DISSENTING OPINION OF JUDGE OWADA

*The legal significance of the 2004 Judgment and of the 2007 Judgment — The applicability of the so-called "*Mavrommatis *principle" to the present case — The jurisprudence of the Court on the* Mavrommatis *principle as a principle relating to consent to jurisdiction — The scope of the* Mavrommatis *principle not covering any and all "procedural defects" in proceedings before the Court — The capacity to appear before the Court as an issue to be determined at the time of the act instituting proceedings — The irrelevance of applicant/respondent distinction for the purposes of access to the Court.*

1. I have voted against the part of the operative clause of the Judgment in the present case in which the Court rejects the first preliminary objection submitted by the Republic of Serbia in so far as it relates to its capacity to participate in the proceedings instituted by the Application of the Republic of Croatia and finds that it has jurisdiction to entertain the Application (Judgment, para. 146 (1) and (3)). For the reasons set out below, I am of the view that the Court is not competent to entertain the present case submitted by the Republic of Croatia, since the Respondent, the Republic of Serbia, lacked the capacity to participate in the present proceedings at the time when the Applicant, the Republic of Croatia, filed an Application to institute the proceedings against the Respondent before the Court.

I. The Legal Significance of the 2004 Judgment and of the 2007 Judgment

2. In its 2004 Judgments in the cases concerning *Legality of Use of Force* (hereinafter referred to as the *"NATO"* cases; *I.C.J. Reports 2004 (I, II, III)*, pp. 279-1450) the Court held that "it ha[d] no jurisdiction to entertain the claims made in the Application filed by Serbia and Montenegro on 29 April 1999" (*ibid.*, p. 328, para. 129). This conclusion of the Court was based on its finding on Article 35, paragraph 1 and paragraph 2, of the Statute of the Court.

First, in relation to Article 35, paragraph 1, the Court found 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" (*ibid.*, pp. 314-315, para. 91).

On that ground, it held that "the Court was not open to Serbia and Montenegro under Article 35, paragraph 1, of the Statute" (*Legality of Use of Force, I.C.J. Reports 2004 (I)*, p. 315, para. 91).

Second, with regard to Article 35, paragraph 2, the Court also found that "the reference in Article 35, paragraph 2, of the Statute to 'the special provisions contained in treaties in force' applies only to treaties in force at the date of the entry into force of the Statute, and not to any treaties concluded since that date" (*ibid.*, p. 324, para. 113). On that ground it held that "Article 35, paragraph 2, of the Statute does not provide [the Applicant] with a basis to have access to the Court, under Article IX of [the Genocide] Convention" (*ibid.*, p. 324, para. 114).

3. In its 2007 Judgment in 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)* in which the same question of the capacity of Serbia and Montenegro to be a party to the proceedings was at issue, this time as respondent, in application of Article 35, paragraph 1, of the Statute, the Court stated as follows:

> "The Court . . . considers it necessary to emphasize that the question whether a State may properly come before the Court, on the basis of the provisions of the Statute, whether it be classified as a matter of capacity to be a party to the proceedings or as an aspect of jurisdiction *ratione personae*, is a matter which precedes that of jurisdiction *ratione materiae*, that is, whether that State has consented to the settlement by the Court of the specific dispute brought before it. The question is in fact one which the Court is bound to raise and examine, if necessary, ex officio, and if appropriate after notification to the parties. Thus if the Court considers that, in a particular case, the conditions concerning the capacity of the parties to appear before it are not satisfied, while the conditions of its jurisdiction *ratione materiae* are, it should, even if the question has not been raised by the parties, find that the former conditions are not met, and conclude that, for that reason, it could not have jurisdiction to decide the merits." (*I.C.J. Reports 2007 (I)*, p. 94, para. 122.)

Having enunciated in this way the basic principle relating to the essential nature of the capacity of the parties to participate in the proceedings before the Court under Article 35, paragraph 1, of the Statute, the Court in that case nevertheless came to the following conclusion:

> "The Court stated [in its 1996 Judgment on the present *Genocide Convention* case, Preliminary Objections] that 'Yugoslavia was bound by the provisions of the [Genocide] Convention on the date of the filing of the Application in the present case' (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Yugoslavia), Preliminary Objections, Judgment, I.C.J. Reports 1996 (II)*, p. 610, para. 17),

> and found that 'on the basis of Article IX of the Convention on the Prevention and Punishment of the Crime of Genocide, it has jurisdiction to adjudicate upon the dispute' (*ibid.*, p. 623, para. 47 (2) *(a)*) . . . [T]his finding must as a matter of construction be understood, by necessary implication, to mean that the Court at that time perceived the Respondent as being in a position to participate in cases before the Court. On that basis, it proceeded to make a finding on jurisdiction which would have the force of *res judicata*." (*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. 98-99, para. 132.)

With regard to the difference between that case and the *NATO* cases, the Court had the following to say:

> "That the FRY had the capacity to appear before the Court in accordance with the Statute was an element in the reasoning of the 1996 Judgment which can — and indeed must — be read into the Judgment as a matter of logical construction. That element is not one which can at any time be reopened and re-examined, for the reasons already stated above. As regards the passages in the 2004 Judgments relied on by the Respondent, it should be borne in mind that the concern of the Court was not then with the scope of *res judicata* of the 1996 Judgment, since in any event such *res judicata* could not extend to the proceedings in the cases that were then before it, between different parties. It was simply appropriate in 2004 for the Court to consider whether there was an expressly stated finding in another case that would throw light on the matters before it. No such express finding having been shown to exist, the Court in 2004 did not, as it has in the present case, have to go on to consider what might be the unstated foundations of a judgment given in another case, between different parties." (*Ibid.*, pp. 99-100, para. 135.)

