CR 2004/11

International Court of Justice

THE HAGUE

Cour internationale de Justice

LA HAYE

YEAR 2004

Public sitting

held on Tuesday 20 April 2004, at 10 a.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 mardi 20 avril 2004, à 10 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. Allemagne)

COMPTE RENDU

Present:	President	Shi
	Vice-President	Ranjeva
	Judges	Guillaume
		Koroma
		Vereshchetin
		Higgins
		Parra-Aranguren
		Kooijmans
		Rezek
		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
Buergenthal
Elaraby
Owada
Tomka, juges
M. Kreća, juge *ad hoc*

M. Couvreur, greffier

The Government of Serbia and Montenegro is represented by:

Mr. Tibor Varady, S.J.D. (Harvard), Chief Legal Adviser at the Ministry of Foreign Affairs of Serbia and Montenegro, Professor of Law at the Central European University, Budapest and Emory University, Atlanta;

as Agent, Counsel and Advocate;

Mr. Vladimir Djerić, 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,

as Counsel and Advocate;

Mr. Slavoljub Carić, Counsellor, Embassy of Serbia and Montenegro, The Hague,

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

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

Ms Marijana Santrač,

Ms Dina Dobrković,

as Assistants;

Mr. Vladimir Srećković, Ministry of Foreign Affairs,

as Technical Assistant.

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

Mr. Thomas Läufer, Director General for Legal Affairs and Legal Adviser, Federal Foreign Office,

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 :

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

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,

comme conseil et avocat;

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,

M. Vladimir Cvetković, troisième secrétaire, département de droit international, ministère des affaires étrangères de Serbie et Monténégro,

Mme Marijana Santrač, LL.B. M.A. (Université d'Europe centrale),

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 :

M. Thomas Läufer, directeur général des affaires juridiques et conseiller juridique du ministère fédéral des affaires étrangères,

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.

Mr. PRESIDENT: Please be seated. The sitting is now open. Judge Al-Khasawneh, for reasons know to me previously, is unable to sit on the Bench this morning. This morning the Court will hear the oral statements of Germany, France and Italy. First, I give the floor to Mr. Thomas Läufer, Agent of Germany.

Mr. LÄUFER:

Introduction

1. Mr. President, distinguished Members of the Court, it is a great honour and privilege to appear before you as Agent of the Federal Republic of Germany. With me today are Edmund Duckwitz, German Ambassador at The Hague, as Agent, and Professor Christian Tomuschat, as Co-Agent and Counsel, who will argue this case together with me.

2. Like the Agents of the other respondent States, we ask the Court to dismiss Serbia and Montenegro's Application at the preliminary stage. As we will show, there is no legal basis for extending these proceedings to the merits phase.

3. Our Preliminary Objections were submitted in due form, as required, and we will refer to them and to the annexes throughout our oral pleadings as "Germany's Preliminary Objections". We shall be elaborating on these objections today. In the light of the written statements by Serbia and Montenegro of 18 December 2002 and 28 February 2003 we are all the more convinced that the Court cannot find any legal basis for its jurisdiction in the case presented here.

4. Mr. President, with your permission, I would like to present our line of argument. I myself will briefly summarize the facts as they are relevant to this case. Professor Tomuschat will then deal with Article IX of the United Nations Convention on the Prevention and Punishment of the Crime of Genocide, henceforth referred to as the Genocide Convention. He will explain that this provision, invoked by the Applicant as the sole compromissory clause vis-à-vis Germany, cannot serve as the basis for the Court's jurisdiction. Indeed, it would appear from the Written Observations of 18 December 2002 of Serbia and Montenegro — at that time still the Federal Republic of Yugoslavia — that it no longer relies on that jurisdictional clause.

5. Professor Tomuschat will demonstrate that the Applicant has renounced its right to pursue its claim against Germany and that it is estopped from continuing the proceedings due to the binding force of its unilateral declarations. Only briefly, and *à titre subsidiaire*, will Professor Tomuschat argue that Article IX of the Genocide Convention cannot be invoked as the basis of jurisdiction as the Applicant was not able to provide any relevant facts that come within the scope *ratione materiae* of Article IX. In particular, the Applicant did not produce any evidence of genocidal intent on the part of Germany when it participated in NATO's air campaign against the former Yugoslavia.

6. Mr. President, in our Preliminary Objections we gave a detailed account of the events which were the source of the conflict between the then Federal Republic of Yugoslavia and the international community and which led to the air operations conducted by NATO in 1999. I do not need to go into these factual matters again as it is our firm conviction that the Court lacks jurisdiction and that the case should not reach the merits stage. Let me only reiterate that it was solely the impending humanitarian catastrophe in Kosovo threatening the lives of hundreds and thousands of civilians which led Germany and its NATO allies to carry out the air operations in order to prevent that catastrophe from happening.

