CR 2004/19

International Court of Justice

THE HAGUE

Cour internationale de Justice

LA HAYE

YEAR 2004

Public sitting

held on Thursday 22 April 2004, at 3 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 jeudi 22 avril 2004, à 15 heures, 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

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

as Co-agent, Counsel and Advocate;

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

Ms Marijana Santrač,

Ms Dina Dobrković,

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Mr. Vladimir Srećković, Ministry of Foreign Affairs,

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

as Deputy Agent;

Mr. Christopher Greenwood, C.M.G., Q.C., Professor of International Law, London School of Economics and Political Science, member of the English Bar,

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comme conseil;

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

as Adviser.

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

comme conseiller.

The PRESIDENT: Please be seated. The sitting is open. The Court meets this afternoon to hear the second round of oral argument of the United Kingdom, Germany, France and Italy.

I now give the floor to Professor Greenwood, counsel for the United Kingdom.

Mr. GREENWOOD: Mr. President, Members of the Court, may it please the Court,

1. I will respond to some of the submissions made yesterday by the Applicant. Before I do so, however, there are two preliminary points which I wish to make.

2. First, Mr. President, you will have noted that to some degree the Applicant's counsel yesterday dwelt on political matters, and matters more appropriate for a hearing on the merits. The Applicant even repeated unfounded allegations about the nature and objectives of the Kosovo action. Such comments, we submit, are wholly out of place in the present hearing, which is limited to jurisdiction and admissibility, and I shall not be drawn into responding to them. Needless to say, the United Kingdom utterly rejects the allegations that the NATO action, which was aimed solely at averting a humanitarian catastrophe, was an attack on the population of the Federal Republic of Yugoslavia as a whole. Likewise, we consider wholly unfounded the allegations that that action was carried out other than in accordance with the most scrupulous regard for international humanitarian law, or that it might amount — even arguably — to genocide.

3. Secondly, Mr. President, Members of the Court will have noted that the Applicant's arguments yesterday went outside what is set out either in their Memorial or in their Written Statement. It is surely not open to the Applicant to raise such substantial points at the oral hearings after ignoring them in their written pleadings. I shall not labour the point, as it was effectively dealt with by other counsel this morning. I merely note that, at the very least, this way of proceeding raises serious issues of procedural fairness and the proper administration of justice.

4. But as we understand it, the Applicant's principal submissions remain as set out in its Written Statement, namely that the Federal Republic of Yugoslavia was not a Member of the United Nations, was not a party to the Statute and was not a party to the Genocide Convention and that the Court is asked to decide "whether it had or did not have jurisdiction" in the light of that

Written Statement[1]. Most of the submissions advanced yesterday — noticeably those by Professor Brownlie and Mr. Djerić — were therefore wholly subsidiary in character and were put forward by the Applicant only as alternatives to its principal submissions.

5. I shall not attempt to respond to all the points made yesterday by the Applicant. But I must make it clear that the United Kingdom stands by all its Preliminary Objections. I also note and adopt the points made this morning regarding the Applicant's silence, first of all on the admissibility of its claims regarding the period after 10 June 1999 and secondly on our submission that issues of jurisdiction must be determined as at the date of the Application.

6. Mr. President, with your permission, I shall address four points:

(a) first, and foremost, the status of the Federal Republic of Yugoslavia in the period 1992 to 2000 in the light of the Applicant's Written Submissions and oral argument yesterday;

(b) secondly, the temporal limitation in the Applicant's optional clause declaration;

(c) thirdly, the 12-month reservation in the United Kingdom's optional clause declaration; and

(d) lastly, the Applicant's arguments regarding the scope of the Genocide Convention.

The status of Yugoslavia

7. Let me first say a word about what Serbia and Montenegro now says, in its Written Statement and orally yesterday, about the status of Yugoslavia (that is to say the former Yugoslavia and/or the Federal Republic of Yugoslavia) in the period 1992 to 2000. There is now much common ground between ourselves and the Applicant on this matter.

