18 NOVEMBER 2008

JUDGMENT

CASE CONCERNING APPLICATION OF THE CONVENTION ON THE PREVENTION AND PUNISHMENT OF THE CRIME OF GENOCIDE

(CROATIA *v.* SERBIA)

PRELIMINARY OBJECTIONS

AFFAIRE RELATIVE À L'APPLICATION DE LA CONVENTION POUR LA PRÉVENTION ET LA RÉPRESSION DU CRIME DE GÉNOCIDE

(CROATIE c. SERBIE)

EXCEPTIONS PRÉLIMINAIRES

18 NOVEMBRE 2008

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CASE CONCERNING APPLICATION OF THE CONVENTION ON THE PREVENTION AND PUNISHMENT OF THE CRIME OF GENOCIDE

(CROATIA *v.* SERBIA)

PRELIMINARY OBJECTIONS

JUDGMENT

Present: *President* HIGGINS; *Vice-President* AL-KHASAWNEH; *Judges* RANJEVA, SHI, KOROMA, PARRA-ARANGUREN, BUERGENTHAL, OWADA, SIMMA, TOMKA, ABRAHAM, KEITH, SEPÚLVEDA-AMOR, BENNOUNA, SKOTNIKOV; *Judges* ad hoc VUKAS, KREĆA; *Registrar* COUVREUR.

In the case concerning the application of the Convention on the Prevention and Punishment of the Crime of Genocide,

between

the Republic of Croatia,

represented by

H.E. Mr. Ivan Šimonović, Ambassador, Professor of Law at the University of Zagreb Law Faculty,

as Agent;

H.E. Ms Andreja Metelko-Zgombić, Ambassador, Head of International Law Service, Ministry of Foreign Affairs and European Integration of the Republic of Croatia,

Ms Maja Seršić, Professor of Law at the University of Zagreb Law Faculty,

H.E. Mr. Frane Krnić, Ambassador of the Republic of Croatia to the Kingdom of the Netherlands,

as Co-Agents;

Mr. James Crawford, S.C., Whewell Professor of International Law, University of Cambridge, Barrister, Matrix Chambers,

Mr. Philippe Sands, Q.C., Professor of Law, University College London, Barrister, Matrix Chambers,

as Counsel and Advocates;

Mr. Mirjan Damaška, Sterling Professor of Law, Yale Law School,

Ms Anjolie Singh, Member of the Indian Bar,

as Counsel;

Mr. Ivan Salopek, Third Secretary of the Embassy of Croatia in the Netherlands,

Ms Jana Špero, Directorate for Co-operation with International Criminal Courts, Ministry of Justice,

as Advisers,

and

the Republic of Serbia,

represented by

Mr. Tibor Varady, S.J.D. (Harvard), Professor of Law at the Central European University, Budapest, and Emory University, Atlanta,

as Agent;

Mr. Saša Obradović, First Counsellor of the Embassy of Serbia in the Netherlands,

as Co-Agent;

Mr. Andreas Zimmermann, LL.M. (Harvard), Professor of Law at the University of Kiel, Director of the Walther-Schücking Institute,

Mr. Vladimir Djerić, LL.M. (Michigan), Attorney at Law, Mikijelj, Janković & Bogdanović, Belgrade, President of the International Law Association of Serbia,

as Counsel and Advocates;

H.E. Mr. Radoslav Stojanović, S.J.D., Ambassador of the Republic of Serbia to the Kingdom of the Netherlands, Professor at the Belgrade University School of Law,

H.E. Ms Sanja Milinković, LL.M., Ambassador, Head of the International Legal Service of the Ministry of Foreign Affairs of the Republic of Serbia,

Mr. Vladimir Cvetković, First Secretary of the Embassy of Serbia in the Netherlands,

Ms Jelena Jolić, M.Sc. (London School of Economics and Political Science),

Mr. Igor Olujić, Attorney at Law, Belgrade,

Mr. Svetislav Rabrenović, LL.M. (Michigan),

Mr. Christian J. Tams, LL.M., Ph.D. (Cambridge), Walther-Schücking Institute, University of Kiel,

Ms Dina Dobrković, LL.B.,

as Advisers,

THE COURT,

composed as above,

after deliberation,

delivers the following Judgment:

1. On 2 July 1999, the Government of the Republic of Croatia (hereinafter "Croatia") filed an Application against the Federal Republic of Yugoslavia (hereinafter "the FRY") in respect of a dispute concerning alleged violations of the Convention on the Prevention and Punishment of the Crime of Genocide, approved by the General Assembly of the United Nations on 9 December 1948 (hereinafter "the Genocide Convention" or "the Convention"). The Application invoked Article IX of the Genocide Convention as the basis of the jurisdiction of the Court.

2. Pursuant to Article 40, paragraph 2, of the Statute of the Court, the Registrar immediately communicated a certified copy of the Application to the Government of the FRY; and, in accordance with paragraph 3 of that Article, all other States entitled to appear before the Court were notified of the Application.

3. Pursuant to the instructions of the Court under Article 43 of the Rules of Court, the Registrar addressed to States parties to the Genocide Convention the notification provided for in Article 63, paragraph 1, of the Statute. The Registrar also sent to the Secretary-General of the United Nations the notification provided for in Article 34, paragraph 3, of the Statute and subsequently transmitted to him copies of the written proceedings.

4. By an Order dated 14 September 1999, the Court fixed 14 March 2000 as the time-limit for the filing of the Memorial of Croatia and 14 September 2000 as the time-limit for the filing of the Counter-Memorial of the FRY.

5. By an Order dated 10 March 2000, the President of the Court, at the request of Croatia, extended the time-limit for the filing of the Memorial to 14 September 2000 and accordingly extended the time-limit for the filing of the Counter-Memorial of the FRY to 14 September 2001.

6. By a letter dated 26 May 2000, the Agent of Croatia requested the Court, for reasons stated in that letter, to extend by a further period of six months the time-limit for the filing of its Memorial. By a letter dated 6 June 2000, the Agent of the FRY informed the Court that his Government was not opposed to the request by Croatia on the condition that it would be granted the same extension for the filing of its Counter-Memorial.

7. By an Order dated 27 June 2000, the Court extended the time-limits to 14 March 2001 and 16 September 2002, respectively, for the filing of the Memorial of Croatia and the Counter-Memorial of the FRY. Croatia duly filed its Memorial within the time-limit thus extended.

8. Since the Court included upon the Bench no judge of the nationality of the Parties, each of them exercised its right under Article 31, paragraph 3, of the Statute to choose a judge *ad hoc* to sit in the case: Croatia chose Mr. Budislav Vukas and the FRY chose Mr. Milenko Kreća.

9. On 11 September 2002, within the time-limit provided for in Article 79, paragraph 1, of the Rules of Court as adopted on 14 April 1978, the FRY raised preliminary objections relating to the Court's jurisdiction to entertain the case and to the admissibility of the Application. Accordingly, by an Order of 14 November 2002, the Court stated that, by virtue of Article 79, paragraph 3, of the Rules of Court as adopted on 14 April 1978, the proceedings on the merits were suspended, and fixed 29 April 2003 as the time-limit for the presentation by Croatia of a written statement of its observations and submissions on the preliminary objections raised by the FRY. Croatia filed such a statement within the time-limit thus fixed.

10. By a letter of 8 November 2002, the Government of Bosnia and Herzegovina requested to be furnished with copies of the pleadings and annexed documents in the case. Having ascertained the views of the Parties pursuant to Article 53, paragraph 1, of the Rules of Court, the

President of the Court decided to grant that request. The Registrar communicated that decision to the Government of Bosnia and Herzegovina and to the Parties by letters of 11 December 2002.

11. By a letter dated 5 February 2003, the FRY informed the Court that, following the adoption and promulgation of the Constitutional Charter of Serbia and Montenegro by the Assembly of the FRY on 4 February 2003, the name of the State had been changed from the "Federal Republic of Yugoslavia" to "Serbia and Montenegro". Following the announcement of the result of a referendum held in Montenegro on 21 May 2006 (as contemplated in the Constitutional Charter of Serbia and Montenegro), the National Assembly of the Republic of Montenegro adopted a declaration of independence on 3 June 2006 (see paragraph 23 below).

12. By a letter dated 11 April 2007, the Registrar, in accordance with Article 69, paragraph 3, of the Rules of Court, asked the Secretary-General of the United Nations to inform him whether or not the United Nations intended to present observations in writing within the meaning of the said provision. In a letter dated 7 May 2007, the Secretary-General indicated that the United Nations did not intend to submit any such observations.

13. On 1 April 2008, the Co-Agent of Serbia provided the Registry with nine additional documents which it wished to produce in the case, under Article 56, paragraph 1, of the Rules of Court. By a letter dated 24 April 2008, the Agent of Croatia informed the Court that his Government had no objection to the production of these documents and that it wished, for its part, to produce two new documents. By the same letter, the Agent of Croatia requested that the Court call upon the Respondent, under Article 49 of its Statute and Article 62, paragraph 1, of the Rules of Court, to produce a certain number of documents. By a letter dated 29 April 2008, the Agent of Croatia provided additional information relating to the said request.

14. By a letter dated 2 May 2008, the Agent of Serbia informed the Court that his Government did not object to the production of the two new documents which Croatia wished to produce in the case. He further informed the Court of his Government's observations with regard to Croatia's request that the Court call upon the Respondent to produce a certain number of documents, and expressed, *inter alia*, "certain doubts as to whether the given request submitted at this stage of the proceedings and in this moment of time could serve the interests of a sound administration of justice".

15. On 6 May 2008, the Registrar notified the Parties that the Court had decided to authorize the production of the documents they wished to submit under Article 56 of the Rules of Court; these documents, accordingly, were added to the case file. The Registrar further informed the Parties of the Court's decision not to accede, at this stage of the proceedings, to Croatia's request that the Court call upon the Respondent, under Article 49 of the Statute and Article 62, paragraph 1, of the Rules of Court, to produce a certain number of documents. He indicated to the Parties that the Court was not satisfied that the production of the requested documents was necessary for the purpose of ruling on preliminary objections. The Registrar also explained that the Court considered that Croatia had failed to provide sufficient reason to justify the great lateness of its request and that to accede to this request made at this very late juncture would, in addition, raise many practical problems.

16. By letters dated 6 May 2008, the Registrar informed the Parties that the Court asked them to address, during the hearings, the issue of the capacity of the Respondent to participate in proceedings before the Court at the time of filing of the Application, given the fact that the issue had not been addressed as such in the written pleadings.

17. Pursuant to Article 53, paragraph 2, of its Rules, the Court, after ascertaining the views of the Parties, decided that copies of the pleadings and documents annexed would be made available to the public at the opening of the oral proceedings.

18. Public sittings were held from 26 May to 30 May 2008, at which the Court heard the oral arguments and replies of:

For Croatia: H.E. Mr. Ivan Šimonović,
H.E. Ms Andreja Metelko-Zgombić,
Mr. Philippe Sands,
Mr. James Crawford.

For Serbia: Mr. Tibor Varady,
Mr. Vladimir Djerić,
Mr. Andreas Zimmermann.

19. At the hearings, a question was put by a Member of the Court and replies given orally and in writing, in accordance with Article 61, paragraph 4, of the Rules of Court. Pursuant to Article 72 of the Rules of Court, Croatia presented written observations on the written reply received from Serbia.

*

20. In its Application, the following claims were made by Croatia:

> "While reserving the right to revise, supplement or amend this Application, and, subject to the presentation to the Court of the relevant evidence and legal arguments, Croatia requests the Court to adjudge and declare as follows:
>
> *(a)* that the Federal Republic of Yugoslavia has breached its legal obligations toward the people and Republic of Croatia under Articles I, II *(a)*, II *(b)*, II *(c)*, II *(d)*, III *(a)*, III *(b)*, III *(c)*, III *(d)*, III *(e)*, IV and V of the Genocide Convention;
>
> *(b)* that the Federal Republic of Yugoslavia has an obligation to pay to the Republic of Croatia, in its own right and as *parens patriae* for its citizens, reparations for damages to persons and property, as well as to the Croatian economy and

environment caused by the foregoing violations of international law in a sum to be determined by the Court. The Republic of Croatia reserves the right to introduce to the Court at a future date a precise evaluation of the damages caused by the Federal Republic of Yugoslavia."

21. In the written proceedings, the following submissions were presented by the Parties:

On behalf of the Government of Croatia,

in the Memorial:

"On the basis of the facts and legal arguments presented in this Memorial, the Applicant, the Republic of Croatia, respectfully requests the International Court of Justice to adjudge and declare:

1. That the Respondent, the Federal Republic of Yugoslavia, is responsible for violations of the Convention on the Prevention and Punishment of the Crime of Genocide:

(a) in that persons for whose conduct it is responsible committed genocide on the territory of the Republic of Croatia, including in particular against members of the Croat national or ethnical group on that territory, by

— killing members of the group;

— causing deliberate bodily or mental harm to members of the group;

— deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;

— imposing measures intended to prevent births within the group;

with the intent to destroy that group in whole or in part, contrary to Article II of the Convention;

(b) in that persons for whose conduct it is responsible conspired to commit the acts of genocide referred to in paragraph *(a)*, were complicit in respect of those acts, attempted to commit further such acts of genocide and incited others to commit such acts, contrary to Article III of the Convention;

(c) in that, aware that the acts of genocide referred to in paragraph *(a)* were being or would be committed, it failed to take any steps to prevent those acts, contrary to Article I of the Convention;

(d) in that it has failed to bring to trial persons within its jurisdiction who are suspected on probable grounds of involvement in the acts of genocide referred to in paragraph *(a)*, or in the other acts referred to in paragraph *(b*), and is thus in continuing breach of Articles I and IV of the Convention.

2. That as a consequence of its responsibility for these breaches of the Convention, the Respondent, the Federal Republic of Yugoslavia, is under the following obligations:

(a) to take immediate and effective steps to submit to trial before the appropriate judicial authority, those citizens or other persons within its jurisdiction who are suspected on probable grounds of having committed acts of genocide as referred to in paragraph (1) *(a)*, or any of the other acts referred to in paragraph (1) *(b)*, in particular Slobodan Milošević, the former President of the Federal Republic of Yugoslavia, and to ensure that those persons, if convicted, are duly punished for their crimes;

(b) to provide forthwith to the Applicant all information within its possession or control as to the whereabouts of Croatian citizens who are missing as a result of the genocidal acts for which it is responsible, and generally to cooperate with the authorities of the Republic of Croatia to jointly ascertain the whereabouts of the said missing persons or their remains;

(c) forthwith to return to the Applicant any items of cultural property within its jurisdiction or control which were seized in the course of the genocidal acts for which it is responsible; and

(d) to make reparation to the Applicant, in its own right and as *parens patriae* for its citizens, for all damage and other loss or harm to person or property or to the economy of Croatia caused by the foregoing violations of international law, in a sum to be determined by the Court in a subsequent phase of the proceedings in this case. The Republic of Croatia reserves the right to introduce to the Court a precise evaluation of the damages caused by the acts for which the Federal Republic of Yugoslavia is held responsible.

