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# Res Judicata in the ICJ's Genocide Case: Implications for Other Courts and Tribunals?

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*Abstract:* The International Court of Justice's ("ICJ") 2007 Judgment in the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* case ("*Genocide* case") has, perhaps predictably, already attracted significant attention from the academic community. Much of this attention has focused on the merits of the judgment, but one commentator has suggested that the *Genocide* case will be remembered mostly "for the wider impact it will have on issues of *res judicata* and evidence." While the important evidentiary issues in the *Genocide* case have started to generate their own commentary, the issue of *res judicata* has received less attention. This comment attempts to fill this void by assessing the implications of the *Genocide* case's analysis and use of the doctrine of *res judicata* for other courts and tribunals. It argues that the anomalous factual circumstances of the case, as well as the Court's legal reasoning carefully circumscribed to its particular Statute, severely limit its usefulness for other cases.

## Res Judicata in the ICJ's *Genocide* Case: Implications for Other Courts and Tribunals?

By Michael Ottolenghi\* & Peter Prows\*\*

The International Court of Justice's ("ICJ") 2007 Judgment in the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* case ("Genocide case")<sup>1</sup> has, perhaps predictably, already attracted significant attention from the academic community. Much of this attention has focused on the merits of the judgment, but one commentator has suggested that the *Genocide* case will be remembered mostly "for the wider impact it will have on issues of *res judicata* and evidence."<sup>2</sup> While the important evidentiary issues in the *Genocide* case have started to generate their own commentary,<sup>3</sup> the issue of *res judicata* has received less attention. This comment attempts to fill this void by assessing the implications of the *Genocide* case's analysis and use of the doctrine of *res judicata* for other courts and tribunals. It argues that the anomalous factual circumstances of the case, as well as the Court's legal reasoning carefully circumscribed to its particular Statute, severely limit its usefulness for other cases.

This comment first gives a concise procedural history of the *Genocide* case, as well as the related *Use of Force* cases, and of the jurisdictional objections that gave rise to the Court's application of *res judicata*. Next, this comment explains the Court's application of *res judicata* in the context of its prior jurisprudence, observing that the *Genocide* case represented a softening of the "triple identity test" that was the hallmark of

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<sup>1</sup> *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Bosn. & Herz. v. Serb. & Mont.) (Judgment of 26 Feb. 2007) ¶115, at <http://www.icj-cij.org> [hereinafter 2007 Judgment].

<sup>2</sup> Pieter H.F. Bekker, *Council Comment: The International Court of Justice's Decision in Bosnia and Herzegovina v. Serbia and Montenegro*, ASIL Newsletter, Spring 2007 at 8.

<sup>3</sup> See, e.g., Andrea Gattini, *Evidentiary Issues in the ICJ's Genocide Judgment*, 5 J. Int'l Crim. Justice 889 (2007).

the Court’s prior practice. This comment then notes that the *Genocide* case did provide one important clarification on the source of *res judicata* in the Court’s jurisprudence, as the Court noted clearly that its application of *res judicata* was based solely on its Statute and did not rely on any “general principle of law.” Finally, this comment concludes with reflections on the relevance—or lack thereof—of the *Genocide* case for other international courts and tribunals when faced with *res judicata* issues and on the importance of appreciating the applicable law, the procedural context, and the facts in each case.

## I.

Bosnia and Herzegovina (“Bosnia”) filed its Application instituting proceedings against the Federal Republic of Yugoslavia (later, Serbia and Montenegro and, finally, simply Serbia) in the *Genocide* case on 20 March 1993 for alleged breaches of, *inter alia*, the 1948 Convention on the Prevention and Punishment of the Crime of Genocide (the “Genocide Convention”), under the compromissory clause contained in Article IX of the Genocide Convention.<sup>4</sup> On the same day, Bosnia requested the Court to indicate provisional measures ordering Serbia to cease and desist from its alleged support for armed attacks in Bosnia and affirming Bosnia’s right to individual and collective self-defense. Serbia, in turn, requested provisional measures in kind.<sup>5</sup> Serbia at the time maintained that it was the legal continuator of the former Socialist Federal Republic of Yugoslavia (“SFRY”) and that, as such, it had inherited the SFRY’s UN Membership and its international obligations, but this contention was opposed by the Security Council and the General Assembly.<sup>6</sup> This political position meant that Serbia did not at that stage

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<sup>4</sup> Article IX of the Genocide Convention provides that: “Disputes between the Contracting Parties relating to the interpretation, application or fulfillment of the present Convention, including those relating to the responsibility of a State for genocide or for any of the other acts enumerated in article III, shall be submitted to the International Court of Justice at the request of any of the parties to the dispute.” Convention on the Prevention and Punishment of the Crime of Genocide, art. 9, Dec. 9, 1948 [hereinafter Genocide Convention].

<sup>5</sup> 1993 I.C.J. Rep. 3, 7-10.

