Response to the Question raised by Judge Abraham

On 28 May 2008, Judge Abraham posed the following question to both parties:

Les Parties se sont référées, entre autres, aux affaires relatives à la Licéité de l'emploi de la force, dans lesquelles la Cour a jugé en 2004 qu'elle n'avait pas compétence pour connaître des requêtes de la Serbie-et-Monténégro, au motif que cet Etat ne remplissait pas les conditions d'accès à la Cour.
Dans ces affaires, la Serbie-et-Monténégro venait devant la Cour comme demanderesse.
Dans la présente affaire, la Serbie se présente en qualité de défenderesse.
Y a-t-il, selon les Parties, des conséquences à tirer, et si oui lesquelles, de cette différence de situation, en ce qui concerne les conditions prévues aux paragraphes 1 et 2 de l'article 35 du Statut?

In response to the question posed by Judge Abraham, Serbia respectfully submits the following answer:

A. Introductory Observations

1. We would like to submit that in the *Legality of Use of Force* cases, the same fact (the fact that Serbia and Montenegro was not a party to the Statute) received two qualifications which are coherent. The fact that Serbia and Montenegro was not a party to the Statute was perceived as a fundamental shortcoming within the concept of access and within the concept of seisin as well. The Court held that the fact that Serbia and Montenegro was not a party to the Statute at the time of the application was a shortcoming that thwarted both a valid access and a valid seisin. The same shortcoming led to denial of jurisdiction.

2. In the *Legality of Use of Force* cases Serbia and Montenegro was the applicant. The question is whether the logic on which the Court relied would also apply in a situation in which the respondent is a State which is not a party to the Statute – and is not qualified to

appear before the Court on the ground of some other vehicle either. We are submitting that the same logic applies. This follows, first of all, from the clear wording of the Court in the *Legality of Use of Force* cases. Speaking of access as a precondition to the exercise of judicial function, the Court does not single out one party (the Applicant), but speaks consistently in plural:

> "*The Court can exercise its judicial function only in respect of 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.*"[1]

Later in this text, we shall add further arguments to this point.

The *Legality of Use of Force* Judgments made it also clear that the relevant moment in time when the preconditions for seisin need to be assessed, is the moment of the application, of the institution of the proceedings. Not the time when the Memorial was submitted, or any other possible later time. The question was defined by the Court in no uncertain terms: "*The question whether Serbia and Montenegro was or was not a party to the Statute at the time of the institution of the proceedings is a fundamental one.*"[2]

We would like to refer to our pleadings (CR 2008/12 pp. 18-22, paras 33-45) in which we offered further arguments showing that the time of the application is the only relevant moment of time with regard to access and seisin.

3. With regard to seisin, we would first like to call the attention of the Court to two mischaracterisations presented by the Applicant: one pertaining to the Respondent, and the other pertaining to the Court. During his closing arguments on 30 May 2008, Professor Crawford pointed out that the Respondent (Professor Varady) argued that the Court was not validly seised in this case, and then he said: "*In other words, he said the case was wrongly entered in the List*".[3] This certainly not what Professor Varady said or hinted. This

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[1] *Legality of Use of Force (Serbia and Montenegro v. Belgium), Preliminary Objections, Judgment, I.C.J. Reports 2004*, para. 46. Exactly the same text can be found in the other 2004 Legality of Use of Force Judgments as well: in para. 45 of the cases with France, Canada, Italy, The Netherlands, and Portugal; and in para. 44 of the cases with Germany and the United Kingdom.

[2] *Legality of Use of Force (Serbia and Montenegro v. Belgium), Preliminary Objections, Judgment, I.C.J. Reports 2004*, para. 30. Exactly the same text can be found in the other 2004 Legality of Use of Force Judgments as well: in para. 29 of the cases with France, Canada, Italy, The Netherlands, and Portugal; and in para.28 of the cases with Germany and the United Kingdom.

[3] CR 2008/13, p. 28, para 17

misinterpretation is linked to another inaccurate reference concerning the Court. At the beginning of para 19 of his pleadings on 30 May 2008, Professor Crawford addresses the Court, and says: "*You rightly acted in the NATO cases on the basis that you had seisin.*"[4] This is simply not true. The opposite is true. The question whether the Court was properly seised was explicitly raised in the NATO cases – and answered in the negative.