The Republic of Croatia reserves the right to supplement or amend these submissions as necessary."

On behalf of the Government of Serbia,

in the preliminary objections:

"For the reasons advanced above, the Federal Republic of Yugoslavia is asking the Court:

— to uphold the First Preliminary Objection and to adjudge and declare that it lacks jurisdiction over the claims brought against the Federal Republic of Yugoslavia by the Republic of Croatia.

Or, in the alternative,

(a) to uphold the Second Preliminary Objection and to adjudge and declare that claims based on acts or omissions which took place before the FRY came into being (i.e. before 27 April 1992) are inadmissible;

and

(b) to uphold the Third Preliminary Objection, and to adjudge and declare that specific claims referring to:

— taking effective steps to submit to trial Mr. Milošević and other persons;

— providing information regarding the whereabouts of missing Croatian citizens; and

— return of cultural property;

are inadmissible and moot.

The Respondent reserves its right to supplement or amend its submissions in the light of further pleadings."

On behalf of the Government of Croatia,

in the written statement containing its observations and submissions on the preliminary objections raised by the FRY:

"On the basis of the facts and legal arguments presented in these Written Observations, the Republic of Croatia respectfully requests the International Court of Justice to reject the First, Second and Third Preliminary Objections of the FRY (Serbia and Montenegro) (with the exception of that part of the Second Preliminary Objection which relates to the claim concerning the submission to trial of Mr. Slobodan Milošević), and accordingly to adjudge and declare that it has jurisdiction to adjudicate upon the Application filed by the Republic of Croatia on 2 July 1999."

22. At the oral proceedings, the following submissions were presented by the Parties:

On behalf of the Government of Serbia,

at the hearing of 29 May 2008:

"For the reasons given in its written submissions and its oral pleadings, Serbia requests the Court to *adjudge and declare:*

1. that the Court lacks jurisdiction,

or, in the alternative:

2. *(a)* that claims based on acts and omissions which took place prior to 27 April 1992 are beyond the jurisdiction of this Court and inadmissible; and

(b) that claims referring to

— submission to trial of certain persons within the jurisdiction of Serbia,

— providing information regarding the whereabouts of missing Croatian citizens, and

— return of cultural property

are beyond the jurisdiction of this Court and inadmissible."

On behalf of the Government of Croatia,

at the hearing of 30 May 2008:

"On the basis of the facts and legal arguments presented in our Written Observations, as well as those during these oral pleadings, the Republic of Croatia respectfully requests the International Court of Justice to:

(1) *reject* the first, second and third preliminary objection of Serbia, with the exception of that part of the second preliminary objection which relates to the claim concerning the submission to trial of Mr. Slobodan Milošević, and accordingly to

(2) *adjudge and declare* that it has jurisdiction to adjudicate upon the Application filed by the Republic of Croatia on 2 July 1999."

*

* *

I. Identification of the respondent Party

23. The Court has first to consider a question concerning the identification of the respondent Party before it in these proceedings. By a letter dated 3 June 2006, the President of the Republic of Serbia (hereinafter "Serbia") informed the Secretary-General of the United Nations that, following the declaration of independence adopted by the National Assembly of the Republic of Montenegro,

"the membership of the state union Serbia and Montenegro in the United Nations, including all organs and organizations of the United Nations system, [would be] continued by the Republic of Serbia, on the basis of Article 60 of the Constitutional Charter of Serbia and Montenegro".

He further stated that "in the United Nations the name 'Republic of Serbia' [was] to be henceforth used instead of the name 'Serbia and Montenegro'" and added that the Republic of Serbia "remain[ed] responsible in full for all the rights and obligations of the state union of Serbia and Montenegro under the UN Charter".

24. By a letter of 16 June 2006, the Minister for Foreign Affairs of Serbia informed the Secretary-General, *inter alia*, that "[t]he Republic of Serbia continue[d] to exercise its rights and honour its commitments deriving from international treaties concluded by Serbia and Montenegro"

and requested that "the Republic of Serbia be considered a party to all international agreements in force, instead of Serbia and Montenegro". By a letter of 30 June 2006, addressed to the Secretary-General, the Minister for Foreign Affairs confirmed the intention of Serbia to continue to exercise its rights and honour its commitments deriving from international treaties concluded by Serbia and Montenegro. He specified that "[a]ll treaty actions undertaken by Serbia and Montenegro w[ould] continue in force with respect to the Republic of Serbia with effect from 3 June 2006", and that "all declarations, reservations and notifications made by Serbia and Montenegro w[ould] be maintained by the Republic of Serbia until the Secretary-General, as depositary, [were] duly notified otherwise".

25. On 28 June 2006, by its resolution 60/264, the General Assembly admitted the Republic of Montenegro (hereinafter "Montenegro") as a new Member of the United Nations.

26. By letters dated 19 July 2006, the Registrar requested the Agent of Croatia, the Agent of Serbia and the Minister for Foreign Affairs of Montenegro to communicate to the Court the views of their Governments on the consequences to be attached to the above-mentioned developments regarding the identity of the Respondent in the case. On the same date, similar letters were addressed to the Parties in the case concerning *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro)*, which had been not only instituted but also heard on the merits before the independence of Montenegro.

27. By a letter dated 22 July 2006, the Agent of Serbia explained that, in his Government's opinion, "there [was] continuity between Serbia and Montenegro and the Republic of Serbia (on the grounds of Article 60 of the Constitutional Charter of Serbia and Montenegro)". He noted that the entity which had been Serbia and Montenegro "ha[d] been replaced by two distinct States, one of them [being] Serbia, the other [being] Montenegro". In those circumstances, the view of his Government was that "the Applicant ha[d] first to take a position, and to decide whether it wishe[d] to maintain its original claim encompassing both Serbia and Montenegro, or whether it [chose] to do otherwise".

28. By a letter dated 29 November 2006, addressed to the Court, the Chief State Prosecutor of Montenegro, after indicating her capacity to act as a legal representative of Montenegro, drew attention to the fact that, following the referendum held in Montenegro on 21 May 2006, the National Assembly of Montenegro had pronounced the independence of Montenegro. In the view of the Chief State Prosecutor, Montenegro had become an independent State with full international legal personality within its existing borders. She further stated that:

> "The issue of international law succession of [the] State union of Serbia and Montenegro is regulated in article 60 of [the] Constitutional charter, and according to [that] article the legal successor of [the] State union of Serbia and Montenegro is the Republic of Serbia, which, as a sovereign state, [has] become [the] follower of all international obligations and successor in international organizations."

The Chief State Prosecutor concluded that, in the dispute before the Court, "the Republic of Montenegro may not have [the] capacity of respondent, [for the] above mentioned reasons".

29. On 26 February 2007 the Court gave judgment in the case concerning *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro)*, in which it decided that Serbia remained a respondent in that case, "and at the date of [that] Judgment [was] indeed the only Respondent" (Judgment of 26 February 2007, para. 77).

30. By a letter dated 15 May 2008, the Agent of Croatia referred to Article 60 of the Constitutional Charter of Serbia and Montenegro and to paragraphs 76 and 77 of the 2007 Judgment. Given those circumstances, the Agent of Croatia confirmed that the proceedings instituted by Croatia on 2 July 1999 were "maintained against [the] Republic of Serbia as Respondent". He further noted that this conclusion was "without prejudice to the potential responsibility of [the] Republic of Montenegro and the possibility of instituting separate proceedings against it".

31. The Court observes that the facts and events on which the submissions of Croatia on the merits are based occurred at a period of time when Serbia and Montenegro were part of the same State.

32. The Court further notes that Serbia has accepted "continuity between Serbia and Montenegro and the Republic of Serbia" (paragraph 27 above), and said that it would honour "its commitments deriving from international treaties concluded by Serbia and Montenegro" (paragraph 24 above), which would include commitments under the Genocide Convention. Montenegro, on the other hand, is a new State admitted as such to the United Nations. It does not continue the international legal personality of the State union of Serbia and Montenegro.

33. As in the case concerning *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro)*, the Court must recall the fundamental principle that no State may be subject to its jurisdiction without its consent; as the Court observed in the case of *Certain Phosphate Lands in Nauru (Nauru* v. *Australia)*, the Court's "jurisdiction depends on the consent of States and, consequently, the Court may not compel a State to appear before it . . ." (*Preliminary Objections, Judgment, I.C.J. Reports 1992*, p. 260, para. 53). The question whether in this case such consent exists on the part of Serbia is one of the issues raised by the preliminary objections the subject of the present Judgment. Montenegro made clear in its letter of 29 November 2006 (paragraph 28 above) that it does not give its consent to the jurisdiction of the Court over it for the purposes of the present dispute. The events referred to above (see paragraphs 23-25 and 32) clearly show that Montenegro does not continue the legal personality of Serbia and Montenegro; it cannot therefore have acquired, on that basis, the status of Respondent in the present case. Furthermore, the Applicant did not in its letter of 15 May 2008 assert that Montenegro is still a party to the present case (see paragraph 30 above).

34. The Court therefore concludes that Serbia is the sole Respondent in the case. The name of Serbia will thus be used when referring to the Respondent, except when it follows from the historical context that reference has to be made to the FRY or to Serbia and Montenegro.

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* *

II. General overview of the arguments of the Parties

35. In its Application dated 2 July 1999 the Government of Croatia, referring to acts which occurred during the conflict that took place between 1991 and 1995 in the territory of the former Socialist Federal Republic of Yugoslavia (hereinafter the "SFRY"), contended that the FRY had committed violations of the Genocide Convention. The Government of the FRY contested the admissibility of the Application as well as the jurisdiction of the Court under Article IX of the Genocide Convention on several grounds (see paragraphs 21 and 22 above).

The Court will now give a general overview of the arguments of the Parties before presenting them in more detail when examining the different preliminary objections raised by the Respondent.

36. With regard to the question which the Parties were invited by the Court to address (see paragraph 16 above), that of the capacity of the Respondent under Article 35 of the Statute to participate in the present proceedings, the Respondent claimed that it did not have such capacity, because, as the Court had confirmed in 2004 in the cases concerning *Legality of Use of Force*, it was not a Member of the United Nations until 1 November 2000 and therefore not party to the Statute at the time of filing of the Application on 2 July 1999. Croatia, however, argued that the FRY was a Member of the United Nations at the time of filing of the Application and that even if that was not the case, the status of Serbia within the United Nations in 1999 did not affect the present proceedings as the Respondent became a Member of the United Nations in 2000 and thereby validly gained capacity to take part in the present proceedings.

37. The Respondent raised a preliminary objection concerning the jurisdiction of the Court on the basis of Article IX of the Genocide Convention. In the Application, Croatia had maintained that both Parties were bound by the Genocide Convention as successor States of the SFRY. Serbia stated that the Court's jurisdiction in the present case, which was instituted on 2 July 1999, could not be based on Article IX of the Genocide Convention, in view of the fact that the FRY did not become bound by the Convention in any way before 10 June 2001, the date at which its notification of accession to the Genocide Convention became effective with a reservation regarding Article IX; thus Serbia had never become bound by Article IX of the Convention.

38. Serbia also contended that Croatia's Application was inadmissible so far as it refers to acts or omissions prior to the FRY's proclamation of independence on 27 April 1992. It stated that acts or omissions which took place before the FRY came into existence could not be attributed to it. Croatia stated that although Serbia's preliminary objection, as stated in its final submission 2 *(a)*, is presented as an objection to the admissibility of the claim, in point of fact Serbia seemed to be arguing that the Court had no jurisdiction *ratione temporis* over acts or events occurring before 27 April 1992. In this regard, it referred to the Court's Judgment of 11 July 1996 in which the Court stated that there are no temporal limitations to the application of the Genocide Convention and to its exercise of jurisdiction under the said Convention, in the absence of reservations to that effect (*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. 595, para. 34). During the oral pleadings, Serbia maintained the alternative argument that the Court lacked jurisdiction *ratione temporis* for acts or events that occurred before 27 April 1992, the date it came into existence, on the grounds that this date was the earliest possible point in time at which the FRY could have become bound by the Genocide Convention (see paragraph 121 below).

39. Serbia maintained that Croatia's submission 2 *(a)* in its Memorial (paragraph 21 above) concerning the submission to trial of persons suspected of having committed acts of genocide (including Slobodan Milošević) was "inadmissible and moot". Serbia contended that "[t]he crimes ascribed to Mr. Milošević and others in relation to the territory of Croatia include[d] crimes against humanity, breaches of the Geneva conventions and violations of the laws or customs of war" but did not include genocide. Croatia accepted that its submission 2 *(a)* was now moot in respect of those persons who have been transferred to the ICTY, including Mr. Milošević. However, Croatia pointed out that a large number of persons who are responsible for what Croatia considers to constitute genocidal acts committed in its territory and who are claimed to be within the jurisdiction of Serbia have still not been handed over to the ICTY or to Croatia nor submitted to trial in Serbia.

40. Serbia asserted that Croatia's submission 2 *(b)* in its Memorial (paragraph 21 above), concerning missing persons, was "inadmissible and moot". Serbia maintained that this specific submission fell outside the scope of the Genocide Convention and, in addition, had become moot since the Government of the FRY had been co-operating with the Government of Croatia since 1995 with a view to establishing the whereabouts of Croatian citizens missing as a result of the armed conflict. Croatia affirmed that its submission relating to the whereabouts of missing persons did fall within the scope of the Genocide Convention. It maintained that Serbia had at its disposal information and documentation on a large number of missing persons. It added that a compromissory clause providing for the Court's jurisdiction — such as Article IX of the Genocide Convention — over a dispute about the interpretation and application of a treaty established the Court's jurisdiction to award appropriate remedies, and that the provision of information on the whereabouts of missing persons was an appropriate remedy.

41. Serbia finally claimed that Croatia's submission 2 *(c)* in its Memorial (paragraph 21 above), concerning return of cultural property was "inadmissible and moot". According to Serbia, it is inadmissible because jurisdiction with respect to alleged crimes of genocide cannot include

property claims regarding objects of art. Croatia considered that its claim regarding the return of cultural property did fall within the scope of the Genocide Convention. In Croatia's view, it is recognized that genocide may not only be committed through physical destruction of a group but also through destruction of a group's cultural identity.

42. The Court will examine these arguments in turn. It will first examine the question of the capacity of Serbia to take part in the present proceedings and will for this purpose briefly recall the series of events relating to the status, at successive periods, of the SFRY, the FRY and Serbia in relation to the United Nations.

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* *

III. Brief history of the status of the FRY with regard to the United Nations

43. In the early 1990s the SFRY, a founding Member State of the United Nations, comprised of Bosnia and Herzegovina, Croatia, Macedonia, Montenegro, Serbia and Slovenia, began to disintegrate. On 25 June 1991 Croatia and Slovenia both declared independence, followed by Macedonia on 17 September 1991 and Bosnia and Herzegovina on 6 March 1992. On 22 May 1992, Bosnia and Herzegovina, Croatia and Slovenia were admitted as Members to the United Nations, as was the former Yugoslav Republic of Macedonia on 8 April 1993.

