DECLARATION OF JUDGE BENNOUNA

[Translation]

I have voted in favour of the operative part of the Judgment and, subject to the limits expressed therein, I am of the opinion that the Court has jurisdiction to entertain Croatia's Application on the merits. However, I do not agree with all of the reasoning on which the Court bases its decision upholding its jurisdiction *ratione personae* in this case. This is particularly true of the whole part of the Judgment which draws on the jurisprudence initiated by the Permanent Court of International Justice in the *Mavrommatis Palestine Concessions* (*Judgment No. 2, 1924, P.C.I.J., Series A, No. 2*, p. 34) case in order to establish the standing of a State to take part in proceedings under Article 35, paragraph 1, of the Statute (i.e., paragraphs 81 to 92 of the Judgment).

Indeed, having recalled that as a general rule its jurisdiction must be assessed at the time when the proceedings are instituted (Judgment, para. 79), the critical date thus being 2 July 1999, the Court emphasizes nonetheless that, like its predecessor, it 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, before the Court ruled on its jurisdiction" (*ibid.*, para. 81).

And yet the Court has chosen to take account of the findings which it made in its Judgments of 2004 in the *Legality of Use of Force* cases, namely that the FRY was not a Member of the United Nations, nor a party to the Statute, between the break-up of the SFRY in 1992 and its admission to the United Nations on 1 November 2000. It thus follows from this, in the present case, that the Court did not have jurisdiction on the date of the filing of the Application by Croatia — 2 July 1999 — but that it could have jurisdiction if the missing condition, that is, the status of the FRY as a party to the Statute, were to be fulfilled before it had ruled on its jurisdiction. Indeed, the whole logic of the jurisprudence of the *Mavrommatis* case is built upon the possibility available to the Applicant, after the Application has been filed, of filing it again before a final decision on jurisdiction has been made. Thus, from the perspective of the sound administration of justice, the Court would be entitled to disregard the initial defect which affected its jurisdiction. That is the logic underlying the reasoning of the Court but it needs to be pursued to its conclusion, for otherwise it remains a shaky and unconvincing argument. One can hardly decide not to pursue the argument thus chosen through to its conclusion in order to skirt certain obstacles and avoid difficulties, know-

ing that the Court's so-called cautious approach may well prove incompatible with legal precision.

I fear that the Court may have manoeuvred itself into a dead end by refusing to draw all the consequences from the legal construct inspired by the jurisprudence of the *Mavrommatis* case. It contents itself with finding that Serbia became a Member of the United Nations again, and a party to the Statute, as from 1 November 2000, and that it thenceforth had the standing to take part in proceedings before the Court.

However, in the present case, the question remains of what account is to be taken of the notification by the FRY, once it had become a Member of the United Nations on 1 November, of its accession to the Genocide Convention accompanied by a reservation to Article IX on the *ratione materiae* jurisdiction of the Court (accession dated 6 March 2001, effective from 10 June of the same year).

Can the Court base itself on the jurisprudence of the *Mavrommatis* case and find that it has jurisdiction without giving any consideration to the impact of that accession accompanied by a reservation? Can it be satisfied with the finding that the missing condition, under Article 35, paragraph 1, of the Statute was fulfilled as from 1 November and that the jurisdiction of the Court was established from that date inasmuch as the first condition, that of the FRY's status as a party to the Genocide Convention, had been proven at the moment when the proceedings were instituted by Croatia on 2 July 1999?

I do not think that the Court can spare itself an examination of the accession of 6 March 2001 accompanied by a reservation to Article IX for the simple reason that the whole logic of the jurisprudence of the *Mavrommatis* case might collapse, since it is built upon the possibility for the Applicant to put the case before the Court again at any time. That was indeed the wording which the Court used in its 1996 Judgment in the case concerning *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Yugoslavia), Preliminary Objections*: "Bosnia and Herzegovina might at any time file a new application, identical to the present one, which would be unassailable in this respect" (*I.C.J. Reports 1996 (II)*, p. 614, para. 26).

We should therefore enquire, in the event that Croatia's Application had been filed again after 10 June 2001 (that is, the day after the accession of the FRY came into force), whether it would have been "unassailable". And it is only possible to answer such a question after an examination of the accession concerned.

And the answer, in our view, is self-evident and should be relatively simple. Inasmuch as the Court has held that the FRY was a party to the Genocide Convention, including Article IX thereof, from 27 April 1992, without a break in continuity, it should find that the accession of 6 March 2001, accompanied by a reservation, cannot give rise to any legal effect on relations between the two Parties.

Indeed, it is well established that a State cannot accede to a treaty to which it is already a party. In addition, on 18 May 2001 Croatia submit-

ted an objection to the filing of an instrument of accession to the Genocide Convention by the FRY on the ground that the latter was "already bound by the Convention". The purpose of the FRY's accession of 6 March 2001 is consequently difficult to understand, unless it was intended to avoid the FRY's prior undertaking in part by excluding the application of Article IX concerning the jurisdiction of the Court. The fact that the FRY has not made use of such a procedure for any of its other treaty obligations makes this explanation even more likely. It was thus that the FRY notified the United Nations Secretary-General by a letter dated 6 March 2001 of its intention to succeed to a number of multilateral treaties of which he is the depositary, emphasizing that it "undertakes faithfully to perform and carry out the stipulations therein contained as from April 27, 1992, the date upon which the Federal Republic of Yugoslavia assumed responsibility for its international relations" (in reference to an appended list of treaties to which the Socialist Federal Republic of Yugoslavia was a party).

It was, in my opinion, the Court's duty to arrive at this conclusion in order to dispel any ambiguity as to the application of the jurisprudence of the *Mavrommatis* case as a basis of jurisdiction in the present proceedings. It is regrettable that it did not do so, probably out of excessive caution. Such caution was not, however, justified in the present instance, since the *res judicata* of the Court's decision is relative and therefore applies only to relations between the two Parties. Finally, it follows from this that the reasoning on this point is incomplete and therefore unsatisfactory, and is likely to weaken the Court's findings, although they are to my mind perfectly well grounded. The principal judicial organ of the United Nations is expected to work to clarify complex legal situations, and it can only do so by pursuing the inherent logic of the approach it has decided to take through to the end.

(Signed) Mohamed BENNOUNA.