4. The question was raised in Paragraph 36 of the 2004 Judgment: "*The 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 this case.*" To this question the Court answered definitely in the negative. After repeating that Serbia and Montenegro was a not a party to the Statute at the time of the institution of the proceedings, and that the Court was not open to it under Article 35 Paragraph 1 of the Statute, the Court concluded: "*In that situation, subject to the application of paragraph 2 of that Article, Serbia and Montenegro could not have properly seised the Court, whatever title of jurisdiction it might have invoked, for the simple reason that Serbia and Montenegro did not have the right to appear before the Court.*"[5] It is well known that the analysis of Article 35 paragraph 2 of the Statute did not lead the Court towards a different position. In his separate opinion, Judge Tomka also confirmed and cited that in the *Legality of Use of Force* cases "[*w*]*hatever title of jurisdiction the applicant might have invoked, it 'could not have* properly seised *the Court ... for the simple reason that [it] did not have the right to appear before the Court.*"[6] After the Court found that it was not properly seised, the Court certainly did not conclude that "*the case was wrongly entered in the List*", but it declined jurisdiction.

5. Of course, it would have been easier to distinguish our present case from the *Legality of Use of Force* cases if our argument were that this case was wrongly entered in the List (rather

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[4] CR 2008/13, p. 29, para 19

[5] *Legality of Use of Force (Serbia and Montenegro v. Belgium), Preliminary Objections, Judgment, I.C.J. Reports 2004*, para 46. Exactly the same text can be found in the other 2004 *Legality of Use of Force* Judgments as well: in para. 45 of the cases with France, Canada, Italy, The Netherlands, and Portugal; and in para 44 of the cases with Germany and the United Kingdom.

[6] *Legality of Use of Force (Serbia and Montenegro v. Belgium), Preliminary Objections, Judgment, I.C.J. Reports 2004*, Separate opinion of Judge Tomka, para 28

than that the Court was not validly seised), and if the Court would have held in 2004 that it was validly seised. But this is evidently not the case. We are asking the Court to take exactly the same position as the one it took in 2004. The Court held in 2004 that it was **not** validly seised because Serbia and Montenegro was not a party to the Statute at the moment when the application was filed – and one of our arguments is that the Court was not validly seised in this case either, for the same reason (because Serbia was not a party to the Statute at the moment when the application was filed).

6. Thus, the position taken by the Applicant is not compatible with the *Legality of Use of Force* Judgments, unless one would misread these judgments. The applicant submits that "*There was a case duly filed before the Court by Croatia, so there was seisin.*"[7] Had the Court held that it was properly seised in the *Legality of Use of Force* cases – because there too, the case was duly filed by the FRY – it would, indeed, follow that the Court was validly seised in this case as well. But, again, the Court did not decide that it was properly seised in the *Legality of Use of Force* cases. It decided that it was not properly seised. This is why the question of Judge Abraham is pertinent with regard to seisin as well. We have demonstrated that there can be no valid seisin without access of both parties, and that lack of seisin – due to lack of access – is a shortcoming of such a fundamental nature that it cannot be remedied by way of posterior developments.[8]

7. During the oral hearing on 29 May 2008 we endeavoured to demonstrate that no distinction can be made between applicant and respondent with regard to such a fundamental shortcoming as not being a party to the Statute. We submitted our arguments within the context of seisin. Since the institutions of access and seisin are interrelated, since they were both relied upon by the Court as frames of reference for the same shortcoming, we shall submit arguments in both contexts.

8. Our arguments in the context of seisin will include parts of the arguments we already presented during the oral hearing of 29 May 2008. Our arguments with regard to access will include parts of the arguments presented during the oral proceedings in the *Bosnia* case

[7] CR 2008/11, p. 34, para 8

[8] See CR 2008/12, pp. 15-22, paras 21-45 (Varady)

(*Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro)*, *CR 2006/45*, 9 May 2006, pp. 18-23, paras. 4.22-4.37). We shall not repeat here our arguments with regard to the "*Mavrommatis* principle", but we would like to refer to them[9], since they are also pertinent with regard to the (lack of) distinction between applicant and respondent.

9. Our position is that the principle of the equality of the parties, as well as the limits to the judicial function of the Court set by the Statute, necessarily lead to the conclusion that no distinction can be made between applicant and respondent with regard to access and seisin.

B. No relevant distinction can be made between applicants and respondents with regard to access

B.1 Difference in conditions of access is not supported by the Charter and the Statute

10. The text of the Charter does not make any difference between positive and negative *jus standi*. Further, the wording of the Statute, in particular its Article 35 dealing with access, also provides no support whatsoever for any differentiation between applicants and respondents as regards their access to the Court. Both paragraph 1 and paragraph 2 of the English version of this Article use exactly the same phrase – that the Court "shall be open..." The French version, as well, uses exactly the same phrase – "est ouverte" – both in paragraph 1 and paragraph 2 of Article 35. This wording does not distinguish in any way between the situation in which the Court is "open" to an applicant and the one in which it is "open" to a respondent. The wording of Article 35 is neutral as regards the position of a State in a litigation and applies to applicants and respondents equally.

