COUR INTERNATIONALE DE JUSTICE

RECUEIL DES ARRÊTS,
AVIS CONSULTATIFS ET ORDONNANCES

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

(SERBIE-ET-MONTÉNÉGRO c. BELGIQUE)

EXCEPTIONS PRÉLIMINAIRES

ARRÊT DU 15 DÉCEMBRE 2004

2004

INTERNATIONAL COURT OF JUSTICE

REPORTS OF JUDGMENTS,
ADVISORY OPINIONS AND ORDERS

CASE CONCERNING LEGALITY OF USE OF FORCE

(SERBIA AND MONTENEGRO *v.* BELGIUM)

PRELIMINARY OBJECTIONS

JUDGMENT OF 15 DECEMBER 2004

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CASE CONCERNING LEGALITY OF USE OF FORCE

(SERBIA AND MONTENEGRO *v.* BELGIUM)

PRELIMINARY OBJECTIONS

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

* *

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

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

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

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

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

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

Court cannot dismiss case in limine litis.

* *

Questions of jurisdiction — Court's "freedom to select the ground upon which it will base its judgment" — Distinction between present proceedings and other cases — Applicant's right of access to Court under Article 35, paragraph 1, of Statute, challenged — If not party to Statute at time of institution of proceedings, subject to application of Article 35, paragraph 2, Applicant had no right to appear before Court — Court must determine whether Applicant meets conditions laid down in Articles 34 and 35 of Statute before examining conditions in Articles 36 and 37 of Statute.

*

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

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

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

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

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

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

*

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

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

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

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

* *

Whether Article 4 of Convention of Conciliation, Judicial Settlement and Arbitration between Yugoslavia and Belgium of 25 March 1930 can provide basis of jurisdiction — Court's finding that it was not open to Applicant under Article 35, paragraph 1, of Statute — Whether Convention, concluded prior to entry into force of Statute, a "treaty in force" for purposes of Article 35, paragraph 2 — Convention envisaged jurisdiction of PCIJ — Conditions for transfer of jurisdiction from PCIJ to ICJ governed by Article 37 of Statute

but no similar substitution can be read into Article 35, paragraph 2, of Statute — Article 37 only applies between parties to the Statute — Article 35, paragraph 2, cannot give Applicant access to Court on basis of 1930 Convention — Unnecessary to examine whether Convention in force as between Parties at time of filing of Application.

*

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

* *

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

JUDGMENT

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

In the case concerning legality of use of force,

between

Serbia and Montenegro,

represented by

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

as Agent, Counsel and Advocate;

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

as Co-agent, Counsel and Advocate;

Mr. Ian Brownlie, C.B.E., Q.C., F.B.A., Chichele Professor of Public International Law (Emeritus), University of Oxford, Member of the Interna-

tional Law Commission, member of the English Bar, member of the Institut de droit international,

as Counsel and Advocate;

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

as Assistants;

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

as Technical Assistant,

and

the Kingdom of Belgium,

represented by

Mr. Jan Devadder, Director-General, Legal Affairs, Ministry of Foreign Affairs, Brussels,

as Agent;

Ms Valérie Delcroix, Conseiller adjoint, Directorate of Public International Law, Directorate-General of Legal Affairs, Ministry of Foreign Affairs, Brussels,

as Deputy Agent;

Mr. Daniel Bethlehem, Q.C., Director, Lauterpacht Research Centre for International Law, Cambridge,

as Counsel;

Ms Clare Da Silva, Research Assistant, Lauterpacht Research Centre for International Law, Cambridge,

as Assistant,

THE COURT,

composed as above,

after deliberation,

delivers the following Judgment:

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

> "by which it has violated its international obligation banning the use of force against another State, the obligation not to intervene in the internal affairs of another State, the obligation not to violate the sovereignty of

another State, the obligation to protect the civilian population and civilian objects in wartime, the obligation to protect the environment, the obligation relating to free navigation on international rivers, the obligation regarding fundamental human rights and freedoms, the obligation not to use prohibited weapons, the obligation not to deliberately inflict conditions of life calculated to cause the physical destruction of a national group".

The Application invoked as a basis of the Court's jurisdiction Article 36, paragraph 2, of the Statute of the Court, as well as Article IX of the Convention on the Prevention and Punishment of the Crime of Genocide, adopted by the United Nations General Assembly on 9 December 1948 (hereinafter "the Genocide Convention").

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

3. On the same day, the Federal Republic of Yugoslavia filed Applications instituting proceedings and submitted requests for the indication of provisional measures, in respect of other disputes arising out of the same facts, against Canada, the French Republic, the Federal Republic of Germany, the Italian Republic, the Kingdom of the Netherlands, the Portuguese Republic, the Kingdom of Spain, the United Kingdom of Great Britain and Northern Ireland and the United States of America.

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

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

6. Since the Court included upon the Bench no judge of the nationality of the Parties, each of them exercised its right under Article 31, paragraph 3, of the Statute to choose a judge *ad hoc* to sit in the case: the Yugoslav Government chose Mr. Milenko Kreća and the Belgian Government chose Mr. Patrick Duinslaeger. Referring to Article 31, paragraph 5, of the Statute, the Yugoslav Government objected to the latter choice. The Court, after deliberating, found that the nomination of a judge *ad hoc* by Belgium was justified in the provisional measures phase of the case.

7. By letter of 12 May 1999 the Agent of the Federal Republic of Yugoslavia submitted a "Supplement to the Application", invoking as a further basis for the Court's jurisdiction "Article 4 of the Convention of Conciliation, Judicial Settlement and Arbitration between the Kingdom of Yugoslavia and Belgium, signed at Belgrade on 25 March 1930 and in force since 3 September 1930".

8. By Order of 2 June 1999 the Court, after hearing the Parties, rejected the request for the indication of provisional measures submitted in the present case by the Federal Republic of Yugoslavia on 29 April 1999. By Orders of the same

date, the Court, after hearing the Parties, also rejected the requests for the indication of provisional measures in the nine other cases referred to in paragraph 3 and decided to remove from the List the cases against Spain and the United States of America.

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

10. By letter of 13 April 2000 the Agent of Belgium informed the Court that his Government confirmed its choice of Mr. Patrick Duinslaeger to sit as judge *ad hoc* in the case. By letter of 15 May 2000 the Agent of the Federal Republic of Yugoslavia, referring to Article 31, paragraph 5, of the Statute, indicated that his Government objected to the presence on the Bench of a judge *ad hoc* chosen by Belgium. By letter of 8 June 2000 the Agent of Belgium informed the Court of his Government's views on the matter. The ruling of the Court on the question is indicated in paragraph 18 below.

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

12. By letter of 18 January 2001 the Minister for Foreign Affairs of the Federal Republic of Yugoslavia, referring *inter alia* to certain diplomatic initiatives, requested the Court, for reasons stated in that letter, to grant a stay of the proceedings or to extend by 12 months the time-limit for the submission of observations by the Federal Republic of Yugoslavia on the preliminary objections raised by Belgium. By letter of 1 February 2001 the Agent of Belgium informed the Court that his Government was not opposed to the request by the Federal Republic of Yugoslavia.

By Order of 21 February 2001 the Court extended to 5 April 2002 the time-limit within which the Federal Republic of Yugoslavia might present a written statement of its observations and submissions on the preliminary objections made by Belgium.

