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CASE AND COMMENT

ACCESS TO INTERNATIONAL JUSTICE IN THE *LEGALITY OF USE OF FORCE* CASES

MUCH international litigation has been spawned by the Balkan crisis, and the latest instalment comes in the form of eight judgments rendered by the International Court of Justice ("ICJ") on 15 December 2004 in the *Legality of Use of Force* cases. In these judgments, the ICJ upheld the preliminary objections of the respondent States and ruled that it had no jurisdiction to entertain Serbia and Montenegro's claims.

The Federal Republic of Yugoslavia ("FRY"), as it was then known, instituted separate proceedings on 29 April 1999 against each of Belgium, Canada, France, Germany, Italy, the Netherlands, Portugal, Spain, the United Kingdom and the United States. In its application, it argued that in the course of the NATO intervention in Kosovo in the Spring of 1999, the respondents had violated, *inter alia*, the prohibition on the threat or use of force, the obligation of non-intervention, and the obligation to protect the civilian population and civilian objects in wartime (see, *e.g.*, *Serbia and Montenegro* v. *Belgium*, para. 1). On 2 June 1999, the ICJ rejected the FRY's requests for the indication of provisional measures, and also decided to remove two of the applications from the list, finding that it "manifestly lacked jurisdiction" in those cases (*Legality of Use of Force* (*Yugoslavia* v. *Spain*) [1999] I.C.J. Rep. 761, 773–4; *Legality of Use of Force (Yugoslavia* v. *United States)* [1999] I.C.J. Rep. 916, 925–6). The eight other cases, however, remained on foot.

At the time it commenced proceedings, the FRY—claiming to be the successor State to the Socialist Federal Republic of

Yugoslavia ("SFRY")—relied on the following grounds of jurisdiction: Article IX of the Genocide Convention (in each of the cases); Article 36(2) of the ICJ Statute (in the cases against Belgium, Canada, the Netherlands, Portugal, and the United Kingdom); and two bilateral treaties (in the cases against Belgium and the Netherlands). Internal political upheaval in the FRY subsequently led to its admission to the UN on 1 November 2000 and its accession to the Genocide Convention on 12 March 2001. This saw a significant alteration in its attitude to the question of the ICJ's jurisdiction. Whereas the FRY (renamed "Serbia and Montenegro" on 4 February 2003) had previously positively asserted that the ICJ had jurisdiction, it now merely asked that the ICJ "decide on its jurisdiction" (*Serbia and Montenegro* v. *Belgium*, paras. 23–4).

This unusual formulation provoked the respondents to argue that the cases should be removed from the list by summary decision. A number of different arguments were made by the respondents in this regard. First, it was suggested that Serbia and Montenegro had effectively discontinued the cases; the ICJ rejected this (*Serbia and Montenegro* v. *Belgium*, paras. 31–2). Second, it was argued that the ICJ had an *ex officio* power to remove the cases from its list; the ICJ agreed that it had such a power, but held it could only exercise this power in certain situations, which did not include the present case (*Serbia and Montenegro* v. *Belgium*, para. 33). Third, it was put to the ICJ that there was agreement between the parties on a "question of jurisdiction that was determinative of the case", as Serbia and Montenegro did not dispute that prior to November 2000, it was not a member of the UN or the Genocide Convention. The ICJ also rejected this argument, noting that the question to be determined was not one of consent, but whether Serbia and Montenegro was entitled to seise the ICJ at the time when it instituted proceedings in 1999 (*Serbia and Montenegro* v. *Belgium*, paras. 34–8). Fourth, it was implied by some of the respondents that the approach adopted by Serbia and Montenegro was influenced by the ongoing ICJ proceedings between Bosnia and Herzegovina and Serbia and Montenegro. The ICJ similarly dismissed this objection, holding that it could not decline to entertain a case "simply because ... its judgment may have implications in another case" (*Serbia and Montenegro* v. *Belgium*, para. 40). Fifth, it was suggested that any dispute concerning rights and obligations under the Genocide Convention had disappeared, and moreover, that Serbia and Montenegro should be estopped from pursuing any action under that convention. The ICJ gave these objections short shrift, holding

that it was clear that the dispute on the merits persisted, and that Serbia and Montenegro could not be held to have "forfeited or renounced" its right of action (*Serbia and Montenegro* v. *Belgium*, paras. 43–4).

The ICJ then turned to the question of its jurisdiction. It first addressed the question whether the FRY had been entitled to institute proceedings before the ICJ. Under Article 35(1) of its Statute, the ICJ is only "open to the States parties to the present Statute"; it followed that the ICJ could "exercise its judicial function only in respect of those States which have access to it under Article 35 of the Statute. And only those States which have access to the Court can confer jurisdiction upon it" (*Serbia and Montenegro* v. *Belgium*, para. 46). Having observed that it had not previously been required to determine the legal status of Serbia and Montenegro, the ICJ embarked on a lengthy recapitulation of the events relating to its legal position *vis-à-vis* the UN between 1992–2000 (*Serbia and Montenegro* v. *Belgium*, paras. 54–79). Previously, the ICJ had noted the "legal difficulties" posed by the stance taken by the Security Council, General Assembly and Secretary-General with regard to the FRY, and had referred to its status as "*sui generis*" (*Application of the Genocide Convention* [1993] I.C.J. Rep. 3, 14; *Application for Revision*, judgment of 3 February 2003, para. 71). In the present case, the ICJ again described the FRY's position within the UN during this period as "highly complex", "ambiguous", and "open to different assessments" (*Serbia and Montenegro* v. *Belgium*, para. 64). However, the ICJ concluded that this uncertainty was brought to an end by the FRY's admission to membership of the UN on 1 November 2000. This event clarified the previous legal situation, as the FRY's membership "did not have, and could not have had, the effect of dating back to the time when the [SFRY] broke up and disappeared"; further, the ICJ held it was clear "that the *sui generis* position of the Applicant could not have amounted to its membership" in the UN (*Serbia and Montenegro* v. *Belgium*, para. 78). Accordingly, Serbia and Montenegro was not, at the time of institution of proceedings, a State party to the ICJ Statute; consequently, the ICJ was not open to it under Article 35(1) (*Serbia and Montenegro* v. *Belgium*, paras. 79, 91).

