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International Court of Justice

THE HAGUE

Cour internationale de Justice

LA HAYE

YEAR 2008

Public sitting

held on Friday 30 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 vendredi 30 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

The Government of the Republic of Croatia is represented by:

H.E. Mr. Ivan Šimonović, Ambassador, Professor of Law at the University of Zagreb Law Faculty,

as Agent;

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

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

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

as Co-Agents;

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

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

as Counsel and Advocates;

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

Ms Anjolie Singh, Member of the Indian Bar,

as Counsel;

Mr. Ivan Salopek, Third Secretary of the Embassy of the Republic of Croatia in the Kingdom of the Netherlands,

Ms Jana Špero, Ministry of Justice, Directorate for Co-operation with International Criminal Courts,

as Advisers.

The Government of the Republic of Serbia is represented by:

Mr. Tibor Varady, S.J.D. (Harvard), Professor of Law at the Central European University, Budapest and Emory University, Atlanta,

as Agent;

Mr. Saša Obradović, First Counsellor of the Embassy of the Republic of Serbia in the Kingdom of the Netherlands,

as Co-Agent;

Le Gouvernement de la République de Croatie est représenté par :

S. Exc. M. Ivan Šimonović, ambassadeur, professeur de droit à la faculté de droit de l'Université de Zagreb,

comme agent ;

S. Exc. Mme Andreja Metelko-Zgombić, ambassadeur, chef du service de droit international du ministère des affaires étrangères et de l'intégration européenne,

Mme Maja Seršić, professeur de droit à la faculté de droit de l'Université de Zagreb,

S. Exc. M. Frane Krnić, ambassadeur de la République de Croatie auprès du Royaume des Pays-Bas,

comme coagents ;

M. James Crawford, S.C., professeur de droit international, titulaire de la chaire Whewell à l'Université de Cambridge, avocat, Matrix Chambers,

M. Philippe Sands, Q.C., professeur de droit au University College de Londres, avocat, Matrix Chambers,

comme conseils et avocats ;

M. Mirjan Damaska, professeur de droit, titulaire de la chaire Sterling, Yale Law School,

Mme Anjolie Singh, membre du barreau indien,

comme conseils ;

M. Ivan Salopek, troisième secrétaire à l'ambassade de Croatie aux Pays-Bas,

Mme Jana Špero, direction de la coopération avec la Cour pénale internationale au ministère de la justice,

comme conseillers.

Le Gouvernement de la République de Serbie est représenté par :

M. Tibor Varady, S.J.D. (Harvard), professeur de droit à l'Université d'Europe centrale de Budapest et à l'Université Emory d'Atlanta,

comme agent ;

M. Saša Obradović, premier conseiller à l'ambassade de la République de Serbie au Royaume des Pays-Bas,

comme coagent ;

Mr. Andreas Zimmermann, LL.M. (Harvard), Professor of Law at the University of Kiel, Director of the Walther-Schücking Institute,

Mr. Vladimir Djerić, LL.M. (Michigan), Attorney at Law, Mikijelj, Janković and Bogdanović, Belgrade, President of the International Law Association of Serbia,

as Counsel and Advocates;

H.E. Mr. Radoslav Stojanović, S.J.D., Ambassador of the Republic of Serbia to the Kingdom of the Netherlands, Professor at the Belgrade University School of Law,

Ms Sanja Milinković, LL.M., Ambassador, Head of the International Legal Service of the Ministry of Foreign Affairs of the Republic of Serbia,

Mr. Vladimir Cvetković, First Secretary of the Embassy of the Republic of Serbia in the Kingdom of the Netherlands,

Ms Jelena Jolić, M.Sc. (London School of Economics and Political Science),

Mr. Igor Olujić, Attorney at Law, Belgrade,

Mr. Svetislav Rabrenović, LL.M. (Michigan),

Mr. Christian J. Tams, LL.M., Ph.D. (Cambridge), Walther-Schücking Institute, University of Kiel,

Ms Dina Dobrković, LL.B.,

as Advisers.

M. Andreas Zimmermann, LL.M. (Harvard), professeur de droit à l'Université de Kiel, directeur de l'Institut Walther-Schücking,

M. Vladimir Djerić, LL.M. (Michigan), avocat, cabinet Mikijelj, Janković & Bogdanović, Belgrade, et président de l'association de droit international de la Serbie,

comme conseils et avocats ;

S. Exc. M. Radoslav Stojanović, S.J.D., ambassadeur de la République de Serbie auprès du Royaume des Pays-Bas, professeur à la faculté de droit de l'Université de Belgrade,

Mme Sanja Milinković, LL.M., ambassadeur, chef du service juridique international du ministère des affaires étrangères de la République de Serbie,

M. Vladimir Cvetković, premier secrétaire à l'ambassade de la République de Serbie au Royaume des Pays-Bas,

Mme Jelena Jolić, M.Sc. (London School of Economics and Political Science),

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M. Svetislav Rabrenović, LL.M. (Michigan),

M. Christian J. Tams, LL.M., Ph.D. (Cambridge), Institut Walther-Schücking, Université de Kiel,

Mme Dina Dobrković, LL.B,

comme conseillers.

The PRESIDENT: Please be seated. The sitting is open. The Court meets today to hear the second round of the oral arguments of Croatia and I now give the floor to His Excellency Mr. Šimonović, the Agent of Croatia.

I had thought Mr. Šimonović might wish to introduce the second round team but we will go straight to Professor Sands.

Mr. SANDS:

1. Thank you very much, Madam President and Members of the Court, we note that yesterday Serbia finally felt able to respond to the invitation set forth in the Registrar's letter of 6 May last. We had expected Serbia to do so on Monday, and we listened with admiration to the results of the preparation and research that were somehow squeezed into the very short period of time between the close of our first round, and the opening of their second round, yesterday morning. Be that as it may, we are of course pleased to be able to respond to what they did say yesterday. We can be relatively brief in our response.

2. I will begin by addressing the application of the Genocide Convention, and the issue of access to the Court under Article 35 (1). Professor Crawford will then deal with the *Mavrommatis* point, with Article 35 (2) and a residual aspect of Serbia's non-retroactivity argument. Croatia's Agent, Ambassador Šimonović, will then briefly address Serbia's third preliminary objection and then set out some concluding remarks. Madam President, I think we will expect to be done within an hour and a half, so it may be, depending on what it is your desire, that we do not need to go beyond a coffee break.

The PRESIDENT: Yes, Professor Sands, we had assumed we would run straight through.

Mr. SANDS:

3. Before turning to the two issues I am to address, I would like to offer a small number of preliminary observations.

4. The *first* concerns the political positions adopted by Croatia during the 1990s. It is well known that Croatia, along with all the other successor States of the former SFRY, believed strongly

that all five successor States should be treated equally. This was not a matter of political expediency, as counsel for Serbia suggested[1]. Rather, it was a point of principle.

5. This brings me to a *second* preliminary observation: the consequences of your Judgment of 1996. Whatever point of principle might have inspired the political position it adopted, and whatever its assessment of the legal situation, Croatia was bound to take full account of the authoritative decisions of this Court, the principal judicial organ of the United Nations, in charting a way forward. After 1996, Croatia could simply have buried its head in the sand and ignored your Judgment, but of course it decided not to do that. How can it be criticized for that? Your 1996 Judgment made a number of important legal findings: for example, that the FRY was bound by the Genocide Convention; that Article 35 of your Statute provided no bar to the FRY's access to the Court; and, as you later described it, that the FRY had a *sui generis* relationship with the United Nations. Croatia paid very careful attention to these decisions, as it was bound to do. It relied on them as authoritative, including during the period of careful reflection that it went through in the steps of taking a decision on whether to initiate these proceedings. That important decision — the initiation of proceedings — was based on advice received, and at the heart of that advice was your 1996 Judgment. Imagine if you had decided differently — if you had decided that you had no jurisdiction, or that access to the Court was barred under Article 35 — then, of course, that too would have been a most significant factor as Croatia decided how to proceed. But that is not what you decided and now Serbia says that Croatia places too great a reliance on the 1996 Judgment[2]. And it says that in some unspecified way Croatia's previous positions should preclude the Respondent from having access to the Court, or should prevent the Court from exercising jurisdiction[3]. But why? When such a court speaks — particularly the International Court of Justice — it is entitled to the fullest respect from the Members of the United Nations, and these Members in turn are entitled to place some reliance, at least, on the approach which is taken by the Court after years of consideration, careful consideration, and several rounds of written and oral argument.

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[1]CR 2008/12, pp. 12-13 (Varady).

[2]CR 2008/12, see *inter alia* pp. 44-46 (Zimmermann).

[3]CR 2008/12, pp. 11-13, paras 8, 12-14.

