CR 2004/6

International Court of Justice

THE HAGUE

Cour internationale de Justice

LA HAYE

YEAR 2004

Public sitting

held on Monday 19 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)

VERBATIM RECORD

ANNÉE 2004

Audience publique

tenue le lundi 19 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)

COMPTE RENDU

Present:	President	Shi
	Vice-President	Ranjeva
	Judges	Guillaume
		Koroma
		Vereshchetin
		Higgins
		Parra-Aranguren
		Kooijmans
		Rezek
		Al-Khasawneh
		Buergenthal
		Elaraby
		Owada
		Tomka
	Judges *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

The Government of Serbia and Montenegro is represented by:

Mr. Tibor Varady, Chief Legal Adviser at the Federal Ministry of Foreign Affairs of Serbia and Montenegro, Professor of Law at the Central European University, Budapest and Emory University, Atlanta;

as Agent, Counsel and Advocate;

Mr. Vladimir Djerić, Adviser to the Minister for Foreign Affairs of Serbia and Montenegro,

as Co-agent, Counsel and Advocate;

Mr. Ian Brownlie, C.B.E., Q.C., F.B.A., Chichele Professor of Public International Law (Emeritus), University of Oxford, Member of the International Law Commission, member of the English Bar, member of the Institut de droit international,

as Counsel and Advocate;

Mr. Saša Obradović, First Secretary, Embassy of Serbia and Montenegro, The Hague,

Mr. Vladimir Cvetković, Third Secretary, International Law Department, Ministry of Foreign Affairs of Serbia and Montenegro,

Ms Marijana Santrač,

Ms Dina Dobrković,

as Assistants;

Mr. Vladimir Srećković, Ministry of Foreign Affairs,

as Technical Assistant.

The Government of the Kingdom of Belgium is represented by:

Mr. Jan Devadder, Director-General, Legal Matters, Ministry of Foreign Affairs, Brussels,

as Agent;

Mr. Daniel Bethlehem, Q.C., Director, Lauterpacht Research Centre for International Law, Cambridge,

as Counsel;

Ms Clare Da Silva, Research Assistant, Lauterpacht Research Centre for International Law, Cambridge,

Ms Valérie Delcroix, Assistant Adviser, Directorate of Public International Law, General Directorate of Legal Affairs, Federal Public Department of Foreign Affairs, Foreign Trade and Co-operation for Development, Brussels,

as Assistants.

Le Gouvernement de la Serbie et Monténégro est représenté par :

M. Tibor Varady, S.J.D. (Harvard), conseiller juridique principal au ministère fédéral des affaires étrangères de la Serbie et Monténégro, professeur de droit à l'Université d'Europe centrale de Budapest et à l'Université Emory d'Atlanta,

comme agent, conseil et avocat;

M. Vladimir Djerić, LL.M. (Michigan), conseiller du ministre fédéral des affaires étrangères de la Serbie et Monténégro,

comme coagent, conseil et avocat;

M. Ian Brownlie, C.B.E., Q.C., F.B.A., professeur émérite de droit international public à l'Université d'Oxford, ancien titulaire de la chaire Chichele, membre de la Commission du droit international, membre du barreau d'Angleterre, membre de l'Institut de droit international,

comme conseil et avocat;

M. Saša Obradović, premier secrétaire à l'ambassade de Serbie et Monténégro à La Haye,

M. Vladimir Cvetković, troisième secrétaire, département de droit international, ministère des affaires étrangères de Serbie et Monténégro,

Mme Marijana Santrač, LL.B. M.A. (Université d'Europe centrale),

Mme Dina Dobrković, LL.B.,

comme assistants;

M. Vladimir Srećković, ministère des affaires étrangères de Serbie et Monténégro,

comme assistant technique.

Le Gouvernement du Royaume de Belgique est représenté par :

M. Jan Devadder, directeur général à la direction générale des affaires juridiques du ministère des affaires étrangères,

comme agent;

M. Daniel Bethlehem Q.C., directeur du *Lauterpacht Research Centre for International Law*, Cambridge,

comme conseil;

Mme Clare Da Silva, assistante de recherche au *Lauterpacht Research Centre for International Law*, Cambridge,

Mme Valérie Delcroix, conseiller adjoint à la direction droit international public, direction générale des affaires juridiques du ministère des affaires étrangères,

comme assistantes.

The PRESIDENT: Please be seated. The sitting is open.

The Court meets today, pursuant to Article 79, paragraph 4, of the Rules of Court of 1978, to hear the oral statements of the Parties on the preliminary objections to jurisdiction and to admissibility raised by the respondent States in the cases concerning *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).*

Since the Court does not include upon the Bench a judge of the nationality of Serbia and Montenegro, the applicant State has availed itself of the right under Article 31, paragraph 2, of the Statute to choose a judge *ad hoc*. It has chosen Mr. Milenko Kreća. Judge Kreća was installed as judge *ad hoc* in 1999, during the phase of the cases devoted to the request for the indication of provisional measures.

At that time, the following of the respondent States now concerned also chose judges *ad hoc*: Belgium (Judge Duinslaeger); Canada (Judge Lalonde); and Italy (Judge Gaja). Subsequently, Belgium, Canada and Italy requested the extension of the appointments of their judges *ad hoc* and Portugal indicated its intention to appoint Mr. José Manuel Sérvulo Correia to sit as judge *ad hoc*. Serbia and Montenegro expressed its objection to the appointment of judges *ad hoc* by these States on the ground that the respondent States were in the same interest. At a meeting held by me with the representatives of the Parties on 12 December 2003 in order to ascertain their views with regard to certain questions of procedure, the Agents of the respondent States reiterated the view of their Governments that the respondent States were not in the same interest; the Agent of Serbia and Montenegro stated that his Government did not insist on its objections to the choice of judges *ad hoc* by Belgium, Canada, Italy and Portugal for the purposes of the current stage of the proceedings. By letters dated 23 December 2003, the Registrar informed the Parties that the Court had decided, pursuant to Article 31, paragraph 5, of its Statute, taking into account the presence on the Bench of judges of British, Dutch and French nationality, that the judges *ad hoc* chosen by the respondent States should not sit during the current phase of the procedure in these cases. In those

letters, the Parties were further informed that that decision did not in any way prejudice the question whether, if the Court should reject the preliminary objections of the respondents, judges *ad hoc* chosen by them might sit in subsequent stages of the said cases.

Moreover, Judge Simma had previously considered that he should not take part in the decision of these cases and had so informed me, in accordance with Article 24 of the Statute. In view of the Court's aforementioned decision pursuant to Article 31, paragraph 5, of the Statute, Germany did not become entitled to choose a judge *ad hoc* under Article 37 of the Rules of Court.

Although there are eight separate proceedings, instituted by eight separate applications, the position of the applicant in each case is the same. The same holds true of the applicant's position as respondent to the Preliminary Objections in each case, for its responses to the eight sets of Preliminary Objections proceed on substantially the same basis. Consequently, the Court considered it desirable to organize the conduct of the oral proceedings in this phase of the case in such a manner as to avoid unnecessary duplication of arguments. A similar approach was adopted during the previous phase of these cases, in the proceedings on the requests for provisional measures. After consulting the Governments concerned, the Court has decided to proceed as follows: there will be two rounds of oral argument; in each of these rounds, the Court will first hear oral argument from the respondent States on the objections they have raised in the eight cases; it will then hear the response from the applicant State, Serbia and Montenegro, to these arguments.

On 29 April 1999 Serbia and Montenegro (then known as the Federal Republic of Yugoslavia) filed Applications instituting proceedings against Belgium, Canada, France, Germany, Italy, the Netherlands, Portugal, Spain, the United Kingdom and the United States of America, "for violation of the obligation not to use force".

In those Applications, Serbia and Montenegro, referring to the bombings of its territory by Member States of the North Atlantic Treaty Organization, that is NATO, in 1999 following the Kosovo crisis, contended that the above-mentioned States had committed acts by which they had violated their "international obligation banning the use of force against another State", their "obligation not to intervene in the internal affairs of another State", their "obligation not to violate the sovereignty of another State", their "obligation to protect the civilian population and civilian objects in wartime [and] to protect the environment", their "obligation relating to free navigation

on international rivers", their "obligation regarding fundamental human rights and freedoms", their "obligation not to use prohibited weapons", and their "obligation not to deliberately inflict conditions of life calculated to cause the physical destruction of a national group". Serbia and Montenegro requested the Court to adjudge and declare *inter alia* that the respondent States were "responsible for the violation of the above international obligations" and that they were "obliged to provide compensation for the damage done to the Federal Republic of Yugoslavia and to its citizens and juridical persons".

