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THE INTERNATIONAL COURT OF JUSTICE MUDDLES JURISDICTION IN YUGOSLAV GENOCIDE CASE

*Richard Graving**

I. INTRODUCTION

The International Court of Justice (ICJ or Court) decided in February 2007 that it had jurisdiction to adjudicate the claim brought by Bosnia and Herzegovina (Bosnia) alleging that Yugoslavia had violated the Genocide Convention (Convention).¹ The Court then ruled that Serbia (the final name of

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1. Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 102 Stat. 3045, 78 U.N.T.S. 277 [hereinafter Genocide Convention] (entered into force Jan. 12, 1951). The first three of its nineteen articles provide:

Article I

The Contracting Parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish.

Article II

In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical racial or religious group, as such:

- (a) Killing members of the group;
- (b) Causing serious bodily or mental harm to members of the group;
- (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- (d) Imposing measures intended to prevent births with the group;
- (e) Forcibly transferring children of the group to another group.

Article III

The following acts shall be punishable:

- (a) Genocide;
- (b) Conspiracy to commit genocide;
- (c) Direct and public incitement to commit genocide;

the respondent) had not committed genocide, incited or conspired to commit genocide, nor had it been complicit in genocide. However, the Court did find that Serbia had violated its obligations under the Genocide Convention to prevent genocide in the Bosnian community of Srebrenica in 1995, and had also violated the Genocide Convention by failing to cooperate with the International Criminal Tribunal for the former Yugoslavia, including failure to render Ratko Mladić for trial by that tribunal. The Court also ruled that Serbia should take steps to punish the acts of genocide committed and that the Court's findings constituted sufficient satisfaction for Bosnia and payment of compensation by Serbia would not be appropriate.²

The case had been pending and active since 1993.³ The original Respondent named was "the Federal Republic of Yugoslavia" (FRY), the self-declared continuation in April 1992 of "the Socialist Federal Republic of Yugoslavia" (SFRY).⁴ The FRY renamed itself "Serbia and Montenegro" (Serbia-Montenegro) in February 2003,⁵ and then became simply "Serbia" when Montenegro declared independence in 2006.⁶ The final Judgment rendered in 2007 was solely against "Serbia."⁷

This commentary focuses on the Court's consideration and determination of its jurisdiction *ratione personae*, that is, (a) the right of access to the Court by both parties and (b) consent by both parties to the Court's jurisdiction, issues to which it devoted a substantial segment of its Judgment. Its landmark substantive rulings on genocide are left for consideration elsewhere. There will be no dearth of commentary on the impact of those substantive rulings for the development of humanitarian law and the international law of human rights.⁸

(d) Attempt to commit genocide;

(e) Complicity in genocide.

2. Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Mont.), 2007 I.C.J. Gen. List 91, para. 471 (Feb. 26) [hereinafter Genocide Judgment 2007].

3. Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Yugo. (Serb. & Mont.)), April 1, 1993 [hereinafter Genocide Order Apr. 1993]; see MICHAEL P. SCHARF, BALKAN JUSTICE, THE STORY BEHIND THE FIRST INTERNATIONAL WAR CRIMES TRIAL SINCE NUREMBERG, 25-30 (Carolina Academic Press 1997) (For a brief account of the human rights catastrophe on which the case was based).

4. Genocide Judgment 2007, *supra* note 2, paras. 1, 67. The Court employed the term "continuator" to describe this claimed status, thus distinguishing it from "successor." *Id.* at para. 80. The distinction lies at the heart of the jurisdictional question faced by the Court.

5. *Id.* at para. 32.

6. *Id.* at para. 67.

7. *Id.* at para. 77.

8. See e.g., Jason Morgan-Foster & Pierre-Olivier Savoie, *World Court Finds Serbia Responsible for*

In her statement to the press following issuance of the Judgment, Judge Rosalyn Higgins, President of the Court, described the case as “highly complex” and “extremely fact-intensive.”⁹ These points are reflected in the aggregate length of the Judgment, the Separate Opinions, the Declarations, the Dissenting Opinions, and the Separate Opinions (excluding translations): 419 pages.¹⁰ One Separate Opinion was ninety pages.¹¹ Another Judge stated that no other case in the Court’s history had generated such extensive written pleadings.¹² Preceding it in earlier phases of the case were two Orders for Provisional Measures (1993), a Judgment on Preliminary Objections (1996), and a Judgment on Application for Revision (2003).¹³ Not included in that formidable archive are the Court’s Order and Judgment in a second case, the 1999 claim by the FRY against ten NATO members for their use of force in Kosovo (Legality of Use of Force (2004), in which the Judgment of the Court, rejecting jurisdiction, appeared to be inconsistent with its Judgments affirming jurisdiction in the earlier phases of the Genocide case.¹⁴ In fact, the apparent inconsistency regarding essentially identical facts led many to anticipate the Court’s Judgment in the Genocide case

Breaches of Genocide Convention, but Not Liable for Committing Genocide, AM. SOC. INT’L L (ASIL INSIGHTS. Washinton D.C), <http://asil.org/insigdhts/2007/03/insights070403.html> (last visited Nov. 2, 2007); *Burdens of Proof*, NOTES FROM THE PRESIDENT, (AM. SOC. INT’L L., Washington D.C), available at, <http://www.asil.org/newsletter/president/pres070625.html> (last visited Nov. 2, 2007).

9. Judge Rosalyn Higgins, President, Int’l Court of Justice, Press Statement on the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro) (Feb. 26, 2007) [hereinafter Higgins Statement] available at <http://www.icj-cij.org/court/index.php?pr=1898&pt=3&p1=1&p2=3&p3=1> (last visited Nov. 2, 2007).

10. See generally Genocide Judgment 2007, *supra* note 2.

11. See generally *id.* (separate opinion of Judge Kreća).

12. *Id.* at para. 72, (separate opinion of Judge Tomka).

13. Genocide Order Apr. 1993, *supra* note 3; Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Yugo. (Serb. & Mont.)), 1993 I.C.J. 325 (Sept. 13) (Further Requests for the Indication of Provisional Measures Order of 13 Sept.) [hereinafter Genocide Order Sept. 1993]; Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Yugo.), 1996 I.C.J. 595 (Judgment of July 11) [hereinafter Genocide Judgment 1996]; Application for Revision of the Judgment of 11 July 1996 in the Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Yugo.), (Yugo. v. Bosn. & Herz.), 2003 I.C.J. 7 (Feb. 3) [hereinafter Genocide Revision Judgment 2003].

14. Legality of Use of Force (Yugo. v. Belg.), 1999 I.C.J. 124, 139 (June 2) (Request for the Indication of Provisional Measures Order of June 2) [hereinafter NATO Order 1999]; Case Concerning Legality of Use of Force (Serb. & Mont. v. Belg.) 2004 I.C.J. 279, 328 (Dec. 15) [hereinafter NATO Judgment 2004].

with considerable interest and even trepidation.¹⁵ Could the Court possibly “square the circle”? Did it need to?

In taking the unusual step of addressing the press in a Presidential Statement, Judge Higgins was not only conscious of the concerns about the Court’s consistency, but also of its interest in promoting a reputation for judicial integrity and relevance. She noted “[t]hat this [was] the first legal case in which allegations of genocide [had] been made by one State against another.”¹⁶ She noted also that for the parties the results were “mixed,” adding somewhat defensively that this did not indicate a “political compromise.”¹⁷ She stated the Court “[had] meticulously applied the law to each and every one of the issues before it.”¹⁸ She was understandably mindful of the criticisms that had been directed against the Court for some of its past decisions, such as the South-West Africa Cases (1966), where it appeared to some commentators that the Court had relied upon cramped reasoning to avoid its responsibilities and accommodate what it might have perceived as political convenience.¹⁹

Partisan reactions to the Court’s Genocide Judgment were immediate.²⁰ Bosnia in particular complained that the Court had required too high a standard of proof for Serbo-Montenegrin involvement, not only in Srebrenica, but in other parts of Bosnia as well.²¹ A leading American academic disparaged the decision as “Slobodon Milošević’s Last Waltz.”²² The Court’s labored treatment of its jurisdiction, however, did not attract the attention it deserved, although it is understandable in view of the rather arcane nature of the issue.²³ This issue attracts more academic than political interest, which is not to deny its critical significance for future cases and international law in general. It was an integral part of the Court’s controversial “approach.” It is the aim of this commentary to show that the Court’s approach was erroneous.

15. See Christine Gray, *Legality of Use of Force (Serb. & Mont. v. Belg.) (Serb. & Mont. v. Can.) (Serb. & Mont. v. Fr.) (Serb. & Mont. v. F.R.G.) (Serb. & Mont. v. Italy) (Serb. & Mont. v. Neth.) (Serb. & Mont. v. Port.) (Serb. & Mont. v. UK): Preliminary Objections. Judgments of 15 December 2004*, 54 INT’L & COMP. L. Q. 787 (2005).

16. Higgins Statement, *supra* note 9.

17. *Id.*

18. *Id.*

19. See South West Africa Cases (Eth. v. S. Afr.; Liber. v. S. Afr.) (Second Phase), 1966 I.C.J. 6, 325 (July 18); see also Leo Gross, *Conclusions, 2 THE FUTURE OF THE INTERNATIONAL COURT OF JUSTICE* 747 (Leo Gross ed., 1976) (describing the decision as the “nadir” of the Court’s fortunes); but see Antonio F. Perez, *The Passive Virtues and the World Court: Pro-Dialogic Abstention by the International Court of Justice*, 18 MICH. J. INT’L L. 399, 410-15 (1997) (defending as prudent the Court’s refusal to rule on the merits).

