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International Court of Justice

THE HAGUE

Cour internationale de Justice

LA HAYE

YEAR 2008

Public sitting

held on Thursday 29 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 jeudi 29 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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H.E. Mr. Frane Krnić, Ambassador of the Republic of Croatia to the Kingdom of the Netherlands,

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

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Ms Anjolie Singh, Member of the Indian Bar,

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The PRESIDENT: Please be seated. The sitting is now open. The Court meets today to hear the second round of oral argument of Serbia in the case concerning *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia* v. *Serbia)*. At the end of today's sitting, Serbia will present its final submissions. Croatia will then present its oral reply tomorrow at 10 a.m., followed by its final submissions at the end of the sitting, and each Party has at its disposal a three-hour session.

I now give the floor to Professor Varady, the Agent of Serbia.

Mr. VARADY:

INTRODUCTION AND THE ISSUE OF ACCESS UNDER ARTICLE 35 (1)

A. Introduction

1. Madam President, distinguished Members of the Court, having considered the arguments and allegations of the Applicant presented during the first round of oral arguments, we would like to submit to your attention our responses. We trust that the arguments presented by the Applicant do not, and cannot refute our arguments showing that this honoured Court does not have jurisdiction in this case. This is probably the reason why instead of proposing a convincing foundation for jurisdiction, the Applicant has put repeated emphasis on its suggestion that given "the special importance of the 1948 Convention", it would be "deeply unattractive"[1], and somehow inappropriate to contest jurisdiction in this case at all.

2. Already during the first day of its presentations, the Applicant stated that "Serbia's real target is the Court's recent Judgment in the *Bosnia* case"[2]. It was added that "it would be odd and even bizarre"[3], or that it would be "very strange"[4] to decide differently on jurisdiction in this case than it was decided in the *Bosnia* case. It was also stressed that accepting the arguments of Serbia would yield "[u]ntold damage to the international rule of law and to the Court"[5].

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[1]CR 2008/10, p. 29, paras. 5-6 and p. 37, para. 25 (Sands).

[2]*Ibid.*, pp. 27-28, para. 2 (Sands).

[3]*Ibid.*, p. 9, para. 8 (Simonovic).

[4]*Ibid.*, p. 12, para. 20 (Simonovic).

[5]*Ibid.*, p. 39, para. 30 (Sands).

3. Madam President, this is the preliminary objections phase in a case in which genocide is being alleged, and we do not think that it is inappropriate to submit to your attention our conviction, and our arguments demonstrating that this honoured Court has no jurisdiction in this case. Yes, it is a genocide case, which has a special gravity — but it is a genocide case for the Respondent as well. It is a case which has a special gravity regarding both sides.

4. We do not think that it could do "untold damage" to the international rule of law and to this Court if we endeavour to embark on a scrutiny of the legal prerequisites for jurisdiction in this case we are just arguing. Rules on jurisdiction are part of the rule of law. We do not see how a justified respect towards the rule of law could preclude us from discussing whether there is a legal basis for jurisdiction in this case.

5. Furthermore, our target is naturally not the "recent" (2007) Judgment in the *Bosnia* case, or any judgment in the *Bosnia* case. The *Bosnia* case, which dealt with the gravest of the conflicts in the former Yugoslavia, has ended. Our "target" is, of course, this present case, in which some issues are related, but are not the same as in the *Bosnia* case, and in which the information which is at the disposal of the Court is radically different from the information that was available to the Court in 1996. Also, in the *Bosnia* case, some crimes committed were already qualified as genocide by the ICTY, before this was considered and confirmed by this Court. In this case — in which the ICTY did not even indict anyone for genocide allegedly committed in Croatia — this most dramatic qualification, which was needed in order to claim jurisdiction, has not been substantiated, and appears to be strained.

6. The Applicant has also put emphasis on the inter-linkage between the conflicts in Bosnia and Croatia, focusing on conflicts such as the one in the Prijedor area. It cannot be denied — and there is no reason to deny — that there is an inter-linkage between the conflict in Bosnia and the conflict in Croatia, just as there is an inter-linkage between all Yugoslav conflicts, the conflict in Slovenia included. But the Yugoslav army and the alleged aspirations towards a greater Serbia are certainly not the only link. In a number of ICTY judgments it has been established that the Bosnian conflict involved "[t]he independent State of the Republic of Croatia and its government, armed forces and representatives in an armed conflict against Bosnian Muslims on the territory of

the independent State of Bosnia and Herzegovina"[6]. Let me also say that we fail to see how the Croatian claim regarding jurisdiction for genocide in this case could be supported by a link with specific conflicts along the Bosnian-Croatian border, such as the conflict in the Prijedor area and other conflicts mentioned, with regard to which this Court has already established that they did not reach the threshold of genocide.

7. Madam President, I would also like to address shortly some hints about the behaviour of the Respondent in this case. Endeavouring to suggest conclusions about the behaviour of the Respondent, the Applicant is linking two dates: that of the Memorial, and that of our notification of accession to the Genocide Convention. The innuendo is that, since it was submitted shortly after the Memorial, the notification of succession was prompted by the Memorial[7]. But it is really obvious that it was not the Memorial of 1 March 2001 that put the Respondent on notice that Croatia was suing for genocide. Everybody knows that this was already known in July 1999 when the Croatian Application was submitted. The notification of accession to the Genocide Convention was obviously not prompted by the Memorial. It took place after the consequential changes in October 2000, and it was prompted by the letter of the Legal Counsel of 8 December 2000, in which the Legal Counsel invited the FRY "[t]o undertake treaty actions, as appropriate, in relations to the treaties concerned, if its intention was to assume the relevant legal rights and obligations as a successor State"[8]. The Genocide Convention was one of the "treaties concerned". Let me also say — although we do not see how this could be consequential — that the Genocide Convention was not the only convention to which the FRY acceded after it was invited to undertake treaty actions if its intention was to assume treaty rights and obligations[9].

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[6]ICTY, *Prosecutor* v. *Rajic*, IT—95-12-S, Trial Chamber Judgment of 8 May 206, para. 66. The same conclusion was reached by the Trial Chambers in the *Blaskic* and *Kordic* cases (*Prosecutor* v. *Blaskic*, IT-95-14, Judgment of 3 March 2000, para. 94 and *Prosecutor* v. *Kordic*, IT-95-14/2, Judgment of 26 Feb. 2001, paras. 108-109).

[7]CR 2008/10, p. 37, para. 26 (Sands).

[8]Letter of the Legal Counsel of the United Nations addressed to the Minister for Foreign Affairs of the Federal Republic of Yugoslavia, dated 8 Dec. 2000 — judges' folder, tab 5.

[9]Other Conventions include, e.g., the European Cultural Convention; European Convention on the Supervision of Conditionally Sentenced or Conditionally Released Offenders; Convention on Elaboration of a European Pharmacopoeia; European Convention on Information on Foreign Law; European Convention on Spectator Violence and Misbehaviour at Sports Events and in particular at Football Matches; Anti-Doping Convention; Customs Convention on Temporary Importation of Packings; Customs Convention Concerning Welfare Material for Seafarers; Customs Convention concerning facilities for the importation of goods for display or use at exhibitions, fairs, meetings or similar events; Convention establishing a Customs Co-operation Council and Annex; and the 1974 International Convention on Simplification and Harmonization of Customs Procedures.

8. Another point I would like to address along the same line is the issue of the alleged inconsistent behaviour of the Respondent. It was pointed out that in the period between 1992 and 2000, the FRY "took no action" and did not contest in 1996 the proposition that it was bound by the Genocide Convention[10], that it "acted as a party to treaties to which the former SFRY was a party", that it filed a counter-claim in the *Bosnia* case, that it filed applications against NATO countries in 1999[11]. It was added that Croatia was "entitled to rely on the position adopted by the FRY".

9. Madam President, it is a fact that between 1992 and 2000 the position of the FRY was influenced by a political perception, which proved to be the wrong perception. It is also true that reliance on this perception was stubborn, without heeding the position taken by the international community. But it is equally true that the position of the FRY — which turned out to be wrong — was not a matter of tactical manoeuvring suited to positions in lawsuits. The FRY was sticking to the perception of continuity, even when it was against its interests — as was the case in the preliminary objections phase of the *Bosnia* case. It was sticking to its position in spite of the fact that it disallowed the FRY to become a Member of the United Nations, of many other international organizations, and to become a party to treaties.

10. It is also a fact that after hundreds of thousands of demonstrators brought about a change of régime in October 2000, the FRY finally took note of the fact that the assertion of continuity was not accepted. Accepting what it believed was the reality, the new Government acted upon this assumption. Consequences were drawn with consistency. Jurisdiction was challenged on the basis of the new perception in the *Bosnia* case, as well as in this case, where the FRY is the Respondent. But at the same time, the same perception was submitted to the Court in the *Legality of Use of Force* cases, where the FRY was the Applicant, and our counter-claim was withdrawn in the *Bosnia* case. In all instances, notwithstanding our role or position, we presented the same perception, both before this Court and before other authorities.

11. It is true, of course, that the position and the arguments we consistently presented are not the same as those which were presented by the former Government of the FRY. But let me point

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[10]CR 2008/10, p. 20, para. 12 (Metelko-Zgombic).

[11]*Ibid.*, p. 25, para. 37 (Metelko-Zgombic).

out also that what we did was not a tactical manoeuvre, just as the change in October 2000 was not a simple change of government. It was a fundamental change which prompted the country to reconsider the basic premises on which it was functioning.

12. At the same time, the inconsistency between Croatia's position before this Court and outside this Court is glaring. Here, the difference between positions taken is not the result of some consequential development. Different positions have been taken at the same time, suited to various purposes. Croatia now says that it "was entitled to rely on the position adopted by the FRY" when it submitted its Application in 1999. But about a month before it submitted its Application, which was based on the assumption that the Court was open to the FRY, Croatia emphatically objected on 27 May 1999 against the declaration made by the FRY under Article 36 (2) of the Statute, stressing that the FRY "could not automatically continue the membership of the SFRY in the United Nations", hence it cannot be a party to the Statute. The letter added that the FRY "deliberately . . . tries to create the erroneous assumption" that it is a party to the Statute[12].

13. Madam President, this is not reliance — and this is not consistency. Instead of relying on "the position taken by the FRY", Croatia used every opportunity — with the single exception of this case — to deny and challenge "the position adopted by the FRY". Croatia supported resolution 47/1, which denied the claim of the FRY for continuity. Since then, and until these days, Croatia denied continuity before international organizations which were in a position to decide about membership, including the United Nations General Assembly and Security Council. It

[12]Letter dated 27 May 1999 from the permanent representatives of Bosnia and Herzegovina, Croatia, Slovenia and the former Yugoslav Republic of Macedonia to the United Nations addressed to the Secretary-General, UN doc. A/53/992 (7 June 1999); judges' folder, tab 4.

argued against United Nations membership[13], and against treaty membership of the FRY[14]. It also argued and stressed that the FRY was not a party to the Statute[15].

14. Let me emphasize again that the difference in the Croatian position taken in this case, compared with all instances outside this case, was not the result of some fundamental political changes or consequential new information. It was simply the result of the interests Croatia had in this case, which are different from the interests Croatia had in all other instances in which the issue emerged whether the FRY did or did not continue the membership in international organizations and the treaty status of the former Yugoslavia. Croatia did not accept the assertion of continuity — and did not rely on it.

B. No access under Article 35 (1)

B.1 The FRY had no access to the Court when the Application was submitted, because it was not a party to the Statute

15. Madam President, let me confess that it is somewhat difficult to believe that after years of the most emphatic rejection of any even indirect manifestation of continued membership of the FRY in the United Nations, in international organizations and in treaties, Croatia is now alleging that the FRY was somehow a party to the Statute. Time and again, Croatia argued and emphasized that the FRY was just one of the "five equal successor States". It wrote letters to the Secretary-General stressing that the FRY was not a party to the Statute. After this position was accepted by everyone, including the FRY, is Croatia really saying that the FRY was not one of the

[13]See, e.g., letter dated 16 Feb. 1994 from the permanent representative of Croatia to the United Nations addressed to the Secretary-General, UN doc. S/1994/198 (19 Feb. 1994).

[14]See, e.g., letter dated 24 May 1995 from the Chargé d'Affaires *a.i.* of the Permanent Mission of Croatia to the United Nations Office at Geneva addressed to the Chairman of the Commission on Human Rights, UN doc. E/CN.4/196/134 (1996), joint letter of Bosnia and Herzegovina, Croatia, Macedonia and Slovenia forwarded to the Commission on Human Rights by the Permanent Mission of Bosnia and Herzegovina to the United Nations Office at Geneva in a Note Verbale dated 20 April 1998, UN doc. E/CN.4/1998/171; aide-mémoire from the Permanent Mission of Croatia dated 23 Aug. 1993, UN doc. S/26349 (1993); Note Verbale dated 14 Jan. 1994 from the Permanent Mission of the Republic of Croatia to the United Nations addressed to the Secretary-General, UN doc. CERD/SP/51(1994); Summary Record of the 18th Meeting of the States parties to the International Covenant on Civil and Political Rights on 16 March 1994, UN doc. CCPR/SP/SR.18 (1994); and Summary Record of the 19th Meeting of the States parties to the International Covenant on Civil and Political Rights on 9 Dec. 1994, UN doc. CCPR/SP/SR.19 (1994).

[15]See, e.g., the letter dated 27 May 1999 from the permanent representatives of Bosnia and Herzegovina, Croatia, Slovenia, and the former Yugoslav of Macedonia to the United Nations addressed to the Secretary-General, UN doc A/53/992 (7 June 1999).

five equal successors? Does Croatia really mean that its efforts to object to the special status were unsuccessful[16], as it says, after everyone accepted the position asserted by Croatia?

16. The Applicant leads us now back to the 1992 letter from the Legal Counsel referring to General Assembly resolution 47/1, stating: "[O]n the other hand, the resolution neither terminates nor suspends Yugoslavia's membership in the Organization"[17].

17. But in the meantime it has been clarified that the "Yugoslavia", whose membership was neither terminated nor suspended, was not the FRY, but the former Yugoslavia. This was definitely and emphatically stressed by Croatia. For example, in the letter dated 2 August 1995 from the Chargé d'Affaires *ad interim* of the Permanent Mission of Croatia to the United Nations addressed to the Secretary-General, it was stressed: "The designation of 'Yugoslavia' as a State within the framework of the United Nations can only be interpreted by us as relating to the former Socialist Federal Republic of Yugoslavia, a State that was a founding Member of the United Nations . . ."[18] Croatia not only understood, but also argued and stressed that the designation "Yugoslavia" can only be interpreted as a reference to the former Yugoslavia.

18. The same understanding was broadly confirmed; for example, the 1998 *Yearbook* of the United Nations published an official "Roster of the United Nations". This roster included "Yugoslavia", and explained in clear and simple terms that this name "refers to the former Socialist Federal Republic of Yugoslavia"[19]. Professor Sands now refers to the *I.C.J. Yearbooks*. In the period between 1992 and 2000, these *Yearbooks* did list "Yugoslavia" as a Member, but adding the critical qualification of *original* Member — which can only refer to the former Yugoslavia.

