JUDGMENT

***Present*: *Judges* ABRAHAM, BUERGENTHAL, ELARABY, KOOIJMANS, KOROMA, OWADA, PARRA-ARANGUREN, RANJEVA, REZEK, SIMMA, TOMKA, VERESHCHETIN.**

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

between

the Republic of Bosnia-Herzegovina,

and

the Federal Republic of Yugoslavia,

Proceedings of the deliberations of the Court

Monday, August 7 2006

11:00 – 12:00
- Presentation of the Parties' final submissions by president Gayoso
- Presentation of historical background and timeline of the conflict in the Balkans, with a focus on Bosnia and Herzegovina
- Questions and points of clarification

13:00 – 13:40 - Opening Speeches

13:40 – 14:20 - Informal brainstorming for strategic purposes

14:20 – 17:00
- Question of jurisdiction
- Speakers list adopted, moderated - and un-moderated caucuses
- Non-binding polls on the question of jurisdiction
  - 1st: 6 for : 6 against (beginning)
  - 2nd: 7 for : 5 against (end)

Tuesday, August 8, 2006

9:00 – 9:30 - Question of jurisdiction
- 2 un-moderated caucuses
- Non-binding poll on the question of jurisdiction: 8 for : 4 against
- 1 un-moderated caucus

9:30 – 11:00 - Question of genocide
- Speakers list, moderated and un-moderated caucuses
- Non-binding poll on the question of genocide: 11 for : 1 against
- Moderated and un-moderated caucuses
- Non-binding poll on the question of genocide: 12 for : 0 against

11:00 – 11:30 - Question of state liability
- Un-moderated caucus

12:30 – 14:30 - Question of state liability
- Un-moderated caucuses
- Non-binding poll on the question of state liability: 5 for : 7 against
- Moderated and un-moderated caucuses
- Non-binding poll on the question of state liability: 6 for : 6 against
- Moderated caucus

9:00 – 11:30 Question of jurisdiction/Matters concerning the progress of discussions

- Non-binding poll on the question of jurisdiction: 6 for : 4 against
- Moderated and un-moderated caucuses
- Non-binding poll on the question of jurisdiction: 5 for : 7 against
- Un-moderated caucus
- Non-binding poll on the question of jurisdiction: 8 for : 4 against
- Un-moderated caucus
- Non-binding poll on the question of jurisdiction: 7 for : 5 against

12:30 – 16:00 Question of state liability concerning omission

- Non-binding poll on the question of liability on grounds of omission: 12 for : 0 against

- Question of state liability concerning acts by state

Final submissions of the Parties

On Monday 24 April 2006, Bosnia and Herzegovina presented the following final submissions:

"Bosnia and Herzegovina requests the International Court of Justice to adjudge and declare:

1. That Serbia and Montenegro, through its organs or entities under its control, has violated its obligations under the Convention on the Prevention and Punishment of the Crime of Genocide by intentionally destroying in part the non-Serb national, ethnical or religious group within, but not limited to, the territory of Bosnia and Herzegovina, including in particular the Muslim population, by

- killing members of the group;
- causing serious bodily or mental harm to members of the group;
- deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- imposing measures intended to prevent births within the group;
- forcibly transferring children of the group to another group;

2. Subsidiarily:

(i) that Serbia and Montenegro has violated its obligations under the Convention on the Prevention and Punishment of the Crime of Genocide by complicity in genocide as defined in paragraph 1, above; and/or

(ii) that Serbia and Montenegro has violated its obligations under the Convention on the Prevention and Punishment of the Crime of Genocide by aiding and abetting individuals, groups and entities engaged in acts of genocide, as defined in paragraph 1 above;

3. That Serbia and Montenegro has violated its obligations under the Convention on the Prevention and Punishment of the Crime of Genocide by conspiring to commit genocide and by inciting to commit genocide, as defined in paragraph 1 above;

4. That Serbia and Montenegro has violated its obligations under the Convention on the Prevention and Punishment of the Crime of Genocide for having failed to prevent genocide;

5. That Serbia and Montenegro has violated and is violating its obligations under the Convention on the Prevention and Punishment of the Crime of Genocide for having failed and for failing to punish acts of genocide or any other act prohibited by the Convention on the Prevention and Punishment of the Crime of Genocide, and for having failed and for failing to transfer individuals accused of genocide or any other act prohibited by the Convention to the International Criminal Tribunal for the former Yugoslavia and to fully co-operate with this Tribunal;

6. That the violations of international law set out in submissions 1 to 5 constitute wrongful acts attributable to Serbia and Montenegro which entail its international responsibility, and, accordingly,

(a) that Serbia and Montenegro shall immediately take effective steps to ensure full compliance with its obligation to punish acts of genocide under the Convention on the Prevention and Punishment of the Crime of Genocide or any other act prohibited by the Convention and to transfer individuals accused of genocide or any other act prohibited by the Convention to the International Criminal Tribunal for the former Yugoslavia and to fully co-operate with this Tribunal;

(b) that Serbia and Montenegro must redress the consequences of its international wrongful acts and, as a result of the international responsibility incurred for the above violations of the Convention on the Prevention and Punishment of the Crime of Genocide, must pay, and Bosnia and Herzegovina is entitled to receive, in its own right and as parens patriae for its citizens, full compensation for the damages and losses caused. That, in particular, the compensation shall cover any financially assessable damage which corresponds to:

(i) damage caused to natural persons by the acts enumerated in Article III of the Convention, including non-material damage suffered by the victims or the surviving heirs or successors and their dependants;

(ii) material damage caused to properties of natural or legal persons, public or private, by the acts enumerated in Article III of the Convention;

(iii) material damage suffered by Bosnia and Herzegovina in respect of expenditures reasonably incurred to remedy or mitigate damage flowing from the acts enumerated in Article III of the Convention;

(c) that the nature, form and amount of the compensation shall be determined by the Court, failing agreement thereon between the Parties one year after the Judgment of the Court, and that the Court shall reserve the subsequent procedure for that purpose;

(d) that Serbia and Montenegro shall provide specific guarantees and assurances that it will not repeat the wrongful acts complained of, the form of which guarantees and assurances is to be determined by the Court;

7. That in failing to comply with the Orders for indication of provisional measures rendered by the Court on 8 April 1993 and 13 September 1993 Serbia and Montenegro has been in breach of its international obligations and is under an obligation to Bosnia and Herzegovina to provide for the latter violation symbolic compensation, the amount of which is to be determined by the Court."

