Yugoslavia, Cases and Proceedings before the ICJ
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A. Introduction

1 Throughout the 1990s and in the early years of the 21st century, the former Yugoslavia underwent considerable changes (→ Yugoslavia, Dissolution of). In 1991, → Croatia and → Slovenia declared their independence from the then Socialist Federative Republic of Yugoslavia (‘SFRY’). → Macedonia (officially called the Former Yugoslav Republic of Macedonia [‘FYROM’]) and → Bosnia-Herzegovina followed suit. All four States were admitted to the → United Nations (UN) as new members. The remainder of the SFRY became the Federal Republic of Yugoslavia (→ Serbia and → Montenegro) (‘FRY’) in 1992. The FRY claimed at the time to continue the international legal personality of the SFRY and with it the membership of the former SFRY in the UN (→ Continuity of States; → Dismemberment of States). The claim was, however, contested by the other four new States, both within and outside the UN.

2 On 19 September 1992, the UN Security Council (→ United Nations, Security Council [‘UNSC’]) in UNSC Res 777 (1992) considered that the SFRY had ceased to exist, and recommended to the UN General Assembly (→ United Nations, General Assembly [‘UNGA’]) to decide that the FRY should apply for membership in the UN but that the FRY should not, in the meantime, participate in the work of the UNGA. In UNGA Res 47/1 (22 September 1992), the UNGA made the decision recommended by the UNSC. The legal counsel of the UN explained the resulting position by stating that the UNGA had only decided that the FRY should not ‘participate’ (UNGA ‘Letter dated 29 September 1992 from the Under-Secretary-General, the Legal Counsel, addressed to the Permanent Representatives of Bosnia and Herzegovina and Croatia to the United Nations’ [30 September 1992] UN Doc A/47/485, 2) in the work of the UNGA, but that the resolution ‘neither terminates nor suspends Yugoslavia’s membership’ in the UN as such. Therefore, the legal counsel reasoned, the FRY could still participate in UN organs other than UNGA bodies, but could not sit in the UNGA as ‘Yugoslavia’. The FRY was later similarly barred from participating in the work of the → United Nations, Economic and Social Council (ECOSOC).

3 The status of the FRY vis-à-vis the UN was tested before the → International Court of Justice (ICJ) in several separate cases, whose different phases overlapped. The issue of the membership of the FRY in the UN was of immediate importance to the Court because, under Art. 35 (1) Statute of the International Court of Justice (1945) (‘ICJ Statute’), a State only has access to the Court if it is a party to the Statute. The FRY could only have such party status if it had been a member of the UN (Art. 93 United Nations Charter). Besides that, Art. 35 (2) ICJ Statute allows for a State’s access to the Court also on the grounds of a declaration by that State under UNSC Res 9 (1946) ([15 October 1946] SCOR 1st Year 14) or according to ‘provisions contained in treaties in force’. The former alternative was of no immediate relevance to the various cases involving Yugoslavia, but the latter was discussed by the Court (see para. 20 below).

B. The Early Phases of the Bosnian Genocide Convention Case

4 The first case to raise the issue of the status of the FRY in the UN was the Application of the Convention on the Prevention and Punishment of the Crime of Genocide Case (Bosnia and Herzegovina v Serbia and Montenegro) (‘Genocide Convention Case’) instituted by Bosnia and Herzegovina in 1993 against the FRY. In its application, Bosnia and Herzegovina alleged violations of the Convention on the Prevention and Punishment of the Crime of Genocide (‘Genocide Convention’), but also numerous other violations, notably of
international humanitarian law, → human rights law, and the prohibitions on the threat and use of force (→ use of force, prohibition of).

1. The Provisional Measures Phase

Immediately after filing its application, Bosnia and Herzegovina requested that the Court indicate provisional measures (→ Interim [Provisional] Measures of Protection). In its Order of 8 April 1993, the Court examined whether it had prima facie jurisdiction to decide the case on the merits. As to the respondent’s membership in the UN and its access to the Court according to Art. 35 ICJ Statute, the Court briefly noted that the solution adopted in the UN (see para. 2 above) was ‘not free from legal difficulties’ (Genocide Convention Case [Provisional Measures] para 18). The Court considered, however, that it did not need to determine at that stage of the proceedings whether the respondent was a member of the UN. At that stage, Art. IX Genocide Convention appeared to the Court prima facie to be a ‘special provision contained in a treaty in force’ within the meaning of Art. 35 (2) ICJ Statute (ibid para. 19). The Court also considered Art. IX Genocide Convention to prima facie provide a basis of jurisdiction within the meaning of Art. 36 (1) ICJ Statute. It declined, however, to find further bases of jurisdiction beyond the scope of the Genocide Convention. It therefore indicated provisional measures only with regard to the allegations of → genocide.

On a further request for provisional measures by Bosnia and Herzegovina, the Court dismissed, again after prima facie examination, a few additional bases of jurisdiction on which the applicant had relied. The Court in the end only reaffirmed some of its earlier provisional measures (Genocide Convention Case [Further Provisional Measures] paras 29–32).

