SEPARATE OPINION OF JUDGE OWADA

Issue of jus standi *of the Respondent as objective element of jurisdiction — Relevance of 2004 Judgment on the* Legality of Use of Force *cases — Estoppel, Acquiescence, Good Faith and forum prorogatum all relating to subjective element of consent and thus irrelevant — 1996 Judgment did not specifically address as a matter of fact the issue of* jus standi *— The Judgment to be construed nonetheless as a matter of law to have finally determined the issue — the* res judicata *principle applicable.*

Issue of application of the Genocide Convention to States — No provision of the Convention including Article I of the Convention capable of creating obligation upon States not to commit the crime of genocide in the absence of express stipulation to that effect — The obligation in existence under general international law but not under the Convention — Article IX of the Convention expanded in its scope to give jurisdiction to the Court to entertain claim based on general international law.

I. Introductory Remarks

1. I concur in general with the conclusions that the Court has reached in this case as contained in its operative clause *(dispositif)*. This position of mine applies both to the issue of jurisdiction and to the issues of merits.

2. However, I find some parts of the Judgment are not necessarily the same as my own view in some important respects. I find this to be the case, especially in relation to the issue of *jus standi* of the Respondent, as contained in Section III of the Judgment on "The Court's jurisdiction", and in relation to the issue of the application of the Convention on the Prevention and Punishment of the Crime of Genocide (hereinafter referred to as the "Genocide Convention") to the Respondent, as contained in Section IV of the Judgment on "The applicable law . . .". More specifically, it is my view that the Court's pronouncement on the issue of *jus standi* of the Respondent in the present case, to which I agree, should be elaborated a little further to answer to some of the points raised by the Parties, whereas the Court's conclusion on the issue of the application of the Genocide Convention to the Respondent, to which I also agree, has been reached on grounds which I cannot share.

3. For these reasons, I wish to append to the Judgment my own separate opinion, which is confined to these two issues.

II. The Issue of *jus standi* of the Respondent

4. As the starting point for my examination of this issue, I wish to make a few preliminary comments. First, I wish to make the point that the Judgment of the Court in the 2004 *Legality of Use of Force* cases (see *Legality of Use of Force (Serbia and Montenegro* v. *Belgium), Preliminary Objections, Judgment, I.C.J. Reports 2004*, pp. 279 *et seq.*) should be taken as one important point of reference for our consideration of the present case, in spite of the fact that it is obviously a different case in the technical sense. It is the most recent authoritative statement on the legal position of this Court on a number of points relevant to the present case. I do not accept as valid the approach advanced by the Applicant to the effect that the Court in the present case would have to choose between the two alternatives — *(a)* to harmonize a "vertical inconsistency" between the 1996 Judgment on preliminary objections in the present case and the present Judgment, or *(b)* to

harmonize a "horizontal inconsistency" between the Judgment on preliminary objections in the 2004 *Legality of Use of Force* cases and the present Judgment, and that the Court should choose the first approach. These two, however, are not to be the alternatives from which to choose one rather than the other. In my view, the Court should proceed in the present Judgment on the basis that there is no inconsistency between the 1996 Judgment and the 2004 Judgment.

5. Second I regard the present phase of the proceedings, not as one more additional argument on preliminary objections to the "jurisdiction" — *ratione personae* — of the Court, but rather as a so far unexplored phase of the proceedings, in which the Court would have to conduct an examination into the allegation of some fundamental defect in the application of the law of procedure of the Court that might vitiate the basis of competence of the Court to deal with the present case on the merits. It is my view that this issue of access to the Court is an issue separate from the issues of jurisdiction in its specific sense, whether *ratione personae*, *ratione materiae*, or *ratione temporis*, which are all issues relating to the scope of the consent given by the parties under the relevant legal instruments (or the relevant legal act in the case of *forum prorogatum*) in relation to a concrete dispute.

6. Finally, it is my view that for this reason the principle enunciated in the case concerning the *Appeal Relating to the Jurisdiction of the ICAO Council* (hereinafter referred to as "*ICAO Council*" case) is simply irrelevant. I certainly endorse the principle enunciated in that Judgment to the effect that "always" in this dictum means "always" in the sense of "at any stage of the proceedings in the case" (*Appeal Relating to the Jurisdiction of the ICAO Council (India* v. *Pakistan), Judgment, I.C.J. Reports 1972*, p. 52, para. 13). This, however, is stating the obvious and nothing more, since the Court is *ipso jure* mandated, both as of right and as of duty, to ascertain that it has jurisdiction at any stage of the proceedings, to the extent that the point at issue has not been raised earlier in the same proceedings and decided upon by the Court in a way which would constitute *res judicata*. On the other hand, I submit that the issue raised in the "Initiative to the Court to Reconsider ex officio Jurisdiction over Yugoslavia" (hereinafter referred to as the "Initiative") of 4 May 2001 by Serbia and Montenegro is not an issue of "jurisdiction" of such character in its specific sense in which the term is used in the *ICAO Council* case.

7. In the *Legality of Use of Force* cases, the Court clarified by its 2004 Judgment on preliminary objections the legal character of the "access to the Court" in the following words:

> "[t]he question [in those cases] is whether *as a matter of law* Serbia and Montenegro was entitled to seise the Court as a party to the Statute at the time when it instituted proceedings" (see *Legality of Use of Force, (Serbia and Montenegro* v. *Belgium), Preliminary Objections, Judgment, I.C.J. Reports 2004*, p. 295, para. 36; emphasis in the original).

and that this was a separate question from the issue of jurisdiction in a specific case.

The Court came out with the conclusion that

> "at the time of filing of its Application to institute the present proceedings before the Court on 29 April 1999, the Applicant in the present case . . . was not a Member of the United Nations, and, consequently, was not, on that basis, a State party to the Statute of the International Court of Justice" (see *Legality of Use of Force, (Serbia and Montenegro* v. *Belgium), Preliminary Objections, Judgment, I.C.J. Reports 2004*, p. 314, para. 91).

8. Contrary to urging from the Applicant that the Court treat this conclusion as exceptional and even as something to be disregarded as irrelevant to the present case, I do consider it relevant to the present case. It is proper for the Court not to depart from the position expressed in this conclusion of the Court and its basic reasoning; after all the Court has pronounced a definitive position on this matter. I might add that this is not one of those cases to which an old adage that "a difficult case makes a bad law" would apply. The conclusion reached by the Court is the result of the best efforts on the part of the Court. (It should also be recalled that in these case all the applicants except France advanced an argument based on the alleged lack of *jus standi* of the Applicant as their principal line of argument.) While obviously this judgment does not technically constitute a *res judicata* for other cases including the present one, to which Article 59 of the Statute applies, what is relevant for the consideration of the Court is the question of whether and to what extent the legal reasoning enunciated by the Court in arriving at its conclusion in that judgment is applicable to the present case.

