INTERNATIONAL COURT OF JUSTICE

YEAR 2004

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15 December
General List
No. 107

15 December 2004

CASE CONCERNING LEGALITY OF USE OF FORCE

(SERBIA AND MONTENEGRO *v.* FRANCE)

PRELIMINARY OBJECTIONS

Case one of eight similar cases brought by the Applicant — Court to consider arguments put forward in this case as well as any other legal issue, including issues raised in other seven cases.

.....

JUDGMENT

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51. The Court notes that it is, and has always been, common ground between the Parties that Serbia and Montenegro has not claimed to have become a party to the Statute on any other basis than by membership in the United Nations. Therefore the question raised is simply whether or not the Applicant was a Member of the United Nations at the time when it instituted proceedings in the present case.

52. In addressing the question whether Serbia and Montenegro had access to the Court under Article 35, paragraph 1, of the Statute, the Court will consider the arguments put forward in this case and any other legal issue which it deems relevant to consider with a view to arriving at its conclusion on this point, including the issues raised in the other cases referred to in paragraph 3 above.

53. The Court will first recapitulate the sequence of events relating to the legal position of Serbia and Montenegro vis-à-vis the United Nations — events already examined, so far as was necessary to the Court, in the context of another case (see Judgment in the case concerning *Application for Revision , I.C.J. Reports 2003*, pp. 14-26, paras 24-53).

54. In the early 1990s the Socialist Federal Republic of Yugoslavia, made up of Bosnia and Herzegovina, Croatia, Macedonia, Montenegro, Serbia and Slovenia, began to break up. On 25 June 1991 Croatia and Slovenia both declared independence, followed by Macedonia on 17 September 1991 and Bosnia and Herzegovina on 6 March 1992. On 22 May 1992, Bosnia and Herzegovina, Croatia and Slovenia were admitted as Members to the United Nations; as was the former Yugoslav Republic of Macedonia on 8 April 1993.

55. On 27 April 1992 the "participants of the joint session of the SFRY Assembly, the National Assembly of the Republic of Serbia and the Assembly of the Republic of Montenegro" adopted a declaration, stating in pertinent parts:

> [That the new FRY – Serbia and Montenegro – would remain bound by all obligations to international organizations and institutions of which the former Socialist Federal Republic of Yugoslavia had been a member. (United Nations doc. A/46/915, Ann. II.)]

.....

57. On 30 May 1992, the Security Council adopted resolution 757 (1992), in which, *inter alia*, it noted 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".

[The Security Council and GA subsquently recommended that the new FRY submit an application for membership in the United Nations.]

.....

63. As is clear from the sequence of events summarized in the above paragraphs (paragraphs 54-62), the legal position of the Federal Republic of Yugoslavia within the United Nations and vis-à-vis that Organization remained highly complex during the period 1992-2000. In fact, it is the view of the Court that the legal situation that obtained within the United Nations during that eight-year period concerning the status of the Federal Republic of Yugoslavia, after the break-up of the Socialist Federal Republic of Yugoslavia, remained ambiguous and open to different assessments. This was due, *inter alia*, to the absence of an authoritative determination by the competent organs of the United Nations defining clearly the legal status of the Federal Republic of Yugoslavia vis-à-vis the United Nations.

.....

72. To sum up, all these events testify to the rather confused and complex state of affairs that obtained within the United Nations surrounding the issue of the legal status of the Federal Republic of Yugoslavia in the Organization during this period. It is against this background that the Court, in its Judgment of 3 February 2003, referred to the "*sui generis* position which the FRY found itself in" during the period between 1992 to 2000.

73. It must be stated that this qualification of the position of the Federal Republic of Yugoslavia as *"sui generis"*, which the Court employed to describe the situation during this period of 1992 to 2000, is not a prescriptive term from which certain defined legal consequences accrue; it is merely descriptive of the amorphous state of affairs in which the Federal Republic of Yugoslavia found itself during this period. No final and definitive conclusion was drawn by the Court from this descriptive term on the amorphous status of the Federal Republic of Yugoslavia vis-à-vis or within the United Nations during this period. The Court did not commit itself to a definitive position on the issue of the legal status of the

Federal Republic of Yugoslavia in relation to the Charter and the Statute in its pronouncements in incidental proceedings, in the cases involving this issue which came before the Court during this anomalous period. For example, in certain of the Orders of 2 June 1999 in the present cases on the request for the indication of provisional measures, the Court, after examining the contention that the Applicant was not a party to the Statute, stated that: "Whereas, in view of its finding . . . above, the Court need not consider this question for the purpose of deciding whether or not it can indicate provisional measures in the present case." (*Legality of Use of Force (Yugoslavia* v. *Belgium), I.C.J. Reports 1999 (I)*, p. 136, para. 33.)

