DISSENTING OPINION OF JUDGE RANJEVA

[Translation]

Arbitral jurisdiction and judicial jurisdiction — The International Court of Justice and its role as a catalyst for scientific development of international law — Authority of jurisprudence — Solution of continuity and State succession and continuity of the jurisdictional solution — Transposal of Mavrommatis *solution and reversal in case law — Consent to jurisdiction and status of the Respondent — Non-fulfilment of conditions for filing Application — Difference in treatment between Respondent and Applicant — Article 35 of the Statute: right to institute contentious proceedings — Article 34 of the Statute: limitation of access to States alone and definition of the legal status or position of States in proceedings: Applicant or Respondent — Principle of sovereign equality of parties to a dispute — No special treatment for Respondent — Consensual basis of jurisdiction — Difference vis-à-vis system of statutorily conferred jurisdiction — Jurisdiction* ratione materiae *— Argumentation strategies independent of proceedings — Declaration of succession by FRY — Croatian objection to claimed succession — Distinction between continuity of treaty obligations and discontinuity of legal personality of SFRY/FRY — Effect of this distinction on Article IX — Systemic links between 1948 Convention and United Nations system — Legally established consent to jurisdiction by Serbia lacking — Historical circumstances of* Mavrommatis *case jurisprudence — Specifics of mechanisms instituted by 1919 Peace Treaties — Law of resolving political crises.*

1. Rendering justice under the law in a judicial institution having universal jurisdiction is a particularly difficult exercise. The consistency of justice over the course of time can bring surprises. An arbitral court, unconstrained in its decisions, is responsible for its judgment only to the parties which have consented to its jurisdiction. A court of law, on the other hand, acts within the context of a concept of legal policy; it has a heritage to uphold embodied in its jurisprudence, which helps promote legal certainty and the consistency of the law. As one of the principal organs of the United Nations, the International Court of Justice enjoys operational autonomy while sharing in the objectives of the Organization, *inter alia*, through the practice of presenting an Annual Report on the Court's activities to the General Assembly. Moreover, the Court is recognized as having a specific mission, and one which is willingly attributed to it: to be a catalyst for the scientific development of international law. However, there are instances where, for scientific reasons or technical legal or judicial reasons, observers and commentators may note some inconsistency vis-à-vis a previous decision without there actually having been a reversal of any precedents. Reasons linked to various factors, particularly the conduct of the parties (subject-matter of claims, basic strategy, argumentation strategy, etc.) in the corresponding proceedings, can

lead to different solutions being devised. Such is the situation in the present case concerning *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia* v. *Serbia)* vis-à-vis the case concerning *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)*, p. 43): transposing the solution chosen in the case concerning *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro)* (*ibid.*, hereinafter *BHY*) is impossible from the legal standpoint because it challenges the whole underlying logic of the basis of the jurisdiction of the International Court of Justice: consent.

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2. As far as the first preliminary objection relating to the Court's jurisdiction to adjudicate Croatia's claim is concerned, I regretfully cannot accept the decision of the majority. I must emphasize, however, that this does not mean that I believe that Serbia has any ground not to answer for violations of the Convention on the Prevention and Punishment of the Crime of Genocide under international law, in so far as such violations may be established. It is that the submission of the case to the Court by Croatia was inappropriate.

3. So far as the international legal status of Serbia in relation to the Socialist Federal Republic of Yugoslavia (SFRY) is concerned, the Court has adopted the solution of continuity in order to accept the continuity of the Court's solution in the *BHY* case. By basing itself upon the principle of State succession in order to justify the continuity of the treaty obligation under the 1948 Convention, the Court has accepted the solution of continuity, which means a break in the continuity of the legal personality from the SFRY to Serbia. That choice, however, ignores the solution in the *BHY* case, which, on the contrary, was based on the continuity of the legal personality from the SFRY to Serbia. This contradiction prompted the majority to rely, in error, on the jurisprudence of the *Mavrommatis* case *(Judgment No. 2, 1924, P.C.I.J., Series A, No. 2)*, and thus ignore the golden rule that the jurisprudence of the Court is based on consent.

