CR 2006/13

International Court of Justice	**Cour internationale de Justice**
THE HAGUE	**LA HAYE**

YEAR 2006

Public sitting

held on Thursday 9 March 2006, at 10 a.m., at the Peace Palace,

President Higgins presiding,

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)**

VERBATIM RECORD

ANNÉE 2006

Audience publique

tenue le jeudi 9 mars 2006, à 10 heures, au Palais de la Paix,

sous la présidence de Mme Higgins, président,

*en l'affaire relative à l'***Application de la convention pour la prévention et la répression du crime de génocide (Bosnie-Herzégovine c. Serbie-et-Monténégro)**

COMPTE RENDU

Present:	President	Higgins
	Vice-President	Al-Khasawneh
	Judges	Ranjeva
		Shi
		Koroma
		Parra-Aranguren
		Owada
		Tomka
		Keith
		Sepúlveda
		Bennouna
		Skotnikov
	Judges *ad hoc*	Ahmed Mahiou
		Milenko Kreća
	Registrar	Couvreur

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Présents : Mme Higgins, président
M. Al-Khasawneh, vice-président
MM. Ranjeva
Shi
Koroma
Parra-Aranguren
Owada
Tomka
Keith
Sepúlveda
Bennouna
Skotnikov, juges
MM. Ahmed Mahiou,
Milenko Kreća, juges *ad hoc*

M. Couvreur, greffier

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Mr. Amir Bajrić, LL.M,

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comme assistants.

The PRESIDENT: Good morning, please be seated. For reasons that have been explained to my satisfaction Judges Abraham and Simma will not be sitting this morning. Mr. Djerić, you have the floor.

Mr. DJERIĆ: Thank you very much.

ISSUES OF PROCEDURE

2. Respondent's access to the Court

2.1. Madam President, distinguished Members of the Court. May it please the Court. It is a great honour and exceptional privilege to stand before you again.

2.2. The present proceedings concern grave crimes committed in Bosnia and Herzegovina during the war. These crimes must be condemned time and again. They should never be forgotten and there must be no impunity for them — all the perpetrators must be brought to justice, whatever it takes. Madam President, the present proceedings, however, do not deal with individual responsibility for the crimes committed. They deal with State responsibility, and raise a number of fundamental legal issues related to the functioning of the international judicial system established by the Charter of the United Nations and the Statute of this Court. It is our duty to deal with these issues, and it is for the Court to pronounce upon them. Today, I will deal with the issue of the Respondent's access to the Court, and will demonstrate that the Respondent does not have access to the Court in the present case.

Access to the Court is a fundamental prerequisite for the proceedings

2.3. The fundamental importance of the question of access to the Court is well known and cannot be overemphasized. This was emphatically stated in the 2004 *Legality of Use of Force* Judgments:

> "[T]he question whether Serbia and Montenegro was or was not a party to the Statute of the Court at the time of the institution of the present proceedings is fundamental; for if it were not such a party, the Court would not be open to it under Article 35, paragraph 1, of the Statute.
>
> . . . .
>
> 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)*, Judgment of 15 December 2004, para. 46; exactly the same text can be found in the other 2004 *Legality of Use of Force* Judgments, as well.)

2.4. Thus, in order to exercise its judicial function in a case, the Court must always be satisfied that the States parties are, first of all, entitled to appear before it. In other words, access to the Court is indispensable in order to establish and exercise jurisdiction in a particular case.

2.5. It should be noted, however, that the difference between access and jurisdiction lies not only in the fact that access is a fundamental precondition of jurisdiction. It is equally important to note that its legal nature is different from that of jurisdiction. While jurisdiction is related to the consent of parties, the question of access depends on the objective requirements of the Statute, which cannot be overruled or modified by the consent of parties given either explicitly or implicitly. As the Court said in the 2004 *Legality of Use of Force* Judgments:

> "[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.*, para. 36; see, also, *Fisheries Jurisdiction (Federal Republic of Germany* v. *Iceland), Judgment, I.C.J. Reports 1973,* p. 53, para. 11.)

Conditions for access to the Court

2.6. Madam President, the objective requirements regulating access to the Court are contained in Article 35 of the Statute. These requirements are well known, so I will restate them only briefly:

— first, the Court is open to the States which are parties to the Statute (Article 35, paragraph 1, of the Statute). While Members of the United Nations are *ipso facto* parties to the Statute (Article 93 (1) of the United Nations Charter), other States, non-members of the United Nations, may become parties "on conditions to be determined in each case by the General Assembly upon the recommendation of the Security Council" (Article 93 (2) of the Charter);

— secondly, States which are not parties to the Statute may appear before the Court if they fulfil the conditions laid down by the Security Council, as provided by Article 35, paragraph 2, of the Statute. These conditions have indeed been laid down in Security Council resolution 9 of 1946. In essence, it provides that a State has to make a declaration by which it accepts the

jurisdiction of the Court and undertakes to comply with the decision or decisions of the Court and to accept all the obligations of a United Nations Member under Article 94 of the Charter[1];

— finally, States which are not parties to the Statute may also appear before the Court under the "special provisions contained in treaties in force" (Article 35 (2) of the Statute). As this Court has unequivocally stated, this clause exclusively concerns those treaties that were already in force at the date of the entry into force of the Statute, not the treaties concluded afterwards (*Legality of Use of Force (Serbia and Montenegro* v. *Belgium)*, Judgment of 15 December 2004, para. 113; exactly the same text can be found in the other 2004 *Legality of Use of Force* Judgments, as well).

2.7. In sum, in order to appear before the Court, a State must either be a party to the Statute or, if not a party, must have made a declaration pursuant to Security Council resolution 9, or be a party to a treaty providing recourse to the Court, which treaty was in force at the date of the entry into force of the present Statute.

2.8. It is also important to note the relevant moment in time on which a party must fulfil one of these conditions for access to the Court: the relevant moment is the moment when the proceedings were instituted.

2.9. As the Court stated in its 2004 *Legality of Use of Force* Judgments: "The question whether Serbia and Montenegro was or was not a party to the Statute of the Court *at the time of the institution of the present proceedings* is a fundamental one . . ." (*Ibid.*, para. 30; emphasis added; see, also, *ibid.*, para. 46.)

2.10. In conclusion, access to the Court depends on the objective requirements of the law — contained in the Statute. It must exist at the time when the proceedings were instituted. As the question of access of a party to the Court is a fundamental prerequisite for the exercise of its judicial function, it is submitted that the Court cannot adjudicate the case once it has been established that it was not open to the party at the time when the proceedings were instituted.

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[1]See Security Council resolution 9 (1946), para. 1.

The issue whether the FRY had access to the Court has never been decided in the present case

2.11. Madam President, it is obvious that the status of a State in the United Nations must be the starting point in the application of Article 35 of the Statute in any case before the Court, as it must be the starting point in the present case. However, the FRY's status in the United Nations was unclear for a long time, and thus could not provide the necessary starting point for a legal determination of the question of the FRY's access to the Court. As noted by the Court, events relating to the status of the FRY in the United Nations between 1992 and 2000, "testify to the rather confused and complex state of affairs that obtained within the United Nations surrounding the issue of the legal status of the Federal Republic of Yugoslavia in the Organization during this period" (*ibid.*, para. 73).

2.12. Clarification of this state of affairs was not within the purview of the Court — it was within the purview of the political organs of the United Nations that, under the Charter, have the authority to deal with membership issues. However, the practical consequence, in the present case, of such a "confused and complex state of affairs" *(ibid.)* was that there was no secure basis for a legal determination on the FRY's access to the Court. As the Court itself noted in the 2004 *Legality of Use of Force* Judgments,

> "[i]f, at that time [in 1999], the Court had had to determine definitively the status of the Applicant [i.e. the FRY] vis-à-vis the United Nations, its task of giving such a determination would have been complicated by the legal situation, which was shrouded in uncertainties relating to that status" (*ibid.*, para. 79).

2.13. Consequently, the Court did not make a definitive determination on the FRY's access to the Court in the period between 1992 and 2000, including in the present case, in which a judgment on preliminary objections was rendered in 1996. As stated in the 2004 *Legality of Use of Force* Judgments:

> "The Court did not commit itself to a definitive position on the issue of the legal status of the Federal Republic of Yugoslavia in relation to the Charter and the Statute in its pronouncements in incidental proceedings, in the cases involving this issue which came before the Court during this anomalous period." (*Ibid.*, para. 74.)

2.14. Only after the admission of the FRY to the United Nations in 2000, which brought resolution to the "rather confused and complex state of affairs" concerning the United Nations

membership of the FRY, it became possible to take a definitive position on the question of the FRY's access to the Court in the period before 2000.

2.15. Thus, the question of the FRY's access to the Court was eventually raised by the parties in the proceedings for the revision of the 1996 Judgment on preliminary objections, which were initiated in 2001. However, the Court's ruling in the revision proceedings exclusively concerned the issue of whether the Application for revision was admissible under the requirements of Article 61 of the Statute. Therefore, having concluded that these requirements had not been fulfilled, the Court did not have to say and did not say anything on the question of whether the FRY had had the right to appear before the Court. As the Court noted in the 2004 *Legality of Use of Force* Judgments,

> "there is no reason to treat the Judgment in the *Application for Revision* case as having pronounced upon the issue of the legal status of Serbia and Montenegro vis-à-vis the United Nations. Nor does the Judgment pronounce upon the status of Serbia and Montenegro in relation to the Statute of the Court." (*Ibid.*, para. 90.)

2.16. Madam President, eventually the question of the FRY's access to the Court was resolved in 2004, by the Judgments in the cases concerning *Legality of Use of Force*. In these Judgments, the Court determined that the FRY had had no access to the Court in 1999, because it had been admitted to the United Nations only in 2000 (*ibid.*, paras. 91 and 79). Consequently, the Court "was not open to Serbia and Montenegro under Article 35, paragraph 1, of the Statute" (*ibid.*, para. 91). The Court also ruled that Serbia and Montenegro had had no access to it on the basis of Article 35, paragraph 2, of the Statute and under Article IX of the Genocide Convention. The Court did not address the issue as to whether the FRY was or was not a party to the Genocide Convention. Instead, it relied on the fact that the said Convention was not a "treaty in force" in the sense of Article 35, paragraph 2, of the Statute (*ibid.*, para. 114).

2.17. Madam President, Members of the Court, in light of all these developments, the question of the FRY's access to the Court in the present case is now, for the first time, ready for a definitive determination.

The FRY did not have access to the Court

2.18. Serbia and Montenegro respectfully submits that the FRY did not have access to the Court at the time when the proceedings in the present case were instituted:

— first, as the FRY was not a Member of the United Nations until 1 November 2000, it was therefore not *ipso facto* party to the Statute, and the Court was not open to it on that basis before that date;

— secondly, the FRY, as a State non-Member of the United Nations, has never become a party to the Statute on the basis of Article 93, paragraph 2, of the Charter, and the Court was not open to it on that basis; and

— thirdly, the FRY has also never made a declaration pursuant to Security Council resolution 9 of 1946.

Therefore, the Court was not open to the FRY on any of these grounds.

2.19. Finally, Madam President, the FRY could not have access to the Court on the basis of the "treaties in force" clause in Article 35, paragraph 2, of the Statute. While the Applicant based the jurisdiction in the present case on Article IX of the Genocide Convention, it is now well established that the Genocide Convention is not a "treaty in force" in the sense of Article 35, paragraph 2, of the Statute (*ibid.*, para. 114). Therefore, even if the FRY were a member of the Genocide Convention at the time the present proceedings were instituted, *quid non*, its Article IX could not provide the FRY with access to the Court. It is submitted, however, that the FRY was not even a party to the Genocide Convention at the time the proceedings were instituted, and this will be later demonstrated by my colleagues. The FRY acceded to the Genocide Convention only in 2001[2], and has ever since maintained a reservation to its Article IX. Consequently, this provision may not, in any case, be a basis of the Court's jurisdiction in the present proceedings.

2.20. Madam President, Members of the Court, what has been said clearly demonstrates that there was no legal basis whatsoever that would provide the FRY with access to the Court at the time when the proceedings in the present case were instituted. Consequently, as the Respondent does not have access to the Court in the present case, the fundamental prerequisite for the exercise of the Court's jurisdiction is missing.

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[2]See Depository Notification of the Secretary-General of the United Nations dated 15 March 2001 (C.N.164.2001.TREATIES-1).

The determination on access to the Court in a particular period of time necessarily applies to all cases before the Court instituted during that period

2.21. In the 2004 *Legality of Use of Force* Judgments, the Court ruled that the admission of the FRY to the United Nations in 2000, made clear that, in 1999, the FRY had no access to the Court under Article 35, paragraph 1, of the Statute. I am respectfully submitting that this ruling also necessitates the conclusion that the admission of the FRY to the United Nations in 2000, made clear that the FRY had no access to the Court in 1993, when the present case was instituted.

2.22. What the Court was contemplating in the 2004 *Legality of Use of Force* Judgments was the situation obtaining between 1992 and 1 November 2000. The situation that obtained in 1999 was completely identical to the situation that obtained in 1993. This was the very same "amorphous legal situation" concerning the FRY status vis-à-vis the United Nations. There were no ensuing circumstances between 1993 and 1999 that would have affected or modified this state of affairs. What remained unclarified in 1999, was even less clarified in 1993 or 1996. The change occurred only in 2000, with the admission of the FRY to the United Nations. The effect of this admission is identical in both the *Legality of Use of Force* cases and in the present case — it made clear that the FRY did not have access to the Court on the basis of Article 35, paragraph 1, of the Statute either in 1999 or in 1993, or at any other point in time before 2000. As the FRY also did not have access to the Court on any other ground envisaged by the Statute, it clearly follows that the Court is not open to the Respondent in the present case.