As a basis for the jurisdiction of the Court, Serbia and Montenegro relied, in its Applications against Belgium, Canada, the Netherlands, Portugal, Spain and the United Kingdom, on Article 36, paragraph 2, of the Statute of the Court and on Article IX of the Genocide Convention; in its Applications against France, Germany, Italy and the United States of America, it relied on Article IX of the Genocide Convention and on Article 38, paragraph 5, of the Rules of Court.

On 29 April 1999, Serbia and Montenegro also submitted a request for the indication of provisional measures in each of the ten above-mentioned cases. Public hearings were held between 10 and 12 May 1999 on those requests.

By a letter dated 12 May 1999, the Agent of Serbia and Montenegro submitted to the Court a "Supplement to the Application" of his Government, by which the latter sought *inter alia* to add to the grounds of jurisdiction of the Court in the cases against Belgium and the Netherlands respectively "Article 4 of the Convention of Conciliation, Judicial Settlement and Arbitration between the Kingdom of Yugoslavia and Belgium, signed at Belgrade on 25 March 1930 and in force since 3 September 1930", and "Article 4 of the Treaty of Judicial Settlement, Arbitration and Conciliation between the Kingdom of Yugoslavia and the Netherlands, signed at The Hague on 11 March 1931 and in force since 2 April 1932".

On 2 June 1999, the Court rendered ten Orders. In the cases between Serbia and Montenegro and, respectively, Belgium, Canada, France, Germany, Italy, the Netherlands, Portugal and the United Kingdom, the Court, having found that it had no prima facie jurisdiction, rejected the requests for the indication of provisional measures and reserved the subsequent procedure for further decision. In the cases against Spain and United States of America, the Court, having found that it manifestly lacked jurisdiction, ordered that those cases be removed from the List.

On 4 January 2000, within the time-limit fixed by the Court for the purpose, Serbia and Montenegro filed an identical Memorial, dated 5 January 2000, in each of the eight cases remaining on the Court's List. On 4 and 5 July 2000, within the time-limit fixed for the filing of a Counter-Memorial, the eight respondent States filed preliminary objections to the jurisdiction of the Court and to the admissibility of the claims of Serbia and Montenegro in each of the cases. The proceedings on the merits were suspended in accordance with Article 79 of the Rules of Court. In each of the cases, an identical written statement by Serbia and Montenegro on the preliminary objections raised by the respondent States was filed on 20 December 2002, within the time-limit as extended by the Court. By subsequent letters addressed to the Court in January and February 2003, the eight respondent States expressed their views concerning the written statement of Serbia and Montenegro. In reply, by a letter of 28 February 2003, Serbia and Montenegro informed the Court that its written observations filed on 20 December 2002 were not to be interpreted as a notice of discontinuance of the proceedings; it indicated that their object was simply to request the Court to decide on its own jurisdiction on the basis of the new elements to which the Court's attention had been drawn.

At my meeting with the representatives of the Parties on 12 December 2003, which I referred to earlier, the question was raised of joinder of the proceedings. The Parties also expressed a desire to produce new documents. In the Registrar's letters of 23 December 2003, also referred to earlier, the Parties were informed that the Court had decided that the proceedings should not be joined; they were further informed that the Court had fixed 27 February 2004 as the time-limit for the filing of new documents, and that these documents, which would relate only to jurisdiction and to admissibility, would be dealt with as provided in Article 56 of the Rules of Court.

By a letter of 26 February 2004, Serbia and Montenegro, within the time-limit fixed by the Court for the purpose, expressed the desire, pursuant to Article 56, to produce two new documents relating to the *Serbia and Montenegro* v. *Belgium* case. Belgium was accordingly so informed pursuant to paragraph 1 of that Article. By a letter of 12 March 2004 Belgium stated that it did not object to the production of those documents, and the Court accordingly decided to add them to the case file. By a joint letter of 27 February 2004, within the time-limit fixed by the Court for this purpose, the respondent States further expressed the desire, pursuant to Article 56, to produce a

common volume of new documents. In the absence of any objection by Serbia and Montenegro, which had been informed in accordance with paragraph 1 of that Article, the Court decided to add the new documents to each case file.

I would add that, having consulted the Parties, the Court has decided, in accordance with Article 53, paragraph 2, of the Rules of Court, to make the written pleadings, and the annexes thereto, accessible to the public on the opening of the oral proceedings.

I note the presence before the Court of the Agents and counsel of the Parties. The Court will hear the Parties according to the schedule communicated to them in the Registrar's letter of 23 December 2003. Thus, this morning the Court will hear Belgium and the Netherlands. This afternoon, the Court will hear Canada, Portugal and the United Kingdom. Tomorrow morning, the Court will hear Germany, France and Italy and, on Wednesday morning, to close the first round of oral argument, the Court will hear Serbia and Montenegro. On Thursday, the Court will start the second round of oral argument by, in the morning, hearing Belgium, the Netherlands, Canada and Portugal. Then, in the afternoon, it will hear the United Kingdom, Germany, France and Italy. Finally, on Friday afternoon, the Court will close the second round of oral argument by hearing Serbia and Montenegro.

I shall therefore now give the floor to Mr. Jan Devadder, Agent of the Kingdom of Belgium.

M. DEVADDER :

1. Monsieur le président, Madame et Messieurs les juges, c'est un honneur pour moi de me présenter à nouveau devant vous aujourd'hui, en qualité d'agent de la Belgique, dans le cadre de cette affaire.

2. Monsieur le président, dans quelques instants, je vous inviterai à appeler M. Bethlehem, qui exposera en détail les prétentions de la Belgique dans cette instance. Mais avant de le faire, j'aimerais, en ma qualité d'agent de la Belgique, formuler quelques observations. Je voudrais, premièrement, souligner la préoccupation de la Belgique devant la récente flambée de violence au Kosovo. La Belgique a condamné dans des termes les plus forts possibles ces actes de violences ethniques ayant causé la perte de vies humaines, des dommages aux biens ainsi que la destruction de patrimoines culturels et religieux. La Belgique entend faire tout ce qui est en son pouvoir, dans

le cadre des responsabilités qui lui incombent toujours en vertu de la résolution 1244 (1999) du Conseil de sécurité afin de préserver la paix et la stabilité dans la province, pour le bien de tous ses habitants, quelles que soient leur origine ethnique ou leurs convictions religieuses. La protection des droits et la sécurité des membres de toutes les communautés cohabitant dans cette région est essentielle.

3. Deuxièmement, il est important que vous soyez informés des relations qui se sont installées entre la Belgique et la Serbie et Monténégro depuis les événements des années quatre-vingt dix. Le ministre belge des affaires étrangères, M. Louis Michel, vient de rentrer d'une visite officielle à Belgrade, début mars, au cours de laquelle il a rencontré le premier ministre serbe, M. Kostunica, ainsi que le ministre sortant des affaires étrangères, M. Svilanovic et le ministre désigné, M. Draskovic. Nos deux Etats ont récemment signé une série d'accords, notamment un accord de coopération militaire en avril 2003 et un accord sur la protection des investissements le mois dernier. Dans la ligne de la déclaration qui a suivi le sommet de Thessalonique en juin 2003, la Belgique note que la Serbie et Monténégro est un candidat potentiel à l'adhésion à l'Union européenne dans le cadre de l'accord de stabilisation et d'association. Néanmoins, l'Union européenne considère que des progrès sont encore nécessaires en vue de mener à bien cette perspective d'adhésion, et plus particulièrement qu'une collaboration pleine et entière avec le Tribunal pénal international pour l'ex-Yougoslavie est requise.

4. Troisièmement, je note aussi que des discussions poussées ont eu lieu concernant la participation de la Serbie et Monténégro au programme de partenariat pour la paix de l'OTAN. La Belgique espère que cette participation se concrétisera dans un avenir assez proche, car elle constitue une étape essentielle de la normalisation des relations à la suite des événements des années quatre-vingt-dix. Mais cette participation est aussi tributaire de la résolution d'une série de problèmes en suspens, problèmes qui sont en quelque sorte l'héritage de ces événements, dont, et non la moindre, la question de la collaboration pleine et entière de la Serbie et Monténégro avec le Tribunal pénal international pour l'ex-Yougoslavie. Par ailleurs la présente affaire reste un obstacle à l'avancement des négociations sur le partenariat pour la paix. La Belgique espère qu'il sera possible, dans la ligne de ses conclusions écrites et de ses conclusions orales d'aujourd'hui, de balayer cet obstacle à la normalisation future des relations avec la Serbie et Monténégro.

5. Quatrièmement, concernant les détails de la présente affaire, les observations écrites de la Serbie et Monténégro en date du 18 décembre 2002 en réponse aux exceptions préliminaires de la Belgique, montrent un changement dans la position de la Partie demanderesse. Comme M. Bethlehem l'exposera plus en détail, à la lumière de ces observations, la Belgique soutient qu'il n'y a plus de différend entre les Parties. Si des désaccords sous-jacents subsistent sur diverses questions, les observations écrites de la Serbie et Monténégro révèlent qu'il y a accord entre les Parties sur une question de compétence qui est effectivement déterminante dans l'affaire soumise à la Cour. Sur ce point, la Belgique se réfère aux conclusions écrites de la Serbie et Monténégro. A la lumière de ces conclusions, la Belgique invite la Cour à classer la présente affaire sur tous les chefs.

