Le PRESIDENT : Je donne maintenant la parole à M. Luigi Daniele, conseil pour l'Italie.

Mr. DANIELE:

Scheme of the Italian Government's arguments

1. Thank you, Mr. President. Mr. President, Members of the Court, the Italian Government's reply will be divided into two parts: in the first, we intend to prove that, despite what the Agent of Serbia and Montenegro said yesterday, the Applicant has confirmed what the Italian Government already said in its oral statement the day before yesterday.

2. Serbia and Montenegro in effect continues to consider that (I) the Court is without jurisdiction, whether *ratione personarum* or *ratione materiae*, to judge this case and (II) the Genocide Convention is not binding on the Republic of Serbia and Montenegro and thus cannot be a source of rights or legal interests which could have accrued to Serbia and Montenegro and which Italy could have infringed.

3. In the second part of our statement we will briefly amplify the points made in our preliminary objections concerning Article IX of the Genocide Convention as a possible base for the Court's jurisdiction in this case. This part of the statement will be made by Professor Luigi Sico, to whom I shall in due course ask you, Mr. President, to give the floor. Mr. Braguglia, in his capacity as Agent, will then present the final submissions on behalf of the Italian Government.

4. I would add that my Government shares a number of the arguments which the other Respondents have set out this morning and afternoon. In large part, these arguments match those set out by the Italian Government in its preliminary objections; for lack of time, we will not take them up again today, but this must not be construed as an implicit renunciation on our part.

5. Before beginning, Mr. President, I must express the unease felt by the Italian Government in response to Serbia and Montenegro's conduct in this stage of the proceedings. Confining themselves to only one and a half pages of written observations then proceeding for three hours to dispute our preliminary objections and lay out a whole series of largely new legal arguments has put the Respondents in a very difficult position. Can such conduct be considered acceptable in contentious proceedings before the Court? The Italian Government does not wish to draw any conclusions from this, but feels it could not refrain from briefly mentioning it.

Lack of an object of the dispute

6. I do not think I am mistaken in saying that a number of us in this venerable court room were gladdened yesterday

to hear the Agent of the Serbian Government claim the right "to state ourselves what we actually said and meant to say" (para. 32).

7. Mr. Varady was speaking of the written observations of 18 December 2002, filed by the Serbian Government, pursuant to Article 79, paragraph 3, of the Rules of Court, in response to the preliminary objections raised by my Government and by all the other respondent States.

8. These written observations could lend themselves to a number of different interpretations, no doubt because of their unusual brevity. Mr. Varady counted up to five of them, including the one which my Government put forward during its oral statement the day before yesterday (para. 38).

9. According to Mr. Varady, all these interpretations were wrong. The real purpose of the Serbian Government "was to investigate the legal status of the FRY in the light of a dramatic event for our country, the admission to the UN as a new Member" (para. 33).

10. It may well be asked why the Serbian Government now feels the need for the Court re-examine this question. In fact, as we noted during our first appearance and as Mr. Varady admits in paragraph 56 of his statement, the Court has already ruled on the position of Serbia and Montenegro vis-à-vis the United Nations, the Statute of the Court and the Genocide Convention during the period preceding its admission to the United Nations. In the Judgment on the request for revision in the *Bosnia and Herzegovina* v. *Yugoslavia* case, the Court declared that request inadmissible and, as a result, confirmed both the *sui generis* position of the FRY vis-à-vis the United Nations and the Court's jurisdiction under Article IX of the Convention referred to above.

11. However, according to Mr. Varady the position taken by the Court leaves several points open. In particular, according to Mr. Varady "the question remains what was the nature, and what were the consequences of this *sui generis* position between 1992 and 2000" (para. 58) and, among other things, "whether this *sui generis* position vis-à-vis the United nations could have provided the link between the new State and international treaties — the Statute and the Genocide Convention in particular" (para. 63).

12. Mr. President, Members of the Court, you hardly need me to tell you, the attitude of the Serbian Government in this case is a constant source of surprise. Instead of citing a precedent favourable to the jurisdiction of the Court under Article IX of the Convention, the Applicant State asks the Court to reconsider the solution that it had already reached.