2.23. However, the Applicant contends that the 2004 *Legality of Use of Force* Judgments have no impact on the present case[3]. In our view, this is erroneous. The Court's determination in the 2004 *Legality of Use of Force* Judgments on the FRY status vis-à-vis the United Nations before its admission in 2000 was made on the basis of the fact that the FRY was admitted to United Nations membership in 2000. In the context of Article 35 of the Statute, this fact necessarily and equally affects each case in which the FRY was a party before 2000. Thus, the Court's determination that a State was not a Member of the United Nations and that the requirements of Article 35 of the Statute were not fulfilled in a particular period of time equally applies to all the cases before the Court instituted during that period. It cannot possibly be held in one case before

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[3]CR 2006/3, p. 13, para. 7 (Pellet).

the Court that the FRY was not a Member of the United Nations and did not have access to the Court in a particular period of time, and in another case that the FRY was a Member of the United Nations or that it had access to the Court in that same period of time.

2.24. The conclusion that the FRY did not have access to the Court in the present case is not only necessitated by the principle of consistency, which requires that both the *Legality of Use of Force* cases and the present case be resolved in the same way, because the facts pertaining to the FRY's access to the Court are identical in both of them. Above all, by virtue of the Charter and the Statute, this same conclusion necessarily flows from the Court's determination that the FRY was not a United Nations Member before 2000, and as such was not *ipso facto* party to the Statute of the Court before 2000 (Article 93 (1) of the United Nations Charter).

2.25. As it is now settled that the FRY was not a party to the Statute as a United Nations Member, and as it is not disputed that the FRY did not become a party to the Statute on some other basis and, finally, as it is clear that the Genocide Convention — the only Convention which was purportedly applicable — is not a "treaty in force" within the meaning of Article 35, paragraph 2, of the Statute, it follows that the FRY did not have access to the Court in 1993 when the present proceedings were instituted.

The Court should now decide the issue of access in the present case

2.26. Madam President, Members of the Court, the question of access is a most fundamental matter. As the Court said in the 2004 *Legality of Use of Force* Judgments: "[t]he Court can exercise its judicial function only in respect of those States which have access to it under Article 35 of the Statute" (*Legality of Use of Force (Serbia and Montenegro* v. *Belgium)*, Judgment of 15 December 2004, para. 46; exactly the same text can be found in the other 2004 *Legality of Use of Force* Judgments, as well).

2.27. Thus, regardless of the views of the parties and their approach towards the Court's jurisdiction, the Court must decline to entertain the case if one of the parties does not have access to it. Otherwise, if the Court were open to the States with no access to it, the carefully balanced judicial system established by the Charter and the Statute would be disrupted and its very

foundations would be put into question. As the Court rightfully pointed out with regard to the question of access:

> "The function of the Court to enquire into the matter and reach its own conclusion is thus *mandatory upon the Court* irrespective of the consent of the parties and is in no way incompatible with the principle that the jurisdiction of the Court depends on the consent." (*Ibid.*, para. 36; emphasis added.)

2.28. Madam President, Serbia and Montenegro respectfully submits that the Court should now decide the issue of access in the present case. After many years of ambiguity, the situation of the FRY's status in the United Nations was clarified, and a definitive determination on the FRY's access to the Court in the period between 1992 and 2000 became possible. Such a determination was indeed made in the 2004 *Legality of Use of Force* Judgments. Now it should be applied in the present case. The Court determined that the FRY did not have access to it in 1999 because it was admitted to the United Nations only in 2000. This determination made it clear that there is the same fundamental deficiency in each and every case instituted before 2000 in which the FRY was a party, either as an applicant or as a respondent — in all of them, the FRY — Serbia and Montenegro — simply did not have access to the Court.

2.29. It is, therefore, respectfully submitted that the Court should decline to entertain the present case because the FRY did not have access to the Court at the time the proceedings were instituted in 1993.

2.30. Madam President, distinguished Members of the Court, with this I will conclude my presentation, and I wish to thank you for your kind attention. Madam President, I would appreciate if you could call upon Professor Varady now. Thank you.

The PRESIDENT: Thank you, Mr. Djerić. I do now call upon Professor Varady.

Mr. VARADY: Thank you very much.

ISSUES OF PROCEDURE

3. Jurisdiction — the Respondent did not remain bound by Article IX of the Genocide Convention

1. Introduction

3.1. Madam President, distinguished Members of the Court. My colleague Vladimir Djerić demonstrated that the Respondent had no access to the Court when the Application was submitted. This is in itself a sufficient and compelling ground against jurisdiction in this case. I would like to add another ground for denying jurisdiction, which is again sufficient and compelling in itself. I would like to demonstrate that the Respondent was not and is not bound by Article IX of the Genocide Convention.

3.2. The proposition that Serbia and Montenegro was bound by Article IX formed the basis on which this honoured Court found that it had jurisdiction in its 1996 Judgment on preliminary objections. Following our request for revision, in its 2003 *Revision* Judgment, the Court opted not to reinvestigate the matter, holding that the requirements set by Article 61 of the Statute were not met. Thus, the assumption on which the 1996 Judgment on preliminary objections was based was neither reinvestigated nor revised.

3.3. We are respectfully submitting that it has become evident that the assumption on which the 1996 Judgment on preliminary objections was based is an erroneous one. It has also become evident that the information accessible to the Court at the time when it decided on jurisdiction was imperfect, ambiguous, and did not allow definitive conclusions.

3.4. This is the reason behind our initiative to reconsider the issue of jurisdiction *proprio motu*. We are aware that reopening the issue of jurisdiction cannot be a routine matter, and only exceptional circumstances can provide justification. This case did yield such exceptional circumstances.

3.5. What is also of critical importance, the issue we are dealing with — i.e., the issue of jurisdiction — concerns the very source of the powers of the Court to decide upon the claim. Earlier decisions rendered in the preliminary phase of the case cannot substitute such power. That

is why — as this was stated in the *ICAO Council* Judgment — the Court "must always be satisfied that it has jurisdiction" (*Appeal Relating to the Jurisdiction of the ICAO Council (India* v *Pakistan), I.C.J. Reports 1972*, p. 52, para. 13). The intrinsic limits of the power of the Court cannot be altered or modified by the proposition that it should follow decisions reached in the preliminary phase.

3.6. Madam President, distinguished Members of the Court, I would first like to identify the assumption on which it was held that the FRY was bound by Article IX of the Genocide Convention. I shall further demonstrate that, due to the quite unique and unorthodox circumstances of the case, this assumption appears in a radically different perspective today than the perspective obtaining at the time when the decision on jurisdiction was reached in the preliminary phase. In simple terms, unlike in 1996, today it is evident that this assumption was an erroneous one. Together with my colleagues, I shall also demonstrate that there is no other assumption or basis either, which could support the conclusion that Serbia and Montenegro was or is bound by Article IX of the Genocide Convention.

2. The assumption on which and the circumstances under which the 1996 Judgment on preliminary objections was rendered

3.7. Let me say first that it is well known that the 1996 Judgment on preliminary objections was rendered in a situation in which the Court was deprived of points of support that are normally available. The only basis of jurisdiction which appeared to be acceptable was a treaty provision: Article IX of the Genocide Convention. At the same time, however, the status and the treaty status of the FRY was highly controversial.

3.8. At that time — and for a considerable period after 1996 — steps taken and declarations made by United Nations authorities and by the successor States themselves had not created conditions for an unambiguous characterization. The information and positions taken yielded more legal difficulties than guidance. The Applicant stated that these legal difficulties were actually known from the beginning. It stressed: "De tout ceci, la Cour a été pleinement consciente."[4] We do not want to contest this ascertainment. Yes, the problem — or at least a part of the problem —

[4] CR 2006/3, 28 February 2006, p. 20, para. 22 (Prof. Pellet).

was indeed known from the outset. But the solution was not known. In 1996, the Court was asked to open the door to the right solution — but the keys were withheld.

3.9. This is the situation which was convincingly characterized by the Court in its 2004 *Legality of Use of Force* Judgments. Describing the situation obtaining between 1992 and 2000, the Court stated:

> "In fact, it is the view of the Court that the legal situation that obtained within the United Nations during that eight-year period concerning the status of the Federal Republic of Yugoslavia, after the break-up of the Socialist Federal Republic of Yugoslavia, remained ambiguous and open to different assessments. This was, *inter alia*, due to the absence of an authoritative determination by the competent organs of the United Nations defining clearly the . . . status of the Federal Republic of Yugoslavia vis-à-vis the United Nations." (*Legality of Use of Force (Serbia and Montenegro* v. *Belgium)*, para. 64; exactly the same text can be found in the other 2004 *Legality of Use of Force* Judgments as well: in paragraph 63 of the cases with France, Canada, Italy, Netherlands, Portugal, and in paragraph 62 of the cases with Germany and United Kingdom.)

3.10. It is clear — and I believe that it is common ground as well — that the ambiguous status of the FRY had a plain and direct impact on the issue of jurisdiction in this case, as well as in other cases to which the FRY has been a party. In the 1996 Judgment on preliminary objections no notification of accession or succession was relied upon — or could have been relied upon — as a linkage between the FRY and the Genocide Convention. The Court did not rely on the theory of automatic succession either. The only assumption on which the 1996 Judgment on preliminary objections was based is the assumption that the FRY had remained bound by Article IX of the Genocide Convention continuing the treaty status of the former Yugoslavia.

3.11. Envisaging a link between the FRY and the Genocide Convention, the Court found foothold in the fact that the SFRY (the former Yugoslavia) "signed the Genocide Convention on 11 December 1948 and deposited its instrument of ratification, without reservation, on 29 August 1950" (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia-Herzegovina* v. *Yugoslavia), Preliminary Objections, Judgment, I.C.J. Reports 1996(II)*, p. 610, para. 17).

3.12. This pronouncement regarding the treaty membership of the SFRY (the former Yugoslavia) only becomes relevant with regard to the position of the FRY, if the FRY were to continue the status of the former Yugoslavia, and thus if it were to derive its standing from the

standing of the former Yugoslavia. And this is exactly what follows in the text of the Judgment. In the next sentence the Court takes note of the fact that the FRY adopted a declaration in which it states that the FRY "continuing the State, international legal and political personality of the Socialist Federal Republic of Yugoslavia, shall strictly abide by all the commitments that the Socialist Federal Republic of Yugoslavia assumed internationally". The Court added that "This intention thus expressed by Yugoslavia to *remain* bound by the international treaties to which the former Yugoslavia was a party was confirmed in an official Note of 27 April 1992 . . ." (*Ibid.*; emphasis added.) This perception of the status of the FRY served as the foothold of the conclusion regarding jurisdiction.

3.13. It has to be added that the language used by the Court is consistent: In connection with the FRY which declared continuity — and consistent with the assumption that the FRY continued the treaty status of the former Yugoslavia — the Judgment uses the *remained bound* language; while with regard to Bosnia and Herzegovina which undertook treaty action — and consistent with the assumption of treaty action — the Court considered that it *became bound* by the Convention (*ibid.*, pp. 611-612, paras. 19, 20, 23, 24).

3.14. As far as the 2003 *Revision* Judgment is concerned, I trust that it is not contested that this Judgment did not reinvestigate whether the FRY was or was not bound by Article IX of the Genocide Convention. What the Court first had to decide — and what the Court did decide — was whether the conditions to lay the case open for revision under Article 61 of the Statute were met.

3.15. Defining the limits of its holding, the Court stated: "Therefore, at this stage the Court's decision is limited to the question whether the request satisfies the conditions contemplated by the Statute." (*Application for Revision of the Judgment of 11 July 1996 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 *(Yugoslavia* v. *Bosnia and Herzegovina)*, Judgment of 3 February 2003, p. 11, para. 16.)

3.16. After a scrutiny of the conditions set by Article 61 of the Statute, the Court found:

> "In the present case, the Court has concluded that no facts within the meaning of Article 61 of the Statute have been discovered since 1996. The Court therefore does not need to address the issue of whether the other requirements of Article 61 of the Statute for the admissibility of the FRY's Application have been satisfied." (*Ibid.*, p. 32, para. 73.)

3.17. In sum, in its 2003 *Revision* Judgment, the majority opinion held that one of the conditions for laying the case open for revision was not met. The second stage of the procedure for revision (reinvestigation of the original Judgment) was never reached. The Court did not reconsider (let alone decide) whether the FRY was or was not bound by the Genocide Convention in 1993 or in 1996. The assumption, on which the 1996 Judgment on preliminary objections was based, was not altered, it was not even addressed.

3. The same assumption emerged as an issue in other cases as well

3.18. Madam President, distinguished Members of the Court. It is well known that this is not the only case in which the assumption that the FRY continued the status and the personality of the former Yugoslavia became an issue. The same issue has been of a decisive importance in all cases in which the FRY appeared before this Court. Speaking of the unorthodox circumstances of the case, one has to add that a complicated case history was combined with an even more complex history of the issue that is of a critical importance for our considerations.

3.19. This is the issue whether the FRY did or did not continue the personality of the former Yugoslavia, and thus whether it did or did not remain a Member of the United Nations and a party to treaties without the need of seeking admission or submitting notifications of accession or succession. The same issue was raised not only in this case, but also in the cases between Croatia and the FRY (where the FRY is the respondent) and between the FRY and ten NATO countries (in which cases the FRY was the applicant).

3.20. In earlier stages of our case the Court had to face this issue without the benefit of clarifications and without an unequivocal qualification given by the competent United Nations authorities. The same issue was argued between the parties in the case between Croatia and the FRY *(Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia* v. *Yugoslavia)*.. And finally, the same issue was raised again in 2004, in the cases concerning *Legality of Use of Force* — this time after clarifications and without the constraints of Article 61.

