INTERNATIONAL COURT OF JUSTICE

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Press Release

Unofficial

No. 2004/39
15 December 2004

Legality of Use of Force (Serbia and Montenegro v. Belgium)
Preliminary Objections

The Court finds that it has no jurisdiction
to entertain the claims made by Serbia and Montenegro

THE HAGUE, 15 December 2004. The International Court of Justice (ICJ), the principal judicial organ of the United Nations, today concluded that it had no jurisdiction to entertain the claims made in the Application filed by Serbia and Montenegro against Belgium on 29 April 1999. The Court's decision was taken unanimously.

Background to the case

On 29 April 1999, the Federal Republic of Yugoslavia (with effect from 4 February 2003, "Serbia and Montenegro") filed an Application instituting proceedings against Belgium in respect of a dispute concerning acts allegedly committed by Belgium

> "by which it has violated its international obligation banning the use of force against another State, the obligation not to intervene in the internal affairs of another State, the obligation not to violate the sovereignty of another State, the obligation to protect the civilian population and civilian objects in wartime, the obligation to protect the environment, the obligation relating to free navigation on international rivers, the obligation regarding fundamental human rights and freedoms, the obligation not to use prohibited weapons, the obligation not to deliberately inflict conditions of life calculated to cause the physical destruction of a national group".

The Application invoked as a basis of the Court's jurisdiction Article 36, paragraph 2, of the Statute of the Court, as well as Article IX of the Convention on the Prevention and Punishment of the Crime of Genocide, adopted by the United Nations General Assembly on 9 December 1948 ("the Genocide Convention"). On the same day, the Federal Republic of Yugoslavia filed Applications, drafted in broadly similar terms, instituting proceedings in respect of other disputes arising out of the same facts against Canada, France, Germany, Italy, the Netherlands, Portugal, Spain, the United Kingdom and the United States of America.

By letter of 12 May 1999 the Agent of the Federal Republic of Yugoslavia submitted a "Supplement to the Application", invoking as a further basis for the Court's jurisdiction "Article 4 of the Convention of Conciliation, Judicial Settlement and Arbitration between the Kingdom of Yugoslavia and Belgium, signed at Belgrade on 25 March 1930 and in force since 3 September 1930".

By Orders of 2 June 1999 the Court rejected the requests for provisional measures submitted in each of the ten cases, including the present one, and further decided that the proceedings against Spain and the United States be removed from its List for manifest lack of jurisdiction.

On 5 July 2000, Belgium submitted preliminary objections relating to the Court's jurisdiction to entertain the case and to the admissibility of the Application. The proceedings on the merits were accordingly suspended. Hearings were held from 19 to 23 April 2004 on those objections, as well as on those submitted by the seven other Respondents.

Reasoning of the Court

The Court first deals with a preliminary question that has been raised in various forms in each of the eight cases concerning Legality of Use of Force, including the present one, namely whether, as a result of the changed attitude of the Applicant to the Court's jurisdiction, as expressed in its Observations on the Respondent's Preliminary Objections, the Court should not simply decide to dismiss the case in limine litis, and remove it from its List, without enquiring further into matters of jurisdiction.

The Court finds itself unable to uphold the various contentions of the respondent States in this respect. It considers that it cannot treat the Observations of Serbia and Montenegro as having the legal effect of a discontinuance of the proceedings and finds that the case does not fall into the category of cases in which it may of its own motion put an end to proceedings in a case. As regards the argument advanced by certain Respondents that the dispute on jurisdiction has disappeared since the Parties now agree that the Applicant was not a party to the Statute at the relevant time, the Court points out that Serbia and Montenegro specifically asked in its submissions for a decision of the Court on the jurisdictional question. It notes that, in any event, there is a distinction between a question of jurisdiction that relates to the consent of the parties and the question of the right of a party to appear before the Court, which is independent of the views or wishes of the parties. As to the argument concerning the disappearance of the substantive dispute, the Court observes that it is clear that Serbia and Montenegro has by no means withdrawn its claims as to the merits. Indeed, these claims were extensively argued and developed in substance during the hearings on jurisdiction, in the context of the question of the jurisdiction of the Court under Article IX of the Genocide Convention. It is equally clear that these claims are being vigorously denied by the Respondents. The Court is therefore unable to find that Serbia and Montenegro has renounced any of its substantive or procedural rights, or has taken the position that the dispute between the Parties had ceased to exist. For all these reasons, the Court finds that it cannot remove the cases concerning Legality of Use of Force from the List, or take any decision putting an end to those cases in limine litis; and that, in the present phase of the proceedings, it must proceed to examine the question of its jurisdiction to entertain the case.

