

LSR Letter to the Canadian Government

May 4, 1999

The Right Honourable Jean Chretien,
Prime Minister of Canada

The Honourable Lloyd Axworthy
Minister of Foreign Affairs

The Honourable Arthur Eggleton
Minister of National Defence

Dear Sirs:

RE: FRY Lawsuit against Canada before World Court

We write concerning Canada's legal response to the case filed April 29, 1999 by the Federal Republic of Yugoslavia in the International Court of Justice (ICJ) against Canada and nine other NATO States, alleging a violation of the international obligation not to use force against another State. We understand that a Provisional Measures hearing has been set down in the Hague, May 10 and 11, 1999.

We urge the Government of Canada to seize the opportunity presented by the FRY application both at the provisional hearings and the subsequent hearing to reinforce respect for law. Canada should advocate for the immediate cessation of war activities and, more generally, for the resolution of conflicts and respect for humanitarian law, civil society and human rights, environmental protection and human health.

The resort to force by nations, such as Canada, who traditionally advocate the rule of law, rather than force, as the means of resolving difficulties, indicates that there is an urgent need to develop international law to coincide with the increasing tensions being experienced in various parts of the world. The International Court of Justice is the central international forum under the Charter of the United Nations for articulating the development and application of international law and practice in accordance with the rule of the law.

The following proposes a strategy that the Government of Canada should adopt at the initial hearing on May 10 regarding the Provisional Measures to cease military actions and at the full hearing on the allegations of illegal use of force by Canada and other NATO States contrary to:

- The Charter of the United Nations
- The Geneva Convention of 1949
- Additional Protocol No. 1 of 1977 on the Protection of Civilians and Civilian Objects in Time of War
- The 1948 Convention on Free Navigation on the Danube
- The International Covenant on Civil and Political Rights
- The 1966 International Covenant on Economic, Social and Cultural Rights

- The Convention on the Prevention and Punishment of the Crime of Genocide.

1. Canada's Legal Position at the Provisional Measures Hearing, May 10, 1999

We urge the Canadian Government to endorse and support Yugoslavia's request that the ICJ order that the use of force cease immediately and further order that:

- all Serbian forces must be withdrawn from Kosovo;
- all Kosovar refugees be given the right to return to their homes under international supervision and protection;
- recognized intergovernmental and nongovernmental human rights and humanitarian aid agencies shall have a right of access into Kosovo.

2. Canada's position at a future ICJ hearing on the FRY claim regarding the breach of international law arising from Canada's involvement with NATO's intervention in the conflict between the FRY and Kosovo.

It is our view that the international legal doctrine of humanitarian intervention is not well developed or clear. This lack of clarity in the law itself promotes conflict about the legality of State intervention in internal conflicts between groups and minorities within States involving violence and actions, which may amount to genocide, where such intervention has not been authorized by the UN Security Council. The lack of certainty threatens the continued legitimacy of the United Nations as the forum for international conflict resolution. It is particularly problematic for members of the Security Council who may be involved in military intervention against other States when this may be seen as contrary to the Charter of the United Nations.

The use of force and unilateralism as a means of dealing with problems of the decision-making process in the UN Security Council is a matter of global concern. Accordingly, LSR encourages the Canadian Government to see the FRY Case as a chance to clarify the law on these matters and to aid in the development of international law to respond to contemporary crises.

The following issues should be raised at the hearing:

- What is the scope of the modern Doctrine of Humanitarian Intervention which will legally justify uninvited intervention in internal conflicts?
- What is the process by which a determination can be made as to when a situation meets the standard for invocation of the Doctrine? In instances of a deadlock within the Security Council, is the use of the Doctrine linked to UN agreement either through the Security Council or the General Assembly? We note the effective use of the Uniting for Peace Resolution by Mr. Lester B. Pearson to resolve the Suez Crisis. We understand that this procedure involved the use of a majority vote in the full membership of the Security Council and a 2/3 majority in the General Assembly.

In determining its position in the FRY case, the Government of Canada should seek public commentary and advice in the formulation the Canadian position in these matters, through hearings and a subsequent report

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INTERNATIONAL COURT OF JUSTICE PRESS COMMUNIQUÉ 99/17

THE HAGUE, 29 APRIL 1999—THE FEDERAL REPUBLIC OF YUGOSLAVIA (FRY) today instituted proceedings before the International Court of Justice (ICJ) against (separately and in the following order) the United States of America, the United Kingdom, France, Germany, Italy, the Netherlands, Belgium, Canada, Portugal and Spain, accusing these States of bombing Yugoslav territory in violation of their obligation not to use force against another State.