4. The present Judgment will elicit a wide range of comments: it constitutes a reversal of case law regarding conditions of access to the Court. Thus, as the Judgment recalls, it is at the date when an application is filed that the jurisdictional capacity of the Court is assessed; at that critical date, all the conditions necessary for the exercise of its jurisdiction must be fulfilled in all respects. For the sake of the sound administration of justice, the present Judgment, in referring to the jurisprudence of the *Mavrommatis* case calls that firmly established rule into question. In other words, failure to fulfil all the conditions of jurisdiction no longer leads inevitably to the Court's lack of jurisdiction. Such situations are not unknown underforum *prorogatum* whereby a State accepts jurisdiction

after *an application has been submitted to the Court; the absence of consent constitutes a defect which can be overcome by potestative initiative, that is to say, at the discretion of the respondent State. Considerations concerning the sound administration of justice (explicit indication of consent to jurisdiction by the party which had not initially indicated such consent and procedural efficiency) explain why this open solution has been upheld in forum prorogatum* case law.

5. However, in the present instance, the circumstances are entirely different, since what is missing is not the consent which can be confirmed in a potestative manner, but the capacity itself of the State (that of Serbia in this instance), not to access the Court as an applicant, but to be brought before it as a respondent. On two occasions, the Court has refused to grant the Federal Republic of Serbia and Montenegro (Yugoslavia) the right to be a party to a dispute before the Court (see the cases concerning *Legality of Use of Force* in 2004 (*I.C.J. Reports 2004 (I, II, III)*, pp. 279-1450) and the case concerning *Application for Revision of the Judgment of 11 July 1996* (*I.C.J. Reports 2003*, p. 7)). Its admission to the United Nations did not have a retroactive effect; it could not rectify its *sui generis* status following the break-up of the Socialist Federal Republic of Yugoslavia (SFRY) and prior to its admission in 2000 as a new State. In addition to judicial revisionism on the link between the status of State party to the Statute of the International Court of Justice and membership of the United Nations, the present Judgment calls into question the very conditions in which the Court exercises its jurisdiction.

6. Although strictly speaking we cannot talk about *res judicata*, the present Judgment favours the continuity of the jurisprudence of the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro)* case, which is supported by an extensive body of decisions on both procedural issues and the legal merits, in order to dismiss the solution adopted in the *Application for Revision of the Judgment of 11 July 1996,* Preliminary Objections case in 2003 and the *Legality of Use of Force* cases in 2004. As a result, there is a lack of consistency and clarity in the work of the Court and a misunderstanding of the nature of the jurisdictional function within the United Nations system. I must therefore regretfully express my dissent from the decision of the majority in the present case.

7. As far as the facts and the conduct of the legal actors in the present proceedings are concerned, the Judgment should have emphasized the specific elements which differentiate the present case from the case concerning the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro)*. First, prior to its admission to the United Nations, the Federal Republic of Yugoslavia claimed unequivocally its continuity from the SFRY, whereas it now objects to the Court's jurisdiction on the

ground that its admission as a new State had no retroactive effect. Leaving aside any ethical or moral considerations, where two separate cases are concerned, is there any obligation in law for a State to be consistent in or faithful to its arguments? Second, unlike *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Yugoslavia)* (*Preliminary Objections, Judgment, I.C.J. Reports 1996 (II)*, p. 595) (hereinafter the *Bosnia* case), the Court could not overlook or set aside the protest by Croatia in 1994 whereby it challenged the claims to continuity made by the Federal Republic of Yugoslavia. Indeed, in a letter dated 16 February 1994 addressed to the Secretary-General by its Permanent Representative, Croatia stated that it:

> "*strongly objects* to the pretention of the Federal Republic of Yugoslavia (Serbia and Montenegro) to continue the state, international, legal and political personality of the former Socialist Federal Republic of Yugoslavia.
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> . . . . . .
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> [I]f the Federal Republic of Yugoslavia . . . expressed its intention to be considered, in respect of its territory, a party, by virtue of succession to the Socialist Federal Republic of Yugoslavia, to treaties of the predecessor State, with effect from 27 April, . . . as a new State, . . . the Republic of Croatia would fully respect that notification of succession." (Doc. S/1994/198, 19 February 1994.)

In 1996, in the *Bosnia* case, the Federal Republic of Yugoslavia did not raise as a preliminary objection the issue of the *sui generis* Member State status that had been attributed to it. Lastly, does the link between its status as a Member of the United Nations or as a State party to the Statute of the International Court of Justice and its access to the Court as a respondent correspond to the pursuit of the sound administration of justice?

