CURRENT DEVELOPMENTS

DECISIONS OF INTERNATIONAL TRIBUNALS

INTERNATIONAL COURT OF JUSTICE

Edited by Malcolm D Evans

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I. AVENA AND OTHER MEXICAN NATIONALS (*MEXICO v UNITED STATES OF AMERICA)*, JUDGMENT OF 31 MARCH 2004

A. Introduction

On 9 January 2003 Mexico instituted proceedings against the United States of America for violations of the Vienna Convention on Consular Relations 1963.[1] Mexico based the jurisdiction of the Court on Article 36(1) of the Statute of the Court which provides that:

> '[t]he jurisdiction of the Court comprises all cases which the parties refer to it and all matters specially provided for in the Charter of the United Nations or in treaties or conventions in force'

and on Article 1 of the Optional Protocol to the Vienna Convention providing for the jurisdiction of the Court over 'disputes arising out of the interpretation or application of the Convention'. Both Mexico and the United States are, and were at all relevant times, parties to the Vienna Convention and to the Optional Protocol.

Mexico claimed that the United States had breached the Vienna Convention in relation to the treatment of 52 Mexican nationals who had been tried, convicted and sentenced to death in the United States. The provisions of the Vienna Convention of which Mexico alleged violations are contained in Article 36. According to its title, Articles 36 deals with: 'Communication and contact with nationals of the sending state.' Paragraph 1(b) of that Article provides that if a national of that State 'is arrested

[1] (1963) 596 UNTS 261.

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or committed to prison or to custody pending trial or is detained in any other manner', and he so requests, the local consular post of the sending State is to be *notified* without delay. The article goes on to provide that the 'competent authorities of the receiving state' shall '*inform* the person concerned without delay of his rights' in this respect.[2] Mexico claimed that in the present case these provisions had not been complied with by the United States authorities in respect of the 52 Mexican nationals who were the subject of its claims. As a result, it was alleged that the United States had committed breaches of paragraph 1 (b). In addition, Mexico claimed that the United States was also in breach of paragraphs 1 (a) and (c) and of paragraph 2 of Article 36, given the inter-relationship of these provisions with paragraph 1 (b).

B. Background to the case: the Provisional Measures Order

In the Order of 5 February 2003, on the request by Mexico for the indication of provisional measures, the Court considered that it was apparent from the information before it that the three Mexican nationals named in the Application who had exhausted all judicial remedies in the United States (Messrs Fierro Reyna, Moreno Ramos, and Torres Aguilera) were at risk of imminent execution. Consequently, the Court ordered by way of provisional measures, that the United States take all measures necessary to ensure that these individuals would not be executed pending the Court's final judgment in these proceedings, and ordered that the Government of the United States inform the Court of all measures taken in implementation of the Order.[3] Pursuant to the Order, in a letter of 2 November 2003, the Agent of the United States advised the Court that the United States had 'informed the relevant state authorities of Mexico's application'; that, since the Order of 5 February 2003, the United States had 'obtained from them information about the status of the [52] cases, including the three cases identified in…[the] Order'; and that the United States could 'confirm that none of the named individuals [had] been executed'.[4] The Court noted that, at the date of the final judgment, Messrs Fierro Reyna, Moreno Ramos, and Torres Aguilera had not been executed, but further noted with great concern that, by an Order dated 1 March 2004, the Oklahoma Court of Criminal Appeals had set an execution date of 18 May 2004 (some six weeks after the Court's judgment) for Mr Torres Aguilera.[5]

C. The decision on the merits of the claims

1. Article 36, paragraph 1

In its final submissions, Mexico asked the Court to adjudge and declare that:

> the United States of America, in arresting, detaining, trying, convicting, and sentencing the 52 Mexican nationals on death row…, violated its international obligations to Mexico, in its own right and in the exercise of its right to diplomatic protection of its nationals, by failing to inform, without delay, the 52 Mexican nationals after their arrest of their right to

[2] Emphasis added, for the sake of clarity.

[3] Provisional Measures, Order of 5 February 2003; see the comment by S Ghandhi 'Avena and Other Mexican Nationals (*Mexico v The United States of America*), Provisional Measures, Order of 5 February 2003' (2004) 53 ICLQ 738.

