



INTERNATIONAL COURT OF JUSTICE

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Summary

Not an official document

Summary 2007/2
26 February 2007

Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)

Summary of the Judgment of 26 February 2007

History of the proceedings and submissions of the Parties (paras. 1-66)

The Court begins by recapitulating the various stages of the proceedings (this history may be found in Press Release No. 2006/9 of 27 February 2006). It also recalls the final submissions presented by the Parties at the oral proceedings (see Press Release No. 2006/18 of 9 May 2006).

Identification of the respondent party (paras. 67-79)

The Court first identifies the respondent party before it in the proceedings. It observes that after the close of the oral proceedings, by a letter dated 3 June 2006, the President of the Republic of Serbia informed the Secretary-General of the United Nations that, following the Declaration of Independence adopted by the National Assembly of Montenegro on 3 June 2006, “the membership of the state union Serbia and Montenegro in the United Nations, including including all organs and organisations of the United Nations system, [would be] continued by the Republic of Serbia on the basis of Article 60 of the Constitutional Charter of Serbia and Montenegro”. On 28 June 2006, by its resolution 60/264, the General Assembly admitted the Republic of Montenegro as a new Member of the United Nations.

After having examined the views expressed on this issue by the Agent of Bosnia and Herzegovina, the Agent of Serbia and Montenegro and the Chief State Prosecutor of Montenegro, the Court observes that the facts and events on which the final submissions of Bosnia and Herzegovina are based occurred at a period of time when Serbia and Montenegro constituted a single State.

It notes that Serbia has accepted “continuity between Serbia and Montenegro and the Republic of Serbia”, and has assumed responsibility for “its commitments deriving from international treaties concluded by Serbia and Montenegro”, thus including commitments under the Genocide Convention. Montenegro, on the other hand, does not claim to be the continuator of Serbia and Montenegro.

The Court recalls a fundamental principle that no State may be subject to its jurisdiction without its consent. It states that the events related clearly show that the Republic of Montenegro does not continue the legal personality of Serbia and Montenegro; it cannot therefore have acquired, on that basis, the status of Respondent in the case. It is also clear that Montenegro does

not give its consent to the jurisdiction of the Court over it for the purposes of the dispute. Furthermore, the Applicant did not assert that Montenegro is still a party to the present case; it merely emphasized its views as to the joint and several liability of Serbia and of Montenegro.

The Court thus notes that the Republic of Serbia remains a respondent in the case, and at the date of the present Judgment is indeed the only Respondent. Accordingly, any findings that the Court may make in the operative paragraph of the Judgment are to be addressed to Serbia. That being said, the Court recalls that any responsibility for past events determined in the present Judgment involved at the relevant time the State of Serbia and Montenegro. It further observes that the Republic of Montenegro is a party to the Genocide Convention and that Parties to that Convention have undertaken the obligations flowing from it, in particular the obligation to co-operate in order to punish the perpetrators of genocide.

The Court's jurisdiction (paras. 80-141)

— The jurisdictional objection of the Respondent

The Court proceeds to examine an important issue of jurisdictional character raised by the “Initiative to Reconsider ex officio Jurisdiction over Yugoslavia” filed by the Respondent in 2001 (hereinafter “the Initiative”). It explains that the central question raised by the Respondent is whether at the time of the filing of the Application instituting proceedings the Respondent was or was not the continuator of the Socialist Federal Republic of Yugoslavia (SFRY). The Respondent now contends that it was not a continuator State, and that therefore not only was it not a party to the Genocide Convention when the proceedings were instituted, but it was not then a party to the Statute of the Court by virtue of membership in the United Nations; and that, not being such a party, it did not have access to the Court, with the consequence that the Court had no jurisdiction ratione personae over it.

The Court recalls the circumstances underlying that Initiative. Briefly stated, the situation was that the Respondent, after claiming that since the break-up of the SFRY in 1992 it was the continuator of that State, and as such maintained the membership of the SFRY in the United Nations, had on 27 October 2000 applied, “in light of the implementation of the Security Council resolution 777 (1992)” to be admitted to the Organization as a new Member, thereby in effect relinquishing its previous claim.

In order to clarify the background to these issues, the Court reviews the history of the status of the Respondent with regard to the United Nations from the break-up of the SFRY to the admission of Serbia and Montenegro on 1 November 2000 as a new Member.

— The response of Bosnia and Herzegovina

The Court observes that the Applicant contends that the Court should not examine the question raised by the Respondent in its Initiative. Bosnia and Herzegovina firstly argues that the Respondent was under a duty to raise the issue of whether the FRY was a Member of the United Nations at the time of the proceedings on the preliminary objections, in 1996, and that since it did not do so, the principle of res judicata, attaching to the Court's 1996 Judgment on those objections, prevents it from reopening the issue. Bosnia and Herzegovina secondly maintains that the Court itself, having decided in 1996 that it had jurisdiction in the case, would be in breach of the principle of res judicata if it were now to decide otherwise, and that the Court cannot call in question the authority of its decisions as res judicata.

With respect to the first contention of Bosnia and Herzegovina, the Court notes that if a party to proceedings before the Court chooses not to raise an issue of jurisdiction by way of the preliminary objection procedure under Article 79 of the Rules, that party is not necessarily thereby debarred from raising such issue during the proceedings on the merits of the case.

The Court does not find it necessary to consider whether the conduct of the Respondent could be held to constitute an acquiescence in the jurisdiction of the Court. Such acquiescence, if established, might be relevant to questions of consensual jurisdiction, but not to the question whether a State has the capacity under the Statute to be a party to proceedings before the Court. The Court observes that the latter question may be regarded as an issue prior to that of jurisdiction ratione personae, or as one constitutive element within the concept of jurisdiction ratione personae. Either way, unlike the majority of questions of jurisdiction, it is not a matter of the consent of the parties. It follows that, whether or not the Respondent should be held to have acquiesced in the jurisdiction of the Court in the case, such acquiescence would in no way debar the Court from examining and ruling upon the question it raised. The same reasoning applies to the argument that the Respondent is estopped from raising the matter at this stage, or debarred from doing so by considerations of good faith. The Court therefore turns to examine the second contention of Bosnia and Herzegovina that the question of the capacity of the Respondent to be a party to proceedings before the Court has already been resolved as a matter of res judicata by the 1996 Judgment on jurisdiction.

— The principle of res judicata

After having reviewed its relevant past decisions, notably its 1996 Judgment on Preliminary Objections in the case and the 2003 Judgment in the Application for Revision case, the Court considers the principle of res judicata, and its application to the 1996 Judgment.

The Court recalls that the principle of res judicata appears from the terms of the Statute of the Court and the Charter of the United Nations. That principle signifies that the decisions of the Court are not only binding on the parties, but are final, in the sense that they cannot be reopened by the parties as regards the issues that have been determined, save by procedures, of an exceptional nature, specially laid down for that purpose (the procedure for revision set down in Article 61 of the Statute). In the view of the Court, two purposes underlie the principle of res judicata: first, the stability of legal relations requires that litigation come to an end; secondly, it is in the interest of each party that an issue which has already been adjudicated in favour of that party be not argued again.

The Court observes that it has been suggested inter alia by the Respondent that a distinction may be drawn between the application of the principle of res judicata to judgments given on the merits of a case and judgments determining the Court's jurisdiction, in response to preliminary objections. The Respondent contends that the latter "do not and cannot have the same consequences as decisions on the merits". The Court dismisses this contention, explaining that the decision on questions of jurisdiction is given by a judgment, and Article 60 of the Statute provides that "[t]he judgment is final and without appeal", without distinguishing between judgments on jurisdiction and admissibility, and judgments on the merits. The Court does not uphold the other arguments of the Respondent in respect of res judicata. It states that, should a party to a case believe that elements have come to light subsequent to the decision of the Court which tend to show that the Court's conclusions may have been based on incorrect or insufficient facts, the Statute provides for only one procedure: that under Article 61, which offers the possibility of the revision of judgments, subject to the restrictions stated in that Article. In this regard, it recalls that the Respondent's Application for revision of the 1996 Judgment in the case was dismissed, as not meeting the conditions of Article 61.

