INTERNATIONAL COURT OF JUSTICE

CASE CONCERNING

THE APPLICATION OF THE CONVENTION
ON THE PREVENTION AND PUNISHMENT
OF THE CRIME OF GENOCIDE

(CROATIA v. YUGOSLAVIA (SERBIA AND MONTENEGRO))

WRITTEN STATEMENT OF THE REPUBLIC OF CROATIA OF ITS OBSERVATIONS AND SUBMISSIONS ON THE PRELIMINARY OBJECTIONS RAISED BY THE FEDERAL REPUBLIC OF YUGOSLAVIA (SERBIA AND MONTENEGRO)

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CHAPTER 1

INTRODUCTION

1.1. On 1 September 2002 the Federal Republic of Yugoslavia (FRY (Serbia and Montenegro)) filed preliminary objections in the *Case concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Croatia v. Yugoslavia). By Order dated 14 November 2002 the Court fixed 29 April 2003 as the time-limit within which the Republic of Croatia could present a written statement of its observations and submissions on the preliminary objections raised by the FRY (Serbia and Montenegro). These Written Observations are submitted pursuant to the Court's Order of 14 November 2002.

1.2. In its Written Observations the FRY (Serbia and Montenegro) puts forward three preliminary objections:

> The First Preliminary Objection is that the Court does not have jurisdiction over Croatia's Application because the FRY (Serbia and Montenegro) only became a party to the Genocide Convention by its accession to that instrument on 12 March 2001, with a reservation as to Article IX;
>
> The Second Preliminary Objection is that Croatia's Application is inadmissible as far as it refers to acts or omissions which occurred prior to 27 April 1992; and
>
> The Third Preliminary Objection is that certain of Croatia's specific Submissions (the requests to submit Mr. Milosevic to trial; to provide information on the whereabouts of missing Croatian citizens; and to return items of cultural property) are inadmissible and moot.

1.3. Croatia considers that the preliminary objections are without merit and should be rejected by the Court. Croatia submits that the Court had jurisdiction over the FRY (Serbia and Montenegro) on 2 July 1999, when Croatia's Application was filed with the Court, and that it continues to have jurisdiction over the FRY (Serbia and Montenegro) in respect of all matters raised in the Application, and in respect of all material times. Croatia further submits that the objections as to admissibility and mootness may be rejected at this preliminary stage; alternatively they should be joined to the

1.8. In the meantime, on 24 April 2001 the FRY (Serbia and Montenegro) had filed an application with the Court instituting proceedings against Bosnia and Herzegovina and requesting the Court to revise the Judgment it had delivered on 11 July 1996 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* (ICJ Reports 1996 (II), p. 595). The application was premised upon the admission of the FRY (Serbia and Montenegro) to the United Nations on 1 November 2000, which the FRY considered to be a "new fact". The application of the FRY (Serbia and Montenegro) specifically made the claim that its admission to the United Nations clarified that prior to that date the FRY (Serbia and Montenegro) was not a member of the United Nations, not a party to the Statute of the Court, and not a party to the Genocide Convention. By its Judgment dated 3 February 2003 the Court ruled that the application of the FRY (Serbia and Montenegro) was inadmissible. Croatia returns below to the significance of this Judgment for the application of the FRY (Serbia and Montenegro) in the present proceedings.

1.9. Finally, with effect from 4 February 2003 the FRY (Serbia and Montenegro) changed its name to Serbia and Montenegro. For ease of reference in this pleading Croatia will hereafter refer to the FRY (Serbia and Montenegro).

CHAPTER 2

THE COURT HAS JURISDICTION OVER THE FRY (SERBIA AND MONTENEGRO) (*RATIONE PERSONAE*)

2.1. The first Preliminary Objection of FRY (Serbia and Montenegro) is that the Court lacks jurisdiction *ratione personae* over the FRY (Serbia and Montenegro). The claim is premised entirely on the argument that the FRY "did not become bound by the Genocide Convention" until 10 June 2001, when its accession to the Convention became effective.[1] The argument is elaborated at some length in Part III of the Preliminary Objections.

