CR 2006/45

International Court of Justice

THE HAGUE

Cour internationale de Justice

LA HAYE

YEAR 2006

Public sitting

held on Tuesday 9 May 2006, at 10 a.m., at the Peace Palace,

President Higgins presiding,

***in the case concerning the* Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina *v.* Serbia and Montenegro)**

VERBATIM RECORD

ANNÉE 2006

Audience publique

tenue le mardi 9 mai 2006, à 10 heures, au Palais de la Paix,

sous la présidence de Mme Higgins, président,

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

COMPTE RENDU

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

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

M. Couvreur, greffier

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Ms Joanna Korner, Q.C., Barrister at Law, London,

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

Mr. Ermin Sarajlija, LL.M,

Mr. Amir Bajrić, LL.M,

Ms Amra Mehmedić, LL.M,

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comme assistants.

The PRESIDENT: Please be seated. I have a small matter I would like to deal with first of all before calling Mr. Djerić to the Bar. Last evening the Court received a communication from Bosnia and Herzegovina. After consideration and as an exceptional matter, we have decided to allow Bosnia and Herzegovina to make an extremely short public statement of information. This exceptional permission turns upon the particular circumstances and is in no way to be regarded as a precedent. I call on Mr. van den Biesen.

Mr. van den BIESEN: Thank you very much, Madam President.

Madam President, Members of the Court, yesterday the Co-Agent of Serbia and Montenegro in his response to Judge Simma's question with respect to the redacted versions of the STC Minutes suggested that one of the members of our team, Ms Joanna Korner, had access to the unredacted versions of these documents in her position as prosecutor at the ICTY. Because this directly refers to her personal knowledge and her personal integrity, we would like to inform the Court that this statement, this suggestion, is entirely untrue. Ms Korner did not have access in her previous position to the unredacted version of these documents and she had not received that afterwards either. Thank you very much.

The PRESIDENT: Thank you. I now call upon Mr. Djerić.

Mr. DJERIĆ: Thank you very much, Madam President.

4. RESPONDENT'S ACCESS TO THE COURT

I. Introduction

4.1. Madam President, distinguished Members of the Court, may it please the Court. We, on the Respondent's side, have been accused during these oral hearings of throwing "technicalities" in the path of resolving this litigation, as Professor Franck, counsel for the Applicant, said[1]. But can access and jurisdiction be regarded as mere "technicalities"? Access and jurisdiction are not only part and parcel of the proceedings but their existence is, in any adjudication, and especially in an international adjudication, the fundamental prerequisite for addressing the merits. As the Court has

[1] CR 2006/35, p. 52, para. 11 (Franck).

recently confirmed, the fact that a case involves alleged violations of *jus cogens*, such as prohibition of genocide, cannot set aside strict jurisdictional requirements contained in the Statute (see case concerning *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of Congo* v. *Rwanda), Jurisdiction of the Court and Admissibility of the Application,* Judgment of 3 February 2006, para. 64). Moreover, it is well established that the questions of a party's access to the Court are "fundamental" (case concerning *Legality of Use of Force (Serbia and Montenegro* v. *Belgium),* Judgment of 15 December 2004, para. 46)[2]. Still, the Applicant labels them as a "technicality". But these are the questions that go to the very heart of the functioning of this Court and to the very heart of the system established by the Charter of the United Nations: if a State without access to the Court could still appear before it, this would be a *de facto* amendment of Article 35 of the Statute; if access to the Court would be based on anything other than the clear action of the Security Council and the General Assembly, as the case may be, this would disrupt the balance between the principal organs of the United Nations, established by the Charter. The consequences of such a situation were yesterday described by my colleague and friend, Professor Zimmermann.

4.2. Madam President, Members of the Court, the question of the FRY's access to the Court before 2000 simply could not be avoided after the FRY's admission to the United Nations that same year. This admission resolved what was termed as a "confused and complex state of affairs" (*Legality of Use of Force*, para. 73) regarding the FRY's position vis-à-vis the United Nations between 1992 and 2000. It is true that, after the admission, the FRY insisted that the existence of this fundamental prerequisite for the exercise of the Court's judicial function be determined in all proceedings before the Court to which it was a party, either as an applicant or as a respondent. Therefore, after its admission to the United Nations in 2000, the FRY/Serbia and Montenegro — sometimes alone, sometimes together with other parties, sometimes to its detriment and sometimes to its benefit, but always in good faith — assisted the Court in the exercise of its "mandatory" function "to enquire into the matter and reach its own conclusion" (*ibid*., para. 36) with regard to the existence of access.

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[2](Hereinafter: *"Legality of Use of Force"*). Exactly the same text can be found in the other 2004 *Legality of Use of Force* Judgments.

4.3. One last word about "technicalities". The characterization of genocide as an international crime is probably one of the most important achievements of international law in the twentieth century. The gravity of this crime and the importance of a possible conviction for genocide must be mirrored in the strictness of the procedure that might lead to such a conviction. All the prerequisites for the exercise of jurisdiction must be in place and must be established to be in place. To label the question of access as a mere "technicality", as the Applicant does, is an invitation to disregard the rule of law, while the full and unconditional respect for the rule of law is necessary and indispensable in the present case more than in any other.

4.4. Madam President, I would like to say that I somewhat regret that the Applicant has in fact avoided to deal with specific points related to access to the Court raised by Serbia and Montenegro in the first round, especially with the very clear pronouncements on the statutory law of access made by the Court in its 2004 *Legality of Use of Force* Judgments. However, the Applicant contends that these Judgments are of no significance in the present case[3], and relies on the concept of *res judicata* by arguing that the 1996 Judgment on preliminary objections prevents any investigation by the Court of the issues of access and jurisdiction in the present case[4]. However, the 2004 *Legality of Use of Force* Judgments cannot be ignored. They contain both specific conclusions related to the FRY's access to the Court before 2000, and general principles related to the statutory law of access to the Court. However, as it seems that the Applicant ignores or underplays both the general principles and the specific findings, it appears necessary, first of all, to recall the principles of the law of access and apply them in the present case.

II. Difference between access and jurisdiction

4.5. First, the Court clearly said that access is different from jurisdiction, and this is in fact not a novelty but reaffirmation of its position taken in earlier cases:

> "a distinction has to be made between a question of jurisdiction that relates to the consent of a party and the question of the right of a party to appear before the Court under the requirements of the Statute, which is not a matter of consent" (*Legality of Use of Force*, para. 36. See, also, *Fisheries Jurisdiction (Federal Republic of Germany* v. *Iceland), Judgment, I.C.J. Reports 1973,* p. 53, para. 11).

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[3]See, e.g., CR 2006/36, p. 25, para. 61(7) (Pellet).

[4]*Ibid*., p. 24, para. 61(5)-(6) (Pellet).

4.6. In contrast to this, the Applicant seems to be trying systematically to deny or blur the distinction between access and jurisdiction. For example, Professor Pellet, counsel for the Applicant, criticizes as "artificial" the distinction between access and jurisdiction[5]. Further, throughout its pleadings the Applicant has in fact claimed that the FRY's access to the Court in the present case could depend on its behaviour, which implies that access, just like jurisdiction, could be constituted through party consent or behaviour. Thus, the Applicant contends that the FRY, either by failing to contest the Court's jurisdiction for the lack of *jus standi*, or by undertaking to abide by all the prior commitments of the former Yugoslavia, is now estopped from claiming otherwise and must accept the consequences of its behaviour[6]. But, even if this were true — and it is not as Professor Zimmermann yesterday demonstrated — it would be simply irrelevant with regard to the issue of access. The consent or behaviour of one party or both parties, either express or implicit, positive or negative, cannot constitute access to the Court. Simply, access is "not a matter of consent" and is not a matter of party behaviour. It is also independent of "the views or wishes of the Parties" (*Legality of Use of Force*, para. 36). It is an objective condition. For example, in the *Legality of Use of Force* case between the FRY and France, the Respondent did not raise the issue of access. Still, the Court considered that it had to examine the issue, because:

> "that question . . . is independent of the views or wishes of the Parties; and the Court would thus have to enquire into the matter and reach its own conclusion irrespective of the attitude of the Parties. The Court will therefore proceed to examine the issue." (Case concerning *Legality of Use of Force (Serbia and Montenegro* v. *France),* Judgment of 15 December 2004, para. 50.)

4.7. Finally, the possible situation of estoppel, which would prevent a party from successfully claiming a certain right, is not relevant to access — because the enquiry into the matters of access is the right of the Court itself, in the words of the Court, is "mandatory upon the Court" (*Legality of Use of Force*, para. 36). The principal role of the Court in assessing the existence of a party's access also implies that the Court need not consider the issue of access when a party requests it to do so, but when it considers that the issue is ripe for consideration.

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[5]CR 2006/35, p. 61, para. 16 (Pellet).

[6]See CR 2006/36, p. 24, para. 61(3)-(4) (Pellet), and pp. 29-30, paras. 15-16 (Franck); CR 2006/37, p. 37, para. 10, and pp. 39-40, paras. 16-17 (Pellet).

III. The nature of the Court's findings on access

4.8. Madam President, the second principle that may be deduced from the Court's pronouncements in the 2004 *Legality of Use of Force* Judgments is that the existence of access is a matter of objective law and is not dependent on the will of the parties. This is apparent from the paragraph I have quoted, where the Court formulated access as "the right of a party to appear before the Court *under the requirements of the Statute, which is not a matter of consent*" (*Legality of Use of Force*, para. 36 (emphasis added)). Thus, the Court would determine the existence of access by considering whether the *objective* requirements of the Statute, contained in Article 35, have been fulfilled. Consent, or, in other words, behaviour, of the parties, is irrelevant, and cannot make the Court depart from the requirements of the Statute (see, also, case of the *Free Zones of Upper Savoy and the District of Gex (France* v. *Switzerland), Order of 19 August 1929, P.C.I.J., Series A, No. 22*, 1929, p. 12).

4.9. In that, the Court's determinations on access under Article 35 of the Statute are similar to its determinations under Article 34, paragraph 1, with regard to the statehood of a party, because both determinations concern the fulfilment of certain objective legal requirements: in the case of Article 34, paragraph 1, whether a party is a State; in the case of Article 35, whether it may appear before the Court.

4.10. Madam President, it goes without saying that negative findings on access conclusively dispose of a case. The Court cannot possibly proceed with a case if one of the parties is not a State or cannot appear before it under Article 35 of the Statute. It is submitted, however, that positive findings on access can always be reviewed until the final judgment in a case. The fact that access is a fundamental precondition for the exercise of the Court's judicial function means that its determination that access *exists* could never be regarded as final and definitive until the final judgment. Otherwise, it would be possible to render a final judgment in a case in which access — the fundamental prerequisite for the exercise of the judicial function — is missing, and this, of course, would be against the mandatory norms of the Statute. For this reason, the Court must always be certain that the objective requirements of access are fulfilled, because once it is established that a party in a case does not have access this prevents the Court from exercising its judicial function over that party any longer. In the words of the Court:

> "The Court can exercise its judicial function only in respect of those States which have access to it under Article 35 of the Statute. And only those States which have access to the Court can confer jurisdiction upon it." (*Legality of Use of Force*, para. 46.)

4.11. It does not matter *when* the Court makes the determination that there is no access, but once such determination is made, the Court must decline to entertain the case. Moreover, once it becomes clear that a party does not have access, the Court should make such a determination. Of course, as will be seen in a minute, it may be that the question of party access is not all that clear and that in such a case the Court may wait with making a conclusive finding, a final determination, on access.

4.12. Madam President, we submit that the nature of access as a fundamental precondition for the exercise of the Court's judicial function means that a *conclusive finding on the lack of access* should have both future and retroactive effect in an ongoing case. Once the Court is aware that it cannot exercise judicial function, it cannot proceed with adjudication despite the fact that it may have previously appeared that the necessary conditions for such an exercise were in place, for example because none of the parties raised the issue. The Court cannot possibly render a final judgment in such a case, because that would be an *ultra vires* exercise of its powers.

4.13. This brings me to the issue of an existing judgment on preliminary objections, which may exist in a case. Of course, this is exactly the question that is before you, honourable Members of the Court, and it is before you due to the Applicant's insistence that the *res judicata* principle should be the answer to all questions of procedure in the present case. In our submission, reliance on the *res judicata* principle during the ongoing proceedings cannot override an objective finding that the mandatory and fundamental prerequisite for the exercise of the Court's judicial function is missing. Otherwise, the *res judicata* principle would justify the Court's *ultra vires* exercise of its judicial functions contrary to the mandatory requirements of the Statute.

4.14. This is the reason why the Applicant's reliance on *res judicata* is untenable. For example, let us suppose that there was a judgment on preliminary objections in one case, and subsequently the Court, in that same case or in another case, makes a finding that one of the parties did not have access to it at the relevant time. Should the Court proceed with the case, despite its full knowledge that one of the parties is not a State or could not appear before it at the relevant time, just because there is an earlier judgment on preliminary objections? It is submitted that this

would be clearly in contravention of the mandatory requirements of the Statute contained in Articles 34 and 35. Therefore, even if the 1996 Judgment on preliminary objections were a *res judicata* with regard to the FRY's access to the Court, and it is not, it should still not be a bar to re-examination of the issue of access for the reasons I have just described.

4.15. In any case, it should be recalled that the 1996 Judgment on preliminary objections is not *res judicata* with regard to the issues of procedure raised by Serbia and Montenegro, as has been demonstrated by Professor Varady. In a moment, I will demonstrate that the 1996 Judgment did not decide the question of the FRY's access to the Court, which is an additional reason why this question is not covered by the principle of *res judicata* in any case.

IV. When should the Court consider access?

4.16. Madam President, in a great majority of cases the issue of party access to the Court will not be contentious. This is illustrated by the fact that there were indeed very few cases in the practice of this Court, apart from the cases involving the FRY, in which the issue of access was expressly raised (see, e.g., *Fisheries Jurisdiction (Federal Republic of Germany* v. *Iceland), Judgment, I.C.J. Reports 1973,* p. 53, para. 11). Of course, this does not mean that the Court, before rendering its final judgments, was not always sure that the requirements of access had been satisfied: on the contrary, this was the fundamental precondition for the exercise of its judicial function.

4.17. At the same time, the question of access and considerations thereof may be complicated by various uncertainties, such as those related to the status of a party in relation to the United Nations, as it was in the present case. As the Court said with regard to the status of the FRY:

> "the legal position of the Federal Republic of Yugoslavia within the United Nations and vis-à-vis that Organization remained highly complex during the period 1992-2000. In fact, it is the view of the Court that the legal situation that obtained within the United Nations during that eight-year period concerning the status of the Federal Republic of Yugoslavia, after the break-up of the Socialist Federal Republic of Yugoslavia, remained ambiguous and open to different assessments. This was due, *inter alia*, to the absence of an authoritative determination by the competent organs of the United Nations defining clearly the legal status of the Federal Republic of Yugoslavia vis-à-vis the United Nations." (*Legality of Use of Force*, para. 64.)