20. See *Where the Past is Another Country*, ECONOMIST, Mar. 3, 2007, at 56.

21. Ruth Wedgwood, *Slobodon Milosevic’s Last Waltz*, N.Y. TIMES, Mar. 12, 2007, at A23.

22. *Id.*

23. See *id.*; see also Burdens of Proof, *supra* note 8, at 1.

The Court's ruling on jurisdiction involves a multitude of issues, including the existence of States, secession of States, succession of States, adherence to treaties, membership in the United Nations (UN), access to the Court, scope of review of judgments, *res judicata*, waiver, estoppel, and good faith. Before examining the Court's rulings scene-by-scene, it is necessary to review the political drama surrounding the break-up of the SFRY that began in 1990.

II. POST-1990 POLITICAL CHANGES IN THE BALKANS

"The Socialist Federal Republic of Yugoslavia (SFRY, a founding member of the United Nations (1945)), consisted of six republics (Slovenia, Croatia, Serbia, Bosnia-Herzegovina, Montenegro, and Macedonia) and two autonomous regions (Kosovo and Vojvodina)" when the well-known events serving as the basis of the alleged genocide began.²⁴ The nation's fragmentation began when Croatia, Macedonia and Slovenia declared independence in 1991, and Bosnia did likewise in 1992.²⁵ Bosnia, Croatia, and Slovenia were also admitted to the UN in 1992, and Macedonia was admitted in 1993.²⁶ Serbia and Montenegro declared themselves in 1992 to be the Federal Republic of Yugoslavia (FRY), the continuator of the SFRY, not simply its successor.²⁷ Serbia and Montenegro contained forty-five percent of the SFRY's population and forty percent of its land mass as well as its capital, Belgrade.²⁸ Thus, four of the six constituent components of the SFRY had seceded and two remained as a unit in what came to be known informally as "rump Yugoslavia." In 2006, Montenegro declared its independence, leaving Serbia as the only remaining entity of the original SFRY.²⁹

The SFRY became a party to the 1948 Genocide Convention in 1950, and the five seceding States became new parties on the dates of their respective declarations of independence, by succession, or voluntary accession.³⁰

24. Marc Weller, *The International Response to the Dissolution of the Socialist Federal Republic of Yugoslavia*, 86 AM. J. INT'L. L. 569, 569 (1992).

25. *Id.* at 570, 593, 594 at n.150; HAGUE ACADEMY OF INTERNATIONAL LAW, STATE SUCCESSION: CODIFICATION TESTED AGAINST THE FACTS 276-77 (Pierre Michel Eisemann & Marti Koskeniemi eds., 2000) [hereinafter HAGUE ACADEMY SUCCESSION].

26. United Nations Member States, Note on Yugoslavia, www.un.org.memberss/growth/shtml (last visited Nov. 6, 2007).

27. Genocide Judgment 2007, *supra* note 2, para. 90.

28. Michael P. Scharf, *Musical Chairs: The Dissolution of States and Membership in the United Nations*, 28 CORNELL INT'L L.J. 29, 53 (1995).

29. Genocide Judgment 2007, *supra* note 2, para. 67.

30. *Id.* at para. 80; *see* Vienna Convention on succession of States in respect of Treaties, Aug. 23, 1978, 1946 U.N.T.S. 3 [hereinafter Vienna Succession Treaty], *available at*

Volumes have been written about the effects of political change on the rights and responsibilities of States that are parties to multilateral treaties (including the UN Charter).³¹ These political changes include change in government or administration, whether effected constitutionally or otherwise; geographical expansion of a State; geographical diminution of a State resulting from secession or independence (including de-colonization); the disappearance of a State and the creation of an entirely new State.³²

The jurisdictional problem in the Genocide case originates from the fact that neither Bosnia nor Serbia existed in their present forms when the SFRY became a founding member of the UN (1945) or when the SFRY became a party to the Genocide Convention (1950).³³ To what extent did the rights and liabilities under these two treaties extend to the time of filing the Bosnian Application to the Court (1993), and, thereafter, to the time of the Judgment on the merits in 2007? Access to the Court and its jurisdiction to adjudicate the dispute depended upon the answer. The point of departure for consideration of the problem lies in the international law of state succession.

III. STATE SUCCESSION

To describe as *law* the practice of States with respect to continuity and succession to treaties may be a misnomer. Such problems arise in contexts that are both varied and highly politicized, and are characterized by solutions that respond more to practicalities than to theoretical formulations.³⁴ The leading

http://untreaty.un.org/ilc/texts/instruments/english/conventions/3_2_1978.pdf; and Multilateral Treaties Deposited with the Secretary-General, available at <http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterXXIII/treaty2.asp>.

31. LORI F. DAMROSCH ET AL., INTERNATIONAL LAW CASES AND MATERIALS 568-89 (4th ed. 2001); MALCOLM N. SHAW, INTERNATIONAL LAW 861-913 (5th ed. 2005); see *infra* notes 32, 34.

32. DAVID J. BEDERMAN, INTERNATIONAL LAW FRAMEWORKS 60-62 (2d ed. 2006); ANTHONY D'AMATO & JENNIFER ABBASSI, INTERNATIONAL LAW TODAY 90-96 (2006) (setting forth excerpts from JAMES CRAWFORD, THE CREATION OF STATES IN INTERNATIONAL LAW (1st ed. 1979); MARK W. JANIS, AN INTRODUCTION TO INTERNATIONAL LAW 193-97 (4th ed. 2003); STEPHEN C. MCCAFFREY, UNDERSTANDING INTERNATIONAL LAW 150-55 (2006); SEAN D. MURPHY, PRINCIPLES OF INTERNATIONAL LAW 32-35 (2006); Detlev F. Vagts, *State Succession: The Codifiers' View*, 33 VA. J. INT'L L. 275 (1993).

33. Genocide Judgment 2007, *supra* note 2, at para. 80.

34. See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 208 reporter's note 1 (1987) (describing the practice of succession as to states as uncertain and confused); IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 622 (6th ed. 2003) (stating that the subject is one of great uncertainty and controversy); BARRY E. CARTER ET AL., INTERNATIONAL LAW 466 (5th ed. 2007) (describing the subject as uncertain and subject to considerable doubt); COUNCIL OF EUROPE, STATE PRACTICE REGARDING STATE SUCCESSION AND ISSUES OF RECOGNITION: THE PILOT PROJECT OF THE COUNCIL OF EUROPE 146 (Jan Klabbers, Martti Koskenniemi, Olivier Ribbelink & Andreas Zimmermann eds., 1999) (stating, "that hard and fast

authority in these matters concluded, after a lifetime of study and exhaustive exposition, that the question was not suitable for codification.³⁵ It lay at the junction of international law and international relations. “The collapse of the Soviet Union, the disintegration of [the SFRY], the binary fission of Czechoslovakia and the extinction of East Germany [have all] stretch[ed] the limits of [traditional] theory about state succession to multilateral treaties.”³⁶ The solutions have been signally of the one-off variety.

The 1978 Vienna Convention on the Succession of States in respect of Treaties (Vienna Succession Treaty), with only twenty-one adherents as of 2007, may be taken as the best attempt to organize an area of practice that is “uncertain and confused.”³⁷ It applies (a) universal or automatic succession to new States that result from secession or separation of territory³⁸ and (b) the “clean slate” principle to newly independent States resulting from “decolonization.”³⁹ The latter may opt in by notification, but need not do so.⁴⁰ Not covered by the Vienna Succession Treaty is the entity that experiences merely a change in government, whether by legal or revolutionary means.⁴¹ It is a “continuator,” not a “successor.” The same is true of the remnants of a state after a portion of its territory has succeeded to form a new state.⁴²

Application of this scheme to the Genocide case would seem to be simple: Serbia as the continuator State and the other five former subdivisions of the

rules are difficult to discern”); PETER MALANCZUK, *AKEHURST’S MODERN INTRODUCTION TO INTERNATIONAL LAW* 161 (7th ed. 1997) (declaring that the law on state succession is aptly described as chaotic); 2 DANIEL P. O’CONNELL, *STATE SUCCESSION IN MUNICIPAL LAW AND INTERNATIONAL LAW* 24 (1967) (concluding that the variety of problems raised and the complicating factors present in concrete cases inhibit the elaboration of a unitary principle); 1 OPPENHEIM’S *INTERNATIONAL LAW* 209 (Robert Jennings & Arthur Watts eds., 9th ed. 1992) (stating that the subject is uncertain and controversial); Matthew C.R. Craven, *The Problem of State Succession and the Identify of States under International Law*, 9 *EUR. J. INT’L L.* 142, 142 (1998) (declaring the subject to be largely confused and resistant to simple exposition); Geoffrey R. Watson, *The Law of State Succession*, *CONTEMPORARY PRACTICE OF PUBLIC INTERNATIONAL LAW* 115, 121 (1997) (concluding that states resolve succession questions on practical rather than theoretical bases).

35. Daniel P. O’Connell, *Reflections on the State Succession Convention*, 39 *ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT* 725, 726 (1979).

36. Richard J. Graving, *Status of the New York Arbitration Convention: Some Gaps in Coverage but New Acceptances Confirm its Vitality*, 10 *FOREIGN INV. L. J.* 1, 19 (1995).

37. See generally Vienna Succession Treaty, *supra* note 30.

38. *Id.* art. 15(b).

39. See *id.* art. 16; ANTONIO CASSESE, *INTERNATIONAL LAW* 78-79 (2d ed. 2005).

40. Vienna Succession Treaty, *supra* note 30, at art. 17.

41. See *id.* art. 2(1)(b) (noting that the definition in effect excluding regime change from concept of succession); JAMES CRAWFORD, *THE CREATION OF STATES IN INTERNATIONAL LAW* 714 (2d ed. 2006) (explaining that this practice is in accord with customary international law).

