SEPARATE OPINION OF JUDGE HIGGINS

Removal from the List other than for reasons of discontinuance — Inherent powers of the Court — Inherent powers not limited to two existing examples — Reasons why this case should have been removed from the List — Inappropriate for Judgment to have pronounced on Article 35, paragraph 2, of Statute.

1. The Court in its Judgment finds that the Observations of Serbia and Montenegro have not had the legal effect of discontinuance of proceedings under the Rules (para. 31). I agree. It is clear that the Applicant has declined to "discontinue", and that "discontinuance" as envisaged in the Rules is dependent on the consent of the Parties.

2. The Court further observes that:

> "Prior to the adoption of Article 38, paragraph 5, of the Rules of Court, in a number of cases in which the application disclosed no subsisting title of jurisdiction, but merely an invitation to the State named as respondent to accept jurisdiction for the purposes of the case, the Court removed the cases from the List by order. By Orders of 2 June 1999, it removed from the List two cases brought by Serbia and Montenegro concerning *Legality of the Use of Force* against Spain and the United States of America, on the ground that the Court 'manifestly lack[ed] jurisdiction' (*I.C.J. Reports 1999*, pp. 773 and 925)." (Judgment, para. 32.)

3. The Court then observes that "[t]he present case does not however fall into either of these categories". The Court thus appears to regard these as a closed list of categories for the removal of cases from the List (other than where discontinuance has occurred), and to suggest that no removal from the List was open to the Court in the present case as the facts do not fall within the existing two examples.

4. A case may be discontinued by the applicant alone and an order issued to remove it from the List (*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; Legal Status of the South-Eastern Territory of Greenland, Order of 11 May 1933, P.C.I.J., Series A/B, No. 55*, p. 157; *Protection of French Nationals and Protected Persons in Egypt, Order of 29 March 1950, I.C.J. Reports 1950*, p. 59; *Electricité de Beyrouth Company, Order of 29 July 1954, I.C.J. Reports 1954,* p. 107; *Aerial Incident of 27 July 1955 (United Kingdom* v. *Bulgaria), Order of 3 August 1959,*

I.C.J. Reports 1959, p. 264; *Aerial Incident of 27 July 1955 (United States of America* v. *Bulgaria), Order of 30 May 1960, I.C.J. Reports 1960*, p. 146; *Barcelona Traction, Light and Power Company, Limited, Order of 10 April 1961, I.C.J. Reports 1961*, p. 9; *Trial of Pakistani Prisoners of War, Order of 15 December 1973, I.C.J. Reports 1973*, p. 347; *Border and Transborder Armed Actions (Nicaragua* v. *Costa Rica), Order of 19 August 1987, I.C.J. Reports 1987*, p. 182; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Order of 26 September 1991, I.C.J. Reports 1991*, p. 47; *Border and Transborder Armed Actions (Nicaragua* v. *Honduras), Order of 27 May 1992, I.C.J. Reports 1992*, p. 222; *Passage through the Great Belt (Finland* v. *Denmark), Order of 10 September 1992, I.C.J. Reports 1992*, p. 348; *Maritime Delimitation between Guinea-Bissau and Senegal, Order of 8 November 1995, I.C.J. Reports 1995*, p. 423; *Vienna Convention on Consular Relations (Paraguay* v. *United States of America), Order of 10 November 1998, I.C.J. Reports 1998*, p. 426; *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Burundi), Order of 30 January 2001, I.C.J. Reports 2001*, p. 3; *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Rwanda), Order of 30 January 2001, I.C.J. Reports 2001*, p. 6).

5. There is a comparable, and analogous, practice relating to discontinuance upon the agreement of the parties, removal from the List being effected by order. Among the many examples are *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. 4; *Compagnie du Port, des Quais et des Entrepôts de Beyrouth and Société Radio-Orient, Order of 31 August 1960, I.C.J. Reports 1960*, p. 186; *Certain Phosphate Lands in Nauru (Nauru* v. *Australia), Order of 13 September 1993, I.C.J. Reports 1993*, p. 322; *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya* v. *United Kingdom), Order of 10 September 2003, I.C.J. Reports 2003*, p. 149; *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya* v. *United States of America), Order of 10 September 2003, I.C.J. Reports 2003*, p. 152.