[4] Judgment, para 3.

[5] Judgment, para 21.

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> consular notification and access under Article 36 (1) (b) of the Vienna Convention on Consular Relations, and by depriving Mexico of its right to provide consular protection and the 52 nationals' right to receive such protection as Mexico would provide under Article 36 (1) (a) and (c) of the Convention.[6]

Before proceeding to examine the Mexican claims, the Court referred to its own judgment in the *LaGrand* case, wherein it had described Article 36, paragraph 1, as 'an interrelated regime designed to facilitate the implementation of the system of consular protection'.[7]

There were two major issues in dispute between the parties under Article 36, paragraph 1 (b): first, the nationality of the individuals concerned, with the United States advancing the argument that a substantial number of the 52 individuals listed were United States nationals and thus that it had no obligations in respect of such persons; and secondly, the precise meaning to be ascribed to the expression 'without delay', with the parties in disagreement over whether the requirement for information to be given 'without delay' became operative on arrest or on ascertainment of nationality.

Both parties recognized the well established principle in international law that a litigant seeking to establish the existence of a fact bears the burden of proving it.[8] On the first issue, the Court accordingly concluded that the United States had 'not met its burden of proof in its attempt to show that persons of Mexican nationality were also United States nationals'.[9] Therefore, the United States had obligations under Article 36, paragraph 1 (b) as regards the 52 named individuals. The Court then examined the application of the Article 36, paragraph 1 (b) regime to the 52 cases specifically and concluded after a detailed examination of the facts, that only in the case of one individual (Mr Salcido Bojorquez) had Mexico failed to prove the Mexican nationality of the named individuals and thus the violation by the United States of its obligations under this particular provision.

Thereafter, the Court turned its attention to whether, in the remaining 51 cases, the United States provided the required information to the arrested persons 'without delay'. The Court remarked that the expression 'without delay' was not defined in the Convention. The phrase therefore required interpretation according to the customary rules for the interpretation of treaties reflected in Articles 31 and 32 of the Vienna Convention on the Law of Treaties.[10] The Court pointed out that dictionary definitions, in the various language versions of the Vienna Convention, offered different meanings of the term 'without delay'. Thus, it was necessary to examine the 'object' and 'purpose' of the treaty; the Court concluded from this analysis that neither the terms of the Convention as normally understood, nor its 'object' and 'purpose', suggested that 'without delay' was to be understood as 'immediately upon arrest and before interrogation'.[11] The Court also reviewed the *travaux préparatoires* which, the Court remarked, did not support such an interpretation.

The Court concluded that 'without delay' was not necessarily to be interpreted as 'immediately upon arrest'. Further, it observed that during the conference debates on

[6] Judgment, para 49.
[7] Judgment, para 50 and ICJ Reports 2001, p 492, para 74.
[8] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)*, ICJ Reports 1984, p 437, para 101.
[9] Judgment, para 57.
[10] (1969) 1155 UNTS 331.
[11] Judgment, para 85.

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this term, no delegate made any connection with the issue of interrogation. The Court considered that the provision in Article 36, paragraph 1 (b), that the receiving State authorities 'shall inform the person concerned without delay of his rights' cannot be interpreted to signify that the provision of such information must necessarily precede such interrogation, so that commencement of interrogation before the information is given would be a breach of Article 36.[12] However, although 'without delay' did not mean 'immediately upon arrest', there was nevertheless a duty upon the arresting authorities to give that information to an arrested person *as soon as it is realised that the person is a foreign national, or once there are grounds to think that the person is probably a foreign national*.[13]

Applying the principles adopted by the Court, resulted in the conclusion that in all the remaining 51 cases, the United States had violated its obligation under Article 36, paragraph 1 (b) of the Vienna Convention to provide information to the arrested person 'without delay'.[14]

The Court next turned its attention to the right of the consular post to be notified 'without delay' of the individual's detention, if he so requested. The Court found that the United States was correct in observing that the fact that a Mexican consular post had not been notified under Article 36, paragraph 1 (b), did not necessarily show that the arrested person was not informed of his rights under that provision; he may have been informed and declined to have his consular post notified. Nevertheless, the Court remarked that the giving of the *information* was relevant for satisfying the element in Article 36, paragraph 1 (b), on which the other two elements therein depended (viz. notification to consular post and forwarding of communications).[15]

After a detailed examination of all the factual evidence on this issue, the Court reached the conclusion that in 49 cases (not including Messrs Juarez Suarez and Hernandez Llanas) the United States had violated its obligation under Article 36, paragraph 1(b) to notify the Mexican consular post of the detention of the named individuals 'without delay'.

