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RESERVATIONS PERTAINING TO THE STATEMENTS ON THE ACCEPTANCE OF COMPULSORY COMPETENCE OF THE INTERNATIONAL COURT OF JUSTICE IN THE DISPUTES OF THE FEDERAL REPUBLIC OF YUGOSLAVIA V. THE MEMBERS STATES OF NATO

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Abstract. *Having previously and under certain reservations delivered a statement on joining the optional clause from paragraph 2 of Article 32 of the Statute of the International Court of Justice, the Federal Republic of Yugoslavia, on 29 April, 1999, applied for the institution of proceedings and imposition of temporary injunctions against six member states of NATO, which had also accepted this clause. However, the Court has rejected the request for temporary injunctions finding out that it had no prima facie competence. When the states bound under an optional clause are in question, the Court has cited in favour of that clause the reservation ratione temporis as well contained in the Yugoslav statement on accepting a compulsory competence. Such determination of the main court organ of the United Nations has served the author as a cause to analyse compulsory competence of the International Court of Justice, permissibility and legal nature of the reservations, interpretation of rules as well as concrete reservations contained in the statements of Yugoslavia and the six member states of NATO on the acceptance of the compulsory competence of the Court.*

Key words: *International Court of Justice, compulsory competence, optional clause, reservations, temporary injunctions.*

I. INTRODUCTION

A strong desire to introduce the system of compulsory competence at the international level, similar to that known to the domestic courts, has not been accomplished on the occasion of establishing the International Court of Justice. Instead, a possibility was left to the states based on the unilateral and reciprocal grounds to accept the compulsory com-

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petence of the Court for certain kinds of disputes. It is achieved by means of statements on the acceptance of the so-called optional or elective clause[1] by means of which a state recognizes as a binding *ipso facto* and without a particular agreement, towards any other state which accepts the same as binding, the competence of the Court in all legal disputes.

Providing statements on joining the optional clause, the states are subjugated to the obligatory competence of the International Court of Justice only in one conditional and relative sense. First of all, that obligation is not imposed to the states, but they take it over fully independently and voluntarily, which preserves the consensual character of the competence of the Court. And the second, maybe more important, they have the right to determine the borders within which they accept the compulsory competence. Those borders are usually cited in the very statement, and are, in fact, the reservations by means of which the states, setting various conditions and limitations, restrict the competence of the Court.

Having previously and under certain reservations accepted the compulsory competence of the International Court of Justice, the Federal Republic of Yugoslavia applied for the institution of proceedings against ten member states of NATO on 29 April, 1999, for the reason of violations of obligations on the prohibition to employ force and at the same requests temporary injunctions to be set by the Court. In her request the Federal Republic of Yugoslavia has cited Article 36, paragraph 2, of the Statute as a basis of the competence of the Court with reference to six states that have accepted the optional clause (Belgium, Canada, Holland, Portugal, Spain and Great Britain). After the oral hearing carried out, it was on 2 June, 1999, that the Court rejected the request for temporary injunctions in all cases, because it found out that it had no prima facie competence.[2] When the states bound by the optional clause are in question, the Court has also cited, in favour of that view, the reservation concerning the time effectiveness contained in the Yugoslav statement on the acceptance of the compulsory competence. Yet, the Court has retained the right in the further proceedings against these states to make the final decision as to the competence, except in the dispute with Spain that was cancelled from the list of disputes. Such determination was approved by the new decision of the Court of 30 June, 1999, on setting the terms to submit motions, countermotions and caveats.[3]

Having the above advanced facts in mind, it seems necessary to consider the question of permissibility and legal nature of the reservations and then to limit the subject of analysis to concrete reservations contained in the statements on the acceptance of the compulsory competence of the Court of Yugoslavia and the six members of NATO. However,

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[1] Part B of the Protocol on Signing the Statute of the Permanent Court of the International Justice used a term elective clause as a synonym for optional clause. Coming of the UN Charter into power the integral part of which is the Statute of the International Court of Justice and upon the termination of the Protocol, the term elective vanishes from the basic documents of the Court, but not from the doctrine nor, which is more important, from the jurisprudence of the Court. Thus, on the facultative as the optional clause, the Court speaks in the case of the rights of passage (Portugal v. India) (previous objections) 1957. (I.C.J. Reports 1957, p. 125), but also in cases of the land and sea border between Cameroon and Nigeria (previous objections) and competence in the sphere of fishing (Spain v. Canada), Jurisdiction of the Court 1988 (http://icj.coj.org).

[2] For the decision text of the Court in the case of Yugoslavia vs. Belgium, see: Yugoslav Review of International Law, 1999, No. 1-3, pp. 230-249.

