

## SEPARATE OPINION OF JUDGE ELARABY

*The issue of FRY membership in the United Nations — Access to the Court under Article 35, paragraph 1 — Scope of reference in Article 35, paragraph 2, to “treaties in force” — The Vienna Convention on Succession of States in respect of Treaties — The Genocide Convention.*

## I. INTRODUCTORY REMARKS

In addition to the joint declaration, which reflects my disagreement with the grounds which led the Court to conclude that it had no jurisdiction in the instant case, I deem it necessary to elaborate further on some aspects. At the outset, I would like to emphasize that regardless of the conclusion that the Court reaches on the issue of jurisdiction, and notwithstanding the fact that the Judgment is confined to deciding on jurisdiction, the Court, as the principal judicial organ of the United Nations, is always called upon to uphold the law of the Charter. The Court, however, confined its conclusion in the instant case to noting, in paragraph 128 of the Judgment, that:

“When, however, as in the present case, the Court comes to the conclusion that it is without jurisdiction to entertain the claims made in the Application, it can make no finding, nor any observation whatever, on the question whether any such violation has been committed or any international responsibility incurred.”

On this point I am inclined to favour the balance reached by the Court in the *Fisheries Jurisdiction* case, where it held that:

“55. There is a fundamental distinction between the acceptance by a State of the Court’s jurisdiction and the compatibility of particular acts with international law. The former requires consent. The latter question can only be reached when the Court deals with the merits, after having established its jurisdiction and having heard full legal argument by both parties.

56. Whether or not States accept the jurisdiction of the Court, they remain in all cases responsible for acts attributable to them that violate the rights of other States.” (*Fisheries Jurisdiction (Spain v. Canada)*, *Jurisdiction of the Court, Judgment, I.C.J. Reports 1998*, p. 456.)

II. ACCESS TO THE COURT UNDER ARTICLE 35,  
PARAGRAPH 1

1. The Court finds that it has no jurisdiction in this case because the Federal Republic of Yugoslavia (FRY)<sup>1</sup> did not have access to the Court at the time it filed its Application. The first ground upon which the Court makes this finding is Article 35, paragraph 1, of the Statute of the Court.

2. Article 35, paragraph 1, provides that “[t]he Court shall be open to the States parties to the present Statute”. Under Article 93, paragraph 1, of the United Nations Charter, all “Members of the United Nations are *ipso facto* [States] parties”. The Court holds that the FRY was not a State party to the Statute because the FRY was not a Member of the United Nations at the time it filed its Application in the instant case, and therefore, in the view of the Court, the Court was not “open” to the FRY. Because, in my view, the FRY *was* a Member of the United Nations when it filed its Application, I disagree.

3. Prior to its fragmentation, the Socialist Federal Republic of Yugoslavia (SFRY) consisted of six republics: Serbia, Croatia, Bosnia and Herzegovina, Macedonia, Slovenia, and Montenegro. On 25 June 1991, Croatia and Slovenia both declared independence, followed by Macedonia on 17 September 1991, and Bosnia and Herzegovina on 6 March 1992. On 22 May 1992, Croatia, Slovenia and Bosnia and Herzegovina were admitted as Members of the United Nations. The “Former Yugoslav Republic of Macedonia” was admitted to membership in the United Nations on 8 April 1993.

4. The FRY came into being on 27 April 1992. On that date, a joint session of the National Assembly of the Republic of Serbia and the Assembly of the Republic of Montenegro proclaimed a new constitution of the “Federal Republic of Yugoslavia”, and also adopted a Declaration. The preamble of the Declaration claimed to reflect the common will of the citizens of Serbia and Montenegro “to stay in the common State of Yugoslavia”, and also provided that:

“The Federal Republic of Yugoslavia, continuing the state, international, legal and political personality of the [Socialist Federal Republic] of Yugoslavia, shall strictly abide by all the commitments that the Socialist Federal Republic of Yugoslavia assumed internationally.

. . . . .  
Remaining bound by all obligations to international organisations

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<sup>1</sup> On 4 February 2003, the Federal Republic of Yugoslavia officially changed its name to “Serbia and Montenegro” (FRY-SM).

and institutions whose member it is, the Federal Republic of Yugoslavia shall not obstruct the newly formed states to join these organisations and institutions, particularly the United Nations and its specialised agencies.”<sup>2</sup>

5. The Declaration was brought to the attention of the United Nations by a Note of the same date informing the Secretary-General that

“[s]trictly respecting the continuity of the international personality of Yugoslavia, the Federal Republic of Yugoslavia shall continue to fulfil all the rights conferred to, and obligations assumed by, the Socialist Federal Republic of Yugoslavia in international relations, including its membership in all international organizations and participation in international treaties ratified or acceded to by Yugoslavia”<sup>3</sup>.

At that time, April 1992, no resolution purporting to oppose or undermine the FRY’s assertion was adopted by any competent United Nations organ and the FRY’s membership was not challenged. This fact suggests that the FRY was at the time considered to be a United Nations Member.