13. By letter of 8 February 2002 the Agent of the Federal Republic of Yugoslavia, referring to "dramatic" and "ongoing" changes in Yugoslavia which had "put the [case] . . . in a quite different perspective", as well as to the decision to be taken by the Court in another case involving Yugoslavia, requested the Court, for reasons stated in that letter, to stay the proceedings or to extend for a further period of 12 months the time-limit for the submission by the Federal Republic of Yugoslavia of its observations on the preliminary objections raised by Belgium. By letter of 26 February 2002 the Agent of Belgium informed the

Court that his Government was not opposed to the request by the Federal Republic of Yugoslavia.

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

14. On 20 December 2002, within the time-limit as thus extended, the Federal Republic of Yugoslavia filed a written statement of its observations and submissions on the preliminary objections in the present case (hereinafter referred to as its "Observations") and filed an identical written statement in the seven other pending cases. By letter of 16 January 2003 the Agent of Belgium presented certain comments of his Government on those Observations.

15. By letter of 5 February 2003 the Ambassador of the Federal Republic of Yugoslavia to the Netherlands informed the Court that, following the adoption and promulgation of the Constitutional Charter of Serbia and Montenegro by the Assembly of the Federal Republic of Yugoslavia on 4 February 2003, the name of the State of the Federal Republic of Yugoslavia had been changed to "Serbia and Montenegro". By letter of 28 February 2003 the Agent of Serbia and Montenegro presented his Government's comments on the above-mentioned letter from the Agent of Belgium of 16 January 2003.

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

17. At a meeting held by the President of the Court on 12 December 2003 with the representatives of the Parties in the cases concerning *Legality of Use of Force (Serbia and Montenegro* v. *Belgium) (Serbia and Montenegro* v. *Canada) (Serbia and Montenegro* v. *France) (Serbia and Montenegro* v. *Germany) (Serbia and Montenegro* v. *Italy) (Serbia and Montenegro* v. *Netherlands) (Serbia and Montenegro* v. *Portugal) (Serbia and Montenegro* v. *United Kingdom)* in order to ascertain their views with regard to questions of procedure, the representatives of the Parties were invited to submit to the Court any observations which their Governments might wish to make, in particular on the following questions: organization of the oral proceedings; presence on the Bench of judges *ad hoc* during the preliminary objections phase; possible joinder of the proceedings (General List Nos. 105, 106, 107, 108, 109, 110, 111 and 113). In reply to the questions put by the President of the Court, the Agent of Belgium cited his Government's need to produce new documents, in view of important developments in the case since the filing of its preliminary objections. The Agent of Belgium also reaffirmed his Government's intention to exercise its right under Article 31, paragraph 3, of the Statute to choose a judge *ad hoc* and further stated that Belgium was opposed to the proceedings being joined. The Agent of Serbia and Montenegro responded that his Government also considered that it needed to produce new documents. As regards the nomination of judges *ad hoc* by those respondent States not having a judge of their nationality upon the Bench, the Agent of Serbia and Montenegro explained that his Government no longer maintained its objection; the Agent further indicated that his Government was in favour of a joinder of all the proceedings in accordance with Article 47 of the Rules of Court. By letter of 18 December 2003 the Agent of Serbia and Montenegro confirmed the views thus expressed at the meeting of 12 December 2003.

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

19. By letter of 26 February 2004 Serbia and Montenegro indicated that it wished to produce new documents pursuant to Article 56 of the Rules. In accordance with paragraph 1 of that Article, those documents were communicated to Belgium, which, by letter of 12 March 2004, informed the Court that it did not object to their production. The Court decided that they would be added to the case file. By a joint letter of 27 February 2004 the Agents of the respondent States in the cases concerning *Legality of Use of Force* indicated that their Governments also wished to produce new documents pursuant to Article 56 of the Rules. In the absence of any objection by Serbia and Montenegro, to which the documents had been communicated in accordance with paragraph 1 of that Article, the Court decided that they would be added to the file of each case.

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

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

For Serbia and Montenegro:	Mr. Tibor Varady, Mr. Ian Brownlie, Mr. Vladimir Djerić.
For Belgium:	Mr. Jan Devadder, Mr. Daniel Bethlehem.

*

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

> "The Government of the Federal Republic of Yugoslavia requests the International Court of Justice to adjudge and declare:
>
> — by taking part in the bombing of the territory of the Federal Republic of Yugoslavia, the Kingdom of Belgium has acted against the Federal

Republic of Yugoslavia in breach of its obligation not to use force against another State;

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

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

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

— by taking part in the use of cluster bombs, the Kingdom of Belgium has acted against the Federal Republic of Yugoslavia in breach of its obligation not to use prohibited weapons, i.e. weapons calculated to cause unnecessary suffering;

— by taking part in the bombing of oil refineries and chemical plants, the Kingdom of Belgium has acted against the Federal Republic of Yugoslavia in breach of its obligation not to cause considerable environmental damage;

— by taking part in the use of weapons containing depleted uranium, the Kingdom of Belgium has acted against the Federal Republic of Yugoslavia in breach of its obligation not to use prohibited weapons and not to cause far-reaching health and environmental damage;

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

— by taking part in destroying bridges on international rivers, the Kingdom of Belgium has acted against the Federal Republic of Yugoslavia in breach of its obligation to respect freedom of navigation on international rivers;

— by taking part in activities listed above, and in particular by causing enormous environmental damage and by using depleted uranium, the Kingdom of Belgium has acted against the Federal Republic of Yugoslavia in breach of its obligation not to deliberately inflict on a national group conditions of life calculated to bring about its physical destruction, in whole or in part;

— the Kingdom of Belgium is responsible for the violation of the above international obligations;

— the Kingdom of Belgium is obliged to stop immediately the violation of the above obligations vis-à-vis the Federal Republic of Yugoslavia;

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

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

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

On behalf of the Government of Serbia and Montenegro,

in the Memorial:

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

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

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

— by destroying or damaging monasteries, monuments of culture, the Respondent has acted against the Federal Republic of Yugoslavia in breach of its obligation not to commit any act of hostility directed against historical monuments, works of art or places of worship which constitute cultural or spiritual heritage of people;
— by the use of cluster bombs, the Respondent has acted against the Federal Republic of Yugoslavia in breach of its obligation not to use prohibited weapons, i.e. weapons calculated to cause unnecessary suffering;
— by the bombing of oil refineries and chemical plants, the Respondent has acted against the Federal Republic of Yugoslavia in breach of its obligation not to cause considerable environmental damage;

— by the use of weapons containing depleted uranium, the Respondent has acted against the Federal Republic of Yugoslavia in breach of its obligation not to use prohibited weapons and not to cause far-reaching health and environmental damage;

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

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

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

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

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

On behalf of the Belgian Government,

in the Preliminary Objections:

"For the reasons stated in these Preliminary Objections, Belgium requests the Court to adjudge and declare that the Court lacks jurisdiction in the case brought against Belgium by the Federal Republic of Yugoslavia and/or that the application brought by the Federal Republic of Yugoslavia against Belgium is inadmissible."

On behalf of the Government of Serbia and Montenegro,

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

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

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

On behalf of the Belgian Government,

at the hearing of 22 April 2004:

"In the case concerning the *Legality of the Use of Force (Serbia and Montenegro* v. *Belgium)*, for the reasons set out in the Preliminary

Objections of Belgium dated 5 July 2000, and also for the reasons set out during the oral submissions on 19 and 22 April 2004, Belgium requests the Court to:

(a) remove the case brought by Serbia and Montenegro against Belgium from the List;

(b) in the alternative, to rule that the Court lacks jurisdiction in the case brought by Serbia and Montenegro against Belgium and/or that the case brought by Serbia and Montenegro against Belgium is inadmissible."