7. In addition, I would like to quote — with your permission, Mr. President — from the German Chancellor's address to the German people at the beginning of the air operations on 23 March 1999: "Tonight NATO has started air strikes against military targets in Yugoslavia. The Alliance thereby wishes to put a brake on grave and systematic violations of human rights and prevent a humanitarian catastrophe." And the Chancellor continued: "[T]he military operation is not directed against the Serbian people. This I wish to tell our Yugoslav fellow citizens in particular. We shall do everything to avoid losses among the civilian population."

8. After the adoption of Security Council resolution 1244 on 10 June 1999 all air operations against the FRY were halted. Germany is an active participant in the international civil and military presences that were established in Kosovo under United Nations auspices according to that resolution. German military units, police officers and civil servants — under KFOR and UNMIK direction — are thus acting in concert with the personnel of other sending States to establish the rule of law and to guarantee human rights to all inhabitants. The recent deplorable incidents in

Kosovo, which this time primarily affected the Serbian minority, have shown once again that the protection of the rule of law and of human rights is crucial for lasting peace and stability in the region.

9. Mr. President, distinguished Members of the Court, after Germany had filed its Preliminary Objections on 5 July 2000, two events took place which all Parties to these proceedings deem to be decisive for the present case. The then Federal Republic of Yugoslavia was admitted to the United Nations as a new Member on 1 November 2000. And on 12 March 2001, Yugoslavia acceded to the Genocide Convention with a reservation to Article IX. Pursuant to a note from the United Nations Secretary-General, this accession became effective on 10 June 2001.

10. In a written statement transmitted to the Court on 18 December 2002 the Applicant explicitly referred to these two events. The Applicant stated with regard to Articles 35 and 36 of the Statute of the Court that:

> "As the Federal Republic of Yugoslavia became a new member of the United Nations on 1 November 2000, it follows that it was not a member before that date. Accordingly, it became an established fact that before 1 November 2000, the Federal Republic of Yugoslavia was not and could not have been a party to the Statute of the Court by way of UN membership."

11. With regard to the Genocide Convention the Applicant stated that: "The Federal Republic of Yugoslavia did not continue the personality and treaty membership of the former Yugoslavia, and thus specifically, it was not bound by the Genocide Convention until it acceded to that Convention (with a reservation to Article IX) in March 2001."

12. In our response to these observations[1] we underlined that this statement by the Applicant can only be interpreted as constituting a formal acknowledgment that the Court has no jurisdiction over the case. It follows from the Applicant's lack of membership of the United Nations at the time when the proceedings were brought against us that it was equally not a party to the Statute of this Court. Furthermore, since the Applicant maintains that the Federal Republic of Yugoslavia was not a party to the Genocide Convention at that time, it follows that Article IX of that Convention, the sole compromissory clause that might be invoked in that case against Germany, is

[1] Letter to the Registrar to the Court dated 26 February 2003.

not applicable. Hence, the Court cannot exercise jurisdiction *ratione personae*. Lastly, it stands to reason that the Application is not admissible *ratione materiae*. This has been amply demonstrated in Germany's Preliminary Objections and I will not extend our arguments here again.

13. Professor Tomuschat will argue in detail that the Applicant is bound by these statements and that it can no longer rest its case on any jurisdictional basis. Suffice it to say that in a letter to the Court dated 28 February 2003 the Applicant again explicitly maintained that before 1 November 2000 the Federal Republic of Yugoslavia was not a party to the Statute of the Court and that it was not bound by the Genocide Convention until its accession to the treaty in March 2001.

14. Mr. President, before asking the Court to give the floor to our Co-Agent, allow me to make the following remarks of a more political character. In the period since Germany and the other respondent States filed their Preliminary Objections, the former Federal Republic of Yugoslavia has witnessed dramatic political changes. Former Serbian President Milosevic was ousted from power by the Serbian people on 5 October 2000. On 28 June 2001, he was transferred to the International Criminal Tribunal for the former Yugoslavia where he is currently on trial for, among other things, the acts of terror and violence in Kosovo which occurred during his presidency. On 17 November 2000, Germany and the Federal Republic of Yugoslavia — now Serbia and Montenegro — resumed diplomatic relations, which had been severed by the Federal Republic of Yugoslavia during NATO's military air campaign. Now, Germany and Serbia and Montenegro enjoy good and friendly relations. We actively support the process of Serbia and Montenegro's integration into Euro-Atlantic structures, for example through our substantial commitment to the Stability Pact for South-Eastern Europe.

15. Thank you, Mr. President and distinguished Members of the Court. I would now ask the Court to give the floor to Professor Tomuschat who will continue Germany's argument.

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

Mr. TOMUSCHAT:

16. Mr. President, distinguished Members of the Court, in this fairly complex proceeding, Germany wishes to reiterate that the Court lacks jurisdiction to look into the merits of the case. It

stated its views in a detailed fashion in its Preliminary Objections. The Objections are unreservedly maintained. In the meantime, however, a number of important developments have taken place which make it necessary to reassess the legal position.

