German Interests in Polish Upper Silesia, Jurisdiction, Judgment No. 6, 1925, P.C.I.J., Series A, No. 6*, p. 13). The Court rejected this contention on the ground that “[n]ow a difference of opinion does exist as soon as one of the Governments concerned points out that the attitude adopted by the other conflicts with its own views” (*ibid.*, p. 14). Then, and only then, it went on to say:

“Even if, under Article 23, the existence of a definite dispute were necessary, this condition could at any time be fulfilled by means of unilateral action on the part of the applicant Party. And the Court cannot allow itself to be hampered by a mere defect of form, the removal of which depends solely on the Party concerned.” (*Ibid.*)

(2) *The case concerning Northern Cameroons*  
(Cameroon v. United Kingdom), Preliminary Objections

17. In this case the Respondent raised a preliminary objection to the jurisdiction of the Court based, *inter alia*, on Article 32, paragraph 2, of the then Rules of Court which provides that when a case is brought before it by means of an application, the application must not only indicate the subject of the dispute, but it must also as far as possible specify the provisions on which the applicant founds the jurisdiction of the Court, and state the precise nature of the claim and the grounds on which it is based.

The Court, while pronouncing its agreement with the view expressed by the Permanent Court of International Justice in the *Mavrommatis* case that “[t]he Court, whose jurisdiction is international, is not bound to attach to matters of form the same degree of importance which they might possess in municipal law”, pointed out that “Article 32 (2) of the Rules of Court requires the Applicant ‘as far as possible’ to do certain things” and on that basis came to the conclusion that:

“In the view of the Court the Applicant has sufficiently complied with the provisions of Article 32 (2) of the Rules and the preliminary objection based upon non-compliance therewith is accordingly without substance.” (*Northern Cameroons (Cameroon v. United Kingdom), Preliminary Objections, Judgment, I.C.J. Reports 1963*, p. 28.)

Thus the question of applicability of the principle to this case did not arise.

(3) *The case concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Jurisdiction and Admissibility*

18. In this case, the Applicant relied in its Application on the declarations of the parties accepting the compulsory jurisdiction of the Court in order to found jurisdiction, but in its Memorial it invoked also the 1956 Treaty of Friendship, Commerce and Navigation between Nicaragua and the United States as a complementary basis for the Court's jurisdiction. The Respondent objected to this invocation of a jurisdictional basis not specified in the Application instituting proceedings and argued that in proceedings initiated by means of an application, the jurisdiction of the Court was founded upon the legal grounds specified in that application.

The Court, accepting that there was a dispute between the Parties, *inter alia*, as to the "interpretation or application" of the Treaty, held on this point that

"it does not necessarily follow that, because a State has not expressly referred in negotiations with another State to a particular treaty as having been violated by conduct of that other State, it is debarred from invoking a compromissory clause in that treaty" (*Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984*, p. 428, para. 83).

It is true that the Court in this context quoted a passage from the *Certain German Interests in Polish Upper Silesia* case which read that "the Court cannot allow itself to be hampered by a mere defect of form, the removal of which depends solely on the party concerned" (*ibid.*, p. 429, para. 83). However, it is clear from what is quoted above that the Court in this case did not accept that there had been a "defect of form" in the Application of the Applicant. Moreover, it should be reiterated that the issue in this case, like the others, concerns the issue of jurisdictional consent of the parties, not an objective question of access to the Court for which the parties' consent is irrelevant.

(4) *The case concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia), Preliminary Objections*

19. As distinct from other cases, this case merits our careful examination, since the issue raised in this case could have touched upon the same issue as is raised in the present case. In this case, the Respondent argued, *inter alia*, that the Genocide Convention, which was invoked as the basis of jurisdiction, could not have been in force between the Parties, at the time of the filing of the Application by the Applicant in March 1993, because the two States did not at that time recognize one another and the conditions necessary to found the basis of the Court's jurisdiction were therefore lacking. On this objection of the Respondent to the juris-

diction of the Court under the Genocide Convention, the Court pointed out that

“this situation no longer obtains since the signature, and the entry into force on 14 December 1995, of the Dayton-Paris Agreement, Article X of which stipulates that [the FRY and the Republic of Bosnia and Herzegovina recognize each other as sovereign independent States]” (*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. 613, para. 25).

The Court in this passage went on to elaborate the point as follows:

“For the purposes of determining its jurisdiction in this case, the Court has no need to settle the question of what the effects of a situation of non-recognition may be on the contractual ties between parties to a multilateral treaty. It need only note that, even if it were to be assumed that the Genocide Convention did not enter into force between the Parties until the signature of the Dayton-Paris Agreement, all the conditions are now fulfilled to found the jurisdiction of the Court *ratione personae*.

It is the case that the jurisdiction of the Court must normally be assessed on the date of the filing of the act instituting proceedings. However, the Court, like its predecessor, the Permanent Court of International Justice, has always had recourse to the principle according to which it should not penalize a defect in a procedural act which the applicant could easily remedy.” (*Ibid.*, p. 613, para. 26.)

As authority for this statement the Court quoted from the *Mavrommatis* case the passage quoted above (see above at paragraph 10) and from the *Certain German Interests in Polish Upper Silesia* case the passage quoted above (see above at paragraph 16), and went on to state as follows:

“The present Court applied this principle in the case concerning the *Northern Cameroons (I.C.J. Reports 1963, p. 28)*, as well as *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)* when it stated: ‘It would make no sense to require Nicaragua now to institute fresh proceedings based on the Treaty, which it would be fully entitled to do.’ (*I.C.J. Reports 1984, pp. 428-429, para. 83.*)

In the present case, even if it were established that the Parties, each of which was bound by the Convention when the Application was filed, had only been bound as between themselves with effect from 14 December 1995, the Court could not set aside its jurisdiction on this basis, inasmuch as Bosnia and Herzegovina might at any time file a new application, identical to the present one, which would be unassailable in this respect.

In the light of the foregoing, the Court considers that it must reject Yugoslavia's third preliminary objection." (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia), Preliminary Objections, Judgment, I.C.J. Reports 1996 (II)*, pp. 613-614, para. 26.)

20. It should be pointed out that the judgment of the Court on this point was confined to the issue of whether "the conditions necessary to found the consensual basis of the Court's jurisdiction were . . . lacking" (*ibid.*, p. 613, para. 25). To that extent, this case is no different from the other cases examined above. It is noteworthy in this context that the Court expressly stated that "[f]or the purposes of determining its jurisdiction in this case, the Court has no need to settle the question of what the effects of a situation of non-recognition may be on the contractual ties between parties to a multilateral treaty" (*ibid.*, p. 613, para. 26). Thus, in my view, the Court came close to deciding upon an issue which in its nature was very similar to the one raised in the present case, i.e., the issue of the legal status of one of the parties in relation to the other party. However, the Court avoided that issue by stating that "the Court has no need to settle the question" (*ibid.*). Presumably the Court in saying this had in mind the Genocide Convention as the "multilateral treaty" in issue. However, this general reservation of the Judgment is equally applicable to the Statute of the Court as "a [relevant] multilateral treaty".

The conclusion I reach out of this case is that the Judgment is inconclusive on this point of status and cannot therefore constitute an authority in the present case.

(5) *The case concerning Gabčíkovo-Nagymaros Project*  
(Hungary/Slovakia)

21. The point in issue in this case does not seem even remotely related to the so-called *Mavrommatis* principle, although a judge in his dissenting opinion quoted the *Mavrommatis* dictum as a rationale to justify a certain point of law involved. In this case Hungary argued that it was entitled to terminate a bilateral treaty with Czechoslovakia for the construction and operation of the Gabčíkovo-Nagymaros System of Locks on the ground that Czechoslovakia had materially breached the treaty by beginning the process of unilaterally diverting the River Danube in November 1991. The Court, however, found that the treaty was not breached until Czechoslovakia actually started the diversion of the water into a bypass canal in October 1992, which came about after Hungary took the action of terminating the treaty.

One of the judges who dissented from the *Gabčíkovo-Nagymaros* Judgment argued in his opinion, citing the *Mavrommatis* and the *Certain German Interests in Polish Upper Silesia* cases, that "it would have been possible for [the Respondent] to withdraw this act [of termination of the

treaty] and to substitute it later by a new notification of termination based on the events of October 1992” (*I.C.J. Reports 1997*; dissenting opinion of Judge Fleischhauer, p. 210, para. 2).

While it may be possible to draw an analogy between the issue involved in this case and the so-called *Mavrommatis* principle, it is clear that this case does not involve the application of the *Mavrommatis* principle and has no relevance to the present case.

(6) *The case concerning Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda)*, Jurisdiction and Admissibility

22. In this case, the issue was whether the claimed withdrawal of reservations by the Respondent relating, *inter alia*, to Article IX of the Genocide Convention as the jurisdictional basis invoked by the Applicant in the case, which came after the submission of the Application by the Applicant, could be used to establish the jurisdiction *ratione materiae* of the Court.

After referring to the dictum in the 1996 Judgment of the Court in the *Genocide Convention* case examined above (see above at para. 19) that “the Court should not . . . penalize a defect in procedure which the Applicant could easily remedy” (*I.C.J. Reports 2006*, p. 29, para. 54), the Court stated that

“if the Rwandan Minister’s statement had somehow entailed the withdrawal of Rwanda’s reservation to Article IX of the Genocide Convention in the course of the proceedings, the DRC could on its own initiative have remedied the procedural defect in its original Application by filing a new Application” (*ibid.*, p. 29, para. 54).

It is clear that this is a case where the issue was whether there was a consensual link for jurisdiction between the Parties based on Article IX of the Genocide Convention, which would be held to exist at the time of the Judgment, if the claimed withdrawal of reservations were to be established by the Applicant. It may be noted that the Court’s conclusion is in any case *obiter dictum*, inasmuch as it had already concluded “that the statement by the Rwandan Minister of Justice was not made in sufficiently specific terms” so as to constitute withdrawal of Rwanda’s reservation to Article IX of the Genocide Convention (*ibid.*, pp. 28-29, para. 52). Be that as it may, however, what is crucial for the purposes of the present case is that the Court was dealing here with the question of whether an initial lack of consent had been subsequently rectified; this has no bearing on the issue in the present case, i.e., procedural defects beyond the consensual reach of the Parties.

(7) *The case concerning Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain), Preliminary Objections*

23. A similar argument to the *Mavrommatis* principle was advanced in the case concerning *Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain), Preliminary Objections, Judgment, I.C.J. Reports 1964*, p. 6 (hereinafter referred to as the “*Barcelona Traction*” case), without specifically citing *Mavrommatis* as precedent. In that case, the Respondent argued that because the case was founded on a compromissory clause referring to the Permanent Court of International Justice, and because the Respondent had not been a party to the United Nations at the time of the adoption of the Statute of the International Court of Justice, Article 37 of that Statute — according to which a compromissory clause which “provides for reference of a matter to . . . the Permanent Court of International Justice, . . . shall, as between the parties to the present Statute, be referred to the International Court of Justice” — did not apply to it, and that therefore the Court lacked jurisdiction to hear the case. The Court, applying a logic that might appear to be analogous to that of the *Mavrommatis* principle, concluded that

“the basic obligation to submit to compulsory adjudication was never extinguished by the disappearance of the Permanent Court, but was merely rendered functionally inoperative by the lack of a forum through which it could be implemented. What therefore happened in 1955, when this *lacuna* was made good by Spain’s admission to the United Nations, was that the operation of the obligation revived, because the means of implementing it had once more become available” (*ibid.*, p. 40).

However, this variation of the *Mavrommatis* principle, which might at first regard appear similar to the situation in the present case — since like the present case the procedural defect in question was held to be cured by the Respondent becoming a Member of the United Nations — is in fact fundamentally different. In the *Barcelona Traction* case, Spain’s membership in the United Nations triggered a pre-existing consent arising out of its previously ratified compromissory clauses. The defect at issue did not involve any issue of Spain’s access to the Court or other fundamental issue of seisin. Thus, the *Barcelona Traction* case, like the other cases discussed above, deals with consent and not access. The principle applied in the *Barcelona Traction* case, therefore, can have no bearing on the present case.

IV. CONCLUSION ON THE *MAVROMMATIS* PRINCIPLE

24. The conclusions I have reached as a result of close examination of the precedents in the jurisprudence of the Court (including the PCIJ), in

which the so-called *Mavrommatis* principle has been invoked, either expressly or by implication, can be summarized as follows:

- (a) In spite of the generalized formula often quoted from the Judgment in the *Mavrommatis* case, the *Mavrommatis* case was decided on a totally different basis, and the present case does not present any legally analogous situation where the so-called *Mavrommatis* principle may have a place of application.
- (b) Each of the subsequent cases in which this principle has been invoked are all related to the issue of the initial absence of consent to jurisdiction which, allegedly, had vitiated the basis of jurisdiction of the Court but was cured by a subsequent act or event. There has been no case that can justify the application of the principle in a generalized formulation in which it is claimed to have an extended application to any and all flaws in procedure.
- (c) The rationale for deviating from the strict application of procedural requirements is diverse in each case and each of the cases where such deviation is accepted by the Court has its own specific rationale and its intrinsic limitations. However, in all the cases that have been examined, the basic problem related to the original absence of consent as the vitiating factor for jurisdiction.
- (d) There has been no case in the jurisprudence of the Court in which the so-called *Mavrommatis* principle has been understood to cover any and all “procedural defects” in the proceedings before the Court. The “procedural defects” that have been at issue in those cases have mostly been alleged technical flaws relating to the element of consent in one way or another at the time of the institution of proceedings, and have never involved such issues as the capacity of the parties to appear before the Court.
- (e) In all the cases where the principle has been applied, what is involved is the issue of assessing the subsequent coming into existence of the consensual nexus of jurisdiction as sufficient for the purpose of constituting the essential condition for the exercise of jurisdiction by the Court. This is only natural, since the very basis of international jurisdiction lies in the consent of the parties and the arrival of this element of consent, even at a later stage in the proceedings, has always been recognized as constituting an exception to the basic principle that the legal basis for the competence of the Court has to exist at the time of the institution of the proceedings, as demonstrated in the institution of *forum prorogatum*.

25. This situation is not at all surprising. The basic principle underlying the jurisdiction of an international court, as the Court has emphasized time and again, is that “its jurisdiction must be determined at the time that the act instituting proceedings was filed” (*Arrest Warrant of*

11 April 2000 (*Democratic Republic of the Congo v. Belgium*), *Judgment, I.C.J. Reports 2002*, pp. 12-13, para. 26). This basic principle is fundamental in particular in the sense that “if the Court has jurisdiction on the date the case is referred to it, it continues to do so regardless of subsequent events” (*ibid.*) and that such events “cannot deprive the Court of jurisdiction” (*ibid.*; see also the cases cited therein). It is as a legitimate exception to this principle that international jurisdiction has recognized that the reverse is not necessarily true. Thus if the consensual nexus as the basis of jurisdiction can be established subsequent to the institution of the proceedings, an act or event constituting such a consensual nexus can always offer the basis of jurisdiction, since international jurisdiction, in contrast to municipal jurisdiction, is based primarily on the consent of the parties. This indeed is the legal basis on which jurisdiction can be established under Article 38, paragraph 5, of the Rules of Court or upon which the institution of *forum prorogatum* is accepted in the jurisprudence of the Court.

26. By contrast, no logical ground exists, and therefore no precedent is to be found in the jurisprudence of the Court as examined above, to hold that the Court has been ready to apply this reverse principle as an exception to the general rule relating to the competence of the Court in such a general way as to justify an unqualified statement that “[e]ven if the grounds on which the institution of proceedings was based were defective . . . this would not be an adequate reason for the dismissal of the applicant’s suit” (*Mavrommatis Palestine Concessions, Judgment No. 2, 1924, P.C.I.J., Series A, No. 2*, p. 34). This statement was made in a very specific context, i.e., with regard to a treaty (Protocol XII) which was central to determining the substantive scope of “any international obligations accepted by the Mandatory” as provided for in Article 11 of the Mandate — a legal instrument that formed the basis for the Court’s jurisdiction (*ibid.*, p. 17). It was in this context that the applicability of Article 11 of the Mandate came to be questioned in the situation where the article in question was held not to be effective (*en vigueur*) at the time of the Application but to have come into effect two and a half months later.

27. In summary, it is clear that the so-called *Mavrommatis* principle under the *Mavrommatis* jurisprudence does not relate to a general proposition of whether any “procedural defect” in seising the Court can be cured when “it would always have been possible for the applicant to re-submit his application in the same terms” (*ibid.*, p. 34; Judgment, para. 82), but rather to a specific question of whether the “procedural defect” in question concerns the issue of consent of the parties to the jurisdiction of the Court and thus can be cured on the basis that consent of the parties can always create the legal basis for the Court to exercise jurisdiction. While I accept the statement in the present Judgment that the Court has “shown realism and flexibility in certain situations in which the conditions governing the Court’s jurisdiction were not fully satisfied when proceedings were initiated but were subsequently satisfied” (*ibid.*, para. 81), it is clear from the rationale of this practice and from the

case law on this point that such exceptions are to be applied restrictively. As the review of the Court's jurisprudence has shown, such flexibility with regard to jurisdictional consent has never been extended to the issue of access to the Court beyond the consent of the parties, and it should not be so extended in the present Judgment.

#### V. IRRELEVANCE OF THE ISSUE OF APPLICANT/ RESPONDENT DISTINCTION

28. As stated in paragraph 7 above, the second question to be examined is that of whether the fact that the FRY/Serbia is the Respondent in the present case whereas it was the Applicant in the 2004 *NATO* cases should make a legal difference in the context of the present case.

29. On this I do not have to spend too much ink. The plain and ordinary meaning of the language of Article 35, paragraph 1, makes it unnecessary to go into the legislative history of the provision. In reply to the question put to the Parties by Judge Abraham, both the Applicant and the Respondent have taken a negative position to such a distinction as a material factor, though clearly this is a matter which belongs to the Court to decide.

What seems to be decisive to me is the fact that making such a distinction in interpretation of Article 35, paragraph 1, would create an unequal treatment between the applicant and the respondent in matters relating to the access to the Court and the capacity to appear before the Court.

30. As the Court clearly enunciated in its 2004 Judgment, 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 (*Legality of Use of Force (Serbia and Montenegro v. Belgium), Preliminary Objections, Judgment, I.C.J. Reports 2004 (I)*, pp. 298-299, para. 46). And the rationale for this principle lies in the fact that the Court, as a court of law, can only function when both of the parties to the dispute have the capacity to appear before the Court.

It is to be recalled in this context that the Court in its 2004 Judgment expressed the view 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" (*ibid.*, p. 295, para. 36). It is on the basis of this distinction that the Court made the point that "[t]he 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" (*ibid.*; emphasis in the original). It is this distinction between the two separate questions that is crucial to the

consideration of this issue by the Court. This rationale naturally applies as validly to the respondent as to the applicant.

31. It may be noted in addition that this position of the Court in the 2004 Judgments is not only logically consistent with the general approach of the Court to the issue of its competence, but is the one which virtually all the parties in those cases endorsed (including, in particular, the respondents in the case) — a fact which is not always registered clearly in the minds of those who did not participate in the case. Thus, the NATO countries, as Respondents, tried to argue, in varying degrees, that the FRY did not have the *locus standi* to seise the Court as applicant, inasmuch as it was not a party to the Statute. The Respondents did not make a distinction in this regard on the applicability of this principle, on the basis of whether the party in question was the applicant or the respondent. It should be recalled that this claim was advanced during the period well after November 2000, when Serbia has been admitted to the United Nations and had become a party to the Statute of the Court. And the Court itself abided strictly by the general rule that its jurisdiction was to be assessed at the date of filing of the act instituting proceedings.

32. The argument that the present Judgment advances that “[i]t was clear that Serbia and Montenegro [as Applicant] did not have the intention of pursuing its claims by way of new applications” (Judgment, para. 89), as if it were a decisive factor in the reasoning of the Court, is singularly unpersuasive since the issue of the capacity of a party to seise the Court, contrary to such other aspects of jurisdiction as hinge upon the will of the parties, is a matter which the Court has to ascertain, if necessary *proprio motu*, independently of the will or the motive of one or the other of the parties. The fact that the Court in the *NATO* cases did not pursue the other “more flexible approach” simply testifies to the position of the Court that this issue belongs not to an area where a “procedural defect” can be cured in a flexible manner, but to an area which constitutes the essential structure of the Court as a court of law with competence to deal with disputes between the applicant and the respondent, both of whom must satisfy the requirement of having *locus standi* before the Court, irrespective of whether they are in a position of applicant or of respondent.

(Signed) Hisashi OWADA.

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## SEPARATE OPINION OF JUDGE TOMKA

*Preliminary objections — Jurisdiction ratione temporis — Whether the FRY could be bound by the Genocide Convention before 27 April 1992 — The Genocide Convention was applicable during the entire period of the armed conflict without interruption — Article IX of the Genocide Convention — Disputes relating to the interpretation or application of the Genocide Convention by the Contracting Parties thereto — Constituent units of the SFRY were not Contracting Parties to the Convention — Succession into responsibility of a predecessor State not within the jurisdiction of the Court — Responsibility for acts of an entity committed before it became a State and a Contracting Party not within the jurisdiction of the Court — Consequences of the FRY becoming party to the Convention on 27 April 1992 a matter to be determined at this stage of the proceedings.*

\* \* \*

1. This is a case which Croatia brought before the Court some eight years after the armed conflict in which it was involved with the Socialist Federal Republic of Yugoslavia (SFRY), and subsequently with the Federal Republic of Yugoslavia (FRY), broke out and four years after it ended, and during which, as Croatia alleges, violations of obligations under the Genocide Convention were committed. More than nine years have passed since the institution of proceedings on 2 July 1999. The Court only today determines that it has jurisdiction under Article IX of the Convention on the Prevention and Punishment of the Crime of Genocide (hereinafter “the Genocide Convention”) to entertain Croatia’s Application. Nevertheless, the Court still leaves open one aspect of its jurisdiction, which it considers together with the issue of admissibility, qualifying both of them as being of a *ratione temporis* character, when it finds that the second preliminary objection of Serbia, contending that the claims of Croatia based on acts and omissions which took place prior to 27 April 1992, are beyond the jurisdiction of the Court and inadmissible, “does not, in the circumstances of the case, possess an exclusively preliminary character” (Judgment, para. 146 (4)).

2. I am unable to subscribe either to this finding or its reasoning, and I have therefore voted against this conclusion while voting in favour of all the other conclusions reached by the Court. My negative vote calls for some explanation. With respect to other issues of jurisdiction, I can refer to the views I have already expressed in paragraphs 24 to 36 of my separate opinion in the case concerning the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and*

*Herzegovina v. Serbia and Montenegro*) (*Judgment, I.C.J. Reports 2007 (I)*, pp. 323-331). My approach in that case does not differ from the approach now adopted by the majority in the present case.

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3. Serbia raised a preliminary objection “that claims based on acts and omissions which took place prior to 27 April 1992 are beyond the jurisdiction of this Court and inadmissible” (Judgment, para. 22), the reason being that those acts occurred prior to the establishment of the Federal Republic of Yugoslavia (Serbia and Montenegro). Serbia argues that the earliest possible point in time at which the Convention could be found to have entered into force between the FRY and Croatia was 27 April 1992. Serbia contends that the

“Genocide Convention including the jurisdictional clause contained in its Article IX cannot be applied with regard to acts which occurred *before* Serbia came into existence as a State, and before it could therefore have become a party to the Convention, i.e. that it may not be applied with regard to acts that occurred before 27 April 1992” (CR 2008/9, pp. 13-14, para. 4; emphasis in the original).

4. Croatia draws the attention of the Court to the fact that a similar issue of jurisdiction *ratione temporis* under the Genocide Convention was dealt with by the Court in the *Bosnia and Herzegovina v. Yugoslavia* case. Croatia relies on the 1996 Judgment in which the Court observed “that the Genocide Convention — and in particular Article IX — does not contain any clause the object or effect of which is to limit in such manner the scope of its jurisdiction *ratione temporis*”, that the Court could only deal with events subsequent to the different dates on which the Convention became applicable between the FRY and Bosnia and Herzegovina and, moreover, “nor did the Parties themselves make any reservation to that end” (*I.C.J. Reports 1996 (II)*, p. 617, para. 34). Croatia recalls in particular the Court’s finding in 1996 that “it has jurisdiction in [the *Bosnia and Herzegovina*] case to give effect to the Genocide Convention with regard to the relevant facts which have occurred *since the beginning of the conflict which took place in Bosnia and Herzegovina*” (*ibid.*; emphasis added). That conflict started in spring 1992, while the conflict in Croatia’s territory had already begun in summer 1991.

5. I concur with the Court’s view on the circumstances which distinguish the present case from the previous one, in which jurisdiction initially was decided in 1996. The Court now emphasizes that in the present case, “the Parties advanced arguments relating to the *consequences to be drawn from the fact that the FRY only became a State and a party to the Genocide Convention on 27 April 1992*” (Judgment, para. 124; emphasis added). I would add that that issue was not before the Court in 1996. No issue of the FRY being a party to the Genocide Convention was raised

by either party in the *Bosnia and Herzegovina* case; nor did the Court take any position with respect to the exact date on which the FRY became party to the Convention. The FRY persisted at that time in its claim in the United Nations that it continued the international legal personality of the former Yugoslavia. The Court limited itself to the conclusion that the Federal Republic of “Yugoslavia was bound by the provisions of the Convention on the date of the filing of the Application in the [*Bosnia and Herzegovina*] case, namely, on 20 March 1993” (*I.C.J. Reports 1996 (II)*, p. 610, para. 17). It reached that conclusion by briefly observing that “[t]he proceedings instituted before the Court are between two States whose territories are located within the former Socialist Federal Republic of Yugoslavia” (*ibid.*). It then noted that the SFRY signed the Genocide Convention on 11 December 1948 and deposited its instrument of ratification, without reservation, on 29 August 1950. It further recalled a formal declaration adopted at the time of the proclamation of the FRY on 27 April 1992 stating 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.” (*Ibid.*)

The Court, avoiding the issue of the claimed continuity of the international legal personality of the SFRY by the FRY, simply noted that:

“This intention thus expressed by Yugoslavia to remain bound by the international treaties to which the former Yugoslavia was party was confirmed in an official Note of 27 April 1992 from the Permanent Mission of Yugoslavia to the United Nations, addressed to the Secretary-General. The Court observes, furthermore, that it has not been contested that Yugoslavia was party to the Genocide Convention.” (*Ibid.*)

6. In the present case, as the Court summarises, “Serbia contended that, not having been a State before 27 April 1992, acts that occurred before that date cannot be attributed to it and that, not having been a party to the Convention, it could not have breached any obligation under it” (Judgment, para. 124).

7. The Court takes the view, without any explanation or justification, that “the question of the temporal scope of its jurisdiction is closely bound up with these questions of attribution, presented by Serbia as a matter of admissibility rather than of jurisdiction, and thus has to be examined in the light of these issues” (*ibid.*). That assertion is question-begging. How can the question of jurisdiction (including its temporal scope), which relates to the consent of the Parties, be “closely bound” with the question of attribution of conduct, which belongs to the law of

State responsibility, and thus clearly to the merits phase? The Court only summarily addresses the issue of the attribution of acts that occurred prior to 27 April 1992, recalling the arguments of Croatia (Judgment, para. 125) and those of Serbia (*ibid.*, para. 126) to conclude that “the questions of jurisdiction and admissibility raised by Serbia’s preliminary objection *ratione temporis* constitute two inseparable issues in the present case” (*ibid.*, para. 129). By briefly addressing the issues of attribution, which the Court sees as relating to the admissibility of the claim and for the ruling on which the Court feels a need to have more factual elements, the Court postpones its decision on the objection to its jurisdiction perceived by it as being of a *ratione temporis* character as well. That latter issue, in the view of the Court, concerns its jurisdiction

“to determine whether breaches of the Genocide Convention were committed in the light of the facts that occurred *prior to the date on which the FRY came into existence as a separate State, capable of being a party in its own right to the Convention*” (*ibid.*; emphasis added).

The Court explains that this issue “may be regarded as a question of the applicability of the obligations under the Genocide Convention to the FRY before 27 April 1992” (*ibid.*).

8. Croatia has always denied that the FRY continued the international legal personality of the SFRY. It consistently maintained that the FRY has been one of the five equal successors of the SFRY. Croatia argued that the FRY became a party to the Genocide Convention by succession, which “is retrospective to the commencement of the successor State” (CR 2008/11, p. 9, para. 8). It unambiguously stated that “[t]he Respondent was a party by succession to the Genocide Convention from the beginning of its existence as a State” (*ibid.*, para. 7).

9. The Court has determined that the FRY did indeed acquire the status of party to the Convention by a process that is to be regarded as succession. The Court came to the conclusion that “the 1992 declaration and Note had the effect of a notification of succession by the FRY to the SFRY in relation to the Genocide Convention” (Judgment, para. 117). Accordingly, the FRY became a party to the Genocide Convention at its “commencement” as a successor State. There is agreement that 27 April 1992 is that date. It has never been contested by any State (nor by Croatia) that the FRY became on that date a party to all those international conventions deposited with the Secretary-General of the United Nations to which it notified succession. The Genocide Convention is no exception.

10. There is no doubt that the Genocide Convention was binding on the SFRY since 12 January 1951, when it entered into force in accordance with Article XIII, until its dissolution and thus was applicable in respect of its entire territory (Article 29 of the Vienna Convention on the Law of Treaties codifying the relevant rule of customary international law; see also *Application of the Convention on the Prevention and Pun-*

*ishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia)*, *Preliminary Objections, Judgment, I.C.J. Reports 1996 (II)*, p. 610, para. 17). There was not a single day during the armed conflict which broke out in 1991 in the territory of the SFRY and ravaged until 1995 when the Convention would not have been applicable in that territory. This is so because, so long as the SFRY continued to exist, it remained party to the Genocide Convention and thus bound by its provisions. As its constituent republics gradually seceded from the Federation and declared independence, they became parties to the Convention on the basis of succession with effect from the date when these republics assumed responsibility for their international relations, Slovenia determining this date as being 25 June 1991, Croatia 8 October 1991, the former Yugoslav Republic of Macedonia 17 September 1991, and Bosnia and Herzegovina 6 March 1992. In the present case, the Court determined that the FRY (Serbia and Montenegro) became party to the Genocide Convention by succession, ascribing to the declaration of 27 April 1992 and the Note of the same date “the effect of a notification of succession by the FRY to the SFRY in relation to the Genocide Convention” (Judgment, para. 117).

Consequently, there was no hiatus or gap in the protection afforded by the Genocide Convention during the conflict, a concern expressed by counsel for Croatia (CR 2008/10, pp. 34-36, paras. 19-21) when addressing the arguments of Serbia regarding the temporal application of the Convention.

The aim of avoiding a *lacuna* in the applicability of the Genocide Convention in the context of violence accompanying the process of the SFRY’s dissolution was stressed by several judges in their separate opinions 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, Judgment, I.C.J. Reports 1996 (II)*); separate opinion of Judge Shahabuddeen, p. 635; separate opinion of Judge Weeramantry, p. 651; and separate opinion of Judge Parra-Aranguren, p. 656).

The Convention was applicable at every moment during the prolonged armed conflict in the territory of the former SFRY, but it was to be applied by different States at different periods as the SFRY had been in the process of dissolution and its successor States, on different dates, gradually acquired international legal personality and the status of parties to the Convention from the very moment of their existence as sovereign States.

11. Therefore, the issue before the Court is not the retroactive application of the Genocide Convention. The issue is rather the interpretation of the compromissory clause contained in Article IX and the determination of the Court’s jurisdiction thereby conferred.

12. Under Article IX of the Genocide Convention, the Court has jurisdiction to consider and adjudicate the “disputes between the Contracting Parties relating to the interpretation, application or fulfilment of the

present Convention, including those relating to the responsibility of a State for genocide". Croatia, relying on this provision, has brought before the Court the dispute with Serbia which, according to Croatia, "relates to the *interpretation and application* of the Genocide Convention" (Application, para. 30; emphasis added). The Court has determined, as the title of both the case under which it was entered in its General List and of the present Judgment indicate, that the case at hand concerns the application of the Convention. In order to fall within the ambit of Article IX of the Convention, the dispute must be about the interpretation or application of the Convention by the *Contracting Parties* to it, and not about the application of the Convention by the predecessor State of the Contracting Party to the Convention (although such predecessor State may have been, and in our case was, party to the Convention), nor about its application by an entity which was not the State party to the Convention and which only subsequently came into being as a State and became a party to it. The constituent units of the SFRY were not the Contracting Parties to the Convention, as only the SFRY itself had that status; the acts of its constituent units were considered as the acts of the SFRY.

13. Under the rule of customary international law codified in Article 4 of the ILC Articles on Responsibility of States for Internationally Wrongful Acts, the conduct of an organ of a territorial unit of the State (and both Croatia and Serbia were territorial or constituent units of the SFRY) is considered as an act of the State, attributed to this State and thus engaging the international responsibility of that State, if it is not in conformity with what is required by an international obligation resting upon that State. When that State ceases to exist, as was the case of the SFRY which disintegrated in the process of dissolution which was completed before summer 1992, as stated in Opinion No. 8 of 4 July 1992 issued by the Arbitration Commission of the Conference on Yugoslavia (*International Legal Materials*, 1992, Vol. XXXI, p. 1523), the issue of succession to responsibility may arise. Similarly, when a territorial unit of a predecessor State succeeds in its effort to secede and establishes itself as a separate State, the issue of the responsibility of the separate State for acts which were committed by the organs of that entity before it established itself as a State with international legal personality may arise. But clearly, regarding these two issues, neither that of succession into responsibility of the predecessor State nor that of the responsibility of an entity for acts committed before it became a State — and thus could have become a party to the Genocide Convention — fall within the jurisdiction of the Court under Article IX of the Genocide Convention. That jurisdiction covers "disputes between the Contracting Parties relating to the interpretation, application or fulfilment of the . . . Convention" by its Contracting Parties. The FRY, now continuing as Serbia, became a Contracting Party on 27 April 1992.

14. The situation in *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)* was different. There, although the relevant acts occurred before the dissolution of Czechoslovakia, the Court was given the jurisdiction and *specifically* asked in the Special Agreement (Art. 2), concluded by Hungary and Slovakia on 7 April 1993, “whether the Czech and Slovak Federal Republic was entitled to proceed, in November 1991, to the ‘provisional solution’ and to put into operation from October 1992 this system” (*Judgment, I.C.J. Reports 1997*, p. 11, para. 2). It is to be noted that the acts, despite in reality being performed on the ground by Slovak authorities, were always considered by the Court as those of Czechoslovakia (*ibid.*, pp. 46-57, paras. 60-88) and, in relation to them, the Court refers to Czechoslovakia and not to Slovakia in the operative clause (*ibid.*, p. 82, para. 155 (1) B and C). When the Court addressed the issue of the consequences of its Judgment, as it was asked in Article 2, paragraph 2, of the Special Agreement, it recalled that: “According to the Preamble of the Special Agreement, the Parties agreed that Slovakia is the sole successor State of Czechoslovakia in respect of rights and obligations relating to the Gabčíkovo-Nagymaros Project.” (*Ibid.*, p. 81, para. 151.) The Court therefore considered that:

“Slovakia thus may be liable to pay compensation not only for its own wrongful conduct but also for that of Czechoslovakia, and it is entitled to be compensated for the damage sustained by Czechoslovakia as well as by itself as a result of the wrongful conduct of Hungary.” (*Ibid.*)

15. In the present case, the Court was not given jurisdiction by the FRY to consider the acts of the predecessor State, the SFRY. Nor is Serbia the sole successor of the SFRY; it is one of the five equal successors of the SFRY.