13. Indeed, this is what my Government also is asking the Court to do. The day before yesterday Mr. Leanza maintained (paras. 35 *et seq*.) that the Court should not consider itself bound by the 2003 Judgment on the application for revision. It is, I think, perfectly normal for a State that is contesting the jurisdiction of the Court, as Italy is, to seek to convince the Court that it should not let itself be influenced by a precedent that would not support that State's arguments. On the contrary, it is to say the least surprising the it should be the Applicant State that is challenging such a precedent, when it should be in its best interests for the Court to confirm its decision.

14. So how is this contradiction to be explained? How is one to explain the fact that the Applicant State brings to the debate factors potentially supportive of the Respondent State's arguments regarding the Court's lack of jurisdiction?

15. The answer is simple: Serbia and Montenegro is actually seeking to obtain a negative decision from the Court on its jurisdiction under Article IX of the Convention on Genocide, a decision which would recognize that Serbia and Montenegro was not bound by the Convention before its notification of accession in March 2001 and which that State might well use in other cases against it currently pending before the Court, whose outcome might be seriously affected by such a decision of the Court in this case.

16. Moreover, the Agent of the Serbian Government made no secret of this. After mentioning the fact that Serbia and Montenegro is the Respondent State in a number of cases before the Court which raise the same problem of the status of that State between 1992 and 2000 (para. 34), Mr. Varady declared, referring to all these cases (by the somewhat unusual term of "lawsuits"): "now, we would simply like to know where we stand. Only a judgment on jurisdiction could put us on a clear track" (para. 39). In paragraph 64 Mr. Varady then added that

> "[w]e need to know whether the turbulent period behind us yielded proper procedural prerequisites for continuing these disputes. A judgment on jurisdiction, based on the elucidation of the position of the FRY between 1992 and 2000, could create an anchor point of orientation."

17. It follows that the decision of the Court that the Serbian Government is seeking would not be in the nature of a true judgment settling an actual dispute between two States, but would be seen instead as a kind of legal opinion, similar in nature to the advisory opinions that your Court is obviously empowered to give under Article 96 of the Charter of the United Nations, but which can in no case be requested by a State.

18. In conclusion, we feel that the considerations set forth yesterday morning by the Agent of the Serbian Government confirm that Serbia and Montenegro, without openly admitting it, no longer has any interest in the Court declaring itself competent in this case under Article IX of the Convention on Genocide. That is the explanation for the quite astonishing failure of the Serbian Government even to ask the Court, either in its Written Observations of 18 December 2002 or yesterday in its oral statement, to declare that it has jurisdiction, but only to *rule on* its jurisdiction.

19. Mr. President, Members of the Court, in the opinion of the Italian Government the comments by the Serbian Government at yesterday's hearing confirm yet again that this case no longer has any object and that the Court would find itself determining abstract issues far removed from reality.

20. Mr. President, I have now finished my statement and would ask you give the floor to Mr. Sico.

The PRESIDENT : Merci, Monsieur Daniele. Je donne maintenant la parole à M. Luigi Sico.

MR. SICO:

Lack of jurisdiction *ratione personarum* and *ratione temporis* in relation to Article IX of the Genocide Convention

21. Mr. President, Members of the Court, it is a great honour for me to take the floor on behalf of Italy before you today, in order to enlarge upon some further subsidiary matters on the lack of jurisdiction *ratione personarum* and *ratione temporis* in relation to Article IX of the Genocide Convention.

22. In its Written Observations, Serbia and Montenegro declared — it must be reiterated yet again — that it "did not continue the personality and the 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". By these words, which you have heard repeated a thousand times, Serbia and Montenegro expressly admitted beyond all possible doubt that the Court has no jurisdiction to entertain this case, for the simple reason that the sole legal basis on which such jurisdiction might be founded was not in force between the Applicant and the Respondent on the date the Application was filed.

23. Further, as I have just said, the accession to the Convention is accompanied by a reservation on the jurisdiction of the Court: consequently, even supposing the Serbian Government were thinking of claiming that its accession could possibly have retroactive effect — which it has never claimed — such retroactive effect could not include the reservation. Consequently, assuming that Serbia and Montenegro's position — or should I say posture — might be reformulated so as to enable it to rely on the possibility of its retroactive accession, without at the same time claiming the same effect for the reservation on jurisdiction, then the Italian Government declares that it is Italy that intends to argue this, on the basis of the principle of reciprocity. Let us be very clear on this point: Italy has no intention of accepting that the Court has jurisdiction under Article IX of the Genocide Convention in respect of Serbia and Montenegro.

