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International Court of Justice

THE HAGUE

Cour internationale de Justice

LA HAYE

YEAR 2004

Public sitting

held on Monday 19 April 2004, at 3 p.m., at the Peace Palace,

President Shi presiding,

***in the case concerning the* Legality of Use of Force**
(Serbia and Montenegro *v.* Canada)

VERBATIM RECORD

ANNÉE 2004

Audience publique

tenue le lundi 19 avril 2004, à 15 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. Canada)

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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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,

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

Ms Marijana Santrač,

Ms Dina Dobrković,

as Assistants;

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Mr. L. Alan Willis, Q.C.,

Ms Ruth Ozols Barr, Department of Justice,

as Counsel and Advocates;

Ms Laurie Wright, Department of Justice,

Ms Sabine Nolke, Department of Foreign Affairs,

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Mme Laurie Wright, ministère de la justice,

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Ms Anik Beaudoin, Department of Justice,

as Counsel.

Mme Marie-Josée Rhéaume, ministère des affaires étrangères,

Mme Anik Beaudoin, ministère de la justice,

comme conseils.

The PRESIDENT: Please be seated. The sitting is now open. The Court will first hear the oral pleadings of Canada. I now give the floor to Ms Colleen Swords, Agent of Canada.

Ms SWORDS:

1. Mr. President and Members of the Court. It is an honour to appear today before you on behalf of the Government of Canada. I will be assisted by Ms Ruth Barr and Mr. Alan Willis.

2. Canada has made two preliminary objections to the jurisdiction of the Court and two objections to the admissibility of the claim. Before discussing the substance of these objections, however, I will make a number of points arising out of the change in the Applicant's position, as reflected in the Written Observations of 18 December 2002, and its failure to contest the Preliminary Objections of Canada.

3. Next we will deal with our two objections to jurisdiction. There is no jurisdiction on the basis of the purported optional clause declaration of 25 April 1999 because the declaration is invalid, and because the dispute arose before the declaration was signed. Similarly, there is no jurisdiction under Article IX of the Genocide Convention, because the Convention is inapplicable to the subject matter of the claims made by the Applicant.

4. Finally, Mr. President, we will come to the two objections we have made to the admissibility of the claim. One of these is that the so-called new elements related to the peacekeeping activities of the United Nations Security Force are extraneous to the original case. As well, we reaffirm the objection that the claim in its entirety is inadmissible because of the absence of parties whose presence would be indispensable to the continuation of the proceedings.

5. Before beginning, there is a general point. The Memorial of the Applicant is replete with factual allegations of the most serious character. These are preliminary objections and it would be wrong to respond to those allegations here. I must however remind the Court that they are not accepted by Canada; in fact for the most part they are denied, and we reserve our right to respond to them as required.

The failure to oppose the objections

6. My first topic, then, is the procedural history of the case and the unusual state of the record as it now stands. The issues have not been joined. On the contrary, there is now agreement on many of the issues that once were strongly contested, and the substance of the preliminary objections made by Canada has not been challenged.

7. More than four years have passed since the Court gave its ruling on the request for provisional measures. Over three have passed since the preliminary objections were filed. For much of that time the case was dormant. It took a radically new direction with the momentous political changes in the year 2000, in what is now Serbia and Montenegro, leading to the admission of that State as a new Member of the United Nations.

8. This is the background to the Written Observations filed by the Applicant on 18 December 2002. The document is remarkably brief. That does not, however, diminish its legal significance. It is the formal pleading contemplated by Article 79, paragraph 5, of the Rules, which allows for a party to file a "written statement of its observations and submissions", and it is the only response that has ever been made to our objections.

9. Paragraph *(a)* of the Written Observations states that Serbia and Montenegro was not and could not have been a party to the Statute of the Court by way of United Nations membership in 1999. It has never been suggested that it became a party in any other way. Since only a party to the Statute can file an optional clause declaration, there is no escaping the logical consequences of this change of position. It is now common ground that there was no possible legal basis for the declaration of 25 April 1999, with the consequence that the declaration was a nullity with no legal effect whatsoever.

10. The second paragraph of the Written Observations deals with the Genocide Convention. It states that the Applicant was not bound by the Convention when this case was filed in 1999 — that it was not bound until its notice of accession of March 2001, which included a reservation to Article IX. This is a critical change of position. It means that, for whatever reasons, right or wrong, the Applicant no longer relies on Article IX as a title of jurisdiction in this case. It cannot do so consistently with its position that it was not a party to the Convention in 1999.

