SEPARATE OPINION OF JUDGE KREĆA

TABLE OF CONTENTS

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

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

* * *

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

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

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

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

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

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

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

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

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

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

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

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

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

> "[w]hereas the Court, under its Statute, *does not automatically have jurisdiction over legal disputes between States parties to that Statute or between other States to whom access to the Court has been granted* . . . whereas the Court can therefore exercise jurisdiction only between States parties to a dispute *who not only have access to the Court but also have accepted the jurisdiction of the Court*, either in general form or for the individual dispute concerned" (*Provisional Measures, I.C.J. Reports 1999 (I)*, p. 132, para. 20; emphasis added).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(b) *Judicial presumptions*

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

---

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

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

For,

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(c) *Effective and valid seisin*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

It appears that Judge Kooijmans was right in noting that:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

31. In the light of these considerations, especially under sections 1 and 3 of this part, I am of the opinion that the formulation of the *dispositif* explicitly linked to the absence of *locus standi* of Serbia and Montenegro would be more appropriate considering the circumstances of the cases. The same effect could be produced by simply adding the adjective "general" to the word "jurisdiction". Not only because the question of *locus standi* was *sedes materiae* of these proceedings, but because such a formulation would naturally derive what the Court said dealing with particular basis of jurisdiction invoked (*exempli causa*, Judgment, paras. 46, 79, 91 and 126). In the formulation accepted it appears that the *dispositif* and reasoning of the Court are not, at least, sufficiently coherent.

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

1. Implicit Discontinuance as a contradictio in adiecto

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

---

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

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

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

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

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

It is obvious in this particular case that the object of the Application stands as defined at the moment of instituting the proceedings, causing the real dispute before the Court, whereas the respondent State did not take any action nor assumed any commitment whereby the objective of the Applicant would have been accomplished. (See the objective of the Applicant, Judgment, para. 22.)

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

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

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

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

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

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

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

(a) *Aspect of the legal logic*

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

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

(b) *Normative aspect*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

---

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

The question of the Court's jurisdiction is

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

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

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

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

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

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

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

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

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

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

(c) *Principle* compétence de la compétence

45. The general principle of *compétence de la compétence* represents a basic structural and functional principle inherent to any adjudicatory body, whether a regular court or any other body possessing adjudicatory powers. The principle is, as pointed out by United States Commissioner Gore in the *Betsey* case (1797), "indispensably necessary to the discharge of any . . . duties" for any adjudicatory body (J. B. Moore (ed.), *International Adjudications, Ancient and Modern, History and Documents, Modern Series*, Vol. IV, p. 183).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

dispute as to jurisdiction a condition for the continuation of the proceedings on preliminary objections; and

— that agreement between the parties as to a question of jurisdiction is determinative of the case, and that, as a result, the dispute before the Court has disappeared.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

4. Legal Interest of the Applicant in the Proceedings

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

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

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

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

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

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

These elements form the essence of the concept of the legal interest based upon which is *legitimatio ad processum (qualité pour agir)*, which is independent of the ability of a State to appear before the Court: it is an expression of a concrete legal relation between the applicant and the subject-matter of the dispute.

Legal interest of the applicant should be objectively determined particularly considering the fact that by instituting the proceedings before the Court, the applicant demonstrates a subjective perception of its legal interest in the matter.

Determination of the legal interest of the applicant is *ex rerum natura* closely connected and intertwined with the determination of legal dispute, taking into consideration that the dispute is in fact based on the opposing attitudes of the parties in relation to a certain conflict of interests. Therefore, what was emphasized regarding the determination of the legal disputes applies *mutatis mutandis* to the basic parameters for the determination of the legal interest of the applicant.

The party entitled to the subjective right, claiming the violation of a concrete right to which the other party is positively opposed, is in possession *eo ipso* of a legal interest. In that case the presumption of legal interest is applied. Legal interest is, in fact, incorporated into the very essence of the concept of subjective right.

65. The Applicant, as well as the Respondent, is a State party to a number of multilateral treaties in force, non-observance of which is being attributed by the Applicant to the Respondent. Considering the fact that the parties acquire mutual subjective rights and obligations by the international treaty, the party whose subjective right has been violated is entitled to claim the protection of its right (cf. *Barcelona Traction, Light and Power Company, Limited, Second Phase, Judgment, I.C.J. Reports 1970*, p. 45, para. 80; p. 46, para. 86). The existence of the subjective right would no longer have its *ratio* in case the entitled party did not possess legal interest for its protection. The presumption of legal interest of the State entitled to the subjective right is strongly supported by another reason deriving from the very nature of the modern international community. Due to the general prohibition on self-redress, the State whose rights have been violated does not have at its disposal an efficient and legal means for the protection of its subjective rights. Therefore, it would in fact be convenient to assume the existence of the legal interest in every particular case of accusation of the violation of the

rules of international law, either conventional or customary, as a sort of *actio condemnatoria* in the proceedings before the Court

The position of multilateral and bilateral treaties containing compromissory clauses is rather specific. The compromissory clause *per se et a priori* proves the existence of the legal interest of the party and therefore need not be either presumed or proved *(action attitrée)*. Considered *stricti juris*, the right to legal protection in the case of a compromissory clause is not deduced from the legal interest of the applicant, but derives directly from the compromissory clause as a treaty provision.

