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The (Non-)Decision of the ICJ Regarding the Legal Status of the Former Republic of Yugoslavia between 1992 and 2000

Replies and Comments

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Focus

International Court of Justice, Case Concerning Legality of Use of Force, Serbia and Montenegro v. Canada, Preliminary Objections, 15 December 2004, para. 77

"The Applicant thus has the status of membership in the United Nations as from 1 November 2000.

However, its admission to the United Nations did not have, and could not have had, the effect of dating back to the time when the Socialist Federal Republic of Yugoslavia broke up and disappeared; there was in 2000 no question of restoring the membership rights of the Socialist Federal Republic of Yugoslavia for the benefit of the Federal Republic of Yugoslavia. At the same time, it became clear that the *sui generis* position of the Applicant could not have amounted to its membership in the Organization."

On 29 April 1999 while the conflict was raging in Kosovo, Serbia and Montenegro (the Federal Republic of Yugoslavia at the time of the submission) lodged before the International Court of Justice a complaint against a series of States, which had, in its opinion, violated various principles of international law. On 15 December 2004 the ICJ dismissed the claim on the basis that *inter alia* the applicant was not a member of the United Nations and, hence, could not have applied to the ICJ to settle the dispute.

The initial application invoked *inter alia* article 36(2) of the ICJ Statute as a basis of the ICJ's jurisdiction. First, the Court pointed out that a difference should be made between jurisdiction based on consent of the parties and the right of a party to appear before the Court. In this case, much centres upon the latter, i.e. whether Serbia and Montenegro is entitled to seize the ICJ.

In this regard the ICJ deems it crucial to examine whether Serbia and Montenegro was a party to the Statute of the ICJ under articles 34(1) or 35 of the ICJ Statute. The ICJ does not ponder much on whether Serbia and Montenegro qualifies as a State; it simply declares that there is no doubt that it is a State for the purpose of article 34(1) of the Statute (para. 45).

The second step is to determine whether Serbia and Montenegro was a member of the United Nations at the moment it filed the application. After retracing the history of Serbia and Montenegro, the ICJ concludes that the legal status of Serbia and Montenegro between 1992 and 2000 was unclear (para. 63). While some documents and statements tend to demonstrate that Serbia and Montenegro was considered as a successor State others show the contrary. The main problem in asserting the legal situation is that there is no authoritative body assessing State succession (para. 63). This comment is rather odd; for the International Court of Justice itself refuses to decide on the legal situation of Serbia and Montenegro. In a previous case on preliminary objections (*Bosnia Herzegovina v. FRY*) the Court had found that Serbia and Montenegro had a *sui generis* position.

The only concrete statements made by the ICJ regarding the position of Serbia and Montenegro within the international community is that by 1 November 2000 it formally became a member of the United Nations following Resolution 55/12 of the General Assembly. The ICJ refuses to make any clear judgement as to the status of Serbia and Montenegro at the time of the application. For the ICJ, it seems that Resolution 55/12 clarifies the legal position of Serbia and Montenegro. It interprets the formal accession within the United Nations organisation as evidence that Serbia and Montenegro did not previously belong to it. Yet, the position of the ICJ may be mistaken.

First, the "new" application does not reveal much about the legal standing of Serbia and Montenegro (see also para. 12 of the common declaration and paras 19-20 of Separate Opinion of Judge Higgins). In my opinion, it only stresses the fact that the international community refused to regard Serbia and Montenegro as a successor to Yugoslavia and, thus, obliged it to apply as a new member of the United Nations. It does not explain the *legal* status of Serbia and Montenegro. As Judge Kooijmans pinpoints in his Separate Opinion "[t]he reader is left with the statement – in itself not uncontroversial- that the *sui generis* position of the FRY cannot have amounted to its membership in the Organization" (para. 4 Separate Opinion of Judge Kooijmans)

Second, in another decision dated 3 February 2003 the ICJ states that Resolution 55/12 could not have modified the *sui generis* status of Serbia and Montenegro, i.e. the Resolution did not prejudice on the legal standing of Serbia and Montenegro between 1992 and 2000. This reversal in jurisprudence is noted by several judges in a common declaration to the Preliminary Objections that goes as far as to state that "the Court had already adjudicated that FRY could seize the Court between 1992 and 2000 and that its admission to the UN in 2002 had changed nothing to the situation." (para. 10)

What the judgement nonetheless demonstrates is that State succession is a highly political rather than legal act. In the case of the dismemberment of States, the attitude of the United Nations towards the Soviet Union and Yugoslavia stands in stark contrast. The United Nations accepted Russia as the successor State to the Soviet Union without any condition whereas it refused to do so with Serbia and Montenegro (Security Council Resolution 777 (1992)). It required Serbia and Montenegro to apply to become a *new* member of the United Nations (General Assembly Resolution 47/1 (1992)) instead of granting it immediate accession as a successor to Yugoslavia.

Undeniably, this shows that international law is not free of politics. What is rather sad is that the ICJ is also playing the game (see also para. 13 of Separate Opinion of Judge Elaraby). While it had a certain margin of appreciation in determining the status of Serbia and Montenegro, and more particularly, in examining whether it qualified as a successor State it refused to adjudicate on the matter.

Responsibility

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