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Summary
Not an official document

Summary 2004/9
15 December 2004

Case concerning Legality of Use of Force (Serbia and Montenegro v. Portugal)
Preliminary Objections

Summary of the Judgment of 15 December 2004

History of the proceedings and submissions of the Parties (paras. 1-23)

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

> "by which it has violated its international obligation banning the use of force against another State, the obligation not to intervene in the internal affairs of another State, the obligation not to violate the sovereignty of another State, the obligation to protect the civilian population and civilian objects in wartime, the obligation to protect the environment, the obligation relating to free navigation on international rivers, the obligation regarding fundamental human rights and freedoms, the obligation not to use prohibited weapons, the obligation not to deliberately inflict conditions of life calculated to cause the physical destruction of a national group".

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

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

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

Since the Court included upon the Bench no judge of Yugoslav nationality, the Yugoslav Government exercised its right under Article 31 of the Statute and chose Mr. Milenko Kreća to sit as judge ad hoc in the case. By letter of 10 May 1999, Portugal informed the Court that it reserved

the right to choose a judge ad hoc in the case, in accordance with Article 31 of the Statute of the Court.

By ten Orders dated 2 June 1999 the Court, after hearing the Parties, rejected the request for the indication of provisional measures in all of the cases, and further decided to remove from the List the cases against Spain and the United States of America.

On 5 July 2000, within the time–limit fixed for the filing of its Counter-Memorial, Portugal, referring to Article 79, paragraph 1, of the Rules, submitted preliminary objections relating to the Court's jurisdiction to entertain the case and to the admissibility of the Application. Accordingly, the proceedings on the merits were suspended.

On 20 December 2002, within the prescribed time-limit as twice extended by the Court at the request of the Federal Republic of Yugoslavia, the latter filed a written statement of its observations and submissions on those preliminary objections (hereinafter referred to as its "Observations"), together with identical written statements in the seven other pending cases.

Pursuant to Article 24, paragraph 1, of the Statute, on 25 November 2003 Judge Simma informed the President that he considered that he should not take part in any of the cases.

At a meeting held by the President of the Court on 12 December 2003 with the representatives of the Parties in the eight cases concerning Legality of Use of Force, the questions of the presence on the Bench of judges ad hoc during the preliminary objections phase and of a possible joinder of the proceedings were discussed, among other issues. By letter of 23 December 2003 the Registrar informed the Agents of all the Parties that the Court had decided, pursuant to Article 31, paragraph 5, of the Statute, that, taking into account the presence upon the Bench of judges of British, Dutch and French nationality, the judges ad hoc chosen by the respondent States should not sit during the current phase of the procedure in these cases. The Agents were also informed that the Court had decided that a joinder of the proceedings would not be appropriate at that stage.

Public sittings in all the cases were held between 19 and 23 April 2004.

After setting out the Parties' claims in their written pleadings (which are not reproduced here), the Judgment recalls that, at the oral proceedings, the following final submissions were presented by the Parties:

On behalf of the Portuguese Government,

at the hearing of 22 April 2004:

> "May it please the Court to adjudge and declare that:
>
> (i) the Court is not called upon to give a decision on the claims of Serbia and Montenegro.
>
> Alternatively,
>
> (ii) the Court lacks jurisdiction, either
>
> (a) under Article 36, paragraph 2, of the Statute;
>
> (b) under Article IX of the Genocide Convention;
>
> and

The claims are inadmissible."

On behalf of the Government of Serbia and Montenegro

at the hearing of 23 April 2004:

> "For the reasons given in its pleadings, and in particular in its Written Observations, subsequent correspondence with the Court, and at the oral hearing, Serbia and Montenegro requests the Court:
>
> — to adjudge and declare on its jurisdiction ratione personae in the present cases; and
>
> — to dismiss the remaining preliminary objections of the respondent States, and to order proceedings on the merits if it finds it has jurisdiction ratione personae."

Before proceeding to its reasoning, the Court includes a paragraph (para. 24) dealing with the Applicant's change of name on 4 February 2003 from "Federal Republic of Yugoslavia" to "Serbia and Montenegro". It explains that, as far as possible, except where the term in a historical context might cause confusion, it will use the name "Serbia and Montenegro", even where reference is made to a procedural step taken before the change.