Finally, under this part of the case, the Court proceeded to examine whether the violations that Mexico had alleged in relation to Article 36, paragraph 1 (b), had also deprived Mexico of its right to provide consular protection and the right of its nationals to receive such protection as Mexico would provide under Article 36, paragraphs 1 (a) and (c) of the Convention.

The Court stressed again the 'interrelated regime' of the three subparagraphs of Article 36, paragraph 1.[16] It proceeded to state that the legal conclusions to be drawn from that interrelationship must necessarily depend on the facts of each case. The Court concluded that, because of the failure of the United States to act in conformity with Article 36, paragraph 1 (b), Mexico was in effect precluded (in some cases totally, and in others for prolonged periods of time) from exercising its right under paragraph 1 (a) to communicate with its nationals and have access to them; the same was true of certain rights identified in subparagraph (c), namely: 'consular officials shall have the right to visit a national of the sending State who is in prison, custody or detention, and to correspond with him …'.[17] Thus, breaches of these two subparagraphs were established

[12] Judgment, para 87.
[13] Judgment, para 88, emphasis added.
[14] Judgment, para 90.
[15] Judgment, para 91.
[16] *LaGrand* case, ICJ Reports 2001, p 492, para 74.
[17] The Court remarked that it was immaterial whether Mexico would have offered consular assistance, 'or whether a different verdict would have been rendered. It is sufficient that the

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also, in relation to the 49 cases (not including Messrs Juarez Suarez and Hernandez Llanas).

As far as the right of consular officials 'to arrange for [the] legal representation' of the foreign national under subparagraph (c), the Court observed that the exercise of the rights of the sending State under subparagraph (c) depended on notification by the authorities of the receiving State; nevertheless, in some cases notification from other sources might still enable consular officers to assist in arranging legal representation for the accused.[18] After another detailed examination, the Court concluded that subparagraph (c) had also been breached in this regard in the cases of 34 named individuals.

2. Article 36, paragraph 2

Here, the Court considered whether the operation of the 'procedural default' rule[19]violated the obligations imposed on the United States under Article 36, paragraph 2[20] by 'failing to provide meaningful and effective review and reconsideration of convictions and sentences impaired by a violation of Article 36, paragraph 1'.

As the Court had considered fully the operation of the 'procedural default' rule in the *LaGrand* case in a similar context, it simply reiterated the fundamental principle it had applied in that case before proceeding.[21]

The Court noted that:

> the procedural default rule ha[d] not been revised, nor ha[d] any provision been made to prevent its application in cases where it ha[d] been the failure of the United States itself to inform that may have precluded counsel from being in a position to have raised the question of a violation of the Vienna Convention in the initial trial. It thus remain[ed] the case that the procedural default rule [might] continue to prevent courts from attaching legal significance to the fact, inter alia, that the violation of the rights set forth in Article 36, paragraph 1, prevented Mexico, in a timely fashion, from retaining private counsel for certain nationals and otherwise assisting in their defence. In such cases, application of the procedural default rule would have the effect of preventing "full effect [from being] given to the purposes for which the rights accorded under this article are intended", and thus violate paragraph 2 of Article 36.[22]

On the facts, only in three cases (Messrs Fierro Reyna, Moreno Ramos, and Torres Aguilera), had conviction and sentence become final in the sense that there was no further possibility of judicial re-examination, thus excluding any further 'review and reconsideration' of conviction and sentence. Thus, the Court concluded that in these

Convention conferred those rights' (judgment, para 102); see also *LaGrand* case, ICJ Reports, 2001, p 492, para 74.

[18] Judgment, para 104.

