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HAGUE INTERNATIONAL TRIBUNALS

Has Pandora's Box Been Closed? The Decisions on the *Legality of Use of Force* Cases in Relation to the Status of the Federal Republic of Yugoslavia (Serbia and Montenegro) within the United Nations

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Abstract
In its judgments on the preliminary objections in the *Legality of Use of Force* cases, the Court held that the FRY was not a UN member in the period between 1992 and 2000. This finding is controversial, at odds with previous decisions of the Court, and has indeed attracted criticism from various judges. This article proposes a different construction of the question of the FRY's membership within the UN and reviews arguments that allow doubts to be cast on the reasoning of the Court. Because of the link between UN membership and the FRY's participation in the Genocide Convention, the Court's finding in the *Legality of Use of Force* cases may have some implications for two sets of proceedings still pending before the Court (*Bosnia and Herzegovina* v. *Serbia and Montenegro* and *Croatia* v. *Serbia and Montenegro*). In the former case, an interpretation of the extent of the *res judicata* principle may allow the Court not to reopen the issue of jurisdiction, already decided in 1996 on the basis of Article IX of the Genocide Convention. In the latter case, various options might allow the FRY to be regarded as a party to the Genocide Convention.

Key words
Article 35(2) of the Statute of the Court; Genocide Convention; *res judicata*; succession of states; UN membership

1. Introduction

After many years of hesitation, the International Court of Justice (the Court) has recently taken a clear stand on a controversial issue: the membership of the Federal Republic of Yugoslavia (FRY)[1] in the United Nations. This finding is at odds with previous decisions of the Court.

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1. Following the adoption and promulgation of the Constitutional Charter of Serbia and Montenegro by the Assembly of the Federal Republic of Yugoslavia on 4 Feb. 2003, the name of the state known as the Federal Republic of Yugoslavia was changed to Serbia and Montenegro. In the present article we shall use the old name when referring to the state prior to 4 Feb. 2003 and the new one when referring to it after that date.

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In its decisions on the preliminary objections in the *Legality of Use of Force* cases,[2] the Court stated clearly that, when the FRY instituted proceedings against the states that had participated in the military operations on its territory in spring 1999, it was not a member of the UN, and, as such, could not be a party to the Statute of the Court.[3] It could for that reason not have access to the Court on the basis of Article 35(1) of the Statute. Moreover, offering a restrictive interpretation of Article 35(2) of its Statute, which – under certain conditions – opens access to the Court to states not party to its Statute, the Court established that the applicant did not have access to it on that basis.[4] Article IX of the Genocide Convention was considered inadequate to provide Serbia and Montenegro with access to the Court. According to the Court's interpretation, Article 35(2) referred only to clauses providing for the jurisdiction of the Court contained in treaties in force at the moment of the entry into force of the Statute, and the Genocide Convention entered into force after the Statute. As a consequence of Serbia and Montenegro's lack of access, the Court found that it had no jurisdiction to entertain the claims made by the FRY.

This is the first time that the Court has taken a definite position on the controversial question of the UN membership of the FRY between 1992 and 2000. Previously the Court had carefully avoided reaching any firm conclusion on the matter, both in decisions (orders and judgments) delivered before the admission of the FRY to the UN and in a decision taken after that date.

In the first order on the request for provisional measures in the *Application of the Genocide Convention* case (*Bosnia and Herzegovina* v. *Serbia and Montenegro*), the Court had stated that the matter was 'not free from legal difficulties', but that it was not necessary to decide it.[5] In the judgment on preliminary objections in the same case, it had abstained from raising the question, founding its jurisdiction on Article IX of the Genocide Convention.[6] In that decision, the Court had not specified on which grounds the parties were bound by the Convention. Some of those grounds could be related to UN membership. Similarly, in the orders of 2 June 1999 on the request for provisional measures in the cases concerning *Legality of Use of Force*, the Court had expressed the opinion that it need not consider the FRY's status within the UN.[7]

2. On 29 April 1999 the Federal Republic of Yugoslavia brought ten similar cases against the states that had participated in the military operations on its territory in the spring of 1999. Two cases were dismissed at a preliminary stage for manifest lack of jurisdiction, while in the remaining eight the Court delivered eight similar decisions. For one of the cases see *Case Concerning Legality of Use of Force* (*Serbia and Montenegro v. Belgium*), Preliminary Objections, Judgment of 15 Dec. 2004, at http://www.icj-cij.org/icjwww/idocket/iybe/iybeframe.htm.
3. *Legality of Use of Force*, *supra* note 2, at para. 78.
4. Ibid., paras. 91–113.
5. *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (*Bosnia and Herzegovina v. Yugoslavia*), Request for the indication of Provisional Measures, Order of 8 April 1993, [1993] ICJ Rep. 3, at 14, para. 18.
6. *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (*Bosnia and Herzegovina v. Yugoslavia*), Preliminary Objections, Judgment of 11 July 1996, [1996] ICJ Rep. 595, at 623, para. 47, point 2 of the operative part.
7. See, for instance, *Case Concerning Legality of Use of Force* (*Yugoslavia v. Belgium*), Request for the Indication of Provisional Measures, Order of 2 June 1999, [1999] ICJ Rep. 124, at 136, para. 33.

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The self-restraint demonstrated by the Court in the decision delivered after the FRY's admission to the UN[8] is more significant.[9] Shortly thereafter, the FRY requested revision of the judgment on the preliminary objections in the *Application of the Genocide Convention* case. The fact on which the request for revision was based consisted exactly in that admission. According to the FRY, the new admission implied lack of membership in the past. This claim was rejected by the confirmation of the decision in the *Application for Revision* case that admission 'cannot have changed retroactively the *sui generis* position' of the FRY within the UN.[10] In the Court's opinion, admission to the UN resolved the question for the future, without shedding any light on the past situation.

In the *Legality of Use of Force* cases, the Court took a different view and considered the admission to the UN to be a new development that brought an end to the *sui generis* position of the FRY within the UN. According to this new interpretation of the Court, the new development clarified the hitherto amorphous legal situation of the FRY. As a result, the Court expressly stated that the *sui generis* position of the state between 1992 and 2000 could not amount to membership of the UN. In a Joint Declaration seven judges strenuously contested this 'clarification'.[11] The reasons for their opposition to the Court's reasoning will be discussed below.

The question arises as to whether the clear position taken by the Court on Yugoslav membership between 1992 and 2000 may have some bearing on the proceedings still pending before the Court in the two cases concerning *Application of the Genocide Convention*, brought against the FRY by Bosnia and Herzegovina and by Croatia.[12]

With regard to the preliminary objections in the *Legality of Use of Force* cases, the Court, taking a procedural decision on the lack of access, found it unnecessary to decide whether and on what ground the applicant was a party to the Genocide Convention. Nevertheless, some of the grounds for participation in the Convention are linked to UN membership. For instance, until the new admission the FRY had argued that it was a party to the Genocide Convention on the basis of continuity with the predecessor state. The absence of continuity would then have impaired participation in the Convention based on this ground. Moreover, Article XI of the Genocide Convention opens access to the Convention to non-member states of the UN only if they receive a specific invitation from the General Assembly. Therefore

8. The admission was requested by the FRY and granted by the General Assembly. See UN Doc. A/RES/55/12 of 1 Nov. 2000.

9. *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, Judgment of 3 Feb. 2003, [2003] ICJ Rep. 7.

10. Ibid., at 31, para. 71.

11. Joint Declaration of Vice-President Ranjeva, Judges Guillaume, Higgins, Kooijmans, Al-Khasawneh, Buergenthal, and Elaraby attached to the preliminary objections decision, *Legality of Use of Force* cases, *supra* note 2.

12. In Feb. 2006 the public hearing on the merits of the case concerning *Application of the Genocide Convention* (*Bosnia and Herzegovina v. Serbia and Montenegro*) will open before the Court. On 2 July 1999 Croatia instituted proceedings before the Court against the FRY for violations of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide allegedly committed between 1991 and 1995. *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (*Croatia v. Yugoslavia*), Application of 2 July 1999.

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lack of membership would have implied the need for a specific invitation to be a party to the Convention.