6. The Respondent now seeks to minimize the Court's jurisprudence. According to Professor Varady, the Court's six decisions — this impressive, long list of cases — is actually reduced to just one, the 1996 Judgment[4]. And that case, he says, did not really address the issues we face in this case, since the 1996 Judgment, as put it, did not consider the qualification of the FRY's 1992 declaration and its accompanying Note[5]. With the greatest respect, that is not correct: the 1992 declaration and the Note were cited in *all* of the decisions in the *Bosnia and Herzegovina* case. We simply do not see how it can be argued that they were not relevant legal considerations on which the Court relied to reach its conclusion that the FRY was bound by the Genocide Convention. Indeed, the FRY itself recognized that — albeit implicitly — in a diplomatic Note that it communicated to Croatia on 19 February 1997, after your Judgment. That Note stated that the 1996 Judgment "found that the Federal Republic of Yugoslavia is a Contracting Party to the Convention on the Prevention and Punishment of the Crime of Genocide, although it has not deposited any act on succession or accession to this Convention"[6].

7. Which brings me to our third preliminary observation: we could not help but notice the nature of so many of Serbia's arguments, which persist in placing form over substance. The 1992 declaration cannot be relied upon, it is said, because it lacked certain formal prerequisites[7]. That argument is not new, and it has already been rejected. The formal modalities for the FRY's succession to the Genocide Convention, it is said, have not been met. That too is an argument that has already been made, and it too has already been rejected. The formal requirements of Article 35 of your Statute have not been met, for example in relation to membership of the United Nations. Again, form over substance. Again, rejected. Serbia is nothing if not persistent. Yet it proceeds as though international law is merely a set of legal categories into which the conduct of States is to be slotted and then assessed. It is not.

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[4]CR 2008/12, p. 63, para. 15 (Varady).

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

[6]Additional documents submitted to the Court prior to the opening of oral submissions.

[7]CR 2008/12, pp. 38-39, paras. 32, 34 (Zimmermann).

Genocide Convention

8. So, I turn now to the Genocide Convention, and the question of its application. This was addressed by Professor Zimmermann, and I hope he will forgive me if I distil his presentation into what we saw as its three component elements.

9. The first question he addressed was this: was the FRY bound by the Genocide Convention as at 2 July 1999? He says it was not[8]. And he criticizes us for having failed to provide clarity as to the basis upon which we have argued for an opposite conclusion. It might be said that on this occasion our crystal was cloudy, not clear. Croatia finds that surprising, since we thought we had been rather consistent in our approach. In the Application of 2 July 1999, Croatia based its arguments on succession on the general principles and rules of international law and on Tuesday, I reiterated that position on behalf of Croatia, and we provided authorities in support of that claim. As an alternative basis, of course, Croatia can rely on the FRY's declaration of 27 April 1992, as the Court appears to have done in its 1996 Judgment:

> "That Republic signed the Genocide Convention on 11 December 1948 and deposited its instrument of ratification, without reservation, on 29 August 1950. At the time of the proclamation of the Federal Republic of Yugoslavia, on 27 April 1992, a forma1 declaration was adopted on its behalf to the effect that:
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> > 'The Federal Republic of Yugoslavia, continuing the State, international legal and political personality of the Socialist Federal Republic of Yugoslavia, shall strictly abide by al1 the commitments that the Socialist Federal Republic of Yugoslavia assumed internationally.'
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> This intention thus expressed by Yugoslavia to remain bound by the international treaties to which the former Yugoslavia was party was confirmed in an officia1 Note of 27 April 1992 from the Permanent Mission of Yugoslavia to the United Nations, addressed to the Secretary-General." (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Preliminary Objections, Judgment, I. C. J. Reports 1996 (II)*, p. 610, para. 17.)

Now Serbia says that Croatia cannot invoke the declaration since it never placed reliance on the Note. With respect, that is not right and it is — once again — a reflection of Serbia's excessive formalism. When Croatia invoked the Court's Judgment of 1996, what was it doing if not relying on the FRY's declaration?

10. Professor Zimmermann is an advocate with a fondness for legal categories. For him, the law is no more than a series of technical issues, in which facts are applied to categories, which they

[8]CR 2008/12, p. 40, para. 36.

fit or do not fit and from which consequences then do or do not flow[9]. Would that the world of international law should be like this, but it is not. We, of course, could take the bait and engage in an elaborate academic discourse on the merits and demerits of various theories of succession. On what basis *precisely* did the FRY's succession occur? Professor Zimmermann asked[10]. On what particular *day* did it occur? he asked. We were insufficiently clear as to our methodology, he said. Well, we agree that methodology can be important, but *not* in this room, *not* for this case and *not* on this issue. These are interesting academic points he has made, but they are only that: academic points. And if we were to engage in academic argument, we should hope to do so with a greater care than did Professor Zimmermann when it came to authorities and inconsistent arguments. Yesterday, for example, he told the Court that Article 34 of the Vienna Convention on the Succession of States with Regard to Treaties did not reflect customary international law[11] and that a majority of States did not accept it[12]. He seems to have forgotten what he himself has written as an authority on this subject. His own book provides that the Article 34 rule reflects a principle which, in relation to the complete dismemberment of a State, which is the situation for the former SFRY — and I quote his words — "had already in 1978 been strongly rooted in State practice"[13].

11. The truth is that with all these academic arguments, Serbia's argument this week faces one giant, insurmountable hurdle — the Mount Everest of hurdles, one might call it — that it did not even begin to grapple with and it is this: *you*, the Court, have ruled that the FRY was bound by the Convention from the beginning of the conflict between Bosnia and Herzegovina and the FRY on no less than six occasions — in 1993 (twice), in 1996, in 1999, in 2003 and again in 2007.

12. You did not change course in your 2004: you ruled simply that you did not have to decide the point (*Legality of Use of Force (Serbia and Montenegro* v. *Belgium), Preliminary Objections, Judgment, I.C.J. Reports 2004,* , pp. 313-314, paras. 87-88). If the Convention bound the FRY in its relations with Bosnia and Herzegovina in that period, it *must* have bound the FRY in

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[9]CR 2008/12, p. 32, para. 7 and p. 33, para. 10.

[10]CR 2008/12, p. 31.

[11]CR 2008/12, p. 34, para. 16.

[12]CR 2008/12, p. 34, para. 17.

[13]A. Zimmermann, *Habilitationsschrift, Staatennachfolge in völkerrechtliche Verträge: Zugleich ein Beitrag zu den Möglichkeiten und Grenzen völkerrechtlicher Kodifikation* (Springer, 2000), p. 860 cited in *Bosnia*, Judgment of 26 February 2007, separate opinion of Judge Tomka, p. 15.

its relations with Croatia over exactly the *same* period. Serbia seems to have no answer to that. Nothing that was legally material changed between March 1993 and July 1999. Counsel for Serbia identified no relevant change — nothing — during that period. The legal situation on 2 July 1999 was exactly as it was on 20 March 1993. Fifteen years after you first ruled that the FRY was bound by the Convention, Serbia asks you — once again — to change course. The true target of this litigation is absolutely clear to us.

13. The Court's 1996 Judgment on the continuing applicability of the Genocide Convention was reasonable, it was pragmatic and it was right. Much as Professor Zimmermann might wish us to inhabit a world in which each State sets out, with absolute precision, the basis for each of its actions — such as the timing and the methodology of its succession to certain treaty obligations — the category approach to international law, as it might be called — the reality in life is different, as all of us in this room know. The infinite wisdom of international law is its flexibility, its ability to accommodate new and unforeseen circumstances whilst maintaining its coherence and strict adherence to principle. States are pragmatic, the United Nations is pragmatic, as it was during the 1990s, this Court has been pragmatic, the system of international law is pragmatic. Again, Serbia puts form over substance. The substance in this case was the FRY's attitude — no more, no less — and that attitude was to be bound by the Convention. Why the FRY had that attitude is not a juridically significant factor.

14. Professor Zimmermann mentioned the more recent Montenegrin experience. It may well be that when the time came for Montenegro to emerge into independence, the United Nations Treaty Secretariat had learnt from experience and encouraged Montenegro to issue statements with some greater degree of precision. But what Montenegro may have done in 2006 cannot have legal consequences for the FRY's succession in the early 1990s, any more than political decisions taken in late 2000 can retroactively affect the legal situation that pertained on 2 July 1999.

