*CR 2004/7*

**International Court of Justice**

**THE HAGUE**

**Cour internationale de Justice**

**LA HAYE**

**YEAR 2004**

***Public sitting***

***held on Monday 19 April 2004, at 11.55 a.m., at the Peace Palace,***

***President Shi presiding,***

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

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**VERBATIM RECORD**

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**ANNÉE 2004**

***Audience publique***

***tenue le lundi 19 avril 2004, à 11 h 55, 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. Pays-Bas)**

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**COMPTE RENDU**

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| *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

***The Government of Serbia and Montenegro is represented by:***

Mr. Tibor Varady, Chief Legal Adviser at the Federal 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, 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. 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 Kingdom of the Netherlands is represented by:***

Mr. J. G. Lammers, Legal Adviser of the Ministry of Foreign Affairs,

*as Agent;*

Mr. N. M. Blokker, Legal Counsel of the Ministry of Foreign Affairs,

*as Co-Agent.*

***Le Gouvernement de la Serbie et Monténégro est représenté par :***

M. Tibor Varady, S.J.D. (Harvard), conseiller juridique principal au ministère fédéral 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 fédéral 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. 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 du Royaume des Pays-Bas est représenté par :***

M. J. G. Lammers, conseiller juridique du ministère des affaires étrangères,

*comme agent;*

M. N. M. Blokker, conseiller juridique, ministère des affaires étrangères,

*comme coagent.*

The PRESIDENT: Please be seated. I now give the floor to Professor Lammers, Agent of the Netherlands.

Mr. LAMMERS:

## I. Introduction

1. Mr. President, distinguished judges of the International Court of Justice, may it please the Court. My name is Johan Lammers. I am the Legal Adviser of the Ministry of Foreign Affairs of the Netherlands and Head of the International Law Department of that Ministry. I am the Agent for the Netherlands in the present case brought by Serbia and Montenegro — formerly known as the Federal Republic of Yugoslavia — in its Application addressed to the Registrar of the Court on 29 April 1999 against the Kingdom of the Netherlands for "violation of the obligation not to use force".

2. First of all, I would like to express my respect to this most distinguished international legal body, the principal judicial organ of the United Nations. Indeed, it is a great honour for me to address the Court.

3. In its Preliminary Objections of 5 July 2000 in the present case, the Netherlands requested the Court to adjudge and declare that:

— Serbia and Montenegro is not entitled to appear before the Court;

— the Court has no jurisdiction over the claims brought against the Netherlands by Serbia and Montenegro; and/or

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

4. In its oral statement, the Netherlands will not repeat in detail what has been put forward in its Preliminary Objections by which it stands fully today. According to Article 60, paragraph 1, of the Rules of Court, the oral statement made on behalf of each party must be directed to the issues that still divide the parties. However, as the Netherlands will indicate this morning, this is difficult, if not impossible. One of the key elements of our observations this morning will be that there is in fact agreement between Serbia and Montenegro and the Netherlands that the Court has no

jurisdiction in the present case and that there is no longer a dispute between the Parties concerning the jurisdiction of the Court.

5. This morning the Netherlands intends first to comment on Serbia and Montenegro's Written Observations of 18 December 2002 and the implications of these observations for the jurisdiction of the Court. Secondly, the Netherlands will briefly discuss the legal consequences for the present case of Serbia and Montenegro becoming a Member of the United Nations on 1 November 2000. Thirdly, the Netherlands would like to inform the Court of the outcome of consultations with Serbia and Montenegro on the remaining in force of bilateral treaties concluded between the Netherlands and Yugoslavia.

## II. Serbia and Montenegro's Written Observations: implications for the jurisdiction of the Court

6. Mr. President, distinguished Members of the Court, on 18 December 2002, Serbia and Montenegro submitted its Written Observations. These refer to "newly discovered facts" that "have been revealed in the light of the acceptance of the Federal Republic of Yugoslavia as a new member of the United Nations on 1 November 2000". Serbia and Montenegro requests the Court to decide on its jurisdiction "considering the pleadings formulated in these Written Observations". This request was repeated in its subsequent letter of 28 February 2003. In this connection the Netherlands would already like to emphasize that in its Written Observations Serbia and Montenegro chose not to contest the Netherlands objections to the jurisdiction of the Court and to the admissibility of the claims of Serbia and Montenegro. Serbia and Montenegro did not ask the Court to reject the Netherlands submissions. It did not, more generally, ask the Court to find that it had jurisdiction.