Lack of jurisdiction *ratione materiae* in relation to Article IX of the Genocide Convention

24. Mr. President, Members of the Court, Italy is thus responding to the objections on jurisdiction *ratione materiae* in relation to Article IX of the Genocide Convention simply in the alternative. It should be noted in this connection that Professor Brownlie, in order to demonstrate that military action by NATO member-States might, objectively seen, be included in the acts prohibited by the Genocide Convention, reminded us in his statement that the Court's ruling in the Judgment of 12 November 1996 on O*il Platforms* (*Islamic Republic of Iran* v. *United States of America, Preliminary Objections*, para. 16) was that it is for the Court to "ascertain whether the violations of the Treaty . . . pleaded by Iran do or do not fall within the provisions of the Treaty and whether, as a consequence, the dispute is one which the Court has jurisdiction *ratione materiae* to entertain".

25. It is common knowledge that the most recent case-law has become very strict when the Court is called upon to decide on preliminary objections regarding the scope of a treaty clause conferring jurisdiction. Indeed, the Court requires careful proof that the facts on which the application is based are capable of classification as conduct governed by the treaty whose interpretation or application is entrusted to it.

26. In this connection, Professor Brownlie contended that the use of armed force may fall within one or other of the

definitions of genocide. It is well established that the nature of armed conflicts has changed fundamentally since the second half of the twentieth century, so that they can no longer be defined as a set of military actions essentially aimed at the *debellatio* of a State, that practically all conflicts have become asymmetrical and that even the ideas of target and military objective have undergone profound changes, fortunately for the better.

27. However, these changes and, above all the fact that very often the armed forces of a State do not face the armed forces of another State hardly make it possible to infer that any use of armed force can be classed as genocide. Paragraph 38 of the Court's Advisory Opinion of 8 July 1996 on the *Legality of the Threat or Use of Nuclear Weapons* once again comes to mind here. At the same time, it cannot be excluded that genocide may sometimes be committed through actions looking like military actions.

28. Clearly, military action constituting an act of genocide must be distinguished from all other military action, essentially by reference to the existence of genocidal intent. However, it is difficult to accept that presumption or even the particular circumstances of each case can be adequate proof of this psychological element, still less that such presumption may be based on the effects of the action undertaken.

29. NATO's intention was to prompt the FRY leadership to end a comprehensive and co-ordinated series of actions which, in the view of the international community as a whole, seriously violated the physical and moral integrity of the ethnic Albanian population in Kosovo — and was thus itself a true case of genocide. Such an intention can definitively not be equated with the intention to physically or morally destroy a group in whole or in part, as contemplated by Article II of the Convention.

30. Contrary to what counsel for Serbia and Montenegro told us yesterday, it was scarcely the intention of the Governments of the NATO Member States to intimidate or compel the leaders of a third State such as the FRY. Indeed, as we have already observed on several occasions (see the Italian Memorial of 3 July 2000, Preliminary Objection No. III, paragraph D, pp. 46 *et seq.*), the statements by NATO Heads of State and its Secretary General read out yesterday morning must above all be placed back in their proper context and afterwards, if this has been done in good faith, it will clearly be seen that their intention was solely to avoid a humanitarian catastrophe in Kosovo.

31. But even accepting that the purpose of the NATO military action was to intimidate the FRY leaders, which is not the case, it would still never be possible to accept the idea put forward by Professor Brownlie that genocidal acts can be directed against a group representing an entire national community, in the knowledge that the very notion of genocide was developed to prohibit any territorial State from annihilating any minority "national, ethnic, racial or religious group" on its territory (see Italian Memorial of 3 July 2000, Preliminary Objection No. III, paragraph C).

32. In this respect, it is not possible either to follow Professor Brownlie's argument, with its conclusion that, because the notion of group is not well defined, this word can refer to the population of a whole State, thus guaranteeing it special protection, the basis of which would have to be established, against one or more other States. Even from this

perspective, it must therefore be concluded that the Court has no jurisdiction *ratione materiae* under Article IX of the Genocide Convention.

