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AN AGREEMENT AS A BASIS OF THE COMPETENCE OF THE INTERNATIONAL COURT OF JUSTICE IN DISPUTES OF THE FEDERAL REPUBLIC OF YUGOSLAVIA V. MEMBER STATES OF NATO

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Abstract. *In this text, the author analyzes the effect of the agreement to which, as a basis of the competence of the International Court of Justice, the Federal Republic has referred to in procedures against ten member states of NATO. The primary purpose of this analysis is to identify the effects resulting from the application of the consensuality principle both the effects of its particular expressions – mutuality and reciprocity principle – and the consensuality test effects contained in the provisions of Article 36.*

Key words: *agreement, International Court of Justice, consensuality principle, mutuality principle, reciprocity principle.*

1. In his independent opinion in the *Anglo-Iran Oil Co, Case*, dating way back in 1952, the Judge Alvarez would ascertain:

"All disputes between the states must be resolved in a pacific way and all the rights recognized by the international law must be respected and must avail of sanctions... As far as the protection of these rights is concerned, it is not necessary to establish whether the prosecutor or the state against which the demand is initiated has accepted or not the competence of the Court or whether they are or not the members of the United Nations. Today, any state in the world is a member of the international community or rather the international society; they are all subordinated to the international law and have the rights and obligations the law prescribes. Unsustainable is the assumption that a state which is not a member of the United Nations or which has not accepted the competence of the Court would be allowed to violate the rights of another state without bringing it before the Court; or vice versa, that a state which is a member of the United Nations would be allowed to act in that way regarding to a state nonmember ... Therefore, the responsible state may be brought before the Court without necessary investigation whether it has or

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has not accepted the competence of the Court or whether it has or has not accepted the provisions of Article 36 (2) of its Statute."[1]

If and when this dictum would be estimated from the equity point of view, it could hardly be objected. But, if and when it is estimated from the law point of view, ascertainment that something desirable is in question, but not realistic, is simply unavoidable. And not only unavoidable, but indisputable as well, which is, it must be admitted, a rare case in international law.[2] The international law which has, after all, as is also the case of law in general, "broken free" from the ethics a long time ago and which recognizes only the equity intra legem[3]; bases, to quote the independent opinion of the judge Higgins in the Case Concerning Legality of Use of Force, "competence of the Court – although someone could be sorry for that state of things at the time when we are entering the 21st century – on assent".[4]

As far as the International Court of Justice (hereinafter referred to as "Court") is concerned, it will persistently and consistently underline the consensual character of its competence on any occasion on which its jurisdiction is called into question.[5] In the dispute that has opened a today already large list of over one hundred cases, in *Corfu Channel Case*, it would say:

"Assent of parties in dispute provides the Court with competence."[6]

A couple of years later in the already mentioned Anglo-Iranian Oil Co. Case the Court will conceptually and functionally define the consensuality principle:

"The general rules contained in Article 36 of the Statute... are based on the principle according to which the competence of the Court to consider and decide on the case meritum depends on the will of parties to the dispute. If the parties to the dispute have not vested the Court with the competence pursuant to Article 36, the Court shall not have such competence."[7]

What are the messages of this dictum? The first of them is that the competence of the

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[1] Anglo-Iranian Oil Co. Case (United Kingdom v. Iran) (Preliminary Objection), 22 July, 1952, I.C.J. Reports 1952, p. 132

[2] On the consensuality principle and its effects it produces as per the competence of the Court see: Shabtai Rosenne, The Law and Practice of the International court, 2nd ed., 1985, 292 and *passim*: Fitzmaurice, The Law and the Procedure of the International Court of Justice 1951-1954.

[3] In the North Sea Continental Shelf Case the Court would declare that its decisions are based on the grounds which "lie not beyond, but inside the rules and it is exactly (the principle, author's remark) the rule of the law that requires application of the equity principle." North Sea Continental Shelf Case (Federal Republic of Germany v. Denmark; Federal Republic of Germany v. the Netherlands), Judgement of 20 February, 1969, I.C.J. reports, 1969, paragraph 88.

[4] Case Concerning Legality of Use of Force (Yugoslavia v. Belgium), Order of 2 June, 1999. Text according to http://www.icj.cij.org/icjwww/indocket/iybe/iybeframe.htm. The same source is also for the texts of other judgements of the Court, independent and disagreeing opinions, unless otherwise designated.

[5] Sure, the consensuality principle is not an invention of the Court. As a worked out leading principle it is already encountered in the jurisdiction of the Permanent Court of International Justice which, for example, in the Case Concerning East Carellia says: "In the international law clearly established is the principle that none state is bound to submit its disputes with other states either to mediation or to arbitration or to any other procedure of pacific settlement without its assent", Advisory Opinion, 23 July, 1923, P.C.I.J.S.B. No. 5, p. 27.

[6] Corfu Channel Case (U.K. v. Albania), Preliminary Objection, I.C.J. Reports, 1948, p. 28..

[7] Anglo-Iran Oil Co. Case (United Kingdom v. Iran) (Preliminary Objection), 22 July, 1952, I.C.J. Reports, 1952, pp. 102-13.

Court depends on the will of parties to the dispute. If there is a will of the parties to the dispute to settle that dispute applying to the Court, the Court will be competent to resolve the dispute. If, however, there is no any will, the Court cannot establish its jurisdiction in the dispute. And how shall the existence or nonexistence of the will be established? How to estimate the presence or absence of the so-called subjective or internal element? How else if not through the objective element, through its manifestation. But not whatever, that is, which manifestations, but through definite expressions of will. What are the expressions of will the existence of which points to the Court that the consensuality principle is satisfied in the concrete case? What does make the consensuality test? The answer to these questions is provided – and this could be the second message of this case – by the rules which represent its operationalization and concretization, and which are set forth in Article 36 of the Statute. The third message to which the focus of attention is being switched to on this occasion refers to the effects of application of this principle. If the consesuality test shows that the principle is satisfied, the Court, to cite its words taken from the advisory opinion in *Effect of Award of Compensation Made by the United Nations Administrative Tribunal*, will be able to "dispense justice", by "considering the arguments of the parties, evaluating the evidence provided by them, finding out the facts and establishing the law to be applied in their case."[8]

But, should the test be negative, the Court will not have an opportunity to consider the arguments of the parties to the dispute, to estimate the evidence provided, to find out the facts and to establish the law of competence. The dispute meritum will remain entirely beyond its province. And, thus, the question of possible violation of the internationally legal norms as well.