44. On 27 April 1992, "the participants of the joint session of the SFRY Assembly, the National Assembly of the Republic of Serbia and the Assembly of the Republic of Montenegro" adopted a declaration stating in particular:

> "
> . . . . . .
>
> 1. The Federal Republic of Yugoslavia, continuing the state, international legal and political personality of the Socialist Federal Republic of Yugoslavia, shall strictly abide by all the commitments that the SFR of Yugoslavia assumed internationally,
>
> . . . . . .
>
> Remaining bound by all obligations to international organizations and institutions whose member it is . . ." (United Nations doc. A/46/915, Ann. II.)

On the same date, the Permanent Mission of Yugoslavia to the United Nations sent a Note with a similar wording to the Secretary-General (see paragraph 99 below).

45. On 19 September 1992, the Security Council adopted resolution 777 (1992), in which it considered that "the Federal Republic of Yugoslavia (Serbia and Montenegro) cannot continue automatically the membership of the former Socialist Federal Republic of Yugoslavia in the United Nations"; it further recommended to the General Assembly that it "decide that the FRY (Serbia and Montenegro) should apply for membership in the United Nations and that it shall not participate in the work of the General Assembly".

46. On the recommendation of the Security Council, stated in its resolution 777 (1992), the General Assembly adopted resolution 47/1, on 22 September 1992, whereby it was decided that the FRY should apply for membership in the United Nations and that it should not participate in the work of the General Assembly.

47. On 25 September 1992, the Permanent Representatives of Bosnia and Herzegovina and Croatia addressed a letter to the Secretary-General, in which, with reference to Security Council resolution 777 (1992) and General Assembly resolution 47/1, they stated their understanding as follows: "At this moment, there is no doubt that the Socialist Federal Republic of Yugoslavia is not a member of the United Nations any more. At the same time, the Federal Republic of Yugoslavia is clearly not yet a member". They "request[ed] that [the Secretary-General] provide a legal explanatory statement concerning the questions raised" (United Nations doc. A/47/474).

48. In response, on 29 September 1992, the Under-Secretary-General and Legal Counsel of the United Nations addressed a letter to the Permanent Representatives of Bosnia and Herzegovina and Croatia, in which he stated, in substance, that "the only practical consequence" of resolution 47/1 was to prohibit the FRY from participating in the work of the General Assembly, but that it "neither terminates nor suspends Yugoslavia's membership in the Organization". He added that the situation thus created would be terminated by "[t]he admission to the United Nations of a new Yugoslavia" (see United Nations doc. A/47/485).

49. Considering this sequence of events, the Court in its Judgments of 15 December 2004 in the cases concerning the *Legality of Use of Force*, observed that

> "all these events testify to the rather confused and complex state of affairs that obtained within the United Nations surrounding the issue of the legal status of the Federal Republic of Yugoslavia in the Organization during this period" (*Legality of Use of Force (Serbia and Montenegro* v. *Belgium), Preliminary Objections, Judgment, I.C.J. Reports 2004*, p. 308, para. 73);

and earlier the Court, in another context, had referred to the "*sui generis* position which the FRY found itself in" during the period between 1992 to 2000 (*ibid.*, citing *I.C.J. Reports 2003*, p. 31, para. 71).

50. This position, however, came to an end with a new development in 2000. On 27 October 2000, Mr. Koštunica, the newly elected President of the FRY, sent a letter to the Secretary-General requesting admission of the FRY to membership in the United Nations.

51. On 1 November 2000, the General Assembly, by resolution 55/12, "*[h]aving received* the recommendation of the Security Council of 31 October 2000" and "*[h]aving considered* the application for membership of the Federal Republic of Yugoslavia", decided to "admit the Federal Republic of Yugoslavia to membership in the United Nations".

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IV. Relevance of previous decisions of the Court

52. Central to the present proceedings is the question of the status and position of the State known at the time of the filing of the Application as the FRY, in relation to the Statute of the Court and to the Genocide Convention. That question has been in issue in a number of previous decisions of the Court. In the case concerning *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro)*, there were two decisions on requests for the indication of provisional measures (Orders of 8 April and 13 September 1993), a decision on preliminary objections (Judgment of 11 July 1996) and a decision on the merits (Judgment of 26 February 2007). In the case concerning *Application for Revision of the Judgment of 11 July 1996* in the Case concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina *v.* Yugoslavia), Preliminary Objections *(Yugoslavia* v. *Bosnia and Herzegovina)*, the Court delivered a Judgment on 3 February 2003. In the set of cases concerning the *Legality of Use of Force* brought by the FRY against ten Member States of the North Atlantic Treaty Organization the Court rendered Judgments in eight of those cases on 15 December 2004 upholding preliminary objections on the ground of a lack of capacity on the part of the Applicant to appear before the Court. Both Parties to the present case have cited these various decisions in support of their respective contentions. It may be convenient at the outset for the Court to indicate to what extent it considers that these decisions may have weight for the purpose of deciding the matters now before it.

53. While some of the facts and the legal issues dealt with in those cases arise also in the present case, none of those decisions were given in proceedings between the two Parties to the present case (Croatia and Serbia), so that, as the Parties recognize, no question of *res judicata* arises (Article 59 of the Statute of the Court). To the extent that the decisions contain findings of law, the Court will treat them as it treats all previous decisions: that is to say that, while those decisions are in no way binding on the Court, it will not depart from its settled jurisprudence unless it finds very particular reasons to do so. As the Court has observed in the case concerning the *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon* v. *Nigeria: Equatorial Guinea*

intervening), while "[t]here can be no question of holding [a State] to decisions reached by the Court in previous cases" which do not have binding effect for that State, in such circumstances "[t]he real question is whether, in [the current] case, there is cause not to follow the reasoning and conclusions of earlier cases" (*Preliminary Objections, Judgment, I.C.J. Reports 1998*, p. 292, para. 28).

54. Furthermore, here the Parties are not merely citing previous decisions of the Court which might be regarded as precedents to be followed in comparable cases. The previous decisions cited here referred to the question of the status of a particular State, the FRY, in relation to the United Nations and to the Statute of the Court; and it is that same question in relation to that same State that requires to be examined in the present proceedings at the instance, this time, of Croatia. It would require compelling reasons for the Court to depart from the conclusions reached in those previous decisions.

55. The Court will consequently bear in mind that in the proceedings in the course of which the above-cited Judgments and Orders were rendered (see paragraph 52), it was not the contention either of Bosnia and Herzegovina or, until 2002, of the FRY that the FRY was not a Member of the United Nations (and thus was not a party to the Statute), or that it was not a party to the Genocide Convention. It was only when the FRY, abandoning its claim to continue the United Nations membership of the SFRY, was admitted to the United Nations in 2000 that it advanced the opposite view, initially in its Written Statement, filed on 20 December 2002, on the Preliminary Objections submitted in the *Legality of Use of Force* cases. It was not until the written and oral proceedings in those cases that the Court heard an exchange of full argument between the parties on these points. The Court will consider in the present Judgment the grounds adopted for the conclusion to which it came, in those decisions, as regards the status of the Respondent.

56. There have also been suggestions in argument by Croatia before the Court that the previous cases mentioned above are relevant as showing, in particular, that Serbia as a party to those cases initially adopted and put forward a legal position from which it cannot now resile for purposes of the present case. This contention relates only to the question of the legal consequences to be drawn from the conduct of this State, and not strictly speaking to the effect or relevance of the above-cited case law.

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V. Preliminary objection to the jurisdiction of the Court

(1) Issues of capacity to be a party to the proceedings

57. The first question to be addressed by the Court when examining the Respondent's first preliminary objection is whether the Parties in the present case satisfy the general conditions, under Articles 34 and 35 of the Statute, for capacity to participate in proceedings before the Court.

58. It should be recalled in this regard that, under Article 34, paragraph 1, of the Statute, "[o]nly States may be parties in cases before the Court". Article 35, paragraph 1, moreover lays down that "[t]he Court shall be open to the States parties to the present Statute". The latter provision is to be understood in the light of Article 93 of the Charter of the United Nations; paragraph 1 of that Article states that "[a]ll Members of the United Nations are *ipso facto* parties to the Statute of the International Court of Justice", but provision is made in paragraph 2 by way of exception for cases in which a State not a Member of the United Nations may become a party to the Statute of the Court. In respect of States which are not parties to the Statute of the Court, as Members of the United Nations or otherwise, the position is governed by Article 35, paragraph 2, of the Statute. That paragraph on the one hand empowers the Security Council to lay down the conditions under which the Court shall be open to such States and on the other contains a reservation for "special provisions contained in treaties in force". Pursuant to the authority thus conferred upon it, the Security Council adopted resolution 9 (1946) of 15 October 1946, providing in substance that the Court shall be open to any State not a party to the Statute which has previously deposited a declaration, either in respect of one or more particular matters or with a more general ambit, whereby the State undertakes to accept the jurisdiction of the Court in accordance with the Charter and to comply in good faith with the decisions of the Court.

59. It is neither disputed nor disputable in the present case that both Parties satisfy the condition laid down in Article 34 of the Statute: Croatia and Serbia are States for purposes of Article 34, paragraph 1.

60. It is not disputed nor is it open to doubt that, at the date it filed its Application, 2 July 1999, Croatia satisfied a condition under Article 35 of the Statute sufficient for the Court to be "open" to it: at that date it was a Member of the United Nations and, as such, therefore a party to the Statute of the Court.

61. On the other hand the Parties disagreed whether Serbia satisfies, for the purposes of the present case, the conditions under Article 35, paragraph 1 or paragraph 2, of the Statute and whether, in view of the foregoing, it has capacity to participate in the present proceedings before the Court.

62. Reduced to their essentials, the Parties' positions on this point may be described as follows.

63. The Respondent contends that it was not a Member of the United Nations at the date the Application was filed and thus was not a party to the Statute of the Court on this basis — or on any other. The Court was therefore not "open" to it within the meaning of Article 35, paragraph 1, of the Statute, which should be applied as of the date of filing of the Application, not any later date; accordingly, the fact that it later became a party to the Statute of the Court — in 2000, as a result of its admission to the United Nations — is irrelevant.

The Respondent further maintains that the Genocide Convention is not one of the "treaties in force" referred to in the proviso in Article 35, paragraph 2, since this term embraces only treaties in force at the date on which the Statute itself entered into force, as the Court recognized in its 2004 Judgments in the cases concerning *Legality of Use of Force*. It is moreover a fact that the

Respondent has not made any declaration of the kind contemplated by Security Council resolution 9 (1946). Consequently, the Respondent argues, the Court is not "open" to it pursuant to Article 35, paragraph 2, either.

Finally, the Respondent contends that the same result obtains where the party failing to fulfil any of the conditions set out in Article 35 of the Statute in a particular case is the respondent as where that party is the applicant: that is to say that the Court is precluded from exercising jurisdiction over the dispute between the two parties.

64. The Applicant in the present case contests these arguments, its contention being essentially as follows.

First, the Respondent had in 1999 a status vis-à-vis the United Nations that was *sui generis*, such that, albeit not a full-fledged Member, it remained a party to the Statute of the Court and therefore had access to it pursuant to Article 35, paragraph 1, of the Statute.

The Applicant further contends that even assuming that the Respondent was not a party to the Statute when the proceedings were initiated, it undoubtedly became one as from 1 November 2000, when it was admitted to the United Nations, and is therefore now, a party, and that is sufficient to enable the Court to exercise jurisdiction over it. In this connection the Applicant cites the jurisprudence deriving from the 1924 Judgment in the case concerning *Mavrommatis Palestine Concessions* (*Judgment No. 2, 1924, P.C.I.J., Series A, No. 2*, p. 34). It also points out that its Memorial was filed on 1 March 2001, after the Respondent had been admitted to the United Nations, at a date when no objection to the institution of new proceedings could have been based on Article 35.

Finally, and again in the alternative, even if the Court were to consider that it is not "open" to the Respondent under Article 35, paragraph 1, of the Statute, it should hold that it is open under paragraph 2 of that Article. The Applicant maintains that the Genocide Convention is a "treaty in force" for purposes of Article 35, paragraph 2, making it possible for access to the Court to be given to States not parties to the Statute. The Applicant is well aware that the Court took the opposite position in its Judgments in 2004 in the *Legality of Use of Force* cases: it nevertheless asks the Court to reconsider, and modify the interpretation it then gave of the Statute provision in question, i.e., that "treaties in force" did not embrace treaties dating from after the entry into force of the Statute.

65. Before proceeding with a more detailed analysis and examination of the Parties' arguments briefly summarized immediately above, the Court feels that it should make a number of preliminary observations at this point. Most of them are drawn from decisions it has rendered in the last 15 years, a period during which the Court has had several opportunities to apply Article 34 and to interpret and apply Article 35 of the Statute, by reference in fact to the legal position of the State which is the Respondent in the present case.

66. It should first be observed that the question whether or not a State meets the conditions of Article 35 of the Statute can be regarded either as an issue relating to the Court's jurisdiction *ratione personae* or as an issue preliminary to the examination of jurisdiction. The Court sees no

need to settle this debate, any more than it felt obliged to do so in its earlier decisions (see, e.g., *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro)*, Judgment of 26 February 2007, para. 136). Where the conditions of Article 35 are not met, the Court is without jurisdiction to adjudicate the dispute on the merits. From this standpoint, a Respondent raising an objection on the basis that the conditions of Article 35 have not been met must be deemed to be making a jurisdictional objection and, if the Court sustains the argument, its judgment will be a finding of lack of jurisdiction. Thus, Serbia is here asking the Court to decide, drawing on its arguments relating to its first preliminary objection, that it is without jurisdiction in the case.

67. Secondly, the issue arises whether the Court, if presented with both an objection based on one party's lack of access to the Court and an objection based on lack of jurisdiction *ratione materiae*, — or indeed, which comes to the same thing, an objection to jurisdiction advancing both of these grounds — must necessarily examine the two questions in a prescribed order, so that it could not consider the second (jurisdiction *ratione materiae*) until after it has answered the first (access to the Court) in the affirmative.

The Court addressed this issue in its 2004 Judgments in the *Legality of Use of Force* cases (see, e.g. *Legality of Use of Force (Serbia and Montenegro* v. *Belgium), Preliminary Objections, Judgment, I.C.J. Reports 2004*, pp. 298-299, para. 46). After pointing out that, as a general rule, it remained free to select the ground on which to base its judgment where several separate grounds were capable of leading to the same conclusion, and it therefore remained free to decide the order in which to deal with these questions, the Court determined that the position was otherwise in the matter before it. It stated that, where the applicant's right to access to the Court has been challenged — as it had been — this "fundamental question" had to be decided before any other, because, if the applicant was not a party to the Statute, the Court was not open to it and accordingly it could not "properly seise . . . the Court, whatever title of jurisdiction it might . . . invoke" *(ibid.)*.

The Court therefore found it necessary in those cases first to examine the question of Serbia and Montenegro's access to the Court, so as to determine whether the Court could "exercise its judicial function" in respect of that State, observing that it could then examine the issues involving jurisdiction *ratione materiae* and any other jurisdictional issues "[o]nly if the answer to that [first] question is in the affirmative".

