Review of the ICJ Order of June 2, 1999 in the Illegality of Use of Force Case (Code A997)

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The International Court of Justice on 2 June 1999 dismissed Yugoslavia's requests for an injunction ("provisional measures") in ten separate suits against ten NATO countries engaged in the bombing of Yugoslavia. Common to all of the cases were two jurisdictional claims made by Yugoslavia: first, that there was jurisdiction under the "optional clause" of the ICJ Statute (Art. 36, para. 2); and second, that jurisdiction is founded upon Article 9 of the Genocide Convention which gives the Court jurisdiction over disputes relating to that Convention. The Court dismissed both of these claims made by Yugoslavia, and held by a vote of 8 to 4 that there was no jurisdiction to issue an injunction.

In the case against the United States, the lack of jurisdiction was clear: the United States has withdrawn entirely from the "optional clause" as well as entering a reservation against Article 9 of the Genocide Convention when it ratified that Convention. An American citizen might question whether this little victory for the United States in exempting its lawyers from arguing for the legality of the NATO bombing was greeted in Washington D.C. with applause or dismay. Arguably, the failure of the United States to submit to the international rule of law continues to harm its image in the world.

Three other defendant states are also not parties to the optional clause, and hence the ICJ clearly found no jurisdiction over France, Germany, and Italy.

In the cases against Spain and the United Kingdom, both countries avoided what I've called the "sitting duck problem" in their acceptances of the "optional clause."[n.1] If state A files a general acceptance of compulsory jurisdiction, then state B--if it believes it someday will want to sue A--is encouraged not to file a general acceptance at all. That way A cannot sue B (under the general principle of reciprocity). But if B wants to sue A, then just before suing A, all B has to do is quickly to file its acceptance of compulsory jurisdiction. A is therefore a sitting duck. To avoid the problem, I argued, A should add a qualification to its acceptance of the optional clause similar to the one that Great Britain has used. The British acceptance of compulsory jurisdiction specifically excludes lawsuits filed in less than twelve months prior to the other party's acceptance of the Court's optional clause.[n.2] In the cases before the ICJ, Yugoslavia filed its acceptance of the Court's compulsory jurisdiction just three days before it filed its ten complaints. Since three days is a lot shorter than twelve months, there was clearly no jurisdiction against the United Kingdom or Spain. Indeed the attorneys for Yugoslavia submitted no argument on this point.

That leaves only four countries that Yugoslavia could claim are subject to the general jurisdiction of the ICJ: Belgium, Canada, The Netherlands, and Portugal. In their deliberations, the judges must have wondered what the effect would be if they had granted Yugoslavia's injunction against these four countries. The NATO bombing would not noticeably be diminished, and the world press (ignoring as usual all legal distinctions) would undoubtedly be full of charges of inconsistency: "if the bombing is illegal for Belgium, Canada, The Netherlands, and Portugal, why isn't it illegal for the countries that are actually doing most of the bombing--the United States and Great Britain?"

Perhaps for this reason, the judges strained to find a mechanism similar to the "sitting duck" that could work for the four remaining countries. They found it in the notion of a dispute. The Court held that the actual "dispute" between Yugoslavia on the one hand, and Belgium, Canada, The Netherlands, and Portugal on the other, "arose" on 24 March 1999--the day that the bombings commenced. By 25 April 1999--the date that Yugoslavia filed its declaration of acceptance of the Court's jurisdiction under the

optional clause--the "dispute" was already a month old. Therefore, the Court held, the dispute arose prior to Yugoslavia's submission to compulsory jurisdiction and hence, by reciprocity, the four defendant states fall outside the Court's jurisdiction with respect to this "dispute."

Yugoslavia's lawyer (called its "Agent") did not help matters much by appending a letter to the request for an injunction that stated:

I have the honour to bring to the attention of the Court the latest bombing of the central area of the town of Surdulica on 27 April 1999 at noon resulting in the loss of lives of civilians, most of whom were children and women . . .

His infelicitous use of the phrase "the latest bombing" in a letter dated two days after the acceptance of the Court's jurisdiction tends to concede that the "dispute" was indeed over bombing that had begun prior to that date.

The mechanism used by the Court is similar to the "sitting duck" problem in that the Court does not want to encourage countries to abstain from accepting the optional clause but then jump in as soon as a dispute starts. And to this extent, it is clearly Yugoslavia's fault for not having accepted the Court's optional clause years ago.

Nevertheless, there is something deeply troubling about the Court's relying on the technical question of when a dispute arises when what is at stake is the bombing of Belgrade and other cities. If the bombing is illegal, as Yugoslavia alleges, why not simply accept jurisdiction regarding the bombs that were dropped after April 25th, the date of Yugoslavia's acceptance of ICJ jurisdiction? Indeed, for purposes of an injunction, the bombs that were dropped between March 24th (the first day of the bombing) and April 27th (when the request for an injunction was filed) are clearly irrelevant. Yugoslavia is not asking for an injunction against bombing that has already occurred. It only wants an injunction against bombing that might occur after it has asked the Court for help.

An argument that Yugoslavia apparently failed to make was that an injunction was necessary to preserve its very existence as a state party before the ICJ. Who could foretell, on April 27th, that Yugoslavia would not be bombed out of existence? The technology is certainly available, in the form of nuclear bombs. Hence the Court, if it is to render justice in the matter, must preserve the status quo of the parties by injunctive relief at least as far as the continued existence of one of the parties is concerned.

The Court was far more forthright with respect to the Genocide Convention. On this issue the Court reached the merits of Yugoslavia's claim that the dropping of bombs on Yugoslavia arguably constitutes genocide. The term "genocide" has been stretched to include many acts that people don't like, but fortunately the ICJ was not willing to go along with extending language to the point of vacuity. It simply held that "the threat or use of force against a State cannot in itself constitute an act of genocide." At least in the present context, that statement appears accurate.[n.3]

What should the Court have done with respect to the cases of Yugoslavia against Belgium, Canada, The Netherlands, and Portugal? In my opinion, the Court should not have denied prima facie jurisdiction, but should have gone directly to the merits of the dispute. It had enough time to figure out that the NATO bombing was an instance of "humanitarian intervention" that was not proscribed by Article 2(4) of the Charter of the United Nations and hence was entirely legal under customary international law.[n.4] Yugoslavia was at least entitled to deliberation on the merits of its claim that the bombing was illegal, rather than being brushed off on a jurisdictional technicality.

FOOTNOTES:

1. See Anthony D'Amato, International Law: Process and Prospect 1987 (2d ed. 1995).
2. I argued this not because avoiding the "sitting duck problem" is necessarily desirable in the abstract, but because it offers a far more reasonable alternative to countries like the United States, Germany, France, and Italy, who would otherwise opt out of the optional clause altogether.
3. Conceivably, bombing a state could constitute genocide. For example, suppose Kosovo becomes a state, and suppose all the Serbs and other minorities in Kosovo emigrate, leaving no one but Muslims. Suppose further that there is a "civilizational" war as popularized by Samuel Huntington, and the forces opposed to the Islamic civilization decide to bomb Kosovo. Then such a bombing, despite the court's language, could constitute genocide.
4. I made such an argument in International Law and Kosovo, 33 United Nations Law Reports 112-114 (1999) Code A995.