This message has been clearly formulated by the Court in *Fisheries Jurisdiction Case in which it found out that there was no assent between the parties to the dispute that the case should be subjected to its jurisdiction.*[9] It will be repeated, not referring to, contrary to it custom, its heritage in *Cases Concerning Legality of Use of Force* in all decisions it made as of that June 1999:

"there exists a fundamental difference between the question of accepting the competence of the Court by a state and the conformance of certain acts with the international law; the first requests acceptance; the second question can be approached only when the Court deals with meritum, only after it has established that it is competent and have heard the entire legal argumentation of both parties."[10]

There could be doubt that the same result has thus been pointed to as it was in the case in which this invention became the heritage of jurisprudence. This author is more apt to think of it as a warning that the disputes regarding the use of force, as they are named, and as they are classified by the Court, would remain without the solutions based on the law

[8] Effect of Award of Compensation Made by the United Nations Administrative Tribunal, Advisory Opinion, 13 July, 1954, I.C.J. Reports 1954, p. 56.

[9] Fisheries Jurisdiction Case (Spain v. Canada), Jurisdiction, 4 December, 1998, paragraph 55, Cited after http://www.icj-cij.org/icjwww/indocket/iybe/iybeframe.htm.

[10] Paragraph 47. The identical statement is contained in the decisions of all other cases initiated by FRY against the member states of NATO. Since all ten decisions contain nearly identical opinions on nearly identical questions, it is why the quotations from the decision in the case Yugoslavia v. Belgium are used in this paper. A separate note follows quotations from other decisions.

unless the competence of the Court would not be shown and proved. Sure, this is an exceptionally complex and voluminous task that by far exceeds the ambitions and possibilities of this text. Everything that is desired here is, from the consensuality point of view, to consider some questions related to the agreements that Yugoslavia has quoted as the basics of the competences of the Court in cases she has initiated against the member states of NATO. But, let us look at them one after the other and let us see what disputes are in fact in question.

2. On 24 March, 1999, North Atlantic Treaty Organization (hereinafter referred to as "NATO") commenced bombing targets in the territory of the Federal Republic of Yugoslavia. As an answer to the "bombing campaign", the Federal Republic of Yugoslavia submitted a Demand for institution of proceedings to the Court Secretariat on April 29, 1999 (the Federal Republic of Yugoslavia v. United States of America, the Federal Republic of Yugoslavia v. United Kingdom, the Federal Republic of Yugoslavia v. France, the Federal Republic of Yugoslavia v. the Federal Republic of Germany, the Federal Republic of Yugoslavia v. Italy, the Federal Republic of Yugoslavia v. Holland, the Federal Republic of Yugoslavia v. Belgium, the Federal Republic of Yugoslavia v. Canada, the Federal Republic of Yugoslavia v. Portugal, the Federal Republic of Yugoslavia v. Spain). In her Demand, the Federal Republic of Yugoslavia would request from the Court to declare each of the states responsible for commitment of certain acts by means of which they violate international law such as:

a) obligation to refrain from using force against any other state by participating in bombing the territories of Yugoslavia;
b) obligation to refrain from interfering in internal affairs of another state by supporting the so-called UCK;
c) obligation to spare civilian population, civilians and civilian premises by participating in attacks on the civil premises;
d) obligation not to perform enemy acts aimed to the cultural monuments, works of arts and shrines which are cultural treasure and spiritual heritage of people by participating in destroying monasteries and cultural monuments;
e) obligation not use prohibited arms, that is, arms that cause unnecessary sufferings by participating in using cluster bombs;
f) obligation not to cause heavy damage to the environment by participating in bombing oil refineries and chemical plants;
g) obligation not to use the prohibited arms and not to cause a long-term damage to health and environment by participating in using arms which contain depleted uranium;
h) obligation to respect the fundamental human rights by not participating in killing civilians, destruction of enterprises, communications, institutions for health care and cultural institutions;
i) obligation to respect freedom of navigation on the international rivers by not participating in destruction of bridges on the international rivers;
j) obligation not to purposely subject a national group to the conditions of life that would bring the group to the physical extermination, on the whole or in part, by participating in the aforementioned activities and particularly by participating in causing heavy damages to the environment and in using depleted uranium.

At the same time, the Federal Republic of Yugoslavia has submitted the Demand for temporary injunctions for protection to be enacted asking from the Court to order the sued states to immediately suspend "performance of acts of using force and ... performing any act which means threat by force or use of force against the Federal Republic of Yugoslavia".

Having heard the parties on May 10 and 11, 1999, the Court made decisions on June 2, 1999, under which it rejected the Demand of Yugoslavia for temporary injunctions in all cases. Prevailing majority of judges[11] were convinced that the Court "is not *prima facie* competent to consider the Demand for institution of proceedings of Yugoslavia".[12]

In the case against Spain and the United States, the Court has established that it

"is not obviously competent to consider the Demand for institution of the proceedings of Yugoslavia ... that because of that it cannot enact any temporary injunction to protect the rights cited therein."