In the present case, even though no question arises as to seisin so far as the Applicant is concerned, the Court considers that here also it is appropriate first to examine the issues relating to application of Article 35 of the Statute.

68. Thirdly, the Court recalls that, as it pointed out in its Judgment of 26 February 2007 in the case concerning *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro)*, the question whether a State may properly appear before the Court, on the basis of the Statute, is "one which the Court is bound to raise and examine, if necessary, ex officio, and if appropriate after notification to the parties" (para. 122).

The first consequence of this is described as follows in that Judgment:

> "if the Court considers that, in a particular case, the conditions concerning the capacity of the parties to appear before it are not satisfied, while the conditions of its jurisdiction *ratione materiae* are, it should, even if the question has not been raised by the parties, find that the former conditions are not met, and conclude that, for that reason, it could not have jurisdiction to decide the merits" *(ibid.)*.

Obviously, it does not however follow that the Court is under an obligation to treat this question expressly in the reasoning in any judgment in which it rules on a preliminary objection to jurisdiction. If neither party has raised the issue and the Court finds that the conditions of Articles 34 and 35 are satisfied in the case, it may well choose to omit from the reasoning in the judgment any specific discussion of the point and to confine itself to responding to the arguments raised by the parties. It may also choose, if it finds appropriate, to deal with the point expressly in its reasoning.

If however the Court in a judgment on preliminary objections to jurisdiction rejects them and upholds jurisdiction, without saying anything on the question of access to the Court, the conclusion may be drawn that the Court has perceived the conditions on access to have been satisfied. As the Court stated in 2007 in respect of its 1996 Judgment in the same case, dealing with the preliminary objections raised by the FRY:

> "Since . . . the question of a State's capacity to be a party to proceedings is a matter which precedes that of jurisdiction *ratione materiae*, and one which the Court must, if necessary, raise ex officio . . . this finding [that it had jurisdiction on the basis of Article IX of the Genocide Convention to adjudicate upon the dispute] must as a matter of construction be understood, by necessary implication, to mean that the Court at that time perceived the Respondent as being in a position to participate in cases before the Court." (*Ibid.*, para. 132.)

69. The Respondent in 1996 and in 2007 was the same State as is Respondent in the present case. The Court cannot but observe, however, that in the present case no implicit finding that Serbia has the necessary capacity to participate in the proceedings instituted by Croatia's Application can be inferred from any previous judgment of the Court. The Judgment of 11 July 1996 on jurisdiction in the case concerning *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Yugoslavia) (Preliminary Objections, Judgment, I.C.J. Reports 1996 (II)*, p. 595), to which the Court gave full effect as *res judicata* in its 2007 Judgment on the merits in the same case, does not of itself have any authority as *res judicata* in the present case. The question of the Respondent's capacity must therefore be examined *de novo*, in the context of the dispute now before the Court.

The Respondent did not raise the question of its lack of capacity to participate in proceedings in its preliminary objections. The Court informed the Parties, by means of letters dated 6 May 2008 from the Registrar, of its wish to hear this issue addressed in the hearings and it was so addressed; the issue is now before the Court.

70. The last series of preliminary observations relates to the order in which the Court will now examine the various questions arising out of the application of Article 35 of the Statute in the present case.

71. As noted above, the Parties argued the question whether the Genocide Convention is a "treaty in force" for purposes of Article 35, paragraph 2, of the Statute. If the answer were in the affirmative, and provided that at the relevant date the Parties were bound vis-à-vis each other by this Convention, including Article IX — a point to be examined later in this Judgment —, it would follow that the Court was "open" to Serbia pursuant to Article 35, paragraph 2, even if Serbia was not a party to the Statute at that date and therefore did not satisfy the condition laid down in paragraph 1.

The Parties are in agreement that the Court addressed this question in its 2004 Judgments in the *Legality of Use of Force* cases and answered it in the negative. It did so on the basis of, *inter alia*, its examination of the *travaux préparatoires* of the provision, which led it to conclude that "treaties in force" referred only to treaties already in force at the entry into force of the Statute and not to treaties concluded subsequently, such as the Genocide Convention (see, e.g., *Legality of Use of Force (Serbia and Montenegro* v. *Belgium), I.C.J. Reports 2004, Preliminary Objections, Judgment*, pp. 318-324, paras. 100-114).

The two Parties further agree that the position adopted by the Court in those cases does not have the force of *res judicata* in the present case, because those Judgments were rendered in different cases which did not involve the same parties.

The Parties however recognize that these findings have great bearing for the present case, as the Court does not depart from its settled jurisprudence unless it finds very particular reasons to do so.

On the basis of these shared premises, the Parties reach different conclusions: while Croatia invites the Court to reconsider its jurisprudence on this point and to correct the error which it claims was committed in 2004, Serbia asks the Court to maintain unchanged in the present case its interpretation of the clause "special provisions contained in treaties in force" in Article 35, paragraph 2.

72. The Court deems it appropriate in the present case to examine the question of Serbia's access to the Court on the basis of Article 35, paragraph 1, before any examination on the basis of paragraph 2.

Only if the Court were to find that the Respondent was not a party to the Statute of the Court at the relevant time — to be determined below — and that, as a result, it did not satisfy the condition in paragraph 1, should the Court address the question whether the Respondent can derive its capacity to participate in the proceedings from the Genocide Convention, on the basis of "special provisions contained in treaties in force" within the meaning of paragraph 2.

73. The Court thus now turns to the question of whether Serbia is or was, at the pertinent time, a party to the Statute, which would suffice, in any event, to confer upon it the necessary capacity to participate in proceedings before the Court, in whatever role.

74. The starting-point for the reasoning should be the following two observations, which are not disputed by the Parties.

75. First, in its Judgments in 2004 in the *Legality of Use of Force* cases, the Court clearly determined the legal status of the FRY, now Serbia, over the period from the dissolution of the former SFRY to the admission of the FRY to the United Nations on 1 November 2000.

After recalling that the FRY's position vis-à-vis the United Nations had remained uncertain and controversial throughout that period, the Court itself having characterized it as "sui generis" in its Judgment on the *Application for Revision of the Judgment of 11 July 1996 in the Case concerning* Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina *v.* Yugoslavia), Preliminary Objections *(Yugoslavia v. Bosnia and Herzegovina), Judgment, I.C.J. Reports 2003*, p. 31, para. 71), the Court recounted in detail the history of relations between the FRY and the United Nations from the dissolution of the former Yugoslavia until the State's admission as a Member of the United Nations on 1 November 2000.

That led the Court to conclude:

> "This new development effectively put an end to the *sui generis* position of the Federal Republic of Yugoslavia within the United Nations, which, as the Court has observed in earlier pronouncements, had been fraught with 'legal difficulties' throughout the period between 1992 and 2000 . . . The Applicant thus has the status of membership in the United Nations as from 1 November 2000. However, its admission to the United Nations did not have, and could not have had, the effect of dating back to the time when the Socialist Federal Republic of Yugoslavia broke up and disappeared; there was in 2000 no question of restoring the membership rights of the Socialist Federal Republic of Yugoslavia for the benefit of the Federal Republic of Yugoslavia. At the same time, it became clear that the *sui generis* position of the Applicant could not have amounted to its membership in the Organization.
>
> In the view of the Court, the significance of this new development in 2000 is that it has clarified the thus far amorphous legal situation concerning the status of the Federal Republic of Yugoslavia vis-à-vis the United Nations. It is in that sense that the situation that the Court now faces in relation to Serbia and Montenegro is manifestly different from that which it faced in 1999. If, at that time, the Court had had to determine definitively the status of the Applicant vis-à-vis the United Nations, its task of giving such a determination would have been complicated by the legal situation, which was shrouded in uncertainties relating to that status. However, from the vantage point from which the Court now looks at the legal situation, and in light of the legal consequences of the new development since 1 November 2000, the Court is led to the conclusion that Serbia and Montenegro was not a Member of the United Nations, and in that capacity a State party to the Statute of the International Court of Justice, at the time of filing its Application to institute the present proceedings before the Court on 29 April 1999." (*Legality of Use of Force (Serbia and Montenegro* v. *Belgium), Preliminary Objections, Judgment, I.C.J. Reports 2004*, pp. 310-311, paras. 78-79).

76. There can be no doubt that for purposes of the present case the aforementioned Judgments of 2004 do not have force of *res judicata* on this — or any other — point, since they were given in different cases which did not involve the same parties, as has already been noted above with respect to another aspect of those Judgments (see paragraph 71).

Nevertheless, it is equally certain that they may be of relevance in the present instance, as, first, they address the legal position of the Respondent in the present case during a period — from 1992 to 2000 — covering the date of filing of the Application on which the Court must rule, and second as was recalled above (paragraph 53), the Court departs from settled jurisprudence only if it is of the opinion that there are very particular reasons to do so.

That is the first consideration to be taken in account.

77. The second point is that, from 1 November 2000 and up to the date of the present Judgment, the Respondent is a party to the Statute by virtue of its status as a Member of the United Nations, that is to say pursuant to Article 93, paragraph 1, of the Charter, which automatically grants to all Members of the Organization the status of party to the Statute of the Court.

Thus, it is indisputable — and neither Party in its argument has suggested otherwise — that at the present time both Croatia and Serbia have access to the Court on the basis of Article 35, paragraph 1, of the Statute. It undoubtedly follows that a dispute between these two States could now be referred to the Court providing, of course, that there was a basis of jurisdiction *ratione materiae* allowing for submission of the dispute to the Court.

Thus, had Croatia's Application been filed on 2 November 2000, instead of 2 July 1999, no objection to jurisdiction could have been based on lack of access to the Court within the meaning of Article 35 of the Statute, and the Court would simply have had to ascertain whether there was a basis for jurisdiction *ratione materiae*, that is to say a legal nexus between the Parties such that each had consented to the jurisdiction of the Court to settle its dispute with the other.

78. This brings the Court to address an issue of particular importance in the present case: whether fulfilment of the conditions laid down in Article 35 of the Statute must be assessed solely as of the date of filing of the Application, or whether it can be assessed, at least under the specific circumstances of the present case, at a subsequent date, more precisely at a date after 1 November 2000.

79. In numerous cases, the Court has reiterated the general rule which it applies in this regard, namely: "the jurisdiction of the Court must normally be assessed on the date of the filing of the act instituting proceedings" (to this effect, see *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. 613, para. 26; cf. *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya* v. *United Kingdom), Preliminary Objections, Judgment, I.C.J. Reports 1998*, p. 26, para. 44).

Given that, as indicated above, fulfilment of the conditions of Article 35 governs the jurisdiction of the Court — whether or not this is seen as an element of jurisdiction *ratione personae* —, it is normally by reference to the date of the filing of the instrument instituting proceedings that it must be determined whether those conditions are met.

80. It is easy to see why this rule exists.

If at the date of filing of an application all the conditions necessary for the Court to have jurisdiction were fulfilled, it would be unacceptable for that jurisdiction to cease to exist as the result of a subsequent event. In the first place, the result could be an unwarranted difference in treatment between different applicants or even with respect to the same applicant, depending on the degree of rapidity with which the Court was able to examine the cases brought before it. Further, a respondent could deliberately place itself beyond the jurisdiction of the Court by bringing about an event or act, after filing of an application, as a result of which the conditions for the jurisdiction of the Court were no longer satisfied — for example, by denouncing the treaty containing the compromissory clause. That is why the removal, after an application has been filed, of an element on which the Court's jurisdiction is dependent does not and cannot have any retroactive effect. What is at stake is legal certainty, respect for the principle of equality and the right of a State which has properly seised the Court to see its claims decided, when it has taken all the necessary precautions to submit the act instituting proceedings in time.

Conversely, it must be emphasized that a State which decides to bring proceedings before the Court should carefully ascertain that all the requisite conditions for the jurisdiction of the Court have been met at the time proceedings are instituted. If this is not done and regardless of whether these conditions later come to be fulfilled, the Court must in principle decide the question of jurisdiction on the basis of the conditions that existed at the time of the institution of the proceedings.

81. However, it is to be recalled that the Court, like its predecessor, has also shown realism and flexibility in certain situations in which the conditions governing the Court's jurisdiction were not fully satisfied when proceedings were initiated but were subsequently satisfied, before the Court ruled on its jurisdiction.

82. In its Judgment of 30 August 1924 on the objection to jurisdiction raised by the Respondent in the *Mavrommatis Palestine Concessions* case, the Permanent Court of International Justice stated thus:

> "it must . . . be considered whether the validity of the institution of proceedings can be disputed on the ground that the application was filed before Protocol XII [annexed to the Treaty of Lausanne] had become applicable. This is not the case. Even assuming that before that time the Court had no jurisdiction because the international obligation referred to in Article 11 [of the Mandate for Palestine] was not yet effective, it would always have been possible for the applicant to re-submit his application in the same terms after the coming into force of the Treaty of Lausanne, and in that case, the argument in question could not have been advanced. Even if the grounds on which the institution of proceedings was based were defective for the reason stated, this would not be an adequate reason for the dismissal of the applicant's suit. The Court, whose jurisdiction is international, is not bound to attach to matters of form the same degree of importance which they might possess in municipal law. Even, therefore, if the application were premature because the Treaty of Lausanne had not yet been ratified, this circumstance would now be covered by the subsequent deposit of the necessary ratifications." (*Judgment No. 2, 1924, P.C.I.J., Series A, No. 2*, p. 34.)

Similarly, the Permanent Court said in the case concerning *Certain German Interests in Polish Upper Silesia*:

> "Even if, under Article 23 [of the German-Polish Convention of 1922, the compromissory clause invoked in the case], the existence of a definite dispute were necessary, this condition could at any time be fulfilled by means of unilateral action on the part of the applicant Party. And the Court cannot allow itself to be hampered by a mere defect of form, the removal of which depends solely on the Party concerned." (*Jurisdiction, Judgment No. 6, 1925, P.C.I.J., Series A, No. 6*, p. 14.)

In the jurisprudence of the present Court, operation of the same idea is discernible in the *Northern Cameroons (Cameroon* v. *United Kingdom)* case *(Preliminary Objections, Judgment, I.C.J. Reports 1963*, p. 28), and in the case concerning *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America)*, in the passage stating: "It would make no sense to require Nicaragua now to institute fresh proceedings based on the [1956] Treaty [of Friendship], which it would be fully entitled to do." (*Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984*, pp. 428-429, para. 83.)

Finally, the Court was confronted more recently with a comparable situation when it ruled on the preliminary objections in the case concerning *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Yugoslavia)* (*Preliminary Objections, Judgment, I.C.J. Reports 1996 (II)*, p. 595). The Respondent argued that the Genocide Convention — the basis of jurisdiction — had only begun to apply to relations between the two Parties on 14 December 1995, the date when, pursuant to the Dayton-Paris Agreement, they recognized each other, whereas the Application had been submitted on 20 March 1993, that is to say more than two-and-a-half years earlier.

