CR 2004/23

International Court of Justice

THE HAGUE

Cour internationale de Justice

LA HAYE

YEAR 2004

Public sitting

held on Friday 23 April 2004, at 3 p.m., at the Peace Palace,

President Shi presiding,

***in the cases 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 vendredi 23 avril 2004, à 15 heures, au Palais de la Paix,

sous la présidence de M. Shi, président,

***dans les affaires relatives 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
		Kooijmans
		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
Kooijmans
Rezek
Al-Khasawneh
Buergenthal
Elaraby
Owada
Tomka, juges
M. Kreća, juge *ad hoc*

M. Couvreur, greffier

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The PRESIDENT: Please be seated. The sitting is now open. The Court meets this afternoon to hear the second round of oral argument of Serbia and Montenegro, and I shall now give the floor to Mr. Tibor Varady, Agent of Serbia and Montenegro.

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

Mr. President, distinguished Members of the Court. I would like to take once again the opportunity to say that it is an exceptional privilege and honour for me to appear before this Court. I would also like to give expression of my respect for the colleagues representing the respondent States, and for their excellent presentations.

THE ISSUE OF PROCEDURAL FAIRNESS

1. Mr. President, several colleagues have raised the issue of procedural fairness, and I would like to make some brief comments in this connection. I could say, of course, that the Statute and the Rules do allow a change of arguments, or the raising of new arguments during the oral hearing — and that this is not without precedent. Let me add that in this case, I have some difficulties in identifying our side as the stronger side within the context of the inequality of arms point. But I do not want to dismiss this issue in this manner, because I feel that I do owe some more explanation.

2. Several respected colleagues have stated that we failed to address the Preliminary Objections of the Respondents for much too long. Canada mentions that we are making our arguments almost four years after Canada filed its Preliminary Objections on jurisdiction and admissibility"[1]. The Netherlands complains that Serbia and Montenegro filed its Written Observations almost two-and-a-half years after the Preliminary Objections of the Netherlands were filed[2].

3. This is true. But allow me Mr. President to mention that these years were not just ordinary years for us. These are the years in which we had to face first the magnitude of destruction caused by the bombing, these are the years in which the people of Serbia brought to an end the Milosevic

[1]See verbatim record of public sitting held on Thursday 22 April 2004, CR 2004/17, para. 8.

[2]See verbatim record of public sitting held on Thursday 22 April 2004, CR 2004/16, para. 4.

régime — which was not an ordinary change of government — and these are the years when we became confronted with the legacy of the past decade.

4. Let me add that we did devote attention to our disputes during these years. The FRY sought a stay of proceedings and alternatively an extension of the time period for the submission of observations — and all NATO countries agreed.

5. This was sought by the newly-elected Minister for Foreign Affairs of the FRY, Mr. Svilanovic, very shortly after he took office, by a letter of 18 January 2001. In this letter it was stressed: "In the light of the fundamental change of policies as well as the new international position of the FRY, my Government will have to undertake a careful review of Yugoslavia's position . . ."

6. Another stay or extension was sought by the FRY on 8 February 2002, stressing that in the given situation the FRY "needs more time for reassessment and for endeavours to find adequate ways to achieve a possible resolution of these cases out of Court". Once again, all NATO countries gave their explicit consent, and an extension was granted.

7. We did not wait until the full time of the second extension expired. As we stated in our letters in which we sought extensions, the new Government of the FRY re-examined its position within the international community, and with regard to international organizations and treaties in particular, we formed new perceptions, and we acted in accordance with these perceptions. Accordingly, we submitted to this honoured Court our perception of the status of the FRY in the period between 1992 and 2000 — and our perception of the FRY with regard the Statute and the Genocide Convention in particular.

8. These were the first steps of the new Government in the inherited cases, we wanted to be consistent. We submitted the same perception in all cases, notwithstanding whether we were in the position of the applicant or in that of the respondent. One month after the oral hearings took place in the *Bosnia Revision* case, we submitted in a written submission our observations in the NATO cases. In our submission of December 2002 we restricted ourselves to points where our reinvestigation of the position of the FRY between 1992 and 2000 yielded *new* perceptions, and where we intended to revise positions taken in the Memorial.

9. Let me add, Mr. President, that there was an exchange of submissions following our Observations of December 2002. Responding to the written submissions of the NATO countries from January and February 2003, Serbia and Montenegro further explained the character of its observations in a letter of 28 February 2003. It was stated:

> "Serbia and Montenegro submits that in its opinion there are newly discovered facts which are relevant in all cases in which Serbia and Montenegro participates before this Court. Consistent with its other submissions since the new Government of the FRY took office in the Fall of 2000, the FRY brought to the attention of the Court these facts in its Written Observations of 18 December 2002."

10. We made it thus plain that what we submitted was our opinion**,** summarizing new perceptions, and stating that there are newly discovered facts which are relevant regarding jurisdiction. We also stated what conclusions follow — in our opinion — regarding our position with regard to the United Nations, the Statute and the Genocide Convention between 1992 and 2000. Furthermore, we made it crystal clear in the same letter that "Serbia and Montenegro stresses that the Written Observations of 18 December 2002 do not represent . . . a notice of discontinuance".

11. Mr. President, Members of the Court, I trust that this additional information may contribute towards a more balanced picture of the position, and of the procedural steps taken by Serbia and Montenegro during the past period.

THERE IS NO GROUND FOR DISCONTINUANCE OR REMOVAL OF THE CASE FROM THE LIST WITHOUT A JUDGMENT ON JURISDICTION

12. Mr. President, jurisdictional issues raised in this case are certainly out of the ordinary, they have a considerable history of controversies — and they inspire theories. We witnessed yesterday a firework of theories. I believe, however, that these fireworks cannot bedazzle us, distract us from a simple straightforward line: these are preliminary proceedings devoted to the issue of jurisdiction, and these proceedings should end with a judgment on jurisdiction.

13. Respondents offered an abundance of stated, restated and altered theories leading towards the same conclusion: the case should be removed from the List without a judgment on jurisdiction. This request is accompanied by an alternative submission: to declare in a judgment that the Court has no jurisdiction. The theories purporting to support the first alternative are

"agreement on lack of jurisdiction", "lack of dispute", "reverse *forum prorogatum*", "estoppel", "unilateral declaration". My learned colleague Pellet, citing the *Temple* case, adds more terms qualifying the same principle, referring to "estoppel", "*préclusion*", "*acquiescement*", "*forclusion*"[3]. He also refers to the principles "*allegans contraria non audiendus est*", "*nemo potest mutare consilium suum in alterius injuriam*", and *venire contra factum proprium non valet*".

