THE CASE CONCERNING LEGALITY OF USE OF FORCE BEFORE THE INTERNATIONAL COURT OF JUSTICE - 20 YEARS AFTER THE NATO INTERVENTION IN YUGOSLAVIA

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Abstract: The Federal Republic of Yugoslavia filed on 29 April 1999 Applications before the International Court of Justice (ICJ) against ten NATO member States: the United States of America, the United Kingdom of Great Britain, France, Germany, Italy, Belgium, the Netherlands, Canada, Portugal and Spain. These Applications required the determination of the responsibility of these States for the wrongful acts committed during the armed intervention in connection with violations of the principle of the prohibition of the use of force against sovereignty, territorial integrity and independence of States (crimes against peace), then violations of the rules and principles of war and humanitarian law (war crimes), and obligations established by the Genocide Convention (crimes against humanity and international law). In the following study, the legal arguments of the parties presented in the proceedings were analyzed. Also, the study provides an analysis of the legal bases offered for the establishment of the ICJ jurisdiction, as well as the decisions made by the ICJ on that occasion with which it declared the lack of its jurisdiction. However, irrespective of this fact and circumstances that it had not decided on the merits of the dispute, the ICJ did not exclude the responsibility of the NATO member States for violating the general international law. In that sense, its conclusion is consistent because it confirms the rule that the States have remained "in all cases responsible for acts attributable to them that violate the rights of other State". Therefore, the re-examination of the case concerning legality of use of

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force before the ICJ twenty years after the armed attack on Yugoslavia is in line with the efforts of the Republic of Serbia (as the legal successor of the SFR Yugoslavia, Federal Republic of Yugoslavia and State Union of Serbia and Montenegro) to resolve all outstanding issues from the past, which is a prerequisite for building a new and more peaceful world.

Key words: Yugoslavia, Serbia and Montenegro, UN, Security Council, NATO's unilateral intervention, legality of use of force dispute, ICJ, international law.

INTRODUCTION

Twenty years after the NATO's unilateral intervention against the Federal Republic of Yugoslavia (Yugoslavia), it can rightly be argued that this case represented a deviation from the principle of the prohibition of the use of force in international relations, which put into question the functioning of the United Nations (UN) collective security system established after the Second World War. This conclusion arises primarily from the fact that the Security Council did not respond adequately and in a timely manner to the open issue of resolving the regional crisis in the territory of Yugoslavia in accordance with its authority and obligations under Chapter VII of the UN Charter, for which the control is permanently in charge. Despite the fact that the Security Council before the NATO's intervention in Yugoslavia, brought a series of resolutions reaffirming certain agreements reached to mitigate the crisis in the southern Serbian province – Kosovo and Metohija (e.g. Resolutions 855 of August 1993, 1160 of March 1998, 1199 of September 1998, 1203 of October 1998 and 1207 of November 1998), none of these resolutions identified the threat to international peace and security *intra vires* the UN Charter. It should be noted, however, that in some of these resolutions adopted with reference to Chapter VII of the Charter, the Security Council confirmed that the continuous deterioration of the situation in Kosovo and Metohija represented a threat to regional peace and security. Although it indicated the possibility of introducing "additional measures" if the parties to the dispute did not meet its requirements, the Security Council did not foresee the establishment of a contingent of international military forces in accordance with the UN Charter or the undertaking of a peacekeeping operation. On the contrary, in a situation where the violation of human rights of the population in Kosovo and Metohija was more than obvious (not only in relation to the Albanian minority, but also in relation to the Serbian and other ethnic communities who found themselves on the "line of fire" between the regular government troops and terrorist groups of the

Kosovo Albanians and foreign mercenaries who were assisted and encouraged by Albania and other hostile States in an attempt to violently destroy the Yugoslav constitutional order and enforce secession of the Serbian southern province), the Security Council left the solution to NATO, based on the voluntaristic analysis of its previous resolutions and an extensive and legally inappropriate interpretation of Article 51 of the UN Charter which provides the inherent right to individual or collective self-defence in the event of an armed attack on a member of the UN (Paunović, 1999, p. 149, etc.). It cannot, therefore, be disputed that the Security Council, in this way, actually neglected its primary obligations under Chapter VI and VII of the UN Charter. Also, it is clear that this omission opened the possibility for NATO opportunistic behavior, which, on the basis of its own assessment of the political situation in Yugoslavia, which was not its member State, considered it appropriate to undertake a unilateral armed intervention, without the explicit authorization of the Security Council. From the aspect of general international law, this *Operation Allied Force,* which NATO undertook *sponte sua* against Yugoslavia, was contrary to the rule of *jus cogens* contained in Article 2(4) of the UN Charter and in customary international law on the prohibition of the use of force or threat of force (Šahović, 2000, p. 139; Trindade, 2013, pp. 93-97). Moreover, this precedent indicates that NATO has grown from an organization for collective self-defence to an organization that, when it is found appropriate, will participate in the implementation of the United Nations collective security system, which is contrary not only to the UN Charter but to the provisions of Article 5 of its founding act (North Atlantic Treaty) (Račić, 1999; Krivokapić, 1999; Weckel, 2000; Gazzini, 2003).[2] Finally, this unilateral approach led first to the dismantling and suspension, and then to the deformation of the universal collective security system established within the UN after the end of the Second World War (Lillich, 1993, p. 557; Marie Dupuy, 2000, pp. 19, etc.; Chesterman, 2002; Franck, 2003, pp. 607, etc.; Kreća, 2007; Račić, 2010).

