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## Participation of Former Yugoslav States in the United Nations and in Multilateral Treaties

*Michael C. Wood*

This article concentrates on the position of the former Yugoslav states in the United Nations. It deals with certain legal matters concerning these states which have not received as much attention as others.<sup>1</sup> The main

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<sup>1</sup> This article is based on a talk given on 8 November 1996 at the Max Planck Institute for Comparative Public Law and International Law, Heidelberg. The views expressed are personal, not those of the United Kingdom Government.

International lawyers have written extensively on former Yugoslavia, and will doubtless continue to do so. On the use of force, Security Council, NATO etc., see D.Petrovic/L.Condorelli, "L'ONU et la crise yougoslave", *AFDI* 38 (1992), 32 et seq.; M.Weller, "Peace-Keeping and Peace-Enforcement in the Republic of Bosnia and Herzegovina", *ZaòRV* 56 (1996), 70 et seq.; N. Figa-Talamanca, "The Role of NATO in the Peace Agreements for Bosnia and Herzegovina", *EJIL* 7 (1996), 164 et seq. On the Bosnia Peace Agreement, see P.C. Szasz, "Protecting Human and Minority Rights in Bosnia: A Documentary Survey of International Proposals", *Cal. W. Int'l. L. J.* 25 (1995), 237 et seq.; P.C. Szasz, "The Quest for a Bosnian Constitution: Legal Aspects of Constitutional Proposals Relating to Bosnia", *Fordham Law Journal* 19 (1995), 363 et seq.; P.C. Szasz, "The Protection of Human Rights through the Dayton/Paris Peace Agreement on Bosnia", *AJIL* 90 (1996), 301 et seq.; J.M. Sorel, "L'accord de paix sur la Bosnie-Herzegovine du 14 décembre 1995: un traité sous bénéfice d'inventaire", *AFDI* 41 (1995), 65 et seq.; P. Gaeta, "The Dayton Agreements and International Law", *EJIL* 7 (1996), 147 et seq.; S. Yee, "The New Constitution of Bosnia and Herzegovina", *EJIL* 7 (1996), 176 et seq.; E. Anderson, "The Role of Asylum States in Promoting Safe and Peaceful Repatriation under the Dayton Agreements", *EJIL* 7 (1996), 193 et seq.; J. Sloan, "The Dayton Peace Agreement: Human Rights Guarantees and their Implementation", *EJIL* 7

points covered are the United Nations membership of the former Yugoslav states, where the issues relate principally to Macedonia and the Federal Republic of Yugoslavia (the FRY); and the participation of the former Yugoslav states in United Nations organs, where the issues relate principally to the FRY. The position of the former Yugoslav states in relation to multilateral treaties, including the United Nations Secretariat's role as depositary, is then addressed more briefly.

The approach is essentially descriptive, setting out the issues and what has happened so far. The picture does not fit neat legal theories. The circumstances of the last six years in former Yugoslavia, and on the East River, have hardly been conducive to calm and careful legal analysis. Moreover, the story is not over. For the most part, the issues have not been resolved.

## I. United Nations Membership of the Former Yugoslav States and their Participation in its Organs

The practice of the United Nations in relation to membership has often departed from legal theory, at least as expounded by the ICJ in its *Condi-*

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(1996), 245 et seq. On territorial issues, see M. Weller, "The international response to the dissolution of the Socialist Federal Republic of Yugoslavia", *AJIL* 86 (1992), 569 et seq.; H. Hannum, "Self-determination, Yugoslavia, and Europe: Old Wine in New Bottles?", *Transnat'l L. & Contemp. Probs.* 3 (1993), 57 et seq.; S.R. Ratner, "Drawing a better line: uti possidetis and the borders of new states", *AJIL* 90 (1996), 590 et seq. On the International Criminal Tribunal for the Former Yugoslavia, see J. O'Brien, "The International Tribunal for Violations of International Humanitarian Law in the Former Yugoslavia", *AJIL* 87 (1993), 639 et seq.; D. Shraga/R. Zacklin, "The International Criminal Tribunal for the Former Yugoslavia", *EJIL* 5 (1994), 360 et seq.; T. Meron, "War crimes in Yugoslavia and the development of international law", *AJIL* 88 (1994), 78 et seq.; V. Morris/M. Schaf, *An Insider's Guide to the International Criminal Tribunal for the Former Yugoslavia*, 1995; Y. Sandoz, "Réflexions sur la mise en oeuvre du droit international humanitaire et sur le rôle du Comité international de la Croix-Rouge en ex-Yougoslavie", *SZIER/RSDIE* 3 (1993), 461 et seq.; A. Pellet, "Le Tribunal criminel international pour l'ex-Yougoslavie. Poudre aux yeux ou avancée décisive?", *RGDIP* 98 (1994), 7 et seq. On succession of states, see W. Hummer, "Probleme der Staatennachfolge am Beispiel Jugoslawien", *SZIER/RSDIE* 3 (1993), 425 et seq.; S. Oeter, "State succession and the struggle over equity", *GYIL* 38 (1995), 73 et seq.; see also B. Stern, *Le statut des Etats issus de l'ex-Yougoslavie à l'ONU*, 1996.

tions of Admission Advisory Opinion.<sup>2</sup> Between the “package deal” of sixteen admissions in December 1955, which terminated a period of Cold War controversy over United Nations membership, and 1990, most admissions were dealt with as essentially routine matters.<sup>3</sup> The Security Council abandoned reference to its Committee on the Admission of New Members after 1949, though this was resumed in 1971. For almost six years between the admission of Brunei in September 1984 and the admission of Namibia<sup>4</sup> in April 1990, United Nations membership remained constant.

Then from 1990 to 1993 changes of membership came fast and furious, and almost all gave rise to interesting legal points: the continued membership of states that had united (Yemen and Germany),<sup>5</sup> the admission of the two Koreas,<sup>6</sup> the admission of the three Baltic states (whose application was forwarded just prior to their recognition by the Soviet Union),<sup>7</sup> the continued membership of the Russian Federation and admission of the

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<sup>2</sup> *Conditions of Admission of a State to Membership in the United Nations*, ICJ Reports 1948, 57 et seq. In addition to the standard commentaries on the Charter, see H.-J. Schütz, “Membership”, in: R. Wolfrum (ed.), *United Nations: Law, Policies and Practice*, 1995, Vol.2, 877 et seq., and the works cited therein; H.G. Schermers/N.M. Blokker, *International Institutional Law*, 3rd edition, 1995, 45–107; S.D. Bailey, *The Procedure of the United Nations Security Council*, 2nd edition, 1988, 295–307; D. Lloyd, “Succession, Secession and State Membership in the United Nations”, *International Law and Politics* 26 (1994), 761 et seq. and various articles in *Development and International Cooperation*, Center for International Relations, University of Ljubljana, 12/2, 1996.

<sup>3</sup> There were, of course, important exceptions: the participation of China, and the membership of Kuwait, Bangladesh, the Vietnams, the two Koreas and the two German states.

<sup>4</sup> Namibia had become a member of various international organizations even before it gained independence: see E. Osieke, “Admission to membership in international organizations: the case of Namibia”, *BYIL* 51 (1980), 189 et seq.

<sup>5</sup> For Yemen, see note 32 in Section I.2 of *Multilateral Treaties deposited with the Secretary-General. Status as at 31 December 1995* (ST/LEG/SER.E/14 (hereafter *Multilateral Treaties*)). For Germany, see note 13 in Section I.2 of *Multilateral Treaties*.