4. Today it is evident that the 1996 Judgment on preliminary objections was based on an erroneous assumption — the Respondent did not remain bound by Article IX of the Genocide Convention

3.21. Madam President, distinguished Members of the Court. We trust that it is important to point out that at the time when the Court had to decide on jurisdiction, it had to face contradictory indications and a rather confusing state of affairs without reliable guidance and authoritative determinations. But the fact that there was no clarity when the 1996 Judgment on preliminary objections was rendered is only one of the reasons behind our initiative to reconsider the question of jurisdiction. There is another reason, which is not less important. This second reason is simply the fact that today, there *is* clarity, the status of the FRY is *not* controversial any more, and authoritative determinations have, indeed, been made — including a clear-cut determination made by this honoured Court.

3.22. We are respectfully asking you to reinvestigate the issue of jurisdiction *proprio motu* not just because some doubts have emerged with regard to a position which appeared acceptable in 1996. What we would like now to submit to your attention are not doubts but evidence that between 1992 and 2000 there was no linkage between the FRY and the Genocide Convention. A party status was only established in 2001 when the FRY acceded to the Convention — but with a reservation to Article IX.

3.23. The fact that ambiguities have been dispelled since the acceptance of the FRY as a new Member of the United Nations in 2000 has been made crystal clear in the 2004 *Legality of Use of Force* Judgments, in which it is stressed:

> "In the view of the Court, the significance of this new development in 2000 is that it has clarified the thus far amorphous legal situation concerning the status of the Federal Republic of Yugoslavia vis-à-vis the United Nations. It is in that sense that the situation that the Court now faces in relation to Serbia and Montenegro is manifestly different from that which it faced in 1999. If, at that time, the Court had had to determine definitively the status of the Applicant vis-à-vis the United Nations, its task of giving such a determination would have been complicated by the legal situation, which was shrouded in uncertainties relating to that status. However, from the vantage point from which the Court now looks at the legal situation, and in light of the legal consequences of the new development since 1 November 2000, the Court is led to the conclusion that Serbia and Montenegro was not a Member of the United Nations, and in that capacity a State party to the Statute of the International Court of Justice, at the time of filing its Application to institute the present proceedings before the Court on 29 April 1999." (*Legality of Use of Force (Serbia and Montenegro* v. *Belgium)*, para. 79; exactly the same text can be found in the other 2004 *Legality of Use of Force* Judgments as well: in paragraph 78 of the cases with France, Canada,

Italy, the Netherlands, and Portugal; and in paragraph 77 of the cases with Germany and the United Kingdom.)

3.24. These findings are unequivocal. The status of the FRY between 1992 and 2000 is not "shrouded by uncertainties" any more. It is clear that the FRY did not continue the personality and status of the former Yugoslavia. As a new State it had to seek admission in order to become a Member of the United Nations and of other international organizations; as a new State it had to submit notifications of succession or accession in order to become a party to treaties.

3.25. These findings and conclusive clarifications set aside the assumption on which the 1996 Judgment on preliminary objections was based. Today, it is evident that the FRY did not continue the international legal personality of the former Yugoslavia, and that it was not a Member of the United Nations until it was accepted as a new Member on 1 November 2000.

5. If the FRY was not a Member of the United Nations and was not a party to the Statute, it could not have been a party to the Genocide Convention either

3.26. The question arises whether the FRY could have been a State party to the Genocide Convention between 1992 and 2000 if it was not a Member of the United Nations.

3.27. The answer is unequivocally no. It is true that in the 2004 *Legality of Use of Force* Judgments the Court did not address directly the question whether the FRY had been a State party to the Genocide Convention in the critical period between 1992 and 2000, and whether it had or had not been bound by Article IX. But the 2004 *Legality of Use of Force* Judgments did decide that the FRY was not a Member of the United Nations between 1992 and 2000, because it did not continue the personality and membership of the former Yugoslavia.

3.28. It clearly follows that it could not have remained a party to the Statute either — which was, indeed, explicitly stated by the Court. Another unavoidable conclusion from the same premise is that the FRY could not have remained bound by other treaties either on the grounds of continuity.

3.29. Madam President, Members of the Court, we shall demonstrate first that since the FRY was not a Member of the United Nations between 1992 and 2000, it *could not* have been a party to the Genocide Convention in any way, by any vehicle, because it was simply *not qualified* to become a party. This is in itself conclusive evidence that there is no jurisdiction *ratione personae* over Serbia and Montenegro in this case.

3.30. There is also another independent reason sufficient in itself to justify the same conclusion. We have demonstrated that the only linkage between the FRY and the Genocide Convention which can be inferred from the 1996 Judgment on preliminary objections rests on the assumption that the FRY continued the personality of the former Yugoslavia. Since this assumption was conclusively eliminated, the conclusion based on this assumption remained without support and justification, and needs to be revisited. Thus, even if it were qualified to become a party to the Genocide Convention — *quid non* — the FRY *was not*, and today Serbia and Montenegro *is not* bound by Article IX of this Convention.

5.1 The FRY was not qualified to be a Contracting Party to the Genocide Convention before November 2000, because it was not a Member of the United Nations and it never received an invitation in accordance with Article XI of the Genocide Convention

3.31. I would first like to demonstrate that the FRY was not even qualified to become a State party to the Genocide Convention between 1992 and 2000. The FRY was not, and could not have been a Contracting Party to the Genocide Convention in 1996, or at any time between April 1992 (when it came into being) and November 2000 (when it became a new Member of the United Nations). Not every State can become a Contracting Party to the Genocide Convention. This Convention, of which the Secretary-General of the United Nations is the Depositary, is unconditionally open to Members of the United Nations. It is *not* unconditionally open to non-Members of the United Nations. Non-Members have to receive an invitation. According to Article XI of the Convention:

> "The present Convention shall be open until 31 December 1949 for signature on behalf of any Member of the United Nations and of any non-member State to which an invitation to sign has been addressed by the General Assembly.
>
> . . . .
>
> After 1 January 1950 the present Convention may be acceded to on behalf of any Member of the United Nations and of any non-member State which has received an invitation as aforesaid.
>
> Instruments of accession shall be deposited with the Secretary-General of the United Nations."

3.32. Confirming the same principle, and in line with the position that non-Member States of the United Nations can only join the Genocide Convention upon specific invitation, on

3 December 1949, the United Nations General Assembly adopted a resolution and authorized the Secretary-General to despatch specific invitations to any of those countries which are not Members of the United Nations and which meet certain criteria. According to this resolution, the General Assembly:

> "Considering that it is desirable to send invitations to those non-member States which, by their participation in activities related to the United Nations, have expressed a desire to advance international cooperation,
>
> 1. Decides to request the Secretary General to dispatch the invitations above mentioned to each non-member State which is or hereafter becomes an active member of one or more of the specialized agencies of the United Nations, or which is or hereafter becomes a Party to the Statute of the International Court of Justice."[5]

3.33. This resolution was observed and confirmed in practice. For example, before becoming a Member of the United Nations, on 20 December 1950, the Federal Republic of Germany received a specific invitation from the Secretary-General to join the Genocide Convention as a Contracting Party[6].

3.34. It is now settled that the FRY was not a Member of the United Nations until November 2000, and it is a plain and undisputed fact that the FRY never received an invitation from either the General Assembly or from the Secretary-General to become a Contracting Party to the Genocide Convention. The precondition for being a Contracting Party was never met. For these reasons, the FRY could not have become a Contracting Party to the Genocide Convention before it became a Member of the United Nations. Subsequent to it becoming a Member of the United Nations, the FRY acceded to the Genocide Convention, with a reservation to Article IX.

5.2 Even if it were qualified to become a State party to the Genocide Convention, the FRY was not bound by this Convention between 1992 and 2000

3.35. Madam President, Members of the Court, we have demonstrated that the FRY could not have been bound by the Genocide Convention before it became a Member of the United Nations. We shall further demonstrate that even assuming that the FRY were qualified to be a party to the Genocide Convention — *quid non* — it was not a party. The reason behind this

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[5] See General Assembly resolution 368 (IV) of 3 December 1949.

[6] See H. H. Jescheck, *Die internationale Genocidium-Konvention vom 9. Dezember 1948 und die Lehre vom Völkerstrafrecht*, Zeitschrift für die gesamte Strafrechtswissenschaft, 1954, pp. 193-217.

conclusion is a simple one. The perceived ground on which the FRY could have been a Member of the United Nations, a party to the Statute, and a party to the Genocide Convention, is the same: continuity between the former Yugoslavia and the FRY. After it became evident that there was no continuity, it also became evident that no membership or treaty status can be built on this erroneous assumption.

3.36. The former Government of the FRY had made efforts to be considered as a Member of the United Nations and of various international organizations without seeking admission, and made efforts to have the FRY recognized as a party to treaties without treaty action. All these efforts had one single point of reliance, and this was the proposition of continuity. As a matter of fact, the former Government of the FRY carefully and consistently avoided submitting notifications of succession or accession, just as it avoided seeking admission to the United Nations or to other international organizations, since this would have contradicted the proposition of continuity.

3.37. By now, it has become clear — and, I believe, uncontested — that the FRY was *not* a Member of the United Nations between 1992 and 2000, because the continuity argument was rejected. This is the sole and obvious reason. Membership was not denied in this period because of some shortcomings in the procedure of admission, there was simply no procedure of admission. The FRY argued that no admission was needed, because it continued the membership of the former Yugoslavia. No other argument was raised or considered. Continuity was the critical issue. Membership was not recognized because the continuity argument was not accepted.

3.38. If there was no continuity, it is clear that the FRY could not have continued automatically the membership of the former Yugoslavia in other international organizations or treaties either. This logic led the Court in the 2004 *Legality of Use of Force* Judgments to the unavoidable conclusion that the FRY was not a party to the Statute between 1992 and 2000. It clearly follows that the FRY could not have remained bound by the Genocide Convention either.

Conclusive clarification given by the Secretary-General

3.39. I would like to refer at this point to conclusive clarifications given by the Secretary-General. But before doing so, let me repeat again that these clarifications were not available earlier.

3.40. Before 1996 — and even for some years after 1996 — the positions taken by the Secretary-General and its office were not unequivocal, they allowed different conclusions. Let me refer again to these well known pronouncements.

3.41. While the claim of the FRY to continuity was denied by General Assembly resolution 47/1, this plain fact was somewhat blurred by the explanation given by the Legal Counsel in his letter of 29 September 1992, stating that the resolution "[n]either terminates nor suspends Yugoslavia's membership in the Organization"[7]. Since it was not stated to which entity does the designation "Yugoslavia" refer — to the former Socialist Federal Republic of Yugoslavia or to the FRY — doubts remained, and arguments continued concerning the question whether the FRY remained a Member.

3.42. Furthermore, between 1992 and 2000 the Secretary-General as depositary listed "Yugoslavia" as a State party to treaties, including the Genocide Convention[8] — leaving again the question open to which entity does the designation "Yugoslavia" refer.

3.43. This is the point to which the Applicant tries to take us back endeavouring to pre-empt arguments based on the absence of a requisite status of the Respondent in the United Nations and in treaties. In its pleadings presented on 28 February, the Applicant is still advancing the argument that Yugoslavia actually remained a Member of the United Nations. It states:

> "Et pour cause d'ailleurs: la Yougoslavie est demeurée Membre des Nations Unies. Les résolutions 777 (1992) du Conseil de sécurité et 47/1 de l'Assemblée générale l'invitent, certes, à présenter une demande d'admission aux Nations Unies et décident, 'qu'elle ne participera pas aux travaux de l'Assemblée générale' mais elles se gardent bien de l'exclure de l'Organisation."

The Applicant is citing in support of this contention the letter of the Legal Counsel which mentions that General Assembly resolution 47/1 neither terminates nor suspends Yugoslavia's membership, and which refers to the continued use of the nameplate and the flag of "Yugoslavia"[9].

3.44. Before this Court, the Applicant does not raise the question whether "Yugoslavia" which, according to the Applicant "[e]st demeurée Membre des Nations Unies", and the membership of which was "neither terminated nor suspended", is or is not identical with the new

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[7] Letter of the Legal Counsel of 29 September 1992 — United Nations doc. A/47/485.

[8] See Multilateral Treaties Deposited with the Secretary-General, status as at 31 December 1992, United Nations doc. ST/LEG/SER.E/11, 1993.

[9] CR 2006/3, 28 February 2006, p. 19, para. 20 (Prof. Pellet).

State, the FRY, which was invited to apply for membership. This is the very question which was not raised by the former Government of the FRY either. The failure to raise this question, and the failure to clarify this issue, is the only way to maintain the perception that the FRY may have been a Member of the United Nations and may have been a State party to the Genocide Convention between 1992 and 2000.

3.45. But the fact that such arguments are still being made only shows one thing. It shows that the perceived obstinate refusal of the Respondent to go along with the proposition of submitting an application as a new Member, was not the only reason for delay in clarifications. The situation obtaining between 1992 and 2000 was not a clear situation, which only the Respondent failed to recognize. Various perceptions have been advanced by various actors, often guided by various purposes.

3.46. The FRY perceived itself to be the "Yugoslavia", the membership of which was neither terminated nor suspended, and on this assumption it was beside the point to apply as a new Member. This was wrong, but not implausible. Had it been made clear in due time that it was the *former* Yugoslavia — rather than the FRY — which retained some attributes of membership, it would have followed that the FRY was just one of the successor States, not a Member of the United Nations before admittance, not a party to the Statute, and not a State party to treaties before appropriate treaty action was taken. This was not made clear by the competent United Nations authorities.