The Court observes that the question whether the Applicant was or was not a State party to the Statute of the Court at the time of the institution of the present proceedings is fundamental; for if it were not such a party, the Court would not be open to it. The Court must therefore examine whether the Applicant meets the conditions for access to it laid down in Articles 34 and 35 of the Statute before examining the issues relating to the conditions laid down in Articles 36 and 37 of the Statute.

The Court points out that there is no doubt that Serbia and Montenegro is a State for the purpose of Article 34, paragraph 1, of the Statute. However, the objection was raised by certain Respondents that, at the time when the Application was filed, Serbia and Montenegro did not meet the conditions set down in Article 35 of the Statute. The Court recalls that Belgium argued as its first preliminary objection to the jurisdiction of the Court, inter alia, that:

> "[t]he FRY [Federal Republic of Yugoslavia] is not now and has never been a member of the United Nations. This being the case, there is no basis for the FRY's claim to be a party to the Statute of the Court pursuant to Article 93 (1) of the Charter. The Court is not therefore, on this basis open to the FRY in accordance with Article 35 (1) of the Statute." (Preliminary Objections of Belgium, p. 69, para. 206; emphasis original.)

The Court then recapitulates the sequence of events relating to the legal position of the Applicant vis-à-vis the United Nations. It refers, inter alia, to the following: the break-up of the Socialist Federal Republic of Yugoslavia in 1991-1992; a declaration of 27 April 1992 by the SFRY Assembly, the National Assembly of the Republic of Serbia and the Assembly of the Republic of Montenegro asserting the continuation of the international legal and political personality of the SFRY by the Federal Republic of Yugoslavia; a note of the same day from Yugoslavia to the United Nations Secretary-General asserting the continuation by the FRY of the membership of the SFRY in the Organization; Security Council resolution 777 of 1992 considering that the FRY could not continue automatically the SFRY's membership; General Assembly resolution 47/1 of 1992 stating that the FRY shall not participate in the work of the General Assembly; and a letter dated 29 September 1992 from the United Nations Legal Counsel regarding the "practical consequences" of General Assembly resolution 47/1. The Court then concludes that the legal situation that obtained within the United Nations during the period 1992-2000 concerning the status of the Federal Republic of Yugoslavia, following the break-up of the Socialist Federal Republic of Yugoslavia, remained ambiguous and open to different assessments. This was due, inter alia, to the absence of an authoritative determination by the competent organs of the United Nations defining clearly the legal status of the Federal Republic of Yugoslavia vis-à-vis the United Nations. The Court then summarizes the various positions taken in that regard within the United Nations.

Against this background, the Court observes that it referred, in its Judgment of 3 February 2003 in the case concerning 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), to the "sui generis" position which the FRY found itself in "during the period between 1992 to 2000"; however, in that case, no final and definitive conclusion was drawn by the Court from this descriptive term on the amorphous status of the Federal Republic of Yugoslavia vis-à-vis or within the United Nations during this period. The Court considers that this situation came to an end with a new development in 2000. On 27 October of that year, the Federal Republic of Yugoslavia requested admission to membership in the United Nations, and on 1 November, by General Assembly resolution 55/12, it was so admitted. Serbia and Montenegro thus has the status of membership in the Organization as from 1 November 2000. However, its admission to the United Nations did not have, and could not have had, the effect of dating back to the time when the SFRY broke up and disappeared. It became clear that the sui generis position of the Applicant could not have amounted to its membership in the Organization.

In the view of the Court, the significance of this new development in 2000 is that it has clarified the thus far amorphous legal situation concerning the status of the Federal Republic of Yugoslavia vis-à-vis the United Nations. From the vantage point from which the Court now looks at the legal situation, and in light of the legal consequences of the new development since 1 November 2000, it concludes that Serbia and Montenegro was not a Member of the United Nations, and in that capacity a State party to the Statute of the International Court of Justice, at the time of filing its Application to institute the present proceedings before the Court on 29 April 1999. The Applicant not having become a party to the Statute on any other basis, it follows that the Court was not then open to it under Article 35, paragraph 1, of the Statute.