15. In sum, there can be no doubt that the Genocide Convention was binding on the FRY on 2 July 1999.

16. The second question that arises from Professor Zimmermann's argument is this: was the FRY bound by Article IX of the Genocide Convention as at the critical date? That should be a fairly straightforward question to answer. Just as you have decided on six occasions that the

Convention was binding on that date, so you have held that Article IX vested the Court with jurisdiction over the FRY when Bosnia and Herzegovina filed its Application. Serbia now invites you to overturn that line of decision. Serbia says that its 1992 declaration cannot be relied on — for formal reasons — and there is no automatic succession to compromissory clauses. What is the authority for that? Professor Zimmermann did not mention any by name. He referred the Court to the Respondent's Written Statement of preliminary objections[14]. We dutifully went off to have a look at those authorities. There are very few of them; none are on point. I will give you a couple of examples: one authority was said to be the views of the United Nations Legal Counsel in 1974, as reported by Professor Schachter[15]. But that objection to succession concerned *political treaties*, such as treaties of pacific settlement, and not treaties like the Genocide Convention, which falls within the category of "essentially non-political agreement . . . intended to have universal application". The second authority on which the Respondent relies was the 1974 *Yearbook* of the International Law Commission[16], which suggested that it would not be fair to impose obligations by way of succession on *"newly independent States"*. This was understandable in the context of decolonization, but we are not here dealing with such a situation and the FRY was not a newly independent State. So that, too, does not assist. Indeed, none of the small number of authorities referred to concerns a treaty such as the Genocide Convention. When one goes to inspect closely, Serbia's cupboard of authorities is bare.

17. In conclusion: there can be no doubt that on 2 July 1999 the FRY was bound by Article IX of the Genocide Convention. To hold otherwise would reverse 15 years of jurisprudence and call into question the basis for the Court's decisions in the case brought by Bosnia and Herzegovina.

18. Which brings us to the third question: assuming that the FRY was bound by the Convention, including its Article IX, does the Court have jurisdiction in relation to events occurring before 27 April 1992, which is the moment, according to Serbia, that the FRY came into being? Serbia says no, because to do so would give rise to a retroactive application of the

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[14]CR 2008/12, p. 36.

[15]FRY, Preliminary Objections, Ann. 38.

[16]FRY, Preliminary Objections, Ann. 24.

Convention to a time before the FRY existed as a State. I am not now going to repeat the arguments we made to respond to Serbia's argument on this issue. That argument we say with the greatest respect was unattractive on Tuesday, and it is unattractive today on Friday.

19. We are castigated for calling it unattractive. But it is unattractive because it creates so many problems and because it undermines the whole system of human rights protection that the world has strived with great difficulty to put in place over the last 60 years. It also has the weakness of being completely inconsistent with Serbia's own perception of its status and the circumstances of its emergence. For example, in December 1991, the European Community invited the six Yugoslav Republics to respond to an invitation extended in an EC declaration on Guidelines on the Recognition of new States in Eastern Europe and in the Soviet Union. On 23 December 1991 Serbia declined, responding that it acquired internationally recognized statehood as early as the Berlin Congress of 1878 and was not interested in secession[17]. So Serbia certainly saw itself as having some degree of international personality even before 1992. Serbia's approach as argued before the Court this week, inevitably leads to a time gap in the application and enforcement of the Convention. Serbia has failed to explain how such a time gap would be avoided, in the period between the dissolution of the SFRY (which started when two constituent Republics proclaimed independence) and the emergence into independence of the FRY, and it seems unable to provide an answer to that absolutely crucial point. By the end of November 1991, the Badinter Commission was able to conclude that the SFRY was in the process of dissolution, and conversely the emergence of the FRY — under the leadership of Milosevic and making use of the JNA, amongst many other statal entities — was in a state of emergence. Professor Crawford will return to this point in due course, but for the present it is sufficient to note that on Serbia's approach *that vital period* would be one during which the enforceable writ of the Genocide Convention would have ceased to run. That cannot be right, Madam President, for the very legal reasons identified by the Court in its 1996 Judgment.

20. What argument does Serbia have for this claim? It relies on a very particular reading of paragraph 34 of your 1996 Judgment. That paragraph, says Serbia, makes clear that the Court's

[17]Roland Rich (1993): "Recognition of States: The Collapse of Yugoslavia and the Soviet Union", *4 EJIL*, p. 47.

jurisdiction *ratione temporis* extends only prospectively from 27 April 1992. But it does nothing of the sort. Paragraph 34 has to be read against the background of the Application made by Bosnia and Herzegovina, and the arguments, including the Memorial dated 15 April 1994, and the verbatim records of the oral arguments heard in this very courtroom from February to May 2006. Those documents make it clear that the Court proceeded on the basis that it had jurisdiction "with regard to the relevant facts which have occurred since the beginning of the conflict which took place in Bosnia and Herzegovina". Now it is true, the Court did not specify the precise date of that conflict, but it is clear from the pleadings that both parties treated the conflict as stretching over a period both before and after 27 April 1992. A few examples confirm that the parties to proceedings before this Court adopted the same approach as the ICTY, which has long treated the conflict with Bosnia and Herzegovina and the conflict with Croatia as having begun in 1991, well before the FRY's declaration of 27 April 1992. Bosnia and Herzegovina's Application of 20 March 1993 for example, refers to numerous acts that occurred well before that date: for example, an attack by Serb forces and the blocking of traffic in Bosnia and Herzegovina on 3 March 1992[18]; for example, widespread attacks throughout Bosnia and Herzegovina on 4 and 5 April 1992[19]; for example, the capture by Serb forces of Zvornik in Eastern Bosnia, on 10 April 1992[20]; for example, the intensification of attacks on 22 April 1992[21]. Each of these, and many more, well before the jurisdictional cut off date now claimed by Serbia.

21. Bosnia's Memorial in that case continued in the same vein. It described an attack at the beginning of April 1992 in which 1,000 Muslim civilians were killed by Serb paramilitary forces in Bijeljina[22]. It describes a number of crucial flashpoints between 27 March and 8 April 1992, including attacks that were initiated by Arkan's "Tigers" in the north and the east and by the JNA units in the south, the west, and the north-west, all intended to secure the main points of entry into Bosnia and Herzegovina[23]. Plainly Bosnia and Herzegovina treated acts prior to 27 April 1992 as

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[18]Bosnia's Application of 20 March 1993, para. 87A.

[19]*Ibid*., para. 87B.

[20]*Ibid.*, para. 87A.

[21]*Ibid.*

[22]Memorial of Bosnia and Herzegovina, 15 April 1994, p. 30, para 2.2.2.2.

[23]*Ibid.*, p. 72, para 2.3.5.2.

falling within the jurisdiction of the Court. Did the FRY object to these acts, did it argue that they fell outside the Court's jurisdiction because they occurred retroactively before the FRY supposedly came into existence? Apparently not.

22. What did the Court do? In paragraph 34 of the 1996 Judgment the Court expressly rejected Yugoslavia's argument that it could only deal with events subsequent to the different dates on which the Convention might have become applicable as between the parties, that includes 27 April 1992. It comes as no surprise, then, that the 2007 Judgment also refers to events that occurred prior to 27 April 1992. Nowhere in the Court's Judgment — certainly nowhere that I have seen — does the Court draw a line across the calendar and say: "oh, we only have jurisdiction after 27 April 1992, so we're not going to look at any facts that occurred prior to that date and we're not going to assess any facts that occurred prior to that date". To the contrary. The Court identified and assessed acts that occurred prior to that date. You refer to decisions of the ICTY which treat the conflict as having started in 1991. You refer to the establishment of the Serb Republic of Bosnia and Herzegovina (later Republika Srpska), on 9 January 1992 (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Yugoslavia)*, p. 84, para. 233). You refer to the armed conflict that broke out in Sarajevo at the beginning of April 1992, and you described the 56,000 people who had been wounded in Sarajevo in a period that pre-dated the Respondent's declaration of 27 April 1992. Nowhere in the Judgment, as far as we can see, do you say that in assessing whether a genocide had occurred you are limited to facts that had occurred after 27 April 1992.

23. Madam President, Members of the Court, the retroactivity argument has no merit whatsoever, and it is inconsistent with your practice. If you accede to Serbia's arguments on the application of the Genocide Convention, or any part of it, you will be rejecting your own jurisprudence across six decisions and 14 years. The consequences of that do not bear thinking about. We invite you to reject Serbia's argument, and to do so decisively.

Article 35 (1)

24. I turn now to the Article 35, paragraph 1, issue: the question of the FRY's membership of the United Nations and access to the Court. It was truly striking how little Serbia had to say on

this point. Professor Varady devoted just a few minutes to the argument, it is synthesized in two pages of the transcript[24]. Madam President, I will follow your disposition: we will not repeat ourselves, and limit ourselves to the one point raised by Serbia on this issue. So I can be very brief.

25. Serbia essentially limited itself to *this* point: Croatia, it said, is not entitled to claim that the Respondent has access to the Court under Article 35 (1) because its position on this issue changed. It changed, says Serbia, from one of opposition to the notion that as at 1999 the FRY was a Member of the United Nations, to one of acceptance of that position: but that is the full extent of their argument. But that misstates Croatia's position: a willingness on the part of Croatia to accept that the FRY had certain attributes of membership — including the right of access to the Court — is *not* to accept that it was a Member of the United Nations. There is no inconsistency in Croatia's position, all the more so when you take into account the adoption of your 1996 Judgment which, obviously, Croatia could not ignore.

