CR 2004/17

International Court of Justice

THE HAGUE

Cour internationale de Justice

LA HAYE

YEAR 2004

Public sitting

held on Thursday 22 April 2004, at 11.15 a.m., at the Peace Palace,

President Shi presiding,

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

VERBATIM RECORD

ANNÉE 2004

Audience publique

tenue le jeudi 22 avril 2004, à 11 h 15, 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. Canada)

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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Mme Sabine Nolke, ministère des affaires étrangères,

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Mme Anik Beaudoin, ministère de la justice,

comme conseils.

The PRESIDENT: Please be seated. I now give the floor to Ms Colleen Swords, Agent of Canada.

Ms SWORDS: Mr. President, distinguished Members of the Court, it is an honour to appear once again on behalf of the Government of Canada.

1. I will begin today with some preliminary comments on the continuing failure of the Applicant to identify its grounds of jurisdiction. I will then address jurisdiction *ratione temporis* under the optional clause, and the Applicant's arguments on the Genocide Convention. Before turning to this, however, one point: while today's submissions are necessarily brief, Canada does retain all of the arguments set out in some detail in its written Preliminary Objections.

PRELIMINARY COMMENTS

2. On the opening day of these hearings, we asked Serbia and Montenegro to clarify the grounds of jurisdiction it now relies on for this case against Canada in light of its Written Observations of 18 December 2002. After listening carefully to the Applicant's submissions yesterday, we still do not know the answer to our question.

3. Nothing in the Applicant's oral pleading repudiated its Written Observations of December 2002. Nothing filled the gaping hole at the heart of its case, namely its failure to assert the basis of jurisdiction on which it seeks to rely. Nothing clarified what it considers to be the legal consequences of its position on jurisdiction in this case arising from its Written Observations. These were, I recall, that it was not and could not have been a party to the Statute of the Court by way of United Nations membership in 1999 and that it was not bound by the Genocide Convention when this case was filed.

4. Instead, the Applicant asked the Court to clarify whether it was a party to the Statute or not. It then proceeded to argue what its position would be if the Court were to find that the Applicant was a party to the Statute in 1999, contrary to the position of both the Applicant and the Respondents.

5. This is extraordinary in light of the fundamental principle of consent to jurisdiction upon which this Court operates. It would mean that a State is free to come to this Court saying: "We do

not think we are party to the Statute of the Court, and neither does the Respondent, but in case you disagree, let us know." This cannot be in the interests of the sound administration of justice.

6. Mr. President, this is a contentious case, not a request for an advisory opinion. The applicant in a contentious case is required to indicate on what basis of jurisdiction it relies by virtue of Article 38 (2) of the Rules. The Applicant has not done so. In fact, it has done the opposite. It asserts no jurisdiction.

7. It is significant that most of the arguments made yesterday must be seen as arguments in the alternative, although the Applicant has not said as much — and for good reason. Arguments *ratione materiae* and *ratione temporis* are only relevant if the Court finds that Serbia and Montenegro is party to the Statute and the Genocide Convention — a position the Applicant itself now rejects.

8. It is regrettable that the Applicant makes these alternative arguments now for the first time and almost four years after we filed our Preliminary Objections on jurisdiction and admissibility. This prevents us from responding in full to its arguments which are somewhat contradictory, or at least of a subsidiary character, to the position taken in the December 2002 Written Observations.

9. This is an unfortunate departure from the spirit of the Rules, in particular Article 60, paragraph 1. The whole point of the procedure laid out in the Rules of Court is to allow the proceedings by successive stages to be based on the most recent submissions advanced by the parties. This progressive back and forth permits the case to evolve towards a clear definition of the dispute and a narrowing of the issues. Instead, the Applicant withheld all substantive arguments until the oral hearings.

10. We admit to being pleased with one change in the Applicant's position. Serbia and Montenegro does not contest our objection to admissibility of the claim for new elements respecting the period beginning 10 June 1999. Accordingly, we assume they have conceded this point.

11. Serbia and Montenegro made an eloquent plea yesterday related to what it called "the huge challenges in finding the proper direction after an unfortunate decade". Much as we welcome the important changes that have taken place in Serbia and Montenegro, this does not relieve it, as

Applicant, from respecting the fundamental rules of this Court and identifying the grounds of jurisdiction on which it relies.

12. Before responding, necessarily briefly, to some of the Applicant's additional arguments, I would like to emphasize that the incursions into the merits in yesterday's pleadings have no place in these Preliminary Objections.

JURISDICTION *RATIONE TEMPORIS* UNDER THE OPTIONAL CLAUSE

13. Mr. President and Members of the Court, the question of *ratione temporis* jurisdiction under the purported optional clause declaration of 25 April 1999 is the topic of my next section.

14. The position of the Applicant on the interpretation and effect of its own declaration has been in constant flux throughout this case. At the point of the Application for Provisional Measures in 1999, it took the position that the global dispute could be subdivided into a multiplicity of micro-disputes, or "instantaneous wrongful acts". We heard nothing about that yesterday. When the Memorial was filed, a completely new approach was instituted. It was said that the dispute had only arisen in full on 10 June 1999, when the use of force had come to an end. Again, we heard not a word about this yesterday. The difficulty the Applicant faces in overcoming its own temporal reservation is evident from the twists and turns of its position at every stage of this case.