42. Vienna Succession Treaty, *supra* note 30, at art. 35.

SFRY as successor States would automatically be bound by the Genocide Convention.⁴³ This is especially true of a human rights convention enjoying *jus cogens/erga omnes* status.⁴⁴ However, membership in the UN is a different matter; it is not covered by the Vienna Succession Treaty.⁴⁵ The practice here can be described only as chaotic. The UN makes its own rules as it goes along. There is no pattern; it depends very much on political "context."⁴⁶ Yet membership in the UN by the FRY, entitling it to access to the Court, as will be seen below, is a critical predicate for recognizing its status as a party to the Genocide Convention. The UN's treatment of this issue was, at best, incoherent. The Judgment in the Genocide case quoted with obvious approval the overly generous term it had applied in an earlier decision: "confused."⁴⁷ The saga of the World Community's confused reaction to the Yugoslav disintegration follows.

IV. INDECISION, AMBIGUITY, AND CONFUSION AS A RESPONSE

The response of the UN, the European Union (EU), the FRY itself, and the ICJ, both in earlier phases of the Genocide case and in the related NATO case, produced a juridical imbroglio of impressive proportion.

Clearly unhappy with the SFRY's military and political "deportment" during its fragmentation, the UN Security Council and General Assembly barred the rump Yugoslavia from participation in UN deliberations in 1992, but did not, in the published opinion of the UN's Under-Secretary-General and Legal Counsel, expel it or suspend its membership.⁴⁸ At the same time, it invited

43. CRAWFORD, *supra* note 41, at 33-35; OPPENHEIM, *supra* note 34, at 234-36; Craven, *supra* note 34, at 160; Oscar Schachter, *State Succession: The Once and Future Law*, 33 VA. J. INT'L L. 253, 254-55 (1993); Vagts, *supra* note 32, at 281 ("[T]he community of states has adamantly ruled out the argument that a state has escaped any of its treaty obligations by virtue of a change of regime.").

44. CASSESE, *supra* note 39, at 78; SHAW, *supra* note 31, at 885-89; Menno T. Kamminga, *State Succession in Respect of Human Rights Treaties*, 7 EUR. J. INT'L L. 469, 472-78, 484 (1996); Rein Mullerson, *The Continuity and Succession of States, by Reference to the Former USSR and Yugoslavia*, 42 INT'L & COMP. L. Q. 473, 490-93, (1993); Schachter, *supra* note 43, at 259.

45. See Vienna Succession Treaty, *supra* note 30, art. 4; KONRAD G. BÜHLER, STATE SUCCESSION AND MEMBERSHIP IN INTERNATIONAL ORGANIZATIONS 30-31 (2001).

46. CRAWFORD, *supra* note 41, at 175-76, 189-90; OPPENHEIM, *supra* note 34, at 223 (one example is the UN's procedure in admitting states that were previously part of India); see also Scharf, *supra* note 28, at 67-69 (setting forth one attempt at rationalizing these results).

47. Genocide Judgment 2007, *supra* note 2, para. 97.

48. Genocide Judgment 2007, *supra* note 2, paras. 92-93, 95; S.C. Res. 777, ¶ 1, U.N. Doc. S/RES/777 (Sept. 19, 1992) (copies of S.C. Res. 777, G.A. Res. 47/1 U.N. Doc. A/RES/47/1 (Sept. 22, 1992), and the legal opinions of Under-Secretary-General and Legal Counsel Carl-August Fleischhauer are reproduced *infra* as Appendices A, B and C, respectively).

“Yugoslavia” to apply for membership.⁴⁹ This left the rump Yugoslavia, which continued to insist it was the continuator of the SFRY, in a kind of oxymoronic limbo. Notwithstanding the schizophrenic posture of the UN’s resolutions, the Secretariat continued to list “Yugoslavia” as a member of the UN, the Yugoslav flag continued to fly at UN headquarters in New York, and the FRY was still subject to allocations for the UN budget.⁵⁰

In contrast to that of the UN, and to the dismay of the FRY, the response of the EU was unequivocal. The Arbitration Commission of the EU Conference for Peace in Yugoslavia (Badinter Commission) declared in 1992 that “old” Yugoslavia had been dissolved and that the FRY was a “new” State.⁵¹ The International Monetary Fund (IMF), the International Bank for Reconstruction and Development (World Bank), and the U.S. Department of State followed suit: the SFRY was dead.⁵² This alone did not mean that the Genocide Convention would not bind the “new” Yugoslavia. It might have succeeded by automatic succession or by voluntary adhesion. In fact, when it had declared that it was a continuator (and not just a successor) it had, after all, declared its intention to honor all treaties of the SFRY, including the Genocide Convention.⁵³ Bosnia, for its part, had declared its commitment to be bound by the Genocide Convention as a successor to the SFRY.⁵⁴ Thus, it appeared that Bosnia could bring its claim against the FRY under the terms of Article IX of the Genocide Convention, which provides:

Disputes between the Contracting Parties relating to the interpretation, application or fulfillment of the present Convention, including those relating to the responsibility of a State for genocide or for any of the other acts enumerated in article III, shall be submitted to the International Court of Justice at the request of any of the parties to the dispute.⁵⁵

Consequently, this was the posture of the case when Bosnia filed its claim in March 1993, and at the same time, applied for the indication of provisional measures against the FRY while the case was pending.

49. Genocide Judgment 2007, *supra* note 2, para. 95; S.C. Res. 777, ¶ 1, *supra* note 48; G.A. Res. 47/1, *supra* note 48.

50. CRAWFORD, *supra* note 41, at 707; Yehuda Z. Blum, *UN Membership of the “New” Yugoslavia: Continuity or Break?*, 86 AM. J. INT’L L. 830, 833 (1992).

51. STEVE TERRETT, *THE DISSOLUTION OF YUGOSLAVIA AND THE BADINTER ARBITRATION COMMISSION* 178-79 (2000); Scharf, *supra* note 28, at 56-57.

52. *See* Scharf, *supra* note 2, at 54-62.

53. Genocide Judgment 2007, *supra* note 2, para. 90; *see id.* para. 121.

54. *See* Multilateral Treaties Deposited with the Secretary-General, *supra* note 30.

55. Genocide Convention, *supra* note 1, at art. IX.

V. ORDERS ON PROVISIONAL MEASURES

In April 1993, and again in September of that year, the Court indicated provisional measures that included a requirement that the FRY take all measures within its power to prevent the commission of genocide.⁵⁶ For purposes of provisional measures, the Court observed that jurisdiction only needed to be established *prima facie*.⁵⁷ It avoided consideration of whether the FRY was a member of the UN, and therefore entitled to access to the Court on the basis of Article 35(1) of the Statute of the Court (Statute), by relying instead on Article 35(2).⁵⁸ Article 35 provides in part:

1. The Court shall be open to the states parties to the present Statute.
2. 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.⁵⁹

The Court interpreted Article 35(2) to include jurisdiction based on a compromissory clause such as Article IX of the Genocide Convention. The Court's interpretation constituted a "special provision" affording such access not only to Bosnia, but to the FRY as well.⁶⁰ No mention was made of Article XI of the Convention that requires UN membership for adherence to the Convention.⁶¹ The Court regarded both parties as bound by the Convention, and therefore, enjoying the right of access to the Court under the terms of Article 35(2).

VI. JUDGMENTS ON PRELIMINARY OBJECTIONS (1996) AND REVISION (2003)

In its 1996 Judgment on preliminary objections, the Court confirmed its earlier provisional Orders determining that it had jurisdiction to hear the case

56. Genocide Order Apr. 1993, *supra* note 3, para. 52; Genocide Order Sept. 1993, *supra* note 13, para. 6; *see also* LaGrand Case (F.R.G. v. U.S.), 2001 I.C.J. 466, 501-06 (June 27) (provisional measures, a kind of interim relief, are legally binding even though article 41 of the Statute uses the equivocal term "indicate").

57. Genocide Order Apr. 1993, *supra* note 3, para. 14.

58. *Id.* paras. 18-19.

59. Statute of the International Court of Justice, 59 Stat. 1031, 39 AJIL Supp. 215 (1945), arts. 35(1), 35(2) [hereinafter ICJ Statute], available at <http://www.icj-cij.org/documents/index.php?p1=4&p2=2&p3=0>.

60. Genocide Order Apr. 1993, *supra* note 3, paras. 20-23.

61. Genocide Convention, *supra* note 1 (Article XI, para. 3, provides: "[T]he present Convention may be acceded to on behalf of any Member of the United Nations and of any non-member State which has received an invitation [from the General Assembly to sign].").

based on Article IX of the Convention.⁶² Once again, Bosnia was taken as a successor of the SFRY with respect to the Convention, and no issue was raised as to whether the FRY was a member of the UN.⁶³ That issue was irrelevant under Article 35(2), which allows access to the Court by non-members when a treaty compromissory clause provided for Court adjudication. Again, no reference as to the FRY was made to Article XI of the Convention which requires UN membership for adherence to the Convention.

The *sui generis* situation of “Yugoslavia” changed dramatically in October 2000 with the overthrow of Slobodon Milošević. The replacement government of Vojislav Koštinić immediately applied for, and was granted, UN membership as a “new” State- the FRY. As a result, it also acceded to the Genocide Convention in 2001.⁶⁴ The FRY then took the position that it had not earlier been a member of the UN, and thus had not been party to the Statute. Further, the FRY also claimed it had not been party to the Genocide Convention until it notified the UN of its accession in 2001.⁶⁵ It was on this basis that the FRY applied to the Court for revision of the 1996 Judgment affirming jurisdiction.

The basis for revision, and the exclusive means under the Statute by which review is available is set forth in Article 61 of the Statute which provides in relevant part that:

[a]n application for revision of a judgment may be made only when 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.⁶⁶

In 2003, the Court held that the FRY Application was inadmissible. The Court concluded that the FRY had not established that its request for revision was “based upon the discovery of ‘some fact’ which was ‘when the judgment was given, unknown to the Court and also to the party claiming revision.’”⁶⁷ The key to this conclusion was the Court’s understanding of “fact.” The “fact” or “facts” were the FRY’s later admission to the UN and its accession to the Genocide Convention. These occurred some four years after the 1996 Judgment. Therefore, the FRY’s admission to the UN and accession to the Genocide Convention could not have been “unknown facts” existing in 1996.⁶⁸

62. Genocide Judgment 1996, *supra* note 13, paras. 17-20; *see also id.* para. 47(2)(a).

63. *See* Genocide Judgment 1996, *supra* note 13, para. 20.

