CR 2006/44

International Court of Justice

THE HAGUE

Cour internationale de Justice

LA HAYE

YEAR 2006

Public sitting

held on Monday 8 May 2006, at 3 p.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 lundi 8 mai 2006, à 15 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	Shi
		Koroma
		Parra-Aranguren
		Owada
		Simma
		Tomka
		Abraham
		Keith
		Sepúlveda
		Bennouna
		Skotnikov
	Judges *ad hoc*	Mahiou
		Kreća
	Registrar	Couvreur

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

M. Couvreur, greffier

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Mr. Thomas M. Franck, Professor of Law Emeritus, New York University School of Law,

Ms Brigitte Stern, Professor at the University of Paris I,

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Mr. Mauro Barelli, LL.M (University of Bristol),

Mr. Ermin Sarajlija, LL.M,

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Ms Amra Mehmedić, LL.M,

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comme assistants.

The PRESIDENT: Please be seated. Judge Ranjeva, for a reason explained to me, is unable to sit this afternoon. Professor Varady, you have the floor.

Mr. VARADY:

1. INTRODUCTION AND ISSUES OF UNITED NATIONS MEMBERSHIP OF SERBIA AND MONTENEGRO

A. Introduction

1.1. Madam President, distinguished Members of the Court. This afternoon, and for a considerable part of the morning session tomorrow, we would like to address issues of access and jurisdiction.

1.2. Madam President, addressing the same issues in their second round presentations, and endeavouring to substitute strength to their arguments, the Applicant tries to point out that it would be somehow inopportune to decline jurisdiction. The argument was made that what is essential is: "[b]ien sûr que justice soit faite, ce qui ne serait assurément le cas si vous reveniez sur votre compétence"[1]. It has also been said that a judgment on the merits should be rendered because "[t]his is the time to get history right"[2], and that "[i]f the principal role of the law is to teach, then the law must not only teach a few individuals . . . it must also teach the citizenry . . ."[3]. It was also submitted that a "[j]udgment for genocide would accelerate democratization of the society and help abandon the ideology of conflicting with neighbours . . ."[4]. In his concluding sentences in the morning of 21 April, Professor Franck pleaded to the Court stating: "Permit me, if you will allow me to be so bold, to encourage you not to loose yourselves in the technicalities, to remind you just once more of the central matter: this is a case about genocide."[5]

1.3. Let me first say that the political considerations which the Applicant tries to bring to the fore may very well justify opposite conclusions. It is certainly true that the fact that genocide was

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[1]CR 2006/37, p. 49, para. 38 (Pellet).

[2]CR 2006/35, p. 53, para. 13 (Franck).

[3]*Ibid.*, para. 15 (Franck).

[4]CR 2006/30 p. 14, para. 13 (Softić).

[5]CR 2006/35, p. 54, para. 16 (Franck).

alleged invites a special responsiveness. But does this mean that less attention should be devoted to the foundation of the proceedings, or should the gravity of the allegations rather invite more procedural scrutiny? Are the fundamental preconditions to proceedings determined by the Charter of the United Nations and the Statute mere technicalities? As far as democratization and peace with neighbours are concerned, Professor Stojanović has pointed out in his introductory speech that this is far from being a certain or even likely outcome of a judgment on genocide. As far as the teaching function is concerned, let me say that for a decision to make history and to educate, it obviously has to stand on procedurally unimpeachable rather than on questionable grounds. An *ultra vires* decision cannot teach legal lessons.

1.4. Madam President, what decision would be more opportune and politically more helpful is not a simple and obvious matter. Nothing in this case is simple and obvious. But the point is that we are facing issues of access and jurisdiction, and these have to be settled on grounds of legal rather than political considerations. Instead of arguing whether the issue of jurisdiction is more or less important when we are dealing with the allegation of genocide, we should concentrate on the question whether this honoured Court does or does not have jurisdiction. The process of dissolution of the FRY yielded human sufferings and crimes, and the same process yielded unprecedented structural and institutional quandaries. Many questions are still unanswered. Whether this case belongs to the jurisdiction of this Court is part of the truth which needs to be established.

1.5. Madam President, our arguments presented during the first round of pleadings were questioned and contested by the Applicant. We trust that we have answers to the questions, and we have arguments to rebut the contestations. We shall respectfully present our answers and arguments.

1.6. This afternoon, I would like first to continue this presentation by addressing the issue whether the Respondent was or was not a Member of the United Nations between 1992 and 2000. This issue is a critically important foothold of conclusions in one or the other direction regarding the question whether the FRY was or was not a party to the Statute in the relevant period of time, and whether the FRY remained or became bound by Article IX of the Genocide Convention. Our second speaker this afternoon will be Professor Zimmermann who will address the issue of good

faith. Professor Zimmermann will also respond to the question raised by Judge Tomka but this will be tomorrow. After Professor Zimmermann, I would like to conclude our presentations this afternoon endeavouring to demonstrate that an investigation of access and jurisdiction is not impeded by *res judicata* considerations. Tomorrow morning, Mr. Djeric will demonstrate that the Respondent did not have access to the Court at the relevant moment of time, and Professor Zimmermann will demonstrate that this Court has no jurisdiction in this case. These presentations will be followed by my concluding remarks. With your permission, Madam President, I will now continue with issues of United Nations membership.

B. The Respondent was not a Member of the United Nations before 1 November 2000

1. Arguments for continuity rehashed

1.7. Addressing issues of United Nations membership in the period between 1992 and 2000, I have to confess that we believed that this issue was settled once and for all. During the past several years the position of the FRY was clarified. The position taken is finally unequivocal. The FRY was not a Member of the United Nations since it came into being on 27 April 1992, and until 1 November 2000 when it became accepted as a new Member. This position was taken by the Court in 2004, and the same position was taken by the General Assembly of the United Nations, by the Security Council, by the Secretary-General of the United Nations — and also by the Applicant itself.

1.8. It is true, of course, that the Respondent has also made endeavours to open issues which appeared to be settled. But this was not a result of a legal gambit. This followed after a historic change on 5 October 2000 which represented more than a simple change of government. At that juncture, after an appalling decade, our country had to reconsider basic premises, including its relationship with the international community. Our position towards the United Nations and towards treaties was also rethought and revisited, and we opened issues of United Nations membership, access to the Court and jurisdiction, in the light of new clarifications which led to a widely shared view. The new Government of the FRY established in October 2000 never changed its position, never adapted its position towards different circumstances or different audiences. The Applicant, however, is taking us back to the arguments which were advanced in vain by the former

Government of the FRY — and which the Applicant is still opposing outside this case. The circle is full.

1.9. In her second round speech of 24 April 2006, Professor Stern tries to take us back to the stage where uncertainties and legal difficulties obtained. One obvious way towards this purpose is reliance on the arguments advanced by the former Government of Yugoslavia which insisted on continuity. In a situation in which uncertainties and controversies did exist, the main points on which the former Government of the FRY tried to rely were some doubts as to whether the designation "Yugoslavia" refers to the former Yugoslavia or to the FRY, and also reliance on some belated or less than clear statements made by United Nations authorities and officials, and failure — or alleged failure — of strict and timely implementation of some specific consequences of the positions taken. These points were raised by the former Government of the FRY as an argument purporting to demonstrate that continuity was somehow approved.

1.10. Professor Stern is not only relying on the substance of these arguments, she is citing them explicitly and extensively. She says, referring to the counsel of the former Government: "Il apparaît opportun de commencer cette analyse du statut de RFY à l'ONU en laissant la parole aux conseils de la Serbie-et-Monténégro, qui, mieux que moi, semblent détruire la thèse qu'ils présentent aujourd'hui."[6]

1.11. After citing at some length the arguments of the former Government of the FRY, Professor Stern concludes: "Voilà donc des arguments fort pertinents et fort utiles."[7] These arguments may be "fort utiles" from the point of view of the position of the Applicant, but they are not valid. Of course, I cannot, and must not restrict myself to saying that these arguments are wrong because these are the arguments of the Milošević Government. I shall demonstrate that these arguments are untenable, because they are lacking substance and foundation.

1.12. Let me mention, Madam President, that Professor Stojanović, myself, and other members of the present delegation of Serbia and Montenegro had already faced these arguments at

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[6]CR 2006/37, p. 13, para. 10 (Stern).

[7]CR 2006/37, p. 14, para. 10 (Stern).

the time when the opposition in Serbia contested the strong conviction and stance of the former Government of the FRY regarding continuity. The circle is really full.

1.1 Arguments endeavouring to prove continuity by reliance on belated and inconsistent (or seemingly inconsistent) actions of United Nations authorities and officials

1.13. Madam President, after the dissolution of the former Yugoslavia, Bosnia and Herzegovina opted to seek United Nations membership by applying as a new State, and it was admitted on 22 May 1992[8]. The FRY decided not to take this path. It did not apply for membership, but claimed instead continuity. This was rejected, but the FRY tried to argue that some actions of the United Nations nevertheless confirmed continuity.

The issue of sanctions

1.14. One of the arguments raised at that time by the former Government of the FRY was that the sanctions imposed on the FRY indirectly prove that the FRY was a Member of the United Nations, since sanctions can only be imposed on Members. This is precisely the argument now raised by Professor Stern. She says: "[L]a République fédérale de Yougoslavie a également fait l'objet de sanctions en vertu du chapitre VII, durant toute la période du nettoyage ethnique et qu'il n'a jamais été soutenu que ces sanctions s'adressaient à un Etat non membre de l'ONU."[9]

1.15. Madam President, there is no language in the Charter suggesting that the measures contemplated in Chapter VII could only be invoked against Members. Accepting the submission of the Applicant would also mean that use of armed force under Chapter VII could also be directed only against a Member — and never against a non-Member for the protection of the Member. This is not what Chapter VII says, this is not what any other provision of the Charter says, and this is not what logic says. What makes things even more obvious, Article 2 (6) of the Charter makes it explicit that the Organization may take steps to ensure that States that are not Members will act in accordance with the Principles of the Charter "so far as may be necessary for the maintenance of international peace and security".

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[8]United Nations doc. A/RES/46/237 of 22 May 1992.

[9]CR 2006/37, p. 15, para. 11 (Stern).

1.16. It is important to add, furthermore, that the text of the resolution on sanctions imposed on the FRY under Chapter VII on 30 May 1992[10] gives no support whatsoever, not even implicit support, to the contentions that the contemplated sanctions were sanctions against a Member State. To the contrary, the resolution actually addressed the issue whether the FRY did or did not continue membership status of the former Yugoslavia, and answered in the negative. This is just a month after the claim for continuity was presented, and this is before the claim reached the agenda, yet a preliminary position was already taken. It is stated in the preamble of United Nations Security Council resolution 757: "Noting that the claim of the Federal Republic of Yugoslavia (Serbia and Montenegro) to continue automatically the membership of the former Socialist Federal Republic of Yugoslavia in the United Nations has not generally been accepted". It is clear, Madam President, that the sanctions imposed on Yugoslavia can in no way demonstrate, or even imply, that the FRY was a Member of the United Nations by way of continuity, or in any other way between 1992 and 2000.

Appearance before the Security Council

1.17. Professor Stern further argues that the relations between the FRY and the Security Council were not interrupted, and during the first three years the FRY was invited 13 times, "autorisant le représentant de la RFY non seulement à assister aux réunions formelles, mais même à y prendre la parole"[11]. Sure. But this is in no way evidence of membership or even *sui generis* membership, as this is suggested by Professor Stern. Article 32 of the United Nations Charter makes it crystal clear and explicit that non-Members of the United Nations shall be invited to participate in a discussion (without a vote, of course) "if it is a party to a dispute under consideration by the Security Council". It is obvious that the FRY was a party to a dispute under consideration by the Security Council in the period referred to by the Applicant, thus it could have been invited in that capacity.

1.18. Furthermore, it is important to note that the Security Council was consistently mindful of the fact that the representative of the FRY cannot be treated as a representative of a Member

[10]Security Council resolution 757 (1992) of 30 May 1992.

[11]CR 2006/37, p. 22, para. 29 (Stern).

State. In practice, at the beginning of Security Council meetings, the President read a list of invitees, stating the name of the representative and the name of the country it represents. But an exception was made with regard to the person from the FRY, whose name was read without stating any country. To take an example from one of the 13 instances referred to by the Applicant, the record shows that at the meeting of 19 April 1993, the list of invitees included, among others, Mr. Sacirbey (Bosnia and Herzegovina)" and, after naming all invitees and their countries, the President stated: "I have also received a request dated 19 April 1993 from Ambassador Dragomir Djokic to address the Council. With the consent of the Council, I would propose to invite him to address the Council in the course of its discussion of the item before it."[12] This treatment can hardly serve as evidence of the membership, or *sui generis* membership of the FRY, the country of Ambassador Djokic.

The initial period

1.19. Another point where the Applicant borrows the arguments of the former Government of the FRY — which arguments remained unsuccessful — is the issue of treatment of the FRY during the first months since it came into being. In the words of Professor Stern:

> "Sans doute ne faut-il pas négliger ce fait que pendant les six premiers mois de son existence — et l'on dit souvent que les premiers mois de la vie sont déterminants pour l'avenir — la République fédérale de Yougoslavie a été un Membre incontesté de l'ONU exerçant toutes les prérogatives d'un Etat Membre de l'ONU."[13]

1.20. This is the same allegation which was repeated by Mr. Vladislav Jovanović, Foreign Minister in the former Government of the FRY, head of the diplomacy which tried to prove that the

[12]Provisional verbatim record of the 3201st Meeting, Security Council, United Nations doc. S/PV.3201, 19 April 1993, p. 3.

[13]CR 2006/37, p. 15, para.11 (Stern).

FRY did, indeed, continue the personality of the former Yugoslavia and, thus, remained a Member of the United Nations[14].

1.21. Madam President, the allegation of Professor Stern and of Minister Jovanović is simply not correct. First, it is not supported by any evidence and it is not true that the FRY exercised full membership rights in this period. Furthermore, the truth is that when the FRY came into being it submitted a claim. It claimed continuity with the former Yugoslavia, and on this ground, it claimed membership in the United Nations, membership in other international organizations, and party position in treaties. It is not true, however, that this claim was accepted — tacitly or otherwise — for five or six months, or for any time. What is true is that the competent organs of the United Nations — the Security Council and the General Assembly — took a position on this demand after about five months, when they rejected the claim of the FRY.

1.22. There is no rule in the Charter or anywhere else, and there is no rule of logic either which would say or imply that if a State is claiming that it is a Member of the United Nations, then it *is* a Member of the United Nations until the claim was examined and rejected. It is true — and probably understandable — that before a position was taken, various United Nations officials treated the representatives of the FRY and the documents submitted by representatives of the FRY in a hesitant and somewhat inconsistent manner. But this certainly cannot make a State a Member of the United Nations.