4. It is clear that in the present case between Croatia and Serbia no such "express finding" constituting *res judicata* exists, such as that which led the Court in 2007 to affirm its jurisdiction to entertain the case. Whatever may have been the precise reasoning of the Court in 1996, when it decided that "on the basis of Article IX of the Convention on the Prevention and Punishment of the Crime of Genocide, it has jurisdiction to adjudicate upon the dispute" (*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 (2) *(a)*), it is clear that this decision on the point of jurisdiction constituted *res judicata* for the 2007 Judgment. It is for this reason that I agreed with the majority in the 2007 Judgment that the Court, as a court of law which can only function in strict observance

of the procedural requirements prescribed in its Statute and Rules, must be held in law, at any rate by construction, to have concluded that the conditions prescribed in Article 34 and Article 35 respectively have been satisfied, including the *locus standi* of the parties.

In the midst of the "amorphous . . . situation" that prevailed as of 1996 (see *Legality of Use of Force (Serbia and Montenegro* v. *Belgium), Preliminary Objections, Judgment, I.C.J. Reports 2004 (I)*, p. 310, para. 79; *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. 98, para. 131) regarding the precise legal status of the Federal Republic of Yugoslavia (hereinafter referred to as the "FRY") in relation to the United Nations, which the 2004 Judgment later came to analyse in great detail, it may well be that the Court at the time of its 1996 Judgment refrained from digging deep into the analysis of the legal standing of the Respondent and was satisfied, as far as that case was concerned, with the fact that neither of the Parties disputed the capacity of the Respondent to appear before the Court. Be that as it may, what is decisive is the fact that, as a result, this issue of *locus standi* of the Respondent, as far as that case was concerned, must be construed in law as finally settled, constituting *res judicata*.

5. It is important to note, however, as the present Judgment declares in no ambiguous terms, that this conclusion of the 2007 Judgment on this point does not constitute *res judicata* for the present case. Neither of course does the 2004 Judgment in this respect. What is crucial, however, is that by the time of the 2004 Judgment, as contrasted to the time of the 1996 Judgment, this amorphous legal situation that prevailed at the time of the 1996 Judgment had been clarified through the developments since November 2000, when the FRY was admitted as a new Member of the United Nations in accordance with the procedures prescribed for the admission of States as new Members. The 2004 Judgment, which was not bound by what the Court had decided in 1996 as *res judicata*, assessed this legal situation which had by then become clear and came to the only logical conclusion as cited above in paragraph 2 of this opinion. This conclusion that Serbia lacked access to the Court can be considered an "express finding" within the meaning of paragraph 135 of the 2007 Judgment cited above in paragraph 3 of this opinion. Following the Court's reasoning expressed therein, when a relevant express finding does exist in another case with different parties, the Court must "go on to consider what might be the unstated foundations of [that] judgment" (*ibid.*, p. 100, para. 135). The Court in the present case, therefore, must consider the unstated foundations that led to the express finding in the *NATO* cases, even though that finding is not *res judicata* in the present case. In other words, the Court in 2004 did not have to consider the 1996 Judgment involving different parties because the 1996 case did not reach an "express finding" as to access (the finding on access is only implicit from the finding on

jurisdiction), but the Court in the present case must consider the foundations for the 2004 finding as to access because it is express.

6. It is against these complex elements to be taken into account in relation to the legal status of the FRY (now Serbia in the present proceedings) in relation to the United Nations and consequently to the Court, that the Court has to look at the issue of *locus standi* of the Respondent in the present proceedings which were instituted in 1999. It should be emphasized that the Court came to its conclusion in 2004 on exactly the same question of *locus standi* of the FRY, though as Applicant at that time, in the proceedings filed in 1999. If the reasoning for that finding is to be respected in the absence of particular reasons to depart from it, the Court must conclude in the present proceedings that the FRY did not have the *locus standi* to appear before the Court, unless there is a contrary prior finding which binds the Court as *res judicata* emanating from a judgment in the same case, as it was the case with the 2007 Judgment. There is no such finding that constitutes *res judicata* in the present case. This is the crucial difference between the 2007 Judgment in the *Bosnia and Herzegovina* v. *Serbia and Montenegro* case and the present *Croatia* v. *Serbia* case.

7. On the basis of this reasoning, however, there are two further questions that the Court has to answer before reaching its final conclusion. First is the question of whether the subsequent admission in November 2000 of the FRY to the United Nations — which has had the effect of making the FRY from that time onwards *ipso facto* a party to the Statute of the Court in accordance with Article 93, paragraph 1, of the Charter of the United Nations — has brought about a change in the legal status of the FRY in the present proceedings with regard to its *locus standi* in the context of Article 35, paragraph 1, of the Statute. Second is the question of whether the fact that the FRY/Serbia is the Respondent in the present case, whereas it was the Applicant in the 2004 *NATO* cases should make a legal difference that justifies distinguishing the present case from the *NATO* cases.

