CR 2004/16

International Court of Justice

THE HAGUE

Cour internationale de Justice

LA HAYE

YEAR 2004

Public sitting

held on Thursday 22 April 2004, at 10.45 a.m., at the Peace Palace,

President Shi presiding,

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

VERBATIM RECORD

ANNÉE 2004

Audience publique

tenue le jeudi 22 avril 2004, à10 h 45, 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)

COMPTE RENDU

Present:	President	Shi
	Vice-President	Ranjeva
	Judges	Guillaume
		Koroma
		Vereshchetin
		Higgins
		Parra-Aranguren
		Kooijmans
		Rezek
		Al-Khasawneh
		Buergenthal
		Elaraby
		Owada
		Tomka
	Judge *ad hoc*	Kreća
	Registrar	Couvreur

Présents : M. Shi, président
M. Ranjeva, vice-président
MM. Guillaume
Koroma
Vereshchetin
Mme Higgins
MM. Parra-Aranguren
Kooijmans
Rezek
Al-Khasawneh
Buergenthal
Elaraby
Owada
Tomka, juges
M. Kreća, juge *ad hoc*

M. Couvreur, greffier

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 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 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 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: I give the floor to the Agent of the Netherlands, Mr. Lammers.

Mr. LAMMERS: Mr. President, distinguished judges of the International Court of Justice, may it please the Court.

1. Before the start of the present oral proceedings there was one main question. This question was phrased in different words by the eight Respondents, and most succinctly by Canada: why are we here? One of the key elements of our observations on Monday has been 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. As we have stated on Monday during the first round of pleadings, it was therefore difficult, if not impossible, to direct our oral statements to the issues that still divide the Parties, in accordance with Article 60, paragraph 1, of the Rules of Court.

2. For the purpose of the first round of pleadings, the Netherlands had therefore decided not to repeat its written Preliminary Objections — which it fully maintains —, but to concentrate on three issues. First of all, Serbia and Montenegro's Written Observations and their implications for the jurisdiction of the Court. Secondly, the legal consequences for the present case of Serbia and Montenegro becoming a Member of the United Nations. Thirdly, the consultations between the Netherlands and Serbia and Montenegro on the remaining in force of bilateral treaties.

3. The gist of our oral statement on Monday was that there is no longer a dispute between the Parties on the jurisdiction of the Court. The Netherlands had already, *inter alia*, put forward in its Preliminary Objections of 5 July 2000 that the Court has no jurisdiction. Serbia and Montenegro in its Written Observations of 18 December 2002 seems to share this view — we see no room for any other conclusion. As this Court has emphasized in the *Nuclear Tests* cases, "[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 dispute brought before it must "continue to exist at the time when the Court makes its decision" (*Nuclear Tests* cases, *I.C.J. Reports 1974*, p. 271 and p. 476). This is what the Netherlands has emphasized during the first round of pleadings, in reaction to Serbia and Montenegro's Written Observations of 18 December 2002.

4. In offering our comments to the oral arguments presented yesterday by Serbia and Montenegro, the Netherlands wants to start by stating that there is an imbalance in the present proceedings. On 5 July 2000 the Netherlands submitted 67 pages of Preliminary Objections in this case. Almost two-and-a-half years later, Serbia and Montenegro presented its Written Observations comprising a little more than one page. This little more than one page in our view — as stated on Monday — seems to allow for no other conclusion than that there is no basis for jurisdiction of the Court in the present case. Serbia and Montenegro did not even begin to address our Preliminary Objections raised almost two-and-a-half years earlier. It was only yesterday that Serbia and Montenegro, during three hours of oral presentations, responded to these Preliminary Objections. Serbia and Montenegro has in fact left unused what would have been the normal opportunity to address our Preliminary Objections, that is the moment when Serbia and Montenegro filed its Written Observations.

5. In its Order of 2 June 1999 relating to Yugoslavia's request for provisional measures in the present case, this Court has referred to the principle of procedural fairness and the sound administration of justice. This reference was made in the context of the invocation by Yugoslavia of a new basis of jurisdiction shortly before the second round of oral argument on Yugoslavia's request for provisional measures, when the Netherlands had less than one day available to prepare its objections. Now, again, less than one day of preparations has been available since Serbia and Montenegro presented yesterday its three hours of oral arguments. The Netherlands claims that the principle of procedural fairness and sound administration of justice, the need of efficiency, and the need to address all issues as much as possible before the start of the oral proceedings require a reasonable degree of stability in the position of the Parties. In the light of these circumstances our observations this morning will be brief.