On Tuesday 9 May 2006, Serbia and Montenegro presented the following final submissions:

"In accordance with Article 60, paragraph 2, of the Rules of Court, Serbia and Montenegro asks the Court to adjudge and declare:

- that this Court has no jurisdiction because the Respondent had no access to the Court at the relevant moment; or, in the alternative
- that this Court has no jurisdiction over the Respondent because the Respondent never remained or became bound by Article IX of the Convention on the Prevention and Punishment

of the Crime of Genocide, and because there is no other ground on which jurisdiction over the Respondent could be based;

In case the Court determines that jurisdiction exists Serbia and Montenegro asks the Court to adjudge and declare:

- That the requests in paragraphs 1 to 6 of the Submissions of Bosnia and Herzegovina relating to alleged violations of the obligations under the Convention on the Prevention and Punishment of the Crime of Genocide be rejected as lacking a basis either in law or in fact.
- In any event, that the acts and/or omissions for which the respondent State is alleged to be responsible are not attributable to the respondent State. Such attribution would necessarily involve breaches of the law applicable in these proceedings.
- Without prejudice to the foregoing, that the relief available to the applicant State in these proceedings, in accordance with the appropriate interpretation of the Convention on the Prevention and Punishment of the Crime of Genocide, is limited to the rendering of a declaratory judgment.
- Further, without prejudice to the foregoing, that any question of legal responsibility for alleged breaches of the Orders for the indication of provisional measures, rendered by the Court on 8 April 1993 and 13 September 1993, does not fall within the competence of the Court to provide appropriate remedies to an applicant State in the context of contentious proceedings, and, accordingly, the request in paragraph 7 of the Submissions of Bosnia and Herzegovina should be rejected."

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1. The Court begins by addressing firstly the submission of the Respondent in regard to the issue of absence of access to the Court on date of institution of the proceedings and respectively on the jurisdiction, found *prima facie* in article IX of the Genocide Convention.

2. *A priori* the Court acknowledges that neither in 1996 nor in the subsequent period up to the 2003 Revision Case the argument concerning the status of the Respondent relative to the Article IX of the Genocide Convention was ever contested. The Court issued the *Revision Case* from which clearly follows *inter alia* that the Respondent State accepted implicitly the jurisdiction of the ICJ by not contesting it within the adequate timeline and thus it turned to have *res judicata* nature.

3. Serbia and Montenegro relies on the fact that at the time of the Judgement in 1996 it was not a Member of the United Nations, was not a party *ipso facto* to the Statute of the Court and was not bound by the Genocide Convention, contending that its admission to the membership of the United Nations on 1 November 2000 represented a *new unknown fact* under the provisions of Article 61 of the Statute of the Court, thereby revealing that it had not previously been a member. However, the Court found that this claim cannot be established for the purpose of revision of the 1996 Judgement in terms of Article 61 of the Court's Statute. The Court proceeds by asserting that the admission of Yugoslavia in 2000 is certainly a new fact, however it was not unknown neither to the parties in dispute or to the Court *per se* and it occurred after the judgement and cannot therefore affect the previous situation.

4. Further, the issue of Yugoslavia's legal status was being discussed before the various organs of the United Nations and was thus a fact known to everyone, in particular to the Respondent and to the Court, which thus rendered its Judgment in 1996 and 2003 with full knowledge of the facts.

5. Lastly, the undertakings, statements, and conduct of Yugoslavia show that it did nothing to clarify the situation, and this was shown by the fact that it remained the Applicant in eight cases before the Court against

members of NATO claiming the acceptance of compulsory jurisdiction of the Court and claimed itself bound by the Genocide Convention, while in the present case it is denying it.

6. Nevertheless the Court never pronounced directly on the issue of the legal status of the FRY within the framework of the present case, and rather entertained the application, considering implicitly some sort of *forum prorogatum* status attributable to the Respondent State.

7. In the *Legality of Use of Force*, the Court found that the FRY did not have access to the Court and the Court did not therefore consider it necessary to decide whether the FRY was or was not a party to the Genocide Convention at the time it filed its Application. Nevertheless some of the judges supported the position that the FRY did have access to the Court under the provisions of Article 35 both in *Legality of Use of Force* and in the present case. Indeed some of the findings of the Court within the framework of the *Legality of Use of Force* remain not deprived from some legal doubts in regard to the interpretation of Article 35, Paragraph 1 of the Statute, which the joint declaration in the above-mentioned case correctly describes as being “at odds” with the Court’s previous judgments and orders. Simultaneously several legal doubts persist on the grounds chosen by the Court to reach its decision that it lacks jurisdiction or its substantive conclusions on the scope of Article 35, Paragraph 2 in the *Legality of Use of Force*.

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

9. Therefore the Court felt compelled to clarify its position on this question. Notwithstanding *sui generis* position in respect to the membership in the United Nations, during the period between 1992 and 2000 the treaty obligations of the SFRY extended to each of the successor States. The latter fact is true regardless of whether or not the FRY was a member of the United Nations during this period.

10. In this context the Court endorses that firm distinction should be drawn between the issue of membership in the United Nations and the “automatic succession” in respect of the treaties.

11. In respect to membership in the United Nations the Court recalls the *Summary of Practice of the Secretary-General as Depositary of Multilateral Treaties* published in 1996, in which the United Nations Office of Legal Affairs concluded that the legal effects of General Assembly resolution 47/1 were limited to the ambit of the United Nations and did not affect the rules of treaty succession:

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

12. Furthermore, on 27 April 1992, the FRY submitted a note to the Secretary-General in which it declared explicitly that it would respect obligations assumed by the SFRY:

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

13. In this context, the separate issue of automatic succession in respect to the treaties is endorsed by the Court. Thus a firm distinction should be drawn between *successor* and *newly independent* States so that to clarify the status of the FRY:

1. Even supposing the absence of the above-mentioned declaration or its strictly "political" nature, as contended by the Respondent, in terms of International Law, the FRY would have succeeded to these treaties automatically, because a *successor State* that separates from a predecessor State is not entitled, upon separation, to disavow the treaty obligations of the Predecessor State. In case of the separation of States, the Successor State automatically assumes the treaty obligations of the predecessor.

