**BHY**

CR 2006/36 (traduction)

CR 2006/36 (translation)

Vendredi 21 avril 2006 à 15 heures

Friday 21 April 2006 at 3 p.m.

**10** The PRESIDENT: Please be seated

Mr. PELLET: Thank you very much.

## JURISDICTION OF THE COURT

### 1. THE COURT CANNOT CALL INTO QUESTION THE FINAL AUTHORITY OF ITS JUDGMENTS AS *RES JUDICATA* (CONTINUED)

### II. The Respondent cannot call into question the *res judicata* authority of the 1996 Judgment

23. Madam President, Members of the Court, at the end of my short statement this morning, I alluded to my presentation of 28 February, during which I read out a fairly long extract from your Judgment of 3 February 2003 on the *Application for Revision of the Judgment of 11 July 1996* (*I.C.J. Reports 2003*, p. 31, paras. 70-71), and, relying solely on what you stated in that 2003 Judgment, I noted:

— that the Court, in order to render its Judgment on the preliminary objections, had relied on the *sui generis* situation prevailing at the time when it handed down that Judgment;

— that the Court had been fully conversant with the very specific circumstance resulting from the attitude of the Respondent itself; and

— that the fact that the FRY had abandoned its claim to be the "continuator" of the former Yugoslavia, and that this had led to its admission to the United Nations, had had no influence on the reasoning followed by the Court in its 1996 Judgment.

24. My opponents, who, generally, have barely addressed the 2003 Judgment, confined themselves on this point[1] to relying on a remark that appears in the 2004 Judgments rendered in the cases relating to *Legality of Use of Force*. According to this *obiter* observation: "These statements [in the Judgment on revision] cannot however be read as findings on the status of Serbia and Montenegro in relation to the United Nations and the Genocide Convention" (*Serbia and Montenegro* v. *Belgium*, Judgment of 15 December 2004,, para. 88; the seven other Judgments of the same day contain identical passages).

**11** 25. It is certainly true that these are mere findings which do not in themselves have the force of *res judicata*, if only because they are findings on which I had relied that appear in a Judgment on

[1] Cf. CR 2006/13, p. 40, para. 4.24 (Zimmermann).

a request for revision, which is limited as such "to the question whether the request satisfies the conditions contemplated by the Statute" (*Application for Revision of the Judgment of 11 July 1996 in the Case concerning* Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina *v.* Yugoslavia), Preliminary Objections *(Yugoslavia* v. *Bosnia and Herzegovina)*, Judgment of 3 February 2003, p, 11, para. 16), and this is also a citation from your 2003 Judgment. The fact remains that, in this crucial passage, the Court quite clearly held that, *in the case which concerns us*, "the Federal Republic of Yugoslavia could appear before the Court between 1992 and 2000 and that this position was not changed by its admission to the United Nations in 2002" (*Legality of Use of Force*, joint declaration of Vice-President Ranjeva, Judges Guillaume, Higgins, Kooijmans, Al-Khasawneh, Buergenthal and Elaraby, appended to the Judgment of 15 December 2004, para. 10). This is doubtless not *res judicata*; but it is, all the same, a very authoritative interpretation — that of the Court itself — of the 1996 Judgment, which, for its part, does have the force of *res judicata*.

26. I therefore consider it necessary, in the light of this interpretation :

— first, to analyse the Respondent's "perception" of the 1996 Judgment, a "perception" which seriously distorts its meaning;

— secondly, to show that the Respondent, with no legal justification whatsoever, ignores the *res judicata* authority attaching to a proper interpretation of that Judgment;

— finally, to examine the grounds on which it relies for that purpose.

**A. The Respondent distorts the meaning of the 1996 Judgment**

27. Madam President, if we are to believe our colleagues on the other side of the Bar, the Judgment of 11 July 1996 is utterly exceptional, not only in the jurisprudence of the Court, but in the annals of all courts, in all jurisdictions: so what we have is a court decision that is said to have decided absolutely nothing. This theory of "*res non judicata*" is original but open to question.

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28. I have tried my hand at drawing up a list of matters which, according to Messrs. Varady, Djerić and Zimmermann, were not decided in 1996. They include:

— the status of the FRY in relation to the United Nations[2];

[2]CR 2006/12, para. 1.46 (Varady); CR 2006/13, p. 13, para. 2.13 (Djerić).

— the status of Yugoslavia in relation to the Court[3]; and

— the status of Yugoslavia in relation to the 1948 Convention[4].

We are then left wondering what the Court could have relied upon in 1996 in order to render its Judgment.

29. This exercise in deconstruction is not, however, unqualified, Madam President. Indeed, our opponents concede an important point, one which, I believe, is sufficient to negate their entire argument: in order to find that it had jurisdiction, the Court relied upon the "presumption" of continuity between the FRY and the former Yugoslavia: "The only assumption on which the 1996 Judgment on preliminary objections was based is the assumption that the FRY had remained bound by Article IX of the Genocide Convention continuing the treaty status of the former Yugoslavia."[5]

30. This is partially true, Madam President, but it is not *completely* true. In reality, the Court relied less on a "presumption of continuity" — which would have been mistaken and, what is more, at variance with the position taken by Bosnia and Herzegovina, which it has never sought to conceal[6] — than on *the position of the Respondent itself on this subject*. The crucial passage in the 1996 Judgment is to be found in paragraph 17:

> "At the time of the proclamation of the Federal Republic of Yugoslavia, on 27 April 1992, a formal declaration was adopted on its behalf to the effect that:
>
> > 'The Federal Republic of Yugoslavia, continuing the State, international legal and political personality of the Socialist Federal Republic of Yugoslavia, shall strictly abide by all the commitments that the Socialist Federal Republic of Yugoslavia assumed internationally.'
>
> 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. Thus, Yugoslavia was bound by the provisions of the Convention on the date of the filing of the Application in the present case, namely, on 20 March 1993." (*I.C.J. Reports 1996 (II)*, p. 610.)

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[3]CR 2006/13, p. 13, paras. 2.13 and 2.15 (Djerić).

[4]CR 2006/13, p. 38, para. 4.15; p. 38, para. 4.17; p. 40, paras. 4.21 and 4.22; p. 41, para. 4.26 (Zimmermann); CR 2006/13, p. 26, para. 3.30 (Varady).

[5]CR 2006/13, p. 21, para. 3.10; see also, p. 26, para. 3.30 (Varady); see also, pp. 39-40, para. 4.21 (Zimmermann).

[6]Cf., *ibid.*, pp. 30-31, para. 3.47 (Varady).

31. In other words, the Court relied on two elements:

first, the FRY's expressed *intention* to be bound; and

secondly, the lack of any objection to this intention.

32. On this basis, and without raising any other issue *proprio motu*, as it could have done if it had had any doubt whatsoever as to whether it had jurisdiction, the Court found, by thirteen votes to two, "that, on the basis of Article IX of the Convention on the Prevention and Punishment of the Crime of Genocide, it has jurisdiction to adjudicate upon the dispute" (*I.C.J. Reports 1996 (II)*, Judgment of 11 July 1996, p. 623, para. 47.2 *(a)*). This, Madam President, is *res judicata*, and this is what the Respondent is seeking once again to challenge.

**B. The Respondent contests the very principle of *res judicata* authority**

33. One of the striking features of the pleadings by counsel for Serbia and Montenegro on questions of jurisdiction — sorry: "issues of procedure"! — is that they did everything they could to avoid mentioning the principle of *res judicata* (which is somewhat paradoxical, and which I even found irritating, since the only arguments devoted by Bosnia and Herzegovina to these matters during the first round of oral pleadings consisted, precisely, of comments — albeit brief ones — on this principle[7]). On the rare occasions when they did refer to the principle, their aim was either to explain that it was not compromised by the Respondent's new objections to your jurisdiction or, more drastically, if not to deny its existence, at least to empty this fundamental principle of all substance.

34. This was quite obviously the strategy employed by Professor Varady when he argued in favour of the "need to face issues of access and jurisdiction" and when he blithely stated: "There is no *res judicata* bar which would disallow the Court to address the issue of access and jurisdiction if it appears to be justified."[8] This amounts, in effect, to brushing aside the clear provisions of

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Articles 59, 60 and 61 of the Statute whenever a judgment on preliminary objections in respect of

[7]CR 2006/3, pp. 8-22 (Pellet).

[8]CR 2006/12, p. 55, para. 1.39 (Varady).

jurisdiction is at issue, and disregarding the well-established jurisprudence of the Court to the opposite effect[9].

35. My opponent disputes, in particular, the relevance of the two precedents I cited, namely the Judgment of 25 March 1999 on the *Request for Interpretation of the Judgment of 11 June 1998 in the Case concerning the* Land and Maritime Boundary between Cameroon and Nigeria (Cameroon *v.* Nigeria), Preliminary Objections *(Nigeria* v. *Cameroon)*, and that of 15 April 1949 in the *Corfu Channel* case. In the first case, Mr. Varady feels able to dismiss the 1998 Judgment on the ground that it was an interpretative judgment, which therefore, in his view, had nothing to do with *res judicata*. But that is not the problem! This decision is relevant simply because it contains a very categorical finding — one that is particularly significant because it restated the principle in question in a general and abstract manner: "The language and structure of Article 60 reflect the primacy of the principle of *res judicata*. That principle must be maintained." (*Request for Interpretation of the Judgment of 11 June 1998 in the Case concerning the Land and Maritime Boundary between Cameron and Nigeria* (Cameron v. Nigeria), Preliminary Objections *(Nigeria* v. *Cameron), Judgment, I.C.J. Reports 1999*, p. 36, para. 12.) And further on we find: "The Court would therefore be unable to entertain this first submission without calling into question the effect of the Judgment concerned as *res judicata*" (*ibid.*, p. 39, para. 16) — a judgment, I would point out, on preliminary objections.

36. Regarding the *Corfu Channel* case, my distinguished opponent puts forward two arguments:

— first, Professor Varady concedes that, in the Judgment of 15 December 1949 on the assessment of the amount of compensation, which I had cited, "the Court did, indeed, refuse to revisit an earlier finding on jurisdiction which was challenged on the same grounds as the ground submitted earlier"[10]; and then he goes on: "It is important to add that this earlier finding was the finding reached in the merits phase, rather than in the preliminary objections phase."[11]

**15** Here again, this fact — though perfectly true — is not relevant: what is relevant is that the

[9]CR 2006/3, p. 14, para. 9. See also *Appeal Relating to the Jurisdiction of the ICAO Council, Judgment, I.C.J. Reports 1972*, pp. 55-56, para. 18 *(b)*.

[10]CR 2006/12, p. 55, para. 1.41.

[11]*Ibid.*

Court nonetheless held, *in connection with a judgment on preliminary objections*, that the judgment possessed the force of *res judicata*, and I have not sought to read anything more into what it said (*Corfu Channel, Assessment of Amount of Compensation, Judgment, I.C.J. Reports 1949*, p. 248)[12];

— secondly, counsel for Serbia and Montenegro asserted that, if one examines not the third, but the second Judgment rendered in the *Corfu Channel* case, that of 19 April 1949 on the merits, "the Court *did address new objections* raised regarding jurisdiction, in spite of . . . an earlier judgment on preliminary objections . . ."[13]. This is true only if one reads the decision very cursorily. In fact, Madam President, the objection raised by Albania during the proceedings on the merits concerned the interpretation of a clause in the Special Agreement concerning the modalities of compensation, which it had been decided to make the subject of a separate phase of the proceedings; this matter had not been the subject of any earlier decision, so that there could be no question of *res judicata*. And it is even open to question whether this Judgment, in which Mr. Varady seems to have taken such interest, does not provide an illustration of the idea of a partial *forum prorogatum*, to which I referred this morning, since the Court did in fact find, without further elaborating thereon, that: "No reason was given in support of this new assertion, and the United Kingdom Agent did not ask leave to reply." (*Corfu Channel*, Judgment, *I.C.J. Reports 1949*, p. 23.) And it was only thereafter that the Court entered into a discussion of the Albanian objections.

37. In any event, regardless of my opponent's views on the matter, the principle of *res judicata* exists. It is firmly maintained by the Court's jurisprudence. And it "must be maintained", as the Court itself has emphasized.

38. Professor Zimmermann adopted a different approach, one seemingly more respectful of *res judicata*, but which, ultimately, nevertheless amounts to refusing to apply it in the present case.

**16** On no less than seven occasions — which strikes me as more like the Coué method of self-hypnosis than argument — he states: "The Court has never decided upon the question whether

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[12]Cf. Shabtai Rosenne, *The Law and Practice of the International Court 1920-2005*, Vol. II, *Jurisdiction*, Nijhoff, Leiden/Boston, 2006, p. 804.

[13]CR 2006/12, pp. 55-56, para. 1.42.

or not the Respondent became bound by the Genocide Convention and its Article IX. This question is accordingly, for that reason too, not *res judicata*"[14].

39. This, Madam President, is something of a paradox, since, as I was saying a moment ago, if there is one point on which the Court ruled in its Judgment of 1996, it is this one! Of course, we know that Mr. Zimmermann and his colleagues draw a distinction — and rightly so, in terms of legal theory — between "being bound" and "becoming bound"[15] but, precisely, what your distinguished Court decided in 1996, was that, at the time when the Application was filed, the Respondent *was* bound by the Convention. So whether it could *become* bound is moot and of purely academic interest.

40. But above all it is, I believe, putting the problem back to front, because *res judicata* applies not to the reasoning of the judgment, or at any rate only to the grounds on which it is necessarily based, but to its operative part. No one has, I think, better expressed this very general principle of the law applicable to all legal decisions which are *res judicata* than Anzilotti when, in his opinion in the case concerning the *Interpretation of Judgments Nos. 7 and 8 (Factory at Chorzów)*, he said:

> "[I]t is certain that the binding effect attaches only to the operative part of the judgment and not to the statement of reasons.
>
> The grounds of a judgment are simply logical arguments, the aim of which is to lead up to the formulation of what the law is in the case in question . . .
>
> When I say that only the terms of a judgment are binding, I do not mean that only what is actually written in the operative part constitutes the Court's decision. On the contrary, it is certain that it is almost always necessary to refer to the statement of reasons to understand clearly the operative part and above all to ascertain the *causa petendi*. But, at all events, it is the operative part which contains the Court's binding decision . . ." (*Interpretation of Judgments Nos. 7 and 8 (Factory at Chorzów), Judgment No. 11, 1927, P.C.I.J,. Series A, No. 13*, p. 24, dissenting opinion of Judge Anzilotti; see also *Polish Postal Service in Danzig, Advisory Opinion, 1925, P.C.I.J., Series B, No. 11*, pp. 29-30.)

41. In the 1996 Judgment on preliminary objections, the operative part consists of two categories of decision (*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)*, pp. 623-624):

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[14]CR 2006/13, p. 59, para. 4.100: see also p. 38, paras. 4.11 and 4.15; p. 41, paras. 4.26, 4.28 and 4.29, and p. 42, para. 4.31.

[15]*Ibid*., p. 22, para. 3.13 (Varady).

17 — on the one hand, in Section (1) of paragraph 47, the Court rejects each of the objections raised by Yugoslavia — which obviously precludes the Respondent from raising them again;

— on the other hand, and this has far wider implications, in Section (2), it finds that it has jurisdiction on the basis of Article IX of the 1948 Convention; it dismisses the additional bases of jurisdiction invoked by Bosnia and Herzegovina; and states that the latter's Application is admissible.

42. This could not be clearer: from then on, by virtue of *res judicata*, which applies to judgments on preliminary objections just as it does to judgments on the merits, neither of the Parties — which were alone bound by these decisions — could challenge them. Yet this is what the Respondent seeks to do. However, Members of the Court, as I shall endeavour to show in the last part of my presentation this afternoon, the reasons relied on by Serbia and Montenegro cannot pose a bar to the operation of the principle of *res judicata*.