8. The Court's decisions of 2003 and 2004 in the *Legality of Use of Force* and *Application for Revision of the Judgment of 11 July 1996* cases constitute the expression of the most recent state of the law concerning the relationship between the status of Member State of the United Nations and access to the Court in the event of a dispute. They were not called into question directly or indirectly by the latest judgment dating from 2007, when the final finding regarding the Court's lack of jurisdiction was supported unanimously by the Members of the Court; but the difference in their views, on the other hand, had to do with the area on which the Court's decision was made: a question more of appropriateness than of legality. Unlike *ad hoc* arbitral courts, it is considered imperative for the Court to abide by its own case law to assure certainty in legal relationships between States. The issue in the present proceedings concerns the distinction to be drawn between access as an applicant, which has been

the subject of past decisions, and the bringing of a respondent before the Court, on which no previous decisions have been rendered.

9. The first aspect of this problem lies in the difference in treatment which the present decision attributes to the Respondent vis-à-vis the Applicant. A State may be brought before the Court, notwithstanding a complete failure to fulfil the conditions for *locus standi* at the critical date when the Application was filed. This difference in treatment affects the principle of equality of the parties in regard to the rules of procedure and the application of identical basic rules. As for the equality of the parties in regard to the rules of procedure, they have the right to be judged in the same conditions: that is to say, that they must fulfil the same conditions of access to the Court (in this case, to be the Respondent) and must comply with the same rules of procedure, irrespective of their status as applicant or respondent. As far as equality in the application of identical basic rules for the proceedings is concerned, the question is whether, under the law respecting States before the International Court of Justice, the act of refusing to be called as respondent following a unilateral application constitutes an injustice.

10. On closer examination, the difference in treatment between the applicant and the respondent may lack any direct basis, inasmuch as it concerns a general principle of procedural law. It is difficult not to link the principle of the equality of rights and conditions of the applicant and the respondent to the provisions of Article 34 of the Statute of the Court, the terms of which must be considered in comparison with those of Article 35. Article 34 stipulates, "Only States may be parties in cases before the Court." The provisions recalled in Articles 35 and 34 in the French version of the Statute — which is the original text, as was noted in the Judgment in the *LaGrand* case ("It might however be argued, having regard to the fact that in 1920 the French text was the original version . . ." (*I.C.J. Reports 2001*, p. 502, para. 100)) — make a distinction between *"La Cour est ouverte aux Etats parties au présent Statut"* ("The Court shall be open to the States parties to the present Statute") (Article 35) and *"Seuls les Etats ont qualité pour se présenter devant la Cour"* ("Only States may be parties in cases before the Court") (Article 34). The difference between the Court being open and the right to be a party lies in the fact that the first provision concerns the authorization or faculty to bring a case before the Court or to initiate contentious proceedings, whereas the second concerns the condition or capacity in which a State may be involved in contentious proceedings. Article 35 only addresses the issue of the access of a State to the forum of the Court: that is its capacity to bring a case and act within specific proceedings. A State which comes before the Court as an applicant must establish that it has a right, vis-à-vis the respondent, with respect to its claim. Article 34, for its part, addresses two issues: first, limiting access to the Court to States and excluding other rights holders under international law which are not States and, second, by use of the word *"qualité"* the Statute considers the capacity or function of the rights holder accessing the Court: that is, the

legal condition of States in proceedings as applicant or respondent as the case may be. The combined interpretation of these two points leads to compliance with the principle of the sovereign equality of States and a differentiation of their legal circumstances depending on the capacity in which they appear in the case, as respondent or applicant, such being the function that entitles them to take part in the proceedings. The inescapable consequences of this are, first, equality of standing in respect of access and, second, exclusion of any specific, different treatment that would place the respondent at a disadvantage.

11. The lack of any specific provisions concerning the respondent, which would be the counterpart of Article 35, can be explained by the consensual nature of the basis of the Court's jurisdiction. In a system of statutorily conferred jurisdiction, justice must be conducted in such a way that all potential litigants can find a court to resolve their dispute; the statutes and functioning of the court régime provide for the right to justice to be exercised. The dispute is put before the court with jurisdiction at the applicant's initiative, thereby making it necessary for his adversary to take part in proceedings; the legal bonds between the two parties cannot then be set within a contractual or consensual framework. In other words, in the framework of legal relationships within which the powers and obligations of the parties to the case are defined, one of the parties is obliged to appear before the court without any requirement for his prior consent.