* * *

66. Summary removal as such might constitute an administrative action of the Court, either *proprio motu* or at the request of the Respondent to reject the Application *in limine litis*. In either case the validity of summary removal is, to say the least, of a dubious nature.

Summary removal as an action of the Court *proprio motu* has lost the *ratio* of its existence by the introduction of Article 38, paragraph 5, of the Rules of Court. Until then, it had been applied as a kind of extorted action of the Court in circumstances in which one State sues another without any existing title of jurisdiction and, in fact, called upon that State to accept the jurisdiction of the Court *ad hoc*[9]. *Cessante ratione, cessat ipsa lex*.

In the circumstances of effective seisin of the Court, summary removal at the request of the Respondent to the Court to reject the Application *in limine litis* is unacceptable. As such, summary removal would be in sharp contradiction with the duty of the Court to examine ex officio the ques-

[9] Thus, the Court found itself in the situation of having to make a choice between Scilla and Haribda — or to allow the "case" to figure on the General List as a pending case for an indefinite period of time or to resort to the removal of the "case" from the General List as was done in a number of cases: *Treatment in Hungary of Aircraft and Crew of United States of America (United States of America* v. *Hungary), Order of 12 July 1954, I.C.J. Reports 1954*, pp. 99-101, and *Treatment in Hungary of Aircraft and Crew of United States of America (United States of America* v. *Union of Soviet Socialist Republics), Order of 12 July 1954, I.C.J. Reports 1954*, pp. 103-105; *Aerial Incident of 10 March 1953, Order of 14 March 1956, I.C.J. Reports 1956*, pp. 6-8; *Aerial Incident of 4 September 1954, Order of 9 December 1958, I.C.J. Reports 1958*, pp. 158-161; *Aerial Incident of 7 November 1954, Order of 7 October 1959, I.C.J. Reports 1959*, p. 276-278; *Antarctica (United Kingdom* v. *Argentina), Order of 16 March 1956, I.C.J. Reports 1956*, pp. 12-14, and *Antarctica (United Kingdom* v. *Chile), Order of 16 March 1956, I.C.J. Reports 1956*, pp. 15-17.

In the light of Article 38, paragraph 5, what the Court might do *proprio motu*, in specific circumstances and before effective seisin, is to take the initiative in removing a case from the General List which, in fact, is done in accordance with Article 88 or 89 of the Rules of Court. As a point of illustration, mention can be made of the case concerning *Maritime Delimitation between Guinea-Bissau and Senegal, Order of 8 November 1995, I.C.J. Reports 1995*, p. 423.

tion of its jurisdiction *in casu* on the basis of the general principle of *compétence de la compétence*. Having in mind the nature of the duty of the Court to examine ex officio its jurisdiction in the case at hand, it might even be said that summary removal in such circumstances would have the meaning of a kind of denial of justice.

Consequently, by the adoption of Article 38, paragraph 5, of the Rules of Court, "removal" acquires its appropriate meaning as simple removal as an accessory effect of declining jurisdiction by the Court's judicial decision[10].

III. The Issue of the Composition of the Court

67. The fundamental difference between the composition of the Court in the provisional measures phase of the proceedings, on the one hand, and its make-up in the preliminary objections phase of the proceedings, on the other, is noticeable. It calls for comments as a matter of principle.

During the provisional measures phase of the proceedings nine out of a total of ten respondent States had judges sitting on the Bench of the Court, irrespective of whether these were national judges (France, Germany, the Netherlands, the United Kingdom and the United States of America) or judges *ad hoc* (Belgium, Canada, Italy and Spain). Among the respondent States having no judge of their nationality on the Bench, only Portugal has not designated its judge *ad hoc*. The Applicant, for its part, had one judge *ad hoc* on the Bench.

In the preliminary objections phase, the Bench underwent a significant change. At the opening of the public sitting held on 19 April 2004, the President of the Court stated, *inter alia*, that

> "[b]y letters dated 23 December 2003, the Registrar informed the Parties that the Court had decided . . . that the judges *ad hoc* chosen by the respondent States should not sit during the current phase of the procedure in these cases" (CR 2004/6, p. 6).