**C. The reasons invoked by the Respondent cannot call into question the 1996 Judgment**

43. Listening to the oral pleadings for counsel of Serbia and Montenegro, I found myself frequently wondering if they had not got the wrong judgment and if, in reality, the one they regarded as being *res judicata* was not the one (or rather the ones — yet they do strongly resemble one another and, as is the usual practice, I shall only refer to that concerning Belgium) which you delivered on 15 December 2004 on the preliminary objections raised in the cases relating to the *Legality of Use of Force*. But of course, Madam President, our colleagues are far too shrewd — and too learned — to make a blatant error one would not forgive in our first-year students, and they are careful to say that the importance of the 2004 Judgments is not that "[they] would have *res judicata* effect with respect to this case, but because [they make] a truthful ascertainment [of Serbia
18 and Montenegro's access to this Court before 1 November 2000], and because this is an objective determination which simply cannot be divorced from our case"[16].

44. However, our opponents have effectively treated the 2004 Judgments on the one hand, and the 1996 and 2003 Judgments on the other, at best as if they formed part of one single case and

[16]CR 2006/13, p. 62, para. 5.9 (Varady).

as though the former had, if not binding force, then at least probative value far superior to that of the latter, in other words of the Judgments delivered in our case.

45. From the opening words of his statement of 8 March, Professor Varady placed "[the] three Judgments of this Court, which are of particular importance in the procedural history of the cases arising from the Yugoslav conflicts" on the same level[17]. The following day, Mr. Djerić, after explaining the Court's purported lack of jurisdiction to rule on whether the Respondent had right of access to the Court in its Judgments of 1996 and 2003, announced: "Madam President, eventually the question of the FRY's access to the Court was resolved in 2004 by the Judgments in the cases concerning *Legality of Use of Force*"[18], concluding with a certain audacity that "[t]he determination on access to the Court in a particular period of time necessarily applies to all cases before the Court instituted during that period"[19]. The same day, Professor Varady was harping on the same theme: "These findings and conclusive clarifications [in the 2004 Judgments] set aside the assumption on which the 1996 Judgment on preliminary objections was based."[20] And Professor Zimmermann, after claiming that it was essential for the Court to expressly take a position on this question, stated:

> "I trust that such a determination cannot be made, since this would entail a conclusion that Bosnia and Herzegovina could bring a case at a time when the Respondent, that is, the FRY — Serbia and Montenegro — as this Court itself has determined in its 2004 *Legality of Use of Force* Judgments [had no access to the Court]."[21]

46. These repeated assertions — and these are just examples — by counsel for Serbia and Montenegro raise very serious objections:

**19** — notwithstanding the half-hearted denials by Professor Varady at the very end of his statement[22], they are tantamount to an admission that the reasoning followed by the Court in the 2004 Judgments means it has to overturn its Judgment and reverse the clear acceptance of its jurisdiction in its 1996 Judgment, which would be to introduce into the legal arsenal available

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[17]CR 2006/12, p. 45, para. 1.4 (Varady); see also p. 54, para. 1.38.

[18]CR 2006/13, p. 14, para. 2.16.

[19]*Ibid.*, p. 16, para. 2.21; see also paras. 2.22-2.23.

[20]*Ibid*., p. 25, para. 3.25; see also para. 3.24.

[21]*Ibid.*, p. 36, para. 4.3.

[22]CR 2006/13, p. 62, para. 5.9.

to the Court a sort of regulatory judgment: the principle, as it were, of the retrospective precedent, which would represent a redoubtable threat to legal security and to the credibility of the *res judicata* principle;

— and what is being suggested to us goes well beyond the *res judicata* principle: not only does it transcend the boundaries of one case, encompassing a whole series of cases arbitrarily defined as forming a whole, but also, far from being confined to the operative part, it also encompasses the reasoning, whereas, as I said, citing Anzilotti's words, even in the event of the identity of the parties, of *petitum* and *causa petendi*, "only the operative part of the judgment is binding" by virtue of *res judicata*, not the reasoning.

47. In support of these truly revolutionary claims (which are also profoundly destabilizing to settled legal positions), two arguments and two alone are put forward: "exceptionality" on the one hand and consistency on the other.

48. Mindful of the unusual nature of their argument, our opponents, and above all Mr. Varady, vie with one another in repeating that the case between us is unique of its kind, is incomparably complex[23], and that naturally "reopening the issue of jurisdiction cannot be a routine matter, and only exceptional circumstances can provide justification"[24]. Of course, but even accepting that it is possible — *quod non* — what criterion could the Court rely on in order to decide that a situation is sufficiently "exceptional" to warrant such an attack on one of the most firmly established principles? In order to measure the degree of complexity necessary to reach this extreme? And does complexity constitute a legal basis? Obviously not.

49 I am certainly ready to share the opinion that this case is exceptional by virtue of the
**20** issues it raises, because — as counsel for Serbia and Montenegro admit — it concerns a "tragedy"[25] on a scale to which we are — happily — unaccustomed, and because the truth which the Court will reveal will be of great comfort to the victims and contribute largely to reconciliation between the peoples in the region. Nonetheless I have some difficulty in accepting that this case is so extraordinary in terms of "procedure" or jurisdiction, even though — and I say this with respectful

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[23] Cf. CR 2006/12, p. 46, para. 1.7 (Varady); p. 48, para. 1.13; p. 51, para. 1.36; p. 56, para. 1.45 or CR 2006/13, p. 23, para. 3.16 (Varady); p. 36, para. 4.5 (Zimmermann).

[24] CR 2006/13, p. 19, para. 3.4 (Varady); see also p. 60, para. 5.2.

[25] Cf. CR 2006/12, p. 46, para. 1.5 (Varady).

frankness, Madam President — I cannot help thinking (and I quote) that the Court was perhaps not very inspired "in purporting to find *ex post facto* clarification of the situation as it was in 1992-2000" (*Legality of Use of Force*, separate opinion of Judge Higgins, para. 20) in its Judgment of 2004, whereas it could easily have avoided arousing in the Respondent legally unjustified hopes of obtaining a review of a judgment which is not "reviewable" as a result of its adoption of a position that was "far from self-evident" (*ibid.*, joint declaration of Judge Ranjeva, Vice-President, and Judges Guillaume, Higgins, Kooijmans, Al-Khasawneh, Buergenthal and Elaraby, appended to the Judgment of 15 December 2004, para. 12); that is another quotation, Madam President.

50. There is no doubt that this raises problems of consistency — not just one problem; at least two. But only one seems to concern the Respondent:

> "It cannot possibly be held in one case before the Court that the FRY was not a Member of the United Nations and did not have access to the Court in a particular period of time, and in another case that the FRY was a Member of the United Nations or that it had access to the Court in that same period of time."[26]

Mr. Djerić is indignant about this, a feeling echoed by Professor Zimmermann[27], who points out that the same problem will arise again in connection with the outcome of the Application filed by Croatia against Yugoslavia in 1999[28].

51. However, along with the issue of "horizontal" consistency so to say, raised by the difference between the solutions adopted in, on the one hand, the *Legality of Use of Force* cases and, on the other, the present case, there would be another — that of "vertical" consistency, internal to this case, if you, Members of the Court, were to uphold this singular claim put forward by the Respondent. That, to my mind, would be considerably more detrimental to the integrity of the judicial function than the other form of inconsistency: the spectre of a "horizontal" inconsistency raised by our opponents.

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52. In one case, that of a "vertical" inconsistency internal to the present proceedings, you, Members of the Court, would place yourselves in a difficult position (an understatement, but I trust a respectful one) in relation to Articles 60 and 61 of your own Statute, and would necessarily be

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[26]CR 2006/13, pp. 16-17, para. 2.23 (Djerić).

[27]*Ibid.*, pp. 36-37, paras. 4.6-4.8.

[28]*Ibid.*, p. 37, para. 4.9.

constrained to contravene the *res judicata* principle that is inseparable from your eminent judicial function. As a former President of the Court wrote: "One of the most important characteristics of the law as declared by courts and tribunals must be stability"[29]; and abiding by the principle of *res judicata* is the fundamental prerequisite for such stability. True, the need for stability would not emerge completely unscathed from a "horizontal" mismatch in the outcomes of different cases. However, much as the consistency and predictability of jurisprudence are undoubtedly desirable, in not following in one case the solution reached in another you would not be contravening any rule of law: you are not bound by the *stare decisis* principle. Just as the 2003 Judgment did not possess for the *Legality of Use of Force* cases "any force of *res judicata*" (Judgment of 15 December 2004, para. 80), nor do the 2004 Judgments for the present case.

53. As the Court held in its 11 June 1998 Judgment on the preliminary objections raised by Nigeria in the case concerning its land and maritime boundary with Cameroon:

> "It is true that, in accordance with Article 59, the Court's judgments bind only the parties to and in respect of a particular case. There can be no question of holding Nigeria [read Bosnia and Herzegovina in the present case] to decisions reached by the Court in previous cases. The real question is whether, in this case, there is cause not to follow the reasoning and conclusions of earlier cases." (*Land and Maritime Boundary between Cameroon and Nigeria (Cameroon* v. *Nigeria): (Equatorial Guinea Intervening), Preliminary Objections, Judgment, I.C.J. Reports 1998*, p. 292, para. 28.)

54. There can be no doubt, Madam President, that in the present instance there is a first and decisive reason for not following the precedents established by the 2004 Judgments in the *Legality*

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*of Use of Force* cases. That reason is that, by reversing your 1996 finding on jurisdiction in this case, you would contravene a number of fundamental rules without any legal grounds for doing so: Serbia and Montenegro have not cited any, and we can see none either. But that is not all.

55. There are a number of considerations which would tend to mitigate the disadvantages of "horizontal" inconsistency, for which I respectfully propose on Bosnia and Herzegovina's behalf that you should opt, in preference to "vertical inconsistency"; that is to say, an inconsistency internal to this case, the consequences of which would, I believe, be totally devastating — the consequences that would flow from your reopening the issue of your jurisdiction in the present case in defiance of *res judicata*.

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[29]Nagendra Singh, *The Role and Record of the International Court of Justice*, Nijhoff, Dordrecht, 1989, p. 185.

56. There is, by contrast, no disadvantage, in my opinion, in accepting what we might term the "circumstantial" risk. The Court, Madam President, does not act in an unchanging world. Facts unknown when it renders a judgment may surface later. The situations submitted to it change — and this can take place over the very period in which a case remains *sub judice*, which can be an extremely lengthy one (especially if it involves a number of phases), as the present case demonstrates — a point to which I will return on Monday. The Court can only carry out its judicial function on the basis of the situation prevailing at the time of its judgments; and the need for legal stability implies that the clock stops at that point; that, indeed, is why Article 61 of the Statute sets such strict conditions on the nature of the facts that can justify requests for revision, and on the time-limits for it. And that is, I repeat, the only means that exist for challenging a judgment, "since it is in the general interest that disputes relating to the same subject-matter are not protracted indefinitely: *ut sit finis litium*"[30] *[translation by the Registry]*.

57. In the present case, it is quite normal that two judgments, separated by some ten years, should take different views of the facts — which had, moreover, changed considerably, as was recognized in the 2004 Judgments —, leading if necessary, regrettable as it may be, to different, or even conflicting, legal outcomes. However — and I will examine this point in greater depth on

**23** Monday — it would not be normal to deprive an applicant of a merits judgment, after it had won the issue of the Court's jurisdiction, because of the unusual length of the proceedings, for which it is not responsible[31].

58. Second, this would, moreover, be even less normal for two cases, or series of cases, involving Serbia and Montenegro: as I indicated in my argument of 28 February[32], that State is chiefly, although not entirely, responsible for the delay in proceedings, as well as for the fact that its legal position "within the United Nations and vis-à-vis that Organization remained highly complex during the period 1992-2000", as was noted by the 2004 Judgments[33], when it was up to it alone to put an end to that uncertainty. There is thus nothing aberrant in differing outcomes being

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[30]Leonardo Brant, "L'autorité de la chose jugée en droit international public", *LGDJ*, Paris, 2003, p. 27.

[31]See also CR 2006/3, pp. 16-17, paras. 14 and 15.2 (Pellet).

[32]*Ibid.*, pp. 16-17, paras. 15-16.

[33]Para. 64; see also paras. 67 and 73.

applied depending on whether the State is respondent, as in the present case, or applicant, as in the *Legality of Use of Force* cases; and there is no reason to favour the applicant (by which I mean the applicant in the cases relating to the *Legality of Use of Force*) in such a case. Professor Thomas Franck will return to this important point shortly.

59. Third, Madam President, these two Judgments, from 1996 and from 2004, share one feature which, paradoxically perhaps, justifies the differences in the outcomes reached. I have just said that, to establish its jurisdiction in the present case, the Court based itself both upon the stated intention of the FRY to be bound by its commitments and upon the lack of any objections to that intention. The 2004 Judgments essentially do exactly the same thing: there, the Court based itself upon the position of Serbia and Montenegro that it was not a party to the Statute and was not bound by Article IX of the 1948 Convention[34]. So what had happened in the meantime? What had happened in the meantime was that Serbia and Montenegro had changed its position, and the Court, in both cases, took note of that country's current position at the time when it gave judgment. In other words, Members of the Court, Serbia and Montenegro's own changes of position explain, to a large extent at least, the admittedly different (although less so than one might think) solutions reached by this Court in the *Legality* cases, on the one hand, and in the one that you are currently hearing, on the other.

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60. I believe, Madam President, that in the considerations which I have briefly outlined there are a number of factors which account for the differing positions adopted by the majority of the Members of the Court in the two cases, and that these to some extent mitigate the horizontal inconsistency to which I referred earlier.

61. Before I finish, I would like, with your permission, Madam President, to recapitulate briefly the main points of a presentation which has undoubtedly been somewhat technical:

(1) there is no rule of law or any legal principle which would allow the Court, at this stage of the proceedings, to reverse the finding in its 1996 Judgment, whereby it accepted that it had jurisdiction to hear Bosnia and Herzegovina's Application;

[34]Para. 84. See also the separate opinion of Judge Kooijmans, paras. 16-19.

(2) in adopting that Judgment, the Court satisfied itself that it had jurisdiction and it cannot now go back on that decision. The Court cannot simply assume jurisdiction in a permissive manner, without having other legal grounds for doing so;

(3) that Judgment — of 1996 — was made at a time when the Respondent, which had raised seven preliminary objections, was in a perfect position to dispute the Court's jurisdiction for lack of *jus standi*, particularly since it alone was in a position to resolve the situation obtaining at that time which was engendering so many legal difficulties;

(4) since it did not do so at the appropriate time, it is estopped from taking any initiative in this regard and must be regarded as having accepted the Court's jurisdiction from this standpoint;

(5) the 1996 Judgment, whereby the Court established its jurisdiction, enjoys the authority of *res judicata* and is not susceptible of appeal, otherwise than through an application for revision, under the conditions laid down in Article 61 of the Statute;

(6) any ruling whereby the Court reversed the 1996 Judgment, which carries *res judicata* authority, would be incompatible both with the *res judicata* principle and with Articles 59, 60 and 61 of the Statute;

**25** (7) the Judgments rendered in 2004 in the *Legality of Use of Force* cases are of no significance whatsoever for the current case, and the Court, which is not bound by precedent, would not contravene any rule of law by not repeating that solution in the present case;

(8) finally, there are, moreover, substantial differences between the two cases, stemming notably from the differing periods and circumstances in which the Judgments were adopted, the difference in Serbia and Montenegro's status in the proceedings and the identical *ratio decidendi* of the two Judgments, which paradoxically produced opposing outcomes — since both rulings were based upon the changing position of the Respondent in the present case regarding its legal status relative to the United Nations and the Statute of the Court, on the one hand, and to the 1948 Genocide Convention on the other.

