CR 2004/10

International Court of Justice

THE HAGUE

Cour internationale de Justice

LA HAYE

YEAR 2004

Public sitting

held on Monday 19 April 2004, at 5.20 p.m., at the Peace Palace,

President Shi presiding,

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

VERBATIM RECORD

ANNÉE 2004

Audience publique

tenue le lundi 19 avril 2004, à 17 h 20, au Palais de la Paix,

sous la présidence de M. Shi, président,

***en l'affaire relative à la* Licéité de l'emploi de la force**
(Serbie et Monténégro c. Royaume-Uni)

COMPTE RENDU

Present:	President	Shi
	Vice-President	Ranjeva
	Judges	Guillaume
		Koroma
		Vereshchetin
		Higgins
		Parra-Aranguren
		Kooijmans
		Rezek
		Al-Khasawneh
		Buergenthal
		Elaraby
		Owada
		Tomka
	Judge *ad hoc*	Kreća
	Registrar	Couvreur

Présents : M. Shi, président
M. Ranjeva, vice-président
MM. Guillaume
Koroma
Vereshchetin
Mme Higgins
MM. Parra-Aranguren
Kooijmans
Rezek
Al-Khasawneh
Buergenthal
Elaraby
Owada
Tomka, juges
M. Kreća, juge *ad hoc*

M. Couvreur, greffier

The Government of Serbia and Montenegro is represented by:

Mr. Tibor Varady, Chief Legal Adviser at the Federal Ministry of Foreign Affairs of Serbia and Montenegro, Professor of Law at the Central European University, Budapest and Emory University, Atlanta;

as Agent, Counsel and Advocate;

Mr. Vladimir Djerić, Adviser to the Minister for Foreign Affairs of Serbia and Montenegro,

as Co-agent, Counsel and Advocate;

Mr. Ian Brownlie, C.B.E., Q.C., F.B.A., Chichele Professor of Public International Law (Emeritus), University of Oxford, Member of the International Law Commission, member of the English Bar, member of the Institut de droit international,

as Counsel and Advocate;

Mr. Saša Obradović, First Secretary, Embassy of Serbia and Montenegro, The Hague,

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

Ms Marijana Santrač,

Ms Dina Dobrković,

as Assistants;

Mr. Vladimir Srećković, Ministry of Foreign Affairs,

as Technical Assistant.

The Government of the United Kingdom of Great Britain and Northern Ireland is represented by:

Sir Michael Wood, K.C.M.G., Legal Adviser, Foreign and Commonwealth Office,

as Agent;

Mr. Chanaka Wickremasinghe, Legal Adviser, Foreign and Commonwealth Office,

as Deputy Agent;

Mr. Christopher Greenwood, C.M.G., Q.C.,

as Counsel;

Mr. David Burton, Embassy of the United Kingdom of Great Britain and Northern Ireland, The Hague,

as Adviser.

Le Gouvernement de la Serbie et Monténégro est représenté par :

M. Tibor Varady, S.J.D. (Harvard), conseiller juridique principal au ministère fédéral des affaires étrangères de la Serbie et Monténégro, professeur de droit à l'Université d'Europe centrale de Budapest et à l'Université Emory d'Atlanta,

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comme agent;

M. Chanaka Wickremasinghe, conseiller juridique au ministère des affaires étrangères et du Commonwealth;

comme agent adjoint;

M. Christopher Greenwood, C.M.G., Q.C.,

comme conseil;

M. David Burton, ambassade du Royaume-Uni à La Haye,

comme conseiller.

The PRESIDENT: The Court will now hear the oral pleadings of the United Kingdom. I now give the floor to Sir Michael Wood, Agent of the United Kingdom.

Sir Michael WOOD: Mr. President, Members of the Court, it is an honour for me to appear before you today as Agent of the United Kingdom. The members of the United Kingdom team include, as Deputy Agent, Dr. Chanaka Wickremasinghe, from the Legal Advisers at the Foreign Office; as counsel, Professor Christopher Greenwood; and as Adviser, Mr. David Burton from our Embassy at The Hague.

Mr. President, counsel for the United Kingdom, Professor Greenwood, will present our case. Before inviting you to give him the floor, I would only wish to salute our opponent's legal team, Professor Varady and his colleagues; I would like to stress the high regard that we have for them and I would like to say, in particular, how interested we are to hear what they will be saying on Wednesday.

Mr. President, without more ado, I would ask you to invite Professor Greenwood to address the Court.

The PRESIDENT: Thank you, Sir Michael. I now give the floor to Professor Greenwood.

Mr. GREENWOOD: Mr. President, Members of the Court, may it please the Court. It is an honour for me to appear before you again and to do so on behalf of my country.

INTRODUCTION

1. The circumstances in which the present hearing takes place are unusual — indeed, probably unique — for this Court. Like the Respondents in the other seven cases being heard this week, the United Kingdom filed Preliminary Objections in this case as long ago as July 2000[1]. In its concluding submissions in those Objections, the United Kingdom requested the Court to adjudge and declare, first, that the Court lacked jurisdiction and, secondly, that the claims brought

[1]Preliminary Objections of the United Kingdom ("UKPO"), 20 June 2000, together with a volume of Annexes ("UKPO Annexes"). In February 2004 the Respondents in all eight cases deposited a volume entitled Further Documents submitted by the respondents pursuant to Article 56 of the Rules of Court ("Further Documents") and a volume of Correspondence addressed to the International Court of Justice following Submission of the Written Observations and Submissions of the Applicant on 18 December 2002 ("Correspondence").

against the United Kingdom were in any event inadmissible[2]. The pleading filed by the United Kingdom contained detailed arguments in support of those submissions.

