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International Court of Justice

THE HAGUE

Cour internationale de Justice

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YEAR 2008

Public sitting

held on Wednesday 28 May 2008, at 10 a.m., at the Peace Palace,

President Higgins presiding,

***in the case concerning* Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia *v.* Serbia)**

VERBATIM RECORD

ANNÉE 2008

Audience publique

tenue le mercredi 28 mai 2008, à 10 heures, au Palais de la Paix,

sous la présidence de Mme Higgins, président,

***en l'affaire relative à l'*Application de la convention pour la prévention et la répression du crime de génocide (Croatie c. Serbie)**

COMPTE RENDU

Present:	President	Higgins
	Vice-President	Al-Khasawneh
	Judges	Ranjeva
		Shi
		Koroma
		Parra-Aranguren
		Buergenthal
		Owada
		Simma
		Tomka
		Abraham
		Keith
		Sepúlveda-Amor
		Bennouna
		Skotnikov
	Judges *ad hoc*	Vukas
		Kreća
	Registrar	Couvreur

Présents : Mme Higgins, président
M. Al-Khasawneh, vice-président
MM. Ranjeva
Shi
Koroma
Parra-Aranguren
Buergenthal
Owada
Simma
Tomka
Abraham
Keith
Sepúlveda-Amor
Bennouna
Skotnikov, juges
MM. Vukas
Kreća, juges *ad hoc*

M. Couvreur, greffier

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as Agent;

H.E. Ms Andreja Metelko-Zgombić, Ambassador, Head of International Law Service, Ministry of Foreign Affairs and European Integration,

Ms Maja Seršić, Professor of Law at the University of Zagreb Law Faculty,

H.E. Mr. Frane Krnić, Ambassador of the Republic of Croatia to the Kingdom of the Netherlands,

as Co-Agents;

Mr. James Crawford, S.C., Whewell Professor of International Law, University of Cambridge, and Barrister, Matrix Chambers,

Mr. Philippe Sands, Q.C., Professor of Law, University College London, and Barrister, Matrix Chambers,

as Counsel and Advocates;

Mr. Mirjan Damaska, Sterling Professor of Law, Yale Law School,

Ms Anjolie Singh, Member of the Indian Bar,

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comme conseillers.

The PRESIDENT: Please be seated. The Court meets this morning for the continuation of the submissions of Croatia and I believe it is you I am to call, Professor Crawford.

Mr. CRAWFORD: Thank you, Madam President, Members of the Court:

4. THE COURT'S JURISDICTION AND THE PRINCIPLE OF CONTINUITY OF RESPONSIBILITY

Introduction

1. It is an honour to appear on behalf of Croatia in these proceedings.

2. As foreshadowed by Dr. Šimonović, it is my task in this presentation to deal with two issues of admissibility. The first concerns Serbia's second preliminary objection, relating to events prior to 27 April 1992. The second concerns Serbia's argument that some of the remedies sought by Croatia in its submissions are inadmissible.

3. Both objections are of course partial only. They would not prevent the Court hearing the case — if it has jurisdiction. And we will come to jurisdiction, I can assure you. All they would do is qualify the extent of your temporal jurisdiction or the remedies that could be awarded.

4. This presentation will be brief because in our view it is obvious that both arguments pertain to the facts and the merits, and are not genuinely issues of admissibility, at least not beyond a certain very elementary point. Madam President, you have warned the Parties twice now against straying into the facts, and I will try to heed that warning. Hence the brevity!

Serbia's second preliminary objection

5. I turn then to Serbia's second preliminary objection, which is: "Croatia's Application is inadmissible as far as it refers to acts or omissions which occurred prior to 27 April 1992." It is striking that 27 April 1992 was a proclamation of continuity. It is now regarded by the Respondent as a marked discontinuity.

6. On Monday we heard counsel, Mr. Djerić and Professor Zimmermann, engage in an elaborate logical *pas de deux*, or, if we count Serbia's Agent, Professor Varady, a *pas de trois*. They all aimed at making responsibility for genocidal acts committed by Serbian entities prior to

that date legally impossible[1]. But Serbia was not a newly independent State within the meaning of the 1978 and 1983 Vienna Conventions, and it had no privilege of a clean slate, either in terms of succession or responsibility. And these are the only two issues that are relevant — there is not a third issue: the issue of succession; the issue of responsibility. International law in these two areas is internally consistent: it aims to avoid both gaps in treaty coverage and gaps in accountability for breaches of treaty.

7. As to the issue of succession, the question is simple: was the Respondent continuously bound by the Genocide Convention? Professor Sands has shown that it was — indeed, it expressly and unconditionally accepted that it was. The famous letter the Respondent sent to the Secretary-General on 27 April 1992 was not an offer to those States who agreed with the FRY's continuity thesis that the FRY would not commit genocide or otherwise breach its treaty obligations. It was neither relative nor qualified. Nor was it expressed to be prospective; it was drafted, as I have said, in terms of continuity. The Respondent was a party by succession to the Genocide Convention from the beginning of its existence as a State.

8. I stress that succession is a distinct mode of transmission of treaty obligations. It is a distinct mode of becoming a party to a treaty. Unlike all the other modes it is retrospective to the commencement of the successor State. It is not, as Serbia seemed to suggest on Monday, accession in disguise. Nor is it excluded by Article XI of the Genocide Convention, which is concerned only with signature ratification and accession, not with succession. In practice, numerous States have succeeded to the Genocide Convention, including Croatia: it has never been suggested before that Article XI excluded this. To suggest, as counsel did on Monday, that Article XI has this effect was an argument of desperation[2].

9. As I have said, succession is a form of *transmission* of existing legal relations, not a mode of acquiring new ones. And the point of succession is to avoid discontinuity. Where a State succeeds to a treaty it is bound by that treaty *ab initio*, and it is accountable for any breach of the treaty which may be attributable to it under the international law rules of attribution.

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[1]See, *inter alia*, CR 2008/8, pp. 54 *et seq.* (Djerić); CR 2008/9, pp. 8 *et seq.* (Djerić); CR 2008/9, pp. 13 *et seq.* (Zimmermann); CR 2008/9, pp. 32-33 (Varady).

[2]See, *inter alia*, CR 2008/8, pp. 50-52.

10. This is of particular importance in the case of universal treaties such as the Genocide Convention. That was a declaratory, confirmatory Convention, not a synallagmatic bargain between States. There are not two kinds of genocide, treaty genocide and customary genocide — as my colleagues opposite implied on Monday. Genocide is a unitary concept, contrary to both treaty and custom. The Genocide Convention does not refer to conduct contrary to the provisions of this Convention, it refers instead to "genocide or any of the other acts enumerated in Article III", a formulation which was deliberate. And genocide is as close as international law gets to an absolute idea; it is not relative to one State or another. You cannot have genocide vis-à-vis Croatia or anyone else. You just have genocide. There is just genocide by reference to the definition set out in the Convention, and the object and purpose of the Convention dictates as wide as possible a temporal application, as you pointed out in 1996.

11. The fundamental problem is that Serbia treats the system of international law as if it were a gentlemen's club, with definite and precise rules of entry and the exclusion of outsiders. The date of proclamation of independence is treated as dispositive — before that date there can be no treaty obligations and thus no responsibility for their breach.

12. Now where the dissolution of a State is an orderly, agreed process occurring at a precise moment in time — as occasionally it can be, as it was with the former Czechoslovakia — this approach might be more or less workable. But in fact, even in the case of Czechoslovakia, there were problems — which the Court was careful to minimize or avoid entirely in the *Gabčíkovo-Nagymaros* case. I note that the diversion of the Danube there occurred before the formal dissolution of Czechoslovakia, that it occurred under the control of Slovakia not Czechoslovakia, and that Hungary's international responsibility already incurred was, formally speaking, a responsibility to Czechoslovakia, not to Slovakia. But all of those facts made no difference to the result, whether in terms of succession or in terms of responsibility.

13. But where the dissolution is a violent, disorderly, disputed process — as it was here — the position is quite different. The dissolution of the SFRY was not at all like joining a gentlemen's club. The point is clearly made by Professor Brownlie in successive editions of his textbook:

> "States not infrequently first appear as independent belligerent entities under a political authority which may be called, and function effectively as, a provisional government . . . [O]nce statehood is firmly established, it is justifiable, both legally and practically, to assume the retroactive validation of the legal order during a period prior to general recognition . . . when some degree of effective government existed . . . [T]he principle of effectiveness dictates acceptance, for some legal purposes at least, of continuity before and after statehood is firmly established."[3]

14. And one of the legal purposes for which "continuity before and after statehood is firmly established" is international responsibility. The relevant rule is, as Serbia accepts, codified in Article 10 of the ILC Articles on State Responsibility, to which I will come shortly. I will demonstrate that the second preliminary objection confuses genuinely preliminary issues of admissibility with the merits of Croatia's claim, and that it should be dismissed as a preliminary objection. I accept that in so doing the Court will not decide — or even need to consider — what, if any, conduct occurring before 27 April 1992 is attributable to the respondent State: attribution is a question of merits and you will not prejudice the merits by dismissing the preliminary objection. I also accept that the onus of establishing breaches of the Genocide Convention in respect of acts occurring prior to that date will remain with Croatia. But questions of proof are matters of merits too.

15. In short, Croatia maintains three propositions:

Proposition 1 — A State can be responsible for conduct committed by persons acting on its behalf prior to the formal date on which it is established or proclaimed.

Proposition 2 — Whether the State is so responsible is a question of attribution.

Proposition 3 — Attribution of conduct is a matter of merits, not jurisdiction or admissibility.

It follows from these three propositions that the second preliminary objection pertains to the merits.

16. I appreciate that this may be thought a somewhat bloodless, abstract way of dealing with the admissibility of a claim of genocide. But the issue of admissibility is a categorical one: it is not whether the Respondent is in truth responsible — for the merits are suspended by the Respondent's own act. It is that *a priori* the Respondent *cannot* be responsible, and that is how counsel put it on Monday.

17. But lest this be thought to be *excessively* bloodless, let me give just one factual example, with all due apologies, Madam President. What I am about to say draws on public documents of

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[3] I. Brownlie, *Principles of Public International Law* (6th ed. Oxford, 2003), 77.

the Yugoslav Tribunal; the references are in the footnotes. In the judgment in the *Babić* case, it is stated that in the period of the indictment, from about 1 August 1991 to 15 February 1992, Serb forces composed of JNA units, local Serb units, police units from Serbia, and paramilitary units, attacked and took control of towns, villages, and settlements in the Krajina, that is to say, within Croatia[4]. According to Babić's testimony in the *Milošević* case, all the relevant persons in "Krajina" were under the control of former President Milošević and of Belgrade. The entire military structure — JNA, police, territorial defence forces of Serbia and "Krajina", as well as paramilitary units, local and from Serbia[5] — that whole structure was under the control of Milošević and of Belgrade. We do not ask you, of course, to find that but that is in the public record. In the second indictment against former President Milošević, the prosecution asserted that he was responsible, amongst other things, for participation in and effective control over other participants in a joint criminal enterprise aimed at occupation of areas of Croatia and the forcible removal of Croat and other non-Serb populations[6]. The Judgment in the *Martić* case also showed the direct involvement of the Respondent in the occupation of Croatia, through its State Security Service (SDB) and Ministry of Interior[7].

18. I stress again: we do not suggest that you need to enter into these facts and issues at this stage. But make no mistake — there are facts and issues to be dealt with, if you have jurisdiction. Serbia's admissibility arguments — on which they spent, on Monday, rather more than half their time, not counting repetition — are really an attempt to get a merits judgment in disguise, and without the burden of having to file a counter-memorial.

I turn now to my three propositions.

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[4] *Babić*, IT-03-72-S, Trial Chamber Judgment, 29 June 2004, para. 14.

[5] *Milošević*, IT-02-54-T, Transcript, 3 Dec. 2002, pp. 13737, 13740 and 13744.

[6] *Milošević*, IT-02-54-T, Second Amended Indictment, 28 July 2004, paras. 25 and 26.

[7] *Martić*, IT-95-11-T, Judgment, 12 July 2007, paras. 141 and 142.

Proposition 1: A State can be responsible for conduct committed by persons acting on its behalf prior to the formal date on which it is established or proclaimed

19. This possibility is of particular importance where, as in this case, the succession is a process and not a single event. The governing principle is stated in Article 10 of the ILC Articles, which reads as follows:

> *"Conduct of an insurrectional or other movement*
>
> 1. The conduct of an insurrectional movement which becomes the new government of a State shall be considered an act of that State under international law.
>
> 2. The conduct of a movement, insurrectional or other, which succeeds in establishing a new State in part of the territory of a pre-existing State or in a territory under its administration shall be considered an act of the new State under international law.
>
> 3. This article is without prejudice to the attribution to a State of any conduct, however related to that of the movement concerned, which is to be considered an act of that State by virtue of articles 4 to 9."

20. I note first the distinction between paragraphs 1 and 2. Paragraph 1 is concerned with rebel movements in existing States — that is why it is limited to insurrectional movements. But paragraph 2 is concerned with the situation of a new State, and it is not limited to insurrectional movements. It applies to the conduct of any movement, insurrectional *or other*, which succeeds in establishing a new State, and that is what we had here. I emphasize the words "or other", which counsel for Serbia tended to ignore[8].