11. This of course is not the ground on which Canada contested the claim to jurisdiction under Article IX. Our objection was based on the subject matter of the Convention and its inapplicability *ratione materiae* to the subject matter of this case. But this divergence of grounds is immaterial. What counts is the result — and on that we are now in agreement, because it is clear the Applicant now repudiates Article IX as a basis of jurisdiction in this case.

12. This abandonment of the two grounds of jurisdiction originally invoked leaves a gaping hole at the heart of the case. Article 38, paragraph 2, of the Rules requires that an Applicant must specify as far as possible the legal grounds on which the jurisdiction of the Court is said to be based. Serbia and Montenegro did this in the original Application: under the heading of "Legal Grounds for Jurisdiction of the Court" it referred to Article 36, paragraph 2, of the Statute and to Article IX of the Genocide Convention. The Written Observations of Serbia and Montenegro now tell us forcefully that neither one of these applies. This contradicts and effectively overrides a *mandatory* element of the original Application, and transforms the case into one in which the Applicant makes no claim to jurisdiction at all. As we put it in a letter to the Registrar on 14 January of last year, whatever the reasons for the Applicant's repudiation of Article IX, "it is sufficient that the Applicant no longer relies on Article IX of the Genocide Convention. Jurisdiction cannot therefore be founded upon that Convention in this case."

13. Everything in the Written Observations points inexorably toward an absence of jurisdiction. But there has been no discontinuance. One may well ask why. This refusal to take the step that is logically implied by everything Serbia and Montenegro now says is, we suggest, inexplicable. It demands answers to some basic questions: why are we here now that all the grounds of jurisdiction originally invoked have been abandoned? And upon what ground of jurisdiction does the Applicant now rely to justify the continuation of this case and the hearings taking place this week? The difficulty this causes us is evident.

14. The abandonment of the original claims to jurisdiction is plain from the content of the Written Observations. But it is the silence of the Written Observations on most of the key issues that speaks most eloquently. The significance of the document lies not only in what it says, but in what it *fails* to say. It counters none of the substantive arguments set out in the Preliminary Objections we filed: not one. Nothing we said is opposed or contested. Above all, there is no

opposition to the concluding submissions of our Preliminary Objections at page 61, where we requested the Court to adjudge that it lacks jurisdiction in the case and that the claims are inadmissible. This is crucial, because the submissions are the legally operative part of the pleading.

15. This in short is a completely unanswered case, except of course on the key points where the Applicant has expressly adopted our position. The silence is eloquent. It amounts to acquiescence in the substance of the arguments we made, and in the action we requested the Court to take through our concluding submissions. There is no reason, Mr. President, why it should not be decisive in the face of a clearly stated case.

16. Mr. President, the clear implication of Article 60, paragraph 1, of the Rules of Court is that a failure to answer a case is significant. The rule stipulates that oral argument "shall be directed to the issues that still divide the parties". But the situation here is unique. Nothing has been contested. There is strictly speaking nothing to debate. To assist the Court to reach the decision, we will necessarily have to restate the gist of our case. Let that not, however, distract attention from the clear implication of the Rules that what is not contested can be taken as agreed, and that a failure to answer the arguments and submissions of a party should be conclusive. The efficient administration of justice requires no less.

17. I would now ask the Court to call upon Ms Ruth Barr to address the first of our preliminary objections.

The PRESIDENT: Thank you, Ms Swords. I now give the floor to Ms Ruth Barr.

Ms BARR:

The claim to jurisdiction under the optional clause

18. Mr. President and Members of the Court. It is a privilege to appear before you today. I will address the purported optional clause declaration of 25 April 1999.

19. There are two separate and independent reasons why jurisdiction in this case cannot be founded upon the declaration. The declaration is null and void because only a party to the Statute of the Court can avail itself of the optional clause. It would also be inapplicable even if it were valid: the temporal reservation adopted by the Applicant excludes jurisdiction in the circumstances of this case.

United Nations membership

20. The nullity of the declaration was always clear, and it is no longer an issue that divides the Parties. In order to make an optional clause declaration, a State must be a party to the Statute. When the Applicant purported to make the declaration, it was not a party to the Statute either by virtue of United Nations membership or otherwise. It follows that the declaration cannot be valid. Nor in fact was the Court even open to the Applicant under Article 35, paragraph 2.

