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Legality of the Use of Force (Serbia and Montenegro v. United Kingdom et al.) (Preliminary Objections)

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I. INTRODUCTION

In April 1999, the Government of the former Federal Republic of Yugoslavia filed Applications in the registry of the International Court of Justice (the "Court") instituting proceedings against eight N.A.T.O. Respondents.[1] Yugoslavia alleged that each Respondent (Belgium, Canada, France, Germany, Italy, the Netherlands, Portugal and the United Kingdom[2]), by virtue of its involvement in military strikes against Yugoslavia, had committed acts that violated several international obligations; including that banning the use of force against another State,

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[1] *Legality of Use of Force (Serbia and Montenegro v. Belgium); (Serbia and Montenegro v. Canada); (Serbia and Montenegro v. France); (Serbia and Montenegro v. Germany); (Serbia and Montenegro v. Italy); (Serbia and Montenegro v. Netherlands); (Serbia and Montenegro v. Portugal); (Serbia and Montenegro v. United Kingdom)* (1999-2004). Collectively, these disputes will be referred to as the *Legality of Use of Force* cases. Although the cases have not yet been reported, the decisions are available online at <http://www.icj-cij.org/icjwww/idecisions.htm>. All the judgments are for the most part identical in content, thus for simplicity, all references (other than those explicitly stated) will refer to the "default judgment" in *Legality of Use of Force (Serbia and Montenegro v. United Kingdom).*

[2] Yugoslavia also initiated proceedings against Spain and the United States, however, these cases were removed from the List on the grounds that the Court manifestly lacked jurisdiction: *Legality of Use of Force (Yugoslavia v. United States of America) (Provisional Measures)* [1999] I.C.J. Rep. 916; and *Legality of Use of Force (Yugoslavia v. Spain) (Provisional Measures)* [1999] I.C.J. Rep. 761.

and the obligation not to deliberately inflict conditions of life calculated to cause the physical destruction of another group.[3]

On 15 December 2004, the Court published its judgment on the preliminary objections raised in each of the *Legality of Use of Force* cases. Although the cases raised significant legal questions concerning the legality of military intervention in the resolution of ethnic conflict, the Court was precluded from addressing the merits of these cases by its finding that it could not exercise jurisdiction over the dispute.

In its initial Application, Serbia and Montenegro invoked two bases for the Court's jurisdiction: Article 36(2) of the *Statute of the International Court of Justice* (the "Statute")[4], and Article IX of the *Convention on the Prevention and Punishment of the Crime of Genocide* (the "Genocide Convention")[5]. In the cases against Belgium and the Netherlands, Serbia and Montenegro also invoked the provisions of bilateral treaties that referred disputes between these States to the Permanent Court of International Justice.[6]

Each Respondent submitted preliminary objections to the admissibility of Serbia and Montenegro's application, and to the Court's jurisdiction to adjudicate the dispute on the above grounds. The crucial issue for determination was the legal status of Yugoslavia in relation to the United Nations (U.N.) at the time the *Legality of Use of Force* cases were initiated, which in turn was deemed to have governed the Yugoslavia's right to access the Court.

After examining several General Assembly and Security Council resolutions, and the administrative practice of the U.N. Secretariat, the Court concluded that Yugoslavia was not a member of the U.N. from the break-up of the former Soviet Republic until its admission as a member in 2000. By virtue of its status, Serbia and Montenegro had no access to the

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[3] *Legality of Use of Force (Serbia and Montenegro v. United Kingdom),* para 1.

[4] Opened for signature 26 June 1945; (1946) U.K.T.S. 67; (entered into force 24 October 1945).

[5] Opened for signature 9 December 1948; 78 U.N.T.S. 277; (entered into force 12 January 1951).

[6] *Legality of Use of Force Cases (Serbia and Montenegro v. Netherlands)*, para. 114, *(Serbia and Montenegro v. Belgium)*, para. 115.

Court, which consequently lacked jurisdiction *ratione personae*[7]. As this case note will illustrate, the Court's reasoning is highly contentious and has been openly criticised in a number of dissenting opinions.[8] Nevertheless, the judgment does provide detailed analysis of the scope and operation of Article 35, paragraphs (1) and (2) of the Statute. Article 36(2) was not given any judicial attention, as the Court held it necessary to determine whether the Applicant could meet the precondition of access under Article 35.

The *Legality of Use of Force* cases should be read in light of the extraordinary political circumstances and legal manoeuvring that influenced their development, in particular the change of government in Belgrade in September 2000, which prompted a reconsideration of Yugoslavia's status within the UN, and a formal application for membership. Previously, Yugoslavia had considered itself a continuation of the former socialist State in relation to international political and legal commitments.