2. The Preliminary Objections Phase

In its judgment on the → preliminary objections raised by the FRY, the Court confirmed its provisional conclusions on its jurisdiction under Art. IX Genocide Convention. As to the application ratione personae of the convention, the Court noted inter alia that, even if the Genocide Convention might not have been in effect as between the parties on the date of the filing of the application, it would in the meantime have come into effect, so that Bosnia and Herzegovina could still bring a new, now valid application. It held that it would make no sense to require Bosnia and Herzegovina to do so. Having dismissed further objections to the application of the convention ratione temporis and ratione materiae, the Court therefore regarded Art. IX Genocide Convention as a valid title of jurisdiction. However, as foreshadowed by the orders on provisional measures, the Court declined to accept further bases of jurisdiction relied upon by the applicant (Genocide Convention Case [Preliminary Objections] paras 27–32).

The Court did not return to the issue of the respondent’s access to the Court. There had been no preliminary objection on this point, the FRY continuing to maintain on the political level that it continued the membership in the UN of the SFRY. Bosnia and Herzegovina had not raised the issue before the Court, either. The Court, for its part, considered that it had to verify in each case submitted to it that it had jurisdiction, and that a respondent’s preliminary objections ‘may be useful to clarify the legal situation’ (Genocide Convention Case [Preliminary Objections] para. 46). It found, however, that the preliminary objections of the FRY had ‘served that purpose’ and proceeded to find that it had jurisdiction and that the application was admissible (ibid paras 46–47).
3. The Decision on Counterclaims

9 After the Court had decided that it had jurisdiction, the FRY submitted counterclaims alleging that Bosnia and Herzegovina had itself incited and committed acts of genocide. The Court admitted these counterclaims, holding that a counterclaim fell to be distinguished from a defence on the merits in that it did not have to negate the applicant’s claim, but rather constituted a separate claim extending the original subject matter of the dispute (Genocide Convention Case [Counter-Claims] para. 27).

4. Application for Revision of the Judgment on Preliminary Objections

10 Momentous political changes in both the FRY, as well as in Serbia proper, in 2000 saw the ousting of President Slobodan Milošević (see also → Milošević Trial). The incoming government abandoned the position that the FRY continued the legal personality of the former SFRY. As requested by the UNGA in 1992 (see para. 2 above), the FRY therefore applied for admission to membership in the UN. It was eventually admitted as a new member on 1 November 2000.

11 It appeared to follow that the FRY had not in fact been a member of the UN between 1992 and 1 November 2000, and that it had not during that time had access to the Court under Art. 35 (1) ICJ Statute. Moreover, it appeared to follow that the FRY, not being the continuator of the SFRY, had not—on that basis—been bound by the Genocide Convention, which the Court had accepted as the title of jurisdiction. The FRY therefore withdrew its counterclaims, which would have sat uneasily with the submission that it did not have access to the Court (Application of the Convention on the Prevention and Punishment of the Crime of Genocide [Bosnia and Herzegovina v Yugoslavia] [Order] [2001] ICJ Rep 572), and applied for a revision of the 1996 judgment affirming the Court’s jurisdiction. It thus had to show, under Art. 61 (1) ICJ Statute, that a decisive fact unknown at the time of the earlier judgment had been discovered. That fact had to have existed already at the time of the judgment, and the party claiming revision could not have been ignorant of it due to its own negligence.

12 The FRY argued at first that its admission to the UN on 1 November 2000 constituted the relevant newly discovered fact. This fact, however, had come into existence only more than four years after the date of the judgment that had to be revised, and was therefore not relevant (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] paras 67–68). Revision on that basis would have meant updating rather than correcting the judgment, which the Court has no power to do under Art. 61 ICJ Statute. The FRY therefore changed its approach and argued that the admission in 2000 had revealed two facts existing even in 1996, namely that the FRY had not been a party to the Statute at the time and that it was not then bound by the Genocide Convention. The Court did not accept this argument. It held that the FRY had thus based its application for revision not on facts existing in 1996, but ‘on the legal consequences which it seeks to draw from facts subsequent to the judgment which it is asking to have revised’ (ibid para. 70).

13 Moreover, the Court noted that in 1996, the situation had been governed by UNGA Resolution 47/1, which had led to the FRY participating in the work of the various UN bodies on a case-by-case basis. While the FRY had been excluded from the UNGA and other bodies, its right to appear before the Court and its status vis-à-vis the Genocide Convention had not been affected. The admission of the FRY in 2000 could not, the Court stated, ‘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). This could be construed as a finding that the FRY had in fact had access to the Court because it had continued to exercise rights implied in membership in the UN on a case-by-case basis (see also Prosecutor v Milutinović et al [Decision on Motion Challenging Jurisdiction] paras 37–44 [→ International Criminal Tribunal for the Former Yugoslavia (ICTY)]) and there had been no measure taking away its right of access (see Legality of Use of Force [Serbia and Montenegro v Belgium] [Preliminary Objections] [(Joint Declaration of Vice-President Ranjeva, Judges Guillaume, Higgins, Kooijmans, Al-Khasawneh, Buergenthal and Elaraby) (2004) ICJ Rep 330 para. 10]; [(Separate Opinion of Judge Elaraby) (2004) ICJ Rep 352 paras 7–10]; [(Separate Opinion of Judge Kooijmans) (2004) ICJ Rep 343 paras 8–9]). The admission of the FRY to the UN had ended this peculiar—as the Court said, *sui generis*—position, but had not retroactively invalidated it. The Court could thus be understood as saying that what was unknown in 1996 was only if and when the *sui generis* position would end, but not what this position had meant for the respondent’s access to the Court.