[3] For the decision text in the dispute of Yugoslavia against Holland, see: Medjunarodna politika, No. 1084, Sept., 1999, p. XXVI.

prior to that, some general notes on the legal effect of the acceptance of the compulsory competence of the Court and the role of the reciprocity principle in the system of optional clause turn out to be useful.

II. COMPULSORY COMPETENCE OF THE COURT PURSUANT TO ARTICLE 36 OF THE STATUTE

Paragraphs 2 and 3 of Article 36 of the Statute read as follow:

"2. The contracting parties to this Statute may at any moment declare to recognize as compulsory ipso facto and without particular agreement with reference to any other state accepting the same obligation the competence of the Court in all legal disputes on:

(a) interpretation of the agreement
(b) any fact of international law
(c) any fact which is, if its existence is established, a violation of international obligation
(d) nature or scope of the compensation for violation of international obligation.

3. The aforementioned statements may be given unconditionally or under the condition of reciprocity with reference to a greater number of states or a particular state or to a particular time."

The first and essential question that imposes itself bearing on this text is what the acceptance of the compulsory competence of the Court ipso facto means without a particular agreement. Put in other words, what are the legal consequences resulting from the acceptance of the optional clause. The Court has answered the question in the case of rights of passage in the following way:

"The Court deems that, by depositing a statement on the acceptance with the Secretary-General, a state giving the statement on the acceptance becomes a party to the system of the optional clause with reference to other states which have given the statement, with all rights and obligations resulting from Article 36."

When rights and obligations "ipso facto and without a particular agreement" are in question, by the very fact of giving the statement, the Court deems that it includes:

1. the right to bring charges before the Court against another state which is in the system of optional clause,
2. obligation of accepting the competence of the Court in the proceedings brought against it by another member state of the optional, that is, elective clause.

This right and obligation, however, do not arise only with reference to the states which are included in the system of optional clause at the moment of giving the statement. Ipso facto and without a particular agreement they also arise with reference to the states that will, possibly, join this system. As the Court has pointed out in the dispute:

"...must be deemed that each state giving the statement on the acceptance has in mind the possibility that, according to this Statute, may at any moment be subjected to the obligation from the optional clause with reference to the new signatory due to the deposition by that signatory of a statement on acceptance. The state which accepts the competence of the Court must expect that the new state brings charges against it before the Court on the very day when that state deposits its statement on the acceptance with the Secretary-Gen-

eral."[4]

On the other hand, when the contents and the method of the reciprocity principle effectiveness in the system of optional clause is in question, those questions may be noticed to have been a source of numerous disagreements during the existence of the Permanent Court of International Justice.[5] The post-war International Court will clear up that dilemma already in the case of *Anglo-Iranian Oil Company* saying: " that the Court has been granted competence only to the extent in which the two statements on entrusting the competence coincide."[6]

Having established under which of the two statements the competence is being entrusted to the narrower extent, the Court will find out that its competence exists within the limits established under that statement. The Court went on building up its viewpoint in the *cases of Norwegian loans and the rights of passage* to formulate it in the Interhandel dispute as a complete concept on the contents and role of the reciprocity principle in the system of optional clause:

"The reciprocity in the case on the acceptance of compulsory competence of the Court enable one side to refer to the reservation on that acceptance it has not included in its own statement, but which has been included by the other side in its statement... The reciprocity enables the state whose acceptance of the competence of the Court is wider to rely on the reservation on the acceptance that has been included by the other side. There the effectiveness of the reciprocity ends. The state cannot refer to it ... which refers to the limitations that the other side ... has not included in its statement."[7]

Summing up these findings of the Court, Rossene arrives at the conclusion that "in the complex, changeable and carefully balanced system of statements mutually connected by Article 36 (2)", which make the system of optional clause, "the reciprocity acts so as to clear up and determine the sphere of competence in the concrete case. The consequence is that the competence, when called into question, has been entrusted within the limits of the narrower of the two statements, the Court being authorised to determine, when necessary, which of the two statements is narrower for the purpose of the concrete case."[8]

The question is immediately imposed such as what the Court is guided by in that estimation. In other words, what is that which makes the acceptance of competence narrower or wider. Thus we arrive to the problem of conditions and reservations to the statements on the acceptance of the optional clause that will be the focus of attention in the lines to follow.

