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ARE THERE EXCEPTIONS TO THE JUS STANDI REQUIREMENT BEFORE THE INTERNATIONAL COURT OF JUSTICE?

A critical appraisal of the Judgment in Croatia/Serbia Case — General observations about ius standi requirement before the ICJ

Abstract. *The author discusses the interpretation of jus standi requirement by the International Court of Justice in the case concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. FR of Yugoslavia/Serbia).*

He finds out that the position of the Court in that regard taken in Case regarding Legality of Use of Force instituted by FR Yugoslavia against ten NATO members is in sharp contradiction to its position in Croatia/FRY/Serbia case.

In the later judgment the Court, in fact, has formulated an exception to the jus standi requirement on the basis of combined effects of the few considerations: a) the so-called Mavrommatis rule; b) principle of sound administration of justice; c) principle compètence de la compètence; d) seisen of the Court.

The author comes to the conclusion that none of the arguments forwarded is not capable to serve as the basis for the exception to the mandatory requirement of jus standi and that, accordingly, the position of the Court in Croatia/Serbia Case seems to be dictated by extra-legal considerations.

Keywords: *jus standi, International Court of Justice, genocide, Croatia/Serbia Case, international criminal law.*

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GENERAL OBSERVATIONS ABOUT IUS STANDI REQUIREMENT BEFORE THE ICJ

In its original meaning[1], the expression *„locus standi in judicio"* implies the right of a person to appear to be heard in such-and-such proceedings[2], or as regards the present Court's, the right of a person *lato sensu* to appear or to be heard in proceedings before the Court.

The right to appear before the International Court of Justice, due to the fact that it is not a fully open Court of law, is a limited right. The limitations

[1] Even in the jurisprudence of the Court the expression is sometimes used as a descriptive one. Exempli causa, in the case concerning Barcelona Traction, Light and Power Company, Limited, the Court used it to denote right of „a government to protect the interests of shareholders as such" which was in effect the matter of legal interest independent of the right of Belgium to appear before the Court (Preliminary Objections, Judgment, I.C.J. Reports 1964, p. 45). On the contrary, in the South West Africa cases the Court has drawn a clear distinction between „standing before the Court itself", i.e., locus standi and „standing in the ... phase of ...proceedings (South West Africa, Second Phase, I.C.J. Reports 1966, p. 18, para. 4).

[2] Jowitt s Dictionary of English Law, 2nd ed., Vol. 2, p. 1115.

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exist in two respects. *Primo*, the right is reserved for States.[3] Consequently, it does not belong to other juridical persons of physical persons. *Secundo*, as far as States are concerned, only States parties to the Statute of the Court possess the right referred to, being as Members of the United Nations *ipso facto* parties to the Statute of the Court or by accepting conditions pursuant to Article 35, paragraph 2, of the Statute. States non-parties to the Statute can acquire this right on condition that they accept the general jurisdiction of the Court's in conformity with Security Council resolution 9 (1946).

From the substantive point of view, this rights is a personal privilege (*privilegia favorabile*) of the Court's as a judicial body equipped with *jus dicere*. It is the consequence of the burden — or *privilegia odiosa* — consisting in fulfillment of the conditions prescribed.

POSITION OF THE COURT'S AS REGARDS JUS STANDI OF FR YUGOSLAVIA/SERBIA IN CROATIA CASE

It appears that the reasoning of the Court in Croatia/Serbia case, on one side and NATO cases, on other, stands in sharp contradiction as regards *ius standi* requirement.

In NATO cases the Court stated, *inter alia*, that:

„...the Court concludes that at *the time of filing of its Application* to institute the present proceedings before the Court on 29 April 1999, *the Applicant in the present case*, Serbia and Montenegro, *was not a Member of the United Nations, and consequently, was not, on that basis, a State party to the Statute of the International Court of Justice. It follows that the Court was not open to Serbia and Montenegro under Article 35, paragraph 1 of the Statute*" (emphasis added).[4]

The facts surrounding the Croatia/Serbia case in that regards were identical. At the time when Croatia filed its Application, Serbia was not a member of the United Nations. It was admitted in the United Nations membership on 1 November 2000. But, in contract to NATO cases, that fact was not perceived by the Court as decisive one. The Court's reasoning expressing basically the Croatian argument,[5] was as follows:

„...the Respondent acquired the status of partly to the Statute of the Court on 1 November 2000. The Court further held that if it could be established that the Respondent *was also a party to the Genocide Convention, including Article IX, on the date of the institution of the proceedings and until at least 1 November 2000*, and it consequently the Applicant would have been at liberty, had it so desired, to submit a fresh application identical in substance to the present Application, *the conditions for the jurisdiction of the Court would be satisfied*.