[2] In the Final Communiqué from the NATO session held in Oslo on 4 June 1992, it was concluded that NATO should act outside its area. This conclusion further indicated the "Yugoslav precedent", which proved very useful in future cases in which NATO expanded its area of military activities based on implied authorizations or authorizations *ex post facto* by the Security Council, which in effect manifested a distortion of the UN's collective security system.

INSTITUTIONALIZATION OF PROCEEDINGS BEFORE THE ICJ AGAINST THE NATO MEMBER STATES

On 29 April 1999, Yugoslavia filed in the Registry of the Court Applications instituting proceedings against ten NATO member States - the United States of America, the United Kingdom of Great Britain, France, Germany, Italy, the Netherlands, Belgium, Canada, Portugal and Spain (Yearbook of ICJ, 2000). In the Applications, Yugoslavia requested the ICJ to adjudicate and prosecute the respondent States for alleged violations of their obligation not to use force against another State. In explaining the reasons for submitting the Applications, Yugoslavia stated the following facts:

The governments of the respondent States, together with the governments of the other NATO member States, by applying force against Yugoslavia – by bombing military and civilian targets on its territory, caused numerous damages. Namely, it was noted that the NATO bombing caused about a thousand civilian victims, including nineteen children, about 4.5 thousand seriously injured, numerous destroyed and damaged residential buildings, schools, hospitals, radio and television facilities, cultural monuments and churches, bridges, roads and railways, and then refineries and chemical plants. With the use of prohibited weapons and weapons containing depleted uranium, it contributed to the serious deterioration of the health of the population and the enormous damage to the environment.[3] In addition, the governments of the respondent States participated in the training, arming, financing, equipping and supplying of the "Kosovo Liberation Army", and providing all kinds of assistance to terrorist groups and the secessionist movement on the territory of Yugoslavia. By participating in the bombardment of Yugoslavia and by providing various forms of assistance to terrorist groups and the secessionist movement, the respondent States have committed numerous violations of international law, in particular regarding the prohibition on the use of force against other States and the non-interference in their internal affairs. With subsequent amendments, these bases were extended to leakage and non-

[3] Afterwards, it was reported that the NATO *Operation Allied Force* caused the death of about 2,5 thousand civilians and 12, 5 thousand wounded, and that material damage is estimated at up to 100 billion dollars. The number of people who died as a result of using prohibited weapons during the NATO armed intervention has been multiplied in the last two decades and is measured in tens of thousands. However, exact data on this has not yet been published.

implementation of preventive measures in the territory of Kosovo and Metohija, which resulted in the killing, wounding and ethnic cleansing of the Serbian and non-Albanian population, whereby the respondent States violated international obligations to ensure public order and peace in the territory under their administration. In addition to these claims, there are also legal grounds for direct liability for violations of the provisions of multilateral conventions, such as the Convention on the Prevention and Punishment of the Crime of Genocide of 1948 (Genocide Convention), the Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War of 1949 with additional Protocol I of 1977, the Convention concerning the Regime of Navigation on the Danube of 1948, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, both from 1966. In addition to the aforementioned violations, the Applications also include the violation of Article 53(1) within Chapter VIII of the UN Charter regulating the relationship of the UN with regional organizations. Under this provision, the Security Council may, when it deems appropriate, use regional organizations for the purpose of enforcing coercive measures but under its leadership.[4] Also, the same Article stipulates that without the approval of the Security Council, regional organizations (regional agreements and agencies) cannot take any coercive action except the measures against each "hostile States" which are, pursuant to paragraph 2 of Article 53 in conjunction with Article 107, defined as States that were the enemies of any signatory States of the UN Charter during the Second World War. Based on the above factual basis, it follows that the use of regional organizations in the case of Yugoslavia was not possible because regional organizations could be used exclusively to take measures against former hostile States in cases of renewing the aggressive policy of any of these States against the UN member States until the UN has assumed, on the request of interested States, the responsibility for suppressing the new aggression. The ICJ was then required to adjudicate and prosecute the respondent States for violating the international legal obligations.

[4] The Russian Federation, China, India, Cuba and a significant number of other States criticized NATO armed intervention in the UN as contrary not only to Article 2(4) but also to Article 53(1) of the UN Charter.

THE INCIDENTAL PROCEEDING BEFORE THE ICJ

In order to prevent further harmful consequences for the lives and health of people, their property and the environment, on 29 April 1999, Yugoslavia submitted, in each case, an Application for the indication of provisional measures. The basis for this request is contained in the provision of Article 73 of the Rules of Court. Yugoslavia requested that the ICJ issue an order to urgently stop the violence and to ensure that the respondent State concerned cease immediately its acts of use of force and refrain from any act of threat or use of force against Yugoslavia which lead to the total or partial physical destruction of its population. Yugoslavia has also stated that in the event that the proposed provisional measures are not adopted, it would certainly lead to further loss of life, further material and non-material damage to its population and further destruction and pollution, which ultimately leads to the destruction of the people. In addition to the aforementioned claims, Yugoslavia retained the right to amend the same, with the possibility that after the decision was made, the Court determined the scope and nature of the compensation that the NATO member States would have to provide to Yugoslav legal and natural persons (ICJ Reports, 2000. pp. 7, etc.).[5] After hearings on the provisional measures from 10 to 12 May 1999, the ICJ delivered its decision in each of the cases on 2 June 1999. In two of them (against Spain and the United States of America), the ICJ, rejecting the request for the indication of provisional measures, concluded that it manifestly lacked jurisdiction and consequently ordered that the cases be removed from the General List. In the eight other cases (against Belgium, Canada, France, Germany, Italy, the Netherlands, Portugal, the United Kingdom of Great Britain), the ICJ declared that it lacked the *prima facie* jurisdiction and that it therefore could not indicate such measures (ICJ Reports, 1999, pp. 124, etc.).

