

Legal position of Serbia and Montenegro following the break-up of the SFRY

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It is a privilege of scholars in international law to communicate with their colleagues from all parts of the world. Santiago Torres Bernárdez and his wife Mrs. Charo Camprubi from Peru with her impeccable knowledge of the French language have been my close friends at the Institute of International Law for almost a quarter of the century. We both soon realized that, when adopting positions on various issues in the discussions, we share the main human values and we do not easily compromise on the requirements of our discipline. Such mutual esteem and friendship I do not easily encounter in my own country.

This paper, which is dedicated to my Spanish Confrère Santiago, deals with some aspects of the case law of the International Court of Justice in The Hague, where he served as the Registrar and as a Judge *ad hoc* in a number of cases.

I. INTRODUCTION

Disparate conclusions of the International Court of Justice on the legal position of Serbia and Montenegro since the creation of the «Federal Republic of Yugoslavia» (FRY) on 27 April 1992 were partly caused by the shift in its claim of its own international status. Until its admission to UN membership on 1 November 2000, it unsuccessfully asserted its identity with and continuity of the Socialist Federal Republic of Yugoslavia (SFRY) within a reduced territory. However, since the end of 2000 (when Slobodan Milošević lost power), it has claimed to be a new State, equal in rights with the other four successor States to the SFRY, which are Bosnia-Herzegovina, Croatia, Macedonia and Slovenia.

As widely known, that State was short-lived. On 4 February 2003, it was reconstituted into a loose union of «Serbia and Montenegro», thus changing its official name. On 3 June 2006, Montenegro proclaimed its own independence, and on 28 June it was admitted to UN membership.

It is likely that this did not end the process of disintegration of that area. On 17 February 2008, the former Serbian and Yugoslav province of Kosovo, with the huge majority of Albanian population, proclaimed its own independence. It has been recognized by a number of foreign States, but not by Serbia, the Russian Federation, China, Greece, and Spain and some other States that are anxious to keep their own territorial integrity.

On the incentive of Serbia, on 8 October 2008, the UN General Assembly requested The Hague Court to render its advisory opinion on the following question: «Is the unilateral declaration of independence by the Provisional Institutions of Self-Government of Kosovo in accordance with international law?» This procedure is now pending.

However, Serbia put essentially the same question before the Arbitration Commission of the Conference on Yugoslavia already on 4 November 1991: «Is the secession of Slovenia and Croatia from Yugoslavia, carried out unilaterally and in a violent manner, a legal act from the standpoint of the United Nations Charter and other legally relevant instruments?»¹

The answer of the Arbitration Commission was that the SFRY was at that critical time «in the process of dissolution» (Opinion No.1 issued on 29 November 1991).² Later on, in its three Opinions, all issued on 4 July 1992, the Commission concluded that this process «is now complete and that the SFRY no longer exists» (Opinion No.8); that «the SFRY's membership of international organizations must be terminated according to their statutes and that none of the successor states may thereupon claim for itself alone the membership rights previously enjoyed by the former SFRY» (Opinion No.9); and that «the FRY (Serbia and Montenegro) is a new state which cannot be considered the sole successor to the SFRY» (Opinion No.10).³

These were the views of an impartial judicial body, which were then all rejected by the FRY itself. These Opinions were as such not obligatory for the UN political organs, but could have a certain persuasive value for member States of the European Community (now Union) in the UN organs.

¹ The formulation of this question was at that time obviously inspired by the common text of Articles 6 and 3 of the Vienna Conventions on the Succession of States of 1978 and 1983, respectively. It reads as follows: «The present Convention applies only to the effects of a succession of States occurring in conformity with international law and, in particular, the principles of international law embodied in the Charter of the United Nations.» Serbia expected the Arbitration Commission to adopt its own narrow legalistic approach and to condemn, or perhaps even to prevent Slovenia and Croatia from breaking up the territorial integrity and political independence of Yugoslavia, at that time a UN member State. However, Serbian leadership did not take into account the process of dissolution of two other federations in Eastern Europe contributing to the acceleration of the disappearance of the SFRY with its own anti-constitutional and violent acts more than the leaderships of the Soviet Union and Czecho-Slovakia did in their respective cases.

² See the text -- *International Legal Materials* 1992, No.6, pp.1494-1497.

³ *Ibid.*, pp.1521-1526.

In these circumstances the UN Security Council acted as an organ of diplomacy, creating a confusing situation. In the preamble to its resolution 777 of 19 September 1992 it confirmed the fact that «the state formerly known as the Socialist Federal Republic of Yugoslavia has ceased to exist», but it did not recommend to the General Assembly to terminate its membership of the UN. In its operative part the Security Council considered that the FRY (Serbia and Montenegro) could not automatically continue the UN membership of the former SFRY, and therefore recommended to the General Assembly that it decide that the FRY should apply for membership of the UN, «and that it shall not participate in the work of the General Assembly».

The Security Council probably expected the FRY to abide by the previous resolutions under Chapter VII of the UN Charter and stop its involvement in the conflict in Bosnia-Herzegovina. In this expectation, the FRY was allowed to keep its mission to the UN as the *de facto* continuation of the SFRY, which at that time was no more than a ghost State. It could perhaps hope to acquire the same position as that of the Russian Federation whose full continuation with the former USSR was generally accepted. However, because of the FRY's non-cooperative attitude its wishes never materialized.

Finally, after Slobodan Milošević had lost power in the elections near the end of 2000, the new Government of the FRY in Serbia practically adhered to all the views of the Arbitration Commission from 1991 and 1992. Its new position was in fact a precondition for its admission to UN membership. In its new status the FRY pretended to be a new State without obligations from the treaties formerly entered into by the SFRY, including the 1948 Genocide Convention. It relied, in fact, in all this on the «clean slate doctrine» in respect of conventional obligations of its predecessor State, which is now not unanimously adopted in practice.

The UN Office of Legal Affairs, like in its previous practice on State Succession, only complicated that situation instead of proposing simple and clear solutions.

The evolution of this factual situation involves many interesting problems in the application of rules of international law. The matter first involves the events of creation and disappearance of States and of the international recognition of these facts as being both of political and legal nature. It also involves the State succession in various domains, including the succession in respect of treaties and of membership of the predecessor State in international organizations. In a series of verdicts The Hague Court answered a number of these questions, but not to all of them. In this changing situation its practice was sometimes not quite consistent.

However, unlike Montenegro, Kosovo cannot expect admission to the UN in the foreseeable future. Like in many historical examples, Serbia will probably be the last to recognize the statehood of its former province. However, because of

the many crimes committed by its former régime on the soil of Kosovo prior to the NATO intervention in 1999, Serbia has lost its control of it probably forever.

II. THE CAUSES OF DISINTEGRATION OF AUSTRIA-HUNGARY AND YUGOSLAVIA

The process of disintegration of a State with multinational population always incites some grievances in the international community. Hence, during the Cold War Tito's Yugoslavia, as one of leaders of the Non-aligned movement, was not only a factor of stability and peace in the Balkans but also in the entire world. Nevertheless that Federation could not survive its enlightened leader who was the undisputed arbitrator in all its internal controversies until his death.

The causes of these disintegrating processes go back to even before the creation of the common State of South Slavs towards the end of 1918. The reader should know about some facts from the past.

The Austro-Hungarian Empire demised with its defeat in World War I *inter alia* as a consequence of the odd solution to its national problem. In fact, in the XIXth century that Empire could not fully consolidate until its loss of Lombardy and Venice in Northern Italy. After its defeat inflicted by Prussia in 1866, it had to reconstitute itself. Its Slavic populations were in sum more numerous than either its German-speaking or Hungarian-speaking subjects. Nevertheless, in 1867 a real union of Austria and Hungary alone in the person of the Monarch was established with three common ministries: of foreign affairs, defense and finance. All the other institutions, including parliaments, were separated.

By this, the lands mostly populated by Slavs, Italians and other nationalities were divided, without any agreement of their inhabitants, between these two member States of the Union. Austria kept Trieste; all the lands populated by Slovenes; Croatian lands of Istria and Dalmatia; Southern Poland with Galicia; and Bohemia-Moravia. Parts of Hungary were the present Slovakia, Transylvania with its mixed Hungarian, Romanian and German inhabitants, and Croatia-Slavonia including Sirmium up to Belgrade.

Due to its special historical position Croatia-Slavonia concluded a separate compromise with Hungary in 1868, preserving its Parliament (*Sabor*) and autonomy in internal affairs, cult, national education and justice. However, more important affairs relating to the economics, transportation etc remained in the exclusive power of Budapest. Unlike Austria-Hungary, that was not a union between equal partners.

The privileged Hungarian position since 1867 was itself a permanent obstacle to further necessary reforms until the very demise of the Empire. A panslavic movement among the Slavic populations (excluding the Poles) incited the

pangermanism, which in turn weakened the Monarchy especially in respect to the united Germany since 1871.

It could be imagined that if the Habsburg Empire had been reconstituted already in 1867 as a federation of four or five equal member States around Vienna, Krakow, Prague, Budapest and Zagreb, it could perhaps have survived its defeat in World War I, and it could have even been able to admit new entities. In such a situation that never materialized, it could have been a nucleus in the process of unification of Europe. Instead of that, in 1918 new States within new frontiers were created.

At the Versailles Peace Conference both Austria and Hungary were severely punished for their former policy. The new Austrian Republic was reduced roughly to one sixth of its former territory. On the other hand, one third of ethnic Hungarians found themselves as the national minority within Czechoslovakia, Romania and the Kingdom of Serbs, Croats and Slovenes. The present frontiers of these two States are the same as in 1919 and 1920, without any chance for their modification.

The entire process of disintegration of that what used to be Yugoslavia could also be explained by its inappropriate constitutional solutions.

That State was constituted on 1 December 1918 under the unusual name of the «Kingdom of Serbs, Croats and Slovenes». Its victorious elite in Belgrade after World War I simply saw an enlarged Serbia in it. Therefore, even the name of «Yugoslavia» was in its very beginning not adopted as allegedly being an Austrian or Croatian invention.

That new State relied on the fiction of ethnic unity of these three provisionally distinct groups (or «tribes»), speaking the same «serbo-croat-slovene» language. It was expected that in the near future they will become a united nation of its orthodox, catholic and islamic citizens. This concept excluded *in limine* the Bulgarians, and that until the end of that State. Although South Slavs too, the Bulgarians with their national Orthodox Church were with reason considered as non-assimilable with the Serbs.⁴ Members of non-Slavic minorities in the new State (Hungarians, Germans, Albanians, Turks and others) were temporarily deprived even of the voting right.

In 1921, the Constituent Assembly adopted the Constitution of the Kingdom of Serbs, Croats and Slovenes by a simple majority of elected representatives. According to this Constitution the new State became a centralized constitutional Monarchy in which the power was divided between the person of monarch and

⁴ Whereas when speaking in their native languages Serbs, Croats, Montenegrins and Bosnians can perfectly understand one another, the language of Slovenes is different so that this «serbo-croat-slovene» official language was a fiction as was the ethnic unity of these «tribes». Like Slovene, Bulgarian and Macedonian are also distinct languages belonging to the larger South-Slavic linguistic group.

the Parliament elected by a universal vote excluding women. The autonomy of all the former historical provinces was suppressed as an alleged relic of the past, and all the State power was centralized in Belgrade.

This new situation was the delusion of the Slavs from the former Habsburg Monarchy. They expected to have more freedom in the new State than under their former Austrian and Hungarian rulers. They unsuccessfully advocated a large regional autonomy of the historical provinces endowed with their local parliaments and with some financial revenues of their own.

As in the case of the Habsburg Empire in 1867, it is a pity that these proposals failed. If for instance, the new Kingdom was united in 1918 according to the German model of 1871, and if Montenegro preserved its national dynasty of Petrović within it, there would most certainly not be the separation of that State from Serbia in 2006. All the Montenegrins would integrate in a spontaneous process and without force into the Serbian nation, with which they share the same religion and language.

But the most acute political problem in this new Kingdom since its beginning became the *Croatian question*. By their number the Croats were, after the Serbs the second largest group in that Monarchy. In the new centralized State they lost all their national institutions that they possessed since the Middle Ages. They even lost the insufficient and defective statehood that Croatia-Slavonia enjoyed as part of Hungary, and certain regional autonomy in Dalmatia within Austria. Bosnia-Herzegovina also lost its integrity, including its external borders.

Stjepan Radić, a gifted leader of the Croatian Peasant Party, profited from the extension of the voting right to the masses of peasant population. His Party soon became the most representative political organization among the Croats. He fought for the decentralization of Yugoslavia in which Croatia would be in confederal or federal relationship with Serbia. In June 1928, he was severely wounded in the Belgrade Parliament by a Serbian extremist from Montenegro and died in Zagreb in August.

