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Summary
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Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)

Preliminary objections

Summary of the Judgment of 18 November 2008

Chronology of the procedure and submissions of the Parties (paras. 1-22)

The Court recalls that, on 2 July 1999, 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"). The Application invoked Article IX of the Genocide Convention as the basis of the jurisdiction of the Court.

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. 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. 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.

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.

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.

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.

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.

Public sittings were held from 26 May to 30 May 2008. At the conclusion of the oral proceedings, the Parties presented the following final submissions to the Court:

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."

Identification of the respondent Party (paras. 23-34)

The Court first observes that it needs to identify the respondent Party before it. It notes that, 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 a referendum held on 21 May 2006, the National Assembly of the Republic of Montenegro adopted a declaration of independence, and that

> "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".

The Court recalls that, 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. It notes that, by a letter dated 22 July 2006, the Agent of Serbia explained that, in his Government's opinion, "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". By a letter dated 29 November 2006, the Chief State Prosecutor of Montenegro stated that "Montenegro [might] not have [the] capacity of respondent" in the dispute before the Court. The Court further notes that, by a letter dated 15 May 2008, the Agent of Croatia confirmed that the proceedings instituted by Croatia on 2 July 1999 were "maintained against [the] Republic of Serbia as Respondent" and that this conclusion was "without prejudice to the potential responsibility of [the] Republic of Montenegro and the possibility of instituting separate proceedings against it".

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. It further notes that Serbia has accepted "continuity between Serbia and Montenegro and the Republic of Serbia". 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.

The Court recalls the fundamental principle that no State may be subject to its jurisdiction without its consent. It states that Montenegro made clear in its letter of 29 November 2006 that it does not give its consent to the jurisdiction of the Court over it for the purposes of the dispute. Furthermore, according to the Court, the events referred to above 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 case. The Court finally notes that the Applicant did not in its letter of 15 May 2008 assert that Montenegro is still a party to the case.

The Court thus concludes that Serbia is the sole Respondent in the case.

General overview of the arguments of the Parties (paras. 35-42)

The Court observes that, in its Application, 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 Government 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.

The Court notes that, with regard to the question of the capacity of the Respondent under Article 35 of the Statute to participate in the 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 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.

The Court notes that 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 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.

The Court observes that 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. Serbia 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. 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.

The Court finally notes that Serbia maintained that Croatia's submissions 2 (a), 2 (b) and 2 (c) in its Memorial concerning, respectively, the submission to trial of persons suspected of having committed acts of genocide (including Slobodan Milošević), missing persons and return of cultural property, were "inadmissible and moot.

The Court examines each of these arguments in turn.

Brief history of the status of the FRY with regard to the United Nations (paras. 43-51)

The Court gives a brief account of the disintegration process of the SFRY in the early 1990s and of the decisions of the United Nations with respect to the legal status of the FRY. It recalls inter alia that on 22 September 1992, the General Assembly, acting on the recommendation of the Security Council, adopted resolution 47/1, 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. It notes that the "sui generis position which the FRY found itself in" during the period between 1992 to 2000 (as the Court characterized it in a 2003 Judgment) came to an end with a letter dated 27 October 2000 sent by Mr. Koštunica to the United Nations Secretary-General, by which the newly elected President of the FRY requested admission of the FRY to membership in the United Nations. This membership was effective as of 1 November 2000.

Relevance of previous decisions of the Court (paras. 52-56)

The Court observes that 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, has been in issue in a number of previous decisions. 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 having cited these various decisions in support of their respective contentions, the Court finds it convenient at the outset to indicate to what extent it considers that these decisions may have weight for the purpose of deciding the matters before it.

The Court states that, while some of the facts and the legal issues dealt with in the other cases arise also in the current one, none of those decisions were given in proceedings between the two Parties to the 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 indicates that it 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.

Preliminary objection to the jurisdiction of the Court (paras. 57-119)

— Issues of capacity to be a party to the proceedings (paras. 57-92)

The Court first examines whether the Parties satisfy the general conditions, under Articles 34 and 35 of the Statute, for capacity to participate in proceedings before the Court.

It notes that it is neither disputed nor disputable 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. It further notes that 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. The question is whether Serbia satisfies, for the purposes of the 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 proceedings before the Court.

After describing the Parties' positions in this respect, the Court stresses again that no previous decision having of itself any authority as res judicata in the case, the question of the Respondent's capacity must be examined de novo, in the context of the dispute before the Court.

