Non-Corrigé
Uncorrected

Traduction
Translation

YUGO/YFR

CR 2004/12 (traduction)

CR 2004/12 (translation)

Mardi 20 avril 2004 à 11 heures

Tuesday 20 April 2004 at 11 a.m.

6 Le PRESIDENT : Je donne maintenant la parole à M. Ronny Abraham, agent de la France.

Mr. ABRAHAM:

Introduction

Mr. President, Members of the Court,

1. It is a great honour for me, once again representing France, to appear before you today, although this feeling is tempered somewhat by the sense of inconsistency aroused by these proceedings and caused by the Applicant's inconstant behaviour.

2. In all honesty, this sense is not a new one. It was clear as early as the filing of the Application on 29 April 1999 that the Federal Republic of Yugoslavia was incapable of establishing a substantial legal basis on which the Court could exercise jurisdiction over the claims made against the States having participated in NATO's military operations during what is commonly called the "Kosovo crisis". You yourselves noted this obvious deficiency, having rejected the request for the indication of provisional measures presented by the Federal Republic of Yugoslavia on the ground that the Court "lack[ed] prima facie jurisdiction to entertain Yugoslavia's Application"[1].

3. In eight of the ten cases initially placed on the List you however chose to give the Applicant a "second chance", as it were, by affording it the opportunity to remedy the lack of jurisdiction found prima facie. However, the conclusion cannot be escaped that, far from manifesting any effort to offer a better supported legal argument, the Memorial filed by the Federal Republic of Yugoslavia on 5 January 2000 is characterized through and through by the same cavalier approach. No doubt, this must be seen as the token of the judicial dead end into which the Applicant has ventured. But, rather than continuing down this path inevitably leading to failure, the Federal Government of Yugoslavia could then have made the choice — the simple, reasonable choice — to discontinue the proceedings.

4. That was not the case, at least not explicitly. And yet, regardless of what one might think of the merit of the arguments submitted by the Applicant on 18 December 2002, the conclusion

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[1]Order of 2 June 1999, *I.C.J. Reports 1999*, p. 373, para. 32.

7 called for by those arguments is unequivocal: as Professor Alain Pellet will demonstrate in a moment, Serbia and Montenegro itself now recognizes that the Court cannot exercise its jurisdiction in the present proceedings and this alone justifies the termination of the proceedings, because the Applicant itself is no longer asking the Court to adjudicate on the merits of its claims.

5. In France's view, this straightforward observation suffices as a matter of law. Thus it is only in the alternative that I shall point out a bit later that none of the acts of which Serbia and Montenegro have accused France or the other Respondents can fall within the provisions of the Genocide Convention. I shall also explain, but this in the further alternative, the reasons why those acts are not attributable to France.

6. But before I do so, Professor Pellet will, with your permission, Mr. President, set out the reasons why the present proceedings are now devoid of object and why the Court should accordingly strike the case from its List.

I now kindly request, Mr. President, that you give the floor to Professor Pellet.

Le PRESIDENT : Merci, Monsieur Abraham. Je donne maintenant la parole à M. le professeur Alain Pellet.

Mr. PELLET : Merci beaucoup, Monsieur le président.

7. Mr. President, Members of the Court, as Mr. Abraham has just said, it is my task to analyse the consequences of the odd position adopted by the Republic of Serbia and Montenegro in response to the preliminary objections raised by France.

8. Mr. President, as a result we find ourselves in a situation which is unusual, to say the least. Here is a State which brings proceedings before the Court in reliance on shaky bases of jurisdiction — so shaky that, in its Order of 2 June 1999, after finding that it "lack[ed] prima facie jurisdiction to entertain [the] Application"[2], the Court denied the provisional measures sought by Yugoslavia; to my knowledge, this has never before occurred in the history of the Court except,

8 perhaps, and then also in very singular circumstances, further to New Zealand's 1995 request in the

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[2] *I.C.J. Reports 1999*, p. 373, para. 32.

case concerning *Nuclear Tests*[3]. Evidently convinced of having slipped up, that same State offers no argument to counter the preliminary objections raised by France and the other Respondents.

9. Quite to the contrary: in its Written Observations of 18 December 2002, the Federal Republic of Yugoslavia acknowledges that there is no basis for the Court's jurisdiction. Accordingly, "[t]he Federal Republic of Yugoslavia requests the Court to decide on its jurisdiction considering the pleadings formulated in these Written Observations". This looks very much like a discontinuance that will not speak its name. However, in a letter from its Agent dated 28 February 2003, Serbia and Montenegro, reiterating its position, stated that, notwithstanding its change in stance, it did not intend formally to discontinue the proceedings. The Court therefore finds itself in the strange — to say the least — position of having to determine the consequences of the Applicant's express recognition that there is no foundation for the Court's jurisdiction, without however a formal discontinuance resulting from this.

10. The short answer, the *"plus simple"* as would be said in the other language, would assuredly be to find that, despite its denials, the Applicant has indeed abandoned its Application. And that, Mr. President, is indeed the course of action which seems to me the most logical, and the one most closely according with the exclusively judicial function of the Court.