During the course of these proceedings, Yugoslavia adopted a "changed attitude" to its legal commitments during the period 1992-2000. It now contended that it was neither a member of the U.N. during this period, nor a party to the Genocide Convention until 2000 and 2001 respectively. This contention had immediate implications for the pending *Genocide Convention* case[9] (initiated by Bosnia and Herzegovina against Yugoslavia), and consequently Serbia and Montenegro asked the Court for a revision of its 1996 Judgment on the Preliminary Objections[10], effectively (although arguably) destroying the jurisdictional bases it had invoked in the present cases. As Judge Kooijmans noted, "[t]he arguments made by Serbia and Montenegro in the *Application for Revision*

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[7] Jurisdiction limited by the identity / character of the parties.

[8] See the Separate Opinions of Judges Higgins, Elaraby and Kooijmans; and the Joint Declaration of Vice-President Ranjeva, Judges Guillaume, Higgins, Kooijmans, Al-Khasawneh, Buergenthal and Elaraby.

[9] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* 1993-Present.

[10] *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)* [2003] I.C.J. Rep. 31.

case and in the present cases are virtually identical, and thus establish a close link between the *Genocide Convention* case and the present cases'.[11] As I will argue, this link must be considered in evaluating the Court's judgment in the *Legality of Use of Force* cases.[12]

Context aside, the Court's reasoning in the *Legality of Use of Force* cases demonstrates a more restrictive approach to the establishment of jurisdiction *ratione personae*, contingent upon a right of access to the Court and, in Serbia and Montenegro's situation, continued membership of the U.N. at the time of Application. The Court also interpreted the operation of Article 35(2) of the Statute narrowly, restricting it to "treaties in force" at the time the Statute came into operation. Serbia and Montenegro was therefore unable to rely on Article IX of the Genocide Convention as a basis for jurisdiction.

II. A PRELIMINARY ISSUE: REJECTION OF SERBIA AND MONTENEGRO'S CLAIMS *IN LIMINE LITIS*

The respondents in each of the *Legality of Use of Force* cases requested that the Court reject the claims of Serbia and Montenegro *in limine litis*[13]. Although presented in different forms and supported by various arguments, the fundamental claim of each Respondent was that by virtue of the Applicant's changed attitude to the question of jurisdiction, the Court could simply dismiss the case without inquiring further into the source of its jurisdiction.[14]

The Applications filed by Yugoslavia on 29 April 1999 were taken to assert by implication, and the subsequent Memorial filed by Serbia and Montenegro explicitly, that the Court was open to it (under Art. 35(1) of

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[11] Legality of Use of Force cases, Separate Opinion of Judge Kooijmans, para 9.

[12] It should also be noted that these events had not yet occurred and this link was not apparent on 2 June 1999, when the Court rejected Yugoslavia's request for provisional measures against all Respondents on the basis that it lacked jurisdiction *ratione temporis*, see *Legality of Use of Force (Provisional Measures)*, above n. 4.

[13] Decisions of this type involve the Court removing the cases from its list, by a 'pre-preliminary' or summary determination finding that there is no subsisting dispute, that the Court lacks jurisdiction or is not called upon to give a decision on the claims; or by declining to exercise jurisdiction.

[14] *Legality of Use of Force*, above n. 3, para. 24.

the Statute) on the basis that it was a member of the United Nations and thus a party to the Court's Statute by virtue of Article 93(1) of the U.N. Charter.[15] However, in its observations on the preliminary objections of the Respondents filed in December 2002, Serbia and Montenegro stated the following:

> As the Federal Republic of Yugoslavia became a *new* member of the United Nations on 1 November 2000, it follows that it was not a member before that date. Accordingly, it became an established fact that before 1 November 2000, the Federal Republic of Yugoslavia was not and could not have been a party to the Statute of the Court by way of U.N. membership.[16]

In relation to jurisdiction under the Genocide Convention, Serbia and Montenegro made the following observation:

> The Federal Republic of Yugoslavia did not continue the personality and treaty membership of the former Yugoslavia, and thus specifically, it was not bound by the Genocide Convention until it acceded to that Convention (with a reservation to Article IX) in March 2001.[17]

The first argument advanced by some of the Respondents was that Serbia and Montenegro's position effectively results in a discontinuance of the proceedings, which it instituted.[18] The discontinuance of proceedings by the Applicant is provided for in Article 89 of the *Rules of the International Court of Justice* (the "Rules")[19], if "the applicant informs the Court in writing that it is not going on with the proceedings".