4.18. In such a situation — extremely rare in international practice — the question of access, which primarily depends on the status of a State vis-à-vis the United Nations, is also — and I am quoting the Court — "ambiguous and open to different assessments". However, the keys for the resolution of this situation are, under the Charter, first of all in the hands of the General Assembly and the Security Council. Therefore, it appears prudent that the Court should not enter into a final assessment of access "in the absence of an authoritative determination by the competent organs of the United Nations defining clearly the legal status" of the State in question. This seems to be exactly the position taken by the Court with regard to the issue of access of the FRY in the period between 1992 and 2000, including in the present case. As the Court said in its *Legality of Use of Force* Judgments:

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

The reason for the absence of a definitive position on access appears to be, in the words of the Court, the following:

> "If, at that time [1999], 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." (*Ibid.*, para. 79.)

4.19. In the present case, all the necessary elements for such definitive determination obtained, and the situation was clarified, after the decision of the Security Council and the General Assembly on the admission of the FRY to the United Nations in 2000. Indeed, such definitive determination was eventually made by the Court in the *Legality of Use of Force* Judgments, and now it should be applied in the present case.

4.20. In this context, I would also like to mention that the Applicant has repeatedly emphasized that the Court delivers its judgments in the light of the information available to it at that point in time[7]. There is no dispute about this observation; but the question is: what is its relevance for the present proceedings?

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[7]See CR 2006/36, p. 22, para. 56; CR 2006/37, p. 43, para. 24 (Pellet).

4.21. First, as I have just demonstrated, the Court had not made a definitive determination on the FRY's access in the period between 1992 and 2000. Specifically, and I will return to this matter again, the Court did not do so in the 1996 Judgment on preliminary objections. Secondly, and in the alternative, the fact that the Court made a positive finding on access in the light of the information available to it at the time does not mean that it cannot revisit its ruling in the light of new information showing that a party does not in fact have access to it. Otherwise, the Court would be forced to act *ultra vires* in contravention of the mandatory requirements of the Statute. It is true that the relevant moment in time when qualifications for access have to be present is the moment when the proceedings were instituted. But this does not mean and cannot mean that these qualifications have to be judged solely on the basis of information available at the moment when the proceedings were instituted.

V. Could there be a difference in access between Applicant and Respondent?

4.22. Madam President, the Applicant has advanced the idea that the political organs of the United Nations imposed, in the words of Mr. Franck, "temporary asymmetry" between the FRY's rights and its duties under the Charter, and hinted at the possibility that the FRY's right to bring proceedings before the Court, its positive *jus standi*, was restricted, while at the same time its negative *jus standi* remained intact[8].

4.23. It should first be noted, as Professor Varady demonstrated, that the Applicant's proposition starts from the false premise that the FRY was a United Nations Member whose rights were restricted under the alleged "internal sanctions". In the present context, I would like to add that, even if the FRY were a United Nations Member, *quid non*, a suspension of such a major membership right, as is the right to institute proceedings before the Court, would certainly be imposed explicitly and just never could be implied or construed. Indeed, the very examples of so-called asymmetry between rights and obligations provided by Professor Franck demonstrate that limitations of rights are always explicit[9]. However, the FRY's *jus standi* before the Court was simply never considered by the United Nations political organs.

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[8]CR 2006/36, pp. 39-40, paras. 42-46 (Franck); CR 2006/37, p. 23, para. 31 (Stern).

[9]CR 2006/36, p. 40, paras. 44-45 (Franck).

4.24. Madam President, the Applicant's contention also raises a more general issue of whether, in principle, it would be possible, in the judicial system of the United Nations, to impose a difference between positive and negative dimension of a State's *jus standi* or access before the Court. At the outset, it should be noted that such a proposition prima facie implies that a State may be put in a position of fundamental inequality in relation to the Court's proceedings: it could be sued, but it could not sue.

4.25. The question of counter-claims is a vivid illustration of a major inequality that would be the result of such a proposition. Under Article 80 of the Rules of Court, a respondent may present counter-claims. A counter-claim is not a defence but a separate claim (*United States Diplomatic and Consular Staff in Tehran, Provisional Measures, Order of 15 December 1979, I.C.J. Reports 1979,* p. 15, para. 24; case concerning *Application of the Convention on the Punishment and Prevention of the Crime of Genocide (Bosnia and Herzegovina* v. *Yugoslavia), Counter-Claims, Order of 17 December 1997, I.C.J. Reports 1997*, paras. 27-28). Thus, with regard to the counter-claim, the respondent will be in the position of a plaintiff, while the applicant will be in the position of a defendant. If a State's positive *jus standi* could be suspended, such a State would be prevented from presenting counter-claims in a case in which it is a respondent. Obviously, the proposition that the right to bring a claim may be taken away, while the obligation to answer a claim before the Court would remain, would put a State in a position of fundamental inequality within the case itself. We submit that such a fundamental inequality of the parties, if it were ever possible, *quid non*, would lead to the impropriety of the Court's exercise of jurisdiction in such a case.

4.26. It is obvious, however, that the history of the current proceedings clearly demonstrates that the proposition of Bosnia and Herzegovina is neither supported by law nor by facts: as is well known, the FRY did present counter-claims against Bosnia and Herzegovina, and these were never contested on ground of some "internal sanctions" that would prevent their submission. This instance not only demonstrates that no "internal sanctions" were in place against the FRY, but also that no distinction has been made between the Applicant's and Respondent's right to present claims.

4.27. More generally, the Court has never in its practice made any difference between applicants and respondents. And this is evidenced by another example from the present case: in the provisional measures phase, the Court relied on the "treaties in force" clause of Article 35, paragraph 2, of the Statute as a prima facie (provisional) basis for access of the FRY (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Yugoslavia (Serbia and Montenegro)), Order of 8 April 1993*, *I.C.J. Reports 1993,* para. 19). I will deal with the relevant Order later, but for the present purposes, I would ask you to consider why such reliance on Article 35, paragraph 2, would be necessary if a respondent could appear before the Court without fulfilling the necessary statutory requirements? I submit that it clearly follows that the Court considered there could be no access, either for respondents or applicants, without fulfilling the necessary requirements of Article 35 of the Statute.

4.28. Madam President, the differentiation between positive and negative *jus standi* clearly does not find any support in the wording of Article 35 of the Statute. Both paragraph 1 and paragraph 2 of this Article use exactly the same phrase — that the Court "shall be open". In the French version, as well, exactly the same phrase — "est ouverte" — is used in both paragraph 1 and paragraph 2 of Article 35. In no way does this wording distinguish between the situation in which the Court is "open" to an applicant and the situation in which the Court is "open" to a respondent. It equally applies to both. It is neutral as regards the position of a State in a litigation.

4.29. That the phrase "shall be open" must equally apply to respondents and applicants is also strongly supported by the systematic interpretation of Article 35 of the Statute taken as a whole. Paragraph 1 of Article 35 of the Statute says: "[t]he Court shall be open to the States parties to the present Statute". The phrase "shall be open" clearly means that States parties to the present Statute may sue and may be sued before the Court. No one has ever suggested otherwise. Paragraph 2 of Article 35 of the Statute uses the same phrase as paragraph 1 and there is nothing to indicate that it should be interpreted differently in paragraph 2 than in paragraph 1 of Article 35.

4.30. As noted by Professor Yee in relation to the wording of Article 35, paragraph 2, of the Statute of the PCIJ — and of course, the present Statute uses the identical wording of the relevant

phrase: "[t]he language of the Statute of the PCIJ speaks of being 'open to other States', without any distinction between applicant and non-applicant States"[10].

4.31. Furthermore, in the context of Article 35, the statutory phrase "shall be open" has been frequently replaced with the following words: "access" (see, e.g., *Legality of Use of Force* Judgments, para. 46; *Fisheries Jurisdiction (Federal Republic of Germany* v. *Iceland)*, *Jurisdiction of the Court, Judgment, I.C.J. Reports 1973*, p. 53, para. 11)[11] and "the right to appear" (see, e.g., *Legality of Use of Force Judgments*, para. 46). None of these synonyms implies any difference between applicants and respondents, on the contrary: both the words "appear" and "access" clearly relate to the ability of a State to be a party before the Court, and are completely neutral as regards its position in a litigation.

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

4.33. When the wording of a provision is so abundantly clear, this should be the end of the matter (*Competence of the General Assembly for the Admission of a State to the United Nations*, *Advisory Opinion, I.C.J. Reports 1950*, p. 8). But in any case, the idea that there could be a difference in access to the Court between applicants and respondents does not receive support from the drafting history of Article 35, paragraph 2, either. On the contrary, as noted by Professor Yee "it contradicts the drafting history"[12]. I will now, with your permission, turn briefly to this drafting history.

4.34. As far as Article 35 of the present Statute is concerned, it is almost identical with the text of Article 35 of the Statute of the Permanent Court, apart from purely formal changes

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[10]Sienho Yee, "The Interpretation of 'Treaties in Force' in Article 35 (2) of the Statute of the International Court of Justice", 47 *ICLQ* 884, p. 896.

[11]It should also be noted that the documents related to the drafting of Security Council resolution 9 use the phrases "access to the Court" and "open to States" interchangeably. See Letter of the President of the Court sent to the Secretary-General of the United Nations, dated 1 May 1946 (United Nations doc. S/99, 5 July 1946) and Report of Mr. Beelaerts van Blokland, Rapporteur of the Committee of Experts, concerning the conditions under which the International Court of Justice shall be open to States not Parties to the Statute (United Nations doc. S/169, 24 September 1946).

[12]Sienho Yee, "The Interpretation of 'Treaties in Force' in Article 35 (2) of the Statute of the ICJ", 47 *ICLQ* 884, p. 896.

necessitated by references to the United Nations instead of to the League of Nations and its Covenant and the terminological changes in order to bring the English text more in line with the French text[13]. The changes did not concern the phrase "shall be open". Therefore, the drafting history of Article 35 of the old Statute is clearly relevant to the wording of Article 35 of the present Statute.

4.35. During the drafting of Article 35 of the old Statute, a difference in conditions of access to the Court, depending on the position of a State as an applicant or respondent, was mentioned by the Chairman of the Sub-Committee of the Third Committee of the First Assembly of the League of Nations[14]. However, there is no indication that this view was ever accepted[15].

4.36. Moreover, the discussion during the drafting of the amendments to the Rules of the Permanent Court in 1926, which took place only six years after the drafting of the Statute, provides an illuminating insight regarding the understanding of this issue. During the discussion on implementation of Article 35, paragraph 2, of the Statute into the Rules of Court, the Registrar remarked that, in the *S.S. "Wimbledon"* case, the Court had decided that the obligation to accept the conditions laid down by the Council in the context of Article 35, paragraph 2, of the Statute could only be imposed on applicants and not on respondents[16]. However, the then President of the Court, Judge Max Huber, rejected this interpretation and insisted that the conditions laid down by the Council resolution had to be accepted in all cases, regardless of whether the State not a Member of the League was in the position of respondent or applicant:

> "It was quite natural that States that wished to profit by the institution established by the League of Nations should have to accept the conditions fixed by the Covenant, and that States which, for one reason or another, had not yet done so should accept them by means of this declaration, *whether they appeared before the Court as Applicant or Respondent*." (*Ibid.*, p. 106; emphasis added.)

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

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

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

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

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

4.37. Finally, the question of distinction between applicants and respondents was not raised during the drafting of the present Statute. It is submitted that any possible distinction between applicants and respondents with regard to access to the Court would have had such a fundamental impact on the equality of States that it would have been raised and discussed during the drafting of the Statute in an explicit way. But it was not.

VI. Access and the 1996 Judgment on preliminary objections

4.38. Madam President, the Applicant claims that the Court in fact decided the issue of access in its 1996 Judgment on preliminary objections[17]. I hope that it is a common ground that a decision on access is a decision on the fulfilment of the requirements contained in Article 35 of the Statute. If this is so, then the Applicant's claim that the Court actually made a decision on access in 1996 is clearly contradicted by the unequivocal pronouncement made by the Court in 2004 that "[t]he question of the status of the Federal Republic of Yugoslavia in relation to Article 35 of the Statute was not raised and *the Court saw no reason to examine it*" (*Legality of Use of Force*, para. 82; emphasis added).

4.39. If the Court, in its own words, "saw no reason to examine" "the question of the status of the Federal Republic of Yugoslavia in relation to Article 35 of the Statute", then it clearly follows that the Court actually did not decide this question, that is, access. This is further confirmed by the fact that the Court also said that it:

> "did not commit itself to a definitive position on the issue of the legal status of the Federal Republic of Yugoslavia in relation to the Charter and *the Statute* [which obviously includes Article 35, if I may note] *in its pronouncements in incidental proceedings, in the cases involving this issue which came before the Court during this anomalous period*" (*ibid.*, para. 74; emphasis added).

4.40. And, of course, the present case was one of the cases that involved the issue of the legal status of the FRY in relation to the Charter and the Statute. And, of course, the 1996 Judgment on preliminary objections is a judgment rendered in incidental proceedings, as the proceedings on preliminary objections are, according to the Rules of Court, incidental

[17] CR 2006/36, pp. 48-49, para. 15 (Stern).

proceedings[18]. It thus clearly follows that the Court *did not commit itself to a definitive position* on access of the FRY to the Court in its 1996 Judgment.

4.41. Madam President, I respectfully submit that these pronouncements of the Court, and I even dare say an authentic interpretation, clearly show that the FRY's access to the Court is not, and cannot be, *res judicata* under the 1996 Judgment.

4.42. Moreover, as I have already demonstrated, the fundamental nature of access as a precondition for the exercise of the Court's judicial function means that positive findings on access cannot be taken as definitive and final until the final judgment is rendered in proceedings, because otherwise it would be possible that the Court renders its final decision with respect to a party over which it cannot exercise judicial function. In other words, access is so fundamental that, until the final judgment, it overrides the principle of *res judicata*. Thus, even if the 1996 Judgment had made a finding on access, *quid non*, that would not be a bar for the Court to re-examine this issue until the end of the proceedings.

VII. The FRY's access to the Court under Article 35, paragraph 1, of the Statute

4.43. Madam President, the Applicant devoted considerable time to arguing that the FRY, in any case, was to be considered a Member of the United Nations in 1993. Professor Stern admits that the Court ruled differently in the *Legality of Use of Force* Judgments, but submits that this ruling should be confined to the *Legality of Use of Force* cases[19]. However, she does not put forward any argument why the objective finding of the Court — that the FRY was not a United Nations Member before 2000 — should be confined to the *Legality of Use of Force* cases, except lamenting that counsel for the Respondent quote the *Legality of Use of Force* Judgments more often than the decisions in the present case[20]. But how could we act differently, if the Court, in its own words, never ruled in the present case on the Respondent's access to the Court, while in the *Legality of Use of Force* cases it made an unequivocal ruling that the FRY was *not* a Member of the United Nations before 2000, and supplied a long reasoning to support this ruling?

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[18]See Rules of Court, Part III, Proceedings in contentious cases, Section D, Incidental proceedings, Subsection 2, Preliminary objections.

[19]CR 2006/37, p. 10, para. 3 (Stern).

[20]CR 2006/37, pp. 10-11, para. 3 (Stern).

4.44. Yesterday my colleague Professor Varady refuted the Applicant's arguments regarding the alleged United Nations membership of the FRY: and I would therefore not use much time on this point and would like just to add a couple of additional observations.