64. Genocide Revision Judgment 2003, *supra* note 13, paras. 49-52.

65. *Id.* paras. 18-20.

66. ICJ Statute, *supra* note 59, art. 61(1).

67. Genocide Revision Judgment 2003, *supra* note 13, para. 72.

68. *See id.* paras. 72-75.

VII. THE NATO CASE: PROVISIONAL MEASURES

NATO forces began air strikes against the FRY in March 1999 to avert what its Secretary-General called "a humanitarian catastrophe."⁶⁹ The FRY government had refused repeated demands that its military and paramilitary forces withdraw from anti-personnel operations in Kosovo province, whose rebellious population was predominantly Albanian, not Serbian.⁷⁰ The following month, the FRY (later "Serbia-Montenegro") "instituted proceedings . . . against Belgium, Canada, France, Germany, Italy, the Netherlands, Portugal, Spain, the United Kingdom and the United States . . ." for a series of alleged violations of international law, including violations of the Genocide Convention.⁷¹ The FRY also requested the indication of provisional measures pending resolution of the dispute.⁷²

The Court may indicate provisional measures of protection, comparable to a preliminary injunction in civil common law, if it appears there is an urgent need to preserve the rights of the parties and if it has *prima facie* jurisdiction.⁷³ Application of this faculty to the Genocide case was discussed above in Part V.⁷⁴ For the first time in its history, the Court concluded in the NATO case that provisional measures should not issue because it did not have *prima facie* jurisdiction.⁷⁵ This did not mean the Court could not find jurisdiction in later phases of the case.⁷⁶

The FRY invoked several bases for jurisdiction. Article IX of the Genocide Convention, to which the FRY and all respondents were parties, provided that disputes between the parties could be submitted to the Court for resolution.⁷⁷ In the case of Spain and the United States, however, their reservations to that Article excluded any right of submission to the Court. The Court accordingly, and summarily, dismissed them from the case *in limine litis*.⁷⁸ The requisite consent to jurisdiction did not exist since there was no jurisdiction *ratione*

69. STEPHEN DYCUS ET AL., NATIONAL SECURITY LAW 409-13 (3d ed. 2002).

70. Peter H. F. Bekker, *International Decision: Legality of Use of Force (Yugo. v. Belg.) (Yugo. v. Can.) (Yugo. v. Fr.) (Yugo. v. F.R.G.) (Yugo. v. Italy) (Yugo. v. The Neth.) (Yugo. v. Port.l) (Yugo. v. Spain) (Yugo. v. U.K.) (Yugo. v. U.S.)*, 93 AM. J. INT'L L. 928, 928 (1999).

71. *Id.* at 928-29.

72. *Id.*

73. See para. 21.; Peter H. F. Bekker & Christopher J. Borgen, *World Court Rejects Yugoslav Requests to Enjoin Ten NATO Members from Bombing Yugoslavia*, AM. SOC. INT'L L (ASIL INSIGHTS. Washington D.C) (June 1999), available at <http://www.asil.org/insights/insigh36.htm>.

74. See *supra* notes 57-58 and accompanying text.

75. Bekker & Borgen, *supra* note 73.

76. See NATO Order 1999, *supra* note 14, para. 21.

77. *Id.* para. 34.

78. See Bekker, *supra* note 70, at 929 n.1.

personae over them. In regard to all ten respondents, the Court observed that genocide requires not only acts but intent to commit genocide as well. The Court could not find at that stage in the proceedings that genocide had been committed by any of the respondents.⁷⁹ Thus, there was no *prima facie* jurisdiction *ratione materiae*. It remained a matter to be considered in subsequent proceedings as to all respondents except Spain and the United States.

Yet another basis invoked by the FRY for jurisdiction was its declaration under Article 36(2) of the Statute, the so-called optional clause, recognizing the compulsory jurisdiction of the Court in relation to any other state accepting the same obligation.⁸⁰ Here, the Court pointed out the FRY declaration restricted its application to events arising after April 25, 1999, and that the NATO bombings had begun on March 24, 1999, thus, excluding applicability of the FRY's Article 36(2) declaration.⁸¹ Since those respondents who made declarations under Article 36(2) could invoke the FRY's condition by reciprocity, there was no *prima facie* jurisdiction *ratione temporis*.⁸² This included Belgium, Canada, the Netherlands, Portugal, Spain (already dismissed entirely), and the United Kingdom.⁸³ These respondents had further argued that even if the *ratione temporis* defense did not apply, the FRY was barred from access to the Court because it was not a member of the UN, and therefore, denied access under the Statute.⁸⁴ The Court refused to rule on this argument in view of its ruling on *ratione temporis*.⁸⁵ Once again, the Court declined to attempt an untying of the Gordian Knot: the UN membership *vel non* of the FRY during the relevant periods of time.

At this point, before proceeding to the controversial and divided NATO Judgment on Preliminary Objections (2004), it is useful to clarify an important distinction between (a) the right of access to the Court (*locus standi*), either as an applicant or a respondent, and (b) the consent needed for Court jurisdiction. Access to the Court may be considered part of the jurisdictional issue or it may be considered a matter preliminary to jurisdiction. The result is the same except that access is a matter of law for the Court, not the parties, while consent is a matter that the parties control through their own decisions. This distinction was made clear by the Court in the NATO Judgment on Preliminary Objections in

79. NATO Order 1999, *supra* note 14, paras. 40-41.; Bekker, *supra* note 70, at 930; Gray, *supra* note 15, at 736.

80. ICJ Statute *supra* note 59, at art. 36(2); NATO Order 1999, *supra* note 14, paras. 22-23.

81. NATO Order 1999, *supra* note 14, paras. 24-29.

82. *Id.* at para. 30.

83. Bekker, *supra* note 70, at 930 (allowing respondent to invoke applicant's reservation by reciprocity).

84. NATO Order 1999, *supra* note 14, paras. 31-32.

85. *See id.* at para. 33.

2004, and later in the Genocide Judgment on the Merits in 2007.⁸⁶ Article 35(1) of the Statute deals only with access, Article 35(2) concerns access based on consent, and Article 36 only addresses consent. For jurisdiction, both access and consent must exist.

The Court's Order on provisional measures in the NATO case set the stage for one of the Court's most controversial decisions.

VIII. THE NATO CASE: PRELIMINARY OBJECTIONS

The Court's final Judgment, dismissing the FRY's claims on jurisdictional grounds, was rendered in 2004. The Court unanimously found that it had no jurisdiction to entertain the FRY claims (the FRY became Serbia-Montenegro as of 2003).⁸⁷ Seven of the fifteen members of the Court (the Seven) filed a strongly worded Joint Declaration disputing the Court's bases for the Judgment.⁸⁸ The Court's bases were: (1) the ambiguity in Yugoslavia's status as a member of the UN was clarified when it "joined" the UN in 2000; it could not therefore be vested with access to the Court in 1999 when the case was brought (under Article 35(1) of the Statute only UN members have access to the Court)⁸⁹ and (2) access by non-members under Article 35(2) by virtue of a compromissory clause in a treaty was not available to Serbia-Montenegro because the treaty it invoked, the Genocide Convention of 1948, entered into force *after* the Statute was adopted in 1945. The phrase "treaties in force" means only those in force when the Statute was adopted. The Court conceded that it did not know of any such treaties, but pointed out the language had been reproduced *in haec verba* from the Statute of the Court's predecessor, the Permanent Court of International Justice (1921-1946), which did cover certain post-World War I treaties.⁹⁰

The Court's reliance on Article 35 was highly controversial. The Seven, who agreed with the ultimate result of the Judgment but disputed the Court's *ratio decidendi*, said the Judgment was at odds with a number of previous

86. NATO Judgment 2004, *supra* note 14, para. 36; Genocide Judgment 2007, *supra* note 2, paras. 102-03.

87. NATO Judgment 2004, *supra* note 14, para. 129.; Peter Bekker et al., *The World Court Dismisses Serbia and Montenegro's Complaints Against Eight NATO Members*, AM. SOC. INT'L L (ASIL INSIGHTS, Washington D.C) (Dec. 2004) available at <http://www.asil.org/insights/2004/12/insight041223.htm>.

88. NATO Judgment 2004, *supra* note 14, para. 1.

89. *Id.* at para. 46; *id.* at para. 52; *id.* at paras. 78-79; *id.* at para. 91.

90. *Id.* at paras. 102-103; John R. Crook, *The 2004 Judicial Activity of the International Court of Justice*, 99 AM. J. INT'L L. 450, 456 (2005) (expressing the view that his interpretation left Art. 35(2) an "empty box").

decisions of the Court.⁹¹ First, in the 1999 Orders rejecting the indication of provisional measures in the NATO case, the Court had assigned its negative decisions on *prima facie* jurisdiction to *ratione temporis* and *ratione materiae* grounds; these are “consent” grounds. Yet here, the Court has invoked “access” reasoning under both 35(1) and 35(2) to bar access on *ratione personae* grounds because the FRY was neither a member of the UN nor a non-member party to a qualifying treaty. The Seven labeled the change “surprising.”⁹²

Second, the “new” reasoning of the Court was also contrary to its position in the Genocide case. In the Provisional Measures phase (1993), in the Preliminary Objections phase (1996), and in the Revision phase (2003), the Court regarded the FRY as having had access to the Court at the relevant times as a member of the UN and, therefore, party to its Statute. The majority’s interpretation of Article 35(2) was also contrary to the Court’s interpretation of Article 35(2) in the Provisional Measures phase of the Genocide case, in which it was clear that it did not matter that the Genocide Convention had entered into force after adoption of the Court’s Statute.⁹³

The Seven said that when more than one basis for a decision existed, the Court was free to adopt the one it thought best for reasons of certainty. Certainty meant taking into account consistency, legal cogency, and consequences for other pending cases. The Seven determined that the Court’s reasoning failed to meet these criteria.⁹⁴

Judge Higgins, a member of the Seven, added another reason for diverging from the majority’s approach. Since the FRY had merely asked the Court “to decide on jurisdiction” rather than specifying a ground, it thereby violated Article 38(2) of the Court’s Rules. In other words, the FRY “was trying to have it both ways.” The Court should have stricken the case from the docket by the exercise of its inherent powers.⁹⁵ Judge Kooijmans concurred.⁹⁶

It was against this rather disorderly background that Court observers awaited the Judgment on the merits in the Genocide Case. Could the Court, with reason and justice, extricate itself from the confusion it had sown?⁹⁷ Did the FRY have access vulnerability or not?