A. New developments after the filing of Germany's Preliminary Objections

17. On the one hand, the Federal Republic of Yugoslavia (FRY), whose official name is now Serbia and Montenegro (SaM), was admitted as a new Member of the United Nations on 1 November 2000 by virtue of General Assembly resolution 55/12. On the other hand, after having joined the United Nations, the FRY notified the United Nations Secretary-General on 12 March 2001 its accession to the United Nations Convention on the Prevention and Punishment of the Crime of Genocide (henceforth, the Genocide Convention). Invoking these two occurrences as new facts, the FRY commenced proceedings for the revision of the Judgment of the Court of 11 July 1996 in the case concerning *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*[2]. In this Judgment, the Court had held that the preliminary objections raised by the FRY against the action brought against it by Bosnia and Herzegovina, alleging the commission of genocidal acts, were unfounded. As is well known, this request for revision was unsuccessful. The Court did not recognize any new facts in the sense contemplated by Article 61 of the Statute in these developments. Accordingly, it dismissed the application as being inadmissible[3].

B. Serbia and Montenegro itself denies the bases of the Court's jurisdiction

18. As far as the proceedings brought by the FRY against Germany are concerned, the only conceivable basis of jurisdiction could be Article IX of the Genocide Convention. No other basis of jurisdiction has ever been invoked by the FRY. Strangely enough, however, in its Written Observations of 18 December 2002 the FRY contends that, since it did not continue the personality and treaty membership of the former Yugoslavia, the Socialist Federal Republic of Yugoslavia (SFRY), it was not bound by the Genocide Convention until it acceded to it in March 2001. Furthermore, the Applicant draws attention to the fact that this late acceptance of the

---

[2] *I.C.J. Reports 1996*, p. 595.

[3] Judgment of 3 February 2003.

Genocide Convention was restricted by a reservation explicitly excluding Article IX, the compromissory clause, from its scope[4]. Thus, the Applicant itself concedes quite openly that there is no basis of jurisdiction for the proceedings it has instituted against Germany. Irrespective of the issue of the relevant date for gauging the requirements of jurisdiction, the reservation just referred to makes clear that the FRY has not, according to its own declarations, submitted to the jurisdiction of the Court and that, therefore, according to the principle of reciprocity, it is prevented from relying on Article IX of the Genocide Convention.

19. Furthermore, the Applicant's submission of 18 December 2002 states that at the time of the filing of the application in 1999 the FRY was not a Member of the United Nations, as evidenced by the fact that it was admitted as a new Member on 1 November 2000, and that, as a consequence, it was not a party to the Statute of the Court. Again, this is an argument which implicitly denies the jurisdiction of the Court since pursuant to Article 35 (1) of the Statute access to the "principal judicial organ of the United Nations" — as stated in Article 92 of the United Nations Charter — is generally reserved to States parties to the Statute. Inasmuch as the Genocide Convention should be inapplicable, the Application would not find a supportive basis in Article 35 (2) of the Statute either.

20. It is obvious that we are facing here an open contradiction. When the FRY commenced proceedings against Germany and other NATO countries, it contended that it was a Member State of the United Nations and a State party to the Genocide Convention. Now, it has revised its legal viewpoint. The logical consequence of this basic shift of attitude would have been to withdraw the Application. No such declaration, however, has been made by the Applicant. It has requested the Court to decide on its jurisdiction, apparently hoping to gain some benefit from such a ruling on the status of the former FRY.

---

[4] "The Federal Republic of Yugoslavia does not consider itself bound by Article IX of the Convention on the Prevention and Punishment of the Crime of Genocide and, therefore, before any dispute to which the Federal Republic of Yugoslavia is a party may be validly submitted to the jurisdiction of the International Court of Justice under this Article, the specific and explicit consent of the FRY is required in each case."

C. Germany's position with regard to the FRY's/SaM's United Nations membership and its capacity as a party to the Genocide Convention

21. How should this contradiction be dealt with? Germany agrees on one important point with the Applicant. Since the Application is still pending, the Court must make a determination on its jurisdiction, thereby definitively settling the case. Otherwise, however, Germany does not agree with the Applicant. It is certainly not enough for a party in a proceeding before the Court to make assertions as to the true nature of the legal position. In general, such assertions cannot be binding, neither on the Respondent nor on the Court. Only to a limited extent may a party make unilateral determinations, as will be shown in greater detail in the following. Whether or not a party was a member of the United Nations and whether or not it was a party to a specific treaty is a question the answer to which must be looked for in objective legal data. To be or not to be — Hamlet's question arises here in a slightly altered context.

