The *Bosnia* Case Revisited and the 'New' Yugoslavia

*Matthew Craven**

Keywords: International Court of Justice; revision of judgments; *Bosnia* case; state succession; Genocide Convention.

Abstract. The application by the Federal Republic of Yugoslavia for a revision of the 1996 ICJ Judgment in the *Bosnia* case is the latest initiative involving the Court in the Balkan crisis. Whilst the application raises interesting questions, they reflect rather upon the indeterminate nature of the Court's original Judgment than upon their own merit. It is doubtful whether the Court would regard the change in circumstances such as to justify revising its Judgment. The most perplexing issue concerns the motivation behind the application. Given the potential effect of the proceedings on other cases involving the FRY before the Court, the application may allow the Court to dispose of all such cases in one single decision, which may have certain attractions for the Court if it is to remain politically disengaged.

1. INTRODUCTION

On 23 April 2001, the Federal Republic of Yugoslavia ('FRY') applied to the International Court of Justice ('ICJ' or 'the Court') for a revision of its Judgment on Preliminary Objections in the Case Concerning the Application of the Genocide Convention, delivered on 11 July 1996.[1] This is the latest in a series of initiatives involving the ICJ in disputes arising from conflict in the former Yugoslavia since the early 1990s. Broadly speaking, the role played by the ICJ in the conflict offers a reminder both of its apparent significance in bringing pressure to bear upon adversaries during diplomatic crises and of its limitations as a mechanism for resolving disputes characterised by high levels of antagonism. In the decade since the beginning of the conflict, the jurisdiction of the Court has been invoked on four separate occasions by three of the states involved. In two of the cases, allegations have been directed against the FRY concerning responsibility for the commission of acts of genocide (one by Bosnia-Herzegovina, one by Croatia[2]). In the other two cases, proceedings were insti-

* Reader in International Law, University of London.

1. Application for Revision of the Judgment of 11th July 1996 in the Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide, 23 April 2001 (hereinafter the 'Application').
2. Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia *v.* Federal Republic of Yugoslavia), 2 July 1999.

15 Leiden Journal of International Law 323–343 (2002)
© 2002 Kluwer Law International

https://doi.org/10.1017/S092215650200016X Published online by Cambridge University Press

tuted against member states of NATO: first on the part of Bosnia-Herzegovina alleging that their implementation of the Security Council's arms embargo was unlawful; and secondly on the part of the Federal Republic of Yugoslavia following the bombing of Belgrade. None of these cases has yet proceeded to the merits. The Bosnia-NATO case was still-born for palpable lack of jurisdiction, and the Court has otherwise confined itself to delivering several orders for interim measures of protection (against the FRY and Bosnia-Herzegovina[3]) and one judgment on preliminary objections (in the *Bosnia* case[4]). It also considered, but rejected the FRY's claim for interim measures of protection against ten NATO states (Belgium, Canada, France, Germany, Italy, The Netherlands, Portugal and the United Kingdom) dismissing, in the process, the applications against the USA and Spain.[5]

During the period of time in which the Court has been seized of these cases, however, the political environment within which the disputes are located has palpably changed. On the one hand a tentative territorial settlement has been achieved, and with it, improved diplomatic relations among the Republics within the region and outside, and a reduction in the scale of residual conflict. On the other hand, those individuals and regimes most closely associated with the early stages of conflict – Milošević, Karađić, Izetbegović, and Tudjman – no longer hold positions of power and, in the case of the first, has been brought for trial before the International Criminal Tribunal for the former Yugoslavia in The Hague. With the conclusion of an agreement on succession,[6] and the thawing of relations among the disputing parties, one may believe that the concerns underlying the applications to the ICJ have been partially assuaged, if not dissolved. This is reflected, amongst other things, by the withdrawal by the FRY of its counterclaims in the *Bosnia* case,[7] and by its acceptance of the assertion that it is to be regarded as a successor state to the former Socialist Federal Republic of Yugoslavia (rather than the continuation of that state). In those circumstances it is possible that some form of political settlement of the disputes referred to the Court may be achieved or at least some general reconciliation, but in the meantime, the Court is faced

3. Order of Provisional Measures, 8 April 1993, 1993 ICJ Rep. 3; Further Order of Provisional Measures, 13 September 1993, 1993 ICJ Rep. 325.
4. Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia-Herzegovina *v.* Yugoslavia), Preliminary Objections, 11 July 1996, 1996 ICJ Rep. 595.
5. Legality of Use of Force (Yugoslavia *v.* Belgium), (Yugoslavia *v.* Canada), (Yugoslavia *v.* France), (Yugoslavia *v.* Germany), (Yugoslavia *v.* Italy), (Yugoslavia *v.* Netherlands), (Yugoslavia *v.* Portugal), (Yugoslavia *v.* Spain), (Yugoslavia *v.* United Kingdom), (Yugoslavia *v.* United States of America), Orders of 2 June 1999, 1999 ICJ Rep. 124 *et seq*.
6. An agreement on succession in relation to assets and debts was also concluded on 29 June 2001.
7. *See* Order of 10 September 2001.

https://doi.org/10.1017/S092215650200016X Published online by Cambridge University Press

with the prospect of grappling with a residual series of 'disputes' which the participants may not actually wish to see determined by it.

2. The Application

It is within this broader context that the application made by the FRY to the ICJ on 23 April 2001 must inevitably be viewed. In its Application, the FRY seeks a revision of the Judgment delivered by the Court on 11 July 1996 concerning its jurisdiction in relation to a case brought by Bosnia and Herzegovina. The background to this case is, of course, well known.[8] Bosnia-Herzegovina had submitted a case to the ICJ alleging, *inter alia*, that the FRY was responsible for the commission of acts of genocide during the conflict leading to the break-up of the Socialist Federal Republic of Yugoslavia ('SFRY'). It based its application, among other things, upon the terms of Article IX of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide to which the SFRY had been a party. In its Judgment dealing with preliminary objections in 1996 the Court had found that, notwithstanding the fact that Bosnia had only succeeded to the Convention some time after the events themselves, it still had *prima facie* jurisdiction since the Genocide Convention contained no clause "the object and effect of which is to limit […] the scope of its jurisdiction *ratione temporis*."[9] It therefore had jurisdiction "with regard to the relevant facts which have occurred since the beginning of the conflict which took place in Bosnia-Herzegovina."[10] Apart from the fact that this might seem to have been a case of retroactive application of treaty provisions, the Court did not proceed to consider in any detail an associated problem, namely, whether or not the FRY itself was to be regarded as party to the Convention. The position of the FRY in that respect was far from clear. Whilst the FRY had been excluded from continuing the membership of the former Yugoslavia in the United Nations[11] and in other specialised agencies,[12] 'Yugoslavia' was still recorded as a member of the United Nations, continued to pay membership dues,[13] and continued to be listed as a state party