And this is probably an appropriate moment to ask you, Madam President, to give the floor to Professor Thomas Franck, who will address the issues of good faith and estoppel. I thank you very much, Members of the Court, for your attention.

Le PRESIDENT : Merci Monsieur Pellet. Je donne maintenant la parole à M. Franck.

M. FRANCK : Merci, Madame le président. Plaise à la Cour.

***Estoppel* et bonne foi**

1. Avec votre permission, je vais vous présenter plusieurs propositions d'ordre juridique qui intéressent la question de votre compétence.

2. En premier lieu, je commencerai par répéter la proposition défendue par mon ami et collègue Alain Pellet pour qui la question de votre compétence doit trouver tout simplement sa réponse dans l'application du principe de la *res judicata*. Je n'ai guère besoin d'ajouter quoi que ce soit à sa plaidoirie sur ce point.

3. En deuxième lieu, je vous prierai d'établir votre compétence en empêchant le défendeur de se présenter désormais dans l'arène en brandissant un nouveau statut destiné à le protéger qui contredit directement la thèse que Belgrade a systématiquement défendue pendant toutes les précédentes étapes de notre litige. Je vous prierai de recourir à la doctrine de l'*estoppel* équitable et
**26** à l'obligation de bonne foi pour empêcher le défendeur de plaider en ce sens ou de faire valoir une argumentation de ce type.

4. En troisième lieu, je vous prierai, Madame et Messieurs de la Cour, pour le cas où vous ne seriez pas tous convaincus que, pour régler la question de votre compétence, il faut faire appel aux principes juridiques de la *res judicata*, de l'*estoppel* et de la bonne foi, de considérer au moins cette question comme si elle se posait pour la première fois — c'est-à-dire comme une question que vous avez à résoudre *de novo*, après avoir analysé à fond les éléments de preuve disponibles, sans jamais invoquer la décision que vous avez rendue sur la compétence dans les affaires de l'OTAN de 2004. Je tâcherai de démontrer que lesdites affaires n'ont tout bonnement aucun rapport avec les besoins de l'espèce.

5. En quatrième lieu, je tâcherai de donner quelques indications quant à la voie à emprunter pour établir votre compétence *de novo* : il faudra peut-être étudier les questions que soulèvent le statut, ou les statuts, *sui generis* de la RFY, ses rapports avec l'ONU et son adhésion à la convention sur le génocide pendant la période cruciale allant de 1992 à 1995, c'est-à-dire la période

pendant laquelle ont eu lieu les actes génocides dont nous faisons état. Mon amie et collègue Brigitte Stern développera ces thèmes pour vous plus en détail cet après-midi et lundi.

**L'obligation de cohérence dans l'affirmation des droits**

6. J'examine donc la question de l'*estoppel* équitable et de la bonne foi. Pour nous, le défendeur ne saurait au stade actuel de l'espèce adopter au sujet de son statut une position radicalement opposée à celle qu'il a adoptée à chacune des autres phases du litige. Si la Cour est de notre avis, le statut du défendeur aujourd'hui devrait être compatible avec celui que la RFY a revendiqué d'un bout à l'autre de l'instance : le statut d'un Etat qui était Membre de l'Organisation des Nations Unies, encore que frappé de certaines interdictions, et qui était partie à la convention sur le génocide d'un bout à l'autre de la période pendant laquelle les actes génocides ont été commis.

7. Dans la première de mes plaidoiries, j'ai étudié comment le défendeur a constamment cherché à créer l'impression que l'article IX de la convention sur le génocide est ambigu sur le point de savoir si cette disposition établit en matière de génocide la responsabilité de l'Etat en sus de la culpabilité individuelle, mais une responsabilité distincte de cette culpabilité. Aujourd'hui, je voudrais m'arrêter sur la deuxième des grandes ambiguïtés dont le défendeur fait état. C'est M. Varady qui en a parlé au premier tour en nous disant que «la question de savoir si la RFY

27 — c'est-à-dire le défendeur — est devenu partie à la convention sur le génocide par voie de succession n'a … à ce jour jamais été tranchée par la Cour avec l'autorité de la chose jugée» (CR 2006/13, p. 38, par. 4.15) : là encore, l'on ne sait pas où l'on en est.

8. Cette situation, nous dit-il, s'explique par «la simple raison qu'aucune des Parties n'avait mis en doute l'éventuelle qualité de partie de la RFY à la convention sur le génocide» (*ibid.*, p. 38, par. 4.17). D'après M. Varady, cette ambiguïté sur le point de savoir si le défendeur était partie à la convention a duré non seulement pendant toute la phase de 1993 de l'espèce, mais aussi pendant la phase de 1996. Lors de cette phase de 1996, dit-il, «la qualité d'Etat successeur en matière de traités de la RFY — le défendeur — n'a pas été examinée; elle n'a pas même été soulevée» (*ibid.*, p. 40, par. 4.21).

9. «La question n'a pas été examinée ?» «Elle n'a pas même été soulevée ?» [«Ce n'était pas une question à régler ?»] Nous constatons ici que le défendeur s'est abstenu de brandir le moyen de défense le plus évident qui consistait à dire qu'il n'était pas partie à la convention au titre de laquelle l'action judiciaire était engagée. La Bosnie n'aurait évidemment pas eu lieu de soulever la question. Elle n'avait pas intérêt à montrer qu'elle intentait une action en se trompant de partie adverse ou qu'elle intentait son action contre une partie qui avait cessé d'exister. Mais la RFY avait quant à elle toutes les raisons de soulever la question au titre de sa défense. Faut-il interpréter son abstention à cet égard comme une ambiguïté ? Un avocat de Belgrade qui eût été doué de raison n'aurait-il pas demandé l'autorisation de plaider que la RFY n'était pas partie au traité dont la violation était le fondement même de l'action engagée ? Ne faut-il pas tenir pour acquis que l'équipe de la RFY aura fait enquête à cet égard et que la réponse émanant des autorités de Belgrade aura consisté à dire : «non, vous ne pouvez pas utiliser ce moyen de défense parce que la RFY *revendique* activement la qualité de partie à la convention». Incontestablement, s'abstenir de contester la compétence de la Cour au motif que l'on n'est pas partie à la convention nous interpelle très clairement, très fortement, sans la moindre ambiguïté. Le message est le suivant : voilà la position que Belgrade a adoptée d'un bout à l'autre des huit premières années du litige, parfois en cherchant à en tirer parti (sous la forme d'une demande reconventionnelle) et parfois en payant volontiers ce qu'il peut en coûter de conserver systématiquement cette attitude. Mais il ne peut y avoir d'ambiguïté, et il n'y eut aucune ambiguïté de la part de la RFY, ni de la part du demandeur, ni de la part de la Cour.

10. M. Varady admet que la Cour en 1993 a écarté toute ambiguïté, qu'elle a bel et bien conclu que la RFY avait elle-même accepté qu'elle était partie à la convention, et que ce fait ressortait de sa déclaration du 27 avril 1992. Dans cette déclaration, et je cite le résumé qu'en a

28 donné M. Varady, «la RFY avait … exprimé l'intention d'assurer la continuité de la personnalité juridique de l'ex-Yougoslavie et, par conséquent, d'honorer les obligations conventionnelles de cette dernière» (CR 2006/13, p. 39, par. 4.20). Ne peut-on penser, à la lecture de la décision que vous rendez donc en 1993, que les avocats de Belgrade ont dû se dire qu'ils pourraient peut-être gagner ce procès lors de la phase suivante, en 1996, au moment où la seule question qui se poserait serait celle de la compétence et de la recevabilité, s'ils étaient autorisés à plaider que la RFY était

en réalité un Etat nouveau et que, pour cette raison-là précisément, ce n'était plus alors un Etat partie à la convention ? Or, il n'a jamais été présenté d'argument en ce sens. Manifestement, la RFY n'était pas du tout disposée à obéir aux exigences du Conseil de sécurité et de l'Assemblée générale qui voulaient la voir accepter le statut d'Etat successeur de l'ex-Yougoslavie parmi d'autres. La RFY a continué de soutenir passionnément avoir l'exclusivité de la succession. Et l'on se demande alors à nouveau : que faut-il penser de cette affirmation que le défendeur présente le plus souvent dans le silence mais parfois aussi avec beaucoup d'éloquence quand il dit être en fait très étroitement lié par la convention ?

11. Il n'y a ici pas trace d'ambiguïté. Systématiquement, dans le cadre du litige qui a abouti à la décision rendue par la Cour en 1996, le défendeur n'a présenté aucune thèse autorisant à penser qu'il n'était pas partie à la convention et il a beaucoup plaidé tant dans ses pièces écrites qu'à l'audience en formulant des arguments qui n'auraient pas eu beaucoup d'intérêt stratégique si le défendeur n'avait pas été partie à la convention. Il était donc inévitable que la Cour s'en tînt à nouveau à ce que le défendeur disait. Sur cette décision, M. Varady s'exprime ainsi : «la Cour s'est contentée» — s'est contentée, dit-il — «de noter que l'*ex-Yougoslavie*» — là encore c'est M. Varady qui souligne — a «signé la convention sur le génocide le 11 décembre 1948 et … déposé son instrument de ratification sans réserve, le 29 août 1950». Mais il vous est également demandé d'estimer que, du moment qu'il «n'avait pas été contesté» au cours de la procédure de 1996 que la Yougoslavie fût toujours partie à la convention sur le génocide (*ibid.*, p. 39-40, par. 4.21), par conséquent, «la question de savoir si la RFY avait la qualité d'Etat successeur à l'égard de la convention sur le génocide, question qui n'avait pas même fait débat entre les Parties, n'a pas été tranchée par la Cour» *(ibid.)*. Est-ce là une déduction raisonnable ? Qui, sinon la RFY, aurait contesté avoir encore la qualité de partie à la convention ? En l'absence de cette contestation, la Cour avait constaté que la Yougoslavie et, par son intermédiaire, la RFY étaient effectivement liées par la convention sur le génocide. Ce fut là la raison pour laquelle la Cour a estimé avoir compétence. La Cour avait fondé cette conclusion sur le fait crucial que la RFY n'avait pas contesté être partie à la convention. Cette absence de contestation n'avait manifestement pas servi les avocats de la Serbie mais ce fut pourtant une stratégie que le gouvernement qui était leur client tenait beaucoup à leur voir adopter.

**29**

12. Mais la RFY ne s'est pas contentée d'acquiescer passivement. Elle a activement manifesté sa qualité de partie à la convention en formulant elle-même des demandes reconventionnelles à l'encontre de la Bosnie-Herzégovine. Sa duplique du 22 février 1999, sur la quasi-totalité de ses cinq cents premières pages, revient uniquement à affirmer qu'elle est partie à la convention sur le génocide. Quelle autre interprétation pouvez-vous donner de cette longue accusation, qui sera retirée par la suite, cette accusation de prétendu génocide que Belgrade avec une extraordinaire témérité a tenté de faire commettre à son encontre par la Bosnie ? Bien entendu, ces prétentions totalement erronées ont été abandonnées quasiment aussitôt après avoir été présentées. Pourquoi ? Elles n'ont été retirées qu'au moment où il est devenu tactiquement opportun de changer son fusil d'épaule, d'affirmer sur le plan juridique l'absence de continuité et de se débarrasser de huit ans passés à insister sur la continuité.

13. Ce fut là la tactique revisée adoptée après le 1er novembre 2000, date à laquelle un nouveau régime en place à Belgrade a décidé de demander son admission à l'Organisation des Nations Unies. Pour échapper à la responsabilité de ce que Belgrade avait fait, ce qui avait été fait par les dirigeants de la RFY désormais en situation d'échec et désormais détestés, Belgrade décida d'obéir enfin aux décisions prises en 1992 par le Conseil de sécurité (résolution 777 du 19 septembre 1992) et par l'Assemblée générale (résolution 47/1 du 22 septembre 1992). En 1992 en effet, huit ans plus tôt, les principaux organes politiques des Nations Unies, écœurés par ce que faisait Belgrade, lui avaient demandé d'entrer à l'ONU comme nouvel Etat Membre, les Membres de l'Organisation cherchant par ce moyen à exercer assez d'influence pour juguler les politiques de Belgrade. Entre-temps, pour favoriser de sa part un changement de politique, la délégation de Belgrade aux Nations Unies se vit refuser le privilège de prendre la parole et de voter dans certains des organes de l'Organisation. Puis, à la suite d'échecs graves sur le terrain et à la suite aussi d'une révolte dans le pays, Belgrade a finalement compris qu'il était temps de renouveler sa stratégie.

14. Nous sommes tous heureux que l'ère Milosević soit terminée et il se pourrait bien, comme nous l'avons tous appris, Madame le président, qu'il y ait plus de joie au ciel pour un seul pécheur qui se repent que pour tous les anges qui s'y trouvent réunis. Mais le pécheur repenti commence toujours par admettre et non par nier qu'il fut naguère un pécheur. Et il commence sa

vie nouvelle en acceptant la responsabilité d'un passé criminel et non en refusant cette responsabilité; il demande la possibilité de se repentir et de réparer ses torts.

15. Ma collègue, Mme Stern, examinera le point de savoir s'il faut considérer que la RFY a été Membre de l'ONU pendant les longues années où elle n'a pas obéi aux décisions prises par les
30 principaux organes politiques des Nations Unies, au sujet de son statut notamment. Ma tâche est différente : je dois montrer que cette volte-face de dernière minute, cette décision tactique consistant à obéir enfin à des décisions prises huit ans auparavant ne peut pas vraiment être en toute équité la réponse aux questions à régler en l'espèce. Il n'est pas possible d'absoudre une partie d'obligations qu'elle avait régulièrement à assumer d'un bout à l'autre de ce long procès et dont elle a même cherché à tirer profit. Que l'on voit ici le signe de l'obligation de manifester sa bonne foi ou bien une contrainte imposée par l'*estoppel* importe moins que l'idée fort simple qu'il ne faut pas laisser la Serbie-et-Monténégro échapper aux obligations lui incombant en vertu de la convention sur le génocide en décidant au bout du compte de prendre une mesure qui lui a été demandée depuis longtemps et à laquelle elle a longuement résisté mais qui ne fut jamais censée être un moyen d'échapper à la responsabilité d'avoir commis un génocide.

16. Tout au contraire : en l'espèce, il n'a toujours existé qu'un seul défendeur et, jusqu'à une date extrêmement récente, le défendeur en question n'a jamais nié que la requête du demandeur fût destinée à la Partie qu'il fallait. Ou bien ladite Partie était de mauvaise foi quand elle a accepté l'acte introductif d'instance ou bien le fait qu'elle s'abstienne pendant si longtemps de contester en être le véritable destinataire doit permettre de l'empêcher par voie d'*estoppel* d'agir ainsi aujourd'hui. D'une façon ou de l'autre, il serait absolument injuste que la Cour récompense Belgrade d'accepter en définitive d'obéir à une demande du Conseil de sécurité en l'absolvant de toute responsabilité en matière de génocide.

