# DISSENTING OPINION OF JUDGE DIMITRIJEVIĆ

*The nature of facts in law — Facts as results of legal determinations — Status of a State is a fact — Contradictory and ambiguous decisions of international organizations and States and interpretations thereof — What was the status of "Yugoslavia", the Socialist Federal Republic of Yugoslavia and the Federal Republic of Yugoslavia after 27 April 1992? — The Federal Republic of Yugoslavia was at no time a continuator of the Socialist Federal Republic of Yugoslavia, it was not a Member of the United Nations until 1 November 2000 — The Federal Republic of Yugoslavia thus had no access to the International Court of Justice and was not party to the Genocide Convention in 1996 — Consent to jurisdiction to be narrowly interpreted — Scope of the judgment envisaged in Article 61, paragraph 2, of the Statute possibility of revision based on the final assessment of facts*

## I Introduction

1 While I can generally accept the presentation of the historical context of the case, I cannot support the conclusions arrived at in the Judgment

2 The arguments of the majority flow in two principal directions One is an attempt to dispose of the case "epistemologically", by restrictively interpreting the meaning of the term "fact" as used in Article 61 of the Statute, and the other — less obvious but contained in the Judgment — through an interpretation of the legal situation which obtained on 11 July 1996 when the Judgment in the case concerning *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v *Yugoslavia), Preliminary Objections* (*I C J Reports 1996 (II)*, p 595) was delivered Regretfully, I am unable to follow either line of reasoning

## II What Is "Fact" in Law?

3 I cannot subscribe to the view of the majority, based as it is mostly on dictionaries for general use, that a fact is only something that can be perceived by human senses as a part of physical reality A legal fact, a fact in law, is something that *legally* exists, that belongs to legal reality as a product of legal rules Being or not being a member of an international organization or a party to an international treaty is a legal fact — not a legal norm — although it can be the result of an authoritative interpretation of the latter

4. Different legal determinations typically rely on different kinds of facts. Often there are conflicting perceptions of the latter This does not mean, however, that, for example, being or not being a State, having or not having the status of a citizen, having or not having domicile, being or not being a father, being or not being validly married, are mere perceptions These are facts which may or may not be readily perceptible and may or may not be correctly perceived But they are facts nonetheless. Whether the Federal Republic of Yugoslavia (FRY) was or was not a party to the Statute of the International Court of Justice at the time of the 1996 Judgment is a factual question Whether the FRY did or did not remain bound by the Genocide Convention continuing the personality of the former Yugoslavia is also a matter of facts In the present case, these are the critical facts on which the legal determination of jurisdiction is to be based.

5 Determinations of law resolve a dispute between the parties and attribute consequences Such determinations are based on what a court perceives and establishes as a fact In the 1996 Judgment the determination of law was that the International Court of Justice had jurisdiction over both the FRY and Bosnia and Herzegovina.

6 Whether in the context of revision or in another context, the concept of "fact" has never been reduced to physical evidence or documents International tribunals have also come to the conclusion that the meaning of "fact" depends on the context and that it must not be construed narrowly

7. The French-German Mixed Arbitral Tribunal stated in 1924. "whereas the notion of *fact* should not be placed in total opposition to that of *law*, from which it is not readily distinguishable, but must be construed in a broader sense " The decision then continued "whereas the essential condition in order that a new fact may provide a basis for revision is that it could have been of such a nature as to be a decisive factor in the award"[1].

8 In the *El Salvador/Honduras* case, the International Court of Justice considered as a factual question whether certain waters were subject to a régime of condominium because this was posited as a possible premise or a legal determination The Court raised the question "in what practical ways that process of delimitation would be at all affected by the *fact* that the waters were subject to a régime of a condominium rather than being simply undelimited waters" (*Land, Island and Maritime Frontier Dispute (El Salvador/Honduras Nicaragua intervening), Judgment, I C J Reports 1992*, p 606, para. 414, emphasis added) In the same case, the Court treated as a fact the issue of whether El Salvador was or was not a party to the case, and whether, accordingly, it could be bound by the decision (*ibid*, pp 597-598)

[1] *Heim et Chamant c Etat allemand, RDTAM*, Vol III, p 55 *[translation by the Registry]*

9 In the case concerning the *Frontier Dispute (Burkina Faso/Republic of Mali)*, both Parties recognized that "the question has here to be appraised in the light of French colonial law, *'droit d'outre-mer'*" (*I C J Reports 1986*, p 568, para 29) The Court held, however, that legislation enacted by France for its colonies does not have the role of law in the actual setting of the case, but may only be considered as a factual element The Court stated "French law — especially legislation enacted by France for its colonies and *territoires d'outre-mer* — may play a role not in itself *but only as one factual element among others* " (*ibid*, p 568, para 30, emphasis added)