8. *See*, *generally*, M. Craven, *The Genocide Case, the Law of Treaties and State Succession*, 68 BYIL 127 (1997).
9. *Supra* note 4, at para. 34.
10. *Id.*
11. *See* Security Counsel Res. 777 (1992), UN DOC. S/RES/777 (19 September 1992); and General Assembly Res. 47/1, GAOR, 47th Sess., Agenda Item 8, UN Doc. A/47/L.1 and Add. 1 (22 September 1992).
12. *E.g.*, International Civil Aviation Organization ('ICAO'), International Fund for Agricultural Development ('IFAD'), International Maritime Organisation ('IMO'), United Nations Industrial Development Organization ('UNIDO') and the World Health Organization ('WHO').
13. Application, *supra* note 1, at para. 9.

https://doi.org/10.1017/S092215650200016X Published online by Cambridge University Press

to multilateral treaties including the Genocide Convention.[14] The FRY, acting on the belief that it was the continuing state, had not issued a notification of succession to the Genocide Convention, and responded to the Bosnian application on the basis that it remained a party to the Convention in virtue of Yugoslavia's ratification in 1950. It was, in that sense, only by reason of reliance upon the FRY's assertion in this respect, or indeed by assuming that the FRY had succeeded to the Convention (in absence of a declaration to that effect), that the Court came to its conclusions.

The application made by the FRY in 2001 went directly to this issue. The initiative giving rise to the application was the eventual acceptance in late 2000 by the FRY that it was to be regarded as a 'successor' state to the former Yugoslavia rather than the continuation of that state. This revision of its position, evidenced in particular, by its application for membership in the United Nations[15] and other specialised agencies, and by its deposit of instruments of accession to various multilateral treaties (including the Genocide Convention), has led it to argue in its application that in accordance with Article 61(1) of the Statute of the Court, new facts have arisen such as justify the Court revising its original Judgment. The particular reasons it gives in support of this argument are that the FRY was neither a member of the United Nations in March 1993 when the Republic of Bosnia-Herzegovina filed its application nor a party to the Statute of the Court (in absence of a declaration pursuant to Article 35 of the Statute); that it had only acceded to the Genocide Convention on 8 March 2001 following its issue of a notification of succession; and that it also included a reservation to Article IX excluding the presumptive jurisdiction of the Court.[16]

On the face of it, this application may be thought to be thoroughly contradictory. If, as the FRY might be construed as arguing, it is not to be regarded as the same state as that which faced proceedings in 1996, or which subsequently instituted proceedings on similar grounds against the NATO states in 1999, there seems to be no basis for revision of the Judgment. The Judgment simply refers to another state which no longer exists and cannot now be regarded as assuming responsibility for the acts in question. It is clear, however, that the FRY is not seeking to posit its

14. The FRY was, however, barred from attending meetings of state parties to certain treaties such as the 1965 Convention on the Elimination of Racial Discrimination, and the 1966 International Covenant on Civil and Political Rights. *See* Application, *supra* note 1, at para. 11.
15. Its membership in the United Nations was approved by the General Assembly in Res. 55/12, UN Doc. A/RES/55/12 (1 November 2000).
16. Application, *supra* note 1, at paras. 3 and 21. The Reservation reads as follows:

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

https://doi.org/10.1017/S092215650200016X Published online by Cambridge University Press

emergence as a new state in 2000 having passed through a period of legal inexistence for some eight years, but rather seeks a revision of its position in accordance with the views held by many other states during that period. There is a certain logic to this. If the Court had adopted the position advanced by Bosnia-Herzegovina in 1993–1996, it would have been forced to the conclusion that, although the FRY may have been responsible internationally for acts of genocide occurring within Yugoslavia during its collapse, there was scarcely any effective basis for asserting its jurisdiction in absence of the FRY's formal accession/succession to the Genocide Convention. The only plausible argument that would remain in those circumstances is that the FRY had in fact succeeded to the Genocide Convention notwithstanding the absence of a declaration to that effect. The Separate Opinion of Judge Weeramantry certainly suggested this was a possibility,[17] but it is far from clear that he was expressing the view of the Court as a whole (the position adopted by Judge Shahabuddeen, in particular, points in a different direction).[18] In any event, it is apparent that the Court wished to avoid forcing itself into taking a position on the issue of continuity/succession, and precisely because it did so, it is now faced with the problem of revisiting its original Judgment.

3. Article 61 and the Revision of Judgments

In general, and according to Article 60 of the Statute of the Court, it is presumed that a judgment of the Court is "final and without appeal." It is apparent, however, that the Court may be induced to revisit a judgment in certain circumstances. First, and most obviously, Article 60 allows parties to a case to request an interpretation of a judgment in cases where there is a dispute as to its meaning or scope.[19] It is also (theoretically) possible for a state to request the Court to re-assert jurisdiction in a discontinued case if such provision is foreseen in the judgment itself.[20] Furthermore, and most pertinently for present purposes, Article 61 of the Statute makes provision for a revision of a judgment when:

17. Separate Opinion of Judge Weeramantry, at 649.
18. Separate Opinion of Judge Shahabuddeen, at 635.
19. The real purpose of the request must be to obtain an interpretation of the judgment. This signifies that its object must be solely to obtain clarification of the meaning and the scope of what the Court has decided with binding force, and not to obtain an answer to questions not so decided. Any other construction of Article 60 of the Statute would nullify the provision of the article that the judgment is final and without appeal.

    (Request for Interpretation of the Judgment of 20 November 1950 in the Asylum Case, 27 November 1950, 1950 ICJ Rep. 402.)
20. Request for an Examination of the Situation in accordance with Paragraph 63 of the Court's Judgment of 20th December 1974 in the Nuclear Tests (New Zealand *v.* France) Case, 22 September 1995, 1995 ICJ Rep. 288.

https://doi.org/10.1017/S092215650200016X Published online by Cambridge University Press

> it is based upon the discovery of some fact of such a nature as to be a decisive factor, which fact was, when the judgment was given, unknown to the Court and also to the party claiming revision, always provided that such ignorance was not due to negligence.