The Court then considers whether it might be open to the Applicant under paragraph 2 of Article 35, which provides:

"The conditions under which the Court shall be open to other States [i.e. States not parties to the Statute] shall, subject to the special provisions contained in treaties in force, be laid down by the Security Council, but in no case shall such conditions place the parties in a position of inequality before the Court."

The Court starts by noting that the words "treaties in force" in that paragraph do not, in their natural and ordinary meaning, indicate at what date the treaties contemplated are to be in force. They may be interpreted as referring either to treaties which were in force at the time that the Statute itself came into force, or to those which were in force at the date of the institution of proceedings in a case in which such treaties are invoked.

The Court points out that Article 35, paragraph 2, is intended to regulate access to the Court by States which are not parties to the Statute. It would have been inconsistent with the main thrust of the text to make it possible for States not parties to the Statute to obtain access to the Court simply by the conclusion between themselves of a special treaty, multilateral or bilateral, containing a provision to that effect. The Court finds that the interpretation of Article 35, paragraph 2, whereby that paragraph is to be construed as referring to treaties in force at the time that the Statute came into force is in fact reinforced by an examination of the travaux préparatoires of the text.

The Court thus concludes that, even assuming that the Applicant was a party to the Genocide Convention at the relevant date, Article 35, paragraph 2, of the Statute does not provide it with a basis for access to the Court under Article IX of that Convention, since the Convention only entered into force on 12 January 1951, after the entry into force of the Statute. The Court does not therefore consider it necessary to decide whether Serbia and Montenegro was or was not a party to the Genocide Convention on 29 April 1999, when the current proceedings were instituted.

The Court finally examines the question whether Serbia and Montenegro was entitled to invoke Article 4 of the 1930 Convention as a basis of jurisdiction in this case.

It observes that it has already found that Serbia and Montenegro was not a party to the Statute when the Application instituting proceedings in this case was filed, and consequently that the Court was not open to it as that time under Article 35, paragraph 1, of the Statute. The question remains however whether the 1930 Convention, which was concluded prior to the entry into force of the Statute, might rank as a "treaty in force" for purposes of Article 35, paragraph 2, and hence provide a basis of access. The Court observes that Article 35 of the Statute of the Court concerns access to the present Court and not to its predecessor, the Permanent Court of International Justice (PCIJ). The conditions for transfer of jurisdiction from the PCIJ to the present Court are governed by Article 37 of the Statute. However, it does not signify that a similar transfer is to be read into Article 35, paragraph 2, of the Statute. The Court notes that Article 37 applies only as between parties to the Statute. It accordingly finds that Article 37 cannot give Serbia and Montenegro access to the present Court under Article 35, paragraph 2, on the basis of the 1930 Convention, irrespective of whether or not that instrument was in force on 29 April 1999 at the date of the filing of the Application.

Having concluded that Serbia and Montenegro has no access to the Court under either paragraph 1 or paragraph 2 of Article 35, the Court notes that it is unnecessary for it to consider the Respondent's other preliminary objections.

The Court finally recalls that, irrespective of whether it has jurisdiction over a dispute, the parties "remain in all cases responsible for acts attributable to them that violate the rights of other States".

The text of the operative paragraph reads as follows:

"For these reasons,

THE COURT,

Unanimously,

Finds that it has no jurisdiction to entertain the claims made in the Application filed by Serbia and Montenegro on 29 April 1999."

Composition of the Court

The Court was composed as follows: 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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Vice-President RANJEVA and Judges GUILLAUME, HIGGINS, KOOIJMANS, AL-KHASAWNEH, BUERGENTHAL and ELARABY append a joint declaration to the Judgment of the Court; Judge KOROMA appends a declaration to the Judgment of the Court; Judges HIGGINS, KOOIJMANS and ELARABY and Judge ad hoc KREĆA append separate opinions to the Judgment of the Court.

A summary of the Judgment is published in the document entitled "Summary No. 2004/3", to which summaries of the declarations and opinions attached to the Judgment are annexed. The present Press Release, the summary and the full text of the Judgment also appear on the Court's website under the "Docket" and "Decisions" headings **(www.icj-cij.org)**.

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