The Court responded to that argument as follows:

> "In the present case, even if it were established that the Parties, each of which was bound by the Convention when the Application was filed, had only been bound as between themselves with effect from 14 December 1995, the Court could not set aside its jurisdiction on this basis, inasmuch as Bosnia and Herzegovina might at any time file a new application, identical to the present one, which would be unassailable in this respect." (*Ibid.*, p. 614, para. 26.)

83. Croatia relies on this jurisprudence, which it contends can be directly transposed to the present case. If Serbia is bound by the Genocide Convention, including Article IX, as Croatia considers is the case, and, since the Respondent has been a party to the Statute of the Court since 1 November 2000, it follows that the Applicant could at any time file a new application, which would be unassailable in this respect. The reasoning of the Court in the aforementioned cases should, according to Croatia, lead it in this case also not to oblige the Applicant to bring fresh proceedings, so that it would disregard the fact that Serbia only became a party to the Statute after the proceedings had been instituted. In this respect, Croatia emphasizes the date on which it filed its Memorial, 1 March 2001.

84. Serbia disputes these arguments, contending that the jurisprudence in question is not applicable to the present case for two reasons. First, the Respondent notes that in all of the precedents cited it was not the respondent alone, which was unable to fulfil one of the conditions necessary for the Court to uphold jurisdiction at the date the proceedings were instituted, but this

was not a point Serbia chose to rely on. Secondly and more importantly, according to Serbia, the jurisprudence cannot be applied where the unmet condition concerns the capacity of a party to participate in proceedings before the Court, in accordance with Articles 34 and 35 of the Statute, that is to say concerns a "fundamental question" which, as the Court stated in 2004, must be examined before any other issue of jurisdiction. Further, Serbia adds, the Court did not apply the "Mavrommatis doctrine" in its 2004 Judgments in the *Legality of Use of Force* cases, since, after finding that the Applicant was not a party to the Statute of the Court at the date the Applications were filed and did not therefore have the right of access to the Court, it held that it lacked jurisdiction, even though it mentioned the fact that the Applicant had been a Member of the United Nations since 1 November 2000. According to Serbia, this is explained by the fact that when the Court is seised of a case in which either the applicant or the respondent does not fulfil the conditions of Articles 34 and 35 of the Statute, it cannot regard itself as having been "properly" seised and does not even possess the *compétence de la compétence*, that is to say the jurisdiction to determine whether it has jurisdiction to decide the merits of the dispute. In such a case, it would be confronted with an insuperable obstacle.

85. The Court observes that as to the first of these two arguments, given the logic underlying the cited jurisprudence of the Court deriving from the 1924 Judgment in the *Mavrommatis Palestine Concessions* case, it does not matter whether it is the applicant or the respondent that does not fulfil the conditions for the Court's jurisdiction, or both of them — as is the situation where the compromissory clause invoked as the basis for jurisdiction only enters into force after the proceedings have been instituted. The Court sees no convincing reason why an applicant's deficiency might be overcome in the course of proceedings, while that of a respondent may not. What matters is that, at the latest by the date when the Court decides on its jurisdiction, the applicant must be entitled, if it so wishes, to bring fresh proceedings in which the initially unmet condition would be fulfilled. In such a situation, it is not in the interests of the sound administration of justice to compel the applicant to begin the proceedings anew — or to initiate fresh proceedings — and it is preferable, except in special circumstances, to conclude that the condition has, from that point on, been fulfilled.

86. In the view of the Court, the second argument mentioned above warrants more detailed analysis.

First, it is true that all of the cited precedents concern cases where the initially unfulfilled condition related to jurisdiction *ratione materiae* or *ratione personae* in the narrow sense and not to the question of access to the Court, which has to do with a party's capacity to participate in any proceedings whatever before the Court. Nevertheless, the Court cannot endorse the radical interpretation advanced by Serbia, namely that whenever it is seised by a State which does not fulfil the conditions of access under Article 35, or seised of a case brought against a State which does not fulfil those conditions, the Court does not even have the *compétence de la compétence*, the competence to decide whether or not it has jurisdiction. Nothing of the sort is to be found in the 2004 Judgments cited by Serbia during the hearings. In those Judgments, the Court did no more than indicate that the question of access to the Court was a "fundamental one" which needed to be examined before the others, and that if the Applicant did not fulfil the Article 35 conditions the Court had to deduce from that fact that it had not been "properly seised". Not being "properly seised" does not mean that the Court lacks the competence necessary to decide on its own jurisdiction, in other words to decide whether it has been properly seised and whether the

conditions necessary to allow it to hear the case on the merits have been satisfied. That is true where it is the applicant which, as in the *Legality of Use of Force* cases, does not fulfil the conditions for access to the Court. It is true *a fortiori* when it is the respondent which allegedly does not meet those conditions since in such circumstances the act of seising the Court, performed by a State which does have access to the Court, is not at issue: that is the case in the present proceedings. The Court always possesses the *compétence de la competence* (see Article 36, paragraph 6, of the Statute). In any event the Court notes that Serbia asks it in its principal submission to decide by a judgment that it lacked jurisdiction to entertain Croatia's Application.

87. More importantly, the Court cannot accept Serbia's argument that when the defect is that one party does not have access to the Court, it is so fatal that it can in no case be cured by a subsequent event in the course of the proceedings, for example when that party acquires the status of party to the Statute of the Court which it initially lacked.

As stated above, the question of access is clearly distinct from those relating to the examination of jurisdiction in the narrow sense. But it is nevertheless closely related to jurisdiction, inasmuch as the consequence is exactly the same whether it is the conditions of access or the conditions of jurisdiction *ratione materiae* or *ratione temporis* which are unmet: the Court lacks jurisdiction to entertain the case. It is always within the context of an objection to jurisdiction, as in the present case, that arguments will be raised before the Court regarding the parties' capacity to participate in the proceedings.

That being so, it is not apparent why the arguments based on the sound administration of justice which underpin the *Mavrommatis* case jurisprudence cannot also have a bearing in a case such as the present one. It would not be in the interests of justice to oblige the Applicant, if it wishes to pursue its claims, to initiate fresh proceedings. In this respect it is of no importance which condition was unmet at the date the proceedings were instituted, and thereby prevented the Court at that time from exercising its jurisdiction, once it has been fulfilled subsequently .

88. It is true that the Court apparently did not take account in its 2004 Judgments of the fact that Serbia and Montenegro had by that date become a party to the Statute: indeed, the Court found that it lacked jurisdiction on the sole ground that the Applicant did not have access to the Court in 1999, when the Applications were filed, without taking its reasoning any further.

89. But if the Court abided in those cases strictly by the general rule that its jurisdiction is to be assessed at the date of filing of the act instituting proceedings, without adopting the more flexible approach following from the other decisions cited above, that is justified by particular considerations relevant to those cases.

It was clear that Serbia and Montenegro did not have the intention of pursuing its claims by way of new applications. That State itself argued before the Court that it was not, and never had been, bound by Article IX of the Genocide Convention, even though that was the basis for jurisdiction which it had initially invoked (e.g. *Legality of Use of Force (Serbia and Montenegro* v. *Belgium), Preliminary Objections, Judgment, I.C.J. Reports 2004*, p. 293, para. 29). It is true that the Applicant in those cases had let it be known that it did not intend to discontinue the proceedings

pending before the Court; but, given the legal position it was asserting from that time on as to the Genocide Convention, it was out of the question that, in the event of judgments rejecting its applications owing to its lack of access to the Court at the date the proceedings had been instituted, it would rely on the status it would then undoubtedly possess of party to the Statute of the Court to submit fresh applications identical in substance to the first. On this basis, and in the particular circumstances of those cases, there would have been no justification for the Court to disregard the FRY's initial lack of capacity to seise the Court, on the ground that the defect had been cured in the course of the proceedings. As stated above (paragraph 85), it is concern for judicial economy, an element of the requirements of the sound administration of justice, which justifies application of the jurisprudence deriving from the *Mavrommatis* Judgment in appropriate cases. The purpose of this jurisprudence is to prevent the needless proliferation of proceedings. No such consideration obtained in 2004 to justify the Court departing at that time from the principle holding that its jurisdiction must be established at the date of filing of the applications. Indeed, Serbia and Montenegro took care not to ask the Court to do so; while Croatia is asking the Court to apply the jurisprudence of the *Mavrommatis* case to the present case, no such request was made, or could logically have been made, by the Applicant in 2004.

90. Two additional considerations lend weight to the conclusion that there is reason, in the circumstances of the present case, to look beyond the legal situation prevailing at the date of the Application.

First, while, as noted above (paragraph 80), a State filing an application with the Court should normally be expected to demonstrate sufficient care to avoid doing so prematurely, it cannot be said that the Applicant in the current proceedings has shown any careless approach in this regard. At the date the Application was filed, the Respondent considered that it had the capacity to participate in proceedings before the Court, and its position in that respect was a matter of public knowledge. In April 1999, the FRY had filed Applications instituting proceedings against ten Member States of the North Atlantic Treaty Organization invoking Article IX as a basis of jurisdiction. The Applicant could therefore feel entitled to seise the Court on what at first sight seemed to be an appropriate basis of jurisdiction. It is of course true that, as stated above (paragraph 67), questions of access to the Court, unlike those of consent to its jurisdiction, are not matters of the will of the parties. However, Croatia's conduct does not reflect any circumstances that would warrant a particularly strict application by the Court of the jurisprudence described above.

Secondly, it should be noted that, while Croatia's Application — a short text comprising some ten pages — was filed on 2 July 1999, that is prior to the admission of the FRY to the United Nations on 1 November 2000, its Memorial on the merits, a document of 414 pages, was submitted on 1 March 2001, after that date.

Although it is not possible to equate the filing of a memorial with that of an instrument instituting proceedings, since by definition a memorial concerns proceedings which are already under way, it should be noted that the Memorial is of considerable importance, not just because it expounds the Applicant's arguments, but also because it specifies the submissions. While this cannot be considered a decisive element, it cannot be entirely ignored: if Croatia had submitted the substance of its Memorial, on 1 March 2001, in the form of a new application, as it could have done, no question with respect to Article 35 of the Statute would have arisen.

91. The Court accordingly concludes that on 1 November 2000 the Court was open to the FRY. Therefore, should the Court find that Serbia was bound by Article IX of the Convention on 2 July 1999, the date on which proceedings in the present case were instituted, and remained bound by that Article until at least 1 November 2000, the Court would be in a position to uphold its jurisdiction.

This question will be examined in the next section.

92. In view of the above finding, the question whether the conditions laid down in Article 35, paragraph 2, have been fulfilled (see paragraph 71 above) has no pertinence in the present case.

* *

(2) Issues of jurisdiction *ratione materiae*

93. The Court now turns to the question of its jurisdiction *ratione materiae*, which forms the second aspect of the first preliminary objection submitted by Serbia requesting the Court to declare that it lacks jurisdiction. According to Serbia, this aspect is an element of jurisdiction *ratione personae*.

94. The basis of jurisdiction asserted by Croatia is Article IX of the Genocide Convention, which provides as follows:

> "Disputes between the Contracting Parties relating to the interpretation, application or fulfilment of the present Convention, including those relating to the responsibility of a State for genocide or any of the other acts enumerated in Article III, shall be submitted to the International Court of Justice at the request of any of the parties to the dispute."

It is common ground between the Parties that Croatia is, and has been at all relevant times, a party to the Genocide Convention, and has not made any reservation excluding the application of Article IX. Croatia deposited a notification of succession with the Secretary-General of the United Nations on 12 October 1992. It asserted that it had already been a party prior thereto as a successor State to the SFRY from the date it assumed responsibility for its international relations with respect to its territory, namely from 8 October 1991. Serbia's objection is to the effect that it was not itself a party to that Convention at the date of filing of the Application instituting proceedings (2 July 1999); it maintains that it only became a party by accession in June 2001. Furthermore the notification of accession by the FRY, dated 6 March 2001 and deposited on 12 March 2001, contained a reservation to the effect that the FRY "does not consider itself bound by Article IX of the Convention" (see the text in paragraph 116 below). When the Secretary-General, the depositary of the Convention, notified States parties of the FRY's notification of accession,

objections were made by Croatia (as well as by Bosnia and Herzegovina, and by Sweden); the ground of Croatia's objection was that the FRY "is already bound by the Convention since its emergence as one of the five equal successor States" of the former SFRY. Croatia also objected to the reservation made by the FRY to the application of Article IX of the Convention, on the grounds that in the view of Croatia it was "incompatible with the object and purpose of the Convention".

95. If, as Croatia contends, Serbia was already a party to the Genocide Convention at the date when the present proceedings were instituted, any change in the situation which might have been effected by the 2001 purported accession by the FRY or by the reservation attached to it could not deprive the Court of the jurisdiction already existing under Article IX of the Convention. The Court recalls that according to its established jurisprudence, if a title of jurisdiction is shown to have existed at the date of the institution of proceedings, any subsequent lapse or withdrawal of the jurisdictional instrument is without effect on the jurisdiction of the Court. The principle was established in the *Nottebohm* case *(Liechtenstein* v. *Guatemala)* (*Preliminary Objection, Judgment, I.C.J. Reports 1953*, p. 122), which related to an acceptance of compulsory jurisdiction (under the optional clause of Article 36, paragraph 2, of the Statute) which expired on a date subsequent to the institution of proceedings citing that acceptance as the basis of jurisdiction. It has subsequently been consistently applied (e.g., where a bilateral treaty relied on as jurisdictional basis had been terminated by the time the Court came to give judgment on the merits of the case (*Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Merits, Judgment, I.C.J. Reports 1986*, p. 28, para. 36)).

96. If therefore the FRY was a party to the Genocide Convention, including its Article IX, on 2 July 1999, the date on which proceedings were instituted, and if it continued to be bound by Article IX of the Convention until at least 1 November 2000, the date on which the FRY became a party to the Statute of the Court, then, the Court today continues to have jurisdiction.

It is thus not necessary for the Court to make a finding as to any legal effect of the notification of accession to the Convention by Serbia dated 6 March 2001.

97. The reasons why it is disputed between the Parties whether Serbia was a party to the Convention on the date on which these proceedings were instituted are bound up with the history of the relationship to the Convention of, first, the SFRY, and, subsequently, of the Respondent.

The SFRY signed the Genocide Convention on 11 December 1948, and deposited an instrument of ratification, without reservation, on 29 August 1950; it is common ground between the Parties that the SFRY was thus a party to the Convention at the time in the 1990s when it began to disintegrate into separate and independent States. The process of disintegration of the SFRY, the appearance of its former constituent Republics as separate States, and the efforts of the FRY to have its claim to continue the State, international legal and political personality of the SFRY internationally recognized, have been described in detail in paragraphs 43 to 51 above and in a number of previous decisions of the Court (most recently in the Judgment of 26 February 2007 in the case concerning *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro)*, paras. 88-99). In the present case, Croatia asserts first that the FRY was a party by succession to the Genocide Convention from the beginning of its existence as a State, since succession, unlike other modes of becoming bound

by a treaty, is retrospective to the commencement of the successor State; it also relies, in support of its arguments in favour of jurisdiction, on a formal declaration adopted on behalf of the FRY on 27 April 1992, and an official Note of the same date transmitted with that declaration to the Secretary-General of the United Nations.