10 Article 61 of the Statute does not distinguish between various kinds of judgments For this simple reason, the notion of "fact" relied upon in Article 61 should be broad enough to accommodate various types of facts which serve as a basis for all legal conclusions Obviously, specific facts on which access to the Court and jurisdiction may be based also belong to the broad category of facts within the meaning of Article 61

11 The same Article allows for some temporal duality between the existence of a fact and its discovery or determination In paragraph 1, reference is made to a fact which existed at the time when the Judgment was given, but which was unknown to the Court and to the party claiming revision, whilst paragraph 2 expects the Court expressly to record "the existence of the *new* fact" (emphasis added) in order to declare an application for revision admissible This implies a new understanding, caused by a realization that occurred after the judgment was delivered and showing that the "old" fact, which had been assumed to exist at the time of the judgment, had not actually existed *ab initio*, or that a fact which had not been seen as existing or had been misperceived as such, had actually existed at the relevant time Contrary to what the majority says in paragraph 69 of the present Judgment, the FRY does not rely "on the legal consequences which it seeks to draw from facts subsequent to the [1996] Judgment", but seeks to prove that the fact on which the Court relied in its 1996 Judgment did not exist The non-existence of a fact, as well as its existence, is also a factual question

## III. Facts in the Present Case

12 The fact that the FRY was *not* a continuator of the Socialist Federal Republic of Yugoslavia (SFRY) and thus *not* a Member of the United Nations or party to international treaties ratified by the SFRY (including the Genocide Convention), was "unknown" in its totality to the Court and to the FRY That is not to say it was unknown in the sense that it was hidden from them or that they had no notion of its possible existence It was familiar to them and to many others as a possibility —

a legal contention shared by those opposing the FRY's continuity (including Bosnia and Herzegovina in other fora, outside the Court).

13 Indeed, the jurisdiction *in personam* over the FRY was based on the perceived fact that, following the break-up of the former Yugoslavia, the FRY continued the personality and treaty membership of the former Yugoslavia The legal conclusion that the Court had jurisdiction derived its sole basis from that perceived fact

14 It goes without saying that the admission of the FRY to the United Nations in 2000 could not have been known to the Court as early as 1996; for that matter, it could not have known of the FRY's intention to apply for membership. Even if the then Government of the FRY had such plans, it could not have known the outcome of the vote in the United Nations Security Council and the General Assembly However, the elements of the legal position of the FRY vis-à-vis the United Nations and relevant to the FRY's being a party to the Statute and to the Genocide Convention were certainly known to both the Court and the Applicant but could not be fully comprehended prior to 1 November 2000

15 The Court had two opportunities to state its position towards its jurisdiction in the case of the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v *Yugoslavia)* The first was when deciding, in its Order of 8 April 1993, on the request for the indication of provisional measures (*I C J Reports 1993,* p 4) That Order relied on the finding that the Court had prima facie jurisdiction on the basis of Article IX of the Genocide Convention in conjunction with Article 35, paragraph 2, of the Statute Whilst stressing more than once that the determination of jurisdiction was based on prima facie findings — understandable when relating to provisional measures — the Court observed

> "Whereas, while the solution adopted *is not free from legal difficulties*, the question whether or not Yugoslavia is a Member of the United Nations and as such a party to the Statute of the Court is one which the Court does not need to determine *definitively* at the present stage of the proceedings" (*Ibid*, p 14, para 18, emphasis added.)

16 The second opportunity came when the Court had to decide on preliminary objections It did so in the Judgment which is the object of the Application for revision At that stage again the Court did not find it necessary to determine definitively whether or not the FRY was a Member of the United Nations and as such a party to the Statute of the Court

It based its jurisdiction on the proposition that the FRY *remained bound* by the Genocide Convention — which is only possible on the assumption of continued personality and therefore continued status and participation in international treaties (It was never alleged, or mentioned, that the FRY would have *become* bound by Article IX by virtue of its own treaty action — like Bosnia and Herzegovina did ) The Court found support for this understanding in the intention of the FRY, allegedly expressed in the Declaration "adopted on its behalf" on 27 April 1992, "to *remain bound* by the international treaties to which the *former* Yugoslavia was party" (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v *Yugoslavia), Preliminary Objections, Judgment, I C J Reports 1996 (II)*, p 610, para 17; emphasis added) The 11 July 1996 Judgment added "that it has not been contested that Yugoslavia was party to the Genocide Convention" From there it followed that "Yugoslavia was bound by the provisions of the Convention on the date of the filing of the Application on 20 March 1993" *(ibid )*

