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**Preliminary Objections in the
Bosnia and Herzegovina v Yugoslavia Case**

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Abstract: *The present paper seeks to address the issue of the preliminary objections raised in the Bosnia and Herzegovina v. Yugoslavia case. The paper engages in a presentation of the procedural issues raised by the respondent State and the manner in which the ICJ has dealt with each of these contentions. Further, the paper provides a critique of some of the aspects which arise from the Court's Judgment, as well as the legal implications of its findings.*

Key-words: *International Court of Justice, preliminary objections, jurisdiction, access*

1. Introduction

The first step in the conduct of proceeding before the International Court of Justice (hereinafter, the "Court") is the establishment of jurisdiction of the Court, either at the request of one of the parties to the proceeding, or on the Court's own initiative. To that end, Article 79 of the Rules of Court (hereinafter, the "Rules") permits a respondent to raise objections to either "*the jurisdiction of the Court or to the admissibility of the application, or other objection the decision of which is requested before any further proceedings on the merits...*". Therefore a *sine qua non* for invoking Article 79 is that the nature of the objections must be such that it is imperative for

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the Court to decide on them before looking to the merits.¹ Further, the decision on preliminary objections, if favorable, would avoid not only a decision on, but also a discussion on the merits.²

The decision of the Court on preliminary objections in the *Bosnia and Herzegovina v. Yugoslavia Case*³ (the “1996 decision”) is one of particular interest in that it raises questions with respect to both the procedural and substantive aspects of raising preliminary objections.

On 20 March 1993 the Republic of Bosnia and Herzegovina (“Bosnia and Herzegovina”) filed an Application against the Republic of Yugoslavia (“Yugoslavia”) claiming alleged violations of the Convention on the Prevention and Punishment of the Crime of Genocide (“Genocide Convention”). The primary basis of jurisdiction relied on by Bosnia and Herzegovina was Article IX of the Genocide Convention, however during the period between March 31, 1993 and August 10, 1993 it invoked several additional bases of jurisdiction and requested provisional measures. Yugoslavia filed its responses to these requests on August 10 and August 23, 1993.

On April 15, 1994 Bosnia and Herzegovina filed its Memorial. On June 26, 1995 Yugoslavia filed its Preliminary Objections to the Court’s jurisdiction and the admissibility of the Application. In accordance with Article 79(3) of the Rules the Court suspended the proceeding on merits until the Preliminary Objections were disposed of by its order of July 14, 1995. Bosnia and Herzegovina filed its response to the Preliminary Objections on November 14, 1995 and the oral proceedings were conducted between April 29 and May 3, 1996.

It is relevant to note that Yugoslavia raised Preliminary Objections on the following grounds:

- (a) jurisdiction *rationae personae*;
- (b) jurisdiction *rationae materiae*;
- (c) jurisdiction *rationae temporis*;

¹ Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (*Libyan Arab Jamahiriya v. United States of America*), ICJ Reports 1998, 26; *Rights of minorities in Upper Silesia (Germany v. Poland)*, PCIJ Series A, No. 15

² *Barcelona Traction case*, ICJ Reports 1964, p.44; *Territorial and Maritime Dispute (Nicaragua v. Colombia)*, Preliminary Objections, ICJ Reports 2007, p.40

³ Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosnia and Herzegovina v. Yugoslavia*), ICJ Reports 1996, p. 595

- (d) admissibility of the claims; and
- (e) admissibility of the additional bases of jurisdiction invoked by Bosnia and Herzegovina.

The coming paragraphs will examine the procedural aspects as well as the reasoning of the Court in dismissing Yugoslavia's Preliminary Objections along with the legal consequences of the 1996 Decision.

2. Commentary on the 1996 Decision

2.1. Procedural Aspects

Before delving into the reasoning of the Court, it is noteworthy to examine the procedural aspects related to preliminary objections, which have been enshrined in Article 79 of the Rules.

Article 79(1)¹ provided for the possibility of preliminary objections (as defined in Section I above) within the time limit fixed for the submission of the Counter-Memorial. Therefore, the Preliminary Objections raised by Yugoslavia were in time and rightly allowed by the Court. This provision has, however, been made more stringent by the amendment of 2001 which requires preliminary objections to be raised "*as soon as possible, and not later than three months after the delivery of the Memorial.*"

Article 79(5) of the Rules also mandates that the proceeding on the merits of the dispute be suspended upon receipt of the preliminary objection by the Registry. As done by the Order of the Court dated July 14, 1995.