On behalf of the Government of Serbia and Montenegro,

at the hearing of 23 April 2004:

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

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

* * *

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

26. The Court must first deal with a preliminary question that has been raised in each of the cases, including the present one, brought before

it by Serbia and Montenegro concerning *Legality of Use of Force*. It has been argued by the Respondents in these cases that the Court could and should reject the claims of Serbia and Montenegro *in limine litis*, by removing the cases from the List; by a "pre-preliminary" or summary decision in each case finding that there is no subsisting dispute or that the Court either has no jurisdiction or is not called upon to give a decision on the claims; or by declining to exercise jurisdiction. Thus the contention for rejecting the Application *in limine litis* has been presented in different forms by the eight respondent States, and supported by various arguments, in order to achieve the same conclusion that, as a result of the changed attitude of the Applicant to the question of the Court's jurisdiction, expressed in its Observations (see paragraph 29 below), the Court is no longer required to adjudge and declare whether or not those objections to jurisdiction are well founded, but can simply dismiss the case, without enquiring further into matters of jurisdiction.

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

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

29. However, in its Observations on the preliminary objections of each of the respondent States, filed on 20 December 2002, Serbia and Montenegro claimed that "the acceptance of the Federal Republic of Yugoslavia as a new member of the United Nations on 1 November 2000" constituted a "new fact"; and on this basis it stated as follows:

> "As the Federal Republic of Yugoslavia became a *new* member of the United Nations on 1 November 2000, it follows that it was not a

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

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

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

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

30. The question whether Serbia and Montenegro was or was not a party to the Statute of the Court at the time of the institution of the present proceedings is a fundamental one (see paragraph 46 below). However, at this initial stage of its judgment, it is necessary for the Court to decide first on a preliminary question raised by the Respondents, namely whether in the light of the assertions by the Applicant quoted above coupled with the contentions of each of the respondent States, the Court should take a decision to dismiss the case *in limine litis*, without further entering into the examination of the question whether the Court has jurisdiction under the circumstances.

31. A number of arguments have been advanced by different Respondents as possible legal grounds that would lead the Court to take this course. One argument advanced by some of the respondent States is that the position of Serbia and Montenegro is to be treated as one that in effect results in a discontinuance of the proceedings which it has instituted. Discontinuance of proceedings by the Applicant is provided for in Article 89 of the Rules of Court, which contemplates the situation in which "the applicant informs the Court in writing that it is not going on with the proceedings . . .". However, Serbia and Montenegro has expressly denied that its Observations were a notice of discontinuance, and has emphasized that it did not state that it was "not going on with the proceedings", but rather that it was requesting the Court to decide on the issue of jurisdiction. It has emphasized that it wants the Court to continue the case and to decide upon its jurisdiction, even though the decision that it seeks may result in a conclusion that there is no jurisdiction.

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

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

34. Another argument for the removal of the case from the List which has been advanced in interpretation of the position of Serbia and Montenegro is that there is substantive agreement between the Parties on a "question of jurisdiction that is determinative of the case", and that as a result the dispute before the Court has disappeared. The Respondents have noted that the Court is asked by Serbia and Montenegro to determine the question of jurisdiction raised in the preliminary objections of the respondent States, in its exercise of the *compétence de la compétence* reflected in Article 36, paragraph 6, of the Statute. They have however claimed that, in accordance with the well-established jurisprudence of the Court, "the Court is not compelled in every case to exercise [its] jurisdiction" (*Northern Cameroons, Judgment, I.C.J. Reports 1963*, p. 29); and that the Court has the power to decide to dispose of the case *in limine litis*. After all, "[t]here are inherent limitations on the exercise of the judicial function which the Court, as a court of justice, can never ignore" *(ibid.)*.

It is emphasized in particular that "the Court can exercise its jurisdiction in contentious proceedings *only when a dispute genuinely exists between the parties*" (*Nuclear Tests (Australia* v. *France), Judgment, I.C.J. Reports 1974*, p. 271, para. 57; *Nuclear Tests (New Zealand* v. *France), Judgment, ibid.*, p. 477, para. 60; emphasis added).

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

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

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

37. As noted above (paragraph 29), Serbia and Montenegro, after explaining why in its view it is questionable whether the Court has jurisdiction, has asked the Court simply "to decide on its jurisdiction" considering the pleadings formulated in its Observations. At the hearings, it insisted that it "wants the Court to continue the case and to decide upon its jurisdiction — and to decide on the merits as well, if it has jurisdiction". Serbia and Montenegro contends that "the position of the FRY with regard to international organizations and treaties has been a most intricate and controversial matter", so that "[o]nly a decision of this Court could bring clarity".

38. The function of a decision of the Court on its jurisdiction in a particular case is solely to determine whether or not the Court may entertain that case on the merits, and not to engage in a clarification of a contro-

verted issue of a general nature. A decision of the Court should have, in the words of the Judgment in the *Northern Cameroons* case, "some practical consequence in the sense that it can affect existing legal rights or obligations *of the parties*, thus removing uncertainty from *their* legal relations" (*I.C.J. Reports 1963*, p. 34; emphasis added); and that will be the proper consequence of the Court's decision on its jurisdiction in the present case.

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

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

41. Yet another argument advanced for reaching the conclusion that the Court would be justified in summarily disposing of the case without a jurisdictional decision relates to a proposition that the substantive dispute under the Genocide Convention, rather than the dispute over jurisdiction, has disappeared. It has been argued that Serbia and Montenegro, by contending that it was not a party to the Genocide Convention until March 2001, is bound to recognize that the rights which it was asserting in its Application under that Convention had no legal basis, and that therefore any legal dispute between itself and the respondent States concerning these rights and obligations under the Convention has ceased to exist. That dispute is the sole dispute in the cases concerning *Legality of Use of Force* in which the only ground of jurisdiction relied on is

Article IX of the Genocide Convention, and thus, in those cases, the whole dispute would have disappeared. In the present case, this argument would imply that the Genocide Convention cannot be relied on by Serbia and Montenegro against Belgium.

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

43. The Court is unable to uphold these various contentions. As regards the argument that the dispute on jurisdiction has disappeared, Serbia and Montenegro has not invited the Court to find that it has no jurisdiction; while it is apparently in agreement with the arguments advanced by the Respondents in that regard in their preliminary objections, it has specifically asked in its submissions for a decision of the Court on the jurisdictional question. This question, in the view of the Court as explained above, is a legal question independent of the views of the parties upon it. As to the argument concerning the disappearance of the substantive dispute, it is clear that Serbia and Montenegro has by no means withdrawn its claims as to the merits. Indeed, these claims were extensively argued and developed in substance during the hearings on jurisdiction, in the context of the question of the jurisdiction of the Court under Article IX of the Genocide Convention. It is equally clear that these claims are being vigorously denied by the Respondents. It could not even be said under these circumstances that, while the essential dispute still subsists, Serbia and Montenegro is no longer seeking to have its claim determined by the Court. Serbia and Montenegro has not sought a discontinuance (see paragraph 32 above); and it has stated that it "wants the Court to continue the case and to decide upon its jurisdiction — and to decide on the merits as well, if it has jurisdiction". In the present circumstances, the Court is unable to find that Serbia and Montenegro has renounced any of its substantive or procedural rights, or has taken the position that the dispute between the Parties has ceased to exist. As for the argument based on the doctrine of estoppel, the Court does not consider that Serbia and Montenegro, by asking the Court "to decide on its jurisdiction" on the basis of certain alleged "new facts" about its own legal status vis-à-vis the United Nations, should be held to have forfeited or renounced its right of action and to be estopped from continuing the present action before the Court.