9. The Applicant has tried to argue that the Respondent is deemed to have accepted the jurisdiction of the Court in the present case, by invoking the principle of estoppel and/or the principle of acquiescence or further to rely on the doctrine of *forum prorogatum*. The basic rationale for this position would seem to be common in all of these arguments. It rests on the proposition that the Respondent, by acting as if it did not contest the jurisdiction of the Court for any other grounds than those which it had specifically raised as the basis for objection to the jurisdiction of the Court in the preliminary objections phase of the present case, has to be regarded in law either as having accepted the jurisdiction of the Court in the present case (the principle of acquiescence), or as having been barred from raising a new ground which is the subject-matter of the present *démarche* of the Respondent (the principle of estoppel), or as having been deprived of the freedom to act in a different way (the principle of good faith). Alternatively the Applicant further argues that the Respondent has acted in fact in such a way as to be tantamount to consenting to the exercise of jurisdiction by the Court in the present case (the doctrine of *forum prorogatum*).

10. These arguments, in a word, are based on one common presupposition, i.e., whatever lacuna may have existed in the lien of jurisdiction that would tie the parties to the Court could be filled by the operation of law or by some actual behaviour of the parties, in such a way as to establish the consent of the Parties to jurisdiction.

11. However, it must be pointed out that while all these principles may be relevant to the issue of legal relationship *inter partes* before the Court, the issue raised in the present phase of the proceedings is a different one in its essential character. And this issue, as a matter of principle, has been the subject of the decision by the Court in its 2004 Judgment on the *Legality of Use of Force* cases. As the Court so unequivocally stated in that Judgment

> "it is the view of the Court that a distinction has to be made 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"

and

> "[t]he function of the Court to enquire into the matter and reach its own conclusion is thus mandatory upon the Court irrespective of the consent of the parties and is in no way incompatible with the principle that the jurisdiction of the Court depends on consent" (see *Legality of Use of Force, (Serbia and Montenegro* v. *Belgium), Preliminary Objections, Judgment, I.C.J. Reports 2004*, p. 295, para. 36).

This position of the Court has to be accepted as an authoritative statement of the law in dealing with the present case.

12. For this reason, all these arguments advanced by the Applicant to justify the exercise of jurisdiction by the Court in the face of a new attempt of the Respondent based on its claim of the lack of *jus standi*/access to the Court should be rejected. On this point, I am in agreement with the conclusion reached by the Judgment (paragraphs 102-103).

13. However, the Applicant has also tried to argue that in any case the 1996 Judgment on preliminary objections in its entirety constitutes *res judicata* in the present case and thus prevents the Respondent from raising the issue of the access to the Court/jurisdiction *ratione personae*, as contained in the new "Initiative" of the Respondent, at this stage of the proceedings. It is my view, however, that an assertion of the principle of *res judicata* with such a sweeping and general application cannot be accepted as a valid construction of the principle of *res judicata* in international law.

14. Article 60 of the Statute is generally regarded to be the provision in the Statute that gives expression to the principle of *res judicata* as applied to the International Court of Justice.

The statement contained in Article 60 of the Statute has been interpreted as the practical embodiment within the Statute of the rule of *res judicata* as "a general principle of law recognized by civilized nations". Thus, during the discussion in the Advisory Committee of Jurists contracted with the task of drafting the Statute of the Permanent Court of International Justice, it was suggested by one member of the Committee (Lord Philimore) that "the general principles referred to in [the present Article 38] were these which were accepted by all nations *in foro domestico*, such as certain principles of procedure, the principle of good faith, and the principle of *res judicata*, etc." (PCIJ, Advisory Committee of Jurists, *Procès-Verbaux of the Proceedings of the Committee*, 1920, p. 335). Nevertheless, the jurisprudence of this Court, especially in its Advisory Opinion in the case concerning the *Effect of Awards of Compensation Made by the United Nations Administrative Tribunal* (hereinafter referred to as the "*Effects of Awards*" case), makes it quite clear that the principle contained in Article 60 of the Statute cannot be considered as an absolute rule in relation to an international tribunal. The Court stated in that Advisory Opinion that

> "[t]his rule . . . cannot . . . be considered as excluding the Tribunal from itself revising a judgment in special circumstances when new facts of decisive importance have been discovered" (*Effects of Awards of Compensation Made by the United Nations Administrative Tribunal, Advisory Opinion, I.C.J. Reports 1954*, p. 55).

15. This is particularly true with an international jurisdiction in which the competence of the tribunal is not *a priori* determined by the legal system itself within which the tribunal operates but is subject to the jurisdictional framework set by the parties to the dispute. For this reason Judge Jessup, in his dissenting opinion in the 1966 *South West Africa case*, emphasized the relative nature of *res judicata* in international law by stating that "the Court is always free, *sua sponte*, to examine into its own jurisdiction" (*South West Africa case, Second Phase, Judgment, I.C.J. Reports 1966*, p. 333). Thus he concluded as follows:

> "Various pronouncements in the jurisprudence of the two Courts [i.e., the PICJ and the ICJ], in various separate opinions and in the 'teachings of the most highly qualified publicists' do not provide an automatic test to determine what is within and what is without the *res judicata* rule." (*South West Africa case, Second Phase, Judgment, I.C.J. Reports 1966*, p. 333.)

In applying the *res judicata* rule, it is indeed essential that we avoid an automatic application of the rule and try to determine the scope of what has been decided as *res judicata* in the concrete context of the case.

16. Specifically in relation to the present case, the critical question in issue is whether the problem of access to the Court, argued by the Respondent extensively at the present phase of the proceedings on the basis of its "Initiative" of 2001, is something which has been disposed of by the Court in its 1996 Judgment dealing with preliminary objections to the jurisdiction of the Court and should thus be regarded as falling within the scope of *res judicata* — "that which has already been judged" — for the purposes of the present case.

17. It must be emphasized that in the present case the question of *jus standi* of the Respondent/access of the Respondent to the Court was, *as a matter of fact*, never an issue before the Court at the time of the 1996 Judgment — neither raised by the Applicant nor by the Respondent. In the proceedings on preliminary objections, the Respondent raised seven preliminary objections relating to the jurisdiction of the Court but did not refer to this issue of access to the Court. On the basis of the arguments of the parties, the 1996 Judgment made no mention of this aspect of the problem of "jurisdiction" *lato sensu*, i.e., the problem of the "competence" of the Court to entertain the case. The *dispositif* of the Judgment was confined to specifically rejecting all six — one out of the seven having been withdrawn — preliminary objections and on this basis proceeded to a finding that

> "on the basis of Article IX of the [Genocide] Convention, [the Court] has jurisdiction to adjudicate upon the dispute" (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro, Preliminary Objections, Judgment, I.C.J. Reports 1996 (II)*, p. 623, para. 47 (2) *(a) (dispositif)*).