THE CONTENTIOUS PROCEEDING BEFORE THE ICJ

After the requests for provisional measures against the NATO member States were rejected in June 1999, the incidental proceeding before the ICJ

[5] The compensation claim is presented in the Memorial from 5 January 2000. It refers to the Submissions defined in the claim for compensation for war damage whose form and amount should be determined by the Court in the event of a lack of agreement between the parties. Yugoslavia as the Applicant retained the right regarding this procedure for the award of a court decision.

were finalized. In the contentious proceedings, Yugoslavia filed a Memorial on 5 January 2000, with a written justification of its Applications (ICJ Reports, 1999, pp. 988, etc.). For technical and formal reasons, the text of the Memorial was identical in all eight cases before the Court (against Belgium, Canada, France, Germany, Italy, the Netherlands, Portugal, the United Kingdom of Great Britain). The explanation of the Applications contains extensive clarifications with facts, legal qualification of unlawful acts, the justification of jurisdiction, final conclusions and proposals that, in the opinion of Yugoslavia, should be adopted by the Court. In the meantime, since the filing date of the Applications, there has been deterioration in the political situation which has called into question the international legal obligations of the respondent States. As previously mentioned, Yugoslavia has called for violations of the obligations of the Genocide Convention. A large number of cases related to the expulsion of the Serbs and non-Albanian population from Kosovo and Metohija after 10 June 1999 were in violation of the obligations accepted in the Security Council resolution 1244 on the establishment of an international UN security mission in the southern Serbian province. These facts according to the Yugoslav standpoint were not controversial even for the respondent States themselves who gave precise information at public press conferences, which *per se*, represented an important source of evidence that could be used in the proceedings**.** In addition to the mentioned differences related to the establishment of the ICJ jurisdiction, Yugoslavia has explained that in this particular case there was jurisdiction also in relation to acts committed since the commencement of the bombing on 24 March, until the signing of the Declaration on 25 April 1999 but also afterwards, and that the legal assessment of these "new constituent elements" should be given in the light of new circumstances (UN doc., 1999). The ICJ left the respondent States a deadline by 5 July 2000 to submit a Counter-Memorial with the preliminary objections to jurisdiction and admissibility of the Applications. All eight respondent States have complied with this deadline, submitting their preliminary objections to this justification (ICJ Reports, 2000, pp. 7, 352, etc). This initiated a new phase of the procedure in which it was not necessary to decide specifically on the existence of the judicial jurisdiction, and in particular the lawfulness of the Applications, since the complaints as incidental matters were included in a single procedure in which the ICJ, as a rule, decides on its own. In accordance with the Order of the Court of 20 March 2002, Yugoslavia submitted its written statement within the time-limit on previous objections on 20 December 2002. In it, Yugoslavia called for "newly

discovered facts" that existed before the initiation of the proceedings, which the ICJ should have considered in the light of the circumstances that followed the admission of Yugoslavia to the UN on 1 November 2000. According to the perceived Yugoslav position, which differed significantly from the earlier standpoint of international legal continuity with the SFR Yugoslavia, prior to the mentioned date of admission to the UN, Yugoslavia was not a party to the Statute.[6] *Mutatis mutandis*, it became bound by the provisions of the Genocide Convention only after it accessed it on 12 March 2001. The declarative acceptance of the obligations under Article IX of the Genocide Convention with the reservation of explicit consent for Yugoslavia meant a significant restriction of the jurisdiction of the Court in relation to the facts set out in the Applications (UN Treaty Collection, 2001). However, according to its point of view, the ICJ can always declare the jurisdiction *ratione materiae*. This view stems from the opinion given by the ICJ at the previous stage of the proceedings, in which it did not deny that certain unlawful acts were indeed committed against the people and the State of Yugoslavia, but that issue of determining possible liability on the basis of legal rules should be left for a special procedure in which discuss *in meritum.*

During January and February 2003, the eight respondent States expressed their views concerning the written statement of Yugoslavia (Serbia and Montenegro).[7] In reply, by a letter of 28 February 2003, Serbia and Montenegro informed the ICJ that its written observations filed on 20 December 2002 represented, in fact, one request filed to the ICJ to decide on its own jurisdiction on the basis of the "new constituent elements" to which the Court's attention had been drawn.

