
Permissible Derogation from Mandatory Rules? The Problem of Party Status in the Genocide Case

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Abstract

In its Merits Judgment in the Genocide case, the International Court of Justice had to deal with the procedural question whether Yugoslavia (Serbia and Montenegro), at the time of the 1996 Preliminary Objections Judgment, had access to the Court. Given the unclear status of Yugoslavia within the United Nations between 1993 and 2000, this was highly doubtful. The Court avoided a definitive answer to that question by holding that it could not reopen the 1996 judgment which enjoyed the force of res judicata. The Court's overly broad application of the res judicata principle as well as its failure to examine ex officio Yugoslavia's status as a party in proceedings before the Court are not entirely convincing in legal terms. However, given the overall procedural and political circumstances prevailing in that case, the Court in 2007 had no other option than to reaffirm its jurisdiction and to proceed to deciding the merits of the case.

1 The 2007 Judgment – The End of a Procedural Odyssey

The Merits Judgment of the International Court of Justice (ICJ) in the case concerning the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*¹ put an end to the odyssey of the Federal Republic of Yugoslavia, Serbia and Montenegro and, eventually, Serbia through various stages of proceedings in different cases before the International Court – an odyssey that frequently was on the verge of turning into an 'oddy'. It is

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¹ *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, judgment of 26 Feb. 2007 (hereinafter 'Genocide case, Merits').

hardly conceivable that the question whether a state is a member of the United Nations and as such a party to the Statute would develop into such a procedural quagmire. But the prevailing political, historical and institutional circumstances and the procedural and overall legal problems involved in this dispute had furnished the *Genocide* case with all the ingredients that make up a highly controversial and judicially sensitive case with regard not only to the merits but also to the ICJ's competence and jurisdiction. While the main point of interest of the 2007 judgment on the merits no doubt lies in the substantive aspects of the dispute concerning the application of the Genocide Convention and the issues connected thereto, the host of procedural problems involved merit separate attention.

The catalyst of these problems was the question whether the Federal Republic of Yugoslavia (FRY or Yugoslavia) was a member of the United Nations and as such a party to the ICJ Statute having access to the Court. This question has been in dispute since the break-up of the former Socialist Federal Republic of Yugoslavia. However, the main focus of this paper lies elsewhere. This article attempts to analyse the 'avoidance technique' applied by the Court in the *Genocide* case.² This avoidance technique, which allowed the Court to decline to address Yugoslavia's party status definitively and conclusively, consisted of two separate parts. Firstly, the Court based its rejection of the FRY's request for a reopening of the 1996 Preliminary Objections Judgment on the principle of *res judicata*, and therefore did not need to – or, in the Court's view, could not – address the question of access to the Court by the FRY. And secondly, while the ICJ said that this issue was so fundamental that it had to raise it on its own initiative, it nevertheless refrained from doing so. Therefore, my task will be twofold. I will first address what the Court *did* decide, namely the *res judicata* effect of the 1996 judgment, and then what the Court *did not* decide, namely the mandatory character of the FRY's status as a party to the Court's Statute. It is my argument that, on the one hand, the Court applied the *res judicata* principle in a much too broad sense, while on the other hand it incorrectly failed to raise the issue of the FRY's access to the Court *ex officio*. These two points will be analysed after a brief account of the procedural history of the case, which also includes the Court's judgments in *Application for Revision*³ and in *Legality of Use of Force*.⁴

² There are a number of other interesting and controversial procedural issues raised in this case which cannot be dealt with here. These include the question of the identification of the respondent party (see *Genocide* case, Merits, *supra* note 1, at paras 67–79), the possible danger of inconsistent case law, the implications of the Court's decisions with regard to related proceedings, or the relation of the Court's judgments to the position of other main organs of the UN (especially in connection with the FRY's membership of the UN).

³ *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 [2003] ICJ Rep 7 (hereinafter *Application for Revision*).

⁴ *Legality of the Use of Force (Serbia and Montenegro v. Belgium)*, Preliminary Objections [2004] ICJ Rep 279.

2 The Procedural History

A *The Jurisdictional Phase (1993–1996)*

The proceedings began on 20 March 1993 when Bosnia and Herzegovina filed an application against the Federal Republic of Yugoslavia (Serbia and Montenegro) for alleged breaches of the Convention on the Prevention and Punishment of the Crime of Genocide. At the time, the status of the FRY within the United Nations was completely unclear. As is well known, the Security Council in its Resolution 777 (1992) considered 'that the State formerly known as the Socialist Federal Republic of Yugoslavia ha[d] ceased to exist' and that Serbia and Montenegro could not 'continue automatically the membership of the former Socialist Federal Republic of Yugoslavia in the United Nations' and therefore recommended to the General Assembly 'that it decide that [Serbia and Montenegro] should apply for membership in the United Nations and that it shall not participate in the work of the General Assembly'.⁵ The General Assembly subsequently followed this recommendation.⁶ Accordingly, Serbia and Montenegro was not allowed to participate in the work of the General Assembly, its subsidiary organs, nor in conferences and meetings convened by it. Furthermore, upon recommendation of the Security Council,⁷ the General Assembly decided that the FRY could not participate in the work of the Economic and Social Council either.⁸ By the same token, Yugoslavia was still permitted to participate in the work of other United Nations organs, and it was also required to contribute to the regular budget of the United Nations.⁹

Faced with an application in such circumstances, a respondent would usually object to the competence of the Court to hear the case *a limine* by invoking that it was not a party to the Statute and that it could therefore not be a party in proceedings before the Court. In reality, this possibility was, however, not open to Yugoslavia, which for political reasons maintained its claim to continue the legal personality of the former Socialist Federal Republic of Yugoslavia. Thus Serbia and Montenegro found itself caught between a rock and a hard place. It had to sidestep the issue of its capacity to be a party in proceedings by confining its preliminary objections to 'ordinary' objections against the Court's jurisdiction (the main objection being the Court's lack of jurisdiction based on Article IX of the Genocide Convention).

In the incidental proceedings on provisional measures requested by Bosnia and Herzegovina, the ICJ briefly addressed the question whether the FRY was a party to the ICJ Statute, although none of the parties had raised that question. The Court avoided any definitive answer, and after admitting that 'the solution adopted [was] not free from legal difficulties', it stated that 'the question whether or not Yugoslavia [was] a Member of the United Nations and as such a party to the Statute of the Court [was]

⁵ SC Res. 777 of 19 Sept. 1992, at para. 1.

⁶ GA Res. 47/1 of 22 Sept. 1992, at para. 1.

⁷ SC Res. 821 of 28 Apr. 1993.

⁸ GA Res. 47/229 of 5 May 1993.

⁹ *Application for Revision*, *supra* note 3, at 22–23, paras 45–47.

one which the Court [did] not need to determine definitively at the present stage of the proceedings'.¹⁰ It continued by examining *proprio motu* whether Yugoslavia could have access to the Court pursuant to Article 35(2) of the Statute¹¹ and held that

A compromissory clause in a multilateral convention, such as Article IX of the Genocide Convention relied on by Bosnia-Herzegovina in the present case, could, in the view of the Court, be regarded *prima facie* as a special provision contained in a treaty in force.¹²

The reference in Article 35(2) to 'treaties in force' is unclear and left ample room for different interpretations.¹³ The main bone of contention was the temporal scope of application of that provision. In particular, it was doubtful whether it referred to treaties in force at the time of both the adoption of the Statute and the institution of proceedings, or whether it was sufficient that the treaties were in force at the time of the commencement of proceedings.¹⁴ In view of the incidental character of proceedings concerning interim measures and given the fact that the established case-law of the Court only requires *prima facie* jurisdiction in incidental proceedings,¹⁵ the Court's handling of Yugoslavia's status in the 1993 Order on Interim Measures appears irreproachable. It neither had to settle the question of Yugoslavia's capacity to be a party before the Court, nor was it required to make an authoritative interpretation of Article 35(2) of the Statute.

The Court, by arguing that it did not need to answer the question of Yugoslavia's UN membership 'definitively at the present stage of the proceedings', appears to have indicated that it would revert to this crucial problem in a later phase. Therefore, one would have expected an answer in the judgment on jurisdiction. However, in its 1996 judgment on preliminary objections,¹⁶ the ICJ did not see any reason to examine the problem of Yugoslavia's status under the Statute, apparently because neither party raised that question. Since the Court confined itself to examining the preliminary objections of Serbia and Montenegro, neither of which contained an objection as to the party status of the respondent, the Court did not consider it necessary to raise

¹⁰ *Case concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia v Yugoslavia (Serbia and Montenegro))*, Request for the Indication of Provisional Measures, Order of 8 Apr. 1993 [1993] ICJ Rep 3, at 14, para. 18.

¹¹ Art. 35(2) reads: "The conditions under which the Court shall be open to other States shall, subject to the special provisions contained in treaties in force, be laid down by the Security Council, but in no case shall such conditions place the parties in a position of inequality before the Court."

¹² *Application of the Genocide Convention*, Order on Provisional Measures, *supra* note 10, at para. 18.

¹³ For a discussion see Yee, "The Interpretation of "Treaties in Force" in Article 35(2) of the Statute of the ICJ", 47 *ICLQ* (1998) 884.

¹⁴ Oellers-Frahm, 'Anmerkungen zur einstweiligen Anordnung des Internationalen Gerichtshofes im Fall Bosnien-Herzegowina gegen Jugoslawien (Serbien und Montenegro) vom 8. April 1993', 53 *ZaöRV* (1993) 638, at 644.

¹⁵ Oellers-Frahm, 'Article 41' in A. Zimmermann, C. Tomuschat, and K. Oellers-Frahm, *The Statute of the International Court of Justice. A Commentary* (2006), at 923, 935–937, MNN 28–33. See also S. Rosenne, *The Law and Practice of the International Court, 1920–2005* (4th edn., 2006), ii, at 578–584.

¹⁶ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia)*, Preliminary Objections, Judgment [1996] ICJ Rep 595 (hereinafter 'Genocide case, Preliminary Objections')

the issue *ex officio*. This is quite astonishing for various reasons which will be dealt in detail below.¹⁷ Suffice it at this point to note the divergence to its approach in 1993, where the issue of party status was not introduced by the parties but raised by the Court on its own initiative.

