CR 2004/14

International Court of Justice

THE HAGUE

Cour internationale de Justice

LA HAYE

YEAR 2004

Public sitting

held on Wednesday 21 April 2004, at 10 a.m., at the Peace Palace,

President Shi presiding,

***in the case concerning the* Legality of Use of Force (Serbia and Montenegro *v.* Belgium); (Serbia and Montenegro *v.* Canada); (Serbia and Montenegro *v.* France); (Serbia and Montenegro *v.* Germany); (Serbia and Montenegro *v.* Italy); (Serbia and Montenegro *v.* Netherlands); (Serbia and Montenegro *v.* Portugal); *and* (Serbia and Montenegro *v.* United Kingdom)**

VERBATIM RECORD

ANNÉE 2004

Audience publique

tenue le mercredi 21 avril 2004, à 10 heures, au Palais de la Paix,

sous la présidence de M. Shi, président,

***en l'affaire relative à la* Licéité de l'emploi de la force (Serbie et Monténégro c. Belgique) Serbie et Monténégro c. Canada) (Serbie et Monténégro c. France) (Serbie et Monténégro c. Allemagne) (Serbie et Monténégro c. Italie) (Serbie et Monténégro c. Pays-Bas) (Serbie et Monténégro c. Portugal) *et* (Serbie et Monténégro c. Royaume-Uni)**

COMPTE RENDU

Present:	President	Shi
	Vice-President	Ranjeva
	Judges	Guillaume
		Koroma
		Vereshchetin
		Higgins
		Parra-Aranguren
		Rezek
		Al-Khasawneh
		Buergenthal
		Elaraby
		Owada
		Tomka
	Judge *ad hoc*	Kreća
	Registrar	Couvreur

Présents : M. Shi, président
M. Ranjeva, vice-président
MM. Guillaume
Koroma
Vereshchetin
Mme Higgins
MM. Parra-Aranguren
Rezek
Al-Khasawneh
Buergenthal
Elaraby
Owada
Tomka, juges
M. Kreća, juge *ad hoc*

M. Couvreur, greffier

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Mme Ruth Ozols Barr, ministère de la justice,

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Mme Laurie Wright, ministère de la justice,

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comme conseiller.

The PRESIDENT: Please be seated. The sitting is now open. The Court meets this morning to hear the first round of oral arguments of Serbia and Montenegro who takes up the floor for the whole of this morning's sitting.

I wish to announce that, for reasons that he has duly conveyed to me, Judge Kooijmans is unable to take part in the present sitting.

I shall now give the floor to Mr. Tibor Varady, Agent of Serbia and Montenegro.

Mr. VARADY: Thank you very much, Mr. President.

I. Introduction

Mr. President, distinguished Members of the Court, it is, once again, an exceptional pleasure to appear before this Court. I am also honoured by the fact that I am facing most distinguished legal teams of high reputation. I would like to start by introducing my colleagues. With me are Mr. Ian Brownlie, Q.C., member of the English Bar as counsel and advocate, and my Co-Agent Mr. Vladimir Djerić, as counsel and advocate. Let me mention at this point that for your convenience, we have provided a map of Serbia and Montenegro in our judges' folders, it is tab. 1. And a further technical matter: the Applicant, the Federal Republic of Yugoslavia, changed its name to Serbia and Montenegro. We shall use both designations depending on the time period we are referring to. We shall also use the common abbreviation for the Federal Republic of Yugoslavia, which is the "FRY".

1. Turning to the subject-matter of the dispute, let me say first that it is well known that during the past decade the former Yugoslavia became the scene of a sequence of tragedies. The arena of violence shifted. After a limited conflict in Slovenia, much more serious confrontations broke out in Croatia, there was even more tragedy in Bosnia and Herzegovina, and finally we had the bombing of Serbia and Montenegro by NATO Member States.

2. While the conflicts lasted, the warring parties took all possible military, political, and legal steps to reinforce their own positions. These steps included applications submitted to the International Court of Justice. As the conflicts subsided, arms were put aside, new political configurations have emerged. The cases submitted to this honoured Court have, however, remained.

3. Mr. President, several colleagues representing the Respondents have mentioned that the relations between Serbia and Montenegro and NATO countries have significantly improved during the last years. We are pleased to confirm this, and the Government of Serbia and Montenegro sincerely hopes that this trend will continue. Yet, the events of 1999 are still awaiting a proper examination. We do have a dispute.

4. Mr. President, we cannot ignore the fact that significant changes took place since the violence subsided. These changes are both political and structural. The Parties facing each other before this Court in this case — just like in other cases stemming from the conflicts in the former Yugoslavia — are not the same as those who fought each other during the past decade.

5. NATO sources alleged that the target of the bombing was the Milošević Government. The bombing did not end the rule of Mr. Milošević. However, 16 months later, the Serbian opposition and the Serbian people did. The party facing NATO countries today represents the people who have overthrown the Government which was the stated target of the use of force.

6. Mr. President, Members of the Court, on 5 October 2000, hundreds of thousands of demonstrators took the streets of Belgrade and brought about the end of the Milošević régime. What remained is a most difficult legacy. We inherited the consequences of a decade of lost opportunities. We have also inherited the lawsuits, the causes of which — we hoped — have been defeated.

7. Mr. President, I would like to recall another massive demonstration which took place in Serbia in the recent past. On 17 November 1996 the anti-Milošević opposition was successful in local elections. The election results were not recognized, however, by the Government, and this prompted the longest demonstrations in Serbian history. From 18 November 1996 to 15 February 1997, demonstrators marched every evening in Belgrade, in Novi Sad, in Niš, and other cities. For 91 winter days there were tens of thousands of people on the streets, and on some of these days the number reached hundreds of thousands in Belgrade alone.

8. These demonstrations earned worldwide sympathies. To cite just a few examples, ITN Television News reported on 24 December 1996: "more than 3,000 demonstrators crowded into Belgrade's Republic Square to protest against Slobodan Milošević. This was the largest

pro-democracy rally so far."[1] Describing the protesters, the *New York Times* stated on 30 December 1996: "Almost all of them say that they are motivated by the need for a shift from dictatorship to democracy."[2]

9. The Government was compelled to recognize opposition victories. After this, on 21 February 1997, Mr. Zoran Đinđic, became mayor of Belgrade. Mr. Đinđić was one of the key opposition leaders, who later became Prime Minister of Serbia until his assassination in 2003.

10. Novi Sad, Niš, and other major cities were also taken over by the opposition. Mr. Milošević was still running the country, but the anti-Milošević opposition took control of many local governments, and an "Alliance of Free Cities" was formed.

11. Mr. President, Members of the Court, these free cities in which the opposition took control in the spring of 1997 became the main targets of NATO bombing in the spring of 1999.

12. The destruction reached all segments of the population. In Belgrade bombs hit the hospital "Dragiša Mišović" killing four persons[3], they hit the city heating plant killing one person[4], and hit many more targets resulting in death or wounding of innocent persons.

13. Bombs hit the Chinese Embassy, killing three and wounding 20 people[5]. The attack on the embassy of a sovereign country, which had nothing to do with the conflict, prompted worldwide protests.

14. Among other attacks, NATO bombers have deliberately targeted the Belgrade Television ("RTS"), killing 16 people[6]. These people had nothing to do with the propaganda which was the alleged pretext for the destruction. Those who have, indeed, been the creators of a propaganda aimed against the Serbian opposition and others, were not in the building. In justifying their action, NATO officials stated that warning was given. NATO Commander General Wesley Clark explained: "[t]he truth was that that — first of all, we gave warnings to Milošević that that [the

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[1]ITN Television News, 24 December 1996, 18:57.

[2]*New York Times*, 31 December 1996, p. A10.

[3]See Memorial, para. 1.1.56.1, and Annex NATO Crimes in Yugoslavia II, p. 246.

[4]See Memorial, para. 1.1.10.4, and Annexes Nos. 72, 73, 74.

[5]See Memorial, para. 1.1.43.2, and Annexes Nos. 94, 95.

[6]See Memorial, para. 1.1.29.1, and Annex NATO Crimes in Yugoslavia I, p. 343.

Belgrade television building] was going to be struck. I personally called the CNN reporter and had it set up so that it would be leaked, and Milošević knew."[7]

15. This may be true, but why was it Mr. Milošević who was warned? Why not the public, why not the Serbian people? If there were strategic reasons not to disclose in advance the intended attack, the Government against which the whole operation was directed should have been the last, not the first to be informed.

16. The International Federation of Journalists condemned the bombing of the RTS in clear and strong terms. It stated: "Hundreds of reporters, writers and broadcasting staff opposed to government manipulation of media are put at risk by this bombing. Killing journalists and media staff never wins wars or builds democracy, it only reinforces ignorance, censorship and fear." It was added: "NATO's action severely compromises the fight for freedom of the press and free expression not just in Europe, but world-wide."[8]

17. Mr. President, in Novi Sad, all bridges over the Danube were destroyed[9], people had to commute between two parts of the city in boats as in medieval times. The Novi Sad TV station producing programmes in five languages was completely destroyed[10].

18. In Niš, NATO bombers used cluster bombs. Among the targets hit was a clinic[11], a market[12], a tobacco factory[13], a synagogue[14]. In the centre of the town cluster bombs killed 13 people[15].

19. According to a study by the ICRC, "NATO forces have made extensive use of cluster bombs during the conflict in Kosovo . . ."[16] This study explains that a single cluster bomb contains

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[7]General W. Clark responding to questions of journalist Jeremy Scahill, *Democracy Now*, 26 January 2004, www.democracynow.org/article.pl?sid=04/01/26/1632224.

[8]International Federation of Journalists, Media Release, 23 April 1999, by Aidan White, IFJ General Secretary.

[9]See Memorial, paras. 1.1.7.2, 1.1.9.2, 1.1.11.5 and 1.1.31.1, Annex NATO Crimes in Yugoslavia I, pp. 233 and 242 and Annexes Nos. 50, 51 and 127.

[10]See Memorial, paras. 1.1.40.1, 1.1.49.3, 1.1.62.4 and 1.1.65.5; Annexes Nos. 143 and 144, Annex NATO Crimes in Yugoslavia II, pp. 440 and 441.

[11]See Memorial, para. 1.1.43.1 and Annex NATO Crimes in Yugoslavia II, p. 118.

[12]See footnote 14, above.

[13]See Memorial, paras. 1.1.11.7, 1.1.25.1, 1.1.28.4 and 1.1.66.3; as well as Annex NATO Crimes in Yugoslavia I, pp. 366 and 223, and Annex NATO Crimes in Yugoslavia II, p. 502.

[14]See Annex NATO Crimes in Yugoslavia II, p. 305.

[15]See footnote 14, above.

147 bomblets, and one single bomblet shatters into 2,000 pre-shaped fragments over a radius of 30-40 metres. NATO used 1,392 cluster bombs in Kosovo only, containing more than 200,000 bomblets[17]. Unexploded bomblets still represent a danger, to children in particular. The ICRC study also stresses that:

> "None of the cluster bomblets used in Kosovo is known to have incorporated self-destruction mechanism in its manufacture, even though cost in comparative terms of this would have been fairly negligible, and would have significantly increased post-conflict protection of the civilian population."[18]

20. Mr. President, the policies of Mr. Milošević may have yielded isolation, but the citizens of Serbia and Montenegro were not isolated in their grief and protest. In a restrained but clear wording, Amnesty International stated on 6 June 2000: "Amnesty International believes that — whatever their intentions — NATO forces did commit serious violations of the laws of war leading in a number of cases to the unlawful killings of civilians."[19]

21. Mr. President, there are two key phrases used repeatedly as slogans by NATO officials and spokespersons, which phrases purported to justify the bombing of Serbia and Montenegro and its consequences. These phrases are: "humanitarian intervention" and "collateral damage". But these justifications have not been accepted — they have rather been rejected. They have been rejected in particular by those who are, indeed, in charge of formulating and implementing international humanitarian policies.

22.The position taken by the Commission on Human Rights of the United Nations Economic and Social Council is crystal clear. In the judges' folder in tab 2, page 3, you may find a quotation from the resolution prompted by the bombing of Serbia and Montenegro and adopted on 20 August 1999. In this resolution the Commission on Human Rights:

> "Expresses its firmest conviction that the so-called 'duty' and 'right' to carry out 'humanitarian intervention' in particular by means of the threat or use of force, is juridically totally unfounded under current general international law and consequently

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[16]*Cluster Bombs and Landmines in Kosovo*, ICRC-Mines-Arms Unit, Geneva August 2000, revised June 2001, p. 6.

[17]*Ibidem*, p. 6.

[18]*Ibidem*, p. 9.

[19]Amnesty International, *"Collateral Damage" or Unlawful Killings?* AI Index: EUR 70/018/2000, 6 June.

> cannot be considered as a justification for violations of the principles enshrined in Article 2 of the Charter of the United Nations."[20]

23. Let us add that according to a probably conservative estimate given by Human Rights Watch, NATO actions yielded 500 civilian deaths, and roughly half of these casualties are attributable to conduct that violated international humanitarian law[21].

24. Speaking of the effects of the bombing, Mr. Jiri Dienstbier, Special Rapporteur of the United Nations Commission on Human Rights for the Former Yugoslavia, stressed:

> "One year after the beginning of the bombing campaign in Yugoslavia it is becoming increasingly clear to an ever larger number of people who are dealing with the conflict or who are, one way or another, participating in it, that the bombs and Tomahawks did not resolve the problems but rather made them bigger, and even created new ones."[22]

The latest wave of violence against the Serbian population in Kosovo in March this year can only confirm these words.

