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Jeudi 22 avril 2004 à 16 h 10

Thursday 22 April 2004 at 4.10 p.m.

6 Mr. PELLET: Merci, Monsieur le président.

1. Mr. President, Members of the Court, the French delegation considers it pointless to repeat *ad nauseam* what has been said by other Respondents and we endorse the arguments presented by our colleagues as and when appropriate. It is also self-evident that the French Republic upholds in their entirety the arguments it advanced in its preliminary objections and during the first round of oral argument — which arguments, however, the Republic of Serbia and Montenegro largely chose to ignore.

2. Having made this remark and before Mr. Abraham concludes France's observations, I should like just to make two brief points:

— first, I shall show that Serbia and Montenegro seeks unsuccessfully to circumvent the problem facing the Court at this *preliminary* stage, or rather, I shall say a few more "pre-preliminary" words about it;

— secondly, I shall try to show that, even from the eccentric standpoint which Serbia and Montenegro would have you adopt, you can but find, Members of the Court, that you do not have jurisdiction on the very basis of the Applicant's reasoning yesterday.

I shall start, with your permission, Mr. President, with the second point.

I. THE QUESTION PUT TO THE COURT BY THE REPUBLIC OF SERBIA AND MONTENEGRO

3. Ignoring the fundamental question facing this Court in the very strange conditions Serbia and Montenegro has created and to which I shall return shortly, that country is asking you through its Agent, Members of the Court, "whether [the FRY's] *sui generis* position vis-à-vis the United
7 Nations could have provided the link between the new State and international treaties — the Statute and the Genocide Convention in particular"[1]. Mr. Varady claims that his country is entitled to a reply to this, as he sees it, key question[2].

4. However, in asking it, the artful Agent of Serbia and Montenegro "whispers" — I almost said "dictates" — the reply to you. And that reply is, on his own admission, positive: "yes, the admission of the FRY to the United Nations has altered the situation". According to him, *on the*

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[1] CR 2004/14, pp. 26-27, para. 63.

[2] *Ibid.*, paras. 63-64.

date on which the Court is called upon to rule, today, the situation is no longer what it was before Serbia and Montenegro's admission to the United Nations. Yet it is on the basis of the present situation, not that in 1992, not that in 1996, not that in 1999, Members of the Court, that you must decide whether you have jurisdiction[3].

5. Yesterday, Mr. Varady sketched an interesting outline of the historical development. Even if one sometimes loses one's way a little in the former Yugoslavias and the Federal Socialist or non-Socialist Republics, at least this outline (provided, mark my words, by Serbia and Montenegro) shows that there is a very clear distinction between the two Yugoslavias, the one prior to 2000 and the one before you today:

(1) prior to November 2000 (in other words, before the letter from the United Nations Secretary-General of 27 December 2001, of which Serbia and Montenegro makes such an issue[4]), the situation was uncertain, obscure, marked by ambiguities and hesitations[5]; the question remained open[6] and the Court rightly based itself on this *sui generis* situation in finding that Yugoslavia was bound by the Genocide Convention and party to the Statute of the Court;

(2) since that date — November 2000 — things have been clarified: the ghost of the former Yugoslavia has ceased to haunt the corridors of the glass edifice in Manhattan; the new Yugoslavia, now Serbia and Montenegro, is not a continuation of it; it has only been a Member of the United Nations since November 2000 and did not accede to the Genocide Convention until March 2001.

8 Again, Mr. President, these are not my words but those of the Agent of Serbia and Montenegro himself.

6. I am not quite sure by which Yugoslavia the Application was made — but what I do know is that this analysis shows that, in any event the Court, according to the Applicant, lacks jurisdiction to entertain it:

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[3]See, for example, the Judgment of 3 February 2003, *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, para. 70. See also the jurisprudence quoted in CR 2004/12, p. 13, paras. 20 and 21.

[4]See CR 2004/14, p. 24, para. 52.

[5]*Ibid.*, p. 23, para. 48.

[6]*Ibid.*, p. 25, para. 57.