15. Counsel for the Applicant ranged broadly over a number of issues related to the temporal reservation: the role of intention, the birth of the dispute, and the nature of the double exclusion formula.

16. Intention is indeed critical — but it is the intention revealed by the text that counts most of all. That is the message of all the leading cases cited yesterday. Intention serves to clarify the wording, not to negate it. The self-serving affirmations by an applicant in the course of litigation with regard to its own intentions must obviously be treated with particular caution.

17. It is clear that the Applicant did have an intention when it included its time condition. It wanted to protect itself on temporal grounds from a very broad range of unwanted litigation arising out of the dissolution of Yugoslavia and its aftermath. It might well have hoped that it could somehow escape from its own restriction when it came to the NATO dispute, possibly by

attempting to subdivide the dispute into a multiplicity of disputes that it could define at will. But that is speculation: what is clear is that it failed to identify any subsequent disputes at the provisional measures stage; and that its own pleadings describe the entire sequence of events as a single dispute. The Applicant cannot have it both ways. Having secured its own protection against past disputes through its temporal reservation, it must live with the consequences.

18. The Applicant said there is no sufficient evidence of a double exclusion formula. The evidence, Mr. President, is about as clear as it can be. It is in the language actually used, which adopts a time-honoured formula with two components. And it is equally clear from the language used that the two conditions must both be fulfilled. The dispute *must* have arisen after the signature of the declaration and must also relate to situations and facts after that date. Grammatically, the two conditions are not alternatives. They are not linked by the word "or". They must both be met.

19. With respect to the first part of the formula, it is impossible to understand the contention that a legal dispute could not have arisen by 24 March 1999. Paragraph 3.2.16 of the Applicant's Memorial is clear. It states: "The dispute arose in the discussions at the Security Council meetings of 24 and 26 March 1999 between Yugoslavia and the Respondents before 25 April 1999 concerning the legality of those bombings as such, taken as a whole." This may have been repudiated yesterday, but it speaks for itself, and a party cannot be allowed to reverse its positions in the course of litigation. On 24 March, after the military action had begun, a letter was addressed by the Applicant to the President of the Security Council asking it "to condemn and to stop the NATO aggression against the Federal Republic of Yugoslavia and to protect its sovereignty and territorial integrity". A conflict of legal views and interests could not have been more clearly stated. Whether by the *Mavrommatis* formulation consistently used by the Court or by the somewhat different formula suggested by Sir Robert Jennings, the dispute had arisen by that time.

20. It was also suggested that the dispute crystallized only when the Application was made. With respect, we suggest that this theory should not be adopted. It would deprive the reservation of any effectiveness, contrary to principles to which Professor Brownlie himself referred yesterday. If a dispute crystallized only by the filing of an application, no dispute would ever be excluded on the basis of a reservation referring to pre-existing disputes. And it would provide no protection at all to the declaring State.

21. I turn now to the remarks made about the second part of the formula, which refers to situations or facts subsequent to the signature of the declaration. As we suggested in the first round, and as the Court itself indicated in the Order of 2 June 1999, there is strictly speaking no need to consider this part of the formula. But if we do consider it, it also bars jurisdiction on the basis of the purported declaration.

22. The Applicant referred yesterday to the ILC Articles on Continuing Breach, and suggested that because this dispute continued over a period of time subsequent to 25 April 1999, the second condition was satisfied. This is a misinterpretation of the second branch of the double exclusion formula. Even in the case of ongoing disputes, it remains necessary to identify a specific date in order to apply the reservation. When it becomes necessary to identify a critical date for the purpose of applying a temporal reservation with this language, the leading cases such as *Phosphates in Morocco* and *Right of Passage* tell us what to do. They direct us to identify the situations or facts that constitute the *"source"* or the *"real cause"* of the dispute, as opposed to its confirmation or development.

23. Typically this takes us back once again to the origins of the dispute, or at least to its earlier phases. At the *very* least, it takes us back as far as the inception of the use of force in late March of that year, and the objections made to that action by the Applicant. In short, Mr. President, the claim to jurisdiction under the optional clause is barred under either one of the two parts of the double exclusion formula in the declaration made by the Federal Republic of Yugoslavia on 25 April 1999.

THE GENOCIDE CONVENTION

24. Mr. President and Members of the Court. Yesterday counsel for the Applicant addressed the Genocide Convention, and in particular the question of the existence of genocidal intention. I note that the claims related to the application of the Genocide Convention during the peacekeeping phase after 10 June 1999 have been dropped altogether. I would also remind the Court that no comment was made on another of our arguments relating to the Convention, namely that there cannot be a "dispute" within the meaning of Article IX of that Convention when the claimant

insists that it was not a party to the Convention at the relevant time, and cannot therefore claim that it was owed any obligations under the Convention at that time.