26. Madam President, this argument might have been more compelling if Serbia had *actually* chosen to respond to the arguments I put forward on Tuesday. It has not. Nor, we respectfully suggest, has it listened with sufficient care and attention to what we *did* say. Croatia's position was, and it remains, that the FRY was not a Member of the United Nations between 1992 and 2000: rather, it had — as this Court described it — a *sui generis* relationship, one that came with attributes of membership. What does Serbia believe is meant by the *sui generis* relationship? We have absolutely no idea, for once again Serbia was silent. There was no response at all to our submission that those attributes included a right of access to the Court. There was no response to our submission that this conclusion followed logically from the fact that no equivalent resolution to that adopted in relation to the General Assembly and Economic and Social Council participation was adopted in relation to the right of access to the Court. On that point too, Serbia was silent. Indeed, it was silent on all the points that we raised. It simply provided no substantive response. Instead all we got was bald assertion: and from this silence we say the Court should draw its own conclusions.

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[24]CR 2008/12, pp. 13-15.

27. And yet, the special relationship between the FRY, and now Serbia, seems to persist. Professor Varady told the Court that "everyone accepted the position asserted by Croatia"[25]. But not quite everyone, it seems. There are still some who believe in the special relationship. [Plate 11 *(a)* on screen.] Even today, in some instances, the United Nations website differentiates between the different successor States. On membership of the United Nations Security Council, for example, in relation to Serbia it sometimes says "See Yugoslavia", whereas in relation to Croatia, which you will see on the next plate [new plate 11 *(b)* on], there is no similar connection drawn. For your convenience, the plates showing the United Nations website may be found in your folders at tab 11. [Plate off.]

28. And this is not just for the past. A recent decision by the Serbian Government, as confirmed by the Parliament of the Republic of Serbia, proudly proclaims that "the Republic of Serbia is an internationally recognized state, one of the founders and a member of the United Nations, as well as one of many other international organizations"[26]. And even more recently, in a statement of 18 February 2008, the Supreme Court of Serbia reiterated that position, declaring that the Republic of Serbia is a sovereign State and "one of the founders of the United Nations"[27]. The special relationship, the *sui generis* situation, seems to persist even today, at least in the eyes of certain organs of Serbia.

29. Madam President, Members of the Court, I cannot, I am afraid, provide you with more assistance than this. On Wednesday we set out our arguments on the meaning and effect of the *sui generis* relationship. It stands completely unrebutted. In our submission Article 35 (1) provides no bar to the FRY having access to the Court on 2 July 1999, and it provides no bar today.

Conclusion

30. Madam President, Members of the Court, I can end on a note of agreement. On Monday, Professor Varady told the Court that: "The issue of jurisdiction boils down to one question: that of

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[25]CR 2008/12, p. 14, para. 15.

[26]See: National Assembly of the Republic of Serbia, http://www.parlament.sr.gov.yu/content/lat/akta/akta_detalji.asp?Id=470&t=Z# (in Serbian), Government of the Republic of Serbia, http://www.srbija.sr.gov.yu/kosovo-metohija/index.php?id=43159 (in English).

[27]See: Supreme Court of Serbia (only in Serbian), http://www.vrhovni.sud.srbija.yu/code/navigate.php?Id=731&newsId=304&bigText=true&offset=

the link between the Respondent and the Genocide Convention."[28] He did not recant from that on Thursday. That succinct statement is surely right, and I hope we have shown that the question of the link between the Respondent and the Convention on 2 July 1999 admits of only one conclusion. From that conclusion all else logically flows: in particular, the rejection of Serbia's argument on jurisdiction under Article IX and on the Article 35 (1) access issue, as well as the safeguarding of your consistent jurisprudence in the *Bosnia* case, and the legacy of that case.

31. Madam President, that concludes my presentation. Once again I thank you and the Members of the Court for your very kind attention, and invite you to call Professor Crawford to the Bar.

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

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

SERBIA'S ACCESS TO THE COURT

Introduction

1. In this presentation I will deal with aspects of all three preliminary objections.

— First, on preliminary objection 1, I will respond to the arguments made yesterday on Article 35, paragraph 2, the treaties in force provision, and on the *Mavrommatis* principle. In the course of doing so I will respond to the question asked by Judge Abraham earlier this week.

— Second, on preliminary objection 2, I will show that the Respondent's argument that there is no possibility of responsibility for conduct prior to 27 April 1992 being attributed to it must fail as a matter of admissibility; as a matter of fact it evidently pertains to the merits.

— Third, I will say something very briefly on the remaining admissibility issue raised by preliminary objection 3.

[28] CR 2008/9, p. 34, para. 11.

Preliminary objection 1: Jurisdiction *ratione personae*

(a) ***Article 35 (2): Treaties in force***

2. Turning first to Article 35, paragraph 2, I am not going to try to repeat my very extensive presentation the other day. I am simply going to make a series of points, in staccato fashion, in response to what was, finally, a very able and well-prepared presentation yesterday by Mr. Djerić.

3. A minor point first: I did not say that the Article 35, paragraph 2, point was not argued in the *NATO* cases: I said it was not argued by *Serbia* as Applicant. If it had really wanted to uphold your jurisdiction in those cases, it should have argued Article 35, paragraph 2, but it did not. Some of the Respondents of course did argue it. You heard the case against. The first time you heard the case in favour was this week. The Court pointed out in paragraph 93 of your Judgment — I take the *Belgian* case as the illustration — that the point had been argued by the Respondents:

> "The Court notes that the Applicant, in the present case, has not in fact claimed that the Court is open to it under paragraph 2 of Article 35, but has based its right of access to the Court solely on paragraph 1 of the Article. However, in some of the cases concerning *Legality of Use of Force*, including the present one, the Respondent . . . has raised the question of the possible application of paragraph 2, in order to contend that Serbia and Montenegro may not rely upon that text." (*Legality of Use of Force (Serbia and Montenegro* v. *Belgium), Preliminary Objections, Judgment*, *I.C.J. Reports 2004*, p. 315, para. 93.)

In fact the Court regarded itself as required to deal with paragraph 2 even though it was not relied on by the Applicant. That is rather the inversion of the normal rule that a court has to satisfy itself of its jurisdiction. Hitherto one has not thought that the Court had to satisfy itself of its jurisdiction when the claimant did not allege a particular ground of jurisdiction, but you chose to do it.

4. Turning to the substance of Article 35, paragraph 2, I must say that I am now unclear as to the interpretation on which the Respondent now relies. Is it only that old treaties count, treaties in force at the date of the Statute (in which case the suggested explanation of the *Upper Silesia* case will not do)? Or is it only treaties which can be described as part of the peace settlement (in which case the Court in the *NATO* cases was wrong on Serbia's account, because it recognized no such exception)? Does Article 35 , paragraph 2, mean the same as it did under the PCIJ Statute (in which case the different status of this Court under the Charter is irrelevant)? Or does it have a different meaning (in which case the *travaux* of the PCIJ Statute and the practice of that Court are irrelevant)? The position was not clarified.

5. Except on one point, Mr. Djerić did not attempt to follow my analysis of the *travaux* of Article 35, paragraph 2. I showed on Wednesday the following:

(1) The first version of Article 35 (2), then numbered Article 32, was introduced following British criticism that the previous version, which allowed access only through the Council, did not deal with treaties made and to be made with the Central Powers.

(2) No one in the debate treated the problem as limited to the peace treaties already concluded. They were explicitly treated as mere examples, both by Mr. Ricci-Busati in his repeated comments and by Mr. Hagerup. Indeed the redrafted version of Article 32 introduced by Mr. Hagerup expressly included the phrase "for example". You might think not very good drafting, but clear on this point.

(3) At the time Article 35 (2) was finally adopted, the drafters had rejected a provision giving the Court compulsory jurisdiction but were looking forward to a future general treaty of arbitration involving the Court. For that project to work, it had to have the widest possible participation.

(4) By that stage it was clear that important States would not be, for some time if ever, parties to the Covenant of the League. Yet it was vital that they should be involved in the continuing project of peaceful settlement through the Court.

(5) Access to the Court was not to be limited to League Members or to those approved by the Council. Access through treaties in force was an alternative to access through the Council.

6. Mr. Djerić asserts that there is no evidence that M. Fromageot, in responding to Max Huber, was talking about what is now Article 35, paragraph 2. I would make the following points:

(1) There was no separate debate on Article 36, paragraph 1, as it now is, draft Article 33 as it then was. The three draft Articles 32 to 34 that I showed you on the screen on Wednesday were introduced together and debated together.

(2) If Max Huber had wanted to talk about Article 36, paragraph 2, draft Article 33, he would have used the phrase "treaties and conventions in force", which was the phrase used in that Article and used now in Article 36 (1). But he did not; he used the phrase "treaties in force" which was taken from draft Article 32 and is now the language of Article 35, paragraph 2.