— if the Application was made by the new Yugoslavia, that State was no more party to the Statute than it was to the Genocide Convention, to which it acceded only with a reservation excluding your jurisdiction;

— if the Application was from the former Yugoslavia, that State no longer exists and, as Professor Varady said yesterday, "the present procedural setting is different from that in which earlier decisions were rendered»[7]. "It is *now* clear" [emphasis added] he also said

> "that the FRY did not *remain* bound by treaties, and did not *remain* a member of the UN . . . on ground of continuity. The FRY did not continue membership or treaty position of the former Yugoslavia. It has also become clear that the 'Yugoslavia' the membership of which was formally not terminated was the *former* Yugoslavia."[8]

7. But, Mr. President, it was on the basis of the former situation that the Court ruled in the case brought before it by Bosnia and Herzegovina; it is that *sui generis* situation which prompted it to recognize that it had jurisdiction in 1996 — and with all the less hesitation because the Respondent had refrained from contesting its jurisdiction in that respect[9]. As Mr. Varady also said, not without a certain understatement: "the treaty-status of the FRY was not contested"[10]. And this was also why the Court had no reason to revise its Judgment in 2003 — which Serbia and Montenegro now seems to accept[11]. As the Court said, in paragraph 71 of its decision on the Application for revision, also quoted yesterday by Mr. Varady:

> "General Assembly resolution 55/12 of 1 November 2000 cannot have changed *retroactively* the *sui generis* position which the FRY found itself in vis-à-vis the United Nations over the period 1992 to 2000, or its position in relation to the Statute of the Court and the Genocide Convention"[12].

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But, while the FRY's admission did not retroactively change that position, it did do so prospectively. I repeat: speaking through its Agent, Yugoslavia has itself so claimed.

8. Incidentally, Mr. President, I have addressed the new question raised by Serbia and Montenegro only because that question was the heart, to be honest the whole point, of Professor Varady's statement of yesterday morning. But, in truth, assuming that question to be

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[7]CR 2004/14, p. 21, para. 40.

[8]CR 2004/14, pp. 24-25, para. 54.

[9]Cf. the Judgments of 1996 (*I.C.J. Reports 1996 (II)*, p. 610, para. 17) and of 3 February 2003 (para. 62).

[10]CR 2004/14, p. 26, para. 59.

[11]Cf. CR 2004/14, pp. 25-26, paras. 56-60.

[12]Para. 71, quoted *in* CR 2004/14, p. 25, para. 58 (emphasis added).

relevant, you would be able to address it only if you responded in the negative to another question, one necessarily preliminary to all others: do the present proceedings still have any object, if ever they did? It is this "pre-preliminary" question, totally disregarded by our opponents, to which I would like briefly to return to conclude my remarks.

II. THE "PRE-PRELIMINARY" QUESTION POSED TO THE COURT AT THIS STAGE IN THE PROCEEDINGS

9. As I tried to explain on Tuesday[13], the only issue, the real "key question"[14], posed to the Court at this pre-preliminary stage is whether, given the position taken by the Applicant itself in its Written Observations dated 18 December 2002 and in its letter of 28 February 2003, there are any "issues that still divide the parties"[15].

10. Mr. Varady did not respond to this crucial question, other than to repeat that his country has not formally sought discontinuance and to stress the fact that the Applicant has not "inform[ed] the Court in writing that it [was] not going on with the proceedings"[16]. True enough! But that is not sufficient, Mr. President! Not only is "[t]he Court, whose jurisdiction is international, . . . not bound to attach to matters of form the same degree of importance which they might possess in municipal law"[17] but also, procedurally, what a State actually does is more important than what it says it is doing — and it is for the Court itself to decide, in the performance of its judicial duties, the true significance of the Parties' positions[18].

11. The Agent of Serbia and Montenegro asks us to allow the State he represents to specify what it said and meant ("allow us to state ourselves what we actually said or meant to say"[19]). But precisely, the Applicant's written pleadings speak for it. And those pleadings are crystal clear: they assert that it follows from Serbia and Montenegro's admission to the United Nations in November 2000 that it was not a Member previously and, accordingly, that it was not a party to the

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[13]CR 2004/12, pp. 12-17, paras. 19-29.

[14]CR 2004/14, p. 26, para. 63.

[15]Art. 60, para. 1, of the Rules of Court.

[16]Art. 89, para. 1, of the Rules of Court. See CR 2004/14, pp. 18-19, paras. 29 and 30.

[17]Judgment of 30 August 1924, *Mavrommatis, P.C.I.J., Series A, No. 2*, p. 34.

[18]See CR 2004/12, pp. 9-10, paras. 11 and 12, and the references cited therein.

[19]CR 2004/14, p. 19, para. 32.

Statute of the Court either; and, because it does not continue the legal personality of the former Yugoslavia, nor was it, at the time it filed its Application, party to the Genocide Convention — to which it did moreover accede, as I have already said, making a reservation to the jurisdiction of the Court.