6. In September 1992, the Security Council and the General Assembly each adopted a resolution declaring “that the Federal Republic of Yugoslavia (Serbia and Montenegro) cannot continue automatically the membership of the former Socialist Federal Republic of Yugoslavia in the United Nations”<sup>4</sup>. These resolutions did not suspend the membership of the FRY in the United Nations in accordance with Article 5 of the Charter. Nor did either resolution have the effect of expelling the FRY from the United Nations in accordance with Article 6 of the Charter. Earlier, the Council, on 30 May 1992, had adopted a resolution<sup>5</sup> imposing economic and other sanctions on the FRY — meaning that the conditions for invoking the provisions of Article 6 existed — yet the FRY was not expelled.

7. This fact was recognized by the United Nations Legal Counsel, who on 29 September 1992, addressed a letter to the Permanent Representatives of Croatia and Bosnia and Herzegovina, in which the “considered

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<sup>2</sup> Declaration of the Joint Session of the SFRY, Republic of Serbia and Republic of Montenegro Assemblies, 27 April 1992, United Nations doc. S/23877, Annex, p. 2.

<sup>3</sup> United Nations doc. A/46/915, Ann. I, p. 2.

<sup>4</sup> United Nations docs. S/RES/777 and A/RES/47/1.

<sup>5</sup> United Nations doc. S/RES/757.

view of the United Nations Secretariat regarding the practical consequences of the adoption by the General Assembly of resolution 47/1” was stated to be as follows:

“While the General Assembly has stated unequivocally that the Federal Republic of Yugoslavia (Serbia and Montenegro) cannot automatically continue the membership of the former Socialist Federal Republic of Yugoslavia in the United Nations and that the Federal Republic of Yugoslavia (Serbia and Montenegro) should apply for membership in the United Nations, the only practical consequence that the resolution draws is that the Federal Republic of Yugoslavia (Serbia and Montenegro) shall not *participate* in the work of the General Assembly. It is clear, therefore, that representatives of the Federal Republic of Yugoslavia (Serbia and Montenegro) can no longer *participate* in the work of the General Assembly, its subsidiary organs, nor conferences and meetings convened by it.

On the other hand, the resolution neither terminates nor suspends Yugoslavia’s *membership* in the Organization . . . The resolution does not take away the right of Yugoslavia to participate in the work of organs other than Assembly bodies.”<sup>6</sup>

8. In addition, the United Nations Secretariat continued to list “Yugoslavia” as a Member of the United Nations after September 1992. “Yugoslavia” also maintained other attributes of membership in the Organization including its flag, seat and nameplate in the General Assembly. The FRY was allowed to maintain the Yugoslav Permanent Mission to the United Nations and to circulate and receive documents. And “Yugoslavia” continued to be listed in the annual “Scale of Assessments” approved by the General Assembly for the contributions of Member States to the United Nations budget<sup>7</sup>.

9. Thus, the only practical consequence of the relevant resolutions was that the FRY was unable to participate in the work of the General Assembly and its subsidiary organs, conferences and meetings. They left untouched its relationship with the Security Council and with this Court. As the Court found in the 2003 *Application for Revision* case,

“Resolution 47/1 did not *inter alia* affect the FRY’s right to

<sup>6</sup> United Nations doc. A/47/485, Annex, pp. 2-3; original emphasis.

<sup>7</sup> In a series of resolutions, the General Assembly fixed a new rate of assessment for “Yugoslavia” of 0.11, 0.1025 and 0.10 per cent for the years 1995, 1996 and 1997 respectively (United Nations doc. A/RES/49/19B) and 0.060, 0.034 and 0.026 per cent for the years 1998, 1999 and 2000 respectively (United Nations doc. A/RES/52/215A).

appear before the Court or to be a party to a dispute before the Court under the conditions laid down by the Statute.” (*Application for Revision of the Judgment of 11 July 1996 in the Case concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia), Preliminary Objections (Yugoslavia v. Bosnia and Herzegovina), Judgment, I.C.J. Reports 2003*, p. 31, para. 70.)

Indeed, the FRY actively participated in proceedings before this Court: it responded to claims with counter-claims; it submitted preliminary objections, and it appointed an *ad hoc* judge to participate in the Court’s deliberations. All these actions confirmed that the FRY was considered a Member of the United Nations and a party to the Statute.

10. The International Criminal Tribunal for the former Yugoslavia (ICTY), when it also considered the question whether the FRY was a member of the United Nations during this period, reached the same conclusion. It held that:

“Resolution 47/1 did not deprive the FRY of all the attributes of United Nations membership: the only practical consequence was its inability to participate in the work of the General Assembly, its subsidiary organs, conferences or meetings convened by it. Apart from that, it continued to function as a member of the United Nations . . . Thus, while the FRY’s membership was lost for certain purposes, it was retained for others . . . The proper approach to the issue of the FRY membership of the United Nations in the period between 1992 and 2000 is not one that proceeds on a[n] *a priori*, doctrinaire assumption that its exclusion from participation in the work of the General Assembly necessarily meant that it was no longer a member of the United Nations. As the FRY membership was neither terminated nor suspended by General Assembly resolution 47/1, it is more appropriate to make a determination of its United Nations membership in that period on an empirical, functional and case-by-case basis.”<sup>8</sup>

Applying this “functional” approach, the Trial Chamber concluded that “the FRY was in fact a member of the United Nations both at the time of the adoption of the [ICTY] Statute in 1993 and at the time of the commission of the alleged offences in 1999”<sup>9</sup>.