1.23. Let me add, Madam President, that the dilemmas and inconsistencies creating a *sui generis* position were actually recognized by the General Assembly. The General Assembly moved to qualify this situation, and this qualification was mindful of the fact that the FRY was *not* a Member. Thus, the term used is not "membership", not even "*de facto* membership", but "*de facto* working status". In paragraph 19 of resolution 48/88 of 29 December 1993 the General

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[14]Minister Jovanović published his arguments in scholarly papers as well. In 1998 he writes in the *Fordham International Law Journal*:

> "Between April 27, 1992, when the FRY was constituted on the part of the SFRY which remained after the unilateral secession of the four federal units, and September 22, 1992, when the GA adopted Resolution 47/1, the FRY exercised all the rights of a member State and actively participated in the work of the United Nations, including regular voting. This is borne out by the fact that the FRY was tacitly accepted as a member State continuing the international legal and political personality of the former SFRY." — Vladislav Jovanovic, "The Status of the Federal Republic of Yugoslavia in the United Nations", 21 *Fordham International Law Journal* 1719 (1998), p. 1724.

Assembly: "*Reaffirms* its resolution 47/1 of 22 September 1992, and urges Member States and the Secretariat in fulfilling the spirit of that resolution, to end the *de facto* working status of Serbia and Montenegro."[15]

Circulation of documents

1.24. Madam President, endeavouring to come up with some appearance of continuity, the Applicant raises the issue of circulation of documents. It refers to the letter of the Secretary-General dated 27 December 2001, and cites the following passage: "[d]u 27 avril 1992 au 1er novembre 2000, le Gouvernement de la République fédérale de Yougoslavie . . . s'est prévalu du droit dont jouissait l'ex-Yougoslavie en tant qu'Etat Membre de faire distribuer des communications comme documents officiels de l'Organisation"[16]. Professor Stern treats this document as a discovery, and asks: "Le défendeur soutient-il que ces documents n'ont jamais existé?"[17]

1.25. Well, we shall certainly not say that these documents, or the document referring to them, do not exist. As a matter of fact, I already cited the letter of the Secretary-General of 27 December 2001 in my concluding remarks in the first round[18]. Moreover, we very much intend to rely on this document, and we have included it in our judges' folders. But we shall point out the context of the quotation used by Professor Stern, and we shall also cite what comes immediately after the quotation.

1.26. Professor Stern cites part of a sentence from paragraph 7 of the document which you can see in your judges' folders — it is tab. 1, and I am referring to page 3 : it is paragraph 7 there. But this paragraph — just as the previous one — does not state conclusions of the Secretary-General. Instead it restates the argument of the former Government of the FRY. Paragraph 6, starting on page 2, summarizes the claim of the FRY for continuity, and paragraph 7,

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[15]United Nations doc. A/RES/48/88 of 20 December 1993, para. 19.

[16]Nations Unies, doc. A/56/767, lettre datée du 27 décembre 2001, adressée au président de l'Assemblée générale par le Secrétaire général, 9 janvier 2002, par. 7. Cited in CR 2006/37, p. 21, para. 26 (Stern).

[17]CR 2006/37, p. 21, para. 26 (Stern).

[18]CR 2006/13, p. 32, para. 3.50 and footnote 14 (Varady).

on page 3, starts with the following: "In furtherance of its claim, the Government of the Federal Republic of Yugoslavia performed a large number of acts . . ." These acts are those which included circulation of official documents. What Professor Stern cites is just a recapitulation by the Secretary-General of the steps taken by the FRY in furtherance of its claim.

1.27. What is even more important, the very same letter of the Secretary-General dated 27 December 2001 addressed to the President of the General Assembly made it crystal clear that the proposition of continuity was not accepted, that the FRY only became a Member State of the United Nations on 1 November 2000, and that the State the membership of which was not terminated was the former Yugoslavia, not the FRY. Professor Stern quoted the closing part of the last sentence of paragraph 7. Paragraph 8 — still on page 3 of tab 1 — starts with the following sentences:

> "In its resolution 55/12 of 1 November 2000, the General Assembly decided to admit the Federal Republic of Yugoslavia to membership in the United Nations. That decision necessarily and automatically terminated the membership of the *former Yugoslavia* in the United Nations."[19] (Emphasis added.)

1.28. Let me add, Madam President, that this document has several appendixes. Appendix III is a letter dated 19 November 2001 from the Permanent Representatives of all five successor States. You will find it on page 4 of tab 1. This letter was also signed by Mr. Mirza Kušljugić, Permanent Representative of Bosnia and Herzegovina to the United Nations. In this letter it is stated: "The State known as Socialist Federal Republic of Yugoslavia has ceased to exist and was succeeded by five equal successor States, none of which continued its legal personality."[20]

The issue of membership fees

1.29. This takes us to the issue of membership fees, since the letter of the Secretary-General of 27 December 2001, deals with "Unpaid assessed contributions of the former Yugoslavia". Madam President, whenever the point was made that there were inconsistencies in the handling of

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[19]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, para. 8.

[20]Letter dated 19 November 2001 from the Permanent Representatives of Bosnia and Herzegovina, Croatia, Slovenia, the former Yugoslav Republic of Macedonia and Yugoslavia, addressed to the Under-Secretary-General for Management, United Nations doc. A/56/767, Appendix III, pp. 11-12.

the dissolution of the former Yugoslavia the question of membership dues emerged as an example. This issue was also raised by Professor Stern — again relying on arguments raised earlier by the former Government of the FRY[21]. For a considerable time the treatment of membership dues marked the *sui generis* situation and showed difficulties stemming from the less than clear legal characterizations. Today, however, after clarifications given by competent United Nations authorities, we have gained a much better perspective in approaching this issue.

1.30. It is a fact that the United Nations Secretariat — consistent with listing "Yugoslavia" as a Member — imposed membership dues on "Yugoslavia". Although the dues were imposed on "Yugoslavia", rather than on the FRY, the FRY — in line with its endeavour to posit itself as the continuator of the personality of the former Yugoslavia — had paid some of these membership dues between 1992 and 2000.

1.31. Of course, the practice of the Secretariat cannot bind political organs or Member States, but the question of membership dues gave rise to conflicting interpretations and perplexity. This is the point where clarifications were very much needed — and this is the point where the clarifications, although not timely, are, indeed, clear and explicit.

1.32. After the FRY was accepted as a Member of the United Nations, the Secretariat took steps to clarify *who* "Yugoslavia" was, and *who* owed payments on behalf of "Yugoslavia". It has been made clear and unequivocal that these were membership dues of the *former Yugoslavia*. The former Yugoslavia was the Member. The FRY did not have any liability of its own. It was only invited in 2001 as one of the successor States to join in paying the debts of the predecessor *together with other successors*.

1.33. Consistent with this concept and perception, in 2001, the United Nations sought arrear payments (the debt of "Yugoslavia") from *all successor States*. This is logical, since if the former Yugoslavia had debts, and if no country continued its personality, then liabilities (just as assets) have to be divided among all successors.

1.34. After the admission of the FRY to the United Nations on 1 November 2000, all five successor States formally adopted a joint position regarding membership dues of the former

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[21]CR 2006/37, pp.23-26, paras. 32-40 (Stern).

Yugoslavia. In a letter dated 19 November 2001 — which we already referred to, and you can follow this in our judges' folders, tab 1, on page 4 — the FRY, Bosnia and Herzegovina and other successor States spelled out and elaborated their common position. In this letter it was stressed:

> "The State known as the Socialist Federal Republic of Yugoslavia has ceased to exist and was succeeded by five equal successor States, *none of which continued its legal personality*. This fact was confirmed by relevant Security Council and General Assembly resolutions of 1992."[22] (Emphasis added.)

1.35. We finally got to the point where ambiguous concepts and formulations were left behind. *Both the United Nations authorities and the Parties to this dispute* spelled out a clear position and joint perception. It has become clear and uncontested that:

— no State continued the personality and membership rights of the former Yugoslavia; and

— the entity which kept some *sui generis* position and residual membership rights in the United Nations, and which was referred to as "Yugoslavia", was actually the former Yugoslavia, not the FRY.

1.36. Let me add that the clear and unequivocal position taken by all five successor States was repeated. It was repeated, *inter alia*, in the letter dated 9 August 2005 which prompted Judge Tomka to raise his question. In this letter, all successor States — Bosnia and Herzegovina included — stated: "The Federal Republic of Yugoslavia that came into existence on 27 April 1992 became a United Nations Member not earlier than 1 November 2000; the State is presently known as Serbia and Montenegro."[23]

1.37. Trying to explain the obvious contradiction between its position during this oral hearing and an emphatic position taken by the same State less than a year ago, counsel for the Applicant explains that "ce n'est pas du tout une question de principe, c'est une modeste question d'argent"[24].

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

[23]See the letter dated 9 August 2005 from the Permanent Representatives of the former Yugoslav Republic of Macedonia and the Chargés d'affaires a.i. of Bosnia and Herzegovina, Croatia, Serbia and Montenegro, and Slovenia, addressed to Under-Secretary-General for Management, United Nations doc. A/60/140, Ann. IV, pp. 17-19.

[24]CR 2006/37, p. 24, para. 36 (Stern).

1.38. Not a principle but a modest question of money. Let me say first that this is not exactly in line with the good faith rhetoric advanced by the Applicant. But apart from that, this is not credible either. Had there been continuity, had the FRY really continued the personality of the former Yugoslavia, then it would have been quite obvious to argue that it is the FRY alone who has to pay the membership dues of "Yugoslavia" between 1992 and 2000, and Bosnia and Herzegovina would owe no money. It is obvious, however, that continuity was simply not contemplated any more by anyone as an option.

1.39. The same position — which cannot be but a position of principle — was consistently taken by Bosnia and Herzegovina — and not only when money was in question. To cite just one example among many[25], we shall refer to another joint letter written by the successor States including Bosnia and Herzegovina — this time without the FRY, since the letter was dated in 1999. In this letter, Bosnia and Herzegovina protested against the notification of a declaration made by the FRY under Article 36 (2) of the Statute, arguing that the FRY could not make a valid declaration since it was not a Member of the United Nations, and was not a party to the Statute. This time the context is not money but exactly the ability of the FRY to appear before this Court as a party to the Statute. The letter states — and it is included in our judges' folder, at tab 2, page 1:

> "Our respective Governments would like to express our disagreement with the content of the above-quoted notification. The notification can have no legal effect whatsoever, because the Federal Republic of Yugoslavia (Serbia and Montenegro) is not a State Member of the United Nations, nor is it a State party to the Statute of the Court, that could make a valid declaration under Article 36, paragraph 2, of the Statute of the Court."[26]

On behalf of Bosnia and Herzegovina this letter was signed by Ambassador Muhamed Šaćirbej — who was at that time Agent of Bosnia and Herzegovina in this case.

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[25]Among many other examples of statements of Bosnia and Herzegovina emphasizing that the FRY did not continue the personality of the former Yugoslavia, and was not a Member of the United Nations between 1992 and 2000, see, e.g., United Nations docs: A/C.5/49/49 (8 December 1994), A/49/853-S/1995/147 (17 February 1995), A/50/656 — S/1995/876 (19 October 1995), A/51/564 — S/1996/885 (1 April 1996), E.CN.4/1998/171 (22 April 1998), S/1999/120 (5 February 1999), S/1999/209 (26 February 1999), S/1999/639 (3 June 1999), A/54/L.62 (8 December 1999).

[26]Letter dated 27 May 1999 from the Permanent Representatives of Bosnia and Herzegovina, Croatia, Slovenia, and the former Yugoslav of Macedonia to the United Nations addressed to the Secretary-General, United Nations doc. A/53/992.

1.2 Parallels with the USSR and other countries, and the practice of the IMF and of the World Bank

1.40. Madam President, I trust that it has already been made sufficiently clear that there was no continuity, the FRY was not a Member of the United Nations between 1992 and 2000. Let me address, nevertheless, very briefly, the argument based on alleged parallels between the dissolution of the former Yugoslavia and the dissolution of the USSR and other countries.

1.41. Let me first say that these parallels — even if they were matching — certainly could not prove continuity. They cannot possibly prove that the continuity claim of the FRY was accepted, they could only indicate that the claim could have been accepted — although it was not.

1.42. But even this was not proven, because the parallels are *not* matching. Let us take as an example only the case which occurred in the same time period. The claim of Russia regarding continuity was accepted. Russia continued the position of the USSR in the United Nations and in the Security Council. But this happened after an unequivocal agreement of the successor States was reached. In the 21 December 1991 Alma Ata Agreement, the successor States of the USSR stated explicitly: "States of the Commonwealth support Russia's continuance of the membership of the Union of Soviet Socialist Republics in the United Nations including permanent membership of the Security Council and other international organizations."[27] This makes an obvious difference. In our case — unlike in the case of Russia — no other successor State supported the continuity claim of the FRY.

1.43. The Applicant also submits — without any reference — that the IMF and the World Bank considered all five States emerging from the dissolution of the former Yugoslavia as continuator States[28]. This point is more relevant because it contains an assertion as to how the FRY was treated, rather than how it could have been treated. But the assertion is patently wrong. The actual position taken by the World Bank and the IMF is the exact opposite — they did *not* accept continuity. Let me quote the position taken by the IMF:

> "[T]he Republic of Bosnia and Herzegovina, the Republic of Croatia and the Federal Republic of Yugoslavia (Serbia/Montenegro) are the successors to the assets

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[27]Agreement concluded between former Soviet republics, reprinted in United Nations doc. A/47/60-S/23329 (30 December 1991), Ann. V, p. 8; also in 31 *ILM*, p. 151.

[28]CR 2006/37, p. 27, para. 45 (Stern).

> and liabilities of the SFRY . . . Each successor may formally succeed to the membership of the SFRY in the IMF . . .”[29]

The same position was taken by the World Bank as well[30]. Positions taken by the IMF and the World Bank do not support, but clearly contradict, the proposition of continuity.

1.3 Whose membership was not terminated?

1.44. Relying on the letter of the Legal Counsel of 29 September 1992, the Applicant states that since resolution 47/1 did not bring about either termination or suspension of membership rights, the FRY remained a Member of the United Nations[31]. This argument could, of course, only stand on the assumption that the State the membership of which was neither terminated nor suspended was the FRY — rather than the former Yugoslavia. We shall demonstrate that this is a wrong assumption. The Applicant also argues that — although no suspension is mentioned in resolution 47/1 — Article 5 of the Charter regulating suspension was nevertheless applied, and since suspension is at issue, the FRY must have been a Member[32]. This is not only in evident contradiction with the letter of the Legal Counsel of 29 September 1992 which says explicitly that resolution 47/1 was *not* adopted pursuant to either Article 5 or Article 6 of the Charter[33], but it is also a clear *petitio principii*. Instead of trying to prove that the FRY was a Member and was suspended, the Applicant simply alleges that Article 5 was applied towards the FRY, and this allegation purports to be the proof that it was a Member.

1.45. These questions take us back to resolution 47/1 and to the letter of the Legal Counsel of 29 September 1992. Madam President, resolution 47/1 clearly does not recognize any rights or any standing of the FRY. There is no sentence, or part of sentence, or hint, which would accord any membership rights to the FRY. All dispositions contained in the resolution are rejections of the claims of the FRY. The FRY submitted one single ground on which it claimed to be a Member of

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[29]*Ibidem*; emphasis added.