14. There is, Mr. President, first of all, a basic problem with the applicability of these theories. The problem is with the identification and with the nature of the undertaking — or dispositive statement — against which requirements like "reliance" or "detriment" could be measured.

15. To illustrate this — and to make myself more clear — let me refer to the analysis of Professor Tomuschat. In one of the several qualifications he offers, he refers to the *Nuclear Tests* cases, and alleges that just as this case was settled on ground of the unilateral declaration of the President of France, our case is also settled by the unilateral declaration of the Agent of Serbia and Montenegro in the Written Observations of December 2002.

16. This is not true. And, as a matter of fact, this is exactly the point where the critical difference becomes evident. The French Minister of Defence stated on 11 October 1974 that "there would not be any atmospheric tests in 1975"[4]. The nature and character of this declaration is completely different from the observations made by Serbia and Montenegro. There is a key element in the French declaration which is completely missing from the observations of Serbia and Montenegro.

17. The French Minister of Defence did not say that in the light of newly emerging facts it follows that nuclear tests are not warranted anymore, and therefore he is asking the Court or, say, the French Parliament, to decide on nuclear tests. This would not have done it. In the *Nuclear Tests* case, the determination is within the powers of the party making the unilateral declaration — and the determination was actually made. A dispositive statement was made by France, rather than leaving it to someone else.

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[3]See verbatim record of public sitting held on Thursday 22 April 2004, CR 2004/21, para. 12.

[4]*Nuclear Tests* case *(Australia* v. *France)*, *Judgment*, *I.C.J. Reports 1974*, p. 266, para. 40.

18. On the other hand, we did not say — neither were we entitled to say — that "there would be no jurisdiction". We did not even go as far as to say that "in our opinion the Court has no jurisdiction". We stopped before reaching this juncture. We submitted our conclusions regarding our position with regard to the Statute and the Genocide Convention — which, of course do have a bearing on jurisdiction — and we explicitly asked the Court to decide on jurisdiction. This is way short of a dispositive unilateral declaration like that given by France. Our observations are by their nature simply incapable of creating estoppel, or estoppel-like situations. They are not dispositive, and reliance or detriment cannot come into question.

19. Let us add, Mr. President, although this is not necessary anymore, that the conclusions we have proposed regarding the treaty status of the FRY, just do not guarantee an inevitable determination. This is known to all who have followed the controversies regarding the position of the FRY — or who participated in these controversies. We have submitted our perception to the Court, we indeed submitted the same perception in all cases pending before this Court — and we asked the Court to decide on jurisdiction considering our submissions.

20. Let me address a further point. Colleagues representing the respondent States suggested that there should be a difference in the consequences of positions taken as an applicant, or of positions taken as a respondent. We do not deny that there may be some differences, although this proposition has to be treated with caution, and differences appear only with regard to some statements, not all statements, and certainly not regarding the observations at issue.

21. It may be true that the applicant, unlike the respondent, may unilaterally discontinue the proceedings — although, beyond a certain moment — which was already reached well before the submission of Written Observations — even this cannot be done unilaterally. But this is not the issue. We did not withdraw our Application, and did not discontinue the proceedings. We submitted our opinion regarding the conclusions which follow in the light of the admission of the FRY to the United Nations. With regard to statements of such a nature, there is no difference between the applicant and the respondent. Such submissions — whether given by the applicant or by the respondent — cannot be dispositive.

22. Mr. President, the definition of estoppel in the *North Sea Continental Shelf* cases, and reiterated in the *Military and Paramilitary Activities* case is well known. The Court explained:

> "[e]stoppel may be inferred from the conduct, declarations and the like made by a State which not only clearly and consistently evinced acceptance by that State of a particular régime, but also had caused another State or States, in reliance on such conduct, detrimentally to change position or suffer some prejudice"[5].

This test is not satisfied; it is not even applicable in our case. The conclusions suggested in our Written Observations are simply not of such a nature as to have any of the described consequences, which, furthermore, would have to be met cumulatively.

23. The estoppel and estoppel-like concepts are just not fitting. A further proof of this is the following. An essential element of all proposed theories is that the action at issue must be contradicted by a later action, assuming other prerequisites are given. We presume that the action at issue consists of the Written Observations of 18 December 2003. But which is the contradicting subsequent action? This question was left without an answer.

24. Facing this obvious difficulty, Professor Tomuschat states: "A party that has publicly proclaimed the lack of jurisdictional foundations of its claims cannot, the next day, argue that what it said was a mistake which should be corrected."[6] Let me say first of all that we did not make any proclamation about jurisdictional foundation, but rather submitted our perception of the status of the FRY with regard to the Statute and the Genocide Convention — and I am quoting from the submission — "[i]n the light of the acceptance of the Federal Republic of Yugoslavia as a new member of the United Nations on 1 November 2000". But let us leave this aside for a moment. The point is that what Serbia and Montenegro is allegedly estopped to do, is described as a *future action*: ("cannot the next day argue"). What is done here is some sort of a pre-emptive strike. Professor Tomuschat stated in essence that we would be estopped to change our position, if we were to change our position. This does not even amount to an allegation of estoppel.

25. Furthermore, the anticipated future action simply never took place — and it is not even alleged that it would have taken place. We did not submit any argument since our December 2002 submission until these oral pleadings, and during these oral pleadings we *definitely* did not say "[t]hat what was said was a mistake which should be corrected" — or anything similar.

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[5] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984*, p. 415, para. 51.

[6] See verbatim record of public sitting held on Tuesday 20 April 2004, CR 2004/11, para 41.

26. Mr. President, Members of the Court, the Respondents have raised the issue whether we have a dispute. At the same time, in most matters nobody seems to agree with us, and we are entering the fifth day of intense debates. It is obvious that we have some common ground regarding jurisdiction *ratione personae*. It is also obvious that we have no common ground at all with regard to jurisdiction *ratione materiae*, jurisdiction *ratione temporis*, the bilateral conventions, and a host of other issues. These cases cannot be removed from the List for lack of dispute.

27. Let me also repeat, Mr. President, that we did not renounce our claim, we did not discontinue this case in any way. The cases cannot be removed from the List without a judgment rendered on jurisdiction and possibly on the merits. Let me repeat that only discontinuance may yield a removal of a case from the List without a judgment, and this is only possible on the basis of Article 88 or Article 89 of the Statute. We said this, and none of the Respondents contradicted this. We have also stressed that the requirements of Article 88 or 89 have clearly not been met. None of the Respondents challenged (or could have challenged) this either.