11. The FRY’s formal admission to the United Nations on 1 Novem-

<sup>8</sup> *Prosecutor v. Milan Milutinović*, Case No. IT-99-37-PT, Decision on Motion Challenging Jurisdiction, 6 May 2003, paras. 37-38, *appeal dismissed*, Case No. IT-99-37-AR72.2, Decision of 12 May 2004 (internal citations omitted).

<sup>9</sup> *Ibid.*, para. 39.

ber 2000<sup>10</sup>, as was found in the 2003 *Application for Revision* case,

“cannot have changed retroactively the *sui generis* position which the FRY found itself in vis-à-vis the United Nations over the period 1992 to 2000, or its position in relation to the Statute of the Court” (*Application for Revision of the Judgment of 11 July 1996 in the Case concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia)*, Preliminary Objections (*Yugoslavia v. Bosnia and Herzegovina*), *Judgment, I.C.J. Reports 2003*, p. 31, para. 71; emphasis added).

12. Again the ICTY Chamber reached the same conclusion when it held that:

“the formal admission of the FRY to membership in 2000 in no way invalidates [the] finding that the FRY retained sufficient indicia of membership during that period to be amenable to the regime of the Security Council resolutions adopted under the United Nations Charter for the maintenance of international peace and security”<sup>11</sup>.

13. The Court has now characterized the FRY’s *sui generis* position as one that “could not have amounted to its membership in the Organization” (Judgment, para. 78) and held that the FRY’s admission to the United Nations in 2000 “did not have and could not have had, the effect of dating back to the time when the Socialist Federal Republic of Yugoslavia broke up and disappeared” (*ibid.*). This, in my view, lacks a solid legal basis. Whereas the Security Council and General Assembly were acting in a political capacity when the relevant resolutions were adopted, the Court, throughout the various phases of the cases related to the former Yugoslavia, should have consistently stated and applied the appli-

<sup>10</sup> On 27 October 2000, the President of the FRY addressed a letter to the Secretary-General requesting admission of the FRY to membership, stating that

“[i]n the wake of fundamental democratic changes that took place in the Federal Republic of Yugoslavia, in the capacity of President, I have the honour to request the admission of the Federal Republic of Yugoslavia to membership in the United Nations in light of the implementation of Security Council resolution 777 (1992)” (United Nations doc. A/55/528-S/2000/1043, Annex).

As a result, on 1 November 2000, the General Assembly adopted resolution 55/12, stating that “[h]aving received the recommendation of the Security Council of 31 October 2000 that the Federal Republic of Yugoslavia should be admitted to membership in the United Nations” and “[h]aving considered the application for membership of the Federal Republic of Yugoslavia”, it “[d]ecides to admit the Federal Republic of Yugoslavia to membership in the United Nations”.

<sup>11</sup> *Prosecutor v. Milan Milutinovic*, Case No. IT-99-37-PT, Decision on Motion Challenging Jurisdiction, 6 May 2003, para. 44, *appeal dismissed*, Case No. IT-99-37-AR72.2, Decision of 12 May 2004.

cable law. This approach would have yielded an outcome consistent with the law of the Charter and the established practice of the United Nations and, I believe, would have led the Court to find that the FRY was a member of the United Nations when, in 1999, it filed its application in the instant case. Therefore, the Court should have concluded that it was open to the FRY under Article 35, paragraph 1.

### III. ACCESS TO THE COURT UNDER ARTICLE 35, PARAGRAPH 2

1. The FRY did not invoke Article 35, paragraph 2, of the Court's Statute as a basis for the Court's jurisdiction. The Court decided *proprio motu* to address it<sup>12</sup>, holding that the FRY, as a non-party to the Statute, could not invoke a treaty which entered into force after the entry into force of the Statute as a basis for access to the Court under Article 35, paragraph 2. I have explained the reasons for my disagreement with the Court's conclusion that the FRY was not a Member of the United Nations in 1999. However, assuming that it was a non-Member, I also cannot agree that it would not have access to the Court under the provisions of Article 35, paragraph 2.

2. Article 35, paragraph 2, of the Court's Statute provides that:

“The conditions under which the Court shall be open to other States shall, subject to the special provisions contained in treaties in force, be laid down by the Security Council, but in no case shall such conditions place the parties in a position of inequality before the Court.”

3. There are two questions relevant to an Article 35, paragraph 2, examination: first, whether a “treaty in force” may provide a basis for the Court's jurisdiction instead of, rather than in combination with, compliance with the requirements laid down by the Security Council in its resolution 9 of 1946; and second, whether the Genocide Convention can be considered a “treaty in force”.

<sup>12</sup> Although the Court is free to decide the issues submitted to it by the Parties for reasons other than those advanced by the Parties, it is undesirable as a matter of judicial policy for the Court to raise *proprio motu* a legal argument that is not determinative of one of the Applicant's submissions, unless there are “compelling considerations of international justice and of development of international law which favour a full measure of exhaustiveness” on the matter. Compare *Oil Platforms (Islamic Republic of Iran v. United States of America)*, *I.C.J. Reports 2003*, p. 232, para. 27, separate opinion of Judge Higgins (“it is unlikely to be ‘desirable’ to deal with important and difficult matters, which are gratuitous to the determination of a point of law put by the Applicant in its submissions”) with Lauterpacht, *The Development of International Law by the International Court*, 1982, p. 37.