6. Mr. President, Members of the Court, our observations during this second round will also be brief for another reason. The Netherlands has listened carefully to the oral arguments presented yesterday by Serbia and Montenegro. Even though we could not analyse these arguments in great detail, the Netherlands has come to the conclusion that hardly anything essentially new has been put forward by the Applicant that would lead to other conclusions than we have already drawn on Monday. Nevertheless there are a few points that the Netherlands would like to mention briefly.

7. Firstly, as the Netherlands has stated on Monday, 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. The Written Observations by Serbia and Montenegro cannot be interpreted in any other way, and Serbia and Montenegro did not change its views on this point in its oral arguments presented yesterday. At the time when Serbia and Montenegro filed its Application in the Registry of the Court on 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. Serbia and Montenegro and the Netherlands agree on these issues.

8. Mr. President, Members of the Court, the Netherlands has in Chapter 4 of its Preliminary Objections extensively dealt with the *ratione temporis* limitation of the declaration of Serbia and Montenegro accepting the jurisdiction of the Court on the basis of Article 36, paragraph 2, of the Statute. There is no need to repeat what has already been said there. Are we really to believe — as Serbia and Montenegro wanted us to yesterday again — that "it was only when the Application was filed on 29 April 1999 that the constituent elements of the dispute before the Court could come into existence" and that "only then did the legal dispute crystallize" (paragraph 45 of the first round speech by Professor Brownlie)?

9. In this regard we would not only like to refer to what the Netherlands has already said in its Preliminary Objections, but also to what the Court itself has already noted in its Order of 2 June 1999 about the subject-matter of the dispute and on the point of time at which the dispute arose, namely: "that a 'legal dispute' . . . 'arose' between Yugoslavia and the Respondent . . . well before 25 April 1999 concerning the legality of those bombings as such, taken as a whole" (paragraph 28 of the Order of 2 June 1999).

10. Article 14 of the Draft Articles on State Responsibility of the International Law Commission to which Serbia and Montenegro yesterday referred (paragraph 48 of the speech by Professor Brownlie) distinguishes between acts having a continuing character and those not having

such a character amounting to a breach of an international obligation. In the first case the subject-matter of the dispute must have arisen well before 29 April 1999 and in the second case we seem to be again confronted with the thesis of Serbia and Montenegro that each individual air attack must be deemed to have given rise to a separate subsequent dispute, a thesis which was also already rejected by the Court in its Order of 2 June 1999 (paragraph 29 of the speech by Professor Brownlie).

11. Finally, it may be recalled that the temporal limitation in the declaration of Serbia and Montenegro relates to "all disputes arising or which may arise after the signature of the present Declaration . . .". Serbia and Montenegro tries to limit the concept of "disputes" in its pleadings of yesterday giving the concept an unnatural restricted scope (paragraphs 53 *et seq.* of the speech by Professor Brownlie). With this latter view of the matter, we are confronted with yet another theory on the concept of dispute and the time of its coming into existence, setting aside what has been argued by the Applicant in its Memorial. Mr. President, Members of the Court, are we not seeing here a perfect example of what Professor Brownlie in his statement yesterday (paragraph 42) has so nicely called an "analysis [involving] an invented superstructure"?

12. Mr. President, next the Netherlands would like to make a few observations with regard to Article IX of the Genocide Convention. In its Preliminary Objections as well as in the first round of pleadings, the Netherlands has recalled paragraph 38 of the Order of 2 June 1999, in which the Court stated that it "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". The Netherlands also recalled paragraph 41 of the Order, in which the Court stated that at that stage of the proceedings it was not in a position to find that the acts imputed by Yugoslavia to the Respondent were capable of coming within the provisions of the Genocide Convention and could not accordingly constitute a basis on which the jurisdiction of the Court could prima facie be founded.

13. Almost five years later, Serbia and Montenegro has still not presented an arguable case under Article IX of the Genocide Convention. In its Memorial of 5 January 2000, as well as in its Written Observations of 18 December 2002, Serbia and Montenegro completely failed to

substantiate its claim that the Netherlands has breached the Genocide Convention. Yesterday, Serbia and Montenegro addressed again the issue of genocidal intent, but did not provide any new information on the basis of which prima facie evidence of genocidal intent on the part of the Netherlands could be assumed. According to Serbia and Montenegro the purpose of the extensive bombing by NATO States was to intimidate the people and government of Serbia and Montenegro to force them to accept the political demands of the Contact Group. The military action — it was noted — ceased when the demands were accepted (paragraph 29 of Professor Brownlie's statement in the first round of pleadings). Mr. President, Members of the Court, is this fact in itself not already proof that there was no intention on the part of the NATO States to destroy the people of Serbia and Montenegro as such? The Netherlands therefore maintains that the Court has no jurisdiction *ratione materiae* in the present case on the basis of the Genocide Convention.

