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Mardi 20 avril 2004 à 12 h 10

Tuesday 20 April 2004 at 12.10 p.m.

8 Le PRESIDENT : Je donne la parole à M. Ivo Braguglia, agent d'Italie.

Mr. BRAGUGLIA:

Scheme of legal arguments

1. Mr. President, Members of the Court, it is a great honour for me to take the floor as Agent of the Government of the Italian Republic in this sitting devoted to considering the Preliminary Objections raised by my Government, in accordance with Article 79 of the Rules of Court, in the case concerning the *Legality of Use of Force* initiated by the Application filed by the Federal Republic of Yugoslavia on 29 April 1999.

2. I shall note that the shortened name "Serbia and Montenegro" will be the only one used from now on in the Italian Government's statement, even though most of the facts and actions which will be referred to occurred at a time when that name had not yet been adopted by the Applicant.

3. Mr. President, Members of the Court, please allow me briefly to sketch out the structure and content of the Italian Government's oral statement, which will be completed today by Professors Leanza and Daniele.

4. Preliminarily, Italy wishes to point out that it is in agreement with most of the arguments set out by the Agents and counsel of the other respondent States and, accordingly, will concentrate on aspects which have not yet been dealt with in full.

5. First, Italy refers to the Preliminary Objections raised in its Memorial of 3 July 2000. Italy believes that all the arguments expounded in that document should be upheld by the Court, especially after Serbia and Montenegro's Written Observations of 18 December 2002 and the 28 February 2003 letter from its Agent.

6. However, further comments and observations would appear necessary to address the radical change of attitude manifested by Serbia and Montenegro in the documents mentioned above.

9 7. First, in the opinion of the Italian Government, the facts related by Serbia and Montenegro in those two documents are such that there can no longer be any doubt as to the merit of the

Preliminary Objections concerning the Court's lack of jurisdiction *ratione personarum* and *ratione materiae*. The Italian Government's oral statement will therefore first be devoted to considering the Court's lack of jurisdiction.

8. This examination will be structured so as to make clear, in particular, that this case is different, and legally autonomous, from all other cases now appearing on the Court's List in which Serbia and Montenegro is a respondent. Mr. Leanza, who will, with your permission, take the floor after me, will elaborate on these lines of argument.

9. Secondly, Italy will concentrate on, and draw the Court's attention to, the legal consequences deriving in the present case from the Observations submitted by Serbia and Montenegro further to Italy's Preliminary Objections.

10. The Italian Government confesses its astonishment at the very unusual stance adopted by Serbia and Montenegro in its Observations. Even if we refuse to see these Observations as expressing an implied abandonment of claim — which the applicant Government does not admit —, we can only point out that Serbia and Montenegro did not even go to the trouble of disputing, in any way whatsoever, the Preliminary Objections submitted by Italy.

11. On the contrary, Serbia and Montenegro confined itself to drawing the Court's attention to facts — notably its admission to the United Nations and its accession to the Genocide Convention, which was accompanied by a reservation to Article IX — which have the obvious effect of reinforcing — and were perhaps intended to reinforce — Italy's Preliminary Objections in respect of the Court's lack of jurisdiction.

12. It is the Italian Government's view that this self-contradictory attitude shows that there is in truth no longer any dispute between Serbia and Montenegro and Italy and that, accordingly, the conditions necessary for the exercise of the Court's high judicial functions are not met in the current case. This part of the Italian Government's argument will be set out by Mr. Daniele. Mr. President, I now ask you to give the floor to Mr. Leanza and I thank you.

10 Le PRESIDENT : Merci, M. Braguglia. Je donne maintenant la parole à M. le professeur Leanza.

Mr. LEANZA:

Reiteration of Preliminary Objections Nos. 1 and 4

13. Mr. President, Members of the Court, I have the honour to devote my statement to the four Preliminary Objections already raised in writing, which Italy maintains and confirms in their entirety. First, the Italian Government will take the liberty of reiterating Preliminary Objections Nos. 1 and 4.