4. In respect of the first question, I agree with the Court's previous finding that

“proceedings may validly be instituted by a State against a State which is a party to such a special provision in a treaty in force, but is not party to the Statute, and *independently of* the conditions laid down by the Security Council in its resolution 9 of 1946” (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Provisional Measures, Order of 8 April 1993, I.C.J. Reports 1993*, p. 14, para. 19; emphasis added)<sup>13</sup>.

5. In regard to the second question, I agree with the Court's previous finding that “Article IX of the Genocide Convention . . . could . . . be regarded prima facie as a special provision contained in a treaty in force [so as to come] prima facie within the jurisdiction *ratione personae* of the Court” (*ibid.*). The Court now holds, however, that “treaty in force” means a “treaty in force at the time that the Court's Statute came into force”, and therefore concludes that the Genocide Convention, having come into force after the Court's Statute, does not give the FRY access to the Court under Article 35, paragraph 2.

6. The Court begins its analysis of Article 35, paragraph 2, by noting that

“[a]s for the words ‘treaties in force’, in their natural and ordinary meaning they do not indicate at what date the treaties contemplated are to be in force, and thus they may lend themselves to different interpretations. One can construe those words as referring to treaties which were in force at the time that the Statute itself came into force, as was contended by certain Respondents; or to those which were in force on the date of the institution of proceedings in a case in which such treaties are invoked. In favour of this latter interpretation, it may be observed that the similar expression ‘treaties and conventions in force’ is found in Article 36, paragraph 1, of the Statute, and the Court has interpreted it in this sense . . . The expression ‘treaty or convention in force’ in Article 37 of the Statute has also been read as meaning in force at the date proceedings were instituted.” (Judgment, para. 101; internal citations omitted.)

<sup>13</sup> See also League of Nations, Records of the First Assembly, Meetings of the Committees, Third Committee, Annex 7, *Report Submitted to the Third Committee by M. Hagerup on behalf of the Sub-Committee*, p. 532:

“The access of other [non-members of the League of Nations] States to the Court will depend *either on* the special provisions of the Treaties in force (for example the provisions of the Treaties of Peace concerning the rights of minorities, labour, etc.) *or else on* a resolution of the Council.” (Emphasis added.)



7. Even assuming — without deciding<sup>14</sup> — that the Court is correct in holding that the term “treaties in force” should be given a more restrictive interpretation than the interpretation it is given when it appears in Articles 36 and 37, in my view the interpretation adopted by the Court — limiting “treaties in force” to treaties in force at the time the Court’s Statute came into force — is unduly restrictive.

8. The Court’s interpretation of “treaties in force” is primarily based on statements in the *travaux préparatoires* of the Statute of the Permanent Court of International Justice (PCIJ), which contained the original, and substantially identical, provision. These statements suggest to the Court that when considering the term “treaties in force” in Article 35, paragraph 2, the provision’s drafters had in mind the peace treaties with former First World War enemy States (who were not Members of the League of Nations and would otherwise not have access to the Court) concluded before the entry into force of the Court’s Statute.

9. However, there is evidence from the discussion of the Statute’s drafters that such a narrow interpretation is not warranted. The peace treaties were considered to encompass all “Treaties of Peace dealing with the rights of minorities, labour, etc.”<sup>15</sup> including any “Treaties other than the German Treaty [that] form[ed] part of the general peace settlement”<sup>16</sup> and provided for judicial dispute settlement. This interpretation was confirmed in 1926 when the Court was considering amendments to the Court’s Rules. At this juncture it was stated that Article 35 related to “*situations provided for by the treaties of peace*” (1926, *P.C.I.J., Series D, No. 2, Add., Acts and Documents*, p. 106; emphasis added). And “it was decided . . . not to lay down, once and for all, in what cases” such treaties

<sup>14</sup> The Court’s interpretation conflicts with the prior jurisprudence of the Permanent Court in the *Certain German Interests in Polish Upper Silesia* case, in which the Permanent Court impliedly construed the expression “treaties in force” as meaning any treaty in force at the time when the case was brought before the Court (*P.C.I.J., Series A, No. 6*). See also statement of Registrar Ake Hammarskjöld:

“The Council’s Resolution of May 17th, 1922, would have no bearing on cases submitted to the Court under a general treaty; for any State which was a party to a general treaty might then, without making any special declaration [as required by the Security Council resolution], be a party before the Court. The only case, therefore, in which the Council’s resolution applied was that in which a suit was brought before the Court by special agreement.” (1926, *P.C.I.J., Series D, No. 2, Add., Revision of the Rules of the Court*, p. 76.)

<sup>15</sup> League of Nations, Records of the First Assembly, Plenary Meetings, Twentieth Plenary Meeting, Annex A, *Reports on the Permanent Court of [International] Justice Presented by the Third Committee to the Assembly*, 1920, p. 463.

<sup>16</sup> Secretariat of the League of Nations, Memorandum on the Different Questions Arising in Connection with the Establishment of the Permanent Court of International Justice, reprinted in PCIJ, Advisory Committee of Jurists, *Documents Presented to the Committee Relating to Existing Plans for the Establishment of a Permanent Court of International Justice*, 1920, p. 17.

might provide non-League Members access to the Court<sup>17</sup>.