In order to determine the possible influence of the Court's findings on the pending cases, this article will first advance an interpretation of the position of the FRY in the UN before its admission that differs from that proposed by the Court. Second, it will examine the reasoning of the Court both on the question of Yugoslavia's UN membership and on the interpretation of Article 35(2) of the Court's Statute. It will then underline the reasons for challenging the results of the Court's findings. Finally, it will analyse the possible implications of those findings for the proceedings still pending before the Court in the *Application of the Genocide Convention* cases. It will also review the various options – deriving from the different solutions to the problems at issue – between which the Court will have to decide in the pending cases.

2. The break-up of Yugoslavia: facts and interpretation

In controversial succession cases the interpretation of actual facts may be open to divergent assessment. This section will first try to shed light on the elements that influenced the classification of the Yugoslav succession. It will then offer a different classification of the facts, according to which the FRY retains the international legal personality of the predecessor state and the UN resolutions denying continuity could consequently be tantamount to a sanction. Finally, the new position adopted by the FRY in 2000 will be described.

2.1. Facts

The former Socialist Federal Republic of Yugoslavia (SFRY) experienced a process of break-up which started with the secession of Slovenia but has no generally accepted date of conclusion.[13] Even if there is an authoritative *dictum* contained in several opinions of the Badinter Commission – the European Community Arbitration Commission on Yugoslavia – to the effect that such a conclusion took place before July 1992,[14] various considerations allow doubt to be cast that the process had definitely concluded at that date.

Following Slovenia, Croatia, Bosnia and Herzegovina, and Macedonia also seceded from the SFRY, which then consisted only of the republics of Serbia and Montenegro. This process could equally be described as one of multiple secessions from the SFRY – which, albeit diminished, would continue its existence – or as one of dismemberment.[15] In the former case the rump Yugoslavia would have remained the same subject as its predecessor, while in the latter it would have to be regarded as being one of the successor states.

The choice between continuity and dissolution should normally be based on factual elements. Several factors support the FRY's claim to continuity.[16] First, the other

13. B. Stern, 'La Succession d'États', (1996) 262 RCADI 15, at 227–32.
14. Opinion 8, 4 July 1992, (1992) 31 ILM, at 1521.
15. M. C. R. Craven, 'The Problem of State Succession and the Identity of States under International Law', (1998) 9 EJIL 142, at 153.
16. M. P. Scharf, 'Musical Chairs: The Dissolution of States and Membership in the United Nations', (1995) 28 *Cornell International Law Journal* 29, at 53.

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former Yugoslav republics seceded at different times; for that reason, at least at the beginning, it was impossible to classify the process as one of dissolution.[17] Among other factors arguing in favour of continuity, the extent of the state's territory is not as relevant as the assertion that the SFRY was born at the core of Serbia and Montenegro's ancient kingdom. Moreover, Belgrade (which had been the capital of the SFRY) continues as the capital of Serbia and Montenegro.[18] An additional element supporting the claim to continuity could be found in the maintenance of a similar governmental structure. Interpretation of the facts, however, could be strongly influenced and even twisted by political considerations, as the recent practice surrounding Russian succession in regard to UN membership demonstrates. An important factual element relating to the organization of government consists in the openness towards the other republics, always maintained by the state.[19] On 11 April 1991, when the summit of the presidents of Yugoslavia's six republics discussed the constitutional reorganization of the country, Serbia and Montenegro favoured a united federal state.[20] On 12 February 1992, in a document expressing the essentials of the organization and functioning of Yugoslavia as a common state, Serbia and Montenegro maintained openness towards other republics and a constitutional balance among the different republics forming the federation.[21] Finally, this openness was reaffirmed in Article 2 of the new Constitution of the FRY.[22] The Constitution shows the willingness of the state to reconstitute a federation when it states, 'the Federal Republic of Yugoslavia may be joined by other member Republics'. This element – already present at the time of the first Opinion even if not yet enshrined in the Constitution – was completely disregarded by the Badinter Commission. The Commission categorized the process as a dissolution precisely because it took the view that the constitutive element of a federation among different nationalities had been lost.[23]

In the case where political concerns prevent factual considerations from being conclusive in nature, the utmost importance will attach to subjective elements such as the assumptions of the states involved.[24] In the case of the former Yugoslavia,

17. M. G. Kohen, 'Le problème de frontières en cas de dissolution et de séparation d'États: quelles alternatives?', (1998) 31 *Revue Belge de Droit International* 129, at 133.
18. Scharf, *supra* note 16, at 53 et seq.; M. P. Wood, 'Participation of Former Yugoslav States in the United Nations and in Multilateral Treaties', (1997) 1 *Max Planck Yearbook of United Nations Law* 231, at 243 et seq.
19. For the documents expressing the willingness of the FRY to continue the federation with other republics, see S. Trifunovska, (ed.), *Yugoslavia Through Documents, From its Creation to its Dissolution* (1994), at 281, 367, 511, and 532.
20. Ibid., at 281 et seq.
21. Ibid., at 511 et seq.
22. Ibid., at 534 et seq.
23. Opinion 1, 29 Nov. 1991, (1992) 31 *International Legal Materials*, at 1494.
24. J. Crawford, *The Creation of States in International Law* (1970), 403; N. Ronzitti, *La successione internazionale tra Stati* (1970), 11; R. Müllerson, 'The Continuity and Succession of States, by Reference to the former USSR and Yugoslavia', (1993) 42 *International and Comparative Law Quarterly* 472, at 476 et seq.; M. C. R. Craven, 'The European Community Arbitration Commission on Yugoslavia', (1995) 66 *British Year Book of International Law* 333, at 356 and 362; M. Koskenniemi, 'The Present State of Research carried out by the English-speaking Section of the Centre for Studies and Research, State Succession: Codification tested against the Facts', Centre for Studies and Research in International Law and International Relations (1997), at 153 et seq.; K. G. Bühler, 'Casenote: Two Recent Austrian Supreme Court Decisions on State Succession from an International Law Perspective: Republic of Croatia et al. *v.* Bank A. G. der Sparkassen, Republic of Croatia at al. *v.* C. Bankverein', (1997) 2 *Austrian Review of International and European Law* 213, at 224 et seq.; C. Hillgruber, *Die Aufnahme neuer Staaten in die Völkerrechtsgemeinschaft* (1998), 765–6.

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however, the claim of the FRY to continuity was strongly opposed by the other successor states. In addition to this, the serious violations of international humanitarian law which took place in the territory of the former Yugoslavia (and on which the International Criminal Tribunal for the former Yugoslavia – the ICTY – was called to adjudicate) contributed to catalyzing international opinion against the FRY, which was regarded as one of those mainly responsible for the aforementioned violations.

2.2. Interpretation of the facts

The contradictory practice of UN organs and member states regarding the FRY's membership of the UN should be evaluated in this context. This would make it possible to advance a different construction both of the classification of the process and of the meaning of the UN resolutions.

It is not necessary here to review all the statements adopted by the UN organs and member states. These are considered in the Court's decisions on preliminary objections in the *Legality of Use of Force* cases and allow the Court itself to define the legal position of the FRY vis-à-vis the UN during the period 1992–2000 as being one that was 'highly complex', 'ambiguous', and 'open to different assessments'.[25]

If the position of the FRY was open to a variety of assessments, one could enquire as to the significance of the decisions taken by the political organs of the UN in 1992 to state categorically that 'the State formerly known as the Socialist Federal Republic of Yugoslavia has ceased to exist',[26] and 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'.[27]

It should be recalled that there is no rule governing automatic succession in the membership of an international organization.[28] Therefore the refusal of the automatic continuity of membership can only indicate a refusal 'to consider' the FRY as the continuation of the SFRY. The foregoing consideration, however, involves a subjective assessment, in contrast to the objectivity that should govern the substitution of states in the case of a change in their international legal personality.

The findings contained in the UN resolutions were not based on an analysis and evaluation of conclusive facts that had established a real change in the legal personality of the state. On the contrary, the elements making it possible to affirm the continuity between the SFRY and the FRY – already examined – were disregarded. The political organs of the UN forced the reality, asserting the existence of a situation that had not yet occurred.