He also noted that "Judge Simma had previously considered that he should not take part in the decision of these cases and had so informed [the President] in accordance with Article 24 of the Statute" (*ibid.*, p. 7).

Thus, during the preliminary objections phase the Bench included three national judges on the side of the respondent States and one *ad hoc* judge on the side of the Applicant.

It is interesting to note that the Court, in adopting relevant decisions,

[10] It might be mentioned in passing that the practice for the "removal clause" to be included at all into the *dispositif* of a judgment of the Court is open to question; not only because of the fact that, as a rule, a case which has been completed is removed automatically from the General List of pending cases, but also because of the nature of the judicial decision of the Court which concerns the parties to the dispute rather than a matter that, basically, concerns the internal functioning of the Court.

failed to provide an explanation in more detail, both with respect to particular decisions concerning the composition of the Court in the proceedings on preliminary objections and with respect to the substantial change in the two successive phases of the proceedings.

In the provisional measures phase the Court, acting on the objections raised by the Applicant relating to the nominations of judges *ad hoc* by four respondent States, settled for a succinct formulation that the nominations were "justified in the present phase of the case"[11]. The Court was somewhat more specific in the relevant decision relating to its own make-up in the preliminary objections phase. Even though, in contrast to the provisional measures phase, the Applicant raised no objections regarding the participation of judges *ad hoc* chosen by the respondent States. In deciding that "the judges *ad hoc* chosen by the respondent States should not sit during the current phase of the procedure" (CR 2004/6, p. 6), the Court invoked the fact of "the presence on the Bench of judges of British, Dutch and French nationality" (CR 2004/6, p. 6).

68. From the terse formulation relating to the acceptance of the nominations of judges *ad hoc* by four respondent States in the provisional measures phase one could infer that the Court, in adopting the decision that their nominations were justified, relied on the grammatical interpretation of the provision of Article 31, paragraph 3, of the Statute. Namely, Article 31, paragraph 3, provides that "[i]f the Court includes upon the Bench no judge of the nationality of the parties, each of these parties may proceed to choose a judge". In other words, the Court followed the logic that the independent and inherent right of a party to choose a judge *ad hoc* on the basis of Article 31, paragraph 3, of the Statute, was not subject to any particular restrictions in this particular case. The Applicant founded its objection to the nomination of the judges *ad hoc* by four respondent States on the contention that they are parties in the same interest and that, consequently, paragraph 5 of Article 31 of the Statute should have been applied. The Court, in its decision does not deal specifically with this contention of the Applicant, although the decision itself implies that the Court rejected it.

69. The absence of an explanation leaves room for assumptions. One of them, it seems to me, that merits attention rests on the interpretation of the expression "several parties in the same interest" (Statute, Art. 31, para. 5). It has been said that

> "Article 31, which uses a form of wording in the singular, 'applies separately to each case on the Court's List'. 'In the presence of two

[11] *Legality of Use of Force (Yugoslavia* v. *Belgium), Order of 2 June 1999, I.C.J. Reports 1999 (I)*, p. 130, para. 12; *Legality of Use of Force (Yugoslavia* v. *Canada), Order of 2 June 1999, I.C.J. Reports 1999 (I)*, p. 265, para. 12; *Legality of Use of Force (Yugoslavia* v. *Italy), Order of 2 June 1999, I.C.J. Reports 1999 (I)*, p. 487, para. 12; *Legality of Use of Force (Yugoslavia* v. *Spain), Order of 2 June 1999, I.C.J. Reports 1999 (II),* p. 767, para. 12.

> separate cases between two sets of parties *(even if one party is common to both cases)*, Article 31, paragraph 5, has no application'." (H. Thirlway, "The Law and Procedure of the International Court of Justice, 1960-1989 (Part Eleven)", *The British Year Book of International Law,* 2000, p. 167, emphasis added, citing joint declaration of Judges Bedjaoui, Guillaume and Ranjeva in *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya* v. *United Kingdom), Preliminary Objections, Judgment, I.C.J. Reports 1998*, p. 40.)

It appears that the interpretation is far too narrow and, in the light of the meaning and in particular of the application of Article 31, paragraph 5, of the Statute, arbitrary because it implies an indissoluble organic link between "parties in the same interest" and formal joinder, which is obviously not the case. The Court may find that the parties are in the same interest without having recourse to joinder. Moreover, it is said that "the 'same interest' provisions apply" only "in the case of the choice of judges *ad hoc*" (G. Guillaume, "La 'cause commune' devant la Cour internationale de Justice", *Liber Amicorum — Mohammed Bedjaoui* (Emile Yakpo and Tahar Boumedra, eds.), 1999, p. 330 *[translation by the Registry]*). The jurisprudence of the Court was also formed in this sense[12].