44. For all these reasons, the Court cannot remove the cases concerning *Legality of Use of Force* from the List, or take any decision putting

an end to those cases *in limine litis*. In the present phase of the proceedings, it must proceed to examine the titles of jurisdiction asserted by the Applicant and the objections thereto advanced by the Respondents, and give its decision with respect to jurisdiction.

* * *

45. The Court accordingly turns to the questions of jurisdiction arising in the present case. The Application filed by Serbia and Montenegro on 29 April 1999 indicated that it was submitted "[o]n the basis of Article 40 of the Statute of the International Court of Justice and Article 38 of the Rules of Court". On the question of the legal grounds for jurisdiction of the Court, the Application stated that "[t]he Government of the Federal Republic of Yugoslavia invokes Article 36, paragraph 2, of the Statute of the International Court of Justice as well as Article IX of the Convention on the Prevention and Punishment of the Crime of Genocide". On 12 May 1999, during the oral proceedings on the request for provisional measures, Serbia and Montenegro submitted to the Court a "Supplement to the Application", invoking as an additional basis of jurisdiction "Article 4 of the Convention of Conciliation, Judicial Settlement and Arbitration between the Kingdom of Yugoslavia and Belgium, signed at Belgrade on 25 March 1930 and in force since 3 September 1930".

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

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

But in those instances, the parties to the cases before the Court were, *without doubt*, parties to the Statute of the Court and the Court was thus open to them under Article 35, paragraph 1, of the Statute. That is not the case in the present proceedings in which an objection has been made regarding the right of the Applicant to have access to the Court. And it is

this issue of access to the Court which distinguishes the present case from all those referred to above.

As the Court observed earlier (see paragraph 30 above), the question whether Serbia and Montenegro was or was not a party to the Statute of the Court at the time of the institution of the present proceedings is fundamental; for if it were not such a party, the Court would not be open to it under Article 35, paragraph 1, of the Statute. In that situation, subject to any application of paragraph 2 of that Article, Serbia and Montenegro could not have properly seised the Court, whatever title of jurisdiction it might have invoked, for the simple reason that Serbia and Montenegro did not have the right to appear before the Court.

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

It is the view of the Court that it is incumbent upon it to examine first of all the question whether the Applicant meets the conditions laid down in Articles 34 and 35 of the Statute and whether the Court is thus open to it. Only if the answer to that question is in the affirmative will the Court have to deal with the issues relating to the conditions laid down in Articles 36 and 37 of the Statute of the Court (see *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Yugoslavia (Serbia and Montenegro)), Provisional Measures, Order of 8 April 1993, I.C.J. Reports 1993*, pp. 11 *et seq*., paras. 14 *et seq*.).

There is no doubt that Serbia and Montenegro is a State for the purpose of Article 34, paragraph 1, of the Statute. However, the objection was raised by certain Respondents (see paragraphs 49, 51, 93, 96 and 97 below) that Serbia and Montenegro did not meet, at the time of the filing of its Application on 29 April 1999, the conditions set down in Article 35 of the Statute.

47. No specific assertion was made in the Application that the Court was open to Serbia and Montenegro under Article 35, paragraph 1, of the Statute of the Court, but it was later made clear that the Applicant claimed to be a Member of the United Nations and thus a party to the Statute of the Court, by virtue of Article 93, paragraph 1, of the Charter, at the time of filing of the Application. As indicated earlier (paragraph 28 above) this position was expressly stated in the Memorial filed by Serbia and Montenegro on 4 January 2000 (Memorial, Part III, paras. 3.1.17 and 3.1.18).

48. A request for the indication of provisional measures of protection was submitted by Serbia and Montenegro on the day of the filing of its Application in the present case, i.e. 29 April 1999 (see paragraph 2 above). The Court, by its Order of 2 June 1999, rejected this request (see paragraph 8 above), on the ground that, on the basis of the original Application, it had no prima facie jurisdiction to entertain it and that it

could not take account of the additional basis of jurisdiction contained in the "Supplement to the Application" in view of the late stage at which it was invoked. The Court's finding regarding the lack of prima facie jurisdiction was based on the reasoning that

> "Yugoslavia has accepted the Court's jurisdiction *ratione temporis* in respect only, on the one hand, of disputes arising or which may arise after the signature of its declaration [i.e. 25 April 1999] and, on the other hand, of those concerning situations or facts subsequent to that signature" (*I.C.J. Reports 1999 (I)*, p. 134, para. 26);

that

> "the Court has no doubt . . . that a 'legal dispute' . . . 'arose' between Yugoslavia and the Respondent, as it did also with the other NATO member States, well before 25 April 1999 concerning the legality of those bombings as such, taken as a whole" (*ibid.*, p. 134, para. 28),

and that therefore

> "the declarations made by the Parties under Article 36, paragraph 2, of the Statute do not constitute a basis on which the jurisdiction of the Court could prima facie be founded in this case" (*ibid.*, p. 135, para. 30).

With regard to the question of jurisdiction under the Genocide Convention, the Court, after examining the acts imputed by Serbia and Montenegro to the Respondent, found that it was not in a position to conclude, at that stage of the proceedings, that those acts were capable of coming within the provisions of the Genocide Convention, and therefore that "Article IX of the Convention, invoked by Yugoslavia, cannot accordingly constitute a basis on which the jurisdiction of the Court could prima facie be founded in this case" (*ibid.*, p. 138, para. 41).

49. In the course of the proceedings on this request, however, the Respondent raised the issue of whether the Applicant was a party to the Statute of the Court, and contended that

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

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

50. Notwithstanding this contention by the Respondent, the Court did not, in its Order on provisional measures, carry out any examination of it, confining itself to observing that in view of its finding relating to the lack of prima facie jurisdiction *ratione temporis* under Article 36, paragraph 2, "the Court need not consider this question for the purpose of deciding whether or not it can indicate provisional measures in the present case" (*I.C.J. Reports 1999 (I)*, p. 136, para. 33).

51. Belgium subsequently argued as its first preliminary objection to the jurisdiction of the Court, *inter alia*, that:

> "The FRY is not now and has never been a member of the United Nations. This being the case, there is no basis for the FRY's claim to be a party to the *Statute* of the Court pursuant to Article 93 (1) of the *Charter*. The Court is not therefore, on this basis open to the FRY in accordance with Article 35 (1) of the *Statute*." (Preliminary Objections of Belgium, p. 69, para. 206; original emphasis.)

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

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

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

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

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

> "The representatives of the people of the Republic of Serbia and the Republic of Montenegro,
>
> Expressing the will of the citizens of their respective Republics to stay in the common state of Yugoslavia,
>
> . . . . . .
>
> wish to state in this Declaration their views on the basic, immediate and lasting objectives of the policy of their common state, and on its relations with the former Yugoslav Republics.
>
> . . . . . .
>
> 1. The Federal Republic of Yugoslavia, continuing the state, international legal and political personality of the Socialist Federal Republic of Yugoslavia, shall strictly abide by all the commitments that the SFR of Yugoslavia assumed internationally,
>
> . . . . . .
>
> Remaining bound by all obligations to international organizations and institutions whose member it is . . ." (United Nations doc. A/46/915, Ann. II.)