28. Mr. President, the question has also been raised whether it is permissible to seek the Court to decide on jurisdiction — and to decide on the merits as well if it has jurisdiction. Professor Daniele alleged in his pleading yesterday that the pleadings of Serbia and Montenegro confirmed that "[l]objet de cette affaire n'existe plus et que la Cour se trouverait à décider sur des questions abstraites et tout à fait éloignées de la réalité"[7]. We certainly did not say or confirm anything similar, nor is this true. If the Court decides on its jurisdiction, the cases will either end or continue with proceedings on the merits. These are certainly not abstract issues at a distance from realities.

29. The argument was also made that a judgment on jurisdiction would have an impact on other cases. This is true — within the limits of Article 59 of the Statute — but this fact does not make the position of Serbia and Montenegro impermissible. Mr. Teles, representing Portugal, has also argued that Serbia and Montenegro would actually want "une décision juridictionnelle au contenu négatif"[8]. This is not what we requested. We requested a judgment on jurisdiction. But at

[7]See verbatim record of public sitting held on Thursday 22 April 2004, CR 2004/22, para. 19.

[8]See verbatim record of public sitting held on Thursday 22 April 2004, CR 2004/18, para. 1.8.

this point, we would like to face more generally the issue as to whether our request is permissible, whether it is compatible with the role and position of an applicant.

30. Several respondent States have referred to the *Monetary Gold* case in this regard. We agree that this is the proper reference. We also agree with the Respondents, that there are certain differences between the *Monetary Gold* case and our case. We do not agree with Professor Pellet, who states that in the *Monetary Gold* case the difference "[p]ortait non pas sur l'existence d'un lien juridictionnel entre elle-même et les États défendeurs, mais sur un élément extérieur"[9]. The argument in the *Monetary Gold* case was, indeed — as it is well known — concentrated on Albania, but the "lien juridictionnel" at issue was not the jurisdictional link towards a third party, but precisely the jurisdictional link between the applicant and the respondents. The question was whether the Court had jurisdiction in the dispute between the applicant (Italy) and the respondents (the United Kingdom, France and the United States).

31. The differences between our case and the *Monetary Gold* case which do exist demonstrate that Italy's position is actually more distant from the traditional position of the applicant, than the position of Serbia and Montenegro in this case.

32. In the *Monetary Gold* case, the applicant, Italy, opened a "Preliminary Question" and in the closing sentence of its submissions it not only raised a question, but requested the Court to adjudge and declare — and let me cite the pleading of Mr. Perassi, counsel of Italy — "Que par conséquent la Cour n'est pas compétente pour statuer sur le fond de ladite demande."[10]

33. In other words, Italy — as applicant — explicitly requested the Court to decline jurisdiction. This is clearly much closer to withdrawal or discontinuance than the position taken by Serbia and Montenegro. And yet, the Court decided that Italy's Application "[o]nce properly deposited, must be considered as real and as remaining real unless it is formally withdrawn"[11]. The Judgment added: "The raising of the Preliminary Question by Italy cannot be regarded as equivalent to discontinuance."[12]

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[9]See verbatim record of public sitting held on Tuesday 20 April 2004, CR 2004/12, para. 14.

[10]*I.C.J. Pleadings, Oral Arguments, Documents*, case of the *Monetary Gold Removed from Rome in 1943*, pp. 30 and 164.

[11]*I.C.J. Reports of Judgments, Advisory Opinions and Orders (1954)*, case of *Monetary Gold Removed from Rome in 1943*, p. 29.

[12]*Ibidem*, p. 30.

34. Mr. President, we did not abandon our claim, we did not discontinue the case, and we are not asking for something illicit or improper. We submitted our perception of the treaty status of the FRY between 1992 and 2000, we also endeavoured to identify perspectives given by the 3 February 2003 Judgment of the Court. Now we are asking the Court to conclude the preliminary phase of this case by a judgment on jurisdiction.

THE QUESTION WE ARE RAISING

35. Mr. President, some colleagues suggested that one should behave differently depending on whether one is the position of the applicant or in that of the respondent. Some difference in approach is, of course, natural. But one cannot take a different approach with regard to facts, neither can one take a different approach with regard to basic perceptions formed. We just could not possibly hide the fact that on 8 December 2000, the Legal Counsel asked the FRY to decide whether it did or did not intend to succeed treaty obligations of the former Yugoslavia — and that the FRY responded. We could not possibly keep it as a secret either, that we acceded to the Genocide Convention in March 2001 as a new party, and this was accepted both by States parties to the Convention and by the depositary. Our only option is consistency — and there is nothing suspicious or irregular about that.

36. We understand, Mr. President, that clear answers cannot be given without clear and direct questions. Such questions have not and could not have been raised during earlier proceedings. As it was pleaded by colleagues representing the Respondents as well, in the 1996 Judgment on jurisdiction in the Bosnian case, the issue was not fully shaped, because it was not contested, and furthermore the consequences of the dissolution of the former Yugoslavia were not yet clarified. Let us repeat that as the Court stated (referring to the 1996 Judgment): "At the time when the Judgment was given, the situation obtaining was created by General Assembly resolution 47/1." (Judgment of 3 February 2003.)

37. At the time when the decisions on provisional measures were rendered in the NATO cases, conclusive clarifications of the status of the FRY were still awaited. The question which had to be addressed in the 2003 Judgment on revision was, whether a new fact within the meaning of Article 61 of the Statute existed — and this is the question which was directly addressed.

38. Mr. President, we are aware of the fact that the unorthodox dissolution of the former Yugoslavia yielded events and structures that often could not be fitted under established concepts and categories. Perceptions have also changed both within and outside the former Yugoslavia. Some decisions had to be made while the principles on which these decisions had to be reached were still controversial and unsettled. Some conclusions and effects were allocated having in view one possible characterization of the nature of the dissolution, while other conclusions and effects were derived from an opposite characterization. The question has arisen whether disappearing and emerging States acquired or maintained a status during this process, which status could have qualified them to have access to the Court, to make declarations as a party to the Statute or to rely on treaty membership without a notification of accession or succession. Time and again, issues which proved to be too thorny were just avoided, or put before this Court.

39. Now we are facing the question as to whether it belongs to this Court to investigate and redefine the sequence of tragic events. It has to be established whether the task of the settlement of these disputes — and of the disputes with NATO countries in particular — belongs to this Court, or whether it belongs to proceedings against individuals, to national courts, to history, and to further co-operative efforts of States and their governments.

40. At this moment, we believe that all conditions are finally satisfied for an answer to be given to the key questions regarding the position of the FRY with regard to the Statute and the Genocide Convention in the period between 1992 and 2000 — and in 1999 in particular.