<sup>6</sup> *Id.* at 12-13 ¶16 (quoting Security Council Resolution 777 (1992) and General Assembly Resolution 47/1 (1992), which each considered that Serbia “cannot continue automatically the membership of the former [SFRY] in the United Nations” and which together decided that Serbia

raise the jurisdictional objections that it later would (and which are discussed below), namely that its lack of UN Membership both deprived the Court of jurisdiction *ratione personae* under Article 35 of its Statute<sup>7</sup> and precluded Serbia from becoming a party to the Genocide Convention under its Article XI.<sup>8</sup> Bosnia, of course, also did not wish to raise these issues and thereby possibly undermine jurisdiction in its own case.<sup>9</sup>

In its ancillary proceedings on provisional measures, the Court in its 1993 Order (“1993 *Genocide* Order”) noted that the UN Membership status of Serbia “[was] not free from legal difficulties.”<sup>10</sup> The Court, however, considered that the issue, which remained uncontested by the Parties, was one which the Court “[did] not need to determine definitively at the present stage of the proceedings,” since the Court needed only to satisfy itself of *prima facie* jurisdiction at that stage.<sup>11</sup> Even if the Court did not have

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“should apply for membership in the United Nations and that it shall not participate in the work of the General Assembly”).

<sup>7</sup> Article 35, paragraphs 1 and 2, of the ICJ Statute provides:

1. The Court shall be open to the states parties to the present Statute.
2. 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.

With respect to paragraph 2 of this Article, the Security Council in its Resolution 9 of 15 October 1946 provides the conditions by which the Court “shall be open” to a State not party to its Statute, namely, that it have previously deposited with the Court’s Registrar a declaration accepting the jurisdiction, Statute, and Rules of the Court and undertaking to comply in good faith with the decisions of the Court and to accept all of the obligations of a Member of the United Nations under Article 94 of the Charter. S.C. Res. 9, ¶ 1 (Oct. 15, 1946).

<sup>8</sup> 2007 Judgment ¶106. Article XI of the Genocide Convention reads:

The present Convention shall be open until 31 December 1949 for signature on behalf of any Member of the United Nations and of any nonmember State to which an invitation to sign has been addressed by the General Assembly

The present Convention shall be ratified, and the instruments of ratification shall be deposited with the Secretary-General of the United Nations.

After 1 January 1950, the present Convention may be acceded to on behalf of any Member of the United Nations and of any non-member State which has received an invitation as aforesaid. Instruments of accession shall be deposited with the Secretary-General of the United Nations.

Genocide Convention art. 11.

<sup>9</sup> 2007 Judgment ¶106.

<sup>10</sup> 1993 I.C.J. Rep. at 14 ¶18.

<sup>11</sup> *Id.*

jurisdiction *ratione personae* over Serbia under Article 35(1) of its Statute on the basis of UN Membership, the Court took the provisional view that Article IX of the Genocide Convention was a “special provision[] contained in [a] treat[y] in force” that, if Serbia were party to it, would confer such jurisdiction under Article 35(2).<sup>12</sup> In light of Serbia’s purported acceptance of the SFRY’s international obligations the Court in its 1993 *Genocide* Order had little difficulty in considering that Serbia was party to the Genocide Convention, that the Court had *prima facie* jurisdiction on that basis, and in ordering the Parties to take all measures within their power to prevent genocide in the others’ territory and to avoid any aggravation of the dispute.<sup>13</sup>

In the subsequent mainline proceedings, Serbia raised various objections to the Court’s jurisdiction *ratione materiae* over Bosnia’s claims under the Genocide Convention. Serbia argued that Bosnia’s claims did not amount to a “dispute” under Article IX of the Genocide Convention, and thus that the Court lacked jurisdiction *ratione materiae*, and that the Court lacked jurisdiction *ratione personae* over Bosnia since Bosnia allegedly did not have the capacity to become party to the Genocide Convention following the breakup of the former Yugoslavia.<sup>14</sup> The Court in its 1996 Judgment on preliminary objections (“1996 *Genocide* Judgment”) readily dismissed Serbia’s former objection, finding that Article IX of the Genocide Convention “does not exclude any form of State responsibility” and that the Parties indeed had manifest differences over the facts of the conflict and their legal consequences under the Convention.<sup>15</sup> With regard to jurisdiction *ratione personae*, the Court first observed that Serbia continued to maintain that it was the legal successor to the SFRY and that the Parties did not dispute that Serbia was party to the Genocide Convention; the Court thus considered that Serbia “was bound by the provisions of the Convention on the date of the filing of the Application in the present case.”<sup>16</sup> The Court also had little difficulty in finding that, as a UN Member and independent State recognized as such by Serbia in the

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<sup>12</sup> *Id.* ¶19.

<sup>13</sup> *Id.* at 16 ¶26, 24 ¶52.

<sup>14</sup> *Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Preliminary Objections*, 1996 I.C.J. Rep. 595, 609-10 ¶16 (July 11).

<sup>15</sup> *Id.* at 616 ¶¶32-33.

<sup>16</sup> *Id.* at 610 ¶17.

1995 Dayton Accords, Bosnia became party to the Genocide Convention when it deposited a Notice of Succession stipulating its wish to succeed to the SFRY's obligations under the Convention in 1992.<sup>17</sup> In the *dispositif* of the 1996 *Genocide* Judgment the Court thus found without qualification that: "On the basis of Article IX of the Convention on the Prevention and Punishment of the Crime of Genocide, it has jurisdiction to adjudicate upon the dispute."<sup>18</sup>

Following the overthrow of the Milošević regime in October 2001, Serbia abandoned its claim to being the continuator of the SFRY and to being party to the Genocide Convention and a UN Member on this basis.<sup>19</sup> Serbia proceeded to lodge a new round of jurisdictional objections in the *Genocide* case. Serbia's renewed jurisdictional challenge was contained in its 2001 "Initiative to the Court to Reconsider *ex officio* Jurisdiction over Yugoslavia" (the "Initiative").<sup>20</sup> The Initiative was lodged concurrently with an Application under Article 61 of the ICJ Statute for Revision of the 1996 Judgment finding jurisdiction.<sup>21</sup> The Initiative argued that Serbia had *not* been a UN Member in any form until its admission to the United Nations as a "new Member" on 1 November 2000 and that it had not been a party to the Genocide Convention until 8 March 2001 when it deposited its instrument of accession containing a reservation to the Genocide Convention's compromissory clause contained in Article IX.<sup>22</sup>

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<sup>17</sup> *Id.* 610-13 ¶¶18-26.