And further:

"within the scope of the consensual competence system, placing on the General List of events for which, it seems, it is safe that the Court would not be able to make a decision on the meritum, would not, undoubtedly, contribute to the correct performance of justice".[13]

Therefore, the Court,

"Prescribes withdrawal of the case from the List."[14]

In the remaining eight cases the Court has concluded:

"that findings to which it ... has come in this proceedings in no way prejudice the question of competence of the Court to deal with the meritum of the case or any question on permission of the Demand for institution of proceedings or on the meritum itself".

and that

"they do not influence the rights of the governments of Yugoslavia and Belgium to submit arguments in connection with these questions".[15]

The decisions by means of which the Court has rejected the Yugoslav Demand for enacting temporary injunctions of protection are a unique precedent. The Court has, for the first time, referred to the nonexistence of *prima facie* competence with reference to each of the bases of competence cited by Yugoslavia both in the Demand for institution of proceedings and in verbal discussion before the Court. And the cited bases of competence are as follow:

a) statement of acceptance of optional clauses pursuant to Article 36.2 of the Court

[11] "Results" of voting of judges were, to use sports terminology, as follows: 14 to 2 in the case against Spain, 13 to 3 in the case of Italy, 13 to 3 in the Case of France, Germany, Great Britain and USA, 12 to 4 in the case of Belgium and Canada and 11 to 4 in the case of Holland and Portugal. Judges Shi and Vereshchetin voted against the decision of the majority of judges in all ten cases. The presiding Weeramantry voted against the Court decisions in the cases of Belgium, Holland, Portugal and Spain. As it has become usual practice, considerable number of judges has decided to add their separate and disagreeing opinions. Separate opinions have also been added by Oda, Higgins, Parra-Aranguren and Koojimans and that disagreeing by Weeramantry, the chairman, and the judges Shi and Vereshchetin and by the ad hoc judge Kreća.

[12] See paragraph 45 of the decision in the case of Belgium.

[13] Paragraph 20 of the Decision on the Case of FRY v. USA.

[14] Ibid., paragraph 34.

[15] Paragraph 46.

Statute in dispute against Belgium, Canada, Holland, Portugal, Spain and Great Britain;

b) Article IX of the Convention on Preventing and Punishing Crimes of Genocide in all Disputes;
c) Article 36.5 of the Rules on the Procedure of the Court (the so-called *forum prorogatum*) in the case against France, Germany, Italy and USA);
d) Article 4 of the Convention on Conciliation, on Court Hearing and Arbitration signed by Belgium and the Kingdom of Yugoslavia on 25 March, 1930, and Article 4 of the Agreement on Court Hearing, Arbitration and Conciliation signed by Holland and the Kingdom of Yugoslavia on 11 March, 1931, in the Hague.[16]
e) Article 36, paragraph 1.
f) If the consensuality test, contained in Article 36 of the Statute, is taken as a starting point, a conclusion can be drawn that the investigation dealing with the agreement as a basis of legal competence is limited to the basis under b) and d), that is, to "all cases provided ... under agreements and conventions in effect."

That it is, therefore, limited to the Convention on Preventing and Punishing the Crimes of Genocide and bilateral agreements on the settlement of disputes with Belgium and Holland. An in depth analysis, however, will show that one more agreement, the agreement the effect of which could be proved to be of crucial importance for the competence of the Court, the Charter of the United Nations, more precisely the Court Statute which is its integral part, is in the province of investigation. Simply because the Statute is an indispensable starting and the closing basis, expressed in which is the will of the parties to entrust settlement of the dispute to the Court, the basis resting upon which are, and which is assumes by all other bases. The basis to which the analysis of each basis of competence enumerated in Article 36 brings us back to. Sure, to which each of the basis of competence Yugoslavia has referred to in her Demands for institution of the proceedings bring us back to as well.

3. That connection is probably the least noticeable when the statement on accepting optional clause is in question. Particularly if the effect of the optional clause to the competence of the Court is assessed according to the letter of its decisions in cases *Legality to use force*. And the internal logics of these decisions probably even more. Here's the point.

The Court, in search of an answer to the question whether Article 36.2 can be a basis for making provisional measures effective, starts by ascertaining that the parties to the dispute have deposited statements on accepting compulsory competences of the Court of parties to the dispute. Then, it gets us acquainted with the letter of statements and, straight away, goes to investigating the effects resulting in each case from the reciprocity principle.

Let us trigger our memory that the reciprocity principle effect question in the elective system or, as the Court uses to say, optional clause is one of those questions which are not already for a long time the source of dilemmas. It is, now seems definitely, resolved al-

[16] For detailed description of facts relevant to the dispute, see AJIL Vol. 93 No. 4, October, 1999, International decision, pp. 928-933.

ready in *Interhandel Case*:

"Reciprocity in the case of statement on accepting compulsory competence of the Court enables one side to refer to the reservation to that acceptance which it has not put in its own statement, but which the other party has put in its statement ... The reciprocity enables the state whose acceptance of competence of the Court is wider to rely upon the reservation to the acceptance which has been put by the other party. It is here where the reciprocity effect ends. It cannot be referred to by the state ... which refers to the limitation which the other party ... has not included in its statement."[17]

The reciprocity test application will show in the case Yugoslavia v. Great Britain and in the case Yugoslavia v. Spain that the statements of these states are the statements that entrust the Court with competence in narrower sense. They, among other things, contain the reservation ratione materiae as well, which excludes the competence of the Court. Paragraph 25 of the Decision Yugoslavia v. Great Britain reads:

"since Yugoslavia has deposited its statement on the acceptance of compulsory competence with the Secretary-General on 26 April, 1999, and filed the Demand for institution of the proceedings on 29 April, 1999, it is beyond disputes that the conditions for exclusion of the competence of the Court provided for in the second part of paragraph (iii) of the first paragraph of the statement of Great Britain have been met in this case."[18]

In the remaining four cases the Court will find that it is the statement of Yugoslavia that entrusts the competence in the narrower scope because it contains the *ratione temporis* reservation:

"Since Yugoslavia has accepted the competence of the Court *ratione temporis* only in connection with, on the one hand, disputes arising or which may arise after signing of her statement and, on the other hand, those referring to the situations and facts resulting after that signing... to assess whether the Court is competent in this dispute (it is, author's remark) enough to decide whether, according to the letter of the text of the statement, the dispute submitted to the Court "had arisen" prior to or "arose" after 25 April, 1999, when the statement had been signed." That reservation, the Court will find out after reformulating the subject of the dispute, acts so that it excludes the competence of the Court. Thus, the Court has lined up with the argumentation, regarding the reciprocity principle effect, pointed out by Holland, Canada and Portugal. But, surely, it did not approve, in that stage of the proceedings, the other direction of the argumentation offered, pointed out not only by all the states against which Yugoslavia had referred to the optional clause, but all ten sued states. Namely, it did not accept the standpoint that its competence could not be based on Article 36.2 of the Statute simply because the statement of Yugoslavia, which was not a member party to the Statute, was not valid. In other words, it did not accept the assertion that the first and previous condition for establishment of the competence, the mutuality principle, was not satisfied. But, has it rejected that argument? Not explicitly, we would say.

For, after paragraph 30 in which the Court, summing up the results of the reciprocity principle effects, concludes that "from the aforementioned follows that statements submitted by the parties according to Article 36, paragraph 2, of the Statute are not a basis

[17] I.C.J. Reports, 1959, p. 23.

[18] Nearly the same formulation is contained in paragraph 25 of the Decision of Yugoslavia v. Spain.

upon which the competence of the Court can *prima facie* be established in this case", follows paragraph 31 in which it concludes that the states sued have denied the validity of the Yugoslav statement. The Court has in short summarized the already abundantly argumented assertions that such state of things has resulted from the fact that the Federal Republic of Yugoslavia is not a successor of the SFRY as regards the membership in the United Nations that she has not approached the Court in a manner prescribed for non-members. Since the Court concludes in paragraph 32 that the Federal Republic of Yugoslavia has rejected these quotations, it will state in paragraph 33 that "in the light of its findings from paragraph 30 above there is no need for the Court to consider this question for the purpose of rendering a decision whether it can or cannot make provisional measures".

In his separate opinion, the judge Kooimans, who has, this is to be stressed, voted with the majority of judges, will strongly criticize this conclusion of the Court:

"With due respects, I find this reasoning embarrassing, if not illogical and inconsistent. How can the Court say that it is not necessary to consider the question of validity of the statement of Yugoslavia, concluding at the same time that that statement, taken together with the statement of the accused, cannot make grounds for competence? That conclusion is probably based on the assumption of validity of the Yugoslav statement, at least at this stage of the proceedings. If that assumption does not exist, the Court had at least to say that it accepts the validity exclusively *arguendo since*, and then, even if it were valid, could not transfer the competence to the Court because of the limitation *ratione temporis* in the statement of the accused."

This author is inclined to partially accept the critical standpoint of the judge Kooimans. Article 36.2 begins as follows:

"The parties to the Statue may at any moment..."

assumes, and the jurisprudence of the Court proves it without exception, that the first things the Court has to do, in order to satisfy the consensuality request, is to establish whether its first element, the element of mutuality, has been met. Namely, the Court must show that the parties to the dispute have generally accepted the obligation of resolving the dispute by applying to the Court. It must demonstrate that there is an agreement between them, the agreement which is not and cannot be expressed in the statement on optional clause which is according to its legal nature a one-sided statement of will, but is expressed in the agreement, the Statute, the parties to which they are. In *Right of Passage Case* the Court itself speaks about

"consensual obligation that is a basis of the Optional Clause"

To work it out in details in *Case Concerning the Land and Maritime Boundary Between Cameroon and Nigeria*. Referring to the aforementioned cited provisions, the Court would ascertain:

"The conclusions thus drawn by the Court in 1957 reflect the very essence of the Optional Clause for acceptance of the compulsory competence of the Court. Every state the member party to the Statute, approving the competence of the Court according to Article 36, paragraph 2, accepts the competence in relations with the states that have previously agreed to this clause. At the same time, it provides a permanent offer to other states the member parties to the Statute that have not deposited their statements on acceptance yet. As of the day one of these states accepts the offer by depositing on its side a statement on the acceptance, the consensual obligation has been established and there is no other

condition to be met."[19]

Whatever the objections on the account of the Court are, they, according to this author, do not make a satisfactory basis in the case of the Court to deny the validity of the old Latin dictum *jura novit curia*. Therefore it seems justified to conclude that the reasoning of the Court is based on the assumption of the validity of the Yugoslav statement, that is, on the assumption that SRY is a member party to the Statute of the Court. In other words, that the aforementioned parts of the decisions of the Court in the six cases in which Article 36.2 has been referred to, at least, imply the standpoint of the Court that the mutuality condition in these cases has been satisfied. Of course, to the extent to which it was necessary in the decision-making procedure on the temporary injunctions.

But, whether the standpoint of the judge Kooimans is correct and, for example, that of Oda that Yugoslavia is not a member of the United Nations, thus also not the member of the Statute[20], or the standpoint of the *ad hoc* judge Kreća, which this author approves as well, there is a joint starting attitude in view of which they all agree: the consensuality principle brings us back to the Statute also in the case of optional clause.