Dismissal of the case in limine litis (paras. 25-43)

The Court begins by observing that it must first deal with a preliminary question that has been raised in each of the cases, namely the contention, presented in various forms by the eight respondent States, that, as a result of the changed attitude of the Applicant to the question of the Court's jurisdiction as expressed in its Observations, the Court is no longer required to rule on those objections to jurisdiction, but can simply dismiss the cases in limine litis and remove them from its List, without enquiring further into matters of jurisdiction.

The Court then examines a number of arguments advanced by different Respondents as possible legal grounds that would lead the Court to take this course, including, inter alia: (i) that the position of Serbia and Montenegro is to be treated as one that in effect results in a discontinuance of the proceedings or that the Court should ex officio put an end to the case in the interests of the proper administration of justice; (ii) that there is agreement between the Parties on a "question of jurisdiction that is determinative of the case", and that as a result there is now no "dispute as to whether the Court has jurisdiction"; (iii) that the substantive dispute under the Genocide Convention has disappeared and thus the whole dispute has disappeared in those cases in which the only ground of jurisdiction relied on is Article IX of that Convention; (iv) that Serbia and Montenegro, by its conduct, has forfeited or renounced its right of action in the present case and is now estopped from pursuing the proceedings.

The Court finds itself unable to uphold the various contentions of the Respondents. The Court considers that it is unable to treat the Observations of Serbia and Montenegro as having the legal effect of a discontinuance of the proceedings under Article 88 or 89 of the Rules of Court and finds that the case does not fall into the category of cases in which it may of its own motion put an end to proceedings in a case. As regards the argument advanced by certain Respondents that the dispute on jurisdiction has disappeared since the Parties now agree that the Applicant was not a party to the Statute at the relevant time, the Court points out that Serbia and Montenegro has not invited the Court to find that it has no jurisdiction; while it is apparently in agreement with the arguments advanced by the Respondents in that regard in their preliminary objections, it has

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

For all these reasons, the Court concludes that it cannot remove the cases concerning Legality of Use of Force from the List, or take any decision putting an end to those cases in limine litis. In the present phase of the proceedings, it must proceed to examine the question of its jurisdiction to entertain the case.

Serbia and Montenegro's access to the Court under Article 35, paragraph 1, of the Statute (paras. 44-90)

The Court recalls that the Application filed on 29 April 1999 stated that "[t]he Government of the Federal Republic of Yugoslavia invokes Article 36, paragraph 2, of the Statute of the International Court of Justice as well as Article IX of the Convention on the Prevention and Punishment of the Crime of Genocide".

The Court notes that in its jurisprudence it has referred to "its freedom to select the ground upon which it will base its judgment", and that, when its jurisdiction is challenged on diverse grounds, it is free to base its decision on one or more grounds of its own choosing, in particular "the ground which in its judgment is more direct and conclusive". However, in those instances, the Parties to the cases before the Court were, without doubt, parties to the Statute of the Court and the Court was thus open to them under Article 35, paragraph 1, of the Statute. The Court points out that this is not the case in the present proceedings, in which an objection has been made regarding the right of the Applicant to have access to the Court. And it is this issue of access to the Court which distinguishes the present case from those cited in the jurisprudence concerned.

The Court observes that the question whether Serbia and Montenegro was or was not a party to the Statute of the Court at the time of the institution of the present proceedings is fundamental; for if it were not such a party, the Court would not be open to it under Article 35, paragraph 1, of the Statute. In that situation, subject to any application of paragraph 2 of that Article, Serbia and Montenegro could not have properly seised the Court, whatever title of jurisdiction it might have invoked, for the simple reason that it did not have the right to appear before the Court. Hence, the Court must first examine the question whether the Applicant meets the conditions laid down in Articles 34 and 35 of the Statute for access to the Court. Only if the answer to that question is in the affirmative, will the Court have to deal with the issues relating to the conditions laid down in Article 36 of the Statute.