In its Applications, Yugoslavia maintains that the above-mentioned States have committed “acts by which [they] have violated [their] international obligation[s] not to use force against another State, not to intervene in [that State’s] internal affairs” and “not to violate [its] sovereignty”; “the obligation to protect the civilian population and civilian objects in wartime, [and] to protect the environment; the obligation relating to free navigation on international rivers”; the obligation “regarding the fundamental rights and freedoms; and the obligation[s] not to use prohibited weapons [and] not to deliberately inflict conditions of life calculated to cause the physical destruction of a national group”.

Yugoslavia has requested the Court to adjudge and declare *inter alia* that the ten States against which it has instituted proceedings are “responsible for the violation of the above[mentioned] international obligations”, that they are “obliged to stop immediately” that violation, and that they are “obliged to provide compensation for the damage done”.

According to Yugoslavia, the above-mentioned States, “together with the Governments of other Member States of NATO, took part in the acts of use of force against the FRY”. Yugoslavia asserts that both military and civilian targets have come under attack during the bombings, causing many casualties (“about 1,000 civilians, including 19 children, were killed and more than 4,500 sustained serious injuries”), enormous damage to schools, hospitals, radio and television stations, cultural monuments and places of worship, the destruction of a large number of bridges, roads and railway lines, as well as oil refineries and chemical plants, resulting in serious health and environmental damage.

As the legal basis for its claims, Yugoslavia cites the obligations not to use force against another State and not to inter-

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FRY v. Canada: Canada’s Legal Arguments

On May 10, 1999 at 4:15 p.m. at the Peace Palace at the Hague, legal counsel for Canada, headed by Mr. Phillippe Kirsche, presented its case to International Court of Justice (the “ICJ”) in response to the Federal Republic of Yugoslavia’s (the “FRY’s”) request to the ICJ for provisional. Canada’s case was based on two arguments:

- that the test of *prima facie* jurisdiction to be applied to provisional measures could not be met; and,
- that provisional measures, particularly of the kind sought by the FRY, would be fundamentally inappropriate and counter-productive.

Jurisdiction

Canada contested the *prima facie* jurisdiction of the ICJ on the following bases:

The Federal Republic of Yugoslavia, did not become a Member of the UN as the successor state as declared in Security Council (the “SC”) resolution 777 and confirmed in General Assembly (the “GA”) resolution 47/1 of 1992. Nor has the FRY ever been admitted as a member of the UN. As a non-member of the UN, the FRY is not a party to the Statute of the ICJ and therefore cannot make a valid declaration under Article 36, paragraph 2 attorning to the jurisdiction of the Court. Furthermore, the FRY has not based its request to attorn to the jurisdiction of the Court on Security Council resolution 9/1946 which allows non-members of the UN to attorn to the jurisdiction of the Court under certain conditions or with the “explicit agreement” of the opposing party.

In any event, the FRY’s declaration under Article 36, paragraph 2 applies only to disputes arising after April 25, 1999. The NATO air operations in Yugoslavia is a pre-existing dispute which began on 24 March 1999. The dispute is not infinitely divisible into the multitude of specific events that occur every day in the conduct of a military campaign. In the *Right of Passage* case, the Court insisted on treating a complex dispute as a unity, notwithstanding the diversity of facts and situations out of which it arose. There cannot be a new and independent dispute with every bomb that falls. All of the defining elements of the dispute were in place well before 25 April.

There is no factual or legal basis for the jurisdiction of the Court under Article XI of the Genocide Convention. The provisional measures requested are aimed exclusively at the cessation of the use of force, which is legally and factually a distinct matter—and for which a separate basis of jurisdiction is invoked. In addition, the ICJ has treaty jurisdiction only if the facts as alleged would constitute a violation of the treaty if proved. The FRY has not cited a single relevant act amounting to genocide by Canada.