In the oral part of the proceeding before the ICJ from 19 to 23 April 2004, the respondent States put forward arguments in support of the rejection of

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[6] With the presentation of "newly discovered facts" to preliminary objections by the NATO member States, the question of the importance of the Declaration of 25 April 1999 was raised. It is important to note that the other successor States of the SFR Yugoslavia did not accept the Yugoslav Declaration *ab inito*, because according to them, the FR Yugoslavia was not a member of the UN at the time of its signing. Hence, it could not be either the parties to the Statute. In a notice sent to the Secretary-General dated 28 May 1999, the Governments of these States pointed out that the presentation of "Yugoslavia" as the original UN Member State authorized pursuant to Article 35(1) of the Statute and Article 93(1) of the Charter may relate exclusively to the predecessor State (SFR Yugoslavia).

[7] On 4 February 2003, the FR Yugoslavia changed its name to the State Union of Serbia and Montenegro. The name change was registered in the UN.

the Yugoslav Applications and declaring the lack of jurisdiction of the Court. In general, respondent States have justified their operations against Yugoslavia with a humanitarian catastrophe in Kosovo and Metohija. The military actions undertaken were justified by the "state of necessity" and were not directed against the people of Yugoslavia, but against the Yugoslav "military machinery" and "military-industrial complex". According to them, the Yugoslav demands did not correctly manifest fulfilment of all the prescribed conditions from the Genocide Convention, which was necessary for the constitution of the *prima facie* jurisdiction of the Court. In the statements of the respondent States, the following requests were also stated: *Belgium* requested that the "Yugoslav case" be removed from the General List, or alternatively the ICJ to declare the lack of its jurisdiction and reject the Yugoslav Application. The reasoning lies in the lack of the *prima facie* evidence which, in accordance with the jurisprudence of the Court and the general principles of international law, could justify its merits. *Canada* demanded the ICJ to declare a lack of its jurisdiction, since Yugoslavia, by imposing new facts, allegedly denied the compulsory jurisdiction of the optional clause adopted by the Declaration of 25 April 1999. Alternatively, Canada sought the same solution, only this time because of the non-application of Article IX of the Genocide Convention. In relation to the requirement based on "new constituent elements" related to the factual situation after 10 June 1999, Canada considered it to be a modification of the Application. As the Application did not cover all parties to the dispute, Canada considered that the Application should be rejected. *France* firstly explained its reasons against the Yugoslav Application by requesting the removal of the case from the Court Register or from the General List, and then declaring that the Court did not have jurisdiction. Consequently, the proclamation of the Yugoslav Application was not allowed. *Italy* requested the ICJ to confirm that the Yugoslav Application for alleged violation of the obligation to prohibit the use of force against another State, in relation to Italy, has become out of date. Alternatively, Italy requested the ICJ to declare the absence of jurisdiction *ratione personae,* given the "newly discovered facts" that indicate that Yugoslavia was not a party to the Statute at the time of submission of the Application, and neither the "treaties in force", as strictly interpreting, nor the rule of Article 35(2) of the Statute could no longer be applied to Yugoslavia. Italy also requested the ICJ to declare a lack of the jurisdiction *ratione materiae* from the moment that Yugoslavia confirmed that Article IX was not related to the interpretation, application and enforcement of the provisions of the Genocide Convention. In the end,

it asked the ICJ to reject the Yugoslav Application because it was not covered by all the parties to the dispute and, as a result of the Application, the *de facto* revised original claim. Other respondent States have raised similar reasons in their preliminary objections. *Germany* and the *United Kingdom of Great Britain* thus demanded the dissolving of the Court, the deletion of the case from the Court Registry and the proclamation of the Yugoslav Applications not admissible. The same was repeated by the *Netherlands*, with the emphasis on the lack of an active legitimacy of Yugoslavia, while *Portugal* requested that this circumstance in a particular case should be explained by a court decision.

On the other side, Yugoslavia asked the ICJ to issue a decision declaring the existence of its jurisdiction *ratione personae.* According to the position of Yugoslavia, the ICJ could reject all preliminary objections of the respondent States and order the further continuation of the proceedings. Yugoslavia has rejected the claims of some of the respondent States because its notification constitutes a request to suspend proceedings pursuant to Article 89 of the Rules of Court (Press Release ICJ, 2004, pp. 1-4).

Since the Court could not simply decide to dismiss the case *in limine litis* without making a decision on the preliminary legal issues raised in the objections of the respondent States and the objections of Yugoslavia, which, *inter alia,* related to its jurisdiction, the ICJ did not decide on the merits but terminated the proceedings in accordance with Article 79 of the Rules of Court. At a public session of 15 December 2004, the ICJ adopted the preliminary objections of the respondent States with regard to the "newly discovered facts" that Yugoslavia was not a member of the UN, and therefore the Statute of the Court also did not have jurisdiction to decide on Yugoslavia's Applications against the NATO member States (ICJ Reports, 2004; Olesson, 2005).