Article 61 goes on to specify the procedure to be adopted, and places certain temporal limits upon the legitimacy of any application for revision – it must in particular, be made at the latest within six months of the discovery of the new fact, and must be within ten years of the date of the original judgment. Article 99 of the Rules of the Court further provides for proceedings on the Merits of the application in the event that, by its initial judgment, the Court finds it admissible.[21]

Article 61 has only been invoked in one case previously – by Tunisia requesting a "revision, interpretation and correction" of the Court's Judgment of 1982 in the *Case Concerning the Continental Shelf (Tunisia/Libyan Arab Jamahiriya)*.[22] In that case the Court emphasised that an application for revision of a judgment may only be made when it is based upon the discovery of a fact which was both "decisive" in the sense that at least part of the judgment would have been different if it had been known,[23] and "unknown" (in an actual or constructive sense) to either the Court or the party claiming revision.[24] In that particular case, the Court found not only that the facts adduced were obtainable by Tunisia (and hence that its ignorance could only have been due to negligence),[25] but also that the Court's reasoning was unaffected by the allegedly faulty information.[26] The application for revision was therefore found inadmissible under the terms of Article 61.

For its part, the FRY claims the "decisive" fact upon which its appli-

---

21. Art. 99 of the Rules of Court provides:

> 1. A request for the revision of a judgment shall be made by an application containing the particulars necessary to show that the conditions specified in Article 61 of the Statute are fulfilled. Any documents in support of the application shall be annexed to it.
>
> 2. The other party shall be entitled to file written observations on the admissibility of the application within a time-limit fixed by the Court, or by the President if the Court is not sitting. These observations shall be communicated to the party making the application.
>
> 3. The Court, before giving its judgment on the admissibility of the application may afford the parties a further opportunity of presenting their views thereon.
>
> 4. If the Court finds that the application is admissible it shall fix time-limits for such further proceedings on the merits of the application as, after ascertaining the views of the parties, it considers necessary.
>
> 5. If the Court decides to make the admission of the proceedings in revision conditional on previous compliance with the judgment, it shall make an order accordingly.

22. Application for Revision and Interpretation of the Judgment of 24th February 1982 in the Case Concerning the Continental Shelf (Tunisia/Libyan Arab Jamahiriya), 10 December 1985.
23. *Id.*, at para. 29.
24. *Id.*, at para. 19.
25. *Id.*, at para. 28.
26. *Id.*, at para. 38.

https://doi.org/10.1017/S092215650200016X Published online by Cambridge University Press

cation rests was its admission into the United Nations on 1 November 2000. This fact, as far as the FRY is concerned, resolves 'dilemmas' concerning its standing, and makes clear not only that it was not a member of the United Nations before that date, but also that it was not a party to the Statute of the Court or to the Genocide Convention.[27] On the face of it, it is extremely difficult to see in what way a change in the FRY's position as regards its assertion as to continuity/succession, can be regarded as a "fact" for purposes of requesting the revision. To begin with, Article 61 speaks of the "discovery" of a fact that was unknown to the Court and party concerned "when the judgment was given." It presumably excludes, in that respect, not only facts that were already well-known, but also those that only later come into being. The Court certainly did not know that the FRY would be admitted to membership in November 2000, but it can barely be maintained that its failure to accurately predict future events in this respect is such as to render the original judgment defective.

If one is to put a gloss on its application, the point the FRY seems to be trying to make is not simply that a new factual situation arose in November 2000, but that a decision was made which 'clarified' the factual situation pertaining at the time of the original judgment (that the FRY was not, contrary to some appearances, a member of the United Nations). On this point, however, two observations can be made. First of all, there is very little doubt that the Court was well aware of the difference of view of the parties concerning the FRY's claim to be the continuation of the former SFRY. It made extensive references to this dispute in its Order of 8 April 1993 and pronounced it to be a matter "not free from legal difficulties."[28] That the Court subsequently continued to avoid the dispute by pretending it was either irrelevant or inexistent (for example by claiming that both parties were in agreement that the FRY was party to the Genocide Convention) may be a point of criticism, but makes it no less well-known to all concerned.

Secondly, it is extremely difficult to regard the FRY's belated acceptance of its position as a successor state as a "fact" in the sense that the authors of Article 61 would surely have had in mind. One might suppose the type of discovery to which Article 61 refers is something in the nature of original maps in a boundary delimitation case, or the text of a missing agreement in a dispute over natural resources. A change in policy on the part of the FRY as regards its international status – a change for which the FRY must itself be largely, if not wholly, responsible – can barely be regarded in the same light. What is at issue, after all, is not a matter of empirical knowledge or of abstract 'status,' but rather the extensiveness of the FRY's claims to rights and responsibilities as either a successor state or as the continuation of the former SFRY. All that has changed, in that regard, is simply the scope and substance of the FRY's legal claims.

27. Application, *supra* note 1, at para. 23.
28. Order of 8 April 1993, 1993 ICJ Rep. 3, at para. 18.

https://doi.org/10.1017/S092215650200016X Published online by Cambridge University Press

Even if the Court is inclined to accept the FRY's claims in respect of the newly discovered "fact" there still remains the question whether it might be such as to have encouraged the Court to adopt a different position in its 1996 Judgment. The argument pursued by the FRY in this regard is that the Court would have had to decline its exercise of jurisdiction on the basis that the FRY was neither party to the Genocide Convention at the relevant point in time, nor party to the Statute of the Court (as a UN member state). These two deficiencies are presented by the FRY as independent and self-sufficient grounds for revising the Judgment.

4. The Statute of the Court and Article 35(2)

Whilst it is clear that the FRY, as a non-UN member state, would not automatically be regarded as party to the Statute, it does not follow, of course, that it would be precluded from referring disputes to the Court, or being a party to such disputes. On the contrary, the Court has exercised jurisdiction in several cases (including the *Nottebohm*,[29] the *Interhandel* case[30] and the *Certain Phosphates* case[31]) involving non-member states on the basis that, in those cases, the states concerned had formally applied to become parties to the Statute in accordance with Article 93(2) of the Charter[32] and following acceptance of the conditions laid down by the General Assembly in Resolution 91 of 11 December 1946.[33] As the FRY points out, however, it has at no stage applied to become a party to the Statute under Article 93 of the Charter, nor has it accepted the conditions laid down by the General Assembly in that respect.[34] On this point there can be little disagreement.

29. Nottebohm (Liechtenstein *v.* Guatemala), 2nd Phase, Judgment of 6 April 1955, 1955 ICJ Rep. 4.
30. Interhandel (Switzerland *v.* United States of America), Judgment of 21 March 1959, 1959 ICJ Rep. 6.
31. Certain Phosphate Lands in Nauru (Nauru *v.* Australia), Preliminary Objections, Judgment of 26 June 1992, 1992 ICJ Rep. 240.
32. Five states have successfully applied to become parties to the Statute without being UN member states – Japan, San Marino, Liechtenstein, Nauru and Switzerland. All of these except Switzerland have since become members of the United Nations.
33. They were fixed for the first time following a request made by the Swiss Government; on this occasion, the General Assembly adopted Res. 91 on 11 December 1946 which listed the following conditions:

    (a) Acceptance of the provisions of the Statute of the International Court of Justice;
    (b) Acceptance of all the obligations of a Member of the United Nations under Article 94 of the Charter;
    (c) An undertaking to contribute to the expenses of the Court such equitable amount as the General Assembly shall assess from time to time after consultation with the Swiss Government.