C. The Legality of Use of Force Cases

14 Before the Bosnian Genocide Convention Case could be heard and decided on its merits, a second set of cases intervened which also raised the issue of the FRY’s status in the UN. Those cases, the *Legality of Use of Force Cases* brought by the FRY against several Member States of the → North Atlantic Treaty Organization (NATO), had their background in the NATO air campaign against the FRY in relation to the conflict in Kosovo (→ Humanitarian Intervention).

1. Access to the Court (Re-)Considered

15 The Court’s orders on the requests by the FRY for provisional measures had nothing to say on the issue of the applicant’s access to the Court. The requests were dismissed for lack of prima facie jurisdiction over the merits. In the majority of cases, the Court held that Art. IX Genocide Convention could not, even on a prima facie examination, afford a basis of jurisdiction on the merits, because the Convention was not capable of applying to the facts as alleged by the FRY (eg *Legality of Use of Force [Yugoslavia v Belgium] [Provisional Measures]* paras 37–41). The bombings by NATO Member States did not appear to the Court to entail the required subjective element of genocide (ibid para. 40). Moreover, insofar as the parties had made declarations under Art. 36 (2) ICJ Statute, these were incapable of providing even a prima facie basis of jurisdiction either on the grounds of a relevant reservation in the respondent’s declaration (eg *Legality of Use of Force [Yugoslavia v United Kingdom] [Provisional Measures]* para. 25) or because the Court construed the FRY’s own declaration as inapplicable *ratione temporis* (*Legality of Use of Force [Yugoslavia v Belgium] [Provisional Measures]* paras 24–30). Where the respondents had argued that the FRY had not been a party to the ICJ Statute, the Court declined to address the point (ibid para. 31).

16 In the cases against Spain and the United States, the Court manifestly did not have jurisdiction because both respondents had lawfully entered reservations with respect to Art. IX Genocide Convention. The Court therefore ordered the cases struck off the list, exercising an inherent power to do so (*Legality of Use of Force [(Yugoslavia v Spain) paras 35, 40]; [(Yugoslavia v United States) paras 29, 34]*). The other cases proceeded to a hearing on the merits. By the time the cases were heard, however, the changed political landscape meant that the proceedings had become a political liability for the government of Serbia and Montenegro—as the FRY had been renamed—in its relations with the respondents. Domestic political pressure meant, on the other hand, that the government could not be seen to discontinue the proceedings. Serbia and Montenegro therefore submitted that it had not been a member of the UN when it had brought the cases before the Court and asked the Court to decide on its jurisdiction in the light of that information.
This submission was clearly directed as much at the future fate of the Genocide Convention Cases as it was at the Legality of Use of Force Cases themselves.

17 The Court declined to take this submission as an implied notice of discontinuance or to otherwise dismiss the case in limine litis (Legality of Use of Force [Serbia and Montenegro v Belgium] [Preliminary Objections] paras 31–44). Instead, it explained that it had to deal with the issue of the applicant’s access to the Court, rather than dispose of the case on the basis of the considerations of subject-matter jurisdiction that had informed its orders on the requests for provisional measures (ibid para. 46).

(a) Art. 35 (1): Membership in the UN
18 This required the Court to address the question whether the applicant had been a member of the UN at the relevant time. The Court answered the question firmly in the negative. It found, in particular, that the admission of the FRY to the UN as a new member in 2000 had ‘clarified the thus far amorphous legal situation’, leading the Court to conclude that it had not been a member of the UN at the time of filing its application (Legality of Use of Force [Serbia and Montenegro v Belgium] [Preliminary Objections] para. 79). The admission itself had clearly not had retroactive effect dating back to the decisive date, and any sui generis position that the applicant might have been in at the time did not amount to membership in the UN (ibid para. 78).

19 The Court considered that its pronouncements on the request for revision in the Bosnian Genocide Convention Case (see para. 13 above) had had no bearing on the issue of the FRY’s status vis-à-vis the UN. It explained that the application for revision was dismissed because the facts relied upon by the FRY had not been ‘facts’ within the meaning of Art. 61 ICJ Statute. The Court therefore had not needed to decide whether the FRY had had a right of access to the Court in 1996. Nor had it in fact done so. Rather, the Court had simply found ‘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’ (Legality of Use of Force [Serbia and Montenegro v Belgium] [Preliminary Objections] para. 89). Inasmuch as the Court had spoken of a ‘sui generis position’ of the FRY, this was explained as not having been a prescriptive term conveying any particular legal consequences but rather as a phrase ‘descriptive of the amorphous state of affairs’ (ibid para. 74).