The Court deems it appropriate 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. It then considers 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 case, at a subsequent date, more precisely at a date after 1 November 2000.

The Court recalls that in numerous cases, it 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". It notes however that, like its predecessor the Permanent Court of International Justice (PCIJ), it 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. It recalls that, in its Judgment of 30 August 1924 on the objection to jurisdiction raised by the Respondent in the Mavrommatis Palestine Concessions case, the PCIJ:

> "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.)

The Court goes on to recall that, in its own jurisprudence, 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 notes that it 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." (Ibid., p. 614, para. 26.)

The Court notes that Croatia relies on this jurisprudence, which it contends can be directly transposed to the case, while Serbia disputes these arguments, contending that the jurisprudence in question is not applicable to the 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. 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.

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, 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.

With respect to the second argument, the Court admits that 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 states that it 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. The Court recalls that it always possesses the compétence de la compétence (see Article 36, paragraph 6, of the Statute).

The Court adds that, more importantly, it 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. It notes that 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 the case. 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 finds 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.

The Court observes that it is true that it 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. 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 notes inter alia that it was clear that Serbia and Montenegro did not have the intention of pursuing its claims by way of new applications. According to the Court, 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 in said cases. In the Court's view, 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. It goes on to say that while Croatia is asking the Court to apply the jurisprudence of the Mavrommatis case to the current case, no such request was made, or could logically have been made, by the Applicant in 2004.

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 case were instituted, and remained bound by that Article until at least 1 November 2000, the Court will be in a position to uphold its jurisdiction.

In view of this finding, the question whether the conditions laid down in Article 35, paragraph 2, have been fulfilled has no pertinence in the case.

— Issues of jurisdiction ratione materiae (paras. 93-117)

The Court then considers 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. It notes that Serbia categorizes this as an element of jurisdiction ratione personae.

The Court recalls that the basis of jurisdiction asserted by Croatia is Article IX of the Genocide Convention and that 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.

It notes that 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".

The Court starts by recalling 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. It adds that 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 Convention until at least 1 November 2000, the date on which the FRY became a party to the Statute of the Court, then, the Court continues to have jurisdiction.

The Court considers the history of the relationship to the Convention of, first, the SFRY, and, subsequently, of the Respondent. It examines in particular 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. It notes that the FRY 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.

The Court examines what was the nature and effect of the 1992 declaration and Note on the position of the FRY in relation to the Genocide Convention. It first finds that 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. The Court then considers 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. It 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. In the Court's view, there is no doubt that the Genocide Convention was one of these "commitments". The Court goes on to say that 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. Arts. 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. 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.

The Court then considers 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 the case, to a succession to the status of the SFRY. It finds 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 further finds that the conduct of Serbia after the transmission of the declaration made it clear that it regarded itself bound by the Genocide Convention. It notes inter alia that, during the period between the making of the 1992 declaration and the filing of Croatia's Application, 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, but 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. The Court notes that 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, containing a reservation to Article IX.

In sum, 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, subject of course to any reservations lawfully made by the SFRY limiting its obligations. It notes that 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 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 further examined, it had, on the date on which the 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.

Having established that the conditions for its 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.

Preliminary objection to the jurisdiction of the Court and to admissibility, ratione temporis (paras. 120-130)

The Court then 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)", "are beyond the jurisdiction of this Court and inadmissible".

The Court notes that the preliminary objection is presented as, at one and the same time, an objection to jurisdiction and one going to the admissibility of the claims. It recalls that the title of jurisdiction relied on by Croatia is Article IX of the Genocide Convention, and that it has already established 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.

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 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 needs to have more elements before it.

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

Preliminary objection concerning the submission of certain persons to trial; the provision of information on missing Croatian citizens; and the return of cultural property (paras. 131-144)

The Court finally considers Serbia's third objection, according to which "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".

— Submission of persons to trial

The Court recalls that in submission 2 (a) of its Memorial, Croatia requested 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".

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 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 International Criminal Tribunal for the former Yugoslavia (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 the current proceedings. Serbia, for its part, 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.

Having reviewed the arguments of both Parties, the Court explains that it 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.

— Provision of information on missing Croatian citizens

The Court recalls that the Applicant asked the Court by submission 2 (b) 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 cooperate with the authorities of the Republic of Croatia to jointly ascertain the whereabouts of the said missing persons or their remains".