11. It is for the Court to determine the legal significance of the situations described by parties or of the procedural steps they have taken. It has made such determinations in respect, for example, of the existence (or non-existence) of a dispute[4] or the meaning to be ascribed to the parties' submissions[5] or to a State's acceptance of the Court's jurisdiction[6]. This must also be the case when it comes to determining whether or not there has been a discontinuance, without it being

9 appropriate to stop at the formal characterization chosen by the Applicant. In this respect, the

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[3]Order of 22 September 1995, *Request for an Examination of the Situation in Accordance with Paragraph 63 of the Court's Judgment of 20 December 1974 in the* Nuclear Tests (New Zealand v. France) *Case, I.C.J. Reports 1995*, pp. 306-307, para. 67.

[4]See Advisory Opinion of 30 March 1950, *Interpretation of Peace Treaties, I.C.J. Reports 1950*, p. 74; Judgments of 20 December 1974, *Nuclear Tests, I.C.J. Reports 1974*, p. 271, para. 55, and p. 479, para. 59, or Advisory Opinion of 26 April 1988, *Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement of 26 June 1947, I.C.J. Reports 1988*, p. 27, para. 35.

[5]See for example the Judgments of 20 December 1974, *Nuclear Tests, I.C.J. Reports 1974*, p. 263, para. 30, and p. 467, para. 31, or Judgment of 4 December 1998, *Fisheries Jurisdiction, I.C.J. Reports 1998*, pp. 448-449, paras. 30 and 31.

[6]See, for example, the Judgment of 25 March 1948, *Corfu Channel, Preliminary Objections, I.C.J. Reports 1947-1948*, p. 28.

Court's observations in the *Nuclear Tests* cases are fully transposable to the present proceedings: "It would of course have been open to Australia, if it had considered that the case had in effect been concluded, to discontinue the proceedings in accordance with the Rules of Court. If it has not done so, this does not prevent the Court from making its own independent finding on the subject."[7] Similarly, in the present case, the fact that Serbia and Montenegro says that it has not discontinued the proceedings in no way prevents the Court from arriving at the opposite conclusion.

12. Moreover, the Court pointed out in the *Monetary Gold* case that it was for the Court to "adjudicate upon the validity, withdrawal or cancellation of an application which has been submitted to it"[8]. In that case the Court considered the question whether "[t]he raising of [a] Preliminary Question by Italy cannot be regarded as equivalent to a discontinuance"[9] and it seems to me that the Court must ask itself the same question in the present proceedings — and arrive at a different answer.

13. In its 1954 Judgment, the Court answered this question in the negative, expressly basing its decision on the "circumstances of the case", which explained Italy's "unusual" challenge of the jurisdiction of the Court. "Unusual" also most definitely describes the present situation — but the circumstances are very different.

14. In the *Monetary Gold* case, the Applicant (Italy) did not deny that it had validly accepted the jurisdiction of the Court; the Judgment reads: "[Italy] continues to hold herself out as being subject to the Court's jurisdiction in these proceedings after the raising of the Preliminary Objection as much as she did before taking that step"[10]. The "doubt" felt by Italy "as to whether the subject-matter of the dispute was such that the Court could deal with it"[11] did not concern the existence of a jurisdictional link between itself and the Respondents but rather an *extraneous* factor which prevented the Court from adjudicating upon its claims: the absence of an indispensable *third party*. That, by the way, is also the case in the present proceedings and Mr. Abraham will say a

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[7]Judgments of 20 December 1974, *I.C.J. Reports 1974*, p. 270, para. 54; see also pp. 475-476, para. 57.

[8]Judgment of 15 June 1954, *Monetary Gold Removed from Rome in 1943 (Preliminary Question), I.C.J. Reports 1954*, p. 28.

[9]*Ibid.*, p. 30.

[10]*Ibid.*, p. 29.

[11]*Ibid.*

10 few words about this a little later. But that is not the aspect of the 1954 Judgment which interests us at present. Rather, my standpoint lies at an earlier, "pre-preliminary" (in the words of Sir Gerald Fitzmaurice)[12] stage: the question which interests us is whether you, Members of the Court, are seised of a case on which you can adjudicate on a preliminary question. And the response must be in the negative for two reasons, each of which is sufficient to establish that you have not been validly seised by the Republic of Serbia and Montenegro and that you cannot but strike the case from your list:

— first, the Applicant acknowledges that, failing any basis for your jurisdiction, you cannot rule on the merits of the dispute, for lack of valid consent to your jurisdiction by all the parties; accordingly and

— secondly, there is no dispute between the parties on the preliminary question which the Court is considering at this stage in the proceedings; the preliminary question is thus devoid of any object.

With your permission, Mr. President, I shall now briefly return to these two points.

1. The Republic of Serbia and Montenegro has recognized that there is no basis for the jurisdiction of the Court in the present case

15. Unlike Italy in the 1954 case, Serbia and Montenegro does *not* continue "to hold herself out as being subject to the Court's jurisdiction in these proceedings". On the contrary, it asserts in no uncertain terms that on the date on which it referred the matter to the Court:

(1) "the Federal Republic of Yugoslavia was not and could not have been a party to the Statute of the Court by way of UN membership"; and

(2) "it was not bound by the Genocide convention"[13].