<sup>6</sup> Like the two German states, the Democratic People’s Republic of Korea and the Republic of Korea were admitted simultaneously by a single General Assembly resolution: A/RES/46/1 of 17 September 1991 (see also S/RES/702 (1991) of 8 August 1991).

<sup>7</sup> A/RES/46/4, 46/5 and 46/6, all of 17 September 1991; R. Kharad, “La reconnaissance internationale des Etats baltes”, *RGDIP* 96 (1992), 843 et seq.

eleven other former Soviet Republics,<sup>8</sup> the admission of the Czech Republic and Slovakia (each of which might have continued the original membership of Czechoslovakia),<sup>9</sup> the admission of some very small states (Liechtenstein, Monaco, Andorra),<sup>10</sup> the admission of the Marshall Islands, Micronesia and eventually Palau (where questions might have been raised about statehood having regard to their relationship with the United States).<sup>11</sup> There was even the question of possible Taiwanese membership.<sup>12</sup> These cases are not dealt with here, though when considering the position of the former Yugoslav states it is important to bear in mind the background, in particular the very recent acceptance of the Russian Federation's continuation of the Soviet Union's membership.

Before turning to Yugoslavia, we should recall briefly earlier examples of the dividing up of states and United Nations membership. The classic case is that of India and Pakistan in 1947. India (though not at the time independent) was an original member of the United Nations. Pakistan was admitted as a new member on 30 September 1947, though its submission

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<sup>8</sup> See Doc. 1991/RUSSIA, cited in Y.Z. Blum, "Russia takes over the Soviet Union's seat at the United Nations", *EJIL* 3 (1992), 354 et seq. See also note 9 in Section I.1 of *Multilateral Treaties*; *ILM* 31 (1992), 138 et seq., 151: in the Alma Ata Decision by the Council of Heads of State of the Commonwealth of Independent States, the Heads of State support "Russia's continuance of the membership of the Union of Soviet Socialist Republics in the United Nations, including permanent membership of the Security Council, and other international organizations." The Russian Federation was careful to refer to itself as the continuation of the USSR, not its successor. See also A. Dastis Quecedo, "La Desintegración de la Unión Soviética y la Cuestión de su 'Sucesión' en las Naciones Unidas", *REDI* 44 (1992), 249 et seq.; R. Mullerson, "The continuity and succession of States by reference to the former USSR and Yugoslavia", *ICLQ* 42 (1993), 473 et seq.

<sup>9</sup> Schermers/Blokker, see note 2, 77-8; J. Malenovsky, "Problèmes juridiques liés à la partition de la Tchécoslovaquie", *AFDI* 39 (1993), 305 et seq.; V. Mikulka, "The Dissolution of Czechoslovakia and the Succession in Respect of Treaties", in: *Development and International Cooperation*, see note 2, 45 et seq.

<sup>10</sup> Schermers/Blokker, see note 2, 48-50 (with further references), who recall the League of Nations refusal to admit Liechtenstein in 1920.

<sup>11</sup> L. Wentworth, "The international status and personality of Micronesian political entities", *ILSA J. Int'l. L.* 16 (1993), 1 et seq.; R. Goy, "L'évolution vers l'indépendance des îles Palaes", *AFDI* 40 (1994), 356 et seq.

<sup>12</sup> For the last few years the General Committee has declined to recommend the inclusion of a proposed item on Taiwan in the agenda of the General Assembly.

that it partly continued the membership of India was not expressly rejected.<sup>13</sup> The Sixth (Legal) Committee of the General Assembly set out its position as follows in a letter dated 8 October 1947:

“... the Sixth Committee agreed on the following principles:

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

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

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

4. It was agreed by the Sixth Committee that these principles are to be transmitted to the First Committee as suitable to give general guidance to the United Nations in connection with future cases, with the understanding that each case will be considered in accordance with its particular circumstances.”<sup>14</sup>

Subsequent cases where a similar approach was adopted were the admission as a new state of Singapore<sup>15</sup> after it seceded from Malaysia in 1965, Bangladesh, and most of the states emerging from the former Soviet Union.

Yugoslavia was an original member of the United Nations, having participated in the San Francisco Conference and having previously signed the Declaration by United Nations of 1 January 1942. But this had no influence on its treatment in the 1990s. (Czechoslovakia was also an

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<sup>13</sup> Schermers/Blokker, see note 2, 79; K.P. Misha, “Succession of States: Pakistan’s membership in the United Nations”, *CYIL* 33 (1965), 281 et seq.

<sup>14</sup> Doc.A/CN.4/149 and Add.1 (*The succession of States in relation to membership in the United Nations: memorandum prepared by the Secretariat*), reproduced in *ILCYB* 1962, Vol.II, 101 et seq.

<sup>15</sup> S. Jayakumar, “Singapore and State Succession: International Relations and International Law”, *ICLQ* 19 (1970), 398 et seq.

original member, but again that appears to have played no part in its treatment in the 1990s.)

### *Slovenia, Croatia, and Bosnia and Herzegovina*

When Yugoslavia broke up, Slovenia, Croatia, and Bosnia and Herzegovina applied for United Nations membership, and were admitted by the General Assembly on the recommendation of the Security Council on 22 May 1992.<sup>16</sup> No special problems arose. The three states had by that time been recognized by many states (though not by the FRY).

### *Macedonia*

Macedonia was another matter.<sup>17</sup> It was eventually admitted to United Nations membership, under unusual circumstances, on 7 April 1993, having lodged an application some nine months earlier. The problem was the difference between Greece and Macedonia over the name of the state and certain other matters (symbols, Constitution etc.).

Macedonia, one of the constituent republics of the former Yugoslavia since 1945, was clearly established as a sovereign independent state by April 1992 at the latest. Indeed, the Badinter Commission had opined on 11 January 1992 that Macedonia satisfied all the conditions for recognition laid down by the European Community (Opinion No. 6).<sup>18</sup> In doing so,

<sup>16</sup> A/RES/46/236, 46/237 and 46/238, all of 22 May 1992.

<sup>17</sup> The term "Macedonia" is used for convenience, and is not intended to imply any position on the difference over the name. Outside Greece and Macedonia, little has been written about recent developments in Macedonia: see S. Pribichevich, *Macedonia, its People and History*, 1982; H. Poulton, *Who are the Macedonians?* 1995. On legal aspects see M.C.R. Craven, "What's in a name? The Former Yugoslav Republic of Macedonia and Issues of Statehood", *Austr.Yb.Int'l L.* 16 (1995), 199 et seq.; P. Pazartzis, "La reconnaissance d' "une République Yougoslave": La question de l'ancienne République Yougoslave de Macédoine (ARYM)", *AFDI* 41 (1995), 281 et seq.