The Court notes in this respect that there is no doubt that Serbia and Montenegro is a State for the purpose of Article 34, paragraph 1, of the Statute. However, certain Respondents objected that, at the time of the filing of its Application on 29 April 1999, that State did not meet the conditions set down in Article 35 of the Statute. Thus Portugal argued, inter alia, that the Applicant did not have access to the Court under Article 35, paragraph 1, of the Statute (Preliminary Objections of Portugal, pp. 5-17). It considered that the Applicant was not a Member of the United Nations and that therefore it was not a party to the Statute since "only member States [of the United Nations] are ipso facto parties in the Statute of the Court (Article 93 (1) of the Charter)" and the Applicant had not "sought to be bound by the Statute pursuant to Article 93 (2) [of the Charter of the United Nations]" (Preliminary Objections of Portugal, pp. 9 and 16, paras. 29 and 56 respectively).

The Court then recapitulates the sequence of events relating to the legal position of the Applicant vis-à-vis the United Nations over the period 1992-2000. It refers, inter alia, to the following: the break-up of the Socialist Federal Republic of Yugoslavia in 1991-1992; a declaration of 27 April 1992 by the SFRY Assembly, the National Assembly of the Republic of Serbia and the Assembly of the Republic of Montenegro asserting the continuation of the international legal and political personality of the SFRY by the Federal Republic of Yugoslavia; a note of the same day from Yugoslavia to the United Nations Secretary-General asserting the continuation by the FRY of the membership of the SFRY in the Organization; Security Council resolution 777 of 1992 considering that the FRY could not continue automatically the SFRY's membership; General Assembly resolution 47/1 of 1992 stating that the FRY shall not participate in the work of the General Assembly; and a letter dated 29 September 1992 from the United Nations Legal Counsel regarding the "practical consequences" of General Assembly resolution 47/1.

The Court concludes that the legal situation that obtained within the United Nations during the period 1992-2000 concerning the status of the Federal Republic of Yugoslavia, remained ambiguous and open to different assessments. This was due, inter alia, to the absence of an authoritative determination by the competent organs of the United Nations defining clearly the legal status of the Federal Republic of Yugoslavia vis-à-vis the United Nations.

The Court notes that three different positions were taken within the United Nations. In the first place, there was the position taken by the two political organs concerned. The Court refers in this respect to Security Council resolution 777 (1992) of 19 September 1992 and to General Assembly resolution 47/1 of 22 September 1992, according to which "the Federal Republic of Yugoslavia (Serbia and Montenegro) cannot continue automatically the membership of the former Socialist Federal Republic of Yugoslavia in the United Nations", and "should apply for membership in the United Nations". The Court points out that, while it is clear from the voting figures that these resolutions reflected a position endorsed by the vast majority of the Members of the United Nations, they cannot be construed as conveying an authoritative determination of the legal status of the Federal Republic of Yugoslavia within, or vis-à-vis, the United Nations. The uncertainty surrounding the question is evidenced, inter alia, by the practice of the General Assembly in budgetary matters during the years following the break-up of the Socialist Federal Republic of Yugoslavia.

The Court recalls that, secondly, the Federal Republic of Yugoslavia, for its part, maintained its claim that it continued the legal personality of the Socialist Federal Republic of Yugoslavia, "including its membership in all international organizations and participation in international treaties ratified or acceded to by Yugoslavia". This claim had been clearly stated in the official Note of 27 April 1992 from the Permanent Mission of Yugoslavia to the United Nations addressed to the Secretary-General of the United Nations. It was sustained by the Applicant throughout the period from 1992 to 2000.

Thirdly, another organ that came to be involved in this problem was the Secretariat of the United Nations. In the absence of any authoritative determination, the Secretariat, as the administrative organ of the Organization, simply continued to keep to the practice of the status quo ante that had prevailed prior to the break-up of the Socialist Federal Republic of Yugoslavia in 1992.

The Court points out that it was against this background that the Court itself, in its 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) (hereinafter the "Application for Revision case"), referred to the "sui generis position which the FRY found itself in" during the relevant period; however, in that case, no final and definitive conclusion was drawn by the Court from this descriptive term on the amorphous status of the Federal Republic of Yugoslavia vis-à-vis or within the United Nations during this period.