[30]See World Bank, Socialist Federal Republic of Yugoslavia Termination of Membership and Succession to Membership, Executive Directors' resolution No. 93-2 (25 February 1993); see also World Bank Press Release No. 93/S43 (26 February 1993), and World Bank Press Release No. 2001/324/ECA.

[31]CR 2006/37, p. 17, para. 17 (Stern).

[32]*Ibid,*, p. 16, para. 14 (Stern).

[33]It is stated in the letter: "This explains the fact that resolution 47/1 was not adopted pursuant to Article 5 (suspension) nor under Article 6 (expulsion)." (United Nations doc. A/47/485.)

the United Nations — this was the claim to continuity. The General Assembly rejected this claim stating that the FRY "cannot automatically continue the membership of the former Socialist Federal Republic of Yugoslavia in the United Nations". The General Assembly decided instead that the FRY "should apply for membership in the United Nations" as other successor States of the SFRY did[34]. An explicit rejection just cannot indicate an implicit acceptance.

1.46. One could possibly say that it was not necessary to mention in resolution 47/1 that the FRY shall not participate in the work of the General Assembly. This would have followed anyway from the fact that the FRY's claim to membership rights by way of continuity were rejected, and that the FRY was instructed to apply for membership if it wished to become a Member. But one can certainly not infer any acceptance and rights from the mere fact that in addition to a *general* rejection an unnecessary *specific* rejection was added to the text of the resolution. The General Assembly added to the general denial of membership rights a specific denial of the right to participate in its own work. This may have been *ex abundanti cautela*, or maybe because at the given moment, before the General Assembly, participation in the work of the General Assembly was the most direct and most imminent issue.

1.47. Madam President, my aim is not to prove that all steps taken by United Nations authorities and officials regarding the Yugoslav problem were timely and logically coherent. It is generally submitted that this was not the case, but this is not relevant either. The point is that some belated or blurred steps taken just did not and could not make the FRY a Member of the United Nations. The wording adopted by resolution 47/1 did contain a logical redundancy. It would have been perfectly sufficient to state that the FRY did not continue the personality of the former Yugoslavia and thus has to apply for membership if it wishes to be a Member. It was not necessary to spell out specific consequences of this holding. But again, this redundancy may have blurred the picture, but could not have made the FRY a Member of the United Nations.

1.48. Madam President, as far as references to "Yugoslavia" are concerned, the membership of which, according to the Legal Counsel, was "neither terminated nor suspended", these references did not and could not have represented references to the FRY. This conclusion follows from logic,

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[34]United Nations doc. A/RES/47/1 (22 September 1992).

it follows from the wording of the letter of the Legal Counsel — and, most importantly, it follows from explicit clarifications given by the competent United Nations authorities.

1.49. First of all, the Legal Counsel could not have referred to the membership of the FRY when it said that the membership was neither terminated nor suspended. One just cannot terminate or suspend or even contemplate termination or suspension of the membership of a State that just presented a claim to membership by way of continuity — which claim was plainly denied.

1.50. It is the membership of the *SFRY, the former Yugoslavia,* which was formally neither terminated nor suspended. This happened because the situation which resulted from the disintegration did not fall into any of the patterns known by the Charter. It was clear that the FRY had not automatically become a Member, but the question arose whether one could consider the membership of an original Member as being extinguished without agreement of the successors, and without reliance on procedures of expulsion or suspension.

1.51. The former Yugoslavia was an original Member, and neither the Security Council nor the General Assembly took decisions which would have formally terminated this membership. Explaining the emerging situation, Matthew Craven concludes that the former Yugoslavia was not expelled or suspended, because there was no provision in the Charter covering the emerging situation[35]. This rather anomalous situation, in which residual membership rights of the former Yugoslavia were kept, lasted until a joint position between the successor States was taken.

1.52. What is also important, the letter of the Legal Counsel of 29 September 1992, although it uses the unfortunately vague term "Yugoslavia", it also gives indications regarding the entity to which this designation refers. The Legal Counsel identified the flag of the country whose membership was neither terminated nor suspended, and made it plain that it was the flag of the *former* Yugoslavia. The Legal Counsel explained that the flag which remains hoisted is "the flag of the old Yugoslavia as it is the last flag of Yugoslavia used by the Secretariat".

1.53. Let us add that while the designation "Yugoslavia" was typically left without explanation by competent United Nations authorities, when an explanation *was* given, it was stated

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[35]In the words of Craven: "The entity known as 'Yugoslavia' . . . has not formally been expelled or suspended from the organization and is still listed as being a party to the Charter of the United Nations, having been one continuously since 1945." (M. Craven, "The Genocide Case, The Law of Treaties and State Succession", 68 *British Year Book of International Law* (1998), p. 133). An explanatory footnote is added to this sentence: "This may well be because the Charter makes no provision for such cases of extinction." (*Op. cit.*, FN 38).

that "Yugoslavia" stands for the former Yugoslavia. For example, the 1998 *Yearbook of the United Nations* which publishes an official "Roster of the United Nations". And this roster includes "Yugoslavia", and explains in clear and simple terms that this name "[r]efers to the former Socialist Federal Republic of Yugoslavia"[36].

1.54. Let me finally stress that today, there are no more ambiguities. The present version of *Historical Information on Treaties deposited with the Secretary-General* makes it clear and explicit that "Yugoslavia", to which the Legal Counsel referred in his letter of 29 September 1992, was the *former* Yugoslavia. This clarifying word was not included in the original letter, but now it is stressed:

> "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."[37] (Emphasis added.)

2. The FRY only became a Member of the United Nations on 1 November 2000

1.55. Madam President, Members of the Court, it is common ground that the position of the FRY and the reactions of United Nations authorities were not clear and unequivocal between 1992 and 2000. There were contradictory references. But one cannot acquire membership by way of contradictory references. It is a persistent fact that the claim of the FRY for continuity was rejected. Thus it only could have become a Member of the United Nations by way of applying as a new State — and this *is* what eventually happened. It is true that these facts are more clearly discernible today than in 1993 or 1996. But the facts did not change. They were only clarified.

1.56. Due to lack of clarity a *sui generis* situation may have existed, but this did not, and could not have amounted to membership. Professor Stern quotes with approval an important characterization formulated in the *Legality of Use of Force* cases[38]. I shall quote exactly the same passage which was cited by Professor Stern:

> "Il convient de préciser que la locution *'sui generis'* employée par la Cour pour qualifier la situation de la République fédérale de Yougoslavie dans la période allant

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[36] *Yearbook of the United Nations 1998*, p. 1420, footnote 9.

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

[38] CR 2006/37 p. 12, para. 5 (Stern).

> de 1992 à 2000 n'est pas une expression normative, dont découleraient certaines conséquences juridiques bien définies, mais une expression descriptive . . ." (Affaire relative à la *Licéité de l'emploi de la force (Serbie-et-Monténégro c. Belgique)*, *exceptions préliminaires*, arrêt du 15 décembre 2004, par. 74.)

1.57. This is true and exact. The *sui generis* qualification does not prescribe a distinct legal standing. There is no third position between being a Member or not being a Member of the United Nations. The qualification of the position of the FRY between 1992 and 2000 as a *sui generis* position is descriptive, rather than prescriptive. It is, let me quote again, "not a . . . term from which certain defined legal consequences accrue; it is merely descriptive of the amorphous state of affairs in which the Federal Republic of Yugoslavia found itself during this period" (*Legality of Use of Force (Serbia and Montenegro* v. *Belgium), Preliminary Objections,* Judgment of 15 December 2004, para. 74).

1.58. Madam President, the FRY did *not* continue the personality and United Nations membership of the former Yugoslavia. It became a new Member on 1 November 2000. I trust that this is by now evident. It is also evident that it became a new Member without any hint or suggestion that it may have been a Member before. To the contrary, all steps taken during the procedure of admission as a new Member clearly *excluded* the hypothesis that the FRY may have had membership status before.

1.59. The procedure of admission bears no trace or hint of a pre-existing membership or quasi-membership position. There is no acknowledgment or hint of such a position in the letter of President Koštunica seeking membership[39]. There is no acknowledgment or hint of such a position in either the procedure or in the resolutions yielded by the procedure.

1.60. President Koštunica does not mention any special standing or existing rights of the FRY. Instead, he relies on Security Council resolution 777 which stated that the FRY cannot continue automatically the membership of the former Yugoslavia in the United Nations, and which

[39]See the Application of the Federal Republic of Yugoslavia for Admission to Membership in the United Nations, United Nations doc. A/55/528 S/2000/1043.

recommended the General Assembly to decide that the FRY should apply for membership in the United Nations[40].

1.61. This was simply and unequivocally the admission of a new Member. No procedural step prescribed for admission of new Members was avoided. The procedure was exactly the same as the procedure of admission of Bosnia and Herzegovina. Let us add that admission took place under agenda item 19 with the title: "Admission of new Members to the United Nations"[41]. Upon admission the United Nations official List of Member States makes it crystal clear that the FRY, now Serbia and Montenegro, is a Member since 1 November 2000[42].

1.62. Madam President, distinguished Members of the Court, the Respondent became a new Member of the United Nations on 1 November 2000. It was not a Member before, it did not continue the personality and membership of the former Yugoslavia. There have been five equal successor States. There may have been imprecise and ambiguous actions undertaken by United Nations authorities and officials, there were controversies, but these could not make the FRY a Member of the United Nations. A *sui generis* situation may have emerged, but, as this was stressed by this Court, "[the FRY] thus has the status of membership in the United Nations as from 1 November 2000 . . . it became clear that the *sui generis* position [of the FRY] could not have amounted to its membership in the Organization" (*Legality of Use of Force*, *op. cit.*, para. 78).

1.63. This honoured Court, the General Assembly, the Security Council, the Secretary-General of the United Nations, made it clear that the FRY was not a Member of the United Nations before it was accepted as a new Member on 1 November 2000. There was no continuity. This was what — outside this case — the Applicant itself is saying emphatically and consistently. This is what cannot be denied any more. Since there was no continuity, and since the FRY became a new Member on 1 November 2000, the FRY could not have been a party to the

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[40]See Application of the Federal Republic of Yugoslavia cited in the preceding footnote. The letter of President Koštunica refers to Rule 134 of the Rules of Procedure of the General Assembly, and to Rule 58 of the Provisional Rules of Procedure of the Security Council. Both of these Rules are in chapters entitled "Admission of new members". See Chapter X of the Provisional Rules of Procedure of the Security Council, and Chapter XIV of the Rules of Procedure of the General Assembly.

[41]United Nations doc. A/55/PV.48, The record of the 48th Plenary Meeting of the General Assembly, 1 November 2000, p. 26.

[42]The List of Member States, www.un.org/Overview/unmember.html — status as of 6 May 2006.

Statute in 1993, and the FRY could not have remained bound by the Genocide Convention, and could not have become bound either before 1 November 2000.

Madam President, thank you very much for the attention and I would like to ask you now to give the floor to Professor Zimmermann. Thank you.

The PRESIDENT: Thank you, Professor Varaday. I do now call to the Bar Professor Zimmerman.

Mr. ZIMMERMANN: Thank you, Madam President.

2. ISSUES OF GOOD FAITH

2.1. Madam President, Members of the Court, may it please the Court. Following up on the issues related to United Nations membership, I will now address the Applicant's arguments based on good faith. Let me start with some general remarks.

A. General observations as to the Applicant's arguments relating to good faith

2.2. In his pleading of 21 April, counsel for the Applicant, and in particular Professor Thomas Franck, at length elaborated on why the Respondent should be precluded from raising objections based on questions of access and jurisdiction at this stage of the proceedings. The fundamental line of reasoning underlying his pleading — recurring so often that the Applicant's Co-Agent would no doubt have spoken of a "mantra" — was the issue of good faith. This good faith argument was couched in different legal concepts, which were used almost interchangeably: throughout the two rounds of pleadings, counsel for the Applicant notably argued that "Yugoslavia" — the term apparently being used with deliberate lack of precision — "perhaps created a situation of estoppel"[43], that it violated the principle of good faith[44], that it created "a form of *forum prorogatum*", that Serbia and Montenegro put itself in a situation of estoppel[45], that the Court should apply the "concept of equitable estoppel and the obligation of good faith"[46], that the

[43]CR 2006/3, para. 19 (Pellet).

[44]*Ibid.*

[45]CR 2006/35, para. 21 (Pellet).

[46]CR 2006736, para. 3 (Franck).

Respondent has "acquiesced" in the exercise of jurisdiction by this Court[47], or that its behaviour might amount to "preclusion" or "foreclusion"[48], a "tacit recognition" of the Court's jurisdiction or, finally, a "waiver of rights"[49]. Along similar lines, counsel on the other side have also argued that the principles of *venire contra factum proprium non potest,* of *allegans contraria non audiendus est* or finally *nullus commodum capere de sua injuria propria* should apply to the present case[50].

2.3. Interestingly, while providing the Court with a whole arsenal of legal concepts, counsel for the Applicant said very little about the conditions governing their application. What is more, Professor Franck seemed to argue that the "good faith considerations", whether in their acquiescence, estoppel or other form, precluded the Applicant not only from raising objections directed against jurisdiction under Article IX of the Genocide Convention, but also from bringing arguments concerning the question of access to the Court. This reasoning of course was in line with the Applicant's general approach of blurring issues of access and jurisdiction into a matter of "compétence", but it is clearly not in line with your own jurisprudence.

2.4. In short, counsel for the Applicant proposed extremely far-reaching consequences while never telling the Court what are the exact legal requirements in order for the very concept of good faith to be applied. To support this rather casual approach with respect to legal concepts, Professor Franck first and foremost stressed the nature of the Respondent's pleas, which he denounced as references to "technicalities" or "evasion"[51]. Yet, his approach does not take into account the position of this Court, which has made it clear in its correspondence with the Parties in this case that they are entitled to raise jurisdictional issues at this point in time if they wish do so.

2.5. Madam President, it is on the basis of this understanding that I will now submit to you a number of reasons why the Applicant's good faith arguments should not meet with success. In doing so, I will attempt to follow the different legal requirements governing the arguments based on good faith. This also means that I will approach the matter on the basis of your jurisprudence,

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[47] *Ibid.*, paras. 12 and 17 (Franck).

[48] *Ibid.*, para. 23 (Franck).

[49] *Ibid.*, para. 25 (Franck)

[50] CR 2006/37, para. 15 (Pellet), respectively para. 36 (Pellet).

[51] See CR 2006/35, p. 52, paras. 11-12, and CR 2006/36, p. 31, para. 21, respectively (Franck).

in which you have frequently made clear that concepts such as estoppel or acquiescence and other related notions presuppose the existence of certain *specific* legal requirements. As I will demonstrate, at least three of these requirements are not fulfilled in our case.