However, the Court declined to treat the contradictory observations of Serbia and Montenegro as having the effect of discontinuance. In its interpretation of Article 89 of the Rules, the Court emphasised the voluntary and express nature of the withdrawal, at the instigation of one of the parties, rather than as an inference drawn from their conduct. The

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[15] Ibid., para. 26.
[16] Ibid., para. 27.
[17] Ibid.
[18] Ibid., para. 29
[19] Adopted 14 April 1978; (as amended 5 December 2000).

Court noted that Serbia and Montenegro had "expressly denied that its observations were a notice of discontinuance",[20] and further noted that any finding to the contrary would "be the result of the Court's own finding and not the placing on record of a withdrawal by Serbia and Montenegro of the dispute from the Court's purview".[21]

Consequently, the Court declined to end the proceedings, although it recognised that it did have the power to do so in certain circumstances, where the Application "disclosed no subsisting title of jurisdiction, but merely an invitation to the State named as a respondent to accept jurisdiction for the purposes of the case", or that "the Court manifestly lacked jurisdiction".[22] The Court's refusal to dismiss the case *in limine litis* was criticised by Judge Kooijmans and Judge Higgins,[23] who felt that the Applicant had not been able to offer any alternate basis for jurisdiction to replace that, which was no longer maintained and thus failed to meet the *continuing* obligation of Article 38(2) of the Rules of the Court.[24] Contrary to the reasoning in the Court's judgment, Judge Kooijmans and Judge Higgins saw the Court's power to strike a case from its list as inherent to the judicial process rather than a power to give effect to the intention of the parties.[25]

Given the absence of any express withdrawal, the Court did not accept the Respondents' argument that Serbia and Montenegro's admission that it was not a party to the Genocide Convention at the time of its application to the Court, meant that in essence the substantive dispute between the parties had disappeared.[26] The Court also rejected the contention that in light of its "changed attitude", the Applicant "should be held to have forfeited or renounced its right of action and to be estopped from continuing the present action before the Court".[27]

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[20] *Legality of Use of Force*, above n. 3, para. 19.
[21] Ibid., para. 30.
[22] Ibid., para. 31.
[23] Judge Kooijmans, above n. 13, para. 21; and Separate Opinion of Judge Higgins, para. 13-15.
[24] Article 38(2) reads, *inter alia*, "[t]he application shall specify as far as possible the legal grounds upon which the jurisdiction of the Court is said to be based".
[25] Judge Kooijmans, above n. 13, para. 22; see also Judge Higgins, above n. 25, para. 12.
[26] *Legality of Use of Force*, above n. 34, para. 39.
[27] Ibid., para. 41.

The Respondents also argued that as there was substantive agreement between the parties on a question of jurisdiction determinative of the case, the dispute before the court had disappeared. It was contended that as both parties agreed now that the Applicant was not a party to the Statute at the time proceedings were initiated, there was no dispute as to the Court's jurisdiction. The exercise of jurisdiction "on a basis which has been abandoned by the Applicant and which was always denied by the Respondent, would make a mockery of the principle that jurisdiction is founded on the consent of the parties".[28]

The Court however, refused to accept this argument, distinguishing between a "question of jurisdiction that relates to the consent of a party and the question of the right of a party to appear before the Court under the requirements of the Statute, which is not a matter of consent".[29] The question for determination was whether *as a matter of law* Serbia and Montenegro was entitled to seise the Court as a party to the Statute at the time it initiated proceedings. As the issue is one of *access* rather than *consent*, jurisdiction is independent of the views of the parties and the "function of the Court to enquire into the matter and reach its own conclusion ... is in no way incompatible with the principle that the jurisdiction of the Court depends on consent".[30]

Interestingly, it was implied by some of the Respondents that the contradictory attitude adopted by Serbia and Montenegro in these proceedings might have been influenced by the pending *Genocide Convention* case. However, the Court held in addressing these preliminary arguments that "it cannot decline to entertain a case simply because of a suggestion as to the motives of one of the parties or because its judgment may have implications in another case".[31] The Court thus declined to remove the cases concerning *Legality of Use of Force* from the list, or to dismiss the cases *in limine litis*, and proceeded to examine the arguments as to the Court's jurisdiction to entertain the dispute.[32]

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[28] Ibid., para. 33.
[29] Ibid., para. 34.
[30] Ibid.
[31] Ibid., para. 38. Note however, the "concerns expressed as to the present cases".
[32] Ibid., para. 42.

