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COMMENTARY

Preliminary Objections in the *Croatia v. Serbia* case: A Commentary

Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia), Preliminary Objections, Judgment of 18 November 2008

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On 18 November 2008, the ICJ found it has jurisdiction to entertain Croatia's Application and will proceed to hear the case on the merits. The Court's judgment can be read as yet another episode in the continuing saga on the international legal position of Serbia.[1] Quite tellingly, the first question addressed by the Court concerned the "identification of the respondent Party"; almost as if the judges were unsure who had actually appeared before the Court. Was it Serbia? Serbia and Montenegro? The Federal Republic of Yugoslavia? While this semantic issue could be solved relatively easily (the Court opted for Serbia, unless historical context would suggest otherwise), more fundamental questions remained.

1. SHADOWS OF THE PAST

One of these questions followed from Serbia's principal argument that it lacked legal standing to participate in the proceedings. Serbia based its argument primarily on the finding of the Court in the 2004 Judgment concerning the *Legality of Use of Force*.[2] In 2004 the Court had found that the Federal Republic of Yugoslavia

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1 The Court dealt with the legal status of Serbia in a series of earlier decisions, including Bosnia and Herzegovina v. Serbia and Montenegro (Orders of 8 April and 13 September, Judgment on preliminary objections of 11 July 1996, Judgment on the merits of 26 February 2007) Documents available at: <http://www.haguejusticeportal.net/eCache/DEF/6/222.html> and the cases concerning the *Legality of Use of Force* (particularly the Judgment of 15 December 2004) Documents available at: <http://www.haguejusticeportal.net/eCache/DEF/6/210.html>. For an overview of the cases see paras 52-56 of the Court's Judgment, available at: <http://www.icj-cij.org/docket/files/105/8440.pdf>.

2 Legality of Use of Force (Serbia and Montenegro *v.* Belgium), Preliminary Objections, Judgment, 15 December 2004.

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(FRY) was not a UN member before it was formally admitted in 2000.[3] In the period before 2000, therefore, the FRY could not be a party to the Statute of the Court, which in effect meant that the FRY was barred from participating in the proceedings. Since Croatia's application was filed before Serbia's admission to the UN (the case was filed in 1999), Serbia argued that the Court should now find that it lacked jurisdiction to entertain on the merits.

A second argument put forward by Serbia is that it could not be regarded as party to the Genocide Convention at the time when the application was filed.[4] Since article IX of this Convention formed the basis of Croatia's assertion that the Court has jurisdiction, the question whether Serbia could be regarded as a party was pivotal to the case. Serbia's claim was based, *inter alia*, on the contention that the Genocide Convention is only open for signature for UN Members and for States that have been invited to sign the Convention.[5] While the FRY initially claimed to be the continuator State of the Socialist Federal Republic, this claim was not accepted by other States nor by the principal UN organs. As a consequence, the FRY had to re-apply for membership of the UN and also considered it necessary to formally accede to the Genocide Convention in 2001. Upon accession, the FRY added a reservation stating that it does not consider itself bound by article IX. The rejections of the FRY's assertion that it was the continuator State were now, slightly ironically, used by Serbia to challenge the Court's jurisdiction.

2. JUDICIAL PRAGMATISM

The Court was not convinced by the Serbian arguments. It acknowledged that it had previously determined that the FRY, and thus Serbia, was not a member of the UN at the time when Croatia filed its application. Formally speaking, therefore, the Court should not be open to Serbia. However, the Court argued that it is also necessary to show "realism and flexibility" (para 81): had Croatia filed its application a year later, after Serbia's admission to the UN, it would not have been possible to challenge the Court's jurisdiction on grounds of lack of access. Croatia could thus start a new procedure that could not be challenged on the same basis. In such circumstances the Court deemed it in the interests of the sound administration of justice not to be too formalistic. It concluded "that what matters is that, at the latest by the date by when the Court decides on its jurisdiction, the applicant must be entitled, if it so wishes, to bring fresh proceedings in which the initially unmet condition would be fulfilled" (para 85).

Moreover, it held that Serbia was bound by the Genocide Convention after all. The Court reiterated the 1992 declaration in which the FRY claimed to be the sole

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3 *Legality of Use of Force*, para. 91.