Consequently, the provision of Article 31, paragraph 5, of the Statute according to which the parties in the same interest shall be reckoned as one party only, cannot be understood as being tantamount to joinder. Although the same interest of the parties constitutes an element of the notion of joinder, taken *per se* it neither constitutes formal joinder nor can be considered identical to it. Joinder implies that the parties in the same interest are reckoned as one party in the totality of their procedural position which, in addition to the appointment of a single judge *ad hoc* includes also one set of pleadings and a single judgment.

The parties in the same interest, in the sense of Article 31, paragraph 5, of the Statute, are reckoned as one party in a restricted, functional sense versus the process position of parties in its totality in the event of the issue of joinder, and that is the choice of judges *ad hoc*. The formulation according to which "several parties in the same interest . . . shall . . . be reckoned as one party only" (Statute, Art. 31, para. 5) is made not for the

[12] *Exempli causa*,

> "in the *Fisheries Jurisdiction* cases, the Court did not join the cases, and rendered two distinct series of judgments, both on jurisdiction and on the merits. However, that did not prevent it from regarding the United Kingdom and Germany as being 'in the same interest' during the initial phase of the procedure." (G. Guillaume, "La 'cause commune' devant la Cour internationale de Justice", *Liber Amicorum — Mohammed Bedjaoui*, 1999, pp. 330, 334-335 *[translation by the Registry]*).

purpose of a joinder but "for the purpose of the preceding provisions" (Statute, Art. 31, para. 5) of Article 31 regulating equalization of the parties before the Court.

If we continue for a moment to use the terminology of joinder, we could possibly qualify the parties in the same interest, in the sense of Article 31, paragraph 5, of the Statute, as a kind of small or procedural joinder substantively and functionally linked with the choice of judges *ad hoc* on the basis of the provisions of Article 31 of the Statute of the Court.

70. The fundamental difference in the composition of the Court in the provisional measures phase as against the preliminary objections phase could be defended with the argument that in the provisional measures phase the Court was not in a position to ascertain the positions of the respondent States vis-à-vis the demands of the Applicant. The argument bears a certain weight but it should not be overestimated in this particular case for two reasons at least. *Primo*, the question of the composition of the Court is a matter of public order (in the Advisory Opinion case concerning *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)* (hereinafter referred to as *"Namibia"*), Vice-President Ammoun pointed out in his separate opinion that it relates to "the rule of . . . very equality which the Statute seeks to safeguard through the institution of judges *ad hoc*" (*I.C.J. Reports 1971*, p. 68)) possessing "absolute logical priority" (*ibid.*, p. 25, para. 36; see also *Western Sahara, Order of 22 May 1975, I.C.J. Reports 1975*, pp. 7-8; *Western Sahara, Advisory Opinion, I.C.J. Reports 1975*, p. 17-18, para. 13). *Secundo*, the indication for consideration of the same interest of the respondent States was provided in the Application itself which related to all the ten respondent States with identical statements of facts and law. The Application itself offered the basis for a prima facie appreciation of the facts and law for the treatment of "the appointment of a judge *ad hoc* . . . as a preliminary matter" (*Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971*, p. 25, para. 36). *Tertio*, the urgency of the proceedings for interim measures could hardly be deemed to have been an obstacle to such proceedings in this particular case, because the proceedings for interim measures themselves lasted over 30 days, counting from the date of submission of the request to the date of the rendering of the order.

71. The decision regarding the composition of the Court in both phases, the provisional measures phase and the preliminary objections phase, was adopted informally, being intimated to the Parties by the Registrar. (The Court has thus departed from the practice established in the *South West Africa* cases (cf. *Order of 18 March 1965, I.C.J. Reports 1965*, p. 3) in which the decision about the composition of the Court was adopted in the