A possible reason for this attitude may lie in the desire to punish the state. The UN resolutions stating that the FRY could not continue automatically the membership of the SFRY could therefore be interpreted as amounting to a sanction.[29]

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25. *Legality of Use of Force*, *supra* note 2, para. 63. The position expressed by the Under-Secretary-General and Legal Counsel of the UN is emblematic of the various opposing contentions on the status of the state in the organization; see UN Doc. A/47/485 of 30 Sept. 1992.
26. UN Doc. S/RES/777 of 19 Sept. 1992.
27. UN Doc. A/RES/47/1 of 22 Sept. 1992.
28. Report of the International Law Commission on the work of its 26th session, 6 May–26 July 1974, GAOR, 29th session, Supplement n. 10, UN Doc. A/9610/Rev.1.
29. For a more detailed description of this position, see M. C. Vitucci, 'La questione dell'appartenenza della Repubblica Federale Iugoslava alle Nazioni Unite', (2000) 83 *Rivista di Diritto Internazionale* 992, at 1015.

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Several states alluded to this punitive factor in their interventions.[30] In all probability, neither in the Security Council nor in the General Assembly was there sufficient consensus to impose the appropriate sanctions of expulsion or suspension of membership rights, and these decisions were for that reason adopted instead.

The sanctions of expulsion and suspension had been invoked previously, against Israel, South Africa, and Portugal, albeit without success.[31] Against South Africa and Portugal other, alternative, measures were imposed.[32] These measures had the result of excluding the states concerned from participation in the work of some bodies, thereby amounting to atypical sanctions. This appears relevant because in the case of the FRY the General Assembly resolution resulted in the exclusion of the state from participation in its activity. The FRY was subsequently also excluded from the Economic and Social Council.[33]

Two more elements reinforce this construction. First, all the relevant resolutions indicated that the question ought to be debated again in three months' time or before the end of the session. The only question to be discussed was the possible suspension of the exclusion, and thus the end of the sanction. Second, the debates preceding several resolutions relating to the ending of the measures adopted against the FRY under Chapter VII of the Charter contained a reference to the reintegration of the state in the membership of international organizations.[34] Even if the necessary consensus was never achieved, the reference would support the sanction thesis. Exclusion from the activity of some bodies was intended as a provisional measure that sooner or later should have come to an end. In line with this reasoning, the new admission would only mean the end of the sanction.

This article analyses the institutional law questions that arise when dealing with issues of membership and sanctions. For similar constructions see U. Villani, 'Lo status della Repubblica serbo-montenegrina nelle Nazioni Unite', (1993) 76 *Rivista di Diritto Internazionale* 26, at 31; T. Treves, 'The Expansion of the World Community and Membership of the United Nations', (1995) 6 *Finnish Yearbook of International Law* 248, at 271. For a reference to the punitive element contained in the non-recognition of the claim to continuity, see M. Bothe and C. Schmidt, 'Sur quelques questions de succession posées par la dissolution de l'URSS et celle de la Yougoslavie', (1992) 96 *Revue Générale de Droit International Public* 811, at 838; D. O. Lloyd, 'Succession, Secession, and State Membership in the United Nations', (1994) 26 *Journal of International Law and Politics* 761, at 782; J. M. Ortega Terol, 'Aspectos teóricos y prácticos de la continuidad en la identidad del Estado', (1999) 15 *Anuario de Derecho Internacional* 273, at 300.

30. UN Doc. A/47/PV. 7 of 30 Sept. 1992: see the interventions of Kenya, Botswana, Zambia, and Tanzania; UN Doc. A/47/PV. 101 of 24 May 1993: see the interventions of Denmark, Bosnia and Herzegovina, and Croatia; UN Doc. S/PV. 3116 of 19 Sept. 1992, see the Russian intervention.
31. For the case of South Africa see UN Docs. S/PV. 1796 to S/PV. 1808, of 18–30 Oct. 1974; for the case of Israel see UN Doc. A/37/PV. 45 of 26 Oct. 1982. For an exhaustive review of the proposed measures see B. Simma (ed.), *The Charter of the United Nations, a Commentary* (2002), H. J. Schütz, 'Article 5', vol. 1, at 199, n. 47.
32. For instance, Portugal and South Africa have been excluded from participation in the UN Economic Commission for Africa: see UN Doc. E/RES/974 (XXXVI) D III of 23 July 1963 and UN Doc. E/RES/974 (XXXVI) D IV of 30 July 1963. South Africa was also prevented from participating in the work of the General Assembly through the non-recognition of its credentials: see UN Doc. A/RES/3206 and 3207 (XXIX) of 30 Sept. 1974 and their interpretation of the President of the General Assembly, A. Bouteflika, in UN Doc. A/29/PV. 2281 of 12 Nov. 1974. For a review of the sanctions imposed by the various international organizations see H. G. Schermers and N. M. Blokker, *International Institutional Law* (2003), 932 et seq.; K. Magliveras, *Exclusion from Participation in International Organisations* (1999), 203 et seq.
33. UN Doc. S/RES/821 of 28 April 1993; UN Doc. A/RES/47/29 of 5 May 1993.
34. UN Doc. S/RES/1074 of 1 Oct. 1996; UN Doc. S/RES/1160 of 31 March 1998; see UN Doc. S/PV. 3865, at 5.

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2.3. The FRY's change of attitude

Eight years later, in October 2000, after a change of government, certainly not sufficient in itself to change the international legal personality of the state, the FRY modified its attitude and requested formal admission to the UN as a new state, abandoning all its previous claims. Since then, the FRY has acted in a manner consistent with this new appraisal of past events, denying what it had previously been so assiduous in claiming: continuity with the predecessor state and therefore membership of the UN and status as a party to the Genocide Convention. Indeed, the FRY acceded to the Convention in March 2001 with a reservation excluding the application of Article IX, the jurisdictional clause that could give access to the Court.[35]

The FRY had previously based its status as a party to the Genocide Convention on the assumption of the continuity of the legal personality of the SFRY.[36] According to the state, the new position would have impaired the very basis of its participation in the Convention.

Acting in a consistent manner, the FRY changed its attitude in the various cases pending before the Court: it withdrew the counterclaim[37] and requested revision of the decision delivered in the *Application of the Genocide Convention* case (*Bosnia and Herzegovina* v. *Serbia and Montenegro*), it asserted its new position in the *Legality of Use of Force* cases,[38] and it filed preliminary objections in the case concerning *Application of the Genocide Convention* instituted by Croatia in 1999.[39]

3. The decision on preliminary objections in the *Legality of Use of Force* cases: the Court's findings and grounds for doubt in that regard

This section will first address the issue of membership by reviewing the findings and reasoning of the Court in the *Legality of Use of Force* cases and comparing them with those advanced in the *Application for Revision* case. The major point of discrepancy

35. This is not the proper place to address the delicate questions of treaty law posed by the objections to this reservation made by Croatia, Bosnia and Herzegovina, and Sweden. Suffice it to say that all states objected to the timing of the reservation and regarded the FRY as being already bound by the provisions of the Genocide Convention.
36. UN Doc. S/23877 of 5 May 1992, Annex, containing the declaration on a new Yugoslavia, adopted in Belgrade on 27 April 1992 by the participants in the Joint Session of the SFRY Assembly. Here one can read the often quoted passage: 'The Federal Republic of Yugoslavia, continuing the state, international legal and political personality of the Socialist Federal Republic of Yugoslavia, shall strictly abide by all the commitments that the SFR of Yugoslavia assumed internationally . . . remaining bound by all obligations to international organizations and institutions whose member it is . . .'.
37. *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (*Bosnia and Herzegovina v. Yugoslavia*), Order of 10 September 2001, [2001] ICJ Rep. 572.
38. See Serbia and Montenegro's Observations on the preliminary objections, filed by the respondent States on 20 Dec. 2002. The state asserted that 'as the Federal Republic of Yugoslavia became a new member of the United Nations on 1 November 2000, it follows that it was not a member before that date'. Moreover, it stated as follows: 'the Federal Republic of Yugoslavia did not continue the personality and treaty membership of the former Yugoslavia, and thus specifically, it was not bound by the Genocide Convention'. These quotations may be read in the decision on the preliminary objections in the *Legality of Use of Force* cases, *supra* note 2, para. 28.
39. On 11 September 2002 the FRY filed certain preliminary objections to the jurisdiction of the Court and to admissibility. The Court has not yet delivered any decision on the preliminary objections in the case concerning *Application of the Genocide Convention* (*Croatia v. Serbia and Montenegro*).

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between the two sets of decisions lies in the appraisal of the consequences flowing from the new admission. The dissent shown by a number of judges allows doubt to be cast on the question as to whether the Pandora's box of Yugoslav membership of the UN may be regarded as definitively closed. The section will then examine the interpretation of Article 35(2) of the Court's Statute. A variety of reasons allows us to question the Court's construction resulting in its finding that Serbia and Montenegro lacked access to it.