The Court has now found that the Respondent was bound by the Genocide Convention, including Article IX thereof, at the date of the institution of the proceedings and remained so bound at least until 1 November 2000.

Having established that the conditions for the Court's jurisdiction are met and without prejudice to its findings on the other preliminary objections submitted by Serbia, the Court's concludes that first preliminary objection, „that the Court lacks jurisdiction", must be rejected (emphasis added)[6].

In fact, in its Judgment in Croatia/Serbia case the Court formulated an exception to the jus standi requirement on the basis of combined effects of the few considerations:

a) the so-called *Mavrommatis* rule;
b) principle of sound administration of justice;
c) principle *compètence de la compètence*, and
d) seision of the Court.

THE SO-CALLED MAVROMMATIS RULE

It seems that the role of the *Mavrommatis* rule was to reconcile two basic observations of the Court, being *premissae minor* in the Court's syllogism, with the specific understanding of the Mavrommatis rule as *premissae maior*.

According to the first observation:

„in its Judgments in 2004 in the *Legality of Use of Force cases* the Court clearly determined the legal status of the FRY, now Serbia, over the

[3] Statute, Art. 34, para. 1.

[4] Case concerning Legality of Use of Force (Serbia and Montenegro v. United Kingdom), Preliminary Objections, Judgment of 15 December 2004, para. 89. The same conclusion in other NATO Cases.

[5] „[t]he Mavrommatis principle is the principle that provided that when four substantial element one: seisin ; two: basis of claim ; three: consent to jurisdiction ; four: access to the Court] jurisdiction" (CR 2008/11, p. 34, para. 8).

[6] Ibidem, para 118.

period from the dissolution of the former SFRY to the admission of the FRY to the United Nations on 1 November 2000".[7]

In terms that the Respondent was not a Member of the United Nations prior to 1 November 2000, not that it was a party to the Statute of the Court.

The second observation is that:

„from 1 November 2000 and up to the date of the present Judgment, the Respondent is a partly to the Statute by virtue of its status as a Member of the United Nations, that is to say pursuant to Article 93, paragraph 1, of the Charter, which automatically grants to all Members of the Organization the status of party to the Statute of the Court".[8]

These observations, in fact *premissae minor* in the majority reasoning are different by their nature and effects in the framework of the present case.

The legal status of the FRY/Serbia in the United Nations, being in the circumstances surrounding the present case the determinative of its *jus standi*, is the jurisdictional fact *per se*. For the membership in the United Nations is the only basis upon which the Court's might be open to the FRY/Serbia, since it did not accept the conditions pursuant to Article 35, paragraph 1, of the Statute nor the general jurisdiction of the Court in conformity with Security Council resolution 9 (1946).

On the other hand, the fact that from 1 November 2000 the FRY/Serbia has been a new Member of the United Nations is, by itself, deprived of jurisdictional significance *in casu*, in the light of the rule that „the jurisdiction of the Court must normally be assessed *on the date of the filing of the act instituting proceedings*"(emphasis added);[9] on the one side, and the fact that Croatia submitted its Application on 2 July 1999, a date well before the admission of the FRY to the United Nations, on the other.

The reconciliation of these two observations, being *premissaee minor* in the majority reasoning *in casu*, implies therefore the establishment of an exception to the general rule. An exception that in the frame of the judicial syllogism represents *premissaee maior*, which the majority tries to find in the so-called *Mavrommatis* rule.

In its Judgment in the *Mavrommatis* case, the Permanent Court's of International Justice stated, *inter alia*, that:

„it must... be considered whether the validity of the institution of proceedings can be disputed on the ground that the application was filed before Protocol XII [annexed to the Treaty of Lausanne] had become applicable. This is not the case. Even assuming that before that time the Court's had no jurisdiction because the international obligation referred to in Article II [of the Mandate for Palestine] was not yet effective, it would always have been advanced. Even if the grounds on which the institution of proceedings was based were defective for the dismissal of the applicant's suit. The Court, whose jurisdiction is international, is not bound to attach to matters of form the same degree of importance which they might possess in municipal law. Even, therefore, if the application were premature because the Treaty of Lausanne had not yet been ratified this circumstance would now be covered by the subsequent deposit of the necessary ratifications"[10]