22. In its Preliminary Objections of 5 July 2000, Germany did not contest the capacity of the FRY as a party to the Genocide Convention. In proceeding from that premise, it based itself on the Judgment of the Court of 11 July 1996 in the case concerning the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Preliminary Objections*[5], the Judgment that was already mentioned. In this decision, the Court held that "Yugoslavia" was bound by the Convention in any event as from 27 April 1992, when the coming into existence of the new State was officially proclaimed. Germany assumed, therefore, that a reciprocal relationship as required by Article IX of the Genocide Convention existed between the two parties to the dispute. The change of position effected by the Applicant overturns this assumption.

23. On the other hand, Germany has consistently taken the view that "Yugoslavia" ceased to be a Member of the United Nations upon the dissolution of the SFRY, meaning that the FRY did not become automatically a new Member of the world organization since there was no identity between the two States. As a corollary, "Yugoslavia" also ceased to be a party to the Statute. This argument was extensively elaborated upon in Germany's Preliminary Objections. It need not be repeated here. Germany just wishes to emphasize that it unrestrictedly maintains this argument.

---

[5]See above note 2.

D. The Court's position on these issues

24. Germany is aware of the fact that on a number of occasions the Court had to rule on the relevant issues. It may be permitted briefly to recall these earlier findings in order to get a clear and complete picture of the legal position.

25. The first judicial pronouncement on the two relevant issues can be found in the case concerning the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Provisional Measures*. In its Order of 8 April 1993[6], the Court refrained from making a definitive determination. It held that "the question whether or not Yugoslavia is a Member of the United Nations and as such a party to the Statute of the Court is one which the Court does not need to determine definitively at the present stage of the proceedings"[7], and confined itself to concluding that it had "prima facie jurisdiction, both *ratione personae* and *ratione materiae*, under Article IX of the Genocide Convention"[8]. Given the fact that in issue was a request for the indication of provisional measures, this reluctance to engage in a full enquiry into the legal position was manifestly dictated by the relevant circumstances.

26. In the Judgment of the Court of 11 July 1996, again in the case concerning *Bosnia and Herzegovina* v. *Yugoslavia*[9], which was already referred to, the Court devoted some attention to the question of whether the FRY could be deemed to be a party to the Genocide Convention. Basing itself on the fact that the former Yugoslavia, the SFRY, had ratified the Convention on 29 August 1950 and that upon its coming into existence on 27 April 1992, the FRY had pledged to "strictly abide by all the commitments that the Socialist Federal Republic of Yugoslavia assumed internationally", the Court concluded that "Yugoslavia", i.e., the FRY, was bound by the Convention since that date. On the other hand, it completely abstained from addressing the status of the FRY as a Member of the United Nations.

27. In the present case, the case concerning *Legality of Use of Force (Yugoslavia* v. *Germany)*[10], where the Court eventually rejected the request for the indication of provisional

---

[6] *I.C.J. Reports 1993*, p. 3.

[7] *Ibid*., p. 14 para. 18.

[8] *Ibid*., p. 18 para. 32.

[9] See above note 2.

[10] *I.C.J. Reports 1999*, p. 422.

measures submitted by the FRY, the Court stated that "it is not disputed that both Yugoslavia and Germany are parties to the Genocide Convention without reservation"[11]. Consequently, it inferred from that finding that Article IX of the Genocide Convention *might* provide the necessary basis of jurisdiction for the action brought by the FRY. It did not, however, address the issue of United Nations membership of the FRY.

28. All of these inferences and conclusions were challenged by the Yugoslav request for revision of the Judgment of 11 July 1996. The FRY defended the thesis that its admission as a Member of the United Nations on 1 November 2000 constituted a new fact which made clear that before that date it simply had not been a Member of the world organization. Furthermore, since State succession had taken place, it was not a party to the Genocide Convention either at the time when Bosnia and Herzegovina filed its application. The response of the Court to these submissions, provided in the Judgment of 3 February 2003[12], reveals some hesitations. The Court held that from 1992 to 2000 the FRY had held a "*sui generis* position within the United Nations"[13]. Thus, it avoided the sharp alternative between membership and non-membership. On the other hand, as far as the position of the FRY in relation to the Genocide Convention was concerned, it pointed out that that position was not affected by the resolutions adopted by the General Assembly[14]. In other words, the Judgment is predicated on the assumption that without any interruption first the SFRY and later the FRY were bound by the Convention.

29. Drawing a tentative conclusion from this *iter* of the jurisprudence, one may say that according to the view of the Court, first, the FRY had not remained outside the United Nations from 27 April 1992 to 1 November 2000, but had enjoyed during that time a special status, a status "*sui generis*" and that secondly, the FRY has been a party to the Genocide Convention since its birth.

---

[11] *Ibid*., p. 430, para. 24.

[12] *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*).

[13] *Ibid*., p. 17, para. 50.

[14] *Ibid*., p. 24, para. 70.