In other words, at that date, by the Applicant's own admission, it was a party neither to the Statute of the Court nor to the 1948 Genocide Convention and it had not and could not have expressed consent to the jurisdiction of the Court. Nor, Mr. President, does France consent thereto.

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[12]Separate opinion appended to the Judgment of 2 December 1963, *Northern Cameroons, Preliminary Objections, I.C.J. Reports 1963*, p. 103.

[13]Written Observations of 18 December 2002, p. 2.

11 16. No consent, no jurisdiction. This is the cardinal principle on which the entire jurisdictional machinery of the Court is based, as it has stated repeatedly, *inter alia* in its Order of 2 June 1999 concerning Yugoslavia's Request for the Indication of Provisional Measures. In that Order, citing its 1995 judgment in the *East Timor* case[14], the Court stated "that one of the fundamental principles of its Statute is that it cannot decide a dispute between States without the consent of those States to its jurisdiction"[15].

17. In its preliminary observations the Republic of Serbia and Montenegro "erases", as it were, the statement of "Legal grounds [which are in fact uncertain and questionable] for jurisdiction of the Court" which it had included in its Application, in accordance with the requirements of Article 38, paragraph 2, of the Rules. As regards the Application against France, these alleged grounds were two in number: Article IX of the 1948 Convention on Genocide and Article 38, paragraph 5, of the Rules of Court[16]. By expressly acknowledging that the first of these grounds does not exist, the Applicant State acknowledges by the same token that the Court has no jurisdiction in the present case because Article 38, paragraph 5, of the Rules is in fact an "anti-ground": citing it is equivalent to admitting that the State against which the Application is made has not given or shown its consent to the jurisdiction of the Court. If such consent is lacking, the case cannot be entered in the List[17], and if it is in the List it must be removed, as happened in respect of the "Request for an examination of the situation" by New Zealand in 1995[18], or longer ago in the *Aerial Incidents* or *Antarctica* cases[19]. Mr. President, the same must apply in the present case: France has never agreed to the jurisdiction of the Court in this case, and Serbia and Montenegro has found that it had been mistaken as to the existence of its own consent. Assuming

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[14]Judgment of 30 June 1995, *I.C.J. Reports 1995*, p. 101, para. 26.

[15]*I.C.J. Reports 1999*, p. 370, para. 19. See also *inter alia* the Judgment of 15 June 1954 cited above, *Monetary Gold, I.C.J. Reports 1954*, p. 32 and the many cases cited in the aforesaid Judgment of 30 June 1995, *ibid.*

[16]Application, p. 8.

[17]Cf. letter from the Registrar of 18 February 1994, cited by Shabtai Rosenne in *The Law and Practice of the International Court, 1920-1996*, Nijhoff; The Hague/Boston/London, 1997, p. 1223.

[18]*Request for an Examination of the Situation in Accordance with Paragraph 63 of the Court's Judgment of 20 December 1974 in the* Nuclear Tests (New Zealand v. France) *Case, Order of 22 September 1995, I.C.J. Reports 1995*, p. 302, para. 44 and p. 306, para. 66.

[19]See *I.C.J. Reports 1954*, p. 101; *I.C.J. Reports 1956*, p. 11 or 14; *I.C.J. Reports 1959*, p. 278.

12 it is considering doing so, it cannot retract this formal declaration today without flouting the principle of good faith.

18. This solution is all the more compelling because the two Parties are in agreement that the conditions essential for the exercise of your jurisdiction are not met. It is doubtless for the Court to decide on its jurisdiction under Article 36, paragraph 6, of the Statute — but only "[i]n the event of a dispute" on this point; but there is — or there is no longer — any dispute; quite simply there is no longer anything to decide . . . The preliminary objections of France combined with the written observations of Serbia and Montenegro form a kind of "compromise in reverse" demonstrating the Parties' agreement that there are no legal grounds on which the Court could have been seised of the case. Here we have a kind of *forum prorogatum* on the part of Serbia and Montenegro. Consequently, neither is there any dispute between the Parties on the preliminary question which the Court is supposed to examine at this stage of the proceedings, a question which is therefore completely devoid of purpose: this will be my second point.

2. There is no dispute between the Parties on the preliminary question, the only one raised at this stage of the proceedings

19. In the separate opinion which he appended to the Judgment concerning the 1963 *Northern Cameroons* case, Sir Gerald Fitzmaurice distinguished "(a) questions which, while remaining preliminary (in the sense of preliminary to the merits) are substantive in character, and (b) questions which are of a wholly antecedent or, as it were, 'pre-preliminary' character"[20]. I have already said in passing a few moments ago that the question raised by the present case undoubtedly falls within the second category. As the learned judge explained: "a plea that the Application did not disclose the existence, properly speaking, of any legal dispute between the parties, must precede competence, for if there is no dispute, there is nothing in relation to which the Court can consider whether it is competent or not"[21]. The existence of a dispute is the condition *sine qua non* for the exercise by the Court of its jurisdiction, and if there is no dispute it is pointless to speculate about jurisdiction or about the admissibility of the Application.

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[20] *I.C.J. Reports 1963*, p. 103.

[21] *Ibid.*, p. 105.

