CR 2004/20

International Court of Justice

THE HAGUE

Cour internationale de Justice

LA HAYE

YEAR 2004

Public sitting

held on Thursday 22 April 2004, at 3.40 p.m., at the Peace Palace,

President Shi presiding,

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

VERBATIM RECORD

ANNÉE 2004

Audience publique

tenue le jeudi 22 avril 2004, à 15 h 40, 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. Allemagne)**

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

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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:

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as Agent, Counsel and Advocate;

Mr. Vladimir Djerić, LL.M. (Michigan), 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,

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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,

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Mr. Vladimir Srećković, Ministry of Foreign Affairs,

as Technical Assistant.

The Government of the Federal Republic of Germany is represented by:

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H.E. Mr. Edmund Duckwitz, Ambassador of the Federal Republic of Germany to the Kingdom of the Netherlands,

as Agents;

Mr. Christian Tomuschat, Professor of Public International Law at the Humboldt University of Berlin,

as Co-Agent and Counsel;

Ms Susanne Wasum-Rainer, Head of the Public International Law Division, Federal Foreign Office,

Le Gouvernement de la Serbie et Monténégro est représenté par :

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comme agent, conseil et avocat;

M. Vladimir Djerić, LL.M. (Michigan), conseiller du ministre des affaires étrangères de la Serbie et Monténégro,

comme coagent, conseil et avocat;

M. Ian Brownlie, C.B.E., Q.C., F.B.A., professeur émérite de droit international public à l'Université d'Oxford, ancien titulaire de la chaire Chichele, membre de la Commission du droit international, membre du barreau d'Angleterre, membre de l'Institut de droit international,

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M. Slavoljub Carić, conseiller à l'ambassade de Serbie et Monténégro à La Haye,

M. Saša Obradović, premier secrétaire à l'ambassade de Serbie et Monténégro à La Haye,

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Mme Dina Dobrković, LL.B.,

comme assistants;

M. Vladimir Srećković, ministère des affaires étrangères de Serbie et Monténégro,

comme assistant technique.

Le Gouvernement de la République fédérale d'Allemagne est représenté par :

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S. Exc. M. Edmund Duckwitz, ambassadeur de la République fédérale d'Allemagne auprès du Royaume des Pays-Bas,

comme agents;

M. Christian Tomuschat, professeur de droit international public à l'Université Humboldt de Berlin,

comme coagent et conseil;

Mme Susanne Wasum-Rainer, chef de la division du droit international public du ministère fédéral des affaires étrangères,

Mr. Reinhard Hassenpflug, Federal Foreign Office,

Mr. Götz Reimann, Embassy of the Federal Republic of Germany,

as Advisers;

Ms Fiona Sneddon,

as Assistant.

M. Reinhard Hassenpflug, ministère fédéral des affaires étrangères,

M. Götz Reimann, ambassade de la République fédérale d'Allemagne à La Haye,

comme conseillers;

Mme Fiona Sneddon,

comme assistante.

The PRESIDENT: I now give the floor to Mr. Läufer, Agent of the Federal Republic of Germany.

Mr. LÄUFER:

1. Mr. President, distinguished Members of the Court, Germany has listened carefully to the pleadings of Serbia and Montenegro. Very kindly, it made the text of these pleadings available to us immediately after the sitting yesterday morning. We are very grateful for this gesture of co-operation.

2. It will not be necessary for Germany to respond to all of the observations advanced by the Applicant. Many of these arguments have already been addressed by the other Respondents. Since Germany has not made a declaration under the optional clause of Article 36 (2) of the Statute, many of these observations are not really relevant for our line of reasoning.

3. We will specifically address the issues relating to Article IX of the Genocide Convention as well as the issues arising in connection with Article 35 of the Statute. It should be reiterated that with regard to Germany no other basis of jurisdiction than Article IX of the Genocide Convention has been — or could be — invoked.

Without further ado, I now request the Court to give the floor to Professor Tomuschat, our Co-Agent and counsel.

The PRESIDENT: Thank you, Mr. Laüfer. I now give the floor to Professor Tomuschat.

Mr. TOMUSCHAT:

4. Mr. President, distinguished Members of the Court, it is obvious that the heart of the dispute at its present stage is constituted by the Written Observations of Serbia and Montenegro of 18 December 2002. These Observations leave no room for interpretation. Serbia and Montenegro stated unequivocally that at the relevant time, when it filed its Application against Germany, it was not a party to the Statute of the Court by way of United Nations membership and was not bound by the Genocide Convention until it acceded to that Convention in March 2001. In order to prevent any misunderstanding from arising, Serbia and Montenegro specifically requested the Court "to decide on its jurisdiction considering the pleadings formulated in these Written Observations".