III. JURISDICTION

The right of Serbia and Montenegro to access the International Court of Justice was the principal jurisdictional issue in the *Legality of Use of Force* cases. Before the Court could determine the validity of the exercise of its jurisdiction under the bases invoked by the Applicant, it had to be satisfied that Serbia and Montenegro could access the Court, as only States that have access to the Court under Articles 34 and 35 of the Statute can confer jurisdiction upon it.[33] Article 34 states that "[o]nly States may be parties in Cases before the Court". Article 35(1) stipulates "[t]he Court shall be open to the States parties to the present Statute".

A. Serbia and Montenegro's right of access to the International Court of Justice

The fact that Serbia and Montenegro is a State for the purpose of Article 34(1) was not in dispute. However, it was contended by the respondent States that Serbia and Montenegro did not meet the conditions laid down in Article 35 at the time it filed its Application on 29 April 1999.[34]

Access to the Court was deemed to be inextricably linked with Serbia and Montenegro's status as a member of the U.N. The Court noted that "no specific assertions" were made in its application that the Court was open to Serbia and Montenegro under Article 35(1) of the Statute.[35] However, the Applicant expressly claimed to be a member of the U.N. at the time of filing the application, and thus a party to the Statute of the Court by virtue of Article 93(1) of the U.N. Charter. Serbia and Montenegro did not claim to have become a party to the Statute on any other basis than by membership of the U.N.[36]

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[33] Ibid., para. 44.
[34] Ibid., para. 49.
[35] Ibid., para. 45.
[36] Ibid., para. 50.

B. Was the Applicant a member of the United Nations at the time proceedings were initiated?

In ascertaining the legal and membership status of Serbia and Montenegro vis-à-vis the U.N., the Court looked to the attitude of member States as expressed in General Assembly and Security Council resolutions, and the practice of U.N. bodies in their administrative dealings with Serbia and Montenegro.

The position of Serbia and Montenegro in relation to the U.N. has been particularly complex in light of the break-up of the former Socialist Federal Republic of Yugoslavia (the "S.F.R.Y.")[37] in the early 1990s. On 25 June 1991, Croatia and Slovenia declared independence, followed by Macedonia on 17 September 1991 and Bosnia and Herzegovina on 6 March 1992. The nations were admitted as members of the U.N. between May 1992 and April 1993.

After the break-up, the Republics of Serbia and Montenegro stated that, under the title the "Federal Republic of Yugoslavia", they wished "to continue the state, international legal and political personality of the S.F.R.Y., and abide by all the commitments that it assumed internationally".[38] This statement was officially expressed in a declaration adopted by the joint session of the S.F.R.Y. on 27 April 1992, the National Assembly of the Republics of Serbia and Montenegro and in an official note from the permanent mission of Yugoslavia to the U.N.[39]

However, U.N. member States did not immediately accept the continuing legal existence of Yugoslavia. On 30 May 1992, the Security Council adopted resolution 757, in which 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".[40] Further, on 19 September 1992, the Security Council adopted resolution 777, reiterating its view that Yugoslavia could not automatically continue

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[37] Comprising of Bosnia and Herzegovina, Croatia, Macedonia, Montenegro, Serbia and Slovenia.

[38] *Legality of Use of Force*, above n. 3, para. 54.

[39] Ibid., para. 55.

[40] Ibid., para. 56.

its U.N. membership, nor participate in the work of the General Assembly and recommending Yugoslavia apply for membership.[41] On 22 September 1992, the General Assembly adopted a resolution 47/1 in similar terms.[42]

Although the Court considered the voting figures for the resolutions (endorsed by the vast majority of members) as indicative of a general international sentiment, it noted with caution that "they cannot be construed as conveying an authoritative determination of the legal status of the Federal Republic of Yugoslavia within, or vis-à-vis, the United Nations".[43] The Applicant's situation was complicated by the administrative practices of U.N. organs that maintained the status quo that had prevailed prior to the break-up of the Socialist Republic,[44] and by the fact that Yugoslavia maintained its claim to a continuing legal personality throughout the period 1992 to 2000.[45]

However, the Court escaped having to determine the difficult issue of the legal status of the Federal Republic of Yugoslavia on these facts alone, when in 2000 Yugoslavia's newly-elected President, Mr Koštunica, sent a letter to the Secretary-General requesting that Yugoslavia be admitted to "membership of the United Nations *in light of the implementation of Security Council resolution 777*".[46] This request was granted by General Assembly resolution 55/12 on 1 November 2000.