4.45. Madam President, the Applicant would like us to believe that the FRY was a United Nations Member which was deprived of certain membership rights by "internal sanctions", while, at the same time, a majority of Member States considered, and repeatedly said so, that the FRY was not a United Nations Member. This is clear from the statements that the FRY "cannot continue automatically the membership of the former Socialist Federal Republic of Yugoslavia" and "therefore . . . should apply for membership"[21]. The clear position of the majority of States, and the Security Council and the General Assembly, that there was no continuity testifies that the Applicant's claim is not borne out by facts. The Applicant's claim means that the very organs which rejected continuity and told the FRY to apply for membership, simultaneously thought that the FRY was a United Nations Member and suspended its membership rights on that basis.

4.46. It is, of course, true that at the same time there were different signals coming from the United Nations, and some privileges that resembled, but never amounted to, membership rights were granted to the FRY, probably for reasons of pragmatism and as a way to leave open the channels of communication with it. This is evident from the very examples put forward by the Applicant. In any case, these privileges could not amount to United Nations membership but only testified to "amorphous status" (*Legality of Use of Force*, para. 74) of the FRY vis-à-vis the United Nations. However, these privileges that the FRY was let to enjoy, together with favourable position of some States towards continuity, complicated the situation and gave the FRY a reasonable hope that its continuity with the former Yugoslavia might, eventually, be recognized.

4.47. According to the Court, these events "testify to the rather confused and complex state of affairs" during the "anomalous period" between 1992 and 2000 (*ibid.*, paras. 73-74). But let me repeat, Madam President, the Court clearly said that this *sui generis* position of the FRY between 1992 and 2000 "could not have amounted to its membership in the Organization" (*ibid.*, para. 78).

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[21]Security Council resolution 777 (1992), para. 1, and General Assembly resolution 47/1 (1992), para. 1.

4.48. Our submission in the first round was that the FRY was not a Member of the United Nations until 1 November 2000, and was therefore not *ipso facto* party to the Statute, and that the Court was not open to it on that basis before that date[22]. This submission was based on the Court's ruling in the *Legality of Use of Force* Judgments that the FRY had not had access to the Court in 1999 because it had the status of membership in the United Nations as from 1 November 2000 (*Legality of Use of Force,* paras. 78 and 91).

4.49. The Court's determination that the objective legal requirements of access are not fulfilled by one party in one particular period of time, must necessarily and equally apply in all cases, in which this same party appears, that have been instituted in the same period of time.

4.50. Consequently, the determination that the FRY did not have access to the Court on the basis of Article 35, paragraph 1, of the Statute in the period before 1 November 2000 (when it became a Member of the United Nations) must necessarily and equally apply to the present case, which was instituted in 1993. If the FRY was not a Member of the United Nations before 2000, it could not have access to the Court on that basis before 2000. It follows that in each and every case instituted before the admission of the FRY to the United Nations in 2000, the FRY simply did not have access to the Court, and the Court cannot exercise its judicial function in respect of the FRY/Serbia and Montenegro in the cases instituted during that period. Between the date on which this case was instituted, 20 March 1993, and the date on which the *Legality of Use of Force* cases were instituted, 29 April 1999, there were no circumstances that would affect this conclusion. As the Court clearly said, the FRY was not a Member of the United Nations before 2000.

4.51. Madam Stern, counsel for the Applicant, tried to distinguish the two cases, by saying that after the institution of the present proceedings the General Assembly decided to exclude the FRY from participation in the ECOSOC[23]. However, this decision was only a consequence of the rejection of the FRY's claim to continuity with the former Yugoslavia. As the General Assembly started to specify the consequences of such rejection, it was logical to mention the ECOSOC too. But these decisions, including resolution 47/229 on the FRY participation in ECOSOC, did not provide any trace of evidence of a possible FRY membership in the United Nations. They only

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[22]CR 2006/13, p. 15, para. 2.18.

[23]CR 2006/37, p. 19, para. 21 (Stern).

implemented the decision to reject the FRY's claim to continuity with the former Yugoslavia, which had been taken already in 1992.

VIII. The FRY's access to the Court under the "treaties in force" clause in Article 35, paragraph 2, of the Statute

4.52. Madam President, Members of the Court, the Applicant contends that Article IX of the Genocide Convention is an independent and sufficient basis for the FRY's access to the Court in the present case, regardless of whether the FRY was or was not a Member of the United Nations at the relevant time, because the Court held that the Genocide Convention was a "treaty in force" within the meaning of Article 35, paragraph 2, of the Statute[24]. According to Professor Stern, the Court did so explicitly in its Order of 8 April 1993, and implicitly in the 1996 Judgment on preliminary objections and, thus, this is *res judicata*[25].

4.53. As my colleague Professor Zimmermann will further demonstrate, the FRY did not become a party to the Genocide Convention until 2001, and then with a reservation to its Article IX. This reason alone would be sufficient to dispose of the Applicant's arguments on this point. In the alternative, I will now demonstrate that the Applicant's claim based on Article 35, paragraph 2, cannot hold in any case.

4.54. Of course, it cannot be disputed that the Court said in 1993 that:

> "a compromissory clause in a multilateral convention, such as Article IX of the Genocide Convention relied on by Bosnia-Herzegovina in the present case, could, in the view of the Court, be regarded prima facie as a special provision contained in a treaty in force . . ." (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Yugoslavia (Serbia and Montenegro)), Order of 8 April 1993*, p. 14, para. 19).

4.55. But this was clearly a prima facie view, a provisional view, as the Court itself said in 1993, and reiterated in the 2004 *Legality of Use of Force* Judgments (para. 93). By no means can it be regarded as a conclusive finding on the matter.

4.56. It is also clear that this view was not confirmed, explicitly or implicitly, in the 1996 Judgment on provisional measures, as the Applicant erroneously contends. As Professor Varady has demonstrated, the 1996 Judgment relied on the FRY's pronouncements of

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[24]CR 2006/36, p. 63, para. 60 *et seq.* (Stern).

[25]CR 2006/36, pp. 64-65, paras. 62-63 and 67 (Stern).

continuity with the former Yugoslavia, that is, the declaration and the Note of 27 April 1992 (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Yugoslavia (Serbia and Montenegro)), Preliminary Objections*, *Judgment*, *I.C.J. Reports 1996 (II)*, p. 610, para. 17). And this demonstrates that the Court, for the purposes of its ruling on preliminary objections, considered that it was open to the FRY on the assumption that the FRY was a Member of the United Nations and as such *ipso facto* party to the Statute under Article 35, paragraph 1. Therefore, the 1996 Judgment could not conceivably ratify the 1993 provisional view that the FRY had access under the "treaties in force" clause in Article 35, paragraph 2, of the Statute. This is also confirmed by the fact that this point was not even pursued in the proceedings after 1993 (see *Legality of Use of Force*, para. 94).

4.57. In any case, as I have demonstrated, the Court has not taken a definitive position on the FRY's access to the Court either in 1993 or in 1996 (*ibid.*, para. 74), so any view that may have been taken in the 1996 Judgment on preliminary objections cannot possibly be regarded as final and conclusive. In conclusion, interpretation of Article 35, paragraph 2, advanced by the Applicant is not and cannot be *res judicata.*

4.58. Madam President, this part of the Applicant's pleadings demonstrates the absurdity of what might be called its "*res judicata* fundamentalism". The bottom line of the Applicant's argument is that an interpretation of Article 35, paragraph 2, contained in a provisional finding, which was allegedly implicitly confirmed in a judgment that dealt with other matters, should override explicit and conclusive interpretation of that same provision contained in a judgment that specifically dealt with access. It is submitted that this construction cannot possibly hold.

4.59. Finally, as regards the substance of the interpretation of Article 35, paragraph 2, advanced by the Applicant, I need not take much time. The "treaties in force" clause in Article 35, paragraph 2, exclusively concerns treaties that were in force at the date of entry into force of the Statute (*Legality of Use of Force*, para. 113). This is the view taken by the Court itself, after an extensive analysis of the said provision. Thus, the Court unequivocally concluded:

> "even assuming that Serbia and Montenegro was a party to the Genocide Convention at the relevant date, Article 35, paragraph 2, of the Statute does not provide it with a basis to have access to the Court, under Article IX of that Convention, since the Convention only entered into force on 12 January 1951, after the entry into force of the Statute . . ." (*ibid.*, para. 114).

4.60. Of course, the FRY was not even a party to the Genocide Convention at the time proceedings in the present case were instituted, and thus its Article IX cannot, in any case, constitute the basis of the Court's jurisdiction in the present case.

IX. Conclusions

4.61. Madam President, in the end, I would like to quote from a letter signed in 1999 by the then Agent of Bosnia and Herzegovina, who was also its country's representative in the United Nations — a letter already quoted in part by my colleagues, but so explicit and straightforward that it in fact summarizes and supports most of our arguments on access, and you can find this letter in your judges' folders at tab 2, page 2:

> "Since a new application for membership in the United Nations, pursuant to Article 4 of the Charter of the United Nations, has not been made by the Federal Republic of Yugoslavia (Serbia and Montenegro) to date, and it has not been admitted to the United Nations, the Federal Republic of Yugoslavia therefore cannot be considered to be *ipso facto* a party to the Statute of the Court by virtue of Article 93, paragraph 1, of the Charter of the United Nations. Neither has the Federal Republic of Yugoslavia (Serbia and Montenegro) become a contracting party of the Statute of the Court under Article 93, paragraph 2, of the Charter, which states that a non-member State can only become a contracting party of the International Court of Justice's Statute under conditions set by the General Assembly on the recommendation of the Security Council on a case-by-case basis. Furthermore, the Federal Republic of Yugoslavia (Serbia and Montenegro) has not accepted the jurisdiction of the Court under the conditions provided for in Security Council resolution 9 (1946) and adopted by the Council by virtue of powers conferred on it by article 35, paragraph 3*[sic!]*, of the Statute of the Court."[26]

4.62. Madam President, distinguished Members of the Court, even if this unequivocal statement of the then Agent of Bosnia and Herzegovina were to be put aside for a moment, I believe that the arguments that we have put before you conclusively demonstrate that the FRY did not have access to the Court in the present case.

4.63. The determination that the FRY was not a Member of the United Nations and did not have access to the Court on the basis of Article 35, paragraph 1, before 2000 is the basis of the Court's Judgments in the *Legality of Use of Force* cases. This is an objective determination which must equally and necessarily apply in the present case, as well, as it applies in all cases instituted before 2000 in which the FRY was a party. Consequently, the FRY was not a Member of the

[26]Letter dated 27 May 1999 from the Permanent Representatives of Bosnia and Herzegovina, Croatia, Slovenia and the former Yugoslav Republic of Macedonia to the United Nations addressed to the Secretary-General, United Nations doc. A/53/992 (7 June 1999).

United Nations in 1993, and did not have access to the Court on the basis of Article 35, paragraph 1, of the Statute at the relevant time.

4.64. Furthermore, the FRY did not have access to the Court on the basis of Article 35, paragraph 2, of the Statute, because it neither made a declaration required under Security Council resolution 9, nor was bound by a treaty in force within the meaning of this provision — the Genocide Convention is not such a treaty in force. In any case, the FRY became a party to the Genocide Convention only in 2000 and with a reservation to its Article IX.

4.65. The Applicant's reliance on the *res judicata* force of the 1996 Judgment on preliminary objections, which was refuted by Professor Varady, in any case cannot apply to the issue of access. Moreover, as the Court itself considered, its pronouncements in the incidental proceedings during the period between 1992 and 2000, including therefore in the 1996 Judgment on preliminary objections, cannot be taken as definitive positions, nor can commit the Court, as regards the issue of the FRY's access to the Court in that period. The definitive position with regard to the FRY's access to the Court during that period was taken in the 2004 *Legality of Use of Force* Judgments and now this objective finding should be applied in the present case.

4.66. Finally, Madam President, I would like to reiterate Serbia and Montenegro's arguments made in the first round with regard to the issue of access. We respectfully submit, as we did in the first round, that the Court should decline to entertain the present case because the FRY did not have access to the Court at the time the proceedings were instituted in 1993.

Madam President, distinguished Members of the Court, allow me in the end to thank you for your kind attention. And perhaps, Madam President, we could either take a break, or you could perhaps give the floor to Professor Zimmermann.

The PRESIDENT: Thank you very much, Mr. Djerić. I think we will make a start with Professor Zimmermann.

Mr. ZIMMERMANN: Thank you, Madam President, for giving me the floor.

5. RESPONDENT WAS NEVER BOUND NOR BECAME BOUND BY THE GENOCIDE CONVENTION AND ITS ARTICLE IX

A. Introduction

5.1. Madam President, distinguished Members of the Court, may it please the Court. This morning I will demonstrate that the Respondent neither remained bound by the Genocide Convention, nor that it ever became bound by Article IX of said Convention.

5.2. Before speaking about matters of jurisdiction, let me first address one general question, however. It is important to note that whatever finding this Court will make with regard to the Respondent's access to Court and the question of jurisdiction under Article IX of the Genocide Convention, there can be no doubt whatsoever that the substantive rules provided for in the Genocide Convention also form part of customary law and even, as this Court has most recently, and rightly so, pointed out, that the prohibition of genocide forms part of *jus cogens* (case concerning *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo* v. *Rwanda),* Judgment of 3 February 2006, para. 64). Thus a judgment by this Court finding that it cannot decide upon the merits of this case would not alter the obligations of both Parties with regard to the prohibitions of genocide and the legal consequences flowing therefrom under general international law. Accordingly — contrary to what counsel for the Applicant seems to imply[27] — there would be no gap whatsoever as to the applicability of the prohibition of genocide during the conflict that took place on the territory of the former Yugoslavia.

5.3. Madam President, allow me to make another remark of a preliminary nature concerning a fundamental aspect of my pleading: the question of continuity and succession. Let me start by stating that I am grateful to Professor Stern who, in her pleading of 24 April, has clarified the most fundamental difference between State continuity on the one hand and State succession on the other[28]. Our starting point is therefore the same and I do not have to come back to it. I am also grateful to her for having confirmed that whenever there is no legal continuity, that is, when one

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[27]CR 2006/36, p. 49, para. 17 (Stern).

[28]CR 2006/37, paras. 43-44 (Stern).

State replaces another in the responsibility for the external representation of a territory[29], the issue of State succession arises — that is the question whether certain rights or obligations are being transmitted or not[30]. Like my learned colleague, I believe that this is a fundamental distinction to be drawn and to be kept in mind.

5.4. With regard to the case at hand, this means that, provided the Respondent continued the international legal personality of the former Yugoslavia, *quid non*, it would have, as being the same State, automatically *remained* a member of all international organizations of which the former Yugoslavia had been a member. Also, it would automatically have *remained bound* by all treaties the former Yugoslavia had previously entered into including the Genocide Convention and its Article IX.

5.5. *If*, however, the FRY did *not* continue the international legal personality of its predecessor State, then the FRY, being a successor State, could have only *become* a Member of the United Nations and a Contracting Party of the Statute of this Court according to the procedure envisaged in Article 4 of the Charter.

5.6. Moreover, as a successor State it could only have *become* a Contracting Party of the Genocide Convention by virtue of applicable rules of State succession or by way of accession.

5.7. A third alternative pleaded by the Applicant was that the FRY should be, regardless of its status as either as continuator or a successor State, considered bound by the Genocide Convention and its Article IX by virtue of a declaration made on 27 April 1992.

Let me now start by addressing the issue of continuity.