21. Although administrative and financial practices at the United Nations were ambiguous, the terms of the 1992 resolutions of the Security Council and the General Assembly are crystal clear. For the reasons set out in our written pleading, they rule out the proposition that the Applicant was already a Member of the United Nations when this case was filed in 1999. The responsible organs of the United Nations have spoken with clarity and authority, and we respectfully submit that these determinations are binding because of the authority conferred upon those bodies by Article 4 of the Charter.

22. The Security Council and the General Assembly spoke again in October and November 2000, when the Applicant formally applied for membership, and was duly granted such membership by General Assembly resolution 55/12. The application and the admission to membership were obviously inconsistent with the proposition that the Applicant was already a Member. The Parties are in agreement, and the United Nations is in agreement. The Applicant became a Member and a party to the Statute on 1 November 2000, and not before. Anything it attempted to do as a party before that date is devoid of legal effect.

23. The Court is of course familiar with all this. It reviewed the entire record in its Judgment of 3 February 2003 on the *Application for Revision* in the *Genocide* case. It referred to Yugoslavia's *sui generis* position within and vis-à-vis the United Nations from 1992 to 2000[1]. But the optional clause was not at issue in last year's decision, and I suggest, Mr. President, that for this purpose a *sui generis* position is simply not enough. It is membership — *de jure* membership — that is required. It is now common ground that the Federal Republic of Yugoslavia was not a party in 1999. And if a State is not a party to the Statute of the Court, it cannot make a valid declaration

[1] *Application for Revision of the Judgment of 11 July 1996 in the Case concerning* Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina *v.* Yugoslavia), Preliminary Objections *(Yugoslavia* v. *Bosnia and Herzegovina), Judgment* (3 February 2003), paras. 50 and 71.

under Article 36, paragraph 2. The declaration is a nullity — an empty piece of paper — because the Applicant was not entitled to make it.

The *ratione temporis* reservation in the declaration

24. Mr. President, Members of the Court, when the Order on Provisional Measures was issued, on 2 June 1999, the Court did not find it necessary to consider the validity of the declaration. According to the Court, there was no prima facie jurisdiction because the declaration limited jurisdiction to disputes arising *after* the declaration, and in this case the dispute arose *before* that date.

25. This limitation was set out in a temporal reservation, or a time condition, which the Applicant put in the declaration of its own free will. The purpose of a reservation of this kind has been explained by Rosenne: it is "to exclude known disputes with which the State making the declaration or the parties to the treaty were concerned when they made the declaration or the treaty"[2]. When the declaration was made, almost halfway through the NATO campaign, this was a pre-existing dispute. It was a known dispute. That alone is sufficient to show that the reservation applies in the present case.

26. The reservation takes a familiar form, the so-called double exclusion or "Belgian formula" — "all disputes arising or which may arise after the signature of the present Declaration, with regard to situations or facts subsequent to this signature". There is one crucial point to be noted here. The two parts of the reservation each represents an essential condition. As a consequence, jurisdiction is excluded *either* if the dispute arose before the declaration *or* if it pertains to situations or facts prior to that date. If, therefore, a dispute arose at some point in time prior to the declaration, the enquiry can stop there. There is no need to consider whether it pertains to situations or facts subsequent to the declaration.

27. This helps simplify things in the case of continuing or ongoing disputes that relate to situations or facts both prior to and subsequent to the critical date. This was what happened in the present case — the use of force by NATO began about a month before the declaration and continued until early June. In fact, it was still under way when the Court issued its Order on

[2]Rosenne, *The Law and Practice of the International Court, 1920-1996*, The Hague, Martinus Nijhoff, 3rd ed., 1997, Vol. II, p. 785.

2 June 1999. But it made no difference. It was sufficient to ascertain the date of origin of the dispute. If it had crystallized before the declaration, that was the end of the matter.

28. Nothing could illustrate the point more clearly than the Court's Order on Provisional Measures of 2 June 1999. The Order referred to the two parts of the formula, and stated in paragraph 25: "it is sufficient to decide whether in terms of the text of the declaration, the dispute brought before the Court 'arose' before or after 25 April 1999, the date on which the declaration was signed". In other words, the enquiry could be and was limited to the first part of the double exclusion, which refers to the origin of the dispute.

29. On the facts of this case, there has never been any difficulty pinpointing the origin of the dispute. In the Provisional Measures Order, the Court noted at paragraph 26 that "the Application is directed, in essence, against the 'bombing of the territory of the Federal Republic of Yugoslavia', to which the Court is asked to put an end". The NATO campaign began on 24 March 1999, a month prior to the declaration. According to *Mavrommatis Palestine Concessions*, a dispute is born as soon as there is "a disagreement on a point of law or fact, a conflict of legal views or interests"[3]. That minimal condition was fulfilled as soon as the air strikes began, and is evidenced *inter alia* by the communications to the Security Council on 24 March and by the meetings of the Council on that date and on 26 March.