6. The Court has also declined to proceed with cases in circumstances other than discontinuance under the Rules. The Permanent Court terminated interim measures proceedings in the *Prince von Pless Administration* case, on the grounds that the request made by Germany in its Application had ceased to have any object (*Order of 11 May 1933, P.C.I.J., Series A/B, No. 54*, p. 150). And in the *Northern Cameroons* case, the Court declined to proceed further with a case for what it saw as reasons of judicial propriety (*Preliminary Objections, Judgment, I.C.J. Reports 1963*, p. 29). In the *Nuclear Tests* cases, the Court did not regard itself as constrained by the fact that Australia and New Zealand

had not, after the French announcement of the conclusion of its testing, discontinued the proceedings under Article 74 of the 1972 Rules. The Court stated that "this does not prevent the Court from making its own independent finding" (*Nuclear Tests (Australia* v. *France), Judgment, I.C.J. Reports 1974*, p. 270, para. 54; *Nuclear Tests (New Zealand* v. *France), Judgment, I.C.J. Reports 1974*, p. 476, para. 57) and it determined that "the object of the claim has been achieved by other means" — i.e., means other than litigation (*Nuclear Tests (Australia* v. *France), Judgment, I.C.J. Reports 1974*, p. 271, para. 55; *Nuclear Tests (New Zealand* v. *France), Judgment, I.C.J. Reports 1974*, p. 476, para. 58).

7. In a pertinent dictum the Court stated that it saw:

> "no reason to allow the continuance of proceedings which it knows are bound to be fruitless. While judicial settlement may provide a path to international harmony in circumstances of conflict, it is none the less true that the needless continuance of litigation is an obstacle to such harmony." (*Nuclear Tests (Australia* v. *France), Judgment, I.C.J. Reports 1974*, p. 271, para. 58; *Nuclear Tests (New Zealand* v. *France), Judgment, I.C.J. Reports 1974*, p. 477, para. 61.)

In both the *Northern Cameroons* and *Nuclear Tests* cases, the Court decided not to adjudicate further and did not issue a formal order.

8. In its Orders of 2 June 1999 (*Legality of Use of Force (Yugoslavia* v. *United States of America), Provisional Measures, Order of 2 June 1999, I.C.J. Reports 1999*, p. 916; *Legality of Use of Force (Yugoslavia* v. *Spain), Provisional Measures, Order of 2 June 1999, I.C.J. Reports 1999*, p. 761) the Court had removed the cases from the List after hearings on provisional measures, on the grounds that the Court manifestly lacked jurisdiction. And, as was recognized in the Judgment at paragraph 32, prior to the formulation of Article 38, paragraph 5, of the Rules of Court, there were cases removed from the List because the application was merely an invitation to the respondent.

9. These were actions by the Court in the exercise of its inherent powers. The precedents on removal from the List cited by the Court — where from the outset no subsisting title of jurisdiction has been disclosed, or where the Court manifestly lacked jurisdiction — do not constitute two exclusive categories within which the Court has to fall if it wishes to exercise its inherent powers in the absence of discontinuance. There is nothing in the case law that so suggests. Indeed, it is hard to know what might be the legal source of a right to remove cases from the List provided only that this would be limited to these two examples.