25. Mr. President, Members of the Court, losses of lives cannot be effectively disguised by the use of labels like "collateral damage", the euphemism used repeatedly by NATO officials and spokespersons. Turns of phrase cannot make tragedies less real.

26. On 4 May 1999, Mary Robinson, United Nations High Commissioner for Human Rights stated in no uncertain terms:

> "If it is not possible to ascertain whether civilian buses are on bridges, should those bridges be blown? These are very important questions because *people are not collateral damage*, they are people who are killed, injured, whose lives are destroyed, and we are very concerned . . ."[23] (Emphasis added.)

II. THE ISSUE OF JURISDICTION IN THE LIGHT OF THE DISSOLUTION OF YUGOSLAVIA

II.1. Serbia and Montenegro did not discontinue the proceedings

27. Mr. President, Members of the Court, at this juncture of the proceedings, our focus is on jurisdiction. Let me first say here, that our Written Observations of December 2002 are not a notice of discontinuance as it was alleged by most Respondents in their letters commenting on our

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[20]See the text of the resolution of 19 August 1999 in UN doc. E/CN.4/Sub.2/1999/L.12/Rev.1. This resolution was adopted on 20 August 1999 (UN doc. E/CN.4/Sub.2/1999/SR.25).

[21]Human Rights Watch Report, "Civilian Deaths in the NATO Air Campaign", February 2000. See "Summary: Principal Findings, International Humanitarian Law and Accountability" — http://www.hrw.org/reports/2000/nato.

[22]J. Dienstbier, "Little to Write Home About", Transitions on Line, 3 May 2000, http://archive.tol.cz/may00/downbutn.html.

[23]"NATO Warned on War Crimes" by Steve Boggan, *The Independent,* 5 May 1999.

submission[24]. These Observations cannot be treated as such, and, indeed, they have not been treated as such.

28. During these oral hearings, a number of other theories have also been suggested by colleagues representing the Respondent. The argument was made that Serbia and Montenegro actually meant something other than what it specifically said. Belgium suggested that the FRY proposed some sort of an agreement on jurisdiction — or rather on the lack of it — and that because of this the Court should "simply remove the case from its List"[25]. Italy's theory is that the object of the dispute has vanished[26]. The Netherlands asserted that an agreement came about on the absence of dispute[27]. The theory advanced by Germany is that the FRY renounced its right to pursue its claim[28], while France submitted the hypothesis, that a "reverse *forum prorogatum*" took place[29]. On ground of these theories, most Respondents would like to achieve the removal of the case from the List, without an actual judgment on jurisdiction. These theories have not been substantiated.

29. Mr. President, the Rules of Court are perfectly clear. Only discontinuance may yield a removal of a case from the List without a judgment on jurisdiction or on the merits, and this is only possible on the basis of Articles 88 and 89 of the Rules. Article 88 establishes the prerequisites of discontinuance by joint action, while Article 89 defines discontinuance by one party. According to Article 88, discontinuance only takes place if the parties "[e]ither jointly or separately, notify the Court in writing that they have agreed to discontinue the proceedings . . .". This clearly did not take place.

30. The only possible form of discontinuance by *one party* is defined in Article 89 of the Rules of the Court which contemplates the situation when "[t]he applicant informs the Court in writing that it is not going on with the proceedings . . .". This did not happen either. In our Written

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[24]The Netherlands, in its letter to the Court of 16 January 2003, Italy, in its letter to the Court of 16 January 2003, the United Kingdom, in its letter to the Court of 17 January 2003, France, in its letter to the Court of 19 February 2003, and Germany, in its letter to the Court of 26 February 2003.

[25]See verbatim record of public sitting held on Monday 19 April, CR 2004/6, oral presentation of Mr. Bethlehem. paras. 2,7 and 10.

[26]See verbatim record of public sitting held on Tuesday 20 April, CR 2004/13, paras. 12 and 65.

[27]See verbatim record of public sitting held on Monday 19 April, CR 2004/7, para. 14.

[28]See verbatim record of public sitting held on Tuesday 20 April, CR 2004/11, paras. 37-39.

[29]See verbatim record of public sitting held on Tuesday 20 April, CR 2004/12, para. 18.

Observations of 18 December 2002, we did not inform the Court that we are not going on with the proceedings, nor did we say anything similar. To the contrary, we have requested the Court to decide on the issue of jurisdiction.

31. The respondent States have made specific reference to Article 89[30]. Had this been a notice of discontinuance under Article 89 of the Rules, the Court would have fixed a time-limit within which the Respondents would have stated whether they opposed the discontinuance of the proceedings. The Court did not proceed under Article 89. It did not, because there was no notice of discontinuance.

32. Mr. President, since during the past days a number of theories were advanced explaining what did we actually mean although we did not say so, allow us to state ourselves what we actually said and meant to say.

33. What the new Government of the FRY — now Serbia and Montenegro — did, was to investigate the legal status of the FRY in the light of a dramatic event for our country, the admission to the United Nations as a new Member. In our December 2002 written submission, we submitted to the Court our observations, regarding the perspectives opened by this event, assuming that they have a relevance with regard to issues of jurisdiction. This explains the format and the subject-matter of this submission. We explained in the introductory sentence that

> "The Federal Republic of Yugoslavia is supplementing its earlier communications on the ground of newly discovered facts which have emerged since earlier pleadings were filed. These facts have been revealed in the light of the acceptance of the Federal Republic of Yugoslavia as a new Member of the United Nations on 1 November 2000."

This was the first sentence of our written submission.

34. We did not adapt or modify these observations, depending on whether we were in the position of the Applicant or in the position of the Respondent. We did not manipulate, we submitted the same findings in all our cases before this honourable Court.

35. Mr. President, the position of the FRY with regard to international organizations and treaties has been a most intricate and controversial matter. Only a decision of this Court could bring clarity. We thought that the clarifications, which followed the admission of the FRY to the

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[30]See the letters of the United Kingdom, the Netherlands and Germany cited in footnote 24.

United Nations as a new Member, had a bearing on jurisdiction, and we have brought to the attention of the Court our perception of the legal consequences of this new perspective. We submitted premises asking the Court to decide whether it had or did not have jurisdiction. This is not discontinuance.

36. We do not see either how the estoppel theory could come into play under the given circumstances. The identification of possible legal conclusions, which follow from the fact of admission to the United Nations, is hardly the type of activity which could yield estoppel. Furthermore, legal preconditions like detriment and reliance have not been demonstrated.

37. Mr. President, let me make it once more clear: the applicant State wants the Court to continue the case and to decide upon its jurisdiction — and to decide on the merits as well, if it has jurisdiction.

38. Let me add, Mr. President, that we are aware of the fact that there are issues pertaining to jurisdiction disputed between the Parties, other than those referred to in our 18 December 2002 submission. The Respondents have raised objections regarding jurisdiction *ratione materiae* and *ratione temporis* as well, and we shall take a clear position with respect to these issues confronting the allegations of the Respondents.

II.2 The position of the FRY between 1992 and 2000 from the present perspective

39. Mr. President, Members of the Court, let me put before you in all frankness the position in which Serbia and Montenegro found itself. The main protagonists of the conflicts of the past decade, those who initiated the disputes or against whom the lawsuits were initiated, are not on the scene anymore. The driving force and heated emotions have subsided, but the disputes have not vanished. Within Yugoslavia, the lawsuits have been left to those who had challenged the protagonists of the conflict, and who eventually prevailed against them. And now, we would simply like to know where we stand. Only a judgment on jurisdiction could put us on a clear track.

40. Mr. President, our delegation is aware of the fact that the question we have raised — and which has also been raised by the Respondents — is not a new one. On a number of occasions this Court has taken positions regarding the issue as to whether the FRY was bound by the Genocide Convention and as to whether it was a party to the Statute between 1992 and 2000. These positions

deserve due esteem. We are respectfully submitting that the present procedural setting is different from that in which earlier decisions were rendered. Also, in this case there are less constraints and more information is available. This is why we are asking the Court to undertake a definitive investigation, and to establish conclusively the position of the FRY in relation to the Statute and the Genocide Convention between 1992 and 2000.

II.2.a. Membership kept by the vehicle of continuity?

41. Mr. President, Members of the Court, let me reiterate once more the pertinent facts. It is well known that the former Government of the FRY asserted that the FRY continued the international legal personality of the former Yugoslavia, that it had accordingly remained a Member of the United Nations and of other international organizations, and that it had remained bound by treaties to which the former Yugoslavia was a party. This position was fervently contested by all States which are now opposed to Serbia and Montenegro before this Court. It was contested before the United Nations, before various other international organizations, and at meetings of State parties to treaties; the contestation was consistent and effective.

42. Mr. President, the FRY wanted membership and insisted on continuity as the foundation of membership. For this reason, the former Government of the FRY made declarations emphasizing continuity, but — in order not to contradict a top policy priority — it carefully and consistently avoided submitting notifications of succession or accession, just as it avoided seeking admission to the United Nations or to other international organizations, since this would have contradicted the proposition of continuity.

43. As it is well known, this endeavour remained unsuccessful. Between 1992 and 2000, one after another, international organizations declared that the FRY could not continue the membership

of the former Yugoslavia, and that it should apply for membership as other successor States did, if it wished to become a Member[31].

44. State parties to treaties took the same position, and rejected the claim of the FRY to be recognized as a State party on ground of continuity. The pattern was constant[32].

45. This is why, Mr. President, just a few days after the Serbian opposition prevailed against Mr. Milošević, Mr. Koštunica, the newly elected President of the FRY, opted to end the persistent stalemate. He wanted the FRY to become a member of the international community with equal rights. He took note of the fact that the FRY was unable to enjoy membership rights in either the United Nations, or in international organizations, or in treaties on the ground of the proposition of continuity. In order to find a way out of the impasse and to acquire membership and membership rights, President Koštunica applied for admission to the United Nations. The application was submitted on 27 October 2000. Following a procedure of admission of new Members, the FRY was admitted as a new Member on 1 November 2000[33].

46. Following this, the FRY applied for membership in international organizations, and was accepted as a member. Furthermore, in a letter of 8 December 2000, the Legal Counsel invited the FRY to "[u]ndertake treaty actions, as appropriate, in relation to the treaties concerned, if its intention is to assume the relevant legal rights and obligations as a successor State"[34]. The FRY opted to succeed to most conventions to which the former Yugoslavia was a State party. With

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[31]GATT: See the record of the meeting of the Council on 16-17 June 1993 — C/M/264; Unesco: See the list of Unesco Member States as of 1 October 2003, Note 4. http://erc.unesco.org/cp/MSList_alpha.asp?lg=E; IMF: See IMF Press Release No. 92/92, 15 December 1992; World Bank: See World Bank, *Socialist Federal Republic Of Yugoslavia Termination of Membership and Succession to Membership*, Executive Directors' resolution No. 93-2, (25 February 1993); see also World Bank Press Release No. 93/S43 (26. February 1993); WHO: See the resolution WHA 46.1, 3 May 1993; IMO (International Maritime Organization): See IMO resolution C.72(70), 18 June 1993; ILO: See *Participation of the Federal Republic of Yugoslavia in the 81st session(1994) of the International Labour Conference,* Official Bulletin, Vol. LXXVII, Series A, 1994, p 166; International Atomic Energy Agency (IAEA): See IAEA General Assembly resolution GC (XXXVI)/RES/576; International Civil Aviation Organization (ICAO): ICAO resolution A 29-2, 25 September 1992.

[32]This claim was rejected by State Parties to the Convention on the Rights of the Child (UN doc. CRC/SP/SR.7), the Convention on the Elimination of All Forms of Racial Discrimination (UN doc. CERD/SP/SR.24), the Convention Against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment (UN doc. CAT/SP/SR.7), the International Covenant on Civil and Political Rights (UN doc. CCPR/SP/SR.18), the Convention on the Elimination of Discrimination against Women (UN Press Release WOM/732 dated 7 February 1994), and in many other instances.

[33]See Report of the Committee on the Admission of New Members concerning the application of the Federal Republic of Yugoslavia for admission to membership in the United Nations: UN doc. S/2000/1051; Security Council resolution 1326 (2000) UN doc. S/RES/1326 (2000) and General Assembly resolution 55/12 (2000) UN doc. A/RES 55/12.

[34]The Letter of the Legal Counsel of the United Nations addressed to the Minister for Foreign Affairs of the Federal Republic of Yugoslavia, dated 8 December 2000.

respect to some treaties, including the Genocide Convention, the FRY opted *not* to succeed. Instead, as a new Member of the United Nations, relying on a possibility offered under Article XI of the Genocide Convention to all Members of the United Nations, the FRY decided to *accede* to this Convention.

47. Mr. President, let us take a look from the present vantage point at the issue of the status of the FRY between 1992 and 2000. This issue was shaped by inconsistent reactions to unpredictable developments — and it was brought before this Court *before* the necessary elucidations would or even could have been made. The critical facts and events which may be judged today from a better position, are the following.

48. Continuity — and membership rights on ground of continuity — were rejected. In September 1992, the General Assembly rejected this claim and stated that the FRY — it has been quoted often and I am quoting it again — "cannot continue automatically the membership of the former Socialist Federal Republic of Yugoslavia in the United Nations"[35]. Thereby a basic position was taken. However, given the highly unconventional set of circumstances, some ambiguities and hesitations had persisted for a considerable period.

49. International organizations and State parties to treaties rejected the claim to membership on the ground of continuity, but depositaries kept references to "Yugoslavia" as a member of international organizations or as a party to international agreements. The United Nations continued to treat "Yugoslavia" as a country which owed membership dues. The Legal Counsel stated that resolution 47/1 "neither terminates nor suspends Yugoslavia's membership in the Organization"[36]. It was only in 2002 that conclusive clarifications were given by the United Nations authorities.