6. Cinquièmement, afin de lever tout doute, je tiens à souligner que la Belgique maintient toutes ses exceptions préliminaires quant à la compétence et à la recevabilité. Sur un élément, concernant l'admission de la Serbie et Monténégro en qualité de Membre des Nations Unies, ces exceptions ont été rattrapées par les événements depuis que la Belgique a présenté ses plaidoiries écrites le 5 juillet 2000. Toutefois, les événements survenus entre-temps, loin de les infirmer, confirment les exceptions formulées par la Belgique. Si, sur cette question, l'accent s'est déplacé, comme M. Bethlehem l'exposera plus en détail, l'exception invoquée reste en elle-même pertinente.

7. Vu le temps limité ce matin, et compte tenu d'autres considérations, la Belgique n'a pas l'intention de repasser par le détail chacune de ses huit exceptions préliminaires quant à la compétence et à la recevabilité. En particulier, nous n'envisageons pas à ce stade de revenir sur les exceptions formulées par la Belgique quant à la recevabilité. Toutefois, pour qu'il ne subsiste aucun doute, je rappelle encore une fois que nous maintenons *toutes* les exceptions que nous avons invoquées quant à la compétence et à la recevabilité. Si besoin est, à la lumière des conclusions orales de la Serbie et Monténégro ce mercredi, nous reviendrons sur ces questions au cours de la phase des répliques à la fin de la semaine. Je me permets cependant d'espérer que ce ne sera pas nécessaire.

8. Sixièmement, et pour terminer, je dois évoquer brièvement ici la convention bilatérale de 1930 entre la Belgique et l'ancien Royaume de Yougoslavie, convention qui a été invoquée dans

le mémoire de la Partie demanderesse comme fondement de compétence. Dans nos plaidoiries écrites, nous avons avancé un certain nombre de raisons pour lesquelles on ne peut raisonnablement invoquer cette convention dans la présente affaire. En fait, à la lumière des observations écrites de la Serbie et Monténégro en réponse aux exceptions préliminaires susvisées, il semble que la Serbie et Monténégro n'argue plus de cette convention comme fondement de compétence. Il subsiste néanmoins un doute sur la question si l'on se réfère aux documents présentés à la Cour par la Serbie et Monténégro sous couvert de sa lettre au greffier en date du 26 février 2004. Afin de dissiper ce doute immédiatement, il est de mon devoir de faire remarquer que la pratique des deux côtés, sur un laps de temps considérable, témoigne de ce que, des deux côtés, on considère que cette convention n'est pas en vigueur entre les Parties à la présente affaire — et qu'en fait, elle n'est plus en vigueur du tout. La Partie demanderesse l'a invoquée dans son mémoire, malgré le fait qu'elle n'ait pas été évoquée dans l'abondante correspondance entre la Belgique et la Serbie et Monténégro, ainsi qu'avec les autres Etats successeurs de la Yougoslavie à l'exception de la Bosnie-Herzégovine, sur la question de la succession aux traités entre la Belgique et l'ex-Yougoslavie. Suite aux exceptions préliminaires de la Belgique du 5 juillet 2000, qui démontraient entre autres que la convention était caduque ou, encore, que la Serbie et Monténégro n'y avait pas succédé, de nouveaux échanges de correspondance eurent lieu entre les deux Parties sur la question de la succession aux traités. Ici non plus, la convention de 1930 n'a jamais été évoquée au cours de ces échanges. Bien qu'il semble l'invoquer dans son mémoire, et nonobstant les objections de la Belgique sur ce point, à aucun moment — je le répète — à aucun moment après que la Belgique ait présenté ses exceptions préliminaires, la Serbie et Monténégro n'a cherché à affirmer que la convention était restée en vigueur et qu'elle y avait succédé. La première — et la seule fois où la convention de 1930 a été invoquée dans le contexte des relations bilatérales — a été une note du ministère des affaires étrangères à Belgrade adressée à l'ambassade de Belgique le *26 décembre 2003*. Dans cette note, la Serbie et Monténégro informe la Belgique qu'elle est disposée à inclure la convention de 1930 dans la liste. Ceci s'est produit un mois après que la Cour ait convoqué les Parties à l'audience dans la présente affaire, et après, littéralement, des années de silence de la part de la Serbie et Monténégro, alors que la Belgique avait publiquement avancé l'affirmation que la convention était

caduque et que la Serbie n'y avait pas succédé. La Belgique invoque le silence de la Serbie et Monténégro sur ce point. Il n'existe — il n'a jamais existé — quelque fondement que ce soit pour prétendre que la convention de 1930 est restée en vigueur ou que la Serbie et Monténégro y a succédé.

9. Monsieur le président, M. Bethlehem va maintenant exposer plus en détail les conclusions de la Belgique sur les points que je viens d'évoquer, ainsi que sur certains autres points. Puis-je vous demander de bien vouloir l'inviter à le faire ? Merci Monsieur le président.

The PRESIDENT: Thank you, Mr. Devadder. I now give the floor to Professor Daniel Bethlehem.

Mr. BETHLEHEM:

Introduction and scheme of argument

1. Mr. President, Members of the Court, it is an honour for me to appear before you today and a particular honour to do so representing Belgium in these proceedings.

2. My submissions this morning are divided into four parts. First, I will develop the argument that the Agent for Belgium noted just a moment ago to the effect that, in the light of Serbia and Montenegro's written observations in response to Belgium's Preliminary Objections, there is agreement between the Parties on a central question of jurisdiction that is determinative of the case before the Court. Belgium will accordingly invite the Court to bring these proceedings to a conclusion with a decision that reflects the agreement of the Parties on this element.

3. Second, in case the Court is not minded to adopt this course, it will be necessary to develop a number of additional submissions. I will accordingly turn next to address some background issues and developments since the filing of Belgium's Preliminary Objections on 5 July 2000.

4. Third, following this I will turn to a number of general observations on jurisdiction which relate to the case as a whole rather than to any particular basis of jurisdiction advanced by the Applicant. The central thrust of these observations is that the jurisdiction of the Court falls to be determined at the point at which the proceedings were instituted. By reference to the now

acknowledged legal position at that time, the Court was not open to Serbia and Montenegro as an applicant. The Application instituting these proceedings was invalid *ab initio*. Notwithstanding Serbia and Montenegro's admission to membership of the United Nations on 1 November 2000, it is now not open to Serbia and Montenegro to proceed with this case on the basis of its Application of 29 April 1999.

5. Fourth, and in the alternative, I will turn finally to develop a number of brief points on each of the heads of jurisdiction advanced by the Applicant in its Memorial. These proceedings are highly unusual — in the sense that the Applicant has not joined argument with any of Belgium's objections to jurisdiction and admissibility. The Court's Rules and Practice Directions enjoin brevity in oral statements. My observations on the heads of jurisdiction advanced in the Applicant's Memorial will therefore be limited to a few brief points that warrant special comment at this stage. As Mr. Devadder has noted, Belgium maintains all of the objections to jurisdiction and admissibility advanced in its written pleadings. It reserves the right to revisit these if this is warranted in the light of the Applicant's oral submissions.

6. Mr. President, before I turn to these submissions, I should say a brief word about nomenclature. This case was instituted by the Federal Republic of Yugoslavia. In the initial title of the case, the Applicant was referred to simply as "Yugoslavia". In the pleadings, it is referred to as the Federal Republic of Yugoslavia or, for sake of brevity, the FRY. It has subsequently become Serbia and Montenegro. In my submissions, I will refer as appropriate to the Federal Republic of Yugoslavia, to the FRY or to Serbia and Montenegro simply for ease of reference. Nothing is intended by or turns on these different formulations.

Part I. There is agreement between the Parties on a question of jurisdiction that is determinative of the case before the Court

7. Mr. President, Members of the Court, I turn now to the first part of my submissions, namely, that there is agreement between the Parties on a question of jurisdiction that is determinative of the case before the Court. As I noted a moment ago, this is an unusual case. Serbia and Montenegro has not taken issue with any of Belgium's objections to jurisdiction and admissibility. Belgium's written pleading is substantial — some 185 pages of argument. In response, the FRY submitted its observations and submissions on 18 December 2002. This is a

particularly important document on which I anticipate you will hear a good deal more during the course of this week. In operative part, it comprises four paragraphs in the very briefest of terms as follows:

> "The Federal Republic of Yugoslavia is supplementing its earlier communication 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. The Federal Republic of Yugoslavia submits that it is now clear that:
>
> (a) *With regard to Article 35 and 36 of the Statute of the Court, with regard to the Genocide Convention (and with regard to bilateral conventions in the cases against Belgium and the Netherlands)*
>
> As the Federal Republic of Yugoslavia became a *new* member of the United Nations on 1 November 2000, it follows that it was not a member before that date. Accordingly, it became an established fact that before 1 November 2000, the Federal Republic of Yugoslavia was not and could not have been a party to the Statute of the Court by way of United Nations membership.
>
> (b) *With regard to the Genocide Convention*
>
> The Federal Republic of Yugoslavia did not continue the personality and treaty membership of the former Yugoslavia, and thus specifically, it was not bound by the Genocide Convention until it acceded to that Convention (with a reservation to Article IX) in March 2001."