form of an order.) This practice possessed certain inherent advantages, both formal and those of a substantive nature. As far as the formal advantages are concerned, it is difficult to understand that the issue of composition of the Court is regulated informally, at least when more delicate and controversial cases are in question, whereas issues, such as the appointment of experts of the Court (cf. *Corfu Channel, Order of 19 November 1949, I.C.J. Reports 1949*, p. 237; *Delimitation of the Maritime Boundary in the Gulf of Maine Area, Appointment of Expert, Order of 30 March 1984, I.C.J. Reports 1984*, p. 165), the appointment of experts to assist the parties to implement a judgment (cf. *Frontier Dispute, Nomination of Experts, Order of 9 April 1987, I.C.J. Reports 1987*, p. 7), or decisions on a request for an inspection *in loco* (cf. *South West Africa, Order of 29 November 1965, I.C.J. Reports 1965*, p. 9; *Gabèíkovo-Nagymaros Project (Hungary/Slovakia), Order of 5 February 1997, I.C.J. Reports 1997*, p. 3) are dealt with through a formal order. Although there is no difference in the legal effect of decisions adopted informally or in the legal effect of those adopted in a formal manner, the manner in which a decision of the Court is embodied bears the meaning of an implicit evaluation of the issues being the object of the decision. This practice is all the more surprising having in mind that the question of the composition of the Court is not a purely procedural matter, but, in cases such as the case in hand, a matter of public order that indirectly concerns the principle of equality of States as one of the fundamental principles of international law which falls within *corpus juris cogentis*.

Also indisputable, it seems to me, are the substantive advantages of making decisions on the composition of the Court in a formal manner. They emanate from the very structure of the order, in particular from the special considerations that the Court had in mind making the order and reasons justifying a particular decision on the composition of the Court. Thus, an easier and more reliable interpretation of the decision of the Court is enabled and, equally important, a consolidation of jurisprudence of the Court on the matter.

72. The decision of the Court by which three respondent States (Belgium, Canada and Italy) have been denied the extension of the appointments of their judges *ad hoc* in the preliminary objections phase, and denying Portugal the right to appoint a judge *ad hoc*, is based on Article 31, paragraph 5, of the Statute which provides that "[s]hould there be several parties in the same interest, they shall, for the purpose of the preceding provisions, be reckoned as one party only. Any doubt upon this point shall be settled by the decision of the Court."

(a) As regards Belgium, Canada and Italy, the Court adopted the relevant decision "pursuant to Article 31, paragraph 5, of the Statute, *taking into account the presence on the Bench of judges of British, Dutch and French nationality*" (CR 2004/6, pp. 6-7; emphasis added). The interpretation of this explanation of the Court's decision inevitably leads to the conclusion that the Court considered not only Belgium, Canada and Italy

as parties in the same interest, but also France, the Netherlands and the United Kingdom.

The effect of Article 31, paragraph 5, of the Statute obviously could not have been the deprivation of Belgium, Canada and Italy's right, "reckoned as one party only", to have upon the Bench a single judge *ad hoc*, but of the extension of the appointments of judges *ad hoc* which they had appointed individually in the provisional measures phase. The deprivation was legally founded only if the Court had found that these three respondent States, together with France, the Netherlands and the United Kingdom, were in the position of "parties in the same interest". The argument of the Court is suggestive of this but not explicit, because it only referred to the "presence on the Bench of judges of British, Dutch and French nationality" (CR 2004/6, p. 6) as *ratio* of exclusion of the right of Belgium, Canada and Italy to choose a single judge *ad hoc* without saying that all of them were parties in the same interest. A direct *nexus* between these two matters — on the one hand, the deprivation of the three respondent States, having no judge of their nationality on the Bench, of their right to choose a single judge *ad hoc*, and, on the other hand, the presence on the Bench of judges of the nationality of the three other respondent States, having judges of their nationality on the Bench — is only possible to establish on the basis of the same interest position of all these respondent States.

(b) As far as Germany is concerned, as Judge Simma had considered that he should not take part in the decision in this case, Germany, on the basis of Article 37, paragraph 1, of the Rules of Court became "entitled to choose a judge *ad hoc* within a time-limit to be fixed by the Court, or by the President". The Court, however, decided that the entitlement under Article 37 is non-existent *in casu* "pursuant to Article 31, paragraph 5, of the Statute" (CR 2004/6, p. 7). In other words, the Court subsumed the position of Germany in this particular matter under Article 37, paragraph 2, of the Rules of Court which provides that "*[p]arties in the same interest shall be deemed not to have a judge of one of their nationalities* . . . if the Member of the Court . . . is or becomes unable to sit" (emphasis added).

Consequently, the Court, proceeding from the "same interest" provision embodied in Article 31, paragraph 1, of the Statute and elaborated in Article 37, paragraphs 1 and 2, of the Rules of Court, by its decision notified to the Parties by letters of the Registrar dated 23 December 2003, took the position that all eight respondent States are parties in the same interest.

73. The decision of the Court produced equalization effects in the composition of the Bench between the Applicant, on the one hand, and the Respondents, on the other.