12. On the other hand, in a system based on consent to jurisdiction, such as that established under Article 36 of the Statute, a State is entitled to refuse to be brought before the International Court of Justice without its consent. This principle accounts for the importance of objections regarding jurisdiction and admissibility in the conduct of proceedings. As far as the law of procedure on merits is concerned, this principle explains the lack of provisions on abuse of process and frivolity. Similarly, this is why there is no counterpart to Article 35 of the Statute concerning the respondent. Once the same conditions as those required of the applicant have been fulfilled, it is for the participants to establish consent to jurisdiction, in particular the consent of the respondent. In view of the importance of the respondent's consent for the connection between the parties in dispute to be established, Article 34 and, in particular, its first paragraph are linked to the issue of jurisdiction *ratione personae*, an interpretation which we can note is borne out by the *travaux préparatoires* of the Advisory Committee of Jurists (see B. Schenk von Stauffenberg, *Statut et Règlement de la Cour permanente de Justice internationale: éléments d'interprétation*, Carl Heymanns Verlag, Berlin, 1934, pp. 217 *et seq.*).

13. Despite these considerations, the Judgment has chosen to interpret the silence of previous decisions in a very specific way: to safeguard and justify the case law of the Judgment of the 2007 case against critics. Indeed the Judgment engages in a justification of the 2007 case law in a surreal context: defending the implausible from the real facts. As the judges present at the time of the 1996 Judgment and still sitting in 2007

stated in their joint opinion, nothing can be deduced from the silence of the 1996 Judgment on capacity to appear before the Court. The unease is further heightened when, for lack of objective arguments, the Judgment turns as a last resort to an *ipse dixit* justifying the possibility for the Court to refrain from furnishing any explanation on a point which can be raised ex officio, even if that point calls into question the very foundation of contentious proceedings before the Court since it is preliminary to even the preliminary proceedings! This was an irrelevant and, in any event, inconclusive debate on the issue addressed in the course of the present case.

14. One must wonder if the Judgment in the present case has not arrived at the same conclusions as the arbitral tribunals of the International Centre for Settlement of Investment Disputes (ICSID) in the *Southern Pacific Properties (Middle East) Limited* v. *Arab Republic of Egypt* (1985) and *Asian Agricultural Products Limited (AAP)* v. *Sri Lanka* (1990) cases. The arbitral tribunals referred to the condition linked to the consent of the two parties for putting the dispute before the ICSID and interpreted their acceptance of ICSID dispute settlement methods in broad terms. The arbitral tribunals did not have to be overly strict because there was evidence of an incipient indication of consent; one cannot then talk of a simple logical legal conclusion.

15. The consensual nature of the basis of jurisdiction means that jurisdiction must always be debated and established by means of a judicial procedure. It cannot be solely "scientific", that is, justified by logical considerations. This is a precautionary principle. Jurisdiction must not be established by attributing a greater meaning to the relevant elements of fact and law than they possess.

16. For these reasons, the Judgment is mistaken in the difference in treatment it attributes to the conditions for a State to be a party before the Court depending on whether that State is the applicant or the respondent.

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17. The jurisdiction *ratione materiae* raises the issue of the history of the status of the Federal Republic of Yugoslavia vis-à-vis the United Nations and the consequences thereof on the *sui generis* position of the Federal Republic of Yugoslavia and on the status of Serbia with respect to Article IX of the Genocide Convention. In the circumstances of the present case, unlike the solution chosen in the *Bosnia* case, the Judgment's approach is open to criticism because it lacks a basis in order to be credible.

18. Quite properly, the Judgment has sought to ensure consistency by transposing vertically the solution from the precedent of the *Bosnia* proceedings on the merits. However, by avoiding a careful examination of the particular or specific aspects of the present case, the Judgment is

lacking in rigour, given the axiom that each case is unique in facts and in law.