The Court dictum is interpreted by counsel for Croatia in the following terms:

„all the substantive requirements for the Court's jurisdiction were united, at the latest when the Respondent was admitted to the United Nations on 1 November 2000. There was a case duly filed before the Court by Croatia, so there was seisin. The Respondent was at relevant time a partly to the Genocide Convention, so there was an apparent basis of claim. The Respondent was a State which had in force an unqualified consent to jurisdiction under the Genocide Convention, so there was consent to jurisdiction. The Respondent was, at least as from 1 November 2000, a partly to the Court's Statute, so there was access to the Court. One: seisin; two: basis of claim; three: consent to jurisdiction; four: access to the Court. Who could say there is a fifth requirement for you to hear a case? The Mavrommatis principle is the principle that provided these four substantial elements are united at any given time, the order in which this occurred is a pure matter of form and does not affect... jurisdiction"[11]

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7 Ibid., para. 75.

8 Ibid., para. 77.

9 Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia), Judgment, I.C.J. Reports 1996 (II), p. 613, para. 26 ; see also I.C.J. Reports 1998,p. 26, para. 44.

10 Judgment No. 2, 1924, P.C.I.J. Series A, No. 2, p. 34.

11 CR 2008/11, pp. 33—34, para. 8 (Crawford).

IS THE MAVROMMATIS RULE CAPABLE TO PRODUCE SUCH RECONCILIATION EFFECTS?

It seems clear that the so-called Mavrommatis rule constitutes an exception to the general rule that the jurisdiction of the Court must be assessed on the date of the filing of the act instituting proceedings. That fact, however, does not solve the problem posed in casu. Even the Mavrommatis rule by itself, inspired basically by reservations made in many arbitration treaties, seems too broad in the light of the subsequent jurisprudence of the Court. The ratification of a treaty is not regarded now as a matter of form but rather as a matter of substance. In the Ambatielos case, the Court found, inter alia, as regards the retroactive effects of the Treaty of 1926, that:

„Article 32 of this Treaty states that the Treaty, which must mean all the provisions of the Treaty, shall come into force immediately upon ratification. Such a conclusion might have been rebutted if there had been any special clause or any special object necessitating retroactive interpretation. There is no such clause or object in the present case. It is therefore impossible to hold that any of its provisions must be deemed to have been in force earlier"[12].

The word „form" used in the Mavrommatis dictum should perhaps be understood as „formalities", for the simple reason that in any judicial proceedings as a formal one, including the proceedings before the Court, the form as such plays a prominent and, as regards some issues, even a decisive role. As a matter of illustration, an application could not be submitted to the Court in an oral form).

In the light of the relevant circumstances of the present case, the true question is: what is the scope of the exception established by the Mavrommatis Judgment. Is it a general exception applicable to certain species of jurisdictional defects?

The so-called Mavrommatis rule is based on a couple of constitutive elements:

(i) the existence of a procedural defect in the instrument serving as the basis of jurisdiction on the date of institution of the proceedings:
(ii) the defect is of such kind that it may be cured by a proper action of the applicant as a rule (in principle, however, the possibility that the defect is overcome by an action of the respondent, if a willing litigant, cannot be *a priori* excluded); and,
(iii) the perfectuated instrument produces a retroactive effect, since, as the Court observed, it would make no sense to require an applicant to „institute fresh proceedings... which it would be fully entailed to do".[13]

It appears that in the *Mavrommatis* Judgment, as well as in other Judgments, such as *Certain German Interests in Polish Upper Silesia,*[14] and *Military and Paramilitary Activities in and against Nicaragua,*[15] based on its precedential authority, the real issue in question was the existence of procedural defects in terms of defects in jurisdictional instruments as contemplated by Article 36 of the Statute. Jurisdictional instruments as such have as their object the competence of the Court's to deal with the particular dispute or type of disputes, not the right of judicial protection before the Court. As those instruments are based on the consent of the parties it is natural that they can be cured by a proper action of the applicant or even the respondent, if it is a willing litigant.

As Judge Owada concluded:

„There has been no case in the jurisprudence of the Court in which the so-called *Mavrommatis* principle has been understood to cover any and all „procedural defects" in the proceedings before the Court's. The „procedural defects" that have been at issue in those cases have mostly been alleged technical flaws relating to the element of consent in one way or another at the time of the institution of proceedings, and have never involved such issues as the capacity of the parties to appear before the Court"[16].