8. In its submissions following these observations, the FRY requested "the Court to decide on its jurisdiction considering the pleadings formulated in these Written Observations". That's it. That is the sum total of Serbia and Montenegro's written pleading in response to Belgium's Preliminary Objections. Serbia and Montenegro did *not* ask the Court to find that it had jurisdiction. It did *not* ask the Court to uphold the FRY's claim to jurisdiction. It did *not* ask the Court to reject Belgium's objections to jurisdiction. It simply asked the Court to decide on jurisdiction in the light of its acknowledgment *inter alia* that it was not a party to the Statute at the relevant time. This plea was reiterated in subsequent correspondence to the Court.

9. Mr. President, as you noted in your opening remarks, in its Memorial, the FRY advanced three bases of jurisdiction against Belgium: the optional clause declarations of the Parties, Article IX of the Genocide Convention, and Article 4 of a 1930 bilateral Convention concluded between Belgium and the Kingdom of Yugoslavia. In its written pleadings, Belgium contended *inter alia* that the Court was not "open" to the FRY, within the meaning of this phrase in Article 35

of the Statute[1]. Serbia and Montenegro's Written Observations in response to Belgium's Preliminary Objections effectively endorses Belgium's contention on this point as regards every head of jurisdiction initially invoked by the FRY. Serbia and Montenegro invited the Court to give a judgment on jurisdiction, which reflected the Parties' agreed appreciation of the Court's jurisdiction in this case. This agreed appreciation is determinative of the case before the Court on this threshold point. It reflects common ground between the Parties on a pivotal point of jurisdiction, which reaches into every corner of the dispute with which the Court was seised. As the Court observed in the *Nuclear Tests* cases:

> "the existence of a dispute is the primary condition for the Court to exercise its judicial function . . . The dispute brought before it must therefore continue to exist at the time when the Court makes its decision. It [the Court] must not fail to take cognizance of a situation in which the dispute has disappeared . . ."[2]

10. Mr President, Members of the Court, in the light of Serbia and Montenegro's Written Observations and submissions abandoning the grounds of jurisdiction that it had originally advanced, the appropriate response would be for the Court simply to remove the case from its List. Alternatively, Belgium invites the Court to bring these proceedings to a conclusion with a judgment that reflects the absence of a dispute.

11. I should add, for reasons of completeness, that Belgium does not anticipate that the Applicant will step back from its Written Observations in its oral submissions on Wednesday. Should it seek to do so, however, for whatever reason, Belgium considers that the principle of estoppel would operate to preclude this. If need be, I will return to the point in the reply phase of our submissions.

Part II. Background issues and developments since 5 July 2000

12. I turn now to the second part of my submissions — setting out certain background issues and developments since the filing of Belgium's written pleadings on 5 July 2000. I propose to do so very briefly simply to provide a frame of reference for what is to follow.

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[1]Belgium's position is summarized at paragraph 12 *(a)* of its Preliminary Objections.

[2]*Nuclear Tests (Australia* v. *France) (New Zealand* v. *France)*, Judgments of 20 December 1974, paras. 55 and 58 respectively.

13. These proceedings were instituted by an Application filed with the Registry on 29 April 1999. That Application reproduced a declaration by the FRY dated four days earlier, that is, 25 April 1999, which purported to be a declaration made under Article 36 (2) of the Statute. The Application went on to assert jurisdiction in respect of the case under both the optional clause declarations of the Parties and under Article IX of the Genocide Convention. In the course of the provisional measures hearings in this case, the Applicant advanced Article 4 of the 1930 bilateral Convention as an additional basis of jurisdiction against Belgium.

14. The Court rejected the request for provisional measures in its Order dated 2 June 1999. The grounds relied upon by the Court in respect of jurisdiction under the optional clause and under Article IX of the Genocide Convention remain relevant to the present phase of the case.

15. The FRY filed its Memorial on 5 January 2000. In that Memorial, it asserted that it was a Member of the United Nations. It went on to advance the three bases of jurisdiction that I have just noted. On its substantive claims, in addition to developing allegations by reference to the statement of claim in its Application, the Memorial also set out novel allegations which went a considerable way beyond the matters specified in the Application. These new issues notably concerned acts alleged to have occurred after 10 June 1999, the date on which the Security Council adopted resolution 1244 (1999).

16. Belgium filed its Preliminary Objections to jurisdiction and admissibility on 5 July 2000. This sets out eight distinct submissions. A central pivot of Belgium's objections was that the Court was not open to the FRY under Article 35 of the Statute notably on the grounds that the FRY was not a Member of the United Nations.

17. Subsequent to the filing of these Preliminary Objections, there have been a number of developments which have, or may have, a bearing on the arguments advanced in this case. The principal documents relevant to these developments were submitted to the Court under cover of the joint letter dated 27 February 2004 — to which, Mr. President, you referred a moment ago — by the Agents of the eight Respondents in the parallel proceedings in this matter. I do not propose to go into the issues in detail but it is useful to highlight the central points.

18. On 27 October 2000, the newly-elected President of the FRY, Vojislav Kostunica, submitted a letter to the United Nations Secretary-General in which he requested "the admission of

the Federal Republic of Yugoslavia to membership in the United Nations in light of the implementation of Security Council resolution 777 of 1992"[3]. By that resolution 777, the Security Council had considered that the FRY could not automatically continue the United Nations membership of the former Yugoslavia and that it should apply for membership in the United Nations[4].

19. Following a Report of the Security Council Committee on the Admission of New Members[5], the Security Council considered the FRY's application[6]. By resolution 1326 (2000), the Security Council recommended to the General Assembly that the FRY be admitted to membership in the United Nations[7]. Following this recommendation, the General Assembly, on a draft resolution co-sponsored by Belgium[8], decided to admit the FRY to membership in the United Nations[9]. A number of the statements made during the meeting of the General Assembly at which the FRY was admitted to membership make it clear, if there was any doubt in the matter, that the FRY was admitted to membership as a *new* member and not in some form as a successor to the membership of the former Yugoslavia[10]. The point was particularly emphasized by other former Yugoslav States.

20. On 12 March 2001, the FRY deposited with the United Nations Secretary-General a notification of accession to the Genocide Convention, indicating that the Convention would enter into force for the FRY on 10 June 2001. The notification of accession included a reservation to Article IX of the Genocide Convention to the effect that "The Federal Republic of Yugoslavia does not consider itself bound by Article IX" of the Convention.

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[3] A/55/528-S/2000/1043, 30 October 2000. (Document No. 1 of the Respondents' joint bundle of additional documents.)

[4] Security Council resolution 777 (1992), Annex 31 to Belgium's Preliminary Objections.

[5] S/2000/1051, 31 October 2000. (Document No. 2 of the Respondents' joint bundle of additional documents.)

[6] S/PV.4214 and S/PV.4215, both of 31 October 2000. (Documents Nos. 3 and 4 of the Respondents' joint bundle of additional documents.)

[7] S/RES/1326 (2000), 31 October 2000. (Document No. 5 of the Respondents' joint bundle of additional documents.)

[8] A/55/L.23*, 1 November 2000. (Document No. 8 of the Respondents' joint bundle of additional documents.)

[9] A/RES/55/12, 10 November 2000. (Document No. 10 of the Respondents' joint bundle of additional documents.)

[10] A/55/PV.48, 1 November 2000, p. 26 *et seq.* (Document No. 9 of the Respondents' joint bundle of additional documents.)

21. As regards bilateral developments between the Parties, in Chapter 7 of its written pleadings, Belgium set out in detail the various internal reviews and bilateral discussions that took place concerning FRY succession to treaties that had been concluded between Belgium and the former Yugoslavia[11]. This issue remained formally unresolved at the point at which the present case was instituted, the bilateral exchanges between the Parties having been suspended in the light of the events in Kosovo. However, as is described in Belgium's Preliminary Objections, all the evidence at that stage pointed clearly to the appreciation that the FRY had not succeeded to the 1930 Convention. Indeed, the evidence pointed to an appreciation that the 1930 Convention had lapsed altogether by no later than 4 July 1992[12]. I will return to this element a little later.