2. After two requests for extensions of time — based, as the Court noted in its Orders granting those requests[3], on what the Applicant referred to as "dramatic changes" in Yugoslavia which "have put the case in a quite different perspective" — after those two requests for extensions of time, the Federal Republic of Yugoslavia filed, in December 2002, a written statement of its observations and submissions. The substance of that document, Mr. President, occupies barely a single page; it does not directly address the arguments made by the United Kingdom and — most noticeably — it does not ask the Court to reject the United Kingdom's concluding submissions. But it *does* amount to an abandonment by the Applicant of the only two grounds for jurisdiction set out in the Application. And it specifically requests the Court to decide on its jurisdiction in the light of those observations — a request which the Applicant repeated in its subsequent letter of 28 February 2003[4].

3. So the Court is faced with a situation in which both the Applicant and the Respondent are effectively at one in considering that there is no basis of jurisdiction for the Court to hear the case. There is, it seems, no longer any dispute between the Parties over jurisdiction and, hence, no longer any dispute before the Court today. We submit that the Court's decision, whatever form it may take, should reflect this central fact.

4. The question, then, is where do we go from here? On the one hand, it is, of course, the Court which possesses the *compétence de la compétence*. That principle, which is based on Article 36, paragraph 6, of the Court's Statute, is well established in the jurisprudence. The purpose of the present hearing is for the parties to each case to make submissions on how the Court should exercise that *compétence*. On the other hand, the fact that, in its written statement, the Applicant no longer maintains there is any basis of jurisdiction over its claims is clearly a matter of the utmost significance. That would be the case for any court but it is especially true of a court which derives its jurisdiction from the consent of the parties.

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[2]UKPO, p. 102.

[3]Order of 21 February 2001 and Order of 20 March 2002.

[4]Correspondence volume.

5. The first purpose of this hearing — as we see it — must, therefore, be to examine the consequences which flow from the Applicant's written statement of 18 December 2002. But that creates a dilemma for the Respondents. Article 60, paragraph 1, of the Rules of Court enjoin the parties to make oral statements which are as succinct as possible and "directed to the issues that still divide the parties". In this case, however, it is not clear that there are any issues that still divide the parties as regards the subject-matter of this hearing.

6. For this hearing is primarily about one question: does the Court have jurisdiction to hear any part of the claims made in the Application and then restated in the Memorial? If the answer to that question is "no", then the case is at an end. Only one other question can arise at this hearing, namely whether the claims are admissible and even that question need not be answered if the Court concludes that it has no jurisdiction.

7. On jurisdiction, the Applicant's Written Statement, properly understood, appears to leave nothing in issue between the Parties. However, the Applicant has not moved to discontinue the proceedings (apparently preferring, for whatever reason, that they be concluded by a judgment of the Court). We do not yet know what position the Applicant will seek to take in these oral hearings. The United Kingdom is therefore left with no choice: we have to address — albeit briefly — the jurisdictional arguments raised in the Application, at the provisional measures stage and in the Memorial, and we have to do so in the light of the Applicant's subsequent Written Statement.

8. Nevertheless, Mr. President, as required by Article 60 of the Rules, I shall not attempt to go over all the ground in the United Kingdom's Preliminary Objections. With your permission, I shall concentrate on three matters. *First*, the effect of the Applicant's Written Statement of 18 December 2002, which is its only response to our preliminary objections; s*econdly*, the principal reasons why Article 36 (2) of the Court's Statute (the "optional clause") manifestly cannot provide a basis for jurisdiction in the present case; and *thirdly*, the principal reasons why the Genocide Convention does not afford a basis for the Court's jurisdiction.

I shall, Mr. President, then conclude with a few brief remarks regarding the Applicant's allegations about the events since the adoption of Security Council resolution 1244 on 10 June 1999.

9. Lest there be any misunderstanding, however, let me make clear that the United Kingdom stands by all of the arguments set out in our preliminary objections. The fact that I shall not address all of them is not to be taken as indicating that any of them have been abandoned.

THE EFFECT OF THE APPLICANT'S WRITTEN STATEMENT OF 18 DECEMBER 2002

10. Dealing first then with the Applicant's response to our preliminary objections, the substantive parts of the Applicant's Written Statement — which my learned friend Mr. Bethlehem read to you this morning — make two points.

11. First, the Applicant now agrees that it was not a Member of the United Nations at the date that the Application in the present case was filed. From that it rightly concludes that it was not "a party to the Statute of the Court by way of United Nations membership". Since the Applicant has never claimed to be a party to the Statute by any other means, and since it could not have done so, the effect is that it accepts that it was not a party to the Statute of the Court at the date when it made its application.

12. If that is correct — and it is, of course, what the United Kingdom has always contended — then it follows that the Applicant was not entitled to bring a claim against the United Kingdom or, indeed, against any of the Respondents in the other seven cases. The Court is open only to parties to the Statute and to States able to avail themselves of Article 35 (2) of the Statute. But by the Applicant's own admission, it was not a party to the Statute and it has never sought to avail itself of Article 35 (2). Nor — for the reasons set out in our preliminary objections — could it have done so[5]. The Court thus lacks jurisdiction *ratione personae* in respect of the entire case. That it seems is now common ground between the Parties.