13 20. This analysis falls in with the jurisprudence of the Court in all respects, first of all the 1963 Judgment itself, in which the Court noted: "[W]hether or not at the moment the Application was filed there was jurisdiction in the Court to adjudicate upon the dispute submitted to it, circumstances that have since arisen render any adjudication devoid of purpose", in the absence of a dispute open to judicial settlement[22]. Similarly, in the *Nuclear Tests* cases the Court, after stressing that "the existence of a dispute is the primary condition for the Court to exercise its judicial function", hammered home the point that "the dispute brought before it must therefore continue to exist *at the time when the Court makes its decision*"[23]; otherwise, as it observed on another occasion, a "*fin de non-recevoir* must follow"[24].

21. Without doubt, as I said a few moments ago, "the existence [or non-existence] of a dispute has to be established objectively by the Court" [*Translation by the Registry*] itself[25]: "It is true" states the 1998 Judgment concerning *Fisheries Jurisdiction*, "that it is for the Court to satisfy itself, whether at the instance of a party or *proprio motu*, that a dispute has not become devoid of purpose since the filing of the Application and that there remains reason to adjudicate that dispute (see *Northern Cameroons, Preliminary Objections, Judgment, I.C.J. Reports 1963*, p. 38; *Nuclear Tests (Australia* v. *France), Judgment, I.C.J. Reports 1974*, p. 271, para. 58)"[26]. However, if it finds that objectively there is no dispute, it has no option but to decline to exercise its jurisdiction.

22. Doubtless there is no necessity to dwell on defining what amounts to a dispute in law. The famous definition by the PCIJ in the *Mavrommatis* case and recognised many times since is not really open to question, at least for the purposes of the present case: it reads "[a] dispute is a disagreement on a point of law or fact, a conflict of legal views or of interests between two

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[22] *Ibid.*, p. 38.

[23] *I.C.J. Reports 1974*, p. 270-271, para. 55., and p. 476, para 58; the italics are ours; on the date on which the dispute must exist, see also the Advisory Opinion of 26 April 1988, *Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement of 26 June 1947, I.C.J. Reports 1988*, p. 30, para. 44 and the Judgments of 20 December 1988, *Border and Transborder Armed Actions, I.C.J. Reports 1988*, p. 95, para. 66, of 27 February 1998, *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie , I.C.J. Reports 1988*, p. 26, para. 46, and p. 131, para. 45, of 11 June 1998, *Land and Maritime Boundary between Cameroon and Nigeria, Preliminary Objections, I.C.J. Reports 1988*, p. 318, para. 99, or of 14 February 2002, *Arrest Warrant of 11 April 2000*, para. 32.

[24] Judgment of 21 December 1962, *South West Africa, Preliminary Objections, I.C.J. Reports 1962*, p. 328.

[25] *Ibid.*; see note 3, *supra*.

[26] Judgment of 4 December 1998, *I.C.J. Reports 1998*, p. 468, para. 88.

14 persons"[27]. As the present Court has said: "It must be shown that the claim of one party is positively opposed by the other."[28]

23. Obviously there is nothing of the sort in the present case: France considers (and has always considered) that the Court is not competent to rule on the Application submitted to it by the Federal Republic of Yugoslavia in 1999; the Republic of Serbia and Montenegro has come to the same conclusion. There is no longer any disagreement between them on this point of law – the only point at issue at this stage of the proceedings – and the preliminary dispute of which the Court is seised no longer exists at the time when the Court is to make its decision[29], even though it is the sole dispute on which, in accordance with Article 60 of the Rules, we should have pleaded in less unusual circumstances. Since the dispute has disappeared, no issue "still divides the parties"; the preliminary objections raised by France "no longer ha[ve] any purpose"; and the finding of the Court must reflect this[30].

24. Mr. President, this submission might be met by three objections:

(1) although there is no disagreement between the Parties as to the absence of any basis for the jurisdiction of the Court, the reasons why the Parties agree on this point do not necessarily coincide;

(2) it is with regard to the merits of the case or cases that the Court has created the jurisprudence to which I have just referred; the hearings in which we are involved are concerned with preliminary objections;

and

(3) it might be claimed that there is a contradiction between my argument before you today and the position that the Court took in its Judgment of 11 July 1996 in the Genocide case and

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[27]Judgment of 30 August 1924, *P.C.I.J. Series A No. 2*, p. 11; see also, for example the Judgments of 12 April 1960, *Right of Passage over Indian Territory, I.C.J. Reports 1960*, p. 34; of 21 December 1962, *South West Africa, I.C.J. Reports 1962*, p. 328 or of 30 June 1995, *East Timor, I.C.J. Reports 1995*, pp. 99-100, para. 22; of 11 June 1998, *Land and Maritime Boundary between Cameroon and Nigeria, I.C.J. Reports 1998*, pp. 314-315, para. 87 or the Advisory Opinion of 26 April 1988, *Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement of 26 June 1947, I.C.J. Reports 1998*, p. 27, para. 35; see also the Advisory Opinion of 30 March 1974, *Interpretation of Peace Treaties, I.C.J. Reports 1950*, p. 74 or the Judgment of 11 July 1996, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Preliminary Objections, I.C.J. Reports 1996*, pp. 614-615, para. 29.