98. The declaration of 27 April 1992 was made in the name of "the representatives of the people of the Republic of Serbia and the Republic of Montenegro" and according to Serbia it was adopted by "an *ad hoc* body consisting of members of the Assembly of the SFRY, the National Assembly of the Republic of Serbia and of the Assembly of the Republic of Montenegro"; see also Ann. 13 to POS, heading; and signature clause]. In that declaration the representatives stated that:

> "The Federal Republic of Yugoslavia, continuing the State, international legal and political personality of the Socialist Federal Republic of Yugoslavia, shall strictly abide by all the commitments that the Socialist Federal Republic of Yugoslavia assumed internationally.
>
> At the same time, it is ready to fully respect the rights and interests of the Yugoslav Republics which declared independence. The recognition of the newly-formed states will follow after all the outstanding questions negotiated on within the Conference on Yugoslavia have been settled . . ." (United Nations doc. A/46/915, Ann. II.)

99. Similarly, the Note of 27 April 1992 from the Permanent Mission of Yugoslavia to the Secretary-General of the United Nations contained the following:

> "The Assembly of the Socialist Federal Republic of Yugoslavia, at its session held on 27 April 1992, promulgated the Constitution of the Federal Republic of Yugoslavia. Under the Constitution, on the basis of the continuing personality of Yugoslavia and the legitimate decisions by Serbia and Montenegro to continue to live together in Yugoslavia, the Socialist Federal Republic of Yugoslavia is transformed into the Federal Republic of Yugoslavia, consisting of the Republic of Serbia and the Republic of Montenegro.
>
> Strictly respecting the continuity of the international personality of Yugoslavia, the Federal Republic of Yugoslavia shall continue to fulfil all the rights conferred to, and obligations assumed by, the Socialist Federal Republic of Yugoslavia in international relations, including its membership in all international organizations and participation in international treaties ratified or acceded to by Yugoslavia." (United Nations doc. A/46/915, Ann. I.)

100. The FRY thus did not consider itself to be one of the successor States of the SFRY emerging from the dissolution of that State, but the sole continuing State, maintaining the personality of the former SFRY, with the implication that the other States formed from the former Yugoslavia were new States, though entitled to assert the rights of successor States. This policy of

the FRY was maintained until a change of Government in 2000, and a subsequent application to the United Nations for admission as a new Member (see paragraphs 50-51 and 116 below).

The 1992 declaration and Note should not of course be viewed in isolation; their effect must be assessed in the light of, in particular, the conduct of the FRY at the time of making of the declaration and subsequently, and that aspect will be examined below (paragraphs 114-117).

101. On the basis of the historical record, and of the declaration and Note of 27 April 1992, Croatia maintains that Serbia was a party to the Genocide Convention on 2 July 1999 on the same terms as the SFRY had been, namely without reservation, and that accordingly Article IX confers jurisdiction on the Court in the present case. In its Application, Croatia based its arguments in this respect on the rules of international law concerning succession of States. In its Written Statement on the Preliminary Objections of Serbia, it invoked primarily the decision of the Court of 3 February 2003 in the case concerning *Application for Revision of the Judgment of 11 July 1996 in the Case concerning* Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina *v.* Yugoslavia), Preliminary Objections *(Yugoslavia* v. *Bosnia and Herzegovina)*, in which the status of the FRY vis-à-vis the United Nations has been in issue. In the course of the oral proceedings, it indicated that it was also relying in the alternative on the declaration and Note of 27 April 1992. It will be convenient to examine first this alternative argument based on the events of 1992, before proceeding, if necessary, to the wider question of the application in this case of the general law relating to succession of States, since if Croatia's contentions as to the effect of the declaration and Note are accepted, the need does not arise for the Court further to address the arguments put to it by the Parties concerning the rules of international law governing State succession to treaties including the question of *ipso jure* succession to some multilateral treaties.

102. Croatia submitted not only that Serbia was bound by the Genocide Convention from the beginning of the conflict between Bosnia and Herzegovina and the FRY, that is to say from a date prior to the 1992 declaration, but that the Court has confirmed that this was so on six occasions in the course of that period, namely in 1993 (twice), 1996, 1999, 2003 and 2007, i.e., in the Orders and Judgments in the case concerning *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro)* on the requests for the indication of provisional measures (1993), on preliminary objections (1996) and on the merits (2007), in the Judgment on the *Application for Revision of the Judgment of 11 July 1996* in that case (2003), and in the Orders on the requests for the indication of provisional measures in the *Legality of Use of Force* cases (1999). Croatia submitted that to hold that the FRY was not bound by the Genocide Convention on 2 July 1999 "would reverse 15 years of jurisprudence and call into question the basis for the Court's decisions" in the case concerning *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* brought by Bosnia and Herzegovina.

103. Croatia argues that these decisions are relevant because the "solemn commitment" given by the FRY in the 1992 declaration has been relied on by the FRY itself in proceedings before this Court, and has been relied on by the Court, so that Croatia also was entitled to rely on it, and has done so. The significance of the attitude adopted by the FRY in previous proceedings will be examined below (paragraph 114).

104. As for the Court itself, it was observed in paragraphs 52 to 56 above, these decisions do not have the status of *res judicata* in the present proceedings. In general the Court does not choose to depart from previous findings, particularly when similar issues were dealt with in the earlier decisions, as in the current case, unless it finds very particular reasons to do so. It is on that basis therefore that the Court will consider the arguments of the Parties on the matters which, it is argued, were covered by those previous decisions.

105. The question what effects might, in law, result from the fact that Croatia might have thought it possible, in good faith, to rely on the commitment given in those documents, can be reserved for the present. The Court will first examine what was the nature and effect of the 1992 declaration and Note on the position of the FRY in relation to the Genocide Convention.

106. Serbia argues that the declaration of 27 April 1992 described in paragraph 98 above was not capable of constituting a notification of succession to the Genocide Convention, for three reasons. First, any notification of succession just like any other relevant treaty action must emanate, in order to be valid, from a person being able to represent the State concerned (cf. Article 7 of the Vienna Convention on the Law of Treaties). The 1992 declaration was however, Serbia contends, adopted by an *ad hoc* body consisting of members of the Assembly of the SFRY, the National Assembly of the Republic of Serbia, and of the Assembly of the Republic of Montenegro. Secondly, as confirmed by uniform depositary practice, specific notifications are necessary in order to bring about succession, in other words a notification of succession must specify precisely which treaty it is directed to; and the 1992 declaration was entirely general in its terms ("all the commitments that the SFR of Yugoslavia assumed internationally"). Thirdly, any notification of succession, in order to be an effective one, must be transmitted to the depositary; the 1992 declaration and Note were however transmitted to the Secretary-General of the United Nations (the depositary of the Genocide Convention) to be circulated as an official document of the General Assembly, and were thus clearly not addressed to him in his function as depositary.

107. In relation to the first point, the Court notes that the assembly that adopted the 1992 declaration was the same that "promulgated the Constitution of the Federal Republic of Yugoslavia", as indicated in the Note of 27 April 1992 (paragraph 99 above). In any event the Note transmitting the declaration to the Secretary-General of the United Nations, was formally communicated by the Chargé d'affaires a.i. of the Permanent Mission of Yugoslavia to the United Nations, and was accepted by the Secretary-General, and circulated as such as an official document of the General Assembly. While at the time objection was taken to the claim of the FRY to be the continuator of the SFRY, it was not then suggested that that claim was not advanced by the appropriate representative body of the FRY, or conveyed to the Secretary-General by an unauthorized representative. Furthermore, as the Court will elaborate more fully below (paragraphs 114-115), there can be no doubt, from the subsequent conduct of those charged with the affairs of the FRY, that the declaration was regarded by the State as made on its behalf, and the commitments contained in it were endorsed and accepted by the FRY.

108. In respect of the second argument, the Court must first consider whether the 1992 declaration and Note were "made in sufficiently specific terms in relation to the particular question" of acceptance to be bound by international treaty obligations (cf. *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo* v. *Rwanda), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 2006*, p. 29, para. 52). The Court notes that the 1992 declaration and Note did not merely state that the FRY would abide by certain commitments: it specified that these were the commitments "that the SFR of Yugoslavia assumed internationally" or "in international relations". While the treaties contemplated were not specified by name, the declaration referred to a class of instruments which was perfectly ascertainable at the moment of making of the declaration: the treaty "commitments" binding on the SFRY at the moment of its dissolution. There is no doubt that the Genocide Convention was one of these "commitments". While the practice of making declarations of succession to a treaty or treaties with an indication of the treaty or treaties to which they are intended to relate is of undoubted practical usefulness, the Court is unable to hold that international law regards as wholly ineffective an instrument that identifies by general reference the treaty to which it is addressed, rather than by designating it by its particular name.

109. In the view of the Court, there is a distinction between the legal nature of ratification of, or accession to a treaty, on the one hand, and on the other, the process by which a State becomes bound by a treaty as a successor State or remains bound as a continuing State. Accession or ratification is a simple act of will on the part of the State manifesting an intention to undertake new obligations and to acquire new rights in terms of the treaty, effected in writing in the formal manner set out in the Treaty (cf. Arts. 15 and 16 of the Vienna Convention on the Law of Treaties). In the case of succession or continuation on the other hand, the act of will of the State relates to an already existing set of circumstances, and amounts to a recognition by that State of certain legal consequences flowing from those circumstances, so that any document issued by the State concerned, being essentially confirmatory, may be subject to less rigid requirements of form. Article 2 *(g)* of the 1978 Vienna Convention on Succession of States in respect of Treaties reflects this idea, defining a "notification of succession" as meaning "in relation to a multilateral treaty, *any notification, however framed or named*, made by a successor State expressing its consent to be considered as bound by the treaty". Nor does international law prescribe any specific form for a State to express a claim of continuity.

110. In respect of both the second and the third arguments advanced by Serbia, the Court notes that the 1992 declaration was not expressed in the terms of one of the recognized legal acts by which a State may become a party to a multilateral convention. It observes, however, that in order to constitute a valid and effective means by which the declaring State could assume obligations under the Convention, the declaration need not strictly comply with all formal requirements. For example, in the *North Sea Continental Shelf (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands)* cases, the Court recognized the possibility that a State that had not carried out the usual formalities (ratification, accession) to become bound by the régime of an international convention might nevertheless "somehow become bound in another way", even though such a process was "not lightly to be presumed" to have occurred. This did not in the event prove to have happened in those cases (*Judgment, I.C.J. Reports 1969*, p. 25, paras. 27 and 28). In the present case, the Court has to consider whether the

1992 declaration and Note, coupled with other consistent conduct of Serbia, indicate such a unilateral acceptance of the obligations of the Genocide Convention, by a process equivalent, in the special circumstances of this case, to a succession to the SFRY as regards to the Convention.

111. For the purposes of the present case, the Court points out first and foremost that the FRY in 1992 clearly expressed an intention to be bound — or, consistently with the view of the legal situation it then held, to continue to be bound — by the obligations of the Genocide Convention. The FRY was then claiming to be the continuator State of the SFRY, but it did not repudiate its status as a party to the Convention even when it became apparent that that claim would not prevail, and that the FRY was regarded by other States, particularly by those that had emerged from the dissolution of the former Yugoslavia, as simply one of the successor States of the SFRY. In the particular context of the case, the Court is of the view that the 1992 declaration must be considered as having had the effects of a notification of succession to treaties, notwithstanding that its political premise was different. It is clear that the operative part of the 1992 declaration, the acceptance of "all the commitments that the Socialist Federal Republic of Yugoslavia assumed internationally", had been drawn up in the light of its assertion, made in the declaration and in the Note of the Permanent Mission, of "the continuity of the international personality of Yugoslavia", and this was linked with the claim of the FRY to continue the membership of the SFRY in the United Nations. There was however no indication that the commitment undertaken would be conditional on acceptance of the claim of continuity. That claim did not in fact prevail. Nonetheless, the conduct of Serbia after the transmission of the declaration made it clear that it regarded itself bound by the Genocide Convention.

112. Serbia has however drawn the attention of the Court to Article XI of the Genocide Convention, which provides that:

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

Serbia contends the following:

> "Before it became a Member of the United Nations on 1 November 2000 as a new State, the Respondent was not even qualified to be a party to the Genocide Convention. Since it was not [prior to that date] a Member of the United Nations, it could only have become a party upon an invitation extended under Article XI. It is an undisputed fact that the FRY never received such an invitation."

113. The Court observes that Article XI, according to its terms, does not exclude States not Members of the United Nations from being *parties* to the Genocide Convention, as Serbia suggests; it provides simply that non-signatory States may only *accede* to the Convention if they are United Nations Member States or States who have received an invitation from the General Assembly. The text does not make any reference to continuation of, or succession to, the treaty rights and obligations of a predecessor State, in the manner and on the conditions recognized in international law. 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)*, the question was raised whether a "Notice of Succession" to the Convention transmitted by Bosnia and Herzegovina was not to be treated as an accession, to which Articles XI and XIII of the Convention would apply. The Court held that Bosnia and Herzegovina had become a party to the Convention by way of succession, and concluded from this that "the question of the application of Articles XI and XIII of the Convention does not arise" (*Preliminary Objections, Judgment, I.C.J. Reports 1996 (II)*, p. 612, para. 24.)

114. The position adopted by the FRY itself in relation to the Convention has already been referred to, and is clearly conduct that must be taken into account by the Court. As early as 1993, in the context of the first request for the indication of provisional measures in the proceedings brought against it by Bosnia and Herzegovina, the FRY, while questioning whether the applicant State was a party to the Genocide Convention at the relevant dates, did not challenge the claim that it was itself a party, and itself presented a request for the indication of provisional measures, referring to Article IX of the Convention. On this basis, the Court in its Order found that "both Bosnia-Herzegovina and Yugoslavia are parties" to the Convention (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Yugoslavia (Serbia and Montenegro)), Provisional Measures, Order of 8 April 1993, I.C.J. Reports 1993*, p. 16, para. 26), and cited the 1992 declaration and Note (*ibid.*, p. 15, paras. 22-23). Moreover, in the same case, at the preliminary objections stage, the FRY argued that the Genocide Convention had begun to apply to relations between the two Parties on 14 December 1995, as recalled above (see paragraph 82), having itself continued the rights and duties, under *(inter alia)* that Convention, established by the SFRY. Furthermore, on 29 April 1999 the FRY filed in the Registry of the Court Applications instituting proceedings against ten States Members of NATO, citing *(inter alia)* the Genocide Convention as title of jurisdiction (see for example *Legality of Use of Force (Serbia and Montenegro* v. *Belgium), Preliminary Objections, Judgment, I.C.J. Reports 2004*, p. 284, para. 1).