It notes that according to Serbia, the relevant acts committed in Croatia do not amount to genocide, so that the obligations under the Genocide Convention do not apply. Serbia 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.

The Court finds that the question what remedies it might appropriately order in the exercise of its jurisdiction under Article IX of the Convention is one which is necessarily dependent upon the findings that it 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 and the Court concludes that the preliminary objection submitted by Serbia, so far as it relates to Croatian submission 2 (b), must be rejected.

— Return of cultural property

By submission 2 (c) advanced by Croatia, which is also challenged by Serbia, the Applicant asked 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".

Here again, having reviewed the arguments of the Parties, the Court finds that the question what remedies it might appropriately order is one which is necessarily dependent upon the findings that it 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. The Court thus concludes that the preliminary objection submitted by Serbia, so far as it relates to Croatian submission 2 (c), must be rejected.

— Conclusion

The Court thus finds that Serbia's third preliminary objection must be rejected in its entirety.

Subsequent procedure (para. 145)

Having established its jurisdiction, the Court observes that it 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.

Operative clause (para. 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 Buergenthal, 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 Buergenthal, 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 Buergenthal, 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, Buergenthal, 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 Kreća."

*

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 Kreća appends a dissenting opinion to the Judgment of the Court.

Separate opinion of Vice-President Al-Khasawneh

The Vice-President appended a separate opinion in which he agreed that the Court has jurisdiction to decide the case on the merits, but disagreed with two of the premises on which the Judgment of the Court is based, namely (i) that the Federal Republic of Yugoslavia (FRY) had no access to the Court between its inception and its admission as a new Member of the United Nations and (ii) that this defect is curable by an innovative interpretation of the Mavrommatis principle.

The Vice-President noted that the first of those premises is based on the 2004 Judgments in the Legality of Use of Force cases (2004 Judgment), in which the Court inferred, from the 2000 admission of the FRY to the United Nations, a retroactive clarification of the status of the FRY revealing that it had not been a United Nations Member in the period 1992-2000. The Vice-President, recalling his disagreement with the reasoning in the 2004 Judgment, stated that the 2007 Genocide Judgment did not resolve the contradictions in the 2004 Judgment but obscured them by invoking the doctrine of res judicata. The Vice-President expressed his regret that in the present case the Court has chosen to revive the 2004 Judgment rather than putting it to rest, noting the moral and logical implications of the eight-year collective disappearing act of the FRY.

The second premise with which the Vice-President disagreed was the interpretation by the majority of the Mavrommatis principle, which is the rule whereby the Court will not insist on a new application if at the time of the institution of proceedings a procedural defect exists which is curable by a subsequent action of the applicant. The Vice-President recalled the sequence of pertinent developments in this case, notably the admission of the FRY to the United Nations in November 2000; the depositing by the FRY of an instrument of accession to the Genocide Convention dated 6 March 2001 containing a reservation to Article IX of that Convention; and the objection to that reservation by Croatia on the grounds that the FRY was "already bound by the Convention since its emergence as one of the five equal successor States of the SFRY". In the Vice-President's view, this reservation, unless invalid, is an obstacle to invoking the Mavrommatis principle, and the invalidation of this reservation would be a prerequisite for upholding the Court's jurisdiction ratione materiae on the basis of the Mavrommatis principle. Since the Judgment avoided reaching a conclusion whereby the reservation is invalid, he thought that the reasoning based on Mavrommatis would lead nowhere.

The Vice-President concluded by recalling that in his opinion the FRY was a continuator of the SFRY until 2000 when it became a successor State and was bound by the Genocide Convention by virtue of the ratification of that Convention by the SFRY. For those reasons, the Vice-President would uphold the jurisdiction of the Court.

Joint declaration of Judges Ranjeva, Shi, Koroma and Parra-Aranguren

In their joint declaration, Judges Ranjeva, Shi, Koroma and Parra-Aranguren conclude that the present Judgment lacks validity and consistency, and is even contra legem.

The authors of the joint declaration observe that one crucial question which the Court had to determine in this phase of the proceedings is whether the Respondent, Serbia, had access to the Court at the time of the filing of the Application on 2 July 1999, a question which they note is both pre-preliminary to the issue of jurisdiction and also fundamental. They emphasize that under the Court's Statute, a State must have access to the Court in order to participate in a contentious case.