12. In the person of its Agent, its most authoritative mouthpiece, Serbia and Montenegro told us yesterday that it had not adapted or modified its observations or "manipulated" its positions[20]. Would that we could believe that, Mr. President. What is more, were it once again to change its mind, this new about-face would have no consequence whatsoever in law: "you cannot blow both hot and cold at once". As Judge Alfaro explained in a passage which I hold dear, complete with its Latin maxims, from the weighty separate opinion he appended to the Court's second Judgment in the *Temple* case, regardless of the terms employed to designate this principle, "estoppel", "preclusion", "forclusion", "acquiescence",

> "its substance is always the same: inconsistency between claims or allegations put forward by a State, and its previous conduct in connection therewith, is not admissible (*allegans contraria non audiendus est*). Its purpose is always the same: a State must not be permitted to benefit by its own inconsistency to the prejudice of another State (*nemo potest mutare consilium suum in alterius injuriam*) . . . Finally, the legal effect of the principle is always the same: the party which by its recognition, its representation, its declaration, its conduct or its silence has maintained an attitude manifestly contrary to the right it is claiming before an international tribunal is precluded from claiming that right (*venire contra factum proprium non valet*)"[21].

11 13. Let me make myself perfectly, Mr. President: it is not the FRY's admission to the United Nations which could give rise to estoppel, contrary to what Mr. Varady would have the Respondents say[22]; rather, what could do so is the "repudiation" of the position explicitly taken by Serbia and Montenegro in its written pleadings to the effect that there is no basis for the Court's jurisdiction.

14. Now, once again, we do not suspect Serbia and Montenegro of "manipulation". But it must assume the consequences of its positions without disavowing or distorting them: Serbia and Montenegro did not *wonder* about the effects of its admission to the United Nations on 1 November 2000; it did not *ponder* whether or not it was a party to the Statute or to the 1948

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[20]See CR 2004/14, p. 19, para. 34.

[21]*I.C.J. Reports 1962*, p. 40.

[22]CR 2004/14, p. 20, para. 36.

Convention. No. It *acknowledged*, in the clearest possible way, that there was no jurisdictional basis on which the Court could adjudicate upon its Application. France concurs. That is the end of the matter.

15. Thus, in the opinion of the French Republic, the Court cannot but find that, failing any disagreement between the Parties as to the Court's lack of jurisdiction in the present case, these Preliminary Objections are without object and, accordingly, the Court cannot but order the case removed from the List.

16. Mr. President, the Republic of Serbia and Montenegro has taken two positions in turn; while different, they are not incompatible:

— in its written pleadings on the Preliminary Objections, it acknowledged the lack of any basis for the Court's jurisdiction;

— during its oral statement of yesterday morning, it recognized that its admission to the United Nations had changed the context of the present case by "revealing" that it was neither a Member of the United Nations nor a party to the Statute of the Court or the 1948 Convention.

It cannot in all honesty go back on either of these positions, which, in fact, buttress each other. Each — the first "pre-preliminarily", the second "merely" preliminarily — can only lead you to find, in accordance with the positions taken by the Applicant, that you cannot rule on the
12 Application. That is also the position of France — whose general conclusion will now be presented by Mr. Abraham, if you would be so kind, Mr. President, as to give him the floor.

Members of the Court, I thank you most sincerely for your kind attention.

Le PRESIDENT: Merci, M. le Professeur. Je donne maintenant la parole a M. Ronny Abraham, Agent de la République Française.

Mr. ABRAHAM:

17. Mr. President, Members of the Court, the time has come for me to bring to a close the observations of the French Republic on the Preliminary Objections.

18. To that end, please allow me, Mr. President, to return simply and briefly to the crux of the matter. For the Court, what is the present stage of the proceedings about?

19. In April 1999 the Federal Republic of Yugoslavia presented to you an Application against France. France asserted Preliminary Objections to that Application in July 2000, the principal one being that the Court lacked jurisdiction to rule on the substance of the Applicant's claims.

20. In response to such an objection, it would normally be for the Applicant State, in order to enable the Court to decide the preliminary issue, to clearly indicate the legal basis which it believed gave the Court jurisdiction to deal with the dispute. In the debate initiated by an objection to jurisdiction, the State having referred the matter to the Court is not expected to confine itself to commenting, no matter how interesting those comments might be academically, on its opponent's arguments. It is expected to state — or reiterate — in the clearest, unequivocal terms the basis on which it claims the Court's jurisdiction is founded.

21. It is true that in the specific phase of proceedings devoted to arguing preliminary objections, the author of the objection, the respondent in the main proceedings, becomes, in a manner of speaking, the applicant, which places upon it *inter alia* the obligation, an admittedly rather peculiar one in the present circumstances, to state its case first at the hearings, while the applicant becomes, again in a manner of speaking, the respondent, answering the arguments asserted against it.

