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YEAR 1999

Public sitting

held on Wednesday 12 May 1999, at 10.00 a.m., at the Peace Palace,

Vice-President Weeramantry, Acting President, presiding

in the cases concerning Legality of Use of Force

(Yugoslavia v. *Belgium) (Yugoslavia* v. *Canada) (Yugoslavia* v. *France) (Yugoslavia* v. *Germany) (Yugoslavia* v. *Italy) (Yugoslavia* v. *Netherlands) (Yugoslavia* v. *Portugal) (Yugoslavia* v. *Spain) (Yugoslavia* v. *United Kingdom) (Yugoslavia* v. *United States of America)*

Requests for the indication of provisional measures

VERBATIM RECORD

ANNEE 1999

Audience publique

tenue le mercredi 12 mai 1999, à 10 heures, au Palais de la Paix,

sous la présidence de M. Weeramantry, vice-président faisant fonction de président

dans les affaires relatives à la Licéité de l'emploi de la force

(Yougoslavie c. Belgique) (Yougoslavie c. Canada) (Yougoslavie c. France) (Yougoslavie c. Allemagne) (Yougoslavie c. Italie) (Yougoslavie c. Pays-Bas) (Yougoslavie c. Portugal) (Yougoslavie c. Espagne) (Yougoslavie c. Royaume-Uni) (Yougoslavie c. Etats-Unis d'Amérique)

Demandes en indication de mesures conservatoires

COMPTE RENDU

Present:	Vice-President	Weeramantry, Acting President
	President	Schwebel
	Judges	Oda
		Bedjaoui
		Guillaume
		Ranjeva
		Herczegh
		Shi
		Fleischhauer
		Koroma
		Vereshchetin
		Higgins
		Parra-Aranguren
		Kooijmans
		Rezek
	Judges *ad hoc*	Kreća
		Duinslaeger
		Lalonde
		Gaja
		Torres Bernárdez
	Registrar	Valencia-Ospina

Présents :

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M. Schwebel, président de la Cour
MM. Oda
Bedjaoui
Guillaume
Ranjeva
Herczegh
Shi
Fleischhauer
Koroma
Vereshchetin
Mme Higgins
MM. Parra-Aranguren
Kooijmans
Rezek, juges
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S. Exc. Madame Cynthia Schneider, ambassadeur des Etats-Unis d'Amérique aux Pays-Bas.

The VICE-PRESIDENT, acting President: Please be seated.

The Court meets today for the second round of hearing in the cases concerning *Legality of Use of Force* instituted by Yugoslavia. And I call upon the distinguished Agent of Yugoslavia to commence the second round of submissions.

Mr. ETINSKI: Mr. President, distinguished Members of the Court.

Our second round presentation should cast more light on issues raised by the Respondents and complete our arguments.

Mr. Brownlie will elaborate upon three propositions:

- First, the Respondents have failed to establish the legality of their use of force;
- Second, in the circumstances, the intensive bombing of Yugoslav populated areas constitutes a breach of Article II of the Genocide Convention;
- Third, the respondent States are jointly and severally responsible for breaches of the Genocide Convention and other breaches of international law committed through their instrumentality of NATO military command structure.

Mr. Corten will demonstrate that the declaration of the Federal Republic of Yugoslavia on the acceptance of the jurisdiction of the Court of 25 April 1999 is valid to establish jurisdiction of the Court in relation to the Respondents which have also accepted compulsory jurisdiction.

The second round will be concluded by my argument on the satisfaction of all conditions provided for by Article 41 of the Statute of the Court and Article 73 of the Rules of Court.

Mr. President, would you be so kind as to call upon Mr. Brownlie to take the floor.

The VICE-PRESIDENT, acting President: Mr. Brownlie, please.

Mr. BROWNLIE: Thank you, Mr. President.

Mr. President, distinguished Members of the Court, I appear in the second round to elaborate upon three propositions.

First, the ten respondent States have failed to establish the legality of their use of force in a situation in which the legal status of the use of force is a central question.

Secondly, in the circumstances the intensive bombing of Yugoslav populated areas constitutes a breach of Article II of the Genocide Convention.

Thirdly, the respondent States are jointly and severally responsible for breaches of the Genocide Convention, and other breaches of international law committed through the instrumentality of the NATO military command structure.

As a preface, it is appropriate to affirm that, even in the context of a request for interim measures, it is necessary for the Court to review the issues of the merits. Perhaps not in a definitive way but none the less so to do. This is evident from the perusal of the text of almost any Order the Court has ever made, as for example, in the recent past the Order of 8 April 1993 in the *Bosnia* case.

If the bombing constituted a humanitarian intervention and, as such, it was lawful, two consequences would follow:

First, it would constitute a lawful use of force and secondly, it would not *a priori* constitute genocide.

In this situation if the respondent State simply reserved their position "on the merits", they are not assisting the Court in the exercise of its judicial functions, and they are taking certain risks.

After this preface, I turn to the first subject of this short speech. The respondent States in the course of the ten hours placed at their disposal made no effort to offer a developed legal justification for the air offensive. It is true that, quite exceptionally, the representative of Belgium contended that it was an armed humanitarian intervention which was compatible with Article 2, paragraph 4, and he admitted that the alleged principle was emerging slowly. (See CR 99/15, pp. 16-17.)

Other Respondents made no reference to humanitarian intervention but used the unusual phrase "humanitarian catastrophe". None of the Respondents found it possible to offer alternative authorities to those presented by Yugoslavia or to say that the British Foreign Office assessment of 1986 was unacceptable.

The attitude adopted by the respondent States in these proceedings leads to strange contradictions. Thus certain respondent States (see CR 99/16, p. 14, para. 33) assert that even civilian casualties are an inevitable, and therefore presumably lawful, risk generated by the alleged humanitarian intervention. In contrast, when deaths and injuries were caused to diplomatic personnel, President Clinton and other Head of State, or Heads of Government, apologized, saying that the missile strike was the result of a mistake.

But, Mr. President, if humanitarian intervention is involved why should apologies be forthcoming in respect of the diplomats of third States, but not the civilians of Belgrade? Why is it that considerations of legality intrude on some occasions and not others?

Before I leave the issue of the alleged humanitarian intervention, it is necessary to remind the Court that NATO briefing and numerous official statements have stressed the objective of putting the population under pressure with the purpose of creating internal political upheavals. The selection of targets confirms such a policy of collective coercion.

I come now to the second proposition that is, that the intensive bombing of Yugoslavia constitutes a serious breach of Article II of the Genocide Convention. This provision defines genocide in terms of acts "committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such".

The evidence available shows that the bombing affects the populated areas of the whole of Yugoslavia. In my submission, this would clearly constitute a national group *as such*, and NATO statements make it clear that it is the population as a whole which is to be intimidated. Moreover, the distinguished representative of Italy has pointed out that the actions affect "l'ensemble de la population d'un Etat", which, in this case of course, is Yugoslavia. (CR 99/19, p. 12.)

Several opponents have asserted that Yugoslavia has failed to produce evidence of genocide. This is not true. The evidence presented by Yugoslavia of the bombing and its effects permits a number of inferences relevant to the constituents of genocide, including "deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part".

Such inferences include the following:

First: the large number of civilian deaths and the resulting knowledge of the risk of death.

Second: the high explosive power of the missiles and the widespread effects of blast.

Third: the incendiary element in these new weapons and the knowledge that some victims are quite commonly burnt to death.

Fourth: the sheer extent of the destruction in urban areas.

Fifth: the general disruption of patterns of life.

Sixth: the extensive damage to the health care system and the deliberate creation of risks to patients by causing power cuts.

I pause here to ask a simple question: how many of the ladies and gentlemen sitting on the other side of the room have ever been bombed, even once?

We are talking here about the massive use of firepower, including, we are told — and this is a boast we hear almost daily — 600 sorties every 24 hours. Now, British people of my generation have direct experience of bombing. I was brought up in Liverpool, I was seven when the war began, and we were bombed every night. Liverpool was an important seaport. Perhaps the more recent generation is less experienced in these matters, and perhaps less sensitive. And, of course, the type of ordnance used now is much more advanced than Second World War bombs.

This massive exercise in the coercion of a European State is described in terms of euphemism by our opponents. It is described without reference to real bombs and missiles. The representative of the United Kingdom referred to "the military action" (CR 99/23, p. 13, para. 17). The representative of Canada spoke of the "NATO air operations (CR 99/16, p. 11, para. 20).

The direct evidence of civilian deaths and serious injuries, the destruction of towns and villages and the means of life, is complemented by the inferences which I have already indicated.

Mr. President, the evidence of genocide is available. It is simply convenient for our opponents to ignore it. If the transcripts are studied in conjunction with the other documents supplied by Yugoslavia, there is sufficient evidence of genocide, and certainly of the serious risk of genocide, as NATO makes daily threats to intensify the bombing operations. The pressures applied to Yugoslavia as a whole have produced substantial internal refugee flows, with about half the people of Belgrade having left the city. In addition, Hungary is receiving a heavy influx of Yugoslav nationals seeking refuge from the air raids (see the *Budapest Sun*, 6-12 May 1999, p. 5). The headline is "Serb crowds seeking passage to Germany".

The Attorney-General, on behalf of the United Kingdom, referred to "systematic and intolerable violence being waged against an entire population", quoting Mrs. Ogata. This description would apply to the condition of Yugoslavia as a whole, facing 600 bombing missions every 24 hours — *600* bombing missions.

Mr. President, I shall now move on to my last topic. Several of the respondent States have contended that the actions of the NATO command structure are not imputable to individual member States of NATO. Three references will be in the transcript by way of examples (CR 99/17, p. 13, para. 6 (France), CR 99/16, p. 15, para. 34 (Canada), CR 99/22, p. 10 (Spain)).

The general implications of such contentions call for some consideration. The North Atlantic Council directs the war against Yugoslavia as a joint enterprise. It constantly says so. It would be a legal and political anomaly of the first order if the actions of the command structure were not attributable jointly and severally to the member States. This joint and several responsibility is justified both in legal principle and by the conduct of the member States. Thus, after the destruction of the Chinese Embassy in Belgrade, the British Prime Minister apologized to the Chinese Government, although there had been no suggestion that a British plane had fired the missiles. More recently the German Chancellor has also apologized.

In the case concerning *Certain Phosphate Lands in Nauru (Nauru* v. *Australia)*, this Court held that the possibility of a joint and several liability of the three States responsible for the administration of a Trust Territory at the material time did not render inadmissible *in limine litis* a claim brought against only one of them (*I.C.J. Reports 1992*, pp. 258-259, para. 48; see also President Jennings, p. 301).

In closing on this issue of joint responsibility, I would point out that it is quite remarkable that States who have publicly associated themselves with a multilateral NATO campaign of coercion should now seek to avoid the legal responsibility involved.

In concluding this short address, it may be permissible to revisit certain questions of general perspective.

First of all, the Kosovo crisis was a crisis selected and developed by the United States as a part of a long-term anti-Serb campaign. The objectives were political and strategic.

Secondly, the relentless coercion of a whole nation involving directed explicitly at the population as a whole must, as a matter of law, involve responsibility for genocide. As a general principle, *dolus* — intention — extends both to intended consequences and also to risks of harm which are deliberately inflicted as risks of harm. And several speakers have made it clear that the population of Yugoslavia must bear the consequences of so-called collateral damage.

Mr. President, what is involved here is the political punishment of a whole community. If I can quote Mr. Barton Gellman, writing in the *International Herald Tribune* on 19 April, in a long article there surveying United States policy, he said this:

> "The period between the two NATO gatherings saw a furious internal debate on whether the alliance could act militarily without explicit authority from the Security Council. On Sept. 24 [this is 1998, of course], a day after a carefully ambiguous

> Security Council resolution, Washington finally persuaded its allies to issue an ultimatum to Mr. Milosević to pull back. Oct. 13 brought the first 'activation order' in NATO's history [that's 13 October], a formal agreement to authorize the bombing of Yugoslavia. But unbeknown at the time, the governing North Atlantic Council approved only Phase 1 of the three-phase air campaign, amounting to about 50 air defence targets. The real punishment [Mr. Gellman continues] of Belgrade would come in Phase 2, with 'scores of targets', and Phase 3, with 'hundreds and hundreds of targets', according to a senior White House official.
>
> Armed with the NATO threat, US special envoy Richard Holbrooke persuaded Mr. Milosević to accept a cease-fire in Kosovo and to withdraw the troops and special police who had not been there before 1998." (*International Herald Tribune*, 19 April 1999.)

What was then planned by the NATO Council is now taking place. The process of punishment is illegal and has consequences which necessarily constitute serious breaches of the Genocide Convention. Mr. Gellman, relying on insider sources, confirms that the air strikes, including their phasing and their intensity, were planned several months ago, and the bombing always had two purposes unrelated to humanitarian issues. The first was punishment for non-acceptance of NATO demands concerning the territorial status of Kosovo, and the second purpose was quite simply to provide credibility to the threats. And so in our submission the air strikes cannot possibly provide a paradigm of humanitarian intervention.

Mr. President, I would thank you and the Court for your patience and consideration, and ask you to give the floor to my colleague, Mr. Corten.

The VICE-PRESIDENT, acting President: Thank you, Professor Brownlie. Mr. Corten, please.

M. CORTEN: Monsieur le président, Madame, Messieurs de la Cour, permettez-moi tout d'abord de vous confier l'immense honneur que je ressens de m'adresser pour la première fois à la plus haute juridiction mondiale.

Il me revient de traiter un point particulier de l'exposé de la République fédérale de Yougoslavie, celui qui concerne les effets *ratione temporis* de sa déclaration d'acceptation de la juridiction de la Cour. Je précise à la Cour que l'autre problème, celui du statut d'Etat continuateur de la Yougoslavie, sera traité ultérieurement par le professeur Etinski.

Parmi les six Etats défendeurs qui ont eux-mêmes déposé une déclaration, cinq d'entre eux, le Canada, les Pays-Bas, le Portugal, l'Espagne et le Royaume-Uni, excluent la juridiction de la

Cour en invoquant par réciprocité la déclaration yougoslave du 25 avril dernier qui s'étend, je vous le rappelle, et je cite en français «à tous les différends qui surviendraient ou qui pourraient survenir après la signature de la présente déclaration, concernant des situations ou des faits postérieurs à cette signature»[1].

Selon les cinq Etats défendeurs, l'emploi de la force ayant commencé le 24 mars 1999, il n'existerait entre eux et la Yougoslavie qu'un seul différend antérieur au 25 avril et dès lors qui échapperait, même *prima facie*, à la compétence de la Cour.

Monsieur le président, la réponse de la Yougoslavie à cette question est simple et elle s'appuie d'abord sur une évidence. Le problème posé ici à la Cour est d'interpréter une déclaration unilatérale d'acceptation de sa juridiction, et de donc de dégager le sens de cette déclaration sur la base de l'intention de son auteur.

Or, si on interprète de bonne foi la déclaration du 25 avril 1999, la conclusion est claire et non équivoque. La Cour est compétente, *prima facie*, d'abord sur la base du texte même de la déclaration, et ce sera la première partie de mon bref exposé, et ensuite plus fondamentalement, sur la base de l'intention réelle de l'auteur de cette déclaration, en l'occurrence la République fédérale de Yougoslavie.

1. Le texte de la déclaration permet de prendre en compte tous les différends qui ont effectivement surgi postérieurement au 25 avril 1999

Partons donc, si vous le permettez, du texte de cette déclaration, qui concerne donc les différends postérieurs du 25 avril, concernant des faits ou des situations postérieurs à cette date.

Peut-on sérieusement prétendre que, depuis le 25 avril dernier, plus aucun différend, c'est-à-dire, pour reprendre les termes de la Cour, aucun «désaccord sur un point de droit ou de fait» (affaire des *Concessions Mavrommatis en Palestine, C.P.J.I. série A n° 2,* p. 11, affaire relative à des *Questions d'interprétation et d'application de la convention de Montréal de 1971 résultant de l'incident aérien de Lockerbie (Jamahiriya arabe libyenne c. Royaume-Uni), C.I.J. Recueil,* par. 22) , n'est surgi entre la Yougoslavie et les Etats défendeurs ?

Permettez-moi de rappeler très brièvement à la Cour quelques événements qui sont pertinents pour l'argumentation de la Yougoslavie.

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[1]Texte original : "all disputes arising or which may arise after the signature of the present Declaration, with regard to the situations or facts subsequent to this signature".

- le 28 avril les Etats membres de l'OTAN bombardent une zone résidentielle de Surdulica, causant 20 morts parmi la population civile;
- le 1er mai les Etats membres de l'OTAN bombardent un autocar dans la province du Kosovo, causant près de 75 morts parmi la population civile.
- le 7 mai les Etats membres de l'OTAN bombardent un marché dans la ville de Nis, causant plus de 10 mors parmi la population civile; et enfin,
- le 8 mai, comme nous le savons, les Etats membres de l'OTAN bombardent l'ambassade de la République populaire de Chine à Belgrade, causant plusieurs morts parmi les diplomates en poste.

Dans chacun de ces cas, qui ne sont que des exemples parmi d'autres, la Yougoslavie a dénoncé les violations flagrantes du droit international dont elle estime avoir été la victime. Dans chacun de ces cas, les Etats membres de l'OTAN ont nié avoir violé une quelconque obligation de droit international.

Monsieur le président, chacun de ces événements a donc donné lieu à un «désaccord sur point de droit ou de fait», désaccord dont, je me permets d'insister sur ce point, les termes dépendent à chaque fois des spécificités de l'attaque militaire.

Des désaccords sur des points de droit peuvent en effet concerner, selon les attaques, le principe de précaution à l'égard de la population civile, l'utilisation d'armes prohibées, le principe de proportionnalité dans le cadre d'attaques armées, l'interdiction de causer certains dommages à l'environnement ou encore, dans certains cas, la liberté de navigation sur certains fleuves internationaux.

Des désaccords sur des points de fait peuvent eux aussi survenir selon les cas, par exemple, sur le caractère intentionnel d'une attaque à l'encontre de la population civile, ou encore sur l'étendue des dommages causés par telle ou telle attaque en particulier.

Il existe donc quantités de différends distincts qui sont surgi entre la Yougoslavie et les Etats membres de l'OTAN après le 25 avril concernant des événements postérieurs à cette date.

Mais il y a plus, Monsieur le président. Régulièrement, et y compris depuis le 25 avril dernier, dans des conditions qui évoluent et qui changent en fonction du développement des initiatives diplomatiques, des différends surviennent non plus au sujet de telle ou telle attaque en particulier, mais sur le principe même de la reprise ou de l'arrêt, ou encore de la suspension des

bombardements. Les Etats membres de l'OTAN sont donc, presque quotidiennement, en désaccord avec la Yougoslavie, dans la mesure où ils décident intentionnellement de commettre de nouveaux actes illicites en dépit des protestations du Gouvernement yougoslave.

Monsieur le président, l'agent du Canada a évoqué lundi dernier une «situation continue» — "continuing situation" — pour caractériser l'emploi de la force mené par les Etats membres de l'OTAN depuis le 24 mars dernier. La Yougoslavie récuse cette qualification qui aurait pu s'appliquer à l'occupation de tout ou partie de son territoire, mais certainement pas à un comportement qui consiste en la répétition d'attaques militaires distinctes. La Yougoslavie préfère donc qualifier ces attaques de «délits instantanés» au sens donné à cette expression dans le cadre des travaux de la Commission du droit international sur la responsabilité internationale des Etats — (*ACDI*, 1978, vol. II, première partie, p. 36 et suiv.) Dans notre espèce, on est bien dans le cas d'une succession et d'une répétition de délits instantanés, et donc distincts pour lesquels, et je cite le rapporteur de la Commission, «la détermination du *tempus commissi delicti* ... ne présente en principe, pas de problème particulier» (p. 38, par. 26), et en l'occurrence les différents délits peuvent être précisément datés, y compris après le 25 avril.

On ne saurait pas non plus limiter l'ensemble de ces délits à un différend, unique et exclusif, qui, en quelque sorte, absorberait les différends ultérieurs qui ont effectivement surgi. Dans l'affaire relative à des *Questions d'interprétation et d'application de la convention de Montréal de 1971 résultant de l'incident aérien de Lockerbie*, la Cour a admis qu'il était possible de distinguer, et je cite, d'une part, un «différend de nature générale», et, d'autre part, des «différends spécifiques». Rien ne s'oppose à ce que la Cour, dans la présente espèce procède, *mutatis mutandis*, puisque les circonstances sont en effet bien différentes, de la même manière.

Les affaires de la *Compagnie d'électricité de Sofia* et du *Droit de passage*, évoquées par nos contradicteurs, ne remettent pas en cause la possibilité de distinguer plusieurs différends dans le cadre d'une même affaire. Ces précédents n'attestent nullement de l'existence d'un principe selon lequel des différends valablement soumis, comme c'est le cas en l'espèce, à la juridiction de la Cour seraient exclus de cette juridiction en raison de certains liens qu'ils entretiendraient avec un différend qui, quant à lui, échapperait à cette juridiction.

Il n'existe aucune raison d'écarter, *prima facie*, la compétence de la Cour pour traiter des différends effectivement survenus après le 25 avril conformément au texte même de la déclaration yougoslave.

D'autant, Monsieur le président, et j'en viens à la deuxième partie de ma plaidoirie, que cette exclusion *prima facie* de la compétence serait en totale contradiction avec l'intention manifeste et claire de la Yougoslavie.

II. L'intention réelle de la Yougoslavie était de confier à la Cour le règlement des différends l'opposant aux Etats défendeurs

Lorsque l'on est dans le cadre de l'interprétation d'une déclaration d'acceptation, le critère décisif est l'établissement de l'intention réelle de l'auteur de cette déclaration.

Dans une affaire récente qui a été citée hier par l'agent de l'Espagne, la Cour a explicitement affirmé qu'il importe de tenir compte :

> «de l'intention de l'Etat concerné à l'époque où ce dernier a accepté la juridiction obligatoire de la Cour. L'intention d'un Etat qui a formulé une réserve peut être déduite non seulement du texte même de la clause pertinente, mais aussi du contexte dans lequel celle-ci doit être lue et d'un examen des éléments de preuve relatifs aux circonstances de son élaboration et aux buts recherchés.» (*Compétence en matière de pêcheries, C.I.J. Recueil 1998,* p. 49.)

La Cour a fait constamment application de ce principe, ce qui l'a menée à se livrer à une recherche fouillée visant à établir la véritable intention de l'auteur du texte interprété (je me permets de vous renvoyer à l'affaire de l'*Anglo-Iranian Oil Co., C.I.J. Recueil 1952,* p. 105 à 107; à l'affaire du *Temple de Préah Vihéar, C.I.J. Recueil 1961,* p. 31 à 34; à l'affaire des *Activités militaires et paramililtaires au Nicaragua, C.I.J. Recueil 1984,* p. 410 à 413).

La tâche de la Cour est donc, en l'espèce, d'interpréter la déclaration du 25 avril 1999 en vue d'établir quelle était l'intention de la Yougoslavie dans les circonstances de son élaboration.

Quelle était, en l'espèce, la volonté de la Yougoslavie en déposant une déclaration ?

Monsieur le président, cette volonté est assez facile à établir. La Yougoslavie a souhaité, à partir du 25 avril 1999, reconnaître la compétence de la Cour pour toute une gamme de différends, à l'exception de certains types spécifiques qui sont inclus dans les réserves, comme les différends territoriaux. En tout état de cause et dans un premier temps, il est évident que la Yougoslavie a entendu régler de manière judiciaire les différends entourant le conflit armé qui l'opposait alors, et qui l'oppose toujours, aux Etats défendeurs. Il va de soi — et les rédacteurs de cette déclaration

pourraient personnellement en témoigner — que la Yougoslavie entendait bien inclure, et non pas exclure, tous les désaccords qui portent sur les bombardements dont elle est victime.

Que l'on puisse considérer que le texte de la déclaration yougoslave est quelque peu ambigu sur ce point est une chose qui est tout à fait possible. Que, par contre, on remette en cause l'intention réelle, certaine et claire de la Yougoslavie à cet égard est tout autre chose, Monsieur le président.

D'ailleurs nos contradicteurs ne remettent pas en cause cet aspect particulier de la question, puisqu'ils admettent que, en déposant sa déclaration le 25 avril dernier, la Yougoslavie entendait bien conférer compétence à la Cour pour trancher les différends entourant le conflit qui a commencé il y a plusieurs semaines.

Sur ce point, il suffit donc à la Cour de consacrer la seule interprétation qui permet de concilier le texte de la déclaration avec l'intention, qui ne fait absolument aucun doute, de son auteur.

Monsieur le président, pour terminer j'aimerais évoquer très brièvement l'affaire du *Temple de Préah Vihéar* que j'ai citée tout à l'heure, et ceci, bien entendu au stade des exceptions préliminaires.

Dans cette affaire, la Cour a refusé d'écarter sa compétence, même si une interprétation grammaticale d'un texte aurait pu la conduire à cette conclusion, parce que ce type d'interprétation aurait mené à un résultat manifestement absurde et déraisonnable (*C.I.J. Recueil 1961,* p. 31), c'est-à-dire contraire à la volonté de l'Etat concerné. Dans notre affaire, il serait de même particulièrement et manifestement absurde et déraisonnable d'écarter la compétence *prima facie* de la Cour en interprétant la déclaration du 25 avril dernier dans un sens non seulement contraire à son texte, mais surtout à la volonté incontestable et manifeste de son auteur, la Yougoslavie.

En conclusion, Monsieur le président, la compétence de la Cour est, *prima facie,* fondée sur l'article 36, paragraphe 2, du Statut, conformément à la volonté même de son auteur, la déclaration de la Yougoslavie permet de prendre en compte l'ensemble des différends qui ont surgi après la date critique, le 25 avril dernier, à l'occasion des attaques militaires menées par les Etats membres de l'OTAN.

Monsieur le président, je remercie la Cour de sa bienveillante attention et vous prie de bien vouloir donner la parole au professeur Etinski pour qu'il termine l'argumentation de la République fédérale de Yougoslavie.

The VICE-PRESIDENT, acting President: Thank you Mr. Corten. The Agent please.

Mr. ETINSKI: Thank you Mr. President.

Mr. President, distinguished Members of the Court, the membership of the Federal Republic of Yugoslavia in the United Nations will be the first point that I shall address. The additional grounds of jurisdiction will be the second. Then, I would like to draw your attention again to the facts and to demonstrate that all conditions provided for in Article 41 of the Statute of the Court and Article 73 of the Rules of Court have been satisfied.