3.1. The Court's finding on FRY membership within the UN

In its latest decisions in the *Legality of Use of Force* cases the Court, following Serbia and Montenegro's new assertions, declared that the legal status of the FRY within the UN during 1992–2000, albeit complex, had never amounted to membership. The renunciation of the continuity claim could possibly have had an impact on this decision. That claim had, however, already been abandoned at the time of the *Application for Revision* judgment, in which the Court had expressed a different opinion. In that case the Court had stated that the FRY had based the request for revision not on new facts according to Article 61 of the Statute, but on new legal consequences of facts already known to the parties at the time of the previous decision of 1996. It had therefore been able to dismiss the request without having to rule on its merits, that is, whether in 1996 the state was a party to the Statute of the Court and to the Genocide Convention. Nor had it decided positively or negatively on Yugoslav membership of the UN at the relevant time.

As has been affirmed above, in controversial succession cases, such as that involving Yugoslavia, subjective elements may influence the decision on continuity claims, that is, on the maintenance of international legal personality. The contradictory UN practice on the membership of the FRY before the new admission was the result of the climate of sanction against that state. Such a climate had hidden factual elements indicating continuity. The core of such continuity was only reinforced, and in no way substantiated, by the FRY's claim; therefore the new position of the state is not sufficient to modify the facts then existing.

One could agree with the Court's finding in the *Application for Revision* that the assumptions underlying the request were not new facts within the meaning of Article 61 of the Statute. Indeed, new considerations cannot but leave the question of membership for the period 1992–2000 unchanged. The judgment in the *Application for Revision* case offers some elements confirming this view. It states that the General Assembly resolution on the admission 'cannot have changed retroactively the *sui generis* position which the FRY found itself in vis-à-vis the UN over the period 1992 to 2000, or its position in relation to the Statute of the Court and the Genocide Convention'.[40] According to this passage, the effects of admission could be relevant only for the future.

In the *Legality of Use of Force* cases, the Court interpreted this passage of the revision judgment as not implying any decision on the status of the FRY within the UN prior

40. *Application for Revision, supra* note 9, at 31, para. 71.

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to admission. In order to reach such a conclusion it had to apply a convoluted line of reasoning, affirming that the '*sui generis*' term used to describe the Yugoslav position in the UN 'is not a prescriptive term from which certain defined legal consequences accrue'.[41] The Court may be right in asserting that the term '*sui generis*' does not entail conclusively either UN membership or its absence from 1992 to 2000. The passage of the revision judgment also stated clearly that admission could have effects only for the future. As far as the past was concerned, if the state was a member, it remained a member; if it was not, it remained excluded. Before reaching its new conclusion, the Court stated that in the *Application for Revision* case no decision had been taken on the FRY's UN membership. Only then did it consider the admission to the UN as a new development that brought an end to the *sui generis* position of the state within the UN.

On closer scrutiny, the straining in this interpretation appears clear: in so ruling the Court sought to derive new legal consequences – for the past – from a fact, the admission, from which it had previously considered it impossible to derive any consequences for the past. Through its construction of the term '*sui generis*', the Court attempted to demonstrate that there was no break with the past. But that break existed, and the minority[42] judges revealed it by both the Joint Declaration and the Separate Opinions.[43] The minority judges had every reason to be surprised. Indeed, the Court, while declaring that it was ruling in line with its previous decisions, offered a new construction without presenting any new evidence or argument.

The unanimous decision of the Court in the *Legality of Use of Force* cases was only possible thanks to a neutral wording of its operative part. Consensus was limited to the finding that the case should not proceed to the merits phase, while there was strong disagreement on the grounds employed by the Court in finding that it had no jurisdiction to entertain the claim.[44] An analysis of the Joint Declaration and Separate Opinions reveals profound disagreement between the judges on the question at stake: the UN membership of the FRY before its admission as a new state. It may happen that, as was occasionally the case in the past, the Joint Declaration will receive more credit than the judgment itself.

All the points of criticism are somehow linked to the choice by the Court to rule on what had hitherto been deliberately left undecided. According to the minority judges, in taking a position on FRY's membership of the UN between 1992 and 2000, the Court had not been consistent with its previous practice in both the same case and other related cases. Lack of consistency would imply lack of predictability and thus impair the judicial function. In particular, the judgment was at odds with a

41. *Legality of Use of Force*, *supra* note 2, para. 73.
42. The unanimous decision does not make it possible to define as 'minority' judges in the true sense the judges who attached the Joint Declaration and the Separate Opinions. In spite of that, the analysis of the Declaration and Opinions makes it clear that they are substantially, if not formally, minority judges.
43. *Legality of Use of Force*, *supra* note 2, Joint Declaration, paras. 10–12; Separate Opinion of Judge Higgins, para. 19, Separate Opinion of Judge Kooijmans, para. 5.
44. See S. Olleson, '"Killing Three Birds with one Stone"? The Preliminary Objection Judgment of the International Court of Justice in the Legality of Use of Force Cases', (2005) 18 *Leiden Journal of International Law* 237, at 238.

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number of other decisions previously delivered by the Court. The most significant contrast consists in what has already been analysed: deriving from the admission consequences for the past. In its judgment in the *Application for Revision* case the Court had decided that the admission of the state to the UN 'did not *inter alia* affect the Federal Republic of Yugoslavia's right to appear before the Court or to be a party to a dispute before the Court under the conditions laid down by the Statute'.[45] In its judgment of 2004, the Court took the opposite view, dismantling all possible grounds for the applicant's access before it in the eight cases on the *Legality of Use of Force*.

3.2. Interpretation of Article 35(2) of the Court's Statute

According to the most recent judgment, since it was not a member of the UN, and thus not automatically a party to the Statute of the Court, the applicant could have access to the Court only on the basis of Article 35(2) of its Statute. This paragraph 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.

This provision raises two questions: first, whether a treaty in force may provide a basis for access to the Court instead of, rather than in combination with, the requirements laid down by the Security Council in Resolution 9 of 1946; and, second, whether the treaty must be in force at the time of the adoption of the Statute of the Court or at the time of the institution of the proceedings.

Regarding the first question, the Court had previously construed the article as meaning that proceedings might be validly instituted against a state party to such special provisions contained in a treaty in force even independently of the conditions laid down by the Security Council in its Resolution 9 of 1946.[46] This interpretation followed that upheld by the Permanent Court in the *Certain German Interests in Polish Upper Silesia* case.[47]

Regarding the second question, in its order on provisional measures in the *Application of the Genocide Convention* case, the Court expressed the opinion that Article IX of the Genocide Convention – which entered into force after the Statute – could be regarded prima facie as a special provision contained in a treaty in force.[48] The Court thus interpreted the clause 'treaties in force' in Article 35(2) as meaning 'in force at the institution of the proceedings'.

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45. *Application for Revision*, *supra* note 9, at 31, para. 70.
46. Order for provisional measures rendered in the *Application of the Genocide Convention* case, *supra* note 5, at 14, para. 19.
47. *Certain German Interests in Polish Upper Silesia case* (*Germany v. Poland*), Judgment of 25 Aug. 1925, PCIJ Rep., Series A, No. 6, at 11. In order to present its request Germany (which was not a party to the Court's Statute) did not have to comply with the conditions provided for by the Council of the League of Nations. The Permanent Court considered sufficient the Convention Concerning Upper Silesia, concluded in Geneva on 15 May 1922, to which Germany and Poland were parties.
48. Order for provisional measures rendered in the *Application of the Genocide Convention* case, *supra* note 5, at 14, para. 19.

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In the decisions on preliminary objections in the *Legality of Use of Force* cases, the Court offered the opposite view. It started by affirming that the similar expressions contained in Articles 36(1) and 37 of the Statute were to be interpreted as meaning treaties or conventions in force at the date when proceedings were instituted.[49] Then, without indicating any reason to reject this interpretation in relation to Article 35, it considered the legislative history of the Statute, which would reinforce the opposite view: the provisions would refer to treaties already in force at the time of the adoption of the Statute.