To King Alexander Karađorđević that situation was a pretext for dissolving the Belgrade Parliament, for suppressing the Constitution and introducing his personal dictatorship on 6 January 1929. By a royal decree he renamed the State as the «Kingdom of Yugoslavia», prohibiting the use of any «tribal names». Nevertheless, he could not prohibit the use of the Serbian name in the liturgy of the Serbian Orthodox Church, which was perhaps not his intent. All other national groups felt that «royal Jacobinism» as greater Serbian aspirations under the Yugoslav name with the aim of creating a new nation by force.

In 1931, King Alexander unilaterally imparted a new Constitution to the Kingdom of Yugoslavia by manifest. Its aim was to preserve his personal authority with the cooperation of governments of his confidence. In the Senate, the upper chamber of the Parliament, the King directly appointed one half of members.

Another half was appointed within each county district by elected deputies on the Assembly for the county and by senior civil servants, again, appointed by him.

The lists of candidates for the Assembly, the lower house of the Parliament, ought to have representatives from all parts of the Kingdom. The ballot was not secret but public, and was noted for each voter the list of choice. All civil servants and employees of the State could lose their jobs if then voted for the opposition list. Finally, following the elections the list winning a simple majority got two thirds of the seats of the Assembly. Hence, there was only an abstract possibility that the Government party supported by the King could lose its power by the prevailing will of the citizens.

The King's dictatorship and his personal power assured by the new Constitution had many sinister consequences that would reflect in the years of World War II. The very popular Communist Party of Yugoslavia was banished and pushed into hiding already in 1921. Following the introduction of dictatorship in 1929, the Croatian extremist politician Dr. Ante Pavelić went to the emigration, first to Bulgaria. He organized terrorist training camps on the soil of Italy and Hungary, the two States claiming the Yugoslav territories mostly populated by Croats.

Pavelić's fascist «*Ustaša*» movement with the collaboration of the Macedonian movement VMRO organized the assassination of King Alexander in Marseille on 9 October 1934. Its collateral victim was the French Minister Louis Barthou. That should have been the revenge for the murder of Stjepan Radić in the Belgrade Parliament in 1928. It was, however, just one in a series of terrorist acts, the first of them having been the Serbian assassination of Archduke Francis Ferdinand and his spouse in Sarajevo on 25 June 1914, precipitating World War I.

Pavelić's terrorist act did not provoke an uprising of Croats and their separation from Yugoslavia. Most of them had no sympathies for the murders of either Stjepan Radić or King Alexander. Apparently, the situation soon normalized. Until Peter II came of age, the king's powers were exercised by a Regency Council whose leading figure was Paul Karađorđević, a cousin of late King Alexander.

The new leader of the Croatian Peasant Party, Dr. Vladko Maček, undertook protracted negotiations with the Belgrade Government in order to assure broad autonomy for Croatia within Yugoslavia. Under the pressures from abroad the compromise was finally reached as late as on 26 August 1939, five days before the outbreak of World War II, and *Croatian Banovina* was constituted.

That short-lived entity was a success because the leading Serbian Autonomous Democratic Party of the Serbs from Croatia had a share and responsibility in the Government affairs of the Banovina. Since the assassination of Stjepan Radić in 1928, that Party was loyal to the Croatian Peasant Party, and it formed a coalition with it in opposition to the royal dictatorship in Belgrade.

However, the defective aspect of that compromise was the partition of Bosnia-Herzegovina. Banovina included all the districts with the local majority of Catholics Croats in relation to Orthodox Serbs. Moslem population was not taken into account even where they formed a majority. In addition, Maček was the leader of the opposition lists at the Yugoslav elections in 1935 and 1938. With that compromise with Belgrade he betrayed the expectations of the Macedonians and the Montenegrins to get their own autonomy within Yugoslavia.

After the establishment of the Croatian Banovina, the creation of the Slovene Banovina within the present frontiers of that State was anticipated, whereas the rest of Yugoslavia should constitute the Serbian Banovina. This further evolution was prevented by the German, Italian and Hungarian invasion of Yugoslavia on 6 April 1941. That was also the end of the Croatian Banovina with its institutions.

As in case of Poland, the victorious aggressor States believed to have destroyed Yugoslavia forever, as being a product of the hated Versailles Peace system. In violation of the principle that only a peace treaty after the end of a war should attain territorial changes, they divided the Yugoslav territories among themselves, satisfying their wishes in revising frontiers from these Treaties. However that new situation lasted only until their defeat in World War II. For Italy it was the capitulation announced on 8 September 1943, and for Germany its unconditional surrender in May 1945. After that all the States concerned recognized the continuity of Yugoslavia, and they had to waive all their territorial gains.

By an arrangement of 1941 Germany and Italy apportioned the territory of the present Slovenia among themselves. The Germans pushed most of non-assimilable Slovene civilians into the occupied Serbia and the catholic clergy into the «Independent State of Croatia». By contrast, the Italians formed the «Province of Ljubljana» in their sector, granting it broad local autonomy.

In addition, Italy appropriated the largest part of the Adriatic coast down to the Albanian frontiers. It even kept under its occupation the part allotted to Croatia, but extorting from it the obligation not to have a Navy or any other military installations there.

Hungary annexed part of Vojvodina (Bačka) and parts of the present Croatia and Slovenia (Baranja, Međimurje and Prekmurje). Finally, Bulgaria appropriated some eastern and southern territories of Serbia, most of Macedonia and a small fraction of Kosovo.

By the will of German and Italian dictators new entities were established there. In the so-called «Independent State of Croatia» Ante Pavelić was imposed with dictatorial powers, with his Ustašas coming from Italy. Deprived of its national coastal territories it was compensated with the entire Bosnia-Herzegovina and Sirmium until Belgrade. It was a Puppet State like Manchukuo or Slovakia at the same time, but with some appearances of statehood more present than in

other occupied parts of Yugoslavia. Nevertheless, that fake independence satisfied the Croatian extreme nationalists.

Italy created Greater Albania that since 1939 was in fictitious personal union with it. In 1941, it annexed in Albanian favor the western part of Macedonia, most of Kosovo and parts of Montenegro. It also had in view the re-establishment of the Kingdom of Montenegro as its Puppet State, which was prevented by the national uprising there already in 1941. Finally, the largest part of Serbia with Banat in Vojvodina and Kosovska Mitrovica in Kosovo was under German occupation. The German Commander in Belgrade appointed the Serbian governments and they acted with the local police as his organs.

Four years of foreign occupation was not a long period of time, but the crimes committed then remained in the memory even of future generations. Crimes committed by Croatian Ustašas against the Serbs in the «Independent State of Croatia» served as a pretext for new Serbian crimes against Croats and Bosnian Moslems between 1991 and 1995.

In that period nobody had his or her rights guaranteed, even the right to bare existence. Fascist regimes did not respect these rights even to their own members and adherents. As in the rest of Europe occupied by the Germans, the Holocaust was committed against the entire Jewish population without any personal guilt on their part. They were simply guilty of being Jews. In the Italian-occupied zone Jews were discriminated against and put under surveillance of the police, but most of them saved their lives joining the Communist partisans after the Italian capitulation in 1943. However, in their zone of occupation Italian fascists armed both Croatian Ustašas and Serbian Tchetniks, inciting them to mutual extermination. It was their attempt of ethnic cleansing of the territories they believed to have gained forever.

Besides Ustašas' extermination of the Jews, in the «Independent State of Croatia» massive crimes were committed against Serbian population. By contrast, Pavelić saw in Bosnian Moslems the purest Croats and «the flower» of the entire Croatian nation. That was because in some parts of his «State» catholic Croats formed the minority, or were only symbolically present. On this basis that regime undertook the ethnic cleansing of that territory. Many awful crimes were committed, but because of the large number of ethnic Serbs, that policy failed in its aims.

Within each Yugoslav nation there were fascists, as well as anti-fascists. Democratic anti-fascist circles were unable or even unwilling to organize resistance against the occupants. They passively waited for the final outcome of World War II.

There was a massive movement among Serbs in Serbia proper, Bosnia-Herzegovina and Montenegro under the name of *tchetniks*, organized by the Army colonel Draža Mihajlović. Following the first news of his resistance in 1941, he was promoted to the rank of general and became the Minister of Defense in the

exiled Yugoslav government in London, but never left the Yugoslav territory. However his resistance to the occupation forces soon evaporated. With his acquiescence, local tchetnik commanders concluded a number of pacts with the occupying forces, directing their fight against Ustašas and Communist partisans in their struggle for power after the war.

What was worst, tchetniks undertook ethnic cleansing of Moslem and catholic Croat population in order to create Greater Serbia within the post-war Yugoslavia. In this respect they were not different from Ante Pavelić who aimed to consolidate the «Independent State of Croatia» deprived of its Serbs. Nevertheless, the tchetnik terror deeply differed from the situation in pre-war Yugoslavia. There had been a political struggle for Serbian hegemony, but all the religious groups had been respected in their right to existence.

In that confusing situation of terror and massive crimes the most clear-sighted proved the non-democratic Yugoslav Communists under the leadership of Josip Broz Tito. They organized the only genuine force of resistance against the occupying forces. Under the slogan «Fraternity - Unity» they mobilized in that resistance movement members of all Yugoslav nations, hindering the fratricidal persecutions and killings as much as possible. What was equally important, already during that war they reorganized Yugoslavia into the federation of six entities: Serbia, Croatia, Slovenia, multiethnic Bosnia-Herzegovina, Macedonia and Montenegro. After the war ended, two entities were associated to Serbia. Vojvodina with substantial Hungarian population and numerous other minorities got the status of «autonomous province». Kosovo-Metohija with the majority of Albanians had in the beginning a lower position of an «autonomous district».

However, in their struggle for absolute power Communists executed many members of the defeated satellite forces as well as of the so-called «class enemies», without any trial or in fake trials. After the conflict with the Soviet Union in 1948 began, many communists and former partisans suspect of loyalty to Stalin were put in two concentration camps, also without any trial. That period was in fact the prolongation of the terror from the fascist period, this time against new enemies or presumed enemies, and it lasted well into 1950s.

The history of the post-war Yugoslav Federation can be divided into two periods. The first Federal Constitution of 1946 was very much like the Soviet Constitution of 1936. Besides its formal provisions and guarantees of freedoms of citizens, all genuine power was centralized in the Politburo of the Central Committee of the Communist Party in Belgrade. In that highest political body the highest leaders of the communist parties from all the six Republics were represented. Its Secretary-General was the Croat Josip Broz Tito. It was the only organ of genuine decision-making. As in the Soviet example, all the State organs on the federal level, as well as Party and State organs in the Republics, were simple transmissions for the execution of the will of the central Politburo.

In that period, the federalism of the country was little more than an illusion. Later on there were constitutional reforms and the introduction of the self-management of workers in industry and in State and other institutions, but the control of the Yugoslav Communist Party from Belgrade was not abolished.

However, through deep constitutional reforms after 1969, which were confirmed in the last Federal Constitution of 1974, Yugoslavia transformed into a proper federation of its member States. Kosovo gained the equal status of an autonomous province as Vojvodina. Both provinces formally remained parts of Serbia, but they became elements of the Federation as well.

The 1971 Constitutional Amendments established the Presidency of Yugoslavia as its collective Head of State. In that supreme organ, which was the Commander-in-Chief of the Yugoslav Army, one member elected by their local Assemblies represented each of the Republics and Provinces respectively. It was provided that this Presidency would perform its functions parallel with Tito as its lifetime President, and autonomously after his passing away.

Most importantly, the Yugoslav League of Communists federalized itself into an association of the Leagues of Communists of all the Republics and Provinces respectively. Its Ninth Congress held in 1969 was the first one that took place after the Communist congresses in all the Republics and Provinces.

The Albanians in Kosovo and Macedonia experienced these reforms as their national renaissance. Since 1912, nobody had asked them whether they wanted to live within Serbia or Yugoslavia or not. In that short period of time they established institutions of higher education in their own language. All posts in the Federal administration, in diplomacy and in the Army were open to them if they were faithful members of the League of Communists.

Even before that time, from the early nineteen-sixties, most Yugoslav citizens got their passports and could travel abroad without restrictions. They could take up employment, they could educate themselves and even publish there. Nevertheless, like in other authoritarian States, there were some taboos that nobody was allowed to breach. Individuals, who attempted to establish independent press or political organizations beyond the League of Communists and its satellite institutions, were punished in political processes. However, most people from East European countries that are now member States of the European Union only wanted to have a communist regime like the one under Tito. They did not aspire to more. That period also saw the economic prosperity passed down to the citizens, including free education, health insurance and the decent pension system.

The question is: How is it that the Federation of equal Republics and Provinces and an association of its equal nations and other ethnic groups («nationalities») could not survive its wartime leader and longtime president Tito? He died on 4 May 1980, at the age of 88 years.