18. This makes a conspicuous contrast to the language of the Court in its earlier Order of 8 April 1993 on the Request for the Indication of Provisional Measures. In that Order the Court drew the attention of the parties to the point that

> "Article 35, paragraph 1, of the Statute of the Court provides that 'The Court shall be open to the States parties to the present Statute', and Article 93, paragraph 1, of the United Nations Charter that 'All Members of the United Nations are *ipso facto* parties to the Statute of the International Court of Justice'; and . . . it is maintained in the Application that 'As Members of the United Nations Organization, the Republic of Bosnia and Herzegovina and Yugoslavia (Serbia and Montenegro) are parties to the Statute'; . . . however in the Application Bosnia-Herzegovina indicates that the 'continuity' of Yugoslavia with the former Socialist Federal Republic of Yugoslavia, a Member of the United Nations, 'has been vigorously contested by the entire international community, and *[sic]* including by the United Nations Security Council . . . as well as by the General Assembly', and reference is there made to *(inter alia)* Security Council resolution 777 (1992) and General Assembly resolution 47/1" (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Yugoslavia), Provisional Measures, Order of 8 April 1993, I.C.J. Reports 1993*, p. 12, para. 15).

After reviewing the contents of Security Council resolution 777 (1992) and General Assembly resolution 47/1, as well as the letter of the Under-Secretary-General and Legal Counsel of the United Nations of 29 September 1992 in which he stated the "considered view of the United

Nations Secretariat regarding the practical consequences of the adoption by the General Assembly of resolution 47/1" (*ibid.*, p. 13, para. 17), the Court declared that

> "while the solution adopted [in the United Nations as of that time] is not free from legal difficulties, the question whether or not Yugoslavia is a Member of the United Nations and as such a party to the Statute of the Court is one which *the Court does not need to determine definitively at the present stage of the proceedings*" (*ibid.*, p. 14, para. 18; emphasis added).

It is thus clear that the Court in this 1993 Order consciously refrained from pronouncing its position on this crucial issue, while implicitly reserving the matter for future "definitive determination".

19. In spite of this background, the Court in its 1996 Judgment, while it could not have been unaware of this problem concerning the legal situation surrounding the legal status of the Respondent *(jus standi)* vis-à-vis the Court, made no mention of this aspect of the problem of "jurisdiction" *lato sensu*, and decided that

> "on the basis of Article IX of the Convention on the Prevention and Punishment of the Crime of Genocide, *it has jurisdiction to adjudicate upon the dispute*" (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro, Preliminary Objections, Judgment, I.C.J. Reports 1996 (II)*, p. 623, para. 47 (2) *(a) (dispositif)*; emphasis added).

More specifically, in paragraphs 41 and 42 of the 1996 Judgment, the Court stated as follows:

> "41. It follows from the foregoing that the Court is unable to uphold any of the additional bases of jurisdiction invoked by the Applicant and that its only jurisdiction to entertain the case is on the basis of Article IX of the Genocide Convention.
>
> 42. Having ruled on the objections raised by Yugoslavia with respect to its jurisdiction, the Court will now proceed to consider the objections of Yugoslavia that relate to the admissibility of the Application." (*Ibid.*, p. 621.)

This passage can only be interpreted as signifying that the Court was focusing its attention with regard to jurisdiction exclusively upon the issues raised by the parties. The language of the Judgment strongly suggests that in making that statement and those that followed, including paragraph 46 and the *dispositif* 2 *(a)*, the Court was addressing to those issues of jurisdiction *stricto sensu* which had been raised by the Respondent, without going into examination of the issue of access, an issue which, in its nature, was independent from the argument of the parties and which was to be determined by the Court as an objective question.

20. It should be clear from this background of facts surrounding the 1996 Judgment that what is at issue here is *not* the question of whether the principle of *res judicata* as incorporated in Article 60 of the Statute is to be honoured or not. It is clear that this is a principle to be honoured by this Court, though with all the caveats that I have discussed earlier on as a legal principle. Neither is it the question of whether the principle applies to the decision of the Court on the merits only or extends to its decision on procedural issues, including the issues of jurisdiction. Clearly the principle should be applicable to both. It is not even the question of whether the 1996 Judgment as a general proposition constitutes *res judicata* either. It does certainly constitute *res judicata*. On all these points, I endorse the position taken by the Court in the present Judgment.

21. The sole and crucial question is what is to be regarded as the exact element of this 1996 Judgment that constitutes *res judicata* for the purposes of the present Judgment.

22. It could be said in this context that perhaps it was unfortunate that in 2001 Serbia and Montenegro brought this very issue before the Court in the form of an application for revision of the 1996 Judgment (*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)* (hereinafter referred to as the *"Revision of the 1996 Judgment"* case), rather than in the form of a request for interpretation of the 1996 Judgment. As the former was strictly the question of the application of Article 61 of the Statute, the Court — quite correctly in my view — gave its 2003 Judgment strictly within the confines of the conditions set out in Article 61. If the issue had been raised as a new dispute concerning the interpretation of the 1996 Judgment as to whether the Judgment covered the question of access of the Respondent to the Court, i.e., as a "dispute as to the meaning or scope of the judgment" under Article 60, the Court could have had the opportunity in 2003 to address the present issue before the Court.

23. Be that as it may, it would seem difficult to establish against the background as reviewed above, that the Court in 1996, while fully aware of the problem which it had already acknowledged in its Order of 8 April 1993 to exist and chosen to avoid to answer, did go, as a matter of fact, into an examination of that issue, though without pronouncing upon it *expressis verbis* in the Judgment, and came out with the "definitive determination" on that issue in the form of such *dispositif*. If that had been the case, the conclusion would certainly be warranted that this specific aspect of the problem would certainly be covered automatically by the application of the *res judicata* principle.

24. Under the actual circumstances of 1996 as revealed through the examination of the factual background, however, I find it difficult to accept the argument of the Applicant that the Court did decide, *as a matter of fact*, the issue of access to the Court and that therefore the issue automatically falls within the purview of the 1996 Judgment as constituting an integral part of *res judicata* established by the 1996 Judgment and is thus *a priori* precluded from the Court's consideration at this stage.

25. In fact, all these points are reflected in the conclusions that the Court has drawn in its 2004 Judgment. In this sense what is stated above represents nothing more than a reconfirmation of the points enunciated by the Court in its 2004 Judgment.

26. Having thus stated my basic position, nevertheless I have to proceed to point out that there is yet one more element which would require further consideration by the Court on this question in the specific context of the present case. And I believe that this element constitutes the critical factor in distinguishing the present case from the 2004 Judgment on the *Legality of Use of Force* cases. The essential element for distinguishing the present case from the *Legality of Use of Force* cases in my view lies in the difference in the time-frame in which the Court has to look at the same problem of *jus standi*/access to the Court of Serbia and Montenegro in the *Legality of Use of Force* cases and in the present case.