(b) Art. 35 (2): Treaties in Force
20 If the FRY therefore had not been a member of the UN when it had filed its applications in the Legality of Use of Force Cases that left the question whether it had had access to the Court by reason of ‘special provisions contained in treaties in force’ within the meaning of Art. 35 (2) ICJ Statute. The Court had considered at the provisional measures stage of the Bosnian Genocide Convention Case that Art. IX Genocide Convention might—prima facie—constitute such a provision (see para. 5 above). Considering that the FRY had relied on this provision as a title of jurisdiction also in the Legality of Use of Force Cases, the same possibility presented itself there. The Court therefore now had to determine whether ‘treaties in force’ within the meaning of Art. 35 (2) ICJ Statute were only treaties in force at the time the Statute entered into force, ie the date of 24 October 1945, or whether they only had to be in force at the time of the introduction of proceedings. Having considered the wording and object and purpose, as well as the drafting history of Art. 35 (2) ICJ Statute and of the Statute of the Permanent Court of International Justice ([adopted 16 December 1920, entered into force 20 August 1921] 6 LNTS 389), the Court preferred the former interpretation (Legality of Use of Force [Serbia and Montenegro v Belgium] [Preliminary Objections] paras 100–14). The Genocide Convention, which entered into force on 12
January 1951 and thus well after the entry into force of the Statute, could not therefore constitute a ‘treat[y] in force’ giving the FRY access to the Court.

2. Dissenting Voices within the Court and Outside Reception

21 The Court’s judgments, finding that the Court did not have jurisdiction to entertain the claims of Serbia and Montenegro, were unanimous. The reasoning leading to this conclusion, however, was sharply criticized by a number of judges. Seven judges appended a joint declaration critical of the Court’s choice to decide the case on the question of the applicant’s access to the Court, rather than its subject-matter jurisdiction. The judgment in their view departed from the holding of the Court in the Genocide Convention Case (Application for Revision), inasmuch as that case had recognized a right of access to the Court as a consequence of the sui generis status of the FRY (see para. 13 above). The seven judges also thought that the judgment had opted for a weaker reason where the alternative jurisdictional grounds would have been less open to doubt (Legality of Use of Force [Serbia and Montenegro v Belgium] [Preliminary Objections] [Joint Declaration of Vice-President Ranjeva, Judges Guillaume, Higgins, Kooijmans, Al-Khasawneh, Buergenthal and Elaraby] para. 12). Moreover, the Joint Declaration deplored the fact that the solution adopted would call into question the finding of jurisdiction in the Bosnian Genocide Convention Case (ibid para. 13; see also [Separate Opinion of Judge Kooijmans] para. 9).

22 Other opinions appended to the judgments expressed a preference for dismissing the case in limine litis under an inherent power in the Court ([Separate Opinion of Judge Higgins] [2004] ICJ Rep 336 paras 2–17; ibid [Separate Opinion of Judge Kooijmans] paras 13–26). Moreover, Judge Elaraby in particular argued that the FRY had indeed continued the legal personality and the membership in the UN of the SFRY, and also that Art. 35 (2) ICJ Statute should be interpreted as encompassing all treaties connected to the settlement of World War II, as well as all treaties aimed at redressing violations of → ius cogens, both categories including the Genocide Convention ([Separate Opinion of Judge Elaraby] para. 16).

23 The reception of the judgments in scholarly writings largely followed the separate opinions and declarations appended to them. Relatively few writers maintain that the FRY had continued the legal personality of the SFRY and thus continued to be a member of the UN. However, the apparent departure by the Court in the Legality of Use of Force Cases from the Genocide Convention Case (Application for Revision) has been widely criticized, especially—as in the Joint Declaration by the seven judges in the Legality of Use of Force Cases—with a view to possible effects on the Genocide Convention Case.

D. The Judgment on the Merits in the Bosnian Genocide Convention Case

24 It was widely expected that the Court would, at the merits stage of the Bosnian Genocide Convention Case, come to consider the issue of the respondent’s access to the Court as of the time of the seizing of the Court. Following its clear holding in the Legality of Use of Force Cases, the Court would then presumably have denied such access. Indeed, some judges in that case had felt that the majority had chosen to rule on Art. 35 (2) ICJ Statute, which the applicant there had not invoked, principally because that point would become relevant in the Bosnian Genocide Convention Case (eg Legality of Use of Force [Serbia and Montenegro v Belgium] [Preliminary Objections] [Separate Opinion of Judge Higgins] para. 18).
In order to achieve a dismissal of Bosnia’s case on those grounds, the FRY had already on 4 May 2001, almost concurrently with its application for revision (see para. 11 above), filed an Initiative to the Court to Reconsider \textit{ex officio} Jurisdiction over Yugoslavia (Application of the Convention on the Prevention and Punishment of the Crime of Genocide [Bosnia and Herzegovina v Yugoslavia] [Initiative to the Court to Reconsider \textit{ex officio} Jurisdiction over Yugoslavia] [4 May 2001]). It had thus reminded the Court of its duty to consider a party’s access to the Court \textit{ex officio}, arguing that the Court could re-examine the matter at any time, independently of any formal procedural steps by either party.

1. \textbf{Access (Not) Reconsidered: The Judgment on Preliminary Objections as Res iudicata}

Bosnia argued that the Court’s 1996 judgment on preliminary objections had become \textit{res iudicata} and that the jurisdiction of the Court once and for all. Serbia and Montenegro met this point by arguing that judgments on jurisdiction were not capable of \textit{res iudicata} effect (Von Tiedemann v Etat Polonais [1 November 1926] [1927] 6 Recueil des Décisions des Tribunaux Arbitraux Mixtes 997, 1001). Moreover, Serbia and Montenegro submitted, a judgment on preliminary objections could not remove the power and duty of the Court to satisfy itself of its jurisdiction, if necessary \textit{proprio motu}, where new issues arose.