<sup>18</sup> *Id.* at 623 ¶47(2)(a).

<sup>19</sup> 2007 Judgment ¶81.

<sup>20</sup> *Id.*

<sup>21</sup> *Id.* Article 61 provides in relevant part:

1. 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.

<sup>22</sup> 2007 Judgment ¶¶26-28. Whether a reservation to Article IX—which has been objected to by the United Kingdom and others—is consistent with the object and purpose of the Convention, and thus whether Serbia after it deposited its instrument of accession in 2001 actually became a party to the Convention, was not an issue that ultimately was addressed by the Court in its 2007 Judgment in the *Genocide* case. *Cf. Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion*, 1951 I.C.J. Rep. 15 (May 28).

Serbia's Initiative thus raised two interrelated jurisdictional challenges. The first was that the Court lacked jurisdiction *ratione materiae* because Serbia was ineligible to be a party to the Genocide Convention and its Article IX compromissory clause when Bosnia and Herzegovina filed its Application in this case on 20 March 1993 since Serbia was not a UN Member at that time and UN Membership is the primary qualification to become a party to the Convention per Article its XI.<sup>23</sup> The second jurisdictional challenge raised by Serbia was that the Court lacked jurisdiction *ratione personae* under Article 35, paragraphs (1) or (2), of the ICJ Statute insofar as Serbia was not a UN Member, and thus party to the ICJ Statute on that basis,<sup>24</sup> or party to any relevant jurisdiction-conferring "special provisions contained in treaties in force" on the date of the filing of the Application.

By the time the oral hearings took place in the Spring of 2006, Serbia's jurisdictional objections had been bolstered by the Court's 2004 *Use of Force* Judgments. The *Use of Force* cases arose out of the NATO bombings in the 1999 Kosovo campaign. The cases were brought by Serbia in 1999 against eight NATO member countries who had participated in the bombings. Serbia asserted jurisdiction for its claims of unlawful use of force under customary international law pursuant to declarations made under Article 36(2) of the ICJ Statute (the "Optional Clause") and to Article IX of the Genocide Convention—to which Serbia at the time, remember, was still claiming to be party on the basis of being the continuator State of the former SFRY.<sup>25</sup> The Court in 1999 had dismissed Serbia's Requests for the Indication of Provisional Measures in the *Use of*

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<sup>23</sup> The Court's 2007 Judgment in the *Genocide* case did not address the question of whether, under Article XI of the Genocide Convention, Serbia was eligible in 1993 to become a party to the Genocide Convention on the basis of "an invitation . . . addressed by the General Assembly" rather than on the basis of UN Membership. Vice-President Al-Khasawneh's dissenting opinion, however, noted that the United Nations Office of Legal Affairs considers that General Assembly resolution 43/138 (1988), which in paragraph 5 urges those States which have not yet become parties to the Convention to ratify it or accede thereto without further delay, "amounts to a general invitation to non-Members to become a party to the Genocide Convention," and, in this respect, further noted that the Democratic People's Republic of Korea's instrument of accession to the Convention was accepted on 31 January 1989 (more than two years before it became a UN Member) on this basis. 2007 Judgment ¶21 (Al-Khasawneh, J., dissenting).

<sup>24</sup> UN Charter art. 93(1).

<sup>25</sup> See *Case Concerning Legality of Use of Force (Serb. & Mont. v. Belgium)*, Judgment of 15 December, 2004 I.C.J. Rep. 279.

*Force* cases on the basis that on prima facie review it had no jurisdiction *ratione temporis* or *ratione materiae*.<sup>26</sup> In 2003, in its Judgment on Serbia’s *Application for Revision* of the Court’s 1996 Judgment on Preliminary Objections in the *Genocide* case (“2003 *Revision* Judgment”), the Court refused to revise its 1996 judgment on preliminary objections in the *Genocide* case, finding that Serbia’s admission as a new UN Member in 2000 “cannot have changed retroactively the *sui generis* position which the FRY found itself in vis-à-vis the United Nations over the period 1992 to 2000, or its position in relation to the Statute of the Court and the Genocide Convention.”<sup>27</sup>

In 2004, however, a bitterly divided Court—in which the Serbian *ad hoc* judge ended up casting the deciding vote as to the reasons for the decisions<sup>28</sup>—went on to effectively accept the arguments made in Serbia’s Initiative and dismissed the *Use of Force* cases for lack of jurisdiction *ratione personae* over Serbia.<sup>29</sup> In reaching this

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<sup>26</sup> See *Legality of Use of Force (Yugo. v. Belg.), Provisional Measures, Order of 2 June, 1999* I.C.J. Rep. 124, 134-35 ¶¶29-30 (finding that the “dispute” within the meaning of Article 36(2) arose at the start of the NATO bombing campaign on 24 March 1999, rather than with each individual NATO air attack continuing after that date, and thus that Serbia’s acceptance of the Court’s compulsory jurisdiction on 25 April 1999 was untimely), 138 ¶¶40-41 (finding that “the threat or use of force against a State cannot in itself constitute an act of genocide within the meaning of Article II of the Genocide Convention; and . . . it does not appear at the present stage of proceedings that the bombings which form the subject of the Yugoslav Application ‘indeed entail the element of intent, towards a group as such, required by [Article II]’” and thus that the acts complained of did not appear to be capable of coming within the provisions of the Genocide Convention).