THE PROBLEM OF ESTABLISHING THE JURISDICTION OF THE ICJ

Attempt to establish compulsory jurisdiction

Considering the Applications submitted by Yugoslavia to the ICJ against the NATO member States, it appears that it has accepted its compulsory jurisdiction on the basis of the unilateral Declaration of 25 April 1999. Yugoslavia recognized *ipso facto* compulsory jurisdiction in respect of any

other State which, subject to reciprocity, would accept the jurisdiction of the ICJ in respect of disputes arising after the signature of this Declaration. The Declaration accepts the so-called *optional clause* of Article 36(2) of the Statute of the ICJ which provides that States may at any time declare admissible *ipso facto* and without special agreement to any other State that receives the same obligation, the jurisdiction of the Court in all legal disputes concerning the case: a) the interpretation of a treaty; b) any question of international law; c) the existence of any fact which, if established, would constitute a breach of an international obligation; d) the nature or extent of the reparation to be made for the breach of an international obligation (Lillich & White, 1976; Merrils, 1979, p. 87; Shaw, 1997, pp. 219, etc.). However, in relation to cases where there is agreement on possible different ways of peaceful resolution of the dispute, the Declaration has no effect. It also excludes disputes relating to issues within the domain of domestic law or which are exclusively within the internal jurisdiction of Yugoslavia, such as territorial disputes. The fact is that the effect of the Declaration is time-limited until the issuance of a notice of termination of compulsory jurisdiction. On the other side, the respondent States, Belgium, the Netherlands, Portugal, the United Kingdom of Great Britain and Canada, accepted in the earlier periods an optional clause from Article 36(2) of the Statute of the ICJ. Their acceptance of the optional clause was largely limited, and those restrictions in relation to its application in the present case had to remain within the preliminary examination of the ICJ. Therefore, it is considered that it would be rational to present the views of the respondent States in order to provide appropriate conclusions in the course of the analysis.

With its own Declaration, *Belgium* limited the jurisdiction of the Court to events after 13 July 1948, except for events in respect of which there was consent to the application of peaceful means of dispute settlement. Since this Declaration is subject to ratification, it has effect from the date of the deposit of the instrument of ratification for a period of five years. After the expiration of this period, the Declaration shall have effect until the moment of giving notice of the termination of its validity. For the *Netherlands*, compulsory jurisdiction became effective from 6 August 1956, for all disputes arising after 5 August 1921. The exception was made only in relation to disputes for which the parties reached an agreement on a peaceful settlement of the dispute. This commitment was accepted for five years and, in the meantime, it was renewed by a tacit agreement of the parties for an additional five years. The Netherlands did so regardless of the fact that another Declaration was made

and whether it was done on condition that the Netherlands expressed its desire to renew it six months before the expiration of those periods. The declaration of 5 August 1946 ceased to be valid on 6 August 1956. *Portugal* has also accepted the compulsory jurisdiction of the Court. However, Portugal imposed that jurisdiction on events that occurred before and after the Declaration of 16 December 1920. Following the deposit of the Declaration with the Secretary-General of the UN, it became effective for a period of one year, with the Declaration retaining its effectiveness even after that period by sending a notification to the Secretary-General. Portugal has also reserved the right to limit the application of the Declaration to a particular category of disputes. *The United Kingdom of Great Britain* accepted the *ipso facto* compulsory jurisdiction of the Court. It conditioned this with reciprocity without concluding special agreements. The Declaration applies to all disputes arising after 24 October 1945, except for disputes for which there is an agreement on the settlement of peaceful means or through arbitration. An exception applies to disputes between the member States of the Commonwealth for situations arising prior to 1 January 1969, for specific disputes in which the other party accepts compulsory jurisdiction or disputes in which the other party gives or confirms the Declaration within a period of not less than 12 months before filing an Application (which, in the case of a dispute with Yugoslavia, was pointed out as one of the main arguments against the constitution of compulsory jurisdiction). In any case, the United Kingdom retained the right to amend or withdraw any of the listed reserves at any time by notification addressed to the Secretary-General. It is very interesting that *Canada* issued a notice ending the compulsory jurisdiction of the Court adopted on the basis of the Declaration of 10 September 1985. On the other hand, Canada has accepted the compulsory jurisdiction of the Court under the condition of reciprocity, in relation to disputes arising after the Declaration, with the exception of disputes for which there is an agreement on peaceful settlement, then for disputes for which the Government of any other the member States of the Commonwealth have reached an agreement, as well as for disputes arising from protective and enforcement measures in relation to fishing vessels in a particular zone, in accordance with the Convention on future multilateral cooperation in the Northwest Atlantic fisheries of 1978. By giving notification to the Secretary-General of the UN, Canada reserves the right to amend or withdraw the above-mentioned reserves or any other reserves that might subsequently result. With this fact, the governments of other States that accepted the optional clause, as well as the Register of the ICJ, should have been informed.

After the continuation of the proceedings, the ICJ has concluded that the Declaration of Yugoslavia of 25 April 1999 may constitute the basis for the establishment of compulsory jurisdiction only for disputes already arising and disputes that might arise after its signing (in relation to Belgium, the Netherlands, Portugal and Canada). In line with the facts established in the proceedings, the ICJ insisted that such a conclusion could have referred to situations or facts that arose after 25 April 1999. Given that the ICJ found itself in a dilemma to accept the argument, it had to decide first on the nature of the *prima facie* jurisdiction, in relation to which it stated the following: "Considering that, on the one hand, Yugoslavia expected that the Court accept the *ratione temporis* jurisdiction for existing disputes or disputes that can only arise after the Declaration is signed, on the other hand, and in relation to the facts and situations that arise after this signing, in order to assessing whether the Court has jurisdiction in the present case, it would be sufficient to determine, in the context of its content, whether the dispute was raised before or after 25 April 1999, as the date on which the Declaration was signed" (ICJ Reports, 1960, p. 34). Consequently, the ICJ concluded that the bombing began on 24 March 1999 and carried on continuously until and after 25 April 1999, and since there was no mutual consent, the declarative statements of the parties did not constitute a legal title for judicial jurisdiction *prima facie* (ICJ Reports, 1952, pp. 102. etc.; Publications of PCIJ, 1938, p. 23). Hence, in eight cases (against Belgium, Canada, France, Germany, Italy, the Netherlands, Portugal, the United Kingdom of Great Britain), the ICJ delivered Orders on 2 June 1999 in which found that it lacked the *prima facie* jurisdiction, which was a prerequisite for the issue of provisional measures. But, despite this lack of the *prima facie* jurisdiction, the ICJ could continue proceedings on the subject matter of the dispute and admissibility of Applications filed against eight NATO member States (Publications of PCIJ, Series A, 1925, pp. 24-25, 1926, pp. 5, etc.; ICJ Reports, 1947-1948, p. 26; 1963, p. 28; 1984, p. 428; 1996, p. 614, para. 26; 1999, pp. 124, 259, 363, 422, 481, 542, 656, 761, 826, 916; 2008, pp. 30, etc.).[8]

