JOINT DECLARATION OF JUDGES RANJEVA, SHI, KOROMA AND PARRA-ARANGUREN

"Pre-preliminary" nature of access to the Court — The Court has already determined that the Respondent lacked access to it during the relevant time and has never definitively determined that Serbia had access — Reliance on the Mavrommatis *case is misguided because* Mavrommatis *did not concern access to the Court, the issue in the present case is not procedural, the defect in the present case is not short-lived, and the defect in the present case concerns the Respondent rather than the Applicant — Jurisdiction must be assessed at the time of the filing of the Application — Fundamental importance of the equality of the Parties — The Applicant itself has previously argued that the Respondent lacked access — Consistency of Judgments — Jurisdiction cannot be founded on 1992 declaration — Jurisdiction lacking.*

1. We, as four remaining Members of the Court who took part in the 1996 proceedings on preliminary objections in the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Yugoslavia)* case, and one of whom also participated in the 1993 proceedings on the indication of provisional measures in that case, are constrained to point out that at no time between 1992 and 2000 did the Court ever *definitively* declare that Serbia — the Respondent in the present case — had the necessary access to bring a dispute before the Court. In fact, the Court deliberately avoided the issue of whether Serbia had access to it. In its 2004 Judgment on the *Legality of Use of Force (Serbia and Montenegro* v. *Italy)*, the Court held that at a time prior to 2000 Serbia lacked access to bring a case to the Court (*Preliminary Objections, I.C.J. Reports 2004 (III)*, p. 910, para. 114). We are therefore constrained to append the following declaration to this Judgment, which, in our opinion, not only lacks legal validity and consistency but is even *contra legem* and untenable. This Court is not entitled to exercise jurisdiction based on a *contra legem* interpretation of a convention, such as the United Nations Charter or the Statute of the Court. Any such Judgment cannot but be extra-legal. It is regrettable that this Court, as a court of law, should have taken such a position.

2. In our view, the crucial question which the Court has to determine in this phase of the proceedings is whether the Respondent, Serbia, had access to the Court at the relevant time, namely at the filing on 2 July 1999 of the Application alleging breaches of the Convention on the Prevention and Punishment of the Crime of Genocide. This question is both pre-preliminary to the issue of jurisdiction and also fundamental, as the

Court can exercise its judicial function only in respect of those States which have access to it.

3. Whether a State has the capacity under the Statute to be a party to proceedings before the Court is an issue of *primordial* importance, as it governs whether the Court may exercise jurisdiction over a dispute brought before it. Under the Court's Statute, a State must have access to the Court in order to participate in a contentious case; the Court's jurisdictional authority is limited to those States with access to it. (See *Legality of Use of Force (Serbia and Montenegro* v. *Belgium), Preliminary Objections, Judgment, I.C.J. Reports 2004 (I)*, p. 295, para. 36, (concluding that "[t]he function of the Court to enquire into the matter [of a party's access to the Court is]. . . mandatory upon the Court. . .")).

4. In its Judgment in the *Legality of Use of Force (Serbia and Montenegro* v. *Belgium)* case, the Court reached the conclusion that:

> "at the time of filing of its Application to institute the present proceedings before the Court on 29 April 1999, the Applicant in the present case, Serbia and Montenegro, was not a Member of the United Nations, and, consequently, was not, on that basis, a State party to the Statute of the International Court of Justice. It follows that the Court was not open to Serbia and Montenegro under Article 35, paragraph 1, of the Statute." (*Ibid.*, pp. 314-315, para. 91.)

Thus, if Serbia and Montenegro at the time of filing of its Application on 29 April 1999 was neither a Member of the United Nations nor a party to the Statute, and therefore did not have access to the Court under Article 35, paragraph 1, of the Statute, then it could not have had access to the Court in the present case when the Government of Croatia filed its Application on 2 July 1999. The Court's other Judgments dealing with parallel proceedings either support or, at the very least, do not contradict this finding. (See *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Yugoslavia), Preliminary Objections, Judgment, I.C.J. Reports 1996 (II)*, p. 623, para. 47 (concluding that the Court had jurisdiction over the case without considering the question of access, which the Parties had not raised); *Application for Revision of the Judgment of 11 July 1996 in the Case concerning* Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina *v.* Yugoslavia), Preliminary Objections *(Yugoslavia* v. *Bosnia and Herzegovina), Judgment, I.C.J. Reports 2003*, p. 31, para. 71 (concluding that the admission of the Federal Republic of Yugoslavia to the United Nations on 1 November 2000 "cannot have changed retroactively the *sui generis* position" of the Federal Republic of Yugoslavia within the Organization); *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro), Judgment, I.C.J. Reports 2007 (I)*, pp. 90-91, paras. 115-116 (find-

