JOINT DECLARATION OF VICE-PRESIDENT RANJEVA, JUDGES GUILLAUME, HIGGINS, KOOIJMANS, AL-KHASAWNEH, BUERGENTHAL AND ELARABY

[English Original Text]

Various objections to the jurisdiction of the Court — Freedom of choice of the Court — Guiding criteria: consistency; certitude; implications for the other pending cases — Judgment of the Court inappropriately based on its lack of jurisdiction ratione personae *— Judgment incompatible with previous decisions of the Court.*

1. We have voted in favour of the *dispositif* of the Judgment because, at the end of the day, we each agree that this case cannot, as a matter of law, proceed to the merits. Nevertheless, we profoundly disagree with the reasoning upon which the Judgment rests, in particular the ground upon which the Court has found it has no jurisdiction.

2. It is not unusual that, in a case, the Court has the possibility of determining its jurisdiction on more than one ground (*Right of Passage over Indian Territory, Preliminary Objections*, *Judgment, I.C.J Reports 1957*, pp. 129-134; *Aerial Incident of 27 July 1955 (Israel* v. *Bulgaria), Judgment, I.C.J. Reports 1959*, pp. 132-134; *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon* v. *Nigeria), Preliminary Objections, Judgment, I.C.J Reports 1998*, pp. 284-289; *Aerial Incident of 10 August 1999 (Pakistan* v. *India), Jurisdiction, Judgment, I.C.J. Reports 2000*, pp. 19-24). Submissions may have been made to the Court that it lacks jurisdiction by reference to more than one of the common bases of jurisdiction (that is to say, *ratione personae*, *ratione materiae*, *ratione temporis*). If the Court finds that, on two or more grounds, its jurisdiction is not well founded, it may choose the most appropriate ground on which to base its decision of lack of competence. The Court does not necessarily first have to dispose of the conditions laid down in Article 35 of the Statute, dealing only later with the conditions laid down in Articles 36 and 37.

3. The choice of the Court has to be exercised in a manner that reflects its judicial function. That being so, there are three criteria that must guide the Court in selecting between possible options. First, in exercising its choice, it must ensure consistency with its own past case law in order to provide predictability. Consistency is the essence of judicial reasoning. This is especially true in different phases of the same case or with regard to closely related cases. Second, the principle of certitude will lead the Court to choose the ground which is most secure in law and to avoid a ground which is less safe and, indeed, perhaps doubtful. Third, as the principal judicial organ of the United Nations, the Court will, in making

its selection among possible grounds, be mindful of the possible implications and consequences for the other pending cases.

4. In the earlier phase of the present case — as in other cases relating to events after the break-up of the Socialist Federal Republic of Yugoslavia — the Court had chosen to base itself on jurisdictional considerations *ratione temporis* and *ratione materiae*.

5. In this respect it should first be recalled that when the Court gave an Order of 2 June 1999, in response to a request by the Federal Republic of Yugoslavia for the indication of provisional measures, in which it found that it lacked prima facie jurisdiction to rule on Yugoslavia's Application, it did so on quite different grounds from the one on which the Court has based itself in the present decision.

6. In the Orders concerning Belgium, Canada, Netherlands, Portugal and the United Kingdom, the Court observed that Yugoslavia's declaration accepting the compulsory jurisdiction of the Court under Article 36, paragraph 2, of the Statute, had been filed with the United Nations Secretary-General on 26 April 1999 (three days before the institution of proceedings). In that declaration, Yugoslavia recognized, on condition of reciprocity, "the jurisdiction of the said Court in all disputes arising or which may arise after the signature of the present Declaration, with regard to the situations or facts subsequent to this signature".

The Court found that the Application was directed, in essence, against the bombing of Yugoslav territory by several members of NATO. It observed that the bombings began on 24 March 1999. Accordingly, it considered that the disputes before it had arisen some time prior to 25 April 1999. The Court further recalled its established jurisprudence whereby any limitation *ratione temporis* attached by one of the parties to its declaration of acceptance of the Court's jurisdiction "holds good as between the Parties" and concluded from this that the declaration of Yugoslavia, taken in conjunction with those made by the Parties which had also accepted the Court's jurisdiction under Article 36, paragraph 2, of the Statute, did not constitute a basis on which its jurisdiction could prima facie be founded (see, for example, case concerning *Legality of Use of Force (Yugoslavia* v. *Belgium), Order of 2 June 1999, I.C.J. Reports 1999 (I)*, p. 135, para. 30). The Court, thus lacking prima facie jurisdiction *ratione temporis*, concluded that it did not need to examine whether Yugoslavia was or was not a Member of the United Nations and a party to the Statute in 1999, or whether on such basis it had jurisdiction *ratione personae*.

7. In all the Orders, the Court next noted that Yugoslavia and certain of the respondent States were parties to the United Nations Genocide Convention without reservation. It recalled the definition of genocide as stated in the Convention and observed that, according to that definition,

"[the] essential characteristic [of genocide] is the intended destruction of 'a national, ethnical, racial or religious group'" (*I.C.J. Reports 1999 (I)*, p. 138, para. 40). In the Court's view, it did not appear "at the present stage of the proceedings that the bombings which form the subject of the Yugoslav Application 'indeed entail the element of intent, towards a group as such, required by the provision quoted above'" (*ibid.*, p. 138, para. 40).

8. Based on different reasoning, the Court has now confirmed that it lacks jurisdiction to entertain the claims presented by Serbia and Montenegro. It began by finding that Serbia and Montenegro, on 29 April 1999, was not a Member of the United Nations and not a party to the Statute. It concluded therefrom that the Court was not open to Serbia and Montenegro under Article 35, paragraph 1, of the Statute.