II. The Applicability of the *Mavrommatis* Principle

8. On the first point, the present Judgment takes the position that this subsequent admission of the FRY to the United Nations is indeed a legally relevant factor to be considered. On that basis the present Judgment comes to the conclusion that, in accordance with the principle enunciated by the Permanent Court of International Justice in the case concerning *Mavrommatis Palestine Concessions* (*Judgment No. 2, 1924, P.C.I.J., Series A, No. 2,* hereinafter referred to as the "*Mavrommatis* case") the requirement under Article 35, paragraph 1, concerning the capacity of the Respondent to appear before the Court is now to be regarded as satisfied.

In the present case, the basic thrust of the Applicant's argument is that

> "[t]he *Mavrommatis* principle is the principle that provided that when four substantial elements [one: seisin; two: basis of claim; three: consent to jurisdiction; four: access to the Court] are united at any given time, the order in which this occurred is a pure matter of form and does not affect [the Court's] jurisdiction" (CR 2008/11, p. 34, para. 8).

Against this, Serbia responds by pointing out that "the conclusion suggested by the Applicant is based on the assumption that the Court was validly seised [but that] this assumption simply does not exist in our case" (CR 2008/12, p. 19, para. 34). More substantively, however, it argues that not every procedural shortcoming can be disregarded in the light of later developments. The Respondent claims, as summarized in the present Judgment, that

> "the jurisprudence [of the *Mavrommatis* case] cannot be applied where the unmet condition concerns the capacity of a party to participate in proceedings before the Court, in accordance with Articles 34 and 35 of the Statute, that is to say concerns a 'fundamental question' which, as the Court stated in 2004, must be examined before any other issue of jurisdiction" (Judgment, para. 84).

The present Judgment, in answer to the argument advanced by the Respondent, states as follows:

> "the question of access is clearly distinct from those relating to the examination of jurisdiction in the narrow sense. But it is nevertheless closely related to jurisdiction, inasmuch as the consequence is exactly the same whether it is the conditions of access or the conditions of jurisdiction *ratione materiae* or *ratione temporis* which are unmet: the Court lacks jurisdiction to entertain the case. It is always within the context of an objection to jurisdiction, as in the present case, that arguments will be raised before the Court regarding the parties' capacity to participate in the proceedings." (*Ibid.*, para. 87.)

9. With regard to this argument of the Judgment, two points have to be raised. The first point is that the Judgment mixes two fundamentally different issues, both relating to the Court's function relating to its "exercise of jurisdiction". One is the issue of whether the Court, as a court of law given a specific mandate to exercise its competence to entertain cases, is *competent to entertain the case* in question within the mandate given to it by its constitutional instrument, i.e., the Statute of the Court. This is the essence of the question of *locus standi* of parties. This question is

legally separate from, and logically preceding, the second question of whether in a given situation the parties have given the Court the jurisdictional basis to entertain the case — a question of jurisdiction properly so-called which in the case of international jurisdiction, in contrast to municipal jurisdiction, is primarily determined by the will of the parties in a particular case to grant such competence to the Court. The first issue, which is independent of the parties, has nothing to do with the second issue relating to the existence and the scope of jurisdiction, which is dependent on the will of the parties. Therefore the thesis advanced by the Applicant that all these different elements that constitute jurisdiction of the Court are of the same legal character and that "the order in which this occurred is a pure matter of form and does not affect [the Court's] jurisdiction" does not hold (CR 2008/11, p. 34, para. 8).

10. It may be true that in the *Mavrommatis* case, the Court did not make this fundamental distinction sufficiently clear. It should be pointed out, however, that in that case the Court was clearly operating in an area where only the elements relating to the second issue were in issue. Thus the pertinent part of the *Mavrommatis* Judgment states:

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

11. The oft-quoted dictum of the *Mavrommatis* case that "[t]he 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" and that therefore, "[e]ven . . . if the application were premature because the Treaty of Lausanne had not yet been ratified, this circumstance would now be covered by the subsequent deposit of the necessary ratifications" has almost acquired a life of its own, going beyond its lim-

ited sphere of application and has come to be understood too often as a principle of generalized application. A perusal of the *Mavrommatis* Judgment and its related documents would reveal, however, that the statement was made in the much more specific context of that case, relating to the very narrow issue of the jurisdictional nexus between the instrument in dispute (Protocol XII of the Treaty of Lausanne) and the compromissory clause that was invoked by the Applicant as the basis of jurisdiction (Article 26 of the Mandate).

12. The dispute between the Applicant (Greece as the State of nationality of Mr. Mavrommatis, a concessionaire in Palestine) and Respondent (the United Kingdom, the Mandatory Power for Palestine under the League of Nations) hinged upon the implementation of Article 11 of the Mandate in question, which in turn was linked to the interpretation of certain provisions of Protocol XII of the Treaty of Lausanne that dealt with the issue of concessions that had been granted by the Ottoman Empire. In the Judgment the Court made its position clear that "Protocol XII was drawn up in order to fix the conditions governing the recognition and treatment by the contracting Parties of certain concessions granted by the Ottoman authorities before the conclusion of the Protocol" and accepted that "the Protocol guarantees the rights recognised in it against any violation regardless of the date at which it may have taken place" (*Mavrommatis Palestine Concessions, Judgment No. 2, 1924, P.C.I.J., Series A, No. 2*, p. 34).