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

> "The Assembly of the Socialist Federal Republic of Yugoslavia, at its session held on 27 April 1992, promulgated the Constitution of the Federal Republic of Yugoslavia. Under the Constitution, on the basis of the continuing personality of Yugoslavia and the legitimate decisions by Serbia and Montenegro to continue to live together in Yugoslavia, the Socialist Federal Republic of Yugoslavia is transformed into the Federal Republic of Yugoslavia, consisting of the Republic of Serbia and the Republic of Montenegro.
>
> Strictly respecting the continuity of the international personality of Yugoslavia, the Federal Republic of Yugoslavia shall continue to fulfil all the rights conferred to, and obligations assumed by, the Socialist Federal Republic of Yugoslavia in international relations, including its membership in all international organizations and participation in international treaties ratified or acceded to by Yugoslavia." (United Nations doc. A/46/915, Ann. I.)

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

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

"*The Security Council,*

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

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

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

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

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

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

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

"*The General Assembly,*

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

1. *Considers* that the Federal Republic of Yugoslavia (Serbia and Montenegro) cannot continue automatically the membership of the former Socialist Federal Republic of Yugoslavia in the United Nations; and therefore decides that the Federal Republic of Yugo-

slavia (Serbia and Montenegro) should apply for membership in the United Nations and that it shall not participate in the work of the General Assembly;

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

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

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

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

"While the General Assembly has stated unequivocally that the Federal Republic of Yugoslavia (Serbia and Montenegro) cannot automatically continue the membership of the former Socialist Federal Republic of Yugoslavia in the United Nations and that the Federal Republic of Yugoslavia (Serbia and Montenegro) should apply for membership in the United Nations, the only practical consequence that the resolution draws is that the Federal Republic of Yugoslavia (Serbia and Montenegro) shall not *participate* in the work of the General Assembly. It is clear, therefore, that representatives of the Federal Republic of Yugoslavia (Serbia and Montenegro) can no longer *participate* in the work of the General Assembly, its subsidiary organs, nor conferences and meetings convened by it.

On the other hand, the resolution neither terminates nor suspends Yugoslavia's *membership* in the Organization. Consequently, the seat and nameplate remain as before, but in Assembly bodies representatives of the Federal Republic of Yugoslavia (Serbia and Mon-

tenegro) cannot sit behind the sign 'Yugoslavia'. Yugoslav missions at United Nations Headquarters and offices may continue to function and may receive and circulate documents. At Headquarters, the Secretariat will continue to fly the flag of the old Yugoslavia as it is the last flag of Yugoslavia used by the Secretariat. The resolution does not take away the right of Yugoslavia to participate in the work of organs other than Assembly bodies. The admission to the United Nations of a new Yugoslavia under Article 4 of the Charter will terminate the situation created by resolution 47/1." (United Nations doc. A/47/485; original emphasis.)

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

64. As is clear from the sequence of events summarized in the above paragraphs (paragraphs 55-63), the legal position of the Federal Republic of Yugoslavia within the United Nations and vis-à-vis that Organization remained highly complex during the period 1992-2000. In fact, it is the view of the Court that the legal situation that obtained within the United Nations during that eight-year period concerning the status of the Federal Republic of Yugoslavia, after the break-up of the Socialist Federal Republic of Yugoslavia, remained ambiguous and open to different assessments. This was due, *inter alia*, to the absence of an authoritative determination by the competent organs of the United Nations defining clearly the legal status of the Federal Republic of Yugoslavia vis-à-vis the United Nations.

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

66. The other organ which under the Charter is vested with powers and responsibilities as regards membership in the United Nations is the General Assembly. In the wake of this Security Council resolution, and

especially in light of its recommendation to the General Assembly that "it decide that the Federal Republic of Yugoslavia (Serbia and Montenegro) should apply for membership in the United Nations", the Assembly took the position in resolution 47/1 of 22 September 1992 that it "[c]onsider[ed] that the Federal Republic of Yugoslavia (Serbia and Montenegro) cannot continue automatically the membership of the former Socialist Federal Republic of Yugoslavia in the United Nations". On that basis, it "decide[d] that the Federal Republic of Yugoslavia (Serbia and Montenegro) should apply for membership in the United Nations".

67. While it is clear from the voting figures (see paragraphs 59 and 60 above) that these resolutions reflected a position endorsed by the vast majority of the Members of the United Nations, they cannot be construed as conveying an authoritative determination of the legal status of the Federal Republic of Yugoslavia within, or vis-à-vis, the United Nations. The uncertainty surrounding the question is evidenced, *inter alia*, by the practice of the General Assembly in budgetary matters during the years following the break-up of the Socialist Federal Republic of Yugoslavia.

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

69. Secondly, the Federal Republic of Yugoslavia, for its part, maintained its claim that it continued the legal personality of the Socialist Federal Republic of Yugoslavia. This claim had been clearly stated in the official Note of 27 April 1992 from the Permanent Mission of Yugoslavia to the United Nations addressed to the Secretary-General of the United Nations (see paragraph 57 above). It was sustained by the Applicant throughout the period from 1992 to 2000 (see, for example, Memorial, Part III, paras. 3.1.3 and 3.1.17).

70. Thirdly, another organ that came to be involved in this problem was the Secretariat of the United Nations. In the absence of any authoritative determination on the legal status of the Federal Republic of Yugoslavia within, or vis-à-vis, the United Nations, the Secretariat, as the administrative organ of the Organization, simply continued to keep to the practice of the *status quo ante* that had prevailed up to the break-up of the Socialist Federal Republic of Yugoslavia in 1992, pending such a determination. This is illustrated by the practice of the Secretariat in its role in the preparation of the budget of the Organization for consideration and approval by the General Assembly. The "considered view of the United Nations Secretariat regarding the practical consequences of the adoption by the General Assembly of resolution 47/1" (United Nations doc. A/47/485), issued by the Under-Secretary-General and Legal Counsel on 29 September 1992 (see paragraph 62 above), should probably also be understood in the context of this continuation of the *status quo ante*.

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

> "The same applies to the Federal Republic of Yugoslavia (Serbia and Montenegro), which remains as the predecessor State upon separation of parts of the territory of the former Yugoslavia. General Assembly resolution 47/1 of 22 September 1992, to the effect

> that the Federal Republic of Yugoslavia could not automatically continue the membership of the former Yugoslavia in the United Nations . . ., was adopted within the framework of the United Nations and the context of the Charter of the United Nations, and not as an indication that the Federal Republic of Yugoslavia was not to be considered a predecessor State." (United Nations doc. ST/LEG/8; see also *I.C.J. Reports 2003*, p. 19, para. 38.)