17 That very expeditious way of dealing with the important matter of jurisdiction, together with the choice of arguments and terms, could only have meant the following·

*(a)* The Court assumed that the SFRY had ceased to exist Otherwise there would be no "former" Yugoslavia It remains unclear to which "Yugoslavia" the Court referred as a party to the Genocide Convention There was certainly no dispute regarding the fact that the former Yugoslavia, i e , the SFRY, was a party, but such qualification of the FRY depended on whether the FRY was sufficiently linked to the commitments of the former State, by continuity or otherwise

*(b)* Failing to indicate that the FRY was bound by the obligations of the SFRY as a successor State the Court must have assumed that there was continuity between the SFRY and the FRY This continuity — it follows from the Judgment — was based on the Declaration of 27 April 1993 and the intention expressed therein to *remain bound* by international treaties ratified by the SFRY, including the Genocide Convention

*(c)* The Court must have assumed that the FRY was a Member of the United Nations Namely, even if the FRY was held to be bound by the provisions of the Genocide Convention on bases other than continuity, without membership in this organization it could not have become a party to the Convention and could have no *locus standi* before the International Court of Justice

It should be noted that the Court found that its jurisdiction was established "only . on the basis of Article IX of the Genocide Convention" (*ibid*, p 621, para 41).

## IV The Legal Status of the Socialist Federal Republic of Yugoslavia, of the Federal Republic of Yugoslavia and of "Yugoslavia" in 1996

18 All the foregoing determinations are findings on facts. They were made by the Court in spite of admitted "legal difficulties" Those difficulties were known to the Court in the form of possible options on how to decide on the presence of certain facts, as disclosed in a series of ambiguous or controversial decisions. Those taken within the United Nations system were the following

19 The Security Council adopted on 30 May 1992 its resolution 757 (1992), quoted by the majority, where the Council noted that the claim by the FRY "to continue automatically the membership of the former Socialist Federal Republic of Yugoslavia in the United Nations has not been generally accepted" (United Nations doc S/RES/757 (1992))

20 This statement was reiterated in Security Council resolution 777 (1992) of 19 September 1992, coupled with the finding that the SFRY had ceased to exist The Council then recommended to the General Assembly to decide that the FRY "should apply for *membership* in the United Nations and that it shall not participate in the work of the General Assembly" (United Nations doc S/RES/777 (1992), emphasis added)

21 Following this recommendation, the General Assembly on 22 September 1992 adopted its resolution 47/1, also quoted by the majority, where this United Nations organ *"considered"* that the FRY "cannot continue automatically the membership of the former Socialist Federal Republic of Yugoslavia in the United Nations" and "decided" that the FRY "should apply for membership in the United Nations and that it shall not participate in the work of the General Assembly" (United Nations doc A/RES/47/1 (1992)) Although the disappearance of the SFRY was implied by the use of the term "former", the General Assembly did not repeat the statement of the Security Council that the SFRY had ceased to exist

22 After deciding, seven months later, in its resolution 47/229 of 29 April 1993, that the FRY should not participate in the work of the Economic and Social Council either, on 20 December 1993 the General Assembly adopted resolution 48/88, in which it referred to resolution 47/1 and urged "Member States and the Secretariat in fulfilling the spirit of that resolution, to end the de facto *working status* of Serbia and Montenegro" (United Nations doc A/RES/48/88, para 19; emphasis added)

23. Whereas the General Assembly had not followed the Security Council in its willingness to take a resolute stand on the extinction of the SFRY, the Security Council returned to that subject in its resolution 1022

(1995) of 22 November 1995 (United Nations doc S/RES/1022), in which it referred to "the successor States to the State formerly known as the Socialist Federal Republic of Yugoslavia" and to "the fact that that State has ceased to exist".

24. General Assembly resolution 48/88 was addressed to "Member States and the Secretariat" It is therefore important to find out what actions were taken by those States and by the United Nations Secretary-General in this respect prior to 11 July 1996, when the Judgment in the case concerning the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v *Yugoslavia), Preliminary Objections*, was delivered, i e , which actions may be presumed to have been known by the Court at the time

25 The first mention of the legal disappearance of Yugoslavia was to be found in Opinion No. 1 of the Arbitration Commission established as an advisory body by the Peace Conference on Yugoslavia, convened by the (then) European Community This Commission, known after its first president as the "Badinter Commission", opined on 29 November 1991 "that the Socialist Federal Republic of Yugoslavia [was] in the process of dissolution" (Conference for Peace in Yugoslavia, Arbitration Commission, Opinion No 1, *International Legal Materials*, 1992, p 1497)