13. It is true that at the stage of the written pleadings, the Respondent in the case did refer to the Protocol in the following carefully guarded language:

> "The Concessions Protocol [i.e., Protocol XII] cannot technically come into operation in Palestine until the Treaty of Peace with Turkey comes into force, i.e., until the moment of the first deposit of the ratifications of that instrument.
>
> His Britannic Majesty's Government have endeavoured and will continue to endeavour to conform themselves strictly to the obligations which they undertake in this Protocol, but they respectfully submit that *until the instrument has come into operation in Palestine it would be premature for an international tribunal to entertain complaints as to its infringement or as to its meaning and effect.* His Majesty's Government, therefore, reserve all their rights as regards the extent to which Mr. Mavrommatis and his concessions are entitled to benefit by its provisions." (*Acts and Documents Relating to Judgments and Advisory Opinions Given by the Court, P.C.I.J., Series C, No. 5-I, Documents Relating to Judgment No. 2, The Mavrommatis Palestine Concessions, Preliminary Objection to the Jurisdiction of the Court and Preliminary Counter-Case Filed by the British Government*, pp. 446-447; emphasis added.)

However, at the stage of the oral pleadings in the public sitting held on

15 July 1924 — a date which was still before the entry into force of the Protocol XII in question — the Respondent did not raise this point that the Protocol was not in operation when developing the argument that the Court had no jurisdiction. It merely stated that "there is nothing in the Concessions Protocol [XII] . . . which provides any tribunal which is to decide questions arising under it" (*P.C.I.J., Series C, No. 5-I*, p. 77). In fact, the agent for the Respondent even went further and stated that

> "The dispute about which I have been addressing you this morning is, in my opinion, and I trust also in that of the Tribunal, not a dispute relating to the Mandate, but one relating solely to the Concessions Protocol which is attached to the Treaty of Lausanne. That is a matter upon which, if there had arisen any genuine difference of opinion between the Greek and the British Governments and if the Greek Government has come to the British Government and said: Will you agree to refer it to arbitration; will you agree to refer to the Permanent Court of International Justice this dispute between us as to the meaning of that contractual engagement by which we are both bound, the answer of the British Government would have been Yes. Both Governments are bound by the Protocol and both have set their hand to the provision that figures in Article 13 of the Covenant of the League." (*Ibid.*, p. 42.)

This shows not only that the issue of whether the Application had been premature because of the unratified status of the Protocol was not insisted upon by the Respondent but also that this issue was regarded by the Respondent as irrelevant to its argument as the basis of its preliminary objection.

14. It is not quite clear why the *Mavrommatis* Judgment made its oft-quoted dictum in this situation despite its mootness to the case. What is clear, nevertheless, is that the *Mavrommatis* case cannot constitute an authority for holding, as the present Judgment declares, that "it is of no importance which condition was unmet at the date the proceedings were instituted, and thereby prevented the Court at that time from exercising its jurisdiction, once it has been fulfilled subsequently" (Judgment, para. 87). It may be conceded, as the Judgment states, that the issue of capacity of the Parties' access to the Court is "closely related to jurisdiction" *(ibid.)* in a general sense that the former is the prerequisite to the latter and thus linked thereto, but this fact cannot alter the legal situation that it is a question which is essentially distinct in its legal nature from jurisdiction. The issue of jurisdiction concerns whether and at what point the legal nexus between the parties on the basis of consent given comes into operation. By contrast, the issue of capacity has nothing to do with the legal nexus between the parties. As the review of jurisprudence in the following section will show, cases where the *Mavrommatis* precedent was invoked concerned only the issue of consent to jurisdiction, an area that has rightfully been allowed a certain level of flexibility for the basic reason that it is always

consent which can create the basis of competence of the Court in international jurisdiction. None of these cases concerned the issue of capacity or access, which is a fundamental question of legal status beyond the consent of the parties.

III. Examination of Past Precedents

15. As I made clear earlier, it is my view that what is more fundamental about this so-called "*Mavrommatis* principle" is the scope of its application. In light of the avowed rationale of the principle that certain procedural defects in the jurisdictional consent of the parties present at the time of application can be cured by subsequent actions after the institution of the proceedings, the principle cannot extend to the issue of *locus standi* of the parties, an issue which is legally distinct from and logically precedent to jurisdictional consent. It is useful in this respect to examine all the cases following the *Mavrommatis* case — in any event the *Mavrommatis* case does not have much relevance to the so-called "*Mavrommatis* principle", as demonstrated above — in which the principle has been referred to, either *eo nomine* or by implication, by one or other of the parties. There have been altogether eight cases, including the *Mavrommatis* case, in the past[1]. It should be pointed out that in all these cases, the point at issue was whether the jurisdictional basis for the Court's exercise of jurisdiction that was not complete at the time of the filing of the Application could be cured through subsequent developments.