(3) Max Huber knew a thing or two. He did not need to ask whether the phrase "treaties and conventions in force" in what is now Article 36 (2) meant treaties and conventions in force at that time. It was blindingly obvious that it meant treaties in force from time to time. The debate that was going on at the time concerned the peace treaties, to which non-League Members were parties and which provided for the Court's jurisdiction.

(4) Mr. Hagerup subsequently explained the point in precisely this way in his report to the Third Committee; it was approved by the League organs on that basis, although the formulation "subject to special provisions contained in treaties in force" — the language as it stood at the time of Mr. Fromageot's answer — was finally retained.

7. I referred on Wednesday to the practice of States in the League period. There can be no doubt that the Treaty of Lausanne when it was finally adopted in 1923 was considered a "treaty in force" for the purposes of Article 35, paragraph 2. I cited Fachiri to that effect: Mr. Djerić made no mention of either the Treaty of Lausanne or the literature concerning it. Article 44 of the Treaty of Lausanne referred minorities disputes to the Permanent Court. Imagine if in 1925 Greece had taken a minorities dispute against Turkey to the Court but the Court had refused jurisdiction on the ground that Turkey had not filed a declaration under the Council resolution of 1922! Turkey was willing to file a special declaration for the particular case in the *Lotus* — though it was not filed in advance, as the resolution required. But what if it had refused to go under the resolution — as one can well imagine it might have done if the case had been brought by Greece concerning minorities rather than France concerning a spat over Lieutenant Demons. Was the Court to refuse jurisdiction? Of course not.

8. But it was not just the Treaty of Lausanne of 1923 or the Upper Silesia Convention of 1922: many treaties were concluded with non-League Members referring matters to the Court. I refer you to the list of treaties you will find at tab 12 in your folders. I do not represent that it is complete, although I do admit that it has taken some time. Under heading A you will find listed treaties with non-League Members concluded after the conclusion of the PCIJ Statute. There are some rather important treaties here, the international legal history of the 1920s could be written about around many of these treaties: the German-French Treaty concerning Delimitation of the Frontier of 1924, the Locarno Treaties (which Mr. Djerić also did not mention), a subsequent

Arbitration Treaty between Germany and the Netherlands, many treaties of Turkey and Iceland, a Greek-Turkish Treaty of Friendship of 1930, and so on. Was the Court to turn its back on these and on the *Upper Silesia* precedent? Again, of course not.

9. I would also note that from the mid-1920s there was a potential problem with departing States, including Brazil and Costa Rica. I give under heading B just two examples of Brazilian PCIJ treaties that stayed in force after Brazil left the League. Now Brazil presumably continued to have access since it was listed in the Annex to the Covenant — even though it has turned its back on the Covenant — but Germany, which left later, was not listed, and nor was Costa Rica, which left in 1925.

10. Mr. Djerić referred to the discussion in the Permanent Court in 1926 in relation to the revision of the Rules. The background to that discussion can be seen from the Minutes of the Eighth Meeting of the same session, which is tab 13 in your folders (*P.C.I.J., Series D, Addendum to No. 2,* pp. 75-77). I refer in particular to page 75. The Registrar, Hammarskjöld, later a judge, pointed out that in the *Wimbledon* case, "it had been decided that the obligation in question [that is the obligation because they were talking about the implementation of the Council resolution, the obligation to accept the Court's jurisdiction in accordance with that resolution] could only be imposed on the applicant Party and not on the respondent".

That is one situation. I will revert to another in which there may well be a difference between the two. The Respondent in the *Wimbledon* case was Germany, lacking access to the Court except through Article 35 (2). Germany never made a declaration under the Council resolution, whether as a matter of deliberate policy or not, I have not been able to find out, but the fact is that it did not. And the reason for Hammarskjöld's remark is obvious; if a respondent could frustrate a treaty obligation to submit a matter to the Court by simply refusing to make a declaration under the Security Council resolution, then the treaty would be nugatory. The Council resolution was for volunteers. As I mentioned on Wednesday, Turkey in the *Lotus* case was persuaded to a make a particular declaration — but what if it had refused? Was the special agreement in such a case to be made ineffective by the unilateral act of the Respondent? That takes us back to nineteenth century arbitration.

11. This is the background to the discussion at the 22nd meeting to which you were taken yesterday by Mr. Djerić (*P.C.I.J., Series D, Addendum to No. 2,* pp. 104-107). The following points should be made:

(1) Judge Anzilotti thought that Article 35, paragraph 2, should be limited to "agreements to be considered as supplementary to the Treaty of Versailles". That is a slightly curious formulation because it should have been agreements to be considered as supplementary to the Treaty of Versailles or the Treaty of Trianon, or the Treaty of Saint Germain etc., the Treaty of Sèvres, which had already been concluded but had not been ratified. So the interpolation in Article 35, paragraph 2, was already a rather long, one but that is what he thought. But his actual proposal — the proposal being debated by the Court — was neutral on the point — it simply referred to "cases in which a declaration in accordance with the Council resolution is required" (*ibid.*, p. 105), without stipulating when.

(2) The President, Huber, noted that having regard to the Hagerup Report "it was quite possible to arrive at the wide interpretation of Article 35 adopted by the Court in the *Upper Silesia* case" (*ibid.*, p. 106). He went on to say that "whether a declaration was or was not required" should be left to be decided if the issue arose (*ibid.*, p. 106). And that was what was done.

(3) Manley Hudson is correct in saying that "In the revision of the Rules in 1926, the Court seems to have preferred to leave open the question as to the meaning of 'treaties in force'."[29]

12. It is true that there were opinions which favoured forcing States to go through what I will call the Council route, either through membership of the League or the adoption of a declaration under the Council resolution. Manley Hudson himself was of that opinion — but then he was an ardent proponent of United States membership of the League, or at least of the Statute of the Court. Even so, his view was far from categorical:

> "Is the expression 'treaties in force' in Article 35 equivalent to the expression 'treaties and conventions in force' in Article 36? There can be no doubt that the latter expression refers to the future. Is the expression in Article 35 analogous to 'a treaty or convention in force' referred to in Article 37? It seems doubtful whether the latter is to be applied in the future indefinitely. [He is talking about Article 37, which was a transitional provision.] Article 35 may have been [may have been] intended to

[29]M.O. Hudson, *The Permanent Court of International Justice. A Treatise* (New York, Macmillan, 1934), p. 349.

> safeguard provisions in the peace treaty made with Turkey; yet the Treaty of Lausanne was not signed until July 24, 1923 . . ."[30]

He saw the point. He then refers to the *Wimbledon* and the *Upper Silesia* cases, both of course involving Germany, and to the 1926 revision of the Rules, and continues:

> "If the implications of this decision [he is referring to *Upper Silesia*] were carried out, it would be possible for two States to escape the Council's conditions by entering into a treaty; indeed, if special agreements were included among treaties in force, the Council's resolution might never be applicable. It is clearly necessary for some restrictive meaning to be given to this provision in Article 35; it ought to be confined to treaties relating to the liquidation of the war, and the action taken in the case of *German Interests in Polish Upper Silesia* ought not to serve as a general precedent."[31]

That is what Hudson said. He does not refer to Judge Fromageot's opinion, to Hagerup's report, or to the Locarno treaties. To be fair, he was writing just before Germany withdrew from the League.

13. The following comments should be made about this influential passage in Hudson's great book.

(1) His view was, as he recognized, contrary to the only decided case in point, the *Upper Silesia* case.

(2) It is expressed more or less *de lege ferenda*: "It seems doubtful . . ."; "ought not to serve as a general precedent".

(3) It fails to address the point that in the drafting of Article 35, paragraph 2, access through the Council and through treaties in force was thought of, and in its actual formulation was expressed, clearly in the alternative. The powers of the Council are not expressed to override treaties in force: they are distinct routes. I stress that there was no equivalent to Article 103 of the Charter in the Covenant of the League. The idea that a Council resolution could override a treaty in force was not on the mental horizon of the drafters of Article 35, paragraph 2, of the Statute.

(4) There is no interwar opinion I have been able to find which confines Article 35, paragraph 2, to treaties already in force in September 1921.

(5) Above all, to limit Article 35, paragraph 2, to "treaties relating to the liquidation of the war" or to "agreements . . . considered as supplementary to the Treaty of Versailles [and the other

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[30] *Ibid.*

[31] *Ibid.*, p. 350.

treaties]" is completely to rewrite the Article, and goes far beyond the legitimate use of *travaux* in the interpretation of treaties. It is to *substitute* a reading — I have shown it is the wrong reading — of the *travaux* for the language of the Article. Assuming for the sake of argument that the phrase "treaties in force" could mean "treaties already in force", then all the authorities on the Statute of the Permanent Court are opposed to that reading, without exception, Anzilotti and Hudson included. Moreover, as I have shown, the Article has to be rewritten already, if the *NATO* decision is to be sustained: it has to mean "treaties in force in 1945 which are still in force". It does not say that, either. Mr. Djerić did not attempt to meet that argument either.