74. This situation, however, came to an end with a new development in 2000. On 24 September 2000, Mr. Koštunica was elected President of the Federal Republic of Yugoslavia. In that capacity, on 27 October 2000 he sent a letter to the Secretary-General requesting admission of the Federal Republic of Yugoslavia to membership in the United Nations, in the following terms:

> "In the wake of fundamental democratic changes that took place in the Federal Republic of Yugoslavia, in the capacity of President, I have the honour to request the admission of the Federal Republic of Yugoslavia to membership in the United Nations *in light of the implementation of Security Council resolution 777 (1992).*" (United Nations doc. A/55/528-S/2000/1043; emphasis added.)

.....

77. This new development [admission of FRY as a member of the United Nations, upon recommendation by Security Council and adoption by General Assembly] effectively put an end to the *sui generis* position of the Federal Republic of Yugoslavia within the United Nations, which, as the Court has observed in earlier pronouncements, had been fraught with "legal difficulties" throughout the period between 1992 and 2000 (cf. *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Yugoslavia (Serbia and Montenegro)), Provisional Measures, Order of 8 April 1993, I.C.J. Reports 1993*, p. 14, para. 18). The Applicant thus has the status of membership in the United Nations as from 1 November 2000. However, its admission to the United Nations did not have, and could not have had, the effect of dating back to the time when the Socialist Federal Republic of Yugoslavia broke up and disappeared; there was in 2000 no question of restoring the membership rights of the Socialist Federal Republic of Yugoslavia for the benefit of the Federal Republic of Yugoslavia. At the same time, it became clear that the *sui generis* position of the Applicant could not have amounted to its membership in the Organization.

78. In the view of the Court, the significance of this new development in 2000 is that it has clarified the thus far amorphous legal situation concerning the status of the Federal Republic of Yugoslavia vis-à-vis the United Nations. It is in that sense that the situation that the Court now faces in relation to Serbia and Montenegro is manifestly different from that which it faced in 1999. If, at that time, the Court had had to determine definitively the status of the Applicant vis-à-vis the United Nations, its task of giving such a determination would have been complicated by the legal situation, which was shrouded in uncertainties relating to that status. However, from the vantage point from which the Court now looks at the legal situation, and in light of the legal consequences of the new development since 1 November 2000, the Court is led to the conclusion that Serbia and Montenegro was not a Member of the United Nations, and in that capacity a State party to the Statute of the International Court of Justice, at the time of filing its Application to institute the present proceedings before the Court on 29 April 1999.

79. A further point to consider is the relevance to the present case of the Judgment in the *Application for Revision* case, of 3 February 2003. There is no question of that Judgment possessing any force of *res judicata* in relation to the present case. Nevertheless, the relevance of that judgment to the

present case has to be examined, inasmuch as Serbia and Montenegro raised, in connection with its Application for revision, the same issue of its access to the Court under Article 35, paragraph 1, of the Statute, and the judgment of the Court was given in 2003 at a time when the new development described above had come to be known to the Court.

80. On 20 March 1993, the Government of the Republic of Bosnia and Herzegovina filed in the Registry of the Court an Application instituting proceedings against the Government of the Federal Republic of Yugoslavia in respect of a dispute concerning alleged violations of the Convention on the Prevention and Punishment of the Crime of Genocide. The Application invoked Article IX of the Genocide Convention as the basis of the jurisdiction of the Court.

81. On 30 June 1995, the Federal Republic of Yugoslavia, referring to Article 79, paragraph 1, of the Rules of Court, raised preliminary objections concerning the admissibility of the Application and the jurisdiction of the Court to entertain the case. The Court, in its Judgment on Preliminary Objections of 11 July 1996, rejected the preliminary objections raised by the Federal Republic of Yugoslavia, and found *inter alia* that "on the basis of Article IX of the Convention on the Prevention and Punishment of the Crime of Genocide, it has jurisdiction to adjudicate upon the dispute" (*I.C.J. Reports 1996 (II)*, p. 623). The question of the status of the Federal Republic of Yugoslavia in relation to Article 35 of the Statute was not raised and the Court saw no reason to examine it.