22. In the period following the filing of Belgium's written pleadings, bilateral discussions recommenced between Belgium and Serbia and Montenegro on the question of succession to treaties. Annex 13 to the joint note of the Respondents submitted to the Court contains five new documents concerning this element. As these documents disclose, there were exchanges between the two sides on the general question of succession to treaties on 6 September 2001 and again on 25 March 2002. The issues remained unresolved, however, because the two sides could not agree on succession to a treaty on maritime transport. As with the earlier bilateral exchanges, however, the 1930 Convention in issue here did not feature in *any* discussion between the two sides, the evident appreciation of both sides being that the Convention was no longer in force or that, if it was, the FRY did not succeed to it.

23. As the Agent for Belgium has noted, on 27 November 2003 the Court informed the Parties in this case that a hearing would be scheduled in April 2004. On 23 December 2003, following a meeting of the Agents in the case with the President of the Court, the Registrar wrote to the Parties setting out the timetable for the hearing in this case. On 26 December 2003, fully a month after the Court's notification of the hearing in this case, the Ministry of Foreign Affairs of Serbia and Montenegro wrote to the Belgian Embassy in Belgrade proposing that the 1930 Convention be included on the list of treaties to which Serbia and Montenegro would succeed. This is the first and only time in the bilateral exchanges between the two sides that have

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[11]Preliminary Objections, paras. 417-423 and 438-448.

[12]Preliminary Objections, paras. 412-423.

stretched over a number of years on the question of succession to treaties that the 1930 Convention has even been mentioned. In subsequent correspondence from the Belgian Embassy in Belgrade to the Ministry of Foreign Affairs of Serbia and Montenegro dated 23 February 2004, Belgium rejected Serbia and Montenegro's proposal.

Part III. The jurisdiction of the Court falls to be determined at the point at which the act instituting proceedings was filed

24. Mr. President, Members of the Court, that brings things up to date. I turn now to the third part of my submissions directed to the contention that the jurisdiction of the Court falls to be determined at the point at which the act instituting proceedings was filed. The propositions are simple. *First*, the jurisdiction of the Court falls to be determined at the point at which the proceedings were instituted. *Second*, the Court was not open to Serbia and Montenegro at the point at which the Application instituting proceedings was filed. *Third*, the Application instituting proceedings was accordingly invalid at the point that it was filed. *Fourth*, it is not now open to Serbia and Montenegro to proceed with the case on the basis of this invalid Application. As I noted in opening, this submission goes to the case as a whole rather than to any particular basis of jurisdiction advanced by the Applicant. If you are persuaded by it, it is determinative of the entire case.

25. Before I address the central point, there are two observations of a more general nature which are relevant. *First*, it is now clear that Serbia and Montenegro was not a Member of the United Nations or otherwise a party to the Statute of the Court at the point at which it filed its Application instituting proceedings. Further, Serbia and Montenegro was admitted as a *new* Member of the United Nations on 1 November 2000. It was not admitted to the dormant membership of the former Yugoslavia, resurrecting and continuing it, and thereby bridging a temporal divide, so that Serbia and Montenegro's membership of the United Nations somehow continued seamlessly back to 1945. That was quite clearly not the understanding of the Security Council or of the General Assembly or of the individual Members of the United Nations who made statements on the point.

26. *Second*, as I have already noted, Serbia and Montenegro has not at any point contended that the Court was open to it on any basis other than United Nations membership. It would not now

be open to it to do so. The relevant principle is that stated by the Court in the Provisional Measures Order in this case in which the Court rejected the FRY's invocation of a new basis of jurisdiction during the oral phase of those proceedings on the ground that "such action at this late stage, when not accepted by the other party, seriously jeopardizes the principle of procedural fairness and the sound administration of justice"[13].

27. Mr. President, I come to the central point of this part of my submissions. It is now clear that Serbia and Montenegro was not in any manner a party to the Statute of the Court at the time at which it filed its Application purporting to institute proceedings. It does not contest the point. It has not advanced any argument to the effect that the Court was open to it on some other basis. It is now precluded from doing so. The only remaining question is thus whether Serbia and Montenegro's admission as a new Member of the United Nations on 1 November 2000 can cure the fundamental defect in its Application instituting proceedings on 29 April 1999. In Belgium's contention, it cannot. Serbia and Montenegro's Application was fundamentally flawed at the point at which it was filed. It is invalid *ab initio*. The defect cannot be cured by Serbia and Montenegro's subsequent admission to membership some 18 months later.

28. It is settled jurisprudence of this Court that jurisdiction must be determined at the time that the act instituting proceedings was filed[14]. An example of the case in which the point was made affirmatively was the *Arrest Warrant* case, in which we were before the Court just a short time ago. This principle is not simply a principle of the judicial application of the principle of inter-temporal law. It is an essential element in the sound administration of justice.

29. There is one notable exception to the principle. It is that the Court will not penalize a defect in a procedural act which the applicant could easily remedy[15]. In the language of the Permanent Court in the case concerning *Certain German Interests in Polish Upper Silesia*, the Court "cannot allow itself to be hampered by a mere defect of form, the removal of which depends solely on the Party concerned"[16]. Thus, for example, the Court will not set aside jurisdiction on

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[13]Case concerning *Legality of Use of Force (Yugoslavia* v. *Belgium), Provisional Measures, Order of 2 June 1999,* para. 44.

[14]See, for example, the *Arrest Warrant* case, Judgment of 14 February 2002, para. 26.

[15]*Genocide Convention* case, *Preliminary Objections*, Judgment of 11 July 1996, para. 26.

[16]*Certain German Interests in Polish Upper Silesia*, *P.C.I.J., Series A, No. 6*, p.14.

grounds of a mere defect of form or procedure in circumstances in which the applicant could easily remedy the position by filing a new application instituting proceedings.

30. Mr. President, Members of the Court, this is the nub of the issue in this case. Can the quite fundamental defect in the jurisdictional foundation of Serbia and Montenegro's case at the point at which it instituted proceedings properly be characterized as a mere defect of form? Can it be said, in the language of the *Mavrommatis Palestine Concessions* case, that Serbia and Montenegro's Application was simply premature? In the circumstances of this case, where does the balance of hardship lie as between the Applicant and the Respondent when it comes to assessing the consequences of upholding or rejecting Belgium's objection to jurisdiction on this point?

31. The Application instituting proceedings in the present case fell comprehensively outside the jurisdictional framework of the Court under Articles 35, 36 and 37 of the Statute at the point at which the proceedings were instituted. The Application was not simply premature. It proceeded by intention on a false premise of fundamental importance. It was not simply an error of timing. It was an intentional manipulation of the essential basis of the Court's jurisdiction. It would be extraordinary if these circumstances were to be regarded as mere defects of form.

32. It might of course be argued that Serbia and Montenegro could remedy the defect simply by filing a new application instituting proceedings. This would not be straightforward. Any new case would necessarily be qualitatively different from the present case in important respects. As I will come to in more detail in a moment, the present optional clause declaration relied upon by Serbia and Montenegro cannot be considered as valid. It was made at a time at which Serbia and Montenegro was not a party to the Statute. The declaration has not, in so far as Belgium is aware, been affirmed by Serbia and Montenegro subsequent to its admission to membership of the United Nations.

33. Parallel arguments arise in respect of Article IX of the Genocide Convention as a discrete head of jurisdiction. Serbia and Montenegro filed a notification of accession to this Convention on 12 March 2001 subject to a reservation in respect of Article IX. Belgium makes no comment on the question of Serbia and Montenegro's accession or succession to this Convention. It simply observes that, were Serbia and Montenegro to seek to rely on the Genocide Convention to found

jurisdiction in a new case, it would necessarily be compelled to do so by reference to its act of 12 March 2001. In such circumstances, the effect of its reservation, if valid, would be to preclude jurisdiction. If the reservation were invalid, or if the view was taken that Serbia and Montenegro had become a party to the Genocide Convention on some basis other than its accession notification, questions of estoppel as regards the effect of its March 2001 reservation would arise.

34. Fresh reliance on the 1930 Convention would also pose considerable difficulties for Serbia and Montenegro. Developments since the filing of its Application in the present case strengthen Belgium's hand in this matter.

35. The defect in Serbia and Montenegro's Application in the present case is therefore neither purely procedural nor something that could be easily remedied by the Applicant in a manner that would place it more or less in the same position as would be the case if the Court decided to uphold jurisdiction at this stage. The exception to the principle that jurisdiction falls to be determined at the time that the act instituting the proceedings was filed does not therefore operate in this case. It is the basic jurisdictional principle that governs.

