SEPARATE OPINION OF JUDGE KOOIJMANS

Reason for adding separate opinion to joint declaration — Issue of prima facie jurisdiction in 1999 Orders on provisional measures — Position of Yugoslavia in period 1992-2000 not substantiated in Judgment — Implication for other pending cases in which Applicant is party — Consistency with earlier case law ignored by the Court.

Options open to the Court — Dismissal in limine litis *— Inconsistency of Applicant's behaviour with regard to jurisdictional grounds — Application no longer meets requirement of Article 38, paragraph 2, of Rules of Court — Inherent powers of the Court to strike case from General List — Judicial policy and sound administration of justice.*

1. With full conviction, I have subscribed to the joint declaration of seven members of the Court. I strongly feel that the Court, in the present Judgment, has failed to meet the criteria for a sound judicial policy, as spelled out in paragraph 3 of the joint declaration, by basing itself on the argument that Serbia and Montenegro has no access to the Court, and that the Court consequently lacks jurisdiction *ratione personae*.

2. My present point of view may seem slightly surprising to those who remember the separate opinion I appended to the Court's Orders of 2 June 1999 on provisional measures in the same cases. There, I said that the Court's reasoning in basing itself on prima facie lack of jurisdiction *ratione temporis* was flawed from a logical point of view (*Legality of Use of Force (Yugoslavia* v. *Netherlands), Provisional Measures, I.C.J. Reports 1999 (I)*, p. 591, para. 2).

I was of the view that the decisions taken in 1992 by the competent organs of the United Nations, with regard to the continued membership of the Federal Republic of Yugoslavia and the events which had taken place thereafter, had raised serious doubts as to whether the Federal Republic of Yugoslavia was capable of accepting the compulsory jurisdiction of the Court as a party to the Statute, and that such doubts as a matter of logic take precedence over other controversies with regard to the Court's jurisdiction. I therefore felt that, in respect of its finding that it had no prima facie jurisdiction, the Court should have based itself on the argument that the Applicant had doubtful *locus standi*, and thus that there was a lack of jurisdiction *ratione personae*, rather than on the ground of lack of jurisdiction *ratione temporis*. (I agreed with the Court's finding that with regard to the Genocide Convention it had no prima

facie jurisdiction *ratione materiae.*)

3. The Court took an approach different to the one I had suggested. It opted for an approach that, in my view, was defensible and legally sound, even if I preferred another approach from a logical point of view (paragraph 30 of my opinion). The approach taken by the Court in 1999 has now been abandoned in favour of the one suggested by me at the time (see Judgment, para. 45). Far from being elated by this change of approach, however, I feel concerned for a number of reasons, which are mentioned in the joint declaration and elaborated upon in the following paragraphs.

4. First, in 1999, I certainly did not assume that the issue of the Court's jurisdiction *ratione personae* was an open and shut case. I explicitly stated: "[n]ot for a moment do I contend that the Court already at the present stage of the proceedings should have taken a definitive stand on what I called earlier a thorny question" (*Legality of Use of Force (Yugoslavia* v. *Netherlands), Provisional Measures, I.C.J. Reports 1999 (I)*, p. 596, para. 21). I went on to refer to the dossier on the Federal Republic of Yugoslavia's continued membership of the United Nations as being full of legal complications, and was of the opinion that a thorough analysis and careful evaluation of the Federal Republic of Yugoslavia's status was required at a later stage of the proceedings (*ibid*, p. 596, paras. 21 and 22). I am, however, not persuaded by the Court's conclusion in the present Judgment that this analysis and evaluation have convincingly demonstrated that the events of 2000 have "clarified the thus far amorphous legal situation concerning the status of the Federal Republic of Yugoslavia vis-à-vis the United Nations" (para. 78). Although this finding is undoubtedly correct as far as the situation after the admission of the Federal Republic of Yugoslavia to the United Nations is concerned (this admission did indeed bring to an end its *sui generis* position vis-à-vis the United Nations), the Judgment does not make clear what the legal effects of this "amorphous" situation were in the period 1992-2000. The reader is left with the statement — in itself not uncontroversial — that the *sui generis* position of the Federal Republic of Yugoslavia cannot have amounted to its membership in the Organization (para. 77).