B. Serbia and Montenegro is a successor State of the former Yugoslavia and therefore did not remain bound by the Genocide Convention

5.8. Madam President, "the Federal Republic of Yugoslavia (Serbia and Montenegro) . . . is not the same legal entity under international law as . . . the Socialist Federative Republic of Yugoslavia"[31]. These are not my words, these are the words used by the Permanent Representative

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[29]See Article 2 (1) *(b)* of the 1978 Vienna Convention on Succession of States in Respect of Treaties.

[30]CR 2006/37, para. 44 (Stern).

[31]Joint letter dated 27 May 1999 from the Permanent Representatives of Bosnia and Herzegovina, Croatia, Slovenia and the former Yugoslav Republic of Macedonia to the United Nations addressed to the Secretary-General, United Nations doc. A/53/1992, p. 2.

of Bosnia and Herzegovina in a letter to the Secretary-General of the United Nations dated 27 May 1999 and there are indeed many more statements reiterating the very same point. My colleague Tibor Varady has demonstrated yesterday that this was also the position taken from the very beginning by the Security Council and the General Assembly. And this was also the position that was confirmed by the admission of the FRY as a new Member to the United Nations in November 2000. It follows that the FRY could not have *remained bound* by the Genocide Convention. As a new State that only came into existence on 27 April 1992, the FRY could only *become bound* by the Genocide Convention and its Article IX, if ever, by virtue of rules of State succession or by virtue of its accession.

5.9. Professor Stern, in an attempt to avoid this necessary conclusion, herself came up with the idea of a legal metamorphosis. According to her argument, a State — the FRY — that at one point was supposed to have continued the legal personality of another State — the former Yugoslavia — could then be transformed into a successor State and vice versa. Furthermore, Professor Stern also argued that a State might, at the very same time be both identical in certain regards and be a successor State in others. I believe you will agree that this new idea of either a legal "metamorphosis" or a split legal régime is simply legally not tenable, since it blurs the fundamental distinction Professor Stern herself has so aptly described and which is deeply rooted in State practice.

5.10. Madam President, we have demonstrated during our first round of arguments that your 1996 Judgment on jurisdiction was based and must have been based on the very notion of continuity[32]. Given the information now available to the Court and further given the position this Court itself has taken in the 2004 Judgments in the cases concerning *Legality of Use of Force*, where you found that Serbia and Montenegro was not the State that had been a founding Member of the United Nations in 1945, we believe it logically follows that Serbia and Montenegro cannot be the entity that had ratified the Genocide Convention (including its Article IX) in 1950.

5.11. Madam President, this brings me to my next point namely whether the Respondent ever *became bound* by Article IX of the Genocide Convention as a successor State of the former

[32]See CR 2006/13, paras. 3.7 *et seq.* (Varady).

Yugoslavia. In that regard counsel for the Applicant has come forward with various ideas why the Court should find that Serbia and Montenegro should be considered bound by the Genocide Convention and, in particular, its Article IX.

5.12. I will now consider them one by one, with one exception. That is the question of *res judicata* — a matter which has already been addressed by my friend and colleague, Tibor Varady.

C. The FRY could not become a Contracting Party of the Genocide Convention for lack of an invitation

5.13. Madam President, during the first round of pleadings, we have argued that the FRY could not become a party to the Genocide Convention, as it never was invited to do so pursuant to Article XI of the Convention[33]. Seeking to counter this proposition, counsel for the Applicant have argued that the Respondent did not need to receive an invitation in the first place since it already was a contracting party of the Convention[34]. That would again presuppose, however, that the FRY could be considered the continuing State of the former Yugoslavia — an argument I have just addressed and that besides was also already refuted by Professor Varady.

5.14. I therefore only have to deal with the subsidiary argument advanced by counsel for the other side. The argument is that the requirement of an invitation by the Secretary-General could be set aside since the FRY is a successor State whose predecessor State, the former Yugoslavia, had already been a party to the Convention before it ceased to exist as an international legal person.

5.15. In answering this subsidiary argument, let me start by referring you to your own Judgment in this case of 1996 which, I believe, speaks for itself. The Court was then dealing with the question whether Bosnia and Herzegovina could become a contracting party of the Genocide Convention given its Article XI. Similarly to the FRY, Bosnia and Herzegovina was, as Professor Stern herself put it, involved in a process of succession[35].

5.16. In paragraph 19 of the 1996 Judgment, this Court first noted that Bosnia and Herzegovina had become a Member of the United Nations on 22 May 1992. It stressed the competences of the Security Council and the General Assembly with regard to membership issues

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[33]See *ibid.*, paras. 3.31 *et seq.* (Varady).

[34]See e.g. CR 2006/36, pp. 51-52, paras. 25-27.

[35]CR 2006/36, p. 51, para. 24 (Stern).

and then stated: "Article XI of the Genocide Convention opens it to 'any Member of the United Nations'" (*I.C.J. Reports 1996 (II)*, p. 611, para. 19).

5.17. That alone would have been sufficient to clarify the Court's position that, at least as a matter of principle and subject to a special invitation contemplated in General Assembly resolution 368 (IV), Article XI of the Convention limits the possibility to become a contracting party of the Convention, be it by way of accession, be it by way of succession, to Member States of the United Nations. But the Court was even more specific and continued:

> "*from the time of its admission to the Organization*, Bosnia and Herzegovina could *thus* become a party to the Convention . . . It is clear from the foregoing that Bosnia and Herzegovina could become a party to the Convention through the mechanism of State succession." (*Ibid*.; emphasis added.)

5.18. Counsel for the Applicant attempted to minimize this clear holding by arguing that it should be read in conjunction with the third preliminary objection then made by the FRY. This approach first raises an interesting point of principle.

5.19. On this side of the Bar, we have consistently argued on other occasions that the very holding of this Court in its 1996 Judgment should indeed be read in conjunction with the preliminary objections then made by the FRY, none of which related to the status of the FRY itself[36]. For most purposes counsel for the Applicant, however, tried to refute any such interrelationship[37].

5.20. But now all of a sudden, for the purposes of Article XI of the Genocide Convention, Bosnia and Herzegovina requests the Court to take account of the context of the preliminary objections then made by the FRY. I believe the Court will agree that Applicant cannot have it both ways.

5.21. If we now followed the Bosnian approach here and took into account the preliminary objections of the FRY, I submit that this would also mean that the very scope of the *res judicata* of the 1996 Judgment should then be also defined with regard to the seven preliminary objections raised by the FRY, none of which dealt however with either the status of the FRY within the United Nations, or with its status vis-à-vis the Organization.

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[36]See e.g. CR 2006/13, para. 4.22 (Zimmermann).

[37]See e.g. CR 2006/36, pp. 10 *et seq.*, paras. 23 *et seq.*; pp. 15 *et seq.*, paras. 38 *et seq.* (Pellet).

5.22. But if, indeed, we read your 1996 Judgment and its paragraph 19 in the context of the third preliminary objection, the Applicant's attempt to counter the argument based on Article XI must still fail. This is so because the passage from the 1996 Judgment explicitly says much more than the Applicant infers. Let me refer you to what the third preliminary objection then made by the FRY said. The second part of the third preliminary objection referred to the fact that Bosnia and Herzegovina had not become a State party to the Genocide Convention *in accordance with the provisions of said Convention, and namely its Article XI*. And it was this objection that the Court addressed in paragraph 19 of the 1996 Judgment.

5.23. If the Court had wanted to simply confirm the statehood of Bosnia and Herzegovina by making reference to its membership in the United Nations as counsel for the Applicant seemed to imply[38], one would have expected the Court to do just that. Instead, responding to this objection, the Court most logically linked the status of a contracting party to the Genocide Convention, with the membership in the Organization.

5.24. It should be also noted that this interrelationship between membership in the United Nations on the one hand and the status as a Contracting Party of the Genocide Convention on the other makes particular sense since Article IX of the Genocide Convention links the Contracting Parties of said Convention with the Court, the main judicial organ of the United Nations. It is therefore quite normal that the Contracting Parties of the Genocide Convention should at the same time be Member States of this very same organization or that the organization should specifically invite them to become a contracting party. One reason behind this lies in the fact that in this way the States parties of the Genocide Convention will be bound to comply with the Court's decision, in accordance with Article 94 of the Charter.

5.25. Madam President, at the very end of her presentation dealing with the issue of Article IX of the Genocide Convention, Professor Stern argued that certain requests by the United Nations organs to the parties then involved in the conflict should be — and could be, she said — interpreted as invitations to participate in the Convention[39].

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[38]CR 2006/36, p. 54, para. 31 (Stern).

[39]CR 2006/36, pp. 54-55, para. 32 (Stern).

5.26. However, under Article XI of the Convention it is for the General Assembly *formally* to invite third States not Members of the United Nations to become a Contracting Party of the Genocide Convention. In its relevant part, the provision, Article XI, reads: "[T]he 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." — that is "an invitation . . . by the General Assembly". In General Assembly resolution 368 (IV), the General Assembly has *specifically* requested the *Secretary-General* to extend such invitations, provided certain specific conditions have been fulfilled. All this shows that the invitation requirement of Article XI is to be taken seriously. Given these circumstances one simply cannot interpret *general* calls, by United Nations organs, to abide by the Genocide Convention as an invitation to accede.

5.27. Besides, and even more importantly, there is simply nothing in these calls that would imply that the United Nations organs had in mind to bring about the status of a Contracting Party of the States concerned. Instead, those calls were simply aimed at the substantive guarantees contained in the Genocide Convention, calls not to commit genocide, but not invitations to acquire the status as a Contracting Party of the Convention.

5.28. Having — I hope, at least — convinced you that the invitation requirement of Article XI of the Genocide Convention can neither be dispensed with, nor that it has been fulfilled, let me now briefly discuss two issues which counsel has also attempted to rely on, namely the issue of the Dayton Peace Agreement and the question of certain statements made by counsel for Serbia and Montenegro in earlier phases of the case — unless you would now advise me to take a break.

The PRESIDENT: Yes. I think this would be a good moment for us all to have a break. The Court now rises.

The Court adjourned from 11.25 to 11.45 a.m.

The PRESIDENT: Please be seated. Professor Zimmermann, do please resume, but maybe a little more slowly to help the interpreters.

Mr. ZIMMERMANN: Yes, thank you, Madam President, I was already told so by the interpreters: I will certainly try. Madam President, I did demonstrate that the FRY is a successor

State of the former Yugoslavia. I also demonstrated that, even as a successor State, it needed an invitation from the United Nations in order to become a Contracting Party of the Genocide Convention under Article XI of the Convention. And finally, I demonstrated that it never received such an invitation. I will now move on to Article IX of the Genocide Convention and the issue of the Dayton Peace Agreement.

D. Article IX of the Genocide Convention and the Dayton Peace Agreement

5.29. Madam President, we submit that the Dayton Peace Agreement and more specifically the General Framework Agreement for Peace in Bosnia and Herzegovina can under no circumstances provide the Court with jurisdiction in this case.

5.30. Let me start with an obvious remark. Counsel for the Applicant referred to Chapter One of Annex 6 of the Agreement which in turn contains a reference to the Genocide Convention in order to argue that the FRY is bound by Article IX of the Genocide Convention. But who are the parties to this Annex 6? The parties are the Republic of Bosnia and Herzegovina, the Federation of Bosnia and Herzegovina and Republika Srpska — but not the FRY. The Applicant attempts to counter this obvious problem by referring to Article VII of the General Framework Agreement. But let us start by having a careful look at Article VII of the General Framework Agreement for Peace in Bosnia and Herzegovina. Article VII provides that "the Parties agree to and shall comply fully with the provisions concerning human rights in Chapter One of the Agreement at Annex 6".

5.31. Annex 6 in turn contains a long list of human rights treaties including the Genocide Convention, but also including *inter alia* the European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols. What counsel for the Applicant is arguing would mean that the Dayton Framework Agreement would have also provided *inter alia* for the jurisdiction of the European Court of Human Rights in cases brought against the Respondent either by way of individual complaints or by way of inter-State complaints. I believe this is sufficient to counter the interpretation of Article VII of the General Framework Agreement proposed by Professor Stern.

5.32. Rather, Article VII of the Dayton Peace Agreement must be understood as obliging the parties to abide by the *substantive standards* contained in those various, mentioned agreements. How could it be otherwise, anyhow, since among the parties to Annex 6 are also non-State entities such as the Federation of Bosnia and Herzegovina and Republika Srpska which under no circumstances could become a party to, for example, the Genocide Convention. It is only if read this way that the provision makes sense at all.

5.33. Besides, the Dayton Peace Agreement only entered into force on 14 December 1995. Accordingly, if this Court were to find that the FRY became bound by Article IX of the Genocide Convention by virtue of having signed the Dayton Peace Agreement, *quid non*, it could have only become bound as of that date. This is due to the fundamental principle of non-retroactivity of treaties codified in Article 28 of the Vienna Convention on the Law of Treaties. The non-retroactivity of the Genocide Convention is also upheld by several eminent scholars including Nehemiah Robinson in his commentary on the Genocide Convention[40] and William Schabas in his book on *Genocide in International Law*[41].

5.34. Since the Court has, however, frequently stated that the instrument providing for its jurisdiction must have been in force at the time the Application was made (see most recently *Armed Activities on the Territory of the Congo (New Application : 2002) (Democratic Republic of the Congo* v. *Rwanda)*, Judgment of 3 February 2006, para. 54), a view which counsel for the Applicant agreed with[42], it follows that even if one were to assume *arguendo* that Article IX of the Genocide Convention became applicable as between the Parties by virtue of the Dayton General Framework Agreement as of 14 December 1995, it still could have not provided the Court with jurisdiction in this case.

5.35. Let me now address certain remarks as to statements made by counsel of the Respondent during earlier phases of this case.

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[40]Nehemiah Robinson, *The Genocide Convention*, Institute of Jewish Affairs, World Jewish Congress, 1949 etc.; reprint New York, 1960, p. 114: "Article IX could not be invoked, except for acts of the State following the ratification of the Convention".

[41]William A. Schabas, *Genocide in International Law*, Cambridge 2000, p. 541: "the operative clauses of the Convention*, including article IX,* can only apply to genocide committed subsequent to its entry into force with respect to a given State party"; emphasis added.

[42]CR 2006/36, para. 2 (Stern).

E. Respondent is not bound by virtue of statements made by its counsel

5.36. Madam President, Members of the Court, at the end of her pleading of 21 April, counsel for the Applicant, Professor Stern, has also argued that the Respondent had recognized the Court's jurisdiction under Article IX of the Genocide Convention in the course of the proceedings[43]. In this respect she referred to certain statements made by counsel for the Respondent. Compared to other aspects of her pleading, she did not elaborate on this at any length. I can assure you, Madam President, that I will equally treat the matter only briefly.

5.37. I put to you that the statements cited by Professor Stern, when read in their proper context, simply are "not capable of carrying the load the Applicant seeks to put upon it", to paraphrase words that this Court has used on a different occasion (cf. *South-West Africa (Ethiopia* v. *South Africa*; *Liberia* v. *South Africa), I.C.J. Reports 1966*, p. 42, para. 72).