19. Had any doubt remained, this must have been dispelled by the Secretary-General, who explained in his letter dated 27 December 2001 to the President of the General Assembly:

> "I have the honour to refer to General Assembly resolution 55/12 of 1 November 2001, in which the Assembly decided to admit the Federal Republic of Yugoslavia to membership in the United Nations.

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[16]CR 2008/11, p. 22, para. 8 (Sands).

[17]Letter dated 29 Sept. 1992 from the Under-Secretary-General, the Legal Counsel, addressed to the permanent representatives of Bosnia and Herzegovina and Croatia to the United Nations, UN doc. A/47/485 (30 Sept. 1992).

[18] Letter dated 7 Aug. 1995 from the Chargé d'Affaires a.i. of the Permanent Mission of Croatia to the United Nations addressed to the Secretary-General, UN doc. A/50/333-S/1995/659 (7 Aug. 1995).

[19]*Yearbook* of the United Nations 1998, p. 1420, footnote 9.

> This decision necessarily and automatically terminated the membership in the Organization of the *former Yugoslavia*, the State admitted to membership in 1945."[20]

The designation "Yugoslavia" did not refer to the Respondent in this case.

20. Madam President, after hesitations and dilemmas, a clear and unequivocal position was taken by all relevant international authorities — including this honoured Court. The FRY was not a Member of the United Nations, and was not a party to the Statute prior to 1 November 2000. There is simply no reason or logic which could now take us back to the legal situation which was, as you stated, "ambiguous and open to different assessments". The FRY was not a party to the Statute, and had no access to the Court in July 1999.

B.2 The Respondent had no access to the Court at the relevant time — and the Court was not validly seised either

21. Madam President, Members of the Court, the fact that the Respondent was not a party to the Statute when the Application was submitted does not only lead to the conclusion that the Court was not open to the Respondent, it also means that the Court was not validly seised, it did not acquire *compétence de la compétence*.

22. In the *Legality of Use of Force* cases the Court held that the Applicant "could not have properly seised the Court" (*Legality of Use of Force (Serbia and Montenegro* v. *Belgium)*, *Preliminary Objections, Judgment, I.C.J. Reports 2004*, p. 299, para. 46)[21], because it was not a party to the Statute, and did not have the right to appear before the Court. The Court did not acquire competence to decide upon jurisdiction.

23. The situation in our case is the same. It is generally accepted that a valid seisin may be effected by either a joint notification or unilaterally. In our case, we are talking about unilateral seisin. Croatia did have access to the Court at the relevant moment. But the conditions for unilateral seisin in a given dispute are never independent from the other party to the dispute. The qualifications of the other party simply cannot be disregarded. Otherwise, a State, party to the

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[20]Letter dated 27 Dec. 2001 from the Secretary-General addressed to the President of the General Assembly, UN doc. A/56/767 (9 Jan. 2002); emphasis added.

[21]Exactly the same text can be found in the other 2004 *Legality of Use of Force* Judgments as well: in paragraph 45 of the cases with France, Canada, Italy, Netherlands, Portugal, and in paragraph 44 of the cases with Germany and the United Kingdom.

Statute, could also validly seise the Court with a case brought against a non-State entity. Or, the Court could be seised against a State that is outside the scope of the judicial authority of the Court.

24. Professor Crawford argued that "there was a case duly filed by Croatia, so there was seisin"[22]. In our case, we are talking about unilateral seisin. But unilateral seisin cannot be reduced to addressing the Court by one party. This simple fact appears clearly from the *Nottebohm* case (*Nottebohm (Liechtenstein* v. *Guatemala), Preliminary Objection, Judgment, I.C.J. Reports 1953*), where the issue was whether the Article 36 (2) declaration of Guatemala *(the Respondent)* would allow a valid unilateral seisin, given the fact that it expired after the Application was submitted. In this case, even the fact that both parties to the dispute were parties to the Statute was not considered to be sufficient for a valid seisin. The Court investigated whether other preconditions on the side of the *Respondent* were met, and stated that: "There can be no doubt that an Application filed after the expiry of this period [the period of the validity of the Guatemala declaration] would not have the effect of legally seising the Court." (*Ibid.*, p. 121.) It was not enough that the case was "duly filed" by the Applicant. Preconditions on the side of the Respondent had to be met. The *Nottebohm* Judgment made it clear that the status of the Respondent is relevant for seisin. It made it also clear that the relevant moment in time when the preconditions for seisin need to be assessed, is the moment of the application.

25. Valid seisin means simply *compétence de la compétence*. But it would be a *contradictio in adiecto* to speak of *compétence de la compétence* in a situation in which the Court *has no competence* to assume jurisdiction. The Court cannot be validly seised, it cannot have *compétence de la compétence* if one of the parties of the dispute is not a party to the Statute, if it is outside the scope of the Court's competence.

26. It is beyond doubt that a valid seisin has consequences with regard to both the Applicant and to the Respondent — and this assumes that they are parties to the Statute, which is the anchor of procedural effects. The existence of this assumption was made clear in the *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar* v. *Bahrain), Jurisdiction and Admissibility* case, where the Court stated: "Once the Court has been validly

[22]CR 2008/11, p. 34, para. 8 (Crawford).

seised, both Parties are bound by the procedural consequences which the Statute and the Rules make applicable . . ." (*Judgment, I.C.J. Reports 1995*, pp. 23 and 24, para. 43.)

27. This is certainly true, but this clearly assumes that both parties are parties to the Statute, and therefore can be parties in a given case brought before the Court. Otherwise, "the procedural consequences which the Statute and the Rules make applicable" would not apply to them. It is generally accepted, that seisin which yields *compétence de la compétence*, flows from the Statute. But this also means that the State towards which competence is asserted — and possibly established — has to be within the scope of the Statute. The Court cannot have *compétence de la compétence* if a party to the dispute is not a party to the Statute. This simple proposition was accepted as a basic assumption in the *Aerial Incident of 27 July 1955* case, where Bulgaria was the *Respondent* and in which the Court stated: "[t]he Statute of the present Court could not lay any obligations upon Bulgaria before its admission to the United Nations . . ." (*Aerial Incident of 27 July 1955 (Israel* v. *Bulgaria), Judgment, I.C.J. Reports 1959*, p. 143.)

28. Madam President, distinguished Members of the Court, sovereign States parties to the Statute are under the obligation to respect *compétence de la compétence* of the Court with regard to them, under the conditions set by the Statute. By the same token, the Court has no competence to decide upon its competence if any of the States parties to the dispute is outside the realm of the judicial authority of the Court.

29. We have already demonstrated that this simple and unavoidable conclusion received ample authoritative support. One of the most clear manifestations of this support are the *Legality of Use of Force* cases, in which the Court makes it crystal clear that access has a fundamental character, that it is a precondition to judicial functioning, and hence to jurisdiction as well. It is stated: "The Court can exercise its judicial function only in respect of those States which have access to it under Article 35 of the Statute. And only those States which have access to the Court can confer jurisdiction upon it." (*Legality of Use of Force (Serbia and Montenegro* v. *Belgium)*, *Preliminary Objections, Judgment, I.C.J. Reports 2004*, p. 299, para. 46.)[23]

[23]Exactly the same text can be found in the other 2004 *Legality of Use of Force* Judgments as well: in paragraph 45 of the cases with France, Canada, Italy, Netherlands, and Portugal; and in paragraph 44 of the cases with Germany and the United Kingdom.

30. This is perfectly logical, since access is, indeed, both a precondition to a valid seisin and a precondition to jurisdiction. This clear position cannot be interpreted otherwise but as a position taken towards both the applicant and the respondent. The Court cannot exercise its judicial function towards parties who are not within the ambit of its judicial function, who do not have access to the Court.

31. The same simple and clear proposition is also underlined by Rosenne. Starting from the assumption that the capacity to be a party to contentious cases is reserved only to States, Rosenne adds and stresses:

> "This statehood has to be supplemented by formal conditions establishing a legal link of the State to the Statute of the Court . . . Only a State meeting one of these formal conditions has access to the Court for any purpose and in any capacity whatsoever. The Court cannot entertain a contentious case against a respondent State that is not similarly qualified."[24]

32. Madam President, we cited this Court stating in the *Legality of Use of Force* cases that "[t]he Court can exercise its judicial function only in respect of those States which have access to it under Article 35 of the Statute" (*Judgment, I.C.J. Reports 2004*, p. 299, para. 46)[25]. Thus, the problem was a fundamental one, and exactly the same fundamental problem exists in our case as well. The Court can exercise its judicial function — which also means that it can be properly seised — only in a dispute between States both of which have access to it under Article 35 of the Statute. In this case, one of the parties did not have access to the Court at the time when the Application was submitted. There was no valid seisin in this case.

B.3 The "*Mavrommatis* principle" is not applicable in the circumstances of this case

33. Professor Crawford submitted in his pleadings yesterday, that the preconditions for jurisdiction need not all exist at the time of the Application, assuming the Court was validly seised.

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[24]Rosenne, S., *The Law and the Practice of the International Court, 1920-2005,* (2006), Martinus Nijhoff publishers, Leiden, Boston, p. 588.

[25]Exactly the same text can be found in the other 2004 *Legality of Use of Force* Judgments as well: in paragraph 45 of the cases with France, Canada, Italy, Netherlands, and Portugal; and in paragraph 44 of the cases with Germany and the United Kingdom.

He referred to the *Mavrommatis* case, and to other cases[26], in which it was, indeed, held that one should not penalize a procedural deficiency which existed at the time of the application, and which can be easily remedied.

34. Let me say first, that the conclusion suggested by the Applicant is based on the assumption that the Court was validly seised. This assumption simply does not exist in our case. We have demonstrated that in our case the Court was *not* validly seised. But there is a further difficulty with this proposition. Not every procedural shortcoming can be disregarded in the light of later developments. The shortcoming we are talking about — i.e., lack of access — is of such a nature that it cannot be remedied in the light of later developments. We would like to support this point by further arguments.

35. There is ample authority supporting the proposition that the time of the Application is the critical date for seisin and for the jurisdictional title. As it was made clear by Fitzmaurice "[s]eisin establishes the critical date for the efficacy of the jurisdictional title"[27]. The very same idea was also underlined by Shihata, who states: "[s]eisin has a direct relationship with substantive jurisdiction for it establishes the critical date for the efficacy of the jurisdictional title involved in any given case"[28].

36. Madam President, Croatia argues that once the Court was validly seised by the Applicant, it became possible to establish jurisdiction over the Respondent at a later moment after the Respondent had gained access to the Court. This construction is without foundation within the setting of our case. First of all, its starting assumption is wrong. One cannot say that in our case, since the Court was validly seised at the time when the Application was submitted, other defects may be later remedied. One cannot say this, because — as we just demonstrated — the Court was *not* validly seised at the time when the Application was submitted.

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[26] *Mavrommatis Palestine Concessions, P.C.I.J., Series A, No. 2, 1924*, *Certain German Interest in Polish Upper Silesia, P.C.I.J., Series A, No. 6, 1925*, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984* and *Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Preliminary Objections, Judgment, I.C.J. Reports 1996*.

[27] Fitzmaurice, G., "The Law and Procedure of the International Court of Justice, 1951-4: Questions of Jurisdiction, Competence and Procedure", *BYBIL*, Vol. 34, (1958), p. 18.

[28] Shihata, F. I., *The Power of the International Court to Determine its Own Jurisdiction (Compétence de la Compétence)* , The Hague, Martinus Nijhoff, 1965, p. 88.

37. Moreover, there are cases in which a procedural defect was surmounted considering later developments, but this is by no means a general principle. We have already cited ample support for the principle that the relevant date is, indeed, the date of the Application. Let me add just one more supporting authority. In the *Lockerbie* case the Court stated: "The date, 3 March 1992, on which Libya filed its Application, is in fact the only relevant date for determining the admissibility of the Application." (*Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya* v. *United States of America), Preliminary Objections, Judgment, I. C. J. Reports 1998*, p. 26, para. 44.)

38. Madam President, let me raise the obvious question: why were the cases cited by Professor Crawford — the *Mavrommatis* case, the *Silesia* case, the *Nicaragua* case — decided differently than the *Legality of Use of Force* cases? In all of these cases referred to by Professor Crawford, in which the Court allowed remedy of an initial deficiency, the deficiency was on the side of the *applicant* — or on the side of the applicant as well as in the *Mavrommatis* case.

39. Why are these cases then decided differently than the *Legality of Use of Force* cases? Obviously not because they would have dealt with a deficiency on a different side. The shortcoming was on the same side, both in the *Legality of Use of Force* cases, and in the cases cited by the Applicant. There was clearly another reason justifying different treatment. The reason is that in the *Legality of Use of Force* cases the problem was of a different nature, and the shortcoming was *much more fundamental* than in the cases cited by the Applicant.

40. It was exactly this fundamental nature of the shortcoming which led the Court in the *Legality of Use of Force* cases to conclude that the Court cannot exercise its judicial function if a party — the applicant in those cases — had no access to the Court *at the time when the application was submitted*. As it was phrased by the Court: "The question whether Serbia and Montenegro was or was not a party to the Statute of the Court at the time of the institution of the present proceedings is a fundamental one."[29] (*Legality of Use of Force (Serbia and Montenegro* v. *Belgium)*, *Preliminary Objections, Judgment, I.C.J. Reports 2004*, p. 293, para. 30.) We are facing the very same fundamental question regarding the status of the very same State.

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[29]Exactly the same text can be found in the other 2004 *Legality of Use of Force* Judgments as well: in paragraph 29 of the cases with France, Canada, Italy, Netherlands, and Portugal; and in paragraph 28 of the cases with Germany and the United Kingdom.

41. Let me point out that if "easy remedy" were justified with regard to lack of access, this approach should have prevailed in the *Legality of Use of Force* cases as well. If one could disregard the special gravity of the shortcoming and its relevance regarding the judicial function of the Court, *quid non*, one should have disregarded it in the *Legality of Use of Force* cases as well. Serbia and Montenegro *did* become a party to the Statute at a moment after the Application was submitted and before the Court took a position on jurisdiction.

42. But in the *Legality of Use of Force* cases the Court did not say that the deficiency may be disregarded because it could be easily remedied by submitting a new application — like this was said in the cases cited by Croatia. The Court did not say this, and the Court insisted that the relevant moment is the moment of the institution of the proceedings. This position is clearly justified by the fundamental nature of the shortcoming, and this is precisely how the Court justified it. In our case, the shortcoming is exactly the same. *Quod ab initio vitiosum est, tractu temporis convalescere nequit*[30].

43. Madam President, flexibility has its limits. In the *Legality of Use of Force* cases, the Court referred with approval to cases in which the position was taken that "when its jurisdiction is challenged on diverse grounds, it is free to base its decision on one or more grounds of its own choosing" (*Legality of Use of Force (Serbia and Montenegro* v. *Belgium)*, *Preliminary Objections, Judgment, I.C.J. Reports 2004*, p. 293, para. 46)[31], but added that this logic does not apply when lack of access is one of the grounds on which jurisdiction is challenged. The Court pointed out that the cases which allow flexibility in choosing a ground on which a decision on jurisdiction is based, are all cases in which the parties "were *without doubt* parties to the Statute of the Court and the Court was thus open to them under Article 35, paragraph 1, of the Statute" (*ibid.,* p. 298, para. 46). The Court stated that this flexibility does not apply when lack of access is argued, because "it is this issue of access to the Court which distinguishes the present case from all those referred to above" (*ibid.,* pp. 298-299, para. 46).