10. The Court's inherent jurisdiction derives from its judicial character and the need for powers to regulate matters connected with the adminis-

tration of justice, not every aspect of which may have been foreseen in the Rules. It was on such a basis that the Permanent Court had admitted the filing of preliminary objections to jurisdiction even before this possibility was regulated by the Rules of Court. The Court stated that it was "at liberty to adopt the principle which it considers best calculated to ensure the administration of justice" (*Mavrommatis Palestine Concessions, Judgment No. 2, 1924, P.C.I.J., Series A, No. 2*, p. 16). The power of the Court to identify remedies for any breach of a treaty, in a case where jurisdiction was based solely upon the treaty concerned, has been regarded as within the Court's inherent powers in the *Corfu Channel* case (*Assessment of Amount of Compensation, Judgment, I.C.J. Reports 1949*, p. 244) and in the *LaGrand (Germany* v. *United States of America)* case (Memorial of the Federal Republic of Germany, Vol. I, 16 September 1999, para. 3.60).

11. The very occasional need to exercise inherent powers may arise as a matter *in limine litis*, or as a decision by the Court not to exercise a jurisdiction it has, or in connection with the conduct or the merits of a case. The judges who jointly dissented in the *Nuclear Tests* cases did not challenge the existence of such inherent powers. They asserted that their use "must be considered as highly exceptional and a step to be taken only when the most cogent considerations of judicial propriety so require" (*Nuclear Tests (Australia* v. *France), Judgment, I.C.J. Reports 1974*, p. 322, para. 22, joint dissenting opinion). Understandably, these judges were particularly concerned that the exercise of the power to decide *proprio motu* should not be exercised without affording an applicant the opportunity to submit counter arguments, as this was not consonant with the due administration of justice. In the present instance, the issue of whether the case should be removed from the List was fully canvassed before the Court.

12. Thus the real question is not whether the Applicant has or has not "discontinued" the case, nor whether the present circumstances are exactly identical to the few examples where the Court itself has removed a case from the List (examples which will, in their turn, have been "new" at the relevant time and not falling into any previously established category). The question is whether the circumstances are such that it is reasonable, necessary and appropriate for the Court to strike the case off the List as an exercise of inherent power to protect the integrity of the judicial process.

I believe the answer is in the affirmative.

13. The starting point for discontinuance is Article 38, paragraph 2, of the Rules of Court, whereby the applicant "shall specify as far as possible the legal grounds upon which the jurisdiction of the Court is said to be based". The Court may, in certain circumstances, allow these grounds of jurisdiction to be enlarged, and it may also occur that an applicant later prefers to proceed on the basis of one specified ground rather than another. Nonetheless, for all the flexibility built in to Article 38, para-

graph 2, of the Rules, the obligation contained in it is a continuing one. An applicant which on Monday specifies two bases of jurisdiction for the case it wishes the Court to decide, and on Thursday informs the Court that these are not, after all, grounds on which it relies, cannot be said on Saturday to be in conformity with Article 38, paragraph 2. It has put itself out of conformity with Article 38, paragraph 2, and the fact that it at the same time declines to "discontinue" the case under Article 88 or 89 of the Rules is irrelevant to that fact.

14. No more is the position of the Applicant who resiled from specified heads of jurisdiction without proffering others rendered in compliance with the Rules by virtue of asking the Court "to decide on its jurisdiction" in the light of these changes of position (Judgment, para. 28). Such a request is totally outside of the contemplation of the Rules. Yet this is what has occurred in this case. On 24 April 1999 the then Federal Republic of Yugoslavia filed its Application instituting proceedings against various States, invoking as the basis of the Court's jurisdiction Article 36, paragraph 2, of the Statute of the Court, as well as Article IX of the Convention on the Prevention and Punishment of the Crime of Genocide. On 20 December 2002, Serbia and Montenegro formally stipulated that it was not a party to the Statute of the Court before 1 November 2000 — and that at the time of its initial Application, it was not bound by the Genocide Convention.

15. Having thus put itself in a position incompatible with Article 38, paragraph 2, of the Rules, Serbia and Montenegro did not inform the Court it was discontinuing the case under Article 89 of the Rules, but rather "asked the Court to decide on its jurisdiction". It was in fact in no position to make such a request of the Court, and these events alone are sufficient, in my view, for the Court to have used its inherent powers to ensure orderly conduct of its judicial function, and to have removed the cases from the List.