82. However, in the wake of the new development in the legal status of the Federal Republic of Yugoslavia in 2000 mentioned above (paragraphs 74-76), the Federal Republic of Yugoslavia filed a new Application dated 23 April 2001 instituting proceedings, whereby, referring to Article 61 of the Statute of the Court, it requested the Court to revise the above-mentioned Judgment of 11 July 1996. In its Application the Federal Republic of Yugoslavia contended the following:

> [claimed that given that FRY did not continue the legal personality of SFRY, it was not a member of the United Nations before 1 November 2000, was not a State party to the ICJ statute, nor a State party to the Genocide Convention].

.....

85. In the Judgment in the *Application for Revision* case, the Court found the Application for revision inadmissible. It is to be noted that the Court observed specifically that:

> "In advancing this argument, the FRY does not rely on facts that existed in 1996. In reality, it bases its Application for revision on the legal consequences which it seeks to draw from facts subsequent to the Judgment which it is asking to have revised. Those consequences, *even supposing them to be established*, cannot be regarded as facts within the meaning of Article 61. The FRY's argument cannot accordingly be upheld." (*I.C.J. Reports 2003*, p. 30, para. 69; emphasis added.)

86. Thus the Court did not regard the alleged "decisive facts" specified by Serbia and Montenegro as "facts that existed in 1996" for the purpose of Article 61. The Court therefore did not have to rule on the question whether "the legal consequences" could indeed legitimately be deduced from the later facts; in other words, it did not have to say whether it was correct that Serbia and Montenegro had not been a party to the Statute or to the Genocide Convention in 1996. It is for this reason that the Court included in its Judgment the words now italicized in the above quotation.

87. In its Judgment the Court went on to state that:

"Resolution 47/1 did not *inter alia* affect the FRY's right to appear before the Court or to be a party to a dispute before the Court under the conditions laid down by the Statute . . . To 'terminate the situation created by resolution 47/1', the FRY had to submit a request for admission to the United Nations as had been done by the other Republics composing the SFRY. All these elements were known to the Court and to the FRY at the time when the Judgment was given. Nevertheless, what remained unknown in July 1996 was if and when the FRY would apply for membership in the United Nations and if and when that application would be accepted, thus terminating the situation created by General Assembly resolution 47/1." (*Ibid.*, p. 31, para. 70.)

On the critical question of the Federal Republic of Yugoslavia's admission to the United Nations as a new Member, the Court emphasized that

"General Assembly resolution 55/12 of 1 November 2000 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" (*ibid.*, para. 71).

These statements cannot however be read as findings on the status of Serbia and Montenegro in relation to the United Nations and the Genocide Convention; the Court had already implied that it was not called upon to rule on those matters, and that it was not doing so.

88. In the immediately following paragraph of the Judgment, the Court stated:

"It follows from the foregoing that it has not been established that the request of the FRY is 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'. The Court therefore concludes that one of the conditions for the admissibility of an application for revision prescribed by paragraph 1 of Article 61 of the Statute has not been satisfied." (*Ibid.*, para. 72.)

The Court thus made its position clear that there could have been no retroactive modification of the situation in 2000, which would amount to a new fact, and that therefore the conditions of Article 61 were not satisfied. This, however, did not entail any finding by the Court, in the revision proceedings, as to what that situation actually was.

89. Given the specific characteristics of the procedure under Article 61 of the Statute, in which the conditions for granting an application for revision of a judgment are strictly circumscribed, there is no reason to treat the Judgment in the *Application for Revision* case as having pronounced upon the issue of the legal status of Serbia and Montenegro vis-à-vis the United Nations. Nor does the Judgment pronounce upon the status of Serbia and Montenegro in relation to the Statute of the Court.

90. For all these reasons, the Court concludes that, at the time of filing of its Application to institute the present proceedings before the Court on 29 April 1999, the Applicant in the present case, Serbia and Montenegro, was not a Member of the United Nations, and consequently, was not, on that basis, a State party to the Statute of the International Court of Justice. It follows that the Court was not open to Serbia and Montenegro under Article 35, paragraph 1, of the Statute.