17. Après tout, les Parties s'accordent à reconnaître que, pendant les huit premières années de ce procès, le litige ne portait nullement sur le point de savoir si la FRY était liée par la convention sur le génocide. Que faut-il déduire de ce silence qui valait acquiescement ? Et du fait que Belgrade avait même affirmé exercer des droits au titre de la convention à l'encontre à la fois de la Bosnie et des Etats membres de l'OTAN ? Le défendeur voudrait nous faire croire que, dans les premiers stades de l'espèce, la question n'a tout bonnement jamais été évoquée, que cette

question se situait en quelque sorte en terrain inconnu du point de vue procédural, un terrain rempli d'ambiguïtés qui n'ont été résolues que lorsque Belgrade a décidé d'adopter une attitude contraire à celle qui fut la sienne pendant huit ans et a cherché alors à modifier rétroactivement un statut juridique qui devenait de plus en plus incommode. Mais il existe un autre motif beaucoup plus plausible pour lequel Belgrade vient seulement de décider aujourd'hui, après toutes ces années, d'affirmer ce qui eût été précédemment la raison la plus patente de vouloir échapper aux obligations découlant de la convention sur le génocide. Belgrade aurait pu dire à la Cour en 1992 et n'importe quand ensuite : je ne suis pas qui vous pensez. Je ne suis pas la Yougoslavie. Je ne suis certainement pas en tout cas *cette* Yougoslavie-*là*, celle qui commet tous les faits dont le
**31** Conseil de sécurité l'accuse et qui sont de plus en plus souvent confirmés par le TPIY. Je ne suis tout bonnement pas cet Etat-là.

18. Ne vous seriez-vous pas attendus à ce que ce soit là la première des choses que le défendeur dirait à la Cour si c'est bien là ce qui correspond à ses convictions ?

19. M. Varady nous a dit que «les ambiguïtés ont été dissipées depuis que la RFY est un nouveau Membre de l'Organisation des Nations Unies qui l'a admise en 2000…» (CR 2006/13, p. 24, par. 3.23). Mes collègues étudieront quel effet a eu cette admission de la RFY à l'Organisation des Nations Unies en qualité de nouvel Etat Membre. Mais permettez-moi de vous assurer qu'avant cette admission, il n'existait aucune ambiguïté. La RFY estimait être liée par la convention. La Bosnie estimait que la RFY était liée dans le cadre de la présente affaire. La Cour a régulièrement jugé que la RFY était liée par la convention.

20. Il n'existe en l'occurrence aucune ambiguïté. Pendant près d'une décennie, Belgrade a été Partie à la présente affaire en réincarnant en quelque sorte la Yougoslavie, qui était l'une des parties originelles à la convention sur le génocide. Et pourquoi Belgrade a-t-il aujourd'hui, après le début du nouveau millénaire, découvert soudainement qu'à cette époque même, son identité n'était pas celle-là après tout ? Après avoir déambulé pendant des années dans les couloirs de l'ONU tel un «Hollandais volant» de la diplomatie, payant même parfois ses cotisations et faisant distribuer des documents comme n'importe quel autre Etat Membre, contestant très fort l'action menée pour contraindre Belgrade à demander à nouveau son admission à l'Organisation, et après avoir présenté soi-même une demande reconventionnelle au titre de la convention ? Pourquoi Belgrade soutient-il

maintenant avec insistance n'avoir jamais prétendu être l'unique successeur de l'ex-Yougoslavie ? Pourquoi prétendre que tout cela ne s'est jamais passé, qu'il y a simplement eu quelques malentendus, quelques ambiguïtés ?

21. La réponse qui est regrettable encore que compréhensible est tout bonnement qu'il s'agit là d'un opportunisme de procédurier. Depuis le début, les régimes successifs de Belgrade s'étaient convaincus eux-mêmes que, comme on le prétend dans les romans policiers modernes, «ils s'en tireraient bien». Ils pouvaient participer à une procédure, ils pouvaient même présenter une demande reconventionnelle au titre de la convention sur le génocide, et le monde entier constaterait que les allégations formulées étaient mensongères, qu'il y avait eu une méchante guerre civile, que l'on pouvait reprocher des crimes à tous les camps, et on s'en tiendrait là. Et ce n'est que lorsque les éléments de preuve recueillis avec tant de peine par des organismes internationaux et notamment le TPIY ont commencé à s'accumuler au point qu'il devint inévitable de conclure à un génocide planifié, dirigé et exécuté par Belgrade — ce n'est qu'alors seulement que leur stratégie juridique prit une autre direction. Ce n'est qu'à ce moment-là seulement que nous avons vu opérer un changement de direction à 180 degrés. La Serbie-et-Monténégro fit enfin ce que le Conseil de sécurité lui avait demandé tant d'années auparavant : le pays a demandé son admission aux
**32** Nations Unies en qualité de nouvel Etat Membre — ce qu'il pouvait et aurait dû faire en 1993. Et la Serbie-et-Monténégro a ratifié la convention sur le génocide *de novo*. Mais l'admission et la ratification n'ont pas été faites dans un nouvel esprit de respect du droit international, c'était une tactique nouvelle pour échapper au droit et ne pas obéir aux demandes. Désormais, on disait à ses concitoyens : nous nous sommes absous nous-mêmes; nous sommes désormais invulnérables, nous ne pouvons plus être responsables de ce que nous avons fait. On pourra faire rendre des comptes à quelques individus devant le TPIY, mais nous, le peuple serbe, nous serons acquittés en droit.

22. Je me rends compte que j'ai parlé d'éléments qui ne sont pas nécessairement synonymes de droit : j'ai parlé de comportement honorable, de moralité, de bonne foi. Mais ces préoccupations ne sont pas sans pertinence quand il est question du droit ou de l'intégrité de la justice. Nous soutenons que l'équité, la bonne foi, quel que soit le sens qu'on leur attribue, ne peuvent pas permettre qu'une telle volte-face, opérée dans la dernière phase d'un litige — d'un litige qui porte en outre sur la responsabilité d'un génocide — dégage un Etat de sa responsabilité

alors que celle-ci est prouvée. Il ne faut pas permettre d'absoudre un Etat qui, c'est parfaitement évident, est l'Etat même qui a infligé de telles souffrances à ses voisins et qui tente encore, comme il l'a fait si souvent jusqu'à présent, de trouver la tactique qui lui épargnera d'avoir à affronter la vérité de ses actes.

23. Il ne faut pas autoriser cette façon de faire. Mais nous ne voulons pas voir simplement triompher l'équité : heureusement, il s'agit aussi du droit. C'est le vice-président Alfaro dans l'opinion individuelle qu'il a jointe à l'arrêt rendu par la Cour dans l'affaire du *Temple de Préah Vihéar*[35] qui a le mieux défini l'obstacle juridique à opposer à une tactique de ce genre, en adoptant pour principe applicable «qu'un Etat partie à un litige international est tenu par ses actes ou son attitude antérieure lorsqu'ils sont en contradiction avec ses prétentions dans ce litige». Ecartant les appellations d'«*estoppel*», de «préclusion», de «forclusion» ou d'«acquiescement» souvent données à la doctrine, le juge Alfaro a fait observer que

> «dans le domaine international, sa substance est toujours la même : la contradiction entre les réclamations ou allégations présentées par un Etat et sa conduite antérieure à ce sujet n'est pas admissible *(allegans contraria non audiendus est)*. Son objectif est toujours le même : un Etat n'est pas autorisé à tirer profit de ses propres contradictions au préjudice d'un autre Etat.»[36]

24. En outre, a dit encore le juge Alfaro à ce sujet, «un Etat peut être lié aussi par une attitude passive … à l'égard de droits affirmés par un autre Etat…»[37]. Madame le président, nous
**33** sommes exactement dans cette situation en l'espèce. En changeant d'attitude, attitude qui fut tantôt active, tantôt passive, sur son statut au sein de l'Organisation des Nations Unies et à l'égard de la convention sur le génocide, le défendeur a perdu le droit de tirer aujourd'hui profit de son changement de tactique le plus récent. Le défendeur adopte en s'opposant de façon flagrante à sa position antérieure une attitude qu'il estime aujourd'hui plus favorable à l'issue du litige en ce qui le concerne et il espère s'emparer d'une victoire technique alors qu'il est au bord de la défaite.

25. Ce serait de fort mauvais augure pour nous, bien entendu, mais ce serait pire encore pour le droit du génocide et particulièrement néfaste pour l'intégrité du processus judiciaire que d'autoriser le défendeur à procéder ainsi. Je citerai une fois encore le juge Alfaro qui dit : «Si un

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[35] Affaire du *Temple Préah Vihéar (Cambodge c. Thaïlande), fond, arrêt, C.I.J. Recueil 1962*, p. 39.

[36] *Ibid.*, p. 40.

[37] *Ibid.*

Etat ne proteste pas alors que … une protestation apparaîtrait indispensable … cette carence signifie … acquiescement ou consentement tacite.»[38] Le même auteur parle aussi de «l'abandon» des droits qui ne sont pas affirmés et il cite avec approbation un autre juge de la Cour, sir Hersch Lauterpacht, pour qui l'idée répond à «un besoin fondamental de stabilité», et le juge Alfaro ajoute que «les effets juridiques du principe sont si fondamentaux qu'ils tranchent seuls, par eux-mêmes, l'objet du différend et qu'on ne saurait considérer comme un simple incident de la procédure toute infraction à ce principe»[39]. Dans cette opinion magistrale, le juge Alfaro étudie ensuite la jurisprudence abondante qui est disponible, notamment un bon nombre d'affaires antérieures, d'arbitrages et de textes qui confortent la proposition générale qu'il a énoncée.

26. Laisser la RFY/la Serbie-et-Monténégro prendre part pendant huit ans à un litige en admettant parfois tacitement, parfois expressément qu'elle est Membre de l'Organisation des Nations Unies et partie à la convention sur le génocide puis, tout juste avant de parvenir au stade final du litige, la laisser affirmer au contraire qu'elle n'a jamais été membre de l'Organisation ni partie à la convention, reviendrait à faire gravement entorse à ce «besoin fondamental de stabilité» dont parlait le juge Alfaro. Il ne faut laisser aucune partie jouer avec ce processus et en tirer profit; et sûrement pas une partie accusée d'avoir violé la convention sur le génocide.

**La RFY ne peut pas modifier son acceptation de la compétence de la Cour *in medias res***

27. Le défendeur, après s'être affirmé pendant des années lié par la Charte et par la convention, comme le montrent les lettres qu'il a adressées au Secrétaire général de l'ONU le 27 avril 1992, cherche aujourd'hui à s'extirper d'une position devenue pour lui de plus en plus

**34** intenable sur le fond. Le couronnement de cette manœuvre tactique est la manière dont il a prétendument adhéré *de novo* à la convention sur le génocide en 2001, sans toutefois accepter la juridiction obligatoire de la Cour en vertu de l'article IX. Mais, sans aucun doute, il y était déjà partie. La qualité de partie à la convention n'est pas une chose insignifiante qui relève du simple caprice. Elle est sans conteste soumise aux règles de la succession d'Etats. Madame le président, quoi que l'Etat de Serbie-et-Monténégro puisse être, quelle que soit son origine, ce n'est pas le

[38] Affaire du *Temple Préah Vihéar (Cambodge c. Thaïlande), fond, arrêt, C.I.J. Recueil 1962*, p. 40.

[39] *Ibid.*, p. 41-42.

produit d'une génération spontanée. C'est forcément le successeur ou le continuateur d'une entité antérieure et, quel que soit le nom donné à son géniteur, celui-ci était partie à la convention sur le génocide. Cette adhésion nouvelle et restreinte ne peut apparaître que comme un retrait à peine déguisé de la compétence de la Cour en plein milieu de la présente affaire — une compétence depuis longtemps reconnue, en paroles et en actes, par le défendeur devant la Cour. Il est impossible de croire que vous, les membres de cette haute juridiction, le laisserez aller de manière aussi délibérée à l'encontre de l'objet et du but de la convention et des règles de conduite devant la Cour. Face à une stratégie d'évasion comparable adoptée par le défendeur dans l'affaire *Nottebohm*, vous avez déclaré : «une fois la Cour régulièrement saisie, la Cour doit exercer ses pouvoirs tels qu'ils sont définis par le Statut» (*C.I.J. Recueil 1953*, p. 122). Et dans l'affaire *Nicaragua*, vous avez fermement rejeté la thèse d'une Partie selon laquelle elle avait effectué un «retrait ou [une] modification» de la compétence de la Cour pour faire échouer une prétention valide (*C.I.J. Recueil 1984*, p. 416). Dans cette affaire *Nicaragua*, vous avez également ajouté que, lorsqu'un Etat accepte la compétence de la Cour, il établit par là un «réseau d'engagements» dans lequel «le principe de la bonne foi joue un rôle essentiel» (*ibid.*, p. 418), et vous avez rattaché cela au droit des autres Etats de «tenir compte» de ces engagements de «bonne foi» et de «tabler sur eux» (*ibid.*, p. 418 et 473, citant l'affaire des *Essais nucléaires*).

**Les décisions rendues par la Cour dans les affaires de 2004 relatives à la *Licéité de l'emploi de la force* ne commandent pas l'issue de la présente espèce et ne peuvent pas conduire à échapper à ces conclusions**

28. M. Varady a dit à la Cour, pendant le premier tour de plaidoiries, que la «logique a fatalement conduit la Cour à conclure en 2004, en ses arrêts sur la *Licéité de l'emploi de la force*, que la RFY n'était pas partie à son Statut entre 1992 et 2000. Il s'ensuit manifestement», ajoute-t-il, «que la RFY ne pouvait pas non plus être demeurée liée par la convention sur le génocide» (CR 2006/13, p. 28, par. 3.38). Le demandeur, au contraire, s'efforcera de démontrer
35 que la Cour n'est pas tenue de suivre les décisions qu'elle a rendues dans les affaires de l'OTAN, pour plusieurs raisons dont la plus évidente est que, en l'espèce, les Parties ne sont pas les mêmes. M. Pellet en a déjà parlé.

29. Mais ce n'est pas la seule raison. Une autre raison est que, par le fond, les affaires de l'OTAN diffèrent de notre espèce. En 2004, vous avez décidé que la RFY/SM avait perdu son droit d'agir en vertu de la convention sur le génocide pendant la période pertinente. Il ne vous était pas demandé de décider si elle avait également cessé d'être responsable du génocide qu'elle était en train de commettre. Cela, c'était l'objet d'une autre affaire, celle qui nous occupe aujourd'hui.

30. Ce ne sont là, toutefois, que des raisons techniques. Il existe une meilleure raison, qui tient aux caractéristiques essentielles des affaires de l'OTAN. Avec tout le respect que je dois à la Cour, Madame le président, ces affaires ne constituent tout simplement pas un précédent très solide, et cela n'est pas dû seulement au nombre et à la force des opinions des juges qui ont rejeté le raisonnement de la majorité. Que faut-il pour qu'une décision de justice ait valeur de précédent dans une autre espèce ? Avant tout, il faut qu'elle ait été rendue après un examen complet de toutes les questions pertinentes, entre des parties entre lesquelles il existe réellement un différend, font valoir avec diligence tous les arguments possibles et présentent tous les éléments de preuve dont elles disposent. Comme nous allons tenter de le démontrer, ce n'est pas ainsi que les affaires de l'OTAN vous ont été soumises par Belgrade.

31. A cet égard, il est intéressant de relever, ici aussi, les propos tenus par mon collègue, M. Varady, pendant le premier tour. Il nous a dit que, ni en 1993, ni en 1996, dans ses conclusions concernant sa compétence à l'égard de la RFY, la Cour n'a tranché cette question, «pour la simple raison qu'aucune des Parties n'avait mis en doute l'éventuelle qualité de partie de la RFY à la convention sur le génocide» (CR 2006/13, p. 38, par. 4.17). Nous espérons que M. Varady continue à être de cet avis lorsque nous affirmons qu'une décision ne peut pas être considérée comme ayant tranché une question si cette question n'a jamais été pleinement débattue, de bonne foi, par des parties dont les intérêts s'opposent réellement.