[19] The unchallenged definition of this rule by Mexico stated: 'a defendant who could have raised, but fails to raise, a legal issue at trial will generally not be permitted to raise it in future proceedings, on appeal or in a petition for a writ of *habeas corpus*'; the rule requires exhaustion of remedies, inter alia, at the State level *and* before a habeas corpus motion can be filed with federal courts; judgment, para 111.

[20] 'The rights referred to in paragraph 1 of this article shall be exercised in conformity with the laws and regulations of the receiving State, subject to the proviso, however, that the said laws and regulations must enable full effect to be given to the purposes for which the rights accorded under this article are intended'.

[21] *LaGrand* case, ICJ Reports 2001, p 497, para 90.

[22] Judgment, para 113.

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three cases, the United States was also in breach of its obligations under Article 36, paragraph 2.[23]

3. Legal consequences of the breach

The final substantive issue that had to be considered by the Court was the appropriate remedy for the intentionally wrongful acts of the United States by the failure of its competent authorities to inform the Mexican nationals concerned, to notify Mexican consular posts and to enable Mexico to provide consular assistance. Mexico argued in its fourth and fifth submissions that it was entitled to full reparation for these injuries in the form of *restitutio in integrum* and that this consisted of the obligation to restore the *status quo ante* by annulling or otherwise depriving of full force or effect the conviction and sentences of all Mexican nationals which had been tainted by Article 36 violations.

The Court rejected this approach and cited the general principle articulated by the PCIJ in the *Factory at Chorzow* case that: '[i]t is a principle of international law that the breach of an engagement involves an obligation to make reparation in an adequate form.'[24] The Court pointed out that what constituted 'reparation in an adequate form' clearly varied depending on the concrete circumstances surrounding each case and the precise nature and scope of the injury, since the question had to be examined from the position of what is the 'reparation in adequate form' that corresponds to the injury. The Court proceeded to refer again to a different phase in the decision in the *Factory at Chorzow* case where the PCIJ elaborated that:

> [t]he essential principle contained in the actual notion of an illegal act … is that reparation must, as far as possible, wipe out the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed.[25]

In the circumstances of this case, and as established in the *LaGrand* case, the remedy to make good these violations should consist in an obligation on the United States to permit 'review and reconsideration', 'with a view to ascertaining whether in each case the violation of Article 36 committed by the competent authorities caused actual prejudice to the defendant in the process of the administration of criminal justice'.[26]

In its sixth submission Mexico argued that the principle of *restitutio in integrum* involved that it was entitled also to an order that in any subsequent criminal proceedings against nationals, statements and confessions obtained prior to notification to the national of his right to consular assistance be excluded. The Court rejected peremptorily this argument stating it was 'of the view that this question is one which has to be examined under the concrete circumstances of each case by the United States courts concerned in the process of their review and reconsideration'.[27]

In examining Mexico's seventh submission,[28] the Court had to examine the notion of 'review and reconsideration' in detail. As a preliminary matter, the Court acknowledged that 'the concrete modalities for such review and reconsideration should be left

[23] Judgment, para 114.
[24] *Factory at Chorzow, Jurisdiction*, 1927 PCIJ, Series A, No.9, p.21.
[25] *Factory at Chorzow, Merits,* 1928 PCIJ, Series A, No.17, p.47.
[26] Judgment, para 121. See also *LaGrand* case, ICJ Reports 2001, pp.513-514, para 125.
[27] Judgment, para 127.
[28] See judgment, para 129 for the precise submission.

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primarily to the United States', (especially in the light of the 'procedural default' rule) but held that such 'review and reconsideration' had to be effective and carried out by taking account of the violation of the rights set forth in the Convention and guarantee that the violation and the possible prejudice caused by that violation would be fully examined and taken into account in the review and reconsideration process. Finally, 'review and reconsideration' should be both of the sentence and the conviction.[29]

The Court stressed that what was *crucial* to the 'review and reconsideration' process was the existence of a procedure which *guaranteed* that full weight was given to the violation of the rights in the Convention, whatever might be the actual outcome of such a process; and that it was the *judicial process* that was best suited to this task.[30]

