

**RESPONSE OF SERBIA AND MONTENEGRO TO THE QUESTIONS POSED BY
THE VICE-PRESIDENT OF THE COURT ON 9 MAY 2006**

I.

On 9 May 2006, the Vice-President of the Court posed the following question to both parties:

“In 1996 the Federal Republic of Yugoslavia concluded two bilateral agreements with Croatia and Macedonia, respectively, and its President made a joint declaration with the President of the Presidency of Bosnia and Herzegovina. In those instruments there are provisions which appear to recognize in different terms the continued personality of the Federal Republic of Yugoslavia. I would be interested to read the comments of both Parties on those provisions.”

In response to the first question of the Vice-President of the Court, Serbia and Montenegro respectfully submits the following answer:

1. The issue which is central for the present case is whether the FRY continued the international legal personality of the SFRY (the former Yugoslavia). This is the issue which is disputed between the parties, and this is the issue regarding which the United Nations General Assembly, the Security Council, and the Secretary-General took a position. The Respondent submits that this position was a clear denial of continuity.
2. It is well-known that, during the debate between 1992 and 2000, the FRY asserted continuity with the former Yugoslavia (the SFRY), while this was consistently and emphatically denied by all other successor States, Bosnia and Herzegovina included.
3. But it should also be noted that parallel with this debate, other claims of a more political nature relying on interpretations of history were also advanced and debated. Serbia insisted that it had existed as a sovereign State before the formation of the Kingdom of

Serbs, Croats and Slovenes after the First World War on 1 December 1918 (which became later the Kingdom of Yugoslavia on 6 January 1929, and after the Second World War, became the Federal People's Republic of Yugoslavia). Montenegro also insisted on its continued statehood throughout history, dating to the Princedom and later Kingdom of Montenegro. Croatia, Bosnia and Herzegovina, and Macedonia also submitted a perception of continued statehood going back to various points in history. This perception is mirrored, for example, in the Preamble of the present Constitution of Croatia which stresses, *inter alia*,

“The millenary identity of the Croatian nation and the continuity of its statehood, confirmed by the course of its entire historical experience within different forms of states and by the preservation and growth of the idea of a national state, founded on the historical right of the Croatian nation to full sovereignty, manifested in: the formation of Croatian principalities in the seventh century, ...”

4. During the years of civil wars over the past decade, these perceptions of continued statehood had been contested and denied by others, but after the armed conflicts ended, one of the gestures towards reconciliation was the mutual recognition of these perceptions of history. This is what is mirrored in the agreements which are the subject matter of the question of the Vice-President of the Court. This is the context – the only context – in which *mutual recognition of continuity* makes any sense – and this is what was confirmed in the submitted documents.
5. It is true that the FRY had repeatedly tried to achieve recognition of a different, much more specific and legally more relevant continuity, but this remained without success. The FRY claimed that it continued the personality of the former Yugoslavia. In this context, one can, of course, only speak of one continuity, only one state can conceivably continue the personality of a predecessor State. The documents referred to above do not accept this continuity. They accept *mutual* historic aspirations to continued statehood, and this is what follows from all three documents.

6. Mention has to be made that these documents were used and abused by politicians and journalists purporting to justify diametrically opposed conclusions. These various interpretations, fitted to various purposes, cannot, however, change the texts which were actually adopted.

The agreement with Macedonia

7. In the *Communiqué on the signing of the Agreement on the regulation of relations and promotion of cooperation between the Republic of Macedonia and the Federal Republic of Yugoslavia* (UN doc. S/1996/291 of 17 April 1996 - Annex) it is stated:

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

8. The same mutual recognition of perceptions of history and historic continuity is reflected in Article 4 of the *Agreement on the Regulation of Relations and Promotion of Cooperation between the Republic of Macedonia and the Federal Republic of Yugoslavia of 8 April 1996*, (UN doc. S/1996/291 of 17 April 1996 - Appendix), which states:

“In the light of the fact that Serbia and Montenegro had existed as independent States before the creation of Yugoslavia, and in view of the fact that Yugoslavia continued the international legal personality of these States, the Republic of Macedonia respects the state continuity of the Federal Republic of Yugoslavia.