2.2. Croatia addressed the question of the Court's jurisdiction over the FRY (Serbia and Montenegro) in Chapter 6 of its Memorial. Croatia there argued that "Croatia and the FRY were both bound by the Genocide Convention on 2 July 1999" (the date of Croatia's Application).[2] The FRY (Serbia and Montenegro) does not challenge that Croatia was bound by the Genocide Convention at that date. As regards the FRY (Serbia and Montenegro) being bound by the Convention at that date, Croatia put its case as follows:

> "With regard to the FRY, the Court has already accepted in its Judgment of 1996 that the FRY was "bound by the provisions of the Convention on the date of the filing of [the Application by Bosnia and Herzegovina], namely on 20 March 1993. Since that Judgment, in April 1999, the FRY has instituted proceedings before the Court against ten States on the basis, *inter alia*, of Article IX of the Genocide Convention. In those proceedings the FRY affirmed before the Court that it ...
>
> > 'is a party to the 1948 Convention on the Prevention and Punishment of the Crime of Genocide'
>
> It cannot therefore be doubted that, as at the date of Croatia's Application to the Court the FRY was bound by the Genocide Convention."[3]

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1 Preliminary Objections, para 3.4.

2 Memorial, para 6.06.

3 *Ibid*, para 6.09.

2.3. Against this background, the claim by the FRY (Serbia and Montenegro) that it was not bound by the Genocide Convention on 2 July 1999 – less than three months after it relied upon the Convention to initiate proceedings against ten NATO States – appears somewhat surprising.

2.4. The explanation is to be found in the change of position adopted by the new government of the FRY (Serbia and Montenegro) from October 2000, when it dropped the position consistently adopted by the previous Government, to the effect that the FRY (Serbia and Montenegro) was the continuation of the SFRY and as such continued as a member of the United Nations and as a party to the Genocide Convention. The new Government adopted a new approach, applied for membership and became a member of the United Nations on 1 November 2000, and subsequently deposited the instrument of accession to the Genocide Convention with effect from 10 June 2001. The act of accession was accompanied by a reservation to Article IX, so that the FRY (Serbia and Montenegro) claims that it "never became bound by Article IX of the Genocide Convention".[4]

2.5. As indicated in paragraph 1.7 above, Croatia objected in a timely fashion to the purported accession and to the reservation.

2.6. The position adopted by the FRY (Serbia and Montenegro) in these proceedings is identical to that which informed its application of 24 April 2001 instituting proceedings against Bosnia and Herzegovina and requesting the Court to revise its Judgment of 11 July 1996. That application was premised upon the admission of the FRY (Serbia and Montenegro) to the United Nations on 1 November 2000, which the FRY (Serbia and Montenegro) considered to be a "new fact" within the meaning of Article 61 of the Court's Statute. In its Application initiating those proceedings the FRY put its argument as follows:

> "After the FRY was admitted as new Member on 1 November 2000, dilemmas concerning its standing have been resolved, and it has become an unequivocal fact that the FRY did not continue the personality of the SFRY, was not a Member of the United Nations before 1 November 2000, was not a State party to the Statute, and was not a State party to the Genocide Convention ..."[5]

Even more specifically – and most pertinently for the present case – the Application by the FRY (Serbia and Montenegro) expressly stated that:

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[4] Preliminary Objections, paras 3.7 and 3.8.

[5] *Application for Revision of the Judgment of 11 July 1996 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, Revision Application of FRY, 24 April 2001, p. 38, para 23.

> "The FRY was not a contracting party to the Convention on the Prevention and Punishment of the Crime of Genocide ... on either 20 March 1993 or at any later moment until the rendering of the Judgment of 11 July 1996."[6]

The position there adopted by the FRY (Serbia and Montenegro) was that its admission to the United Nations was a new fact, such as to require the Court to revise its 1996 Judgment.