21. The Commentary to Article 10 makes this clear:

> "Where the insurrectional or other movement succeeds in establishing a new State . . . the attribution to the new State of the conduct of the insurrectional or other movement is again justified by virtue of the continuity between the organization of the movement and the organization of the State to which it has given rise. Effectively the same entity which previously had the characteristics of an insurrectional or other movement has become the government of the State it was struggling to establish. The predecessor State will not be responsible for those acts. The only possibility is that the new State be required to assume responsibility for conduct committed with a view to its own establishment, and this represents the accepted rule."[9]

I stress the very broad and factually based notion of a "movement, insurrectional or other". Historically, there are lots of ways that movements can create new States — none more unusual

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[8]See, *inter alia*, CR 2008/8, p. 54.

[9]ILC, Commentary to Art. 10, para. (6); see also para. (8).

than this one, one might say — and correspondingly the notion of a "movement" is intended to be a broad one, not the very restrictive one which Serbia presumed.

22. A recent illustration of this principle is provided by a decision of the Eritrea/Ethiopia Claims Commission, which held that Ethiopians of Eritrean ethnicity who registered to vote in the Eritrean independence referendum thereby, by the act of registration, irrespective of whether they voted or how they voted, acquired Eritrean nationality pursuant to an ordinance of 1992. Obviously this was before the formal independence of Eritrea which — the Court will be relieved to hear, only occurred after the referendum! Eritrea argued, *inter alia*, that since it did not come into existence as a State until 1993 and since these persons may have been opposed to independence, an election for an as-yet undetermined nationality could not be assumed. The Commission held that the persons concerned acquired Eritrean nationality in 1992, with consequences for the application of the law of responsibility between the two States. It said:

> "[T]he Commission is not . . . persuaded by Eritrea's argument that registration as an Eritrean national in order to participate in the 1993 Referendum was without important legal consequences. The governing entity issuing those cards was not yet formally recognized as independent or as a Member of the United Nations, but it exercised effective and independent control over a defined territory and a permanent population and carried on effective and substantial relations with the external world, particularly in economic matters. In all these respects, it reflected the characteristics of a State in international law.
>
> Taking into account the unusual transitional circumstances associated with the creation of the new State of Eritrea and both Parties' conduct before and after the 1993 Referendum, the Commission concludes that those who qualified to participate in the Referendum . . . became citizens of the new State of Eritrea pursuant to Eritrea's Proclamation No. 21/1992 . . ."[10].

23. Madam President, Members of the Court, the lockstep logic of Serbia's counsel would not allow for such a result — citizenship effectively in advance of the State. But the life of international law has not been logic, it has been experience, and the rule stated in Article 10, paragraph 2, as the ILC said, "represents the accepted rule".

24. Applying the accepted rule to our case, it is perfectly clear that there was a process, a governmental process, throughout. Moreover it was carried out, in fact, under the rubric of continuity. Specific dates were not crucial and were not presented as such at the time. It is fair to

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[10]Eritrea/Ethiopia Claims Commission, Partial Award, *Civilian Claims (Eritrea's Claims 15, 16, 23 & 27-32)*, 17 Dec. 2004, 44 *ILM* 601, 610-11 (paras. 48-49, 51).

say that the FRY backed protesting into separate statehood. But that is no reason to absolve it from responsibility for the conduct of its own personnel in the process.

Proposition 2: Whether the State is so responsible is a question of attribution.

25. I turn then to the second proposition. Given the possibility of responsibility, whether a State is responsible is a question of attribution. Now that proposition is entailed by the first. Whether the new State is responsible is a matter of attribution. Article 10 is a special rule of attribution dealing with a specific situation, which explains its placement after Article 9, another such special rule. It does not depend, as counsel for Serbia suggested on Monday, on continuity of legal personality — it depends on continuity of effective control. In fact outside the context of decolonization, it is extremely rare for movements engaged in creating a new State to enjoy any form of separate personality, and the Commentary makes it clear that such issues are irrelevant to the application of Article 10, paragraph 2[11]. Rather the question is one of fact and evidence in the given case.

Proposition 3: Attribution of conduct to the State is a matter of merits, not jurisdiction or admissibility

26. This brings me already to our third proposition. Attribution of conduct to the State is a matter of merits, not of jurisdiction or admissibility. Once the principle of Article 10, paragraph 2, is accepted — and Serbia did not challenge it, though they misunderstood and misapplied it — then it follows as the night the day that this admissibility challenge must fail. The factual examples I gave — I could have given others — shows that the issue here is a live one. It is pleaded. For the purposes of admissibility, that is all that matters. The evaluation of the facts is a matter for another day; it is not for this phase of the proceedings.

27. Madam President, Members of the Court, to summarize, the law of responsibility allows that the conduct of a movement of any character is attributed to a State which — at the time the conduct occurred — was in the process of formation. This rule of attribution, embodied in Article 10, paragraph 2, of the ILC Articles on State Responsibility, depends on the specific facts, which cannot be investigated at this stage. Serbia's admissibility argument must fail.

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[11] ILC, Commentary to Article 10, para. 2.

The third preliminary objection: Admissibility of submissions

28. I turn now, and even more briefly, to my second task, which is to respond to Serbia's argument that some of the remedies sought by Croatia in the submissions are inadmissible not only because they are moot but because they are not available as a matter of principle. The Agent for Croatia has dealt with the matter of mootness; I should say something as to the admissibility of the submissions in principle. This is dealt with in Chapter 4 of our Written Observations, which I will not repeat but to which there is little to add.

29. On Monday, Serbia made particular complaint as to the submission relating to the return of cultural property. Paragraph 2 *(c)* of our submissions requests the Court, as a consequence of any finding of responsibility for genocide, to order the Respondent, *inter alia*:

> "forthwith to return to the Applicant any items of cultural property within its jurisdiction or control which were seized in the course of the genocidal acts for which it is responsible"[12].

Serbia makes the point that since seizure of cultural property cannot be genocide, an order for the return of cultural property is outside the scope of the Genocide Convention and thus inadmissible[13].

30. I should first comment that this issue only arises if the Court, first, upholds its jurisdiction over the claim and, secondly, upholds the claim itself on the facts. The question what conduct is then required of the Respondent as a matter of full reparation will then arise. That question will have to be determined in light of the facts as found and the arguments of the Parties — and it will include developments that may take place up to the closure of the oral argument on the merits. For the Court in effect to be asked now, as a matter of admissibility, to edit Croatia's final submissions on remedies is premature, to say the least. The ragbag category of admissibility should not be expanded unduly, nor should it be used to bring in advance issues which pertain to the merits. Otherwise every contentious case will be preceded by a contentious preliminary phase in which — without benefit of full pleading on the facts — the Court is effectively asked to anticipate which remedies are to be excluded *in limine*. I do not say that power does not exist; I do say that it should be exercised only in a very clear case. This is not such a case.

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[12]MC, p. 414.

[13] See, *inter alia*, CR 2008/9, p. 29 (Zimmermann).

31. Turning to our case, it is true that Croatia is not only interested in — indeed not even primarily interested in — financial compensation, though that remains an issue. Besides compensation to the victims — in its capacity as *parens patriae* — Croatia in its submissions requests remedies derived both from the needs of the victims and their families and the Genocide Convention and international law.

32. Of course, establishing that genocide was committed is a prerequisite for all other remedies, including financial compensation It is also a remedy in itself, as you have frequently found.

33. Trying those apparently responsible for genocidal acts is the essence of the Convention in both its aspects: prevention and punishment.

34. To reveal the whereabouts of missing persons who were victims of genocide is an obligation well grounded in the Genocide Convention. People have been abducted, murdered or simply "disappeared" within the framework of a genocidal campaign. Revealing the truth about such missing persons is a part of establishing responsibility for genocide. It is also, once responsibility has been established, an important remedy for the targeted ethnic group and their families.

35. Now, the question can be asked: can deprivation of the targeted group's cultural heritage, its deliberate destruction and looting constitute genocide, as defined in international law? I will not even try to address this difficult question in general terms. It suffices to say that the claimant perceives the deliberate destruction and looting of cultural property as part of a broader plan or pattern of activities, including physical extermination, aimed at the extinction of the Croatian ethnic group from the occupied territories and carried out with the relevant intent. An order for return is not *a priori* inadmissible as a remedy for genocide as defined in the Convention. Whether it is an appropriate remedy is, again, a matter for another day.

36. Madam President, Members of the Court, that concludes this rather summary treatment of issues which will undoubtedly require much more profound treatment in due course — assuming you have jurisdiction *ratione personae* over the Respondent by reason of Article 35 of the Statute. That question, the real question in this phase of the case, on day 3, we at last reach.

Professor Sands and I will now explore that question, starting, with your permission, Madam President, with Professor Sands.

The PRESIDENT: Thank you, Professor Crawford. I now call Professor Sands.

Mr. SANDS:

THE FRY'S SPECIAL STATUS WITHIN THE UNITED NATIONS

I. Introduction

1. Madam President, Members of the Court, in this second presentation on behalf of the Republic of Croatia I will address the issue of access to the Court under Article 35 (1) of the Court's Statute. Professor Crawford will then deal with the question of access and Croatia's rights under Article 35 (2). These arguments are distinct and are presented as alternatives.

2. That Article 35 of the Court's Statute has to be addressed at all — at this stage of these proceedings — is perhaps surprising. Croatia filed its Application on 2 July 1999. By then the Court had already made clear its view — unanimously — that there was no Article 35 bar to Croatia's Application, whether on grounds of jurisdiction *ratione personae* or on the grounds of "access to the Court". In the two 1993 Orders on Provisional Measures, the Court ruled that it did not have to "determine definitively" at that stage of the proceedings whether Yugoslavia was a party to the Statute of the Court: the Article 35 (1) issue, as we will refer to it. It found it had prima facie jurisdiction under Article 35 (2), given that prima facie participation of Bosnia and Herzegovina and Yugoslavia in the Genocide Convention, which could be regarded as "a special provision contained in a treaty in force" (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Yugoslavia), Provisional Measures, Order of 8 April 1993, I.C.J. Reports 1993*, p. 14, paras. 19 and 20; also *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Yugoslavia), Provisional Measures, Order of 13 September 1993, I.C.J. Reports 1993*, p. 338, para. 25). The Orders attracted no dissent. Three years later, in its 1996 Judgment on Preliminary Objections, the Court said nothing explicit about Article 35 of the Statute. Yugoslavia had raised no preliminary objection in relation to that provision, and apparently no judge felt a necessity to express a view as to any difficulties in relation to Article 35 (1) *or* 35 (2). That silence

was not without consequence: logically, the Court must have proceeded on the basis that the conditions established by *either* Article 35 (1) *or* Article 35 (2), or both, had been met; and this seems to be the point you made in paragraph 133 of your Judgment in 2007. Now, it is true that three years after the 1996 Judgment, in your Order of 2 June 1999, you found that you did not have prima facie jurisdiction to entertain an application for provisional measures from Yugoslavia against a number of NATO members; *but* you did so on very different grounds, namely: first, that there was no jurisdiction *ratione temporis* under Article 35 (2) of the Statute, and second the acts alleged against the Respondent were not prima facie capable of coming within the Genocide Convention (*Legality of Use of Force (Yugoslavia* v. *Belgium), Provisional Measures, Order of 2 June 1999, I.C.J. Reports 1999 (I)*, p. 135, para. 30 and p. 138, para. 41). The Court concluded that it need not address the question of whether the requirements of Article 35 (1) were then met. Yugoslavia nevertheless addressed that question. And on 12 May 1999, Yugoslavia's Agent, Mr. Etinski, duly authorized by the respondent State as its representative, addressed this Court in this room. Yugoslavia was a Member of the United Nations, he submitted, and had "the right to participate in the work of [United Nations] organs *other than Assembly bodies*"[14]: and I emphasize those last four words.

3. Madam President, Members of the Court, it was against *this* background of judicial decision by this Court and argument by the FRY that Croatia filed its Application on 2 July 1999. Now, before looking in more detail at that Application, it is appropriate to say something about the FRY's *sui generis* relationship to the United Nations — and the Statute of the Court — during the period in question. I would like to be able to reply to the arguments that Serbia made on Article 35 (1) on Monday, but I am unable to do so. Beyond bald assertion, Serbia presented no detailed arguments.

II. The FRY's relationship with the United Nations 1992 to 2000

4. The Court is by now very well aware of the facts concerning the break-up of the SFRY, the emergence of the FRY, and the FRY's relationship with the United Nations. There is no need for us to revisit this issue in any great detail. The essence is that between 1992 and 2000 —

[14]CR 99/25, p. 24.

including the date on which Croatia filed its Application in these proceedings — the FRY had a special and unique relationship with the United Nations. In our submission, the relationship included attributes of membership, and included an entitlement to appear before the Court under the conditions envisaged by Article 35 (1) of the Court's Statute. That Article, you will recall, provides that: "The Court shall be open to the States parties to the present Statute."

5. The SFRY was an original Member of the United Nations. Its membership continued for more than 45 years until, as described in Croatia's Memorial, break-up began in mid-1991[15]. Now the key dates are shown on the screen behind me and of course there is a tab in your judges' folder, tab 7 [slide]. On *19 May 1991*, a referendum held in Croatia voted overwhelmingly in favour of independence[16]. On *25 June 1991*, the Croatian Parliament, the Sabor, proclaimed Croatia "a sovereign and independent State"[17]. On *29 November 1991* the Badinter Commission expressed the view that the SFRY was then "in the process of dissolution"[18]. On *27 April 1992* the Republic of Serbia and Montenegro proclaimed the formation of the FRY, declaring that the FRY "continuing the State, international legal and political personality of the [SFRY], shall strictly abide by all the commitments that the SFRY assumed internationally"[19]. The following month on *22 May 1992* the Republic of Croatia was admitted to membership of the United Nations. Then on *30 May 1992* the United Nations Security Council adopted resolution 757 (1992), noting that "the claim by the [FRY] to continue automatically the membership of the former [SFRY] in the United Nations has not been generally accepted". On *19 September 1992* Security Council resolution 777 stated that the FRY "cannot automatically continue the membership of the former [SFRY]". And three days later, on *22 September 1992*, General Assembly resolution 47/1 adopted the terms of that resolution and decided that the FRY "should apply for membership in the United Nations and that it shall not participate in the work of the General Assembly"[20] [slide off]. Now, on 29 September 1992, the Under-Secretary-General and United Nations Legal Counsel, in a letter

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[15]MC, Chap. 2, pp. 41 *et seq*.