B *The Application for Revision (2003)*

After the change of government, Serbia and Montenegro decided to comply with General Assembly Resolution 47/1 (1992) and to apply for membership in the UN in 2000. Upon admission to the UN, Serbia and Montenegro filed an Application for Revision of the 1996 judgment pursuant to Article 61 of the Statute.¹⁸ In a somewhat perfunctory judgment, the ICJ devoted no more than 11 paragraphs to rejecting this application in 2003.¹⁹ The Court stated that by basing its application for revision on its admission as a new member to the UN in 2000, Yugoslavia invoked facts that had occurred after the judgment had been given rather than relying on facts already existing in 1996. The Court maintained that Yugoslavia's application for revision rested 'on the legal consequences which it [sought] to draw from facts subsequent to the [1996] Judgment' and that such legal consequences could not be regarded as facts within the meaning of Article 61 of the Statute.²⁰

Here again, the Court avoided any discussion of the disputed status of Yugoslavia by resorting to the formalistic statement that the question of Yugoslavia's status in 1996 was one of legal appreciation rather than of determining 'objective facts'. But one searches in vain for an answer to the decisive question why the alleged facts are mere 'legal consequences' instead of facts. For it could reasonably be argued that the membership of the FRY to the UN – whether a regular or *sui generis* one – was a fact which the Court had assumed in 1996 but which was reversed by the admission of the FRY in 2000.²¹

The Court furthermore held that GA Resolution 47/1²² 'did not *inter alia* affect the FRY's right to appear before the Court or to be a party to a dispute before the Court under the conditions laid down by the Statute',²³ but again failed to indicate the reasons for this assertion. This is particularly astonishing as there is general consensus that the Former Socialist Republic of Yugoslavia had dissolved by way of

¹⁷ See *infra* sect. 4.

¹⁸ Art. 61(1) reads: 'An application for revision of a judgment may be made only when it is based upon the discovery of some fact of such a nature as to be a decisive factor, which fact was, when the judgment was given, unknown to the Court and also to the party claiming revision, always provided that such ignorance was not due to negligence.'

¹⁹ *Application for Revision*, *supra* note 3, at 30–32, paras 65–74.

²⁰ *Ibid.*, at 30, para. 69.

²¹ The more so as a similar argument was indeed made by the FRY: see *Application for Revision*, *supra* note 3, Oral Pleadings, CR/2002/42, at 17 (Varady). For a detailed discussion see Geiß, 'Revision Proceedings before the International Court of Justice', 63 *ZaöRV* (2003) 167, at 174–181; Zimmermann and Geiß, 'Article 61' in Zimmermann *et al.*, *supra* note 15, 1299, at MNN 36–50.

²² *Supra* note 6 and corresponding text.

²³ *Application for Revision*, *supra* note 19, at para. 70.

dismemberment. Read against the background of the earlier Security Council Resolution 777 (1992),²⁴ Resolution 47/1 means that the Former Yugoslavia had ceased to exist, that the FRY could not continue the Former Yugoslavia's membership in the UN and that the FRY had to apply for membership. Even assuming that the FRY, while having been required as a successor state to the Former Yugoslavia to apply for membership in the United Nations, nevertheless was to be considered as a quasi-member state having access to the Court on a temporary basis (the more so if that state is permitted to partially participate in United Nations organs),²⁵ such a pragmatic approach would have required some explanation in legal terms. However, the judgment in *Application for Revision*, which appears to have indeed proceeded on the assumption of a *sui generis* access to the Court, does not provide any explanation for the legal basis of a 'provisional' membership.

C The Story's Short-Lived Twist: The 2004 Judgment in *Legality of Use of Force*

The story of the FRY's status as a party to the ICJ Statute took a twist in 2004 when the Court decided on the FRY's claims against several NATO Member States for the bombings during the Kosovo campaign. This time the FRY was applicant, the application having been filed in April 1999, i.e., prior to the political change in the FRY. The FRY's attitude towards its own application changed after the formation of a new government and its admission to the UN in 2000. In some way, the new government now felt uneasy about this case. The FRY itself admitted that the 'dramatic' and 'ongoing' changes in Yugoslavia had 'put the [case] in a quite different perspective'.²⁶ The FRY furthermore did not substantively reply to the preliminary objections raised by the respondents and instead of asking the Court to affirm its jurisdiction it confined itself to requesting the Court to simply 'decide on its jurisdiction' and submitted 'written observations' of no more than one page.²⁷

In a highly interesting – but also highly controversial – judgment,²⁸ the Court, after rejecting all arguments favouring a dismissal *a limine litis* of the application,²⁹

²⁴ *Supra* note 5.

²⁵ As was the case with the FRY. For a detailed critical analysis of the anomalous situation of Yugoslavia in the UN see K.G. Bühler, *State Succession and Membership in International Organizations* (2001), at 180–273, especially at 220–273 (with extensive references).

²⁶ Letter of 8 Feb. 2002, cited in *Legality of Use of Force*, *supra* note 4, at 285, para. 13.

²⁷ Written statement of the observations and submissions of the Federal Republic of Yugoslavia on the preliminary objections made by the Kingdom of Belgium, 18 Dec. 2002, available at www.icj-cij.org/icjwww/idocket/iybe/iybepleadings/iybe_written_observations_20021218.pdf.

²⁸ *Legality of Use of Force*, *supra* note 4. It is worth noting that while the judgment was given unanimously, no fewer than 12 out of 15 judges (including the *ad hoc* judge) appended a declaration or separate opinion (or both). This divergence of views is quite astonishing for a unanimous judgment. For critical comments see Swords and Willis, 'The Decision of the International Court of Justice in the *Case Concerning Legality of Use of Force (Serbia and Montenegro v. Canada)*', 42 *Canadian Ybk Int'l L* (2004) 353, and Olleson, "'Killing Three Birds with One Stone?'" The Preliminary Objections Judgments of the International Court of Justice in the *Legality of Use of Force Cases*', 18 *Leiden J Int'l L* (2005) 237.

²⁹ *Legality of Use of Force*, *supra* note 4, at 291–298, paras 25–44.

examined the status of Serbia and Montenegro as a party to the ICJ Statute, a question which it had hitherto avoided addressing. It did so in reply to the submissions of most of the respondent states which in their preliminary objections argued that the FRY had never been a member of the UN and was thus not a party to the Statute. After recapitulating the sequence of events with regard to the legal position of Serbia and Montenegro vis-à-vis the UN,³⁰ the ICJ stated that these events had remained 'highly complex'³¹ and testified 'to the rather confused and complex state of affairs that obtained within the United Nations surrounding the issue of the legal status of the [FRY]' during the period between 1992 and 2000.³² It then referred to the admission of the FRY to the UN in 2000 and assessed the situation prevailing as follows:

79. In view of the Court, the significance of [the FRY's admission to the UN] in 2000 is that it has clarified the thus far amorphous legal situation concerning the status of the Federal Republic of Yugoslavia vis-à-vis the United Nations. It is in that sense that the situation that the Court now faces in relation to Serbia and Montenegro is manifestly different from that which it faced in 1999. If, at that time, the Court had had to determine definitively the status of the Applicant vis-à-vis the United Nations, its task of giving such a determination would have been complicated by the legal situation, which was shrouded in uncertainties relating to that status. However, from the vantage point from which the Court now looks at the legal situation, and in light of the legal consequences of the new developments since 1 December 2000, the Court is led to the conclusion that Serbia and Montenegro was not a Member of the United Nations, and in that capacity a State party to the Statute of the International Court of Justice, at the time of filing its Application to institute the proceedings before the Court on 29 April 1999.³³

The Court concluded that, at the time of its Application to institute proceedings on 29 April 1999, Serbia and Montenegro was not a member of the UN and the Court therefore was not open to it under Article 35(1) of the Statute.³⁴ The Court then went on to examine whether the FRY could have had access to the Court on the basis of Article 35(2) of the Statute as the Court had assumed provisionally in its Order on Provisional Measures in the *Genocide* case in 1993.³⁵ The Court did not do so *ex officio* but because a number of Respondents in their preliminary objections invoked the inapplicability of Article 35(2) of the Statute.³⁶ After a scrutiny of the wording and the preparatory work of the text, the Court found that the terms 'special provisions contained in treaties in force' only applied to treaties that had been in force already at the time of the entry into force of the Statute, i.e., in 1945.³⁷ The Court accordingly concluded that Article IX of the Genocide Convention was not a special provision in a treaty in force within the meaning of Article 35(2) of the Statute. As a consequence, Serbia and

³⁰ *Ibid.*, at 301–305, paras 55–63.

³¹ *Ibid.*, at 305, para. 64.

³² *Ibid.*, at 308, para. 73.

³³ *Ibid.*, at 310–311, para. 79.

³⁴ *Ibid.*, at 314–315, para. 91.

³⁵ *Supra* note 10.

³⁶ *Legality of Use of Force*, *supra* note 4, at 316–317, paras 96–97.

³⁷ *Ibid.*, at 318–324, paras 101–114.

Montenegro did not, at the time of the institution of the proceedings, have access to the Court, which therefore had no jurisdiction to entertain the claim.³⁸

The Court's judgment in *Legality of Use of Force* met with strong criticism from within the Bench.³⁹ The problem with the reasoning of the slim majority⁴⁰ in that judgment certainly was that it severely restricted the ICJ's freedom of action in the *Genocide* case. In view of the fact that the Genocide Convention could by no reasonable means furnish an adequate basis of jurisdiction *ratione materiae* in this case, it is indeed doubtful whether it was necessary for the Court to prejudge all aspects of Yugoslavia's access to the Court without taking into consideration the apparent implications for the *Genocide* case.

D *The Return to Normality: The 2007 Judgment*

In the *Genocide* case, the issue of party status was introduced by Serbia and Montenegro in the merits phase only. In a written submission entitled 'Initiative to the Court to Reconsider *ex officio* Jurisdiction over Yugoslavia',⁴¹ the FRY requested the ICJ to declare that it lacked jurisdiction since until its admission on 1 November 2000 the FRY had not been a member of the UN and thus not a party to the Statute. The question was accordingly raised in the proceedings and the Court had to address the issue. In doing so, the Court rejected the proposal by Serbia and Montenegro by applying the principle of *res judicata*. The Court stated that although in its 1996 Judgment it had not specifically mentioned the legal complications of the status of the FRY in relation to the United Nations,⁴² it had determined 'that all conditions relating to the capacity of the parties to appear before [the Court] had been met'.⁴³ The Court argued that its affirmation of jurisdiction in 1996 included an implicit declaration that the FRY had the capacity to appear before the Court in accordance with the Statute.⁴⁴ Therefore, the determination of the party status of the FRY, forming an implicit part of the 1996 judgment to which the force of *res judicata* applied, was also covered by the effect of that principle.⁴⁵

In conclusion, the Court held that the principle of *res judicata* precluded any reopening of the decision embodied in the 1996 judgment. It therefore affirmed its jurisdiction⁴⁶ and turned to deciding the merits of the case.