ing that the Court had jurisdiction over Serbia by virtue of the doctrine of *res judicata* as applied to the 1996 jurisdictional Judgment, without entering into an analysis of Serbia's status or access); and pp. 266-275, joint dissenting opinion of Judges Ranjeva, Shi and Koroma (emphasizing that the question of access to the Court had not been settled by the 1996 Judgment on jurisdiction in that case because it had not been specifically raised by the Parties; re-examining the question *de novo*; and concluding that the Federal Republic of Yugoslavia had not been a Member of the United Nations at the time the case was filed, and therefore had no access to the Court at the relevant time) (Judge Parra-Aranguren did not take part in that Judgment for reasons known to the Court).)

5. Thus, in none of its prior Judgments has the Court concluded definitively that Serbia and Montenegro had access to it in the period between 1992 and 2000, and in the *Legality of Use of Force* cases it concluded *definitively* that the State did not have such access. These findings notwithstanding, the Court has held in the present Judgment that it is entitled to exercise jurisdiction in this matter, even though at the filing of the Application on 2 July 1999 the Respondent was neither a Member of the United Nations nor a party to the Statute of the Court, and therefore lacked access to the Court. To reach its conclusion in the present case, the Court has relied on the *Mavrommatis Palestine Concessions* case, where the Permanent Court of International Justice held that a treaty defining certain procedural and substantive norms at issue (Protocol XII of the Treaty of Lausanne) could be applied to the dispute even though it had not come into force until after the Application was filed. According to that Judgment:

> "Even assuming that before that time the Court had no jurisdiction because the international obligation referred to. . . was not yet effective, it would always have been possible for the applicant to resubmit his application in the same terms after the coming into force of the Treaty of Lausanne. . ." (*Judgment No. 2, 1924, P.C.I.J., Series A, No. 2*, p. 34).

The Judgment went on to state: "Even if the grounds on which the institution of proceedings was based were defective for the reason stated, this would not be an adequate reason for the dismissal of the applicant's suit" *(ibid.)*, and then: "The Court, whose jurisdiction is international, is not bound to attach to matters of *form* the same degree of importance which they might possess in municipal law." (*Ibid.*; emphasis added.) According to the present Judgment, the Court should thus consider that Serbia has access to it because, following the logic of the *Mavrommatis* case, Serbia's non-membership in the United Nations at the relevant time can be treated as a mere temporary procedural defect which was cured on 1 November 2000 when it became a new Member of the United Nations.

6. For the Court to conclude, on the basis of this *obiter dictum* in the *Mavrommatis* case, that the Respondent has access to it and it has jurisdiction over the Respondent is a misapplication of the Permanent Court's comment. The present case does not lend itself to the approach taken in *Mavrommatis*, because the *Mavrommatis* case did not concern access. Indeed, the Permanent Court did not consider, let alone decide, the issue of whether the State in question had access to the Court, nor did it rule on the status of a Member State. In fact, the *Mavrommatis* reasoning as applied in that case was not even technically concerned with the jurisdiction of the Permanent Court, which was based on Articles 26 and 11 of the Mandate for Palestine, not on Protocol XII. The Court determined it had jurisdiction based on Articles 26 and 11 of the Mandate (*Judgment No. 2, 1924, P.C.I.J., Series A, No. 2*, p. 29) before it even entered into its discussion of Protocol XII (*ibid.*, p. 34; see also *ibid.*, p. 31 (stating that Article 11 of the Mandate, not Protocol XII, is "the very clause from which the Court derives its jurisdiction")). Protocol XII served merely to complement the jurisdictional grant in Article 11 of the Mandate through the provision of additional procedural and substantive rules (*ibid.*, p. 31: "In this respect, the Protocol is the complement of the provisions of the Mandate in the same way as a set of regulations alluded to in a law indirectly form part of it."). The procedural defect at issue in *Mavrommatis*, therefore, did not concern an imperfection in the jurisdictional clause itself, and it certainly did not concern an issue of access to the Court.