III. Permissibility, Legal Nature of Reservations and Rules of Interpretation

The rights of states to limit the competence of the Court when accepting the optional clause by incorporating the conditions and reservations in the statement on the acceptance

[4] I.C.J. Reports 1957, p. 146.
[5] For more details see: Sh. Rosenne, The Law and Practice of the International Court, Dorderecht-Boston, Lancaster, 1985, pp. 384-386.
[6] I.C.J. Reports 1952, p. 103.
[7] I.C.J. Reports 1959, p. 23.
[8] Rossene, op. cit. pp. 370 and 387.

was a source of serious disputes, to tell the truth, mostly in the doctrine. Favouring to such state of things was to a great extent the very text of paragraph 3 of Article 36 of the Statute that permits conditioning of the acceptance but does not mention reservations at all. According to that provision the statements on the acceptance of the compulsory competence are granted unconditionally or under the reciprocity condition by the greater number of states or certain states or for certain time.[9] That made numerous theoreticians to conclude that reservations are permitted only in view of the reciprocity and the term. However, the practice of the states has gone to quite another direction, so that it was already in the thirties that numerous and various reservations became normal accompanying part of statements on the acceptance of the optional clause.[10] That is why there resulted a significant revision of theoretical viewpoints that, already in the first post-war decades, justify permissibility, among other things, by the general legal principle in plus stat minus. Namely, each party to the Statute is allowed to remain completely outside the system of optional clause. If, however, it agrees to be subjected to the compulsory competence of the Court, than it must be allowed to accept that competence only partially, setting certain conditions and limitations.[11]

The court practice will confirm the permissibility of reservations. Already in a separated opinion in the case of Norwegian loans, the judge Lauterpacht has concluded that "the right to set reservations that are not in disagreement with the Statute is no more in question".[12]

In *the case of military and paramilitary activities in and against Nicaragua*, the Court will clearly and unambiguously express that attitude by the following words:

"The statements on the acceptance of the compulsory competence of the Court are optional, unilateral obligations, which include full freedom of states to accept them or not. In giving the statement the state is also free to do that unconditionally and without limitations as regards its term or to qualify it by conditions and reservations."[13] And finally, in the *case of competence in the sphere of fishing* the Court will fully work out the concept on the legal nature of the statement on the acceptance of the optional clause as a basis of permissibility of reservations in the following way:

"Each state shall, when formulating the statement, decide on the limits it sets with reference to its acceptance of the competence of the Court",

that is,

"The statement on the acceptance of the compulsory competence of the Court, whether it states precisely the limits of the acceptance or not, represents a unilateral act of the state sovereignty."[14]

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[9] Sometimes neither the jurisprudence nor the doctrine of international law make striking differences between the conditions and reservations. But, that difference exists and in practice it can cause significant effects. Namely, the questions is that the conditions refer to coming into effect and the term of the acceptance as a legal instrument, while the reservations determine limits within which the compulsory competence is accepted by the state giving the statement.

[10] For more details see: Public International Law, Textbook, Editor: Lord Templeman, London, 1997, pp. 345-346.

[11] E.J. Arechaga, International Law in the Past Third of a Century, Recueil des Cours (t. 159), La Haye, 1978, p. 154.

[12] I.C.J. Reports 1957, p. 46.

[13] Ibid., 1984, p. 418, para. 59.

[14] Jurisdiction of the Court, 4 December, 1998, paragraphs 44 and 46.

By their legal nature the reservations are unilateral statements that make an integral part of the basic statement on the acceptance of the compulsory competence of the International Court that, also, represents a unilateral act. Like typical manifestations of the will of a state they are similar to the establishment of reservations to the many-sided agreements, but are differentiated from them in several very important views. First, characteristic of the reservation is the intention of the contracting party to exclude or amend the legal force of certain provisions of the agreement with reference to itself. On the contrary, the basic function of the reservations to the statement on the acceptance of the optional clause consists of determining the scope of the accepted compulsory competence of the Court, regardless of the fact whether it is done pointing to the disputes comprised by that obligation or their exemption from the competence of the Court.

Second, as for the reservations to the agreements the contracting parties are entitled to make statements on the proposed limitations of the application of the agreement by accepting reservations or by entering a caveat. This is not the case with the reservations to the statements on the acceptance of the optional clause that are, per definitionem, unilateral and individual legal acts deprived of the elements of conformity of certain subjects. As pointed out by Court in the case of the rights of passage "statements on the basis of Article 36, paragraph 2, including reservations, have immediate legal force ipso facto without a particular agreement with reference to the other parties which have given such statement, *even prior to the receipt of the text and regardless of the fact that they were not given a chance to take a stance on this reservation*."[15]

The third difference concerns the existence of the judicial competence in settlement of disputes concerning the application and interpretation. As for the reservations on the multilateral agreements, such competence, as a rule, does not exist. On the other hand, possible disputes on the application and interpretation of reservations accompanying the statements on the acceptance of the optional clause the Court will resolve as an integral part of the decision on the competence to settle the concrete dispute.[16]

Finally, and as a logic consequence of differences between these two institutes, the rules being applied in the course of their application are, also, different. As Court has said in *the case of land and maritime borders between Cameroon and Nigeria*:

"The regime referring to the interpretation of statements given according to Article 36 of the Statute is not identical to that of the agreement established under the Vienna Convention on the Agreement Law."[17]

In the case of competence in the field of fishing the Court has gone a step forward in underlining the difference between the regimes of interpretation, commenting that "the provisions of this Convention may be applied only by analogy to the extent connectable with sui generis character of the unilateral acceptance of the competence of the Court."[18]

It is just on this sui generis character of the statements on the acceptance of the competence of the Court that Court has established, in the said decision, the rule on the interpretation of the reservations to the statement on the acceptance of the optional clause.