8. We listened very carefully to what the Agent for Serbia and Montenegro, Professor Varady, had to say on this subject yesterday. He added some useful further clarification, including his quotation from the Historical Information section of the document entitled *Status of Multilateral Treaties deposited with the Secretary-General*[2]. As he said, that document, under the heading "former Yugoslavia" clarified that "the [United Nations] Legal Counsel took the view that [General Assembly resolution 47/1] neither terminated nor suspended the membership of the *former* Yugoslavia in the United Nations". Professor Varady also referred to a letter dated

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[1]First round speech of Professor Varady, CR 2004/14, para. 35.

[2]First round speech of Professor Varady, CR 2004/14, paras. 51-52.

27 December 2001 from the United Nations Secretary-General concerning the assessed contributions of the former Yugoslavia. That lead us to make some further enquiries overnight, Mr. President. The July 2002 report of the Committee on Contributions, which the Court will find as United Nations document A.57/11, indicates that that Committee shared the view set out in the Secretary-General's letter concerning the status of the former Yugoslavia. It also reveals that all five successor States denied liability for the arrears of what they described as a State that had ceased to exist. In its essentials, the position of Serbia and Montenegro on this point is now the same as that of the United Kingdom.

9. We agree with Serbia and Montenegro that the Federal Republic of Yugoslavia was not a Member of the United Nations and that it was not a party to the Statute until 1 November 2000. Moreover, Serbia and Montenegro's position on this matter is, we say, decisive in these jurisdictional proceedings. Accordingly, we submit that it is clear that the Court cannot take jurisdiction in this case. Whether the Court gives effect to this fact by striking the case off its List or by adopting a judgment is essentially a matter of form.

The optional clause: the temporal issue

10. I next turn to the argument, expounded yesterday by Professor Brownlie, regarding the effect of the Applicant's purported optional clause declaration on the jurisdiction of the Court *ratione temporis*[3]. This argument of course presupposed the validity of the declaration, though it is now common ground that on 25 April 1999 the Applicant could not have made a valid optional clause declaration. It follows that the Applicant's submissions on this point were very much a second order argument.

11. Mr. President, the Court heard so much about that declaration and its meaning yesterday that it is worth reminding ourselves what the relevant part actually says. The Federal Republic of Yugoslavia purported to recognize the jurisdiction of the Court "in all disputes arising or which may arise after the signature of the present Declaration, with regard to the situations or facts subsequent to this signature".

[3]First round speech of Professor Brownlie, CR 2004/4, pp. 36-45, paras. 34-68.

12. In our submission, those words are perfectly clear. The jurisdiction of the Court is accepted only with regard to disputes arising or which may arise after the date of signature and then only with regard to situations or facts subsequent to that date. Despite the Applicant's very best efforts, the conditions *are* cumulative. If a dispute arose before the signature of that declaration it was excluded from the acceptance of the Court's jurisdiction. Similarly, if a dispute arose after the date of signature but with regard to situations or facts prior to that date, it was again excluded. That is the natural and ordinary meaning of the words used and the long list of authorities cited yesterday confirms that it is to the natural and ordinary meaning of the words used in an optional clause declaration that the Court will turn in the event of a dispute regarding interpretation.

13. For example, in the first of the authorities cited by the Applicant, the *Temple* case, the Court said that "words are to be interpreted according to their natural and ordinary meaning in the context in which they occur"[4]. And in the *Anglo-Iranian* case, cited this morning, every declaration "must be interpreted as it stands, having regard to the words actually used"[5]. Moreover, when having regard to the intention of the State making the declaration, the Court has not set up the intention of the framer as something which overrides the natural meaning of the words used; it has rather referred to it as something which marches hand in hand with the natural and ordinary meaning of the words. Thus, in the *Anglo-Iranian* case, the Court held that the words chosen by Iran were "decisive confirmation" of its intention[6]. Similarly, in the *Fisheries Jurisdiction* case between Spain and Canada, the evidence of Canada's intention pointed to a meaning which also corresponded with the natural reading of the words used[7].

14. Still more recently, in the *Aerial Incident* case between Pakistan and India, a case in which the applicant argued in vain to read the declaration in ways which ignored the natural meaning of the words used, the Court repeated the formula it had used in *Anglo-Iranian* and emphasized "the intention of the declarant State, *as expressed in the actual text of the declaration*"[8].

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[4] *I.C.J. Reports 1961*, p. 33.

[5] *I.C.J. Reports 1952*, p. 105.

[6] *I.C.J. Reports 1952*, p. 107.