50. Mr. President, Members of the Court, between 1992 and 2000, the question arose — to which country did the designation "Yugoslavia" refer? The question remained without a clear answer for too long. Today, however, there are no more ambiguities with regard to the question whose membership was "neither terminated nor suspended", and which "Yugoslavia" remained listed as a party to treaties and a member of international organizations.

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[35]Resolution 47/1 of 22 September 1992 UN doc.A/RES/47/1.

[36]Letter of the Legal Counsel of 29 September 1992 — UN doc. A/47/485.

51. An explicit position was taken by the very same authority from which the controversial formulation emanated. The present version of *Historical Information on Multilateral Treaties* makes it clear and explicit that "Yugoslavia" to which the Legal Counsel referred in his letter of September 1992, was the *former* Yugoslavia. This clarifying word was not included in the original 1992 letter, but now, in the *Historical Information*, it is stressed: "The Legal Counsel took the view, however, that this resolution [resolution 47/1] of the General Assembly neither terminated nor suspended the membership of the *former* Yugoslavia in the United Nations."[37] (Emphasis added.)

52. This has also been confirmed directly by the *Secretary-General***.** After the FRY applied for membership in 2000 — and was accepted as a new Member of the United Nations — the situation created by resolution 47/1 was clarified. In his letter dated 27 December 2001 to the President of the General Assembly, Secretary-General Kofi Annan stated — and you may follow this in tab 3 of the judges' folders:

> "I have the honour to refer to General Assembly resolution 55/12 of 1 November 2000, in which the Assembly decided to admit the Federal Republic of Yugoslavia to membership in the United Nations.
>
> This decision necessarily and automatically terminated the membership in the Organization of the *former Yugoslavia*, the State admitted to membership in 1945."[38] (Emphasis added.)

53. The Secretary-General made it thus finally clear that "Yugoslavia", the membership of which was neither terminated nor suspended, and which was listed as a party to treaties, was the *former* Yugoslavia, not the FRY.

II.2.b. Membership acquired by the vehicle of a *sui generis* position vis-à-vis the UN?

54. Mr. President, Members of the Court, it is now clear that the FRY did not *remain* bound by treaties, and did not *remain* a Member of the United Nations and of other international organizations on ground of continuity. The FRY did not *continue* the membership or treaty

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[37]See *Historical Information*, http://untreaty.un.org/ENGLISH/bible/englishinternetbible/historicalinfo.asp – under the heading "former Yugoslavia".

[38]See the letter dated 27 December 2001 from the Secretary-General addressed to the President of the General Assembly, UN doc. A/56/767.

position of the former Yugoslavia. It has also become clear that "Yugoslavia", the membership of which was formally not terminated, was the *former* Yugoslavia.

55. This leads to the following question: If the FRY was not a party to treaties by way of continuing treaty membership of the former Yugoslavia, the question still arises whether the FRY could have *acquired* the status of a party to treaties and the status of a member of international organizations between 1992 and 2000.

56. Mr. President, as we heeded the admission of the FRY to the United Nations in our Written Observations, we also have to give due consideration to the 3 February 2003 Judgment of the Court. This honoured Court held that the FRY found itself in a *sui generis* position vis-à-vis the United Nations. This opens a new perspective. In its Judgment of 3 February 2003 the Court stated: "[R]esolution 47/1 did not *inter alia* affect the FRY's right to appear before the Court or to be a party to a dispute before the Court under the conditions laid down by the Statute. Nor did it affect the position of the FRY in relation to the Genocide Convention." (Para. 70.)

57. This is certainly true. The FRY came into being on 27 April 1992. Unlike other successor States, it asserted membership in the United Nations by submitting a claim to continuity with the former Yugoslavia. This claim was, however, rejected by resolution 47/1. The resolution did not endow the FRY with any standing. Whatever the position of the FRY was vis-à-vis the United Nations, the Statute or the Genocide Convention, this was not affected by resolution 47/1 — as the Court noted. The question remained open.

58. The Court also states in its 3 February 2003 Judgment that:

> "[G]eneral Assembly resolution 55/12 of 1 November 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." (Para. 71; emphasis added.)

This is again a convincing conclusion. The *sui generis* position which the FRY had vis-à-vis the United Nations, and its position in relation to the Statute and the Genocide Convention (whatever the nature of these positions was) could not have been changed *retroactively* by admission of the FRY to the United Nations. Such admission may have possibly shed a different light on the said position, but it could not have changed it retroactively. The question remains what

was the nature, and what *were* the consequences of this *sui generis* position between 1992 and 2000.

59. Mr. President, the *sui generis* position of the FRY was not analysed in the 1996 Judgment on jurisdiction in the *Bosnia-Herzegovina* v. *Yugoslavia* case, because the conditions were not given — and the treaty status of the FRY was not contested. At that time, resolution 47/1 (which left the question open) was still the main source of information. As it was stated in the 3 February 2003 Judgment:

> "[t]he Court notes that the admission of the FRY to membership of the United Nations took place more than four years after the Judgment which it is seeking to have revised. At the time when that Judgment was given, the situation obtaining was created by General Assembly resolution 47/1." (Para. 70.)

60. The *sui generis* position of the FRY was not analysed in the 2003 Judgment either, since such a scrutiny would have been obviously beyond the scope of the first phase of Article 61 proceedings upon an application for revision. The language used by the Court in the 2003 Judgment is prudent, staying within the limits of the purpose of the given procedural setting. The Court does not speak of a *sui generis* position "in" the United Nations. It rather speaks of a *sui generis* position *vis-à-vis* the United Nations. Likewise the Court speaks of the position of the FRY *"in relation to"* the Statute and the Genocide Convention.

61. Now and within the setting of this case, a fresh look at the status of the FRY has become possible on the basis of the new information, and without the limitations of Article 61 proceedings.

62. The issue is the following. It has been established that the FRY did not continue the personality of the former Yugoslavia. It has also been established that references to "Yugoslavia" the membership of which "was neither terminated nor suspended" were references to the former Yugoslavia. The remaining question is whether the FRY *became* a party to the Statute and to the Genocide Convention between 1992 and 2000 — and if it did, how did this take place.

63. The *sui generis* position of the FRY vis-à-vis the United Nations is an important element of the analysis. Accepting that the FRY — without continuing the personality of the former Yugoslavia — *acquired* a *sui generis* position vis-à-vis the United Nations, the key question is whether this *sui generis* position vis-à-vis the United Nations could have provided the link between

the new State and international treaties — the Statute and the Genocide Convention in particular. This is the question which requires a definitive answer.

64. Mr. President, Members of the Court, the NATO bombing completed the cycle of violence within the former Yugoslavia. Serbia and Montenegro is now facing huge challenges in finding the proper direction after an unfortunate decade. The cases pending before this Court represent a most important segment of these challenges. We need to know whether the turbulent period behind us yielded proper procedural prerequisites for continuing these disputes. A judgment on jurisdiction based on the elucidation of the position of the FRY between 1992 and 2000 could create an anchor point of orientation. Thus Serbia and Montenegro has a clear legal interest in the rendering of a judgment on jurisdiction.

65. We understand that the sequence of events in the former Yugoslavia during the last decade defied established patterns and ignored rules and expectations. Problems reached this Court while clarifications were still awaited. We understand that it is a momentous task to establish consistency and justice considering such background. It is our conviction, however, that by now it has become possible to revisit the conflicting conceptualizations and to put together a clear and conclusive picture. We have full confidence in the world's highest judicial authority, and we shall endeavour to contribute to clarifications in good faith and to the best of our knowledge.

66. Mr. President, Members of the Court, thank you very much for your kind attention and patience. Before ceding the floor to other speakers, allow me to put forward the schedule of our presentations:

(i) Our counsel and advocate Mr. Ian Brownlie, Q.C., will demonstrate that objections regarding jurisdiction *ratione materiae* under Article IX of the Genocide Convention are without foundation, or belong to the merits.

(ii) Mr. Brownlie will further demonstrate that the Article 36 declaration as formulated by the FRY is fit to establish jurisdiction both *ratione temporis* and *ratione materiae*.

(iii) Mr. Brownlie will also demonstrate that the objection that the FRY is acting in bad faith is without foundation and irrelevant.

(iv) My colleague and Co-Agent Mr. Vladimir Djerić will speak next, and he will demonstrate that jurisdiction cannot be denied on ground of the objection that necessary third parties were missing.

(v) Mr. Djerić will also challenge the objection that the claims are not specified against individual respondents.

(vi) Mr. Djerić will further deal with the issue of jurisdiction on ground of bilateral agreements.

(vii) I shall conclude our arguments, and present the submission on the final day of our presentations

Thank you very much, Mr. President. I would like to ask you now to give the floor to Mr. Brownlie.

The PRESIDENT: Thank you, Mr. Varady. I now give the floor to Professor Brownlie.

Mr. BROWNLIE: Mr. President, distinguished Members of the Court.

1. It is my responsibility this morning to examine three of the principal issues raised in the Preliminary Objections. The first issue is the question of jurisdiction *ratione materiae* in relation to Article IX of the Genocide Convention; the second is the matter of jurisdiction *ratione temporis* in the context of Article 36 of the Statute of the Court, and the third is the application of the 12-month clause also in the context of Article 36.

Jurisdiction *ratione materiae* in accordance with Article IX of the Genocide Convention

2. The Preliminary Objections of all the respondent States now before the Court have contended that there is an absence of jurisdiction *ratione materiae* in respect of Article IX of the Genocide Convention, in particular, on the ground that the necessary element of intent has not been established by the applicant State.

3. As will be demonstrated in due course, this question necessarily involves questions of merits and the objection does not possess an exclusively preliminary character. In any event, the findings of the Court at the provisional measures stage of these proceedings, in the words of the Order in *Yugoslavia* v. *Belgium*: "in no way prejudge . . . any questions relating to the

admissibility of the Application, or relating to the merits themselves; and whereas they leave unaffected the right of the Governments of Yugoslavia and Belgium to submit arguments in respect of those questions . . ." (Order of 2 June 1999 *(Yugoslavia v Belgium)*, para. 46.)

4. In fact the Court made certain provisional determinations as follows:

> "Whereas it appears to the Court, from this definition, 'that [the] essential characteristic (of genocide) is the intended destruction of 'a national, ethnical, racial or religious group' *(Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Provisional Measures, Order of 13 September 1993, I.C.J. Reports 1993, p. 345, para. 42)*; whereas 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 whereas, in the opinion of the Court, it does not appear at the present stage of the 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 the provision quoted above' (*Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996 (I), p. 240, para. 26)*;
>
> Whereas the Court is therefore not in a position to find, at this stage of the proceedings, that the acts imputed by Yugoslavia to the Respondent are capable of coming within the provisions of the Genocide Convention [and therefore Article IX of the Convention], invoked by Yugoslavia, cannot accordingly constitute a basis on which the jurisdiction of the Court could prima facie be founded in this case." (Order of 2 June 1999 (*Yugoslavia* v. *Belgium*, paras. 40-41.)

5. In the first place it is necessary to examine the proposition 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. This proposition forms part of the determination of the Court in the various Orders, as in the Order quoted already.

6. The Court cites a passage from the *Nuclear Weapons* Advisory Opinion. Therein, after setting out the provisions of Article II of the Genocide Convention, the Court observed:

> "It was maintained before the Court that the number of deaths occasioned by the use of nuclear weapons would be enormous; that the victims could, in certain cases, include persons of a particular national, ethnic, racial or religious group; and that the intention to destroy such groups could be inferred from the fact that the user of the nuclear weapon would have omitted to take account of the well-known effects of the use of such weapons.
>
> The Court would point out in that regard that the prohibition of genocide would be pertinent in this case if the recourse to nuclear weapons did indeed entail the element of intent, towards a group as such, required by the provision quoted above. In the view of the Court, it would only be possible to arrive at such a conclusion after having taken due account of the circumstances specific to each case." (*I.C.J. Reports 1996*, p. 240, para. 26.)

7. In my submission, the passage from the Advisory Opinion is to be construed with considerable caution. The Court is careful to emphasize that account must be taken "of the circumstances specific to each case". In the light of this qualification, to suggest that the use of force against a State "cannot in itself constitute an act of genocide" does not provide any real assistance.

8. I can now turn to the issue of intent. The relevant text is Article II of the Convention which defines genocide as:

> "any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:
>
> *(a)* killing members of the group;
>
> *(b)* causing serious bodily or mental harm to members of the group;
>
> *(c)* deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part."

And there are some other paragraphs that don't concern us at the moment.

9. First of all there are some preliminary questions concerning methods of proof. In *Akayesu* the ICTR Trial Chamber stated that intent can be inferred from presumptions of fact (case No. ICTR-96-4-T, para. 523). This must surely be correct as a matter of general principle. Thus, various forms of systematic ill-treatment may constitute *evidence* of the requisite intent. Thus, it has been held that forcible expulsions may provide evidence of the requisite intention. And, if forcible expulsions may constitute evidence of intention, then a systematic air offensive lasting 78 days and causing internal refugee flows may constitute appropriate evidence. These considerations support the conclusion that there is here a prima facie case of genocide.

10. The examples of forms of requisite evidence lead on to the larger issues of legal principle. The first such issue is the definition of the protected group, and the available jurisprudence provides some assistance in this respect. Thus in *Akayesu* the Trial Chamber regarded the identification of a protected group as primarily a question of fact.

11. This fairly pragmatic approach has been adopted in other decisions, including decisions of the ICTY. Thus the Trial Chamber in the *Krstic* case states that:

> "A group's cultural, religious, ethnical or national characteristics must be identified within the socio-historic context which it inhabits. As in the *Nikolic* and

Jelisic cases, the Chamber identifies the relevant group by using as a criterion the stigmatisation of the group, notably by the perpetrators of the crime, on the basis of its perceived national, ethnical, racial or religious characteristics." (Para. 557.)