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[15] I.C.J. Reports 1957, p. 146.
[16] Sh. Rossene, op. cit., p. 390.
[17] I.C.J. Reports 1998, para. 25.
[18] Jurisdiction of the Court, Judgement, para. 46.

First of all, Court reminds that "the interpretation of the statements given according to Article 36, paragraph 2, of the Statute and whatever reservations contained in them is directed towards that to find out whether the mutual agreement is given for the competence of the Court,"[19]

Following from this is that the first criterion is relevant for establishing the rules of interpretation of the purposes of this act:

"Each state shall, when formulating the statement, decide on the limits it sets with reference to its acceptance of the competence of the Court ... The conditions and reservations, therefore, do not deviate in themselves from the already given wider acceptance. They, first of all, act by determining the parameters of acceptance of the compulsory competence of the Court of the state. Therefore, there is no reason to interpret them restrictively."[20]

Since the application of the earlier rule has been thus eliminated, according to which unilateral legal acts have to be interpreted restrictively, Court will in the same sense, somewhat later, eliminate the application of the contra preferentem rule as well:

"The contra proferentem rule may play a certain role in the interpretation of contractual provisions. But ... that rule has no any role in the case of interpretation of reservations contained in the unilateral statement ... given according to Article 36, paragraph 2, of the Statute."[21]

However, the activities of the Court in determining the rules of interpretation will not be limited only to negative aspects, but it will immediately get down to defining the rules of interpretation of acts *sui generis*. Starting again from its purpose, determination of limits within which the competence of the Court shall be accepted, the Court concludes:

"All the elements of the statement according to Article 36, paragraph 2, of the Statute which, taken together, contain acceptance of the competence of the Court by the states giving the acceptances, should be interpreted as a unity, always applying the same legal principles of interpretation."[22]

That rule of unity should be applied "even when ... the relevant expression of agreement of the states on the competence of the Court and the limits of that agreement represent amendment of the earlier expression of agreement given in wider limits. The additional reservation contained in the new statement on the acceptance of the competence of the Court, which replaces the previous acceptance, should not be interpreted as deviation from the more comprehensive acceptance given in the earlier statement; therefore, there is no fear that such reservations should be interpreted restrictively. Therefore, only the existing statement is that what represents the unity that should be interpreted, applying the same rules of interpretation to all provisions, also including those contained in the reservations."[23]

After that the Court will reach for the wealthy heritage of its own jurisprudence and will remind of the following rules of interpretation:

[19] Ibid., para. 44.
[20] Ibid., para. 44.
[21] Ibid., para. 51.
[22] Ibid., para. 44.
[23] Ibid., para. 45.

- that each statement "should be interpreted as it is, having in mind the actually used expressions";[24]
- that each reservations should be attached the effect "such as it is";[25]
- that the "statements and reservations should be read as a whole"; and
- that its decisions "the Court cannot base upon a purely grammatical interpretation of the text. It must long for interpretation that is in harmony with the natural and rational manner of understanding the text".[26]

However, the legal nature of the act, that is, the fact that the statement according to Article 35, paragraph 2, of the Statute is unilaterally made instrument, has influenced one more essential criterion of interpretation to be taken into consideration, that is, the intention of the state giving the statement. In that respect the Court did not hesitate to stress the intention of the state giving the statement[27] and to interpret:

"relevant expressions of the statement, including the reservation contained in it, in a natural and rational manner, paying due attention to the intention of the given statement that existed at the time of the acceptance of the competence of the Court. The intention of the state that have set the reservation may be deduced not only from the text of the relevant clause, but also from the context in which the clause is to be understood as well as from the investigation of the facts on the circumstances of its preparation and on purposes it is to serve."[28]

Also, the third essential element or criterion of the interpretation of the statement on the acceptance, which is the purpose of the reservation, has been indicated in the cited clause. This three-part test has been defined by Court as "the interpretation principle according to which the reservation accompanying the statement on the acceptance of the compulsory competence of the Court should be interpreted in a natural and rational manner, paying due attention to the intention of the state that has set the reservation and to the purpose of the reservation."