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[30]Paulus D., 50, 17, 29 — Regula Catoniana.

[31]Exactly the same text can be found in the other 2004 *Legality of Use of Force* Judgments as well: in paragraph 45 of the cases with France, Canada, Italy, Netherlands, and Portugal; and in paragraph 44 of the cases with Germany and the United Kingdom.

44. And this is, again, the issue which distinguishes our case from the cases cited by Croatia. The question as to whether a State has access to the Court — and, hence whether it is within the ambit of the judicial function of the Court — simply precedes other questions. This is logical, because in exercising its judicial function, the Court may, of course, choose freely between possible avenues of reasoning, it may also decide to allow some shortcomings to be remedied, but this flexibility does not apply when the issue is whether the Court can or cannot exercise judicial function at all.

45. Madam President, distinguished Members of the Court, whether we are contemplating the issue of access within the setting of seisin or otherwise, the result is the same — and the result shows that there is no jurisdiction in this case. There is no jurisdiction because the Respondent had no access to the Court, the Court was not validly seised, and hence it has not been endowed by *compétence de la compétence*. Furthermore, lack of access is a shortcoming of such a fundamental nature that it cannot be remedied *"tractu temporis"*.

Thank you very much and I would like to ask you now to give the floor to my colleague Vladimir Djerić.

The PRESIDENT: Thank you, Professor Varady. I now give the floor to Mr. Djerić.

Mr. DJERIĆ:

RESPONDENT'S ACCESS UNDER ARTICLE 35 (2) OF THE STATUTE

1. Madam President, Members of the Court, I will deal with the question of "Respondent's access under Article 35, paragraph 2, of the Statute". Yesterday, Professor Crawford argued that the Respondent had access to the Court under Article 35, paragraph 2, of the Statute, because the Genocide Convention should be regarded as a "treaty in force" in the sense of this provision. I have to say that I very much enjoyed his spirited presentation and his endeavour to persuade the Court to overrule its recent Judgments in the *Legality of Use of Force* cases, which held exactly the opposite. After a careful consideration of his arguments, I will try to show that, with all due respect, the spell of yesterday's presentation is gone.

2. As a preliminary note, let me say that, contrary to what the Applicant says[32], questions of Article 35, paragraph 2, were argued in the preliminary objections in the *Legality of Use of Force* cases, as is evident from the Judgments themselves (see, e.g., *Legality of Use of Force (Serbia and Montenegro* v. *Belgium), Preliminary Objections, Judgment, I.C.J. Reports 2004*, pp. 316-317, paras. 96-97 (hereinafter: "*Legality of Use of Force*")).

3. According to the Applicant, the phrase "treaties in force" is clear and means "treaties in force . . . at the time when the other State comes before the Court"[33]. Then, the Applicant says that "[a] treaty cannot be relied on unless it is in force at the time it is relied on . . ."[34]. But if this were really so, then the words "in force" would be redundant, why not just say "treaties" if a treaty "cannot be relied on unless it is in force . . ."? Moreover, if the words "in force" should simply be taken to mean *now* in force, why would Article 36, paragraph 5, of the Statute use the words "*still* in force" (emphasis added). It appears that the phrase "in force" may have different meanings in different contexts, and not just the one suggested by the Applicant.

4. This is what the Court also noted in the *Legality of Use of Force* cases: "the words 'treaties in force', in their natural and ordinary meaning . . . do not indicate at what date the treaties contemplated are to be in force, and thus they may lend themselves to different interpretations" (*Judgment, I.C.J. Reports 2004*, p. 318, para. 101).

5. Article 35, paragraph 2, is an exception to the general rule stated in paragraph 1 of this Article that the Court shall be open to the States parties to the Statute. It is an exception because it allows other States, not parties to the Statute, to come before the Court under the conditions laid down by the Security Council. Within this exception, there is a further one, that this shall be "subject to the special provisions contained in treaties in force". If this phrase is to be interpreted as the Applicant proposes, this would make the rule in Article 35, paragraph 2, completely redundant. A phrase in a legal text cannot however be interpreted so to make the rest of the provision completely redundant. The result of the interpretation suggested by the Applicant would be that States not parties to the Statute could come before the Court simply by concluding treaties

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[32]CR 2008/11, p. 39, para. 23 (Crawford).

[33]*Ibid.*, p. 40, para. 26 (Crawford).

[34]CR 2008/11, p. 41, para. 27 (Crawford).

providing for its jurisdiction and thereby circumventing the conditions and procedures envisaged by the Charter and the Statute. The rest of Article 35, paragraph 2, of the Statute would thus serve no purpose; Article 93, paragraph 2, of the Charter would be undermined, if one is to follow the interpretation proposed by the Applicant.

6. The avoidance of the conditions of access envisaged by Article 93, paragraph 2, of the Charter and Article 35, paragraph 2, of the Statute would mean that States not parties to the Statute could not be required to comply with the decisions of the Court in cases in which they are parties; neither the question of their non-compliance could be brought before the Security Council. This would be contrary to a long and consistent practice of requiring States not members of the United Nations that wish to come before the Court — either by becoming parties of the Statute or by complying with conditions laid down by the Security Council — to accept all the obligations of United Nations Members under Article 94 of the Charter[35].

7. Moreover, the interpretation proposed by the Applicant would deprive the political organs of the United Nations of their role in deciding which States may come before the Court and participate in the judicial system of the United Nations. This would be plainly against the Charter.

8. The Applicant says it could not locate any treaties that were in force on the date the present Statute entered into force[36]. But, the Court was aware of this when it rendered the Judgments in the *Legality of Use of Force* cases (*I.C.J. Reports 2004*, p. 323, para. 113). As the Court said, "it was natural to reserve the position in relation to any relevant treaty provisions that might then exist" (*ibid*., p. 319, para. 102). Moreover, the Statute could have entered into force at a much later date, and, in the meantime, States parties could have decided to enter into treaties which would have been in force and would have provided recourse to the Court. Indeed, this is the situation that necessitated the inclusion of the treaties-in-force clause in the Statute of the Permanent Court, which was adopted after the treaties of peace had been concluded after the First World War.

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[35]See Security Council resolution 9 (1946), para. 1; see Security Council resolution 11 (1946) and General Assembly resolution 91 (I) (Switzerland); Security Council resolution 71 (1949) and General Assembly resolution 363 (IV) (Liechtenstein); Security Council resolution 102 (1953) and General Assembly resolution 805 (VIII) (Japan); Security Council resolution 103 (1953) and General Assembly resolution 806 (VIII) (San Marino); Security Council resolution 600 (1987) and General Assembly resolution 42 (XXI) (Nauru).

[36]CR 2008/11, p. 40, para. 26 (Crawford).

9. Madam President, the Applicant dedicated a lot of time yesterday to the history of Article 35, paragraph 2, of the Statute of the Permanent Court and of this Court. I am not going to deal with it extensively — as the Court already did so in the *Legality of Use of Force* cases and reached different conclusions from the Applicant. But, with all due respect, I have to note that the Applicant's analysis of the drafting history of Article 35, paragraph 2, of the Statute of the Permanent Court avoids mentioning the main reason for the inclusion of the "treaties-in-force" clause. After the occasion on which the issue of access to the Court under the existing treaties of peace was raised, to which the Applicant refers, a small drafting committee was entrusted with drafting a new formula. It was the formula proposed by this committee that was eventually adopted in the text of the Statute of the Permanent Court (this is the formula: "subject to special provisions contained in treaties in force")[37]. Madam President, this formula was produced by the drafting committee on the basis of the instructions that were unanimously formulated by the Sub-committee of the Third Committee of the League of Nations, which *inter alia* stated "[a]ccount shall be taken of Parties who may present themselves before the Court *by virtue of the Treaties of Peace*"[38]. Therefore, account was to be taken not of all "treaties in force" but of "the Treaties of Peace". This shows the intention behind this provision and this provides a meaningful interpretation of its substance.

10. Further, the Applicant contends that "the crucial juncture" was when Mr. Fromageot replied to Mr. Huber that "the expression 'Treaties in force' meant not only the Treaties in force now but at any given moment in future"[39]. However, this exchange took place during the discussion of Articles 33 and 34, as they were then numbered, that concerned jurisdiction *ratione materiae*. Article 32, future Article 35, and its paragraph 2, that is relevant here, were discussed immediately afterwards. There is no evidence that what Mr. Fromageot said did concern the phrase "treaties in force" in what would become Article 35, paragraph 2, of the Statute.

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[37]League of Nations, Permanent Court of International Justice, Documents concerning the actions 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 (hereinafter: "Documents"), p. 143.

[38]Documents, p.141; emphasis added.

[39]CR 2008/11, p. 53, paras. 59 & 61, quoting Documents, p. 144.

11. Madam President, further I have to note that the Applicant's meticulous analysis of Article 35, paragraph 2, does not mention that members of the Court also discussed this provision at the time when the Court was revising its Rules in 1926, and this discussion is referred to in the *Legality of Use of Force* Judgments (*I.C.J. Reports 2004*, p. 321).

12. In 1926, the Registrar took the position which the Applicant is advocating today, and, according to the record, said that Article 35 of the Statute "gave the Court unconditional jurisdiction in the case of treaties in force". Judge Anzilotti raised doubts about this interpretation. The question was eventually postponed for a subsequent meeting[40]. And you may find the record of this meeting at tab 1 of your judges' folders. When it was eventually discussed, both the President of the Court, Judge Huber, and Judge Anzilotti, disagreed with the view of the Registrar. Judge Anzilotti explained that the "treaties in force" clause was included for the following reason:

> "the peace treaties in certain cases imposed the Court's jurisdiction on the central States; in other cases these States had been given the right of themselves instituting proceedings before the Court. That being so, to allow the Council to impose other conditions would amount to modifying the peace treaties, which could not be done. *The clause in question therefore had in mind the peace treaties.*"[41]

13. This view was supported by the President of the Court, Judge Huber. He said:

> "In regard to the principle involved, he thought, having regard to the semi-official commentaries on the Statute constituted by M. Hagerup's report, that it was quite possible to arrive at the wide interpretation of Article 35 of the Statute adopted by the Court in the Upper Silesian case. But the essential thing was to construe the Council Resolution in accordance with the actual terms of this Article 35 to which it referred, and the President thought, like M. Anzilotti, that the exception made in Article 35 could only be intended to cover situations provided for by the treaties of peace."[42]

14. Therefore, both President Huber and Judge Anzilotti were of the view that the "treaties in force" clause concerned the peace treaties. Of course, there was some difficulty with the fact that in the *Upper Silesia* case (*Certain German Interests in Polish Upper Silesia, Jurisdiction, Judgment No. 6, 1925*, *P.C.I.J. Series A, No. 6*), Germany appeared before the Court on the basis of the 1922 Polish-German Convention on Upper Silesia, which entered into force after the entry into force of the Statute of the Permanent Court. However, as Judge Anzilotti explained — and, again,

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[40] *Acts and Documents (1926), P.C.I.J., Series D., No. 2, Add.,* pp. 76-77.

[41] *Acts and Documents (1926), P.C.I.J., Series D., No. 2, Add.*, p. 105 (emphasis added).

[42] *Ibid.*, p. 106.

this explanation can be found at page 105 of the *1926 Acts and Documents*, which are reproduced at tab 1 of your folders:

> "the question then related to a treaty — the Upper Silesian Convention — drawn up under the auspices of the League of Nations which was to be considered as supplementary to the Treaty of Versailles. It was therefore possible to include the case in regard to which the Court had then had to decide in the general expression 'subject to treaties in force', whilst construing that expression as referring to the peace treaties, and it was not necessary to read it as compelling the Court to adopt an interpretation as wide as that which was proposed."[43]

15. At this point, let me say that this interpretation of Anzilotti was not only supported by President Huber, it was not contested by any other judge. Madam President, we submit that this discussion is of crucial importance — both Judge Anzilotti as, at the time, Commendatore Anzilotti, and President Huber, participated in the discussions in the Third Committee and its Subcommittee during the drafting of Article 35, paragraph 2, of the Statute of the Permanent Court. They were "present at the creation", to use the phrase of Dean Acheson. So was Judge Loder, the former President, who during the discussion in 1926 did not oppose their view regarding the "treaties in force" clause. (Compare *Acts and Documents (1926), P.C.I.J., Series D., No. 2, Add.*, p. 104 and Documents, p. 82.)

16. In conclusion, all the above clearly confirms the view reached by this Court:

> "the legislative history of Article 35, paragraph 2, of the Statute of the Permanent Court demonstrates that it was intended as an exception to the principle stated in paragraph 1, in order to cover cases contemplated in agreements concluded in the aftermath of the First World War before the Statute entered into force".

17. Madam President, let me now turn to the preparatory work of the present Statute. It is silent on the meaning of the phrase "treaties in force" in Article 35, paragraph 2. The Applicant contends that if the drafters of the present Statute wanted to restrict access under this provision, they would have left it out[44]. However, while the 1945 discussions are silent on the issue, I would like to note that one of those present at the time was Judge Manley Hudson, who held the view that Article 35, paragraph 2, should be strictly construed, and that the *Upper Silesia* case should not serve as a general precedent[45].

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[43] Add No. 2, p. 105.

[44] CR 2008/11, p. 48, para. 50.

[45] Manley O. Hudson, *The Permanent Court of International Justice 1920-1942*, 1943, pp. 391-392.

18. Since the drafters of the Statute accepted the text of the old Article 35, paragraph 2, only with small corrections of style, it is to be presumed that they also wished it to retain the meaning it had in the Statute of the Permanent Court. The fact that possibly there were no treaties in force providing for jurisdiction of the new Court at the time when its Statute entered into force does not prove much. The drafters were perfectly entitled to provide for a possibility that access may be attained in this way, as well. Similarly, they did provide for the possibility of this Court having jurisdiction over "matters specially provided for in the Charter" (Article 36, paragraph 1, of the Statute) but the Charter eventually contained no such matters (*Aerial Incident of 10 August 1999 (Pakistan* v. *India), Jurisdiction, Judgment*, para. 48).

19. Madam President, the Applicant argues that the "treaties in force" clause should be interpreted as the treaties in force at the moment of filing application. We have demonstrated that such interpretation is untenable. However, the Applicant hints at, but never develops, an argument that the Genocide Convention "is a part of post-war settlement"[46]. This may be understood as implying that the Convention could be a peace treaty similar to the treaties of peace after the First World War, and that, therefore, on a similar basis, Article 35, paragraph 2, could apply to it.

20. We respectfully submit that this is not the case. First, the preparatory work clearly supports the conclusion reached by the Court that only treaties in force at the time of the entry into force of the present Statute could qualify under Article 35, paragraph 2. Secondly, the Genocide Convention did not settle post-Second World War affairs, as the peace treaties had done after the First World War. As Professor Zimmermann has demonstrated, it was future oriented and does not have retroactive effect[47], in other words, it did not settle matters related to the war. Moreover, the very idea of the Genocide Convention is that it should have wide membership, and not only include those States that were at war with each other.