16. Although the Court rightly says that “in the present case, the Parties advanced arguments relating to the consequences to be drawn from the fact that the FRY only became a State and a party to the Genocide Convention on 27 April 1992” (*Judgment*, para. 124), it avoids drawing such conclusions, justifying its convenient choice by a need to have more elements before it (*ibid.*, para. 129).

17. I consider that the question of “consequences to be drawn from the fact that the FRY became a State and a Party to the Genocide Convention on 27 April 1992” is a legal question which should be decided already at this stage and for the answering of which there is no need of any further information. In reality, the Court, in the space of the 15 years between 1993 and 2008, had to deal repeatedly with issues relating to the legal status of the FRY and its participation in the Genocide Convention, and all necessary information has been put before it. What is conspicuous is that the Court does not even indicate what other elements it needs. The legal issue which Serbia raised before the Court is not case-specific, but rather of general application. In my conscience, I am unable to follow the course of action

adopted by the majority and respectfully and not without regret disagree.

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18. The conclusion I reach is a consequence of the fact that the FRY (now Serbia) is one of the successor States of the SFRY, the position always maintained by Croatia. Had the FRY continued the international legal personality of the SFRY, the question of the Court's jurisdiction to consider acts committed before 27 April 1992 could not have been relevant.

Furthermore, as Croatia noted, the argument of Serbia is "limited only to some of the 'gravest incidents' — such as the atrocities in Vukovar and the shelling of Dubrovnik — which occurred between 25 August 1991 and the end of that year" (Written Statement of Croatia, 29 April 2003, p. 11, para. 3.2).

19. The conclusion on the scope of the Court's jurisdiction, based on the interpretation of the compromissory clause contained in Article IX of the Convention, does not amount to the exclusion of responsibility of those who committed so many serious atrocities during the armed conflict in the territory of Croatia. Nor does that conclusion prevent the responsibility of the State to which the acts of the perpetrators of such atrocities may be attributed. As the Court has reminded on a number of occasions (see e.g., *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 2006*, pp. 50-51, para. 123), there is a fundamental distinction between the acceptance by States of its jurisdiction (and the scope thereof) and the conformity of their acts with international law. States remain responsible for acts attributable to them which are contrary to international law although such acts may have been committed during the period over which the jurisdiction of the Court does not extend.

20. May I add that a number of persons were indicted by the Prosecutor of the International Criminal Tribunal for the former Yugoslavia for atrocities committed in Vukovar and Dubrovnik in order to establish individual criminal liability for their commission. Some of those cases have been completed (*Jokić* (case IT-01-42/1 "Dubrovnik"); *Strugar* (case IT-01-42 "Dubrovnik")); some closed due to the death of the accused (*Slobodan Milošević* (case IT-02-54 "Kosovo, Croatia and Bosnia"); *Dokmanović* (case IT-95-13a "Vukovar Hospital")); another is pending before the Appeal Chamber (*Mrkšić et al.* (case IT-95-13/1 "Vukovar Hospital")); yet another is at the trial stage (*Šešelj* (case IT-03-67)); finally, in another case, one accused is still at large (*Hadžić* (case IT-04-75)). The case of one accused (*Kovačević* (case IT-01-42/2 "Dubrovnik")) was referred by the ICTY to the Republic of Serbia. Other cases have been dealt with by national judicial authorities. However, one cannot but notice that no accused was charged by the Prosecu-

tor of the ICTY of a crime of genocide or the other acts enumerated in Article III of the Genocide Convention in relation to the tragic events which occurred in the territory of Croatia. They were charged with violations of the laws or customs of war (war crimes) and/or with crimes against humanity.

21. It remains to be seen how Croatia wishes to establish before this Court, whose procedure is not criminal, that the crime of “genocide has been perpetrated, and that the FRY is responsible for genocide” (Memorial of Croatia, p. 8, para. 1.17), despite the fact that the ICTY “has not . . . issued indictments against those persons most responsible for genocide in Croatia” (*ibid.*, p. 3, para. 1.07). But this matter is for the merits, which hopefully will not take nine more years to resolve and thus to close this unfortunate and painful chapter in Croatian-Serbian relations.

(Signed) Peter TOMKA.

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## SEPARATE OPINION OF JUDGE ABRAHAM

[Translation]

*Agreement with the operative clause of the Judgment — Disagreement with reasoning by means of which the Judgment dismisses the argument that Serbia does not have standing to take part in the proceedings — Question of the scope of Article 35 of the Statute — Two possible interpretations: conditions applicable to both Parties, or only to the Applicant — Better founded and more numerous arguments in favour of the second interpretation — Textual arguments — Analysis of the travaux préparatoires — Analysis of the judicial practice and prior jurisprudence of the Court — Rationale and purpose of the text — Principle of the equality of the States parties to a treaty containing a compromissory clause — Conclusion: invalidity of arguments in the Judgment seeking to demonstrate that the Respondent had access to the Court for the purpose of the proceedings, on the basis of Article 35, paragraph 1, of the Statute — Date when fulfilment of conditions for the Court's jurisdiction must be assessed — Principle: conditions which must be fulfilled on the date when proceedings are instituted — Exception arising from the decision in the Mavrommatis case — Incorrect application by the Court of that decision in the case — Need to rule on the applicability on the present date of Article IX of the Genocide Convention in relations between the Parties — Reservation accompanying Serbia's alleged "accession" to the Convention in 2001 devoid of legal effect.*

1. To convince the Court to declare that it lacked jurisdiction to hear Croatia's Application, Serbia relied on two arguments, each of which would, in its opinion, be sufficient to justify a ruling on a complete lack of jurisdiction. First, it contended, the Court was not "open" to Croatia within the meaning of Article 35, paragraph 1, of the Statute on the date when the Application was filed (2 July 1999), thus no proceedings could be brought before it since it could not appear before the Court even as a respondent. Second, it was not a party, on that date, to the Genocide Convention, and was not thus bound by the compromissory clause in its Article IX relied upon by Croatia as the basis for jurisdiction — a clause by which, moreover, it has never been bound, having been careful on its accession to the Convention in 2001 to make a reservation to exclude it.

2. The Court has dismissed all those arguments and found that it has jurisdiction to hear the case on the basis of the compromissory clause invoked by the Applicant.

I wholly approve of the operative clause of the Judgment. However, I only approve the reasoning in part.

While, overall, I agree with the reasons for which the Court has dismissed the second limb of the objection to jurisdiction — the one concerning the fact that Serbia was allegedly not a party to the Genocide Convention, including its Article IX, in 1999 — on the other hand, the

reasons given in the Judgment to justify the dismissal of the first part of the objection do not satisfy me at all, since, in my opinion, they are not supported by a correct analysis of the applicable law.

3. The Court's task was to answer the objection, portrayed by the Respondent as absolute, deriving from the fact that, not being a party to the Statute of the Court in 1999 — and not becoming one until 1 November 2000 — that Serbia did not have standing to validly appear before the Court, the latter not being “open” to it within the meaning of Article 35 of the Statute.

Such an objection was not unfamiliar ground for the Court. No one has forgotten that in 2004 it was precisely because Serbia and Montenegro was not a Member of the United Nations, nor therefore a party to the Statute of the Court, until 1 November 2000, that eight Applications filed by that country in 1999 against eight NATO Member States were dismissed due to the resulting lack of jurisdiction (see the Judgments delivered on 15 December 2004 in the cases concerning *Legality of Use of Force* (Serbia and Montenegro v. various NATO member States), *I.C.J. Reports 2004 (I, II, III)*, pp. 279-1450).

4. In the present proceedings, however, Serbia has not come before the Court as an Applicant, as in the aforementioned cases. It appears as a Respondent and itself pleads its lack of standing as a party to the Statute of the Court in order to avoid its jurisdiction. From the fact that the Court was not “open” to it under Article 35 of the Statute it seeks here to draw the, for it, favourable conclusion — that it would be safe from the compulsory jurisdiction of the Court — whereas in 2004 an unfavourable conclusion was drawn against it: it was not allowed to use the Court to set out its claims.

Nevertheless, the Judgment does not appear to take account of this difference in situation. The Court examines the issue of whether the Respondent fulfils the conditions to which Article 35 of the Statute makes “access” to the Court subject, as if those conditions were uniformly applicable to an applicant and to a respondent. At the end of its reasoning, to which I will return below, as it does not seem to be entirely rigorous, the Court answers in the affirmative, without however contradicting its 2004 Judgments: Serbia does indeed fulfil the conditions for access to the Court, for the purposes of the present proceedings, because it was accepted as a Member of the United Nations on 1 November 2000 and became a party to the Statute on that date.

5. I consider that the long and complex arguments which the Court devotes to the question of Serbia's “access to the Court”, in the light of Article 35 of the Statute (in paragraphs 57 to 92 of the Judgment), were in fact pointless. The reason is that, in my opinion, *the conditions in Article 35 of the Statute do not apply to the respondent in proceedings, but only to the party which brings the case to the Court*. It is true that Croatia itself, which might nevertheless have derived benefit from it, did not argue in favour of such an interpretation, which was hardly likely to encourage the Court to adopt such an approach. But, as it was a matter

of interpreting its Statute, it was for the Court to rule *ex officio*, without being bound by the arguments of the parties in a given case. In addition, the Court had explicitly reserved this question in its Judgment on the merits in the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)* case (*I.C.J. Reports 2007 (I)*, p. 102, para. 141), rightly indicating (paragraph 141 of the Judgment) that “[t]his matter, being one of interpretation of the Statute, would be one for the Court to determine”.

I will now set out the reasons why I at least have come to the above conclusion regarding the interpretation of Article 35 of the Statute. To do so I must begin with the relevant provisions, whose intrinsic logic I shall endeavour to reveal.

6. Taking the expression in the broad sense, the capacity (or standing) to take part in proceedings before the Court is subject to conditions which are defined in Articles 34 and 35 of the Statute.

Article 34 in principle reserves the right to appear before the Court to States, while in certain conditions authorizing public international organizations to submit observations in certain cases.

Article 35 further reserves access to the Court to States which:

- either are parties to the Statute (which is the case of all United Nations Member States and non-Member States which have decided to become parties to it under the conditions laid down in Article 93, paragraph 2, of the Charter) — which is what is stated in Article 35, paragraph 1;
- or, though not parties to the Statute, have complied to the conditions laid down in a Security Council resolution, “subject to the special provisions contained in treaties in force” — which is what is stated in paragraph 2. The resolution in question (S/RES/9 (1946) of 15 October 1946) provides that the Court shall be open to any State which is not a party to the Statute having deposited a declaration by which it undertakes to accept the jurisdiction of the Court and the authority of its decisions, either in general or in a particular case.

7. It is certain that the condition laid down by Article 34 for a legal entity to be able to take part in proceedings before the Court (namely that that entity must be a State under international law) applies equally to the applicant and the respondent (and to both if the case has been brought before the Court jointly by a special agreement).

8. The scope of application of Article 35, however, is debatable. While it is clearly apparent from the wording itself that paragraph 3 of Article 35 — which gives the Court the power to fix the amount to be contributed to the cost of proceedings by a State which is not a Member of the United Nations — applies to any State in the situations so defined, be it an applicant or a respondent, a simple reading of paragraphs 1 and 2 of

that same Article 35 does not make it easy to reach such a certain conclusion.

9. In this connection, two interpretations may be defended (and have moreover been so defended both in scholarly works and in the practice of the Court prior to the present Judgment).

According to one interpretation, paragraphs 1 and 2 have the same scope of application as paragraph 3, the result being that the conditions established by these two paragraphs would apply equally to the applicant State and the respondent State, the Court being unable to exercise its jurisdiction unless both of them, in one way or another, fulfil those conditions. Thus, for example, even if the applicant State is a Member of the United Nations, the Court would also not be able to exercise its jurisdiction if the respondent State were not a party to the Statute and had also not deposited the declaration of acceptance provided for by the Security Council resolution of 15 October 1946 (unless between the two States concerned, there was a “treaty in force” within the meaning of Article 35, paragraph 2, that is to say a treaty which was already in force on the date when the Statute came into force, as the Court pointed out in its Judgments of 15 December 2004 in the cases concerning *Legality of Use of Force*).

But a second interpretation is possible whereby, in order to ensure that it is in a position to exercise its jurisdiction, the Court merely has to verify that the applicant State, and it alone, fulfils the conditions — the alternative ones — mentioned in Article 35, paragraphs 1 and 2.

10. It should be noted here and now that if, as I believe it should, the second interpretation were to be upheld, that would clearly not mean that the Court would be justified in exercising its jurisdiction with respect to a respondent State which had not, one way or another, consented to its jurisdiction. Irrespective of the interpretation of Article 35 adopted, consent to the jurisdiction of the Court must be verified, both with respect to the applicant State and to the respondent State. The consequence of the second interpretation is only that, where the respondent State is concerned, it would be sufficient to verify that it is bound vis-à-vis the applicant State by a treaty containing a clause attributing jurisdiction to the Court, which clause would establish its consent to jurisdiction (or any other form of jurisdiction), without there being any need also to wonder whether it is a Member of the United Nations or party to the Statute of the Court or, failing that, whether it has made the declaration laid down by the 1946 resolution — the latter conditions only being relevant, and only requiring verification, with respect to the applicant State.

11. It is immediately clear that the choice between the above two interpretations is not purely academic. It can have decisive consequences regarding the possibility for the Court to exercise its jurisdiction in the following situation: the two States in dispute are bound by a treaty containing a compromissory clause attributing jurisdiction to the Court to settle such a dispute, but it is not a “treaty in force” within the meaning

of paragraph 2, because it post-dates the Statute; seisin of the Court is made by way of a unilateral application; the applicant State is a Member of the United Nations (or, failing that, it is party to the Statute of the Court, or has filed the declaration laid down by the 1946 resolution); the respondent State, by contrast, is not a Member of the United Nations, is not a party to the Statute of the Court, and has not signed — and does not wish to sign — the above declaration.

In that case, the choice of the first interpretation of Article 35 prevents the Court from exercising its jurisdiction, notwithstanding the compromissory clause binding the two States. The choice of the second interpretation on the other hand enables the Court to exercise its jurisdiction.

12. Such a situation is unlikely to arise often before the Court.

It does, however, happen to correspond to the *Bosnia and Herzegovina v. Serbia and Montenegro* and the *Croatia v. Serbia* cases, at least providing Serbia (then the FRY) on the one hand, and the two applicant States on the other, are regarded as being bound, on the dates when the Applications were filed, by the Genocide Convention and its Article IX, and providing we confine ourselves, where the conditions of Article 35 are concerned, to the situation prevailing on those dates, when the Respondent did not fulfil any of the said conditions, according to what the Court ruled in its 2004 Judgments cited above.

13. There is no doubt that there are sound arguments in favour of each of the two above interpretations. On reflection, even though the prevailing academic view appears to indicate the contrary if anything, I have come to the conclusion that the most numerous and sounder arguments weigh in favour of the interpretation whereby the conditions mentioned in Article 35, paragraphs 1 and 2, are required of the applicant State alone when a unilateral application is brought before the Court on the basis of a compromissory clause applicable to relations between the applicant and the respondent.

I will endeavour to summarize below the reasons which lead me to this conclusion, and which are based upon:

- (a) the actual text of the Statute;
- (b) the *travaux préparatoires*;
- (c) practice and jurisprudence; and lastly
- (d) the rationale of the provisions being interpreted.

#### (A) TEXTUAL ARGUMENTS

14. Paragraph 1 of Article 35 contains the phrase: “The Court shall be open.” The same phrase is repeated in paragraph 2: “The conditions under which the Court shall be open to other States shall . . . be laid down by . . .”

In itself, the expression which has passed into current legal usage as “access to the Court”, which is its exact equivalent from the opposite per-

spective, that of the State, quite clearly suggests that what is at issue here is defining the conditions under which a party to a dispute can bring it before the Court and address it in order to uphold what it considers to be its rights.

The “ordinary meaning” of the terms used, to borrow the expression in Article 31, paragraph 1, of the Vienna Convention, does not at first sight point towards a “symmetrical” interpretation of the text, according to which the conditions laid down would also have to be fulfilled by the respondent. Yet the respondent is not seeking access to the Court, since in any number of cases, it seeks, on the contrary, to evade its jurisdiction by, rightly or wrongly, challenging it. As it is not the one trying to push open the door of the Court, it is hard to see why conditions of entrance should be imposed on it (or on it as well).

In the admittedly to some extent specific field of international human rights law, the “right of access to a court” (a national one) defined as a fundamental component of the right to a “fair trial”, guaranteed by Article 14 of the International Covenant on Civil and Political Rights and Article 6 of the European Convention on Human Rights, has always been understood as a person’s right to seise a court in order to put his or her claims to it, thus a right as applicant and not as respondent. Naturally, that does not mean that, once the proceedings have commenced, the requirements of a “fair trial” (impartiality and independence of the Court, etc.) will not apply just as much for the applicant as for the respondent, and the two parties must be treated equally in the proceedings.

This is the “ordinary meaning” of the words.

15. This first impression is supported by a comparison of the terms contained in paragraphs 1 and 2 of Article 35 with those in Article 34 and Article 35, paragraph 3.

The latter two provisions show that when the authors of the Statute wished to establish a rule applicable to both parties to proceedings, they carefully indicated it by unequivocal wording. Hence, Article 34 provides that “[o]nly States may be parties in cases before the Court” and Article 35, paragraph 3, refers to a State which “is a party to a case”. In contrast, the terminology used in paragraphs 1 and 2 of Article 35 (“The Court shall be open”) does indeed seem to suggest that it is referring to something else: the party, and only that party, which takes the initiative of bringing a case before the Court — both parties in the event of joint seisin; but only one of them in the event of a unilateral application.

#### (B) ANALYSIS OF THE *TRAVAUX PRÉPARATOIRES*

16. Reference should be made, as the Court did in its Judgments of 15 December 2004 (see, for example, paragraphs 103 to 108 of the Judgment in the *Legality of Use of Force (Serbia and Montenegro v. Belgium)* case (*Preliminary Objections, Judgment, I.C.J. Reports 2004 (I)*),

pp. 319-321), to the *travaux préparatoires* of Article 35 of the Statute of the Permanent Court of International Justice, which contained provisions in substance identical to those in Article 35 of the present Statute.

17. There is, so it seems, only one indication concerning the scope of the terms “The Court shall be open . . .”; but it is a particularly clear one.

18. The first draft of the provision which was to become Article 35 (then number 32) was the fruit of the work of the Advisory Committee of Jurists in 1920. That provision contained a first subparagraph drafted 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.”

When the preliminary draft was considered by the sub-committee of the Third Committee of the first Assembly of the League of Nations, one of the members of the sub-committee, Sir Cecil Hurst, 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”. In other words, he feared that the requirement, for access to the Court by a State that had taken part in the creation of the League of Nations or subsequently become a Member of it, might prevent disputes implicating the Central Powers, who did not meet those requirements, from being submitted to the Court.

The answer given by the Chairman of the subcommittee was perfectly clear: “the Article applie[s] only to the plaintiff Parties” (see 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. 141).

In the rest of the *travaux préparatoires* of the Statute of the Permanent Court, there does not appear to be any other comment on this question to invalidate or contradict the one just mentioned.

As for the *travaux préparatoires* of the Statute of the International Court of Justice, they would seem to contain no further comment.

### (C) ANALYSIS OF JUDICIAL PRACTICE AND JURISPRUDENCE

19. The practice of the Permanent Court appears to have been a little unclear.

In the first case in which the question of the interpretation of Article 35 arose, the Court appears, in its practice, to have abided by the interpretation according to which the conditions of access to the Court apply to the Applicant alone.

If we are to give credence to the generally well informed commentary on the Statute and the Rules of the Permanent Court of International Justice published in Berlin in 1934 under the aegis of the Institute for Public International Law:

“In the *S.S. ‘Wimbledon’* case, brought before the Court under Article 386 of the Treaty of Versailles, Germany, which at that point had yet to become a Member of the League, was the Respondent. A declaration was not considered as necessary, on the one hand, in light of the reservation contained in Article 35, paragraph 2, of the Statute which concerns in particular — as is apparent from the drafting history of the article — certain provisions of the Peace Treaties, *and on the other hand, in those proceedings Germany was the Respondent and the article — as also seems apparent from its drafting history — only concerns the applicant parties.*” [*Translation by the Registry.*] (B. Schenk von Stauffenberg, *Statut et Règlement de la Cour permanente de justice internationale: éléments d’interprétation*, Carl Heymanns Verlag, Berlin, 1934, p. 234; emphasis added.)

20. A few years later the question arose again when the Rules of Court were revised in 1926. It was then decided to add a provision making it an obligation for a State not a Member of the League of Nations to deposit the declaration provided for by the resolution of the League Council of 17 May 1922 with the Registry of the Court. During the meeting on 25 June 1926, the Registrar recalled in that connection “the decision taken by the Court in the *Wimbledon* case. At that time, it had been decided that the obligation in question could only be imposed on the applicant Party, and not on the respondent.” (Publications of the Permanent Court of International Justice, *Series D, Acts and Documents concerning the Organization of the Court, Addendum to No. 2, Revision of the Rules of Court*, p. 75.)

21. However, at the meeting on 21 July 1926, during which that provision of the revised Rules was considered, the President said that:

“It [is] quite natural that States that wish . . . to profit by the institution established by the League of Nations . . . have to accept the conditions fixed by the Covenant, and that States which, for one reason or another, [have] not yet done so should accept them by means of this declaration, whether they appear . . . before the Court as Applicant or Respondent.” (*Ibid.*, p. 106.)

22. Eventually, the Court adopted a neutral phrase, worded as follows (Art. 35):

“(2) *The declaration provided for in the Resolution of the Council of the League of Nations of May 17, 1922 (Annex), shall, when it is required under Article 35 of the Statute, be deposited with the Registry not later than the time fixed for the deposit of the first document of the written procedure.*” (*Op. cit.*, von Stauffenberg, p. 235; emphasis in original.)

As was observed in the aforementioned commentary on the Statute and the Rules of the Permanent Court:

“The text adopted left the question of the circumstances in which the declaration is necessary entirely unresolved, and preserved the freedom of the Court to rule in each individual case on the necessity of the declaration;

. . . . .  
*The provision adopted by the Court did not settle the matter of whether the obligation to make a declaration also extended to States appearing before the Court as respondents either.”* (*Op. cit.*, von Stauffenberg, pp. 235-236; emphasis added.)

23. The practice of the International Court of Justice in the matter at hand provides little in the way of enlightenment. We appear to find the same uncertainties as before.

In support of one of the two interpretations (the one I referred to as “symmetrical” above) the *Corfu Channel* case should be mentioned. In its Order of 31 July 1947 to fix the time-limits for the submission of the first two written pleadings, the President held that “the . . . note of the Albanian Government may be regarded as constituting the document mentioned in Article 36 of the Rules of Court” (*I.C.J. Reports 1947-1948*, p. 5). Article 36 of the Rules of Court dealt precisely with the case of States which were not parties to the Statute, but which had access to the Court under Security Council resolution 9 of 1946, which for that purpose, as mentioned above, required the filing of a declaration. In those proceedings, Albania was the Respondent: we may deduce from this that, in the view of the President, both the respondent and the applicant were subject to the conditions of “access to the Court” laid down by Article 35 of the Statute.

24. But conversely, it must be noted that the Rules of Court, having initially retained a neutral phrase on the point concerned — that is, one which did not permit a final decision as between the two possible interpretations of Article 35 of the Statute — following on in this respect from the Rules of the former Permanent Court, moved away from that position as of the Revised Rules of 1978. Indeed, in Article 36 and Article 39 respectively, the 1946 and the 1972 Rules of Court contained an (identical) provision, the actual wording of which did not indicate whether the declaration provided for by Security Council resolution 9 of 1946 was required of the applicant State alone or of each of the two States parties to the proceedings, when either, or even both, were not parties to the Statute. On the other hand, the Rules of Court in force since 1978 contain an Article 41 worded as follows:

*“The institution of proceedings by a State which is not a party to the Statute but which, under Article 35, paragraph 2, thereof, has accepted the jurisdiction of the Court by a declaration made in accordance with any resolution adopted by the Security Council under that Article, shall be accompanied by a deposit of the declaration in question, unless the latter has previously been deposited with the Registrar . . . .”* (Emphasis added.)

As was noted by Shabtai Rosenne, who appears very hesitant on the point concerned, “The Rules contain no parallel provision regarding the filing of a declaration by a respondent which is not a party to the Statute.” (*The Law and Practice of the International Court, 1920-2005*, Fourth Edition, Vol. II, *Jurisdiction*, p. 619.)

The silence of the Rules of Court regarding a respondent State which is not party to the Statute, when an express provision obliges an applicant State in such a situation to prove that it meets the conditions of “access to the Court” laid down in Article 35, paragraph 2, constitutes a fairly clear indication in favour of the interpretation restricting the scope of that Article to the applicant.

25. The foregoing considerations concern what I have termed the “judicial practice” of the former and the existing Courts: we can see that the practice has varied.

It is another matter to ascertain whether the point under discussion has been settled by the *jurisprudence* as such, that is to say by an analysis of the judicial decisions rendered by the Court itself prior to the present Judgment. It would not appear so.

26. It must be said that the Order of 8 April 1993 on the Request for provisional measures in the case concerning *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia)* was fairly clearly, albeit implicitly, inspired by the “symmetrical” interpretation of Article 35. After expressing its doubts on whether Yugoslavia was then a Member of the United Nations and, as such, a party to the Statute of the Court (*I.C.J. Reports 1993*, p. 14, para. 18), and citing Article 35, paragraph 2, of the Statute, the Court went on to assert 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 a party to the Statute, and independently of the conditions laid down by the Security Council in its resolution 9 of 1946” (*ibid.*, para. 19),

before concluding that Article IX of the Genocide Convention could be regarded *prima facie* as such a provision and thus provide sufficient basis for jurisdiction in that case (*ibid.*). The reasoning thus deployed presupposes at least tacitly that the conditions of “access to the Court” in Article 35 are equally applicable to the respondent: if not, since in that case it was only the Respondent’s standing as party to the Statute that was in doubt, not the Applicant’s, the Court would not have needed to fall back on the notion of “treaty in force” within the meaning of paragraph 2 and find that such a treaty was binding on both Parties to the proceedings.

But the Order of 1993 certainly did not aim to settle the issue definitively, its conclusions were only *prima facie* and the passage cited above was, moreover, partly contradicted by the Court, following more detailed consideration of the term “treaties in force” in its Judgments

of 15 December 2004 on the cases concerning *Legality of Use of Force*.

27. The Judgment of 11 July 1996 on the preliminary objections in the same case shed no new light on the point under discussion. As the FRY argued that it lacked standing as a party to the Statute in order to challenge the jurisdiction of the Court, the Court did not have to consider the question, nor therefore the prior question of whether the conditions of access to the Court in Article 35 are also applicable to a respondent State. And while it must be borne in mind that, by declaring its jurisdiction to hear the dispute on the basis of Article IX of the Genocide Convention, the Court must be assumed, by deduction, to have considered that all the conditions of “access to the Court” mentioned in Articles 34 and 35 of the Statute had been met, it is, however, impossible to logically construe that it did so on the basis of either of the two possible interpretations of the scope of application of Article 35.

28. Finally, the Judgments of 15 December 2004 do not provide any more decisive indications: true, the Court found that it lacked jurisdiction to hear the Applications by Serbia and Montenegro on the ground that that State did not meet the conditions of Article 35, but it was the applicant State. None of the wording used by the Court in its Judgments in those cases clearly indicates either that the conditions of Article 35 applied to the applicant State alone, and that the Court only considered them in those cases because it was the Applicant who allegedly did not fulfil them, or, on the contrary, that those conditions applied to the Respondents as much as to the Applicant, for as Members of the United Nations, there is no doubt that the former fulfilled them.

In short, the Court had no need to settle the question of whether a respondent must fulfil the “conditions of access” and it did not do so.

As I said above, it even expressly reserved the question in its 2007 Judgment delivered 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)*.

#### (D) RATIONALE AND PURPOSE OF THE TEXT

29. More than the above arguments, it is the arguments derived from the rationale of the text to be interpreted and its ultimate purpose, or what must be supposed to be its ultimate objective, which seem to me to point in favour of one of the two interpretations.

30. The actual situation in which the difficulty of interpretation we are seeking to resolve is likely to arise should not be forgotten.

That situation presupposes a combination of two factors.

First, a dispute must arise between two States, between which a compromissory clause assigning jurisdiction to the Court is in force: if this is not so, and because, moreover, at least one of those States is not, let us

suppose, a party to the Statute, the Court cannot have jurisdiction and no other question arises.

Second, at least one of the two States concerned must not fulfil the conditions of “access to the Court” in Article 35 of the Statute: that State is not a party to the Statute, and it has not signed the declaration required by Security Council resolution 9 of 15 October 1946. Indeed, it is obvious that if the two States in dispute satisfy the conditions of access to the Court, either under paragraph 1 or under paragraph 2 of Article 35, the question of whether these conditions apply only to the applicant State or to both States parties to the case is irrelevant, and, in that event, the case could equally well be brought before the Court jointly by way of a special agreement or by a unilateral application by either one of the two States concerned.

31. Let us suppose then that the two above conditions are both met: it is then that the question of choosing one of the two possible interpretations of Article 35 regarding its scope of application arises. The advantages and disadvantages of each of them must be considered, in particular with regard to their consequences.

32. The principal objection which comes to mind when considering the interpretation whereby the conditions of access apply only to the applicant and do not have to be fulfilled by the respondent, without this meaning that the Court is prevented from exercising its jurisdiction, is that of the dissymmetry, imbalance, or even inequality it appears to create between the two opposing States.

33. One can indeed recall, in response to this objection, that whatever the solution chosen, once proceedings have begun, in procedural terms, the two parties will and must be treated with strict equality by the Court. While this is true, it does not wholly answer the objection.

34. The consequence of an “asymmetrical” interpretation of Article 35 appears to be that, for two States bound by a compromissory clause, where one of them fulfils the conditions of access but the other not, the former could take the initiative to bring the latter before the Court (since it has standing to do so), while the converse will not apply: is that not a breach of the fundamental principles of the equality but also as the reciprocity of the rights of States, principles which must be applied as much in bringing a case before the Court as in the course of the proceedings?

35. However, on further reflection, that objection is not convincing at all, since the inequality which it exposes is merely apparent. Indeed, there is nothing to stop a State which is a party to a treaty containing a compromissory clause and which seeks to apply it in order to resolve a given dispute from positioning itself so as to have access to the Court by fulfilling the conditions laid down by Article 35, paragraph 2, and the Security Council resolution to which that paragraph refers.

To do so, that State, which we are assuming is not a party to the Stat-

ute, merely has to file with the Registry of the Court a declaration by which it accepts the jurisdiction of the Court and undertakes to comply with its decision (resolution 9, para. 1). Such a declaration may be signed for the purposes of resolving a particular dispute which has already arisen (*ibid.*, para. 2). It can be submitted at any time and takes immediate effect.

36. Thus, in the “asymmetrical” interpretation of Article 35, there is no real inequality between the two States bound by a compromissory clause: the one which does not already fulfil the conditions of “access to the Court” but which seeks to bring a dispute before it can — and it alone can decide this — enable itself to do so.

37. Let us now consider the disadvantages which, conversely, the “symmetrical” interpretation of Article 35 would entail, the one which prevents the Court from exercising its jurisdiction solely because the respondent does not fulfil the conditions of access to the Court.

38. Two States are bound by a compromissory clause; let us suppose that one of them fulfils the conditions of access to the Court (because, for example, it is a Member of the United Nations, and therefore a party to the Statute of the Court), while the other does not.

The second State could, at any point, implement the compromissory clause against the first by, for the purposes of the case, filing the declaration laid down by resolution 9 of 1946. But the first State could not solely of its own volition bring the second before the Court: all the respondent would need to do, if it did not want such proceedings, would be to plead that it did not fulfil the conditions of access to the Court in order to put itself beyond its compulsory jurisdiction, notwithstanding the compromissory clause.

39. Two highly prejudicial consequences would flow from this.

40. First, what we have termed the “symmetrical” interpretation of Article 35, which a large section of scholarly opinion (and possibly the Court itself) appears to favour, owing to its symmetrical nature, *actually creates real inequality between the States*.

It is symmetrical in appearance only: in reality it leads (or can lead) to dissymmetrical consequences.

41. Second, it enables a State which is not a party to the Statute, but which is nonetheless bound by a treaty containing a compromissory clause attributing jurisdiction to the Court in the event of a dispute (there is no contradiction or legal impossibility in such a situation), not to comply with that compromissory clause every time that it chooses not to, by refraining from satisfying the conditions of access to the Court. In other words, this interpretation of Article 35 *enables a State to comply or not to comply, as it sees fit, with a treaty clause, compliance with which nonetheless constitutes an international legal obligation*.

Can we reasonably suppose that those who drafted Article 35 of the Statute sought to achieve such a result or simply to make it possible?

Can we accept an interpretation of a treaty provision (Article 35 of the Statute) which ultimately means stripping other treaty provisions (the compromissory clauses of treaties to which States not parties to the Statute of the Court are parties) of any actual meaning?

In short, can we accept an interpretation of the law which enables a State not to honour a legal obligation?

That would, as I see it, be seriously illogical. Yet it is what is suggested, reading between the lines, by the Judgment which the Court has just delivered.

42. It might be objected that compliance with a compromissory clause by States which are parties to the treaty in which it is contained is one thing, while the application by the Court of the conditions of jurisdiction arising from its Statute is another; and that, consequently, regrettable though the conduct of a respondent which does not accept the jurisdiction of the Court though bound *vis-à-vis* the applicant by a compromissory clause may be, nonetheless that does not authorize the Court to uphold its jurisdiction if the respondent is not a party to the Statute and has not signed the declaration provided for by resolution 9 of 1946 and that the said Statute makes the jurisdiction of the Court subject to the fulfilment of one or other of those conditions.

I would be willing to accept such an argument, despite its highly abstract and formalistic character and the regrettable nature of the consequences stemming from it, if Article 35 of the Statute was sufficiently clear and categorical as to leave no reasonable room for any interpretation other than the one which requires *both* parties to fulfil the conditions laid down in it for the Court to be able to exercise its jurisdiction. But, precisely, I believe I have shown above that this is certainly not the case: both the actual text and the *travaux préparatoires* tend, if anything, to support the opposite interpretation.