[8] This position of the ICJ was formally in line with the Rules of Court. However, in some other cases, the ICJ showed much more flexibility in establishing jurisdiction on the basis of the tacit acceptance of jurisdiction by the parties initially opposed to the establishment of the Court's jurisdiction. In the jurisprudence of the ICJ (and its legal predecessor - the Permanent Court of International Justice), these cases were covered by a decision on the prorogation of jurisdiction (*forum prorogatum*).

Attempt to establish jurisdiction under the Genocide Convention and the Rules of Court

Another, certainly important legal basis for the establishment of judicial jurisdiction invoked by Yugoslavia in the proceedings before the ICJ relates to Article IX of the Genocide Convention. Yugoslavia has highlighted this legal basis in relation to Belgium, the Netherlands, Canada, Portugal, Spain and the United Kingdom of Great Britain, while in relation to France, Germany, Italy and the United States of America, Yugoslavia also provided an additional legal basis contained in Article 38(5) of the Rules of Court which provides that: "When the applicant State proposes to found the jurisdiction of the Court upon a consent thereto yet to be given or manifested by the State against which such application is made, the application shall be transmitted to that State. It shall not, however, be entered in the General List, nor any action be taken in the proceedings, unless and until the State against which such application is made consents to the Court's jurisdiction for the purposes of the case."

By analyzing the individual approaches of the respondent States, different conclusions can be drawn regarding the possibility or the inability to establish the jurisdiction of the ICJ that the other party to the dispute recognizes and accepts its jurisdiction within a period which cannot be shorter than a year before the initiation of the proceedings. Considering that Yugoslavia passed the Declaration on 25 April 1999, and the Application was filed on 29 April 1999, this condition became virtually impossible. *Spain* had the view that Yugoslavia was not a member of the UN under Resolution 777 of the Security Council and resolution 47/1 of the General Assembly of 1992, and therefore not a member of the Statute of the ICJ. Finally, this led to the challenge of the Yugoslav Declaration of 25 April 1999 as a legally valid basis for the acceptance of judicial jurisdiction. On 13 September 1968, Spain deposited with the Secretary-General of the UN, as the depositary of international treaties, an instrument to accede to the Convention on the Prevention and Punishment of the Crime of Genocide. The instrument contained a reservation in respect of Article IX of the Convention that legal title could not serve as the basis of judicial jurisdiction, not even *prima facie* (Press Release ICJ, 1999, pp. 1-2). It was a similar case with the *United States*. Namely, after the ratification of the Genocide Convention on 25 November 1988, they took advantage of the possibility of making reservations. Thus, for each dispute before the ICJ, pursuant to Article IX of the Convention, the United States requested the existence of their "special consent". On the

occasion of the Application of Yugoslavia before the ICJ, the United States called for this deficiency, and since the Convention did not prevent the provision of reserves and that Yugoslavia did not give relevant objections to it, the Court adopted a decision declaring it absolutely lack in competence. Hence, in these two cases (against Spain and the United States of America), the Court, rejecting the request for the indication of provisional measures, concluded that it manifestly lacked jurisdiction and consequently ordered that the cases be removed from the General List. Taking into account the allegations made in both cases, the Court has obviously been guided by the basic criterion for establishing its own jurisdiction - the existence of a party's consent and reciprocity (Knežević Predić, 2000).

From the previous analysis, it can be concluded that one of the most important issues discussed in the process of determining the existence of the ICJ jurisdiction related to the question whether Yugoslavia was not a member of the UN in accordance with General Assembly resolutions 47/1 of 22 September 1992 and 48/88 of 20 December 1993, and Security Council resolutions 757 of 30 May and 777 of 19 September 1992, and hence neither of the Statutes of the ICJ. Given that a positive attitude in relation to this issue conditioned the constitution of judicial jurisdiction, the Court soon found that it was not necessary to consider this issue since it was previously recognized that the parties' statements on the acceptance of compulsory jurisdiction were not relevant in the decision-making (Crook, 2002, pp. 405-406). In the aforementioned decision, the ICJ made a clear distinction between the issue of consensual establishment of jurisdiction and the question of the rights of the parties to appear before the Court, which is "independent of their views and wishes". The question of whether Yugoslavia was the party of the Statute on the "critical date" relating to the initiation of proceedings, for the Court was a matter of fundamental importance. But before the ICJ entered into a deeper debate, it had to examine whether Yugoslavia met the conditions for the access to the Court under Articles 34 and 35 of the Statute, and then the conditions prescribed in Article 36. In assessing the existing situation, the Court had to examine the argument from the dispute between Yugoslavia and Bosnia and Herzegovina in the Revision process, in which Yugoslavia put forward a position that denied the previous thesis on the existence of international legal continuity with the SFR Yugoslavia (Dimitrijević, 2003). In the light of the new events that followed the admission of Yugoslavia to the UN on 1 November 2000, the ICJ noted that Yugoslavia at the time of filing the Application, on 29 April 1999, was not a party to the Statute, and that "on