7. Moreover, the issue in the present case is not "procedural" (concerning what a party has filed or could file), as it was in *Mavrommatis*, but is decidedly preliminary and fundamental (concerning the status of that party under the Charter of the United Nations and the Statute of the Court). A party can correct a procedural error, but cannot simply change a fundamental characteristic of the opposing party's legal status. This fact, which somehow escaped the attention of the majority, is somewhat obscured in the present case by the retrospective application of the *Mavrommatis* dictum to a situation which has since resolved itself (i.e., examining Serbia's status retrospectively). In fact, the logic of the *Mavrommatis* approach was meant to be applied prospectively, in particular to excuse *procedural* imperfections that the applicant could rectify *ex ante* by re-filing a corrected application. Such is not the situation in the present case, which involves, rather, a *fundamental* question which is only known to resolve itself *ex post*. In applying the *Mavrommatis* principle retroactively, the majority sets a dangerous precedent that threatens the finality of all of the Court's judgments, as any jurisdictional decision could be reopened further to new developments.

8. Further, *Mavrommatis* and all of its progeny dealt with very short-

lived defects. For example, in the Court's 1996 Judgment on Preliminary Objections in *Bosnia and Herzegovina* v. *Yugoslavia*, the procedural defect at issue was remedied after merely nine days (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Yugoslavia), I.C.J. Reports 1996 (II)*, p. 612, para. 24). To apply the same principle to a long-lasting defect like the one in the present case would create a jurisprudential slippery slope in respect of the Court's jurisdiction, to the detriment of judicial certainty and finality. If procedural defects could be rectified even years later, the Court's jurisdiction would be open to endless challenge, even with regard to cases long considered to have been definitively settled. The present Judgment proposes no limit to this uncertainty. *According to the Court's settled jurisprudence, its jurisdiction in a case must exist at the time of filing the Application*.

9. Additionally, the *Mavrommatis* procedural-defect approach has been applied where it has been the applicant or both parties, but not the respondent alone, which failed to fulfil one of the conditions necessary for the Court to find jurisdiction at the date the proceedings were instituted (see the present Judgment, para. 84). Where an application is imperfect and the applicant could perfect and merely re-file it, logically the *Mavrommatis* doctrine holds that the Court should not bar the application because of a mere procedural imperfection easily rectifiable by the applicant. For example, in the *Certain German Interests in Polish Upper Silesia* case, the Permanent Court emphasized that "the Court cannot allow itself to be hampered by a mere defect of form, *the removal of which depends solely on the Party concerned*" (*Jurisdiction, Judgment No. 6, 1925, P.C.I.J., Series A, No. 6*, p. 14; emphasis added). The present situation, in which the Respondent failed to fulfil one of the preconditions necessary for the Court to find jurisdiction at the date the proceedings were instituted, is entirely different, because the Court can in no way have known at the date of filing whether the Applicant would ever be in a position to file a procedurally correct Application. This depended on the status of the Respondent, which in turn depended on actions of the international community (in granting or withholding recognition of the Respondent as a Member State of the United Nations). Thus, the present case does not involve a "mere" procedural defect susceptible of correction in a fresh application made by the same party responsible for the defective instrument.

10. Instead of relying on the *Mavrommatis* case to uphold the Court's jurisdiction now that it is clear that the Respondent ultimately became a State with access to the Court, the Court should, with respect to this decidedly non-procedural matter, have determined whether, under its Statute and jurisprudence, the Parties had access to it at the relevant

time. Thus, the Court was required to proceed from the fundamental premise that the determination was to be made at the time Croatia filed its Application. As the Court rightly observes in the present Judgment, it has reiterated in numerous precedents that: "the jurisdiction of the Court must normally be assessed *on the date of the filing of the act instituting proceedings*" (para. 79; emphasis added, citing *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Yugoslavia), Preliminary Objections, Judgment, I.C.J. Reports 1996 (II)*, p. 613, para. 26; *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya* v. *United Kingdom), Preliminary Objections, Judgment, I.C.J. Reports 1998*, p. 26, para. 44). Yet, the Court in the present Judgment chose two different strategies to contravene this fundamental principle. First, it argued that jurisdiction could be reconsidered as of the date of the Court's consideration of the case, stating:

> "What matters is that, at the latest by the date when the Court decides on its jurisdiction, the applicant must be entitled, if it so wishes, to bring fresh proceedings in which the initially unmet condition would be fulfilled" (Judgment, para. 85).

As stated, this proposition would appear to be fundamentally self-contradictory. The majority is trying to have it both ways. It states, on the one hand, that it does not matter that the Court did not have jurisdiction *ratione personae* over Serbia when Croatia filed its Application, that it is just a matter of form, and that, since Serbia is a party to the Statute of the Court *now*, the Court can exercise jurisdiction. On the other hand, it states that it is irrelevant that Serbia later entered a reservation to Article IX of the Genocide Convention because what matters is that, at the time the Application was filed, this reservation did not yet exist. The Court cannot take one approach to jurisdiction on one issue and a different approach to jurisdiction on another issue in the same case.