Moreover, in its letter of 28 February 2003, it confirmed the earlier statements and added that the comments of the Respondents "have taken notice of this position".

5. In yesterday's pleadings, Serbia and Montenegro sought to distance itself to a considerable extent from the clear language of the Observations of 18 December 2002. The distinguished Agent stated that Serbia and Montenegro was "asking the Court to undertake a definitive investigation, and to establish conclusively the position of the FRY in relation to the Statute and the Genocide Convention between 1992 and 2000"[1]. This is not what was said on 18 December 2002. Professor Varady's statements yesterday sounded more like a request to the Court to render an advisory opinion. However, in contentious proceedings it is incumbent upon the Applicant to specify the legal grounds on which the jurisdiction of the Court should be based (Rules, Article 38 (2)). It cannot leave open the decisive question of whether the Court may entertain the case as to its merits or not. The Written Observations of 18 December 2002 are quite unambiguous in that regard. Serbia and Montenegro tells the Court that it cannot rely on Article IX of the Genocide Convention since it was not a party to that instrument at the relevant time.

6. During yesterday's hearing, Serbia and Montenegro deliberately avoided responding to the arguments which Germany derived from the Observations of 18 December 2002. It refrained from arguing that it was in fact a party to the Genocide Convention. Professor Varady only raised questions. He noted that "the question still arises whether the FRY could have acquired the status of a party to treaties and the status of a member of international organizations between 1992 and 2000"[2]. But he did not provide any answer to that question, not suggesting even by what mysterious operation such a legal effect could have been produced.

7. To be sure, Serbia and Montenegro has argued that for a limited period of time the entity in the territory of Yugoslavia experienced some sort of identity crisis. If we have understood him correctly, there were from 1992 to 2000 two States at the same time,

— the former Yugoslavia, a vanishing entity, and

— the FRY, as the embodiment of the real Yugoslavia.

[1]See verbatim record of the public sitting held on Wednesday 21 April, CR 2004/14, para. 40.

[2]*Ibid*., para. 55.

8. This is an artful construction, which would appeal to many who also see in their countries a similar dichotomy, the real State with its many deplorable features, and the true, the mythical national community — *la France profonde* or the Germany of Goethe and Schiller. In the blunt landscape of international law, with its reliance on effectiveness, such a construction is not tenable. According to general principles of international law, which do not yield as soon as special circumstances are adduced, a State requires the existence of a territory, a population, and a government which is a tangible reality. Well, it is obvious that in the territory of what is now comprised by Serbia and Montenegro there has always been only one State. It certainly was not always the same State. A change of identity took place at some point in time. But there has never been any parallel existence of two States.

9. Originally, after the Second World War, the Socialist Federal Republic of Yugoslavia (SFRY) was established. This State existed until sometime in 1992, after some of its former component States had broken away from it and were thereafter admitted as new Members of the United Nations. At the present juncture there is no need for Germany to analyse in detail this process of disintegration. Initially, when Slovenia and Croatia declared their independence in 1991, it may have looked as if there was a secessionist movement which did not affect the identity of "rump" Yugoslavia. However, after Bosnia and Herzegovina and Macedonia had also declared their independence and established themselves as new independent States, it became clear that the process of disintegration had to be reinterpreted, namely as a replacement of the SFRY by five new States.

10. Consequently, in resolution 777 (1992) of 19 September 1992, the Security Council stated unequivocally that "the state formerly known as the Socialist Federal Republic of Yugoslavia has ceased to exist". It was only the FRY, which had adopted its new name on 27 April 1992, that consistently refused to take note of the new reality. With its request for admission to the United Nations as a new Member, the FRY eventually accepted, eight years later, in 2000, that it was just one of these successor States and that it did not enjoy any privileged position because of its name, its size, or the number of its inhabitants.

11. Germany refrains from taking a stance on the question as to when State succession took place. Logically, this change occurred when the old SFRY ceased to exist. This was certainly not

the day when the SFRY adopted its new name FRY. A simple change of name has no substantive consequences. But the resolutions of both the Security Council (resolution 777 (1992) of 19 September 1992) and the General Assembly (resolution 47/1 of 22 September 1992) made it plain in fact that the SFRY was no longer in existence. It was not the two resolutions which abolished the SFRY. They simply took note of the new situation as it had been brought about by the disintegration process.

12. Given the requisite realistic approach to any issues to be evaluated in light of the rules of international law, it has to be concluded that the entity called FRY, which according to the Court had a *sui generis* position vis-à-vis the United Nations, was in fact the new FRY. Obviously, the FRY, as a new State, was not a Member of the United Nations before its admission to the world organization on 1 November 2000. However, according to the Judgment of 3 February 2003, the FRY enjoyed some status with the United Nations which was derived from the membership of the former SFRY.