The Court placed significant emphasis on the terms in which the request for membership was expressed – in particular the phrase "*in light of the implementation of Security Council resolution 777*". The request "signified that [Yugoslavia] had finally decided to act on Security Council resolution 777 (1992) by aligning itself with the position of the Security Council as expressed in that resolution".[47] The Court also noted that the actions of the Security Council and General Assembly in responding to Yugoslavia's

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[41] Ibid., para. 57.
[42] Ibid., para. 58.
[43] Ibid., para. 65.
[44] Ibid., para 66; for example, budgetary assessments of the annual contributions of member States that continued to include Yugoslavia between 1992-2000: the administrative practices of the Secretariat and the Secretary General as a depositary of multilateral treaties.
[45] Ibid., para. 67.
[46] Ibid., para. 73, 76.
[47] Ibid., para. 75.

request were consistent with the procedures for adopting a new member under Article 4 of the Charter, rather than recognising any continuing membership.

In light of the developments that occurred in 2000, the Court determined that Serbia and Montenegro was not a member of the U.N. at the time it instituted proceedings in April 1999:

> This new development effectively put an end to the *sui generis* position of the Federal Republic of Yugoslavia within the United Nations ... The Applicant thus has the status of membership in the United Nations as from 1 November 2000. However, its admission to the UN 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 if 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 Organisation.[48]

As the Applicant was not a member of the U.N., and consequently not a State party to the Statute, the Court was not open to Serbia and Montenegro under Article 35(1).[49]

If we accept the Court's approach, it appears that the events of 2000 simply crystallised or clarified the legal uncertainty that had preceded them. There are, however, a number of difficulties with this reasoning. The Court will not always have the benefit of hindsight, and the approach avoids the difficult question of when Yugoslavia actually ceased to be a member of the U.N. Moreover, given that membership could not be backdated to the break-up of socialist Yugoslavia, the approach does not "not make clear what the legal effects of this 'amorphous' situation were in the period 1992-2000".[50] Furthermore, the distinction between a future event being *determinative* or *indicative* of the presence of a fact in the past is not always easy to discern and raises significant normative questions.

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[48] Ibid., para. 76.
[49] Ibid., para. 89.
[50] Judge Kooijmans, above n. 13, para. 4.

Should the present legal status of a State be able to affect its liability for acts done in the past, or affect the right of a State to seek compensation?

The Court indicated that Yugoslavia's application for membership cleared the ambiguity surrounding its previous legal situation. However, given the contrary opinions expressed by several judges in separate opinions,[51] this finding is far from self-evident. In particular, Judge Elaraby, by placing less emphasis on U.N. resolutions and greater weight on the *practical continuation* of Yugoslavia's membership, was of the opinion that the Federal Republic of Yugoslavia was a member when the Application was filed.[52] Judge Elaraby noted that the resolutions had little practical consequence - they did not suspend Yugoslavia's membership, it continued to participate in legal proceedings before the Court, retained its flag, seat and nameplate in the General Assembly, and was listed as a Member of the U.N. by the Secretariat after September 1992.[53]

As the alternate conclusion of Judge Elaraby illustrates, criticisms could also be made of the Court's use of evidence in establishing Yugoslavia's legal position. As an indication of Yugoslavia's attitude to its legal status in the U.N., and as evidence of State behaviour, the Court provided no justification why the request for membership should have been prioritised over the other actions previously taken by Yugoslavia – for example, consistently maintaining its claim to a continuing legal personality between 1992 and 2000. As Judge Kooijmans queries: '[h]ave these [prior] commitments become meaningless ... merely as a result of its admission to the United Nations as a new Member and the negation of the presumption of continuity implicit therein?'[54] The case also highlights the broader difficulties faced by international legal jurists when legal status, rights and obligations of States can only be determined by reference to the contentious political actions of States.

The approach taken by the Court in establishing the legal status of the Federal Republic of Yugoslavia in the *Legality of Use of Force* cases appears contradictory to that adopted in the *Application for Revision*

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[51] Ibid.; also see the Joint Declaration, above n. 10, para. 12.
[52] Separate Opinion of Judge Elaraby, para. 2.
[53] Ibid., para. 2-13.
[54] Judge Kooijmans, above n. 13, para. 5.

judgment in the *Genocide Case*.[55] In that judgment, the Court heard the same objection that raised by the Respondents in the current cases - namely that the admission of Yugoslavia as a new member of the U.N. in 2000 meant that it could not have been a member before that date. However, the Court found that this "new fact" (and the legal consequences inferred from it) could not be used to establish the existence of the fact at the time the judgment was given – that is, July 1996.