2. On the other hand, in conformity with Article 17, Paragraph 1, of the Vienna Convention on Succession of States in respect of Treaties only *newly independent* States have a sufficient margin of discretion to decide on the treaty obligations that they intend to be bound by. This Article provides that "a newly independent State may, by a notification of succession, establish its status as a party to any multilateral treaty which at the date of the succession of States was in force in respect of the territory to which the succession of States relates". A newly-independent State is required upon independence to clarify its legal position regarding treaties in conformity with the "clean slate" doctrine codified in Article 17 of the Vienna Convention.

14. Accordingly FRY is a Successor State of the SFRY and therefore Article 34 of the Vienna Convention on Succession of States is to be duly applied.

Article 34 of the Vienna Convention asserts that:

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

(a) any treaty in force at the date of the succession of States in respect of the entire territory of the predecessor State continues in force in respect of each successor State so formed [, and]

(b) any treaty in force at the date of the succession of States in respect only of that part of the territory of the predecessor State which has become a successor State continues in force in respect of that successor State alone".

15. The Court finds important to recall that the rule of succession to treaties applies to new States and is entirely independent of the issue of a State's membership in the United Nations. By way of example, when Switzerland was admitted to the United Nations, it was considered a new Member, though not a newly independent State. It did not therefore have to clarify its legal position with respect to treaties. Conversely in the FRY's case, it succeeded to the SFRY's treaty obligations in 1992 regardless of the status of its membership in the United Nations at that time."

16. Article 34 of the Vienna Convention should be considered reflective of customary law on succession to treaties. It is indisputable that certain provisions in the Vienna Conventions on treaties *"are declaratory of customary international law"* [1] and recent State practice, for instance in respect of the successors of Czechoslovakia and the SFRY, lends support to this proposition in respect of the rules of succession. This is all the more true in cases involving succession to human rights treaties.

17. Furthermore the Court endorses the importance of humanitarian character of the multilateral treaties, in particular of the Genocide Convention. It's preliminary support may be found in *Advisory Opinion of 21 June 1971*, when determining *"the legal consequences for States of the continued presence of South Africa in Namibia, notwithstanding Security Counsel Resolution 276 (1970)"*; that had declared invalid and illegal all acts taken by the Government of South Africa on behalf of or concerning Namibia after the termination of the Mandate. The Court added: "With respect to existing bilateral treaties, member states must abstain from invoking or applying those treaties or provisions of treaties concluded by South Africa on behalf or concerning

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[1] *Gabcíkovo-Nagymaros Project (Hungary/Slovakia), Judgment, I.C.J. Reports,* p. 62, para. 99. See also *Digest of United States Practice in International Law (1980)* 1041 n. 43 (U.S. State Department Legal Adviser expressing opinion that the rules of the Vienna Convention on Succession of States in respect of Treaties were "generally regarded as declarative of existing customary law".

Namibia which involve active intergovernmental cooperation. With respect to multilateral treaties, however, the same rule cannot be applied to certain general conventions such as those of a humanitarian character, the non-performance of which may adversely affect the people of Namibia." *(Legal Consequences for States of the Continued Presence of South Africa in Namibia (South west Africa) notwithstanding Security Council resolution 276, I.C.J. Reports 1971, p.55, para.122).*

18. Similar ideas are sustained by Article 60, Paragraph 5 of the 1969 Vienna Convention on the Law of Treaties when providing its rules on termination or suspension of a treaty as a consequence of its breach *"do not apply to provisions relating to the protection of the human person contained in treaties of a humanitarian character, in particular provisions prohibiting any form of reprisals against persons protected by such treaties".*

19. In the current stage of International Law there has been pressure for recognition of the principle of automatic succession. In this context, in the Separate Opinion on *Legality of Use of Force*, Judge Weeramantry proceeds by asserting that: *"Without automatic succession to such a Convention, we would have a situation where the worldwide system of human rights protections continually generates gaps in the most vital part of its framework, which open up and close, depending on the break up of the old political authorities and the emergence of the new. The international legal system cannot condone a principle by which the subjects of these States live in a state of continuing uncertainty regarding the most fundamental of their human rights protections. Such a view would grievously tear the seamless fabric of international human rights protections, endanger peace, and lead the law astray from the Purposes and Principles of the United Nations, which all nations, new and old, are committed to pursue."*

20. Notwithstanding the general acceptance of the "automatic succession" in respect to multilateral treaties, the Court proceeds by analysing the issue of the formal admission of Serbia and Montenegro to the United Nations on 1 November 2000 and its eventual legal consequences for purpose of the present judgement. In addressing this issue the Court found crucial to stress that the foregoing fact did not affect legal status of the FRY as successor to the SFRY's treaty obligations. The reasoning of the Court is based on the fact that it was admitted as a new Member of the United Nations, but not as a newly independent State, because its separation from the SFRY and its assumption of the legal obligations as a successor State took place on 27 April 1992.

21. The Court acknowledged this in the 2003 *Application for Revision* case, when it emphasized "that General Assembly Resolution 55/12 of 1 November 2000 [admitting the FRY as a Member] cannot have changed retroactively the *sui generis* position which the FRY found itself in vis-à-vis the United Nations over the period 1992 to 2000, or its position in relation to the Statute of the Court and the Genocide Convention. Furthermore, the letter of the Legal Counsel of the United Nations dated 8 December 2000 cannot have affected the FRY's position in relation to treaties.

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22. The Court remarks that it considers the submissions of Bosnia and Herzegovina on the subject of genocide to be limited to the territory of Bosnia and Herzegovina and not comprising the crimes committed on Serbian territory. The argument for that is that the latter belong to the internal affairs of Serbia and Montenegro and the Court lacks jurisdiction *rationae materiae* in this respect.

23. The crime of Genocide according to the Genocide Convention comprises the actual commission of an act described as genocide, and the intent to perform such an act (in terms of law, *actus reus* and *mens rea*).

24. In favour of the fulfilment of the definition of genocide provided in Articles 1 and 2 of the Genocide Convention, the Court finds that:

- "Group" (as in "members of the group") shall be understood as non-Serbs, that is, in particular, Croats and Bosnian Muslims. In this respect the Court is convinced that the large numbers and, in particular, the percentage of the aforementioned ethnicities of this number, of people killed (as stated in the oral

pleadings and confirmed by the witness statements rendered before this Court) are sufficient evidence of the fact that the group defined above has been affected in particular. An argument on intent shall follow.