36. Beyond this, the balance of hardship and convenience in the present case also dictates a finding that the fundamental jurisdictional defect in the FRY's Application taints the Application *ab initio*. To allow Serbia and Montenegro to proceed with the case in circumstances in which it has not to this point even joined argument with Belgium's objection to jurisdiction and admissibility would be to prejudice Belgium's rights as Respondent and would be contrary to the sound administration of justice. It would also raise basic questions about the burden of proof. In the light of Belgium's objections to jurisdiction and admissibility, the burden of proof to show jurisdiction rests with Serbia and Montenegro. It has not so far even begun to address these points. It is difficult to see any basis on which the Court could uphold jurisdiction in the present circumstances.

37. Mr. President, Members of the Court, a final point on this element requires comment. The fact that Serbia and Montenegro was and continues to be a respondent in the *Genocide Convention* case initiated by Bosnia, and that it initiated proceedings in the *Application for Revision* case, in which the Court gave Judgment last year, does not challenge the assessment that I have just put forward. The *Application for Revision* case stemmed from the *Genocide Convention*

case. As the respondent in the latter case, Serbia and Montenegro was quite properly competent to initiate proceedings in the former case. In the *Genocide Convention* case, the controlling consideration is that the FRY did not contest jurisdiction on the ground that it was not a Member of the United Nations. On the contrary, it asserted United Nations membership on the grounds of succession to membership of the former Yugoslavia. The Federal Republic of Yugoslavia thus acquiesced on the question of its standing to appear before the Court in the *Genocide Convention* case. While it was perfectly entitled to pursue this course as respondent in that case, it cannot rely on its acquiescence as respondent in one case in order to found jurisdiction as Applicant in this case. Belgium relies on both the letter and the spirit of Article 35 of the Statute. It does not acquiesce to the bringing of a claim against it by an applicant for whom the Court was not open at the relevant time.

38. There is a further relevant factor which distinguishes the jurisdictional issues in the *Genocide Convention* case from those in this case. In finding that it had jurisdiction in the *Genocide Convention* case, the Court stressed, both at the provisional measures phase and in its Judgment on Preliminary Objections, that both parties to those proceedings corresponded to parts of the territory of the former Yugoslavia which had signed the Genocide Convention and deposited its instrument of ratification without reservation. The Court emphasized this element again in the *Application for Revision* case[17], confirming the *sui generis* character of those proceedings and the appreciation of the special circumstances that pertained between States which were formerly part of the Socialist Federal Republic of Yugoslavia. There is no analogy between the jurisdictional issues in the *Genocide Convention* case and those in the present case.

39. In the light of these considerations, Belgium contends that whether the Court has jurisdiction in this case falls to be determined at the point at which Serbia and Montenegro filed its Application instituting proceedings. There is no suggestion now that the Court was open to Serbia and Montenegro at that point. The Application instituting proceedings was accordingly invalid at the time that it was filed. This fundamental defect is not now cured by reference to an exception

[17] *Application for Revision* case, Judgment of 3 February 2003, paras. 57–62.

focused on avoiding unnecessary procedural formalism. It is therefore not now open to Serbia and Montenegro to proceed with this case on the basis of its invalid Application.

Part IV. Observations on specific bases of jurisdiction advanced in the Applicant's Memorial

40. Mr. President, Members of the Court, I turn finally to make a number of brief points on each of the heads of jurisdiction advanced by the Applicant in its Memorial. In doing so, I will not go over ground covered in Belgium's written pleadings. Belgium maintains its reliance on all of these arguments and if necessary, I will come back to these in reply.

(1) Jurisdiction under the optional clause declarations of the Parties

41. I turn, first, to make two observations about the jurisdiction of the Court under the optional clause declarations of the Parties[18].

42. The first observation follows from my earlier submissions. It is now acknowledged that the FRY was not a party to the Statute at the point at which it purported to make a declaration under Article 36 (2) of the Statute. By reference to the plain language of Article 36, paragraph 2 — which refers to "States parties to the present Statute" —, it is clear that the purported declaration was not valid either at the point at which it was made or at the point at which the Application instituting proceedings was filed. The issue was addressed in Belgium's written pleadings in the following terms:

> "Absent an entitlement to appear, the FRY cannot, simply by lodging a Declaration purportedly under Article 36 (2) of the *Statute*, perfect its otherwise fundamentally flawed position and avail itself of the procedures of the Court. The FRY was not competent to make a declaration under Article 36 (2) of the *Statute*. The FRY's Declaration of 25 April 1999 cannot therefore give the Court jurisdiction in this case."[19]

43. Mr. President, Members of the Court, that assessment remains valid today.

44. The only remaining question is whether Serbia and Montenegro's admission to membership of the United Nations on 1 November 2000 has served to cure the otherwise fundamental defect in the declaration made 18 months previously. Belgium contends that it has not. A declaration under Article 36 (2) of the Statute is an optional act. It does not follow

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[18]See further Chapter 5 of Belgium's Preliminary Objections.

[19]Preliminary Objections, para. 235.

automatically upon membership of the United Nations. It requires some further affirmative action on the part of a State party to the Statute of the Court. The mere fact of Serbia and Montenegro's admission to United Nations membership on 1 November 2000 cannot therefore, of itself, cure the invalidity of the declaration of 25 April 1999. At the very least, some further conduct subsequent to the date of admission to United Nations membership would have been required — such as subsequent affirmation or restatement of the declaration by Serbia and Montenegro or acquiescence by Belgium or wider acceptance of the validity of the declaration more generally.

45. No such subsequent conduct either affirming or accepting the FRY declaration of 25 April 1999 is evident in this case. Serbia and Montenegro did not take any step to affirm or restate its declaration following its admission to United Nations membership. Belgium has not acquiesced and accepted the validity of the FRY declaration. On the contrary, it has contested the validity of the declaration from the outset. There is no broader evidence from elsewhere pointing to wider acceptance of the validity of the declaration.

46. The principle that the Court's jurisdiction falls to be determined at the point at which the act instituting proceedings was filed is also relevant in this case. The FRY was not a party to the Statute when it purported to make its declaration under Article 36 (2) on 25 April 1999. It was not a party to the Statute four days later, when it instituted proceedings in purported reliance on the declaration. The Court's jurisdiction falls to be determined at that point. The invalidity of the declaration at that point cannot be cured *ex post facto* by Serbia and Montenegro's admission to United Nations membership some 18 months later.

47. Mr. President, Members of the Court, my second observation on the question of jurisdiction under the optional clause is simply to reinforce the central submission made in Belgium's written pleadings on the matter. The Court will already have a clear appreciation of the point as it formed the basis of the Provisional Measures Order in this case. The point is essentially that the temporal limitation in the FRY's optional clause declaration effectively excludes disputes described in Serbia and Montenegro's Application and in its Memorial.

48. The Court's assessment of this matter in its Provisional Measures Order in this case remains pertinent today[20]. I do not propose to say anything more on the point, save to make the observation that the present case is caught by both elements of the temporal limitation in the FRY's declaration of 25 April 1999. As I have just noted, that declaration purports to accept the jurisdiction of the Court in all disputes *(a)* arising or which may arise after the signature of the present declaration, and *(b)* with regard to situations or facts subsequent to this signature. The declaration thus purported to exclude the jurisdiction of the Court in respect of all matters that antedate the signature of the declaration.

49. As formulated in the FRY's Application and Memorial, the case with which the Court is seised concerns both a dispute which arose well before the signing of the FRY's declaration *and* a dispute which concerns situations or facts which arose prior to the signature of the declaration. Both elements of the temporal limitation in the FRY's declaration thus operate to preclude jurisdiction in the present case[21]. These are matters that addressed in some detail in Belgium's written pleadings and I say no more about them at this point.

(2) Jurisdiction under Article IX of the Genocide Convention

50. Mr. President, I turn, next, to the question of jurisdiction under Article IX of the Genocide Convention[22]. Once again, the Court will already have a clear appreciation of the central point relevant on this question as, again, it formed the basis of the Court's Provisional Measures Order in this case. The point is essentially that the allegations set out in the FRY's Memorial, even if they are accepted at face value, are not capable of supporting a finding that there has been a breach of the Genocide Convention.

51. The relevant test to be applied to the assessment of these issues was described by the Court in the *Oil Platforms* case as requiring the Court to ascertain whether the alleged violations of the treaty in question, simply as pleaded, come within the provisions of the treaty[23]. On this

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[20]Provisional Measures Order, para. 28.

[21]See further Belgium's Preliminary Objections, at Chapter 5, and, in particular, paragraphs 262-313.

[22]See further Chapter 6 of Belgium's Preliminary Objections.

[23]*Oil Platforms (Islamic Republic of Iran* v. *United States of America), Preliminary Objections, Judgment, I.C.J. Reports 1996*, p. 803, para. 16.

formulation, the question is whether the allegations of genocide raised by the FRY in its Memorial, simply taking the facts alleged *pro tem*, are capable of coming within the scope of the Genocide Convention *ratione materiae*. Belgium contends that they are not.