There were in this some important external factors. After the Cold War ended, it was believed that there was no need any more for the non-aligned Yugoslavia as a factor of peace and stability in the world and especially in the Balkans. Hence, in 1982 the total foreign debt of Yugoslavia was rescheduled. On the global sum of about 22 billion dollars, in a few subsequent years that State paid 4.5 to 5 billion dollars annually for interest only, the capital remaining the same. Such conditions would ruin any State in the world and they deeply reflected on the social situation of the people. That was in fact part of the policy aiming to destroy Communism in Eastern Europe. Communism was finally destroyed in Yugoslavia and with it Yugoslavia was also destroyed, which was certainly not the objective of instigators of that policy. Promises of new foreign loans in 1991 with favorable interest rates could not save that State anymore.

Besides that, there were many internal factors in this dismemberment. The 1974 Constitution assured the rights and equal status of ethnic groups within Yugoslavia, but it did not secure the political rights of its citizens. Until his very end, Tito was an enlightened absolutist but not a democrat. Hence, the equality of ethnic groups meant the equality of communist elites representing these groups.

Even before 1974, Yugoslavia possessed constitutional courts on the federal level, as well as on the level of its Republics and Provinces. However all the controversies of these entities with the Federation or between themselves, were settled in the highest Party organ. Tito was the supreme arbitrator, but after his death even minor disputes became a factor of insoluble conflicts between the Party elites from different Republics and Provinces. The Federal Constitutional Court proved its inefficiency because it could not operate as an independent judicial body. Its members were divided according to the affiliation to the entities that nominated them to their posts.

Paradoxically, in this relies the reason why the Soviet Union and Czechoslovakia dissolved in 1991 and 1992 relatively peacefully, whereas the demise of Yugoslavia degenerated into a series of bloody conflicts with a huge number of victims. After the ruling communist parties lost their exclusive power in these two States, they quickly transformed into authentic federations of their member-States before peacefully disintegrating and forming independent States within their actual frontiers.

Tito committed a big political mistake with the consequences which he certainly did not want. After removing the political leadership in Croatia and Slovenia, accused of «nationalism» in 1971, the next year he removed, for symmetry, the leadership of Serbia. These leaderships were modern, tolerant and democratically oriented politicians, open to reforms. He replaced them with his «old guard», relying on their loyalty to his policy. In Serbia there were some concealed nationalists who, after Tito's death, were replaced by Slobodan Milošević and his group of extreme nationalists.

In the spring of 1981, mass demonstrations of students at the Prishtina University took place with the slogan: «Kosovo -- Republic», claiming for the autonomous province the full status of the seventh Republic in the Federation. That claim appeared legitimate, but at that very time it was unwise. Thereafter, many Albanian Communists were accused of the alleged crime of «counter-revolution» and were excluded from the Party. That meant the end of their career in Yugoslavia.

The Student claims were the detonator of greater Serbian nationalism. In the roots of the problem was a very unequal birth rate between different ethnic groups. While the birth rate of the Albanians in Kosovo and Macedonia was the highest in Europe, higher even than in Albania itself, the birth-rate of the Serbs and all other Yugoslav ethnic groups was very low or even negative. The Serbs feared to lose Kosovo, which they deemed to be the historic cradle of their nation. The share of the Serbs and Montenegrins fell to about 10 per cent in the total population of Kosovo.

It was not difficult to manipulate with these feelings of Serbs. They did not take into account that when they constituted majority in Kosovo in the pre-Ottoman time, except in eastern Herzegovina, the Orthodox Serbs were almost non-existent in Bosnia, Vojvodina and Croatia. Hence, after Tito's death, the main objective of Serbian Party leaders of nationalistic orientation was the destruction of the order as provided in the 1974 Federal Constitution.

In a series of carefully organized «anti-bureaucratic» demonstrations in 1988 and 1989, Slobodan Milošević won the full power in Vojvodina, in Montenegro and in Kosovo itself. With the adoption of the amendments to the Constitution of Serbia on 27 March 1989, the autonomy of Kosovo and Vojvodina was suppressed, obviously against the will of the majority of the Albanians in Kosovo. Prior to that, on 23 March, the Assembly of Kosovo itself had to adopt by the majority vote all these amendments. The building of the Assembly was at the time surrounded by tanks, and many Albanian politicians who dared to oppose Milošević's policy had been arrested. After that, Milošević could rule over 90% of the Albanians in Kosovo only with ruthless police terror, and he actually did. But the terror could not last forever.

These violent events incited the Party leadership and people from other Republics to defend themselves from the «anti-bureaucratic revolutions» exported from Serbia and to first of their separation from Yugoslavia. Milošević had prepared two scenarios for this situation that he created himself.

Because most Party members came from Serbia and Montenegro, he believed he would win the power in the entire Yugoslavia through their majority delegates at the Fourteen Congress of the League of Communists of Yugoslavia. At his insistence the Congress was convoked in Belgrade on 20 January 1990. After all their proposals were rejected by «democratic majority», in late-night hours of 22

January the delegates from Slovenia simply left the Congress. The delegates from Croatia followed them, and that was the end of the League of Communists of Yugoslavia.

In that situation there were no chances for democratic reforms on the level of Yugoslavia. The first free multiparty elections were organized in Slovenia and Croatia in which the former communists, i.e. newly reformed socialists, temporarily lost the majority in their Parliaments. Hence, these two Republics got non-Communist governments.

However, in these new circumstances the Federal institutions continued to work. The most important was the Presidency of Yugoslavia, consisting of eight members representing all the Republics and Provinces, which was the collective Commander-in-Chief of the Yugoslav Army. Of course, Milošević wanted to win the majority in that body, which he did not entirely succeed.

On 18 March 1991, Serbian Parliament dismissed the Member of the Yugoslav Presidency from Kosovo from his office and replaced him by a person of their choice. Certain Sejdo Bajramović replaced Mr. Riza Sapundžiu, previously elected by the Parliament of Kosovo before its dissolution by the Serbian authorities. Milošević thus controlled four seats in the collective Head of State of the former Federation: those of Serbia, Vojvodina, Kosovo and Montenegro.

On 17 May 1991, there followed the *coup de grâce* to Yugoslavia. The term of Dr. Borisav Jović from Serbia as the rotating president of the Federal Presidency having expired, following the pre-established order, it was now the term of the Croatian representative, Mr. Stjepan Mesić, to occupy that post. That day Mr. Mesić was not elected, however the votes in the Presidency were tied: four against four. As a consequence, the Federal Army remained without its constitutional commander.

It was in fact a concealed *coup d'Etat* organized and perpetrated jointly by the leadership of Serbia and Montenegro and supported by the Federal Army. After that, the Army only observed the commands of the Members of the Federal Presidency appointed by the parliaments of Serbia (one for Serbia itself, another for Kosovo), of Vojvodina and of Montenegro. It ignored members of the Presidency from Bosnia-Herzegovina, Croatia, Macedonia and Slovenia.

This way Milošević believed to be able to realize his alternative plan of creating Greater Serbia by joining together everywhere the Serbs lived in all Republics and Provinces, even where they constituted a minority in population. It was not a matter of protecting the Serbs, but of seizing territories outside Serbia. The Yugoslav Army, abandoned by its non-Serb officers and by some Serb officers who still believed in the idea of Tito's Yugoslavia, committed aggressive assaults, first in Croatia in the summer 1991 and the next year throughout Bosnia-Herzegovina.

The best way to secure the existence of one's own national group in an ethnically mixed territory such as Kosovo, Bosnia-Herzegovina or Croatian

«Krajina», is to preserve its multiethnic situation by respecting some natural rights of all the groups living there. These are: their right to existence, to equality, to proportionate sharing in the decision-making, the right to use their native language for official purposes, and to have their schools and other cultural institutions.

On the contrary, attempts at ethnic cleansing in such a territory in order to appropriate it can be fatal to one's own group. Adolf Hitler attempted to capture in World War II vast territories in the Eastern Europe for their colonization by the German race. The result was that after that War, the German minority population disappeared, from the Baltic countries to Yugoslavia and Hungary. Another result was the presence of the Red Army in Berlin for the next forty-five years.

If a conflict of this kind happens somewhere, it is wrong to pretend that all its parties shared at least some responsibility for it, which is especially popular with foreign diplomats. For the wars of the Nazi Germany against Poland and the Soviet Union there was no shared responsibility. It was very similar with the conflicts that occurred on the territories of the former Yugoslavia.

Nevertheless, responsibility does not fall on an entire nation, and especially not on its future generations. But new governments in these States cannot behave as if nothing has happened in the meantime. Personal responsibility must be individualized, assigned to the perpetrators of massive international crimes, and first of all on their superiors. It should also include the supreme crime of aggression. The party to a conflict that defended itself can also be responsible for the commission of international crimes against innocent civilians or disarmed enemy soldiers.

3. PROCLAMATION OF THE FEDERAL REPUBLIC OF YUGOSLAVIA IN 1992

The régime in Belgrade could no longer ignore the dissolution of the Soviet Union (USSR), the creation of the Commonwealth of Independent States (CIS) and the international recognition of the former Soviet Republics as new States. The independence of Georgia was the last to be internationally recognized as late as in March 1992, after joining the CIS.

Through the Declaration of Minsk of the three Slavic Republics (Russia, Ukraine and Belarus) of 8 December, followed by the Declaration of Alma Ata of 21 December 1991 by which the CIS was established, the signatory States including the Russian Federation recognized the fact that the USSR has ceased to exist as a subject of international law and geographical reality.

Nevertheless, unlike other former Soviet Republics, the rest of the world did not recognize the Russian Federation as a new State. It was universally recognized as a continuation of the former USSR, automatically inheriting all its international

obligations, including the obligations concerning the reduction of nuclear arms. Without formal amendments to the text of the UN Charter it inherited the permanent seat on the Security Council as well.

Faced with these realities, the Belgrade régime ceased to oppose the appearance of Bosnia-Herzegovina, Croatia, Macedonia and Slovenia as new States. But it tried its best to obtain advantages of the Russian Federation as a continuing State of the SFRY.

Hence on 27 April 1992, the participants in the Joint Session of the SFRY Assembly, the National Assembly of the Republic of Serbia and the Assembly of the Republic of Montenegro, proclaimed the entity called the «Federal Republic of Yugoslavia» in Belgrade. It consisted of Serbia, with its two Provinces, and Montenegro. The red star was removed from the Yugoslav official flag. An important Declaration was issued at that session which proclaimed in its first paragraph the following:

«1. 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 SFR of Yugoslavia assumed internationally in the past.

At the same time, it shall be ready to fully respect the rights and interests of the Yugoslav republics which declared independence. The recognition of the newly-formed States will follow after all the outstanding questions negotiated on within the Conference on Yugoslavia have been regulated.

Remaining bound by all obligations to international organizations and institutions whose member it is, the Federal Republic of Yugoslavia shall not obstruct the newly-formed States to join these organizations and institutions, particularly the United Nations and its specialized agencies...».

Consequently, without FRY's obstructions, on 22 May, Bosnia-Herzegovina, Croatia and Slovenia were admitted to membership of the UN. Due to the obstruction from Greece, not from the FRY, Macedonia was admitted almost a year later, on 8 April 1993.

However, unlike in the case of all the member States of the CIS including the Russian Federation, that Declaration did not recognize the external borders of Serbia and Montenegro with the newly formed States as international frontiers. In respect of the territories of Croatia, it provided:

«The FR of Yugoslavia shall respect and fulfill the rights and obligations of the SFR of Yugoslavia assumed vis-à-vis the territories of Krajina which have been placed, within the framework of the United Nations peace-keeping operations, under the protection of the world Organization.»

The Belgrade Government believed to have established in the occupied part of Croatia called «Krajina» a situation like that still existing in Cyprus. It was

willing to fight and negotiate for new frontiers in its favor. Bosnia-Herzegovina was not even mentioned in that document. But exactly in that period the UN Security Council began to order a series of sanctions against FRY for its involvement in the conflict in that new UN Member State.

IV. THE CASES OF THE FRY BEFORE THE ICJ

On 20 March 1993, Bosnia-Herzegovina filed its Application with the International Court of Justice (ICJ) against the FRY concerning the latter's violations of the 1948 Genocide Convention. That case was finally decided by the Judgment of the Court fourteen years later, on 26 February 2007. Previously, in its Judgment of 11 July 1996 on preliminary objections, the Court found that it had the jurisdiction to adjudicate in the case on the basis of Article IX of the Genocide Convention. After the FRY was admitted to UN membership as a new State, it requested the Court to revise that Judgment due to this new fact. It expected from the Court to declare its lack of jurisdiction in the case involving Bosnia-Herzegovina. However, in its Judgment of 3 February 2003, on the *Application for Revision*, the Court found that the FRY's request was inadmissible under Article 61 of the Court's Statute.