11. As noted by Professor Yee in relation to the wording of Article 35, paragraph 2, of the Statute of the PCIJ (of course, the present Statute uses the identical wording of the relevant phrase):

[9] CR. 2008/12, pp. 18-22, paras. 33-45 (Varady)

"...the language of the Statute of the PCIJ speaks of being "open to other States", without any distinction between applicant and non-applicant States."[10]

12. Furthermore, in the context of Article 35, the statutory phrase "shall be open" has been frequently replaced in the practice of the Court with the following words: "access"[11] and "the right to appear".[12] None of these formulations, however, do indicate any difference between applicants and respondents. On the contrary, they clearly relate to the ability of a State to be a party before the Court, and are completely neutral as regards its position in litigation.

13. In conclusion, the words "the Court shall be open" in Article 35 of the Statute, in their natural and ordinary meaning, do not lend themselves to different interpretations. Their meaning is clear and unambiguous: the Statute does not make any distinction between respondents and applicants; between States that sue and that are sued.

14. A systematic reading of Article 35 of the Statute supports this understanding. While the question invites the parties to assess potential consequences to be drawn from differences in party status with respect to paragraphs 1 and 2 of Article 35 of the Statute, the assessment is influenced by the normative context of those provisions. Article 34, as the other statutory provision addressing an aspect of access, is particularly important in this respect. Paragraph 1 of that provision provides that "Only states may be parties in cases before the Court." It has to the respondent's knowledge never been argued that with respect to the specific aspect

[10] Yee, S., "The Interpretation of 'Treaties in Force' in Article 35(2) of the Statute of the ICJ", 47 ICLQ 884, at 896.

[11] See, *e.g.*, *Legality of Use of Force (Serbia and Montenegro* v. *Belgium), Preliminary Objections, Judgment, I.C.J. Reports 2004*, para. 46 (hereinafter: "*Legality of Use of Force*"); *Fisheries Jurisdiction case (Germany v. Iceland), Judgment on the Jurisdiction of the Court, ICJ Reports 1973*, p. 53, para. 11. It should also be noted that the documents related to the drafting of Security Council resolution 9 use the phrases "access to the Court" and "open to States" interchangeably. See *Letter of the President of the Court sent to the Secretary-General of the United Nations, dated 1 May 1946* (U.N. doc. S/99, 5 July 1946) and *Report of Mr. Beelaerts van Blokland, Rapporteur of the Committee of Experts, concerning the conditions under which the International Court of Justice shall be open to States not Parties to the Statute* (U.N. doc. S/169, 24 September 1946).

[12] See, *e.g.*, *Legality of Use of Force*, para. 46.

of access addressed in Article 34, paragraph 1 of the Statute, one could draw a distinction based on the party's status as applicant or respondent in a litigation.

15. Equally, a distinction between applicants and respondents in terms of access has never been seen as being relevant in the application of paragraph 3 of Article 35, which provides as follows:

> "When a state which is not a Member of the United Nations is a party to a case, the Court shall fix the amount which that party is to contribute towards the expenses of the Court. This provision shall not apply if such state is bearing a share of the expenses of the Court."

16. In conclusion, the two provisions referred to in Judge Abraham's question - paragraphs 1 and 2 of Article 35 - therefore are set in a normative context of rules on access which treat applicants and respondents alike. To introduce a distinction into them would ignore that context.

17. When the wording of a provision is so abundantly clear, this should be the end of the matter.[13] But in any case, the idea that there could be a difference in access to the Court between applicants and respondents does not receive support from the drafting history of Article 35, paragraph 2, either. On the contrary, as noted by Professor Yee "... it contradicts the drafting history."[14]

18. As far as Article 35 of the present Statute is concerned, it is almost identical with the text of Article 35 of the Statute of the Permanent Court, apart from purely formal changes necessitated by references to the United Nations instead of the League of Nations and its Covenant and the terminological changes in order to bring the English text more in line with the French text.[15] The changes did not concern the phrase "shall be open". Therefore, the

[13] *Advisory Opinion on the Competence of the General Assembly for the Admission of a State to the United Nations, I..C.J. Reports 1950*, p. 8.

[14] Yee, S., "The Interpretation of 'Treaties in Force' in Article 35(2) of the Statute of the ICJ", 47 ICLQ 884, at 896.