5. The Court's finding does not seem to be based on a thorough analysis and careful evaluation of, *inter alia*, the legal effects of the statements made and positions taken by the Federal Republic of Yugoslavia before 2000, in particular its note of 27 April 1992 to the United Nations, in which it — admittedly on the presumption of the continuity of the "international personality of Yugoslavia" — unilaterally committed itself to

fulfil all the rights conferred on, and obligations assumed by, the Socialist Federal Republic of Yugoslavia in its international relations, including its membership in all international organizations and participation in international treaties ratified or acceded to by Yugoslavia. Have these commitments become meaningless (at least partially), merely as a result of its admission to the United Nations as a new Member and the negation of the presumption of continuity implicit therein; and if so, on what grounds? Have the "thick clouds which have packed around Yugoslavia's membership in the United Nations" (an expression I used in my 1999 opinion, para. 27) been fully dissipated by the Federal Republic of Yugoslavia's belated decision to act as a successor State to the Socialist Federal Republic of Yugoslavia, leaving it in a legal vacuum for the period 1992-2000 as far as its relationship vis-à-vis the United Nations and thus its participation in certain treaties — in particular the Genocide Convention — is concerned? In this respect, the Judgment does not give the reader much by way of clarification.

6. Second, as regards the potential impact of the 1999 Orders on other cases before the Court, in particular the 1993 case concerning the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro)*, it deserves mention that in 1999 both the Applicant and the Respondents (with the possible exception of Portugal) considered themselves to be party to the Genocide Convention, which had been found by the Court in 1996 to be the only basis of jurisdiction in the *Genocide Convention* case. An impact of the orders on provisional measures in the instant cases on the *Genocide Convention* case was therefore not foreseeable and — to say the least — not very probable.

7. All this changed, however, when in 2000 a new Government came into power in Belgrade. This Government no longer considered the Federal Republic of Yugoslavia to be the continuation of the former Socialist Federal Republic of Yugoslavia, and it decided to apply for membership of the United Nations as a successor State. Moreover, it was of the view that the Federal Republic of Yugoslavia, at the time of its inception in 1992, had not been a party to the Genocide Convention, but only became a party after its accession to the Convention on 6 March 2001.

8. These new perceptions in Belgrade led the Government to submit an Application to the Court containing a Request for Revision of the 1996 Judgment on preliminary objections in the *Genocide Convention*

case on the basis of the "newly discovered facts" mentioned in the previous paragraph.

The Court gave its decision rejecting the Federal Republic of Yugoslavia's Application for Revision in a Judgment dated 3 February 2003, in which I did not participate. As recalled in paragraph 10 of the joint declaration, the Court found that "resolution 47/1 did not *inter alia* affect the Federal Republic of Yugoslavia's right to appear before the Court . . . under the conditions laid down by the Statute", and that the Federal Republic of Yugoslavia's *sui generis* position vis-à-vis the United Nations during the period 1992-2000 cannot have been changed retroactively by its admission to the United Nations in 2000 (*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, paras. 70 and 71).

9. The arguments made by Serbia and Montenegro in the *Application for Revision* case and in the present cases are virtually identical, and thus establish a close link between the *Genocide Convention* case and the present cases. Such a link did not exist in previous phases of the proceedings in these cases. It is, therefore, all the more remarkable that, in spite of the fact that this link is now undeniable, the Court, in its present Judgment, has chosen an approach which is not in line with the approach taken in 1999 and 2003 and which inevitably has implications for the *Genocide Convention* case.

The Court's statement that it "cannot decline to entertain a case simply . . . because its judgment may have implications in another case" (Judgment, para. 39) may be correct in general terms, but must be deemed to lack the prudence and care which are called for in situations where a variety of options exists.

10. Third, the decisions taken by the Court in the 1999 Orders on provisional measures and in the 2003 Judgment in the *Application for Revision* case and its reasoning therein are part of the Court's case law. As we say in the joint declaration: "[c]onsistency is the essence of legal reasoning". In my view, this consistency in reasoning in the Court's case law is of paramount importance and dwarfs any misgivings I personally may have or may have had with regard to each and every argument used, as long as I do not consider them legally untenable.

11. Although I do not consider the Court's reasoning in the instant cases legally untenable, I have, in some respects, serious doubts as to its correctness; moreover, I find it judicially unsound for the reasons given in the joint declaration and in the preceding paragraphs. What seemed to me to be a logical ground for determining lack of *prima facie jurisdiction*

does not automatically qualify as a proper ground for the *definitive* determination of the issue of jurisdiction.

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12. The views expressed in my separate opinion appended to the 1999 Orders on provisional measures and my perception of them in the light of today's circumstances are, however, not the only reason why I deemed it necessary to add a separate opinion to the joint declaration. I also wish to indicate which of the options open to the Court and referred to in paragraph 2 of the joint declaration would, in my view, have been the better one.

13. These options were three in number. The first is the one chosen by the Court in its Judgment and is based on its jurisdictional considerations *ratione personae*. The second is the approach followed by the Court in 1999, which was founded on a lack of prima facie jurisdiction *ratione temporis* and *ratione materiae*.