52. Before I turn briefly to elaborate on this point, it is perhaps worth remarking that the jurisprudence of the Court shows some evolution in the test to be applied at this jurisdictional stage to allegations of breach of treaty. Earlier jurisprudence, preceding the *Oil Platforms* case, for example, is cast in terms of "a reasonable connection between the Treaty and the claims submitted to the Court" or the question of whether the allegations of breach "are of a sufficiently plausible character" to warrant the conclusion that they come within the scope of the treaty in question[24]. Mr. President, Members of the Court, the point that I make here is simply that, however the jurisdictional test is formulated, the assessment in the present case remains the same. The facts as alleged by the FRY in support of its claim of genocide are not capable of supporting a finding that there has been a breach of the Genocide Convention. The claims advanced do not show a reasonable connection to the Genocide Convention. The allegations of genocide, as pleaded by the FRY, are not of a sufficiently plausible character. Belgium is content to live with any formulation of the jurisdictional test.

53. Genocide is a particularly egregious crime. An allegation of genocide is about as serious an allegation as can be made. Of the 352 close-typed, single spaced pages that comprise the FRY Memorial, less than two pages are given over to the allegations of "Facts Related to the Existence of an Intent to Commit Genocide"[25]. A further half a page of the Memorial, under the heading of "Law", is devoted to a recitation of certain of the provisions of the Genocide Convention[26]. That is the sum total of the FRY's allegations of genocide in this case. And this is after the Court, in its Provisional Measures Order in this case, had already signalled its prima facie assessment that the facts as alleged in the Application did *not* appear to come within the scope of the Genocide Convention. Against this backdrop, to be faced at this stage with an allegation of genocide set out

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[24]As, for example, in the *Interhandel* and *Ambatielos* cases. The point is addressed in Belgium's Preliminary Objections at paragraph 325.

[25]FRY Memorial, pp. 282-284.

[26]FRY Memorial, p. 326.

in its entirety in less than two pages of an otherwise very lengthy pleading is really quite extraordinary.

54. The detail of the allegations in these two pages adds a further layer of superficiality to the claim. No specific allegations of either genocidal intent or conduct are made against Belgium. Genocidal intent is said to be implied by reference to certain isolated acts of bombing and unsubstantiated allegations, which do not arise above the level of bare assertion, about the use of depleted uranium. Genocidal intent is also said to be inferred from the fact that "Serbs and members of other non-Albanian groups were killed, injured or expelled as such, due to their ethnicity" and that Serbian institutions were destroyed or damaged[27]. Now, that is the full extent of the FRY's allegations of genocide.

55. In its written pleadings, Belgium developed its submissions that the breaches alleged by the FRY are not capable of falling within the provisions of the Genocide Convention in some detail. These submissions have not been controverted and there is no need, accordingly, for me to go into these issues further at this stage. The essential point is that, even were the Court to accept the FRY's allegations of genocide at face value, they are not capable of coming within the scope of the Genocide Convention *ratione materiae*. Let me put it perhaps more clearly in these terms: were this case to proceed to an assessment of the merits of the allegations, and were Belgium simply to remain silent in the face of the allegations and not to submit any Counter-Memorial or make any oral argument on the issues, there would still be no basis on which the Court could reach any conclusion other than that the allegations do not come within the scope of the Genocide Convention as a matter of jurisdiction and are unfounded as a matter of substance.

56. Mr. President, Members of the Court, a brief point concluding this submission is warranted. There may be some suggestion that the jurisdictional issues relevant to the allegations of genocide should be joined to the merits on the ground, it may be argued, that it is only at that stage that the Court will properly be in a position to assess the weight of the claims and therefore whether they come within the scope of the Genocide Convention. Belgium would very strongly urge the Court not to adopt such an approach for at least two reasons. *First*, as I have just noted,

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[27]FRY Memorial, p. 283.

even if Belgium were to remain completely silent in the face of these allegations, there is no basis whatever on which the Court could find that they have merit. The allegations as pleaded have no evidential foundation whatever. In the circumstances, it would be entirely inappropriate to proceed to a merits hearing on the issue.

57. *Second*, there are wider reasons of principle against joinder of jurisdiction to the merits of this case. To do so would be to open the door, in the future, to any applicant with a grievance to allege genocide in the almost sure knowledge that this would carry it through to a hearing on the merits. The Genocide Convention has near universal participation. Joinder of jurisdictional issues to the merits of this case, in which the claims advanced are so evidently baseless and outside the scope of the Convention, would diminish the Convention and risk turning it into a jurisdictional vehicle for any aggrieved applicant which wanted a day in court. Belgium very strongly urges the Court to resist any entreaty to join the jurisdictional arguments to the merits in this case.

Mr. President and Members of the Court, I turn, finally, to the last rather brief portion of my submissions. Mr. President, I am in your hands if you would like to suspend the proceedings and take a break. Otherwise I should say that I've only got about another 12 minutes or so in my presentation.

The PRESIDENT: You may continue, please.

Mr. BETHLEHEM: Thank you.

(3) Jurisdiction under Article 4 of the 1930 Convention

58. I turn then finally to the question of jurisdiction under Article 4 of the 1930 Convention[28]. Four grounds of objection were advanced in Belgium's written pleadings in response to the FRY's reliance on this Convention: *first*, that Article 37 of the Statute did not operate in the circumstances of this case as the FRY was not a party to the Statute; *second*, that the 1930 Convention is no longer in force; *third*, that, even if the 1930 Convention remains in force, the FRY has not succeeded to it; and *fourth*, that the conditions laid down in the 1930 Convention have not been satisfied.

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[28]See further Chapter 7 of Belgium's Preliminary Objections.

59. The argument concerning the operation of Article 37 of the Statute has largely been covered in my earlier submissions this morning concerning the point at which jurisdiction falls to be determined. I do not therefore propose to say anything more about it at this stage. Similarly, I do not propose to address the fourth argument advanced in Belgium's written pleadings to the effect that the conditions laid down in the 1930 Convention have not been satisfied. Belgium maintains all of its submissions on this point but, in the absence of arguments to the contrary, there is nothing more that it wishes to add at this stage. In the brief time that remains, I propose therefore to address Belgium's two core arguments under this heading, namely, that the 1930 Convention is no longer in force; and alternatively, that even if it is in force, Serbia and Montenegro has not succeeded to it.

60. I turn, first, to the argument that the 1930 Convention is no longer in force. The argument is straightforward. It is that the Convention had lapsed — whether through obsolescence or desuetude or on the basis of the implied consent of the original parties to the treaty — by no later than 4 July 1992, that is, at the point at which the former Yugoslavia was considered by the Badinter Commission to have ceased to exist[29]. Mr. President, Members of the Court, there is of course very little jurisprudence or practice, or even commentary, on desuetude or obsolescence of treaties. The International Law Commission has, however, acknowledged that desuetude or obsolescence may be a factual circumstance in the termination of treaties; the legal basis for termination in such cases being the implied consent of the parties to abandon the treaty.

61. The question, in the present case, is whether there is any basis to imply such consent to the abandonment of the 1930 Convention. Belgium contends that there is and has advanced four elements in support of this contention in its written pleadings, namely: *(a)* the scheme of the Convention, *(b)* the fact that the Convention was not conceived of as operating in perpetuity, *(c)* the practice of the original parties to the Convention, and, most importantly, *(d)* the disappearance of the former Yugoslavia and the consistent attitude of its successor States on the question of the continued existence of the Convention. I propose to focus here simply on the last of these points.

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[29]This argument is addressed at paragraphs 412-423 of Belgium's Preliminary Objections.

62. There are a number of elements to the argument that the 1930 Convention is no longer in force. The first is that, with the disappearance of one of the original parties to a bilateral treaty, the question necessarily arises as to whether the treaty continues in force. The disappearance of a party to a bilateral convention is perforce an event which crystallizes the question of the treaty's continued application.

63. The second element is that a response to this question necessarily requires an examination of the attitudes both of the remaining original party to the treaty and of any potential successor to the party that has ceased to exist. A bilateral treaty is a compact which requires the common intent of two sides to enter into legal relations. With the disappearance of one of the original parties to the treaty — not simply a change of name or some other less fundamental change — there cannot be a presumption in favour of continuity. The attitude of the remaining original party will be critical to any question of continuity.

64. The third element is that, in this case, the appreciation both of Belgium and of the successor States of the former Yugoslavia with which questions of succession to former Yugoslav treaties were addressed uniformly supports the conclusion that the 1930 Convention is no longer in force. The evidence to this effect points clearly to the implied abandonment of the Convention and its lapse by reason of desuetude.