14. Preliminary Objection No. 1, concerning the inadmissibility of Serbia and Montenegro's 11th submission, should be sustained in full. In its 11th submission, Serbia and Montenegro accuses Italy of acts which — given when and where they were allegedly committed, as well as their nature and their perpetrators — are completely different from those forming the subject-matter of Serbia and Montenegro's Application and thus are not part of the same dispute. It is therefore obvious that Serbia and Montenegro seeks, through its 11th submission, impermissibly to broaden the subject-matter of the Application.

15. Mr. President, Members of the Court, in respect of Objection No. 4, Italy will recall the arguments raised in its Memorial to show that Serbia and Montenegro's submissions are inadmissible in their entirety.

16. Even assuming the Court were to conclude that it has jurisdiction in this case — which Italy does not believe it will — the Court could not render its judgment on the merits. Given that the set of cases brought by Serbia and Montenegro concerns only a small number of NATO member States, the Court would find itself required to judge acts that were also, and principally, committed by several other States which are not parties to the present case but whose position would inevitably be prejudged by a decision of the Court.

17. Further, even if all the States which participated in NATO's action in Yugoslavia were subject to the judgment of the Court, the point of view from which the facts would need to be ascertained would no doubt be determined by the basis of jurisdiction found in each case. It follows that the same facts would be assessed by the Court sometimes in the light of the Genocide
11 Convention, sometimes from the viewpoint of the prohibition on the use of armed force. Thus, the action — obviously one designed and carried out as a unified whole — would likely be perceived

by the Court as less unitary, and possibly even as fragmentary, and a true, reliable understanding of it would therefore not be possible. This would prove to be a ground for inadmissibility which the Court could not ignore.

Restatement of Preliminary Objection No. 2 in the light of the Observations of Serbia and Montenegro

18. Mr. President, Members of the Court, I now turn to Preliminary Objection No. 2 relating to the Court's lack of jurisdiction *ratione personarum*.

19. Referring to the arguments already set out in the Preliminary Objections, the Italian Government wishes to bring to the Court's attention some considerations suggested by the facts described by Serbia and Montenegro in its Observations of 28 February 2003 (*sic*) as "newly discovered facts which have emerged since earlier pleadings were filed".

20. The fact that Serbia and Montenegro was admitted to the United Nations with effect from 1 November 2000 proves conclusively that, as Italy maintained in its second Preliminary Objection, it was not a party to the Statute of the Court when the Application was filed, i.e. on 29 April 1999.

21. On that date Serbia and Montenegro, not being a Member State of the United Nations, was not a party to the Statute in accordance with Article 93, paragraph 1, of the United Nations Charter, nor had it ever asked to become a party to the Statute under paragraph 2 of the said Article, as a non-Member of the United Nations. Serbia and Montenegro therefore was not entitled to appear before the Court under Article 35, paragraph 1, of the Statute.

22. Mr. President, Members of the Court, the question is still whether the Court could nevertheless regard itself as having jurisdiction *ratione personarum* pursuant to Article 35, paragraph 2, because Serbia and Montenegro was allegedly a party to a "treaty in force" laying down the jurisdiction of the Court.

12 23. In its second Preliminary Objection, the Italian Government set out a good many arguments on this issue. In particular, Italy maintained that the mere presence of a clause conferring jurisdiction in a treaty in force between two States, one of which, the Applicant, is not at the same time a party to the Statute, could not give that State the right to appear before the Court,

unless it met the conditions laid down by the Security Council in its resolution No. 9 of 15 October 1946. This Serbia and Montenegro has not done, and does not claim ever to have done.

24. However, the issue thus summarized is no longer of any interest in the case now before us, since Serbia and Montenegro — as it has stated in its observations — sent the United Nations Secretary-General, in his capacity as depositary, notification of accession to the Genocide Convention, dated 6 March 2001. This notification was accompanied by a reservation with regard to Article IX excluding any compulsory jurisdiction of the Court.

25. In its Observations Serbia and Montenegro justified the notification of accession as follows: it "did not continue the personality and treaty membership of the former Yugoslavia, and thus specifically, it was not bound by the Genocide Convention until it acceded to that Convention (with a reservation to Article IX) in March 2001".

26. In the light of the intentions manifested by Serbia and Montenegro, the notification of accession — the unilateral nature of which is well established — cannot but imply that according to Serbia and Montenegro even the Convention was not, when the Application was filed, a "treaty in force" between the Parties to the case within the meaning of Article 35, paragraph 2, of the Statute. Consequently, according to the Applicant the Genocide Convention could not form a basis on which the Court could found its jurisdiction *ratione personarum* in relation to Serbia and Montenegro.