The third option would have been dismissal of the case *in limine litis*. This option is explicitly rejected in the Judgment, but it would have been my preference. I therefore find it useful to set out my views; they are not necessarily shared by other colleagues who have signed the joint declaration and who might have chosen the second option, which is also plausible and conceivable for good reasons but with regard to which the Court has not explicitly expressed itself.

14. The option of dismissal *in limine litis* logically precedes the other two and it is therefore with good reason that the Court has dealt with it first. Similarly, the relevant question has correctly been defined as

> "whether in the light of the assertions by the Applicant . . . coupled with the contentions of each of the respondent States, the Court should take a decision to dismiss the case *in limine litis*, without further entering into the examination of the question whether the Court has jurisdiction under the circumstances" (Judgment, para. 29).

15. I do not intend to deal with all the arguments given by the Court in the relevant part of the Judgment (paras. 27-43), which contain mainly a reply to the contentions of the Respondents. In a number of respects, I agree with what is said by the Court; that is true particularly when it states: "in certain circumstances the Court may of its own motion put an end to proceedings in a case" (para. 32). I am, however, of the view that the Court has refrained from exercising this *proprio motu* competence in a well-considered way, and regrettably has confined itself first and foremost to responding to the arguments of the Parties in order to ultimately

conclude that "[f]or all these reasons, [it] cannot remove the cases . . . from the [General] List, or take any decision putting an end to those cases *in limine litis*" (para. 43). Though the Court explicitly stated that, apart from the arguments of the Parties, it would also consider "any other legal issue which it deems relevant" (para. 26), there is hardly any evidence that it has done so. In the following, I will try to demonstrate that such an approach would nevertheless have been the most appropriate one.

16. In its final submissions, Serbia and Montenegro asked the Court to "adjudge and declare on its jurisdiction *ratione personae* in the present cases" (CR 2004/23, p. 38). Such a request is highly unusual. Normally, the applicant asks the Court to find *that* it has jurisdiction, not *whether* it has jurisdiction.

17. The first time that Serbia and Montenegro asked the Court to decide *on* its jurisdiction was when it submitted its Written Observations on the preliminary objections of the Respondents on 20 December 2002. In its Observations, Serbia and Montenegro summarily stated that, at the time of the filing of its Applications in 1999, it had neither been a party to the Statute nor to the Genocide Convention, thereby implying that the Court could not base its jurisdiction on either Article 36, paragraph 2, of the Statute or Article IX of the Genocide Convention, which were the bases of jurisdiction it had invoked in its 1999 Applications.

18. Serbia and Montenegro explicitly stated in a letter to the Court, dated 28 February 2003, that its Written Observations did not represent a notice of discontinuance, and reiterated its request to decide on the Court's jurisdiction "considering the pleadings formulated in the Written Observations". What is striking — although perhaps not surprising in view of the litigation tactics of Serbia and Montenegro with regard to the various cases before the Court in which it is a party, as either applicant or respondent — is that these Observations did not in any way refer to an alternative basis of jurisdiction replacing the ones presented in 1999 but no longer maintained by the Applicant.

19. It was only during the oral pleadings that the Applicant raised the "key question" whether the *sui generis* position vis-à-vis the United Nations (mentioned by the Court in the Judgment in the *Application for Revision* case of 3 February 2003 and thus three weeks before the sending of the letter to the Court) could have provided the link between the new State and international treaties, in particular the Statute of the Court and the Genocide Convention. In this respect, it is noteworthy that the Agent for Serbia and Montenegro did not give any suggestion as to how this could have happened. He merely stated that the question required a definitive answer and that only a decision of the Court could bring clarity. "A judgment on jurisdiction based on the elucidation of the position of the Federal Republic of Yugoslavia between 1992 and 2000 could create an *anchor point of orientation.*" (CR 2004/14, pp. 26-27,

paras. 63-64; emphasis added.)

20. Article 38, paragraph 2, of the Rules of Court states, *inter alia*, that "[t]he application shall specify *as far as possible* the legal grounds upon which the jurisdiction of the Court is said to be based" (emphasis added). The Applications of 29 April 1999 met this requirement by explicitly mentioning Article 36, paragraph 2, of the Statute and Article IX of the Genocide Convention (supplemented in the cases against Belgium and the Netherlands by letter of 12 May 1999, referring to compromissory clauses in two bilateral conventions of 1930 and 1931 respectively).

In its Written Observations, filed on 20 December 2002, the Applicant abandoned these jurisdictional grounds as being pertinent at the date the Applications were filed without replacing them by another basis for the Court's jurisdiction (the Observations were silent as regards the two bilateral treaties).