4. It seems to this author that the Court did not have much of the choice when the mutuality condition was in question. For, to remember, it is the same Court which, only three years earlier, stated in *Case Concerning Application of the Convention of the Prevention of Punishment of the Crime of Genocide* that

"the status of Yugoslavia as a member party to the Convention on Genocide was not denied"[21]

The Conventions on Genocide whose

"Article XI ... opens to every 'member of the United Nations'".[22]

And indeed, none of the states accused tried to deny the accuser the status of the contracting party to the Convention on Genocide. A group of states will simply be satisfied to eliminate the effect of its Article IX, contained in which is a compromissary clause, referring to the reservations they have set to that Article. To be more precise, the United States and Spain are in question. Having established that the said states have really set the reservations to Article IX, the Court, which in the *Case Concerning Reservations to the Convention on Genocide*, has distinctly come out in favour of the allowableness of this type of reservations[23] was left nothing else but to conclude "that the Convention on Genocide does not forbid reservations; ... that Yugoslavia did not object setting of reservations by the United States to Article IX; ...that the said reservation acts so that it excludes this Article from the provisions of the Convention in effect between the parties"[24] and to conclude "that as a consequence thereof, Article IX of the Convention on Genocide cannot be a basis of competence of the Court to consider the dispute between Yugoslavia and the

[19] Cameroon v. Nigeria (Preliminary Objections), paragraph 25. Quoted according to http.
[20] See a separate opinion of the judge Oda, II Status of the Federal Republic of Yugoslavia, Previous question.
[21] Case concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia-Herzegovina v. Yugoslavia), Preliminary Objections, Judgement 11 July, 1996, paragraph 17.
[22] Ibiden, paragraph 19.
[23] Case Concerning Reservations to the Convention on Genocide (Advisory Opinion), I.C.J. Reports 1951, p. 15.
[24] Paragraph 75 of the decision in the case Yugoslavia v. USA.

United States which supposedly is subject to its provisions."[25]

The remaining states will either recognize to Yugoslavia the status of the contracting party to the Convention[26] or will not at all come out on that question.[27] They will direct the focus of their argumentation so as to prove that Yugoslavia has not submitted essential evidence that would back up the assertion that the acts she imputes to the states accused are not within the province of the Convention because she did not succeed in demonstrating the existence of the subjective element of this criminal act, the intention. The Court will accept their argumentation. That strategy of agreement will be commenced by the assertion "that the Court, in order to establish, even *prima facie*, whether there is a dispute pursuant to Article IX of the Convention on Genocide, cannot limit itself to conclude that one of the contracting parties claims that the Convention is applied and the other to deny it; and ... that in this case the Court has to establish whether the violations of the Convention cited by Yugoslavia are such that they could be subjected to the provisions of this instrument and whether, as a consequence thereof, this dispute is such that the Court is competent ratione materie to consider it according to Article IX."[28]

Having concluded "that threat by force or use of force against a state cannot be deemed by itself an act of genocide pursuant to Article II of the Convention on Genocide; and since, according to the opinion of the Court, bombardment, which is the subject of the Demand for institution of the proceedings of Yugoslavia in this stage of the proceedings 'does not seem to contain the element of intention, towards the group as such,[29] which is required by the above cited provision'"[30],

The Court will, without much troubles, conclude that "it is not in position in this phase of the proceedings to establish that the acts which Yugoslavia ascribes to the accused can be subjected to the provisions of the Convention on Genocide; and since Article IX of the Convention, which Yugoslavia refers to, cannot, in connection with this, be a basis based upon which the competence of the Court *prima facie* could be grounded in this case."[31]

This viewpoint of the Court underwent a fiercely worded criticism by the disagreeing judges and much else could not be added to this criticism. Even the judge Parra-Arangueren will in his separate opinion say:

"Article IX of the Convention on Genocide is the only *prima facie* basis of the competence of the Court in this case. Therefore, the only temporary injunctions it can make are those directed to the protection of rights of the accuser under the Convention on Genocide."

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[25] Ibid., paragraph 76.

[26] Thus, Holland will, for example, ascertain that although she is not a contracting party to the Convention on the Succession of States in the International Agreements, she recognises to Yugoslavia the status of a contracting party to the Convention on Genocide due to a particular character of this Convention. See Yugoslavia v. Holland, Public Sitting, 10 May, 1999.

[27] See, for example, Yugoslavia v. Canada, Public Sitting, 10 May, 1999. That approach, but as an alternative, will be approved by Portugal as well. She will, as a first thing, ascertain that the Convention is not effective between the parties because at the moment when Yugoslavia submitted the Demand for institution of the proceedings Portugal was not a contracting party to the Convention. See Yugoslavia v. Portugal, Public Sitting 11 May, 1999.

[28] Paragraph 38 of the Decision in the case Yugoslavia v. Belgium.

[29] Paragraph 7.

[30] Ibid., paragraph 39.

[31] Ibid., paragraph 40.

5. Finally, the Federal Republic of Yugoslavia has also in the case against Belgium and in the case against Holland referred to the bilateral agreements concluded by the Kingdom of Yugoslavia at the Convention on Conciliation, on the judicial hearing and on the arbitration between the Kingdom of Yugoslavia and Belgium signed on 25 March, 1930, in Belgrade[32] and the Agreement on Judicial Hearing, Arbitration and Conciliation between the Kingdom of Yugoslavia and Holland signed in the Hague on 11 March, 1931.[33] Yugoslavia has pointed out these two bases in the "Supplement to the Demand" in the second part of the hearing that will, according to the letter of the Decision, compel the Court to take note of this basis, but not to consider it. In the identically formulated paragraphs 44 the decision of the Court will be:

"Whereas reference of a party to the new basis of competence in the second round of the hearing on the Demand for provisional measures has never appeared in the Court practice; whereas that such activity in this late phase, if not accepted by the other party, seriously endangers the principle of fair procedure and the principle of correct exercise of justice; and ... as a consequence thereof, the Court cannot, for the purpose of making a decision whether it can or cannot take provisional measures in this case, take into consideration the new basis of competence that Yugoslavia tried to cite on 12 May, 1999."

That viewpoint will meet with the disapproval of the disagreeing judge Vereschhetin. He will ascertain:

"The legitimate concern of the Court to respect the 'principle of fair procedure and correct performance of justice' cannot be expanded to the measure to exclude *a priori* additional basis of competence, only because the sued state has not been given enough time to prepare counterarguments. As it is known, it cannot be deemed normal to cite the new basis of competence in the second phase of the hearing. Nevertheless, the sued states have been given the possibility to present their counterarguments before the Court and they have made use of that possibility providing different observations and objections regarding the new basis of competence. They could, if necessary, request extension of the hearing."