Your Excellencies, *the Federal Republic of Yugoslavia is a Member State of the United Nations*. On 22 September 1992 the General Assembly adopted resolution 47/1, which reads:

> "The General Assembly,
>
> . . . .
>
> Having received the recommendation of the Security Council of 19 September that the Federal Republic of Yugoslavia . . . should apply for membership in the United Nations and that it shall not participate in the work of the General Assembly,
>
> 1. Considers that the Federal Republic of Yugoslavia . . . cannot continue automatically the membership of the former Socialist Federal Republic of Yugoslavia in the United Nations; and therefore decides that it shall not participate in the work of the General Assembly;"

The Under-Secretary-General and Legal Counsel of the United Nations addressed a letter on 29 September 1992 to the Permanent Representatives to the United Nations of Bosnia and Herzegovina and Croatia, in which he stated that the consequences of the resolution are as follows:

> "While the General Assembly has stated unequivocally that the Federal Republic of Yugoslavia . . . cannot automatically continue the membership of the former Socialist Federal Republic of Yugoslavia in the United Nations and that the Federal Republic of Yugoslavia should apply for membership in the United Nations, the only practical consequence that the resolution draws is that the Federal Republic of Yugoslavia . . . should not participate in the work of the General Assembly. It is clear, therefore, that representatives of the Federal Republic of Yugoslavia . . . can no longer participate in the work of the General Assembly, its subsidiary organs, nor conferences and meetings convened by it.
>
> On the other hand, the resolution neither terminates nor suspends Yugoslavia's membership in the Organization. Consequently, the seat and nameplate remain as before, but in Assembly bodies representatives of the Federal Republic of

> Yugoslavia . . . cannot sit behind the sign 'Yugoslavia'. The Yugoslav mission at United Nations Headquarters and offices may continue to function and may receive and circulate documents. At Headquarters, the Secretariat will continue to fly the flag of the old Yugoslavia as it is the last flag of Yugoslavia used by the Secretariat. The resolution does not take away the right of Yugoslavia to participate in the work of organs other than Assembly bodies. The admission to the United Nations of a new Yugoslavia under Article 4 of the Charter will terminate the situation created by resolution 47/1;"

So, the resolution neither terminates nor suspends Yugoslavia's membership in the Organization. And the resolution does not take away the right of Yugoslavia to participate in the work of organs other than Assembly bodies. The Under-Secretary-General's position was confirmed by later practice of the Organization.

Indeed, on 28 April 1993 the Security Council adopted resolution 821 (1993) by which it recommended to the General Assembly to decide that the Federal Republic of Yugoslavia shall not participate in the work of the Economic and Social Council. The General Assembly accepted the recommendation by resolution 47/229. If Yugoslavia's membership in the Organization was terminated or suspended by resolution 47/1, there would be no need for a new resolution excluding Yugoslavia from the work of the Economic and Social Council.

In the capacity as the depositary of multilateral treaties, the Secretary-General reported every year on the status of multilateral treaties deposited with the Secretary-General. In all annual reports after 1992, the Secretary-General listed Yugoslavia as an original Member of the United Nations. (Multilateral Treaties Deposited with the Secretary-General, Status as at 31 Dec. 1996, ST/LEG/SER.E/15, Ann. 1). Under the same name Yugoslavia was always listed in annual reports of the Secretary-General as an original Member of the United Nations, before and after 1992.

The Under-Secretary-General for Management sent a letter to the head of the Permanent Mission of the Federal Republic of Yugoslavia to the United Nations, dated 5 December 1997, requesting the Government of the Federal Republic of Yugoslavia to pay contribution under the provision of Article 19 of the Charter of the United Nations. (The letter of the Under-Secretary-General for Management, dated 5 December 1997, will appear as Annex 1.) The amount included contribution to the regular budget as well as to UN peace-keeping forces and missions established after 1992. The document of the United Nations Secretariat entitled "Status of contribution as at 30 November 1998" refers to the debt of Yugoslavia as a Member State on 1 January 1998. This document will appear as Annex 2.

The Federal Republic of Yugoslavia has paid its financial contributions as a member State (letters of confirmation of 3 October 1997 and 22 September 1998 are enclosed as Annexes 3 and 4). There were no objections from any other Member States.

The conclusion is clear: the Federal Republic of Yugoslavia cannot participate in the work of the General Assembly and the Economic and Social Council and their bodies and conferences. That is all. There are no other consequences. And the *I.C.J. Yearbook* informs that Yugoslavia is one among 185 member States of the United Nations on 31 July 1997.

To amplify this argument I submit to the Court the text of Mr. Mitić related to this issue titled "International Law and the Status of the Federal Republic of Yugoslavia in the United Nations" as Annex 5.

Your Excellencies, without prejudice to the grounds of jurisdiction of the Court, I would refer to additional grounds of jurisdiction in relation to the Kingdom of Belgium and the Kingdom of the Netherlands.

In its Judgment on preliminary objections in the *Genocide* case, the Court said:

> "The proceedings instituted before the Court are between two States whose territories are located within the former Socialist Federal Republic of Yugoslavia. That Republic signed the Genocide Convention on 11 December 1948 and deposited its instrument of ratification, without reservation, on 29 August 1950. At the time of the proclamation of the Federal Republic of Yugoslavia, on 27 April 1992, a formal declaration was adopted on its behalf to the effect that:
>
> > 'The Federal Republic of Yugoslavia, continuing the State, international legal and political personality of the Socialist Federal Republic of Yugoslavia, shall strictly abide by all the commitments that the Socialist Federal Republic of Yugoslavia assumed internationally.'
>
> This intention thus expressed by Yugoslavia to remain bound by the international treaties to which the former Yugoslavia was party was confirmed in an official Note of 27 April 1992 from the Permanent Mission of Yugoslavia to the United Nations, addressed to the Secretary-General. The Court observes, furthermore, that it has not been contested that Yugoslavia was party to the Genocide Convention. Thus, Yugoslavia was bound by the provision of the Convention . . ." (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Preliminary Objections, Judgment, I.C.J. Reports 1996*, p. 610, para. 17.)

Having in mind the quoted position of the Court I refer to the following agreements.

Yugoslavia and Belgium have concluded the Convention of Conciliation, Judicial Settlement and Arbitration. The Convention was signed at Belgrade on 25 March 1930. And it is in force. Pursuant to Article 4 of the Convention, the two parties agreed as follows:

> "All disputes with regard to which the Parties are in conflict as to their respective rights shall be submitted for decision to the Permanent Court of International Justice unless the Parties agree in the manner hereinafter provided, to resort to an arbitral tribunal.
>
> It is understood that the disputes referred to above include in particular those mentioned in Article 36 of the Statute of the Permanent Court of International Justice."

Yugoslavia and the Netherlands have concluded the Treaty of Judicial Settlement, Arbitration and Conciliation. The Treaty was signed at The Hague, 11 March 1931, and it is in force. Pursuant to Article 4 of the Treaty the two parties agreed as follows:

> "If, in the case of one of the disputes referred to in Article 2, the two Parties have not had recourse to the Permanent Conciliation Commission, or if that Commission has not succeeded in bringing about a settlement between them, the dispute shall be submitted jointly under a special agreement, either to the Permanent Court of International Justice, which shall deal with the dispute subject to the conditions and in accordance with the procedure laid down in its Statute, or to an arbitral tribunal which shall deal with it subject to the conditions and in accordance with the procedure laid down by the Hague Convention of October 18, 1907 for the Pacific Settlement of International Disputes.
>
> If the Parties fail to agree as to the choice of a Court, the terms of the special agreement, or in the case of arbitrator procedure, the appointment of arbitrators, either Party shall be at liberty, after giving one month's notice, to bring the dispute, by an application, direct before the Permanent Court of Justice."

The Kingdom of the Netherlands could object that the provided procedure is not strictly followed. In this regard I would remind that the Court, like its predecessor, the Permanent Court of Justice, has always had recourse to the principle according to which it should not penalize a defect in a procedural act which the Applicant could easily remedy.

In relation to those two Respondents, Belgium and the Netherlands, there are additional grounds of jurisdiction of the Court.

Mr. President, distinguished Members of the Court, information on facts submitted to you should be complete as much as possible.

The most glaring example of abuse unchecked information was the explosion at the Markale market in Sarajevo in 1994. Without any investigation, the crime was attributed to the Bosnian Serbs. It was an event influencing further development in Bosnia and Herzegovina, including NATO bombing. But, until now it has not definitely been established who committed the crime.

After the killing of 39 Albanians in the village of Racak, in January 1998, the Head of the OSCE Verification Mission for Kosovo declared, without any investigation at all, that a massacre

of civilians was involved. He said at the time that although he is not a lawyer, he is sure that a crime against humanity is in question. The forensic experts from Yugoslavia, Belarus and Finland worked together to produce an expert report establishing the causes and circumstances of the death. After completing the team work in Pristina, the Yugoslav and Belarus forensics signed reports on joint findings. During the joint work the Finnish experts were agreed with the relevant findings, but did not sign the reports explaining that they wish to make additional analyses. They did so, but there was a delay in making the results public. The head of the Finnish team, Mrs. Ranta's press conference coincided with the holding of the meeting at the Kleber Conference Centre, when it became clear that the Yugoslav delegation was not prepared to sign the so-called Interim Agreement for Peace and Self-Government for Kosovo. Mrs. Ranta said the killed persons were civilians. The Yugoslav and Belarus forensics established that there were traces of gunpowder on the hands of the killed, while the Finnish experts denied this finding. On the basis of this and the fact that the killed persons had civilian clothes on them Mrs. Ranta claimed that they were civilians. If the finding that there were traces of gunpowder on the hands of the killed is correct, it is an indication that weapons were used and that death occurred in armed skirmish. The difference in the findings is essential. However, without any further investigation, some countries qualified the event as a massacre.

Information presented by the Respondents is selective, incomplete and lacking in accuracy. It is quite untrue to present the situation in Kosovo and Metohija as repression against the Albanian minority by the Serbian authorities. The Agents of the Respondents quoted a few words form the report of the Secretary-General basing their accusations on them. However, the relevant part of the report of the Secretary-General of 17 March 1999 reads:

> "The following narrative of when and where major incidents occurred suggests how violence against civilians in Kosovo continues to spread. On 18 January 1999, a Serb man was killed after reportedly failing to stop at a Kosovo Liberation Army's (KLA) roadblock in Nedakovac, near Kosovska Mitrovica. On 19 January, the body of a Kosovo Albanian teacher was discovered near Istok. On 20 January, two Serbian women (mother and daughter) were wounded after unidentified persons opened fire on their house, apparently targeting the father. On 21 January, a Kosovo Albanian man and woman were killed when their car was fired upon at an intersection outside Orahovac. The same day, the body of a Kosovo Albanian doctor was found near the Pec-Mitrovica highway.
>
> On 24 January, five Kosovo Albanians, two men, one woman and two boys, aged 11 and 12, were killed on the Rakovina-Jablanica road, while repairing their tractor. According to international observers, some 60 spent cartridges were found on the scene of the incident and the bodies revealed multiple bullet wounds.

On 25 January, a Kosovo Albanian was killed and his son severely wounded near Decani when masked assailants fired a reported 55 rounds into their car. On 26 January, a Serb man was severely wounded in an attack directed at his house in the Istok municipality. The body of a 23-year-old Serb was found under a driveway in the outskirts of Kosovska Mitrovica on 27 January; the body may have been moved to the location after the victim was killed elsewhere.

On 29 January, Kosovo Albanian sources reported that the body of a Kosovo Albanian was found in Bistrazin village and that another Albanian, close to the Democratic League of Kosovo (LDK), was seriously wounded in front of his apartment by two shots fired by unknown persons. On 30 January, a 36-year-old Kosovo Albanian from Pec was found shot in the head on the Pec-Pristina road. That same day, the body of another reputed 'Kosovo Albanian loyalist', a physics teacher from Djakovica, was found in the village of Gradis. In Istok municipality, an elderly Serb was killed and his 72-year-old wife was injured when unidentified persons threw a grenade into their house in the village of Rakos.

On 31 January, the body of a Kosovo Albanian from the village of Begov Vukovac was found, shot in the head, south of Istok. That same day, in Stimlje municipality, masked gunmen reportedly broke into a house in the village of Donje Godance and wounded one man and two boys.

Attacks and killings in urban areas continued during the first half of February. On 4 February, bodies of three Kosovo Albanians were found in a car between the villages of Istinic and Gornja Lika, in Decani municipality, and the body of a Serb was found near the village of Rastavica. All had been shot. On 4 February, a Serb male was killed by automatic weapon fire while travelling on the Pec-Djakovica highway.

On 7 February, bodies of two Kosovo Albanians reported missing since 3 January were found in Kacanik, south of Urosevac. During the night of 7-8 February, the body of an unidentified man aged about 30 was found in the village of Livadja in Lipljan municipality. At this writing, UNHCR is attempting to clarify several reports of bodies found in or around Djakovica on 8 February. The bodies of two young persons, one a 17-year-old boy and one a 20-year-old woman, were reported found in two different locations in Djakovica suburb. The body of a Kosovo Albanian male, dead from gunshot wounds, was found in his car in the Djakovica area, near the village of Trakanic. The same day, again in Djakovica, bodies of a male and an elderly woman were also found. Both victims, who are believed to be from the Roma community, died of gunshot wounds to the neck. Bodies of two Kosovo Albanians from the village of Goden near Djakovica were found on 10 February.

On 11 February, four more bodies were discovered in different areas of Kosovo. According to media reports, the body of the Kosovo Albanian owner of an Istok tea room was found on the Zac-Zablace road; he had been shot in the head. Two men, one a Kosovo Albanian shot in the head, the other, as-yet-unidentified, were found in separate locations in Novo Selo, near Pec. The body of an unidentified male was found in a pond in Klina.

Targeted violence against civilians in Kosovo is taking new, even more dangerous, forms. In particular, recently increased terrorist acts against Serb and Albanian establishments in urban areas, including grenade attacks on cafes and shops, are a cause of serious concern. Since the end of January, at least 10 such incidents in Pristina, Pec, Kosovska Mitrovica and Urosevac have been reported. The investigation by UNHCR indicated that in many cases these establishments had been frequented by Serbs and Albanians and no incidents between them had previously been reported. The latest attack, on 13 February, in the main town square in Urosevac, was particularly horrible: 12 people were wounded and about 20 neighbouring shops and several cars parked nearby heavily damaged. On 17 February, another explosive device planted at the Urosevac market was discovered and deactivated by the Kosovo Verification

Mission. The result of these attacks is the growing alienation of the Serb and Albanian communities, a pervasive feeling of insecurity and the shrinking of the remaining ground for coexistence.

. . . .

February was also marked by the continuing departure of the Serbian population from towns and villages where they had been in the minority, or where clashes between Kosovo Albanian paramilitary units and security forces occurred. According to information provided by the Serbian Commissioner for Refugees, some 90 villages in central and western Kosovo have lost their entire Serbian population in recent months, while towns like Podujevo and Kosovska Mitrovica have seen a reduction of the Serbian population. The estimated number of displaced Serbs within Kosovo is 10,000 while 30,000 more have moved to other parts of Serbia."

On the basis of the above Report it is clear that there can be no question about repression against the Albanian community in Kosovo and Metohija, massive violation of human rights, etc., by Serbian authorities.

The member States of NATO explain their armed action by the wish to protect the Albanian refugees although any serious examination can show that the large streams of refugees appeared only after the beginning of the bombing. As it is known, Kosovo and Metohija are targeted the most. Not only towns, but also villages are bombed on a daily basis. The number of casualties of NATO bombing among the Albanians far exceeds the total number of Albanians killed in Kosovo and Metohija in the clashes with the Yugoslav army and police forces in the past decade. The statement of the United Nations High Commissioner for Refugees was made about a month after the aggression of NATO against Yugoslavia and it can by no means serve as a proof of large-scale persecution of Albanians in Kosovo and Metohija. Quite the opposite, the bombing is the main reason for their fleeing from Kosovo. Not only Kosovo and Metohija but many towns across Yugoslavia are being abandoned also by Serbs and the members of other communities in an attempt to find refuge against the systematic and massive bombing of populated areas.

That before the NATO armed intervention there were no particular problems in Kosovo and Metohija is also shown by the German provincial authorities which, up until NATO intervention, had refused further permission to stay to former Albanian refugees, invoking the official document issued by the Ministry of Foreign Affairs of Germany that "in Kosovo an explicit political persecution to Albanian ethnicity is not verifiable" and that

"actions of the security forces are not directed against the Kosovo Albanians as an ethnically defined group, but against the military opponent and its actual or alleged supporters, that is the KLA, which is fighting for an independent Kosovo using terrorist

means" (letter of the Ministry of Foreign Affairs of the Federal Republic of Germany No. 514-516.80.32 426 of 12 January 1998, a copy of which is enclosed to Annex).

The same document says:

> "The members of the Albanian people are not threatened by political persecution related to their national affiliation. Thus, in Belgrade alone several thousands of ethnic Albanians live. Their status is not unfavourable and they are not treated as unequal citizens on a systematic basis by the State. In southern Serbia there are areas with a majority Albanian population in which no cases of violation of human rights worth mentioning have been registered against this category of persons." (Municipalities of Bujanovac, Presevo and Medvedja.)

Respondents did not comment on the Applicant's allegations that there are bank accounts in their banks for contributions to fund terrorist groups in Kosovo and Metohija and that these accounts have been advertised in newspapers and on the Internet. They passed over in silence the Applicant's allegations that they have never condemned terrorism in Kosovo and Metohija in strong terms nor undertaken anything at all to really suppress it. They have not responded to our assertion that the attempt to impose the so-called Rambouillet Agreement by an ultimatum — threat and use of force — is the most serious violation of international law.

Concerning the greatest urgency and irreparable prejudice, I would call your attention to new casualties inflicted in the past two days.

On 10 May 1999, Dragan Obrenovic and Velija Dzemilovic were killed in front of their houses in a NATO attack on Cacak.

On 10 May 1999, a couple of minutes after 3.00 p.m., Nasko Ristic and Milos Jovic were killed in a truck in Cacak. Twelve persons were wounded, four of them seriously: Milenko Cirovic, Milan Stankovic, Miodrag Maksimovic and Zoran Vuckovic.

On 11 May 1999 in the morning, three people were killed and four seriously wounded during the NATO attack on civilian facilities in the village of Staro Gradsko, Lipljani district, Kosovo and Metohija.

The VICE-PRESIDENT, acting President: Mr. Etinski, I am sorry to interrupt you, but may I ask how much longer you expect to take.

Mr. ETINSKI: I will finish in four minutes.

Four-year-old Dragana Dimic and Bosko and Rosa Jankovic, both aged 60, were killed. Wounded were 7-year-old Bojan Dimic, his father Sinisa as well as Okica Seslija.

On 11 May 1999 Dusan Matkovic was wounded in Nis in a NATO air strike.

On 11 May 1999 NATO planes fired several cluster bombs in the area of the village of Babin Most, 15 km from Pristina, a few minutes after 8 a.m. Five minutes before noon, NATO planes fired three missiles in the area of Pristina. Around 1 p.m., two missiles hit the districts of Grabovci and Belacevac, municipality of Obilic, with an exclusively ethnic Albanian population.

The claim of the Respondents that the requested provisional measures will not protect the rights provided for by the Convention on the Prevention and Punishment of Genocide is not true. Acts of genocide are committed by bombing, consequently, by the use of force. The cessation of the use of force in this particular case also means the protection of rights provided for by that Convention.

Mr. President, distinguished Members of the Court, I am astonished by the assertion of the Agents of the Respondents that the provisional measures of protection would have negative effects; that they would allegedly enable further expulsion of Albanians, etc. The Government of the Federal Republic of Yugoslavia reiterated on various occasions its readiness to accept a United Nations monitoring civilian mission in Kosovo and Metohija. It is absolutely unclear how the bombing can ensure the return of the refugees and their security in Kosovo and Metohija. How can the Albanian minority possibly be protected by bombing, when the members of that minority are also the victims of bombing?

Mr. President, distinguished Members of the Court, the required conditions provided for by Article 41 of the Statute of the Court and Article 73 of the Rules of Court for the indication of provisional measures have been satisfied:

— the Federal Republic of Yugoslavia is a Member State of the United Nations;
— the Declaration on the Acceptance of the Compulsory Jurisdiction of the Court is valid and effective in relation to the case;
— there is jurisdiction of the Court in relation to the Respondents who have accepted the compulsory jurisdiction of the Court;
— there is the dispute related to the interpretation and application of the Genocide Convention;
— the Court has jurisdiction on the basis of Article IX of the Convention;
— the requested measures are related to the rights of the Federal Republic of Yugoslavia which are the subject-matter of the dispute.

The conditions of the greatest urgency and irreparable prejudice are satisfied and I ask the Court to use its power under Article 41 of the Statute and to indicate the requested provisional measures.

With your permission, Mr. President, I will now read the submission. I ask the Court to indicate the following provisional measures. The United States of America, the United Kingdom of Great Britain and Northern Ireland, the Republic of France, the Federal Republic of Germany, the Republic of Italy, the Kingdom of the Netherlands, the Kingdom of Belgium, Canada, Portugal and the Kingdom of Spain shall cease immediately the acts of use of force and shall refrain from any act of threat or use of force against the Federal Republic of Yugoslavia.

Mr. President, distinguished Members of the Court, I thank you for your attention.

The VICE-PRESIDENT, acting President: Thank you very much, Mr. Etinksi. This concludes the second round of hearings of Yugoslavia in the cases regarding the use of force instituted by Yugoslavia against ten respondent States.

The Court today received two documents from Yugoslavia advancing certain additional grounds of jurisdiction against Belgium and the Netherlands. These were immediately communicated to the two States concerned and Yugoslavia has now addressed the Court on these documents. The Court will, after hearing the responses of the two States, consider whether, so far as regards the cases against them, this necessitates an alteration of the schedules already indicated for the completion of the oral hearings.

Judge Guillaume wishes to ask a question, and I give the floor to Judge Guillaume.

M. GUILLAUME : Je vous remercie, Monsieur le président. Ma question s'adresse à M. l'agent du Portugal. M. l'agent du Portugal a précisé : «qu'à la date d'enregistrement de la requête de la République fédérale de Yougoslavie, le 29 avril 1999, le Portugal n'était pas partie à la convention pour la prévention et la répression du crime de génocide, bien que son instrument d'accession ait déjà été déposé aux Nations Unies». J'aimerais savoir à quelle date cet instrument a été déposé ? Et à quelle date, selon M. l'agent du Portugal, le Portugal est devenu ou deviendra partie à la convention ? Tout commentaire de la part de M. l'agent de la Yougoslavie sur ce point sera également le bienvenu. Je vous remercie, Monsieur le président.

The VICE-PRESIDENT, acting President: Thank you, Judge Guillaume.

The Court will now adjourn and meet at 3 p.m. to hear the second round of submissions of the respondent States.

The Court rose at 11.20 a.m.

Non-Corrigé
Uncorrected

Traduction
Translation

CR 99/25 (traduction)

CR 99/25 (translation)

Mercredi 12 mai à 10 heures

Wednesday 12 May at 10 a.m.

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Le VICE-PRESIDENT, faisant fonction de président : Veuillez vous asseoir.

La Cour siège aujourd'hui pour le second tour de parole dans les affaires relatives à la *Licéité de l'emploi de la force* introduites par la Yougoslavie. Je donne la parole, pour commencer, à l'agent de la Yougoslavie.

M. ETINSKI : Monsieur le président, Madame et Messieurs de la Cour : notre exposé du second tour devrait jeter davantage de lumière sur les questions soulevées par les défendeurs et compléter notre argumentation.

M. Brownlie développera les trois points suivants :

— premièrement, les défendeurs n'ont pas établi la licéité de leur emploi de la force;
— deuxièmement, le bombardement intensif de zones habitées yougoslaves constitue en l'occurrence une violation de l'article II de la convention sur le génocide;
— troisièmement, les Etats défendeurs sont solidairement responsables des violations de la convention sur le génocide et autres violations du droit international commises par l'intermédiaire du commandement militaire de l'OTAN.

M. Corten montrera que la déclaration d'acceptation de la juridiction de la Cour faite par la République fédérale de Yougoslavie le 25 avril 1999 établit valablement la compétence de la Cour à l'égard des défendeurs qui ont eux aussi accepté la juridiction obligatoire.

Je terminerai ce second tour de parole en démontrant que toutes les conditions prévues par l'article 41 du Statut de la Cour et l'article 73 du Règlement sont satisfaites.

Monsieur le président, voudriez-vous avoir l'amabilité de donner la parole à M. Brownlie.

Le VICE-PRESIDENT, faisant fonction de président : Monsieur Brownlie, je vous en prie.

M. BROWNLIE : Merci, Monsieur le président.

Monsieur le président, Madame et Messieurs de la Cour, je développerai au cours de ce second tour trois points.

Premièrement, les dix Etats défendeurs n'ont pas établi la licéité de leur emploi de la force, dans une situation où la question de la validité juridique de l'emploi de la force est cruciale.

Deuxièmement, le bombardement intensif de zones habitées yougoslaves constitue en l'occurrence une violation de l'article II de la convention sur le génocide.

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Troisièmement, les Etats défendeurs sont solidairement responsables des violations de la convention sur le génocide et autres violations du droit international commises par l'intermédiaire du commandement militaire de l'OTAN.

En préambule, il convient d'affirmer que, même lorsqu'il s'agit d'une demande de mesures conservatoires, la Cour doit examiner le fond des questions qui lui sont soumises. Peut-être pas de manière définitive, mais il faut néanmoins qu'elle le fasse. Il suffit de parcourir le texte de presque n'importe laquelle de ses ordonnances pour s'en rendre compte, par exemple celui de sa récente ordonnance du 8 avril 1993 dans l'affaire de la Bosnie.

Si les bombardements constituaient une intervention humanitaire et, à ce titre, étaient licites, il en découlerait deux conséquences :

Premièrement, ils constitueraient un emploi licite de la force et, deuxièmement, ils ne constitueraient pas à priori un génocide.

Cela étant, si les Etats défendeurs ont simplement réservé leur position «sur le fond», ils n'aident pas la Cour dans l'exercice de sa fonction judiciaire et ils prennent certains risques.