5.38. If we first look at Professor Rosenne's statement, we see that it was made in 1993, at an early stage of these proceedings. If we look closer at the context of that statement, we find that Professor Rosenne was then criticizing attempts by the Applicant to establish bases of jurisdiction other than Article IX of the Genocide Convention. As the history of this case suggests, he had every reason and right to do so. A closer reading of his pleading reveals that Professor Rosenne then went on to clarify that even under Article IX of the Genocide Convention, the Court should not grant the interim relief then sought by the Applicant. What is more, we need to bear in mind that the statement was made in the course of provisional measures hearings. I think it is well known and not disputed that during the subsequent written proceedings, the Respondent advanced a series of arguments why Article IX did not provide a basis for the Court's jurisdiction. Indeed, the Court itself later acknowledged that the Respondent had continuously contested the Court's jurisdiction.

5.39. This leaves the statement by Professor Suy during the 1996 hearings on preliminary objections. But again, this statement ought not to be taken out of context. As that context shows, it can simply not be interpreted as recognition of this Court's competence under Article IX of the Genocide Convention. As his sequence of arguments suggests, Professor Suy was assessing the date at which the Applicant had become bound by the Genocide Convention. His pleading was not

[43]CR 2006/36, pp.60-61, paras. 49-52.

aimed at assessing whether or when the Respondent became bound by it — an issue that — as both Parties agree — then simply was not regarded as crucial. In so far as Professor Suy briefly commented on the matter, he did so on the basis of the information then available to the Parties and to the Court. This information however — as my friend and colleague Tibor Varady has shown — today has to be evaluated in the light of the developments since 1 November 2000.

5.40. Accordingly neither of the two statements can have the legal effect counsel for the Applicant has attempted to argue they should have. To the contrary, it is well known that the Respondent continuously contested the Court's jurisdiction, including that under Article IX of the Genocide Convention.

5.41. Let me now briefly come back to the question whether the Respondent could be considered bound by the Genocide Convention due to an alleged continuity.

F. The FRY is not bound by the Genocide Convention due to an alleged continuity with the former Yugoslavia

5.42. Madam President, I will be brief. Once again Professor Stern tried artificially to distinguish continuity for the purpose of membership in the United Nations from continuity with regard to treaties — as if that could be done. Yet if — and let me stress the "if" — *if* the FRY had been identical with the former Yugoslavia and *if* it had therefore continued its international legal personality, it is obvious that it would then *per se* have continued *both* its membership in international organizations and its treaty status — but the same is also true vice versa.

5.43. If a State is not identical with its predecessor State and if it accordingly does not continue its international legal personality, it will neither retain its membership in international organizations nor its status as a contracting party. Instead, it may *only* acquire such status by either admission respectively with regard to treaties, accession or succession. And indeed, how can a State be both at the very same time — a continuing State *and* a successor State.

5.44. It is for that reason, as was demonstrated once again by Tibor Varady, that the 1996 Judgment was and must have been based solely on the assumption that the FRY continued the international legal personality of the former Yugoslavia *in toto*.

5.45. Professor Stern then relied on the opinion of the Legal Counsel of 16 September 1993, which she said supported the continuity thesis[44]. However — just as in his previous opinion — the Legal Counsel did not, in the part quoted by counsel for the other side, unlike in other parts of his opinion, refer to the FRY but instead to "Yugoslavia". Thus while the letter may have raised some doubts about the treaty status of the former Yugoslavia, it certainly cannot be understood as a statement as to the treaty status of the FRY.

5.46. Finally Professor Stern herself mentioned the incident involving the "Summary of Practice of the Secretary-General as Depositary of Multilateral Treaties" which had erroneously tried to portray the FRY as a continuator State of the former Yugoslavia[45]. However, what she did not clearly say is that, in addition to some other States, it was Bosnia and Herzegovina itself that protested against any such legal qualification, which finally led to the famous "Erratum" being issued by the Secretary-General[46]. As a consequence, the incident itself does not support the argument counsel for the Applicant was trying to make — I believe rather the contrary is true.

5.47. Let me now move on to issues of treaty succession proper.

G. Serbia and Montenegro never succeeded to the Genocide Convention and in particular its Article IX

General remarks

5.48. Let me start in that regard with one remark of a more general nature, namely that once again counsel for the Applicant have in their rebuttal on various occasions disregarded the behaviour of Bosnia and Herzegovina itself. I have already touched upon this general pattern yesterday when dealing with issues of good faith.

5.49. But let me now be more specific with regard to issues of treaty succession. In that regard it is telling that counsel for the other side neither mentioned nor addressed the fact that Bosnia and Herzegovina itself had requested that the FRY in 1998 should notify its succession to

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[44]CR 2006/36, p. 56, para. 36 (Stern).

[45]CR 2006/36, p. 52, para. 26 (Stern).

[46]See M. Wood, "Participation of Former Yugoslav States in the United Nations and in Multilateral Treaties", *Max Planck Yearbook of United Nations Law* 1997, pp. 231 *et seq.* (256).

the treaties of the former Yugoslavia[47]. Of course, such notification would have been redundant if the FRY:

— had either been a continuing State of the former Yugoslavia;

— if it already had become bound by virtue of the declaration of 27 April 1992; or

— if the principle of an alleged automatic succession applied.

5.50. This immediately brings me to my next point, namely the issue of automatic succession.

Serbia and Montenegro never automatically succeeded to the Genocide Convention (and in particular its Article IX)

5.51. Madam President, we submit that Serbia and Montenegro never automatically succeeded to Article IX of the Genocide Convention. Let me start by mentioning a number of issues raised in our first round pleading to which counsel for the Applicant have not replied — and which therefore must be taken to have been conceded.

5.52. *First*, while mentioning the practice of Bosnia and Herzegovina vis-à-vis the Human Rights Committee as such, Professor Stern failed to explain why Bosnia and Herzegovina did acquiesce in the *accession* of several *successor States* of the former Soviet Union to the Genocide Convention[48]. This practice of course clearly contradicts the very idea of automatic succession, which Bosnia claimed was generally accepted.

5.53. *Secondly*, while I truly appreciate the role of various treaty bodies with regard to the continued development of international law, and in particular the role of the Human Rights Committee, I hope it is not in dispute that it cannot substitute State practice. This is even more so true where, as in the case at hand, State practice, at least to a large extent, either contradicts the assumption of automatic succession or is, to say the least, not virtually uniform within the meaning of the Court's holding in the *North Sea Continental Shelf* case.

5.54. *Thirdly*, let me reiterate the crucial distinction to be drawn between the substantive obligations arising under the Genocide Convention on the one hand and the jurisdictional clause

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[47]Cf. CR 2006/13, para. 4.41 (Zimmermann).

[48]*Ibid*., para. 4.86 (Zimmermann).

contained in its Article IX on the other[49]. Bosnia and Herzegovina failed to address why the jurisdictional clause contained in Article IX should be subject to automatic succession. That jurisdictional clause:

— contains no substantive obligations;

— it certainly does not form part of *jus cogens*; and

— it does not create individual rights.

If the very notion of automatic succession itself is based on the idea of acquired individual rights -- as Bosnia seemed to imply —, then Article IX is certainly not covered by it.

5.55. Accordingly, it is submitted that the relevant practice arising under human rights treaties is the practice relating to provisions providing for the competence of treaty bodies to receive either interstate or individual complaints. Here the practice of Bosnia and Herzegovina itself, this time with regard to the United Nations Convention against Torture, is, once again, more than telling.

5.56. The former Yugoslavia had ratified the said Convention on 10 September 1991 and had, under Articles 21 and 22 of the Convention, recognized the competence of the Committee against Torture to receive and consider communications by other State parties respectively by individuals[50]. In 1993, after its independence, Bosnia and Herzegovina submitted a declaration of succession with regard to the Convention as such, indicating that the succession should take effect as of 6 March 1992. It was however *only on 4 June 2003* that Bosnia and Herzegovina filed a further *separate* declaration indicating that it would now also accept without reservations the competence of the Committee against Torture to consider interstate and individual complaints under Articles 21 and 22 of the Convention, respectively[51]. This shows two things:

— *first*, when it comes to its own treaty practice with respect to the Torture Convention, Bosnia and Herzegovina itself clearly distinguished between substantive and jurisdictional obligations arising under human rights treaties; and

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[49]See CR 2006/13, paras. 4.94 *et seq.* (Zimmermann).

[50]See information available at http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterIV/treaty14.asp#N3.

[51]See Report of the Committee against Torture, Thirty-first Session and Thirty-second Session, United Nations doc. A/59/44, Anns. I and III.

— *secondly*, it accepted that procedural and jurisdictional obligations are not subject to automatic succession.

The same considerations, I submit, should apply to Article IX of the Genocide Convention.

5.57. Let me, after these preliminary considerations, go through the various arguments brought forward by counsel for Bosnia and Herzegovina with regard to the issue of automatic succession.

5.58. Professor Stern was right that I did not mention Article 34 of the 1978 Vienna Convention on the Succession of States with Regard to Treaties. In this respect, I believe it is sufficient to note that, given the number of *19* — 19 — Contracting Parties of the said Convention even more than 30 years after its adoption, it is probably safe to assume that the general principle contained in Article 34, to say the least, has not been generally accepted by the community of States.

5.59. Besides, as a matter of treaty law, Article 34 of the 1978 Vienna Convention could in any event not govern our case since it does not apply retroactively as between Bosnia and Herzegovina on the one side and Serbia and Montenegro on the other given that none of them has made a declaration under Article 7 of the Convention.

5.60. Professor Stern must have also misunderstood my statements when mentioning the two occasions where I made reference to the notion of newly independent States. To state the obvious, the FRY is certainly not such a newly independent State. To that extent I can agree with my learned colleague. Yet with regard to the first statement she refers to[52] it is simply sufficient kindly to ask you to also read the very next paragraph of my first round pleading. There I quote the Secretary-General stating that *any* — any — successor State, in order to become bound, must specify in its notification of succession those treaties it wants to succeed to. In the Secretary-General's view a general across-the-board notification cannot bring about succession[53].

5.61. With regard to the next reference to newly independent States Professor Stern was referring to[54], it would have been sufficient to just read two further paragraphs of my pleading[55].

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[52]CR 2006/36, para. 39 referring to CR 2006/13, para. 4.51 (Zimmermann).

[53]See CR 2006/13, para. 4.52 (Zimmermann).

[54]*Ibid.*, referring to CR 2006/13, para. 4.51 (Zimmermann).

There, I referred to the ILC's work in the field. I then went on to note that in the relevant passage, the ILC had explained why law-making treaties, which in the understanding of the ILC included human rights treaties, did not and should not constitute a separate category of treaties and therefore should not be subject to the principle of automatic succession, namely since — and I quote once again the ILC — "such treaties may contain purely contractual provisions such as, for example, a provision for the *compulsory adjudication of disputes*"[56].

5.62. I believe it is obvious that this consideration equally applies to all categories of successor States, be they newly independent States or not.

5.63. Let me end this part of my presentation by stating that this Court has so far never accepted the customary nature of the principle contained in Article 34 of the 1978 Vienna Convention (see notably *Gabčíkovo-Nagymaros (Hungary/Slovakia)*, *I.C.J. Reports 1997*, p. 7, para. 123). Furthermore, it has neither ever accepted that human rights treaties are subject to automatic succession (*I.C.J. Reports 1996*, p. 595, para. 23). However, very recently, the Court did take an implicit position in the case between the Democratic Republic of the Congo and Rwanda, and I believe it is safe to say that you decided the question in the negative specifically with regard to Article IX of the Genocide Convention.

5.64. Madam President, when Belgium ratified the Genocide Convention in 1951 it did not enter a reservation as to its Article IX. Later on Belgium, by declaration dated 13 March 1952, extended the territorial application of the Genocide Convention to the then Belgian Congo and the trust territory of Rwanda-Urundi it then administered[57].

5.65. The Democratic Republic of the Congo, upon its independence, submitted a declaration of succession as to the Genocide Convention and accordingly became bound by it as of

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[55]CR 2006/13, para. 4.72 (Zimmermann).

[56]See *ibid.*

[57]See Note on territorial Application, to be found at: http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterIV/treaty1.asp.

31 May 1962[58]. Rwanda instead simply acceded to the Convention in 1975 and, at the same time, entered a reservation as to its Article IX[59].

5.66. What is important for our purposes is that this Court has most recently accepted this accession by Rwanda (*Armed Activities on the Territory of the Congo (New Application : 2002) (Democratic Republic of the Congo* v. *Rwanda)*, Judgment of 3 February 2006, para. 38) and at the same time has also upheld its Article IX reservation. In contrast to that, the alleged rule of automatic succession would have meant that Rwanda had automatically become bound by the Genocide Convention *including its Article IX* by virtue of the Belgian ratification, and its extension to Rwanda-Urundi. However, this Court dealt with Rwanda's accession, including its reservation, rather than considering the question of automatic succession. This, to me, seems to be highly relevant for our case, and for the question of automatic succession more generally.

5.67. This brings me to the end of my argument concerning the issue of automatic succession and I will now turn to the legal relevance of the declaration adopted on 27 April 1992.

H. The Respondent did not become bound by the Genocide Convention and its Article IX by virtue of the declaration adopted on 27 April 1992

5.68. Members of the Court, there are two independent reasons why the declaration adopted on 27 April 1992 did not and could not bind the Respondent vis-à-vis Article IX of the Genocide Convention, namely

— because it did not fulfil the requirements for such legally binding declarations as developed in the Court's jurisprudence; and

— because applicable rules of State succession are *lex specialis*.

The declaration and the Note of 27 April 1992 did not fulfil the requirements for a legally binding unilateral declaration

5.69. The requirements for a unilateral declaration to be binding under international law were developed by this Court in the *Nuclear Tests* cases and recently further specified in the case between the Democratic Republic of the Congo on the one hand and Rwanda on the other.

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[58]Cf. the depositary's information available at: http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterIV/treaty1.asp.

[59]*Ibid.*, the reservation reads: "The Rwandese Republic does not consider itself as bound by article IX of the Convention."

5.70. In the recent case between the DRC and Rwanda the Court explored whether a Minister of Justice may, by way of a unilateral declaration, bind his or her State. The Court accepted such a proposition provided the persons concerned are "exercising powers in their field of competence in the area of foreign relations" (*ibid.*, para. 47).

5.71. In other words, it was necessary that those making the statement must have been empowered to exercise competences in the area of foreign relations, be it only for certain matters falling within their purview (see *mutatis mutandis* the Court's Judgment in *Armed Activities on the Territory of the Congo (New Application : 2002) (Democratic Republic of the Congo* v. *Rwanda)*, Judgment of 3 February 2006, para. 48). In the case at hand the question therefore arises whether it fell within the field of competence of those making the declaration of 27 April 1992 to decide whether or not the FRY did or did not continue to be bound by treaties its predecessor State had ratified.

5.72. Let me reiterate that the declaration of 27 April 1992 was adopted, as this Court itself has noted, by "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" (*Legality of the Use of Force (Serbia and Montenegro* v. *Belgium)*, Judgment of 15 December 2004, para. 56). This was accordingly not an organ of the FRY, but an *ad hoc* body — an *ad hoc* body which consisted of parliamentarians of the *predecessor State* of the Respondent and individual members of the parliaments of two constituent republics of the *former Yugoslavia*.