<sup>18</sup> *ILR* 92 (1993), 182; *ILM* 31 (1992), 1507; *RGDIP* 97 (1993), 571. See M.C.R. Craven, "The European Community Arbitration Commission on Yugoslavia", *BYIL* 66 (1995), 333 et seq.; A. Pellet, "Note sur la Commission d'arbitrage de la Conférence européenne pour la paix en Yougoslavie", *AFDI* 37 (1991), 329 et seq.; id., "L'activité de la Commission d'arbitrage de la Conférence européenne pour la paix en Yougoslavie", *AFDI* 38 (1992), 220 et seq.; id., "L'activité de la Commission d'arbitrage de la Conférence internationale pour l'ancienne Yougoslavie", *AFDI* 39 (1993), 286 et seq. For Ratner's trenchant critique of the

the Commission noted that Macedonia had formally renounced all territorial claims and held that the use of the name "Macedonia" could not therefore imply any territorial claim against another state. But the EC member states did not recognize the new state for some fifteen months after the Badinter Opinion.<sup>19</sup>

Macedonia's application for United Nations membership was dated 30 July 1992. It lay in the Secretariat for months, without being transmitted by the Secretary-General to the Security Council (though Council members were aware of its existence). The formal circulation of a membership application may involve the exercise of political discretion on the part of the Secretary-General, and in delicate cases he is likely to consult those most concerned before taking action. There would have been little point in transmitting Macedonia's application to the Security Council before Council members were ready to take it up. In the meantime, efforts by various mediators (the EU under Portuguese and UK Presidencies, the ICFY Co-Chairmen) failed to resolve the issues dividing Greece and Macedonia.

There was a serious risk both of instability within Macedonia and of Macedonia becoming sucked into the conflicts in other parts of the former Yugoslavia. In its resolution 795 (1992) of 11 December 1992 the Security Council, at the request of Macedonia, authorized the Secretary-General to establish an UNPROFOR presence in Macedonia. This Force, the name of which was later changed to UNPREDEP, has been seen as the classic example of preventive deployment. Resolution 795 refers to the state in question as "the former Yugoslav Republic of Macedonia" rather than using its constitutional name, Republic of Macedonia.

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Commission's "brief, broad opinion" on *uti possidetis* (Opinion No. 3, *ILR* 92 (1993), 170; *ILM* 31 (1992), 1499; *RGDIP* 96 (1992), 267) see note 1, 613-614.

19 The EC member states' approach to recognition in the case of the states of the former Soviet Union and the former Yugoslavia was unusual. The EC Guidelines and Declaration of 16 December 1991 (*BYIL* 62 (1991), 559) are not in line with previous state practice, including that of the United Kingdom. Indeed, the Declaration contained a special clause aimed at Macedonia. See R. Rich, "Recognition of States: The Collapse of Yugoslavia and the Soviet Union", *EJIL* 4 (1993), 36 et seq.; D. Turk, "Recognition of States: A Comment", *EJIL* 4 (1993), 66 et seq., R. Mullerson, *International Law, Rights and Politics 1994*, 117 et seq. (chapters on recognition and issues of continuity and succession); M. Škrk, "Recognition of States and its (Non)-Implication on State Succession: A Case of Successor States to the Former Yugoslavia", in: *Development and International Cooperation*, see note 2, 85 et seq.



Against this background, early in 1993 certain Council members decided that the time had come to secure Macedonia's membership in the United Nations. On 22 January 1993 the Secretary-General, following informal consultations held by the President of the Council at the request of the Secretary-General concerning the receivability of the application, circulated Macedonia's application as an official document.<sup>20</sup> The three EU members of the Council — the United Kingdom, France and Spain — took the lead and after prolonged efforts, stretching over four months, succeeded in putting together a package with which both Greece and Macedonia were prepared to live. This contained a number of unusual elements. First, there was the Council resolution recommending admission. A comparison between resolution 817 (1993) of 7 April 1993 and a standard Council resolution on admission reveals similarities and differences:

- As in other cases, the resolution says that the Council has examined the application for admission and recommends to the General Assembly that the state be admitted to membership in the United Nations.

But there the similarities end:

- The name of the state appears nowhere in the resolution (or indeed in the surrounding Council documentation). It is identified throughout as "the State whose application is contained in document S/25147" or simply as "the State".
- The resolution deals with more than admission. It contains political elements concerning settlement of the difference between Greece and Macedonia. It notes that a difference has arisen over the name of the state, welcomes the readiness of the ICFY Co-Chairmen to use their good offices to settle this difference and to promote confidence-building measures among "the parties" (Greece and Macedonia), takes note of certain letters from the parties, urges the parties to cooperate with the Co-Chairmen, and requests the Secretary-General to report on the outcome.<sup>21</sup>
- Finally, in recommending the admission of "the State whose application is contained in document S/25147", the Council added the clause —

"this State being provisionally referred to for all purposes within the United Nations as "the former Yugoslav Republic of Macedonia" pending settlement of the difference that has arisen over the name of the State"

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<sup>20</sup> Doc.A/47/876-S/25147. For a description of the protracted negotiations see the relevant chapters in M. Papakonstantinou, *To Hmerologio Enos Politikoy (The Diary of a Politician)*, 1994.

<sup>21</sup> See S/RES/845 (1993) of 18 June 1993 and Pazartzis, see note 17, 293–297.

Four things should be noted about this clause. First, it did not purport to determine the name of the state, even for United Nations purposes, even as a provisional name, but rather describes how the state will be provisionally referred to. This is emphasized by the fact that the expression begins with the words “the former”, neither with a capital letter. Second, the Council only dealt with how the state would be referred to “within the United Nations”. It did not purport to say anything about the position outside the United Nations (though other organizations and some states have adopted the same provisional way of referring to the state, a fact acknowledged in the 1995 Interim Accord). Third, in no sense is Macedonia’s United Nations membership conditional or qualified. The Charter makes no provision for conditional membership. Macedonia is a full United Nations member like any other. Fourth, it is important to note that in a letter referred to in the resolution Macedonia, while expressing disappointment that it had not proved possible for the Council to adopt “the standard, straightforward resolution”, expressed its appreciation for the recommendation.<sup>22</sup> In other words, Macedonia acquiesced in the terms of the resolution, a fact clearly documented in the resolution itself.

The second part of the package was General Assembly resolution 47/225 of 8 April 1993, which is briefer than the Council resolution (omitting the political elements), but which follows the Council resolution in identifying the state to be admitted as “the State whose application is contained in document A/47/876-S/25147” and in including the clause concerning the provisional way of referring to the state.

The third element was the statement made by the President of the Security Council following the adoption of resolution 817 (1993).<sup>23</sup> Such statements are normally anodyne, but on this occasion every word was carefully negotiated with the parties. Like the Security Council and General Assembly resolutions the statement carefully avoids naming what it terms “the State concerned”. It does, however, clarify — if clarification were needed, and Macedonia seemed to think it was — that the reference in resolution 817 (1993) to “the former Yugoslav Republic” carries no implication whatsoever that the state concerned has any connection with the FRY. The reference merely reflects the historic fact that the state concerned was in the past a republic of the former Socialist Federal Republic of Yugoslavia. More significantly, in the statement the Council stressed the importance of early implementation of confidence-building measures and expressed the hope —

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<sup>22</sup> Doc. S/25541.

<sup>23</sup> Doc. S/25545.

“that both sides, and all others concerned, will avoid taking steps that would render a resolution more difficult”

The reference to “all others concerned” included the United Nations Secretary-General, and read together with the Greek letter referred to in resolution 817 (1993),<sup>24</sup> was understood as meaning that he would not — contrary to normal practice and internal Secretariat regulations — hoist the Macedonian flag (which at that time included the thirteen-point Sun of Vergina, a symbol associated with Philip of Macedon) outside United Nations Headquarters, either at the admission ceremony or subsequently. This non-hoisting of the flag, which had been dealt with at some length in the Greek letter noted in the resolution, was the fourth element of the admission package.

A fifth element was the seating of the new member in the General Assembly. The question whether it would sit under M (as in “Macedonia (former Yugoslav Republic of)”) or F (as in “Former Yugoslav Republic of Macedonia” — FYROM) had been taken up in the Balkan media. The matter was resolved by placing the quotation marks in the resolutions before the word “the” and seating Macedonia next to Thailand.