91. See 2004 I.C.J. 279, (Joint Declaration of Vice President Ranjeva, Judges Guillaume, Higgins, Kooijmans, Al-Khasawneh, Buergethal and Elaraby) at para. 1, (“profoundly” disagreeing with the Court’s reasoning).

92. *Id.* at para. 9.

93. *Id.* at paras. 8-11.

94. *Id.* at paras. 2-3, 12-13, Chester Brown, *Access to International Justice in the Legality of Use of Force Cases*, 64 CAMBRIDGE L. J. 267, 271 (2005) (asserting the Court “would have done well to find less problematic grounds on which to base its decision.”).

95. 2004 I.C.J. 279 (Separate opinion of Judge Higgins) at paras. 12, 15.

96. 2004 I.C.J. 279 (Separate opinion of Judge Kooijmans) at paras. 22-26.

97. See Becker et al., *supra* note 87, nn.20-23.

IX. THE GENOCIDE CASE: MERITS

In its Judgment on the Merits, the Court ruled by a vote of ten to five that it had jurisdiction over the case based on Article IX of the Genocide Convention.⁹⁸ To reach this result, it avoided one more time the question of whether the FRY was a member of the UN during the crucial period from 1992 to 2000, and therefore entitled to Court access. The Court invoked what it determined were the *res judicata* effects of its 1996 Judgment on Preliminary Objections.⁹⁹ That Judgment apparently relied on Article 35(2) of the Statute (which affords Court access to non-members of the UN who are party to an appropriate compromissory clause of a treaty “in force”) by referring back to its April 1993 Order on provisional measures.¹⁰⁰ UN membership under Article 35(1) was irrelevant. Access (or *jus standi*) under Article 35 was, declared the Court, an inevitable corollary of consent.¹⁰¹ Also not addressed by the Court in 1996, was whether or not “treaties in force” was to be understood as limited to those that entered into force before adoption of the Statute in 1945. The Court simply assumed the phrase was not so limited. This assumption was expressly rejected in the NATO case.¹⁰²

To apply *res judicata* to the 1996 understanding of scope of “treaties in force,” meant in 2007 that the Court had to regard its earlier “broad” understanding of “treaties in force” as an integral part of the Judgment. Yet the Court said nothing about this issue in 1996. In 2007, the Court declared access a matter of “necessary implication”, entitled to *res judicata*.¹⁰³ The Court explained:

[i]n the view of the Court, the express finding in the 1996 Judgment that the Court had jurisdiction in the case *ratione materiae*, on the basis of Article IX of the Genocide Convention, seen in its context, is a finding which is only consistent, in law and logic, with the proposition that, in relation to both Parties, it had jurisdiction *ratione personae*, in its comprehensive sense, that is to say, that the status of each of them was such as to comply with the provisions of the Statute concerning the capacity of States to be parties before the Court The determination by the Court that it had jurisdiction under the Genocide Convention is thus to be interpreted as incorporating a determination that all the

98. Genocide Judgment 2007, *supra* note 2 at paras. 140, 471(1).

99. *Id.* at para. 140.

100. *Id.* at para. 105, (referring to Genocide Order Apr. 1993, *supra* note 3, para. 19).

101. *See id.* at para. 136 (calling it “a matter of logical construction”).

102. *See Crook, supra* note 90, at 456.

103. Genocide Judgment 2007, *supra* note 2, para 132.

conditions relating to the capacity of the Parties to appear before it had been met.¹⁰⁴

Judges Ranjeva, Shi, and Koruma, who voted against the jurisdictional *dispositif*, argued *res judicata* could not be applied to an issue which was not addressed, let alone decided.¹⁰⁵ This violated Article 56(1) of the Statute, which requires the Court to state the reasons on which the judgment is based. The Court had not addressed access in its 1996 Judgment, and the parties themselves had not even raised the question, for varying, but understandable reasons of their own.¹⁰⁶ The Court did, however, deal with the issue of access in the NATO case. It was inconsistent of the Court not to do so here.¹⁰⁷

Judge Skotnikov, who also voted against the jurisdictional *dispositif*, took a stronger line. Even if the Court had considered the access issue in 1996, its ruling could not have been considered absolute and final.¹⁰⁸ Judge Kreća, the *ad hoc* designee of the FRY, argued at treatise-format length (ninety pages) that the NATO Judgment disposed of the problem and should have been followed in the present case.¹⁰⁹

Three Judges, voting in favor of the jurisdictional *dispositif*, supported it on grounds other than *res judicata*. Judge Al-Khasawneh, Vice President of the Court, had serious doubts about the need to rely on *res judicata* when it was clear the FRY had never been anything but a member of the UN. The admission to the UN in 2000 was merely a conversion from continuator status to successor status.¹¹⁰ Judge Tomka voted in favor of the *dispositif*, but on the basis that the FRY was a party to the Genocide Convention in 1993, by the rules of state succession, and the FRY's lack of access was cured retroactively by its admission to the UN in 2000.¹¹¹ Judge Mahiou, the *ad hoc* designee of Bosnia argued that Serbia should be barred from raising the access issue because of acquiescence, estoppel, or good faith.¹¹² These arguments closely tracked the Bosnian pleadings.

104. *Id.* para. 133.

105. 2007 I.C.J. Gen. List 91 (Joint Dissenting Opinion of Judges Ranjeva, Shi, and Koroma) at para. 3.

106. *Id.* at paras. 3,7.

107. *Id.* at para. 17.

108. 2007 I.C.J. Gen. List 91 (Declaration of Judge Skotnikov) at para. 3.

109. *See* 2007 I.C. J. Gen. List 91 (Separate Opinion of Judge Kreća) at para. 47.

110. 2007 I.C.J. Gen. List 91 (Dissenting Opinion of Vice President Al-Khasawneh) at paras. 9-10.

111. 2007 I.C.J. Gen. List 91 (Separate opinion of Judge Tomka) at para. 27 (stating that similar circumstances would be covered after admission).

112. 2007 I.C.J. Gen. List 91 (Dissenting Opinion of Judge Mahiou) at paras. 13-18; (explaining that the Court rejected Mahiou's position on grounds that it related to consent, not access); *see* Genocide Judgment 2007, *supra* note 2 paras. 102-03.

X. PRELIMINARY ANALYSIS

It remains to analyze the performance of the Court in confronting a concededly difficult situation, both legal and political. Did the Court's decisions on jurisdiction unnecessarily describe a circle that needed to be squared? If so, did it succeed? Does it matter? What are the implications of the Court's treatment of the suit by Croatia against the FRY filed in 1999, in which the question of access is not addressed even by implication?¹¹³

The Court's struggles with jurisdiction and consistency emanated from a single, core fact: the SFRY had broken up and the UN manifestly failed to respond in accordance with its Charter. The UN response was a political compromise without juridical coherence. Examples abound of UN practices adopted to fill gaps in Charter coverage or to resolve otherwise practical problems,¹¹⁴ but the result of the abortive attempt to expel Yugoslavia/FRY, under whatever name it had chosen to adopt, pursuant to its internal constitutional processes, was clearly *ultra vires*. The attempt to expel Yugoslavia/FRY was also contrary to its past practices regarding the secession of Pakistan from India (1947), the secession of Bangladesh from Pakistan (1974), and the secession of Singapore from Malaysia (1965).¹¹⁵

Membership in international organizations is governed by their constitutive documents.¹¹⁶

Articles V and VI of the UN Charter provide:

[a] Member of the United Nations against which preventive or enforcement action has been taken by the Security Council may be suspended from the exercise of the rights and privileges of membership by the General Assembly upon recommendation of the Security Council. This exercise of these rights and privileges may be restored by the Security Council.¹¹⁷

A Member of the United Nations which has persistently violated the Principles contained in the present Charter may be expelled from the

113. Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croat. v. Yugo.), 1999 Gen. List 118 (July 2) [hereinafter Croatian Genocide Application 1999].

114. Major examples of UN "creativity" are the 1950 Uniting for Peace Resolution of the General Assembly, providing for peace-keeping efforts in the absence of Security Council action, and the significant development of action undertaken under the provisions of Chapter VII. CARTER ET AL., *supra* note 34, at 1039-50 (quoting THOMAS M. FRANCK, RECOURSE TO FORCE 24-40 (2002)).

115. In each case, the non-seceding state was considered a continuator. See CRAWFORD, *supra* note 41, at 392-93; see Blum, *supra* note 50, at 832; see Scharf, *supra* note 28, at 34-35.

116. See BÜHLER, *supra* note 45, at 30-31.

117. UN Charter 59 Stat. 1031, art. 5, available at <http://www.un.org/aboutun/charter/>.

Organization by the General Assembly upon the recommendation of the Security Council.¹¹⁸

These provisions, the only ones of substantive relevance, were neither invoked nor followed. In fact, “no member state has ever been suspended or expelled from the [UN].”¹¹⁹ Nor can these provisions be circumvented in good faith by the transparent expedient of simply declaring that Yugoslavia had “ceased to exist.”¹²⁰ The legal opinion of the UN Under-Secretary for Legal Affairs was that the General Assembly’s resolution neither terminated nor suspended the membership of Yugoslavia.¹²¹ That disposes of the “extinction” fallacy, *a fortiori*.