The equalization effects are expressed on two levels:

(i) on the level of the relation between the applicant State and those

respondent States having no national judge upon the Bench. Unlike the provisional measures phase, full equalization was realized in the preliminary objections phase in accordance with the perfectly coherent jurisprudence of the Court, thanks to the decision of the Court. (Cf. joint declaration of Judges Bedjaoui, Guillaume and Ranjeva, *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya* v. *United Kingdom), Preliminary Objections, Judgment, I.C.J. Reports 1998*, pp. 34-39);

(ii) on the level of the relation between the applicant State and those respondent States having Members of their nationality upon the Bench. On this level partial equalization has been realized given the fact that Judge Simma had decided not to take part in the decision in the case, and the Court's decision that Germany, pursuant to Article 31, paragraph 5, of the Statute was not entitled to choose a judge *ad hoc*.

Thus the relation between the applicant State and the respondent States having Members of their nationality upon the Bench suffered a change in the concrete matter in comparison with the composition of the Court in the procedure on provisional measures — three respondent States (France, the Netherlands and the United Kingdom) have their national judges upon the Bench and the applicant State has a judge *ad hoc* on the Bench.

Can such a solution be considered tenable in law and justice? The answer to this question, it seems to me, is in the negative rather than in the positive.

In the construction of Article 31, paragraphs 1 to 5, of the Statute, the arithmetical equality of the numbers of judges upon the Bench having the nationality of the parties, in the relevant variants of the relation between the number of national judges (Art. 31, para. 1), national judges and judges *ad hoc* (Art. 31, para. 2) or judges *ad hoc* mutually (Art. 31, para. 3), figures as an expression of equality of the parties. Although equality of the parties is not exhausted in the arithmetical equality, it seems incontestable that, in the relations among States as sovereign political units, the arithmetical equality is an important constitutive element of equality: *a contrario*, the provisions of Article 31, paragraphs 1 to 5, of the Statute as such would be devoid of substance.

It is obvious that *in concreto* this arithmetical equality is non-existent despite the fact that the respondent States are parties in the same interest. What is involved, in fact, is but one example of inequality of the parties, inequality that comes about due to grammatical interpretation of Article 31, paragraph 4, of the Statute.

For as Judge Guillaume notes, referring to Article 31, paragraph 4, of the Statute,

"This provision guaranteed equality between the parties where

> neither had a national on the Bench. Thus in such cases, whether there is a plurality of applicants, or of respondents, or of both, only one judge *ad hoc* is chosen to sit on each side.
>
> The system worked equally well where the Court included a judge of the nationality of one of the parties and the latter objected to a plurality of applicants or respondents acting in the same interest and not having a judge of their own nationality present on the Bench. Here again, equality was effectively guaranteed.
>
> On the other hand, the system was more open to criticism where on one side there were several States with judges of their nationality on the Bench, whereas on the other there was only one judge, or even merely a judge *ad hoc*." (G. Guillaume, "La 'cause commune' devant la Cour internationale de Justice", *Liber Amicorum — Mohammed Bedjaoui* (Emile Yakpo and Tahar Boumedra, eds.), 1999, pp. 328-329; emphasis added.)

It follows, consequently, that in the event of conflict between the principle of permanence of the Court and equality of parties "the authors of the Statute and Rules accorded priority to the principle of the permanence of the Court", having restricted the application of the principle of equality of parties "in regard to choice of judges *ad hoc* to situations where the 'common interest' provisions apply" (*ibid.*, p. 330 *[translation by the Registry]*).

Such a state of affairs is hardly tenable. The deficiencies of the solutions enshrined in the Statute and in the Rules of Court cannot constitute a basis for a derogation of the fundamental principle of equality of parties. The principle of equality of parties is but one ingredient, a constitutive element of a broader principle of sovereign equality of States. Although the Statute and the Rules of Court are, by their nature, *jus specialis* designed to regulate the work of the Court, it cannot be accepted that they authorize, as such, the Court to disregard the relevant norms of general international law. And, as the Statute itself determines, the Court's function "is to decide in accordance with international law" (Statute, Art. 38, para. 1). Especially as concerns contemporary international law which, unlike international law that was in effect at the time of drawing up of the Statute of the Permanent Court of International Justice, recognizes *jus cogens* the rules of overriding importance that, by definition, brook no competition of incongruous rules. And the principle of sovereign equality of States is undoubtedly a rule that belongs to *corpus juris cogentis*.