30. Initially at least, the Applicant took the view that the dispute could be subdivided into a multiplicity of "instantaneous wrongful acts"[4]. The Court did not agree. Its decision concluded at paragraph 28 that "it has not established that new disputes, distinct from the initial one, have arisen between the Parties since 25 April 1999".

31. It takes only a glance at the Application to see that any splitting of the case would have been totally artificial. The Application refers to the use of force and the NATO air campaign in its totality — a continuous campaign that began on 24 March and continued until 9 June. There is no hint that a multiplicity of separate disputes was involved. The unity and continuity of the dispute is also evident from the Memorial, and from the documentary volumes filed with the Memorial.

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[3] *Mavrommatis Palestine Concessions, Judgment No. 2, 1924, P.C.I.J., Series A, No. 2*, p. 11.

[4] *Legality of the Use of Force (Serbia and Montenegro* v. *Canada), Provisional Measures, Order of 2 June 1999, I.C.J. Reports 1999*, para. 24.

They describe an uninterrupted sequence of events covering the entire period from March to June with no distinction and with no suggestion that anything changed on 25 April. It was a single dispute — global and indivisible — and the Applicant described it as such.

32. The theory of multiple disputes faded from view at the Memorial stage, and gave way to a new approach. The dispute, we were told, only arose "in full" after 10 June 1999, when it acquired "new elements" in the context of the United Nations peacekeeping operations under Security Council resolution 1244[5]. Mr. President, even if they were admissible, the so-called new elements would do absolutely nothing to get around the temporal limitation on the jurisdiction of the Court.

33. The Memorial of the Applicant cites a passage of the Court's Judgment in *Right of Passage (Merits)*, to the effect that a dispute arises when all its constituent elements are in existence[6]. It is obvious that all the constituent elements relating to a dispute concerning the use of force are in place when force is used by one party and is protested by the other party. And it is nonsensical to say that a dispute relating to the use of force should be incomplete until the use of force has come to an end.

34. The new elements argument puts the Applicant on the horns of a dilemma. If the new elements related to the United Nations peacekeeping operation are "part and parcel" of the original dispute, as the Applicant states in the Memorial, then it must have the same date of origin as the original dispute[7]. The new elements would be as clearly excluded from jurisdiction as the original claim on the basis of the temporal reservation in the declaration. If, on the other hand, the new elements are *not* part and parcel of the original dispute, as we contend, they are plainly inadmissible.

35. And not only inadmissible, Mr. President: the new elements argument leads to a tangle of contradictions that undercut the claim to jurisdiction as fatally as the temporal reservation itself: specifically, it implies there was no legal dispute until after the cessation of hostilities — contrary to worldwide public knowledge — and that as a consequence the case was premature when filed.

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[5]Memorial, p. 340, para. 3.2.14, and p. 339, para. 3.2.11.

[6]Memorial, pp. 339-340, para. 3.2.13.

[7]Memorial, p. 339, para. 3.2.12.

36. In any event, the argument loses sight of a well-established principle. Jurisdiction must be established as of the time of the application. Nothing added after the application can change the point in time at which the dispute arose. The exception referred to in the Bosnia *Genocide* case, Preliminary Objections, has no relevance whatever. It refers to a procedural act that could easily be remedied later on. But the defect here is substantive, not procedural. It flows from a substantive reservation in which the Applicant voluntarily limited the jurisdiction of the Court in order to protect itself from unwanted litigation.

37. In the end, the issue here is simple. Unless the Applicant takes the position that the case deals with two separate and distinct disputes — contradicting the position in its Memorial — it would still end up with a dispute that arose before the declaration was signed. It would still, after all these convolutions, end up with a dispute that is beyond the jurisdiction of the Court by reason of the language of the Applicant's own declaration.

38. I have said nothing about the second part of the Belgian formula, the part that refers to "situations or facts subsequent to [the] signature" of the declaration. It is unnecessary to consider it, as the Court found in 1999. But I do suggest that even if it stood alone, this second part of the phrase would bar jurisdiction as much as the first. The reasoning has been set out at length in our written pleadings at paragraphs 86 to 90 inclusive.

39. Thank you, Mr. President. I would now ask the Court to call upon Mr. Alan Willis.

The PRESIDENT: Thank you, Ms Ruth Barr. I now give the floor to Mr. Alan Willis.