Croatia filed its own Application against the FRY on 2 July 1999, based again on Article IX of the 1948 Genocide Convention. In its Judgment of 18 November 2008 the Court established its jurisdiction. The proceedings on the merits are now pending.

Earlier that year, on 29 April, it was the FRY which filed its Applications with the Court against ten NATO Member States «for the violation of the obligation not to use force».⁵ It invoked various grounds of the Court's jurisdiction, but Article IX of the 1948 Genocide Convention was again of the essential importance. In its Judgments in eight of these cases rendered on 15 December 2004, concerning the *Legality of Use of Force*, the Court established the lacking capacity of the FRY to appear before the Court.⁶

Hence, the FRY appeared before the ICJ in both capacities as a respondent and as an applicant State. It first pretended to be the continuing State of the former SFRY, but since it's admission to the UN it alleged its capacity of a new State, to be debarred from all obligations of the predecessor State. In all these cases, Article

⁵ They were Belgium, Canada, France, Germany, Italy, the Netherlands, Portugal, Spain, the United Kingdom and the United States.

⁶ In a series of its Orders issued on 2 June 1999, the Court rejected the requests of the FRY for the indication of provisional measures against all ten States. It then found manifest lack of its jurisdiction in the cases against Spain and the United States.

IX of the 1948 Genocide Convention was of the essential importance for the jurisdiction of the Court.

V. VIEWS HELD BY THE UN SECRETARIAT ON VARIOUS ISSUES OF STATE SUCCESSION

Prior to explaining the Court's own positions in all these cases, we must expose some dubious practices of the Office of Legal Affairs of the UN Secretariat on various issues of State Succession.

1. Dissolution of British India in 1946

On the basis of the Indian Independence Act adopted by the British Parliament, the former British India, an original UN Member, become independent in 1947. It was at that very moment split into two separate States: India and Pakistan. On the basis of a legal opinion issued by the UN Secretariat, the continuing position of British India was recognized to India only. In regard of Pakistan it was written that: «The territory which breaks off, Pakistan, will be the new State; it will not have treaty rights and obligations of the old State, and will not, of course, have membership in the United Nations». As its precedents the separation of the Irish Free State from Great Britain in 1922, and of Belgium from the Netherlands in 1830 were invoked.⁷

British India was also an original Member of the former League of Nations. However, until 1947, it was not a sovereign State. Its internationally recognized status was no different from that of Ukrainia and Byelorussia (today Belarus), also recognized original UN member States. In such a situation it was equivalent to giving additional votes in decision-making to the United Kingdom and the Soviet Union.

Because India and Pakistan become independent as separate States at the same time, it would have been the most appropriate to treat them equally. If both of them could not have acquired the position of continuing States of British India, they should both have been admitted to UN membership as new States. In that case there was no separation.⁸

⁷ Cf., *Yearbook of the International Law Commission 1974*, Volume II, Part One, p.211, para.4.

⁸ It was, however, the former Eastern Pakistan that separated from the rest of that State. In 1974, it was admitted to the UN as a new State under the name of Bangladesh. Among other examples such was the separation of Montenegro from the union of Serbia and Montenegro. After its proclamation of independence on 3 June 2006, Serbia assumed all the responsibilities of the former

Since then, some successor States to disappeared entities insisted on their continuity with the predecessor State. The situation was quite opposite to that after World War I. Then, foreign creditors tried to impose continuity to Austria, Hungary, Turkey and the USSR with their predecessor States Austria-Hungary, the Ottoman Empire and the Czarist Russia. However, at that time all of them claimed to be new States, equal in rights and obligations with other successor States of the Empires vanished.

2. The question of Article 34(1) of the 1978 Vienna Convention

More serious is the problem of the 1978 Vienna Convention on Succession of States in respect of Treaties in practice. Its text deserves much criticism. From a technical point of view it is far inferior to the 1969 Vienna Convention on the Law of Treaties, although both of them should constitute a whole.

The primary aim of this Convention was dealing with problems arising from decolonization. By and large the process of decolonization came to an end in 1974, when most of the former Portuguese colonies finally got their independence. Hence, this happened before the adoption and signature of this Convention. It seems unlikely that its numerous, inadequately itemized and largely unnecessary provisions concerning «newly independent States» will ever find their application in practice. Its provisions relating to other situations of territorial changes, which actually occurred in practice after 1990, are scanty and some of them are insufficient. But they should not be entirely ignored for that reason.

For the purposes of the succession of States all treaties, except those on boundaries and boundary regimes, to which the predecessor State was a party should be divided into three categories: (i) multilateral conventions in general; (ii) multilateral treaties of a restricted character; and (iii) bilateral treaties.⁹ We are only interested here in their first category.

Hence, the 1978 Vienna Convention divides the new successor States into two quite separate categories: (a) newly independent States, «the territory of which

union as its continuing State. The ICJ in its 2008 Judgment on the *Application of the Genocide Convention* (Croatia v. Serbia) recognized that fact. It treated Montenegro as a new State admitted as such to the UN, which «does not continue international legal personality of the State union of Serbia and Montenegro». Cf. *I.C.J. Reports 2008*, paras.32-33. Unfortunately the same course of events was not followed after the proclamation of Kosovo's independence on 17 February 2008 as well.

⁹ Although the International Law Commission has invoked this division as its own (cf., *Yearbook of the International Law Commission 1974*, Vol.II, Part One, p.172, para.72), its draft articles and the provisions of the 1978 Vienna Convention, do not follow it consistently. This especially relates to provisions which *do not refer* to «newly independent States». That is one of the shortcomings of that Convention.

immediately before the date of the succession of States was a dependent territory for the international relations of which the predecessor State was responsible»;¹⁰ and (b) all other new States arisen either from separation of or from dissolution of the predecessor State.

Multilateral conventions in general should, according to Article 34(1) (and Article 38(1)) of the 1978 Convention, automatically be binding on new successor States without any notification of succession to their depositaries.¹¹ Therefore, these conventions should be valid on the territory of these new States without interruption and legal vacuum in their application, irrespective of the date of their international recognition or of their admission to the UN and other international organizations.¹²

In this respect Article 17(1) of the 1978 Convention provides an exception privileging newly independent States only. Unlike other new States, they may notify to depositaries only the succession to these multilateral treaties to which they wish to be parties. Thus, they may reject some conventions concluded for them by the former colonial power, by simply failing to notify their succession.¹³

The practice of the UN Secretary-General in his capacity as a depositary of many multilateral conventions has neglected the above distinction. Subsequent to all the territorial changes that happened after 1990, the Secretary-General did not make any distinction between «newly independent States» and other new States. He invariably waited for the admission of these new States into the UN membership,

¹⁰ Cf., Article 2 (1f) of the 1978 Vienna Convention.

¹¹ Paragraph 1 of Article 34 reads as follows: «1. When a part or parts of the territory of a State separate to form one or more States, whether or not the predecessor State continues to exist: -- (a) any treaty in force at the date of the succession of States in respect of the entire territory of the predecessor State continues in force in respect of each successor State so formed; -- (b) any treaty in force at the date of the succession of States in respect only of that part of the territory of the predecessor State which has become a successor State continues in force in respect of that successor State». According to paragraph 2, the above provision is not applicable if the States concerned agree otherwise, as well as in respect of multilateral treaties of a restricted character including by implication all bilateral treaties. In addition, Article 38(1) does not provide the notification of succession of treaties covered by Article 34.

¹² It is important to notice that all the new States arisen from the dissolution of the Soviet Union, Yugoslavia and Czecho-Slovakia have considered this principle from Article 34(1) as a rule of positive international law. At the time of their proclamation of independence, they all assumed the obligations from almost all the treaties of their predecessor States, even including bilateral treaties and multilateral treaties of a restricted character. The only exceptions to this are the three Baltic States (Estonia, Latvia and Lithuania) which claim to have continued their statehood between 1940 (when they were incorporated into the Soviet Union by force) and 1991. As such, they do not consider themselves as successor States to the former USSR.

¹³ Subject again to some multilateral treaties of a restricted character, Article 17 provides that «a newly independent State may, by a notification of succession, establish its status as a party to any multilateral treaty which at the date of the succession of States was in force in respect of the territory to which the succession of States relates».

and only then asked them to notify their succession to conventions according to their choice. Thus, he extended the privilege provided to «newly independent States» to all new States.

It is true that at that crucial period of time this Convention did not formally enter into force for at least fifteen States that ratified or acceded to it, as its Article 49 provides. But that requirement of fifteen States was only arbitrarily prescribed. For the full application of the sum of provisions of that Convention as the treaty law, practically all States in the world should become parties to it. Its provisions can be applicable to all the treaties in force between all States at a given time, including multilateral conventions with a huge number of parties.

For this reason the principles set out in the 1978 Vienna Convention and their subsequent transformation into the new customary international law are of the utmost importance.

Hence, through its unfortunate practice the UN Secretariat has precluded the transformation of the principle enshrined in its Article 34(1) into a new customary rule of general international law. It has thus created the problem of retroactive validity of multilateral conventions between the date of proclamation of independence of a new State, and the date of its notification of succession upon its admission to the UN.

The most serious problem appeared in respect of the human rights conventions, including in particular the 1948 Convention on the Prevention and Punishment of the Crime of Genocide. If the above principle should have been applied to all new States from their declaration of independence, including the States which are not universally recognized (e.g. the Turkish Republic of Northern Cyprus, Southern Ossetia or Abkhazia), Article IX of the Genocide Convention could automatically apply to all of them. It could also apply without any interruption in time, to the new States that were formerly members of the USSR, the Yugoslav Federation and Czecho-Slovakia, which were later admitted to UN membership.

Hence, it was the UN Secretariat that through its practice created the problem of the jurisdiction of the ICJ *ratione temporis* on the basis of Article IX of the 1948 Genocide Convention. As yet, the Court has not found a satisfactory solution to it.

The practice of the UN Secretariat does not seem accurate from a larger perspective. It only sees in all the general conventions sources of rights of their States parties, and not of their obligations. Particularly when it comes to human rights conventions, obligations prevail over rights. That should be clear to all experienced international lawyers.¹⁴

¹⁴ For more detail on this issue see -- V.D. Degan: «La succession d'Etats en matière de traités et les Etats nouveaux (issus de l'ex-Yougoslavie)», *Annuaire français de droit international* 1996,

3. Legal position of the FRY

Our last remark relates to the legal position of the Federal Republic of Yugoslavia (Serbia and Montenegro) between 27 April 1992 and 1 November 2000. Here again the UN Secretariat created the problems to the ICJ on which it took contradictory positions. As already said, for the FRY's position in the UN at that time the Security Council resolution 777 of 19 September 1992, approved by the resolution 47/1 of the General Assembly on 22 September, was of the crucial importance.

In its preamble that resolution confirmed the fact that «the state formerly known as the Socialist Federal Republic of Yugoslavia has ceased to exist». In light of this fact its recommendation to the General Assembly was correct that it decide that the FRY should apply for membership of the UN. However, the most controversial was the last conclusion that the FRY «shall not participate in the work of the General Assembly». Later on that ban of participation was extended to the Economic and Social Council as well.

Hence, contrary to the suggestion in Opinion No.8 by the (Badinter) Arbitration Commission, SFRY's membership of the UN was never terminated. The FRY was allowed to keep the place of that non-existing State until its own admission to the UN membership as a new State.

In the confusing situations that can sometimes be created by decisions of political organs, the Office of Legal Affairs should recommend more or less discretely the most reasonable solutions in accordance with law. Its advice is of no use if it only confirms a political decision as adopted, and by that only contributes to actual misunderstandings. That actually occurred in case of the FRY and it contributed to the discordant conclusions on this subject-matter by The Hague Court itself.

On 25 September 1992, permanent representatives of Bosnia-Herzegovina and Croatia to the UN addressed a letter to the Secretary-General concerning the scope of the above resolutions. They asserted that: «at this moment, there is no doubt that the Socialist Federal Republic of Yugoslavia is not a Member of the United Nations any more. At the same time, the Federal Republic of Yugoslavia is clearly not yet a member». They concluded that «the flag flying in front of the United Nations and the name-plaque bearing the name «Yugoslavia» do not represent anything or anybody any more». They asked the Secretary-General to provide a legal explanation of these questions.

The Under-Secretary-General and the Legal Counsel of the UN gave his answer on 29 September. He entirely ignored the statement from the preamble of the Security Council 777 resolution that the SFRY has ceased to exist. He

concentrated on other statements from it as confirmed by the General Assembly resolution 47/1:

«While the General Assembly has stated unequivocally that the Federal Republic of Yugoslavia (Serbia and Montenegro) cannot automatically continue the membership of the former Socialist Federal Republic of Yugoslavia in the United Nations and that the Federal Republic of Yugoslavia (Serbia and Montenegro) should apply for membership in the United Nations, the only practical consequence that the resolution draws is that the Federal Republic of Yugoslavia (Serbia and Montenegro) shall not *participate* in the work of the General Assembly...