[7] *I.C.J. Reports 1998*, p. 454, para. 49.

[8] *Aerial Incident of 10 August 1999 (Pakistan* v. *India),* Judgment of 21 June 2000, para. 44.

15. Now, counsel for the Applicant effectively invited you to disregard the natural meaning of the words used in the optional clause declaration — and which I have just quoted. He argued instead for an interpretation for which there is no textual warrant at all but which is said to reflect the Applicant's intentions in April 1999.

16. Professor Brownlie put forward four reasons for the Court to hold that the Applicant's declaration does not mean what it so obviously says[9]. First, he said

> "The declaration must be construed on its own and in its temporal context. The formula is not 'all disputes' but 'all disputes . . . with regard to the situations or facts subsequent to this signature . . .' The hostilities which were begun on 24 March 1999 were to be subject to the Court's legal assessment: that was the clear intention of the declaration."[10]

But with great respect, it is difficult to see that this means anything at all. In particular, it is difficult — and I put it mildly — to see how the conclusion that hostilities which began on 24 March were intended to be subjected to the legal assessment of the Court: it follows from the expedient of using a formula which stipulated that the dispute must have regard to facts or situations subsequent to 25 April of that year.

17. Secondly, Mr. President, Professor Brownlie told us that "[t]here is no sufficient evidence of a double exclusion formula"[11]. Well, the Court might find that strange, given the language chosen by the then Government of the FRY, and that choice of language was a — presumably deliberate — selection of what Judge Higgins has pointed out, in her lecture on "Time and the Law"[12], is a well-established formula, first employed by Belgium in 1925, and long known as the "double exclusion" formula.

18. But in explaining his second point, Professor Brownlie added that it was not until the Application in the present case was filed that a dispute crystallized and this was, of course, after the date on which the declaration was signed. But, Mr. President, that is not at all the way in which the question of the date at which a dispute arises has been treated by the Court in the past and the citation of the many learned references offered to the Court ignored the very different contexts in

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[9]CR 2004/14, pp. 38-40.

[10]First round speech of Professor Brownlie, CR 2004/14, pp. 38-39, para. 44.

[11]First round speech of Professor Brownlie, CR 2004/14, p. 39, para. 45.

[12](1997) 46 *ICLQ* 501, p. 502.

which the word "dispute" is used. Moreover, as counsel for Portugal explained this morning, the Applicant's approach would render meaningless the first limb of this well-established formula, because it would mean that the date on which any dispute arose would always be the date on which application was made to the Court and therefore would always follow the declaration in question. It also of course — the argument — wholly fails to circumvent the obstacle created by the second limb of the formula.

19. The third reason advanced was that "[t]he Yugoslav declaration is not drafted in such a way as to be retrospective but prospective"[13]. But that, of course, is precisely *our* point. The declaration was drafted so as to accept jurisdiction in respect of future disputes concerning future situations or future facts *and only such disputes*.

20. Finally, Mr. President, Professor Brownlie referred to the International Law Commission Articles on State Responsibility and their 1978 and 2001 provisions regarding continuing breaches[14]. But those provisions were — and are — concerned with the extension in time of a breach of an international obligation, not with the quite distinct question of when a dispute arises. While it makes perfect sense to speak of a breach of an obligation being of a continuing character, in certain circumstances, a dispute can arise only at a fixed point in time, even if it concerns such a breach.

21. In our submission, therefore, the argument that seeks to explain away the plain language of the declaration is simply unconvincing.

22. I would like make three further, very brief points on this matter. The first is that Professor Brownlie very candidly told the Court that his analysis of the dispute may have superseded that in the Memorial. Given that it is diametrically at odds with the language of the Memorial, I think that proposition could be accepted[15]. The analysis in the Memorial, of course, had in turn superseded that which was offered to the Court in the 1999 hearings which had itself superseded that on which the Application appears to have been based. And this not only makes a mockery out of any concept of the orderly administration of justice, the constant changes of heart

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[13]First round speech of Professor Brownlie, CR 2004/14, p. 39, para. 46.

[14]First round speech of Professor Brownlie, CR 2004/14, pp. 39-40, paras. 47-49.

[15]First round speech of Professor Brownlie, CR 2004/14, p. 43, para. 59.

also, we say, cast doubt on the plausibility of the case now being advanced as the Applicant struggles to reconcile the words it chose in 1999 with its desire to bring a highly selective version of events before the Court.