In the three and a half years since Macedonia’s admission there have been set-backs (e.g. rejection by both parties in 1993 of the Vance-Owen draft Treaty, the Greek embargo imposed as of 16 February 1994) and progress (e.g. the Interim Accord of 13 September 1995) in the efforts to settle the differences between Greece and Macedonia. The Accord of 13 September 1995 is interim because the difference over the name has yet to be settled — Article 1 merely states that “the Party of the First Part [later identified as having Athens as its capital] recognizes the Party of the Second Part [capital Skopje] under the provisional designation set forth in a letter of the Party of the First Part” — and some of the “provisional” elements in the Macedonian admission package remain. Difficulties continue to arise despite the Interim Accord.<sup>25</sup> The flag issue has, however, been resolved; since October 1995 Macedonia’s new flag — red with an eight-pointed Sun — flies outside United Nations Headquarters. And “practical measures” have been taken so that the difference about the name

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<sup>24</sup> Doc. S/25543: “the hoisting and flying at the United Nations of the flag bearing the Sun of Vergina would result in great damage to the efforts undertaken [by the ICFY Co-Chairmen] and render more difficult, if not defeat, a solution”. Pazartzis refers also to a letter to the Secretary-General from the President of the Security Council: see note 17, 291.

<sup>25</sup> For example, the problem over the EC/Macedonia Cooperation Agreement and other problems catalogued in Doc. A/50/1014-S/1996/605. The Interim Accord is in Doc. S/1995/794.

will not obstruct or interfere with normal trade and commerce (Article 5.2 of the Interim Accord and the Memorandum of 13 October 1995).

### *Federal Republic of Yugoslavia*

On 22 September 1992, the General Assembly adopted resolution 47/1 (by a recorded vote of 127 : 6 : 26), in which, having received the recommendation of the Security Council in its resolution 777 (1992) of 19 September 1992, the Assembly considered —

“that the Federal Republic of Yugoslavia (Serbia and Montenegro)<sup>26</sup> cannot continue automatically the membership of the former Socialist Federal Republic of Yugoslavia in the United Nations; and therefore *decides* that the Federal Republic of Yugoslavia (Serbia and Montenegro) should apply for membership in the United Nations and that it shall not participate in the work of the General Assembly”.

Seven months later, on 5 May 1993, the General Assembly adopted resolution 47/229 (by a recorded vote of 107 : 0 : 11), in which, having received the recommendation of the Security Council in its resolution 821 (1993) of 28 April 1993, the Assembly decided —

“that the Federal Republic of Yugoslavia (Serbia and Montenegro) shall not participate in the work of the Economic and Social Council”.

The legal basis, and effect, of these decisions of the General Assembly remain controversial. To understand the issues fully it is necessary to have regard to the statements made in the Security Council when the relevant Security Council resolutions were adopted,<sup>27</sup> as well as the background in

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<sup>26</sup> The expression “Federal Republic of Yugoslavia (Serbia and Montenegro)” was first used by the Security Council in its S/RES/757 (1992) of 30 May 1992, presumably to avoid appearing to “recognize” the state under its new name. The expression was taken up by other organs and organizations. At the latest at the time of the initialling of the Peace Agreement at Dayton, however, the earlier reticence to using the constitutional name of the state — “Federal Republic of Yugoslavia” — had disappeared, and — starting with its S/RES/1022 (1995) of 22 November 1995 the Security Council has dropped the explanatory “Serbia and Montenegro”. It is unclear why certain other organs have not done likewise, e.g. A/RES/50/193 of 22 December 1995 and A/RES/51/111 of 12 December 1996 continued to use the old formula.

<sup>27</sup> Doc. S/PV.3116; Doc. S/PV.3204.

the Council, which includes provisions of earlier resolutions, in particular Security Council resolution 757 (1992) of 30 May 1992, which noted

“that the claim by the Federal Republic of Yugoslavia (Serbia and Montenegro) to continue automatically the membership of the former Socialist Federal Republic of Yugoslavia in the United Nations has not been generally accepted.”

One also has to have regard to the debates in the General Assembly,<sup>28</sup> including the United Kingdom statement introducing on behalf of the co-sponsors of the draft that became General Assembly resolution 47/1, and the Legal Counsel's subsequent letter of 29 September 1992.<sup>29</sup>

Conceptually there is a clear distinction between continuity (or identity) and succession of states. (The terminology is often confusing: thus the European Union and others repeatedly said that the FRY could not be regarded as “the sole successor” or “the successor” when what was presumably meant was “the continuation”.) There is continuity when the same state (the same international legal person) continues despite changes of name, territory and/or constitution.<sup>30</sup> There is succession when one state replaces another in the responsibility for the international relations of territory: in this case there is a predecessor state and a successor state.<sup>31</sup>

Important legal consequences flow from the distinction between continuity and succession, yet history demonstrates that there is often no agreement among states on whether a given situation is one of continuity or succession. Pragmatic solutions, which may involve elements of both continuity and succession,<sup>32</sup> often emerge.

<sup>28</sup> Doc.A/47/PV.7, 141–196; Doc.A/47/PV.101.

<sup>29</sup> Doc.A/47/485, Annex, cited below.

<sup>30</sup> K. Marek, *Identity and Continuity of States in Public International Law*, 1954; J. Kunz, “Identity of States under International Law”, *AJIL* 49 (1955), 68 et seq.; G. Cansacchi, “Identité et continuité des sujets internationaux”, *RdC* 130 (1970), 7 et seq.

<sup>31</sup> For the modern terminology of state succession (if not necessarily the applicable rules), see the Vienna Convention on Succession of States in Respect of Treaties of 23 August 1978 (*ILM* 17 (1978), 1488 et seq.) and the Convention on State Succession in Respect of State Property, Archives and Debts of 8 April 1983 (*ILM* 22 (1983), 306 et seq.).

<sup>32</sup> For example, in an affidavit dated 10 December 1990 an official of the United Kingdom Foreign and Commonwealth Office said of the emerging Estonia that, if HMG were to deal with it on a government-to-government basis, “Her Majesty's Government would have to consider at this point whether Estonia is regarded as a continuation of the old State, or its successor or something in between”, *BYIL* 60 (1990), 502.

The FRY claims to be the continuation of the SFRY (Socialist Federal Republic of Yugoslavia). At the time of the proclamation of the FRY on 27 April 1992, in a formal declaration, and in a letter to the United Nations of the same date, the FRY stated that —

“The Federal Republic of Yugoslavia, continuing the State, international legal and political personality of the Socialist Federal Republic of Yugoslavia, shall strictly abide by all the commitments that the Socialist Federal Republic of Yugoslavia assumed internationally.”

Similar language was contained in notes of the same date addressed by SFRY diplomatic missions to their host Governments. In essence, the FRY considers that Slovenia, Croatia, Bosnia and Herzegovina, and Macedonia seceded from Yugoslavia leaving a rump-Yugoslavia composed of Serbia and Montenegro. In support of this position the FRY can point to the respective declarations of independence of the other four republics, to the fact that rump-Yugoslavia contains the old federal capital and a sizable proportion of the population and economic activity of the SFRY, and to the history of Yugoslavia, which was formed after World War I around the kernel of Serbia – Montenegro (which had themselves been independent states since the nineteenth century until they united in 1918). The FRY may also support its claim by pointing to the very recent case of the Russian Federation, which claimed to be, and was accepted as, the legal continuation of the Soviet Union. But why has the FRY insisted so much upon continuity in the face of widespread opposition? The explanation may have originally lain in its desire to remain a member of international organizations, in particular the United Nations, without having to go through the application procedures (which might well have been unsuccessful), and in the belief that continuity would be to its advantage in succession talks. It may also be connected with its views on the nature of the armed conflicts in the former Yugoslavia. It may have an emotional element: Yugoslavia was a founding member of the United Nations and of the Non-Aligned Movement. It might even be because the FRY believed its position to be correct in law, and that the contrary view, whether coming from other former Yugoslav states, from third states, or from the Arbitration Commission, was politically motivated.