21. Therefore, Serbia and Montenegro's Applications, as supplemented by its Written Observations of 20 December 2002, no longer meet the first requirement of Article 38, paragraph 2, of the Rules of Court. That fact in itself, however, does not provide the Court with a ground to remove the cases from the List. The provision that the Application shall specify the legal grounds of jurisdiction was included in 1936; in order to distinguish the requirements of paragraph 2 from those of paragraph 1, which were prescribed by the Statute itself, the words "as far as possible" were used (see G. Guyomar, *Commentaire du Règlement de la Cour internationale de Justice*, 1983, pp. 234 *et seq.*). In contrast to the requirements of paragraph 1, non-compliance with those of paragraph 2 does not lead *eo ipso* to non-admissibility. These requirements "were imposed on the Parties by the Court simply because they were helpful to it, but represented a mere recommendation" (*ibid.*, p. 235 *[translation by the Registry]*). Likewise, Rosenne is of the view that "an application will not be rejected *in limine* only because such specification [of the jurisdictional grounds] is omitted" (*The Law and Practice of the International Court 1920-1996*, 1997, p. 705).

22. Serbia and Montenegro's contention that only discontinuance in conformity with Articles 88 and 89 of the Rules of Court may yield a removal of a case from the List without a judgment on jurisdiction or on the merits (CR 2004/14, p. 18, para. 29) is, however, not correct. The fact that the Rules only speak of removing a case from the List by unilateral action of the applicant (Art. 89) or joint action by the parties (Art. 88) cannot deprive the Court of its inherent power, as master of its own procedure, to strike *proprio motu* a case from the List. This is also recognized by Rosenne who, in this respect, refers to the general powers of the Court under Articles 36 and 48 of the Statute (*op. cit.*, p. 1478). This

power is not related to the intention of the parties but to the judicial task of the Court. This is borne out by the Court's reasoning in the Orders in the cases brought by the Federal Republic of Yugoslavia against Spain and the United States of America, where it said that

> "within a system of consensual jurisdiction, to maintain on the General List a case upon which it appears certain that the Court will not be able to adjudicate on the merits would most assuredly not contribute to the *sound administration of justice*" (*Legality of Use of Force (Yugoslavia* v. *Spain), Provisional Measures*, *I.C.J. Reports 1999 (II)*, p. 773, para. 35; emphasis added).

Such power has to be used sparingly and only as an instrument of judicial policy to safeguard the integrity of the Court's procedure. The present cases, however, are without precedent and can truly be called exceptional.

23. The Court was, in my opinion, perfectly entitled to issue such an order in the instant cases on the basis of the fact that the Applicant has not provided the Court with any plausible information as to the basis of its jurisdiction. It is not for the Court to ascertain in the preliminary phase of a case whether it has jurisdiction if the applicant fails to substantiate in any persuasive manner what the basis for that jurisdiction could be, and after it has explicitly admitted that the initial grounds it invoked are no longer valid. Nor is it the Court's task to provide a party, which asks for the elucidation of an observation made by the Court in a judgment in another case to which it was also a party, with "an anchor point of orientation", as this would be tantamount to rendering an advisory opinion or giving an interpretation of a judgment in circumstances and under conditions not warranted by the Statute.

24. It is incompatible with the respect due to the Court for a party not to provide it with any substantive argument for the speculation that it might have jurisdiction while explicitly withdrawing the previously adduced jurisdictional grounds. It is not in conformity with judicial propriety and a sound judicial policy to render a fully reasoned judgment on jurisdiction when the Applicant bases its request to do so on grounds which can only be called inadequate. The Applicant can, therefore, be held to its statement that there are no recognized or generally accepted grounds of jurisdiction.

25. In the second round of the oral pleadings, the Agent for France stated that

> "the party against whom the application is brought is not required to prove that there is no basis for jurisdiction, which would require it — and it would be absurd to ask this of it — as a matter of course to examine all possible bases" (CR 2004/21, p. 13, para. 22).

What is true for the Respondent is also true for the Court and even more so. The fact that the Court has the duty under certain circumstances to ascertain *proprio motu* that it *has* jurisdiction cannot, by *a contrario* reasoning, be turned into an obligation to explore grounds for its jurisdiction which have not been invoked by the Applicant. As Rosenne states:

> "There can be no doubt that the choice of a title of jurisdiction is as much a political act as a decision to institute proceedings, and the Court is following its usual attitude when faced with political questions of that character not to substitute itself for the party concerned. It is for this reason that a principle such as *curia jura novit* cannot appropriately be applied by the Court *proprio motu* to substitute a title of jurisdiction which has not been invoked for another . . ." (*Op. cit.*, p. 956.)

Neither does the Court have to rule on a title of jurisdiction which has not been claimed.

26. In view of the fact that the Applicant has failed to demonstrate, and has not even made an effort to demonstrate, that the Court has jurisdiction, I am of the opinion that the Court should have decided *in limine litis* to remove the eight cases from the General List.

(Signed) Pieter H. KOOIJMANS.