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JOINT DECLARATION OF VICE-PRESIDENT RANJEVA, JUDGES GUILLAUME, HIGGINS, KOOIJMANS, AL-KHASAWNEH, BUERGENTHAL AND ELARABY

Various objections to the jurisdiction of the Court — Freedom of choice of the Court — Guiding criteria: consistency; certitude; implications for the other pending cases — Judgment of the Court inappropriately based on its lack of jurisdiction ratione personae *— Judgment incompatible with previous decisions of the Court.*

1. We have voted in favour of the *dispositif* of the Judgment because, at the end of the day, we each agree that this case cannot, as a matter of law, proceed to the merits. Nevertheless, we profoundly disagree with the reasoning upon which the Judgment rests, in particular the ground upon which the Court has found it has no jurisdiction.

2. It is not unusual that, in a case, the Court has the possibility of determining its jurisdiction on more than one ground (*Right of Passage over Indian Territory, Preliminary Objections, Judgment, I.C.J. Reports 1957*, pp. 129-134; *Aerial Incident of 27 July 1955 (Israel* v. *Bulgaria), Judgment, I.C.J. Reports 1959*, pp. 132-134; *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon* v. *Nigeria), Preliminary Objections, Judgment, I.C.J. Reports 1998*, pp. 284-289; *Aerial Incident of 10 August 1999 (Pakistan* v. *India), Jurisdiction, Judgment, I.C.J. Reports 2000*, pp. 19-24). Submissions may have been made to the Court that it lacks jurisdiction by reference to more than one of the common bases of jurisdiction (that is to say, *ratione personae, ratione materiae, ratione temporis*). If the Court finds that, on two or more grounds, its jurisdiction is not well founded, it may choose the most appropriate ground on which to base its decision of lack of competence. The Court does not necessarily first have to dispose of the conditions laid down in Article 35 of the Statute, dealing only later with the conditions laid down in Articles 36 and 37.

3. The choice of the Court has to be exercised in a manner that reflects its judicial function. That being so, there are three criteria that must guide the Court in selecting between possible options. First, in exercising its choice, it must ensure consistency with its own past case law in order to provide predictability. Consistency is the essence of judicial reasoning. This is especially true in different phases of the same case or with regard to closely related cases. Second, the principle of certitude will lead the Court to choose the ground which is most secure in law and to avoid a ground which is less safe and, indeed, perhaps doubtful. Third, as the principal judicial organ of the United Nations, the Court will, in making its selection among possible grounds, be mindful of the possible implications and consequences for the other pending cases.

4. In the earlier phase of the present case — as in other cases relating to events after the break up of the Socialist Federal Republic of Yugoslavia — the Court had chosen to base itself on jurisdictional considerations *ratione temporis* and *ratione materiae*.

5. In this respect it should first be recalled that when the Court gave an Order of 2 June 1999, in response to a request by the Federal Republic of Yugoslavia for the indication of provisional measures, in which it found that it lacked prima facie jurisdiction to rule on Yugoslavia's Application, it did so on quite different grounds from the one on which the Court has based itself in the present decision.

6. In the Orders concerning Belgium, Canada, Netherlands, Portugal and the United Kingdom, the Court observed that Yugoslavia's declaration accepting the compulsory jurisdiction of the Court under Article 36, paragraph 2, of the Statute, had been filed with the United Nations Secretary-General on 26 April 1999 (three days before the institution of proceedings). In that declaration, Yugoslavia recognized, on condition of reciprocity, "the jurisdiction of the said Court in all disputes arising or which may arise after the signature of the present Declaration, with regard to the situations or facts subsequent to this signature".