<sup>27</sup> See *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 (Bos. & Herz. v Yugo.)*, Preliminary Objections (*Yugo. v Bos. & Herz.*), 2003 I.C.J. Rep. 7, 31 ¶71 (Feb. 3).

<sup>28</sup> Judge Simma recused himself from the *Use of Force* cases and the Court considered it sufficient for the NATO countries’ interests for the preliminary objections phase that there were judges of British, Dutch and French nationalities already on the bench and thus refused to seat a judge *ad hoc* chosen by those NATO countries without such a judge of their nationality on the bench. See 2004 I.C.J. Rep. at 286-87 ¶¶16, 18. This left a total of only 15 judges, including the *ad hoc* judge appointed by Serbia, to decide these cases in which the remaining regular members of the Court would be divided as to the essential reasoning for the dismissals by a tie vote of seven to seven.

<sup>29</sup> Together with its 2001 Initiative and its *Application for Revision* of the 1996 *Genocide* case judgment, Serbia came to change its submissions in the *Use of Force* cases from asking the Court to find jurisdiction to asking the Court simply “to adjudge and declare on its jurisdiction *ratione personae*.” *Id.* ¶24. Although the Court was unanimous in finding that it lacked jurisdiction, seven of the fifteen judges would have dismissed the *Use of Force* case for lack of jurisdiction *ratione temporis* and/or *ratione materiae*, as suggested by the 1999 Order on Provisional

conclusion, the Court found that: (i) Serbia was not a UN Member until its admission as a new Member in 2000 and thus that the Court was not open to Serbia under Article 35(1) of the ICJ Statute,<sup>30</sup> and, (ii) in a lengthy discussion that contradicted the provisional view of the matter taken in the 1993 *Genocide* Order, the Genocide Convention's compromissory clause (Article IX) was not a "special provision[] contained in [a] treat[y] in force" within the meaning of Article 35(2) of the ICJ Statute that, if it were party, might allow Serbia access to the Court.<sup>31</sup>

This holding in the 2004 *Use of Force* Judgments left the Court in a difficult situation when confronted with Serbia's Initiative in the *Genocide* case. On the one hand, the Court could have followed the (tenuous) precedent set by the 2004 *Use of Force* Judgments that Serbia's apparent non-Membership in the United Nations before 2000 deprived it of jurisdiction *ratione personae* over Serbia in cases brought under the Genocide Convention. This would have meant dismissing the case for lack of jurisdiction after fourteen years of proceedings and a judgment on jurisdiction in 1996

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Measures. See Joint Declaration of Vice-President Ranjeva, Judges Guillaume, Higgins, Kooijmans, Al-Khasawneh, Buergenthal and Elaraby, 2004 I.C.J. Rep. 330.

<sup>30</sup> 2004 I.C.J. Rep. at 314-15 ¶91.

<sup>31</sup> *Id.* ¶¶92-114. The Court in its 1993 Order in the *Genocide* case stated 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." The Court in its 2004 Judgment in the *Use of Force* cases concluded, however, that the "treaties in force" to which Article 35(2) of the ICJ Statute refers means those treaties in force at the date of the entry into force of the ICJ Statute, rather than those in force at the date of the filing of an Application in a case. *Id.* at 324 ¶113. Thus, the Genocide Convention, which entered into force on 12 January 1951 after the ICJ statute had entered into force in 1946, could not be such a "treat[y] in force" within the meaning of Article 35(2) of the ICJ Statute. *Id.* at 324 ¶114. See also Separate Opinion of Judge Higgins, 2004 I.C.J. Rep. 336, 341:

[G]oing beyond what the Applicant requested in the present case, the Court has devoted some 23 paragraphs to laying the grounds for a finding that Article 35, paragraph 2, of the Statute could not have been an alternative basis for allowing access to the Court in respect of the Genocide Convention so far as Serbia and Montenegro is concerned. This exercise was clearly unnecessary for the present case. Its relevance can lie, and only lie, in another pending case. I believe the Court should not have entered at all upon this ground in the present case.

already, which likely would have seriously damaged the reputation of the Court.<sup>32</sup> On the other hand, the Court could have re-examined the status of, and legal consequences flowing from, Serbia's UN Membership, *vel non*, before 2000—an issue which the Court acknowledged in its 1993 *Genocide* Order “[was] not free of legal difficulties” and which it did not “determine definitively”<sup>33</sup> at that stage, but which the Court also did not expressly revisit for this case in its 1996 *Genocide* Judgment because “[n]either party raised the matter before the Court” at that stage.<sup>34</sup> (Indeed, a sound case might still have been made that Serbia, as a country under Security Council sanctions and whose UN Membership status was “*sui generis*” according to the 2003 *Revision* Judgment, was barred from accessing the Court as an Applicant, as in the *Use of Force* cases, but could still be subject to jurisdiction as a UN dues-paying Respondent.<sup>35</sup>)

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<sup>32</sup> A ready analogy might be the loss of confidence in the Court which followed its judgment in 1966 dismissing the *South West Africa* cases after it had upheld jurisdiction in its 1962 judgment. See *South West Africa Cases* (Eth. v. S. Afr.) (Liber. v. S. Afr.), 1966 I.C.J. 6 (July 18).