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 (Serbia and Montenegro) cannot sit behind the sign «Yugoslavia». Yugoslav missions 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.»¹⁵

By that «legal opinion» of the Under-Secretary-General the main problem was simply avoided. It did not anticipate the situation that actually occurred on 1 November 2000, when the FRY was admitted to the UN Membership. Meanwhile, the FRY was recognized the *de facto* position similar to that of the Russian Federation of the continuing State of the former SFRY.

However, since 1 November 2000 the FRY alleged to be free from all the obligations of its predecessor States, which it could not deny in the former period. Tinkering with these two opposite legal situations was the direct product of the above political resolutions. The UN Legal Service did nothing to prevent it.

The Office of Legal Affairs supported the FRY also in its new position. Upon its admission to UN membership, the Under-Secretary-General and the Legal Counsel addressed a letter to the FRY's Ministry of Foreign Affairs. He stressed in it that: «It is the Legal Counsel's view that the Federal Republic of Yugoslavia should now undertake treaty actions, as appropriate, in relation to the treaties concerned, if its intention is to assume the relevant legal rights and obligations as a successor State». Like in previous cases, he thus clearly recognized to the FRY the status of a «newly independent State», as provided in Article 17(1) of the 1978 Convention.

¹⁵ Quoted *I.C.J. Reports 2003, Application for Revision* case, paras. 37-38.

On 6 March 2001 the Ministry of Foreign Affairs in Belgrade sent a large text of notification of accession of the FRY to the 1948 Genocide Convention, not anymore as a continuing or successor State of the former SFRY, but as an entirely new State. It added in it the following reservation on Article IX of that Convention:

«The Federal Republic of Yugoslavia does not consider itself bound by Article IX of the Convention on the Prevention and Punishment of the Crime of Genocide and, therefore, before any dispute to which the Federal Republic of Yugoslavia is a party may be validly submitted to the jurisdiction of the International Court of Justice under this Article, the specific and explicit consent of the FRY is required in each case».

Following that notification the Secretary-General issued his Depositary notification according to which the accession (not succession) of the FRY to the 1948 Convention «was effected on 12 March 2001» and that the Convention would «enter into force for the FRY on 10 June 2001».

Only three other States parties to the 1948 Convention objected to that notification. Croatia asserted that the said reservation was «incompatible with the object and purpose of the Convention», whereas Bosnia-Herzegovina stated that it was made several years after 27 April 1992, «the day on which the FRY became bound to the Genocide Convention in its entirety».

Sweden, a State that was not involved in any of the actual disputes with the FRY, made substantially the most important objection. It informed the Secretary-General that it considered the FRY to be one of the successor States to the SFRY «and, as such, a Party to the Convention from the date of entering into force of the Convention for the Socialist Federal Republic of Yugoslavia». It therefore considered the FRY's reservation «as having been made too late and thus null and void».¹⁶

The FRY was at that time involved as a respondent in two disputes concerning the violations of that Convention with Bosnia-Herzegovina and Croatia, and as an applicant in a set of eight disputes with NATO members. The Secretary-General was not sensitive to this situation before the ICJ, one of the six principal organs of the Organization and its principal judicial organ.

In all the above cases the ICJ only recognized the basis of its jurisdiction in Article IX of the 1948 Genocide Convention, which reads:

«Disputes between the Contracting Parties relating to the interpretation, application or fulfillment of the present Convention, including those relating to the responsibility of a State for genocide or for any other acts enumerated in Article 3, shall be submitted to the International Court of Justice at the request of any of the parties to the dispute.»

¹⁶ For all these texts see -- *I.C.J. Reports 2003, Application for Revision case*, paras.51-53.

The Court was persistent in rejecting all other alleged bases of its jurisdiction, such as for the commission of aggression, or of crimes against humanity or of war crimes. These other international crimes are not covered by the definition of genocide in Articles I, II and III of that Convention.

However, during the proceedings in different cases before it, the Court took different positions on the entitlement of the access of the FRY to it, as a respondent and as an applicant. The legal vacuum in the entry of the 1948 Convention into force for the FRY between its claims of continuity with the SFRY and its notification of «accession» to that Convention created the problem of the Court's jurisdiction *ratione temporis*. It has not been clearly resolved as yet.

These issues will be discussed in our review of verdicts rendered by the Court.

V. BOSNIA-HERZEGOVINA V. THE FRY

We shall first deal with the case between Bosnia-Herzegovina and the FRY until the final Judgment of the Court of 26 February 2006.

Together with Croatia and Slovenia, Bosnia-Herzegovina was admitted to the UN on 22 May 1992. On 29 November, it transmitted to the UN Secretary-General its notification of succession to the 1948 Convention.

On 20 March 1993 Bosnia-Herzegovina instituted proceedings against the FRY for the violation of the Genocide Convention. It recounted a series of events in its territory from April 1992 onwards that allegedly amounted to acts of genocide. They were committed by the former members of the Yugoslav People's Army and by the Serb military and paramilitary forces under the direction and with the assistance from the FRY.

1. Order of 8 April 1993

On the same 20 March 1993 Bosnia-Herzegovina made a request for the indication of provisional measures by the Court.

In both the application and the request of provisional measures acts were largely recited that could *prima facie* amount to violations of the Genocide Convention such as ethnic cleansing, murder, summary execution, torture and rape of its citizens, the starvation of its civilian population, etc. In the final Judgment of 2007 these acts were designated, but the Court did not qualify them as acts of genocide. That was for the lack of proofs of *dolus specialis*, i.e. that these crimes were committed «with intention to destroy, in whole or in part, a national, ethnical, racial or religious group» from Article 2 of the Convention.

By these provisional measures Bosnia-Herzegovina tried to ensure its other rights that were gravely breached, such as securing other human rights of its citizens, prohibition of the threat and the use of force against it, ban of intervention in its internal affairs by the FRY, etc. Its right to self-defense under Article 51 of the UN Charter was also invoked, and it consequently claimed the right to request immediate assistance from any State in spite of the imposition of arms embargo upon the former Yugoslavia by the Security Council. The Court, however, noted that it was unable to indicate measures for the protection of disputed rights that fell outside the scope of the Genocide Convention.¹⁷

In light of further rulings of the Court it is interesting to know how it established its jurisdiction *ratione personae*, especially in respect of the FRY. It took into consideration the fact that the «continuity» of the FRY with the former SFRY was contested by the international community. It quoted in this respect resolution 777 of the Security Council, resolution 47/1 of the General Assembly, and the letter of the Legal Counsel of the UN, which were all quoted above.

The Court stressed that the solution adopted «is not free from legal difficulties», but the question whether or not the FRY was a Member of the UN and as such a party to its Statute «is one which the Court does not need to determine definitively at the present stage of the proceedings».¹⁸ Then follows a more specific argument:

«19. Whereas Article 35 of the Statute, after providing that the Court shall be open to the parties to its Statute, continues:

«2. The conditions under which the Court shall be open to other States shall, subject to the special provisions contained in treaties in force, be laid down by the Security Council, but in no case shall such conditions place the parties in a position of inequality before the Court»;

whereas the Court therefore considers that proceedings may validly be instituted by a State against a State which is a party to such a special provision in a treaty in force, but is not party to the Statute, and independently of the conditions laid down by the Security Council in its resolution 9 of 1946 (cf. *S.S. «Wimbledon»*, 1923, *P.C.I.J. Series A, No.1*, p.6); whereas a compromissory clause in a multilateral convention, such as Article IX of the Genocide Convention relied on by Bosnia-Herzegovina in the present case, could, in the view of the Court, be regarded *prima facie* as a special provision contained in a treaty in force; whereas accordingly if Bosnia-Herzegovina and Yugoslavia are both parties to the Genocide Convention, disputes to which Article IX applies are in any event *prima facie* within the jurisdiction *ratione personae* of the Court».¹⁹

¹⁷ *I.C.J. Reports 1993*, p.20, para.35.

¹⁸ *Ibid.* p.15, para.18.

¹⁹ *Ibid.* p.15, para.19.

Having thus established its *prima facie* jurisdiction, the Court indicated in its Order of 8 April 1993 the following provisional measures:

A. (1) The Government of the FRY should immediately take all measures within its power to prevent commission of the crime of genocide;

A. (2) This Government should in particular ensure that any military, paramilitary or irregular armed units which may be subject to its control do not commit acts of genocide or other acts from Article 3 of the Convention, «whether directed against the Moslem population» or any other group;

(B) Both Governments of the FRY and Bosnia-Herzegovina should not take any action which may aggravate or extend the existing dispute, or render it more difficult of solution.²⁰

2. Order of 13 September 1993

On 27 July 1993 Bosnia-Herzegovina submitted a second request asking the Court to indicate some additional measures of protection. In the written procedure it was also the FRY that requested the Court to indicate the following provisional measure: «The Government of the so-called Republic of Bosnia-Herzegovina should immediately... take all measures within its power to prevent the commission of the crime of genocide against the Serb ethnic group».²¹

In its Order of 13 September 1993 the Court reaffirmed the measures it had ordered on 8 April. It held that the then perilous situation demanded not an indication of additional measures «but immediate and effective implementation of those measures» already ordered.²² The Court, however, noted that since its first Order, and despite it and many Security Council resolutions, «great suffering and loss of life has been sustained by the population of Bosnia-Herzegovina in circumstances which shock the conscience of mankind and flagrantly conflict with moral law».²³

The Court thus declined to adopt more far-reaching injunctions requested by Bosnia-Herzegovina, as well as the injunction requested by the FRY. In declining Bosnian requests, among others, to interdict the plans to partition Bosnian territory, to declare the annexation of Bosnian territory to be illegal, and to hold that Bosnia must have the means to prevent acts of genocide and partition by obtaining military supplies, the Court repeated that it had *prima facie* jurisdiction in this case to order interim measures only within the scope of the jurisdiction conferred on it by the Genocide Convention. It was not entitled to deal with broader claims.²⁴

²⁰ *Ibid.* p.25, para.52.

²¹ *I.C.J. Reports 1993*, p.334, para.12.

²² *Ibid.* p.349, para.59.

²³ *Ibid.* p.348, para.52.

²⁴ *Ibid.* pp.345-346, paras.42, 43.

3. Judgment of 11 July 1996 on preliminary objections

The FRY did its utmost to prevent the Court to decide on the merits of the application by Bosnia-Herzegovina. On 2 February 1996 it raised not less than seven preliminary objections contesting the admissibility of that application and the jurisdiction of the Court.

In its Judgment of 11 July 1996 the Court rejected all these preliminary objections, and it found in addition that the application was admissible. All these complaints can be divided into those concerning the Court's jurisdiction *ratione personae*, *ratione materiae* and *ratione temporis*, together with those on the admissibility of application.

The FRY could not contest its own position of a party to the 1948 Genocide Convention on the basis of its alleged continuity with the former SFRY. But it tried by all means to contest the very statehood of Bosnia-Herzegovina, the validity of its notification of succession of that Convention, and its validity *ratione temporis* in respect of the time of the application. Hence, its fourth preliminary objection read as follows:

«Whereas the so-called Republic of Bosnia and Herzegovina has been recognized in contravention to the rules of international law and that it has never been established in the territory and in the form in which it pretends to exist ever since its illegal declaration of independence, and that are at present four States in existence in the territory of the former Yugoslav Republic of Bosnia and Herzegovina, the so-called Republic of Bosnia and Herzegovina is not a party to the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, and consequently -- the Court has no jurisdiction over this case.»²⁵

Later on, the FRY withdrew this objection in view of the fact that the two States have recognized each other within their international borders. That was on behalf of Article X of the Dayton Peace Agreement signed in Paris on 14 December 1995. After the massacre of Srebrenica in July of that year, peace was established in Bosnia-Herzegovina by this Agreement and all crimes stopped. However, that arrangement did not deal with the situation in Kosovo.

This Judgment was important for assessing the nature of genocide as an international crime, of the scope of the 1948 Convention, and especially of the scope of its Article IX concerning the ICJ's jurisdiction. We shall, however, concentrate on some of these aspects only here.

While renouncing all the claims in its application that were not directly linked to the crime of genocide, Bosnia-Herzegovina invoked in this phases of the proceedings some additional bases of the Court's jurisdiction. In its view these bases could nonetheless,

²⁵ *I.C.J. Reports 1996*, pp.604-605.

«present a degree of interest, enabling the Court to make findings on some of the means used by Yugoslavia to perpetrate the genocide of which it stands accused, and particularly its recourse to a war of aggression during which it seriously violated the 1949 Geneva Conventions and the 1977 Protocols I and II.»²⁶

The Court once again dismissed this and other bases, strictly insisting «that its only jurisdiction to entertain the case is on the basis of Article IX of the Genocide Convention».²⁷

Another problem was that of the «automatic succession» to that Convention upon the proclamation of independence of Bosnia-Herzegovina, and in this respect also of the Court's jurisdiction *ratione temporis*.