23. Secondly, Professor Brownlie attempted to brush aside the argument that the dispute in the present case had been evident as early as the debates in the Security Council on 24 and 26 March 1999. He told the Court that the Yugoslav representative had made no reference to a legal dispute in those debates and that references to the law had been confined to the effect of Security Council resolutions.

24. Now, it is, of course, true that the Council is a political organ and that the term "legal dispute" may not have been used. But it is also clear from even a cursory reading of those debates that they demonstrated a clear difference between the Parties to the present case regarding the legality of the NATO action. What Mr. Jovanovic actually said — on 24 March 1999 — was "this blatant aggression is a flagrant violation of the basic principles of the Charter of the United Nations"[16]. And on 26 March 1999, "my country has been the victim of a brutal unlawful aggression" which was "unjust, illegal, indecent and unscrupulous"[17]. And that followed statements by the United Kingdom representative that the action was lawful[18] and, on 26 March 1999, Mr. Jovanovic's comments were made in the context of discussion of a draft resolution which called on the Council to affirm that the NATO action was "a flagrant violation of the United Nations Charter, and in particular Articles 2 (4), 24 and 53"[19], a resolution which was, of course, defeated by twelve votes to three.

25. Those quotations also show that counsel's statement that "the legal references, such as they were, were to resolutions of the Security Council"[20] was also wide of the mark. It is not at all surprising, we submit, that the Court, in 1999, said that it had

> "no doubt, in the light, *inter alia*, of the discussions at the Security Council meetings of 24 and 26 March 1999 . . . that a 'legal dispute' . . . arose between Yugoslavia and

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[16]UKPO, Ann. 19, p.13.

[17]UKPO, Ann. 16, p.11.

[18]UKPO, Ann. 14, p.12; Ann. 16, p. 7.

[19]UKPO, Ann. 15.

[20]First round speech of Professor Brownlie, CR 2004/14, p. 42, para. 58.

the Respondent, as it did also with the other NATO member States, well before 25 April 1999 concerning the legality of those bombings taken as a whole"[21].

26. Lastly, Mr. President, let me say something about the oft-repeated assertion that nothing else matters because it was clearly the intention of the then Government of the FRY that its declaration should cover the dispute about the NATO campaign. As I have already demonstrated, when the Court has referred to the intention of the State as an aid to the interpretation of a declaration, it has not done so in a way that disregards the ordinary meaning of the words used. But also it has had before it evidence — in the form of drafting history or other contemporary documents, such as the advice to the Greek Government from Mr. Politis in the *Aegean Sea* case[22] or the parliamentary statement in the Spain-Canada case[23] — from which to deduce precisely what was the intention of the State making the declaration.

27. Now, no evidence of that kind has been offered to the Court in *this* case, Mr. President. Instead the Court is asked simply to accept that bringing the NATO States before the Court *must* have been the reason why the Applicant made its purported declaration when it did. And that is a wholly unsatisfactory basis on which to proceed.

28. But, Mr. President, if we are going to play that game, then I suggest that the then Government of the FRY intended rather more than counsel told you. If it had wanted to take the NATO action before the Court, it had also surely been just as keen to ensure that no one could call it to account before the Court over earlier events in Kosovo. Had the United Kingdom or another State brought proceedings before this Court regarding those events and had sought to rely on the April 1999 declaration, you would be hearing a very different explanation indeed of the date on which a dispute arises and the intentions of the framers of the declaration from the one that you heard yesterday.

29. The application of an optional clause declaration is not simply a matter of giving effect to what the Court is now told was the intention of the framer as regards the cases he wanted to bring before the Court. The declaration, and the intentions of its maker, must be taken as a whole. If a State, for whatever reason, chooses to exclude a category of disputes that concern it, then it must

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[21] *Yugoslavia* v. *Belgium, I.C.J. Reports 1999*, p. 124, para. 28.

[22] *I.C.J. Reports 1978*, p. 30, para. 70.

[23] *I.C.J. Reports 1998*, p. 454 para .49.

live with that choice not only as a potential applicant but also as a respondent. A State cannot be allowed, as we say, to have its cake and eat it — relying on one reading of its declaration when it appears as applicant and a quite different one when it appears as respondent.