19. To one preliminary question the Judgment brings no answer. Can a party which has been a respondent in previous proceedings submit new arguments contrary to those it has put forward in the past? Examination of the present case reveals that the dispute concerns the same question of law: violation of the Genocide Convention. It also relates to similar facts: the after-effects of the break-up of the SFRY. As for what is at issue in the case, the Applicant's claims seek the same redress as those submitted in the *Bosnia* case. The dispute following the break-up of the SFRY fed upon itself. In the circumstances of the present case, a joinder of the proceedings under the terms of Article 47 of the Rules of Court might have been an option for the Court, since it is not inconceivable even without the consent of the parties. When the Croatian Application was filed the *Bosnia* case was still pending and the Court would not have been obliged to deliver largely identical judgments, when the context in this instance is complex. The distinct and independent approaches to the cases concerning *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro)* and *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia* v. *Serbia)*, along with the lack of a decision to join the proceedings, give the Parties to the second case full control over their strategies of argumentation regarding their own status. For its part, the Court can draw no advantage from the decision in the case concerning *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro)* in adjudicating the case concerning *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia* v. *Serbia)* as to the rights of the Parties which can submit their own claims and support their own arguments of fact and law. The Court must, in particular, provide substantive reasons for its findings on the specific arguments advanced in the present case.

20. Three acts punctuating the evolving understanding of the legal status of Serbia from 1992 should have given rise to a more detailed examination: first, the declaration of continuity made by the Federal Republic of Yugoslavia; second, the Croat objection in 1994 to the continuity claimed by the Federal Republic of Yugoslavia; and finally, the admission of the Federal Republic of Yugoslavia to the United Nations as a new Member State after the suspension of its participation in the United Nations General Assembly. The combined effect of those three acts has prompted the Court, since 1992, to talk of a *sui generis* situation, more out of linguistic convenience than by reference to a pre-established legal category. Consequently, there is reason to supplement the Judgment's analysis, even if it means arriving at different conclusions.

21. The declaration of continuity made by the Federal Republic of

Yugoslavia actually represents a notification of succession and falls within the framework of the requirements of the Convention on Succession of States in respect of Treaties; it is binding upon it. This aspect is of no interest in the present case. As for the Convention on the Prevention and Punishment of the Crime of Genocide, the *erga omnes* nature of the obligations which it lays down is acknowledged as the consequence of the basis of those provisions in customary law.

22. The crux of the problem concerns the scope of Croatia's 1994 objection to the continuity claimed by the Federal Republic of Yugoslavia on the fate of Article IX in the jurisdictional relationship between the two Parties in dispute. The Court cannot regard these unilateral acts as mere scraps of paper and must attribute legal consequences to them.

23. In relations between Croatia and the Federal Republic of Yugoslavia the difficulty stems from the letter from the Permanent Representative of Croatia to the United Nations dated 16 February 1994. This official document was mistakenly not taken into consideration in the Judgment as a basis for the decision on the issue of State succession that arose in the litigious relationship between the Parties. As stated in that document,

> "if the Federal Republic of Yugoslavia (Serbia and Montenegro) expressed its intention to be considered, in respect of its territory, a party, by virtue of succession, to the Socialist Federal Republic of Yugoslavia, to treaties of the predecessor State, with effect from 27 April 1992, the date on which the Federal Republic of Yugoslavia (Serbia and Montenegro), as a new State, assumed responsibility for its international relations, the Republic of Croatia would fully respect that notification of succession" (doc. S/1994/198 (1994)).

24. The subject-matter of the letter was a protest against the declaration of 27 April 1992 by the Federal Republic of Yugoslavia. It constituted an objection entering a reservation to the claim of continuity. On closer analysis, various aspects must be emphasized: first, a rejection of the continuity of the personality of the SFRY by the Federal Republic of Yugoslavia; next an acceptance of the continuity of the treaty obligations *ratione loci*: that is the applicability to the territory of the Federal Republic of Yugoslavia of treaty obligations for which a succession had taken place; and, lastly, a formal notice to the Federal Republic of Yugoslavia to accept Croatia's offer. The Croat letter means that, having been informed of the declaration of succession of April 1992, the Republic of Croatia considered that, with respect to treaty ties between the Croats and the Serbs, the letter is binding upon it vis-à-vis the Federal Republic of Yugoslavia within the terms which Croatia established therein: a continuity of treaty obligations combined with a clause of territorial applicability. However, any notion of the continuity of the personality of the State is ruled out, par-

ticularly as far as the organic and institutional dimensions vis-à-vis the United Nations are concerned.