<sup>33</sup> *Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Provisional Measures, Order of 8 Apr.*, 1993 I.C.J. Rep. 3, 14 ¶18.

<sup>34</sup> 2007 Judgment ¶106. The Court went on to explain:

Bosnia and Herzegovina as Applicant, while denying that the FRY was a Member of the United Nations as a continuator of the SFRY, was asserting before this Court that the FRY was nevertheless a party to the Statute, either under Article 35, paragraph 2, thereof, or on the basis of the declaration of 27 April 1992 [in which the FRY legislatures adopted a declaration stating, *inter alia*, that the FRY was the continuator of the SFRY and “shall strictly abide by all the commitments that the SFR of Yugoslavia assumed internationally”]; and for the FRY to raise the issue would have involved undermining or abandoning its claim to be the continuator of the SFRY as the basis for continuing membership of the United Nations.

<sup>35</sup> One possible explanation for how the Court could have reasoned that it had jurisdiction *ratione personae* over Serbia in the *Genocide* case, while reconciling this with the conclusion in the *Use of Force* cases that it lacked such jurisdiction, might be found in Article 5 of the UN Charter. Article 5 provides that “rights and privileges of membership” in the Organization may be suspended by the General Assembly upon the recommendation of the Security Council for Members against which preventive or enforcement action under Chapter VII has been taken by the Security Council. Rosenne has argued that the suspension of the rights and privileges of membership “could deprive a State of its right to institute proceedings in the Court, without affecting its obligations should proceedings be introduced or be pending against it.” Shabtai Rosenne, 2 *The Law and Practice of the International Court, 1920-2005* at 605 (2006) [hereinafter “Rosenne”]. It would seem that the Charter Article 5 procedure may well be said to have been followed in this case with respect to Serbia. The Security Council, by its resolution 713 (1991), did take Chapter VII enforcement action (a weapons embargo) against the former Yugoslavia and subsequently recommended, by its Resolution 777 (1992), to the General Assembly that the FRY

Instead of either following the *Use of Force* cases precedent or else reconsidering the issue for this case, the Court in its 2007 *Genocide* Judgment took a pass: by a vote of ten votes to five it held that the jurisdictional issues raised in Serbia's Initiative had already been decided with the force of *res judicata* in its 1996 *Genocide* Judgment and thus that the Court had jurisdiction on the basis of Article IX of the Genocide Convention.<sup>36</sup> This is not necessarily to say that the Court took the easy way out, for it considered that its jurisdiction *ratione personae* was “not a matter of the consent of the parties” that Serbia might have waived or been estopped from raising anew, but it was, in fact, a “mandatory” prerequisite for the Court's jurisdiction under its Statute.<sup>37</sup> Despite the Court's recognition that its 1996 *Genocide* Judgment had not expressly revisited the question of Serbia's UN Membership status that had been raised but not decided in its 1993 *Genocide* Order, the Court in its 2007 *Genocide* Judgment nevertheless reasoned that its jurisdiction *ratione personae* had been decided “by necessary implication” when it held without qualification in 1996 that it had jurisdiction to decide the dispute on the basis of Article IX of the Genocide Convention.<sup>38</sup> If the Court had noted the troublesome issue of Serbia's UN Membership status in 1993, then, “as a matter of logical construction,” it must have resolved the related mandatory question of jurisdiction *ratione personae* when it upheld its jurisdiction in 1996<sup>39</sup>—even if neither the Court nor the Parties actually mentioned the issue again until Serbia's Initiative. Since this holding in 1996 was contained in the form of a “judgment,” it remained “final and without

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“shall not participate in the work of the General Assembly.” S. C. Res. 777, ¶ 1, U.N. Doc. S/RES/777 (Sept. 19, 1992); *see also* S. C. Res. 713, U.N. Doc. S/RES/713 (Sept. 25, 1991). For its part, the General Assembly, by its resolution 47/1, *recommended* that the FRY apply for new Membership while actually only *deciding* that it “shall not *participate* in the work of the General Assembly”—it never expressly stated that Serbia would not be a UN Member until it applied to become a new Member. G.A. Res. 47/1, ¶ 1, U.N. Doc. A/RES/47/1 (Sept. 22, 1992) (emphasis added). The view that Serbia's *rights* in the Organization had been suspended but that its *obligations* remained is reinforced by the fact that during the period 1992-2000 it still paid the UN dues assessed to the SFRY, minus the payments made by Bosnia and Herzegovina, Macedonia, Croatia and Slovenia. *See* 2004 I.C.J. Rep. at 306 ¶¶68.

<sup>36</sup> 2007 Judgment, ¶140.

<sup>37</sup> *Id.* ¶¶102, 139. On the “mandatory” rather than consensual nature of Article 35 of the Court's Statute, *see* 2004 I.C.J. Rep. at 295 ¶36.