[28]Judgment of 21 December 1962 quoted above, *ibid.*

[29]See Judgments of 20 December 1974 quoted above, *supra*, note 22.

[30]Cf. *ibid.*, p. 271, paras. 56 and 57, and pp. 476-477, paras. 59 and 60.

15 which it confirmed by the Judgment of 3 February 2003 following the application for revision by Yugoslavia.

A brief examination is enough to show that none of these objections carries conviction.

25. As regards the first point, suffice it to recall that there is a distinction "between the dispute itself and arguments used by the parties to sustain their respective submissions on the dispute"[31]. The reasons advanced by the Parties in support of their arguments are "elements which might furnish reasons in support of the Judgment, but cannot constitute the decision"[32]. Whatever differences may exist between the Parties as to the reasons that justify a solution, these have no effect upon the outcome of the dispute if they have the same concrete result. This is true in the present case: even though they may differ on the true grounds that preclude the jurisdiction of the Court, France and Serbia and Montenegro are in agreement that there is no legal basis capable of founding that jurisdiction – the only issue pending in the present case, which confirms, if need be, that it is devoid of purpose.

26. Mr. President, we now come to the second possible objection: the jurisprudence of the Court on which I have relied to establish that the existence of a dispute is the condition *sine qua non* for the exercise of jurisdiction relates to the merits of the dispute and not to incidental proceedings initiated by a preliminary objection. This in no way alters the elements of the problem, because in accordance with Article 79 of the Rules, the filing of an objection suspends proceedings on the merits[33] and the dispute between the Parties is provisionally confined "to those matters that are relevant to the objection"[34], and this alone will be the subject of the Judgment of the Court[35]. In other words, as Ambassador Rosenne has noted, "[p]reliminary objections proceeding . . . take the form of self-contained proceeding . . ."[36], "self-contained proceedings", the essential purpose of which is different from that of the main case and must be assessed *per se*.

16 Besides, it is perfectly acceptable for a Party to relinquish one or more objections, in which case

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[31]Judgment of 4 December 1998, *Fisheries Jurisdiction, I.C.J. Reports 1996*, p. 449, para. 31.

[32]Judgment of 18 December 1951, *Fisheries, I.C.J. Reports 1951*, p. 126; see also the Judgment of 6 April 1955, *Nottebohm, Second Phase , I.C.J. Reports 1955*, p. 16.

[33]Art. 79, para. 3.

[34]Paras. 5 and 6.

[35]Para. 7.

[36]*The Law and Practice of the International Court, 1920-1996*, Nijhoff, The Hague/Boston/London, 1997, p. 922.

the Court confines itself to placing the fact on record[37]. It is difficult to see why, in parallel as it were, it could not find under the same conditions that the Applicant State, having become the respondent with respect to the objection (*in excipidiendo reus fit actor*), should relinquish challenging the objection. In so doing it renders the dispute devoid of purpose "with all the legal consequences that flow from it" [*Translation by the Registry*] and puts an end to the case.

27. The third potential objection to my argument is more specific. It concerns the Court's recent decisions in the cases relating to the *Application of the Convention on Genocide* and Yugoslavia's *Application for Revision* of the Judgment of 11 July 1996 on that Application, which resulted in the Judgment of 3 February 2003. Admittedly, these cases are different from the one which concerns us now and, in strict law, it would probably be enough to note that the Judgments to which they led, pursuant to Article 59 of the Statute, only have the authority of *res judicata*, as emphasized by my friend and colleague Professor Tomuschat a moment ago. But it would be curious and indeed unfortunate were the Court, even if it is not bound by the rule of precedent, to appear to reverse its Judgment and, in 2004, take up a position contrary to the one it adopted in 2003, which was excellent. So this, Members of the Court, is what the French Republic is asking of you.

28. By your Judgment of 11 July 1996, you found that the Court "on the basis of Article IX of the Convention on the Prevention and Punishment of the Crime of Genocide . . . [had] jurisdiction to adjudicate upon the dispute"[38] of which Bosnia and Herzegovina seised you in . . . — I scarcely dare remind you — 1993. You confirmed it last year by rejecting the Application for Revision filed by the Federal Republic of Yugoslavia on the basis of arguments very close to those put forward by Serbia and Montenegro in its Written Observations dated 18 December 2002 or in the letter from its Agent of 28 February 2003. But, in the former of these two cases, you based yourselves, Members of the Court, on the situation which existed *at the time when you delivered your Judgment on the Preliminary Objections*, the situation *in 1996*. In the

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[37]See for example the Order of 31 October 1951, *Rights of Nationals of the United States of America in Morocco, I.C.J. Reports 1951*, p. 111 or the Judgment of 11 July 1996, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide, I.C.J. Reports 1996*, p. 609, para. 16, and p. 623, para. 47.1; see also the Judgment of 6 July 1957, *Certain Norwegian Loans, I.C.J. Reports 1957*, p. 22.

[38]*I.C.J. Reports 1996*, p. 623, para. 47 (2).