Mr. WILLIS:

The claim to jurisdiction under Article IX of the Genocide Convention

40. Mr. President and Members of the Court: it is an honour to appear once again before this Court. I will deal this afternoon with the claim to jurisdiction under Article IX of the Genocide Convention — I should say the former claim to jurisdiction, since it has now been implicitly abandoned. I will deal first with the genocide claims relating to the use of force and subsequently with the new, and fundamentally different, claims related to the peacekeeping operations under Security Council resolution 1244.

The Genocide Convention as related to the use of force

41. Obviously we react with indignation to the charge of genocide, the gravest of all international crimes. The charges are baseless. We reject them categorically. But these are Preliminary Objections, limited to questions of jurisdiction and admissibility, and we cannot answer the charges here.

42. Mr. President, the reliance on the Genocide Convention is based on a misinterpretation of the Convention. It follows that Article IX cannot provide a basis for jurisdiction. The allegations — true or false — do not fall within the scope of the Convention.

43. The expression I just used will be easily recognized. It refers to the test of *ratione materiae* jurisdiction under a treaty, which was adopted in the 1996 Judgment in *Oil Platforms (Preliminary Objections)*. The Court — in its own words — "must ascertain whether the violations . . . pleaded . . . *do or do not fall* within the provisions of the Treaty"[8] — in other words, whether their "lawfulness can be evaluated" under the treaty. It follows that jurisdiction cannot be established on the basis of a legally incorrect interpretation of the scope or coverage of a treaty.

44. The test is a simple one, but it has important implications. It is not enough merely to allege the breach of a treaty with a compromissory clause. The test sets a relatively high standard at the jurisdictional phase. This high standard is a logical consequence of the principle of consent as the basis of the jurisdiction of the Court. Through the years the Court has held that there must be an "unequivocal indication" of a "voluntary and indisputable" acceptance of jurisdiction[9]. In the case of a compromissory clause, that requirement cannot be met unless it is clear that the treaty genuinely applies to the subject-matter of the claim.

45. Mr. President and Members of the Court, there is no evidence that would link Canada to breaches of the Convention. There are in fact *no allegations or claims* that would bring the case within the subject-matter scope of the Convention even if they were supported by evidence. The reliance on the Convention is based on a misconception.

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[8] *Oil Platforms (Islamic Republic of Iran* v. *United States of America), Preliminary Objections, Judgment, I.C.J. Reports 1996*, p. 803; emphasis added.

[9] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia)*, *Provisional Measures*, *Order of 13 September 1993*, *I.C.J. Reports 1993*, para. 34.

46. Above all, it overlooks the fact that the essence of genocide is *intention* and *destruction* — the destruction of human collectivities. The ultimate objective of the crime of genocide is the destruction of a national, ethnical, racial or religious group as such. This ultimate objective is referred to in the law of genocide as a "specific intent" or *dolus specialis*. It is the hallmark of the crime. Article II of the Convention enumerates a series of prohibited acts, but an intention to commit one of these acts is not sufficient by itself. According to the introductory words of Article II, a prohibited act constitutes genocide only if it is committed "with intent to destroy, in whole or in part, a national, ethnical, racial or religious group as such".

47. The meaning of this phrase was considered in a 1996 report of the International Law Commission on a *Draft Code of Crimes against the Peace and Security of Mankind.* The ILC noted that to amount to genocide a prohibited act must be a step in a larger plan — in its words, it must be "an incremental step in the overall objective of destroying the group"[10]. And it also pointed out that the intention must be to destroy the group in its collective capacity — "as a separate and distinct entity"[11]. Professor Schabas in his recent treatise on *Genocide in International Law* puts it more plainly: the crime must, he writes, "be motivated by hatred of the group"[12].

48. This establishes a sharp distinction between genocide and acts — even criminal acts — that are committed in the pursuit of aims that do not include the destruction of a group as such. And that, of course, is why this Court noted in paragraph 39 of the Provisional Measures Order in the present case that the threat or use of force cannot in itself constitute an act of genocide. The objective must be the destruction of a population, not the destruction of a State or the acquisition of territory or the coercion of a government. The distinction was underlined in a Provisional Measures Order given in the *Genocide* case on 13 September 1993: the essential characteristic of genocide, the Court stated, is the "intended destruction of 'a national, ethnical, racial or religious group'"[13], and not the disappearance of a sovereign State, or a change in its constitution or its

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[10]*Report of the International Law Commission on the work of its forty-eighth session* (6 May–26 July 1996) (United Nations doc. A/51/10) in (United Nations doc. A/51/10) in *Yearbook of the International Law Commission 1996*, Vol. II, Part 2, p. 45.