The Court was careful to distinguish the *Application for Revision* judgment as dealing specifically with a revision under Article 61 of the Statute, and presenting no finding as to the legal situation of Yugoslavia during the period 1992 to 2000.[56] Nevertheless, the two judgments, when contrasted, highlight a significant inconsistency in the Court's approach as to whether an event or fact that arises on a certain date can be used to prove the existence of another fact earlier in time. It is interesting to note that on both occasions the Court's approach has gone against the interests of Serbia and Montenegro. In the *Application for Revision* case, it could not rely on its admission for membership in 2000 to evade the Court's jurisdiction in determining claims that it breached provisions of the Genocide Convention. In the *Legality of Use of Force* cases, Serbia and Montenegro's status as a "new member" effectively removed its previous right of access to the Court for the purposes of enforcing its claimed rights under international law against the Respondents (all N.A.T.O. States).

IV. THE SCOPE AND OPERATION OF ARTICLE 35(2) OF THE STATUTE

Although Serbia and Montenegro's application relied solely on Article 35(1) of the Statute as a basis for jurisdiction, in response to the oral arguments and preliminary objections of some of the Respondents, the Court nevertheless deemed it appropriate to the examine the possible application of Article 35(2), which provides:

> The conditions under which the Court shall be open to other States [i.e. States not parties to the Statute] shall, subject to the special provisions contained in treaties in force, be laid down by the

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[55] *Application for Revision* case, above n. 12.
[56] *Legality of Use of Force*, above n. 3, para. 83-87.

> Secretary Council, but in no case shall such conditions place the parties in a position of inequality before the Court.[57]

The Court had previously indicated in the *Genocide Convention* case that Article IX of the Genocide Convention could be considered *prima facie* a special provision contained in a treaty in force, although the point was not pursued.[58] Several Respondents in the present cases urged the Court to revisit the provisional approach adopted in the *Genocide Convention* case, and contended that reference to "treaties in force" only related to treaties in force when the Statute of the Court entered into force on 24 October 1945.

The two main arguments forwarded by the Respondents for limiting the operation of the provision in this way were, first, the "evident focus of the clause in question on the peace treaties concluded after the First World War". Second, that to construe the phrase "treaties in force" as meaning *jurisdictional clauses contained in treaties in force* (i.e. any treaties whatsoever) would undermine the scheme of the Statute and place States not party to the Statute in a privileged position as they would have access to the Court without assuming any treaty obligations.[59]

The Respondents argued that interpretation of Article 35(2) of the Statute should be undertaken in accordance with customary international law, reflected in Article 31 of the *Vienna Convention on the Law of Treaties*.[60] According to this interpretive approach, the Respondents maintained that the words "special provisions" taken in their natural and ordinary meaning, referred to "treaties that make 'special provision' in relation to the Court, and this can hardly be anything other than provision for the settlement of disputes between the parties to the treaty by reference of the

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[57] Ibid., para. 90.

[58] Ibid., para. 92.

[59] Ibid., para. 94; *Legality of Use of Force (Serbia and Montenegro v Belgium)*, Preliminary Objections of Belgium, p. 73, paras. 222-223.

[60] Opened for signature 23 May 1969; 1155 U.N.T.S. 331; (entered into force 27 January 1980). According to Article 31, a treaty must be interpreted in good faith, in accordance with the ordinary meaning of its terms in their context and in light of the treaty's object and purpose. Interpretation must be based on the text of the treaty, although this may be supplemented by recourse to preparatory work and the circumstances of the treaty's conclusion.

matter to the Court".[61] However, the Court noted the natural and ordinary meaning of the words "treaties in force" held no indication of the date at which the treaties were contemplated to be in force, and as such was open to various interpretations[62].