74. The issue of the realization of the overriding rule of equality of States in regard to the composition of the Bench is, basically, an issue of a technical, derivative nature. There are two ways that seem to be appro-

priate, independently or in combination, depending on the circumstances of a particular case. One of them boils down to the exemption of a Member or Members of the Court in the event that there exists inequality between the litigant parties in multiple cases in which one party is comprised of two or several States whose judges sit in the Court. Whereas the other party is composed of a State (or States) that do not have national judges or have a smaller number of national judges as compared to the other side. In such a case a solution could be found within the co-ordinates of the proposal submitted at the time of the revision of the Rules of Court in 1926, according to which:

> "Where one of the parties is represented by two or more States having judges present on the Bench, only one of those judges, to be chosen by the States in question, may take part in the proceedings and judgment in the case." (*Statut et Règlement de la Cour permanente de Justice internationale — Eléments d'interprétation*, Carl Heymanns Verlag, Berlin, 1934, p. 189, cited in G. Guillaume, "La 'cause commune' devant la Cour internationale de Justice", *Liber Amicorum — Mohammed Bedjaoui* (Emile Yakpo and Tahar Boumedra, eds.), 1999, p. 329. *[Translation by the Registry.]*)

Two objections could be raised with respect to this way of solving the issue. The first is that it implies revision of Article 31, paragraph 1, of the Statute. The objection is justified, but only partially, having in mind that, by the application of Article 24, paragraph 2, of the Statute, it is possible to achieve equalization even without a formal revision of the Statute. The circumstances that two or more States whose judges sit in the Court — States that are parties in the same interest — can be regarded by the President of the Court as a "special reason" for having recourse to the authority being at their disposal on the basis of Article 24, paragraph 2, of the Statute. It is difficult, however, to imagine that a broader application of this provision of the Statute is feasible, not only because of the principle of permanence of the function of a Member of the Court, but also because of the requirement relating to the minimal number of judges constituting the Court (Statute, Art. 25, para. 2). Still, the possibilities offered by this provision of the Statute should not be underestimated, especially if the principle of permanence is interpreted systematically, without the ingredients of a fetish. In that sense, the principle of permanence of the Court is of a relative nature, not only because of the provision of the Statute stipulating that a third of judges shall be elected every third year (Statute, Art. 13), but also because of the fact that a judge or judges may be prevented from sitting on the Bench for factual or legal reasons (Statute, Art. 23, para. 3, and Art. 24, para. 1).

The other manner would consist in giving the right to a party having no judge of its nationality on the Bench to nominate more than one judge *ad hoc* if equalization cannot be achieved in some other way. There exist no substantive obstacles in the Statute to this manner of equalization. The fact that Article 31, paragraph 2, of the Statute refers to the right of

"any other party" (i.e., a party other than the party which has a judge of its nationality) to "choose a person to sit as judge" in the singular, cannot be regarded as a ban on "any other party" to choose more than one judge *ad hoc*. Article 31, paragraph 2, of the Statute is, both by diction and by the terms used, designed individualistically, i.e., one party (having a judge of its nationality on the Bench)/other party (party other than the party having a judge of its nationality on the Bench). When multiple cases, such as the cases at hand, are involved, the said provision should be interpreted teleologically.

A contrario, it remains unclear how equalization, as an expression and manner of ensuring the fundamental principle of equality of States, could be achieved. For it should be borne in mind that it is not only about nominal equality between parties, considering that even a quick look at the voting practice in the Court shows that differences between national judges and judges *ad hoc* in the cases in which States of their nationalities were involved are not so significant as usually presumed.

75. The schedule of public hearings in the eight cases concerning the *Legality of Use of Force* held from 19 April 2004 to 23 April 2004, taken *per se* and in particular in connection with the decision of the Court relating to the composition of the Court in these cases, represents a specific and unusual approach of the Court.

Prima facie, the schedule of public hearings reflects the idea of consolidation of separate proceedings in the sense of a logical order of the hearings. More precisely, during the first round of pleadings on the preliminary objections held on 19 and 20 April, all eight respondent States submitted their pleadings, whereas the Applicant did so on 21 April 2004. The schedule was basically applied to the second round of pleadings, so that 22 April 2004 was reserved for the eight respondent States and 23 April 2004 for the Applicant. However, a couple of things contradict a simple equalization of this schedule of public hearings with the consolidation of separate proceedings. *Primo*, the schedule departs from the logical and normal practice that after the pleading of one respondent State, who raised preliminary objections, there follows the pleading of the Applicant, bearing in mind that a separate pleading is in question. It is possible to argue that eight respondent States were in question, so that the schedule of public hearings in the form in which it is designed was meant to avoid possible duplication in the arguments of the Parties, in particular that of the Applicant. Leaving aside the fact that such reasoning implies also substantive similarity or identity of pleadings of the respondent States, it is clear already from a quick reading of the official records of pleadings that, as designed, the schedule of public hearings did not exclude duplication of arguments. *Secundo*, the order of pleadings of the respondent States does not correspond to their order in the List of pending cases. Moreover, it is in contrast also with the order of pleadings of the respondent States in the provisional measures phase of the cases.