10. Indeed, there were numerous treaties and conventions connected with the Peace Settlement of 1919, including labour treaties adopted by the International Labour Conference, treaties regarding the various mandates approved by the Council of the League of Nations, and treaties concerning the protection of minorities<sup>18</sup>.

11. By analogy, in the context of the Statute of the International Court of Justice drafted in the aftermath of the Second World War, the Genocide Convention can be considered a treaty connected with the peace settlement. Barely a year after the end of the war, there was already a General Assembly resolution<sup>19</sup> mandating the Economic and Social Council to prepare a draft convention prohibiting genocide as a crime against international law. The Convention was the first post-war treaty in the area of human rights and was considered to be the United Nations' first concrete legal response to the Holocaust. The philosophy, object and purpose of the Convention as a whole are a direct outcome of the tragic events of the Second World War. Thus, when the Convention was drafted, it was stressed that

“Having regard to the troubled state of the world, it was essential that the convention should be adopted as soon as possible, before the memory of the barbarous crimes which had been committed faded from the minds of men.”<sup>20</sup>

12. The fact that the Genocide Convention came into force after the Statute of the Court does not change this conclusion. The PCIJ drafters clearly contemplated that the treaties “in force” under Article 35 included not only those that were already in force, but also treaties granting non-League Members access to the Court which were still in draft form and under negotiation<sup>21</sup>.

13. This is confirmed in the Permanent Court's jurisprudence in the *Certain German Interests in Polish Upper Silesia* case (*P.C.I.J., Series A, No. 6*). In this case, Germany, a non-League Member, was the applicant

<sup>17</sup> Report of the Registrar of the Court, reprinted in 1936, *P.C.I.J., Series D, No. 2, 3rd Add.*, p. 818: “It was decided . . . not to lay down, once and for all, in what cases declarations were required (question of the Peace Treaties).”

<sup>18</sup> See M. Hudson, *The Permanent Court of International Justice 1920-1942*, 1972, pp. 439-444 (giving examples).

<sup>19</sup> United Nations doc. A/96 (I) (11 December 1946).

<sup>20</sup> United Nations, *Official Records of the General Assembly, Committees, Third Session, Part I*, Sept.-Dec. 1948, Vol. 4, *Report of the Economic and Social Council, Sixth Committee, Legal Questions, Sixty-third Meeting* (1948), p. 5.

<sup>21</sup> Secretariat of the League of Nations, *Memorandum on the Different Questions Arising in Connection with the Establishment of the Permanent Court of International Justice*, *op. cit.*, p. 17.

and the PCIJ's jurisdiction was derived from the German-Polish Convention relating to Upper Silesia, which was concluded *after* the adoption of the PCIJ Statute. Poland did not dispute the fact that the suit had been duly submitted to the Court under Article 35, and the Court found itself, on the basis of the treaty alone — (Germany had not complied with the conditions laid down by the Council of the League of Nations) — able to exercise jurisdiction over the parties to the case.

14. When the PCIJ considered the revision of its Rules in 1926, Judge Anzilotti explained that the *German Interests* case

“related to a treaty — the Upper Silesian Convention — *drawn up under the auspices of the League of Nations which was to be considered as supplementary to* [a First World War Peace Treaty,] the Treaty of Versailles. It was therefore possible to include the case in regard to which the Court had then to decide in the general expression ‘subject to treaties in force’, whilst construing that expression as referring to the peace treaties.”<sup>22</sup>

Similarly, being the first major human rights convention drawn up *under the auspices of the United Nations*, the Genocide Convention can be considered *supplementary to* the Second World War peace treaties and consequently comes within the definition of Article 35's “treaties in force” even though it entered into force after the Statute of the Court.

15. As an additional argument, I believe that even if one adopts the Court's interpretation of “treaties in force” as encompassing only those treaties which, like the Peace Treaties, were in force before the Statute of the Court came into force<sup>23</sup>, a special, broader interpretation of the expression is appropriate in a case which, like the present case, involves a multilateral treaty of a universal character which is intended to remedy violations of *jus cogens*. On this point, I subscribe to the view of Professor Sienho Yee, that in cases involving *jus cogens*, there is a special need

“to . . . resolv[e] disputes . . . as soon as possible. As treaties may not override *jus cogens*<sup>24</sup>, they should not hinder efforts to remedy violations of *jus cogens*. Accordingly, the phrase ‘treaties in force’ should be given the broadest scope so as to facilitate any consenting

<sup>22</sup> Minutes of Meeting of the PCIJ on 21 July 1926 on amending its Rules of Court, at 1926, *P.C.I.J., Series D, No. 2, Add., Acts and Documents*, p. 105; emphasis added.

<sup>23</sup> The Court notes in paragraph 113 that, in the context of the present Court, there were no such treaties in force prior to the Statute.

<sup>24</sup> Vienna Convention on the Law of Treaties, Art. 53. See also Ian Brownlie, *Principles of Public International Law*, 4th ed., 1990, pp. 512-515.

sovereign State to utilise the Court to resolve any disputes involving *jus cogens*.”<sup>25</sup>

16. Thus, even if the PCIJ drafters primarily had in mind the special category of existing peace treaties, to the exclusion of all others, their original intent should give way, in the context of the ICJ Statute, to a broader interpretation of “treaties in force” that includes multilateral treaties addressing *jus cogens* violations which have largely emerged in the post-Second World War era.