30. None of the long line of authorities cited yesterday by counsel for the Applicant comes anywhere near suggesting a different conclusion. Indeed, he might have done better to have relied on the older authority of Humpty Dumpty, who told Alice, in *Alice Through the Looking Glass* that "when I use a word it means just what I want it to mean; neither more nor less"[24]. Appropriately enough, Mr. President, *Alice Through the Looking Glass* is a fantasy story. Indeed, Humpty Dumpty might have been rather impressed with the Applicant's approach to the meaning of words, since Humpty Dumpty appears to have thought that, once used, his words retained the same meaning, while the Applicant's words are clearly expected to change with its changing intentions.

The optional clause: the 12-month reservation

31. Mr. President, let me now turn to the arguments regarding the 12-month reservation to the United Kingdom's optional clause declaration. On this matter, I need make only three points — all of them brief.

32. First, counsel for the Applicant ignored, in his speech yesterday, the fact that the Court's Order of 2 June 1999, in the case against the United Kingdom, simply does not leave open the possibility of the optional clause being a basis for the jurisdiction. In contrast to its findings regarding Article IX of the Genocide Convention in all eight cases and its decision regarding the optional clause in four of them, the Court held that, as against the United Kingdom, the optional clause *manifestly* did not afford a basis for the jurisdiction of the Court[25]. Paragraph 38 of the Court's Order in the case against the United Kingdom went on to state the following:

> "the findings reached by the Court in the present proceedings in no way prejudge *the question of the jurisdiction of the Court to deal with the merits of the case under Article IX of the Genocide Convention*, or any questions relating to the admissibility of the Application, or relating to the merits themselves; and . . . they leave unaffected the right of the Governments of Yugoslavia and the United Kingdom to submit arguments in respect of *those* questions."

There is no mention there of further argument on the optional clause.

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[24]Lewis Carroll, *Alice through the Looking Glass*, Chap. 6.

[25]*Yugoslavia* v. *United Kingdom, I.C.J. Reports 1999*, para. 25.

33. As we pointed out in the first round[26], Mr. President, the Court's treatment of Spain also compels the conclusion that the Court did not mean to leave open the question of optional clause jurisdiction in the case against the United Kingdom. Where there is a manifest absence of jurisdiction, the appropriate course for the Court is to remove the case from its List. That is what the Court did in the case against Spain and, but for Article IX of the Genocide Convention, it is what it would have done in the case against the United Kingdom. We note that counsel for the Applicant said nothing at all about this.

34. Secondly, in any event, Professor Brownlie's argument is contrary to the plain language of the United Kingdom reservation. That reservation excludes from the acceptance of the jurisdiction any dispute where the acceptance of the Court's compulsory jurisdiction was deposited or ratified less than 12 months prior to the filing of the application. Both in our Preliminary Objections and in our first round speech we made the point that this sets an objective condition which is either satisfied on the day the application is filed or can never be satisfied. Professor Brownlie commented that this observation "begged the question" but, with respect, what question? The words mean what they say.

35. Lastly, Mr. President, it was argued that, whatever the United Kingdom reservation said, its effect could be overridden because the applicant could always bring a new application today and the Court was not obliged to attach to defects of form the importance which they might possess in municipal law.

36. But this is no matter of form. As the Court explained in the *Fisheries Jurisdiction (Spain* v. *Canada)* case, a declaration under the optional clause is "a unilateral act of State sovereignty"[27] and "it is for each State, in formulating its declaration, to decide upon the limits it places upon its acceptance of the jurisdiction of the Court"[28]. If those limits are exceeded, the Court quite simply lacks jurisdiction. The United Kingdom placed a limit on its acceptance of the jurisdiction of the Court and that limit has plainly been exceeded here. That is an end of the matter.

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[26]First round speech of Professor Greenwood, CR 2004/10, p. 18, paras. 51-53.

[27]*I.C.J. Reports 1998*, p. 454, para. 46.

[28]*I.C.J. Reports 1998*, p. 454, para. 44.

The Genocide Convention

37. Lastly, Mr. President, a few comments in response to Professor Brownlie's submissions on Article IX of the Genocide Convention.