5.73. Accordingly this was certainly not a body — to quote again what you said in your recent Judgment in the case between the DRC and Rwanda — exercising powers in their field of competence in the area of foreign relations *of the FRY*. Besides, as the declaration says, it was not those organs as such that acted but rather "the participants" of this meeting in their individual capacity.

5.74. Furthermore, in any event, a parliamentary assembly is certainly not in a position, under international law, to represent a State in its foreign relations. Accordingly for that reason alone, the declaration dated 27 April 1992 cannot have created a legal obligation incumbent upon the Respondent.

5.75. In your Judgment of 3 February 2006 in the case between the DRC and Rwanda you also further determined that the non-binding character under international law of a given unilateral statement may be deduced from the fact that it was made "in the context of a presentation of general policy" (*Armed Activities on the Territory of the Congo (New Application : 2002) (Democratic Republic of the Congo* v. *Rwanda)*, Judgment of 3 February 2006, para. 53). Let me therefore now once again quote from the declaration of 27 April 1992. In it "the representatives of the people of the Republic of Serbia and the Republic of Montenegro . . . wish[ed] to state . . . their *views* on the basic immediate and lasting objectives of the *policy* of their common state".

5.76. I believe that the very fact that these were simple *views* uttered as to certain *policy* objectives to be achieved neatly fits the description of a statement made, as you said, "in the context of a presentation of general policy" (*ibid.)*. Besides, these policy objectives were based on the idea of continuity — an idea that was rejected by both Bosnia and Herzegovina itself and the international community at large.

5.77. In the *Nuclear Tests* cases you furthermore considered that the binding character of a unilateral declaration, like the principle of *pacta sunt servanda*, is based on the very notion of good faith and trust (see e.g. *I.C.J. Reports 1974*, p. 268, para. 46). Yet, as I have demonstrated yesterday, Bosnia and Herzegovina has from the very beginning not relied in any form on this declaration and on the concept of continuity contained therein. Instead and rather to the contrary it has consistently argued that the FRY can only become bound by treaties of the former Yugoslavia, if it was willing to make specific declaration of succession. In this respect, the 1998 letter, which I mentioned during my first pleading[60], is just one pertinent example at hand.

5.78. I therefore believe that this declaration of 27 April 1992 cannot be considered a legally binding declaration under current international law.

Applicable rules of State succession are *lex specialis*

5.79. There is however another *additional* reason why this declaration could not have made the FRY a contracting party of the Genocide Convention and its Article IX. As was admitted by counsel for the Applicant herself, whether a given successor State is bound by treaties of its

[60]See CR 2006/13, para. 4.19 (Zimmermann).

predecessor State — or not — is governed by the applicable rules of State succession: "Lorsque se produit un processus successoral, ce sont les règles spécifiques à la succession d'Etats qui s'appliquent."[61]

5.80. Madam President, I agree with Professor Stern's statement. But applying the specific rules of State succession as *lex specialis* to the general rules governing unilateral declarations means that, as I have previously demonstrated[62], in order for a successor State to become bound by treaties of its predecessor State it must indeed submit *specific* declarations of succession containing a list of those treaties it wishes to succeed. General notifications of succession or even so-called devolution agreements are not *per se*, as such, sufficient to make the successor State a contracting party. In the declaration of 27 April 1992, not a single treaty is mentioned.

Thus, even if the Court were to find the declaration to be binding as a matter of principle, the FRY could still not be considered a party of the Genocide Convention and in particular bound by its Article IX.

5.81. Finally, if we follow up on the Applicant's argument and consider the declaration as a binding unilateral declaration providing for the continuity of the FRY with the former Yugoslavia with regard to both membership in the United Nations and status as a Contracting Party of the Genocide Convention, such a declaration would not only provide for the jurisdiction of the Court, but would also grant the FRY access to the Court. In other words this would mean that a State like the FRY which otherwise would not have access to the Court, could by its *own* behaviour provide for such access and could therefore circumvent both, the requirements of Article 35 of the Statute and membership-related decisions of the General Assembly and the Security Council. Yet, as you have stated, the issue of access is an objective question which is not subject to the wishes of the parties (case concerning *Legality of Use of Force (Serbia and Montenegro* v. *Belgium)*, Judgment of 15 December 2004, para. 46), let alone one single State. These considerations provide further reasons why the Applicant's argument based on the declaration of 27 April 1992 must fail.

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[61]CR 2006/36, p. 53, para. 30 (Stern).

[62]CR 2006/13, paras. 4.50-4.52 (Zimmermann).

I. Summary of argument

5.82. Madam President, Members of the Court, this brings me to the end of my presentation. Before concluding let me summarize my argument:

5.83. We submit to this Court that the FRY did not continue the international legal personality of the former Yugoslavia. Instead it is a successor State of the former Yugoslavia and, as such, only came into existence as of 27 April 1992.

5.84. Since the former Yugoslavia ceased to exist and since the FRY did not continue its international legal personality, it continued neither its membership in international organizations nor its status as a contracting party with regard to treaties to which the former Yugoslavia had been a party.

5.85. Besides, under Article XI of the Genocide Convention, the FRY was not qualified to become a Contracting Party of the Genocide Convention, since it was not a Member of the United Nations and since it never received an invitation emanating from the competent United Nations organs.

5.86. The Dayton Peace Agreement did not and could not provide the Court with jurisdiction on the basis of Article IX of the Genocide Convention since the FRY is not a party to Annex 6 of the General Framework Agreement, and since, in any event, the said Annex only referred to the substantive obligations contained in the instruments mentioned in the Annex. Besides, and in any event, the Dayton Peace Agreement, which entered into force only in 1995, could not have *ex post facto* provided the Court with jurisdiction.

5.87. Statements made by counsel in earlier phases of this case may not be perceived as an implicit acceptance of the Court's jurisdiction given that the Respondent continuously and unambiguously challenged jurisdiction throughout these proceedings — a fact recognized by this Court.

5.88. Moreover, the Respondent never automatically succeeded to the Genocide Convention and, in particular, not to the compromissory clause contained in its Article IX.

5.89. The Respondent did neither become bound by the Genocide Convention and its Article IX by virtue of the declaration adopted on 27 April 1992 since the said declaration did not fulfil the criteria for a binding unilateral declaration as developed in the Court's jurisprudence.

Besides, a more specific rule of State succession, constituting *lex specialis*, would also hinder the declaration from having such alleged effect.

5.90. Accordingly the FRY only became bound by the Genocide Convention when it acceded to it in 2001, at which time it however entered a valid reservation as to Article IX of the Convention which ever since has been maintained.

5.91. This last remark also gives me the opportunity to now address the question of Judge Tomka to Serbia and Montenegro. Judge Tomka had asked whether there are treaties to which the former Yugoslavia had been a party and to which the FRY later acceded. In response, I can confirm that the Genocide Convention is *not* the only treaty to which the former Yugoslavia had been a party and to which the FRY later acceded. For example, on 28 February 2001, the FRY deposited an instrument of accession to 11 out of 16 treaties concluded within the framework of the Council of Europe to which the former Yugoslavia had been a party. If I may turn your attention to the first additional tab submitted to your judges' folder today — and I hope you have it — you will see the list of treaties concluded within the Council of Europe to which the former Yugoslavia was a party. You will also find a procès-verbal, issued by the Council of Europe, concerning the deposit of the FRY's instruments of accession to some of those treaties. The treaties to which the FRY acceded *inter alia* include

— the European Cultural Convention, to which the former Yugoslavia had been a party since 7 October 1987, and

— the European Convention on the Supervision of Conditionally Sentenced or Conditionally Released Offenders, to which the former Yugoslavia had been a party since 10 July 1991.

Another set of treaties binding upon the former Yugoslavia to which the FRY acceded are seven customs conventions of the World Customs Organization, such as

— the Customs Convention on the Temporary Importation of Packings, and

— the 1974 Customs Convention on the Simplification and Harmonization of Customs Procedures.

As far as the latter 1974 Convention is concerned, the former Yugoslavia had been a party *without* reservation, while the FRY, however, acceded to it *with* a reservation. You may find the

relevant instrument of accession, containing the said reservation, among the documents we have provided to you today.

I would also like to mention the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, the ICSID Convention. The former Yugoslavia had been a party of the said Convention since 1967. Serbia and Montenegro is not yet a party to it. However, it is in the process of acceding to it. It has already signed the ICSID Convention on 31 July 2002 and will become a party upon deposit of the instrument of ratification by way of accession, after the necessary domestic procedures have been completed.

I hope that this answers the question of the honourable Judge Tomka. Of course, we remain at the Court's disposal for any further information in this regard.

5.92. Madam President, distinguished Members of the Court, this brings me to the end of my presentation. Let me thank you once again for your kind attention throughout these proceedings. Could I now ask you, Madam President, to once again give the floor to Professor Varady, who will conclude the Applicant's arguments relating to the procedural aspects of this case.

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

Mr. VARADY:

6. CONCLUDING REMARKS

6.1. Madam President, distinguished Members of the Court, approaching literally the final hour of party presentations in this case, let me express — and emphasize — once again, my true and deep respect for this honoured Court. During these proceedings, Professor Zimmermann, Mr. Djeric and myself have dealt with the procedural setting of this imposing case, or more specifically, with access and jurisdiction, and I would like to present our closing arguments.

Our conclusions

6.2. I would first like to repeat very briefly the main points of our presentations. I shall not repeat the numerous arguments, we are maintaining all our arguments, I shall just repeat our conclusions:

6.3. First, there was no continuity. The FRY did not continue the personality and status of the former Yugoslavia. It was not a Member and it was not a party to the Statute before 1 November 2000. This is what follows from clear and authoritative pronouncements of the General Assembly, of the Security Council, of the Secretary-General, and this is what was unequivocally established by this Court. This means that the FRY had no access to the Court at the relevant moment when the Application was submitted, and it did not remain a party to the Genocide Convention. It only became a party to the Genocide Convention when it acceded in March 2001, with a reservation to Article IX — hence Article IX of the Genocide Convention cannot represent a basis of jurisdiction.

6.4. The 1996 Judgment on jurisdiction is not *res judicata*. We have stated and explained the reasons behind this conclusion. Special circumstances which make the investigation of access and jurisdiction necessary clearly exist. The Applicant advanced as an alternative proposal that the Court should undertake a *de novo* investigation "[w]hether the FRY was actually a Member of the United Nations and a party to the Genocide Convention during the time when the alleged genocide was perpetrated"[63]. We have nothing against this proposal.

6.5. Furthermore, there is no *forum prorogatum* and the FRY did not acquiesce to the jurisdiction of this Court. In addition to the convincing arguments raised by my colleague Zimmermann, let me say that we just do not see how one can contend that the Respondent went out of his way to contest jurisdiction, that it stubbornly tried five times to convince the Court that it has no jurisdiction[64], and at the same time to argue that the Respondent acquiesced to the jurisdiction of this Court.

6.6. The issue of access is a matter of objective determination. This determination was already made by this Court with regard to the Respondent for the relevant time period. Furthermore, all facts show that the FRY had no access to the Court under either Article 35 (1) or under Article 35 (2) at the time when the Application was submitted.

6.7. And finally, the Respondent neither remained nor became bound by Article IX of the Genocide Convention. It could not remain bound because it did not continue the personality and

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[63]CR 2006/36, p. 39, para. 41 (Franck).

[64]CR 2006/35, p. 54, para. 1 (Pellet).

treaty status of the former Yugoslavia. It could not have become bound by the Genocide Convention before 1 November 2000 because it was not a Member of the United Nations. Furthermore the 27 April 1992 declaration is not a document which could have created treaty status, and automatic succession did not and could not have created the requisite link either with Article IX.

This dispute does not mirror the actual conflict

6.8. Permit me also, Madam President, to make a few general closing remarks. This is a difficult case — and this is one of the few points on which both Parties agree. For one thing, it is a difficult and complicated case because it does not mirror the dividing lines between the sides to the actual conflict. Let me point out once again that this legal dispute between two multi-ethnic States, Bosnia and Herzegovina as the Applicant, and Serbia and Montenegro as the Respondent, is simply not a matching articulation of the actual conflict fought along ethnic dividing lines. The process of the dissolution of Yugoslavia, which is also the core of the jurisdictional problem, did not yield States along ethnic dividing lines. This threat did not materialize. But this has consequences regarding the setting of this case. The Applicant emphasized time and again that the axis along which justice and injustice were allocated is that dividing Serbs and "non-Serbs". We have pointed out that this is an oversimplification. But even if we were to follow this line, given the track on which this dispute was placed, a judgment just could not render justice along the same axis, it cannot allocate justice between Serbs and Bosniaks, or "Serbs and non-Serbs". The Applicant speaks of the "[l]'armée serbo-bosniaque, qui a concrètement perpétré le genocide . . ."[65] A judgment on the merits would find the Bosnian Serbs, the alleged perpetrators of genocide, on the side of the alleged victim, while the Kosovo Albanians, for example, would find themselves on the side of the alleged perpetrator.

6.9. What is more directly mirrored in this dispute are the uncertainties and controversies about the character of States and State-like structures which have been emerging during this conflict; controversies about sovereignty, secession, and continuity. It took long, unusually long, before the Court was provided with sufficient information to take a conclusive position on issues as

[65]CR 2006/35 p. 46, para. 21 (Condorelli).

to whether the FRY did or did not continue the international legal personality of the former Yugoslavia, whether it was or was not a party to the Statute between 1992 and 2000, and whether the FRY could have remained or become bound by Article IX of the Genocide Convention.

6.10. We have reached this point now. United Nations authorities *did* finally take conclusive positions, and the Parties presented arguments on issues which were earlier not raised and faced. We also have the benefit of the circumstance that the very same questions on which the procedural standing of the Respondent depends were raised and decided by this Court in 2004 based on sufficient and current information.

The question of consistency

6.11. Madam President, Members of the Court, as a further matter, I would like to address a recurring claim regarding consistency, and a recurring charge of lack of consistency. Considerable time and space has been devoted to this issue, different facets and angles have been pointed out — and it is, indeed, an issue of most considerable importance.

6.12. Let me start with the charge of inconsistency, and with our own position. As we have stated before, after hundreds of thousands of demonstrators put an end to the Milosevic régime, the new Government had to reconsider the most basic premises on which the country was functioning, including its relationship towards the world and international organizations. Accepting what we believe is the reality, we acted on this assumption. We drew consequences of this assumption ourselves where it was for us to do so, and we withdrew our counter-claim. In all other instances, we presented the same perception, and asked the Court to draw conclusions, and to decide on its jurisdiction.

6.13. It is true, of course, that the position and the arguments we consistently presented are not the same as those which were presented by the former Government of the FRY. But let me point out also that this was not a tactical manoeuvre, just as the change in October 2000 was not a simple change of government. It was a fundamental change which prompted the country to reconsider the basic premises on which it was functioning. Let me also mention that with respect to the procedural questions we are talking about, the former Government of the FRY was wrong, but not abusive, not manipulative, and not implausible under the circumstances. First of all, the

position taken regarding continuity was in line with the political conviction and principles then adopted by the FRY, rather than with its interests in the case. The former Government contested jurisdiction, but on different grounds. The reason for which the Milosevic Government was widely condemned, both in Serbia and Montenegro and in the world, is not its position on continuity.