The position of Slovenia, Croatia, Bosnia and Herzegovina, and Macedonia appears to be diametrically opposed to that of the FRY. They maintain that the FRY is one of the successor states to the former Yugoslavia, which has itself ceased to exist. In other words, in their eyes the FRY is in exactly the same position as themselves. It is not clear when they regard the new state as having come into being, given that Slovenia, Croatia, Bosnia and Herzegovina, and Macedonia themselves became

sovereign independent states on different dates. Were there a series of new states, as each republic gained statehood, or simply a new state when the last of the four gained statehood, or on 27 April 1992 when Serbia and Montenegro reorganized themselves? How do Slovenia, Croatia, Bosnia and Herzegovina, and Macedonia reconcile their position with the fact that each of them declared independence? How do they distinguish the case of the FRY from that of the Russian Federation? A possible distinction — referred to by a number of states — is their own refusal (unlike the states of the former Soviet Union) to accept the FRY as the continuation of the former Yugoslavia, and the absence of general acceptance of such continuity by third states. Another is the proportion of the old state represented by the Russian Federation and the FRY.<sup>33</sup>

Recent developments might indicate that the position is evolving. The measures imposed by the Security Council under Article 41 of the Charter were finally terminated on 1 October 1996,<sup>34</sup> having been suspended on 22 November 1995.<sup>35</sup> Termination of sanctions, however, has not yet been accompanied by the regularization of the FRY's position in international organizations: some refer in this context to "the outer wall of sanctions"

In the context of mutual recognition and normalization of relations, Macedonia, Croatia, and Bosnia and Herzegovina have each agreed to language which appears to acknowledge some sort of continuity between the FRY and former Yugoslavia:

- Article 4 of the Agreement of 8 April 1996 on the Regulation of Relations and Promotion of Cooperation between the Republic of Macedonia and the Federal Republic of Yugoslavia<sup>36</sup> was summarized in the joint communique of the same date as follows:

"In the light of the historical facts, both States mutually respect their state continuity (the Republic of Macedonia respects the state continuity of the Federal Republic of Yugoslavia and the Federal Republic of Yugoslavia respects the state continuity of the Republic of Macedonia)."

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<sup>33</sup> Schermers/Blokker, see note 2, 76, suggest the FRY was not recognized as "the successor" (sic) of the SFRY "perhaps because it was not considered the principal part of the former Republic of Yugoslavia, but more probably because it was considered the main party responsible for the outbreak of war in the territory of the former Yugoslavia". The latter is legally irrelevant. See also the United States position at note 42. Craven, see note 18, 375-380, poses some pertinent questions.

<sup>34</sup> S/RES/1074 (1996) of 10 October 1996.

<sup>35</sup> S/RES/1022 (1995) of 22 November 1995.

<sup>36</sup> Doc. S/1996/250; Doc.S/1996/291; see Škrk, see note 19, 103-105.

The text of Article 4 makes clear that “the historical facts” were rather different in each case. Macedonia had not previously (at least since antiquity) been a state, though it came close to asserting statehood during World War II, so “state continuity” in its case is an odd concept. And in the case of the FRY “state continuity” appears to be essentially a reference to the pre-Yugoslavia states of Serbia and Montenegro.

- Article 5 of the Agreement of 23 August 1996 on the Normalization of Relations between the Federal Republic of Yugoslavia and the Republic of Croatia<sup>37</sup> is similar to Article 4 of the Agreement with Macedonia. In it Croatia acknowledged the existence of the state continuity of the FRY; again there is reference to the pre-Yugoslavia states of Serbia and Montenegro.
- A joint statement issued in Paris on 3 October 1996 by Presidents Milosevic and Izetbegovic<sup>38</sup> — the status of which is unclear given the position of each President — contained the following:

“The Federal Republic of Yugoslavia will respect the integrity of Bosnia and Hercegovina in accordance with the Dayton Agreement which affirmed the continuity of various forms of statal organization of Bosnia and Hercegovina that the peoples of Bosnia and Hercegovina had during their history. Bosnia and Hercegovina accepts the State continuity of the Federal Republic of Yugoslavia.”

Despite these somewhat equivocal acceptances of the FRY’s “state continuity” it would seem that the position in New York is unchanged. On 28 October 1996 the Permanent Representatives of Slovenia, Croatia, Bosnia and Herzegovina, and Macedonia wrote a letter to the Secretary-General<sup>39</sup> in which, after referring to Security Council resolution 777 (1992) of 19 September 1992, they asserted that —

“All states which have emerged from the dissolution of the former Socialist Federal Republic of Yugoslavia, which had ceased to exist are equal successor states. The FRY (Serbia and Montenegro) has also to follow the procedure for admission of new Member States to the United Nations which would enable the Organization to make its judgment on whether the conditions set out in Article 4 of the Charter are met.”

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<sup>37</sup> Doc. A/51/318-S/1996/706; see Škrk, see note 19, 105–107.

<sup>38</sup> Doc. A/51/461-S/1996/830.

<sup>39</sup> Doc. A/51/564-S/1996/885.



Turning to the position of third states, the member states of the European Union are on record as saying that the FRY cannot be regarded as the “sole successor” to the SFRY. In the Badinter Commission’s Opinion No. 1 of 29 November 1991,<sup>40</sup> responding to a request from Lord Carrington, then President of the Conference on Yugoslavia, the Commission opined “that the SFRY is in the process of dissolution”. The reasoning is terse. The Opinion starts with the proposition that in the case of a “federal-type State” the existence of the state implies that “the federal organs represent the components of the Federation and wield effective power”. The Opinion then notes three matters:

(a) Although the SFRY “has now retained its international personality”, “the Republics” (actually four of the six republics) have expressed their desire for independence.

(b) The composition and workings of the essential organs of the Federation no longer meet the criteria of participation and representativeness inherent in a federal State.

(c) There is armed conflict and the authorities of the Federation are powerless to enforce cease-fires.

Consequently the SFRY is “in the process of dissolution” Seven months later, in its Opinion No. 8 of 4 July 1992<sup>41</sup> the Commission opined that “the existence of a federal state, which is made up of a number of separate entities, is seriously compromised when a majority of those entities, embracing a greater part of the territory and population, constitute themselves as sovereign states with the result that federal authority may no longer be effectively exercised”. It asserted various “developments” since its Opinion No. 1, including that —

“Serbia and Montenegro ... have constituted a new state, the “Federal Republic of Yugoslavia”, and on 27 April adopted a new constitution”,

and that

“The former national territory and population of the SFRY are now entirely under the sovereign authority of the new states.”

The Commission was “therefore” of the opinion that the process of dissolution was now complete and that the SFRY no longer existed.

<sup>40</sup> *ILR* 92 (1993), 162; *ILM* 31 (1992), 1494.

<sup>41</sup> *ILR* 92 (1993), 199; *ILM* 31 (1992), 1521. For a critique of Opinions Nos. 1 and 8, see Craven, see note 18, 357–375.