Après ce préambule, j'en viens au premier point de ce bref exposé. Les Etats défendeurs, au cours des dix heures dont ils disposaient, n'ont fait aucun effort pour offrir une justification juridique circonstanciée de l'offensive aérienne. Il est vrai que, tout à fait exceptionnellement, le représentant de la Belgique a soutenu qu'il s'agissait d'une intervention humanitaire armée qui était compatible avec l'article 2, paragraphe 4, de la Charte, et a admis que le principe allégué émergeait lentement (voir CR 99/15, p. 16-17).

D'autres défendeurs n'ont pas parlé d'intervention humanitaire mais utilisé l'expression inhabituelle de «catastrophe humanitaire». Aucun des défendeurs n'a été en mesure d'invoquer des sources faisant autorité autres que celles citées par la Yougoslavie ou de dire que l'opinion exprimée en 1986 par le *Foreign Office* britannique était inacceptable.

L'attitude adoptée par les Etats défendeurs dans la présente procédure aboutit à d'étranges contradictions. Ainsi, certains Etats défendeurs (voir CR 99/16, p. 14, par. 33) affirment que même

les victimes civiles sont un risque inévitable — et donc, faut-il sans doute comprendre licite — généré par l'intervention dite humanitaire. En revanche, lorsqu'il y a eu des morts et des blessés parmi les membres de la communauté diplomatique, le président Clinton et d'autres chefs d'Etat, ou des chefs de gouvernement, ont présenté des excuses, déclarant que la frappe des missiles était due à une erreur.

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Mais, Monsieur le président, s'il s'agit d'une intervention humanitaire, pourquoi faudrait-il présenter des excuses dans le cas des diplomates d'Etats tiers et non dans celui des civils de Belgrade ? Pourquoi les considérations de licéité seraient-elles de mise dans certains cas et non dans d'autres ?

Avant d'en terminer avec l'allégation d'intervention humanitaire, il me faut rappeler à la Cour que de nombreuses notes et déclarations officielles de l'OTAN ont insisté sur l'objectif consistant à exercer une pression sur la population afin de créer des perturbations politiques sur le plan intérieur. Le choix des cibles confirme cette politique de contrainte collective.

J'en viens maintenant à notre deuxième point, à savoir que le bombardement intensif de la Yougoslavie constitue une violation grave de l'article II de la convention sur le génocide. Selon la définition qui y est donnée du génocide, celui-ci s'entend d'actes «commis dans l'intention de détruire, en tout ou en partie, un groupe national, ethnique, racial ou religieux, comme tel».

Les éléments dont on dispose montrent que les bombardements affectent les zones habitées de toute la Yougoslavie. A mon avis, il s'agit donc bien d'un groupe national *comme tel*, et les déclarations de l'OTAN font clairement apparaître que c'est la population dans son ensemble que l'on cherche à intimider. D'ailleurs, le représentant de l'Italie a fait observer que les actions affectent «l'ensemble de la population d'un Etat», cet Etat étant naturellement, en l'espèce, la Yougoslavie (CR 99/19, p. 12).

Plusieurs des Parties adverses ont affirmé que la Yougoslavie n'avait pas rapporté la preuve du génocide. Cela n'est pas vrai. Les preuves produites par la Yougoslavie quant aux bombardements et à leurs effets permettent d'inférer l'existence d'un certain nombre de caractéristiques liées à des éléments constitutifs de génocide, notamment la «soumission

intentionnelle du groupe à des conditions d'existence devant entraîner sa destruction physique totale ou partielle».

Ces caractéristiques sont les suivantes :

Premièrement : le grand nombre de civils tués et la connaissance qui en résulte du risque mortel causé.

Deuxièmement : la forte puissance explosive des missiles et les effets étendus de l'explosion.

Troisièmement : la propriété incendiaire de ces armes nouvelles et la connaissance du fait que certaines victimes meurent souvent de leurs brûlures.

Quatrièmement : l'ampleur même des destructions causées dans les zones urbaines.

Cinquièmement : le bouleversement général de la vie quotidienne.

Sixièmement : les dommages étendus causés au système de santé et les risques que l'on fait courir délibérément aux patients en provoquant des coupures d'électricité.

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Je m'arrêterai un instant pour poser cette simple question : Combien sont-ils, parmi ceux et celles qui sont assis de l'autre côté de cette salle, à avoir été bombardés, ne serait-ce qu'une fois ?

Nous parlons ici de l'emploi d'une puissance de feu massive, comportant, nous dit-on — et l'on nous en informe presque chaque jour avec orgueil — six cents sorties toutes les vingt-quatre heures. Eh bien, les Britanniques de ma génération ont l'expérience directe des bombardements. J'ai été élevé à Liverpool, j'avais sept ans quand la guerre a commencé, et nous étions bombardés toutes les nuits. Liverpool était un important port maritime. Peut-être la génération plus récente a-t-elle moins d'expérience en la matière, et est-elle moins sensibilisée. Et bien sûr, les pièces d'artillerie utilisées à présent sont d'un type beaucoup plus perfectionné que les bombes de la seconde guerre mondiale.

Nos adversaires ont recours, pour désigner cet exercice massif de la contrainte à l'encontre d'un Etat européen, à divers euphémismes. Il n'est pas question de bombes et de missiles. Le représentant du Royaume-Uni a évoqué «l'action militaire» (CR 99/23, p. 13, par. 17). Celui du Canada a parlé des «opérations aériennes de l'OTAN» (CR 99/16, p. 11, par. 20).

La preuve directe de la réalité des victimes — morts et blessés graves — faites parmi la population civile, ainsi que de la destruction des villes et villages et des moyens d'existence, est complétée par les inférences que j'ai déjà mentionnées.

Monsieur le président, la preuve du génocide a été rapportée. Nos adversaires trouvent simplement commode de l'ignorer. Si l'on étudie les comptes rendus des audiences conjointement avec les autres pièces fournies par la Yougoslavie, on y trouve une preuve suffisante du génocide, à tout le moins d'un risque sérieux de génocide, dès lors que l'OTAN menace quotidiennement d'intensifier les bombardements. Les pressions exercées contre la Yougoslavie tout entière ont provoqué d'importants déplacements intérieurs de réfugiés, la moitié environ de la population de Belgrade ayant quitté cette ville. En outre, la Hongrie doit faire face à un afflux considérable de Yougoslaves qui cherchent à se mettre à l'abri des raids aériens (voir le *Budapest Sun*, 6-12 mai 1999, p. 5, qui indique en manchette : «Déplacements massifs de Serbes cherchant à passer en Allemagne»).

L'*Attorney-General* du Royaume-Uni, parlant au nom de ce pays, a fait état, citant Mme Ogata, d'une «violence systématique et intolérable exercée contre une population tout entière». Cette description peut s'appliquer à la situation de l'ensemble de la Yougoslavie, qui fait face toutes les vingt-quatre heures à six cents missions de bombardement — *six cents* missions de bombardement !

Monsieur le président, j'en viens maintenant à mon dernier point. Plusieurs des Etats demandeurs ont prétendu que les actions du commandement de l'OTAN ne sauraient être imputées aux Etats membres de l'OTAN pris séparément. Je renvoie à cet égard aux comptes rendus des audiences (par exemple : CR 99/17, p. 13, par. 6 (France); CR 99/16, p. 15, par. 34 (Canada); CR 99/22, p. 10 (Espagne)).

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Les implications générales d'une telle affirmation méritent qu'on s'y arrête. Le Conseil de l'Atlantique Nord mène la guerre contre la Yougoslavie en tant qu'entreprise commune. Il ne cesse de le dire. Ce serait une anomalie juridique et politique de premier ordre que de ne pouvoir attribuer aux Etats membres solidairement les actions du commandement militaire. Cette responsabilité solidaire se justifie tant sur le plan des principes juridiques qu'au vu du comportement

des Etats membres. Ainsi, après la destruction de l'ambassade de Chine à Belgrade, le premier ministre britannique a présenté des excuses au Gouvernement chinois, alors que rien n'indiquait que les missiles eussent été tirés par un avion britannique. Plus récemment, le chancelier allemand a lui aussi présenté des excuses.

Dans l'affaire relative à *Certaines terres à phosphates à Nauru (Nauru c. Australie)*, la Cour a considéré que la possibilité d'une responsabilité solidaire des trois Etats chargés de l'administration d'un territoire sous tutelle au moment considéré ne rendait pas irrecevable *in limine litis* une demande formée contre un seul d'entre eux (*C.I.J. Recueil 1992,* p.258-259, par. 48; voir aussi opinion dissidente de sir Robert Jennings, président, p. 301, *eod. loc.*).

Enfin, j'en terminerai avec ce point de la responsabilité solidaire en faisant observer qu'il est vraiment remarquable que des Etats qui se sont associés publiquement à une action coercitive multilatérale de l'OTAN cherchent maintenant à se soustraire à la responsabilité juridique qui s'y attache.

Pour conclure ce bref exposé, permettez-moi de rappeler certains points de portée générale.

Premièrement, la crise du Kosovo est une crise qui a été choisie et amplifiée par les Etats-Unis dans le cadre d'une campagne anti-serbe à long terme. Les objectifs étaient politiques et stratégiques.

Deuxièmement, la contrainte exercée sans relâche contre une nation tout entière, affectant et visant explicitement la population dans son ensemble, doit, sur le plan du droit, emporter une responsabilité pour génocide. C'est un principe général que le *dolus* — l'intention — s'applique non seulement aux conséquences voulues mais aussi aux risques de dommages que l'on fait délibérément courir. Et plusieurs orateurs ont clairement donné à entendre que la population de Yougoslavie devait supporter les conséquences des dommages dits collatéraux.

Monsieur le président, ce dont il s'agit ici, c'est d'un châtiment politique infligé à toute une communauté. Permettez-moi de citer M. Barton Gellman qui, dans un long article publié dans l'*International Herald Tribune* du 19 avril où il passait en revue la politique des Etats-Unis, a écrit ceci :

«Dans l'intervalle entre les deux réunions de l'OTAN, un furieux débat interne a eu lieu sur le point de savoir si l'Alliance pouvait agir militairement sans l'autorisation expresse du Conseil de sécurité. Le 24 septembre [1998, bien entendu], le lendemain de l'adoption d'une résolution du Conseil de sécurité à la formulation soigneusement ambiguë, Washington a finalement persuadé ses alliés d'adresser à M. Milosević un ultimatum lui enjoignant de se retirer. Le 13 octobre a vu le premier «ordre d'activation» de l'histoire de l'OTAN, à savoir une décision formelle d'autoriser le bombardement de la Yougoslavie. Mais — ce qu'on ne savait pas à l'époque — le Conseil de l'Atlantique Nord (l'organe directeur) n'a approuvé que la phase 1 d'une campagne aérienne en trois phases, phase qui visait une cinquantaine d'objectifs de défense aérienne. Le véritable châtiment de Belgrade [poursuit M. Gellman] viendrait lors de la phase 2, qui concernerait des «dizaines de cibles», et de la phase 3, avec «des centaines et des centaines de cibles», selon un haut fonctionnaire de la Maison Blanche.

Armé de la menace de l'OTAN, l'envoyé spécial des Etats-Unis Richard Holbrooke a convaincu M. Milosević d'accepter un cessez-le-feu au Kosovo et d'en retirer les forces armées et forces de police spéciales qui n'y étaient pas avant 1998.» *(International Herald Tribune,* 19 avril 1999.) *[Traduction du Greffe.]*

Le plan établi alors par le conseil de l'OTAN est maintenant mis à exécution. Ce processus punitif est illicite et a des conséquences qui constituent nécessairement des violations graves de la convention sur le génocide. M. Gellman, s'appuyant sur des sources internes, confirme que les frappes aériennes, y compris leurs différentes phases et leur intensité, étaient prévues depuis plusieurs mois, les bombardements ayant toujours eu deux buts sans rapport avec l'aspect humanitaire : premièrement, infliger une punition pour la non-acceptation des exigences de l'OTAN concernant le statut territorial du Kosovo, et deuxièmement, donner tout simplement de la crédibilité aux menaces. Aussi les frappes aériennes ne sauraient-elles, à notre avis, constituer un paradigme d'intervention humanitaire.

Monsieur le président, je vous remercie ainsi que la Cour de votre patience et de votre attention et vous prie de bien vouloir donner la parole à mon collègue M. Corten.

Le VICE-PRESIDENT, faisant fonction de président : Merci, Monsieur Brownlie. M. Corten, je vous en prie.

Mr. CORTEN: Mr. President, Members of the Court, may I begin by saying how much I appreciate the honour of addressing, for the first time, the world's most senior Court.

My task is to consider a particular point in the statement of the Federal Republic of Yugoslavia, concerning the effects *ratione temporis* of its statement of acceptance of the Court's jurisdiction. The other problem, that of Yugoslavia's successor status, will be considered later by Professor Etinski.

Of the six respondent States which have themselves deposited declarations, five — Canada, the Netherlands, Portugal, Spain and the United Kingdom — deny the Court's jurisdiction in reliance, on grounds of reciprocity, on the Yugoslav declaration of 25 April last, which covers, you will recall, "all disputes arising or which may arise after the signature of the present declaration, with regard to the situations or facts subsequent to this signature".

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The five respondent States argue that, the use of force having begun on 24 March 1999, there was only one dispute between them and Yugoslavia before 25 April, a dispute which consequently escapes — even prima facie — the Court's jurisdiction.

Mr. President, Yugoslavia's response to this point is simple and is based first and foremost on something quite obvious. The problem before the Court is that of interpreting a unilateral declaration of acceptance of its jurisdiction, and thus of ascertaining the meaning of the declaration on the basis of the intention of its author.

But if the declaration of 25 April 1999 is interpreted in good faith, the conclusion is clear and unequivocal. The Court does have jurisdiction, prima facie, firstly on the basis of the text itself of the declaration — and this will provide the first limb of my short contribution — and further, more fundamentally, on the basis of the real intention of the author of the declaration, the Federal Republic of Yugoslavia.

I. The text of the declaration allows all disputes effectively arising after 25 April 1999 to be taken into account

Let us start then, with your permission, with the text of the declaration. It concerns, as I have said, disputes after 25 April, relating to situations or facts subsequent to that date.

Can it seriously be argued that since 25 April no further dispute, i.e., to use the Court's words, no "disagreement on a point of law or fact" (*Mavrommatis Palestine Concessions, P.C.I.J., Series A, No. 2,* p. 11; case concerning *Questions of Interpretation and Application of the*

1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. *United Kingdom), I.C.J. Reports 1998*, para. 22), has arisen between Yugoslavia and the respondent States?

I should like to summarize very briefly for the Court a number of events relevant to Yugoslavia's line of argument.

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— on 28 April the NATO member States bombed a residential area of Surdulica, killing 20 civilians;

— on 1 May the NATO member States bombed a bus in the province of Kosovo, killing nearly 75 civilians;

— on 7 May the NATO member States bombed a market in Nis, killing more than ten civilians; and finally,

— on 8 May, as we know, the NATO member States bombed the Embassy in Belgrade of the People's Republic of China, killing a number of Chinese diplomats.

In each of these cases, which are only examples, Yugoslavia denounced the flagrant violations of international law of which it considered itself to be a victim. In each of these cases, the NATO member States denied having violated any obligation under international law.

Mr. President, each of these events led to a "disagreement on a point of law or fact", a disagreement — I must stress this point — the substance of which varied in each case with the nature of the military action.

Thus the disagreements on points of law may concern, depending on the attack, the principle of taking precautions with regard to civilians, the use of banned weapons, the principle of proportionality in relation to armed attacks, the rule prohibiting certain kinds of damage to the environment, or again, in certain cases, the freedom of navigation on certain international waterways.

Disagreement on points of fact may also arise according to case, for example, as to the intentional nature of an attack against civilians, or again as to the scale of the damage caused by any given attack.

Thus there have been a large number of separate disputes arising between Yugoslavia and the NATO Member countries since 25 April concerning events occurring after that date.

But there is more, Mr. President. Disputes have been arising regularly, including in the period since 25 April, in circumstances developing and according to the various diplomatic initiatives, not just disputes with regard to any given attack in particular, but on the very principle

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of the resumption, the cessation or the suspension of the bombing. Thus the NATO member States are in dispute almost daily with Yugoslavia, whenever they decide deliberately to embark on further illegal acts despite the protests of the Yugoslav Government.

Mr. President, the Canadian Agent mentioned last Monday a "continuing situation" to describe the use of force by the NATO member States since 24 March. Yugoslavia does not accept this description, which might have been applied to an occupation of all or part of its territory, but definitely not to conduct consisting in repeated separate military attacks. Yugoslavia thus prefers to describe these attacks as "instantaneous wrongful acts" within the meaning given to this expression in the context of the work of the International Law Commission on State Responsibility (*YILC*, 1978, Vol. II, Part One, pp. 37 *et seq.*). Here we have clearly a succession and repetition of instantaneous wrongful acts — and hence separate acts — for which, and I quote the Commission's rapporteur, "the determination of the *tempus commissi delicti* . . . in principle presents no special problems" (p. 40, para. 26), and in fact the various wrongful acts can be precisely dated, including those after 25 April.

Nor can there be any question of subsuming the totality of these acts into a single and exclusive dispute which, as it were, would absorb the subsequent disputes that have effectively arisen. In the case concerning *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie*, the Court agreed that a distinction could be made — and I quote — between "disputes of a general nature" and "specific disputes". There is no reason why the Court should not proceed in the same way in this case, albeit *mutatis mutandis* given the quite different circumstances.

The case of the *Electricity Company of Sofia and Bulgaria* and the *Right of Passage* case, which were cited by our opponents, do not preclude the possibility of distinguishing a number of

separate disputes within the framework of a single case. These precedents are no evidence of the existence of a principle whereby disputes validly submitted, as in the present case, to the Court's jurisdiction should be excluded from such jurisdiction because of their purported links with a dispute which itself falls outside that jurisdiction.

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There is no reason to exclude prima facie the Court's jurisdiction over disputes effectively arising after 25 April, in accordance with the specific terms of the Yugoslav declaration.

All the more so, Mr. President — and this brings me to the second part of my statement — in that a prima facie exclusion of jurisdiction would run entirely counter to the manifest and clear intention of Yugoslavia.

II. Yugoslavia's real intention was to entrust to the Court the settlement of the disputes with the respondent States

When interpreting a declaration of acceptance, the crucial criterion is to ascertain the real intention of its author.

In a recent case cited here by the Agent of Spain, the Court expressly stated that due regard must be had to:

> "the intention of the State concerned at the time when it accepted the compulsory jurisdiction of the Court. The intention of a reserving State may be deduced not only from the text of the relevant clause, but also from the context in which the clause is to be read, and an examination of evidence regarding the circumstances of its preparation and the purposes intended to be served". (*Fisheries Jurisdiction, I.C.J. Reports 1998*, para. 49.)

The Court has applied this principle consistently, carrying out a detailed examination in an effort to establish the true intention of the author of the text under interpretation (see case concerning *Anglo-Iranian Oil Co., I.C.J. Reports 1952*, pp. 105-107, case concerning the *Temple of Preah Vihear, I.C.J. Reports 1961*, pp. 31-34, and the case concerning *Military and Paramilitary Activities in and against Nicaragua, I.C.J. Reports 1984*, pp. 410-413).

In this instance, therefore, the Court's task is to interpret the declaration of 25 April 1999 with a view to ascertaining what Yugoslavia's intention was when it drafted that instrument.

What was Yugoslavia's purpose in depositing this declaration?

Mr. President, the purpose is not difficult to discern. Yugoslavia desired, from 25 April 1999 onwards, to recognize the Court's jurisdiction over a wide range of disputes, with the exception of specific categories mentioned in the reservations, such as territorial disputes. What is in any event clear is that, initially, Yugoslavia wished to secure a judicial settlement of the disputes relating to the armed conflict then — and indeed still — in progress between Yugoslavia and the respondent States. It goes without saying — and the drafters of the declaration could personally testify to this — that Yugoslavia did indeed wish to include, and not to exclude, all the disagreements relating to the bombing to which it has been subjected.

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It may well be that the wording of the Yugoslav declaration might be considered a little ambiguous on this point. But to challenge the true, certain and clear intention of Yugoslavia on this question is a completely different matter, Mr. President.

Indeed, our opponents do not challenge this particular aspect of the question, since they accept that, when it deposited its declaration on 25 April, Yugoslavia did in fact wish to confer jurisdiction on the Court to settle the disputes surrounding the conflict which broke out a few weeks ago.

On this point, it will therefore suffice for the Court to adopt the only interpretation enabling the text of the declaration to be reconciled with the intention — as to which there can be absolutely no doubt — of its author.

Mr. President, to complete my contribution, I should like to touch very briefly on the *Temple of Preah Vihear* case, which I mentioned just now, that is to say, of course, in relation to the preliminary objections stage.

In that case, the Court declined to rule out its jurisdiction, even though a grammatical interpretation of a document might have entailed this conclusion, since such an interpretation would have led to a manifestly absurd and unreasonable result (*I.C.J. Reports 1961*, p. 31), that is to say, contrary to the will of the State concerned. In our case, it would also be particularly and manifestly absurd and unreasonable to exclude the prima facie jurisdiction of the Court by interpreting the declaration of 25 April in a sense not only at variance with the text, but also with the undeniable and manifest will of its author, Yugoslavia.

In conclusion, Mr. President, the Court's jurisdiction is based prima facie on Article 36, paragraph 2, of the Statute. In accordance with the clear will of its author, Yugoslavia's declaration enables account to be taken of the totality of the disputes which have arisen since the critical date, 25 April last, in respect of the military attacks conducted by the NATO member States.

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Mr. President, I thank the Court for its kind attention and I would ask you to give the floor to Professor Etinski, who will complete the arguments presented by the Federal Republic of Yugoslavia.

Le VICE-PRESIDENT, faisant fonction de président : Je vous remercie, M. Corten. Monsieur l'agent, vous avez la parole.

M. ETINSKI : Je vous remercie Monsieur le président.

Monsieur le président, Madame et Messieurs les membres de la Cour, je parlerai tout d'abord de la qualité d'Etat Membre des Nations Unies dont jouit la République fédérale de Yougoslavie. Je parlerai ensuite des bases supplémentaires de compétence. Enfin, j'appellerai une fois de plus votre attention sur les faits et vous montrerai que toutes les conditions prescrites par l'article 41 du Statut de la Cour et l'article 73 de son Règlement ont été remplies.

La République fédérale de Yougoslavie est un Etat Membre des Nations Unies. Le 22 septembre 1992, l'Assemblée générale a adopté sa résolution 47/1, qui se lit comme suit :

> «L'Assemblée générale,
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> . . . .
>
> Ayant reçu la recommandation du Conseil de sécurité en date du 19 septembre 1992, selon laquelle la République fédérative de Yougoslavie ... devrait présenter une demande d'admission à l'Organisation des Nations Unies et ne participera pas aux travaux de l'Assemblée générale,
>
> 1. Considère que la République fédérative de Yougoslavie ... ne peut pas assurer automatiquement la continuité de la qualité de Membre de l'ancienne République fédérative socialiste de Yougoslavie et, par conséquent, décide que la République fédérative de Yougoslavie ... ne participera pas aux travaux de l'Assemblée générale;»

Le Secrétaire général adjoint aux affaires juridiques et conseiller juridique de l'Organisation des Nations Unies a, le 29 septembre 1992, adressé aux représentants permanents de la

Bosnie-Herzégovine et de la Croatie auprès des Nations Unies une lettre dans laquelle il indiquait que la résolution de l'Assemblée générale avait les conséquences suivantes :

> «Si l'Assemblée générale a déclaré sans équivoque que la République fédérative de Yougoslavie ... ne pouvait pas assurer automatiquement la continuité de la qualité de Membre de l'ancienne République fédérative socialiste de Yougoslavie à l'Organisation des Nations Unies et que la République fédérative de Yougoslavie devrait présenter une demande d'admission à l'Organisation, l'unique conséquence pratique de cette résolution est que la République fédérative de Yougoslavie ... ne participera pas aux travaux de l'Assemblée générale. Il est donc clair que les représentants de la République fédérative de Yougoslavie ... ne peuvent plus participer aux travaux de l'Assemblée générale et de ses organes subsidiaires, ni aux conférences et réunions organisées par celle-ci.
>
> D'un autre côté, la résolution ne met pas fin à l'appartenance de la Yougoslavie à l'Organisation et ne la suspend pas. En conséquence, le siège et la plaque portant le nom de la Yougoslavie subsistent, mais dans les organes de l'Assemblée les représentants de la République fédérale de Yougoslavie ... ne peuvent occuper la place réservée à la «Yougoslavie». La mission de la Yougoslavie auprès du siège de l'Organisation des Nations Unies, ainsi que les bureaux occupés par celle-ci, peuvent poursuivre leurs activités, ils peuvent recevoir et distribuer des documents. Au Siège, le Secrétariat continuera de hisser le drapeau de l'ancienne Yougoslavie car c'est le dernier drapeau de la Yougoslavie que le Secrétariat ait connu. La résolution n'enlève pas à la Yougoslavie le droit de participer aux travaux des organes autres que ceux de l'Assemblée. L'admission à l'Organisation des Nations Unies d'une nouvelle Yougoslavie en vertu de l'article 4 de la Charte mettra fin à la situation créée par la résolution 47/1;»

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Ainsi donc, la résolution ne met pas fin à l'appartenance de la Yougoslavie à l'Organisation et ne la suspend pas non plus. Et la résolution n'ôte pas à la Yougoslavie le droit de participer aux travaux d'organes autres que ceux qui relèvent de l'Assemblée générale. La pratique ultérieure de l'Organisation a confirmé la position adoptée par le Secrétaire général adjoint.

Au reste d'ailleurs, le 28 avril 1993, le Conseil de sécurité a adopté sa résolution 821 (1993) dans laquelle il a recommandé à l'Assemblée générale de décider que la République fédérale de Yougoslavie ne devrait pas participer aux travaux du Conseil économique et social. L'Assemblée générale a accepté cette recommandation dans sa résolution 47/229. Si la résolution 47/1 avait mis fin à l'appartenance de la Yougoslavie à l'Organisation ou l'avait suspendue, il n'y aurait pas eu besoin d'une nouvelle résolution pour empêcher la Yougoslavie de participer aux travaux du Conseil économique et social.

En sa qualité de dépositaire des traités multilatéraux, le Secrétaire général fait rapport tous les ans sur l'état des traités multilatéraux qui ont été ainsi déposés. Dans tous les rapports annuels

postérieurs à l'année 1992, le Secrétaire général a dans son énumération cité la Yougoslavie comme faisant partie des Etats Membres originaires de l'Organisation des Nations Unies (*Traités multilatéraux déposés auprès du Secrétaire général, Etat au 31 décembre 1996*, ST/LEG/SER.E/15, Ann. 1). Sous la même appellation, la Yougoslavie a toujours figuré, avant et après 1992, dans la liste publiée dans les rapports annuels du Secrétaire général, parmi les Etats Membres originaires de l'Organisation des Nations Unies.