[16]*Ibid.*, para. 2.113.

[17]*Ibid.*, para. 2.114.

[18]Opinion No. 1 of December 1991; MC, para. 2.120.

[19]United Nations doc. A/46/915; MC, para. 2.138.

[20]The resolution was adopted by 127 votes to 6, with 26 abstentions.

addressed to the permanent representatives of Bosnia and Herzegovina and of Croatia, stated that "the only practical consequence that [resolution 47/1] draws is that the [FRY] shall not participate in the work of the General Assembly" and that it was "clear, therefore, that representatives of the [FRY] can no longer participate in the work of the General Assembly, its subsidiary organs, nor conferences and meetings convened by it." He went on:

> "On the other hand, the resolution neither terminates nor suspends Yugoslavia's *membership* in the Organization. Consequently, the seat and nameplate remain as before, but in Assembly bodies representatives of the [FRY] cannot sit behind the sign 'Yugoslavia'. Yugoslav missions at United Nations Headquarters and offices may continue to function and may receive and circulate documents. At Headquarters, the Secretariat will continue to fly the flag of the old Yugoslavia as it is the last flag of Yugoslavia used by the Secretariat. The resolution does not take away the right of Yugoslavia to participate in the work of organs other than Assembly bodies. The admission to the United Nations of a new Yugoslavia under Article 4 of the Charter will terminate the situation created by resolution 47/1."[21]

On 29 April 1993, General Assembly resolution 47/229 decided that the FRY "shall not participate in the work of the Economic and Social Council". The fact that this resolution had to be adopted at all, and its limited and narrow scope, is inconsistent with the conclusion that the FRY did not on that date — 29 April 1993 — have other attributes of membership of the United Nations including a right of access to the Court under Article 35 (1).

6. No further restrictions were placed on the participation of the FRY in the work of the United Nations. Nor did they adopt any measures that would prevent the FRY from participating in the work of any other United Nations organs, or programmes, or bodies, including its principal judicial organ, the International Court of Justice. There can be no dispute as to the facts over two phases: from 27 April 1992 until 22 September 1992 there were no restrictions on the full participation of the FRY in the work of all United Nations bodies, including the General Assembly. And then from 22 September 1992 onwards (until 1 November 2000, when the FRY was admitted to membership of the United Nations), the FRY was not subject to restrictions on participation in any body except in respect of the General Assembly and the Economic and Social Council. There was no restriction placed on its participation in the work of this Court.

7. Throughout this period the FRY exercised — and was perceived as exercising — the attributes of membership of the United Nations. Some examples:

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[21] United Nations doc. A/47/485; emphasis in the original.

(a) it claimed to be a Member of the United Nations[22];

(b) a number of other Members of the United Nations — including the Russian Federation and China — acted on the basis that the decision to suspend the FRY from limited activities did not amount to expulsion or non-membership[23];

(c) the annual edition of the *I.C.J. Yearbook* treated Yugoslavia as being a Member of the United Nations[24];

(d) the FRY occupied the seat of the *former Yugoslavia* in participating in the work of other United Nations organs and bodies, whose seat, name and missions subsisted;

(e) the FRY was able to circulate documents within the United Nations system under the same conditions as other Members (except in the limited context of the General Assembly and the Economic and Social Council), and it received documents circulated by other Members;

(f) the Permanent Mission of the FRY, at the same address as the former mission of the SFRY, appeared on the list of missions prepared by the United Nations;

(g) the FRY continued to participate in the work of other United Nations organs, including the Security Council and the International Court of Justice, as well as other United Nations bodies, such as the ICTY, in a manner that was not distinguishable from the participation of other Members[25]; and

(h) throughout this entire period the FRY was assessed for United Nations budgetary contributions, it paid assessments, and acted as being liable (as continuator) for certain unpaid contributions of the SFRY (less the amounts owed by successor States, which of course became contributors in their own right)[26].

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[22]See e.g., the FRY's Memorial in the *Legality of Use of Force* cases, 5 January 2000. Part 3 of that Memorial is entitled "The FR of Yugoslavia is a Member State of the United Nations." See also CR 99/25, p. 24 (Etinski) who unequivocally stated that "The Federal Republic of Yugoslavia is a Member State of the United Nations."

[23]See e.g., the view expressed by Mr. Vorontsov, Permanent Representative of the Russian Federation, who states:

> "The decision to suspend the participation of the Federal Republic of Yugoslavia in the work of the General Assembly will in no way affect the possibility of participation by the Federal Republic of Yugoslavia in the work of other organs of the United Nations, in particular the Security Council . . ." (Security Council, Provisional Verbatim Record of the 3116th Meeting, S/PV.3116, 19 September 1992, 4-5.) (*Legality of Use of Force*, Memorial, para. 3.1.1.)

Also the view of the Permanent Representative of the People's Republic of China, Mr. Li Daoyu:

> "The resolution just adopted does not mean the expulsion of Yugoslavia from the United Nations. The name-plate 'Yugoslavia' will be kept in the General Assembly hall . . . The Federal Republic of Yugoslavia will continue to issue its documents in the United Nations." (Security Council, Provisional Verbatim Record of the 3116th Meeting, S/PV.3116, 19 September 1992, pp. 14-15.) (*Legality of Use of Force*, Memorial, para. 3.1.2.)

[24]See e.g., *Legality of Use of Force*, Memorial, para. 3.1.17.

[25]See the arguments adduced by the FRY in its 5 January 2000, *Legality of Use of Force*, Memorial, para. 3.1.1 *et seq.* See also the arguments of the Agent of the FRY in this very Hall on 12 May 1999 in the hearing for the request for provisional measures in the *Legality of Use of Force* case, CR 99/25, p. 24 *et seq.*

[26]See, *inter alia*, CR 99/25, pp. 24-25 with regard to the payment of contributions by the FRY.

8. I would note that throughout this period four of the SFRY's successor States, including Croatia, objected to this special status enjoyed by the FRY but their efforts at changing it were unsuccessful.

III. Croatia's Application and the FRY's change of direction

9. This was the context in which Croatia filed its Application with the Court, on 2 July 1999. By that time there had been other, even more significant developments, which gave rise to expectations on which Croatia relied. Specifically, this Court had handed down Orders and Judgments — in 1993, 1996 and 1999 — which identified no bar to the exercise by the Court of its jurisdiction under Article 35 (1) or Article 35 (2) or both. In the context of those proceedings the FRY had publicly proclaimed its entitlement to bring proceedings before the International Court of Justice, and it raised no preliminary objections based on Article 35 of the Statute. Croatia was entitled to rely on the words of Mr. Etinski, the FRY's Agent, spoken in this same room just weeks before Croatia filed its Application. "The Federal Republic of Yugoslavia is a Member State of the United Nations," said Mr. Etinski, and all the requisites of the Court's Statute and Rules had been satisfied[27]. As to the effect of the General Assembly resolutions, Mr. Etinski was crystal clear, and I quote:

> "The conclusion is clear: the Federal Republic of Yugoslavia cannot participate in the work of the General Assembly and the [ECOSOC]. That is all. There are no other consequences."

He also reminded the Court that "the *I.C.J Yearbook* informs that Yugoslavia is one among 185 Member States of the United Nations on 31 July 1997".

10. Those undertakings by the distinguished Agent gave rise to an expectation on which Croatia was entitled to rely: it is instructive to compare Croatia's Application of 2 July 1999 with Bosnia's Application of 20 March 1993. Croatia invoked the same provisions of the Genocide Convention, of the Court's Statute and the Court's Rules[28]. That is the material distinction

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[27]CR 99/25, p. 23.

[28]Croatia's Application of 2 July 1999 provided:

between this case and that brought by the FRY against NATO members, which was based on an Article 36 (2) declaration that the Court decided — rightly, we would submit — could not, on its own terms, apply retroactively[29].

11. Between the date of the filing of the Application (2 July 1999) and the date of the filing of Croatia's Memorial (1 March 2001) came a new development. On 24 September 2000, Mr. Koštunica was elected President of the FRY. On 27 October 2000 he sent a letter to the Secretary-General requesting admission of the FRY to membership in the United Nations, in the "wake of fundamental democratic changes" that took place in the FRY[30]. On 31 October 2000 the Security Council recommended to the General Assembly that the FRY be admitted to membership in the United Nations[31]. On 1 November 2000, the General Assembly, by resolution 55/12, decided to "admit the Federal Republic of Yugoslavia to membership in the United Nations".

12. Four months later, on 1 March 2001, Croatia filed its Memorial in this case. Chapter 6 of the Memorial dealt with jurisdiction. Basing its arguments squarely on the Court's Judgment of 1996, Croatia saw no need to make any mention of Article 35 of the Court's Statute. Croatia had no reason to doubt, as the Memorial stated, that "as at the date of Croatia's application to the Court the FRY was bound by the Genocide Convention" in conditions that entitled it to have access to the Court. It is important to point out that this submission was stated to be "without prejudice to Croatia's consistent position rejecting the FRY's claim to be the continuation of the SFRY", a

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"On behalf of the Republic of Croatia and in accordance with Article 40 (l), of the Statute of the International Court of Justice and Article 38 of the Rules of Court, I respectfully submit this Application instituting proceedings in the name of the Republic of Croatia against the Government of the Federal Republic of Yugoslavia for violations of the Convention on the Prevention and Punishment of the Crime of Genocide (hereinafter called the 'Genocide Convention'). The Court has jurisdiction pursuant to Article 36 (1) of its Statute and Article IX of the Genocide Convention." (Para. 1.)

Bosnia's Application of 20 March 1993 provided:

"I have the honour to refer to Article IX of the Convention on the Prevention and Punishment of the Crime of Genocide of 9 December 1948 (hereinafter referred to as the 'Genocide Convention'). Under the jurisdiction thereby conferred upon the Court, and in accordance with Article 36 (1) and Article 40 (1) of the Statute of the Court and Article 38 of the Rules of Court, I hereby submit on behalf of the Republic of Bosnia and Herzegovina, an Application instituting proceedings against Yugoslavia (Serbia and Montenegro) for violating the Genocide Convention in the following case."

[29]See FRY Application filed on 29 April 1999:

"Legal grounds for jurisdiction of the Court

The Government of the Federal Republic of Yugoslavia invokes Article 36, para. 2, of the Statute of the International Court of Justice as well as Article 9 of the Convention on the Prevention and Punishment of the Crime of Genocide."

[30]United Nations doc. A/55/528-S/2000/1043.

[31]United Nations doc. S/RES/1326.

statement that nevertheless recognized the approach adopted by the Court as to the FRY's *sui generis* status vis-à-vis the United Nations. I shall return to that point shortly.

13. In September 2002 the FRY filed its preliminary objections, of which there were three. Abandoning the position it had consistently adopted for eight years, until the events of November 2000, the FRY now argued that it "never became bound by Article IX of the Genocide Convention"[32]. It is most striking, however, that the FRY's preliminary objections are totally silent about Article 35 of the Court's Statute. The FRY mentions only — en passant — that: "It is now settled that the FRY was not a Member of the United Nations when the dissolution of the SFRY took place in 1992."[33] But on Article 35 (1) the preliminary objections say nothing. As the Court has recently noted, the written pleadings in this case are silent on this point, and that is for an obvious reason: never before had there been an issue. Again on Monday, Serbia was virtually silent on this point.

14. The FRY raised the same argument in its Application for Revision of the 1996 Judgment, which was submitted on 24 April 2001. On 3 February 2003, five months after the preliminary objections in this case were filed, the Court gave its Judgment in that case (*Application for Revision of the Judgment of 11 July 1996 in the Case concerning* Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina *v.* Yugoslavia), Preliminary Objections *(Yugoslavia* v. *Bosnia and Herzegovina), Judgment*, *I.C.J. Reports 2003*, p. 7). The FRY's arguments were given short shrift. The Court referred to "the FRY's special situation that existed between September 1992 and November 2000" (*ibid.*, p. 22, para. 45), emphasizing "the *sui generis* position which the FRY found itself in vis-à-vis the United Nations over the period 1992 to 2000" (*ibid.*, p. 31, para. 71). You also emphasized that United Nations General Assembly resolution 55/12 of 1 November 2000 "cannot have changed retroactively the *sui generis* position . . . or its position in relation to the Statute of the Court and the Genocide Convention" (*ibid.*). Now that, we say, is a crucial point, and it is one that must be right, both as a matter of legal logic and policy. A party to a case cannot change its position — its political position — and then expect a court to allow such a change to have retroactive effect. On another

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[32]Preliminary Objections, para. 3.8.

[33]*Ibid.*, para. 3.12.

issue, on Monday we heard a great deal from Serbia against any non-retroactivity, but on this issue, where retroactivity is the foundation of its entire argument, Serbia suddenly drops into silence and emerges as retroactivity's secret friend. In any event, the Court's approach in 2003 must also be right, we submit, for this case: whatever may be the prospective effects of any developments that occurred in 2000, they cannot retroactively transform the legal or factual situation as it pertained on 2 July 1999.