In its April and September 1993 Orders indicating interim measures, the Court provisionally, but explicitly, excluded consideration of “whether or not Yugoslavia is a Member of the United Nations and as such a party to the Statute of the Court”¹²² In its Application, Bosnia conceded that the UN solution poses legal difficulties and relied on Article 35(2) of the Statute for access and *prima facie* jurisdiction. It is not surprising that the Court found that under Article 35(2), concerning non-UN Member parties to treaties with compromissory clauses, it enjoyed *ratione personae* jurisdiction and the parties enjoyed the concomitant right of access. The Court’s aversion to 35(1) when 35(2) was at hand, and in fact, had been pled, is understandable, even if unwise. The Court also found that *prima facie* jurisdiction *ratione materiae* existed under Article IX of the Genocide Convention. This seems obvious in view of Bosnia’s allegations.

The temporal scope of “treaties in force” under Article 35(2) was not addressed in 1993 by the parties or the Court. In retrospect, an explicit statement of the Court’s “broad” understanding of the term’s unlimited time span could have eliminated the complications arising from the Court’s later limited interpretation in the NATO case, but at that juncture, the Court as a whole was probably well advised to preserve its options.

The 1996 Judgment on Preliminary Objections was essential in providing the basis for the 2007 Judgment on the Merits, although it did not represent a significant change in the approach or analysis of the Court. The 1996 proceedings were simply a reprise of the 1993 proceedings on interim measures. Neither party raised the issue of Yugoslavia’s membership *vel non* in the UN and

118. *Id.* at art. 6.

119. Blum, *supra* note 50, at 831 n.3.

120. The words “ceased to exist” contained in Security Council Resolution 777 were deleted from General Assembly Resolution 47/1 to satisfy those states that opposed the expulsion of the FRY. HAGUE ACADEMY SUCCESSION, *supra* note 25, at 283.

121. *Infra* app. C.

122. Genocide Order Apr. 1993, *supra* note 3, para. 18.

therefore, access to the Court under Article 35(1). Once again, the Court declared jurisdiction *ratione personae* existed by virtue of Article IX of the Genocide Convention. This time the Court did not explain, as it had in the interim measures phase, that it ignored the UN membership issue and the Court did not express a view on the scope of “treaties in force.” Again, it assumed *sub silentio* that the phrase was not limited to treaties entered into force before adoption of the Statute in 1945. In retrospect, it would have made matters simpler for the Court if it had done so during this phase.

Of particular interest in analyzing the Court’s performance is the total absence in the earlier phases of what it later came to regard as crucial to its approach: the distinction between access/*jus standi* and jurisdiction *ratione personae* (*stricto sensu*).¹²³ The former, the Court later said, was a matter for the Court to determine without reference to party consent; the latter, in contrast, was a matter of party consent.¹²⁴ This made it easier for the Court to apply *res judicata* in 2007 to a matter it had decided earlier only “by necessary implication.”

In 1999, while the Genocide case was pending, the FRY filed its Application against the ten NATO countries for violation of the Genocide Convention. For jurisdiction, it invoked Article IX of the Genocide Convention and its Declaration under the Optional Clause, Article 36(2). Later that year, the Court refused interim measures on the grounds that *prima facie* jurisdiction was lacking, specifying: (1) *ratione materiae* under the Genocide Convention (“intent” to commit genocide was not shown) and (2) *ratione temporis* under Article 36(2) because of the FRY’s time limitation invoked by the respondents on the basis of reciprocity (i.e., if the applicant could not sue the respondent because of its time limitation then the respondent can invoke that same limitation against the applicant). The FRY had claimed continuing UN membership but several of the NATO respondents had denied it. However, the Court declared it was not necessary to address that issue because the FRY was barred, at least *prima facie*, on other grounds from obtaining interim measures. Only three of the Judges even mentioned the UN membership matter, two denying membership (Judge Oda and Judge Kooijmans) and one arguing the Court should have addressed the issue (the FRY-appointed *ad hoc* Judge Kreća).¹²⁵

123. If the term “jurisdiction *ratione personae*” is raised to a level of generality to embrace “access/*jus standi*” as well, it might be appropriate to describe it as “jurisdiction *ratione personae* (*lato sensu*)” (although the Court does not employ this particular terminology to distinguish its broader scope from “jurisdiction *ratione personae* (*stricto sensu*)”).

124. See NATO Judgment 2004, *supra* note 14, para. 36; see Genocide Judgment 2007, *supra* note 2, paras. 102-03.

125. 1999 I.C.J. 124 (Separate Opinion of Judge Oda) at paras. 3-4; 1999 I.C.J.124, (Separate Opinion of Judge Kooijmans) at para. 25, 1999 I.C.J. 124 (Dissenting Opinion of Judge Kreća) at para. 9.

The 1999 NATO Orders were unremarkable and consistent with prior holdings in the Genocide case. The Court continued to avoid resolving the UN membership dilemma the General Assembly had left it. Meanwhile, Yugoslavia's UN status remained on hold.

The picture changed dramatically in November 2000. The FRY requested, and was granted, admittance to the UN as a "new" member, and in March 2001, the FRY "acceded" to the Genocide Convention. It immediately petitioned the Court for a revision of the 1996 Judgment on Preliminary Objections, based on the claims that the FRY had not been a member of the UN before 2000, and that it was not a party to the Genocide Convention before 2001. This *volte-face* made resolution of the UN's contradictory actions seem inevitable, but this was not to be.

In its Judgment on Revision in 2003, the Court once again sidestepped the UN membership problem with a strict, but quite sensible, reading of Article 61(1). The Court concluded the FRY request was not based upon the discovery of some fact that was unknown to the Court and to the party claiming revision when the judgment was rendered. The "fact" had occurred more than four years after the Judgment, and the date of the fact's occurrence was more significant than any putative effect it might have had. The court held the application was "inadmissible."¹²⁶

It is difficult to argue with the Court's conclusion, especially since the Statute makes no other provision for "review," except for the possibility of clarification under Article 60. A judgment is "final and without appeal." It should be noted that if the Court had earlier been required or inclined to apply the same rigorous standards of interpretation, it would have ruled that the FRY remained a member of the UN and a party to the Genocide Convention throughout.

The Court's subsequent Judgment of 2004 on Preliminary Objections in the NATO case overturned its careful, previous attempts to deal with the UN's ambiguous treatment of Yugoslavian statehood. The Judgment conflicted "vertically" with its previous rulings in the case and "horizontally" with its rulings in the Genocide case. Except for Judge Owada's somewhat tortured attempt at reconciliation in his Separate Opinion in the 2007 Genocide Judgment, the decision was seen by most observers as totally at odds with all that had gone on before.¹²⁷

For the first time in the history of the two cases, Genocide and NATO, a majority of the Court dealt directly with Yugoslavian statehood. While all fifteen members of the Court rejected jurisdiction, eight Judges ruled the FRY had not been a UN member at the time its Application was filed in 1999, and

126. Genocide Revision Judgment 2003, *supra* note 13, paras. 72, 74-75.

127. 2007 I.C.J. Gen. List 91, *supra* note 2 (Separate Opinion of Judge Owada) (Feb. 11).

therefore, under Article 35(1) did not enjoy the right of Court access at that time.¹²⁸ The eight regarded the FRY's admission to UN membership in 2000 as clarifying, retroactively, the ambiguity that had existed since 1992.¹²⁹ Admission in 2000 meant non-admission before that date. The logical difficulty with this is that the conclusion begs the question: what was the effect of the 2000 admission? It could be regarded as a confirmation of previously existing membership, especially since the purported expulsion by the political branches of the UN was dubious at best.¹³⁰ This was the separate view of Judge Elaraby, a member of the group of seven Judges who disputed the Court's *ratio decidendi*.¹³¹

After an extensive review of the *travaux préparatoires*, the eight Judges then went on to rule out access on the basis of Article 35(2).¹³² In contrast to the unstated premise in the Genocide case that access under Article 35(2) as a non-UN member was available, the eight declared the door was open only through "treaties in force" before 1945, the date the Statute was adopted.¹³³ Thus, access for the FRY was barred regardless of whether the SFRY ratified the Convention in 1950 or the FRY acceded to the Convention in 2001. Continuity or succession was irrelevant; access was barred *ratione temporis*. This interpretation is not unreasonable even though it is ineffective.¹³⁴ What purpose does the provision serve if access to the Court is effectively cut off at the very time the Court is created? On the other hand, can it be that the broader interpretation is really *carte blanche* for any two or more countries to agree between or among themselves to seize the Court at its leisure? The leading commentator on the Court agrees with the majority, and urged a restrictive view of Article 35(2) even before the Court had ruled.¹³⁵

The seven dissenters profoundly disagreed with the reasoning on which the Court had based its Judgment. The Judgment was not consistent with past case law. The Court ruled on grounds that were less certain than others available, such as *ratione temporis* and *ratione materiae*, and its Judgment called into

128. NATO Judgment 2004, *supra* note 14, para. 91.

129. *See id.* paras. 78-79.

130. If not a confirmation of existing membership, then at least a recognition of state succession.

131. *See* 2004 I.C.J.279, (Separate Opinion of Judge Elaraby) at para.2; *supra* note 14, paras. 2, 9.

132. *Id.* at paras. 113-14.

133. *Id.*

134. *See* Crook, *supra* note 90, at 455-56.

