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The case concerning *Legality of Use of Force*

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BACKGROUND

When, on 22 March 1999, ten NATO members (including Spain) launched air strikes against the Federal Republic of Yugoslavia, some legal advisors no doubt automatically began to formulate opinions to themselves in keeping with the positive international law they usually apply. These opinions probably went something like this: the armed action might constitute a continuing violation of Article 2.4 of the United Nations Charter, since it could not be classified as either individual or collective self-defence and had not been authorised by the Security Council. Moreover, the *jus cogens* principle concerning the use of force had not been replaced by any other principle of the same level that might be invoked as a ground to avoid responsibility, such as a humanitarian intervention. Indeed, this was the gist of the argument that the renowned professor Sir Ian Brownlie submitted to the International Court of Justice in his role as an advisor to the Yugoslav delegation in the case that the court itself called "case concerning *Legality of Use of Force*". He made this argument on 10 May 1999, at the oral proceedings held by the Court in relation to the application filed by the FRY against the ten NATO States requesting the indication of urgent provisional measures to halt the use of force, as well as a ruling on the illegality thereof.

The FRY had filed the application on 29 April that same year, that is, just over a month after the start of the bombing. Although legal advisors in some countries may have drafted express opinions in the interim echoing Brownlie's contentions on behalf of the FRY, that was not the case in Spain, where the Foreign Minister at the time had not consulted the Ministry's International Legal Service in advance. In any case, and regardless of whether such a report had been prepared, the Yugoslav application took all of the respondents by surprise, and we had to scramble to put together a legal rationale for our governments" *faits accomplis* in the ten days allotted by the ICJ before the hearing. Some of the legal advisors who had been consulted and had expressed misgivings regarding the legality of their governments" actions had met with tart responses, such as the one that contemporaneous media accounts attributed to then US Secretary of State Madeleine Albright, who purportedly quipped that if the lawyers did not agree, it was time to "get some new lawyers".

For more information on how the request for the indication of provisional measures played out, readers are referred to the note I published at the time in *Revista Española de Derecho Internacional*

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(*REDI*), which was subsequently included in the book *Prudencia Jurídica y Poder Exterior* (Biblioteca Diplomática Española, MAEC, Madrid 2010), which offers a selection of my work. They are likewise referred to the notes on the precarious circumstances in which the International Legal Service was obliged to handle the FRY's application against Spain, for which I had both the exclusive assistance of a young legal advisor, Adela Díaz Bernárdez, and the friendly, informal collaboration of Professor Carlos Jiménez Piernes and Santiago Torres Bernárdez, the *ad hoc* judge appointed for the occasion by the Spanish government at my suggestion. In order to contribute in some way to this discussion on 'spain and the use of force", I have reread the remarks made by the Spanish delegation, which I had the honour of delivering to the Hague Court at the time, with nostalgic curiosity, and I will offer a brief overview here of the argument I submitted to request that the Yugoslav application against Spain be dismissed. It should be noted that, unlike other respondents, Spain offered a relatively solid defence, limited to a well-founded rejection of the Court's jurisdiction and, therefore, to the inadmissibility of the provisional measures requested by the FRY. I will outline the arguments here in the opposite order in which I chose to put them forward at the time based on a "lawyerly" approach and our desire to show our solidarity with the other respondents. I will thus begin by mentioning the two soundest arguments from a purely legal standpoint. It must be borne in mind that, while individual applications were filed against all ten NATO member respondents, their Agents before the Court acted jointly and offered a coordinated defence, following several meetings in London and The Hague chaired by the British legal advisor at the time, the charismatic Frank Berman.