E. The contradictions

30. These findings seem to be in contradiction to the submissions of the Applicant as laid down in the Written Observations of 18 December 2002. Does one have to find out now, for the first time, what the true legal position is? It should not be overlooked that the case law as just succinctly summarized is essentially founded on the fact that the FRY's status as a party to the Genocide Convention had never been contested before the request for revision of the Judgment of 11 July 1996 was filed on 24 April 2001; all the parties in the different proceedings, including the FRY, were in fact in full agreement on that issue. The FRY could hardly argue that State succession had occurred since such a submission would have destroyed its claim for identity with the SFRY. On the other hand, the Applicants — Bosnia and Herzegovina as well as later Croatia — had no interest in denying the FRY's being bound by virtue of the SFRY's act of ratification dating back to August 1950. Now, the factual circumstances are not the same any longer. The Applicant challenges the finding by the Court that it has always been a party to the Genocide Convention.

F. The procedural autonomy of the parties

31. Now, Germany is of the view that the Gordian knot can be cut in a way which avoids inflicting damage on any one of the actors involved. It suggests focusing on the facts of the instant case, leaving aside all the possible repercussions which the eventual decision of the Court may have on other proceedings where the configuration of the parties is a different one. In fact, the judgment of the Court will be *res judicata* only between the parties actually involved in the relevant proceeding. Essentially, therefore, two judgments rendered in two different proceedings with different parties cannot be at variance with one another.

32. The key argument to bear in mind is the power of determination of the parties in a proceeding before the Court. As was already pointed out, the parties have no power of determination regarding the *substantive* legal position. Whether a State as a subject of international law has certain rights or obligations must be evaluated by reference to the applicable rules of international law. However, a State is always free to renounce the *rights* of which it is the holder. *Duties*, on the other hand, cannot be repudiated as lightly.

33. First of all, according to the basic rule of international adjudication that the jurisdiction of international courts and tribunals is not compulsory, but depends on consent, it is the parties to a dispute which decide whether that dispute should be submitted to third-party settlement by a judicial body. Even if a jurisdictional link exists between the parties to a controversy, it depends on their free decision to have recourse to the available judicial remedy. There exists no ex officio procedure as far as inter-State disputes are concerned. No public prosecutor can compel a State to take the seat of the Respondent in a proceeding before the Court. Whenever Article 36, paragraph 1, of the Statute becomes applicable by virtue of a jurisdictional clause contained in a treaty or convention in force, a State can unilaterally institute proceedings against a Respondent who has also accepted that same clause. In fact, this is the configuration encompassed in Article IX of the Genocide Convention. It thus depends *entirely* on the will of the State concerned to bring an actual dispute to the Court or to look for a different method of settlement.

34. Second, a party instituting proceedings also determines the scope of the subject-matter to be adjudicated by the Court. Its submissions delimit the jurisdictional power of the Court. The Court is not authorized to grant a party more than it has requested. In the *Corfu Channel* case[15], it explicitly said that "it cannot award more than the amount claimed in the submissions of the United Kingdom Government[16]. This is a general proposition which does not apply solely to the issue of monetary compensation[17]. Hence, the Applicant identifies and fixes the scope of the substantive task the Court has to cope with in discharging its judicial function.

35. Likewise, it is the parties which decide on the defences on which they wish to rely. Their power of determination is particularly obvious with regard to preliminary objections. Pursuant to Article 79, paragraph 1, of the Rules, preliminary objections shall be raised within a time-limit of three months after the Applicant has delivered its Memorial. Once this time has elapsed, the Respondent is generally debarred from calling into question the jurisdiction of the Court[18]. In

---

[15] *I.C.J. Reports 1949*, p. 244.

[16] *Ibid*., p. 249; in the same vein see also the *Asylum* case, *Request for Interpretation, I.C.J. Reports 1950*, p. 402.

[17] See Fitzmaurice, Gerald: *The Law and Procedure of the International Court of Justice, 1951-1954: Questions of Jurisdiction, Competence and Procedure*, *BYBIL* 34 (1958), p. 99; Rosenne, Shabtai: *The Law and Practice of the International Court 1920-1996*, 3rd ed., The Hague *et al*., Martinus Nijhoff Publishers, 1997, pp. 594-596.

[18] A famous example to the contrary is the *Nottebohm* case where the Court, notwithstanding its rejection of the Preliminary Objections raised by Guatemala in its Judgment of 18 November 1953, *I.C.J. Reports 1953*, p. 111, later dismissed the Application as inadmissible by its Judgment of 6 April 1955, *I.C.J. Reports 1955*, p. 26.

particular, by remaining silent in a situation where according to objective data the Court's jurisdiction is lacking, the Respondent is in a position to permit the proceeding to continue. In such circumstances, sheer passivity may establish *forum prorogatum*. This remains true although the Court has reserved the right to examine *proprio motu* its jurisdiction if the particular circumstances of the case at hand so warrant[19]. Thus, in the case concerning the *Appeal Relating to the Jurisdiction of the ICAO Council*[20], it held: "The Court must . . . always be satisfied that it has jurisdiction, and must if necessary go into that matter *proprio motu*."[21] But, if consent has been given by the Respondent, albeit implicitly, the jurisdiction of the Court is well founded.