25. It is in this specific and unqualified context that the issue of the fate of the dispute settlement clause in Article IX lies. An initial conclusion cannot be avoided: the declaration in question is binding upon its author and lays down the legal framework of its relationship with Serbia within the context of the present case. Furthermore, as the dispute settlement clause is severable from the system of obligations of the Genocide Convention, it must be addressed independently inasmuch as there is reason to apply specific rules to the indication of consent to jurisdiction, which must be established explicitly and not implicitly, that is, based on logical conclusions. In the present case, a doubt about continuity is justified given, on the one hand, the systemic ties which the Judgment itself recalls between the 1948 Convention and participation in the United Nations system — irrespective of the continuity of the substantive ties of obligation under multilateral treaties — and, on the other hand, the organic link between the Court and the United Nations system. In view of the distinction drawn by Croatia in its 1994 letter in response to the 1992 declaration by the Federal Republic of Yugoslavia, it is not demonstrated that Croatia accepted the jurisdictional clause with respect to the other Party or that it can be binding upon Croatia in the jurisdictional context of the present case. This possibly surprising conclusion must be drawn because of the consensual nature of the basis of jurisdiction, since the International Court of Justice is not a court of statutorily conferred jurisdiction, whose sphere of competence can be interpreted broadly.

26. For these reasons Article IX does not fall within the scope of succession in relations between Croatia and Serbia.

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27. In the present case, the extension of the jurisprudence of the *Mavrommatis* case with respect to the Respondent is open to criticism since, at the date when the Application was filed, the Respondent did not fulfil the conditions required to appear before the Court. It is not unknown for applications instituting proceedings to be validated after they have been filed, as the Judgment rightly recalls: *forum prorogatum*, for example, corresponds to just such a situation, serving as the underlying basis for jurisdiction. This occurs when a State accepts the jurisdiction of the ICJ after the case has been brought. The reasons for this practice were explained by the Court in the case concerning *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti* v. *France)*.

28. In the present instance the problem lies in the fact that at the date of filing of the Application, the Respondent did not fulfil the conditions required of a State in order to appear before the Court. The Judgment, in transposing the *infans conceptus pro nato habetur* principle in the sense that the proceedings are regarded as having been instituted according to

the rules providing that the applicant fulfilled all of the conditions required, has held that for reasons relating to the sound administration of justice the subsequent admission of Serbia to the United Nations validated the circumstances and conditions of the filing of the Application. Evidently, for reasons of procedural economy and with a not very formalistic view of the law of international disputes, nothing is said to stand in the way of the fulfilment of the conditions for submitting a case to the Court being assessed at the date when all of those conditions have been met. In the present instance, the admission of Serbia and Montenegro to the United Nations in 2000 represented the solution. The important thing was not to oblige the Applicant to file a new Application once again in the same case, with the same subject-matter, the same claim, the same reason and against the same State. However, the Court's finding on the first preliminary objection can be criticized, even if we were to assume that the Court had jurisdiction. For this reason, the Judgment relies on the jurisprudence of the *Mavrommatis* case.

29. The content of the *Mavrommatis* principle has been abundantly discussed in the Judgment. However, the conclusion at which that decision arrived cannot be accepted owing to the lack of a rigorous analysis of the *Mavrommatis* ruling and the subsequent judgments referred to.

30. An analysis should have been made of the passage quoted in paragraph 82 rather than a simple recollection of the finding of the Permanent Court of International Justice. The overall procedural economy is justified by a number of points which are put forward:

— the condition that was missing, which concerned the incomplete nature of the international obligation under Article 11 of the Mandate for Palestine: it had been established but had not at that point entered into force. On reading the Judgment, nothing suggests that that obligation might have been of an irreversible nature;
— the discretionary or potestative nature of the Applicant's initiative to submit its Application again;
— insufficient grounds for dismissing the initial Application.