Le Secrétaire général adjoint à la gestion a adressé au chef de la mission permanente de la République fédérale de Yougoslavie auprès de l'Organisation des Nations Unies une lettre datée du 5 décembre 1997 dans laquelle il invite le Gouvernement de la République fédérale de Yougoslavie à verser à l'Organisation sa contribution conformément à l'article 19 de la Charte des Nations Unies. (Cette lettre du Secrétaire général adjoint à la gestion datée du 5 décembre 1997 sera jointe à l'annexe 1.) Le montant demandé comprenait la contribution à verser au budget ordinaire ainsi que celle qu'il fallait verser aux forces de maintien de la paix et aux missions de l'ONU mises en place postérieurement à l'année 1992. Le document publié par le Secrétariat des Nations Unies qui est intitulé «Etat des contributions versées au 30 novembre 1998» indique quels arriérés sont dûs par la Yougoslavie en sa qualité de Membre au 1er janvier 1998. Ce document sera joint à l'annexe 2.

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La République fédérale de Yougoslavie s'est acquittée de ses obligations financières d'Etat Membre (les lettres de confirmation du 3 octobre 1997 et du 22 septembre 1998 sont jointes aux annexes 3 et 4). Aucun autre Etat Membre n'a formulé d'objection.

La conclusion est claire : la République fédérale de Yougoslavie ne peut pas participer aux travaux de l'Assemblée générale ni du Conseil économique et social, non plus qu'aux réunions de leurs organes subsidiaires et aux conférences organisées par eux. C'est tout, il n'y a pas d'autre conséquence. Et l'*Annuaire de la C.I.J.* nous informe qu'au 31 juillet 1997, la Yougoslavie est l'un des 185 Etats Membres de l'Organisation des Nations Unies.

Pour développer ce point, je soumets à la Cour le texte de M. Mitic concernant cette question qui est intitulé «International Law and the Status of the Federal Republic of Yugoslavia in the United Nations», lequel constituera l'annexe 5.

Madame, Messieurs les Membres de la Cour, sans préjudice des motifs donnant d'ores et déjà compétence à la Cour, je vais parler des bases supplémentaires de compétence qui concernent le Royaume de Belgique et le Royaume des Pays-Bas.

Dans l'affaire relative à l'*Application de la convention pour la prévention et la répression du crime de génocide*, la Cour statuant sur les exceptions préliminaires, a dit ceci :

> «L'instance introduite devant la Cour oppose deux Etats dont le territoire est situé à l'intérieur de l'ex-République fédérative socialiste de Yougoslavie. Celle-ci a signé la convention sur le génocide le 11 décembre 1948 et a déposé son instrument de ratification, sans réserves, le 29 août 1950. Lors de la proclamation de la République fédérative de Yougoslavie, le 27 avril 1992, une déclaration formelle a été adoptée en son nom, aux termes de laquelle :
>
> > «La République fédérative de Yougoslavie, assurant la continuité de l'Etat et de la personnalité juridique et politique internationale de la République fédérative socialiste de Yougoslavie, respectera strictement tous les engagements que la République fédérative socialiste de Yougoslavie a pris à l'échelon international.»
>
> L'intention ainsi exprimée par la Yougoslavie de demeurer liée par les traités internationaux auxquels était partie l'ex-Yougoslavie a été confirmée dans une note officielle du 27 avril 1992 adressée au Secrétaire général par la Mission permanente de la Yougoslavie auprès des Nations Unies. La Cour observe en outre qu'il n'a pas été contesté que la Yougoslavie soit partie à la convention sur le génocide. Ainsi, la Yougoslavie était liée par les dispositions de la convention...» (*Application de la convention pour la prévention et la répression du crime de génocide*, exceptions préliminaires, arrêt, *C.I.J. Recueil 1996*, p. 610, par. 17.)

Compte tenu de la position qu'adopte ainsi la Cour, j'invoque à présent les accords ci-après.

La Yougoslavie et la Belgique ont conclu une convention de conciliation, de règlement judiciaire et d'arbitrage qui a été signée à Belgrade le 25 mars 1930. Cette convention est en vigueur. A l'article 4 de ladite convention, les deux parties sont convenues des dispositions suivantes :

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> «Tous différends au sujet desquels les parties se contesteraient réciproquement un droit seront soumis pour jugement à la Cour permanente de justice internationale, à moins que les parties ne tombent d'accord, dans les termes prévus ci-après, pour recourir à un tribunal arbitral.
>
> Il est entendu que les différends ci-dessus visés comprennent notamment ceux que mentionne l'article 36 du Statut de la Cour permanente de justice internationale.»

Par ailleurs, la Yougoslavie et les Pays-Bas ont conclu un traité de règlement judiciaire, d'arbitrage et de conciliation qui a été signé à La Haye, le 11 mars 1931, et qui est en vigueur. A l'article 4 dudit traité, les deux parties sont convenues des dispositions ci-après :

> «Si, dans le cas d'un des litiges visés à l'article 2, les deux parties n'ont pas eu recours à la Commission permanente de conciliation ou si celle-ci n'a pas réussi à concilier les parties, le litige sera soumis d'un commun accord par voie de compromis, soit à la Cour permanente de justice internationale qui statuera dans les conditions et suivant la procédure prévues par son statut, soit à un tribunal arbitral qui statuera dans les conditions et suivant la procédure prévues par la Convention de La Haye du 18 octobre 1907 pour le règlement pacifique des conflits internationaux.
>
> A défaut d'accord entre les parties sur le choix de la juridiction, sur les termes du compromis ou, en cas de procédure arbitrale, sur la désignation des arbitres, l'une ou l'autre d'entre elles, après un préavis d'un mois, aura la faculté de porter directement, par voie de requête, le litige devant la Cour permanente de justice internationale.»

Le Royaume des Pays-Bas pourrait formuler ici une objection et dire que la procédure prévue n'est pas strictement suivie. A cet égard, je rappellerai que la Cour, comme celle qui l'a précédée, la Cour permanente de justice internationale, a toujours appliqué le principe suivant lequel il ne faut pas pénaliser le demandeur qui a commis dans un acte de procédure une erreur qu'il peut facilement réparer.

En ce qui concerne ces deux défendeurs, la Belgique et les Pays-Bas, il existe donc des bases supplémentaires de compétence pour la Cour.

Monsieur le président, Madame et Messieurs les Membres de la Cour, les renseignements qui vous sont communiqués sur les faits devraient, dans la mesure du possible, être complets.

Or, on abuse devant vous de renseignements non vérifiés; l'exemple le plus patent porte sur l'explosion du marché de Markale, à Sarajevo, en 1994. Sans qu'il y ait la moindre enquête, le crime a été attribué aux Serbes de Bosnie. Et l'événement a joué un rôle dans l'évolution de la situation en Bosnie-Herzégovine, y compris dans des bombardements de l'OTAN. Mais, à ce jour, on n'a toujours pas établi de façon définitive qui est l'auteur du crime.

A la suite du meurtre de 39 Albanais dans le village de Racak, en janvier 1998, le chef de la mission de vérification du Kosovo organisée par l'OSCE a déclaré, sans avoir procédé à la moindre enquête, qu'il s'agissait d'un massacre de civils. Il a dit à l'époque que, sans être juriste, il était sûr qu'il avait été commis là un crime contre l'humanité. Des médecins légistes originaires de Yougoslavie, du Bélarus et de Finlande ont travaillé ensemble pour établir un rapport d'experts visant à établir les causes et les conditions des décès. Après avoir terminé leur travail d'équipe à Pristina, les légistes yougoslaves et bélarusses ont signé des rapports consignant leurs constatations

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communes. Pendant le travail, les experts finlandais ont souscrit à ces constatations, mais n'ont pas signé les rapports en expliquant qu'ils souhaitaient procéder à des analyses supplémentaires. C'est ce qu'ils ont fait, mais la publication des résultats a été retardée. La conférence de presse de Mme Ranta, le chef de l'équipe finlandaise, a coïncidé avec la réunion qui s'est tenue au centre de conférences de l'avenue Kléber, au moment où il est apparu que la délégation yougoslave ne signerait pas l'accord intérimaire pour la paix et l'autonomie du Kosovo. Mme Ranta a déclaré que les personnes qui avaient été tuées étaient des civils. Les légistes yougoslaves et bélarusses ont indiqué que les mains des personnes tuées portaient des traces de poudre, tandis que les experts finlandais disaient ne pas en avoir trouvé. C'est cela, et aussi le fait que les personnes tuées portaient des vêtements civils, qui ont fait dire à Mme Ranta qu'il s'agissait de civils. Mais s'il est exact qu'il y avait des traces de poudre sur les mains des personnes tuées, cela indique qu'on s'est servi d'armes et que le décès est intervenu au cours d'affrontements armés. Cette différence dans les constatations est fondamentale. Mais, sans enquêter plus avant, certains pays ont qualifié l'événement de massacre.

L'information présentée par les défendeurs est sélective, incomplète, elle manque de précision. Il est tout à fait inexact de présenter la situation au Kosovo-Metohija comme témoignant de la répression organisée par les autorités serbes à l'encontre de la minorité albanaise. Les agents des défendeurs ont cité quelques mots extraits du rapport du Secrétaire général pour fonder leurs accusations sur ces citations. Pourtant, l'extrait pertinent du rapport du Secrétaire général daté du 17 mars 1999 est le suivant :

> «La relation qui suit indique quand et où il s'est produit des incidents graves donne à penser que la violence dirigée contre les civils au Kosovo ne cesse de se généraliser. Le 18 janvier 1999, un serbe a été tué parce qu'il ne se serait pas arrêté à un barrage que l'armée de libération du Kosovo a mis en place à Nedakovac, près de Kosovska Mitrovica. Le 19 janvier, le corps d'un enseignant albanais du Kosovo a été découvert près d'Istok. Le 20 janvier, deux femmes serbes (la mère et la fille) ont été blessées après que des personnes non identifiées ont ouvert le feu sur leur habitation, apparemment pour chercher à atteindre le père. Le 21 janvier, un homme et une femme albanais du Kosovo ont été tués quand leur voiture a essuyé des coups de feu à un carrefour, à l'extérieur d'Orahovac. Le même jour, le corps d'un médecin albanais du Kosovo a été découvert près de l'autoroute qui relie Pec à Mitrovica.

Le 24 janvier, cinq albanais du Kosovo, deux hommes, une femme et deux jeunes garçons de onze et douze ans, ont été tués sur la route reliant Rakovina à Jablanica, alors qu'ils réparaient leur tracteur. D'après des observateurs internationaux, on aurait trouvé une soixantaine de cartouches sur les lieux de l'incident et les corps portaient de multiples blessures par balles.

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Le 25 janvier, un albanais du Kosovo a été tué et son fils gravement blessé près de Decani, quand des assaillants masqués ont tiré 55 rafales, d'après ce qu'ont dit les témoins, sur leur voiture. Le 26 janvier, un serbe a été gravement blessé lors d'une attaque dirigée contre sa maison, dans la municipalité d'Istok. Le corps d'un serbe de vingt trois ans a été découvert le 27 janvier sous une passerelle, dans les faubourgs de Kosovska Mitrovica; il est possible que la victime ait été tuée ailleurs et son corps transporté jusqu'au lieu où on l'a trouvé.

Le 29 janvier, des sources albanaises du Kosovo ont fait savoir que le corps d'un albanais du Kosovo avait été découvert dans le village de Bistrazin et qu'un autre albanais, proche de la Ligue démocratique du Kosovo, avait été grièvement blessé devant l'entrée de son appartement par deux balles tirées par des inconnus. Le 30 janvier, un albanais du Kosovo âgé de trente six ans, originaire de Pec, a été découvert une balle dans la tête sur la route entre Pec et Pristina. Le même jour, a été découvert dans le village de Gradis le corps d'un autre homme réputé être un «albanais kosovar loyaliste», un professeur de physique originaire de Djakovica. Dans la municipalité d'Istok, un serbe âgé a été tué et sa femme de 72 ans blessée quand des inconnus ont jeté une grenade dans leur maison, dans le village de Rakos.

Le 31 janvier, le corps d'un albanais du Kosovo originaire du village de Begov Vukovac a été trouvé une balle dans la tête au sud d'Istok. Le même jour, dans la municipalité de Stimlje, des hommes armés et masqués auraient pénétré dans une maison du village de Donje Godance et blessé un homme et deux garçonnets.

Les agressions et les meurtres en milieu urbain se sont poursuivis au cours de la première quinzaine de février. Le 4 février, les corps de trois albanais du Kosovo ont été découverts dans une voiture entre les villages d'Istinic et Gornja Lika, dans la municipalité de Decani, et le corps d'un serbe a été découvert près du village de Rastavica. Toutes les victimes avaient été tuées par balles. Le 4 février, un serbe a été tué sous le feu d'une arme automatique alors qu'il se déplaçait sur l'autoroute entre Pec et Djakovica.

Le 7 février, les corps de deux albanais du Kosovo portés disparus depuis le 3 janvier ont été découverts à Kacanik, au sud d'Urosevac. La nuit du 7 au 8 février, le corps d'un homme non identifié âgé d'une trentaine d'années a été découvert dans le village de Livadja dans la municipalité de Lipljan. Au moment où nous rédigeons, le HCR recherche des précisions sur plusieurs comptes rendus de découvertes macabres qui ont eu lieu le 8 février à Djakovica ou aux alentours. Les corps de deux jeunes gens, un garçon de dix sept ans et une femme de vingt ans, ont été découverts dans deux endroits différents des faubourgs de Djakovica. Le corps d'un albanais du Kosovo, tué par balle, a été découvert dans sa voiture dans la région de Djakovica, à proximité du village de Trakanic. Le même jour, également à Djakovica, les corps d'un homme et d'une femme âgés ont également été découverts. Les deux victimes, qui seraient de la communauté de Roma, sont mortes de blessures par balles tirées dans le cou. Les corps de deux albanais du Kosovo originaires du village de Goden à proximité de Djakovica ont été découverts le 10 février.

Le 11 février, quatre nouveaux corps ont été découverts dans différentes régions du Kosovo. D'après les informations transmises par les médias, le corps d'un albanais du Kosovo propriétaire d'un salon de thé à Istok a été découvert sur la route entre Zac et Zablace; il avait été tué d'une balle dans la tête. Deux hommes, un albanais du Kosovo tué d'une balle dans la tête, l'autre toujours non identifié, ont été découverts à des endroits différents de Novo Selo, à proximité de Pec. Le corps d'un homme non identifié a été découvert, dans une mare à Klina.

Les violences dirigées contre les civils au Kosovo revêtent aujourd'hui des formes nouvelles encore plus dangereuses. En particulier, les actions terroristes qui s'intensifient depuis peu contre les établissements serbes et albanais en milieu urbain, notamment les attaques à la grenade dirigées contre des cafés et des magasins, prennent un caractère inquiétant. Depuis la fin de janvier, ce sont au moins dix incidents de ce type qui ont été signalés à Pristina, Pec, Kosovska Mitrovica et Urosevac. L'enquête menée par le HCR permet de dire que, très souvent, ces établissements avaient été fréquentés par des serbes et des albanais et qu'aucun incident entre eux n'avait été signalé. La dernière attaque lancée le 13 février sur la principale place d'Urosevac fut particulièrement horrible : douze personnes ont été blessées et une vingtaine de magasins ainsi que plusieurs voitures garées à proximité ont été sérieusement endommagées. Le 17 février, un autre engin explosif dissimulé sur le marché d'Urosevac a été découvert et désamorcé par la mission de vérification au Kosovo. Ces attaques ont pour résultat qu'elles aliènent de plus en plus les communautés serbe et albanaise, qu'elles répandent partout un sentiment d'insécurité et rétrécissent toujours davantage le terrain de la coexistence.

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Février a également été marqué par de nouveaux départs de Serbes quittant les villes et les villages où ils se trouvaient en minorité, ou bien où s'étaient produits des heurts entre les unités paramilitaires albanaises du Kosovo et les forces de sécurité. D'après les informations émanant du commissaire serbe aux réfugiés, quatre-vingt dix villages environ du centre de l'ouest du Kosovo ont perdu toute leur population serbe au cours des derniers mois, tandis que des villes comme Podujevo et Kosovska Mitrovica ont vu se réduire leur population serbe. On estime à 10.000 le nombre de Serbes déplacés à l'intérieur du Kosovo tandis que 30.000 Serbes ont gagné d'autres régions de Serbie.» *[Traduction du Greffe.]*

A en croire le rapport que je viens de citer, il est clair qu'il ne saurait être question que les autorités serbes mènent une campagne de répression à l'encontre de la communauté albanaise du Kosovo-Metohija, commettent des violations massives des droits de l'homme, etc.

Les Etats membres de l'OTAN expliquent leur action armée par la volonté de protéger les réfugiés albanais alors que quiconque examine sérieusement la situation peut constater que les énormes flux de réfugiés ne se sont constitués qu'après le début des bombardements. Comme on le sait, c'est le Kosovo-Metohija qui est le plus visé. Non seulement les villes mais aussi les villages sont bombardés tous les jours. Le nombre de victimes que font les bombardements de l'OTAN chez les Albanais est très supérieur au nombre total d'Albanais tués au Kosovo-Metohija

à l'occasion de heurts avec l'armée et les forces de police yougoslaves au cours des dix dernières années. La déclaration de la Haut-Commissaire des Nations Unies pour les réfugiés date d'un mois environ après que l'OTAN ait agressé la Yougoslavie et cette déclaration ne peut absolument pas prouver l'existence d'une vaste campagne de persécution des Albanais au Kosovo-Metohija. Tout au contraire, c'est principalement en raison des bombardements que les Albanais fuient le Kosovo. Non seulement le Kosovo-Metohija mais beaucoup de villes situées sur tout le territoire de la Yougoslavie sont actuellement abandonnées aussi par les Serbes et par les membres d'autres communautés qui cherchent à trouver refuge contre ces bombardements systématiques et massifs visant les zones habitées.

Les autorités provinciales allemandes prouvent par ailleurs qu'antérieurement à l'intervention armée de l'OTAN, il n'existait pas de problème particulier au Kosovo-Metohija, car, jusqu'à cette intervention de l'OTAN, lesdites autorités refusaient tout nouveau permis de séjour aux anciens réfugiés albanais, invoquant à cet effet le document officiel émanant du ministère des affaires étrangères d'Allemagne qui dit qu'«au Kosovo, il n'est pas possible de vérifier qu'il y ait expressément un mouvement de persécution politique dirigé contre la population de souche albanaise» et que

> «l'action des forces de sécurité n'est pas dirigée contre les Albanais du Kosovo en tant que groupe défini d'un point de vue racial, elle est dirigée contre un adversaire militaire et ses partisans réels ou allégués, c'est-à-dire l'armée de libération du Kosovo, qui lutte pour l'indépendance du Kosovo par des moyens terroristes» (lettre du ministère des affaires étrangères de la République fédérale d'Allemagne n° 514-516.80.32 426 en date du 12 janvier 1998, dont nous annexons copie).

30

Le même document dit encore :

> «Les membres de la population albanaise ne sont pas menacés par une persécution politique liée à leur filiation nationale. C'est ainsi qu'à Belgrade, pour ne considérer que Belgrade, vivent plusieurs milliers d'Albanais de souche. Leur situation n'est pas défavorable et ils ne sont pas traités systématiquement par l'Etat comme des citoyens de seconde zone. En Serbie méridionale, il y a des régions où la population albanaise est majoritaire et où il n'a été constaté, à l'encontre de cette catégorie de personnes, aucun exemple de violation des droits de l'homme qu'il y ait lieu de retenir.» (Il s'agit des municipalités de Bujanovac, Presevo et Medvedja.) *[Traduction du Greffe.]*

Les défendeurs n'ont pas relevé l'affirmation du demandeur qu' il se trouve dans leurs banques des comptes — ayant fait l'objet d'une publicité dans les journaux et sur l'Internet — sur lesquels

des contributions peuvent être versées pour financer des groupes terroristes au Kosovo-Metohija. Ils ont gardé le silence au sujet de la remarque faite par le demandeur qu'ils n'ont jamais condamné avec force le terrorisme au Kosovo-Metohija ni rien fait pour l'éliminer véritablement. Ils n'ont pas répondu à notre argument selon lequel la tentative d'imposer le prétendu accord de Rambouillet par la voie d'un ultimatum — le recours à la menace et à l'emploi de la force — est la plus grave des violations du droit international.

Sur la question de l'extrême urgence et du préjudice irréparable, je voudrais appeler votre attention sur les nouvelles victimes dénombrées ces deux derniers jours.

Le 10 mai 1999, Dragan Obrenovic et Velija Dzemilovic ont été tués devant leurs domiciles lors d'une attaque de l'OTAN sur Cacak.

A la même date, quelques minutes après 15 heures, Nasko Ristic et Milos Jovic ont été tués à bord d'un camion à Cacak. Douze personnes ont été blessées, dont quatre grièvement : Milenko Cirovic, Milan Stankovic, Miodrag Maksimovic et Zoran Vuckovic.

Dans la matinée du 11 mai 1999, trois personnes ont été tuées et quatre grièvement blessées lors de l'attaque lancée par l'OTAN contre des installations civiles dans le village de Staro Gradsko, district de Lipljani, au Kosovo-Metohija.

Le VICE-PRESIDENT, faisant fonction de président : Monsieur Etinski, je regrette de vous interrompre, mais puis-je vous demander combien de temps vous pensez qu'il vous faudra encore.

M. ETINSKI : J'en aurai terminé dans quatre minutes.

Une fillette de quatre ans, Dragana Dimic, et Bosko et Rosa Jankovic, âgés tous deux de soixante ans, ont été tués. Ont été blessés Bojan Dimic, âgé de sept ans, son père Sinisa, ainsi qu'Okica Seslija.

31

Le 11 mai 1999, Dusan Matkovic a été blessé à Nis au cours d'une frappe aérienne de l'OTAN.

Le 11 mai également, quelques minutes après 8 heures, des avions de l'OTAN ont largué plusieurs bombes-grappes aux alentours du village de Babin Most, à 15 kilomètres de Pristina. A 11 h 55, des avions de l'OTAN ont lancé trois missiles sur la région de Pristina. Vers 13 heures,

deux missiles ont frappé les districts de Grabovci et de Belacevac, dans la municipalité d'Obilic, dont la population est exclusivement de souche albanaise.

Les défendeurs prétendent que les mesures conservatoires demandées ne protégeront pas les droits visés par la convention pour la prévention et la répression du crime de génocide. Cela n'est pas vrai. Les actes de génocide sont commis au moyen des bombardements, donc par l'emploi de la force. La cessation de l'emploi de la force signifie aussi, en l'espèce, la protection des droits établis par cette convention.

Monsieur le président, Madame et Messieurs de la Cour, je reste stupéfait devant l'affirmation des agents des défendeurs que ces mesures conservatoires de protection auraient des effets négatifs, qu'elles permettraient de nouvelles expulsions d'Albanais, etc. Le Gouvernement de la République fédérale de Yougoslavie a réaffirmé à plusieurs reprises qu'il était disposé à accepter une mission de surveillance civile de l'ONU au Kosovo-Metohija. Je ne vois absolument pas comment les bombardements peuvent assurer le retour des réfugiés et leur sécurité au Kosovo-Metohija. Comment la minorité albanaise pourrait-elle être protégée par les bombardements, alors que les membres de cette minorité en sont également les victimes ?

Monsieur le président, Madame et Messieurs de la Cour, les conditions exigées par l'article 41 du Statut de la Cour et par l'article 73 de son Règlement pour l'indication de mesures conservatoires sont satisfaites :

— la République fédérale de Yougoslavie est un Etat Membre de l'Organisation des Nations Unies;
— la déclaration d'acceptation de la juridiction obligatoire de la Cour est valable et opérante en l'espèce;
— la Cour est compétente à l'égard des défendeurs qui ont accepté la juridiction obligatoire de la Cour;
— il y a un différend relatif à l'interprétation et à l'application de la convention sur le génocide;
— la Cour a compétence sur la base de l'article IX de la convention;
— les mesures demandées ont trait aux droits de la République fédérale de Yougoslavie qui font l'objet du différend.

32 Les conditions de l'extrême urgence et du préjudice irréparable sont satisfaites, et je prie la Cour d'user du pouvoir que lui confère l'article 41 du Statut pour indiquer les mesures conservatoires demandées.

Si vous le permettez, Monsieur le président, je donnerai maintenant lecture de ma conclusion. Je prie la Cour d'indiquer les mesures conservatoires suivantes : les Etats-Unis d'Amérique, le Royaume-Uni de Grande-Bretagne et d'Irlande du Nord, la République française, la République fédérale d'Allemagne, la République italienne, le Royaume des Pays-Bas, le Royaume de Belgique, le Canada, le Portugal et le Royaume d'Espagne doivent cesser immédiatement de recourir à l'emploi de la force et doivent s'abstenir de tout acte constituant une menace de recours ou un recours à l'emploi de la force contre la République fédérale de Yougoslavie.

Monsieur le président, Madame et Messieurs de la Cour, je vous remercie de votre attention.

Le VICE-PRESIDENT, faisant fonction de président : Merci beaucoup, Monsieur Etinski. Ainsi prend fin le deuxième tour de parole de la Yougoslavie dans les instances relatives à l'emploi de la force introduites par la Yougoslavie contre dix Etats.

La Cour a reçu aujourd'hui de la Yougoslavie deux documents dans lesquels elle fait valoir à l'encontre de la Belgique et des Pays-Bas certains moyens supplémentaires pour fonder la compétence de la Cour. Ces documents ont été immédiatement communiqués aux deux Etats intéressés et la Yougoslavie vient de s'exprimer à leur sujet devant la Cour. Après avoir entendu les réponses des deux Etats, la Cour examinera si cela nécessite, dans le cas des instances introduites contre eux, une modification du calendrier déjà indiqué pour l'achèvement de la procédure orale.

M. Guillaume souhaite poser une question : Je lui donne la parole.

M. GUILLAUME : Thank you, Mr. President. My question is to the Agent of Portugal. He stated that "on the date of filing of the Application from the Federal Republic of Yugoslavia, 29 April 1999, Portugal was not party to the Convention on the Prevention and Punishment of the Crime of Genocide, although its instrument of accession had already been deposited with the United Nations". My question is, on what date was this instrument deposited? And on what date

according to the Agent of Portugal, has Portugal become or will become party to the Convention? Any comment from the Agent of Yugoslavia on this point will also be welcome. Thank you, Mr. President.