36. Lastly, it is an uncontested proposition of general international law that a subject of international law may, by its own free will, renounce any right it may hold. There may be certain limits to that power. Thus, for instance, fundamental rules of international law established for the benefit of human beings may not be set aside by governments, which are no more than trustees of their peoples. But generally, the authority to make determinations even on sovereign rights goes very far. In particular, a State may invite military forces of a foreign nation to enter its territory for the pursuit of certain common purposes[22]. Within a defensive alliance, States welcome foreign troops on their soil as a matter of routine. Without consent having been given to such deployment, the arrival of foreign troops in foreign territory would amount to a flagrant violation of national sovereignty.

G. Serbia and Montenegro has renounced any possible right of action

37. It is this general rule of international law which provides the key to solving the intricacies of the instant case. The statement by the Applicant that the FRY "was not bound by the Genocide Convention until it acceded to that Convention" is not understood by SaM itself as implicit discontinuance of the proceedings since it explicitly requests the Court to decide on its jurisdiction. The Applicant, hence, has no intention of unilaterally bringing the proceedings to an

---

[19]See Rosenne, above note 17, pp. 928-932,

[20]*I.C.J. Reports 1972*, p. 46.

[21]*Ibid*., p. 52, para. 13.

[22]See the study by Nolte, Georg: *Eingreifen auf Einladung* (Intervention upon Invitation), Berlin *et al.*, Springer, 1999.

end. However, its will is not the determinative element. The sentence referred to is not devoid of any meaning. It contains a clear message to the effect that the Applicant does not wish to pursue the matter on the basis of Article IX of the Genocide Convention. In other words, the Applicant has renounced the right of action which it originally claimed when instituting the proceedings against Germany and the other Members of the North Atlantic Treaty Organization.

38. The renunciation as it must be inferred from the Written Observations of 18 December 2002 settles the issue of the jurisdiction of the Court independently of the prior existence or non-existence of a right of action under Article IX of the Genocide Convention. If the FRY, now having been transformed to SaM, was not bound by the Genocide Convention when NATO's air operations took place, it could never derive any rights from that Convention on account of the loss of human lives which occurred in the Yugoslav territory as a result of those air operations. If, on the other hand, as assumed by the Court in its earlier decisions, the FRY was at all times a party, as from its first hour, then the declaration deploys its full effect. Recourse to Article IX of the Convention, as it may have been possible for the FRY as a contracting party, is now precluded.

39. The fact that the Applicant has renounced its right of action in the instant case does not affect the objective legal position. It is trivial to note once again that a State has a power of disposition over its rights, but not over its obligations. In the case of a multilateral treaty which generates rights and obligations in the relations between the different parties, transactions being effected between two parties do not entail legal effects for third parties. The rule that treaties cannot impose obligations on third States, which is Article 35 of the Vienna Convention on the Law of Treaties, reflects a more fundamental rule of general international law to the effect that no State, or group of States, is in a position to bring into existence obligations for third States by acting unilaterally. Any other interpretation of the legal position under general international law would amount to an encroachment of the principle of sovereign equality of States. Thus, the renunciation by the FRY of its rights under Article IX of the Genocide Convention is legally unable to modify the legal relations existing between SaM and its neighbours. This also means that a finding by the Court that the Applicant is debarred from pursuing its claims against Germany on the basis of Article IX of the Genocide Convention will remain confined to the instant case. It

would not hinder the Court, in a different procedural setting, to note that the FRY has always been a party to the Convention.

H. The principle of estoppel prevents Serbia and Montenegro from changing its position

40. Germany is of the view that the conclusions it has reached are furthermore buttressed by two legal concepts which have been firmly acknowledged in the jurisprudence of the Court. On the one hand, Germany invokes the principle of estoppel. On the other hand, Germany relies on the binding force of unilateral declarations. In fact, the Written Observations of 18 December 2002 have a particular quality. Normally, the submissions of parties to an international dispute are made up of detailed explanations which discuss the most diverse matters, always with the aim of supporting the claims submitted to the judgment of the Court. Here, however, the Applicant has confined itself to a few sentences, as if they were set in stone. These sentences state just two axiomatic propositions, namely that the FRY, at the relevant time, was neither a Member of the United Nations nor a party to the Genocide Convention.