135. *See* 2 SHABTAI ROSENNE, THE LAW AND PRACTICE OF THE INTERNATIONAL COURT, 1920-1996, 628-30 (3d ed. 1997); *see* 2 SHABTAI ROSENNE, THE LAW AND PRACTICE OF THE INTERNATIONAL COURT, 1920-2005, 609-(4th ed. 2006).

question the solutions adopted in the Genocide case.¹³⁶ Two of the seven Judges would have gone further, dismissing the case for the FRY's failure to state the basis for the Court's jurisdiction, rather than permitting the FRY to "ask[] the Court 'to decide on . . . jurisdiction.'"¹³⁷

In its 2007 Judgment on the Merits in the Genocide case, the Court declared in its *dispositif* on jurisdiction that it had jurisdiction based on Article IX of the Genocide Convention. The vote was ten to five. The decision rested on the principle of *res judicata*; the matter had been "decided" in the 1996 Judgment on Preliminary Objections even though access to the Court was never raised as an issue; the Court held it was a "necessary implication" of the Judgment.¹³⁸

There were five dissenters on this point. Judges Ranjeva, Shi, and Koroma, writing in a Joint Dissenting Opinion, argued that the Court was required to state its reasons under Article 56(1) of the Statute. The Court had not done so in 1996, therefore an implication could not serve as the basis for applying *res judicata*. They added that the parties had not even raised the issue in 1996 and that the Court's reasons, for purposes of *res judicata*, had to be circumscribed by the issues presented to it. Finally, they declared that the issue of UN membership should have been addressed in 2007, and the finding should have been that the FRY was not a UN member in 1993.¹³⁹ Therefore, the FRY was not entitled to Court access at that time. This resulted necessarily from the fact that the FRY had become a member, new or otherwise, in 2000. The three characterized the Court's Judgment on this matter as "untenable as a matter of law."¹⁴⁰ Judge Skotnikov, in his separate declaration, said the matter had already been decided in the 2004 NATO Judgment: the FRY had not been a UN member before 2000. That was determinative. He also stated that *res judicata* should not apply in incidental proceedings such as those conducted in 1996.¹⁴¹ Judge Kreća, appointed *ad hoc* by the FRY, said essentially the same, at much greater length, in his separate opinion.¹⁴²

XI. EVALUATION

An evaluation of the Court's handling of the various cases spawned by the Yugoslav breakup must focus on two separate periods: (a) from the breakup of

136. 2004 I.C.J. 279 (Joint Declaration of Vice-President Ranjeva, Judges Guillaume, Higgins, Kooijmans, Al-Khasawneh, Buergenthal and Elaraby) at para. 13.

137. 2004 I.C.J. 279 (Separate Opinion of Judge Higgins) at para. 14.

138. Genocide Judgment 2007, *supra* note 2, para. 132.

139. 2007 I.C.J. Gen. List 91 (Joint Dissenting Opinion of Judges Ranjeva, Shi and Koroma) at para. 13.

140. *Id.* at para. 3.

141. 2007 I.C.J. Gen. List 91 (Declaration of Judge Skotnikov) at 1-2.

142. *See* 2007 I.C.J. Gen. List 91 (Separate Opinion of Judge *ad hoc* Kreća).

the SFRY to the FRY's "admission" to the UN (1991/1992 to 2000) and (b) the post-admission period (2001-2007). That evaluation, in turn, must take into account the Court's role as a principal organ of the UN, not simply as an independent dispute-resolving, juridical entity like its predecessor, the Permanent Court of International Justice, which was not linked organizationally with the League of Nations.¹⁴³

There are two primary motives propelling the political response of the UN and other international institutions to the Yugoslav break-up: (1) revulsion against the human rights violations ascribed to the Serb-dominated Belgrade government,¹⁴⁴ and (2) a need, or at least desire, to justify intervention on grounds that the military struggles engendered were international in character, rather than a matter assigned to the domestic jurisdiction of a single state.¹⁴⁵ An evaluation of the Court's response must begin with an acceptance of these premises. The framework questions for an evaluation of the Court's treatment of the Yugoslav breakup in the Genocide case are: Could the Court have disagreed with the political organs of the UN? Should it have done so in the Genocide case?

For the Indication of Provisional Measures phase of the Genocide case in 1993, the Court explicitly avoided the access question of UN membership for the FRY under Article 35(1) of the Statute by invoking the non-UN membership access provision of Article 35(2). This involved interpreting 35(2) to embrace agreements with compromissory clauses that were entered into after the 1945 adoption of the Court's Statute, such as the Genocide Convention of 1950. The Court's leading commentator had already rejected that interpretation, arguing for a 1945 cut-off date, but the Court felt it unnecessary to deal with an opinion contrary to the one it adopted. During the Preliminary Objections phase in 1996, the Court made no mention of the 35(2) access basis. It ruled simply that Article IX of the Genocide Convention provided the basis for jurisdiction *ratione personae*. In its 2007 Judgment on the Merits, it applied *res judicata* to the access issue it had not mentioned in 1996 on the grounds the issue had been decided during the 1996 proceedings by necessary implication. This raises the next question: Why had the Court adopted in 1993 an interpretation of 35(2) that had already been authoritatively questioned by a leading commentator (and that it later repudiated in the NATO case), leaving it little choice in the 2007 Genocide Judgment than resort to *res judicata*? Reliance on 35(1) was at hand,

143. SHABTAI ROSENNE, *THE WORLD COURT* 15 (5th ed. 1995).

144. Blum, *supra* note 50, at 830; see Yehuda Z. Blum, *Correspondents' Agora: U.N. Membership of the Former Yugoslavia*, 87 AM. J. INT'L. L. 248, 249 (1993) (providing Professor Blum's reply to a letter written to the Journal's Editor in Chief).

145. CRAWFORD, *supra* note 41, at 714. The efforts of international institutions are described in considerable detail, with abundant endnotes, in TERRETT, *supra* note 51, at 69-118.

and was juridically more cogent. It was rejected, it seems, in deference to the perceived preferences of a majority in the Security Council, and of a somewhat ambiguous majority in the General Assembly.

Clearly, the SFRY/FRY was neither suspended nor expelled from UN membership under the terms of the UN Charter. The only provisions applicable to suspension and expulsion are Articles V and VI of the Charter.¹⁴⁶ The UN Legal Counsel was simply reading these provisions as written and as intended when he declared that Yugoslavia continued as a member of the UN, albeit on a restricted basis.

The Court's avoidance of the question of access by membership on the basis that the issue was not free from legal difficulties was, at best, inapposite. The only possible basis for doubt might be the reference to filing a future application for membership, but the remainder of the text in the two resolutions makes it clear that suspension or expulsion had not occurred under the terms of the Charter. Further, application for membership was something to be done in the future by the FRY, not necessarily a *sine qua non* requirement of FRY membership. A new application for "admission" might just as well be equated to a matrimonial renewal of vows ceremony. A second basis for the Court's avoidance of the membership issue under 35(1) is arguably that the UN had merely recognized the disappearance or extinction of the SFRY/FRY and concluded, logically enough, that an extinct state could not be a state member of the UN. There are several problems with this approach, however.

First, the UN did not purport to act on this basis. While the Security Council resolution referred in its preamble to the SFRY's extinction, that language was deleted in the subsequent General Assembly resolution. Among other nations, Russia and China did not accept the extinction determination and held the Permanent Member power of potential veto. On the other hand, the United States, Germany, Austria and the five ex-SFRY secessionists unsuccessfully urged the extinction position. The anti-extinction advocates prevailed in excising the Security Council recitation.

Second, while it is true the UN has come to represent the collectivity of the world's nation-states, that representation is indeed exclusive as to its own membership but is not exclusive as to the existence of statehood. Membership in the UN means statehood by Charter definition, but non-membership does not mean non-statehood. Under customary international law, States have not delegated to the UN the decision as to statehood. A decision by the UN regarding statehood deserves serious weight, but is not the sole criterion. The nations of the world make that decision, and they do it severally.¹⁴⁷

146. See *supra* nn. 117-18 and accompanying text.

147. JOHN DUGARD, *RECOGNITION AND THE UNITED NATIONS* 166 (1987); COLIN WARBRICK, *States and Recognition in International Law*, INTERNATIONAL LAW 217, 218 (Malcolm D. Evans

Furthermore, the UN did not even purport to act on an extinction basis, as that phrase was deleted from the text of the Security Council resolution before adoption by the General Assembly. In contrast, the wording of the Badinter Commission was precise and definitive, but acted only for the European Union.¹⁴⁸ The Commission's decision was rendered for its constituents and is only "subsidiary" evidence of international law under Art. 38(1)(d) of the Court's Statute.¹⁴⁹ At best, it would be evidence of only special regional custom.

Third, there is a presumption of continuity in state existence, for good reason. Stability in international relations requires it.¹⁵⁰ Not free from legal difficulties is an inadequate rebuttal.

In 1993, both Bosnia and the FRY faced a jurisdictional dilemma. It was to the procedural advantage of each to allege facts that favored the opposing party's political claims, but that strategy also undermined their own claims. Bosnia had taken the position the FRY was a new state, but this was at least one obstacle to genocide jurisdiction. The FRY, for its part, had proclaimed its continuator status, but this was an obstacle to a jurisdictional defense. The result was ambiguity in the pleadings and an invitation to the Court to seek a way out, which of course it did by "rising above" the dilemma and resorting to a completely different basis of access jurisdiction, Article 35(2).

The Court's failure to properly address the dilemma can be ascribed only to excessive deference to the awkward posture of the UN's political branches. It would not have constituted a questionable review and legal challenge to the UN political organs to find that the FRY was still a member of the UN. On the contrary, it would have coincided with the legal opinion of the Under-Secretary for Legal Affairs, and it would have coincided with actual UN practice during the period 1993-2000. Since it involved access, rather than consent, it was a matter the Court could have decided *ex officio* without regard to the pleading convenience of the parties.

ed., Oxford University Press 2006) (stating that process of collective recognition in international law does not exist).