12. Finally in *Rutaganda* the Trial Chamber of the ICTR (case No. ICTR-96-3-T) observed that:

"56. The Chamber notes that the concepts of national, ethnical, racial and religious groups have been researched extensively and that, at present, there are no generally and internationally accepted precise definitions thereof. Each of these concepts must be assessed in the light of a particular political, social and cultural context. Moreover, the Chamber notes that for the purposes of applying the Genocide Convention, membership of a group is, in essence, a subjective rather than an objective concept. The victim is perceived by the perpetrator of genocide as belonging to a group slated for destruction. In some instances, the victim may perceive himself/herself as belonging to the said group.

57. Nevertheless, the Chamber is of the view that a subjective definition alone is not enough to determine victim groups, as provided for in the Genocide Convention. It appears, from a reading of the *travaux préparatoires* of the Genocide Convention, that certain groups, such as political and economic groups, have been excluded from the protected groups, because they are considered to be 'mobile groups' which one joins through individual political commitment. That would seem to suggest *a contrario* that the Convention was presumably intended to cover relatively stable and permanent groups.

58. Therefore, the Chamber holds that in assessing whether a particular group may be considered as protected from the crime of genocide, it will proceed on a case-by-case basis, taking into account both the relevant evidence preferred and the political and cultural context as indicated *supra*."

13. These concepts must now be applied to the case in hand. But what is the case in hand? In the submission of Serbia and Montenegro the case involves the use of the threat of force, and eventually the use of force, to coerce the Yugoslav Government to accept the demands made at Rambouillet by the NATO delegations. The strategy adopted by the NATO States was to coerce the State of Yugoslavia into accepting specific demands and to do this by destroying the infrastructure and a wide range of targets.

14. The Commander-in-Chief of the NATO forces, General Wesley Clark, made a public statement of the aim of the attack: "We're going to systematically and progressively attack, disrupt, degrade, devastate, and ultimately, unless President Milosević complies with the demands of the international community, we're going to completely destroy his forces and their facilities and support." (BBC News, http://news.bbc.co.UK/English/static.NATOgallery/air default.stm/ 14 May 1999).

15. The air offensive caused many civilian casualties and resulted in severe hardships including internal refugee flows caused by the fear of bombing. The protected group in the present case, for the purposes of Article II of the Genocide Convention, can easily be identified. It was the population of Serbia and Montenegro. In *Akayesu* the Trial Chamber observed: "[A] national group is defined as a collection of people who are perceived to share a legal bond based on common citizenship, coupled with reciprocity of rights and duties." (Judgment, para. 512.)

16. In his Fourth Report to the International Law Commission on the Draft Code of Offences against the Peace and Security of Mankind, Mr. Doudou Thiam, in the context of genocide, stated that:

> "A national group often comprises several different ethnic groups, States which are perfectly homogeneous from an ethnic point of view are rare. In Africa, in particular, territories were divided without taking account of ethnic groups, and that has often created problems for young States shaken by centrifugal movements which are often aimed at ethnic regrouping. With rare exceptions (Somalia, for example) almost all African States have an ethnically mixed population. On other continents, migrations, trade, the vicissitudes of war and conquests have created such mixtures that the concept of the ethnic group is only relative or may no longer have any meaning at all. The nation therefore does not coincide with the ethnic group but is characterised by a common wish to live together, a common ideal, a common goal and common aspirations." (ILC *Yearbook,* 1986, Vol. II, Part One, p. 60, para. 57.)

17. The evidence available shows that the bombing affected the populated areas of the whole of Serbia and Montenegro. The NATO statements make it clear that it was the population as a whole, that is, all nationals of the State of Yugoslavia, which formed the target group to be intimidated.

18. Serbia and Montenegro has submitted ample evidence of the human and material losses caused by the sustained bombardment with sophisticated ordnance, and the evidence is set forth extensively in the Memorial. The evidence presented by Yugoslavia of the bombing and its effects permits a number of inferences relevant to the constituents of genocide, including "deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part".

19. In our submission, such inferences include the following:

First: the widespread pattern of civilian deaths and injuries caused in horrific circumstances.

Second: the high explosive power and blast effects of sophisticated missiles.

Third: the extent of the destruction in urban areas, including administrative buildings and bridges.

Fourth: the deliberate destruction of the chemical plants at Pancevo and elsewhere, and the resulting major fires and heavy air pollution.

Fifth: the destruction of water storage and supply facilities.

Sixth: extensive damage to the healthcare system and the creation of risks to patients by power cuts.

Seventh: the extensive use of cluster munitions, which as NATO spokesmen stated, are not precise munitions. The data are provided in the report published by the ICRC Mine Arms Unit, the revised edition, published in June 2001.

Eighth: the extensive use of depleted uranium ammunition, which has long-lasting carcinogenic effects.

20. Mr. President, these tactics, and these weapons, were not used in a ground war, they were used in a bombing campaign with the stated purpose of intimidating the people of Yugoslavia, and its Government, as a group, as a national unit. In such circumstances, which targets could be military targets? Targets can only be defined in relation to purpose and the purpose was intimidation. In other words, the purpose was precisely to cause "serious bodily or mental harm to members of the group", to use the language of the Genocide Convention.

21. When the statements of British Ministers are studied it will be seen that the purpose of the air operations envisaged was not military, but was to force compliance with the demands of the Contact Group. The bombing campaign was the necessary result of the need to implement threats, which had not succeeded.

22. I shall now move to the final sequence of my argument that the bombing campaign constituted genocide, in any event on a prima facie basis and for purposes of jurisdiction. It is accepted on all sides that the Genocide Convention requires a specific form of intention. It is necessary to prove an intention to destroy a national group "as such". The question of the existence of genocide and the pertinent intent should be determined by reference to the specific circumstances, as the Court stipulated in the *Nuclear Weapons* Advisory Opinion.

23. What then are the circumstances? The position is that the group of NATO States using the threat of force, and, ultimately, an aerial bombardment of targets throughout Serbia and Montenegro, had the objective of intimidating Yugoslavia and its nationals into accepting the demands made during the Rambouillet talks.

24. Mr. President, the methods employed can be measured against the acts specified in Article II of the Genocide Convention, that is to say, killing members of the group, and causing serious bodily or mental harm to members of the group. Research carried out by Human Rights Watch indicates a total of approximately 500 civilian deaths and 820 civilians injured. And as the Agent has pointed out, those figures are probably conservative.

25. On 13 October 1998, the North Atlantic Council formally authorized the use of four days of air strikes followed by a "phased" air campaign in Yugoslavia (Statement of the Secretary-General of NATO). From then onwards threats were made at regular intervals, and on 30 January 1999 the North Atlantic Council agreed that the Secretary-General could authorize air strikes against targets in Yugoslavia (Statement to the Press by Javier Solana on 30 January 1999). The Secretary-General of NATO repeated the threat of force — his choice of words — on 23 February 1999.

26. The NATO enterprise had three segments: the Rambouillet demands; the continuing threat of a bombing campaign to enforce those demands; and, when the threats failed, the massive and sustained aerial offensive, targeting towns throughout Serbia and Montenegro.

27. In any event the principle of effectiveness in matters of treaty interpretation must surely apply to the Genocide Convention, and it would be extraordinary if the requirement of intent were not seen to be satisfied when the genocidal consequences were readily foreseeable.

28. Mr. President, before concluding my argument on Article IX of the Genocide Convention, it is necessary to respond to certain points made on behalf of the respondent States this week. Counsel for the United Kingdom expressed dismay at the possibility that all military action should be treated as genocide (CR 2004/10, para. 73). Professor Tomuschat also asserted that warfare cannot be compared with genocide (CR 2004/11, para. 44).

29. These references to "military action" and to "warfare" are essentially irrelevant. The bombing campaign was not a part of normal military operations. The "military action" must be

assessed alongside the ample evidence of the political purpose of the bombing, which was to coerce the people and Government of Serbia and Montenegro. The purpose of the coercion was explicitly formulated in the series of statements I have already referred to, emanating from NATO States. The people and Government of Serbia were to be forced to accept the political demands of the Contact group. And as Professor Tomuschat pointed out, the military action ceased when the demands were accepted.

30. The means of intimidation, the extensive bombing, and the destruction of the infrastructure, constituted "acts . . . causing serious bodily or mental harm to members of the group . . ." for the purposes of Article II of the Genocide Convention. And so, in our submission the prolonged process of coercion of a whole population constitutes prima facie evidence of genocide.

Article 79 of the Rules of the Court

31. As a sequel to the argument related to the Genocide Convention, it is necessary to invoke the provisions of Article 79 of the Rules of Court, and, in particular, paragraph 7, which reads:

> "After hearing the parties, the Court shall give its decision in the form of a judgment, by which it shall either uphold the objection, reject it, or declare that the objection does not possess, in the circumstances of the case, an exclusively preliminary character. If the Court rejects the objection or declares that it does not possess an exclusively preliminary character, it shall fix time-limits for the further proceedings."

32. It is the submission of Serbia and Montenegro that the issue of jurisdiction *ratione materiae* relating to the Genocide Convention is not of an exclusively preliminary character. The modalities of Article 79, paragraph 7, were explored by the Court in the *Lockerbie* case (*Preliminary Objections, I.C.J. Reports 1998*, pp. 26-29). The Court concluded that the objection of the United Kingdom according to which the Libyan claims were without object did not have an exclusively preliminary character. In giving its reasons for this conclusion the Court observed:

> "The Court therefore has no doubt that Libya's rights on the merits would not only be affected by a decision, at this stage of the proceedings, not to proceed to judgment on the merits, but would constitute, in many respects, the very subject-matter of that decision. The objection raised by the United Kingdom on that point has the character of a defence on the merits. In the view of the Court, this objection does much more than 'touch[ing] upon subjects belonging to the merits of the case' (*Certain German Interests in Polish Upper Silesia, Jurisdiction, Judgment No. 6, 1925, P.C.I.J., Series A, No. 6* p. 15); it is 'inextricably interwoven' with the

> merits (*Barcelona Traction, Light and Power Company Limited, Preliminary Objections, Judgment, I.C.J. Reports 1964,* p. 46).
>
> The Court notes furthermore that the United Kingdom itself broached many substantive problems in its written and oral pleadings in this phase, and pointed out that those problems had been the subject of exhaustive exchanges before the Court . . ." (*I.C.J. Reports 1998*, p. 29.)

33. In the present proceedings also the various Preliminary Objections enter into the issues of substantive law and facts relating to the definition of genocide and its application in the circumstances of the present case, including major issues relating to intention, choice of targets and the nature of the munitions used.

Mr. President, with your agreement, that would be a convenient place for me to stop, if that is acceptable.

The PRESIDENT: Well indeed, it is time to have a break of ten minutes, after which you may continue.

The Court adjourned from 11.25 a.m. to 11.35 a.m.

The PRESIDENT: Please be seated. Professor Brownlie, you may continue.

Mr. BROWNLIE: Thank you, Mr. President. I shall now move on to the issues of jurisdiction *ratione temporis.*

Jurisdiction *ratione temporis*

34. The Yugoslav declaration of 25 April 1999 recognizes the jurisdiction of the Court "in all disputes arising or which may arise after the signature of the present Declaration, with regard to the situations, or facts subsequent to this signature . . ."

35. It is necessary to apply this form of words to the circumstances of this case. The Court has consistently adopted the position that the primary criterion of the process of interpretation is the intention of the declarant government and not a purely grammatical interpretation of the text (*Anglo-Iranian Oil Co., Preliminary Objections*, *I.C.J. Reports 1952*, p. 104).

36. Thus, in the *Temple* case, the Court made the following observations:

> "Such being, according to the view taken by the Court, the position in respect of the form of declarations accepting its compulsory jurisdiction, the sole relevant

> question is whether the language employed in any given declaration does reveal a clear intention, in the terms of paragraph 2 of Article 36 of the Statute, to 'recognize as compulsory *ipso facto* and without special agreement, in relation to any other State accepting the same obligation, the jurisdiction of the Court in all legal disputes' concerning the categories of questions enumerated in that paragraph.
>
> In the light of all the foregoing considerations, the Court considers that it must interpret Thailand's 1950 Declaration on its own merits, and without any preconceptions of an *a priori* kind, in order to determine what is its real meaning and effect if that Declaration is read as a whole and in the light of its known purpose, which has never been in doubt.
>
> In so doing, the Court must apply its normal canons of interpretation, the first of which, according to the established jurisprudence of the Court, is that words are to be interpreted according to their natural and ordinary meaning in the context in which they occur." (*Preliminary Objections, Judgment, I.C.J. Reports 1961*, p. 32.)