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[12] Ambatielos (Greece v. United Kingdom), Preliminary Objection, Judgment, I.C.J. Reports 1952, p. 40.

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

[14] Jurisdiction, Judgment No. 6, 1925, P.C.I.J., Series A, No. 6, p. 14.

[15] (Nicaragua v. United States of America) (Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984, pp. 428-429, para. 83).

[16] Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. FR of Yugoslavia/Serbia), Dissenting Opinion of Judge Owada, para. 24.

But, „the right of a party to appear before the Court... is not a matter of consent"[17]. Since the *jus standi* requirement belongs to *corpus juris cogentis*[18], its defect in *jus standi* cannot be cured upon the institution of proceedings.

Consequently, a defect in *jus standi* is not a matter of form[19] or „a mere defect of form, the removal of which depends solely on the Party concerned".[20]The nature of *jus standi* determines the date of assessment of its fulfillment. As an objective requirement relating to the limits of the judicial activity of the Court, *jus standi* must be assessed as soon as possible, i.e., on the date of the institution of proceedings[21].

In the absence of *jus standi* of a party, the proceedings before the Court are, as matter of law, devoid of substance as demonstrated in the *Legality of Use of Force* cases:

„The conclusion which the Court's has reached, that Serbia and Montenegro did not, at the time of the institution of the present proceedings, have access to the Court... *makes it unnecessary for the Court to consider the other preliminary objections filed by the Respondents to the jurisdiction of the Court..."* (emphasis added)[22].

The theory about the uniting of all the requirements for the Court's jurisdiction at any given time has certain, but strictly limited, merits.

It is applicable, in principle, to the requirements regarding the jurisdiction stricto sensu in all its aspects — ratione materiae, personae et temporis — but not to the requirement of jus standi. The requirement of jus standi is not just a fundamental one, but at the same time of antecedent and ore-preliminary nature. „The Cour't can exercise its judicial function only in respect of those States which have access to it under Article 35 of the Statute. And only those States which have access to the Court's can confer jurisdiction upon it" (emphasis added)[23].

Such a nature of the *jus standi* requirement affects the temporal order of the fulfillment of the requirements regarding the jurisdiction *lato sensu*. It could be said that the *jus standi* requirement is, in terms of time, not only antecedent but, in that sense, also immovable, related to the date of the institution of the proceedings, and that other requirements provided accumulate around it as a kind of linchpin. In its Judgment in the *Fisheries Jurisdiction* case the Court stated in explicit terms: „a declaration, which may be either particular of general, must be filed by the State which is not a party to the Statute, *previously to its appearance before the Court"*[24].

Otherwise, pursuing the logic on which the majority's understanding of the *Mavrommatis* principle is based, it would be possible to imagine a situation of the Court having pronounced itself competent in the *Aerial Incident* case, after Bulgaria's admission to membership in the United Nation, since „the Statute of the present Court's could not lay any obligation upon Bulgaria before its admission to the United Nations"[25].

Such a temporal order seems not only reasonable, but unavoidable, as well. As a general, potential right of a State, *jus standi* belongs to a State if the State is not a party to the dispute or

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17 Legality of Use of Force (Serbia and Montenegro v. Belgium), Preliminary Objections, Judgment, I.C.J. Reports 2004 (I), p. 295, para. 36.

18 G. Schwarzenberger, „International Law as Applied by International Court'ss and Tribunals", International Judicial Law, Vol. IV, 1986, pp. 434—435 ; Faclere, The Oermanent Court's of International Justice, 1932, p. 63 ; R. Kolb, Thèorie du ius cogens international Essai de relecture du concept, 2001, pp. 344—348.

19 See Mavrommatis Palestine Concessions, Judgment, No. 2, 1924, P.C.I.J., Series A, No. 2, p. 34.

20 Certain German Interests in Polish Upper Silesia, Judgment No. 6, 1925, P.C.I.J., Series A, No. 6, p. 14.

21 In that regard, strictly and without exception, the Court has treated the issue in eight Legality of Use of Force cases (Serbia and Montenegro v. Belgium), Preliminary Objections, Judgment, I.C.J. Reports 2004 (I), pp. 298—299, paras. 46 ; pp. 310-311, para 79 ; pp. 314-315, para. 91 and p. 327, para. 126.