As the preparatory work of the Statute of the present Court was deemed inconclusive, the decision is based on the preparatory work relating to the similar article contained in the Statute of the Permanent Court,[50] which appears to refer to the jurisdictional clauses contained in the peace treaties. The Court considered that

> it was natural to reserve the position to any relevant treaty provisions that might exist when its Statute entered into force; moreover, it would have been inconsistent with the main thrust of the text to make it possible in the future for states to obtain access to the Court simply by conclusion between themselves of a special treaty, multilateral or bilateral, containing a provision to that effect.[51]

This argument has the merit of referring to a textual element contained in Article 35(2), namely the need to avoid placing the parties in a position of inequality before the Court, but such reference was neither explicit nor proved.[52] The main argument was then based on the preparatory work of the Statute of the Permanent Court, where the reference to treaties providing for jurisdictional clauses substituted another reference to the peace treaties with no further discussion indicating a possible change.[53] Moreover, in an internal report on the legislative history of what subsequently became Article 35, the example for the special provisions contained in treaties in force referred to provisions of the peace treaties.[54] Finally, in the discussion held in 1926 on the amendment to this rule, two judges expressed the view that the

49. *Legality of Use of Force*, *supra* note 2, para. 100.
50. The text of Art. 32 of the draft became Art. 35 of the Statute of the Permanent Court and later Art. 35 of the Court's Statute.
51. *Legality of Use of Force*, *supra* note 2, para. 101.
52. The need to avoid inequalities before the Court has been advanced to reinforce two opposing interpretations of Article 35(2).

In the *Application for Revision* case, the FRY maintained that the need to avoid inequalities provided a state not party to the Statute of the Court but party to a treaty containing a jurisdictional clause with access before the Court only if the conditions laid down by the Security Council in its Resolution 9 of 1946 were met. 'It is evident that inequality would emerge if some parties to proceeding before the Court would not be bound by conditions which parties to the Statute already accepted' and that are, for example, contained in Art. 94(1) of the UN Charter. See Application instituting proceedings in the *Application for Revision* case, para. 29 at http://www.icj-cij.org/icjwww/idocket/iybh/iybhapplication/iybh_iapplication_20010424.PDF.

By contrast, Bosnia and Herzegovina argued that, according to Art. 35(2), being a party to a treaty containing a jurisdictional clause was the only condition for obtaining access before the Court. Otherwise, the application of the jurisdictional clause 'would arbitrarily depend on the "double consent" expressed by the non-members, in the treaty first, and, second, in the declaration' contemplated by the 1946 resolution of the Council. In the opinion of Bosnia and Herzegovina, 'this would introduce a serious inequality between the Parties to the treaties in question depending on whether they are Members of the UN or not'. See Written Observations of Bosnia and Herzegovina in the *Application for Revision* case, paras. 5.10 and 5.24 at http://www.icj-cij.org/icjwww/idocket/iybh/iybhapplication/iybh_iapplication_20011203_obs_bh.pdf.
53. *Legality of Use of Force*, *supra* note 2, paras. 103–105.
54. Ibid., para. 108.

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exception of the future Article 35 could only be intended to cover situations provided for by the peace treaties.[55]

These arguments are not conclusive and another interpretation is possible.

First of all, even assuming that the drafters of the Statute of the Permanent Court had intended to limit access to the Court to non-member states which were parties to jurisdictional clauses contained in the peace treaties already in force at the time of the adoption of the Statute, a parallel with the present Court requires some caution. The reference to peace treaties could be considered as transitional. An indication suggesting the need to tone down the requirement of the link to peace treaties is contained in the discussion held in 1926 on the revision of the Permanent Court's rules. Judge Anzilotti at that time affirmed that the reference to the peace treaties could have been construed in such a way as to include all treaties that were 'supplementary' to peace treaties, even if adopted after the entry into force of the Statute.[56] The link with peace treaties – even if diluted – was maintained, while the temporal condition, 'treaties in force at the time of the adoption of the Statute', was abandoned. The fundamental reason for interpreting what subsequently became Article 35(2) of the Statute as meaning treaties in force at the time of the adoption of the Statute consisted, however, in the reference to peace treaties. If the latter is diluted, the former – the temporal condition – can no longer be considered valid.

Following this line of reasoning, the second paragraph of Article 35 could be construed as containing a reference to treaties in force at the time of the institution of the proceedings. As far back as the *Certain German Interests in Polish Upper Silesia* case, the Permanent Court had rejected the restrictive interpretation derived from the preparatory work. In that case Germany had access to the Court on the basis of a treaty which entered into force after the Statute. The present Court followed this precedent when it affirmed its jurisdiction in the order relating to provisional measures in the *Application of the Genocide Convention* case (*Bosnia and Herzegovina* v. *Serbia and Montenegro*).[57] The Genocide Convention, on which the Court founded its jurisdiction, entered into force after the Statute and cannot be considered 'supplementary' to the peace treaties of the Second World War. Thus the Court abandoned both the reference to the peace treaties and the temporal restriction, albeit implicitly.

Finally, it has been argued that the broader interpretation should be applied with reference to a treaty intended to remedy violations of *jus cogens*.[58] According to this construction, 'as treaties may not override *jus cogens*, they should not hinder efforts to remedy violations of *jus cogens*'.[59] For that reason, the phrase 'treaties in force' of Article 35(2) should be interpreted so as to include also treaties entering into force

55. Ibid., para. 108.
56. Ibid., Separate Opinion of Judge Elaraby, para. 14.
57. Order for provisional measures rendered in the *Application of the Genocide Convention* case, *supra* note 5, at 14, para. 19.
58. S. Yee, 'The Interpretation of "Treaties in Force" in Article 35(2) of the Statute of the ICJ', (1998) 47 *International and Comparative Law Quarterly* 884, at 903. This author in fact shares a restrictive interpretation of Article 35(2) in all cases except those involving *jus cogens*.
59. Ibid., at 903.

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after the adoption of the Statute, thereby facilitating the function of the Court to resolve disputes involving *jus cogens*. The argument to support such a construction is not conclusive. Moreover, the Court has never opened access of parties to it on the basis of the subject matter of the treaty supporting their claims.

Both interpretations of Article 35(2) are possible. If the Court had chosen the other one (according to which the provision would refer to treaties in force when the proceedings were instituted), it would have had to consider whether the FRY was a party to the Genocide Convention at the relevant time. Those who look to the Court's decisions in search of answers may be disappointed. After the appetizer consisting in the solution of the question of the FRY's UN membership, the related question as to whether the state was a party to the Genocide Convention could have followed as the main dish. Future decisions in the still pending proceedings in the *Application of the Genocide Convention* cases will have to address this issue.

In any event, neither the narrow interpretation of Article 35(2) nor the controversial finding of the Court that the *sui generis* position of the state within the UN could not amount to membership have any *res judicata* value in other cases. It is obvious that, under Article 59 of the Court's Statute, the decision has binding force only between the parties and in respect of the particular case in which it is delivered. However, the undeniable authority of the Court's decisions – even mentioned in Article 38 of the Court's Statute as subsidiary means for the determination of rules of law – makes it possible for the Court's present findings to influence future decisions. That said, the dissent demonstrated through the Joint Declaration and Separate Opinions means that it is not unlikely that the Court may at least reconsider its position on Yugoslav membership if it is called on to analyse the same circumstances (facts and legal consequences thereof) in future decisions on the *Application of the Genocide Convention* cases.

4. Implications of the Court's findings

This section will consider the implications of the Court's findings on the question of the state's participation in the Genocide Convention. The question may arise in two different sets of proceedings pending before the Court, namely the two cases on the *Application of the Genocide Convention* that oppose Serbia and Montenegro to Bosnia and Herzegovina and to Croatia respectively. This section will first analyse the possible influence of the Court's decision on the former case, in which the Court has already delivered a judgment on the issue of jurisdiction. To that purpose, it will offer an interpretation of the *res judicata* principle that might make it possible not to reopen the question of jurisdiction. The present section will then examine the link between UN membership and participation in the Genocide Convention. In this context it will review the various options that might allow the Court (both in the former case, should it decide to examine the issue of jurisdiction, and in the latter) to regard the state then known as the FRY as still being a party to the Genocide Convention notwithstanding the findings of the judgments in the *Legality of Use of Force* cases.

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4.1. The case opposing Bosnia and Herzegovina and Serbia and Montenegro

Despite the preoccupation shown by some judges in the *Legality of Use of Force* cases, it is possible that the implications of the Court's findings need not be determined.