31. An analysis of the jurisprudence of the *Mavrommatis* case prompts the following comments. First, the case was brought before the Permanent Court of International Justice by way of a special agreement. Such a consensual means of submitting a case presumes a lack of absolute defects of a kind that would call into question the choice of court made by common agreement. Second, the corrective initiative lay within the powers of the Applicant. This aspect was repeated in the subsequent decisions mentioned in the present Judgment. Thus in the *Certain German Interests in Polish Upper Silesia* case *(Jurisdiction, Judgment No. 6, 1925, P.C.I.J., Series A, No. 6)*, the Judgment talks of unilateral action on the part of the applicant Party. Lastly, the defect marring the regularity of the submission of the case to the Court lay within the exclusive responsibility of the party concerned, that is, the Applicant.

32. A conclusion can be drawn: the conditions indicated by the *Mav-*

rommatis Judgment do not exist in the present case. First, the question does not concern the jurisdiction *ratione personae* of the Court, but an issue preliminary to jurisdiction: the right or obligation to be able to be brought before the Court as a respondent. This is a preliminary point of law. Indeed, if the condition governing appearance before the Court is not fulfilled, there is ultimately no dispute capable of judicial resolution. Second, the defect noted when the Application was filed concerned the status of the Respondent in the proceedings, a matter beyond the power of the Applicant. Lastly, the initiative to fulfil the missing condition lies outside the powers of the Applicant; control over that which is preliminary to the preliminary issue of jurisdiction comes under a different order of authority, one which is beyond both the Court and the parties. For these reasons, transposing the principles of the jurisprudence in the *Mavrommatis* case constitutes an error of fact and of law.

33. Finally, it is not without interest to recall the reasons of judicial and jurisprudential policy underlying the *Mavrommatis* Judgment.

34. Particular attention must be paid to the limitation of the obligation of declaration to the Applicant. It is on the basis of the *travaux préparatoires* of 1920 and the jurisprudence of the *S.S. "Wimbledon"* case *(Judgments, 1923, P.C.I.J., Series A, No. 1)* that we can envisage the limitation of the provisions of the first paragraph to the Applicant, without there being corresponding rules for the Respondent. How, in the absence of a valid dispute settlement clause, can a State be brought before the Court on the sole basis that the Applicant fulfils all the conditions laid down by the Statute? The interpretation of the provisions of Article 35 in terms of limiting the conditions of access to applicant States parties flows from the overall structure of the Versailles Peace Treaties. The *travaux préparatoires* amply demonstrated that paragraphs 1 and 2 viewed as a whole were aimed specifically at the former Central Powers, the defeated States, which could not, particularly in 1919-1920, seek to claim equal rights with the victors. To restate the remarks made by Sir Cecil Hurst and the commentary by von Stauffenberg, as well as the *travaux préparatoires* of the Statute, within the general context of the 1919 Peace Treaties, two considerations must be emphasized. First, there was greater likelihood of the defeated States (Germany and the other Central Powers) appearing before the Court as respondents. Second, within the context of those treaties, it was difficult to confer upon the defeated States a right to claim equal rights with the victors; so far as the defeated States were concerned, it was not absurd to regard the Permanent Court of International Justice as possessing something similar to statutorily conferred jurisdiction within the system of the 1919 Peace Treaties. In the context of the United Nations Charter, the fundamental principle of the sovereign equality of States renders any departure from such equality contrary to the principles of the new world order. One might thus wonder if, from the perspective of a solution to a crisis falling under Chapter VII of the Charter, Serbia has been treated as a defeated State, comparable to Germany in 1919. The Court should have resolved

this question of law. These considerations explain the limits of a very narrow interpretation of Article 35 with a view to its general application.

35. As far as the *S.S. "Wimbledon"* case is concerned, it will be recalled that it was brought before the Permanent Court of International Justice pursuant to Article 386 of the Treaty of Versailles. Germany, which had yet to become a Member of the League of Nations at that point, was the Respondent. A declaration was not considered necessary for two reasons: (1) the special reservation in Article 35, paragraph 2, specifically concerns the provisions of the Peace Treaty (see the drafting history of the article); (2) the article only mentions applicant parties, whereas Germany was the Respondent, a possibility which had not been foreseen at Versailles.

36. The link between the Versailles Peace Treaties of 1919 and the mechanism established by the provisions of Articles 34 and 35 of the Statute of the Permanent Court of International Justice, carried over in the Statute of the present Court, reveals the political dimension of the project: the judicial rights of defeated States are not treated on a basis of equality with those of other States.

(Signed) Raymond RANJEVA.