The Court decided at the time that after Yugoslavia, as the applicant State, the respondent States should make their presentations in English alphabetical order (International Court of Justice, Press Release 99/19 of 7 May 1999), which is also the order of the cases in the official name of the cases on the Court's List of pending cases. This would not merit too much attention by itself. It could simply be a matter of convenience — if it were not followed also by grouping of the respondent States in the schedule of public hearings. Thus, within the framework of the first round of oral pleadings, the morning session of the Court on 19 April 2004 was reserved for Belgium and the Netherlands. Also, the morning session of the following day was reserved for Germany, France and Italy. Although the Court offered no explanation for the reasons for such a grouping, which cannot be taken as unusual, it is reasonable to assume that the Court relied, among other things, also on different jurisdictional claims pointed out by the applicant State. (Namely, with respect to Belgium and the Netherlands, the Applicant presented also additional titles of jurisdiction, i.e., Article 4 of the Convention of Conciliation, Judicial Settlement and Arbitration between Belgium and the Kingdom of Yugoslavia dated 25 March 1930, and Article 4 of the Treaty of Judicial Settlement, Arbitration and Conciliation between the Netherlands and the Kingdom of Yugoslavia dated 11 March 1931.) On the other hand, the process position of Germany, France and Italy is characterized by the fact that these three respondent States have not made a declaration of acceptance of the compulsory jurisdiction of the Court under Article 36, paragraph 2, of the Statute. *Tertio*, there has appeared an intriguing coincidence of the said grouping of the respondent States in the schedule of public hearings and of the composition of the Court derived from it, a composition that would completely fit in with the principle of equality of parties. If, *ex hypothesi*, joinder has been established for groups of cases in accordance with the schedule of public hearings held on 19 and 20 April 2004 (joinder for Belgium and the Netherlands, a second for Germany, France and Italy, and a third for the United Kingdom, Portugal and Canada), then the relation between the Applicant and the groups of respondent States included in the said joinders would be brought to the point of full equality of the Parties as far as the composition of the Court is concerned.

* * *

76. The question of *locus standi* of Serbia and Montenegro before the Court, or its jurisdiction, is one thing, and the question of the legality of use of force is another.

Due to the inherent features of the jurisdiction of the Court — the consensual nature coupled with limited access — the Court was not in a position to make a pronouncement with regard to the legality of use of force in these particular cases.

This fact testifies by itself to the delicate position in which the Court, as the world Court, may find itself.

The Court, whose function is "to decide in accordance with international law" (Statute, Art. 38, para. 1) disputes as are submitted to it is, in these particular cases, hindered in a way in carrying out its function in regard to the issue that certainly cannot be regarded as an ordinary one.

The question of the use of force in relations between States in an ontological issue of the international order. It is a watershed of the primitive *de facto* order that is governed by the elements of constellation of powers and opportunism, and of the *de jure* international order embodied in the rule of law.

On this occasion it seems appropriate to observe that we are witnessing a cacophony of voices, coming as a rule from the circle of powerful and influential States, to the effect that the sovereignty of States is just history. As far as international law and the Court, as its organ, are concerned, it is painful and surprising to realize that, among the advocates of limited sovereignty, there can hardly be found those supporting a limitation of sovereignty in, probably, the only aspect where limitation of sovereignty — irrespective of the will of the States — corresponds with the idea of a legally organized international community. Namely, that disputes between States should be solved before the Court and not on the battlefield.

The *ratio* of existence of international law rests in its implementation, especially when it comes to rules that have an overriding character. Hence, one can understand the calls, or perhaps entreaties, addressed to the Court that

> "Yugoslavia was at least entitled to deliberation on the merits of its claim . . . rather than being brushed off on a jurisdictional technicality" (Anthony D'Amato in "Review of the ICJ Order of June 2, 1999 on the Illegality *[sic]* of Use of Force Case", as found in "Kosovo & Yugoslavia: Law in Crisis", a presentation of Jurist (source: http://jurist.law.pitt.edu/amato1.htm at 22 November 2004)).

It remains for the Court, fettered by the strong rules of its jurisdiction, to appeal, if at all, to the Parties, somewhat quixotically, to be aware of their responsibilities under international law, following the practice in some previous cases (*exempli causa, Fisheries Jurisdiction (Spain* v. *Canada), Jurisdiction of the Court, Judgment, I.C.J. Reports 1998*, p. 456, para. 56) or to address the matter even in a more qualified manner.

(Signed) Milenko KREĆA.