41. The premises are the following. The FRY became a new Member State of the United Nations on 1 November 2000. It has become clear and certain that it did not continue the personality of the former Yugoslavia. Recently, it has also become clear and certain that the quasi-continuity which persisted and which was recorded by depositaries and other relevant authorities, pertained to another entity. It was the *former Yugoslavia* (not the FRY) the membership of which — in the words of the Legal Counsel — was neither terminated nor suspended, it was the *former Yugoslavia* whose membership dues continued to be assessed, and it was the *former Yugoslavia* which remained listed as a State party to treaties.

42. Our focus is not on the former Yugoslavia, but on the FRY, that is Serbia and Montenegro. According to the Judgment of 3 February 2003, this State acquired a *sui generis*

position vis-à-vis the United Nations and this adds new and important elements for a definitive investigation.

43. It has become certain that there was no continuity, that the FRY did not remain bound by treaties by way of continuing treaty membership of the former Yugoslavia. The remaining question is whether the FRY could have become and whether it became a party to the Statute and to the Genocide Convention on its own right between 1992 and 2000. In other words, whether the acquired *sui generis* position could have linked a new State — the FRY — with the Statute and with the Genocide Convention in the absence of treaty action.

44. Mr. President. Let me also state that we believe that there is a logical order of priority and sequence between the various issues which have been raised during these proceedings. It would be logical first to raise and answer the question whether the FRY was entitled at all to give a declaration under Article 36 (2) of the Statute, and only if the answer were in the affirmative should the question be raised whether the content of the declaration is fitting — whether it is adequate to establish jurisdiction in this case. Likewise, the question whether Serbia and Montenegro is bound at all by Article IX of the Genocide Convention precedes the question whether the actual bombing of Serbia and Montenegro may represent a proper subject-matter for a dispute between parties who are bound by Article IX.

45. Let me finally add that what we are proposing is not some esoteric exercise. It has never been esoteric for us, and we trust that the same is true with the Respondents. The Government and the people of Serbia and Montenegro are shouldering a tremendous burden in facing the devastations of the past, and trying to build a future in Europe. Our society is still fragile. We need peace; peace of mind as well. Only consistency can bring peace. The political arena is not best fitted to achieve this purpose. The Court is. We have full trust in this Court.

46. Thank you very much, Mr. President. I truly appreciate your attention and patience. Allow me now to put forward the sequence of our presentations. Our next speaker is Mr. Brownlie, and he will be followed by Mr. Djerić. With your permission I shall read at the end our submissions. Thank you very much. I would like to ask you now, Mr. President, to give the floor to Mr. Brownlie.

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

Mr. BROWNLIE: Thank you Mr. President.

1. Mr. President, distinguished Members of the Court, in the second round I shall not address those questions on which the Parties have essentially joined issue. These questions include the matter of jurisdiction *ratione temporis* and the application of the 12-month clause in the context of Article 36 of the Statute.

2. My main topic this afternoon will be the issue of jurisdiction *ratione materiae* in relation to the Genocide Convention, but before I move to that subject, I have some preliminary points to make.

3. The first preliminary point concerns the general tendency in the presentations of the respondent States to avoid specifics and to completely ignore the diplomatic record. The respondent States ignore reality. Thus, the Belgian delegation refers to "a barely developed allegation that certain acts were undertaken with the objective of coercing the Yugoslav Government or of intimidating the people of Yugoslavia" (CR 2004/15, p. 9, para. 6 (Bethlehem)).

4. The avoidance of reality is striking, not least because, as will be demonstrated, the motive of coercion was repeated in public statements over a period of eight months.

5. Another preliminary matter. The respondent States make much of the fact that, on the question of the crystallizing of the dispute for the purposes of Article 36 (2) of the Statute, the applicant State has changed its position since the drafting of the Memorial. But, Mr. President, it is not uncommon for States to modify their position in the course of adversarial proceedings. Thus, in the *Anglo-Norwegian Fisheries* case, in the course of the oral hearings, on the merits, the British Government abandoned the claims for compensation in respect of the confiscated trawlers and their catches. This modification, like others that could be found in the record, has never attracted adverse comment.

6. Mr. President, I have a final preliminary point. Counsel for the respondent States have, in certain cases, insisted that the dispute is so obviously about the use of force that it could not possibly constitute genocide.

7. This is to ignore the standard practice in adversarial proceedings. It is, after all, the applicant State which selects the bases of claim which constitute appropriate vehicles for the redress to be requested of the Court. As in the *Nicaragua* case, the same complex of facts may give rise to a variety of bases of claims, or in common law parlance, causes of action.

8. Mr. President, I can now move to the issue of intention in the context of Article IX of the Genocide Convention. The question of intention can be approached when the purposes of the use or threat of force have been ascertained. In face of the chronic reticence of the respondent States on this subject, it is necessary to revisit the ample documentary record.

9. In chronological sequence, the following official statements tell the story:

A. On 28 August 1998, there was an internal NATO decision to use air strikes if necessary.

B. On 12 October 1998, NATO authorized air strikes on Yugoslavia. The North Atlantic Council formally authorized the use of four days of air strikes followed by a "phased" air campaign in Yugoslavia. I refer to the Statement of the Secretary-General of NATO.

C. On 16 October 1998, there was an extension of the order authorizing air strikes.

D. On 30 January 1999, the North Atlantic Council agreed that the Secretary-General could authorize air strikes against targets in Yugoslavia. I refer to the statement to the press by Javier Solana on 30 January 1999.

E. And then on 23 February 1999, the Secretary-General of NATO repeated the threat of force, and that was his phrase.

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10. In the period starting in October 1998 statements by the British Foreign Secretary and the Prime Minister consistently referred to the policy of using air strikes in order to achieve political purposes.

11. This policy continued until the convening of the talks at Rambouillet in February 1999. At Rambouillet, Yugoslavia was told that she would not be permitted to make amendments to the Draft Agreement proposed. In the event Yugoslavia refused to sign and the "Rambouillet Accords" referred to in the press remained only as a set of proposals.

12. It is worth recalling that many observers believe that the NATO side did not really wish the talks to succeed. In any event, the proposals at Rambouillet were presented on a take-it-or-leave-it basis, a concomitant of diplomacy backed by force.

13. After the Rambouillet talks the threats of force were renewed. In the House of Commons on 24 February 1999 Foreign Secretary, Mr. Cook, in answer to a question, stated that: "The best measure that we have to secure compliance from Belgrade is to make clear to Belgrade, as I have already done, that the NATO planes remain on alert, and that the order for Javier Solana to authorise their use remains in force."

14. The strategy of the NATO States has always been based upon the threat of force. This is clear from the statement by the British Prime Minister in the House of Commons on 23 March 1999, immediately prior to the bombing. Then he said:

> "Let me recap briefly on the last few months. Last October, NATO threatened to use force to secure Milosevic's agreement to a ceasefire and an end to the repression that was, at that time, in hand. That was successful — at least, for a while. Diplomatic efforts, backed by NATO's threat, led to the creation of the 1500 Kosovo Verification Mission."