<sup>38</sup> 2007 Judgment. ¶132.

<sup>39</sup> *Id.* ¶ 135.

appeal” as *res judicata* under Article 60 of the Court’s Statute.<sup>40</sup> On this basis, the Court finally proceeded to the merits of the case.

## II.

The Court’s application of *res judicata* in these circumstances predictably aroused a strong joint dissent and may indeed be questioned in light of the Court’s prior jurisprudence.<sup>41</sup> The dissenters urged that *res judicata* “applies where there is an identity of parties, identity of cause, and identity of subject-matter in between the earlier and subsequent proceedings in the same case”—an expression of the so-called ‘triple identity’ test.<sup>42</sup> The scope of a judgment’s *res judicata* should be discernable from its text since Article 56 of the Statute requires that “[t]he judgment shall state the reasons on which it is based.”<sup>43</sup> Yet the dissenters, who were the only three judges by that point who had actually been on the Court in 1996, argued that the issue of jurisdiction *ratione personae* “was not even addressed, let alone decided, in either the reasoning or the *dispositif* of the 1996 [*Genocide*] Judgment” since it was an issue the Parties opted not to contest until Serbia’s admission as a new UN Member in 2000.<sup>44</sup> Thus the issue had to be considered afresh and the Court, in turn, was obliged to dismiss the case in light of its findings in the 2004 *Use of Force* Judgments that Serbia had not been a UN Member or party to the Genocide Convention until 2000.<sup>45</sup>

The dissenters’ emphasis on the strictures of the triple-identity test for *res judicata* finds support in the previous jurisprudence of the Court. This test is commonly accepted to have been best expressed in Judge Anzilotti’s dissenting opinion in the

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<sup>40</sup> *Id.* ¶ 117.

<sup>41</sup> See Joint Dissenting Opinion of Judges Ranjeva, Shi and Koroma [hereinafter “Joint Dissent”]; Declaration of Judge Skotnikov. See also Stephan Wittich, *Permissible Derogation from Mandatory Rules? The Problem of Party Status in the Genocide Case*, 18 Eur. J. Int’l L. 591, 604-08 (2007).

<sup>42</sup> Joint Dissent, *supra* note 41, ¶4.

<sup>43</sup> *Id.* ¶3.

<sup>44</sup> *Id.* ¶¶3-5. Here the dissenters quoted Rosenne to the effect that “[i]n the last analysis the scope of the *res judicata* can only be determined by reference to the pleadings in general, and to the parties’ submissions in particular.” *Id.* ¶5 (quoting 3 Rosenne, *supra* note 35, at 1603).

<sup>45</sup> *Id.* ¶17.

*Interpretation of Judgments Nos. 7 & 8 (Chorzow Factory)* case.<sup>46</sup> There, Judge Anzilotti, basing his analysis firmly on articles 59 and 60 of the P.C.I.J.’s Statute,<sup>47</sup> enunciated the “three traditional elements [of *res judicata*:] *persona, petitum, causa petendi*, for it is clear that the ‘particular case’ (*le cas qui a été décidé*) covers both the object and the grounds of the claim. It is within these limits that the Court’s judgment is binding.”<sup>48</sup> These “traditional” elements for the identification of *res judicata*—the triple identity test—have been accepted by the Court in its subsequent jurisprudence.<sup>49</sup>

The *Haya de la Torre* case between Columbia and Peru, for example, saw the Court *not* apply the doctrine of *res judicata* precisely because one of the three “traditional elements” identified by Judge Anzilotti from the Court’s Statute was absent. In a prior case between the same parties at the ICJ – a dispute following a grant of diplomatic asylum to a political refugee by the Colombian Embassy in Lima – the Court was asked a number of questions relating to the international law of diplomatic asylum and the interpretation of certain conventions.<sup>50</sup> Neither Colombia’s claim nor Peru’s counterclaim requested the Court to decide on the actual method of terminating the asylum for the political refugee in question. On 20 November 1950 the Court issued a judgment answering the questions posed and, noting that the question of the possible surrender of the refugee to the Peruvian authorities had not been raised by the Parties, therefore did not decide this point – no mention of the possible surrender of the refugee was made in the operative clause of the judgment.<sup>51</sup> Following delivery of this judgment, Colombia filed a request for interpretation under Article 60 of the ICJ Statute. On 27 November 1950 the Court gave its judgment on the request for interpretation and noted

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<sup>46</sup> *Interpretation of Judgments Nos. 7 & 8 (Chorzow Factory)* (Ger. v. Pol.), 1927 P.C.I.J. (ser. A) No. 13, at 23 (dissenting opinion of Judge Anzilotti); 3 Rosenne, *supra* note 35, at 1599.

<sup>47</sup> Articles 59 and 60 of the P.C.I.J.’s Statute are identical to the current Articles 59 and 60 of the I.C.J.’s Statute. See Statute of the Permanent Court of International Justice arts. 59-60.

<sup>48</sup> *Interpretation of Judgments Nos. 7 & 8 (Chorzow Factory)* (Ger. v. Pol.), 1927 P.C.I.J. (ser. A) No. 13, at 23 (dissenting opinion of Judge Anzilotti) (quoting French version of Article 59 of the ICJ Statute).

<sup>49</sup> See Rudolf Bernhardt, *Article 59*, in *The Statute of the International Court of Justice: A Commentary* 1240 (Andreas Zimmermann et al. eds., 2006) [hereinafter “Zimmerman Commentary”].