15. Croatia took careful and full account of the Court's Judgment of 3 February 2003, in preparing its Written Statement of 29 April 2003, just a couple of months later, in response to the FRY's preliminary objections. Croatia understood the Judgment of February 2003 to be saying that the conclusions that the Court had adopted in 1993, 1996 and 1999, in relation to the legal situation as it pertained on those dates, could not be affected by actions taken by the FRY in 2000, or by the United Nations in that year or in following years. In this regard, it is of central importance for these proceedings that the critical legal date is — subject to what might be called the *Mavrommatis* point — 2 July 1999, the date on which Croatia filed its Application. In determining its jurisdiction, or issues of access to the Court, we respectfully submit that the Court must consider the legal situation — and the issues of jurisdiction and access — as at that date. The logical approach taken by the 2003 Judgment has inevitable consequences. If the actions of the FRY and the United Nations General Assembly cannot have had retroactive effect on the *sui generis* position of the FRY vis-à-vis the United Nations over the period 1992 to 2000, in terms of the FRY's relations with Bosnia, it is difficult to see on what basis a different conclusion might now be reached in relation to Croatia.

16. It was this logic which inspired Croatia to adopt the approach it did in its Written Observations of 29 April 2003. These observations simply could not have predicted the judgment that came a year later. It came totally out of the blue, a judicial *tremblement de terre*. As to the 2003 Judgment, Croatia expressed the view that "the Court's reasoning is unimpeachable"[34]. It concluded that the reasoning was applicable "without distinction to the legal situation governing relations between Croatia and the FRY — Serbia and Montenegro — in the period up to and

[34]Written Observations, 29 April 2003, para. 2.12.

including 2 July 1999"[35]. It was on this basis Croatia concluded that on the date of the filing of its Application the Court had jurisdiction over the FRY pursuant to Article IX, as it had in relation to Bosnia and Herzegovina, and that the first preliminary objection of the FRY was without merit and should be rejected. On Monday we heard nothing from Serbia in response to this argument, which stands unchallenged. As with the *Bosnia and Herzegovina* case, Article 35 of the Court's Statute required no mention in Croatia's Written Observations, since it was not mentioned by the FRY in its preliminary objections, which were filed after the events of November 2000.

IV. The Court's change of direction

17. So we come to the Court's change of direction. I have described how matters stood at the close of the written pleadings in this phase of the case. In all normal circumstances, that is how one would expect matters to stand today, some five years after that 2003 Judgment. Indeed, over a period of ten years the jurisprudence of the Court had been constant in its approach to Article 35: it posed no bar to the exercise of jurisdiction, it raised no issues of admissibility. The solitary exception to that jurisprudence intervened unexpectedly and, Croatia would respectfully submit, unnecessarily, on 15 December 2004, when the Court gave its Judgment in the cases brought by the FRY against various NATO members, concerning *Legality of Use of Force*. The Court by a narrow majority abandoned its previous approach to Article 35. It adopted a new approach. It is difficult to see how the new approach can be reconciled with what had come before. We are confronted, apparently, with irreconcilable Judgments, a fact that Serbia seeks to ignore and which places both the Bench and the Bar in some difficulty.

18. The 2004 Judgment merits careful attention. Fourteen judges and one *ad hoc* judge sat in that case. Unanimously, they concluded that the Court did not have jurisdiction (*Legality of Use of Force (Serbia and Montenegro* v. *Netherlands), Preliminary Objections, Judgment, I.C.J. Reports 2004*, p. 1011, para. 128)[36]. They did so, however, for very different reasons.

19. The Court devoted 46 paragraphs of its Judgment to the issues raised by Article 35 (1) (*ibid.*, paras. 44-90). Most of these were devoted to a recapitulation of the factual events that

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[35] *Ibid.*

[36] Similar Judgments were also handed down in several other cases.

pertained between 1992 and 2000 (paras. 53-81). The Court characterized the events it described as doing no more than "testify to the rather confused and complex state of affairs that obtained within the United Nations surrounding the legal status of the Federal Republic of Yugoslavia in the Organization during this period" (*ibid.*, p. 1040, para. 72), and it found that the qualification of the FRY's position as "*sui generis*" was merely "descriptive of the amorphous state of affairs" and "not a prescriptive term from which certain defined legal consequences accrue" (*ibid.*, p. 1040, para. 73). According to the majority that sat on that Court, the development of 2000 — the FRY's application for acceptance into membership of the United Nations — ended the FRY's *sui generis* position (*ibid.*, p. 1041, para. 77) and clarified "the thus far amorphous legal situation" (*ibid.*, p. 1042, para. 78). The Court ruled that its earlier Judgment of 2003 — in which it concluded that the development of 2000 "cannot have changed retroactively the [FRY's] *sui generis* position" — "cannot . . . be read as findings . . . in relation to the United Nations and the Genocide Convention" (*ibid.*, p. 1045, para. 87). We say that is a cryptic ruling that seems difficult to square with legal logic. At paragraph 90 of its Judgment, the Court ruled that "for all these reasons" at the time of its filing of its Application, Serbia and Montenegro was *not* a Member of the United Nations and, consequently, was not on *that* basis a party to the Statute of the Court.

20. Much could be said about this Judgment, but for the moment it suffices to mention just one aspect: the Court seems not to have actually given reasons for the conclusion it came to, or an explanation as to why it chose to abandon its earlier jurisprudence, or any indication of how to reconcile its new approach with its old for other cases that were still pending. It remains something of a mystery to us why these 46 paragraphs were thought to be necessary at all: all of the judges agreed that the Court did not have jurisdiction *ratione temporis*, and that would have been sufficient to dispose of the cases without causing the perturbations that have now ensued.

21. Croatia most respectfully submits that the Court's Judgment of 2004 raises serious issues for this distinguished body, the "principal judicial organ" of the United Nations. For counsel appearing in this case it poses considerable difficulties, having regard to the very great respect with which each Member of the Court is held. But I cannot avoid referring to the joint declaration made by the then Vice-President and six judges of the Court, underscoring the need, in the exercise of the judicial function, for a court to follow three key principles: first, consistency in case law; second,

the need for certitude, and third, the implications for other pending cases (*Legality of Use of Force (Serbia and Montenegro* v. *Belgium), Preliminary Objections, Judgment, I.C.J. Reports 2004,* joint declaration of Vice-President Ranjeva, Judges Guillaume, Higgins, Kooijmans, Al-Khasawneh, Buergenthal and Elaraby, p. 330, para. 3). We say it is difficult to see how these vital principles were respected by the 2004 Judgment. The authors of the joint declaration characterized the Court's conclusions as "doubtful" (*ibid.*, p. 330, para. 3), as being "contrary" to the position adopted by the Court in its 1999 Order (*ibid.*, p. 332, para. 8), and as amounting to "a change of position" (*ibid.*, p. 332, para. 9). Croatia considers that the Court's reasoning was indeed "at odds with judgments or orders previously rendered by the Court" (*ibid.*), and that the grounds adopted by the majority were "less certain" than others open to it (*ibid.*, p. 333, para. 12). Of crucial importance for this case, the authors of the declaration noted that, contrary to the view stated by the majority, the Court had "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 subsequent developments (*ibid.*, p. 332, para. 10). As regards the majority's assertion that it was "clear that the *sui generis* position of the Applicant could not have amounted to its membership in the Organization", the authors of the declaration stated that they found this proposition "far from self-evident", adding that "we cannot trace the steps of the reasoning" (*ibid.*, p. 333, para. 12).

22. A number of judges wrote separate opinions, and each of course merits the most careful attention. But it may be that the opinions of two of the judges, who no longer sit on this distinguished Bench, but who distinguished the Court with their presence over many years, are worthy of note. Judge Kooijman's separate opinion is of particular interest, since back in 1999, at the provisional measures phase of that case, he had indicated that decisions taken in 1992 by organs of the United Nations raised serious doubts as to whether the FRY was capable of accepting the compulsory jurisdiction of the Court as a party to the Statute (*ibid.,* separate opinion of Judge Kooijmans, p. 343, para. 2). And he noted that the Court's approach in 1999 had now been "abandoned" in favour of the one he suggested at the time. And yet, with his characteristically independent spirit, he concluded that "far from being elated by this change of approach" he now felt "concerned" (*ibid.*, p. 344, para. 3). Judge Kooijmans was "not persuaded" that a thorough analysis and careful evaluation had "convincingly demonstrated" that the events of 2000 had

clarified the "amorphous legal situation" back in 1992-2000 (*ibid.*, p. 344, para. 4). We have noted this aspect of Judge Kooijman's opinion: he concluded that the Court's finding did not seem to be based on a thorough analysis and careful evaluation of the legal effect of statements made by the FRY before 2000 (*ibid.*, p. 344, para. 5), or of the factual circumstances that pertained between 1992 and 2000, to which I drew the Court's attention in the opening part of this presentation.

23. At the very least, in the absence of any decision to suspend its right to participate in other organs of the United Nations, including the International Court of Justice, Croatia hoped for a detailed explanation by the Court as to the manner in which the FRY's *sui generis* status at the United Nations changed. In this respect, Croatia also finds much with which to agree in the separate opinion of Judge Elaraby and, in particular, his conclusion that the Court's judicial act of transforming the FRY's *sui generis* position from 1992 to 2000 into non-membership of the United Nations throughout that period "lacks a solid legal basis" (*ibid*., separate opinion of Judge Elaraby, p. 357, para. 13). In his view, an approach based on the law of the United Nations Charter and the established practice of that Organization "would have led the Court to find that the FRY was a member of the United Nations when, in 1999, it filed its application", leading to the conclusion that the Court was open to the FRY under Article 35 (1) (*ibid.*, p. 358, para. 13).

V. Croatia's approach

24. Madam President, Croatia very much regrets that its Application should now place the Court at something of a crossroads. And we hope that you, and all of the Members of the Court, will understand that Croatia has no desire to place the Court in any sort of difficulty. If these hearings had taken place at any time between 1996 and 2003, it seems that the Court would not have been faced with this issue. Until the Judgment of 2004, the Court had developed a consistent jurisprudence, based on the proposition that there was no bar to the FRY's access to the Court, there was no bar to the Court exercising jurisdiction over the FRY on the basis of Article 35 of the Court's Statute. The Court recognized the particular — and peculiar — circumstances that followed the break-up of the SFRY, and it characterized the position of the FRY vis-à-vis the United Nations as *sui generis*. It is notable that the Court's approach to the exercise of jurisdiction

over the FRY had not attracted general criticism either by States or by commentators. The *sui generis* character of the FRY's situation accommodated a political and legal reality that balanced recognition of attributes associated with membership of the United Nations with a pragmatic avoidance of descending into detail. With great respect, we would say that it is the 2004 Judgment that is the source of the difficulty, and not the five judgments and orders that came both before and after.

VI. Conclusions

25. Madam President, Members of the Court, the Parties received a letter dated 6 May 2008 from the Registrar, inviting them to argue these issues of access. We understood that letter to refer to the issues arising in relation to Article 35 of the Statute, having regard to the facts, having regard to the law and also of course, the Court's jurisprudence. In fact, we had already undertaken to address these very issues, as we recognized them to be material and important. We were therefore very grateful to receive the letter from the Registrar. We had expected to hear from Serbia on these issues. And perhaps we will hear from Serbia in the second round as to how it proposes the Court might resolve the conflict as between these judgments. Be that as it may, our conclusion on the first issue is simple: we submit that in fact and in law, the situation was that on 2 July 1999 the FRY had a special relationship with the United Nations, properly characterized as *sui generis*. The attributes of that relationship were tantamount to membership. It may not have been able to participate in the General Assembly or in ECOSOC, but it was not barred from participating in any other organ of the United Nations or any other United Nations bodies or any other United Nations programmes, and there was no bar on its right of access to the Court under Article 35, paragraph 1. Putting it another way, you did not identify in Article 35 (1) a bar in relation to Bosnia's case against the FRY, in 1993, or in 1996, or in 2003, or in 2007. We do not see why you should proceed any differently in this case.

26. Madam President, that concludes my presentation, and I thank you and the Members of the Court for your attention. I have noted the time and I do not know whether this is an appropriate moment for a break or for Professor Crawford to start.

The PRESIDENT: If it is convenient for Professor Crawford to go the full 60 minutes, we might take our break now. The Court now rises. Thank you.

The Court adjourned from 11.15 to 11.30 a.m.

The PRESIDENT: Please be seated. Yes, Professor Crawford.

Mr. CRAWFORD: Madam President, Members of the Court:

VI. SERBIA'S ACCESS TO THE COURT

Introduction

1. In this presentation I will deal with two arguments concerning access to the Court, the matter on which the Court asked us to deal in its letter of 6 May 2008. That was an unusual — though understandable — request: in fact we were going to deal extensively with Article 35 in any event. But on Serbia's part your letter led to an unusual and far less understandable response. Our opponents said nothing about Article 35, paragraph 2, other than briefly to refer to the *NATO* Judgments. There was no analysis of those Judgments, of the separate and dissenting opinions or of the subsequent discussion in your 2007 Judgment. No analysis whatever. So in dealing with my two arguments I cannot be responsive to Serbia. Not for the first time Serbia has refused to argue a point it should have argued. So I will simply respond to your invitation, unassisted — as the Court is unassisted — by Serbia.

2. The first of the two arguments concerns the consequences to be drawn from the evident fact that this case was indeed commenced and existed as a case before the Court from the date of its commencement in 1999, and that it continued to do so after the Respondent was admitted to the United Nations on 1 November 2000. Any deficiency that may have existed before 1 November 2000 was thereby cured.