32. Si c'est le cas, Monsieur Varady, vous conviendrez sans doute que les arrêts de 2004 relatifs à la *Licéité de l'emploi de la force* ne sauraient constituer un précédent valable pour la présente affaire parce que, en 2004, Belgrade, le demandeur n'avait aucun intérêt de bonne foi à contester les moyens de défense des défendeurs — la Belgique et le Canada — qui ont fait valoir, avec succès, que Belgrade n'avait pas le droit d'introduire cette instance. Puisqu'il n'était pas dans l'intérêt du demandeur, dans les affaires de l'OTAN, de contester l'argument des défendeurs selon

lequel Belgrade n'était ni membre de l'ONU, ni partie à la convention sur le génocide, on ne peut

**36** pas dire que la Cour, dans ces affaires, ait eu le bénéfice d'échanges d'arguments complets et de bonne foi. Nous retrouvons ici le problème de la bonne foi des plaideurs. La RFY, qui avait introduit l'affaire tranchée en 2004, se disait victime d'un génocide commis par certains Etats membres de l'OTAN, accusation on ne peut plus grave. Et lorsque deux de ces Etats ont fait observer que la RFY n'était peut-être ni membre de l'ONU, ni partie à la convention sur le génocide, la RFY s'est-elle défendue contre cet argument qui, s'il était retenu, allait forcément conduire au rejet de sa demande ? Selon moi, Madame le président, le défendeur n'était que trop heureux de perdre sur ce terrain, parce que cela lui donnait une meilleure chance de succès dans la présente affaire. Je le répète avec tout le respect que je dois à la Cour : un précédent établi dans de telles circonstances doit être omis, ou écarté, et non pas répété.

33. Permettez-moi, Madame le président, de rappeler brièvement les arguments qui furent opposés à la Serbie-et-Monténégro dans les affaires de l'OTAN. Dès 1999, au sujet de la demande en indication de mesures conservatoire déposée par Belgrade, le Canada, représenté par M. Philippe Kirsch, alors ambassadeur, avait ouvert la procédure orale en affirmant à la Cour que :

> «la République fédérale de Yougoslavie n'est pas partie au Statut de la Cour. La Yougoslavie n'a pas rempli les conditions requises par les organes politiques de l'Organisation des Nations Unies pour être admise au sein de cette organisation et ne saurait automatiquement bénéficier de la qualité de Membre du précédent Etat de Yougoslavie».

Ce n'est donc pas comme si la question n'avait pas été soulevée ou comme si elle n'était pas importante. L'équipe juridique de Belgrade devait savoir que, si elle ne parvenait pas à réfuter cet argument dans cette instance-là, la RFY serait privée d'accès à la Cour et ne pourrait pas se présenter devant elle pour demander des réparations en vertu de l'article IX de la convention. Pour triompher, elle devait faire un effort pour démontrer la qualité de continuateur qu'elle revendiquait depuis longtemps.

34. En 1999, elle fit effectivement un effort dans ce sens, faisant valoir qu'elle était bien l'Etat continuateur, que d'ailleurs l'ONU lui demandait toujours de payer sa contribution annuelle et que, en fait, elle la payait en partie. Le 5 janvier 2000, la RFY déposa un mémoire sur le fond, dont la partie 3.1 s'intitule «La République fédérale de Yougoslavie est un Etat Membre des Nations Unies» et la partie 3.4, «La compétence de la Cour au titre de l'article IX de la convention

sur le génocide». Je n'ennuierai pas la Cour en lui exposant tous les excellents arguments avancés par la RFY à l'appui de ces propositions, car je ne ferai en cela que répéter une grande partie de ce que mes collègues et moi-même soutenons en la présente instance.

**37** 35. Cependant, le 18 décembre 2002, tout cela changea brusquement. La RFY, en «complét[ant] ses communications antérieures» — complétant ? — informa la Cour qu'elle était devenue «*nouvellement* [les italiques sont dans l'original] Membre de l'Organisation des Nations Unies». Mais elle alla beaucoup plus loin. Non seulement la RFY, sous un nouveau nom, était devenue un nouveau Membre de l'Organisation, mais en plus, soutenait-elle — et c'est ce qui importe ici — «il en découl[ait] qu'elle ne l'était pas avant cette date». Vraiment ? Et pourquoi ? Quant à la convention sur le génocide, la RFY informa la Cour que, n'ayant jamais été membre de l'ONU, elle n'avait jamais été partie à la convention sur le génocide «avant d'adhérer à cette convention (avec une réserve à l'article IX) en mars 2001».

Le PRESIDENT : Monsieur le professeur, je pense qu'il serait temps de faire une pause. Nous reprendrons sous peu. L'audience est suspendue.

*L'audience est suspendue de 16 h 30 à 16 h 45.*

Le PRESIDENT : Veuillez vous asseoir. Monsieur Franck, vous pouvez poursuivre.

M. FRANCK : Madame le président, avant la pause je faisais allusion au changement survenu dans l'attitude de la RFY le 18 décembre 2002, date à laquelle elle a informé la Cour qu'elle complétait ses communications antérieures et qu'elle était nouvellement devenue Membre de l'ONU, d'où il découlait qu'elle ne l'était pas avant cette date, et elle a notifié son adhésion à la convention sur le génocide avec une réserve à l'article IX.

36. M. Varady, qui a toute ma sympathie à cet égard, s'est alors trouvé soudain dans la situation délicate de devoir communiquer à la Cour cette volte-face vertigineuse en 2002; il l'a fait en priant la Cour «de statuer sur sa compétence à la lumière de l'argumentation exposée» par son gouvernement. Mais de quelle argumentation s'agissait-il ? Celle qui insistait sur le statut d'Etat continuateur, ou la communication de dernière minute par laquelle il était renoncé à ce statut ? Et s'il s'agissait de cette dernière, pourquoi n'était-il pas tout simplement mis fin à la procédure ?

Dans ses plaidoiries en 2004, M. Varady a insisté sur le fait que la communication de décembre 2002 à la Cour n'était «pas une notification de désistement, comme l'[avait] prétendu la plupart des défendeurs…» (CR 2004/14, p. 20, par. 27), en ajoutant : «nous n'avons ni informé la Cour que nous n'allions pas poursuivre la procédure, ni dit quelque chose d'approchant» (*ibid.*, p. 20, par. 30). Mais évidemment, la position de la RFY était devenue intenable, et le conseil devait en avoir conscience. Pourquoi la RFY a-t-elle donc poursuivi la procédure ?

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37. La réponse à cette question a été très bien donnée à l'audience du lendemain par M. Daniel Bethlehem, représentant la Belgique, qui a déclaré :

> «Il n'est pas demandé à la Cour [dans cette déclaration] — non plus qu'ailleurs dans les conclusions orales du demandeur — de se déclarer compétente. Il ne lui est pas demandé de faire droit à la prétention de la Serbie-et-Monténégro affirmant la compétence. L'agent de la Serbie-et-Monténégro n'a pas prié la Cour de rejeter la principale exception d'incompétence formulée par la Belgique sur la base de la non-appartenance de la Serbie-et-Monténégro à l'Organisation des Nations Unies à la date critique. Sur ce dernier point, les parties sont toujours d'accord. Et … cette appréciation commune, s'agissant de cet aspect liminaire de la compétence, est déterminante dans l'affaire soumise à la Cour.» (CR 2004/15, p. 10, par. 8.)

38. «Cette appréciation commune» du demandeur et du défendeur. En effet, elle était déterminante. Et elle était déterminante, non pas sur la base d'une argumentation complète et raisonnée présentée par des parties en désaccord, mais en raison de ce que M. Bethlehem a justement appelé une «appréciation commune» entre la RFY et certains des Etats de l'OTAN qui avaient contesté le statut du demandeur. On peut comprendre pourquoi certains membres de la Cour se sont peut-être sentis obligés d'accepter «cette appréciation commune» aux fins de cette affaire particulière. Mais ce n'est pas de cela que sont faits les grands principes du droit. Et même, si les parties avaient été, non pas des Etats, mais des boxeurs sur un ring, l'un d'eux aurait très bien pu être disqualifié à vie pour avoir fait seulement semblant de se battre.

39. Il pourrait sembler étrange que Belgrade n'ait pas vigoureusement fait valoir son droit, en tant que partie à la convention sur le génocide à la date critique, d'engager son action contre les Etats de l'OTAN. Il pourrait sembler étrange que Belgrade n'ait même pas fait un effort symbolique pour réfuter les affirmations des Etats défendeurs contestant sa qualité de Membre de l'ONU à l'époque critique et de partie à la convention sur le génocide. Mais, comme M. Varady l'a expliqué par la suite, les tacticiens de l'équipe juridique ne demandaient pas mieux que de

poursuivre l'affaire, et de la perdre précisément à cause de cet argument selon lequel cette nouvelle Yougoslavie n'était pas, et n'avait pas été, *cette autre Yougoslavie*. Son «principal objectif stratégique», avait déclaré M. Varady, avait été de «transformer la responsabilité collective en responsabilité individuelle»[40]. Il était trop évident qu'en perdant, comme il allait inévitablement le faire, sa cause contre les Etats de l'OTAN sur un point de procédure aussi circonscrit, Belgrade s'assurait un avantage pour la suite, l'affaire contre la Bosnie, la plus importante.

**39** 40. Mais s'il n'était pas dans l'intérêt de Belgrade, dans les affaires contre les Etats de l'OTAN, de disputer de la question de sa qualité de Membre de l'ONU ou de partie à la convention sur le génocide alors, sûrement, Madame et Messieurs les juges, on ne peut pas dire que la Cour ait eu le bénéfice d'un échange complet d'arguments sur cette question par des parties véritablement opposées par un différend. Pour reprendre les termes de M. Varady lui-même, la décision ne pouvait avoir qu'un effet très limité «pour la raison évidente qu'aucune des parties n'avait vraiment contesté le statut de la RFY».

41. Autrement dit, Madame le président, si la Cour ne se considère pas — comme nous pensons qu'elle devrait le faire — comme liée par les décisions qu'elle a déjà rendues sur sa compétence en l'espèce en 1996 et en 2003, nous la prions respectueusement de se considérer du moins comme entièrement libre de déterminer *de novo* dans une procédure véritablement contradictoire — celle-ci — si la RFY était effectivement Membre de l'ONU et partie à la convention sur le génocide au moment où le génocide allégué a été perpétré. Pour l'aider dans cette tâche, ma collègue et amie, Mme Stern, démontrera que la RFY est restée Membre de l'une et partie à l'autre pendant toute la période cruciale. Il s'ensuit que vous continuez à avoir compétence pour connaître de ce différend.

**Le défendeur veut faire admettre une symétrie entre droits et obligations**

42. Le défendeur veut faire admettre une symétrie entre droits et obligations pour vous convaincre de l'applicabilité du précédent des affaires de l'OTAN à la présente espèce. Pour décider si la RFY est restée Membre de l'ONU pendant la période pertinente du génocide, vous examinerez bien sûr les décisions prises par le Conseil de sécurité concernant son statut. Le

[40] 12 NIN 9, décembre 2004.

défendeur voudrait vous voir conclure que le Conseil de sécurité avait décidé qu'il n'était pas membre, et que ce statut de non membre était la conséquence de la décision prise par les organes politiques de l'ONU de suspendre certains de ses droits de participation. Cette déduction est tout à fait injustifiée, car ces résolutions ont simplement créé une asymétrie entre les droits de la RFY et ses obligations en vertu de la Charte.

43. La décision d'imposer une asymétrie temporaire entre droits et obligations est une arme utilisée fréquemment par les institutions pour amener les Etats récalcitrants à se conformer à leurs obligations. Une juste interprétation des mesures prises par le Conseil de sécurité et l'Assemblée
**40** générale pour restreindre les droits de Membre de la RFY devrait vous amener à conclure que ces mesures concordent mieux avec l'idée que la RFY était et restait Membre qu'avec l'idée contraire.

44. L'imposition d'une telle asymétrie entre droits et obligations est une méthode courante pour réprimer le non-respect de la loi et, peut-être, induire un changement de comportement. Dans le droit national de certains pays, par exemple, les personnes incarcérées pour crimes n'ont pas le droit de vote, mais elles doivent néanmoins payer des impôts. En droit anglais, les étrangers ennemis peuvent être poursuivis même s'ils n'ont pas eux-mêmes le droit de poursuivre[41]. Aux Etats-Unis, les sociétés étrangères peuvent, dans certains cas — par exemple le défaut d'inscription au registre —, se voir refuser le droit d'agir devant les tribunaux, sans échapper pour autant à la juridiction de ces mêmes tribunaux (voir Arizona Revised Statutes, titre 10, chap. 15 ; Foreign Corporations, 10-1502A et E ; Delaware General Corporation Law, art. 383 *a)* et *b)*).

45. Dans le droit des Nations Unies, il n'y a pas non plus de raison de présumer que l'imposition d'une telle asymétrie à un Etat qui ne se conforme pas à ses obligations puisse dispenser cet Etat de tous ses devoirs envers l'Organisation, et encore moins de toutes ses obligations conventionnelles. Ce n'est pas une simple conjecture de ma part, c'est ce qui ressort clairement de la pratique de l'ONU. Lorsque, en 1974, l'Assemblée générale a rejeté les lettres de créance des représentants accrédités auprès d'elle par la République d'Afrique du Sud[42] et qu'elle a refusé aux représentants de Pretoria le droit de prendre la parole et de voter, chacun savait que l'intention n'était nullement de retirer au régime d'apartheid sa qualité de Membre de l'ONU ou de

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[41] *Amin c. Brown* [2005] EWHA 1670 (Ch.).

[42] Nations Unies, doc. A/PV.2281 (1974), p. 76 et 86.

le décharger des obligations découlant pour lui de la Charte, des résolutions impératives du Conseil de sécurité ou des traités en vigueur. Au contraire, la décision de limiter le droit de participation de l'Afrique du Sud — qui créait un précédent — avait pour but d'inciter cet Etat à se conformer à ses obligations de Membre, et non pas de lui donner un moyen facile de s'y soustraire.

46. Les deux cas ne sont pas identiques mais, si je cite le précédent des lettres de créance de l'Afrique du Sud, c'est pour démontrer que les organes politiques de l'ONU ont découvert que suspendre le droit d'un Etat à prendre la parole et à voter à l'Assemblée générale est un moyen de faire pression sur lui pour qu'il se conforme aux décisions des Nations Unies, et ne revient en aucun cas à le dispenser de toutes les obligations découlant pour lui de la Charte ou des traités.

**41** 47. Madame et Messieurs de la Cour, si vous considérez maintenant que vous devez une nouvelle fois réexaminer la question de votre compétence, veuillez tenir compte de tout ce que je viens d'exposer. Qu'on ne vous fasse pas croire que, lorsque les organes principaux de l'ONU ont décidé de restreindre les droits de la RFY, ils entendaient en même temps la dispenser de ses obligations ou lui retirer sa qualité de Membre. En vertu de la Charte des Nations Unies, même un Etat qui a été suspendu — ce qui n'était pas le cas de la RFY — reste Membre, reste tenu de s'acquitter des obligations que lui impose la Charte, y compris celle de l'article 25, «d'appliquer les décisions du Conseil de sécurité…».

48. Ce serait un comble, en effet, que la mesure prise par le Conseil de sécurité et l'Assemblée générale précisément pour obliger la RFY à se conformer aux obligations que lui impose la Charte soit considérée comme déchargeant en même temps la RFY de son devoir de respecter ces mêmes obligations.

49. La vérité, Madame le président, est tout simplement que, en 2004, la Cour n'avait pas été pleinement informée des mesures que l'ONU avait prises à l'égard de la RFY à l'époque où le génocide était commis, époque où le défendeur continuait à exercer, à New York et aussi à La Haye, un grand nombre de ses prérogatives de Membre de l'ONU et de partie à la convention sur le génocide. La RFY ne plaidait pas avec sérieux dans le cadre des affaires de l'OTAN. Je vous en prie, ne cédez pas, ne vous laissez pas aller à penser que cette décision de 2004 peut vous donner des indications utiles pour résoudre les questions très différentes et hautement complexes que pose la présente affaire qui, elle, est extrêmement sérieuse.