Like the member states of the European Union some other third states, including the United States of America and the members of the Organization of the Islamic Conference, do not accept the FRY as the continuation of the SFRY. In the statement after the vote on Security Council resolution 777 (1992) the United States representative said that —

“for the first time, the United Nations is facing the dissolution of one of its Members without agreement by the successor States on the status of the original United Nations seat. Moreover none of the former republics of the former Yugoslavia is so clearly a predominant portion of the original State as to be entitled to be treated as the continuation of that State. For these reasons, and in the absence of agreement among the former republics on this issue, my Government has made it clear all along that we cannot accept Serbia and Montenegro’s claim to the former Yugoslavia’s United Nations seat.”<sup>42</sup>

The effect of the Security Council and General Assembly resolutions on the FRY’s position in the United Nations is not self-evident. Whether, at the time of writing, the FRY is a member of the United Nations is a question to which there is no easy answer. Schermers and Blokker may well be right when they say that the resolutions “did not result in a termination of membership”.<sup>43</sup> The operative provisions of General Assembly resolutions 47/1 of 22 September 1992 and 47/229 of 5 May 1993 decide merely that the FRY shall not participate in the work of the General Assembly and ECOSOC. If the FRY were not a member of the United Nations such a decision would be otiose since, as a non-member, it could not in any event participate in these two organs, except as an observer. It could, perhaps, be explained on the basis that there is doubt as to whether it is a United Nations member, and the resolutions make the matter clear. But the first resolution, which dealt only with the General Assembly and left the FRY free to participate in ECOSOC, can hardly have been said to have clarified the membership question. Some states had proposed that the FRY be excluded from membership in the United Nations, a position hardly consistent with non-membership, but were unable to secure a Council recommendation under Article 6 of the Charter. If the true

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<sup>42</sup> Doc. S/PV. 3116, 12–13.

<sup>43</sup> See Schermers/Blokker, see note 2, 76, 106. For other views see Y.Z. Blum, “UN Membership of the “New” Yugoslavia: Continuity or Break?”, *AJIL* 86 (1992), 830-3; D. Lloyd, “Succession, Secession, and State Membership in the United Nations”, *N.Y.U.J. Int’l L. & Pol.* 26 (1994), 761 et seq.; “Correspondents’ Agora: UN Membership of the Former Yugoslavia”, *AJIL* 87 (1993), 240-51.

position is that the former Yugoslavia has been extinguished as a state then it ceased to be a member of the United Nations by operation of law. What was needed, in the face of the FRY's refusal to accept such extinction, was a determination or instruction to the Secretariat by the relevant United Nations organs that the former Yugoslavia was extinguished and therefore no longer a member. While there is no express provision in the Charter for such a determination it would be a reasonable implied power, requiring a recommendation of the Security Council and a decision of the Assembly by analogy with those membership decisions expressly provided for in Articles 4 to 6. What in fact we have is something that tends in that direction, but does not go so far. Security Council resolution 777 (1992) contains preambular language —

“Considering that the State formerly known as the Socialist Federal Republic of Yugoslavia has ceased to exist”.

This appears clear enough — unlike the Badinter Commission it does not simply say that the SFRY has ceased to exist — an undisputed fact — but that the state formerly known as the SFRY has ceased to exist. But the resolution does not draw the logical conclusion, for it recalls its earlier preambular view that the claim by the FRY to continue automatically the membership of the former SFRY has not been generally accepted. This leaves open the possibility that in the future it might be generally accepted that the FRY could continue the SFRY's membership. In operative paragraph 1 of the resolution the Security Council considers (it did not decide) that the FRY cannot continue automatically the SFRY's membership and therefore recommends that the Assembly decides that the FRY should apply for membership of the Assembly. This rather subtle wording was followed to the letter by the General Assembly in resolution 47/1.

The Legal Counsel of the United Nations set out the practical consequences of resolution 47/1 in his letter of 29 September 1992 —

“... 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. It is clear, therefore, that representatives of the Federal Republic of Yugoslavia (Serbia and Montenegro) can no longer participate in the work of the General Assembly, its subsidiary organs, nor conferences and meetings convened by it.

On the other hand, the resolution neither terminates nor suspends Yugoslavia's membership in the Organization. Consequently, the seat and nameplate remain as before, but in Assembly bodies representatives of the Federal Republic of Yugoslavia (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".<sup>44</sup>

This letter was disputed by Slovenia and some others, but appears to reflect the general understanding of the members of the Security Council (see, in particular, the statements of the Russian Federation and China in the Council and the United Kingdom in the Assembly) and has been followed by the Secretariat ever since. The ICJ in its Order of 8 April 1993 (*Case concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide*) after citing this letter at length, remarked that "the solution adopted is not free from legal difficulties".<sup>45</sup> While that is beyond dispute, three observations are in place.

First, the two Council and Assembly resolutions concern United Nations membership and/or participation in United Nations organs. Participation is one of the most important of the "rights and privileges of membership" referred to in Article 5 of the Charter, suspension from which (except under Article 19) requires a recommendation of the Security Council. On either analysis, membership or participation, the Council and Assembly followed the correct procedure.<sup>46</sup> The Assembly acted upon the recommendation of the Council, thus — in the words of the United Kingdom representative — following the procedure laid down in the Charter for membership questions; the same point was made by the French representative in the Security Council. The Assembly did not, and could not, act alone. The bad example set by the Assembly in the 1970s regarding South Africa's participation in the Assembly<sup>47</sup> was not followed, and may be seen to have been overtaken by the FRY case. Admittedly some critics in the Council and Assembly argued variously that there was no legal basis in the Charter for the action taken, that no Charter provision was cited, or that the Council was interfering in Assembly business. Some disagreed with the underlying assumption — that the state had ceased to exist —

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<sup>44</sup> Doc. A/47/485, Annex: Schermers/Blokker, see note 2, 76 refer also to a memorandum by the Legal Counsel.

<sup>45</sup> ICJ Reports 1993, 14.

<sup>46</sup> A point made by Schermers/Blokker, see note 2, 77.

<sup>47</sup> Schermers/Blokker, see note 2, 183-4.

pointing to earlier precedent, especially that of India in 1947. The United Kingdom representative, on behalf of the co-sponsors, conceded that:

“The situation is without precedent and was clearly not foreseen by the authors of the Charter. But the sponsors are satisfied that the Council and the Assembly must by necessary implication have the power under the Charter to act in this way in this unforeseen situation”.

Calls to seek an Advisory Opinion from the ICJ or the views of the United Nations Legal Counsel went unheeded.

Second, the result, while “not free from legal difficulties”, was probably not a bad political compromise, and has allowed lines to be kept open to the FRY within the United Nations. The FRY Chargé (no new Permanent Representative has been appointed) and members of the FRY Mission have full access to United Nations Headquarters. The FRY may circulate documents. The representative of the FRY has requested, and been invited, to participate in Security Council meetings, albeit without reference to any particular rule in the Provisional Rules of Procedure: he is invited by name without reference to rule 37 (invitations to United Nations Members) or rule 39 (invitations to “other persons”). On occasion he has been seated at the Council table throughout the meeting behind the nameplate “Yugoslavia”. Nonetheless, one cannot be unmindful of the stern words of the representative of Ghana speaking in the General Assembly before the adoption of resolution 47/1 —

“The draft resolution before us may be pragmatic, but it cannot be said to be principled, logical or consistent to the extent that it allows for Yugoslav participation in the work of our Organization, other than that of the General Assembly. Principle should not be made to yield to temporary expediency.”<sup>48</sup>

Third, the Council and Assembly have not tied themselves to any particular resolution of the matter. At some point the political momentum will exist to regularize the FRY’s position in the United Nations. There would seem to be essentially two ways of doing this. The FRY could apply for membership as the other former Yugoslav states have done. This appears to be what was envisaged by the Council and the Assembly in 1992, and in the Legal Counsel’s letter. Indeed the FRY Prime Minister, Milan Panic, addressing the General Assembly on 22 September 1992 said: “I hereby formally request membership in the United Nations on behalf of the new

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<sup>48</sup> Doc.A/47/PV.7, 161.