3.47. Moreover, let me add that the conduct of the Applicant was not consistent either. Before this Court the Applicant allowed that the designation "Yugoslavia" may validate the status of the FRY. At the same time, outside this Court, the Applicant opposed forcefully and consistently any appearance of membership of the FRY under the label of "Yugoslavia". Let me cite just a few examples. In a letter dated 16 February 1995, addressed to the Secretary-General, Bosnia and Herzegovina stressed that the maintenance of certain attributes of the SFR Yugoslavia "[f]acilitate the assertions of the Belgrade authorities and undermine the relevant resolutions . . .", and concluded:

> "To eliminate this regrettable and unnecessary ambiguity . . . the long overdue action of removing the name-plate of the former SFR Yugoslavia from the premises of the United Nations should be taken."[10]

In another letter signed by the Applicant and addressed to the Secretary-General, it is stressed:

> "The Federal Republic of Yugoslavia (Serbia and Montenegro) also has to follow the procedure for admission of new Member States to the United Nations, which would enable the Organization to make its judgment whether the conditions set out in Article 4 of the Charter of the United Nations are met."[11]

Or, to cite another example, in a draft resolution of the General Assembly sponsored by Bosnia and Herzegovina, it is stressed that "[t]he abbreviated name 'Yugoslavia' as used by the United Nations, refers only to the former Socialist Federal Republic of Yugoslavia"[12]. This is a plain position, but it has not been the position the Applicant has taken before this Court.

3.48. Madam President, the issue was, indeed, still controversial when the Judgment on preliminary objections was rendered in 1996. But today, these ambiguities have been clarified. It has been made clear that the "neither terminates nor suspends" language could *not* have referred to a new State which was invited to apply for membership. The clarification was done explicitly, and without leaving the slightest doubt. The position of the Secretary-General is now the following:

3.49. The present version of *Historical Information on Multilateral Treaties Deposited with the Secretary-General*[13] makes it clear and explicit that "Yugoslavia" to which the Legal Counsel referred in his letter of September 1992, was the *former* Yugoslavia and *not* the FRY. This clarifying word did not appear in the original letter, but it is now there and the explanation is finally given. It is stated in the *Historical Information*:

> "The Legal Counsel took the view, however, that this resolution of the General Assembly neither terminated nor suspended the membership of the *former* Yugoslavia in the United Nations." (Emphasis added.)

Further on it is stated:

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[10]Letter dated 16 February 1995 from the Permanent Representative of Bosnia and Herzegovina to the United Nations addressed to the Secretary-General, United Nations docs. A/49/853, S/1995/147.

[11]Letter dated 28 October 1996 from the Permanent Representatives of Bosnia and Herzegovina, Croatia, the former Yugoslav Republic of Macedonia and Slovenia to the United Nations addressed to the Secretary-General. United Nations docs. A/51/546, S/1996/885.

[12]Bosnia and Herzegovina, Croatia, Jordan, Kuwait, Malaysia, Morocco, Qatar, Saudi Arabia and Slovenia: draft resolution "The equality of all five successor States to the former Socialist Federal Republic of Yugoslavia", United Nations docs. A/54/L.62 of 8 December 1999.

[13]See Historical Information, http://untreaty.un.org/ENGLISH/bible/englishinternetbible/historicalinfo.asp — under the heading "former Yugoslavia".

> "the Secretary-General, as depositary, continued to list treaty actions that had been performed by the former Yugoslavia in status lists in the present publication, using for that purpose the short-form name 'Yugoslavia', *which was used at that time to refer to the former Yugoslavia*" (emphasis added).

3.50. This perception was also confirmed directly and emphatically in a letter signed by *the Secretary-General*. In his letter dated 27 December 2001 to the President of the General Assembly, Secretary-General Kofi Annan stated — and this we included in our judges' folders, tab 2, which is immediately after the map:

> "I have the honour to refer to GA resolution 55/12 of 1 November 2000, in which the Assembly decided to admit the Federal Republic of Yugoslavia to membership in the United Nations.
>
> This decision necessarily and automatically terminated the membership in the Organization of the *former Yugoslavia*, the State admitted to membership in 1945."[14] (Emphasis added.)

3.51. Thus, there can be no doubt any more. Whatever position was maintained for "Yugoslavia" in the United Nations and with regard to treaties, it was maintained for the former Yugoslavia, not the FRY. The designation "Yugoslavia" did not refer to the Respondent in this case.

3.52. As far as the Genocide Convention is concerned, all ambiguities have directly been eliminated by specific steps taken, and by the official record kept and updated by the depositary. In his letter of 8 December 2000, the Legal Counsel invited the FRY to "[u]ndertake treaty actions, as appropriate, in relation to the treaties concerned, if its intention is to assume the relevant legal rights and obligations as a successor State"[15]. The FRY opted to succeed to a number of conventions. With regard to the Genocide Convention, the FRY opted *not* to succeed. Instead, as a new Member of the United Nations, relying on a possibility offered under Article XI (3) of the Genocide Convention to all Members of the United Nations, the FRY decided to *accede* to this Convention.

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[14]See the letter dated 27 December 2001 from the Secretary-General addressed to the President of the General Assembly, United Nations doc. A/56/767.

[15]Letter of the Legal Counsel of the United Nations addressed to the Minister for Foreign Affairs of the Federal Republic of Yugoslavia, dated 8 December 2000; submitted as document No. 7 in the judges' folder submitted by the FRY at the oral hearings on the Application for Revision of the Judgment of 11 July 1996, Preliminary Objections, on 4-7 November 2002.

3.53. Now, the Secretary-General, as depositary, lists Serbia and Montenegro as a State party to the Genocide Convention, specifying that it became a party to this Convention *by accession on 12 March 2001 — and with a reservation to Article IX*[16].

3.54. Madam President, Members of the Court, in 1996, the position of the depositary was that "Yugoslavia" was a party to the Genocide Convention, without explaining whether this was a reference to the former Yugoslavia, or to the Respondent. Today, the position of the Secretary-General is unequivocal. It makes clear that the references to "Yugoslavia" were references to the former Yugoslavia, and not the FRY. It makes also clear that the Respondent only became a party to the Genocide Convention in 2001, and that it became a party with a reservation to Article IX.

3.55. I would now like to invite you once again to follow this in our judges' folders. The next tab is tab 3, which shows the status of Contracting Parties to the Genocide Convention on 31 December 1992 — after the FRY became a new State, and after the much debated pronouncements of United Nations authorities were made. This listing shows that Bosnia and Herzegovina became a State party by succession on 29 December 1992. The FRY is not indicated as a State party, but the listing shows "Yugoslavia" as a State party, stating the date of signature as 11 December 1948, and the date of ratification as 29 August 1950. It is beyond doubt and beyond debate that the Respondent came into being on 27 April 1992. Whatever confusion may have been created by the reference to "Yugoslavia", this has been completely clarified and rectified by now.

3.56. The present listing dated 1 January 2006 — it is the next tab, tab 4 — shows Bosnia and Herzegovina the same way as the earlier listing — and it shows Serbia and Montenegro as a State party to the Genocide Convention by way of accession which took place on 12 March 2001. It is also known, and it is recorded by the depositary, that the Respondent became a State party to the Genocide Convention with a reservation to Article IX.

3.57. This conclusive position and the official record of the depositary may not be newly discovered facts within the specific meaning of Article 61 of the Statute. But these are glaring

[16]United Nations, *Treaty Series (UNTS)*, Vol. 78, p. 277, at http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterIV/treaty1.asp.

facts — which were obviously not within the purview of the Court when it took its position on jurisdiction in 1996 — and which are clearly consequential.

3.58. The assumption that the FRY remained bound by treaty actions of the former Yugoslavia is the sole basis of the 1996 Judgment on preliminary objections — and this is the point where conclusive clarifications have emerged after the 1996 Judgment was rendered. The clarifications demonstrate the opposite result: the FRY did not continue the personality and treaty membership of the former Yugoslavia, and, thus, it did not remain bound by Article IX of the Genocide Convention.

3.59. Coming to conclusions, let me repeat at this point that there are two conceivable ways in which the FRY could have been linked to Article IX of the Genocide Convention. First, there is the assumption that the FRY *remained* bound by treaty obligations of the former Yugoslavia continuing its international legal personality. The second possible theory is that the FRY *became* bound by Article IX either by way of succession or by way of accession. There is no imaginable third proposition.

3.60. We have demonstrated that the FRY did not remain bound by Article IX of the Genocide Convention. I trust that the arguments and the evidence we submitted have already made definite not only that the FRY was not bound by Article IX in one specific way — that it did not remain bound — but also that it was not bound at all. There are three independent reasons supporting this proposition.

3.61. *First*, the assumption that the FRY remained bound by Article IX by way of continuing the treaty status of the former Yugoslavia was the only plausible assumption which could have linked the FRY with Article IX at the time when the 1996 Judgment on preliminary objections was rendered. The linkage which was eliminated by subsequent clarifications is the only plausible linkage.

3.62. *Second*, as we have demonstrated, the fact that the FRY was not a Member of the United Nations means that it was simply not qualified to become a State party to the Genocide Convention *in any way*. Unless an invitation according to Article XI was extended, which was clearly not the case, and which has never even been alleged.

3.63. And *third*, the position taken and the record of the depositary do not merely show that the FRY did not remain bound by Article IX the Genocide Convention, but show that the Respondent was simply not a State party to the Genocide Convention before it acceded in 2001, with a reservation to Article IX.

3.64. I trust that this is sufficient to make it certain that the Respondent was not bound by the Genocide Convention before it acceded in 2001, and that the Respondent never remained or became bound by Article IX. Nevertheless, in order to face and to dispel any conceivable doubt, my colleague Professor Zimmermann will present further arguments concentrating on hypotheses which have not been relied upon in the 1996 Judgment on preliminary objections. Professor Zimmermann will submit additional arguments and evidence demonstrating that the FRY did not and could not have become bound by Article IX by way of treaty action or automatic succession either.

3.65. Thank you very much, Madam President. This may be a convenient moment for a break, and I would like to ask you, after the break, to give the floor to Professor Zimmermann. Thank you very much for your attention.

The PRESIDENT: Thank you, Professor Varady. The Court will rise for ten minutes.

The Court adjourned from 11.20 to 11.30 a.m.

The PRESIDENT: Please be seated. Professor Zimmermann, you have the floor.

Mr. ZIMMERMANN: Thank you, Madam President. Madam President, Members of the Court, may it please the Court.

ISSUES OF PROCEDURE

4. Respondent never became bound by the Genocide Convention and its Article IX

A. Introduction

4.1. It is once more a real privilege and honour to appear before this distinguished Court on behalf of Serbia and Montenegro.

4.2. Let me start by reiterating what this Court has repeated time and again and rightly so, namely that there is a

> "fundamental distinction to be drawn between the existence of the Court's jurisdiction over a dispute, and the compatibility with international law of the particular acts which are the subject of the dispute" (see e.g., *Legality of Use of Force (Serbia and Montenegro* v. *Belgium)*, Judgment of 15 December 2004, para. 128; case concerning *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo* v. *Rwanda)*, Judgment of 3 February 2006, para. 127)[17].

4.3. Before rendering judgment on the merits of this case and before judging upon the tragic events which form the subject-matter of it, the Court thus has to first make a clear and unambiguous determination that, in 1993, it could have been validly seised by the Applicant. I trust that such a determination cannot be made, since this would entail a conclusion that Bosnia and Herzegovina could bring a case at a time when the Respondent, that is, the FRY — Serbia and Montenegro — as this Court itself has determined in its 2004 *Legality of Use of Force* Judgments —

— was neither a Member State of the United Nations,

— nor could have had access to the Court under Article 35, paragraph 2, of the Statute of the Court.

4.4. This fundamental obligation of the Court to determine whether it can render a judgment dealing with the merits of this case is even more important for two reasons:

4.5. *First,* the Court is facing one of the most complex cases which has raised and still raises fundamental issues of jurisdiction, admissibility and, indeed, the very fact whether the Respondent can be a party at all in these proceedings.

4.6. *Second*, this case brings up most important issues of consistency. The eight *Legality of Use of Force* cases raised identical issues to the ones we are facing here today. In all these cases, the Court found that Serbia and Montenegro had no access to the Court since Serbia and Montenegro had not been a Member State of the United Nations. It also clarified that the Genocide Convention is not a treaty in force within the meaning of Article 35, paragraph 2, of the Court's Statute.

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[17] See also CR 2006/8, pp. 17-18, para. 21 (Prof. Pellet).

4.7. Madam President, the recent 2004 *Legality of the Use of Force* Judgments have, by setting aside disputes of the past, paved the way for further improving the political relations between Serbia and Montenegro on the one side, and Belgium, France, Germany, Italy, the Netherlands, Portugal, Spain, and the United Kingdom, on the other.

4.8. In the present case, in which Serbia and Montenegro is the Respondent, the same jurisdictional issues resurface that led the Court to find that it could not consider the merits in the cases concerning the *Legality of Use of Force*. One therefore has to address fundamental issues of consistency and indeed equality before the Court when contemplating whether Serbia and Montenegro can now be a party *in this case*.

4.9. Finally, as is well known, there is yet another case pending against Serbia and Montenegro. In that other case, brought by Croatia, the Court will once again have to address the status of the Respondent before the Court. In said case, brought by Croatia, this Court never had an opportunity, so far, to address the issue of its jurisdiction, including the status of Serbia and Montenegro as a possible party in proceedings before this Court. Thus, this other set of proceedings will yet again raise the very same issue of consistency.

4.10. Having outlined the background of our case, it is now my task to assess whether there is a legal basis upon which the case could have been brought against Serbia and Montenegro *ratione personae*. Any pronouncement on this matter would presuppose, however, that the Court would first determine, in contrast to its own previous finding in the 2004 *Legality of Use of Force* Judgments, that Bosnia and Herzegovina, indeed, could bring a case against Serbia and Montenegro — at a time when the Respondent, as this Court has determined, was not a Member State of the United Nations.