3. The second argument concerns Article 35, paragraph 2, of the Court's Statute and the decision of the Court on Article 35 (2), in the *NATO* cases. Assuming, *quod non*, that the Court only has jurisdiction if the necessary conditions were met in 1999, at the time this case was commenced, I will argue that the Respondent had access to the Court under Article 35 (2) at the

time and irrespective of its status relative to the United Nations. This is because Article IX of the Genocide Convention was a special provision contained in a treaty in force at that time.

4. For reasons that will appear, I will call the first argument, the *Mavrommatis* argument, although I might, with respect, more properly have called it the Tomka argument (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro)*, Judgment of 26 February 2007, separate opinion of Judge Tomka, paras. 24-36). The second I will call the "treaties in force" argument. On either argument the Court has jurisdiction.

5. Underlying both arguments there are, or should be, two points which are fundamental and which ought to be common ground.

6. The first point is that the Respondent in the present case is now and at all relevant times has been a State in international law. No question arises as to the fundamental qualification, the real question of capacity, to be a party to a case before the Court. It is laid down separately and distinctly by Article 34, paragraph 1, of your Statute. The Court would have to satisfy itself of this requirement in any case, if necessary of its own motion. That requirement is satisfied in this case. The Respondent is, as I have explained, and was, at all material times, a State.

7. The second fundamental point is that it is, so to speak, the right State — by which I mean the right respondent State. The responsibility which Croatia invokes in the present case is the responsibility of this State, the Respondent opposite. I have already demonstrated the continuity of this responsibility under the Genocide Convention. No doubt the Respondent denies responsibility but that is a matter of merits. The present point is that the State you have before you is the same State as it was in 1992. Consistently throughout this time the respondent State affirmed that it was bound by the Genocide Convention. It was only on 12 March 2001, some weeks after the Memorial in this case was filed, that the Respondent put into effect its plan to avoid accountability under the Genocide Convention. By then, Madam President, Members of the Court, it was too late.

A. The *Mavrommatis* principle: all the substantive requirements for the Court's jurisdiction were united on 1 November 2000

8. I turn then to my first argument, based on what I have called the *Mavrommatis* principle. Putting it as simply as I can, it is that all the substantive requirements for the Court's jurisdiction

were united, at the latest, when the Respondent was admitted to the United Nations on 1 November 2000. There was a case duly filed before the Court by Croatia, so there was *seisin*. The Respondent was at relevant times a party to the Genocide Convention, so there was an apparent *basis of claim*. The Respondent was a State which had in force an unqualified consent to jurisdiction under the Genocide Convention, so there was *consent to jurisdiction*. The Respondent was, at least as from 1 November 2000, a party to the Court's Statute, so there was *access to the Court*. One: seisin; two: basis of claim; three: consent to jurisdiction; four: access to the Court. Who could say there is a fifth requirement for you to hear a case? The *Mavrommatis* principle is the principle that provided these four substantial elements are united at any given time, the order in which this occurred is a pure matter of form and does not affect your jurisdiction.

[Graphic]

9. The chronology of the *Mavrommatis* case (*Mavrommatis Palestine Concessions, P.C.I.J. Series A, No. 2, 1924*, p. 34) is shown on the screen: for your convenience, these and later slides are at tab 8 in your folders. Greece filed its Application in *Mavrommatis* on 13 May 1924. On 6 August 1924 there was the deposit of ratifications of the Treaty of Lausanne including Protocol XII.

10. Great Britain objected that there was no jurisdiction because when the Application was filed Protocol XII was not in force. The Court replied in the following terms:

> "In the same connection it must also be considered whether the validity of the institution of proceedings can be disputed on the ground that the application was filed before Protocol XII had become applicable. This is not the case. Even assuming that before that time the Court had no jurisdiction because the international obligation referred to in Article II was not yet effective, it would always have been possible for the applicant to re-submit his application in the same terms after the coming into force of the Treaty of Lausanne, and in that case, the argument in question could not have been advanced. Even if the grounds on which the institution of proceedings was based were defective for the reason stated, this would not be an adequate reason for the dismissal of the applicant's suit. The Court, whose jurisdiction is international, is not bound to attach to matters of form the same degree of importance which they might possess in municipal law. Even, therefore, if the applicant were premature because the Treaty of Lausanne had not yet been ratified, this circumstance would now be covered by the subsequent deposit of the necessary ratifications." (*Mavrommatis Palestine Concessions, Judgment No. 2, 1924, P.C.I.J., Series A, No. 2,* p. 34.)

I stress the words "this circumstance would now be covered" — "ce fait aurait été couvert". The question is whether the requirements for jurisdiction to be exercised are "covered" — that is to say,

whether they exist — at the relevant time, not the temporal order in which they came into existence.

[End graphic]

11. The Court took a similar approach, more summarily, in *Certain German Interests in Polish Upper Silesia*. The Factory at Chorzów was one of the German interests, and Poland made a preliminary objection that "the existence of a difference of opinion in regard to the construction and application of the Geneva Convention had not been established before the filing of the Application" (*Certain German Interests in Polish Upper Silesia, Jurisdiction, Judgment No. 6, 1925, P.C.I.J., Series A, No. 6*, p. 13). The Court noted that Article 23 of the Geneva Convention of 1922 did not lay down any specific procedure by way of notification or negotiation before application was made to the Court. But it went on to say:

> "Even if, under Article 23, the existence of a definite dispute were necessary, this condition could at any time be fulfilled by means of unilateral action on the part of the applicant Party. And the Court cannot allow itself to be hampered by a mere defect of form, the removal of which depends solely on the Party concerned." (*Ibid*., p. 14.)

The Court said the same thing as concerns the second part of the case, the large agricultural Estates: "even if the application were on this ground declared premature, the German Government would be free to renew it immediately afterwards" (*ibid*., p. 22).

12. Your Court has taken the same line in several cases. In *Nicaragua* (*Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America)*, *Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984*, p. 392), the United States objected to the invocation by Nicaragua in its Memorial of the 1956 bilateral Treaty of Friendship, Commerce and Navigation as a complementary ground for the Court's jurisdiction, when Nicaragua had failed to specify this jurisdictional basis in the Application (*ibid*., p. 426, paras. 77-78). The Court responded:

> "Taking into account [the relevant] Articles of the Treaty of 1956, . . .there can be no doubt that, in the circumstances in which Nicaragua brought its Application to the Court, and on the basis of the facts there asserted, there is a dispute between the Parties, *inter alia,* as to the 'interpretation or application' of the Treaty. That dispute is also clearly one which is not 'satisfactorily adjusted by diplomacy' within the meaning of Article XXIV of the 1956 Treaty . . . In the view of the Court, it does not necessarily follow that, because a State has not expressly referred in negotiations with another State to a particular treaty as having been violated by conduct of that other

> State, it is debarred from invoking a compromissory clause in that treaty. The United States was well aware that Nicaragua alleged that its conduct was a breach of international obligations before the present case was instituted; and it is now aware that specific articles of the 1956 Treaty are alleged to have been violated. It would make no sense to require Nicaragua now to institute fresh proceedings based on the Treaty, which it would be fully entitled to do." (*Ibid.,* pp. 428-429*,* para. 83.)

The Court cited the passage which I have already referred to from *Certain German Interests in Polish Upper Silesia*, and concluded:

> "Accordingly, the Court finds that, to the extent that the claims in Nicaragua's Application constitute a dispute as to the interpretation or the application of the Articles of the Treaty of 1956 described . . . the Court has jurisdiction under that Treaty to entertain such claims."[37]

13. In the *Bosnia* case (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Yugoslavia), Preliminary Objections, Judgment, I.C.J. Reports 1996 (II)*, p. 595)*,* the timeline was more complex. It was as follows.

[Graphic]

— 6 March 1992: independence of Bosnia and Herzegovina;

— 22 May 1992: Bosnia and Herzegovina becomes a Member of the United Nations;

— 29 December 1992: notice of succession in relation to the Genocide Convention with effect from 6 March 1992;

— 18 March 1993: notification to the parties of the succession of Bosnia and Herzegovina;

— 20 March 1993: Bosnia and Herzegovina files Application;

— 14 December 1995: entry into force of the Dayton-Paris Agreement."

14. Yugoslavia submitted that, even supposing that Bosnia and Herzegovina had been bound by the Convention in March 1993 when the Application was filed, it could not then have entered into force between the parties, because the two States did not recognize each other and the conditions necessary to found the consensual basis of the Court's jurisdiction were therefore lacking. The Respondent argued that the Convention was not operative between the parties until their mutual recognition by the entry into force on 14 December 1995 of the Dayton-Paris Agreement (*ibid*., pp. 612-613, para. 25). In rejecting this argument, you said:

> "It is the case that the jurisdiction of the Court must normally be assessed on the date of the filing of the act instituting proceedings. However, the Court, like its predecessor, the Permanent Court of International Justice, has always had recourse to

[37] *Ibid.*, p. 429.

> the principle according to which it should not penalize a defect in a procedural act which the applicant could easily remedy.
>
> . . . . . .
>
> In the present case, even if it were established that the Parties, each of which was bound by the Convention when the Application was filed, had only been bound as between themselves with effect from 14 December 1995, the Court could not set aside its jurisdiction on this basis, inasmuch as Bosnia and Herzegovina might at any time file a new application, identical to the present one, which would be unassailable in this respect.
>
> In the light of the foregoing, the Court considers that it must reject Yugoslavia's third preliminary objection." (*Ibid.*, pp. 613-614, para. 26.)

[End graphic]

15. Madam President, Members of the Court, to summarize, the *Mavrommatis* principle is the principle that even if jurisdictional conditions are satisfied in the wrong temporal order, this does not prevent your exercising jurisdiction provided that they are in fact eventually satisfied at some point of time. Premature applications are "covered by the subsequent deposit of the necessary ratifications" (*Mavrommatis Palestine Concessions, Judgment No. 2, 1924*, *P.C.I.J., Series A, No. 2,* p. 34).

[Graphic]

16. I turn to the facts of the present case. You can see the time-line on the screen but you are well familiar with it by now:

— 12 January 1951: SFRY became a party to the Genocide Convention without reservation.

— 27 April 1992: FRY affirms that it "will strictly abide by all the commitments" of the SFRY assumed internationally.

— 22 May 1992: Croatia admitted as a Member of the United Nations.

— 12 October 1992: Croatia notifies its succession to the Genocide Convention, with effect from 8 October 1991.

— 2 July 1999: Application filed by Croatia.

— 1 November 2000: FRY admitted as a Member of the United Nations.

Even if there may have been defects in the position of the respondent State prior to 1 November 2000 — and we say there were none — they were curable and they were cured on that day. On 2 November 2000, there remained a case on the Court's list. The case was against this

respondent State. The Respondent was a party to the Court's Statute on that day. It was a party to the Genocide Convention without any reservation. All the conditions for the Court to hear the merits were united on that day. To dismiss that case on the ground that the conditions were united in the wrong order would contradict the *Mavrommatis* principle.

17. It should be stressed that the Respondent's argument is raised only *now*, and it is raised by a State in no way lacking in capacity or in the right of access to this Court. In effect it relies on an incapacity that it no longer has, and which as from 1 November 2000 lost all relevance. To uphold Serbia's claim would be not merely to hold that its reservation to Article IX of the Genocide Convention is valid, which, as Professor Sands has shown you, is not the case. It would be to give it retrospective effect. Whatever prospective effect reservations may have, no one gives them *retrospective* effect.

18. It may be argued that, while admittedly Croatia could have started this very case on 1 March 2001 when the Respondent's unqualified consent to jurisdiction under the Genocide Convention was still on any view in play, it failed to do so. What did Croatia do on 1 March 2001? It filed a Memorial! To argue that instead of filing a memorial it should have filed an application would be pure formalism, rejected by the Court in *Mavrommatis* and in later cases. In none of *Mavrommatis*, *Upper Silesia*, *Nicaragua* or *Bosnia* did the Court require a new case to be filed.

19. Why, in any event, should Croatia have engaged in such apparently redundant formalities? The Court had by 1 March 2001 unequivocally upheld the Respondent's capacity to be a party to proceedings under Article IX of the Genocide Convention. In the period from 1992 to the date of its admission to the United Nations, the respondent State filed — by my count — 40 applications, pleadings, requests or analogous documents before the Court, more than any other State. That is a rather impressive catalogue. You will find the list of its 40 filings at tab 9 of your folders. I apologize to my colleagues opposite if I have understated their impressive forensic output during this period. And all this — they now say — by a State that had no access to the Court! If that is what States with no access to the Court do, heaven knows what States do when they do have access!

20. But if, Madam President, Members of the Court, *if* some affirmative action by Croatia was required after 1 November 2001, at a time when all the conditions for the Court's jurisdiction

were *certainly* met, this requirement was satisfied by the filing of the Memorial. What more unequivocal affirmation could there be of an application than filing a memorial in support of the application, giving content to it? It could have been annexed. Perhaps in future everyone will annex their application as Annex 1 to the memorial, just to make sure. International law does not require the repetition of procedural steps — but this was a procedural step if ever there was one.

[End graphic]

21. For these reasons, in Croatia's submission, your jurisdiction can be upheld in this case, quite simply on the ground that when the respondent State became a party to the Statute, any deficiency that may previously have existed was "covered", to use the term the Permanent Court used in *Mavrommatis*. If you do that, you will not have to resolve the issues raised by other aspects of Article 35.