(1) *The case concerning* Certain German Interests in Polish Upper Silesia (Germany *v.* Poland), Jurisdiction

16. In this case the Respondent raised an objection to the Court's jurisdiction based on the compromissory clause in the bilateral treaty between the Applicant and the Respondent — Article 23 of the Conven-

[1] These other seven cases are: *Certain German Interests in Polish Upper Silesia (Germany* v. *Poland), Jurisdiction, Judgment No. 6, 1925, P.C.I.J., Series A, No. 6; Northern Cameroons (Cameroon* v. *United Kingdom), Preliminary Objections, Judgment, I.C.J. Reports 1963; Barcelona Traction, Light and Power Company, Limited (Belgium* v. *Spain), Preliminary Objections, Judgment, I.C.J. Reports 1964; Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984; 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); Gabčíkovo-Nagymaros Project (Hungary/Slovakia), Judgment, I.C.J. Reports 1997; Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo* v. *Rwanda), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 2006.*

tion of Geneva — contending that one of the conditions for the exercise of jurisdiction by the Court, i.e., "differences of opinion respecting the construction and application of Articles 6 to 22" had not been fulfilled (*Certain German Interests in Polish Upper Silesia, Jurisdiction, Judgment No. 6, 1925, P.C.I.J., Series A, No. 6*, p. 13). The Court rejected this contention on the ground that "[n]ow a difference of opinion does exist as soon as one of the Governments concerned points out that the attitude adopted by the other conflicts with its own views" (*ibid.*, p. 14). Then, and only then, it went on to say:

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

(2) The case concerning Northern Cameroons (Cameroon *v.* United Kingdom), Preliminary Objections

17. In this case the Respondent raised a preliminary objection to the jurisdiction of the Court based, *inter alia*, on Article 32, paragraph 2, of the then Rules of Court which provides that when a case is brought before it by means of an application, the application must not only indicate the subject of the dispute, but it must also as far as possible specify the provisions on which the applicant founds the jurisdiction of the Court, and state the precise nature of the claim and the grounds on which it is based.

The Court, while pronouncing its agreement with the view expressed by the Permanent Court of International Justice in the *Mavrommatis* case that "'[t]he 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'", pointed out that "Article 32 (2) of the Rules of Court requires the Applicant 'as far as possible' to do certain things" and on that basis came to the conclusion that:

> "In the view of the Court the Applicant has sufficiently complied with the provisions of Article 32 (2) of the Rules and the preliminary objection based upon non-compliance therewith is accordingly without substance." (*Northern Cameroons (Cameroon* v. *United Kingdom), Preliminary Objections, Judgment, I.C.J. Reports 1963*, p. 28.)

Thus the question of applicability of the principle to this case did not arise.

(3) The case concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua *v.* United States of America), Jurisdiction and Admissibility

18. In this case, the Applicant relied in its Application on the declarations of the parties accepting the compulsory jurisdiction of the Court in order to found jurisdiction, but in its Memorial it invoked also the 1956 Treaty of Friendship, Commerce and Navigation between Nicaragua and the United States as a complementary basis for the Court's jurisdiction. The Respondent objected to this invocation of a jurisdictional basis not specified in the Application instituting proceedings and argued that in proceedings initiated by means of an application, the jurisdiction of the Court was founded upon the legal grounds specified in that application.

The Court, accepting that there was a dispute between the Parties, *inter alia*, as to the "interpretation or application" of the Treaty, held on this point that

> "it does not necessarily follow that, because a State has not expressly referred in negotiations with another State to a particular treaty as having been violated by conduct of that other State, it is debarred from invoking a compromissory clause in that treaty" (*Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984*, p. 428, para. 83).

It is true that the Court in this context quoted a passage from the *Certain German Interests in Polish Upper Silesia* case which read 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" (*ibid*., p. 429, para. 83). However, it is clear from what is quoted above that the Court in this case did not accept that there had been a "defect of form" in the Application of the Applicant. Moreover, it should be reiterated that the issue in this case, like the others, concerns the issue of jurisdictional consent of the parties, not an objective question of access to the Court for which the parties' consent is irrelevant.

(4) The case concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina *v.* Yugoslavia), Preliminary Objections

19. As distinct from other cases, this case merits our careful examination, since the issue raised in this case could have touched upon the same issue as is raised in the present case. In this case, the Respondent argued, *inter alia*, that the Genocide Convention, which was invoked as the basis of jurisdiction, could not have been in force between the Parties, at the time of the filing of the Application by the Applicant in March 1993, because the two States did not at that time recognize one another and the conditions necessary to found the basis of the Court's jurisdiction were therefore lacking. On this objection of the Respondent to the juris-

diction of the Court under the Genocide Convention, the Court pointed out that

> "this situation no longer obtains since the signature, and the entry into force on 14 December 1995, of the Dayton-Paris Agreement, Article X of which stipulates that [the FRY and the Republic of Bosnia and Herzegovina recognize each other as sovereign independent States]" (*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. 25).

The Court in this passage went on to elaborate the point as follows:

> "For the purposes of determining its jurisdiction in this case, the Court has no need to settle the question of what the effects of a situation of non-recognition may be on the contractual ties between parties to a multilateral treaty. It need only note that, even if it were to be assumed that the Genocide Convention did not enter into force between the Parties until the signature of the Dayton-Paris Agreement, all the conditions are now fulfilled to found the jurisdiction of the Court *ratione personae*.
>
> It is the case that the jurisdiction of the Court must normally be assessed on the date of the filing of the act instituting proceedings. However, the Court, like its predecessor, the Permanent Court of International Justice, has always had recourse to the principle according to which it should not penalize a defect in a procedural act which the applicant could easily remedy." (*Ibid.*, p. 613, para. 26.)

As authority for this statement the Court quoted from the *Mavrommatis* case the passage quoted above (see above at paragraph 10) and from the *Certain German Interests in Polish Upper Silesia* case the passage quoted above (see above at paragraph 16), and went on to state as follows:

> "The present Court applied this principle in the case concerning the *Northern Cameroons* (*I.C.J. Reports 1963*, p. 28), as well as *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America)* when it stated: 'It would make no sense to require Nicaragua now to institute fresh proceedings based on the Treaty, which it would be fully entitled to do.' (*I.C.J. Reports 1984*, pp. 428-429, para. 83.)
>
> In the present case, even if it were established that the Parties, each of which was bound by the Convention when the Application was filed, had only been bound as between themselves with effect from 14 December 1995, the Court could not set aside its jurisdiction on this basis, inasmuch as Bosnia and Herzegovina might at any time file a new application, identical to the present one, which would be unassailable in this respect.