27. In the *Legality of Use of Force* cases, the filing of the Application took place on 29 April 1999, and on that day a request for the indication of provisional measures of protection was submitted by the Applicant in that case, Serbia and Montenegro. The Court, by its Order of 2 June 1999, rejected this request on the ground that it had no prima facie jurisdiction to entertain the cases (*I.C.J. Reports 1999 (I)*, p. 134, para. 26). Nothing further came about in the proceedings of the Court on these cases until well after 2000, when Serbia and Montenegro was admitted to the United Nations. It was in 2004 that the Court had the opportunity, for the first time on the occasion

of its Judgment on Preliminary Objections in these cases, to engage in an overall examination of the question of jurisdiction in relation to these cases, including the issue of the access of the Applicant to the Court.

28. Under these circumstances, the Court, for the first time in 2004, was in a position to engage in an examination of the issue of *jus standi* of the Applicant in the context of the issue of the legal status of the then Federal Republic of Yugoslavia (hereinafter referred to as "the FRY") from the viewpoint of whether the Applicant (i.e., Serbia and Montenegro) satisfied the conditions laid down in Articles 34 and 35 of the Statute and whether the Court was open to the Applicant. In the Judgment itself the Court declared for the first time in 2004 that "[o]nly if the answer to that question is in the affirmative will the Court have to deal with the issues relating to the conditions laid down in Articles 36 and 37 of the Statute of the Court" (see *Legality of Use of Force, Preliminary Objections, Judgment, I.C.J. Reports 2004*, p. 299, para. 46). Based on a detailed examination of facts and law involved as they were known to the Court as of that time, the Court came out with the conclusion that the Applicant had not been a member of the United Nations *during the critical period between 1999-2000* and thus did not satisfy the conditions laid down in Article 35 of the Statute. It thus followed that the Applicant could not have access to the Court, with the consequent result that the Court did not have jurisdiction to entertain these cases.

29. In coming to this conclusion, the Court was clearly aware that the Applicant in these cases, the FRY (Serbia and Montenegro), had in 2003 in the *Revision of the 1996 Judgment* case, put forward essentially the same argument that the Respondent in the instant cases was invoking, i.e., that the FRY had not been a party to the Statute at the date of institution of the proceedings in the *Genocide Convention* case in 1993. Against this, the Respondent in the *Revision of the 1996 Judgment* case, Bosnia and Herzegovina, argued, *inter alia*, that the 1996 Judgment on preliminary objections in the *Genocide Convention* case had the force of *res judicata* (cf. Written Observations of Bosnia and Herzegovina of 3 December 2001 on the *Revision of the 1996 Judgment* case, para. 5.36); that Serbia and Montenegro had acquiesced in the Court's jurisdiction on the basis that it was a Member of the United Nations and party to the Statute and could not retract that position (*ibid.*, paras. 4.4-4.7); that Serbia and Montenegro was precluded, whether on the basis of estoppel or of the general principle of good faith, from invoking its own mistake in interpreting the legal situation (*ibid.*, para. 4.19). It also argued that the Court would have jurisdiction under Article 35, paragraph 2, of the Statute (*ibid.*, paras. 5.1-5.27).

30. Nevertheless, in its Judgment on the *Revision of the 1996 Judgment* case the Court did not pronounce on any of these contentions for the simple reason that the Court decided that the task of the Court was to confine itself to the examination of the question whether a "new fact" had been adduced to satisfy the conditions required under Article 61 of the Statute. The Court, solely on that basis, rejected the application for revision of the Applicant, Serbia and Montenegro, as not satisfying the conditions under Article 61. It was during this same period following the new developments of 2000, which definitively clarified the legal status of FRY in and vis-à-vis the United Nations, that the Court in 2004 for the first time had the opportunity to address the issue of its competence to entertain the cases brought by the FRY as the Applicant, including the issue of the Applicant's access to the Court. In light of the circumstances which had come to be clarified in the post-2000 period, the Court came to its well-known conclusion that it lacked jurisdiction because the Applicant lacked the *jus standi* to appear before the Court in light of the facts available to it as of that time.

31. By contrast, the legal situation surrounding the 1996 Judgment on preliminary objections in the present case was quite different. As already stated, in its Order of 8 April 1993 on the request for the indication of provisional measures, the Court determined that

> "while the solution adopted [in the United Nations as of that time] is not free from legal difficulties, the question whether or not Yugoslavia is a Member of the United Nations and as such a party to the Statute of the Court is one which *the Court does not need to determine definitively at the present stage of the proceedings*" (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Yugoslavia), Provisional Measures, Order of 8 April 1993, I.C.J. Reports 1993*, p. 14, para. 18; emphasis added).

It was in 1996, well before 2000, that the Court, in its Judgment on Preliminary Objections made the finding that

> "on the basis of Article IX of the Convention on the Prevention and Punishment of the Crime of Genocide, it has jurisdiction to adjudicate upon the dispute" (*I.C.J. Reports 1996 (II)*, para. 47 (2) *(a) (dispositif)*, p. 623).

32. This means that if we accept that this Judgment did dispose of all the issues relating to jurisdiction *stricto sensu* raised by the Respondent and declared that "it has jurisdiction to adjudicate upon the dispute", then this decision could only mean as a matter of law that every process to be completed before the Court could proceed to the examination of the merits of the case had been *completed* in 1996, long before the legal situation regarding the status of the FRY became finally clarified in a new light in 2000. And this to my mind is the decisive difference that distinguishes the 1996 Judgment from the 2004 Judgment, both relating to the preliminary objections on jurisdiction.

33. It is true that the 1996 Judgment did not make any express reference, nor any express "definitive determination" by the Court with regard to the issue of the legal status of the Respondent vis-à-vis the Statute of the Court. Nevertheless, it is simply impossible to think that the Court was unaware of the issue surrounding the legal status of the Respondent (the issue of *jus standi*/access to the Court) which had already been identified and expressly referred to in its Order of 1993. Under such circumstances, the conclusion is inescapable that whatever the view of the Court may have been at the time of this 1996 Judgment on the issue of the legal status of the FRY during the relevant period between 1993 and 1996, the Court at the time of its 1996 Judgment at least *did not put in question* the capacity of the FRY to have access to the Court under the Statute. Since the issue of the capacity of a party to have the legal standing to appear before the Court has to be regarded as a question which logically precedes the issues relating to jurisdiction *stricto sensu* — i.e., the issues relating to jurisdiction *ratione personae*, *ratione materiae* and *ratione temporis* under the relevant legal instruments that afford the basis for jurisdiction of the Court in a concrete case — it would be impossible to argue as a matter of law that the Court itself, when it pronounced in its 1996 Judgment that "it had jurisdiction to adjudicate upon the dispute" — and not just *prima facie jurisdiction* but jurisdiction *ratione personae*, *ratione materiae* and *ratione temporis* — should be deemed to have left undecided, and kept open, what is the logical premise for such a pronouncement — i.e., the premise that the Respondent had the legal standing to appear before the Court, on whatever ground that might be. In other words, this Judgment has to be regarded *in law* as amounting to the "definitive determination" as referred to in its Order of 1993, as far as the present case is concerned.