7. According to Serbia and Montenegro's Written Observations, there are two "newly discovered facts". Firstly, with regard to Articles 35 and 36 of the Statute of the Court, with regard to the Genocide Convention, and with regard to bilateral conventions in the cases against Belgium and the Netherlands, Serbia and Montenegro submits that it is now clear that before 1 November 2000, Serbia and Montenegro was not and could not have been a party to the Statute of the Court by way of United Nations membership. Secondly, with regard to the Genocide Convention, Serbia and Montenegro submits that it did not continue the personality and treaty

membership of the former Yugoslavia, and was therefore not bound by the Genocide Convention until it acceded to that Convention, with a reservation to Article IX, in March 2001.

8. Serbia and Montenegro's Written Observations are fundamentally different from its original Application. In its original Application, dated 29 April 1999, Serbia and Montenegro invoked, as legal grounds for jurisdiction of the Court, Article 36, paragraph 2, of the Statute of the Court as well as Article IX of the Genocide Convention. In a Supplement to the Application dated 12 May 1999, Serbia and Montenegro invoked, as an additional basis for the jurisdiction of the Court, Article 4 of the 1931 Treaty of Judicial Settlement, Arbitration and Conciliation between the Kingdom of the Netherlands and the Kingdom of Yugoslavia. In Part 3 of its Memorial of 5 January 2000, Serbia and Montenegro further explained these alleged grounds for jurisdiction.

9. However, in its Written Observations of 18 December 2002 Serbia and Montenegro essentially no longer takes the view that these are indeed grounds for jurisdiction of the Court. It supplemented and in fact revised its original Application in a fundamental way. It may be recalled that Serbia and Montenegro has reserved its right to do so at the very end of its original Application, as follows: "[t]he Government of the Federal Republic of Yugoslavia reserves the right to amend and supplement this Application". This is what now has happened in the Written Observations of 18 December 2002.

10. Mr. President, distinguished judges of the Court, with regard to Serbia and Montenegro's Written Observations, the Netherlands would like to submit the following:

*(a)* Serbia and Montenegro and the Netherlands now in fact agree that the Court has no jurisdiction in the present case;

*(b)* Serbia and Montenegro and the Netherlands in fact agree that there is no longer question of a dispute between the Parties on the jurisdiction of the Court;

*(c)* from an objective point of view there is no longer question of a dispute between the Parties on the jurisdiction of the Court.

### *(a)* Serbia and Montenegro and the Netherlands now in fact agree that the Court has no jurisdiction in the present case

11. With regard to Articles 35 and 36 of the Statute of the Court, Serbia and Montenegro now has the same view as has been expressed by the Netherlands in its Preliminary Objections,

namely, at the time when Serbia and Montenegro filed its Application in the Registry of the Court, 29 April 1999, Serbia and Montenegro was not a party to the Statute of the Court. Therefore, the Court cannot have jurisdiction in this case on the basis of Article 35, paragraph 1, of the Statute, providing that the Court "shall be open to the States parties to the present Statute". Furthermore, as Serbia and Montenegro was not a party to the Statute at the time, it did not have the right under Article 36, paragraph 2, of the Statute to make a declaration to recognize the jurisdiction of the Court.

12. Next, both Serbia and Montenegro and the Netherlands now agree that the Court has no jurisdiction in this case on the basis of the Genocide Convention. It is true that this common view is partly based on different grounds. According to Serbia and Montenegro, the Court has no jurisdiction in this case on the basis of the Genocide Convention because, *inter alia*, Serbia and Montenegro did not continue the personality and treaty membership of the former Yugoslavia, and was therefore not bound by the Genocide Convention until it acceded to that Convention, with a reservation to Article IX, in March 2001. However, according to the Netherlands, the Court has no jurisdiction in this case on the basis of the Genocide Convention for another reason: Serbia and Montenegro has completely failed to substantiate its claim that the Netherlands has breached the Genocide Convention. Serbia and Montenegro simply alleges that a genocidal intent existed, but does not even make a beginning of substantiating such allegations. As this Court has stated in paragraph 38 of its Order of 2 June 1999:

> "[w]hereas, in order to determine, even prima facie, whether a dispute within the meaning of Article IX of the Genocide Convention exists, the Court cannot limit itself to noting that one of the Parties maintains that the Convention applies, while the other denies it; and whereas in the present case the Court must ascertain whether the breaches of the Convention alleged by Yugoslavia are capable of falling within the provisions of that instrument and whether, as a consequence, the dispute is one which the Court has jurisdiction *ratione materiae* to entertain pursuant to Article IX".

It may in this connection also be recalled that in paragraph 41 of its Order of 2 June 1999 the Court itself, albeit prima facie, has come to the conclusion that

> "the Court [was] . . . not in a position to find . . . that the acts imputed by Yugoslavia to the Respondent are capable of coming within the provisions of the Genocide Convention; and [that] . . . Article IX of the Convention . . . cannot accordingly constitute a basis on which the jurisdiction of the Court could prima facie be founded in this case".

Thus, although it may be true that the parties on this point in part use different grounds, it is according to the Netherlands decisive that they arrive at the same conclusion: viz. that the Court has no jurisdiction in the present case on the basis of the Genocide Convention.

13. Finally, Serbia and Montenegro now also agrees with the Netherlands that with regard to the 1931 bilateral Treaty of Judicial Settlement, Arbitration and Conciliation, it is now clear that before 1 November 2000, it was not and could not have been a party to the Statute of the Court by way of United Nations membership. As the Netherlands has indicated in paragraph 6.4 of its Preliminary Objections, one of the reasons why this bilateral treaty does not provide a basis for jurisdiction of the Court is that Serbia and Montenegro was not a party to the Statute when it filed its Application in 1999.

***(b)* Serbia and Montenegro and the Netherlands in fact agree that there is no longer question of a dispute between the Parties on the jurisdiction of the Court**

14. Mr. President, Members of the Court, Serbia and Montenegro and the Netherlands in fact agree that there is no longer question of a dispute between the Parties on the jurisdiction of the Court. As the Court has emphasized: "[t]he Court, as a court of law, is called upon to resolve existing disputes between States. Thus the existence of a dispute is the primary condition for the Court to exercise its judicial function;". The Court has furthermore emphasized that the dispute brought before it must "continue to exist at the time when the Court makes its decision", it said so in the *Nuclear Tests* cases (*Nuclear Tests* cases, *I.C.J. Reports 1974*, p. 271 and p. 476).

15. In the case concerning *Mavrommatis Palestine Concessions*, the Permanent Court of International Justice has defined a dispute as "a disagreement on a point of law or fact, a conflict of legal views or of interests between two persons" (*1924, P.C.I.J., Series A, No. 2*, p. 11). The International Court of Justice has used this definition of a dispute in its case law, for example in the Advisory Opinion concerning the *Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement* (*I.C.J. Reports 1988*, p. 27).

16. In the present case there appears to be according to the parties no longer a disagreement or conflict of legal views. In its Preliminary Objections the Netherlands has concluded that the Court has no jurisdiction in the present case. Serbia and Montenegro no longer contests this conclusion in its Written Observations. Neither does it ask the Court to find that it has jurisdiction.

Therefore, the conclusion is warranted that according to the Parties there is no longer a dispute between the Parties as to the jurisdiction of the Court in the present case.

***(c)* From an objective point of view there is no longer question of a dispute between the Parties on the jurisdiction of the Court**

17. From an objective point of view, even when the Court were to conclude that it is not sufficiently clear whether *according to the Parties* there is no longer a dispute between the Parties on the lack of jurisdiction of the Court, the Court still has to decide whether or not there is sufficient disagreement or conflict of legal views between the Parties with regard to the jurisdiction of the Court so as to qualify this as a dispute. As the Court has observed in the case concerning *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania*, "whether there exists an international dispute is a matter for *objective* determination" (*I.C.J. Reports 1950*, p. 74; emphasis added). It is for the Court to decide whether or not from an objective point of view the Parties are still in dispute. The Netherlands submits that from an objective point of view there is no longer a dispute between the Parties on the jurisdiction of the Court.