As already said, the «automatic succession» of general conventions suggested the principle set out in Article 34(1) of the 1978 Vienna Convention. But the Court avoided giving its answer on this issue. Its conclusion was that, whether Bosnia-Herzegovina automatically became party to the Genocide Convention on the date of its accession to independence on 6 March 1992, or whether it became a party as a result --retroactive or not-- of its notice of succession of 29 December 1992, at all events it was a party to it on the date of filing its Application on 20 March 1993.²⁸

In respect of the broader problem of temporal application of the Genocide Convention, the Court stressed that this Convention -- and in particular its Article IX -- does not contain any clause the object and effect of which is to limit in such a manner the scope of its jurisdiction *ratione temporis*. Neither did the parties themselves make any reservation to that end, either to the Convention or on the occasion of the signature of the Dayton-Paris Agreement.

The Court thus found that it had jurisdiction in this case to give effect to the Genocide Convention with regard to relevant facts that have occurred since the beginning of the conflict in Bosnia-Herzegovina.²⁹

There was finally the problem with the situation of the FRY as the respondent State in the present case. Unlike in its first Order of 8 April 1993 on provisional measures, the Court did not discuss at all the relationship of the FRY with the UN and its position of the party to its Charter and to the Court's own Statute. It was sufficient to it to establish that, on the basis of its formal declaration at its proclamation of 27 April 1992, the FRY was a party to the 1948 Convention, and «that it has nobody contested».³⁰

However, from the silence of this Judgment on this issue only one conclusion can be drawn. Namely, the Court was aware of the General Assembly resolution 47/1 which ordered that the FRY should apply for membership of the UN. That

²⁶ *Ibid.* pp.617-618, para.35.

²⁷ *Ibid.* p.621, para.41.

²⁸ *Ibid.* p.612, para.23.

²⁹ *Ibid.* p.617, para.34.

³⁰ *Ibid.* p.610, para.17.

could only mean that at the time the Court rendered this Judgment on 11 July 1996 the respondent State was not a UN Member and as such not a party to the Statute of the Court. Rejecting all the preliminary objections rose by it in the case involving Bosnia-Herzegovina, and establishing its jurisdiction to adjudicate upon that dispute, meant that the Court's jurisdiction was based on Article 35(2) of its Statute. We shall discuss that problem later on.

In other words, the Court's *prima facie* finding in its Order of 8 April 1993: «that proceedings may validly be instituted by a State against a State which is a party to such a special provision in a treaty in force, but is not party to the Statute», became through this silence its final conclusion. Consequently, Article IX of the Genocide Convention was deemed to be a sufficient basis for the Court's jurisdiction even in a case in which one of its parties was not a UN Member State, or had in this respect a *sui generis* position.

4. Judgment of 3 February 2003 on Application for Revision

In September 2000, Slobodan Milošević was defeated in presidential elections and in a popular uprising in Belgrade he was then stripped of all power in the FRY. The new Government of Zoran Đinđić again tried to prevent further proceedings before the ICJ, but it was at the same time ready to cooperate with the International Criminal Tribunal for the Former Yugoslavia (ICTY). Next year, Milošević was arrested in Belgrade and turned over to the Tribunal in The Hague.

The new Government of the FRY renounced the claim of continuity with the former SFRY. It was only then possible to reach the Agreement on Succession Issues with other successor States of the former SFRY in 2001.

From a political aspect it was understandable that the new Government of the FRY tried to avoid State responsibility for international crimes for which the responsibility fell on the former authorities, while being ready to prosecute all suspects of these crimes in their personal capacity. However, Bosnia-Herzegovina was not itself willing to withdraw its application before the ICJ. From the aspect of the victims of these crimes it was also understandable.

On 24 April 2001, the FRY instituted proceedings before the ICJ for the revision of its 1996 Judgment on preliminary objections. It was based on Article 61 of the Statute of the Court. The FRY contended that its admission to the UN on 1 November 2000 as a new State was a «new fact», and a decisive factor regarding the question of jurisdiction of the Court *ratione personae*. It alleged that after its admission it was an unequivocal fact that the FRY did not continue the personality of the SFRY, that before that date it was not a UN Member State, that it was not a party to the Court's Statute and that it was not a party to the 1948 Genocide Convention.³¹

³¹ *I.C.J. Reports 2003*, para.18.

Bosnia-Herzegovina submitted itself that the matter here was not of a new «fact», but of the consequences of the fact of the FRY's admission to the UN. It was a matter of its own change of position that can have «no retroactive or respective effect». In its view the FRY relied merely on a new 'perception' of the facts from 1993 in light of the events that took place in 2000 and 2001, which occurred subsequently to the 1996 Judgment.³²

In its Judgment rendered on 3 February 2003 the Court found the application of the FRY inadmissible. It strictly relied on narrow requirements from Article 61 of its Statute concerning revision of judgments. The Statute and the Rules of the Court (Articles 98-100) foresee a two stage procedure. The first stage is to be limited to the question of admissibility of the request. The proceedings on merits can only follow if all conditions from Article 61 of the Statute were fulfilled.³³

The Court found that it was not established that the request of the FRY was based upon discovery of «some fact» which when the judgment of 1996 was given was unknown to the Court and to the party claiming revision. Hence, one of the conditions for the admissibility of an application for revision has not been satisfied, and the Court was not required to go further and investigate whether other conditions from Article 61 were fulfilled.

Shortly after that Judgment was rendered, on 12 March 2003, some former members of Milošević's police assassinated Zoran Đinđić. New Governments were less disposed fully to cooperate with the international community in prosecuting criminals in Bosnia and Kosovo, which again weakened the international position of that State.³⁴

5. Judgment of 26 February 2007 on merits

That final Judgment in this case betrayed the expectations of many victims of the crimes committed in Bosnia-Herzegovina and their descendants. But for some of these frustrations the ICJ was not to blame.

The Applicant tried once again to expand the jurisdiction of the Court to crimes others than genocide. His representatives suggested that the present phase

³² *Ibid.* paras.22-23.

³³ The Court reinterpreted these conditions as follows: (a) the application should be based upon the «discovery» of a «fact»; (b) the fact, the discovery of which is relied on, must be «of such a nature as to be a decisive factor»; (c) the fact should be «unknown» to the Court and to the party claiming revision when the judgment was given; (d) ignorance of this fact must not be «due to negligence»; and (e) the application for revision must be «made at least within six months of the discovery of the new fact» and before ten years have elapsed from the date of the judgment. *Ibid.*, para.16.

³⁴ That assassination had similar effects as the murder of the Nobel Prize winner and Israeli Prime Minister Yitzhak Rabin on 4 November 1995. After his passing away, the prospects of a just peace in the Middle East diminished.

«will provide an additional opportunity for this Court to rule on /the/ important matter, not only for the guidance of the Parties here... but for the benefit of future generations that should not fear the immunity of States from responsibility of their genocidal acts».³⁵ However, the reaction was again firm:

«The jurisdiction of the Court in this case is based solely on Article IX of the Convention. All the other grounds of jurisdiction invoked by the applicant were rejected in the 1996 Judgment on jurisdiction... The Court... has no power to rule on alleged breaches of other obligations under international law, not amounting to genocide, particularly those protecting human rights in armed conflicts».³⁶

In spite of these repeated statements Bosnian victims believed until the very rendering of this Judgment that the Court would incorporate within its jurisdiction aggression and other international crimes. All the crimes committed in ethnic cleansing were identified with the genocide, and it was expected that the Court would adjudicate billions of dollars in compensation by Belgrade to all the victims of the aggression in Bosnia-Herzegovina. Hence, that opinion was entirely ignorant of the findings of the Court on its jurisdiction. The same story repeated in Croatia after its application against the FRY in 1999.

Another aspect of that Judgment is of a more complex nature, although the decisions of the Court are hard to be criticized as such.

Genocide, the most disgusting among all international crimes, is the most difficult to prove. Its definition in Article II of the 1948 Convention is the same as in Article 6 of the Rome Statute of the International Criminal Court and in the statutes of *ad hoc* tribunals for the former Yugoslavia and Rwanda. According to this common provision genocidal acts should be committed «*with the intention to destroy, in whole or in part, a national, ethnical, racial or religious group, as such*». Hence, the standards for proving this crime are the same as in criminal law. Besides *actus reus*, *mens rea* must also be proved, which The Hague Court has called «*dolus specialis*».

If the applicant is unable to prove before the ICJ the existence of *dolus specialis*, the criminal acts actually committed, in spite of their abhorrent nature and widespread character, remain either crimes against humanity or war crimes. These misdeeds fall within the jurisdiction of international criminal courts and tribunals, but not of the ICJ. That is because these acts are not covered by Article IX of the 1948 Genocide Convention. In addition, these criminal tribunals have the power to prosecute individual perpetrators and their superiors for these acts

³⁵ *I.C.J. Reports 2007*, para.151.

³⁶ *Ibid.* para.147. On the same ground the Court has also excluded from its jurisdiction all the crimes committed in «ethnic cleansing» if not covered by Article II of the Convention. See para.190.

only. But the power to adjudicate pecuniary compensation to the injured State lies only with the ICJ, in case it establishes the violation of the Genocide Convention.

Besides that, unlike criminal tribunals, the ICJ does not possess a prosecutor's office of its own that should gather evidence of the commission of genocide *proprio motu*. In the proceedings before The Hague Court the Applicant State has, according to the Court's Statute and Rules, no power to gather these evidences on the territory of the respondent State.³⁷

This situation was actually reflected in the 2007 Judgment. A considerable part of its text was dedicated to the description of the atrocities committed by Serb side in the principal areas of Bosnia and in various detention camps, as having been indicated in the Application. The Court's findings on the crimes committed were based on impartial sources: final Judgments of the ICTY, the Mazowiecki Commission, reports of the UN Secretary-General, etc. The events actually proved were horrifying.

Hence, the Court found that the requirement of the material element was proved in respect of: (a) killing members of the group; (b) causing serious bodily or mental harm to members of the group; (c) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; as all being defined in Article II of the 1948 Convention. Nevertheless, in the Court's view the Applicant did not prove the *dolus specialis* by the perpetrators in the commission of all these crimes.³⁸

And in respect of paragraphs (d) and (e) of Article II, the Court found that the evidence placed before it did not enable it to conclude that Bosnian Serb forces committed acts which could be qualified as «imposing measures intended to prevent births within the group», and «forcibly transferring children of the group to another group».³⁹

A different finding was made only in respect of the massacre at Srebrenica that happened from about 13 July 1995, in which more than 7.000 military-aged Bosnian Moslem men were executed. However, the Court relied on the existence of *dolus specialis* with respect to this massacre from the Judgments of the ICTY for *Krstić* and *Blagojević*. According to these two Judgments, the killings of victims were planned no earlier than on 12 July, and the Government in Belgrade was not informed about that.⁴⁰

It follows from the above that the State Applicant in these proceedings could not by its own means of gathering evidence prove the existence of *dolus specialis*

³⁷ In this respect see Articles 61, 62, 66 and 67 of the Rules of the Court in light of Article 49 of its Statute.

³⁸ Cf., *I.C.J. Reports 2007*, paras. 276-277, 319, 354.

³⁹ *Ibid.* paras. 361, 367.

⁴⁰ *Ibid.* paras. 278-297.

that could satisfy the high standards imposed by the Court. In this respect the ICJ was strongly dependent on the evidence produced by the Prosecutor as acknowledged in judgments of the ICTY. Without these two judgments perhaps even the Srebrenica massacre could not be qualified as genocide.

The question should nevertheless be raised of whether the Court itself deprived Article IX of the 1948 Genocide Convention of its object and purpose by imposing these high standards that an applicant State before it cannot satisfy.

Hence, on this narrow basis the Court only established the commission of the crime of genocide at Srebrenica and not in other parts of Bosnia controlled by Serb forces, or on the territory of FRY including Kosovo.⁴¹ For the Srebrenica massacre the responsibility lies with the Army of the Republika Srpska with its Command. In respect of this entity the Court concluded that it never attained international recognition of a sovereign State, that it enjoyed some *de facto* independence, and had *de facto* control of substantial territory of Bosnia-Herzegovina.⁴²

Nevertheless, Bosnia-Herzegovina could not sue before the ICJ this unrecognized entity that, in addition, now constitutes one of its two component parts. It raised its Application against the Federal Republic of Yugoslavia. Hence, the main issue of this case was that of the attribution of the Srebrenica massacre to the Respondent State.

It is a matter of the obligation from Article III of the Genocide Convention, which reads:

«The following acts shall be punishable: (a) genocide; (b) conspiracy to commit genocide; (c) direct and public incitement to commit genocide; (d) attempts to commit genocide; (e) complicity in genocide.»