22 Serbia and Montenegro v. Belgium, Preliminary Objections, Judgment, I.C.J. Reports 2004, (I), pp. 327—328, para. 127.

23 Ibid., p. 299, para. 46.

24 Fisheries Jurisdiction (Federal Republic of Germany v. Iceland), Jurisdiction of the Court, Judgment, I.C.J. Reports 1973, p. 53, para. 11 ; emphasis added ; see also eight Legality of Use of Force cases (Serbia and Montenegro v. Belgium), Preliminary Objections, Judgment, I.C.J. Reports 2004 (I), pp. 298—299, para. 46.

25 Aerial Incident of 27 July 1955 (Israel v. Bulgaria), Judgment, I.C.J. Reports 1959, p. 143.

a party to the proceedings before the Court's. It is transformed into and active, effective right under the additional proviso of the existence of a proper jurisdictional instrument.

It is also supported by the order of the relevant Articles of the Statute — Article 35, regarding *jus standi* precedes Article 36, regarding jurisdiction *stricto sensu*. The order of the enumeration of the relevant requirements may represent *per se* an indication of hierarchy or order of priority.

Bearing in mind the fundamental nature of the *jus standi* requirement, such a temporal order is rather a matter of substance than a matter of form. In such circumstances the theory of uniting, in an indefinite period of time, the relevant requirements for the competence of the Court looks, as a matter of law, like a judicial „Waiting for Godot".

SOUND ADMINISTRATION OF JUSTICE AS A PURPORTED BASIS FOR THE ESTABLISHMENT OF THE DESIRED EXCEPTION TO THE GENERAL RULE

It appears that the majority itself did not accept the *Mavrommatis* rule as applicable to the *jus standi* requirement. It is loyally observed that the *Mavrommatis* rule as well as the jurisprudence of the Court based on it relate to „jurisdiction *ratione materiae* or *ratione personae* in the narrow sense and not to the question of access to the Court, which has to do with a party's capacity to participate in any proceedings whatever before the Court"[26].

The majority in fact tries to introduce an exception to the rule that the existence of *jus standi* of a party should be assessed on the date of the institution of the proceedings on the principles underpinning the *Mavrommatis* rule. According to this view:

„That being so, it is not apparent why the arguments based on the sound administration of justice which underpin the *Mavrommatis* case jurisprudence cannot also have a bearing in a case such as the present one. It would not be in the interests of justice to oblige the Applicant, if it wishes to pursue its claims, to initiate fresh proceedings. In this respect it is of no importance which condition was unmet at the date the proceedings were instituted, and thereby prevented the Court at that time from exercising its jurisdiction, once it has been fulfilled subsequently"[27].

It questionable whether the principle of sound administration of justice directly underpins the jurisprudence of the *Mavrommatis* case? If we interpret the terms used in the relevant part of the Judgment in the *Mavrommatis* case, in accordance with its ordinary and natural meaning, it seems that the principle of judicial economy, and not the principle of sound administration, underpins the Court's reasoning. For, *ratio decidendi* lies in the words:

„Even assuming that before that time the Court had no jurisdiction because the international obligation referred to in Article II [of the mandate for Palestine] was not yet effective, *it would always have been possible for the applicant to re-submit his application in the same terms after the coming into force of the Treaty of Lausanne*, and in that case, the argument in question could not have been advanced" (emphasis added)[28]

And it would mean going much too far, if the principle of judicial economy would overcome the requirements which makes the core of the legality of proceedings before the Court.

The principle of sound administration of justice is obviously not omnipotent nor a law-creating principle. It is rather a standard which allows the Court, in the limits of *discretio legalis*, to mitigate the rigid application of the rule of procedure or to solve an issue of procedure which is not regulated by specific rules of the Statute of the Court and its Rules. In that sense it is designed in the jurisprudence of the Court's[29]. As such, it cannot serve as a basis for the establishment of exception to the general rule as regards the requirement of *jus standi* for a number of reasons.

First of all, the requirement of *jus standi* is of a mandatory, constitutional nature. Article 35 of the Statute is part of this Chapter II

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[26] Judgment, para. 86.

[27] Ibid., para. 87.

[28] Mavrommatis Palestine Concessions, Judgment No. 2, 1924, P.C.I.J., Series A, No. 2, p. 34 ; see also the Polish Upper Silesia case, Jurisdiction, Judgment No. 6, 1925, P.C.I.J., Series A, No. 6, p. 14.

[29] Barselona Traction, I.C.J. Reports 1964, pp. 6, 42: Oil Platforms, I.C.J. Reports 1998, pp. 190—203, para. 33 ; p. 205, para 43 ; Application of the Convention on the Prevention and Punishment of the Crime of Genocide, I.C.J. Reports 1997, p. 257, para. 30 ; pp. 257—258, para. 31.