37. It must also follow that the intention of the State concerned must be investigated in the light of the surrounding circumstances. In this connection the Judgment in the *Fisheries Jurisdiction* case *(Spain* v. *Canada)* is significant. The Court stated the position in this way:

> "In the event, the Court has in earlier cases elaborated the appropriate rules for the interpretation of declarations and reservations. Every declaration 'must be interpreted as it stands, having regard to the words actually used' (*Anglo-Iranian Oil Co., Preliminary Objection, Judgment, I.C.J. Reports 1952*, p. 105). Every reservation must be given effect 'as it stands' (*Certain Norwegian Loans, Judgment, I.C.J. Reports 1957,* p. 27). Therefore, declarations and reservations are to be read as a whole. Moreover, 'the Court cannot base itself on a purely grammatical interpretation of the text. It must seek the interpretation which is in harmony with a natural and reasonable way of reading the text.' (*Anglo-Iranian Oil Co., Preliminary Objection, Judgment, I.C.J, Reports 1952*, p. 104.)
>
> At the same time, since a declaration under Article 36, paragraph 2, of the Statute, is a unilaterally drafted instrument, the Court has not hesitated to place a certain emphasis on the intention of the depositing State. Indeed, in the case concerning *Anglo-Iranian Oil Co.*, the Court found that the limiting words chosen in Iran's declaration were 'a decisive confirmation of the intention of the Government of Iran at the time when it accepted the compulsory jurisdiction of the Court' (*ibid.,* p. 107).
>
> The Court will thus interpret the relevant words of a declaration including a reservation contained therein in a natural and reasonable way, having due regard to the intention of the State concerned at the time when it accepted the compulsory jurisdiction of the Court. The intention of a reserving State may be deduced not only from the text of the relevant clause, but also from the context in which the clause is to be read, and an examination of evidence regarding the circumstances of its preparation and the purposes intended to be served." (*I.C.J. Reports 1998*, p. 454, paras. 47-49.)

38. The Court in the *Interhandel* case examined the surrounding circumstances, and in the *Temple* case *(Preliminary Objections)*, the Court again emphasized that, in order to resolve contradictions in the terms of a declaration, the Court is entitled to go outside the terms of the

declaration and to refer to other relevant circumstances (*I.C.J. Reports 1959*, pp. 20-22; and *I.C.J. Reports 1961*, pp. 33-34, respectively).

39. Of particular significance in this context is the fact that the relevant circumstances may include considerations of international law. And here a distinction is necessary. The considerations of law relate to the elucidation of the intention of the declarant State and not to the issue of legality as such. The distinction is to be seen in the *Aegean Sea* case, in relation to the Court's investigation of the background to the reservations of Greece (*I.C.J. Reports 1978*, pp. 28-34, paras. 69-81).

40. Against this background I can move to my argument. My proposition is that the intention of the declarant government on 25 April 1999 is entirely clear. The wording of the declaration refers to "all disputes arising or which may arise after the signature of the present declaration, with regard to the situations or facts subsequent to this signature . . .".

41. The prior question at this stage is, of course: when did the dispute arise? The respondent States, as in the case of the United Kingdom, argue as follows:

> "The FRY's acceptance of the jurisdiction is expressly confined to a dispute which meets two conditions:
>
> *(a)* the dispute must arise after 25 April 1999; and
>
> *(b)* the dispute must be with regard to situations or facts subsequent to 25 April 1999."

And the United Kingdom continues:

> "These conditions are cumulative, not alternative. The effect of the formula is, therefore, that a dispute falls outside the scope of the FRY's acceptance of the jurisdiction of the Court if the dispute has arisen prior to 25 April 1999 or even though the dispute arises after 25 April 1999, if it is a dispute with regard to situations or facts before that date." (Preliminary Objections of the United Kingdom, p. 57, paras. 4-29)

42. This version of the position is referred to as the "double exclusion formula", and thus it is alleged that the conditions are cumulative, and not alternative. Serbia and Montenegro considers that this analysis involves an invented superstructure and is substantially incompatible with the evidence of the intention of the declarant State in 1999.

43. And this for four reasons.

44. *First*: The declaration must be construed on its own and in its temporal context. The formula is not "all disputes" but "all disputes . . . with regard to the situations or facts subsequent to

this signature . . ." The hostilities which were begun on 24 March 1999 were to be subject to the Court's legal assessment: that was the clear intention of the declaration. However, the declaration did not, of course, concern itself with the specification of the nature of the legal claims.

45. *Second*: There is no sufficient evidence of a double exclusion formula. The overall criterion must be the intention of the declarant. The dispute to be identified was a dispute with regard to the situation, which consisted of the armed conflict mounted by a coalition of NATO States. But this background alone could not be sufficient to identify the nature and incidence of the dispute. It was only when the Application was filed on 29 April 1999 that the constituent elements of the dispute before the Court could come into existence. Only then did the legal dispute crystallize.

46. *Third:* The Yugoslav declaration is not drafted in such a way as to be retrospective but prospective. The declaration refers to "all disputes arising *or which may arise after the signature of the present Declaration* . . ."

47. *Fourth:* In any event, and without prejudice to the foregoing argument, the "situation" to which the dispute was related must be evaluated as in *Spain* v. *Canada* in accordance with the pertinent principles of general international law which form part of the context. Once the bombing offensive was launched, the continuing pattern of activity is to be characterized in accordance with Draft Article 25 on State Responsibility adopted on a first reading by the International Law Commission in 1978. The Article reads as follows:

"*Article 25*

Moment and duration of the breach of an international obligation by an act of the State extending in time

> 1. The breach of an international obligation by an act of the State having a continuing character occurs at the moment when that act begins. Nevertheless, the time of commission of the breach extends over the entire period during which the act continues and remains not in conformity with the international obligation.
>
> 2. The breach of an international obligation, by an act of the State composed of a series of actions or omissions in respect of separate cases, occurs at the moment when that action or omission of the series is accomplished which establishes the existence of the composite act. Nevertheless, the time of commission of the breach extends over the entire period from the first of the actions or omissions constituting the composite act not in conformity with the international obligation and so long as such actions or omissions are repeated.

> 3. The breach of an international obligation, by a complex act of the State consisting of a succession of actions or omissions by the same or different organs of the State in respect of the same case, occurs at the moment when the last constituent element of that complex act is accomplished. Nevertheless, the time of commission of the breach extends over the entire period between the action or omission which initiated the breach and that which completed it." (ILC, *Yearbook* 1978, Vol. II, Part Two, pp. 89-90.)

48. The Articles adopted by the Commission on a second reading in 2001 include Article 14 which provides in material part as follows:

> "1. The breach of an international obligation by an act of a State not having a continuing character occurs at the moment when the act is performed, even if its effects continue.
>
> 2. The breach of an international obligation by an act of a State having a continuing character extends over the entire period during which the act continues and remains not in conformity with the international obligation."

49. On this basis, even if the view of the respondent States concerning the double exclusion formula were to be adopted, the two conditions would be satisfied. The dispute arose on deposit of the Application on 29 April 1999 and the situation was in legal terms a breach of an international obligation by an act of the State having a continuing character.

50. The position advanced on behalf of Serbia and Montenegro can now be summarized.

First: There can be no room for doubt that in the declaration of 1999 Yugoslavia intended to accept the jurisdiction of the Court in order to obtain redress for the bombing by a coalition of States. But the declaration does not identify the dispute: that is not the function of a declaration.

Second: For the purposes of the declaration and the Statute of the Court the date of the dispute was that of the deposit of the Application namely, 29 April 1999.

Thirdly: The breach of the obligations forming the subject of the Application was of a continuing character and therefore both the dispute and the situation to which it related were subsequent to 25 April 1999, the date of signature of the Yugoslav declaration.

51. By way of an epilogue it is appropriate to emphasize that the interpretation of the Yugoslav declaration should be carried out on a contextual basis. It is the intention which is paramount and the context indicates the intention to accept the jurisdiction of the Court particularly but not exclusively with regard to the military action by the United Kingdom and other Respondents. This is accepted by the United Kingdom in her Preliminary Objections at pages 55 to 56, paragraph 4.27.

52. And it is a characteristic of the case law on jurisdiction *ratione temporis* that each decision reflects the historical and legal background of the particular case. It follows that the pre-existing case law cannot provide more than very general guidance. And it is precisely in the context of the case law that Shabtai Rosenne is critical of the contextual approach of the Court to questions of interpretation in this context (see Rosenne, *The Law and Practice of the International Court, 1920-1996*, Vol. II, p. 787).

53. And there is a second epilogue. It is important to reaffirm that the legal dispute in respect of which the Court has competence under Article 36, paragraph 2, did not arise during the Security Council debates of 24 and 26 March 1999. I shall begin with a reference to the definition offered in the *Mavrommatis Palestine Concessions* case, Judgment No. 2, by the Permanent Court — this is a very familiar definition: "A dispute is a disagreement on a point of law or fact, a conflict of legal views or of interests between two persons."

54. In my submission this definition refers to a condition which is necessary but not sufficient. This important limitation of the definition is carefully explained by Shabtai Rosenne in the treatise already referred to (*The Law and Practice of the International Court, 1920-1996*, Vol. II, pp. 519-521).

55. The problem of the identification of a legal dispute has been elucidated by Sir Robert Jennings in the *Essays in Honour of Wang Tieya*, 1999, pages 401 to 405. Like Shabtai Rosenne, Sir Robert points to the circularity and other limitations of the definition offered in the *Mavrommatis* case. Sir Robert proposes the following definition of a legal dispute. He says: "A 'legal dispute' in a technical and realistic sense is accordingly, one which has been thus processed, or reduced, into a form suitable for decision by a court of law, i.e. a series of specific issues for decision." (*Op. cit.*, p. 403.)

56. In this context, that is, the evaluation of temporal limitations, Shabtai Rosenne offers the following opinion: He says: "The judgment in the *Interhandel* case contains what appears to be a definitive decision on this issue. Here the court emphasised that the subject of the dispute was indicated in the application and the principal final submission of the Swiss Government." (Rosenne, *op. cit.*, p. 789, referring to *Interhandel*, *I.C.J. Reports 1959*, p. 21.)

57. In the light of these authorities and certain cogent considerations of principle, it is submitted that the dispute could not have arisen during the Security Council proceedings on 24 and 26 March 1999. The Summary Records concerned can be found in the United Kingdom, Annexes, Nos. 14 and 16 and the Netherlands, Annexes, 7.4 and 7.5.

58. A reading of the Security Council proceedings does not produce any evidence, or any sufficient evidence, of the elements of the legal dispute which crystallized with the filing of the Application. In particular, I respectfully draw the attention of the Court to the following points.

First: The focus of the discussion was the "situation in Kosovo", or "the conflict of Kosovo".

Second: The legal references, such as they were, were to resolutions of the Council acting under Chapter VII.

Third: The Yugoslav representative made no reference to a legal dispute when he spoke (3988th Meeting, pp. 13-15).

Fourth: The diplomatic background had consisted of efforts, accompanied by the threats of bombing over a long period, to reach a political and not a legal settlement: I refer to the views of Sir Jeremy Greenstock, in the record at page 11, referring to efforts to reach a political solution; and the views of the German delegate, at page 16. The threat of a bombing campaign is not, even these days, the appropriate procedure for launching a dispute.

Fifth: The resolution of Belarus, India and the Russian Federation, which was before the Council, refers to Chapters VII and VIII of the Charter and not to judicial settlement.

59. Overall, the Council proceedings explicitly relate to the Kosovo crisis and to political solutions, rather than the prelude to the resolution of legal disputes of any kind. Legal considerations were advanced by only a small number of delegates. It must be recalled that the bombing of Yugoslavia as a whole was the fulfilment of an ultimatum concerning the acceptance of NATO conditions presented during the Rambouillet talks. All this is a long way from *Phosphates in Morocco* and *Interhandel*. The Summary Records do not contain a single reference to a legal dispute. For the convenience of the Court, I would like to indicate that, in so far as this analysis differs from that of the Memorial, the version in the Memorial is superseded (see the Memorial, p. 340, para. 3.2.16).

The conditions of Article 36(2) of the Statute and the 12-month clause

60. In her Preliminary Objections the United Kingdom contends that:

> "Notwithstanding the terms of the Court's decision at the Provisional Measures stage, the FRY has again attempted, in its Memorial, to found the jurisdiction of the Court on the declarations under Article 36 (2) of the Statute. The FRY contends that the twelve-month clause in the United Kingdom declaration will not present an obstacle to the jurisdiction of the Court provided that the oral hearings are held after 25 April 2000." (P. 44, para. 4.6.)

61. In the Memorial Serbia and Montenegro relies on the *Mavrommatis* principle which was reaffirmed and applied by the Court in its Judgment on Preliminary Objections in the *Bosnia* case. In the words of the Court there:

> "It is the case that the jurisdiction of the Court must normally be assessed on the date of the filing of the act instituting proceedings. However, the Court, like its predecessor, the Permanent Court of International Justice, has always had recourse to the principle according to which it should not penalize a defect in a procedural act which the Applicant could easily remedy. Hence, in the case concerning the *Mavrommatis Palestine Concessions*, the Permanent Court said:
>
> > 'Even if the grounds on which the institution of proceedings was based were defective for the reason stated, this would not be an adequate reason 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.' (*P.C.I.J., Series A, No. 2*, p. 34.)
>
> The same principle lies at the root of the following *dictum* of the Permanent Court of International Justice in the case concerning *Certain German Interests in Polish Upper Silesia*:
>
> > 'Even if, under Article 23, the existence of a definite dispute were necessary, this condition could at any time be fulfilled by means of unilateral action on the part of the Applicant Party. And the Court cannot allow itself to be hampered by a mere defect of form, the removal of which depends solely on the Party concerned.' (*P.C.I.J., Series A, No. 6,* p. 14.)
>
> The present Court applied this principle in the case concerning the *Northern Cameroons* (*I.C.J. Reports 1963*, p. 28), as well as *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America)* when it stated: 'It would make no sense to require Nicaragua now to institute fresh proceedings based on the Treaty, which it would be fully entitled to do.' (*I.C.J. Reports 1984*, pp. 428-429, para. 83.) (*I.C.J. Reports 1996 (II)* pp. 613-614, para. 26.)

62. It must be obvious that the 12-month requirement has now been satisfied. No doubt the pertinent Order of the Court relating to the Request for Provisional Measures invoked the British

12-month clause but, of course, the Court, in paragraph 38, stated that the findings did not prejudge the question of the jurisdiction of the Court.