[15] *Documents of the United Nations Conference on International Organization*, Vol. XIV, p. 839.

drafting history of Article 35 of the old Statute is clearly relevant to the wording of Article 35 of the present Statute.

19. During the drafting of Article 35 of the old Statute, a difference in conditions of access to the Court, depending on the position of a State as an applicant or respondent, was mentioned by the Chairman of the Sub-Committee of the Third Committee of the First Assembly of the League of Nations.[16] However, there is no indication that this view received support .[17]

20. Moreover, the discussion during the drafting of the amendments to the Rules of the Permanent Court of International Justice in 1926, which took place only six years after the drafting of the Statute, provides an illuminating insight regarding the understanding of this issue. During the discussion on implementation of Article 35, paragraph 2, of the Statute in the Rules of the Court, the Registrar remarked that, in the *Wimbledon* case, the Court had decided that the obligation to accept the conditions laid down by the Council in the context of Article 35, paragraph 2, of the Statute could only be imposed on applicants and not on respondents.[18] However, the then President of the Court, Judge Max Huber (who participated in the drafting of the Statute of the Permanent Court of International Justice), rejected this interpretation and insisted that the conditions laid down by the Council resolution had to be accepted in all cases, regardless of whether the State not Member of the League was in the position of respondent or applicant:

> "It was quite natural that States that wished to profit by the institution established by the League of Nations should have to accept the conditions fixed by the Covenant, and that States which, for one reason or another, had

[16] Permanent Court of International Justice, *Documents concerning the action taken by the Council of the League of Nations under Article 14 of the Covenant and the adoption by the Assembly of the Statute of the Permanent Court*, p. 141.

[17] See Yee, S., "The Interpretation of 'Treaties in Force' in Article 35(2) of the Statute of the ICJ", 47 ICLQ 884, at 893-894.

[18] Publications of the Permanent Court of International Justice, Series D., *Acts and Documents concerning the organization of the Court*, Addendum to No. 2, "Revision of the Rules of Court" (1926), p. 75.

not yet done so should accept them by means of this declaration, *whether they appeared before the Court as Applicant or Respondent.*"[19]

No other judge voiced any different view or disagreement with the interpretation given by the President.

21. The question of distinction between applicants and respondents was not raised during the drafting of the present Statute. If the drafters of the present Statute wished to allow for such fundamental departure from the accepted principles of international litigation and equality of States they would have clearly said something to that effect – but they did not.

B.2 The principles of consent and the role of political organs of the UN do not allow any difference in conditions of access of applicants and respondents

22. A theory according to which the requirements of access to the Court would not be applicable in case of respondents would run counter the fundamental principle that a State may be subject to international adjudication, in the current case adjudication by the International Court of Justice, only with its consent.[20] This is not a consent to a specific title of jurisdiction in a particular case in the sense of Article 36 of the Statute, but the general consent to be part of the United Nations judicial system established by the UN Charter and the Statute. This general consent to participate in the judicial system established by the Charter and the Statute is one of the fundamental prerequisites of access to the Court as set forth by Article 35 of the Statute.

23. This general consent is given either through an application for UN membership, or when a non-member State submits a formal request to be a party to the Statute, or accepts the conditions set forth in Security Council resolution 9, or participates in one of the "treaties in force" in the sense of Article 35, paragraph 2, of the Statute. Of course, the consent by the

[19] *Ibid.*, p. 106 (emphasis added).

[20] See, e.g., *Ambatielos case (merits: obligation to arbitrate), Judgment of May 19th, 1953: I.C.J. Reports 1953*, p. 19.

State concerned is not all that is required for the fulfilment of conditions of access to the Court under Article 35, because in all these cases (except the "treaties in force" clause) it must be accompanied by specific action by the United Nations political organs – either by admission to membership of the Organization which entails *ipso facto* membership in the Statute of the Court (Article 93, para. 1, of the Charter); or by determination of conditions for participation of a State which is not a member of the UN in the Statute of the Court (Article 93, para. 2, of the Charter); or finally by a determination of the conditions for participation in proceedings before the Court of States not parties to the Statute (Article 35, para. 2, of the Statute). Yet, in each and every of these situations, the State itself must also give its consent to be part of the judicial system of the United Nations. Therefore, if a State that has never given such consent could still be brought before the Court as a respondent, this would clearly violate a fundamental principle of international adjudication, which has been continuously underlined and upheld by the Court ever since its creation.