13. Following this construction, it must be carefully checked with regard to every single right and duty whether a non-Member of the United Nations, the FRY, could be considered as benefiting from rights held by its predecessor or being bound by obligations that were incumbent on that predecessor, the SFRY.

14. In this sense, it would seem perfectly arguable that an entity which maintains a wrong identity is made accountable for the acts of the person it purports to represent. On the other hand, however, it is inconceivable that through such a game of changing identities the "wrong" entity arrogates to itself rights which do not pertain to it. Since the FRY was not a Member of the United Nations, it was not a party to the Statute and, therefore, could not derive any rights from the Statute. Germany is adamant in this regard: the FRY could not fulfil the requirements of Article 35 of the Statute. The continuance in force of some of the legal entitlements of the former SFRY did not legitimate it to avail itself of rights which count among the core rights of membership in the United Nations.

15. However, this line of reflection will not be pursued any further. Coming back to the Genocide Convention, it stands to reason that because of the lack of continuity between the SFRY and the FRY the Genocide Convention could become binding on the FRY only by some legal

device, either by virtue of the rules of State succession or by virtue of an act of acceptance by the FRY.

16. According to Serbia and Montenegro, notwithstanding the speculations entertained in its pleadings[3], no automatic succession took place. By ratifying the Genocide Convention in March 2001, Serbia and Montenegro has made clear that it did not feel bound by the Convention before that date and that, consequently, no treaty relationship existed between it and Germany at the time when NATO's air operations took place and when it filed its Application with the Court. It is only logical that, according to its current appraisal of the legal position, Serbia and Montenegro should have discontinued the proceedings against Germany. It is utterly contradictory to maintain, on the one hand, that the Genocide Convention was not in operation between the Applicant and the Respondent, and, on the other hand, to rely on Article IX of that Convention as the jurisdictional basis for the Application.

17. Again, however, we are confronted with the statement of the Court in paragraph 70 of the Judgment of 3 February 2003[4] that General Assembly resolution 47/1 did not "affect the position of the FRY in relation to the Genocide Convention". Germany takes this statement at face value. Nobody has ever contended that the General Assembly enjoys a power to make determinations on a State's contractual obligations. What the General Assembly stated in resolution 47/1 was no more than an interpretation of the legal position of the FRY vis-à-vis the United Nations as it seemed to exist in 1992. Therefore, no binding force can be attached to the view expressed by the Court in its Judgment of 3 February 2003 on the capacity of the FRY as a party to the Genocide Convention.

18. A short glance must also be cast over the sentence by which the Court, in its Order of 2 June 1999 in the present case, held that "it is not disputed that both Yugoslavia and Germany are parties to the Genocide Convention without reservation"[5]. This is a statement referring to the time before the FRY ratified the Genocide Convention as a new State, thereby undertaking, as it argues, the obligations under that Convention for the first time. Again, however, this former statement is

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[3]*Ibid.*

[4]*Application for Revision of the Judgment of 11 July 1996 in the Case concerning* Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina *v.* Yugoslavia), Preliminary Objections *(Yugoslavia* v. *Bosnia and Herzegovina).*

[5]Case concerning *Legality of Use of Force (Yugoslavia* v. *Germany), Provisional Measures*, para. 24.

not based on an objective assessment of the legal position. The Court confined itself to noting that the assumed legal relationship was "not disputed". In other words, the Court acknowledged that on such issues the parties concerned have a power of legal determination. There was no need for the Court to investigate the legal position inasmuch as the parties were in agreement on their status.

19. Of course, the Court certainly did not want to permit the parties in a proceeding before it to invent legal constructions which have nothing to do with realities. Apparently, what it said relates to instances where doubts may emerge. In such instances, the basic principle of inter-State consent clarifies the legal position, perhaps even with constitutive effect for the proceeding at hand. It would run against the sovereign power of determination of States to prescribe to them how they should appraise the legal position.

20. Consequently, it must be concluded that there is as yet no truly authoritative pronouncement of the Court on the capacity of the FRY as a party to the Genocide Convention. To date, no enquiry into this problem has been undertaken by the Court on its own. Everything it has said was suggested by the procedural conduct of the parties before it.

21. Inevitably, therefore, the question seems to arise whether the issue of State succession has to be looked into by the Court.

22. Germany holds that, contrary to first impressions, this neither should nor can be done.

23. On the one hand, the issues of State succession have not been properly argued during this week. Serbia and Montenegro has limited itself to making some vague references to the possible acquisition of treaty membership with regard to the Genocide Convention. But it has refrained from seriously addressing this issue. The Court would intrude into territory which has not been sufficiently explored by the Parties.