65. Significantly, the evidence to which I have just alluded, pointing to the abandonment of the 1930 Convention, is drawn not simply from Belgian conduct or from the conduct of other former Yugoslav successor States, such as Croatia, Slovenia and Macedonia, but also from the conduct of the FRY itself. In the period following the dissolution of the former Yugoslavia, there were negotiations between Belgium and, separately, Croatia, Slovenia, Macedonia and the FRY on the question of succession to bilateral Belgian-Yugoslav treaties. In no case in all of these exchanges was the 1930 Convention even referred to. It did not feature on any list of treaties drawn up by any party in the course of these discussions. There was no sense, at any point by any party that the 1930 Convention even needed to be addressed, let alone that it was in force.

66. Annexes 61 to 72 to Belgium's Preliminary Objections contain both the internal Belgian working documents relevant to the various bilateral exchanges and the separate agreements concluded between Belgium and, respectively, Croatia, Slovenia and Macedonia. Mr. President,

Members of the Court, we invite the Court to examine these documents — and notably the documents concerning the negotiations with the FRY. You will see that there is no trace of any reference to the 1930 Convention.

67. To conclude this submission, the conduct of Belgium, of the FRY, of Croatia, of Slovenia and of Macedonia, in the period following the dissolution of the former Yugoslavia shows a common appreciation that the 1930 Convention was no longer in force. The first and only time that this Convention was even mentioned was in the FRY's letter to the Court dated 12 May 1999 by which it sought to rely on the Convention as a basis of jurisdiction in this case. That letter, however, runs counter to the preceding six years of conduct, including by the FRY itself, which supports the conclusion that the 1930 Convention was no longer in force. It is this earlier conduct — objective, consistent and uniform — that is dispositive of the desuetude of the 1930 Convention.

68. Mr. President, Members of the Court, I turn now to my final submission and after this I will bring Belgium's pleadings in the first round to a close. And this final submission is that even if the 1930 Convention remained in force, Serbia and Montenegro has not succeeded to it[30]. Before I address the question, I should point out that it is in respect of this element that both Belgium and Serbia and Montenegro have submitted additional documents to the Court. The Belgian documents were submitted as Annex 13 to the joint letter signed by the Agents of the Respondents dated 27 February 2004. This comprises five documents dating from 6 September 2001 through to 23 February 2004. For convenience, their place in the scheme of Belgium's written pleadings: they are numbered Annexes 72 *(a)* through to 72 *(e)* to Belgium's Preliminary Objections and they would feature in Belgium's written pleadings following paragraph 422.

69. Serbia and Montenegro's additional documents were submitted under cover of the letter to the Court by the Co-Agent of Serbia and Montenegro dated 26 February 2004. They comprise two documents. The first, a letter from the Belgian Foreign Minister to his FRY counterpart dated 29 April 1996, is not in fact a new document. It is extracted in operative part and addressed in Belgium's written pleadings at paragraphs 442 and 443, and it is also attached as Annex 74 to those

[30]Preliminary Objections, paras. 424-450.

pleadings. The second additional document submitted by Serbia and Montenegro corresponds to Annex 72 *(b)* to Belgium's Preliminary Objections, that is, it is the same as the second of the additional documents submitted by Belgium.

70. Mr. President, Members of the Court, Belgium's submission on the question of succession can be simply stated by way of a number of propositions as follows. *First*, as a matter of law, questions of succession to bilateral treaties are to be addressed differently from questions of succession to multilateral treaties. This emerges from the approach adopted in the Vienna Convention on Succession of States in Respect of Treaties as well as from the International Law Commission's Commentary on the Draft Articles that formed the basis of that Convention[31].

71. *Second*, as regards succession to bilateral treaties, the basic principle is that succession depends on consent to this effect by both the remaining original party and the successor State. In other words, in the case of bilateral treaties, there is no presumption of continuity[32].

72. *Third*, in the light of this principle, the question of whether Serbia and Montenegro succeeded to the 1930 Convention — even assuming *arguendo* that it remained in force — is to be addressed by reference to the consent or otherwise of both Belgium and Serbia and Montenegro on the matter.

73. *Fourth*, by reference to the conduct of both Belgium and Serbia and Montenegro, the evident appreciation of both sides was that there was no succession to the 1930 Convention. As I have just noted, there were a series of bilateral exchanges between the two sides during this period on the question of succession to treaties. At no point in these exchanges did the 1930 Convention even feature in the discussions. Serbia and Montenegro did not assert succession. The 1930 Convention did not feature on any lists of treaties exchanged by the two sides in the course of the discussions. Internal working documents of Belgium relevant to the question of FRY succession make no reference to the 1930 Convention[33]. The appreciation evident from all of the documents annexed to Belgium's Preliminary Objections is that neither Belgium nor Serbia and Montenegro considered that Serbia and Montenegro had succeeded to the 1930 Convention.

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[31]See further paragraph 430 of Belgium's Preliminary Objections.

[32]See further paragraph 431 of Belgium's Preliminary Objections.

[33]The relevant material is set out in paragraphs 435 to 441 and 444 to 446 of Belgium's Preliminary Objections and in various of the attached Annexes, notably Annexes 61 to 65 and 69 to 71.

74. Mr. President, I come now to the letter from the Belgian Foreign Minister to his FRY counterpart dated 29 April 1996, to which Serbia and Montenegro has signalled that it will make reference. This is extracted in operative part at paragraph 442 of Belgium's written pleadings. The letter in question follows a series of bilateral exchanges between the two sides on the question of succession, which proceeded by way of an exchange of lists of bilateral treaties that were to be the subject of discussion. The 1930 Convention did not feature on any of the lists of treaties exchanged between the two sides.

75. As part of the negotiating process concerning the treaties referred to on the lists of the two sides, the Belgian Foreign Minister wrote to his FRY counterpart on 29 April 1996 *inter alia* proposing that bilateral agreements between Belgium and the former Yugoslavia should continue to have effect until they are either confirmed or renegotiated by both parties. The salient point regarding this correspondence is that it comes in the midst of bilateral exchanges between the two sides on the question of succession to treaties, which was proceeding by way of detailed lists of treaties compiled by each side. It was to the treaties on these lists to which the letter of the Belgian Foreign Minister referred. The 1930 Convention did not feature on any of these lists. The letter of the Belgian Foreign Minister did not encompass within its ambit the 1930 Convention or any other treaty that did not appear on the lists of the two sides.

76. The FRY's appreciation that it did not succeed to the 1930 Convention is further attested to by exchanges between the two sides after the Application instituting the present proceedings was filed. On 6 September 2001, the FRY Embassy in Brussels wrote to the Belgian Ministry of Foreign Affairs proposing to restart negotiations on the question of succession to bilateral treaties. The relevant document is additional document Annex 72 *(a)* submitted by Belgium. This FRY document sets out a list of treaties which the FRY proposed should form the basis of future negotiations with Belgium — this was 6 September 2001. The 1930 Convention did not feature on this list. Six months later, on 25 March 2002, we have the FRY response to the letter of the Belgian Foreign Minister of 29 April 1996 — that is, six years later. Again, the wider context is an exchange of lists of treaties between the two sides as regards which the 1930 Convention is only noticeable by its absence.

77. We come then to the very recent exchange of correspondence between the two sides in which the 1930 Convention does, indeed, feature. What is notable about this correspondence — and the Agent of Belgium referred to these in his opening — is that the first and only point at which Serbia and Montenegro raised the question of succession to the 1930 Convention was on 26 December 2003, just a few months ago. This was a month after the Court notified the Parties of the hearing in this case. Serbia and Montenegro may seek to rely on this correspondence — this sole letter — to support its claim to have succeeded to the 1930 Convention. What the correspondence is fact shows, however — coming against the backdrop of ten years of conduct which evidences a common appreciation that the 1930 Convention was no longer in force —, is a last minute and, we would contend, a rather ill-conceived attempt to construct a case in favour of succession. This assertion goes firmly against the run of the evidence attesting to non-succession to the 1930 Convention.

78. Mr. President, Members of the Court, in the event that the Court, contrary to Belgium's submission, considers that the 1930 Convention remains in force, Belgium contends that Serbia and Montenegro has not succeeded to it and that it cannot rely upon it for purposes of founding jurisdiction in this case.

Conclusion

79. I have not addressed a number of objections to jurisdiction and admissibility, which are set out in Belgium's written pleadings. As has been emphasized, however, Belgium maintains its reliance on all of the submissions in its written pleadings. If need be, I will return to these points in our second round submissions. The Agent of Belgium will also at that point present Belgium's formal submissions in this case. Mr. President, Members of the Court, I thank you for the patience and the courtesy with which you have listened to my submissions this morning. This brings Belgium's first round submissions to a close.

The PRESIDENT: Thank you, Professor Bethlehem.

Indeed, this statement of Professor Bethlehem brings to a close the first round of hearings for Belgium. The Court will now go into recess for ten minutes, after which the sitting will resume to hear the oral arguments of the Netherlands.

The Court rose at 11.55 a.m.

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