THE GENOCIDE CONVENTION OF 9 DECEMBER 1948

Unlike some of the other parties to the dispute, Spain was not bilaterally bound to accept the ICJ's jurisdiction in relation to the FRY from a conventional standpoint, but rather solely in the multilateral framework of the Convention on the Prevention and Punishment of the Crime of Genocide of 9 December 1948, Art. 9 of which provides that disputes between the Contracting Parties shall be submitted to said jurisdiction. I waited until the end of my speech in the Hague to mention the unequivocal fact that, at the admittedly late time of its accession to the Convention on 13 April 1968, Spain had entered a reservation to the application of that article, which was neither prohibited by the Convention itself nor objected to by any of the Contracting Parties, including Yugoslavia. As the transcript of my remarks clearly shows, I did not wish to elaborate on this incontrovertible argument against the inclusion of the relations between Spain and the FRY under the ICJ's jurisdiction. I suppose a certain embarrassment regarding the reservation signed by the then Spanish minister Fernando Castiella, a copy of which I submitted to the Court, made me reluctant to draw any but the most necessary attention to this unedifying initiative of the Franco regime, which, far from being withdrawn following the adoption of the 1978 Constitution, remained in force until December 2008. I could easily have underscored the disingenuous behaviour of the FRY in invoking this clearly invalid basis for jurisdiction in our bilateral relations. I could have gone on at great length regarding the inapplicability of the concept of genocide to the NATO bombings, a charge that, in contrast, it was not at all farfetched to levy with regard to the FRY's own prior behaviour towards the

ethnic Albanian population of Kosovo. Professor Alain Pellet, in his role as legal advisor to the French government, called attention to the fact that the FRY had prudently refrained from using the term "genocide" in its application, as the events on which the application was based lacked both the objective element mentioned in Art. 2 of the Convention ("to destroy, in whole or in part, a national, ethnical, racial or religious group") and the subjective one (that the acts be "committed with intent" to achieve such a result). The ICJ itself gave the case a neutral name, referring to the "use of force" without any further specification. Other respondents did expound on this aspect of the issue, a logical decision, given that, unlike Spain, they were not protected by the aforementioned reservation. Portugal, for instance, firmly argued that the Convention was not applicable between the parties, as it had not yet entered into force for Portugal on the date the FRY filed its Application.

The representatives of the United States, another country that had entered a reservation to Art. 9, went even further and took the time to justify this reservation at great length, hinting, perhaps even more clearly than Spain, at the real reasons for its rejection of jurisdiction under the Convention: the Convention's text does not prohibit the reservation, nor is it incompatible with the ultimate purpose of the treaty, as witnessed by the fact that, as of 1999, it had been entered by fifteen States without eliciting the slightest protest from the other contracting parties, thereby enabling its near universal acceptance. In his dissenting opinion, the *ad hoc* judge for the FRY, Kreca, argued that the reservations to the Convention are contrary to a *jus cogens* norm due to the connection between genocide and the prohibition on the use of force, shamelessly asserting that Spain's reservation, whilst valid, "does not contribute to the implementation of the concept of an organized, *de jure*, international community". He failed to explain how, if he truly considered it valid, the FRY could include Spain in its application invoking a basis for jurisdiction so manifestly inapplicable to the relations between the two States.

ART. 36.2 OF THE STATUTE OF THE ICJ: EXCLUSION FROM ITS JURISDICTION *RATIONE TEMPORIS*

Given the lack of a bilateral or multilateral conventional basis for the Court's jurisdiction, in its application against Spain the FRY invoked the existence of unilateral declarations by both States accepting the ICJ's jurisdiction, which, it argued, gave it jurisdiction in the specific case of the bombing of Yugoslav territory by the Spanish Air Force. Once again, it was not hard for our delegation to show, in relation to this argument, the utter lack of reciprocity between the two declarations due to their respective dates of submission. First, and quite justifiably, it was necessary to rhetorically underscore the FRY's obvious bad faith in suddenly accepting the ICJ's jurisdiction on 25 April 1999, that is, only four days before submitting its request for the indication of provisional measures and the adjudication of the case on the merits. Moreover, however, the specific terms of the Spanish declaration of acceptance, deposited on 29 October 1990, left no room for doubt. Spain accepted the jurisdiction, explicitly excluding "[d]isputes in regard to which the other party or parties have accepted the compulsory jurisdiction of the Court less than 12 months prior to the filing of the application bringing the dispute before the Court". This specification clearly excluded reciprocity