The ICJ then considered whether Serbia and Montenegro could nonetheless have access to it under Article 35(2), which stipulates in relevant part that "the conditions under which the Court shall be open to other States shall, subject to the special provisions contained in treaties in force, be laid down by the Security Council". The question here was whether the Genocide Convention

was a "treaty in force" under Article 35(2), and whether the ICJ's jurisdiction might be founded on this basis. The ICJ noted that there were two possible interpretations of the phrase "treaties in force": it could refer either to treaties in force at the time of entry into force of the ICJ Statute, or to treaties in force at the time of commencement of proceedings (*Serbia and Montenegro* v. *Belgium*, para. 101). After reviewing the *travaux préparatoires* of the provision, which dated from the Statute of the ICJ's predecessor, the Permanent Court of International Justice ("PCIJ"), the ICJ held that Article 35(2) was "intended to refer to treaties in force at the date of the entry into force of the new Statute" (*Serbia and Montenegro* v. *Belgium*, para. 113). This, then, excluded Serbia and Montenegro from having access to the ICJ under the Genocide Convention, which entered into force in 1951.

Finally, the ICJ addressed the argument made in the applications against Belgium and the Netherlands that its jurisdiction might be founded on the basis of bilateral agreements conferring jurisdiction on the PCIJ and dating from 1930 and 1931 respectively. Here the question was whether Article 37 of the ICJ Statute, which preserves and transfers the jurisdiction of the PCIJ to the ICJ, was of any assistance to Serbia and Montenegro. The ICJ held that it was not, as this provision only operates "as between the parties to the present Statute", thus excluding Serbia and Montenegro (*Serbia and Montenegro* v. *Belgium*, paras. 115–26; *Serbia and Montenegro* v. *Netherlands*, paras. 114–25). Accordingly, the ICJ held that it lacked jurisdiction.

While the ICJ was correct to uphold the respondents' preliminary objections in the *Legality of Use of Force* cases, its reasoning is, concordant with the FRY's position within the UN from 1992–2000, not free from legal difficulties. For in basing its decision on its jurisdiction *ratione personae*, the ICJ's approach is inconsistent with its orders in the FRY's requests for provisional measures, where it preferred to rule that it lacked prima facie jurisdiction *ratione temporis* or *ratione materiae*. Furthermore, the ICJ's finding that Serbia and Montenegro was not a member of the UN prior to 1 November 2000—and that the ICJ was not open to it—directly contradicts its finding in another case that the FRY's admission to the UN in 2000 "cannot have changed retroactively the *sui generis* position which the FRY found itself in *vis-à-vis* the United Nations over the period 1992 to 2000, or its position in relation to the Statute of the Court" (*Application for Revision*, judgment of 3 February 2003, para. 71). This was noted by seven judges who saw fit to append a joint declaration, in which they also lamented the ICJ's statement that in rendering the judgment, it did

not need to consider implications for other litigation (joint declaration of Vice-President Ranjeva, Judges Guillaume, Higgins, Kooijmans, Al-Khasawneh, Buergenthal and Elaraby, para. 10). In addition, the ICJ's decision to rule on the application of Article 35(2) was highly unusual, given that Serbia and Montenegro did not invoke this provision; the ICJ's approach to this issue was described in the joint declaration as "astonishing" (joint declaration, para. 11; see also separate opinion of Judge Higgins, para. 18). While the outcome in the *Legality of Use of Force* cases is the right one, the ICJ would have done well to find less problematic grounds on which to base its decision.

CHESTER BROWN

PROPORTIONALITY AND DISCRIMINATION IN ANTI-TERRORISM LEGISLATION

PART 4 of the Anti-terrorism, Crime and Security Act 2001 (the ATCS Act) allowed the Home Secretary to certify a person as a suspected international terrorist. If subject to immigration control, the person could then be detained pending removal from the UK. If there was no country to which the person could be sent without being at risk of death, torture or inhuman or degrading treatment, section 23 authorised indefinite detention. The government purported to derogate under Article 15 of the ECHR from the right to liberty under Article 5 and made an order under section 14 of the Human Rights Act 1998 to make the derogation effective in municipal law. In *A and others* v. *Secretary of State for the Home Department* [2004] UKHL 56, [2005] 2 W.L.R. 87, detainees claimed that the derogation was not justified by Article 15, and that indefinite detention of people subject to immigration control constituted unlawful discrimination on the ground of nationality or immigration status contrary to Article 14 taken together with Article 5. Of the nine Law Lords (Lord Bingham of Cornhill, Lord Nicholls of Birkenhead, Lord Hoffmann, Lord Hope of Craighead, Lord Scott of Foscote, Lord Rodger of Earlsferry, Lord Walker of Gestingthorpe, Baroness Hale of Richmond and Lord Carswell) a majority agreed, quashing the derogation order and declaring section 23 of the ATCS Act to be incompatible with Articles 5 and 14.

Their Lordships assumed that the detention needed to be justified under Article 15(1) of the ECHR as a measure strictly required by the exigencies of a public emergency threatening the life