14. Mr. Djerić did argue the catastrophe theory of interpretation: the skies will fall, he said, as though apprehended to fall on Chicken Little, if the Council resolution could be avoided by a treaty. In Hudson's words, "if special agreements were included among treaties in force, the Council's resolution might never be applicable". What a tragedy! Two States — they have to be States, Article 34, paragraph 1 — agree in a legally binding treaty to resort to the Court rather than to arbitration. Of course that agreement entails a commitment to be bound by the decision. Institutional costs are for the Court to apportion: the Council has no power to implement the decision but it did not have that anyway. No third party is affected; there is no access to the optional clause system — for that you have to be a Member. One can understand the policy argument, that it was better to force States to go the Council route — that was Baron Descamps's view when we were trying to maximize membership in the League. But once it was clear that that was not going to work, another strategy was adopted — and this is the fundamental point — another strategy was adopted, which opened the Court to access by treaties in force *faute de mieux* in terms of universality. Baron Descamps's view was clearly rejected in the drafting of Article 35, paragraph 2, in favour of a view which supported access to the Central Powers, both as applicants and respondents, in relation to treaties concluded and to be concluded — and as a straightforward alternative to access via the Council.

15. Madam President, Members of the Court, for all these reasons, the restrictive — I have to say the destructive — view of Article 35, paragraph 2, should be rejected.

(b) *The* Mavrommatis *point*

16. I turn to my second point, the *Mavrommatis* point. I dealt at some length with the *Mavrommatis* principle on Wednesday and again will not repeat in any detail what I said. On 1 November 2000 all four conditions for jurisdiction were met and, in our view, incontestably so. They were, one: seisin; two: a basis of claim; three: consent to jurisdiction; four: access to the Court. The Respondent, through Professor Varady, denies three of them. The second and third come down to the question whether the Genocide Convention was in force for the Respondent continuously from the beginning of the conflict or not. Professor Sands has dealt with that already: that is why it is the Respondent's most substantial jurisdictional objection in this context. I accept that that objection is not susceptible to being overcome by the *Mavrommatis* principle. If the Respondent became a party to the Convention only on 11 March 2000, and irrespective of the validity of its reservation, then the *Mavrommatis* principle would not have been satisfied at an earlier date. But of course the Respondent was a party to the Genocide Convention in 1999 without reservation, as you have already decided. And it was a party by succession to the beginning of the conflict, *stare decisis*.

17. That leaves only the issue of seisin in November 2000, and it explains how desperately Professor Varady yesterday argued that the Court did not have seisin of this case. It says something about international lawyers that we can be passionate about seisin, and Professor Varady is an international lawyer, very certainly. In other words, he said the case was wrongly entered in the List. He thereby gaily trashes a decade of litigation by this State, the respondent State, imagine the wasted costs — the 40 legal acts before the Court I listed to you the other day.

18. But as between States qualified under Article 34, paragraph 1, to appear before the Court, an apparent title of jurisdiction is sufficient to give seisin, and this no matter how implausible the jurisdictional basis may appear, no matter how predictable its eventual dismissal may be. Of course in our case, neither of those qualifications applies. There is a strong prima facie basis of jurisdiction under either Article 35 (1) or 35 (2), and the dismissal of our claim on jurisdictional grounds is not at all predictable, at least not on our side of the Bar. But that is irrelevant: there is seisin.

19. You rightly acted in the *NATO* cases on the basis that you had seisin. Once it became clear after argument in the United States and Spanish cases that there was no basis for jurisdiction whatever, you struck the cases out, again quite rightly. But that was an *exercise* of competence-competence, not a denial of it. There is no suggestion that the cases should not have been entered in the List.

20. In the present case, it is frankly absurd to suggest that you do not have competence-competence, or that the Croatian Application is somehow *nul et non avenu*. It shows the ridiculous extent to which the Respondent is forced to go in order to sustain the claim that it was absent from the Court in the 1990s. As Judge Schwebel remarked in *Request for an Examination of the Situation*, if the Court is not seised of the case, why are you wearing gowns?

21. This position is of long standing, and goes to the root of the competence-competence doctrine, fundamental to modern judicial settlement, fundamental to the Court. In the *Lotus*, as I said, the Permanent Court treated itself as seised even before Turkey made its declaration under the Council resolution. It is with respect self-evident that the Court was seised of this case on 1 November 2000 when *on any view* the Respondent had access to the Court.

22. Professor Varady said that the *Mavrommatis* principle does not apply to fundamental issues such as access to the Court. But there is no authority for this. The peremptory requirement is statehood, as set out in Article 34, paragraph 1: all other obstacles can be overcome by procedural steps such as compliance with Security Council resolution 9 (I). It is, incidentally, rather odd to treat compliance with Security Council resolution 9 (I) as a matter of capacity. Any State can make a declaration and the declaration gives it access unquestionably under the second alternative in Article 35, paragraph 2. It is odd to think of a State giving itself capacity by making a declaration that no other State can stop it from making. An incapacity I can remove by making a unilateral declaration is a strange form of incapacity.

23. I stress that neither Professor Varady nor Mr. Djerić made any mention of the point that Croatia could certainly have started this very case again on the day it filed its Memorial. Filing the Memorial clearly amounted to an affirmation of our Application, a fundamental step in the proceedings that must have legal significance. Assume that the bilateral FCN treaty in the *Nicaragua* case had been terminated before Nicaragua filed its Memorial — it was actually

terminated afterwards — could it have been relied on by Nicaragua after it had been terminated? The answer must be, no. The filing of the Memorial clearly has legal significance.

24. Madam President, Members of the Court, in a way I am sorry that there is not more to say on this point, because it is — having regard to the state of the authorities before the Court — by a margin the simplest and most straightforward way of upholding your jurisdiction without contradicting, or seeming to contradict, any earlier decision. It does not contradict the *Bosnia* case, since it is an alternative path to the same destination, and international law recognizes alternative paths to jurisdiction. Nor does it contradict the *NATO* cases: the *Mavrommatis* principle was wholly inapplicable in the *NATO* cases, since there was no moment when all jurisdictional requirements in that case were satisfied. So in this sense, with great respect, I commend it to you.

(c) ***Judge Abraham's question***

25. That brings me to Judge Abraham's question: does it make a difference that Serbia was Applicant in the *NATO* cases but Respondent here? Evidently it makes no difference under the normal operation of jurisdictional requirements under Article 35, which apply reciprocally, in accordance with their terms, both under paragraph 1 and paragraph 2. I should say that there was great emphasis in the *travaux* of Article 35, paragraph 2, on the equal treatment of the Central Powers; they were not just there to be respondents. Of course, in the Polish *Upper Silesia* case, Germany was the Applicant. But it may well make a difference, at least in practice, in the situation where the *Mavrommatis* principle is being relied on. There was never any possibility, as I have said, for that principle to operate in the *NATO* cases, since there was no moment in time at which all jurisdictional elements were combined. But a respondent which is subjected to proceedings that it considers unfounded can always make it clear, at a very early stage, that it does not waive any missing elements, as Spain and the United States made it clear in *NATO* at the provisional measures stage, and as France made it clear in the *Request for an Examination of the Situation*. As soon as this is clear, then on the first procedurally-appropriate occasion, the Court may have to have a hearing to find out whether it was clear: that is what happened in the *New Zealand* v. *France* case. As soon as it is clear, the Court will act accordingly and dismiss the case, if necessary ex officio. But if a respondent State — whether through waiver, as with the United States in

United States Nationals in Morocco, or by the making of a declaration under a Security Council resolution — as, on the Respondent's argument, must have been Turkey's situation in the *Lotus* — or by the admission of the respondent State to the Statute or to the Charter — as here — then the conditions for jurisdiction are united and the Respondent, which by definition will have brought this new situation about, can no longer object. On the other hand, to commence proceedings is in itself to waive any jurisdictional defects which it is within the power of the Applicant to waive. An applicant cannot, so to speak, approbate and reprobate in respect of its own application — although that does not seem to hinder the Respondent in this case — any more than a State can claim immunity in relation to the very case it has itself commenced before a domestic court.

26. I did not hear Serbia respond yesterday to Judge Abraham. Croatia reserves the right to comment on the Respondent's eventual response within the time-limit laid down by the Court.

Preliminary objection 2: Responsibility before 27 April 1992

27. I turn to preliminary objection 2. The Respondent's argument here resembled nothing more than a series of logical conundrums posed by a schoolmaster: I thought we might be strolling in some cloister rather than standing in a courtroom. And I fear that the Agent, Professor Varady, has caught the disease of logicism from Professor Zimmerman. I can well see how that can happen: Professor Zimmerman has it very badly.