For the case regarding *Application of the Genocide Convention* (*Bosnia and Herzegovina* v. *Serbia and Montenegro*) there is already a judgment on jurisdiction,[60] based on the assumption that, at the relevant time, both the FRY and Bosnia and Herzegovina were parties to the Convention.

For this case the Court could consider the decision on jurisdiction delivered in 1996 to be *res judicata* as between the parties. The Court could find in its case law elements that might allow it to regard the 1996 decision on jurisdiction as final and binding for the parties.

In the case relating to the *Jurisdiction of the ICAO Council*, the Court expressed the view that decisions on jurisdiction – as opposed to other procedural or otherwise genuinely interlocutory decisions – should be considered as final determinations on the question.[61] The judgment refers to decisions of the ICAO Council, but the principle could be extended to the Court's own decisions. It is true that in the *South West Africa* cases the Court abstained from explicitly ascertaining whether the decisions on preliminary objections could be final and binding.[62] However, even in that case – where discrepancies between the different phases are evident – in its decision on the merits of 1966 the Court did not exclude the jurisdiction it had previously established in the preliminary objections phase in 1962.[63] It only challenged pronouncements made on points of merits in that decision.

The reasoning followed by the Court in its judgment of 1966 in the *South West Africa* cases consists of three different arguments.

The first argument expressed the view that a decision on a preliminary objection could never be preclusive of a matter appertaining to the merits and that if a judgment on a preliminary objection touched on a point of merits, it could do so only in a provisional way. The explanation was that a finding on any point of merits 'ranks simply as part of the motivation of the decision on the preliminary objections, and not as the object of that decision. It cannot rank as a final decision on the point of merits involved'.[64]

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60. Judgment on preliminary objections rendered in the *Application of the Genocide Convention* case, *supra* note 6.
61. *Appeal relating to the Jurisdiction of the ICAO Council* (*India v. Pakistan*), [1972] ICJ Rep. 46, at 56, para. 18: 'final decisions of the Council as to its competence should not be distinguished from final decisions on the merits. . . . Although a jurisdictional decision does not determine the "ultimate merits" of the case, it is a decision of a substantive character, inasmuch as it may decide the whole affair by bringing it to an end, if the finding is against the assumption of jurisdiction. A decision which can have that effect is of scarcely less importance than a decision on the merits, which it either rules out entirely or, alternatively, permits by endorsing the existence of the jurisdictional basis which must form the indispensable foundation of any decision on the merits. A jurisdictional decision is therefore unquestionably a constituent part of the case, viewed as a whole, and should, in principle, be regarded as being on a par with decisions on the merits as regards any rights of appeal that may be given'.
62. *South West Africa cases* (*Ethiopia v. South Africa; Liberia v. South Africa*) *second phase*, Judgment of 18 July 1966, [1966] ICJ Rep. 6, at 36–7, para. 59.
63. *South West Africa cases* (*Ethiopia v. South Africa; Liberia v. South Africa*), Preliminary Objections, Judgment of 21 Dec. 1962, [1962] ICJ Rep. 319.
64. *South West Africa cases, second phase, supra* note 62, at 36–7, para. 59.

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By contrast, one could argue that the object of the decision on the preliminary objections, that is, its competence, was considered, at least implicitly, as final.

The Court seems to share the view that only the operative provisions, with the exclusion of the grounds, are binding and final.

There are several possible interpretations on the scope of the *res judicata* principle. It may cover either only the operative part of the judgment or also the statement of the grounds that led the Court to a certain conclusion.[65] The distinction between grounds that are essential to the conclusion and other grounds is of no assistance, as any reason could somehow be considered as concurring to form the opinion expressed by the Court in the operative provisions. If the extent of the binding effects of the findings covered all the grounds, 'this would undermine the function of the Court. Indeed, the Court can decide only if states refer a dispute to it and parties would be reluctant to submit a case to the Court, fearing the binding effects of its decision on points other than the specific object of their request. However, in some circumstances, the mere operative clause is either too synthetic to make an understanding of its meaning possible or makes reference to the grounds, or it is otherwise not easy to distinguish between one and the other.[66] It is therefore more reasonable to link the binding effects of the Court's findings to other factors.

The second argument advanced by the Court in the *South West Africa* cases judgment of 1966 could be of some help on this point. It has been argued that the real foundation of the Court's judgment lies in the distinction between the principal question that is the subject matter of the decision and the preliminary questions that need to be resolved solely in order to find a solution to the first one; only the principal question should give rise to binding effects.[67] The Court challenged points of merits contained in the 1962 decision since they were not included in the 'only question which, so far as this point goes, the Court was then called upon to decide',[68] but were merely instrumental to its solution.

The third argument advanced by the Court refers to the alleged difference between the question decided in the preliminary objections case and the question discussed in the second phase of the judgment. The first consisted in the capacity of the applicants to invoke the jurisdictional clause, while the second touched on the admissibility of the claim – the legal right or interest of the applicants in the subject matter of their claim. As the admissibility question had not been decided in the first phase, the Court was able to dispose of it.[69]

Even if the distinction were considered to be artificial,[70] one could argue that it was introduced in order to justify the different finding of the Court on the question

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65. For a distinction between *res judicata* and precedent as reflecting the difference between the operative part of the judgment and statement of reasons, see I. Scobbie, 'Res Judicata, Precedent and the International Court: A Preliminary Sketch', (1999) 20 *Australian Yearbook of International Law* 299, at 303.
66. G. Abi-Saab, *Les Exceptions Préliminaires dans la Procédure de la Cour Internationale* (1967), 247; C. De Visscher, 'La Chose Jugée devant la Cour Internationale de la Haye', (1965) 1 *Revue Belge de Droit International* 5, at 7.
67. G. Gaja, 'Considerazioni sugli effetti delle sentenze di merito della Corte internazionale di giustizia', (1975) XIV *Comunicazioni e Studi* 313, at 318.
68. *South West Africa cases, second phase, supra* note 62, at 38, para. 61.
69. Ibid., paras. 75–76.
70. Abi-Saab, *supra* note 66, at 249, n. 77.

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of the legal right or interest of the applicants, on the assumption that a subsequent different ruling on the same question is precluded.

This construction of the arguments advanced by the Court seems to confirm the thesis that the judicial organ of the UN is prevented from re-examining jurisdictional questions on which it has already ruled.[71]

If one applies the line of reasoning of the Court in 1966 to the 1996 decision on preliminary objections, the finding on the status of the FRY as a party to the Genocide Convention should be considered final.

In the second point of the operative part of the judgment the Court affirms its jurisdiction on the basis of Article IX of the Genocide Convention.[72] First, the application of the jurisdictional clause of the Convention represents the subject matter of the decision and is not merely instrumental to it. Then, in contrast to the *South West Africa* case, in the *Application of the Genocide Convention* case no confusion between jurisdiction and admissibility could arise. Moreover, in the third point of the operative part of the judgment, the Court decided in favour of the admissibility of the claim of Bosnia and Herzegovina, with the result that this aspect could not be discussed again. Finally, it does not seem possible to sever the application of the jurisdictional clause of the Genocide Convention, already decided, from the subjection of the parties to the obligations resulting from the Convention.[73] The Court will decide on the merits, establishing whether there have been material breaches of the obligations of the Convention, but it has already determined that the parties are bound by the Convention when it based its own jurisdiction on Article IX.

If this construction of the *res judicata* principle is accepted, the Court's findings in the *Legality of Use of Force* cases will not give rise to any consequences for the case on the *Application of the Genocide Convention* opposing Bosnia and Herzegovina to Serbia and Montenegro. That case will proceed to the merits phase. Otherwise, if the Court finds that the issue of the state's participation in the Genocide Convention is not covered by the *res judicata* principle, it could consider the same arguments that will be advanced in relation to the case that opposes Serbia and Montenegro to Croatia. Moreover, only in the case opposing Bosnia and Herzegovina to Serbia and Montenegro, the Court could reason on the principle of equality of the parties in the proceedings. In the *Application of the Genocide Convention* case (*Bosnia and Herzegovina* v. *Serbia and Montenegro*), the Court found that the state then known as the FRY could have access to it and be the respondent in the proceedings based on Article IX of the Genocide Convention. The question arises as to whether the Court could reach a different result when dealing with the access to the Court – always on the basis of

71. G. Fitzmaurice, 'The Law and Procedure of the International Court of Justice, 1951–4: Questions of Jurisdiction, Competence and Procedure', (1958) 34 *British Year Book of International Law* 21, at 159–60; Abi-Saab, *supra* note 66, at 248–51.