21. Finally, there is a third, and most important reason. The practice of States after the Second World War clearly demonstrates that treaties concluded after the entry into force of the present Statute have *never* been regarded as treaties in force within the meaning of Article 35, paragraph 2. A notable example of such practice is the Treaty of Peace with Japan signed on

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[46]CR 2008/11, p. 57, para. 75.

[47]CR 2008/9, pp. 20-21, paras. 39 and 40.

8 September 1951[48]. If there is a treaty which is a part of the post-war settlement after the Second World War, this is the one. However, its signatories that were not parties to the Statute — Cambodia, Ceylon, Laos, Japan, and Vietnam — all of them filed declarations under Security Council resolution 9. Therefore, not even this *quintessential* peace treaty was regarded as capable of bringing before the Court States not parties to the Statute under the "treaties in force" clause. They all filed declarations under Security Council resolution 9[49].

22. Moreover, specifically concerning the Genocide Convention, which is invoked in the present case, we have the example of the Federal Republic of Germany, which felt it necessary to file a declaration pursuant to Security Council resolution 9 after it had become a party to the Genocide Convention[50]. The text of Germany's declaration is reproduced at tab 2 of the judges' folder. This declaration shows that Germany, which was not a party to the Statute at the time, considered that the Genocide Convention, and its Article IX, did not provide it with access to the Court. Thus, the declaration under resolution 9 was filed by Germany and was not opposed by other States parties to the Convention. It should be noted that Germany also filed similar declarations with respect to five more treaties, including the Brussels Convention, which was arguably part of the post-Second World War settlement[51]. The Applicant does not mention this practice at all.

23. Moreover, it should be noted that the place the Charter gave to the Court in the system of the United Nations is different from the place of the Permanent Court of International Justice in relation to the system of the League of Nations. The present Court is fully integrated into the system, unlike the Permanent Court, and this must have effect on access. Article 35, paragraph 2, of the Statute, should be interpreted with this in mind, and no space should be left for possible circumvention of the conditions and procedures for access to the Court, as this would also effect a careful balance among the main organs of the United Nations set by the Charter. The Applicant also fails to take this into account.

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[48]Treaty of Peace with Japan, signed at San Francisco, on 8 September 1951, *UNTS* 1952, p. 46, No. 1832.

[49]*I.C.J. Yearbook 1951-1952*, pp. 213 (Japan and Ceylon) and 214 (Cambodia); *I.C.J. Yearbook 1952-1953*, pp. 200 (Laos) and 201 (Vietnam).

[50]*I.C.J. Yearbook 1955-1956*, p. 215.

[51]*I.C.J. Yearbook 1971-1972*, p. 44.

24. Madam President, it is clear that State practice after the Second World War provides further and strong support to the Court's conclusion in the *Legality of Use of Force* Judgments that the "treaties in force" clause applies only to the treaties that were in force when the present Statute entered into force.

25. Yesterday, Professor Crawford used much of his time and energy, and invested all its authority, to convince you to accept the Applicant's interpretation of Article 35, paragraph 2, and reverse your recent decision in which this provision was analysed in detail. Yet, as I have demonstrated, his argument cannot hold in the light of the wording of Article 35, paragraph 2, in the light of its history, and of the State practice after the Second World War.

26. Moreover, to accept this interpretation would mean that the Court would give Serbia two different answers to the same question posed in two cases, which were not only instituted almost at the same time, but concern the same issue — the issue of access of Serbia to the Court before November 2000. The *Legality of Use of Force* Judgments are about access and deal with it explicitly and in detail, unlike any other judgments of the Court. One of the questions these Judgments dealt with was: can the Genocide Convention be a basis of access to the Court under Article 35, paragraph 2, of the Statute? The Court gave its answer to this question, and, honorable Members of the Court, it gave the right answer. There is no access to the Court under Article 35, paragraph 2, in the present case because the Genocide Convention is not a treaty in force within the meaning of this provision.

27. Madam President, Members of the Court, thank you for your kind attention. We could continue now with Professor Zimmermann, or have a break.

The PRESIDENT: Thank you, Mr. Djerić. I think if Professor Zimmermann would be prepared to make a start and find a convenient moment in 25 minutes or so. Thank you.

Mr. ZIMMERMANN:

I. INTRODUCTION

1. Madam President, Members of the Court, my colleagues have addressed different aspects of the question of access. They have done so in the framework of Serbia's first preliminary

objection. Yet, that first objection is not solely founded because the Respondent had no access to the Court. It equally must obtain because this Court has no jurisdiction to entertain Croatia's claim.

II. THE COURT HAS NO JURISDICTION TO ENTERTAIN THE CASE

2. Madam President, the Parties agree that jurisdiction in this case can only be based on Article IX of the Genocide Convention. I would have thought that it was equally common ground that this case involved rather intricate issues of legal personality, statehood, continuity and succession.

3. On that basis, I was indeed looking forward to hearing how precisely, in the view of the Applicant, Article IX of the Genocide Convention could be linked to Serbia.

The PRESIDENT: Professor Zimmerman, I am being asked if you could speak a little more slowly, please.

Mr. ZIMMERMAN: Certainly. This, in particular, because in his pleading on Monday, my colleague Tibor Varady had invited the Applicant to be specific about how exactly and when exactly the Respondent remained or became bound by Article IX[52]. Unfortunately, his invitation seems not to have been accepted.

4. True, in their first round pleadings, counsel for the Applicant were very clear — even "crystal clear"[53] — as to the result: they firmly asserted that Article IX was "at all material times" binding upon the Respondent[54]. But neither Professor Crawford nor Professor Sands was clear as to why that should be the case. When trying to explain how they reached their crystal clear result, they continued to advance the same mélange of mutually exclusive arguments that already could be found in Croatia's written submissions. These included:

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[52]CR 2008/8, pp. 48 *et seq*., paras. 19 *et seq*. (Varady).

[53]CR 2008/10, p. 32, para. 13 and p. 38, para. 29 (Sands); CR 2008/11, p. 23, para. 9 and p. 54, para. 65 (Crawford).

[54]CR 2008/10, p. 28, para. 3 (Sands).

— references to automatic succession, or automatic succession to human rights treaties — which then was said to cover dispute settlement provisions as well, as anything else was "troubling"[55];

— some comments on the declaration and Note of 27 April 1992, which Professor Sands hardly analysed but qualified as a "solemn commitment"[56] — and found arguments considering it rather "unattractive"[57];

— finally, there were frequent but vague hints at notions of good faith, reliance and legitimate expectations which now permitted Croatia, it was argued, to treat Serbia as being bound by Article IX of the Genocide Convention[58].

5. While the result was said to be crystal clear, the reasoning leading to it is anything but crystal clear I may say.

6. Madam President, Members of the Court, the Applicant has been mixing up mutually exclusive arguments on purpose. It has done so in order to avoid having to take a position on the complex and difficult legal issues arising at this point of the case.

7. We are dealing with questions of treaty action, treaty membership, State succession or State identity. These are technical questions in relation to which the international community of States as well as the depositaries of treaties insists on precision and clarity — and they do so for good reason. This is not a field of law where legal philosophy governs, where object and purpose reign and broad concepts dominate. This is an area of the law where States are required to be precise, technical, nuanced and exact. This is why even in the uncontroversial 2006 case of State continuity between Serbia and Montenegro on the one hand, and Serbia on the other, the Secretary-General, as a depositary, required Serbia to be extremely specific.

8. Although Serbia's claim, made in writing by President Tadić, then was unopposed, the Secretary-General required an express confirmation by Serbia that: "[a]ll treaty actions undertaken

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[55] *Ibid.*, p. 33, para. 16 (Sands).

[56] *Ibid.*, p. 30, para. 10 (Sands).

[57] *Ibid.*, p. 29, para. 6 (Sands).

[58] CR 2008/11, p. 9, para. 7 (Crawford).

by Serbia and Montenegro will continue in force . . . and that all declarations, reservations and notifications made by Serbia and Montenegro will be maintained"[59].

9. And heeding that request, the Serbian Foreign Minister reproduced that formula[60]. A pure formality, one might say. But essential when State identity and State succession matters are concerned.

10. Madam President, Professor Sands is of course entitled to find this unattractive. But this case — and this succession aspect of the case in particular — is not about attractiveness. It is no beauty contest in which the most attractive argument wins. I am afraid that whether we find it attractive or not, the law of succession to treaties is a technical area of the law. Presenting an attractive *mélange* of mutually exclusive assertions cannot replace a detailed assessment of the possible ways by which Serbia may have become or remained bound by Article IX, *quod non*.

11. It is this detailed assessment, including an assessment of relevant State practice, that I will undertake in the following — so I might warn you that you will be listening to a speech that at least Professor Sands might find unattractive. Yet it is a speech in which I will demonstrate that on neither of the potential constructions, the Respondent in this case is bound by Article IX of the Convention.

12. Madam President, Members of the Court, if we disregard the abandoned continuity thesis, there are two such potential constructions. The Respondent could have become bound by Article IX:

— either by way of automatic succession,

— or through the declaration and Note of 27 April 1992.

Allow me to address these two issues in turn before, for the sake of completeness, dealing with a third option that counsel for the Applicant has not really pleaded but seems to have at least alluded.

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[59]Letter cited in the letter of the Court of 19 July 2006, sent to both Croatia and Serbia and Montenegro.

[60]See United Nations Treaty Collection Database, *Multilateral Treaties Deposited with the Secretary-General, Status as at 15 November 2007, Historical Information*, available from: <http://untreaty.un.org/ENGLISH/bible/englishinternetbible/historicalinfo.asp

1. Serbia never automatically succeeded to the Genocide Convention

13. Madam President, counsel for Croatia stated that "Croatia succeeded to the Genocide Convention by notification of succession dated 12 October 1992"[61]. I could not agree more. Yet, Serbia never notified the depositary of its succession to the Genocide Convention even if counsel for Croatia tried to imply otherwise[62].

14. Croatia is obviously aware of this problem. Hence it relied on an alleged principle of customary international law. In its view, this required the automatic succession to all treaties in cases of a separation. Alternatively — the moderate version of its argument, one might say — it said that automatic succession should at least apply to human rights treaties.

15. Both lines of argument must, however, be refuted. Let me first address the radical version of its argument, the idea that there should be automatic succession to all treaties.

(a) ***Article 34 of the 1978 Vienna Convention on the Succession of States with Regard to Treaties does not reflect customary international law***

16. Madam President, in support of this argument, counsel for the Applicant referred to Article 34 of the 1978 Vienna Convention on the Succession of States with regard to Treaties. This provision however did not apply obviously to the dissolution of Yugoslavia. More importantly, it does not reflect customary international law. This is borne out by the fact that as of today, i.e., 30 years after its adoption, only 21 States have become parties to this Convention. As an exercise in codification, that Convention truly is a failure.

17. What is more, one of the reasons for this failure is its Article 34. The majority of States does not accept the broad and unqualified principle of universal succession advocated by the Applicant. Rather, it accepts the classical view pursuant to which States retain a large measure of freedom to decide whether or not they may succeed to certain or all treaties of their respective predecessor States, or whether instead they want to accede to those, and if so under what conditions.

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[61]CR 2008/10, para. 9 (Sands).

[62]See CR 2008/10, p. 20, para. 13, where Ms Metelko-Zgombic states the Note was sent to "the United Nations Secretary-General, who serves as the depositary of the United Nations". This designation however fails to take account of the different functions of the Secretary-General and disregards the fact that the Note deliberately not sent to the depositary.

18. Allow me to also further remind you that this Court has so far never accepted the customary nature of the principle contained in Article 34 of the 1978 Convention (*Gabčíkovo-Nagymaros Project (Hungary/Slovakia), Judgment, I.C.J. Reports 1997,* p. 71, para. 123). As I have previously mentioned you have rather, be it only implicitly, in your Judgment in the *Congo* v. *Rwanda* case taken a position, which contradicts the very idea of automatic succession[63] — and indeed in a case concerning the Genocide Convention, that is at the very heart of this case.

19. It is quite curious in turn that counsel for Croatia referred to a statement by the then representative of the Soviet Union to specifically provide for an automatic succession as to treaties of "universal character" made during the 1977 Vienna Conference on State Succession. This is quite curious indeed because during said diplomatic conference the respective proposal to specifically provide for automatic succession with regard to such treaties of "universal character" was formally withdrawn after it had become obvious that it would not gather sufficient support[64].

(b) ***Human rights treaties and in particular compromissory clauses contained therein are not subject to automatic succession***

20. Madam President, that brings me to the moderate version of Croatia's argument — the claim that Article IX should be binding on the Respondent because it had automatically succeeded to human rights treaties to which the former Yugoslavia had been a party.

21. Again, for Croatia to make such an argument now is a somewhat strange turn of events. In my first round speech, my colleagues and I have highlighted some of the more spectacular instances in which Croatia prevented the FRY from participating in the work of human rights treaty bodies. Had the FRY automatically succeeded to these treaties, it would hardly have been necessary for it to make the specific notifications of succession which Croatia consistently (and successfully) required the FRY to make.

22. Croatia's own State practice thus clearly contradicts the very idea that there could be an automatic succession to human rights treaties. But Croatia is not alone in rejecting the notion of

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[63]CR 2008/8, p. 34, paras. 9-13 (Zimmermann).

[64]Cf. M. Yasseen, "La Convention de Vienne sur la succession d'Etats en matière des traités", *AFDI* 1978, p. 59 (107).

automatic succession. Its conduct is in line with that of many other States. I note that a significant number of successor States on whose territory the Genocide Convention had previously been applicable have formally *acceded* to the Genocide Convention. No such accession has *ever* been objected to — with the sole exception of Serbia's accession where however only three of the overall 140 contracting parties of the Genocide Convention have objected, two of which — namely Croatia itself, as well as Bosnia — had an obvious litigation interest.

23. The same pattern can be discerned with regard to numerous other human rights treaties. Let me, to give just one example, mention that in the past more than 30 successor States have *acceded* to the 1951 Refugee Convention even though that Convention had previously been applicable on their territory. This includes successor States that acceded to the Refugee Convention *after* Croatia itself had become a party thereof. And again, Croatia saw no reason whatsoever to object to such accessions[65].

24. Madam President, Members of the Court, Croatia has also cited statements of treaty bodies on the question of succession. It is true that such bodies play an important role in the development of the respective treaty régime and also play a crucial role in their day-to-day application. Yet, they have been established with a view to a specific treaty régime and its unique features. Their mandate is not to develop general rules of State succession. Their statements cannot substitute State practice and in particular practice by those States most concerned; this holds even more true when such practice is not being challenged by the other contracting parties.

25. Madam President, whatever we think about human rights treaties as such, there is another aspect which counsel for the Applicant seeks to blur. As I have shown in my first round speech, any alleged automatic succession can be even less contemplated with regard to compromissory clauses — a proposition supported by ample authority contained in our preliminary objections[66].

26. Counsel for the Applicant found the distinction between substantive clauses and compromissory clauses "troubling"[67] but beyond that said very little to discard it. In fact, the need to distinguish the two types of clauses — substantive obligations on the one hand, and procedural

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[65]For example Swaziland acceded to the Refugee Convention as of 14 February 2000; the United Kingdom had extended the geographical scope of application to Swaziland by virtue of a declaration dated 11 July 1960.