In its judgment on the merits—in which the sole respondent was now Serbia, Montenegro having seceded from Serbia and Montenegro in 2006—the Court followed the Bosnian line of argument. It found that the issue of its jurisdiction was \textit{res iudicata} and therefore declined to re-examine whether the respondent had had access to the Court when the proceedings were instituted. The judgment on preliminary objections of 1996 had not in terms pronounced on the issues under Art. 35 ICJ Statute, and in its reasoning had only dismissed the preliminary objections that the FRY had then made (see para. 9 above). However, the Court held that a holding to the effect that the FRY had had the capacity to appear before the Court had been ‘an element in the reasoning of the 1996 Judgment which can—and indeed must—be read into the Judgment as a matter of logical construction’ (Genocide Convention Case [Merits] para. 135). The Court’s express finding that it had subject-matter jurisdiction in the case under Art. IX Genocide Convention was ‘only consistent, in law and logic, with the proposition that ... it [also] had jurisdiction \textit{ratione personae} in its comprehensive sense’, including in the sense of Art. 35 ICJ Statute (\textit{ibid} para. 133). It followed that the 1996 judgment had established, as a matter of law between the parties and the Court, that both parties had in fact had access to the Court, even if that may not otherwise have been the case. The Court accordingly had jurisdiction because its 1996 judgment had determined this to be the case with the force of \textit{res iudicata} (\textit{ibid} para. 138). Even if the position taken by the Court on the FRY’s access to the Court in the Legality of Use of Force Cases was correct, the Court in the Genocide Convention Case neither could nor needed to comply with that position.

The Court’s application of the principle of \textit{res iudicata} was roundly attacked by a number of judges. Like a number of academic commentators, some judges preferred the view that only matters that have been discussed in an earlier judgment could be qualified as \textit{res iudicata}. The issue of the respondent’s access to the Court, however, had neither been expressly decided, nor been the subject of any reasoning (Application of the Convention on the Prevention and Punishment of the Crime of Genocide [Bosnia and Herzegovina v Serbia and Montenegro] [Merits] [Joint Dissenting Opinion of Judges Ranjeva, Shi and Koroma] [2007] ICJ Rep 266 para. 3; \textit{ibid} [Declaration of Judge Skotnikov] [2007] ICJ Rep 366, 367).
29 The Court certainly applied in the Genocide Convention Case a fairly extensive concept of *res iudicata*, broadly comparable to the position at common law, where the parties are bound in respect of any matter that they could and should have raised in the earlier proceedings (*Johnson v Gore Wood & Co* United Kingdom House of Lords [14 December 2000] [2000] UKHL 65), with the added requirement that there must have been an implicit decision (but see Wittich 607–8). The Court has not yet had occasion to clarify its position on this point. In any event, the interpretation of the 1996 judgment by the Court is not implausible, given that the Court in 1996 had been aware of its duty to satisfy itself of its jurisdiction, and that it had categorically held in the *dispositif* that it had jurisdiction (see para. 8 above). In the result, the procedural device of *res iudicata* allowed the Court to avoid going back on its earlier judgment and to avoid having to find that it lacked jurisdiction.

2. The Merits

30 The merits of the Bosnian Genocide Convention Case are discussed elsewhere in this Encyclopedia in the entry → Application of the Convention on the Prevention and Punishment of the Crime of Genocide Case (Bosnia and Herzegovina v Serbia and Montenegro).

E. The Croatian Genocide Convention Case

31 If the Court was able to avoid dismissing Bosnia’s case on the grounds that the 1996 judgment on preliminary objections prevented it from giving effect to the respondent’s lack of access to the Court, the same strategy could not prevail in the similar case brought by Croatia. There had not yet been a judgment on preliminary objections in that case and accordingly no decision that could have become *res iudicata*. In fact, the FRY only brought preliminary objections in 2002, arguing at first that the Court lacked subject-matter jurisdiction because the FRY had not in fact continued the legal personality of the SFRY and had therefore only become a party to the Genocide Convention in 2001 by way of accession, and then only with a reservation to Art. IX. This position was later refined by submitting that the respondent—by that time, Serbia and Montenegro—had not had access to the Court.

32 In its judgment of 18 November 2008, the Court dismissed these preliminary objections. The fact that the *Legality of Use of Force Cases* had denied the respondent’s access to the Court between 1992 and 2000 was duly recorded (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide [Croatia v Serbia] [Preliminary Objections] ['Croatian Genocide Convention Case, Preliminary Objections'] paras 71, 75). The Court further noted, however, that the respondent had since become a member of the UN. It therefore turned to the question at which point in time a respondent’s access to the Court had to be established. On this point, the Court had often held that ‘the jurisdiction of the Court must normally be assessed on the date of the filing of the act instituting proceedings’ (*ibid* para. 79). This, the Court explained, was so that a withdrawal of the title of jurisdiction by a respondent after the filing of an application would not deprive the Court of jurisdiction. Also, each applicant was thus bound to make sure that its application was valid *ab initio* (*ibid* para. 80). In the *Croatian Genocide Convention Case*, however, the Court preferred a different approach. It referred to the → Mavrommatis Concessions Cases as holding that the Court was not bound to dismiss an application for mere ‘matters of form’ (*ibid* para. 82), such as where an originally premature application could, by the time of the Court’s decision, validly be resubmitted. Where that was the case, the Court explained, it would not be in the interests of the sound administration of justice or of judicial economy to dismiss the original application and thus require the applicant to bring new proceedings (*ibid* para. 85). It was of no importance, the Court held, which condition
was originally unmet, even where that condition was a fundamental one such as a respondent’s access to the Court (ibid para. 87).