16. In the event, the disorderly nature of the course now being followed by Serbia and Montenegro was compounded. In response to its initial claims on the merits against the various respondent States, in the eight cases allowed to proceed by the Court beyond the initial hearings on provisional measures, preliminary objections were lodged. For the ensuing three years no response was made to these objections — and indeed, when extremely brief Written Observations were eventually made, they did not even attempt to counter or otherwise respond to the substantive arguments contained in the preliminary objections of the Respondents. Instead, the Applicant resiled from its previously stated grounds of jurisdiction and simply suggested that "the Court decide". This incoherent manner of proceeding is not, in my view, compatible with sound judicial procedures, which are designed to be fair to all parties concerned, and it provided further grounds for which the appropriate response of the Court would have been to remove the cases from the List.

17. The regrettable history of events in this case falls within the circumstances described by the Court in the *Northern Cameroons (Cameroon* v. *United Kingdom)* case:

> "There are inherent limitations on the exercise of the judicial function which the Court, as a court of justice, can never ignore. There may thus be an incompatibility between the desires of an applicant, or, indeed, of both parties to a case, on the one hand, and on the other hand the duty of the Court to maintain its judicial character. The Court itself, and not the parties, must be the guardian of the Court's judicial integrity." (*Preliminary Objections, Judgment, I.C.J. Reports 1963*, p. 29.)

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18. In paragraph 39 of the Judgment, the Court states that it "cannot decline to entertain a case simply because of a suggestion as to the motives of one of the parties or because its judgment may have implications in another case". Some observations in response to this statement have been made in paragraph 12 of the joint declaration of seven judges. In that context it is also necessary to make some observations on the remarkable attention given by the Court to Article 35, paragraph 2, of the Statute. This provision had, of course, never been invoked by the Applicant during the period when it relied on its original grounds of jurisdiction. The Applicant's irregular request of 20 December 2002 to the Court was "to decide on its jurisdiction considering the pleadings formulated in these Written Observations". These Written Observations contained no invocation of Article 35, paragraph 2, as an alternative ground of jurisdiction — yet, going beyond what the Applicant requested in the present case, the Court has devoted some 23 paragraphs to laying the grounds for a finding that Article 35, paragraph 2, of the Statute could not have been an alternative basis for allowing access to the Court in respect of the Genocide Convention so far as Serbia and Montenegro is concerned. This exercise was clearly unnecessary for the present case. Its relevance can lie, and only lie, in another pending case. I believe the Court should not have entered at all upon this ground in the present case.

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19. Because I am of the firm view that grounds *ratione personae* should not have been chosen for the disposition of this case (for reasons elaborated in the joint declaration of seven judges), it is not my intention here to offer my own views as to the arguments that the Court advances to support its findings on this ground. It suffices to say that, while General Assembly resolution 55/12 of 1 November 2000, admitting the

Federal Republic of Yugoslavia as a new State, necessarily clarifies the legal situation *thereafter*, it remains debatable whether "from the vantage point from which the Court now looks at the legal situation", the "new development in 2000 . . . has clarified the thus far amorphous legal situation concerning the status of the Federal Republic of Yugoslavia vis-à-vis the United Nations" *at the relevant time* (Judgment, para. 78).

20. It was said by Judge Lachs in 1992 that, while the various major organs of the United Nations do each have their various roles to play in a situation or dispute, they should act

> "in harmony — though not, of course, in concert — and that each should perform its functions with respect to a situation or dispute, different aspects of which appear on the agenda of each, without prejudicing the exercise of the other's powers" (*Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya* v. *United Kingdom), Provisional Measures, Order of 14 April 1992, I.C.J. Reports 1992*, p. 27, separate opinion of Judge Lachs).

The Court, in purporting to find an *ex post facto* clarification of the situation as it was in 1992-2000, notwithstanding that the General Assembly and Security Council had in all deliberation felt the objectives of the United Nations were best met by legal ambiguity, seems to have ignored that wise dictum.

(Signed) Rosalyn HIGGINS.