50. Pour toutes ces raisons, les affaires de l'OTAN, un peu — paradoxalement — comme le statut juridique de la RFY à l'ONU entre 1992 et 2001, devraient être écartées en raison de leur spécificité. Elles ne méritent certainement pas d'être considérées comme une réponse, aux fins de la présente instance, aux questions délicates concernant le statut du défendeur et les obligations découlant pour lui de la Charte des Nations Unies et de la convention sur le génocide.

51. En conclusion, Madame le président, la Bosnie considère que vos décisions antérieures sur votre compétence sont *res judicata*. Elle considère que, en voulant revenir sur sa position concernant son statut de Membre de l'ONU et de partie à la convention sur le génocide, et en cherchant à la dernière minute à se soustraire à la compétence de la Cour, Belgrade viole les principes de la bonne foi des plaideurs et qu'il faudrait y faire obstacle le cas échéant par la voie de l'*estoppel*. Nous sommes convaincus que les affaires de l'OTAN ne peuvent pas être utilisées pour valider une telle tactique, que la question du statut du défendeur à l'époque critique impose une évaluation complète de toutes les preuves pertinentes et que ces preuves montrent que le défendeur était Membre de l'ONU à cette époque, sous réserve de quelques restrictions importantes apportées à ses droits en vue d'obtenir de lui qu'il respecte ses obligations internationales, y compris celles que lui imposait la convention sur le génocide.

**42**

Je vous remercie, Madame le président, Messieurs de la Cour.

Le PRESIDENT : Je vous remercie, M. le professeur.

Mr. FRANCK : I ask you to call on my colleague, Professor Brigitte Stern.

The PRESIDENT: Professor Stern, you have the floor.

**42**

Ms STERN:

**WHEN THE 1996 JUDGMENT WAS HANDED DOWN, THE RESPONDENT HAD TO BE REGARDED AS PARTY TO THE GENOCIDE CONVENTION**

1. Madam President, Members of the Court, following on from my two colleagues, who have already addressed the issue of your jurisdiction, it is now my task to show you, on an alternative basis, that, even if you today felt compelled to reconsider the principle of your jurisdiction in 1993, you would be bound to take exactly the same decision, because in 1993, at the time when the

Application was filed — as in 1996 when you rendered your decision — the FRY was a Member of the United Nations and party to the Genocide Convention.

2. As the Agent of Serbia and Montenegro, Mr. Stojanovic, stated in his opening address, "the Court must determine whether the Respondent had access to the Court *when the Application was filed* — and I stress that he indeed said 'when the Application was filed' — and whether the Court had jurisdiction with respect to the Respondent pursuant to Article IX of the Genocide Convention"[43]. Here at least is one point on which both Parties are agreed, and one cannot see how it could be otherwise (see *inter alia 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, Judgment of 3 February 2006*, para. 54).

**43** 3. Of course the situation has evolved since 1993, when these proceedings commenced. We note what Professor Varady said in regard to the changes brought about by the new democratic Government following the overthrow of the Milosevic régime, which he described in the following terms:

> "Many things were changed or redirected — and many things still have to be changed or redirected.
>
> At a number of critical junctures, the new Government of the FRY opted to follow the position taken by the majority of States in the international community — including that of the Applicant . . .
>
> We accepted a status and all of its consequences . . ."[44]

4. That is all very fine, but it simply means that, having for years insisted that it was the continuator, as regards both its status within the United Nations and its participation in international treaties, and after being for years the *effective continuator*, the new Government was at last going to accept, *for the future*, the status that the international community had been urging upon it. It is surely inconceivable that what was basically a positive attitude, which looked to the future, could be misdirected so as to nullify retroactively proceedings instituted by Bosnia and Herzegovina in respect of which the International Court had already accepted jurisdiction, thus conferring on the Applicant what might be termed, so to say, a *vested right in seeing justice done*:

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[43]CR 2006/12, p. 11, para. 7 (Stojanovic).

[44]CR 2006/12, pp. 58-59, paras. 1.52-1.55 (Varady).

a vested right in having the truth established regarding the ethnic cleansing suffered by Bosnia and Herzegovina. A truth, incidentally, for which the need is all the more urgent now that Mr. Milosevic has escaped international justice. How, out of one mouth — that of Mr. Stojanovic — can the Respondent admit that "[s]erious crimes were committed during the war in Bosnia and Herzegovina. The Bosnian Muslims suffered worst"[45], while, out of another — that of Professor Varady (but also those of Mr. Djeric and Professor Zimmermann) — it attempts to exploit the real progress made by Serbia and Montenegro towards rejoining the community of democratic States by, in an unjustified and unjustifiable manner, throwing the cause of international justice into reverse? Is Serbia and Montenegro then telling us that, because, after eight years of refusal — after assuming the role of continuator with all the consequences attaching thereto — it has finally agreed to don the garb of successor, all should now be as if it had accepted the role of successor from the outset? I am bound, moreover, to note that, from time to time in its
**44** oral argument Serbia has clothed its invitation to the Court to reverse its previous decisions in an aura of goodwill: its counsel have suggested that, in the same way that "the recent 2004 *Legality of the Use of Force* Judgments have, by setting aside disputes of the past, paved the way for further improving . . . political relations . . ."[46], a decision by this Court finding that it has no jurisdiction — and hence that it cannot pass judgment upon the acts committed by the Federal Republic of Yugoslavia — would, so they tell us, pave the way for further improving political relations between the two countries appearing before you today. I will confine myself to repeating to you what the Agent of Bosnia told you on the first day of the first round of these hearings, namely that there can be no true peace and reconciliation without justice[47]. And a refusal to pass judgment can in no circumstances — by definition — result in justice.

5. Thus Serbia and Montenegro contends that the entire proceedings must be retroactively reconstructed on the basis of the 2004 Judgments — or rather, I should say, "deconstructed" — since this would be to deny a jurisdiction already accepted and to nullify proceedings that are currently ongoing. In this sapping operation, the arguments of Serbia's counsel are cumulative,

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[45] *Ibid.*, p. 11, para. 6 (Stojanović).

[46] CR 2006/13, p. 37 para. 4.7 (Zimmermann).

[47] CR 2006/12, pp. 21-22, paras. 15-16 (Softić).

and well summarized by Professor Varady at the close of his initial presentation on 8 March last. I would remind you of what he said:

> "We shall point out two reasons, each of which is sufficient to yield the conclusion that this honoured Court has no jurisdiction in this case. First, we shall demonstrate that the FRY (now Serbia and Montenegro) had no access to the Court at the relevant moment when the Application was submitted. The second reason leading to the conclusion of lack of jurisdiction in this case is that Serbia and Montenegro never became bound and is not bound by Article IX of the Genocide Convention, which is the only purported ground of jurisdiction."[48]

6. Logic, Madam President, Members of the Court, would require that Bosnia confines itself to rebutting this second point, since it has consistently sought to found your jurisdiction solely on Article IX of the Genocide Convention, and that it should not reply — or at least do so on a wholly subsidiary basis — to the arguments on the Court's jurisdiction based on the issue of the FRY's membership of the United Nations. Notwithstanding that Serbia and Montenegro, whilst relying on its so-called non-membership of the United Nations as its main argument, also uses that issue in order to seek to show — over and over again — that the Genocide Convention is not applicable, I shall nonetheless concentrate today exclusively on our opponents' attempts to deny your jurisdiction on the basis of Article IX of the Genocide Convention, and will leave for Monday morning my demonstration that the FRY must also be regarded as having been a Member of the United Nations.

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The PRESIDENT: Professor Stern. I am afraid that it is the usual request. Could you please speak a little more slowly?

Ms STERN: I am sorry, I will try.

7. Before coming to the main thrust of my presentation, which I shall try to take more slowly, I must therefore draw the Court's attention to the consistency of the strategy followed by Serbia and Montenegro since the start of this case: rather than accepting that the Court should consider its conduct in relation to the Genocide Convention — and given its repeated claims that there has been no genocide, that should not worry it — rather than doing that, it has preferred to

[48] *Ibid.*, p. 59, para. 1.57 (Varady).

commit virtually all the energy of its Agents and counsel to removing the Genocide Convention from consideration by this Court.

8. In 1993 and 1996, the sole aim pursued by what was then the Federal Republic of Yugoslavia — but we shall see that, while the name changes, the strategy remains the same — was to achieve what I referred to at the time as a "disqualification of the Genocide Convention, whose universal scope has nonetheless been recognized by the Court"[49]. That remains in 2006 what is at stake in what Professor Varady somewhat casually refers to as "the procedural aspect of this complex case"[50]. True, he admits a few paragraphs further on: "[a]pproaching issues of procedure, I do not want to disregard the fact that in this case . . . the allegation pertains to genocide, probably the greatest crime known"[51]. But he at once forgets what he has just said: having paid "lip service", in that very expressive English phrase, to humanitarian considerations, he immediately ignores them, immersing himself in legal quibbles, whose purpose is *to prevent your Court from examining* acts committed in Bosnia and Herzegovina, and thus to avoid any possibility of the truth coming out and of justice being done.

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9. In 1996 — as I need hardly remind you — one of the main arguments relied on by the Federal Republic of Yugoslavia in order to disqualify the Convention was to deny that Bosnia and Herzegovina was a party thereto. As you well know, the Court rejected that argument in its 1996 Judgment. However, at that time the FRY had not thought of the converse argument. Now it has done so, and here it is daring to defend before you, despite its numerous statements to the contrary, despite the fact that it had raised no preliminary objections based on its non-participation in the Genocide Convention, despite its reliance on the Convention in order to submit to the Court a counter-claim in which it accused Bosnia and Herzegovina of genocide against the Serbs, and despite its reliance on the Convention in order to bring proceedings against eight member countries of NATO, it now comes to this Great Hall of Justice and tells us that "there is no conceivable way

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[49]CR 1996/9, p. 9 (Stern).

[50]CR 2006/12, p. 39, para. 1.2 (Varady).

[51]*Ibid*., para. 1.5 (Varady).

in which Serbia and Montenegro could have either remained or become bound by Article IX of the Genocide Convention"[52].

10. As the Agent of Bosnia and Herzegovina has already pointed out[53] what Serbia and Montenegro has just told you in 2006 is that, because ten years ago you rejected its arguments that Bosnia and Herzegovina was not a party to the Genocide Convention, well, so what? Here is another argument for you, ten years on: it was Serbia and Montenegro that was not party to the Convention. It is clear, Members of the Court, from the mere enunciation of such a claim, that you cannot accept it.

11. Bosnia and Herzegovina will therefore show you that this attempt to disqualify the Convention cannot and must not succeed. To do so, I will begin by showing that the Federal Republic of Yugoslavia was undeniably a party to the Genocide Convention in 1993.

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## I. It is impossible to deny that the FRY was party to the Genocide Convention in 1993

### 1. The Court has already ruled that the FRY was party to the Genocide Convention in 1993

12. Professor Zimmermann contended the contrary, stating: "the Court has so far never decided upon the succession of Serbia and Montenegro with regard to the Genocide Convention, which issue, therefore, for that reason too, is not *res judicata*"[54]. But the issue is not whether the Court has decided upon successor State status, which is of little significance; the real issue, the fundamental issue, is *the status of the Federal Republic of Yugoslavia as a State party to the Genocide Convention*. And on this point, Madam President, Members of the Court, you could only have found, with the authority of *res judicata*, that the Federal Republic of Yugoslavia, now Serbia and Montenegro, was party to the Convention. Had you not done so, you simply could not have declared yourselves competent, as you so undeniably did.

13. I note that, while it is in principle only the operative part of a judgment of the Court that carries the authority of *res judicata*, thus rendering it binding, and that, by the same token, the "reasons contained in a decision, at least in so far as they go beyond the scope of the operative part,

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[52]CR 2006/12, p. 54, para. 1.57 (Varady).

[53]CR 2006/30, p.11, para. 6 (Softić).

[54]CR 2006/13, p. 38, para. 4.11 (Zimmermann).

have no binding force as between the Parties concerned" (*Polish Postal Service in Danzig, Advisory Opinion, 1925, P.C.I.J., Series B, No. 11*, pp. 29-30), that statement by the Permanent Court of International Justice means, *a contrario*, that the reasons which do not go beyond the scope of the operative part or which support it are, of course, also binding. Applying that reasoning to the circumstances of the present case, this distinction enables us to conclude that, while the Court in its 1996 Judgment confined itself in the operative part to declaring that it had jurisdiction on the basis of Article IX of the Genocide Convention, it could not have reached such a conclusion without a prior finding in its reasoning — and I quote — that "Yugoslavia was bound by the provisions of the Convention on the date of filing of the Application in the present case, on 20 March 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)*, p. 610, para. 17). Inasmuch as this finding is "a condition essential to the Court's decision" (*Interpretation of Judgments Nos. 7 and 8 (Factory at Chorzów), Judgment No. 11, 1927, P.C.I.J., Series A, No. 13*, p. 20), that ground, which thus constitutes the condition *sine qua non* of the operative part, should also be considered as having the force of *res judicata*. Consequently, the Court's finding that Yugoslavia was bound by the Genocide Convention in 1993 enjoys *res judicata* authority.

14. In support of this claim that the Court had never decided whether the FRY was party to the Genocide Convention, Professor Zimmermann stressed, *inter alia*, that the FRY had raised no preliminary objection regarding its status as a party to the Genocide Convention — which we readily acknowledge, while wondering how such a "forgotten" objection can now be aired — and argued, despite all evidence to the contrary, that the Court could not have ruled on the Respondent's status, since the issue was never raised. However, as we know full well, the Court can perfectly well take decisions on issues which have not been raised, on issues which are not disputed, if it is of the opinion that they are significant and indeed Professor Zimmermann himself chose to remind us of that in a different context, when he told us:

> "Besides, one has also to take into consideration the fundamental nature of issues relating to the party status of a given State and its access to the Court which the

> Court itself has to enquire into and which is independent of any approach chosen by the parties."[55]

I agree with him entirely on this point. Even if it is undisputable — and no one can deny it — that the FRY raised no objection regarding its status as a party to the Convention, the Court nevertheless took a decision on this point, as it necessarily had to do in order to establish its jurisdiction.

15. How can it be argued that the issue of access to the Court was not decided back in 1996, since the Court clearly stated that its approach consisted in examining all aspects of jurisdiction? "Having reached the conclusion that it has jurisdiction in the present case, both *ratione personae* and *ratione materiae* on the basis of Article IX of the Genocide Convention, it remains for the Court to specify the scope of that jurisdiction *ratione temporis*." (*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.)

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As we can see, the Court overlooked nothing, considered everything, and undeniably reached a determination on all aspects of its jurisdiction. We can thus see what the Court already decided in 1993: that the FRY was party to the Genocide Convention.

16. It remains for me to show you that, even if you had not already established the status of both States as parties to the Convention, you would be bound to do so again now. You would also be bound to reject what I will call Serbia and Montenegro's "maximalist" argument that major legal obstacles barred it from even entertaining the idea of being a party to the Genocide Convention, and its more moderate argument — if we can call it that since the ultimate outcome is the same — that the circumstances of the succession process in the former Yugoslavia resulted in the Federal Republic of Yugoslavia no longer being a party to the Convention from, precisely, 27 April 1992.

17. We need to look at what Serbia and Montenegro wants to make you say. It wants to make you say that from 27 April 1992 until 12 June 2001, when it acceded to the Convention with a reservation (12 June to account for the 90 days for its accession of 12 March to come into force) — thus for a period of nine years — it was not a party to the Convention: nine years which

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[55]CR 2006/13, p. 42, para. 4.33 (Zimmermann).

included the period of ethnic cleansing in Bosnia, the originator of the proceedings before you today. Hence, throughout this period, Serbia and Montenegro was not bound by the Genocide Convention, notwithstanding repeated, official, public declarations to the contrary. The Court cannot accept such a conclusion.