27. Neither can it be maintained, from the point of view of Serbia and Montenegro, that Article IX acquired the status of a "treaty in force" between the Parties after the filing of the Application, thus remedying the initial lack of jurisdiction when the Court has to rule on the preliminary objections.

13 28. Such a conclusion is at variance with the reservation entered by Serbia and Montenegro to Article IX of the Genocide Convention, a reservation which excludes all compulsory jurisdiction of the Court. Thus, and without having to consider what the force of such a reservation would be, Serbia and Montenegro implicitly but very clearly confirms that it does not consider that the Court has jurisdiction *ratione personarum* in this case.

29. Serbia and Montenegro inevitably comes to this conclusion, but does not say so openly. Serbia and Montenegro — while fully convinced that the Court lacks jurisdiction *ratione*

personarum, for the reasons given — does not say so explicitly, perhaps out of concern for consistency. Moreover, since this is a position shared by the Respondent and the Applicant, it would be difficult for the Court not to take it into account.

Restatement of Preliminary Objection No. 3 in light of the Observations of Serbia and Montenegro

30. Mr. President, Members of the Court, as regards Preliminary Objection No. 3 the opinions expressed by Serbia and Montenegro clearly demonstrate its profound conviction that the Court also lacks jurisdiction *ratione materiae*.

31. Serbia and Montenegro admits that it was not bound by the Genocide Convention before March 2001. In other words, according to the Applicant Government, the Convention, and in particular its Article IX, was not in force in relations between Serbia and Montenegro and Italy, either when the events that are the subject of the Application occurred or when the Application was filed.

32. Still according to Serbia and Montenegro, the notification of accession to the Convention in March 2001 did not operate to confer jurisdiction *ratione materiae* on the Court ex post facto. As I have just said regarding Preliminary Objection No. 2, such a conclusion is at variance with the reservation entered by Serbia and Montenegro to Article IX of the Convention, a reservation which, if it applies to the future, must be regarded as also applying to the past.

33. It follows that, as regards jurisdiction *ratione materiae*, Serbia and Montenegro also has come round — if not to the arguments put forward by Italy in support of its third Preliminary Objection — at the very least to the conclusions that the Italian Government draws from them.
14 Exactly like Italy, Serbia and Montenegro now takes the view that the Genocide Convention does not constitute a basis on which the jurisdiction *ratione materiae* of the Court could be founded. Moreover, this is in line with the Court's conclusions, albeit prima facie, in its Order on Provisional Measures of 2 June 1999.

34. In the light of the foregoing, the Italian Government asks the Court to set the final seal on its provisional statement and so to declare its lack of jurisdiction under Article IX of the Genocide Convention as regards the dispute between Serbia and Montenegro and Italy.

Specificity and legal autonomy of the present case in relation to any other dispute before the Court concerning Serbia and Montenegro as respondent

35. Mr. President, Members of the Court, Italy wishes to stress that the considerations just set forth on the lack of jurisdiction *ratione materiae* would not be affected by the Court's Judgment of 3 February 2003 on the Application for revision of the Judgment delivered in the case between Bosnia Herzegovina and Yugoslavia. In the Italian Government's view, there are various reasons for concluding that, in this case, the Court should not adhere to that precedent.

36. To begin with, that Judgment was delivered pursuant to Article 61 of the Statute on an application for revision. The Court was called upon, not to settle legal matters directly — such as the questions of jurisdiction and admissibility submitted to the Court in the present case — but only to say whether or not the party claiming revision had proved the existence "of some fact of such a nature as to be a decisive factor, which fact was, when the judgment was given, unknown to the Court and also to the party claiming revision".

37. Second, in the above-mentioned Judgment, the Court avoided taking a definitive position on whether Serbia and Montenegro in fact became a party to the Genocide Convention on its accession to independence following the dissolution of the former Socialist Federal Republic of Yugoslavia. In fact, the Court simply refused to accept that Serbia and Montenegro's situation with respect to the Convention could have been altered by the General Assembly resolution admitting it to membership of the United Nations, or by the letter from the United Nations Legal Counsel of 8 December 2000, calling upon Serbia and Montenegro to undertake treaty actions with a view to completing its accession to the Genocide Convention.