(Competence of the Court) and not of Chapter III (Procedure) which is the natural operating space of the principle of sound administration of justice. Then, there do not exist *lacunae* in the provision of Article 35 of the Statute. It is clear and comprehensive, as the concretization of the provision of Article 93, paragraphs 1 and 2, of the United Nations Charter, which lifted a limitation to the right of judicial protection before the International Court of Justice to the rank of public order of the United Nations. As such it cannot be considered as a procedural rule. Finally, even if, *arguendo*, the requirement of *jus standi* would be defined as procedural, it would obviously represent *norme procedurale fondamentale*, incapable of any modification.

It appears that, contrary to the majority view, the application of the general rule in casu derives directly from the principle of sound administration of justice. In the syntagma „sound administration of justice", the very administration of justice is the substance of the principle. „The justice" as the object of „sound and proper administration" is not abstract justice but justice according to rules of law governing the Court's judicial activity.

The institution of proceedings before the Court, as far as its significance is concerned, „falls short only of that of the judgment itself"[30]. It permeates, as very few rules do, the whole body of the Court's law, starting with the provision of Article 40 of the Statute, via the provisions of Articles 26 (1(B(, 38, 39, 40 (2-3), 42, 46, 80, 81 up to Articles 87, 92 (1), 98 (1-3), 99 (1-2) and 104 of the Rules of Court.

On the date of the institution of the proceedings, a process relationship is established between the parties to the dispute, as well as between the parties to the dispute and the Court — a fact which *per se* produces important legal consequences for the parties to the dispute and the Court itself. From that date the conservatory effects of the Application are beginning and the litispendence goes on.

All in all, from that moment on, the Court starts its judicial activity *stricto sensu*, separated from the administrative action of the Registry of the Court. The principal task of the Court, in that phase of the proceedings, is to establish the existence of the necessary requirements for its jurisdiction *lato sensu*, i.e., the requirement of *jus standi*, for requirements regarding the special jurisdiction in all of its relevant aspects — *ratione personae, materiae* et *temporis* — may be perfected and even established in the course of the proceedings.

The proper application of the principle of sound administration of justice *in casu*, must take into account the difference between the requirement of *jus standi*, on the one side, and the requirements of jurisdiction of the Court's *stricto sensu*, on the other.

An exception to the general rule regarding the date of assessment of the Court's jurisdiction might operate as regards the requirement of jurisdiction based on consent of the parties, for it does not touch the legality of the juridical activity of the Court as such.

Regarding the requirement of *jus standi*, as a matter of interpretation of a tule of the Statute, being objective law, the legal situation seems different, regardless of whether the principle underpinning the *Mavrommatis* rule is understood as a principle of judicial economy or as a principle of sound administration of justice.

The imperative wording of Article 35, paragraph 1, of the Statute, read in conjunction with Article 93 of the United Nations Charter, does not leave any doubt in that regard. For, „[t] he Court can exercise its judicial function only in respect of those States which have access to it under Article 35 of the Statute. And only those States which have access to the Court can confer jurisdiction upon it".[31]

COMPÈTENCE DE LA COMPÈTENCE AS AN IMPROPER MODUS OPERANDI

The application of the principles underpinning the *Mavrommatis* rule, as perceived by the majority, implies a *modus operandi*, since the principle f sound administration of justice does not operate automatically. The *modus operandi*

[30] G. Schwarzenberger, International Law, Vol. I, 1945, p. 376.

[31] Legality of Use of Force (Serbia and Montenegro v. Belgium), Preliminary Objections, Judgment, I.C.J. Reports 2004 (I), pp. 298-299, para. 46 ; see also the ten cases in the provisional measures phase (Yugoslavia v. Belgium), I.C.J. Reports 1999 (I), p. 132, para. 20 ; and Fisheries Jurisdiction (Federal Republic of Germany v. Iceland), Jurisdiction of the Court's, Judgment, I.C.J. Reports 1973, p. 53, para. 11.

is ascertained in the principle of *compètence de la compètence* so that it could be said that the exception to the general rule, that the jurisdiction *lato sensu* is assessed on the date of the institution of the proceedings, is, in the majority approach, the result of combined effects of the principle of sound administration of justice and *compètence de la compètence* respectively.

The majority view that „[t]he Court always possesses the *compètence de la compètence*[32] is basically correct, in contrast to the interpretation of Serbia according to which, „whenever it is seised by a State which does not fulfil the conditions of access under Article 35, or reised of a case brought against a State which does not fulfil those conditions, the Court does not even have the *compètence de la compètence"*[33].