The Court found that the Application was directed, in essence, against the bombing of Yugoslav territory by several members of NATO. It observed that the bombings began on 24 March 1999. Accordingly, it considered that the disputes before it had arisen some time prior to 25 April 1999. The Court further recalled its established jurisprudence whereby any limitation *ratione temporis* attached by one of the parties to its declaration of acceptance of the Court's jurisdiction "holds good as between the Parties" and concluded from this that the declaration of Yugoslavia, taken in conjunction with those made by the Parties which had also accepted the Court's jurisdiction under Article 36, paragraph 2, of the Statute, did not constitute a basis on which its jurisdiction could prima facie be founded (see, for example, case concerning *Legality of Use of Force (Yugoslavia* v. *Belgium), Order of 2 June 1999, I.C.J. Reports 1999 (I)*, p. 135, para. 30). The Court, thus lacking prima facie jurisdiction *ratione temporis*, concluded that it did not need to examine whether Yugoslavia was or was not a Member of the United Nations and a party to the Statute in 1999, or whether on such basis it had jurisdiction *ratione personae*.

7. In all the Orders, the Court next noted that Yugoslavia and certain of the respondent States were parties to the United Nations Genocide Convention without reservation. It recalled the definition of genocide as stated in the Convention and observed that, according to that definition, "[the] essential characteristic [of genocide] is the intended destruction of 'a national, ethnical, racial or religious group'" (*ibid.*, p. 138, para. 40). In the Court's view, it did not appear "at the present stage of the proceedings that the bombings which form the subject of the Yugoslav Application 'indeed entail the element of intent, towards a group as such, required by the provision quoted above'" (*ibid.*, p. 138, para. 40).

8. Based on different reasoning, the Court has now confirmed that it lacks jurisdiction to entertain the claims presented by Serbia and Montenegro. It began by finding that Serbia and Montenegro, on 29 April 1999, was not a Member of the United Nations and not a party to the Statute. It concluded therefrom that the Court was not open to Serbia and Montenegro under Article 35, paragraph 1, of the Statute.

Moreover, the Court considered that Article 35, paragraph 2, of the Statute enabled States not parties to the Statute to appear before the Court only by virtue of treaties concluded prior to the entry into force of the Statute. It observed that the Genocide Convention entered into force at a later date, on 12 January 1951. It thus concluded that Article 35, paragraph 2, did not grant Serbia and Montenegro access to the Court under Article IX of the Convention. Accordingly, the Court

was not called upon to decide "whether Serbia and Montenegro was or was not a party to the Genocide Convention" when the Applications were filed. In any event, the Court was, once again, not open to Serbia and Montenegro.

In sum, and contrary to its position in 1999, the Court has thus preferred to rule on its jurisdiction *ratione personae*, without even examining the questions of jurisdiction *ratione temporis* and *ratione materiae* on which it had previously pronounced prima facie.

9. This change of position is all the more surprising as the reasoning now adopted by the Court is at odds with judgments or orders previously rendered by the Court.

10. We would first observe that the question whether Yugoslavia was a Member of the United Nations and as such a party to the Statute between 1992 and 2000, remained a subject of debate during that period. The Court declined to settle the issue, both in 1993 (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Yugoslavia (Serbia and Montenegro)), Provisional Measures, I.C.J. Reports 1993*, p. 14, para. 18), and in 1999 when issuing its Order on Provisional Measures (*Legality of Use of Force (Yugoslavia* v. *Belgium), Order of 2 June 1999, I.C.J. Reports 1999 (I)*, p. 136, para. 33). It then confined itself to stating that the solution adopted in this respect by Security Council resolution 757 and General Assembly resolution 47/1 was "not free from legal difficulties" (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Yugoslavia (Serbia and Montenegro)), Provisional Measures, I.C.J. Reports 1993*, p. 14, para. 18).

Subsequent to the admission of Serbia and Montenegro to the United Nations on 1 November 2000, the Court had to consider the question whether that admission clarified the previous position. The Court then found, in its Judgment of 3 February 2003, that "Resolution 47/1 did not *inter alia* affect the Federal Republic of Yugoslavia's right to appear before the Court or to be a party to a dispute before the Court under the conditions laid down by the Statute" (*Application for Revision of the Judgment of 11 July 1996 in the Case concerning* Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina *v.* Yugoslavia), Preliminary Objections *(Yugoslavia* v. *Bosnia and Herzegovina), I.C.J. Reports 2003*, p. 31, para. 70). The Court added that "General Assembly resolution 55/12 of 1 November 2000 cannot have changed retroactively the *sui generis* position which the Federal Republic of Yugoslavia 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" (*ibid.*, para. 71). The Court thus previously found in 2003 that the Federal Republic of Yugoslavia could appear before the Court between 1992 and 2000 and that this position was not changed by its admission to the United Nations in 2002.