26 In its Opinion No 8 of 4 July 1992 the Commission found that the process of dissolution was completed and that the SFRY no longer existed The Commission, in its Opinion No 9 of the same date, advised 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". The Commission concluded in its Opinion No 10, that the FRY was "a new state which cannot be considered the sole successor to the SFRY" (Opinions 8, 9 and 10 are reproduced in *International Legal Materials*, 1992, pp 1521 *et seq* )

27 Already on 5 May 1992, in a statement of the European Community and its Member States, it was stressed that the latter had not accepted the "automatic continuity" of the FRY in international organizations (United Nations doc A/46/905, Annex) In its Declaration on the former Yugoslavia of 29 June 1992 the European Council stated that "The European Community and its member States do not recognize the new federal entity comprising Serbia and Montenegro as the successor State *[sic!]* of the former Yugoslavia" and that they had decided "to demand the suspension of the delegation of Yugoslavia *[sic!]* in the proceedings at the CSCE and international forums and organizations" (United Nations doc S/24200, Annex) In their Declaration on Yugoslavia of 20 July 1992 the Ministers for Foreign Affairs of the European Community stated that the "new federation cannot be accepted as the sole successor" to the SFRY and that European Community Member

States "will oppose the participation of Yugoslavia *[sic!]* in international bodies"[2] (United Nations doc. S/24328)

28 As interpreted by the United States, a permanent member of the Security Council, at the time of the adoption of resolution 777 (19 September 1992), this resolution

> "recommends that the General Assembly take action to confirm that the membership of the Socialist Republic of Yugoslavia *has expired* and that because Serbia and Montenegro *is not the continuation* of the Socialist Republic of Yugoslavia it must apply for membership if it wishes to *participate in the United Nations*" (emphasis added)

The United States representative said further that the provision in the resolution that the FRY shall not participate in the work of the General Assembly "*flows inevitably* from the determination by the Council and the General Assembly that Serbia and Montenegro is not the continuation of the former Yugoslavia " (emphasis added) The United States delegate to the Security Council believed that he was stating the obvious when he said that "a country which is *not a member of the United Nations* cannot participate in the work of the General Assembly" (United Nations doc S/PV 3116; emphasis added) This interpretation was supported by the delegates of some other States in the Security Council[3]

29 Regarding General Assembly resolution 47/1, the representative of the United Kingdom stated that "as regards the need to submit an application for membership" the FRY was "in precisely the same position as other components of the former Socialist Federal Republic of Yugoslavia" (United Nations doc A/47/PV 7)

30 On the other hand, there were statements by representatives of other Member States, which explicitly or implicitly and in nuances of various degrees supported the claim of the then Government of the FRY that the latter was identical to the SFRY and that it was its continuator

31 Thus the representative of the Russian Federation, while voting for Security Council resolution 777, interpreted it as being opposed to the exclusion of the FRY "formally or de facto, from *membership* in the United Nations" (United Nations doc S/PV 3116, emphasis added) The

[2] For other examples (and comments on the unusual expression "sole successor") see J Klabbers, M Koskenniemi, O Ribbelink, A Zimmermann (eds), *State Practice Regarding State Succession and Issues of Recognition The Pilot Project of the Council of Europe*, 1999, pp 61-62

[3] Austria, Bosnia and Herzegovina, Finland, Germany, Hungary, Poland, Slovenia, Spain, quoted in K Buhler, *State Succession and Membership in International Organizations*, 2001, p 196, n 884

delegate of China, abstaining, shared the interpretation according to which the adoption of the resolution did not amount to the expulsion of "Yugoslavia" and referred to the situation created by the decision as a "transitional arrangement" (United Nations doc S/PV 3116)

32 A third group of Members of the United Nations failed in 1992 to see any coherence in resolution 47/1 and to discern its purported basis in law, in light in particular of its failure to refer to the provisions of the United Nations Charter governing membership[4]

33 In this respect it is important to observe the conduct of Bosnia and Herzegovina It has been one of those States which have most vigorously contested the membership of the FRY in the United Nations and other international organizations as well as the existence of continuity between the SFRY and the FRY In addition to the instances cited by the majority in the Judgment (paras 35, 36, 42 and 43) one can quote, *inter alia*, its reactions in the General Assembly on the occasion of the adoption of resolution 47/1 (United Nations doc A/47/PV 7), in a communication to the Secretary-General of 25 September 1992 on the occasion of the raising of the flag of Yugoslavia after the adoption of that resolution (United Nations doc. A/47/474), in the International Atomic Energy Agency against the listing in 1996 of the FRY as having ratified the Non-Proliferation Treaty in 1970 (which, according to Bosnia and Herzegovina, implied its identity with the SFRY)[5], and in connection with the notification by the FRY in 1997 of its withdrawal of the reservation to the Convention on the Rights of the Child made by the SFRY in 1991[6]