- There can be no doubt about the fact that killings occurred, not only in Srebrenica, but also in the first phase of the war, including in the siege of the capital city of Bosnia and Herzegovina and at several other sites on the territory of Bosnia and Herzegovina, proved by a large number of witness statements and other evidence presented throughout the case before us and also in the proceedings before the ICTY. The same applies to evidence that confirms the actual violations of Article 2 lit. b – e.
- As a matter of fact, the ICTY -- being a recognized international Tribunal within the framework of the United Nations with the competence to convict individuals of committing international crimes, and, being required to apply particularly severe regulations on the assessment of evidence (“beyond reasonable doubt”), therefore, a court the findings of which are especially respected and also used by the ICJ as facts established in the course of fair trial -- has recognized the existence of “ethnic cleansing” in Srebrenica, while a General Assembly Resolution has made clear that “ethnic cleansing” is to be regarded as genocide.

25. These are the facts established by the evidence presented in course of the proceedings that we accept to fulfil the definition of genocide. Now on the issue of the element of intent:

- First, every doubt on whether a state can actually form intent has to be put aside by taking into consideration that while the Genocide Convention in its Article 2 does not refer to who actually commits genocide, persons or states, Articles 4, 5 and 6 mention persons – a slightly misleading statement, although, we note that a “person” as a legal term usually, in any event, comprises natural as well as legal persons, equally. Intent, however, has to be formed by a state’s organs that are competent to represent it. Nothing stands in the way of understanding the plans and policies laid out before the Serbian National Assembly by the President of the Serbs, Slobodan Milosevic, as a manifestation of the state’s expressly formed intent, whatever content it may have.
- As intent is especially hard to prove in any case, it has to be inferred from what we know has occurred. On the one hand, from the clearly expressed plans and policies of Serbia and Montenegro with regard to building a Greater Serbia by establishing new borders that, in fact, were intended to reach far into the territory of Bosnia and Herzegovina (meaning, in particular, the territory of today’s Republika Srpska), and on the other hand from the mere conduct of the VRS (the army of the Republika Srpska), e.g. destroying determinedly places of worship and historical archives (e.g. the Central Library in Sarajevo), which leaves no doubt about the character of these actions being directed at eliminating the cultural background of an ethnicity – amounting, even in itself, but certainly as a preparatory act aimed at the future commission of genocide, to genocide, in our opinion.
- Regarding the fact that, although countless killings were committed, obviously not each and every member of the group has been exterminated or been the target of intended extermination, we want to clarify that Article 2 of the Genocide Convention only requires “intent to destroy, in whole or *in part*, a national, ethnical, racial or religious group, as such” (emphasis added). This provision is clearly fulfilled.

26. The Court thus considers the requirement of intent to be fulfilled in all the aforementioned instances.

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27. Having decided that Serbia and Montenegro has violated its obligations under the Convention on the Prevention and Punishment of the Crime of Genocide and is responsible for its omissions in this regard, the Court regards submission No. 1 of the Applicant as dealt with and, subsequently, finds that the subsidiary submissions relating to breaches of the Genocide Convention that are based on other Article 2 lit. b - e do not require further consideration.

28. For the purposes of finding Serbia and Montenegro internationally responsible for the crimes of genocide, committed on the territory of Bosnia and Herzegovina, the Court should establish the existence of the two constitutive elements of the internationally wrongful act of Serbia and Montenegro (whether it is an act or

omission) – (i) the breach of international obligation of Serbia and Montenegro, and (ii) the attribution of such act or omission to the State.

29. Article 1 of the Genocide Convention provides that "The Contracting Parties confirm that genocide [...] is a crime under international law which they take to prevent and to punish". Moreover Article 6 of the Genocide Convention stipulates that "Persons charged with genocide or any of the other acts enumerated in the article III [of the Genocide Convention] shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction".

30. The provisions, contained in the two aforementioned articles oblige Serbia and Montenegro to (i) prevent the commission of the crime of genocide and (ii) to transfer the individuals, responsible for its commission to the International Criminal Tribunal on the Former Yugoslavia.

31. Due to failing of Serbia and Montenegro to prevent its citizens – members of the VRS army in their capacity of senior and middle-level officers and regular VRS army members, as well as members of the paramilitary groups and guerillas – who committed crimes on the territory of Bosnia and Herzegovina, including, but not limited to, crimes of genocide, from committing such crimes, Serbia and Montenegro ceased to fulfill its obligation to prevent the commission of the crime of genocide, as required by Article 1 of the Genocide Convention.

32. Since Serbia and Montenegro ceased to transfer individuals, accused of commission of the crime of genocide on the territory of Bosnia and Herzegovina to the International Criminal Tribunal of the former Yugoslavia, it failed to comply with the respective provision of Article 1 of the Genocide Convention.

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THE COURT,
composed as above,
after deliberation,
delivers the following Judgment:

For these reasons

THE COURT

Decides:

by 8 votes to 4,

IN FAVOUR:

ABRAHAM, BUERGENTHAL, KOOIJMANS, OWADA, PARRA-ARANGUREN, RANJEVA, REZEK, TOMKA;

AGAINST:

ELARABY, KOROMA, SIMMA, VERESHCHETIN

(a) the FRY succeeded to the Genocide Convention on 27 April 1992, and henceforth its accession in 2001 should be declared void *ab initio.*

(b) the FRY was not a newly independent State required to establish its status vis-à-vis multilateral treaties, but a successor State. Thus, it is bound by Article 9 of the Genocide Convention, i.e. the ground for jurisdiction in the present dispute accepted by the Court.

(c) The Court ascertains that the FRY has been bound since 1992 to assume all the legal obligations of the SFRY, including those flowing from the Genocide Convention. This conclusion is therefore consistent with:

- the FRY's declaration of succession in 1992;
- Article 34 of the Vienna Convention on Succession of States in respect of Treaties;
- the position taken by the FRY prior to 1 November 2000; and
- the Court's prior jurisprudence[2].

(d) The Court rules that Serbia and Montenegro has committed a breach of the Convention on the Prevention and Punishment of the Crime of Genocide committed genocide according to Article 2 of the said Convention.