One possible interpretation is to limit "treaties in force" to those in force at the time at which the Statute came into force; another interpretation is to construe "treaties in force" as those in force at the date proceedings were instituted. The Court noted that the latter interpretation would be consistent with the judicial interpretation of similar phrases found in Articles 36 and 37 of the Statute.[63] However, in the context of the object and purpose of Article 35 in defining the conditions of access to the Court, the Court favoured the former interpretation:

> The Court considers that it was natural to reserve the position in relation to any relevant treaty provisions that might then exist; moreover, it would have been inconsistent with the main thrust of the text to make it possible in the future for States to obtain access to the Court simply by the conclusion between themselves of a special treaty, multilateral or bilateral, containing a provision to that effect.[64]

In considering supplementary materials that may provide a clearer interpretation of the provision, the Court examined the *travaux préparatoires* of the text, in particular the drafting history of the Statute of the Permanent Court of International Justice, which contained substantially the same provision. The Court found that the circumstances and debate surrounding the drafting of the provision and its subsequent interpretation in the *S.S. Wimbledon* case[65] and the case concerning *Certain German Interests in Polish Upper Silesia*[66] indicated that Article 35

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[61] *Legality of Use of Force*, above n. 3, para. 99.
[62] Ibid.
[63] Ibid. For the interpretation of Article 36(1), see *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie, (Libyan Arab Jamahiriya v. United Kingdom) (Preliminary Objections, Judgment)* [1998] I.C.J. Rep. 16, para. 19. For the interpretation of Article 37 see *Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain) (Preliminary Objections, Judgment)* [1964] I.C.J. Rep. 27.
[64] *Legality of Use of Force*, above n. 3, para. 100.
[65] [1923] P.C.I.J. Rep., Series A, No. 1, at 6.
[66] [1925] P.C.I.J. Rep., Series A, No. 6, at 11.

intended to cover situations provided for by the treaties of peace – that is, "agreements concluded in the aftermath of the First World War before the Statute entered into force".[67]

Although the Court found the *travaux préparatoires* of the Statute of the present Court "less illuminating" as the text was reproduced from the Statute of the Permanent Court, it could not see any indication that an extension of access to the Court was intended[68] by enlarging the scope of the Article's operation to include treaties in force at the initiation of a dispute. Therefore, Article 35(2) "must be interpreted ... in the same way as the equivalent text in the Statute of the Permanent Court, namely as intended to refer to treaties in force at the date of the entry into force of the new Statute ... and not to any treaties concluded since that date".[69]

This interpretation was considered somewhat restrictive by Judge Elaraby, who felt that the peace treaties concluded after the First World War constituted a far broader category than that envisaged by the Court, and included treaties adopted by the International Labour Conference and treaties concerning the protection of minorities.[70] By analogy, Judge Elaraby regarded the Genocide Convention a peace treaty drafted in the aftermath of the Second World War.

> The Convention was the first post-war treaty in the area of human rights and was considered to be the United Nation's first concrete legal response to the Holocaust ... [it] can be considered *supplementary* to the Second World War peace treaties and consequently come within the definition of Article 35's "treaties in force" even though it entered into force after the Statute of the Court.[71]

In contrast to Judge Elaraby's reasoning, the character and context of the Genocide Convention was not a substantial consideration and the Court refused to exercise its jurisdiction under the basis of Article IX, given that it only entered into force on 12 January 1951, after the commencement of

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[67] *Legality of Use of Force*, above n. 3, para. 111.
[68] Ibid.
[69] Ibid.
[70] Judge Elaraby, above n. 54, para. 8-10.
[71] Ibid., para. 11, at 14.

the Statute. It was therefore unnecessary to determine whether Serbia and Montenegro was a party to the Genocide Convention at the time it initiated proceedings, nor was it necessary to consider the application of Article 36(2) of the Statute.[72]

V. BILATERAL TREATIES AS A LEGAL BASIS FOR JURISDICTION

In its proceedings against Belgium and the Netherlands, Serbia and Montenegro invoked additional grounds of jurisdiction, namely bilateral treaty provisions that referred disputes between the States to the Permanent Court of International Justice. In the claim against Belgium, the Applicant relied on Article 4 of the *Convention of Conciliation, Judicial Settlement and Arbitration between the Kingdom of Yugoslavia and Belgium*[73] (the "1930 Convention").[74] Against the Netherlands, Serbia and Montenegro invoked Article 4 of the *Treaty of Judicial Settlement, Arbitration and Conciliation between the Kingdom of Yugoslavia and the Netherlands*[75] (the "1931 Treaty").[76] Given the Court's interpretation as to the application of Article 35(2) of the Statute, could Serbia and Montenegro invoke Article 4 of the 1930 Convention and the 1931 Treaty as "special provisions contained in treaties in force" to establish a basis of jurisdiction in this case?

The Court held that it could not. Both the 1930 Convention and the 1931 Treaty referred to the Permanent Court of International Justice, whereas Article 35 of the Statute of the Court concerns access to the present Court and not to its predecessor.[77] Although Article 37 of the Statute preserved and transferred the jurisdiction of the Permanent Court to the I.C.J. on certain conditions, the court noted that a similar substitution could not be read into Article 35(2) of the Statute. The Court held that "Article 37 of the Statute can be invoked only in cases which are brought before it as

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[72] *Legality of Use of Force*, above n. 3, para. 112.
[73] Signed at Belgrade on 25 March 1930 and in force since 3 September 1930.
[74] *Legality of Use of Force (Serbia and Montenegro v. Belgium)*, para. 115.
[75] Signed at the Hague on 11 March 1931 and in force since 2 April 1932.
[76] *Legality of Use of Force (Serbia and Montenegro v. Netherland)*, para. 114.
[77] Ibid., para. 122; *(Serbia and Montenegro v Belgium)*, para. 123.

between parties to the Statute".[78] That is, under Article 35(1) of the Statute – not based on Article 35(2).

Following the decision in the *Barcelona Traction* case[79], the Court held three conditions must be met when a treaty providing for the jurisdiction of the Permanent Court of Justice is invoked in conjunction with Article 37 of the Statute. There should be a treaty in force; it should provide for the reference of a matter to the Permanent Court; and that "both the Applicant and the Respondent were, at the moment when the dispute was submitted to it, parties to the Statute".[80] Having already determined that Serbia and Montenegro was not a party to the Statute of the Court when the dispute was referred to it in April 1999, Article 37 of the Statute had no application and therefore the Applicant did not have access to the Court based on Article 35(2), the 1930 Convention and the 1931 Treaty.

VI. CONCLUSION

Given the importance and potential implications of the contentions of Serbia and Montenegro as to the legality of N.A.T.O. military intervention in its territory, it is frustrating that the Court could not proceed to examine the substantive merits of the dispute. The outcome of the *Legality of Use of Force* cases once again raises questions as to the Court's ability meaningfully to resolve international disputes, and its normative role in upholding the principles of international law and protecting against violations of citizens' and States' rights. Indeed, the Court seems to have anticipated these criticisms, by drawing particular attention to the

> fundamental distinction between the existence of the Court's jurisdiction over a dispute, and the compatibility with international law of the particular acts which are the subject of the dispute ... Whether or not the Court finds that it has jurisdiction over a dispute, the parties remain in all cases responsible for acts attributable to them that violate the rights of other States.[81]

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[78] *Serbia and Montenegro v. Belgium,* para. 124; and *Serbia and Montenegro v. the Netherlands,* para. 123.
[79] *Barcelona Traction*, above n. 69, at 32.
[80] *Legality of Use of Force*, above n. 3, paras. 125 and 125 (respectively).
[81] Ibid., para. 114.

This statement was reiterated by Judge Elaraby in a separate opinion,[82] along with Judge Koroma, who found it necessary to emphasise in a separate declaration that the Court was confined to examining only issues of jurisdiction, "determined and limited by the Charter of the United Nations and the Statute of the Court".[83]

The apparent lack of consistency between the Court's reasoning in the present cases and its previous approach in the *Application for Revision* case is another area of concern. Although the Court is not strictly bound by precedent, the joint declaration of seven judges explicitly stated, consistency is of "paramount importance"[84] and "is the essence of legal reasoning".[85] As noted, the Court also substantially revised its position with respect to the scope of Article 35(2) of the Statute. Given that the Applicant did not invoke this provision, such a revision was considered "astonishing"[86], particularly in light of the possible implications and consequences for other pending cases.

The Court's decision was not a favourable outcome for the Applicant in the present case. However, given the unconventional actions of Serbia and Montenegro in resiling from its previously stated grounds of jurisdiction, it is an outcome that in some respects is hardly surprising. The Court ruled that the former Federal Republic of Yugoslavia was not a member of the U.N. following the break-up of the Socialist Republic and prior to its acceptance as new member in 2000. In turn, this meant that Serbia and Montenegro was unable to access the Court under Article 35(1) of the Statute. Although the Court attempted to clarify Yugoslavia's legal position during this period, given the inconsistency with earlier approaches and the nature of its reasoning (questioned by seven of the judges), it appears that Yugoslavia's status from 1992 to 2000 and the legal implications that can be drawn from it, will remain a point of contention. AIJ

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[82] Judge Elaraby, above n. 54.
[83] See Declaration of Judge Koroma.
[84] Judge Kooijmans, above n. 13, para. 10.
[85] Ibid.; Joint Declaration, above n. 10, para. 3.
[86] Joint Declaration, ibid. See also the separate opinion of Judge Higgins, above n. 25, para. 18.