34. It should be emphasized that this position is strictly to be distinguished from the one based on "tacit acceptance" or "implied acceptance" of jurisdiction. The only context in which this logic prevails is that the Court itself, by legal construction, must be deemed in law to have settled the issue of access to the Court, an issue which constitutes the logical prerequisite that the Court

has to satisfy before it can proceed to the conclusion that it has jurisdiction *ratione personae*, *ratione materiae*, and *ratione temporis*. Without addressing that problem, the Court simply could not have proceeded to the examination of jurisdiction *stricto sensu*.

35. Furthermore, it would follow from this conclusion as long as we accept that the Court by legal construction has to be deemed to have made such "definitive determination", though without specifically addressing it in the Judgment, the issue of access to the Court has to be regarded also as coming into the ambit of issues that constitute *res judicata* of the 1996 Judgment.

36. It might further be added that a case could be made that the parties, as well as the Court itself, until 2000 long after the 1996 Judgment, had been acting in reliance on the conclusion, induced by the Court itself, that the Respondent did indeed have the capacity to appear before the Court, and that this fact in itself constitutes an objective legal situation which can no longer be ignored at this stage by the parties and by the Court.

37. In a nutshell, my view on this question is that *the Court itself*, and not the Respondent, *is precluded now from taking a different position at this stage* which would be diametrically opposed to the one that the Court itself is deemed in law to have so definitively determined in the present case. The principle of consistency as an essential prerequisite for the stability of legal relations should support such an approach.

III. The Nature of Obligations under the Genocide Convention

38. The Court, in paragraph 179 of the present Judgment, concludes that

> "[i]t affirms that the Contracting Parties are bound by the obligation under the Convention not to commit, *through their organs or persons or groups whose conduct is attributable to them*, genocide and the other acts enumerated in Article III" (Judgment, paragraph 179; emphasis added).

39. I agree with this finding of the Court in its present general formulation, and on this basis have voted in favour of the items of the *dispositif* relating to this point (*dispositif* sub-paras. (2) to (5)).

40. At the same time, however, I wish to register here my position that while I accept the conclusion of the Court that the Respondent "through [its] organs or persons or groups whose conduct is attributable to [it]" (Judgment, paragraph 179) may not only incur international responsibility for acts of genocide or the other acts enumerated in Article III committed by such organs or persons or groups under international law, but also can be held to account before this Court for such internationally wrongful acts as falling within the jurisdiction of the Court under Article IX the Genocide Convention, I cannot agree with the legal ground on which the Judgment has arrived at this conclusion, inasmuch as the Judgment is primarily based on its finding on the scope of Article I of the Convention.

41. In the most crucial part of the Judgment which discusses this point of direct responsibility of the State for genocide, the Judgment declares as follows:

> "under Article I [of the Genocide Convention] the State parties are bound to prevent such an act, which it describes as 'a crime under international law', being committed. The Article does not *expressis verbis* require States to refrain from themselves committing genocide. However, in the view of the Court, taking into account the established purpose of the Convention, the effect of Article I is to prohibit States from themselves committing genocide. Such a prohibition follows, first, from the fact that the Article categorizes genocide as 'a crime under international law': *by agreeing to such a categorization, the State parties must logically be undertaking not to commit the act as described*. Secondly, it follows from the expressly stated obligation to prevent the commission of acts of genocide. That obligation requires the States parties, *inter alia*, to employ the means at their disposal, in circumstances to be described more specifically later in this Judgment, to prevent persons or groups not directly under their authority from committing an act of genocide or any of the other acts mentioned in Article III. It would be paradoxical if States were thus under an obligation to prevent, so far as within their power, commission of genocide by persons over whom they have a certain influence, but were not forbidden to commit such acts through their own organs, or persons over whom they have such firm control that their conduct is attributable to the State concerned under international law. In short, *the obligation to prevent genocide necessarily implies the prohibition of the commission of genocide*." (Judgment, paragraph 166; emphasis added.)

42. In my view, there could be no question that under the general law of State responsibility international responsibility could certainly be incurred on the part of a State if an individual or an entity, acting as an organ of that State or in any other matter which makes the act attributable to the State, should be held responsible for this internationally wrongful act.

43. I also have no difficulty in accepting the proposition that the underlying basic principle of the Genocide Convention is that genocide as defined in the Convention is a heinous "crime under international law" (Art. I), which the States members of the international community, collectively as community and severally in their individual capacity, are obligated to prevent and punish, and *a fortiori* to forego its commission by themselves.

44. But I do not believe that it follows from this general proposition that the Convention, as such, therefore should by necessary implication be deemed to impose upon States parties an obligation under Article I that the State parties undertake not to commit an act of genocide and to accept *direct international responsibility for such an act and be held to account under the Convention*, despite the fact that the article does not contain any provision imposing such an obligation upon the States parties. The issue is not whether such an obligation on the part of States exists in contemporary international law or not; the issue is what is the source of such obligation if it exists, for the purposes of the present case.

45. It seems to me absolutely clear from the very title and the whole structure of the Convention that the object and purpose of the Convention is to make a solemn compact among the States parties to the Convention to "confirm that genocide [as defined by the Convention] is a *crime under international law*" and to "undertake to prevent and to punish" this international crime (Art. I), primarily focusing, as the concrete means to carry out this undertaking, on prosecuting individuals who are the actual culprits of the crime. We find no provisions in the Convention which prescribe an undertaking on the part of the States parties that they bind themselves to the obligation not to commit an act of genocide themselves and to assume direct responsibility directly for a breach of such obligation under the Convention. Since the Convention is a solemn compact

among sovereign States, I do not believe that one can simply presume that such an undertaking is implicitly assumed by the States parties to the Convention when the Convention itself is totally silent on that point.

46. As the Permanent Court of International Justice declared in its famous dictum, it is one of the fundamental principles accepted in the contemporary international legal order that:

> "International law governs relations between independent States. The rules of law binding upon States therefore emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law and established in order to regulate the relations between these co-existing independent communities or with a view to the achievement of common aims. *Restrictions upon the independence of States cannot therefore be presumed*." ("*Lotus", Judgment No. 9, 1927, P.C.I.J., Series A, No. 10*, p. 18; emphasis added.)

47. In the same vein, the same Court stated, in the context of a case in which the question at issue was whether the extent of autonomy granted by one of the parties under a treaty could be inferred when the treaty in question was silent, as follows:

> "the exercise of the [autonomous] powers necessitates the existence of *a legal rule which cannot be inferred from the silence of the instrument* from which the autonomy is derived, or from an interpretation designed to extend the autonomy by encroaching upon the operation of the sovereign power" (*Interpretation of the Statute of the Memel Territory, Merits, Judgment, 1932, P.C.I.J., Series A/B, No. 49*, p. 313; emphasis added).

48. Moreover, even if such a presumption were to be permissible in the present context, it would certainly be a rebuttable presumption. And it can indeed be rebutted in light of the legislative history of the Convention, as I am going to demonstrate in a moment.