[11]*Ibid.*

[12]Schabas, *Genocide in International Law*, Cambridge, Cambridge University Press, 2000, p. 255.

[13]*Supra*, No. 12, para. 42.

territory, or its annexation, partition or dismemberment. In other words, the ordinary aims of war are fundamentally distinct from the aims of genocide.

49. Mr. President, there is nothing in the material before you that takes account of the introductory phrase of Article II as a separate and independent requirement. No direct or circumstantial evidence of a genocidal intention is either provided or alleged to exist. A bare affirmation of genocidal intention is clearly not enough. The Memorial implies that a genocidal intention can automatically be assumed if civilians are exposed to destruction. That is legally incorrect, because it gives no independent effect to the introductory phrase of Article II. And in so doing, it overlooks the defining trait of the crime of genocide. It treats genocide as if it were exactly the same thing as a crime under the law of armed conflict, otherwise known as international humanitarian law.

50. Mr. President, it is not the same thing. From the very outset, the distinct, and indeed the unique role of the Genocide Convention has been emphasized. When in 1947 the Secretary-General of the United Nations presented the initial draft, he noted that genocide should be defined so as not to encroach "on other notions which logically are, and should be distinct"[14]. And it was so defined, through the introductory words to Article II. Not long after that the Court had occasion to consider the Convention in the 1951 *Reservations* case, and it underscored the special nature of genocide in words that have become proverbial: a crime involving the denial of the right of existence of entire human groups, a denial which shocks the conscience of mankind.

51. The treatment of genocide in the Memorial is brief and superficial; but it shows plainly how the claim confuses genocide with the law of armed conflict, and treats the two as if they were the same. We are faced with allegations about the use of depleted uranium. That is an issue of humanitarian law, not a genocide issue. There is no recognition whatever of the recent statement in the *Nuclear Weapons* reference that was referred to in the Provisional Measures Order in the present case: that even the use of the most horrendous weapons of mass destruction would not *ipso facto* constitute genocide.

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[14]United Nations doc. E/447, p. 15, as quoted in Schabas, *supra*, No. 15, p. 52.

52. There is almost nothing else on the subject of genocidal intention, except for a claim related to air strikes against chemical plants[15]. Even at face value, this is an allegation of civilian targeting and of environmental destruction — familiar and indeed typical issues in the law of armed conflict. If it were true that attacks exposing civilians to destruction were *ipso facto* genocide, then — for example — crimes under Part IV of Protocol I would automatically constitute genocide. These two distinct bodies of law would cover exactly the same ground in exactly the same way.

53. This is untenable. It is legally wrong because it overlooks the fact that, from the early drafting stages to the recent jurisprudence, the distinct nature of genocide has been a central theme. The Applicant said in its Memorial that it had presented evidence of a genocidal intention. It has done no such thing. It has presented unsubstantiated allegations that could be evaluated under the law of armed conflict, but not under the law of genocide.

54. Mr. President, the attempt to equate the law of genocide and the law of armed conflict is not only wrong but also dangerous. The law of genocide is and must remain distinct, because it is the "crime of crimes". It must not be watered down, and it must not be trivialized by overuse.

55. There is a further point in connection with the attempt to use Article IX as a basis of jurisdiction. There is an extraordinary omission in the Memorial filed by the Applicant — the virtual absence of any allegations that relate specifically to Canada. The same Memorial is used for all the Respondents in eight separate cases. While this failure to link Canada to anything specific is significant on a range of issues, it becomes crucial when it comes to the charges of genocide. And this is because of the centrality of specific intent in the law of genocide. Intention is subjective. It is a property of human minds. Mr. President, a genocidal intention is not something that can exist in the abstract, unattached to any human subject. It is impossible to speak coherently of a genocidal intention without identifying the actual persons who are said to possess this intention, and providing some factual allegations that would substantiate it if proved.

56. This points toward some of the indispensable elements of a charge of genocide, all of them missing from the case at bar. It presupposes the attribution of a state of mind to identifiable

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[15]Memorial, p. 282, para. 1.6.1 ff.

persons. And where State responsibility for genocide is in question, it would be indispensable to link these identifiable persons to the institutions and organs for which that State is responsible under international law. On this ground alone, the failure to link the charges to organs or officials of the Canadian State, including its armed forces, is fatal to the charge of genocide against us. And it is unnecessary to go further into the debates surrounding the nature and extent of State responsibility for genocide.