34 In view of the foregoing, the finding of the Court "that it has not been contested that Yugoslavia was a party to the Genocide Convention" must be seen in a different light Actually, the other party in the proceedings, Bosnia and Herzegovina, has never failed to contest the identity between the SFRY and the FRY, except only in relation to the Genocide Convention and only regarding a specific case before the International Court of Justice It is true that Bosnia and Herzegovina did advance bases of jurisdiction other than continuity between the SFRY and the FRY, but the Court itself based its jurisdiction only on the FRY being a party to the Genocide Convention

35. In addition to the variety of interpretations by Member States, resolution 47/1 was also interpreted by other addressees of resolution 48/88. The United Nations Secretary-General did this in his two capaci-

[4] See the statements of India, Brazil, Mexico, Ghana, Kenya, Zambia, Tanzania and Guyana, quoted in K Buhler, *op cit*, p 198

[5] Communication of 29 August 1996, IAEA doc GC(40)INF/10 (16 September 1997, Communication of 15 September 1997, IAEA doc GC(41) INF/19m, Attachment, 1 October 1997)

[6] Communication of 10 October 1997, Status of the Convention on the Rights of the Child, *Multilateral Treaties Deposited with the Secretary-General*

ties of interpreter of United Nations decisions and depositary of international treaties Responding to demands for interpretation by some Member States on 29 September 1992 the United Nations Under-Secretary-General for Legal Affairs issued the opinion quoted in the Judgment (para 31) Naturally, his opinion could not cure the inconsistencies and ambiguities of resolution 47/1. Let me indicate some of the most conspicuous

36 First, it is unclear to which "Yugoslavia" the opinion refers when not using the official title "the FRY" and when determining that the representatives of the latter can "no longer" participate in the work of the General Assembly and not sit behind the sign "Yugoslavia", although "Yugoslavia's" membership in the United Nations had allegedly neither been terminated nor suspended Even if it was, statements to the effect that Yugoslav membership has "expired", quoted above (para 28), only refer to membership and not to the State in question, since States normally do not "expire" It is therefore quite conceivable that "Yugoslavia" went on existing as a State without necessarily being a Member of the United Nations

37 I am sure that all actors must have been aware that "Yugoslavia" in this particular and important context could have been taken as a short reference *both* to the SFRY and the FRY and that representatives of States and international organizations shall not be presumed to have acted in a cavalier fashion What then is the difference between "old Yugoslavia" and "new Yugoslavia", referred to in the opinion? What was believed would happen to the old State once the new State was admitted to the United Nations? In view of the instruction to fly the flag of the SFRY (the *old* Yugoslavia) and the fact that this flag lost its symbolic meaning (for it had been abolished by the same gathering which had proclaimed the Constitution of the FRY and adopted the Declaration of 27 April 1992), it can be concluded that, for unknown reasons, some actors kept alive the fiction that, as late as on the eve of 1 November 2000, when the FRY was admitted to membership, a phantom State existed, which was neither the SFRY nor the FRY, alternatively, and contrary to the assertions of the Security Council and organs of other international organizations (but not the General Assembly), it was presumed that the SFRY still existed until that date Such a "common roof" theory[7] tallies with the opinion of the delegate of China, quoted above, that the adoption of resolution 47/1 did not amount to the expulsion of "Yugoslavia" and his qualification of the arrangement as "transitory", as

[7] Similar to the *Dachtheorie* which maintained that the German Reich continued to exist after 1945 above and apart from the Federal Republic of Germany and the German Democratic Republic Cf H von Mangold, F Klein, *Das Bonner Grundgesetz*, 1957, pp 33 *et seq* , W Wengler, "Deutschland als Rechtsbegriff", *Festschrift Hans Nawiasky*, 1956, p 51, n 3

well as with the statement of Romania that this resolution did not provide for "either the suspension or the exclusion of *Yugoslavia* from the United Nations" (United Nations doc. A/47/PV 7, p 192 (1992), emphasis added)

38 Paradoxically, this fanciful theory seems to correspond best to the situation obtaining after the adoption of resolution 47/1, which was aptly described by one writer as "limited survival after death of the former Yugoslavia at the United Nations"[8]. Since allegedly there has been no termination of membership, an entity must have been within the United Nations, but it was not the FRY Even accepting the most generous interpretation of such statements, the FRY could not have had a double identity and be represented once behind the sign "Yugoslavia" and at other times under its official name