11. Further, the interpretation given in the present Judgment of Article 35, paragraph 2, of the Statute also appears to us to be at odds with the position previously adopted by the Court in its Order of 8 April 1993, where it considered that "proceedings may validly be instituted by a State against a State which is a party to such a special provision in a treaty in force, but is not party to the Statute, and independently of the conditions laid down by the Security Council in its resolution 9 of 1946" (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Yugoslavia (Serbia and Montenegro)), Provisional Measures, Order of 8 April 1993, I.C.J. Reports 1993*, p. 14, para. 19). It is moreover astonishing that the Court found it necessary to rule on the scope of Article 35, paragraph 2, whereas the Applicant did not invoke this text.

12. Turning to the second criterion that the Court should apply in selecting between alternative grounds for its decision — that of certitude — we also find this not to be reflected in the ground chosen by the Court today. Nothing has occurred, in the series of cases concerning Kosovo, since the Court's last judgment in 2003, to suggest that the grounds previously chosen have now lost legal credibility. Further, the grounds today selected by the Court are less certain than others open to it. The Court has determined that the admission of the Applicant to the United Nations in

November 2000 "did not have and could not have had, the effect of dating back to the time when the Socialist Federal Republic of Yugoslavia broke up and disappeared" (para. 77). The Court has also stated that "the significance of this new development in 2000 is that it has clarified the thus far amorphous legal situation concerning the status of the Federal Republic of Yugoslavia vis-à-vis the United Nations" (para. 78). Without specifying whether this "clarification" refers to the period 1992-2000, the Court asserts that it has now become "clear that the *sui generis* position of the Applicant could not have amounted to its membership in the Organization". We find this proposition far from self-evident and we cannot trace the steps of the reasoning. Such grounds seem to us to be less legally compelling and therefore less certain, and more open to different points of view, than the grounds relied upon by the Court thus far and which are now set aside by the Court.

13. We have referred also to the care that the Court must have, in selecting one among several possible grounds for a decision on jurisdiction, for the implications and possible consequences for other cases. In that sense, we believe that paragraph 39 of the Judgment does not adequately reflect the proper role of the Court as a judicial institution. The Judgment thus goes back on decisions previously adopted by the Court, whereas it was free to choose the ground upon which to base them and was under no obligation to rule in the present case on its jurisdiction *ratione personae*. Moreover, this approach appears to leave some doubt as to whether Yugoslavia was a party, between 1992 and 2000, to the United Nations Genocide Convention. Such an approach could call into question the solutions adopted by the Court with respect to its jurisdiction in the case brought by Bosnia-Herzegovina against Serbia and Montenegro for the application of the Genocide Convention. We regret that the Court has decided to take such a direction.

(Signed) Raymond RANJEVA.

(Signed) Gilbert GUILLAUME.

(Signed) Rosalyn HIGGINS.

(Signed) Pieter KOOIJMANS.

(Signed) Awn Shawkat AL-KHASAWNEH.

(Signed) Thomas BUERGENTHAL.

(Signed) Nabil ELARABY.

SEPARATE OPINION OF JUDGE HIGGINS

Removal from the List other than for reasons of discontinuance — Inherent powers of the Court — Inherent powers not limited to two existing examples — Reasons why this case should have been removed from the List — Inappropriate for Judgment to have pronounced on Article 35, paragraph 2, of Statute.

1. The Court in its Judgment finds that the Observations of Serbia and Montenegro have not had the legal effect of discontinuance of proceedings under the Rules (para. 31). I agree. It is clear that the Applicant has declined to "discontinue", and that "discontinuance" as envisaged in the Rules is dependent on the consent of the Parties.

2. The Court further observes that:

> "[p]rior to the adoption of Article 38, paragraph 5, of the Rules of Court, in a number of cases in which the application disclosed no subsisting title of jurisdiction, but merely an invitation to the State named as respondent to accept jurisdiction for the purposes of the case, the Court removed the cases from the List by order. By Orders of 2 June 1999, it removed from the List two cases brought by Serbia and Montenegro concerning *Legality of the Use of Force* against Spain and the United States of America, on the ground that the Court 'manifestly lack[ed] jurisdiction (*I.C.J. Reports 1999*, p. 773)'." (Judgment, para. 32.)