Moreover, the Court considered that Article 35, paragraph 2, of the Statute enabled States not parties to the Statute to appear before the Court only by virtue of treaties concluded prior to the entry into force of the Statute. It observed that the Genocide Convention entered into force at a later date, on 12 January 1951. It thus concluded that Article 35, paragraph 2, did not grant Serbia and Montenegro access to the Court under Article IX of the Convention. Accordingly, the Court was not called upon to decide "whether Serbia and Montenegro was or was not a party to the Genocide Convention" when the Applications were filed. In any event, the Court was, once again, not open to Serbia and Montenegro.

In sum, and contrary to its position in 1999, the Court has thus preferred to rule on its jurisdiction *ratione personae*, without even examining the questions of jurisdiction *ratione temporis* and *ratione materiae* on which it had previously pronounced prima facie.

9. This change of position is all the more surprising as the reasoning now adopted by the Court is at odds with judgments or orders previously rendered by the Court.

10. We would first observe that the question whether Yugoslavia was a Member of the United Nations and as such a party to the Statute between 1992 and 2000, remained a subject of debate during that period. The Court declined to settle the issue, both 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, I.C.J. Reports 1993*, p. 14, para. 18) and in 1999 when issuing its Order on provisional measures (*Legality of Use of Force (Yugoslavia* v. *Belgium), Order of 2 June 1999, I.C.J. Reports 1999 (I)*, p. 136, para. 33). It then confined itself to stating that the solution adopted in this respect by Security Council resolution 757 (1992) and General Assembly resolution 47/1 was "not free from legal difficulties" (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Yugoslavia (Serbia and*

Montenegro)), Provisional Measures, I.C.J. Reports 1993, p. 14, para. 18).

Subsequent to the admission of Serbia and Montenegro to the United Nations on 1 November 2000, the Court had to consider the question whether that admission clarified the previous position. The Court then found, in its Judgment of 3 February 2003, that

> "resolution 47/1 did not *inter alia* affect the Federal Republic of Yugoslavia's right to appear before the Court or to be a party to a dispute before the Court under the conditions laid down by the Statute" (*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), I.C.J. Reports 2003*, p. 31, para. 70).

The Court added that

> "General Assembly resolution 55/12 of 1 November 2000 cannot have changed retroactively the *sui generis* position which the Federal Republic of Yugoslavia 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" (*ibid.*, para. 71).

The Court thus previously found in 2003 that the Federal Republic of Yugoslavia could appear before the Court between 1992 and 2000 and that this position was not changed by its admission to the United Nations in 2002.

11. Further, the interpretation given in the present Judgment of Article 35, paragraph 2, of the Statute also appears to us to be at odds with the position previously adopted by the Court in its Order of 8 April 1993, where it considered that

> "proceedings may validly be instituted by a State against a State which is a party to such a special provision in a treaty in force, but is not party to the Statute, and independently of the conditions laid down by the Security Council in its resolution 9 of 1946" *(Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Yugoslavia* (*Serbia and Montenegro)), Provisional Measures, Order of 8 April 1993, I.C.J. Reports 1993*, p. 14, para. 19*)*.

It is moreover astonishing that the Court found it necessary to rule on the scope of Article 35, paragraph 2, whereas the Applicant did not invoke this text.

12. Turning to the second criterion that the Court should apply in selecting between alternative grounds for its decision — that of certitude — we also find this not to be reflected in the ground chosen by the Court today. Nothing has occurred, in the series of cases concerning Kosovo, since the Court's last judgment in 2003, to suggest that the

grounds previously chosen have now lost legal credibility. Further, the grounds today selected by the Court are less certain than others open to it. The Court has determined that the admission of the Applicant to the United Nations in November 2000 "did not have, and could not have had, the effect of dating back to the time when the Socialist Federal Republic of Yugoslavia broke up and disappeared" (para. 77). The Court has also stated that "the significance of this new development in 2000 is that it has clarified the thus far amorphous legal situation concerning the status of the Federal Republic of Yugoslavia vis-à-vis the United Nations" (para. 78). Without specifying whether this "clarification" refers to the period 1992-2000, the Court asserts that it has now become "clear that the *sui generis* position of the Applicant could not have amounted to its membership in the Organization". We find this proposition far from self-evident and we cannot trace the steps of the reasoning. Such grounds seem to us to be less legally compelling and therefore less certain, and more open to different points of view, than the grounds relied upon by the Court thus far and which are now set aside by the Court.

13. We have referred also to the care that the Court must have, in selecting one among several possible grounds for a decision on jurisdiction, for the implications and possible consequences for other cases. In that sense, we believe that paragraph 39 of the Judgment does not adequately reflect the proper role of the Court as a judicial institution. The Judgment thus goes back on decisions previously adopted by the Court, whereas it was free to choose the ground upon which to base them and was under no obligation to rule in the present case on its jurisdiction *ratione personae*. Moreover, this approach appears to leave some doubt as to whether Yugoslavia was a party, between 1992 and 2000, to the United Nations Genocide Convention. Such an approach could call into question the solutions adopted by the Court with respect to its jurisdiction in the case brought by Bosnia and Herzegovina against Serbia and Montenegro for the application of the Genocide Convention. We regret that the Court has decided to take such a direction.

(*Signed*) Raymond RANJEVA.
(*Signed*) Gilbert GUILLAUME.
(*Signed*) Rosalyn HIGGINS.
(*Signed*) Pieter KOOIJMANS.
(*Signed*) Awn Shawkat AL-KHASAWNEH.
(*Signed*) Thomas BUERGENTHAL.
(*Signed*) Nabil ELARABY.