4.11. Madam President, Members of the Court, the only possible basis for the Court's jurisdiction is Article IX of the Genocide Convention. My colleague Professor Varady has already demonstrated that the FRY did *not* remain and *could not* have remained a party to the Genocide Convention by way of continuing the personality and treaty status of the former Yugoslavia. I will now address the question whether the Respondent could have *become* bound by Article IX of the Genocide Convention by way of treaty succession. In that regard

- I will now *first* show that the Court has so far never decided upon the succession of Serbia and Montenegro with regard to the Genocide Convention, which issue, therefore, for that reason, too, is not *res judicata;*
- *Secondly* I will also demonstrate that Serbia and Montenegro has never succeeded to the Genocide Convention and, in particular, its Article IX.

B. The Court never decided upon the succession of Serbia and Montenegro with regard to the Genocide Convention

4.12. Madam President, the only possible legal basis for the claims of Bosnia and Herzegovina before this Court are alleged violations of the Genocide Convention which are to be attributed to Serbia and Montenegro.

4.13. This raises the question whether a treaty relationship existed between Bosnia and Herzegovina on the one hand and Serbia and Montenegro on the other with regard to Article IX of the Genocide Convention at the relevant point in time — or indeed at any time.

4.14. It is by now common ground between the Parties that both Bosnia and Herzegovina and Serbia and Montenegro are successor States of the former Yugoslavia. Accordingly, both States could have only become bound by the Genocide Convention by virtue of applicable rules of State succession, or by accession.

4.15. This Court has found in its 1996 Judgment on preliminary objections that Bosnia and Herzegovina had become bound by the Genocide Convention through the mechanism of State succession (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Yugoslavia), Judgment*, *I.C.J. Reports 1996 (II)*, p. 612, para. 23). The very same question whether the FRY — the Respondent — has succeeded to the Genocide Convention has, however, so far never been decided by this Court with the force of *res judicata*.

4.16. Let me demonstrate this by briefly analysing the various relevant decisions of this honourable Court.

4.17. In its Order of 8 April 1993, the Court saw no reason to address the issue, the obvious underlying reason being that neither party had questioned the status of the FRY as a possible Contracting Party to the Genocide Convention.

4.18. Bosnia and Herzegovina needed the status of the FRY as a Contracting Party, with regard to the Genocide Convention, in order for the Court to have jurisdiction. Bosnia and Herzegovina, therefore, did not raise this question here in this Great Hall of Justice. At the same time, outside the Court, Bosnia and Herzegovina consistently challenged the very same legal position of the FRY and required that it should make *specific* declarations of succession, which the FRY never did during the relevant period of time.

4.19. The FRY in turn considered itself to be identical with the former Yugoslavia and therefore simply saw no need to make such declarations of succession. Instead it had simply recorded the claim to be identical in a general declaration, which, however, Bosnia and Herzegovina considered *not* to constitute a declaration of succession[18] (*Application for Revision of the Judgment of 11 July 1996 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 (Yugoslavia* v. *Bosnia and Herzegovina)*, Judgment, paras. 10 *et seq.*)

4.20. This was the picture the Court had in mind when it rendered its Order of 8 April 1993. In this Order, the Court simply recorded and took note of the fact that the FRY had, in a general declaration of 27 April 1992, expressed the intention to continue the personality, and consequently to honour the treaty obligations of the former Yugoslavia.

4.21. The same is true, *mutatis mutandis*, for the Court's 1996 Judgment on preliminary objections. There, the Court simply noted that the *former Yugoslavia* "[s]igned the Genocide Convention on 11 December 1948 and deposited its instrument of ratification without reservation on 29 August 1950" (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia-Herzegovina* v. *Yugoslavia), Preliminary Objections, Judgment, I.C.J. Reports 1996 (II)*, p. 610, para. 17). Treaty succession *by the FRY* — the Respondent — was not contemplated, was not even raised as an issue. Ratification of the Genocide Convention by the *former* Yugoslavia was perceived as relevant in the context of the assumption of continued personality. The Court added that "it [had] not been contested that Yugoslavia was party to the

[18] Joint letter by Bosnia and Herzegovina, Croatia, the former Yugoslav Republic of Macedonia and Slovenia addressed to the Secretary-General of the United Nations according to which "the Federal Republic of Yugoslavia (Serbia and Montenegro) had not acted in accordance with international rules on the succession of States", United Nations doc. A/50/910-S/1996/231.

Genocide Convention" *(ibid.)*. This was one of the essential reasons why '"Yugoslavia" was at that time considered to be bound by the Genocide Convention — and it seems that this is one point which is now being accepted by counsel for the Applicant[19]. Once again, the issue whether the FRY had succeeded to the Genocide Convention, which had not even been argued by the parties, was not decided by this honourable Court.

4.22. Indeed the Court solely decided upon the preliminary objections formally raised by the Respondent. This limited holding was later confirmed by this Court in its 2004 *Legality of Use of Force* Judgments where the Court stated: "The Court, in its Judgment on Preliminary Objections of 11 July 1996, rejected the preliminary objections raised by the Federal Republic of Yugoslavia . . ." (*Legality of Use of Force (Serbia and Montenegro* v. *Belgium)*, Judgment, para. 82.) All of those preliminary objections of the FRY related, however, exclusively to the status *of Bosnia and Herzegovina* vis-à-vis the Genocide Convention, but not to the FRY's own status with regard to the Convention.

4.23. Similarly, in the 2003 *Revision* Judgment, the Court did not even reach the question whether the Genocide Convention applied between the parties, given that, in its view, the conditions for the admissibility of the request for revision had not been fulfilled. This interpretation of the 2003 *Revision* Judgment was confirmed by the Court in its 2004 *Legality of Use of Force* Judgments where the Court specifically stated that in 2003 it "did not have to say whether it was correct that Serbia and Montenegro had not been a party to the Statute or to the Genocide Convention in 1996" (*ibid.*, para. 87).

4.24. In contrast thereto *c*ounsel for the Applicant attempted to imply that in paragraphs 70 and 71 of the 2003 *Revision* Judgment the Court indeed had taken a position as to the status of the Respondent vis-à-vis the Genocide Convention[20]. However, this cannot be brought in line with the clear language of the 2004 Judgment. In it, the Court explicitly stated: "These statements cannot . . . be read as findings on the status of Serbia and Montenegro in relation to the United Nations and the Genocide Convention . . ." (*ibid.*, para. 87).

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[19]CR 2006/3, p. 18, para. 19 (Prof. Pellet).

[20]CR 2006/3, pp. 20-21, para. 22 (Prof. Pellet).

4.25. In the same 2004 *Legality of Use of Force* Judgments, the Court also did not "consider it necessary to decide whether Serbia and Montenegro was or was not a party to the Genocide Convention . . . when the current proceedings were instituted" (*ibid.*, para. 114).

4.26. Madam President, let me reiterate: our contention is that the Court has not so far decided with force of *res judicata* whether Serbia and Montenegro became bound by the Genocide Convention during the relevant period of time — or not. This contention is further confirmed, if ever necessary, by the operation of the applicable provisions of the Rules of Court.

4.27. Article 79, paragraph 9, of the current Rules, which is identical to Article 79, paragraph 7, of the Rules as applicable to our case, deals with a judgment on preliminary objections. It clearly states that in a judgment on preliminary objections the Court "shall either uphold *the objection,* reject it, or declare that [it] does not possess . . . an exclusively preliminary character" (emphasis added).

4.28. It is thus the objections *actually raised* by the respondent, and only those, which define and delimit the scope of the *res judicata* effect, if ever, of any judgment on preliminary objections. With regard to the 1996 Judgment on preliminary objections, the Respondent had however never raised a preliminary objection based on the argument that it was not bound, or became bound, by the Genocide Convention. Accordingly, this issue was not, and could not be, decided by the Court with the force of *res judicata*.

4.29. In the same vein, Article 79, paragraph 1, of the Rules provides that "[a]ny objection . . . to the jurisdiction of the Court or to the admissibility . . . or other objection *the decision upon which is requested before any further proceedings on the merits* . . ." (emphasis added), shall be made within the period prescribed by the Rules. Accordingly, the sole effect of *not* raising an objection as to the Court's jurisdiction or the admissibility of the case within the time frame foreseen by the Rules is that it does not stay the proceedings on the merits. On the other hand, States are not barred from raising such objections at a later stage, since otherwise that part of Article 79, paragraph 1, clause 1, of the Rules of Court, which I have just quoted, would be superfluous.

4.30. And this is precisely the situation we are facing at this juncture: in 1996 the FRY had *not* raised the preliminary objection of not being a Contracting Party to the Genocide Convention.

This only means that the Respondent did not have the right that the proceedings on the merits be interrupted until the Court would decide on the objection that it was not a Contracting Party at the relevant period and that it never became bound by Article IX of the Genocide Convention.

4.31. Accordingly, the issue whether Serbia and Montenegro has succeeded to the Genocide Convention — or rather has *not* succeeded to it — has not become *res judicata* in any event. The Court is therefore completely free to decide upon it now.

4.32. Madam President, I would like to avail myself of this opportunity to reply briefly to some points made by counsel for the Applicant in his pleading last week. Counsel for the Applicant has attempted to argue, albeit somewhat reluctantly it seems, that the Respondent might have, by not raising the question of its lack of access to the Court and its succession to the Genocide Convention, not acted in good faith[21]. This allegation is however contradicted by your 1996 Judgment on preliminary objections. In it you stated that the Respondent had "consistently contended . . . that the Court lacked jurisdiction whether on the basis of the Genocide Convention or on any other basis" (*I.C.J. Reports 1996 (II)*, pp. 620-621; see also as the provisional measures stage of the case, *I.C.J. Reports 1993*, pp. 341-342).

4.33. Besides, one has also to take into consideration the fundamental nature of issues relating to the party status of a given State and its access to the Court which the Court itself has to enquire into and which is independent of any approach chosen by the parties. (See, for example, case concerning *Legality of Use of Force (Serbia and Montenegro* v. *Belgium)*, Judgment, 15 December 2004, para. 36.)

4.34. It has to be also noted that the legal status of the FRY was — to put it in the words of the Court — "rather confused and complex" (*ibid.*, para. 73) and "shrouded in uncertainties" (*ibid.*, para. 79) and it was only the admission of the FRY to the United Nations which "clarified the thus far amorphous legal situation" *(ibid.)*. Indeed, only from the vantage point of the admission of the FRY to the United Nations in 2000, both the Court and the Respondent could have had a clearer look at the legal situation surrounding the FRY. Accordingly, the allegation by the Applicant that the FRY has acted in bad faith seems to be for that reason, too, without foundation.

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[21]CR 2006/3, p. 19, para. 19 (Prof. Pellet).

4.35. Counsel for the Applicant, Professor Pellet, has also argued that the Respondent might have created, as he put it, "une sorte de *forum prorogatum*"[22] — a kind of *forum prorogatum*. Let me in that regard first clearly reiterate what the Court had already stated in its 1996 Judgment on preliminary objections after the Applicant had already at that time argued *forum prorogatum*, namely that "[t]he Court does not find that the Respondent has given in this case a 'voluntary and indisputable' consent . . ." (*I.C.J. Reports 1996 (II)*, p. 621, para. 40; citation omitted). Indeed, how can a State that has *explicitly* raised seven preliminary objections as to the Court's jurisdiction be considered to have, at the same time, implicitly accepted that jurisdiction because it did not raise an eighth one? One therefore simply cannot assume whatever form of *forum prorogatum*.

4.36. Madam President, let me now demonstrate that Serbia and Montenegro never became bound by the Genocide Convention. Before doing so, I should stress once more the ancillary nature of our argument on this point since in order for the Court to decide upon this question it has to first and foremost find that Serbia and Montenegro can be a party at all in these proceedings before the Court — proceedings which were brought by Bosnia and Herzegovina at a time when the Respondent did not have access to the Court. As this Court itself has pointed out:

> "it is incumbent upon it to examine first of all the question whether the Applicant meets the conditions laid down in Articles 34 and 35 of the Statute and whether the Court is thus open to it. Only if the answer to that question is in the affirmative will the Court have to deal with the issues relating to the conditions laid down in Articles 36 and 37 of the Statute of the Court." (See e.g., case concerning *Legality of Use of Force (Serbia and Montenegro* v. *Belgium)*, Judgment, 15 December 2004, para. 46; citation omitted.)

4.37. My colleague Vladmir Djerić has demonstrated that the Respondent did not have access to the Court during the relevant period of time and that the Genocide Convention is not a treaty in force within the meaning of Article 35, paragraph 2, of the Statute. Professor Tibor Varady has then shown that the FRY did not remain bound by the Genocide Convention. I will now present an additional argument equally leading to the conclusion that this Court has no jurisdiction in this case. I will demonstrate that the Respondent never became bound by Article IX of the Genocide Convention.

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[22]CR 2006/3, p. 19, para. 19 (Prof. Pellet).

C. The Respondent was not a party to the Genocide Convention during the relevant period of time

4.38. Madam President, Members of the Court, as I have outlined before, both parties agree that Serbia and Montenegro is a successor State to the former Yugoslavia — which has ceased to exist. In order for Serbia and Montenegro to be responsible for the alleged violations of the Genocide Convention and in order for the Court to have jurisdiction with regard to those acts, and considering that the FRY did not continue the personality and treaty status of the former Yugoslavia, the Applicant must therefore establish that the Respondent has succeeded to the Genocide Convention. Such succession, in turn, could have only occurred

— either on the basis of the declaration of 27 April 1992;

— or, by virtue of a principle of automatic succession.

4.39. I will now show that, *first,* declarations of the FRY which were solely and exclusively based on an assumed identity of the FRY with the former Yugoslavia cannot create commitments based on a contrary assumption; and that, *second,* Serbia and Montenegro did not become bound by the Genocide Convention by virtue of the principle of so-called automatic succession.