28. But in the spirit of the academy let me illustrate the problem with a hypothetical case. Assume a State party to the Genocide Convention without reservation has an ethnically-mixed province. A rebel movement in the province, of one ethnicity, seeks to secede and slaughters a large number of the others in the province on the ground of their different ethnicity. The remainder are forced to flee, and thus cleansed, the province declares its independence. But saner leadership in the former rebel movement then prevails — it is now the government — and the government announces the new State's succession to the Genocide Convention without reservation. According to Professor Zimmerman, it is nonetheless logically impossible to hold the new State responsible for the conduct of the movement. The movement could not be bound by the Genocide Convention and the new State could not be bound before it came into formal existence. Instead of treaty

succession creating continuity, this approach inevitably creates discontinuity — but after all, logic dictates it, thus it must be so.

29. Madam President, Members of the Court, this is the jurisprudence of forms, divorced from reality.

30. But Professor Varady did address Article 10 of the ILC Articles, logically impossible as to treaties, however it may be according to Professor Zimmermann. And citing Rosenne he did concede that responsibility for breach of treaty could be attributed to a State for events prior to its declaration of independence, though with due caution — Rosenne is a cautious author. He might equally have cited the less cautious Professor Brownlie to that effect. I quoted Professor Brownlie on Wednesday, but Yugoslavia seemed unenthusiastic about this authority — at any rate, he was not mentioned yesterday! Nor was the Eritrea-Ethiopia Compensation Commission decision on pre-referendum Eritrean nationality cited. Professor Zimmermann did not tell us how its decision was to be squared with his imperative categories.

31. But as soon as one makes that concession — whether with Rosenne or with Brownlie and with however many cautionary notes — as soon as one accepts that there can be attribution for pre-independence acts — then we are outside the realm of admissibility altogether and into the merits: the question then becomes essentially one of fact and appreciation. And the Court will have noted that following his citation of Rosenne, the Agent did not merely paddle on the edges of the sea of the facts; he dived in fully clothed, swimming off furiously. I am afraid that despite your injunction, Madam President, I need to follow him just a little, just to see if he is still afloat.

32. Professor Varady asserted that there was no movement in Belgrade which sought the creation of an independent Serbian State. He claimed that a movement to create the Federal Republic of Yugoslavia did not exist at all. Apparently the FRY was a spontaneous creation on 27 April 1992, created *ex nihilo* after everyone else in the SFRY had unaccountably left the room and abandoned the party. But, of course, there is plenty of evidence on the existence of a Serbian national movement oriented on the creation of a Greater Serbia — a matter which we merely ask you at this stage to note, since adjudication on the facts would be premature.

33. Let me take, by way of example, one Vojislav Šešelj, talking to the paramilitaries in the city of Benkovac, in the occupied part of Croatia, on 23 November 1991. He said (it is in the pleadings):

> "We cannot cross the Serbian borders with a Serbian army! Do you want the Desert Storm here . . . I want a Serbian army when I get a Serbian state! Now we want to set the borders. Diplomatically we are O.K. because we want Yugoslavia without Slovenes and Croats. An army mixed with politics is not good . . . We must fight for Serbia that covers all Serb territories! We shall call such a Serbia Yugoslavia as long as that is in our interest."[32]

34. In March 1991, one Slobodan Milošević, acting as the President of Serbia, said:

> "The Presidency of SFRY, which is also a Supreme Command of Armed Forces of Yugoslavia, was a source of an organised obstruction of the work of JNA, which is obliged and capable to protect the citizens from the war, either civil or conquering [. . .] I have ordered a mobilisation of reserve Republic of Serbia MUP security forces and urgent establishment of additional police forces of the Republic of Serbia. I asked the Government of the Republic of Serbia to carry out necessary preparations for the establishment of the additional forces in number that would guarantee protection of interests of the Republic of Serbia and the Serbian people . . . The citizens of Serbia should know that the Republic of Serbia is able to provide full protection of the interests of the Republic, all its citizens and the Serbian people."[33]

The PRESIDENT: Professor Crawford, I think you are in danger of going the wrong side of a line.

Mr. CRAWFORD: I felt that myself, this is slightly rhetorical speech. Once you say rhetorical . . .

The PRESIDENT: I think you've made the point that you differ on this since you've given an example.

Mr. CRAWFORD:

35. According to Professor Varady this was not a movement. We should no doubt be grateful that it was not: may we be preserved from such non-movements!

36. Of course in cases covered by Article 10 (2) of the ILC Articles — or by the principle stated in different terms by Rosenne and Brownlie, there will be a competing authority — or at

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[32]MC, 1 March 2001, Vol. 5, App. 2, pp. 42-43. Transcript of a video clip of Vojislav Šešelj's address to paramilitaries in Benkovac, occupied part of Croatia, 23 Nov. 1991. Filmed by paramilitaries themselves.

[33]ICTY, case IT-02-54-T, Exhibit P328, tab 29, entered through Stipe Mesic, 1 Oct. 2002.

least will normally be — the *Eritrea* case was slightly exceptional in that regard. In such cases the issue is reduced to one of factual control.

37. Further evidence on this point can be found in ICTY cases — to quote only one example, the Revised Second Amended Indictment against Momcilo Perisic, dated 5 February 2008[34].

38. Professor Varady — I have now regained, Madam President, dry land! Professor Varady gave a novel interpretation to the words "succeeds in establishing a new State". He seemed to think it meant "succeeds in all its aims in the course of establishing a new State". Madam President, it falls to few of us to succeed in establishing all our aims in life, and this is true (one might say *a fortiori*) of movements aimed at creating new States. The nationalist movement ended up in creating the Federal Republic of Yugoslavia, consisting of Serbia and Montenegro; it failed to get general recognition of its continuity with SFRY. However, the fact that the Serbian national movement ended up with the old borders of Serbia and the new name of a State rather than what it aspired to — different borders and the old name — does not change the fact that it did establish that State and that that State — the respondent State — carries responsibility for internationally wrongful acts committed in the process which were attributable to it under international law.

39. Finally Professor Varady asserted that the ILC did not have the *sui generis* case of the FRY in mind when it drafted Article 10, paragraph 2. But the world of movements "insurrectional or other" is full of variety, and paragraph 10 of the ILC Commentary states that: "This terminology [insurrectional or other] reflects the existence of a greater variety of movements whose actions may result in the formation of a new State." The category of movements is not closed.

40. For these reasons the Applicant's claim to responsibility under the Convention, extending to the beginning of the conflict in Croatia is admissible. That is all you need to decide.

Preliminary objection 3: admissibility of claim 2 *(a)*

42. Madam President, Members of the Tribunal,

The PRESIDENT: Did I year you say "Members of the Tribunal", Professor Crawford?

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[34]IT-04-81-PT, 5 Feb. 2008, paras. 6-7.

Mr. CRAWFORD: I am sorry, let me rephrase that. I was not referring to the Tribunal.

Madam President, Members of the Court, finally I should say a word about the admissibility of claim 2 *(a)* in Croatia's submissions in its Memorial, which reads "to submit to trial before the appropriate judicial authority" persons suspected on probable grounds of genocide. Serbia argues that under Article VI it has no responsibility except in relation to persons who committed genocide in Serbia. There are two simple answers to this. First, persons found in Serbia suspected of committing genocide in Croatia can still be submitted to trial before the ICTY — which is a tribunal —, and Serbia would on that hypothesis still have obligations to fulfil. Secondly, the phrase "the act was committed" in Article VI refers, we submit, to the act charged against the defendant in question, not to the global act of genocide, but to the act charged against the defendant. Otherwise, the determination of venue for genocide will be extraordinarily difficult. When crimes are committed in a trans-boundary context is a complex matter, highly facts dependent. For these reasons, Croatia's first claim to relief is not inadmissible. How it fares on the merits will depend on the facts.

Madam President, Members of the Court, thank you again for your attention. I would ask you, Madam President, to call the Agent for Croatia to conclude our response and to present our submissions.

The PRESIDENT: Thank you, Professor Crawford. And now we do call Dr. Šimonović.

Mr. ŠIMONOVIĆ:

CLOSING REMARKS

1. Madam President, Members of the Court, thank you very much for your patience during the course of this week with this challenging case. In my closing remarks, I will try to be short and to the point.

2. I believe that during these two rounds Croatia as the Applicant managed to cover all relevant issues and answer all questions raised, either by the Court, or by the Respondent. We have proved that the Genocide Convention was in force at all times, that both the Applicant and the Respondent had access to the Court and that the Applicant's submissions are based on facts and

law, in particular the Genocide Convention, and are, thus, admissible. I would just like to add a couple of clarifications.

Lack of ICTY genocide charges

3. Although the Respondent admitted that numerous war crimes have been committed during the conflict in Croatia, it questioned whether any of them amounted to genocide. Its crucial argument in this respect was that the ICTY did not bring charges against any individual for genocide committed in Croatia.