The judges note that in the Legality of Use of Force cases, the Court concluded that when Serbia and Montenegro filed its Application on 29 April 1999, it was not a Member of the United

Nations and thus lacked access to the Court under Article 35, paragraph 1, of the Statute. Consequently, they reason that Serbia and Montenegro must also have lacked access to the Court when Croatia filed its Application in the present case on 2 July 1999. They point out that the Court's other judgments dealing with parallel proceedings support and do not contradict this view. These findings notwithstanding, the authors of the joint declaration note that the Court has held in the present Judgment that it is entitled to exercise jurisdiction in the present case through reliance on the Mavrommatis Palestine Concessions case, where the Permanent Court of International Justice held that "[e]ven 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" (Judgment No. 2, 1924, P.C.I.J. Series A, No. 2, p. 34), because "[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" (ibid.).

The authors of the joint declaration are critical of the Court's misapplication of the Mavrommatis dicta for the following reasons. First, they argue that the present case does not fall under the Mavrommatis dictum because the Mavrommatis case did not concern access to the Court. Second, that the issue in the present case is not "procedural", as it was in Mavrommatis (concerning what a party has filed or could file), 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). In their view, a party can correct a procedural error, but cannot simply change a fundamental characteristic of the opposing party's legal status. Third, they explain that Mavrommatis and all of its progeny dealt with very short-lived defects, unlike the situation in the present case. Fourth, they note that the Mavrommatis 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.

Accordingly, they argue that reliance on the Mavrommatis case is inappropriate and that the Court must determine for itself whether the parties had access to it at the relevant time, proceeding from the fundamental premise that such a determination is to be made at the time of Croatia's Application. The authors of the joint declaration note that although the Court first accepts that jurisdiction must be assessed as of the date of the filing of the act instituting proceedings, it later contradicts itself, proposing that jurisdictional requirements may be fulfilled by the time the Court considers its jurisdiction or at the time of the Applicant's submission of its Memorial. The authors of the joint declaration emphasize that the Court's jurisprudence does not support either of these alternative approaches.

The judges joining the declaration also express concern that the approach of the Court ignores the equality between the Applicant and the Respondent in terms of their access to the Court, which they point out is one of the fundamental principles of international justice.

They also note that the Court's position contradicts even the factual situation as presented by the Applicant itself, which in a letter dated 27 May 1999 stated that Serbia and Montenegro lacked access to the Court. In light of the foregoing, they conclude that for the Court now to decide that it has jurisdiction in this case is not only contra legem but also contrary to the factual situation presented by the Applicant.

The authors of the joint declaration are also critical of the Court's reasoning with regard to the consistency of its judgments. They note that on at least three occasions, the Court reiterates in respect of decisions taken in previous proceedings (not involving exactly the same parties) that, while such decisions are not res judicata under Article 59 of the Statute of the Court, the Court "will not depart from its settled jurisprudence unless it finds very particular reasons to do so" (para. 53; see also paras. 54 and 76). The Court then justifies its current position, which is contrary to that taken in the 2004 proceedings, by reasoning that the Applicant in 2004 did not raise the issue while the Applicant in this case did. The authors of the joint declaration find this unconvincing, emphasizing that access is not a condition which may be satisfied merely upon

request by the Applicant, but rather is a fundamental characteristic that arises out of a party's status, and that 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.

Judges Ranjeva, Shi, Koroma and Parra-Aranguren conclude, therefore, that since the Respondent in the present 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 to which it is not entitled.

Dissenting opinion of Judge Ranjeva

The judicial nature of the jurisdictional function of the International Court of Justice explains Judge Ranjeva's difficulty in accepting the continuity of solution in the present case, when the majority of the Court has relied on solution of jurisprudential continuity. The present Judgment calls into question the ironclad rule of jurisdiction — the basis of jurisdiction is consensual — when it relies on the "Mavrommatis jurisprudence".

From the historical perspective, the Mavrommatis decision was based on one of the cardinal principles of the Versailles Peace Treaty: in respect of jurisdiction ratione personae, it was difficult to grant the defeated States (Germany and the Central Powers) rights equal to those of the victor States: the Permanent Court of International Justice might thus have had characteristics of a court of quasi-statutory jurisdiction. If the Court had deliberately based its solution on the prospect of a crisis under Chapter VII, it would not have been unreasonable to uphold the Court's jurisdiction ratione personae.