43. Let us pursue this line of reasoning. If we accept, for the time being, the opposite interpretation of Article 35 to the one I propose, it follows that the conduct of the respondent which is not a party to the Statute of the Court and which refrains from filing the declaration laid down by resolution 9 of 1946 (which it is *always* free to do), when it is bound by a compromissory clause attributing jurisdiction to the Court, constitutes a violation, by that respondent, of the compromissory clause, as it seeks to foil the jurisdiction of the Court which the respondent nevertheless accepted as an obligation on becoming a party to the treaty. Faced with such a situation, should the Court, by declaring that it lacks jurisdiction, agree to allow this unlawful conduct to produce the very outcome which the perpetrator of that conduct (our hypothetical, or perhaps not so hypothetical, respondent) seeks to attain? I venture to suggest that would be allowing a little too much rein to jurists' natural propensity for abstract reasoning, were that to lead to consequences at variance with the elementary requirements of the law and common sense combined.

44. I thus come to the following conclusions:

The fundamental rule laid down by Article 34 of the Statute obviously applies to both the applicant and the respondent: in order to appear before the Court as a party to proceedings in any capacity whatever, a party must be a State.

However, the “conditions of access” defined by Article 35, paragraphs 1 and 2, apply to:

- both parties to the dispute, if the case is brought before the Court jointly by them;
- to the respondent alone, if the case is brought before the Court by a unilateral application.

\* \* \*

45. In the present Judgment, the Court could have chosen to follow the path I have outlined. Two, in my view, positive consequences would have followed. In the first place, the Court would not have needed to enter into the particularly complex question of whether and for what reasons the fulfilment of the conditions of “access to the Court” (which, as the Judgment notes, the Respondent did not meet on the date when the Application was filed) could be evaluated in the present case by viewing them from the perspective of a later date, when, as a general rule, jurisprudence requires that the conditions governing the jurisdiction of the Court must be fulfilled at the time when proceedings are initiated. Second, the solution we suggest would have made it possible to demonstrate that, contrary to the thoughts and writings of numerous commentators, there was no contradiction between the position adopted by the Court in its 1996 Judgment on the preliminary objections in the *Bosnia and Herzegovina v. Serbia and Montenegro* (then known as the FRY) case and the position adopted in the 2004 Judgments, also on preliminary objections, in the cases between Serbia and Montenegro and various NATO Member States. If the Court had found that it had jurisdiction in the first case and not in the second raft of cases, it could not be criticized for contradicting itself, bearing in mind that the condition which was not met by Serbia, the applicant State in the cases examined in 2004, was simply not applicable to that State, in its capacity as the Respondent, in the case on which the Court ruled in 1996. On the contrary, the reasoning adopted by the Court in the present Judgment inevitably reveals the erroneousness of the Judgment delivered in 1996 on its jurisdiction 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, Judgment, I.C.J. Reports 1996 (II)*, p. 595). Indeed if the condition of “access to the Court” within the meaning of Article 35 of the Statute is as applicable to the respondent as it is to the applicant, which is what the present Judgment quite clearly suggests, without expressly saying so, the Court should have ruled that it lacked jurisdiction in 1996, as (1) the FRY was not on that date a party to the Statute, and did not fulfil any of the conditions of access to the Court; (2) as the

question was one of *ordre public*, the Court should have raised it *ex officio*, as is apparent from the reasoning of the 2007 Judgment on the merits in the same case, as recalled in paragraph 68 of the present Judgment; and (3) the lack of “access to the Court” for a party to which that requirement applies prevents the Court from having jurisdiction.

46. We could of course say that if the Court was mistaken in 1996, it was because there were certain reasons at that time for not clearly appreciating the status of the FRY, not the least of which was the fact that the Respondent itself at that point claimed a status which it did not possess, or rather one that it was subsequently (but retrospectively) revealed not to possess.

Nonetheless, I regret that the Court refrained in the present case from adopting a solution which, besides being supported by the sound legal arguments set out above, would have enabled it to avoid depicting as erroneous one of its prior, and not least significant judgments, as it was on the *res judicata* of that decision that the Court subsequently based itself to rule on the merits and, for the first time, find that a State bore international responsibility for violating the Genocide Convention.

47. However, the path which the Court has decided to follow to justify its jurisdiction in the present case, based on the implicit (and, as will be apparent, in my view mistaken) premise that the respondent must also fulfil the conditions of “access to the Court”, does not seem to me open to criticism as such. However, I consider that the Court did not follow its reasoning through to the end, and has thus opened the door to the danger of a challenge to one of the best-established principles of its jurisprudence with respect to jurisdiction. Let me explain.

48. The Respondent did not have “access to the Court” on the date when the proceedings were instituted, on 2 July 1999, as it was not on that date a party to the Statute of the Court, either as a Member of the United Nations (which it had yet to become), or in any other capacity. That is the starting-point of the reasoning, in accordance with the Judgments delivered in 2004 in the case between Serbia and Montenegro and eight NATO Members. Whatever criticisms might have been levelled at those Judgments at the time (and we know that some of those criticisms came from within the Court itself), it is legitimate for the Court, at present, not to wish to call into question a solution that was carefully considered and so recently adopted. I can only approve of the desire for continuity in the jurisprudence, which should only yield in the face of particularly cogent reasons, which the Court did not find here, rightly so in my view.

49. But the Court was then confronted with an important principle, namely that the conditions for its jurisdiction must be met on the date when the proceedings are instituted. They only *need* to exist on that date (no matter if all or some of them subsequently evaporate); they *must*, however, do so on that date — as a general rule, it is not enough for them to be satisfied at a later point, namely during the course of the proceed-

ings. This is what is very clearly explained by paragraphs 79 and 80 of the Judgment. To abide by that principle, the Court would have had to declare that it lacked jurisdiction, as the Respondent did not acquire standing to take part in proceedings (“access to the Court”) until 1 November 2000, that is, after the date when proceedings were instituted.

50. However, the Court refers to a strand of its case law originating in the Judgment delivered on 30 August 1924 by the Permanent Court of International Justice in the *Mavrommatis Palestine Concessions (Judgment No. 2, 1924, P.C.I.J., Series A, No. 2)* case, which allows for greater flexibility in the application of the aforementioned principle, in the interests of realism and the sound administration of justice. This decision is thoroughly analysed in paragraphs 82 to 87 of the Judgment. In short, when the conditions governing the jurisdiction of the Court are not met, or not met in full, on the date when proceedings are instituted, but are met later, before the Court has ruled on its jurisdiction, the Court does not uphold the objection to its jurisdiction and does not dismiss the application, out of a concern for “judicial economy” — with a view to preventing “the needless proliferation of proceedings” (as indicated in paragraph 89 of the Judgment). For, dismissing an application in such circumstances would result in obliging the applicant to file a new application, to which no objection could be made as, on the date of its filing, the conditions of jurisdiction initially lacking would be met. It would be a pointless waste of time: ultimately, the Court would be obliged to hear the case on the merits anyway — the sound administration of justice dictates that it should agree to do so forthwith.

51. It is from this decision that the Court has sought inspiration in the present case, the Judgment says so explicitly. But in my opinion it did not follow its reasoning through to the end.

To be able to apply the “*Mavrommatis* doctrine”, the Court should have established that Croatia could *now*, if it so wished, submit a fresh application against Serbia, identical in substance to the previous one, and which would not meet with any objection concerning the jurisdiction of the Court. It is in fact that possibility, and that possibility alone, which justifies the derogation from the fundamental principle, whereby jurisdiction is assessed on the date when the proceedings are instituted, since that derogation is aimed at dispensing with fresh proceedings, which would prolong the duration of the dispute to no real purpose.

For that, the Court would have had to conclude that, at present, not only are Croatia and Serbia both parties to the Statute of the Court — a fact as undeniable as it is undiscussed — but also that they are both bound by Article IX of the Genocide Convention, which Serbia strongly disputes.

52. But for reasons which for me remain inexplicable, the Court did not consider that it had to rule on this last point, which would have required it to take a position on the legal effects of the act of “accession” to the Convention by the FRY on 6 March 2001, accompanied by a res-

ervation designed to deny Article IX any effect with respect to that country. On the contrary, the Judgment expressly states, without, however, clearly explaining why, that “[i]t is thus not necessary for the Court to make a finding as to any legal effect of the notification of accession to the Convention by Serbia dated 6 March 2001” (Judgment, para. 96).

53. Instead of that, the Judgment confines itself to noting that Serbia became a party to the Statute of the Court on 1 November 2000, which is indisputable, and that on the same date, it was bound by Article IX of the Genocide Convention, since, according to the analysis of the Court, the FRY became a party to the Convention without reservations through succession in 1992. On 1 November 2000, then, all the conditions for the jurisdiction of the Court were met, and, according to the Judgment, were so irrevocably: there is no need to wonder whether they continue to do so at present.

54. This reasoning has two major shortcomings.

First, it is not consistent with the decision in the *Mavrommatis* case, which is only justified by a concern to avoid the fruitless institution of new proceedings which would not give rise to any objection, the conditions for the jurisdiction of the Court *now* being fulfilled. In other words, while claiming to base itself on the strand of case law deriving from the *Mavrommatis* Judgment, the Court erroneously applies it and gives it completely new scope.

What is more serious, however, is that with the reasoning adopted by the Court in this case, nothing remains of the principle — to which, however, the Judgment pays strong tribute in paragraphs 79 and 80 — according to which jurisdiction is normally assessed on the date when the proceedings are instituted. And it follows from the reasoning adopted that, for the Court to declare that it has jurisdiction, the conditions for its jurisdiction must and need only have been met *at some point following the institution of proceedings*. So much the better if they were met on the latter date; but if not, they need only have been met subsequently, in the course of proceedings, even if only briefly. In other words, the conditions for jurisdiction may not have been met at the start of the proceedings; they may no longer exist on the date when the Court rules on its jurisdiction; it will suffice that they were met at some point between those two dates. That is exactly what the Court contents itself with here: the Judgment shows that the conditions were not met on the date when the proceedings were instituted; they may no longer be met now, since the Court does not rule out the possibility that Serbia’s reservation to Article IX may have had legal effect from 2001; but it is sufficient that they were met on 1 November 2000, even if they ceased to be so the following day (or a few months later).

What we have here is no longer a reasonable exception to the rule whereby jurisdiction is assessed on the date when the proceedings are instituted. It is a new rule: the previous one has been abolished. There is no point in seeking (or claiming to seek) a possible derogation from an established principle in the *Mavrommatis* decision. Having abolished the

principle, the derogation becomes pointless, even if the Court persists in asserting, mistakenly, that it falls within the continuity of its jurisprudence.

55. I think that the Court could easily have reached the same result, while following the rationale on which the “*Mavrommatis* doctrine” is based. The Court could simply have concluded that, as Serbia had been bound by the Genocide Convention from 1992 without reservations (by succession: see Judgment, paragraph 111), it could not claim to “accede” to that treaty by its notification of 12 March 2001, as no State can accede to a treaty to which it is already a party, and consequently the alleged accession was ineffective, as was the reservation to Article IX which accompanied it. Even supposing that that reservation could be regarded, at the outside, as a “belated reservation” to a treaty by which the State making the reservation had already long been bound, it could not produce any legal effect, at least in relations between Serbia and Croatia, the latter having objected to it.

It follows thus that today Croatia could, if it wished, file a fresh application against Serbia, identical in substance to the previous one, and this justifies the willingness of the Court, in application of the jurisprudence of the *Mavrommatis* decision, to overlook the fact that the conditions for its jurisdiction were not fulfilled on the date when the proceedings were instituted.

56. Of course, the above thoughts are offered only as *obiter dicta*, for I believe the Court would have been better advised to set aside Serbia’s objection derived from its lack of “access to the Court” in July 1999 on the sole ground that the conditions laid down in Article 35 of the Statute are not applicable to a respondent.

That is why I had no hesitation in voting in favour of the operative clause of the Judgment.

(Signed) Ronny ABRAHAM.

## DECLARATION OF JUDGE BENNOUNA

[Translation]

I have voted in favour of the operative part of the Judgment and, subject to the limits expressed therein, I am of the opinion that the Court has jurisdiction to entertain Croatia's Application on the merits. However, I do not agree with all of the reasoning on which the Court bases its decision upholding its jurisdiction *ratione personae* in this case. This is particularly true of the whole part of the Judgment which draws on the jurisprudence initiated by the Permanent Court of International Justice in the *Mavrommatis Palestine Concessions (Judgment No. 2, 1924, P.C.I.J., Series A, No. 2, p. 34)* case in order to establish the standing of a State to take part in proceedings under Article 35, paragraph 1, of the Statute (i.e., paragraphs 81 to 92 of the Judgment).

Indeed, having recalled that as a general rule its jurisdiction must be assessed at the time when the proceedings are instituted (Judgment, para. 79), the critical date thus being 2 July 1999, the Court emphasizes nonetheless that, like its predecessor, it has

“shown realism and flexibility in certain situations in which the conditions governing the Court's jurisdiction were not fully satisfied when proceedings were initiated but were subsequently satisfied, before the Court ruled on its jurisdiction” (*ibid.*, para. 81).

And yet the Court has chosen to take account of the findings which it made in its Judgments of 2004 in the *Legality of Use of Force* cases, namely that the FRY was not a Member of the United Nations, nor a party to the Statute, between the break-up of the SFRY in 1992 and its admission to the United Nations on 1 November 2000. It thus follows from this, in the present case, that the Court did not have jurisdiction on the date of the filing of the Application by Croatia — 2 July 1999 — but that it could have jurisdiction if the missing condition, that is, the status of the FRY as a party to the Statute, were to be fulfilled before it had ruled on its jurisdiction. Indeed, the whole logic of the jurisprudence of the *Mavrommatis* case is built upon the possibility available to the Applicant, after the Application has been filed, of filing it again before a final decision on jurisdiction has been made. Thus, from the perspective of the sound administration of justice, the Court would be entitled to disregard the initial defect which affected its jurisdiction. That is the logic underlying the reasoning of the Court but it needs to be pursued to its conclusion, for otherwise it remains a shaky and unconvincing argument. One can hardly decide not to pursue the argument thus chosen through to its conclusion in order to skirt certain obstacles and avoid difficulties, know-

ing that the Court's so-called cautious approach may well prove incompatible with legal precision.

I fear that the Court may have manoeuvred itself into a dead end by refusing to draw all the consequences from the legal construct inspired by the jurisprudence of the *Mavrommatis* case. It contents itself with finding that Serbia became a Member of the United Nations again, and a party to the Statute, as from 1 November 2000, and that it thenceforth had the standing to take part in proceedings before the Court.

However, in the present case, the question remains of what account is to be taken of the notification by the FRY, once it had become a Member of the United Nations on 1 November, of its accession to the Genocide Convention accompanied by a reservation to Article IX on the *ratione materiae* jurisdiction of the Court (accession dated 6 March 2001, effective from 10 June of the same year).

Can the Court base itself on the jurisprudence of the *Mavrommatis* case and find that it has jurisdiction without giving any consideration to the impact of that accession accompanied by a reservation? Can it be satisfied with the finding that the missing condition, under Article 35, paragraph 1, of the Statute was fulfilled as from 1 November and that the jurisdiction of the Court was established from that date inasmuch as the first condition, that of the FRY's status as a party to the Genocide Convention, had been proven at the moment when the proceedings were instituted by Croatia on 2 July 1999?

I do not think that the Court can spare itself an examination of the accession of 6 March 2001 accompanied by a reservation to Article IX for the simple reason that the whole logic of the jurisprudence of the *Mavrommatis* case might collapse, since it is built upon the possibility for the Applicant to put the case before the Court again at any time. That was indeed the wording which the Court used in its 1996 Judgment 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*: "Bosnia and Herzegovina might at any time file a new application, identical to the present one, which would be unassailable in this respect" (*I.C.J. Reports 1996 (II)*, p. 614, para. 26).

We should therefore enquire, in the event that Croatia's Application had been filed again after 10 June 2001 (that is, the day after the accession of the FRY came into force), whether it would have been "unassailable". And it is only possible to answer such a question after an examination of the accession concerned.

And the answer, in our view, is self-evident and should be relatively simple. Inasmuch as the Court has held that the FRY was a party to the Genocide Convention, including Article IX thereof, from 27 April 1992, without a break in continuity, it should find that the accession of 6 March 2001, accompanied by a reservation, cannot give rise to any legal effect on relations between the two Parties.

Indeed, it is well established that a State cannot accede to a treaty to which it is already a party. In addition, on 18 May 2001 Croatia submit-

ted an objection to the filing of an instrument of accession to the Genocide Convention by the FRY on the ground that the latter was “already bound by the Convention”. The purpose of the FRY’s accession of 6 March 2001 is consequently difficult to understand, unless it was intended to avoid the FRY’s prior undertaking in part by excluding the application of Article IX concerning the jurisdiction of the Court. The fact that the FRY has not made use of such a procedure for any of its other treaty obligations makes this explanation even more likely. It was thus that the FRY notified the United Nations Secretary-General by a letter dated 6 March 2001 of its intention to succeed to a number of multilateral treaties of which he is the depositary, emphasizing that it “undertakes faithfully to perform and carry out the stipulations therein contained as from April 27, 1992, the date upon which the Federal Republic of Yugoslavia assumed responsibility for its international relations” (in reference to an appended list of treaties to which the Socialist Federal Republic of Yugoslavia was a party).

It was, in my opinion, the Court’s duty to arrive at this conclusion in order to dispel any ambiguity as to the application of the jurisprudence of the *Mavrommatis* case as a basis of jurisdiction in the present proceedings. It is regrettable that it did not do so, probably out of excessive caution. Such caution was not, however, justified in the present instance, since the *res judicata* of the Court’s decision is relative and therefore applies only to relations between the two Parties. Finally, it follows from this that the reasoning on this point is incomplete and therefore unsatisfactory, and is likely to weaken the Court’s findings, although they are to my mind perfectly well grounded. The principal judicial organ of the United Nations is expected to work to clarify complex legal situations, and it can only do so by pursuing the inherent logic of the approach it has decided to take through to the end.

(Signed) Mohamed BENNOUNA.

## DISSENTING OPINION OF JUDGE SKOTNIKOV

1. In my view, the Court should have upheld the first preliminary objection submitted by Serbia in so far as it relates to the capacity of the Respondent to participate in the proceedings instituted by Croatia. Therefore, I voted against paragraph 1 of the operative clause.

I disagree with the Court's reasoning and its conclusion that Serbia's lack of *jus standi* at the time of institution of the proceedings has been cured by its subsequent admission to the United Nations.

The *Mavrommatis* jurisprudence provides for an exception to the general rule that the jurisdiction of the Court must be assessed on the date of the institution of the proceedings. That jurisprudence deals exclusively with defects related to consent of the parties (*Mavrommatis Palestine Concessions, Judgment No. 2, 1924, P.C.I.J., Series A, No. 2*). Such jurisdictional defects, if they can be easily cured by subsequent action of the applicant (or a respondent who is willing to litigate), may be disregarded by the Court on the grounds of judicial economy.

Nevertheless, the Judgment treats the *Mavrommatis* exception as applicable to any defect, including the absence of the right of a party to appear before the Court. That right, however, is not a matter of consent. The question of the right of a party to appear before the Court precedes the question of whether the Court has jurisdiction, which is a matter of consent (see, for example, *Legality of Use of Force (Serbia and Montenegro v. Belgium), Preliminary Objections, Judgment, I.C.J. Reports 2004 (I)*, pp. 298-299, para. 46).

Accordingly, the absence of a right to appear before the Court is not a defect capable of being cured by applying the *Mavrommatis* jurisprudence.

2. I agree with the Court's conclusion that Serbia was party to the Genocide Convention at the time of filing of the Application. For that reason I voted in favour of paragraph 2 of the operative clause.

3. However, this Convention, as the Court established in its *Legality of Use of Force* Judgments, is not a treaty in force in the sense of Article 35, paragraph 2, of the Statute of the Court (see, for example, *ibid.*, pp. 323-324, paras. 113-114). Therefore it is not capable of giving access to the Court to a party which is not a Member of the United Nations at the time the proceedings are instituted. Accordingly, I voted against the Court's conclusion in paragraph 3 of the operative clause that it has jurisdiction to entertain this case.

4. Even if I had shared the view taken by the Court in paragraph 3 of the operative clause, I would have voted against paragraph 4.

Having found that the respondent State became a party to the Genocide Convention as of 27 April 1992 (the date on which the FRY came into existence), the Court has, in my opinion, erred in leaving open until the merits stage the question raised by Serbia in its second preliminary objection as to whether the Court has jurisdiction to examine facts or events which occurred prior to that date.

In fact, Serbia, in its second preliminary objection, puts forward two contentions. First, that the Court has no jurisdiction under Article IX of the Genocide Convention with regard to the events that took place prior to 27 April 1992. Second, that if there is jurisdiction, it cannot be exercised in respect of the events which occurred prior to that date. The Court notes in this connection that “[a] distinction between these two kinds of objections [to jurisdiction and admissibility] is well recognized in the practice of the Court” (Judgment, para. 120). The Court makes it clear that an objection to admissibility “consists in the contention that there exists a legal reason, even when there is jurisdiction, why the Court should decline to hear the case” (*ibid.*, para. 120). If the Court has no jurisdiction, it is evident that the issue of the existence or non-existence of a different legal reason not to hear the case becomes moot. Nevertheless, defying its own reasoning and departing from its case law, the Court concludes that the issue of jurisdiction in respect of events prior to 27 April 1992 is “inseparable” from the issue of admissibility, which, according to the Court, involves questions of attribution to the Respondent of the facts in the period preceding that date (*ibid.*, para. 129).

However, the admissibility question raised by Serbia can become relevant only if the Court has jurisdiction to examine these facts. The question of jurisdiction must be answered by the Court first. Only if the answer is in the affirmative can the Court, in the exercise of its jurisdiction under Article IX of the Genocide Convention, decide whether it can address the events occurring before the FRY came into existence, including questions related to attribution of responsibility.

The Court explains its reluctance to tackle the issue of jurisdiction as a preliminary one by stating that “[i]n order to be in a position to make any findings on each of these issues [jurisdiction and admissibility], the Court will need to have more elements before it” (*ibid.*, para. 129). I fail to see what element is lacking in respect of the issue of jurisdiction. The Court has found that the respondent State acquired the status of party to the Genocide Convention, by a process that is to be regarded as succession (*ibid.*, paras. 110 to 117), on 27 April 1992, the date on which it came into existence. It follows that the Court has no jurisdiction to examine any facts or events which occurred prior to the date on which the obligations of the Convention became binding on the Respondent.

The Court’s insistence that the issues of jurisdiction and admissibility

are “inseparable” suggests that the issue of attribution of responsibility could be considered together with the issue of jurisdiction and influence the Court’s decision on the latter. But responsibility under the general rules of State responsibility, even if established, cannot mutate into the jurisdiction of the Court, which, unlike State responsibility, is based on consent.

5. I voted against paragraph 5 of the operative clause, since I do not agree with the Court’s conclusion that it has jurisdiction to entertain this case.

*(Signed)* Leonid SKOTNIKOV.

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SEPARATE OPINION OF JUDGE *AD HOC* VUKAS

*Capacity of the Respondent — Application of the Genocide Convention — Jurisdiction of the Court ratione temporis — Existence of Serbia as a State — Nature of the acts of genocide — Missing Croatian citizens.*

While fully subscribing to the Court's conclusions in the operative clause (Judgment, para. 146), I would like to make clear my own reasoning that led me to those conclusions.

1. THE CAPACITY OF THE REPUBLIC OF SERBIA TO PARTICIPATE IN THE PROCEEDINGS INSTITUTED BY THE APPLICATION OF THE REPUBLIC OF CROATIA

1. In respect of the preliminary objection submitted by the Republic of Serbia concerning its capacity to participate in the proceedings instituted by the Application of the Republic of Croatia, I will not engage in a discussion of the various arguments advanced by either the Applicant or the Respondent. Nor will I take into account the various opinions concerning their legal personality and membership in the United Nations expressed by the Republic of Croatia and the Federal Republic of Yugoslavia (FRY) for political considerations in the first decade following the dissolution of the Socialist Federal Republic of Yugoslavia (SFRY). Finally, I will try to avoid an analysis of the various considerations made by the International Court of Justice (ICJ) in some of the previous cases heard by the Court.

2. I base my conclusion that the Respondent possessed the capacity to participate in the proceedings (on the basis of Article 35, paragraph 1, of the Statute of the Court, and Article 93, paragraph 1, of the Charter of the United Nations) on the date of the submission of the Application by the Republic of Croatia (2 July 1999) on official documents of the United Nations and the opinions of the competent organs of the world body.

(a) The practical consequence of Security Council resolution 777 of 19 September 1992 and General Assembly resolution 47/1 of 22 September 1992 was that the Federal Republic of Yugoslavia (Serbia and Montenegro) was not allowed to participate in the work of the General Assembly. As the State was not excluded from the activities which all the Members of the United Nations have, in the other organs of the Organization, the Court spoke of the "*sui generis*" position which the FRY found itself in vis-à-vis the United Nations over

the period from 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).

(b) The position of the FRY in relation to the Statute of the ICJ, at the time of the filing of Croatia’s Application in the present case is indicated in the *Yearbook* of the Court. That is in the list of States Members of the United Nations (entitled to appear before the Court on the basis of their membership in the Organization), which included “Yugoslavia” (*I.C.J. Yearbook 1998-1999*, No. 53, p. 73). This volume of the *Yearbook* covers the period from 1 August 1998 to 31 July 1999. As in this period the SFRY no longer existed, following its dissolution in the years 1991 to 1992, the only State which the International Court of Justice could have meant under the name “Yugoslavia” was the FRY. Therefore, according to the *I.C.J. Yearbook*, the Republic of Croatia — also a Member of the United Nations at that point (from 22 May 1992) — was entitled to institute proceedings against the FRY on 2 July 1999.

3. Finally, if we consult an official document of the United Nations, published by the United Nations Information Service on 1 June 1993, we find “Yugoslavia” in the list of “United Nations Member States” (Note No. 27/Rev.1).

## 2. JURISDICTION *RATIONAE MATERIAE*

(a) Both Parties in this case, the Applicant and the Respondent, were parties to the Genocide Convention, without any reservation to its provisions, on 2 July 1999 — the date when the Government of the Republic of Croatia filed the Application against 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 (hereinafter: “the Genocide Convention”).

(b) The SFRY was a party to the Genocide Convention from its entry into force on 12 January 1951, as it signed the Convention on 11 December 1948, and deposited its instrument of ratification on 29 August 1950 (Human Rights, Status of International Instruments, United Nations doc. ST/HR/8, 1987, p. 178).

4. As a result of the process of disintegration of the SFRY, the Republic of Croatia became an independent State on 8 October 1991. Although generally willing to maintain the international obligations and rights of the former Federation, and to assume responsibility for international relations with respect to the territory of Croatia, it decided to take individual decisions on its succession in respect of each particular treaty con-

cluded by the SFRY. In view of this, on 12 October 1992 Croatia notified the Secretary-General of the United Nations (depository of the Genocide Convention) of its decision to act as a successor concerning the ratification of the SFRY (without any reservation) in respect of the Genocide Convention. However, in the notification to the Secretary-General, it was stated that, in conformity with international practice, Croatia's succession should take effect from 8 October 1991 — the date of its independence when it assumed responsibility for its international relations (<http://treaties.un.org/pages/showActionDetails.aspx?objid=0800000280028171>). The succession of the Republic of Croatia in respect of the Genocide Convention has in no way been contested or limited since the notification of its succession.

(c) In the course of the dissolution of the SFRY, two Republics, which had been members of the former Federation — Montenegro and Serbia — united in the Federal Republic of Yugoslavia on 27 April 1992 and wanted to be considered as continuing “the State, international legal and political personality of the Socialist Federal Republic of Yugoslavia” (United Nations, doc. A/46/915, Ann. II, para. 1). The contents of this declaration by the competent body of the FRY (the National Assembly of the Republic of Serbia and the Assembly of the Republic of Montenegro) were officially stated in the Note of 27 April 1992 from the Permanent Mission of Yugoslavia to the Secretary-General of the United Nations (depository of the Genocide Convention):

“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.)

5. The above-mentioned declaration and Note thus confirm that the FRY became a party to the Genocide Convention as a successor of the SFRY. It became a party without any reservation, just like the SFRY, and that was its status in respect of the Convention on 2 July 1999, the date when Croatia filed its Application instituting proceedings.

6. All the subsequent acts of the FRY in respect of the Genocide Convention in 2001 (rejection of the effects of the 1992 declaration, new notification of accession, including the reservation in respect of Article IX of the Convention) cannot have any effect in respect of the jurisdiction *ratione materiae* of the Court in relation to the FRY in the present case.

3. PRELIMINARY OBJECTION TO THE JURISDICTION OF THE COURT AND TO  
ADMISSIBILITY *RATIONE TEMPORIS*

(a) The first reason advanced by Serbia concerning the limitation of the jurisdiction of the Court *ratione temporis* is based on application of the Genocide Convention between the FRY and Croatia. According to counsel for Serbia, the earliest possible point in time at which the Convention could be found to have entered into force between the FRY and Croatia was 27 April 1992 [CR 2008/9, p. 13 (Zimmermann)].

7. However, application of the Genocide Convention to the Respondent before 27 April 1992 is not governed by the declaration of the FRY of its succession in respect of the ratification of the Convention by the SFRY on the one hand, and the notification of succession by the Republic of Croatia on the other, and the relation between these rather new parties to the Genocide Convention.

8. The Convention had to be applied by Croatia, as well as by Montenegro and Serbia, long before 27 April 1992, as its contents became a part of Yugoslav municipal law back in 1951. Article 210, paragraph 2, of the 1974 Constitution of the SFRY provided that “[i]nternational treaties which have been promulgated shall be directly applied by the courts of law” (*The Constitution of the Socialist Federal Republic of Yugoslavia, Jugoslovenski pregled*, Belgrade, 1989, p. 107). Therefore, violation of the Convention by all natural and legal persons in Yugoslavia, all organs of the State and federal units of Yugoslavia (Bosnia and Herzegovina, Croatia, Macedonia, Montenegro, Serbia and Slovenia) was prohibited.

9. Since the dissolution of the Federal Republic of Yugoslavia in 2006, it has become even clearer that the Respondent is in fact the same subject as the Socialist Republic of Serbia in the SFR of Yugoslavia. Given the circumstances of the dissolution of the FRY, Croatia confirmed that the proceedings it instituted on 2 July 1999 were “maintained against [the] Republic of Serbia as Respondent”. However, the Agent of Croatia noted that this conclusion was “without prejudice to the political responsibility of [the] Republic of Montenegro and the possibility of instituting separate proceedings against it” (letter dated 15 May 2008 by the Agent of Croatia; Judgment, para. 30).

(b) The second reason for objecting to the jurisdiction of the Court and to the admissibility *ratione temporis*, is the opinion of Serbia that “the Genocide Convention including the jurisdictional clause contained in its Article IX cannot be applied with regard to acts that occurred *before* Serbia came into existence as a State”, and could thus not have become binding upon it before 27 April 1992 [CR 2008/9, pp. 13-14 (Zimmermann)].

10. In respect of this objection of Serbia, I have two remarks. The first concerns the date when Serbia came into existence as a State, and the second deals with the nature of the relevant acts, and the time when they occurred.

(b) (i) 27 April 1992 is not the date when “Serbia came into existence as a State”. It is the date when two former Yugoslav Republics — Montenegro and Serbia — formally established the State called “The Federal Republic of Yugoslavia”. But Serbia was a State long before that date.

11. As mentioned previously, Serbia was one of the Yugoslav Republics. Although the six Republics were called “states” in the Federal Constitution of the SFRY (Art. 3), they were federal units forming the Yugoslav Federation. However, the situation changed in the 1990s. As stated in paragraph 43 of the present Judgment “[I]n the early 1990s the SFRY . . . began to disintegrate”. The reason for this was not only the variety of concepts concerning the future of Yugoslavia, but more particularly the use of force against two of its component units — Slovenia and Croatia. As a consequence thereof, Croatia and Slovenia declared independence on 25 June 1991, followed by Macedonia on 17 September 1991, and Bosnia and Herzegovina on 19 October 1991. Taking into account these events, the Arbitration Commission — an expert body of the Conference on Yugoslavia (convened by the European Community) — on 29 November 1991 concluded “that the Socialist Federal Republic of Yugoslavia is in the process of dissolution” (Opinion No. 1, adopted on 29 November 1991 and made public on 7 December 1991; *International Legal Materials*, Vol. 31, (1992) p. 1497).

12. The conclusion on the “process of dissolution” of the SFRY by the Arbitration Commission was based on the opinion that “the essential organs of the Federation . . . no longer meet the criteria of participation and representativeness inherent in a Federal State” and on the fact that “the recourse to force has led to armed conflict between the different elements of the Federation which has caused the death of thousands of people . . .” (*ibid.*, pp. 1496-1497).

13. Taking into account the decision of four former Yugoslav Republics to proclaim and defend their independence, the European Community decided to play an active role in respect of the recognition of new States on the territory of the dissolving SFRY. On 16 December 1991, the Council of the European Communities adopted two instruments containing guidelines/conditions for the recognition of new States in Eastern Europe: the declaration on “Guidelines on the Recognition of the New States in Eastern Europe and the Soviet Union” and the declaration on Yugoslavia (*ibid.*, pp. 1485-1487). Four Republics, which had been members of the SFRY, asked the member States of the European Community to recognize them as independent States: Bosnia and Herzegovina,

Croatia, Macedonia and Slovenia met the necessary conditions for their recognition, contained in the two above-mentioned instruments. The consequence of that opinion was the recognition of those former Yugoslav Republics as independent States by the European States as of mid-January 1992, followed by recognition by States in all other regions.

14. Only in respect of Bosnia and Herzegovina was the Commission of the opinion that the will of the peoples of that Republic to constitute the Republic of Bosnia and Herzegovina as a sovereign and independent State should be clarified, possibly by means of a referendum. The proposed referendum was held on 29 February 1992 and 1 March 1992 and contributed to the beginning of the war in Bosnia and Herzegovina.

15. Two Republics of the former SFRY — Montenegro and Serbia — did not initiate the procedure established by the European Community for their recognition as independent States. The desire of these two Republics was to be considered as continuing “the state, international legal and political personality of the Socialist Federal Republic of Yugoslavia” (United Nations doc. A/46/915, Ann. II).

16. However, the political decision of Serbia not to proclaim independence, and not to request recognition by the European Community, does not mean that in the meantime it did not possess the characteristics of a sovereign State. For the purpose of this text, I will not analyse the extent to which the Government of Serbia (headed by Slobodan Milošević) controlled the remaining organs of the SFRY and its army, but there is no doubt that there was no power limiting the sovereign leadership of Serbia in its rule over the population and territory of Serbia. Therefore, Serbia was a State, which did not seek recognition as such by the international community for political reasons. As mentioned previously, it wanted to be considered as continuing the “international legal and political personality of the Socialist Federal Republic of Yugoslavia”. In this venture Serbia was helped by Montenegro, and these two former Yugoslav Republics on 27 April 1992 established the Federal Republic of Yugoslavia (Judgment, para. 99).