³⁸ *Ibid.*, at 327–328, paras 127 and 129.

³⁹ See in particular the Joint Declaration of Vice-President Ranjeva, Judges Guillaume, Higgins, Kooijmans, Al-Khasawneh, Buergenthal, and El-Araby in *ibid.*, at 330–334.

⁴⁰ The fact that the cases were disposed of for lack of party status of the FRY was only possible due to the vote of the *ad hoc* Judge appointed by Yugoslavia, thus enabling a bare majority of 8–7.

⁴¹ *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 *ex officio* Jurisdiction over Yugoslavia, 4 May 2001, available at www.icj-cij.org/icjwww/idocket/ibhy/ibhy_written_pleadings/ibhy_initiative_serbia-montenegro.pdf.

⁴² *Genocide* case, Merits, *supra* note 1, at paras 102 and 132.

⁴³ *Ibid.*, at para. 133.

⁴⁴ *Ibid.*, at para. 135.

⁴⁵ *Ibid.*, at paras 135–136.

⁴⁶ *Ibid.*, at para. 140.

E *The Procedural History as a da capo Aria*

The various stages of the litigation history in the 'Yugoslavia cases' before the Court between 1993 and 2007 to some extent mirror the composition of a *da capo* aria, a musical form that was widespread during the baroque era. A *da capo* aria consisted of three sections. The first set out the main theme, which in the present context is the jurisdictional phase between 1993 and 1996 where the Court avoided raising the question of Yugoslavia's party status. The middle section of a *da capo* aria offered a striking contrast by presenting conflicts or alternatives to the initial theme. The 'conflict' in the Yugoslavia cases seems to have been demonstrated by the case concerning the *Application for Revision*, where the ICJ was confronted with the disputed question of the FRY's access to the Court. The FRY's views on its status as not being a party to the Statute were diametrically opposed to, and hence conflicted with, the 1996 judgment. Yet, based on a strict interpretation of the terms of Article 61 of its Statute, the Court could refrain from deciding this question and the conflict was sidestepped rather than solved. The 'alternative' to the initial theme was presented by the case concerning *Legality of Use of Force* where the Court, in deciding that the FRY as a non-member of the United Nations did not have access to the Court, came up with a new theme that could have served as an alternative to the initial approach by the Court.

The third and final section in a *da capo* aria consisted in a repetition of the first, this repetition, however, being full of variations on the theme and rich in ornaments and embellishments. This third section could be viewed in the 2007 merits judgment where the Court, while upholding its initial position (*da capo*), gave an inventive and colourful substance to its 1996 judgment by interpreting it in a highly intriguing manner. This inventive interpretation runs as follows: the Court in its 1996 judgment had said nothing on the question of the FRY's party status. However, logic dictates that the definitive determination of that question must, by way of implication, be read into the decision that the Court ultimately possessed jurisdiction. Therefore, the question of party status was covered by the *res judicata* effect of the 1996 judgment.

This broad understanding by the Court of the *res judicata* principle was the gist of the decision of the procedural aspects in the 2007 merits judgment. In legal terms it is, however, not fully convincing for the reasons dealt with in the following section.

3 The Court's Application of the *res judicata* Principle

A *General Remarks*

The principle of *res judicata* is one of the few general principles of law of a procedural character (a general principle of procedural law).⁴⁷ With regard to the ICJ, this principle follows from Article 60 of its Statute, which provides that the Court's judgment in a given case 'is final and without appeal'. The Court itself has in a number of cases applied, or at least referred to, this principle. In many of these cases, the Court

⁴⁷ B. Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (1953), at 336–372.

was concerned with the effect of decisions of other courts or tribunals rather than its own. This is indicative of the current significance of the *res judicata* principle in international law, whose main purpose apparently is to avoid conflicting decisions in view of the increasing overlap of jurisdiction of international courts and tribunals.⁴⁸ In its more recent case law, the Court has taken for granted the existence of *res judicata* as a general principle of law without examining its source or origin.⁴⁹ What is more, the Court has never established the specific criteria that define the scope of application of *res judicata* in international law and especially in its own proceedings. Therefore, I will explore the conditions or elements of the principle and then will examine the Court's application of the principle in the *Genocide* case.

B The Scope of the Principle

As to the scope of the *res judicata* principle in proceedings before the ICJ, several questions arise. First, does the principle apply at all to jurisdictional judgments on preliminary objections? Here the answer certainly is in the affirmative. There is no sound reason to doubt that judgments on preliminary objections enjoy the effect of *res judicata*.⁵⁰ In its 2007 judgment in the *Genocide* case, the ICJ confirmed that view when it observed that Article 60 of its Statute did not distinguish between judgments on jurisdiction and admissibility, and judgments on the merits.⁵¹ However, as we will see shortly, there nevertheless is a difference in the application of the *res judicata* principle between judgments on the merits and judgments on jurisdiction.

A second question to be asked is whether there are more precise criteria or elements that determine the scope of application of the *res judicata* principle in international law. This is particularly difficult in view of the great diversities of the principle in the different municipal legal orders, the more so as the different structure of international law makes it difficult to transpose particular domestic doctrines of *res judicata*.⁵² Nevertheless, it is generally said that there are two requirements for the *res judicata* principle to apply.⁵³ These are identity of the parties and of the subject-matter of the dispute, the latter often being divided into the object of the claim (*petitum*) and the grounds of the claim (*causa petendi*). While the identity of the parties may be doubtful in parallel

⁴⁸ For details see Reinisch, 'The Use and Limits of *Res Judicata* and *Lis Pendens* as Procedural Tools to Avoid Conflicting Dispute Settlement Outcomes', 3 *L and Practice of Int'l Courts and Tribunals* (2004) 37.

⁴⁹ *Effect of Awards of Compensation Made by the United Nations Administrative Tribunal* [1954] ICJ Rep 47, at 53; *Request for Interpretation of the Judgment of 11 June 1998 in the Case Concerning the Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria) Preliminary Objections (Nigeria v. Cameroon)* [1999] ICJ Rep 31, at 39, para. 16.

⁵⁰ See the balanced discussion by G. Abi-Saab, *Les exceptions préliminaires dans la procédure de la Court internationale de justice* (1967), at 245–251.

⁵¹ *Genocide* case, Merits, *supra* note 1, at para. 117.

⁵² To the same effect, Scobbie, 'Res Judicata, Precedent and the International Court: A Preliminary Sketch', 20 *Australian Ybk Int'l L* (1999) 299, at 301–302.

⁵³ *Pious Fund of the Californias (Great Britain v. USA)*, 16 *AJIL* (1922) 323, at 324; *Polish Postal Service in Danzig*, 1925 *PCIJ Series B*, No. 11, at 30; *Interpretation of Judgments Nos. 7 and 8 (Factory at Chorzów)*, 1927 *PCIJ Series*, No. 13, at 23 (dissenting opinion of Judge Anzilotti); Cheng, *supra* note 47, at 339–340.

proceedings before different tribunals,⁵⁴ it hardly poses a problem in the International Court.⁵⁵

In order to determine the object of the claim, one must look closely at the claims and submissions of the parties and interpret the remedies requested and the relief sought. In doing so, one must not stick to the wording or formulation of the parties' claims. Rather it is important to take into account the true or ultimate object by looking at the application as well as the written and oral submissions of the parties.⁵⁶ This evidences that in most cases the object of the claim cannot be determined independently from the grounds of the claim (*causa petendi*). The grounds of the claim are generally understood as referring to the underlying legal bases of the claim or causes of action.⁵⁷ Here again, a broad approach is called for that takes into consideration all the submissions of the parties during the proceedings. In particular, the formal source of the alleged substantive right will not be decisive in determining whether a decision is *res judicata*. Thus, for instance, if the court or tribunal rejects a treaty-based claim, the principle of *res judicata* will preclude the party from raising the same claim based on customary law unless the cause of action of the 'new' claim differs from the previous claim with regard to its substantive or material content. With regard to the reasons of a claim, the difference between judgments on the merits and those on preliminary objections is relevant. The simple reason is that in proceedings on jurisdiction the parties will not base their claims on substantive causes of action in the same way as in the merits phase. This makes it very difficult to distinguish between the different *causae petendi* in cases where a party raises several jurisdictional claims. In other words, where jurisdictional questions are concerned, a party does not invoke a substantive cause of action to establish and substantiate its claim but advances reasons to contest the Court's jurisdiction or the admissibility of the claim.

Thirdly, the question of which parts of a judgment are covered by the principle of *res judicata* must be examined. In its 2007 merits judgment in the *Genocide* case, the Court said that '[t]he operative part of a judgment of the Court possess[e]d the force of *res judicata*'.⁵⁸ However, it is clear that the operative clause (*dispositif*) cannot be read in total isolation from the factual circumstances which form the basis of the *dispositif*,

⁵⁴ See in particular the conflicting decisions of two UNCITRAL tribunals in the CME cases: *Ronald S. Lauder v. The Czech Republic*, Final Award of 3 Sept. 2001, reprinted in 14 *World Trade and Arbitration Materials* (2002) 35; *CME Czech Republic BV v. The Czech Republic*, Partial Award of 13 Sept. 2001, reprinted in *ibid.*, at 109. For a discussion see Reinisch, *supra* note 48, at 39–42.

⁵⁵ In the *Genocide* case it could of course well be argued that while one of the parties to the dispute – and hence the addressee of the judgment – in 1996 was the FRY (consisting of Serbia and Montenegro), it was only Serbia that requested a reconsideration of the Court's basis of jurisdiction in the later phase of the proceedings and that, therefore, the parties were not identical.

⁵⁶ This is indicated by early cases: see Cheng, *supra* note 47, at 343–345. See also *Nuclear Tests (Australia v. France)* [1974] ICJ Rep 253, at 263, para. 30, where the Court, however, applied this technique in a different context.