63. In her Preliminary Objections the United Kingdom seeks to distinguish the decision of the Court in the *Bosnia* case. In the first place it is contended that in the *Bosnia* case the Treaty concerned was the Genocide Convention which "is a Treaty of a special character for the obligations which it creates are obligations *erga omnes*" (Preliminary Objections, pp. 54-55, paras. 4.24-4.25). But the Court in the *Bosnia* Judgment makes no reference to this factor and the issue both in that case and in the present case is that of jurisdiction.

64. Secondly, the United Kingdom argues that:

> "Paragraph 1 (ii) of that declaration unambiguously states that the United Kingdom does not accept the jurisdiction of the Court under Article 36 (2) of the Statute vis-à-vis another State if 'the acceptance of the Court's compulsory jurisdiction [by that other State] was deposited or ratified less than twelve months *prior to the filing of the application* bringing the dispute before the Court' (emphasis added). It follows, as the Court recognised in its Order of 2 June 1999, that Article 36 (2) manifestly cannot constitute a basis for exercising jurisdiction over the United Kingdom unless the Applicant's declaration under Article 36 (2) had been in force for at least twelve months before that State filed its Application. Either this requirement is satisfied when the Application is filed or it cannot be satisfied at all." (Preliminary Objections, p. 55, para. 4.26.)

65. In our submission this logic simply begs the question, and fails to circumvent the logic of the *Mavrommatis* principle, "according to which [the Court] should not penalize a defect in a procedural act which the Applicant could easily remedy". I am using the language of the Judgment in the *Bosnia* case. Obviously, the applicant State could simply file a new application.

66. Finally, the United Kingdom points out that her declaration expressly excludes "disputes in respect of which any other party to the dispute has accepted the compulsory jurisdiction of the International Court of Justice only in relation to or for the purpose of the dispute". In my submission the key word here is "only". The United Kingdom has not provided any, or any sufficient, evidence to establish that the intention of the Yugoslav Government had this unique purpose.

67. In her Preliminary Objections the United Kingdom asserts that counsel for the FRY "expressly stated at the Provisional Measures stage that the purpose of the FRY was to accept the jurisdiction of the Court for the present dispute" (p. 56, para. 4.27). This refers to the speech of

Mr. Corten (CR 99/25, p. 18), but, with respect, the substance of the speech does not sustain this assertion.

68. There is, of course, no indication in the text of the Yugoslav declaration that the acceptance was for the purpose of establishing jurisdiction only for the purpose of a particular dispute.

Bad faith

69. Mr. President, before I close, there is the issue of bad faith which has been invoked by Belgium and the United Kingdom, in the Preliminary Objections, as a ground for asserting the inadmissibility of the Application.

70. The Belgian Preliminary Objections seek to find a legal basis for the arguments in the doctrine of clean hands and also on the basis of good faith as a general principle of law. The United Kingdom contents itself with invoking good faith as a general principle of law.

71. This type of argument does not address issues of law or jurisdiction but is in fact addressed purely to political prejudice. Two aspects of the argument can be examined briefly. In the first place, the applicant State is charged with abuse of process. Such arguments do not find favour with the Court. Thus, in its Judgment in the *Nauru* case, the Court dealt with the Australian argument based upon judicial propriety as follows:

> "Australia's fifth objection is that 'Nauru has failed to act consistently and in good faith in relation to rehabilitation' and that therefore 'the Court in exercise of its discretion, and in order to uphold judicial propriety should . . . decline to hear the Nauruan claims'.
>
> The Court considers that the Application of Nauru has been properly submitted in the framework of the remedies open to it. At the present stage, the Court is not called upon to weigh the possible consequences of the conduct of Nauru with respect to the merits of the case. It need merely note that such conduct does not amount to an abuse of process. Australia's objection on this point must also be rejected." (*Preliminary Objections*, *I.C.J. Reports 1992*, p. 255, paras. 37-38.)

72. The argument based upon the general principle of good faith, in the form now advanced by the United Kingdom, was advanced by Nigeria in the Preliminary Objections phase of the case concerning the *Land and Maritime Boundary*. It was carefully examined and rejected by the Court. In the words of the Judgment:

> "The Court furthermore notes that although the principle of good faith is 'one of the basic principles governing the creation and performance of legal obligations … it is not in itself a source of obligation where none would otherwise exist' (*Border and Transborder Armed Actions (Nicaragua* v. *Honduras), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1988*, p. 105, para. 94). There is no specific obligation in international law for States to inform other States parties to the Statute that they intended to subscribe or have subscribed to the Optional Clause. Consequently, Cameroon was not bound to inform Nigeria that it intended to subscribe or had subscribed to the Optional Clause.
>
> Moreover:
>
> > 'A State accepting the jurisdiction of the Court must expect that an Application may be filed against it before the Court by a new Declarant State on the same day on which that State deposits with the Secretary-General its Declaration of Acceptance.' (*Right of Passage over Indian Territory, Preliminary Objections, Judgment, I.C.J. Reports 1957*, p. 146.)'
>
> Thus, Cameroon was not bound to inform Nigeria of its intention to bring proceedings before the Court. In the absence of any such obligations and of any infringement of Nigeria's corresponding rights, Nigeria may not justifiably rely upon the principle of good faith in support of its submissions." (*I.C.J. Reports 1998*, p. 297, para. 39.)

73. Given the general irrelevance of the materials alleged to prove bad faith, an extended response to the Belgian and British arguments would be out of place. However, some observations by way of a limited response may be in order and thus, for a few minutes, I shall descend into the political arena.

74. Belgium and the United Kingdom accuse the Yugoslav Government of disobeying various directives of the Security Council in respect of the situation in Kosovo.

75. This conduct is characterized as evidence of a lack of good faith. But, Mr. President, an effective and objective enquiry into bad faith would extend to a variety of matters, including, for example, the provision of external support to the KLA insurgents. Let me provide one example of a serious lack of co-operation by the NATO Governments with a humanitarian agency empowered to act in Kosovo, namely, the OSCE Mission — the Kosovo Verification Mission. Mr. President, If there was a humanitarian catastrophe imminent, why were the 1400 monitors of the OSCE Mission forced to withdraw at short notice? The reason was the imminent NATO bombing campaign, but this element is not mentioned in the letter of the Foreign Minister of Norway, the CSCE Chairman-in-Office, dated 19 March — just a few days before the bombing — to the President of Yugoslavia. I do not want to quote from the document. With respect, it should be

read as a whole. It can be found in the Memorial, Annex 166, and it is presently in the judges' folder at tab 5.

76. Mr. President, the CSCE Statement, when it is related to the events which followed it, is seen to include regrettable lapses of candour.

Mr. President, that finishes my submission this morning. I thank the Court for its care and patience and I would ask you to give the floor to Mr. Vladimir Djerić.

The PRESIDENT: Thank you, Professor Brownlie. I now give the floor to Mr. Djerić.

Mr. DJERIĆ: Thank you, Mr. President.

Mr. President, distinguished Members of the Court, it is with great pleasure that I take this opportunity to appear before the Court once again on behalf of Serbia and Montenegro. In my presentation, I will first deal with the objection that the Court should not adjudicate the present disputes in the absence of certain third parties; second, I will deal with the objection that NATO and not its Member States should be responsible for the breaches of international law; third, I will examine the question whether the claims of Serbia and Montenegro have been sufficiently specified; and, finally, I will examine the two bilateral treaties as the bases of jurisdiction with respect to Belgium and the Netherlands.

I. Should the Court adjudicate in the absence of other actors involved in the dispute?

1. Mr. President, the respondent States claim that it would be inappropriate to proceed with the present cases because the Court will have to decide upon the rights and obligations of States or entities that are not participating in the proceedings. They try to rely on the well-known principle pronounced in the *Monetary Gold* case (*I.C.J. Reports 1954*, p. 19). According to this principle, whereas the Court can only exercise jurisdiction over a State with its consent, the Court cannot adjudicate if the legal interests of an absent State form the very subject-matter of the dispute (*ibid.*, pp. 32-33).

2. The legal situation in the *Monetary Gold* case was described by the Court in the following way: "In order . . . to determine whether Italy is entitled to receive the gold, it is necessary to

determine whether Albania has committed any international wrong against Italy, and whether she is under an obligation to pay compensation to her." (*I.C.J. Reports 1954*, p. 32.)

3. Thus, at the first stage, the Court had to decide about the international responsibility of Albania, and at the second stage, to decide upon Italy's claim, which was dependent upon the pronouncement on the international responsibility of Albania. And this was a situation in which the legal interests of Albania formed "the very subject-matter of the decision" (*ibid.*).

4. This sequence has been confirmed in the subsequent jurisprudence of the Court. In the *Nauru* case, the question was whether proceedings could continue against Australia, if the other two States which also made up the Administering Authority for Nauru — the United Kingdom and New Zealand — were not before the Court. However, the Court distinguished this situation from the *Monetary Gold* case:

> "In the latter case [*Monetary Gold*], the determination of Albania's responsibility was a prerequisite for a decision to be taken on Italy's claims. In the present case, the determination of the responsibility of New Zealand or the United Kingdom is not a *prerequisite* for the determination of the responsibility of Australia, the only object of Nauru's claim." (*Certain Phosphate Lands in Nauru (Nauru* v. *Australia), Preliminary Objections, Judgment, I.C.J. Reports 1992*, p. 261, para. 55; emphasis added.)

5. This line of reasoning was again confirmed in 1995 in the case concerning *East Timor*. As is well known, the issue in that case was whether Australia had violated its international obligations when it concluded a treaty with Indonesia concerning East Timor and not with Portugal, which was East Timor's administering Power. The Court concluded that it could not reach a decision in the case without first determining whether Indonesia did or did not have the treaty-making power with respect to East Timor, in other words, without *first* deciding upon the legal interests of Indonesia:

> "The Court concludes that it cannot, in this case, exercise the jurisdiction it has by virtue of the declarations made by the Parties under Article 36, paragraph 2, of its Statute because, in order to decide the claims of Portugal, it would have to rule, *as a prerequisite*, on the lawfulness of Indonesia's conduct in the absence of that State's consent." (*East Timor (Portugal* v. *Australia), Judgment, I.C.J. Reports 1995*, p. 105, para. 35; emphasis added.)

6. Mr. President, it clearly follows from the jurisprudence that, according to the *Monetary Gold* principle, the legal interests of the absent State would form "the very subject-matter of the decision" *only* when the Court would have to decide on them as a *prerequisite* for reaching the decision. On the other hand, in cases of possible simultaneous responsibility of States, such as in

the *Nauru* case, the *Monetary Gold* principle is not a bar to adjudication. This is so because the Court need not — in both a temporal and a logical sense — first decide on the legal interests of absent States in order to reach a decision in the case.

7. Applying these principles to the circumstances of the present cases, it seems clear that the military operations against the Federal Republic of Yugoslavia were a simultaneous action of all States members of the NATO alliance. All of them decided to initiate and continue the military operations. All of them participated in the choice of targets. As stated in the *NATO Handbook*, an official NATO publication:

> "When decisions have to be made, action is agreed upon on the basis of unanimity and common accord. There is no voting or decision by majority. Each nation represented at the Council table or on any of its subordinate committees retains complete sovereignty and responsibility for its own decisions." (*NATO Handbook*, 2001, p. 150, available at: www.nato.int/docu/handbook/2001/pdf/147-170.pdf.)

8. Therefore, the Court will have to make a decision with respect to the acts of the respondent States, and of the respondent States only. In order to do so, the Court need not first make any determination with respect to the legal interests of any State not before the Court. This is not logically required as a precondition for the Court's decision. And in this sense, the present cases resemble the *Nauru* case, in which the Court had to make a determination with respect to the responsibility of Australia, which was in effect simultaneous to the possible determination of responsibility of the United Kingdom and New Zealand.

9. Mr. President, some of the respondent States are at pains to distinguish the present cases from the *Nauru* case, by asserting that in the latter case the absent parties had a relatively secondary, minor or incidental role, while Australia played a dominant role. In the present cases, they say, the dominant participant will not be before the Court (Preliminary Objections of Canada, p. 58, para. 197; Preliminary Objections of the Portuguese Republic, p. 43, para. 143; Preliminary Objections of the United Kingdom, p. 94, para. 6.22; Preliminary Objections of the Kingdom of the Netherlands, pp. 61-62, paras. 7.2.23-7.2.24).

10. However, the special role played by Australia in the Mandate and Trusteeship régime for Nauru was not *ratio decidendi* behind the application of the *Monetary Gold* principle in the *Nauru* case. Instead, the Court's analysis was focused on the issue of whether or not a decision in the case against Australia would require, as a prerequisite, a determination of the legal interests of third

States: and the Court concluded that its decision would not require such determination. This was so in *Nauru*, and this is so in the present cases.

11. Some respondent States claim that the *Monetary Gold* principle is applicable in relation to NATO itself (Preliminary Objections of the French Republic, Ch. II, Sec. 3, p. 38 ff, para. 29 ff; Preliminary Objections of the Italian Republic, p. 51 ff; Preliminary Objections of the Portuguese Republic, pp. 43-44; also Preliminary Objections of the Kingdom of the Netherlands, p. 54, para. 7.2.2). They say the legal interests of NATO form the very subject-matter of the decision, and in the absence of NATO the Court cannot proceed with the case.

12. At the outset, it is worth noting that the United Kingdom, Canada and Germany do not invoke this argument. Obviously, the Respondents themselves do not have the same attitude towards the nature of NATO and its role in the military intervention in 1999. In any event, Serbia and Montenegro submits that the *Monetary Gold* principle is clearly not applicable in relation to NATO.