17 latter, you found that the "fact" relied upon by Yugoslavia in support of its Application was not a "new fact" within the meaning of Article 61 of the Statute and that it was therefore not "capable of founding a request for revision of that Judgment"[39] — which, it should be emphasized, had the authority of *res judicata* with respect to the Parties. In so doing, you in no way precluded the possible relevance of this fact — in the event, Yugoslavia's admission to the United Nations — in cases ruled upon subsequently. You even expressly reserved this possibility by stressing that "[a] fact which occurs several years after a judgment has been given is not a 'new' fact within the meaning of Article 61; this remains the case" — and this is what interests us most — "*irrespective of the legal consequences that such a fact may have*"[40], when not dealing with an application for revision.

29. Also, Members of the Court, I have merely anticipated a possible objection by Serbia and Montenegro. But, in any event, you do not have to rule on whether the *grounds* set forth by Serbia and Montenegro to show the absence of any basis of the jurisdiction it originally asserted are well founded or otherwise — any more than France is adopting a position on them. You need only ascertain:

(1) that neither the respondent States, nor the applicant State consent to your jurisdiction, which under current law is based solely on the consent of the parties; and/or

(2) that, consequently, France's preliminary objections (and those of the other respondent States) have become without object, since there is no longer any dispute between the Parties in this respect.

The result, it seems to me, is that you cannot but remove the case from your List — by a judgment or an order (which would perhaps be more logical) — without there thus being any need for you to rule on the Preliminary Objections raised by France.

30. Further, the French Republic cautiously does not exclude this and Mr. Abraham will briefly set out the essential points if you would kindly give him the floor, Mr. President. However, you may think this an appropriate point for the traditional break. For my part, Members of the Court, it only remains to thank you for your attention.

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[39] Judgment of 3 February 2003, para. 68.

[40] *Ibid.*, para. 67 (emphasis added).

18 Le PRESIDENT : Merci, Monsieur Pellet. Le moment est venu de marquer une pause de dix minutes. Je donnerai ensuite la parole à M. Abraham, agent de la France.

L'audience est suspendue de 11 h 35 à 11 h 45.

Le PRESIDENT : Veuillez vous asseoir. Avant que je ne donne la parole à M. Abraham, je souhaite vous informer que le juge Al-Khasawneh est maintenant en mesure de prendre place sur le siège pour le reste de l'audience de la matinée. Monsieur Abraham, vous avez la parole.

Mr. ABRAHAM: Mr. President, Members of the Court,

31. Professor Pellet has just shown that Serbia and Montenegro no longer consents to the Court exercising its jurisdiction in this case, since it is actually no longer calling for this. This will probably provide an adequate basis for you to bring these proceedings to a close. However, the Applicant has not itself drawn all the logical conclusions necessarily flowing from the position it set out on 18 December 2002. Accordingly, it declined to expressly discontinue proceedings which, however, it patently does not wish to proceed with. And above all, it has not formally withdrawn the serious accusations it made against my country as against the other respondent States here present.

32. Indeed, in its efforts to bring France before the Court, the Federal Republic of Yugoslavia did not hesitate to rely on the Convention for the Prevention and Punishment of the Crime of Genocide and the compromissory clause in its Article IX. As I shall show, there can be no further doubt on this point: this basis of jurisdiction is completely artificial, self-evident as it is that the acts of which the Applicant accuses France and its NATO partners are not of a kind to fall within the provisions of the 1948 Convention. I shall also provide ample evidence that the alleged acts cannot be attributed to France and that there cannot therefore be any dispute between it and Serbia and Montenegro on the application of this Convention.

19 **1. Lack of jurisdiction *ratione materiae* on the basis of the Genocide Convention**

33. Mr. President, let me first set out the reasons why the Court patently does not have jurisdiction *ratione materiae* to entertain the Yugoslav Application on the basis of the Genocide Convention.

34. In its Memorial, the Federal Republic of Yugoslavia gave a long recital of alleged "facts", for which it does not provide the slightest proof And France does not wish to open a discussion — one clearly inappropriate in the context of preliminary objections — on the subject of these allegations, whose substance and spurious presentation it disputes. France nevertheless wishes to refute the serious and slanderous accusation made against it: manifestly, neither the military operations in which it took part together with its NATO partners until 10 June 1999, nor the events which unfolded in Kosovo from that date reveal any genocidal intent whatever on its part. The complaints made against the French Republic therefore clearly do not fall within the provisions of the Genocide Convention.

35. In fact, Serbia and Montenegro itself does not appear to lend great credence to the assertion — which I might describe as far-fetched were it not offensive — that France, in common with the other respondent States, had a hand in genocidal actions. Indeed, in both its Application and its Memorial, it devotes the bulk of its arguments to alleged violations of the United Nations Charter or of certain rules and principles of international humanitarian law. Patently — and the Court was not wrong when choosing an appropriate title for the case — the core of the dispute which the Applicant thus wishes to bring before it is related to the "legality of the use of force". There cannot seriously be any question here of violations of the Genocide Convention.

36. If Serbia and Montenegro has persisted in relying on the 1948 Convention, this is solely, as everyone has understood, because it had the vain desire to avail itself of the compromissory clause in Article IX. Indeed, as the Court noted in another case concerning Yugoslavia, neither the
20 United Nations Charter nor the principles of humanitarian law mentioned by the Applicant actually include "any provision . . . conferring upon the Court jurisdiction"[41].