2.7. In the course of the oral proceedings the FRY (Serbia and Montenegro) reformulated its arguments as to the existence of new facts. The "two decisive facts" upon which the FRY (Serbia and Montenegro) relied were that

1. the FRY (Serbia and Montenegro) was not a party to the Statute at the time of the Judgment; and
2. the FRY (Serbia and Montenegro) did not remain bound by Article IX of the Genocide Convention continuing the personality of the former Yugoslavia.[7]

According to the Judgment of the Court, "the FRY further stressed at the hearings that these "newly discovered facts" had not occurred subsequently to the Judgment of 1996. In this regard, the FRY states that "the FRY never argued or contemplated that the newly discovered facts would or could have a retroactive effect".[8]

2.8. It is clear that the arguments of the FRY (Serbia and Montenegro) in those proceedings are essentially identical to those it now puts forward in these proceedings. In the Revision Application the Court had to decide, in effect, whether or not the FRY (Serbia and Montenegro) was bound by the Genocide Convention on 20 March 1993 and/or 11 July 1996, as it had previously affirmed in its 1996 Judgment. In relation to the issue of jurisdiction *ratione personae* in the present proceedings the Court has to address the question: was the FRY bound by the Genocide Convention on 2 July 1999? If the FRY (Serbia and Montenegro) was bound by the Convention on 11 July 1996, the FRY (Serbia and Montenegro) would need to establish some intervening development prior to 2 July 1999 for the legal situation on that date to be any different.

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6 *Ibid*, p. 8, para 3(a).

7 *Application for Revision of the Judgment of 11 July 1996 in the Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Bosnia and Herzegovina v. Yugoslavia), Judgment of 3 February 2003, para 19.

8 *Ibid.* para 20.

2.9. The Court's Judgment of 3 February 2003 was clear in rejecting the application of the FRY (Serbia and Montenegro), and upholding its Judgment of 1996, to the effect that the FRY (Serbia and Montenegro) was bound at that date by the Genocide Convention and that the Court exercised jurisdiction over it pursuant to Article IX of the Convention. In relation to the argument of the FRY (Serbia and Montenegro) that it was only "revealed" in December 2000 that it was not bound by the Genocide Convention in 1996, the Court stated:

> "In advancing this argument, the FRY does not rely on facts that existed in 1996. In reality, it bases its Application for revision on the legal consequences which it seeks to draw from facts subsequent to the Judgment which it is asking to have revised. Those consequences, even supposing them to be established, cannot be regarded as facts within the meaning of Article 61 [of the Statute]. The FRY's argument cannot accordingly be upheld."[9]

2.10. The "facts" upon which the FRY (Serbia and Montenegro) relied did not obtain until 1 November 2000, more than a year after Croatia had filed its application in these proceedings. The Court also addressed the implications of General Assembly resolution 47/1, of 22 September 1992, which determined that the FRY (Serbia and Montenegro) "cannot continue automatically the membership" of the former SFRY in the United Nations, and decided that the FRY (Serbia and Montenegro) should apply for membership in the United Nations. In its 2003 Judgment the Court confirmed that at the time Bosnia instituted proceedings against the FRY (Serbia and Montenegro) (on 20 March 1993) and at the time of the Judgment (11 July 1996) "the situation obtaining was that created by General Assembly resolution 47/1."[10] That situation "obtained" until 1 November 2000, when the General Assembly adopted resolution 55/12 admitting the FRY (Serbia and Montenegro) to membership of the United Nations. It therefore cannot be challenged that the legal situation – in particular relating to the question of whether the FRY (Serbia and Montenegro) was bound by the Genocide Convention – was precisely the same on 11 July 1996 and on 2 July 1999, when Croatia filed its Application to the Court. On that date the FRY (Serbia and Montenegro) was bound by the Genocide Convention, and pursuant to Article IX of the Convention the Court had jurisdiction *ratione personae* over the FRY (Serbia and Montenegro).

2.11. Moreover, as the Court makes clear in its Judgment of 3 February 2003, United Nations General Assembly resolution 47/1 did not affect the

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9 *Ibid*, para 69.

10 *Ibid*, para 70.