24. On the other hand, there is no need to carry out such an adventurous expedition into uncharted territory, given the obstinate denial of Yugoslavia to rely on Article IX of the Genocide Convention. Germany reiterates that the assertions contained in the Written Observations of 18 December 2002 amount to a renunciation of the right of action which Serbia and Montenegro may have enjoyed under that provision.

25. To be sure, none of the words "renunciation" or "waiver" or "abandonment" has been pronounced by the Applicant. But the fact that the Applicant formally states that it was not a party

to the Genocide Convention must have implicit consequences. The Applicant does not wish to act on that basis. It has not requested the Court to investigate the legal position, arguing that this is an open question, leaving it to the wisdom of the Court to make a determination. It would indeed be contrary to the intentions of Serbia and Montenegro to belittle the Written Observations of 18 December 2002. The statement was clear and straightforward. The Applicant has repudiated the Genocide Convention as a source of legal rights and obligations. Of course, no subject of international law is able to get rid of legal obligations unilaterally unless it is specifically empowered to do so, for instance if it can invoke a denunciation clause. But Serbia and Montenegro, as a sovereign State, is fully entitled to abandon any of its rights under the Convention at any time — and it has visibly done so.

26. It cannot be the task of the Court to provide the jurisdictional foundations of an application contrary to the declared will of the Applicant itself. The Court would misconceive its role as guardian of international legality if it proceeded to impose on Serbia and Montenegro a position as applicant on a specific legal basis which that State rejects. To initiate a proceeding and to choose the appropriate legal basis counts among the sovereign prerogatives of a claimant. The Court cannot order it to act in a specific way that would fit the particular circumstances of the case at hand. The basic principle of free choice of means applies here as well. The concept of a cause of action upon instructions imparted by the Court would be deeply at variance with the guiding principles of international adjudication.

27. Germany, hence, comes to the conclusion that the Court must take the Written Observations of 18 December 2002 as a determination by Serbia and Montenegro, which it must respect as a binding procedural move for the purposes of the instant proceedings, although any judgment in the present case might be used as a precedent in other pending proceedings. But, as explained in our first round pleadings, a judgment denying Serbia and Montenegro the opportunity to rely on Article IX of the Genocide Convention does not constitute a genuine precedent. The final outcome of the instant proceedings will be essentially impacted by the refusal of Serbia and Montenegro to make use of the Genocide Convention. Given this refusal, which is the determinative element, a finding by the Court that Article IX of the Genocide Convention is not available for impleading the Respondents does not amount to saying that Serbia and Montenegro is

not a party to the Genocide Convention. It will simply reflect the deliberate will of Serbia and Montenegro not to base its Application on this head of jurisdiction.

28. Given the preceding observations, Germany wishes once again to emphasize that the following observations are put forward only *à titre subsidiaire*. In any event, the considerations addressed to the scope *ratione materiae* of the Genocide Convention will be very brief. Germany sees no necessity to comment on the attempts by Serbia and Montenegro to demonstrate that there was or is a prima facie case of genocide. It would be futile to refute this contention. In our opinion, counsel for Serbia and Montenegro has visibly failed in his endeavour to show that the criteria of Article IX of the Genocide Convention are met. Additionally, other Respondents have already submitted persuasively that to characterize the air operations in the territory of the former Yugoslavia as genocide or attempted genocide would be a blatant misnomer.

29. Germany considers that it should confine itself to the few additional observations it has just put forward.

30. In concluding, Germany once again reiterates that it unrestrictedly maintains all of the Preliminary Objections it has raised.

Mr. President, may I now request you kindly to invite Dr. Läufer to take the floor, so that Germany's final submissions can be read out and put on record.

The PRESIDENT: Thank you, Professor Tomuschat. I now give the floor to Mr. Thomas Läufer, Agent of Germany.

Mr. LÄUFER: Mr. President, I will now proceed to our final submissions. May it please the Court to adjudge and declare.

31. Germany requests the Court to dismiss the Application for lack of jurisdiction and, additionally, as being inadmissible on the grounds it has stated in its Preliminary Objections and during its oral pleadings.

32. This brings to a close Germany's argument in the case *Legality of Use of Force (Serbia and Montenegro* v. *Germany)*. I thank the Court for its kind attention and for its patience in listening to our submissions.

The PRESIDENT: Thank you, Mr. Läufer. The Court takes note of the final submissions which you have now read on behalf of the Federal Republic of Germany. This brings to an end the second round of oral argument by the Federal Republic of Germany.

The Court rose at 4.05 p.m.

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