<sup>50</sup> *Asylum Case* (Colom. v. Peru), 1950 I.C.J. 266 (Nov. 20).

<sup>51</sup> *Id.*

that the question of the possible surrender of the refugee 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.”<sup>52</sup> This was so because “it is the duty of the Court not only to reply to the questions as stated in the final submissions of the parties, but also to abstain from deciding points not included in those submissions.”<sup>53</sup>

Following this judgment a further diplomatic exchange took place between the parties and in December 1950 new proceedings were instituted by Colombia (the *Haya de la Torre* case). The object of this case was to obtain the Court’s decision on whether Colombia was bound to deliver the refugee to Peru, and thus to terminate the asylum. The Court was asked whether Colombia was bound to deliver the man to the Peruvian authorities. The Court ruled on this point as follows: “[t]he question of the surrender of the refugee was not decided by the Judgment of November 20th. This question is new. . . . There is consequently no *res judicata* upon the question of surrender.”<sup>54</sup> The Court therefore simply refused to apply *res judicata* in a situation where the triple identity test was not satisfied. Instead, the Court found, independently of its prior judgment, that Colombia was under no obligation to surrender the refugee to Peru.<sup>55</sup>

### III.

Whatever one thinks of the Court’s softening of the triple identity test for *res judicata* in the 2007 *Genocide* Judgment to include matters decided “by necessary implication,”<sup>56</sup> its relevance for other courts and tribunals is likely to be decidedly more

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<sup>52</sup> *Request for Interpretation of the Judgment of 20 November 1950 in the Asylum Case* (Colom. v. Peru), 1950 I.C.J. 395, 403 (Nov. 27).

<sup>53</sup> *Id.* at 402.

<sup>54</sup> *Haya de la Torre Case* (Colom. v. Peru), 1951 I.C.J. 71, 80 (June 13).

<sup>55</sup> *Id.* at 83.

<sup>56</sup> As Stephan Wittich has argued:

[I]t is doubtful whether the criteria for the application of the *res judicata* principle [in the form of the triple identity test] were really 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

limited. As discussed below, the Court applied *res judicata* from its particular Statute, rather than from any more “general principles of law” that might be applied more generally. The factual circumstances of the case, as well as the mandatory nature of jurisdiction *ratione personae* for the Court, are also unlikely to recur in other contexts where waiver, estoppel, or abuse of process could appropriately be applied to a late jurisdictional challenge.

The Court in its 2007 *Genocide* Judgment noted “[t]wo purposes, one general, the other specific, [which] underlie the principle of *res judicata*, internationally as nationally”—namely, “that litigation come to an end” and “that an issue which has already been adjudicated in favour of [a] party be not argued again.”<sup>57</sup> The Court considered, however, that “[t]he fundamental character of [*res judicata*] appears from the terms of the Statute of the Court and the Charter of the United Nations.”<sup>58</sup> Thus, Articles 59 and 60 of the Court’s Statute respectively provide that “[t]he decision of the Court has no binding force except between the parties and in respect of that particular case,”<sup>59</sup> and

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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).

Wittich, *supra* note 41, at 604-05.

<sup>57</sup> 2007 Judgment ¶116 (noting that the Court’s function, according to Article 38 of its Statute, is to “decide such disputes as are submitted to it” and that Article 60, moreover, articulates the formal finality of its judgments).

<sup>58</sup> *Id.* ¶ 115.

<sup>59</sup> Statute of the International Court of Justice art. 59.

that “[t]he judgment is final and without appeal. In the event of dispute as to the meaning or scope of the judgment, the Court shall construe it upon the request of any party.”<sup>60</sup>

Until the *Genocide* case, there existed a split of opinion among commentators regarding whether for the Court *res judicata* constituted a “general principle of law” which the Court could adopt by virtue of Article 38(1)(c) of its Statute.<sup>61</sup> Indeed, while the Court frequently referred to, and applied, the principle of *res judicata* in its judgments, it did so “without examining its source or origin.”<sup>62</sup> Thus, while some influential commentators adhered to the view that *res judicata* was a general principle of law,<sup>63</sup> and was utilized by the Court as such under Article 38 of its Statute, Shabtai Rosenne has noted that “the case law [of the ICJ] does not apply the concept of *res judicata* on the basis that it is a general principle of law, but always by reference to the Statute.”<sup>64</sup>

The Court’s statement in the *Genocide* case, quoted above, that the “fundamental character” of *res judicata* derives from the Court’s Statute is important in terms of the potential uses of the principle by other courts and tribunals. The Court did not look to any “general principles of law” under Article 38 of its Statute in interpreting and applying *res judicata* in this case. Simply put, if the Court had understood *res judicata* to be a

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<sup>60</sup> *Id.* art. 60. The Court was also unmoved by the comparative practice of the European Court of Human Rights and the International Criminal Court, which, in certain circumstances, allow jurisdictional or admissibility challenges to be lodged at late stages of the proceedings; the Court noted that these precedents “do not support the view that there exists a general principle which would apply to the Court, whose Statute not merely contains no such provision, but declares, in Article 60, the *res judicata* principle without exception.” 2007 *Genocide* Judgment ¶ 119.

<sup>61</sup> Statute of the International Court of Justice art. 38(1)(c).