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> "In advancing this argument, the FRY does not rely on facts that existed in 1996. In reality, it bases its Application for revision on the legal consequences which it seeks to draw from facts subsequent to the Judgment which it is asking to have revised. Those consequences, even supposing them to be established, cannot be regarded as facts within the meaning of Article 61 [of the Statute]. The FRY's argument cannot accordingly be upheld."[9]

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2.11. Moreover, as the Court makes clear in its Judgment of 3 February 2003, United Nations General Assembly resolution 47/1 did not affect the

[9] *Ibid*, para 69.

[10] *Ibid*, para 70.

right of the FRY (Serbia and Montenegro) to appear before the Court, and "[n]or did it affect the position of the FRY in relation to the Genocide Convention".[11] The Court also made it clear that any new fact and the situation resulting therefrom could not have retroactive effect:

> "The Court wishes to emphasize that General Assembly resolution 55/12 of 1 November 2000 cannot have changed retroactively the *sui generis* position which the FRY found itself in vis-à-vis the United Nations over the period 1992 to 2000, or its position in relation to the Statute of the Court and the Genocide Convention."[12]

2.12. In Croatia's view the Court's reasoning is unimpeachable. The reasoning is applicable without distinction to the legal situation governing relations between Croatia and the FRY (Serbia and Montenegro) in the period up to and including 2 July 1999.

2.13. The Court's Judgments of 11 July 1996 and 3 February 2003 confirm that on the date of filing of Croatia's Application instituting these proceedings – 2 July 1999 – the FRY was bound by the Genocide Convention and the Court accordingly had, and continues to have, jurisdiction over the FRY (Serbia and Montenegro) pursuant to Article IX of the Convention.

2.14. It follows that the first preliminary objection of the FRY (Serbia and Montenegro) is without merit and should be rejected by the Court.

[11] *Ibid.*

[12] *Ibid*, para 71.

CHAPTER 3

THE APPLICATION IS ADMISSIBLE IN RESPECT OF ALL ACTS OR OMMISSIONS ALLEGED BY CROATIA, INCLUDING THOSE OCCURRING PRIOR TO 27 APRIL 1992

3.1. The second preliminary objection of the FRY (Serbia and Montenegro) is made in the alternative to the first preliminary objection. It contends that Croatia's Application is inadmissible to the extent that it relates to acts or omissions which occurred prior to 27 April 1992.[1] The FRY (Serbia and Montenegro) considers that it can only be responsible for acts or omissions occurring after it came into existence as a State – on 27 April 1992 – and not for acts or omissions which occurred prior to that date. Specifically, the FRY (Serbia and Montenegro) argues that it cannot be responsible as an entity *in statu nascendi* in the period prior to 27 April 1992, and that it cannot be held responsible by way of any *de facto* identity with the SFRY. Croatia considers that in so far as they concern the Court's jurisdiction, these arguments are without merit and should be rejected by the Court; alternatively that they raise issues of fact and law that go to the merits of the dispute between Croatia and the FRY (Serbia and Montenegro) and cannot be resolved at this preliminary objections stage.

3.2. Croatia notes that the FRY (Serbia and Montenegro) does not claim that all of Croatia's Application is inadmissible on this ground. Its argument is limited only to some of the "gravest incidents" – such as the atrocities in Vukovar and the shelling of Dubrovnik – which occurred between 25 August 1991 and the end of that year. The FRY (Serbia and Montenegro) accepts that it can, in principle, be responsible for acts and omissions occurring after 27 April 1992. There is therefore no claim of inadmissibility as to these matters, which are numerous and are addressed

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[1] Preliminary Objections, paras 4.1-4.36.

in detail in the Memorial.[2] Similarly, the FRY (Serbia and Montenegro) does not assert the inadmissibility of Croatia's claim concerning the failure of the FRY (Serbia and Montenegro) to bring to trial those persons responsible for the acts or omissions occurring prior to 27 April 1992 (as described in Chapters 4 and 5 of Croatia's Memorial) who are known to live in the FRY (Serbia and Montenegro).[3]

3.3. The claim by the FRY (Serbia and Montenegro) as to inadmissibility is therefore very limited in relation to Croatia's Application as a whole. The claim of the FRY (Serbia and Montenegro) as to inadmissibility encompasses only that part of Croatia's Application concerning the direct responsibility of the FRY (Serbia and Montenegro) for acts and omissions occurring prior to 27 April 1992. Even if the claim was successful, which Croatia considers it cannot be, significant parts of Croatia's case would remain before the Court.