49. Needless to say, in making this point I do not mean to suggest for a moment that under the current state of international law States are left free to commit an act of genocide. Nothing could be further from my own position on this question. The point is simply that the object and purpose of the Convention is to pursue the question of preventing and punishing the heinous act of genocide, which the international community is unanimous in abhorring and condemning, through an approach of treating it as an international crime and *holding to account the individuals* who are actual culprits of genocide *for their criminal responsibility*.

50. It is to be emphasized that this approach is also in line with the approach adopted by the International Military Tribunal at Nuremberg, which formed the crucial background for the Genocide Convention. The Tribunal famously stated that "crimes against international law are committed by men, not by abstract entities" (*Judgment of the International Military Tribunal, Trial of Major War Criminals*, 1947, Vol. 1, p. 223) and went on to punish the individuals involved, rather than the State as such.

51. Needless to say, there is no question that a State, as a legal entity, always acts in its name through individuals who are its organs and that such acts of these individuals constitute in law acts of the State. As a result, an act of such individuals acting as an organ of the State is to be identified as an act of the State in whose name they are acting, and could incur the international responsibility

of the State concerned, if the act in question is something which can be characterized as an internationally wrongful act. Precisely for this reason, the Convention addresses that very issue in its Article IV.

52. But the issue here is a different one. Even granting that in a great number of cases of genocide, it is the State which is the real culprit behind the act even when the act in question is perpetrated as an act of the individual involved acting as an organ of that State, the question to ask in relation to the Convention is whether the Convention in its actual structure takes the approach of directly holding the State to account for the act which is declared to be an international crime under the Convention. In my view, the question to ascertain is which of the following three approaches the Convention, in dealing with the act of genocide, is adopting as the effective means of achieving the object and purpose of the Convention to prevent and punish genocide:

(a) an approach of holding the individual who actually had a hand in the act in question to account for *a crime of genocide*, which requires the existence of *dolus specialis* on the part of the culprit as a matter of criminal law;

(b) an approach of holding the State, in whose name the individual has committed the act, to account for an *internationally wrongful act*, under the international law of State responsibility; or

(c) an approach of holding both the individual and the State to account consecutively.

In any case it is clear that the Convention has rejected yet another possibility, i.e., *(d)* an approach to hold the State directly to account for *an international crime of genocide*, on the ostensible ground that a State cannot commit a crime in the penal sense.

53. On the basis of a natural interpretation of the provisions of the Convention having regard to the object and purpose of the Convention as reflected in its structure, and reinforced by its legislative history as demonstrated by the *travaux preparatoires*, I am persuaded by the conclusion that — setting aside for the moment the legal implication which came later to be introduced into the picture by an amendment to the language of Article IX (a point I am going to deal with later in this opinion) — all the evidence available to us points to the direction that the Convention in its original scheme followed the approach *(a)*, i.e., the approach to pursue the goal of preventing and punishing and thus banishing genocide as an "international crime", primarily through prosecuting the individuals who have committed the criminal act with *dolus specialis*, whether acting in the capacity as organs of State or otherwise. The provisions of Article IV clearly testify to this approach. Also the emphasis on *dolus specialis* as one essential constituent element of genocide as a crime specified in Article II also tends to confirm this interpretation.

54. It must be noted in this connection that there is nothing in this approach of the Convention which would logically contradict or exclude the proposition contained in the approach *(b)*. As is stated above (paras. 41 *et seq.*), if an act committed by an individual, acting in his capacity as an organ of a State, amounts to an internationally wrongful act in the eyes of international law, the law of State responsibility attributes this act in question to the State for whom the individual has acted as its organ, thus incurring international responsibility of the State for that act. This, however, is a legal situation arising under the rules of general international law and is separate from the question of the scope of the obligations under the Convention as represented by the substantive provisions of the Convention (i.e., Arts. I through VII). In other words, the approach *(b)* would certainly be viable, based on the legal link that could exist under general

international law between the rights of the State that suffers injury through its nationals who are victims of the crime of genocide to seek remedy for this internationally wrongful act on the one hand, and the obligations of the State for this internationally wrongful act on the other.

55. As a general proposition of the law on this legal nexus, I have no disagreement with the position enunciated in the Judgment when it pronounces as the following:

> "The Court observes that that duality of responsibility [i.e., the responsibility of an individual and the responsibility of the State on whose behalf the individual has acted, both existing side by side] continues to be a constant feature of international law. This feature is reflected in Article 25, paragraph 4, of the Rome Statute for the International Criminal Court, now accepted by 104 States: 'No provision in this Statute relating to individual criminal responsibility shall affect the responsibility of States under international law'. The Court notes also that the ILC's Articles on the Responsibility of States for Internationally Wrongful Acts . . . affirm in Article 58 the other side of the same coin: 'These articles are without prejudice to any question of the individual responsibility under international law of any person acting on behalf of a State' . . ." (Judgment, paragraph 173).

56. However, I submit that this argument, while certainly valid, misses the point. The point at issue is *not* whether *international law* recognizes this "duality of responsibility" *(ibid.)*, which it clearly does, but whether the *Genocide Convention* is based on such an approach based on "duality of responsibility" *(ibid.)* by holding the State to account directly under the Convention for its internationally wrongful act, as well as holding the individual to account for his crime of genocide as defined under the Convention. In my view the Convention leaves this first aspect relating to the direct responsibility of the State as falling outside the scope of the Convention, as far as the substantive provisions of the Convention are concerned. The Convention as such does not touch on this legal link and leaves the matter to general international law.

57. In this connection, it is to be noted that the Judgment states that

> "[t]he jurisdiction of the Court is founded on Article IX of the Convention, and the disputes subject to that jurisdiction are those 'relating to the interpretation, application or fulfilment' of the Convention, but it does not follow that the Convention stands alone",

and then goes on to say that:

> "In order to determine whether the Respondent breached its obligations under the Convention, as claimed by the Applicant, and if a breach is committed, to determine its legal consequences, the Court will have recourse not only to the Convention itself, but also to the rules of general international law on treaty interpretation and on responsibility of States for internationally wrongful acts." (Judgment, paragraph 149.)

58. However, it has to be pointed out with regard to this approach of the Judgment that the issue of the rules of general international law on State responsibility is a separate issue of substance which is independent of the scope of Article I of the Convention in the present context, in the sense that the question of whether a certain act of a State constitutes a violation of the obligation undertaken by the State under Article I the Convention is one thing, while the question of whether the same act constitutes an internationally wrongful act under general international law is quite

another, In deciding on the former issue, the latter question cannot be brought into play. In my view the question of State responsibility in this sense, which could certainly be brought into existence under general international law as a result of the commission of the crime of genocide by an individual, would be a distinct issue of responsibility of the State arising out of the link of attribution of the act in question to the State and not arising directly out of Article I of the Convention. Therefore it could come under the jurisdiction of the Court under Article IX of the Convention, only if it can be established that this aspect of State responsibility under general international law is brought into the ambit of the operation of Article IX, not as a matter of "interpretation, application or fulfilment of the Convention" but through some mechanism for incorporating this issue by reference into the scope of the jurisdiction of the Court. I do not believe that the Court can extend its jurisdiction to this issue of general international law automatically as if it were a logical sequence that can be incorporated into the scope of the jurisdiction of the Court through the process of interpretation on specific obligations provided for under the Convention.