24. The Respondent's lack of access means that either the respondent State has not given its consent to be, generally or in an individual case, part of the judicial system of the United Nations, or that the competent UN organs have not accepted the Respondent as a member of this judicial system in a manner envisaged by the Charter and the Statute, or that both of these requirements have not been fulfilled. The result of this situation is that the Respondent does not have any link with the Court, which therefore cannot exercise its judicial function with respect to the Respondent. As the Court said in the *Aerial incident of 27 July 1955* Judgment, with respect to the situation of Bulgaria before its admission to the United Nations,

> "Until its admission, it was a stranger to the Charter and to the Statute. What has been agreed upon between the signatories of these instruments cannot have created any obligation binding upon it, in particular an obligation to recognize the jurisdiction of the Court."[21]

[21] *Case concerning the Aerial incident of July 27th, 1955 (Israel v. Bulgaria), Preliminary Objections, Judgments of May 26th, 1959: I.C.J. Reports 1959*, p. 143.

25. If this principle is applied to the present case, the fact that the Respondent could not have had any obligation under the Charter and the Statute until its admission to the United Nations means that it could not be brought to the Court, *i.e.*, it did not have any obligation to come before the Court. This is obviously yet another confirmation that conditions of access fully apply to respondent States. On a more general level, this means that the fundamental precondition for the Court's exercise of its judicial function was missing. Simply, the Respondent was until its admission to the United Nations, to use the Court's expression, "a stranger to the Charter and to the Statute."

26. The possibility that a respondent State could be brought before the Court without fulfilling the conditions of access under the Charter and the Statute would also prevent the Security Council and the General Assembly from exercising their power to decide on the participation of States in the judicial system of the United Nations. This would not only effectively suspend Article 93 of the Charter and Article 35 of the Statute, but would upset the balance between the main organs of the Organization, as well.

27. Any distinction between applicant and respondent would also undermine the role of the General Assembly and the Security Council under Art. 6 of the Charter. This is due to the consideration that a case could then still be brought before the ICJ, the principal judicial organ of the United Nations, against a State which has been expelled from the organization despite the fact that it is thereby no longer a member of the United Nations. This would also undermine the decision of the political organs of the organization to not only act under Art. 5 of the Charter and strip the State concerned of its membership *rights and privileges* (including the *right* to bring a case before the ICJ and thus be an applicant), but to instead deliberately *completely* expel the State concerned from the organization as such.

28. The distinction proposed would also run counter to the idea underlying Art. 94, para. 1 of the Charter. Art. 94, para. 1 of the Charter presupposes that parties to a case before the Court are under an obligation to comply with decisions by the Court. Practice by the political organs of the United Nations under both Art. 93, para. 2 of the Charter, as well as under Art. 35, para. 2 of the Statute confirms that the entering into such an obligation is considered essential before a non-member State of the United Nations is granted access to

the Court. Yet, allowing for a case to be brought against a State which does not have access (as not being a member of the United Nations and as therefore not being bound by Art. 93, para. 2 of the Charter, or as not having fulfilled the requirements laid down by the General Assembly and the Security Council by virtue of Art. 93, para. 2 of the Charter respectively Art. 35, para. 2 of the Statute) would circumvent this essential requirement. This is even more relevant since it is of particular importance that a State against which a case is brought, *i.e.* the respondent, is under an obligation to comply with a judgment by the Court.

B.3 The question of equality

29. Furthermore, the acceptance of such possibility would lead to fundamental inequality between States in relation to proceedings before the Court – States without access could be sued but could not sue before the Court. However, when faced with a contentious case, the Court, in order to discharge its function as a court proper and to administer justice, has to ensure the equal treatment of the parties. The fundamental nature of this duty is expressed *e.g.* in the Court's statement that "the equality of the parties to the dispute must remain the basic principle for the Court".[22] Equality of parties is, as has been noted, "not an abstract notion or a mere declaration of principle, but a firm reality originating in ... the very nature and object of the international legal process."[23]

30. It must be also noted that the principle of equality is reconfirmed in Art. 35, paragraph 2 of the Statute specifically with regard to States not parties of the Statute.

31. As an illustration of the consequences of fundamental inequality that would ensue from a differential treatment of access of respondents and applicants, respectively, it suffices to mention the question of counter-claims. Under Rule 80 of the Rules of Court, a respondent

[22] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America). ICJ Reports 1986,* 14, at 25 (para. 31).