**2. In 1993, the FRY could have been a party to the Genocide Convention**

18. I will therefore begin by rejecting what I have called the "maximalist" argument by demonstrating that in 1993 the FRY could have been a party to the Genocide Convention. That argument seeks to show that the conditions did not exist for even hypothetical participation in the Convention, and thus to demonstrate that the FRY could not even claim to be party to the Genocide
**50** Convention — and for two different reasons: first, because it was not a Member of the United Nations and, second, because, as a non-United Nations Member, it had not received a specific invitation by the Secretary-General to accede. These are not, of course, alternative conditions, but cumulative ones.

19. Before responding to this two-pronged assault on us by counsel for Serbia and Montenegro, I would like to say that the basic assumption underlying this restrictive interpretation appears to me to be misconceived. Misconceived because it is contrary to the Convention's very nature. Such a consideration has already been voiced in the present case in the separate opinion of Judge Parra-Aranguren appended to the 1996 Judgment, in which he emphasized "the importance of maintaining the application of such conventions of humanitarian character" (*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 Parra-Aranguren, para. 2). That view is, as I would remind you, largely in line with what the Court itself stated in its 1951 Advisory Opinion on *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*:

> "[t]he object and purpose of the Genocide Convention imply 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." (*Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, I.C.J. Reports 1951,* p. 24.)

20. It is, moreover, highly instructive to note that in resolution 368 (IV), "[i]nvitations to be addressed to non-Member States to become parties to the Convention on the Prevention and Punishment of the Crime of Genocide", adopted by the General Assembly on 3 December 1949, the intention was in no way to bar accession to the Convention, but rather to broaden it as far as possible.

21. This — important — general commentary over, I will now address Serbia and Montenegro's curious argument that it could not even claim to be a party to the Convention, when at the time it was loudly declaring the contrary. I will reply by saying that there is absolutely no

**51** validity to this objection for two cumulative reasons, which thus counter very precisely the two alleged obstacles to the Federal Republic of Yugoslavia's participation in the Genocide Convention.

22. First, I submit, although I will not show it today, that the Federal Republic of Yugoslavia could have been a party to the Genocide Convention because it was a Member of the United Nations in 1993. However, as I said, I will expand on that point on Monday.

23. Nevertheless, I will continue the analysis by demonstrating that if, for the sake of argument, we assume that the Federal Republic of Yugoslavia was not a Member of the United Nations — which Bosnia and Herzegovina does not accept — it could still have participated in the Genocide Convention. I will remind you of this second limb of Serbia and Montenegro's objection in the terms in which it was expressed by Professor Varady:

> "[n]ot every State can become a Contracting Party to the Genocide Convention. This Convention, of which the Secretary-General of the United Nations is the Depositary, is unconditionally open to Members of the United Nations. It is *not* unconditionally open to non-Members of the United Nations."[56]

24. However, the Federal Republic of Yugoslavia, as I will show you, Members of the Court, had no need whatsoever of a special invitation as the Respondent contends, since it was engaged in a succession process.

25. Nevertheless, before I show you that an invitation to accede was unnecessary for a non-United Nations Member State in the event of State succession, I would like to repeat the obvious, namely that, Member of the United Nations or otherwise, the Federal Republic of

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[56]CR 2006/13, p. 26, para. 3.31 (Varady).

Yugoslavia had no need for a specific invitation, quite simply *because it was party to the Genocide Convention*. It is agreed that the Secretary-General, who invites non-Member States to accede on behalf of the General Assembly, never addressed any such request to the Federal Republic of Yugoslavia, a point on which Bosnia and Herzegovina does not contest the position of Serbia and Montenegro. However, if this was the case and there was no invitation, it is because there was no reason to address such a request to the Federal Republic of Yugoslavia, since it was generally regarded as a party to the Convention. This was, in any case, the opinion of the Federal Republic of Yugoslavia itself, which was after all the most directly concerned.

**52** 26. It was also the opinion of the Secretary-General. We could thus view the very fact that he did not send such an invitation as evidence of his conviction that the Federal Republic of Yugoslavia was a party to the Genocide Convention. And that conviction is demonstrated by the United Nations documents. In a document entitled "Multilateral Treaties Deposited with the Secretary-General: Status as at 31 December 1992"[57], that is to say after 27 April 1992, a State called Yugoslavia is indicated as having been bound since the initial date of ratification by the Socialist Federal Republic of Yugoslavia. That entry could only refer to the Federal Republic of Yugoslavia, thus recognizing that it has retained the status of its predecessor State. In 1996, the Secretary-General even attempted to go further in recognizing the FRY's status as continuator of the treaty status of the SFRY: in the "Summary of Practice of the Secretary-General as Depositary of Multilateral Treaties" of 1996[58], he included the now famous paragraph 297, which stated that the Federal Republic of Yugoslavia continued to hold all the rights and duties with respect to international conventions of its predecessor. We all know of the political controversy among the five States born out of the former Yugoslavia, with four of them refusing to accept a privileged status for the Federal Republic of Yugoslavia, and the paragraph was withdrawn. But if things were no longer put down in black and white or expressed as clearly, the situation remained the same, that is to say, a State remained bound by the treaties of the SFRY, and that State could only be the FRY. In other fora, the situation was much clearer: for example, in the list of treaties

[57]United Nations doc. ST/LEG/SER.E/11, New York, 1993

[58]United Nations doc. ST/LEG/8, p. 89, para. 297.

adopted under the aegis of Unesco, after 27 April 1997, next to the name "Yugoslavia" was written "Federal Republic of Yugoslavia".

27. Thus, no need for an invitation, since such an invitation would have been an absurdity. Can we imagine the United Nations Secretary-General inviting a State party to the Genocide Convention to accede to it? The mere enunciation of such an hypothesis demonstrates its inanity.

28. I would also like to rebut Professor Zimmerman's interpretation of the letter of 8 December 2000 from the United Nations Legal Counsel to the FRY after its admission as a new Member of the United Nations in November 2000. I will read you the passage, which I only have in English: "It is the Legal Counsel's view that the Federal Republic of Yugoslavia should now

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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."[59] Professor Zimmermann inferred from this that "the approach taken by the Legal Counsel confirmed that the FRY had not been a party to the Genocide Convention beforehand"[60]. This conclusion is incorrect and goes beyond what the Legal Counsel said. I would simply note that the matter appears very much open, since, first, the Legal Counsel was requesting action "as appropriate" and, second and more importantly, the fact that the FRY was asked to clarify its intentions with respect to the treaties as a successor State after November 2000 does not mean in any way that it had not enjoyed, prior thereto, the status of continuator of the predecessor State: continuator with respect to treaties and with respect to the United Nations — a key point that I will address in greater detail after the weekend.

29. However, I will now take our alternative argument even further by submitting that, supposing that the FRY was neither a Member of the United Nations nor a party to the Convention, and that you are of the opinion that without an invitation from the Secretary-General a non-Member State cannot accede to the Convention — in regard to which you have, however, already had occasion to emphasize the importance of participation being as widespread as possible — there would still have been no need for an invitation in the present case, since there was an ongoing *succession process*, a possibility for which no provision is made in Article [XI] of the

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[59]CR 2006/13, p. 49, para. 4.57 (Zimmermann).

[60]*Ibid.*, para. 4.58.

Genocide Convention. I will not reread the Article, but it states in one of its paragraphs that an invitation is required for signature and, in another, for accession.

30. The invitation is an invitation to sign or an invitation to accede, but the Convention does not make any reference to an invitation to continue or to succeed. In the event of a succession process, the rules specific to State succession apply. In the present case, the predecessor State was indisputably party to the Genocide Convention, which, if we accept the principle of the automatic continuity of treaties, to which I will return shortly, would entail an *obligation to participate*, both for the continuator State and for the successor State; but, in any case, even if we reject the principle of automatic continuity, it would confer *a right to participate* upon the successor State,

**54** while the continuator State would, of course, necessarily remain bound by the treaty. How can one dare suggest that the States which emerged from the former Yugoslavia, one of the original signatories of the Convention, lacked the right to participate in it on the pretext that a succession process had occurred in that State? I think that in asking the question we have already answered it. This conclusion appears particularly pertinent here, since, given the object and purpose of the Convention, it is important that it should retain the same territorial scope of application.

31. True, I am aware that the Court in its 1996 Judgment, when examining whether Bosnia and Herzegovina was bound by the Genocide Convention, began its reasoning with the observation that Bosnia and Herzegovina was a Member of the United Nations and therefore could become a party in virtue of Article XI. This reasoning must, however, be seen within its context, which was set by the FRY's third preliminary objection, aimed at denying Bosnia, described as the "so-called Republic of Bosnia and Herzegovina" (*Application of the Convention for the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Yugoslavia), Preliminary Objections, Judgment, I.C.J. Reports 1996,* p. 604), the status of State, on the ground that by seceding it had violated the duties stemming from the right of peoples to self-determination. In other words, the Court evoked Bosnia's status as a Member of the United Nations in order to confirm its status as a State — a status necessarily implied by membership of the United Nations — a State established in conformity with international law, thus enabling Bosnia to rely on the rules on State succession and preventing the Federal Republic of Yugoslavia from challenging it under Article 6 of the Convention on the Succession of States with respect to Treaties, since

Article 6 concerns illegal successions. In such a distinctive context, it seems to me that it is not possible to draw any conclusions on the need, as Serbia contends, for a special invitation to accede to the Genocide Convention for all States born of a succession process. I would therefore simply recall that there is no reference to such an invitation in Article [XI], and that there appears to be no reason for requiring such an invitation in the context of a succession process.

32. Finally, in the further alternative, even if we were to assume that Serbia and Montenegro needed an invitation to accede to the Convention, it seems to me that the entire thrust of United
55 Nations policy towards that country was aimed at making it comply with the Convention. I will not quote once again all of the numerous resolutions that we have already cited so often, urging the FRY to abide by the Genocide Convention, which imply that it was a party or at least would suggest, if it was not, an invitation to participate in it. While I believe that we have thus refuted the "maximalist" argument, and while I hope that we have shown you that all the legal conditions were met for the Federal Republic of Yugoslavia to be entitled to be a party to the Genocide Convention, we must now address what I call the "moderate" position, which is that the Federal Republic of Yugoslavia was in fact not a party to the Genocide Convention.

### 3. The FRY was party to the Genocide Convention in 1993 because it had made a declaration of continuation of its international treaty status

33. Your Court had little difficulty in reaching such a conclusion, given that it was so obvious. In your Order of 8 April 1993, you first found that:

> "a compromissory clause in a multilateral convention, such as Article IX of the Genocide Convention relied on by Bosnia-Herzegovina in the present case, could, in the view of the Court, be regarded prima facie as a special provision contained in a treaty in force: whereas accordingly if Bosnia-Herzegovina and Yugoslavia are both parties to the Genocide Convention, disputes to which Article IX applies are in any event prima facie within the jurisdiction *ratione personae* of the Court" (*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. 19).

The Court therefore took as its starting point the idea that, at the provisional measures stage, it was sufficient for it to establish that the two States were parties to the Convention. We know that the main issue at that time was the party status of Bosnia. However, the Court endeavoured to ascertain that both States were parties.

34. As regards the FRY, the Court reached the conclusion that the FRY was a party by virtue of its expressed will. Bosnia and Herzegovina's party status was also ascertained by the Court, even if, let me repeat, the question of the legal basis for such status was left open. The conclusion thus reached was that both States were parties to the Convention, and that the latter could therefore be considered to afford a prima facie basis of jurisdiction at that stage (*ibid*., p. 16, para. 26).

**56** 35. Then, naturally, the same reasoning was adopted, only this time no longer on a prima facie basis, in the 1996 Judgment. I shall not repeat your entire reasoning, which is more familiar to you than to us. I think I need only remind the Court of the unambiguous conclusion adopted in 1996: "[t]hus, Yugoslavia was bound by the provisions of the Convention on the date of the filing of the Application in the present case, namely, on 20 March 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),* p. 610, para. 17; emphasis added).

36. Professor Varady attempted to cast doubt on this conclusion by suggesting that the assumption on which it is based was false. Thus, this is what he told us: he told us that the assumption of the continuity of treaty status was in reality founded on the assumption of the continuity of status within the United Nations, and that, since the assumption of continuity of status within the United Nations had been nullified by the admission of the Federal Republic of Yugoslavia to the United Nations in 2000, that should also have nullified the continuity of its treaty status. In actual fact, this was not at all the reasoning adopted by the Court. The Court did not rely on assumptions, it relied on the political and legal reality, the reality of the declaration by the Federal Republic of Yugoslavia that it considered itself bound by the treaties signed by the Socialist Federal Republic of Yugoslavia — the reality, therefore, of a declaration by a sovereign State that it was bound and that it would abide by all the obligations and all the treaties signed by the SFRY. It was precisely in 1996 that the Court, holding that both parties were bound by the Genocide Convention, *took its decision* — as you know — *without basing itself on the FRY's status within the United Nations, that is to say its status as a Member or non-Member, successor or continuator,* a question which it did not settle. There is no need to invoke the continuity of the Federal Republic of Yugoslavia within the United Nations in order to draw hypothetical

conclusions concerning the Genocide Convention. On the day it came into being, the Federal Republic of Yugoslavia said two things: it said first, "I hereby continue the status of the Socialist Federal Republic of Yugoslavia within the United Nations", and secondly, "I hereby assume all the treaty obligations of the SFRY". The Court analysed these two propositions as not being mutually related, and still less as possessing a cause-effect relationship, since it did not examine the former in order to take a position on the latter. This independent analysis of status within the United Nations and of treaty status is entirely consistent with the view that was taken by the United Nations, as expressed by the United Nations Under-Secretary-General for Legal Affairs, in his famous legal opinion of 16 November 1993: "The status of Yugoslavia as a party to treaties was not affected by the adoption by the General Assembly of resolution 47/1 of 22 September 1992 . . . It did not address Yugoslavia's status as a party to treaties."

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37. Your Court therefore simply concluded that the Federal Republic of Yugoslavia was bound, not on the basis of an assumption, as counsel for Serbia would like to have us believe, or on the basis of some inductive or deductive intellectual construct, but simply that it was bound on the basis of a reality which is central to all international law, namely the consent of States. Let me repeat once again, word for word, the language that you used: the Court relied on "[t]his intention thus expressed by Yugoslavia 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).

**4. Even if it was not considered to be a continuator State, the FRY was party to the Genocide Convention in 1993, by virtue of the rule of automatic succession to that universal treaty**

38. I shall pass over this question rapidly, merely pointing out that Article 34 of the Convention on Succession of States in respect of Treaties lays down this rule of automatic succession. I shall not waste your valuable time by discussing the scope of that Article — as you know, it has been the subject of debate — or the means of applying it to all treaties; I shall simply say that it is widely accepted that this principle applies to treaties incorporating norms of *jus cogens*.

39. Professor Zimmermann tried to convince you that this rule did not exist, totally ignoring Article 34, which he failed to cite even once. On the other hand, he extensively cited articles, commentaries, references concerning newly independent States within the meaning of the 1978 Convention on Succession in respect of Treaties[61]. Madam President, Members of the Court, I confess that I have given the matter a great deal of thought but have been unable to find the slightest connection between the Federal Republic of Yugoslavia and a newly independent State within the meaning of the Convention, and hence to find that these arguments have even the slightest relevance. To my knowledge, the Federal Republic of Yugoslavia has never claimed to be a newly independent State — a State previously colonized by Yugoslavia!