13. Both the application of this principle and the reasoning behind it have been linked exclusively to States. In its jurisprudence, the Court has consistently referred to States. There is not even a hint that the principle could be applied to other subjects of international law: and this is logical because the *Monetary Gold* rationale protects the fundamental principle that the Court's jurisdiction must be based on the consent of States. The position of other entities is simply irrelevant because the contentious proceedings before the Court are not open to them.

II. Should NATO's legal personality shield the respondent States from responsibility in the present case?

14. Mr. President, some respondent States argue that the claims in the present cases do not concern their acts but rather the acts of NATO (see, e.g., CR 2004/12, p. 24, para. 50 (Abraham)). Accordingly, since NATO as an international organization possesses international legal personality, it is NATO and not individual Member States that should be held responsible (see, e.g., CR 2004/9, p. 22, para. 4.8. (Galvão Teles); Preliminary Objections of the French Republic, Ch. II, p. 36, para. 23; Preliminary Objections of the Italian Republic, pp. 52-54; Preliminary Objections of the Portuguese Republic, pp. 38-42, paras. 130-141). Again, I have to note that only certain respondent States have raised this objection. In fact, it seems that the majority of the respondent

States allow that, in principle, they may be held responsible for the acts performed within the framework of NATO.

15. At the outset, Mr. President, it should be noted that the nature of responsibility of, and its allocation between, NATO and its Member States, as well as between the Member States themselves, is clearly a question for the merits and does not have an exclusively preliminary nature as requested by Article 79, paragraph 7, of the Rules (see *Certain Phosphate Lands in Nauru (Nauru* v. *Australia), Preliminary Objections, Judgment, I.C.J. Reports 1992*, pp. 258-259, para. 48).

16. In any case, Mr. President, it would be really astonishing to accept the proposition that, by establishing and acting through an international organization, States could evade their obligations and responsibility under international law, especially under peremptory norms such as the prohibition of use of force and of genocide.

17. Furthermore, Article 103 of the United Nations Charter expressly stipulates that in the event of a conflict between the obligations of United Nations Members under the Charter and their obligations under any other international agreement, the Charter obligations shall prevail. Therefore, the respondent States remain responsible for all violations of the United Nations Charter and, in my submission, for all violations of the principle of *ius cogens* because these obligations prevail over any other agreement, including the North Atlantic Treaty.

18. With all due respect, the Respondents' proposition that States members of an international organization, as a matter of principle, cannot be liable for acts of the organization is incorrect and misleading.

19. Some time ago, this question was thoroughly studied in a report by Professor Higgins, as she then was, for the Institut de droit international. The study itself and the resolution adopted by the Institute do not seem to adopt a general proposition that States members are simply *never* liable for acts of an international organization. Rather, the conclusion seems to be that there is no general rule of international law which provides that States members shall be liable for acts of an international organization. As the author of the report observed,

> "Our conclusion is that, by reference to accepted sources of international law, there is no norm which stipulates that member states bear a legal liability to third parties for the non-fulfilment by international organizations of their obligations to

> third parties." (*The Legal Consequences for Member States of the Non-Fulfilment by International Organizations of Their Obligations Towards Third Parties*, Provisional Report, Institute of International Law, *Yearbook*, Vol. 66, Part I, Session of Lisbon, 1995, p. 415, para. 113.)

20. However, Mr. President, the present cases do not concern the issue of liability of Member States for obligations of an international organization, that is, NATO. Rather, the issue in the present cases concerns liability of individual respondent States themselves for their own acts.

21. It is not disputed by Serbia and Montenegro that NATO has international legal personality in relation to certain limited matters (see, e.g., Agreement on the Status of the North Atlantic Treaty Organization, National Representatives and International Staff, Ottawa, 20 September 1951), but it is still a military alliance.

22. In relation to the use of force, the founding instrument of NATO — the North Atlantic Treaty — is clear and straightforward. According to its Article 5, which is reproduced at tab 4, page 2, of the judges' folder:

> "The Parties agree that an armed attack against one or more of them in Europe or North America shall be considered an attack against them all and consequently they agree that, if such an armed attack occurs, each of them, in exercise of the right of individual or collective self-defence recognised by *Article 51 of the Charter of the United Nations*, will assist the Party or Parties so attacked by taking forthwith, individually and in concert with the other Parties, such action as it deems necessary, including the use of armed force, to restore and maintain the security of the North Atlantic area."

23. Therefore, according to Article 5, if an armed attack against any of the Parties occurs, *each Party* — not the Organization as a separate personality — shall take "individually and in concert with others" such action "as it deems necessary". Clearly, the ultimate decision to use force rests with individual States and this remains a sovereign prerogative of NATO Members.

24. Furthermore, the *NATO Handbook*, which I have already cited, unequivocally states that "[e]ach nation represented at the Council table or on any of its subordinate committees retains complete sovereignty and responsibility for its own decisions" (*NATO Handbook*, 2001, p. 150 available at: www.nato.int/docu/handbook/2001/pdf/147-170.pdf).

25. Mr. President, other information also demonstrates that each NATO Member State individually decided that the military operations should be initiated and continued, and made a sovereign decision on the use of armed force against Yugoslavia. That this was done within the

framework of a military alliance does not alter the fact that decisions on the use of force were ultimately taken by the national governments.

26. For example, France being one of the respondent States raising the objection under consideration, I will quote from a communiqué issued by the French authorities on 24 March 1999, in English translation:

> "Consequently, the President of the Republic, in agreement with the government, has decided on the participation of the French forces in the now inevitable military operations, which are going to be initiated in the framework of the Atlantic alliance."
>
> ("En conséquence, le président de la République, en accord avec le gouvernement, a décidé la participation des forces françaises aux actions militaires, devenues inévitables, qui vont être engagées dans le cadre de l'Alliance atlantique." Available at: www.diplomatie.gouv.fr/actual/dossiers/kossovo/kossovo3.html.)

I will also quote from a statement by German Chancellor Schröder:

> "Bundeswehr soldiers are also participating in this NATO mission. This was decided by the German government and the Deutscher Bundestag — in accordance with the will of a vast majority of the German people.
>
> This was not an easy decision for the German government . . ."
>
> ("An dem Einsatz der NATO sind auch Soldaten der Bundeswehr beteiligt. So haben es Bundesregierung und der Deutsche Bundestag beschlossen — in Übereinstimmung mit dem Willen der großen Mehrheit des Deutschen Volkes. Die Bundesregierung hat sich ihre Entscheidung nicht leicht gemacht…" Available at: www.bundeskanzler.de/Reden-.7715.8165/Erklaerung-von-Bundeskanzler-Gerhard-Schroeder-z...htm)

27. Mr. President, in addition to the fact that the respondent States, individually and in concert with others, took the decision to initiate and continue air strikes against Yugoslavia, their national authorities did have the power to approve or veto the targets, which power is pertinent to their international responsibility. A statement by the Dutch Defence Minister delivered in the Dutch Parliament clearly demonstrates that the ultimate control over military actions rested with each individual member State:

> "Dutch military in Vicenze have assessed each time again whether the targets which Saceur [Supreme Allied Commander Europe] apportioned to the Dutch F-16's, were in conformity with our views on what constitute legitimate targets. It was agreed that in case of doubt the Chief of the Defence Staff would inform the Cabinet . . . The Netherlands have the right to consider that the deployment of these weapons [cluster bombs] in some situations is not warranted. Of course, our allies are informed in these circumstances, but from a formal point of view this remains a Dutch competence. The Cabinet is responsible for the deployment of Dutch forces."

("Door Nederlandse officieren in Vicenza werd telkens opnieuw beoordeeld of de doelen die door Saceur aan Nederlandse F-16's werden opgedragen in overeenstemming waren met onze opvattingen over legitieme doelen. Afgesproken was dat bij twijfel de chef defensie-staf het kabinet zou informeren. Dat gold dus ook voor de inzet van clusterwapens waarbij Nederlandse zouden worden gebruikt. Nederland heeft het recht om de inzet van die wapens in bepaalde situaties niet verantwoord te vinden. Uiteraard wordt hierover contact opgenomen met de bondgenoten, maar het blijft formeel een Nederlandse bevoegheid. Het kabinet is verantwoordelijk voor de inzet van Nederlandse eenheden." (Tweede Kamer, 18 mei 2000, 77ste vergadering, p. 77-5020). Available at: www.tweede-kamer.nl/ documentatie/parlando/index.jsp.)

28. In conclusion, it is clear that, as a matter of principle, the respondent States cannot hide behind NATO's international legal personality to escape responsibility. Further, the respondent States as sovereign States made a sovereign decision to initiate and continue the military operations against Yugoslavia and controlled the choice of targets. The fact that they did so in concert with other NATO States cannot shield them from the responsibility because the decisions were theirs, nevertheless.

III. Whether acts allegedly committed by the respondent States have been sufficiently specified by the applicant State?

29. Mr. President, this takes me to the objection that Serbia and Montenegro has failed to specify which particular acts it attributes to each individual respondent State (see, e.g., Preliminary Objections of the French Republic, Introduction, pp. 2-4, paras. 9-15, Ch. II, p. 34, para. 17; Preliminary Objections of the Kingdom of Belgium, p. 9, para. 28; Preliminary Objections of the Kingdom of the Netherlands, p. 51 ff., para. 7.1.1 ff.; Preliminary Objections of the United Kingdom, p. 92, para. 6.18).

30. For easier reference, I submit that acts of the respondent States which are the subject-matter of the present disputes may be divided into three categories:

— first category: decisions to initiate and continue the military operations against Yugoslavia;

— second category: decisions on the targets to be hit;

— third category: specific acts of warfare, including weapons used, as well as assistance to the so-called "Kosovo Liberation Army".

31. It is submitted that with regard to the first category of acts alleged — decisions to initiate and continue the military operations — the objection as to the specificity of allegations must be rejected. As has just been described, each of the respondent States decided to use its military

forces against Yugoslavia, and all of them individually and in concert with others commenced, perpetuated, and endorsed the bombing campaign. It is in relation to these acts that Serbia and Montenegro claims the respondent States violated, *inter alia*, their obligation not to use force.

32. In relation to the second category of acts — decisions on the selection of targets — the objection as to the specificity of allegations must again be rejected. As has just been demonstrated, all respondent States had control over the choice of targets and all respondent States could have vetoed targets. These acts and omissions of the Respondents give rise to their responsibility for various violations of international humanitarian law and the Genocide Convention.

33. In relation to the third category of acts — specific acts of bombing and warfare — it may be true that the Applicant's submissions have not been as specific as is the case with the other two categories of acts. However, on the one hand, the case before the Court involves joint military operations, and on the other, all the respondent States expressly acknowledged and approved all specific acts of bombing. It is submitted that the onus should rest with the respondent States to demonstrate that their forces did not, in fact, participate in the specific acts of bombing which involved violations of international law.

34. In the alternative, Serbia and Montenegro submits that this objection clearly does not have an exclusively preliminary character, as required by Article 79, paragraph 7, of the Rules. Whether or not the Applicant has sufficiently corroborated its claims in relation to each of the respondent States is clearly the question for the merits (see case concerning the *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon* v. *Nigeria)*, *Preliminary Objections*, *Judgment*, *I.C.J. Reports 1998*, p. 319, para. 100). Moreover, the objection related to the specificity of allegations involves questions such as the role of particular respondent States in the joint military operations, their role in particular instances of bombing, and ultimately allocation of responsibility. To consider these questions, the Court would have, in fact, to adjudicate the merits of the dispute (see *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America)*, *Merits*, *Judgment*, *I.C.J. Reports 1986*, para. 41, p. 31).

IV. Bilateral treaties with Belgium and the Netherlands

35. Mr. President, as additional bases of jurisdiction in the proceedings against Belgium and the Netherlands, Serbia and Montenegro has invoked two bilateral treaties. One is the 1931 Treaty of Judicial Settlement, Arbitration and Conciliation concluded between the Netherlands and Yugoslavia (hereinafter "the 1931 Treaty"); another is the 1930 Convention on Conciliation, Judicial Settlement and Arbitration concluded between Belgium and Yugoslavia (hereinafter "the 1930 Convention"). Both the Netherlands and Belgium have raised objections in relation to these two treaties.

The 1978 Vienna Convention on Succession does not apply in the present case

36. Mr. President, at the outset, it should be noted that it is common ground that the 1978 Vienna Convention on Succession of Treaties is not in force between Serbia and Montenegro and the two States concerned, and *is therefore not applicable to the present cases as treaty law*.

37. However, both Belgium and the Netherlands contend that rules of the 1978 Vienna Convention pertaining to "newly independent states" should, in fact, apply in the present case as customary international law (Preliminary Objections of the Kingdom of Belgium, pp. 140-143, paras. 430-434; Preliminary Objections of the Kingdom of the Netherlands, p. 42, para. 6.11). Serbia and Montenegro cannot accept this contention.

38. As the Court will recall, the 1978 Vienna Convention makes a clear distinction between cases of "newly independent states" (Part III of the 1978 Vienna Convention), and cases of "uniting and separation of states" (Part IV of the 1978 Vienna Convention).

39. The concept of "newly independent states" is confined to States that become independent during the process of decolonization, such as colonies, trusteeships, mandates and protectorates (see Report of the Commission to the General Assembly, United Nations doc. A/9610/Rev.1 (1974), in: *Yearbook of the International Law Commission*, 1974, p. 176, paras. 7-8). However, it has been recognized that the break-up of the former Yugoslavia was not a case of decolonization but a case of dissolution (see, e.g., Opinion No. 8, Conference on Yugoslavia Arbitration Commission ("Badinter Commission"), 31 *ILM* 1488, p. 1521 (No. 6, Nov. 1992)). The former Yugoslavia was not a colonial power, while the FRY and other successor States were not dependent territories within the former Yugoslavia. It is clear, therefore, that the reliance of the

respondent States on the rules pertaining to "newly independent states" is entirely misplaced: these rules are simply not applicable to the cases of dissolution, such as the case of the former Yugoslavia.