The Inappropriateness of Interim Relief

Mr. Kirsche further argued that, regardless of the lack of jurisdiction, this would not be an appropriate case for the granting of provisional measures under Article 41 of the Statute of the ICJ for the following reasons:

First, relief under Article 41 is a form of equitable relief granted at the discretion of the Court. The Court must take into account all of the circumstances of the case. The FRY does not come to the Court with “clean hands”. As stated before the SC on May 5, 1999 by the UN High Commissioner for Refugees, the refugee crisis was “not new,” and her agency was providing assistance to 500,000 Kosovar

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FRY vs. Canada

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Albanians in and outside Kosovo well before NATO air action began on March 24, 1999.

Second, granting the provisional measures sought by the FRY would cause "irreparable harm" by leaving the forces of the FRY free to continue the repression and expulsion of the ethnic Albanian population of Kosovo.

Third, granting the provisional measures requested would amount to an anticipatory judgment in favour of the FRY and allow the latter to continue its programme of ethnic cleansing without fear of reprisal. Any attempt to tie the hands of NATO would have permanent consequences that a final judgment could never alter or reverse.

The Court heard the pleadings of all of the defendant states before making its decision on the provisional measures.

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from the Standing Committee on Foreign Affairs and International Trade. We also urge consultative meetings with members of civil society including the NGO community with regard to these matters.

Lawyers for Social Responsibility is an affiliation of Canadian lawyers concerned with the development of a peaceful society that operates in accordance with the rule of law. We believe that Canadians are sympathetic both to the importance of humanitarian intervention and to a Canadian role in these matters where it is legally justified. The fact that the law on these matters is controversial may lead to a view that Canada and the NATO forces are guilty of breach of humanitarian laws by failing to act in compliance with international law when intervening.

We trust that the Government of Canada will respond responsibly to the FRY case and will be prepared to test and indeed promote the development of international humanitarian law as a basis for Canadian and NATO use of force.

We look forward to your response to these proposals.

Sincerely yours,

Beverly J. T. Delong
National President

The ICJ Decision

The decision of the ICJ came down on June 2, 1999. The Court held that it manifestly lacked jurisdiction with respect to the cases against Spain and the U.S. However, with respect to the cases against Canada and the remaining NATO states, the Court held that it lacked *prima facie* jurisdiction and therefore could not indicate provisional measures but would remain seized of the cases and give fuller consideration to the question of jurisdiction at a later date.

In responding to the merits of the case, the Court noted that the declaration of the FRY, deposited with the UN on April 26, 1999, stated that the FRY accepted the jurisdiction of the ICJ "in all disputes arising or which may arise after the signature of the present Declaration [April 25] with regard to the situations or facts subsequent to this signature" The Court determined that the subject of the dispute was "the bombing of the territory of the Federal Republic of Yugoslavia" and that the bombings in question began on March 24, 1999. Thus, it held, that the dispute arose prior to the April 25th submission to the jurisdiction of the Court. The fact that the acts of bombing persisted was "not such as to alter the date on which the dispute arose". Four out of sixteen judges dissented from the majority opinion.

Had this aspect of the jurisdiction problem been overcome, the Judges would have been required to turn to the question of whether FRY, which is allegedly not a member of the UN and therefore not party to the statute of the ICJ, could request provisional measures from the Court. This was not determined.

The second major issue considered by the Court (with respect to the case against Canada) was that both FRY and Canada were parties to the Genocide Convention (the "Convention") without reservation. The Court stated that it must ascertain whether the breaches alleged by FRY were capable of falling within the provisions of the Convention.

Council for FRY argued that the bombing of its most heavily populated areas, the use of certain weapons which have long-term health and environmental effects, and the destruction of the largest part of the power supply system, was evidence of intent to destroy, in whole or in part, the FRY national group.

The Court noted that the definition of genocide in Article II of the Convention included the phrase "acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group". However, the Court held that it was not apparent at that stage of the proceedings that the bombings entailed the element of intent required by the Convention. This being the case, the Court was not in a position to find, at that stage, that the imputed acts were capable of coming within the provisions of the Convention, and thus, Article IX did not constitute a basis on which the Court's jurisdiction could *prima facie* be founded.

In its reasoning, the Court stated that it was "deeply concerned with the human tragedy, the loss of life, and the enormous suffering in Kosovo which form the background of the present dispute, and with the continuing loss of life and human suffering in all parts of Yugoslavia" and that it was "profoundly concerned with the use of force in Yugoslavia" and that "such use raises very serious issues in international law" (Paras. 15 & 16, Order).