3.4. However limited the claim of the FRY (Serbia and Montenegro) may be, it is misconceived and must fail. This is for three main reasons:

- First, the objections raised by the FRY (Serbia and Montenegro) do not relate to the admissibility of the application but rather to the substance and merits, namely whether the FRY (Serbia and Montenegro) is responsible for the acts in question (paras. 3.5-3.9 below);
- Second, in the event that the Court should decide to deal with the issues by way of preliminary objection, it is well-established that the relevant obligations under the Genocide Convention are not temporally limited as the FRY (Serbia and Montenegro) claims (paras. 3.10-3.16 below); and
- Third, the "admissibility" grounds for disputing the responsibility of the FRY (Serbia and Montenegro) are contrived and largely irrelevant, since it is established in general international law that State responsibility cannot be temporally limited in respect of conduct occurring only after a State has been recognised to exist, as the

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2 For numerous examples of acts and omissions that occurred after 27 April 1992, see Memorial, Chapters 4 and 5 which set out incidents of looting and destruction of property, including cultural property, brutal attacks, including rapes and other sexual offences and killings of Croats, forced labour; expulsions and transportation of Croats to concentration camps in Serb-occupied territory or in the FRY itself. E.g. paras 4.03; 4.46, 4.77, 4.90, 4.92, 4.93, 4.114, 4.138, 4.192 for such acts and omissions in E. Slavonia. For acts and omissions in other parts of Croatia see e.g. paras 5.14, 5.27, 5.75, 5.146, 5.147, 5.155, 5.207, 5.209, 5.212, 5.214, 5.220-5.222, 5.233.

3 Memorial, Submissions, 2(a), p. 414.

> FRY claims. Moreover, it is abundantly clear from the Memorial that Croatia's claim does not depend upon some asserted *de facto* identity between the FRY (Serbia and Montenegro) and SFRY, but turns on the degree of control exercised over those persons responsible for the acts and omissions by the entity that became the FRY (Serbia and Montenegro) (paras. 3.17 *et seq.* below).

(1) The Objection of the FRY (Serbia and Montenegro) goes to the merits and does not raise issues of admissibility

3.5. It is apparent that the admissibility challenge of the FRY (Serbia and Montenegro) constitutes an argument as to the merits of Croatia's claim, namely, whether the FRY (Serbia and Montenegro) can be held responsible for acts of genocide committed in Croatia prior to 27 April 1992. This raises questions of fact and law which go to the merits, concerning the establishment of facts and the attribution of responsibility. The issues of attribution are addressed as such by Croatia in Chapter 8 of its Memorial.[4] In that Chapter, and throughout its Memorial, Croatia's position is absolutely clear: the FRY (Serbia and Montenegro) is responsible for violations of the Genocide Convention irrespective of whether they occurred before or after 27 April 1992.

3.6. The Court has long recognised that the merits cannot be addressed at the stage of preliminary objections. The objection of the FRY (Serbia and Montenegro) requires the Court to decide either that the responsibility of a State cannot arise – as a matter of law – in relation to acts or omissions which occurred before that State came into being or, if such responsibility could arise, that it did not do so in this case on the facts. Either of these decisions would be one concerning the merits of Croatia's claim. In either scenario the issues cannot be dealt with at the preliminary objections phase: they require a determination of the legal and factual merits, going to the heart of the case.

3.7. The admissibility of a claim raises distinct issues from those arising in relation to jurisdictional or merits claims. Admissibility is essentially concerned with the appropriateness of adjudication in light of the circumstances of the application. A leading commentator has described the general rule in the following way:

> "In both advisory and contentious cases, it seems, the rule is that the Court is under an obligation to give a decision, whether

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[4] Memorial, paras 8.32 *et seq.*

> judgment or advisory opinion; the exception to the rule is that in certain circumstances it may or must refrain from doing so. What those circumstances are can be defined at least to this extent: if to give the decision would involve the Court in action inappropriate to the exercise of the judicial function, then it must refuse."[5]

The question then would be whether the arguments of the FRY (Serbia and Montenegro) indicate that it might in some way be "inappropriate" for the Court to address the merits of the claims, insofar as they relate to matters occurring prior to 27 April 1992.

3.8. In the practice of the Court only a limited number of factors have been relied upon to decide that it may be inappropriate to consider the merits. These factors concern the nature of the claim, the interests of parties and non-parties concerned, and other related circumstances.[6] They essentially go to judicial propriety.[7] They have included the following considerations:

- whether the decision of the Court would be hypothetical (e.g. *Northern Cameroons case* ICJ Rep. 1963, p. 15);
- whether the question was essentially moot; (e.g. *Nuclear Tests case* ICJ Rep. 1974, p. 327);
- whether the requesting state has a sufficient interest in the subject matter (e.g. *South West Africa cases* ICJ Rep. 1966, p. 6); and
- whether the decision might implicate the legal interests of third States (e.g. *Monetary Gold Removed from Rome in 1943 case* ICJ Rep. 1954, p. 19).

In relation to the admissibility objection of the FRY (Serbia and Montenegro) based upon matters arising prior to 27 April 1992 none of these grounds arises, and none of them is remotely arguable. There is nothing in the second preliminary objection to suggest that the matter in question is moot or hypothetical. There is clearly a dispute between the parties, and a dispute concerning the responsibility of the FRY (Serbia and Montenegro) (directly or indirectly) for acts of genocide perpetrated in

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5 H. Thirlway, "The Law and Practice of the International Court of Justice 1960-1989, (Part Eleven)," 71 *B.Y.I.L.* (2000) 71, at 157.

6 See J. Collier and V. Lowe, *The Settlement of Disputes in International Law*, 1999, pp. 155-161.

7 It is notable that in those cases in which States have sought to advance admissibility challenges largely unrelated to judicial propriety, they have been dismissed: see e.g. *Nicaragua v. US*, ICJ Rep. 1984, p. 392 and *Border and Transborder Armed Actions*, ICJ Rep. 1988, p. 69.

Croatia during a period of time when the Genocide Convention was applicable. There is no argument that Croatia lacks a legitimate interest in the issue. There is no conceivable argument that taking this matter on to the merits would be an inappropriate exercise of the Court's judicial functions.

3.9. Croatia notes that the second preliminary objection of the FRY (Serbia and Montenegro) is not supported by a single authority. The Preliminary Objections are not supported by a single decision of the Court which justifies the argument. This confirms the extent to which the argument as to inadmissibility is misconceived.

(2) The Application of the Genocide Convention is not limited Ratione Temporis

3.10. The argument of the FRY (Serbia and Montenegro) is presented as an inadmissibility challenge, rather than as a jurisdictional challenge. In fact, what the FRY appears to be arguing is that the Court has no jurisdiction *ratione temporis* over acts or events occurring before 27 April 1992, when the FRY (Serbia and Montenegro) came into existence. This argument is equally misconceived and without merit.