In this respect the Court applied the Articles on State Responsibility as formulated by the International Law Commission in 2001. It applied them as reflecting customary international law. These standards of attribution are from public international law.

We must, however, leave out lengthy explanation of the Judgment on this interesting aspect here.⁴³ For the rest we shall only explain our critical remarks on some findings by the ICJ in the operative part of its 2007 Judgment.⁴⁴

In its paragraph (2) the Court found: «that Serbia has not committed genocide, through its organs or persons, whose acts engage the responsibility under customary international law» in violation of its obligations from the Genocide Convention. In paragraph (3) the Court concluded that through its organs or persons «Serbia

⁴¹ *Ibid.* paras. 368-369.

⁴² *Ibid.* paras. 233, 235.

⁴³ See, *ibid.* paras. 377-424.

⁴⁴ See, *ibid.* para.471.

has not conspired to commit genocide, nor incited the commission of genocide». In paragraph (4) it was found that «Serbia has not been complicit in genocide».

A previous finding by the Court seems to be accurate, namely «that it can only form its opinion on the basis of the information which has been brought to its notice at the time when it gives its decision, and which emerges from the pleadings and documents in the case file, and the arguments of the Parties made during the oral exchange».⁴⁵

In view of the heavy burden imposed on the Applicant to prove the existence of *dolus specialis* for each crime committed in Bosnia, the above findings do not seem to be very apt. Instead, it should be stated there that «*on the basis of the information presented to the Court*» Serbia has not committed all the above acts through its organs or persons, whose acts engage its international responsibility.

Perhaps by its emphatic conclusions the Court wanted to prevent possible applications for the revision of this Judgment in the next ten years. But such a motivation, if any, does not seem to be the most appropriate. In case that some time in the future the ICTY convicts a senior officer of the Army of Yugoslavia, or a responsible commander of the Police of Serbia, for the genocide at Srebrenica, Bosnia-Herzegovina will be enabled to submit to the ICJ an application for the revision of its 2007 Judgment in accordance with the stringent rules set forth in Article 61 of its Statute. The same should occur in case of discovery of official documents of the FRY that are now not known to the Court and to Bosnia-Herzegovina.

In respect of the finding of the Court in paragraph (5), that Serbia violated its obligation to prevent the genocide in Srebrenica, it seems that the conclusions on applicable law in paragraphs 428 to 438 of the Judgment were well presented. This does not, however, relate to the factual finding in para.437 on Milošević's ignorance of these events. New documents would prove the contrary.

However, the weakest point in this entire Judgment is in our opinion the decision of the Court under (9) that, as regards the breach by Serbia of its above obligation, the Court's own findings in paragraphs (5) and (7) constitute appropriate satisfaction, «and that the case is not one in which an order for payment of financial compensation... would be appropriate».⁴⁶

This last statement needs a more exhaustive comment. The Court established the causal nexus between the genocide in Srebrenica and the responsibility of Serbia only at the time when that massacre happened.⁴⁷ In this respect it relied

⁴⁵ *Ibid.* para.395.

⁴⁶ Paragraph (7) reads that «Serbia has violated its obligation to comply with the provisional measures ordered by the Court on 8 April and 13 September 1993 in this case, inasmuch as it failed to take all measures within its power to prevent genocide in Srebrenica in July 1995». Nevertheless, had the FRY complied with these provisional measures in good faith from 1993, most of other dreadful crimes in Bosnia-Herzegovina could probably have been prevented.

⁴⁷ *I.C.J. Reports 2007*, para.462.

on its precedent from the *Corfu Channel* Judgment of 1949. But the events in these two cases do not allow for any analogy.

In the Corfu Channel incident, Albania was found guilty of the deaths of 44 and personal injuries to 42 British officers and men during the innocent passage of two British warships through this Channel in October 1946. The Court, however, made a *declaration* that the mine-sweeping operation and collection of evidence by the U.K. constituted a violation of Albanian sovereignty. It stressed that: «/t/ his declaration... is in itself appropriate satisfaction».⁴⁸ In the case of Srebrenica it was a matter of the violation by Serbia of its obligation to prevent the massacre of about 8.000 men. Nobody violated Serbia's sovereignty.

What is even more important here, is that during the break-up of Yugoslavia, the regime of Belgrade unlawfully appropriated most of the arms, ammunition and equipment of the former «Yugoslav People's Army» which should have been apportioned among all the five successor States. With these arms Serbia equipped the Army of the Republika Srpska in Bosnia-Herzegovina and the «Militia» of the Serb Krajina in Croatia. The military-aged Bosnian Muslim men were, in fact, murdered in Srebrenica with the arms which should have been their own.

In these circumstances the payment of financial compensation by Serbia, not in the full amount but in an appropriate share, to the victims of this crime and to their descendants should have no alternative. The satisfaction to the victims provided by the Court itself in its Judgments looks like a mockery of justice.

Taking all the above into account, the Court in fact rendered a declaratory judgment in this case, just as Serbia itself requested in its final submission.

It must be, nevertheless, added that this Judgment confirmed the fact that the responsibility for genocide at Srebrenica and for all other international crimes committed, falls on the *de facto* authorities of the Republika Srpska in Bosnia-Herzegovina. In spite of the lack of internationally recognized personality of this entity, in the view of this author internationally wrongful acts of these *de facto* authorities result in the *de facto* responsibility of this present entity of Bosnia-Herzegovina. However, the Court had no power to rule on this issue explicitly.

VI. THE FRY V. NATO MEMBER STATES: JUDGMENT OF 15 DECEMBER 2004

Now we come to another case before the ICJ in which the FRY appeared as Applicant against, originally, ten NATO member States. It was a matter of a series of cases concerning *Legality of Use of Force*.

⁴⁸ *I.C.J. Reports 1949*, p.35.

However, some facts should be explained beforehand. After the formal suppression of autonomy of Kosovo in March 1989, members of non-Serbian population, especially the Albanians, were dismissed on a massive scale from their jobs in mines and other enterprises, from schools, hospitals and cultural institutions. Education in the Albanian language was abolished at all levels, which prior to 1989 used to be a vested right of that population. Its Albanian population opposed the large-scale measures of that discrimination by passive resistance only. It was expected that the Dayton-Paris Agreements would improve their situation as well. After these expectations were betrayed, the Kosovo Liberation Army was organized.

In 1998, the first large-scale clashes of the Serbian police and the Yugoslav Army with the Kosovo Liberation Army took place. Then, massive crimes were committed against the Albanian civilians. The UN Security Council resolution 1199 of 23 September 1998 noted the displacement of over 230,000 persons from their homes, of which 50,000 were without shelter and other basic necessities. The first wave of refugees appeared in northern Albania, Macedonia and Bosnia-Herzegovina. During these events, massacres of the civilians occurred, including women and children, in particular in the village of Račak.

That situation was temporarily halted by a new Security Council resolution 1203 of 24 October 1998. A Verification Mission of the OSCE to Kosovo was agreed on, while NATO assumed the verification from the air.

Already the previous resolution 1160 of 31 March had supported a peaceful resolution of the Kosovo problem by the interested parties, based on the territorial integrity of the FRY and enhancing the status of Kosovo which would include «a substantially greater degree of autonomy and meaningful self-administration». The negotiations at Rambouillet, France, did not produce an agreement on this basis because the FRY refuted the solution proposed.

Parallel to the beginning of NATO action on 23 March 1999, massacres of civilians and expulsion of populations in previously unseen proportions started. Up to a million refugees were driven to Albania, Macedonia, Montenegro and Bosnia-Herzegovina in 1999. That action was prepared in advance, and it was carried out according to a plan. More than half of the population of Kosovo was expelled from their homes. Many villages were razed to the ground. That was Milošević's last lunatic attempt to assure in that «Serbian» province a balance between Serbian and Albanian population.

It must be concluded that it was not the NATO action that was the reason for the exodus. The exodus in its massive proportions was premeditated, and a previous one had taken place, according to a plan, a year before.

Hence, NATO air strikes appear to fulfill the requirements of humanitarian intervention even in the absence of a Security Council resolution under Chapter VII of the UN Charter that should otherwise authorize it. In such situation

enforcement action can be justified by general international law, at least as this author conceives it.⁴⁹

The Government of the FRY tried to thwart the NATO action by submitting on 29 April 1999 its Applications at The Hague Court against all the ten member States taking part in it. The Applications were raised against Belgium, Canada, France, Germany, Italy, the Netherlands, Portugal, Spain, the United Kingdom and the United States. As already said, at the same date the FRY requested from the Court the indication of provisional measures against all these States. However, by a series of Orders issued on next 2 June, the Court rejected all these requests. It then found manifest lack of its jurisdiction in the cases against Spain and the United States. But the proceedings against other eight States continued.

In the meantime, towards the end of 2000 there occurred the change of Government in Serbia. The new authorities tried to discontinue the proceedings of Bosnia-Herzegovina and Croatia against the FRY. The proceedings against NATO Member States were primarily in this function, because the Government in Belgrade probably did not believe to be able to prove in these air strikes and their consequences the crime of genocide.

Judgments in eight of these remaining cases were rendered on 15 December 2004, preceding the final Judgment of 2007 in the case involving Bosnia-Herzegovina. Their texts are in most parts identical, so that we can refer here to the Judgment against Belgium.

The Court found by unanimous decisions that it had no jurisdiction to entertain claims made in the applications of Serbia and Montenegro on 29 April 1999. Nevertheless, we do not believe that the Court itself will be very proud of all these Judgments. They are at odds with all its previous and later rulings on the access of this State to it.

In these cases, in which the FRY appeared as the Applicant, the Court gave effect to its declaration that prior to its admission to the UN Membership on 1 November 2000 it was not a UN Member State. Hence, it was not a party to the Court's Statute at the date it submitted its Applications on 29 April 1999. The Court was not quite clear about whether the FRY was at that same date a party to the Genocide Convention. In this it contradicted its Judgment in the *Application of Revision* case of 3 February 2003, and also the later Judgment of 26 February 2007 in the case involving Bosnia-Herzegovina.

The former status of the FRY in the UN between 1992 and 2000 was according to this Judgment, rather confused and complex situation, a *sui generis* position

⁴⁹ The views of this author are in minority in respect to other doctrinal opinions expressed so far. See the details -- V.D. Degan: «Humanitarian intervention (NATO action against the Federal Republic of Yugoslavia in 1999)», L.C. Vohrah *et al.* (eds): *Man's Inhumanity to Man*, Essays on International Law in Honour of Antonio Cassese, Kluwer Law International 2003, pp.233-259, especially at pp.248-253.

that was merely descriptive of the amorphous state of affairs, on which the Court previously did not draw definite conclusions. The admission of the FRY to the UN «put an end to this *sui generis* position».⁵⁰ In addition, the 2003 Judgment in the *Application for Revision* case possessed no force of *res judicata* in relation to the present case.⁵¹

On the basis of these arguments it was concluded: «It follows that the Court was not open to Serbia and Montenegro under Article 35, paragraph 1 of the Statute»⁵² (because of not being a party to it). Nevertheless, all these lengthy considerations seem to be given *ultra petitem*. The FRY based its Application in 1999 on paragraph 2 of this Statute.

Conditions under which the Court is open to States not parties to the Statute, from paragraph 2 of Article 35, are the following: (a) there must be special provisions contained in «treaties in force», providing the jurisdiction of the Court (such as Article IX of the Genocide Convention); (b) other conditions shall be «laid down by the Security Council»; (c) «in no case shall such conditions place the parties in a position of inequality before the Court». The latter means that in case of a finding that the FRY was not a party to the Court's Statute, its status should be equal before it to other States parties to the Genocide Convention either as applicant or respondent.

Other conditions are provided in the Security Council resolution 9 (1946) that it adopted as early as 15 October 1946. After that it was not amended. According to this resolution the Court is open to all States not parties to its Statute upon their unilateral declarations. The main condition is that such a State has to undertake to comply in good faith with the decisions of the Court and to accept all the obligations of the UN Member under Article 94 of the Charter.⁵³

The ordinary meaning of the term «treaties in force» in above paragraph 2 seems to be that special conditions on Court's jurisdiction were contained in a treaty that was in force at the date of submission of an Application. That was the interpretation adopted by the Court itself in its previous Order on provisional measures against the FRY of 8 April 1993, and it was confirmed in the Court's Judgment on provisional measures of 11 July 1996 by implication.

When in application of the General rule of interpretations as set out in Article 31(1) of the 1969 Vienna Convention on the Law of Treaties, a text is clear, there is no need for supplementary means of its interpretation as provided in Article 32.

However, in this Judgment the Court noted: «A number of Respondents contended in their pleadings that the reference to the 'treaties in force' in Article

⁵⁰ *I.C.J. Reports* 2004, paras.73, 76, 78.