17. In any event, it is necessary to stress that, even in the period before the establishment of the FRY, Serbia was obliged to prevent and punish the crime of genocide, as the provisions of the Genocide Convention had for a long time before the 1990s formed a part of general customary international law of a peremptory nature (*jus cogens*).

(b) (ii) Serbia’s principal argument in respect of the lack of jurisdiction of the Court *ratione temporis* is the contention that acts or omissions which took place before the FRY came into existence (27 April 1992), cannot be attributed to the FRY [Preliminary

Objections of the Federal Republic of Yugoslavia (PO), para. 4.1]. In addition to the facts presented above concerning the existence of the Respondent (Serbia) before 27 April 1992, the main argument against this contention lies in the nature of certain of the “acts and omissions” which are qualified as “genocide” in the Genocide Convention. That is to say that only some of them occur instantaneously; most are the result of criminal activity over a longer time frame. Thus, for example, according to Article II (c) of the Genocide Convention, genocide means “[d]eliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part”. The majority of the acts to be dealt with in the present case took place in 1991. However, the suffering of the thousands of persons who disappeared in various detention facilities continued in the following years. The establishment of the FRY on 27 April 1992 was neither the beginning nor the end of many acts of genocide.

- (c) Having dealt with the various reasons advanced by Serbia as a preliminary objection to the jurisdiction of the Court and to admissibility *rationae temporis*, I feel obliged to repeat the Court’s comment that “there is no express provision in the Genocide Convention limiting its jurisdiction *ratione temporis*” (Judgment, para. 123).

4. PRELIMINARY OBJECTION TO THE ADMISSIBILITY OF CLAIMS RELATING TO THE SUBMISSION OF CERTAIN PERSONS TO TRIAL, PROVISION OF INFORMATION ON MISSING CROATIAN CITIZENS AND RETURN OF CULTURAL PROPERTY

18. While I share in the conclusions of the Court in rejecting this preliminary objection, I would like to stress the major importance of one of the requests by Croatia: the one concerning information on missing Croatian citizens. Thus, notwithstanding the existing co-operation between Serbia and Croatia concerning the location and identification of missing persons, a request from the Court to Serbia to provide all the information within its purview as to the whereabouts of Croatian citizens would be an act of great value for the missing persons and the members of their families.

(Signed) Budislav VUKAS.

DISSENTING OPINION OF JUDGE *AD HOC* KREĆA

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## I. GENERAL ISSUES

### *1. The consistency as a purported principle of the majority reasoning*

1. It seems that the principle of judicial consistency understood as “consistency with its own past case law. . . especially. . . in different phases of the same case or with regard to closely related cases” (*Legality of Use of Force (Serbia and Montenegro v. Belgium)*, *Preliminary Objections, Judgment, I.C.J. Reports 2004 (I)*, p. 330, para. 3; joint declaration of Vice-President Ranjeva, Judges Guillaume, Higgins, Kooijmans, Al-Khasawneh, Buergenthal and Elaraby) should have been the essence of the majority reasoning in the present case. Even for the standards of the Court itself in whose jurisprudence the principle of consistency has a prominent place, there is a conspicuous reference to the course “not. . . to depart from previous findings, particularly when similar issues were dealt with in the earlier decisions, as in the current case” (*Judgment*, para. 104) or similarly couched (*exempli causa, ibid.*, paras. 53, 54, 71, 76, 141).

2. The consistency as such may *in concreto* be evaluated at three levels:

- (a) consistency *in casu* (horizontal consistency);
- (b) limited vertical consistency, i.e., consistency in cases in which the Federal Republic of Yugoslavia (FRY)/Serbia was involved as a party; and
- (c) general vertical consistency in terms of the consistency of decisions taken by the Court in cases in which the FRY/Serbia was involved, in the light of the general jurisprudence of the Court on relevant issues.

3. It appears that the application of the principle of consistency *in casu* was a difficult task, as regards the *jus standi* of the FRY/Serbia even an impossible mission, due to heterogeneous decisions taken by the Court in

the earlier cases in that respect as well as in respect of the status of the FRY/Serbia vis-à-vis the United Nations as its determinative.

4. In that regard, the decisions of the Court in the earlier cases may be divided into three groups:

- (a) decisions based on avoiding or ignoring the position as regards the *jus standi* of the FRY/Serbia;
- (b) decisions involving some elements or *indiciae* of the *jus standi* of the FRY/Serbia; and
- (c) decisions based on substantive assessment, whether positive or negative, of the *jus standi* of the FRY/Serbia.

5. The explicit avoidance position was taken by the Court in its Orders of 8 April 1993 in the *Bosnia* case and 2 June 1999 in the *Legality of Use of Force* cases. In its Order of 8 April 1993 the Court found, *inter alia*, that in resolution 47/1 “the solution. . . is not free from legal difficulties” (*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), but decided that the question is one which “the Court does not need to determine definitively at the present stage of the proceedings” (*ibid.*).

Since the FRY/Serbia could have the status of a party in the Court only on the basis of its membership in the United Nations, the meaning of the finding regarding the *jus standi* of the FRY is that it, as such, “is not free of legal difficulties”. That position was slightly modified in its Order of 2 June 1999 by stating 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), Provisional Measures, Order of 2 June 1999, I.C.J. Reports 1999 (I)*, p. 136, para. 33).

6. In the Judgment on Preliminary Objections in the *Bosnia* case, which would have been the proper place for the decision as to whether the fundamental condition of *jus standi* (*Legality of Use of Force (Serbia and Montenegro v. Belgium), Preliminary Objections, Judgment, I.C.J. Reports 2004 (I)*, pp. 298-299, para. 46) had been fulfilled, the Court put the issue of the *jus standi* of the FRY under the carpet. It satisfied itself by the finding that “Yugoslavia was bound by the provisions of the Convention on the date of the filing of the Application” (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia), Preliminary Objections, I.C.J. Reports 1996 (II)*, p. 610, para. 17) and since Bosnia and Herzegovina “became a Member of the United Nations. . . on 22 May 1992” (*ibid.*, p. 611, para. 19) and as such “could become a party to the Convention through the mechanism of State succession” (*ibid.*, p. 611, para. 20), it came to the conclusion that “all the conditions are now fulfilled to found

the jurisdiction of the Court *ratione personae*” (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia), Preliminary Objections, I.C.J. Reports 1996 (II)*), p. 613, para. 26). The approach could be called the implicit avoiding position or, perhaps more properly, the ignoring position as regards the *jus standi* of the FRY. (The implicit avoiding position is basically the substance of the joint declaration of seven judges on the *Legality of Use of Force* cases also (*Serbia and Montenegro v. Belgium), Preliminary Objections, Judgment, I.C.J. Reports 2004 (I)*), pp. 330-334.) For, if the Court would consider itself not competent on considerations *ratione temporis* and *ratione materiae*, as was argued in the joint declaration, then the question of the *jus standi* of the FRY would be set aside, and would be substantially disqualified as an antecedent condition of the jurisdiction of the Court.)

7. In the decisions of the Court involving some elements or *indiciae* of substantive assessment of the *jus standi* of the FRY, one could include the Order of 8 April 1993 in the case concerning *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* and the 2003 Judgment in the *Application for Revision* case.

The Order of 8 April 1993, apart from the finding that the solution adopted by General Assembly resolution 47/1 “is not free from legal difficulties”, adduced another consideration namely, that

“proceedings may validly be instituted by a State against a State which is a party to. . . 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)” (para. 19 of the Order)<sup>1</sup> .

In its Judgment in the *Application for Revision* case (*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. 7), the Court entered into the assessment of both the *jus standi* of the FRY and its determinative — the status of the FRY vis-à-vis the United Nations. As regards the status of the FRY vis-à-vis the United Nations a notion *sui generis* of membership was constructed.

8. The Court, considering General Assembly resolution 55/12 of 1 November 2000 by which FRY/Serbia was admitted to the United Nations as a new Member, points out, *inter alia*, that it

<sup>1</sup> The consideration proved to be erroneous in the light of the eight Judgments of the Court in the *Legality of Use of Force* cases (*Serbia and Montenegro v. Belgium*), *I.C.J. Reports 2004 (I)*, pp. 323-324, paras. 113-114).

“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.” (*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.)

(Apart from the substantive validity of the position taken, two observations seem to be of interest. First, the assessment of the status of the FRY took place almost a decade after Bosnia and Herzegovina submitted its Application to the Court, and over four years since the admission of the FRY to the United Nations as a new Member. Second, the assessment is, by its nature, an *obiter dictum* exceeding the competence of the Court in the revision procedure which, in the sense of Article 61 of the Statute, should have confined itself to the issue whether the admission of the FRY to the United Nations as such is a “new fact”.)

Regarding the *jus standi* of the FRY, the Court noted 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.” (*Ibid.*, p. 31, para. 70.)

9. The Court performed substantial assessment of *jus standi* in two cases: in the *Legality of Use of Force* cases, the Court found that the FRY was deprived of the right to appear before it due to the fact that in the period 1992-2000 Serbia and Montenegro was not a Member of the United Nations and, consequently, “did not. . . have access to the Court under either paragraph 1 or paragraph 2 of Article 35 of the Statute” (*Legality of Use of Force (Serbia and Montenegro v. Belgium)*, Preliminary Objections, *Judgment, I.C.J. Reports 2004 (I)*, p. 327, para. 127), while in the 2007 Judgment in the case concerning *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* it found, through the form of decision by “necessary implication”, that Serbia did have access to the Court (*I.C.J. Reports 2007 (I)*, pp. 98-99, para. 132).

10. In the jurisprudence of the Court, taken as a whole, the cases in which the issue of access was *status versiae et controversiae* are rare because of the practically universal nature of the United Nations and because of the equality sign between the membership in the Organization and the *jus standi* before the Court. Along with the cases in which the

FRY/Serbia was involved, the list of relevant cases included the *Monetary Gold* and *Fisheries* cases. In all these cases the Court followed a uniform pattern in its reasoning. *Exempli causa*, in the *Fisheries Jurisdiction (Federal Republic of Germany v. Iceland)* case, the Court stated *inter alia*:

“the Minister for Foreign Affairs of Iceland seemed to suggest that the timing of the declaration of the Federal Republic of Germany of 29 October 1971, deposited with the Registrar on 22 November 1971, may have had some effect on the binding force of the agreement contained in the Exchange of Notes of 19 July 1961 *or on the right of access to the Court of the Federal Republic of Germany*. As to the first point, it is clear that the binding force of the agreement between the two Governments, which is to be examined in the present Judgment, *bears no relation to the date on which the declaration required by the Security Council resolution of 15 October 1946 was deposited with the Registrar: the former is designed to establish the jurisdiction of the Court over a particular kind of dispute; the latter provides for access to the Court of States which are not parties to the Statute. As to the second point (i.e., the question of the Federal Republic’s right of access to the Court), according to the Security Council resolution, a declaration, which may be either particular or general, must be filed by the State which is not a party to the Statute, previously to its appearance before the Court. This was done.*” (Judgment, *I.C.J. Reports 1973*, p. 53, para. 11; emphasis added.)

11. It comes out that in the series of decisions taken by the Court as regards the *jus standi* of the FRY/Serbia, the Judgments on the *Legality of Use of Force* cases are the only ones in conformity with the general jurisprudence of the Court in the matter. In its reasoning part, the Judgment substantiates the basic elements of the *jus standi* as defined by Article 35 of the Statute in terms of an autonomous processual condition of antecedent and mandatory nature distinguishable from jurisdiction of the Court *stricto sensu*. The Court found, *inter alia*, that

“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 jurisdic-

tion upon it.” (*Legality of Use of Force (Serbia and Montenegro v. Belgium)*, *Preliminary Objections, Judgment, I.C.J. Reports 2004 (I)*, pp. 298-299, para. 46; see also pp. 292-293, para. 29.)

12. In addition, the finding that “at the time of filing of its Application to institute the present proceedings before the Court on 29 April 1999, the Applicant. . . was not a Member of the United Nations” (*ibid.*, p. 314, para. 91) was, as time has shown, of far-reaching importance. The Court accepted it in the Judgment of 2007 in the case concerning *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* and in the present Judgment after more than one decade of wandering between the Scylla of avoiding position, and the Haribda of *sui generis* position, a sort of *tertium quid* between membership and non-membership of the FRY in the United Nations.

13. However, it should be noted that *stricti juris* even the 2004 Judgment is not free from inconsistency. It regards the disharmony between the *dispositif* of the Judgment with its *ratio decidendi*. While the reasoning part of the Judgment is strictly formulated in terms of the right of the FRY to access to the Court under Article 35, paragraphs 1 and 2, of the Statute (*ibid.*, p. 298, paras. 46; pp. 310-311, para. 79; pp. 314-315, para. 91 and p. 327, para. 126), its *dispositif* concerns exclusively the “*jurisdiction to entertain the claims*” (*ibid.*, p. 328, para. 129; emphasis added). The inconsistency between the *dispositif* and the *ratio decidendi* is even greater, because the Court did not deal with the issue of jurisdiction *stricto sensu*, sticking to the basic assumption that it must determine whether the FRY meets the conditions laid down in Article 35 of the Statute before examining the conditions in Articles 36 and 37 of the Statute. Therefore, the Court concluded that the fact that

“Serbia and Montenegro did not, at the time of the institution of the present proceedings, have access to the Court. . . makes it unnecessary for the Court to consider the other preliminary objections filed by the Respondents *to the jurisdiction of the Court*” (*ibid.*, pp. 327-328, para. 127; emphasis added).

14. It appears that the jurisdiction of the Court, in the cases in which the FRY/Serbia was involved as a party, is far from consistent at all three levels of its evaluation. The very fact that the Court, in dealing with an identical issue in the different phases of the same case, or in closely related cases, applied the three basic, mutually exclusive *modus faciendi*, is, if not by itself an answer to the question whether the Court acted in a consistent manner or not, at the very least represents a strong *indiciae* in that regard.

It is difficult to discuss in terms of substantial consistency the decisions of the Court based on the avoiding position. For, the decisions regarding the *jus standi* of the FRY/Serbia, taken *sub silentio*, either by accepting the factual presumptions (*praesumptio facti vel homine*) about the con-

tinuity and legal identity (1996 Judgment in the case concerning *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*) or by the constructions which keep them indirectly in force (2007 Judgment in the same case) do not give real answers to the question which is cardinal for the legality of the Court's judicial activity. Decisions based on the substantial assessment of *jus standi*, although in contrast to those based on avoidance, represent the expression of a proper judicial action, are diametrically opposed in the determination of the *jus standi* of the FRY/Serbia. *Indiciae* or elements of the substantial assessment of *jus standi*, since they are not, by themselves, decisions and, moreover, were not an element of the proper decisions on the issue, demonstrate the scope of the inconsistency in the legal reasoning.

15. The conclusion follows that the only consistency of the decisions of the Court regarding *jus standi* of the FRY/Serbia is found in the inconsistency of the decisions *per se* and in its *ratio decidendi*. And, if the purpose of consistency is, *inter alia*, to "provide predictability" (joint declaration of Vice-President Ranjeva, Judges Guillaume, Higgins, Kooijmans, Al-Khasawneh, Buergenthal and Elaraby, *Legality of Use of Force (Serbia and Montenegro v. Belgium)*, *Preliminary Objections, Judgment, I.C.J. Reports 2004 (I)*, p. 330, para. 3) "in different phases of the same case or with regard to closely related cases" (*ibid.*), it is not clear what that predictability would consist of in those cases in which the FRY/Serbia was a party, except, perhaps, that the FRY/Serbia has *jus standi* as a respondent, and that it is deprived of it as an applicant.

16. The jurisdiction of the Court regarding the status of the FRY/Serbia as a Contracting Party to the Genocide Convention is seemingly consistent. In the different phases of the case concerning *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia)* as well as in the provisional measures phase of the *Legality of Use of Force* cases, the Court basically adopted the finding that the FRY/Serbia may be considered as bound by the Genocide Convention on the basis of intention, as expressed in the declaration adopted on 27 April 1992

"to remain bound by the international treaties to which the former Yugoslavia was party. . . confirmed in an official Note of 27 April 1992 from the Permanent Mission of Yugoslavia to the United Nations" (*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; see also *Legality of Use of Force (Yugoslavia v. United Kingdom)*, *Provisional Measures, Order of 2 June 1999, I.C.J. Reports 1999 (II)*, p. 838, para. 32).

The finding acquired, in the merits phase of the case concerning *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, the *res indicata* status and is in part reaffirmed in the present Judgment, too (para. 11). So, in terms of horizontal as well as limited vertical consistency, it seems that the Court acted almost *semper idem*. The precedential authority of the finding is, however, in doubt in terms of substantive consistency.

First of all, the qualification of the 1992 declaration as a unilateral legal act capable of producing the proper effects per se, seems to be inconsistent with the relevant rules of international law as expressed in the jurisprudence of the Court (paras. 121-128 below).

Even if *ex hypothesis* the 1992 declaration may be considered as such an act, well-settled rules in the jurisprudence of the Court regarding the interpretation of unilateral acts could hardly lead to the conclusion reached by the Court (para. 132 below).

17. Two additional considerations are of interest also.

Although in the present Judgment as well, the majority reaffirms the *dispositif* of the decisions of the Court adopted in the earlier cases related to the Genocide Convention, its legal reasoning is not consistent in that regard. While in the earlier cases, or its relevant phases, the majority, clearly and unequivocally, gave to the 1992 declaration a constitutive character, the present Judgment considers Serbia a Contracting Party by a combined action of the declaration and some additional, explicit or implicit, considerations (paras. 160-167 below). In that way, the majority perception of the declaration is blurred, for it is not clear enough whether it sees it as a constitutive or declarative act or as a mixture of the two.

18. The jurisdictional treatment of the declaration is different as well. In the earlier cases, the 1992 declaration was treated as a proper basis for the jurisdiction of the Court *ratione personae* (*I.C.J. Reports 1996 (II)*, pp. 610-613, paras. 17-26), while in the present case the 1992 declaration is treated as an issue of jurisdiction *ratione materiae* (Judgment, paras. 93-119).

The position of the Court in the 1996 Judgment was clear and designed in accordance with the standard practice of the Court. The jurisdiction *ratione personae* was determined in terms of whether Bosnia and Herzegovina and the FRY may be considered as parties to the Genocide Convention. Finding that the Parties to the dispute are Contracting Parties to the Genocide Convention — the FRY on the basis of the 1992 declaration (*I.C.J. Reports 1996 (II)*, p. 610, para. 17) and Bosnia and Herzegovina through the mechanism of State succession (*ibid.*, p. 611, para. 20) —, the Court concluded:

“For the purposes of determining its jurisdiction in this case, the Court has no need to settle the question of what the effects of a situ-

ation of non-recognition may be on the contractual ties between parties to a multilateral treaty. It need only note that, even if it were to be assumed that the Genocide Convention did not enter into force between the Parties until the signature of the Dayton-Paris Agreement, *all the conditions are now fulfilled to found the jurisdiction of the Court ratione personae.*" (*I.C.J. Reports 1996 (II)*, p. 613, para. 26; emphasis added.)

The Court assessed its jurisdiction *ratione materiae* in the following terms:

"whether there is a dispute between the Parties that falls within the scope of that provision [Art. IX of the Convention].

.....  
*It is jurisdiction ratione materiae*, as so defined, to which Yugoslavia's fifth objection relates." (*Ibid.*, p. 614, para. 27; emphasis added.)

19. In the present Judgment, the majority treats the jurisdiction of the Court *ratione materiae* exclusively as the issue of whether Serbia could be considered a Contracting Party to the Genocide Convention in the relevant period of time (Judgment, paras. 93-119). In its conclusion, the majority finds that:

"In sum, in the present case the Court, taking into account both the text of the declaration and Note of 27 April 1992, and the consistent conduct of the FRY at the time of its making and throughout the years 1992-2001, considers that it should attribute to those documents precisely the effect that they were, in the view of the Court, intended to have on the face of their terms: namely, that from that date onwards the FRY would be bound by the obligations of a party in respect of all the multilateral conventions to which the SFRY had been a party at the time of its dissolution. . ." (*Ibid.*, para. 117.)

20. A turn in the jurisdictional treatment of the 1992 declaration took place in the majority reasoning in the 2007 Judgment because of the specific needs as regards the construction of the decision by "necessary implication" on the *jus standi* of the FRY in the 1996 Judgment. The dictum reads:

"In the view of the Court, the express finding in the 1996 Judgment that the Court had jurisdiction in the case *ratione materiae*, on the basis of Article IX of the Genocide Convention, seen in its context, is a finding which is only consistent, in law and logic, with the proposition that, in relation to both parties, it had jurisdiction *ratione personae* in its comprehensive sense, that is to say, that the status of each of them was such to comply with the provisions of the Statute concerning the capacity of States to be parties before the

Court.” (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, *I.C.J. Reports 2007 (I)*, p. 99, para. 133.)

21. Apart from its meaning in terms of judicial consistency, the different treatment of the 1992 declaration seen in this context is highly significant for at least three reasons:

- (a) the manner in which the majority reads the relevant earlier decisions;
- (b) the majority perception of the *res judicata* effects of the 1996 Judgment; and
- (c) the majority perception of the precedential authority of the 1996 Judgment.

22. The judicial consistency is rather the result, the picture of the coherency of the decisions and the reasons making a logical and legal union, based on the proper application of legal rules which should bind any court of law in its judicial activity, and not a matter for itself or by itself. It represents the intrinsic, organic quality of the judicial reasoning in the different phases of a case, or different cases, which regard identical or similar issues. As such, it cannot be built up in terms of *ex post* harmonization of heterogeneous decisions on identical or substantially identical issues. Deliberate actions in that regard may have for result the formal consistency only, which exhausts itself in the strengthening of the formal authority of the court of law.

In a situation where two diametrically opposed decisions existed as regards the issue of *jus standi* — the *Bosnia and Herzegovina* case (2007) and the *Legality of Use of Force* cases (2004) — it seems impossible to achieve the quality of substantive consistency, either legally or logically. Even by using a measure of judicial engineering.

## 2. *What is the possible backing of the inconsistency?*

23. It is difficult to explain the heterogeneous decisions of the Court as regards the *jus standi* of the FRY/Serbia by reasonable differences in the legal reasoning, unavoidable in every bigger collegium of judges. They are rather the expression of different views of a proper judicial policy in that regard, for the differences in legal reasoning as such have their limits which were well surpassed in the cases where the FRY/Serbia was involved.

It would seem that Judge Higgins in her separate opinion appended to the Judgment in the *Legality of Use of Force* cases gave succinctly the real explanation of the matter by saying:

“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.” ((*Serbia and Montenegro v. Belgium*), *Preliminary Objections, Judgment, I.C.J. Reports 2004 (I)*, p. 342, para. 20; emphasis added.)

24. The explanation given in the separate opinion of Judge Higgins was confirmed in a number of pronouncements of the Court.

In the *Legality of Use of Force* cases (2004) the Court pointed out *expressis verbis* that

“in its Judgment on Preliminary Objections of 11 July 1996. . . [t]he 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” (*ibid.*, p. 311, para. 82; emphasis added).

In addition, it admitted that:

“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 [one of them being the present one] involving this issue which came before the Court during this anomalous [1992-2000] period.” (*Ibid.*, p. 309, para. 74.)

25. This seems to be a perception of the judicial policy of the Court, of which it could not be said that it perfectly fits in the functional parallelism as a governing principle of the relations between the principal political organs of the United Nations, the General Assembly and the Security Council, on the one hand, and the International Court of Justice as its principal judicial organ, on the other, as well as judicial independence and impartiality. It seems rather like an action in concert with the principal political organs, implying that the Court follows the legal ambiguity which “has been anomalous in extreme” (R. Higgins, “The new United Nations and former Yugoslavia”, *International Affairs*, Vol. 69, No. 3, July 1993, p. 479).

26. Of special relevance in that regard is the pronouncement of the Court in the case concerning *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, made, moreover, in the merits phase, that “in 1999 — and even more so in 1996 — it was by no means so clear as the Court found it to be in 2004 that the Respondent was not a Member of the United Nations at the relevant time” (*Judgment, I.C.J. Reports 2007 (I)*, p. 98, para. 131; emphasis added).

(This pronouncement opens a very unpleasant question as to the activity of the Court over a considerable period of time in the light of the principle *bona fidei* which, as a peremptory one, is at least equally valid for the Court as it is for States. If, for more than a decade, it was so clear that the Respondent was not a Member of the United Nations, and the

quality of being a Member of the United Nations was the only basis on which the Respondent could have been considered a party to the Statute of the Court, it follows that the Court deliberately avoided recognizing the jurisdictional fact affecting the very legality of the totality of its actions in the cases in which the FRY/Serbia was involved as a party. Such an attitude of the Court could be termed judicial arbitrariness, close to, or in the zone of, abuse of judicial power rather than judicial caution resulting in judicial indecision. The explicit admission by the Court that “in 1999 — and even more so in 1996 — it was by no means clear . . . that the FRY was not a Member of the United Nations at the relevant time” being, in fact, tantamount to the admission that the Court acted *sine vires*, represents a sufficient and sound basis for revision of the 1996 Judgment *proprio motu*. It would be the proper way of action of the Court in such circumstances to preserve its judicial integrity. For, in the light of international law, the fact that the Court acted *sine vires* automatically deprives the 1996 Judgment of validity, both in formal and in substantive terms. Standing in the way of the application of the law in that regard is only the comfortable position of the Court in the judicial environment of the international community which does not know the appellate procedure or the appellate court.)

27. The action in concert with the political organs of the World Organization was familiar or, even, inherent to the spirit prevailing at the Hague Peace Conference that judicial settlement as such may play the role of an instrument for diminishing the danger of, and, moreover, substitute to the resort of arms. The situation is quite different now. The idea that

“an international Court should play an important role in the new Organization of nations for peace and security”, is illusory. Indeed, there is evidence, in the records of the various organs of the United Nations, that the Court is regarded as something different from other United Nations organs, and its procedures something independent from customary United Nations procedures.” (S. Rosenne, *The Law and Practice of the International Court, 1920-2005*, Vol. I, *The Court and the United Nations*, pp. 189-190; footnote omitted.)

28. In the framework of the United Nations “the International Court of Justice stood as the judicial apex, while the Security Council was the new Praetorian guard for the political consensus and its enforcement” (M. Cohen, “Impartiality, Realism and International Process”, *International Law at a Time of Perplexity: Essays in Honour of Shabtai Rosenne*, p. 96).

So,

“Much more than the establishment of peace, the development of international law is the essential function of judicial settlement . . . The gradual elaboration of the law through the accumulation of a

*body of homogeneous decisions is a condition of order and stability.”*  
(C. De Visscher, *Theory and Reality in Public International Law*, rev. ed., 1968, p. 390; emphasis added.)

29. The principle of functional parallelism gives to the ICJ an important, substantially broader scope for judicial activity in terms of the impartial determination of disputes on the basis of law. By its very nature the principle runs counter to crypto-political decisions clad in legal garb, which may bring any court of law dangerously close to the well-known *chambres de réunion*. The principle gives each organ involved the possibility to act in its own space, fulfilling its original role, and regards the court that is to declare the law.

30. Deliberate concerted activity with political organs leaves hard consequences on any court of law. Legal reasoning and reasoning based on political considerations and expediency are in unsolvable conflict both in terms of substance and in terms of time. This is clearly demonstrated, as far as judicial consistency is concerned, in the cases before the Court involving the FRY/Serbia as a party.

31. It appears that during some 15 years the Court, in terms of judicial policy, acted in several capacities in the cases in which the FRY/Serbia was involved as a party.

32. Since the institution of proceedings in the case concerning *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* in 1993, until the admission of the FRY to the United Nations in 2000, the Court, in respect of the jurisdictional issues involved, basically acted as a guardian of the ambiguous policy of the principal political organs of the United Nations in regard to the status of the FRY in the Organization. In the proceedings on the indication of provisional measures of 1993 and in the Judgment on preliminary objections of 1996, it relied tacitly on the factual presumption (*praesumptio facti vel homine*) of the legal identity and continuity of the FRY with the SFRY, acting in concert with the General Assembly as author of the legally vague and controversial resolution 47/1, which allowed *pro et contra* interpretation of the status of the FRY vis-à-vis the United Nations.

33. So, as became clear *tractu temporis*, it choose the weakest possibility in the light of the principle that “[t]he Court must however always be satisfied that it has jurisdiction, and must if necessary go into that matter *proprio motu*” (*Appeal Relating to the Jurisdiction of the ICAO Council (India v. Pakistan)*, Judgment, *I.C.J. Reports 1972*, p. 52, para. 13), especially with respect to the *jus standi* requirement as the principal condition for the legality of the Court’s judicial action *in casu*.

The Court had two more, much better, possibilities at its disposal:

(a) to ask for an authentic interpretation of resolution 47/1 from the General Assembly; or

(b) to make its own explicit interim determination of the matter in a proper form.

34. In contrast to the legal presumption (*praesumptio juris et de jure*), the factual presumption bears an unavoidable limitation in terms of time. In the context of the matter, it was obvious that the factual presumption of continuity of the FRY may be valid only until the moment when the competent political organs of the United Nations adopted the final decision on the status of the FRY/Serbia in the United Nations, unfounded on the continuity premise. That is what happened in November 2000, when, by decision of the competent organs of the United Nations, the FRY was admitted to its membership as a new Member.

35. This fact demonstrated dramatically the ontological irreconcilability of the legal reasoning, on the one side, and the reasoning based on pragmatic considerations and expedience, on the other.

Since the admission to the membership in the United Nations is a matter of exclusive competence of the two principal political organs — the Security Council and the General Assembly — and their decision is binding upon the United Nations structure as a whole, it might be expected from the Court, in the spirit of functional parallelism, to adapt in a proper form its determination of the *jus standi* of the FRY/Serbia to that fact, being, in the circumstances surrounding the case, determinative of its *jus standi*.

The Court, however, opted for a different treatment of the FRY/Serbia in that regard, depending on the cases before it, thus demonstrating not only its inconsistency but throwing a shadow on the application of the fundamental principle of the equality of States before the Court also.

36. In the *Legality of Use of Force* cases the Court designed its determination of the *jus standi* of Serbia/Montenegro in the spirit of the principle of functional parallelism, finding, *inter alia*, that

“at the time of filing of its Application to institute the present proceedings before the Court on 29 April 1999. . . , Serbia and Montenegro, was not a Member of the United Nations, and, consequently, was not. . . a State party to the Statute of the International Court of Justice” (*Serbia and Montenegro v. Belgium*), *Preliminary Objections, Judgment, I.C.J. Reports 2004 (I)*, p. 314, para. 91).

So, in the eight *Legality of Use of Force* cases the Court in fact acted as a guardian of legality, both in the formal and in the substantive terms, respecting the division of competences between the principal political organs of the United Nations and the International Court of Justice as expressed in the functional parallelism principle.

37. In its Judgment in the *Bosnia* case (2007) the majority *de facto* stuck to the continuity presumption using technical, legal explanations in

the form of specific interpretation of the *res indicata* rule, relying on the understanding of judicial power in terms of unqualified power, which implies that:

“Subject only to this possibility of revision, the *applicable principle* is *res judicata pro veritate habetur*, that is to say that the findings of a judgment are, for the purposes of the case and between the parties, to be taken as correct, and may not be reopened on the basis of claims that doubt has been thrown on them by subsequent events.” (*I.C.J. Reports 2007 (I)*, p. 93, para. 120; emphasis added.)

38. In that Judgment the Court in fact acted as a guardian of its past decision embodied in the 1996 Judgment. Acting in that way, the Court persisted on its own judicial truth, completely divorced from the reality as established in the United Nations by resolution 55/12 and thus producing a *judicium illusorum*.

In that way the position of the Court took a highly interesting turn. While the 1996 Judgment in the *Bosnia* case was adopted with the purpose of acting in harmony with the principal political organs of the United Nations, the insistence on the validity of the premises on which it was based following the adoption of General Assembly resolution 55/12, brought the Court in harsh disharmony with the whole United Nations structure which implemented the resolution strictly.

As a matter of illustration, the objective meaning of the factual presumption on which the *jus standi* of the FRY/Serbia was based in the 1996 Judgment, and accepted in the 2007 Judgment, is that in the context of the dispute before the Court, the FRY/Serbia was considered, at least tacitly, to have been a Member in the period 1992-2000 as far as the Court and the Applicants are concerned, whereas for the United Nations itself it was not a Member, nor even for the Applicants, in respect of any other matter than the cases before the Court. In addition, in the eyes of the Court, the FRY/Serbia was considered a Member of the United Nations in the *Bosnia* case, and is in the present case, and was considered a non-Member in the eight *Legality of Use of Force* cases.

39. The Judgment in the *Application for Revision* case (*I.C.J. Reports 2003*, p. 7) is specific in this particular context (paras. 7-8 above). It possesses two basic meanings. On the one hand, by the construction of the *sui generis* position of the FRY vis-à-vis the United Nations, the Judgment tended, in essence, to substitute the tacit presumption on the continuity with a substantive ground of *jus standi*. For, by admission of the FRY to the United Nations, the presumption of the continuity became devoid of any substance. On the other hand, articulated well after the admission of the FRY to the United Nations, the *sui generis* construction amounted to a revision of the decision taken by the General Assembly which, being binding and conclusive, cannot be reversed by the Court (*Northern Cameroons (Cameroon v. United Kingdom)*, *Preliminary*

*Objections, Judgment, I.C.J. Reports 1963*, p. 33). The construction is a demonstration of the late reaction of the Court, for *terminus ad quem* for the Court's interpretation of the substance of General Assembly resolution 47/1, which as such was a part of its judicial function, in terms other than those of resolution 55/12 of 1 November 2000, elapsed by the admission of the FRY to the United Nations as a new Member.

40. In the present Judgment, the majority makes an effort to reconcile the basic premises of the 2004 Judgments and the 2007 Judgment. To that effect, the majority proceeds from the finding contained in the 2004 Judgment that the FRY/Serbia, being a Member of the United Nations from 1 November 2000, cannot be considered a party to the Statute prior to that date (*Legality of Use of Force (Serbia and Montenegro v. Belgium), Preliminary Objections, Judgment, I.C.J. Reports 2004 (I)*, p. 310, para. 76). Accordingly, on the date of the institution of the present proceedings it did not possess the right to appear before the Court. However, the majority is not ready to accept the necessary consequences of the fact which it took as the starting point of its legal reasoning, but rather resorts to a broadened interpretation of the so-called *Mavrommatis* rule in an effort to prove that, at a certain point in time, all requirements under Articles 35 and 36 of the Statute for the competence of the Court *in casu* were fulfilled.