6.14. At the same time, the inconsistency between Bosnia and Herzegovina's position before this Court and outside this Court is glaring. Here, the difference between positions taken is not the result of some consequential development. Different positions have been taken at the same time, suited to various purposes. Bosnia and Herzegovina was one of the co-sponsors of resolution 47/1 which denied the claim of the FRY for continuity[66]. Since then, and until these days, Bosnia and Herzegovina persistently denied continuity before international organizations which were in a position to decide about membership, including the United Nations General Assembly and Security Council. It argued against United Nations membership, and against treaty membership of the FRY. It also argued and stressed that the FRY was not a party to the Statute. At the same time while endeavouring to influence United Nations authorities to decide against continuity and membership, Bosnia and Herzegovina is asking the Court not to heed what was achieved, not to follow the positions taken by United Nations authorities, but to decide differently. This inconsistency *is* manipulative.

6.15. Madam President, let us turn to another angle of consistency, consistency of the decisions of this Court. Speaking of the practice of various international courts, we have demonstrated that a reconsideration of matters of jurisdiction, if this is prompted by special circumstances of the case, is a mainstream solution consistently repeated. But it is mainstream within a distinct, small group of truly rare cases. Practice shows that in situations in which subsequent information casts serious doubts on a finding of jurisdiction, international courts will typically reinvestigate whether they have jurisdiction in order to avoid a decision *ultra vires*. But such special circumstances are extremely rare. As far as the fact pattern of our case is concerned it is not only rare, but simply unique. What we have faced is a true dilemma whether a State was or was not a party to the Statute — a question which almost never arises — and at the same time, we

[66]See United Nations doc. A/47/PV.7, p. 141.

have also faced the consequences of an unorthodox dissolution of a State which could not be fitted under any provision of the United Nations Charter.

6.16. Speaking of consistency at *this* moment, our colleague Professor Pellet makes a distinction between vertical and horizontal, pleading for the priority of vertical consistency — which would be consistency with the 1996 Judgment, rather than with the 2004 Judgment on *Legality of Use of Force*[67]. But "vertical consistency" is actually nothing else than *res judicata,* and we have demonstrated that under the circumstances of this case, the *res judicata* principle does not represent an impediment to the investigation of access and jurisdiction.

6.17. Let me say that consistency is, of course, a critically important consideration even outside the context of the *res judicata* argument, and here we are reaching a simple but most consequential question. Consistency with what? Should one be consistent with what was accessible and ascertainable in 1996, or one should be consistent with what became known in 2004 and what remains to be true today?

6.18. Madam President, the 1996 Judgment was not in contradiction with the information obtainable in 1996. When the Legal Counsel stated that General Assembly resolution 47/1 "neither terminates nor suspends" Yugoslavia's membership in the United Nations without specifying to what Yugoslavia he refers, when the depositary referred to Yugoslavia as a State party to the Genocide Convention again without specifying to *what* Yugoslavia this refers, one of the possible interpretations of this information was to hold that the Federal Republic of Yugoslavia remained a party to the Statute and to the Genocide Convention. After the FRY was admitted as a new Member of the United Nations, after the Secretary-General explained that references to Yugoslavia were actually references to the *former* Yugoslavia, consistency with the newly available information, and also with position taken by the competent United Nations authority, prompted a different conclusion. This was the conclusion that the FRY was not a Member of the United Nations between 1992 and 2000, was not a party to the Statute, and had no access to the Court — and this is what the Court decided in 2004.

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[67]CR 2006/36, pp. 20-21, paras. 51-52 (Pellet).

6.19. Madam President, let me also add that since the assumption of continuity has clearly been superseded and has no foundation, consistency with the 1996 Judgment is simply not possible any more. A judgment on the merits asserting jurisdiction in the absence of the assumption of continuity would not be consistent with the 1996 Judgment.

6.20. Trying to diminish the importance and the relevance of the 2004 decisions, Professor Franck is quoting my argument according to which in the 1996 Judgment key questions regarding the status of the FRY were not argued and decided, and he adds that if this is relevant, then it has to be considered that in the *Legality of Use of Force* cases the Court did not have this benefit either[68].

6.21. It is true that the new Government of the FRY did not take in the *Legality of Use of Force* cases a different position from that taken in other cases or from that taken before international organizations. It presented its position and asked the Court to decide on jurisdiction. But there are some obvious differences between the two cases regarding the information accessible and the information presented to the Court. In the 1996 case, no preliminary objection dealt with the issue whether the FRY was a party to the Statute, or whether it was a party to the Genocide Convention. In the 2004 cases, Belgium, Canada, Germany, Italy, the Netherlands, Portugal and the United Kingdom argued that the FRY was not a Member of the United Nations and was not a party to the Statute. The issue was raised, addressed, and decided. What is also important — and we have stressed this — the information available to the Court was finally authoritative and sufficient to reach definitive conclusions.

6.22. Madam President, the fact is that by now it has become known that the Respondent did not continue the personality and treaty status of the former Yugoslavia. It was not a party to the Statute between 1992 and 2000. It has also become known that the depositary is listing Serbia and Montenegro as a new party to the Genocide Convention by virtue of its accession in 2001, and with a reservation to Article IX. The only conclusion consistent with these facts is that the Respondent had no access to the Court when the Bosnian Application was submitted, and that the Respondent is not bound by Article IX of the Genocide Convention.

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[68]CR 2006/36, p. 39, para. 40 (Franck).

6.23. Madam President, there is another most important angle of consistency. This is consistency of *outcomes* and consequences. In the words of Judge Rezek:

> "Il serait inéquitable, il serait contraire aux principes les plus élémentaires du droit, de nier à un Etat, à l'intérieur d'un système donné, une qualité quelconque au regard de certains effets, et d'affirmer cette qualité par rapport à d'autres effets choisis." (*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,* declaration of Judge Rezek, para. 3.)

6.24. Madam President, consistency of outcomes and equal treatment are the high ground which is beyond the reach of criticism stemming from heated and irreconcilable expectations.

6.25. Out of the cases in which the standing and qualifications of the FRY between 1992 and 2000 emerged as a threshold issue, this case and the case with Croatia are still pending, only the *Legality of Use of Force* cases have been concluded. The outcome of the concluded cases is that the FRY was not qualified to be a party before this Court, because at the time when the Application was submitted in 1999, it was not a Member of the United Nations, and was not a party to the Statute. It had no access to the Court, and hence the Court denied jurisdiction. For the same reason the FRY was consistently denied membership in other international organizations, and was not recognized as a party to international treaties. This has so far been the outcome of all disputes involving the issue of continuity.

6.26. Whenever the FRY asserted membership rights or acted on the assumption of membership rights in the United Nations in various international organizations and treaties, the question was raised whether the FRY, indeed, remained a Member of the United Nations, and whether it *was* a party to a given treaty or a member of a given international organization between 1992 and 2000. The answer was invariably negative. Bosnia and Herzegovina was among those who forcefully and consistently opposed the recognition of any membership rights of the FRY. The outcome was that the FRY was disallowed to benefit from rights based on membership, because it was not a Member. The efforts of the FRY did yield some hesitation, did bring about some hazy concepts and contradictions, but did not yield either membership in international organizations, or the status of a contracting party to treaties.

6.27. The position taken, and the wording was essentially the same. To illustrate this with just one example, we shall cite the position taken by the World Health Organization. The WHO Assembly decided at its plenary meeting on 3 May 1993 — and you can follow this in our judges' folders at tab 4 . It gives the whole text, but I am citing a part of the text which says:

> "The Forty-sixth World Health Assembly,
>
> 1. Considers that the Federal Republic of Yugoslavia (Serbia and Montenegro) cannot continue automatically the membership of the former Socialist Federal Republic of Yugoslavia in the World Health Organization;
>
> 2. Decides that the Federal Republic of Yugoslavia (Serbia and Montenegro) should apply for the membership of the World Health Organization in accordance with the relevant provisions of the Constitution and that it shall meanwhile not participate in the work of its principal and subsidiary organs, including the Forty-sixth World Health Assembly."[69]

6.28. Other international organizations have followed the very same logic, adopted the same arguments, and came to the same conclusion[70].

6.29. The issue of the position of the FRY was also raised at meetings of State parties to treaties, including human rights treaties. Invariably, a motion was made to disallow the participation of the FRY. These motions were successful. The claim to continuity was not accepted, the FRY was *not* allowed to take the seat of the former Yugoslavia, and it was not allowed to participate in the work of meetings of State parties[71]. The outcome was the same.

6.30. Madam President, the FRY did not have any benefit of the proposition of continued personality. There were, indeed, ambiguous designations, there were inconsistencies, *but no membership rights*. The FRY was not a member of various international organizations on grounds of continuity — it only became a member when it applied and was admitted as other successor

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[69]WHA 46.1, 3 May 1993.

[70]E.g., International Civil Aviation Organization — ICAO (ICAO resolution A29-2, 25 September 1992); the World Intellectual Property Organization — WIPO (see the decision adopted by the Governing Bodies of WIPO and the Unions administered by WIPO on 24 September 1992, AB/XXIII/5 — Third Series of Meetings, Geneva, 21-29 September 1992); the General Agreement on Tariffs and Trade — GATT (see the record of the meeting of the Council on 16-17 June 1993-C/M/264); the Unesco (see the list of Unesco Member States as of 1 October 2003, Note 4; the International Maritime Organization — IMO (see IMO resolution C.72(70), 18 June 1993); the International Labour Organisation — ILO (see Participation of the Federal Republic of Yugoslavia in the 81st session (1994) of the International Labour Conference, *Official Bulletin*, Vol. LXXVII, Series A, 1994, p. 166); the International Atomic Energy Agency — IAEA (see IAEA General Assembly resolution GC (XXXVI)/RES/576).

[71]See e.g., rejection by State parties to the Convention on the Rights of the Child, Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, the International Covenant on Civil and Political Rights, and in many other instances.

States were. It was not accepted as a State party to treaties on grounds of continuity — it only became a party when it submitted a notification of accession or succession.

6.31. And now, after the same decision has repeatedly been made, and after authoritative clarifications were made, we are facing once again the same question as to whether the FRY was a Member of the United Nations between 1992 and 2000, and whether it continued the treaty status of the former Yugoslavia in the Statute and in the Genocide Convention. The answer to the same question just cannot be different in this case either. The answer to the same question has to be the same, and the outcome has to be the same.

6.32. Madam President, another argument was raised against overruling the position taken in 1996 on the grounds of what is now known and recognized. The Applicant observed that inconsistencies are a fact of life, that it is perfectly normal that two judgments rendered within an interval of ten years "[a]boutissent, le cas échéant, même si c'est regrettable, à des solutions juridiques différentes, voire incompatibles"[72].

6.33. Indeed, such things do happen, no machinery of justice is perfect. If a decision was rendered ten years ago, and in a new case the Court gets convinced that different legal consequences should be attached to the same fact pattern — and regrettably, the earlier case is already concluded — obviously nothing can be done. The case decided ten years ago is not within the sphere of authority of the Court, it is not within the power of the judges anymore, and it cannot be reconsidered on the grounds of the newly emerged knowledge and insight. *But this is not our situation*. Here, in our case, the issue is still before the Court. It *can* be decided on the grounds of newly emerged knowledge and insight. The Court just cannot disregard its present level of information while the final decision is still in its hands. This is the reason why the principle set in the *ICAO Council* Judgment is so plainly justified. In our situation it is perfectly possible to decide now on the grounds of all information the Court *now* possesses.

6.34. Madam President, distinguished Members of the Court, among the cases in which the same issue emerged, the eight *Legality of Use of Force* cases have an outcome. The case with Croatia and this case are still not finally decided. Information and insight available today lead to

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[72]CR 2006/36, p. 22, para. 57 (Pellet).

the same outcome as that reached in the *Legality of Use of Force* cases. Consistency, equal outcomes and equal treatment are not only fully justified, but also possible. We are respectfully asking this Court to establish that the Respondent had no access to the Court at the relevant moment in time and to decline jurisdiction in this case.

Madam President, Members of the Court, I am truly grateful for your attention, and I would like to ask you now, Madam President, to give the floor to our agent, Professor Stojanović.

The PRESIDENT: Thank you, Professor Varady. Professor Stojanović, you have the floor.

M. STOJANOVIĆ : Thank you, Madam President.

CONCLUSION GENERALE

1. Et voilà le temps est venu pour un discours finalement qui peut être intitulé la conclusion générale des plaidoiries de la délégation de Serbie-et-Monténégro, et je commencerai cette conclusion générale, Madame le président, Messieurs les juges, que l'on est arrivé à la fin d'un procès historique. Au cours des deux derniers mois et demi, les équipes d'avocats des deux Parties adverses se sont employées à présenter les éléments de preuve, à exposer leurs arguments respectifs et à interroger les témoins et les experts. L'équipe de la Partie de la Bosnie-Herzégovine, composée d'éminents juristes internationaux, s'est employée, tout au long de ce procès, à plaider en faveur d'une interprétation élargie de la notion de génocide. Elle a aussi insisté sur la thèse qu'il ne pouvait y avoir de paix sans justice.

2. De son côté, l'équipe de la Partie de la Serbie-et-Monténégro que j'ai eu l'honneur de diriger — et qui est composée aussi bien d'éminents avocats internationaux que de jeunes juristes de notre pays —, s'est avant tout employée à servir la cause de la justice. Mais elle a aussi cherché à défendre l'avenir même du peuple serbe au sein de la communauté des peuples européens fidèles aux traditions démocratiques, ce qui est le seul véritable destin de ce peuple. Si nous avons nié la responsabilité de notre Etat pour les crimes qui lui sont imputés par la requête de la Bosnie-Herzégovine, nous n'avons point voulu nier le fait que des crimes avaient été commis. Et si nous avons cherché à mettre en exergue les défaillances de la requête introduite par la Bosnie-Herzégovine, ainsi que les éléments illogiques des arguments développés par le requérant, nous n'avons pas pour autant souhaité défendre le régime déplorable de Slobodan Milosevic,

auquel d'ailleurs tous les représentants de la Serbie-et-Monténégro dans le présent procès étaient opposés et qu'on peut qualifier comme l'une des épreuves les plus dures de notre histoire récente. Nous sommes, en effet, d'avis que le caractère antidémocratique et anachronique de ce régime ne peut pas servir de prétexte à la Partie adverse pour imputer tous les péchés des Balkans à un seul peuple lequel, à un moment de son histoire, avait subi le régime de Slobodan Milosevic.

3. Madame le président, permettez-moi à présent de mettre en exergue certains points qui, selon notre avis, ont une importance cruciale et qui concernent le mérite de la présente complexe affaire.

4. Au cours de la présente procédure, la Partie de la Serbie-et-Monténégro a apporté des preuves — aussi bien au cours de nos plaidoiries que par les dépositions des témoins — en faveur de notre hypothèse de départ : «Personne et rien ne peut prouver que le Gouvernement de la RFY (Serbie-et-Monténégro) et le peuple serbe, ont eu l'intention d'exterminer, en partie ou dans l'ensemble, les Musulmans et les Croates de la Bosnie-Herzégovine.» (CR 2006/14, p. 10, par. 1.)

5. Nos témoins, ceux venant de la Serbie-et-Monténégro tout comme ceux venant de la Republika Srpska, ont confirmé que la Serbie-et-Monténégro n'a pas exercé de contrôle sur les autorités de la Republika Srpska, ni sur le plan politique, ni sur le plan militaire, ni sur le plan financier.