2.6. *First*, the concepts of acquiescence, estoppel or preclusion only operate and apply in interstate relations and with regard to subjective rights and obligations between the States concerned. Thus they do not apply to objective statutory requirements, which the parties cannot dispose of.

2.7. *Second*, acquiescence, estoppel and other related notions presuppose either clear and unambiguous conduct on behalf of the State that is said to have lost its right, or a clear and unambiguous situation in which that State could have been reasonably expected to assert its right.

2.8. *Third and finally*, estoppel, acquiescence and other related notions presuppose a reliance on the part of the other State — that is the State pleading estoppel or acquiescence — that the right in question would no longer be asserted.

2.9. As I will show in the following, not *one* of these three elements is met in the present case. The Applicant's reliance on general notions of good faith — whether in their acquiescence, estoppel or other form — therefore is unjustified, and therefore it cannot meet with success. Before exploring these issues in turn, let me make two further brief observations. Both concern the relation between the different arguments advanced, and are intended to chart the course for their evaluation that will then follow.

2.10. For once, I would like to stress that the arguments directed against the Applicant's pleadings on good faith are *alternative* arguments. Although I submit to your attention three considerations, I would like to clarify that each single one of them is sufficient to undermine the Applicant's pleading. Having invoked the general concept of good faith, the Applicant has to establish that *all* its requirements are met in the present case. I believe that *none* of them can be sustained, but it would of course be sufficient if only one of them was not met.

2.11. Furthermore, it bears repeating that our arguments relating to access and jurisdiction are also alternative arguments. As I have noted, various counsel for the Applicant, in their respective pleadings, often seemed to blur matters of access and jurisdiction. But their alternative character is neatly brought out in your 2004 Judgments in the *Legality of Use of Force* cases, and in

particular in the brief phrase: "only those States which have access to the Court can confer jurisdiction upon it"[52].

2.12. Madam President, Members of the Court, I hope you forgive me for commenting on these rather evident issues. However, they seem to me, at least, to be necessary comments on the Applicant's rather generalized assertions of general legal concepts — concepts that produce broad legal consequences but that apparently are not governed by specific legal conditions.

2.13. Let me now begin with the more specific considerations aimed at countering the Applicant's good faith argument. The first consideration is that the notions of estoppel and acquiescence are simply not applicable with respect to issues of access to the Court.

B. Estoppel and acquiescence are not applicable with regard to issues of access

2.14. The essence of my argument in that regard is this: a State can only acquiesce in the loss of a right, or be estopped from invoking it, in relation to another State, or other States. Acquiescence and estoppel presuppose a legal relation between actors of international law. In his separate opinion in the *Temple of Preah Vihar* case, on which counsel for the Applicant so much focused his attention, Judge Alfaro made this clear by pointing to the quintessential example of bilateral treaties[53]. In the *Land, Island and Maritime Frontier Dispute* case, a Chamber of this Court described the essentially bilateral nature of estoppel when describing it as: "a statement or representation . . . *by one party to another* and reliance upon it by *that other party to his detriment* or to the *advantage of the party making it*."[54]

2.15. More generally, it is surely no coincidence that international courts and tribunals have usually been faced with claims based on acquiescence or estoppel in cases involving territorial disputes or disputes concerning boundaries. What these disputes have in common is that the disputed right (in whose loss one State may have acquiesced, or that that State may be estopped from invoking) can form the subject of *inter partes* negotiation. It is surely up to the two (or more)

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[52]Case concerning *Legality of the Use of Force (Serbia and Montenegro* v. *Belgium)*, para. 46.

[53]*I.C.J. Reports 1962*, p. 42.

[54]Case concerning *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras), Application to Intervene, Judgment, I.C.J. Reports 1990*, p. 118, para. 92.

parties to the dispute to agree on the course of their boundary, or on the territorial status of a disputed piece of land.

2.16. But the same considerations do *not* apply to the rights that are at issue in the present case, namely the right to raise arguments based on the lack of one party's access to the Court. The statutory requirements concerning access are simply not subject to rules of estoppel or acquiescence, as the parties are not in a position to dispose of them. Access to the Court is not subject to the discretion of the parties. It exclusively concerns the relationship between a State (in this case, the Respondent), on the one hand, and the Court, on the other.

2.17. Whilst acquiescence and estoppel concern *subjective* legal positions, access is an *objective* condition — a requirement whose fulfilment is to be assessed exclusively by this Court, as the guardian of the Statute.

2.18. Madam President, Members of the Court, already during the first round of our pleadings, my colleague and friend Vladimir Djeric has explored your jurisprudence on the question of access. I will certainly not repeat what he has said nor deal with your jurisprudence in any detail. Instead, I would simply reiterate that your jurisprudence clearly establishes access as the most fundamental condition of proceedings, and one that any State appearing before this Court must fulfil in each and every case at the relevant time.

2.19. In his pleading, Mr. Djeric has also analysed the minimum requirements governing access to the Court, listed in Article 93 of the Charter of the United Nations and Articles 34 and 35 of the Statute, and he has shown that this Court has already determined that the Respondent does not meet these minimum requirements with regard to cases brought before its admission to the United Nations in 2000.

2.20. Counsel for the Applicant contend the Respondent is barred from now arguing lack of access. But this ignores the basic distinction between, on the one hand, subjective legal positions subject to acquiescence or estoppel, and, on the other, objective requirements of inter-State litigation that can only be determined by the Court, and to which acquiescence and estoppel do not apply.

2.21. Madam President, allow me to further elaborate on this crucial distinction. It is a distinction that is widely recognized by writers analysing the Court's law and procedure. I do not

wish to present to you an exhaustive analysis of the literature on the topic, but would like to draw your attention to two very pertinent remarks. The first is by Georg Schwarzenberger, who observed in no unclear terms that: "if a party to a dispute is a State to which the Court is closed, this suffices to prevent the case from receiving consideration by the Court"[55].

2.22. *Second*, the distinction between subjective factors capable of modification through *inter partes* conduct and objective factors to which acquiescence and estoppel do not and did not apply, was also accepted by Professor Thirlway. Writing on *forum prorogatum*, that is, a form of party conduct that like acquiescence is said to establish consent, he stated:

> "*Forum prorogatum* only operates to provide the element of agreement constitutive of jurisdiction; thus it cannot make up for a jurisdictional or procedural defect which cannot be cured by the agreement of the parties, e.g., lack of status as a party to the Statute."[56]

2.23. But what is by far more important is of course your own jurisprudence on the matter. In fact, in your 2004 Judgments in the cases concerning *Legality of Use of Force*, you unequivocally clarified that it is *upon the Court*, and *not upon the parties*, to determine the question whether a given State has access to the Court or not:

> "The question is whether *as a matter of law* Serbia and Montenegro was entitled to seize the Court as a party to the Statute at the time when it instituted proceedings in these cases. Since that question is independent of the views or wishes of the Parties, even if they were now to have arrived at a shared view on the point, the Court would not have to accept that view as necessarily the correct one. 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 consent."[57]

2.24. It is thus ex officio that the Court can, and indeed has to, examine whether the Respondent could validly be brought before this Court in the present case. Arguments based on acquiescence, estoppel or *forum prorogatum,* even if their requirements were otherwise fulfilled, *quid non*, cannot apply and in particular cannot absolve the Court from considering the matter.

2.25. Madam President, allow me to put forward two further arguments supporting this conclusion. The first is a simple comparison; it is aimed at reinforcing the importance of the

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[55]G. Schwarzenberger, *International Law as applied by international courts and tribunals*, Vol. IV, p. 434.

[56]H. Thirlway, "The Law and Procedure of the International Court of Justice 1960-1989", *BYBIL*, 1998, 1, p. 27.

[57]Case concerning *Legality of Use of Force (Serbia and Montenegro* v. *Belgium)*, Judgment of 15 December 2004, para. 36; emphasis in the original.

fundamental distinction to be drawn between subjective legal positions governed by acquiescence or estoppel, and objective requirements of inter-State litigation outside the parties' competence.

2.26. If we assume for a moment that the parties could decide on access to the Court, by means of estoppel, acquiescence, or through some other form of conduct, what would be the consequences of such a line of reasoning? One would have to accept that just as access, other objective conditions could be determined by them. If we look at the provisions setting out objective requirements of proceedings before this Court, namely Article 93 of the Charter and Articles 34 and 35 of the Statute, we for example, find in Article 34, paragraph 1, that the Court is only open to States. Now, could that requirement also be subject to a determination by the parties? Could two sub-State entities, or two groups, decide that they would regard each other as States in the sense of Article 34 of the Court's Statute, and argue their dispute here, in the Great Hall of Justice? I believe it is safe to assume that they could not.

2.27. To take another example: could States agree on a certain meaning of the term "treaties in force", and then simply bring a case on the basis of Article 35, paragraph 2, of the Court's Statute?

2.28. These questions, at least at first glance, might seem far-fetched and of course can only be answered in the negative. But I believe they illustrate that there are certain conditions of proceedings before this Court that are *objective* conditions which are not subject to the conduct of the parties — whatever form such conduct might take. Among these objective conditions that have to be fulfilled is, as you clarified, also the question of access to the Court.

2.29. Madam President, Members of the Court, there is a second argument justifying the distinction between objective and subjective factors. I could elaborate now on that point or we could take the break. I am in your hands, Madam President.

The PRESIDENT: Why not continue for just a while longer?

Mr. ZIMMERMAN: Thank you. As I said, there is a second argument justifying the distinction between objective and subjective factors and that concerns the institutional set-up of the United Nations. One of the recurring themes of this case is the close relation between issues of United Nations membership and proceedings before this Court, the United Nations "principal

judicial organ"[58]. The United Nations Charter of course deliberately divides the powers and competencies of its main organs. Not always does it do so in a very clear and unambiguous manner. But it is very clear in one respect: in its Articles 4 to 6, it entrusts decisions about membership, including admission, to two of the main organs, namely the Security Council and the General Assembly. This Court has emphasized this in the Advisory Opinion on *Conditions of Admission of a State to Membership in the United Nations*. In your Opinion of 28 May 1948, you first noted the material conditions for membership under Article 4, paragraph 1, of the Charter. You then went on to observe: "All these conditions are subject to the judgment of the Organization" (*I.C.J. Reports 1948*, p. 62); and then further noted: "The judgment of the Organization means the judgment of the two organs mentioned in paragraph 2 of Article 4"[59]: that is the General Assembly and the Security Council.

2.30. In our case, which is so charged with membership issues, the role of the General Assembly and the Security Council and the interrelation between the different United Nations organs should not be overlooked. It was said by Judge Lachs in 1992 that, while the various main organs of the United Nations do each have their various roles to play in a situation or dispute, they should act: "in harmony though not, of course, in concert and that each should perform its functions with respect to a situation or dispute, different aspects of which appear on the agenda of each, without prejudicing the exercise of the other's powers" (*Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya* v. *United Kingdom), Provisional Measures, Order of 14 April 1992, I.C.J. Reports 1992;* separate opinion of Judge Lachs, p. 27).

2.31. Admittedly, the Security Council and the General Assembly were in part responsible for what you described as an "amorphous legal situation concerning the status of the Federal Republic of Yugoslavia vis-à-vis the United Nations"[60].

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[58]Cf. Art. 92, United Nations Charter.

[59]*Ibid.*

[60]Case concerning *Legality of the Use of Force (Serbia and Montenegro* v. *Belgium)*, para. 79.

2.32. However, your jurisprudence also shows that the amorphous legal situation has not been indefinite. It came to an end on 1 November 2000, with the admission of the FRY to the Organization. In line with the procedure established by the United Nations Charter, that admission was the result of a recommendation by the Security Council[61] and a subsequent decision by the General Assembly[62]. One should also note that the approach adopted by the two main organs was based on a deliberate decision to make use of the regular Article 4 admissions procedure rather than any other form. This clear-cut approach chosen by both organs is even more relevant since the cases of Indonesia and the dissolution of the United Arab Republic have demonstrated that the organs of the United Nations may also simply reconfirm otherwise doubtful membership situations — if, indeed, they considered that one State was still a Member. Besides, as we all know, after the Dayton Peace Agreement, discussions had been underway within the organization to do just this, namely to simply confirm that "Yugoslavia" was still a Member of the United Nations. But this was not done: the two United Nations organs apparently considered that there was no Yugoslav membership which could be confirmed.

2.33. This new development, this new admission, instead of a reconfirmation of membership, also finally clarified the *status quo ante*. Again, I can restrict myself to citing what you stated in December 2004:

> "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"[63]

and, one may add, as it seems to be a necessary implication, at any other point in time between 27 April 1992 and 1 November 2000.

2.34. Madam President, Members of the Court, could I ask you to consider for a moment the consequences of a judgment based on acquiescence or estoppel or any other party-oriented

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[61]United Nations doc. S/RES/1326 of 31 October 2000.

[62]General Assembly res. 55/12 of 1 November 2000.

[63]Case concerning *Legality of the Use of Force (Serbia and Montenegro* v. *Belgium)*, para. 79.

mechanism holding that, notwithstanding the Security Council and General Assembly decisions, the Respondent could be treated as a State party to the Statute of the Court in the present case.

2.35. It is evident that to hold that by virtue of estoppel or acquiescence or otherwise, the parties could have themselves agreed on a certain interpretation of the FRY's membership issue would completely ignore the United Nations Charter's division of powers. If membership was negotiable for the parties, what would become of Article 4 of the Charter whose fundamental, indeed constitutional, importance you so rightly underlined in the 1948 *Admissions* Advisory Opinion?

2.36. What is more, what signal would a judgment by this Court, ratifying a "party agreement" on membership issues, send to the other main organs of the United Nations? Would such a judgment really be in line with the late Judge Lachs' plea for inter-institutional respect?

2.37. The Respondent submits that Applicant's arguments on good faith ignore the constitutional set-up of the United Nations Charter in that they fail to accept the political organs' competence to decide issues of membership. This again shows that Applicant's pleading on the issue of good faith is based on a fundamentally flawed conception of the underlying legal notions, of the rights and obligations that can form the subject of acquiescence and estoppel, and of the function of membership within the Organization.

2.38. Let me conclude this part of my argument by observing that even if one were to otherwise consider, be it only *arguendo,* that due to considerations of good faith Respondent could not argue a lack of jurisdiction now, it would still not have access to the Court. This fundamental requirement for the Court to decide this case on its merits is simply not subject to the wish of the States involved in the current proceedings — whatever position they might have taken inside or outside this Great Hall of Justice, be it individually or be it jointly.

I have hereby concluded my first argument and I would now move on either to my second argument or we take the usual break.

The PRESIDENT: I think now will be a good moment for the break. Thank you.

Mr. ZIMMERMAN: Thank you.

The PRESIDENT: The Court now rises.

The Court adjourned from 4.25 to 4.45 p.m.

The PRESIDENT: Please be seated. Yes, Professor Zimmermann.

Mr. ZIMMERMANN: Thank you, Madam President. Madam President, Members of the Court, I hope I have demonstrated that issues of access to the Court are not subject to acquiescence, estoppel and other party-oriented mechanisms in the first place.