(e) Since the international responsibility of Serbia and Montenegro for its violations of the Genocide Convention has thus been established, Bosnia and Herzegovina is entitled to receive compensation for damages suffered.

The Court advises the parties to settle the exact amount of compensation by way of arbitration or any other means of settlement they will agree on.

Following Paragraph 6c of Bosnia and Herzegovina's final submissions the Court reserves its right to adjudicate in this matter if agreement is not thus reached within one year from the date indicated on this judgment.

(f) The Court orders Serbia and Montenegro to provide guarantees and assurances to Bosnia and Herzegovina that it will not repeat the wrongful acts it has been found guilty of in the form of a binding unilateral declaration.

(g) Serbia and Montenegro has committed an internationally wrongful act, which resulted in the omission to prevent and punish the crime of genocide under the Convention on Prevention and Punishment of the Crime of Genocide.

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[2] *Ibid.*, pp. 617, 621, paras. 34 and 41.

Concurring opinion of the Honourable Judge Thomas Buergenthal:

First of all, I want to give my opinion on the issue of jurisdiction of the Court, as this was the most cumbersome point during the deliberations.

I voted in favour on the grounds of the automatic state succession according to the contemporary principles of international law. State succession is still a pending problem in the international law system, but as refers to this particular case, I strongly believe that the events in Bosnia and Herzegovina are an appalling example of a violation of Human Rights and suffering, which requires an international response. Therefore, even keeping in mind the negativists' theories that treaties of the predecessor state are non-binding, an exception to this rule must exist as referring to such a fundamental treaty like the Convention on the Prevention and Punishment of the Crime of Genocide.

On the second point, the judgment, I was very pleased to see that the conclusion that genocide occurred was reached easily and Serbia and Montenegro violated every provision inside Article 2 of the said Convention.

On the third point, I am of the opinion that Serbia and Montenegro should not only be held responsible for its omission to prevent or punish the crimes of genocide, but also for the active and intentional commission of such acts against, but not limited to, the citizens of Bosnia and Herzegovina.

Finally I would like to express my deep concern about the failure of the government of Serbia and Montenegro to put the military leaders, who are accused of crimes of genocide, on trial.

Concurring opinion of the Honourable Judge Ronny Abraham:

I agree with all three major issues discussed at the court.

However I want to underline the most controversial issue that occurred during the discussions of the Court.

At the beginning, I was against opening the question of jurisdiction. Since membership in the United Nations combined with the status of a party to the Statute and to the Genocide Convention represent the only basis on which jurisdiction over the FRY was assumed the disappearance of this assumption is clearly of such a nature to be a decisive factor regarding jurisdiction over the FRY and require a revision of the Judgements of 1996 and 2003.

I was convinced that whatever might have been the legal status of Yugoslavia at the time the Judgement was made, that State was, and still is bound by its own statements.

Yugoslavia admitted that it was a Member of the United Nations and a party to the Genocide Convention. Therefore Yugoslavia is a party to the Genocide Convention and the jurisdiction over it *ratione personal* is hereby justified. Accordingly in my opinion, the admission of the FRY to membership of the UN in November 2000 did not have legal implications for the judgment reached by the Court on this matter in 1996.

Concurring opinion of the Honourable Judge Hisashi Owada:

I appreciate the real challenge of intelligence experienced through the sessions of the Court and after all I am content with final judgement at its most. While the question of jurisdiction led to tough discussions within the Court, I am convinced not only by the political but also by the legal basis of the arguments supporting the jurisdiction of the Court relying on the Article 36 of the ICJ Statue bearing in mind the Vienna Convention on Succession of States in Respect of Treaties dated August 1978.

While the whole Court reached to a consensus on the genocide issues, regarding the arguments of intent held throughout the session and regarding the facts, I am also convinced that the definition of "genocide" as stated in Article 2 of the Convention on the Prevention and Punishment on the Crime of Genocide is fulfilled. Hence, the

genocide exists. I also support that there is not only omission but also *acts*, that is, actions not only passively but also actively taken by the government of Serbia and Montenegro against the group identified as Croats and Bosnian Muslims.

Thus, I stand in concurrence with the judgement of the Court except the issue of "acts", after all I believe that a strong and fair judgement has been established by the Court.

Concurring Opinion of the Honourable Judge Gonzalo Parra-Aranguren

1. For the purposes of the present case, I would like to draw my satisfaction on the approval of several issues that I have addressed to the Court within the framework of the deliberation process, especially concerning the jurisdictional matters and the definition of the crime of genocide. Unfortunately I still remained with the impression that the issue of State Responsibility was not approached in the most appropriate way by the Court.

2. Since Article 9 of the Genocide Convention does not exclude any form of Responsibility as claimed by the Respondent, it is clearly acknowledged that the State responsibility could be engaged in this case through:
   a) Application under execution of the convention;
   b) Commission of the acts inserted in article II of the Genocide Convention;
   c) Omissions, deriving from the rules relative to the international responsibility of the State.

3. In regard to the omission I do recall the recent case of *Congo v. Rwanda 2002*, in which the ICJ stated that the prevention of the genocide constitutes an obligation *erga omne*s, and that under no circumstances the perpetrator may escape to the consequences presented in article 21 of Draft Articles on State Responsibility. Furthermore the omission can be easily found in the position of the FRY in its lack of cooperation with the ICTY.

4. Notwithstanding the omission of the obligation to prevent and punish the commission of genocide, I am further convinced, basing on the evidence provided by the parties in dispute, that the acts delineated in Article II of the Genocide Convention occurred.

5. Besides the arguments provided by the Court in its present judgement relating to the link between the FRY and VRS, I would like to recall one specific point that I did not have opportunity to address in the course of the deliberation.

6. As it is stated in Article 3 of the Convention there are five elements that are equally punishable. There is no hierarchy among them. Even if the majority of the Court during the deliberation process found legal doubts in establishing an *effective control* of Belgrade during the period in which the acts were committed, the Respondent is nevertheless to be held responsible for such acts as complicity in genocide and for the *direction* as asserted in Article 8 of Draft Articles on State Responsibility.

7. The evidence for the latter statement is an undeniable fact that the FRY provided a direct aid in form of weapons, military equipment, funds, etc, to Republika Srpska and respectively to the VRS. In view of the evidence provided by Bosnia and Herzegovina relating to the period between 1992 and 1995 it is hard for me to accept that there was no tight link between the VRS and VJ, especially in the Drina River region.