We are to a great extent indebted for its appearance to the request submitted to the Court to decide in view of the place and role of the effectivity principle in the interpretation process. In its answer the Court says:

"Sure that this principle plays an important role in the contractual law and in the jurisprudence of this Court; however, that what with the reservation to the statement according to Article 36, paragraph 2, of the Statute is first of all necessary is that it should be interpreted in a manner connectable with the effect longed for by the state, which has set the reservation."[29]

Such defined role of the effectivity principle removes the application of the rule "that the government text must be, in principle, interpreted so as to produce and that should produce effects that are in keeping with the existing law, but not (*effects, author's remark*)

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[24] Anglo-Iranian Oil Co., Preliminary Objections, Judgement, I.C.J. Reports 1952, p. 105.
[25] Certain Norwegian Loans, Judgement, I.C.J. Reports 1957, p. 27.
[26] Preliminary Objection, Judgement, I.C.J. Reports 1952, p. 104.
[27] Ibid., para. 48.
[28] Ibid., para. 49.
[29] Ibid., para. 52.

that violate it."[30]

The actual state of things, however, shows that "states set reservations to the competence of the Court for different reasons; sometimes just because they feel vulnerable in view of the legality of their position or politics. The Court has never in its practice indicated that the interpretation of the questions exempted from the competence of the Court as legal according to international law is the rule by means of which interpretation of such reservation is guided.

The fact that the state need not be convinced in the conformance of some of its actions with international law does not make an exemption from the principle of agreement to the competence of the Court and the freedom to set a reservation."[31]

Based upon this, the Court will draw the following conclusion on the rules of interpretation:

"There is a fundamental distinction between the acceptance of the competence of the Court by a state and the conformance of certain acts with international law. The first requests an agreement. The second question can be reached only when the Court deals with the meritum?, after having established its competence and heard the complete legal argumentation of both parties."

It is interesting that the Court will repeat this viewpoint in all its decisions by means of which it has rejected the request of the Federal Republic of Yugoslavia to institute provisional measures.

IV. Reservations to the Statements of the Federal Republic of Yugoslavia and Member States of NATO on the Acceptance of Compulsory Competence of the Court

The Federal Republic of Yugoslavia entered the system of optional, that is, elective clause on 26. April, 1999, by depositing the statement the text of which reads as follows:

"This is to declare that the Government of the Federal Republic of Yugoslavia recognizes, in keeping with Article 36, paragraph 2, of the Statute of the International Court of Justice, as obligatory ipso facto and without a particular agreement with reference to other states accepting the same obligation, that is, under the reciprocity condition, the competence of the said Court in all disputes arising or that may arise after signing of this statement and on the occasion of situations or facts arising after signing, except in cases in which the parties have agreed or will agree to resort to another procedure or any other mode of pacific settlement. This statement shall not be applied to disputes concerning the questions that, according to international law, fall exclusively under the competence of the Federal Republic of Yugoslavia as well as to territorial disputes.

The aforementioned obligation has been accepted until the moment its termination is made public."[32]

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[30] Right of Passage over Indian Territory, Preliminary Objections, Judgement, I.C.J. Reports 1957, p. 142.
[31] Ibid., para. 54.
[32] For the text of the statement see: Yugoslav Review of International Law, 1999, No 1-3, p. 222.

Applying the reciprocity principle, the Court has found in the *disputes of the Federal Republic of Yugoslavia against Great Britain and Spain* that statements of these states contain, among other things, the reservation ratione materiae which excludes the competence of the Court. In the remaining four cases, Yugoslavia against Kingdom of Belgium, Kingdom of Holland, Canada and Portugal, the Court has taken a stance that the reservation ratione temporis, which the Federal Republic of Yugoslavia has included in her statement, excludes disputes among these states and the Federal Republic of Yugoslavia from the competence of the Court.

The statement of Great Britain, deposited on 1 January, 1969, excludes the competence of the Court in disputes because of which only or regarding which only the other party has accepted the compulsory competence of the Court and disputes with which between ratification or deposition of the statement on the acceptance of the optional clause and submission of the claiming request has not passed more than twelve months.[33] In order to eliminate the competence of the Court, Great Britain has in the course of hearing of the parties referred exactly to this reservation. Namely, she has advanced the attitude that the statement on the acceptance of competence of Yugoslavia represents "in essence an attempt the competence of the Court to be accepted exclusively because of one case" and pointed out that the Yugoslav statement deposited only three days prior to the application for the institution of proceedings "obviously ... does not meet the requirement of the twelve-month term."[34]

Since the Federal Republic of Yugoslavia has not answered to the assertion of Great Britain, there was nothing left for the Court but to conclude: "statements deposited by the parties according to Article 36, paragraph 2, of the Statute obviously cannot be a basis of competence in this case, even not *prima facie*."[35]