Compètence de la compètence is an inherent right and duty of the Court, necessary for it to discharge its duties as regards jurisdictional issues *lato sensu.* As such, it operates during the entire proceedings, from the institution until the end, implying that the Court, either upon a jurisdictional objection of a party, or *proprio motu*, not only makes the determination whether it has jurisdiction in terms of incidental jurisdiction, but in that regard remains attentive during the entire proceedings. *A contrario*, the Court would be deprived of its essential duty to establish its jurisdiction *lato sensu*.

However, the power of the Court to determine whether it has jurisdiction is one thing, and the substance of the decision taken on the basis of the principle of *compètence de la compètence* is quite another thing. As a structural and functional principle, the principle of *compètence de la compètence* does not possess its own substance in terms of substantive law. This principle is only the legal vehicle which allows the Court to satisfy itself that the conditions governing its own competence, as defined by its Statute, are met. The decision of the Court's on the basis of the principle of *compètence de la compètence* is of a declaratory nature and, as such, it cannot bestow on the Court's itself a jurisdiction which is not supported by applicable rules of law.

Due to its nature, this is especially true as regards requirement of *jus standi*. Since the majority itself does not dispute that during the period from the dissolution of the former SFRY in April 1992 to the admission of the FRY to the United Nations on 1 November 2000, the FRY/ Serbia was not a Member of the United Nations, and since the membership in the United Nations is determinative of its *jus standi*, a reasoning in the following terms seems unavoidable:

„If, on a correct legal reading of a given situation, certain alleged rights are found to be non-existent, the consequences of this must be accepted. The Court cannot properly postulate the existence of such rights in order to avert those consequences"[34].

Unfortunately, the majority does not follow this dictum, but involves itself in the fishing of *jus standi* of Serbia.

The non-existence of *jus standi* of the Party in the moment of institution of the proceedings deprives the Court, as a semi-open Court of law, of the power to take judicial action. In that regard, the principle of *compètence de la compètence*, as such, does not and cannot add or change anything whatsoever. For,

„The details of this law [law of jurisdiction] have grown with the continuing exercise of the Court's's broad dictum that 'there is not dispute which States entitled to appear before the Court cannot refer to it" (emphasis added)[35].

EFFECT OF SEISIN OF THE COURT'S

It seems that the majority view has overstressed the role of the seisin of the Court, attributing to it some effect in terms of substantive jurisdiction.

The qualifications of the seisin of the Court as „duly", „regular" or „proper" are frequently used, in the present phase of the proceedings as well, to indicate a States recourse to the Court in a proper way. This, in fact, implies that a State has submitted an application, or that two or more States have submitted a special agreement, in conformity with the relevant provisions of the Statute of the

[32] Judgment, para. 86.

[33] Ibid.

[34] South West Africa (Ethiopia v. South Africa ; Liberia v. South Africa), Second Phase, Judgment, I.C.J. reports 1966, p. 36, para. 57.

[35] I. Shihata, The Power of the International Court to Determine its own Jurisdiction, Compètence de la Compètence, 1965, p. 304.

Court and its Rules. In this sense, the expressions such as „duly seised" or „properly seised" have, first and foremost, a formal, procedural meaning.

Although it is a procedural act, seisin, however, is not deprived of any legal effects. By the act of seizure, the Court has acquired a measure of procedural competence „to determine its substantive jurisdiction if in question or otherwise uncertain"[36] and to activate its inherent power to determine its jurisdiction (*compètence de la compètence)* either upon an objection of the party or *proprio motu.*

Form the law of the Court does not know, apart from the administrative action of the Registry as regards non-State entities, separate proceedings designed specifically to deal with the validity of the proceedings in terms of whether necessary requirements, as established by Article 35 and 36 of the Statute, are being fulfilled. Thus, in effect, the Court, although „properly" or „duly" seised, only *a posteriori* decides whether it possesses substantive competence to deal with the case brought before it. It seems that the *Qatar/Bahrain* case, to the effect that „the question of whether the Court was validly seised appears to be a question of jurisdiction".[37]

Stricti juris, the seizure of the Court is valid in substantive terms only if all the requirements for the Court's jurisdiction *lato sensu*, provided by Article 35 and 36 of the Statute are fulfilled. A *contrario*m seisin, regardless of whether termed „properly" or „duly", is essentially only „effective" seisin, enavling the Court to establish whether it possesses substantive competence *in casu*, or whether, in the light of the relevant requirements, it is „validly seised". (Adjectives, at least in the legal vocabulary, more often than not, hinder rather than help understanding. Thus, „proper(ly)" or „due (duly)" seisin would, in fact, be the very „seising of the Court's"[38], and „seisin" would, by definition, imply „valid seisin").