15. This statement and, indeed, the public record of events and policy positions as a whole, provide substantial justification for various conclusions which are relevant to the question of intention, both in relation to genocide and more generally.

16. The first conclusion is this. There is both in fact and in ordinary logic, a symbiosis between the threats as such involving military aircraft on constant standby, and the ultimate use of massive and persistent force against Yugoslavia. It is surely disingenuous to seek to refer to the long and public record of coercion as simply "military action" or "air operations".

17. And in this context it is astonishing to hear colleagues representing respondent States describe the process of coercion and intimidation as being the subject of "allegations" by the applicant State.

18. I come to my second conclusion. The purpose of the intimidation was to enforce the political demands of the NATO States. The record covering a period of eight months, including the Rambouillet talks, makes this clear.

19. And the third conclusion is a corollary of the second conclusion. It was the refusal of Belgrade to accept the demands of the NATO States which fuelled the decision to bomb. The

sequel to Rambouillet was the decision to bomb. The threats of force having failed, it was necessary to bomb to maintain the credibility of the policy overall.

20. I come now to my fourth conclusion. The evidence shows that the timing and purpose of the air offensive were related to political demands and the refusal of Belgrade to accept the terms presented in Rambouillet. It follows that the references, very late in the day, to "humanitarian catastrophe", lack credibility. And thus the fourth conclusion is that the reference to humanitarian motives for the bombing fails on the facts. As a matter of sound logic, the legality of the humanitarian intervention is a question which is secondary to the question whether, on the facts, there was a genuine case of humanitarian intervention.

21. There are a number of serious difficulties with the hypothesis of humanitarian intervention. Quite apart from the general nature of the documentary record, there is the timing. The threats of bombing began in October 1998, and there were no particular developments in Kosovo in the period subsequent to Rambouillet and immediately prior to the beginning of the bombing on 24 March 1999, with one exception.

22. The exception was the decision by the OSCE, at the order of the NATO States, to withdraw the 1,500 monitors of the Kosovo Verification Mission, and to do this a few days before the bombing began. This issue was raised by Serbia and Montenegro on Wednesday of this week (CR 2004/14, pp. 46-47, para. 75). The respondent States have not seen fit to make any reference to this important question, which does bear closely upon the question of intention.

23. I would also refer to the OSCE report written on 20 February 1999, which was presented to the Security Council[13]. This report, while submitting in its first introductory sentence that "the situation in Kosovo remained tense and volatile", stresses in its second sentence: *"In February, however, the level of direct military engagement between security forces of the Federal Republic of Yugoslavia (FRY) and the Kosovo Liberation Army (KLA) dropped significantly compared with late December and the month of January."*

24. Furthermore, the report of the Secretary-General mentions that "[t]he current security environment in Kosovo is characterized by disproportionate use of force . . . by the Yugoslav

[13]S/1999/214 of 26 February 1999.

authorities in response to persistent attacks and provocations by the Kosovo Albanian paramilitaries"[14]. But it concludes:

> "I strongly support efforts by the Contact Group to provide a political framework for a settlement of the crisis. I encourage the parties to seize this opportunity to achieve peace and autonomy for the people of Kosovo by negotiation, while respecting the national sovereignty and territorial integrity of the Federal Republic of Yugoslavia."[15]

Mr. President, this was exactly a week before the bombing began.

25. As the Court will appreciate, I have left the issue of legality as such on one side. However, succinct accounts of the question of legality by counsel for Serbia and Montenegro may be found in the *International and Comparative Law Quarterly*, Volume 49 (2000), at pages 878 to 910.

26. But there is one point to be made, again concerning the facts. Can it be accepted that the heavy bombardment of the towns and cities of Serbia and Montenegro for 78 days was proportionate or necessary as an alleged form of humanitarian intervention? Was the use of cluster munitions and depleted uranium proportionate and necessary?

27. At this point, Mr. President, I can return to address the question of intention more directly. The definition of genocide has to be applied in the circumstances of the particular case. There are many types of genocide and this has emerged in particular from the work of the Rwanda Tribunal.

28. Of course, no one supposes that there was a plan for genocide concocted in London or any other NATO capital. But there was a plan, which was publicly stated on many occasions in national parliaments and by the Secretary-General of NATO, to coerce the people and Government of Serbia and Montenegro.

29. My distinguished colleagues representing the respondent States tended to assume that it was completely obvious that intimidation did not constitute genocide. Thus yesterday the Agent of Canada contended that:

> "political coercion and intimidation are characterizations which have nothing at all to do with the destruction of a people. It would be a fundamental distortion of ordinary

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[14] S/1999/293, p. 8.

[15] P. 9.

> language and of the purposes of the Convention to equate coercion with an intention to destroy a protected group *as such*."

30. And I take this as representing a typical response from counsel for the respondent States. What is genocide is, of course, a mixed question of law and fact. The circumstances of the bombing of Yugoslavia were unusual to say the least. But the respondent States do not have a prerogative to make their own characterization of the incidence of genocide. The State at the receiving end of the major bombing offensive, countrywide, and lasting 78 days, has a right to make its own characterization.

31. In this context the Agent of Canada referred to "the destruction of a people" and "the destruction of the protected group as such". But, with respect, the definition in the Genocide Convention refers to the "intent to destroy, in whole or in part . . .".

32. The decision of the Appeals Chamber in the *Krstić* case on Monday dealt with the significance of the phrase "in part" in some detail.

33. Mr. President, the facts are important because they cannot be ignored if the issue of jurisdiction *ratione materiae* is to be given fair and efficient judicial consideration. Certain facts are incontrovertible. The bombing lasted 78 days. As NATO spokesmen admitted, nearly every day, civilians were being killed. Why were they being killed, Mr. President? And this is also the question, why are we here? The answer is the civilians were being killed because this was a necessary part of the policy of coercion and the need, as seen by the respondent States, to implement the threats of bombing, which had failed to work at Rambouillet, and to implement those threats by actual bombing. It was the respondent States, Mr. President, which decided how long it might be necessary to prolong the bombing in spite of the civilian deaths and suffering. Part of the protected group was destroyed. The respondent States cannot take credit for the eventual success of a squalid and cowardly military action.

34. And, for present purposes, Mr. President, the military deaths count as well. This is not a question of the humanitarian law of war, but of the *jus ad bellum*.

35. In this and other respects the respondent States have ignored various important questions pertaining to the nature of the conflict and its anomalous status as a form of warfare.

36. Mr. President, in the circumstances, this is the strongest possible example of the propriety of joining certain types of issue to the merits. The question of jurisdiction *ratione materiae* is the *alter ego* of the existence of genocide as a question of law and fact.