8. Such facts as financing of the army, mode of promotion of the officials, and composition of the Serb delegation in the Dayton Agreement, which was nominated by the President of the FRY, amount to the recognition that Republika Srpska was *de facto* territorial subdivision of the FRY.

9. I don't see the necessity of proving that the Belgrade gave any direct order to commit genocide or instructed directly to do it, since Serbia and Montenegro itself does not deny that it participated actively in aiding and abetting the VRS, and *ipso facto* participated in complicity in genocide.

10. Therefore it is my position that due to the gravity of the crime of genocide and to certain evolution in terms of ICTY decisions, such a high threshold of the *Nicaragua Case* should not be interpreted in such a narrow approach and thus should be progressively challenged at the present stage of International Law.

Dissenting Opinion of the Honourable Judge Abdul G. Koroma

Judge Koroma is afraid that he cannot vote for the judgement issued by this Court because of a complete lack of competence (jurisdiction *ratione temporae et personae*) on the grounds of the Convention on the Prevention and Punishment of the crime of genocide.

The issue of jurisdiction must be analysed answering two questions: The first one consists of the determination of whether the FRY can be considered a successor State to the SFRY or not; the second one, only raised in case the answer to the first question is negative, requires the Court to determine whether or not an accession to the Convention on Genocide by the FRY has existed.

Regarding the issue on succession, it is easily noticeable that *tavola rasa* principle prevailed over the automatic succession one, since the UNGA Resolution 55/32 (2000) was passed, accepting the FRY as a new UN Member; and UNSC Resolution 777 (1992) denied the SFRY succession on UN-membership by the FRY. Thus, it can be understood that the FRY was not bound by the Convention on Genocide before its March 2001 accession to it.

Furthermore, answering the second question, as the Convention on Genocide, in Article 11, provides the only mechanisms accepted in it to accede to it –- accordingly to Article 15 of the 1969 Vienna Convention on Treaty Law, and more specifically in letter a) -- we must conclude that no legal obligation bound FRY under the Convention on Genocide, as long as none of the means in Article 11 were used before the FRY accession in 2001. The Court should have rejected the FRY's formal declaration of April 27 1992 as a mean of accession, since it does not constitute a formal accession.

That all would imply that, despite the fact that the conduct of the FRY drives to a tacit acceptance of the ICJ's jurisdiction, Serbia cannot be convicted on the grounds of the Convention on genocide.

Dissenting Opinion of the Honourable Judges Peter Tomka, Thomas Buergenthal, Hisashi Owada, and Bruno Simma

Introduction

1. It is our opinion that Serbia and Montenegro shall be held internationally responsible for the commission of the crime of genocide under the Convention on Prevention and Punishment of the Crime of Genocide[3]

Arguments:

2. In order to find a State internationally responsible, the Court needs to establish, whether an international wrongful act of that State occurred.

3. An internationally wrongful act of a State exists, when conduct consisting of an act or omission: (A) is attributable to the State under international law; and (B) constitutes a breach of an international obligation of the

[3] Convention on the Prevention and Punishment of the Crime of Genocide Approved and proposed for signature and ratification or accession by General Assembly resolution 260 A (III) of 9 December 1948 [hereinafter as Genocide Convention].

State.[4] The existence of the two abovementioned elements for finding a state responsible under the international law has been established by the Permanent Court of International Justice (PCIJ)[5] and on several occasions by the present Court as well.[6]

4. It is therefore necessary for this Court to establish the existence of both constitutive elements to find Serbia and Montenegro internationally responsible for the crime of genocide committed in Bosnia and Herzegovina.

5. It is a general principle of law that a state may only act through its agents and representatives[7].

6. A State shall be responsible for the actions of its organ[8], for the conduct of a person or entity "which is not an organ of a State but which is empowered by the law of that State to exercise elements of the governmental authority"[9] and the conduct of a private person may be imputed to the State when the person acts as an 'agent of the State', i.e., on the instructions of the State or under the State's direction or control[10].

Article 5 of DARSIWA

7. The conduct of any State organ (any person or entity) shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State.[11]

8. The reference to a "Sate organ" covers all the individuals or collective entities that make up the organization of the State and act on its behalf.[12] It goes without saying that the army is definitely considered to make up the organization of the State, and is an integrate part of the state and is definitely acting on behalf of the state.

9. Since this Court has once already established that the crime of genocide against the People and State of Bosnia and Herzegovina were committed by, among others by its own officials, agents, surrogates, or forces, including, but not limited to, JNA troops and JNA officers, such activities shall be attributable to Serbia and Montenegro under Article 4 of DARSIWA.

Article 8 of DARSIWA

10. Article 8 of DARSIWA stipulates that the conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct.

11. As the Court has provided in its Order of 8 April 1993, which was further on reaffirmed by its Order of 13 September 1993 (i) that Yugoslavia (Serbia and Montenegro) must immediately cease and desist from providing, directly or indirectly, any type of support - including training, weapons, arms, ammunition, supplies, assistance, finances, direction or any other form of support - to any nation, group, organization, movement, militia or individual engaged in or planning to engage in military or paramilitary activities in or against the People,

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[4] Articles on the Responsibility of States for Internationally Wrongful Acts [hereinafter as ARS], UNGAR 56/83, 2001, Art. 2.
[5] Phosphates in Morocco, Preliminary Objections, 1938, P.C.I.J., Series A/B, No. 74, p. 10.
[6] United States Diplomatic and Consular Staff in Tehran, I.C.J. Reports 1980, p. 29, para. 56. Cf. p. 41, para. 90. See also Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, I.C.J. Reports 1986, p. 14, at pp. 117-118, para. 226; Gabčíkovo-Nagymaros Project (Hungary/Slovakia), I.C.J. Reports 1997, p. 7, at p. 54, para. 78.
[7] PCIJ, 1923, *Questions relating to settlers of German Origin in Poland* case
[8] ARS, UNGAR 56/83, 2001, Art. 4.
[9] *Ibid.,*, Art. 5.
[10] *Ibid.,*, Art. 8.
[11] *Ibid.*, Art. 4.
[12] *Commentaries to the Draft Articles on Responsibility of States for Internationally Wrongful Acts*, in Report of the International Law Commission, Fifty-Third Session, U.N. GAOR, 56th Sess., Supp. No. 10, at 81, U.N. Doc. A/56/10 (2001) [hereinafter ILC, *Commentaries on ASR*].