For, as the Court stressed in subtle terms — although using the word „seising" in terms of „effective seisin" — in the *Nottebohm* case: „under the system of the Statute the seisin" — in the *Nottebohm* case: „under the system of the Statute the seising of the Court by means of an Application is not *ipso facto* open to all States parties to the Statute, it is only open to the extent defined in the applicable Declarations"[39].

Seisin of the Court as a procedural step is effected in practice in a highly relaxed manner. It appears that it is assumed that the fulfillment of the procedural conditions specified in Article 38, paragraphs 1, 2 and 3, and Article 39, paragraphs 1 and 2, of the Rules of Court, are sufficient in that regard. Only, „[w] hen the applicant State proposes to found the jurisdiction of the Court upon a consent" of a State against which such application be taken in the understandable, if the requirements under Article 36 of the Statute are in question, for the simple reason that following the seisin of the Court substantive jurisdiction may be conferred upon the Court or perfected by the parties.

As regards the requirements under Article 35 of the Statute, this is another matter. Having in mind the nature of the requirements and its effects upon the legality of the judicial activity of the Court, it seems essential, in particular in case of doubt or uncertainty, to determine as soon as possible whether or not the requirements under Article 35 of the Statute are met. In contrast to the requirements under Article 35 which, being based on the consent of the parties to the dispute, cannot only be perfected but also created in the time following the seisin of the Court, the requirements under Article 36 of the Statute must be fulfilled on the date of the institution of the proceedings before the Court. Short of this, seisin of the Court is not valid, but is merely a procedural step having no effects on the substantive competence of the Court to deal with the case.

It is precisely in this I see the meaning of the dictum of the Court in the eight *Legality of Use of Force* cases, that the Applicant „could not have properly seised the Court"[40], because it was not a party to the Statute and, consequently, did not have a right to appear before the Court.

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[36] (G. Fitzmaurice, „The Law and Procedure of the International Court of Justice, 1951-1954: Questions of Jurisdiction, Competence and Procedure", British Year Book of International Law, 1958, p. 15).

[37] (Martime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1995, p. 23, para. 43).

[38] (G. Fitzmaurice, op.cit.).

[39] (Nottebohm (Liechtenstein v. Guatemala), Preliminary Objections, Judgment, I.C.J. Reports 1953, p. 122).

[40] (Serbia and Montenegro v. Belgium), Preliminary Objections, Judgment, I.C.J. Reports 2004 (I), p. 299, para. 46).

К ВОПРОСУ ИСКЛЮЧЕНИЙ ИЗ ПРАВИЛА JUS STANDI В МЕЖДУНАРОДНОМ СУДЕ ООН КРИТИЧЕСКАЯ ОЦЕНКА РЕШЕНИЯ СУДА ПО ВЗАИМНЫМ ОБВИНЕНИЯМ ХОРВАТИИ И СЕРБИИ — ОБЩИЕ ЗАМЕЧАНИЯ О JUS STANDI В МЕЖДУНАРОДНОМ СУДЕ ООН

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***Аннотация**. В статье рассматривается толкование принципа jus standi Международным судом ООН в случаях применения Конвенции о геноциде «Хорватия против Федеративной Республики Югославия/Сербия».*
Определено, что позиция Суда в отношении правомерности использования силы по иску, выдвинутому Федеративной Республикой Югославия против десяти стран – членов НАТО, находится в остром противоречии с его позицией в деле «Хорватия/СФР Югославия/Сербия».
В своем последнем решении Суд фактически сформулировал исключение из принципа jus standi на основании последствий нескольких факторов: a) так называемого принципа Мавроматтиса; b) принципа релевантного осуществления правосудия; c) принципа compètence de la compètence; d) владение собственностью судом.
Автором сделан вывод о том, что ни один приведенный аргумент не может служить основанием исключения из такого обязательного требования, как jus standi, и, соответственно, позиция Суда в деле «Хорватия против Сербии» представляется продиктованной экстраправовыми факторами.

***Ключевые слова:** jus standi, Международный суд ООН, геноцид, дело Хорватия против Сербии, международное уголовное право.*