The Court considers that this situation came to an end with a new development in 2000. On 27 October of that year, the Federal Republic of Yugoslavia requested admission to membership in the United Nations, and on 1 November, by General Assembly resolution 55/12, it was so admitted. Serbia and Montenegro thus has the status of membership in the Organization as from 1 November 2000. However, its admission to the United Nations did not have, and could not have had, the effect of dating back to the time when the SFRY broke up and disappeared. It became clear that the sui generis position of the Applicant could not have amounted to its membership in the Organization.

In the view of the Court, the significance of this new development in 2000 is that it has clarified the thus far amorphous legal situation concerning the status of the Federal Republic of Yugoslavia vis-à-vis the United Nations.

The Court finds that from the vantage point from which it now looks at the legal situation, and in light of the legal consequences of the new development since 1 November 2000, it is led to the conclusion that Serbia and Montenegro was not a Member of the United Nations, and in that capacity a State party to the Statute of the International Court of Justice, at the time of filing its Application.

A further point the Court considers is the relevance to the present case of the Judgment in the Application for Revision case, of 3 February 2003. The Court points out that, given the specific characteristics of the procedure under Article 61 of the Statute, in which the conditions for granting an application for revision of a judgment are strictly circumscribed, there is no reason to treat the Judgment in the Application for Revision case as having pronounced upon the issue of the legal status of Serbia and Montenegro vis-à-vis the United Nations. Nor does the Judgment pronounce upon the status of Serbia and Montenegro in relation to the Statute of the Court.

For all these reasons, the Court concludes that, at the time when the present proceedings were instituted, the Applicant in the present case, Serbia and Montenegro, was not a Member of the United Nations, and consequently, was not, on that basis, a State party to the Statute of the International Court of Justice. The Applicant not having become a party to the Statute on any other basis, it follows that the Court was not then open to it under Article 35, paragraph 1, of the Statute.

Serbia and Montenegro's possible access to the Court on the basis of Article 35, paragraph 2, of the Statute (paras. 91-116)

The Court then considers whether it might be open to Serbia and Montenegro under paragraph 2 of Article 35, which provides:

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

In this regard, it quotes from its Order of 8 April 1993 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 the "Genocide Convention case"), where it stated, inter alia, that a "compromissory clause in a multilateral convention, such as Article IX of the Genocide Convention relied on by Bosnia and Herzegovina in the present case, could, in the view of the Court, be regarded prima facie as a special provision contained in a treaty in force" (emphasis added).

The Court initially notes that Portugal has contended that, at the date of the filing of the Application, 29 April 1999, it was not a party to the Genocide Convention. However, the Court considers that logical priority must be given to the question whether Serbia and Montenegro can invoke Article 35, paragraph 2, of the Statute, that is to say, whether or not Article IX of the Genocide Convention can be regarded as one of the "special provisions in treaties in force" contemplated by that text.

The Court recalls that a number of Respondents contended in their pleadings that the reference to "treaties in force" in Article 35, paragraph 2, of the Statute relates only to treaties in force when the Statute of the Court entered into force, i.e. on 24 October 1945. In respect of the Order of 8 April 1993 in the Genocide Convention case, the Respondents pointed out that that was a provisional assessment, not conclusive of the matter, and considered that "there [were] persuasive reasons why the Court should revisit the provisional approach it adopted to the interpretation of this clause in the Genocide Convention case".

The Court notes that the passage from the 1993 Order in the Genocide Convention case was addressed to the situation in which the proceedings were instituted against a State whose membership in the United Nations and status as a party to the Statute was unclear. It observes that the Order of 8 April 1993 was made on the basis of an examination of the relevant law and facts in the context of incidental proceedings on a request for the indication of provisional measures, and concludes that it would therefore now be appropriate for the Court to make a definitive finding on the question whether Article 35, paragraph 2, affords access to the Court in the present case, and for that purpose, to examine further the question of its applicability and interpretation.

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

The Court points out that the words "treaties in force" in Article 35, paragraph 2, do not, in their natural and ordinary meaning, indicate at what date the treaties contemplated are to be in force, and may thus lend themselves to different interpretations. They may be interpreted as referring either to treaties which were in force at the time that the Statute itself came into force, or to those which were in force on the date of the institution of proceedings in a case in which such treaties are invoked.