38. Lastly, whereas in the case between it and Bosnia-Herzegovina, Serbia and Montenegro was acting as respondent and its interest was in getting the Court to declare that it did not have jurisdiction, in this case the positions are reversed and one would expect Serbia and Montenegro, if anything, to be concerned to convince the Court that it does have jurisdiction.

39. In fact, Serbia and Montenegro's position in relation to the time from which the Genocide Convention began to produce its legal effects with respect to it cannot be seen as merely a defence tactic. On the contrary, Serbia and Montenegro is expressing a genuine conviction: it does not consider itself party to the Convention before March 2001. It would be somewhat

difficult for the Court not to take account of the conviction expressed by Serbia and Montenegro with respect to the applicant but not the respondent.

40. In conclusion, in the view of the Italian Government, the Court is at liberty to rule as it chooses on Italy's second and third Preliminary Objection. However, the Court should not overlook the fact that these two Objections now correspond to Serbia and Montenegro's stance on the Genocide Convention.

41. Mr. President, Members of the Court, in the view of the Italian Government, if the Court were to decide not to take account of Serbia and Montenegro's position on its situation regarding the Genocide Convention, it might, as a prerequisite, have to rule on two of the most fiercely debated issues in modern treaty law.

42. The former consists in establishing how and when a State resulting from the dissolution of a predecessor State becomes party to the multilateral treaties by which the predecessor State was bound. The second question relates to the legal validity of a reservation made by a State after becoming party to the international treaty concerned.

43. These are two very tricky matters, whose solution would require detailed discussion, which would not be particularly appropriate at this phase in the proceedings, dealing solely with the preliminary objections. However, according to the Italian Government, the Court could and perhaps should avoid any consideration of such questions.

16 44. In fact, the Observations made by Serbia and Montenegro on the preliminary objections, and the letter from its Agent on 28 February 2003 raise a question which the Court must consider as a preliminary, prior to any question relating to its own jurisdiction or the admissibility of the Application. To set out our arguments on this aspect of the question, may I ask you, Mr. President, to give the floor to Mr. Daniele.

Le PRESIDENT : Merci, Monsieur le professeur Leanza. Je donne maintenant la parole à M. le professeur Luigi Daniele.

Mr. DANIELE:

The dispute is without object

45. Mr. President, Members of the Court, as Mr. Leanza has just said, I will be addressing a single question. But it is certainly a very important question to which the Italian Government attaches great importance; a question that the Italian Government regards as a wholly preliminary matter, which needs to be examined *in limine litis*, that is to say before turning to the issues of jurisdiction and admissibility raised by the present case. The question is: can a dispute, under Article 38, paragraph 1, of the Statute, between Serbia and Montenegro on the one hand, and Italy on the other seriously be considered to exist now? And if there is such a dispute, does it still have an object?

46. According to a well-established principle of its jurisprudence, for the Court to exercise its judicial functions, there must be a dispute between the parties to the proceedings.

47. Confining myself to the best known precedents, I would first cite the Judgment of 21 December 1962 on Preliminary Objections in the cases concerning *South West Africa (Ethiopia* v. *South Africa; Liberia* v. *South Africa, Preliminary Objections, I.C.J. Reports 1962*, p. 319, para. 328). There the Court acknowledged that the existence of the dispute is a question of an entirely preliminary nature, which the Court should thus consider before even addressing questions concerning its jurisdiction or the admissibility of the application. It was by virtue of that principle that the Court, before examining the preliminary objections to its jurisdiction raised by
17 South Africa, considered that it was "necessary to decide a preliminary question relating to the existence of the dispute which is the subject of the Application".

48. This principle was reiterated in the *Nuclear Tests* cases, between Australia and New Zealand on the one hand, and France on the other. In the Judgments of 20 December 1974 (*I.C.J. Reports 1974*, pp. 253 and 260, para. 24, and pp. 457 and 463, para. 24), the Court found that it had "first to examine a question which it finds to be essentially preliminary, namely the existence of a dispute, for, whether or not the Court has jurisdiction in the present case, the resolution of that question could exert a decisive influence on the continuation of the proceedings".