3 3

Le VICE-PRESIDENT, faisant fonction de président : Merci, Monsieur Guillaume.

L'audience sera maintenant levée. La Cour se réunira à 15 heures pour entendre les conclusions des Etats défendeurs dans ce deuxième tour de parole.

L'audience est levée à 11 h 20.

ANNEXES TO

Mr. ETINSKI'S

ORAL STATEMENT

Annex 1

UNITED NATIONS NATIONS UNIES

Contributions 2-1 5 December 1997

Excellency,

Under the provisions of Article 19 of the Charter of the United Nations:

"A Member of the United Nations which is in arrears in the payment of its financial contributions to the Organization shall have no vote in the General Assembly if the amount of its arrears equals or exceeds the amount of the contributions due from it for the preceding two full years. The General Assembly may, nevertheless, permit such a Member to vote if it is satisfied that the failure to pay is due to conditions beyond the control of the Member."

In order for your Government not to fall under the provisions of Article 19 of the Charter during any meetings of the General Assembly to be held in 1998, it would be necessary that a minimum payment of $11,776,400 be received by the Organization to bring such arrears to an amount below that specified under the terms of Article 19.

United Nations records show that the following amounts remain due from your Government:

	US$
Regular Budget	10,642,874
United Nations Disengagement Observer Force (UNDOF)	90,484
United Nations Interim Force in Lebanon (UNIFIL)	464,417
United Nations Iran-Iraq Military Observer Group (UNIIMOG)	5,672

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His Excellency
Mr. Vladislav Jovanović
Chargé d'affaires a.i.
Permanent Mission of the Federal Republic of Yugoslavia
to the United Nations
New York, N.Y.

UNITED NATIONS NATIONS UNIES

	US$
United Nations Observer Mission in Angola (MONUA) (includes UNAVEM)	258,088
United Nations Iraq-Kuwait Observation Mission (UNIKOM)	119,589
United Nations Mission for the Referendum in Western Sahara (MINURSO)	153,866
United Nations Observer Mission in El Salvador (ONUSAL) (includes ONUCA)	125,622
United Nations Transitional Authority in Cambodia (UNTAC) (includes UNAMIC)	688,452
United Nations Protection Force (UNPROFOR)	1,260,922
United Nations Operation in Somalia (UNOSOM and UNOSOM II)	474,815
United Nations Operation in Mozambique (ONUMOZ)	159,944
United Nations Peace-Keeping Force in Cyprus (UNFICYP)	22,372
United Nations Observer Mission in Georgia (UNOMIG)	11,807
United Nations Mission in Haiti (UNMIH)	67,536
United Nations Observer Mission in Liberia (UNOMIL)	23,777
United Nations Assistance Mission for Rwanda (UNAMIR) (includes UNOMUR)	122,210
United Nations Military Liaison Team in Cambodia (UNMLT)	143
United Nations Mission of Observers in Tajikistan (UNMOT)	4,280
United Nations Mission in Bosnia and Herzegovina (UNMIBH)	52,792
United Nations Transitional Administration for Eastern Slavonia, Baranja and Western Sirmium (UNTAES)	89,352
United Nations Preventive Deployment Force (UNPREDEP)	18,206

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UNITED NATIONS NATIONS UNIES

	US$
United Nations Support Mission in Haiti (UNSMIH)	13,780
United Nations Mission for the Verification of Human Rights and of Compliance with the Commitments of the Comprehensive Agreement on Human Rights in Guatemala (MINUGUA)	792
International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991	61,588
International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States between 1 January and 31 December 1994	32,303
TOTAL:	14,965,683

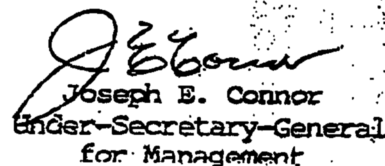
I should like to appeal, through you, to your Government for prompt remittance of the above amounts. Your early advice as to when payment might be expected would be much appreciated.

United Nations records also indicate that the following credit remains in favour of your Excellency's Government:

- United Nations Transition Assistance Group (UNTAG) 1,846

It would be appreciated if instructions could be received regarding the disposition of the above credit.

Accept, Excellency, the assurances of my highest consideration.



Joseph E. Connor
Under-Secretary-General
for Management

BANK ACCOUNTS

ABA Number: 021000021
Name of Bank: Chase Manhattan Bank, N.A.
Location: New York, N.Y. 10017, U.S.A.

NAME OF ACCOUNT	ACCOUNT NUMBER
Regular Budget:	
Peace-keeping Operations:	
United Nations Disengagement Observer Force (UNDOF)	001-1-505583
United Nations Interim Force in Lebanon (UNIFIL)	001-1-505393
United Nations Iran-Iraq Military Observer Group (UNIIMOG)	001-1-505[illegible]
United Nations Angola Verification Mission (UNAVEM)/ United Nations Observer Mission in Angola (MONUA)	001-1-505716
United Nations Transition Assistance Group (UNTAG)	001-1-505740
United Nations Iraq-Kuwait Observation Mission (UNIKOM)	001-1-505435
United Nations Mission for the Referendum in Western Sahara (MINURSO)	001-1-505468
United Nations Observer Mission in El Salvador (ONUSAL)	001-1-505492
United Nations Transitional Authority in Cambodia (UNTAC)	[illegible]-505526
United Nations Protection Force (UNPROFOR)	001-1-505559
United Nations Operation in Somalia (UNOSOM)	001-1-505617
United Nations Operation in Mozambique (ONUMOZ)	001-1-505773
United Nations Force in Cyprus (UNFICYP)	001-1-505641
United Nations Observer Mission in Georgia (UNOMIG)	001-1-505872
United Nations Mission in Haiti (UNMIH)	001-1-505922
United Nations Observer Mission in Liberia (UNOMIL)	001-1-505294
United Nations Assistance Mission for Rwanda (UNAMIR)	001-1-505963
United Nations Military Liaison Team in Cambodia (UNMLT)	001-1-50[illegible]
United Nations Observer Mission Uganda-Rwanda (UNOMUR)	001-1-505963
United Nations Mission of Observers in [illegible]	
United Nations Mission in Bosnia and Herzegovina (UNMIBH)	001-1-508264
United Nations Transitional Administration for Eastern Slavonia, Baranja and Western Sirmium (UNTAES)	001-1-508298
United Nations Preventive Deployment Force (UNPREDEP)	001-1-508322
United Nations Support Mission in Haiti (UNSMIH)	001-1-508546
Military Observer Group of MINUGUA	001-1-011780
Tribunals:	
Yugoslavia Tribunal	001-1-507084
Rwanda Tribunal	001-1-507118

TOTAL P.05

UNITED NATIONS NATIONS UNIES

POSTAL ADDRESS—ADRESSE POSTALE UNITED NATIONS, N.Y. 10017
CABLE ADDRESS—ADRESSE TELEGRAPHIQUE UNATIONS NEWYORK

REFERENCE: Contributions 2-1

The Secretary-General of the United Nations presents his compliments to the Chargé d'affaires a.i. of the Federal Republic of Yugoslavia to the United Nations and has the honour to refer to regulation 5.3 of the Financial Regulations and Rules of the United Nations, which provides that, after the General Assembly has adopted or revised the programme budget, the Secretary-General shall transmit relevant documents to Member States, inform them of their commitments and request them to remit their contributions.

In compliance with that regulation, the Secretary-General has the honour to transmit the document ST/ADM/SER.B/519 and to inform His Excellency that the contribution payable by His Excellency's Government with respect to the regular budget of the United Nations for 1998 is as follows:

	US$
Contribution to the United Nations regular budget	630,976
Adjustment of advance to the Working Capital Fund for 1998-1999	(42,500)
Net contribution payable	588,476

In this connection, the Secretary-General wishes to bring to the attention of His Excellency that the United Nations records show that as at 29 December 1997 an amount of $10,642,874 remains payable by His Excellency's Government with respect to the regular budget for prior years.

In view of the critical financial situation of the Organization, the United Nations continues to require funds on an urgent basis in order to meet its financial commitments in a timely manner. In this connection, attention is drawn to regulation 5.4 of the Financial Regulations of the United Nations, which states that contributions are due and payable in full within 30 days of the receipt of the communication of the Secretary-General. It would be highly appreciated if His Excellency's Government could make a special effort to comply with financial regulation 5.4. The Secretary-General also invites His Excellency to kindly indicate the approximate date by which payment could be expected from his Government in order to facilitate the financial planning of the Organization.

Payment in United States dollars may be made by cheque issued to the order of the "United Nations General Fund Account" or by deposit to the "United Nations General Fund Account" no. 001-1-507965, Chase Manhattan Bank, N.A., New York, N.Y. 10017.

29 December 1997

United Nations

ST/ADM/SER.B/533

Secretariat

Distr.: General
8 December 1998

Original: English

Status of contributions as at 30 November 1998

1. The present document is published in accordance with a decision taken by the General Assembly at its 2444th plenary meeting, on 17 December 1975, that the Secretary-General should provide Member States, on a biannual basis, with information, for each Member State, on the amounts assessed, paid and owed to the regular budget and on continuing operations for which there is a special assessment. This decision was taken, *inter alia*, in response to the Secretary-General's appeal to Member States to help to ease the cash-flow position of the United Nations by forwarding their contributions more promptly.

2. The status of contributions is issued at this time in view of the continuing financial difficulties of the United Nations and the desire of Member States to be kept informed of the financial situation. The following annexes are attached:

		Page
I.	Status of advances due the Working Capital Fund for the biennium 1998–1999 as at 30 November 1998	4
II	Status of contributions to the United Nations regular budget as at 30 November 1998	5
III.	Status of contributions to the United Nations Emergency Force (1973) (UNEF) and the United Nations Disengagement Observer Force (UNDOF) as at 30 November 1998	10
IV.	Status of contributions to the United Nations Interim Force in Lebanon (UNIFIL) as at 30 November 1998	14
V.	Status of contribution to the United Nations Iran-Iraq Military Observer Group (UNIIMOG) as at 30 November 1998	18
VI	Status of contributions to the United Nations Angola Verification Mission (UNAVEM, UNAVEM II and UNAVEM III) and to the United Nations Observer Mission in Angola (MONUA) as at 30 November 1998	21
VII.	Status of contributions to the United Nations Transition Assistance Group (UNTAG) as at 30 November 1998	24
VIII.	Status of contributions to the United Nations Iraq-Kuwait Observation Mission (UNIKOM) as at 30 November 1998	

98-38964 (E) 181298

Membir State	199) scaleof ssessnents)ercenago)	Contibutlons paable as at 1 January 998			Collectons/ adjustmnts in 1998	Contrilutions outstaning		
		Prior years	Crrent yeir	Total		Prior years	Current yeir	Tota outstaning
Syrian Arab Repulic	0.06:	0	652,009	652,0(9	62,009	)	0	0
Tajikistin	0.001	1,9)1,815	84,131	2015,946	402,632	1,469,18	84,31	1,55,314
Thailard	0.15	0	1,661,571	1561,571	1,661,571	)	0	0
The fomer Yugosav Repullic of Macidonia	0.005	0	52,182	52,582	22,582 a	)	0	0
Togo	0.00:	232,868	21,932	254,000	164,409 a	68,559	21,032	8,591
Trinidat and Tobago	0.01(	238,648	189,293	127,941	427,941 a	)	0	0
Tunisia	0.02(	0	294,156	294,456	294,456 a	|	0	0
Turkey	0.44(	0	4,647,738	4,647,738	4,647,738	|	0	0
Turkmenistan	0.01!	17	157,744	157,761	157,761 a	|	0	0
Uganda	0.004	36,512	42,165	78,577	53,033 a	(	22,444	2:544
Ukraine	0.676	17,661,894	7,130,133	24,791,827	15,535,940 a	2,125,95-	7,130,033	9,255,987
United Arab Emiraes	0.177	0	1,861,380	1,861,380	1,861,380 a	'	0	0
United Kingdom ofGreat Britair and Northern Ireland	5.076	0	53,380,600	53,380,600	53,380,600 a	|	0	0
United Republic ofTanzania	0.004	105,604	42,165	47,669	147,669 a	|	0	0
United States of Anerica	25.000	373,259,953	97,727,256	670,967,209	355,262,548	17,977,40!	297,727,256	315,704,661
Uruguay	0.049	426,032	515,297	941,329	941,329	(	0	0
Uzbekisan	0.077	2,140,917	809,753	2,950,670	2,950,670 a	(	0	0
Vanuatu	0.001	215,278	10,516	225,794	81,771 a	128,50:	10,516	139,023
Venezula	0.235	599,998	2,471,324	3,071,322	701,286 a	(	2,367,036	2,367,036
Viet Nan	0.010	0	105,163	105,163	105,163	(	0	0
Yemen	0.010	224,390	105,163	329,553	131,600	87,89(	105,163	193,053
Yugoslavia	0.060	10,642,874	630,976	11,273,850	631,976 a	10,011,898	630,976	10,642,874
Zambia	0.003	0	31,549	31,549	31,549 a	(	0	0
Zimbabwe	0.009	0	94,647	94,647	2,469 a	(	92,178	92,178
Total	100.000	473,591,663	1,086,468,287	1,560,059,950	1,131,571,363 b	73,194,724	355,294,863	428,489,587

a Incudes credits transferred from the Working Capital Fund.

b Incudes credits totalling $5,181,000 transferred from the Working Capital Fund and $909,728 that had been held in the suspense account in favour of 14 Member States in 199 towards the 199 assessment.

UNITED NATIONS NATIONS UNIES

Annex 3

Contributions 2-1 2 October 1997

Excellency,

On behalf of the Secretary-General, I have the honour to acknowledge receipt of a letter dated 20 September 1997 from the Government of the Federal Republic of Yugoslavia, informing us of a transfer deposit to Chase Manhattan Bank of $1,065,078.

An official receipt, in duplicate, is enclosed for the foregoing payment which has been recorded as contribution from the Government of the Federal Republic of Yugoslavia to the United Nations regular budget for 1991 (partial payment).

On behalf of the Secretary-General, I should like to express, through you, to the Government of the Federal Republic of Yugoslavia our appreciation for this payment.

Accept, Excellency, the assurances of my highest consideration.

Joseph E. Connor
Under-Secretary-General
for Administration and Management

His Excellency
Mr. Vladislav Jovanovic
Ambassador Extraordinary and Plenipotentiary
Charge d'affaires a.i. of the Federal Republic of
Yugoslavia to the United Nations
New York, N.Y

UNITED NATIONS
NATIONS UNIES
NACIONES UNIDAS

RECEIPT VOUCHER - GOVERNMENT CONTRIBUTION
RECU DE PAIEMENT - CONTRIBUTION DE GOUVERNEMENT
RECIBO DE PAGO - CONTRIBUCION GUBERNAMENTAL

NO. [illegible]
DATE 30 September 1997

Reference to / Référence / Referente a: Advice of credit received from Chase Manhattan Bank, New York - value date 19 September 1997

Payment of / Paiement de / Pago de: Contribution to the United Nations Regular Budget for 1991 (partial payment)

Amount / Montant / Cantidad: One Million Sixty-five Thousand Sixty-three Dollars and 00/100

In figures / Montant en chiffres / Cantidad en cifras: $1,065,063.00

Remarks/Observations/Observaciones:

Received from/Reçu de/Recibido de

Government of the Federal Republic of Yugoslavia
c/o Permanent Mission of Federal Republic of
Yugoslavia to the United Nations
854 Fifth Avenue
New York, N.Y. 10021

For the United Nations
Pour l'Organisation des Nations Unies
Por las Naciones Unidas

SEP 3 0 1997

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CABLE ADDRESS—ADRESSE TELEGRAPHIQUE UNATIONS NEWYORK

REFERENCE:

WITH THE COMPLIMENTS

OF THE

SECRETARY-GENERAL OF THE UNITED NATIONS

The Secretary-General of the United Nations has the honour to acknowledge receipt of a contribution, the details and purpose of which are indicated on the official United Nations receipt enclosed herewith in duplicate.

F.1/A (11-9...

UNITED NATIONS
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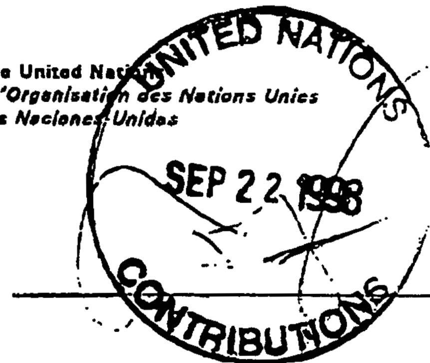

Annex 5

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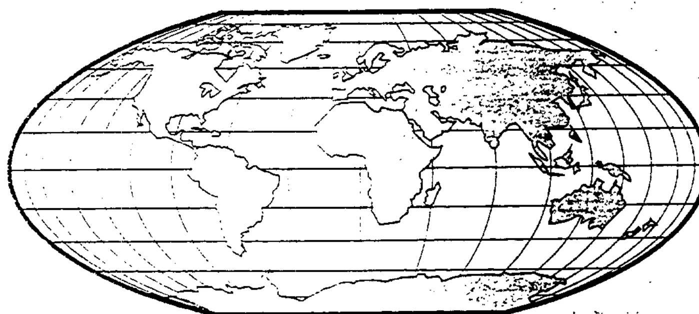

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PRO ET CONTRA

Sixth Anniversary of a Controversial Decision

Dr. Miodrag MITIĆ

This year marks the sixth anniversary (on 22 September) of the adoption of UN General Assembly resolution 47/1 which attempted to sort out the status of the Federal Republic of Yugoslavia in the United Nations in the wake of secession and recognition of four former Yugoslav republics. Although adopted as a document of a temporary nature the decision has not taken its final form to this date leaving Yugoslavia, totally unjustifiably and with no clear legal grounds, stripped of some important rights of a member of the United Nations. This precedent, unheard-of in the history of the world Organization, aroused great interest and reaction of a considerable number of renowned experts in international law worldwide. Their reaction could be briefly defined as one of astonishment and consternation at the contents of the resolution and at the way in which it was adopted and put into effect.

International Law and the Status of the Federal Republic of Yugoslavia in the United Nations

Background.- On 19 September 1992, the UN Security Council adopted resolution 777 in which it "considers that the Federal Republic of Yugoslavia (Serbia and Montenegro) cannot continue automatically the membership of the former Socialist Federal Republic of Yugoslavia in the United Nations; and therefore recommends to the General Assembly that it decide that the Federal Republic of Yugoslavia (Serbia and Montenegro) should apply for membership in the United Nations and that it shall not participate in the work of the General Assembly." At the same time, the Security Council "decides to consider the matter again before the end of the main part of the forty-seventh session of the General Assembly".

In the preamble of the resolution the Security Council recalls its resolution 757 which states that "the claim by the Federal Republic of Yugoslavia (Serbia and Montenegro) to continue automatically the membership of the former SFRY in the United Nations has not been generally accepted" and that the Council considers that "the state formerly known as the Socialist Federal Republic of Yugoslavia has ceased to exist".

Only a few days later, on 22 September 1992, the UN General Assembly adopted resolution 47/1 in which it "Having received the recommendation of the Security Council of 19 September 1992 that the Federal Republic of Yugoslavia (Serbia and Montenegro) should apply for membership in the United Nations and that it shall not participate in the work of the General Assembly,

1. Considers that the Federal Republic of Yugoslavia (Serbia and Montenegro) cannot continue automatically the membership of the former Socialist Federal Republic of Yugoslavia in the United Nations; and therefore decides that the Federal

Republic of Yugoslavia (Serbia and Montenegro) should apply for membership in the United Nations and that it shall not participate in the work of the General Assembly;

2. Takes note of the intention of the Security Council to consider the matter again before the end of the main part of the forty-seventh session of the General Assembly."

By comparing Security Council resolution 777 and General Assembly Resolution 47/1 it can be inferred that:

1. Both resolutions contain the position that "the FRY cannot continue automatically the membership of the former SFRY in the United Nations", that it should apply for membership in the United Nations and that it shall not participate in the work of the General Assembly;

2. Unlike Security Council resolution, General Assembly resolution does not contain the position that "the state formerly known as the Socialist Federal Republic of Yugoslavia has ceased to exist";

3. Both resolutions note the intention of the Security Council to consider "the matter" before the end of the main part of the forty-seventh session of the General Assembly.

Let us take up the first assertion: that the "Federal Republic of Yugoslavia cannot continue automatically the membership of the former SFRY in the United Nations". It means that the FRY cannot automatically continue the membership of the SFRY but it does not mean that it cannot do so at all. Therefore, the above assertion does not signify the total and final denial of this right to the FRY but only says that it cannot exercise this right automatically, that some additional conditions are required, some additional procedure (in this particular case, recognition of international legal continuity). The claim that the FRY should apply for membership of the United Nations is logically related to the previous claim (although it seems premature considering that the right to continue membership is not irrevocably denied), but is entirely contradictory to the position in the same sentence that "it shall not participate in the work of the General Assembly". For, the denial of participation in the work of one of the organs of the United Nations is applicable only to a member of this Organization regardless of its time dimension. Why, then, should Yugoslavia apply for membership if its right of participation in the work of one of the United Nations organs - the General Assembly - has been withheld to it (and only temporarily, at that)?

It is indicative that resolution 47/1 does not include the formulation from Security Council resolution - on the basis of which it has been adopted - "that the state known as the SFRY has ceased to exist". This statement of the Security Council has been taken over from the opinion of the so-called Badinter Commission No.8 of 4 July 1992 that "the process of the disintegration of the SFRY referred to in the opinion No.1 of 29 November 1991 has come to an end and that it should be noted that the SFRY no longer exists."(It may be added that a number of reputed legal experts consider that "disintegration" is not a legal term at all).[1] A number of representatives of the member States in the UN General Assembly directly opposed such an arbitrary and unfounded opinion for, as the Badinter Commission itself claims in its opinion quoted earlier, "the existence or disappearance of a State are in any case de facto questions", therefore, its position that federal States have different criteria for their survival is devoid of any legal and real grounds.[2] The more so, since all members of the international community, with the exception of Malaysia and New Zealand, continue to maintain diplomatic relations with the "non-existent State" and have retained their diplomatic missions in Belgrade, while the delegation of Yugoslavia had normally participated, until the adoption of the UN General Assembly resolution 47/1, in the work of all the organs of the United Nations, including the General Assembly.

Thanks to the mentioned opposition of a number of States, the UN General Assembly has not incorporated in its resolution 47/1 the said sentence from Security Council Resolution 777 related to the "disappearance" of Yugoslavia, behind which is the Badinter Commission.

Although both resolutions (Security Council and General Assembly) state the intention of the Security Council to consider "the matter" again before the end of the main part of the forty-seventh session of the General Assembly, the Security Council, six years on, has still not addressed this question. The very intention of the Security Council to consider the matter again is proof enough that the solution in resolutions 777 and 47/1 is not final and that it is of a temporary character.

1. The fact is that 127 member States of the UN voted in favour of resolution 47/1, six were against, with 26 abstentions. It is only natural that such a large number of States voted in favour of the resolution because, shortly before the voting, the then Prime Minister of Yugoslavia had accepted the concept of the resolution, declaring explicitly that the Federal Republic of Yugoslavia would apply for membership in the United Nations (which was one of the cardinal mistakes of the Yugoslav diplomacy in resolving the Yugoslav crisis, by allowing such an unacceptable position to be conveyed from the rostrum of the General Assembly as the official position of Yugoslavia). Why would the delegations of other States arouse anger of the USA and other initiators of the resolution if the official Yugoslav delegation

1. Thus, the former principal Legal Counsel of the United Nations, Prof. Eric Soy (Interview given to the daily "Borba" on 10 April 1992), Prof. Vojin Dimitrijević (Hardly Acceptable Dayton, weekly NIN, 23 February 1996) and others.

2. Badinter "special" criteria for federal States have provoked sharp criticisms by experts in the USA, France, Germany, Belgium, etc.

headed by the Prime Minister endorsed the US standpoint?

At the General Assembly session itself extremely contradictory positions were voiced on the occasion of the adoption of the resolution.

Already during the adoption of resolution 777 in the Security Council, the representative of the USA expressed his satisfaction that the resolution confirms the position "that the membership of the SFRY has ceased and that, since Serbia and Montenegro are not a continuation of the SFRY, they should apply for membership if they wish to participate in the United Nations". According to him "a country which is not a member of the UN cannot participate in the work of the General Assembly".[3]

The position of the representative of the Russian Federation who accepted the concept of the resolution, although it has serious inherent contradictions, is fundamentally different from that of the United States. He proceeds from "the prevailing view in the international community that neither of the republics that have emerged instead of the SFRY cannot claim automatically to continue membership in the United Nations". However, he pointed out explicitly that Russia does not go along with the proposal put forward by some States that the FRY be excluded formally or *de facto* from the United Nations membership. He also stressed that "the decision to suspend the participation of the FRY in the work of the General Assembly will not affect in any way the possibility of participation of the FRY in the work of other organs of the UN, in particular of the Security Council, nor will it affect the issuance of documents or the functioniong of the Permanent Mission of the FRY to the United Nations or the maintenance of the plate with the name of Yugoslavia in the General Assembly and in the meeting rooms of the organs of the United Nations".[4]

The representative of China pointed out that the resolution "does not mean the exclusion of Yugoslavia from the United Nations", that the nameplate of Yugoslavia remains in the General Assembly, that the FRY continues to participate in other organs of the UN except the General Assembly and continues to issue documents in the United Nations.[5] (China abstained from voting). The representatives of India and Zimbabwe most strongly denied the legality of the resolution stressing that no provision of the Charter authorises the Security Council to recommend to the General Assembly that the participation of a country in the General Assembly may be withdrawn or suspended".[6] (Zimbabwe, in addition to Kenya, Tanzania, Swaziland, Zambia and Yugoslavia, voted against the resolution while India abstained).