59. In considering the matter in the present context, therefore, we have to examine the precise scope of the jurisdictional framework, within which the Court operates in the present case, as set by Article IX of the Convention. In this respect, the standard formula that one normally finds in a compromissory clause in many treaties — and indeed the formula that had been adopted in the original compromissory clause of the present Convention — would not allow us to go into this area of issues of general international law — i.e., the issues relating to international responsibility of a State for an internationally wrongful act emanating under general international law, but not under specific provisions of the treaty in issue. The issue would not fall within the operational scope of such compromissory clause which limits the jurisdiction of the Court to issues relating to "interpretation and application of the present Convention".

60. The crucial question therefore is whether the added language in Article IX has changed this legal situation, especially from the viewpoint of the scope of the jurisdiction of the Court in such a way as to include within the ambit of the Convention the issue of State responsibility under general international law for internationally wrongful acts arising out of the commission of the crime of genocide by individuals specifically provided for under the Convention.

61. In order to ascertain this point, a close examination of the *travaux preparatoires* on the legislative history of this article would seem to be indispensable, given the fact that in particular the amended language of Article IX is so ambiguous as to render it "[devoid of] any meaningful sense" according to some. (See, e.g., the declaration of Judge Oda in the 1996 Judgment, *I.C.J. Reports 1996 II*, p. 628.) In other words, here we are faced with a situation in which "the interpretation according to [the general rule of interpretation in accordance with] Article 31: *(a)* leaves the meaning ambiguous or obscure; or *(b)* leads to a result which is manifestly absurd or unreasonable." (*Vienna Convention on the Law of Treaties*, Art. 32.)

62. As is well known, the particular language in question in Article IX, consisting, *inter alia*, of the addition of the phrase "including disputes relating to the responsibility of a State for any of the acts enumerated in Articles II and IV [present Article III]" was proposed by way of an amendment to Article X (present Article IX) of the original draft Convention by Belgium and the United Kingdom (United Nations doc. A/C.6/258). This proposal for amendment was made in the course of the deliberation on the draft Convention in the Sixth Committee of the United Nations General Assembly, and was accepted by a narrow margin of 19 votes to 17, with 9 abstentions (United Nations, *Official Records of the General Assembly, Third Session, Sixth Committee*, Summary Record of the 104th meeting, p. 447).

63. However, in order properly to understand the scope of this amendment, it is necessary to go back to the pre-history to this development. Originally the United Kingdom had earlier proposed the following amendment to Article V (present Art. IV):

> "*Criminal responsibility* for any act of genocide as specified in articles II and IV *shall extend* not only to all private persons or associations, but also *to States, governments, or organs or authorities of the State or government*, by whom such acts are committed. Such acts committed by or on behalf of States or governments constitute a breach of the present Convention." (United Nations doc. A/C.6/236; emphasis added.)

This proposal, while supported by Belgium, was met with a strong challenge from a number of delegations, including France, the United States, Canada and others, mainly on the ground that it was an attempt to apply the concept of criminal responsibility to States, and was rejected by 24 votes to 22.

64. The United Kingdom tried to reintroduce the same idea of direct responsibility of State in the form of an amendment to Article VI (present Article V) in the following words:

> "Where the act of genocide as specified by articles II and IV is, or is alleged to be the act of the State or government itself or of any organ or authority of the State or government, the matter shall, at the request of any other party to the present Convention, be referred to the International Court of Justice, whose decision shall be final and binding. Any acts or measures found by the Court to constitute acts of genocide shall be immediately discontinued or rescinded and if already suspended shall not be resume or reimposed." (United Nations doc. A/C.6/236 and Corr.)

It is not at all clear whether this amendment purported to deal with criminal responsibility of a State for its own commission of the crime of genocide — which seems to be the implication from the general context of the proposal — or tortious liability of a State for an act of genocide committed by the State — which seems to be the implication from its reference to the International Court of Justice — in this somewhat confused formulation. In any case, it seems clear from the language of the amendment that the same idea of holding a State to account for its own commission of *the crime of genocide* was retained, whereas the sponsor of the amendment would no longer seem to have intended to pursue criminal responsibility of a State, seeing that this time the amendment was proposed on the basis that the matter be referred to the International Court of Justice which by its Statute could not charge a State for its criminal responsibility.

65. Belgium, along the same line of approach, proposed an amendment to this United Kingdom text, which included the provision that "[t]he Court shall be competent to order appropriate measures to bring about the cessation of the imputed acts or to repair the damage caused to the injured persons or communities" (United Nations doc. A/C.6/252), presumably with the intention of making the purport of this amendment clear.

66. However, the United States raised a strong objection to this new proposal on the ground that the substance of the issue had already been debated and decided during the consideration of Article IV. Faced with this objection, Belgium and the United Kingdom withdrew their amendments; they instead developed a further new proposal, this time in the form of an amendment to Article X (present Art. IX), which later became the basis for the present wording of Article IX.

67. It should be noted that throughout the whole debate on this issue, the focus was on whether a State could be held to account for *the crime of genocide* which was the focus of the Convention. The contention of the United Kingdom in its original position would seem to have been that in principle the State could and should be held to account for its own commission of *the crime of genocide*. The United Kingdom delegate made the remarks in the discussion to the effect that the United Kingdom, recognizing the reality that the domestic criminal procedure of a State simply could not be expected to be effective vis-à-vis its own State in a situation of the commission of genocide by the State itself, and emphasizing that there was no prospect whatsoever for an international tribunal to come into existence in the foreseeable future, thought it essential to provide for a recourse to the International Court of Justice, the only international court in existence at that juncture. It seems reasonable to infer from these remarks that the United Kingdom delegate tried in this new proposed amendment to Article X to find a hook to hang on to for achieving the objective that he had persistently pursued of holding a State to account for its own act of genocide, through devising a formula of linking this problem with the compromissory clause already in existence in the draft Convention for the reference of disputes to the International Court of Justice. It should be noted, however, that this jurisdictional clause contained in Article X (present Article IX) in its original form had been meant to be no more than a standard compromissory provision for the reference of a dispute relating to the interpretation and application of the provision of the Convention to the International Court of Justice, and as such would not be available for creating a new obligation of a substantive nature, where no such obligation had been incorporated in the substantive provisions of the Convention.