The Court then turned its attention to the clemency procedure. The Court noted that this procedure performed an important function in the administration of criminal justice in the United States and is 'the historic remedy for preventing miscarriages of justice where judicial process has been exhausted'.[31] The Court accepted that executive clemency, while not *judicial*, was an integral part of the overall scheme for ensuring justice and fairness in the legal process within the United States criminal justice system. Nevertheless, the issue was whether the clemency process as practised within the criminal justice systems of different states in the United States could, *in and of itself*, qualify as an appropriate means for undertaking the effective 'review and reconsideration' of the conviction and sentence by taking account of the violation of the rights set out in the Convention. The Court found that the clemency process, as practised in the United States criminal justice system, did not appear to meet the requirements stipulated by it (see above), and that therefore it was not sufficient by itself to serve as an appropriate means of 'review and reconsideration'. However, appropriate clemency procedures could supplement judicial 'review and reconsideration', in particular where the judicial system had failed to take due account of the violation of rights set out in the Convention, as had occurred in the case of Messrs Fierro Reyna, Moreno Ramos and Torres Aguilera.

In the penultimate section of this part of the judgment, the Court examined the eighth Mexican submission, which required the cessation of violations of Article 36 of the Convention in respect of the named nationals *and* guarantees and assurances of non-repetition. In regard to the first plea, the Court considered that Mexico had not established a continuing violation of Article 36 rights with respect to the named individuals and, therefore, it could not uphold Mexico's claim seeking cessation; in addition, in as much as the named individual cases were at various stages of domestic criminal proceedings, they were still in a state of *pendente lite*; furthermore, the appropriate remedy in these cases had already been indicated by the Court, namely 'review and reconsideration'.[32] In respect of the second plea, the Court noted that the United States had made considerable efforts to ensure that its law enforcement authorities provided consular information to every arrested person they knew or had reason to believe was a foreign national. Particularly noteworthy efforts to implement the obligations under Article 36, paragraph 1 of the Convention included a new outreach programme adopted in 1998, including the dissemination to federal, state and local

[29] Judgment, paras 131 & 138; see also *LaGrand* case, ICJ Reports 2001, p 516, para 128 and p 514, para 125.
[30] Judgment, paras 139,140 & 141.
[31] *Herrera v Collins*, 506 US 390 (1993), pp 411–412.
[32] Judgment, para 148.

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authorities of the State Department booklet *Consular Notification and Access—Instructions for Federal, State and Local Law Enforcement and Other Officials Regarding Foreign Nationals in the United States and the Right of Consular Officials To Assist Them* and the efforts in some local jurisdictions to provide the information under Article 36, paragraph 1 (b), in parallel with the reading of '*Miranda* rights'. Finally, the Court repeated what it had declared in the *LaGrand* case that: 'the commitment expressed by the United States to ensure implementation of the specific measures adopted in performance of its obligations under Article 36, paragraph (1), must be regarded as meeting [Mexico's] request for a general assurance of non-repetition'.[33]

D. Comment

One of the submissions advanced by Mexico was that the right to consular notification and communication under the Vienna Convention was a 'fundamental human right' that constituted part of the due process in criminal proceedings and should be guaranteed in the territory of each of the Contracting Parties to the Convention; according to Mexico, this right, as such, was so fundamental that 'its infringement will *ipso facto* produce the effect of vitiating the entire process of the criminal proceedings conducted in violation of this fundamental right'.[34]

The Court declined to decide whether the Vienna Convention rights are 'human rights', observing dryly that 'neither the text nor the object and purpose of the Convention, nor any indication in the *travaux préparatoires'* supported the conclusion drawn by Mexico from its contention.[35] Since there is little doubt that, after the *LaGrand* judgment, Article 36 creates individual rights for both the sending State and for the State's detained nationals, if the Court's argument rejecting Mexico's contention on the effects of designating the right to consular notification and communication as a 'fundamental human right' is accepted, there seems little to be gained by such a designation in practical terms, at least. On the other hand, in relation to the *LaGrand* judgment wherein the Court declined also to declare such rights as having a human rights character, Professor Mennecke states: 'the attempt of the [Court] … to differentiate between Article 36 as an individual and a human right seems artificial and short sighted'.[36] In addition, it is true that Article 16(7) of the International Convention on the Protection of All Migrant Workers and Members of their Families 1990 confers Vienna Convention-style consular notification and communication rights as human rights in an explicitly human rights treaty.[37]

Of course, the authority of the Court depends on its decisions being respected. In this connection, the Court had noted with dismay that by an Order dated 1 March 2004,

[33] Judgment, paras 149 &150; see also *LaGrand* case, ICJ Reports 2001, pp 512–513, para 124.