That what the Court, according to him, should have done was to subject the cited additional bases of competence to the test of their acceptability as the bases of competence for temporary injunctions. The test, which, starting from Article 38 of the Rules on the Court Proceedings, has crystallized itself in its jurisprudence:

"It should be noted that Yugoslavia, submitting the Demand for initiation of the proceedings, has reserved the right to change and supplement it. Such reservation is, together with the initiation of the proceedings, a standard one and, with reference to the basic competences, the Court has been interpreting it as a permission for the basis of competence to be added, under the condition that the prosecutor makes it plain that he intends to persist on that basis and, also, under the condition that the result shall not be a transformation of the dispute, that under the Demand for initiation of the proceedings has been

[32] The King Alexander passed the Law on ratification of this Convention on 30 June, 1930. The text of the Law and the Convention is according to the Proceedings of International Agreements 1930 II, Agreements and conventions proclaimed in 1930, Book II, pp. 849-864.

[33] The King Alexander passed the Law on Ratification on 31 July, 1931. The text of the Agreement according to the Proceedings of International Agreements 1932, Agreements and conventions were proclaimed in 1932, pp. 67-75.

brought before the Court, into another dispute, different in character."

The test which, according to him, has been fully satisfied in these cases. That conclusion, with more elaborated arguments, will also be made by the *ad hoc* judge Kreća.[34]

In the course of the hearing, Belgium and Holland have presented arguments that are intended not only to show that Yugoslavia has, by pointing to these bases in the late phase of the procedure, violated the subject principles and that, therefore, they should not be taken into consideration at this stage of the proceedings, but also to show and prove that the competence of the Court cannot at all be based upon them. The arguments presented are somewhat similar, but considerably different, since the mentioned agreements contain different stipulations. And those differences are such that they dictate separate consideration of these two cases. May we be allowed, first, to present somes notes in the case of Holland.

Holland will, in the oral hearing, ascertain that the Agreement on Judicial Hearing, Arbitration and Conciliation does not create a basis for the competence of the Court simply because that Agreement is not effective between the parties to the dispute. Holland is not, as her agents will point as the first evidence, a contracting party to the Vienna Convention on succession of states in the international agreements of 1978, so that the Federal Republic of Yugoslavia could not on the basis of its provisions "inherit" the status of the contracting party. In addition, Holland will further cite, in favour of her assertion, that this Agreement does not fall into the group of bilateral agreements on the term extension of which the two parties have reached an agreement.[35] It is beyond the knowledge of this author whether this assertion is correect or not. It should be checked by an insight into the official correspondence of the two states. Thefore, the following comments will be based upon the assumption that this Agreement falls into the group of agreements which are in effect in the relations between the two states. After all, the thrid argument to be pointed out by Holland has been so devised that she supposes their validity. And it is that Yugoslavia has not met procedural prerequisites provided for under the Agreement to refer to the Court. The only violation of the procedure to which Holland has concretely pointed to is that Yugoslavia has not respected the term of one month between the notice that there is a desire to subject the dispute to the judiciary settlement and the lodging of the "complaint" to the Court required under the Agreement.

The text of the Agreement seems to have not left much choice to Holland, according to this autor. Truly, its Article 2 provides for that "All disputes, of whatever nature they are, the subject of which would be the law recognized by one of the High Contracting Parties, and which would be denied by the other party, and which could not be settled by ordinary dimplomatic procedures" shall be submitted to the Court.

It seems that possible proving that it was really a dispute that could not be settled by the diplomaticits way does not fall into the sphere of unfeasible. On the contrary. As for the proceedings before the Permanent Commission, that is, Permanent International Commision , it is provided for under Article 3 as a proceedings the parties can, but need not resort to: "Prior to any proceedings before the Permanent Court of Intenrtional Justice and prior to any arbitration proceedings, the dispute may be, according to mutual agreement between the

[34] See Part IV Additional bases of competence of his disagreeing opinion.
[35] Paragraph 43 of the Decision in the case of Yugoslavia v. Holland.

parties, submitted for conciliation to the Permanent Interntional Commision, called Permanent Conciliation Commission, established under this Agreement."

Consequently, there remains Article 4 of the Agreement which reads:

"If, in case of a dispute provided for under Article 2, both parties have not referred to the Permanent Conciliation Commission, or if this has not managed to consiliate the parties, the dispute will be, by mutual consent, submitted either to the Permanent Court of International Justice, which will be resolved under the conditions and according to the procedure provided for under its Statute or to the Arbitration Court ...

For want of a consent between the parties on the choice of the judiciary power, on expressions of compromise, or, in case of arbitartion proceedings, on appointment of arbitrars, one or the other between them, after the one-month notice, shall have the rights to directly submit the dispute, by means of a compalint, before the Permanent Court of International Justice."

Paragraph 2 of this Article, quite clearly, provides grounds to Holland to object that Yugoslavia has not respected the term of one month between the notice that there is a desire to subject the dispute to the judiciary settlement and the lodging of the "complaint" to the Court required under the Agreement. That objection will not surprise the Yugoslav party. Expecting it, doubtlessly, she will, at the oral hearing, immediately after pointng to the additional basis, refer to the "principle that the Court should not punish the procedural omission that can easily be corrected".