33 Serbia had submitted that if this Mavrommatis approach was to be applied, the Court would have had to consider the point also in the Legality of Use of Force Cases. There, as in the Croatian Genocide Convention Case, Serbia and Montenegro had by the time of the judgments become a member of the UN. Nonetheless, the Court had not given any thought to any subsequent rectification of the original defect of the applications. The Court answered this submission by pointing out that, in the Legality of Use of Force Cases, Serbia and Montenegro had clearly not intended to bring any new, valid applications if the original suits were dismissed, although it had indicated that it did not wish to discontinue the various cases. Accordingly, there had been no need for any considerations of judicial economy (ibid para. 89).

34 The Court’s reading of the Mavrommatis approach—itself adopted from similar reasoning at the preliminary objections stage of the Bosnian case (see para. 7 above) and, more directly, from Judge Tomka’s opinion at the merits stage (Genocide Convention Case [Merits] [Separate Opinion of Judge Tomka] [2007] ICJ Rep 310 paras 26–27)—became the subject of strong dissent within the Court. According to four judges, the Mavrommatis principle meant only that formal defects which the applicant itself could have avoided when it brought the application were not necessarily fatal to a claim, but not that fundamental defects beyond the applicant’s control which happened to be cured later would be immaterial (Croatian Genocide Convention Case, Preliminary Objections [Joint Declaration of Judges Ranjeva, Shi, Koroma and Parra-Aranguren] [2008] ICJ Rep 472 para. 7).

Moreover, Judge Owada argued that the Mavrommatis approach meant only that consent to jurisdiction could be established after the application is brought, but not that objective defects could be cured (Croatian Genocide Convention Case, Preliminary Objections [Dissenting Opinion of Judge Owada] [2008] paras 14–25).

35 Beyond this question whether the Court has correctly interpreted the Mavrommatis precedent and its progeny, the approach of the Court in the Croatian Genocide Case holds some attraction. In particular, the invocation of judicial economy has some force. It is to be noted, however, that shortly after becoming a member of the UN, on 6 March 2001, the FRY had acceded to the Genocide Convention, with a reservation concerning Art. IX Genocide Convention. At the time of the Court’s judgment, Croatia therefore could not have brought a valid application within the Court’s jurisdiction (Croatian Genocide Convention Case, Preliminary Objections [Separate Opinion of Vice-President Al-Khasawneh] [2008] ICJ Rep 468, 470–71). The Court met this point by requiring only that the respondent’s access to the Court and the title of jurisdiction should once have coincided, which on the Court’s view they had between 1 November 2000 and 6 March 2001. It held, with respect to the title of jurisdiction, that a declaration of the FRY of 27 April 1992, in which it had claimed to continue the legal personality of the former SFRY and therefore to continue to be bound by all treaty engagements of the SFRY, fell to be reinterpreted as a notice of accession—inter alia—to the Genocide Convention. In any case, the later reservation, made after the date of the institution of proceedings, could not have affected the jurisdiction of the Court (Croatian Genocide Convention Case, Preliminary Objections, paras 95–96). The fact of the application in 1999, coupled with the emergence of the respondent’s access to the Court on 1 November 2000, had constituted a valid institution of proceedings, immunizing the proceedings from later changes to their jurisdictional basis. In effect, therefore, the Court found that the Croatian application had become valid when the respondent was admitted to the UN. Thus, the Court substantially held that a defect in the original application was immaterial if it could have been cured later, and not only if it could still be cured by a new
application. It is somewhat doubtful whether the concept of judicial economy supports this approach.

36 Because the subject matter of the Croatian case extended to acts prior to 27 April 1992, the date on which the FRY proclaimed its existence as a new State, Serbia raised another preliminary objection relating to the development of its legal status. It objected that the Court lacked jurisdiction over any claims relating to acts prior to 27 April 1992, and that such claims were inadmissible. This was, Serbia argued, because the Genocide Convention could not have entered into force between the FRY and Croatia prior to that date, and because Art. IX of the Convention could not apply to acts that occurred before the FRY (now Serbia) came into existence as a State (ibid para. 121). The Court found that this preliminary objection did not possess an exclusively preliminary character and fell to be determined at the merits stage (ibid para. 130).

37 The Court therefore returned to this preliminary objection in its judgment on the merits of 3 February 2015 (Application of the Convention on the Prevention and Punishment of the Crime of Genocide [Croatia v Serbia] [Merits] ['Croatian Genocide Convention Case, Merits'] paras 74–78). This aspect will be dealt with below. The actual merits, however, are discussed elsewhere in this Encyclopedia in the entry → Application of the Convention on the Prevention and Punishment of the Crime of Genocide Case (Croatia v Serbia).