[23] Rosenne, S., *The Law and Practice of the International Court of Justice 1920-2005* (2006), vol III, Martinus Njihoff Publishers, Leiden, Boston, at 1048-1049.

may present counter-claims. A counter-claim is not a defence but a separate claim,[24] which means that, with regard to the counter-claim, the respondent will be in the position of a plaintiff, while the applicant will be in the position of a defendant. If a State without access to the Court could be placed in the position of respondent but not in the position of applicant, it would be prevented from presenting counter-claims in a case in which it is a respondent. Obviously, the proposition that the obligation to answer a claim before the Court exists, while the right to bring a claim does not, would put a respondent State that has no access to the Court in a position of fundamental inequality within the case itself. . The issue of the counter-claim makes it also clear that the "*Mavrommatis* principle" could not apply with regard to such a fundamental question as access. If the lack of access on the side of the respondent could be remedied by the fact that the respondent becomes a party to the Statute at a later moment, the respondent might still loose its chance for submitting a counterclaim, if it did not become a party to the Statute before the time-limit set for submitting the counter-claim.

32. Such fundamental inequality of the parties, if it were ever possible, *quid non*, would clearly lead to the impropriety of the Court's exercise of jurisdiction.

B.4 Security Council resolution 9 (1946) does not lend support to any purported difference in access of applicants and respondents

33. Security Council resolution 9 was adopted on 15 October 1946, pursuant to Article 35, paragraph 2, of the Statute. It was therefore adopted a little more than one year after the Statute had been drafted and adopted. But there is nothing in the text of this resolution, nor in the correspondence and drafts that preceded it,[25] that would indicate any difference in

[24] *United States Diplomatic and Consular Staff in Tehran, Provisional Measures, Order of 15 December 1979, I.C.J. Reports 1979*, p. 15, para. 24; *Case Concerning Application of the Convention on the Punishment and Prevention of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia), Counter Claims Order*, 17 December 1997, paras. 27-28.

[25] See *Letter of the President of the Court sent to the Secretary-General of the United Nations, dated 1 May 1946* (U.N. doc. S/99, 5 July 1946) and *Report of Mr. Beelaerts van Blokland, Rapporteur of the Committee of Experts, concerning the conditions under which the International Court of Justice shall be open to States not Parties to the Statute* (U.N. doc. S/169, 24 September 1946).

conditions of access of States not members of the Statute, depending on whether they were applicants or respondents.

34. Security Council resolution 9 allows that States not parties to the Statute may deposit either a particular or a general declaration accepting the jurisdiction of the Court:

> "A particular declaration is one accepting the jurisdiction of the Court in respect only of a particular dispute or disputes which have already arisen. A general declaration is one accepting the jurisdiction generally in respect of all disputes or of a particular class or classes of disputes which have already arisen or which may arise in the future."[26]

35. Again, this wording equally applies to applicants and respondents and does not allow any distinction on that basis with respect to access to the Court by a State not party to the Statute. Indeed, the very possibility that such State may give a general declaration accepting the jurisdiction of the Court in respect of *all disputes* entails both the possibility that it would be an applicant and the possibility that it would be a respondent in the cases before the Court. Moreover, such general declaration necessarily covers the situation of being a respondent and the situation of being an applicant, and, in fact, cannot be limited to one of them. This clearly shows that conditions of access apply equally to respondents and applicants, without exception.

36. In conclusion, it is simply not possible to bring a State not party to the Statute before the Court as a respondent unless it fulfils conditions of access set forth in Article 35 of the Statute. Respondents are subject to access requirements in the same way as applicants. It is submitted that a different result simply could not be possible under the Charter and the Statute. These documents do not provide for any difference on the basis of States' litigating position. Moreover, Article 35, paragraph 2, of the Statute expressly provides that conditions of access to be set forth by the Security Council "in no case shall... place the parties in a position of inequality before the Court."

[26] Security Council resolution 9 (1946), para. 2.

B.5 The Court has never made a difference with regard to conditions of access

37. The Court has never in its practice made any difference between the access of applicants and the access of respondents. This is evidenced by the *Bosnia* case: in the provisional measures phase, the Court relied on the "treaties in force" clause of Article 35, paragraph 2, as a *prima facie* (provisional) basis for access of the FRY.[27] Although necessarily tentative, in this phrase of the procedure, such reliance indicated the Court's feeling that avenues set by the Statute had to be followed and the relevant conditions of access had to be fulfilled. Why such reliance on Article 35, paragraph 2 would be considered necessary if proceedings could be validly initiated, and a respondent could appear before the Court without fulfilling the necessary statutory requirements of access? If the requirements of access had not applied to the respondent, the Court would have simply noted this fact and proceeded to deal with the case.