3. Security Council, S/PV 3616, 19 September 1992, pp.12-13.

4. Ibid. pp.2-5.

5. Ibid. pp.14-15.

6. Ibid. p.7.

2. Immediately after the adoption of the resolution, in view of its extremely vague and confusing wording, attempts were made to interpret it in such a way that Yugoslavia has been excluded from the United Nations. Thus, the missions of Croatia and Bosnia and Herzegovina to the United Nations requested the UN Secretary-General, as early as 25 September 1992, to confirm the exclusion of Yugoslavia from the United Nations. The UN chief Legal Counsel, Under-Secretary K.G. Fleischhauer (former chief legal adviser of the Ministry of Foreign Affairs of Germany and currently Judge of the International Court of Justice) reacted with his letter of 29 September 1992, clearly pointing out that resolution 47/1 "has not been adopted either on the basis of Article 5 of the Charter (suspension) or on the basis of Article 6 (exclusion)", as well as that "it neither terminates nor suspends the membership of Yugoslavia in the Organization."[7]

On 14 January 1994, the permanent representative of Slovenia to the UN, Danilo Tirk, in his letter to the UN Secretary-General repeatedly requested "necessary action that should be taken by the Security Council and the General Assembly with respect to the final termination of the membership of the former Yugoslavia in the United Nations", demanding also that Yugoslavia be removed from the official publications of the UN as depositary of international multilateral treaties. On 31 January, chief Legal Counsel Fleischhauer replied, on behalf of the UN Secretary-General, to the representative of Slovenia drawing his attention to the following:

a) that the Permanent Mission of the Federal Republic of Yugoslavia addressed to the president of the Security Council and the UN Secretary-General, on 27 April 1992, a letter to which was enclosed the text of the Declaration adopted at the joint meeting of the Assembly of the SFRY, the National Assembly of the Republic of Serbia and the Assembly of the Republic of Montenegro, in which it is noted that, "strictly observing the continuity of the international legal personality of Yugoslavia, the Federal Republic of Yugoslavia will continue to exercise all the rights and to fulfil all the obligations undertaken by the SFRY in international relations, including its membership in all international organizations and the participation in international treaties ratified or acceded to by Yugoslavia";

b) that "various States have refused or reserved their position on the claim of the FRY to continue the membership of the former Yugoslavia in international organizations and to continue its international legal personality, among others, Slovenia, but that "nevertheless, approximately five months after the Declaration of 27 April 1992 the representatives of the FRY participated, until 27 September 1992, in the sessions of the UN as representatives of Yugoslavia"; furthermore, that "on 22 September 1992, the Prime Minister of the Federal Republic of Yugoslavia delivered a speech during the seventh plenary meeting of the 47th session of the General Assembly";

7. Doc.UN A/47/485, 29 Septemer 1992.

c) that, on 29 September 1992, he sent separate letters to the permanent representatives of Bosnia and Herzegovina and Croatia to the United Nations, "explaining the viewpoint of the Secretariat of the United Nations on the practical consequences of the adoption of General Assembly resolution 47/1", in which it is noted that the resolution "neither terminates nor suspends the membership of Yugoslavia in the Organization" and that it "does not deny the rights of Yugoslavia to participate in the work of other organs of the General Assembly except the bodies of the General Assembly". The letter notes explicitly that "since the publication of that statement on the practical consequences of the adoption of resolution 47/1 the Security Council recalled that resolution (resolution 821)/1993) and the General Assembly which reaffirmed it (resolutions 47/229 and 48/88) without any objections whatsoever to the interpretation given by the Secretariat;"

d) that until the adoption of General Assembly resolution 47/229 the representatives of the FRY were authorized to participate in the meetings of the Economic and Social Council and its bodies";

e) that in paragraph 19 of its resolution 48/88 of 20 December 1993 the General Assembly reaffirmed its resolution 47/1 and called upon the member States to implement the spirit of that resolution "that the *de facto* working status of Serbia and Montenegro be terminated", but that the viewpoint of the UN Secretariat on the practical consequences of resolution 47/1 has not been changed by paragraph 19 of resolution 48/88 and that, as stated in the report, "the Secretariat is not in a position to take action in regard to the status of the member States in the absence of appropriate decisions taken by the competent organs of the Organization" (document A/48/847, paragraph 16);

f) "although aware that various States refuse or question the claim of the FRY to continue the international legal personality of the SFRY, including the participation in international treaties ratified or acceded to by Yugoslavia, the Secretary-General as Depositary is not in a position to refuse or ignore the claim relating to the question of succession of States, in the absence of any decision on the part of the competent organ representing the international community of States as a whole or of the competent organ of treaties with regard to individual treaties or conventions. Neither one of the General Assembly resolutions deals with this question of international law";

g) "in the absence of the decision of such an organ which would contain the guidelines on the question, the Secretary-General retains the *status quo* with regard to the actions relating to the treaties and references in publications concerning Yugoslavia. For example, since 27 April 1992, the Secretary-General issued three depositary notifications concerning actions with regard to the treaties submitted by the Government of Yugoslavia and relating to the treaties in force in the SFRY. Those were the following actions: deposition of the instrument of acceptance of amendments to the Statute of the World Health Organization (C.N. 153.1993 Treaties-3 of 19 June 1993): communication in respect of the position of the Government concerning the succession of Bosnia and Herzegovina in the Convention on the Prevention and Punishment of the Crime of Genocide (C.N.228.1993 Treaties-3 of 26 August 1993) and notification of the implementation of the Rules of Acceptance and Reciprocal Recognition of Equipment and Spare Parts for Motor Vehicles (C.N.219.1993 Treaties-12 of 29 August 1993). *No objection to the communications has been received with regard to the afore-mentioned notifications*" (emphasis added -MM).

And, finally, "the concluding message" to the permanent representative of Slovenia to the United Nations regarding his intervention "in respect of the definitive termination of the membership of the former Yugoslavia in the United Nations":

"In the light of the above remarks I regret to have to inform you that the Secretary-General is not prepared to accept your requests".

3. Debating on the question of the membership of Yugoslavia in the United Nations in connection with the Memorial of the Government of Bosnia and Herzegovina against Yugoslavia, the International Court of Justice, stating that "this question is one that the Court should not determine definitively and at the present phase of the proceedings", could not but also refer to the controversial General Assembly resolution 47/1, noting diplomatically that "the resolution is not free from legal difficulties". Otherwise, the usual official documents of the International Court of Justice confirm that Yugoslavia is a member of the United Nations and, in that capacity, a member of the Statute of the International Court of Justice.[8]

In the context of the international legal continuity of Yugoslavia, that is, its membership in the United Nations, it is interesting to note another example of the objective position of the United Nations Secretariat which, unfortunately, unlike the mentioned interpretation of the "practical consequences" of General Assembly resolution 47/1, was disgracefully withdrawn at the instance of the separated republics and, first and foremost, of the United States.

As already mentioned, the UN General-Secretary as Depositary, despite the intervention of individual States, treats Yugoslavia in its publications, without interruption, in particular in its summaries of practice of multilateral treaties, as a State party to all multilateral treaties concluded by the SFRY and/or by the FRY. At the beginning of 1996, the Treaty Section of the Office of Legal Affairs of the UN Secretariat issued, in the capacity as the depositary, A Summary of Practice of the Secretary-General as Depositary of Multilateral Treaties which, on p.89, para 297, explicitly says:

"The independence of the new successor State, which then exercises its sovereignty on its territory, is of course without effect as concerns the treaty rights and obligations of the predecessor State as concerns

8. For example, International Court of Justice, Yearbook 1993-94, No.48, p.67.

its own (remaining) territory. Thus, after the separation of parts of the territory of the Union of Soviet Socialist Republics (which became independent States), the Union of Soviet Socialist Republics (as the Russian Federation) continued to exist as a predecessor State, and all its treaty rights and obligations continued in force in respect of its territory. *The same applies to the Federal Republic of Yugoslavia (Serbia and Montenegro), which remains as the predecessor State upon separation of parts of the territory of the former Yugoslavia"* (emphasis added - MM).[9] On 1 April 1996, the representatives of the four separated republics applied to the UN Secretary-General opposing the interpretation of the General Secretary referred to above and, on 8 April, the letter of the permanent representative of the United States, Madeleine Albright, arrived at the address of the Secretary-General. In her letter, M. Albright draws the attention to "the concern in connection with the publication" and "in accordance with the instructions from the Government of the United States, points out that paragraph 297 may be interpreted in such a way that the Federal Republic of Yugoslavia (Serbia and Montenegro) constitutes the continuity of the former SFRY". "The position of my Government", continues Mrs Albright, "is that the SFRY has ceased to exist and that none of the newly emerged States constitutes its continuity and, consequently, as long as the wording of paragraph 297 of the Summary is contrary to the described legal situation, my Government wishes to note that it is strongly opposed to it". The letter is concluded with the statement that "our views on this question should not be understood as interference in relation to any other position in the Summary". In other words, it is the only thing that bothers the US and it should be eliminated.

Already the next day, 9 April 1996, the UN Secretariat promptly reacted - distributing "Errata" under No. LA 41/TR/220, in which it is noted:

"Paragraph 297 should read:

In the absence of provisions which set specific conditions for succession or which otherwise restrict succession, the Secretary-General is guided by the participation clauses of the treaties as well as by the general principles governing the participation of States. The independence of the new successor State, which then exercises its sovereignty on its territory is without effect on the treaty rights and obligations of the predecessor State in its own (remaining) territory. Thus, after the separation of parts of the territory of the Union of Soviet Socialist Republics (which became independent States), the Russian Federation continued all treaty rights and obligations of the predecessor State."

And what about the case of Yugoslavia? It simply disappeared; it was eliminated from the text. It would be ridiculous, if not impossible, to assume that the previous comments of the UN Secretariat were the result of some influence or, God forbid, pressure of Yugoslavia on its authors. But, they were obviously a mistake. A political one of course because the honourable legal experts of the United Nations did not take into account the position of the leading member State of the United Nations.

Positions of the authors of international law.- A large number of renowned authors of international law made strong critical remarks about the application of international law to the Yugoslav crisis, more specifically to the status of Yugoslavia in the United Nations, and about Resolution 47/1.

In addition to the fact that the majority of them are agreed that General Assembly resoluton 47/1 has no grounds in the United Nations Charter, because neither a case of exclusion nor of suspension is involved - clearly determined in Arts. 5 and 6 of the Charter - a certain number of authors openly admit that here we are dealing with a case of punishment unprecedented in the history of the world Organization. Thus, writing about resolution 47/1 and non-acceptance of the continuity of Yugoslavia, the British author, Colin Warbrick, considers that it was essentially a kind of punishment, one of "the weapons for political pressure".[10] A similar opinion was expressed by the Austrian Professor of international law, Waldemar Hummer. He pointed to the fact that out of eleven cases of "succession" of membership in the United Nations so far, only in the case of Yugoslavia was the established practice of continuity abandoned and that "discontinuity was deliberately accepted in spite of the existence of objective and subjective criteria of identity.[11] According to him, such an outcome is based, quite clearly, less on dogmatic considerations and much more on aspects of sanctions. Such an opinion has also been given by a prominent Yugoslav expert in international legal affairs, Prof. Obrad Račić, who considers that this absolutely unstatutory decision means in the first place a political warning to Yugoslavia because of its behaviour. "The statement that the State formerly known as the SFRY has ceased to exist, as far as the author of these lines can remember, is the first 'judgement' of this kind in the history of the United Nations".[12] The British author, Marc Weller, also admits that the question of continuity and/or recognition was only a punitive means in the case of Yugoslavia. He also claims that in dealing with the Yugoslav crisis the international community acted in a confused and inconsistent way.[13]

9. Summary of Practice of the Secretary-General as Depositary of Multilateral Treaties, prepared by the Treaty Section of the Office of Legal Affairs, UN Doc.ST/LEG/8.

10. Colin Warbrick: Recognition of States, International and Comparative Law Quarterly, Vol.42/1993, p.440.

11. Waldemar Hummer: Probleme der Staatennachfolge am Beispiel Jugoslawien, Schweizerische Zeitung für Internationales and Europeisches Recht, No.4/1993 p.457.

12. Obrad Račić: Yugoslavia: Discontinuity of Membership in the UN, Yugoslav Review for International Law, No.1-2/1993, pp.42-45.

13. Marc Weller: International Response to the Dissolution of the SFRY, American Journal of International Law, No.86/1993, p.605.

That these and similar assertions of a number of authors of international law are well founded is confirmed also by the debate in the Security Council on the occasion of the adoption of resolution 777, which was the initial proposal for resolution 47/1. On the same occasion the representative of the Russian Federation, inter alia, said:

"The reached compromise that the Federal Republic of Yugoslavia should not participate in the work of the General Assembly may seem unsatisfactory to some. Frankly speaking, we would have preferred not to have taken such a measure in order to exert influence on the Federal Republic of Yugoslavia, because even without this measure it suffers sufficient pressures of the international community in the form of economic sanctions. But we found it possible to agree with *this gesture of condemnation by the world community* (emphasis added - MM), implying that with a view to making full contribution to the resolution of world problems dealt with in the General Assembly, the Federal Republic of Yugoslavia must take all possible measures for an early termination of the fratricidal conflict in the region."[14]

The reputed world authors of international law have expressed critical remarks about resolution 47/1 in much stronger and uncompromising terms than is the diplomatic, obfuscated statement of the International Court of Justice that the resolution "is not free from legal difficulties".

Thus, a former member of the UN International Law Commission, Rosalyn Higgins, (otherwise very critical about the behaviour of the Serb and/or the Yugoslav side) has some very serious objections to make about the resolution: "The resolution says that Yugoslavia should apply for membership in the United Nations. But the resolution neither suspends nor terminates the membership of Yugoslavia in the UN. The consequence is *abnormal to absurdity* (emphasis added - MM). The seat and the name of the country remain the same as before. The old Yugoslav flag continues to be flown in the 42nd Street. Yugoslavia remains a member of the United Nations, which does not mean Serbia and Montenegro, but Yugoslavia in its entirety. But Croatia, Slovenia and Bosnia and Herzegovina are also members. Now, as we can see, they do not appear on the UN financial list where there exists only Yugoslavia. This is obviously unsatisfactory from a legal point of view."[15]

The Israeli Professor of international law, Yehuda Blum, considers unambiguously that the negation of international legal continuity of Yugoslavia is not legally grounded. Commenting on resolution 47/1 he says:

"Unusually and inconsistently, the allegedly non-existent Yugoslavia continues to keep its seat (with nameplate) in the General Assembly and its flag is fluttering in front of the United Nations, together with the flags of the other member States.

"The Yugoslav delegation is not allowed to participate in the debates in the General Assembly, nor to vote; however, it continues to attend the meetings. Thus, Yugoslavia has actually been suspended from the work of the General Assembly until the Security Council reconsiders the decision before the end of the main part of the forty-seventh session of the General Assembly, in the manner not provided for by the Charter and which is in collision with its Article 5. The procedure resorted to has brought disorder into the criteria which were adhered to in many respects by the United Nations and the international community for decades."[16]

The already quoted Austrian Professor Hummer comments on resolution 47/1 in the following way:

" Thus the situation in respect of the membership of 'Yugoslavia' in the United Nations is defined in the following way: in a completely *sui generis* way the seat and nameplate remain in the General Assembly, as well as the flag of the SFRY in front of the UN although this State should have disappeared through dismemberment(!). On the other hand, the Federal Republic of Yugoslavia which has never applied for membership and, consequently, could never have been admitted, has been excluded (sic) from cooperation in the General Assembly and instructed to initiate a formal procedure for admission to membership. Since the 'cooperation' affects only participation in consultations and voting - the Federal Republic of Yugoslavia may, without ever being admitted to membership, participate in the meetings of the General Assembly and in all other organs of the United Nations and continue fully to take part. Consequently, what is involved in this construction is only the suspension of cooperation of the Federal Republic of Yugoslavia in the UN General Assembly, under the reserve of a different decision of the Security Council 'before the end of the main part of the forty-seventh session of the General Assembly'".[17]

The well known German expert in international law, Professor K. Partsch, commenting on resolution 47/1 speaks about "freezing of membership rights", with an ironical remark that,"from a purely legal aspect, it is surprising that a State which does not exist any more continues to belong to the Organization, retains its representatives also in organs other than the General Assembly, and can continue to cooperate."[18]

The already quoted chief Legal Counsel of the United Nations for many years, Prof. Eric Soy, says

14. Security Council, S/PV 3116, 19 September 1992, pp.2-5.

15. Rosalyn Higgins: The United Nations and Former Yugoslavia: International Affairs, Vol.69/1993, p.479.

16. Yehuda Blum: UN Membership of "New" Yugoslavia: Continuity or Break?, American Journal of International Law, Vol.86, No.4/1992, p.833

17. W. Hummer: Op.cit., p.453.

18. K. Partsch: Belgrads Leerer Stuhl in Glaspalast, Das Einfrieren der UN Mitgliedschaft Jugoslawiens durch Sicherheitsrat und Generalversamlung, Vereinte Nationen, No.40/1992, p.187.

that "the position on 'disintegration' which would mean a total disappearance of Yugoslavia cannot be defended from the legal aspect".

Prof. Soy also claims that:

"Although territorially reduced, Yugoslavia retains its identity of a State with its international rights and obligations ... Such a position has always been defended by West Germany which claimed that it represents the continuation of Germany regardless of the 'rump' territory. Holland remained Holland even after the separation of Belgium".[19]

Prof. Soy considers that Yugoslavia can invoke the example of the Russian Federation, as well as the case of India and Pakistan, Pakistan and Bangladesh, where the newly created States applied for membership in the United Nations, while the predecessor States (Russia, India, Pakistan) remained members of the UN. He also adds that "it is up to international organizations to decide", believing already at that time, before the adoption of resolution 47/1[20], that "politics will continue to play the decisive role", stressing that Serbia and Montenegro have "strong arguments and numerous precedents which are in their favour".

Denying the right of individual Yugoslav republics to secede, the Italian Professor of international law, Aldo Bernardini, (supporting the same thesis of his colleague and compatriot, former president of the International Tribunal for the Former Yugoslavia, Antonio Cassese, that the secession in Yugoslavia was carried out contrary to both international and internal law[21]), claims that "up until the establishment of consolidated extinction the international 'legitimacy' of the existing State entity of Yugoslavia should be considered lasting".[22]

Strongly criticising the Badinter Commission for ignoring many principles of international law (inviolability of frontiers, the right of peoples to self-determination, non-interference in internal affairs of other States), Professor of international law at the Fletcher University (USA), Horst Hannum, argues that it is "unknown in international law that the internal constitutional structure of a State is relevant for the question of whether that State exists or not as a fact in international law", adding that "non-genial position of the European Community is proof of the confusing European approach to secession as a component of self-determination".[23]

Professor Hannum takes a very critical view of the thesis on the disintegration and/or dissolution of Yugoslavia, which constituted the basis of Badinter's opinion and later on also of Security Council resolution 777, as well as of General Assembly resolution 47/1, claiming, like many other Western international lawyers, that it is a question of secession:

"The cases of Yugoslavia and the Soviet Union were considered to be cases of dissolution and not secession despite the evident fact that secession is precisely what happened in Yugoslavia".

Hannum, like a number of other foreign authors, speaks of the falsification committed by the Badinter Commission in its opinion on the principle *uti possidetis,* omitting the second part of the sentence from the decision of the International Court which entirely changes the meaning. According to him, in the Yugoslav case " the traditional international practice of non-intervention in civil wars has been replaced by a selective rule which prohibits some central governments (for example, to Belgrade) to suppress secession by force, but accepts the use of force by some others (for example, Colombo and New Delhi) and has yet to decide about even more difficult cases (for example, the Kurds and the Tibetans)." According to him, "much more dangerous is the unfounded suggestion of the Badinter Commission that the statehood of a federal State is something less solid than the statehood of a unitary State if one or several constituent units wish to separate." Expressing the opinion that "the political validity of the opinion of the Commission is equally dubious" (as well as legal), Hannum quotes the view of an American author, Benedict Kingsbury, that the activity of the European Community in the case of Yugoslavia "constitutes an amalgamation of often contradictory and irreconcilable considerations concerning the existing right, order and justice".[24] He wonders cynically whether the opinions of the Badinter Commission mean " a long sigh for self-determination or only the death rattle of the Austro-Hungarian and the Ottoman Empires".[25] Among such ironical remarks addressed to the Badinter Commission is certainly the correct observation that it "reinforced the principle of territorial integrity only when the new States had been recognized". The renowned American specialist in international law, Prof. Thomas Franck, is thinking along the same lines, judging the Yugoslav case as "the first confrontation in Europe in order to test the survival of the territorial integrity against the post-modern neotribalistic claim to the right to self-determination".[26] Speaking about the extension of the powers of the Security Council, Franck observes that "the sanctions under Chapter VII imposed despite the fact that the conflict in Yugoslavia had initially developed in a State that is still a member of the United Nations" and that the preamble of the Security Council resolution "attempted to make blunt the edge of the precedent by pointing out at its beginning 'that Yugoslavia welcomed the convening of the Security Council meet-

19. Eric Soy: quoted Interview, p.17.

20. Eric Soy: quoted Interview, p.17.

21. Antonio Cassese: Self-Determination of Peoples. A Legal Reappraisal. A Grotius Publication. Cambridge University Press, p.273.

22. Aldo Bernardini: Yugoslavia - Self-Determination of Peoples or Regions, Il diritti del uomo, translation of Tanjug Press, 1 September 1995, pp.16-20.

23. Horst Hannum: Self-Determination and Europe, Old Wine in New Bottles? Transnational Law and Contemporary Problems, Vol.3, No.1/1993, p.64.

24. Ibid., p.67.

25. Ibid., p.66.

26. Thomas M. Franck: Fairness in International Law and Institutions, Oxford 1995.

ing'".[27] (The author notes that the representative of Ecuador expressed the hope at the meeting of the Security Council that the crisis will not undermine the principle of unity and territorial integrity of the State and that his position was supported by Zimbabwe, India, China and Zaire, whose representatives stressed that the secessionist civil war, except in case of Yugoslavia's consent, is outside the powers of the Security Council").[28]

The chief legal counsel of the State Department, Edwin Williamson, speaking about the problem of international continuity in the American Society of International Law on 1 April 1992, that is, almost half a year before the adoption of resolution 47/1, advocated the standpoint that for continuity, in addition to the principled position of the UN Legal Committee in connection with the case of India, " the existence of one or several following elements: substantial part of the territory (including the historical territorial nucleus), the majority of the State's population, resources and armed force, the seat of the government and the name of the former member" are of significance.[29]

The special rapporteur of the UN Commission for International Law, commenting on the positions of the United States Government on the notion of dissolution and separation, at the meeting of the said Commission in 1974, said: "There is a clear theoretical difference between dissolution (disintegration) and separation of one part of a State. Indeed, the US Government itself identified this difference. In the first case the predecessor State disappeares; in the last case, the predecessor State continues to exist after separation. Let us take one example which is not difficult to imagine: a State A consists of four parts, each of them being territorially separate in some measure and each of them has a different ethnic and cultural background. If one part separates from the State A, the international legal personality of the State A will continue in force. If, on the other hand, the State disintegrates and each one of the four parts becomes independent, the international legal personality of the State A will disappear. Of course, it is possible for one of the four parts to continue to be considered as the State A and to enjoy its international legal personality. Then, what would otherwise be considered a case of dissolution, will be considered a case of separation of parts of a State".[30] The conclusion that can be drawn is that continuity is not excluded even in the case of complete separation of all parts of a State (which is clearly not the case of the SFRY)! Secession in Yugoslavia not only has not affected one half of the territory and of the population which has remained in the common State (FRY), but the fact is that more than two thirds of the population which constituted the majority population of almost three fourths of the territory of the former SFRY (including the Republic of Srpska and the Republic of Serb Krajina) opted against secession.

One of the renowned European authors of international law, Professor at the Brussels University, Jean Salmon, presented in the Belgian Review of International Law, in an extremely unbiased way, a few months before the adoption of resolution 47/1 (June 1992), the problem of recognition of States and of continuity in connection with the cases of the USSR and Yugoslavia.[31] Salmon notes that the European Community, including Belgium, in the first phase, rightfully took a passive and cautious position on the separation of Slovenia and Croatia. This was dictated by the incontestable principles of international law: the principle of non-interference in internal affairs and respect for the sovereignty and integrity of States". Then comes the Badinter Commission and the Declaration of the European Community about Yugoslavia setting conditions for recognition.

"Recourse to the 'Arbitration Commission'" which *takes political decisions under the guise of law* (emphasis added - MM) cannot deceive anyone. First of all, because it follows from the text that the Twelve held a meeting (meeting in connection with recognition - our remark). Besides, already the next day, without waiting for the position of the Commission, Chancellor Kohl declared that the FR of Germany was going to recognize Croatia and Slovenia on 15 January. And also because the commission was termed "arbitration", in no respect does it appear to be an institution of international public law having the same name. It was not set up by the parties to the dispute. It was comprised of five presidents of the constitutional courts of the member States of the Community, headed by Robert Badinter. However prestigious and experienced in constitutional law its members may be, this fact attributes no special competence to this institution in terms of international law; still less does it confer the right to it to take decisions on problems associated with internal affairs of countries which are not members of the Community, *let alone its objectivity and minimum guarantees for the procedure which would rightfully be expected from an organ termed "arbitration commission"* (emphasis added - MM). Strongly criticising the documents of the European Community and its activity the author ironically refers to the thesis on disintegration, launched by the European Community, as "the chronicle of announced death". He wonders on what grounds Serbia and Montenegro, that is, the FRY, are not allowed to be the legal successors of Yugoslavia, as is the case with Russia, adding that there is no legal basis for a different treatment. Salmon says:

"The real problem is completely glossed over. Did the republics have the right to carry out separation without the consent of Yugoslavia or without the con-

27. Ibid., p.237.

28. Ibid., p.163.

29. American Society of International Law, Panel on "State Succession and Relations with Federal States", Gold Room-Rayburn House Office Building, Washington, US State Department, p.10.

30. Yearbook of International Law Commission, 1974, Vol.II, pp.69-70.

31. Jean Salmon, Professeur ordinaire a l'Universite Libre de Bruxelles: Reconnaissance d'Etats, Revue belge de droit international, vol.XXV, 19921, pp.226-239.

sent of all the republics as was the case with the USSR? In order to evade the question a tertium genus was invented - unknown in international law: a State in the process of dissolution ... If no agreement between the interested parties is reached, it is not clear how it would be possible to abandon the framework of international public law in the field of secession: it is an internal question, there is no application of Article 2, para 4 of the Charter since this article is only applicable when "international relations" are in question; however, the principles of non-interference by third parties, respect for the sovereignty and territorial integrity of States, restraint from premature recognition" are applicable. The author comments that it "could be thought that we reverted to the law of 1815, when a few powers gathered at a congress (Vienna) decided the fate of other European peoples", noting that at that time the right of Holland to preserve its name was not denied despite the separation of one half of the territory, as the same right was not denied to Pakistan following the secession of Bangladesh.