B. Access to the Court under Article 35 (2) of the Statute

22. Madam President, Members of the Court, it is with some trepidation that I now turn to my second argument. This concerns the access of the Respondent to the Court under Article 35 (2) of the Statute by reason of its participation at all relevant times to the Genocide Convention. It is not often that it becomes the duty of counsel to argue before the Court that an express recent decision of the Court was wrong. In doing so today — in relation to your decision on the meaning of Article 35 (2) of the Statute — I hope you will accept that I mean no disrespect to the Court as an institution or to the individual judges who participated in that case.

23. But the Article 35 (2) point was not argued by any of the States parties in the *NATO* cases, not even by Serbia itself, the Applicant to those cases. In the circumstances the Court will, I am sure, understand my arguing it now. I do so on the footing that Serbia was at all relevant times a party to the Genocide Convention, and that Croatia raises a claim of genocide against persons for whose conduct the Respondent is or may be available.

[Graphic]

24. Let me start, as one must, with the actual language of Article 35. It reads as follows:

"Article 35

1. The Court shall be open to the States parties to the present Statute.

2. The conditions under which the Court shall be open to other States 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.

3. When a State which is not a Member of the United Nations is a party to a case, the Court shall fix the amount which that party is to contribute towards the expenses of the Court. This provision shall not apply if such State is bearing a share of the expenses of the Court."

25. Now it must be stressed that every other phrase in Article 35 plainly has its normal meaning. Each phrase refers to some element of Article 35 which applies from day to day, as to things as they are, not as they were when the Charter was concluded, 26 June 1945, or on the day when it happened to enter into force. In fact the Charter entered into force on 24 October 1945 but as this Court pointed out in *Barcelona Traction*, its entry into force might have been very considerably delayed (*Barcelona Traction, Light and Power Company, Limited (New Application: 1962) (Belgium* v. *Spain), Preliminary Objections, Judgment, I.C.J. Reports 1964*, p. 35). The Court is open to States parties to the Statute as they are from time to time. The "other States" identified in Article 35 (2) are other States not parties to the Statute from time to time. The conditions laid down by the Security Council under Article 35 (2) are those laid down from time to time. All these phrases refer to the position as it is from time to time, not the position as it was on a given day in 1945.

26. And so must the phrase "the special provisions contained in treaties in force". Literally interpreted, that means treaties in force at the relevant time, the time when the other State comes before the Court. It is clear that it does not mean to give permanent effect to treaties in force on 26 June 1945 or 24 October 1945, which then conferred jurisdiction on the Court. In fact, after extensive research, we have been unable to find any such treaties in existence on either of those days. Not one of the dozen or so national treaty lists we have consulted lists any such treaty — the United Nations *Treaty Series* does not; the Court's own publications do not. Treaties conferring jurisdiction on the Permanent Court are dealt with in Article 37, not in Article 35 (2) — I will revert to Article 37 shortly.

27. Let us assume, however, contrary to the facts, that there was a treaty already in force on 26 June 1945 or on 24 October 1945, which made special provision for this Court's jurisdiction. That treaty would on any view be covered by Article 35 (2). Let us further assume that the treaty

was subsequently terminated or replaced — a not unlikely contingency. It is obvious that it could no longer be relied on. The phrase "treaties in force" in Article 35 (2) cannot simply mean "treaties which were in force when the Charter was concluded". A treaty cannot be relied on unless it is in force at the time it is relied on: that is precisely why the normal meaning of the phrase "treaties in force" is as I have stated. Instead the Respondent is compelled to interpret the phrase "treaties in force" as meaning "treaties in force on 26 June 1945 or perhaps it is 24 October 1945, which continue to be in force at the relevant time". With respect, that is not to interpret the phrase; it is to rewrite it completely.

28. Another indication is given by Article 35 (3). This provides that it is the Court — I stress the Court — which fixes the amount which non-Members of the United Nations are to contribute, unless the State in question is already "bearing a share of the expenses of the Court". Now there are two ways in which a State which is not a Member of the United Nations might have access to the Court, apart from the treaties-in-force clause. One way would be for it to become a party to the Statute under Article 93 (2) of the Charter, in which case the conditions, including expenses payable, are laid down by the General Assembly on the recommendation of the Security Council. Another way is for the State to take advantage of the conditions laid down by the Security Council under Article 35 (2), in which case the Security Council could fix the expenses payable: in fact Security Council resolution 9 (I) of 1946 does not mention expenses, but it could have done so. Why involve the Court on the issue of expenses? Because there is a third avenue of access, not involving the General Assembly or the Security Council — that is, through the treaties in force clause. The involvement of the Court in assessing expenses for other States is a sign of openness, not closure.

[End graphic]

29. Now let us look at the context of the Statute as a whole. References to treaties or other instruments being in force occur four times in the Statute, as follows:

[Graphic]

"Article 35 (2)

"[S]ubject to the special provisions contained in treaties in force".

Article 36 (1)

"[A]ll matters specially provided for . . . in treaties and conventions in force".

Article 36 (5)

"Declarations made under Article 36 of the Statute of the Permanent Court of International Justice and which are still in force . . ."

Article 37

"Whenever a treaty or convention in force provides for reference of a matter to a tribunal to have been instituted by the League of Nations, or to the Permanent Court of International Justice . . ."

30. These four provisions fall into two very clearly defined groups. One group, consisting of Article 36, paragraph 5, and Article 37, addresses the specific problem of optional clause declarations and treaties providing for the jurisdiction of the Permanent Court. A second group, consisting of Article 35, paragraph 2, and Article 36, paragraph 1, contain quite general references to jurisdiction specially conferred by treaties in force. These two provisions — Article 35 (2) and Article 36 (1) — use exactly the same vocabulary: "special provisions"/"specially provided"; "treaties in force"/"treaties and conventions in force". One must presume that the same words or phrases in these paragraphs have the same meaning.

31. Now it is obvious — and the majority in the *NATO* cases expressly accepted (*I.C.J. Reports 2004*, p. 319, para. 101) — that the phrase "treaties and conventions in force" in Article 36, paragraph 1, means treaties which are in force from time to time: it does not mean treaties in force when the Charter was concluded. The same should follow for the comparable language of Article 35, paragraph 2.

32. What about the other group of references, Article 36, paragraph 5 and Article 37? Let me deal with them in turn.

33. Article 36, paragraph 5, provides:

"5. Declarations made under Article 36 of the Statute of the Permanent Court of International Justice and which are still in force shall be deemed, as between the parties to the present Statute, to be acceptances of the compulsory jurisdiction of the International Court of Justice for the period which they still have to run and in accordance with their terms."

The language is not at all like Article 35, paragraph 2. It refers to declarations by definition made in the past. The last declaration made under Article 36 of the Statute of the Permanent Court was

made in 1940. It uses the phrase "still in force". In the English text, the word "still" is used twice in what is a classic transitional provision: the more elegant French version is satisfied with a single "encore". Furthermore, Article 36, paragraph 5, deals expressly with the issue of the continuing validity of such declarations: "for the period which they still have to run and in accordance with their terms". There is no equivalent language in Article 35, paragraph 2, but — on the Respondent's view — there should have been.

34. The question whether Article 36, paragraph 5, continued to operate after 1945 was addressed by the Court in the *Aerial Incident* case (*Aerial Incident of 27 July 1955 (Israel* v. *Bulgaria), Judgment, I.C.J. Reports 1959*, p. 127). The question was whether a Bulgarian optional clause declaration made in 1921 was "still in force" in 1955, when Bulgaria was admitted to the United Nations and became a party to the Court's Statute. The majority held that it was not, and that Article 36, paragraph 5, was a merely transitional provision, effective only so far as the original members of the Charter were concerned. The reasoning is fairly reflected in the following passage of the Judgment. Referring to Article 36, paragraph 5, the Court said:

> "By its nature and by its purpose, that transitional provision is applicable only to the transitory situation it was intended to deal with, which involved the institution of a new Court just when the old Court was being dissolved. The situation is entirely different when, the old Court and the appearance of its compulsory jurisdiction having long since disappeared, a State becomes a party to the Statute of the new Court: there is then no transitory situation to be dealt with by Article 36, paragraph 5." (*Ibid.*, p. 139.)

35. In contrast with Article 36, paragraph 5, which is expressly and in its terms a transitional provision, Article 35, paragraph 2, is not at all a transitional provision. There may always be States which are not parties to the Statute or Members of the United Nations: there are several now.

36. Thus *Israel* v. *Bulgaria* does not even begin to suggest that the words "treaties in force" are to be limited to treaties in force in 1945 or 1946. That issue was not addressed by the Court in that case.

37. Moreover, the decision in *Israel* v. *Bulgaria* had no restrictive effect on the Court's interpretation of the second transitional provision, Article 37. In 1964, in the *Barcelona Traction* case *(Preliminary Objections)*, you made it clear that the phrase "treaty or convention in force" in Article 37 was to be applied from time to time, and that it was not limited to treaties in force at the

time of the adoption of the Charter. As the Court said, "[t]he case of *Israel* v. *Bulgaria* was in a certain sense *sui generis*" (*I.C.J. Reports 1964*, p. 29). It concerned unilateral declarations; it did not concern treaties. Above all, "certain general multilateral conventions of great importance which seem likely to continue in force" to quote the Court's words in *Barcelona Traction* (*ibid.)*. Article 37 was not to be restrictively interpreted so that any fortuitous gap in time meant a loss of jurisdiction. Accordingly the words "treaty or convention in force" in Article 37 meant a treaty or convention in force at the relevant time, in this case, in 1955, when Spain became a Member of the United Nations.

38. Factors the Court took into account in 1964 in reaching this conclusion included the need not to create inequality or to discriminate in favour of those becoming parties to the Statute after 1946 (see *ibid.*, p. 36). But giving the ordinary and natural meaning to Article 35, paragraph 2, does not do this. Only the parties to the treaty in force are bound by it, so the principle of consent is maintained. One cannot become a party to the optional clause system by way of Article 35, paragraph 2. There is no freeriding, since the Court can determine the issue of costs under Article 35, paragraph 3.

[End graphic]

39. The Court has up to now emphasized its openness to all States, whether or not parties to the Statute, without drawing artificial or arbitrary distinctions or insisting on pure points of form. That was the practice of the Permanent Court, and until the decisions in the *NATO* cases in 2004 it was your practice as well.

40. As to the Permanent Court, let me take two examples, the *Polish Upper Silesia* case and the *Lotus* case.

[Graphic]

41. The time-line in the *Polish Upper Silesia* case appears on the screen:

— 1 September 1921: the Permanent Court Statute entered into force;

— 15 May 1922: the Upper Silesia Convention — often referred to as the Geneva Convention — was concluded, it came into force on 3 June 1922;

— 15 May 1925: Germany lodged an Application against Poland, relying on Article 23 of the 1922 Convention;

— 8 September 1926: that is *after* the Application was lodged, Germany joined the League of Nations;

— 11 March 1927: it ratified the Permanent Court Statute.

42. If the position taken by the Court in the *NATO* cases was correct, the Court in *Polish Upper Silesia* should have declined jurisdiction. But of course it upheld its jurisdiction — as every law student knows. It said, among other things:

> "Before considering the preliminary objections made by Poland, it should be observed that the two Parties agree in recognizing that Article 23 of the Geneva Convention falls within the category of 'matters specially provided for in treaties and conventions in force', mentioned in Article 36 of the Court's Statute, and the Polish Government does not dispute the fact that the suit has been duly submitted to the Court in accordance with Articles 35 and 40 of the Statute." (*Certain German Interests in Polish Upper Silesia (Preliminary Objections)*, *P.C.I.J., Series A, No. 6 (1925),* p. 11.)

43. Now it is true that the initial reference in the passage I have just read is to "treaties and conventions in force" mentioned in Article 36 of the Statute, and not to "treaties in force" in Article 35. But Germany's access to the Court in that case could only have been based on Article 35, and the Court expressly recognized this when it went on to refer to Article 35. In 1925 Germany was not a party to the Statute, it was not a Member of the League. It was not listed in the Annex to the Covenant. Jurisdiction was based on Article 23 of the Geneva Convention, which was concluded and entered into force after the Permanent Court's Statute entered into force. Germany did not make a particular or general declaration accepting the jurisdiction of the Court, in terms of the Council's resolution of 17 May 1922 made pursuant to Article 35. Only three States made such declarations: Liechtenstein and Monaco made general declarations; Turkey made a specific declaration, in circumstances to which I will come shortly. For its part Germany never made such a declaration. Instead Germany relied exclusively on the terms of special provisions in treaties in force, and the Court accepted the reliance.

[End graphic]

[Graphic]

44. The Permanent Court's publication, *Extracts from International Agreements affecting the Jurisdiction of the Court*, listed a number of agreements to which non-League Members such as Germany were parties, and which were concluded after the Statute entered into force on

1 September 1921. We have located approximately 30 such treaties. Let me give some examples. One was the London Agreement of 30 August 1924 between the Allied Governments and Germany to carry out the Experts' Plan[38]. The London Agreement concerned the stabilizing of Germany's currency, and Article 10 provided for the submission of disputes between the Allies and Germany to the Permanent Court.

45. Another example, a heartbreaking example, was the famous Arbitration Agreements of Locarno of 1925: you can see them listed on the screen now. Arbitration treaties were concluded on the same day between Germany and four other European States, Belgium, France, Poland and Czechoslovakia[39]. These treaties depended for their legal effect on secure and rapid access to the Permanent Court, expressly referred to in Articles 1, 16 and 19 of each of them. Locarno was the high point of hope of the interwar international system. Jurisdictionally the Locarno Treaties depended at the time they were concluded on the ordinary and natural meaning of the phrase "treaties in force" in Article 35, paragraph 2, of the Court's Statute!