3. The Court then observes that "[t]he present case does not however fall into either of these categories". The Court thus appears to regard these as a closed list of categories for the removal of cases from the List (other than where discontinuance has occurred), and to suggest that no removal from the List was open to the Court in the present case as the facts do not fall within the existing two examples.

4. A case may be discontinued by the applicant alone and an order issued to remove it from the List (*Denunciation of the Treaty of 2 November 1865 between China and Belgium, Order of 25 May 1929, P.C.I.J., Series A, No. 18; Legal Status of the South-Eastern Territory of Greenland, Order of 11 May 1933, P.C.I.J., Series A/B, No. 55*, p. 157; *Protection of French Nationals and Protected Persons in Egypt, Order of 29 March 1950, I.C.J. Reports 1950*, p. 59; *Electricité de Beyrouth Company, Order of 29 July 1954, I.C.J. Reports 1954, p. 107; Aerial Incident of 27 July 1955 (United Kingdom* v. *Bulgaria), Order of 3 August 1959, I.C.J. Reports 1959*, p. 264; *Aerial Incident of 27 July 1955 (United Kingdom* v. *Bulgaria), Order of 30 May 1960, I.C.J. Reports 1960*, p. 146; *Barcelona Traction, Light and Power Company, Limited, Order of 10 April 1961, I.C.J. Reports 1961*, p. 9; *Trial of Pakistani Prisoners of War, Order of 15 December 1973, I.C.J. Reports 1973*, p. 347; *Border and Transborder Armed Actions (Nicaragua* v. *Costa Rica), Order of 19 August 1987, I.C.J. Reports 1987*, p. 182; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Order of 26 September 1991, I.C.J. Reports 1991*, p. 47; *Border and Transborder Armed Actions (Nicaragua* v. *Honduras), Order of 27 May 1992, I.C.J. Reports 1992*, p. 222; *Passage through the Great Belt (Finland* v. *Denmark), Order of 10 September 1992, I.C.J. Reports 1992*, p. 348; *Maritime Delimitation between Guinea-Bissau and Senegal, Order of 8 November 1995, I.C.J. Reports 1995*, p. 423; *Vienna Convention on Consular Relations (Paraguay* v. *United States of America), Order of 10 November 1998, I.C.J. Reports 1998*, p. 426; *Armed Activities on the Territory of the Congo, (Democratic Republic of the Congo* v. *Burundi), Order of 30 January 2001, I.C.J. Reports 2001*, p. 3; *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Rwanda), Order of 30 January 2001, I.C.J. Reports 2001*, p. 6).

5. There is a comparable, and analogous, practice relating to discontinuance upon the agreement of the parties, removal from the List being effected by order. Among the many examples are *Delimitation of the Territorial Waters between the Island of Castellorizo and the Coasts of Anatolia,*

19. Because I am of the firm view that grounds *ratione personae* should not have been chosen for the disposition of this case (for reasons elaborated in the joint declaration of seven judges), it is not my intention here to offer my own views as to the arguments that the Court advances to support its findings on this ground. It suffices to say that, while General Assembly resolution 55/12 of 1 November 2000, admitting the Federal Republic of Yugoslavia as a new State, necessarily clarifies the legal situation *thereafter*, it remains debatable whether "from the vantage point from which the Court now looks at the legal situation", the "new development in 2000 . . . has clarified the thus far amorphous legal situation concerning the status of the Federal Republic of Yugoslavia vis-à-vis the United Nations" *at the relevant time* (Judgment, para. 78).

20. It was said by Judge Lachs in 1992 that, while the various major organs of the United Nations do each have their various roles to play in a situation or dispute, they should act:

> "in harmony — though not, of course, in concert — and that each should perform its functions with respect to a situation or dispute, different aspects of which appear on the agenda of each, without prejudicing the exercise of the other's powers" (*Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya* v. *United Kingdom), Provisional Measures, Order of 14 April 1992, separate opinion of Judge Lachs, I.C.J. Reports 1992*, p. 27).

The Court, in purporting to find an *ex post facto* clarification of the situation as it was in 1992-2000, notwithstanding that the General Assembly and Security Council had in all deliberation felt the objectives of the United Nations were best met by legal ambiguity, seems to have ignored that wise dictum.

(Signed) Rosalyn HIGGINS.