38. Of course we accept his point that the Court's Order of 1999 was not a definitive ruling on the Genocide Convention. But it was a decision that, prima facie, and on the basis of the facts and arguments then before the Court, the action of the United Kingdom did not entail that element of intent to destroy a protected group which the Court has held to be the essential characteristic of the crime of genocide[29].

39. The Order left the Parties free to make further submissions on this point[30] and it was, of course, for the Applicant to do so if it wished to achieve a different result from the one it had obtained in 1999. The Rules make clear that the place for the Applicant to do that was in its Memorial.

40. But the Memorial merely restated what the Applicant had said — and the Court had rejected — in 1999. In these circumstances, there is no reason — and no basis — for the Court to depart today from the conclusion which it reached on a prima facie basis in 1999.

41. Not until yesterday did we at last hear any further argument. Then we were regaled with a 30-minute submission making arguments and referring to authorities never mentioned in the Memorial[31]. Mr. President, we submit that it is far too late for that. An Applicant whose treatment of the legal issues concerning the Genocide Convention in its Memorial does nothing more than recite the provisions of the Convention and whose response, in its written submissions, to our own detailed arguments is to ignore the issue altogether, cannot expect the Court to allow it to make its case for the first time at the oral hearings.

42. But even if the Applicant's argument were not out of time, it would make no difference. The argument still comes nowhere near what would be necessary to bring this claim within the scope of the Genocide Convention.

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[29] *Yugoslavia* v. *United Kingdom, I.C.J. Reports1999*, para. 35.

[30] Para. 38.

[31] First round speech of Professor Brownlie, CR 2004/14, pp. 28-36, paras. 2-33.

43. Professor Brownlie swept aside the general principle, stated by the Court in the *Nuclear Weapons* Opinion[32], that "the threat or use of force cannot in itself constitute an act of genocide" as not providing "any real assistance"[33], because the Court had accepted that the matter would be different if the use of force were accompanied by a genocidal intent. But the presence or otherwise of that intent is crucial. The most obvious form which the act of genocide takes is killing people. That is also an all too common occurrence in armed conflict. But what separates deaths in armed conflict from genocide is the presence or absence of an intent not merely to kill but to kill as part and parcel of the intended destruction of a group.

44. Professor Brownlie argued that, since the existence or otherwise of that intention would inevitably turn on the facts of each particular case, it would always be bound up with the merits of a case and could not, therefore, be the subject of a decision at the preliminary objections stage[34].

45. That approach is entirely at odds with the decision of the Court in the *Oil Platforms* case, where the Court insisted that in order to determine whether a particular compromissory clause conferred jurisdiction, it was necessary for the Court — at the preliminary objections stage — to determine whether the Applicant's claims could fall within the scope of the relevant treaty[35].

46. I might add that the argument is also contrary to principle and to the orderly management by the Court of its caseload. If an Applicant has only to make an allegation of genocide in a case about the use of force in order to ensure it can get to a hearing on the merits, the invitation to abuse the Convention and to clog the Court's List with cases which have no prospect of success will be enormous. The Court needs no reminding of the complexity of a hearing on the merits of allegations of genocide.

47. The *Lockerbie* case[36], on which Professor Brownlie relied, simply does not support his argument. The passage from the Judgment which he quoted concerned not jurisdiction but admissibility. The argument with which the Court was dealing in the passage quoted to you yesterday was an argument that resolutions of the United Nations Security Council adopted after an

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[32]*I.C.J. Reports 1996*, p. 240, para. 26.

[33]First round speech of Professor Brownlie, CR 2004/14, p. 30, para. 7.

[34]First round speech of Professor Brownlie, CR 2004/14, p. 35, paras. 31-32.

[35]*I.C.J. Reports 1996*, p. 503, para. 16.

[36]*I.C.J. Reports 1998*, pp. 26-29.

application had been filed had rendered the dispute without object. The Court held that this argument raised questions of the compatibility of the rights asserted by Libya with the resolutions of the Council and the priority to be given to those resolutions and that these questions did not possess an exclusively preliminary character. It is a far cry from the fundamental question raised here of whether the Applicant's claims fall within the scope of the Treaty from which it seeks — or rather sought — to derive jurisdiction in the first place.