18. For the reasons set forth in the preceding paragraphs the Netherlands respectfully submits that the Court has no jurisdiction or should decline to exercise jurisdiction in the present case.

19. Should the Court, however, come to the conclusion that there is still a disagreement between the Parties on the jurisdiction of the Court and a dispute on jurisdiction to be settled by a decision of the Court, in accordance with Article 36, paragraph 6, of the Court's Statute, the Netherlands requests the Court to adjudge and declare that for the reasons indicated in its Preliminary Objections and supplemented during the present hearings Serbia and Montenegro is not entitled to appear before the Court, the Court has no jurisdiction in the present case, and/or the claims of Serbia and Montenegro are inadmissible.

20. Mr. President, distinguished Members of the Court, it is then with regard to two issues that the Netherlands would like to supplement its Preliminary Objections. Firstly, the Netherlands will discuss the legal consequences for the present case of Serbia and Montenegro becoming a Member of the United Nations on 1 November 2000. Secondly, the Netherlands would like to

inform the Court of the outcome of consultations with Serbia and Montenegro on the remaining in force of bilateral treaties concluded between the Netherlands and Yugoslavia.

## III. Legal consequences for the present case of Serbia and Montenegro becoming a Member of the United Nations

21. The Netherlands does not feel the need to discuss this issue extensively. Its more detailed observations have been put forward in Chapter 3 of its Preliminary Objections and the correctness of these observations has only been confirmed by subsequent United Nations practice.

22. As the Netherlands has stated in its Preliminary Objections, Serbia and Montenegro was not a Member of the United Nations when it filed its Application on 29 April 1999. At that time, it was therefore not an *ipso facto* party to the Statute of the Court in accordance with Article 93, paragraph 1, of the Charter of the United Nations. Neither has it become a party to the Statute in any other way, nor has it accepted the jurisdiction of the Court by making a declaration pursuant to Security Council resolution 9 (1946).

23. The organs exclusively competent to decide on admission to membership and expulsion from the United Nations are the Security Council and the General Assembly. In September 1992, both organs considered that "the Federal Republic of Yugoslavia (Serbia and Montenegro) cannot continue automatically the membership of the former Socialist Federal Republic of Yugoslavia in the United Nations" (Security Council resolution 777; General Assembly resolution 47/1). Both organs also decided "that the Federal Republic of Yugoslavia (Serbia and Montenegro) should apply for membership of the United Nations".

24. This is precisely what Serbia and Montenegro has done in the year 2000. In a letter dated 27 October President Kostunica of Serbia and Montenegro requested admission to membership in the United Nations. On 31 October the Security Council recommended to the General Assembly that Serbia and Montenegro be admitted to membership, and the next day, on 1 November 2000, the General Assembly decided to admit Serbia and Montenegro to membership in the United Nations.

25. In its Judgment of 3 February 2003 in the *Yugoslavia* v. *Bosnia and Herzegovina* case *(Application for Revision of the Judgment of 11 July 1996)*, the Court has observed that, during the period between 22 September 1992 and 1 November 2000, the legal position of Serbia and

Montenegro remained complex. In this Judgment, the Court mentions a number of examples illustrating this complexity.

26. The Netherlands submits that these examples aptly demonstrate how difficult it has been in practice to deal with the status of Serbia and Montenegro correctly and consistently. However, this cannot detract from the unequivocal legal requirement laid down in Article 93, paragraph 1, of the United Nations Charter, according to which membership of the United Nations is a prerequisite for being an *ipso facto* party to the Statute of the Court. Whatever other implications the complex legal position of Serbia and Montenegro in the period between 1992 and 2000 may have, with respect to the jurisdiction of the Court it must be concluded that Serbia and Montenegro was not a party to the Statute at the time it filed its Application.

27. Therefore, subsequent United Nations practice, in particular the admission to membership in the United Nations of Serbia and Montenegro, has confirmed the correctness of what has been put forward in the Preliminary Objections of the Netherlands. The declaration of Serbia and Montenegro deposited with the Secretary-General of the United Nations on 26 April 1999 accepting the jurisdiction of the Court is invalid and does not establish jurisdiction of the Court on the basis of Article 36, paragraph 2, of the Statute vis-à-vis the Netherlands.