39 According to the opinion of the Under-Secretary-General quoted by the majority (para 31), the representatives of the FRY were excluded only from participation in the General Assembly bodies He opined that resolution 47/1 did not "take away the right of Yugoslavia *[sic!]* to participate in the work of organs other than Assembly bodies" (United Nations doc A/47/485) This right was obviously very feeble because, seven months later, participation in the work of ECOSOC was denied without adducing further legal reasons How could the Court then have concluded that the "right" of the FRY to appear before the International Court of Justice was any stronger? In fact, in the final part of its paragraph 17 the 1996 Judgment refers only to Yugoslavia, with the Court determining that "Yugoslavia was party to the Genocide Convention" and that "Yugoslavia was bound" by its provisions

40 Or, conversely, why does an explicit reference to Article 4 of the United Nations Charter appear in the opinion of the Legal Counsel and not in resolution 47/1? If the measures against the FRY were limited only to non-participation in one of the main organs of the Organization, and if the effects of resolution 47/1 amounted only to a "situation" (which, in the words of the Court, was "not free from legal difficulties"), and were not decisive for the very important matter of the status of a State in the United Nations, was not the prescribed "admission to the United Nations of a new Yugoslavia under Article 4" too potent a remedy? Restrictive measures of partial non-participation directed against the FRY could simply have been rescinded If the membership of the FRY was not terminated, why did that State have to apply to be admitted as a new Member?

[8] T Treves, "The Expansion of the World Community and Membership of the United Nations", *The Finnish Yearbook of International Law*, Vol VI (1995), p 278

41 The answer to all these questions lay most probably in the true nature and purpose of the measures against the FRY In spite of the protestations to the contrary, initially voiced by the sponsors of resolution 47/1 (cf. the statement of the representative of the United Kingdom, United Nations doc A/PV 7), these measures were *punitive* At the time of the exclusion of the FRY from ECOSOC, condemnatory allusions were made to the conduct of the FRY On behalf of the sponsors of the resolution 47/229, it was said

> "The course of events in the seven months that have passed since the General Assembly adopted resolution 47/1 has certainly demonstrated that the *message* sent by that resolution has not been taken into account by the authorities in Belgrade This highly regrettable fact necessitates the adoption of the present draft resolution By excluding the Federal Republic of Yugoslavia (Serbia and Montenegro) from the work of the Economic and Social Council also, the General Assembly builds upon the groundwork laid by resolution 47/1 and sends the unequivocal *message* to Belgrade that the patience of the States Members of the United Nations is not unlimited " (Representative of Denmark, United Nations doc A/47/PV.101; emphasis added.)

42 The FRY thus became the target of gradually increasing restrictions aimed at reducing *de facto* the scope to which it was allowed to play the role of "Yugoslavia" in the United Nations Another signal was simultaneously sent to the FRY, i e., that it could hope to receive better treatment, that is, be allowed to represent the still existing (old) "Yugoslavia" if the Security Council and the General Assembly become satisfied that the objections to its acting this role, or pretending to be identical with Yugoslavia, no longer existed One way of testing this was the procedure of admission under Article 4 of the United Nations Charter, which would offer those United Nations organs the opportunity to examine whether the FRY was "peace-loving" and "able and willing" to carry out the obligations contained in that Article In the process, the repeated assertions that the SFRY had ceased to exist were conveniently forgotten and the fiction of its virtual existence prolonged If the SFRY still survived under the name of "Yugoslavia", the same name as the State whose Minister for Foreign Affairs had signed the United Nations Charter on 26 June 1945 (*Charter of the United Nations and Statute of the International Court of Justice*, San Francisco, 1945, p 509, *Delegates and Officials of the United Nations Conference on International Organizations,* San Francisco, 1945, p 78), the conclusion could be drawn that the Judgment of 11 July 1996 did not concern the FRY but the still existing SFRY, the succession to which still had to be decided

43 It became clear on 1 November 2000 that the pragmatic solution temporarily adopted could not resist its legal maladies relating to the suggested admission to membership of the United Nations of a *new* State

while pretending that it was at the same time an *old* State, or *readmitting* a State that had not previously been excluded from membership, or *reconfirming* the membership of an existing Member, etc In other words, a State which had been treated as a Member of the United Nations was invited to apply for membership implying that it actually was not a Member To say the least, the FRY was being asked to relinquish its claim to continuation of the SFRY and thereby admit that it had been a Member under false pretences