49. The Court's jurisprudence is also very clear on the necessity for the dispute to exist not only when the application is filed, but also when the judgment is delivered. In the Judgment of 2 December 1963 (case concerning *Northern Cameroons (Cameroons* v. *United Kingdom), Preliminary Objections, I.C.J. Reports 1963,* p. 15, paras. 33-34), after recalling that "the function of the Court is to state the law", the Court ruled that "it may pronounce judgment only in connection with concrete cases where there exists *at the time of the adjudication* an actual controversy involving a conflict of legal interests between the parties".

50. The principle concerned here has been reiterated in a number of decisions, even recent ones. I shall only instance the Judgment of 14 February 2002, in the case concerning the *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo* v. *Belgium)* (para. 32). The Court then had occasion to state that, according to its jurisprudence, "events occurring subsequent to the filing of an application may render the application without object such that the Court is not called upon to give a decision thereon".

51. The Court's jurisprudence also shows clearly that the disappearance of the object of the dispute could depend on events arising from the conduct of the parties or of any one of the parties. In the Judgments on the above-mentioned *Nuclear Tests* cases (*Australia* v. *France) (New Zealand* v. *France)*, the Court — after interpreting the declarations of the French authorities as representing an undertaking to refrain from any further atmospheric nuclear tests in the South Pacific — concluded that "the objective of the Applicant has in effect been accomplished" (paras. 52 and 55) and that "the object of the claim having clearly disappeared, there is nothing on which to give judgment" (paras. 59 and 62).

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52. Mr. President, Members of the Court, the Italian Government considers this jurisprudence decisive in the present case.

53. Italy does not seek to dispute the fact that, when the Application was filed, there was a real dispute between Serbia and Montenegro and Italy. That dispute concerned aspects of Italy's participation in the NATO action known as "Allied Force".

54. According to Serbia and Montenegro, during that action, genocidal acts were committed on its territory and against its population. Again according to Serbia and Montenegro, Italy, by

participating in that action, breached the rights belonging to Serbia and Montenegro as party to the Genocide Convention. Whence jurisdiction of the Court under Article IX of that Convention.

55. For its part, the Italian Government has always firmly dismissed the allegations of Serbia and Montenegro, both at the provisional measures stage and thereafter, raising the Preliminary Objections on which the Court is now called upon to rule. In particular, I would refer to the third Preliminary Objection, whereby — as Mr. Leanza has just recalled — Italy contended that the acts forming the object of the Application of Serbia and Montenegro definitely did not constitute acts of genocide and therefore do not fall within the Court's jurisdiction under Article IX of the Genocide Convention.

56. Mr. President, Members of the Court, the question is now whether there is *currently* — i.e., when the Court is called upon to rule on the Preliminary Objections — a dispute between Serbia and Montenegro and Italy, or if, since the Application was filed, either the dispute has become moot or its object has disappeared.

57. Now, the view expressed by Serbia and Montenegro, first in its Written Observations in response to Italy's Preliminary Objections and subsequently reiterated and confirmed in its Agent's
19 letter of 28 February 2003, proves — in the opinion of the Italian Government — that the dispute which constituted the *object of the Application of Serbia and Montenegro has indeed disappeared and has become moot.*

58. For in those two documents, Serbia and Montenegro has radically altered its position vis-à-vis the Genocide Convention. I would venture to point out at this juncture that, in the context of these proceedings, the Genocide Convention constitutes the true central core around which the entire case has developed. First, as the Court stated in its Provisional Measures Order of 2 June 1999 (paras. 28 *et seq.*), Article IX of the Convention is the only possible legal basis on which the jurisdiction of the Court could be founded. Secondly, since the Court's jurisdiction relates solely to Article IX of the Convention, Serbia and Montenegro cannot, in the present case, raise any other complaint against Italy than the violation of the rights that Serbia and Montenegro seeks to derive from that Convention.