It is the principle that was already well established in the jurisprudence of the Permanent Court of International Justice. In the case of *Mavrommatis Palestine Concessions* the following standpoint can be encountered:

"Even although the grounds upon which the initiation of the preceedings are deffective based upon the said reason, that is not an adequate reason to reject the prosecutor's charges. The Court, the competence of which is international, is not bound to attach the same degree of imporatnce to the questions of form that they may have in the domestic law. Consequently, if the demand was hasty because the Agreement from Lausanne had not been ratified yet, now that corcumstance was covered by the subsequently deposited necessary ratification instruments."[36]

In Certain German Interests in Polish Upper Silesia we will notice the same principle:

"Even though, according to Article 23, the existence of a certain dispute is necessary, that condition can be satisfied at any moment by the unilateral action of the prosecutor. The Court cannot allow to be hindered by an ordinary lack of form, the elimination of which exclusively depends upon the interested party."[37]

As for the Court, it has, referring to the just quoted heritage of his functional predecessor recently applied the mentioned principle in the already quoted Genocide Case:

"In this case, even though the parties, each of which was bound by the Convention at the moment when the demand for institution of the proceedings was submitted, were found out to be mutually bound beginning from 14 December, 1995, the Court could not reject its competence upon those grounds, since Bosnia and Herzegovina can at any moment submit a new demand, identical to this, and which in that case cannot be called into

[36] Mavromatis Palestine Concessions. P. C. I. J., Series A, No. 2. p. 34.
[37] Certain German Interests in Polish Upper Silesia, P. C. I. J., Series a, No. 6, p. 14.

question."[38]

But, may we switch the reader's focus of attention to only one dictum of the Court belonging to its heritage, the dictum in Military and Paramilitary Activities in and against Nicaragua:

"It would be senseless to require from Nicaragua to bring charges based upon the agreement that fully empowers her to do that."[39]

Really, would not that be senseless to require from the Federal Republic of Yugoslavia, more that one year after the Demand for institution of the proceedings has been submitted, to bring new charges based upon the Agreement the first article of which reads:

"High Contracting Parties shall be bound in no case to request settlement of disputes and conflicts by other than pacific ways and only according to the methods provided for under this Agreement, that might arise between the Kingdom of Yugoslavia and Holland and which could not be settled, over the suitable period, by ordinary diplomatic actions."

And when it is, partly thanks to the procedure on provisional measures, quite clear that

"lack of agreement between the parties on the choice of the judicial power", is in question, when, according to the letter of the very Agreement each of the parties is authorised to institute the proceedings before the Court.

The said principle will also produce the same effect in the case of Belgium, sure, if pointed out by her. Article 6 of the Convention allows her to rely upon it in the next stage of the proceedings:

"In the lack of agreement between the parties on the compromise provided for in the previous article or if the elective judges have not been appointed, according to the notice made three months in advance, one or the other party shall have the possibility, by means of an application, to bring the debatable question directly before the Permanent International Court."

But her objection was worded differently, wider. At the hearing, Belgium would say

"that, according to the letter of Convention (of 1930, author's remark), referring to P.C.I.J. is a subsidiary remedy", and ... that Yugoslavia 'has failed to exhaust previous procedures the exhaustion of which is a necessary condition to recourse to P.C.I.J.'". [40]

However, it is hard to see what made Belgium to ascertain that reference to the Court is a "subsidiary remedy" when the subject Article 4 reads:

"All debatable questions, according to which the parties would deny each other a certain right, will be submitted to the Permanent International Court for judgement, unless the parties agree, pursuant to the below mentioned provisions, that they will have recourse to the court of choice.

Sure that the above discussed debatable questions particularly include those questions which are mentioned in Article 36 of the Statute of the Permanent International Court."

After all, to which procedure the Belgian objection of nonexhausted previous procedures could refer? If provision of Article 1 which says that "Debatable questions of any kind that would arise between the High Contracting Parties and which could not be settled

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[38] Paragraph 26.

[39] Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America) I. C. J. Reports, 1984, pp. 428-429, para. 83.

[40] Paragraph 43 of the Decision.

by the diplomatic way" is thought of, there we would be satisfied to repeat the conclusion stated when it comes to the similar provision in the Convention with Holland.[41]

Also, there is little likelihood that it is anything more valid if conciliation were thought of. Because the relevant Article 7 could hardly be interpreted so as to provide conciliation as a procedure which compulsory precedes the judiciary settlement of disputes:

"As for the debatable questions provided for under Article 4, prior to any proceedings before the Permanent International Court, or prior to any arbitration proceedings, the parties will be able, by mutual agreement, to have recourse to conciliation provided for under this Convention."

The provision which in French reads: "les Parties pourront, d'un commun accord, recourir à la procédure de conciliation" cannot be interpreted as an obligation to first have recourse to conciliation. It seems that this conclusion – the conclusion that conciliation is not a necessary prerequisite to refer to the Court – necessarily follows from the letter of Article 8 of the Convention:

"All debatable questions between the Parties, except those provided for under Article 4 will compulsory be subjected to the conciliation procedure before they could be made a subject of the arbitration hearing."

Conciliation is, it is crystal clear now, compulsory only in the case an arbitral dispute settlement is intended to be recoursed to. Moreover, Article 8 could easily be interpreted such as that it excludes the disputes subjected to the competence of the Court from the obligation to have recourse to conciliation.

But, the argument of nonexhausting previous procedures is another, alternative direction of the arguments of Belgium. According to the first one, the Court should exclude the Convention as a basis of competence because the "Convention of 1930 entrusts competence not to the Court but to P.C. I. J." ... and (that, author's remark) it claims that Article 37 of the Statute in this case does not produce effects.

To remind. Article 37 of the Statute reads:

"When an agreement or convention in effect provides for presentation of some question before some court that should be established by the League of Nations or before the Permanent Court of International Justice, the question will be brought, if contracting parties to this Statue are in question, before the International Court of Justice."