13. Moreover, since, as it has now expressly accepted, the Applicant did not become a party to the Statute of the Court until 1 November 2000, it could not have made a valid declaration under Article 36 (2) of the Statute prior to that date. Accordingly, its purported declaration, which is dated 25 April 1999 and which was deposited the following day, is a nullity. The Written Statement of 18 December 2002 is, therefore, an abandonment by the Applicant of the optional

[5]UKPO, paras. 3.27-3.34.

clause as a basis for the jurisdiction of the Court. The Applicant no longer seeks — and can no longer seek — to rely upon the optional clause at all.

14. The second substantive paragraph of the Written Statement states that the Applicant did not become party to the Genocide Convention until March 2001. It could not, therefore, rely upon the Convention as a basis for the jurisdiction of the Court when it filed its application.

15. Again, the important point to notice here is that the Applicant is once more abandoning the basis on which it endeavoured, in its Application and Memorial, to found the jurisdiction of the Court.

16. The Written Statement is therefore significant at more than one level. It confirms much of what the United Kingdom has said in its preliminary objections and, indeed, in its oral submissions in 1999. Thus, it is now common ground between the Parties that the Applicant was not a Member of the United Nations or a party to the Statute of the Court at the time that it made its application and that it was not entitled to make a valid declaration under the optional clause. At this level, the Applicant's Written Statement reinforces the arguments which we have already made.

17. At a more fundamental level, however, it is necessary to ask how there can be jurisdiction in a case in which the Respondent has always denied that jurisdiction exists and the Applicant has now abandoned both of the grounds on which it sought to found jurisdiction. Although, as I have already mentioned, it is the Court which possesses the *compétence de la compétence*, the positions taken by the parties on the question of the Court's jurisdiction produce legal effects in their own right.

18. Article 36 (6) of the Statute, which states the principle of *compétence de la compétence,* specifies that "*in the event of a dispute as to whether the Court has jurisdiction*, the matter shall be settled by decision of the Court". But, in the light of the written pleadings, it is difficult to see that there is now any dispute as to jurisdiction. The United Kingdom has consistently denied that there is any basis for the jurisdiction of the Court and, given what it has said in its Written Statement, the Applicant now accepts that proposition.

19. As the Court has repeatedly made clear, Mr. President, "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"[6]. For that reason, Article 38 (2) of the Rules stipulates that the Applicant must, as far as possible, specify in its Application "the legal grounds upon which the jurisdiction of the Court is said to be based". But although the Court has never had occasion to pronounce on this issue until now, the jurisdiction of the Court cannot, we say, be founded upon a ground which a State asserts in its Application but then abandons before the Court at the preliminary objections stage of the proceedings.

20. Indeed, some measure of confirmation for that conclusion can be found in the very limited exception, which the Court has identified to the requirement that the grounds of jurisdiction must be specified in the Application. In the *Nicaragua* case, the Court accepted that "an additional ground of jurisdiction may be brought to the Court's attention later" but the Court insisted that it could only take such an additional basis into account "provided the Applicant makes it clear that it intends to proceed upon that basis"[7]. The insistence on that condition, we say, reflects the twin principles that, first, the Court can rely upon a particular basis of jurisdiction only if an Applicant puts it forward and, secondly, that the mere act of asserting a basis of jurisdiction is not enough; the Applicant must manifest an intention to "proceed upon that basis", in other words, it must continue to rely upon that title of jurisdiction.

21. The point appears to be a new one but the principle is clear. For the Court to exercise jurisdiction on a basis which has been abandoned by the Applicant and which was always denied by the Respondent, would make a mockery of the principle that jurisdiction is founded on the consent of the parties.

22. It follows, therefore, that irrespective of the reasons why the Applicant has abandoned the only legal grounds upon which it had asserted the jurisdiction might be based, the fact of that abandonment means that there is no basis upon which the Court can now exercise jurisdiction.

23. This, in our submission, is the end of the matter and it would be entirely appropriate for the Court simply to remove the case from its List. Nevertheless, in view of the unusual circumstances of this hearing, I shall go on to show that neither of the grounds originally advanced

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[6] *East Timor (Portugal* v. *Australia)*, *I.C.J. Reports 1995*, p. 101, para. 26, quoted in para. 19 of the Court's 1999 Order in the present case.

[7] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Jurisdiction, I.C.J. Reports 1984*, p. 392, para. 80.

by the Applicant — and now abandoned by it — could have afforded a basis for jurisdiction in any event.

THE OPTIONAL CLAUSE

24. Mr. President, if we first consider the optional clause, it is apparent that there are three distinct reasons why the 1969 declaration of the United Kingdom and the purported declaration made by the Federal Republic of Yugoslavia on 25 April 1999 cannot establish jurisdiction: *first,* as the Applicant now accepts, the declaration of 25 April 1999 was not a valid acceptance of Article 36 (2) jurisdiction; *secondly,* even if the April 1999 declaration had been valid, the effect of the reservations to that declaration is that the present case falls outside its scope; and *thirdly,* in any event, as the Court recognized in its Order of 2 June 1999[8], the effect of the United Kingdom's "twelve-month" reservation to its own declaration is to preclude the establishment of jurisdiction under Article 36 (2) in the case against the United Kingdom.