The Court further reminded all parties that regardless of the jurisdiction of the Court, they "remain in any event responsible for acts attributable to them that violate international law, including humanitarian law", that any disputes must be resolved by peaceful means and that the Security Council holds the jurisdiction over threats and breaches of the peace and acts of aggression.

Legal Statement on Kosovo Intervention

WE WRITE TO EXPRESS OUR DEEP CONCERN OVER THE WIDENING crisis in Kosovo. We do not believe that you can bomb people into agreeing to peace. Indeed, Article 52 of the Vienna Convention on Treaties states that "a treaty is void if its conclusion has been procured by the threat or use of force in violation of the principles of International Law embodied in the Charter of the United Nations."

We need to create the conditions under which the Balkan people can determine their own destiny. The Government of Canada cannot act to force upon any peoples a democratic government: democracy must be called for by those people.

We urge the Government of Canada to consider these proposals to respond to this situation in a manner more firmly grounded in International Law:

1. Stop the bombing as it is not authorized by the Security Council under the Charter of the United Nations. Even if the Government believed its original bombing fell under the doctrine of humanitarian intervention, it has become clear that this doctrine does not apply in this circumstance as the bombing has not lessened in any manner the level of atrocities. Further, the bombing is simply pouring fuel on the fire of ethnic hate and disempowering those individuals in all regions who are calling for the nonviolent resolution of this conflict.
2. Urge the immediate arrest of Radovan Karadzic and Ratko Maladic in Bosnia to signal Canadian support for compliance with the rules of international humanitarian law.
3. Return the question of the resolution of this conflict to the UN Security Council in accordance with the provisions of the UN Charter.
4. Under the auspices of the UN or the OSCE, support the immediate negotiation of a ceasefire, which negotiations must include the nonviolent elected leaders of Kosovo and the eminent leaders of civil society of both sides. Encourage a thorough discussion of the social, political, religious and economic needs of all parties.
5. Encourage the use of peacekeeping representatives under the authority of either the UN or the OSCE. Those representatives should involve people from states other than those involved in the bombing and preferably from states maintaining good relations with the peoples of the Balkans.
6. Because the level of human rights violations in Kosovo by the Serbs has reached such a high level, support the call for consideration of an autonomous state for Kosovo. The Supreme Court of Canada in Reference re Secession of Quebec [1998] 2 SCR 217 at para. 138 stated that:

"...the international law right to self-determination only generates, at best, a right to external self-determination in situations of former colonies; where a people is oppressed, as for example under foreign military occupation; or where a definable group is denied meaningful access to government to pursue their political, economic, social and cultural development. In all three situations, the people in question are entitled to a right to external self-determination because they have been denied the ability to exert internally their right to self-determination."

ICJ Press Communiqué

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vene in its internal affairs, the provisions of the Geneva Convention of 1949 and of the Additional Protocol No. 1 of 1977 on the Protection of Civilians and Civilian Objects in Time of War, the 1948 Convention on Free Navigation on the Danube, the International Covenant on Civil and Political Rights, the 1966 International Covenant on Economic, Social and Cultural Rights, and the Convention on the Prevention and Punishment of the Crime of Genocide. Yugoslavia further points out that the activities of the States involved are "contrary to Article 53, paragraph 1, of the Charter of the United Nations".

At a meeting held today, the Court decided that hearings on provisional measures would open on Monday 10 May 1999 at 10.00 a.m. They are expected to last two days.

Vice-President Weeramantry will exercise the functions of the presidency in all ten cases, President Schwebel being a national of one of the Parties.

The full texts of Yugoslavia's Applications and requests for the indication of provisional measures [are] available on the Court's website:

<http://www.icj-cij.org>

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Allan: Please add these page numbers to the Kosovo supplemental material already sent to you by David Wright: "Kosovo The world at a Crossroads"

Page 5 begins "The following excerpts:

Page 6 begins ...interim administration for Kosovo

Page 6 of the main part of the newsletter will be the "Items not found page," which you should also have received from David Wright by now.

The layout of the newsletter is as always for pages 1-8 of the main part of the newsletter (called "Spring 1999"), i.e., two sheets 11 x 17.

The layout of the Kosovo supplement, which is to be collated to the center of the main LSR newsletter), is laid out as follows:

