JOINT DISSENTING OPINION OF JUDGES RANJEVA, SHI AND KOROMA

Serious misgivings about Judgment's application of res judicata *of 1996 Judgment on Preliminary Objections to include by "necessary implication" jurisdiction* ratione personae *— Membership in the United Nations as a criterion for access to the Court under Article 35 of the Statute and for entitlement to become a party to the Genocide Convention under Article XI — Jurisdiction* ratione personae *a matter of constitutional and statutory requirements — Article 56 of the Statute: requirement that the Court state the legal principles on which it bases its findings — Scope and effect of* res judicata *derived from relevant provisions of the Statute and by reference to Parties' submissions in the same case — Duty to reply to Parties' submissions and to abstain from deciding more — Ability of the Court to satisfy itself of its own jurisdiction* proprio motu *unaffected — Issue of Parties' access not raised, considered, or decided in 1996 Judgment — Court's consideration of FRY's proclamation of 27 April 1992 — Estoppel and* res judicata *distinguished — Article 35 of the Statute and the conditions by which the Court shall be open — Article 41 of the Rules of Court — Court's 2004* Legality of Use of Force (Serbia and Montenegro *v.* Belgium) *Judgment not* res judicata *for the present case — If Serbia and Montenegro was not a United Nations Member in 1999, then it must not have been a Member when the Application in this case was filed — Court's finding in* Legality of Use of Force (Serbia and Montenegro *v.* Belgium) *Judgment that Genocide Convention did not contain any of "the special provisions contained in treaties in force" under Article 35, paragraph 2, of the Statute — Court should always face jurisdictional challenges — Jurisdictional findings made in 1996 Judgment addressed to Serbia and Montenegro whereas* res judicata *effect in present Judgment applied only to Serbia.*

1. In the Judgment the Court affirms its jurisdiction *ratione personae* based on the *res judicata* effect of the 1996 Judgment on Preliminary Objections and finds, by "necessary implication", that: (1) [the Federal Republic of Yugoslavia (FRY, Serbia and Montenegro and now Serbia)] "was bound by the provisions of the Genocide Convention on the date of the filing of the Application", and (2) "on the basis of Article IX of the Convention on the Prevention and Punishment of the Crime of Genocide, [The Court] has jurisdiction to adjudicate upon the dispute".

2. We view these findings by "necessary implication" with serious misgivings, both in terms of the Statute of the Court and under international law, and hereby express our joint opinion. In doing so, we would like to point out that our position is purely a legal one, not involving any political or moral judgment in respect of the merits of the case. However, we hold firmly to the view that the Judgment, seeking to justify the Court's affirmation of its jurisdiction on the basis of *res judicata*, largely sidesteps two central and related questions which are before the Court and which have a bearing on the existence or non-existence of its jurisdiction at the time the Application was filed in this case: namely, whether or not Serbia and Montenegro (the Respondent) was a United Nations Member and, secondly, whether the Respondent was a party to and/or bound by the Genocide Convention. Under the Charter of the United Nations and the Statute of the Court, membership of the United Nations is one of the ways in which a State is granted access to the Court, and by which the Court, pursuant to Article 35 of its Statute, can exercise jurisdiction *ratione personae* of that State. Membership of the United Nations also entitles a State to become a party to the Genocide Convention pursuant to Article XI thereof.

3. For the Court to affirm its jurisdiction *ratione personae* based on *res judicata*, it must take into consideration the relevant provisions of the Statute as well as the Parties' submissions to the Court. In our judgment, the Court's reliance in this case on *res judicata* to determine whether the

Respondent had access to the Court at the time the Application was filed is untenable as a matter of law. In this regard, we would recall that whether a party has access to the Court is a matter of both constitutional and statutory requirements, whereas jurisdiction is based on consent. Moreover, in relying on *res judicata* as a basis of its jurisdiction *ratione personae*, the Judgment implies that the issue of access was considered and decided, but the issue of access was not even addressed, let alone decided, in either the reasoning or the *dispositif* of the 1996 Judgment. The issue was neither raised at any time by any of the Parties to the proceedings nor discussed directly or indirectly in the text of the 1996 Judgment. In other words, the Court cannot refuse in its Judgment to address this constitutional and statutory requirement, which is one of the substantive submissions of the Parties at this stage, by making a finding based on *res judicata* because *res judicata* cannot extend to an issue which has not been considered, let alone decided, by the Court. Simply put, *res judicata* applies to a matter that has been adjudicated and decided. A matter that the Court has not decided cannot be qualified as *res judicata*. There is nothing in the 1996 Judgment indicating that the Court had *definitively* ruled on that issue in such a way as to confer upon it the authority of *res judicata*. An issue is not precluded by the doctrine of *res judicata* just because the Court says it is. The question before the Court is simply a factual one: judicially ascertaining whether the issue is the same as one earlier decided. When the Court makes such a crucial finding, it must set out its reasons; as Article 56 of the Statute of the Court requires, "[t[he judgment shall state the reasons on which it is based". This provision requires the Court to state the legal principles on which it bases a finding, and how it understood and applied the relevant principles and provisions of the law. The 1996 Judgment states neither the legal principles on which the issue of access was decided nor how those principles were applied.

4. As is to be recalled, the jurisprudence of the Court shows that it has always treated *res judicata* in the context of its Statute and the submissions of the parties. It applies where there is an identity of parties, identity of cause, and identity of subject-matter in between the earlier and subsequent proceedings in the same case. *Res judicata* is not an absolute principle and does not preclude raising an issue which may be proper in the circumstances of the case. In other words, and according to doctrine and jurisprudence, jurisdictional matters can be taken up at any time. Moreover, a party may advance a legally distinct claim arising from the same facts without being barred by *res judicata*. In other words, a State can make a claim on one legal basis and this does not deprive it of the right to assert another claim on a separate legal basis. The question will then arise whether the issue raised by the latter claim was finally determined by the earlier decision.

5. It is thus the issues presented by the *parties* themselves that establish the operative parameters of the judgment and, "[i]n the last analysis the scope of the res judicata can only be determined by reference to the pleadings in general, and to the parties' submissions in particular" (Shabtai Rosenne, *The Law and Practice of the International Court, 1920-2005*, Vol. 3, p. 1603). In this connection, the Court, explaining in the request for interpretation of the Judgment of 20 November 1950 in the *Asylum* case what it had actually decided in its Judgment of 20 November 1950, observed that the question of how asylum was terminated was not raised or decided in the Judgment and that no *res judicata* effect was therefore possible on this issue. This was so, the Court remarked, because, "it is the duty of the Court not only to reply to the questions as stated in the final submissions of the parties, but also to abstain from deciding points not included in those submissions" (*I.C.J. Reports 1950*, p. 402).

6. Of course, this does not affect the ability of the Court to satisfy itself of its own jurisdiction *proprio motu* (*Appeal Relating to the Jurisdiction of the ICAO Council (India* v. *Pakistan), Judgment, I.C.J. Reports 1972*, p. 52, para. 13). However, we hold the view that the Court had not done so in its 1996 Judgment, which is confirmed in its Judgment on the *Legality of Use of Force (Serbia and Montenegro* v. *Belgium)* where it was stated that, "in its Judgment on Preliminary Objections of 11 July 1996 . . . [t]he 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" (*I.C.J. Reports 2004*, p. 311, para. 82). It does therefore now seem not only wholly inconsistent but even a denial of the Court's own "juridical fact" to now reach the conclusion in the present Judgment that, as a matter of "logical construction" and as an element of the reasoning which *can* and *must* be read into the 1996 Judgment, the FRY had the capacity to appear before the Court in accordance with the Statute. In our opinion, the scope and effect of *res judicata* for purposes of jurisdiction *ratione personae* must be determined by reference to the law of the case itself: in this case, whether the Parties had access to the Court and whether the requirements of the United Nations Charter and the Statute of the Court for a Party to appear before the Court were met.

7. On the issue of access, the Court observes in the Judgment that "neither party raised the matter before the Court" because, it is asserted, Bosnia and Herzegovina, the Applicant, would not have wanted to contend that the FRY was not a party to the Statute, thereby, perhaps, denying the Court jurisdiction *ratione personae*, while the FRY would not have wanted to undermine or abandon its claim, at the time, to be the continuator State of the SFRY (paragraph 106). And, as the Court later confirmed in its Judgment in the case concerning *Legality of Use of Force (Serbia and Montenegro* v. *Belgium)*, the Court in 1996, "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*" (*I.C.J. Reports 2004*, p. 309, para. 74; emphasis added) and, as "[t]he question of the status of the Federal Republic of Yugoslavia in relation to Article 35 of the Statute was not raised . . . the Court saw no reason to examine it" (*ibid.*, p. 311, para. 82).

8. Moreover, it is acknowledged in the present Judgment that the Parties and the Court were aware in 1996 that Serbia's membership status of the United Nations and its status as a party to the Genocide Convention were controversial. The Judgment recalls in paragraph 130 that the Court had remarked in its 8 April 1993 Order indicating provisional measures in this case that the solution adopted in the United Nations regarding the status of the FRY as a Member and continuator State of the SFRY "[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, Order of 8 April 1993, I.C.J. Reports 1993*, p. 14, para. 18). It further (paragraph 130) recognizes that there was in fact a disagreement before the Court between the Parties over the FRY's status as a Member of the United Nations at the time of the filing of the Application: Bosnia and Herzegovina, in its Memorial (paras. 4.2.3.11-4.2.3.12), had contended that the FRY could not automatically continue the SFRY's membership of the United Nations, while the FRY had made clear its view that it was the SFRY's continuator State (*Legality of Use of Force (Serbia and Montenegro* v. *Belgium), Judgment, I.C.J. Reports 2004*, p. 299, para. 47). But neither Party actually supported or contested FRY's access to the Court until Serbia and Montenegro's admission to the United Nations as a new Member in 2000. It is thus obvious that not all of the elements of jurisdiction *ratione personae* were actually placed before and decided by the Court in its 1996 Judgment and, accordingly, that the *res judicata* effect of that Judgment for this issue is unsustainable, to say the least.

9. As stated earlier, as a matter of principle, a State is not precluded from legally raising a distinct claim arising from the same facts, where a separate point falls for decision within the same legal context. And more fundamentally, once the question of the Court's jurisdiction has been raised in regard to specific issues, it is the duty of the Court to take those issues into account in determining, on the basis of the law, whether it has been vested with the authority or competence to decide the dispute.

10. The Court confirmed this position in its Judgment on the *Legality of Use of Force (Serbia and Montenegro* v. *Belgium)* when it held that "the *right* of a party to appear before the Court" (*I.C.J. Reports 2004*, p. 295, para. 36; emphasis added) is a question of statutory requirements "not a matter of consent" *(ibid.)*. Thus, whether a State has access to the Court is regulated by the Statute and it is for the Court to determine whether that State meets the said requirements. In that Judgment the Court went on to hold that Serbia and Montenegro was not a Member of the United Nations at the time of the institution of those proceedings in 1999. Accordingly, much attention was focused by the Parties, at the merits stage of this case, on whether the Court had jurisdiction *ratione personae* over the FRY at the time of the institution of the present proceedings in 1993.

11. The requirements to be met in order for the Court to have jurisdiction *ratione personae* are set out in Articles 34 and 35 of the Statute. Article 34 deals with the statehood requirement, while Article 35, paragraph 1, provides that the Court "shall be open" to States parties to the Statute which includes, *ipso facto*, all Members of the United Nations (Charter, Art. 93, para. 1). Under Article 35, paragraph 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." Thus, the Security Council, acting pursuant to Article 35, paragraph 2, of the Statute, in its resolution 9 of 15 October 1946, set forth provisions by which the Court could be open to States not parties to the Statute. Resolution 9 provides for the Court to be open to non-party States that make a declaration accepting the jurisdiction of the Court under the Charter, the Statute, and the Rules, undertaking to comply in good faith with the decisions of the Court, and accepting all the obligations of a Member of the United Nations under Article 94 of the Charter. Article 41 of the Rules of Court regulates "[t]he institution of proceedings by a State which is not a party to the Statute" and provides that "the Court shall decide" "any question of the validity or effect" of a declaration accepting the jurisdiction of the Court, in accordance with any such Security Council resolution adopted pursuant to Article 35, paragraph 2, of the Statute.

12. The status of the FRY with regard to its United Nations membership from 1992 to 2000 is, therefore, an important consideration from the standpoint of Article 35 of the Statute. It may be recalled that the question of the FRY's membership status in the light of the actions taken by the other organs of the Organization was characterized by the Court itself, in its 1993 Order, as "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)), Order of 8 April 1993, I.C.J. Reports 1993*, p. 14, para. 18). The Court in its 2003 *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)* Judgment also described the "*sui generis"* position of the FRY vis-à-vis the United Nations from 1992 to 2000. In the light of Serbia and Montenegro's admission as a new Member in 2000, the Court in 2004 revisited in a "prescriptive" way the question of the FRY's status as a Member of the United Nations from 1992 to 2000 in its Judgment on the *Legality of Use of Force (Serbia and Montenegro* v. *Belgium)* and stated as follows:

> "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*." (*I.C.J. Reports 2004*, p. 305, para. 64; emphasis added.)

With regard to the admission of the FRY as a Member of the United Nations, the Court stated as follows:

> "it has clarified the thus far amorphous legal situation concerning the status of the Federal Republic of Yugoslavia vis-à-vis the United Nations . . . 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." (*Ibid.*, pp. 310-311, para. 79.)

The Court then went on to state that it, "*can exercise its judicial function only in respect of those States which have access* to it under Article 35 of the Statute. And only those States which have access to the Court can confer jurisdiction upon it" (*ibid.*, p. 299, para. 46; emphasis added).

> The Court further stated that, it had not committed:
>
> *"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"* (*ibid.*, p. 309, para. 74; emphasis added).

13. This finding by the Court is obviously not without significance. It is not *res judicata* for the present case in the sense contemplated by Articles 59 and 60 of the Statute of the Court because it was not applicable between the same Parties and in respect of this "particular case". But, from both the factual and legal perspectives, it seems quite clear that, if Serbia and Montenegro was not a Member of the United Nations in 1999, then it must also not have been a Member on 28 March 1993, when the Application in this case was filed. Accordingly, as the Respondent was not a Member of the United Nations, it was ineligible for one of the two methods by which a State may accede to the Genocide Convention pursuant to its Article XI (the other being upon invitation by the General Assembly).

14. But in order to reach to the conclusion that it had jurisdiction by virtue of Article IX of the Genocide Convention, the Court in its 1996 Judgment took note of the FRY's proclamation of 27 April 1992 that it "shall strictly abide by all the commitments that the Socialist Federal Republic of Yugoslavia assumed internationally" (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Yugoslavia), Preliminary Objections, I.C.J. Reports 1996 (II)*, p. 610, para. 17) and observed further that "it has not been contested that Yugoslavia was party to the Genocide Convention" *(ibid.)*. Thus, the Court held, "Yugoslavia was bound by the provisions of the Convention on the date of the filing of the Application in the present case, namely, on 20 March 1993" *(ibid.).* The Court would thus appear to have made its finding on the basis of estoppel rather than *res judicata*. In the first place, it is our understanding that the principle of estoppel is distinguishable, cannot be inferred in all circumstances, and serves a different function, from that of *res judicata* on an issue like jurisdiction and cannot replace the latter, nor indeed can it replace the requirements of the United Nations Charter or the Statute of the Court.

15. We are also constrained to observe that, in affirming its jurisdiction *ratione personae* based on *res judicata*, the Court chose not to address the relevance of Article 35, paragraph 2, of the Statute for the purposes of its jurisdiction, even though this was one of the Respondent's central arguments at this stage. It will be recalled that, in the 1993 Order indicating provisional measures in this case, the Court 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, [as indicated in Article 35, paragraph 2, of the Statute] 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).

The Court considered that Article IX of the Genocide Convention could be regarded prima facie as a special provision in a treaty in force within the meaning of Article 35, paragraph 2. However, following comprehensive consideration of the matter the Court, in its Judgment in the *Legality of Use of Force (Serbia and Montenegro* v. *Belgium)* case, concluded that "the special provisions contained in treaties in force" (*I.C.J. Reports 2004*, p. 324, para. 113) to which Article 35, paragraph 2, applies are those "in force at the date of the entry into force of the new Statute" *(ibid.)* — a condition which would exclude the Genocide Convention (entry into force 12 January 1951).

16. It is against this background that the Court found in its Judgment in the *Legality of Use of Force (Serbia and Montenegro* v. *Belgium)* case that the FRY was not a Member of the United Nations in 1999 and that the Genocide Convention did not contain any of "the special provisions contained in treaties in force" (*ibid.*, para. 114).

17. It thus seems to us, notwithstanding Articles 59 and 60 of the Statute of the Court, that it is inconsistent as well as jurisdictionally untenable for the Respondent to be considered to have been a Member of the United Nations in 1993 or to have otherwise satisfied the requirements of Article 35 of the Statute. In other words, if at the time the Application was filed the FRY was neither a Member of the United Nations nor a party to the Statute, then it lacked access to the Court. Access to the Court must meet the constitutional and statutory requirements for it to be valid. We firmly believe that it is fundamental that the Court should always ensure it has jurisdiction over a case when faced with the challenge of whether a party has access to it. Faced with such a challenge by the Respondent in this case, that the Court lacked jurisdiction *ratione personae* over it, judicial consistency would have required the Court to respond as it did in the *Legality of Use of Force* cases. The Court there felt bound first and foremost to examine the question whether the Respondent was or was not a party to the Statute of the Court at the time the proceedings were instituted as it considered the question of access to the Court of such importance that it constituted an exception from the general rule that the Court is free to determine which ground to examine first (*Legality of Use of Force (Serbia and Montenegro* v. *Belgium), Judgment, I.C.J. Reports 2004*, p. 298, para. 45). It is regrettable that on this occasion the Court chose to depart from its own jurisprudence.

18. But the Court has not been able to reconcile the judicial inconsistency regarding its finding on *res judicata* even within this Judgment. In paragraph 74 of the present Judgment, the Court observes that the facts and events that constitute the subject-matter of Bosnia and Herzegovina's Application in this case, and the submissions based upon them, occurred when Serbia and Montenegro was a single State. But for reasons explained in paragraphs 75 and 76 of the Judgment, the Court now decides that any findings of law that the Court may make are to be

addressed only to Serbia. On the other hand, the 1996 Judgment on Preliminary Objections, which constitutes the basis of the Court's findings on *res judicata*, was addressed to the Federal Republic of Yugoslavia (Serbia and Montenegro). If the Court's findings are not to be reopened by subsequent events (paragraph 120), we find it difficult to reconcile this dictum of the Court with the position of *res judicata* it has taken on the 1996 Judgment.

19. It is our view that in the Judgment the Court, by relying on *res judicata* as a basis for its jurisdiction, did not give the comprehensive consideration required of the principle which alone would have allowed it to arrive at a legally valid conclusion, and has neglected to deal with one of the substantive submissions squarely put before it at this juncture, namely, whether the Respondent had valid access to the Court for the Court to exercise its jurisdiction in this case.

(Signed) Raymond RANJEVA.
(Signed) SHI Jiuyong.
(Signed) Abdul G. Koroma.