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40. I shall not, therefore, devote too much time to rebutting this argument, and I shall merely cite international practice and, in particular, the position adopted by the meeting of persons chairing human rights treaty bodies, who made the following observation: "[t]he chairpersons emphasized, however, that they were of the view that *successor States were automatically bound* by obligations under international human rights instruments from the respective date of independence"[62].

41. This was also the position taken, as you know, Madam President, by the Human Rights Committee — which you chaired at the time — when Bosnia submitted its report on compliance with the Covenant on Civil and Political Rights, a report which it submitted prior to any notification of succession, thereby giving concrete effect to the principle of automatic succession[63].

42. Lastly, I would note that, even though I know very well that the Court did not wish to resolve the issue of the rules of succession precisely applicable in 1996, it did not, however, rule out the possibility of automatic succession by Bosnia and Herzegovina to the Genocide Convention (*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),* para. 23).

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[61]See for example CR 2006/13, p.47, para. 4.51 (Zimmermann): "[f]requently, newly independent States will submit to the Secretary-General 'general' declarations of succession . . . The Secretary . . . *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"; or again, *ibid.*, p. 51, para. 4.70: "the evidence of State practice appeared to be unequivocally in conflict with the thesis that a *newly independent State* is under an obligation to consider itself bound by a general law-making treaty applicable in respect of its territory prior to independence".

[62]Meeting of 19 to 23 September 1994, United Nations, doc. E/CN4/1995/80, 28 November 1994, p. 4, para. 10. See also United Nations, doc. E/CN4/1996/76, 4 January 1996, p. 3, para. 8. emphasis added.

[63]See CCPR/C/79/Add.14, p. 2.

**5. Even if your Court did not recognize the applicability of the principle of automatic succession, the FRY was party to the Genocide Convention in 1993, as it was in any case bound as successor State by its many declarations**

43. Regardless of the subjective reason why the FRY expressed its objective intention to be bound by the Convention, international law is based on the sovereign expression of the will of States. A State cannot express its consent to be bound by a treaty and then, some years later, come forward to say that, in the final analysis, it has changed its mind and that such consent must be
**59** considered as never having been expressed. To accept such an approach would be to accept the collapse of the entire structure of international law.

**A declaration of will expressed publicly with the intention of binding its author has binding effect**

44. I need not recall this axiom, which you enunciated in the case concerning *Nuclear Tests (New Zealand* v. *France)*, and which is sufficiently well known for me not to read out the relevant passage (*Judgment, I.C.J. Reports 1974*, p. 267, para. 46). As you know, it is particularly important to take account of the statements made by the representative of a party in the course of judicial or arbitral proceedings, as these are considered to bind the parties[64].

45. I shall therefore review — albeit not exhaustively — a number of unilateral declarations by which the Federal Republic of Yugoslavia expressed its firm intention to be a party to the Genocide Convention and, if that is not enough, I shall also recall that it gave the same treaty undertaking in the Dayton Agreements.

**The many manifestations of the FRY's intention to be a party to the Genocide Convention**

**The FRY's intention as expressed in the documents of 27 April 1992**

46. My colleague Alain Pellet has already read out these documents and I shall therefore not go over them again, except to cite a phrase found in both the declaration by the "representatives of the people of the Republic of Serbia" and the Note addressed to the Secretary-General, where it is stated that the FRY "shall strictly abide by all the commitments that the Socialist Federal Republic of Yugoslavia assumed internationally".

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[64]See Award made on 17 July 1986 by the Arbitral Tribunal set up under the Special Agreement of 23 October 1985 between Canada and France in connection with the *Dispute concerning filleting within the Gulf of Saint Lawrence*, *RGDIP*, 1986, p. 756.

47. There is no doubt that, in the light of these declarations, all the conditions laid down in the *Nuclear Tests* case for unilateral declarations to be binding on a State are fulfilled in this case. These declarations create legal obligations, given the nature of their author, and I regard as futile the attempt made by Professor Zimmermann to minimize the scope of these texts by saying that they are purely political documents adopted by unauthorized bodies. I would point out nonetheless

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that these texts were transmitted to the Secretary-General, and that the Secretary-General was asked to circulate them as "official documents of the General Assembly"[65]. By acting in this way, the Federal Republic of Yugoslavia wished to make it known to all the Members of the United Nations that it was undertaking legal commitments. The declarations of 27 April 1992 thus constitute an immediate commitment with binding force for the Federal Republic of Yugoslavia.

48. As the Court indicated in the *Nuclear Tests* case, this commitment exists independently of any reaction by other States, that is to say, independently of any acceptance, but above all also independently of any reaction of rejection. And this could be important to our case. Hence, once again, these declarations expressed the intention of the Federal Republic of Yugoslavia, today Serbia and Montenegro, to be unconditionally bound by the treaties to which the SFRY was party.

**The intention of the FRY as manifested in its declarations during the proceedings in this case**

49. It has adopted a consistent line of conduct throughout all the stages of the proceedings.

50. During the proceedings relating to the request for the indication of provisional measures, it insisted, *inter alia*, on the fact that the Court's jurisdiction should remain confined to the Genocide Convention. I shall merely cite what Professor Rosenne said at the hearing on 2 April 1993: "[t]he Federal Republic of Yugoslavia does not consent to any extension of the jurisdiction of the Court beyond what is strictly stipulated in the Convention itself"[66].

51. This same line of conduct, as we know, was adopted during the *1996 oral pleadings*. Mr. Suy asserted on several occasions that the Convention could be applicable to the parties, and the only point that he discussed concerned the date of applicability; he attempted in particular to deny that the Convention was applicable with effect from 6 March 1992, the date of Bosnian

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[65] United Nations, doc. A/46/915, 6 May 1992.

[66] CR 1993/13, p. 15 (Rosenne). See also the letter cited in the Memorial of the Government of the Republic of Bosnia-Herzegovina, dated 15 April 1994, p. 155, para. 4.2.2.3.

independence. He admitted that it might be applicable from 29 December 1992, from
**61** 14 December 1995, the date of the Dayton Agreements, and from other dates as well, but the latest date accepted in the 1996 pleadings was the date of the Dayton Agreement[67].

52. Now, though, the Respondent tells us: "Oh no, no, no. We have been bound by the Genocide Convention only since 2001."[68] Thus, the date is today again put back, this time by six years.

**The intention of the FRY as confirmed by its treaty undertaking expressed in the Dayton Agreements**

53. But there is still more, there is also the fact that the intention of the Federal Republic of Yugoslavia was undeniably confirmed in the Dayton Agreements. We know that, in those Agreements, "the Parties agree to and shall comply fully with the provisions concerning human rights set forth in Chapter One of the Agreement at Annex 6 . . .".[69]

54. Agree to and shall comply fully with. In fact, the Genocide Convention is the first treaty that appears in that Annex. We also note that no restriction, no reservation, was entered by any of the Parties, which state that they shall "comply fully with" the Conventions. In other words, what we have here is a number of declarations which clearly show that the Federal Republic of Yugoslavia was bound.

55. Bosnia considers that it was bound from the day it came into being, 27 April 1992. But even if your Court adopted a later date, the Federal Republic of Yugoslavia could not escape its responsibilities, particularly the responsibilities incurred, for example, prior to the Dayton Agreements, since, as you know, in the 1996 Judgment, you clearly said:

> "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-Herzegovina. This finding is, moreover, in accordance with the object and purpose of the Convention . . ." (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Yugoslavia), Preliminary Objections, Judgment, I.C.J. Reports 1996 (II)*, p. 617, para. 34.)

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[67]CR 1996/6, p. 23 (Suy).

[68]CR 2006/13, p. 15, para. 2.19 (Varady).

[69]General Framework Agreement for Peace in Bosnia and Herzegovina (Dayton Agreements), 21 November 1995, in United Nations doc., letter dated 29 November 1995 from the Permanent Representative of the United States of America to the United Nations addressed to the Secretary-General, doc. A/50/790, doc. S/1995/999, 30 November 1995, p. 4.

**The interpretation of the various manifestations of the FRY will to be bound by the Genocide Convention**

**62** 56. As we have seen, the manifestations of the will to be bound are countless and consistent without the slightest exception; still, they have to be interpreted. We know that the declarations have legal import, but if we interpret them, we can see them as either a declaration of continuity or a notification of succession or — why not — as an act of accession, but regardless of the view taken, the result is the same: the Federal Republic of Yugoslavia manifested its will to be bound.

57. True, Professor Zimmermann argued that, because the Federal Republic of Yugoslavia undoubtedly intended to make a declaration of continuity as the continuator State, this declaration cannot be construed in any other way. And, in support of his argument, he states:

> "Let me quote what was said on behalf of the Applicant by my esteemed colleague Professor Brigitte Stern: 'On ne voit pas pourquoi la notification de succession, acte qualifié comme tel par un Etat souverain, devrait être considérée comme une notification d'adhésion' (CR 1996/9, pp. 32-33)."[70]

Well, I am of course very flattered that my esteemed colleague Mr. Zimmermann cites me as authority in support of his arguments, but he must surely know that, while I did indeed say what I said and he quoted me accurately, the Court, for its part, completely disagreed with me on this point. And I, for my part, rely on the authority of the Court, the sole source of authoritative interpretations. And the Court, having before it Bosnia's notification of succession, considered that it could interpret it as it wished. You are well aware that it did not take a position on the manner in which Bosnia and Herzegovina became a party; it said that Bosnia automatically became a party to the Convention, or it became one by the effect, retroactive or not, of its notification of succession; or indeed whether Bosnia might not be considered to have acceded to the Genocide Convention.

58. Thus it is for the Court to make legal characterizations. Nothing therefore prevents the International Court of Justice from analysing the multiple declarations by the Federal Republic of

**63** Yugoslavia as notifications of succession. Just as the Court did not specify in 1996 how Bosnia and Herzegovina had become a party, there is no need to ascertain how the Federal Republic of Yugoslavia became a party; what matters is determining whether States are bound, not identifying the legal process by which they became so.

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[70] CR 2006/13, p. 45, para. 4.43 (Zimmermann).

59. But Bosnia is going further. We are therefore going to show you, as I believe, that the Federal Republic of Yugoslavia was indeed a party to the Genocide Convention at the time when Bosnia's Application was filed. The Federal Republic of Yugoslavia does not stop at that point in its attacks on the Convention. No doubt thinking that it will fail, in the light of the clear facts, to convince the Court that it was not a party to the Convention, Serbia and Montenegro advances a new argument in support of its contention that the Convention does not apply, even if the two States were parties to it; this new argument is that the Genocide Convention was not a treaty in force within the meaning of Article 35, paragraph 2, of your Statute.

The PRESIDENT: Professor Stern, do you think that would be an appropriate point to hold over until Monday morning? You still have a fair way to go.

Ms STERN: I would need six or seven minutes.

The PRESIDENT: Then, please continue.

Ms STERN: Thank you, Madam President. Of course, since Bosnia and Herzegovina considers the Federal Republic of Yugoslavia to have been a Member of the United Nations in 1993, this discussion is in the alternative. I am therefore going to examine Article IX of the Convention, in force in 1996, as the sole basis for the jurisdiction of the Court.

**II. Article IX of the Genocide Convention is an independent, sufficient basis for the jurisdiction of the Court**

60. In denying that the Convention was in force, Serbia therefore now puts forward the thesis that this is not a convention in force within the meaning of Article 35, paragraph 2. Once again, it is going to base its argument *solely* on your Judgments in the *Legality* cases, which introduced a totally unprecedented interpretation of the expression "treaties in force".

**64** 61. We know that the *Legality* case produced a novel interpretation of the meaning of "treaty in force" — a novel interpretation seized upon by Mr. Djerić in asking the Court to reconsider its earlier interpretation. As the Court unambiguously stated, so Mr. Djerić tells us, in the *Legality* case, this clause applies only to treaties in force at the date when the Statute entered into force. A different position has, however, been taken in our case.

62. I would remind you that in the Court's Order indicating provisional measures you stated as follows in paragraph 19:

> "the Court . . . considers that proceedings may validly be instituted by a State against a State which is a party to such a special provision in a treaty in force, but is not party to the Statute, and independently of the conditions laid down by the Security Council in its resolution 9 of 1946 (cf. *S.S. Wimbledon", 1923, P.C.I.J., Series A, No. 1*, p. 6) . . . Article IX of the Genocide Convention . . . could . . . be regarded . . . as a special provision contained in a treaty in force" (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Provisional Measures, Order of 8 April 1993, I.C.J. Reports 1993*, p. 14, para. 19).

63. These prima facie conclusions adopted in 1993 were implicitly, but necessarily, again reached in 1996.

64. Let us not forget that the Court necessarily recognized in its 1996 Judgment that a treaty in force — and not just a treaty in force at the time when the Statute was adopted — could serve as the basis for its jurisdiction, independently of status as a party to the Statute, because it upheld its jurisdiction precisely without taking a position on the question of membership of the United Nations.

65. Bosnia and Herzegovina is asking the Court to hold that, on this point also, the 1996 Judgment is *res judicata*, and to refrain from retroactively importing into our case a finding which, as the President of this Court vigorously pointed out, there was no reason to reach, given that Article 35, paragraph 2, had not been invoked by Serbia and Montenegro. As the document in question is at present available only in English, I am going to quote it in the language of Shakespeare:

> "These Written Observations contained no invocation of Article 35, paragraph 2, as an alternative ground of jurisdiction — yet, going beyond what the Applicant requested in the present case, the Court has devoted some 23 paragraphs to laying the grounds for a finding that Article 35, paragraph 2, of the Statute could not have been an alternative basis for allowing access to the Court in respect of the Genocide Convention so far as Serbia and Montenegro is concerned. This exercise was clearly unnecessary for the present case. Its relevance can lie, and only lie, in another pending case." (*Legality of Use of Force, Preliminary Objections, Judgment*, 15 December 2004, separate opinion of Judge Higgins, para. 18.)

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66. Aside from the fact that from the procedural perspective that finding was unnecessary, it is also questionable as to its substance. I shall not dwell on this matter; I would just like to raise two points. The first is that there is no reason to give differing interpretations to the expression

"treaties in force" in Articles 35, 36 and 37, as was noted by Professor Rosenne, who writes: "[t]he expression *treaties in force* appears in Articles 35, 36, 37 of the Statute. This normally means that the treaty must be in force between the parties on the date when the proceedings are instituted."[71] The second point is that, even assuming that the expression does not have the same meaning in each of the three Articles, the interpretation adopted is by no means convincing. And indeed, in his separate opinion appended to the Court's Judgment in the case concerning *Legality of Use of Force*, Judge Elaraby criticized that interpretation from this standpoint, stating that "the interpretation adopted by the Court — limiting 'treaties in force' to treaties in force at the time the Court's Statute came into force — is unduly restrictive" (*Legality of Use of Force*, *Preliminary Objections, Judgment*, 15 December 2004, Point III "Access to the Court under Article 35, Paragraph 2", separate opinion of Judge Elaraby, para. 7).

67. In other words, whatever the true position may be, Bosnia and Herzegovina is asking the Court, as I have already said, to consider the Judgment to be *res judicata* on this point as well. It is therefore requesting the Court to decide this case on the basis of its own specific terms: in other words, by standing by what it said in 1996, that is, that it had jurisdiction on the basis of Article IX of the Genocide Convention, which means first that the two States in dispute before you were parties to the Convention and secondly that it was a convention in force. I hope to have convinced you that you were correct in your decision at that time. Thank you, Madam President.

**66** The PRESIDENT: Thank you, Professor Stern. The Court now rises and the hearings will resume on Monday next at 10 a.m.

*The Court rose at 6.05 p.m.*

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[71] S. Rosenne, *The Law and Practice of the International Court 1920-2005*, Vol. II, *Jurisdiction*. 4th Edition, Leiden/Boston, 2006, p. 641.