The Court has also arrived at the same conclusion in the case of Spain whose statement on the acceptance of the competence contains essentially the same reservation. Namely, under (b) of the statement Spain has excluded from the competence disputes regarding which and because of which the other party has exclusively accepted the obligatory competence of the Court, while under (c) excluded from the competence of the Court are disputes where between the statement on the acceptance of the competence and the claiming request by means of which application for institution of proceedings has not passed more than twelve months. In this appearance before the Court Spain has referred only to the reservation under (c), which was quite enough for the Court to find out that "the statements given by the parties according to Article 36, paragraph 2, of the Statutes obviously cannot be a basis of competence in this case, even not prima facie."[36]

In the remaining four cases the situation is essentially different, because according to the Court it is just the statement of the Federal Republic of Yugoslavia under which the competence is accepted in the narrower scope. Also, the statement of Yugoslavia may be said, as regards the language and style, to be fully in tune with the accepted standards of

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[33] Point (iii) of paragraph 1 of The Statement on acceptance; see paragraph 22 of the Decision on temporary injunctions.
[34] Paragraph 23 of the Decision.
[35] Paragraph 25 of the Decision.
[36] Ibid., paragraph 25.

formulating this kind of unilateral acts and it does not leave those standards even when the conditions and reservations are in question.[37] It was given under the conditions usual in the system of optional clause: without time limits and with the rights reserved to withdraw the acceptance of competence at any moment. As is the case with the most statements in effect, mentioned in it is the reciprocity condition although, as it is undoubtedly proved by the theory and jurisprudence of the Court, the reciprocity request is immanent to the optional clause system.[38] The statement itself contains two typical reservations ratione materiae.

a) a reservation under which disputes, according to international law, fall into the exclusive domestic jurisdiction of the Federal Republic of Yugoslavia;
b) a reservation under which territorial disputes are excluded from the jurisdiction of the Court.

The third reservation contained in the statement, also usual to the system of optional clause, refers to the exclusion of disputes on which the parties to the dispute have agreed or will come to an agreement to settle them applying other methods of pacific settlement of disputes. Finally, the fourth, but the first reservation as regards the text, is the reservation under which excluded from the jurisdiction of the Court are disputes that have arisen or might have arisen prior to signing this statement and regarding the situations or facts that had arisen prior to its signing. The so-called **double exclusion formula** is in question with the reservation ratione temporis, which in this stage of the proceedings will prove to be the key one for estimation of the limits within which the parties have entrusted the competence to the Court. Applying the reciprocity principle, referred to by Holland, Canada and Portugal and that of proprio motu in the case of Belgium, the Court will conclude that its jurisdiction is excluded by the very reservation ratione temporis contained in the statement of the Federal Republic of Yugoslavia. On that occasion the Court started from the attitude that Yugoslavia had ratione temporis accepted its jurisdiction "only with reference, on the one hand, to the disputes arising or that may arise after signing her statement and, on the other hand, those concerning the situations or facts arisen after that signature". Therefore, "to estimate whether the Court is competent in this dispute, it is enough to decide whether the dispute, according to the letter of the text of the statement, submitted to the Court, had arisen before 25 April, 1999, or after, when the statement was signed."[39]

Thus the Court has, at the same time, determined the manner in which it will consider the question of jurisdiction, but, to tell the truth, only prima facie. The first step in that direction is interpretation of the reservation, that is, statement in which the reservation is contained. Namely, the Court interprets the reservation "according to the letter of the statement", which, we would say, represents a determination that the statement should be

[37] For more details see: B. Bakotić, Fakultativna klauzula i obavezna nadležnost Medjunarodnog suda, Medjunarodni problemi, 1971, No. 2, pp. 41-68; H. Briggs, Reservations to the Acceptance of Compulsory Jurisdiction of the International Court of Justice, Recueil des Cours (t.93), La Haye, 1958, pp. 279-363; S. Siriški, Tendencije prihvatanja nadležnosti Medjunarodnog suda pravde, Medjunarodni problemi, 1989, No. 2-3, pp. 261-270.
[38] See, for example: Sh. Rossene, op. cit., p. 385.
[39] Paragraph 26 of the Decision.

"interpreted such as it is, having in mind the really used expressions", that is, "such as it is".[40]

In the course of hearing before the Court the Federal Republic of Yugoslavia has stated that the language interpretation is not enough, so that "the question before the Court, is the question of interpreting unilateral statement on the acceptance of its jurisdiction and, therefore, of establishing the meaning of the statement on the basis of the intention of its author", and such interpretation "permits to take into consideration all disputes really arisen after 25 April, 1999", Moreover, "it would be quite contrary to the obvious and clear intention of Yugoslavia" to conclude that she has not entrusted settlement of these disputes to the Court.[41]

That attitude of Yugoslavia has neither been commented nor accepted by the Court. Instead, it has directed its consideration towards searching for an answer to the question whether "the dispute submitted to the Court "had arisen" prior to 25 April, 1999, or after when the statement was signed".