59. However, Serbia and Montenegro is now saying that it only became a party to the Convention by virtue of its notice of accession in March 2001. That statement, reiterated twice, in

almost identical terms, necessarily leads to two conclusions. First, according to the current position of Serbia and Montenegro, it was not a party to the Convention either when the acts forming the subject-matter of the Application occurred (i.e., between 24 March and 10 June 1999, the date when the NATO action ceased), or, obviously, when the Application was filed, on 29 April 1999. Secondly, and as a result, Serbia and Montenegro acknowledges that prior to 2001 it did not possess any right or legal interest arising from the Convention. Thus it was not entitled to invoke any right or interest based on that instrument, which Italy, by taking part in the NATO action, could have violated and which could therefore have fallen within the Court's jurisdiction under Article IX of the Convention.

60. The new position adopted by Serbia and Montenegro concerning its accession to the Convention — construed according to the principle of good faith, a principle which should always govern relations between States, especially when they are parties to a case before the Court — can only mean one thing: Serbia and Montenegro acknowledges, albeit implicitly, that it possesses no
20 legal interest under the Convention on which it could rely as against Italy, and of which a breach could fall within the Court's jurisdiction under Article IX of the Convention.

61. Mr. President, Members of the Court, there is therefore no doubt that, at this stage in the proceedings, the dispute has indeed disappeared. Not only does Serbia and Montenegro, like Italy, consider that the Court lacks jurisdiction, but also — and above all — Serbia and Montenegro, like Italy, considers that, in the present case, there is no question of any Convention-based legal interest which Serbia and Montenegro could claim has been violated.

In other words, this is not simply a situation where, as a number of respondent States have already contended yesterday and this morning, the two Parties to the proceedings have finally reached agreement on the issue of jurisdiction and now consider that the Court's decision on this issue should be negative. Here, it is the very object of the Application — the very object of the substantive questions raised in the Application, that is to say the treaty right of Serbia and Montenegro, that Italy is said to have breached. That treaty right, according to the current position of the Applicant, did not exist and, logically speaking, could not have been breached by Italy nor, in truth, by any other State having taken part in the NATO action.

62. It is true that Serbia and Montenegro reaches this conclusion because it does not regard itself as bound by the Convention prior to March 2001, whereas Italy has always firmly stated that it never violated that Convention. This difference in the line of argument does not detract from the conclusion that, as a result of the new position adopted by Serbia and Montenegro, any conflict of legal interests with the Italian Republic has disappeared.

63. Admittedly, Serbia and Montenegro has not adopted an explicit position in this respect. In the Observations it presented in response to the Preliminary Objections, the Applicant simply asserted that it did not become a party to the Convention until March 2001 and requested the Court to decide on its jurisdiction in the light of that situation. However, as the Court found in the Judgments concerning the *Nuclear Tests* cases (paras. 29 and 30), it is "the Court's duty to isolate the real issue in the case and to identify the object of the claim". It went on to state that "it has
21 never been contested that the Court is entitled to interpret the submissions of the Parties, and in fact is bound to do so", this being "one of the attributes of its judicial functions".

64. In the present case, there is no doubt that it is for the Court to interpret the Observations presented by Serbia and Montenegro in response to the Preliminary Objections, as well as its Agent's letter of 28 February 2003. In the opinion of the Italian Government, the Court should regard the statements contained in those documents, if not as an implicit notice of discontinuance — which, as we have seen, Serbia and Montenegro does not admit — at least as an admission that there is no longer any conflict of legal interests between the Parties. As a result, any decision that the Court may render on this case would settle questions that are totally divorced from the reality, as was the case with the questions arising in the *Northern Cameroons* case (p. 33), or with questions that remain *in abstracto*, such as the questions raised in the *Nuclear Tests* cases (paras. 59 and 62).

Submissions

65. Mr. President, Members of the Court, for the reasons I have just set out, the Italian Government requests the Court to find that no decision is called for on the Application of Serbia and Montenegro, since the dispute between Serbia and Montenegro and Italy has become moot or its object has disappeared. Further, and in the alternative, Italy would refer to the submissions set

out in its Preliminary Objections. This concludes the statement of the Italian Government and I thank you for your attention.

Le PRESIDENT : Je vous remercie, Monsieur le professeur. Ceci met un terme au premier tour de plaidoiries de l'Italie.

La Cour reprendra ses travaux demain matin à 10 heures pour entendre le premier tour de plaidoiries de la Serbie et Monténégro.

La séance est à présent levée.

L'audience est levée à 13 heures.