115. This was still the situation when on 2 July 1999 Croatia filed the Application instituting the present proceedings. During the period between the making of the 1992 declaration and that date, neither the FRY nor any other State for which the issue might have had significance questioned that the FRY was a party to the Genocide Convention, without reservations; and no other event occurring during that period had any impact on the legal situation arising from the 1992 declaration. On 1 November 2000, the FRY was admitted as a new Member of the United Nations, as it had requested by a letter addressed to the Secretary-General by the President of the FRY dated 27 October 2000, "in light of the implementation of Security Council resolution 777 (1992)" (United Nations doc. A/55/528-S/2000/1043). As the Court observed in its Judgments in the cases

concerning the *Legality of Use of Force*, "[t]his new development effectively put an end to the *sui generis* position of the Federal Republic of Yugoslavia within the United Nations . . ." (*Legality of Use of Force (Serbia and Montenegro* v. *Belgium), Preliminary Objections, Judgment, I.C.J. Reports 2004*, p. 310, para. 78). Nevertheless, the FRY did not at that time withdraw, or purport to withdraw, the declaration and Note of 1992, which had been drawn up in the light of the contention that the FRY was continuing the legal personality of the SFRY. It did not, for example, suggest that the failure of that contention to gain acceptance had entailed the nullity of the declaration, or cessation of the commitment to the international obligations contemplated by it.

116. It was not until March 2001 that the FRY took any further step inconsistent with the status which it had since 1992 been claiming to possess, namely that of a State party to the Genocide Convention. On 12 March 2001 it deposited with the Secretary-General a notification of accession to the Genocide Convention, which, after referring to the 1992 declaration and to the subsequent admission of the FRY to the United Nations as a new Member, contained the following:

> "NOW it has been established that the Federal Republic of Yugoslavia has not succeeded on April 27, 1992, or on any later date, to treaty membership, rights and obligations of the Socialist Federal Republic of Yugoslavia in the Convention on the Prevention and Punishment of the Crime of Genocide on the assumption of continued membership in the United Nations and continued state, international legal and political personality of the Socialist Federal Republic of Yugoslavia . . ."

The notification of accession contained the following reservation:

> "'The Federal Republic of Yugoslavia does not consider itself bound by Article IX of the Convention . . . and, therefore, before any dispute to which the Federal Republic of Yugoslavia is a party may be validly submitted to the jurisdiction of the International Court of Justice under this Article, the specific and explicit consent of the FRY is required in each case.'"

However, the Court notes also that on that same date, the FRY deposited with the Secretary-General of the United Nations declarations of succession to a large number of other multilateral conventions of which the Secretary-General is depositary. This practice of the FRY was fully consistent with that of the other former States emerging from the dissolution of the SFRY, which also saw themselves as successors to that State, and thus had, during the period from 1991 on, notified their succession to those conventions. There was indeed (other than the accession of the FRY to the Genocide Convention) only one exception to that very extensive and consistent body of practice.

117. In sum, in the present case the Court, taking into account both the text of the declaration and Note of 27 April 1992, and the consistent conduct of the FRY at the time of its making and throughout the years 1992-2001, considers that it should attribute to those documents precisely the effect that they were, in the view of the Court, intended to have on the face of their terms: namely, that from that date onwards the FRY would be bound by the obligations of a party in respect of all the multilateral conventions to which the SFRY had been a party at the time of its dissolution, subject of course to any reservations lawfully made by the SFRY limiting its obligations. It is common ground that the Genocide Convention was one of these conventions, and that the SFRY had made no reservation to it; thus the FRY in 1992 accepted the obligations of that Convention, including Article IX providing for the jurisdiction of the Court and that jurisdictional commitment was binding on the Respondent at the date the present proceedings were instituted. In the events that have occurred, this signifies that the 1992 declaration and Note had the effect of a notification of succession by the FRY to the SFRY in relation to the Genocide Convention. The Court

concludes that, subject to the more specific objections of Serbia to be examined below, it had, on the date on which the present proceedings were instituted, jurisdiction to entertain the case on the basis of Article IX of the Genocide Convention. That situation continued at least until 1 November 2000, the date on which Serbia and Montenegro became a Member of the United Nations and thus a party to the Statute of the Court.

Accordingly, there is no need to consider the contentions of Croatia based on more general issues relating to the rules of international law concerning succession of States to treaties, referred to in paragraph 101 above.

* *

(3) Conclusions

118. The Court recalls that it held earlier in this Judgment (paragraph 91) that the Respondent acquired the status of party to the Statute of the Court on 1 November 2000. The Court further held that if it could be established that the Respondent was also a party to the Genocide Convention, including Article IX, on the date of the institution of the proceedings and until at least 1 November 2000, and if consequently the Applicant would have been at liberty, had it so desired, to submit a fresh application identical in substance to the present Application, the conditions for the jurisdiction of the Court would be satisfied.

The Court has now found that the Respondent was bound by the Genocide Convention, including Article IX thereof, at the date of the institution of the proceedings and remained so bound at least until 1 November 2000.

119. Having established that the conditions for the Court's jurisdiction are met and without prejudice to its findings on the other preliminary objections submitted by Serbia, the Court concludes that the first preliminary objection, "that the Court lacks jurisdiction", must be rejected.

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VI. Preliminary objection to the jurisdiction of the Court and to admissibility, *ratione temporis*

120. The Court therefore now turns to the second preliminary objection as stated in Serbia's final submission 2 *(a)*, namely the objection that "claims based on acts and omissions which took place prior to 27 April 1992", that is to say prior to the formal establishment of the "Federal Republic of Yugoslavia (Serbia and Montenegro)", the name by which the present Serbia was formerly known, "are beyond the jurisdiction of this Court and inadmissible". The preliminary objection is thus presented as, at one and the same time, an objection to jurisdiction and one going to the admissibility of the claims. A distinction between these two kinds of objections is well recognized in the practice of the Court. In either case, the effect of a preliminary objection to a particular claim is that, if upheld, it brings the proceedings in respect of that claim to an end; so that the Court will not go on to consider the merits of the claim. If the objection is a jurisdictional objection, then since the jurisdiction of the Court derives from the consent of the parties, this will most usually be because it has been shown that no such consent has been given by the objecting State to the settlement by the Court of the particular dispute. A preliminary objection to admissibility covers a more disparate range of possibilities. In the case concerning *Oil Platforms (Islamic Republic of Iran* v. *United States of America)* the Court noted that:

> "Objections to admissibility normally take the form of an assertion that, even if the Court has jurisdiction and the facts stated by the applicant State are assumed to be correct, nonetheless there are reasons why the Court should not proceed to an examination of the merits." (*Judgment, I.C.J. Reports 2003*, p. 177, para. 29.)

Essentially such an objection consists in the contention that there exists a legal reason, even when there is jurisdiction, why the Court should decline to hear the case, or more usually, a specific claim therein. Such a reason is often of such a nature that the matter should be resolved *in limine litis*, for example where without examination of the merits it may be seen that there has been a failure to comply with the rules as to nationality of claims; failure to exhaust local remedies; the agreement of the parties to use another method of pacific settlement; or mootness of the claim. If the Court finds that an objection "does not possess, in the circumstances of the case, an exclusively preliminary character" (Article 79, paragraph 7, of the Rules of Court as adopted on 14 April 1978), it will be dealt with at the merits stage. Challenges either to jurisdiction or to admissibility are sometimes in fact presented along with arguments on the merits, and argued and determined at that stage (cf. *East Timor (Portugal* v. *Australia), Judgment, I.C.J. Reports 1995*, p. 92, para. 4; *Avena and Other Mexican Nationals (Mexico* v. *United States of America), Judgment, I.C.J. Reports 2004*, p. 29, para. 24**).**

121. As set out above, Serbia's preliminary objection, as stated in its final submission 2 *(a)*, is presented as relating both to the jurisdiction of the Court and to the admissibility of the claim. The title of jurisdiction relied on by Croatia is Article IX of the Genocide Convention, and the Court has established above that Croatia and Serbia were both parties to that Convention on the date on which proceedings were instituted (2 July 1999). Serbia's contention is however that the Court has no jurisdiction under Article IX, or that jurisdiction cannot be exercised, so far as the claim of Croatia concerns "acts and omissions that took place prior to 27 April 1992", i.e., that the Court's jurisdiction is limited *ratione temporis*. Serbia advanced two reasons for this: first,

because the earliest possible point in time at which the Convention could be found to have entered into force between the FRY and Croatia was 27 April 1992; and secondly, because "the Genocide Convention including the jurisdictional clause contained in its Article IX cannot be applied with regard to acts that occurred *before* Serbia came into existence as a State", and could thus not have become binding upon it. Serbia therefore contended that acts or omissions which took place before the FRY came into existence cannot possibly be attributed to the FRY.

122. In that respect, Croatia has drawn the attention of the Court to the fact that a similar question of jurisdiction *ratione temporis* under the Genocide Convention in respect of the events in the former Yugoslavia was dealt with by the Court in the case concerning the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Yugoslavia*), in response to two of the preliminary objections of the FRY. In that Judgment the Court found that

> "Yugoslavia, basing its contention on the principle of the non-retroactivity of legal acts, has . . . asserted . . . that, even though the Court might have jurisdiction on the basis of the [Genocide] Convention, it could only deal with events subsequent to the different dates on which the Convention might have become applicable as between the Parties. In this regard, the Court will confine itself to the observation that the Genocide Convention — and in particular Article IX — does not contain any clause the object or effect of which is to limit in such manner the scope of its jurisdiction *ratione temporis*, and nor did the Parties themselves make any reservation to that end, either to the Convention or on [a later possible opportunity]. The Court thus finds that it has jurisdiction in this case to give effect to the Genocide Convention with regard to the relevant facts which have occurred *since the beginning of the conflict which took place in Bosnia and Herzegovina*." (*I.C.J. Report 1996 (II)*, p. 617, para. 34; emphasis added.)

Croatia argues that the same reasoning should also be applicable in the present case, and therefore invites the Court to dismiss the Serbian objection.

123. The Court observes however that the temporal questions to be resolved in the present case are not the same as those dealt with by the Court in 1996. At that time, the Court had merely to determine, first whether, at the date that the proceedings in the case were instituted, the Genocide Convention had become applicable between the FRY and Bosnia and Herzegovina, and secondly whether in the exercise of its jurisdiction it was limited to dealing only with events subsequent to the date or dates on which the Convention might thus have become applicable. That date was, or those dates were, in any event subsequent to the moment at which the FRY had come into existence and had thus become capable of being itself a party to the Convention. Therefore the finding of the Court that it had jurisdiction "with regard to the relevant facts which have occurred since the beginning of the conflict" (that is to say not merely facts subsequent to the date when the Convention became applicable between the parties) was not addressed to the question whether these included facts occurring prior to the coming into existence of the FRY. In the present case, the Court therefore cannot draw from that judgment (which, as already noted, does not have the authority of *res judicata* in the present proceedings) any definitive conclusion as to the temporal scope of the jurisdiction it has under the Convention. At the same time, the Court notes, as it did in 1996, that there is no express provision in the Genocide Convention limiting its jurisdiction *ratione temporis*.

124. Another circumstance distinguishing the present case from the case between Bosnia and Herzegovina and the FRY is that in the present case Serbia's objection is presented as relating both to the Court's jurisdiction and to matters of admissibility of the claims of Croatia. In particular, the Court notes that, in the present case, the Parties advanced arguments relating to the consequences to be drawn from the fact that the FRY only became a State and a party to the Genocide Convention on 27 April 1992, not only with regard to its jurisdiction but also with regard to the attribution to Serbia of acts that occurred before that date. Serbia contended that, not having been a State before 27 April 1992, acts that occurred before that date cannot be attributed to it and that, not having been a party to the Convention, it could not have breached any obligation under it. In the Court's view the question of the temporal scope of its jurisdiction is closely bound up with these questions of attribution, presented by Serbia as a matter of admissibility rather than of jurisdiction, and thus has to be examined in the light of these issues. The Court therefore now turns to the aspect of the objection related to issues of attribution of acts that occurred prior to 27 April 1992.

125. In its Memorial, Croatia referred to the temporal element and contended that "the fact that the FRY only formally proclaimed itself on 27 April 1992 does not mean that acts occurring prior to that date cannot be attributed to it". It invoked what it referred to as a well-established principle that "a state in *statu nascendi* is responsible for conduct carried out by its officials and organs or otherwise under its direction and control". Croatia indicated that it relies on the rule stated in Article 10, paragraph 2, of the International Law Commission's Articles on the State Responsibility (Annex to General Assembly resolution 56/83, 12 December 2001, hereinafter referred to as "the ILC Articles on State Responsibility"), that "the conduct of a movement insurrectional or other which succeeds in establishing a new State shall be considered an act of the new State under international law".

126. In its preliminary objections Serbia contended that "[a]cts or omissions which took place before the FRY came into existence cannot possibly be attributed to the FRY"; it denies that Croatia has been able to demonstrate that the FRY was a State *in statu nascendi*, and argues that that concept is "evidently not appropriate for this case". At the hearings it argued that the requirements of Article 10, paragraph 2, of the ILC Articles on State Responsibility are not fulfilled in respect of the claims made by Croatia against Serbia in the present case. It contended that Croatia has been unable to specify an identifiable "insurrectional or other movement" in the territory of the SFRY as one that established the FRY which would fall within the definition of that Article.

127. In so far as Article 10, paragraph 2, of the ILC Articles on State Responsibility reflects customary international law on the subject, it would necessarily require the Court, in order to determine if that rule is applicable to the present case and for purposes of a possible application, to enter into an examination of factual issues concerning the events leading up to the dissolution of the SFRY and the establishment of the FRY. The Court notes further that for it to determine whether, prior to 27 April 1992, the FRY was a State *in statu nascendi* for purposes of the rule invoked would similarly involve enquiry into disputed matters of fact. It would thus be impossible to determine the questions raised by the objection without to some degree determining issues properly pertaining to the merits.

128. The provision introduced into the Rules of Court in 1972, and constituting Article 79, paragraph 7, of the Rules adopted on 14 April 1978, was drafted, as the Court indicated in the case concerning *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America)*, to make it clear that when preliminary objections are exclusively preliminary, they have to be decided upon immediately, "but if they are not, especially when the character of the objections is not exclusively preliminary because they contain both preliminary aspects and other aspects relating to the merits, they will have to be dealt with at the stage of the merits" (*Merits, Judgment, I.C.J. Reports 1986*, p. 31, para. 41; see also *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya* v. *United Kingdom), Preliminary Objections, I.C.J. Reports 1998*, pp. 27-29.)

129. In the view of the Court, the questions of jurisdiction and admissibility raised by Serbia's preliminary objection *ratione temporis* constitute two inseparable issues in the present case. The first issue is that of the Court's jurisdiction to determine whether breaches of the Genocide Convention were committed in the light of the facts that occurred prior to the date on which the FRY came into existence as a separate State, capable of being a party in its own right to the Convention; this may be regarded as a question of the applicability of the obligations under the Genocide Convention to the FRY before 27 April 1992. The second issue, that of admissibility of the claim in relation to those facts, and involving questions of attribution, concerns the consequences to be drawn with regard to the responsibility of the FRY for those same facts under the general rules of State responsibility. In order to be in a position to make any findings on each of these issues, the Court will need to have more elements before it.