In the light of the fact that during the National Liberation War and at the session of the Anti-Fascist Assembly of the National Liberation of Macedonia, the Macedonian people decided to organize the Republic of

Macedonia as a State and to join the Yugoslav Federation, and in view of the fact that in the 1991 referendum the Macedonian people decided to organize the Republic of Macedonia as a sovereign and independent State and appreciating the fact that this has been carried out in a peaceful manner, the Federal Republic of Yugoslavia respects the state continuity of the Republic of Macedonia.”

9. It is important to point out that Article 4 does not speak of the continuity of the FRY (composed of Serbia and Montenegro, and until 2003 officially called the Federal Republic of Yugoslavia), but of *two* historic States, one Serbia, the other Montenegro, both of which claimed uninterrupted continued statehood. It is stated that Yugoslavia (the Kingdom of Yugoslavia) continued the international legal personality of “these States” (in plural) and this is the background on which, and the context in which Macedonia respects the state continuity of the FRY. Paragraph 2 of Article 4 shows a reciprocal gesture, the FRY is also recognizing Macedonian claims to historic continuity starting with the National Liberation war, again maintaining continuity within the Yugoslav Federation, and accepting that “organizing Macedonia as a sovereign and independent State” is compatible with the idea of “the state continuity of the Republic of Macedonia” – the same wording as the one used regarding “the state continuity” of the FRY in paragraph 1.
10. It is therefore obvious that Article 4 does not deal at all with the issue of continuity between the FRY and the former Yugoslavia. It deals with mutual recognition of historic aspirations to continued statehood of Serbia, of Montenegro, and of Macedonia.
11. What is also important, and what underscores that the continuities described in Article 4 are a different matter, the *Communiqué on the signing of the Agreement on the regulation of relations and promotion of cooperation between the Republic of Macedonia and the Federal Republic of Yugoslavia* (UN doc. S/1996/291 of 17 April 1996 - Annex) stresses that the Agreement is not a departure from, but in conformity with, *inter alia*, Security Council resolution 777 (1992) and General Assembly resolution 47/1 (1992) which

rejected the claim of the FRY to continue international legal personality of the former Yugoslavia.

The Agreement with Croatia

12. The Agreement with Croatia reflects exactly the same approach. According to Article 5:

“Proceeding from the historical fact that Serbia and Montenegro existed as independent States before the creation of Yugoslavia, and bearing in mind the fact that Yugoslavia has continued the international legal personality of these States, the Republic of Croatia notes the existence of the State continuity of the Federal Republic of Yugoslavia.

Proceeding from the historical fact of the existence of the various forms of statal organization of Croatia in the past, the Federal Republic of Yugoslavia notes the existence of the continuity of the Croatian statehood.”

13. This is, again, a recognition of historic pretensions to continued statehood of three states, Serbia, Montenegro, and Croatia, and the recognition of continuity is mutual. Just as in the case with the Agreement with Macedonia, mutual recognition is an added clear indication that the issue is not that of continuing the legal personality of the former Yugoslavia, because no one has ever alleged, or could have alleged, that Macedonia or Croatia would have claimed such continuity. The claim which is mutually recognized is the claim to historic continued statehood.

The Joint Declaration of the President of Bosnia and Herzegovina and of the President of Serbia

14. The very same is true of the Joint Declaration, which was signed by Mr. Alija Izetbegović, President of Bosnia and Herzegovina and Mr. Slobodan Milošević, then president of Serbia, rather than of the FRY – thus without formal powers to represent the FRY. In this Joint Declaration it is stated:

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

Bosnia and Hercegovina accepts the state continuity of the Federal Republic of Yugoslavia. “

15. Again, there is the mutual recognition of historic State continuity, rather than recognition of the claim of the FRY to continue the international legal personality of the former Yugoslavia.
16. It follows unequivocally from the text of all three documents that they do not represent an explicit or implicit recognition of the claim of the FRY to continue the international legal personality of the former Yugoslavia. They represent instead a mutual recognition of historic claims to continued statehood of Serbia, of Montenegro, of Croatia, of Macedonia, and of “various forms of statal organization of Bosnia and Herzegovina”.
17. Serbia and Montenegro would also like to submit, that even if these documents had a different content, they could not possibly either grant or deny the claim of the FRY to continued membership in the United Nations, since this was within the competences of the General Assembly and the Security Council. Moreover, Bosnia and Herzegovina (as well as other successor States of the former Yugoslavia) has consistently and emphatically denied the continuity of the FRY with the former Yugoslavia both before and after the issuance of the Joint Declaration and the conclusion of the two agreements referred to in the Vice-President’s question.¹