⁵¹ *Ibid.* para.80.

⁵² *Ibid.* para.91.

⁵³ See the text -- *I.C.J. Yearbook* 2004-2005, pp.99-100.

35, paragraph 2 of the Statute relates only to treaties in force when the Statute of the Court entered into force, i.e. on 24 October 1945». ⁵⁴ Hence, it has undertaken to investigate the preparatory work of the same provision which already figured in Article 35, paragraph 2, of the Statute of the Permanent Court of International Justice of 1920, as well as the circumstances of its conclusion.

It was decisive for the Court that during discussions in the Sub-Committee of the Third Committee of the First Assembly Meeting of the League of Nations in 1920, the question was raised about whether the Council might place conditions on the admission of Germany before the Court, for example in the cases mentioned in Article 380 of the Treaty of Versailles. Although the answer was negative, in 2004, the ICJ concluded that the provision of paragraph 2 of Article 33 related to «treaties in force» when the Statute of the PCIJ entered into force itself. ⁵⁵

Because there were no substantial changes in the text of Article 31 of the Statute of the new ICJ at the San Francisco Conference in 1945, ⁵⁶ the Judgment of 2004 concluded: «neither the circumstances, nor any consideration of the object and purpose of the text, nor the *travaux préparatoires*, offer support to the alternative interpretation that the provision was intended as granting access to the Court to States not parties to the Statute without any conditions other than the existence of a treaty... which might be concluded any time subsequently to the entry into force of the Statute». ⁵⁷ In respect of the FRY's Application:

«114. The Court thus concludes that, even assuming that Serbia and Montenegro was a party to the Genocide Convention at the relevant date, Article 35, paragraph 2, of the Statute does not provide it with a basis to have access to the Court, under Article IX of that Convention, since the Convention only entered into force on 12 January 1951, after the entry into force of the Statute... The Court does not therefore consider it necessary to decide whether Serbia and Montenegro was or was not a party to the Genocide Convention on 29 April 1999 when the current proceedings were instituted.»

The above confirms the fact that mixing in the *travaux préparatoires* of a provision which is otherwise clear, it can be proved that black is white and white is black.

According to the above *travaux préparatoires*, the Council of the League could, after 1920, exclude all the treaties that for the States not Parties to the Statute of the Permanent Court entered into force subsequent to its own entry into force. But it did not do that. The same could probably be done by the UN Security Council after 1945, but it was silent again on this issue.

⁵⁴ *I.C.J. Reports 2004*, para.96.

⁵⁵ *Ibid.*, paras.103 to 108.

⁵⁶ See *ibid.*, paragraphs 110-113.

⁵⁷ *Ibid.*, para.113.

The most plausible interpretation in this state of affairs remains that treaties in question, like Article IX of the Genocide Convention, must be in force for the parties to a dispute at the time of submission of the application in a case. The above interpretation by the ICJ looks like an *argumentum ab absurdo*, depriving Article 31(2) of its object and purpose.

It does not even seem that the ICJ was competent to interpret this provision otherwise than it did before. If it had a different view, it could ask the Security Council to revise its 1946 resolution itself in the sense as alleged in its 2004 Judgment. However, such a revision, if any, should only apply to future cases.

Today, there are very few States that are not UN Members and not parties to the Court's Statute. The above situation could apply to some entities not universally recognized, such as Kosovo. In case that Kosovo unilaterally submits a declaration under Article 33(2) of the Court's Statute, there is no organ that could obstruct it in doing so.

In respect of the confusing situation of the FRY prior to its admission to the UN, a practical solution for the Court should have been to join the objections by Respondent States with the merits of these cases, and to wait for the final Judgment in the case between Bosnia-Herzegovina and Serbia. Serbia itself was much satisfied with that declaratory Judgment. After its rendering it would probably withdraw its Applications against NATO Member States. In case that it did not do that, in the proceedings on merits that State could not be able to prove the commission of the crime of genocide by these States.

VII. CROATIA V. SERBIA: JUDGMENT ON PRELIMINARY OBJECTIONS OF 18 NOVEMBER 2007

Croatia submitted its Application against the FRY to the ICJ on behalf of Article IX of the Genocide Convention on 2 July 1999. That happened after the Applications by the FRY in the cases of *Use of Force*, which occurred earlier on 29 April.

We shall now see the arguments on the basis of which the ICJ established its jurisdiction in this new case, in which the FRY appeared as the Respondent again. In fact, in its new Judgment of 18 November 2008 the Court shifted in its previous position once again.

Like in its previous Judgments, the Court maintained that all its previous decisions did not have the force of *res judicata* for the present case which is between Croatia and Serbia. «To the extent that the decisions contain findings of law, the Court will treat them as it treats all previous decisions; that is to say that,

while those decisions are in no way binding on the Court, it will not depart from its settled jurisprudence unless it finds very particular reasons to do so».⁵⁸

Nevertheless, the Court itself can jeopardize the stability and predictability of its entire jurisprudence, if such very particular reasons do not seem convincing enough for several changes in legal qualification of the same facts. Many scholars teach the discipline of International Law «chiefly as interpreted and applied» by the ICJ and inter-State arbitration. This is done mainly due to the consistency of its practice of many years. If for some extra-legal motives this «settled practice» diminishes in its intrinsic value that can be harmful for the entire International Law as a legal discipline.

Serbia as the Respondent State in this case strongly relied on the finding of the Court in its 2004 Judgment, i.e. that prior to 1 November 2000 it had not been a party to the Court's Statute. It expected that, as in the previous case, the Court would proclaim its lacking jurisdiction in respect of Croatia's Application, too. But it occurred otherwise.

This time, the Court established its jurisdiction on paragraph 1 of Article 33 of its Statute. It stressed that its previous finding based on its paragraph 2 did not have the force of *res judicata* in the present case. In addition, Croatia asked the Court to reconsider and modify the interpretation it gave of Article 33(2) of its Statute in its 2004 Judgment, «i.e. that 'treaties in force' did not embrace treaties dating from after the entry into force of the Statute».⁵⁹

The Court established that, from 1 November 2000 up to the date of that Judgment, the Respondent was a party to the Statute by virtue of its Membership of the UN, that is to say pursuant to Article 93, paragraph 1 of the Charter. Thus, it is undisputable that at the present time both Croatia and Serbia have access to the Court on the basis of Article 33, paragraph 1, of the Statute.⁶⁰

In this case Croatia relied on the precedents of the two Hague Courts starting with the *Mavrommatis Palestine Concessions* cases of 1924. If the conditions governing the Court's jurisdiction were not fully satisfied when the proceedings were initiated, but were subsequently satisfied, the Applicant could at any time file a new application which would be in this respect unassailable.⁶¹ In this case the Court gave full effect to this practice.

On the objection by Serbia that the Court did not apply the «Mavrommatis doctrine» in its 2004 Judgment,⁶² the reason was found «that Serbia and Montenegro did not have the intention of pursuing its claim by way of new application».⁶³ By

⁵⁸ *I.C.J. Reports 2007*, para.53.

⁵⁹ *Ibid.* para.64.

⁶⁰ *Ibid.* para.77.

⁶¹ *Ibid.* paras.81, 83.

⁶² *Ibid.* para.84.

⁶³ *Ibid.* para.89.

contrast, while Croatia's original Application of 2 July 1999 was a short text comprising some ten pages, its Memorial on the merits which was submitted on 1 March 2001, was a document of 414 pages.⁶⁴ This argument also does not seem convincing enough, notably that the «Mavrommatis doctrine» was not observed in the 2004 Judgment. Croatia's memorial was not a new application.

An important question in this case was the Court's jurisdiction *ratione temporis*. One of the most controversial aspects of the 2004 Judgment was the Court's own doubt that on 29 April 1999, the date of the FRY's submission of its Application against the NATO member States, it was a party to the 1948 Genocide Convention. In that Judgment the Court was at odds with all its previous and subsequent findings.

In the present case involving Croatia, Serbia did not dare to invoke its objection to the jurisdiction of the Court based on its reservation on Article IX of the Genocide Convention of 12 March 2001. It expressed this when notifying to the UN Secretary-General its «accession» to this Convention as a new State.⁶⁵ That reservation excludes from the jurisdiction of the Court all the present and future disputes concerning this Convention in the absence of a specific and explicit consent by the FRY.

In this Judgment it was established that the FRY was bound by this Convention since its assuming *en bloc* all the treaties of the former SFRY on its own proclamation on 27 April 1992.⁶⁶

However, Serbia raised the objection in the present proceedings that «claims based on acts and omissions which took place prior to 27 April 1992 are beyond the jurisdiction of the Court and inadmissible».⁶⁷

It is the fact that most international crimes were committed in Croatia in the period before Croatia obtained its international recognition and before its admission to the UN.

Croatia alleged on its part: «the fact that the FRY only formally proclaimed itself on 27 April 1992 does not mean that acts occurring prior to that date cannot be attributed to it». It relied in this respect on Article 10(2) of the International Law Commission's Articles on State Responsibility in which it was provided that «conduct of a movement, insurrectional or other, which succeeds in establishing a new State, shall be considered an act of the new State under international law».⁶⁸

This is a very important problem in the context of the dissolution of the SFRY in a series of armed conflicts. However, in our view the Court was right to find

⁶⁴ *Ibid.* para.90.

⁶⁵ The Court rectified the Depositary notification by the Secretary-General and concluded that the matter was in fact of a notification of succession, not of accession. *Ibid.* para.116.

⁶⁶ *Ibid.* paras. 98, 99.

⁶⁷ *Ibid.* para.120.

⁶⁸ *Ibid.* para.125.

that Serbia's preliminary objection *ratione temporis* did not in the circumstances of the case possess an exclusively preliminary character.⁶⁹ It was therefore merged with the merits of this case.

A different question is whether in light of high standards for proving the existence of *dolus specialis* as prescribed in the Judgment of 2007, Croatia will be able to prove the commission of acts of genocide on its territory.

However, taking into account all the above reviewed decisions by the ICJ in cases in which the FRY, or Serbia and Montenegro, or Serbia proper were involved, one cannot avoid the impression that the NATO actions in 1999 were removed from the Court's jurisdiction for reasons that were not strictly legal.⁷⁰

VIII. CONCLUSIÓN

Article 34(1) of the 1978 Vienna Convention on Succession of States in respect of Treaties, which is now in force between a very limited number of States parties, offered a basis for the so-called «automatic succession» by all the successor States to all the general conventions that their predecessor State was a party to.

In case that the transformation of this provision into new customary law was not obstructed by the opposite practice of the UN Secretariat, the legal vacuum between the access of a new State to its independence and its admission to the UN membership would not appear at all. In that case the problem of the notification of succession or of the adhesion to these conventions would also not arise. That proved to be of particular importance for the respect of obligations from the 1948 Genocide Convention, and that could probably avoid most of controversies discussed in the present article.

However, such a situation, if it was realized in practice, could not deprive new States of their right to denounce these general conventions. But that could occur strictly in conformity with the provisions set out in each of them, as Article 54-(1)-(a) of the 1969 Vienna Convention on the Law of Treaties confirms.

According to its Article 14, the 1948 Genocide Convention was in effect for an initial period of ten years that expired on 12 January 1951. For all its present States parties it remains to be in force for successive periods of five years until one of them denounces it at least six months before the expiration of the current period.

⁶⁹ *Ibid.* para.130.

⁷⁰ The worst thing was that within the ICTY its Prosecutor, with the complicity of the Tribunal itself, did not undertake investigation on the use of some weapons in the NATO action. The matter involved, in particular, the use of depleted uranium projectiles and cluster bombs. See the details -- V.D. Degan: «Humanitarian intervention» in *Essays on International Law in Honour of Antonio Cassese*, pp.254-259.

Subject to this condition, Article IX of the Convention should bind all new successor States in respect of all other States parties to it. In case a new State proclaims its independence in the circumstances of an internal armed conflict when international crimes are most likely to occur, that period of time would be sufficient for the ICJ to exercise its jurisdiction for dealing with the violations of this Convention.

In all these consensual relations between all the parties to this Convention, even in the period preceding the admission of a successor State to the UN, the ICJ should be open to all such States either as applicants or respondents. That would be on the basis of paragraph 2 of Article 35 of its Statute. Only in the case that the Security Council expressly excludes this possibility by amending its resolution No.9 of 15 October 1946, such a jurisdiction of the Court, based on Article IX of the 1948 Convention would be precluded but solely for future cases.

That would be the case if both the UN Secretariat and the ICJ itself did not meddle too much with the political implications of the cases before them. Their deliberations strictly based on law would serve the best the political objectives too, including the legitimate interests of Serbia and Montenegro.

Guerra y Paz: 1945-2009
Obra homenaje
al Dr. Santiago Torres Bernárdez

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