The Court observes that the object and purpose of Article 35 of the Statute is to define the conditions of access to the Court. While paragraph 1 of that Article opens it to the States parties to the Statute, paragraph 2 is intended to regulate access to the Court by States which are not parties

to the Statute. It would have been inconsistent with the main thrust of the text to make it possible in the future for States not parties to the Statute to obtain access to the Court simply by the conclusion between themselves of a special treaty, multilateral or bilateral, containing a provision to that effect.

The Court moreover notes that the interpretation of Article 35, paragraph 2, whereby that paragraph is to be construed as referring to treaties in force at the time that the Statute came into force, is in fact reinforced by an examination of the travaux préparatoires of the text; the Court considers that the legislative history of Article 35, paragraph 2, of the Statute of the Permanent Court of International Justice (hereinafter the "Permanent Court") demonstrates that it was intended as an exception to the principle stated in paragraph 1, in order to cover cases contemplated in agreements concluded in the aftermath of the First World War before the Statute entered into force. However, the travaux préparatoires of the Statute of the present Court are less illuminating. The discussion of Article 35 was provisional and somewhat cursory; it took place at a stage in the planning of the future international organization when it was not yet settled whether the Permanent Court would be preserved or replaced by a new court. Indeed, the records do not include any discussion which would suggest that Article 35, paragraph 2, of the Statute should be given a different meaning from the corresponding provision in the Statute of the Permanent Court. It would rather seem that the text was reproduced from the Statute of the Permanent Court; there is no indication that any extension of access to the Court was intended.

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

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

Unnecessary to consider other preliminary objections (para. 117)

Having found that Serbia and Montenegro did not, at the time of the institution of the present proceedings, have access to the Court under either paragraph 1 or paragraph 2 of Article 35 of the Statute, the Court states that it is unnecessary for it to consider the other preliminary objections filed by the Respondents to its jurisdiction.

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The Court finally recalls (para. 118) that, irrespective of whether it has jurisdiction over a dispute, the parties "remain in all cases responsible for acts attributable to them that violate the rights of other States".

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The text of the operative paragraph reads as follows:

"For these reasons,

THE COURT,

Unanimously,

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

Joint declaration of Vice-President Ranjeva and Judges Guillaume, Higgins, Kooijmans, Al-Khasawneh, Buergenthal and Elaraby

1. Vice-President Ranjeva and Judges Guillaume, Higgins, Kooijmans, Al-Khasawneh, Buergenthal and Elaraby voted in favour of the dispositif of the Judgments because they agree that these cases cannot, as a matter of law, proceed to the merits. They have added in their joint declaration that they nevertheless profoundly disagree with the reasoning adopted by the Court.

2. They note that when the Court finds in a case that, on two or more grounds, its jurisdiction is not well founded ratione personae, ratione materiae or ratione temporis, it may choose the most appropriate ground on which to base its decision of lack of competence. They point out that this choice must be guided by three criteria: consistency with the past case law; degree of certitude of the ground chosen; possible implications for the other pending cases.

3. In the present instances, according to the Judgments of the Court, Serbia and Montenegro was not a Member of the United Nations in 1999 and, as a result, was not then a party to the Statute of the Court. In the Judgments, the Court concludes therefrom that it was not at that time open to the Applicant under Article 35, paragraph 1, of the Statute. The Judgments go on to state that paragraph 2 of that Article enables States not parties to the Statute to appear before the Court only by virtue of Security Council decisions or treaties concluded prior to the entry into force of the Statute. It is observed in the Judgments that the United Nations Genocide Convention only entered into force in 1951. It is thus concluded that Article 35, paragraph 2, of the Statute does not grant Serbia and Montenegro access to the Court either.

4. In the view of the seven judges making the joint declaration, this solution is at odds with a number of previous decisions of the Court, in particular the Judgment rendered on 3 February 2003 in a case between Bosnia and Herzegovina and Yugoslavia, in which it was found that Yugoslavia could appear before the Court between 1992 and 2000 and that this position had not been changed by its admission to the United Nations in 2002. Further, the authors of the declaration note that in reality it is far from self-evident that Yugoslavia was not a Member of the United Nations at that time. Lastly, they regret that the Judgment leaves some doubt as to whether Yugoslavia was a party, between 1992 and 2000, to the United Nations Genocide Convention and thus could call into question the solutions adopted by the Court in the case brought by Bosnia and Herzegovina against Serbia and Montenegro. Thus, the Court's Judgment does not meet any of the three criteria set out in paragraph 2 above.