⁵⁷ I. Brownlie, *System of the Law of Nations. State Responsibility (Part I)* (1983), at 56.

⁵⁸ *Genocide* case, Merits, *supra* note 1, at para. 123.

nor from the legal reasoning (*ratio decidendi*) leading the Court to the findings in the operative part. Indeed, as the Permanent Court stated:

It is perfectly true that all the parts of a judgment concerning the points in dispute explain and complete each other and are to be taken into account in order to determine the precise meaning and scope of the operative portion.⁵⁹

In its merits judgment in the *Genocide* case, the present Court reaffirmed that statement by saying that ‘if any question arises as to the scope of *res judicata* attaching to a judgment, it must be determined in each case having regard to the context in which the judgment was given’.⁶⁰ And further: ‘a general finding may have to be read in context in order to ascertain whether a particular matter is or is not contained in it’.⁶¹ This is all the more important as the clauses in the operative part of a judgment often are the non-self-explanatory result of a compromise which has been reached only by formulating the operative part in vague and imprecise terms. Thus both the factual assumptions and the legal reasons will in most cases be relevant not only for fully understanding the operative part⁶² but also for ascertaining the scope of *res judicata*.⁶³

Finally, the question arises whether a judgment affirming jurisdiction precludes a reconsideration of the Court’s jurisdiction in a later stage of the proceedings. There is no unqualified answer to this difficult question which is but a variation on the question as to the scope of *res judicata*. At the outset, two points should be mentioned, which seem to be uncontested. Firstly, with regard to jurisdictional issues, where a state fails to object at all to the Court’s jurisdiction, the principle of *forum prorogatum* will apply. It is true that the requirements for prorogated jurisdiction are quite strict. In particular, the consent leading to *forum prorogatum* must be a ‘voluntary and indisputable acceptance of the Court’s jurisdiction’.⁶⁴ Indeed, in its judgment on preliminary objections in the *Genocide* case, the Court repeated that statement with particular regard to Yugoslavia.⁶⁵ Nevertheless the principle of *forum prorogatum* has found its way into the Court’s case law – even though cases are rare.⁶⁶

Secondly, as evidenced by the *Corfu Channel* case, an objection that already failed in the jurisdictional phase will not be successful at a later stage either, unless it is based on new grounds. There is no doubt that *res judicata* will apply to such a clear

⁵⁹ *Polish Postal Service in Danzig*, 1925 PCIJ Series B, No. 11, at 30.

⁶⁰ *Genocide* case, Merits, *supra* note 1, at para. 125.

⁶¹ *Ibid.*, at para. 126.

⁶² Cf. Bernhardt, ‘Article 59’ in Zimmermann *et al.*, *supra* note 15, at 1231, 1239, MN 24; M. Shahabuddeen, *Precedent in the World Court* (1996), at 163–164.

⁶³ Rosenne, *supra* note 15, volume III, at 1603.

⁶⁴ *Corfu Channel (United Kingdom v. Albania)*, Preliminary Objections [1948] ICJ Rep 15, at 27.

⁶⁵ *Genocide* case, Preliminary Objections, *supra* note 16, at 621, para. 40.

⁶⁶ To date, in only two cases has the Court’s jurisdiction been based on *forum prorogatum*: *Corfu Channel*, Preliminary Objections, *supra* note 64, at 15 and 19; *Certain Criminal Proceedings in France*, Letter from the Minister for Foreign Affairs of the French Republic of 8 Apr. 2003 (Consent to the Jurisdiction of the Court to Entertain the Application Pursuant to Art. 38, para. 5, of the Rules of Court) [2003] ICJ Rep 143. As to acquiescence as a specific form of *forum prorogatum* see *Avena and Other Mexican Nationals* [2004] ICJ Rep 12, at 29, para. 24.

situation.⁶⁷ On the other hand, a decision affirming jurisdiction will not bar a party from later raising new objections, especially where that party has previously reserved its right to do so, or where the Court has reserved certain matters of jurisdiction for later decisions. The Court's case law supports this assumption,⁶⁸ particularly with regard to preliminary objections that contain aspects of admissibility or do not have an exclusively preliminary character and have a bearing on the merits.⁶⁹ Thus, in the merits phase of the *Fisheries Jurisdiction* cases, the Court re-examined questions of jurisdiction.⁷⁰ However, the jurisdictional issues in those cases concerned the extent of jurisdiction already established and therefore were such that the decision on them would not contradict the finding of jurisdiction made in the earlier judgment.⁷¹ What is more, Iceland did not participate in the proceedings and, in the case of non-appearance, Article 53(2) of the Statute imposes on the Court a heavy duty to examine its jurisdiction *proprio motu*.⁷²

Yet this does not answer the question whether the Court, after having affirmed its jurisdiction, may entertain a new objection to jurisdiction or competence which was not at all an issue during the previous proceedings on jurisdiction. The treatment of such a 'new' objection is a delicate matter as the party raising it will most likely intend to reverse the previous judgment on jurisdiction. It appears that such a constellation had never been before the Court until the *Genocide* case. It is impossible to give a clear-cut answer to this question, the more so as much will depend on the specific circumstances of the particular case.

At this point it seems appropriate to emphasize the paramount importance of the consensual basis of jurisdiction in international litigation, particularly in the ICJ. It is undisputed that the Court must ascertain whether it possesses jurisdiction, especially when the respondent party denies the Court's jurisdiction. Given the importance of issues of jurisdiction, the Court not only must do so on its own initiative in the preliminary phase concerning jurisdiction, but it may be argued that the Court also must do so at a later stage whenever doubts as to its jurisdiction arise. Unless the new objection falls within the ambit of *res judicata* decided by the preliminary jurisdiction judgment,

⁶⁷ I. Shihata, *The Power of the International Court to Determine Its Own Jurisdiction* (1965), at 78.

⁶⁸ See the *Genocide* case, Merits, *supra* note 1, at para. 127.

⁶⁹ Shihata, *supra* note 67, at 79. Cf. also Rosenne, *supra* note 63, ii, at 868. See, e.g., *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)* (Jurisdiction and Admissibility) [1984] ICJ Rep 392, at 425–426, para. 76. This may also have been the attitude of the Court in *South West Africa, Second Phase, Judgment* [1966] ICJ Rep 6, at 36–37, para. 59.

⁷⁰ *Fisheries Jurisdiction (United Kingdom v. Iceland)*, Merits, Judgment [1974] ICJ Rep 3, at 20, para. 42; *Fisheries Jurisdiction (Federal Republic of Germany v. Iceland)*, Merits, Judgment [1974] ICJ Rep 175, at 189, para. 34, and 203, paras 71–72.

⁷¹ See also *Genocide* case, Merits, *supra* note 1, at para. 128.

⁷² Indeed the Court said that its duty to examine '*proprio motu* the question of its own jurisdiction [was] reinforced by the terms of Article 53': *Fisheries Jurisdiction* cases, *supra* note 70, Jurisdiction of the Court, Judgment [1973] ICJ Rep 3, at 7, para. 12, and [1973] ICJ Rep 49, at 54, para. 13. The Court has repeatedly invoked its duty to raise *ex officio* any preliminary question 'which might constitute a bar to any further examination of the Applicant's case': *United States Diplomatic and Consular Staff in Tehran*, Judgment [1980] ICJ Rep 3, at 18, para. 33. See also Rosenne, *supra* note 15, iii, at 1360; Mangold and Zimmermann, 'Article 53', in Zimmermann *et al.*, *supra* note 15, at 1160, MN54.

there appears no compelling reason to prevent the Court from re-examining jurisdictional issues. While opinion in doctrine is not entirely uniform, those few authors addressing the question tend to support this conclusion.⁷³ Shihata, for instance, states that ‘if the Court, after affirming its jurisdiction in a case, discovers *ex officio* or after a new objection, that it lacks such jurisdiction, a new decision declining jurisdiction becomes mandatory’.⁷⁴

An objection to the jurisdiction or competence of the Court in a later stage of the proceedings, i.e., where the Court already has affirmed its jurisdiction, certainly is on its face inconsistent with the *res judicata* principle,⁷⁵ especially because it seems that if this were to be accepted, the jurisdictional decision would remain reviewable indefinitely.⁷⁶ However, it must be recalled that the force of *res judicata* only applies to those issues actually decided which, in turn, depend on the submissions of the parties. This is evidenced by the proceedings in the *Asylum* case where the Court, precisely in order to determine whether *res judicata* applied to a specific question, referred to the submissions of the parties:

The Court can only refer to what it declared in its Judgment in perfectly definite terms: this question was completely left outside the submissions of the Parties. The Judgment in no way decided it, nor could it do so. It was for the Parties to present their respective claims on this point. The Court finds that they did nothing of the kind.⁷⁷

Therefore, when the respondent raises a new objection never dealt with in the proceedings on the preliminary objections, the force of *res judicata* does not apply⁷⁸ and the Court may well re-examine its jurisdiction on which it has already decided affirmatively.

C *The Application of res judicata in the Genocide Case*

In its merits judgment in the *Genocide* case, the Court rejected the new request in which the FRY asked the Court to declare that it lacked jurisdiction since, at the time of the preliminary objections judgment, the FRY had not been a party to the Court’s Statute and hence had had no access to the Court. The Court held that it was precluded from addressing this request by the principle of *res judicata*. However, it is doubtful whether the criteria for the application of the *res judicata* principle as outlined above were really

⁷³ M. Hudson, *International Tribunals. Past and Future* (1944), at 122; W. Schätzel, *Rechtskraft und Anfechtung von Entscheidungen internationaler Gerichte* (1928), at 91–92; Rosenne, *supra* note 15, ii, at 876. See also G. Abi-Saab, *Les exceptions préliminaires dans la procédure de la Cour Internationale* (1967), at 248–251, and Bernhardt, *supra* note 62, at 1240, MN 27.

⁷⁴ Shihata, *supra* note 67, at 78.

⁷⁵ As is argued by Thirlway, ‘The Law and Procedure of the International Court of Justice 1960–1989 (Part Nine)’, 69 *British Ybk Int’l L* (1998) 1, at 7.

⁷⁶ This consideration appears to have been the main reason for the Court to decline a re-examination of its jurisdiction: see *Genocide* case, Merits, *supra* note 1, at para. 118.