Quoting the opinion of the Badinter Commission, that is, the position of the European Community that Yugoslavia is in "the process dissolution" and that "it is up to the republics to resolve the problem of succession", Salmon claims that this argumentation is convincing *by no means* (emphasis added - MM). "In it opposed are, as if representing antinomes, the concepts of "continuity" and "succession". There is no legal obstacle whatsoever for one part of a dismembered State to be the legal continuer of the predecessor State. Of course, that part can be the legal continuer only for the remaining territory. The State that continues to exist and the newly emerged States represent, all of them taken together, the successors of the former entity. In other words, the fact that one of the successors considers itself the continuer of the former State does not affect in any way the process of the State succession since this continuer is not the only one. The fact that a State has changed its constitution after secession does not mean that it does not exist any more as a State entity in relation to third countries".

Commenting on the position of the Badinter Commission on the question of the right of the Serb people in Bosnia and Herzegovina and in Croatia to self-determination, Salmon concludes:

"Here again we are astonished at the inadequacy of the explanation. We are dealing with assertions, official decisions. *Not a trace of any rationale behind* (emphasis added - MM). Namely, the right of peoples to secession has not been known in international law so far. No more for a part of a federal State than for a part of a federal unit. There is no reason in law to accept the right to self-determination, for example, of Croatia and for the same right to be denied to a part of the Croatian territory inhabited by Serbs. Or, it is proceeded from the criterion of numerical strength, in which case the arms will decide; or, it is proceeded from the wish of the population as the criterion, in which case *there can be no discrimination* against a part of the population by denying it something that has been granted to the other part. However, it is quite obvious that the drama created by secession is in that it provokes chain reaction".

Furthermore, Salmon rightly argues that the conditions of recognition of States set by the European Community (rule of law, democracy, human rights) are "certainly honourable", but are not provided for by the Charter of the United Nations as conditions for membership in the world Organization. In respect of recognition, Salmon claims, Europe imposed its conditions "more hastily" than in the case of the USSR.

Prof. Salmon's article ends with the conclusion which sublimates the whole problem of international legal continuity in the case of Yugoslavia and quite clearly reveals the political background of the problem that will be brought out into the open a few months later in resolution 47/1:

"We will point out another inconsistency: if the process of dissolution of a federation is in question, as was the case with the USSR, why not allow one of the parts to be the continuer of the predecessor State? Unless of course what is involved is simply a way of *punishment of someone who plucked the courage not to bow to the will of powerful neighbours?*" (emphasis added - MM).

The German Professor of international relations, Hans Maull, although using the language from the arsenal of anti-Serb propaganda such as "Serb aggression", quite openly speaks about "pro-Croatian partiality" of Bonn's policy, undue recognition of internal borders and the insistence of the Government of the FR of Germany on the recogntion of Croatia. He states that Chancellor Kohl had previously promised Tudjman that Croatia would be recognized, that Genscher declared, on 16 December 1991, that Germany was going to recognize Croatia even in the case of the Badinter Commission being against (!) and that the German policy went through with recognition despite the strong opposition not only of France and Great Britain but also of Lord Carrington, Cyrus Vance, UN Secretary-General Peres de Cuellar, US Secretary of State James Baker and US President George Bush himself.[32] He argues that Germany helped Croatia evade the imposition of sanctions, while "the direct catalysers of the war in Bosnia were the referendum which the Arbitration Commission of the European Community imposed on Bosnia and the recognition of Bosnia and Herzegovina by the United States and the European Community as a result of the strong pressure by the United States." Professor Maull claims that "throughout the whole conflict Bonn considered Croatia and its leader Tudjman as a protege of the German foreign policy" ("although Tudjman heavily depended on Bonn, he had a trump card in his hands - had the West exerted greater pressure on him, he would have driven out the Bosnian refugees from Croatia, the great majority of whom

32. Hans W. Maull: Germany in the Yugoslav Crisis. Survival, The ISSS Quarterly, No.4, Vol.37, Winter 1995-96, pp.99-130.

would have gone to Germany"). Maull also criticises the European Community's inconsistency in recognizing Croatia, contrary to the opinion of the Badinter Commission.

The former special representative of the UN Secretary-General for Yugoslavia, Yasushi Akashi, says that "the two most difficult conceptual issues revolve around the notions of self-determination and sovereignty. The mediator is confronted with a subjectively valid question: do the Bosnian Serbs have the same rights to self-determination as all the other ethnic groups in the former Yugoslavia? Are internationally recognized borders inviolable? Why, in the case of Ethiopia, are the Eritreans permitted to secede if the Bosnian Serbs are not? The issues are endless. The sense of injustice runs deep on all sides. Faced with these questions, and in the absence of a clear political framework in which to operate, the United Nations can achieve nothing more than a temporary respite from the fighting". Akashi himself, although still bound by the obligations in the hierarchy of the United Nations and the limits deriving from them, cannot help mentioning precisely partiality and one-sidedness shown by the internationa community in the solution of the Yugoslav crisis:

"The additional tasks given to UNPROFOR, particularly those under Chapter VII of the UN Charter, have obliged UNPROFOR to contain the conflict and mitigate its consequences by imposing constraints mainly upon one of the parties. Those tasks have created a great deal of confusion as to the nature of UNPROFOR: was it a peace-keeping or a peace-enforcement operation? This ambiguity, which still plagues the mission today, has affected its credibility with the parties, the Security Council and the international community as a whole".

Noting that "disagreement among the key countries at the international level has prevented a coherent and unified policy" Akashi points out as the first condition for a successful action of the United Nations the need to have "the collective will of the international community identified and summarised in an unambiguous and coherent way". According to him, after the Cold War and a rare use of the veto the number of unanimously adopted resolutions drastically increased in which "however, there are often serious ambiguities". He says that questions are increasingly raised as to whether the Security Council, with its present structure, is the real representative of the international community. Another problem, according to him, is that the United Nations does not dispose of the independent enforcement means[33] but depends on the consent of others.

Two important gatherings of experts in international law held in the USA and Germany devoted to the status of Yugoslavia in the United Nations.- In addition to the opinions of individual experts in international law, it should be pointed out that, in the course of 1996, two important meetings were held in the USA and Germany dedicated to international legal aspects of the Yugoslav crisis and, in particular, to the status of Yugoslavia in the United Nations and/or resolution 47/1.

The first meeting was held in Washington from 27 to 30 March 1996 within the annual meeting of the American Society of International Law.

In his introductory remarks on the theme of "Yugoslavia" Ambassador Herbert Okun, a former UN mediator for Yugoslavia, stressed that "many important international law aspects of the Yugoslav conflict have been ignored or slighted in the welter of commentary".

"This is unfortunate, but perhaps one should also note out that this lack of attention to international legal norms and standards was also a hallmark of the international diplomacy that sought to solve the Yugoslav problem, particularly in the early crucial stage 1991-1992" notes Ambassador Okun. He illustrated this with how the European Community proceeded to act toward its own (Badinter) Commission "treating its opinions as if they were items on a table d'hote menu" claims Okun. According to him" key instances where international law could have helped diplomats - vital issues such as the recognition of States - were either ignored or forgotten by the diplomats."[34]

One of the participants in the debate, Susan Woodward from the Brookings Institution, answering the basic question asked by the theme "Are International Institutions Doing Their Job?", said resolutely "No", especially in the case of Yugoslavia. "We must accept and think seriously about the total and absolute disregard for precedent in international law by the major powers and by European institutions in the Yugoslav crisis." - was the conclusion of S. Woodward. She is of the opinion that the legal precedent of the territorial integrity of Yugoslavia should be primarily considred.

"Now the principle of territorial integrity is being imposed upon Bosnia-Herzegovina, or you might say reinforced, without sufficient means. In either case, the effort of the international community now to defend the integrity of Bosnia would not have been necessary had the principle not been violated in the first place. This began before either Croatia or Slovenia took the step of declaring their independence on the basis of the legal/constitutional right to national self-determination under the Yugoslavia Constitution, which - as a point of constitutional interpretation within Yugoslavia - is not at all a clearly defined right. Nonetheless, it was a right that the European Parliament had already seen fit to declare a legal principle in March 1991." S. Woodward considers that this demonstrates "an absence of procedure, meaning an accepted, legal and formal procedure for recognising States." She claims that the Badinter

33. Yasushi Akashi: The Limits of UN Diplomacy and the Future of Conflict Mediation, Survival, Vol.37, No.4, Winter 1995-96, pp.83-98.

34. American Society of International law, Proceedings of the 90th Annual Meeting, March 27-30, 1996, Washington D.C., p.471.

Commission was established at the suggestion of the Slovene government to resolve and arbitrate economic questions, prior to the establishment of the first of three peace conferences. She says that Badinter himself has said that "such a Commission, particularly with its mandate to arbitrate economic questions, cannot arbitrate questions as fundamental as the fate of a people." Her conclusion is that the Commission was inappropriately used and its advice to the European Community foreign ministers on the conditions for recognizing the sovereignty of each of the four applying republics was ignored". She considers that the recognition of the independence of Slovenia and then of Croatia "was not only done preemptively, without any formal procedure devised in advance, but was also a procedure denied to the other four remaining republics of Yugoslavia".

"The Germans won in the political struggle within Yugoslavia over recognition. Germany's idea was based upon its own experience at the time, and it assumed that a referendum for the union of two previously united but then dissolved parts of Germany was appropriate, as well, to the disunion of a country. But these are two fundamentally different acts"- concludes S. Woodward.[35]

Abram Chayes of the Harvard University Law School considers that "the prompt recognition of states in the former Soviet Union was on the whole right, despite the fact that in most of those cases there was no credible provision for the protection of minorities. In the Bosnia and Croatia cases, however, it seems to me that the failure to attend to that problem was a serious mistake in the previolence period". He noted that the case of Nicaragua shows that it is not appropriate for a State unilaterally to intervene to assist secessionists in order to promote those objectives.

Professor Woodward pointed out that two elements are particularly characteristic for the crisis in Yugoslavia. One is that "the policies of international organizations led to increasing political disintegration". The second element is that there was no reason to do it violently. According to her, there were ways to negotiate the conflicts over republican rights, the borders of the nations and the right to self-determination. The conclusion is very interesting:

"Since the outsiders were willing to break up Yugoslavia and support separate States but unwilling to recognize that they were supporting incompatible principles - there was no alternative to war for many people on the ground".[36] She points out that there was no effort made to insist on an all-Yugoslav plebiscite on the issue of dissolution. There was never an effort to pressure Slovenia, in exchange for waiting for independence, to go ahead with its internal commitment to federal elections.

Professor Dinstein pointed out that "to suggest that the Soviet Union, Yugoslavia and Czechoslovakia committed suicide is, frankly speaking, unhistorical".

35. American Society, p.311

36. Ibid., p.487

He claims that Slovenia and Croatia and, later on, Bosnia and Herzegovina, separated and that they were prematurely recognized by the international community" while "Yugoslavia has not yet consented to dismemberment; the result is the bloodshed which is not yet finished":[37]

Surely, the most important remarks at the said gathering were those of one of the four panelists, Larry Johnson, the third highest placed person in the hierarchy of the United Nations Office of Legal Affairs[38], who is a UN insider. He focused on a certain number of points that, according to him, have, after Dayton, yet to be resolved.

"These questions relate to the status of Yugoslavia in the United Nations: Is it a member of the UN or is it not? Has the Federal Republic of Yugoslavia taken over the seat of the former Socialist Federal Republic of Yugoslavia or not and, if not, why not? What is the status of multilateral treaties entered into by the former Yugoslavia?"

Describing the procedure of the adoption of resolution 47/1, Johnson presented the position of the UN Legal Committee taken in connection with the secession of Pakistan from India, which is considered a UN position of principle:

"1. As a general rule, it is in conformity with legal principles to presume that a State which is a Member of the UN does not cease to be a Member simply because its Constitution or its frontiers have been subjected to changes, and that the extinction of the State as a legal personality recognized in the international order must be shown before its rights and obligations can be considered thereby to have ceased to exist.

2. When a new State is created, whatever may be the territory and the populations which it comprises and whether or not they formed part of a State Member of the UN, it cannot under the system of the Charter claim the status of a Member of the United Nations unless it has been formally admitted as such in conformity with the provisions of the Charter.

3. Beyond that, each case must be judged according to its merits."

Johnson says that, applying these principles to the case in point, the question is: has it been shown that the international legal personality of the former Yugoslavia, recognized in the international order has been extinguished?

In an attempt to answer this question he says:

"Resolutions of the Security Council and the General Assembly do not particularly help. They are internally contradictory and inconsistent. First, the General Assembly does not repeat the preambular paragraph concerning the former Yugoslavia ceasing to exist. Second, the resolutions say that the Federal Republic of Yugoslavia cannot automatically continue the membership of the former Yugoslavia, thus implying that it could so continue if something happened - such as a decision confirming or rejecting the

37. Ibid., p.317

38. Now Chief Legal Counsel of IAEA .

claim of continuity by the relevant organs. However, the resolutions go on to say that "therefore" the Federal Republic of Yugoslavia "should" apply for membership and that it cannot participate in the General Assembly. But that makes no sense since normally you do not continue a membership by submitting a new application for membership. So perhaps the phrase meant that only the relevant organs - not the Federal Republic of Yugoslavia unilaterally - could decide the matter and that the submission of an application for membership would be the appropriate way to resolve that question.

Some say that the most logical interpretation is that, by deciding that an application should be submitted, the two organs have in effect stripped Yugoslavia of membership. After all, normally there would be no need to submit an application for membership if the State were already a member. There are two problems connected with that approach: First, the Charter provides in Articles 5 and 6, respectively, the procedures for suspension of the rights and privileges of membership and for expulsion from the Organization. No one claimed that the resolution in question was adopted pursuant to those Articles. Another problem with the position that the Federal Republic of Yugoslavia had been stripped of membership is the final clause of the decision: that the Federal Republic of Yugoslavia shall not participate in the work of the General Assembly.

At this point, one may allude to the legislative history in the Security Council - hardly comforting to those seeking evidence of unity and clarity of purpose. The United States made it clear - after the vote - that it considered the final clause as stating the obvious since clearly if the FRY was not a member it could not participate in any UN body; however, two other permanent members had exactly the opposite understanding. For the Russian Federation, which spoke before the decision and voted in favour, and China, which spoke after the decision and abstained, the resolution does not affect Yugoslavia's membership nor did it affect the participation of the representatives of the FRY in other organs of the United Nations, such as the Economic and Social Council (ECOSOC) and its subsidiaries, the Security Council or others. Both States, in their explanations of vote explicitly stated their understanding that the resolution did not take away the nameplate of the country in UN meeting rooms, even if no one could sit behind it in the General Assembly. They also made clear their view that the resolution in no way affected the right of the Federal Republic of Yugoslavia to circulate documents and to maintain its missions to the United Nations. In the General Assembly, a number of speakers expressed disagreement with, among other things, the procedure used, the ambiguity of what was being done and opposition to the decision having been initiated by the Security Council when it was the General Assembly's exclusive concern. I would point out that the British representative, when introducing the resolution in the General Assembly, stated that it meant that no representative of the FRY (Serbia and Montenegro) will sit in the seat of Yugoslavia in any organ of the Assembly. This sounds as if the nameplate for Yugoslavia is to remain, in which case, why have a nameplate for a nonmember?

By the way, immediately following the British introduction as the "kick off" speaker for the debate on the proposal, the General Assembly heard none other than Mr. Milan Panić, introduced as the "Prime Minister of the Federal Republic of Yugoslavia". To make matters even more unclear, Mr. Panić, in the middle of his speech said: "I herewith formally request membership in the United Nations on behalf of the new Yugoslavia, whose Government I represent". The United Nations never received any written follow-up to that statement.

At this stage I should refer to the political context in which all of this was happening. At the same time that there were calls for additional sanctions against the Federal Republic of Yugoslavia, some States did not want to punish Mr.Panić and his chances for success in his campaign to unseat Milošević in the upcoming elections for President of Serbia. It was said that this measure was purely temporary and if Mr.Panić won the election he would surely make good on his promise to apply for membership and the whole situation would change. Now was not the time for arcane legality to get in the way of a political decision. That is what is behind the second paragraph of the resolution, which anticipated that by mid-December the Security Council would revert to the matter and the transitory decision taken three months earlier would be somehow set right. Well, here we are three-and-one-half years later with the same, unsatisfactory, transitory situation.

In addition, it was said that neither Russia nor China would support all-out suspension or expulsion under the Charter. The most, from a political and practical point of view, that they would accept was to follow the South-African example - maintenance of membership, nameplate, delegates and flag - but no representation in the General Assembly. Of course, the South-African case was based on rejection of Assembly credentials whereas in this case the basis was a succession-to-membership question - fairly understandable to international lawyers but not very interesting for political delegates. Needless to say, *no advice was sought from the UN lawyers* (emphasis added - MM) and I would frankly be surprised if the advice of many delegation legal advisers was sought or followed."

Johnson goes on explaining how only after the adoption of the resolution the opinion of the then UN Legal Counsel was required and that he concluded that resolution 47/1 *"did not terminate or suspend Yugoslavia's membership in the United Nations* (emphasis added - MM) but had only one practical consequence: the representatives of the FRY could not participate in General Assembly bodies, but they could participate in other organs of the United Nations. Johnson also quoted the statement of the International Court of Justice mentioned earlier that resolution 47/1 "is not free from difficulties". He

pointed out that most of the UN specialised agencies adopted decisions similar to the General Assembly's regarding the status of Yugoslavia. In respect of multilateral treaties for which the United Nations acts as depositary, Johnson informed the participants about the position of the Secretary-General that the *status quo* should be maintained since "the depositary is not in a position to reject or disregard the FRY claim of continuity, which related to the general international law question of succession of States in the absence of a decision by a competent treaty organ with regard to a particular treaty".

Johnson argues that "the current position"[39] - with regard to the membership of Yugoslavia has been termed as *"groundless, legally indefensible, illogical, absurd, confusing and - at best - ambiguous"* (emphasis added - MM).

" Such comments come in particular from certain States in Eastern Europe and yet just last October an announcement appeared each week in the UN Journal that the Chair of the Eastern-European Group of States at the United Nations for that month was - yes, it is true -Yugoslavia (represented by the Charge d'Affaires of the Federal Republic of Yugoslavia)."

The concluding remarks of Mr. Johnson are also interesting and are carried here in their entirety:

" I, for one, remain convinced that the legal opinion at the time was the right one. If the Security Council and the General Assembly adopt ambiguous and illogical resolutions, they will have to live with ambiguous and illogical results: it is not the role of the Legal Counsel to interpret illogical decisions to achieve a result that may be textually logical, such as ousting the Federal Republic of Yugoslavia from membership, but which is a result achieved not by legal opinion, but only by applying specific provisions of the Charter. In addition, given the nature and complexity of the Yugoslav conflict and the enormous difficulties of achieving success and results in negotiations between the parties, it would not have been particularly helpful for the Secretary-General to declare that one of the parties was no longer a member of the United Nations based upon a legal opinion of an ambiguous General Assembly resolution. Also, being an American lawyer, I take some solace from the long line of constitutional law cases from the Chinese exclusion case, which provide that in order for a later-in-time statute to supersede a treaty, the intent of Congress to so supersede the treaty must be clearly and unequivocally expressed. So, too, in my view, is the case with denying a claim from a State that it is continuing the international personality of a member State that has undergone constitutional and territorial changes. As is inferred from the 1947 principles of the Legal Committee, if the Security Council and the General Assembly wish to reject that claim and find that international personality has been extinguished, they must do so clearly and unambiguously. Membership is too important a matter to be left to ambiguity.

Finally, if any given legal opinion does not reflect the correct interpretation of Assembly resolution 47/1, the General Assembly is always free - and is sometimes encouraged - to simply adopt another decision, making its interpretation clear and definitive. It has not done so here and no formal proposals have ever been circulated to that effect. The Dayton Conference did not solve this problem either.

What should have happened? Various options were available but not used. If a majority of the members of the Organization questioned and challenged the Federal Republic of Yugoslavia's claim of continuity, they could have asked the International Court of Justice for an advisory opinion on the question, or the General Assembly could have established its own "Badinter Commission", a body of experts to examine the claim, or it could have asked for the views of the Legal Committee. In the meantime, FRY representatives would have continued to participate "provisionally", but with no diminution of rights, pending a decision on the claim. This would not be unusual, since in the General Assembly's rules it is provided that if the credentials of any representative have been challenged, that representative may be seated provisionally, with the same rights as other representatives, until the Credentials Committee has reported on the challenge and the general Assembly has given its decision".

The theme of the status of the Federal Republic of Yugoslavia in the United Nations was the subject of another gathering of prominent international lawyers held at the most prestigious German institution concerned with international law - the Max Planck Institute for Comparative Public Law and International Law - in Heidelberg in November 1996. The Max Planck Yearbook for 1997 published an article by Michael Wood, deputy chief legal adviser of the Ministry of Foreign Affairs of Great Britain, written on the basis of his presentation at the said meeting, entitled "Participation of Former Yugoslav States in the United Nations and in Multilateral Treaties".[40] Like Johnson, Wood points out at the beginning of his paper that the presented view is his personal and not the position of Great Britain. Having in mind that a highly competent and experienced expert is in question, who directly participated in these matters, as well as that he was the chief rapporteur at the meeting, we will quote some of his main theses and excerpts from his statement which shed more light on the problem of the status of the FRY in the UN and on the question of resolution 47/1.

Focusing his attention primarily on the status of the Federal Republic of Yugoslavia, Wood begins with the assertion that "the story is not over" and that, for the most part, the issues have not been resolved. Two initial observations of the author are particularly indicative: that "the practice of the United Nations in

39. At the time, in March 1996.

40. Michael C. Wood: Participation of Former Yugoslav States in the United Nations and in Multilateral Treaties, Max Planck Yearbook of United Nations Law, Vol.I/1997, pp.231-257

relation to membership has often departed from legal theory" and that, from 1990 to 1993, "fast and furious changes in membership" took place. In connection with Yugoslavia, Wood quotes the already mentioned position of principle of the UN Legal Committee on continuity, that is, on the rule that States, despite changes of the constitution and frontiers, remain members of the UN and that the newly created, seceded States are bound to apply for membership in the United Nations. In this context, he recalls briefly the examples of secession of Pakistan from India, Bangladesh from Pakistan and Singapore from Malaysia, where the predecessor States continued the membership in the UN. He points out that Yugoslavia was an original member of the United Nations and that this had no influence on its treatment in the United Nations in the 1990s. Quoting resolution 47/1, as well as the subsequent General Assembly resolution (47/229) by which it was decided on 5 May 1993 that the FRY shall not participate in the work of the Economic and Social Council either, Wood notes that "the legal basis, and effect, of these General Assembly resolutions remain controversial".[41]

Recalling the claim of the Federal Republic of Yugoslavia on its international legal continuity, stated in its official note to the Secretary-General of 27 April 1992, the author says that in support of its position Yugoslavia can point in particular to:

a) the respective declarations of independence of the other four republics;

b) the fact that "rump Yugoslavia" contains the old federal capital and a sizable proportion of the population and economic activity of the SFRY, as well as the history of Yugoslavia, which was formed after World War I around the kernel Serbia-Montenegro which had themselves been independent States from the 19th century until their unification in 1919;

c) that the continuity of the Soviet Union was recognized to the Russian Federation almost at the same time when the case of Yugoslavia was debated. The author maintaines that Yugoslavia insists upon continuity to remain a member of international organizations and that the emotional element may also be of relevance - that Yugoslavia was a founding member of the United Nations and of the Non-Aligned Movement. He considers that it might even be because it believed its position to be correct in law, and that the contrary view, whether coming from other former Yugoslav republics, from third States or from the Arbitration Commission, was politically motivated. The author wonders how do Slovenia, Croatia, Bosnia and Herzegovina and Macedonia reconcile their position on the negation of continuity of Yugoslavia with the fact that each of them declared independence, and on different dates at that. How do they distinguish between the case of the Federal Republic of Yugoslavia and that of the Russian Federation, adding that a possible difference referred to by a certain number of States - is their own refusal (unlike the case of the former USSR) to accept the continuity of the FRY, and the absence of general acceptance of such continuity by third States. The author notes that "the recent developments might indicate that the position is evolving", adding further that the sanctions were finally terminated on 1 October 1996, but that termination has not yet been "accompanied by the regularisation of the FRY's position in international organizations: in this context, some refer to "the outer wall of sanctions".[42] The author refers to a certain number of bilateral treaties and documents between the FRY, on the one hand and Croatia, Macedonia and Bosnia and Herzegovina, on the other, which appear to acknowledge "some sort of continuity between the FRY and the SFRY", but he points out that their position in New York with regard to the continuity of Yugoslavia remained unchanged illustrating this with a later note of the four States (including Slovenia) to the United Nations, in which it is said that the FRY, too, has to follow the procedure for admission to membership. He points to the confusion created with many authors, and even States (including the European Union), by ignoring the fundamental difference between the notions of continuity and succession.[43]

Quoting the words of the British representative in the General Assembly who introduced the draft resolution 47/1 that "the situation is without precedent and was clearly not foreseen by the authors of the Charter", but that "the sponsors are satisfied that the Council and the Assembly must, by necessary implication, have the power under the Charter to act in this way in an unforeseen situation", the author says that "calls to seek an advisory opinion from the International Court of Justice and the United Nations Legal Counsel went unheeded". Wood also says that one cannot be unmindful of the stern words of the representative of Ghana speaking before the adoption of the resolution:

"The draft resolution before us may be pragmatic, but it cannot be said to be principled, logical or consistent to the extent that it allows for Yugoslav participation in the work of our Organization, other than that of the General Assembly. Principle should not be made to yield to temporary expediency."

The conclusion of the author is that "the Council and the Assembly have not tied themselves to any particular resolution of the matter" and that "at some point the political momentum will exist to regularise the position of the Federal Republic of Yugoslavia in the United Nations". According to him, there seem to be essentially two ways of doing this:

41. Ibid., p.241

42. Ibid., p.244.

43. Also, the European Union erroneously claims that "the FRY cannot be regarded as the sole successor to the SFRY" or Schermers/Blokker, in their book entitled International Institutional Law, suggest that: "the FRY was not recognized as 'the successor of the SFRY' because it was not considered the principal part of the former Yugoslavia, but more probably because it was considered the main party responsible for the outbreak of war in the territory of the former Yugoslavia". Wood expresses his surprise at the assertion about "the successor" and, with regard to "the responsibility for the outbreak or war", he says that it is legally irrelevant.

a) the Federal Republic of Yugoslavia could apply for membership as the other former Yugoslav republics have done;

b) the relevant organs might accept the continued membership of the FRY without insisting on a formal application, for example by reversing the decisions on non-participation of 1992 and 1993. This would probably be explicitly "without prejudice to questions of State succession" (Wood thinks that this "could be done by a decision of the relevant organs as a pragmatic solution to a difficult situation").