It will be shown, however, that it is a direction the scopes of which are much more far-reaching, that is, that here determining the moment the dispute has arisen in time is not or at least not only in question, but defining the dispute itself. Namely, in the hearing before the Court Yugoslavia has stated that "each of these events" meaning each of the bombing attacks carried out against the targets on her territory is a "flagrant violation of international law the victim of which she thinks she is". Since "member states of NATO deny to have violated any international obligation", therefore, there is between Yugoslavia and the charged states "disagreement on the law or the fact, disagreement ... the expression of which in any case depends upon the particular characteristics of the attacks". They, the Federal Republic of Yugoslavia goes on explaining, "represent "instantaneous illegal acts"", so it is why "there are also numerous separate disputes that have arisen between the parties after 25 April regarding the events after this date".[42]

The Court, however, will not accept the concept of "instantaneous illegal acts", which are per se a particular separate dispute. In its opinion, from the request to institute the proceedings "from establishing the facts upon which the dispute is based and from the manner the very request has been formulated ... it can be seen that the request for the institution of the proceedings is, basically, directed against bombing the territory of the Federal Republic of Yugoslavia, the stoppage of which is requested by the Court".[43] The bombardment itself, concludes the Court, "was initiated on 24 March, 1999, and is being carried out continuously over the period from 25 April, 1999". Therefore, the dispute "had arisen between Yugoslavia and the charged, as it had arisen between other member states of NATO, well ahead of 25 April, 1999, regarding the legality of that bombardment as such, taken as a whole."

If the dispute is defined in that way, it logically follows, as the first, that "... the fact that the bombing attacks were continued after 25 April, 1999, and that the dispute re-

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[40] See attitude of the Court in cases of Anglo-Iranian Oil Co., (previous objections) and the Norwegian loans (judgement); I.C.J. Reports 1952, p. 105; ibid. 1957, p. 27.

[41] Paragraph 25 of the Decision.

[42] Ibid.

[43] Paragraph 27.

garding them was continued after that date it does not change the date the dispute had arisen"; and as the second, that " each individual attack cannot cause a separate subsequent dispute."

Starting from the conviction that "Yugoslavia, at this stage of the proceedings, has not proven that new disputes, separated from the initial, have arisen between the parties after 25 April, 1999, with reference to the subsequent situation or the facts that may be ascribed to Belgium, the Court has rejected Yugoslav request for temporary injunctions because of the lack of prima facie jurisdiction.

V. FINAL NOTES

In connection with the decision of the Court a question is necessarily imposed whether the conclusion that there is no jurisdiction, even prima facie, refers to the dispute as it has been defined by the Federal Republic of Yugoslavia in its application for the institution of proceedings or to the dispute as understood by the Court. It is clear, as the Court itself admits, that "bombardment of the territory of the Federal Republic of Yugoslavia" is in question, but not "each of... the acts of bombardment separately". Namely, it is obvious that the Court has used that what is called reservation ratione temporis in the statement on the acceptance of the optional clause of the Federal Republic of Yugoslavia to, treating it as ratione materiae reservation, redefine the subject of the dispute. Although it cannot be seen from the very text of the decisions, numerous disagreeing separate opinions of the judges vividly testify that it is just this question that was a stumbling block in the process of decision-making.

Only the judges Viramantri and Vereshchetin backed up the attitude of Yugoslavia that the subject of the dispute is made of a series of individual acts of bombardment, although from different points of view. According to the opinion of the first of them, "The Court is faced with a certain number of such acts which were effected independently and at different times ... to conclude that they all make one dispute which has been completed by a decision made to carry out bombardment is a too wide understanding of the rules of legal interpretation." Further, the Court deems: "Recognized in all legal systems is the principle that the act of violation is complete when the violation is carried out, but not when it is planned. ... Up to that carrying out the grounds for institution of the complaint would be incomplete. The plan and intention to cause damage does not mature into a court request until the physical act by means of which the damage is made has been done".[44]

On his part the judge Vereshchetin says: "It should be admitted that the letter of Yugoslav statement has unclear things and that, strictly speaking, it excludes the jurisdiction of the Court to consider the disputes, situations and facts which had appeared prior to the so-called "critical date: that is 25. April, 1999, when the statement was signed." Nevertheless, he thinks that "even after the "critical date" Yugoslavia could, with good reasons, make an appeal because of a series of new serious violations of international law by the NATO states. Each of these alleged new serious violations, the existence of which the

[44] Quoted after: Yugoslav Review of International Law, 1999, No. 1-3, p. 261.