⁷⁷ *Request for Interpretation of the Judgment of November 20th, 1950, in the Asylum Case* [1950] ICJ Rep 395, at 403.

⁷⁸ See Rosenne, *supra* note 15, iii, at 1603, who states: ‘[t]he *res judicata* does not derive from the operative clause of the judgment ... but from the reasons in point of law given by the Court’.

met in the case. To be sure, it could be argued that the object of Yugoslavia's preliminary objections filed in the jurisdictional phase of the proceedings was the same as that of its request to the Court in the merits phase to reconsider the 1996 Judgment, this object being that the Court declare its lack of jurisdiction and dismiss Bosnia's application. Argued this way, the object of the claims (the *petitum*) would arguably be identical. Yet, with regard to the cause of the claims (*causa petendi*), the situation certainly is different. While the preliminary objections of the FRY were mainly based on issues arising in the context of the Genocide Convention (the disputed status of the FRY as a party to that Convention, the ambit of Article IX of the Convention, the non-retroactive effect of the Court's jurisdiction under Article IX), the FRY's arguments in the merits phase concerning its status in relation to the Court's Statute did not at all involve the Genocide Convention but were based on different grounds. In other words, the basis of the claim brought forward in the merits phase (i.e., lack of party status) was totally different from those in the jurisdictional phase (i.e., no valid title of jurisdiction arising under the Genocide Convention).

The Court's conclusion on the applicability of the *res judicata* principle was only possible because it performed a 'magical cut' in arguing that the 1996 judgment had, by way of 'necessary implication', included a finding that the FRY was a party to the Statute and thus had the capacity to appear before the Court. The Court said that it 'could not have proceeded to determine the merits unless the Respondent had had the capacity under the Statute to be a party to proceedings before the Court'.⁷⁹ However, the problem with such an implicit inclusion of Yugoslavia's party status into the 1996 judgment is that this issue has never been raised by the parties, nor did the Court examine it.⁸⁰ It is hardly understandable how an issue that has never been pleaded by the parties may be covered by the force of *res judicata*. Keeping in mind the elements of the *res judicata* principle, a matter that has not been addressed by the parties can form neither the *petitum* nor the *causa petendi* of a claim.

To circumvent this crucial problem, the ICJ emphasized that the fact that the disputed party status of the FRY had not been raised and addressed expressly in the 1996 judgment and the proceedings leading thereto did not signify that in 1996 the Court was unaware of the controversial status of the FRY.⁸¹ Interestingly though, the Court, in making that statement, referred to its 1993 order, indicating provisional measures where it had stated that the whole issue was 'not free from legal difficulties'.⁸² But there the Court also had said that the question whether or not Yugoslavia was a party to the Court's Statute was one which it '[did] not need to determine *definitively* at the *present* stage of the proceedings'.⁸³ The Court thus appears to have indicated that it would revert to this central issue in its preliminary objections judgment in order to 'definitively determine' the question. Since the Court did not do so, it seems somewhat

⁷⁹ *Genocide case, Merits, supra* note 1, at para. 132.

⁸⁰ As was observed by the Court in *Legality of Use of Force, supra* note 4, at 311, para. 82.

⁸¹ *Genocide case, Merits, supra* note 1, para. 130.

⁸² Order of 8 Apr. 1993, *supra* note 10, at 14, para. 18.

⁸³ *Ibid.*, at 14, para. 18 (emphases added).

puzzling that a question that had not been addressed at all should suddenly be considered disposed of once and for all, enjoying the force of *res judicata*. Oddly enough, in its merits judgment the Court even acknowledged that ‘[n]othing [had been] stated in the 1996 Judgment about the status of the FRY in relation to the United Nations, or the question whether it could participate in proceedings before the Court’.⁸⁴ It is perhaps indicative of the somewhat curious, and ultimately unconvincing, line of reasoning that the Court, in four consecutive paragraphs, emphasized no less than six times that the issue of Yugoslavia’s access to the Court must be read into the 1996 judgment.⁸⁵

It was precisely for these reasons that Judges Ranjeva, Shi and Koroma in their joint dissenting opinion considered the Court’s ‘implied construction’ of the 1996 judgment flawed. Since the entire judgment is silent on the issue of Yugoslavia’s access to the ICJ under the terms of the Statute, the Court in their opinion did not decide the issue: ‘There is nothing in the 1996 Judgment indicating that the Court had *definitively* ruled on that issue in such a way as to confer upon it the authority of *res judicata*.’⁸⁶ This dissenting opinion is noteworthy not the least because these three judges are the only ones who already sat on the Court in 1996.

But there is yet a further problem with the Court’s argument that the 1996 judgment contains an implicit ruling on the issue of Yugoslavia’s status as a party to the Statute. According to Article 56 of the Statute, the judgment of the Court ‘shall state the reasons on which it is based’. If the Court really decided the issue of Yugoslavia’s party status in its 1996 judgment, it would have been necessary to include also the reasons by which the Court came to the conclusion that Yugoslavia indeed was a party to the Statute and had access to the Court. Since Article 56 requires the reasons to be ‘stated’, there is no room for any kind of ‘implicit inclusion’. But one searches in vain for the reasons which led the Court to conclude that the 1996 judgment resolved the issue

⁸⁴ *Genocide case*, Merits, *supra* note 1, at para. 122.

⁸⁵ (1) ‘[T]his finding must as a matter of construction be understood, by necessary implication, to mean that the Court [in 1996] perceived the Respondent as being in a position to participate in cases before the Court’: *ibid.*, at para. 132.

(2) ‘[T]he fact remains that the Court could not have proceeded to determine the merits unless the Respondent had had the capacity under the Statute to be a party to proceedings before the Court’: *ibid.*

(3) ‘[T]he express finding in the 1996 Judgment that the Court had jurisdiction *ratione materiae* ... is a finding which is only consistent, in law and logic, with the proposition that, in relation to both parties, it had jurisdiction *ratione personae* in its comprehensive sense, that is to say, that the status of each of them was such as to comply with the provisions of the Statute concerning the capacity of State to be parties before the Court’: *ibid.*, at para. 133.

(4) ‘The determination by the Court that it had jurisdiction under the Genocide Convention is thus to be interpreted as incorporating a determination that all the conditions relating to the capacity of the parties to appear before it had been met’: *ibid.*, at para. 133.

(5) ‘That the FRY had the capacity to appear before the Court in accordance with the Statute was 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’: *ibid.*, at para. 135.

(6) ‘The Court thus considers that the 1996 Judgment contained a finding ... which was necessary as a matter of logical construction, and related to the question of the FRY’s capacity to appear before the Court under the Statute’: *ibid.*, at para. 136.

⁸⁶ *Genocide case*, Merits, *supra* note 1, dissenting opinion of Judges Ranjeva, Shi, and Koroma, at para. 3.

of party status in a final and irrevocable manner. The lack of reasons is regrettable, the more so as one is at a total loss to know on what basis Yugoslavia could have been considered a party to the Statute. Was it on the basis of automatic succession – a possibility which, however, was generally rejected, especially by the United Nations and not the least because there is no succession into membership in international organizations?⁸⁷ Or was the FRY to be considered as temporarily continuing the membership of the Former Yugoslavia in the United Nations for the purposes of the Statute until its admission in 2000 – the membership of the FRY as a membership in abeyance? Or did the rather unique and anomalous position of the FRY in relation to the United Nations during the period between 1992 to 2000, and which the Court had referred to as ‘*sui generis*’,⁸⁸ suffice as granting the FRY access to the Court? The latter approach would have probably been the most convincing one.⁸⁹ However, as already mentioned earlier, the Court’s decision in *Legality of Use of Force* had ruled out this possibility.

The only way to argue an implicit extension of the *res judicata* effect would have been the doctrine of wider *res judicata* as known in English law. According to this doctrine, the principle of *res judicata* applies not only to the points raised by the parties but to every point which properly belonged to the subject of the litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time.⁹⁰ Indeed, variants of such a broad understanding of the *res judicata* principle may also be found in international arbitration. For instance, the Spanish-United States Claims Commission held in the *Delgado* case:

Even if the claimant did not at the time of the former case ask indemnity of the commission for the value of the lands, the claimant had the same power to do so as other claimants in other cases where it has been done, and he can not have relief by a new claim before a new umpire.⁹¹

Applying this doctrine of wider *res judicata* to the *Genocide* case, it could be argued that since neither of the parties, especially Yugoslavia itself, raised the issue of Yugoslavia’s party status – an issue that properly belonged to the subject of the litigation – the force of *res judicata* extends over that question. Viewed from this standpoint, *res judicata* would be similar in its effect to the preclusion of an estoppel.⁹²

However, this doctrine of wider *res judicata* can only apply to issues that are subject to the discretion of the parties and which the parties may validly dispose of. But the issue which the Court considered as implicitly decided in the 1996 judgment was not a ‘standard’ one of jurisdiction that depends on the consent of the parties. Rather it

⁸⁷ A. Zimmermann, *Staatennachfolge in völkerrechtliche Verträge* (2000), 659.

⁸⁸ *Application for Revision*, *supra* note 3, at 31, para. 71.

⁸⁹ See the Joint Declaration of Vice-President Ranjeva, Judges Guillaume, Higgins, Kooijmans, Al-Khasawneh, Buergenthal, and El-Araby in *Legality of Use of Force*, *supra* note 4, at 330, para. 13.

⁹⁰ Scobbie, *supra* note 52, at 301.

⁹¹ *Delgado* case (Spanish–United States Claims Commission) (1881), in J.B. Moore, *International Arbitrations to which the United States Has Been a Party* (1898), iii, 2196 (Spanish–United States Claims Commission 1881).

⁹² Cf. Bowett, ‘Estoppel Before International Tribunals and Its Relation to Acquiescence’, 33 *British Ybk Int’l L* (1957) 176, at 177.

concerned the question of access to the Court which is certainly one of the most fundamental procedural conditions in proceedings in the ICJ. It is so important that the Court itself even described it as ‘mandatory’ and not subject to the consent of the parties.⁹³ And yet the Court had no difficulty in reading this fundamental issue into the 1996 judgment. This question directly leads us to the second main procedural problem to be discussed, namely that of the significance of mandatory rules under the Statute.