    The date when an interested State becomes a party to the Statute is that when the instrument of acceptance of the conditions is submitted to the Secretary-General of the United Nations.

34. Application, *supra* note 1, at para. 24.

https://doi.org/10.1017/S092215650200016X Published online by Cambridge University Press

Even if the FRY was not formally a party to the Statute, however, it is apparent from the terms of Article 35(2) of the Statute that the Court may still be open to non-state parties if certain conditions are fulfilled. Article 35(2) reads as follows:

> 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.

The Security Council duly laid down the conditions under which the Court would be open to non-state parties in its Resolution 9 (1946) of 15 October 1946, which required, amongst other things, that a state deposit with the registrar a declaration accepting the jurisdiction of the Court and indicating its willingness to comply with the decisions of the court.[35] Such declarations may be particular (accepting jurisdiction in relation to a particular case) or general (accepting jurisdiction generally in respect to all disputes of a particular class). In the past, particular declarations were

---

35. Under the terms of Res. 9, the Security Council resolved that:

> 1. The International Court of Justice shall be open to a State which is not a party to the Statute of the International Court of Justice, upon the following condition, namely, that such State shall previously have deposited with the Registrar of the Court a declaration by which it accepts the jurisdiction of the Court, in accordance with the Charter of the United Nations and with the terms and subject to the conditions of the Statute and Rules of the Court, and undertakes to comply in good faith with the decision or decisions of the Court and to accept all the obligations of a Member of the United Nations under Article 94 of the Charter;
>
> 2. Such declaration may be either particular or general. A particular declaration is one accepting the jurisdiction of the Court in respect only of a particular dispute or disputes which have already arisen. A general declaration is one accepting the jurisdiction generally in respect of all disputes or of a particular class or classes of disputes which have already arisen or which may arise in the future. A State, in making such a general declaration, may, in accordance with Article 36, paragraph 2, of the Statute, recognize as compulsory, ipso facto and without special agreement the jurisdiction of the Court, provided, however, that such acceptance may not, without explicit agreement, be relied upon vis-à-vis States parties to the Statute which have made the declaration in conformity with Article 36, paragraph 2, of the Statute of the International Court of Justice;
>
> 3. The original declarations made under the terms of this resolution shall be kept in the custody of the Registrar of the Court, in accordance with the practice of the Court. Certified true copies thereof shall be transmitted, in accordance with the practice of the Court, to all States parties to the Statute of the International Court of Justice, and to such other States as shall have deposited a declaration under the terms of this resolution, and to the Secretary-General of the United Nations;
>
> 4. The Security Council reserves the right to rescind or amend this resolution by a resolution which shall be communicated to the Court, and on the receipt of such communication and to the extent determined by the new resolution, existing declarations shall cease to be effective except in regard to disputes which are already before the Court;
>
> 5. All questions as to the validity or the effect of a declaration made under the terms of this resolution shall be decided by the Court.

https://doi.org/10.1017/S092215650200016X Published online by Cambridge University Press

deemed to have been filed by Albania as respondent in the *Corfu Channel* case[36] and by Italy as claimant in the *Monetary Gold* case.[37] General declarations have also been filed by Cambodia (1952), Ceylon (1952), the Federal Republic of Germany (1955, 1956, 1961, 1965 and 1971), Finland (1953 and 1954), Italy (1955), Japan (1951), Laos (1952) and the Republic of Vietnam (1952). Again, the FRY points out that it has at no stage submitted such a declaration whether of a particular or general nature.

The claim that the Court lacks jurisdiction by reason of the failure of FRY to submit a requisite declaration under Article 35(2) raises two general questions as regards the interpretation of that article. The first is whether, for purposes of establishing its jurisdiction over states not party to the Statute, the Court need evidence not only of a consent to its exercise of jurisdiction in the dispute in question – as may be found in the terms of a special agreement – but also evidence of a declaration accepting in express terms the conditions laid down by the Security Council in Resolution 9 (1946)? The second is whether the general requirement to fulfil the conditions laid down by the Security Council is qualified by the terms of "treaties in force," and if so, how broadly that qualification may be understood?

4.1. The necessity of a declaration and the doctrine of *forum prorogatum*

As far as the FRY is concerned, Article 35(2) requires, in addition to the identification of any other basis for jurisdiction (specifically Article IX of the Genocide Convention), the deposit of a declaration accepting the conditions laid down by the Security Council "as a vehicle through which the jurisdiction of the Court may be extended to a non-party to the Statute."[38] Since no such declaration had been made, it reasons that jurisdiction in relation to the *Bosnia* case could not be entertained even if it were found to be a party to the Genocide Convention at the relevant point in time. The claim that jurisdiction may only be exercised in relation to states which are 'legitimate participants' in the Statute (either as parties or having accepted the conditions set out by the Security Council) is given a certain plausibility by the terms of the Statute itself. Arguably, acceptance of the Statute may be regarded as a necessary prerequisite for the Court's exercise of certain preliminary jurisdictional prerogatives,[39] such as determining its own competence, indicating interim measures of pro-

36. Corfu Channel (United Kingdom *v.* Albania), Preliminary Objections, Judgment of 25 March 1948, 1947-1948 ICJ Rep. 15, at 17.
37. Monetary Gold Removed from Rome in 1943 (Italy *v.* France, United Kingdom and United States of America), Judgment of 15 June 1954, 1954 ICJ Rep. 19.
38. Application, *supra* note 1, at para. 25.
39. For the distinction between 'preliminary' and 'substantive' jurisdiction *see* G. Fitzmaurice, *The Law and Procedures of the International Court of Justice, 151-4: Questions of Jurisdiction, Competence and Procedure*, 34 BYIL 56 (1958).

https://doi.org/10.1017/S092215650200016X Published online by Cambridge University Press

tection, or allowing third party intervention.[40] It is apparent, furthermore, that the Court is maintained by contributions from state parties (albeit indirectly) and that it should not be presumed that non-parties should have unlimited access to it as a forum for dispute resolution.