17. Because of the overriding importance of such treaties to the progressive development of international law and the maintenance of peace, they are, and should be, subject to a special interpretation. Cf. Article 60, paragraph 5, of the Vienna Convention on the Law of Treaties (non-applicability of treaty termination rules to “provisions relating to the protection of the human person contained in treaties of a humanitarian character”); the Court’s Advisory Opinion on *Reservations to the Genocide Convention* (limiting ability of States to enter reservations to the Genocide Convention) (*Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, I.C.J. Reports 1951*, p. 24), and Order on counter-claims in the *Application of the Genocide Convention* case (limiting applicability of reciprocity rules in context of Genocide Convention) (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Counter-Claims, Order of 17 December 1997, I.C.J. Reports 1997*, p. 258, para. 35).

18. In sum, the Genocide Convention and other treaties that either relate to the peace settlement following the Second World War or are aimed at redressing violations of *jus cogens* should be interpreted as “treaties in force” under Article 35, paragraph 2, as long as they are in force at the time an application is instituted before the Court.

#### IV. JURISDICTION UNDER THE GENOCIDE CONVENTION

1. The Court found that the FRY did not have access to the Court and the Court did not therefore consider it necessary to decide whether the FRY was or was not a party to the Genocide Convention at the time it filed its Application. In my view, the FRY did have access to the Court under the provisions of Article 35 and I shall proceed to

<sup>25</sup> S. Yee, “The Interpretation of ‘Treaties in Force’ in Article 35 (2) of the Statute of the ICJ”, 47 *ICLQ* 884, 903 (1998).

examine the Genocide Convention as a basis for the Court's jurisdiction<sup>26</sup>.

2. During the period 1992-2000, the treaty obligations of the SFRY extended to each of the successor States. This is true regardless of whether or not the FRY was a member of the United Nations during this period. As the Court notes in paragraph 71, the United Nations Office of Legal Affairs in its "Summary of Practice of the Secretary-General as Depositary of Multilateral Treaties" published in 1996, concluded that the legal effects of General Assembly resolution 47/1 were limited to the framework of the United Nations and did not affect the rules of treaty succession:

"[A]fter the separation of parts of the territory of the Union of Soviet Socialist Republics (which became independent States), the Union of Soviet Socialist Republics (as the Russian Federation) continued to exist as a predecessor State, and all its treaty rights and obligations continued in force in respect of its territory. The same applies to the Federal Republic of Yugoslavia (Serbia and Montenegro), which remains as the predecessor State upon separation of parts of the territory of the former Yugoslavia. General Assembly resolution 47/1 of 22 September 1992, to the effect that the Federal Republic of Yugoslavia could not automatically continue the membership of the former Yugoslavia in the United Nations . . . was adopted within the framework of the United Nations and the context of the Charter of the United Nations, and not as an indication that the Federal Republic of Yugoslavia was not to be considered a predecessor State."<sup>27</sup>

3. Indeed, during this period, the FRY continued to claim that it was a successor State to the SFRY and that, as such, it was bound by all the treaty obligations of the predecessor State. On 27 April 1992, the FRY submitted a note to the Secretary-General in which it declared explicitly

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<sup>26</sup> The FRY argued in relation to all eight Respondents that the Court had jurisdiction *ratione personae* under the Genocide Convention. Because I find that the Court did not have jurisdiction *ratione materiae*, I will not proceed to consider the alternative grounds raised by the FRY in relation to particular respondent parties.

<sup>27</sup> United Nations doc. ST/LEG/8. The passage was later

"deleted by the Secretariat in response to the objections raised by a number of States that the text was contrary to the relevant Security Council and General Assembly resolutions and the pertinent opinions of the Arbitration Commission of the International Conference for Peace in Yugoslavia" (Judgment, para. 71, citing United Nations docs. A/50/910-S/1996/231, A/51/95-S/1996/251, A/50/928-S/1996/263 and A/50/930-S/1996/260).

that it would respect the obligations assumed by the SFRY:

“Strictly respecting the continuity of the international personality of Yugoslavia, the Federal Republic of Yugoslavia shall continue to fulfil all the rights conferred to, and obligations assumed by, the Socialist Federal Republic of Yugoslavia in international relations, including its membership in all international organizations and participation in international treaties ratified or acceded to by Yugoslavia.”<sup>28</sup>

4. Under applicable rules of international law, the FRY would have succeeded to these treaties even in the absence of such a declaration because a successor State that separates from a predecessor State is not entitled, upon separation, to disavow the treaty obligations of the predecessor State. The entitlement to pick and choose treaty obligations applies only to *newly independent* States in conformity with Article 17, paragraph 1, of the Vienna Convention on Succession of States in respect of Treaties. Article 17, paragraph 1, provides that

“a newly independent State may, by a notification of succession, establish its status as a party to any multilateral treaty which at the date of the succession of States was in force in respect of the territory to which the succession of States relates”.

Article 34 of the Vienna Convention, on the other hand, provides that

“[w]hen a part or parts of the territory of a State separate to form one or more States, whether or not the predecessor State continues to exist:

- (a) any treaty in force at the date of the succession of States in respect of the entire territory of the predecessor State continues in force in respect of each successor State so formed[, and]
- (b) any treaty in force at the date of the succession of States in respect only of that part of the territory of the predecessor State which has become a successor State continues in force in respect of that successor State alone”<sup>29</sup>.