## IV. Consultations with Serbia and Montenegro on the remaining in force of bilateral treaties

28. The second issue on which the Netherlands would like to elaborate in addition to what it has already stated in its Preliminary Objections relates to the outcome of consultations with Serbia and Montenegro on the remaining in force of bilateral treaties concluded between the Netherlands and Yugoslavia.

29. In a letter of 12 May 1999, the Agent of Serbia and Montenegro submitted to the Court a "Supplement to the Application" of his Government, in which Serbia and Montenegro invoked as an additional basis for the jurisdiction of the Court Article 4 of the Treaty of Judicial Settlement, Arbitration and Conciliation between the Kingdom of the Netherlands and the Kingdom of Yugoslavia, which was signed at The Hague on 11 March 1931 and entered into force on 2 April 1932.

30. In its Order of 2 June 1999, the Court stated that it could not take into consideration this new title of jurisdiction, as the invocation at such a late stage of the proceedings seriously jeopardized the principle of procedural fairness and the sound administration of justice.

31. It may be recalled that in Chapter 6 of its Preliminary Objections, the Netherlands submitted that for various reasons the 1931 Treaty of Judicial Settlement, Arbitration and Conciliation did not provide a basis for jurisdiction of the Court. One of the reasons was that the 1931 Treaty could not be deemed to have automatically remained in force after the succession of Serbia and Montenegro to the Socialist Federal Republic of Yugoslavia. It was further submitted that apparently also in the view of Serbia and Montenegro the 1931 Treaty would not have automatically remained in force. On the basis of that understanding, consultations at the initiative of Serbia and Montenegro took place in July 1996, at the level of legal experts of the Ministries of Foreign Affairs of the Netherlands and Serbia and Montenegro, during which no agreement was reached as to the continued application of the 1931 Treaty.

32. Subsequently, after the Netherlands had presented its Preliminary Objections, further consultations took place between legal experts of the Netherlands and Serbia and Montenegro. In 2002, agreement was reached concerning the continuance of bilateral treaties. This agreement is laid down in an Exchange of Notes between Serbia and Montenegro and the Netherlands, dated 9 and 20 August 2002, reproduced in the bundle of Further Documents submitted by the Respondents pursuant to Article 56 of the Rules of the Court (No. 12). Two attachments are annexed to this Exchange of Notes. Attachment A comprises seven bilateral treaties that are considered to be treaties in force between Serbia and Montenegro and the Kingdom of the Netherlands. Attachment B comprises six bilateral treaties which, as explicitly stated in the Exchange of Notes, "will not be considered in force between the Federal Republic of Yugoslavia and the Kingdom of the Netherlands". The first treaty listed in Attachment B is the 1931 Treaty. This subsequent development only confirms what has already been submitted on this issue by the Netherlands in its Preliminary Objections, that is that the 1931 Treaty does not provide a basis for jurisdiction of the Court.

**V. Summary of submissions and conclusions**

33. Mr. President, distinguished judges of the Court. I would like to draw some conclusions and summarize the submissions of the Netherlands.

(i) In the light of Serbia and Montenegro's Written Observations of 18 December 2002, the Netherlands submits that in the present case the Court has no jurisdiction or should decline to exercise jurisdiction as the parties in fact agree that the Court has no jurisdiction or as there is no longer a dispute between the Parties on the jurisdiction of the Court.

(ii) However, should the Court decide that there is still a dispute between the Parties on the jurisdiction of the Court in the present case, the Netherlands requests the Court, on the basis of what has been put forward in its Preliminary Objections and supplemented during the present hearings, to adjudge and declare that:

— Serbia and Montenegro is not entitled to appear before the Court;

— the Court has no jurisdiction over the claims brought against the Netherlands by Serbia and Montenegro; and/or

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

Mr. President, distinguished judges of the Court, I thank you for your attention.

The PRESIDENT: Thank you, Mr. Lammers. This statement brings to a close the first round of arguments for the Netherlands. The Court will resume at 3 o'clock this afternoon, when it will hear the oral pleadings of Canada, Portugal and the United Kingdom.

The sitting is now closed.

*The Court rose at 12.25 p.m.*

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