State and Government of Bosnia and Herzegovina; (ii) that Yugoslavia (Serbia and Montenegro) itself must immediately cease and desist from any and all types of military or paramilitary activities by its own officials, agents, surrogates, or forces in or against the People, State and Government of Bosnia and Herzegovina, and from any other use or threat of force in its relations with Bosnia and Herzegovina.

12. Therefore, Serbia and Montenegro should be found internationally responsible for the commission of acts of genocide against the People and the State of Bosnia and Herzegovina by means of its own officials, agents, surrogates, or forces that were acting on the instructions of, or under the direction or control of the Republic of Serbia and Montenegro.

Opinion of the Honourable Judge Raymond Ranjeva

Firstly and most importantly, I have to state that the performance of the International Court of Justice in the cases involving the interpretation of the UN Convention on the Prevention and Punishment of the Crime of Genocide have caused my utmost concern.

The ruling in the *Legality of the Use of Force* judgements of 1999-2004, where the Court has taken one reasoning out of several possible ones to deny *locus standi*, has had substantially adverse effects on the case at hand. This is also reflected in the fact that the Court was for a long time split exactly in half on the question of jurisdiction. The field of state succession has proven to be very contentious still due to inconsistent state practice, even though a convention - namely the Vienna Convention on Succession of States in respect of Treaties 1978 - exists. The work of the International Court of Justice could be facilitated by a great margin if politics would pay more attention to public international law before rendering far-reaching decisions.

I have voted for jurisdiction in this case although I see the danger of allegations of bias, that the judgement was based on political reasons or victor's justice. Even if jurisdiction in this case is arguably existent, the Court has to keep in mind that *"justice must not only be done, but must be seen to be done."*

Furthermore, I want to comment on the issue of state responsibility. Even before being constituted as a convention, the ILC text on the Draft Articles on Responsibility of States for Internationally Wrongful Acts (DARSIWA) has already displayed its limited reach. So is it e.g. legally almost impossible to impute the actions of a puppet state to the state that *de facto* – through its support – ensures the survival of the puppet as long as there are no clear connections *de iure*. It is my belief that the rules on state responsibility were circumvented by actions taken specifically for this purpose by officials in both Serbia and Montenegro and the so-called Republika Srpska. However, on the basis of the wording of the DARSIWA, the evidence produced by Bosnia and Herzegovina in favour of an attribution of the actions of the VRS to Serbia and Montenegro was not sufficient to convince the majority of judges, including myself. In the light of the reasoning in the *Military and Paramilitary activities in and against Nicaragua* case, no extensive interpretation of the facts seemed adequate.

Opinion of the Honourable Judge Francisco Rezek

1. Regarding the issue of Article 8 of DARSIWA, I do not see enough evidence for instructions of, or under the direction or control of, the former Republic of Yugoslavia. In contrary I want to point out that there is much evidence for independent conduct of especially the VRS under the command of General R. Mladic. The fact that the former Yugoslavian government provided armed forces to the convicted militants shall only constitute an omission, even if Serbian Citizen were actively participating in genocide crimes. In this regard I emphasize especially the former judgment of the Court in the Nicaragua conflict, concerning the military and paramilitary activities in and against Nicaragua.

2. Furthermore the Draft Convention on State Liability has to be interpreted narrowly, especially in regard of Article 8.

3. Regarding the general applicability of the Convention on the Prevention and Punishment of the Crime of Genocide I want to point out that the mere nature of the Convention delivers in first place the right for individuals to rely upon it. All states being parties to the Convention agree in first place on preventing and punishing all crimes of genocide in their own authority. Only Article 9, where Serbia and Montenegro among other states currently has a reservation on, provides for the submission of disputes to the International Court of Justice, which does not at all constitute full state liability according to the Convention.

Concurring Opinion of the Honourable Judge Pieter H. Kooijmans

1. Jurisdiction

a) The first and strongest argument for the Court's jurisdiction is Article 34 of the Vienna Convention on Succession of States in respect of Treaties that states that the treaties to which the predecessor state was a party continue to be in force for the successor states unless the states concerned otherwise agree. Until 2001 Serbia and Montenegro considered itself to be bound by the Genocide-Convention.
b) Another argument for in favour of jurisdiction is the fact that Serbia and Montenegro failed to object to the Courts decision of 1993, in which the Court considered itself to be competent for this case.

2. Genocide

There can be no doubt that thousands of innocent civilians have been tortured, raped and killed solely on account of belonging to a group, and have had conditions imposed on them that are calculated to bring about the physical destruction, in whole or in part, of the group to which they belong. That is, the requirements of the Genocide-Convention that genocide took place are fulfilled.

3. State Responsibility

In order to attribute genocide to Serbia and Montenegro I'd like to refer to the Order of the Court for Provisional Measures of April 8, 1993, in which the Court found that Serbia and Montenegro had an obligation to prevent genocide and that Serbia and Montenegro should prevent military, paramilitary or irregular armed units under its control from committing genocide, conspiring to commit or complicity in genocide. So it is evident that the Court found Serbia and Montenegro to have control over the troops committing genocide.

For these reasons I find Serbia and Montenegro to be held responsible for its violation of the Genocide-Convention.

Dissenting Opinion of the Honourable Judges Nabil Elaraby, Bruno Simma, and Vladlen S. Vereshchetin

Introduction

1. We have noted the long and heated discussions about the issue of jurisdiction, and we are guided by the aim to establish jurisdiction of this Court on solid grounds, further incontestable and beyond serious doubt about their legal quality.

   We regard this aim as not achieved to the full extent in the past, since new aspects of the issue have been brought to the Court's attention at various stages of the proceedings, including, after a Judgment on the issue dated 11 July 1996.

   We have considered, discussed and weighed the respective factors, more than once, all arguments presented by the parties to the dispute, after which we have come to the conclusion that this Court has

no right to assume jurisdiction to decide upon the case presented by Bosnia-Herzegovina against Serbia and Montenegro.