However, this is not so, either as regards the date of the institution of the proceedings, a date relevant on the basis of the generally accepted rule, or as regards the date of the rendering of the Judgment allegedly as an exception to the general rule, but it is rather an unspecified date in the period of time between the date of the admission of the FRY to United Nations membership — on 1 November 2000 — and the date when the FRY, as a new, successor State, expressed its consent to be bound by the Genocide Convention in the form of accession — on 6 March 2001.

41. Two basic inconsistencies exist in this regard.

First, it transpired that, in the same period of time, the FRY/Serbia, at least as regards its status as a Contracting Party to the Genocide Convention, was both a continuator and a successor State. The present Judgment, true *implicite*, treats the FRY/Serbia as a continuator State as regards the Genocide Convention until 12 March 2001, because it considers it bound by the provisions of the Convention until that date on the basis of the 1992 declaration adopted on behalf of the State “continuing the state, international legal and political personality of the SFRY” (para. 1 of the declaration). From 12 March 2001 *pro futuro*, the FRY/Serbia is a successor State which, acting upon the reminder of the Secretary-General (paras. 176-177 below) expressed its consent to be bound by the Genocide Convention.

Second, if, *arguendo*, it is accepted that the majority interpretation of the *Mavrommatis* rule is correct, the relevant date for assessment as to

whether the necessary requirements for the competence of the Court are met, should be the date of the rendering of the Judgment. This seems to transpire clearly from the *Mavrommatis* Judgment:

“Even, therefore, if the application were premature because the Treaty of Lausanne had not yet been ratified, this circumstance would *now* be covered by the subsequent deposit of the necessary ratifications.” (*Mavrommatis Palestine Concessions, Judgment No. 2, 1924, P.C.I.J., Series A, No. 2*, p. 34; emphasis added.)

42. In its 1996 Judgment in the case concerning *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, the Court stated *inter alia*:

“even if it were to be assumed that the Genocide Convention did not enter into force between the Parties until the signature of the Dayton-Paris Agreement, all the conditions are *now* fulfilled to found the jurisdiction of the Court” (*I.C.J. Reports 1996 (II)*, p. 613, para. 26; emphasis added).

And, it seems obvious that on that date the requirement under Article 36, paragraph 1, of the Statute was not fulfilled as regards the basis of the jurisdiction of the Court, because the FRY, when acceding to the Genocide Convention, expressed its reservation regarding Article IX of the Convention.

43. It appears that the idea underlying functional parallelism — each has its own — is the most appropriate and productive as regards the Court, in an uninstitutionalized, eminently political community. As the Court stated in the *Nicaragua* case:

“The [Security] Council has functions of a political nature assigned to it, whereas the Court exercises purely judicial functions. Both organs *can therefore perform their separate but complementary functions with respect to the same events.*” (*Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984*, p. 435, para. 95; emphasis added.)

In such society, the assurance of the autonomy of the Court from the political organs is the crucial element of its judicial integrity. The cases in which the FRY/Serbia was involved as a party demonstrate that the judicial consistency, and especially the proper exercise of judicial power as its substance and determinative, should be best safeguarded by objective rules as a guide in determining the applicable law. This principle, which is axiomatic, should be followed in particular by international courts and tribunals, pursuing their activities in a judicial environment that knows no appellate court or procedure.

44. In sum, it appears that the jurisprudence of the Court, as regards the issue of *jus standi* of the FRY/Serbia as well as its status as Contracting Party to the Genocide Convention, not only is not consistent, but there are also departures from earlier decisions, often *sub silentio*, with-

out adducing reasons for departing or, at least, without clear and convincing reasons.

45. The legal ambiguity which the political organs of the United Nations abided by from the beginning to the very end of the Yugoslav crisis may be understandable from the standpoint of pragmatic political considerations and expediency, but not from the standpoint of judicial consideration of the matter. (For instance, recognition of the legal identity and continuity of the FRY with the SFRY, for which there existed strong legal reasons, would automatically open the question of legality, both in its formal and in its substantive terms of the actions and omissions vis-à-vis that State from the very beginning of the Yugoslav crisis.)

### 3. Nature of the issue of jurisdiction

46. In a number of points, the majority justifies the failure of the Court to deal properly, in its earlier decisions, with specific jurisdictional issues pertaining both to jurisdiction *lato sensu* and *stricto sensu* properly, by referring to the absence of the party or parties concerned. *Exempli causa*, it is stated that “[w]hile at the time objection was taken to the claim of the FRY to be the continuator of the SFRY, it was not then suggested that that claim was not advanced by the appropriate representative body of the FRY” (Judgment, para. 107; emphasis added). Or, that “the FRY, while questioning whether the applicant State was a party to the Genocide Convention at the relevant dates, did not challenge the claim that it was itself a party” (*ibid.*, para. 114; emphasis added; see also para. 115). This is surprising in the light of the importance of the issue of jurisdiction, especially jurisdiction *lato sensu*, and its legal nature as well.

47. In view of the fact that “the establishment or otherwise of jurisdiction is not a matter for the parties but for the Court itself”, 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. (*Fisheries Jurisdiction (Spain v. Canada)*, *Jurisdiction of the Court, Judgment, I.C.J. Reports 1998*, p. 450, para. 37; see also the 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*” (*Anglo-Iranian Oil Co. (United Kingdom v. Iran)*, *Preliminary Objection, Judgment, I.C.J. Reports 1952*, p. 116).)

48. 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 objections

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 case concerning *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*:

“The Court must, in each case submitted to it, verify whether it has jurisdiction to deal with the case . . . and such 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 jurisdiction established 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.

49. The dictum of the Court in the case concerning *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 that “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 *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).)

50. 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.

51. As a *questio juris*<sup>2</sup> 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).

52. 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 (cf. “*Lotus*”, *P.C.I.J., Series A, No. 10*, p. 31)” (*Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, *Merits, Judgment, I.C.J. Reports 1986*, p. 24, para. 29).

53. Consequently, the rule according to which a party seeking to assert

<sup>2</sup> “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)).

a fact must bear the burden of proving that 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).

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.

54. 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.)

55. 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 (*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*.

56. 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*. The principle of *com-*

*pétence de la compétence* possesses two meanings in that regard: a narrow and a broad one. 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.

.....

Article 36, paragraph 6, suffices to invest the Court with power to adjudicate on its own 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.* (*Nottebohm (Liechtenstein v. Guatemala), Preliminary Objection, Judgment, I.C.J. Reports 1953, pp. 119-120; emphasis added.*)

57. The Court exercises its inherent power from the institution of the proceedings until its end with a view to establishing whether or not it possesses jurisdiction 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.)

58. Without the operation of the principle of *compétence de la compétence* in its broad meaning as a principle of general international law, it would be impossible to establish the competence of the Court to indicate provisional measures, for the objections to the Court's jurisdiction, pursuant to Article 79 of the Rules, may be submitted by the respondent within the time-limit fixed for the delivery of the Counter-Memorial and by a party other than the respondent within the time-limit fixed for the delivery of the first pleading. The operation of the principle in this case results in the judicial presumption on proper jurisdiction of the Court in the form of “prima facie jurisdiction”.

59. The understanding that action by the party is a condition necessary for the Court to deal properly with jurisdictional issues appears to be erroneous. It relies on the equalization of the merits and the jurisdictional part of the proceedings before the Court. Equalization of these two parts of the proceedings is conducive to the treatment of the question of jurisdiction as *questio facti* and as a matter *inter partes*, which is in discord with its true nature.

The rule according to which “the existence of a dispute is 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), is valid in the merits phase of a case, but is not equally valid in the jurisdictional phase of the proceedings. The application of the rule in the jurisdictional phase is resisted by the very nature of the question of jurisdiction, running counter to the inherent right and duty of the Court to determine its jurisdiction.

## II. SPECIFIC ISSUES *IN CASU*

### 1. *Jus standi of the Respondent*

#### (a) *General approach of the majority to the jus standi requirement*

60. The general approach of the majority to the *jus standi* requirement does not seem clear and precise either as regards its substance or as regards the terminology used. The majority is ambivalent as regards the preliminary question whether the *jus standi* requirement is an autonomous one.

*Jus standi* in the Judgment is seen as:

- (a) “either as an issue relating to the Court’s jurisdiction *ratione personae* or as an issue preliminary to the examination of jurisdiction” (Judgment, para. 66);
- (b) “the question of access is clearly distinct from those relating to the examination of jurisdiction in the narrow sense” (*ibid.*, para. 87);

61. These qualifications are not only imprecise but are also contradictory. For, if access to the Court is understood as jurisdiction *ratione personae*, it is unclear how it can be “an issue preliminary to the examination of jurisdiction” or “clearly distinct from those relating to . . . jurisdiction in the narrow sense”, if jurisdiction *ratione personae* is, in fact, a part of the jurisdiction. If, on the contrary, it is an issue preliminary to jurisdiction in the narrow sense, it is, *mutatis mutandi*, equally unclear. Besides, the qualifications are indirect, offered primarily with the intention of determining the relation between *jus standi* and jurisdiction of the Court.

62. It is true that in descriptive terms every jurisdiction over *personae*, be it natural or legal persons, is jurisdiction *ratione personae*. But, a descriptive meaning of the expression is one thing and the legal meaning as *technicus terminus* is quite another thing.

Jurisdiction *ratione personae* concerns the issue whether the party to the dispute is bound by a jurisdictional instrument serving as a basis of jurisdiction as usually understood. As such, it is not a matter that falls within the ambit of Article 35 but rather of Article 36 of the Statute.

The equalizing of these two terms — jurisdiction *ratione personae* and

*jus standi* — applied in the merits phase in the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, should be treated as an incident dictated by the substance of an *ad hoc* construction of the decision by necessary implication (*I.C.J. Reports 2007 (I)*, separate opinion of Judge *ad hoc* Kreća, pp. 485-489, paras. 40-43).

63. If one deems it necessary to find a proper solution to the terms used, within the frame of jurisdiction *ratione personae*, then, if it relates to the requirement of *jus standi* also, it would be termed as “jurisdiction *ratione personae lato sensu*”, combining the descriptive and technical meaning of the term. *A contrario*, a measure of confusion is inevitable, since the jurisdiction of the Court is “a unitary concept, and the use by the Court and elsewhere of terms such as jurisdiction *ratione personae*, *ratione materiae* or the scope of the jurisdiction *ratione temporis* is solely for purposes of systematic presentation” (S. Rosenne, *The Law and Practice of the International Court, 1920-2005*, Vol. II, *Jurisdiction*, p. 526).

64. The majority had no intention, it seems, of dealing in more detail with the substance of the *jus standi* requirement, finding that it is a matter of “debate” (Judgment, para. 66), tending to suggest its theoretical nature. Any issue, however, can, and often must, be treated as a theoretical one, concerned with knowledge as, *exempli causa*, is shown by the extensive discourse in the Judgment about the objection to the admissibility and to the jurisdiction of the Court (*ibid.*, para. 120). The more so, since the experience with respect to the Court, at least its part relating to cases in which the FRY/Serbia was involved, could hardly be accepted as satisfactory.

In essence, the discourse about the *jus standi* requirement in the present case, taking into consideration all the circumstances concomitant to its application, is in fact a discourse about the nature and scope of Article 35 of the Statute.

65. The situation is confusing also as regards the terms used in order to determine the requirement under Article 35 of the Statute. The expressions “access to the Court” (*ibid.*, paras. 64, 67, 87), “capacity to participate in the proceedings” (*ibid.*, paras. 69, 87), “capacity to be a party to the proceedings” (*ibid.*, table of contents, para. 57), “right to access” (*ibid.*, para. 67), “properly appear before the Court” (*ibid.*, para. 68) are used interchangeably.

66. More expressions, more confusion. The expression “access to the Court” corresponds by its meaning to the general term *jus standi in indicio* as 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). This, however, could not be said for the expression used in the Judgment — “capacity to participate in the proceedings” — which has a broader meaning. It includes, for instance, also the capacity to participate in the proceedings on the basis of legal interests of the party which, otherwise, has access to the Court.

*Exempli causa*, in the case concerning *Barcelona Traction, Light and Power Company, Limited*, the Court used it to denote the 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* case 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 (Ethiopia v. South Africa; Liberia v. South Africa), Second Phase, Judgment, I.C.J. Reports 1966*, p. 18, para. 4).

67. In addition to the expression “access to the Court”, also appropriate seem the expressions “right to appear”, “*jus standi* before the Court”, or “entitled to appear before the Court”, because they have been designed in terms of the right or entitlement of a State and, as such, correspond with the general provision of Article 35 providing that “the Court shall be open”, implying a subjective right of a State party to the Statute. (Furthermore, other expressions are used, such as, for example, “*locus standi in judicio ratione personae*” — S. Rosenne, *op. cit.*, Vol. II, *Jurisdiction*, p. 913. It appears however, that this expression is less appropriate. It is partly a pleonasm, because *locus standi in indicio* is *per definitionem* related to *personae*; it seems also too extensive because, by suggesting that there also exists *locus standi in indicio ratione materiae*, it may concern also a legal interest of the party to the dispute.)

(b) *Nature and characteristics of the jus standi requirement*

68. The totality of the requirements for the competence of the Court is given in Articles 34, 35 and 36 of the Statute. The requirements are not, however, of the same nature, having in mind that they express two dominant, but distinct features of the International Court of Justice as a court of law — its character of a partly open court and consensual basis of jurisdiction.

As stated by the Court in the provisional measures phase in the ten *Legality of Use of Force* cases:

“the Court can. . . 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” (*Yugoslavia v. Belgium*), *Provisional Measures, Order of 2 June 1999, I.C.J. Reports 1999 (I)*, p. 132, para. 20).

69. Whereas Article 36 of the Statute is concerned with the consensual basis of the jurisdiction of the Court, embracing instruments serving as its basis, Articles 34 and 35 are concerned with access to the Court. All three Articles have their place in the Statute in the part under the heading

“Competence of the Court”. As in the practice of the Court the words “jurisdiction” and “competence” are used interchangeably, the difference between “access to the Court” and “jurisdiction of the Court” may be diluted or even lost. Therefore, it seems appropriate to make, in this part as well, the corresponding terminological requirements under Article 36 of the Statute and in terms of jurisdiction/competence *lato sensu* in the sense of requirements under Articles 34 and 35 of the Statute. Or, special and general jurisdiction/competence, respectively.

70. The right to appear before the International Court of Justice is a limited right, due to the fact that it is not a fully open court of law. The limitations exist in two respects. First, the right is reserved for States (Statute, Art. 34, para. 1). Consequently, it does not belong to other juridical persons or physical persons. Second, as far as States are concerned, only States parties to the Statute of the Court possess the right referred to, being as Member 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).

71. The common element underpinning these two notions is that they represent processual conditions on whose existence is dependent the validity 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 decision in the proceedings. And there the common ground between the two notions essentially ends and room for differences emerges.

72. Both notions, *jus standi* and jurisdiction *ratione personae*, share the characteristic of belonging to the *corpus* of processual conditions, necessary for the validity of proceedings before the Court, whether incidental or on the merits, and with respect to the reference of disputes to the Court for decision. They also share the attribute of being absolute processual conditions that must be satisfied in every case and both are positive requirements in that, if they are not satisfied, the Court cannot entertain the claims made.

73. The differences between them, however, are considerably greater, making them distinct processual conditions:

- they reflect the different aspects of the legal nature of the Court. While jurisdiction *ratione personae*, as one of the relevant aspects of jurisdiction, expresses the consensual nature of the Court’s jurisdiction, *jus standi* derives from the fact that the International Court of Justice, in contrast to arbitration courts, is not a fully open court of law. Access to the Court is limited in two respects on the basis of Article 34, paragraph 1, and Article 35, paragraphs 1 and 2, of the Statute of the Court.
- although both jurisdiction *ratione personae* and *jus standi* are regulated by the rules of the Statute having an objective, constitutional

character, there exists a fundamental difference in the application of these rules. The rules of the Statute which concern *jus standi* are applied by the Court *ex lege*, while the corresponding rules concerning jurisdiction *ratione personae* are applied on the basis of the consent of States to the dispute. In its Judgments in the *Legality of Use of Force* cases, the Court stated, *inter alia*, that “a question of jurisdiction . . . 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” ((*Serbia and Montenegro v. Belgium*), *Preliminary Objections, Judgment, I.C.J. Reports 2004 (I)*, p. 295, para. 36). Therefore, it can be said that in substance the jurisdiction of the Court is governed by the law in force between the parties, while *jus standi* is governed by the objective rules of the Statute as such.

- the differing natures of *jus standi*, on the one hand, and jurisdiction *ratione personae*, on the other, generate corresponding legal consequences in the proceedings. A lack of *jus standi* possesses an automatic effect, since, as a rule, it cannot be overcome in the proceedings before the Court, while a lack of jurisdiction *ratione personae* is surmountable as the parties may either confer jurisdiction upon the Court in the course of the proceedings or perfect it for instance, by express agreement or by *forum prorogatum*. As a consequence, in contrast to a lack of *jus standi*, the absence of jurisdiction *ratione personae* does not preclude valid seisin of the Court (paragraph 106 below).

74. The competence or special jurisdiction in the particular case of the International Court of Justice, as a semi-open court of law with jurisdiction based on consent of the parties to a dispute, implies twofold consent by States:

- (a) consent that the Court is “an organ instituted for the purpose *jus dicere*” (*Corfu Channel (United Kingdom v. Albania)*, *Preliminary Objection, Judgment, 1948, I.C.J. Reports 1947-1948*; dissenting opinion of Dr. Daxner, p. 39). This consent is expressed indirectly, through membership of the United Nations, or directly, in the case of 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
- (b) consent that the Court is competent to deal with the particular dispute or type of dispute which is given through the relevant jurisdictional bases under Article 36 of the Statute, as a substantive but qualified condition.
- (c) *Majority’s decision-making framework*

75. The starting-point of the majority reasoning consists of two obser-

vations “which are not disputed by the Parties” (Judgment, para. 74).

According to the first observation,

“in its Judgments in 2004 in the *Legality of Use of Force* cases, the Court clearly determined the legal status of the FRY, now Serbia, over the period from the dissolution of the former SFRY to the admission of the FRY to the United Nations on 1 November 2000” (*ibid.*, para. 75),

in terms that the Respondent was not a Member of the United Nations prior to 1 November 2000, nor that it was a party to the Statute of the Court.

The second observation is that

“from 1 November 2000 and up to the date of the present Judgment, the Respondent is a party to the Statute by virtue of its status as a Member of the United Nations, that is to say pursuant to Article 93, paragraph 1, of the Charter, which automatically grants to all Members of the Organization the status of party to the Statute of the Court” (*ibid.*, para. 77).

These observations, in fact *premissae minor* in the majority reasoning, are different by their nature and effects in the framework of the present case.

76. The legal status of the FRY/Serbia in the United Nations, being in the circumstances surrounding the present case the determinative of its *jus standi*, is the jurisdictional fact *per se*. For the membership in the United Nations is the only basis upon which the Court might be open to the FRY/Serbia, since it did not accept the conditions pursuant to Article 35, paragraph 1, of the Statute nor the general jurisdiction of the Court in conformity with Security Council resolution 9 (1946).

On the other hand, the fact that from 1 November 2000 the FRY/Serbia has been a new Member of the United Nations is, by itself, deprived of jurisdictional significance *in casu*, in the light of the rule that “the jurisdiction of the Court must normally be assessed *on the date of the filing of the act instituting proceedings*” (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia)*, Judgment, *I.C.J. Reports 1996 (II)*, p. 613, para. 26; emphasis added; see also *I.C.J. Reports 1998*, p. 26, para. 44) on the one side, and the fact that Croatia submitted its Application on 2 July 1999, a date well before the admission of the FRY to the United Nations, on the other.

77. The reconciliation of these two observations, being *premissae minor* in the majority reasoning *in casu*, implies therefore the establishment of an exception to the general rule. An exception that in the frame of the judicial syllogism represents *premissae maior*, which the majority tries to find in the so-called *Mavrommatis* rule.

(d) *The Mavrommatis rule, as a purported legal basis for reconciliation*

78. In its Judgment in the *Mavrommatis* case, the Permanent Court of International Justice stated, *inter alia*, that:

“it must. . . be considered whether the validity of the institution of proceedings can be disputed on the ground that the application was filed before Protocol XII [annexed to the Treaty of Lausanne] had become applicable. This is not the case. Even assuming that before that time the Court had no jurisdiction because the international obligation referred to in Article II [of the Mandate for Palestine] was not yet effective, it would always have been possible for the applicant to re-submit his application in the same terms after the coming into force of the Treaty of Lausanne, and in that case, the argument in question could not have been advanced. Even if the grounds on which the institution of proceedings was based were defective for the reason stated, this would not be an adequate reason for the dismissal of the applicant’s suit. The Court, whose jurisdiction is international, is not bound to attach to matters of form the same degree of importance which they might possess in municipal law. Even, therefore, if the application were premature because the Treaty of Lausanne had not yet been ratified, this circumstance would now be covered by the subsequent deposit of the necessary ratifications.” (*Judgment No. 2, 1924, P.C.I.J., Series A, No. 2, p. 34.*)

79. The Court’s dictum is interpreted by counsel for Croatia in the following terms:

“all the substantive requirements for the Court’s jurisdiction were united, at the latest when the Respondent was admitted to the United Nations on 1 November 2000. There was a case duly filed before the Court by Croatia, so there was *seisin*. The Respondent was at relevant times a party to the Genocide Convention, so there was an apparent *basis of claim*. The Respondent was a State which had in force an unqualified consent to jurisdiction under the Genocide Convention, so *there was consent to jurisdiction*. The Respondent was, at least as from 1 November 2000, a party to the Court’s Statute, so there was *access to the Court*. One: *seisin*; two: *basis of claim*; three: *consent to jurisdiction*; four: *access to the Court*. Who could say there is a fifth requirement for you to hear a case? The *Mavrommatis* principle is the principle that provided these four substantial elements are united at any given time, the order in which this occurred is a pure matter of form and does not affect. . . jurisdiction.” (CR 2008/11, pp. 33-34, para. 8 (Crawford).)

(e) *The substantial incapability of the Mavrommatis rule to produce the desired effects in casu*

80. It seems clear that the so-called *Mavrommatis* rule constitutes an exception to the general rule that the jurisdiction of the Court must be assessed on the date of the filing of the act instituting proceedings. That fact, however, does not solve the problem posed *in casu*. (Even the *Mavrommatis* rule by itself, inspired basically by reservations made in many arbitration treaties, seems too broad in the light of the subsequent jurisprudence of the Court. The ratification of a treaty is not regarded now as a matter of form but rather as a matter of substance. In the *Ambatielos* case, the Court found, *inter alia*, as regards the retroactive effects of the Treaty of 1926, that:

“Article 32 of this Treaty states that the Treaty, which must mean all the provisions of the Treaty, shall come into force immediately upon ratification. Such a conclusion might have been rebutted if there had been any special clause or any special object necessitating retroactive interpretation. There is no such clause or object in the present case. It is therefore impossible to hold that any of its provisions must be deemed to have been in force earlier.” (*Ambatielos (Greece v. United Kingdom)*, *Preliminary Objection, Judgment, I.C.J. Reports 1952*, p. 40.)

The word “form” used in the *Mavrommatis* dictum should perhaps be understood as “formalities”, for the simple reason that in any judicial proceedings as a formal one, including the proceedings before the Court, the form as such plays a prominent and, as regards some issues, even a decisive role. As a matter of illustration, an application could not be submitted to the Court in an oral form.)

In the light of the relevant circumstances of the present case, the true question is: what is the scope of the exception established by the *Mavrommatis* Judgment. Is it a general exception applicable to any jurisdictional defect, or a special exception applicable to certain *species* of jurisdictional defects?

81. The so-called *Mavrommatis* rule is based on a couple of constitutive elements:

- (i) the existence of a procedural defect in the instrument serving as the basis of jurisdiction on the date of institution of the proceedings;
- (ii) the defect is of such kind that it may be cured by a proper action of the applicant as a rule (in principle, however, the possibility that the defect is overcome by an action of the respondent, if a willing litigant, can not be *a priori* excluded); and,
- (iii) the perfected instrument produces a retroactive effect, since, as the Court observed, it would make no sense to require an applicant to “institute fresh proceedings . . . which it would be fully entitled to do” (*Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, *Jurisdiction*

and Admissibility, Judgment, *I.C.J. Reports 1984*, pp. 428-429, para. 83).

82. It appears that in the *Mavrommatis* Judgment, as well as in other Judgments, such as *Certain German Interests in Polish Upper Silesia* (*Jurisdiction, Judgment No. 6, 1925, P.C.I.J., Series A, No. 6*, p. 14) and *Military and Paramilitary Activities in and against Nicaragua* (*Nicaragua v. United States of America*) (*Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984*, pp. 428-429, para. 83), based on its precedential authority, the real issue in question was the existence of procedural defects in terms of defects in jurisdictional instruments as contemplated by Article 36 of the Statute. Jurisdictional instruments as such have as their object the competence of the Court to deal with the particular dispute or type of disputes, not the right of judicial protection before the Court. As those instruments are based on the consent of the parties it is natural that they can be cured by a proper action of the applicant or even the respondent, if it is a willing litigant.

83. But, “the right of a party to appear before the Court. . . is not a matter of consent” (*Legality of Use of Force (Serbia and Montenegro v. Belgium), Preliminary Objections, Judgment, I.C.J. Reports 2004 (I)*, p. 295, para. 36). Since the *jus standi* requirement belongs to *corpus juris cogentis*<sup>3</sup>, its defect in *jus standi* can not be cured upon the institution of proceedings.

Consequently, a defect in *jus standi* is not a matter of form (see *Mavrommatis Palestine Concessions, Judgment No. 2, 1924, P.C.I.J., Series A, No. 2*, p. 34) or “a mere defect of form, the removal of which depends solely on the Party concerned” (*Certain German Interests in Polish Upper Silesia, Judgment No. 6, 1925, P.C.I.J., Series A, No. 6*, p. 14).

84. The nature of *jus standi* determines the date of assessment of its fulfilment. As an objective requirement relating to the limits of the judicial activity of the Court, *jus standi* must be assessed as soon as possible, i.e., on the date of the institution of proceedings. (In that regard, strictly and without exception, the Court has treated the issue in eight *Legality of Use of Force* cases ((*Serbia and Montenegro v. Belgium*), *Preliminary Objections, Judgment, I.C.J. Reports 2004 (I)*, pp. 298-299, paras. 46; pp. 310-311, para. 79; pp. 314-315, para. 91 and p. 327, para. 126).)

In the absence of *jus standi* of a party, the proceedings before the Court are, as matter of law, devoid of substance as demonstrated in the *Legality of Use of Force* cases:

“The conclusion which the Court has reached, that Serbia and

<sup>3</sup> G. Schwarzenberger, “International Law as Applied by International Courts and Tribunals”, *International Judicial Law*, Vol. IV, 1986, pp. 434-435; Faclere, *The Permanent Court of International Justice*, 1932, p. 63; R. Kolb, *Théorie du ius cogens international*, *Essai de relecture du concept*, 2001, pp. 344-348.

Montenegro did not, at the time of the institution of the present proceedings, have access to the Court. . . *makes it unnecessary for the Court to consider the other preliminary objections filed by the Respondents to the jurisdiction of the Court. . .*" (*Serbia and Montenegro v. Belgium*), *Preliminary Objections, Judgment, I.C.J. Reports 2004 (I)*, pp. 327-328, para. 127; emphasis added.)

85. The theory about the uniting of all the requirements for the Court's jurisdiction at any given time has certain, but strictly limited, merits.

It is applicable, in principle, to the requirements regarding the jurisdiction *stricto sensu* in all its aspects — *ratione materiae, personae et temporis* — but not to the requirement of *jus standi*. The requirement of *jus standi* is not just a fundamental one, but at the same time of antecedent and pre-preliminary nature. "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.*" (*Ibid.*, p. 299, para. 46; emphasis added.)

86. Such a nature of the *jus standi* requirement affects the temporal order of the fulfilment of the requirements regarding the jurisdiction *lato sensu*. It could be said that the *jus standi* requirement is, in terms of time, not only antecedent but, in that sense, also immovable, related to the date of the institution of the proceedings, and that other requirements provided accumulate around it as a kind of linchpin. In its Judgment in the *Fisheries Jurisdiction* case the Court stated in explicit terms: "a declaration, which may be either particular or general, must be filed by the State which is not a party to the Statute, *previously to its appearance before the Court*" (*Fisheries Jurisdiction (Federal Republic of Germany v. Iceland)*, *Jurisdiction of the Court, Judgment, I.C.J. Reports 1973*, p. 53, para. 11; emphasis added; see also eight *Legality of Use of Force* cases (*Serbia and Montenegro v. Belgium*), *Preliminary Objections, Judgment, I.C.J. Reports 2004 (I)*, pp. 298-299, para. 46).

Otherwise, pursuing the logic on which the majority's understanding of the *Mavrommatis* principle is based, it would be possible to imagine a situation of the Court having pronounced itself competent in the *Aerial Incident* case, after Bulgaria's admission to membership in the United Nation, since "the Statute of the present Court could not lay any obligation upon Bulgaria before its admission to the United Nations" (*Aerial Incident of 27 July 1955 (Israel v. Bulgaria)*, *Judgment, I.C.J. Reports 1959*, p. 143).

87. Such a temporal order seems not only reasonable, but unavoidable, as well. As a general, potential right of a State, *jus standi* belongs to a State if the State is not a party to the dispute or a party to the proceedings before the Court. It is transformed into an active, effective right under the additional proviso of the existence of a proper jurisdictional instrument.

It is also supported by the order of the relevant Articles of the Statute — Article 35, regarding *jus standi* precedes Article 36, regarding jurisdiction *stricto sensu*. The order of the enumeration of the relevant requirements may represent *per se* an indication of hierarchy or order of priority.

88. Bearing in mind the fundamental nature of the *jus standi* requirement, such a temporal order is rather a matter of substance than a matter of form. In such circumstances the theory of uniting, in an indefinite period of time, the relevant requirements for the competence of the Court looks, as a matter of law, like a judicial “Waiting for Godot”.

(f) *Sound administration of justice as a purported basis for the establishment of the desired exception to the general rule*

89. It appears that the majority itself did not accept the *Mavrommatis* rule as applicable to the *jus standi* requirement. It is loyally observed that the *Mavrommatis* rule as well as the jurisprudence of the Court based on it relate to “jurisdiction *ratione materiae* or *ratione personae* in the narrow sense and not to the question of access to the Court, which has to do with a party’s capacity to participate in any proceedings whatever before the Court” (Judgment, para. 86).

The majority in fact tries to introduce an exception to the rule that the existence of *jus standi* of a party should be assessed on the date of the institution of the proceedings on the principles underpinning the *Mavrommatis* rule. According to this view:

“That being so, it is not apparent why the arguments based on the sound administration of justice which underpin the *Mavrommatis* case jurisprudence cannot also have a bearing in a case such as the present one. It would not be in the interests of justice to oblige the Applicant, if it wishes to pursue its claims, to initiate fresh proceedings. In this respect it is of no importance which condition was unmet at the date the proceedings were instituted, and thereby prevented the Court at that time from exercising its jurisdiction, once it has been fulfilled subsequently.” (*Ibid.*, para. 87.)

90. Is it questionable whether the principle of sound administration of justice directly underpins the jurisprudence of the *Mavrommatis* case? If we interpret the terms used in the relevant part of the Judgment in the *Mavrommatis* case, in accordance with its ordinary and natural meaning, it seems that the principle of judicial economy, and not the principle of sound administration, underpins the Court’s reasoning. For, *ratio decidendi* lies in the words:

“Even assuming that before that time the Court had no jurisdiction because the international obligation referred to in Article II [of the mandate for Palestine] was not yet effective, *it would always have been possible for the applicant to re-submit his application in the same*

*terms after the coming into force of the Treaty of Lausanne, and in that case, the argument in question could not have been advanced.” (Mavrommatis Palestine Concessions, Judgment No. 2, 1924, P.C.I.J., Series A, No. 2, p. 34; emphasis added; see also the Polish Upper Silesia case, Jurisdiction, Judgment No. 6, 1925, P.C.I.J., Series A, No. 6, p. 14.)*

And it would mean going much too far, if the principle of judicial economy would overcome the requirements which makes the core of the legality of proceedings before the Court.

91. The principle of sound administration of justice is obviously not omnipotent nor a law-creating principle. It is rather a standard which allows the Court, in the limits of *discretio legalis*, to mitigate the rigid application of the rule of procedure or to solve an issue of procedure which is not regulated by specific rules of the Statute of the Court and its Rules. In that sense it is designed in the jurisprudence of the Court<sup>4</sup>. As such, it can not serve as a basis for the establishment of exception to the general rule as regards the requirement of *jus standi* for a number of reasons.

First of all, the requirement of *jus standi* is of a mandatory, constitutional nature. Article 35 of the Statute is part of its Chapter II (Competence of the Court) and not of Chapter III (Procedure) which is the natural operating space of the principle of sound administration of justice. Then, there do not exist *lacunae* in the provision of Article 35 of the Statute. It is clear and comprehensive, as the concretization of the provision of Article 93, paragraphs 1 and 2, of the United Nations Charter, which lifted a limitation to the right of judicial protection before the International Court of Justice to the rank of public order of the United Nations. As such it cannot be considered as a procedural rule. Finally, even if, *arguendo*, the requirement of *jus standi* would be defined as procedural, it would obviously represent *norme procedurale fondamentale*, incapable of any modification.

92. It appears that, contrary to the majority view, the application of the general rule *in casu* derives directly from the principle of sound administration of justice. In the syntagma “sound administration of justice”, the very *administration* of justice is the substance of the principle. “The justice” as the object of “sound and proper administration” is not abstract justice but justice according to the rules of law governing the Court’s judicial activity.

<sup>4</sup> *Barcelona Traction, I.C.J. Reports 1964*, pp. 6, 42; *Oil Platforms, I.C.J. Reports 1998*, pp. 190-203, para. 33; p. 205, para. 43; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide, I.C.J. Reports 1997*, p. 257, para. 30; pp. 257-258, para. 31.

93. The institution of proceedings before the Court, as far as its significance is concerned, “falls short only of that of the judgment itself” (G. Schwarzenberger, *International Law*, Vol. I, 1945, p. 376). It permeates, as very few rules do, the whole body of the Court’s law, starting with the provision of Article 40 of the Statute, via the provisions of Articles 26 (1 (b)), 38, 39, 40 (2-3), 42, 46, 80, 81 up to Articles 87, 92 (1), 98 (1-3), 99 (1-2) and 104 of the Rules of Court.

On the date of the institution of the proceedings, a process relationship is established between the parties to the dispute, as well as between the parties to the dispute and the Court — a fact which *per se* produces important legal consequences for the parties to the dispute and the Court itself. From that date the conservatory effects of the Application are beginning and the litispence goes on.

94. All in all, from that moment on, the Court starts its judicial activity *stricto sensu*, separated from the administrative action of the Registry of the Court. The principal task of the Court, in that phase of the proceedings, is to establish the existence of the necessary requirements for its jurisdiction *lato sensu*, i.e., the requirement of *jus standi*, for requirements regarding the special jurisdiction in all of its relevant aspects — *ratione personae, materiae et temporis* — may be perfected and even established in the course of the proceedings.