There is no direct basis for the difference in treatment between an applicant and a respondent, because it ultimately jeopardizes equality of access as between them. In a system of statutorily conferred jurisdiction, which is not that of the International Court of Justice, all potential litigants must be given the assurance that there is a court to which they can turn to resolve their disputes, and that they can do so without having to rely on consent. By contrast, in a judicial order founded on consensual jurisdiction, there is no need for a counterpart to Article 35 in respect of the respondent. Once the requirements applicable to the applicant have been met, it is for the participants to establish, by judicial means, the respondent's consent to jurisdiction.

In the present case, the main difficulty concerned the shift from the continuity of the international personality of the SFRY and Serbia to State succession as found by the Court. In contradistinction to the theoretical approach to succession adopted in the Judgment, the problem was confined to considering the question of succession to Article IX of the Convention on the Prevention and Punishment of the Crime of Genocide in the relationship between Croatia and Serbia. The 16 February 1994 letter from Croatia's Permanent Representative to the United Nations, which has received no attention in the Judgment, was an objection to the FRY's claim in its declaration of 27 April 1992 to continuity of personality, and careful consideration should have been given to its significance in regard to Article IX.

It can be seen from an analysis of Croatia's objection that there are various aspects to this document: a rejection of continuity of the personality of the SFRY, acceptance of continuity of treaty obligations and the serving of notice on the FRY to respond to Croatia's offers. In other words, Croatia considers its letter to be effective in the terms it defined, while the rejection of continuity of international personality calls into question the entire organic, institutional dimension in regard to the United Nations. This is the framework governing the fate of Article IX, a clause which is severable from the system of obligations under the Convention on the Prevention and Punishment of the Crime of Genocide. The distinction drawn by Croatia between continuity of treaty obligations and discontinuity of international personality as between the SFRY and Serbia is not questionable pro ratione temporis. Thus, there was reason to ascertain whether there was

consent to jurisdiction, which did not need to be argued in Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro) and which could be deduced from a simple, logical judicial finding.

Finally, it was not appropriate to apply the Mavrommatis jurisprudence. The present case was initiated by unilateral application, not special agreement; further, in the cited jurisprudence the applicant had sole control over the action needed to cure the defect. Also, the conditions laid down by the Mavrommatis Judgment are not satisfied. This however is a preliminary legal issue.

At all events, had there been a decision finding against jurisdiction, which Judge Ranjeva would have greeted with a sense of relief, given the nature of the International Court of Justice, that would not have exempted Serbia from the obligation to answer under international law for violations of the Convention on the Prevention and Punishment of the Crime of Genocide.

Dissenting opinion of Judge Owada

In his dissenting opinion, Judge Owada concludes 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 proceedings at the time when the Applicant filed an Application to institute proceedings against it.

Judge Owada first explains the legal significance for the present case of the 2004 Judgments in the cases concerning Legality of Use of Force and the 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 particular, he emphasizes that the 2007 case was bound by a prior express finding on jurisdiction, i.e., the 1996 Judgment in that case, whereas the 2004 Judgments were not. He emphasizes that in the present case, like the 2004 cases, it is clear that no such express finding constituting res judicata exists.

Judge Owada next examines the so-called "Mavrommatis principle" applied by the present Judgment, characterized by the Applicant to mean 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. Judge Owada proceeds to examine the eight cases in which the principle has been referred to, either eo nomine or by implication. He concludes that:

(a) In spite of the generalized formula often quoted from the Judgment in the Mavrommatis Palestine Concessions 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 principle in its generalized formulation in which the Judgment is claimed to extend 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, but in all the cases, 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.

Judge Owada concludes from his review of the Mavrommatis jurisprudence that flexibility with regard to jurisdictional consent has never been extended to the issue of access to the Court which lies beyond the consent of the parties, and it should not be so extended in the present Judgment.

Finally, Judge Owada addresses 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 in the context of the present case. He concludes that it should not, noting that a contrary conclusion would result in unequal treatment of the applicant and the respondent before the Court.

Separate opinion of Judge Tomka

1. Judge Tomka has voted for all but one of the findings of the Court. He felt obliged to vote against paragraph 146 (4) of the Judgment, where the Court found 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".

2. Judge Tomka first examines the arguments of the Parties on this question. Serbia contends that as the acts occurred before the Federal Republic of Yugoslavia (FRY), the State whose international legal personality it now continues, came into existence as a State, and thus could have become a Contracting Party to the Genocide Convention, are beyond the jurisdiction of the Court and inadmissible. Croatia relies on the Court's 1996 Judgment in the Bosnia and Herzegovina v. Yugoslavia case, where the Court found that it had jurisdiction over all "relevant facts which have occurred since the beginning of the conflict which took place in Bosnia and Herzegovina". That conflict started in spring 1992, whilst the one in Croatia had already begun in summer 1991.