[66]Preliminary Objections, paras. 3.93-3.103.

[67]CR 2008/10, p. 33, para. 16 (Sands).

rules establishing specific kinds of dispute settlement — is plain if we accept the reasons counsel for Croatia gave for the alleged automatic succession to human rights treaties.

27. He stated that automatic succession was warranted because such treaties confer individual rights[68] and that the obligations contained in the Convention also form part of customary international law[69]. However, Article IX of the Genocide Convention — the compromissory clause here at issue — does not possess any of those features. It does not create individual rights. It is not part of customary international law and even less so a rule of *jus cogens.* It solely regulates inter-State relations. The reasoning invoked by counsel for the Applicant — even if we accept it for the sake of argument — simply does not apply as to Article IX of the Genocide Convention.

28. In fact, there would still be no automatic succession to Article IX even if we accepted a rule of automatic succession for supervisory mechanisms of human rights treaties such as the ICCPR. The reason for this is that the supervisory mechanisms of the ICCPR may well be central to the whole effectiveness of the instruments. In contrast, the Genocide Convention contains many more mechanisms to prevent genocide apart from Article IX, including the specific obligation to punish offenders, as well as the obligation to co-operate with the international tribunal which is contained in Article VI. This provides yet another reason why Article IX of the Genocide Convention does not share the fate of the substantive treaty obligations even if one were to assume, be it only *arguendo*, an automatic succession to the substantive clauses of the Convention.

29. Lastly, the distinction between substantive obligations and compromissory clauses is also born out of practice. Let me refer you to the treatment of the European Convention on Human Rights and Fundamental Freedoms — one of the most maybe crucial modern human rights treaties — after both the Czech and the Slovak Republic had notified their succession to the Convention. Even then, that is, even after these two successor States had indicated their willingness to continue the treaty status of their predecessor State, a decision by the Committee of Ministers of the Council of Europe was still deemed necessary to make them contracting parties of

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[68] *Ibid.*, pp. 33 *et seq.*, paras. 16-18 (Sands).

[69] *Ibid.*, pp. 28 *et seq.*, para. 5 (Sands).

the Convention and to extend the jurisdiction of the European Court for Human Rights to those successor States[70].

30. This proves once again that treaty provisions providing for the jurisdiction of an international tribunal, *even* when contained in a human rights treaty, cannot automatically be subject to succession. And this must be even more so true where a State has not even notified its succession to a treaty containing a compromissory clause, but has rather made a reservation to that end.

31. Madam President, this concludes my argument on the question of automatic succession and this might be an appropriate moment for the usual break.

The PRESIDENT: Yes, Professor Zimmermann. Thank you very much. The Court will now briefly rise.

The Court adjourned from 11.25 to 11.40 a.m.

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

Mr. ZIMMERMANN: Thank you, Madam President. Honourable Court, before the break I demonstrated that Article IX of the Genocide Convention was not and could not have been subject to automatic succession by the FRY, now Serbia. Allow me now to move on to the second potential link between the Respondent and Article IX, and that is the declaration and Note of 27 April 1992.

2. The 1992 declaration and the ensuing Note did not bring about Serbia's succession to the Genocide Convention

32. Counsel for the Applicant have qualified said declaration and Note as a "solemn" undertaking, and have argued that Croatia had rightly relied on it[71]. On Monday I showed that the declaration and the Note lacked each and every required element of an effective and valid notification of succession. Other than criticizing this as "unattractive", counsel for Croatia have

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[70]See J.-F. Flauss, "Convention européenne des droits de l'homme et succession d'Etats au traités: une curiosité, la décision du comité des ministres du Conseil de l'Europe en date 13 juin 1993 concernant la République tcheque et la Slovaquie", *RUDH* 1994, pp. 1 *et seq*.

[71]CR 2008/10, p. 30, para. 10 (Sands); similarly CR 2008/11, p. 9, para. 7 (Crawford).

not addressed these concerns. I will not repeat my assessment now but instead focus on another question: Has Croatia really relied on the declaration and Note of 27 April 1992? The answer to that question is clear: It has not, maybe it is even crystal clear. But for the purpose of this litigation, it has throughout rejected the view that this declaration and the Note could have any effect. I will not recite all the manifold instances of this line of Croatian conduct. Much material can be found in our written pleadings. Let me just give one example:

> "Given that the 'Federal Republic of Yugoslavia (Serbia and Montenegro) has not notified of its succession to the Conventions on Slavery, it cannot be considered a party to the said Conventions."[72]

These were not my words — these were the words contained in a letter from the Croatian Permanent Mission to the United Nations to the Chairman of the Commission of Human Rights dated 24 May 1995. This letter was written by Croatia more than three years after the 1992 declaration and Note and there are numerous Croatian statements to the very same effect.

33. Madam President, Croatia never relied on the declaration and the Note. It never placed trust in it. The declaration and the Note were inherently linked to the very continuity thesis Croatia, as well as the other successor States, always rejected. For Croatia to invoke good faith considerations with respect to documents it has vigorously attacked for years is simply misplaced.

34. Finally, it is precisely for that reason that the 1992 declaration and the Note have not acquired some other sort of self-standing legal effects vis-à-vis Croatia. In a brief passage in his speech, Professor Crawford seemed to suggest as much when he distinguished it from an offer that had to be accepted to entail legal effects[73]. But the law of State succession, as I have noted at the outset, is technical. It provides for distinct mechanisms by which obligations are transmitted to States — such as formal notifications of succession or accessions. Besides, even if it were treated as some form of unilateral statement, in line with this Court's jurisprudence, it would be subject to clear conditions: it would still have to emanate from the competent authorities, it would still have to be specific, and it would still have to be relied on. Neither of these conditions is fulfilled in the case at hand.

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[72]Letter dated 24 May 1995 from the Permanent Mission of Croatia to the United Nations Office at Geneva, addressed to the Chairman of the Commission on Human Rights, UN doc. E/CN.4/1996/134 (1996).

[73]CR 2008/11, p. 9, para. 7 (Crawford).

35. Madam President, Members of the Court, that concludes the Respondent's argument on the first preliminary objection. Let me summarize. That objection rests on two pillars: lack of access and lack of jurisdiction.

36. My colleagues have shown that the Respondent had no access. I have demonstrated that there is no basis of jurisdiction because at the time of the Application, the Respondent was not bound by Article IX of the Genocide Convention, the only purported title on which this claim is based — neither through automatic succession, nor by virtue of the declaration and Note of 27 April 1992. Accordingly, the FRY — now Serbia — was free to determine to which treaties of its predecessor State it wanted to succeed by virtue of a valid notification of succession and to which it instead wanted to accede.

37. The FRY indeed submitted notifications of succession to a significant number of treaties, but (contrary to allegations by the Applicant) it also acceded to a number of other treaties. The latter group included but was not limited to the Genocide Convention. Rather there are also other treaties to which Serbia acceded including treaties to which Croatia was already a contracting party[74]. And once again, no State — including Croatia — ever objected to any of the other accessions, thereby indeed accepting such possibility of accession by the FRY — now Serbia.

38. When acceding to the Genocide Convention, the FRY could then obviously also make use of its right to enter a reservation as to Article IX of the Convention — a type of reservation which indeed this Court has, ever since 1951, upheld (see most recently *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo* v. *Rwanda), Jurisdiction of the Court and Admissibility of the Application, I.C.J. Reports 2006*, p. 21-33, paras. 28-70). There simply therefore was no question whatsoever of any retroactive effect of the Serbian reservation, as counsel for Croatia wants us to believe. And in fact, even Croatia, one of the few States that in 2001 protested against the Applicant's Article IX reservation, recently seems to have reconsidered its own view on the Article IX reservation made by the FRY. At least this seems to appear from its conduct vis-à-vis a State which until last Friday featured in the title of this case: Montenegro.

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[74]Such as the European Cultural Convention, which the SFRY had ratified in 1987: the FRY acceded on 28 February 2001; Croatia had succeeded on 27 January 1993.

39. As is well known, Montenegro became an independent State in 2006. As, unlike Serbia, it did not continue the legal personality of the former State union of Serbia and Montenegro, it (Montenegro) had to clarify its position regarding treaties to which Serbia and Montenegro had been a party. One of those treaties was the Genocide Convention.

40. On 26 October 2006, Montenegro notified the United Nations Secretary-General of its intention to succeed to the Genocide Convention. You can find the respective depositary notification in tab 3 of your judges' folder. This notification of succession, as you can see in footnote 2 of this document specifically referred to the 2001 FRY's accession to the Genocide Convention. Upon succession, Montenegro moreover also confirmed the Article IX reservation made by Serbia and Montenegro upon its accession to the Convention.

41. The notification of succession as well as the confirmation of the Article IX reservation was duly circulated by the depositary to all treaty parties, including Croatia. In October 2007, the 12-month period provided for protests and objections against reservations lapsed. By that time, no State had protested against Montenegro's Article IX reservation. What is more important, Croatia had not protested either.

42. Madam President, Members of the Court, may I kindly invite you to reflect upon this for a moment: when accepting Montenegro's conduct, other States (including Croatia) have accepted that what was succeeded to by Montenegro by virtue of its notification of succession was the treaty status of Serbia and Montenegro vis-à-vis the Genocide Convention which had been brought about by the FRY's *accession* of 2001 — and a treaty status which included the FRY's Article IX reservation.

43. By not protesting against that treaty status, the other contracting parties *including Croatia* have not only accepted that the FRY had only become bound by the Genocide Convention by virtue of its accession, but also that the FRY's reservation as to Article IX of the Genocide Convention is indeed a valid one.

44. In other words, and with a more specific focus on the Applicant, Croatia apparently saw no reason to protest against this Article IX reservation confirmed by Montenegro despite the fact — as you will see in your folder — that said depositary notification even contained a reference to the FRY itself.

45. Madam President, Croatia is not a State that can invoke good faith in these proceedings. Its behaviour throughout, as my colleague Tibor Varady has mentioned, was motivated by tactical considerations. The latest episode involving Montenegro's seemingly acceptable Article IX reservation is but the last in a series of Croatian inconsistencies.

46. Madam President, Members of the Court, let me now make a couple of very short and brief remarks as to what counsel for Croatia said as to our third preliminary objection — or rather what they did not say.

III. PRELIMINARY OBJECTION 3

47. As to the surrender of persons, our contention that the Court lacks jurisdiction under Article IX to deal with an alleged obligation of Serbia to punish genocidal acts allegedly committed in Croatia, i.e., outside Serbia or to hand over persons to Croatia stands unchallenged and must be considered to have been conceded.

48. *Mutatis mutandis*, Croatia has neither challenged the argument that a claim for clarifying the fate of missing persons is inadmissible because the Parties have agreed to solve the matter through a bilateral mechanism.

49. Finally, as to the return of cultural property, let me reiterate that in line with the settled jurisprudence of this Court, its jurisdiction does not extend to any form of seizure or destruction of cultural property and therefore logically can neither extend to the return of such property and that besides there is not even a dispute as between the Parties in that regard — the latter contention once again not having been challenged by counsel for Croatia.

IV. JURISDICTION DOES NOT COVER ACTS PRIOR TO 27 APRIL 1992

50. Madam President, Members of the Court, I now come to my next task in this pleading, and that is to deal with the Applicant's arguments directed against Serbia's second preliminary objection — the objection that jurisdiction in any event cannot cover the period up to 27 April 1992. I will deal with these two aspects of this objection namely:

— first, the temporal application of Article IX of the Genocide Convention; as well as

— secondly, issues raised by Article 10 (2) of the ILC's Articles on State Responsibility.

1. The temporal application of Article IX of the Genocide Convention

51. Madam President, on Monday, I had made various arguments directed against the retroactive application of Article IX[75]. These arguments were made in addition to our main submission that the Respondent never became bound by Article IX at all. Their aim was to exclude any application of Article IX to events prior to 27 April 1992, that is the date of the Respondent's emergence as a successor State.

52. To support that conclusion, I considered the consequences of applying treaties to entities that did not yet exist as States. I also drew your attention to statements made by Croatia itself[76] and by Judge Shahabuddeen[77]. I discussed Article 28, of the Vienna Convention on the Law of Treaties as the provision governing retroactive effects of treaties[78], and then considered how the Genocide Convention itself was interpreted by eminent scholars such as William Schabas[79] or Nehemiah Robinson[80].

53. I do not think that any of these arguments was addressed at all, let alone refuted, in the Applicant's pleadings. Of course, counsel for the Applicant presented a conclusion that differed from mine — namely that Article IX did apply retroactively, even to events which preceded the emergence of the Respondent as a State. Yet counsel added precious little in support of that contention. Again — as with respect to State succession — things were evident and crystal clear to Professor Sands.

54. Madam President, as the saying has it, there are many clear and easy answers to complex questions — the only problem being that they are almost inevitably false. The same, I have to say, is true here.

55. Just as with respect to State succession, things are simply not as simple and crystal clear as Professor Sands would have us believe. In his view, the retroactive application of Article IX was mandated, he argued, because you allegedly decided so in paragraph 34 of your

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[75]CR 2008/9, pp. 13 *et seq.*, paras. 1 *et seq*. (Zimmermann).

[76]*Ibid*., paras. 12-13 (Zimmermann).

[77]*Ibid*., para. 21 (Zimmermann).

[78]*Ibid*., paras. 29 *et seq.* (Zimmermann).

[79]*Ibid*., para. 40 (Zimmermann).

[80]*Ibid*., para. 39 (Zimmermann).

1996 Judgment in the *Bosnia* case, and because there could be no time gap in the application of a treaty such as the Genocide Convention. But neither assertion is convincing.

56. Let me start with what I believe, and will demonstrate, is a mistaken reliance by Croatia on paragraph 34 of your 1996 Judgment.

(a) ***Paragraph 34 of the 1996 Judgment***

57. I am afraid to say that the way Croatia was trying to transpose your holding in paragraph 34 of the 1996 Judgment in the *Bosnia* case to the case at hand is misleading since it completely disregards the whole setting and context of your holding.

58. First of all, why did the Court in 1996 have to pronounce on the temporal application of the Convention? It did so because the Applicant's status vis-à-vis the Convention was in doubt. In its sixth and seventh preliminary objections — the respective text of which you can find at tab 4 of your judges' folder — the FRY, the Respondent, had argued that Bosnia's notification of succession, dated 29 December 1992, should either be treated as an accession or that it, even if it were to be construed as a notification of succession proper, could not have retroactive effect as to the date of independence of Bosnia and Herzegovina.

59. These were the two only points that were raised by the Respondent as to the jurisdiction *ratione temporis* of the Court, these were the two only points that were then argued by counsel for the two sides[81], and on these points only did the Court pronounce. Nothing more and nothing else.

60. In paragraphs 23 and 24 of its 1996 Judgment, the Court first determined that Bosnia had indeed succeeded to the Genocide Convention. The Judgment then went on in paragraph 34 — the text of which you may find at tab 5 of your folder — to consider the effect *ratione temporis* of such succession

61. After having noted the preliminary objections of the Respondent, the Court determined that the Genocide Convention did not contain any clause which would exclude — contrary to the FRY's argument — that a successor State could retroactively become bound as from the date of its independence, even if its notification of succession was deposited only significantly later.