¹ Among many examples of statements of Bosnia and Herzegovina emphasizing that the FRY did not continue the personality of the former Yugoslavia, and was not a Member of the United Nations between 1992 and 2000, see, e.g., United Nations documents: A/C.5/49/49 (8 December 1994), A/49/853 - S/1995/147 (17 February 1995), A/50/656 - S/1995/876 (19 October 1995), A/51/564 - S/1996/885 (1 April 1996), E.CN.4/1998/171 (22 April 1998), S/1999/120 (5 February 1999), S/1999/209 (26 February 1999), S/1999/639 (3 June 1999), A/54/L.62 (8 December 1999).

II.

On 9 May 2006, the Vice-President of the Court posed the following question to Serbia and Montenegro:

“In the opinion of Serbia and Montenegro was the Federal Republic of Yugoslavia a Member of the United Nations in the period between 27 April 1992, when it came into existence, and 19 September 1992, when Security Council resolution 777 was adopted followed, of course, by General Resolution 47/1 of 22 September 1992?”

In response to the second question of the Vice-President of the Court, Serbia and Montenegro respectfully submits the following answer:

1. In the opinion of Serbia and Montenegro, the Federal Republic of Yugoslavia was not a Member of the United Nations before 1 November 2000 – thus it was not a member during the period between 27 April 1992 and 19/22 September 1992 either.
2. No successor State of the former Yugoslavia remained or became automatically a Member of the United Nations. All successor States claimed membership in the United Nations, but on various grounds, and no successor State became a Member before it was accepted as such. Bosnia and Herzegovina, Croatia, Macedonia and Slovenia applied for membership, and became Members when their application was accepted. The FRY claimed continuity, and could have become a Member on that ground, had continuity been accepted. It was not accepted. As Serbia and Montenegro stated in the second round of oral pleadings, when the FRY came into being it submitted a claim. It claimed continuity with the former Yugoslavia, and on this ground, it claimed membership in the United Nations, membership in other international organisations, and party status in the treaties to which the former Yugoslavia was a party. This claim was, however, not accepted. It was not accepted for a limited time period either. There is no evidence supporting such acceptance. The competent organs of the United Nations - the Security Council and the

General Assembly – took a position on this demand after about five months, when they rejected the claim of the FRY.

3. There is no rule in the Charter or anywhere else, which would say or imply that, if a State is claiming that it is a Member of the United Nations, then it *is* a Member of the Organization until the claim is examined and rejected. It is true – and probably understandable - that before a position was taken, various United Nations officials treated the representatives of the FRY and the documents submitted by representatives of the FRY in a hesitant and somewhat inconsistent manner. The representatives of the FRY occupied the premises of the UN mission of the former Yugoslavia, and it was a matter of practical necessity to communicate with representatives of a country which was a participant of the conflict to which the United Nations authorities devoted a considerable attention. This yielded some contradictory steps of United Nations officials. But this certainly cannot make a State a Member of the United Nations.
4. As a matter of fact, before the question reached the agenda of the Security Council and the General Assembly, a preliminary position was already taken by the Security Council, only a month after the FRY came into being and after it submitted its claim to continuity. In its resolution 757 (1992), adopted on 30 May 1992, the Security Council actually addressed the issue whether the FRY did or did not continue membership status of the former Yugoslavia, and answered it in the negative. It is stated in the preamble of Security Council resolution 757:

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

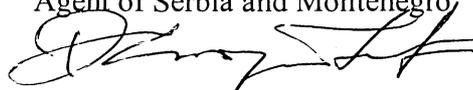
5. A year later, on 29 December 1993, the General Assembly opted to qualify the position of the FRY which had yielded some controversies. This qualification was mindful of the fact that the FRY was not a Member. Thus, the term used is not “membership” not even “*de*

facto membership”, but “*de facto* working status”. In paragraph 19 of resolution 48/88 of 29 December 1993 the General Assembly:

“Reaffirms its resolution 47/1 of 22 September 1992, and urges Member States and the Secretariat in fulfilling the spirit of that resolution, to end the *de facto* working status of Serbia and Montenegro.”²

6. It is Serbia and Montenegro’s considered position that the FRY was not a Member of the United Nations for any period of time before it became a new Member on 1 November 2000.

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Agent of Serbia and Montenegro

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² UN doc. A/RES/48/88 of 20 December 1993, para. 19.