Article 79(9) sets out that the Court may either uphold or reject a preliminary objection. The same provision also permits the Court to declare that an objection is not of an exclusively preliminary character and fix a timetable for further proceedings. This is ordinarily the situation where the Court finds that the objection is so intricately connected to the merits of the dispute that it cannot be disposed of in a preliminary manner.² Finally, Article 79(10) imposes upon the Court to give effect to an agreement of the parties that the preliminary objections be heard along with the merits. In the 1996 decision, however, neither did the Court defer any of the Preliminary Objections to a later date, nor was there any agreement of the parties to hear the Preliminary Objections along with the merits.

¹ As adopted on April 14, 1978 which were to be applicable to all cases submitted to the Court prior to February 1, 2001

² Appeal Relating to the Jurisdiction of the ICAO Council (*India v. Pakistan*), ICJ Reports 1972, p.56

2.2. Reasoning of the Court

The Court, in the 1996 decision, dismissed all the Preliminary Objections raised by Yugoslavia. The reasoning of the Court in doing so is as follows:

2.2.1. Jurisdiction *Rationae Personae*

Yugoslavia had, in its third and sixth Preliminary Objections, challenged the jurisdiction of the Court invoked under Article IX of the Genocide Convention on the ground that it did not bind the parties or even assuming that it did, that it had not entered into force between them. While rejecting this Preliminary Objection the Court considered a number of factual positions.

Firstly, the Court considered that Yugoslavia was a party to the Genocide Convention, thereby bound by it, which had not been contested. The former Socialist Federative Republic of Yugoslavia (“SFRY”) had signed and ratified the Genocide Convention without reservation in 1950. Further, Yugoslavia had, by its proclamation of April 27, 1992, expressed that as the continuing state of SFRY it would be bound by the international commitments of SFRY. A note dated April 27, 1992 from the Permanent Mission of Yugoslavia to the Secretary General later confirmed this position.

Secondly, the Court noted that Article IX of the Genocide Convention opened it to any member of the UN from the date of admission thereto. In light of the fact that Bosnia and Herzegovina became a member of the UN on May 22, 1992, it could have been a party to the Genocide Convention as well, through the mechanism of state succession. Further, the Secretary General had communicated Bosnia and Herzegovina’s Notice of Succession to all the members of the Genocide Convention on March 18, 1993. Therefore, Bosnia and Herzegovina could become a party to the Genocide Convention through the mechanism of state succession.

Thirdly, the Court looked into Yugoslavia’s contention that if the Notice given by Bosnia and Herzegovina could be considered to be an instrument of accession to the Genocide Convention, it would only become effective on March 29, 1993 *i.e.* nine days after the filing of the Application. The Court however placed reliance on the *Mavrommatis principle*¹ and held that since the procedural defects had been cured as on the date of the judgment, there

¹ *Mavrommatis Palestine Concessions Case*, PCIJ, Series A, No. 2, p.34.

was no basis to uphold the third Preliminary Objection. To do so would merely extend the timeframe for resolution of the dispute as Bosnia and Herzegovina could have, on its own initiative, filed a new application during the elapsed time and remedied the procedural defect. Further, the Court explained that even if it were to be assumed that Bosnia and Herzegovina was not recognized by Yugoslavia, therefore there was no consensual basis to found the Court's jurisdiction, that defect had been remedied by the entry into force of the Dayton-Paris Agreement on December 14, 1995 by which Yugoslavia and Bosnia and Herzegovina expressly recognized each other as sovereign independent states.

2.2.2. Jurisdiction *Rationae Materiae*

The fifth Preliminary Objection raised by Yugoslavia related to whether the disputes between the parties were covered by Article IX of the Genocide Convention. Yugoslavia contended that the Court lacked *rationae materiae* jurisdiction on the ground that (i) the genocide complained of was of a domestic nature and Yugoslavia did not take part in it or exercise jurisdiction over the territory; and (ii) Article IX excluded State Responsibility as claimed by Bosnia and Herzegovina.

The Court first considered that the Genocide Convention sought to punish the crime of genocide irrespective of the nature of the conflict and that Yugoslavia's involvement in the said genocide was in itself a dispute between the parties.¹ Further, the Court noted that Article I of the Genocide Convention recognized genocide as a "*crime under international law*" in times of both peace and war. The domestic or international nature of the conflict was accordingly irrelevant.

Coming next to the nature and extent of State Responsibility envisaged by the Genocide Convention, the Court held that Article IX referred to "*the responsibility of a State for genocide or for any of the other acts enumerated in Article III*". This in light of the object and purpose of the Genocide Convention it was clear that rights and obligations imposed were *erga omnes* obligations. The Court went further and examined the imputability and application of the Genocide Convention to States for actions within their own territory and found that Article IV did not limit the same at all. In fact, the Court concluded that the language was sufficient to include the responsibility of a State for an act of genocide perpetrated by the State itself.

¹ East Timor (*Portugal v Australia*), ICJ Reports 1995, p.100, para. 22

Accordingly, the Court rejected the fifth Preliminary Objection raised by Yugoslavia.

2.2.3. Jurisdiction *Rationae Temporis*

Yugoslavia contended, in its seventh Preliminary Objection, that even assuming that the Genocide Convention was applicable, it would only be so for a part of the dispute and not the entirety of the dispute between the parties. Yugoslavia forwarded several arguments in support of this contention. However, the Court considered that the Genocide Convention, including Article IX, did not limit the scope or application of its jurisdiction *rationae temporis*, and neither did the parties make any such reservation to the Genocide Convention or when signing the Dayton-Paris Agreement. Accordingly, the Court rejected the sixth and seventh Preliminary Objections and held that it had jurisdiction over all the relevant facts since the beginning of the conflict in Bosnia and Herzegovina.

2.2.4. Admissibility

Yugoslavia challenged the admissibility of the Application on the basis that there was no “*international dispute*” as the conflict upon which Bosnia and Herzegovina’s case was founded was in the context of a civil war. Referring to its findings on jurisdiction *rationae materiae*, the Court affirmed that there was, in fact, an international dispute between the parties in that their positions with regard to the entirety of the claims raised in the Application were radically different. In any event, the Court found that the Application could not be inadmissible on the sole ground that it would have to look into events that may have occurred in the context of a civil war.

Separately, Yugoslavia also questioned the admissibility of the Application brought by Bosnia and Herzegovina on the premise that Mr. Alija Izetbegović, who had authorized the filing of the Application, was not the President of Bosnia and Herzegovina but only of the Presidency, which was in contravention of domestic law. The Court did not accept this argument on the ground that it was a valid presumption of international law that the head of a State was competent to take decisions with respect to international relations of that State and that it would not go into domestic law to ascertain the validity of such actions. In particular, the Court was guided by the fact that the UN and a number of international bodies recognized Mr. Izetbegović as the Head of State. In fact, the Dayton-Paris agreement too bears his signature.

The Court, therefore, rejected Yugoslavia's Preliminary Objections as to admissibility of the Application.

2.2.5. Admissibility of the Additional Bases of Jurisdiction invoked by Bosnia and Herzegovina

As previously mentioned, Bosnia and Herzegovina invoked several additional bases of jurisdiction, all of which being rejected by the Court for the following reasons.

Bosnia and Herzegovina claimed that the Court had jurisdiction under the Treaty between the Allied and Associated Powers and the Kingdom of Serbs, Croats and Slovenes of 10 September 1919, which provided for settlement of disputes by the Permanent Court of International Justice. The Court, however, found that this treaty was not in force and jurisdiction under it could not be invoked.

Bosnia and Herzegovina also invoked the letter of June 8, 1992 from the Presidents of the Republics of Montenegro and Serbia to the President of the Arbitration Commission of the International Conference for Peace in Yugoslavia, which suggested settlement of disputes before the Court. It was held that this letter could not be considered as a binding declaration to unconditionally submit to the jurisdiction of the Court given the circumstances under which the letter was sent.

As regards Bosnia and Herzegovina's letter of August 10, 1993 by which it expressed its intention to rely on "*the Customary and Conventional International Laws of War and International Humanitarian Law, including but not limited to the Four Geneva Conventions of 1949, their First Additional Protocol of 1977, the Hague Regulations on Land Warfare of 1907, and the Nuremberg Charter, Judgment, and Principles*", the Court found that none of these were applicable to the dispute in question.

Finally, Bosnia and Herzegovina attempted to invoke the principle of *forum prorogatum* on the premise that Yugoslavia had impliedly consented to the jurisdiction of the Court. However, this contention was rejected by the Court on the footing that the request for indication of provisional measures aimed at preservation of rights covered by the Genocide Convention cannot imply consent to jurisdiction and the conditions to invoke the doctrine were not fulfilled.

2.3. Legal Implications of the 1996 Decision

The Court first addressed the legal implications of the 1996 decision when it was confronted with an application for revision (“Revision Application”) of the same under Article 61 of the Statute, which was filed by Serbia and Montenegro (formerly known as Yugoslavia) on April 24, 2001. The Revision Application was founded on the footing that the admission of Yugoslavia as a new member of the UN revealed that it was not a member of the UN before such time and could not be a member of the Genocide Convention when the Application was filed. The Court rejected the Revision Application by its decision of February 3, 2003¹ on the ground that no new facts were revealed, the circumstances relied upon arose only after the 1996 decision had been rendered and, in any event, could not be called “facts”. This decision did not touch upon the membership status of Yugoslavia to the UN in 1993.