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[81] CR 96/6, pp. 20-33 (Etinsky), CR 96/10, pp. 46-48 (Suy); see also, CR 96/9, pp. 35-42 and CR 96/11, pp. 62-67 (Pellet).

62. This is the underlying reason why the Court, when dealing with the issue of its jurisdiction *ratione temporis* in paragraph 34, very aptly and carefully added that its jurisdiction *ratione temporis* could not "in such manner" be limited — namely could not be limited in the manner argued by the Respondent in its sixth and seventh preliminary objections.

63. It was therefore the Court's position that Bosnia and Herzegovina had become bound by the Genocide Convention by the time of its independence, due to its notification of succession, that is, by 6 March 1992 despite the fact that its notification of succession had only been deposited on 29 December 1992.

64. On the other hand, the FRY was at the time of the 1996 Judgment considered to have been a party to the Genocide Convention ever since 1950 (*I.C.J. Reports 1996 (II)*, p. 610, para. 17). Accordingly, there was no doubt that the treaty relationship had come into existence between Bosnia on the one hand and the FRY by 6 March 1992.

65. Let me also note that the conflict in Bosnia and Herzegovina only started in April 1992, that is approximately one month after the treaty relationship, as it was then in 1996 perceived, had been created between the two States involved. When the Court therefore found in paragraph 34 of its 1996 Judgment that is had jurisdiction "with regard to the relevant facts which have occurred since the beginning of the conflict which took place in Bosnia and Herzegovina" (*ibid.*, p. 617, para. 34) there was no question whatsoever to apply the Genocide Convention and its Article IX with regard to a period where Bosnia and Herzegovina was not yet bound by the Convention or where it had not even existed.

66. Seen against this context, Croatia thus reads far too much into paragraph 34 of the 1996 Judgment. This was not a sweeping statement requiring the retroactive application of a convention to a time when one of the litigants did not exist.

67. Instead, the Court confirmed that Bosnia had succeeded to the Genocide Convention, and that its succession could take effect from the date of Bosnia's independence, as the treaty relation between the two litigants' States was established at that time. Nothing more, nothing less, nothing else.

68. Now, what is then the true effect of that holding, properly read, for our case? We submit that it is this: the Court has jurisdiction *ratione temporis* from the time a treaty relationship might

have come into existence between Croatia on the one hand and the FRY on the other. That, however, could only have been, if ever, on 27 April 1992, as before that, the FRY did not yet exist.

69. In line with your holding in paragraph 34 of the 1996 Judgment, the Court can accordingly only have jurisdiction in this case — if ever it has jurisdiction at all — to give effect to the Genocide Convention with regard to facts which have occurred after 27 April 1992.

70. Madam President, allow me now to deal with Croatia's second argument by which it attempts to argue for a retroactive application of the Convention concerning a period where the Respondent did not even exist yet, and that is the allegation as anything else would lead to an impermissible time gap.

(b) ***The time gap argument***

71. Let me first note that this argument disregards the drafting history of the Convention and the strict presumption, spelled out in Article 28 of the Vienna Convention on the Law of Treaties against retroactivity.

72. It also ignores the analyses by Robinson and Schabas which I referred to on Monday[82]. But more importantly, it blurs the fundamental distinction between the different obligations under the Genocide Convention. By qualifying the Convention as "universal law" and warning against time gaps, counsel for the Applicant seeks to turn Article IX into a catch-all clause also embracing obligations arising under customary law and to circumvent the usual rules of treaty interpretation.

73. Madam President, no one denies the crucial and fundamental importance of the Genocide Convention. As Professor Sands observed, your jurisprudence, which since 1951 has interpreted the Convention, is of utmost importance. But that jurisprudence must be taken at face value. Yet, taking it at face value requires us to distinguish between different types of obligations enshrined in it, and enables us to view warnings against time gaps more realistically.

74. First, your jurisprudence since 1951 cannot be interpreted to mean that *all* aspects of the Convention were declaratory. It rather underlines the importance of distinguishing between different types of obligations. Take the example of Article IX, which is so relevant and central to

[82]CR 2008/9, p. 20, paras. 39-40 (Zimmermann).

our case: How possibly could a provision on dispute settlement be declaratory in a system of dispute settlement based on compromissory clauses?

75. Certainly, Articles II and III of the Convention confirmed pre-existing obligations, but the system of dispute settlement set in place did not exist before. Or, to put in the words of Professor Crawford: There are certainly not two kinds of genocide, treaty genocide and customary genocide — but there can certainly be only one kind of jurisdiction, namely treaty-based jurisdiction.

76. Thus, in respect of Article IX, the Convention could hardly be said to be a "treaty that has a declaratory character and that applies universal law". This is brought out very clearly by this Court's jurisprudence which time and again has underlined the distinction between substantive obligations and procedural means for their implementation (see, e.g., *Armed Activities on the Territory of the Congo (New Application : 2002) (Democratic Republic of the Congo* v. *Rwanda), Jurisdiction of the Court and Admissibility of the Application, Judgment, I.C.J. Reports 2006*, p. 32, paras. 66-67).

77. Counsel for the Applicant has sought to brush aside this differentiated approach and labelled the Convention in its totality as universal, declaratory law[83]. In so doing, they have tried to make the Applicant's retroactivity argument appear less dramatic. But it is, indeed, dramatic.

78. May I kindly invite you to reflect for a moment about the consequences of Croatia's argument.

79. Assume what might happen if Article IX of the Genocide Convention — or, for that matter, other compromissory clauses annexed to treaties — did indeed apply retroactively, and could be applied even back to times before entities had emerged as independent States and became parties to the conventions in question.

80. Imagine the idea of genocide claims based on nineteenth century conduct and of turning Article IX into a vehicle for remedying all types of past injustices. If we accept the Applicant's argument, it is difficult to see how the Pandora's box could be closed again. The ILC, in its work on the law of treaties, surely had good reasons to be particularly cautious when dealing with the

[83] CR 2008/10, p. 36, para. 21 (Sands).

retroactive effects of dispute settlement clauses. And as much as counsel for the Applicant has tried to speak about the Genocide Convention in its totality, and about its individual rights concerns, it is crucial to realize that this whole argument depends on the retroactive application of a dispute settlement clause that is solely about inter-State litigation.

81. It is in this light that the Applicant's second assertion has to be approached: the alleged time gap to which Professor Sands referred.

82. For a start, let me say that it is difficult to understand the exact point to which the time-gap argument leads. Does Croatia mean to suggest that whenever a time gap appears, Article IX becomes applicable? Or is it suggested that the existence of a time gap is actually one of alternative ways of becoming bound by Article IX? We believe that this latter proposition is — to state the obvious — not acceptable.

83. But let me make a more simple point: if we look at the universal law against genocide, to which Professor Sands referred, there is in fact no time gap. Until 27 April 1992, until the FRY was created, the former Yugoslavia continued to exist and continued to be bound by the Genocide Convention. This was indeed acknowledged by counsel for Croatia when he stated that "(s)o long as the SFRY continued to exist, it remained bound by the terms of the Genocide Convention"[84].

84. More importantly, as Professor Sands reminded us, the rules against genocide are not exclusively a matter of treaty law. As this Court held already in 1951, the commission of genocide is also prohibited under customary law. As of today, the customary prohibition even possesses the character of *jus cogens*. Accordingly, regardless of the application or non-application of the Genocide Convention as such, committing the acts identified in Articles II and III of the Convention, constitutes a violation of customary international law and, as such, may give rise to State responsibility or individual criminal responsibility.

85. There simply is no time gap regarding the prohibition of genocide, or regarding responsibility for genocide.

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[84]CR 2008/10, p. 29, para. 8 (Sands).

86. What Croatia appears to be really driving at is not a time gap regarding the prohibition of genocide or responsibility — whether individual or State — but the question of the availability of a special kind of settlement of disputes, provided for in Article IX.

87. But at this point, we are not on the ground of established general principles at all. This is not only because as a general matter, the kind of dispute settlement envisaged in Article IX — International Court of Justice proceedings provided in a compromissory clause — as a matter of logic presupposes a basis *in treaty law*. But because with more specific regard to Article IX, there can hardly be said to be a consensus among the States parties.

88. Out of the 140 States parties to the Genocide Convention, 27 — that is one in five — are, or at some point were, not bound by Article IX. The Court has upheld their reservations in many cases, including in cases brought by the Respondent against the United States and Spain (see the two Orders of 2 July 1999 in the *Legality of Use of Force* cases between Yugoslavia and Spain, *I.C.J. Reports 1999*, p. 761; and between Yugoslavia and the United States, *ibid.*, p. 916), or more recently in the *Congo* v. *Rwanda* Judgment (*I.C.J. Reports 2006*, pp. 21-33, paras. 28-70).

89. This Court has thereby accepted that while the respective respondents were bound by the prohibition against genocide, and while any genocidal act attributable to them would entail responsibility, their responsibility could not be established through the special kind of dispute settlement envisaged in Article IX.

90. In Professor Sands's terminology, this might be called a "time gap"; in fact, it would be an open-ended gap that could only be closed if the States in question decided to withdraw their valid reservations. But it is clearly a "gap" the Court has accepted in many cases.

91. Madam President, this brings me to my next point, namely that the Court may not exercise jurisdiction vis-à-vis Serbia for violations of the Genocide Convention committed by an alleged movement concerning a period preceding the Respondent's existence.

V. THE COURT MAY NOT EXERCISE JURISDICTION VIS-À-VIS SERBIA FOR VIOLATIONS OF THE GENOCIDE CONVENTION COMMITTED BY AN ALLEGED MOVEMENT CONCERNING A PERIOD PRECEDING THE RESPONDENT'S EXISTENCE

92. Let me now demonstrate why we continue to believe, contrary to what Professor Crawford tried to demonstrate yesterday, that the Court cannot exercise jurisdiction for

violations of the Genocide Convention committed by whatever movement during a period preceding the Respondent's existence and therefore preceding the entry into force of the Convention.

93. I will do so following up on what my colleague Vladimir Djerić outlined on Monday.

94. Madam President, any international wrongful act of a State presupposes the breach of an international obligation and the attribution of the given action to the State in question. Accordingly, rules on State responsibility are *secondary* rules, which by their very nature presuppose the existence of primary rules. And it is only the breach of such a *primary* rule which may eventually bring about State responsibility provided the alleged breach of such a *primary* rule is attributable to a given State.

95. Article 10, paragraph 2, constitutes a specific rule on attribution. It presupposes, however, that the violation of a primary rule has taken place, which then, by virtue of Article 10 (2), would be attributed to the State concerned, in our case, allegedly, Serbia.

96. More specifically with regard to our case and in order for the Court to be able to exercise jurisdiction under Article IX, the Court must be in a position to find that a breach of the Genocide Convention has occurred which eventually may be attributed to Serbia. This is due to the fact that its jurisdiction in this case, if ever there is jurisdiction at all, is limited to possible violations of the Convention.

97. Let me reiterate, in order for the Court to exercise its jurisdiction in this case, it must be possible, as a matter of logic, that a violation of the Convention has occurred. Accordingly, the Court would have to eventually decide whether a violation of the Genocide Convention *as such* could have been committed in the period before 27 April 1992.

98. Any such determination presupposes, however, that the Genocide Convention and accordingly also its Article IX was already applicable during that period.

99. In the case at hand, the Convention is the only instrument containing primary obligations for which the Court might exercise jurisdiction, if ever it has jurisdiction. The question whether the Genocide Convention was applicable during the relevant period is however to be exclusively answered by the Convention itself and rules of treaty law. This was confirmed by the ILC, which stated in its Commentary on its Articles on State responsibility:

> "Nor do the articles deal with the question whether and for how long particular primary obligations are in force for a State. It is a matter for the law of treaties to determine whether a State is a party to a valid treaty, whether the treaty is in force . . . and with respect to which provisions, and how the treaty is to be interpreted. . . . The articles take the existence and content of the primary rules of international law as they are at the relevant time; they provide the framework for determining whether the consequent obligations of each State have been breached, and with what legal consequences for other States."[85]

100. This now brings me to Article 10, paragraph 2. Any attempt to apply the principle contained in Article 10, paragraph 2, with regard to acts that allegedly occurred prior to 27 April 1992 presupposes a prior determination that a primary obligation did exist at the crucial time, i.e., well before 27 April 1992. The only relevant primary obligations are however the obligations contained in the Genocide Convention given that the Court's jurisdiction is exclusively based on Article IX of the Convention.

101. I have already demonstrated, however, that the acts that have allegedly occurred during that period could not constitute violations of the Genocide Convention committed by the FRY because the Genocide Convention could not have been in force with regard to the FRY, given that the FRY had not even existed prior to 27 April 1992.

102. Croatia now attempts to circumvent this result by relying on Article 10, paragraph 2, of the ILC Articles. Yet, this norm only regulates the *secondary* question of attribution. The secondary question of attribution can however only come up once a violation of a primary obligation has previously been determined.

103. The issue of a violation of the Genocide Convention with regard to acts prior to 27 April 1992 simply cannot arise, however, because the FRY was not yet existing and could thus not have yet been bound by the Convention. The alleged movement, in turn, to state the obvious, could not have been a party to the Genocide Convention at all.

104. It is however only with regard to violations of the Genocide Convention that the Court may eventually exercise its jurisdiction under Article IX of the Convention. Yet, a movement, insurrectional or otherwise, cannot, as a matter of simple logic, commit violations of a treaty by which it is not bound and cannot even be bound.

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[85]Paragraph 4 of the ILC's introductory Commentary to the Articles on State Responsibility, reproduced in UN doc A/56/10, pp. 43 *et seq*.

105. Madam President, what the Applicant has tried is to blur the crucial and essential distinction between a possible violation of a primary obligation on the one hand and the question of attribution on the other. As a matter of fact, Croatia has used the secondary rule contained in Article 10, paragraph 2, to imply that the obligations contained in the Genocide Convention and accordingly the Court's jurisdiction could be extended to a period in time in which the Respondent in this case did not even exist. It did so by arguing that alleged genocidal acts committed by the so-called movement prior to the coming into existence of the Respondent can be attributed to the respondent State.

106. Let us assume for one moment, be it only *arguendo*, that the alleged movement indeed was a movement within the meaning of Article 10, paragraph 2, and that indeed this movement did commit genocidal acts. These genocidal acts could then indeed be attributed to the Respondent and would give rise to State responsibility for those genocidal acts. Yet, this could still not give rise to the Court's jurisdiction because the movement could not have not been bound by the Genocide Convention as not being a contracting party thereof.

107. Accordingly, even assuming there was attribution within the meaning of Article 10, paragraph 2, the Court could still for that reason alone not exercise its jurisdiction which is limited to violations of the Genocide Convention as such.

108. Madam President, this jurisdictional objection I just outlined to you is solely and exclusively related to the exercise of the Court's jurisdiction. Deciding it does not presuppose any factual findings whatsoever but simply is a matter of legal logic. As a matter of fact it was already Judge Fitzmaurice in the *Northern Cameroons* case that confirmed that "a claim . . . would have to be ruled out as inadmissible so soon as it became clear that it related to a period in respect of which it was impossible *a priori* for the defendant State to be under any obligation" (*Northern Cameroons (Cameroon* v. *United Kingdom), Preliminary Objections, Judgment*, *I.C.J. Reports 1963*, separate opinion of Judge Sir Gerald Fitzmaurice, p. 129).