The Genocide Convention in the "new elements" argument

57. I turn next to the new claims related to the United Nations Peacekeeping Force in Kosovo, or "KFOR". The new claims are not only inadmissible; they are also unrelated to the subject matter of the Genocide Convention.

58. The Memorial sets out a litany of tragic events related to the "killing, wounding and ethnic cleansing of Serbs and other non-Albanian groups in Kosovo and Metohija"[16]. But there is nothing — not a word — linking the misdeeds of the so-called Albanian terrorists to acts or omissions of Canada or of its armed forces. There is no allegation of negligence, malfeasance or complicity or of a lack of due diligence on the part of Canada, or of its forces. No causal link is alleged or even hinted at. We said it in our written objections and we say it again: Canada stands accused of nothing, so far as the peacekeeping operation is concerned. It has no charges to answer; it has nothing to refute.

59. The Applicant attempts to get around the lack of any Canadian involvement by affirming, first, that the acts of each NATO Member are imputable to all the other NATO Members, and second, that KFOR is an instrumentality of NATO. Both propositions are legally unsound. When it comes to genocide there is nothing in the established rules of State responsibility or in the relevant treaties that makes the acts of all NATO Members *ipso facto* imputable to all the others, regardless of their participation or knowledge or consent. And the second point, that KFOR is merely an instrumentality of NATO, is also legally wrong. According to Security Council resolution 1244, the United Nations Peacekeeping Force in Kosovo, or KFOR, operates "under United Nations auspices" with a substantial NATO participation. It includes more than 30 States,

[16]Memorial, p. 352.

the majority of which are not NATO Members, and it maintains a reporting relationship to the Security Council. It is far more than a NATO instrumentality. In any event, the argument goes nowhere on its facts: nothing that amounts to a breach of the Genocide Convention is attributed to any of our KFOR partners.

60. The Memorial sets out an alternative argument that if KFOR is not under the command and control of NATO, then each Respondent is responsible for the acts committed in the area under its control. If this means that each KFOR participant is automatically responsible for everything that might go wrong in its own area, regardless of any intent or negligence or complicity, then the argument has no basis in international law, or in the Convention. In any event, all this is academic, because there is no allegation that any of the incidents referred to took place in an area under Canadian responsibility.

61. What the argument on this point must come down to, then, is that the Genocide Convention makes Canada *automatically* responsible for ethnic incidents in Kosovo, solely by reason of its participation in the United Nations Peacekeeping Force. This could not reflect a legally sound interpretation of the Convention. There is indeed a general obligation under Article I to prevent and punish genocide; but a contribution to peacekeeping in a region torn by ethnic strife is in itself an effort to prevent genocide, and not a dereliction of duty under Article I. The attempt to bring Canada to the bar under the Genocide Convention for its participation in KFOR is therefore based on an implicit interpretation that is manifestly unreasonable or absurd within the meaning of Article 31 of the Vienna Convention on the Law of Treaties.

The disappearance of the treaty dispute

62. There is one additional and equally fundamental reason why Article IX cannot provide a source of jurisdiction. The Applicant, as we know, now takes the position that it was not bound by the Genocide Convention until it acceded in March 2001. Mr. President, that may be right or it may be wrong. I will not pursue that question here. But one way or the other, the new position that Serbia and Montenegro was not a party to the Convention in 1999 has decisive implications with respect to the relevance of Article IX to this proceeding. The Agent of Canada has already referred to one of these implications: that the Applicant no longer relies upon or invokes Article IX as a

ground of jurisdiction. But the other goes even deeper. It means that, for the purposes of Article IX, there can no longer be a legal dispute between the Parties with respect to breaches of the Genocide Convention by Canada in 1999.

63. A treaty dispute assumes that one party is asserting a treaty claim against the other — that one party asserts treaty rights against the other, or claims treaty obligations from the other. That is what the Federal Republic of Yugoslavia did in 1999, and what Serbia and Montenegro no longer does in 2004. It can no longer claim that Canada breached its treaty obligations to the Federal Republic of Yugoslavia in 1999, because its new position denies the very existence of any such treaty obligations. A party cannot simultaneously claim that it was not a party to a convention and that there is a dispute with respect to the treaty obligations owed to it under that convention. The two propositions are mutually contradictory, and it follows that any "dispute" within the meaning of Article IX has simply disappeared.