25. Mr. President, I can be relatively brief about the first two points, because they have already been thoroughly and very effectively covered by counsel for the other Respondents, whose arguments on this point the United Kingdom gratefully adopts.

The Applicant's purported declaration was a nullity

26. On the first point, I would only add the following. For the April 1999 declaration to be valid and effective as a basis of jurisdiction in this case, it is necessary that the Applicant was a party to the Statute of the Court at the date when the declaration was deposited and at the date when the Application was made in reliance upon it. These requirements can only be met if the Applicant was a Member of the United Nations on those dates.

27. Yet, Mr. President, that is precisely what all of those involved in the dissolution of the former Socialist Federal Republic of Yugoslavia deny. It's what was denied by the Security Council when it adopted resolution 757 (1992)[9], which expressly stated that the Applicant's claim automatically to continue the membership of the former SFRY in the United Nations had not been

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[8]Case concerning *Legality of Use of Force (Yugoslavia* v. *United Kingdom) (Provisional Measures), Order of 2 June 1999*, *I.C.J. Reports 1999,* paras. 23-25.

[9]UKPO, Ann. 22.

generally accepted. And then in resolution 777 (1992)[10], in which the Council considered that the Federal Republic of Yugoslavia could not automatically continue the membership of the Socialist Federal Republic of Yugoslavia and that it should apply for admission to the United Nations as a new Member.

28. It is what was denied by the General Assembly in similar terms, for example in resolution 47/1[11].

29. It is what was denied by the other successor States of the former Socialist Federal Republic of Yugoslavia, each of which was admitted to the United Nations as a new Member[12].

30. It is what was denied by the Arbitration Commission of the Peace Conference for the Former Yugoslavia, chaired by Judge Robert Badinter[13].

31. It is what was denied by other States involved in the region, including the United Kingdom[14].

32. And now, following the election in 2000 of a democratic government in Belgrade, it is exactly what is denied by the Applicant itself.

33. Finally, Mr. President, the stance taken by the relevant United Nations organs and by the other States and entities in 1992 and the years that followed it was later confirmed by the decision to admit the Applicant as a new Member of the United Nations in November 2000, after it had applied for membership on 27 October 2000[15]. As the Court has heard earlier today from other counsel, that decision is incompatible with the notion that the Applicant was already a Member of the United Nations in April 1999.

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[10]UKPO, Ann. 23.

[11]UKPO, Ann. 24.

[12]For their admission to the United Nations, see United Nations General Assembly resolutions 46/236 (Slovenia), 46/237 (Bosnian and Herzegovina), 46/238 (Croatia) and 47/225 (the Former Yugoslav Republic of Macedonia). For their rejection of the Federal Republic of Yugoslavia's claim to be the continuation of the former Socialist Federal Republic of Yugoslavia, see A/47/PV.7, pp. 152 (Croatia), 154 (Bosnia and Herzegovina), UKPO, Annex 25 and the statement at UKPO, Annex 28.

[13]Opinions 8, 9 and 10, 92 *ILR* 199, 103 and 206.

[14]For the United Kingdom's position, see, e.g., the statement by Sir David Hannay, A/47/PV.7, pp. 141-142 (UKPO, Ann. 25). See also the European Union statement quoted in para. 3.10 of the UKPO.

[15]Further Documents Nos. 1-10.

34. The recognition of these realities in the present case is in no way incompatible with the February 2003 decision[16] of the Court regarding the *Application for Revision* of the 1996 Judgment[17] in the *Genocide* case brought by Bosnia and Herzegovina against the Federal Republic of Yugoslavia. That, of course, was a case in which none of the Respondents in the present proceedings was involved and the Court's decision is, accordingly, not binding upon them.

35. But, in any event, Mr. President, the Court's decision of 3 February 2003 turned on the fact that the Federal Republic of Yugoslavia had failed to satisfy the requirements of Article 61 of the Statute. Those requirements are understandably strict, given that what is at stake is the revision of an earlier Judgment of the Court. The party which seeks such revision is required to demonstrate the existence of a fact which was unknown both to the Court and the party concerned at the time of the earlier Judgment.

36. In its February 2003 decision, the Court held that neither the admission of the Federal Republic of Yugoslavia to membership in November 2000, nor the consequences for its status at the time of the earlier Judgment which the Federal Republic sought to derive from that admission, constituted unknown facts of the kind required by Article 61 of the Statute[18].

37. But none of that is in issue here. Here there is no earlier judgment which anyone is seeking to revise, no hitherto unknown fact whose existence has to be demonstrated. In the *Bosnia* case the status of the Federal Republic of Yugoslavia had not been put in issue by either of the parties during any of the proceedings which led to the 1996 Judgment. By contrast, in the present case, the question whether the Applicant was entitled to make a declaration under Article 36 (2) of the Statute has been very much in issue from the outset.

38. Nor, Mr. President, is the United Kingdom contending that the admission of the Applicant to membership of the United Nations changed anything retrospectively[19]. Its relevance to the present proceedings is rather that it confirms, beyond any shadow of doubt, what the United Kingdom had said all along was the true position, namely that the Applicant was not a Member of

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[16] *Application for Revision of the Judgment of 11 July 1996 (Yugoslavia* v. *Bosnia and Herzegovina)*, Judgment of 3 February 2003.