37. This is a gross attempt to abuse the Genocide Convention and one that is in any event bound to fail. Indeed, for the Court to exercise its jurisdiction, it is not enough for a jurisdictional link between applicant and respondent to be invoked *in abstracto*; the arguments advanced by the former — the applicant — are "of a sufficiently plausible character to warrant a conclusion that the

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[41] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Yugoslavia)*, Order of 13 September 1993, *I.C.J. Reports 1993*, p. 341, para. 33.

claim is based on the Treaty", to borrow the terms used by the Court in the *Ambatielos* case[42]. Moreover, as you were careful to point out in the Judgment you have just delivered in the case concerning *Oil Platforms (Islamic Republic of Iran* v. *United States of America)*, establishing this plausible link does not imply that the Applicant has to enable the Court to determine, from the preliminary objection stage, whether the respondent's actions have actually prejudiced its rights, but nevertheless places the onus on it to show that "the legality of" these actions can "be assessed in the light" of the provisions of a nature to found jurisdiction[43].

38. Mr. President, Serbia and Montenegro has never managed to prove the existence of this plausible link in the present case. Its Application and its Memorial remain particularly deficient in this respect, and for good reason; they proceed, and I shall revert to this, on the basis of pure allegations paraphrasing the text of the Genocide Convention, without ever explaining in what respect that Convention is relevant to the purposes of settling the dispute. However, in its Order of 2 June 1999 relating to the provisional measures, your Court was careful to note, in the guise of an implicit caveat addressed to the Applicant, that:

> "in order to determine . . . whether a dispute within the meaning of Article IX of the Genocide Convention exists, the Court cannot limit itself to noting that one of the Parties maintains that the Convention applies, while the other denies it; and whereas in the present case the Court must ascertain whether the breaches of the Convention alleged by Yugoslavia are capable of falling within the provisions of that instrument and whether, as a consequence, the dispute is one which the Court has jurisdiction *ratione materiae* to entertain pursuant to Article IX"[44]

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39. Serbia and Montenegro, to succeed in convincing the Court that its allegations could fall within the provisions of the Genocide Convention, would need to establish, at least plausibly, that the acts of which it accuses France were committed "with intent to destroy, in whole or in part, a national, ethnical, racial or religious group as such", as provided in Article II of the 1948 Convention. As the Court has asserted on a number of occasions, that element of intent constitutes "the essential characteristic of genocide"[45].

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[42] *Ambatielos, Merits, Judgment, I.C.J. Reports 1953*, p. 18.

[43] Judgment of 6 November 2003, para. 81.

[44] *I.C.J. Reports 1999*, p. 372, para. 25; see also *Oil Platforms (Islamic Republic of Iran* v. *United States of America) Preliminary Objection, Judgment of 12 December 1996, I.C.J. Reports 1996 (II)*, p. 810, para. 16.

[45] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Yugoslavia), Order of 13 September* 1993, *I.C.J. Reports 1993*, p. 345, para. 42; see also *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996 (I)*, p. 240, para. 26.

40. The crime of genocide thus necessarily arises from a "frame of mind"[46] — in the words of the International Law Commission — and entails the "denial of the right of existence of entire human groups", solemnly denounced by this Court, "a denial which shocks the conscience of mankind and results in great losses to humanity, and which is contrary to moral law and to the spirit and aims of the United Nations"[47].

41. Since it instituted these proceedings, the Federal Republic of Yugoslavia has never succeeded, Mr. President, in producing prima facie evidence of any genocidal intent on the part of France when it participated in the NATO military operations. How could it have been otherwise? During those operations, everything was done to ensure that the air strikes were solely directed against military targets and every effort was made to spare the civilian population. How then can it be claimed that those who engaged their forces, in order — needless to say — to put an end to a human tragedy, were acting to assuage some genocidal intent?

42. In its written pleadings, the Applicant merely presents the alleged genocide as the inevitable consequence of the armed conflict which took place on its territory. However, as the
22 Court firmly indicated to the Applicant, "the threat or use of force against a State cannot in itself constitute an act of genocide within the meaning of Article II of the Genocide Convention"[48].

43. The Applicant's cavalier conduct in the present case, in various respects, is all the more shocking because it relates to one of the most serious charges that can be levelled against a State. The Applicant's only, and very feeble, attempt to provide any evidence of genocidal intent has been to accuse the Respondents of using depleted uranium weapons and of bombing the Pancevo chemical plants. Neither of those allegations stands up to scrutiny. The first is technically incorrect and, moreover, as the Court has already had occasion to indicate, the element of intent cannot be inferred from the use of a specific weapon[49]. As for the chemical plants, they could be seen as legitimate military targets under the rules and principles of international humanitarian law.

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[46]ILC, Commentary to Art. 17 of the draft Code of crimes against the Peace and Security of Mankind, Report of the ILC on the work of its 48th session, doc. A/51/10, p. 88.

[47]*Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, I.C.J. Reports 1951*, p. 23.

[48]Order of 2 June 1999, *I.C.J. Reports 1999*, p. 372, para. 27; see also *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996 (I)*, p. 240, para. 26.