3. Judge Tomka continues by commenting on certain issues dealt with in the 1996 Judgment and their relevance to the present case. He concurs with the Court's view on the circumstances which distinguish the present case from its 1996 Judgment. He agrees with the Court that in the present case consequences are to be drawn from the fact that the FRY only became a State and a party to the Genocide Convention on 27 April 1992. He then adds that no party raised the issue of the FRY being a party to the Genocide Convention in 1996; nor did the Court take any position with respect to the exact date on which it became a party. Judge Tomka notes that in 1996, the Court limited itself to the conclusion that the FRY was bound by the Convention on 20 March 1993, the date the Application was filed. He notes that the Court recalled the FRY's statement on 27 April 1992 where it claimed to continue the international legal personality of the SFRY and pledged to "strictly abide by all the commitments" of that State, and its conclusion that the FRY's intention was to remain bound by the SFRY's international obligations.

4. According to Judge Tomka, the Court's conclusion, 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" (Judgment, para. 124), is question-begging. He considers that the Court only summarily addresses the issue of the attribution of acts that occurred prior to 27 April 1992 in its Judgment and that, in so doing, the Court also postpones its decision on the objection to its jurisdiction perceived by it as being of a ratione temporis character.

5. Judge Tomka continues by recalling Croatia's argument, that the FRY was a successor and not the continuing State of the SFRY, and that Serbia is therefore a "party by succession to the Genocide Convention from the beginning of its existence as a State". He notes that the Court concurred with Croatia's submission on this point (Judgment, para. 117), and determined accordingly that on 27 April 1992, the FRY became a party to the Genocide Convention.

6. Judge Tomka emphasizes that there is no doubt that the Genocide Convention was binding on the SFRY from 12 January 1951, when it entered into force, and that it was continuously applicable in respect of its entire territory. He stresses that there was not a single day during the conflict, which started in 1991 and ended in 1995, when the Convention would not have been applicable in that territory. He explains that this is so because so long as the SFRY continued to exist, it remained party to the Convention and, as its constituent republics gradually seceded, they became parties on the basis of succession with effect from the date when they assumed responsibility for their international relations. There was consequently no hiatus or gap in the protection afforded by the Convention during the armed conflict, although it was to be applied by different States at different periods during the process of the SFRY's dissolution.

7. Judge Tomka considers that the issue before the Court is not the retroactive application of the Convention, but rather, the interpretation of the compromissory clause contained in Article IX of the Convention and the determination of the Court's jurisdiction thereby conferred. On this point, he begins by recalling the arguments of Croatia, which relied upon Article IX of the Convention. Judge Tomka considers that 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, not by the predecessor State of a Contracting Party to it, nor about its application by an entity which was not the State party to the Convention and only subsequently came into being as a State and became a party to it.

8. Judge Tomka recalls Article 4 of the International Law Commission's Articles on the Responsibility of States for Internationally Wrongful Acts, which provides that the conduct of an organ of a territorial unit of the State is considered as an act of that State and thus engages the international responsibility thereof. He explains that when that State ceases to exist, the issue of succession to responsibility may arise; similarly, when a territorial unit of a predecessor State secedes and becomes an independent 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 may arise. However, he considers that with regard to these two issues, neither of them falls within the jurisdiction of the Court under Article IX of the Genocide Convention.

9. Judge Tomka concludes 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 at this stage in the proceedings and for the answering of which there is no need of any further information. He emphasizes that the considerable length of the proceedings and the Court's repeated handling of issues relating to the legal status of the FRY and

its participation in the Genocide Convention entail that all necessary information has been put before it.

10. As a further concluding point, Judge Tomka highlights that his observations are based on the fact that the FRY (now Serbia) is a successor State and not the continuing State of the SFRY. According to him, this conclusion on the scope of the Court's jurisdiction 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 it prevent the responsibility of the State to which the acts of the perpetrators of such atrocities may be attributed. As there is a fundamental distinction between the acceptance by States of the Court's jurisdiction and the conformity of their acts with international law, he emphasizes that 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. As a final observation, he adds that whilst a number of persons were indicted by the Prosecutor of the International Criminal Tribunal for the former Yugoslavia for atrocities committed in Croatia, none of them have been charged with the crime of genocide, and in the light of this, wonders how Croatia will establish before the Court, whose procedure is not a criminal one, that the crime of genocide has been perpetrated. However, he considers that this issue is for the merits.