Yugoslavia, whose Government I represent".<sup>49</sup> In the alternative, the relevant organs might accept continued FRY membership without insisting on a formal application, for example by reversing the non-participation decisions of 1992 and 1993. This would probably be explicitly "without prejudice to questions of State succession". It could be done by a decision of the relevant organs as a pragmatic solution to a difficult situation.

This article has concentrated on FRY membership and participation in the United Nations. Similar questions have arisen in other fora, such as the specialized agencies,<sup>50</sup> the international financial institutions,<sup>51</sup> other organizations (e.g. the International Sea-Bed Authority<sup>52</sup>) and meetings of states parties to human rights treaties, to the United Nations Convention on the Law of the Sea and to the Non-Proliferation Treaty. Especially important is the OSCE, given its close involvement in the region. The issues are often similar to those in the United Nations, and similarly complex. Once the matter is resolved in the United Nations itself, and in the OSCE, other bodies are likely to follow suit, though the international financial institutions are a special case. In some cases, particularly meetings of states parties or membership in organisations such as the International Sea-Bed Authority, where there are no special admission conditions or procedures, the question of participation is closely related to participation in multilateral treaties.

## II. Participation in Multilateral Treaties

In connection with multilateral treaties the succession/continuity problem is compounded by a general uncertainty concerning the rules of international law on succession to treaties. That uncertainty, while interesting, was of no great moment for most states before 1990 and Yemeni and German unification. Those who dealt with such issues prior to 1990, for

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<sup>49</sup> Doc.A/47/PV.7, 149.

<sup>50</sup> "Most specialized agencies have followed the UN, adopting resolutions in which Yugoslavia was not expelled, but only prevented from participating in the plenary organ": Schermers/Blokker, see note 2, 77.

<sup>51</sup> P.R. Williams, "State succession and the international financial institutions: political criteria v. protection of outstanding financial obligations", *ICLQ* 43 (1994), 776 et seq.; I.F.I. Shihata, "Matters of State Succession in the Practice of the World Bank", in: *Development and International Cooperation*, see note 2, 7 et seq.

<sup>52</sup> The FRY was prevented from participating in the first session of the Assembly of the International Sea-Bed Authority by a decision of the Assembly in August 1995. For the FRY's protest, see Doc.A/50/385.

example in drawing up the Conventions of 1978 and 1983 or the Restatement (Third) of the Foreign Relations Law of the United States of 1987, focused principally on decolonization and did not anticipate the dramatic events to come in Europe.<sup>53</sup> But since then there have been a series of difficult cases: former Soviet Union, former Yugoslavia, former Czechoslovakia. Referring to former Yugoslavia a former Legal Advisor to the US State Department, Mr. Williamson, has written that —

“The intractable political issues that served to divide the country ... make the task of resolving treaty succession issues nearly impossible.”

After referring to the united views of the states of the former Soviet Union and the inability of the Serbs, Croats and other South Slavs to agree on much of anything, Mr. Williamson adds that —

“The succession process also was made more difficult as a result of the State Department’s desire to maintain a legal posture consistent with that taken with respect to Soviet treaty succession issues, while at the same time supporting the policy objectives of the United States.”<sup>54</sup>

It is salutary to recall the questions which the ICJ expressly did not answer in its judgment of 11 July 1996 (*Genocide Convention*, Preliminary Objections):

- The Court left open “whether or not the principle of “automatic succession” applies in the case of certain types of international treaties or conventions” (para. 23). The Human Rights Committee, and other human rights bodies, had been bolder, and acted on the assumption that there was such automatic succession (see Judge Weeramantry p. 10). Similarly, some of the separate opinions seemed to treat the Genocide Convention as unique (e.g. Judge Shahabuddeen).
- The Court found “no need to settle the question of what the effects of a situation of non-recognition may be on the contractual ties between parties to a multilateral treaty” (para. 26).

<sup>53</sup> D.F. Vagts, “State Succession: The Codifiers’ View”, *Va. J.Int’l L.* 33 (1993), 275 et seq.

<sup>54</sup> E.D. Williamson/J.E. Osborn, “A U.S. Perspective on Treaty Succession and Related Issues in the Wake of the Break-up of the USSR and Yugoslavia”, *Va.J.Int’l L.* 33 (1993), 261 et seq. ( 270); R. Williams, “The Treaty Obligations of the Successor States of the former Soviet Union, Yugoslavia, and Czechoslovakia: do they continue in force?”, *Den. J. Int’l L. & Pol’y* 23 (1994), 1 et seq.; M. Shaw, “State Succession Revisited”, *Finnish Yearbook of International Law* 6 (1995), 34 et seq.

Such judicial restraint is understandable. It leaves scope for academic speculation, but it reduces the value of the judgment for those advising Governments and others on a day-to-day basis. Other issues of importance were dealt with by the Court at best obliquely or inconclusively. On the crucial question for the parties to the proceedings, and for others — whether the FRY was bound by the Genocide Convention — the judgment cites the FRY Declaration of 27 April 1992, which itself is based on the contested claim to state continuity with the SFRY, seeing this as an “intention .... by Yugoslavia [i.e. the FRY] to remain bound by the international treaties to which the former Yugoslavia was party”. The Court adds that “it has not been contested that Yugoslavia was party to the Genocide Convention.” “Thus”, concludes the Court, “the FRY was bound by the provisions of the Convention” (para. 17). The Court appears to be saying, in this short paragraph, that the FRY is a party to the Genocide Convention because (i) it expressed the intention to remain bound by the former Yugoslavia’s treaties and (ii) its participation in the Genocide Convention had not been contested. Not contested by whom? By Bosnia, perhaps — the other party to the proceedings — in which case the Court’s conclusions relate only to the treaty relations between Bosnia and the FRY. If one other state party had contested the FRY’s participation would this have affected matters? If not one, how many? How is one to apply the Court’s approach to other multilateral treaties? In his dissenting judgment Judge *ad hoc* Kreca criticized this passage at some length.

In another tantalizingly brief paragraph (para. 34) the Court considers its jurisdiction *ratione temporis*. The Court said that Yugoslavia had asserted that the Court could only deal with events subsequent to the different dates on which the Genocide Convention might have become applicable as between the parties, an elementary proposition one might have thought. But the Court observed that the Convention did not contain any clause limiting its jurisdiction *ratione temporis* and that the parties themselves had not made any reservation to that end. Thus, found the Court, it had jurisdiction “in this case to give effect to the Genocide Convention with regard to the relevant facts which have occurred since the beginning of the conflict which took place in Bosnia-Herzegovina”. It is unclear how this finding relates to the normal rules on the temporal application of treaties. The implications are potentially far-reaching.