4 Access to the Court and Mandatory Rules

A *The Problems Stated*

In the following I will analyse the problem of access to the ICJ and of party status. The term ‘party status’ is understood as meaning the capability or qualification to be a party in proceedings before the Court pursuant to Article 35 of the Statute. In the first place, it will be examined whether this matter is ‘only’ part of jurisdiction in a broad sense, or whether it is distinct from jurisdiction, but nevertheless a condition for its exercise. As to the substance of the issue, it is submitted that the question of access to the Court is an aspect of the broader concept of ‘mandatory requirements’ of the Statute. The main argument is that since the parties to a dispute in proceedings before the ICJ may not agree among themselves – neither expressly not tacitly – on whether the conditions for party status under the Statute are met in a given case, these conditions are mandatory in the sense that both the parties and the Court may not derogate from them. This is a far-reaching restriction on the fundamental principle of party autonomy in international law which raises the question as to the basis of this mandatory character. Finally, it is to be asked what the legal effects of this mandatory character are. These questions will be examined in the following sections.

B *Access to the Court and Jurisdiction*

It is a feature of procedural law common to any judicial or, for that matter, arbitral procedure that, before the court or tribunal may deal with the merits of a dispute brought before it, procedural conditions of a general kind must be met. One of these conditions, probably the most fundamental one, is that the court or tribunal is open to the parties to the dispute. While in the context of the ICJ this problem is generally dealt with under the rubric of jurisdiction,⁹⁴ it is rather a precondition to the exercise of, and thus detached from, jurisdiction. This distinction was confirmed by the Court in the *Fisheries Jurisdiction* case between Germany and Iceland. There the Court distinguished between the legal effects of a special agreement establishing jurisdiction over a particular kind of dispute and the effect of a resolution of the Security Council pursuant to Article 35(2) of the Statute, which provides for access to the Court of states which are not parties to the Statute.⁹⁵

⁹³ *Legality of Use of Force*, *supra* note 4, at 295, para 36.

⁹⁴ See, e.g., Rosenne, *supra* note 15, ii, ch 10.

⁹⁵ *Fisheries Jurisdiction (Federal Republic of Germany v. Iceland)* [1973] ICJ Rep 49, at 53, para. 11. See also Zimmermann, ‘Article 35’, in Zimmermann *et al.*, *supra* note 15, at 566, MN 2.

While the Statute of the Court uses the terms ‘jurisdiction’ and ‘competence’ interchangeably, it seems that jurisdiction is a narrower concept than competence and denotes the power of the Court to decide the subject-matter of the dispute with final and binding force in relation to the parties. In this sense, jurisdiction concerns the question over which parties (*ratione personae*) and which subject-matter (*ratione materiae*) – including possible temporal limitations (*ratione temporis*) – the Court may exercise its judicial function. By contrast, competence refers to those powers which the Court possesses independently of whether or not the Court has jurisdiction.⁹⁶ Thus, the Court has for instance competence over specific matters even though it may, in the end, not have jurisdiction to decide a case. An example of this aspect of competence is the power of the Court to determine its own jurisdiction according to Article 36(6) of its Statute. On this note, the power of the Court to indicate provisional measures of protection may also be viewed as a facet of competence rather than jurisdiction because in the incidental proceedings on provisional measures, the Court’s jurisdiction *vel non* is usually established on a *prima facie* basis.⁹⁷ Therefore, the Court has the power to indicate provisional measures even if it later turns out that it does not have jurisdiction to hear the merits of the case.⁹⁸

A somewhat different aspect of competence is that it may introduce an element of discretion.⁹⁹ For instance, the Court’s case law indicates that it need not in every case give a judgment on the merits, even if it affirms its jurisdiction to do so. This is a matter of judicial propriety which clearly is detached from jurisdiction.¹⁰⁰ The fact that the Court may decline to hear a case for lack of admissibility of the claim also falls under the broader concept of competence. Finally, the powers which are not expressly provided for in its Statute or Rules, but which the Court possesses implicitly due to its nature as a judicial organ,¹⁰¹ are also part of the broader concept of competence – even though these powers are frequently also denoted as inherent *jurisdiction*.¹⁰²

Thus, while there is certainly no clear-cut division between jurisdiction and competence, the existing conceptual differences certainly warrant a distinction between the two. The main reason for considering issues of competence as being distinct from jurisdiction is that, in contrast to the latter, the former is not subject to the consent of

⁹⁶ Similarly Rosenne, *supra* note 15, ii, at 524, who, however, views access to the Court as forming part of jurisdiction *ratione personae* rather than competence. A different concept is proposed by Fitzmaurice, ‘The Law and Procedure of the International Court of Justice, 1951–4: Questions of Jurisdiction, Competence and Procedure’, 34 *British Ybk Int’l L* (1958) 1, at 8–9. He views jurisdiction as the more comprehensive notion and considers competence as pertaining to the circumstances of the particular case.

⁹⁷ Ollers-Frahm, *supra* note 15, at 923, 935, MN 28.

⁹⁸ To date, this has happened in only one case, *Anglo Iranian Oil Co.*, Preliminary Objections [1952] ICJ Rep 93.

⁹⁹ Rosenne, *supra* note 15, ii, at 524.

¹⁰⁰ *Case concerning the Northern Cameroons (Cameroons v. United Kingdom)* [1963] ICJ Rep 15, at 29; *Nuclear Tests*, *supra* note 56, at 270–271, paras 55–56.

¹⁰¹ Brown, ‘The Inherent Powers of International Courts and Tribunals’, 76 *British Ybk Int’l L* (2005) 195.

¹⁰² *Nuclear Tests* cases, *supra* note 56, at 259, para. 22.

the parties. With regard to access to the Court (as an aspect of competence) this was clearly stated by the Court in *Legality of Use of Force* when it observed 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.¹⁰³

In its merits judgment in the *Genocide* case, the Court confirmed its previous observation. There Bosnia and Herzegovina argued that the FRY, by failing to raise the issue of access to the Court at an earlier stage of the proceedings, had acquiesced in the Court's competence. The Court rejected that argument:

Such acquiescence, if established, might be relevant to questions of consensual jurisdiction ... but not to the question whether a State has the capacity under the Statute to be a party to proceedings before the Court.¹⁰⁴

That the capacity of a state to appear as a party in proceedings before the Court is not subject to the agreement of the parties is also widely recognized in doctrine.¹⁰⁵

C Access to the Court as a 'Mandatory Requirement'

1 The Meaning of 'Mandatory'

The conclusion that the issue of access to the Court is not subject to the parties' agreement or consent is complemented by the Court's statement in *Legality of Use of Force* that '[t]he function of the Court to enquire into the matter [of the FRY's access to the Court] and to reach its own conclusion [was] thus mandatory upon the Court'.¹⁰⁶ The Court argued that this was 'a matter of law', and although it is unclear what the Court was alluding to with this statement it could probably be understood as meaning 'objective' or 'public' law in contradistinction to private law which is subject to the principle of party autonomy. In other words, the parties may not, expressly or tacitly, derogate from the provisions of Article 35 of the Court's Statute.

Put into a broader context, this non-derogability is but an expression of the general principle that the parties to a dispute before the Court must adhere to the provisions of the Statute as a whole and may not deviate from individual provisions, even if they wish to do so by way of an agreement. In other words, in the absence of authorization to the contrary, parties must take the provisions of the Statute as they find them.¹⁰⁷ To be sure, the Court has not yet had many opportunities to express opinion on the mandatory character of the Statute but when it has, its opinion was unambiguous. Thus, in the judgment in *Application for Revision in the Case concerning Land, Island and Maritime Frontier Dispute* of 2003, the Court for instance held that Article 61 of the Statute was non-derogable.¹⁰⁸ On a more general basis, the Permanent Court already

¹⁰³ *Legality of Use of Force*, *supra* note 4, at 295, para. 36.

¹⁰⁴ *Genocide* case, Merits, *supra* note 1, at para. 102.

¹⁰⁵ See Zimmermann, *supra* note 95, at 575, MN 37 and the references there in note 74.

¹⁰⁶ *Legality of Use of Force*, *supra* note 4, at 295, para. 36.

¹⁰⁷ G. Schwarzenberger, *International Law as Applied by International Courts and Tribunals* (1986), iv, at 591.

¹⁰⁸ *Application for Revision of the Judgment of 11 September 1992 in the Case Concerning the Land, Island and Maritime Frontier Dispute (El Salvador v. Honduras: Nicaragua intervening)* [1993] ICJ Rep 392, at 400, para. 22.

described the Statute as being mandatory in its entirety when it said in the *Free Zones* case that ‘the Court cannot, on the proposal of the Parties, depart from the terms of the Statute’.¹⁰⁹

2 The Significance of the Mandatory Character of the Statute

The conclusion that the Statute is of a mandatory character may sound somewhat trivial, or seem to convey a truism, but it will soon become clear that it has more significant implications than one might think on first glance. In particular, the mandatory character of the Statute stands in marked contrast to the generally derogable nature of international law. The structure of international law has traditionally been that of a civilistic legal order. International law largely has the character of *ius dispositivum* and is thus assimilated to municipal private rather than public law. With the exception of *ius cogens* pursuant to Article 53 of the Vienna Convention on the Law of Treaties (VCLT), the subjects of international law, in particular states, may derogate from virtually every norm, and the principle of freedom of contract as an expression of private autonomy reigns supreme. This extensive private autonomy of states is an attribute of their sovereignty.¹¹⁰ As a consequence, general international law only applies if and to the extent that its subjects do not provide otherwise. It is an expression of this far-reaching freedom that parties to a multilateral treaty may for instance modify that treaty by concluding *inter se* agreements (Article 41 VCLT). Transposed to the level of procedural law, the principles of private autonomy and freedom of contract find their expression in the principle of party autonomy, which means that the parties in proceedings may shape every aspect of the dispute. However, it is clear that, in contradistinction to arbitral proceedings where party autonomy to a large extent also applies to the law governing the procedure, parties in proceedings before the ICJ are bound to the provisions governing the Court’s procedure. To give an example, it would certainly be inconceivable that the parties to the Statute of the Court were allowed to deprive the Court of its *Kompetenz-Kompetenz* pursuant to Article 36(6).¹¹¹

The question therefore arises as to the legal source for the mandatory character of the Statute. In other words, on what basis do the provisions of the Statute override the generally applicable party autonomy and prohibit the parties from departing from the terms of the Statute? This will be examined in the following.