Second, the Court also argued that jurisdiction could be reconsidered as of the date of the Memorial, concluding that because Croatia's Application was "a short text comprising some ten pages" (*ibid.*, para. 90), while its Memorial, presented after Serbia gained access to the Court, was "a document of 414 pages" *(ibid.)*, this somehow allows for reconsideration of access at the date of the Memorial because the Memorial thus breaks new ground. The Court's jurisprudence does not support either of these alternative approaches. Despite these two attempts to change the date at which access to the Court is to be determined to either the date of the Memorial or the date of the Court's consideration of the case, the fundamental premise remains — and the present Judgment acknowledges — that access to the Court is to be determined as of the date of the filing of the Application.

11. In a nutshell, when the Applicant instituted proceedings against the Respondent in 1999, the Respondent was not a party to the Statute of the Court and therefore had no access to the Court. This fact cannot be rectified by recourse to the approach taken by the Permanent Court in the *Mavrommatis* case.

12. In choosing to exercise jurisdiction in the present case, the Court will not only be in flagrant violation of the provisions of the United Nations Charter, the Statute of the Court, General Assembly resolution 47/1, and Security Council resolution 777, but will also be ignoring one of the fundamental principles of international justice, that of equality between the applicant and the respondent. Stating that the Court can exercise jurisdiction because the Respondent has subsequently been admitted to the United Nations, and that this thus validates the Application, is to ignore the fact that as a non-Member State of the United Nations and non-party to the Statute of the Court, Serbia and Montenegro was not entitled to institute proceedings before the Court against Croatia without the latter's consent. Indeed, when the Respondent in the present case attempted to do so against other States in the *Legality of Use of Force* cases, this Court ruled that the present Respondent as Applicant in those cases had no access to the Court and that the Court therefore could not exercise its jurisdiction.

13. It should also be noted that, indeed, the Applicant itself has previously taken the position that the Respondent lacked the capacity to participate in proceedings before the Court at the relevant time. In a letter addressed to the Secretary-General of the United Nations in May 1999, concerning the question of the Court's exercise of jurisdiction, the Applicant stated as follows:

> "Since a new application for membership in the United Nations, pursuant to Article 4 of the Charter of the United Nations, has not been made by the Federal Republic of Yugoslavia (Serbia and Montenegro) to date, and it has not been admitted to the United Nations, the Federal Republic of Yugoslavia therefore cannot be considered to be *ipso facto* a party to the Statute of the Court by virtue of Article 93, paragraph 1, of the Charter of the United Nations. Neither has the Federal Republic of Yugoslavia (Serbia and Montenegro) become a contracting party of the Statute of the Court under Article 93, paragraph 2, of the Charter, which states that a non-member State can only become a contracting party of the International Court of Justice's Statute under conditions set by the General Assembly on the recommendation of the Security Council on a case-by-case basis. Furthermore, the Federal Republic of Yugoslavia (Serbia and Montenegro) has not accepted the jurisdiction of the Court under the conditions provided for in Security Council resolution 9 (1946) and adopted by the Council by virtue of powers conferred on it by article 35, paragraph 3, of the Statute of the Court." (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, United Nations doc. A/53/992, 7 June 1999.)

14. In the light of the foregoing, for the Court now to decide that it has jurisdiction in this case is inconsistent not only with its earlier findings but also with the express position of the Applicant in this case at the relevant times. Hence, not only may this Judgment be seen as unjustified and even *contra legem*, but it is also in contradiction with the factual situation as previously characterized by the Applicant.

15. Finally, a point should be made about the consistency of the Court's judgments. On at least three occasions, the Court reiterates that decisions taken in previous proceedings (not involving exactly the same parties) are not *res judicata* under Article 59 of the Statute of the Court, but that the Court "will not depart from its settled jurisprudence unless it finds very particular reasons to do so" (Judgment, para. 53; see also paras. 54 and 76). The Court also notes that this is the position taken by both of the Parties to the present dispute (*ibid.*, para. 71). However, the present Judgment addresses this issue through weak attempts to distinguish the 2004 Judgment. First, it reasons that the Applicant in 2004 did not raise the issue of access while the Applicant in this case did (*ibid.*, paras. 88-89). This is unconvincing: access is not a condition which may be satisfied merely upon request by the applicant (and certainly not access for the opposing party!); rather, it is a fundamental characteristic that arises out of a party's status and is required by the Charter and the Statute of the Court. If Serbia lacked access to the Court in 2004, Croatia *absolutely cannot* provide it with access in the present case simply by making a request to the Court to that effect. The Court also attempts to distinguish the 2004 case by arguing that "[i]t was clear [in that case, contrary to the present case] that Serbia and Montenegro did not have the intention of pursuing its claims by way of new applications" (*ibid.*, para. 89). This assumption by the Court is also an unconvincing basis on which to rest such an important distinction, as the Court overlooks the fact that the Applicant could not file a new application because of Serbia's reservation to the Genocide Convention.