44 In his capacity as depositary of international treaties, the United Nations Secretary-General experienced similar difficulties, manifested in the need to change his original conclusions regarding the application of resolution 47/1, unusually and dramatically, through *errata* in the English text, quoted in paragraph 39 of the Judgment Initially, the Secretariat had held simply that the resolution 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" (United Nations doc ST/LEG/8, para 89), but in the corrected version the proviso was added that this effect was "subject to any decision taken by a competent organ representing the international community of States as a whole or by a competent treaty organ with regard to a particular treaty or convention" (United Nations doc. ST/LEG/7/Rev 1, para 89) The United Nations Office of Legal Affairs had initially even gone so far as to continue to regard the FRY as the "predecessor State upon separation of parts of the territory of the former Yugoslavia" and find that resolution 47/1 had not affected this quality of the FRY (United Nations doc ST/LEG/8, para 297) However, the latter part of the explanation was eliminated in the corrected version in English (United Nations doc ST/LEG/7/Rev 1, para 297)[9]

45 There was certainly a *claim* of the FRY to continuity, expressed in the Declaration of 27 April 1992 and ensuing diplomatic correspondence, but the decisive element in 1996 was whether other States recognized this claim An international decision on continuity of States is one of the decentralized acts of the international community, essentially similar to that on the recognition of States Whether an entity is recognized as a State depends not on its self-perception but on the perception of others Furthermore, there are no criteria which, when fulfilled, compel other States to recognize a candidate for statehood. Even if there are, in theory, some criteria on State recognition, there are none on continuity, so that the full scope of appreciation remains with other States The FRY had no

[9] "Summary of Practice of the Secretary-General as Depositary of Multilateral Treaties", prepared by the Treaty Section of the Office of Legal Affairs, paras 89 and 297

great difficulties in being recognized as a State, but its additional claim to continuity of the SFRY "ha[d] not been generally accepted", as stated in Security Council resolution 757 (1992).

46 There have not been many instances of disintegration of a State, but in all such cases the general response regarding continuity has depended primarily on the attitude of the other States which emerged on the territory of the State which had ceased to exist. If there was an agreed arrangement, other members of the international community would generally follow suit In the case of the SFRY there was no agreement the claim of the FRY was contested by Croatia, the Former Yugoslav Republic of Macedonia, Slovenia and, importantly, Bosnia and Herzegovina, i e , all other States which had emerged from the former SFRY. That is the unique feature of this situation The continuation of the SFRY by the FRY was not a matter to be decided only by the FRY, or exclusively by the FRY and other successor States of the SFRY, but, as confirmed by the United Nations Office of Legal Affairs (see para 44 above), remained dependent on a decision to be taken by other actors By admitting the FRY to membership of the United Nations, the Security Council and the General Assembly did satisfy the first and last criteria and thus finally determined the outcome of the debate

## V. Conclusions

47 The process of recognition is a process in time The debate on the adoption of Security Council resolution 777 (1992) and the subsequent actions by the Secretariat of the United Nations show that continuity between the SFRY and the FRY was an assumption or perception shared by *some* other international actors but far from being widely accepted If the FRY's claim to continuity was not "generally accepted" in 1992, it could have been accepted later, say in 1996, when the Judgment was delivered, but the Court — while relying on the consequences of continuity — failed to prove universal acceptance at the time of the Judgment It could not, for that matter, have proven it in 1996 or for the whole period between 11 July 1996 and 1 November 2000, when it finally became clear that general acceptance had not materialized

48 Accordingly, the crucial point is to determine when the FRY's claim was *generally rejected* When did it become clear that the FRY was certainly not a continuator of the SFRY, with all the consequences for the new State, favourable and unfavourable, which that entailed? This question was finally decided by a forum very closely approximating the

totality of all States, the whole of the international community, i e , the Organization of the United Nations, when on 1 November 2000 the latter admitted the FRY as a *new* Member of the Organization, thus excluding the possibility of the FRY having formerly been a Member as a continuator of the SFRY, or on some other basis

49 The admission of the FRY as a *new* Member of the United Nations revealed (led to the discovery of) the fact that the FRY was *not* a Member of the United Nations (and not a party to the Statute of the International Court of Justice) at the time of the Judgment of 11 July 1996 The letter of the United Nations Legal Counsel of 8 December 2000 inviting the FRY to undertake treaty actions (Application of Yugoslavia, Ann 27), if the intention of the latter was to assume rights and obligations as a successor State, demonstrated that the FRY had not previously been a party to international treaties on the ground that they had been ratified by the SFRY and that, specifically, the FRY was not a party to the Genocide Convention at the time of the Judgment of 11 July 1996