5. Thus, there is a difference in international law between a newly independent State and a successor State. A newly independent State is required upon independence to clarify its legal position regarding treaties in conformity with the “clean slate” doctrine codified in Article 17 of the Vienna Convention. In the case of the separation of States, on the other hand, the successor State automatically assumes the treaty obligations of the predecessor.

6. This rule of succession to treaties applies to new States and is

<sup>28</sup> United Nations doc. A/46/915, Ann. I, p. 2.

<sup>29</sup> Vienna Convention on Succession of States in respect of Treaties, Art. 34, para. 1.

entirely independent of the issue of a State's membership in the United Nations. By way of example, when Switzerland was admitted to the United Nations, it was considered a new Member, though not a newly independent State. It did not therefore have to clarify its legal position with respect to treaties. Conversely in the FRY's case, it succeeded to the SFRY's treaty obligations in 1992 regardless of the status of its membership in the United Nations at that time. The existence of the FRY dates back to 1992, not to 2000, and this is a point on which, in my view, the Court should have made the distinction. Oscar Schachter underlined this distinction when he stated that:

“a separated state which was not a colony is presumed to succeed to the treaty obligations and rights of the predecessor state unless this result would be incompatible with the object of the treaty. The experience thus far with respect to the cases of the former Soviet Union and the former Yugoslavia supports a general presumption of continuity. That presumption would not, however, apply to membership in the United Nations or other general international organizations that provide for the election of new members.”<sup>30</sup>

7. Article 34 of the Vienna Convention should be considered reflective of customary law on succession to treaties. It is indisputable that certain provisions in the Vienna Conventions on treaties “are declaratory of customary [international] law” (*Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, *Judgment*, *I.C.J. Reports 1997*, p. 62, para. 99)<sup>31</sup> and recent State practice, for instance in respect of the successors of Czechoslovakia and the SFRY, lends support to this proposition in respect of the rules of succession. This is all the more true in cases involving succession to human rights treaties. In the words of my learned colleague Judge Weeramantry,

“[it] . . . seems to me to be a principle of contemporary international law that there is automatic State succession to so vital a human rights convention as the Genocide Convention . . . [The] reasons [for applying the principle of automatic succession] apply with special force to treaties such as the Genocide Convention . . . leaving no room for doubt regarding automatic succession to such treaties.” (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia)*),

<sup>30</sup> O. Schachter, “State Succession: The Once and Future Law”, 33 *Va. J. Int'l Law* 257 (1992-1993).

<sup>31</sup> See also *Digest of United States Practice in International Law*, 1980, p. 1041 n. 43 (United States State Department Legal Adviser expressing opinion that the rules of the Vienna Convention on Succession of States in respect of Treaties were “generally regarded as declarative of existing customary law”).

*Preliminary Objections, Judgment, I.C.J. Reports 1996 (II)*, pp. 654, 645, separate opinion of Judge Weeramantry; see also *ibid.*, pp. 634-637, separate opinion of Judge Shahabuddeen (recognizing that allowing a suspension of the operation of the Genocide Convention would be incompatible with the object and purpose of the treaty, and others which, like it, exist to safeguard the fundamental rights and freedoms of the individual and endorse the most elementary principles of morality.)

8. When the FRY was formally admitted as a Member of the United Nations in 2000, this did not affect its legal status as successor to the SFRY's treaty obligations. It was admitted as a new Member of the United Nations, but in my view, not as a newly independent State, because its separation from the SFRY and its assumption of the legal obligations as a successor State took place on 27 April 1992.

9. As a result, the letter of 8 December 2000 from the United Nations Legal Counsel to the FRY, in which he stated that, in his view,

“the Federal Republic of Yugoslavia should now undertake treaty actions, *as appropriate*, in relation to the treaties concerned, if its intention is to assume the relevant legal rights and obligations as a successor State” (*Application for Revision of the Judgment of 11 July 1996 in the Case concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia)*, Preliminary Objections (*Yugoslavia v. Bosnia and Herzegovina*), *Judgment, I.C.J. Reports 2003*, p. 24, para. 51 (citing Application of Yugoslavia, Ann. 27; emphasis added)

must be read in context: it was a routine letter which the United Nations Secretariat addresses to all new Members regardless of the particular circumstances of their admission. The FRY was a State in existence since 1992 and not a newly independent State. The appropriate characterization would have been that the FRY was a successor State, as repeatedly acknowledged by the FRY when it declared that it succeeded to the SFRY's legal obligations on 27 February 1992.

10. The Court acknowledged this in the 2003 *Application for Revision* case, when it emphasized

“that General Assembly resolution 55/12 of 1 November 2000 [admitting the FRY as a Member] cannot have changed retroactively the *sui generis* position which the FRY found itself in vis-à-vis the United Nations over the period 1992 to 2000, or its position in relation to the Statute of the Court and the Genocide Convention. Furthermore, the letter of the Legal Counsel of the United Nations



dated 8 December 2000 cannot have affected the FRY's position in relation to treaties.