38 In its merits judgment, the Court treated Serbia’s objection to jurisdiction and admissibility regarding acts prior to 27 April 1992 primarily as a matter of jurisdiction ratione temporis. The Court emphasized that its jurisdiction under Art. IX Genocide Convention was limited to the interpretation, application, or fulfilment of the Convention as treaty law, irrespective of the concomitant existence of the substantive rules of the Convention as customary law and ius cogens (Croatian Genocide Convention Case, Merits, paras 84–89). Any dispute in relation to events preceding the date of the relevant entry into force of the Genocide Convention therefore had to be brought within the application of the Convention as such. In accordance with the Court’s previous holding at the preliminary objections stage, the relevant date of the entry into force of the Genocide Convention for the FRY, whose international legal personality was continued by Serbia, was 27 April 1992, the date of the proclamation reinterpreted as a notice of accession (ibid paras 76, 84).

39 This raised the question whether the Convention applied retroactively to impose treaty obligations on its parties with respect to acts said to have occurred before the relevant entry into force of the Convention. Croatia had argued that this was indeed the case; at least the obligations to prevent and punish genocide were in Croatia’s view comprehensive and retroactive. The Court disagreed, principally because of a presumption against retroactivity derived from Art. 28 → Vienna Convention on the Law of Treaties (1969), but also because it was logically impossible to prevent acts that had already happened and because of certain inferences from the drafting history of the Genocide Convention (ibid paras 93–100). It followed that the dispute regarding acts prior to 27 April 1992 was not brought within the application of the Genocide Convention by the relatively direct argument that the Convention applied retroactively.

40 This nevertheless did not exhaust the issue. Croatia had also argued that Serbia should be held responsible for acts having occurred before 27 April 1992 on either or both of two bases: either those acts and any relevant acts of some Serbian elements within the SFRY were attributable to Serbia under Art. 11 (2) ILC Draft Articles on Responsibility of States for Internationally Wrongful Acts ('Draft Articles on State Responsibility'; → State Responsibility), or Serbia had succeeded to the responsibility of the SFRY in relation to such acts. The first of these arguments was roundly rejected by the Court because such attribution, even if it was made out, could not bring about the relevant obligation as well
However, the second argument was sustained as a basis of jurisdiction. The Court accepted that Serbia’s succession to any responsibility of the SFRY under the Genocide Convention could, if it existed, give rise to Serbia’s own responsibility within the meaning of Art. IX Genocide Convention (ibid paras 111–15). The Court also declined to accede to Serbia’s argument that any succession argument would implicate the responsibility of the SFRY as a third State within the meaning of the Monetary Gold rule of the indispensable third party (→ Monetary Gold Arbitration and Case). In this respect, the Court found that the right of a third State not to have the Court rule on its responsibility without its consent, which underlay the Monetary Gold rule, had no application if that third State no longer existed and was no longer capable of holding any rights (ibid para. 116).

41 Of course, this route to Serbia’s responsibility still required, on the merits, that the SFRY had incurred responsibility under the Genocide Convention. This in turn required that there had been acts of genocide. Following a lengthy discussion of the facts and the law, the Court denied that this had been the case, either before or after 27 April 1992. This obviated the need for any discussion of whether Serbia could have and had succeeded to any responsibility of the SFRY (ibid paras 441–42). Croatia’s argument on jurisdiction therefore did not lead to ultimate success, although it did allow the Court to examine the events prior to 27 April 1992.

42 The Court was not unanimous in its handling of the remaining Serbian objection. In particular, Judges Owada, Skotnikov, and Xue and Judge ad hoc Kreća all thought that the Court, in leaving undecided the question of whether the approach of succession to the responsibility of the SFRY was legally sound and then proceeding to the merits, had not simply exercised its freedom to select the grounds on which it will base its judgment, but had disregarded the primacy of establishing its jurisdiction (Croatian Genocide Convention Case, Merits [Separate Opinion of Judge Owada] paras 11, 14–21; [Separate Opinion of Judge Skotnikov] paras 1–6; [Declaration of Judge Xue] para. 17; [Separate Opinion of Judge ad hoc Kreća] para. 56). President Tomka and Judges Xue and Sebutinde further thought that succession to responsibility was not covered by Art. IX Genocide Convention (Croatian Genocide Convention Case, Merits [Separate Opinion of President Tomka] paras 8–24; [Declaration of Judge Xue] paras 18–23; [Separate Opinion of Judge Sebutinde] paras 7–15).