> In the light of the foregoing, the Court considers that it must reject Yugoslavia's third preliminary objection." (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Yugoslavia), Preliminary Objections, Judgment, I.C.J. Reports 1996 (II)*, pp. 613-614, para. 26.)

20. It should be pointed out that the judgment of the Court on this point was confined to the issue of whether "the conditions necessary to found the consensual basis of the Court's jurisdiction were . . . lacking" (*ibid.*, p. 613, para. 25). To that extent, this case is no different from the other cases examined above. It is noteworthy in this context that the Court expressly stated that "[f]or the purposes of determining its jurisdiction in this case, the Court has no need to settle the question of what the effects of a situation of non-recognition may be on the contractual ties between parties to a multilateral treaty" (*ibid.*, p. 613, para. 26). Thus, in my view, the Court came close to deciding upon an issue which in its nature was very similar to the one raised in the present case, i.e., the issue of the legal status of one of the parties in relation to the other party. However, the Court avoided that issue by stating that "the Court has no need to settle the question" *(ibid.)*. Presumably the Court in saying this had in mind the Genocide Convention as the "multilateral treaty" in issue. However, this general reservation of the Judgment is equally applicable to the Statute of the Court as "a [relevant] multilateral treaty".

The conclusion I reach out of this case is that the Judgment is inconclusive on this point of status and cannot therefore constitute an authority in the present case.

(5) The case concerning Gabčíkovo-Nagymaros Project (Hungary/Slovakia)

21. The point in issue in this case does not seem even remotely related to the so-called *Mavrommatis* principle, although a judge in his dissenting opinion quoted the *Mavrommatis* dictum as a rationale to justify a certain point of law involved. In this case Hungary argued that it was entitled to terminate a bilateral treaty with Czechoslovakia for the construction and operation of the Gabčíkovo-Nagymaros System of Locks on the ground that Czechoslovakia had materially breached the treaty by beginning the process of unilaterally diverting the River Danube in November 1991. The Court, however, found that the treaty was not breached until Czechoslovakia actually started the diversion of the water into a bypass canal in October 1992, which came about after Hungary took the action of terminating the treaty.

One of the judges who dissented from the *Gabčíkovo-Nagymaros* Judgment argued in his opinion, citing the *Mavrommatis* and the *Certain German Interests in Polish Upper Silesia* cases, that "it would have been possible for [the Respondent] to withdraw this act [of termination of the

treaty] and to substitute it later by a new notification of termination based on the events of October 1992" (*I.C.J. Reports 1997*; dissenting opinion of Judge Fleischhauer, p. 210, para. 2).

While it may be possible to draw an analogy between the issue involved in this case and the so-called *Mavrommatis* principle, it is clear that this case does not involve the application of the *Mavrommatis* principle and has no relevance to the present case.

(6) The case concerning Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo *v.* Rwanda), Jurisdiction and Admissibility

22. In this case, the issue was whether the claimed withdrawal of reservations by the Respondent relating, *inter alia*, to Article IX of the Genocide Convention as the jurisdictional basis invoked by the Applicant in the case, which came after the submission of the Application by the Applicant, could be used to establish the jurisdiction *ratione materiae* of the Court.

After referring to the dictum in the 1996 Judgment of the Court in the *Genocide Convention* case examined above (see above at para. 19) that "the Court should not . . . penalize a defect in procedure which the Applicant could easily remedy" (*I.C.J. Reports 2006*, p. 29, para. 54), the Court stated that

> "if the Rwandan Minister's statement had somehow entailed the withdrawal of Rwanda's reservation to Article IX of the Genocide Convention in the course of the proceedings, the DRC could on its own initiative have remedied the procedural defect in its original Application by filing a new Application" (*ibid.*, p. 29, para. 54).

It is clear that this is a case where the issue was whether there was a consensual link for jurisdiction between the Parties based on Article IX of the Genocide Convention, which would be held to exist at the time of the Judgment, if the claimed withdrawal of reservations were to be established by the Applicant. It may be noted that the Court's conclusion is in any case *obiter dictum*, inasmuch as it had already concluded "that the statement by the Rwandan Minister of Justice was not made in sufficiently specific terms" so as to constitute withdrawal of Rwanda's reservation to Article IX of the Genocide Convention (*ibid.*, pp. 28-29, para. 52). Be that as it may, however, what is crucial for the purposes of the present case is that the Court was dealing here with the question of whether an initial lack of consent had been subsequently rectified; this has no bearing on the issue in the present case, i.e., procedural defects beyond the consensual reach of the Parties.