"The Locarno Arbitration Treaties, 16 October 1925

Arbitration Convention between Germany and Belgium, 54 LNTS 303, Articles 1, 16, 19.

Arbitration Convention between Germany and France, 54 LNTS 315, Articles 1, 16, 19.

Arbitration Treaty between Germany and Poland, 54 LNTS 327, Articles 1, 16, 19.

Arbitration Treaty between Germany and Czechoslovakia, 54 LNTS 341, Articles 1, 16, 19."

[End graphic]

[Graphic]

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[38]Belgium, British Empire, France, Italy, etc. and Germany, Agreement between the Allied Governments and the German Government to carry out the Experts' Plan of 9 April, 1924, London, 30 August 1924: 30 *LNTS* 75.

[39]Arbitration Convention between Germany and Belgium, 54 *LNTS* 303, Articles 1, 16, 19; Arbitration Convention between Germany and France, 54 *LNTS* 315, Articles 1, 16, 19; Arbitration Treaty between Germany and Poland, 54 *LNTS* 327, Articles 1, 16, 19; Arbitration Treaty between Germany and Czechoslovakia, 54 *LNTS* 341, Articles 1, 16, 19; see also *Extracts from International Agreements affecting the Jurisdiction of the Court (Third Edition), P.C.I.J., Series D, No. 5, 1926*, pp. 297-301.

46. Madam President, Members of the Court, let me turn to a second famous case of this period, the *Lotus* case *(Judgment No. 9, 1927, P.C.I.J., Series A, No. 10)*. Here the time-line was as follows:

— 1 September 1921: P.C.I.J. Statute enters into force

— 12 October 1926: Special Agreement concluded

— 4 January 1927: Turkey and France file a case based on the Special Agreement. (Turkey was not, of course a party to the League of Nations in 1927)

— 4 January 1927: Registrar acknowledges receipt in accordance with the Statute and calls on Turkey to nominate an *ad hoc* judge

— 24 January 1927: Turkey files a declaration "in accordance with the terms of paragraph 2 of Article 35 of the Rules".

47. The point here is different from the *Upper Silesia* case, and more procedural than substantive. Article 35, paragraph 2, of the revised Rules required that the declaration referred to in the Council's resolution of 17 May 1922 be filed "not later than the time fixed for the deposit of the first document of the written procedure". So the case could be filed and become part of the Court's dossier prior to acceptance of the Court's jurisdiction. In fact this was not what the Council resolution of 17 May 1922 said: it required that the declaration must have been "*previously* . . . deposited with the Registrar", i.e., before the declaring State had access to the Court. But the Court was content for this to be done at a later stage. The procedural issues were relaxed. Meanwhile the case was before the Court and was part of its dossier.

[End graphic]

48. Thus the Court was on solid ground when in the provisional measures phase of the *Bosnia* case, you expressed the view that Article 35 (2) provided a prima facie basis of jurisdiction (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, *(Bosnia and Herzegovina* v. *Yugoslavia)*, *Provisional Measures, Order of 8 April 1993*, *I.C.J. Reports 1993,* pp. 14-16, paras. 20-26), and when in the preliminary objections phase you accepted the Respondent's capacity to plead — in short, its access to the Court — on the same ground (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Yugoslavia), Preliminary Objections, Judgment, I.C.J. Reports*

1996 (II), pp. 610-614, paras. 17-26). In doing so you were acting consistently with the practice and jurisprudence of your predecessor, the Permanent Court.

49. Perhaps the principal reason given by the majority in the *NATO* cases for a restrictive interpretation of the phrase "treaties in force" in Article 35 (2) is that the *travaux préparatoires* support that interpretation (*Legality of Use of Force (Serbia and Montenegro* v. *Belgium)*, *Preliminary Objections, Judgment, I.C.J. Reports 2004,* pp. 318-328, paras. 100-114). Before I take you to the *travaux* two preliminary remarks are in order.

50. The first preliminary remark is that the relevant *travaux* were not those of 1945 but of 1920, that of the Permanent Court, not your Court. In 1945 there were no examples of existing jurisdictional provisions referring to the new Court: no saving clause was necessary because there was nothing to save. It is suggested that the language of Article 35 of the Permanent Court's Statute was blindly copied over, without consideration of the fact that — according to your decisions of 2004 — the reference to treaties in force in 1945 was entirely null and lacking in significance. Now it is true that there was a lot of copying from the Permanent Court Statute to your Statute, but it was not blind copying. In Article 35, for example, two of the four sentences were changed and paragraph numbers were conveniently inserted. Moreover there was the substantial and well-documented experience of a Court which, though not an organ of the League, had been a relative success amongst pre-war bodies. The drafters of your Statute must be taken to have been well aware of the Permanent Court's practice in providing access to non-Member States, most notably Germany before 1926. Two of the most famous cases of the Permanent Court, the *Upper Silesia* case and the *Lotus*, involved non-Members. There are two possible views: the affirmative view, that the drafters of Article 35, paragraph 2, were relaxed about non-Member States having access by treaty, or the negative view, which is that they wanted to deny such access but omitted to notice that the phrase "subject to the special provisions contained in treaties in force" was, on that assumption, not merely unnecessary but actually damaging. If they wanted to deny access to non-Members by treaty, the way to do so was not to copy the phrase, it was to leave it out! Not merely does the negative view deny the principle of *effet utile*; it does very little credit to drafters who were both able and well-informed.

51. But let us assume, for the sake of argument, that the drafters of 1945 had no intention at all other than to replicate the meaning of the second sentence of Article 35 of the Permanent Court's Statute, whatever it may have meant. That brings me to my second preliminary remark.

52. When the Permanent Court's Statute was drafted in 1920 and 1921, the framers were already aware that they faced a huge problem with non-Members of the League. It was not merely that the Central Powers, ex-enemy States such as Germany and Turkey, were not eligible at that stage. Russia and the United States were also excluded, for different reasons. The United States Senate rejected the Treaty of Versailles on 19 November 1919 and then again, and finally, on 19 March 1920. If the Permanent Court was merely a court of the League, a court of a gentleman's club, it risked failure; foreseeably, many disputes would arise between Members and non-Members, as indeed they did. The drafting history of Article 35 has to be read against that fundamental fact.

53. I turn then to the drafting history. The Court will be familiar with the old joke about drafting history. According to some, it is only necessary to interpret the words of a text when the drafting history is ambiguous or obscure! In this case, you will be pleased to learn, the drafting history is clear and unambiguous.

54. Of course there were two phases to the drafting history of the Permanent Court's Statute: first before the Advisory Committee of Jurists, secondly before the League Assembly and various committees, though there was some overlap in personnel, they were distinct phases.

55. Within the Committee of Jurists there were at least two views on the issue of access. One view, which was represented by the President of the Committee, Baron Descamps, favoured leaving all questions of access of non-League Members to the Council. Others, in particular Messrs. Loder and Hagerup, favoured a wider view. For example, Mr. Loder

> "thought that Article 17 of the Covenant was drawn up with the intention of extending the jurisdiction of the Court as widely as possible. States other than Members of the League of Nations should be admitted, though of course with special conditions regarding the costs of the procedure"[40].

[40]Permanent Court of International Justice, Advisory Committee of Jurists, Procès-Verbaux of the Proceedings of the Committee, 16 June-24 July 1920 (The Hague, 1920), 10th meeting, 26 June 1920, p. 220.

As against the wider "Hagerup/Loder" view, Baron Descamps stressed the need for a special procedure of admission, though he accepted "that lastly the Court should be competent to deal with the particular cases mentioned in the Treaties of Peace"[41]. Following an intervention by Mr. Hagerup, the broader view was again put by Mr. Loder: "why . . . shut [the doors of the Court] to [non-Member States] if they agree to submit their disputes to the Court"[42] said the later President Loder. Baron Descamps, with support from some other Members, did his best to enforce his Members-only view, but at a subsequent meeting Mr. Hagerup (with Mr. Loder's agreement) proposed that the Court be required to hear cases "[a]s the result of an agreement between two non-Member States"[43]. Mr. Ricci-Busatti noted that the peace treaties already referred cases involving non-Members to the Court[44]. Baron Descamps agreed but said these were only isolated cases and that the Council could invite non-League Members "under certain conditions"[45]. At a later meeting, Baron Descamps and Lord Phillimore tried to halt debate on the question but Mr. Ricci-Busatti was persistent.

[Graphic]

> "Mr. Ricci-Busatti observed that there were cases where it would be impossible to make access to the Court, in the case of States which were not Members of the League of Nations, subject to special conditions as laid down in Article 17 of the Covenant. Such cases were, *for instance*, those in which recourse to the Court on the part of all the contracting parties, without distinction, was directly provided for by the Treaties of Peace.
>
> The members of the Committee acknowledged the accuracy of Mr. Ricci-Busatti's observation, which would be duly considered in the drafting of the Article."[46] (Emphasis added.)

56. This passage calls for two observations. The first is that Mr. Ricci-Busatti's comment was not limited to the existing peace treaties: he simply used them as an illustration (he said "for instance"). The second is that the drafting committee, from which Mr. Ricci-Busatti was excluded, ignored his point — despite the fact that its validity had been acknowledged. Not for the last time,

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[41] *Ibid*.

[42] *Ibid*., p. 221.

[43] *Ibid*., p. 291 (13th meeting, 1 July 1920).

[44] *Ibid*., p. 291.

[45] *Ibid*., p. 292.

[46] *Ibid*., p. 540 (24th meeting, 14 July 1920).

Madam President, Members of the Court, someone left off the drafting committee had their views ignored. Article 28 as it emerged from the drafting committee ignored Mr. Ricci-Busatti's point[47]. [End graphic]

57. That was the background to the draft presented by the Advisory Committee of Jurists to the Tenth Session of the Council in Brussels in October 1920, which marked the end of the first phase of the Advisory Committee and the beginning of the second phase in the League Assembly and its committees. Draft Article 32 declared roundly "other States may have access to the Court" — "elle est accessible aux autres Etats". It also provided for the conditions for access to be laid down by the Council in accordance with Article 17 of the Covenant. It did not refer separately to treaties in force[48]. The Council made various amendments to the Advisory Committee's text, but none to Article 32.

58. The amended text was then considered by a sub-committee presided over by Mr. Hagerup — who you will remember favoured the broader view. The sub-committee had the advantage of comments on the Brussels draft from the British Government, calling among other things for further elaboration of draft Article 32[49]. The subsequent debate is of great interest. The crucial meetings of this sub-committee were the 6th and 7th, and I have placed the whole of the minutes of those meetings in your folders at tab 10. I will only mention the highlights. Sir Cecil Hurst, the British Legal Adviser, later a judge of the Court "asked for explanations regarding the distinction between the States to which the Court is open by right, and those which might have access to it". Mr. Hagerup responded by saying "it was chiefly a question of the distribution of expenses"[50]. Then Sir Cecil Hurst remarked "under the Treaties of Peace the Central Powers would often be Parties before the Court"; he said the existing text did not take

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[47] *Ibid*., p. 566 (25th meeting, 19 July 1920).

[48] Draft scheme for the Institution of the Permanent Court of International Justice Mentioned in Article 14 of the Covenant of the League of Nations, presented to the Council of the League by the Advisory Committee of Jurists, Annex to 32nd Meeting of the Advisory Committee of Jurists in Procès-Verbaux of the Proceedings of the Committee, 16 June-24 July 1920, p. 679 (hereafter, "Procès-Verbaux").

[49] British Amendments to Brussels text of Draft Scheme in *Documents concerning the action taken by the Council of the League of Nations under Article 14 of the Covenant and the adoption by the Assembly of the Statute of the Permanent Court* (hereafter, "Documents"), pp. 70-71.

[50] Minutes of Subcommittee, 6th Meeting, 29 November 1920 in *Documents*, p. 140.

sufficient account of this fact[51]. It was following this key observation that the reference to "treaties in force" was included.

[Graphic]

59. We now come to the crucial juncture. Mr. Hagerup introduced as one group three new draft Articles; 32, 33 and 34[52]. They would become Articles 35, 36 and 37 of the Statute; relevantly they are now Articles 35 (2), 36 (1) and (for a different purpose) 37 of your Statute. You can see Mr. Hagerup's draft Articles on the screen.

"Article 32

> The Court shall be open of right to the States mentioned in the Annex to the Covenant, and to such others as shall subsequently enter the League of Nations.
>
> The conditions under which the Court shall be open to other States shall, subject to special conditions contained in treaties in force, be laid down by the Council.
>
> When a State which is not a Member of the League of Nations is a party to a dispute, the Court shall fix the amount which that party shall contribute towards the expenses of the Court."

This was the first appearance of the phrase "subject to special provisions contained in treaties in force" and it was caused by Sir Cecil Hurst's remark.

"Article 33

> The jurisdiction of the Court comprises all cases which the parties refer to it and all matters specially provided for in treaties and conventions in force.

Article 34

> When a treaty or convention in force provides for the reference of a matter to a tribunal to be instituted by the League of Nations, the Court will be such tribunal."

60. Now the Court will note that all three draft Articles, introduced together, used the phrase "traités en vigueur"; the latter two added "et conventions" but the difference was not commented on. In the subsequent discussion, which covered all three Articles, reference was made to existing treaties and to future treaties, including a future treaty of general arbitration — it had by now been definitively decided that the Court would not have inherent or compulsory jurisdiction and it was hoped in future that there would be a treaty of general arbitration. Mr. Fromageot, later a judge of

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[51] *Ibid*., p. 141.