5. The seven judges finally observe that the Court could easily have founded its Judgment that it lacked jurisdiction on the grounds on which it relied in 1999 when the requests for the indication of provisional measures were considered. The Court then found that it lacked jurisdiction ratione temporis in respect of the declaration accepting the compulsory jurisdiction of the Court which Serbia and Montenegro had filed several weeks after the start of military operations in Kosovo. It also found itself to be without jurisdiction ratione materiae in respect of the United Nations Genocide Convention, as no genocidal intention had been established. These solutions could easily have been confirmed.

Declaration of Judge Koroma

In his declaration Judge Koroma stated that, while concurring in the Judgment, he considered it necessary to stress the following. The question which the Court was requested to rule on and which it in fact did decide in this phase of the case was the issue of jurisdiction, namely, whether

the Court could entertain the merits of the case. The jurisdictional function is intended to establish whether the Court is entitled to enter into and adjudicate on the substantive issues in a case. This function, in his view, cannot be dispensed with as it is both required by law and stipulated in the Statute of the Court. It is this function that the Court has carried out in this Judgment and it is within this paradigm that the Judgment must be understood. The Judgment cannot be interpreted as the Court taking a position on any of the matters of substance before the Court.

Separate opinion of Judge Higgins

Judge Higgins agrees that Serbia and Montenegro have not discontinued the case. However, she disagrees with the apparent finding of the Court that a case may only be removed from the List where there is a discontinuance by the applicant or the parties, or where an applicant disclosed no subsisting title of jurisdiction, or where the Court manifestly lacked jurisdiction (see paragraph 32 of the Judgment). In her view, the right of the Court exceptionally to remove a case from the List rests on its inherent powers, which are not limited to a priori categories.

Judge Higgins is of the opinion that the present case should have been removed from the List, as the Applicant has by its own conduct put itself in a position incompatible with Article 38, paragraph 2, of the Rules of Court. The manner in which it has dealt with preliminary objections would further warrant the case not being proceeded with.

Finally, Judge Higgins greatly regrets the attention the Court has afforded to Article 35, paragraph 2, of the Statute, believing its relevance lies only in another pending case.

Separate opinion of Judge Kooijmans

Judge Kooijmans has added a separate opinion to the Judgment and the joint declaration of seven Members of the Court, which he co-signed, for two reasons.

First he wishes to explain why in his view the Court should not have decided the issue of jurisdiction on the ground of Serbia and Montenegro's lack of access to the Court, although in 1999, when the Court rejected Yugoslavia's request for interim measures of protection, he was in favour of this approach. In his view, the Court has not in a convincing and transparent way elucidated the status of the Federal Republic of Yugoslavia vis-à-vis the United Nations before its admission to the Organization in 2000. Further, the Court's Judgment has undeniable implications for other pending cases, in particular the Genocide Convention case (Bosnia Herzegovina v. Serbia and Montenegro), which could easily have been avoided by choosing another approach. Finally, the Judgment is at odds with previous decisions of the Court, thus endangering the principle of consistency of reasoning. This consistency with earlier case law should prevail over present or earlier misgivings of individual judges if an approach in conformity with that consistency does not lead to legally untenable results.

In the second place Judge Kooijmans sets out why in his view the Court would have done better to dismiss the cases in limine litis. In 1999 the Applicant invoked two grounds of jurisdiction which it explicitly abandoned in its Written Observations of 20 December 2002 without replacing them by other grounds. Nevertheless it did not discontinue the case but asked the Court to decide whether it had jurisdiction. Thus the Applications did no longer meet the requirement of Article 38, paragraph 2, of the Rules of Court, which states that the application shall specify as far as possible the legal grounds upon which the jurisdiction of the Court is said to be based. Since the Court has the inherent power to strike a case from the General List in order to safeguard the integrity of the procedure, it should have done so in view of the fact that the Applicant has failed to demonstrate and even did not make an effort to demonstrate that a valid ground of jurisdiction existed.