An immediate difficulty with the claim of the FRY, in this respect, is that it had already participated in proceedings in respect of this case before the Court. It had responded to claims with counterclaims, submitted preliminary objections and had appointed an *ad hoc* judge (Judge Kreca) to participate in the Court's deliberations. Indeed, its behaviour until 2000 was such as to amount to a ready and active acceptance of the Court's jurisdiction, and indeed, of a willingness to comply with its decisions. To counter the inevitable argument that the FRY had, by its behaviour, remedied any defect in jurisdiction through its subsequent behaviour,[41] the FRY asserts that declarations under Article 35(2) must be "express." Mere 'other party conduct' like bringing a claim, submitting a counterclaim, or raising an objection cannot, of itself, make it a legitimate participant. The doctrine of *forum prorogatum*, in other words, would have no place as regards the question of access to the Court.

Such an approach to the issue of *forum prorogatum* tends to draw upon the idea that it is a question that habitually arises once the Court has been seised of the case,[42] and then only to provide for the element of agreement constitutive of jurisdiction. As Rosenne puts it, "[w]here the agreement is not express and not in writing, that is to say where it is *reached in the course of the proceedings*, the Court will become competent by what might be termed prorogated jurisdiction."[43] It cannot, therefore, remedy procedural or jurisdictional defects that are not dependent upon agreement, such as the requirement of being party to the Statute (or making a decla-

---

40. *See* I. Brownlie, Principles of Public International Law, 5th Ed., 715–716 (1998); J. Collier & V. Lowe, The Settlement of Disputes in International Law 126 (1999).
41. It would fall, in that respect, within the framework of Judge Lauterpacht's approach to the doctrine of *forum prorogatum* which he expresses in the following way:

    > If State A commences proceedings against State B on a non-existent or defective jurisdictional basis, State B can remedy the situation by conduct amounting to an acceptance of the jurisdiction of the Court,

    Genocide Convention Case (Further Requests for Provisional Measures), 16 April 1993, 1993 ICJ Rep. 325, Individual Opinion, para. 24.
42. It is distinct, in that respect, from the scenario envisaged in Art. 38(5) of the Rules of the Court:

    > When the applicant State proposes to found the jurisdiction of the Court upon a consent thereto yet to be given or manifested by the State against which such application is made, the application shall be transmitted to that State. It shall not however be entered in the General List, nor any action be taken in the proceedings, unless and until the State against which such application is made consents to the Court's jurisdiction for the purposes of the case.

43. S. Rosenne, The Law and Practice of the International Court, 1920–1996, Vol. II, 575 (1997) (emphasis added).

https://doi.org/10.1017/S092215650200016X Published online by Cambridge University Press

ration under the terms of Article 35(2)).[44] Certainly, there is little evidence of the principle of *forum prorogatum* being applied as regards the issue of participation in the Statute (indeed there is remarkably little evidence of it being the primary basis for jurisdiction in any case before the ICJ[45]), but one may wonder whether that fact alone is decisive any more than it might be to conclude that *forum prorogatum* applies only in respect of claims rather than counterclaims. The essence of the argument seems to be that participation in the statute or otherwise is a matter quite distinct from the other more general issues of jurisdiction. Whereas the latter is based upon consent, or agreement, and therefore may be remedied by subsequent conduct, the former is a procedural *sine qua non*.

To some extent, this interpretation is evidenced in Article 41 of the Rules of the Court. Article 41 provides that:

> The institution of proceedings by a State which is not a party to the Statute but which, under Article 35, paragraph 2, thereof, has accepted the jurisdiction of the Court by a declaration made in accordance with any resolution adopted by the Security Council under that Article, shall be accompanied by a deposit of the declaration in question, unless the latter has previously been deposited with the Registrar. If any question of the validity or effect of such declaration arises, the Court shall decide.

Apart from noting that the Court appears to retain a preliminary jurisdiction in respect of the validity or effect of a declaration (suggesting it would already be seised of the matter), evidence of compliance with Article 35(2) appears to be something of a prerequisite for the continuance of proceedings. It is clear, however, that Article 41 refers exclusively to cases in which a non-party state institutes proceedings. No corresponding provision exists as regards respondent states, which of course leaves open the question whether the jurisdictional deficiency in such a case may be overcome by subsequent action. Whilst not strictly being a case of *forum prorogatum*, the *Corfu Channel* case is nevertheless instructive on this point. In that case the Court located its jurisdiction in a letter from the Government of Albania addressed to the registrar of 2 July 1947. That letter neither invoked the terms of Resolution 9, nor could be regarded as an act separate from that which established jurisdiction for the case in hand. In fact, the letter was merely construed as constituting the notification required[46] by an Order of the President of the Court on 31 July 31 of

44. *See* H. Thirlway, *The Law and Procedure of the International Court of Justice 1960–1989 (Part Nine)*, 69 BYIL 1, at 27 (1998).
45. The classic example of *forum prorogatum* being invoked as the basis for jurisdiction is the Rights of Minorities in Polish Upper Silesia Case, 1928 PCIJ (Ser. A) No. 15.
46. Art. 36 of the 1946 Rules of the Court provided that:

> When a State which is not a party to the Statute is admitted by the Security Council, in pursuance of Article 35 of the Statute, to appear before the Court, it shall satisfy the Court that is has complied with the conditions that may have been prescribed for its admission.

https://doi.org/10.1017/S092215650200016X Published online by Cambridge University Press

the same year.[47] All that was apparently required, was an acceptance by Albania that the dispute should be resolved by the ICJ. Given that the Court subsequently insisted that consent to its jurisdiction does not require it to be "expressed in any particular form"[48] let alone in two different ways, it would seem odd to insist upon the fulfilment of a specific procedure for purposes of establishing whether the Court is 'open' to a non-party state as respondent.

To suggest that the requirements in Article 35(2) are essentially asymmetrical – as requiring evidence of a declaration in cases where a non-party institutes proceedings, but not necessarily otherwise – seems somewhat counter-intuitive given the general presumptions of reciprocity and equality of arms.[49] It may be defended, however, if one construes the issue of participation as strictly one of 'access' to the Court. Whilst it should not readily be supposed that a state which is unwilling to bear the burdens of supporting the Court should have access to it as a means of resolving disputes with other states,[50] it does not necessarily follow that jurisdiction should be precluded simply because the respondent state has failed to make a similar undertaking. In such a case, if there is an inequality, it must be one borne solely by the applicant state rather than the respondent.

This general conclusion is reinforced, furthermore, in the terms of Article 35(2) of the Statute which seem to envisage the possibility that state parties to 'treaties in force' may be exempt from the requirements laid down by the Security Council. Thus, as the Court held in its Order of 8 April 1993 concerning the Request for the Indication of Provisional Measures:

> proceedings may validly be instituted by a State against a State which is party to such a special provision in a treaty in force, but is not a party to the Statute, and independently of the conditions laid down by the Security Council in its resolution 9 of 1946.