NATO states deny, may be considered as a separate dispute between the interested parties, the dispute which clearly appears after 25 April, 1999." The judge bases this conclusion upon, in the Court jurisprudence recognized, the differentiation of a dispute of general nature and a particular dispute, so it is why he deems that "there is no anything that could justify the suggestion that the Court cannot consider a particular legal dispute between the parties only on the basis that the dispute is connected with the dispute or it is a part of the dispute excluded from the jurisdiction of the Court."[45]

On the contrary, the judge Shi will decide for the opinion that the subject of the dispute is a unique act, but he will, in contrast to the majority of judges, take a stance that the Court is competent both ratione materiae and ratione temporis. Analysing the Yugoslav reservation, he arrives at the conclusion that the critical date is not 24 March, 1999: "... the legal dispute that is before the Court consists of a series of legal elements. It cannot be said that the dispute had arisen before all the integral elements arose. None of the previous elements existed prior to the critical date, that is, 25 April, 1999. It is correct that the air bombardment of the territory of Yugoslavia had commenced several weeks prior to that critical date when the statement was signed. However, the air bombardment and its consequences are only the facts or situations and as such they do not constitute a legal dispute. The integral elements of this dispute do not exist prior to the critical date and exist at the date and after the date of the request for institution of the proceedings of Yugoslavia on 29 April, 1999."[46]

When the subject of the dispute is in question, the judge Shi says: "In this case, the dispute refers to the alleged delay of various international obligations by means of violent acts in the form of air bombardment of the territory of Yugoslavia the accuser ascribes to the state sued. It is obvious that the alleged delay of obligations through such "continuous act" appeared first at the moment when the act began, weeks prior to the critical date, 25 April, 1999. Since the acts of air bombardment were continued well enough after the critical date and are still in progress, it is why the time of commitment of violations extends during the whole period over which the acts are being continued and ceases only after the acts of the sued party have been finished or after the international obligation that is allegedly violated by the acts of that state ceases to exist or ceases to be valid for it."[47]

The judge Higgins will comment in his separate opinion: "It is surprising that the Federal Republic of Yugoslavia has not pointed out before the Court the argument that would direct either to the continuous event or to the continuous dispute ... She has exclusively based her attitude upon the dispute which, in her opinion, arises, and the situations and facts which, in her opinion, appear after the critical date, 25 April, 1999." For such orientation of Yugoslavia the judge Higgins has the following explanation: " She neither wanted that any dispute that might exist ... before 25 April be subjected to the jurisdiction of the Court nor any situations and facts connected with such dispute. That was the intention of the Federal Republic of Yugoslavia and that was clear."[48]

Perhaps the best estimate for such explanation, that could be ascribed to the vast ma-

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[45] Ibid., p. 268-269.
[46] Ibid., p. 265.
[47] Ibid., p. 266.
[48] Ibid., p. 256.

jority of judges, was that given by the judge Vereshchetin in his separate opinion:

"In decisions on the advanced cases, the Court has, rejecting to take the clear intention of Yugoslavia into consideration, taken a stance towards the Yugoslav statement, which might lead to an absurd conclusion that Yugoslavia through her statement on the acceptance of the jurisdiction of the Court intends to exclude the jurisdiction of the Court in view of requests by means of which she institutes the proceedings against the sued states."[49]

REZERVE UZ IZJAVE O PRIHVATANJU OBAVEZNE NADLEŽNOSTI MEDJUNARODNOG SUDA PRAVDE U SPORU SR JUGOSLAVIJE PROTIV DRŽAVA ČLANICA NATO

Zoran Radivojević

Pošto je prethodno i uz odredjene rezerve dala izjavu o pristupanju fakultativnoj klauzuli iz stava 2 člana 36 Statuta Medjunarodnog suda pravde, SR Jugoslavija 29. aprila 1999. godine podnosi zahtev za pokretanje postupka i odredjivanje privremenih mera protiv šest država članica NATO koje su, takodje, prihvatile ovu klauzulu. Sud je, medjutim, odbio zahtev za privremenim merama našavši da nema prima facie nadležnost. Kada je reč o državama koje su vezane fakultativnom klauzulom, Sud je u prilog toga stava naveo i rezervu ratione temporis sadržanu u jugoslovenskoj izjavi o prihvatanju obavezne nadležnosti. Takvo opredeljenje glavnog sudskog organa UN poslužilo je autoru kao povod za analizu obavezne nadležnosti Medjunarodnog suda pravde, dopuštenosti i pravne prirode rezervi, pravila tumačenja, kao i konkretnih rezervi sadržanih u izjavama Jugoslavije i šest članica NATO o prihvatanju obavezne nadležnosti Suda.

Ključne reči: *Medjunarodni sud pravde, obavezna nadležnost, fakultativna klauzula, rezerve, privremene mere*

[49] Ibid., p. 269.