[17] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Yugoslavia) (Preliminary Objections)*, *I.C.J. Reports 1996 (II)*, p. 595.

[18] *Application for Revision, Judgment, 3 February 2003,* paras. 68-70.

[19] Cp. *Application for Revision, Judgment, 3 February 2003,* para. 71.

the United Nations at the time when it purported to make a declaration under Article 36 (2) of the Statute.

39. It is true that, in the context of the *Application for Revision* case and in the light of the arguments of the parties in the Bosnian proceedings, which had begun as long ago as 1993, the Court considered that, prior to November 2000, the status of the Applicant had been *sui generis* and that the implications of the decision taken by the General Assembly in resolution 47/1 were determined on a case-by-case basis[20]. That is one way of describing the position as it appeared from the *Bosnia* proceedings. But it does not alter our fundamental proposition in this case that one of those consequences was that the Applicant could not, in April 1999, have made a valid declaration under Article 36 (2) of the Statute thereby entitling it to bring proceedings against States which had consistently denied that it was a party to the Statute of the Court.

40. Mr. President, between 1992 and 2000 there were good reasons to keep open means of communication with the Applicant at a time when the United Nations was seeking to bring about peace in a series of bitter conflicts, even if the price of maintaining those contacts was a measure of untidiness in the way in which the position of the Applicant vis-à-vis the United Nations was treated. But that is not a reason to treat the Applicant as having been a Member of the United Nations entitled to use the optional clause jurisdictional system of the Court, when all the evidence shows that it was not then regarded as possessing such a capacity.

The reservation to the Applicant's purported declaration excludes jurisdiction in the present case

41. The second reason, Mr. President, why the purported declaration of 25 April 1999 cannot found the jurisdiction of the Court is that, even if it were valid, the reservation attached to it means that the present case falls outside its terms in any event.

42. As this matter has been dealt with by a number of other counsel today, it is sufficient for me to note that the reservation to the Federal Republic of Yugoslavia's declaration explicitly and quite deliberately excludes the jurisdiction of the Court with regard to any dispute which arose before 25 April 1999 and any dispute, whenever it arose, with regard to situations or facts

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[20] *Application for Revision*, Judgment, 3 February 2003, paras. 70-71.

occurring before 25 April 1999. The dispute which the Applicant sought to put before the Court is excluded by both limbs of this formula.

43. Mr. President, we say that it is as plain as day from the terms of the Application that the dispute stated therein arose before 25 April 1999. The Application refers to a single "dispute" and relies almost entirely on allegations of facts said to have occurred before that date. At the hearings in 1999 the Applicant made what can only be described as a desperate effort to divide what was plainly one dispute into a series of "micro-disputes", arguing that each bomb dropped constituted a separate dispute. That artificial approach was rightly and understandably rejected by the Court[21].

44. Then, in its Memorial, the Applicant reverted to the concept of a single dispute. The Memorial makes no attempt to distinguish between events before and events after 25 April 1999. Instead, it relies on the argument that events after the adoption of Security Council resolution 1244 on 10 June 1999, introduced new elements which aggravated and extended *the* dispute with the result that that dispute must be deemed to have arisen after 25 April[22] and indeed after 10 June.

45. Mr. President, this is a truly extraordinary argument, as counsel for Canada has demonstrated. A dispute which the Applicant has described throughout as one concerning the legality of the use of force and the conduct of military operations only came into existence — on this analysis — after that use of force and those military operations had ceased and both the character and the legal basis for what was being done had changed.

46. The argument is also self-defeating. The Court's jurisprudence — in decisions such as *Nauru*[23] and *Fisheries Jurisdiction (Spain* v. *Canada)*[24] — establishes a principle that an applicant may not alter its claim in such a way as to go beyond the limits of the claim as set out in the Application. If the events said to have occurred after 10 June 1999 have indeed transformed the dispute, then that principle is violated. If they have not done so, then the Applicant is still seeking to bring before the Court a dispute excluded by the terms of its own reservation.

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[21]See, e.g., the Order of 2 June 1999 in *Yugoslavia* v. *Belgium*, para. 29.

[22]Memorial, paras. 3.2.12 to 3.2.16.

[23]Case concerning *Certain Phosphate Lands in Nauru*, *I.C.J. Reports 1992*, p. 240, para. 67.

[24]*I.C.J. Reports 1998*, p. 432, para. 29.

47. The true position, Mr. President, is that the dispute which the Applicant seeks to bring before the Court is one which plainly arose before 25 April 1999 — a fact which is demonstrated over and over again in the debates in the United Nations Security Council on 24 and 26 March 1999[25] and in the statements of the parties at that time, all of which are described at length in Part 4 of our Preliminary Objections. The dispute is also — as the Application and Memorial themselves make clear — one which is inseparable from facts occurring before 25 April 1999, so it falls fouls of the second limb of the reservation as well. If this is not a dispute with regard to the facts occurring before 25 April 1999, then why, the Court may ask, do such facts take so prominent a place in both the Application and the Memorial?

48. In framing its so-called declaration, the then Government of the Federal Republic of Yugoslavia chose to exclude a large category of disputes. It undeniably had the right to do so and, given its own conduct at that time, one can well understand why it did so. But now it must take the consequences.