no other basis" it could not have access to the Court (Dimitrijević, 2005).[9] Consequently, the ICJ was not open to it at that time under Article 35(1), of the Statute. The ICJ then examined the possibility of the case being brought under the provision of Article 35 (2) of the Statute, which provides:" The conditions under which the Court shall be open to other states shall, subject to the special provisions contained in treaties in force, be laid down by the Security Council, but in no case shall such conditions place the parties in a position of inequality before the Court". After the ICJ found that the meaning of the term "in treaties in force" in the usual sense indicates the date that the treaties are deemed to have been in force, it has come to the conclusion that it can be interpreted to include treaties which were in force when the Statute of the Court itself came into force or when the lawsuit was instituted. The purpose of the provision of Article 35(2) of the Statute is to regulate the right of access of the States to the Court which are not parties to the Statute. However, it would be inconsistent for this approach to be drawn to a simple conclusion that those States have the right to freely adhere to the Court by a specific treaty, whether multilateral or bilateral, containing a provision of this type. Article 35(2) of the Statute can, therefore, be interpreted only in such a way that the "treaties in force", i.e. their special clauses relate exclusively to the treatise in force at the time when the Statute of the Court was in force. For the credibility of such an approach, the ICJ has used the *travaux préparatoires* that have been elaborated upon the formulation of statutory provisions.[10] In conclusion, the Court noted that, even assuming that Yugoslavia (Serbia and Montenegro) was a party to the Genocide Convention on the relevant date, the provision of Article 35(2) of the Statute did not provide access to the Court under Article IX of the Convention, since it entered into force 12 January 1951, therefore, after the entry into force of the Statute. The need to determine whether the State in the dispute was or was not a Party to the Convention on the date of the application was therefore irrelevant.[11]

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[9] The accession of Yugoslavia to the UN followed on 1 November 2000, with the adoption of the General Assembly resolution 55/12.

[10] Although the *travaux préparatioires* concern the drafting of the Statute of the Permanent Court of International Justice, the final provision of this article of the Statute relates *mutatis mutandis* to the provision of Article 35 (2) of the Statute of the International Court of Justice.

[11] Yugoslavia has accessed the Convention on 12 March 2001.

Attempt to establish jurisdiction under the Dispute Settlement Treaties

In relation to Belgium, Yugoslavia, *inter alia,* outlined the provision of Article 4 of the Convention of Conciliation, Judicial Settlement and Arbitration between the Kingdom of Yugoslavia and Belgium of 25 March 1930 (with effect from 3 September 1930). It also did the same with regard to the Netherlands, accepting the obligations under Article 4 of the Treaty of Judicial Settlement, Arbitration and Conciliation of 11 March 1931 between the Kingdom of Yugoslavia and the Netherlands (with effect from 2 April 1932) (International Legal Materials, 1978, pp. 1488-1517). The basis for such an action was found in Article 38(2) of the Rules of Court, which stipulates that, if possible, the plaintiff will state the legal grounds upon which the jurisdiction of the Court is said to be based.[12] Article 37 of the Statute of the ICJ states that: "Whenever a treaty or convention in force provides for reference of a matter to a tribunal to have been instituted by the League of Nations, or to the Permanent Court of International Justice, the matter shall, as between the parties to the present Statute, be referred to the ICJ". The ICJ, therefore, dismissed the Yugoslav position, stating that there was no automatism in relation to the constitution of jurisdiction over disputes between the parties to the Statute. This confirmed the basic statutory principle that the Court cannot decide between States without their consent (ICJ Reports, 1995, pp. 101-102).

CONCLUSIONS

Even 20 years after the NATO bombing campaign, it is not likely that this use of force was legally justified. The alleged implied authorization for its undertaking was not within the legal responsibility of the wider international community in relation to the maintaining international peace and security or with protection of fundamental human rights (Simma, 1999, Etinski, 1999,

[12] Yugoslavia argued that the Dispute Settlement Treaties with Belgium and the Netherlands are still in force. It defended it by the fact that Belgium did not explicitly deny the validity of the Convention, and that the Netherlands, by a note dated on 20 May 1997, added the Treaty to the list of bilateral agreements concluded or renewed with the former SFRY, which it considered to be still in force in relation to FR Yugoslavia. According to the Yugoslav standpoint, both international treaties provide for the jurisdiction of the Permanent Court of International Justice, and by the succession of contractual rights and obligations, they remained in legal circulation between the parties.