One or two of the separate or dissenting judgments do seek to grapple with some of the issues. Judge Shahabuddeen develops a complex “construction” in relation to the Genocide Convention, leaving open whether his theory applies to other “human rights treaties” (however defined). Judge Weeramantry, at somewhat greater length, supports full-blown “automatic succession” to what he terms “so vital a human rights convention as the Genocide Convention”. He does not make clear whether the



principle applies to any other convention, and in any event neither his views nor those of Judge Shahabuddeen were adopted by the Court.

For the most part, Slovenia, Croatia, Bosnia and Herzegovina, and Macedonia have deposited instruments of succession to the multilateral treaties to which Yugoslavia was a party. See, for example, those listed in the United Nations publication *Multilateral Treaties deposited with the Secretary-General of the United Nations, Status as at 31 December 1995* (hereafter *Multilateral Treaties*), for each of them the date of deposit of the instrument of succession is given.

The FRY has deposited no such instrument of succession. Yet in *Multilateral Treaties* "Yugoslavia" remains listed under the heading "Participants", and against it the relevant dates of signature, ratification or accession by the former Yugoslavia. There are no footnotes, and no explanations. The introduction to *Multilateral Treaties* says that the number of participants "does not include those States which have ceased to exist". Indeed, such states (e.g. the former German Democratic Republic) are not included in the list of participants, while "Yugoslavia" is.

As already mentioned, on 27 April 1992 the FRY sent a note to the United Nations Secretary-General confirming its declaration of the same date to the effect that "the FRY, continuing the State, international legal and political personality of SFRY, shall strictly abide by all the commitments that the SFRY assumed internationally". The note to the Secretary-General was not, apparently, intended for him in his capacity as treaty depositary or, at least, was not received as such; it was not circulated as a depositary notification and is not referred to in *Multilateral Treaties*. Yet both the Secretariat, and states parties generally, appear to consider the FRY to be a party to most multilateral treaties. For example, no one suggested that Yugoslavia's ratification of the United Nations Convention on the Law of the Sea (UNCLOS) should not count towards the sixty required for entry into force (whereas that of the German Democratic Republic was discounted). The Secretariat took the view that Assembly resolution 47/1 "was without effect on the capacity of the Federal Republic of Yugoslavia (Serbia and Montenegro) to participate in treaties, including those deposited with the Secretary-General".<sup>55</sup>

The ICJ appears to have had no difficulty in reading the FRY's declaration and note as indicating the FRY's "intention to honour the international treaties of the former Yugoslavia" (including the Genocide Convention). Certain human rights treaty monitoring bodies appear to have adopted a similar approach. Thus in October 1992 the Human Rights

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<sup>55</sup> *Summary of the Practice of the Secretary-General as Depositary of Multilateral Treaties* (Doc.ST/LEG/8).

Committee treated the FRY as a party to the Covenant, demanding that it submit a special report. But there remain some questions. First, the declaration and/or note were not formally notified by the Secretary-General (as depositary) to other states. Second, the note did not specify which treaties are covered by the intention to honour. Its reference to "all the commitments that the SFRY assumed internationally" might be construed as including all those which are open to succession by a successor state. There are some treaties, in particular those providing for a special admission procedure (such as the Charter of the United Nations) or otherwise imposing unfulfilled conditions on participation (such as United Nations membership) to which succession is not possible. But is it clear which they are? In case of doubt who decides? Third, the intention expressed in the declaration and note is based on the contested proposition of legal continuity. The Court appears to have been ready to ignore this, perhaps on the unspoken assumption that it can be severed. While in the case of the Genocide Convention, and indeed in most other cases, it makes good sense to treat the FRY's statement of intention as being sufficient to constitute it a party, one way or another, it may be thought — to borrow the Court's expression in a different context — that "the solution adopted is not free from legal difficulties". While it does not appear that any state has objected to the abiding by commitments point in the FRY's declaration and note, as opposed to the continuity point, not all states may feel able to adopt the approach of the Secretariat and Court. And even if the states would like to, the question remains whether national courts, faced with cases involving private individuals, will adopt this approach. There is everything to be said, in the interests of all concerned, including the FRY, for further action to clarify the position. Perhaps the FRY should send a further communication to the Secretary-General (as depositary), and to other depositaries, restating its intention of participating in the treaties concerned, without reference to continuity, listing the treaties, and requesting that the communication be circulated as a depositary notification.

It is initially up to each state to decide its attitude to FRY participation in multilateral treaties. The United Kingdom, upon its recognition of the FRY on 10 April 1996, confirmed that "as appropriate, we regard treaties and agreements in force to which the United Kingdom and the Socialist Federal Republic of Yugoslavia were parties as remaining in force between the United Kingdom and the Federal Republic of Yugoslavia".<sup>56</sup>

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<sup>56</sup> Letter from the Secretary of State for Foreign and Commonwealth Affairs to the President of the FRY, to be published in *United Kingdom Materials in International Law 1996 (BYIL 67, 1996)*.

One cannot leave this subject without referring to the furore caused in April 1996 by a document entitled *Summary of Practice of the Secretary-General as Depositary of Multilateral Treaties*.<sup>57</sup> In an unfortunate and virtually unintelligible passage (paras. 297, 298) the document in effect equated the FRY to the Russian Federation, saying that “the Federal Republic of Yugoslavia (Serbia and Montenegro) remains ... as the predecessor state upon separation of parts of the territory of the former Yugoslavia. General Assembly resolution 47/1 ..... was adopted within the framework of the United Nations and in the context of the Charter of the United Nations, and not as an indication that the Federal Republic of Yugoslavia was not to be considered a predecessor state”. An erratum was issued deleting the offending sentences, but not before a series of written protests were lodged (by four former Yugoslav states, the United States etc.). Indeed, so strongly did some — Germany for example — feel about this apparently low-level slip-up that they apparently felt it necessary to protest even after the erratum had issued.<sup>58</sup>

A further aspect of the matter is the participation of the FRY in meetings of states parties to certain treaties. The FRY has been prevented, often by vote, from participating. Since states parties have a treaty right to participate in such meetings on what legal basis have those who voted for exclusion done so? The EU statements are of masterly obscurity. Is it that the FRY is not a state party (indeed, prior to recognition, not a state)? The letter just referred to by four former Yugoslav states appears to take this line, saying that the FRY has been excluded from meetings because it has “not acted in accordance with international rules on the succession of States”. Is it that the majority of states parties have the right to exclude any State Party from the meeting (who will be next)? Is it a form of reprisal for breach of treaty (but in what respect is the FRY in breach of UNCLOS)? Or is it simply on political grounds without regard to, indeed in disregard of, the law?

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There has often been tension between law and policy in connection with the former Yugoslavia. It may from time to time have seemed that international law has been given short shrift by policy makers. There is much that can hardly be explained by reference to the normal rules of public international law. The recognition of the various former Yugoslav states, to which only passing reference has been made in this article, is a case in point. As a result, the value as precedents for international lawyers of much

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<sup>57</sup> Doc.ST/LEG/8.

<sup>58</sup> Doc.A/50/910-S/1996/231; Doc.A/51/95-S/1996/251; Doc.A/50/930-S/1996/260; Doc.A/50/928-S.1996/263.

of what happened in the former Yugoslavia may prove to be limited. There are a number of possible explanations, including the speed at which events unfolded during 1991, at a time when attention was elsewhere (Iraq, Soviet Union, other parts of central and eastern Europe); and the involvement of a number of new and largely untried actors in international affairs (the European Union and its Troika, the OSCE, the Co-Chairmen of the International Conference on the Former Yugoslavia, the Badinter Arbitration Commission). Even the United Nations Security Council and General Assembly were venturing down new paths.