68. A perusal of the debate in the Sixth Committee in this confused situation makes me wonder whether the essential nature and the legal implications of the Belgium/United Kingdom amendment, seen within the framework of the basic object and purpose of the Convention which was to criminalize genocide committed by individuals and to create the obligations on the part of States to prevent and punish the crime of genocide, were sufficiently precisely conceived by the co-sponsors of the Belgium/United Kingdom amendment, and its impact upon the essential character and the scope of the Convention fully grasped by the delegates who voted for the amendment. It is interesting to note in this context that a great majority of the delegates who participated in the debate were in general consensus that this new formulation should not be aimed at criminalizing a State as such for perpetrating the act of genocide. It is however doubtful whether many of them (a notable exception being the delegate of the United States) gave enough thought to the question of compatibility of this approach with the essential character of the Convention as the legal instrument to penalize the crime of genocide committed by individuals on the international level.

69. As a result of this ambiguity brought into the present Article IX, some of them would seem to have interpreted the formula only to be declaratory of the traditional principle of State responsibility on the breach of specific treaty obligations, whereby a State is held responsible for its own breach of the obligations arising under the substantive provisions of the Convention. According to this interpretation, in a convention which dealt essential with criminal responsibility of individuals for genocide, as well as the specific obligation of the contracting States to prevent and punish the commission of genocide by such individuals within their jurisdiction, the reference to State responsibility in Article IX can only relate to the traditional sense of responsibility arising out of the breach of such obligation of State to prevent and punish under Article I. Thus, for example, the President of the United States, in presenting the Genocide Convention for advice and consent of the Senate on 16 June 1949, proposed such understanding as follows:

"I recommend that the Senate give its advice and consent to ratification of the Convention —

> 'with the understanding that article IX shall be understood in the traditional sense of responsibility to another state for injuries sustained by nationals of the complaining state in violation of principles of international law, and shall not be understood as meaning that a state can be held liable in damages for injuries inflicted by it on its own nationals'" (*Department of State Bulletin*, 4 July 1949).

70. Others would appear to interpret this formula as being constitutive of a new international legal norm whereby a State by its own action and in its own name can commit an internationally wrongful act of genocide, whether one calls it an "international crime", an "international delict" or otherwise, for which it should be held internationally responsible. In this view, the Convention has established that a State can commit a crime of genocide by its own action, but the institutions for holding the State to account under the Convention are somewhat restricted. Apart from the political organs like the Security Council of the United Nations, the only international judicial organ available for holding a State committing genocide to account is the International Court of Justice, and it can do so only in a limited sense that it can hold the State to account for this act of genocide only in the form of civil/tortious liability, and not in the form of criminal responsibility. It is presumably with such interpretation in mind that the United Kingdom delegate spoke of the tenet of the proposed amendment on behalf of the co-sponsors as follows:

> "The delegations of Belgium and the United Kingdom [have] always maintained that the Convention would be incomplete if no mention were made of the responsibility of States for the acts enumerated in articles II and IV." (United Nations, *Official Records of the General Assembly, Third Session, Sixth Committee*, p. 430.)

71. Whatever may be the correct reading of the legislative history, it must be accepted that the *travaux preparatoires* are totally inconclusive in shedding a definitive light on the precise legal scope of the State responsibility which came to be declared to fall within the jurisdiction of the Court. Based on the analysis of this extremely confused state of legislative history concerning Article IX in this respect, one can safely say that it seems hardly possible to come to a positive conclusion that the general intention of the parties who participated in the drafting of this Convention was to enact into the Convention, through this technical amendment to Article IX, a new substantive norm under the Convention, in addition to those enumerated therein, by which a State should be held to account for the act of genocide of its own commission, whether it be categorized as an "international crime" or "international delict". Thus an interpretation is to be discounted that purports to suggest that under this new formula, a State can be held to incur *direct* responsibility in its own name as the perpetrator of genocide, even though the jurisdictional limit of the International Court of Justice makes the justiciability of this act of genocide by a State before the Court somewhat less than criminal responsibility for jurisdictional reasons.

72. On the other hand, the principle of interpretation expressed in the maxim *ut res magis valeat quam pereat*, often referred to as the rule of effectiveness would seem to dictate that we give to this amended language of Article IX its proper and rational meaning. Against the background of the legislative history, confused as it may be, and the professed motives of the co-sponsors for the proposed amendment to the extent that they seem to have been accepted or at any rate not contradicted by those who voted for it, it would seem reasonable to conclude that this amended language of Article IX has had the effect of somehow enlarging the scope of jurisdiction of the Court under the Convention. In my interpretation, what it has done by adding the words "including those [i.e., disputes] relating to the responsibility of a State for genocide or for any of the other acts

enumerated in article III" to the standard formula used for a compromissory clause of a similar kind is to bring into the Convention, albeit through a jurisdictional backdoor of Article IX, the justiciability of the question of State responsibility under general international law for an internationally wrongful act of genocide, classified as an international crime of individuals under the Convention, within the scope of the jurisdiction of the Convention. As a result, it is my conclusion that the Court is now competent to consider this issue of general international law as an issue under the Convention, provided that the act in question of the individual can be attributable to the State as its own act through the doctrine of attribution in the law of State Responsibility.

73. In light of the foregoing analysis, it is my position that the scope of the Convention in relation to the act of genocide should be as follows:

(i) Article I prescribes the crime of genocide as an international crime to be punished by national courts and competent international tribunals on the basis of individual perpetrators, as well as lays down the legal obligation upon the contracting parties to prevent and punish such crime of genocide;

(ii) The Convention excludes from its scope the issue of direct responsibility of a State for the commission of genocide as *an international crime of the State* even in its generic sense. This concept of direct responsibility of a State for genocide has to be rejected as being alien to the object and purpose of the Convention and thus as being outside the scope of the Convention. Even with the new formula incorporated in Article IX, a State cannot be held directly accountable for the perpetration of an act of genocide committed in its own name, whether that act of genocide may be categorized as a crime of the State or as an international delict of the State.

(iii) However, the addition in Article IX of the new language to include the issue of "the responsibility of a State for any of the acts enumerated in Article III" within the scope of the jurisdiction of the Court is constitutive of a new mandate for the Court, though not a new substantive obligation for the contracting States, under the Convention. This is so to the extent that it had the effect of introducing an additional scope to the compromissory clause of Article IX, since *the issue of accountability of a State arising under the law of State responsibility in general international law resulting from the criminal act of genocide committed by an individual or a group of individuals now falls within the compulsory jurisdiction of the Court.*

Article IX, as a compromissory clause, cannot create new substantive obligations to the contracting States in addition to those which are provided in substantive articles (Arts. I-VIII). It can however create a new procedural scope to the jurisdiction of the Court by including within the Court's purview the obligations which it would not otherwise have, i.e., the obligations flowing to the State parties under general international law from the acts of individuals contemplated as punishable under the Convention.

It is my view that it is on this basis, and not on the basis of Article I of the Convention, which forms a source of substantive obligations of the Contracting Parties, as the Judgment asserts, that the Court can proceed to examine the issue of State responsibility of the Respondent arising out of alleged acts of genocide committed by individuals and groups as well as entities, whose action can be attributable to the Respondent under the law of State responsibility.

(Signed) Hisashi OWADA.