[34] Judgment, para 124. The argument presumably being that in death penalty cases, this should result inevitably in commutation of the death sentence; see, for example, the jurisprudence of the Human Rights Committee in this regard; see further, P R Ghandhi, 'The Human Rights Committee and Article 6 of the International Covenant on Civil and Political Rights' (1989) 29 IJIL 326.

[35] Judgment, para 124.

[36] M Mennecke, 'Towards the Humanization of the Vienna Convention of Consular Rights – The *LaGrand* Case before the International Court of Justice' (2001) 44 GYIL 430 at 453.

[37] GA Res A/Res/45/158.

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the Oklahoma Court of Criminal Appeals had set an execution date of 18 May 2004 for Mr Torres Aguilera. It is therefore interesting to observe that as a consequence of the *Avena* case, that same Court granted an indefinite stay of execution in this case and remanded the case for evidentiary hearing on several issues.[38] Several hours later, Governor Brad Henry commuted the death sentence to life without parole, stating that 'he took into account the fact that the United States signed the 1963 Vienna Convention and [was] part of that treaty. In addition, the United States State Department contacted [his] office and urged [him] to give "careful consideration" to that fact'.[39]

In his comment on the Provisional Measures Order in this journal, the author commented that perhaps the *Avena* case would signal a new norm of compliance with such orders.[40] It is, perhaps, not too premature to suggest that in the light of the municipal outcome of the *Torres* case the Court has at last convinced both the United States federal and state authorities to observe its orders and judgments and abide by its international treaty commitments in such death penalty cases. This is certainly a welcome development.

SANDY GHANDHI*

II. LEGALITY OF USE OF FORCE (*SERBIA AND MONTENEGRO v BELGIUM*) (*SERBIA AND MONTENEGRO v CANADA*) (*SERBIA AND MONTENEGRO v FRANCE*) (*SERBIA AND MONTENEGRO v GERMANY*) (*SERBIA AND MONTENEGRO v ITALY*) (*SERBIA AND MONTENEGRO v NETHERLANDS*) (*SERBIA AND MONTENEGRO v PORTUGAL*) (*SERBIA AND MONTENEGRO v UNITED KINGDOM*): PRELIMINARY OBJECTIONS. JUDGMENT OF 15 DECEMBER 2004[1]

A. Introduction

This is a surprising—and disquieting—judgment which raises serious questions about the role of the Court. *The Legality of Use of Force* cases began in 1999 when the Federal Republic of Yugoslavia (FRY)[2] first brought an action against ten NATO

[38] *Torres v The State of Oklahoma*, No PCD – 04-442, 13 May 2004.
[39] www.acluok.org/NewsEvents/OsbaldoTorresClemency.htm
[40] (2004) 53 ICLQ 738 at 746.
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[1] ICJ Reports 2004. For convenience references in this note will be made to the judgment in *Serbia and Montenegro v Belgium*; the eight judgments are in almost all particulars identical. This is reflected in the Court's rejection of the requests for ad hoc judges by those respondent States without judges of their nationality on the Bench, even though Serbia and Montenegro no longer maintained its opposition to their appointment. The Court's decision to reject the nomination of ad hoc judges was based on Article 31(5) of the Statute which provides: 'Should there be several parties in the same interest, they shall, for the purpose of the preceding provisions, be reckoned as one party only.' The Court said that it had taken into account the presence upon the Bench of judges of British, Dutch and French nationality (judgment paras 17–18).

[2] As the Court explained (at para 25), 'The official title of the Applicant in these proceedings has changed during the period of time relevant to the present proceedings.' On 27 Apr 1992 the Federal Republic of Yugoslavia (FRY) was established; it claimed to be the continuation of the Socialist Federal Republic of Yugoslavia (SFRY). On 1 Nov 2000 the applicant was admitted to

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