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

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

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

74. It must be stated that this qualification of the position of the Federal Republic of Yugoslavia as *"sui generis"*, which the Court employed to describe the situation during this period of 1992 to 2000, is not a prescriptive term from which certain defined legal consequences accrue; it is merely descriptive of the amorphous state of affairs in which the Federal Republic of Yugoslavia found itself during this period. No final and definitive conclusion was drawn by the Court from this descriptive term

on the amorphous status of the Federal Republic of Yugoslavia vis-à-vis or within the United Nations during this period. The Court did not commit itself to a definitive position on the issue of the legal status of the Federal Republic of Yugoslavia in relation to the Charter and the Statute in its pronouncements in incidental proceedings, in the cases involving this issue which came before the Court during this anomalous period. For example, the Court stated in its Order of 2 June 1999 on the request for the indication of provisional measures in the present case as follows:

> "Whereas Belgium contends that the Court's jurisdiction in this case cannot in any event be based, even prima facie, on Article 36, paragraph 2, of the Statute, for, under this provision, only 'States . . . parties to the . . . Statute' may subscribe to the optional clause for compulsory jurisdiction contained therein; and whereas, referring to United Nations General Assembly resolution 47/1 of 22 September 1992, it contends that 'the Federal Republic of Yugoslavia is not the continuator State of the former Socialist Federal Republic of Yugoslavia' as regards membership of the United Nations, and that, not having duly acceded to the Organization, Yugoslavia is in consequence not a party to the Statute of the Court;
>
> Whereas Yugoslavia, referring to the position of the Secretariat, as expressed in a letter dated 29 September 1992 from the Legal Counsel of the Organization (doc. A/47/485), and to the latter's subsequent practice, contends for its part that General Assembly resolution 47/1 '[neither] terminate[d] nor suspend[ed] Yugoslavia's membership in the Organization', and that the said resolution did not take away from Yugoslavia '[its] right to participate in the work of organs other than Assembly bodies';
>
> Whereas, in view of its finding in paragraph 30 above, the Court need not consider this question for the purpose of deciding whether or not it can indicate provisional measures in the present case" (*I.C.J. Reports 1999 (I)*, pp. 135-136, paras. 31-33).

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

> "In the wake of fundamental democratic changes that took place in the Federal Republic of Yugoslavia, in the capacity of President, I have the honour to request the admission of the Federal Republic

of Yugoslavia to membership in the United Nations *in light of the implementation of Security Council resolution 777 (1992).*" (United Nations doc. A/55/528-S/2000/1043; emphasis added.)

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

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

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

79. In the view of the Court, the significance of this new development in 2000 is that it has clarified the thus far amorphous legal situation con-

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

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

81. On 20 March 1993, the Government of the Republic of Bosnia and Herzegovina filed in the Registry of the Court an Application instituting proceedings against the Government of the Federal Republic of Yugoslavia in respect of a dispute concerning alleged violations of the Convention on the Prevention and Punishment of the Crime of Genocide. The Application invoked Article IX of the Genocide Convention as the basis of the jurisdiction of the Court.

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

83. However, in the wake of the new development in the legal status of the Federal Republic of Yugoslavia in 2000 mentioned above (paragraphs 75-77), the Federal Republic of Yugoslavia filed a new Applica-

tion dated 23 April 2001 instituting proceedings, whereby, referring to Article 61 of the Statute of the Court, it requested the Court to revise the above-mentioned Judgment of 11 July 1996. In its Application the Federal Republic of Yugoslavia contended the following:

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

84. In its oral argument however, the Federal Republic of Yugoslavia explained that it did not invoke its admission to the United Nations in November 2000 as a decisive "new fact", within the meaning of Article 61 of the Statute, capable of founding its request for revision of the 1996 Judgment. In this context, the Federal Republic of Yugoslavia referred to that admission and a letter of 8 December 2000 from the Under-Secretary-General and Legal Counsel of the United Nations to the Minister for Foreign Affairs of the Federal Republic of Yugoslavia, expressing the view that in respect of multilateral treaties deposited with the Secretary-General, "the Federal Republic of Yugoslavia should now undertake treaty actions, as appropriate, . . . if its intention is to assume the relevant legal rights and obligations as a successor State". The Federal Republic of Yugoslavia contended that its admission to the United Nations "as a new Member" as well as the Legal Counsel's letter of 8 December 2000 were

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

85. In the proceedings on that Application instituted under Article 61 of the Statute, it was for the Federal Republic of Yugoslavia to show,

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

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

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

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

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

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

> General Assembly resolution 47/1." (*I.C.J. Reports 2003*, p. 31, para. 70.)

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

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

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

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

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

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

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

91. For all these reasons, the Court concludes that, at the time of filing of its Application to institute the present proceedings before the Court on 29 April 1999, the Applicant in the present case, Serbia and Montenegro, was not a Member of the United Nations, and, consequently, was not, on that basis, a State party to the Statute of the International Court of Jus-

tice. It follows that the Court was not open to Serbia and Montenegro under Article 35, paragraph 1, of the Statute.

* * *

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

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

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

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

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

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

> Convention, disputes to which Article IX applies are in any event prima facie within the jurisdiction *ratione personae* of the Court" (*I.C.J. Reports 1993,* p. 14, para. 19; emphasis added).

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

95. As in respect of the questions of dismissal of the case *in limine litis* and access under paragraph 1 of Article 35 (see paragraphs 27 and 53 above), the Court will consider the arguments put forward in this case and any other legal issue which it deems relevant to consider, including the issues raised in the other cases referred to in paragraph 3, with a view to arriving at its conclusion regarding the possible access to the Court by Serbia and Montenegro under Article 35, paragraph 2, of the Statute.

96. A number of Respondents contended in their pleadings that the reference to the "treaties in force" in Article 35, paragraph 2, of the Statute relates only to treaties in force when the Statute of the Court entered into force, i.e. on 24 October 1945. In respect of the observation made by the Court in its Order of 8 April 1993, quoted in paragraph 94 above, the Respondents pointed out that that was a provisional assessment, not conclusive of the matter, and considered that "there [were] persuasive reasons why the Court should revisit the provisional approach it adopted to the interpretation of this clause in the *Genocide Convention* case" (Preliminary Objections of Belgium, p. 73, para. 222). In particular they referred to the "evident focus of the clause in question on the peace treaties concluded after the First World War", and argued that to construe the phrase of Article 35, paragraph 2, of the Statute, "the special provisions contained in treaties in force", as meaning *"jurisdictional clauses contained in treaties in force"* (i.e., any treaties whatever) would "fundamentally undermine the scheme of the *Statute* and the distinction between access to the Court and the jurisdiction of the Court in particular cases". Such interpretation would, according to Belgium, "place States not party to the *Statute* in a privileged position as they would have access to the

Court without any assumption of the obligations . . . required of States to which the Court is open" (Preliminary Objections of Belgium, p. 73, para. 223), or according to the United Kingdom "would . . . place them in a privileged position by giving them access to the Court without requiring them to meet the conditions normally imposed as a prerequisite to access to the Court" (Preliminary Objections of the United Kingdom, p. 40, para. 3.32).

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

Italy observed that

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

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

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

98. The Court notes that the passage quoted above (paragraph 94) from the 1993 Order in the *Genocide Convention* case was addressed to the situation in which the proceedings were instituted against a State the membership of which in the United Nations and status of a party to the Statute was unclear. Bosnia and Herzegovina in its Application in that case maintained that "the Federal Republic of Yugoslavia (Serbia and Montenegro)" was a Member of the United Nations and a party to the

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

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

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

101. Article 35, paragraph 2, refers to "the special provisions contained in treaties in force", in the context of the question of access to the Court. Taking the natural and ordinary meaning of the words "special provisions", the reference must in the view of the Court be to treaties that make "special provision" in relation to the Court, and this can hardly be anything other than provision for the settlement of disputes between the parties to the treaty by reference of the matter to the Court. As for the words "treaties in force", in their natural and ordinary meaning they do not indicate at what date the treaties contemplated are to be in force, and thus they may lend themselves to different interpretations. One can construe those words as referring to treaties which were in force at the time that the Statute itself came into force, as was contended by certain Respondents; or to those which were in force on the date of the institution of proceedings in a case in which such treaties are invoked. In favour of this latter interpretation, it may be observed that the similar expression

"treaties and conventions in force" is found in Article 36, paragraph 1, of the Statute, and the Court has interpreted it in this sense (for example, *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya* v. *United Kingdom), Preliminary Objections, Judgment, I.C.J. Reports 1998*, p. 16, para. 19). The expression "treaty or convention in force" in Article 37 of the Statute has also been read as meaning in force at the date proceedings were instituted (*Barcelona Traction, Light and Power Company, Limited, Preliminary Objections, Judgment, I.C.J. Reports 1964*, p. 27).