64. Mr. President, let me conclude. This is not — and it never has been — a dispute about genocide. It is a dispute about the use of force and the law of armed conflict. There are allegations that the NATO air strikes intentionally exposed civilians to destruction and used prohibited weapons. If that were true — which it is not — it would amount to a war crime. But it would not amount to genocide. It lacks the essential characteristics of the crime of genocide: that the ultimate objective must be the destruction of a national, ethnical, racial or religious group as such.

65. Thank you, Mr. President and Members of the Court. I would now ask you to call on the Agent of Canada to conclude our argument today.

The PRESIDENT: Thank you, Mr. Willis. I now give the floor to Ms Swords, Agent of Canada.

Ms SWORDS:

Admissibility

66. Mr. President and Members of the Court. Jurisdiction comes first. If there is no jurisdiction, there is no need to consider questions of admissibility. We have therefore left our preliminary objections on admissibility to the end of our presentation this afternoon.

67. Our preliminary objections do, however, include two objections to the admissibility of the claim. The first is that the new elements added to the case by the Memorial of the Applicant are inadmissible. They concern the period after the use of force was brought to an end in June 1999, the ethnic disorders in Kosovo after that time, and the peacekeeping efforts of KFOR.

68. Mr. President, the original claim and the new elements are as different as night and day. They would transform the subject-matter of the case. The original claim relates, by the terms of the title chosen by the Applicant himself, to the obligation not to use force as it relates to the NATO air strikes of 1999. That characterization is confirmed by the description of the "Subject of the Dispute" in the body of the Application. None of this escaped the attention of the Court at the provisional measures stage, when it stated that the Application is directed, in essence, against the "bombing of the territory of the Federal Republic of Yugoslavia"[17].

69. That is the picture in general terms. When the details are brought into sharper focus, the distinctions multiply, and none of them are trivial:

— the time frame is different;

— the parties are different: over 30 States in KFOR, many with no connection to NATO, all in an operation under the ultimate authority of the Security Council;

— the territory is different: the whole territory of the Federal Republic of Yugoslavia in the case of the original claim, and Kosovo alone in the case of the new elements;

— and, above all, the significance of the shift from the use of force to peacekeeping and policing is self-evident: in ordinary language, war and peace are opposites, and the legal considerations that govern them are fundamentally different.

70. Mr. President and Members of the Court. In the *Nauru* case the Court ruled that certain new elements were inadmissible because they represented a dispute that was necessarily distinct in terms of time, subject-matter and place. The analysis is paralleled, I suggest, by all the distinctions I have just enumerated. In fact, it is difficult to imagine a sharper contrast of subject-matter, made all the more striking by the changes of time, place and relevant actors.

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[17] *Legality of the Use of Force (Serbia and Montenegro* v. *Canada), Provisional Measures, Order of 2 June 1999, supra*, para. 24.

71. The new elements would therefore transform the subject-matter of the case. And they are inadmissible according to the jurisprudence of this Court. In the 1998 *Fisheries Jurisdiction* case, the Court described this relevant principle as "essential from the point of view of legal security and the good administration of justice"[18].

72. Our second objection with respect to admissibility is that the very subject-matter of the case requires the presence of third parties who are not before the Court. The claim in its entirety is therefore inadmissible on the *Monetary Gold* principle. We would refer the Court to and reaffirm the arguments set out in our written submissions. In no other case have the main actors been left out of the proceedings. In this case, the missing parties are not only involved; they are at the centre of the dispute, and their presence would, in words of this Court, be indispensable.

73. To summarize our position today, Mr. President, the Applicant has abandoned all the grounds of jurisdiction it identified under Article 38 (2) of the Rules in its original Application. We invite the Court to give effect to this abandonment.

74. In any event, the Court lacks jurisdiction over the proceedings brought by the Applicant against Canada on 29 April 1999 — either on the basis of the purported declaration of 25 April 1999, or on the basis of Article IX of the Genocide Convention. Furthermore, the claims are inadmissible because the subject-matter of the case requires the presence of essential third parties, not before the Court, and because the new claims respecting the period subsequent to 10 June 1999 would transform the subject of the dispute originally brought before the Court. On all these points, we reaffirm our written objections of 5 July 2000.

75. This concludes Canada's arguments in the first round. I wish to thank the Court for its patience and attention.

The PRESIDENT: Thank you, Ms Swords. This concludes the first round of oral hearings of Canada.

The Court rose at 3.55 p.m.

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[18] *Fisheries Jurisdiction (Spain* v. *Canada), Jurisdiction, Judgment, I.C.J. Reports 1998*, para. 29.