2.39. I will now move on to my second argument directed against the Applicant's good faith pleadings. I will demonstrate that the Respondent never expressly or implicitly accepted that it would not raise jurisdictional arguments, that accordingly there was never a clear and unambiguous expression of a loss of right.

C. No clear and unambiguous expression of a loss of right

2.40. Madam President, Members of the Court, issues of estoppel and acquiescence are to be viewed in the context of the issue we are considering — and we are focusing on issues of jurisdiction. From the very beginning of these proceedings the Respondent has always challenged the Court's jurisdiction. This was formally acknowledged by the Court when it stated in its 1996 Judgment on jurisdiction that the Respondent had "consistently contended during the subsequent proceedings 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 to the provisional measures stage of the case, *I.C.J. Reports 1993*, pp. 341-342).

2.41. As a matter of fact the Applicant itself complained that the Respondent had time and again claimed that the Court has no jurisdiction. It is already for this reason that it seems far-fetched to argue that the Respondent would now be estopped to do just this — argue that the Court lacks jurisdiction. As this Court observed in the *Nicaragua* case:

> "estoppel may be inferred from the conduct, declarations and the like made by a State which . . . *clearly and consistently* evinced acceptance by that State of a particular régime" (*I.C.J. Reports 1984*, p. 415, para. 51) (emphasis added).

2.42. In our case, counsel for Bosnia and Herzegovina however attempted to focus on one *specific* point in the Respondent's conduct relating to jurisdiction — namely, its alleged failure to

raise the question of its treaty membership in the Genocide Convention at an earlier stage of these proceedings. By doing so, counsel for the Applicant has however unduly restricted the scope of analysis. Let me again quote this Court's statement from the *Nicaragua* case. In that case, this Court required the "acceptance by . . . State of a particular régime" *(ibid.)*. In the present case, the relevant régime is that of the Court's jurisdiction. The question to be answered therefore is whether or not the Respondent has "clearly and consistently" accepted that régime — that is, your jurisdiction. But taking the procedural history of this case into account, can one really say that the Respondent has clearly and consistently accepted that this honourable Court has jurisdiction? I believe the answer to this question is obvious — the Respondent has never done so.

2.43. Madam President, Members of the Court, but even if we follow, for the time being, the restricted focus the Applicant is proposing, the circumstances of the present case are still *not* of such a nature as to give rise to estoppel or acquiescence. According to the Applicant all that the Respondent should have done is to raise "the most obvious defence" available — that is its status within the United Nations Charter and the Genocide Convention[64]. Yet given the ambiguities that surrounded the legal status of the Respondent, it simply could not have been expected to discuss its own status. It is true that to Professor Franck, the matter seemed clear. But, as we know, many things appear clear in retrospect, and yet were far from obvious at the relevant point in time. It seems to me that Professor Franck, looking back at the earlier stages of these proceedings, may have presented a rather simplified picture of a highly complex situation: one that does not do justice to the uncertain state of affairs obtaining in 1996.

2.44. Had matters indeed been as obvious as Professor Franck now suggests, the Respondent could indeed now be barred from relying on a different legal position. However, if matters were not quite as clear, then one might view the Respondent's conduct in a quite different light. The FRY was then arguing on the basis of a certain assumption which at that time was perfectly tenable but later proved to be incorrect. If that is the correct position, I submit that the Respondent's decision not to raise all possible preliminary objections in 1996 cannot be held against it now, and cannot be interpreted as forming the basis for acquiescence or estoppel.

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[64]CR 2006/36, p. 27, para. 9.

2.45. Fortunately, there is much on record that corrects Professor Franck's rereading of this case's history. You, yourself, first pronounced on the matter in your Order on provisional measures of 8 April 1993 where you already noted the "legal difficulties" to which the Respondent's status within the United Nations had given rise (*I.C.J. Reports 1993*, p. 14, para. 8).

2.46. Later, in your Judgments of 15 December 2004 in the *Legality of Use of Force* cases, you again recalled this state of affairs when observing that "the *sui generis* position of the Federal Republic of Yugoslavia within the United Nations . . . had been fraught with 'legal difficulties' throughout the period between 1992 and 2000" (case concerning the *Legality of Use of Force (Serbia and Montenegro* v. *Belgium)*, para. 78).

2.47. Looking back to that period, you spoke of an "amorphous legal situation" and admitted that had you had

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

2.48. I submit that these two statements provide a much more accurate description of the situation obtaining between 1992 and 2000 than the one given by counsel for the Applicant. However, it is interesting to observe that at an earlier stage of the proceedings, the Applicant itself had accepted that matters were far more complex than it is now prepared to acknowledge. For example, in the Memorial, the Applicant "admitted that . . . the governing bodies of the United Nations have not made yet a final decision regarding the status of Yugoslavia (Serbia and Montenegro) in the United Nations"[65].

2.49. And indeed, if we look at the Applicant's present position, the matter even seems to remain controversial to this very date. Already, during the first round of pleadings, my colleagues and I have argued that your more recent jurisprudence clearly establishes that Serbia and Montenegro was not a Member of the United Nations between 1992 and 2000. But notwithstanding this jurisprudence, counsel for the Applicant have maintained the opposite. In her pleading Professor Stern vigorously argued that the Respondent had remained a Member of the

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[65]Memorial of 15 April 1994, para. 4.2.3.14.

United Nations[66]. I note in passing that these views can hardly be brought in line with other statements made by representatives of the Applicant — a matter about which I will speak in a minute. But for the moment, the more important point to note is, that according to counsel for the Applicant, *still, even today,* the Respondent's status within the United Nations, between 1992 and 2000, remains controversial.

2.50. Now, that may be so. But if indeed there was — and apparently there still is — what Professor Stern called "une bataille de qualification"[67], could one really fault one Party in this litigation for having initially opted for one of the defensible positions — one that later turned out to be incorrect? I submit that the Respondent's position, in 1996, was — to say the least — plausible, and it should not now be faulted for having taken it in the first place.

2.51. Madam President, Professor Pellet has advanced an additional argument — possibly because he was himself not sure of the apparent "clarity" of the situation obtaining in 1993 or 1996. In his pleading of 21 April, he argued the Respondent could have easily clarified the legal uncertainties which prevented the Court from taking a definitive stance on the matter[68]. But again, I submit, this argument fails to accept that in 1996, matters simply were not clear. And besides — and possibly more importantly — it vastly overestimates the Respondent's powers.

2.52. Let me begin with this latter point. As you observed in 1993 and affirmed in 2004, it was not one State's insistence on a certain reading of history that caused problems. Rather, the "legal difficulties" to which you referred flowed from the course deliberately adopted by the United Nations two main political organs at the time. Clearly, the only conduct that could have clarified the legal situation would have been a decision by those two political organs. In fact, the matter is rather clearly recognized in the Applicant's Memorial, where it is stated: "*the governing bodies of the United Nations* have not yet made a final decision regarding the status of the Respondent"[69].

2.53. In short, while the Respondent's view was certainly one of the factors complicating the legal assessment, the Respondent was not alone in that, and — more importantly — it could not

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[66]CR 2006/37, pp. 10 *et seq.*

[67]CR 2006/27, p. 12, para. 6 (Stern).

[68]CR 2006/36, p. 23, para 58 (Pellet).

[69]Memorial of 15 April 1994, para. 4.2.3.14.

simply have clarified matters. Very briefly, I submit that in any event, one cannot fault the Respondent now for its failure to abandon its claim to identity at the preliminary objections stage. As your jurisprudence shows, matters simply were not that clear. True, the Respondent's reading was not the one that eventually was to become accepted. But in 1996, it seemed to be a tenable position. Besides a State certainly could not be required to give up its claim of continuity in a situation which was so much shrouded with uncertainties and where mixed signals were at that time being sent out by the organs of the United Nations.

2.54. It was a somewhat curious turn of events that in her pleading of 24 April, Professor Stern has placed before you much of the evidence supporting the interpretation and the claim of continuity previously made by the FRY itself. Let me be precise: the Respondent does not follow her in her conclusion that the FRY was a United Nations Member in the period between 1992 and 2000. As my friend and colleague, Tibor Varady, has shown, that indeed seems to be a rather far-fetched conclusion. However, Professor Stern's comprehensive presentation of the evidence at least establishes one matter, namely that in 1996, the membership situation still awaited a final clarification, and that different positions could still be taken and that the Respondent can accordingly not now be barred from raising this very issue.

2.55. Lastly, in order to support their argument on good faith, counsel for the Applicant have made much of the counter-claims raised in this case. To Professor Franck, the Respondent thereby "actively asserted its adherence to the Convention"[70]. But is that really a convincing evaluation of the Respondent's conduct?

2.56. What would have been Professor Franck's advice to a government whose preliminary objections had just been rejected? Would one not rather have to say that after the 1996 Judgment had been rendered, Serbia and Montenegro simply had no other choice than to proceed with the case — even though its own position as to jurisdiction had not changed a iota.

2.57. And can one really fault a State for availing itself of a procedural right to bring counter-claims — a right whose existence this Court affirmed, over the Applicant's objections, in its Order of 17 December 1997?

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[70]CR 2006/36, p. 29, para. 12.

2.58. We would submit that the FRY's counter-claims, which in any event were later withdrawn after the FRY had been admitted to the United Nations and after its legal status had thus been clarified, were nothing but a logical consequence of the Court's 1996 Judgment on jurisdiction. More generally, the Respondent submits that the exercise of rights either expressly provided for in the Statute or the Rules of this honourable Court or developed in its jurisprudence should be presented as what they are: an exercise of rights specifically recognized, but not an illegitimate delaying strategy or a sign of bad faith.

2.59. Madam President, estoppel and acquiescence are exceptional constructions. They should not be applied to a situation which was "shrouded in legal uncertainties"[71] even more so when the Respondent has consistently taken a certain position namely that the Court does not have jurisdiction. That brings me to my last point namely that moreover there simply was no legitimate reliance on the side of the Applicant.

D. No legitimate reliance on the part of the Applicant

2.60. Madam President, distinguished Members of the Court, even if you followed Professor Franck's interpretation, and held that everything was obvious in 1993 or 1996, I submit that the Applicant's argument based on good faith still would not and could not succeed. In order to explore this, allow me, Madam President, to deal with a third argument. It is based on the Applicant's own perception of the — allegedly so obvious — legal situation. While he did not say so expressly, I do not think that counsel for the Applicant would dispute that estoppel and acquiescence presuppose a certain form of conduct on behalf of the State invoking it.

2.61. The State claiming estoppel and acquiescence — the Applicant in this case — must have legitimately relied on the appearance allegedly created. After all, as Professor Franck noted, good faith arguments ultimately are based on notions of fairness[72]. Fair conduct in litigation however is a basic rule that applies to both parties to the dispute, and when assessing one party's behaviour, one should not ignore the other party's conduct. Within the legal régime governing estoppel and acquiescence, this basic condition is most commonly phrased in terms of a "legitimate

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[71]Cf. case concerning *Legality of the Use of Force (Serbia and Montenegro* v. *Belgium)*, para. 79.

[72]See e.g. CR 2006/36, p. 32, para. 22.

reliance". With respect to estoppel and preclusion, Judge Fitzmaurice, in his separate opinion in the *Temple of Preah Vihar* case, referred to this in the following sense:

> "The essential condition of the operation of the rule of preclusion or estoppel . . . is that the party invoking the rule must have 'relied upon' the statement or conduct of the other party, either to its own detriment or to the other's advantage."[73]

2.62. In rather similar terms, this Court observed in the *Nicaragua* case — in the passage to which I have already referred:

> "estoppel may be inferred from the conduct, declarations and the like made by a State which not only clearly and consistently evinced acceptance by that State of a particular régime, but also had caused another State . . . *in reliance on such conduct,* detrimentally to change position or suffer some prejudice"[74].

2.63. Finally, with respect to acquiescence, essentially the same requirement is contained in the frequent statements that the State invoking acquiescence must have been entitled to perceive the other State's silence as amounting to an abandonment of a right.

2.64. Applying this requirement of reliance once again to the context of jurisdiction let me state first that only reliance on acceptance of jurisdiction can be relevant. But there can have been no such reliance since Respondent had continuously challenged the Court's jurisdiction. Since the Applicant was aware of this it again attempted to focus on other points. But even with regard to those other points — can one really say that the Applicant has actually relied on the previous position taken by the FRY as to its status vis-à-vis the former Yugoslavia? Can one really say that Bosnia and Herzegovina relied that the FRY did continue the international legal personality of the former Yugoslavia? Can one really say that Bosnia and Herzegovina relied that no notification of succession or accession was needed in order for the Respondent to become a contracting party to the Genocide Convention? And, finally, can one really say that Bosnia and Herzegovina relied that the FRY continued to be a Member of the United Nations and thus had access to the Court?

2.65. I would submit that the answer to all these questions is "no", and that this is yet another reason why the Applicant's good faith argument must fail. As a matter of fact, while going on at some length about the Respondent's conduct, both Professors Franck and Pellet, in their pleadings of 21 and 24 April respectively, were remarkably brief in their comments on the Applicant's own

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[73] *I.C.J. Reports 1962*, p. 62.

[74] *I.C.J. Reports 1984*, p. 415, para. 51; emphasis added.

conduct. In fact, it is telling that in his pleading, Professor Franck did not once seek to establish that the Applicant had relied upon the Respondent's alleged failure to raise arguments based on access and jurisdiction. In fairness, he did briefly mention the Applicant's position at the beginning of his pleading. He there noted that in 1996 and thereafter "Bosnia, of course, would have had no reason to raise the issue."[75]

2.66. Strictly legally speaking, that may be correct. Of course, Bosnia was not *obliged* as a matter of law to raise arguments that might eventually benefit the Respondent. But this does not mean that Bosnia's conduct was irrelevant for the purposes of acquiescence and estoppel. If we look at the statements just quoted, from your jurisprudence and from Judge Fitzmaurice's separate opinion in the *Temple of Preah Vihar* case, we realize that the question is not whether the party invoking a good faith argument was under an *obligation* to clarify the alleged appearance itself, and to do so within the context of an on-going litigation.

2.67. Rather and instead, the test is a much more general one: it must be assessed whether the party invoking a good faith argument in fact relied upon the other party's statement, or absence of statement. The reason for this is obvious, and it goes back precisely to the concepts of decency and moral conduct that Professor Franck has emphasized so forcefully. These concepts require that the party invoking a good faith argument must have itself been acting in good faith.