[49]See *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996 (I)*, p. 240, para. 26.

Furthermore, in its Memorial, the Applicant never succeeds in demonstrating, notwithstanding the Court's implicit invitation to do so, "that the bombings which form the subject of the Yugoslav Application 'indeed entail the element of intent, towards a group as such'"[50].

44. The same conclusion follows concerning the "new elements" arising after 10 June 1999, referred to in various passages of the Yugoslav Memorial. The reference to those new elements, and the significance Serbia and Montenegro has apparently sought to give them, require comment. First, in the context of these preliminary objections, France does not intend to take a position on the veracity of those facts, which the Applicant has not seriously sought to establish in its Memorial. Secondly, those new elements, even if they really occurred, would radically transform the subject-matter of the initial dispute. As the Court stated in its Order of 2 June 1999, it is "the bombings which form the subject of the Yugoslav Application"[51]. But those bombings ended with
23 the adoption on 10 June 1999 of Security Council resolution 1244 (1999).

45. Lastly, and above all, the Applicant has once again utterly failed to show how those "new elements", even if proved, could establish any genocidal intent on the part of France.

46. Mr. President, the inevitable conclusion is: none of these allegations, whether relating to military operations prior to 10 June 1999 or to subsequent events, is capable of falling within the provisions of the Genocide Convention. Accordingly, there is no doubt that the Court lacks jurisdiction to entertain the Yugoslav Application on the basis of Article IX of that Convention.

2. The alleged acts cannot be attributed to France

47. The arguments I have just set out are more than sufficient to establish the Court's lack of jurisdiction. As a final totally alternative, I shall therefore briefly mention one other bar to the pursuance of these proceedings.

48. This is the impossibility of attributing the alleged acts to France. The Preliminary Objections filed by my Government on 5 July 2000 include a precise enumeration of the acts that the Applicant has sought to attribute to France in its Application and Memorial (pp. 34-36, paras. 17-21). I shall thus simply point out that these totally unsubstantiated allegations concern

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[50]Order of 2 June 1999, *I.C.J. Reports 1999*, p. 373, para. 27.

[51]*I.C.J. Reports 1999*, p. 373, para. 27.

actions in which France is said to have participated first in NATO-led operations and then in connection with the KFOR mission after 10 June 1999. Serbia and Montenegro never attempts to establish the precise part France is alleged to have played in the perpetration of the purportedly unlawful acts. It simply asserts, without further proof, that the NATO and KFOR acts are attributable to the "Respondents"[52]. But this is a travesty of the reality, for the sake of a very unconvincing legal argument.

49. Mr. President, France in no way wishes to play down, still less deny, its role in the collective action taken, to prevent a humanitarian catastrophe in Kosovo and put an end to the
24 atrocities taking place there. However, as the Federal Republic of Yugoslavia itself indicates in its Memorial, "The general rule on attribution of an act to a State is that a State is responsible for an act committed under guidance and control of its organ as well as for an act endorsed by its organ."[53]

50. In the present case, France did not act individually and autonomously. All the acts in which it took part for those purposes were carried out under the guidance and control of international organizations — and principally NATO. It was NATO which planned, decided upon and implemented the military operation on Yugoslav territory in the spring of 1999. It was also NATO which created KFOR and exercises unified command and control of it, pursuant to Security Council resolution 1244 (1999), which authorized the deployment of that force "under United Nations auspices".

51. Aware of this difficulty, the Federal Republic of Yugoslavia contends that in reality NATO acts under the political and military guidance and control of its member States[54]. This curious conception of the transparency of the Organization patently flies in the face of the international legal personality it must be granted under the criteria identified by this Court in its Advisory Opinion concerning *Reparation for Injuries Suffered in the Service of the United Nations*[55]. To convince oneself of the impossibility of attributing NATO's acts to France, one

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[52]Memorial, section 2.8, pp. 327-328.

[53]*Ibid.*, p. 328, para. 2.8.3.

[54]*Ibid.*, p. 327.

[55]*I.C.J. Reports 1949*, p. 179.

needs only to compare the legal nature of this Organization with that of the "Administering Authority" of Nauru, as considered by the Court in its 1992 Judgment[56]. However, KFOR is under both NATO operational command and United Nations supervision, which authorized its deployment and received periodic reports on its activities. It is in this context that French nationals participate in the courageous action led by KFOR.

25 52. It is therefore not to France, nor to the other NATO member States nor States participating in KFOR, that the alleged acts could be attributed, — which I certainly do not believe — they did constituteviolations of international obligations. Consequently, in the present proceedings, there is no dispute between Serbia and Montenegro and France which could be entertained by the Court.

53. Mr. President, Members of the Court, France considers, for all the reasons set out above, that the Court cannot uphold the Application of Serbia and Montenegro, and principally should remove the case from its List. In the alternative, France maintains its preliminary objections in their entirety. It only remains for me to thank you for your attention.

Le PRESIDENT : Merci, Monsieur Abraham. Votre intervention conclut le premier tour des plaidoiries de la France.

The Court rose at 12.05 p.m.

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[56] *Certain Phosphate Lands in Nauru (Nauru* v. *Australia), Judgment of 26 June 1992, I.C.J. Reports 1992,* p. 258.