72. Judgment on preliminary objections rendered in the *Application of the Genocide Convention* case, *supra* note 6, at 623, para. 47, 2(a).

73. S. Forlati, 'La sentenza della corte internazionale di giustizia in merito alla richiesta di revisione della pronuncia sulla giurisdizione resa fra Bosnia e Iugoslavia', (2003) 86 *Rivista di Diritto Internazionale* 426, at 444 and 447, n. 75.

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the Genocide Convention – of the same state as the applicant, or whether this would contradict the principle of equality of the parties affirmed in Article 35(2).

When deciding on the two cases regarding the *Application of the Genocide Convention*, the Court will have to address a very delicate problem. It could reach different outcomes in the two sets of proceedings only because in the case concerning Bosnia and Herzegovina there is already a judgment on the issue of jurisdiction. While this appears possible from a purely formal point of view, reasons of substantial justice might prevent the Court from reaching different solutions in two similar cases. The same reasons could represent an incentive to look at the scenarios proposed below, which would allow the Court to affirm its jurisdiction also in the Croatia case.

4.2. The case opposing Croatia to Serbia and Montenegro

In the case between Croatia and Serbia and Montenegro the Court has not yet delivered any decision. If Serbia and Montenegro continue along the path of its new judicial strategy of denying its membership of the UN prior to 2000 and consequently its status as a party to the Genocide Convention,[74] the Court will have to address the question of the state's participation in the Genocide Convention.

The Court has a number of options open to it.

First, there is the radical solution, under which, if the state was not a member of the UN, and provided that it had not received an invitation from the General Assembly, it could not have been a party to the Genocide Convention. This would derive from an acceptance of the Court's finding on Yugoslav membership in the *Legality of Use of Force* cases and from Article XI of the Genocide Convention. According to its Article XI, the Convention can be acceded to by any non-member state of the UN which has received an invitation from the General Assembly. Should the Court follow this thesis, it could dismiss the case for lack of jurisdiction.

The doubts and dissent surrounding the said decisions justify the exploration of other options.

Indeed, the 1996 decision on the *Application of the Genocide Convention* case (*Bosnia and Herzegovina* v. *Serbia and Montenegro*) does not make it clear why both the applicant and the respondent were considered parties to the Convention. As far as that decision concerns the FRY, besides the continuity of the international legal personality of the predecessor state, various constructions are possible: the automatic succession principle, the particular succession rules applicable to human rights treaties, the declarations of the states, or the agreement shown during the proceedings.

None of the constructions based on the succession principles enjoys sufficient consensus to affirm beyond any doubt participation of the FRY in the Genocide Convention at the relevant time. The automatic succession principle does not have a solid basis in state practice.[75] The asserted objective regime that would govern

74. On 11 September 2002 the FRY filed preliminary objections to the jurisdiction of the Court and to admissibility. Even if the document is not yet in the public domain, it is highly possible that the preliminary objections are based on the same arguments raised in the *Application for Revision* case and in the *Legality of Use of Force* cases.

75. The Court abstained from deciding on the basis of the automatic succession principle in the case concerning *Application of the Genocide Convention.* According to one author, 'it is clear evidence of the fact that the Court

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succession to human rights treaties has not yet been fully demonstrated. The practice of the Human Rights Commission has not yet crystallized so as to confirm the automatic continuity of such treaties.[76] Moreover, the description of the Genocide Convention as a treaty protecting human rights is open to doubt, since the aim of the Convention is to protect groups as opposed to individuals.

According to one author, the status of the FRY as a party to the Genocide Convention between 1992 and 2000 could be construed on the basis of Article 25 of the Vienna Convention on the Law of Treaties.[77] Article 25(1) states that, if a treaty so provides or if the negotiating states have in some other manner so agreed, that treaty may be applied provisionally pending its entry into force. It has been argued that this provision justifies regarding the successor states, having expressed their consent, as being provisionally bound by treaties entered into by their predecessors. According to the construction at issue, the 1992 declaration of the FRY[78] could represent an expression of such consent. This consent would have met with the acquiescence (in the form of non-contestation) of Bosnia and Herzegovina.[79] While this opinion has the merit of avoiding discussion of the thorny issue of the international legal personality of the state, it seems to set aside the strong assertion of continuity advanced by the FRY at the relevant time. The state had expressed its intention not to become, but to remain, bound by the Convention on the assumption of the continuity of the SFRY's international legal personality.[80] This would impair the construction based on Article 25. Moreover, the effects of the provisional application could be nullified if the state subsequently expressed an intention in that regard.[81]

The Court could otherwise reason on the basis of the state's previous attitude. It has been argued that the Court could assert its jurisdiction in the *Application of the Genocide Convention* case opposing Croatia to Serbia and Montenegro on the basis of the position, maintained by the latter state up to the time of its admission to the UN, that it was a party to the Genocide Convention.[82] According to this view, continuing participation in the Convention would not be properly construed on the principle of estoppel, as it only deals with facts and not with the representation of law implicit

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had little confidence in the general rules of State succession relating to cases of dismemberment/secession'; see M. C. R. Craven, 'The Genocide Case, the Law of Treaties and State Succession', (1997) 68 *British Year Book of International Law* 127, at 159. By contrast, see the Separate Opinions of Judge Shahabuddeen (*supra* note 6, at 634 et seq.) and of Judge Weeramantry (*supra* note 6, at 640 et seq.) attached to the *Application of the Genocide Convention* decision.

76. G. L. Burci, 'L'entrata in vigore della Convenzione di Vienna sulla successione di Stati in materia di trattati e la prassi nell'ambito delle Nazioni Unite', (1997) 80 *Rivista di Diritto Internazionale* 175, at 178.
77. P. Puoti, *La questione jugoslava davanti alla Corte internazionale di giustizia* (2004), 95 et seq.
78. See *supra* note 36.
79. Decision on preliminary objections rendered in the *Application of the Genocide Convention* case, *supra* note 6, at 610, para. 17.
80. See *supra* note 36. See also the Dissenting Opinion of Judge ad hoc Kreća, attached to the *Application of the Genocide Convention* case, *supra* note 6, at 658, para. 93.
81. See Art. 25(2) of the Vienna Convention.
82. This opinion has been advanced by Forlati, *supra* note 73, at 447. A similar argument was proposed by Bosnia and Herzegovina in the *Application for Revision* case; Written Observations, *supra* note 52, part IV paras. 4.6–4.7 and 4.15; see also the pleadings made by A. Pellet, counsel and advocate of the State, at the Public Sitting of 5 Nov. 2002, CR 2002/41, para. 19 at http://www.icj-cij.org/icjwww/idocket/iybh/iybhcr/iybh_icr2002–41_20021105.PDF.

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in the maintenance of a position.[83] The Court could, however, take into account the attitude maintained by the FRY for eight years on the basis of the more general principle according to which *allegans contraria non audiendus est*, of which estoppel is merely one aspect.

The aim of this principle is to preclude a party from benefiting by its own inconsistency. In the light of what has been discussed above, the judicial attitude of the FRY could be described as inconsistent. When the political organs of the UN forced the reality, the state claimed continuity against a factual background that could justify this contention. Subsequently, against the same background and merely for reasons of judicial strategy, the state abandoned its claim. It consequently asserted that it had never been a party to the Genocide Convention after 1992. The inconsistency lay in the fact that the FRY was asserting that its new position was valid also in regard to the past. The latter should have been prevented by the principle at stake.

The possible opposing argument that the representation should have been addressed to the state wishing to benefit from it (Croatia) could be overcome by the consideration that the FRY had communicated its position to the Secretary-General of the UN, who had then circulated it. Moreover, the Secretary-General is also the depository of the Genocide Convention. This construction would make it possible to consider the state then known as the FRY as a party to the Genocide Convention on the basis of that state's previous attitude, on which Croatia had relied, for instance when instituting the proceedings.