2.68. The Respondent submits this is not what Bosnia and Herzegovina has done. For the purpose of this litigation, and for the purpose of this litigation only — as indeed Professors Pellet and Franck seem to admit —, Bosnia and Herzegovina has accepted that Serbia and Montenegro is identical with the former Yugoslavia — a conduct which was adopted with the clear goal of avoiding certain "procedural problems". Yet, outside this courtroom, Bosnia and Herzegovina has always — and consistently — argued that the FRY cannot continue the international legal personality of the former Yugoslavia. It is well known that Bosnia and Herzegovina has in the past consistently, and indeed successfully, opposed the claim of the FRY to be identical with the former Yugoslavia. It is largely due to that position taken by the other successor States of the former Yugoslavia — and Bosnia and Herzegovina itself in particular — that the FRY's original claim to

[75]CR 2006/36, p. 27, para. 9 (Franck).

be identical with the former Yugoslavia failed to gain acceptance by the international community. With respect, more specifically, to the Respondent's position within the United Nations, the Applicant has on *numerous* occasions stated very clearly that in order to become a United Nations Member — and consequently *ipso facto* a party to the Statute of the Court — Serbia and Montenegro would have to apply for membership in line with the procedure set out in Article 4 of the Charter. I do not think I have to recite the string of statements to which Professor Varady made reference.

2.69. Madam President, Members of the Court, to be very clear: none of this is intended to suggest that Bosnia and Herzegovina was under an *obligation itself* to raise arguments based on access or jurisdiction in the present case. As Professor Franck states, of course, it was *not* obliged to do so. But certainly, its own inconsistent conduct is relevant in the context of estoppel and acquiescence. As Professor Franck stated, both concepts are grounded in good faith. But in terms of good faith, and when assessing whether the Applicant relied on the appearance allegedly created, it hardly seems possible to me to distinguish — as Professor Franck seems to imply — between its position within this courtroom and its position taken elsewhere.

2.70. There simply do not exist two Bosnias, to paraphrase Professor Franck "this Bosnia" and "that Bosnia", one Bosnia pleading in this Great Hall of Justice, the other Bosnia taking political and legal positions elsewhere in the United Nations. There is only one Bosnia. And certainly, within the context of a good faith argument, this one Bosnia which has consistently claimed that the Respondent was not a United Nations Member, which has always required the Respondent to submit specific notifications of succession — this one Bosnia cannot now argue that the Respondent's acceptance of precisely this very same position is a "last minute shift" of position[76].

2.71. As Professor Pellet stated, taking up a well-known description, acquiescence and estoppel preclude parties from blowing hot and cold: "on ne peut souffler le chaud et le froid"[77]. But blowing hot and cold is precisely what the Applicant has done over the years. It cannot in fairness and decency now preclude the Respondent from taking a position that it itself has

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[76]Cf. CR 2006/36, p. 30, para. 15 (Franck).

[77]CR 2006/37, p. 39, para. 15 (Pellet).

advanced for years. Put differently, in the terminology of Judge Fitzmaurice's opinion in the *Temple of Preah Vihar* case, the Applicant has simply not "relied on" the Respondent's alleged failure to raise procedural arguments at an earlier stage. That, Madam President, Members of the Court, is the third reason why I believe Bosnia's good faith argument must necessarily fail.

E. Summary of argument

2.72. Madam President, let me now conclude by summarizing my argument.

2.73. *First*, we have demonstrated that the very concepts of estoppel and acquiescence or any other similar party-oriented mechanisms are not applicable with regard as to whether the FRY has access to the Court or not. Instead, this is a purely objective question to be decided ex officio by the Court regardless of the position the Parties have taken.

2.74. *Second*, we have also demonstrated that the behaviour of the Respondent did not amount to a clear and unambiguous expression of a loss of right since the Respondent has *consistently* questioned the Court's jurisdiction throughout the whole case. In such a situation, the simple fact of not raising one jurisdictional argument cannot amount to estoppel or acquiescence with regard to jurisdiction even more so if this argument was less than obvious given the uncertainties surrounding the status of the Respondent at the time. The Respondent therefore has neither acquiesced in the exercise of jurisdiction by this Court nor is it estopped from continuing to raise arguments as to the Court's jurisdiction.

2.75. Finally, *third*, I have also demonstrated that Bosnia and Herzegovina may not claim to have legitimately relied on the position allegedly taken by the Respondent given its own behaviour outside these proceedings.

2.76. Madam President, Members of the Court, this brings me to the end of my presentation for today. I thank you for your kind attention and would now propose that you, Madam President, call once again upon my colleague, Tibor Varady, who will then address the issue of *res judicata*.

The PRESIDENT: Thank you, Professor Zimmerman. Professor Varady.

Mr. VARADY:

3. THE 1996 JUDGMENT ON JURISDICTION AND THE ISSUE OF *RES JUDICATA*

A. The assumption on which the 1996 Judgment on jurisdiction was based

3.1. Madam President, distinguished Members of the Court, the Applicant argued that we have deprived the 1996 Judgment on jurisdiction of its meaning[78], and adds that the 1996 Judgment is *res judicata*, and it bars the investigation of access and jurisdiction at this stage of the proceedings. We would like to face these arguments.

3.2. First, Professor Pellet sees "dénaturation" in the fact that we submitted that the only assumption on which the 1996 Judgment 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". Professor Pellet does not deny this. He says that this is partially true, but he submits that the decision of the Court is based on two elements: "l'*intention* exprimée par la RFY d'être liée, d'une part; et, l'absence de contestation opposée à cette intention d'autre part"[79].

3.3. Madam President, let me repeat once again that it is well known that envisaging a link between the FRY and the Genocide Convention, in 1996 the Court found a starting point in the undisputed fact that the SFRY (the former Yugoslavia) signed this Convention in 1948. This can only be relevant with regard to the position of the FRY if the FRY continued the personality and treaty status of the Yugoslavia which signed the Convention in 1948. And this is, indeed, the sequence of logic the Court follows. "L'intention exprimée par le FRY . . ." is not an abstract intention "d'être liée". This is the intention to continue the personality of the former Yugoslavia expressed in a declaration of 27 April 1992. The Court quotes this declaration, and cites the exact part which insists on continuity:

> "The Federal Republic of Yugoslavia, continuing the State, international legal and political personality of the Socialist Federal Republic of Yugoslavia, shall strictly abide by . . . the commitments that the Socialist Federal Republic of Yugoslavia assumed internationally."

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[78] "Le défendeur dénature le sens de l'arrêt de 1996", CR 2006/36, p. 11 (Pellet).

[79] CR 2006/36 p. 13, para. 31 (Pellet).

3.4. Immediately after quoting this part of the declaration of continuity, the Court starts the next sentence by saying "This intention thus expressed by Yugoslavia . . ." (case concerning *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Yugoslavia), Preliminary Objections, Judgment, I.C.J. Reports 1996 (II),* p. 610, para. 17). It is crystal clear that "this intention thus expressed" expresses the claim for continuity. The intention the Court is referring to is the intention to continue the international legal and political personality of the former Yugoslavia. This only confirms that the assumption on which the 1996 Judgment on jurisdiction was based is that of continuity — the only plausible assumption on which the FRY could have been linked to the Genocide Convention in 1996.

3.5. The Applicant is uncomfortable with this assumption, because after the 1996 Judgment was rendered, it has become evident that this assumption was an erroneous one. This is clearly conceded by Professor Pellet himself. He speaks without any reservation about the "'présomption de continuité' — qui eût été erronée et, de plus, contraire à la position de la Bosnie-Herzégovine, qui n'en avait jamais fait mystère"[80].

3.6. Demonstrating that the assumption on which the 1996 Judgment on jurisdiction was based is that of continuity, we submitted that with regard to the FRY, and with regard to the intention expressed by the FRY, the Court uses the "remained bound" language, which is consistent with the assumption of continuity, while with regard to Bosnia and Herzegovina, the "became bound" language is used, which is consistent with the assumption of treaty action undertaken by Bosnia and Herzegovina as a successor State. The inference is obvious, but the Applicant tries to mitigate its importance, by saying that the distinction between "être lié" et "devenir lié" is purely academic[81]. Let me say first that the distinction between "être lié" et "devenir lié" could really be somewhat more volatile than the distinction between "remained bound" and "became bound". But the Court in fact, does not use the "être lié" language when it says what was the intention of Yugoslavia. The French and the English texts are consistent. Instead of using the term "être lié" which would better suit the arguments of the Applicant, the Court speaks of the intention of the

[80]CR 2006/36, p. 12, para. 30 (Pellet).

[81]CR 2006/36, p. 16, para. 39 (Pellet).

FRY "de demeurer liée" (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Yugoslavia), Preliminary Objections, I.C.J. Reports 1996 (II)*, para. 17 (in French)) — exactly to "remain bound" which is only consistent with the assumption of continuity.

3.7. The Applicant also mentions as a purported basis of the 1996 Judgment "l'absence de contestation opposée à cette intention". Madam President, first of all it is clear that the "intention" which was not contested is the intention to continue the personality of the former Yugoslavia. We are still talking about the same assumption of continuity. Furthermore, absence of contestation could conceivably represent a self-supporting basis only if jurisdiction itself were not contested. In this hypothesis — if all conditions were met — it could conceivably amount to acquiescence or *forum prorogatum*. But this is not what we are talking about, and this is not what the Court was talking about. Jurisdiction was contested. Moreover, this hypothesis was clearly discarded by the Court and has just been cited by my colleague, Professor Zimmerman.

3.8. In the context of the 1996 Judgment "l'absence de contestation opposée à cette intention" is nothing else but a supporting observation, and this is what the Court exactly says. In the words of the Court: "The Court observes, furthermore, that it has not been contested . . ." (*Ibidem*, para. 17.) In the given exact context, absence of contestation was clearly not the basis of jurisdiction. It was only an observation supporting the assumption of continuity on which the 1996 Judgment on jurisdiction was based.

B. The *res judicata* argument

3.9. Turning to the *res judicata* argument, let me first say that, contrary to what the Applicant suggests, we are certainly not trying to negate the principle of *res judicata*[82]. That would, of course, make no sense. *Res judicata* is, no doubt, a principle of paramount importance, but it is not without limitations, and it does not impede the investigation of all findings in all judgments.

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[82]See section B in the presentation of Professor Pellet entitled "*Le défendeur conteste le principe même de l'autorité de la chose jugée*", CR 2000/36, pp. 13-17.

3.10. Devoting due attention to the issue of *res judicata*, we shall demonstrate that within the exact procedural setting of this case there are no impediments which would prevent the investigations of access and jurisdiction in the merits phase.

1. Decisions on preliminary objections do not and cannot have the same consequences as decisions on the merits

3.11. Madam President, the Applicant is taking for granted that judgments on preliminary objections have the same effects as judgments on the merits. It relies on several citations from secondary sources, and on two judgments of this Court. We shall demonstrate that these sources do not substantiate the assertion of the Respondent, and we shall also demonstrate that there is much more support in both scholarly writings and court practice proving that it is, indeed, possible to raise or re-raise issues of access and jurisdiction in the merits phase.

3.12. Just as in the first round of oral pleadings, the Applicant is relying on the 1949 *Corfu Channel* case and on the 1999 Cameroon v. *Nigeria* case. We have already presented our arguments regarding these cases during the first round, and these arguments have not been rebutted.

3.13. As far as the *Nigeria* v. *Cameroon* case is concerned, it does contain a passage on *res judicata* in the context of a judgment on preliminary objections, but as this is admitted by Professor Pellet this can only be a dictum, since the judgment is dealing with interpretation[83]. As far as the *Corfu Channel* cases are concerned, while in the third phase, a preliminary objection was, indeed, dismissed on grounds that the same objection was already dealt with earlier, the second decision — the one rendered on the merits — actually supports the assumption that a judgment on preliminary objections does not create *res judicata* impediments, since after preliminary objections were rejected in the first phase — the preliminary objections phase — new objections regarding jurisdiction were raised in the merits phase — and these objections were, indeed, duly considered (*Corfu Channel (United Kingdom* v. *Albania), Merits, Judgment, I.C.J. Reports 1949*, p. 26.). Thus, the *Corfu Channel* cases actually lend more support to our position.

3.14. In his closing pleadings of 24 April 2006, Professor Pellet also makes reference to paragraph 18 of the *ICAO Council* Judgment in support of his contention that the *res judicata*

[83]CR 2006/36, p. 14, para. 35 (Pellet).

principle is "[f]ermemant contenu par la jurisprudence de la Cour"[84]. But this is probably just an oversight, because paragraph 18 does not speak at all about the judgments of this Court, it speaks about the effects of the decisions of the ICAO Council itself. Let me add that the *ICAO Council* Judgment provides full justification to our approach — but I shall return to this case later.

3.15. The Applicant also relies on scholarly writings, but almost all of these sources only confirm some uncontested general principles, without addressing the specific issue we are facing. Nagendra Singh is only cited to confirm that: "One of the most important characteristics of the law declared by courts and tribunals must be stability."[85] Charles De Visscher is cited in support of the proposition that "il est de l'intérêt général que les litiges ne recommencent pas indéfiniment relativement au même objet"[86].

3.16. More to the point is the quotation from Rosenne in the context of the *South-West Africa* case, but here Rosenne actually confirms that preliminary objections may, indeed, be raised in the merits phase, even after the Court has upheld its jurisdiction in the preliminary objections proceedings, on the condition that the new objection does not raise issues that have been decided with the force of *res judicata*[87].

3.17. Shabtai Rosenne is even more unequivocal when he treats this issue outside the specific context of the *South-West Africa* case. He concludes that preliminary objections may be raised, or re-raised in the merits phase. He speaks of the "non-exhaustive nature" of preliminary objections, and stresses:

> "[w]hether or not matters of jurisdiction have been raised at the stage of preliminary objections, they may still be raised later, even by the Court *proprio motu*. The 'non-exhaustive quality of the preliminary objections proceedings' means that the party raising an objection does not exhaust its ability to try and bar a decision on the merits simply by invoking the preliminary objection in good time, though once out of time it cannot prevent proceedings on the merits which will revert to their normal course from the point at which they were suspended."[88]

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[84]CR 2006/37, p. 45, para. 29 (Pellet).

[85]CR 2006/36, p. 21, para. 52 (Pellet).

[86]CR 2006/36, p. 22, para. 56 (Pellet).

[87]CR 2006/35, pp. 60-61, para. 14 (Pellet).

[88]S. Rosenne, *The Law and Practice of the International Court 1920-2005, Jurisdiction*, Vol. II, Nijhoff, Leiden/Boston, 2006, p. 876.

Thus, preliminary objections may, indeed be raised after the preliminary objections stage, they just cannot suspend the proceedings on the merits anymore, but will be heard together with the arguments on the merits.

3.18. Madam President, our case has not been shaped along common patterns, and thus the existing scholarly analyses are rarely inspired by cases or situations with a matching pattern. But there are such analyses, and in order to find a pertinent point of reliance, I would like to focus — in addition to the opinion of Rosenne — on those scholarly opinions which are addressing the exact pattern which we are facing in our case.