41. If such a principled statement is made, it cannot be withdrawn as easily as any other submission that may have to be adapted to the arguments put forward by an opponent in the course of proceedings[23]. Germany is of the view that the Written Observations of 18 December 2002 have fundamentally restructured the entire procedural configuration in a sense that corresponds fully to the definition of estoppel as provided by the Court in its *North Sea Continental Shelf* Judgment of 20 February 1969[24] and reconfirmed in the case concerning *Military and Paramilitary Activities in and against Nicaragua, Jurisdiction and Admissibility*[25]. According to these two decisions, estoppel can be invoked if, first, a party relies on specific conduct manifested or declarations made by another State. Quite definitely, Germany does rely on the formal statement by the Applicant that the compromissory clause of Article IX of the Genocide Convention is inapplicable between the two parties. Furthermore, those two decisions require that departure from the viewpoint adopted by the first State prove harmful to the State which has trusted that the first State will

[23]Cf. also, as far as evidence is concerned, the conclusions by L. Delbez, *Les principes généraux du contentieux international*, Paris 1962, pp. 114-115.

[24]*I.C.J. Reports 1969*, p. 26, para. 30.

[25]Judgment of 26 November 1984, *I.C.J. Reports 1984*, p. 415, para. 51.

remain faithful to the line of conduct it has indicated by its conduct or through its declarations. This requirement is fulfilled as well. The Applicant has generated the legitimate expectation that the dispute will be settled on the premise that Article IX of the Genocide Convention is not available as a legal basis to support the jurisdiction of the Court. Statements like those contained in the Written Observations of 18 December 2002 are indeed statements which must be taken seriously. A party that has publicly proclaimed the lack of jurisdictional foundations of its claims cannot, the next day, argue that what it said was a mistake which should be corrected.

I. The binding force of authoritative unilateral declarations

42. The doctrine of estoppel is not far away from the doctrine which attaches binding force to unilateral declarations of a specific type. It is well known that in the *Nuclear Tests* cases[26], the Court reached the conclusion that France was bound by its announcements concerning its future policy of testing nuclear devices. Although the relevant passage in the Judgment of 20 December 1974 is well known, it may be permitted to quote no more than three sentences as a prerequisite for showing that, also in that regard, the Applicant cannot depart from the position which, through the Written Observations of 18 December 2002, it has formally endorsed. The relevant key sentences read as follows:

> "It is well recognized that declarations made by way of unilateral acts, concerning legal or factual situations, may have the effect of creating legal obligations . . . When it is the intention of the State making the declaration that it should become bound according to its terms, that intention confers on the declaration the character of a legal undertaking, the State being thenceforth legally required to follow a course of conduct consistent with the declaration. An undertaking of this kind, if given publicly, and with an intent to be bound, even though not made within the context of international negotiations, is binding."[27]

There can be no doubt that the Applicant wished to make clear, once and for all, that according to its evaluation of the legal position there existed no legal relationship of any kind between itself and Germany and the other Members of the North Atlantic Treaty Organization within the framework of the Genocide Convention. The Written Observations of 18 December 2002 were not addressed to an indefinite public at large, but they were of course

---

[26] *Nuclear Tests (Australia* v. *France), Judgment of 20 December 1974, I.C.J. Reports 1974*, p. 253.

[27] *Ibid*., p. 267, para. 43.

directed to all the States that have a tangible interest in the matter. In this respect, they were "public" inasmuch as they went clearly beyond the internal fora of the Applicant.

J. Submission *à titre subsidiaire*: NATO's air operations are not covered by Article IX of the Genocide Convention

43. Given the conclusions to be drawn from the preceding observations, namely that the Applicant is and remains bound by the renunciation of any possible right of action under Article IX of the Genocide Convention, the following observations are presented only *à titre subsidiaire*. Germany is firmly convinced that Article IX is not operative in its relations with the Applicant. In principle, there would be no need to demonstrate that the facts of the dispute do not fit into the scope of Article IX — and this will be a summary demonstration of the following.

44. The Applicant has totally failed to show that Germany pursued a genocidal intent. None of the facts adduced provides any kind of circumstantial evidence of such intent, which is a constitutive element of the crime of genocide, as has been pointed out yesterday by many speakers. As the Court rightly pointed out in rejecting the FRY's application for the indication of provisional measures, warfare cannot be equated with the commission of genocide[28]. Nobody can or would deny that armed conflict leads to loss of human life. Germany deeply and sincerely regrets that the air operations against the FRY caused the death of a significant number of Yugoslav citizens. But genocide constitutes a specific type of criminal offence where the perpetrator seeks to target human beings on account of their belonging to a specific "national, ethnical, racial or religious" group (Genocide Convention, Article II). It is a matter of common knowledge, as demonstrated in the Preliminary Objections (paras. 2.1-2.37), that the military operations against the FRY were undertaken in an attempt to rescue the Kosovo Albanians from being subjected to atrocities, including genocidal acts, and from being driven out of their ancestral lands. The North Atlantic Treaty Organization never conceived of any plan to kill or otherwise substantially harm the population of the FRY. In fact, the bombings stopped on the day when the FRY's Government accepted to withdraw its armed forces from the province of Kosovo. This brief account will not be continued. Germany does not wish to go into the merits of the dispute. In any event, the Applicant

[28] See above note 10, p. 431, para. 27.

has not been able to furnish any proof that the air operations were part and parcel of a strategy designed seriously to harm the Serbian people.