109. Madam President, honourable Members of this Court, this concludes my argument. My colleague, Tibor Varady, will now demonstrate that there is yet another argument why Article 10, paragraph 2, of the ILC Articles cannot be applied to the case at hand, namely because there was not even at any relevant point in time a "movement" within the meaning of Article 10, paragraph 2.

Thank you very much.

The PRESIDENT: Thank you, Professor Zimmermann. I now call Professor Varady.

Mr. VARADY:

JURISDICTION CANNOT BE EXTENDED RETROACTIVELY ON THE GROUND OF ARTICLE 10 OF THE ILC ARTICLES

A. Introduction

1. Madam President, distinguished Members of the Court, I would like to support with some more arguments and from a different angle our second preliminary objection. Professor Crawford emphasized yesterday that "the relevant rule is codified in Article 10 of the ILC Articles on State Responsibility". He also cites Article 10 and submits that its second paragraph is applicable to the circumstances of our case. With due respect, and this is not just a turn of phrase, the authority of Professor Crawford does mandate respect, I would like to demonstrate, however, that this is not applicable.

2. Madam President, Members of the Court, in order to establish jurisdiction over a person, the person in question has to be appropriately qualified. It has to have access to the Court: it has to be bound by consent. But there is also another qualification. Claims against a respondent can only be admissible if these claims are directed against the same person who is invited to appear as a respondent. This obvious requirement is missing if the respondent is Serbia, while the claims are directed against a "Serbian nationalist movement". In other words, this evident prerequisite simply *cannot be met* if the respondent State did not exist at the time period to which the claims are linked. One cannot have jurisdiction towards a State regarding acts which were committed before that State came into existence. Such claims must also be inadmissible.

3. We are aware that there is an exception to almost every principle. The question has arisen with regard to specific situations prior to independence, before coming to existence as a State. In his treatise on "The Law and Practice of the International Court" Shabtai Rosenne submits that the date of independence as a State is not "automatically and for all purposes the exclusion date", and

explains that jurisdiction of an international court could conceivably reach back to a date before independence in some cases when a former movement becomes the new State[86].

4. Rosenne hastens to add, however, that: "Nevertheless, as a matter of general principle the Court should not be quick in exercising jurisdiction over disputes originating before or relating to situations and facts occurring before the beginning of a party's existence as a State." And then he continues:

> "The reason why this principle is presupposed is found in the undoubted connection that always exists between legal responsibility and legal personality, and in international law between international responsibility and international personality. It is that connection above all which speaks against retroactivity into a period during which that essential factor was missing."[87]

5. The picture is clear. Jurisdiction should not be extended, as a matter of principle, into a period in which international personality was missing — the State did not exist. Exceptions may exist in specific situations in which insurrection movements develop into a State, but such exceptions should not be made lightly.

6. Madam President, it appears that the Parties agree that the ILC Articles on State Responsibility have identified those specific situations in which the issue of the responsibility of a State may be raised retroactively, regarding conduct which preceded existence. We shall now demonstrate that the ILC Articles do not and cannot substantiate the claim that jurisdiction can be extended retroactively to a period prior to 27 April 1992.

B. Neither the concept itself nor the three indispensable elements of the concept are fitting

7. Madam President, Article 10 describes two situations in which the conduct of an insurrectional movement may be ascribed to a future State. They are explained in more details in the Commentaries which accompany the Articles[88]. Paragraphs 1 and 2 address two scenarios. Croatia opted to rely on the scenario of paragraph 2, and cites paragraph 2 in its Written Observations[89].

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[86]Shabtai Rosenne, *The Law and Practice of the International Court*, 1920-2005, Vol. II, Jurisdiction, M. Nijhoff Publishers, 2006, p. 919.

[87]*Ibid.*, p. 920.

[88]Crawford, J., *The International Law Commissions Articles on State Responsibility — Introduction, Text and Commentaries*, 2002, Cambridge University Press (hereinafter "Commentary").

[89]See Written Observations, para. 3.21.

8. With regard to paragraph 2, the Commentary explains:

> "Paragraph 2 of Article 10 addresses the second scenario, where structures of the insurrectional or other revolutionary movement become those of the new State, constituted by secession or decolonisation in part of the territory which was previously subject to the sovereignty or administration of the predecessor State."[90]

9. Paragraph 2 sets three essential elements:

(a) the conduct in question has to be the conduct of a movement striving to establish a new State in part of the territory of a pre-existing State;

(b) this movement has to be an insurrectional or like movement; and

(c) this movement has to be successful.

10. It is clear that all three elements are necessary preconditions to the applications of the norm formulated in Article 10 (2). The conduct of an insurrectional movement can only be ascribed to the new State if the situation matches the scenario specified in Article 10 (2). If only one of the elements is missing, this is not any more the scenario contemplated in the norm of Article 10 (2). We shall demonstrate, Madam President, that *none* of the essential elements described in Article 10 (2) is matching the given circumstances of our case.

B.1. No "movement" aiming to establish the FRY as a new State

11. Attempts to stretch the wording of Article 10 (2) to the actual facts encounter a stumbling block already at the very first step. Article 10 (2) speaks of movements striving to establish a new State in part of the territory of a pre-existing State. In order to ascribe to the Respondent conduct which took place before the FRY came into being, one would first have to demonstrate that a movement aiming to establish the FRY as a new State existed. No such movement has, however, been identified, or could have been identified.

12. Where the Applicant presents arguments in the context of Article 10, the word "movement" appears, but the references remain elusive and unspecified. An attempt to describe the "movement" in question was made in the Written Observations. It is stated (in para. 3.33):

> "There can be no doubt that the Serbian nationalist movement that ultimately succeeded in establishing the FRY (Serbia and Montenegro) as a new State can be regarded as falling within the scope of an 'insurrectional or other' movement for the purposes of Article 10, paragraph 2 of the ILC Articles."

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[90] *Ibid.*

13. Madam President, there was no movement, there was no structure, during the conflict called "Serbian nationalist movement". Admittedly, a movement could conceivably exist, without having a name. This would be quite unprecedented, but even if this were the case, one would have to define the movement somehow. The Applicant has given no definition. Only a name is given which has not been the name of any movement. The simple reason for lack of definition is that no definition *can* be given which would fit the purpose of the Applicant. There was no movement which aimed at and succeeded in establishing the FRY.

14. Furthermore, in order to propose a construction which would be compatible with Article 10, it is clearly necessary to identify a movement which is — as stated in the Commentary — in "continuing struggle with the constituted authority"[91]. This essential characteristic is also obviously missing. The "movement" suggested by the Applicant is clearly not such a movement, not even in the words of the Applicant. Whatever we are talking about in this case, it is certainly not a struggle between the said movement and the constituted authority. There was no such struggle.

B.2. No insurrection or like movement

15. Even if one could somehow overcome the lack of a relevant and identifiable movement aiming to establish the FRY as a new State, and even if a relevant movement existed, *(quid non),* such movement could not have had a character which would fit under Article 10 (2). It is clear that the FRY was not created by an insurrection. Being aware of the fact that the notion of insurrectional movement is not fitting, Croatia stresses that the definition of Article 10 (2) mentions "insurrectional or other" movements. This is, of course, a fact. But it is also a fact that a context is defined with the "insurrectional or other" movement. This context is explained in the Commentary, which speaks of "insurrectional or other *revolutionary* movement"[92]. It cannot be any movement; it has to be some movement challenging the established order.

16. Furthermore, the context and the framework of Article 10 (2) assume some insurrection, some uprising, some challenge *on the territory which becomes the new State.* Again, the pattern is

[91]Commentary, p. 116, para. 2.

[92]Commentary, p. 118, para. 8; emphasis added.

not fitting. There was no insurrection or revolution in the FRY (in Serbia and Montenegro), the conflict was *not* in Serbia and Montenegro.

17. Explaining the position of insurrectional or similar movements towards the pre-existing State, and explaining when the conduct will be ascribed to the emerging State, the Commentary speaks of "[t]he conduct of such movements during the continuing struggle with the constituted authority . . ."[93]. It is common ground that the pre-existing State, the constituted authority, was the SFRY, the former Yugoslavia. But Serbian forces were certainly not "in a continuing struggle" with the SFRY. The conduct which is the subject-matter of the claim is clearly not a conduct "during struggle with the constituted authority". The FRY (now Serbia) is not charged for acts allegedly committed against the "constituted authority", which are the authorities of the former Yugoslavia. Again, the pattern is just not fitting.

B.3. There was no success

18. Another key element of the scenario contemplated under Article 10 (2) is *success.* The wording of Article 10 (2) states this explicitly, and this has also received much emphasis in the Commentary. The Commentary describes the situation regulated by Article 10 (2) as a situation "[W]here the insurrectional or other movement *succeeds* in establishing a new State . . ."[94] The Commentary cites cases in support of the proposed rules, and all cases cited in the Commentary give emphasis to success as a requirement[95]. But where is success in our case?

19. Madam President, the element of success is patently missing in our case. A successful movement is a movement which achieves its aims. This means that what was envisaged and claimed was also accomplished. The question arises as to what were the aims of the "Serbian nationalist movement led by President Milošević", as it was stated. Had there really been an insurrection movement in the sense of Article 10 (2), this would have been easy to establish. But this was not the case.

20. Nevertheless, the question whether there was success can easily be answered. It can easily be answered because it is obvious that the conflict did not end with a success of Serbian

[93]Commentary, p. 116, para. 2.

[94]Commentary, p. 117, para. 6; emphasis added.

[95]Commentary, pp. 119-120, paras. 12-13.

nationalism — notwithstanding whether this Serbian nationalism did or did not yield a movement compatible with the concept and scenario of Article 10 (2).

21. There was no success notwithstanding whether one accepts as the aim the one asserted by Mr. Milošević and his associates (the preservation of the SFRY), or the one asserted by Croatia to be the real aim of the "Serbian nationalist movement led by President Milošević".

22. It does not need to be demonstrated that the former Yugoslavia was not preserved. It was dissolved. It fell apart. If one were to accept for the sake of argument the allegation of Croatia that the actual aim of the "Serbian nationalist movement" was a "Greater Serbia"[96], there is again nothing like success. No "Greater Serbia" came into being. No part of Croatia, no part of Bosnia and Herzegovina or of Macedonia became part of Serbia. This is obvious.

23. Madam President, there may be things which remained unclarified during the conflict in the former Yugoslavia, but one thing is certain. The conflict did not end with the success of the Serbian aspirations. Being aware of the requirement of success, and trying to construe some resemblance of success, the Applicant suggested in its Written Observations that "the Serbian nationalist movement ultimately succeeded in establishing the FRY"[97]. But this "success" does not correspond to any stated or unstated aim or purpose. This is not compatible with logic either. There was no need to have an "insurrection or other movement" in order to establish the FRY as a State. Neither Croatia nor other republics of the former Yugoslavia opposed this.

C. Conclusions

24. Madam President, distinguished Members of the Court, the rule of Article 10 was designed to deal with situations in which new States are emerging by secession or decolonization. This is stated expressly in the Commentary[98]. Article 10 was not designed to encompass all possible conflicts, or all variations of decomposition of States. Thus, it should not be perceived as unusual, or unexpected, if the specific circumstances of the dissolution of a Balkan State do not fit under the pattern of Article 10 (2). None of the elements of the scenario contemplated in Article 10 (2) match the situation at issue in this dispute.

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[96]See, e.g., Memorial, paras. 1.26, 2.04, 2.44, 2.71, 2.86, 3.03, 3.71, and 3.80.

[97]See Written Observations, para. 3.33.

[98]Commentary, p. 118, para. 8.

25. Nothing fits, because nothing *can* fit on a wrong track. The framers of the ILC Articles intended to create an exception having in mind a given type of situation. In the Commentary, it is stated explicitly that the scenario addressed in Article 10 (2) is that "[w]here the structures of the insurrectional or other revolutionary movement become those of a new State, constituted by secession or decolonization . . ."[99]. The situation we have in front of us is a completely different one.

26. This is why not even a flexible interpretation of Article 10 (2) could yield a different result. No element is fitting. To begin with, there was no Serbian nationalist movement aiming to establish the FRY as a new State.

27. Furthermore, the term insurrection may be broadly interpreted, but it cannot mean the opposite. One cannot propose — as Croatia does — that the authorities and the army *of the pre-existing State* (the SFRY) committed misdeeds under the control of the "Serbian nationalist movement", *and* at the same time posit the "Serbian nationalist movement" as an insurrection, a revolutionary or like movement challenging the same pre-existing State.

28. Likewise, success can again be broadly interpreted, but, again, it cannot mean the opposite. Serbian nationalism did not succeed.

29. Madam President, Members of the Court, Article 10 envisages a pattern, a certain set of circumstances. The facts of this case just do not fit under this pattern. Article 10 (2) cannot be applied to the circumstances of our case, and *Article 10 (2) cannot justify retroactive extension of jurisdiction to conduct preceding the emergence of the FRY as a State.*

CONCLUSIONS

1. With your permission, Madam President, I shall move to our conclusions. I would like to start my closing remarks with a short reference to some policy arguments advanced by Croatia. In his introductory speech, Professor Šimonović submitted that the establishment of legal responsibility by this Court "will lay the ground for sustainable peace, stability and good neighbourly relations"[100]. We believe that this proposition deserves respectful consideration. But

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[99] *Ibid.*

[100] CR 2008/10, p. 8, para. 5 (Šimonović).

let me also say that the past decades have shown that it is just not easy to predict what measure or decision will bring us closer to peace in our region. The argument could also be made that in our region — and maybe not only in our region — a continued confrontation of States stirs up passions, and it may also be perceived as a continuation of ethnic rivalries.

2. It is just not easy to predict what will contribute most to peace. Justice is certainly conducive to peace. But justice assumes a comprehensive look. The alleged jurisdiction of the Court in this case is restricted to genocide and, as we have pointed out, the ICTY undertook a thorough scrutiny of misdeeds in Croatia, but not one single person was convicted, or even indicted for genocide in Croatia. There is prima facie no genocide. Hence, this avenue of justice which has a distinct dignity, and which has already given invaluable contributions to both the perception and to the resolution of the Balkan conflicts, may not be the best suited to the specific circumstances of this dispute.

3. Furthermore, both Serbia and Croatia have made quite considerable progress since the days of the conflict, and improved their mutual relations. One wonders what could be the effects at this moment of embarking on the merits of a dispute between two States with a focus on accusations for genocide.

4. Madam President, there is a shared belief today that international crimes should not go unpunished. This belief has become a part of our civilization, and has a critical importance. But this does not mean that there is — or there should be — only one avenue in dealing with perpetrators of international crimes. I would like to refer at this point to a statement in the joint separate opinion submitted in the *Arrest Warrant* case:

> "the international consensus that the perpetrators of international crimes should not go unpunished is being advanced by a flexible strategy, in which newly established international criminal tribunals, treaty obligations and national courts all have their part to play. We reject the suggestion that the battle against impunity is 'made over' to international treaties and tribunals, with national courts having no competence in such matters." (*Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo* v. *Belgium), Judgment, I.C.J. Reports 2002*, joint separate opinion of Judges Higgins, Kooijmans and Buergenthal, pp. 78-79, para. 51.)