Irrespective of whether this might extend, with equal force, to states seeking to institute proceedings (despite the terms of Article 41 of the Rules of the Court), it appears clear to the Court that the FRY's status in relation to the statute was irrelevant if it was found to be party to a "special provision in a treaty in force."

47. Corfu Channel case, *supra* note 36, at 27.
48. *Id.*
49. Art. 35(2) after all stresses that "in no case shall such conditions place the parties in a position of inequality before the Court."
50. It should be noted that the FRY had paid UN membership dues up until 1998, Application, *supra* note 1, at para. 9.

https://doi.org/10.1017/S092215650200016X Published online by Cambridge University Press

4.2. Special provisions of treaties in force

Article 35(2) seems to qualify the conditions for participation in the Statute in case of special provisions of treaties in force. It is evident, however, that there are various constructions that might be given to the language of that Article in terms of both the identity and effect of such 'treaties in force.' Does the qualification affect the requirement for deposit of a declaration *tout court*, or merely modify the requirements laid down by the Security Council? What is the critical date for purpose of determining when the treaty in question was in force in respect of this Article? The approach of the FRY in this regard is to rely upon the drafting history of the Statute as explained by Rosenne.[51] It points out that Article 35(2) owes its origin to the corresponding provision in the Statute of the Permanent Court of International Justice ('PCIJ'). This provision, as Rosenne explains, was included to give the PCIJ jurisdiction over disputes arising from the Peace Treaties concluded prior to the entry into force of the Statute in relation to states that were not members of the League of Nations. By analogy, the same wording would suggest that the phrase 'special provisions of treaties in force' should be interpreted as meaning only those treaties in force on the date when the Statute itself entered into force (24 October 1945), and not treaties which subsequently come into force.[52] The Genocide Convention, therefore, could not be regarded as a treaty in force for purposes of Article 35(2) and the requirements laid down by the Security Council still pertain.

Plausible as this argument may be as a matter of original intent, the FRY is clearly faced with the problem that the ICJ has already indicated in its Order of 8 April that the requirements of Resolution 9 did not apply in relation to the Genocide Convention:

> a compromissory clause in a multilateral convention, such as Article IX of the Genocide Convention relied on by Bosnia-Herzegovina in the present case, could, in the view of the Court, be regarded *prima facie* as a special provision contained in a treaty in force;

and therefore

> if Bosnia-Herzegovina and Yugoslavia are both parties to the Genocide Convention, disputes to which article IX applies are […] within the jurisdiction *rationae personae* of the Court.[53]

This, of course, may not be the end of the matter. Apart from the fact that this determination was merely *prima facie*, it is notable that the Court relied for purposes of this interpretation upon the Judgment of the PCIJ

51. Application, *supra* note 1, at para. 30. Rosenne, *supra* note 43, at 628.
52. Rosenne, *supra* note 43, at 629.
53. 1993 ICJ Rep. 3.

https://doi.org/10.1017/S092215650200016X Published online by Cambridge University Press

in the *Wimbledon Case*.[54] Although that case certainly provided support for the proposition that Court might assume jurisdiction in relation to a state not party to the Statute (Germany), it does not entirely displace Rosenne's argument: the treaty referred to in that case was the 1919 Treaty of Versailles which had indeed entered into force before the adoption of the Statute.

It is thought, nevertheless, that whilst the drafters of the Statute might undoubtedly have wished to preserve the force of jurisdictional provisions within the peace treaties, it does not follow that they would have equally wished to limit access to the Court in relation to subsequent treaties with similar jurisdictional provisions. Indeed to insist upon such an interpretation would lead to the conclusion that the effect of those jurisdictional clauses would itself become dependent upon prior participation in the Statute, a point which might well be regarded as highly undesirable from the perspective of maintaining the integrity of those instruments, or clarity as regards the extent of respective obligations. Whatever the case, it appears from the above discussion that much would seem to depend upon the position adopted by the Court as to whether the FRY was party to the Genocide Convention of 1948 at the salient point in time.

5. The Genocide Convention

In line with the position adopted by the FRY as regards its membership in the United Nations, it has also revised its posture as regards the question whether it is party to the Genocide Convention. At all salient points in time up until 2000 the FRY acted in the belief that it was indeed party to the Convention. This is reflected not only in the terms of its preliminary objections and counterclaims in the *Bosnia* case, but also in the fact that it instituted proceedings against the NATO states invoking Article IX of that Convention. The position adopted in the present application appears to be one in which the FRY claims that it was not a party to the Convention until the entry into force of its instrument of accession (received on 12 March 2001), namely on 10 June 2001.[55] Since it, furthermore, appended a reservation to its instrument of accession to the effect that it does not consider itself bound by Article IX, it is reasoned that no jurisdiction could be asserted under that instrument in relation to the claims made by Bosnia.

Leaving aside the behaviour of the FRY prior to its application for membership in the United Nations – and indeed the outstanding claims made in respect of the NATO countries – the reasoning of the FRY in this respect is impeccable. If, having been invited by the Legal Counsel of the United Nations to regularise its position in relation to multilateral

54. 1923 PCIJ (Ser. A) No. 1.
55. Confirmed in a note of the UN Secretary-General as depositary to the Genocide Convention of 21 March 2001.

https://doi.org/10.1017/S092215650200016X Published online by Cambridge University Press

treaties as a successor state,[56] and having submitted an instrument of accession, it seems difficult to conclude thereafter that it was party to that treaty prior to that moment and that the instrument of accession itself had no legal value. If, furthermore, the instrument of accession is regarded as legally effective, so also, absent any objections, would be its reservation to Article IX.

The obvious difficulty with this approach to the issue is that, in its Order of 1993 and Judgment of 1996, the Court had already taken the view that the FRY was "bound by the provisions of the Convention on the date of filing of the Application in the present case, namely, on 20th March 1993." It relied, in that respect, upon two facts. First was the fact that the former SFRY had ratified the Genocide Convention without reservation on 29 August 1950 and that "both Parties to the present case correspond to parts of the territory of the former Socialist Federal Republic of Yugoslavia." Second was the issuance of a formal declaration on the part of the FRY on 27 April 1992, in which it indicated that it would "strictly abide by all the commitments that the Socialist Federal Republic of Yugoslavia assumed internationally" (a declaration confirmed in an official Note to the UN Secretary-General on 27 April 1992).[57] This was clearly not a notification of succession or accession to the Convention. Rather it seemed to be just a confirmation that it remained bound as the continuing state, and would not seek to invoke the principle *rebus sic stantibus* as reason for avoiding those commitments.