45. Lastly, Germany wishes to stress that jurisdictional clauses must be interpreted and applied with the utmost care. Great harm would be done to the foundations of the system of international adjudication if such clauses, which are always geared to a specific subject-matter, could be relied upon in disputes which have nothing to do with that specific substantive identification. In fact, the Court has consistently shown attentive awareness of the dangers inherent in "dynamic" interpretation of jurisdictional clauses. It is not enough for a party to assert that a claim brought by it meets the substantive requirements established therein. In the *Oil Platforms* case[29], for instance, the Court painstakingly examined the different claims brought by Iran with a view to determining whether they might come within the scope of the different substantive provisions of the 1955 Treaty of Amity between the United States and Iran. Only if such was the case, could the jurisdictional clause of Article XXI, paragraph 2, of that Treaty become applicable. The Court held that it could not

> "limit itself to noting that one of the Parties maintains that such a dispute exists, and the other denies it. It must ascertain whether the violations of the Treaty of 1955 pleaded by Iran do or do not fall within the provisions of the Treaty and whether, as a consequence, the dispute is one which the Court has jurisdiction *ratione materiae* to entertain . . ."[30]

46. A number of earlier cases can be referred to as well where the Court consistently held that it will not permit the artificial establishment of capricious and arbitrary links between the facts of a dispute and the compromissory clause which might serve as the entry gate to its jurisdiction. It stands to reason that at the time when proceedings are initiated it is impossible to furnish full and convincing proof that indeed the matters in issue fall within the scope of such a clause. As a minimum, however, there must be a certain plausibility that the facts relied upon by the Applicant are covered by the relevant clause. Facts must be taken as what they are. They cannot be squeezed and moulded *ad libitum* to fit the requisite criteria. More than half a century ago, the Permanent Court held in the *Ambatielos* case:

---

[29] *Oil Platforms (Islamic Republic of Iran v. United States of America), Preliminary Objection, I.C.J. Reports 1996*, p. 803.

[30] *Ibid*., p. 810, para. 16.

> "The Court must determine . . . whether the arguments advanced by the Helenic Government in respect of the treaty provisions on which the Ambatielos claim is said to be based, are of a sufficiently plausible character to warrant a conclusion that the claim is based on the Treaty. It is not enough for the claimant Government to establish a remote connection between the facts of the claim and the Treaty of 1886."[31]

That is, the Treaty which allegedly provided for dispute settlement by arbitration. This dictum was confirmed by later pronouncements. Suffice it to refer to the relevant statement of the Court in its Advisory Opinion on *Judgments of the Administrative Tribunal of the ILO upon Complaints Made against Unesco*[32], where the Court, after having said that a mere verbal reference to certain terms or provisions does not meet the requirements of the relevant jurisdictional clause, continued as follows: "it is necessary that the complainant should indicate some genuine relationship between the complaint and the provisions invoked . . .".[33]

47. Such a "genuine relationship" cannot be perceived in the present case. Undoubtedly, the military operations against the FRY caused bloodshed and loss of human life. But those tragic losses are miles apart from genocide. It would be a distortion of historical realities to classify them, albeit on a provisional basis just for the purposes of the compromissory clause of Article IX of the Genocide Convention, as facts that might be susceptible of being identified as genocide. Allegations that are so far-fetched as the contention that NATO forces launched their attacks with a view to destroying the Serbian people are simply untenable. They cannot have any legal relevance.

48. All that must be said concerning the attempt by the Applicant to invoke Article IX of the Genocide Convention was already said by the Court in its Order of 2 June 1999[34]. When ruling on the preliminary objections raised, the Court should simply base itself on the persuasive considerations of this earlier decision in the present case.

49. Lastly, Germany simply notes that, given the Applicant's assertion that at the relevant time it was not a party to the Genocide Convention, the criteria of Article IX of that Convention are not met. A dispute in the sense contemplated by Article IX can exist only between parties to that instrument.

---

[31] *I.C.J. Reports 1953*, p. 18.

[32] *I.C.J. Reports 1956*, p. 77.

[33] *Ibid*., p. 89.

[34] See above note 10, p. 431, para. 25.

K. Submissions

50. In conclusion, Germany requests the Court to dismiss the Application for lack of jurisdiction. As specified in the Preliminary Objections, some parts of the Application must additionally be considered inadmissible. I thank the Court for its kind attention and patience. Thank you.

The PRESIDENT: Thank you, Professor Tomuschat. This concludes the first round of oral pleadings of Germany.

The Court rose at 10.55 a.m.

_____