1. Declarations which were solely based on an assumption of continued personality cannot create commitments for Serbia and Montenegro as to the Genocide Convention

4.40. Honourable Members of the Court, the declaration adopted on 27 April 1992, at a joint session of the Assembly of the SFRY (the former Yugoslavia)[23], the National Assembly of the Republic of Serbia, and the Assembly of Montenegro was, as was admitted by Bosnia and Herzegovina itself (Written Observations of Bosnia and Herzegovina of 3 December 2001 in the case concerning *Application for Revision of the Judgment of 11 July 1996 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 *(Yugoslavia* v. *Bosnia and Herzegovina)*, e.g., para. 2.9), firmly based on the idea of continued personality. And it is for that reason that Bosnia and Herzegovina itself regularly took the position that the FRY had not, by virtue of its declaration of 27 April 1992, become a Contracting Party to treaties of the former Yugoslavia.

[23] At that time, it was contested whether the SFRY and its National Assembly still existed.

4.41. A characteristic example of this approach is the joint letter of Bosnia and Herzegovina, Croatia, Macedonia and Slovenia of 20 April 1998, addressed to the Commission on Human Rights. It can be found in tab. 5 of the judges' folder. This joint letter was transmitted by a Note Verbale of the Permanent Mission of Bosnia and Herzegovina to the United Nations Office at Geneva. In very clear terms, that letter stated:

> "All states that have emerged from the dissolved predecessor state have equal succeeding rights and legal status. The same principle applies to the legal status regarding international instruments to which SFRY was a state party. Consequently FRY *should notify its succession* to all relevant international instruments including human rights instruments as was done by other successor states."[24]

4.42. On the same basis, Bosnia and Herzegovina frequently and successfully requested that the FRY should not be treated as a State party to treaties and accordingly, should not participate in meetings of Contracting Parties of various human rights treaties. It is only in this case, and for the sole purpose of this case, that Bosnia and Herzegovina considers the said declaration as a notification of succession.

4.43. Yet that claim is entirely unfounded. As a matter of fact, it is simply inconceivable that a declaration based at the time on a claim of continued personality could be regarded as something different, that is, a notification of *succession.* In that regard it is quite telling what counsel for Bosnia and Herzegovina argued before this Court concerning a possible reinterpretation of a notification of succession emanating from Bosnia and Herzegovina itself, as a notification of accession. Let me quote what was said on behalf of the Applicant by my esteemed colleague Professor Brigitte Stern:

> "On ne voit pas pourquoi la notification de succession, acte qualifié comme tel par un État souverain, devrait être considérée comme une notification d'adhésion." (CR 96/9, pp. 32-33.)

4.44. Accordingly, Bosnia and Herzegovina itself submitted that one may not second-guess the intention of a State and turn a notification of succession into an act of accession. Similarly, one should not treat a declaration, which at the time was clearly based on the notion of *identity* and

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[24] See Joint letter of Bosnia and Herzegovina, Croatia, Macedonia and Slovenia forwarded to the Commission on Human Rights by the Permanent Mission of Bosnia and Herzegovina to the United Nations Office at Geneva in a Note Verbale dated 20 April 1998, United Nations doc. E/CN.4/1998/171; emphasis added.

characterized *as such* by the FRY, as a notification of succession against the will of the State that made this declaration.

4.45. In fact, this Court itself confirmed that the Note of 27 April 1992 was exclusively based on the claim of identity, and thus could not bring about succession when it stated in 2004:

> "the Federal Republic of Yugoslavia, for its part, maintained its claim that it *continued the legal personality of the Socialist Federal Republic of Yugoslavia. This claim has been clearly stated in the official Note of 27 April 1992 . . .*" (*Legality of the Use of Force (Serbia and Montenegro* v. *Belgium)*, Judgment of 15 December 2004, para. 69; emphasis added.)

4.46. I will now further demonstrate that the declaration of 27 April 1992 and the Note which accompanied it *first*, were not intended to serve the purpose of treaty succession; and *second*, were not capable of serving such purpose.

4.47. Already the text of the declaration indicated that this was a declaration of "the representatives of the people of the Republic of Serbia and the Republic of Montenegro" and at the end of the text, "the participants of the joint session" were identified as signatories. The opening sentence of this declaration stressed that the citizens of Serbia and Montenegro expressed their common will "to stay in the common state of Yugoslavia". The underlying political idea that guided the opinions expressed in the declaration was clearly the perception that Yugoslavia continued to exist, that the FRY was the same State as the former Yugoslavia, and that it continued the identity of the former Yugoslavia.

4.48. Since the declaration clearly did not aim to *create* a status, but rather to describe a perception, it explicitly stated as its purpose solely to state the *views* of the participants on *policy objectives* as stressed in its introductory part of the declaration:

> "Remaining strictly committed to the peaceful resolution of the Yugoslav crisis, wish to state in this Declaration their *views* on the basic, immediate and lasting *objectives of the policy* of their common state, and its relations with the former Yugoslav Republics." (Emphasis added.)

4.49. Furthermore, the declaration of 27 April 1992 was not addressed to the depositary, but to the President of the Security Council, consistent with the fact that this was a policy statement, rather than treaty action[25]. The declaration and the Note were transmitted by a letter of 6 May 1992

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[25]See the letter dated 27 April 1992 from the Chargé d'affaires *a.i.* of the Permanent Mission of Yugoslavia to the United Nations addressed to the President of the Security Council, United Nations doc. S/23877 (1992).

addressed to the Secretary-General, asking the Secretary-General to circulate the declaration and the Note *"as an official document of the General Assembly"*[26]. This is, again, indicative of the fact that both the declaration and the Note were political documents rather than treaty action.

4.50. Yet another reason why the declaration and the Note were unsuited to bring about treaty action is that they *did not identify any treaty.* Neither was any specific treaty mentioned or referred to, nor was any list of relevant treaties annexed to it.

4.51. That such "general notifications" are irrelevant for purposes of State succession has clearly been confirmed by the Secretary-General, acting as depositary of multilateral treaties. Taking a position on "general declarations of succession" the Secretary-General stresses:

> "Frequently, newly independent States will submit to the Secretary-General 'general' declarations of succession . . . The Secretary . . . *does not consider such a declaration as a valid instrument of succession to any of the treaties deposited with him***,** and he so informs the Government of the new State concerned."

4.52. The Secretary-General continues:

> "it has always been the position of the Secretary-General, in his capacity as depositary, to record a succeeding State as a party to a given treaty *solely on the basis of a formal document* similar to instruments of ratification, accession, etc., that is, a *notification emanating from the Head of State, the Head of Government or the Minister for Foreign Affairs, which should specify the treaty or treaties by which the State concerned recognizes itself to be bound.*
>
> *General declarations are not sufficiently authoritative to have the States concerned listed as parties in the publication Multilateral Treaties Deposited with the Secretary-General.*"[27] (Emphasis added.)

4.53. Let me reiterate:

(i) Both parties agree that the Respondent is one of the successor States of the former Yugoslavia, the SFRY, which has ceased to exist;

(ii) the declaration adopted on 27 April 1992 was not a notification of succession, nor was it perceived as such by third States;

(iii) instead it was a political declaration based on the assumption of identity;

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[26]United Nations doc. A/46/915.

[27]Summary of Practice of the Secretary-General as Depositary of Multilateral Treaties, 1999, paras. 302-304 (footnote omitted); available at: http://untreaty.un.org/ENGLISH/summary.asp; emphasis added.

(iv) neither the declaration nor the Note of 27 April 1992 referred to any treaty and besides did not emanate from any of the authorities considered by the depositary to be competent authorities to legally bind the FRY;

(v) Bosnia and Herzegovina itself never treated the declaration as bringing about a succession of the Respondent with regard to treaties of the former Yugoslavia;

(vi) finally, even if it were considered a notification of succession, the declaration could still not, given its general character, be considered to have brought about succession of the Respondent with regard to specific treaties of the former Yugoslavia.

4.54. Accordingly, the declaration and the Note could not bring about succession. Let me restate that the declaration and the Note were not even a "general declaration of succession" — they were policy statements claiming continuity. As a matter of fact, the word "succession" (or succeed) is completely missing from the text. Instead the Note assumes that it was adopted "[o]n the basis of the continuing personality of Yugoslavia".

4.55. It is only based on this claim, and clearly stressing the proposition of continued personality as the sole possible basis for assuming the obligations of the former Yugoslavia, that the Note states:

> "*Strictly respecting the continuity of the international personality of Yugoslavia***,** the Federal Republic of Yugoslavia shall continue to fulfil all the rights conferred to, and obligations assumed by, the Socialist Federal Republic of Yugoslavia in international relations, including its membership in all international organizations and participation in international treaties ratified or acceded to by Yugoslavia." (Emphasis added.)

4.56. Let me also reiterate that Bosnia and Herzegovina vigorously contested the claim that the FRY could continue the international position, as well as the treaty rights and obligations of the former Yugoslavia until it was willing to submit specific notifications of succession[28], which Serbia and Montenegro never did with regard to the Genocide Convention.

4.57. It is also quite telling how the United Nations Under-Secretary General for Legal Affairs, the Legal Counsel, reacted after the FRY had been admitted to the United Nations as a new Member and after the status of the FRY as one of the successor States of the former Yugoslavia

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[28]E.g., joint letter of Bosnia and Herzegovina, Croatia, Macedonia and Slovenia forwarded to the Commission on Human Rights by the Permanent Mission of Bosnia and Herzegovina to the United Nations Office at Geneva in a Note Verbale dated 20 April 1998, United Nations doc. E/CN.4/1998/171.

had been confirmed. He, the Legal Counsel, invited the FRY to decide whether or not to assume the rights and obligations of the former Yugoslavia in international treaties. In a letter of 8 December 2000, which can be found as tab 6 of the judges' folder, he, the Legal Counsel, stated:

> "It is the Legal Counsel's view that the Federal Republic of Yugoslavia should *now undertake treaty actions,* as appropriate, in relation to the treaties concerned, *if its intention is to assume the relevant legal rights and obligations as a successor State.*" (Emphasis added.)

4.58. It is also important to add that the letter of the Legal Counsel was accompanied by a list of treaties with respect to which the FRY, in order to become a party, should undertake treaty action. This list included the Genocide Convention. The approach taken by the Legal Counsel confirmed that the FRY had not been a party to the Genocide Convention beforehand.

4.59. Let me underline once again that the declaration of 27 April 1992 has never been treated by *anybody* as a declaration of succession. Before it became clear that the FRY had only become a Member of the United Nations on 1 November 2000, depositary practice did show "Yugoslavia" as a Member State of the United Nations and as a contracting party to treaties. This practice may have created ambiguities, and the appearance of the status as a contracting party — yet the only appearance which could have been created was that of a *continued* status of the former Yugoslavia as a contracting party.

4.60. Before the legal status of Serbia and Montenegro was clarified, "Yugoslavia" was also listed as a Contracting Party to the Genocide Convention, stating the date of signature as 11 December 1948, and the date of ratification *as 29 August 1950*[29].

4.61. In sharp contrast thereto the same survey indicated that Bosnia and Herzegovina became a Contracting Party *on 29 December 1992* by way of succession[30]. While the reference to "Yugoslavia" as a Contracting Party *since 1950* may have created the appearance of the continued existence of a State called "Yugoslavia" as a Contracting Party, it could not have supported in any way the hypothesis, or even the appearance that the FRY, being a new State, being a successor

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[29]Multilateral Treaties deposited with the Secretary-General, Part I (United Nations treaties), Chapter IV (Human Rights), as of 3 October 2000.

[30]See Multilateral Treaties deposited with the Secretary-General, Part I (United Nations treaties), Chapter IV (Human Rights), at: http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterIV/treaty12.asp.

State, had become *in 1992*, by virtue of a declaration, automatically, or otherwise, a Contracting Party to the Genocide Convention.

4.62. By now, the situation has been clarified. In the publication *Multilateral Treaties Deposited with the Secretary-General*, in the section "Historical Information"[31], which can be found as tab 7 of the judges' folder, the depositary offers an explanation. It demonstrates that both the declaration and the Note were clearly perceived as a claim to continuity — and that this claim had remained unaccepted.

4.63. The Secretary-General now states:

> "Yugoslavia came into being on 27 April 1992 following the promulgation of the constitution of the Federal Republic of Yugoslavia on that day. Yugoslavia nevertheless advised the Secretary-General on 27 April 1992 that it claimed to continue the international legal personality of the former Yugoslavia. Yugoslavia accordingly claimed to be a member of those international organizations of which the former Yugoslavia had been a member. *It also claimed that all those treaty acts that had been performed by the former Yugoslavia were directly attributable to it, as being the same State . . . Bosnia and Herzegovina, Croatia, Slovenia and the former Yugoslav Republic of Macedonia . . . objected to this claim.*" (Emphasis added.)

4.64. Accordingly the declaration, the Note, the practice of the depositary and the reaction of third States, including Bosnia and Herzegovina itself, never even suggested, but instead rather excluded any possibility that the 1992 declaration could have brought about a succession of Serbia and Montenegro to the treaties to which the former Yugoslavia had been a party — including the Genocide Convention.

4.65. Madam President, Members of the Court, I have just shown that Serbia and Montenegro has never notified its succession to the Genocide Convention. I will now further demonstrate that it could have never become bound by the Genocide Convention by virtue of automatic succession, since no rule of automatic succession existed prior to 1978 when the Vienna Convention on State Succession in respect of Treaties was adopted, nor has such a rule since developed.

[31] Available at http://untreaty.un.org/ENGLISH/bible/ englishinternetbible/historicalinfo.asp.

2. The jurisdiction of the Court cannot be based on a theory of automatic succession of treaties

4.66. Let me start with a simple fact: It is uncontested by now that the FRY came into existence on 27 April 1992. Accordingly, and in order to find that it has succeeded to the Genocide Convention in accordance with a purported principle of automatic succession, such norm of customary international law must have existed already at that very date.