148. BÜHLER, *supra* note 45, at 182; TERRETT, *supra* note 51, at 120-27; WARBRICK, *supra* note 147 at 264-68 (describing more stringent requirements for recognition by Western European countries); Roland Bieber, *European Community Recognition of Eastern European States: A New Perspective for International Law?*, 86 Am. Soc'y Int'l L. Proc. 374, 374-75 (1992) (explaining that the policy developed by Western European states since December 1991 should not provide precedent for other parts of the world).

149. ICJ Statute, *supra* note 59, art. 38(1)(d); HAGUE ACADEMY SUCCESSION, *supra* note 25, at 308.

150. CRAWFORD, *supra* note 41, at 701; KRYSZYNA MAREK, *IDENTITY AND CONTINUITY OF STATES IN PUBLIC INTERNATIONAL LAW* 548 (1954).

The second time *tranche*, 2000 to 2007, presents a different set of considerations. If the Court had ruled as it should have in 1993 and 1996, there would have been no issues of inconsistency in 2007. If it had not done so earlier in 2004 and 2007, it still could have resolved the apparent inconsistency by regarding the 2000 UN “admission” as simply a confirmation of continued membership to that date, with successor membership status thereafter.¹⁵¹ It could have left untouched its 2003 Judgment on Revision, with its negative inference *dictum* on non-retroactivity of the FRY’s admission in 2000, because the narrow issue there was not UN membership, but the qualification of the 2000 “admission” as an “unknown fact” existing in 1996.¹⁵² The Court properly rejected a retrospective inference of non-membership in the Revision case, given the wording of Article 61 on revision, but the rejection of *nunc pro tunc* in 2004 was a case of *petitio principii* – it assumed what it set out to prove. The 2000 “admission” does not necessarily import a change in status. It is equally consistent with political clarification, leaving the legal reality untouched.

Both putative solutions to the squaring-the-circle conundrum, resort to Article 35(1) initially or, in default of that, retroactive sanitizing following “admission,” imply a certain disregard for the political maneuverings of the UN’s political branches. But would this have constituted the kind of judicial review advocated by those who entertain the possibility and desirability in appropriate cases of the Court’s reversing the UN political branches on grounds of unconstitutionality, in effect, for inconsistency with international law?¹⁵³ In this particular case, the answer has to be “no” since the existence of legal conflict is, at best, illusory.

A genuine issue of judicial review did arise, but was not finally resolved, in the Lockerbie/Libya case.¹⁵⁴ The Security Council ordered Libya (under

151. This in fact was the position of Vice-President Al-Khasawneh in the dissent of the Genocide Judgment 2007, 2007 I.C.J. Gen. List 91 (Dissenting Opinion of Vice-President Al-Khasawneh) at para. 10; *supra* note 2, para. 10, at 4 (h); The UN-created International Criminal Tribunal for the former Yugoslavia reached the same conclusion in 2003. Prosecutor v. Milan Milutinovi, Case IT-99-37-PT, (May 6, 2003), available at <http://www.un.org/icty/Supplement/supp41-e/milutinovic.htm> (last visited Nov. 6, 2007).

152. Genocide Revision Judgment 2003, *supra* note 13, paras. 67-73.

153. See generally Thomas M. Franck, *The “Powers of Appreciation”: Who Is the Ultimate Guardian of UN Legality?*, 86 AM. J. INT’L L. 519, 522-23 (1992); Michael J. Glennon, *Protecting the Court’s Institutional Interests: Why Not the Marbury Approach?*, 81 AM. J. INT’L L. 121, 123-24 (1987); but see Perez, *supra* note 19, at 443-44 (asserting that the institutional survival of the ICJ may ultimately depend upon its willingness to exercise restraint on occasion).

154. See Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. U.S.), 1992 I.C.J. 3 (Provisional Measures Order of Apr. 14, 1992) [hereinafter Lockerbie Order of Apr. 14], available at <http://www.icj-cij.org/docket/files/89/7213.pdf>; Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya

Chapter VII of the Charter) to surrender for trial in the U.S. or the U.K., the two Libyan nationals charged with planting the bomb that destroyed Pan Am Flight 103, even though Article 7 of the 1971 Montreal Convention on air terrorism allowed Libya to extradite the suspects *or* prosecute them under Libyan law.¹⁵⁵ The Security Council imposed sanctions for Libya's refusal to extradite, whereupon, Libya sought to enjoin the sanctions as a violation of the Montreal Convention. The Court postponed a definitive ruling on the merits phase, which never arrived because Libya eventually agreed to a trial in the Netherlands by a Scottish judge.¹⁵⁶ Implicit in the Court's decision to defer resolution of the merits phase – and barely disguised in the opinions of several judges, both dissenting and concurring – was the notion that the Court could impose limitations on Security Council actions under Chapter VII of the Charter.¹⁵⁷

The Genocide case was different, however. It did not involve action pursuant to specific Charter authorization. It had not ripened into a potential conflict with an otherwise applicable norm. The Genocide case falls into a twilight zone where the Court should be free to calibrate its role as both an organ of the UN and a neutral dispenser of international law under Article 38 of the Statute.¹⁵⁸ The approach to the jurisdictional conundrum envisioned in this article could not reasonably be considered an improper encroachment on UN objectives. In fact, it would have enhanced the roles of both the UN in general, and the Court in particular, by advancing the cause of peace through law. The Court has an opportunity to do just that in the pending, and still languishing in its initial stages, genocide case brought by Croatia against the FRY in 1999.¹⁵⁹

XII. CONCLUSION

To conclude in summary fashion, the Court should have proceeded this way:

v. U.S.), 1998 I.C.J. 9 (Preliminary Objections Judgment of Feb. 27, 1998) [hereinafter *Lockerbie Judgment of Feb. 27*], available at <http://www.icj-cij.org/docket/files/89/7249.pdf>.

155. Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, Sept. 23, 1971, 24 U.S.T. 564, 974 U.N.T.S. 178, available at <http://untreaty.un.org/English/Terrorism/Conv3.pdf>.

156. DAMROSCH ET AL., *supra* note 31, at 370-71, 419-20, 900-01, 1129-30; Bernd Martenczuk, *The Security Council, the International Court and Judicial Review: What Lessons from Lockerbie?*, 10 EUR. J. INT'L L. 517, 517-18 (1999).

157. THOMAS M. FRANCK, *FAIRNESS IN INTERNATIONAL LAW AND INSTITUTIONS* 244 (1995); José E. Alvarez, *Judging the Security Council*, 90 AM. J. INT'L L. 1, 28-31, 39 (1996); Martenczuk, *supra* note 156, at 527-28, 546.

158. ICJ Statute, *supra* note 59, art. 38(1) (providing that the Court's "function is to decide in accordance with international law").

159. See *Croatian Genocide Application 1999*, *supra* note 113.

(1) In the Genocide Orders of 1993 and 1996, relied explicitly on Article 35(1) of the Statute and not 35(2) (except as to the consent component in the latter).

(2) In the NATO Order of 1999, ruled, as it did, that *ratione materiae* was not *prima facie* present.

(3) In the Genocide Review Judgment of 2003, ruled, as it did, that the 2000 FRY admission to UN membership was not a qualifying unknown fact, and denied admissibility to the application.

(4) In the NATO Judgment of 2004, adhered to the holding and *ratione decidendi* of the NATO Order of 1999, i.e., no jurisdiction *ratione materiae*. The opinion of the seven concurring “minority” Judges was not only consistent with past rulings but right on the legal substance.

(5) In the Genocide Judgment of 2007, affirmed that the FRY had always been a UN member regardless of the FRY’s 2000 “admission”, either as a continuator or as an immediate successor, and affirmed its prior ruling on existence of jurisdiction.

Throughout, a strictly “legal” approach would have been more direct, sounder juridically, more consistent, and every bit as practical politically. Inordinate sensitivity to the uncertainties of the UN’s political branches was not required in reaching the same procedural results. The strained resort to *res judicata* was an unnecessary embarrassment.

APPENDIX A

The Security Council, Reaffirming its resolution 713 (1991) of 25 September 1991 and all subsequent relevant resolutions, 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;

2. Decides to consider the matter again before the end of the main part of the forty-seventh session of the General Assembly.

APPENDIX B

The General Assembly, having received the recommendation of the Security Council of 19 September 1992 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,

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 decides 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;

2. Takes note of the intention of the Security Council to consider the matter again before the end of the main part of the forty-seventh session of the General Assembly.

APPENDIX C

While the General Assembly has stated unequivocally that the Federal Republic of Yugoslavia (Serbia and Montenegro) cannot automatically continue the membership of the former Socialist Federal Republic of Yugoslavia in the United Nations and that the Federal Republic of Yugoslavia (Serbia and Montenegro) should apply for membership in the United Nations, the only practical consequence that the resolution draws is that the Federal Republic of

Yugoslavia (Serbia and Montenegro) shall not participate in the work of the General Assembly. It is clear, therefore, that representatives of the Federal Republic of Yugoslavia (Serbia and Montenegro) can no longer participate in the work of the General Assembly, its subsidiary organs, nor conferences and meetings convened by it.

On the other hand, the resolution neither terminates nor suspends Yugoslavia's membership in the Organization. Consequently, the seat and nameplate remain as before, but in Assembly bodies representatives of the Federal Republic of Yugoslavia (Serbia and Montenegro) cannot sit behind the sign Yugoslavia. Yugoslav missions at United Nations Headquarters and offices may continue to function and may receive and circulate documents. At Headquarters, the Secretariat will continue to fly the flag of the old Yugoslavia as it is the last flag of Yugoslavia used by the Secretariat. The resolution does not take away the right of Yugoslavia to participate in the work of organs other than Assembly bodies. The admission to the United Nations of a new Yugoslavia under Article 4 of the Charter will terminate the situation created by resolution 47/1. (United Nations doc. A/47/485; emphasis in the original.)

