Comments of the Republic of Croatia on the Republic of Serbia's further written observations of 6 June 2008

1. The Republic of Croatia notes the contents of the Republic of Serbia's 20-page response with some surprise. Contrary to established practice and against the background of its limited first round arguments at the oral phase, the Respondent has taken the opportunity to summarise, restate and then further develop the whole of its case on jurisdiction *ratione personae*, and to respond to arguments made by counsel for Croatia generally on that subject. Hitherto, States have not treated questions from the bench – helpful as they often are in clarifying particular points – as an excuse for post-hearing briefs, for a further written round (or rounds) of pleading. The Respondent has departed from that practice. The Republic of Croatia respectfully invites the Court to ignore those aspects of Serbia's written observations that are not responsive to Judge Abraham's question.

2. The Republic of Croatia responded to Judge Abraham's question, at the first opportunity, on the final day of oral argument: see CR 2008/13, 30 May 2008, pp. 30-31 (Professor Crawford). He made two major points: (a) In principle, under normal operation of jurisdictional requirements under Article 35(1) or (2) of the Statute an Applicant and a Respondent are treated alike; (b) but it may well make a difference, at least in practice, in situation where the *Mavrommatis* principle is being relied on.

3. The Respondent reargues at length that the Court have not seisin in this case. In response to those assertions, Republic of Croatia would make the following remarks. It should be stressed that these are intended to be responsive and are without prejudice to the Republic of Croatia's submissions already made on Articles 35(1) and (2).

(a) The operation of the rules of seisin have the effect that a Respondent State has full opportunity to object, or to consent, to the Court's competence to hear a case, or to its jurisdiction, *after* the case is commenced. The Respondent must take the legal consequences of its own conduct in that regard.

(b) The first occasion when the Respondent objected to the jurisdiction of the Court in the present case was by preliminary objections filed on 1 September 2002, long after all the conditions for the Court's jurisdiction were fulfilled. On the basis that the Genocide Convention was applicable (as the Respondent had previously affirmed on many occasions, and as the Court has consistently held), all those conditions were fulfilled, on any view, on 1 November 2000.

(c) It is therefore not necessary for the Court to decide the hypothetical question whether the Respondent could have commenced proceedings against the Republic of Croatia in 1999. What is clear is that the Republic of Croatia had the capacity to seise the Court in the present case at that time, and the Court dealt with the case accordingly. The Court is entitled to deal with the question of seisin in accordance with its decisions given at the time the question arises. How else can it act? To argue that the Court lacked seisin in 1999 is inconceivable. If the Court has seisin it is entitled to deal with the case in accordance with the applicable law, including the *Mavrommatis* principle.

(d) If, at any time after the Republic of Croatia had commenced this case in 1999, the Respondent had filed a declaration under Security Council resolution 9(I), jurisdiction would have been incontestable. That declaration would not have conferred seisin on the Court, any more than Turkey's later declaration did in *The Lotus*. In both cases the Court already had seisin as a result of an application filed by a State Party to the Statute and the case had been duly entered in the List.

(e) Rather than filing a declaration, the Respondent took formal steps to become a Party to the Statute (action that was without prejudice, in the view of the Republic of Croatia, to such attributes of membership of the United Nations it already enjoyed before that date). The effect was – for the purpose of the present case – the same. Jurisdiction became as incontestable as it was in *The Lotus*.

(f) It may be asked how the Court ceases to have seisin, once a case has been entered on the Court's list. The answer is to be found in the Court's practice in *Request for an Examination of the Situation*. France forthwith objected to the New Zealand application. The Court entered the application on the List, for the purpose of determining whether it was properly filed in accordance with its judgment of 1974.

having determined that it was not, the Court directed that the case be removed from the List: see ICJ Reports 1995 p. 288 at p. 306 (para. 66). That was an exercise of competence-competence.

4. The conclusion reached in paragraph 3 above, finds support in Article 41 of the Rules of Court, which reads:

> "*The institution of proceedings* by a State which is not a party to the Statute but which, under Article 35, paragraph 2, thereof, has accepted the jurisdiction of the Court by a declaration made in accordance with any resolution adopted by the Security Council under that Article, shall be accompanied by a deposit of the declaration in question, unless the latter has previously been deposited with the Registrar." (emphasis added)

As observed by Rosenne, "The Rules contain no parallel provision regarding the filing of a declaration by a Respondent which is not a party to the Statute." *(The Law and Practice of the International Court, 1920-2005* (4th edn, Nijhoff, 2004), vol. 2, *Jurisdiction*, p. 619). The absence of any provision in the Rules concerning a Respondent State which is not a party to the Statute clearly supports the view that the Court may acquire seisin at the instance of an Applicant State which *is* a party to the Statute. In this way, and as applicable in this case, an important consequence arises to indicate a material difference between the situation of an Applicant, on the one hand, and that of a Respondent , on the other, in relation to the interpretation and application of Articles 35(1) and (2)."

5. For these reasons, the Court has jurisdiction on any view of the matter, and irrespective of whether the Court finds it necessary to address Croatia's arguments as to the interpretation and application of Articles 35(1) and (2) in light of its jurisprudence.