37. Whilst the circumstances are unusual, this confers no benefits and no immunity as such. The concerted policy of the respondent States, and its execution, can be characterized legally and politically in several ways. This distinguished Bench includes those who, from their own experience, can surely sympathize with the legal advisers in Belgrade, who, in appalling circumstances, had the task of characterizing the deaths and destruction which rained upon Yugoslav cities.

38. In the circumstances, the means of implementing the policy of intimidation included taking the risk of creating genocidal conditions. This is a perfectly sensible and arguable proposition and there is nothing in the *Oil Platforms* Judgment which would prevent the Court joining the issue to the merits.

39. In relation to the application of Article 79, paragraph 7, of the Rules of Court, I would invite the Court to recognize the parallels with the *Lockerbie* case (Preliminary Objections, *I.C.J. Reports 1998*, pp. 26-29), quoted in the first round. Professor Greenwood says that *Lockerbie* was concerned with admissibility, but this makes no difference to its relevance.

40. In conclusion I would emphasize the cogent considerations that apply to the issue of jurisdiction *ratione materiae*, namely, that the threshold for such a decision should be low. This should result from the fact, amply demonstrated, that the issue is not exclusively preliminary. More importantly, it derives from the consideration that it is difficult for the Court to approach the issues with sufficient rigour in the absence of a substantial review of the evidence, such a review obviously being inappropriate in these hearings.

Mr. President, that concludes my submissions on behalf of Serbia and Montenegro. I would thank the Court for its display of patience in a long week 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: Mr. President, distinguished Members of the Court.

1. With your permission I shall briefly reply to yesterday's submissions of the respondent States, first, in relation to the application of the *Monetary Gold* principle in the present cases; and second, in relation to the bilateral treaties with Belgium and the Netherlands.

2. By way of an introduction as to the issue of the *Monetary Gold* principle, I would like to stress that the respondent States, in their responses in the second round of oral pleadings, did not contest Serbia and Montenegro's categorization of the Respondents' acts which form the subject-matter of the present proceedings (CR 2004/14, pp. 54-55, paras. 30-33).

3. Mr. President, counsel for Portugal persists with his argument that the determination of the responsibility of NATO is a prerequisite for the adjudication in the present proceedings and that the Court cannot proceed without NATO's consent. I have already demonstrated that the *Monetary Gold* principle is applicable exclusively to States because both its rationale and application are founded on the fundamental proposition that the jurisdiction of the Court must be based on the consent of States. Furthermore, it is well known that only States can be parties in cases before the Court (Article 34 of the Statute).

4. The question whether an international organization can be subject to the jurisdiction of the Court without its consent (CR 2004/18, p. 18, para. 4.2. (Teles)) deserves to be answered. The position, even central position, of an international organization in a dispute does not affect the jurisdiction of the Court. Indeed, there were cases in which the subject-matter before the Court involved the legal interests of international organizations, but that has never been seen as an obstacle to adjudication in their absence. As the Court observed in the *Northern Cameroons* case:

> "The Court is not concerned with the question whether or not any dispute in relation to the same subject-matter existed between the Republic of Cameroon and the United Nations or the General Assembly. In the view of the Court it is sufficient to say that having regard to the facts already stated in this Judgment, the opposing views of the Parties . . . reveal the existence of a dispute . . ." (Case concerning the *Northern Cameroons (Cameroon* v. *United Kingdom), Preliminary Objections, Judgment of 2 December 1963, I.C.J. Reports 1963*, p. 27.)

5. Mr. President, it clearly follows that the involvement of an international organization in the subject-matter of the dispute does not trigger the *Monetary Gold* principle.

6. However, I wish again to emphasize that the present cases do not concern the responsibility of NATO. The issue in the present cases is the responsibility of individual respondent States for their own acts. No respondent State has offered any evidence, except pure assertions, to contradict our position that the use of force against the FRY was a military operation by members of a military alliance in which the respondent States decided, individually and in concert with others, to initiate and continue the air strikes. The responsibility of the respondent States is simultaneous with the responsibility of the other States participating in the military operations, but the legal interests of the third States do not form the very subject-matter of the present disputes, because the Court need not decide upon them as a prerequisite for reaching its decision in the present cases.

7. The parallel with the United Nations peacekeeping operations, suggested by Portugal (CR 2004/18, p. 19, para. 4.4. (Teles)) is not accurate. With regard to the military operations against the FRY, the NATO Member States not only made available their military forces but they, as sovereign States, made the decision to use force and made the decisions on the targets to be hit.

8. Counsel for Portugal claims that the position of Serbia and Montenegro on this question does not take into account the developments in NATO since 1949 (CR 2004/18, pp. 18-19, para. 4.3. (Teles)). However, he offers no evidence on the nature and substance of the developments. I wish to repeat that Serbia and Montenegro does not suggest that NATO does not possess international legal personality. However, on the basis of NATO's founding instrument and other NATO documents, one must conclude that NATO's legal personality is limited. The fact that NATO concluded a technical agreement, such as the Kosovo Verification Mission Agreement, with the FRY does not change anything in this analysis and is, in fact, irrelevant for the present cases.

9. In this context, it is worth noting that the German Constitutional Court recently took the position that changes in NATO, specifically the adoption of the 1999 Strategic Concept, were not of such a nature as to necessitate ratification by the German Parliament. According to the German Constitutional Court — and I quote the English translation provided by the Court:

> "it cannot be inferred that an objective amendment of the NATO Treaty has taken place. The definitions of content that have been made can still be understood as a further development and a concretization of the open wording of the NATO Treaty . . . In this context the member states act on the basis of the constitutional law of the respective member state . . . The fact that the Federal Government approves

> Germany's participation in crisis response operations in the Council with the reservation that it first obtain a constitutive approval from the *Bundestag*, is in line with this approach." (BverfG, 2 BvE 6/99 of 22 November 2001, para. 16, available at:www.bverfg.de/entscheidungen/frames/es20011122_2bve000699en.)

10. Finally, Mr. President, it would be appropriate to say a little more about the process of targeting. All the available information points to the conclusion that all the respondent States were involved in the choice of targets and that all of the respondent States could veto targets. According to a report by the NATO Parliamentary Assembly:

> "However, during the campaign, military leaders, such as US Lt. General Michael Short, commander of NATO air forces during the war, complained that politicians intervened at almost every stage in order to be able to approve the target lists. The Netherlands' review of the Kosovo operation points out the problems caused by trying to wage 'war by committee'." (NATO Parliamentary Assembly, *General Report: National Missile Defence and the Alliance After Kosovo*, November 2000, para. 81, available at www.naa.be/archivedpub/comrep/2000/at-243-e.asp.)