Separate opinion of Judge Abraham

Judge Abraham expresses his agreement with the operative part of the Judgment and with the reasoning by which the Court has rejected Serbia's objection of lack of jurisdiction based on the fact that Serbia was not a party to the Genocide Convention, including Article IX thereof, on the date when the Application was filed.

However, Judge Abraham dissociates himself from the reasoning by which the Judgment rejects the Respondent's argument that it did not possess, on the date when the Application was filed, the capacity to have "access to the Court" pursuant to Article 35 of the Statute.

He takes the view that the lengthy passages devoted to this question in the Judgment, with a view to showing that the Respondent meets the condition of having "access to the Court" for the purposes of this case because of its admission to the United Nations on 1 November 2000, were in fact unnecessary, since the requirements of Article 35 of the Statute do not apply to the respondent in a case, but only to the party that is instituting the proceedings.

This interpretation is based on the text of Article 35, analysis of the travaux préparatoires, the previous practice of the Court and, above all, on reasoning derived from the logic and purpose of the text. In particular, to interpret Article 35, as the Judgment appears to do, as applying uniformly to the Applicant and the Respondent, results in the creation of inequality between two States that are both parties to a Convention which includes a compromissory clause, when one of them is a party to the Statute of the Court and the other is not, to the benefit of the latter: the second State could use the compromissory clause at any time by bringing proceedings before the Court and depositing for that purpose the declaration provided for by resolution 9 (1946) of the Security Council, whereas the first State could not implement the same clause of its own volition, since its opponent could simply refuse to deposit the declaration in order to place itself outside the jurisdiction of the Court.

In addition, Judge Abraham expresses his disagreement with the way in which the Court has applied the Mavrommatis case law here. While he acknowledges that it is possible in principle to take the view that lack of access to the Court on the date when proceedings are instituted — by a party to which that condition applies — can be remedied during the proceedings where the necessary requirement is met before the Court rules on its jurisdiction, this is with the proviso that

at that latter date it should be established that the applicant could, if it so wished, file a new application identical with the previous one in terms of substance which could not meet with any objection regarding the jurisdiction of the Court. What lies behind the Mavrommatis case law is a desire for procedural economy. In this instance, that should have led the Court to adjudicate on the effects of the reservation made by Serbia in 2001 to Article IX of the Genocide Convention and to find it invalid, which the Court has declined to do. By arguing as it has done, and by contenting itself with the fact that the condition of "access" was met on 1 November 2000, on which date Serbia was certainly still bound by Article IX of the Genocide Convention, the Court does more than make a reasonable exception to the principle that its jurisdiction must be determined as of the date when the application is filed; it abrogates that principle outright, whilst claiming to uphold it.

Declaration of Judge Bennouna

Judge Bennouna voted in favour of the Court's jurisdiction to entertain Croatia's Application on the merits, in so far as the Federal Republic of Yugoslavia (FRY) has been bound by the Genocide Convention since 1992 and became a Member of the United Nations and a party to the Statute of the Court (as Serbia and Montenegro) on 1 November 2000, even though that occurred after Croatia had instituted the proceedings on 2 July 1999.

The Court, relying on its jurisprudence to arrive at this conclusion, should have pursued its argument further and examined Serbia's accession to the Genocide Convention of 6 March 2001, with a reservation to Article IX, which attributes jurisdiction to the Court. By doing so, the Court would have found that Serbia could not accede to a treaty to which it had already been a party since 1992 and that, as a result, no account should be taken of that accession, nor above all of the reservation that accompanied it. In Judge Bennouna's view, the Court would thus have strengthened the reasoning of the Judgment, which as it is remains incomplete and therefore unsatisfactory.

Dissenting opinion of Judge Skotnikov

In the view of Judge Skotnikov, the Court should have upheld the first preliminary objection submitted by Serbia in so far as it related to the capacity of the Respondent to participate in the proceedings instituted by Croatia. He is critical of the Court's decision to depart from the general rule that the jurisdiction of the Court must be assessed on the date of the institution of the proceedings. He disagrees with the Court's conclusion that Serbia's lack of jus standi at the time of the institution of the proceedings by Croatia has been cured by its subsequent admission to the United Nations. Judge Skotnikov notes that the Mavrommatis exception to the above-mentioned general rule, relied upon by the Court, deals exclusively with defects related to consent of the parties. The right of a party to appear before the Court is not a matter of consent and, accordingly, the absence of that right is not a defect capable of being cured by applying the Mavrommatis jurisprudence.