In *Ambatielos Case the Court will say that provisions of Article 37 "act so that these references to the Permanent Court of International Justice in the agreements must now be interpreted like references to the International Court of Justice*."[42]

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[41] It seems that the dispute as defined under the Demand for institution of the proceedings as well as defined by the Court in its Decision, does not fall into the exceptions from the obligation of the judiciary settlement of disputes provided for under paragraph 2 of this Article: this obligations shall not be applicable to:
debatable questions which have arisen prior to the conclusion of this Convention;
debatable questions referring to the questions left by international law to the exclusive competence of states;
debatable questions bearing on the territorial statute (au statut territorial) of High Contracting Parties."
According to the provisions of paragraph 3, disputes on whether the concrete question falls into the rank of indicated exceptions shall be resolved, not bringing up the essence of the subject, by the Court upon the request of one of the parties.

[42] Ambatielos Case (Greece v. United Kingdom), Preliminary Objection, Judgement 1 July, 1952, I. C. J. Reports 1952, p. 39.

But, the request that the agreement shall expressly refer to the Permanent Court of International Justice is only one of the requests contained in Article 37, but confirmed in the jurisprudence of the Court. There is also a request that there shall be in question agreement in effect between the contracting parties and the request that the parties to the dispute shall be at the same time the contracting parties of the Statute. The assumption is that the intention of Belgium was nonfulfilment of these requests when she ascertained that "Article 37 of the Statute in this case does not produce effects".

This, in the first case, brings us back to the question whether it is here the agreement in effect between the parties and, in the second, to the question whether the Federal Republic of Yugoslavia is the member of the Statute of the Court or not.

6. At the very beginning of this text we have quoted a high moral viewpoint of the judge Alvarez. Quickly and easily, backed by the generous support of judicial heritage, we have shown that development of international law has not taken the direction, to paraphrase the judge Higgins, that some maybe wanted. And, half a century after, the judicial settlement of disputes requires investigation whether the prosecutor and the accused have accepted the competence of the Court.

Using some more efforts and without abundant support by the jurisprudence of the Court, we believe we have shown that not even its another assumption can be fully accepted. We have shown that membership in the United Nations is not irrelevant for the question of the competence of the Court. After all, a significant number of judges have also pointed to this. Both, which is particularly interesting, those who have voted together with the judging majority and the disagreeing *ad hoc* judge Kreća. The judge Oda will at the very beginning of his long separate opinion say:

"The Court is open for contracting parties of its Statute (Article 35). The contracting paties shall only be allowed to bring cases before the Court. From that, in my opinion, follows that the Federal Republic of Yugoslavia, which is not a member of the United Nations and consequently even a contracting party to the Statute of the Court, has no legitimacy before the Court to request institution of the proceedings. The Demand for institution of the proceedings brough by the Federal Republic of Yugoslavia should, therefore, be proclaimed not allowed only for that reason and should be removed form the General List of the Court."

The judge Oda seems to equalize the question of the status of the Federal Republic of Yugoslavia in the United Nations as well as the question of the status with reference to the Statute. To deny his final conclusion, the Federal Republic of Yugoslavia would, moreover, have to prove first of all that she is a member of the United Nations, based upon which she would prove that she is also a contracting party to the Statute.

On his part, the *ad hoc* judge Kreća will say:

"It would be, of course, unreasonable to expect from the Court to make a decision on that whether the Federal Republic of Yugoslavia is a member of the United Nations or not. Such expectation would not be in keeping with the nature of the judiciary function and would mean to go deeper into the sphere of principal political organs of the world's Organization – the Security Council and the General Asembly.

But, I am deeply convinced that the Court should answer the question whether the Federal Republic of Yugoslavia, in the light of the contents of Resolution 47/1 of the General Assembly and the pratice of the world's Organization, can or cannot be

considered a member of the United Nations and, particularly, a contracting party to the Statute of the Court."

After all, it seems to this author that it would be not only unreasonable but, from the positive law point of view, inadmissible as well that the Court shall makle a decision on the question of membership, that is, status of a state in the Organization. But, that which is not only reasonable and from the law point of view permissible, but necessary, is that the Court shall decide on whether the Federal Republic of Yugoslavia is a party to the Statute or not. This author believes that she has shown that that necessity is dictated by the consensuality principle, that undoubtedly principal guiding principle of the Court.

There is little likelihood that the authorization of the Court to interpret the Statute could be called into question. Also, it is the least likely, we would say not at all, that the status of the status of the Federal Republic of Yugoslavia with reference to the Statute could be discussed beyond the contractual law. The thus defined competent law in no way excludes the importance of the decisions made within the United Nations. But it, surely, states precisely their role in the proceedings in which the Court "dispenses justice" in the way that it should "consider arguments of the parties, estimate evidence they have presented to it, establish the facts and stipulate the law to be applied to them".[43]

And that is the role of the source of evidence.

At the same time, defining the question of the status of the Federal Republic of Yugoslavia as a key and starting one would enable to create a complete structure of arguments within which that not debatable (status of the Federal Republic of Yugoslavia with reference to the Convention on Preventing and Punishing Crimes of Genocide, for example) may also appear as evidence to be presented by the states sued and the Court.

UGOVOR KAO OSNOV NADLEŽNOSTI U SPOROVIMA SR JUGOSLAVIJE PROTIV DRŽAVA ČLANICA NATO

Vesna Knežević-Predić

Autor u ovom tekstu analizira dejstvo ugovora na koje se, kao osnov nadležnosti Medjunarodnog suda pravde, SR Jugoslavija pozvala u postupcima protiv deset država članica NATO. Prevashodni cilj te analize je identifikacija efekata koje proizvodi primena načela konsensualnosti i to kako efekata njegovih posebnih izraza – načela uzajamnosti i reciprociteta – tako i efekata testa konsensualnosti koji je sadržan u odredbama člana 36.

Ključne reči: *ugovor, Medjunarodni sud pravde, načelo konsensualnosti, načelo uzajamnosti, načelo reciprociteta*

[43] Effect of Award of Compensation Made by United Nations Administrative Tribunal, Advisory Opinion, 13 July 1954, I. C. J. Reports 1954, p. 56.