The author notes that similar problems that should be resolved have arisen also in other fora in connection with the position of the FRY in the specialized agencies, the international financial institutions and OSCE, stressing that most specialized agencies have followed the United Nations, adopting resolutions in which Yugoslavia was not expelled, but only prevented from participating in the plenary organ.

In the part of his presentation relating to multilateral treaties of which the Secretary-General is the depositary, Wood recalls a few facts which are extremely relevant for the recognition of Yugoslavia's international continuity:

a) Yugoslavia remained listed on the publication Multilateral Treaties whose depositary is the Secretary-General;

b) the introduction to Multilateral Treaties explicitly says that the number of participants "does not include those States which have ceased to exist" (thus, the former German Democratic Republic is not included);

c) no one suggested that the ratification by Yugoslavia of the UN Convention on the Law of the Sea should not count towards the sixty ratifications required for entry into force (whereas that of the German Democratic Republic, for example, was discounted);

d) "the International Court of Justice appears to have had no difficulty in reading the FRY's Declaration and note as indicating the FRY's "intention to honour the international treaties of the former Yugoslavia";

e) the UN Secretariat in its Summary of Practice of the Secretary-General as Depositary of Multilateral Treaties[44] took the explicit position that General Assembly resolution 47/1 "does not affect in any way the capacity of the FRY to participate in treaties, including those deposited with the Secretary-General";

f) that, in October 1992, the Human Rights Committee called upon the Government of Yugoslavia to submit, as a Party to the International Covenant on Civil and Political Rights, its report on the implementation of the Covenant;

g) that the British Government confirmed, on 10 April 1996, that "we regard treaties and agreements in force to which the United Kingdom and the Socialist Federal Republic of Yugoslavia were parties as remaining in force between the United Kingdom and the Federal Republic of Yugoslavia".

Wood also recalls the case of recognition of Yugoslavia by the UN Treaties Service (which we have already dealt with), as well as that a correction was issued following the intervention of the seceded republics and the United States, adding ironically that Germany found it necessary to protest even after the announcement of the correction.

Referring to the practice of excluding the FRY from participation in various meetings of States parties to various treaties, he wonders "on what legal basis have various representatives who voted for exclusion done so. Is it a form of reprisal for breach of treaty by the FRY? Or is it simply on political grounds without regard to, indeed in disregard of, the law?".

Wood argues that resolutions 47/1 and 47/229 "merely decide that the Federal Republic of Yugoslavia shall not participate in the work of the General Assembly and ECOSOC", concluding that: "If the Federal Republic of Yugoslavia were not a member of the United Nations, such a decision would be absurd since, as a non-member, it could not in any event participate in these two organs, except as an observer". According to him "unlike the Badinter Commission which says that 'the SFRY has ceased to exist' General Assembly resolution asserts that the General Assembly considers "that the State formerly known as the SFRY has ceased to exist". He draws the attention to the fact that the preambular paragraph of the resolution that Yugoslavia's claim to continue automatically the membership of the former SFRY has not been generally accepted "leaves open the possibility that in the future it might be generally accepted that the FRY could continue the membership of the SFRY". He emphasises in particular that in operative paragraph 1 of resolution No.777 the Security Council "considers" and not "decides" that "the FRY cannot automatically continue the membership of the SFRY", which equally confirms the above assertion.

Wood concludes that "there has often been tension between law and politics in connection with the former Yugoslavia" and says:

" It may from time to time have seemed that *international law has been given short shrift by policy makers. There is much that can hardly be explained by reference to the normal rules of international public law* (emphasis added - MM). The recognition of the various former Yugoslav States, to which only passing reference has been made in this article, is a case in point. As a result, the value of precedents for international lawyers of much of what happened in the former Yugoslavia may prove to be limited. There are a number of possible explanations, including the speed at which the events unfolded during 1991, at a time when attention was elsewhere (Iraq, the Soviet Union, other parts of Central and Eastern Europe); and the involvement of a new and largely untried

44. Summary of Practice of the Secretary General as Depositary of Multilateral Treaties (Doc.ST/LEG/8).

actors in international affairs (the European Union and its Troika, the OSCE, the Co-Chairmen of the International Conference on the Former Yugoslavia, the Badinter Commission). Even the UN Security Council and the General Assembly were venturing down the new paths."[45]

Epilogue without an end- The above account reflects the thinking of the majority of international lawyers. It would be unfair to say that there are not those who defend the acts of politics, but they are few, no matter what they think about the character, the consequences and responsibilities for the bloody conflicts caused by the Yugoslav crisis. It is interesting to note that among those rare lawyers the author of these lines has not found a single American author supporting resolution 47/1. When, at the end of 1992, the first article on this theme authored by Yehuda Blum appeared in the American Journal of International Law[46], supporting the continuity of Yugoslavia, three opponents published their views in the ensuing issues of the Journal: Professor at the Faculty of Law in Zagreb, Vlado Djuro Degan, who, in the capacity as a senior official of the new Croatian State, correctly set out Croatia's position, the chief legal counsel of the Ministry of Foreign Affairs of Sweden, Ove Bring, and the legal adviser of the Mission of the Republic of Croatia to the United Nations, Kelly Malone. Politeness does not permit to qualify with proper words the allegations of the two last authors. Thus, Bring says:

"This alleged non-existent Yugoslavia continues to keep its seat (with the nameplate) in the General Assembly and its flag continues to flutter in front of the United Nations, along with the flags of other member States" - according to the words of Professor Blum. "But, there is a simple answer to this apparent inconsistency. The nameplate and the flag are not the nameplate and the flag of a member State (because that State has ceased to exist) but of another so far undefined internationa legal personality whose representatives are tolerated in the UN. Of course *it is not the first time that de facto different international legal personalities, although they are not members of the UN, are represented in the Organization as observers or in other ways* (emphasis added - MM). The cases of PLO (Palestine) and the African National Congress (South Africa) are cases in point: although they are not States, both entities are established as actors on the international arena and as legal personalities of international law. These and other examples of legal personalities (the Maltese Order, Taiwan) are unique by their character and special features and in this sense *the case of the Federal Republic of Yugoslavia confirms this model* (emphasis added - MM). There is no doubt, however, that Serbia-Montenegro is a State although it is not exactly the State that Belgrade claims to be and it is not a member of the UN".[47]

45. Ibid., pp.256-257.

46. American Journal of International Law, Vol.86, No.4/1992.

47. Yugoslav Review for International Law, No.3/1993, pp.308-309.

K. Malone claims that "Serbia and Montenegro belong to a *sui generis* category", adding that "even in this case there are no legal grounds for them to participate in the work of the Organization, not even in other bodies, in addition to the General Assembly."[48]

Professor Blum answered them in the same journal noting that the assertions of Bring and Malone are not based either on the law or on facts. Their assertions need no comments since, by their absurdity, they show not only the authors' level of knowledge of international law, but also rare maliciousness towards Yugoslavia which they were unable to conceal (avoiding even to mention its name, at least as it was officially referred to in the UN at the time - "the Federal Republic of Yugoslavia (Serbia and Montenegro)".

The already quoted German Professor K. Partsch, describing resolution 47/1, says that "the selected solution finds its legitimacy in its provisional character for a brief transitory period", and "whether it is permanent or in conformity with the Charter for a longer period of time, we can wait and see".[49] He claims in the same article that the applied procedure (for the adoption of resolution) was "under the Charter although it was politically motivated and is not foreseen in the Charter". He maintains that "it was essential to exert pressure on the parties to the conflict[50] to meet the demands of the Security Council and to get ready for a peaceful solution through negotiations". And, finally, the incredible conclusion: "Political motive is also in conformity with the main objectives of the United Nations. The objectives could hardly be achieved through expulsion or suspension".

To what extent the utterances of this one and similar lawyers mirror the real political background of individual legal acts is best illustrated by the presentation of Nicholas Nitri of the Washington School of Law, who, at the annual meeting of the American Society of International Law referred to earlier, in the debate on the right to self-determination, inter alia, said:

"The right to secession is not recognized; it is not recognized in the case of the dissolution of Yugoslavia, Czechoslovakia, Ethiopia or the Soviet Union either. Those are all cases of dissolution of States and the international community very cautiously distinguished between these two terms. I would simply challenge anyone of you to quote here a resolution of any international body or an ordinary higher-level statement of any ministry of foreign affairs in the world, in which the specific right to secession, not to self-determination, but to secession, has been mentioned".[51]

48. Ibid, pp.311-312.

49. The author appears to have forgotten that pressure was put to bear only on one party, that is, the FRY, by preventing its participation in the main organ of the United Nations.

50. K. Partsch, op.cit.

51. Mohammed Bedjaoui: Nouvel ordre mondial et controle de la legalite des actes du Conseil de Securite, Bruxelles, 1994.

Consequently, it is clear that, in the case of Yugoslavia, "dissolution" (or in the Slovene language "razdruživanje") has in the case of Yugoslavia, primarily been used in order to recognize seceded Yugoslav republics, without having the appearance or - even more dangerously - without becoming the precedent of secession. That is why there were many shenanigans in the European Community, the United Nations and in other international fora, so that resolution 47/1 is just one example. It is not by accident that the recent president of the International Court of Justice, Mohammed Bedjaoui, in his book "The New World Order and Control of the Legality of Acts of the Security Council", among eight Security Council resolutions which, in his opinion, should primarily be the subject of control of legality, listed three resolutions concerning the Yugoslav crisis.

American specialist in international law Thomas Raju says:

"When a few rich and powerful States decide to dissolve a sovereign independent State through the policy of recognition, how can that State defend itself? There is no elimination or defence against this form of international destruction of a State. Indeed, Europe, led by Germany, dismembered Yugoslavia without a bullet shot".[52]

Commenting on the "work" of the Badinter Commission, the already quoted American Professor of international law, Horst Hannum, states:

"In reality the Commission seeks to establish a new rule of international law: if a State has been created on the basis of federal (or possibly confederal) principles, then it is enough that one or several constituent republics cease to participate in the federal government with a view to depriving that State as a whole of recognition as a State by the international community. Such a rule would no doubt surprise the USA, Canada, Germany and other federal States and would lead to a direct recognition of secessionist movements in federal States, denying at the same time the same recognition to various regions which attempt to secede from unitary or centralised States".[53]

However, in the Yugoslav case, this rule was applied and thus, at least for some actors in the international community, Yugoslavia "disappeared".

Instead of finally doing away with this shameful and controversial General Assembly resolution, six years after the end of the forty-seventh session of the UN General Assembly, the question is still "on ice". Even worse, the so-called "outer wall of sanctions" has been contrived without any decision of any organ of the international community.

A Press Statement of the USA Department of State of 29 September 1997 states the following:

"The Government of the United States reiterates that it clearly rejects the claim of "the Federal Republic of Yugoslavia" to be the sole successor State or the sovereign continuity of the former SFRY. In conformity with common international law, the United States considers that all five States successors, Bosnia and Herzegovina, Croatia, Former Yugoslav Republic of Macedonia, Slovenia and "the Federal Republic of Yugoslavia" are equal successors of the SFRY. The United States shares this position with the international community.

The outer wall of sanctions against Serbia and Montenegro remains fully in force. *The sanctions include the ban on membership in international organizations, such as the UN and the OSCE, and on access to the international financial institutions* (emphasis added - MM), as well as on the normalization of relations with the United States.

Progress on the question of succession continues to be the central element of the outer wall of sanctions."[54]

Any comment is superfluous. What is the use of Security Council resolutions, no matter how clear they may be, when some States, as in the above mentioned example, can introduce the so-called outer walls of sanctions and impose "ban on membership in international organizations, including the UN and the OSCE"?

As a conclusion, the opinion of two renowned experts in international law.

The eminent British Professor of international law, Jan Brownly, in his work on peaceful settlement of international disputes, published in 1995/[55], says that there is a "disturbing situation" - "the Security Council is a means of the current policy of a very small group of States, in fact of three."

The well known French Professor and member of the UN International Law Commission, Alain Pellet, expressed Brownly's thought in even clearer terms:

"There is again much talk about 'the new international order'. In the field of law, the term is somewhat exaggerated. Nonetheless, a fundamental element remains: the law is the expression of the interests of the most powerful State or States. The absence of a serious international counterpoise has as a result the fact that the United States, currently the only superpower, can easily make its positions prevalent. Nothing prevents the thought that the United Nations has become the instrument of the American policy, thanks to which the US positions are made legitimate. The United Nations finds itself at a crossroads. Either it will forge instruments of genuine world debate that will make possible the elaboration and application of balanced rules of international law corresponding to the general interest or at least facilitate the creation of such rules, or it will just be an instrument of *"ius Americanum"*, which in the long run cannot serve as a guarantor of a lasting international order".[56]

52. Thomas G.C. Raju: Nations, States and Secession, Lessons from the Former Yugoslavia, Mediterranean Quarterly, Fall 1994, pp.40-65.

53. H. Hannum, op.cit., pp.64-65.

54. Department of State, Office of the Spokesman, Press Statement, September 29, 1997, p.1.

55. Jan Brownly: The Peaceful Settlement of International Disputes in Practice, Peace International Law Review, Vol.VII, No.II, Spring 1995.

56. Alain Pellet: La formation du droit international dans le cadre des Nations Unies, Journal Europeen de droit international, vol.6, No.3, p.425.

If there is something of a solace in this situation, it is the fact that precisely in these powerful States, in particular in the United States, there are countless world renowned great names of international law, whose ethical norms did not bow to the daily policy that ignores the law. Their criticisms and warnings cannot leave the politicians' minds at ease nor make valid their legally untenable decisions. Including the controversial resolution 47/1 and also those that have never been drawn up and adopted in the United Nations, but are eagerly enforced in its name against Yugoslavia.

International legal continuity is not an alchemist formula to be politically manipulated with in the longer run. It is true that continuity requires recognition, but there are also objective criteria which cannot be easily circumvented.

Continuity is manifested in three forms: through diplomatic relations, through multilateral treaties and through membership in international organizations. It is more than obvious that in respect of the first two forms (diplomatic relations, international treaties) Yugoslavia has a generally accepted international legal continuity. As regards international organizations, its continuity has not been yet generally accepted, but has not been finally denied either. The indisputable fact that Yugoslavia remained a member of the United Nations, that in the OSCE it has only been suspended (which also means a confirmation of its membership and/or continuity) and that it has not been excluded from almost any significant international organization (despite various restrictions) shows that this third form of manifestation of continuity is hard to deny. The fact that in the association of parliaments of the world, the Inter-Parliamentary Union, Yugoslavia's international legal continuity has been recognized (in spite of the attempts to challenge it) is an important element in the endeavours to resolve this question finally and clearly also in all international governmental organizations.[57] It is a paradox that the representatives of parliaments of States clearly confirmed by an overwhelming majority, only a few days before the adoption of resolution 47/1, the international legal continuity of Yugoslavia. But the governments of some countries are playing a cat-and-mouse game with the position of this country in the United Nations, a country which is one of its founding members and, although it may not be among the most exemplary, it is surely not one of those member States that have for decades flagrantly violated the UN Charter and that are peacefully sitting in the highest organs of that Organization.

57. The Inter-Parliamentary Union, at the 151st of the Inter-Parliamentary Council (Stockholm, 7-12 September 1992), with 69 votes in favour, 19 against and 23 abstentions, brought decision on "maintenance of the membership of the national group of the Federal Republic of Yugoslavia" upon "having examined the situation of the national group of the Socialist Federal Republic of Yugoslavia".

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INTERNATIONAL
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Verwaltungsgericht Trier
Eing. 14. Jan. 1999
Anlagen: Doppel
Aktenheft 1 Schriftstücke
Heftung Vollmacht

An das
Verwaltungsgericht Trier
Postfach 3826

54228 Trier

Betr.: Verwaltungsstreitverfahren gegen die Bundesrepublik Deutschland wegen Asylrechts;
hier: [redacted]

Bezug: Schreiben des Verwaltungsgerichts Trier
vom 17.06.98 Gz.: 6 K 2150/96.TR

Anlg.: - 5 -

Sehr geehrte Damen und Herren,

zu den mit Bezugsschreiben aufgeworfenen Fragen nimmt das Auswärtige Amt wie folgt Stellung:

1) Albanischen Volkszugehörigen droht in der Bundesrepublik Jugoslawien keine politische Verfolgung, die explizit an die Volkszugehörigkeit anknüpfen würde.
So leben allein in Belgrad mehrere Zehntausend ethnische Albaner, bei denen keine staatliche Schlechterstellung oder systematische Ungleichbehandlung (dies wären z.B. diskrimminierende Gesetze, Ausschluß von öffentlichen Einrichtungen usw.) feststellbar ist. In Südserbien gibt es Gegenden mit albanischer Bevölkerungsmehrheit, ohne daß nennenswerte staatliche Rechtsverletzungen gegen diesen Personenkreis gemeldet würden (v.a. Gemeinden Bujanovac, Preševo und Medvedja mit ca. 60% albanischem Bevölkerungsanteil). Viele albanische Volkszugehörige leben seit Generationen regulär in Montenegro, wo sie in das politische Leben integriert sind und u.a. auch einen Minister stellen. S. ferner zu 3).

3) Nach Erkenntnis des Auswärtigen Amts sind die Maßnahmen der Sicherheitskräfte in erster Linie auf die Bekämpfung der UÇK gerichtet, die unter Einsatz terroristischer Mittel für die Unabhängigkeit des Kosovo, nach Angaben einiger ihrer Sprecher sogar für die Schaffung eines „Groß-Albanien" kämpft. Opfer unter der Zivilbevölkerung sowie die drohende humanitäre Katastrophe waren hierbei bis zum Einlenken auf das NATO-Ultimatum bewußt herbeigeführte oder zumindest hingenommene „Kollateralschäden".

Einer Einschätzung der ECMM (03.11.98) zufolge lassen sich aus offiziellen Äußerungen, Angaben albanischer Organisationen sowie durch Augenschein (Ablauf der Offensive, Zerstörungen) folgende Aspekte der Strategie der Sicherheitskräfte ableiten:

- Beherrschung der Versorgungswege durch Einnahme der Hauptmagistralen, Kontrolle von Schlüsselpositionen und „Säuberung" eines drei bis vier Km breiten Streifens um die Versorgungswege mit dem Nebeneffekt, daß das vom Gegner (UÇK) kontrollierte Gebiet in kleinere Teilgebiete zersplittert wird;
- Einflußnahme auf die Zivilbevölkerung mit dem Ziel, dem Gegner deren Unterstützung zu entziehen. Die UÇK hatte breiten Rückhalt in der Bevölkerung (beteiligte sich in Einzelfällen auch aktiv an Kampfhandlungen), die „Einflußnahme" der Sicherheitskräfte drückte sich durch massive Einschüchterung, zynische Machtdemonstration (Bereitstellung von Hilfsgütern in unmittelbarer Nähe zu Polizei- und Militärstellungen, großangelegte Kontrollen von Flüchtlingen auf Waffengebrauch (Paraffintests) usw.) und - im weiteren Verlauf der Offensive mit steigender Tendenz - „Strafmaßnahmen" wie willkürliche (aber durch die Vielzahl der Einzelfälle im Ergebnis massive) Zerstörung von Gebäuden, Plünderungen und Mißhandlungen festgenommener oder kontrollierter Personen aus.

Mit dem Bosnien-Krieg vergleichbare massive staatlich geduldete Einsätze von paramilitärischen Gruppen sind aus dem Kosovo-Konflikt nicht bekannt.

Eine auf Verteibung aus der Bundesrepublik Jugoslawien ausgerichtete Strategie der Sicherheitskräfte ist nicht erkennbar. Hierfür spricht auch, daß der Großteil der Flüchtlinge als „Binnenvertriebene" im Kosovo (in nennenswertem Umfang auch in Montenegro) verblieb und nur ein geringer Teil ins Ausland (v.a. Mazedonien und Albanien) floh.

2) Eine explizit an die albanische Volkszugehörigkeit anknüpfende politische Verfolgung ist auch im Kosovo nicht festzustellen. Der Osten des Kosovo ist von den bewaffneten Konflikten bislang nicht erfaßt, das öffentliche Leben in Städten wie Priština, Uroševac, Gnjilan usw. verlief im gesamten Konfliktzeitraum in relativ normalen Bahnen.

Der o.a. Einschätzung der ECMM zufolge war das Vorgehen der Sicherheitskräfte nicht gegen Kosovo-Albaner als ethnisch definierte Gruppe gerichtet, sondern gegen den militärischen Gegner und dessen tatsächliche oder vermutete Unterstützer. Auf den teilweise totalen Betroffenheitsgrad der Zivilbevölkerung im Konfliktsgebiet hatte diese Schlußfolgerung keinen Einfluß, sie spricht jedoch gegen das Vorliegen einer gruppengerichteten und für das Vorliegen einer (in den Mitteln maßlos überzogenen) zielgerichteten Verfolgung.

Nach Angaben des CDHRF kamen im Kosovo-Konflikt bis zum 02.11.98 1.326 ethnische Albaner ums Leben, davon 204 Frauen, 189 Kinder und 364 Personen über 55 Jahre (Angaben über identifizierte Tote). Differenzierungen, wie viele UÇK-Angehörige bzw. aktiv an den Kämpfen beteiligte Dorfbewohner unter den Toten sind, wurden jedoch nicht getroffen, so daß eine Einschätzung des umgekommenen Anteils an reinen Zivilisten nicht getroffen werden kann.

Einer früheren Angabe des CDHRF von 1.050 Getöteten war die Zahl von 538 Verwundeten gegenübergestellt worden.
Nach Einschätzungen des UNHCR sind über 300.000 Menschen angesichts der Kämpfe aus den Dörfern geflüchtet. Davon blieben etwa 200 000 als Binnenvertriebene im Kosovo, etwa 50.000 hielten sich zumindest zeitweise in den Wäldern auf. Seit dem durch das NATO-Ultimatum erzwungenen Teilrückzug von Polizei- und Armee-Einheiten (Wiederherstellung des Niveaus zu Jahresbeginn) kommt es gegenwärtig zur Rückkehr einer Vielzahl von Flüchtlingen in ihre Dörfer. Mit der einsetzenden Normalisierung ist aber vielerorts auch ein Wiederaufleben von UÇK-Strukturen festzustellen.

4) Wie bereits erwähnt, sind die Maßnahmen der Sicherheitskräfte gegen die UÇK und ihre Unterstützer gerichtet und nicht an die politischen, karitativen oder verwaltungsmäßigen Tätigkeiten der Betroffenen geknüpft. Insofern diese Tätigkeiten jedoch der UÇK zugute kommen, ist eine juristische Würdigung als Unterstützung der UÇK nicht ausgeschlossen. So ist dem Auswärtigen Amt der Fall eines Arztes bekannt, der wegen der Behandlung mutmaßlicher UÇK-Angehöriger zu einer Haftstrafe verurteilt wurde.

5) Rückkehrer albanischer Volkszugehörigkeit, die aufgrund des Rückübernahmeabkommens rückgeführt wurden, sind auch schon vor Ausbruch der bewaffneten Konflikte bei ihrer Einreise zu ihrem Aufenthalt in Deutschland befragt worden. Eine Verschärfung der Befragung seit Ausbruch der Kämpfe konnte durch das Auswärtige Amt nicht beobachtet werden, ist aber nicht für jeden Einzelfall auszuschließen. Mittlerweile ist die Rückführung ausgesetzt und dem Auswärtigen Amt liegen keine aktuelleren Erkenntnisse zu dieser Thematik vor. Einerseits ist davon auszugehen, daß die jugoslawischen Behörden sehr wohl mutmaßliche Rekrutierungswege der UÇK auch in Deutschland zu ermitteln suchen, andererseits dürfte die Mehrheit der durch die UÇK aus Deutschland rekrutierten Kosovo-Albaner nicht auf dem „Rückführungsweg", sondern auf anderem - Kontrollen und Befragungen umgehendem - Wege nach Jugoslawien eingereist sein. Letzteres ist den jugoslawischen Behörden auch aus mehreren Terrorismusverfahren bekannt, die gegen diesen Personenkreis geführt wurden.

Ein Einfluß exilpolitischer Tätigkeiten auf mögliche Einleitung von Strafverfahren oder Strafschärfung bei bereits bestehender Anhängigkeit von Strafverfahren konnte durch das Auswärtige Amt nach wie vor nicht beobachtet werden.

6) In Jugoslawien gibt es Zufluchtsmöglichkeiten für albanische Volkszugehörige, die vor den bewaffneten Auseinandersetzungen flüchten. Die Konflikte im Kosovo haben dazu geführt, daß ca. 300.000 Menschen ihre Ortschaften verlassen hatten und an anderen Orten Schutz suchten. Dabei haben ca. 46.000 Menschen in Montenegro, 20.000 in Südserbien, der überwiegende Teil jedoch in nicht betroffenen Gebieten des Kosovo selbst vorübergehende Aufnahme

gefunden. Die ca. 50.000 Flüchtlinge, die sich vorübergehend ohne feste Unterkunft in den Bergen und Wäldern (meist in unmittelbarer Nähe ihrer Dörfer) aufgehalten hatten, sind seit dem Teilabzug der Sicherheitskräfte fast vollständig in feste Unterkünfte zurückgekehrt.

Bis dato liegt dem Auswärtigen Amt keine Meldung über eine unmittelbar durch Rückführung oder freiwillige Rückkehr verursachte Obdachlosigkeit vor.

7) Die Echtheit des mit Bezugsschreiben übersandten Urteils des Landgerichts Kosovska Mitrovica, K-18/96, kann durch das Auswärtige Amt aus den folgenden Gründen nicht bestätigt werden:
Laut Gerichtsregister des Landgerichts Kosovska Mitrovica war das Verfahren K-18/96 an diesem Gericht gegen eine andere Person als die des Klägers (A. Mehaj) anhängig.
Laut Gerichtsregister des Landgerichts Kosovska Mitrovica war von 1996 bis heute überhaupt kein Strafverfahren gegen den Kläger an diesem Gericht anhängig.

Mit freundlichen Grüßen

Im Auftrag

Meisner
(Meisner)