95. The proper application of the principle of sound administration of justice *in casu*, must take into account the difference between the requirement of *jus standi*, on the one side, and the requirements of jurisdiction of the Court *stricto sensu*, on the other.

An exception to the general rule regarding the date of assessment of the Court’s jurisdiction might operate as regards the requirement of jurisdiction based on consent of the parties, for it does not touch the legality of the juridical activity of the Court as such.

Regarding the requirement of *jus standi*, as a matter of interpretation of a rule of the Statute, being objective law, the legal situation seems different, regardless of whether the principle underpinning the *Mavrommatis* rule is understood as a principle of judicial economy or as a principle of sound administration of justice.

The imperative wording of Article 35, paragraph 1, of the Statute, read in conjunction with Article 93 of the United Nations Charter, does not leave any doubt in that regard. For, “[t]he 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.” (*Legality of Use of Force (Serbia and Montenegro v. Belgium)*, *Preliminary Objections, Judgment, I.C.J. Reports 2004 (I)*, pp. 298-299, para. 46; see also the ten cases in the provisional measures phase (*Yugoslavia v. Belgium*), *I.C.J. Reports 1999 (I)*, p. 132, para. 20; and *Fisheries Jurisdiction (Federal Republic of Germany v. Iceland)*, *Jurisdiction of the Court, Judgment, I.C.J. Reports 1973*, p. 53, para. 11.)

(g) *Compétence de la compétence as an improper modus operandi*

96. The application of the principles underpinning the *Mavrommatis* rule, as perceived by the majority, implies a *modus operandi*, since the principle of sound administration of justice does not operate automatically. The *modus operandi* is ascertained in the principle of *compétence de la compétence* so that it could be said that the exception to the general rule, that the jurisdiction *lato sensu* is assessed on the date of the institution of the proceedings, is, in the majority approach, the result of combined effects of the principle of sound administration of justice and *compétence de la compétence* respectively.

97. The majority view that “[t]he Court always possesses the *compétence de la compétence*” (Judgment, para. 86) is basically correct, in contrast to the interpretation of Serbia according to which, “whenever it is seised by a State which does not fulfil the conditions of access under Article 35, or seised of a case brought against a State which does not fulfil those conditions, the Court does not even have the *compétence de la compétence*” (*ibid.*).

98. *Compétence de la compétence* is an inherent right and duty of the Court, necessary for it to discharge its duties as regards jurisdictional issues *lato sensu*. As such, it operates during the entire proceedings, from the institution until the end, implying that the Court, either upon a jurisdictional objection of a party, or *proprio motu*, not only makes the determination whether it has jurisdiction in terms of incidental jurisdiction, but in that regard remains attentive during the entire proceedings. *A contrario*, the Court would be deprived of its essential duty to establish its jurisdiction *lato sensu*.

99. However, the power of the Court to determine whether it has jurisdiction is one thing, and the substance of the decision taken on the basis of the principle of *compétence de la compétence* is quite another thing. As a structural and functional principle, the principle of *compétence de la compétence* does not possess its own substance in terms of substantive law. This principle is only the legal vehicle which allows the Court to satisfy itself that the conditions governing its own competence, as defined by its Statute, are met. The decision of the Court on the basis of the principle of *compétence de la compétence* is of a declaratory nature and, as such, it can not bestow on the Court itself a jurisdiction which is not supported by applicable rules of law.

100. Due to its nature, this is especially true as regards the requirement of *jus standi*. Since the majority itself does not dispute that during the period from the dissolution of the former SFRY in April 1992 to the admission of the FRY to the United Nations on 1 November 2000, the FRY/Serbia was not a Member of the United Nations, and since the membership in the United Nations is determinative of its *jus standi*, a reasoning in the following terms seems unavoidable:

“If, on a correct legal reading of a given situation, certain alleged rights are found to be non-existent, the consequences of this must be accepted. The Court cannot properly postulate the existence of such rights in order to avert those consequences.” (*South West Africa (Ethiopia v. South Africa; Liberia v. South Africa)*, *Second Phase, Judgment*, *I.C.J. Reports 1966*, p. 36, para. 57.)

Unfortunately, the majority does not follow this wise dictum, but involves itself in the fishing of *jus standi* of Serbia.

101. The non-existence of *jus standi* of the Party in the moment of institution of the proceedings deprives the Court, as a semi-open court of law, of the power to take judicial action. In that regard, the principle of *compétence de la compétence*, as such, does not and cannot add or change anything whatsoever. For,

“The details of this law [law of jurisdiction] have grown with the continuing exercise of the Court’s *compétence de la compétence*, but its basic norm can still be traced to the Permanent Court’s broad dictum that ‘there is no dispute *which States entitled to appear before the Court* cannot refer to it’.” (I. Shihata, *The Power of the International Court to Determine its own Jurisdiction, Compétence de la Compétence*, 1965, p. 304; emphasis added.)

(h) *Effects of seisin of the Court*

102. It seems that the majority view has overstressed the role of the seisin of the Court, attributing to it some effect in terms of substantive jurisdiction.

103. The qualifications of the seisin of the Court as “duly”, “regular” or “proper” are frequently used, in the present phase of the proceedings as well, to indicate a State’s recourse to the Court in a proper way. This, in fact, implies that a State has submitted an application, or that two or more States have submitted a special agreement, in conformity with the relevant provisions of the Statute of the Court and its Rules. In this sense, the expressions such as “duly seised” or “properly seised” have, first and foremost, a formal, procedural meaning.

104. Although it is a procedural act, seisin, however, is not deprived of any legal effects. By the act of seizure, the Court has acquired a measure of procedural competence “to determine its substantive jurisdiction if in question or otherwise uncertain” (G. Fitzmaurice, “The Law and Procedure of the International Court of Justice, 1951-1954: Questions of Jurisdiction, Competence and Procedure”, *British Year Book of International Law*, 1958, p. 15) and to activate its inherent power to determine its jurisdiction (*compétence de la compétence*) either upon an objection of the party or *proprio motu*.

For, the law of the Court does not know, apart from the administra-

tive action of the Registry as regards non-State entities, separate proceedings designed specifically to deal with the validity of the proceedings in terms of whether necessary requirements, as established by Articles 35 and 36 of the Statute, are being fulfilled. Thus, in effect, the Court, although “properly” or “duly” seised, only *a posteriori* decides whether it possesses substantive competence to deal with the case brought before it. It seems that it is precisely this that is the *rationale of the dictum* of the Court in the *Qatar/Bahrain* case, to the effect that “the question of whether the Court was validly seised appears to be a question of jurisdiction” (*Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1995*, p. 23, para. 43).

105. *Stricti juris*, the seizure of the Court is valid in substantive terms only if all the requirements for the Court’s jurisdiction *lato sensu*, provided by Articles 35 and 36 of the Statute, are fulfilled. *A contrario*, seisin, regardless of whether termed “properly” or “duly”, is essentially only “effective” seisin, enabling the Court to establish whether it possesses substantive competence *in casu*, or whether, in the light of the relevant requirements, it is “validly seised”. (Adjectives, at least in the legal vocabulary, more often than not, hinder rather than help understanding. Thus, “proper(ly)” or “due (duly)” seisin would, in fact, be the very “seising of the Court” (G. Fitzmaurice, *op. cit.*), and “seisin” would, by definition, imply “valid seisin”.)

For, as the Court stressed in subtle terms — although using the word “seising” in terms of “effective seisin” — in the *Nottebohm* case: “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, (Liechtenstein v. Guatemala), Preliminary Objection, Judgment, I.C.J. Reports 1953*, p. 122).

106. Seisin of the Court as a procedural step is effected in practice in a highly relaxed manner. It appears that it is assumed that the fulfilment of the procedural conditions specified in Article 38, paragraphs 1, 2 and 3, and Article 39, paragraphs 1 and 2, of the Rules of Court, are sufficient in that regard. Only, “[w]hen the applicant State proposes to found the jurisdiction of the Court upon a consent” of a State against which such application is made, “[i]t shall not . . . be entered in the General List, nor any action be taken in the proceedings” (Art. 38, para. 5, of the Rules of Court). Such a manner is understandable, if the requirements under Article 36 of the Statute are in question, for the simple reason that following the seisin of the Court substantive jurisdiction may be conferred upon the Court or perfected by the parties.

107. As regards the requirements under Article 35 of the Statute, this is another matter. Having in mind the nature of the requirements and its effects upon the legality of the judicial activity of the Court, it seems essential, in particular in case of doubt or uncertainty, to determine as soon as possible whether or not the requirements under Article 35 of the

Statute are met. In contrast to the requirements under Article 35 which, being based on the consent of the parties to the dispute, cannot only be perfected but also created in the time following the seisin of the Court, the requirements under Article 36 of the Statute must be fulfilled on the date of the institution of the proceedings before the Court. Short of this, seisin of the Court is not valid, but is merely a procedural step having no effects on the substantive competence of the Court to deal with the case.

It is precisely in this that I see the meaning of the dictum of the Court in the eight *Legality of Use of Force* cases, that the Applicant “could not have properly seised the Court” (*Serbia and Montenegro v. Belgium*), *Preliminary Objections, Judgment, I.C.J. Reports 2004 (I)*, p. 299, para. 46), because it was not a party to the Statute and, consequently, did not have a right to appear before the Court.

- (i) *If valid, why was not the alleged exception applied in the Legality of Use of Force cases?*

108. It remains unclear why the Court, if found that there exists an exception to the general rule that the jurisdiction *lato sensu* is assessed on the day of the institution of the proceedings, did not apply it in the identical legal situation in the *Legality of the Use of Force* cases? The objection of Serbia (Judgment, para. 84) aims at the very heart of the majority reasoning, alluding to the violation of the fundamental principle of equality of States. The unconvincing answer of the majority to that objection is surprising. It consists of three considerations, broad in their vagueness and formalism, so that one can get the impression that they are given *formalitatatis causa*.

109. Firstly, the majority finds that:

“It was clear that Serbia and Montenegro did not have the intention of pursuing its claims by way of new applications. That State itself argued before the Court that it was not, and never had been, bound by Article IX of the Genocide Convention, even though that was the basis for jurisdiction which it had initially invoked (e.g., *Legality of Use of Force (Serbia and Montenegro v. Belgium)*, *Preliminary Objections, Judgment, I.C.J. Reports 2004 (I)*, pp. 292-293, para. 29). It is true that the Applicant in those cases had let it be known that it did not intend to discontinue the proceedings pending before the Court; but, given the legal position it was asserting from that time on as to the Genocide Convention, it was out of the question that, in the event of judgments rejecting its applications owing to its lack of access to the Court at the date the proceedings had been instituted, it would rely on the status it would then undoubtedly possess of party to the Statute of the Court to submit fresh

applications identical in substance to the first . . . Indeed, Serbia and Montenegro took care not to ask the Court to do so; while Croatia is asking the Court to apply the jurisprudence of the *Mavrommatis* case to the present case, no such request was made, or could logically have been made, by the Applicant in 2004.” (Judgment, para. 89.)

The question of “the intention of pursuing. . . claims by way of new applications” (*ibid.*) does not seem relevant at all in the frame of the so-called *Mavrommatis* rule. In its Judgment in the *Mavrommatis* case, the Court invoked the general possibility “for the applicant to re-submit his application” (*Judgment No. 2, 1924, P.C.I.J., Series A, No. 2*, p. 34) and not the intention. It applied rather an objective than subjective standard in that regard. In the absence of clear and unequivocal evidence of “intention” one can only speculate. The majority “infers” that the Applicant did not wish to pursue the proceedings on the basis of the argument of Serbia that it was not, and never had been, bound by Article IX of the Genocide Convention. It seems almost unbelievable that the majority, in relation to jurisdiction as a *questio juris* falling within the scope of the principle *jura novit curia*, gives decisive importance to the arguments of a party.

110. At the same time, the finding that “Serbia and Montenegro did not have the intention of pursuing its claims by way of new applications” appears to be erroneous and even *contra factum proprium*. For, in the *Legality of Use of Force* cases the Court stated *expressis verbis*:

“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.

The Court is unable to uphold these. . . contentions. . . 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. . .; *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.” (*Legality of Use of Force (Serbia and Montenegro v. Belgium)*, *Preliminary Objections, Judgment, I.C.J. Reports 2004 (I)*, p. 297, paras. 42-43; emphasis added.)

The consideration that “there would have been no justification for the Court to disregard the FRY’s initial lack of capacity to seise the Court, on the ground that the defect had been cured in the course of proceedings” (Judgment, para. 89) because “Serbia and Montenegro took care not to *ask the Court to do so*” (*ibid.*; emphasis added), is not convincing. In contrast to Croatia, it seems sufficient to remark that as regards the issue of jurisdiction, the wishes of the parties are not of decisive importance, if any (paras. 46-59 above).

111. Secondly, it seems that the majority tends to introduce elements of penalizing or reward for the parties as regards the application of the exception to the general rule, depending on a party’s attitude towards its *jus standi* in earlier cases. Such a conclusion stems from the consideration that:

“At the date the Application was filed, the Respondent considered that it had the capacity to participate in proceedings before the Court, and its position in that respect was a matter of public knowledge. . . The Applicant could therefore feel entitled to seise the Court on what at first sight seemed to be an appropriate basis of jurisdiction.” (Judgment, para. 90.)

Therefore, “Croatia’s conduct does not reflect any circumstances that would warrant a particularly strict application by the Court of the jurisprudence described above” (*ibid.*).

112. The dictum suggests that the Court has full discretionary power regarding the application of the constitutional rules of its Statute on the basis of the assessment of the behaviour of the parties in terms of *bona fidae*, although a party’s arguments might be motivated by considerations based on litigation strategy. It looks like an inversed theory of estoppel in favour of the Applicant.

Things are additionally complicated by the statement of the majority that the attitude of the Respondent as regards its *jus standi* in the relevant period makes that the Applicant “could. . . feel entitled to seise the Court on what at first sight seemed to be an appropriate basis of jurisdiction” (*ibid.*). Such a statement seems highly doubtful.

113. Apart from the issue of the relevance of the arguments of the Parties as regards the jurisdiction *lato sensu* and that *in concreto* the question in issue is not “the basis of jurisdiction” but the “capacity to appear before the Court”, the true meaning of the majority’s consideration is that the Applicant, for utilitarian purposes, relied on the earlier arguments of the Respondent as regards its *jus standi*. For, the fundamental premise of the Croatian policy, which is a matter of common

knowledge consistently applied, is that the SFRY was dissolved into six legally equal parts, so that the FRY, according to that premise, does not have continuity with the SFRY, and, consequently, no continuity as regards the membership in the United Nations<sup>5</sup>. And without continuation in the membership of the SFRY in the United Nations, the FRY/Serbia simply could not have the status of a party to the Statute of the Court.

114. Further, the majority's consideration seems also dubious in the light of the arguments of the Applicant itself. It appears probable that the Applicant relied in fact on the decisions of the Court taken in the different phases of the *Bosnia* case as regards the *jus standi* of FRY/Serbia, expecting, as it is shown rightly, that they will overcome the jurisprudence which consists of the Judgments in the eight *Legality of Use of Force* cases, the *Fisheries Jurisdiction* and *Monetary Gold* cases. This expectation was described in a condensed form by counsel of Croatia. He said:

“Croatia took account of the provisional measure Orders and the 1996 Judgment. It relied on the Court's reasoning as authoritative. It had a reasonable expectation that the Court would, following a principle of judicial certainty, adopt the same reasoning in future cases where the facts in issue were, to all intents and purposes, identical.” (CR 2008/10, p. 31, para. 12).

As Serbia's real target in the proceedings, according to that view, was “the Court's recent Judgment in the *Bosnia* case. It wants a judgment . . . that will allow it to minimize, neutralize, and — eventually — abandon the *Bosnia* Judgments of 2007 and 1996 as an anomaly” (*ibid.*, pp. 27-28, para. 2), then, in the view of the Applicant, the Court's decision in terms of a rescue operation of the legality of the jurisdictional decision in the *Bosnia* case was expected.

115. Thirdly, another additional consideration is even more unconvincing than the previous two. The majority states that

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<sup>5</sup> *Exempli causa*, in its Memorial. Croatia pointed out, *inter alia*, that “[n]either Croatia nor any of the other Republics of SFRY which became independent accept that FRY was the ‘continuation’ in a legal sense of the SFRY” (Memorial, para. 2.138, footnote 220).

In his letter of 16 February 1994 addressed to the Secretary-General, the Permanent Representative of Croatia to the United Nations takes a position on the “declaration adopted on 27 April 1992 at the joint session of the National Assembly of the Republic of Serbia and the Assembly of the Republic of Montenegro” (UN doc. S/1994/198 (1994)).

The question seems clear and unequivocal: “The Republic of Croatia strongly objects to the pretensions of the Federal Republic of Yugoslavia (Serbia and Montenegro) to continue the state, international, legal and political personality of the former Socialist Federal Republic of Yugoslavia.”

“while Croatia’s Application — a short text comprising some ten pages — was filed on 2 July 1999, that is prior to the admission of the FRY to the United Nations on 1 November 2000, its Memorial on the merits, a document of 414 pages, was submitted on 1 March 2001, after that date” (Judgment, para. 90).

Although saying that “it is not possible to equate the filing of a memorial with that of an instrument instituting proceedings” (*ibid.*), the majority in fact passes half of the way in this equation. Given the fact that it “expounds the Applicant’s arguments, but also . . . specifies the submissions” (*ibid.*), the majority view is that that “it cannot be entirely ignored” (*ibid.*).

Apart from the fact that such an equalizing has no basis whatsoever in the Statute and in the Rules of Court, it implicitly derogates, or at least substantially dilutes, the basic thesis of the majority on the existence of the exception to the general rule that the jurisdiction of the Court must be assessed on the date of institution of the proceedings. For, on the basis of such determination of the Memorial of Croatia, the majority concludes that “if Croatia had submitted the substance of its Memorial, on 1 March 2001, in the form of a new application, as it could have done, no question with respect to Article 35 of the Statute would have arisen” (*ibid.*).

## 2. *Jurisdiction ratione materiae*

### (a) *General approach of the majority*

116. The present Judgment, in contrast to the 1996 Judgment (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia), Preliminary Objections, I.C.J. Reports 1996 (II)*), p. 613, para. 26) treats the 1992 declaration as the basis of the jurisdiction *ratione materiae*. The turn in the treatment of the declaration, which in the 1996 Judgment was perceived by the majority as a proper basis of the jurisdiction of the Court *ratione personae* (paragraphs 18-20 above), seems to be dictated by the needs of an *ad hoc* construction of the Judgment by necessary implication applied in the 2007 Judgment.

117. The declaration was adopted by the participants of the Joint Session of the Assembly of the SFRY, the National Assembly of the Republic of Serbia and the Assembly of the Republic of Montenegro, on 27 April 1992. The text of the declaration reads as follows:

“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,

Accepting all basic principles of the Charter of the United Nations and the CSCE Helsinki Final Act and the Paris Charter, and par-

ticularly the principles of parliamentary democracy, market economy and respect for human rights and the rights of national minorities,

Remaining strictly committed to a peaceful resolution of the Yugoslav crisis, *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.*

*In that regard, the representatives of the people of the Republic of Serbia and the Republic of Montenegro declare:*

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,

At the same time, it is ready to fully respect the rights and interests of the Yugoslav Republics which declared independence. The recognition of the newly-formed states will follow after all the outstanding questions negotiated on within the Conference on Yugoslavia have been settled,

Remaining bound by all obligations to international organizations and institutions whose member it is, the Federal Republic of Yugoslavia shall not obstruct the newly-formed States to join these organizations and institutions, particularly the United Nations and its specialized agencies. The Federal Republic of Yugoslavia shall respect and fulfil the rights and obligations the SFR of Yugoslavia assumed vis-à-vis the territories of Krajina which have been placed, within the framework of the United Nations peace-keeping operation, under the protection of the world Organization.

The Federal Republic of Yugoslavia also remains ready to negotiate, within the Conference on Yugoslavia, all problems related to the division of assets, which means both to assets and debts acquired jointly. In case of a dispute regarding these issues, the Federal Republic of Yugoslavia shall be ready to accept the arbitration of the Permanent Court of Arbitration in The Hague.

2. The diplomatic and consular missions of the Federal Republic of Yugoslavia abroad shall continue without interruption to perform their functions of representing and protecting the interests of Yugoslavia. Until further notice, they shall continue to take care of all the assets of Yugoslavia abroad.

They shall also extend consular protection to all nationals of the

SFR of Yugoslavia whenever they request them to do so until a final regulation of their nationality status.

The Federal Republic of Yugoslavia recognizes, at the same time, the full continuity of the representation of foreign states by their diplomatic and consular missions in its territory.

3. The Federal Republic of Yugoslavia is interested in the reinstatement of economic, transport, energy and other flows and ties in the territory of the SFR of Yugoslavia. It is ready to make its full contribution to that end.

4. The Federal Republic of Yugoslavia has no territorial aspirations towards any of its neighbors. Respecting the objectives and principles of the United Nations Charter and CSCE documents, it remains strictly committed to the principle of *non-use* of force in settling any outstanding issues.

5. The Federal Republic of Yugoslavia shall ensure the highest standards of the protection of human rights and the rights of national minorities provided for in international legal instruments and CSCE documents. In addition, the Federal Republic of Yugoslavia is ready to grant the national minorities in its territory all those rights which would be recognized to and enjoyed by the national minorities in other CSCE participating states.

6. In its foreign relations, the Federal Republic of Yugoslavia shall be guided by the principles of the United Nations Charter, as well as the principles of CSCE documents, particularly the Paris Charter for New Europe. As the founding member of the Movement of non-aligned countries, it shall remain committed to the principles and objectives of the policy of non-alignment.

It shall develop relations of confidence and understanding with its neighbors proceeding from the principle of good neighborliness. The Federal Republic of Yugoslavia shall, as a State of free citizens, be guided in its democratic development by the standards and achievements of the Council of Europe, the European Community and other European institutions, with an orientation to join them in the foreseeable future.” (United Nations doc. A/46/915, Ann. II; emphasis added.)

118. In its 1996 Judgment the Court perceived the declaration as a unilateral act that *per se* produced legal consequences relevant as regards its jurisdiction *ratione personae*. The Court found that by way of the declaration the FRY expressed the intention “to remain bound by the international treaties to which the former Yugoslavia was party” (*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) and, on that

basis, could be considered as bound by the Genocide Convention on the date of filing of the Application by Bosnia and Herzegovina.

119. *De novo* assessment of the nature and effects of the 1992 declaration is necessary, not only because of the fact that the 1996 Judgment is not *res indicata* in the present case, but primarily due to substantial reasons. The reasons regarding the new developments, legal and factual, should be added to the reasons which existed at the time of the adoption of the 1996 Judgment and considered *in toto*.

In the light of the developments which took place following the adoption of the 1996 Judgment, and especially the admission of the FRY to the UN membership in a double capacity — as a new Member and as a successor State — it comes out that, as regards the perception of the nature and effects of the declaration, the 1996 Judgment was a kind of interim judgment based on the continuity presumption. As such, it is deprived of precedential authority *in casu*.

(b) *Whether the 1992 declaration could be considered a unilateral legal act in terms of international law?*

120. It seems obvious that the issue of an act by a single State cannot by itself qualify as a unilateral act capable of producing legal effects *in foro externo*. The unilateral nature of an act is but one extrinsic element which, when coupled with other elements, both extrinsic and intrinsic, forms a unilateral legal act in terms of international law.

121. In the circumstances of the case at hand a number of elements are of special relevance. The primary extrinsic element concerns the capacity of the participants in the Joint Session of the Assembly of the SFRY, the National Assembly of the Republic of Serbia and the Assembly of the Republic of Montenegro to perform unilateral acts in the sense of international law. This Joint Session of the Assembly of the SFRY, the National Assembly of the Republic of Serbia and the Assembly of the Republic of Montenegro was not constituted as the Parliament of the Federal Republic of Yugoslavia; rather it was a body of representatives *in statu nascendi*. Even if, *arguendo*, it represented the Parliament, it was obviously not a State organ possessing the capacity to perform unilateral acts on behalf of the State. Representatives of a State for purposes of formulating unilateral legal acts are Heads of State, Heads of Government and ministers of foreign affairs<sup>6</sup>. This rule has also been confirmed in the jurisprudence of the Court (*Nuclear Tests (Australia v. France)*, *Judgment*, *I.C.J. Reports 1974*, pp. 269-270, paras. 49-51; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia)*, *Preliminary Objections*,

<sup>6</sup> Art. 4, Report on Unilateral Acts of States, *Yearbook of the International Law Commission*, 1998, Vol. II, Part One, doc. A/CN.4/486; United Nations doc. A/CN.4/500 and Add. 1.

*Judgment, I.C.J. Reports 1996 (II)*, p. 622, para. 44; *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, *Judgment, I.C.J. Reports 2002*, pp. 21-22, para. 53; *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda)*, *Jurisdiction of the Court and Admissibility of the Application, I.C.J. Reports 2006*, p. 27, para. 46; see also *Legal Status of Eastern Greenland (Denmark v. Norway)*, *Judgment, 1933, P.C.I.J., Series A/B, No. 53*, p. 71). Consequently, it appears that the declaration, if designed as a unilateral legal act *in foro externo*, was issued by an incompetent organ under international law and, as such, produced no legal effects<sup>7</sup>.

122. True, the declaration, as the Court found, “was confirmed in an official Note of 27 April 1992 from the Permanent Mission of Yugoslavia to the United Nations, addressed to the Secretary-General” (*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 word “confirmed” in the present context may have two meanings: a descriptive one in the sense that the letter from the Permanent Representative reproduced the text of the declaration and a meaning as a “*terminus technicus*”, signifying confirmation of a unilateral act of an unauthorized State organ. Neither of these two possible meanings of the word “confirmed” can be accepted *in concreto*. In respect of the descriptive meaning of the word “confirmed”, it is obvious that the Note from the Permanent Representative<sup>8</sup> reproduces the text of the declaration only in part, i.e., citing only a small part thereof relating exclusively to legal identity and continuity.

By definition, the limited powers held by heads of permanent missions to international organizations, including permanent missions to the United Nations, negate the possibility of the official Note of the Permanent Mission of Yugoslavia of 27 April 1992 being understood as “con-

<sup>7</sup> See Art. 4 (subsequent confirmation of an act formulated by a person not authorized for that purpose) in the Third Report of the Special Rapporteur, *Yearbook of the International Law Commission*, 2000, Vol. I, p. 96.

<sup>8</sup> The text of the Note reads:

“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, 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.)

firmation” of an act issued by an organ, if at the material point in time it was an organ incompetent under international law to perform legal acts on behalf of the State.

123. Hence the proper characterization of the Note of the Yugoslav Permanent Mission of 27 April 1992 is that of a *transmission* of the declaration, followed by the corresponding reproduction of a part of the declaration directly connected with the Federal Republic of Yugoslavia’s proclaimed legal identity with, and continuation of, the former SFRY vis-à-vis the United Nations.

124. This characterization of the Note of the Yugoslav Permanent Mission suggests that the declaration of 27 April 1992 and the Note of the Permanent Mission are two distinct, yet not totally separate acts, both by their nature and by their effects. For its part, the declaration is basically a general statement of policy with respect to matters directly or indirectly connected with the issue of the proclaimed legal identity and State continuity of the Federal Republic of Yugoslavia, while the Note seems to be primarily a notification in the standard sense. Evidence to this effect is found in the fact that the addressee of the Note was the Secretary-General, who was requested to circulate the declaration and the Note as an official document of the General Assembly<sup>9</sup>, whereas the declaration as such was addressed *urbi et orbi*.

(c) *The issue of intention*

125. The intention to produce a proper legal effect is a common element of unilateral legal acts. In that regard, unilateral acts are always a manifestation of the will of a State. However, the intention to produce legal consequences is not *per se* sufficient to give to unilateral act as such the character of legal undertaking.

In that respect, unilateral legal acts may be divided into two groups: unilateral legal acts which produce legal effects on its own, and unilateral legal acts which produce proper legal effects on the basis of acceptance or acquiescence by another State or States (paras. 126-128, and 134 below).

The 1992 declaration would represent, in that respect, a mixture of those two kinds of unilateral acts. Its point 4 might have legal effects on its own, and that would be the act of renouncing the territorial aspirations towards the neighbouring countries. The other points of the declaration would imply the acceptance or acquiescence of other States in order to produce proper legal effects.

126. It appears that in the 1996 Judgment, the majority applied mechanically the legal formula from the *Nuclear Tests* cases to point 1 of the declaration saying that:

“The Federal Republic of Yugoslavia, continuing the State, inter-

<sup>9</sup> United Nations doc. A/46/915.

national 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.)

That formula could not be applied to the declaration.

127. The well-known dictum of the Court in the *Nuclear Tests* cases reads as follows:

“It is well recognized that declarations made by way of unilateral acts, concerning legal or factual situations, may have the effect of creating legal obligations. Declarations of this kind may be, and often are, very specific. When it is the intention of the State making the declaration that it should be bound according to its terms, that intention confers on the declaration the character of a legal undertaking, the State being thenceforth legally required to follow a course of conduct consistent with the declaration. An undertaking of this kind, if given publicly, and with an intent to be bound, even though not made within the context of international negotiations, is binding.” (*Nuclear Tests (Australia v. France), Judgment, I.C.J. Reports 1974*, p. 267, para. 43; *Nuclear Tests (New Zealand v. France), ibid.*, p. 472, para. 46.)

In the *Nuclear Tests* cases the act in issue was a unilateral legal act capable of producing legal effect of its own, being an expression of “the power of auto-limitation which States enjoyed under international law, in other words, their ability in the exercise of their sovereignty to subject themselves to international legal obligations” (see V. Rodríguez Cedeño, Special Rapporteur, *Yearbook of the International Law Commission*, 1998, Vol. II, Part Two, p. 53, para. 140).

128. The 1992 declaration, although being a unilateral act, is not capable of producing legal effects *per se*, without the acceptance by other States. The continuity claim on which it was based — “continuing the State, international legal and political personality of the SFRY, [it] shall strictly abide by all the commitments that the SFRY assumed internationally” — had to be, as such, accepted by the international community in order for the relevant part of the declaration to produce legal effects. Otherwise, the 1996 Judgment would create a general principle, according to which any interested State could determine, in the form of a unilateral act, its objective legal status in terms of the dichotomy continuator State/successor State, including its membership in the international organizations. For, in the very point of the declaration in which its authors said that the FRY “shall strictly abide by all the commitments that the SFRY assumed internationally” it is also said that the FRY is

“remaining bound by all obligations to international organizations and institutions whose member it is” including “particularly the United Nations and its specialized agencies”.

However, the continuity claim as a legal basis of the declaration was not generally accepted. That appears to be a matter of common knowledge.

(d) *Whether the “intention of the FRY” is separable from the continuity condition?*

129. The idea which is underlying the majority reasoning is that the “intention of the FRY to abide by all the commitments that the SFRY assumed internationally” is separable from the continuity condition since it was not expressed in explicit terms. It implies that the continuity premise, since it was not explicitly formulated in terms of the condition of validity of the declaration, represents, in fact, only a motif for its adoption, which would *per se* be irrelevant.

130. In the light of the text of the declaration, the idea seems abstract and divorced from its natural and ordinary meaning. The undertaking “shall strictly abide by all the commitments that the SFRY assumed internationally” is given by the FRY as “continuing the State, international legal and political personality of the SFRY”. Relevant in that sense are also the *travaux préparatoires* of the declaration. At the meeting of the Federal Chamber of the Assembly of the SFRY held on 27 April 1992, which proclaimed the Constitution of the FRY, the President of the Assembly of Serbia emphasized, in his introductory speech *inter alia* that “Serbia and Montenegro do not recognize that Yugoslavia is abolished and ceased to exist” (*Politika*, Belgrade, 28 April 1992, p. 6; emphasis added). Another opening speaker, the President of the Assembly of Montenegro, pointed out, *inter alia*, that Serbia and Montenegro were “the only States which brought their statehood with them on the creation of Yugoslavia and *decided to constitutionally rearrange the former Yugoslavia*” (*ibid.*; emphasis added).

That fact was not contested by the then Applicant — Bosnia and Herzegovina — which asserted that “it is on the basis of this alleged ‘continuity’ that Yugoslavia (Serbia and Montenegro) considers itself to be bound by all international commitments undertaken by the former SFRY” (Memorial, p. 160, para. 4.2.2.11).

131. As such, it is a declaration of continuity out of which comes *ex lege* that the FRY strictly abides by the commitments assumed by the SFRY. The wording “abide by all the commitments that the SFRY assumed internationally” is, in fact, a claim for legal identity

with the SFRY which, by itself, represents the basis and substance of the continuity as the operational, functioning side of a single institution.

132. In the 1992 declaration, the continuity claim is an inherent condition, its *rationale* and the element permeating the declaration as a whole. It is more than a formal condition, for the declaration would be devoid of substance without the continuity claim. If the declaration was intended to produce legal effects irrespective of continuity, these effects would have been expressed as the confirmation or safeguarding of rights and obligations created by the treaty commitments of the SFRY rather than, as inferred by the Court itself, in terms to “remain bound by the international treaties to which the former Yugoslavia was party” (*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; emphasis added).

133. The idea of the separability of the intention of the FRY to abide by all the commitments of the SFRY and the continuity premise is sharply, almost irreconcilably opposed also to the rules of interpretation of unilateral legal acts of States, well settled in the jurisprudence of the Court. Where unilateral acts of States are to be interpreted, “declarations. . . are to be read as a whole” (*Fisheries Jurisdiction (Spain v. Canada), Jurisdiction of the Court, Judgment, I.C.J. Reports 1998*, p. 454, para. 47; emphasis added) and “interpreted as a unity” (*ibid.*, p. 453, para. 44; emphasis added). Further, unilateral acts “must be interpreted as [they stand,] having regard to the words actually used” (*Anglo-Iranian Oil Co. (United Kingdom v. Iran), Preliminary Objection, Judgment, I.C.J. Reports 1952*, p. 105). Finally, when States “make statements by which their freedom of action is to be limited, a restrictive interpretation is called for” (*Nuclear Tests (Australia v. France), Judgment, I.C.J. Reports 1974*, p. 267, para. 44; *Nuclear Tests (New Zealand v. France), ibid.*, p. 473, para. 47; emphasis added).

134. The intention of the authors of the acts, incapable of producing legal effects *per se* made in treaty pattern, is of a specific nature. Regarding that particular group of unilateral acts, the consideration of the Court in the *Nuclear Tests* cases, that “nothing in the nature of a *quid pro quo* nor any subsequent acceptance of the declaration, nor even any reply or reaction from other States, is required for the declaration to take effect” (*I.C.J. Reports 1974*, p. 267, para. 43) does not stand. For, the object of unilateral acts made in treaty pattern, is not an obligation *stricto sensu*, by way of which the authors limit themselves in the exercise of its sovereignty, but a synallagmatic obligation immanent to treaties. As regards those kind of unilateral legal acts, the intention is only the *cause* which must be accompanied by a proper treaty action in order to produce the intended effects (para. 153 below). If not, the

fundamental principle *pacta tertiis nec nocent nec prosunt* would be infringed.