The Court also observes that, in any event, the said letter did not contain an invitation to the FRY to accede to the relevant conventions, but rather to 'undertake treaty actions, as appropriate, . . . as a successor State'." (*I.C.J. Reports 2003*, p. 31, para. 71.)

11. In its 1996 Judgment on preliminary objections in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia)*, the Court left open the question whether it accepted the automatic succession argument, and confined its Judgment to noting that:

"Without prejudice as to whether or not the principle of 'automatic succession' applies in the case of certain types of international treaties or conventions, the Court does not consider it necessary, in order to decide on its jurisdiction in this case, to make a determination on the legal issues concerning State succession in respect to treaties which have been raised by the Parties." (*I.C.J. Reports 1996 (II)*, p. 612, para. 23.)

The time has come for the Court to answer this question and, in my view, the answer should have been that:

- (a) the FRY succeeded to the Genocide Convention on 27 April 1992, and
- (b) the FRY was not a newly independent State required to establish its status vis-à-vis multilateral treaties. Thus, it is bound by Article IX of the Convention.

12. Because, in my view, the FRY succeeded to the Genocide Convention in 1992, the FRY's purported accession — and reservation — to the Convention in March 2001 must be declared void *ab initio*. The Court, should, in my view, have concluded that the FRY has been bound since 1992 to assume all the legal obligations of the SFRY, including those flowing from the Genocide Convention. Such a conclusion would have been consistent with:

- The FRY's declaration of succession in 1992;
- Article 34 of the Vienna Convention on Succession of States in respect of Treaties;
- the position taken by the FRY prior to 1 November 2000; and
- the Court's prior jurisprudence. (*Ibid.*, pp. 617, 621, paras. 34, 41.)

13. Thus the Court should have followed the rationale that it adopted in 1996 in respect to Bosnia, that

"[s]ince the Court has concluded that Bosnia and Herzegovina could become a party to the Genocide Convention *as a result of a succes-*

*sion*, the question of the application of Articles XI and XIII of the Convention does not arise” (*I.C.J. Reports 1996 (II)*), p. 612, para. 24; emphasis added)

and made the same finding in respect of the FRY. The FRY became a party to the Genocide Convention “as a result of a succession” and as a result the Convention provides a basis for the Court’s jurisdiction *ratione personae*.

14. When considering its jurisdiction *ratione materiae*, the Court must ascertain whether the breaches of the Genocide Convention alleged by the FRY-SM are capable of falling within the provisions of that Convention (*Oil Platforms (Islamic Republic of Iran v. United States of America)*, *Preliminary Objection, Judgment, I.C.J. Reports 1996 (II)*, p. 803). Article IX of the Convention provides the Court with jurisdiction over disputes “relating to the interpretation, application or fulfilment” of the Convention, including disputes “relating to the responsibility of a state for genocide”. Genocide, in turn, is defined in Article II of the Convention as the “intent to destroy, in whole or in part, a national, ethnical, racial or religious group” through certain acts, including the use of force.

15. Aside from the question of whether the acts of NATO are imputable to each respondent State, the facts alleged by the FRY-SM, even if substantiated on the merits, do not satisfy the element of specific intent necessary to constitute genocide. Genocide, as defined in the Convention, requires evidence that force was used with “an intent to destroy” a certain defined group, and the Court should not accept the FRY-SM’s invitation to lower the *mens rea* bar set by the Convention by holding that the requirement of genocidal intent is satisfied as long as genocidal consequences were “readily foreseeable”. As a result, the Court, in my view, lacks jurisdiction *ratione materiae*.

## V. CONCLUSION

The FRY had every right to claim the continuity of the legal personality of its predecessor with respect of the territory of Serbia and Montenegro. In the FRY’s case, however, the competent United Nations organs opted to disregard the law of the Charter. The legal consequences of the FRY’s “*sui generis*” status vis-à-vis the United Nations — it was excluded from participating in certain activities of specified organs but was never expelled — were not, in my view, properly addressed by the Court. As the principal judicial organ of the United Nations, the Court’s function under Article 38 of its Statute is to decide disputes in accordance with international law. It has been in a position more than once in the last decade to set the record straight regarding the legal status of the FRY’s membership in accordance with the Charter of the United Nations.

Yet the Court, in holding that it “is led to the conclusion that Serbia and Montenegro was not a Member of the United Nations . . . at the time of filing its Application” did not address in a comprehensive manner “the legal situation [regarding the FRY’s membership status], which was shrouded in uncertainties” (Judgment, para. 79).

For this and other reasons set out in my opinion, I disagree with the findings of the Court regarding the interpretation of Article 35, paragraph 1, which the joint declaration correctly describes as being “at odds” with the Court’s previous judgments and orders. I also do not agree with the grounds chosen by the Court to reach its decision that it lacks jurisdiction or its substantive conclusions on the scope of Article 35, paragraph 2. Moreover I find that the approach adopted by the Court casts an unnecessary shadow of doubt on the *Genocide Convention* case which has been on the docket of the Court since 1993.

However, because I consider that the Court does not have jurisdiction *ratione materiae*, I find myself in agreement with the *dispositif* contained in paragraph 129 of the Judgment, which states that the Court “[f]inds that it has no jurisdiction to entertain the claims made in the Application filed by Serbia and Montenegro on 29 April 1999”. I was therefore able to vote in favour of the Judgment.

(Signed) Nabil ELARABY.

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