40. Even if the rules of the 1978 Vienna Convention were applicable in the present case as customary international law — and they are not — the appropriate setting, therefore, would be the second setting envisaged by the Convention, which deals with cases of "uniting and separation of states". Of course, this would not help the Respondents' case.

41. However, I would like to reiterate that the rules of the 1978 Convention do not apply in the present case, either as treaty law or as customary international law.

Acts of States parties to the treaties in question

42. Mr. President, in the submission of Serbia and Montenegro, the question of succession of the FRY to bilateral and multilateral treaties of the former Yugoslavia should be considered primarily on the basis of acts of States parties to the treaties in question, be they bilateral or multilateral. Starting from this proposition, I will demonstrate that both Belgium and the Netherlands had, in relation to the FRY, maintained bilateral treaties in force between them and the former Yugoslavia, including two bilateral treaties under consideration.

The 1930 Convention between Belgium and Yugoslavia

43. Mr. President, Belgium took a clear and unequivocal position that, pending succession agreement with the FRY, all bilateral treaties that were in force between the former Yugoslavia and Belgium should continue to be in force between the FRY and Belgium. This position was taken in 1996, in a letter by the Foreign Minister of Belgium, and I will quote the English translation:

> "In this regard, Belgium proceeds on the assumption that the bilateral agreements linking, on the one hand, the Kingdom of Belgium . . . and, on the other hand, the Socialist Federal Republic of Yugoslavia, will continue to have effect until they are either confirmed or renegotiated by both parties."
>
> ("A ce propos, la Belgique part du principe que les accords bilatéraux liant, d'une part, le Royaume de Belgique… et, d'autre part, la République Socialiste Fédérative de Yougoslavie, continueront à produire leurs effets jusqu'à ce qu'ils aient été soit confirmés soit renégociés par les deux parties.")

(Letter of the Foreign Minister of Belgium to the Federal Minister of Foreign Affairs of the Federal Republic of Yugoslavia, dated 29 April 1996, reproduced in Annex 74, Preliminary Objections of the Kingdom of Belgium, Annexes, Vol. 2.)

44. This statement was binding on Belgium, while the FRY was entitled to rely on it. Firstly, it was contained in a letter from the Foreign Minister, who by virtue of his function had clear authority to undertake treaty actions and bind the State in such a way. Secondly, this intention expressed by Belgium to remain bound, in relations with the FRY, by the bilateral treaties in force between Belgium and the former Yugoslavia, was not given on the basis of any assumptions, nor was it conditioned in any sense. The Belgian position is unequivocal — *all* bilateral treaties, without exceptions, continue to be in force. Furthermore, this position taken by Belgium was accepted by the FRY, including by the FRY's reliance on the 1930 Convention before this Court. It is clear, therefore, that the 1930 Convention, being a bilateral treaty in force between the former Yugoslavia and Belgium, was in force between the FRY and Belgium at the time it was invoked as a basis for the jurisdiction of the Court, on 12 May 1999.

45. Belgium argues that the letter from the Foreign Minister was written having in mind the bilateral treaties contained in various lists compiled by the two sides, and that the letter did not pertain to the 1930 Convention (CR 2004/6, p. 36, para. 75 (Bethlehem); Preliminary Objections of the Kingdom of Belgium, pp. 144-145, paras. 442-443). However, the wording of the letter is quite clear: it relates to *all* treaties and not only to those contained in the provisional treaty lists. Furthermore, the lists were circulated both before and after the letter was communicated. These were not definitive lists, these were provisional lists which served to facilitate the negotiations. These negotiations have not been concluded and there is still no final agreement of the parties. In such a situation, as the letter of the Belgian Foreign Minister stipulates, all treaties in force between the former Yugoslavia and Belgium will continue to have effect between the FRY and Belgium "until they are either confirmed or renegotiated by both parties".

46. Belgium also argues that the 1930 Convention had lapsed, "whether through obsolescence or desuetude or on the basis of the implied consent of the parties" (Preliminary Objections of the Kingdom of Belgium, pp. 134-138, paras. 412-423; see also CR 2004/6, p. 32, para. 60 (Bethlehem)).

47. However, the Vienna Convention on the Law of Treaties does not envisage the termination of treaties by obsolescence or desuetude. Article 54 of the Vienna Convention provides that the termination of a treaty may occur either (1) in conformity with the provisions of the treaty; or (2) "at any time by consent of all the parties after consultation with other contracting States". Neither of these conditions has been satisfied in the present case.

48. Firstly, the 1930 Convention has not been terminated in conformity with its provisions. Belgium has conceded this point (*ibid.*, p. 135, para. 416 *(b)*). At the same time, Belgium contends that the 1930 Convention was not conceived of as operating in perpetuity, but offers no evidence for such a contention. On the contrary, what clearly follows from the provisions of the 1930 Convention is that it has continued to be in force.

49. As a second option, Article 54 of the Vienna Convention on the Law of Treaties also provides that a treaty may be terminated at any time by consent of the parties "after consultation with other contracting States". Belgium has offered no evidence of such consent or consultation.

50. Mr. President, while the Vienna Convention does not leave room for obsolescence and desuetude, they were mentioned in the preparatory work of the International Law Commission. Their legal basis, according to the ILC, was "the consent of parties to abandon the treaty, which is to be implied from their conduct in relation to the treaty" (ILC *Yearbook*, 1966, Vol. II, p. 237, para. (5)). However, Belgium has failed to produce any proof of such implied consent of the parties to terminate the 1930 Convention.

51. The fact that the 1930 Convention was not invoked by the parties for more than 60 years (Preliminary Objections of the Kingdom of Belgium, pp. 135-136, para. 416 *(c)*) does not seem to have much bearing, considering their friendly relations during this period.

52. Finally, the reliance by Belgium on its practice with other successor States of the former Yugoslavia has no effect on its relations with the FRY and on the present proceedings (*ibid.*, p. 136 ff, para. 416 *(d)* ff; see also CR 2004/6, p. 33, para. 65 (Bethlehem)). It is simply *res inter alios acta.*

The 1931 Treaty between the Netherlands and Yugoslavia

53. Mr. President, I will now proceed to discuss the 1931 Treaty of Judicial Settlement, Arbitration and Conciliation concluded between the Netherlands and Yugoslavia.

54. I submit that the Netherlands, in its communications with the FRY before the present proceedings were instituted, had provided a clear indication that it regarded the 1931 Treaty as being in force between the two States.

55. In this context, of particular importance is a diplomatic note sent by the Dutch Ministry of Foreign Affairs (Treaties Division) to the FRY Embassy in the Hague on 20 May 1997, addressing the question as to which bilateral treaties should continue to be in force. Appended to the note was a list of treaties, on which the 1931 Treaty was listed under No. 3. I will now quote the relevant parts of this diplomatic note:

> "It was suggested by the Dutch side that the Agreements mentioned on the list, minus those mentioned under numbers 10, 11 and 14 continue to be applicable between the Kingdom of the Netherlands and the Federal Republic of Yugoslavia.
>
> . . . . . .
>
> With respect to the remaining in force of the Agreements mentioned under the numbers 1 to 4, 6 and 7, as well the non-continued applicability of the Agreement mentioned under number 10, the Yugoslav delegation would contact the authorities concerned in Belgrade . . ." (Diplomatic note from the Ministry of Foreign Affairs of the Netherlands (Treaties Division) to the Embassy of the Federal Republic of Yugoslavia in the Hague, dated 20 May 1997, FRY Memorial, Annex 178, pp. 529-532 (emphasis added).)

56. Mr. President, the 1931 Treaty is among those treaties that, according to this diplomatic note, should *"continue to be applicable"* in the future. Clearly, the Netherlands must have considered that the 1931 Treaty was in force when it proposed that this treaty should continue to be in force. Therefore, this diplomatic note of the Dutch Ministry for Foreign Affairs provided a clear indication to the FRY that the 1931 Treaty was in force.

57. Moreover, the FRY never opposed this position taken by the Dutch side. The positions taken had not changed in the period between 20 May 1997, when the diplomatic note was communicated, and 12 May 1999, when the FRY invoked the treaty in question before the Court.

58. It clearly follows that the 1931 Treaty was in force on 12 May 1999.

59. The fact that the two sides agreed in 2002 that the 1931 Treaty would not be considered to be any longer in force is irrelevant to the present proceedings. First, the language used in the

official notes exchanged by the two sides at that time clearly indicates that the agreement will have only *future effect* with respect to the treaties in the so-called "Attachment B", which included the 1931 Treaty: "The treaties . . . referred to in Attachment B *will not* be considered in force between the [FRY] and the [Netherlands]." (Note of the Embassy of the Federal Republic of Yugoslavia to the Netherlands of 9 August 2002, addressed to the Ministry of Foreign Affairs of the Netherlands; Note of the Ministry of Foreign Affairs of the Netherlands of 20 August 2002, addressed to the Embassy of the Federal Republic of Yugoslavia, reproduced in case concerning *Legality of Use of Force,* Further Documents Submitted by the Respondents Pursuant to Article 56 of the Rules of the Court, February 2004.)

60. Even more importantly, Mr. President, the 2002 Exchange of Notes has no bearing on the present proceedings because the relevant time at which a basis of jurisdiction must exist is the time when it is invoked before the Court — in our case, 12 May 1999. If the jurisdiction was established on that date, it cannot be affected by subsequent extrinsic fact (see *Nottebohm (Liechtenstein* v. *Guatemala), Preliminary Objections, Judgment, I.C.J. Reports 1953*, p. 123; *Right of Passage over Indian Territory, Preliminary Objections, Judgment, I.C.J. Reports 1957*, p. 142; *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya* v. *United Kingdom), Preliminary Objections, Judgment, I.C.J. Reports 1998*, pp. 18-19, para. 38).

61. In conclusion, since the 1931 Treaty was in force between the FRY and the Netherlands on 12 May 1999, the date when it was invoked before the Court, the subsequent Exchange of Notes between the two States in 2002 has no bearing on the jurisdiction thus established.

Whether the jurisdiction could be established under the provisions of the two bilateral treaties?

62. Mr. President, both Belgium and the Netherlands contend that the FRY did not institute the proceedings in compliance with the provisions of the two bilateral treaties.

63. Belgium argues that the 1930 Convention could provide only a subsidiary basis for the jurisdiction in the present case, and that its invocation by the FRY was premature (Preliminary Objections of the Kingdom of Belgium, pp. 148-149, paras. 455-459). Belgium relies on Article 2 of the Convention which provides: "Disputes for the settlement of which a special procedure is

laid down in other conventions in force between the High Contracting Parties shall be settled in conformity with the provisions of those conventions."

64. First, it will suffice to observe that a number of claims in the present case are independent of the Genocide Convention or any other convention in force which provides for recourse to the Court.

65. Second, one also must reject the contention made by Belgium that Article 36, paragraph 2, of the Statute is in fact a special procedure laid down in a convention in force, falling within the terms of Article 2 of the 1930 Convention (Preliminary Objections of the Kingdom of Belgium, p. 149, para. 457). At the time the 1930 Convention was drafted, the term "convention in force" was already contained, for example, in Article 36, paragraph 1, of the Statute of the Permanent Court, providing that the Court would have jurisdiction in "all matters specially provided for in treaties and conventions in force". Consequently, the term "convention in force" has its clear meaning and refers to treaties other than the Court's Statute.

66. Mr. President, I will conclude by briefly considering the 1931 Treaty with the Netherlands and the contention that the FRY did not comply with its Article 4. The text of Article 4 is clear — whether or not the parties resort to conciliation procedure they may submit the case "jointly under a special agreement" either to the Permanent Court or to an arbitral tribunal. Further, if the parties fail to agree on the choice of a court either party would be free to bring the dispute before the Permanent Court, after giving one month's notice.

67. The Netherlands contends that the opportunity accorded to the parties to choose between the Permanent Court and an arbitral tribunal was essential for its consent to be bound by the 1931 Treaty, and that the possible adjudication by an arbitral tribunal is a part of the object and purpose of the treaty (Preliminary Objections of the Kingdom of the Netherlands, p. 49, para. 6.28; p. 50, para. 6.31). However, this is erroneous, because the 1931 Treaty itself envisages the possibility that parties may not agree about the choice of venue and, in that case, provides for unilateral recourse to the Court.

68. In addition, while under Article 4 parties should first try to agree on whether to resort to the Permanent Court or to an arbitral tribunal, if possibilities for reaching such agreement appear to have been exhausted, each party is free to act unilaterally. In a situation of armed operations

initiated by the Netherlands and its allies against the FRY, it was reasonable for the FRY to conclude that any efforts to reach an agreement on the mode of dispute settlement would be in vain and ineffective and to directly bring the case before the Court (see *United States Diplomatic and Consular Staff in Tehran*, *Judgment*, *I.C.J. Reports 1980*, p. 28, para. 52).

69. In conclusion, it is respectfully submitted that there are no obstacles to establishing the jurisdiction of the Court under the provisions of both the 1930 Convention with Belgium and the 1931 Treaty with the Netherlands.

70. Mr. President, Members of the Court, this concludes Serbia and Montenegro's arguments in the first round. I would like to thank you for your attention and patience.

The PRESIDENT: Thank you, Mr. Djerić. Your statement brings to an end the first round of oral argument by Serbia and Montenegro.

The Court will meet again on Thursday 22 April 2004 at 10 a.m., when it will start the second round of oral argument by hearing Belgium, the Netherlands, Canada and Portugal. Thank you.

The Court is adjourned.

The Court rose 1 p.m.

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