Arguments:

Membership

2. Due to the lack of membership of the Federal Republic of Yugoslavia (hereinafter referred to as FRY, now Serbia and Montenegro) in the United Nations in the period of 1992-2000, there is no access for the Respondent to this Court at the relevant time.

3. Access to this Court means that this Court is open to a state to address it and bring before it any international dispute within the competence of the Court. As the Court is the judicial organ of the United Nations (hereinafter UN) and its Statute an integral part of the UN-Charter, membership of the UN is generally required in order to be party to the Statute (Article 35, Paragrahp 1).

4. After the Socialist Federal Republic of Yugoslavia (SFRY) ceased to exist in 1991, the FRY claimed that it continued the legal personality of its predecessor state. This claim was not accepted by the international community, instead, it was suggested that the FRY should apply for membership in the UN (Security Council Resolution 777 (1992), General Assembly Resolution 47/1 of 22 September 1992).

   The FRY maintained its position at all times, until 8 November 2000 when the FRY was admitted to the UN – however, as a new (sic!) state. Even if there had been difficulties concerning the determination of the FRY's status – which was an intended effect of the policy that the international community at that time was pursuing – this newly obtained membership is clear evidence of the fact that before 2000 the FRY was certainly not considered a member of the UN.

   The new membership came too late for the purposes of jurisdiction, though, if we bear in mind that the date of the filing of the Application by Bosnia Herzegovina – 21 March 1993 – is the point in time relevant to determine the actual access of the Respondent to the Court, while, nevertheless, this is without any prejudice to the question of accepting the Court's jurisdiction by a valid and express declaration.

   This condition was reaffirmed by Security Council resolution 777 (1992) of 19 September 1992 that reads:

   "The Security Council,

   (omissis)

   Considering that the State formerly known as the Socialist Federal Republic of Yugoslavia has ceased to exist,

   Recalling in particular resolution 757 (1992) which notes that 'the claim by the Federal Republic of Yugoslavia (Serbia and Montenegro) to continue automatically the membership of the former Socialist Federal Republic of Yugoslavia in the United Nations has not been generally accepted',

   1. Considers that the Federal Republic of Yugoslavia (Serbia and Montenegro) cannot continue automatically the membership of the former Socialist Federal Republic of Yugoslavia in the United Nations; and therefore recommends to the General Assembly that it decide that the Federal Republic of Yugoslavia (Serbia and Montenegro) should apply for membership in the United Nations and that it shall not participate in the work of the General Assembly;

   (omissis)"

Succession

5. No succession to treaty obligations results in not being bound by formerly concluded treaties throughout the whole period of 1992-2000. Even though jurisdiction over "other states" (not parties to the Statute) on the grounds of "special provisions contained in treaties in force" – as provided in Article 35 Paragraph 2 of the Statute of the Court – makes clear that membership in the United Nations and jurisdiction based on treaty law are different matters that are not necessarily connected and, therefore, have to be judged separately, the question is, whether the FRY had succeeded to its predecessor's treaty obligations, i.e. to the Convention on the Prevention and Punishment of the Crime of Genocide (hereinafter Genocide Convention).

   We have already established above that the international community did not recognize continuity of the legal personality. As a matter of fact, after obtaining membership, the FRY acceded to the Genocide Convention – but only in 2001. The list of parties to the convention gives evidence of the date of accession, and of the mode of accepting the rights and obligations of the treaty, namely, accession.

   What becomes clear is that a state that has acceded to the convention in 2001 can not possibly have been bound by it by succession – otherwise, already being a party to it, there would be no point in acceding to its obligations *again*. It follows that prior to expressing its consent to be bound in 2001, the FRY was only bound by customary international law – including customary provisions on genocide. Thus, in conclusion, we must not forget that the FRY was, of course, never entitled to commit acts of genocide. However, the issue of jurisdiction on the grounds of an Article of the Convention on Genocide cannot be upheld with customary international law as a basis, since it is a special treaty provision, one that cannot be regarded as a provision that has become custom.

   As a final remark, we would like to make clear that there is no automatic succession to treaty obligations whatsoever, since Article 11 of the Vienna Convention on the Law of Treaties enumerates the ways a state can express its consent to be bound by a treaty – it has to be express, clear and formal consent.

Article 11 of the Genocide Convention

6. Article 11 of the Genocide Convention calls for an invitation to sign it as a non-member of the UN, which has never been offered to the FRY. As a matter of fact, the Genocide Convention provides a possibility to become a party to it despite being a non-member of the UN: by signing it upon invitation of the General Assembly (Article 11). This being the last ground for jurisdiction of the Court in the present case, we finish our reasoning by observing that there has never been any invitation of this particular kind offered to the FRY by the General Assembly or any other organ of the UN.

The case of Serbia Montenegro vs. NATO Allies

7. The judgment of this very Court in 2004, concerning the cases on *Legality of the Use of Force* by Serbia and Montenegro against the NATO Allies, denied jurisdiction for Serbia and Montenegro. Only two years ago the ICJ decided upon its jurisdiction with regard to Serbia and Montenegro in a case filed in 1999 (e.g. ICJ 15 Dec 2004, General List N.113, Case concerning legality of use of force Serbia Montenegro v UK), when Serbia Montenegro (hereinafter SM) still had not obtained membership in the UN – it did so by denying jurisdiction.

   Even though the ICJ is not bound by its own decisions, there are no reasons present to deviate from this Court decisions concerning the jurisdiction of ICJ based on UN membership of SM.

Conclusion

8. Furthermore, the ICJ is in no way a political forum and its powers must not be abused, nor must its severity in scrutinizing the legal circumstances of a case be sacrificed just in order to achieve what the public might regard as a satisfying judgment, namely, the conviction of SM. Therefore, special care has to be shown in dealing with jurisdiction issues. Drawing the conclusion that the Court has jurisdiction over Serbia and Montenegro despite the counter-arguments stated above would, to our minds, amount to applying a double-standard regarding its position: On the one hand, in 1992 we deny it the rights of a full member for 8 years, which includes denying the right to bring claims before the Court, on the other hand, we insist on its obligations as a full member and consider it justifiable to raise claims against the state. That is not acceptable.

9. *A fortiori*, our opinion should not be considered a condoning of the behaviour of either side in the bloody conflict on the territory of the former Yugoslavia.

10. For the above-mentioned reasons, we do not agree with the legal arguments of the majority of this Court.