13 22. But it is nevertheless true that, under a fundamental procedural principle applicable in international fora, the party bringing the proceedings must unambiguously indicate the basis of jurisdiction on which it claims entitlement to act and must show that this jurisdictional basis applies to the case in question. The party against whom the application is brought is not required to prove that there is no basis for jurisdiction, which would require it — and it would be absurd to ask this of it — as a matter of course to examine all possible bases.

23. Thus, Mr. President, even in the preliminary debate on the court's jurisdiction, the applicant does not entirely cease to be the applicant, nor the respondent the respondent. It is indeed the applicant State which bears the burden of establishing the jurisdiction of the Court.

24. Now, what has our opponent said and done since France raised its objections? It has done nothing of what would be expected of a State anxious to show the Court that it does have jurisdiction to deal with the Application; rather, it has done exactly the opposite.

25. In its Written Observations of December 2002, the Federal Republic of Yugoslavia explained that Yugoslavia's legal status in April 1999 prevented it from seising the Court, in other words that the Court was without jurisdiction to deal with the dispute.

26. And in its oral statement yesterday — which, we must admit, we were awaiting with impatient curiosity, given the extraordinary situation — Serbia and Montenegro did not call into question the substance of its Written Observations. It did not seek to demonstrate the existence of a basis for jurisdiction, and moreover, as has been explained at length, it could not have done so without violating the principle of good faith in judicial debate. Its Agent and counsel provided commentary, legal analyses which were sometimes interesting and often debatable, but nothing, absolutely nothing, which could found a basis of jurisdiction for your Court in the present case.

27. We must therefore necessarily ask ourselves the following question: what does Serbia and Montenegro want, what is it seeking to obtain?

28. Based on its Written Observations of December 2002, the meaning of which was not changed — I stress — by the oral statements made yesterday, the response would appear to be, or rather logically is, the following: Serbia and Montenegro is seeking from the Court a decision whereby the Court declares itself to be without jurisdiction to deal with the Application, but
14 naturally not just on any ground, but on the grounds relied on by the Applicant since what might be called its change of mind in December 2002.

29. Yet that is not exactly what its Agent told us yesterday. No doubt aware that it would be impossible, and even absurd, for a State to request of the Court a decision that the Court lacks jurisdiction over that State's own application, my colleague more subtly sought to assert the legitimate interest which Serbia and Montenegro would have in a decision of the Court ruling on its jurisdiction. What interest? That of obtaining clarification, elucidation, of the uncertain, controversial, complex question of the legal status of Yugoslavia, or, dare I say, of the successive Yugoslavias since the disappearance of the former Socialist Federal Republic.

30. In other words, to confine ourselves to the oral statements of yesterday, Serbia and Montenegro is not exactly asking the Court to declare itself without jurisdiction (even if the arguments which it now advances necessarily lead to that conclusion), nor — let alone, I would say — is it asking the Court to find that it does have jurisdiction; it is asking the Court to rule on

the issue of its jurisdiction, because Serbia and Montenegro is interested in the answer to that question.

31. That it should be interested in it, we can all understand. But is that what might be called a legitimate legal interest in contentious proceedings? Definitely not.

32. Mr. President, it became glaringly apparent yesterday from the oral statement by the Agent of Serbia and Montenegro that the Applicant is seeking to obtain from the Court, under cover of contentious proceedings in which it no longer believes and which in reality it does not wish to pursue, a sort of advisory opinion which would shed some light on a question that it considers obscure, and from which it could perhaps derive some future benefit.

33. That, Mr. President, is nothing other than an attempt to pervert the purpose of contentious proceedings, which is not to deliver opinions clarifying a particular question of law or to accommodate scholars, but to settle concrete disputes between the Parties.

34. A State cannot appear before the Court in contentious proceedings and confine itself to asking the Court to take a position, to adjudicate on a question; it must tell the Court at the same time how it is asking the Court to rule, failing which it does not make any real submissions to the
15 Court and manifests its lack of interest in the outcome of the proceedings, as a means of resolving a concrete dispute. Clearly, the Court cannot accept this.

35. Mr. President, Members of the Court, it is now my responsibility to set out France's final submissions upon the conclusion of these proceedings.

For the reasons it has set out orally and in its written pleadings, the French Republic requests the International Court of Justice to:

— principally, remove the case from the List;

— in the alternative, decide that it lacks jurisdiction to rule on the Application filed by the Federal Republic of Yugoslavia against France; and,

— in the further alternative, decide that the Application is inadmissible.

Mr. President, Members of the Court, I thank you for your attention.

Le PRESIDENT : Je vous remercie, M. Abraham La Cour prend acte des conclusions finales que vous venez de lire au nom de la République française. Voilà qui clôt le second tour de plaidoiries de la République française.

L'audience est levée à 16 h 35.