The 12-month reservation to the United Kingdom declaration and the terms of the Court's Order of 2 June 1999

49. Turning now, Mr. President, to the third point about the optional clause, in so far as the Applicant has sought to rely upon the optional clause against the United Kingdom, it faces another separate and insuperable obstacle. The United Kingdom's declaration accepting the jurisdiction of the Court expressly excludes "disputes . . . where the acceptance of the compulsory jurisdiction of the Court on behalf of any other party to the dispute was deposited or ratified less than 12 months prior to the filing of the application bringing the dispute before the Court" — the 12-month reservation. The Applicant's purported declaration was deposited only three days before the Application in the present case was filed.

50. It was for this reason that the Court, in its Order of 2 June 1999 in the case against the United Kingdom, held that "the declarations made by the Parties under Article 36, paragraph 2, of the Statute *manifestly* cannot constitute a basis of jurisdiction in the present case, even prima facie"[26].

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[25]UKPO, Annexes 14 and 16.

[26]*Yugoslavia* v. *United Kingdom, Order of 2 June 1999*, para. 25.

51. The Court reached exactly the same conclusion in the parallel case brought against Spain. In the Spanish case, however, the Court ordered the removal of the case from the List[27]. The only distinction between the case against the United Kingdom and the case against Spain is that Spain had also reserved the application of Article IX of the Genocide Convention, so that that Convention also manifestly provided no basis for the jurisdiction of the Court.

52. It follows that the Court considered, in the case against Spain, that no subsequent development could have removed the effect of the Spanish temporal reservation and made Article 36 (2) a possible basis for the jurisdiction of the Court.

53. What was true of Spain, Mr. President, was — and remains — equally true of the United Kingdom, whose temporal reservation is substantially identical to that of Spain. Accordingly, the Court's Order of 2 June 1999, in the case against the United Kingdom, should, we say, be read as conclusive in respect of the optional clause and as leaving open for further argument only the question whether the Genocide Convention might furnish a basis for the jurisdiction of the Court. Otherwise there would be an unexplained and inexplicable discrimination between the two Respondents, something the Court cannot have intended.

54. In any event, it is clear that the temporal reservation to the United Kingdom's declaration excludes jurisdiction today just as it did in 1999. In its Memorial, the Applicant — after quoting at length from the Court's 1996 Judgment in the *Genocide Convention* case — merely asserts that "It is evident that the Application failed to meet the twelve month requirement in . . . the United Kingdom reservation but it is also evident that this requirement will be satisfied if the oral hearings on the merits start after 25 April 2000, which is very likely."[28]

55. That argument, we say, misunderstands the Court's jurisprudence on reservations under the optional clause and it is based on a misreading of the United Kingdom reservation. The 1996 Judgment in the *Genocide Convention* case[29], on which the Memorial places so much reliance, has no bearing whatever on this issue, as the United Kingdom has explained in paragraphs 4.24 and 4.25 of its Preliminary Objections.

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[27] *Yugoslavia* v. *Spain*, *Order of 2 June 1999*, paras. 35 and 40.

[28] Memorial, para. 3.2.22.

[29] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Yugoslavia), Preliminary Objections*, *I.C.J. Reports 1996*, p. 595.

56. The Court has repeatedly made plain that its jurisdiction must be established at the date on which the application in a case is filed. One has only to recall, for example, the decisions in the *Lockerbie* and *Arrest Warrant* cases[30]. This elementary and fundamental principle is quite different from — and entirely consistent with — the Court taking account of developments subsequent to the filing of an application where those developments shed light on what was the true position at the time that the Application was filed.

57. In the present case, the Court itself has held that jurisdiction on the basis of the two optional clause declarations *manifestly* did not exist at that date. The fact that, if one assumed that the Applicant's declaration was valid — which is, of course, contested — it might have been open to the Applicant, from late April 2000 onwards, to file a fresh application is neither here nor there. The Applicant did not, and has not sought to do so.

58. In any event, Mr. President, the language of the United Kingdom reservation is clear: the United Kingdom does not accept the jurisdiction of the Court in respect of a dispute in which the acceptance of the compulsory jurisdiction by any other party to the dispute was deposited or ratified "less than twelve months prior to the filing of the application". The reservation thus states an objective condition which must be satisfied — and which can only be satisfied — at the date on which an application against the United Kingdom is filed. Events occurring after that date cannot retrospectively change either the date on which the declaration was deposited or ratified or the date on which the application was filed. They cannot, therefore, alter the effect of the reservation.

59. For all these reasons, Article 36 (2) of the Statute could not establish jurisdiction in the present case, even if the Applicant were still seeking to rely upon it.

The Genocide Convention

60. Let me now turn briefly to the Genocide Convention.

61. The Applicant's Written Statement of 18 December 2002 makes clear that the Applicant does not consider that it was a party to the Genocide Convention in 1999, that it has never accepted the jurisdictional provisions of Article IX of that Convention and that it no longer relies on the

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[30]Case concerning *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya* v. *United Kingdom), Preliminary Objections*, *I.C.J. Reports 1998*, p. 9, para. 38; case concerning the *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo* v. *Belgium)*, 14 February 2002, para. 26.

Genocide Convention as a basis for the jurisdiction of the Court. For the reasons already given, the United Kingdom submits that the Court need look no further than that statement, which amounts to a clear and unequivocal abandonment of any reliance on Article IX of the Genocide Convention as a basis for jurisdiction.