130. In view of the above, the Court concludes that Serbia's preliminary objection *ratione temporis* does not possess, in the circumstances of the case, an exclusively preliminary character.

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VII. Preliminary objection concerning the submission of certain persons to trial; the provision of information on missing Croatian citizens; and the return of cultural property

131. Serbia's preliminary objection as stated in its final submission 2 *(b)*, (hereinafter referred to as the "third objection") is that

> "claims referring to submission to trial of certain persons within the jurisdiction of Serbia, providing information regarding the whereabouts of missing Croatian citizens and return of cultural property are beyond the jurisdiction of this Court and inadmissible".

In the objection as filed on 11 September 2002, it had been asserted that some of the Applicant's specific submissions are per se inadmissible and moot. Serbia has identified the claims in question as those made as submissions 2 *(a)*, 2 *(b)* and 2 *(c)* advanced in the Memorial of Croatia. Despite this overall classification of the objection as being both to the jurisdiction of the Court and to the admissibility of certain claims, it appears that not all the contentions of Serbia in this respect are related to both aspects of the objection.

132. The Court notes that Croatia has asked the Court simply to reject the third objection, though in relation to one matter it suggests that the point should be examined at the merits stage (see paragraphs 138 and 142 below). The Court recalls that it is required by Article 79, paragraph 7, of the 1978 Rules of Court either to "uphold the objection, reject it, or declare that the objection does not possess, in the circumstances of the case, an exclusively preliminary character"; and that this last course may be indicated, *inter alia*, when an objection contains "both preliminary aspects and other aspects relating to the merits" (*Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Merits, Judgment, I.C.J. Reports 1986*, p. 31, para. 41).

* *

(i) Submission of persons to trial

133. Submission 2 *(a)* in the Croatian Memorial requests the Court to find that Serbia is under an obligation:

> "to take immediate and effective steps to submit to trial before the appropriate judicial authority, those citizens or other persons within its jurisdiction who are suspected on probable grounds of having committed acts of genocide as referred to in paragraph (1) *(a)*, or any of the other acts referred to in paragraph (1) *(b)* [of the Submissions of Croatia], in particular Slobodan Milošević, the former President of the Federal Republic of Yugoslavia, and to ensure that those persons, if convicted, are duly punished for their crimes".

Croatia's claim is based on Articles I and VI of the Genocide Convention. By Article I, the Contracting Parties "undertake to prevent and punish" genocide; and Article VI provides that

> "Persons charged with genocide or any of the other acts enumerated in article III shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction."

Croatia thus contends that "the failure of the FRY . . . to submit all relevant persons for trial by a competent tribunal gives rise to its international responsibility".

134. As regards the factual basis of this claim, the Court notes that Croatia has adjusted its submissions to take account of the fact that former President Slobodan Milošević had, since the presentation of the Memorial, been transferred to the International Criminal Tribunal for the former Yugoslavia (ICTY), and has since died. Furthermore, Croatia accepts that this submission is now

moot in respect of a number of other persons whom Serbia has transferred to the ICTY, but insists that there continues to be a dispute between Croatia and Serbia with respect to persons who have not been submitted to trial either in Croatia or before the ICTY in respect of acts or omissions which are the subject of these proceedings. As regards the ICTY, Serbia maintains, as a first basis of its objection, that as a matter of fact there is only one person still at large who has been accused by the ICTY of crimes allegedly committed in Croatia, and these accusations relate not to genocide but to war crimes and crimes against humanity. Croatia observes that a number of persons have been charged with genocide by the Croatian authorities, and that a number of perpetrators so charged are out of reach of the Croatian authorities, "presumably in Serbia".

135. The second and third bases of Serbia's objection to Croatian submission 2 *(a)* are as follows. Serbia observes that Croatia is asserting that Serbia is under an obligation under the Genocide Convention to punish its nationals for alleged acts of genocide committed in Croatia, that is to say outside Serbia's own territory; it draws attention however to the finding made by the Court in 2007 (since the proceedings were instituted in this case) in its Judgment in the case concerning *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro)*, that the Convention "only obliges the Contracting Parties to institute and exercise territorial criminal jurisdiction" (Judgment of 26 February 2007, para. 442). Serbia then objects further that Croatia is apparently claiming that Serbia has violated the Genocide Convention by failing in a duty to hand over persons who have allegedly committed acts of genocide, not to the ICTY, but to Croatia itself; and it argues that no such obligation is to be found in the Convention; in this respect, it again cites the Judgment in the case concerning *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro)* (Judgment of 26 February 2007, para. 443).

136. In the view of the Court, these issues are clearly matters of interpretation or application of the Genocide Convention, the role conferred on the Court by Article IX, and thus, contrary to the contention of Serbia in its objection, within the jurisdiction of the Court (cf. *Avena and Other Mexican Nationals (Mexico* v. *United States of America), Judgment, I.C.J. Reports 2004*, p. 32, para. 30).

The Court understands the first basis of Serbia's submission to be essentially a matter of admissibility: it amounts to an assertion that, on the facts of the case as they now stand, the claim is moot, in the sense that Croatia has not shown that there are at the present time any persons charged with genocide, either by the ICTY or by the courts of Croatia, who are on the territory or within the control of Serbia. Whether that is correct will be a matter for the Court to determine when it examines the claims of Croatia on the merits. The Court therefore rejects the objection and sees no remaining issue of admissibility.

* *

(ii) Provision of information on missing Croatian citizens

137. By submission 2 *(b)* advanced by Croatia, which is challenged by Serbia by its third preliminary objection, the Applicant asks the Court to find that Serbia is under an obligation

> "to provide forthwith to the Applicant all information within its possession or control as to the whereabouts of Croatian citizens who are missing as a result of the genocidal acts for which [Serbia] is responsible, and generally to cooperate with the authorities of the Republic of Croatia to jointly ascertain the whereabouts of the said missing persons or their remains".

Serbia has asserted in support of its objection to this submission that the relevant acts committed in Croatia do not amount to genocide, so that the obligations under the Genocide Convention do not apply. It has also drawn attention to co-operation between the two States concerning the location and identification of missing persons, both direct and in the context of the work of the International Commission for Missing Persons, and to the existence of bilateral treaty-instruments concluded by the two States imposing obligations to exchange data about missing persons. Croatia contends that these agreements do not preclude the exercise of the Court's jurisdiction under Article IX of the Genocide Convention, and are in practice ineffective.

138. It does not appear that this submission of Croatia is regarded by Serbia as "beyond the jurisdiction of this Court" (see paragraph 131 above); it has been presented rather as a matter of mootness of the claim, a question of admissibility. It is not disputed that the Genocide Convention does not specifically prescribe a duty to provide information of the kind referred to, but Croatia has contended that its submission "falls squarely within [the terms of] the Genocide Convention", and presented the matter in terms of an appropriate remedy for a continuing breach of the Convention by Serbia.

139. However, the question what remedies might appropriately be ordered by the Court in the exercise of its jurisdiction under Article IX of the Convention is one which is necessarily dependent upon the findings that the Court may in due course make of breaches of the Convention by the Respondent. As a matter which is essentially one of the merits, and one dependent upon the principal question of responsibility raised by the claim, this is not a matter that may be the proper subject of a preliminary objection. This conclusion is reinforced by the consideration that, in this particular case, in order to decide whether an order in the terms of Croatian submission 2 *(b)* would be an appropriate remedy, the Court would have to enquire into disputed matters of fact. This it would have to do in order to establish whether or not, and in what circumstances, the co-operation as to the provision of information between the two States mentioned by Serbia has taken place, and whether this remedy might be held as resulting from the establishment of responsibility for breaches of the Convention. These issues are for the merits, and the Court concludes that the preliminary objection submitted by Serbia, so far as it relates to Croatian submission 2 *(b)*, must be rejected.

* *

(iii) Return of cultural property

140. By submission 2 *(c)* advanced by Croatia, which is also challenged by Serbia by its third preliminary objection, the Applicant asks the Court to find that Serbia is under an obligation "forthwith to return to the Applicant any items of cultural property within its jurisdiction or control which were seized in the course of the genocidal acts for which it is responsible". Serbia has argued that in this respect no dispute exists between the Parties, "even more so since cultural property has to a large extent already been returned to Croatia by Serbia", so that the claim has become "moot and thus inadmissible". It is less clear whether Serbia also disputes the jurisdiction of the Court to entertain that claim: it does argue that the acts complained of "must constitute acts of genocide in order for the Court to be able to exercise jurisdiction under Article IX of the Convention", but not that the Court would have no jurisdiction to consider whether those acts do or do not constitute breaches of the Convention.

141. As already noted above, since proceedings were instituted in this case, the Court has given judgment in the case concerning *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro)*, (Judgment of 26 February 2007); and Serbia has relied on that decision also in the context of the issue now under examination. In that case the Court found that there had been a "deliberate destruction of the historical, cultural and religious heritage of the . . . group [protected by the Convention]" (Judgment of 26 February 2007, para. 344). However, the Court found that "[a]lthough such destruction may be highly significant inasmuch as it is directed to the elimination of all traces of the cultural or religious presence of a group, and contrary to other legal norms, it does not fall within the categories of acts of genocide set out in Article II of the Convention" *(ibid.)*. As has already been indicated (paragraphs 52-56 above), this decision does not have the force of *res judicata* in the present proceedings, but the Court sees no reason to depart from its earlier finding on the general question of interpretation of the Convention in this respect. The Court will have to decide how these findings of law are to be applied, and what may be their effect in the present case.

142. Croatia however indicates that it perceives the alleged deliberate destruction and looting of cultural property in this case as part of a broader plan or pattern of activities aimed at the extinction of an ethnic group, and therefore within the purview of the Genocide Convention, and that accordingly an order for return of property taken in such circumstances is not *a priori* inadmissible; it suggests that whether or not such an order would be an appropriate remedy in this case is a matter to be determined at the merits stage.

143. However, as the Court has noted above, the question what remedies might appropriately be ordered by the Court is one which is necessarily dependent upon the findings that the Court may in due course make of breaches of the Genocide Convention by the Respondent; it is not a matter that may be the proper subject of a preliminary objection. As in the case of submission 2 *(b)*, this conclusion is reinforced by the consideration that in order to decide whether an order in the terms

of Croatian submission 2 *(c)* would be an appropriate remedy, the Court would have to enquire into disputed matters of fact, to establish whether or not a breach of an obligation deriving from the Genocide Convention had been established, and if so in what respects. The Court concludes that the preliminary objection submitted by Serbia so far as it relates to Croatian submission 2 *(c)* must be rejected.

* *

(iv) Conclusion

144. Serbia's third preliminary objection, as stated in its final submission 2 *(b)*, addressed to Croatia's submissions 2 *(a)*, 2 *(b)* and 2 *(c)*, must therefore be rejected in its entirety.

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145. Having established its jurisdiction, the Court will consider the preliminary objection that it has found to be not of an exclusively preliminary character when it reaches the merits of the case. In accordance with Article 79, paragraph 7, of the Rules of Court as adopted on 14 April 1978, time-limits for the further proceedings will be fixed subsequently by the Court.

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VIII. Operative clause

146. For these reasons,

THE COURT,

(1) By ten votes to seven,

Rejects the first preliminary objection submitted by the Republic of Serbia in so far as it relates to its capacity to participate in the proceedings instituted by the Application of the Republic of Croatia;

IN FAVOUR: *President* Higgins; *Vice-President* Al-Khasawneh; *Judges* Buergenthal, Simma, Tomka, Abraham, Keith, Sepúlveda-Amor, Bennouna; *Judge* ad hoc Vukas;

AGAINST: *Judges* Ranjeva, Shi, Koroma, Parra-Aranguren, Owada, Skotnikov; *Judge* ad hoc Kreća;

(2) By twelve votes to five,

Rejects the first preliminary objection submitted by the Republic of Serbia in so far as it relates to the jurisdiction *ratione materiae* of the Court under Article IX of the Convention on the Prevention and Punishment of the Crime of Genocide to entertain the Application of the Republic of Croatia;

IN FAVOUR: *President* Higgins; *Vice-President* Al-Khasawneh; *Judges* Buergenthal, Owada, Simma, Tomka, Abraham, Keith, Sepúlveda-Amor, Bennouna, Skotnikov; *Judge* ad hoc Vukas;

AGAINST: *Judges* Ranjeva, Shi, Koroma, Parra-Aranguren; *Judge* ad hoc Kreća;

(3) By ten votes to seven,

Finds that subject to paragraph 4 of the present operative clause the Court has jurisdiction to entertain the Application of the Republic of Croatia;

IN FAVOUR: *President* Higgins; *Vice-President* Al-Khasawneh; *Judges* Buergenthal, Simma, Tomka, Abraham, Keith, Sepúlveda-Amor, Bennouna; *Judge* ad hoc Vukas;

AGAINST: *Judges* Ranjeva, Shi, Koroma, Parra-Aranguren, Owada, Skotnikov; *Judge* ad hoc Kreća;

(4) By eleven votes to six,

Finds that the second preliminary objection submitted by the Republic of Serbia does not, in the circumstances of the case, possess an exclusively preliminary character;

IN FAVOUR: *President* Higgins; *Vice-President* Al-Khasawneh; *Judges* Ranjeva, Buergenthal, Owada, Simma, Abraham, Keith, Sepúlveda-Amor, Bennouna; *Judge* ad hoc Vukas;

AGAINST: *Judges* Shi, Koroma, Parra-Aranguren, Tomka, Skotnikov; *Judge* ad hoc Kreća;

(5) By twelve votes to five,

Rejects the third preliminary objection submitted by the Republic of Serbia.

IN FAVOUR: *President* Higgins; *Vice-President* Al-Khasawneh; *Judges* Ranjeva, Buergenthal, Owada, Simma, Tomka, Abraham, Keith, Sepúlveda-Amor, Bennouna; *Judge* ad hoc Vukas;

AGAINST: *Judges* Shi, Koroma, Parra-Aranguren, Skotnikov; *Judge* ad hoc Kreća.

Done in English and in French, the English text being authoritative, at the Peace Palace, The Hague, this eighteenth day of November, two thousand and eight, in three copies, one of which will be placed in the archives of the Court and the others transmitted to the Government of the Republic of Croatia and the Government of the Republic of Serbia, respectively.

(Signed) Rosalyn HIGGINS,
President.

(Signed) Philippe COUVREUR,
Registrar.

Vice-President AL-KHASAWNEH appends a separate opinion to the Judgment of the Court; Judges RANJEVA, SHI, KOROMA and PARRA-ARANGUREN append a joint declaration to the Judgment of the Court; Judges RANJEVA and OWADA append dissenting opinions to the Judgment of the Court; Judges TOMKA and ABRAHAM append separate opinions to the Judgment of the Court; Judge BENNOUNA appends a declaration to the Judgment of the Court; Judge SKOTNIKOV appends a dissenting opinion to the Judgment of the Court; Judge *ad hoc* VUKAS appends a separate opinion to the Judgment of the Court; Judge *ad hoc* KREĆA appends a dissenting opinion to the Judgment of the Court.

(Initialled) R. H.

(Initialled) Ph. C.