There are two possible interpretations of the Court's findings in this respect. One is that the FRY, as the continuing state, remained bound by the Convention in virtue of the original ratification by the SFRY in 1950. The other is that it had in fact succeeded to the Convention (either automatically or in virtue of its declaration). The emphasis given to the fact that both parties 'correspond to parts of the territory' of the SFRY may suggest the second approach was preferred, but it might also be suspected that the Court was simply avoiding the obvious difference of opinion. If the basis for the FRY being party to the Convention was that it was (at that stage at least) the continuing state, it may well be argued that its subsequent 'change in status' allows it to reconsider its position in respect of treaties formerly binding upon its territory as a successor state. To suggest as much is to rely not only upon the belief that the FRY became a successor state at some point in time after 1996, but also upon the supposition that it has a right of option as a 'newly independent State.'[58] Whilst the FRY does indeed seem to claim a right as to how it becomes bound

56. Letter of Legal Counsel of the United Nations of 8 December 2000. This read as follows:

> It is the Legal Counsel's view that 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.

57. *Supra* note 4, at para. 17.
58. *Cf.* Art. 17 of the 1978 Vienna Convention on Succession of States in respect of Treaties.

https://doi.org/10.1017/S092215650200016X Published online by Cambridge University Press

as a successor (choosing accession rather than succession), it does not appear that it regards itself as having become a successor only subsequent to the Court's Judgment on preliminary objections. If otherwise, it has little argument in respect of the original Judgment. Rather, the suggestion seems to be that the FRY is a successor state from the moment of the dissolution of the SFRY (sometime in early 1992 perhaps).

This retrospective 'reclassification' of events presents a number of problems. For the FRY, it is placed in the difficult position of having to argue not only that the Court's finding of jurisdiction was necessarily premised upon the belief that the FRY was in fact the continuing state, but also that it was not a party to the Convention when it clearly believed itself to be so. Bosnia, for its part, is left with the problem of explaining how the FRY became party to the Convention in absence of any communication to that effect and therefore that it had either succeeded automatically, or by dint of its declaration of 1992. In either case, the argument would have to proceed by means of imputing an inexistent intent to the acts of the FRY during the period prior to its reclassification of its status.

If one follows the argument of the FRY in this respect, the issue would presumably turn upon the question whether it had succeeded to the Convention with the demise of the SFRY, or simply became party to the Convention at the moment of its accession. At the outset this may be presented as a simple alternative: either the FRY succeeded to the Convention or it did not; it either began life with a clean slate, or it did not. The choice between accession and succession, however, is regularly treated less as one that demarcates the boundary of the latter, and more as a matter of discretionary technique within the broader field of succession. In other words, a successor state may fulfil its obligations as such by acceding to a treaty, albeit the case that this may entail a temporal disjunction in the continuity of pre-existent obligations. Such a view tends to be built upon the observation that, whilst many successor states have broadly committed themselves to 'continue' obligations formerly binding upon the territory 'inherited,' they have frequently done so by means of depositing instruments of accession to those treaties rather than by recognising their succession.[59] This is also supported by the terms of Article 17 of the Vienna Convention on Succession of States in respect of Treaties[60] according to which newly independent states enjoy a 'right of option' as regards pre-existent treaty obligations and are not thereby obliged to maintain treaty continuity.[61]

---

59. For example, whilst Kazakhstan, Kyrgyzstan, Tajikistan and Turkmenistan all succeeded to the Geneva Conventions and Protocols, Armenia, Azerbaijan, Georgia, Moldova and Uzbekistan all deposited fresh instruments of accession. 1994 ICRC Annual Report 266.
60. "[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."
61. Art. 23(3) emphasises that a notification of succession would not operate retrospectively as to render a state party to the treaty from the date of independence.

https://doi.org/10.1017/S092215650200016X Published online by Cambridge University Press

Whether or not the FRY believes itself subject to the principle of the clean slate, or simply to enjoy a freedom of choice as regards the manner in which it continues treaty obligations, it is evident that arguments to the contrary are difficult to substantiate. One option might be to suggest that the terms of Article 34 of the Vienna Convention apply to the effect that it is automatically bound by all (multilateral) treaties to which the SFRY was formerly a party. The customary status of such a principle is doubtful, however, and apart from anything else, few successor states in recent years have applied such a principle in a uniform manner. Another option might be to suggest that it is automatically bound by the Genocide Convention insofar as such an obligation extends to all treaties protecting fundamental human rights. Again, whilst Judge Weeramantry appeared to favour such a view in the Court's 1996 Judgment,[62] it is generally recognised that such an argument remains somewhat tentative.[63]

Although the argument concerning succession may be one of general interest, it is not necessarily decisive in this particular case. It relies, as suggested, upon the FRY's revisionary understanding of its change in status and upon its belief that this materially affected the Court's original judgment. From the perspective of Bosnia, by contrast, it might simply be argued that the FRY had already "committed itself to a course of conduct consistent with the declaration"[64] of 1992, and should thereafter be precluded, or estopped,[65] from assuming a contradictory position to the prejudice of another state (*nemo potest mutare consilium suum in alterius injuriam*).[66] The only question that may be raised in such circumstances is whether its consent to (continue to) be bound by the Convention may be regarded as being vitiated by error – namely that it was premised upon the FRY's belief that it was the continuing state. As the ICJ noted in the *Temple* case, however, a plea of error:

---

62. *See*, *e.g.*, Separate Opinion of Judge Weeramantry, 1996 ICJ Rep. 595.
63. *See*, *e.g.*, M.T. Kamminga, *State Succession in Respect of Human Rights Treaties*, 7 EJIL 469 (1996); M. Shaw, *State Succession Revisited*, 6 Finn. YIL 34 (1995); R. Mullerson, *The Continuity and Succession of States by Reference to the former USSR and Yugoslavia*, 42 ICLQ 473 (1993).
64. *Cf.* Nuclear Tests Case (Australia *v.* France), Judgment of 20 December 1974, 1974 ICJ Rep. 253, at 267, para. 43.
65. As Fitzmaurice points out in the Temple case, the doctrine of estoppel does not always add a great deal:

> Thus it might be said that A, having accepted a certain obligation, or having become bound by a certain instrument, cannot now be heard to deny the fact, to 'blow hot and cold'. True enough, A cannot be heard to deny it; but what this really means is simply that A is bound, and, being bound, cannot escape from the obligation merely by denying its existence.