3.19. A further example of scholarly opinions based on a matching pattern is that of Georg Schwarzenberger. He states:

> "If in the interlocutory judgment the Court affirms its jurisdiction, but subsequently, finds that it lacks jurisdiction, it would be contrary to the *jus aequum* character of the relations between the Court and the parties to treat the judgment on jurisdiction as irreversible."[89]

Further on, Schwarzenberger gives even more emphasis to the same point:

> "In the absence of the requisite jurisdiction, any proceedings before the Court are *ultra vires* and a nullity. Thus irrespective of whether the duty is expressly stated, it is incumbent on the Court to examine ex officio this *conditio sine qua non* of its activities."[90]

3.20. The same position is endorsed and explained by Marten Bos. Discussing the range of Article 60 of the Statute, he states: "[c]ela nous paraît à tel point absurde que la Cour, en pleine connaissance de cause, puisse être obligée de prononcer *ultra vires* que nous considérons ledit article 60 comme n'étant pas applicable aux arrêts préliminaires"[91].

3.21. Madam President, there are strong arguments in favour of allowing a reconsideration of issues of access and jurisdiction during the merits phase. These arguments are particularly forceful with regard to situations which *are* matching the pattern of our case.

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[89]G. Schwarzenberger, *International Law as Applied by International Courts and Tribunals*, Vol. IV, London 1986, pp. 447-448.

[90]*Op. cit.*, p. 511.

[91]M. Bos, *Les conditions de procès en droit international public*, Bibliotheca Visserania, Vol. 19, Leiden, Brill, 1957, p. 321.

2. There is no *res judicata* within the exact setting of this case

2.1. The issue of the access to the Court and the issue whether the Respondent was bound by Article IX were not raised or considered as preliminary objections — and, thus, cannot be *res judicata*

3.22. Let us now turn our attention even more closely to the exact setting of this case which yields a number of reasons, any and all of them leading to the conclusion that the *res judicata* principle does not impede the Court to investigate issues of access and jurisdiction in the merits phase of our case. To begin with, it is important to point out that the specific issues pertaining to access and jurisdiction we are initiating to be raised in this phase of the case had not been addressed beforehand — at least not in this case.

3.23. During the preliminary proceedings, the Respondent submitted seven preliminary objections, and these are the objections which define the range and the scope of the 1996 Judgment. Some of these objections dealt with jurisdiction *ratione personae* over the Applicant**,** but *none* of the seven preliminary objections dealt with jurisdiction *ratione personae* over the *Respondent*. It is a fact that none of the preliminary objections dealt with the issue whether the FRY had access to the Court, and none of these objections raised the question whether the *Respondent* was bound by Article IX of the Genocide Convention.

3.24. Madam President, Article 79 (9) of the current Rules of Court, as well as Article 79 (7) of the Rules as they apply to our case, make it clear in identical terms what is the subject-matter and what is the range of a judgment on preliminary objections. It is stated that "the Court shall give its decision in the form of a judgment, by which it shall either uphold the objection, reject it, or declare that the objection does not possess, in the circumstances of the case, an exclusively preliminary character".

3.25. The 1996 Judgment contains a decision in the form of a judgment on preliminary objections — which objections did not address the question whether the Court had jurisdiction *ratione personae* over the Respondent, and whether the FRY had access to the Court.

3.26. Addressing the issue as to what does a judgment on jurisdiction cover and settle, the Applicant submits that the 1996 Judgment on jurisdiction has two *"dispositifs"*: one which is in

line with Article 79 of the Rules and rejects the preliminary objections raised, and another which says that the Court has jurisdiction under Article IX of the Genocide Convention[92].

3.27. This argument is not in accordance with the wording of Article 79, and it is contrary to the position taken by Rosenne cited by Professor Pellet[93]. In the passage cited by Professor Pellet, Rosenne says "[i]n an appropriate case objections can be raised after the Court upheld its jurisdiction in the preliminary objections proceedings and after the proceedings on the merits have been resumed"[94]. What is the *dispositif* which is here contemplated? If the *dispositif* were the broad ascertainment upholding jurisdiction, rather than the position taken on the specific issues and objections raised, then what Rosenne says about raising new objections would just make no sense once the Court upheld its jurisdiction. But Rosenne speaks of new objections that "[do] not raise issues that have been decided with the force of *res judicata* in the judgment on preliminary objections"[95]. He assumes that jurisdiction once upheld *may* be challenged by new objections — and this is perfectly in line with the wording of Article 79, and with the assumption that a decision on particular objections is the decision which may become *res judicata* in a judgment on preliminary objections.

3.28. Let me finally add, Madam President that, even if one were to accept the definition of *dispositif* offered by Professor Pellet, it would not cover the issue of access, which is not mentioned in those sentences in the 1996 Judgment which Professor Pellet considers to be the *dispositif*. This point will be further developed by my colleague Djeric.

3.29. Accordingly, the specific issues we raised in our initiative had not been raised as preliminary objections, and they are not covered by the 1996 Judgment on preliminary objections. The application for revision was denied, and the Court did not reach the stage in which the proposed issues could have been considered. It follows that, even if one would not distinguish the effects of a judgment on jurisdiction from the effects of a judgment on the merits, *quid non,* neither

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[92]CR 2006/36, pp. 16-17, para. 41 (Pellet).

[93]CR 2006/35, p. 60, para. 14 (Pellet).

[94]Rosenne, *op. cit.*, p. 865.

[95]Rosenne, *op. cit.*, p. 865.

the question of access to the Court of the Respondent nor the question of jurisdiction *ratione personae* over the Respondent based on the Genocide Convention could have become *res judicata*.

2.2. It is a well-established principle that the Court must always be satisfied that it has jurisdiction

3.30. Madam President, let me present a further argument and demonstrate that even if one were to assume that decisions on preliminary objections may have *res judicata* effects between the parties, and even if one were to assume that these effects even extend to objections which were not raised in the preliminary phase, *quid non,* this could not impede the Court from addressing issues of access and jurisdiction during the merits phase of the case.

3.31. The distinct character of a decision on jurisdiction follows from the Statute itself. Article 59 of the Statute which defines the nature and the range of the *res judicata* effect states that: "The decision of the Court has no binding force except between the parties and in respect of that particular case." In other words the binding force of the judgment is clearly limited to the rights and duties of the parties.

3.32. In our case, however, we are talking about access and jurisdiction, and this is not simply a matter of rights and duties of the Parties. It is primarily a right and duty of the Court. There is no binding force imposed by Article 59 impeding the Court to open or reopen *proprio motu* the issue of its own authority to proceed, if this appears to be necessary under the specific circumstances of the case — and this is what we are initiating.

3.33. This understanding has been clearly confirmed by Professor Bernhardt. In his comment on Article 59 of the Statute, under the title "Binding Force with Regard to the Court?", he states: "Article 59 does not concern the binding force of a decision for the Court itself."[96]

3.34. This takes us back to the compelling logic of the *ICAO Council* Judgment (*Appeal Relating to the Jurisdiction of the ICAO Council (India* v. *Pakistan), Judgment, I.C.J. Reports 1972*, p. 46) which addresses and answers the question whether the Court itself may raise the issue of its jurisdiction — and whether it has to do so under appropriate circumstances. The Court

[96] A. Zimmermann, E. Tomuschat, K. Oellers-Fram (Eds), *The Statute of the International Court of Justice: A Commentary*, Oxford 2006, p. 1240.

confirmed unequivocally that jurisdictional objections may, indeed, be raised during the merits phase, and that the Court must always be satisfied that it has jurisdiction.

3.35. Let me state once again what this Court said:

> "It is certainly to be desired that objections to the jurisdiction of the Court should be put forward as preliminary objections for separate decision in advance of the proceedings on the merits. The Court must however always be satisfied that it has jurisdiction, and must if necessary go into that matter *proprio motu*." (*Ibidem*, p. 52, para. 13.)

3.36. The Applicant does not contest this principle. Professor Pellet states: "il ne fait aucun doute, que la Cour 'doit . . . toujours s'assurer de sa compétence'"[97]. He submits, however, that the fact that the Court may examine its jurisdiction does not mean that it may also re-examine it[98]; and adds that the fact that the Court must always be satisfied that it has jurisdiction does not mean that it can return to it "à tout moment". Professor Pellet submits: "La Cour doit s'assurer de sa compétence: l'arrêt de 1996 lui a donné l'occasion de le faire; elle ne peut, aujourd'hui, remettre en question sa propre autorité."[99] He also makes the point that "Il ne suffit pas qu'une règle permissive permette à la Cour de s'assurer de sa compétence pour qu'elle puisse le faire sans aucun autre fondement juridique; . . . "[100]

3.37. Madam President, let me start with the last sentence. If there is an uncontested principle stating that the Court must always be satisfied that it has jurisdiction and that it must if necessary go into the matter *proprio motu,* then, obviously, this legal principle set by the Court is the "fondement juridique" to do so. It is a different question whether the Court will see sufficient reasons in the circumstances of the case to undertake an investigation and to take a different position on access and jurisdiction. We shall demonstrate that there are abundant reasons to do so.

3.38. A second line of argument of the Applicant is that "always" does not mean "at any moment"; that the right and duty to examine does not imply the right and duty to re-examine, and

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[97]CR 2006/35, p. 57, para. 8 (Pellet).

[98]*Ibid.*, pp. 58-59, para. 10 (Pellet).

[99]CR 2006/37. p. 47, para. 30 (Pellet).

[100]CR 2006/36, p. 24, para. 61 (Pellet).

that the Court somehow forfeited the possibility to examine access and jurisdiction *proprio motu* after it did not seise this occasion in 1996.

3.39. Madam President, these arguments have no foundation whatsoever in either the text, or in the context or logic of the *ICAO Council* Judgment. First, let me ask that if "always" does not mean "at any time" what could it then mean? In the *ICAO Council* case the question arose whether objections to jurisdiction can be raised at a later moment, in the merits phase, and the answer was yes, because the Court must "always be satisfied that it has jurisdiction", obviously including the merits phase as well.

3.40. Our case cannot be distinguished from the *ICAO Council* case on that ground either that in the *ICAO* case objections to jurisdiction were only raised by the Respondent in the merits phase, while in our case the Respondent already contested jurisdiction in the preliminary objections phase. This circumstance is irrelevant, first of all because we are not raising the same objections which were raised in the preliminary objections phase. Furthermore — and most importantly — the established principle is independent not only from the timing of party motion or from the circumstance whether the party is raising or re-raising certain jurisdictional issues, *the principle is independent from party motion altogether*. The *ICAO Council* Judgment speaks of the right and duty of the *Court* to act *proprio motu.*

3.41. The remaining question is whether the Court can somehow forfeit this right by not raising the issue *proprio motu* in the preliminary objections phase. The answer is, again, clearly negative. First of all, the *ICAO Council* Judgment does not talk about a privilege which would be lost if the first occasion was not seised. The *ICAO Council* Judgment says that the Court *must* "always be satisfied that it has jurisdiction, and must if necessary go into that matter *proprio motu*". Furthermore, the whole point is that since the Court cannot act *ultra vires*, it therefore has to consider new information and clarifications emerging after the preliminary objections phase, and to decline jurisdiction if it is not satisfied that it has jurisdiction.

3.42. In our case there was no sufficient information in 1996 which would have prompted and answered the questions which are prompted and which can be answered today. In 1996, the failure to contest the assumption of continuity was just not a failure to raise the obvious, which failure would yield some sort of *forum prorogatum* for the Respondent and an impossibility to raise

the question of jurisdiction *proprio motu* for the Court. It has been described and repeated many times that the situation was not transparent, that it was anomalous. But there can be no stronger evidence to this than the attitude of the Applicant during these very proceedings. Several counsel of the Applicant still maintain that there was continuity.

3.43. Madam President, let me address at this point another argument advanced by the Applicant, this time referring not to the foundations but to the possible implementation of the principle set in the *ICAO Council* Judgment. Professor Pellet states that there are no criteria to establish what circumstances are exceptional, and this could have a destabilizing effect[101].

3.44. The term "special circumstances" is, of course, a general standard, one of the many, which has to be interpreted in given cases. Let me mention that the same general standard has been used by other international courts as well, such as the European Court of Human Rights. I shall return to the practice of other courts in a few moments. At this point, let me just say that it is difficult to imagine a case in which new developments and new information would be as special and as consequential as in this case. To begin with, one of the key underlying issues is United Nations membership of the FRY between 1992 and 2000, and since 1 November 2000 we have a pronouncement of the competent authority, the General Assembly. Also, it is generally recognized that legal uncertainty and unclarity were prevailing at the time when the Judgment on preliminary objections was rendered, and that this has come to an end. It cannot be maintained any more that the FRY was a party to the Statute until 1 November 2000, or that it remained or became bound by Article IX of the Genocide Convention. This new perspective, based on newly emerging information, was unequivocally confirmed in the 2004 *Legality of Use of Force* Judgments, which established that the Respondent was not a party to the Statute, had no access to the Court between 1992 and 2000, and opened the question whether the Respondent could have been bound by Article IX of the Genocide Convention. These circumstances, without precedent and most unlikely to ever get repeated, are certainly special, and it is clear that under these circumstances it is necessary to undertake an investigation of issues of access and jurisdiction.

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[101] CR 2006/36, p. 19, paras. 47-48 (Pellet).

3.45. Madam President, Members of the Court, the rule and principle spelled out in the *ICAO Council* Judgment makes it clear that the Court may and should open the issue of jurisdiction in the merits phase if this is prompted by the special circumstances of the case. This is why in its correspondence with the Parties in this case, the Court referred exactly to the *ICAO* case in its letter of 12 June 2003 permitting the Respondent to present further arguments on jurisdictional questions during the oral proceedings on the merits.

2.3. The special circumstances of this case make a new investigation of the issues of access and jurisdiction unavoidable

3.46. Madam President, I would like to present another independent reason showing that the special circumstances of our case make unavoidable the investigation of the issues of access and jurisdiction in the merits phase.

3.47. So far, we have been discussing the issue of whether the Statute does or does not provide a foothold for *res judicata* effects at all — and towards the Court in particular — if we are talking about a judgment on preliminary objections. In other words, we were discussing whether the restrictions imposed by Articles 59 and 60 of the Statute, which would impede the parties or the Court to raise or re-raise the issue of jurisdiction in the merits phase, when serious indications emerge showing that the perceived basis of jurisdiction did not and does not exist.

3.48. The *ICAO Council* Judgment made it plain that that the effects yielded by the Statute cannot impede the Court itself to consider the issue of jurisdiction *proprio motu* in the merits phase. The facts of our case open an even more fundamental question. In our case there is a truly exceptional circumstance that has a consequential impact on the ability of the Court to decide on its jurisdiction with a binding force, and on the effects of such a judgment. The question is not only what are the exact effects of Articles 59 and 60 regarding a judgment on jurisdiction, but whether the Statute could have endowed the 1996 Judgment with any effects at all, since the Respondent was not a party to the Statute.

3.49. Madam President, while domestic courts have an anchor of their power to decide in the sovereign authority of the forum State, the corresponding anchor of this honoured Court is a treaty, the Statute of the Court. This is the foundation which endows the decisions of the Court with specific consequences. But the rights and duties established by the Statute flow from the consent

of the States who are parties to the Statute. What makes our case so exceptional is that the essential foundation and framework were simply missing when the 1996 Judgment was rendered. Hence in our case, the question is not only what specific conclusions are supported by the foothold in the Statute, but whether such a foothold existed at all.