(e) *The effects of the 1992 declaration*

135. The intention of the authors of the 1992 declaration seems clear on the face of the declaration itself. In its preamble it is said that the participants in the Joint Session of the Assembly of the SFRY, the National Assembly of the Republic of Serbia, and the Assembly of the Republic of Montenegro, as its authors, “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” (emphasis added). In that respect, it can be compared with the communication of the Junta of the Government of National Reconstruction of Nicaragua to the Secretary-General of the Organization of American States, accompanied by the “Plan to secure peace” which the Court in the *Nicaragua* case determined as

“This part of the resolution is a *mere statement* which does not comprise any formal offer which if accepted would constitute a promise in law, and hence a legal obligation. . . an *essentially political pledge*, made not only to the Organization, but also to the people of Nicaragua, intended to be its first beneficiaries” (*Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, *Merits, Judgment, I.C.J. Reports 1986*, p. 132, para. 261; emphasis added).

136. It should be noted that the declarations of the Assembly in the constitutional system of Yugoslavia have, since its foundation, been treated as general political acts having for its object the issues not included in the competence of the Assembly (M. Snuderl, *Constitutional Law*, Ljubljana, Vol. II, 1957, p. 47; A. Fira, *Constitutional Law*, Belgrade, 1977, p. 381).

(f) *Could the 1992 declaration be considered a notification of succession?*

137. The majority treats the 1992 declaration in a specific way, different from that implemented in the 1996 and 2007 Judgments. While in the 1996 and the 2007 Judgments the 1992 declaration is perceived as a unilateral legal act producing *per se* effects in terms of the determination of the FRY as a party to the Genocide Convention, in the present Judgment the declaration is put in a broader context of the succession in respect of treaties. Basically, the majority treats it as a notification of succession. And the succession itself, in respect of treaties, is in the majority reasoning, coloured by the logic of automatic succession without speaking its name.

138. In that regard, the majority finds that:

“In the case of succession or continuation on the other hand, the act of will of the State relates to an already existing set of circumstances, and amounts to a recognition by that State of certain legal consequences flowing from those circumstances, so that any document issued by the State concerned, being essentially confirmatory, may be subject to less rigid requirements of form.” (Judgment, para. 109.)

And, further, that the idea is reflected in:

“Article 2 (g) of the 1978 Vienna Convention on Succession of States in respect of Treaties . . . defining a ‘notification of succession’ as meaning ‘in relation to a multilateral treaty, *any notification, however framed or named*, made by a successor State expressing its consent to be considered as bound by the treaty’” (*ibid.*).

139. It appears, however, that “any document issued by the State” (*ibid.*), may, as a matter of law, mean only the document issued by an organ competent under international law to act on behalf of a State. The principle seems to be generally recognized in international law (Head of State principle).

140. The majority interprets “being. . . confirmatory” (*ibid.*) in the context of “an already existing set of circumstances. . . [as amounting] to a recognition by that State of certain legal consequences flowing from those circumstances” (*ibid.*). Further, that the 1992 declaration referred “to a class of instruments which was perfectly ascertainable. . . the treaty ‘commitments’. . . the Genocide Convention was one of these ‘commitments’” (*ibid.*, para. 108.)

141. The finding, it seems, starts from the perception of notification of succession as confirmation that the Respondent is bound by a “perfectly ascertainable” (*ibid.*) class of instruments which includes the Genocide Convention, on the basis of law (*plein du droit*).

True, such an understanding might correspond to the grammatical meaning of Article 34 of the Convention on Succession of States in respect of Treaties which is, however, substantially modified in the practice of States. None of the successor States, following the entry into force of the Convention, acted in the way implying that the notification of succession meant confirmation that the transfer of rights and obligations of the predecessor State occurred *ipso jure*. The majority itself does not refer to any practice in that regard. Successor States, most of them being at the same time Contracting Parties to the Convention on Succession of States in respect of Treaties, treated the continuity rule provided in its Article 34 “only as main and general flexible rule covering everything that has emerged in the region involving State succession” (H. Bokor-Szego, “Questions of State Identity and State Succession in Eastern and Central Europe”, *Succession of States*, 1999, ed., by M. Mrak, pp. 104-105). The

residual and *jus dispositivum* nature of the rules on succession on the one hand, and the general notion of succession of States given in Article 2, paragraph 1 (*b*), of the Convention, leaving aside any connotation of inheritance of rights and obligations on the occurrence of change of sovereignty, on the other, give supportive force to such practice of successor States.

142. The majority has made an impressive effort to construct conditions for the application of the *Mavrommatis* principle as it sees it, in order to escape the inescapable — to consider the relationship of the Respondent vis-à-vis the Genocide Convention within the general law on succession of States in respect of treaties. For that purpose it resorts to the inverted order of examination of the Applicant's contentions, by first examining the alternative contention regarding the 1992 declaration, with the explanation that

“if Croatia's contentions as to the effect of the declaration and Note are accepted, the need does not arise for the Court further to address the arguments put to it by the Parties concerning the rules of international law governing State succession to treaties including the question of *ipso jure* succession to some multilateral treaties” (Judgment, para. 101).

However, Croatia's contentions as to the effect of the 1992 declaration have been designed within the law on succession. Counsel for the Applicant pointed out, *inter alia*, that

“The famous letter [Note] the Respondent sent to the Secretary-General on 27 April 1992 was not an offer to those States who agreed with the FRY's continuity thesis that the FRY would not commit genocide or otherwise breach its treaty obligations. It was neither relative nor qualified. Nor was it expressed to be prospective; it was drafted. . . in terms of continuity. *The Respondent was a party by succession to the Genocide Convention from the beginning of its existence as a State.*” (CR 2008/11, p. 9, para. 7 (Crawford); emphasis added. See also Written Statement of Croatia, p. 3; Preliminary Objections of Serbia, Ann. 7.)

As the Applicant sees succession as “a distinct mode of transmission of treaty obligations. . . retrospective to the commencement of the successor State” (CR 2008/11, p. 9, para. 8 (Crawford)), it is obvious that one is dealing here with automatic succession.

143. Moreover, the majority itself suggests that the FRY acquired the status of party to the Convention by a process that is to be regarded as succession. True, in its *conclusio* the majority finds that “both the text of the declaration and Note of 27 April 1992, and the consistent conduct of the FRY at the time of its making and throughout the years 1992-2001” (Judgment, para. 117) by its combined effects make the Respondent a Contracting Party to the Genocide Convention as from 1992. However,

the element “conduct of the FRY” could hardly have any substantial role (paras. 160-166 below), which is also attested to by the final position of the majority to the effect that “the 1992 declaration and Note *had the effect of a notification of succession by the FRY to the SFRY in relation to the Genocide Convention* (Judgment, para. 117; emphasis added).

144. It appears indisputable that, before the adoption of the Convention on Succession of States in respect of Treaties, it is not possible to speak of automatic succession in terms of customary law. As an Expert Consultant of the Conference, Sir Francis Vallet, emphasized:

“The rule [in Article 2 — Succession of States in cases of separation of parts of a State — corresponding to Article 34] was not based either on established practice or on precedent, it was a matter of the progressive development of international law rather than of codification.” (Summary Records, Committee of the Whole, 48th meeting, 8 August 1978, doc. A/CONF.80/16/Add.1, p. 105, para. 10.)

The automatic succession as a rule of customary law began to be discussed after the 1990s, with reference to the practice of the successor States of the USSR, the Czechoslovak Socialist Republic and the SFRY and the related pronouncements of some human rights bodies, in particular the Human Rights Committee.

However, what is involved here is a theory, a construction *de lege ferenda* without foundation in practice. The allegedly consistent practice in that regard is the result of a creative interpretation exceeding the permissible interpretative framework. Even if the practice of the successor States was most consistent, the question of *opinio juris* remains open, because a good part of that practice has been modelled under the influence of conditional recognition, which also implied the acceptance of the standard of respect for human rights<sup>10</sup>, practised as regards those successor States.

145. It appears that none of the successor States applied the practice of confirmatory notification in a generalized form, which alone perfectly corresponds with the conception of the *ipso jure* transfer of the rights and obligations from the predecessor State to the successor State (s), but declared themselves bound by the treaties of their predecessor State in their own name, applying different modalities. Besides, universal succession implies not only *ipso jure* transfer of treaty rights and obligations, but transfer *uno actu* comprising *all* the treaty rights and obligations of the predecessor State, together with the reservations made, excluding boundary treaties or territorial settlement. The fact that the modalities

<sup>10</sup> “Guidelines for the Recognition of New States in Eastern Europe”, *International Legal Materials*, Vol. 31 (November 1992), pp. 1485-1487.

applied have, or may have, the effect of a *continuum* of treaty rights and obligations does not mean automatic succession — although it is implied — because that *continuum* is created not by the operation of the rule of international law (*ipso jure*) but by the will of the successor State. It is difficult, *exempli causa*, to qualify the notification of succession of Bosnia and Herzegovina of 29 December 1992 in terms of automatic succession if it states that “*having considered* the Convention on the Prevention and Punishment of the Crime of Genocide of 9 December 1948 to which the former SFRY was a party, *wishes to succeed* to the same” (Communication from the Secretary-General of the United Nations dated 18 March 1993 (ref. C.N. 451-1992, Treaties 5 (Depositary Notification)), entitled “Succession by Bosnia and Herzegovina”; emphasis added).

146. In that crucial point which is, in fact, the point of differentiation between automatic succession and succession of treaties of the predecessor State by the will of the successor State, the practice of the successor States seems consistent.

The Minsk Accords of 8 December 1991, signed by Russia, Belarus and Ukraine, providing for the unconditional commitment to honour treaty obligations of the USSR, appeared to lay conventional foundations for universal succession of the treaties of the former USSR. However, the subsequent Alma-Ata Accords modified the commitment to fulfil treaty obligations of the former Soviet Union to the extent that such continuation was “in accordance with constitutional procedures” of the successor State (P. R. Williams, “The Treaty Obligations of the Successor States of the Former Soviet Union, Yugoslavia and Czechoslovakia: Do They Continue in Force?”, 23 *Denver Journal of International Law and Policy* 1, 1994-1995, pp. 22-23; see also R. Mullerson, “The Continuity and Succession of States by Reference to the Former USSR and Yugoslavia”, 42 *International and Comparative Law Quarterly*, 1993, p. 479). Acting on that basis, the Baltic republics opted to accede to conventions of the USSR in their own right (J. Klabbbers, “State Succession and Reservations to Treaties”, in J. Klabbbers and R. Lefeber, *Essays on the Law of Treaties*, 1998, p. 111), while Moldova, Uzbekistan and Turkmenistan explicitly adopted the clean State model (B. Stern, “Rapport préliminaire sur la succession d’Etats en matière de traités” (Report submitted to the International Law Association’s Committee on Aspects of the Law of State Succession for the 1996 Helsinki Conference), p. 675). Turkmenistan, Kazakhstan, Kyrgyzstan and Tajikistan issued notifications of succession in their own right, without any reference to reservations and declarations made by the Soviet Union as a predecessor State (J. Klabbbers, *op. cit.*, p. 113). Consequently, the former Soviet republics widely practised accession as a means of binding themselves by multilateral treaties to which the USSR was a party.

147. The practice of the Czech and the Slovak Republics is also not free from inconsistency, although these two States notified the Secretary-General of the United Nations that they consider themselves bound by the multilateral treaties to which the former Czechoslovakia was a party. Inconsistency is reflected not only in the fact that they consider themselves bound as from different dates (the Czech Republic as from 1 January 1993 and Slovakia as from 31 December 1992), but also because, in spite of confirmatory notifications relating to the multilateral treaties to which Czechoslovakia was a party, they also issued notifications on succession in respect of particular treaties, while they acceded to some others. Thus the Czech Republic became a party to the 1985 International Convention against Apartheid in Sports by succession, whereas Slovakia did not. Also, whereas Slovakia succeeded to most treaties on the date of general notification, the Czech Republic, in a number of cases, succeeded on the basis of notification of succession which followed on a later date (see J. Klabbers, *op. cit.*, pp. 117-118). As regards some multilateral conventions, the Czech Republic bound itself in the form of accession, although in question were conventions to which the former Czechoslovakia was a party such as, for example, the Convention on International Civil Aviation (P. R. Williams, *op. cit.*, p. 41).

148. The legal situation as regards the former Yugoslav republics is much more contradictory. At first, while the FRY stuck to the continuity claim until 2000, Slovenia, Croatia, Bosnia and Herzegovina and Macedonia *ab ignitio* considered themselves as successor States and were recognized as such by the international community. Further, although declaratively favouring automatic succession in respect of multilateral treaties to which the SFRY was a party, in particular Bosnia and Herzegovina and Croatia in proceedings before the Court, they did not apply the automatic succession pattern of treaty action in practice. Thus, for instance, Bosnia and Herzegovina designed its notification on succession to the Genocide Convention in terms of a "wish" to succeed to same, which fits in with the concept of succession in its own right rather than automatic succession. Particularly illustrative is the case of the 1989 Convention on the Rights of the Child. Bosnia and Herzegovina is listed as having succeeded on 1 September 1993; Croatia succeeded on 12 October 1992; Slovenia succeeded on 6 July 1992 and Macedonia did so on 2 December 1993 (*Multilateral Treaties Deposited with the Secretary-General, Status as at 31 December 1993*, United Nations doc. ST/LEG/SER./E/11-12, pp. 193-194). None of these dates corresponds to the dates upon which those republics succeeded the SFRY according to the generally accepted opinion of the Badinter Arbitration Commission (*International Legal Materials*, Vol. 32, 1993, pp. 1587-1589). The Commission established the following dates in that regard: 8 October 1991 in the case of the Republic of Croatia and the Republic of Slovenia; 17 November 1991 in the case of the former Yugoslav Republic of Macedonia; 6 March

1992 in the case of the Republic of Bosnia and Herzegovina. Finally, this contradictory practice seems to be nothing more than the expression of a confused and ambivalent attitude towards the automatic succession rule. For example, at a meeting of Legal Advisers on International Public Law convened by the Committee of Ministers for the Council of Europe on 14-15 September 1992, the representative of Croatia noted that Croatia would respect all the treaties of the SFRY unless they conflicted with the Croatian Constitution (Committee of Legal Advisers on International Public Law for the Council of Europe, 4th meeting 14-15 September 1992, p. 3). Slovenia, as stated by its representative “had been invited to accede to some conventions to which former Yugoslavia had been a party and would like to be invited to accede to other conventions which had been ratified by the former federation” (*ibid.*).

149. It comes out that the rule contained in Article 34 of the Convention on Succession of States in respect of Treaties did not generate the rule of general international law on *ipso jure* transfer of the treaty rights and obligations from the predecessor State to the successor State.

Moreover, it has not even become a *jus perfecta* as a conventional rule. Before the Convention even came into force in 1978, the automatic succession rule provided in its Article 34 was modified by the practice of successor States, followed by acceptance of that practice by existing States. The absence of objections to notifications of succession in its own right as regards multilateral treaties to which their predecessor States were parties as well as to numerous accessions<sup>11</sup> to those treaties are credible evidence in that regard. In short, Article 34 of the Convention remained an empty provision, a conventional project which was not materialized.

Even if it had not been modified before the coming into force of the Convention on Succession of States in respect of Treaties, the rule *qua* treaty rule is inapplicable *in casu*, since it entered into force in November 1996, well after the dissolution of the SFRY.

Retroactive effects of the Convention are excluded in its Article 7, paragraph 1, which provides that “the Convention applies only in respect of a succession of States which has occurred after the entry into force of the Convention”.

150. If so, automatic succession in respect of treaties is the expression of diplomatic or political considerations rather than a rule in harmony with common sense and legal considerations.

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<sup>11</sup> *Exempli causa*, most of the successor States of the USSR acceded to the Genocide Convention (Azerbaijan (16.VIII.1996); Armenia (23.VI.1998); Georgia (11.X.1993); Kazakhstan (26.VIII.1998); Kyrgyzstan (5.IX.1997); Moldova (26.I.1993); Uzbekistan (9.IX.1999)) along with other successor States such as Algeria (31.X.1963); (Rwanda (16.IV.1975); Tonga (16.II.1972).

First of all, if we stick to the difference between the predecessor State and the successor State, in terms of legal personality, it is unclear how the successor State, as a new State, may be considered bound by the will of the predecessor State, being another State in legal terms. Such an understanding obliterates the difference between the predecessor State and the successor State as distinct legal personalities and relies on the fiction that, in respect of treaties, their wills concur. (See, for instance, the concept of succession as substitution plus continuation according to which “[d]er Nachfolger des Völkerrechts aber tritt in Rechte und Pflichten seines Vorgängers so ein, als wären es seine eigenen” (H. M. Huber, *Beiträge zu einer Lehre von der Staaten-succession*, Berlin, 1897, p. 14).) Further, a rule on automatic succession runs counter to the fundamental principle of equality of States to the detriment of successor States. Successor States, by applying this rule, would be deprived of the rights which, otherwise, States have when expressing consent to be bound, such as, for example, making a reservation in respect of part of a treaty or accepting to be bound by a treaty under certain conditions. Finally, automatic succession rests on, or is substantially close to, the idea of universal succession in civil law which is incompatible with an essentially consensual order, in which the main subjects (legal persons) are States as equal and sovereign political entities.

As far as the effects of automatic succession in respect of treaties are concerned, it would not substantially contribute to legal stability and certainty, because it lies on the shoulders of the norms of *jus cogens* as the most perfect part of the structure of international law.

151. Erroneous is the thesis that, in the absence of *ipso jure* transfer of the rights and obligations, there appears a time gap in the application of the rules prohibiting the crime of genocide. In contrast to its procedural provisions, including Article IX, the substantive provisions of the Genocide Convention, being part of the *corpus juris cogentis*, bind any successor State, regardless whether it is, or is not, a Contracting Party to the Convention. The rules of *jus cogens* as preemptory, absolutely binding, rules, bind *a priori* every State, be it a successor or predecessor State, “even without any conventional obligation” (*Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, I.C.J. Reports 1951*, p. 23).

In that regard, to speak about the succession of substantive rules contained in universal treaties or general multilateral treaties adopted in the interests of the international community as a whole, like the Genocide Convention, is either superfluous or a wrong way of expressing, for those rules are *ab initio et suo vigore* binding on any successor State, regardless of the law on succession of States in respect of treaties.

152. The different position of the substantive and procedural provisions of universal treaties or general multilateral treaties which express

the interests of the international community as a whole is not contradicted by the legal nature of succession in respect of treaties, either. In fact, the expression “succession in respect of treaties” is in its brevity somewhat abstract and imprecise in this particular context. It is not the treaties *qua* legal acts which are the subject of succession, but rather the rights and obligations deriving from the treaties.

Substantive obligations in universal treaties being “the obligations of a State towards the international community as a whole” (*Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain), Second Phase, Judgment, I.C.J. Reports 1970*, p. 32, para. 33) are the obligations of “a State”, regardless of its legal position in terms of whether it is a new State or the existing one. Opposite to them stand procedural provisions of such treaties, including provisions such as those of Article IX of the Genocide Convention which are not “obligations towards the international community as a whole”, but obligations *intuitu personae* which are not binding upon the successor State without its consent.

153. The notification of succession to which the successor States resort in practice in order to be bound by the treaties of the predecessor State in its own right must be specific, in contrast to notifications confirming *ipso jure* the transfer of treaty rights and obligations of the predecessor to the successor State. They could not concern “a class of instruments”, regardless of their ascertainability, but the specific treaty which was in force in relation to the predecessor State.

A synallagmatic obligation, being a specific obligation constituted *ex consensu*, cannot be undertaken like an obligation contemplated by the dictum of the Court in the *Nuclear Tests* cases, by the intention of a State solely. As regards those obligations, the intention of a State represents just a basis of consent as a legally designed intention for treaty law purposes. The notification of succession as developed in the practice of successor States is nothing else than a new, specific way of expressing consent to be bound by treaty in the case of succession. This point demonstrates the close relationship between the law of succession in respect of treaties and the law on treaties.

154. It is natural that the succession of States with respect to treaties has the closest link with the law of treaties itself and could be regarded as dealing with particular aspects of participation in treaties, the conclusion of treaties and the application of treaties. Special Rapporteur Humphrey Waldock described this link as follows:

“the Commission could not do otherwise than examine the topic of succession of States with respect to treaties within the general framework of the law of treaties. . . the principles and rules of the law of treaties seemed to provide a surer guide to the problems of succession with respect to treaties than any general theories of succession”

(*Yearbook of the International Law Commission*, 1968, Vol. I, p. 131, para. 52).

Or as stated by O'Connell: "The effect of change of sovereignty on treaties is not a manifestation of some general principle or rule of State succession, but rather a matter of treaty law and interpretation." (D. P. O'Connell, *The Law of State Succession*, 1956, p. 15.)

155. The Convention on the Law of Treaties (1969) stipulates in Article 11 (Means of Expressing Consent To Be Bound by a Treaty): "The consent of a State to be bound by a treaty may be expressed by signature, exchange of instruments constituting a treaty, ratification, acceptance, approval or accession, *or by any other means if so agreed.*" (Emphasis added.)

The Convention on Succession of States in respect of Treaties defines notification of succession as "any notification, however phrased or named, *made by a successor State expressing its consent to be considered as bound by the treaty*" (Art. 2, para. 1 (g) of the Convention, United Nations, *Treaty Series*, Vol. 1946; emphasis added).

It seems clear that the notification of succession as defined, being a means of "expressing consent" in relation to "the treaty", could hardly be understood, as the majority view suggests, as an abstract, generalized form of expressing an intention to be bound by an ascertainable class of treaty instruments.

156. *Tractu temporis*, the notification of succession becomes "other means" in the terms of Article 11 of the Convention on the Law of Treaties, of the expressing consent to be bound by the treaty designed for successor States on the basis of collateral agreement in simplified form between them and the parties to its predecessor's treaties. As such, the notification of succession is treated by the Secretary-General as depositary of multilateral treaties.

157. To that effect, the position of the Secretary-General, as depositary of multilateral treaties, seems clear:

"Frequently, newly independent States will submit to the Secretary-General 'general' declarations of succession, usually requesting that the declaration be circulated to all States Members of the United Nations. The Secretary-General, duly complies with such a request. . . but does not consider such a declaration as a valid instrument of succession to any of the treaties deposited with him, and he so informs the Government of the new State concerned. In so doing, the Secretary-General is guided by the following considerations.

The deposit of an instrument of succession results in having the succeeding State become *bound, in its own name, by the treaty to which the succession applies, with exactly the same rights and obligations as if that State had ratified or acceded to, or otherwise*

*accepted, the treaty.* Consequently, it has always been the position of the Secretary-General, in his capacity as depositary, to record a succeeding State as a party to a given treaty solely on the basis of a formal document similar to instruments of ratification, accession, etc., that is, a notification emanating from the Head of State, the Head of Government or the Minister for Foreign Affairs, which should specify the treaty or treaties by which the State concerned recognizes itself to be bound.

*General declarations are not sufficiently authoritative to have the States concerned listed as parties in the publication Multilateral Treaties Deposited with the Secretary-General.*” (Summary of Practice of the Secretary-General as Depositary of Multilateral Treaties, doc. ST/LEG/7/Rev. 1, paras. 303-305 (footnote omitted); emphasis added.)

158. It should be noted that the Applicant itself, except for the purposes of the present proceedings, did not consider the FRY a party to the Genocide Convention nor to other multilateral treaties on the basis of the 1992 declaration. The general position of the Applicant in that regard was expressed in a letter of its Minister of Foreign Affairs addressed to the President of the Security Council dated 23 August 1993. That position was as follows:

“As a result of the dissolution of the former State, the country known as the Federal Republic of Yugoslavia (Serbia and Montenegro) will have to deposit an instrument of succession to all international treaties it wishes to continue to be a party to.” (United Nations doc. S/26349 (1993).)

The position, repeatedly raised on a number of occasions (United Nations doc. CERD/SP/51 (1994), p. 3; United Nations doc. CCPR/SP/40 (1994), p. 3; United Nations doc. CCPR/SP/SR.18 (1994), p. 3, para. 2; p. 6, para. 21, p. 7, para 23; United Nations doc. CCPR/SP/SP/SR.19 (1994), pp. 3, 4 and 8), was summarized in a letter of the Permanent Representative of Croatia of 30 January 1995 addressed to the Secretary-General in his capacity as depositary of multilateral treaties (United Nations doc. A/50/75-E/1995/10).

159. Commenting on a document regarding the “Status of succession, accession and ratification of human rights treaties by successors to the former Yugoslavia, the former Soviet Union and the former Czechoslovakia”, the Permanent Representative of Croatia recalled that:

“The representatives of the Federal Republic of Yugoslavia (Serbia and Montenegro) have been prevented from participating in international meetings and conferences of State[s] parties to multilateral treaties in respect of which the Secretary-General acts as depositary (i.e. Convention on Prohibitions and Restrictions of the Use of Certain Conventional Weapons which May be Deemed to be

Excessively Injurious or to have Indiscriminate Effects, Convention on the Rights of the Child, International Convention on Elimination of All Forms of Racial Discrimination, International Covenant on Civil and Political Rights, etc.) as the Federal Republic of Yugoslavia (Serbia and Montenegro) *had not acted according to international rules of succession of States. Namely, the Federal Republic of Yugoslavia (Serbia and Montenegro) had tried to participate in international forums as a State party without having notified its succession. . .*” (United Nations doc. A/50/75-E/1995/10; emphasis added.)

And, consequently, that:

“*Should the Federal Republic of Yugoslavia (Serbia and Montenegro) express its intention to be considered a party, by virtue of succession, to the multilateral treaties of the predecessor State with effect as of 27 April 1992, the date on which the Federal Republic of Yugoslavia (Serbia and Montenegro), as a new State, assumed responsibility for its international relations, the Republic of Croatia would take note of that notifications of succession.*” (*Ibid.*; emphasis added.)

- (g) *Could the Respondent be considered a party to the Genocide Convention on the basis of the 1992 declaration and its conduct?*

160. It is true that, in the majority perception, the Respondent is considered a party to the Genocide Convention by the combined effects of the 1992 declaration and its “consistent conduct” as regards the Convention. This is suggested by the *conclusio* that “both the text of the declaration and Note of 27 April 1992, and the consistent conduct of the FRY at the time of its making and throughout the years 1992-2001” (Judgment, para. 117) give rise to the finding that the FRY was a Contracting Party to the Convention at the relevant time.

(It may, incidentally, be mentioned that the very reliance on the conduct of the Respondent, in the assessment as to whether it can be considered a Contracting Party to the Convention in the relevant period of time, represents by itself a tacit admission that the 1992 declaration was not capable of producing the effects attributed to it by the 1996 Judgment and by the subsequent decisions of the Court on its precedential authority.)

It transpires, consequently, that the “consistent conduct” of the FRY possesses substantive effects *in casu*, that “consistent conduct” as such is not a supportive argument for the understanding of the 1992 declaration as a notification of succession, but a basis *per se*. This is additionally sug-

gested by the fact that the *conclusio* does not refer to the 1992 declaration as an act, but to the text of the declaration. What is understood under “consistent conduct” in that perception? It appears that what is meant by “consistent conduct” are the actions and inactions of the FRY.

161. The actions in question are the following:

- (i) that in the case concerning *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (preliminary objections phase), the FRY “argued that the Genocide Convention had begun to apply to relations between the two Parties on 14 December 1995” (Judgment, para. 114);
- (ii) that the FRY “on 29 April 1999. . . filed in the Registry of the Court Applications instituting proceedings against ten States Members of NATO, citing (*inter alia*) the Genocide Convention as title of jurisdiction” (*ibid.*, para. 114).

As regards the inactions of the FRY, according to the majority perception, the following inactions are relevant:

- (i) that the FRY “did not repudiate its status as a party to the Convention even when it became apparent that that claim [continuity claim] would not prevail (*ibid.*, para. 111);
- (ii) that in the provisional measures phase of the case concerning *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, the FRY “while questioning whether the Applicant State was a party to the Genocide Convention at the relevant dates, did not challenge the claim that it was itself a party” (*ibid.*, para. 114);
- (iii) that following its admission to the United Nations in 2000, the FRY “did not at that time withdraw, or purport to withdraw, the declaration and Note of 1992, which had been drawn up in the light of the contention that the FRY was continuing the legal personality of the SFRY” (*ibid.*, para. 115).

162. The conduct of the FRY, according to the majority perception, attributes to the 1992 declaration the quality of “a valid and effective means by which the declaring State could assume obligations under the Convention” (Judgment, para. 110). For, as it is reasoned, the declaration “need not strictly comply with all formal requirements” (*ibid.*) having in mind that

“For example, in the *North Sea Continental Shelf (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands)* cases, the Court recognized the possibility that a State that had not carried out the usual formalities (ratification, accession) to become bound by the régime of an international convention might nevertheless ‘somehow become bound in another way’, even though such a process was ‘not lightly to be presumed’ to have occurred.” (*Ibid.*)

Consequently, the conduct of the FRY possesses as regards the 1992 dec-

laration a convalidating effect, because *a contrario* it is devoid of any substance. The reasoning and *conclusio* of the majority simply call for comments.

163. The *rationale* of referring to the *North Sea Continental Shelf* cases is completely unclear, as the claim of the Respondents that the FRG was contractually bound by the 1958 Geneva Convention on the Continental Shelf, and in particular by its Article 6, “by conduct, by public statements and proclamations” (*I.C.J. Reports 1969*, p. 25, para. 27) was rejected in the Judgment and even in the opinions of Judges appended to it (*ibid.*, pp. 86, 155, 198, 242). As the Court stated,

“only the existence of a situation of estoppel could suffice to lend substance to this contention, — that is to say if the Federal Republic were now precluded from denying the applicability of the conventional régime, by reason of past conduct, declarations, etc., which not only clearly and consistently evinced acceptance of that régime, but also had caused Denmark or the Netherlands, in reliance on such conduct, detrimentally to change position or suffer some prejudice” (*ibid.*, p. 26, para. 30).

Needless to say, however, that such effects of past conduct are limited to a particular case, so that the actions or inactions of the FRY in the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* as well as in the *Legality of Use of Force* cases are absolutely irrelevant *in casu*.

164. Even if, *arguendo*, the claim of Denmark and the Netherlands is acceptable, the requirement of a “very definite, very consistent course of conduct” (*ibid.*, p. 25, para. 28) on the part of the FRY would hardly have been met. For, in the preliminary objections phase in the *Legality of Use of Force* cases (*Serbia and Montenegro v. Belgium*), *Preliminary Objections, Judgment, I.C.J. Reports 2004 (I)*, pp. 292-293, para. 29), as well as in the merits phase in the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* case, the FRY clearly pointed out that it did not consider itself a Contracting Party to the Genocide Convention before the expression of consent in the form of accession on 6 March 2001 (effective 10 June 2001) (*Bosnia and Herzegovina v. Serbia and Montenegro*), *Judgment, I.C.J. Reports 2007 (I)*, p. 77, para. 81).

165. Conduct in terms of actions and/or inactions of a party cannot be the means of binding a State by a treaty, because it is simply not a statement of the will of a State. As such, it can be an external, material expression of a certain intention of a State and, in that sense, the basis for a unilateral undertaking of an obligation, as demonstrated by the idea underlying the dictum of the Court in the *Nuclear Tests* cases. Unilateral undertaking of an obligation is, however, one thing, and acquiring the

status of a Contracting Party to a treaty as an act essentially characterized by synallagmaticity, is quite another thing (para. 134 above). Therefore, the means of expressing consent to be bound by a treaty is always a matter of concurrence of the wills of the negotiators, a part of the final clauses of a treaty having retroactive effects. Conduct of a State in terms of actions or inactions is not stipulated in the Genocide Convention nor in any other convention as a means of expressing consent to be bound. In contrast to the expression of consent to be bound by a treaty, the actions or inactions of a party to the dispute can constitute jurisdiction of the Court in a particular case by way of the mechanism of *forum prorogatum*.

166. If, as the majority reasons, the practice of a State is considered as a basis for acceptance of the conventional régime, the role of the 1992 declaration, both as a matter of logic and as a matter of law, is unclear within the framework of such reasoning.

As a matter of logic, in such a perception of the practice of a State, the 1992 declaration ought to be either irrelevant as such or only an element of the practice, together with other actions and/or inactions of a State. However, in the majority perception, the “consistent conduct” of the FRY and the 1992 declaration have been placed on the same level, as two equal and independent bases for the determination of the FRY as a Contracting Party to the Genocide Convention.

As a matter of law, in relation to the 1992 declaration and the “consistent conduct” of the FRY, as projected by the majority, it appears that the latter has been attributed the convalidating role as regards the deficiencies of the declaration. It is hardly possible, in the circumstances surrounding the present case, that the practice may have a convalidating role. For, *in concreto*, what is involved here is the incapability of the 1992 declaration, in the light of the rules of general international law, to produce a proper legal effect, and not the defects of consent (*vices de consentement*) which, as a rule, may be convalidated by the actions or inactions of the State concerned. The practice of the Respondent, as perceived by the majority, should, in fact, remove the objective deficiencies of the 1992 declaration which are not in the domain of the will of its authors and, as such, cannot be affected by its actions and/or inactions.

(h) *Legal effects of the admission of the FRY/Serbia to the United Nations as a new State*

167. In the absence of the rule on automatic succession as regards the multilateral treaties applicable to the present case, the admission of the FRY/Serbia to the United Nations is unavoidably reflected on its status vis-à-vis the Genocide Convention due to the specific circumstances surrounding its admission to the United Nations. That was not only the

admission to the membership in the ordinary sense, but an admission followed by the determination of the legal personality of the FRY in terms of continuator/successor dichotomy.

This element is highly relevant *in casu*. In the case that the FRY continues the legal personality of the SFRY, it would be a Contracting Party to the Genocide Convention on the basis of the deposition of the instruments of ratification of the SFRY, without reservation, on 25 August 1950. The position of the FRY as a successor State puts the matter on a different legal level, as demonstrated by the actions taken by the Secretary-General as depositary of multilateral treaties (paras. 173, 176-178 below).

168. At the end of the year 2000 the FRY did two things:

- (a) it renounced the continuity claim and accepted the status of the successor State of the former SFRY; and
- (b) it proceeded from a qualitatively new legal basis — as the successor State — and on that basis submitted the application for admission to membership in the United Nations.

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

- (a) statehood in the sense of the relevant attributes such as defined territory, stable population and sovereign power;
- (b) 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 either be 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.

170. By submitting the application for admission to membership in the United Nations, the FRY not only renounced the claim to legal identity and continuity but claimed at the same time to be accepted as a new State in the sense of some other, different legal personality from the one claimed until the year 2000 — a successor State versus the continuator of the former SFRY.