16. Since the Respondent in this case did not fulfil the conditions required to gain access to the Court at the time when the Applicant instituted proceedings in 1999, the Court cannot exercise a jurisdiction that has not been conferred on it. In other words, the conditions for the Court to exercise jurisdiction in this case — the concordance of jurisdiction *ratione personae*, *ratione materiae* and *ratione temporis* — were not met

and the Court, therefore, wholly lacked jurisdiction at the time and still lacks it today. This conclusion is also in conformity with General Assembly resolution 55/12, admitting Serbia and Montenegro to membership of the United Nations and by virtue of which Serbia and Montenegro became a party to the Statute. Consequently, the Court's present Judgment is not only *contra legem* and therefore inadmissible to provide a basis for the Court's jurisdiction, but it also contradicts the Court's jurisprudence. If the Respondent lacked access to the Court when it filed its Applications against some States in 1999, as the Court held in 2004, it cannot be deemed to have had access to the Court as Respondent when Croatia filed its Application against it, also in 1999.

17. In addition to our views on the foregoing issues concerning access, we also express concern regarding the Court's position on jurisdiction, which it concludes is established based on the declaration made on 27 April 1992 regarding commitments that "the SFR of Yugoslavia assumed internationally. . . [to remain] bound by all obligations. . ." (Judgment, para. 44). First, this declaration was made on the basis of a claimed State continuity which, as it turned out, was not accepted by the United Nations, including the Applicant, and thus such a declaration cannot form the basis of the Court's jurisdiction. Second, the Court's analysis of the validity of the declaration is based on a flawed premise. The Court states that the Federal Republic of Yugoslavia at the time of the declaration "was then claiming to be the continuator State of the SFRY, but it did not repudiate its status as a party to the Convention even when it became apparent that that claim would not prevail. . ." (*ibid.*, para. 111; emphasis added). The Court's statement is factually inaccurate. Quite the contrary — and as the Court even notes later in its Judgment (*ibid.*, para. 116) — on 6 March 2001 the Federal Republic of Yugoslavia specifically repudiated the 27 April declaration, stating that:

> "NOW it has been established that the Federal Republic of Yugoslavia has not succeeded on April 27, 1992, or on any later date, to treaty membership, rights and obligations of the Socialist Federal Republic of Yugoslavia in the Convention on the Prevention and Punishment of the Crime of Genocide. . .
>
> THEREFORE, I am submitting on behalf of the Government of the Federal Republic of Yugoslavia this notification of accession to the Convention on the Prevention and Punishment of the Crime of Genocide. . ." (Notification of Accession to the Genocide Convention by the Federal Republic of Yugoslavia, 6 March 2001, *Application for Revision of the Judgment of 11 July 1996 in the Case concerning* Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina *v.*

Yugoslavia), Preliminary Objections (*Yugoslavia* v. *Bosnia and Herzegovina*), *Judgment, I.C.J. Reports 2003*, p. 25, para. 52).

Thus, not only did the Federal Republic of Yugoslavia repudiate the 27 April declaration, but its action of acceding to the Genocide Convention cannot but lead to the conclusion that it also accepted that it was not a party to the Genocide Convention during the relevant time. Third, even if, hypothetically, this declaration could provide a basis for the Court's jurisdiction, it would not be a complete basis because, as discussed in the beginning of this declaration, a fundamental pre-condition to its exercise — Serbia's access to the Court — has not been established.

18. In conclusion, because we are firmly convinced both that Serbia lacked access to the Court at the relevant time (and thus the Court lacked jurisdiction *ratione personae*) and that Serbia's 27 April declaration is not sufficient to give the Court jurisdiction, we conclude that the Court is wholly lacking jurisdiction to hear the case.

(*Signed*) Raymond RANJEVA.
(*Signed*) SHI Jiuyong.
(*Signed*) Abdul G. KOROMA.
(*Signed*) Gonzalo PARRA-ARANGUREN.