11. Another quote, from a well-researched article in the *Washington Post*, is also quite revealing: "After the internal military review, the target approval process passed through the White House, the British prime minister's office and the French presidential administration." ("Target Selection Was Long Process", *Washington Post*, 20 September 1999, p. A11.)

12. For the present purposes, this information clearly indicates that the choice and approval of targets was controlled by the highest national authorities. This is what matters at the preliminary stages of the proceedings. The question of whether some Respondents exercised fuller control than the others in this respect is clearly not a preliminary matter, while it certainly is of relevance for the allocation of responsibility at the merits stage.

13. In conclusion, in its oral pleadings the FRY has expounded on its Memorial, and has offered to the Court evidence on the nature of the military operations against the FRY, which clearly points to the conclusion that the Respondents, individually and in concert with the others, initiated and continued the military operations and controlled the choice of targets. At the same time, the respondent States have offered no evidence and no information to substantiate their claims that it is NATO and not its Member States that should be held responsible in the present cases.

14. In this context, Mr. President, I would like to note the claim of some respondent States that their right of defence would be impaired due to the absence of third parties. They assert that

they will have great difficulties in obtaining information to defend themselves (Preliminary Objections of Italy, pp. 58-59; Preliminary Objections of the Netherlands, p. 62, para. 7.2.26). However, it is quite obvious that the respondent States must have the information on the decision to start bombing. The respondent States also must have the information on the selection of targets — they participated in the selection of targets. Obviously, the Respondents must also have the information on the actions of their own military forces.

15. Mr. President, the point has been made by Professor Sico, counsel for Italy, that Serbia and Montenegro attaches some sort of collective responsibility to NATO Member States (CR 2004/22, p. 15, para. 34 (Sico)). However, Serbia and Montenegro submits that the question of the nature of responsibility of NATO Member States should not be addressed at the present stage of the proceedings. It is clearly a question for the merits.

16. Moreover, the fact that the proceedings are conducted against eight States and not against all the participants in the military operations does not render the present case inadmissible. The United Kingdom has raised a similar argument in its Preliminary Objections — that it is somehow against the *Monetary Gold* principle to base submissions on the alleged joint liability of 19 States and to maintain proceedings against only eight of them (Preliminary Objections of the United Kingdom, p. 93, para. 6.19). This is erroneous. As the Court observed in the *Nauru* case,

> "The Court does not consider that any reason has been shown why a claim brought against only one of the three States should be declared inadmissible *in limine litis* merely because that claim raises questions of the administration of the Territory, which was shared with two other States." (*Certain Phosphate Lands in Nauru (Nauru* v. *Australia), Preliminary Objections, Judgment, I.C.J. Reports 1992*, pp. 258-259, para. 48.)

BILATERAL TREATIES WITH THE NETHERLANDS AND BELGIUM

17. Mr. President, I will now just briefly consider the bilateral treaties with the Netherlands and Belgium, as the bases of jurisdiction. Both Belgium and the Netherlands complain that Serbia and Montenegro misinterpreted their position on the 1978 Vienna Convention on Succession of States in Respect of Treaties (CR 2004/15, p. 12, para. 13 (Bethlehem); CR 2004/16, p. 10, para. 15 (Lammers)). The Netherlands states that it does not consider that Serbia and Montenegro is a "newly independent State" (CR 2004/16, p. 10, para. 15 (Lammers)). Belgium states that the

Convention generally cannot be said to reflect customary international law (CR 2004/15, p. 12, para. 13, (Bethlehem)).

18. However, this was not what Serbia and Montenegro said. What we really said was that both the Netherlands and Belgium relied, in the present cases, "on the rules pertaining to 'newly independent States'" and that this reliance was misplaced (CR 2004/14, pp. 56-57, paras. 37-39). Both the Netherlands and Belgium rely on the "clean slate" rule of succession, which rule is applicable to "newly independent States" according to the 1978 Vienna Convention on Succession and according to State practice. Moreover, all the pronouncements of the International Law Commission quoted by Belgium and the Netherlands were in fact made in the context of "newly independent States".

19. Mr. President, our point is simple: rules and authorities pertaining to "newly independent States" cannot be just transposed to the context of "uniting and separation of States". These two situations are different: the facts are different, the context is different and, accordingly, applicable rules are different. Still, Belgium and the Netherlands say that the "clean slate" rule is, according to the Netherlands, a "generally accepted rule of international law" (CR 2004/16, p. 10, para. 15 (Lammers)), and, according to Belgium, one of the "accepted principles of law relevant to the particular circumstances of the case" (CR 2004/15, p. 12, para. 13 (Bethlehem)). However, this contention cannot withstand the analysis. It is neither supported by State practice nor by authorities. On the contrary, it seems that the State practice in cases of dissolution is not going in the direction of the "clean slate" rule. In 1999, a study of State practice regarding State succession, conducted by the Council of Europe, reached the following conclusion:

> "On the whole, there does indeed seem to be a certain tendency in State practice towards the application of the model of automatic succession in cases of separation of a State, which seems to be particularly strong and coherent in cases of a complete dissolution of a State." (*State Practice Regarding State Succession and Issues of Recognition*, Klabbers *et al.*, eds., Kluwer Law International, 1999, p. 116 (footnote omitted).)

20. Therefore, the reliance of Belgium and the Netherlands on the "clean state" rule is not only misplaced in the context of "uniting and separation" of States but is also contradicted by State practice. At the same time, I wish to underline that Serbia and Montenegro does not consider that there is a rule of automatic succession. As we already said in the first round, the question of

succession to the treaties of the former Yugoslavia should be primarily considered on the basis of acts of States parties to the treaties in question, be they bilateral or multilateral (CR 2004/14, p. 57, para. 42).

21. Mr. President, I would like to make a few remarks in relation to the 1930 Convention between Yugoslavia and Belgium. Obviously, the central issue is the meaning of the letter of the Foreign Minister of Belgium of 29 April 1996, in which he wrote: "the bilateral treaties 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" (letter of the Foreign Minister of Belgium to the Federal Minister for Foreign Affairs of the Federal Republic of Yugoslavia, dated 29 April 1996, the original French version reproduced in Annex 74, Preliminary Objections of Belgium, Annexes, Vol. 2).

22. Mr. Bethlehem, counsel for Belgium, did not dispute that this letter was binding on Belgium. How could he? He tried to find a way out by saying that this letter should be interpreted in its context, and should apply only to the bilateral treaties contained in various lists exchanged by the parties. According to him, the context was "a bilateral process of negotiation on succession, which proceeded by way of an exchange of lists of treaties between the Parties" (CR 2004/15, p. 13, para. 14 (Bethlehem)).