14. Mr. President, Members of the Court, I now would like to make some brief observations regarding the bilateral 1931 Treaty concluded between the Netherlands and Yugoslavia, which Serbia and Montenegro has invoked as a ground for jurisdiction. In the first place, the Netherlands agrees with Serbia and Montenegro, that the 1978 Vienna Convention on the Succession of Treaties is not applicable in the present case, as neither the Netherlands nor Serbia and Montenegro are parties to it.

15. Serbia and Montenegro stated yesterday (paragraphs 37-42 of the pleadings by Co-Agent Djerić), that the Netherlands has contended that the rules of the 1978 Vienna Convention pertaining to "newly independent States" should apply in this case as customary international law. This is without foundation. As is expressly stated in paragraph 6.12 of its Preliminary Objections, the Netherlands does not consider Serbia and Montenegro as a "newly independent State". In paragraphs 6.8 to 6.11 the Netherlands indeed substantiates that the "clean slate rule" constitutes a generally accepted rule or principle of international law in respect of bilateral treaties whether involving "newly independent States" or other successor States (except of course in the case of treaties establishing boundary or other territorial régimes) and that henceforth the consent of the other party is required for the continuation of a bilateral treaty. Serbia and Montenegro shares this view. As mentioned in paragraph 6.16 of the Netherlands Preliminary Objections, the FRY — in its Memorial in the *Genocide* case — has itself extensively set forth that the "clean slate principle"

should be applied to the Genocide Convention. While the Genocide Convention concerns a multilateral treaty, the "clean slate principle" should *a fortiori* be applied in the case of a bilateral treaty. This is precisely why Serbia and Montenegro and the Netherlands decided to initiate consultations on the continuance of bilateral treaties.

16. Mr. President, Members of the Court, I come now to the part of Serbia and Montenegro's pleadings, which deal specifically with the 1931 Treaty. The Diplomatic Note of 20 May 1997 of the Kingdom of the Netherlands to which Serbia and Montenegro referred yesterday, was already mentioned in paragraph 3.3.10 of the FRY's Memorial and annexed to it as Attachment No. 318. In paragraph 6.22 of its Preliminary Objections, the Netherlands set forth that the Note was merely a report of consultations which took place in July 1996 between legal experts of the Netherlands and the FRY. In reaction to the contention in Serbia and Montenegro's pleadings, the Netherlands submits that Serbia and Montenegro quoted selectively from the Note in question, as the part which refers to the Note's character as a report of consultations was left out. A careful reading of the Note shows, that *it was suggested* at that meeting by the Dutch side that some treaties would continue to be applicable, some would not continue to be applicable, while others would still be under discussion. The Netherlands submitted already in its Preliminary Objections, and it needs not be repeated, that the Note in question, which remained unanswered by the FRY — I repeat, which remained unanswered by the FRY —, did not contain an agreement to the extent that any treaty represented therein would constitute a treaty in force between the Kingdom of the Netherlands and the FRY. The Netherlands maintains this position. Against this background the Netherlands also maintains that it cannot possibly have been its intention — as alleged yesterday by Serbia and Montenegro — to give to the passage "will not be considered in force" in the Exchange of Notes of 9 and 20 August 2002 the meaning that the treaties in Attachment B of the Note would not be in force *only* as from 20 August 2002. Moreover, the word "will" in the paragraph just quoted does not refer to the words "in force", as apparently suggested by Serbia and Montenegro, but to the word "considered". The parties simply stated that, whereas the treaties on List A were to be considered in force from the moment of the coming into existence of the FRY, those on List B were not to be considered to be so in force.

17. Mr. President, distinguished judges of the Court. I would now like to summarize again 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. The Court takes note of the final submissions which you have now read on behalf of the Kingdom of the Netherlands. This brings to an end the second round of oral argument by the Kingdom of the Netherlands.

The Court now goes into recess for 10 minutes, after which it will hear the second round of oral argument of Canada.

The Court rose at 11.05 a.m.

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