Judge Skotnikov agrees with the Court's conclusion that Serbia was party to the Genocide Convention at the time of filing of the Application. 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. 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.

The majority has also, in his 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 27 April 1992 (the date on which the FRY came into existence). Judge Skotnikov notes that Serbia further contended that, even if there is

jurisdiction, it cannot be exercised in respect of the events which occurred prior to that date. This contention represents an objection to admissibility of Croatia's claims. Judge Skotnikov points out that 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, 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 "in order to be in a position to make any finding on each of these issues [jurisdiction and admissibility], the Court will need to have more elements before it" without, however, indicating what element is lacking in respect of the issue of jurisdiction. The Court's insistence that the issues of jurisdiction and admissibility (the second issue, according to the Court, involves questions of attribution to the Respondent of the facts in the period preceding 27 April 1992) 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.

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, on 27 April 1992, the date on which it came into existence. It follows that the Court cannot have jurisdiction to examine any facts or events which occurred prior to that date.

Separate opinion of Judge <u>ad hoc</u> Vukas

The Applicant, the Republic of Croatia, became a Member of the United Nations (UN), and thus party to the Statute of the International Court of Justice, on 22 May 1992. The Respondent, the Republic of Serbia, decided on 27 April 1992, together with the Republic of Montenegro, to establish the "Federal Republic of Yugoslavia" (FRY). This new State, composed of two former Republics of the Socialist Federal Republic of Yugoslavia (SFRY), sought to continue the international personality of Yugoslavia and its membership in the UN. The United Nations was not pleased with this decision. The FRY was thus not allowed to participate in the General Assembly, but it was considered to be a member of the UN, and therefore a party to the Statute of the Court.

The SFRY was a party to the Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention) from its entry into force on 12 January 1951. After the dissolution of the SFRY, Croatia and the FRY expressed in 1992 their decision to succeed the SFRY as parties to the Genocide Convention (without any reservation to its provisions).

Taking into account the above-mentioned facts, it is clear that Croatia was entitled to institute the proceedings against the FRY on 2 July 1999. Croatia's Application does not only concern the acts and omissions which took place after the establishment of the FRY on 27 April 1992 and there are several reasons for this. First of all, both Croatia and Serbia were under the obligation to prevent and punish the crime of genocide as federal units of the SFRY — a party to the Genocide Convention. Moreover, the provisions of that Convention have for a long time formed a part of general customary international law of a peremptory nature. Finally, many of the acts of genocide in respect of which Croatia instituted the proceedings were initiated as of 1991, but the suffering of the victims continued in the following years.

Dissenting opinion of Judge ad hoc Kreća

In the opinion of Judge Kreća the relevant conditions for the jurisdiction of the Court in the present case are not met.

On the date of institution of the proceedings, the Respondent was not a Member of the United Nations as determinative of its jus standi in the circumstances surrounding the case. The so-called Mavrommatis principle, based on considerations of judicial economy, is substantially incapable of redressing the lack of jus standi of the Respondent as a mandatory requirement of a constitutional nature.

As regards the basis of jurisdiction, Judge Kreća finds that in the relevant point of time the Genocide Convention was not applicable between the Parties. Following its admission to the United Nations on 1 November 2000, the Respondent, acting upon a reminder of the Secretary-General as depositary of multilateral treaties, expressed its consent to be bound by the Convention on 6 March 2001. The 1992 declaration, perceived by the Court in closely related cases as a basis for considering the Respondent a Contracting Party to the Genocide Convention, is, according to Judge Kreća, for a number of reasons incapable of producing such effects.

Judge Kreća cannot concur with the finding of the majority relating to the scope of the jurisdiction of the Court ratione temporis. He finds that only a State in existence, bound by an international obligation, may commit, or may be attributed to, an internationally wrongful act that entails international responsibility. The legal existence of the Respondent as a new international legal person different from its hybrid and controversial position during the period 1992 to 2000, started in November 2000 by its admission to membership in the United Nations.

Regarding all three issues included in the objection relating to the submission of certain persons to trial, provision of information on missing citizens and return of cultural property, Judge Kreća is of the opinion that the particular dispute does not fall within the ambit of Article IX of the Genocide Convention.