171. The admission of the FRY to membership of the United Nations from 1 November 2000 also meant the acceptance of the claim of the FRY 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. The subject of the series of collateral agreements, or of the general collateral agreement as well as explicit statements, is recognition of the FRY as a new personality, a personality of the successor State of the

former SFRY, and, in that capacity it was admitted to the World Organization as a Member. Thus, the FRY, 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. 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 in the United Nations.

172. As regards the claim of the FRY to be accepted as a successor State, the following explicit statements are relevant: Statements made upon the admission of FRY to membership in the United Nations on 1 November 2000 by the Non-Aligned Movement; Germany, on behalf of the Western European and Other States Group; France, on behalf of the European Union and the Central and Eastern European countries associated with the European Union, the associated countries of Cyprus, Malta and Turkey, and the EFTA countries members of the European Economic Area; Croatia and Slovenia. See also document A/55/522-S/2000/1028 (letter dated 25 October 2000 from the Permanent Representative of the former Yugoslav Republic of Macedonia to the United Nations addressed to the Secretary-General) containing, in an annex thereto, the following joint statement made at the Informal Summit of the Heads of State and Government of the countries participating in the South-East European Cooperation Process:

“We strongly encouraged the commitment of the Federal Republic of Yugoslavia to follow a policy of good-neighborly relations, reconciliation and mutual understanding in the region, as well as respect for the principle of equality and non discrimination of all the successor States of the former Yugoslavia in their mutual relations.” (Non-paper of the United Nations Legal Counsel attached to his letter to the Minister of Foreign Affairs of the Federal Republic of Yugoslavia dated 8 December 2000, Ann. 23 of the Preliminary Objections of the FRY.)

(i) *The relevance of the Secretary-General's/Secretariat's action in the exercise of the depositary function*

173. Although the Secretary-General, in the capacity of depositary of the Genocide Convention, is not invested with any autonomous, substantive competence in terms of the determination of whether the FRY was viewed, or could be viewed, as qualifying to be a party to the Genocide Convention, his actions are not *a priori* devoid of any effects, which the complete ignoring of his actions might suggest. After all, his functions of depositary of multilateral treaties would be devoid of any substance.

In the present case the actions taken by the Secretary-General as regards the position of the FRY vis-à-vis the Genocide Convention are of a specific nature. They must be viewed in the totality of his competences as one of the principal organs of the Organization. In a case like the

present one, actions of the Secretary-General in the capacity of executive organ of the Organization and depositary of multilateral treaties respectively, are inevitably interrelated but distinguishable.

174. In closely related cases, the Court heavily relied on the pronouncements of the Secretary-General in its Judgment in the preliminary objections phase (1996) and found, with regard to the Sixth Preliminary Objection raised by the FRY, that

“Bosnia and Herzegovina could become a party to the Convention through the mechanism of State succession. Moreover, the Secretary-General of the United Nations considered that this had been the case” (*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. 20).

The Court took also note of this consideration of the Secretary-General in its Order of 8 April 1993 (*I.C.J. Reports 1993*, p. 16, para. 25).

175. In paragraph 44 of that same Judgment the Court rejected the Second Preliminary Objection of the FRY, in which Mr. Alija Izetbegović “was not serving as President of the Republic. . . at the time at which he granted the authorization to initiate proceedings” (*I.C.J. Reports 1996 (II)*, pp. 621-622), and in the reasoning and in the wording practically repeated the consideration which Mr. R. Zacklin, then Director and Deputy to the Under-Secretary-General in charge of the Office of Legal Affairs, made in his letter of 25 March 1993 addressed to the Registry of the Court. In that letter it is said that “[i]n the United Nations and in the International Conference on the former Yugoslavia, Mr. Izetbegović has been regarded and continues to be regarded as the President of Bosnia-Herzegovina” (dissenting opinion of Judge *ad hoc* Kreća, *I.C.J. Reports 1996 (II)*, p. 704, para. 37). The same finding is included in the Court’s Order of 8 April 1993 (*I.C.J. Reports 1993*, p. 11, para. 13).

It appears that in the 1996 Judgment, the Court took the above decision, on the basis of a consideration of an official of lower rank than the Secretary-General, in a matter which as such touches the constitutional system of Bosnia and Herzegovina, which did not contain, as it does not contain at present, the institution of an individual Head of State but a collective one.

176. Following the admission of the FRY to membership of the United Nations on 1 November 2000, the Legal Counsel of the United Nations sent, on 8 December 2000, a letter addressed to the Minister of Foreign Affairs of the FRY, expressing, *inter alia*, that “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”.

177. In the non-paper of the UN Legal Counsel entitled “Admission of the Federal Republic of Yugoslavia to the United Nations on 1 November 2000: Implications for Treaties Deposited with the Secretary-General”, the view is elaborated in detail. It starts with the finding that:

“1.3. The admission of the FRY to membership in the United Nations on 1 November 2000 has raised a number of issues relating to treaty actions undertaken by the FRY in relation to multilateral treaties accepted in deposit by the Secretary-General, and recorded against the name ‘Yugoslavia’;

2.1. Four major categories of treaty actions are at issue:

- (a) Treaty actions undertaken by the SFRY prior to 27 April 1992 (Annex A);
- (b) Treaty actions undertaken by the FRY between 27 April and 1 November 2000, pursuant to its previous claim to continue the legal personality of the SFRY (Annex B);
- (c) Treaty actions undertaken by the FRY, in its own right, and not dependent on prior treaty actions by the SFRY (Annex C); and
- (d) Treaty actions undertaken by the FRY, which require membership in the United Nations or a specialized agency as an essential precondition (Annex D). Treaty actions relating to the International Court of Justice and the Constitution of the World Health Organization have been addressed separately (see paragraphs 8 and 9 below).

4.1. In the light of the circumstances of FRY’s admission to membership in the United Nations on 1 November 2000, it would be proper for the depositary to treat the Federal Republic of Yugoslavia as a ‘Newly Independent State’.

4.2. *The international community appears to agree that the FRY’s admission to membership in the United Nations on 1 November 2000, together with its declaration make it a successor State with the requirement that it comply with the principle of equality among the successor States to the former SFRY. . . Accordingly, the FRY should be treated as a new State as described in the Summary of Practice of the Secretary-General as Depositary of Multilateral Treaties (ST/LEG/7/Rev.1, p. 87, para. 289).*

4.3. *[T]he FRY, as the new State that came into existence on 27 April 1992, may now wish to succeed to treaty actions undertaken by the SFRY prior to this date. This would include treaties to which the SFRY was a party.”* (Ann. 23 of the Preliminary

Objections of the Federal Republic of Yugoslavia, 2002; Emphasis added.)

178. The determination that the FRY is qualifying to become a party to the Genocide Convention is necessarily implied in the very decision of the General Assembly, upon the recommendation of the Security Council, to admit the FRY to the membership of the United Nations not only as a new Member but as a successor State at the same time. For, as United Nations Secretary-General Kofi Annan stated in his letter to the President of the United Nations General Assembly dated 27 December 2001:

“I have the honour to refer to General Assembly resolution 55/12 of 1 November 2000, in which the Assembly decided to admit the Federal Republic of Yugoslavia to membership in the United Nations. This decision necessarily and automatically terminated the membership in the Organization of the *former* Yugoslavia, the State admitted to membership in 1945.” (United Nations doc. A/56/767; emphasis added.)

That action clearly belongs to the Secretary-General as the executive organ of the Organization. Although far from being consistent in legal terms, it undoubtedly results from the decision taken by the principal political organs of the United Nations — the General Assembly and the Security Council — in respect of the question of the admission of a State to United Nations membership, which is in their exclusive competence. (Such an interpretation was advocated in the literature as well. In an article entitled “The New United Nations and Former Yugoslavia”, Professor Rosalyn Higgins wrote:

“The Assembly did recommend that the *new Federal Republic (Serbia-Montenegro)* should apply for membership of the United Nations. But the resolution did not either suspend, or terminate, Yugoslavia’s *membership* in the UN. The outcome had been anomalous in the extreme. The seat and nameplate remain as before. The old Yugoslav flag continues to fly on 42nd Street. ‘*Yugoslavia*’ remains a member of the UN, i.e. not *Serbia-Montenegro*, but *Yugoslavia in its entirety*.” (*Op. cit.*, p. 479; emphasis added.)

This necessarily means, as the Legal Counsel of the United Nations pointed out in the above-cited non-paper entitled “Admission of the Federal Republic of Yugoslavia to the United Nations on 1 November 2000: Implications for Treaties Deposited with the Secretary-General” that “the FRY, as the new State that came into existence on 27 April 1992, may now wish to succeed to treaty actions undertaken by the SFRY prior to this date” (emphasis added). As regards the Genocide Convention, the SFRY undertook a treaty action on 29 August 1950 in the form of ratification pursuant to Article XI of the Convention.

179. In these circumstances, the Respondent was fully entitled to express its consent to be bound by the Genocide Convention in the form of accession like a number of other successor States (footnote 11).

The right of accession of a successor State to a treaty such as the Genocide Convention derives from its very nature as a general international treaty, expressing the interests of the international community as a whole. As the Court stated in its Advisory Opinion in the case concerning *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, “[I]n such a convention the contracting States do not have any interests of their own; they merely have, one and all, a common interest, namely, the accomplishment of those high purposes which are the *raison d’être* of the convention” (*I.C.J. Reports 1951*, p. 23). Such a nature of the Genocide Convention implies

“that it was the intention of the General Assembly and of the States which adopted it that as many States as possible should participate. The complete exclusion from the Convention of one or more States would not only restrict the scope of its application, but would detract from the authority of the moral and humanitarian principles which are its basis.” (*Ibid.*, p. 24.)

180. Accession of a State to the Convention, therefore, appears to be an application of the demand for the participation in the Convention of as many States as possible. This is so, regardless of the nature of the accession to the multilateral treaties expressing the interests of the international community as a whole within the positive law.)

As regards those treaties, the right of accession must be treated as a *jus cogens* rule. In reality, the exercise of that right, bearing in mind the effects of the substantive provisions of such treaties, possesses constitutive effects only in regard of the provisions other than the substantive ones.

181. The Respondent’s accession to the Genocide Convention is, in some part, unusual. The standard notification of accession is accompanied by the explanation of the legal position of the FRY in terms of the dichotomy continuator/successor State and its consequences for the status of the FRY vis-à-vis the Genocide Convention.

The explanation notes, first of all, that the FRY declared on 27 April 1992 that it,

“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” (notification of accession of the FRY, Preliminary Objections of Serbia, Ann. 5).

Further, that

“the contention and assumption of continuity was eventually not

accepted by the United Nations, nor was it accepted by other successor States of the Socialist Federal Republic of Yugoslavia, and thus it produced no effects” (notification of accession of the FRY, Preliminary Objections of Serbia, Ann. 5).

And, finally, that

“it has been established that the Federal Republic of Yugoslavia has not succeeded on April 27, 1992, or on any later date, to treaty membership, rights and obligations of the Socialist Federal Republic of Yugoslavia in the Convention on the Prevention and Punishment of the Crime of Genocide on the assumption of continued membership in the United Nations and continued state, international legal and political personality of the Socialist Federal Republic of Yugoslavia” (*ibid.*).

A couple of observations seem relevant *in concreto*:

First, the explanation is an integral part of the FRY’s notification of accession to the Genocide Convention, making a logical and legal union with the statement of accession;

Second, the substance of the explanation corresponds to the objective legal position of the FRY, established by the admission of the FRY to the United Nations on 1 November 2000;

Third, the substance of the explanation corresponds to the action taken by the Secretary-General of the United Nations in his capacity as depositary of multilateral treaties;

Fourth, the FRY’s notification of accession is generally accepted by the Contracting Parties to the Genocide Convention, with three objections (Croatia, Sweden and Bosnia and Herzegovina): it was accepted as a whole, together with the provided explanation.

182. Accession is a valid means of expression of consent to be bound by a treaty in terms of the law of treaties and, as such, specifically provided in Article XI of the Genocide Convention.

In view of the fact that automatic succession in respect of treaties is not a part of positive international law, successor States are free, acting as regards multilateral treaties of predecessor States in their own name, to choose the means of expressing consent to be bound by a concrete treaty within the framework of the means stipulated by the treaty. Considering such a state of facts, there is no difference in substantive terms whatsoever between accession and notification of succession as developed in the practice of successor States. For, acting in its own name, the successor State, in its notification of succession, also determines the date from which it considers itself bound by the concrete treaty and which need not necessarily concur with the date of succession (para. 148 above).

183. Article XI of the Genocide Convention provides:

“The present Convention shall be open until 31 December 1949 for signature on behalf of any Member of the United Nations and of any non-member State to which an invitation to sign has been addressed by the General Assembly.

The present Convention shall be ratified, and the instruments of ratification shall be deposited with the Secretary-General of the United Nations.

After 1 January 1950 the present Convention may be acceded to on behalf of any Member of the United Nations and of any non-member State which has received an invitation as aforesaid.

Instruments of accession shall be deposited with the Secretary-General of the United Nations.” (United Nations, *Treaty Series*, (UNTS), Vol. 78, 1951; footnotes omitted.)

It appears that accession is not only established as a means of expression of consent to be bound by the Convention, but that it is a means specifically designed for non-original Contracting Parties, i.e., those which consent to be bound by the Convention after 1 January 1950.

184. Consequently, there remains the question whether the provisions of Article XI of the Convention are also equally applicable to the successor States. Article XI does not contain any indication, let alone any element given *explicite*, to the effect that accession, as a means of expression to be bound by the Convention, is not applicable as regards successor States. No corresponding limitation exists in the law on succession in respect of treaties, either. Moreover, the relevant rules of the law on succession appear to suggest quite the contrary, granting a successor State the right of option in that regard. For, if a successor State, according to Article 17 of the Convention, has the right to choose to become a party to multilateral treaties “independently of the consent of the other States parties and *quite apart from the final clauses of the treaty*” (*Yearbook of the International Law Commission*, 1974, Vol. II, Part One, p. 215, para. 2; emphasis added), then that right belongs *a fortiori* to a successor State in case it has been provided by the treaty.

185. The reservation of the FRY to Article IX of the Convention was completely ignored, although the reservation, in the light of the relevant rules of the law of treaties, is of far-reaching importance as regards the jurisdiction of the Court *in casu*. The FRY sent a notification of accession to the Secretary-General of the United Nations as its depositary on 6 March 2001, containing a reservation to Article IX of the Convention to the effect that:

“The FRY does not consider itself bound by Article IX of the Convention on the Prevention and Punishment of the Crime of

Genocide, and, therefore, before any dispute to which the FRY is a party may be validly submitted to the jurisdiction of the International Court of Justice under this Article, the specific and explicit consent of the FRY is required in each case.” (United Nations doc. C.N.945.2006.TREATIES-2 (Depositary Notification).)

In a Note dated 21 March 2001 the Secretary-General stated, *inter alia*, that “[d]ue note has been taken of the reservation contained in the instrument” (*ibid.*).

On 18 May 2001 the Permanent Representative of Croatia sent a communication to the Secretary-General, stating *inter alia*:

“The Government of the Republic of Croatia objects to the deposition of the instrument of accession of the Federal Republic of Yugoslavia to the Convention on the Prevention and Punishment of the Crime of Genocide, due to the fact that the Federal Republic of Yugoslavia is already bound by the Convention since its emergence as one of the five equal successor States to the former Socialist Federal Republic of Yugoslavia.

.....

The Government of the Republic of Croatia further objects to the reservation made by the Federal Republic of Yugoslavia in respect of Article IX of the Convention on the Prevention and Punishment of the Crime of Genocide, and considers it to be incompatible with the object and purpose of the Convention. The Government of the Republic of Croatia considers the Convention on the Prevention and Punishment of the Crime of Genocide to be fully in force and applicable between the Republic of Croatia and the Federal Republic of Yugoslavia, including Article IX.” (*Multilateral Treaties Deposited with the Secretary-General, Status as at 31 December 2002*, United Nations doc. ST/LEG/SER./E/21, p. 129.)

186. Thus, the objection of Croatia concerns two things:

- (i) accession as a means of expressing consent of the FRY to be bound by the Genocide Convention; and
- (ii) the reservation of the FRY made in respect of Article IX of the Convention.

*In concreto*, the objection to the reservation in respect of Article IX is of interest, having in mind the fact that Croatia considers “the Convention on the Prevention and Punishment of the Crime of Genocide to be fully in force and applicable between the Republic of Croatia and the Federal Republic of Yugoslavia, including Article IX”.

In that regard it seems clear that the objection to Article IX, supported by the fact that Croatia is not opposed to the entry into force of the Convention between itself and the Respondent, makes automatically applica-

ble paragraph 3 of Article 21 of the Convention on the Law of Treaties, which stipulates:

“When a State objecting to a reservation has not opposed the entry into force of the treaty between itself and the reserving State, the provisions to which the reservation relates do not apply as between the reserving State and the objecting State to the extent of the reservation.”

187. The action taken by the Secretary-General through the Legal Counsel in regard to the deposited multilateral treaties, including the Genocide Convention, is basically of an administrative nature, a sort of reminder of the necessary consequences resulting from the fact that by the act of admission of the FRY, it was at the same time accepted and recognized, implicitly and explicitly, as a new personality both by the Organization itself and its member States (paras. 167-173 above) and implemented in the total structure of the Organization. As such, it fits perfectly the function of the depositary provided by Article 77, paragraph 1 (*e*), of the Convention on the Law of Treaties, i.e., “[i]nforming the parties and the States entitled to become parties to the treaty of acts, notifications and communications relating to the treaty” (United Nations, *Treaty Series*, Vol. 1155).

### 3. *Preliminary objection to the jurisdiction of the Court, and to admissibility ratione temporis*

188. This particular objection of the Respondent is treated by the majority “at one and the same time [as] an objection to jurisdiction and one going to the admissibility of the claims” (Judgment, para. 120), consequently, as “two inseparable issues in the present case” (*ibid.*, para. 129).

Innovativeness of such a treatment of the issues of the scope of the jurisdiction of the Court *ratione temporis* and the admissibility of claims is accompanied by a contradictory reasoning. For, if the essential characteristics of an objection to jurisdiction is in that “if upheld, it brings the proceedings in respect of that claim to an end” (*ibid.*, para. 120) and objections to admissibility, as observed by reference to the Judgment in the *Oil Platforms* case “normally take the form of an assertion that, even if the Court has jurisdiction and the facts stated by the applicant State are assumed to be correct” (*ibid.*), the Court nonetheless declines to hear the case, it is unclear how two such objections can be considered inseparable issues. For, whereas the objection to jurisdiction concerns the existence of the jurisdiction of the Court *ad casum*, an objection to inadmissibility, as accepted by the majority, is concerned with the performance of the jurisdiction that is established.

189. It is true that the Respondent formulated this objection in the sense that “claims based on acts and omissions which took place prior to

27 April 1992 are beyond the jurisdiction of this Court and inadmissible” (CR 2008/12, p. 68). It is equally true, however, that it is up to a party to the dispute, *in concreto* the Respondent, to *present* its objection(s) to jurisdiction, and that it is up to the Court to make the determination on the basis of final submissions and, if necessary, other pertinent evidence, the real meaning of a jurisdictional objection. This would not be a matter which touches upon the power of the Court 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*), but a matter of the objective determination of a legal issue.

It seems, based on the wording of this particular objection of the FRY, as well as on the reasons advanced, that it is rather an objection to the scope of the jurisdiction *ratione temporis*, whereas admissibility could be an alternative objection.

190. It appears that the majority fails to pay due regard to the fact, which any legal reasoning must obey, considering that it expresses the iron law of logic and common sense itself. And, that is, that any legal personality, including a State, might bear responsibility or be subject to the legal procedure, only if it exists and during the period of time of its existence. *In concreto*, it seems obvious that the Court may have jurisdiction starting only on 27 April 1992, when the Respondent was constituted as the legal person in terms of international law — for acts or omissions which may be attributed to it.

The term “State” in the International Law Commission’s Articles on the Responsibility of States for Internationally Wrongful Acts (Annex to General Assembly resolution 56/83, 12 December 2001) possesses a clear and precise meaning. It is certainly not a State in an abstract or metaphysical sense, but a real State, a State in existence. Only a State in existence, bound by an international obligation, may commit an internationally wrongful act that entails international responsibility. The same holds true, *mutatis mutandi*, also for the term “State” or “party” used both in the Statute and in the Rules of Court. Jurisdiction of the Court, either *stricto* or *lato sensu*, cannot be established in relation to a non-existent State.

191. In the law of State responsibility, the only exception to that iron rule of logic is the mechanism of succession in respect of treaties of delictual responsibility. The Applicant refers to the rule provided in Article 10, paragraph 2, of the ILC’s Articles on State Responsibility, according to which “the conduct of a movement insurrectional or other which succeeds in establishing a new State shall be considered an act of the new State under international law” (Judgment, para. 125).

192. Two observations seem relevant in that regard:

First, the mechanism of succession in respect of delictual responsibility is not a part of *lex lata*;

Second, this particular assertion of the Applicant seems manifestly

absurd, in serious conflict with common sense and cogent legal considerations. The assertion that the FRY — which is, in fact, a part of the SFRY that remained after the successive secessions of the four former federal units, including Croatia, and whose legal position in terms of legal identity and continuity with the SFRY was the subject of vehement legal and political confrontations in the international community — came into being as a consequence of a successful insurrectional movement, hardly deserves another qualification. Besides, it turns out that the “successful insurrectional movement” grew into the youngest successor State in the territory of the former SFRY, following the four successive secessions of the former Yugoslav republics, ending the process of its dissolution.

It appears that such an assertion is rather a matter of litigation strategy. In the majority view, the determination of questions relating to the assertion of the Applicant regarding the insurrectional nature of the FRY would require it “to enter into an examination of factual issues concerning the events leading up to the dissolution of the SFRY and the establishment of the FRY” (Judgment, para. 127). It appears, however, that examination of the relevant factual issues *in concreto* is not a sufficient basis for the determination of this particular objection of the Respondent as one having no exclusively preliminary nature.

193. The issue of the dissolution of the SFRY is of a mixed nature, being a *questio juris et questio facti* at the same time, since it is based on the principles of international law which serve to define the conditions in which an entity constitutes a State or disappears as a State. As regards the *questio facti* aspect of the dissolution of the SFRY, the relevant facts have been clearly established by the Arbitration Commission and accepted by the international community as well as by the successor States of the SFRY.

According to Opinion No. 1 of the Arbitration Commission (*International Legal Materials*, Vol. 31 (November 1992), p. 1496), due to the fact that the republics, more precisely Slovenia, Croatia, Bosnia and Herzegovina and Macedonia “have expressed their desire for independence” the “composition and workings of the essential organs of the Federation . . . no longer meet the criteria of participation and representativeness inherent in a federal State” and, consequently, “the SFRY is in the process of dissolution”. The process was completed — as stated by the Commission in its Opinion No. 8 (*ibid.*, p. 1523), adopted with respect to the question posed on 18 May 1992 by Lord Carrington — with the constitution of the Federal Republic of Yugoslavia as a new State that on 27 April 1992 adopted a new Constitution (92 *International Law Reports (ILR)* 167). *Ergo*, these facts, being established and accepted, did not even call for a special examination, but were simply to be perceived or taken cognizance of.

Finally, even if these facts ought to have been the subject of examination, they were obviously not of such a nature as to be preclusive of the matter. As such they are issues that “may be by no means divorced from

the merits. A jurisdictional decision may often have to touch upon the latter or at least involve some consideration of them.” (*Appeal Relating to the Jurisdiction of the ICAO Council, Judgment, I.C.J. Reports 1972*, p. 56, para. 18 (c)). It might rather be said that they touch

“on a point of merits, but . . . only in a provisional way, to the extent necessary for deciding the question raised by the preliminary objection. Any finding on the point of merits therefore, ranks simply as part of the motivation of the decision on the preliminary objection, and not as the object of that decision.” (*South West Africa (Ethiopia v. South Africa; Liberia v. South Africa), Second Phase, Judgment, I.C.J. Reports 1966*, p. 37, para. 59.)

194. The extension of the scope of the jurisdiction of the Court *ratione temporis* to the events that occurred before 27 April 1992 radically modified the characterization of the case in terms of responsibility. Considering that in the period preceding 27 April 1992 the Respondent did not exist as a State, extension of the scope of the Court’s jurisdiction *ratione temporis* can mean two things:

- (i) that the responsibility claim was addressed to a dead, non-existent State; or
- (ii) that, assuming hypothetically that there exists the rule of positive international law regarding succession in respect of delictual responsibility, the responsibility claim of the Applicant as such, apart from the jurisdictional side of the matter, represents, in fact, a claim for joint and several responsibility of Serbia, Montenegro, as well as Bosnia and Herzegovina and Macedonia, either of both or of Macedonia alone, depending on the moment of occurrence of the events alleged by the Applicant in its Memorial, as successor States which the territorially reduced SFRY comprised in that period.

#### *4. Preliminary objection to the admissibility of claims relating to the submission of certain persons to trial, provision of information on missing Croatian citizens, and return of cultural property*

195. Given the unusual understanding of the jurisdiction of the Court *ratione personae et materiae* (paras. 18-20 above), this particular objection remains simply “preliminary objection” and is treated as such.

In fact, all three issues included in this particular objection are *par excellence* issues of the jurisdiction of the Court *ratione materiae* that should be assessed in terms of whether there is a dispute between the Parties that falls within the scope of Article IX of the Genocide Convention. Article IX states that:

“Disputes between the Contracting Parties relating to the interpretation, application or fulfilment of the present Convention, including

those relating to the responsibility of a State for genocide or for any of the other acts enumerated in Article III, shall be submitted to the International Court of Justice at the request of any of the parties to the dispute.”

196. As regards the submission of certain persons to trial, it seems obvious that it is essential that certain conditions be met in order that the dispute regarding the submission could be considered as a dispute falling within the ambit of Article IX of the Convention. Firstly, that the persons accused of genocide or any other acts enumerated in Article III of the Convention have precisely been identified in due procedure provided for by the law of the ICTY. Further, that it has been shown that persons charged by the ICTY Prosecutor with acts of genocide committed in Croatia are to be found in the territory of the Respondent or territory within its control. Finally, that the Applicant did not take effective steps to submit those persons to the ICTY as a “competent international penal tribunal” in terms of Article VI of the Convention. It seems that none of these preconditions have been fulfilled.

197. It is a matter of common knowledge that not a single citizen of the Respondent has been accused of genocide or other acts enumerated in Article III of the Convention, allegedly committed in the territory of Croatia. (As to the part of the submission relating to the former President, Mr. S. Milošević, it is not only moot but, as presently designed, it implies the existence of a sort of *actio popularis*, which is obviously totally erroneous (see *South West Africa (Ethiopia v. South Africa; Liberia v. South Africa)*, *Second Phase, Judgment, I.C.J. Reports 1966*, p. 47, para. 88).)

It is in that sense that the Applicant has invoked the Genocide Convention, since it refers to “trial before the appropriate judicial authority” (submission 2 (a) in the Memorial) and not to the “international penal tribunal” in terms of Article VI of the Convention.

Therefore, it is only in the case of accumulation of certain elements of the dispute as regards the “submission of certain persons to trial” in the terms of the Genocide Convention that it would fall within the jurisdiction of the Court *ratione materiae*.

The Applicant probably has in mind the submission of certain persons indicted for genocide by its organs, which are not verified by the Chief Prosecution and the ICTY itself, for trial before its national criminal courts. If so, the Applicant’s submission is rather a matter of application of treaty rules in force between Croatia and Serbia on legal assistance in criminal matters.

198. It is however true, that in the oral proceedings counsel for Croatia referred, *inter alia*, also to the ICTY, by saying: “persons found in Serbia suspected of committing genocide in Croatia can still be submitted to trial before the ICTY — which is a tribunal —, and *Serbia would, on that hypothesis still have obligations to fulfil*” (CR 2008/13, p. 35 (Crawford));

emphasis added). The Applicant, in fact, presumed that a number of perpetrators so charged are in Serbia (CR 2008/10, p. 15 (Šimonović)).

By reference to the ICTY the matter is *prima facie* brought into *nexus* with the Genocide Convention. That *nexus* is, however, of hypothetical nature and, as such, it is beyond the jurisdiction of the Court. On this particular point, in fact, there does not exist an actual, real, dispute as a primary condition for the Court to exercise its judicial function, but a hypothetical dispute.

For the dispute between the Parties is one thing, and the dispute before the Court is quite another. What, in effect, does the Applicant contend? On the one hand, that the persons charged with genocide by the Croatian authorities are *presumably* staying in Serbia and, on the other, that these persons, who *may* be staying in Serbia, *might* be accused in a proper procedure before the ICTY, as a competent international penal tribunal, which *might* then activate the obligation of Serbia to co-operate with the ICTY. The Respondent denies that contention, putting forward arguments which appear relevant to it.

199. Consequently, it is indisputable that there are clearly opposite views, a disagreement about the submission of Croatia. But, such a disagreement is not sufficient to constitute the dispute before the Court to fall within the competence of the Court *in casu*.

It is of an abstract, hypothetical nature in view of the fact that the submission of the Applicant is subjected to a triple qualification:

- (a) that the persons charged with genocide by the Croatian authorities are staying in the territory of Serbia;
- (b) that the ICTY bring in an indictment against them; and
- (c) that Serbia, explicitly or tacitly, refuse to co-operate with the ICTY.

200. Thus, it appears that, in actual fact, there does not exist a dispute between the Parties in terms of the well-known definition given in the case concerning *Mavrommatis Palestine Concessions*. According to that definition the dispute is a “disagreement on a point of law or fact, a conflict of legal views or interests between two persons” (*Judgment No. 2, 1924, P.C.I.J., Series A, No. 2, p. 11*).

The Parties are, in essence, not disputing a point of law, because the Respondent does not deny the obligation to co-operate with the ICTY in terms of Article VI of the Convention. For its part, the Applicant does not deny that the ICTY has not accused any of the Respondent’s citizens of the crime of genocide allegedly committed in the territory of Croatia.

Accordingly, what remains as a possible subject of dispute before the Court is a disagreement on a point of fact. However, *in concreto*, the “fact” in terms of a thing that exists or occurred simply is not present.

What the Court is really faced with is not a “fact”, but a presumed fact or a hypothetical fact. Dealing with presumed facts or hypothetical facts however is outside the purview of the judicial function of the Court because of cogent legal considerations. For, as the Court stated in the case concerning *Northern Cameroons*:

“The function of the Court is to state the law, but it may pronounce judgment only in connection with concrete cases where there exists at the time of the adjudication *an actual controversy* involving a conflict of legal interests between the parties. *The Court’s judgment must have some practical consequence* in the sense that it can affect existing legal rights and obligations of the parties, thus removing uncertainty from their legal relations.” (*Northern Cameroons (Cameroon v. United Kingdom), Preliminary Objections, Judgment, I.C.J. Reports 1963*, pp. 33-34.)

It would be incompatible with the judicial function of the Court to render judgments which would be dependent on the existence of facts or situations to which a party refers.

201. The majority’s conclusion as regards the duty of prosecution and punishment that “[t]hese issues are clearly matters of interpretation or application of the Genocide Convention” (Judgment, para. 136) seems correct but abstract, since it is not followed by a proper *conclusio*. The Genocide Convention does not contain the principle of universal repression. States are “obliged to punish persons charged with the commission of acts coming under the Convention insofar as they were committed in their territory” (N. Robinson, *The Genocide Convention, its Origins and Interpretation*, 1949, p. 31).

In its Judgment in the *Bosnia* case, the Court stated clearly:

“Even if Serbian domestic law granted jurisdiction to its criminal courts to try those accused, and even supposing such proceedings were compatible with Serbia’s other international obligations, *inter alia* its obligation to co-operate with the ICTY, to which the Court will revert below, an obligation to try the perpetrators of the Srebrenica massacre in Serbia’s domestic courts cannot be deduced from Article VI. Article VI only obliges the Contracting Parties to institute and exercise territorial criminal jurisdiction; while it certainly does not prohibit States, with respect to genocide, from conferring jurisdiction on their criminal courts based on criteria other than where the crime was committed which are compatible with international law, in particular the nationality of the accused, it does not oblige them to do so.” (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment, I.C.J. Reports 2007 (I)*, pp. 226-227, para. 442.)

The idea underlying the *conclusio* of the majority seems to be the under-

standing that, if a person charged in State A with acts of genocide committed in its territory is found in the territory of State B, a party to the Genocide Convention, that State would be under an obligation to cooperate in the arrest and extradition of such a person. Such an understanding seems erroneous for two principal reasons:

First, the duty to co-operate in the Convention is limited to co-operation with international penal tribunals (Art. VI of the Convention);

Second, it runs counter to the general principle of international criminal law in that regard — *aut dedere, aut punire*. The duty to extradite might be established on the basis of a treaty, bilateral or multilateral, on legal assistance in criminal matters only!

202. It is completely unclear how the dispute on the information on missing persons falls within the jurisdiction of the Court *ratione materiae* under the Genocide Convention. Co-operation of that kind between the Contracting Parties is not envisaged by the Convention. In the concrete case, the object are the bilateral treaty instruments, so this is rather a dispute about its fulfilment.

203. The majority reasoning as regards the return of items of cultural property (submission 2 (c)) is, it seems, not in harmony with its *conclusio*. If the majority sees “no reason to depart from its earlier finding on the general question of interpretation of the Convention in this respect” (Judgment, para. 141), it is not clear how it came to the *conclusio* that the objection raised by Serbia is not of an exclusively preliminary nature.

In the *Bosnia* case, the Court found, *inter alia*, that the deliberate destruction of the historical, cultural and religious heritage “does not fall within the categories of acts of genocide set out in Article II of the Convention” (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, *I.C.J. Reports 2007 (I)*, pp. 185-186, para. 344. It is *a fortiori* valid for acts of seizure of those items of cultural property. If so, the dispute regarding the return of items of cultural property cannot be considered as falling within the jurisdiction *ratione materiae* of the Court on the basis of Article IX of the Convention, which perceives genocide in terms of physical or biological destruction of the relevant group as such.

204. The majority’s consideration that the claim of Croatia includes “disputed matters of fact” (Judgment, para. 143), appears to be irrelevant in the light of the fact that as a matter of law the so-called cultural genocide does not fall within the scope of the Genocide Convention.

Both objections of the Respondent are determined by the majority as objections having no exclusively preliminary character on the basis of the consideration that it includes disputed matters of fact inappropriate to be examined in the present phase of the proceedings.

In that regard, a different treatment of the disputed matters of fact in

closely related cases seems evident. I have in mind the treatment of the disputed facts in the Order of 8 April 1993 (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia), Provisional Measures, I.C.J. Reports 1993*, p. 25), followed by the Order of 13 September 1993 (*ibid.*, pp. 349-350) as well as the Orders of 2 June 1999 in the ten *Legality of Use of Force* cases ((*Yugoslavia v. Belgium*), *Provisional Measures, I.C.J. Reports 1999 (I)*, p. 138, para. 39) regarding facts that possess a sufficiently clear manifestation of genocidal intent, a matter much more demanding than the matter involved in this particular issue.

(Signed) Milenko KREĆA.

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