6. Notre témoin, le professeur Dragoljub Micunovic, a démontré devant cette honorable Cour, qu'en Serbie de l'époque, il existait des forces politiques qui ont œuvré activement en faveur d'une résolution pacifique des conflits politiques en ex-Yougoslavie. Déjà, à partir de 1990, quand les différentes communautés ethno-nationales de l'ex-Yougoslavie ont commencé à s'organiser aussi sur le plan militaire, l'opposition politique a mené en Serbie une forte campagne — tant sur le plan interne que sur le plan international — visant à éviter le déferlement de la guerre en ex-Yougoslavie.

7. La campagne politique menée par l'opposition en Serbie a contribué à l'échec de la mobilisation qui a été décrétée en automne 1991. Ceci a démontré que le peuple était opposé à la guerre en ex-Yougoslavie. Nous sommes dès lors d'avis que cette honorable Cour ne saurait pas déclarer l'Etat de ce peuple comme coupable des crimes que la requête de Bosnie-Herzégovine et les plaidoiries des avocats du demandeur veulent lui imputer. La Partie de la Bosnie-Herzégovine a

souligné, à plusieurs reprises, que la présente requête ne visait pas le *peuple* serbe mais l'*Etat* serbe. Pourtant, une éventuelle condamnation de cet Etat porterait préjudice avant tout au peuple de cet Etat puisqu'elle mènerait à la stigmatisation de ce peuple et aurait des conséquences historiques durables.

8. Nos témoins venant de la Republika Srpska, le professeur Vladimir Lukic et le professeur Vitomir Popovic, qui ont occupé — pendant la guerre — de hauts postes au sein du Gouvernement de la Republika Srpska, ont confirmé que, les autorités de la Republika Srpska avaient gardé leur indépendance par rapport au Gouvernement de la Serbie-et-Monténégro, tant sur le plan législatif que sur le plan exécutif et judiciaire. Cette indépendance s'est manifestée, entre autres, par le refus de la Republika Srpska de signer le plan de paix élaboré par Vance-Owen une année après le commencement de la guerre, suivi du refus en 1994 du plan de paix élaboré par le groupe de contact, en dépit des démarches entreprises par le Gouvernement de la Serbie-et-Monténégro pour inciter le Gouvernement de la Republika Srpska à approuver ces deux plans de paix.

9. Notre témoin, M. Dusan Mihailovic, fut un des protagonistes de la scène politique en Serbie qui à l'époque fut aussi bien membre du gouvernement que membre d'un parti politique de l'opposition. En tant qu'un des leaders des partis politiques de l'opposition, en 2000 il a contribué au renversement du régime de Slobodan Milosevic. Après octobre 2000, il est devenu ministre de l'intérieur du gouvernement démocratique de la Serbie. Il a apporté une contribution significative à la lutte contre la criminalité organisée que la Serbie avait héritée du régime de Slobodan Milosevic. L'intégrité de M. Mihailovic ne peut donc pas être mise en question. Ainsi, lors de son témoignage, M. Mihailovic a affirmé, sans équivoque, que le Gouvernement de la Serbie n'avait pas exercé de contrôle sur la Republika Srpska pendant la guerre de 1992 à 1995, et que les questions portant sur cette guerre n'avaient jamais figuré sur l'ordre du jour de ce gouvernement.

10. Dans un souci de brièveté, je m'abstiens de dresser un récapitulatif complet des exposés faits par les témoins et par les experts. Des références supplémentaires étaient faites par les autres membres de notre délégation lors de leurs exposés respectifs.

11. Nous sommes d'avis que les crimes commis pendant la guerre en Bosnie-Herzégovine ne peuvent pas être imputés à l'Etat de Serbie-et-Monténégro.

12. L'Etat demandeur a mis l'accent sur l'argument que les actes génocidaires allégués et le plan allégué qui aurait existé afin de commettre le génocide sont imputables aux autorités de Belgrade. Ce point apparaît clairement dans la réplique et les plaidoiries du premier tour. Cet argument a été fermement réfuté dans le premier tour par M. Ian Brownlie, Q.C. qui a développé de fortes preuves de non imputabilité. En plus, M. Brownlie a indiqué le manque de preuves convaincantes qui auraient prouvé le plan génocidaire.

13. Les tentatives du demandeur de dénigrer les fortes preuves de non-imputabilité dans le deuxième tour étaient également réfutées par les preuves complémentaires produites. Dans le deuxième tour, M. Brownlie a également remarqué et souligné que le demandeur a renoncé à s'appuyer sur le plan génocidaire allégué.

14. Nous affirmons que les crimes commis en Bosnie-Herzégovine pendant la guerre de 1992 à 1995 ne peuvent pas être qualifiés de crimes de génocide. Nous avons démontré que le demandeur n'a pas démontré l'intention génocidaire qui est indispensable pour que l'Etat puisse répondre du génocide. Il n'a pas démontré un plan, un projet ou une ligne de conduite dont l'intention génocidaire pourrait être déduite. Par ailleurs, le demandeur n'a pas spécifié le groupe protégé conformément aux critères déterminés par la convention sur le génocide.

15. Nous insistons, une fois de plus, il existe une différence fondamentale entre les crimes commis par le régime nazi (lors de la «Kristal Nacht») et les crimes commis en Bosnie-Herzégovine : en Bosnie-Herzégovine, ces crimes ont été commis au cours d'une tragique guerre civile et multiethnique, tandis qu'en Allemagne, il n'avait pas été question d'une guerre entre les nazis et le peuple juif.

16. Madame le président, Messieurs les juges, le requérant s'est efforcé de réduire les événements dramatiques et complexes de la dernière décennie à une confrontation simpliste entre «le mal» et «le bien»; à savoir entre les Serbes qui sont «les mauvais» et les non-Serbes qui sont «les bons». La Partie de la Bosnie-Herzégovine avait ainsi prétendu que toute décision de la Cour qui irait dans le sens de sa requête, serait une décision en faveur du «bien» et que cette décision contribuerait également au bien-être général et au processus de la démocratisation dans la région. Une telle approche ne peut être basée que sur la méconnaissance ou la dénaturation des faits — et c'est ce que, selon notre avis, le requérant a fait tout au long de cette procédure. Ce point fut

développé déjà dans la partie IV de ma plaidoirie (par. 173-179) ainsi que dans la partie qui porte sur les conflits entre les Croates et les Musulmans de Bosnie-Herzégovine, d'une part, ou entre les différentes factions des Musulmans de Bosnie-Herzégovine, d'autre part (par. 180-183). Il est évident que dans ces conflits-là, on ne peut pas parler des «Serbes» et des «non-Serbes». La Partie adverse passe aussi outre le fait qu'environ 10 %, à peu près un demi-million, de la population de Bosnie-Herzégovine était les citoyens qui se déclaraient comme des «Yougoslaves». On peut ainsi poser à la Partie adverse une question supplémentaire : Au sein de cette catégorie-là de la population, peut-on faire une distinction entre les «Yougo-Serbes» et les «Yougo-non-Serbes», et peut-on déterminer qui appartenait à l'un ou l'autre de ces deux groupements ? La Partie adverse ne fait pas état de cette réalité pourtant significative. Pourquoi ? Parce que cette réalité ne correspond pas au schéma simplifié selon lequel la population de Bosnie-Herzégovine était subdivisée entre les «Serbes» et les «non-Serbes».

17. Pour donner un autre exemple de dénaturation des faits, je vais citer la plaidoirie de M. van den Biesen concernant les actes commis contre les Musulmans sur le territoire de la Serbie. Puisque M. van den Biesen souhaitait prouver, à tout prix, que des atrocités furent commises contre les Musulmans en Serbie, il a dû faire appel à une extension créative de la notion de Musulmans. M. van den Biesen a ainsi évoqué des actes commis contre les «Muslims in Kosovo». En réalité, et de toute évidence, les Musulmans auxquels le coagent du requérant faisait référence sont les Albanais. Dans ce contexte, il est utile de rappeler qu'un nombre significatif d'Albanais de Kosovo sont des chrétiens et qu'il est donc impossible de faire une équation entre «les Albanais» et «les Musulmans». Il est, de surcroît, notoire que les Musulmans qui font l'objet de la présente affaire appartiennent à une communauté ethnique et non pas à une communauté religieuse. En effet, ils appartiennent à l'une des nations constitutives de la Bosnie-Herzégovine, dont la dénomination officielle est aujourd'hui «Bosniaque».

18. Il est évident que si l'on tient compte des éléments mentionnés ci-dessus, on doit laisser de côté les stéréotypes. Or, les stéréotypes, — la «mantra», comme dirait l'agent adjoint, M. van den Biesen —, occupent une place importante dans les plaidoiries du requérant, et comportent, entre autres, l'extension de la catégorie des Musulmans (Bosniaques) aux Albanais.

19. Madame le président, Messieurs les juges, il ne s'agit pas ici d'une affaire simple où la vérité peut être recherchée avec l'aide de stéréotypes. Il s'agit d'une affaire des plus complexes, qui entraîne aussi des questions cruciales relatives à la compétence de la Cour. Cette affaire ne peut donc être dénouée que par l'examen méticuleux des questions de fait et de droit et non pas par le recours aux stéréotypes.

20. La Partie adverse a demandé à cette honorable Cour d'imputer à l'Etat de Serbie-et-Monténégro des actes que cet Etat n'a pas commis et de lui imposer les réparations en faveur de la Bosnie-Herzégovine.

21. Madame le président, comme vous le savez, la Republika Srpska, qui représente 49 % du territoire de la Bosnie-Herzégovine, ne soutient pas la requête introduite par la Bosnie-Herzégovine devant cette honorable Cour. Permettez-nous dès lors d'attirer votre attention sur le fait que si la Serbie-et-Monténégro était trouvée coupable pour le crime de génocide, les conséquences d'un tel jugement pourraient être néfastes.

22. Nous prions dès lors la Cour de statuer en faveur de la réconciliation et non pas en faveur de la continuation du conflit. Nous avons toute confiance que le droit sera l'unique fondement d'une telle décision et que la justice judiciaire sera ainsi rendue dans la présente affaire.

23. Au cours des deux tours de plaidoiries, les représentants de la Bosnie-Herzégovine ont démontré qu'ils maîtrisaient l'art élaboré de la rhétorique mais ils ont apporté peu de preuves valables. Cette approche étrange adoptée par la Partie adverse dans une affaire qui est complexe, en réalité reflète la conviction de la Partie adverse que tous les faits étaient indubitables et qu'il ne reste plus à cette honorable Cour que de rendre sa décision aux termes de laquelle la Serbie-et-Monténégro serait déclarée responsable pour le crime de génocide.

24. Madame le président, Messieurs les juges, notre éventuel succès dans la présente affaire ne peut constituer pour nous une occasion de réjouissance. Après la grande tragédie que nous avons vécue sur le territoire de l'ex-Yougoslavie, il ne peut y avoir lieu de réjouissance pour aucune des deux Parties. Il nous faut, au contraire, tirer les leçons nécessaires de ce qui s'est passé et nous employer à bâtir les chemins et les ponts au service de la réconciliation et de notre future coopération.

25. Permettez-moi, enfin, Madame le président, de lire la conclusion écrite de la Serbie-et-Monténégro.

CONCLUSIONS FINALES DE LA SERBIE-ET-MONTÉNÉGRO

En application de l'article 60, paragraphe 2, du Règlement de la Cour, la Serbie-et-Monténégro prie la Cour de dire et juger :

— que la Cour n'a pas compétence car, au moment pertinent, l'Etat défendeur n'avait pas accès à la Cour; ou alternativement

— que la Cour n'a pas compétence car l'Etat défendeur n'est jamais demeuré ni devenu lié par l'article IX de la convention sur la prévention et la répression du crime de génocide et parce qu'il n'existe aucun autre fondement à la compétence de la Cour;

Si la Cour détermine qu'elle a compétence, la Serbie-et-Monténégro prie la Cour de dire et juger :

— que les demandes contenues dans les paragraphes 1 à 6 des conclusions de la Bosnie-Herzégovine concernant les violations alléguées des obligations incombant à l'Etat en application de la convention sur la prévention et la répression du crime de génocide sont rejetées comme non fondées en droit et en fait;

— en tout état de cause, que les actes et/ou les omissions dont le défendeur aurait été responsable ne sont pas imputables au défendeur. Une telle imputation aurait nécessairement impliqué la violation du droit applicable dans cette procédure;

— sans préjudice des demandes susvisées, que la réparation accordée à l'Etat demandeur dans cette procédure, en application d'une interprétation appropriée de la convention sur la prévention et la répression du crime de génocide, se limite à un jugement déclaratoire;

— ensuite, et sans préjudice des demandes susvisées, qu'aucune question relative à la responsabilité juridique concernant les violations prétendues des ordonnances en indication de mesures conservatoires rendues par la Cour les 8 avril 1993 et 13 septembre 1993 n'entre dans la compétence de la Cour, qui ne peut accorder de remèdes appropriés à l'Etat demandeur dans le contexte de la procédure contentieuse, et qu'en conséquence la demande contenue dans le paragraphe 7 des conclusions de la Bosnie-Herzégovine doit être rejetée.

Finalement, je vous remercie, Madame le président et Messieurs les juges de la Cour internationale de Justice, pour votre gentille attention consacrée à la délégation de la Serbie-et-Monténégro pendant les plaidoiries qu'elle a présentées devant vous. Merci.

The PRESIDENT: Thank you very much, Mr. Stojanović. The Court takes note of the final submissions which you have read on behalf of Serbia and Montenegro as it took note on 24 April 2006 of the final submissions of Bosnia and Herzegovina. I shall now give the floor to the Vice-President who has two questions for the Parties. Vice-President.

The VICE-PRESIDENT: Thank you, Madam President.

Madam President, I should like to pose two questions. The first is addressed to both Parties, the second only to Serbia and Montenegro. They are as follows.

In 1996 the Federal Republic of Yugoslavia concluded two bilateral agreements with Croatia and Macedonia, respectively, and its President made a joint declaration with the President of the Presidency of Bosnia and Herzegovina. In those instruments there are provisions which appear to recognize in different terms the continued personality of the Federal Republic of Yugoslavia. I would be interested to read the comments of both Parties on those provisions.

The second question, addressed to Serbia and Montenegro, is the following. In the opinion of Serbia and Montenegro, was the Federal Republic of Yugoslavia a Member of the United Nations in the period between 27 April 1992, when it came into existence, and 19 September 1992, when Security Council resolution 777 was adopted followed, of course, by General Assembly resolution 47/1 of 22 September 1992.

Thank you, Madam President.

The PRESIDENT: Thank you. The text of these questions will be passed to the Parties as soon as possible and, as regards the first question, the cited documents will be attached thereto. The Parties are invited to provide their written replies to the questions no later than Friday 12 May 2006.

This brings us to the end of these nine weeks of hearings in the case. I would like to thank the Agents, counsel and advocates for their statements. In accordance with the Court's practice, I

shall request both Agents to remain at the Court's disposal to provide any additional information it may require.

With this proviso, I now declare closed the oral proceedings 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 Court will now retire for deliberation. The Agents of the Parties will be advised in due course of the date on which the Court will deliver its judgment.

Since the Court has no other business before it today, the sitting is closed.

The Court rose at 1.25 p.m.