3 Some Considerations on the Theoretical Basis of Mandatory Rules

In the first place, general treaty law may provide a justification for limiting the rights of parties to specific types of multilateral treaties to derogate from treaty provisions by agreement. Thus, as just mentioned, Article 41 VCLT allows for *inter se* agreements to modify a multilateral treaty between certain of the parties only, and in principle this provision applies also to constituent treaties of international organizations. However,

¹⁰⁹ *Free Zones of Upper Savoy and the District of Gex*, Order of 19 Aug. 1929 PCIJ Series A, No. 22, at 12.

¹¹⁰ *SS Wimbledon*, 1923 PCIJ Series A, No. 1, at 25.

¹¹¹ This is precisely the reason why the Court’s decision in the *Norwegian Loans* case not to ‘prejudge the question’ of the validity of the French reservation on the ground that the parties did not contest it is so debatable: *Case of Certain Norwegian Loans (Norway v. France)* [1957] ICJ Rep 9, at 27. See Schwarzenberger, *supra* note 107, at 445, n. 134, stating that Art. 36(6) is *ius cogens*.

paragraph 1(b)(i) excludes this possibility with regard to a treaty provision, ‘derogation from which is incompatible with the effective execution of the object and purpose of the treaty as a whole’. There is a strong argument that the object and purpose of treaties establishing international organizations require that the integrity of the constituent treaty be maintained and thus exclude the permissibility of *inter se* agreements *a priori*.¹¹² If parties to a constitution of an international organization were allowed to conclude *inter se* agreements, the result would be that the treaty relations are split up between different groups of Member States. In the end, this may well prevent the organization from performing its tasks effectively.¹¹³

A similar argument also builds on the specific character of constituent treaties of international organizations, which establish institutional or constitutional limitations. While, as mentioned above, international law still today is largely structured along similar lines as municipal private law, the establishment of international organizations has led to the development of a branch of international law which to some extent resembles that of municipal public law.¹¹⁴ Constituent treaties of international organizations are not aimed at establishing a bundle of bilateral and reciprocal rights and duties but at creating objective legal relationships. Their structure of performance strongly militates against the permissibility of deviation by individual parties.

These considerations apply *a fortiori* to the ICJ Statute as an integral part of the United Nations Charter. The Charter is not an ordinary constituent treaty but frequently regarded as a ‘quasi-constitutional treaty’, assimilated to constitutions as understood in municipal law.¹¹⁵ Viewed from this standpoint, derogation from the Statute by individual Member States appears hardly conceivable. With regard to the ICJ Statute, one could thus speak of ‘constitutional limitations of the Court’s jurisdiction’,¹¹⁶ prohibiting any derogation by the parties from the express terms of the Statute. This argument based on the ‘public law character’ of the Charter and the Statute may be illustrated by a comparison to domestic law. Codes of civil procedure are generally part of public law, even though they govern proceedings in private law disputes. And this public law character does not allow for modifications agreed between the parties to a dispute (unless, of course, such a possibility is expressly provided for).

The case law of the ICJ provides examples where the Court and its predecessor invoked such constitutional or institutional limitations. Thus, in the case concerning the *Free Zones*, the Permanent Court said that it had to render judgment ‘according to the precise terms of the constitutional provisions governing its activity’.¹¹⁷ Similarly, in the Merits Judgment of the *Genocide* case, the Court referred to the ‘mandatory

¹¹² With regard to the UN Charter see Karl, Mützelburg, and Witschel, ‘Article 108’, in B. Simma (ed), *The Charter of the United Nations* (2nd edn., 2002), at 1345–1346, MN 10.

¹¹³ W. Karl, *Vertrag und spätere Praxis im Völkerrecht* (1983), at 70–71. *Contra* J. Klabbers, *An Introduction to International Institutional Law* (2002), at 93.

¹¹⁴ R. Kolb, *Théorie du ius cogens international* (2001), at 186.

¹¹⁵ Schwarzenberger, *supra* note 107, iii, at 117.

¹¹⁶ *Ibid.*, iv, at 434 and 445.

¹¹⁷ *Free Zones of Upper Savoy and the District of Gex*, *supra* note 109, at 12 (emphasis added).

requirements of the Statute'.¹¹⁸ Such a 'constitutional' or 'institutional' perception of the Court may perhaps also be viewed in the Court's observation in *Corfu Channel* that it is the 'organ of international law'.¹¹⁹ While this argument on the institutional or constitutional limitations draws on similar considerations as that based on general treaty law, it may be considered as a separate justification for the mandatory character of the Statute.

A third basis for the mandatory character could be viewed in the concept of *ius cogens*. Doctrine is surprisingly consistent in describing the Statute of the Court as being *ius cogens*.¹²⁰ However, it is not clear whether these authors, when speaking of *ius cogens* in the context of the Statute, really have in mind the concept underlying Article 53 VCLT. This may well be doubted. Article 53 VCLT is viewed as the general expression of peremptory norms in international law. As to the norms that enjoy the character of *ius cogens*, the overwhelming majority of authors refer to specific substantive norms (such as the prohibition of the use of force) that protect the so-called international public order.¹²¹

For several reasons, this traditional reading of *ius cogens* hardly applies to the Statute of the ICJ. For one, the Statute primarily contains procedural rules as distinct from the substantive norms and principles which form the content of *ius cogens* as traditionally conceived. Secondly, there is nothing that would indicate that the Statute conveys such important values that form the basis of an international public order. The vast majority of the provisions of the Statute are of a rather technical nature, which can hardly be seen as an expression of basic values of the international legal order. Furthermore, it is highly doubtful whether an *inter se* agreement between parties to a dispute that could raise the issue of its compatibility with *ius cogens* meets the requirements of a 'treaty' within the meaning of the Vienna Convention. Likewise, it is debatable whether the invalidity of a treaty conflicting with *ius cogens* under Article 53 is applicable *tel quel* to an agreement between the parties to a dispute that is in conflict with a provision of the Statute. In sum, the traditional perception of the concept of *ius cogens* as enshrined in Article 53 VCLT is not apt to explain the mandatory character of the provisions of the Statute.¹²²

Finally, one may apply a pragmatic approach arising out of functional necessity that may provide an explanation for the mandatory character of the Statute. The Court's specific position as a court of justice whose task is to exercise a judicial function

¹¹⁸ *Genocide case, Merits*, *supra* note 1, at para. 139. It must, however, be added that the Court adopted this term from the FRY. See also *Legality of Use of Force*, *supra* note 4, at 295, para. 36.

¹¹⁹ *Corfu Channel (United Kingdom v. Albania) (Merits)* [1949] ICJ Rep 35.

¹²⁰ See the references in Kolb, *supra* note 114, at 186, n. 763.

¹²¹ For recent typical examples of this 'traditional' view see A. Orakhelashvili, *Peremptory Norms in International Law* (2006), at 50–65, and C. Tomuschat and J.-M. Thouvenin (eds.), *The Fundamental Rules of the International Legal Order* (2006). For an excellent account of this traditional view see Kolb, *supra* note 114, at 59–163, especially at 68–83 with regard to the view that bases *ius cogens* on international public order.

¹²² It is only if one follows the progressive understanding of *ius cogens* as developed by Kolb that the mandatory character of the Statute will be reconcilable with peremptory norms: Kolb, *supra* note 114, *passim*. However, this has to date remained an isolated opinion.

requires that the parties are prevented from derogating from the Statute. The Court is not just an arbitral tribunal on an *ad hoc* basis depending on the consent of the parties to the dispute. Rather it is a permanent judicial institution with pre-determined composition, procedure and so on. It is a permanently established public court and, unlike an *ad hoc* arbitral tribunal, it is not the servant of the parties but a multilateral institution that has to serve a number of different states in a great variety of disputes. As such, it is bound to apply the provisions of the Statute in an equal manner to any dispute brought before it and irrespective of whether the parties to a specific dispute wish to deviate therefrom. The clearest expression of that idea may be found in the *Northern Cameroons* case where the Court stated:

There may thus be an incompatibility between the desires of an applicant, or, indeed, of both parties to a case, on the one hand, and on the other hand the duty of the Court to maintain its judicial character. The Court itself, and not the parties, must be the guardian of the Court's judicial integrity.¹²³

Similarly, in the *Nuclear Tests* cases the Court referred to the necessity to 'safeguard its basic judicial functions'.¹²⁴ In doctrine, it is also argued that a functional approach that justifies the mandatory nature of the Statute may include some of the other limitations mentioned above,¹²⁵ and considerations of the 'proper administration of justice'¹²⁶ may also be relevant in explaining the need for maintaining the integrity of the Statute.

Given the ICJ's overall pragmatic approach to issues of procedure, the functional approach seems to be most in line with the case law of the Court. On the one hand, it allows the Court to adequately protect its own integrity as the main judicial organ in international law when exercising its judicial function. On the other hand, it is flexible enough so as to furnish the Court with a margin of discretion necessary to consider the circumstances of the particular case in questions of procedure, especially if these call for solutions not provided for in the Statute. And since terms like *ius cogens* or peremptory norms already have their predetermined meaning within the scope of Article 53 VCLT, it is advisable to avoid them in the present context. Therefore, the phrases 'mandatory rules' or 'mandatory requirements' are to be preferred in order to describe the non-derogable character of the Court's Statute, the more so as the Court itself has used that term.

4 Legal Effects of Mandatory Rules

A *Ex Officio Examination by the Court*

According to both its Statute and Rules as well as its case law, the ICJ possesses broad powers of examining procedural questions on its own initiative. Especially with regard

¹²³ *Northern Cameroons*, *supra* note 100, at 29.

¹²⁴ *Nuclear Tests*, *supra* note 56, at 258–259, para. 23.

¹²⁵ Such an approach is briefly indicated by *Abi-Saab*, 'Cours général de droit international public', 207 *RdC* (1987 VII) 9, at 259. See also *Schwarzenberger*, *supra* note 107, at 433–434, who refers to the Court's constitutional limitations under its own *ius cogens* as well as considerations of public law and public policy.