23. However, counsel for Belgium seems to stretch the notion of "context" to such an extent that it includes the entire history of negotiations. According to Article 31 of the Vienna Convention on the Law of Treaties, context shall comprise, first, the text itself. In our case, the text is clear — all bilateral treaties in force between the former Yugoslavia and Belgium shall remain in force between the FRY and Belgium. Secondly, according to Article 31 of the Vienna Convention on the Law of Treaties, the context shall comprise, in short, any agreement of the parties relating to the treaty or any instrument made in connection with the treaty. In connection with the letter in question, we have neither. Moreover, if an agreement or an instrument were to form a part of the context of the letter it should have been drawn up on the occasion when the letter was sent (see Sir Ian Sinclair, *The Vienna Convention on the Law of Treaties*, Manchester University Press, 2nd ed., 1984, p. 129). Again, this was not the case.

24. Counsel for Belgium said that the purpose of the letter was to "avoid a legal vacuum" (CR 2004/15, p. 13, para. 14 (Bethlehem)). We agree with that. However, this purpose could never be achieved if the letter relates to various provisional lists of bilateral treaties, which differ among themselves. The interpretation put forward by Belgium would lead to legal uncertainty because no one could ever be sure which treaties are in force. Which of the provisional lists would be applicable? No one would know. The result of such interpretation would be absurd. In contrast to that, the interpretation of Serbia and Montenegro would lead to a result that would fully achieve the stated purpose of the letter and the goal of legal certainty.

25. Moreover, the principle of good faith, relied upon by Belgium (CR 2004/15, p. 13, para. 15 (Bethlehem)), mandates that interpretation does not lead to a result that is manifestly absurd or unreasonable. Clearly, it is the principle of good faith that defies the interpretation proposed by Belgium, because this interpretation would lead to unreasonable and manifestly absurd results.

26. Mr. President, I will also now briefly consider the question of desuetude. Belgium boasts that it supplied "six pages of argument" in its written pleadings and 12 annexes as proof of the implied consent of parties to abandon the treaty (CR 2004/15, p. 14, para. 16 (Bethlehem)). What is the evidence supplied by Belgium?

27. For the period before the dissolution of the former Yugoslavia, the main evidence is the fact that the 1930 Convention was concluded within the framework of the League of Nations. While Belgium argues that the 1930 Convention operated only within the framework of the League of Nations (Preliminary Objections of Belgium, p. 135, para. 416 *(a)*), the very existence of Article 37 of the Statute of the Court is evidence that the treaties of judicial settlement concluded within the framework of the League had survived its demise.

28. For the period after the dissolution of the former Yugoslavia, the main evidence supplied by Belgium consists of the attitudes of the other successor States of the former Yugoslavia and of the provisional lists of bilateral treaties circulated by the parties.

29. However, in order to prove the implied consent of Belgium and the FRY to abandon the 1930 Convention, what is needed is a proof of *facta concludentia* of these two parties, that is Belgium and the FRY, in relation to the Convention. The conduct of other successor States of the

former Yugoslavia cannot be given much weight in this exercise. The Convention is a bilateral treaty regulating bilateral relations between Belgium and the FRY. What matters are the acts of Belgium and the FRY revealing a clear intention to abandon the treaty, not acts of other successor States. However, Mr. President, it is clear that Belgium expressed its intention to maintain, in its relations with the FRY, all the bilateral treaties that had been in force with the former Yugoslavia.

30. What is then left of Belgium's proof of obsolescence are the provisional lists of treaties circulated by the two sides for the purpose of still unfinished negotiations. These provisional lists are open and treaties may be added or removed from the lists. They can hardly constitute a sufficient proof of the implied consent of the parties to abandon the 1930 Convention.

31. In the submission of Serbia and Montenegro, the 1930 Convention is in force between the FRY and Belgium and constitutes a valid basis of jurisdiction in the present case.

32. Mr. President, at the very end I will consider the 1931 Treaty between the Netherlands and Yugoslavia. In the first round, I quoted the Diplomatic Note of the Ministry of Foreign Affairs of the Netherlands of 20 May 1997. I have never said that this Note contained an agreement as suggested by the Agent of the Netherlands (CR 2004/16, p. 11, para. 16 (Lammers)). What I said was that the Note "provided a clear indication to the FRY that the 1931 Treaty was in force" (CR 2004/14, p. 60, para. 56). In other words, the Note demonstrated the appreciation of the Netherlands that the 1931 Treaty was in force. How else could the Netherlands side possibly suggest that the Treaty should *continue to be applicable* if it was not applicable when this suggestion was made?

33. As far as the 2002 Exchange of Notes is concerned, I will not enter into linguistic discussions with the Agent of the Netherlands. I will just reiterate our position that the Exchange of Notes had only *pro futuro* effect. In this regard, the text of the Note speaks for itself. Even more importantly, as I explained in the first round, the 2002 Exchange of Notes is irrelevant for the present proceedings. It is a well-established principle that the basis of jurisdiction must exist at the time it is invoked before the Court. In our case the relevant date is 12 May 1999 (case concerning *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, and the cases quoted therein).

34. Mr. President, distinguished Members of the Court, this brings my submissions to an end. I would like to thank you for your attention and patience. Mr. President, I would be grateful if you could now call upon our Agent, Professor Varady, to give our final submissions.

The PRESIDENT: Thank you, Mr. Djerić. I now give the floor to the Agent of Serbia and Montenegro, Mr. Varady.

Mr. VARADY: Mr. President, Members of the Court, our final submissions are the following: for the reasons given in its pleadings and in particular in its Written Observations, subsequent correspondence with the Court and at the oral hearing, Serbia and Montenegro requests the Court

— *first*, to adjudge and declare on its jurisdiction *ratione personae* the present cases; and

— *second,* to dismiss the remaining preliminary objections of the respondent States and to order proceedings on the merits if it finds it has jurisdiction *ratione personae*.

Thank you very much, Mr. President, Members of the Court, for your kind attention.

The PRESIDENT: Thank you, Mr. Varady. The Court takes note of the final submissions which you have now read on behalf of Serbia and Montenegro, as it took note yesterday of the final submissions of the respondent States.

This brings us to the end of this week of hearings devoted to the oral argument on the Preliminary Objections in the eight cases.

I should like to thank the Agents, counsel and advocates for their statements.

In accordance with practice, I shall request the Agents to remain at the Court's disposal to provide any additional information it may require. With this proviso, I now declare closed the oral proceedings in the cases 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).*

The Court will now retire for deliberation. The Agents of the Parties will be advised in due course of the date on which the Court will give its decisions in the cases.

As the Court has no other business before it today, the sitting is closed.

The Court rose at 4.30 p.m.

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