Separate opinion of Judge Elaraby

Judge Elaraby voted in favour of the dispositif, but disagreed both with the grounds on which the Court decided to base its Judgment — Article 35, paragraph 1 and Article 35, paragraph 2 of the Court's Statute — and with the conclusions which the Court reached on each of these grounds. The joint declaration, to which Judge Elaraby is a signatory, explains why he believes that the Court should have chosen alternative grounds to reach its decision. His separate opinion explains why he disagrees with its substantive findings.

Beginning with the issue of access to the Court under Article 35, paragraph 1, Judge Elaraby explained why, in his view, the Federal Republic of Yugoslavia was a Member of the United Nations at the time it filed its Application in the case. He emphasized that, although the FRY was excluded from participation in the work of the General Assembly and its subsidiary organs, it remained, as the Court had previously found, a sui generis Member between 1992 and 2000. Thus Judge Elaraby pointed out that during this period it continued to exhibit many attributes of United Nations membership and was neither suspended nor expelled from the Organization under the relevant provisions of the United Nations Charter. On this basis, Judge Elaraby concluded that the FRY was a Member of the United Nations when it filed its Application in 1999 and, as a result, he disagreed with the Court's finding that it was not "open" to the FRY under Article 35, paragraph 1, of the Court's Statute.

He also disagreed with the Court's finding that, assuming the FRY was a non-Member of the United Nations, it would not have had access to the Court under Article 35, paragraph 2. For Judge Elaraby, the Court's interpretation of the term "treaties in force" in Article 35, paragraph 2, as meaning "treaties in force at the time the Statute of the Court entered into force" was unduly restrictive. Like the Court, Judge Elaraby analysed the relevant travaux préparatoires, but, unlike the Court, he found that the expression "treaties in force" should be read to include any treaties connected with the peace settlement following the Second World War, whether they entered into force before or after the Statute of the Court. This would include, according to Judge Elaraby, the Genocide Convention, a treaty drafted under the auspices of the United Nations in direct response to the tragic events of the Second World War. In the alternative, Judge Elaraby stated that, even if the Court's reading of "treaties in force" were adopted as a general rule, there should be an exception for treaties intended to remedy violations of jus cogens. These, he wrote, should be subject to a broader interpretation so that any State seeking access to the Court on the basis of a treaty that addresses a jus cogens violation could do so as long as the treaty was in force when the Application was filed.

Because Judge Elaraby concluded that the Court was open to the FRY under Article 35 when it filed its Application in 1999, he went on to assess whether the Court has jurisdiction ratione personae under Article IX of the Genocide Convention. He concluded that it does, because the FRY succeeded to the treaty obligations of the former Socialist Federal Republic of Yugoslavia, including the Genocide Convention. In reaching this conclusion he explained that, in cases involving the separation of parts of the territory of a State to form one or more new States, Article 34 of the Vienna Convention on Succession of States in respect of Treaties embodied a customary rule of automatic succession by the new State to the treaties in force on the territory of its predecessor. He pointed out that it was all the more important for the Court to recognize and apply this rule in the case of a fundamental human rights treaty such as the Genocide Convention. Judge Elaraby thus concluded that the FRY was a party to the Genocide Convention on the basis of succession — not its subsequent purported accession and reservation — and therefore that the Court had jurisdiction ratione personae. He found, however, that the Court did not have jurisdiction ratione materiae under the Convention, so in the final analysis agreed with the Court that there was no jurisdiction to examine the merits of the FRY's case.

Separate opinion of Judge Kreća

Judge Kreća noted that the Respondent, as well as the Applicant, attached crucial importance to the issue of locus standi of Serbia and Montenegro before the Court.

In the case at hand, it is closely, and even organically, linked with the membership of Serbia and Montenegro in the United Nations, due to the fact that it could not be considered as being party to the Statute of the Court 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.

In that regard he finds that at the end of the year 2000 the Applicant 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.

The admission of the FRY to the United Nations as a Member as from 1 November 2000 has two principal consequences in the circumstances of the case at hand:

(i) with respect to the admission of Yugoslavia as a Member as from 1 November 2000, it can be said that what is involved is the admission as a new Member; and

(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.

He is also 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 case as well as the reasoning of the Court.