3.50. Today it is known that in 1996 when the decision on preliminary objections was rendered, the Respondent was not a party to the Statute. Thus, there was no foothold, Articles 36 (6), 59, and 60 did not represent a binding treaty provision providing a possible basis for deciding on jurisdiction with *res judicata* effects.

3.51. Our position is, and we trust that this has been demonstrated, that there are no impediments to investigating or reinvestigating access and jurisdiction in the merits phase — particularly not when such an investigation is undertaken by the Court itself, *proprio motu*. This conclusion is even more manifest in a case in which the very anchor for exercising judicial function was missing, since the competence of the Court to decide on its jurisdiction in the preliminary phase was not based on the Statute, and the effects of the pronouncement were not determined either by the Statute.

3.52. Madam President, our position is that the principles rightly set by the *ICAO Council* Judgment allow the Court to consider issues of access and jurisdiction in the merits phase even if the Respondent had been a party to the Statute when preliminary objections were considered, and when the Judgment on jurisdiction was rendered. The specific, unusual, but clearly established circumstance that the Respondent was *not* a party to the Statute in 1996 when the Judgment on jurisdiction was rendered provides a strong added reason for holding that the 1996 Judgment cannot be conclusive. Thus, it is clearly justified to consider in this phase of the proceedings issues of access and jurisdiction in the light of consequential new information which was not available in 1996, and which was recognized in the 2004 *Legality of Use of Force* Judgments.

3. Treaties, rules, and practice of international courts

3.1 Treaties and rules

3.53. Madam President, addressing our submission that it is, indeed, possible to investigate access and jurisdiction in the merits phase after the 1996 Judgment was rendered, our esteemed

colleague Professor Pellet submits that this would mean that "l'arrêt du 11 juillet 1996 serait tout à fait exceptionnel, non seulement dans la jurisprudence de la Cour mais dans les annales judiciaires, toutes juridictions confondues . . ."[102] The same line of argument returns in the closing observations of Professor Pellet. He submits "aucun corps judiciaire ne peut deux fois sur le métier remettre son ouvrage"[103].

3.54. With due respect but this is simply not true. What we are suggesting is not a unique oddity, unknown in international jurisprudence. We shall demonstrate that the right of the Court to reinvestigate its jurisdiction during the merits phase under circumstances like those which have arisen in our case, is not a strange exception, but pretty much a mainstream solution, widely accepted in treaties and rules. The practice of other international courts is in harmony with the principle set in the *ICAO Council* Judgment.

3.55. First of all, the principle according to which an international court may consider or reconsider the issue of jurisdiction at any stage of the proceedings has expressly been stated in international conventions and rules of international tribunals. For example, the European Convention for the Protection of Human Rights and Fundamental Freedoms provides in its Article 35, paragraph 4: "The Court shall reject any application which it considers inadmissible under this Article. *It may do so at any stage of the proceedings*." (Emphasis added.)

3.56. In the same vein, the Statute of the International Criminal Court makes it also clear that — if this is prompted by exceptional circumstances — the issue of jurisdiction may be brought up at any stage of the proceedings, and it may be brought up more than once. According to Article 19 (4) of the Rome Statute:

> "The admissibility of a case or the jurisdiction of the Court may be challenged only once by any person or State referred to in paragraph 2. The challenge shall take place prior to or at the commencement of the trial. *In exceptional circumstances, the Court may grant leave for the challenge to be brought more than once or at a time later than the commencement of the trial*." (Emphasis added.)

3.57. To cite one more important example, the Rules of the European Court of Justice have also given explicit recognition to this principle. According to Article 92 (2):

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[102]CR 2006/36, p. 11, para. 27 (Pellet).

[103]CR 2006/37, p. 47 para. 31 (Pellet).

> "The Court may *at any time of its own motion* consider whether there exists any absolute bar to proceeding with a case or declare, after hearing the parties, that the action has become devoid of purpose and that there is no need to adjudicate on it" (emphasis added).

3.2 Practice of other international courts

3.58. Madam President, the principle is clear, and it follows from the nature of the power of international courts, and from the *jus aequum* character of the relationship between the parties and the court. An international court must always be satisfied that it has jurisdiction. The principle according to which the Court may decide on its own competence is not limited to the preliminary phase, and the power of the Court to control its competence is not limited to one pronouncement. An earlier position taken by an international court cannot substitute a basis of jurisdiction, the court cannot just rely on its own earlier stance, but must always be satisfied that it has power to decide the case.

3.59. This principle was clearly phrased by President McNair in the *Anglo Iranian Oil Co.* case. The wording extends to international courts in general, but the primary focus is, of course, on this Court. In the words of President McNair:

> "An international tribunal cannot regard a question of jurisdiction solely as a question *inter partes*. That aspect does not exhaust the matter. The Court itself, acting *proprio motu*, must be satisfied that any State which is brought before it . . . has consented to the jurisdiction." (*Anglo-Iranian Oil Co.* case *(United Kingdom* v. *Iran), Preliminary Objections, Judgment*, *I.C.J. Reports 1952*, p. 116.)

The reasons behind this principle are even stronger when the international court is not a part of a multilevel system, and thus it has to supervise itself whether preconditions for adjudication were met.

3.60. One may point out that there have to be compelling reasons to depart from the sensible proposition that preliminary questions should be answered in the preliminary phase. The number of cases in which such compelling exceptional reasons may possibly emerge is scarce. At the same time, evidence shows that when such exceptional circumstances did emerge, the issue of jurisdiction was considered or reconsidered at a later stage of the proceedings.

3.61. In the case *Storck* v. *Germany*[104] brought before the European Court of Human Rights, a committee of three judges declared the application inadmissible on 15 October 2002. The Applicant asked the Court to reopen the proceedings. On 28 January 2003 the same committee of three judges decided to reopen the proceedings. In its decision of 26 October 2004 the Court changed its ruling on admissibility, and declared the application admissible against the objections of the German Government *and against the argument that the 2002 decision on admissibility is* res judicata*, and that the case cannot be reopened*. The ECHR held: "However, in exceptional circumstances, . . ., the Court does have, in the interest of justice, the inherent power to re-open the case which had been declared inadmissible and to rectify those errors."[105]

3.62. It is important to mention that in this case the Court changed its decision from inadmissibility to admissibility, which is actually a harder test of the limits of the power to reconsider preliminary matters. If preliminary objections are rejected, the case continues, and the only question is whether objections to jurisdiction may be raised again at a later stage of the same proceedings. If preliminary objections are sustained, the matter is concluded, and the whole case has to be reopened in order to allow the reconsideration of the issue of admissibility. This is why several authors advocating the possibility to reopen the issue of jurisdiction restrict their opinion to cases in which jurisdiction was initially upheld and where the case will, thus, normally continue[106].

3.63. In the *Storck* case, after admissibility was reconsidered, the same issue was raised once again — thus a third time — in the merits phase, and again before the same judges who rendered the earlier decisions. Germany requested the Court to declare the application inadmissible, and repeated its argument that the case was *res judicata* after the first decision, and that the Court did not have the right to reopen the case after the application was once declared inadmissible. In its

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[104]*Waltraud Storck* v. *Germany*, ECHR, Application No. 61603/00, Decision on Admissibility of 26 October 2004.

[105]*Ibidem*, p. 12.

[106]For example, Lamberti Zanardi, "Il procedimento sulle eccezioni preliminari nel processo devanti alla Corte internazionale di Giustizia", *Rivista di diritto internazionale*, 1965, fasc. 4, 537, at 559.

decision of 16 June 2005 the Court considered the objection, but rejected this argument, citing its own reasoning according to which the court has "[t]he inherent power to reopen a case"[107].

3.64. The practice of the ECHR clearly shows that the question of jurisdiction may be considered or reconsidered at any stage of the proceedings, in all situations, either on party motion, or *proprio motu*[108]. As a further example, I would like to mention a most recent ECHR decision, in which the underlying fact pattern was different, but the problem and the position taken was the same. In the case of *Blečić* v. *Croatia*[109] finally decided on 8 March 2006, the question arose whether the Government of Croatia can raise preliminary objections in the merits phase of the proceedings, after it failed to do so in the preliminary phase — and after the same question of jurisdiction was raised in the preliminary phase by the Court itself, and the Court held that it had jurisdiction. The Grand Chamber remained faithful to the principle that the Court may reconsider issues of jurisdiction at *any* stage of the proceedings, it considered the objections to jurisdiction raised by Croatia, and finally decided that it had *no* jurisdiction. The ECHR held, and I'm quoting: "Accordingly, the Court, . . . has to satisfy itself that it has jurisdiction in any case brought before it, and is therefore obliged to examine the question of its jurisdiction at every stage of the proceedings."[110]

3.65. Madam President, Members of the Court, the same principle which found expression in international conventions as well as in rules and practice of international courts, was also adopted in arbitration cases where this was necessitated by the special circumstances of the case. In the *Von Tiedemann* case, which was shaped along the very same pattern as our case, the obtaining exceptional circumstances prompted the Mixed Arbitral Tribunal to reconsider its decision on jurisdiction and to declare lack of jurisdiction.

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[107] *Storck* v. *Germany*, ECHR, Application No. 61603/00, Judgment (Merits and Just Satisfaction) of 16 June 2005, p. 8.

[108] See, among other cases, *Azinas* v. *Cyprus* (Grand Chamber), No. 56679/00, para. 32, ECHR 2004-III; *Odièvre* v. *France* (Grand Chamber), No. 42326/98, para. 22, ECHR 2003-III; *Nielsen* v. *Denmark*, No. 343/57, Commission decision of 2 September 1959, *Yearbook* 2, p. 454.

[109] *Blecic* v. *Croatia*, ECHR (Grand Chamber), Application No. 59532/00, Judgment of 8 March 2006.

[110] *Ibidem*, p.17, para. 67.

3.66. The *Von Tiedemann* problem is a mirror image of our problem. We have included this case in our judges' folders at tab 3.

Madam President, I will probably have to go about five or six minutes beyond time, if you allow me to do so.

The PRESIDENT: Yes, certainly.

Mr. VARADY: Thank you very much.

The Mixed Arbitral Tribunal was faced with a complex of several cases in which the same question was raised. The issue was that of the capacity of one of the parties. As in our case, the German-Polish Mixed Arbitral Tribunal first declared itself competent, rejecting the preliminary objections of the Polish State[111]. After that, and before reaching the merits in the *Von Tiedemann* case, the Mixed Arbitral Tribunal had to decide on its jurisdiction in six other parallel cases which were based on the very same fact pattern — again a situation which is practically the same as the situation which developed following the *Legality of Use of Force* cases. In these six cases *(Kunkel and others)*, the Tribunal declined jurisdiction.

3.67. The reason for declining jurisdiction is, again, most familiar. It pertains to the capacity of the applicants. As this was summarized in the *Von Tiedemann* decision — and this can be followed in tab 3 on page 4:

> "Par arrêt du 2 décembre 1925 en cause Kunkel et consorts c. Etat polonais . . . le Tribunal a posé en principe qu'il est incompétent pour statuer sur les réclamations formées contre l'Etat polonais en tant que les requérants les fondent sur leur qualité prétendue de ressortissants polonais."[112]

3.68. After dismissal of jurisdiction in six parallel cases, Poland moved for reconsideration of jurisdiction in the *Von Tiedemann* case in which the issue was the same as in the six other cases. The applicant opposed reconsideration, arguing that the issue of jurisdiction cannot be revisited because it was definitively settled by the earlier decision on jurisdiction. The Tribunal opted to reconsider its own previous decision on jurisdiction, and eventually it declared itself being without jurisdiction in the *Von Tiedemann* case too. The Tribunal stated that in order to follow the

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[111] *Von Tiedemann* v. *Polish State*, *Rec. TAM*, t. VI, pp. 997-1003.

[112] *Ibidem*, p. 1000.

principle of *res judicata* it would be obliged to commit an "excès de pouvoir"[113], and this would render the decision *ultra vires* and non-binding upon the parties[114].

3.69. The Tribunal made its position crystal clear — you may follow this citation at tab 3, page 5:

> "le tribunal estime que, dans l'intérêt de la sécurité du droit, il importe que ce qui a été jugé, soit, en principe, tenu pour définitif.
>
> Mais la question se présente sous un aspect tout particulier lorsque le jugement préliminaire rendu est un jugement affirmant la compétence du Tribunal et que celui-ci constate dans la suite, mais avant le jugement au fond, qu'en réalité il est incompétent. En pareil cas, s'il s'était obligé de se regarder comme lié par sa première décision, il serait amené à statuer sur une matière dont il reconnaît cependant qu'elle échappe à sa juridiction. Et lorsque — comme en l'espèce — il a entre-temps proclamé son incompétence dans des causes identiques, il se mettrait en contradiction irréductible avec lui-même en jugeant néanmoins au fond et il s'exposerait au risque de voir l'Etat défendeur s'autoriser de l'aveu d'incompétence émanant du tribunal même pour refuser d'exécuter sa sentence . . .
>
> En d'autres termes, pour rester fidèle au principe du respect de la chose jugée, il devrait commettre un abus manifeste de pouvoir."[115]

3.70. The very same logic applies to our case as well. The authority of a decision on preliminary objections cannot substitute the bases of jurisdiction defined in the Statute — even less can it substitute preconditions for access.

C. Conclusions

3.71. Madam President, distinguished Members of the Court, let me conclude first of all that the 1996 Judgment was based on the assumption of continuity, that is, on the assumption that the FRY continued the personality, United Nations membership and treaty status of the former Yugoslavia. By now, it has become evident that this assumption was erroneous. This is conceded by our opponent Professor Pellet as well.

3.72. The 1996 Judgment does not impede this Court to investigate access and jurisdiction in the merits phase of this case. It does not, because

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[113] *Ibidem*, p. 1001.

[114] *Ibidem*.

[115] *Ibidem*.

— first, decisions on preliminary objections do not have the same effects as final decisions on the merits;

— secondly, the issues whether the Respondent had access to the Court and whether it was bound by Article IX of the Genocide Convention were not raised as preliminary objections, and were not decided;

— thirdly, the uncontested principle stated in the *ICAO Council* Judgment makes it clear that the Court must always be satisfied that it has jurisdiction and that it can investigate this issue *proprio motu* in the merits phase as well;

— fourthly, at the time when the 1996 Judgment was rendered, the Statute was not a binding treaty between the parties, thus the Statute could not have endowed this Judgment with *res judicata* effects;

— and fifthly, reinvestigation of access and jurisdiction in the merits phase after a judgment on preliminary objections was rendered, is not only in line with the principle stated by this Court in the *ICAO Council* case, it is also perfectly in line with rules and practice of other international courts.

We have also demonstrated that special circumstances which make an investigation of access and jurisdiction necessary, clearly exist.

This concludes our presentation this afternoon, and I thank you very much for your attention.

The PRESIDENT: Thank you, Professor Varady.

The Court now rises. The hearings will resume at 10 o'clock tomorrow morning.

The Court rose at 6.05 p.m.