Mitić, 1999, Knežević-Predić, 1999; Šahović, 1999, pp. 417, etc.; Kovács, 2000, pp. 119, etc.,). Moreover, this aggressive armed campaign was not even within the framework of customary international law which does not allow the use of collective self-defence based on a unilateral assessment of the situation (ICJ Reports, 1986, pp. 14, etc.). From this, a rational question arises: did NATO as a military defence organization really have the right to assess the political situation in Yugoslavia that was beyond its prescribed jurisdiction and whether it had the right to unilaterally take disproportionate, unnecessary and aggressive measures which obviously brought into question the relationship between the means and the aims of the alleged humanitarian intervention? (Brownlie, 2000; Wippman, 2001; Gray, 2004, p. 42). This issue has remained unresolved, as well as the question did NATO really act in a "state of emergency" when it undertook *Operation Allied Force* against Yugoslavia and violated the rule of *jus cogens* on the prohibition of the use of force?

Taking into account the jurisprudence of the ICJ from which it appeared that the protection of human rights cannot be the basis for the unilateral use of the armed force, it is clear why Yugoslavia initiated proceedings against ten NATO member States or why Yugoslavia wanted to involve the ICJ in crisis management (Rossene, 2001, pp. 101, etc). This was quite justified, since the UN's collective security system was built on the prohibition of the use of force or the threat of force. In this regard, the system starts from the assumption that all disputes must be settled by peaceful means, and Yugoslavia assumed this rule by institutionalizing the proceedings against the NATO member States before the ICJ. In this respect, it may be possible to make some conclusions. Namely, based on the previous analysis of the "Legality of Use of Force Case", it can be seen that the ICJ has confirmed that the Declarations of the parties to the dispute of Article 36(2) of the Statute, are given with the restrictions of *ratione termporis,* and that they cannot present a valid legal basis for the constitution of competences – *prima facie.* Then, the ICJ in the preliminary stage of the proceedings was not in a position to decide whether the incriminated acts listed in the Yugoslav Applications were attributed to the respondent States. The ICJ apparently was unable to declare itself competent in the proceedings under Article IX of the Genocide Convention. Considering the Dispute Settlement Treaties with the Kingdom of Yugoslavia, which were additionally brought out of the Yugoslav side as a possible legal basis for the founding of jurisdiction, the Court failed to establish the presence of the consent of Belgium and the Netherlands, and these Treaties could not be a valid legal title to establish the jurisdiction of the ICJ. If there has been an acceptance of these Treaties as legal titles for establishing the jurisdiction of the

ICJ, it is possible that there would be a violation of the principle of fair trial and legal decision-making. Finally, in the light of the new events that followed the admission of Yugoslavia to the UN on 1 November 2000, the ICJ noted that Yugoslavia at the time of filing the Applications, on 29 April 1999, was not a party to the Statute, and that "on no other basis" it could not have access to the Court. But, regardless of this fact, the ICJ did not rule out the international legal responsibility of the NATO member States for serious violations of international law relating to the prohibition of the use of force or the threat of force against Yugoslavia directed not only against its sovereignty, territorial integrity and political independence, but also against human rights and fundamental freedoms of the majority of its population (ICJ Reports, 1998, p. 456.; Cassese, 1999; Obradović, 2000, UN Press Release 1999; Independent International Commission on Kosovo., 2000).

From today's retrospective, it cannot be disputed that NATO used armed forces as an *ultimum remedium,* after the Yugoslav government rejected an unacceptable "agreement" from Rambouillet on resolving the political crisis in Kosovo and Metohija. Also, it cannot be disputed that NATO carried out an armed operation that led to catastrophic consequences for all national groups living in the territory of Yugoslavia. The selective use of the armed forces has not led to the resolution of the political conflict, but has significantly contributed to the war destruction and demolition of the political system of Yugoslavia, and then to the persecution and the eviction of its population, and permanent irradiation and pollution of its territory which together represents serious international crimes against peace and humanity (Vukasović, 1999; Todić, 1999). The fact that the Security Council did not adequately act in crisis management could not have been an excuse for the unilateral NATO military intervention against Yugoslavia. Of course, one can accept the fact that such a situation was caused by a post-Cold War situation where the UN was not ready to accept full responsibility for the maintenance of international peace and security, as indicated by Security Council resolution 1244 of 10 June 1999, by which the alleged humanitarian intervention of NATO in Yugoslavia was post-authorized, in a manner that gave priority to the effective state after the military operation in relation to international law *(ex factis ius oritur).*[13] Such a restriction of the international legal order does not

[13] In line with the factual situation following the escalation of the conflict in Kosovo and Metohija, the Security Council, using the powers of Chapter VII of the Charter, adopted Resolution 1244 authorizing the already planned military presence of member States *(Kosovo Force - KFOR)* and the NATO alliance in order to provide logistical support to the UN Interim Administration Mission in Kosovo *(UNMIK).*

automatically imply the illegitimacy of the action taken to end the political crisis, but certainly indicate its inadmissibility in relation to international law. In the end, the armed attack that NATO carried out against Yugoslavia has led to the realization of a policy of *fait accompli* which has no justification in a positive international legal order *(ex iniuria ius non oritur)*. Consequently, neither the international legal responsibility for taking unlawful acts during this NATO operation is not excluded, but it is quite clearly pushed aside because the great powers or permanent members of the Security Council have not yet reached a consensus on the modalities of the use of force in contemporary international relations, which should be in accordance with the normative order of the universal system of collective security.

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