(7) The case concerning Barcelona Traction, Light and Power Company, Limited (Belgium *v.* Spain), Preliminary Objections

23. A similar argument to the *Mavrommatis* principle was advanced in the case concerning *Barcelona Traction, Light and Power Company, Limited (Belgium* v. *Spain), Preliminary Objections, Judgment, I.C.J. Reports 1964*, p. 6 (hereinafter referred to as the *"Barcelona Traction"* case), without specifically citing *Mavrommatis* as precedent. In that case, the Respondent argued that because the case was founded on a compromissory clause referring to the Permanent Court of International Justice, and because the Respondent had not been a party to the United Nations at the time of the adoption of the Statute of the International Court of Justice, Article 37 of that Statute — according to which a compromissory clause which "provides for reference of a matter to . . . the Permanent Court of International Justice, . . . shall, as between the parties to the present Statute, be referred to the International Court of Justice" — did not apply to it, and that therefore the Court lacked jurisdiction to hear the case. The Court, applying a logic that might appear to be analogous to that of the *Mavrommatis* principle, concluded that

> "the basic obligation to submit to compulsory adjudication was never extinguished by the disappearance of the Permanent Court, but was merely rendered functionally inoperative by the lack of a forum through which it could be implemented. What therefore happened in 1955, when this *lacuna* was made good by Spain's admission to the United Nations, was that the operation of the obligation revived, because the means of implementing it had once more become available" (*ibid.*, p. 40).

However, this variation of the *Mavrommatis* principle, which might at first regard appear similar to the situation in the present case — since like the present case the procedural defect in question was held to be cured by the Respondent becoming a Member of the United Nations — is in fact fundamentally different. In the *Barcelona Traction* case, Spain's membership in the United Nations triggered a pre-existing consent arising out of its previously ratified compromissory clauses. The defect at issue did not involve any issue of Spain's access to the Court or other fundamental issue of seisin. Thus, the *Barcelona Traction* case, like the other cases discussed above, deals with consent and not access. The principle applied in the *Barcelona Traction* case, therefore, can have no bearing on the present case.

IV. Conclusion on the *Mavrommatis* Principle

24. The conclusions I have reached as a result of close examination of the precedents in the jurisprudence of the Court (including the PCIJ), in

which the so-called *Mavrommatis* principle has been invoked, either expressly or by implication, can be summarized as follows:

(a) In spite of the generalized formula often quoted from the Judgment in the *Mavrommatis* case, the *Mavrommatis* case was decided on a totally different basis, and the present case does not present any legally analogous situation where the so-called *Mavrommatis* principle may have a place of application.

(b) Each of the subsequent cases in which this principle has been invoked are all related to the issue of the initial absence of consent to jurisdiction which, allegedly, had vitiated the basis of jurisdiction of the Court but was cured by a subsequent act or event. There has been no case that can justify the application of the principle in a generalized formulation in which it is claimed to have an extended application to any and all flaws in procedure.

(c) The rationale for deviating from the strict application of procedural requirements is diverse in each case and each of the cases where such deviation is accepted by the Court has its own specific rationale and its intrinsic limitations. However, in all the cases that have been examined, the basic problem related to the original absence of consent as the vitiating factor for jurisdiction.

(d) There has been no case in the jurisprudence of the Court in which the so-called *Mavrommatis* principle has been understood to cover any and all "procedural defects" in the proceedings before the Court. The "procedural defects" that have been at issue in those cases have mostly been alleged technical flaws relating to the element of consent in one way or another at the time of the institution of proceedings, and have never involved such issues as the capacity of the parties to appear before the Court.

(e) In all the cases where the principle has been applied, what is involved is the issue of assessing the subsequent coming into existence of the consensual nexus of jurisdiction as sufficient for the purpose of constituting the essential condition for the exercise of jurisdiction by the Court. This is only natural, since the very basis of international jurisdiction lies in the consent of the parties and the arrival of this element of consent, even at a later stage in the proceedings, has always been recognized as constituting an exception to the basic principle that the legal basis for the competence of the Court has to exist at the time of the institution of the proceedings, as demonstrated in the institution of *forum prorogatum*.

25. This situation is not at all surprising. The basic principle underlying the jurisdiction of an international court, as the Court has emphasized time and again, is that "its jurisdiction must be determined at the time that the act instituting proceedings was filed" (*Arrest Warrant of*

11 April 2000 (Democratic Republic of the Congo v. *Belgium), Judgment, I.C.J. Reports 2002*, pp. 12-13, para. 26). This basic principle is fundamental in particular in the sense that "if the Court has jurisdiction on the date the case is referred to it, it continues to do so regardless of subsequent events" *(ibid.)* and that such events "cannot deprive the Court of jurisdiction" (*ibid.*; see also the cases cited therein). It is as a legitimate exception to this principle that international jurisdiction has recognized that the reverse is not necessarily true. Thus if the consensual nexus as the basis of jurisdiction can be established subsequent to the institution of the proceedings, an act or event constituting such a consensual nexus can always offer the basis of jurisdiction, since international jurisdiction, in contrast to municipal jurisdiction, is based primarily on the consent of the parties. This indeed is the legal basis on which jurisdiction can be established under Article 38, paragraph 5, of the Rules of Court or upon which the institution of *forum prorogatum* is accepted in the jurisprudence of the Court.

26. By contrast, no logical ground exists, and therefore no precedent is to be found in the jurisprudence of the Court as examined above, to hold that the Court has been ready to apply this reverse principle as an exception to the general rule relating to the competence of the Court in such a general way as to justify an unqualified statement that "[e]ven if the grounds on which the institution of proceedings was based were defective . . . this would not be an adequate reason for the dismissal of the applicant's suit" (*Mavrommatis Palestine Concessions, Judgment No. 2, 1924, P.C.I.J., Series A, No. 2*, p. 34). This statement was made in a very specific context, i.e., with regard to a treaty (Protocol XII) which was central to determining the substantive scope of "any international obligations accepted by the Mandatory" as provided for in Article 11 of the Mandate — a legal instrument that formed the basis for the Court's jurisdiction (*ibid.*, p. 17). It was in this context that the applicability of Article 11 of the Mandate came to be questioned in the situation where the article in question was held not to be effective *(en vigueur)* at the time of the Application but to have come into effect two and a half months later.