43 There is some force in President Tomka’s argument that the Court has not decided anything on the question of jurisdiction in 2015 that it could not have decided in 2008 (Croatian Genocide Convention Case, Merits [Separate Opinion of President Tomka] para. 4). In particular, the Court was careful not to decide whether succession to responsibility was possible either in principle or in this particular case. The Court assigned this question to the merits and then had no need to return to it. However, the Court did hold that, if any succession to responsibility could be made out, Art. IX Genocide Convention would extend to such responsibility. Thus, the Court in effect held that succession to responsibility, provided it existed, would apply within the scope of the primary rules of the Genocide Convention as a secondary rule of international law (cf Croatian Genocide Convention Case, Merits, para. 115). It is arguable that this was sufficient to decide that the dispute was capable of falling within the substantive scope of the Genocide Convention and thus within the scope of Art. IX of the Convention. It does not appear that the Court would have had to establish the existence of succession to responsibility as a general rule of international law in order to find that the dispute came within Art. IX Genocide Convention. Otherwise, all issues relating to secondary rules of international law would be issues of jurisdiction in cases where a compromissory clause is limited to the substance of the treaty. This would defeat the general point that such compromissory clauses require only that the case be capable of falling within the substance of the treaty (cf Legality of Use of Force [Yugoslavia v Belgium] [Provisional Measures] para. 38). Moreover, in this case, succession to responsibility was not argued to be only a matter of general international law, but also a
matter of the facts of the case, viz the declaration of 27 April 1992 (cf Croatian Genocide Convention Case, Merits [Dissenting Opinion of Judge ad hoc Vukas] para. 2). It is natural to leave any questions as to the assessment of the facts to the merits. The Court’s judgment can therefore be defended, although it might have been desirable if the Court had said that succession to responsibility was at least a possibility. However, it is understandable if the Court did not wish to commit itself even to this very moderate statement, given the problematic nature of any such succession.

F. The Advisory Opinion on Kosovo

Kosovo, forming part of the FRY—later renamed Serbia and Montenegro, and continued by Serbia after the separation of Montenegro—was put under UN administration following the Kosovo conflict by UNSC Res 1244 (1999). → Negotiation[s] on the legal status of Kosovo between the FRY/Serbia and the Provisional Authorities of Self-Government of Kosovo having broken down, a unilateral declaration of independence was issued. After some States had recognized Kosovo as a new State, with other States opposing its claim to independence, the UNGA, at the behest of Serbia, addressed a request for an advisory opinion to the ICJ, asking whether ‘the unilateral declaration of independence by the Provisional Institutions of Self-Government of Kosovo [had been] in accordance with international law’ (Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo [Advisory Opinion] para. 49).

These advisory proceedings could conceivably, on one interpretation of the question put to the Court, have raised the issue of the statehood of Kosovo. The Court, however, interpreted the question as asking only if the declaration as such was prohibited by international law (Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo para. 56), and held that it was not. The Court reasoned that general international law did not regulate declarations of independence as such unless these were the result of prior international wrongs such as the use of force (ibid paras 80–81). It also concluded that UNSC Res 1244 (1999) was not addressed to the authors of the declaration, who in the view of the majority of the Court had not been acting as part of the Provisional Institutions of Self-Government, and therefore had no bearing on the legality of the declaration (ibid paras 102–9). The opinion thus did not pronounce on the current legal status of Kosovo.

G. Application of the Interim Accord of 13 September 1995

Another contentious case related to post-secession Montenegro, but did not raise any further issues as to the status of any part of the former Yugoslavia. In the case Application of the Interim Accord of 13 September 1995 the FYROM argued that Greece had violated its treaty commitments in opposing the membership of the FYROM in NATO even though the FYROM was, in accordance with the treaty, not to be referred to in NATO by the name of ‘Macedonia’—which is contentious between the parties. The Court held that the case did not relate to the difference between the parties as to the FYROM’s definitive name. The case also did not concern the actions of NATO itself in refusing the FYROM’s membership application, but only the conduct of Greece in opposing the membership application (Application of the Interim Accord of 13 September 1995 [Judgment] paras 34–44). In this respect, the Court found a violation of Greece’s undertaking not to oppose membership applications made by the FYROM where the latter was not to be referred to as ‘Macedonia’. It did not matter in this respect that the FYROM was going to refer to itself as ‘Macedonia’ even within NATO. It mattered only that the name ‘FYROM’ was to be used by the
organization; that being so, Greece was bound by treaty not to oppose the FYROM’s membership application and had violated this obligation (ibid paras 89-103, 113).

H. Conclusions

After a period of uncertainty even in the case law of the Court, the status of the FRY, Serbia and Montenegro, and Serbia during all relevant periods has now been clarified. Such uncertainty largely resulted from the political solution to the problems of State identity and succession chosen by the UN organs in 1992 (see para. 2 above). The resulting difficulties have, however, contributed to the development of the law on a number of important issues, predominantly in the procedural law of the ICJ.

The Court has, in particular, pronounced on the substantive extent of the res iudicata created by its judgments (see para. 27 above)—a fundamental issue under Art. 60 ICJ Statute and, indeed, in any judicial system. The Bosnian Genocide Convention Case now stands for the proposition that judgments of the ICJ are binding between the parties and the Court even in regard to holdings that are only necessarily implied in them. Whether the Court will come to refine this position remains to be seen, but it is unlikely to abandon this approach, should similar circumstances arise again. Likewise, the Court has now arguably extended the Mavrommatis approach regarding defective applications in holding that an application would not be dismissed on the grounds of an original defect that had since been cured (see para. 32 above). The application of this rule to the Croatian Genocide Convention Case may not be entirely beyond doubt (see para. 35 above), but the rule as such is here to stay, as perhaps is the Court’s strong emphasis on practicalities and judicial economy over the finer points of form and timing.

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