In the meantime, Serbia and Montenegro filed an “*Initiative to the Court to Reconsider ex officio Jurisdiction over Yugoslavia*” (the “Initiative”) on May 4, 2001. By the Initiative, Serbia and Montenegro sought to resile from the position taken in 1992 *i.e.* that it was the continuing state of SFRY, and claimed that it only became a member of the UN on November 1, 2000. It once again contended that Yugoslavia was a member of neither the UN nor the Genocide Convention on the date of the Application and that the Court did not have *rationae personae* jurisdiction over it and requested suspension of the proceedings on merits. The Court however declined to do so, pursuant to which Serbia and Montenegro requested the Court to decide whether Yugoslavia had access to the Court as an “issue of procedure”. The Court deferred the question of Yugoslavia’s access till the hearing on merits by its letter of June 12, 2003.

The “*issue of procedure*” was accordingly settled by the Court’s decision on the merits rendered on February 26, 2007 (“2007 decision”). The Court adumbrated that since jurisdiction was established under the Statute in the 1996 decision, which was binding on the parties, without any recourse to appeal,² it had the force of *res judicata*. The Court also considered were it the case that the question of access to the Court was not implicit in the 1996 decision, any decision now taken would necessarily entail reopening an

¹ *Application for Revision of the Judgment dated 11 July 1996 in the Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia), Preliminary Objections, (Yugoslavia v. Bosnia and Herzegovina)*, ICJ Reports 2003, p.7

² *Corfu Channel case (United Kingdom v. Albania), Preliminary Objections*, ICJ Reports 1948, p.15

issue which was *res judicata*¹ and would likely yield a contradictory result. Accordingly, the Court affirmed its jurisdiction on the strength of the 1996 decision.

The Court also took note of the decision in the *Legality of Use of Force case*² (“2004 decision”) wherein the Court looked to the 1996 decision and held that the question of whether Yugoslavia had access to the Court was not looked into and confirmed that it did not. As to whether a preliminary objection could be raised after the decision on the preliminary objections had been rendered, the 2004 decision distinguished between jurisdiction relating to consent and that relating to access. It was held that the question of access was one of law and it was incumbent upon the Court to look into this at any stage of the proceeding. With respect to the scope of the 1996 decision the Court nevertheless disagreed with the 2004 decision and held that the fact that Yugoslavia had access to the Court was an implied finding in the 1996 decision. The Court went further to state that since the 2004 decision was in a different case, it did not, indeed could not, have the force of *res judicata*.

3. Critique

Upon perusal of the 1996 decision, it appears that the question of access to the Court by Yugoslavia was never, in fact, considered. This is also implicit from the Dissenting Opinion to the 1996 decision of Judge *ad hoc* Kreka. The Court brushed the issue of jurisdiction *rationae personae* vis-à-vis Yugoslavia by citing the proclamation of April 27, 1992 and simpliciter stating that the fact of Yugoslavia being a continuer state of the Socialist Federal Republic of Yugoslavia, consequently party to the Genocide Convention was not contested. However, when confronted with the issue at the merits stage, the Court took the stand that confirmation of Yugoslavia’s access was implicit in the 1996 decision. The Court similarly faced problems with decisions on jurisdiction by implication in the *South West Africa case*³ where the Court resided from the position it had taken in 1962 and stated that there was no *res judicata* as the issue of *locus standi* had not been dealt with and proceeded to decline jurisdiction on the examination of

¹ *Nottebohm case (Liechtenstein v. Guatemala)*, *Preliminary Objections*, ICJ Reports 1953, p.111

² *Legality of Use of Force (Serbia and Montenegro v. Belgium)*, *Preliminary Objections, Judgment*, ICJ Reports 2004, pp. 310-311

³ *South West Africa Case (Ethiopia and Liberia v. South Africa)*, ICJ Reports 1962, p.319

locus standi in 1966. Pertinently, the Court had, in the 1966 decision, opined against a decision on jurisdiction being made implicitly.

The second question that comes to mind is whether it was incumbent upon the Court to look into the statutory limits of its activities, including issues affecting its own judicial integrity. There have been instances where it was held that the Court is obligated to confirm that it has *rationae personae* and *rationae materiae* jurisdiction over a dispute *proprio motu*. After all, the establishment of jurisdiction (including the right of access of parties) is the first step to initiating proceedings before the Court.

For the present, suffice it to say that the 1996 decision is not free from flaw and the attempt of the Court to address these paucities in the 2007 decision leaves much to be desired.

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