Inadmissibility of the submissions of Serbia and Montenegro as a whole in relation to the existence of a dispute to which not all the NATO Member States participating in the military action which is the object of the proceedings are parties

Mr. President, Members of the Court, neither the Agent nor counsel for Serbia and Montenegro exhaustively addressed the objection whereby Italy complained that a possible decision declaring the wrongfulness of the military action by NATO would inevitably affect the legal position of a number of other States which are not parties to the present proceedings and would irreparably undermine their rights (see Italian Memorial of 3 July 2000, Preliminary Objection No. IV, para. B).

34. In reality, the jurisprudence cited by Mr. Djerić, in paragraphs 1 *et seq.* of his statement, concerns situations which have little connection with the subject-matter of these proceedings. Whereas in the *Monetary Gold*, *Nauru* and *East Timor* cases, the Court sought to avoid ruling on the responsibility of a State which was not a party to the proceedings, since such responsibility constituted a prerequisite of the determination of the situation forming the subject-matter of the Application, in the present case the Court is called upon to rule on the wrongfulness of certain actions that the applicant State itself associates with a sort of collective responsibility of the NATO member States, of which only eight are parties to the present cases. That conclusion is confirmed by Serbia and Montenegro's attitude in addressing the objection raised by some of the respondent States concerning their failure to specify the actions it attributed to each of them.

35. By persistently contending that it did not need to be more specific in that respect and by seeking to place the burden of proof that they did not take part in certain specific actions back on the Respondents (para. 33), Serbia and Montenegro has shown that it holds all NATO Member States, without distinction, responsible for the "Allied Force" action, and that it is thus requesting the Court to deliver a judgment on the merits, which would inevitably prejudge the legality of the conduct of States not parties to these proceedings. On this basis, Italy requests the Court to find that the Application of Serbia and Montenegro is inadmissible.

36. Mr. President, Italy thus concludes its reply. May I therefore ask you to give the floor to the Agent of the Italian Government for the final submissions. Members of the Court, thank you for your attention.

Le PRESIDENT : Merci, Monsieur Sico. Je donne maintenant la parole à M. Ivo Braguglia, agent de l'Italie.

Mr. BRAGUGLIA: Thank you, Mr. President. My task is now simply to read out the submissions of the Italian Government.

Submissions

37. For the reasons set out in the Preliminary Objections and in its oral statements, the Italian Government submits as follows:

May it please the Court to adjudge and declare,

Principally, that:

I. No decision is called for on the Application filed in the Registry of the Court on 29 April 1999 by Serbia and Montenegro against the Italian Republic for "violation of the obligation not to use force", as supplemented by the Memorial filed on 5 January 2000, inasmuch as there is no longer any dispute between Serbia and Montenegro and the Italian Republic or as the subject-matter of the dispute has disappeared.

In the alternative, that:

II. The Court lacks jurisdiction *ratione personarum* to decide the present case, since Serbia and Montenegro was not a party to the Statute when the Application was filed and also does not consider itself a party to a "treaty in force" such as would confer jurisdiction on the Court, in accordance with Article 35, paragraph 2, of the Statute;

III. The Court lacks jurisdiction *ratione materiae* to decide the present case, since Serbia and Montenegro does not regard itself as bound by Article IX of the Genocide Convention, to which it made a reservation upon giving notice of accession in March 2001 and since, in any event, the dispute arising from the terms of the Application instituting proceedings, as supplemented by the Memorial, is not a dispute relating to "the interpretation, application or fulfilment" of the Genocide Convention, as provided in Article IX;

IV. Serbia and Montenegro's Application, as supplemented by the Memorial, is inadmissible in its entirety, inasmuch as Serbia and Montenegro seeks thereby to obtain from the Court a decision regarding the legality of action undertaken by subjects of international law not present in the proceedings or not *all* so present;

V. Serbia and Montenegro's Application is inadmissible with respect to the eleventh submission, mentioned for the first time in the Memorial, inasmuch as Serbia and Montenegro seeks thereby to introduce a dispute altogether different from the original dispute deriving from the Application.

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

Le PRESIDENT : Je vous remercie, Monsieur Braguglia. La Cour prend acte des conclusions finales que vous venez de lire au nom de l'Italie. Cet exposé met fin au second tour de plaidoiries de l'Italie et à la séance de cet après-midi. La Cour reprendra ses audiences demain à 15 heures pour entendre le second tour de plaidoiries de la Serbie et Monténégro. Merci.

La séance est levée.

La séance est levée à 17 h 05.