27. In summary, it is clear that the so-called *Mavrommatis* principle under the *Mavrommatis* jurisprudence does not relate to a general proposition of whether any "procedural defect" in seising the Court can be cured when "it would always have been possible for the applicant to re-submit his application in the same terms" (*ibid.*, p. 34; Judgment, para. 82), but rather to a specific question of whether the "procedural defect" in question concerns the issue of consent of the parties to the jurisdiction of the Court and thus can be cured on the basis that consent of the parties can always create the legal basis for the Court to exercise jurisdiction. While I accept the statement in the present Judgment that the Court has "shown realism and flexibility in certain situations in which the conditions governing the Court's jurisdiction were not fully satisfied when proceedings were initiated but were subsequently satisfied" (*ibid.*, para. 81), it is clear from the rationale of this practice and from the

case law on this point that such exceptions are to be applied restrictively. As the review of the Court's jurisprudence has shown, such flexibility with regard to jurisdictional consent has never been extended to the issue of access to the Court beyond the consent of the parties, and it should not be so extended in the present Judgment.

V. Irrelevance of the Issue of Applicant/Respondent Distinction

28. As stated in paragraph 7 above, the second question to be examined is that of whether the fact that the FRY/Serbia is the Respondent in the present case whereas it was the Applicant in the 2004 *NATO* cases should make a legal difference in the context of the present case.

29. On this I do not have to spend too much ink. The plain and ordinary meaning of the language of Article 35, paragraph 1, makes it unnecessary to go into the legislative history of the provision. In reply to the question put to the Parties by Judge Abraham, both the Applicant and the Respondent have taken a negative position to such a distinction as a material factor, though clearly this is a matter which belongs to the Court to decide.

What seems to be decisive to me is the fact that making such a distinction in interpretation of Article 35, paragraph 1, would create an unequal treatment between the applicant and the respondent in matters relating to the access to the Court and the capacity to appear before the Court.

30. As the Court clearly enunciated in its 2004 Judgment, the Court can exercise its judicial function only in respect of those States which have access to it under Article 35 of the Statute. And only those States which have access to the Court can confer jurisdiction upon it (*Legality of Use of Force (Serbia and Montenegro* v. *Belgium), Preliminary Objections, Judgment, I.C.J. Reports 2004 (I)*, pp. 298-299, para. 46). And the rationale for this principle lies in the fact that the Court, as a court of law, can only function when both of the parties to the dispute have the capacity to appear before the Court.

It is to be recalled in this context that the Court in its 2004 Judgment expressed the view that "a distinction has to be made between a question of jurisdiction that relates to the consent of a party and the question of the right of a party to appear before the Court under the requirements of the Statute, which is not a matter of consent" (*ibid.*, p. 295, para. 36). It is on the basis of this distinction that the Court made the point that "[t]he question is whether *as a matter of law* Serbia and Montenegro was entitled to seise the Court as a party to the Statute at the time when it instituted proceedings in these cases" (*ibid.*; emphasis in the original). It is this distinction between the two separate questions that is crucial to the

consideration of this issue by the Court. This rationale naturally applies as validly to the respondent as to the applicant.

31. It may be noted in addition that this position of the Court in the 2004 Judgments is not only logically consistent with the general approach of the Court to the issue of its competence, but is the one which virtually all the parties in those cases endorsed (including, in particular, the respondents in the case) — a fact which is not always registered clearly in the minds of those who did not participate in the case. Thus, the NATO countries, as Respondents, tried to argue, in varying degrees, that the FRY did not have the *locus standi* to seise the Court as applicant, inasmuch as it was not a party to the Statute. The Respondents did not make a distinction in this regard on the applicability of this principle, on the basis of whether the party in question was the applicant or the respondent. It should be recalled that this claim was advanced during the period well after November 2000, when Serbia has been admitted to the United Nations and had became a party to the Statute of the Court. And the Court itself abided strictly by the general rule that its jurisdiction was to be assessed at the date of filing of the act instituting proceedings.

32. The argument that the present Judgment advances that "[i]t was clear that Serbia and Montenegro [as Applicant] did not have the intention of pursuing its claims by way of new applications" (Judgment, para. 89), as if it were a decisive factor in the reasoning of the Court, is singularly unpersuasive since the issue of the capacity of a party to seise the Court, contrary to such other aspects of jurisdiction as hinge upon the will of the parties, is a matter which the Court has to ascertain, if necessary *proprio motu*, independently of the will or the motive of one or the other of the parties. The fact that the Court in the *NATO* cases did not pursue the other "more flexible approach" simply testifies to the position of the Court that this issue belongs not to an area where a "procedural defect" can be cured in a flexible manner, but to an area which constitutes the essential structure of the Court as a court of law with competence to deal with disputes between the applicant and the respondent, both of whom must satisfy the requirement of having *locus standi* before the Court, irrespective of whether they are in a position of applicant or of respondent.

(Signed) Hisashi OWADA.