There is no jurisdiction in this case

5. Madam President, Members of the Court, the point I am trying to make is that there are, indeed, various policy considerations, which may be juxtaposed. The battle against impunity requires a flexible strategy, considering more possible avenues of decision making. But let me also add that the question which is now in front of us is an eminently legal question.

6. We trust — and we endeavoured to demonstrate — that this Court has no jurisdiction in this case. We pointed out two major reasons, each of which is sufficient to support a conclusion of lack of jurisdiction.

7. First, this Court has no jurisdiction because the Respondent was not a party to the Statute, and had no access to the Court at the time when the Application was submitted. Hence, a fundamental precondition to the exercise of its judicial function is missing. The Court was not validly seised. *Post factum* developments may conceivably be considered by a judicial mechanism which was properly put into motion. This was not the case here. The Court was not validly seised, it did not acquire *compétence de la compétence*, which would have possibly allowed it to consider new developments, and to decide on jurisdiction.

8. Second, this Court has no jurisdiction, because there is no basis for jurisdiction. Madam President, the only basis for jurisdiction is consent. Speaking of the reality of consent, Fitzmaurice came to the following conclusion: "To sum up — what is required, if injustice is not to be done to one party or the other, is neither restricted nor liberal interpretations of jurisdictional clauses, but *strict proof* of consent."[101] This appears to be the right standard. But even if one were to adopt a liberal or extensive interpretation, no consent could be shown in our case. The proposition of continuity could have yielded jurisdiction, but it was unequivocally rejected. Rejection certainly does not create consent.

9. When the FRY accepted the proposition that it can only become a party to treaties by specific treaty action, it opted to be bound by the Genocide Convention — but it also opted not to be bound by Article IX, which is the purported basis of consent, and hence, of jurisdiction in this case. This was made clear and explicit in the reservation, which is an integral part of the notification of accession. It is a matter of public record that the FRY (now Serbia) is a party to the

[101] Fitzmaurice, "The Law and Procedure of the International Court of Justice, 1951-4: Questions of Jurisdiction, Competence and Procedure," 34 *BYBIL*, 1958, p. 88.

Genocide Convention since March 2001, with a reservation to Article IX. Madam President, in some cases, one can conceivably construe a less than clear acceptance as consent, but it is just not possible to construe a denial of consent as consent.

10. In addition to our first preliminary objection, we have demonstrated that claims relating to a period prior to 27 April 1992 are inadmissible, and the Court has no jurisdiction *ratione temporis* regarding these claims. We have also demonstrated that one cannot possibly extend claims prior to existence on the ground of Article 10 (2) of the ILC Articles, because the actual circumstances simply cannot be fitted under Article 10. None of the requirements of Article 10 (2) is met or matched by the actual facts.

11. In our third preliminary objection, we proved that the claims regarding submission to trial of responsible persons, regarding missing persons, and regarding cultural property, are both inadmissible and beyond the jurisdiction of this Court.

The issue of consistency

12. Madam President, almost two decades have passed since the process of dissolution of the former Yugoslavia began. This process was marked by heated controversies, and also by human tragedies. There are practically no international authorities and no organizations that did not have to take a position with regard to problems from conflict in the former Yugoslavia. This honoured Court is certainly no exception. For a considerable time period it was difficult to take positions, because it was difficult to fit an unorthodox situation into patterns, because there was a bitter conflict between the perceptions that were submitted, because clarifications were belated. It is most understandable that the steps taken by various international authorities and organizations were marked both by a striving for consistency, and by the difficulties in achieving consistency.

13. Speaking of consistency, trying to posit the 1996 *Bosnia* Judgment as a precedent, the Applicant is relying on the aspiration for consistency. Looking for some support for its position, the Applicant puts emphasis on the *Bosnia* case, in which it was assumed in 1996 that the FRY was a party to the Genocide Convention and had access to the Court. I would like to present arguments showing that the decisions in the *Bosnia* case cannot be invoked as a precedent in any sense, and do not support the contentions of the Applicant.

14. In order to rely on a precedent, one obviously has to compare the exact issues which were decided, with those issues which have to be decided in the case at Bar. If these issues do not match, one has to distinguish a precedent, rather than to rely on it. This was put in plain and convincing words by Judge Shahabuddeen, in his monograph entitled *Precedent in the World Court*. Commenting on the *Certain Norwegian Loans* Judgment, which was also a judgment on jurisdiction, Shahabuddeen stresses: "Thus, one way of distinguishing a precedent is to show that, although the decision might appear on the surface to be applicable, it was nevertheless one in which the specific legal point was not the subject of consideration."[102]

15. Hence, in order to establish whether the holdings of the *Bosnia* Judgments support the contentions of the Applicant in this case, one first has to take a closer look, and to identify what the specific legal points raised in the *Bosnia* case were, and to compare them with the assertions submitted by the Applicant in this case. The Applicant presented an impressive list of cases related to the Bosnian conflict. A closer look will first reveal that the list of cases which deal with the issues presented in this case, is actually much shorter than the list suggested by the Applicant. The provisional measures cases only took a tentative position on issues of access and jurisdiction. The *Revision* case and the 2007 final Judgment did not open the issue of jurisdiction, they actually refused to do so. So, this long list which was meant to be impressive is actually reduced to the 1996 Judgment. Furthermore, it is not easy to compare the "legal points" considered in the 1996 case with the legal points formulated in our case — because no clear legal justification of the basis of jurisdiction was offered by the Applicant in our case.

16. It is certain, however, that "automatic succession" or the qualification of the 1992 declaration and Note as notification of succession were not what the 1996 *Bosnia* Judgment established, and what the 2007 *Bosnia* Judgment took as *res judicata*. These legal points were "not the subject of consideration" in the 1996 *Bosnia* Judgment on jurisdiction.

17. Let us now take a look at the issue of access. The issue of access was not raised at all in the 1996 *Bosnia* Judgment. But let us take a further step, and let us ask whether the logic of the assertions of the Applicant in this case was confirmed in any direct — or even indirect — way by

[102] Shahabuddeen, M., *Precedent in the World Court*, (1996), Cambridge University Press, p. 119.

the *Bosnia* case, or by the underlying assumption of the *Bosnia* case? The answer is again clearly negative. One of the two main assertions of the Applicant in this case is reliance on Article 35 (2) of the Statute. The 1996 *Bosnia* Judgment offers no support whatsoever for this proposition. The second principal legal point is the "*Mavrommatis* principle", that is the assertion that although the Respondent may not have been a party to the Statute and may not have had access to the Court at the time when the Application was submitted, it became a party to the Statute at a later moment, and this allows the Court to remedy the initial deficiency. Was this legal point confirmed in the *Bosnia* case? Is the *Bosnia* case a precedent in any sense? Certainly not.

18. Madam President, holding that although the Respondent was not a party to the Statute at the time of the Application and assuming that this can be remedied before a judgment on jurisdiction was rendered, would certainly not be consistent, it would not be even compatible with the logic of the 1996 *Bosnia* Judgment. In the 1996 *Bosnia* Judgment the issue of access was not raised or discussed. It is possible to interpret the *Bosnia* Judgment as a judgment in which — in the absence of contestation — it was assumed that the Respondent was a party to the Statute, and hence it had access to the Court. But it is really beyond any logic or even imagination to interpret the 1996 Judgment as a judgment based on the proposition that, although the FRY was not a party to the Statute when the Application was submitted, which is 20 March 1993, this deficiency was remedied, because the FRY somehow became a party to the Statute between 1993 and 11 July 1996 when the Judgment on jurisdiction was rendered.

19. Madam President, let me put emphasis on another reason for which the 1996 *Bosnia* Judgment cannot be a point of reliance or yardstick of consistency. The assumptions which were conceivable 12 years ago, are not conceivable anymore today. Consistency is also consistency with what is known and accepted as true. What is known and accepted as true today is not the same thing as 12 years ago. It is common ground today that one may distinguish two periods in the perception of the Yugoslav conflict. We have already referred to a persuasive characterization given by this Court in the 2004 *Legality of Use of Force* Judgments. In this assessment the Court identified the first period as that between 1992 and 2000, and added:

> "In fact, it is the view of the Court that the legal situation that obtained within the United Nations during that eight-year period concerning the status of the Federal Republic of Yugoslavia, after the break-up of the Socialist Federal Republic of

Yugoslavia, remained ambiguous and open to different assessments." (*Legality of Use of Force (Serbia and Montenegro* v. *Belgium)*, *Preliminary Objections, Judgment, I.C.J. Reports 2004*, p. 305, para. 64.)[103]

20. Since that period, we have a new period of eight years behind us in which authoritative determinations by competent organs of the United Nations were made, and a dependable perception became accepted. In this new period, a consensus was reached that the FRY was not a party to the United Nations and was not a party to the Statute prior to 1 November 2000, and consequences have been drawn from these conclusions. In the *Bosnia* case, the Court had to take a position on jurisdiction during the period of ambiguities. The *Legality of Use of Force* cases belong to the new period in which the Court had the benefit of conclusive clarifications. Our present case — and all decisions to be taken in this case — belong to this new period.

21. Consistency simply cannot be found between the allegations of the Applicant in this case on one hand, and the *Bosnia* Judgments (or the underlying assumptions of the *Bosnia* Judgments) on the other hand. There is no consistency in this direction. But consistency can, indeed, be found in another direction.

22. Madam President, during the 1990s, one of the strongest priorities of the Yugoslav and Croatian diplomacy were two confronted principles, two confronted perceptions of the dissolution of the former Yugoslavia. The FRY asserted continuity, and spared no effort to emphasize this. It failed to depart from the track of continuity even in the preliminary objections phase of the *Bosnia* case, when this was to its own detriment, and when neither of the parties raised the critical issues, or attempted to provide the Court with elucidations which were missing and needed at that time. At the same time, Croatia insisted that there was no continuity, spared no effort in denying continuity, and advanced, instead, the principle of five equal successors.

23. The principle asserted by the FRY did not yield more than some ambiguities and postponements. The principle asserted by Croatia and the other successor States prevailed, and became generally accepted. As we stated earlier, in its letter of 16 February 1994 addressed to the Secretary-General in his capacity of depositary, Croatia criticized the FRY stating that it has

[103]Exactly the same text can be found in the other 2004 *Legality of Use of Force* Judgments as well: in paragraph 63 of the cases with France, Canada, Italy, Netherlands, Portugal, and in paragraph 62 of the cases with Germany and the United Kingdom.

> "not acted according to rules of international law and the . . . resolutions of the Security Council and of the General Assembly. Moreover, it has ignored them and tried to participate in international forums as a State party to treaties . . ."

on the ground of the assertion of continuity. Having rejected the claim to continuity, Croatia concluded that if the FRY really wished to be a party to treaties as a new State, it should submit notifications of succession, which "Croatia would fully respect"[104].

24. And this is what eventually the FRY did. It abandoned its reliance on continuity, which did not yield membership in international organizations and did not yield the status of a party to treaties. Instead, accepting the position of a new State, it applied for membership in the United Nations and in international organizations. After it was invited by the Legal Counsel to "undertake treaty actions, as appropriate . . . if its intention is to assume the relevant legal rights and obligations as a successor State"[105], the FRY undertook specific treaty actions by notifications of succession or accession to each and every treaty to which the FRY wanted to be a party. The question is now whether Croatia "would fully respect" this course of action (as it said it would do), and whether it would accept the result of the perception that there was no continuity, that there are five equal successor States, five new States. Lack of continuity means there is no continued membership in international organizations, no continued status in treaties — but it also means that the new State may choose whether it will or will not apply for membership in international organizations, and whether it will succeed or accede to specific treaties. This applies to the Genocide Convention as well. This also applies to hundreds of other treaty actions undertaken by the FRY in 2001 which were duly accepted and remained uncontested until now and which would all of a sudden be posited as being without effect and purpose if one were to assume that the 1992 declaration somehow made the FRY a party to treaties.

25. Madam President, the principle asserted among others by Croatia, which became generally accepted, is the only possible foundation of consistency. There would be no consistency however if one were to hold that this principle applies in all circumstances — except at one point where this is inconvenient for Croatia.

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[104]See letter dated 16 February 1994 from the Permanent Representative of Croatia to the United Nations addressed to the Secretary-General, United Nations doc. S/1994/198 (19 Feb. 1994) — cited in our Concluding Remarks on 26 May 2008.

[105]Letter of the Legal Counsel of the United Nations addressed to the Minister for Foreign Affairs of the Federal Republic of Yugoslavia, dated 8 Dec. 2000, submitted as Ann. 23 of our Preliminary Objections.

Madam President, distinguished Members of the Court, I have reached 1 o'clock and I have maybe five minutes more at the most if you would allow me?

The PRESIDENT: Certainly.

Mr. VARADY: Thank you very much.

26. There has been a tragic sequence of Yugoslav conflicts that have also reached the attention of this Court as a legal confrontation between States. Within this sequence, the conflict in Croatia was the first one to arise. It started in 1991. After 17 years, it is the only remaining one. We believe that this sequence of confrontations can be ended at this point — and this can be done on a firm and convincing legal ground.

27. Madam President, this is a case in which the Respondent had no access to the Court at the time of the institution of the proceedings, and hence, the Court was not properly seised. This is a case in which the only alleged basis of jurisdiction is Article IX of the Genocide Convention, and it is known that the Respondent acceded to the Convention with a reservation to Article IX. This is a case in which a considerable number of claims relate to a period in which the Respondent simply did not exist — and some claims relate to a period in which the Applicant did not exist either. Again, a considerable number of claims are inadmissible, and also moot, due to the work of the ICTY, due to the work of courts both in Serbia and in Croatia, and due to successful co-operative efforts of the parties. This is also a case in which the only alleged basis of jurisdiction would direct the scrutiny of the Court to genocide, yet during more than ten years of thorough work, the ICTY has not found reason to issue any single indictment for genocide in connection with acts committed during the conflict in Croatia. The time has come to conclude the sequence of legal confrontations born out of the conflicts in the former Yugoslavia. There is no reason to continue it, and there is no legal ground on which it could be continued. I am respectfully asking this Court to decline jurisdiction in this case.

28. And now with your permission, I will submit our final submissions. For the reasons given in its written submissions and its oral pleadings, Serbia requests the Court to adjudge and declare, first, that the Court lacks jurisdiction, or in the alternative, second:

(a) that claims based on acts and omissions which took place prior to 27 April 1992 are beyond the jurisdiction of this Court and inadmissible, and

(b) that claims referring to submission to trial of certain persons within the jurisdiction of Serbia, providing information regarding the whereabouts of missing Croatian citizens and return of cultural property are beyond the jurisdiction of this Court and inadmissible.

Thank you very much for your kind attention.

The PRESIDENT: Thank you very much, Professor Varady.

This concludes the second round of Serbia and tomorrow morning the Court will meet at 10 o'clock to hear the second round submissions of Croatia.

The Court now rises.

The Court rose at 1.05 p.m.