DISSENTING OPINION OF JUDGE SKOTNIKOV

1. In my view, the Court should have upheld the first preliminary objection submitted by Serbia in so far as it relates to the capacity of the Respondent to participate in the proceedings instituted by Croatia. Therefore, I voted against paragraph 1 of the operative clause.

I disagree with the Court's reasoning and its conclusion that Serbia's lack of *jus standi* at the time of institution of the proceedings has been cured by its subsequent admission to the United Nations.

The *Mavrommatis* jurisprudence provides for an exception to the general rule that the jurisdiction of the Court must be assessed on the date of the institution of the proceedings. That jurisprudence deals exclusively with defects related to consent of the parties *(Mavrommatis Palestine Concessions, Judgment No. 2, 1924, P.C.I.J., Series A, No. 2)*. Such jurisdictional defects, if they can be easily cured by subsequent action of the applicant (or a respondent who is willing to litigate), may be disregarded by the Court on the grounds of judicial economy.

Nevertheless, the Judgment treats the *Mavrommatis* exception as applicable to any defect, including the absence of the right of a party to appear before the Court. That right, however, is not a matter of consent. The question of the right of a party to appear before the Court precedes the question of whether the Court has jurisdiction, which is a matter of consent (see, for example, *Legality of Use of Force (Serbia and Montenegro* v. *Belgium), Preliminary Objections, Judgment, I.C.J. Reports 2004 (I)*, pp. 298-299, para. 46).

Accordingly, the absence of a right to appear before the Court is not a defect capable of being cured by applying the *Mavrommatis* jurisprudence.

2. I agree with the Court's conclusion that Serbia was party to the Genocide Convention at the time of filing of the Application. For that reason I voted in favour of paragraph 2 of the operative clause.

3. However, this Convention, as the Court established in its *Legality of Use of Force* Judgments, is not a treaty in force in the sense of Article 35, paragraph 2, of the Statute of the Court (see, for example, *ibid.*, pp. 323-324, paras. 113-114). Therefore it is not capable of giving access to the Court to a party which is not a Member of the United Nations at the time the proceedings are instituted. Accordingly, I voted against the Court's conclusion in paragraph 3 of the operative clause that it has jurisdiction to entertain this case.

4. Even if I had shared the view taken by the Court in paragraph 3 of the operative clause, I would have voted against paragraph 4.

Having found that the respondent State became a party to the Genocide Convention as of 27 April 1992 (the date on which the FRY came into existence), the Court has, in my opinion, erred in leaving open until the merits stage the question raised by Serbia in its second preliminary objection as to whether the Court has jurisdiction to examine facts or events which occurred prior to that date.

In fact, Serbia, in its second preliminary objection, puts forward two contentions. First, that the Court has no jurisdiction under Article IX of the Genocide Convention with regard to the events that took place prior to 27 April 1992. Second, that if there is jurisdiction, it cannot be exercised in respect of the events which occurred prior to that date. The Court notes in this connection that "[a] distinction between these two kinds of objections [to jurisdiction and admissibility] is well recognized in the practice of the Court" (Judgment, para. 120). The Court makes it clear that an objection to admissibility "consists in the contention that there exists a legal reason, even when there is jurisdiction, why the Court should decline to hear the case" (*ibid.*, para. 120). If the Court has no jurisdiction, it is evident that the issue of the existence or non-existence of a different legal reason not to hear the case becomes moot. Nevertheless, defying its own reasoning and departing from its case law, the Court concludes that the issue of jurisdiction in respect of events prior to 27 April 1992 is "inseparable" from the issue of admissibility, which, according to the Court, involves questions of attribution to the Respondent of the facts in the period preceding that date (*ibid.*, para. 129).

However, the admissibility question raised by Serbia can become relevant only if the Court has jurisdiction to examine these facts. The question of jurisdiction must be answered by the Court first. Only if the answer is in the affirmative can the Court, in the exercise of its jurisdiction under Article IX of the Genocide Convention, decide whether it can address the events occurring before the FRY came into existence, including questions related to attribution of responsibility.

The Court explains its reluctance to tackle the issue of jurisdiction as a preliminary one by stating that "[i]n order to be in a position to make any findings on each of these issues [jurisdiction and admissibility], the Court will need to have more elements before it" (*ibid.*, para. 129). I fail to see what element is lacking in respect of the issue of jurisdiction. The Court has found that the respondent State acquired the status of party to the Genocide Convention, by a process that is to be regarded as succession (*ibid.*, paras. 110 to 117), on 27 April 1992, the date on which it came into existence. It follows that the Court has no jurisdiction to examine any facts or events which occurred prior to the date on which the obligations of the Convention became binding on the Respondent.

The Court's insistence that the issues of jurisdiction and admissibility

are "inseparable" suggests that the issue of attribution of responsibility could be considered together with the issue of jurisdiction and influence the Court's decision on the latter. But responsibility under the general rules of State responsibility, even if established, cannot mutate into the jurisdiction of the Court, which, unlike State responsibility, is based on consent.

5. I voted against paragraph 5 of the operative clause, since I do not agree with the Court's conclusion that it has jurisdiction to entertain this case.

(Signed) Leonid SKOTNIKOV.