62. But even if that were not so, the Genocide Convention cannot afford a basis for the jurisdiction of the Court in this case, Mr. President. Even if all the other requirements were met, Article IX of that Convention could confer jurisdiction only in respect of "disputes between Contracting Parties relating to the interpretation, application or fulfilment of [that] Convention". Any jurisdiction conferred by Article IX is therefore closely circumscribed in relation to its subject-matter and, as the Court has held (in the *Oil Platforms* case[31] and in the provisional measures stage of the present case[32]), the Court must, at the preliminary objections stage, ascertain whether the allegations pleaded are ones which fall within the provisions of the treaty and which the Court therefore has jurisdiction *ratione materiae* to entertain.

63. The Genocide Convention deals with a crime which, in the Court's words, involves "a denial of the right of existence of entire human groups, a denial which shocks the conscience of mankind and results in great losses to humanity"[33]. As the Court has held, its essential characteristic is "the intended destruction of a national, ethnical, racial or religious group" as such[34].

64. The two international criminal tribunals which have tried cases of genocide have followed the Court in being equally strict in this requirement. In our Written Preliminary Objections we cited some of the decisions of the International Criminal Tribunal for Rwanda. And in a judgment of the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia, given this morning, in a case about the massacre at Srebrenica, the Appeals Chamber had this to say — and I quote from their judgment in the case of the Prosecutor in *Krstic*:

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[31]Case concerning *Oil Platforms (Islamic Republic of Iran* v. *United States of America), Preliminary Objection, I.C.J. Reports 1996*, p. 803, para. 16. See also the separate opinion of Judge Higgins at para. 29.

[32]*Yugoslavia* v. *United Kingdom*, *Order of 2 June 1999,* paras. 33-36.

[33]Advisory Opinion on *Reservations to the Genocide Convention*, *I.C.J. Reports 1951*, p. 15, p. 23.

[34]*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Yugoslavia), Provisional Measures*, *I.C.J. Reports 1993*, p. 325, para. 42.

> "The crime of genocide is singled out for special condemnation and opprobrium. The crime is horrific in its scope. Its perpetrators identify entire human groups for extinction. Those who devise and implement genocide seek to deprive humanity of the manifold richness its nationalities, races, ethnicities and religions provide."

And then a little later in the same judgment:

> "The gravity of genocide is reflected in the stringent requirements which must be satisfied before the conviction is imposed. These requirements, the demanding proof of specific intent and the showing that the group was targeted for destruction in its entirety or in substantial part, guard against the danger that convictions for this crime will be imposed lightly."

65. But, Mr. President, the intentional destruction or attempted destruction of a national, racial, ethnic or religious group is not even remotely what this case is about. As the Application makes clear, it is about the legality of the use of force. But that is something entirely different from genocide, as the Court made clear at the provisional measures stage in the present case[35]. The present case is also about alleged violations of international humanitarian law, the law of armed conflict. But again, that has nothing to do with genocide, unless there is the element of intention required by the Convention.

66. At the provisional measures stage, the Applicant invited the Court to infer that such intention existed from the fact that the attacks by NATO forces had caused civilian casualties, from the nature of some of the weapons said to have been employed, and from the targets selected. The Court, however, declined to do so.

67. How, then, did the Applicant deal with the issue in its Memorial. In a volume of over 350 pages, it devoted two to what it describes as "facts related to the existence of an intent to commit genocide"[36] and then one further page to the law on the subject (which is confined to a recitation of the provisions of the Genocide Convention)[37]. The Memorial invited the Court to infer an intention to commit genocide from the fact that depleted uranium ammunition was used and chemical plants were targeted and it then added a number of allegations about the treatment of Serbs in Kosovo after the deployment of KFOR troops there in accordance with Security Council resolution 1244 (1999). And on that flimsy basis, the Memorial concludes that "the Applicant has

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[35]Order of 2 June 1999, para. 35.

[36]Memorial, pp. 282-4.

[37]Memorial, p. 326.

submitted evidence on the intent to commit genocide . . . accordingly the Applicant claims that the jurisdiction of the Court, based on Article IX of the Genocide Convention, is established"[38].

68. Mr. President, that is nonsense. The intention to commit genocide is a serious matter and it is not something to be lightly alleged, still less to be lightly inferred from the way in which hostilities are conducted in an armed conflict. The United Kingdom has dealt with this issue in detail in Part 5 of its Preliminary Objections and I will not repeat them here. For present purposes, it suffices to make the following brief points.

69. The use of a particular weapon, even one that is prohibited by international agreement (and that is manifestly not the case here), is not something from which an intent to commit genocide can be inferred. The complete failure in the Memorial to address the consideration of this issue by the Court in the *Nuclear Weapons* Advisory Opinion or the reasoning on this point in the Court's Provisional Measures Order in the present case is eloquent testimony to the lack of substance of the Applicant's case on this point.

70. Likewise, Mr. President, the suggestion that attacks on chemical plants constitute evidence of genocidal intent is fanciful. It is based on the notion that "the responsible individuals of the respondents *should have known* that strikes against such facilities *may* incur an additional risk to the population"[39]. In other words, because someone is to be presumed to have known that an attack *might* give rise to additional risks to the civilian population, the State has to be presumed to have intended not only to kill those civilians but to destroy a national, ethnic, racial or religious group as such. It is precisely, Mr. President, the same argument that the Court rejected at the provisional measures stage.