<sup>62</sup> Wittich, *supra* note 41, at 600.

<sup>63</sup> *See, e.g.*, Bin Cheng, *General Principles of Law as Applied by International Courts and Tribunals* 336 (Grotius Publications 1987) (1953); *see also Waste Management, Inc. v. Mexico*, ICSID Case No. ARB(AF)/00/3 ¶39 (2002), available at [http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC604\\_En&caseId=C187](http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC604_En&caseId=C187) (“There is no doubt that *res judicata* is a principle of international law, and even a general principle of law within the meaning of Article 38(1)(c) of the Statute of the International Court of Justice.”). There is, of course, an important doctrinal distinction between finding that *res judicata* is a general principle of law within the purview of Article 38 of the Court’s Statute (as the ICSID Additional Facility Tribunal in *Waste Management* did) and the Court itself actually applying *res judicata* as a general principle rather than as one derived from articles 59 and 60 of its Statute.

<sup>64</sup> 3 Rosenne, *supra* note 35, at 1598-99.

“general principle” of law, then the rather unorthodox use of *res judicata* by the ICJ in the *Genocide* case would merit close attention and might readily be adopted by other courts and tribunals. But since the Court in the *Genocide* case made clear that its application of *res judicata* was in fact firmly rooted in its Statute, the use of the Court’s jurisprudence in this area by other courts and tribunals should be more limited.

The Court’s use of *res judicata* from its Statute limits the precedential value of the *Genocide* case for other courts and tribunals that have their own rules and constitutions, which frequently are materially different than the ICJ’s. There are indeed important differences between the provisions of Articles 59, 60, and 61 of the ICJ Statute, which all featured prominently in the *Genocide* case, and, for example, the provisions in the ICSID Convention dealing with the final and binding nature of an ICSID arbitral award. In the ICSID context, Article 53 of the Convention provides that “the award shall be binding on the parties and shall not be subject to any appeal or to any other remedy except those provided for in this Convention.”<sup>65</sup> Article 59 of the ICJ Statute, which provides that a decision “has no binding force except between the parties and in respect of that particular case,” is stricter on its face than ICSID Convention Article 53. Article 59 of the ICJ Statute clearly invokes the triple identity test as it specifically limits the binding force of a judgment to “that particular case,” while the ICSID Convention does not. The ICC Rules of Arbitration also do not contain this limitation and provide simply that “[e]very Award shall be binding on the parties,” while the 1976 UNCITRAL Arbitration Rules also specify only that the award “shall be final and binding on the parties.”<sup>66</sup> The less specific phrasing of these rules governing other tribunals thus opens the door for those

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<sup>65</sup> Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, art. 53, Oct. 14, 1966, at <http://icsid.worldbank.org/ICSID/ICSID/DocumentsMain.jsp>.

<sup>66</sup> International Chamber of Commerce 1998 Rules of Arbitration art. 28(6); United Nations Commission on International Trade Law, UNCITRAL Arbitration Rules art. 32(2). *But see* North American Free Trade Agreement, U.S.-Can.-Mex., art. 1136(1), Dec. 17, 1992, 32 I.L.M. 289 (1993) (“An award made by a Tribunal shall have no binding force except between the disputing parties and in respect of the particular case”). This provision of the NAFTA treaty is virtually identical to Article 59 of the ICJ Statute and thus a NAFTA tribunal might find ICJ interpretations of this language to be of particular relevance. Even so, NAFTA tribunals have interpreted the *res judicata* of their awards differently from the ICJ. *See Waste Management, Inc. v. Mexico*, ICSID Case No. ARB(AF)/00/3 ¶39 (“There is no doubt that *res judicata* is a principle of international law, and even a general principle of law within the meaning of Article 38(1)(c) of the Statute of the International Court of Justice.”).

tribunals to import their own understanding of *res judicata* which need not be dependent on the ICJ's particular Statute.<sup>67</sup>

One practical consequence of this difference can be seen in the different ways the ICJ Statute and, for example, the ICSID Convention implement the finality of decisions. In the ICJ context, a judgment is *res judicata* when it is rendered and will remain so even if a successful application for revision under Article 61 is made. This is so because revision proceedings are considered as a separate "particular case" and thus outside the bounds of Article 59.<sup>68</sup> For ICSID, by contrast, Article 53 refers to the various remedies of interpretation, revision, annulment, and referral to the ICJ, each of which could potentially undermine or overturn the binding nature of an award.<sup>69</sup>

Just as the specificities of the ICJ Statute may limit the usefulness of the *Genocide* case as a precedent for other courts and tribunals, the particular factual and procedural circumstances of the case are also likely to pose large obstacles for other courts and tribunals looking to the *Genocide* case as a possible precedent for *res judicata*. The combination of issues of State succession, international armed conflict, and parallel proceedings that the Court struggled with in the *Genocide* case, and which make its holding on *res judicata* noteworthy in the ICJ context, are unlikely to recur in other contexts. While the Court's holding on *res judicata* may be important, it is unlikely to have the "wider impact" some have predicted.

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<sup>67</sup> See, e.g., *Waste Management*, ICSID Case No. ARB(AF)/00/3 ¶39.

<sup>68</sup> Andreas Zimmerman & Robin Geiss, *Article 61*, in Zimmerman Commentary, *supra* note 49, at 1305.

<sup>69</sup> ICSID Convention arts. 50-52, 64.