4 The other objections of Serbia concerned the claims based on acts and omissions that occurred prior to the creation of the FRY and the claims concerning the submission of certain persons to trial, the provision of information on missing Croatian citizens and the return of cultural property.

5 See article XI of the Genocide Convention: "The present Convention shall be open until 31 December 1949 for signature on behalf of any Member of the United Nations and of any nonmember State to which an invitation to sign has been addressed by the General Assembly".

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continuing State of the Socialist Federal Republic of Yugoslavia (SFRY) and, respecting the continuity of the international personality of the SFRY, accepted the rights conferred to and the obligations assumed by that State.[6] The Court subsequently downplayed the importance of the rejection of the FRY's claim to continuity by the international community. What matters, according to the Court, is that the FRY unilaterally accepted all the obligations of the SRFY, including those flowing from the Genocide Convention. The FRY, the Court argues, never indicated that the acceptance of the obligations by the FRY was conditional upon international acceptance of the claim to be the continuor of the SFRY. The Court attached particular importance to the argument that the FRY has never repudiated its status as party to the Genocide Convention when it became clear that it would not be accepted as the continuation of the SRFY. It redefined the 1992 declaration as one of notification of succession to treaties, "notwithstanding that its political premise was different" (para. 111).

3. INDETERMINACY

The Court's answers to Serbia's objections proved to be highly controversial. It spurred remarkably sharp criticism from the four judges that had participated in the *Bosnia and Herzegovina v. Yugoslavia* case, Ranjeva, Shi, Koroma and Parra-Aranguren. In a joint declaration the judges denounced the Court's argumentation as lacking "legal validity and consistency", while being "*contra legem*, and untenable" and "extra-legal".[7] While the consistency of the Court's reasoning certainly raises questions, such harsh critique obscures an important element of the reasoning of the Court. It portrays the Court's arguments as essentially a failure to consistently apply some identifiable, clear legal standard that should have determined the outcome of the case. The problem, however, lies at a deeper level. The Judgment is almost a textbook example of what critical legal scholars have identified as the indeterminacy of international legal reasoning.[8] The Court constantly oscillates between oppositions such as rule and exception, formalism and pragmatism, stability and change, subjective intentions and objective meaning, etc. Thus, when it comes to the relevance of its previous decisions, the Court emphasizes the importance of stability (it "will not depart from settled jurisprudence") and change ("unless it finds particular reasons to do so").[9] In

[6] "Strictly respecting the continuity of the international personality of Yugoslavia, the Federal Republic of Yugoslavia shall continue to fulfil all the rights conferred to, and obligations assumed by, the Socialist Federal Republic of Yugoslavia in international relations, including its membership in all international organizations and participation in international treaties ratified or acceded to by Yugoslavia" (United Nations doc. A/46/915, Ann. I).

[7] Joint Declaration of Judges Ranjeva, Shi, Koroma and Parra-Aranguren, para. 1.

[8] Some classic studies are: D. Kennedy, International Legal Strcutures, Nomos Verlag, 1987; M. Koskeniemi, From Apology to Utopia, the Structure of International Legal Argument (Cambridge: Cambridge University Press, 2006) (reissue with new epilogue); A. Carty, The Decay of International Law?: A Reappraisal of the Limits of Legal Imagination in International Affairs (Palgrave Macmillan, 1988).

[9] Para 53.

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similar fashion, the Court stresses that the case should be decided on the basis of the situation that prevailed when the application was filed, while at the same time downplaying the importance of this date in the interests of process economy and the sound administration of justice. Finally, it attaches great weight to Serbia's consent to be bound by the international obligations of the SFRY, but basically defines away Serbia's claim that it accepted these obligations because it believed to be the continuator State of the Socialist Republic.

Because of its constant wavering between oppositions, the judgment leaves the impression that the outcome of the case could as well have been otherwise; that much depends on what the Court considered desirable as a matter of judicial policy. To be sure, it *is* to be applauded that the ICJ now can shed light on yet another part of the breakdown of Yugoslavia and has the opportunity to further develop and apply the concept of genocide. The way in which this outcome has been achieved, however, raises fundamental questions, not only regarding the judgment itself, but also regarding international law's capacity to determine the identity of its primary subjects.