— Application of the principle of res judicata to the 1996 Judgment

The Court recalls that the operative part of a judgment of the Court possesses the force of res judicata. The operative part of the 1996 Judgment stated that the Court found "that, on the basis of Article IX of the Convention on the Prevention and Punishment of the Crime of Genocide, it has jurisdiction to decide upon the dispute". According to the Court, that jurisdiction is thus established with the full weight of the Court's judicial authority. For a party to assert today that, at

the date the 1996 Judgment was given, the Court had no power to give it, because one of the parties can now be seen to have been unable to come before the Court is to call in question the force as res judicata of the operative clause of the Judgment. Therefore, the Court need not examine the Respondent's objection to jurisdiction based on its contention as to its lack of status in 1993.

The Respondent has however advanced a number of arguments tending to show that the 1996 Judgment is not conclusive on the matter. It has been inter alia suggested that, for the purposes of applying the principle of res judicata to a judgment on preliminary objections, the operative clause to be taken into account and given the force of res judicata is the decision rejecting specified preliminary objections, rather than the broad ascertainment upholding jurisdiction. The Court does not uphold this contention, explaining that it does not consider that it was the purpose of Article 79 of the Rules of Court to limit the extent of the force of res judicata attaching to a judgment on preliminary objections, nor that, in the case of such judgment, such force is necessarily limited to the clauses of the dispositif specifically rejecting particular objections. If any question arises as to the scope of res judicata attaching to a judgment, it must be determined in each case having regard to the context in which the judgment was given. It may be necessary to distinguish between, first, the issues which have been decided with the force of res judicata, or which are necessarily entailed in the decision of those issues; secondly any peripheral or subsidiary matters, or obiter dicta; and finally matters which have not been ruled upon at all.

The Court notes that the fact that it has dealt, in a number of past cases, with jurisdictional issues after having delivered a judgment on jurisdiction does not support the contention that such a judgment can be reopened at any time, so as to permit reconsideration of issues already settled with the force of res judicata. There is an essential difference between those cases mentioned in paragraph 127 of the Judgment and the present case: the jurisdictional issues examined at a late stage in those cases were such that the decision on them would not contradict the finding of jurisdiction made in the earlier judgment. By contrast, the contentions of the Respondent in the present case would, if upheld, effectively reverse the 1996 Judgment.

Addressing the argument of the Respondent that the issue whether the FRY had access to the Court had not been decided in the 1996 Judgment, the Court notes that the statements it made in the 2004 Judgments in the Legality of Use of Force cases do not signify that in 1996 the Court was unaware of the fact that the solution adopted in the United Nations as to the question of continuation of the membership of the SFRY “[was] not free from legal difficulties”. As the Court recognized in the 2004 Judgments, in 1999 — and even more so in 1996 — it was by no means so clear as the Court found it to be in 2004 that the Respondent was not a Member of the United Nations. Although the legal complications of the position of the Respondent in relation to the United Nations were not specifically mentioned in the 1996 Judgment, the Court affirmed its jurisdiction to adjudicate upon the dispute and since the question of a State's capacity to be a party to proceedings is a matter which the Court must, if necessary, raise *ex officio*, this finding must as a matter of construction be understood, by necessary implication, to mean that the Court at that time perceived the Respondent as being in a position to participate in cases before the Court. On that basis, it proceeded to make a finding on jurisdiction which would have the force of res judicata. The Court does not need to go behind that finding and consider on what basis the Court was able to satisfy itself on the point. Whether the Parties classify the matter as one of “access to the Court” or of “jurisdiction ratione personae”, the fact remains that the Court could not have proceeded to determine the merits unless the Respondent had had the capacity under the Statute to be a party to proceedings before the Court. That the FRY had the capacity to appear before the Court in accordance with the Statute was an element in the reasoning of the 1996 Judgment which can — and indeed must — be read into the Judgment as a matter of logical construction.