38. The position of the Court taken in the 1996 Preliminary Objections Judgment (which was taken as res judicata in the 2007 Judgment) is evidently different from the position taken in the *Legality of Use of Force* cases. But it is also evident that the reason for this is not a distinction made between Applicant and Respondent; just as it is clear that in 1996 the Court did not contemplate – let alone decide – that lack of access at the time of the Application could be later remedied. The reason for different holdings in the *Bosnia* case and the *Legality of Use of Force* case respectively, is obviously the (non)-availability of sufficient and adequate information in 1996. In 1996, the issue of access was not argued by any of the parties, and on the ground of what was then known, it was plausible to assume that the FRY was a party to the Statute at the time when the application was submitted. The 1996 Judgment was rendered during the period of eight years in which the position of the FRY, in the words of the Court, "[*r*]*emained ambiguous and open to different assessments*" (Legality of Use of Force, Serbia and Montenegro v. Belgium, Paragraph 64.) In contrast to this, the *Legality of Use of Force* Judgments were rendered **after** it became clear that the FRY was

[27] *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia (Serbia and Montenegro)), Order of 8 April 1993*, para. 19.

not a party to the Statute until 1 November 2000 – and this was unequivocally confirmed by the Court. This case is also being decided after conclusive clarifications became available.

B.6 Parties raising the issue of lack of access have confirmed the understanding that both the Applicant and the Respondent must have access

39. In the various Cases concerning the Legality of Force, several parties have also explictely taken the position that both the applicant and the respondent in a given case must have access. Thus, for example, Italy stated:

> "To be able to adjudicate upon a case brought before it, the Court must first have jurisdiction *ratione personarum*, meaning that *both the Applicant and the Respondent* must be among the States with access to the Court."[28]

In the same vein, Portugal stated that:

> "This means that for an entity which does not enjoy the right of access to the Court, the question of jurisdiction does not even arise. It simply cannot appear before the Court *as either Applicant or Respondent*."[29]

C. No relevant distinction can be made between applicants and respondents with regard to seisin

40. In the *Legality of Use of Force* cases the Court held that the Applicant "could not have properly seised the Court "[30], because it was not a party to the Statute, and did not have the right to appear before the Court.

[28] *Case concerning Legality of the Use of Force, (Yugoslavia v. Italy), Preliminary Objections of the Italian Republic*, p. 8. Emphasis added.

[29] *Case concerning Legality of the Use of Force, (Yugoslavia v. Portugal), Preliminary Objections of the Portuguese Republic*, p. 5. Emphasis added.

41. It is generally accepted that a valid seisin may be effected by either a joint notification or unilaterally. In our case, we are talking about unilateral seisin. But the conditions for unilateral seisin in a given dispute are not restricted to preconditions pertaining to the applicant. The qualifications of the other party simply cannot be disregarded. Otherwise, a State, party to the Statute, could also validly seise the Court with a case brought against a non-State entity. Or, the Court could be seised against a State that is outside the scope of the judicial authority of the Court.

42. Unilateral seisin cannot be reduced to addressing the Court by one party. This simple fact appears clearly from the *Nottebohm* case[31], where the issue was whether the Article 36(2) declaration of Guatemala **(the Respondent)** would allow a valid unilateral seisin, given the fact that it expired after the Application was submitted. In this case, even the fact that both parties to the dispute were parties to the Statute was not considered to be sufficient for a valid seisin. The Court investigated whether other preconditions on the side of the **Respondent** were met, and stated that "*There can be no doubt that an Application filed after the expiry of this period [the period of the validity of the Guatemala declaration] would not have the effect of legally seising the Court*".[32] It was not enough that the case was "duly filed" by the applicant. Preconditions on the side of the respondent had to be met. The *Nottebohm* Judgment made it clear that the status of the respondent is relevant for seisin.

43. Valid seisin means simply *compétence de la compétence*. But it would be a *contradictio in adiecto* to speak of *compétence de la compétence* in a situation in which the Court **has no competence** to assume jurisdiction. The Court cannot be validly seised, it cannot have *compétence de la compétence* if one of the parties to the dispute is not a party to the Statute, if it is outside the statutory scope of the Court's competence.

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[30] *Legality of Use of Force (Serbia and Montenegro v. Belgium), Preliminary Objections, Judgment, I.C.J. Reports 2004*, para 46. Exactly the same text can be found in the other 2004 *Legality of Use of Force* Judgments as well: in para. 45 of the cases with France, Canada, Italy, Netherlands, Portugal, and in para. 44 of the cases with Germany and the United Kingdom.

[31] *Nottebohm case (Preliminary Objections,) Judgment of November 18th, 1953: I.C.J. Reports 1953*

[32] Ibid. p. 121.