[52] Minutes of Sub-Committee, 7th Meeting, 1 December 1920, *ibid*., p. 143.

the Court, referred to existing treaties in the field of labour, transit, minorities and air navigation, but without suggesting that only existing treaties were covered by the second sentence[53]. The President, Mr. Hagerup, said he would mention these in his report.

[End graphic]

[Graphic]

61. The minutes then read as follows:

> "In reply to a question of Mr. Huber, Mr. Fromageot (France) declared that the expression 'Treaties in force' meant not only the Treaties in force now but at any given moment in future." (Minutes of Subcommittee, 7th meeting., 1 December 1920 in *Documents*, p. 144.)

Thus we have one future judge telling another future judge what the words in draft Article 32 were intended to mean[54]. Note that Mr. Fromageot, in the passage on the screen, used the phrase "treaties in force" — "les traités en vigueur". He was taking the phrase from draft Article 32, not the phrase "treaties and conventions in force" from the other two Articles. He was talking about a formulation which began — as the final text would begin — with the phrase "sous réserve", "subject to". No one disagreed with Mr. Fromageot.

[End graphic]

62. Following this debate, Mr. Hagerup presented his report to the Third Committee of the League[55]. The report was approved by that Committee and then by the Assembly. The relevant passages were subsequently included by the Permanent Court in its official publication *Extracts from International Agreements affecting the Jurisdiction of the Court (P.C.I.J., Series D, No. 3*, pp. 7-10). On Article 32 of the Brussels draft, the Subcommittee said that its wording "seemed lacking in clearness, and the Subcommittee has re-cast it in an effort to express clearly what follows".

[Graphic]

63. The new version was numbered Article 35. Paragraph 1 dealt, as before, with the Members of the League, present and future. Paragraph 2 read as follows:

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[53]Minutes of Subcommittee, 7th Meeting., 1 Dec. 1920 in *Documents*, p. 143.

[54]*Ibid*., p. 144.

[55]Report submitted to the Third Committee by Mr. Hagerup on behalf of the Subcommittee in *Documents*, p. 206.

> "2. The access of other States to the Court will depend *either* on the special provisions of the Treaties in force (*for example* the provisions of the Treaties of Peace concerning the rights of minorities, labour, etc.) *or else* on a resolution of the Council. Such resolution may lay down conditions of access in conformity with Article 17 of the Covenant, but in no case must these conditions result in any inequality of the Parties before the Court."

64. Now it is true that the final drafting of the second sentence of Article 35 in the Permanent Court's Statute differed from that proposed by the Subcommittee: it reverted to the formulation which had been discussed by Mr. Huber and Mr. Fromageot — that is the "sous réserve"/"subject to" formulation with which we are familiar. But all the main ideas were retained: (1) for other States access to the Court depended either on treaties in force or on the Council; (2) the Council could lay down conditions for access; but (3), these were not to place any party in a position of inequality. So also was retained much of the language, notably the crucial phrase "des dispositions particulières des traités en vigueur" — "the special provisions contained in treaties in force". This remained unchanged in the final version of the Statute. It is unchanged today.

65. Two things are crystal clear from the Subcommittee's draft of Article 35 (2), as approved by the League Assembly and as later reproduced by the Court itself. The first thing is that treaties in force and a Council resolution were straightforward alternatives: "leur accès à la Cour dépendra *ou bien* des dispositions particulières des traités en vigueur *ou bien* d'une résolution du conseil". There is no reason to give a restrictive interpretation to the mode of access by treaty any more than to the mode of access by resolution. They were treated as equivalent; indeed treaties came first.

66. The second thing is that the phrase "des dispositions particulières des traités en vigueur" was not limited to existing treaties. You can see this from the phrase in brackets "(*par exemple* — for example — les dispositions dans les traités de paix concernant le droit des minorités, le travail, etc.)". The provisions of the peace treaties on minorities and on labour conditions were merely illustrative: they were not intended to be exclusive, and that was entirely consistent with the debate that had occurred.

[End graphic]

67. Where in the drafting history of Article 35 is there to be found any departure from the intention so clearly displayed in this text, approved by the Assembly itself? Nowhere. Mr. Fromageot's explicit reply to Max Huber's question was clear, definitive and was explained to

the Assembly in the same way by Mr. Hagerup — himself a proponent of the broader view — as he had said he would do.

68. If the drafters of Article 35 of the Statute had wished to limit the treaty access by non-League Members to treaties concluded before September 1921 — there is no evidence whatever that they did — they could easily have said so expressly. Articles 26 and 27 of the Statute dealt with provisions of the peace treaties concerning labour, transit and communications. It would have been easy to refer to the peace treaties or to other treaties already in force. But in fact in September 1921, not all the peace treaties had been concluded. In August 1920, Turkey had refused to ratify the Treaty of Sèvres, and the form the eventual peace treaty with Turkey would take was not yet settled. Not all the minority treaties or declarations had been concluded in September 1921. There is no basis for treating September 1921 as any sort of cut-off point. In 1923, the Court published its first compilation of international agreements governing its jurisdiction: this included a number of treaties concluded after 1 September 1921 with non-League Members, for example, in the field of railways, the Agreement for the Regulation of International Railway-traffic of November 1921, to which Hungary was a signatory[56]; and river transit, the Statute of Navigation of the Elbe of February 1922, to which Germany was a signatory[57]. No one, least of all the Court, treated 1 September 1921 as having any significance; as constituting any sort of cut-off and, as I have said, there are more than 30 treaties in this category.

69. When the Treaty of Lausanne was eventually concluded — the peace treaty with Turkey — it contained Article 44, referring minorities disputes to the Permanent Court. The Treaty of Lausanne was signed on 24 July 1923 and entered into force on 6 August 1924. Turkey was not then, and would not be for many years, a Member of the League. The Treaty of Lausanne was quite certainly a "treaty in force" for the purposes of Article 35 (2) of the Statute, as Fachiri in his study of the Court expressly accepted[58]. Yet it was a later treaty[59].

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[56]See Agreement for the Regulation of International Railway-traffic, Porto Rosa, 23 November 1921: *P.C.I.J., Series D, No. 3*, p. 59 (Hungary).

[57]See Statute of Navigation of the Elbe, 22 Feb. 1922, 26 *LNTS* 220: *P.C.I.J., Series D, No. 3*, p. 60 (Germany).

[58]A.F. Fachiri, *The Permanent Court of International Justice* (OUP, London, 1932) p. 67.

[59]28 *LNTS* 13.

70. For all these reasons, there is no basis to read the relevant words in Article 35 (2) of your Statute as if they were not there, or were simply a mistaken copying of words from 1921 which could have no meaning in the context of the new Court. *Everything points* to their having their normal and natural meaning — the meaning they have elsewhere in the Statute, the meaning they have in Article 36 (1), the meaning the Permanent Court in the *Upper Silesia* case treated them as having — treaties in force from time to time.

71. Let me however address one final, unspoken concern. It is conceivable that the phrase "subject to the special provisions contained in treaties in force" in Article 35, paragraph 2, might be used in an attempt to give the Court jurisdiction between entities whose international status is uncertain and disputed — and perhaps over the very subject of that dispute. A bilateral agreement between two such dubious entities would be, arguably, a treaty in force, and it would cast upon the Court the task of saying that one or both of the parties were not States as required by Article 34, paragraph 1, of the Statute. This concern might, I suppose, be taken to justify a narrow interpretation of Article 35, paragraph 2. Membership of the United Nations, and of the Statute, is a matter for decision by the Security Council and the General Assembly. The drafting of the Permanent Court's Statute showed no intention to give the Council a monopoly but this concern might support such a proposition. According to this unstated argument, the phrase "subject to the special provisions contained in treaties in force" should be treated as an exception to political control, and construed as narrowly as possible — if necessary, construed out of existence.

72. There are, I respectfully suggest, three answers to this concern.

73. The first is that the fundamental condition of access to the Court, the real question of capacity, is statehood: Article 34, paragraph 1. This applies at all times and in all circumstances; it is a continuing requirement that is plainly met in this case but might not be in another. Under the Statute this is a matter for the Court — the Court has control.

74. The second reason is that the political organs, first of the League, then the United Nations, have never sought a monopoly control over access as against the Court. The League Council resolution of 17 May 1922 was very liberal in allowing any State not a League Member to deposit a particular or general declaration accepting jurisdiction. It did not subject the status of entities making declarations under the resolution to any form of political control. Exactly the same

is true of Security Council resolution 9 (I) of 15 October 1946. The political bodies have consistently and for 80 years left this question to the Court, by means of the regulation in Article 34, paragraph 1. They have never asserted a control. It is for this Court, not the political organs of the United Nations, to ensure that the conditions for access are met, including, especially, under Article 34, paragraph 1.

75. The third reason for rejecting this unstated concern is that our case bears no resemblance to a bilateral treaty between two entities of doubtful status. This case is between two parties to the Genocide Convention, a major multilateral convention concluded as a result of and in the immediate aftermath of the Second World War. It is not too much to say that the Genocide Convention is part of the post-war settlement. The Convention is declaratory in terms, as I have said. The obligations of States to punish genocide apply to genocide wherever committed. It is the paradigm of the universal convention. As you said in *Reservations* case:

> "The origins of the Convention show that it was the intention of the United Nations to condemn and punish genocide as 'a crime under international law' involving a denial of the right of existence of entire human groups, a denial which shocks the conscience of mankind and results in great losses to humanity, and which is contrary to moral law and to the spirit and aims of the United Nations . . . A . . . consequence is the universa1 character both of the condemnation of genocide and of the co-operation required 'in order to liberate mankind from such an odious scourge' . . . The Genocide Convention was therefore intended by the General Assembly and by the contracting parties to be definitely universal in scope." (*Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, I.C.J. Reports 1951*, p. 23.)

Your reasoning in that case was based on a presumption against "[t]he complete exclusion from the Convention of one or more States" (*ibid.*, p. 24).

76. There is accordingly no reason to adopt an interpretation of Article 35, paragraph 2, which is not in accord with its ordinary and natural meaning. Further, the ordinary and natural meaning is fully confirmed, as I have shown, by the *travaux préparatoires*.

77. There is also a countervailing consideration of policy, which involves the position of the Court in the world. The Court was conceived in 1920 against the background of a league which, it was already clear, would have partial membership. The Court was conceived as a Court for *all* States, whether or not members of the league, and that conception was followed in 1945. There was the same problem of the exclusion of the ex-enemy States in 1945 as there was in 1920. It is

true that we have achieved a situation where United Nations membership is virtually universal. But that is a contingency: there can be new States; existing Members can leave the United Nations. This Court is a court for bad times as well as good. What is needed in bad times is *more* access to the Court, not less. Moreover in times of political discontinuity we need legal continuity. The presumption of continuity adopted by the Court in the preliminary objections phase of the *Bosnia* case (*I.C.J. Reports 1996*, p. 610, para. 17) was — with profound respect — profoundly right. What treaties like the Genocide Convention need is continuity of protection, and for that we need continuity of access.

78. Madam President, Members of the Court, a colleague of mine described your decision in the *NATO* cases as "in many ways an unsettling judgment and one which threatens to undermine the authority of the International Court of Justice"[60]. Now, the Court is, of course, used to criticism and is rightly resistant, as a general matter, to changes in course. Let the critics come into line with the Court, rather than the other way round. But not always: there may be times, there have been times, when further reflection may cause second thoughts. I suggest, with the greatest of respect, that this is such an occasion. For the reasons I have explained, the words of Article 35, paragraph 2, of the Statute mean, and should be held to mean, precisely what they say.

79. Madam President, Members of the Court, this concludes the first round presentations of Croatia. Thank you Madam President, Members of the Court, for your attention.

The PRESIDENT: Thank you, Professor Crawford.

That indeed brings to an end the first round of oral argument. I shall now give the floor to Judge Abraham, who has a question for the Parties.

M. ABRAHAM : Merci, Madame le président. Ma question s'adresse aux deux Parties.

Les Parties se sont référées, entre autres, aux affaires relatives à la *Licéité de l'emploi de la force*, dans lesquelles la Cour a jugé en 2004 qu'elle n'avait pas compétence pour connaître des requêtes de la Serbie-et-Monténégro, au motif que cet Etat ne remplissait pas les conditions d'accès à la Cour.

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[60]C. Gray (2005) 54 *ICLQ* 787, 794.

Dans ces affaires, la Serbie-et-Monténégro venait devant la Cour comme demanderesse.

Dans la présente affaire, la Serbie se présente en qualité de défenderesse.

Y a-t-il, selon les Parties, des conséquences à tirer, et si oui lesquelles, de cette différence de situation, en ce qui concerne les conditions prévues aux paragraphes 1 et 2 de l'article 35 du Statut ? Merci.

The PRESIDENT: Thank you. The text of this question will be sent to the Parties as soon as possible. The Parties may decide if they deem it convenient to respond to the question during the second round of oral argument. It will also be possible for them to provide written responses to the question by 6 June 2008 at the latest, and I would add that any comments a Party may wish to make in accordance with Article 72 of the Rules of Court on the response by the other Party must be submitted no later than 13 June 2008.

The Court will meet tomorrow at 10 a.m. to hear the second round of oral argument. Serbia will present its reply tomorrow and Croatia on Friday, at 10 a.m. Each Party has at its disposition a three-hour period. I would add that the purpose of the second round of oral argument is to enable each of the Parties to respond to the arguments raised by the other Party during the first round. The second round should not, therefore, constitute a repetition of past statements.

The Court now rises.

The Court rose at 12.45 p.m.

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