50 The admission of the FRY to the United Nations as a new Member and the subsequent events showed that a possibility known to the Court and other parties, that is, that the FRY was not the sole continuator but one of the successors of the SFRY, had become established as a fact existing since the very creation of the FRY, the "fact" that the FRY was a continuator of the SFRY had not existed at any time In its Judgment the Court, without explicitly saying so, espoused one of the views existing in 1996 (and summarized above) The majority in the present case treats this view as the only known *fact* at the time, disregarding other, predominant views The legal situation was admittedly complex, as indicated by the majority, but it was known in all its complexity The truth is that the fact was not seen by the Court in its entirety and that later events demonstrated that it differed from that which provided the basis for jurisdiction in the 1996 Judgment

51. Even if none of the interpretations advanced above are accepted, the follow-up to Security Council resolution 777 (1992) and General Assembly resolution 47/1, which was known to the Court at the time of the rendering of the Judgment of 11 July 1996, was, to say the least, inconclusive. For the purposes of the Order on provisional measures, the developments until April 1993 could have possibly warranted the provisional assumption that the FRY was a continuator of the SFRY, but the situation in 1996 had not developed to the degree that it allowed a final determination that the Court had jurisdiction on such basis

52 The process of determining the nature of the extinction of the SFRY was not completed on 11 July. it could not have been brought to an end by unilateral action of the FRY without the necessary confirma-

tion of the relevant organs of the United Nations or another "competent organ representative of the international community of States"

53 According to Article 61, paragraph 2, of the Statute of the International Court of Justice, the purpose of the judgment opening the proceedings for revision is limited to the initial determination of the existence of a new fact and of its (decisive) nature The judgment to be delivered in this case should enable the Court to go more deeply into the matter of its jurisdiction on the basis of facts that existed in July 1996 but acquired their real meaning only on 1 November 2000 Opening the proceedings for revision would not preclude any possible finding by the Court that the facts existing at the time of the 1996 Judgment were such that the Court could nevertheless entertain jurisdiction Declaring the Application for revision inadmissible only by reference to the literal meaning of the word "fact" misses a serious opportunity to decide on important matters relating to the jurisdiction of the International Court of Justice

54 One of these important matters is the question of the access to the Court of States other than States parties to the Statute of the Court under Article 35, paragraph 2, of the Statute These issues were, admittedly, touched upon in its 1993 Order on provisional measures, but the Court has never really discussed the scope of the "treaties in force" provision For instance, are the conditions in Article 35, paragraph 2, objectively laid down by the Statute, or can they be changed by agreements of States? Could the FRY, if it was not a party to the Statute of the International Court of Justice before 1 November 2000, come before the Court before 1 November 2000?

55 In view of the consistent opposition of Bosnia and Herzegovina to the claim of the FRY to continuity and its frequently repeated protests against any action resting on this claim, the Court should have examined its jurisdiction *proprio motu* and not have been satisfied by the fact that Bosnia and Herzegovina did not dispute that jurisdiction *in this particular case* The jurisdiction of the International Court of Justice is optional, which means that any consent to it by a State should be carefully examined and narrowly interpreted. The process of determining the nature of the extinction of the SFRY was not completed on 11 July 1996, it could not have been brought to an end by unilateral action of the FRY without the necessary international confirmation The admission of the FRY to the United Nations as a new Member completed the process by confirming the general sense in the international community that the FRY, while being one of the successors to the SFRY, was not its continuator, with all the consequences following therefrom, including its participation in international treaties The "*sui generis* position which the FRY found itself in vis-à-vis the United Nations over the period 1992 to 2000", as the majority describes the status of the FRY in paragraph 71 of the Judgment, was an insufficient ground to establish the jurisdiction of the International

Court of Justice In paragraph 70, the majority admits that it was not known in 1996 whether the FRY would apply for membership in the United Nations and whether it would be admitted, but still bases the whole argument on the assumption that the admission of a State as a Member of the United Nations does not necessarily result in the conclusion that it had not been a Member prior to admission If for some curious reason that logical conclusion does not apply in this particular case, it would be an exception to the rule All exceptions, including this one, must be strictly construed and their existence unequivocally proven, but this was not done by the majority

56 When pressing its claim to continuity, the FRY was apparently seeking to benefit from some advantages of the continuator State, while being reconciled to the disadvantages of such status By constantly protesting against that claim of the FRY, Bosnia and Herzegovina was in a reciprocal position The result, depriving the FRY of all advantages and leaving it with the burden of being submitted to the jurisdiction of the International Court of Justice, while giving Bosnia and Herzegovina all the benefits, in the only instance where it recognized the claim of the FRY to continuity, was tantamount to differential treatment

57 Admittedly, there could have been other bases for the jurisdiction of the Court, including a construction that would not rely on the FRY *remaining* bound by treaty obligations of the former SFRY, but the Court dismissed them in paragraph 41 of the 1996 Judgment. They could have been examined had the case been opened for revision

*(Signed)* Vojin DIMITRIJEVIC