Temple of Preah Vihear (Cambodia *v.* Thailand), Merits, Judgment of 15 June 1962, 1962 ICJ Rep. 6, Separate Opinion of Judge Fitzmaurice, at 63. *See*, *generally*, D. Bowett, *Estoppel Before International Tribunals and its Relation to Acquiescence*, 28 BYIL (1957) 176.

66. *See* Temple case, *id.*, at 40.

https://doi.org/10.1017/S092215650200016X Published online by Cambridge University Press

> cannot be allowed as an element vitiating consent if the party advancing it contributed by its own conduct to the error, or could have avoided it, or if the circumstances were such as to put that party on notice of a possible error.[67]

Even assuming the facts to be such as to disclose an error to which the FRY had not contributed by its own conduct, it is by no means clear that the error would have prejudiced the making of the declaration. After all, the FRY might equally have determined to continue treaty obligations as a successor state in the same declaration.

6. THE IMPLICATIONS

Whilst there is a certain appeal to a number of the arguments proffered by the FRY in this application, there can be little doubt that it was submitted more in hope (perhaps of some obscure strategic advantage) than in any sincere expectation that the Court will be willing to revise its original Judgment. For all the vagaries of the Court's original decision, it is the difficulty of establishing the existence of a 'new fact' of which the parties were unaware that presents the most serious hurdle. Not only is it hard to see why so much should be thought to turn upon the question of continuity or succession, but it is even more difficult to discern in what way any such assumption might have led the Court to an erroneous decision. The question hanging in the air, then, is what motivated the application? What advantage might be thought to accrue? Without being party to the decision-making process within the FRY itself, of course, any answer will be purely speculative. The application itself, however, does offer some insights in that regard. At the forefront seems to emerge the idea that the FRY is seeking to present the Court with a suitable exit strategy and a means of disposing of not simply the *Bosnia* case, but all cases relating to the former Yugoslavia in a single judicial 'package deal.' It should not be readily assumed, after all, that the Court is necessarily enthused by the idea of involving itself in a series of issues which have the potential to reignite the embers of ethnic or racial hatred within the former Yugoslavia particularly insofar as it will involve issues of 'collective responsibility' (rather than merely the responsibility of certain individuals).

It is evident that the overt consequence of the FRY's application, if acceded to by the Court, would be that the Court would have to declare its lack of jurisdiction either in relation to the subject matter or as regards the FRY itself. Notwithstanding the fact that decisions of the Court are binding only upon the parties thereto, and only in respect of that particular case (Article 59 Statute), such a decision would undoubtedly also have consequences for other cases now before the Court. To begin with, and as noted above, the FRY submitted applications to the ICJ invoking the

67. *Id.*, at 26.

https://doi.org/10.1017/S092215650200016X Published online by Cambridge University Press

Genocide Convention as against ten NATO states in 1999. In doing so, it clearly relied upon the supposition that it was a party to the Genocide Convention at that time and that it could thereby invoke the jurisdiction of the Court under the terms of Article IX. Were it to be successful in this application, the FRY would have to accept simultaneously that the Court did not have jurisdiction in relation to the NATO cases. Even if, as the Court suggested in 1996, the Genocide Convention is not "temporally limited" it is evident that other states would be able to rely as a matter of reciprocity upon the FRY's own reservation in relation to Article IX. It is clear, furthermore, and for similar reasons, the decision would affect the application made by Croatia against the FRY which, like that of Bosnia-Herzegovina, similarly invokes the Genocide Convention. Again, if the Court were to reconsider its judgment to find that it lacked jurisdiction in the *Bosnia* case, it would be forced into a similar conclusion in relation to Croatia. Not only does the Croatian application refer, broadly speaking, to events in the same period of time, but like that of Bosnia, it preceded the deposit of the instrument of accession on the part of the FRY.

Even if the Court is not inclined to accept the FRY's arguments in respect of the Genocide Convention, a similar conclusion would seem to follow from its arguments in respect of its status as non-party to the Statute. Indeed it is here that one may perceive the sense of a package deal in the making. As pointed out above, the FRY seeks to argue that since it had not issued a declaration as required under Article 35(2), it cannot be regarded as party to the Statute for purposes of present proceedings. On the face of this, that argument only affects the Bosnian and Croatian cases now before the Court. In the application, however, the FRY develops this line of thinking in a quite surprising way. It submits that the Court has to distinguish categorically between the issue of jurisdiction on the one hand, and acceptance of the Statute on the other. It argues, in that respect, that its declaration issued under the Optional Clause (Article 36(2)) prior to instituting proceedings against the NATO states[68] could not be assimi-

68. The declaration reads as follows:

> I hereby declare that the Government of the Federal Republic of Yugoslavia recognizes, in accordance with Article 36, paragraph 2, of the Statute of the International Court of Justice, as compulsory ipso facto and without special agreement, in relation to any other State accepting the same obligation, that is on condition of reciprocity, the jurisdiction of the said Court in all disputes arising or which may arise after the signature of the present Declaration, with regard to the situations or facts subsequent to this signature, except in cases where the parties have agreed or shall agree to have recourse to another procedure or to another method of pacific settlement.
>
> The present Declaration does not apply to disputes relating to questions which, under international law, fall exclusively within the jurisdiction of the Federal Republic of Yugoslavia, as well as to territorial disputes.
>
> The aforesaid obligation is accepted until such time as notice may be given to terminate the acceptance.
>
> New York, 25 April 1999.

https://doi.org/10.1017/S092215650200016X Published online by Cambridge University Press

lated to a declaration made under Article 35(2) and, for that reason, was considered as suffering from a procedural defect:

> Instead of making a declaration as a State which is not a party to the Statute and wants to avail itself access to the Court, the former Government of the FRY purported to use an opportunity which is only open to parties to the Statute.[69]

Apart from the controversial suggestion that a distinction should be made between the acts of the present Government of the FRY and those of the former government, it is evident that this contention has little bearing on the particular facts of the *Bosnia* case. Rather, it seems to be in the nature of a simple invitation to the Court to the effect that if the Court were to declare its lack of jurisdiction in the *Bosnia* case on this ground, the FRY would be willing in exchange to accept the termination of proceedings in relation to the NATO countries. Doubtless, any such suggestion is likely to be dismissed by the Court as irrelevant to the task in hand. It is indicative, however, of a certain lack of commitment on the part of the states concerned to have matters finally determined by the Court, and suggests to the contrary, that its role may be more one of providing diplomatic ammunition in regional relations or for assuaging the demands of local constituencies.

69. Application, *supra* note 1, at para. 26.

https://doi.org/10.1017/S092215650200016X Published online by Cambridge University Press