71. Indeed, it is not only the same argument, the so-called "facts" invoked in support of it are the same. We have the same allegations about depleted uranium and attacks on chemical plants being made by the Applicant at the provisional measures stage and the Court held then that the inferences which the Applicant invited it to draw from them were not sufficient to bring the case within the scope of the Genocide Convention. Mr. President, the Applicant's arguments are no stronger now in 2004 than they were then in 1999.

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[38]Memorial, p. 349, para. 3.4.3.

[39]Memorial, p. 282, para. 1.6.1.1.

72. I might add that it is also striking that this passage of the Memorial makes no attempt whatever to identify any intention specific to the United Kingdom. Instead, it invites the Court to find the intention which is the indispensable element of genocide, by means of a triple presumption. Because attacks on targets near to civilians can be expected to cause civilian casualties, NATO must be *presumed* to have intended to cause those casualties. Because NATO is presumed to have intended to cause civilian casualties, it must be *presumed* to have intended to destroy a national, ethnic, racial or religious group. And because the United Kingdom is a member of NATO, the United Kingdom must be *presumed* to have intended to destroy such a group as well.

73. This approach makes a mockery of the Genocide Convention, Mr. President, and should be given no encouragement by the Court. It treats as genocide all military action, including military action conducted in strict compliance with the laws of armed conflict, and it reduces the specific intent requirement of the Convention to a mere formality. Both the jurisprudence of the Court and the need to preserve the integrity of the Convention call for the immediate rejection — here and now — of what is an abuse of the Convention.

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74. Mr. President, that leaves only the allegations about the situation in Kosovo after the adoption of Security Council resolution 1244. In its Memorial the Applicant introduced a new claim that the KFOR troops deployed under the authority of the Security Council given in that resolution and operating alongside a United Nations civil administration, UNMIK, were complicit in attacks on Serbs and other non-Albanians in Kosovo after 10 June 1999.

75. Two points must be made about this new claim. First, like the Applicant's other Genocide Convention claims, it is patently incapable of falling within the provisions of that treaty. There is no conceivable factual basis for any suggestion that KFOR or UNMIK — the two bodies entrusted by the Security Council with the maintenance of law and order in Kosovo since the adoption of resolution 1244 — have done anything that could possibly fall within the scope of the Genocide Convention. On the contrary, KFOR and UNMIK have consistently condemned all ethnic violence in Kosovo and KFOR troops have acted to protect Serb communities there. The outbreak of violence in March 2004 is a case in point. KFOR troops took immediate action to

protect vulnerable Serb communities from the inter-ethnic violence. Indeed, 61 KFOR personnel, as well as 65 officers of the UNMIK police in Kosovo, were injured doing so and one police officer was killed. In reporting on these events to the United Nations Security Council, the Under Secretary-General for Peacekeeping Operations expressly thanked NATO for its swift response and the immediate despatch of extra troops — 750 of whom were British[40]. It is absurd to suggest that the conduct of the United Kingdom — as one of the contributor States of KFOR — comes anywhere near the scope of the Genocide Convention.

76. Secondly — and this point is relevant not just to the Genocide Convention but more broadly to the admissibility of this new claim — the new claim regarding the conduct of the United Kingdom and other contingents in KFOR is wholly different from what is contained in the Application. It cannot, consistent with the Court's jurisprudence, be added to the case at the stage of the Memorial. The Court has consistently held inadmissible "new claims, formulated during the course of the proceedings, which, if they had been entertained, would have transformed the subject of the dispute originally brought before it under the terms of the Application"[41].

77. This is just such a claim. What has been happening in Kosovo under United Nations administration differs both in fact and in legal basis from the NATO military campaign which preceded it. To allow the addition of claims in respect of the period after 10 June 1999 would transform the case both in law and in fact, entailing a challenge to the authority of the Security Council and the way in which KFOR — to which some 18 States from outside NATO currently contribute forces — and UNMIK have discharged their mandates from the Council.

CONCLUSION

78. In conclusion, Mr. President, the United Kingdom considers that the stance now taken by the Applicant — abandoning the only grounds for jurisdiction which it has put forward — makes it impossible for this case to continue. We believe that it is open to the Court to recognize this fact by the simple course of removing the case from the List and we invite you to do so.

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[40] United Nations doc. S/PV.4942, p. 4.

[41] *Fisheries Jurisdiction (Spain* v. *Canada)*, para, 29.

79. But should the Court consider that it must give judgment on the Preliminary Objections put to it, the United Kingdom will repeat the submissions made in its Preliminary Objections. In our view, the Court has no jurisdiction with respect to the present claims. Moreover, those claims are not admissible. We note that the Applicant has not contested either submission and that its only response has been, in effect, to endorse the principal submission regarding the lack of jurisdiction. For that, and for the other reasons which we have given, we shall invite the Court to rule accordingly.

Mr. President, I thank the Court for its patience. With your permission, that concludes the arguments of the United Kingdom in the first round of the pleadings.

The PRESIDENT: Thank you, Professor Greenwood. This brings to a close the first round of hearings of the United Kingdom. The Court will resume at 10 o'clock tomorrow morning when it will hear the oral pleadings of Germany, France and Italy.

The sitting is now closed.

The Court rose at 6.05 p.m.

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