25. The Applicant took issue with the prima facie findings of the Court at the provisional measures stage, namely that the use of force cannot in itself constitute an act of genocide and that the requisite element of genocidal intention was not to be found in the claims made by the Applicant. And yet, Mr. President, the very description of the purpose of the NATO action that was given yesterday is fundamentally inconsistent with the idea that a genocidal intention existed in this case, or indeed that the case has anything to do with genocide. We obviously do not accept the characterizations of the purpose of the action given by the other side, but we do appear to agree that the purpose was *not* to destroy a group in whole or in part.

26. The descriptions given yesterday demonstrate that the ultimate objective was poles apart from what the Court has defined as a denial of the right of existence of entire human groups. We were told that the purpose was to coerce the Yugoslav Government to accept the demands made at Rambouillet and to force compliance with the demands made by the Contact Group. The *political* purpose of the bombing, according to the Applicant, was to coerce the people and Government of Serbia and Montenegro. Or alternatively, in other passages of the argument, to intimidate them.

27. Mr. President and Members of the Court: political coercion and intimidation are characterizations that have nothing at all to do with the destruction of a people. It would be a fundamental distortion of the ordinary language and of purposes of the Genocide Convention to equate coercion with an intention to destroy a protected group *as such*.

28. Mr. President, we also argued in the first round that the Applicant has wrongly equated genocide with violations of international humanitarian law, and that it treats the two as if they were the same thing. We received ample confirmation of that yesterday. The allegations made are matters that could be evaluated under various instruments of international humanitarian law. But they cannot be evaluated under the law of genocide, in the absence of at least some allegations or evidence that the overall intent was to destroy a group — and we know that was not the intent from the Applicant's own description of the political objectives of the campaign.

29. To put it in a nutshell, Mr. President and Members of the Court, what was proffered as evidence of genocidal intention yesterday falls into two categories: the allegation of an overall

objective of political coercion, not the destruction of a protected group as such; and a series of allegations that properly belong to the distinct domain of the law of armed conflict.

30. Moreover, the Applicant's analysis omits a vital element of Article II, namely that the intention to destroy must be directed towards the group "as such". On this point, I would simply refer the Court to paragraphs 147 to 152 in our Preliminary Objections, to which the Applicant has not presented a rebuttal. I would also note that the Rwanda Tribunal noted in its decision on *Niyitegeka* that "as such" means that the act must be committed against an individual "*because* the individual was a member of a specific group and specifically *because* he belonged to that group".

31. One final point. The Applicant has suggested that our objections with respect to the Genocide Convention are not of an exclusively preliminary character. This is incorrect. It is obviously unnecessary for the Applicant to prove its claims at this stage. But it must at least submit a claim whose subject-matter falls within the Convention, as the *Oil Platforms* test requires. And given what the Court has called the essential characteristic of genocide, *that* must include allegations pointing toward an overall plan or ultimate objective of destroying a protected group as such. And there is nothing of the kind in the Applicant's case against Canada. If a question can be determined through the application of the *Oil Platforms* test, then that should be the end of the matter. It is then virtually by definition a matter that has an exclusively preliminary character within the meaning of Article 79, paragraph 7.

32. Mr. President, we submit that even if all the allegations made by the Applicant were proved to be true, they would not fall within the subject-matter of the Genocide Convention. To join the preliminary objections to the merits would create a dangerous precedent — mere allegations of genocide cannot be sufficient to deprive the objections of their exclusively preliminary character. There should be no free ride to the merits. The policy as to when Article 79, paragraph 7, should be applied is clear: rarely, sparingly, and only when absolutely necessary for the proper administration of justice.

33. Mr. President and distinguished Members of the Court, this concludes Canada's argument in the second round of oral pleadings. I will now proceed to the reading of Canada's final submissions. I will do so in French.

CONCLUSIONS FINALES

34. Le Gouvernement du Canada demande à la Cour de dire et juger que la Cour n'est pas compétente car le demandeur a abandonné toutes les bases de compétence qu'il avait initialement indiquées dans sa requête en vertu de l'article 38, paragraphe 2, du Règlement de la Cour, et n'a pas précisé d'autres bases de compétence.

35. A titre subsidiaire, le Gouvernement du Canada demande à la Cour de dire et juger que

— en premier lieu, la Cour n'est pas compétente pour statuer sur l'instance introduite par le demandeur contre le Canada le 29 avril 1999, sur le fondement de la prétendue déclaration du 25 avril 1999;

— en deuxième lieu, la Cour n'a pas non plus compétence sur la base de l'article IX de la convention sur le génocide;

— en troisième lieu, les demandes nouvelles ayant trait à la période postérieure au 10 juin 1999 sont irrecevables car elles transformeraient l'objet du différend dont la Cour a originellement été saisie;

— et, en dernier lieu, les demandes en leur entier sont irrecevables parce que la présence essentielle de tiers qui ne sont pas parties à l'instance est exigée par l'objet du litige.

Mr. President, distinguished Members of the Court, I thank you very much for your kind attention.

The PRESIDENT: Thank you, Ms Swords. The Court takes note of the final submissions which you have now read on behalf of Canada. This brings to an end the second round of oral argument of Canada.

The Court rose at 11.40 a.m.

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