Unless one assumes that the prerequisite of UN membership is relevant only in regard to becoming a new party to the Convention, and not in regard to remaining a party or resuming that status, all ingenious theses designed to justify the continuous status of the state as a party to the Genocide Convention encounter the obstacle of the absence of that prerequisite. Another option could be to consider that the General Assembly implicitly invited the FRY to become a party to the Genocide Convention. The text of Article XI, however, appears to exclude an implicit invitation. Otherwise, one could maintain that, in the Yugoslav case, there is no need for the prerequisite. Indeed, when the FRY based its participation in the Genocide Convention on the assumption of continuity, there was general acquiescence in the participation itself. However, it is open to doubt whether this acquiescence would make it possible to consider the state as a party to the Convention, setting aside the issue of UN membership.

A more radical way in which one could overcome the obstacle of the prerequisite might consist in challenging the Court's finding on the lack of membership in the *Legality of Use of Force* cases. The case law of the ICTY provides the Court with a hint that it should decide in favour of Yugoslav membership of the UN between 1992 and 2000. This organ has made pronouncements on this issue both before and after the admission of the FRY to the UN in November 2000.[84] Even after that date, the

83. D. W. Bowett, 'Estoppel before International Tribunals and its Relation to Acquiescence', (1957) 33 *British Year Book of International Law* 176, at 189–90.

84. For the period before 2000 see the letter of the President of the ICTY to the Security Council of 24 April 1996 referring to the lack of co-operation of the Federal Republic of Yugoslavia with the ICTY, UN Doc. S/1996/319.

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ICTY was able to affirm Yugoslav membership of the UN both at the time when the Tribunal was instituted in 1993 and when the crimes in Kosovo were allegedly committed in 1999, at least for certain purposes.[85]

The Tribunal affirms that membership was lost for certain purposes and maintained for others. This thesis does, however, raise some questions. It would appear that a state either is or is not a member of the UN. While it seems impossible to reach opposing results as to membership itself, the extent of membership rights can be graduated. The ICTY's assertion that the determination of the UN membership should be made on a case-by-case basis[86] becomes more meaningful if it refers to the extent of membership rights. The construction advanced in section 2 above allows for an explication of this assertion. According to that interpretation, the denial of the FRY's continuity claim by the political organs of the UN would amount to an atypical sanction. On the one hand, the sanctioned state was at that time a member of the UN. On the other hand, as the sanction was atypical, its exact content, together with its consequences – that is, the extent of the membership rights preserved – ought to have been indicated on a case-by-case basis.

The Court could apply this approach to the case between Croatia and Serbia and Montenegro on the *Application of the Genocide Convention*. Depending on the extent of the membership rights recognized, the consequences would vary and the Court would have various options when deciding on its jurisdiction in the case. One option might be to consider exclusion from participation in the works of some UN bodies as the only consequence of the sanction.[87] Such an approach would involve access to the Court on the basis of Article 35(1) of the Statute while the FRY's participation in the Genocide Convention at the relevant time would derive from its continuity

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The president makes it clear that the FRY's obligations of co-operation stemmed from UN membership and were only confirmed in the Dayton Agreements: 'Can there be any more flagrant way of showing their disregard and even contempt for their obligations *as a member State* [emphasis added] of the United Nations, obligations they recently re-affirmed by entering into the Dayton Accords?'. The arguments advanced by the President were considered by the ICTY in the Case No. IT-95–13-R61 (*Mile Mrkšić, Miroslav Radić, Veselin Šljivanćanin*), proceedings of 28 March 1996, at 45–6.

After the admission, see the Decision to dismiss the appeal in Case No. IT-99-37-AR72.2 (*Prosecutor v. Milan Milutinović et al.*) and in particular Reasons to dismiss interlocutory appeal Concerning jurisdiction over the territory of Kosovo, decision of 8 June 2004. The ICTY rejected the appellant's argument of the lack of jurisdiction based on the assumption that the FRY was not a member of the UN when the ICTY was instituted. The demonstration of Yugoslav membership in the UN for the period between 1992 and 2000 may be found in the Decision on Motion Challenging Jurisdiction, Case No. IT-99-37-PT of 6 May 2003.

85. *Decision on Motion Challenging Jurisdiction*, *supra* note 84, paras. 38–39: 'Thus, while the FRY's membership was lost *for certain purposes*, *it was retained for others* [emphasis added]. The Chamber holds that the FRY retained sufficient indicia of United Nations membership to make it amenable to the regime of Chapter VII Security Council resolutions adopted for the maintenance of international peace and security. 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 an *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. The Chamber, therefore, concludes that in relation to the application of the Security Council resolution establishing the Statute of the International Tribunal the FRY was in fact a member of the United Nations both at the time of the adoption of the Statute in 1993 and at the time of the commission of the alleged offences in 1999'.
86. See *supra* note 85.
87. See the construction of the consequences of the UN resolutions offered by the Under-Secretary-General and Legal Counsel of the UN and contained in the document referred to in note 25, *supra*.

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with the predecessor state. At the other extreme lies the complete withdrawal of membership rights that would result in the denial of membership itself. However, if lack of membership is the result of a sanction, the state's UN membership could still be taken into account by the Court solely for the purpose of satisfying the prerequisite for status as a party to the Genocide Convention. That status could itself be construed on the basis of the principle *allegans contraria non audiendus est*. In this case, in order to allow Serbia and Montenegro access to the Court, the restrictive interpretation of Article 35(2) of the Court's Statute should be challenged. The grounds for a different interpretation have already been examined.

5. Conclusions

Contrary to its previous practice of self-restraint, the Court has, in its judgments on the preliminary objections in the *Legality of Use of Force* cases, adopted a clear position on the legal status within the UN of the state known until 2003 as the FRY. According to the Court, that state was not a UN member in the period between 1992 and 2000. This finding is controversial and has indeed attracted criticism from seven judges.

In its earlier decisions the Court had abstained from taking a position on this issue. It had in those decisions reasoned in a manner which, at least implicitly, pointed in the direction of UN membership of the FRY during the said period.

The analysis of the line of reasoning followed by the Court in the judgments in the *Legality of Use of Force* cases has highlighted internal contradictions and inconsistencies with other decisions. This would open the possibility of a future different construction of the issues decided by the Court. One possible option that has been advanced consists in the continued UN membership of the FRY during the period at stake. This would derive from continuity with the predecessor state (the SFRY), which the UN organs had denied only by means of a sanction.

In any case, the question arises as to whether the findings of the Court might have a bearing on the cases concerning the *Application of the Genocide Convention* that are still pending before the Court. The case that opposed Serbia and Montenegro to Bosnia and Herzegovina, in which a decision on jurisdiction has already been reached, is different from that involving Croatia.

In the former case, this article has analysed a possible interpretation of the *res judicata* principle that would make it possible to treat as final and binding for the parties the jurisdiction established in the decision on preliminary objections.

As regards the latter case, without pretending to offer a single solution, it has reviewed the various options that might allow the FRY to be regarded as a party to the Genocide Convention during the period considered. The Court will have to decide among these in the case between Croatia and Serbia and Montenegro concerning *Application of the Genocide Convention*.

When choosing among them, the Court will have to overcome the obstacle of UN membership as a prerequisite for the respondent state's participation in the Genocide Convention. The alternative prerequisite has not been satisfied by the invitation of the General Assembly. Here again, various options are proposed.

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While we wait to see which options will receive the Court's preference, it could be maintained that, even if the Court should eventually decline jurisdiction, all the previous decisions at issue will not amount to much ado about nothing.

First, the debate on the numerous decisions of the Court concerning the question of the FRY's UN membership at the relevant time and its implications will contribute to clarifying the complicated legal issues involved: international legal personality, the succession of states within the UN and in regard to human rights treaties, the interpretation of the provisions of the Court's Statute, and procedural questions such as the *res judicata* principle or estoppel.

Second, this discussion could possibly lead the Court towards a more consistent approach. Such consistency has no value in itself, as the judicial organ should be free to take any decision whatever. The value of consistency is linked to the Court's function of ruling on disputes that the parties decide to bring before it. The unpredictability deriving from inconsistency could indeed discourage parties from submitting a dispute. For instance, access to the Court based on a treaty should be treated in the same way both when a state is the applicant and when the same state is the respondent.

Third, and finally, whatever decision the Court may take in the cases still pending on the *Application of the Genocide Convention*, it is important to recall the concept expressed by the Court in the last paragraph of the decision in the *Legality of Use of Force* cases. Whether or not the Court has jurisdiction over a dispute, the parties themselves remain responsible for any violations of their international obligations.[88]

88. *Legality of Use of Force*, *supra* note 2, para. 128.

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