¹²⁶ *Legality of Use of Force*, *supra* note 4, at 294, para. 33.

to issues of jurisdiction, the Court often resorts to its *ex officio* powers in order to examine whether it has jurisdiction over a case. But there may be cases in which the Court not only is empowered to raise an issue *ex officio* but where the Court even has a duty to do so. This was confirmed by the Court in the *ICAO Council* case where it stated that it 'must ... always be satisfied that it has jurisdiction, and must if necessary go into that matter *proprio motu*'.¹²⁷ The Court took a similar approach in the *Nuclear Tests* cases:

However, while examining these questions of a preliminary character, the Court is entitled, *and in some circumstances may be required*, to go into other questions which may not be strictly capable of classification as matters of jurisdiction or admissibility but are of such a nature as to require examination in priority to those matters.¹²⁸

With particular reference to the question whether a state is a party to the Statute, the Court in *Legality of Use of Force* clearly pronounced on its duty to raise this fundamental issue on its own initiative, irrespective of whether this was requested or otherwise addressed by the parties:

The question 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 in these cases. Since that question is independent of the views or wishes of the Parties, even if they were now to have arrived at a shared view on the point, the Court would not have to accept that view as necessarily the correct one. The 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.¹²⁹

Again in the merits judgment in the *Genocide* case, the Court reaffirmed this statement:

The question is in fact one which the Court is *bound to raise and examine, if necessary, ex officio*, and if appropriate after notification to the parties. Thus if the Court considers that, in a particular case, the conditions concerning the capacity of the parties to appear before it are not satisfied, while the conditions of its jurisdiction *ratione materiae* are, it *should*, even if the question has not been raised by the parties, find that the former conditions are not met, and conclude that, for that reason, it could not have jurisdiction to decide the merits.¹³⁰

While these examples show that the Court openly accepted its duty of *ex officio* examination ('must go into that matter', 'mandatory upon the Court', 'bound to raise and examine'), the passages quoted from *Nuclear Tests* and the *Genocide* case contain two qualifications. First, the Court said that it may 'in some circumstances' or 'if necessary' be required to raise particular questions on its own initiative. This restrictive qualification seems to merely stress that usually the issue is in any event raised by the parties, or one of them, so that it will not be necessary for the Court to raise it *ex officio*.

¹²⁷ *Appeal Relating to the Jurisdiction of the ICAO Council (India v. Pakistan)* [1972] ICJ Rep 46, at 52, para. 13.

¹²⁸ *Nuclear Tests*, *supra* note 56, at 258, para. 22 (emphasis added).

¹²⁹ *Legality of Use of Force*, *supra* note 4, at 295, para. 36 (second emphasis added).

¹³⁰ *Genocide* case, Merits, *supra* note 1, at para. 122 (emphases added).

It could also be understood as to mean that in many instances the issue is not of such importance that the Court's duty of *ex officio* examination is applicable at all.

The second and more important qualification made by the Court concerned the question of the conditions for a party's access to the Court in the *Genocide* case, which the Court 'should' raise *ex officio*. The use of the weaker verb 'should' instead of 'shall' stands in marked contrast to the Court's previous statement that it is 'bound' to raise this issue *ex officio*.

Whatever the reasons for these terminological inconsistencies, it is clear that whenever it is doubtful whether the mandatory requirements of the Statute, in particular the status of one of the parties to the proceedings, are met, the Court has to act on its own authority, irrespective of whether the parties have addressed this problem. And the statements by the Court quoted above also evidence that the mandatory character of the Statute not only operates as between the parties so as to prohibit any derogation by them; the non-derogable nature of the Statute also requires the Court, as the 'guardian of its judicial integrity', to safeguard the proper compliance of the proceedings with the terms of its Statute, in particular when the issue concerned relates to a question of fundamental importance, as is the case with regard to the capacity of a party to have access to the Court.

However, in the *Genocide* case, the Court unfortunately did not live up to its own standards. In no phase of the proceedings did it examine the disputed status of Yugoslavia as a party to the Statute. Thus the Court allowed the parties, at least in principle and implicitly to override the mandatory rules of the Statute by acknowledging the situation as the parties had recognized it.

B Irrelevance of the Parties' Agreement and Nullity of the Decision?

Apart from this strictly procedural consequence (i.e., the *ex officio* duty of the Court), the mandatory character of the Statute has further implications. Where the parties to a dispute agree, expressly or tacitly, to deviate from the mandatory requirements of the Statute, it seems an undisputable *sequitur* that this part of the agreement is not to be applied and does not entail the legal consequences intended (i.e., the derogation from the Statute). Other parts of the agreement may well be valid and may result in the effects intended by the parties. For instance, the parties may agree on a stipulation of undisputed facts, an agreement that does not affect any mandatory rule of the Statute.

A more complex question concerns the Court's own conduct in relation to the mandatory requirements of the Statute. While, as discussed above, it seems incontestable that the Court has the duty to raise certain fundamental matters of procedure *ex officio*, it is not clear what the legal consequences are if it refrains from doing so. No doubt it is a general principle of procedural law that a judicial decision which does not meet the essential conditions of its existence may be considered null and void.¹³¹

¹³¹ Oellers-Frahm, 'Judicial and Arbitral Decisions: Validity and Nullity', in R. Bernhardt (ed.), *Encyclopedia of Public International Law* (1997), iii, at 38.

For instance, in the case concerning the *Arbitral Award of 31 July 1989*, the Court said that a decision rendered by a tribunal in excess of its jurisdiction might be a manifest breach of its competence or *excès de pouvoir*.¹³² That such a manifest *excès de pouvoir* may lead to the invalidity of a decision is generally recognized in arbitral practice.¹³³ Some constituent treaties of arbitral tribunals even provide for annulment on the ground that there has been a serious departure from a fundamental rule of procedure.¹³⁴ While to date such questions of invalidity have only been addressed in arbitral practice, it in theory could also arise in the context of judgments of the ICJ.¹³⁵

In strictly procedural terms, the ICJ's failure to examine the highly questionable party status of Yugoslavia no doubt is a serious breach of a mandatory, and thus fundamental, rule of procedure. Whether the Court also manifestly exceeded its powers is debatable. In any event, it is fairly clear that absent any institutional framework or procedural devices for annulment, there is little or no room for a plea of nullity of judgments of the Court.¹³⁶

5 Conclusions

The proceedings in the various stages of the *Genocide* case, together with the Court's judgment in *Legality of Use of Force*, have raised a number of complex and highly controversial procedural issues, and it seems that the Court has resolved almost none of them. From a procedural point of view, the approach and the decision taken by the Court certainly are highly unsatisfactory. The extensive criticism this article has expressed must, however, be put into a broader perspective and entails the duty to offer alternatives – alternatives that are both tenable in legal terms and feasible in terms of legal policy. In legal terms, the 1996 preliminary objections judgment certainly was a missed opportunity for the ICJ to clarify the complex problem. The cautious attitude of the Court probably was prompted by the intention not to prejudge any decision which the political organs of the United Nations as the organs primarily responsible for questions of membership might have taken. Whatever considerations may have guided the ICJ in 1996, the absence of a scrutiny of Yugoslavia's status in that decision could still have been remedied by examining that issue without difficulty in the merits phase. However, the judgment in *Legality of Use of Force* deprived the Court of that possibility. The approach taken by the Court in that judgment had severe implications for the *Genocide* case. Not only did the judgment in 2004 close the door to reconsidering the issue of access to the Court; by rejecting all possible ways for Yugoslavia to enjoy party status, the Court also locked the door and threw away the

¹³² *Arbitral Award of 31 July 1989 (Guinea-Bissau v. Senegal)* [1991] ICJ Rep 53, at 69, paras 47 and 48.

¹³³ *Ibid.*, at 38–39; Schwarzenberger, *supra* note 107, at 704–708.

¹³⁴ See, e.g., Art. 52(1)(d) of the International Convention for the Settlement of Investment Disputes 1965, 575 UNTS 159.

¹³⁵ Bernhardt, 'Article 59', in Zimmermann *et al.*, *supra* note 15, at 1245, MN 50; Schwarzenberger, *supra* note 107, iv, at 511; Shihata, *supra* note 67, at 73.

¹³⁶ Bernhardt, *supra* note 135, at 1245, MN 50.

key. The ICJ's decision that Yugoslavia's *sui generis* membership could not amount to a regular membership confined to the purpose of proceedings before the Court, as well as its narrow interpretation of Article 35(2) of the Statute made it impossible for the Court in the *Genocide* case to reach a reasonable decision on Yugoslavia's status that was in conformity with both the judgment of 1996 and that of 2004. In other words, due to the decision in *Legality of Use of Force*, the ICJ in the *Genocide* case had virtually no room for manoeuvre in 2007. Since the Court in 2004 could have reached the same decision (i.e., that it lacked jurisdiction) without encroaching upon the *Genocide* case in such a prejudicial manner, an innocent bystander may well speculate that the majority in 2004 did not wish to have the *Genocide* case proceed to the merits.

In fairness to the Court, it must be stressed that the procedural constellation and the factual and political circumstances involved in these proceedings make the *Genocide* case rather unique. The ambiguous practice of the political organs of the United Nations with regard to the status of Yugoslavia produced a legally absurd result that did not lend itself to an easy solution by the ICJ.

Finally, it must also be admitted that given the realities of this case, there is hardly any other way the Court could have decided the problem of Yugoslavia's status before the Court in the merits judgment. To be sure, the Court could have disregarded and departed from the 2004 judgment in *Legality of Use of Force* by holding that Yugoslavia's *sui generis* membership entitled Yugoslavia to appear as a party before the Court, or by interpreting Article 35(2) of the Statute in a broader sense than did the 2004 judgment. However, such a decision would have prompted the concern of inconsistent case law and would have undermined the Court's authority. On that score, while the application of the *res judicata* principle was not free from flaws, it was a sound, common-sense decision and certainly the lesser evil than a decision that would have been in marked contradiction to a previous judgment. Likewise, while from the strictly legal point of view, it would have been tenable for the Court to annul its 1996 preliminary objections judgment and decline jurisdiction in 2007, such a decision would not have been a realistic alternative in terms of legal policy. After almost 15 years of proceedings, a judgment of the Court annulling its 1996 judgment and rejecting Bosnia and Herzegovina's application on the ground that the FRY lacked access to the Court, no doubt would have caused a decline in the Court's credibility not just within the community of international lawyers but also in the general public. Despite all its shortcomings, the solution presented by the ICJ in the jurisdictional part of the merits judgment is a viable compromise that has paved the way for the Court to address the real issues at dispute in the *Genocide* case.