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

103. The first interpretation, according to which Article 35, paragraph 2, refers to treaties in force at the time that the Statute came into force, is in fact reinforced by an examination of the *travaux préparatoires* of the text. Since the Statute of the Permanent Court of International Justice contained substantially the same provision, which was used as a model when the Statute of the present Court was drafted, it will be necessary to examine the drafting history of both Statutes. The text proposed by the 1920 Committee of Jurists (as Article 32 of its draft) was as follows:

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

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

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

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

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

> "*Article 32*
>
> 1st paragraph: No change.
>
> The conditions under which the Court shall be open to other States shall, subject to special provisions contained in treaties in force, be laid down by the Council.
>
> When a State which is not a Member of the League of Nations is a party to a dispute, the Court will fix the amount which that party shall contribute towards the expenses of the Court."

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

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

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

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

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

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

109. Before the Permanent Court of International Justice, the issue arose on two occasions. In the *S.S. "Wimbledon"* case (*1923, P.C.I.J., Series A, No. 1*, p. 6) the jurisdiction of the Court was founded on Article 386 of the Treaty of Versailles of 28 June 1919. When the proceedings were instituted in that case against Germany, that State was not a Member of the League of Nations nor was it mentioned in the Annex to the Covenant. A declaration by Germany accepting the jurisdiction of the Court was not considered as necessary, in light of the reservation contained in Article 35, paragraph 2, of the Statute which was intended, as shown above (paragraphs 104-106), to cover special provisions in the Peace Treaties.

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

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

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

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

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

110. When the Charter of the United Nations and the Statute of the Court were under preparation, the issue was first discussed by the United Nations Committee of Jurists. In the debate, some confusion apparently arose regarding the difference between a non-Member State which may become party to the Statute and one which may become party to a case before the Court. Some delegates did not make a clear distinction between adherence to the Statute and access to the Court. The debate mostly concentrated on the respective roles of the General Assembly and the Security Council in that context: there was some criticism that the Assembly was excluded from action under paragraph 2 of Article 35 (*Documents of the United Nations Conference on International Organization*, Vol. XIV, pp. 141-145). A proposal was made to adopt paragraph 2 as it stood, but some delegates continued to argue for a role of the Assembly to be recognized in that paragraph. The United Kingdom suggested that there might be inserted in paragraph 2, after the words "Security Council", the phrase "in accordance with any principles which may have been laid down by the General Assembly".

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

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

> treaty providing for compulsory jurisdiction." (*Documents of the United Nations Conference on International Organization*, Vol. XIV, p. 144.)

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

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

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

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

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

> "[i]t was pointed out that the question as to what states are to be parties to the Statute should be decided in the Charter, while the question as to what states may appear before the Court in the case, once the Court is established, should be determined by the Statute" (*ibid.*, p. 283).

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

113. The Court considers that the legislative history of Article 35, paragraph 2, of the Statute of the Permanent Court demonstrates that it was intended as an exception to the principle stated in paragraph 1, in order to cover cases contemplated in agreements concluded in the aftermath of the First World War before the Statute entered into force. However, the *travaux préparatoires* of the Statute of the present Court are less illuminating. The discussion of Article 35 was provisional and somewhat cursory; it took place at a stage in the planning of the future international organization when it was not yet settled whether the Permanent Court would be preserved or replaced by a new court. Indeed, the records

quoted in paragraphs 110 to 112 above do not include any discussion which would suggest that Article 35, paragraph 2, of the Statute should be given a different meaning from the corresponding provision in the Statute of the Permanent Court. It would rather seem that the text was reproduced from the Statute of the Permanent Court; there is no indication that any extension of access to the Court was intended.

Accordingly Article 35, paragraph 2, must be interpreted, *mutatis mutandis*, in the same way as the equivalent text in the Statute of the Permanent Court, namely as intended to refer to treaties in force at the date of the entry into force of the new Statute, and providing for the jurisdiction of the new Court. In fact, no such prior treaties, referring to the jurisdiction of the present Court, have been brought to the attention of the Court, and it may be that none existed. In the view of the Court, however, neither this circumstance, nor any consideration of the object and purpose of the text, nor the *travaux préparatoires*, offer support to the alternative interpretation that the provision was intended as granting access to the Court to States not parties to the Statute without any condition other than the existence of a treaty, containing a clause conferring jurisdiction on the Court, which might be concluded any time subsequently to the entry into force of the Statute. As noted above (paragraph 102), this interpretation would lead to a result quite incompatible with the object and purpose of Article 35, paragraph 2, namely the regulation of access to the Court by States non-parties to the Statute. In the view of the Court therefore, the reference in Article 35, paragraph 2, of the Statute to "the special provisions contained in treaties in force" applies only to treaties in force at the date of the entry into force of the Statute, and not to any treaties concluded since that date.

114. The Court thus concludes that, even assuming that Serbia and Montenegro was a party to the Genocide Convention at the relevant date, Article 35, paragraph 2, of the Statute does not provide it with a basis to have access to the Court, under Article IX of that Convention, since the Convention only entered into force on 12 January 1951, after the entry into force of the Statute (see paragraph 113 above). The Court does not therefore consider it necessary to decide whether Serbia and Montenegro was or was not a party to the Genocide Convention on 29 April 1999 when the current proceedings were instituted.

* * *

115. As noted in paragraph 45 above, by a letter of 12 May 1999, the Agent of Serbia and Montenegro submitted to the Court a "Supplement to the Application" against the Kingdom of Belgium. In that Supplement, it invoked as an additional ground of jurisdiction of the Court "Article 4 of the Convention of Conciliation, Judicial Settlement and Arbitration between the Kingdom of Yugoslavia and Belgium, signed at Belgrade on 25 March 1930 and in force since 3 September 1930" (hereinafter "the 1930 Convention").

116. In its Order of 2 June 1999 on the request by Serbia and Montenegro for the indication of provisional measures, the Court, after having stated that "the invocation by a party of a new basis of jurisdiction in the second round of oral argument on a request for the indication of provisional measures has never occurred in the Court's practice" and that "such action at this late stage, when it is not accepted by the other party, seriously jeopardizes the principle of procedural fairness and the sound administration of justice", concluded that it "cannot, for the purpose of deciding whether it may or may not indicate provisional measures . . ., take into consideration the new title of jurisdiction which Yugoslavia sought to invoke on 12 May 1999" *(Legality of Use of Force (Yugoslavia* v. *Belgium), Provisional Measures, Order of 2 June 1999, I.C.J. Reports 1999 (I)*, p. 139, para. 44).

117. In its Memorial, Serbia and Montenegro referred to its invocation of the 1930 Convention, and to the Court's ruling on the matter, and stated that "[t]he Applicant considers that the procedural obstacles and difficulties [have] disappeared, so the new basis of the jurisdiction of the Court in the case against Belgium . . . is established". It is thus now for the Court to determine whether Serbia and Montenegro was entitled to invoke Article 4 of the 1930 Convention as a basis of jurisdiction in this case.