44. It is beyond doubt that a valid seisin has consequences with regard to both the Applicant and to the Respondent – but this assumes that they are parties to the Statute, which is the anchor of procedural effects. The existence of this assumption was made clear in the *Maritime Delimitation and Territorial Questions between Qatar v. Bahrein (Jurisdiction and Admissibility)* case, where the Court stated:

> "Once the Court has been validly seised, both Parties are bound by the procedural consequences which the Statute and the Rules make applicable ..."[33]

45. This is certainly true, but this clearly assumes that both parties are parties to the Statute, and therefore can be parties in a given case brought before the Court. Otherwise, "the procedural consequences which the Statute and the Rules make applicable" would not apply to them. It is generally accepted, that seisin which yields *compétence de la compétence*, flows from the Statute. But this also means that the State towards which competence is asserted – and possibly established – has to be within the scope of the Statute. The Court cannot have *compétence de la compétence* if a party to the dispute is not a party to the Statute. This simple proposition was accepted as a basic assumption in the *Aerial Incident of 27 July 1955* case, where Bulgaria was the **respondent** and in which the Court stated that:

> "... [t]he Statute of the present Court could not lay any obligations upon Bulgaria before its admission to the United Nations..."[34]

46. Sovereign States parties to the Statute are under the obligation to respect *compétence de la compétence* of the Court with regard to them, under the conditions set by the Statute. By the same token, the Court has no competence to decide upon its competence if any of the States parties to the dispute is outside the realm of the judicial authority of the Court.

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[33] *Maritime Delimitation and Territorial Questions between Qatar and Bahrain, Jurisdiction and Admissibility, Judgment, I.C. J. Reports 1995*, para. 43.

[34] *Case Concerning the Aerial Incident of July 27th, 1955 (Israel v. Bulgaria), Preliminary Objections, Judgment of May 26th 1959*, p. 143.

47. This proposition was confirmed in the *Legality of Use of Force* cases, in which the Court makes it crystal clear that access has a fundamental character, that it is a precondition to judicial functioning, and hence to jurisdiction as well. It is stated:

> "The Court can exercise its judicial function only in respect of 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."[35]

48. This is perfectly logical, since access is, indeed, both a precondition to a valid seisin and a precondition to jurisdiction. This clear position cannot be interpreted otherwise but as a position taken towards both the applicant and the respondent. The Court cannot exercise its judicial function towards parties who are not within the ambit of its judicial function, who do not have access to the Court.

49. The same simple and clear proposition is also underlined by Rosenne. Starting from the assumption that the capacity to be a party to contentious cases is reserved only to States, Rosenne adds and stresses:

> "This statehood has to be supplemented by formal conditions establishing a legal link of the State to the Statute of the Court [...] Only a State meeting one of these formal conditions has access to the Court for any purpose and in any capacity whatsoever. The Court cannot entertain a contentious case against a respondent State that is not similarly qualified."[36]

50. The Court stated in the *Legality of Use of Force* cases that "*The Court can exercise its judicial function only in respect of States which have access to it under Article 35 of the*

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[35] *Legality of Use of Force (Serbia and Montenegro v. Belgium), Preliminary Objections, Judgment, I.C.J. Reports 2004*, para. 46. Exactly the same text can be found in the other 2004 Legality of Use of Force Judgments as well: in para. 45 of the cases with France, Canada, Italy, The Netherlands, and Portugal; and in para. 44 of the cases with Germany and the United Kingdom.

[36] Rosenne, S., *The Law and the Practice of the International Court, 1920-2005,* (2006), Martinus Njihoff Publishers, Leiden, Boston, p. 588.

Statute".[37] Thus, the problem was a fundamental one, concerning the limits of the possible exercise of the judicial function of the Court. The Court can exercise its judicial function – which also means that it can be properly seised – only in a dispute between States both of which have access to it under Article 35 of the Statute. No distinction can be made between the applicant and the respondent. The exercise of judicial function in contentious cases clearly assumes that both parties are within the scope of authority of the Court set by the Statute.

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51. In conclusion, it is the considered opinion of Serbia, that the fact that Serbia was not a party to the Statute at the time when the Application was submitted is a shortcoming that thwarts both valid access and valid seisin, and leads to lack of jurisdiction notwithstanding whether Serbia is an applicant or a respondent.

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[37] *Legality of Use of Force (Serbia and Montenegro v. Belgium), Preliminary Objections, Judgment, I.C.J. Reports 2004*, para. 46. Exactly the same text can be found in the other 2004 Legality of Use of Force Judgments as well: in para. 45 of the cases with France, Canada, Italy, The Netherlands, and Portugal; and in para. 44 of the cases with Germany and the United Kingdom.