4.67. It follows that any practice by the States or organs of the United Nations subsequent to 27 April 1992, which could eventually lend support to such proposition, is *per se* irrelevant for our case as having occurred *ex post facto*.

4.68. Madam President, the assumption that the FRY might have become bound by the Genocide Convention by virtue of an alleged principle of so-called "automatic succession" is contradicted by

— the drafting history of the 1978 Vienna Convention;

— the practice of the Legal Counsel of the United Nations;

— relevant State practice;

— depositary practice; and

— finally State practice (including that of the Applicant itself) specifically with regard to the former Yugoslavia.

4.69. Already during the preparatory work of the ILC for the 1977-1978 Diplomatic Conference at which the Vienna Convention on State Succession in Respect of Treaties was finally adopted, the ILC considered whether the principle of automatic succession should apply to law-making treaties such as, for example, the Geneva Conventions. Such a proposition was not accepted.

4.70. The ILC, after having devoted considerable time to the issue, instead stated that

> "the evidence of State practice appeared to be unequivocally in conflict with the thesis that a newly independent State is under an obligation to consider itself bound by a general law-making treaty applicable in respect of its territory prior to independence"[32].

4.71. The ILC further emphasized that State practice with respect to the Geneva Conventions was conflicting. While a number of States had notified their succession, a large number of States

[32] *Ibid.*

had also become parties by way of accession[33], which clearly contradicts the proposition of automatic succession.

4.72. In particular, the ILC stressed the point that law-making treaties cannot be subject to a régime of automatic succession since "such treaties may contain purely contractual provisions such as, for example, a provision for the *compulsory adjudication of disputes*." (emphasis added)[34]. This argument is, to state the obvious, particularly relevant with regard to Article IX of the Genocide Convention. Accordingly, the ILC deliberately opted not to include in its draft articles any specific provision relating to the category of law-making treaties, which, if introduced, might have also covered the Genocide Convention.

4.73. During the Vienna Diplomatic Conference, similar proposals contemplating automatic succession regarding law-making treaties were withdrawn, as it became obvious that they would not receive sufficient support[35].

The PRESIDENT: Professor Zimmerman, could you, for the interpreters, speak a little more slowly? Thank you.

Mr. ZIMMERMAN: Yes, I will.

4.74. This approach was also in line with the view taken by the United Nations Legal Counsel, who in 1976 had already stated with regard to the Geneva Convention relating to the Status of Refugees that:

> "it is the practice of the Secretary-General, as depositary of international agreements, to consider the would-be successor State as a party to an agreement only after a notification of succession specifically mentioning the agreement succeeded to has been deposited with him . . ."[36]

4.75. Accordingly until 1978 no rule of automatic succession with regard to human rights treaties had been established. This leaves the period between 1978 and 1992; that is a period of less than 15 years. I will now show that within this period, no rule of customary international law providing for such automatic succession developed either.

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[33]See ILC *Yearbook*, 1974, Vol. II/1, pp. 43-44.

[34]*Ibid*., p.4.

[35]See M. Yasseen, *La Convention de Vienne sur la succession d'Etats en matière de traités*, AFDI 1978, p. 107.

[36]See United Nations *Juridical Yearbook*, 1976, p. 219.

4.76. Madam President, Members of the Court, in its well-known holding in the *North Sea Continental Shelf* case, the Court stated with regard to a similarly short period of 11 years, that is the period between 1958 and 1969, that:

> "Although the passage of only a short period of time is not necessarily, or of itself, a bar to the formation of a new rule of customary international law . . . an indispensable requirement would be that within the period in question, short though it might be, *State practice, including that of States whose interests are specially affected, should have been both extensive and virtually uniform* . . ." (*North Sea Continental Shelf (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands), Judgment, I.C.J. Reports 1969*, p. 43, para. 74; emphasis added.)

4.77. This standard has clearly not been attained, nor could it be attained in the present case. The State practice which has developed is far from being "virtually uniform"; besides, it has not been "extensive". As a matter of fact State practice in general, and State practice regarding the respondent in particular, contradicts the proposition of automatic succession.

4.78. It has to be noted first, that in the case of treaty succession with regard to human rights treaties, there was almost no State practice whatsoever until the early 1990s, given that an extremely small number of cases of State succession arose between 1978 and 1990.

4.79. Existing State practice, and in particular the practice of successor States (who are the "*States whose interests are specially affected"*, in the sense of your *North Sea Continental Shelf dictum*), does not support the proposition of automatic succession. To the contrary, relevant State practice supports the position that human rights treaties are *not* subject to automatic succession.

4.80. This is true, first of all, for the practice of successor States of the former USSR, which does not support the theory of automatic succession, let alone in a "virtually uniform" manner. Instead, this practice rather contradicts the theory of automatic succession. Indeed, while some successor States of the USSR submitted specific notifications of succession, some others have taken no position at all. Most importantly, a large number of successor States which came into existence on the territory of the former USSR have *acceded* to major human rights treaties such as:

— the two International Covenants on, respectively, Civil and Political Rights and Economic, Social and Cultural Rights[37] [38];

— CEDAW[39];

— the United Nations Convention Against Torture[40];

— the Convention on the Rights of the Child[41]; and

— the CERD[42].

All of those treaties had previously been ratified by the USSR. Practice thus confirms the view that successor States of the USSR have not become bound by the various human rights treaties by way of automatic succession.

4.81. Practice of third States confirms the conclusion that the conduct of the different successor States, including even those which did not take any position, is not compatible with the proposition of automatic succession. *Inter alia*, Serbia and Montenegro would like to draw the attention of the Court to the decision of the Swiss Federal Court which found that Kazakhstan had not succeeded to the International Covenant on Civil and Political Rights (ICCPR) due to a lack of a notification of succession. The decision stated:

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[37]With regard to the International Covenant on Civil and Political Rights the following countries have become Contracting Parties by way of *accession*: Armenia (23 June 1993), Azerbaijan (13 August 1992), Georgia (3 May 1994), Kyrgyzstan (7 October 1994), Republic of Moldova (26 January 1993), Tajikistan (4 January 1999), Turkmenistan (1 May 1997), Uzbekistan (28 September 1995).

[38]With regard to the International Covenant on Economic, Social and Cultural Rights the following countries have become Contracting Parties by way of *accession*: Armenia (13 September 1993), Azerbaijan (13 August 1992), Georgia (3 May 1994), Kyrgyzstan (7 October 1994), Republic of Moldova (26 January 1993), Tajikistan (4 January 1999), Turkmenistan (1 May 1997), Uzbekistan (28 September 1995).

[39]The following countries have become Contracting Parties by way of *accession*: Armenia (13 September 1993), Azerbaijan (10 July 1995), Georgia (26 October 1994), Kazakhstan (26 August 1998), Kyrgyzstan (10 February 1997), Republic of Moldova (1 July 1994), Tajikistan (26 October 1993), Turkmenistan (1 May 1997), Uzbekistan (19 July 1995).

[40]The following countries have become Contracting Parties by way of *accession*: Armenia (13 September 1993), Azerbaijan (16 August 1996), Georgia (26 October 1994), Kazakhstan (26 August 1998), Kyrgyzstan (5 September 1997), Republic of Moldova (28 November 1995), Tajikistan (11 January 1995), Turkmenistan (25 June 1999), Uzbekistan (28 September 1995).

[41]The following countries have become Contracting Parties by way of accession: Armenia (23 June 1993), Azerbaijan (13 August 1992), Kyrgyzstan (7 October 1994), Republic of Moldova (26 January 1993), Tajikistan (26 October 1993), Turkmenistan (20 September 1993), Uzbekistan (29 June 1994). Kazakhstan by ratification of 12 August 1994.

[42]The following countries have become Contracting Parties by way of accession: Armenia (23 June 1993), Azerbaijan (16 August 1996), Georgia (2 June 1999), Kazakhstan (26 August 1998), Kyrgyzstan (5 September 1997), Republic of Moldova (26 January 1993), Tajikistan (11 January 1995), Turkmenistan (29 September 1994), Uzbekistan (28 September 1995).

> "En tant qu'Etat successeur de l'ancienne URSS, la République du Kazakhstan est libre d'exprimer *ou non* son consentement à être liée par les traités auxquels l'Etat dont elle est issue est partie . . ."[43] (Emphasis added.)

4.82. Let me also mention that a high number of newly independent States including Papua New Guinea, Burkina Faso, Cambodia, Chad, Gabon, Madagascar, Mauritania, Bahamas, Belize, Domenica, Kenya, the Seychelles, the Solomon Islands, the United Republic of Tanzania, and Zimbabwe — although they had been in a position to notify their succession with regard to the Geneva Convention relating to the Status of Refugees, have instead, both before and after 1978, *acceded* to it, thereby contradicting the view that human rights treaties were, at least as of 1992, subject to a rule of automatic succession.

4.83. With regard specifically to the Genocide Convention, there is also ample State practice that contradicts the idea of automatic succession, given that a great number of successor States have *acceded* to the Convention. Many other successor States made specific notifications of succession. All this clearly shows an absence of a uniform, or even prevailing practice. Such practice lends no support to, but rather contradicts, the proposition of automatic succession.

4.84. New States which acceded to the Genocide Convention instead of notifying their succession, or did not take any treaty action at all, include Rwanda[44], Tonga[45], Algeria[46], Bangladesh[47], as well as all concerned successor States of the USSR, that is, Azerbaijan, Armenia, Georgia, Kazakhstan, Kyrgyzstan, the Republic of Moldova, Uzbekistan, Tajikistan and Turkmenistan)[48].

4.85. It is of particular importance that — with the only exception of Croatia, Bosnia and Herzegovina and Sweden concerning the accession of the FRY — no other Contracting Party to the

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[43]See BGE, Vol. 123 II, pp. 518-519.

[44]By declaration dated 13 March 1952 Belgium had extended the applicability of the Genocide Convention to the Trust Territory of Rwanda-Burundi; still Rwanda acceded on 16 April 1975.

[45]By declaration dated 2 June 1970 the United Kingdom of Great Britain and Northern Ireland had extended the applicability of the Genocide Convention to the Kingdom of Tonga; still Tonga acceded on 16 February 1972.

[46]The Genocide Convention had entered into force with regard to France on 14 October 1950; Algeria acceded to the Convention on 31 October 1963.

[47]Pakistan had ratified the Genocide Convention by 12 October 1957; Bangladesh acceded on 5 October 1998.

[48]The following countries have become Contracting Parties by way of accession: Azerbaijan (16 August 1996), Armenia (23 June 1993), Georgia (11 October 1993), Kazakhstan (26 August 1998), Kyrgyzstan (5 September 1997), Republic of Moldova (26 January 1993), Uzbekistan (9 September 1999). Tajikistan and Turkmenistan have taken no treaty action whatsoever. Belarus and Ukraine had become Contracting Parties of their own right in 1954. Estonia, Latvia and Lithuania do not consider themselves to be successor States of the USSR.

Genocide Convention has until today ever objected to accessions by successor States to the Genocide Convention.

4.86. Moreover, Bosnia and Herzegovina itself has acquiesced in such practice with regard to seven such *accessions* by successor States of the former USSR, which have taken place after Bosnia and Herzegovina itself had become a Contracting Party to the Genocide Convention.

4.87. Depositary practice similarly indicates that the principle of automatic succession does not apply to human rights treaties. The point may be illustrated by reference to the Swiss Government's conduct as depositary of the 1949 Geneva Conventions. The Swiss Government has consistently taken the position that, in order for a successor State to be listed as a Contracting Party of either the four Geneva Conventions of 1949, or its Additional Protocols of 1977, said State must submit a specific notification of succession referring to the treaties to which the respective State wanted to succeed. The then Legal Adviser of the Swiss Government, now Judge Caflisch, stated in that regard:

> "[La Suisse] n'opère à cet égard aucune distinction selon la nature ou l'objet du traité. En matière de succession d'Etats aux conventions de Genève la pratique du dépositaire suisse est identique à celle qu'il observe pour d'autres traités ouverts à l'ensemble de la communauté internationale . . ."[49]

4.88. The same is true for the United Nations Secretary-General. Indeed, it is the considered view of the Secretary-General that even if a successor State had either entered into a so-called "devolution agreement" or submitted a general notification of succession, it could *not* be regarded as a contracting party by virtue of succession[50].

4.89. State practice of the States whose interests are specially affected, that is, State practice in the case of the dissolution of the former Yugoslavia, also clearly contradicts the proposition of automatic succession. The Applicant itself (together with other successor States of the former Yugoslavia) has consistently opposed the suggestion that the FRY could have become a contracting party to human rights treaties by way of automatic succession.

4.90. For example, during the 18th meeting of States parties to the International Covenant on Civil and Political Rights (16 March 1994), Mr. Šaćirbej moved on behalf of Bosnia and

[49]L. Caflisch, *La pratique suisse en matière de droit international public 1996*, SZIER 1997, p. 684.

[50]Cf. Summary of Practice of the Secretary-General as Depositary of Multilateral Treaties, 1999, paras. 302-304.

Herzegovina and proposed: "[t]hat the State parties should decide that the Federal Republic of Yugoslavia (Serbia and Montenegro) should not participate in the work of the Meeting of the States parties to the Covenant"[51].

4.91. Bosnia and Herzegovina's proposal was clearly based on the assumption that the FRY was not a contracting party to said treaty. This motion by Bosnia and Herzegovina to exclude the FRY from the meeting was adopted by 51 votes for, 1 vote against and 20 abstentions[52]. The same sequence of arguments and events was repeated on a number of other occasions. In all these cases, the proposition of automatic succession would have brought about a different conclusion — namely that the FRY should, indeed, have been allowed to attend meetings of States parties.

4.92. In other words, outside this Great Hall of Justice Bosnia and Herzegovina has consistently taken the position that there was only one way for the FRY to become a contracting party to human rights treaties — namely by submitting specific notifications of succession. Such a notification was however never submitted by the Respondent with regard to the Genocide Convention.