between Spain and the FRY, as the latter's declaration predated the filing of the application by only a few days. In its order regarding the Spanish case, the Court noted this incompatibility and, together with the reservation to the Convention against Genocide, the only serious bases for jurisdiction invoked by the applicant with regard to Spain, found that it lacked jurisdiction in the specific case. Those respondents whose unilateral declarations of acceptance had not established any temporal limits (i.e. all the others except for the United Kingdom, whose declaration, from 1 January 1969, was formulated in terms similar to Spain's) had a harder time refuting the Yugoslav claim. As a result, they engaged in an interesting debate with the FRY delegation regarding the nature of the dispute itself and its existence in time. In fact, the FRY's own unilateral declaration of 25 April 1999 excluded certain matters from the Court's jurisdiction, limiting it to "disputes arising or which may arise after the signature of the present Declaration". The respondents thus argued, and the Court agreed, that the dispute concerning the use of force, should it be found to exist at all, would have arisen earlier, at the start of the NATO bombing campaign, that is, on 24 March, prior to the FRY's declaration, and that, therefore, the FRY's own declaration excluded the alleged basis for jurisdiction. Canada called the aforementioned date "critical" for the existence of a dispute, which was not only prior but also "known", given that the FRY had protested NATO's actions from the start, that is, even before taking its case to the ICJ. The applicant argued that each bombing of its territory was a separate international crime and that, therefore, the number of disputes was equal to the number of armed actions that had been carried out since the date of its declaration. The Court rejected the requests for the indication of provisional measures, without getting into the merits of the dispute, due to what it found to be the FRY's flawed argument. Thus, in her individual opinion, the British judge Rosalyn Higgins noted the widespread use of the concept of "critical" dates in international jurisprudence (*Phosphates in Morocco*, PCIJ), as well as in the case law of the European Court of Human Rights and the UN Human Rights Committee: while it could be accepted that relevant facts existed subsequent to the date in question, it could not be accepted that the dispute itself arose after the date indicated by the Yugoslav party itself in its declaration accepting jurisdiction.

THE JURISDICTION *RATIONE PERSONAE* OF THE ICJ

Given that both bases for jurisdiction invoked by the FRY in its application against Spain requesting the indication of provisional measures could be refuted, it might have seemed superfluous for the Spanish delegation to address other considerations as well. However, the International Legal Service's first idea upon being notified of the application to institute proceedings was to challenge the FRY's *jus standi* as a non-member State of the United Nations, contending that Art. 36.2 of the Statute of the ICJ limits its jurisdiction to "the states parties to the present Statute", a condition that the UN Charter reserves for "Members of the United Nations" (Art. 93). At the coordination meetings held between the respondent State delegations, the advisability of invoking this argument *ratione personae* was discussed: Security Council Resolution 777, adopted on 9 September 1992, and Resolution 47/1 of the General Assembly, adopted on 21 September of the same year, rejected the notion that the FRY could "continue automatically the membership of the former Socialist Federal Republic of Yugoslavia

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in the United Nations" and, therefore, be considered a party to the Statute. In keeping with the general consensus that this argument should also be used, the Spanish delegation submitted it as a preliminary issue that had to be addressed before the specific question of the bases for jurisdiction invoked by the FRY could be examined. As the Agent for Spain, I argued that the FRY could only be considered one of various successor States of the former Socialist Federal Republic of Yugoslavia and that it had not yet applied for membership in the United Nations. The other respondents" delegations did the same, especially Canada's, which contended that the FRY's declaration of 25 April, and, therefore, its application to institute proceedings in the ICJ, was a nullity and should be rejected on those grounds.

The Agent for the FRY unconvincingly tried to rebut the *ratione personae* argument, citing an opinion issued by Prof. Carl-August Fleischhauer, then Legal Counsel of the UN, in September 1992, in which he somewhat confusingly argued, at the request of Bosnia-Herzegovina, Slovenia and Croatia, that Resolution 47/1 of the General Assembly "neither terminates nor suspends Yugoslavia's membership in the Organization". In his separate opinion, the Dutch judge Kooijmans rejected the idea that preference could be given to a mere legal opinion over the unequivocal wording of the two aforementioned pertinent resolutions. In contrast, the *ad hoc* judge appointed by the FRY sought to shore up the soundness of the Yugoslav delegation's pleadings at the hearings, arguing that the Security Council and General Assembly Resolutions invoked by the respondents were of a purely political and pragmatic nature and were intended solely to prevent the FRY from participating in the organisation's work and that they were not conclusive with regard to the underlying issue of the FRY's membership in it.

Other delegations were more cautious. France, Italy and the United States refrained from making this argument, most likely because they thought that the Court would be disinclined to accept it. After all, the Court had summoned the respondents to a public hearing in relation to the application requesting the institution of proceedings, something that would have been incongruous had it begun with the premise that the applicant was a State that could not be considered a party to the Statute. Indeed, this view was, to a certain extent, confirmed by the orders of 2 June 1999, in which the Court avoided ruling on this delicate matter, finding instead that the issue of the FRY's continued membership, or lack thereof, in the UN "is not without legal difficulties" and that it was not necessary to resolve these issues in order to decide on the case at hand, namely, the FRY's request for provisional measures.