118. Article 4 of the Convention reads as follows:

> "All disputes with regard to which the Parties are in conflict as to their respective rights shall be submitted for decision to the Permanent Court of International Justice unless the Parties agree in the manner hereinafter provided, to resort to an arbitral tribunal.
>
> It is understood that the disputes referred to above include in particular those mentioned in Article 36 of the Statute of the Permanent Court of International Justice." *[Translation by the League of Nations Secretariat.]*

119. Belgium contends that Article 4 of the 1930 Convention cannot constitute a basis on which to found the jurisdiction of the Court in this case for a number of reasons. It argues that Serbia and Montenegro was not a party to the Statute of the Court when it filed its Application on 29 April 1999, nor on 12 May 1999 when it invoked Article 4 as an additional basis for the jurisdiction of the Court. Further, it asserts that the 1930 Convention had lapsed through obsolescence or desuetude by 1992; or that there was an implied consent of the parties to abandon the treaty. Alternatively, Belgium submits that, even if the 1930 Convention remained in force, Serbia and Montenegro has not succeeded to it.

120. As explained above, Serbia and Montenegro, having asserted in its Memorial that it was a Member of the United Nations and as such a party to the Statute of the Court, changed its approach in its Observations; in that document, and in argument presented during the oral pro-

ceedings, its view was that, at the time when proceedings were instituted in April 1999, it did not have the status of a Member of the United Nations and of a party to the Statute of the Court by continuation of the membership of the former Yugoslavia. Serbia and Montenegro however asserts that the 1930 Convention remained in force according to a letter of the Foreign Minister of Belgium dated 29 April 1996 declaring that Belgium proceeds on the assumption that the bilateral agreements binding Belgium and the Socialist Federal Republic of Yugoslavia will continue to have effect until they are confirmed or renegotiated by both parties. It further dismisses other considerations such as "obsolescence" or "desuetude" invoked by Belgium for extinction of the 1930 Convention on the grounds that they are not envisaged by the Vienna Convention on the Law of Treaties as causing termination of a treaty and that there has been no agreement of the parties to terminate the treaty.

121. The Court has found (paragraph 91 above) that Serbia and Montenegro was not a party to the Statute at the date of the filing of its Application instituting proceedings in this case, and consequently that the Court was not open to it at that time under Article 35, paragraph 1, of the Statute. Therefore, to the extent that Serbia and Montenegro's case rests on reliance on Article 35, paragraph 1, it is irrelevant whether or not the 1930 Convention could provide a basis of jurisdiction.

122. However, the Court has referred above (paragraph 92) to the question whether paragraph 2 of Article 35 of the Statute might be applicable, inasmuch as the provisions of the Genocide Convention, invoked by Serbia and Montenegro as a basis of jurisdiction, might be regarded as "special provisions contained in treaties in force", so that the lack of status of the Applicant as a party to the Statute would not be a bar to the proceedings. The Court concluded that this was not the case; after examining, *inter alia*, the history of the text, it held above that paragraph 2 of Article 35 "was intended as an exception . . . to cover cases contemplated in agreements concluded . . . before the Statute entered into force" and that it must be read "to refer to treaties in force at the date of the entry into force of the . . . Statute, and providing for the jurisdiction of the . . . Court" (paragraph 113).

123. The question however remains whether the provisions of the 1930 Convention, which was concluded prior to the entry into force of the Statute, might rank as "special provisions contained in treaties in force" for this purpose. It must be observed that Article 35 of the Statute of the Court concerns access to the present Court and not to its predecessor, the Permanent Court of International Justice.

124. It is true that the jurisdiction of the Permanent Court under treaties in force was preserved and transferred, on certain conditions, to the present Court by Article 37 of its Statute. Article 37 reads as follows:

> "Whenever a treaty or convention *in force* provides for reference of a matter to a tribunal to have been instituted by the League of Nations, or to the Permanent Court of International Justice, the matter shall, *as between the parties to the present Statute*, be referred to the International Court of Justice." (Emphasis added.)

The effect of this text is that the parties to such a treaty, by becoming parties to the Statute, agree that the reference in their treaty to the Permanent Court shall be read as a reference to the present Court. However, it does not signify that a similar substitution is to be read into Article 35, paragraph 2, of the Statute, which relates, not to consensual jurisdiction, but to the conditions of access to the Court. The Court notes that Article 37 of the Statute can be invoked only in cases which are brought before it as between parties to the Statute, i.e. under paragraph 1 of Article 35, and not on the basis of paragraph 2 of that Article.

125. As regards jurisdiction, when a treaty providing for the jurisdiction of the Permanent Court is invoked in conjunction with Article 37, the Court has to satisfy itself, *inter alia*, that both the Applicant and the Respondent were, at the moment when the dispute was submitted to it, parties to the Statute. As the Court observed in the *Barcelona Traction* case,

> "three conditions are actually stated in the Article. They are that there should be a treaty or convention in force; that it should provide (i.e., make provision) for the reference of a 'matter' (i.e., the matter in litigation) to the Permanent Court; and that the dispute should be between States both or all of which are parties to the Statute." (*I.C.J. Reports 1964,* p. 32.)

As just noted above, the Court has already determined that Serbia and Montenegro was not a party to the Statute of the Court on 29 April 1999 when it instituted proceedings against Belgium (see paragraphs 91 and 121 above). Article 37 of the Statute of the Court therefore had no application as between Serbia and Montenegro and Belgium at the date of the institution of proceedings.

126. The Court therefore concludes that Serbia and Montenegro did not have access to the Court under Article 35, paragraph 2, of the Statute on the basis of the 1930 Convention, even assuming that that instrument was in force on 29 April 1999 at the date of filing of the Application. The Court therefore does not need to pronounce on the question whether the 1930 Convention was or was not in force on that date.

* * *

127. The conclusion which the Court has reached, that Serbia and Montenegro did not, at the time of the institution of the present proceedings, have access to the Court under either paragraph 1 or paragraph 2 of Article 35 of the Statute, makes it unnecessary for the Court to consider

the other preliminary objections filed by the Respondents to the jurisdiction of the Court (see paragraph 46 above).

* * *

128. Finally, the Court would recall, as it has done in other cases and in the Order on the request for the indication of provisional measures in the present case, the fundamental distinction between the existence of the Court's jurisdiction over a dispute, and the compatibility with international law of the particular acts which are the subject of the dispute (see *Legality of Use of Force (Yugoslavia* v. *Belgium), Provisional Measures, Order of 2 June 1999, I.C.J. Reports 1999 (I)*, p. 140, para. 47). Whether or not the Court finds that it has jurisdiction over a dispute, the parties "remain in all cases responsible for acts attributable to them that violate the rights of other States" (see *Fisheries Jurisdiction (Spain* v. *Canada), Jurisdiction of the Court, Judgment, I.C.J. Reports 1998*, p. 456, paras. 55-56; *Aerial Incident of 10 August 1999 (Pakistan* v. *India), Jurisdiction, Judgment, I.C.J. Reports 2000*, p. 33, para. 51). When, however, as in the present case, the Court comes to the conclusion that it is without jurisdiction to entertain the claims made in the Application, it can make no finding, nor any observation whatever, on the question whether any such violation has been committed or any international responsibility incurred.

* * *

129. For these reasons,

THE COURT,

Unanimously,

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

Done in French and in English, the French text being authoritative, at the Peace Palace, The Hague, this fifteenth day of December, two thousand and four, in three copies, one of which will be placed in the archives of the Court and the others transmitted to the Government of Serbia and Montenegro and the Government of the Kingdom of Belgium, respectively.

(*Signed*) SHI Jiuyong,
President.

(*Signed*) Philippe COUVREUR,
Registrar.

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

(Initialled) J.Y.S.

(Initialled) Ph.C.