4.93. Madam President, I will now demonstrate that, even if the FRY did indeed become bound, *quid non*, by the Genocide Convention by virtue of automatic succession, such succession could only extend to the substantive guarantees of the Convention, and could not have included Article IX of the Convention.

3. Even if the automatic succession of rules of human rights treaties were a generally accepted principle, this could not include the rule of Article IX of the Genocide Convention

4.94. Already in 1947, the Legal Counsel of the United Nations stated that: "it has been clear that no succession occurs in regard to rights and duties of the old State which arise from political treaties such as treaties . . . of pacific settlement"[53].

4.95. This approach was also adopted by the ILC during its work on the codification of the law on State succession with regard to treaties. The ILC had decided — as I mentioned

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[51] Cf. United Nations doc. CCPR/SP/SR.18, p. 3, para. 2.

[52] *Ibid.*, p. 7, para. 23.

[53] Quoted by O. Schachter, The Development of International Law through the Legal Opinions of the United Nations Secretariat, *BYBIL*, 1948, p. 106.

beforehand — not to create a specific category of so-called law-making treaties which would have been made subject to the principle of automatic succession specifically since "such treaties may contain purely contractual provisions such as, for example, a *provision for the compulsory adjudication of disputes*"[54].

4.96. This view is also further confirmed by a decision of the Pakistani Supreme Court which stated that:

> "as a general rule a new State so formed will succeed to rights and obligations arising only under treaties specifically relating to its territories . . . *but not to rights and obligations under treaties affecting the State . . . e.g. treaties of . . . arbitration . . .*"[55].

4.97. Such a position that treaty obligations regarding the settlement of disputes, which are essentially political obligations, are not transmissible under international law is also confirmed by the view of D.P. O'Connell, the still leading authority in the field. After noting the fact that treaties "are ranging in subject-matter from renunciation of war and peaceful settlement of international disputes, through copyright and counterfeiting, to weights and measures", he continues: "Clearly not all these treaties are transmissible: no State has acknowledged its succession to the General Act for the Pacific Settlement of International Disputes."[56]

4.98. Thus, both practice and considered scholarly opinion clearly show that treaty clauses providing for the peaceful settlement of disputes are not subject to automatic succession. Accordingly Article IX of the Genocide Convention is not subject to the principle of automatic succession and the FRY is accordingly not bound by it, even in the hypothesis that the substantive provisions of the Genocide Convention were subject to the principle of automatic treaty succession, which they are not.

D. Conclusion

4.99. Madam President, Members of the Court, let me summarize:

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[54]*Ibid.*, p. 4; emphasis added.

[55]Supreme Court of Pakistan, *Yangtze (London) Ltd.* v. *Barlas Brothers (Karachi) and Co.*, Judgment of 6 June 1961 (see Materials on State Succession, United Nations Legal Series, doc. ST/LEG/SER.B/14, pp. 137 *et seq.*; also quoted in *Statement of the Government of India in Continuance of its Statement* of 28 May 1973 and in *Answer to Pakistan's Letter* of 25 May 1973, *I.C.J. Pleadings, Trial of Pakistani Prisoners of War (Pakistan* v. *India)*, 1973, pp. 147-148; emphasis added.

[56]*State Succession in Municipal Law and International Law*, Vol. II, 1967, p. 213 (footnote omitted; [emphasis added]).

4.100. The Court has never decided upon the question whether or not the Respondent became bound by the Genocide Convention and its Article IX. This question is accordingly, for that reason too, not *res judicata.*

4.101. Even assuming, *quid non*, that the Respondent can be a party in these current proceedings, the Court would then have to consider the issue of succession of Serbia and Montenegro with regard to the Genocide Convention.

4.102. In this respect, it is submitted that the Respondent has never become bound by Article IX of the Genocide Convention because it has never succeeded to it.

4.103. This is *first* due to the fact that the declaration of 27 April 1992 did not and could not bring about succession.

4.104. *Second*, Serbia and Montenegro never automatically succeeded to the Genocide Convention.

4.105. *Third,* and in the alternative, Serbia and Montenegro never succeeded *to Article IX* of the Genocide Convention by way of automatic succession given its character as a clause providing for the judicial settlement of disputes.

4.106. Accordingly, this Court not only lacks jurisdiction in this case because Serbia and Montenegro was not qualified to be a party in the relevant moment. It also lacks jurisdiction *ratione personae* vis-à-vis the Respondent with regard to alleged violations of the Genocide Convention.

4.107. Madam President, Members of the Court, this brings me to the end of my presentation. Before asking you to call upon my colleague Professor Varady to conclude this morning's argument, I would like to thank you for your kind attention.

The PRESIDENT: Thank you, Professor Zimmermann. I now call upon Professor Varady.

Mr. VARADY: Thank you very much.

ISSUES OF PROCEDURE

5. Concluding remarks

5.1. Madam President, distinguished Members of the Court. In our presentations pertaining to access and jurisdiction we have advanced arguments demonstrating that the Respondent did not

have access to the Court at the relevant moment, and that the Respondent was not and is not bound by Article IX of the Genocide Convention, which is the only purported basis of jurisdiction. We are respectfully asking this Court to undertake a scrutiny of these issues. It is submitted that this is a scrutiny which the Court is entitled to undertake. According to the wording of the ICAO Council Judgment the Court "[m]ust . . . always be satisfied that it has jurisdiction . . ." (*Appeal Relating to the Jurisdiction of the ICAO Council, I.C.J. Reports 1972*, p. 52).

5.2. We are fully aware of the fact that such a scrutiny is not and should not be a routine matter. Under conventional circumstances the issue of jurisdiction is conclusively settled before the merits. But the circumstances of this case are hardly conventional. Indeed, it is difficult to imagine a case in which revisiting the fundamental preconditions to proceeding would be more justified. It is difficult to imagine a case with such an unorthodox and intricate setting — and with such a turnaround of the relevant perspective.

5.3. Our esteemed colleague Professor Pellet pointed out in his speech of 28 February that, under the circumstances of this case, a hesitation to render a pronouncement on the merits "serait désastreux pour l'image de la Cour et de la justice internationale . . ."[57]. Madam President, the unparalleled reputation of this honoured Court has been based on a relentless pursuit of truth, rather than on political circumspection. If the Respondent had had access to the Court at the relevant moment, and if it either had remained or became bound by Article IX of the Genocide Convention, then obviously a judgment accepting jurisdiction and deciding on the merits would best serve the well-established reputation. But if the truth is the opposite, if the Respondent did not have access to the Court at the relevant moment, and if the Respondent had neither remained nor become bound by Article IX of the Genocide Convention, then a judgment declining jurisdiction would be the one which would best serve the image and the reputation of this honoured Court.

5.4. Madam President, today it is known that the initial responses and characterizations of the position of the FRY at the time of the dissolution of the former Yugoslavia given by the competent authorities were incomplete and ambiguous. It is also known that — though belatedly — the competent authorities did not clarify these issues.

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[57]CR 2006/3, p. 16, para. 14 (A. Pellet).

5.5. Let me add that it is known all too well that the dissolution of Yugoslavia yielded a situation which was difficult to conceptualize, and that the responses did not create a clear situation. This is today admitted by both the participants and the analysts. It has also become common ground between the successor States themselves. To give just one illustration, in their joint letter of 19 November 2001 to the Under-Secretary-General for Management, the five successor States, including the parties to this dispute, have agreed on the following characterization:

> "The dissolution of the former Socialist Federal Republic of Yugoslavia was unique and indeed no identical precedent existed before. All the previous cases (for example the break-up of the former Union of Soviet Socialist Republics or Czechoslovakia) were different and so the legal consequences were different and it is quite unlikely that the same situation could occur again. However, if a similar situation occurs, the United Nations should find a way to address it in an appropriate manner."[58]

5.6. Let me mention that we sincerely hope that such a situation will not occur again. Let me also add that the implied criticism addressed to the United Nations authorities for their failure to take a clear position and their failure to address the issue in an appropriate manner may have been complemented with a criticism of the successor State themselves, including the FRY. But the point is that today all successor States — including the Parties to these proceedings — agree that a unique process without precedent took place, and that the competent authorities failed to provide a proper and timely response and characterization.

5.7. This controversial, ambiguous and unclarified state of affairs is the one which was brought before the Court when it had to reach a decision on preliminary objections in 1996. There was no other guidance.

5.8. What is even more important, today everybody agrees that the actual picture is different from that which was brought before the Court during the preliminary proceedings. By now, everybody agrees that the FRY became a *new* Member of the United Nations in November 2000. Admission in the capacity of a new Member took place without any vote against, without any objection voiced. Today, it is, I believe, common ground that the Respondent was not a Member of

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[58]See the Letter dated 19 November 2001, from the Permanent Representatives of Bosnia and Herzegovina, Croatia, Slovenia, the former Yugoslav Republic of Macedonia and the FR of Yugoslavia, addressed to Under-Secretary-General for Management, United Nations doc. A/56/767, App. III.

the United Nations and was not a party to the Statute before 1 November 2000. This is what the Secretary-General said clearly and unequivocally, and this is what this honoured Court said clearly and unequivocally.

5.9. In the 2004 *Legality of Use of Force* Judgments it was established that Serbia and Montenegro had no access to this Court before 1 November 2000 because it was not a Member of the United Nations, and no alternative basis for access existed. This is evidently relevant in this case as well. Not because the 2004 *Legality of Use of Force* Judgments would have *res judicata* effect with respect to this case, but because this is a truthful ascertainment, and because this is an objective determination which simply cannot be divorced from our case.

5.10. In the *Legality of Use of Force* cases the Court established: "The function of the Court to enquire into the matter and reach its own conclusion is thus *mandatory upon the Court* irrespective of the consent of the parties . . ." (*Legality of Use of Force*, Judgments, para. 36; emphasis added).

5.11. Following such an enquiry it was held that Serbia and Montenegro was not a party to the Statute, and hence had no access to the Court. This is obviously not a conclusion restricted to the specific fact-pattern of the *Legality of Use of Force* cases. If Serbia and Montenegro was not a party to the Statute in the period before November 2000, it obviously could not have had access to the Court in that period in other cases either.

5.12. Madam President, in addition to arguments pertaining to lack of access, we have also advanced an additional argument contesting jurisdiction stating that the Respondent did not remain bound, and never became bound, by Article IX of the Genocide Convention. We also showed that the Respondent was not even qualified to be a State party to the Genocide Convention in any way before it became a Member of the United Nations. Let me just summarize the main points of this argument.

5.13. In its 1996 Judgment on preliminary objections, this Court rendered a decision on those preliminary objections which were raised. This Court has never decided upon the question whether or not the Respondent remained or became bound by the Genocide Convention and its Article IX. This question is outside the scope and outside the authority of previous judgments.

5.14. We now demonstrated that the Respondent did not *remain* bound by Article IX of the Genocide Convention. We started with the refutation of this hypothesis, because the only plausible assumption which could have linked the FRY with Article IX is this assumption at the time of the Judgment on preliminary objections; namely the assumption that the FRY remained bound because it continued the personality and treaty status of the former Yugoslavia. No other basis was relied upon. In the light of the new perspective which has now been accepted, this assumption has lost all foundation.

5.15. Today it is clear — and I believe uncontested — that the FRY did not continue the international legal personality and treaty status of the former Yugoslavia. The proposition of continued personality and continued treaty status of the FRY (today Serbia and Montenegro) was rejected. Claims of the FRY to membership in international organizations and claims to status in treaties on ground of continuity were repeatedly and consistently denied. Furthermore, in the cases against eight NATO countries jurisdiction was denied because it was determined that the FRY was not a Member of the United Nations, and was not a party to the Statute between 1992 and 2000. There was no continuity. The FRY did not continue the status and personality of the former Yugoslavia, and hence, it did not remain bound by the Genocide Convention either.

5.16. Madam President, Members of the Court, it is evident that the Respondent did not remain bound by Article IX of the Genocide Convention. In order to cover all possible ground, we have also demonstrated that the Respondent did not *become* bound by this Article either. We pointed out that no one even argued that the Respondent ever submitted any notification of succession to the Genocide Convention. The only document which was referred to is the declaration of 27 April 1992. We have demonstrated that this document did not and could not bring about succession. Automatic succession did not take place either. Even if automatic succession would have taken place, this could not have encompassed Article IX, given its character as a clause providing for the judicial settlement of disputes.

5.17. Furthermore, we have shown that the Respondent was not even qualified to be a party to the Genocide Convention before it became a Member of the United Nations. As it became clear that the Respondent was not a Member State of the United Nations between 1992, when it came into being, and 2000, when it became a new Member State, it also became clear that it just could

not have become a party to the Genocide Convention in that period. It was simply not qualified. As a non-Member of the United Nations, it could only have joined the Convention following an invitation extended according to Article XI. It is clear that such an invitation was not extended; this was not even alleged. After the FRY became a Member State of the United Nations, it acceded to the Convention — with a reservation to Article IX.

5.18. And finally, let me emphasize again that the treaty status of the Respondent is today clearly evidenced by the record of the depositary. This record shows and confirms unequivocally that the Respondent only became a State party to the Genocide Convention when it acceded in 2001 with a reservation to Article IX.

5.19. Madam President, distinguished Members of the Court, we are respectfully asking you to consider the presented arguments, to investigate the questions of access and jurisdiction, and to decline jurisdiction in this case, because the Respondent did not have access to the Court in the relevant moment, and because the Respondent was not and is not bound by Article IX of the Genocide Convention which is the only purported basis of jurisdiction. Thank you very much for your kind attention.

The PRESIDENT: Thank you, Professor Varady. There being no further pleadings before us this morning, the Court will now rise and will resume at 3 o'clock this afternoon.

The Court rose at 12.40 p.m.

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