ON THE URGENCY AND SUITABILITY OF THE PROVISIONAL MEASURES

In addition to contesting the bases for jurisdiction invoked by the FRY to request the indication of provisional measures to suspend the bombing of Yugoslav territory, the respondents cited other reasons of a more political, rather than strictly legal, nature aimed at fostering a climate of moral reproach towards the applicant State among the members of the Court. On the surface, they seemed to be grounded in technical arguments regarding the nature of provisional measures (according to Art. 41 of the Statute, Arts. 73 et seq. of the Rules of Court, and ICJ case law). However, some

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respondents ventured to make substantive contentions regarding the dispute itself. For instance, some respondents addressed the "urgency" of the measures invoked by the FRY. In this regard, Belgium joined the debate over the merits of the FRY's request insofar as it argued that what was truly urgent was to prevent the continued "genocide" in Kosovo, and that, in this regard, the indication of provisional measures such as those requested by the FRY would almost certainly upset the balance between the parties as a result of their inevitable dilatory, political and military impact. The Yugoslav application therefore constituted an abuse of jurisdiction, even if the FRY were legally entitled to bring the dispute before the Court. The respondents likewise invoked the need to adopt measures "prudently" and only exceptionally, citing the opinion of Sir Hersch Lauterpacht in the *Interhandel* case (1959). They stressed that, were the Court to indicate provisional measures, it would be favouring the position of the applicant State, albeit indirectly, since, as noted by the Italian Agent, the indication of the requested provisional measures would require a prior decision on the merits of the case, which had not been addressed in the preliminary stage. The FRY, he wrote, requested the indication of a provisional measure ("that the respondent stop immediately the violations (of the obligation not to use force) vis-à-vis the Federal Republic of Yugoslavia") that coincided verbatim with one of the claims contained in the application on the merits.

Although it had sufficient grounds to reject the ICJ's jurisdiction, the Spanish delegation added its voice to the chorus of accusations out of solidarity with the other respondents, with a somewhat testy emphasis on what it considered to be the applicant's bad faith in filing its application by surprise, without the slightest basis for jurisdiction and despite its own "dirty hands", as the Canadian delegation further stressed in its submission. The Agent for Spain emphasised the unlawful nature of the FRY's claim, referring to the actual context of the application, which it qualified as pure political propaganda intended to distract international public opinion. In this regard, he cited the words of the then UN Secretary General, Kofi Annan, regarding the serious humanitarian catastrophe that the FRY was perpetrating in Kosovo through the excessive and indiscriminate use of force and the "odious campaign of ethnic cleansing" being waged by the Serbian authorities in that territory. The contempt that the FRY had shown for the Court in requesting the indication of provisional measures was clear, especially given the manifest lack of any basis for jurisdiction in our specific case. The FRY invoked a lengthy list of instruments against the respondents, some of which were patently inapplicable to Spain, such as the 1948 Convention regarding the regime of navigation on the Danube, to which Spain is obviously not a party. Otherwise, however, the Spanish delegation considered it neither prudent nor necessary to present an argument on the merits. This stands in contrast to the Belgian delegation, which not only invoked the pertinent UN resolutions (Security Council resolutions 1160/98, 1199/98 and 1203/98), which classified the situation in Kosovo as a threat to peace and security, but also went one step further, evoking an alleged right of humanitarian intervention and the exception of a state of necessity. Nevertheless, the direct allusions to alleged violations of international law attributed to the FRY's actions in Kosovo were, for the aforementioned reasons, sufficiently explicit for the Agent of Spain to deem it necessary to expressly state that Spain did not accept the Court's jurisdiction under the terms of Art 38.5 of the Rules (*forum prorogatum*), since there was not, as I noted, "the slightest sign, nor any plausible theory", why the Court should have

jurisdiction *prima facie* to indicate provisional measures in relation to Spain. For good measure, I also requested that the Court remove the alleged dispute between Spain and the FRY from its General List. The ICJ agreed to all of the Spanish requests in its order of 2 June 1999.

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