6. The Respondent's lengthy "reply" to Judge Abraham's question calls only for a brief response, as follows:

(a) The Respondent argues that the Court lacked seisin in the *NATO Cases* ("Response", paras. 1-7). But that was not what the Court said. Thus in the Provisional Measures phase against the *United States*, the Court held (having examined its jurisdiction) that "within a system of consensual jurisdiction, to *maintain* on the General List a case

upon which it appears certain that the Court will not be able to adjudicate on the merits would most assuredly not contribute to the sound administration of justice": ICJ Reports 1999 at p. 925 (para. 29, emphasis added). This responded to the actual position taken by the Parties and did not amount to a finding that the Court lacked seisin. Nor was any such finding made at the Jurisdictional phase of the remaining cases: see e.g. the *Belgian* case, ICJ Reports 2004 at p. 294 (para. 33), p. 296 (para. 40), pp. 297-8 (para. 44). The Court exercised its jurisdiction, dealt with the case and found (unanimously, though for different reasons) that it lacked jurisdiction: at p. 328 (para. 129). There was nothing retrospective in this decision, which is indistinguishable in form to all other cases in which a preliminary objection to jurisdiction is successfully maintained. Nor did the decision have automatic consequences for other cases on the Court's List, having regard to Article 59 of the Statute.

(b) The Respondent invents the concept of "negative *jus standi*" ("Response", para. 10). It treats the majority's finding in the *NATO cases* on access as a trump card. But – as pointed out above – a State which is brought before the Court under a *prima facie* valid jurisdictional title but which may not be a party to the Statute still has to deal with the Court in order to clarify the situation. The case exists on the List (as Serbia now concedes). It is not void. The Respondent can resolve the question of access (assuming it exists) by making a declaration under Security Council resolution 9(I), or by becoming a party to the Statute. In *The Lotus*, Turkey did the former; in the present case, this Respondent did the latter. There was and is no "negative *jus standi*", like a black hole eliminating not merely Article 36(6) of the Statute but the orderly procedures applied by the Court to ascertain its jurisdiction.

(c) The Respondent submits that there is no difference between Applicants and Respondents as concerns the basic qualification of statehood in Article 34(1): see "Response", para. 14. This is obvious – but the Republic of Croatia has never suggested otherwise. The Respondent was at all relevant times a State, responsible for its conduct in accordance with the international law of State responsibility, including attribution.

(d) The Respondent relies on the requirement of "general consent to participate in the judicial system established by the Charter and the Statute" ("Response", para. 22). The Republic of Croatia will not repeat what it said on Article 35(2) in the oral phase: that issue was not raised by Judge Abraham's question. For present purposes, and assuming, *arguendo*, that the Respondent lacked access to the Court in 1999, it could have remedied that deficiency at any time while the case was listed by making a declaration under Security Council resolution 9(I); such a declaration could be made *ad hoc* and solely for the purposes of the case – as was Turkey's declaration in *The Lotus*. Instead it chose to become a party to the Statute. Any pre-existing defect was thereby cured, in accordance with the *Mavrommatis* principle. There is accordingly no violation of any "fundamental principle of international adjudication" ("Response", para. 23) on any view. This deals also with the purely protestative arguments made in paragraphs 24-28 of the "Response".

(e) It is not the case that the procedural point made by the Republic of Croatia in paragraph 2(b) above leads to "fundamental inequality between States in relation to proceedings before the Court" ("Response", para. 29). If a case is placed on the List, all the Respondent has to do is to object citing any applicable ground of objection, whether related to access or otherwise. That is what France did in *Request for an Examination of the Situation*. The Respondent did not do so here. The Court also has certain powers to act *proprio motu*, but it did not exercise them (had it done so the Respondent would have been the first to complain!). The fundamental equality of States is protected by the due process of the Court.

(f) Having apparently accepted ("Response", para 3) that the Court has seisin in the present case, the Respondent tries to diminish its effect by labelling it as "unilateral seisin" ("Response", para 43), which is apparently something less than seisin. In other words, the case is only *apparently* on the List. But listing a case, acquiring seisin over it, is a matter for the Court to decide – a decision which it may make explicitly on a provisional basis but which, whether or not provisional, is subject to the Court's powers and procedures for determining objections to competence. There is only one form of seisin and the Court has it in the present case.

(g) The "automatic" character of the Respondent's position is clearly exposed in para. 46 of its Response when it says that: "the Court has no competence to decide on its competence if any of the States parties to the dispute is outside the realm of the judicial authority of the Court". But it is for the Court to decide whether that is the situation, not for the Respondent to do so. In the present case the Republic of Croatia has given three distinct and credible grounds for affirming jurisdiction:

- on the basis of Article 35, para. 1 (the Respondent enjoyed *sui generis status* in 1992 -2000 period – including access to the Court, which could not have been changed retroactively),
- on the basis of Article 35, para 2 (Article IX of the Genocide Convention is a "treaty in force"), and
- on the basis of application of *Mavrommatis* principle (in the present case all procedural requirements for the Court's jurisdiction were in any case met on 1 November 2000).

Now it is for the Court to decide. To suggest that in doing so the Court is not exercising its authority under Article 36(6) of its Statute is absurd.

Respectfully submitted.

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before the International Court of Justice

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