4. First of all, this issue belongs to the merits. It is very difficult to address it, Madam President, while obeying the Court's instructions regarding this hearing. But I will do my best.

5. The ICTY is a subsidiary organ of the United Nations with the task of prosecuting war crimes, crimes against humanity and genocide committed during the conflict in the former Yugoslavia. Because of capacity constraints, faced with piles of evidence on war crimes, it had to use prosecutorial discretion to decide for which individual crimes committed in the former Yugoslavia to raise charges. We would not like to second guess the reasons for which the prosecution has not raised any charges against higher Serbian military officials for crimes committed in Croatia, which could have involved genocide. For some of them, such as Ratko Mladić, who committed crimes in both Croatia and Bosnia and Herzegovina, genocidal charges have been raised only for the latter. No matter what the reasons, I would like to remind you of the following facts.

6. It was in the *Bosnia* v. *Serbia* Judgment that this Court, Madam President, as the principal judicial body in charge of establishing State responsibility, and one of the main organs of the United Nations concluded that

> "State responsibility can arise under the Convention for genocide and complicity, without an individual being convicted of the crime or an associated one" (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro)*, Judgment of 27 February 2007, para. 182).

Deciding this, the Court was obviously aware of the constraints of the ICTY and of its own role.

7. Croatia raised genocide charges against a number of persons for genocidal acts — mentioned in our Memorial — with full names of victims, witnesses, as well as their perpetrators — most of whom are now presumably in Serbia.

8. Other organs of the United Nations explicitly expressed concerns related to the qualification of war crimes committed in Croatia and Bosnia and Herzegovina from the perspective of the Genocide Convention.

— At its Second Special Session in 1992, the United Nations Commission on Human Rights in operative paragraph 12 of its resolution:

> "Calls upon all states to consider the extent to which the acts committed in Bosnia and Herzegovina and Croatia constitute genocide, in accordance with the Convention on the prevention and Punishment of the Crime of genocide."[35]

— The General Assembly repeated the same call in operative paragraph 16 of its resolution on the situation of human rights in the territory of the former Yugoslavia adopted the same year[36].

Madam President, Members of the Court, the Republic of Croatia feels obliged to answer this call. In our view, the Court of Justice, as one of the main United Nations organs, is the right place for these issues to be addressed.

NATO cases social framework

9. Madam President, Members of the Court, during the first and the second round of our presentation, we have clearly shown that the Court's reasoning regarding its jurisdiction in the genocide cases followed a coherent and consistent line of reasoning, with a single exception: it is the Judgment of the Court in the *NATO* cases.

10. First of all, the *NATO* cases were unusual. Or, rather, the behaviour of the Applicant in these case was extremely unusual. From the outset, it was clear that the FRY did not have a case against the NATO States. Although fully aware of their legal futility, Milošević's régime started the proceedings. The ambition was not to win them, but rather to:

— use them for propaganda purposes, and

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[35]Second Special Session of the Commission on Human Rights on the situation of human rights in the territory of the former Yugoslavia, 30 Nov. and 1 Dec. 1992.

[36]General Assembly resolution A/RES/47/147 of 26 April 1993 on the situation of human rights in the territory of the former Yugoslavia, adopted on 18 Dec. 1992.

— harm proceedings in the genocide cases brought against the FRY by Bosnia and Herzegovina and Croatia.

11. Aware of various weaknesses of the case, including those regarding jurisdiction, the Applicant did not invest the usual effort to establish jurisdiction. The Applicant, in fact, did exactly the opposite: it raised objections to the Court's jurisdiction itself.

12. The Application of the FRY in the *NATO* cases could indeed be considered a gross attempt to abuse the Genocide Convention. The fact that the FRY as the Applicant itself raised the issue of the Court's jurisdiction in those cases is indicative of the absurd situation: no applicant State has ever before made a jurisdictional objection to its own application.

13. Yesterday the Respondent insisted that Article 35 (2) has been argued in the *NATO* cases. I would like to remind the Court that in the *NATO* cases the issue was argued solely by some of the Respondents, and not Serbia, as the Applicant. The arguments on Article 35 (2) presented by Professor Crawford, therefore, appear for the first time from the Applicant's perspective. The same applies to the *Mavrommatis* principle, although that was discussed by at least one Member of the Court in your 2007 decision.

14. When comparing the decisions on lack of jurisdiction in the *NATO* cases and the possibility of establishing jurisdiction in the Croatian case, the Respondent suggested that Serbia would be given different answers to the question of jurisdiction. Firstly, for reasons elaborated by Professor Crawford, from a legal point of view, the situations are not the same. Secondly, because of its own behaviour, Serbia deserves these two different answers.

15. The answer to the honourable Judge Abraham's question: what is the difference between Serbia and Montenegro as Applicant in the *NATO* cases, and Serbia as Respondent in this case, with respect to access to the Court in the sense of Article 35 of the Statute — should follow the same line of reasoning. Professor Crawford elaborated on the legal differences. I would like to put those legal differences into their social context.

16. In the *NATO* cases, Serbia and Montenegro was an applicant who did not behave like an applicant. When arguing jurisdiction, it behaved like a respondent. In those cases, there were only respondents: there was no real applicant at all. The difference is that in this case, Croatia is a real Applicant.

17. Madam President, Members of the Court, the border between the desired respect for legal form and undesired legal formalism is sometimes a small one. Adopting the *Mavrommatis* principle is a good way of solving this dilemma. This principle has not been invoked by Serbia and Montenegro as the Applicant in the *NATO* cases, and probably with good reason. But this does not mean that it should not be implemented when invoked by the Applicant in this case. Serious genocide cases should be decided in the merits phase, if possible.

Mootness of submissions

18. I believe that already during the first round we have proved that our submissions are neither inadmissible, nor moot. Professor Crawford addressed inadmissibility while I dealt with mootness. Unlike Monday, yesterday we heard very little about the alleged mootness of our submissions. I would like to conclude that argument by indicating that this case has already positively affected individual requests contained in our submissions; proceedings against perpetrators, tracing missing persons and the return of cultural property. Pressure stemming from the genocide charges helps to achieve some results. However, there is still a long way to go before Croatia can be satisfied.

19. This should not be the reason to terminate these proceedings, but just to the contrary. It proves how important it is to continue this case in order to fulfil requests contained in our submissions.

20. For Croatia, it is of utmost importance that the requests contained in our submissions are fulfilled: the sooner, the better. We wish they become moot as soon as possible. But until they do, this case has a continuing and important role.

Reflections of this case on others

21. In these proceedings, protecting its own interests, Croatia also protects some broader interests and general principles.

— A negative decision on jurisdiction in the Croatian case would surely have adverse consequences for the *Bosnia* case, the first Judgment in history establishing the responsibility of a State for the crime of genocide. If there is no jurisdiction for Croatia, then not only your

Orders and decisions on jurisdiction of 1993 and 1996 will be treated by many as wrong, but the Judgment in merits of 2007, as well.

— Serbia has not yet confronted its responsibility for sufferings in Croatia from 1991 to 1995. The establishment of truth and responsibility for past events, including State responsibility, is vital for sustainable peace, stability and co-operation in south-east Europe and its European future.

— By insisting on a broad coverage by the Genocide Convention, and other humanitarian and human rights instruments, with no gaps in its application, Croatia seeks to promote the interests of civilians in turmoil and conflict, characteristic of processes of dissolution and the emergence of new States.

22. Madam President, Members of the Court, thank you for your attention. This concludes the second round of Croatia's oral pleadings. With your permission, I will now read Croatia's final submissions.

Submissions

23. On the basis of the facts and legal arguments presented in our Written Observations, and as presented during these oral pleadings, the Republic of Croatia respectfully requests the International Court of Justice to:

(a) reject the first, second and third preliminary objections of Serbia, with the exception of that part of the second preliminary objection which relates to the claim concerning the submission to trial of Mr. Slobodan Milošević, and accordingly to

(b) adjudge and declare that it has jurisdiction to adjudicate upon the Application filed by the Republic of Croatia on 2 July 1999.

Thank you, Madam President.

The PRESIDENT: Thank you, Dr. Šimonović. The Court takes note of the final submissions which you have just read on behalf of Croatia.

That brings us to the end of the hearings on the preliminary objections raised by Serbia. I should like to thank the Agents, counsel and advocates for their statements. In accordance with practice, I request that both Agents remain at the Court's disposal to provide any additional

information it may require: and with this proviso I now declare closed the oral proceedings in the case concerning *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia* v. *Serbia).* The Court will now retire for deliberation. The Agents of the Parties will be advised in due course of the date on which the Court will deliver its judgment.

The Court having no other business before it today, I now declare the sitting closed.

The Court rose at 11.40 a.m.