48. So, the question is whether the Applicant's allegations are capable of coming within the scope of the Genocide Convention. Notwithstanding what we heard yesterday, Mr. President, we say it is clear that they cannot do so.

49. Professor Brownlie's argument to the contrary turned on his assertion that an intention to destroy the population of Serbia and Montenegro — in whole, or in substantial part, because that is what we have to talk about — could be inferred from what he called the avowed purpose of the NATO campaign to intimidate the people of Serbia and Montenegro.

50. Two points in that connection. First, there was no such intention. What counsel for the Applicant glossed over in their speeches yesterday was the events which led to the NATO action — the atrocities, the ethnic cleansing, the humanitarian catastrophe identified by the Security Council which NATO acted to halt and reverse. It was suggested that a "series of statements emanating from NATO States" supported the thesis about NATO's intentions. That assertion is wholly unfounded. I ask Members of the Court to read the statements to which Professor Brownlie referred as a whole[37].

51. One example will suffice for the moment. Dr. Solana, then Secretary-General of NATO, in his statement announcing the start of air operations (which appears as Annex 13 to the Preliminary Objections of the United Kingdom), after referring to the fact that NATO was taking action to ensure compliance with what the international community had agreed on at Rambouillet added that whatever measures were necessary to avert a humanitarian catastrophe would be taken. He went on to say that the action would be directed towards disrupting the violent attacks being committed by the Serb army and Special Police forces and weakening their ability to cause further

[37]The statements to which reference was made (first round speech of Professor Brownlie, CR 2004/4, p. 34, para. 25) may be found in *The Kosovo Conflict and International Law: An analytical Documentation 1974-99*, Cambridge International Documents Series, Vol. 11 (Cambridge, CUP, 2001), pp. 256 and 279.

humanitarian catastrophe. "Let me be clear" he said, "NATO is not waging war against Yugoslavia. We have no quarrel with the people of Yugoslavia . . . Our objective is to prevent more human suffering and more repression and violence against the civilian population of Kosovo."

52. But even had the facts been as Professor Brownlie sought to portray them, it would not be possible to draw the inference that there was an intention to destroy the population of Serbia and Montenegro. Intimidation — even if that had been what we were about — is not extermination and an intention to intimidate is not an intention to exterminate. No one pretends that aerial bombardment — or any other kind of bombardment for that matter — is a pleasant business or that it will not cause casualties. That has been a feature of the conduct of hostilities in all conflicts but it is not genocide, Mr. President, unless it is carried out for the clear and specific purpose of destroying a national, ethnic, racial or religious group. Such an intention is wholly exceptional and there is no question of it having been present in this case.

53. Indeed, what really gave the game away was Professor Brownlie's remark that: "In any event the principle of effectiveness in matters of treaty interpretation must surely apply to the Genocide Convention, and it would be extraordinary if the requirement of intent were not seen to be satisfied when the genocidal consequences were readily foreseeable."[38] So much for the idea of specific intent. Though it is presented as an afterthought, this point was what really lay behind the Applicant's arguments on Article IX and it is precisely what has been rejected by this Court, by the international criminal tribunals and by the whole corpus of State practice and commentary on the Genocide Convention.

Conclusions

54. Mr. President, that concludes my argument. The United Kingdom maintains that this is a case in which there is a manifest lack of jurisdiction. As a subsidiary point, we also maintain that the claim is inadmissible. I would now ask you to call on the Agent of the United Kingdom, Sir Michael Wood, to present our formal submissions.

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[38]First round speech of Professor Brownlie, CR 2004/4, p. 34, para. 27.

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

Sir Michael WOOD: Thank you, Mr. President. Mr. President, Members of the Court, it only remains for me to read out the United Kingdom's final submissions.

For the reasons given in our written Preliminary Objections and at the oral hearing, the United Kingdom requests the Court:

— to remove the case from its List, or, in the alternative,

— to adjudge and declare that

  — it lacks jurisdiction over the claims brought against the United Kingdom by Serbia and Montenegro

  and/or

  — the claims brought against the United Kingdom by Serbia and Montenegro are inadmissible.

I thank you, Mr. President.

The PRESIDENT: Thank you, Sir Michael. The Court takes note of the final submissions which you have now read on behalf of the United Kingdom. This brings to an end the second round of oral argument by the United Kingdom.

The Court rose at 3.35 p.m.

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