3.11. Croatia here addresses this issue briefly, since it has already been fully elaborated in the Memorial.[8] Croatia notes in particular that the FRY (Serbia and Montenegro) has not taken issue with the arguments put forward in the Memorial, and that in its Preliminary Objections it has not sought to re-open the issues decided in 1996 by the Court in the *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. FRY)*.[9]

3.12. In its 1996 Judgment the Court rejected the arguments of the FRY (Serbia and Montenegro) that it was not competent to deal with events occurring prior to 29 December 1992 (when Bosnia and Herzegovina became a party to the Convention). The Court made clear its view that:

> "the Genocide Convention – and in particular Article IX – does not contain any clause the object or effect of which is to limit in such manner the scope of its jurisdiction *ratione temporis*, and nor did the Parties themselves make any reservation to that end, either to the Convention or on the occasion of the signature of the Dayton-Paris Agreement. The Court thus finds that it has jurisdiction in this case to give effect to the Genocide Convention

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8 Memorial, paras 6.13-6.15 and 8.37 *et seq.*

9 ICJ Rep. 1996, p. 595.

> with regard to the relevant facts which have occurred since the beginning of the conflict which took place in Bosnia-Herzegovina. This finding is, moreover, in accordance with the object and purpose of the Convention as defined by the Court in 1951 and referred to above (see paragraph 31 above)."[10]

3.13. It is noteworthy that the Court introduced no temporal limitations to the application of the Genocide Convention or its exercise of jurisdiction under the Convention. The Court confirmed that it had jurisdiction over events occurring prior to 29 December 1992, and did not exclude its jurisdiction over events occurring prior to 27 April 1992. It confirmed the applicability of the Convention to the "relevant facts which have occurred since the beginning of the conflict" (emphasis added), which plainly includes all events including those prior to 27 April 1992. The Court's conclusion is equally applicable to acts and omissions occurring on the territory of Croatia, including in the period prior to 27 April 1992.

3.14. The rationale for the Court's approach was not said to be premised upon the particular circumstances of Bosnia's case or any determination as to the date upon which the FRY (Serbia and Montenegro) came into existence. It derives from the Court's assessment of the fundamental object and purpose of the Convention, namely the elimination of the scourge of genocide. The approach is emphasised by Judge Shahabuddeen in his Separate Opinion, noting that the objections of the FRY (Serbia and Montenegro) would have led to an

> "inescapable time-gap in the protection which the Genocide Convention previously afforded to all 'human groups' comprised in the former Socialist Federal Republic of Yugoslavia"

and that this would not be consistent with the "object and purpose" of the Convention. According to Judge Shahabuddeen, that object and purpose, furthermore, "required parties to observe it in such a way as to avoid the creation of such a break in the protection which it afforded".[11]

3.15. The applicability of the obligations of the Genocide Convention to all events occurring "since the beginning of the conflict" necessarily means that its application is unaffected by formal considerations relating to the proclamation by the FRY (Serbia and Montenegro) of its existence. The Genocide Convention's obligations applied to all parties and governmental authorities for the duration of the conflict.

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[10] *Ibid*, paragraph 34.

[11] *Ibid*, pp. 635-6.

3.16. In light of this conclusion, which is plainly correct in principle, the Genocide Convention must be considered as applicable to all the events that occurred in the former SFRY and to the conflict as a whole. The extent to which the FRY (Serbia and Montenegro) is responsible under the Convention for such of those events as amounted to breaches of the Convention is a question pertaining to the merits of the present case. For the purposes of the Court's jurisdiction, it is sufficient to say that its responsibility cannot be excluded *a priori* by reference to the scope or applicability of the Convention

(3) The Grounds on Which Responsibility is disputed are contrived and irrelevant to the Court's jurisdiction

3.17. The FRY (Serbia and Montenegro) advances two arguments to support its position to the effect that it cannot be held responsible for acts or omissions in Croatia prior to the formal establishment of the FRY (Serbia and Montenegro) on 27 April 1992. The first is a general argument as to the absence of any basis in international law for holding states responsible for acts or omissions prior to the creation of the State concerned. The second is an argument specific to the events, namely, that there was no *de facto* identity between the FRY (Serbia and Montenegro) and the SFRY. Both arguments go to the legal and factual merits and cannot be addressed at the stage of preliminary objections. Nevertheless, it is appropriate to set out Croatia's views – on a preliminary basis – as to their implausibility.

3.18. The arguments are unsustainable for two principal reasons. First, it is generally recognised that under international law responsibility is not limited to acts or omissions occurring only after the formal establishment of a State, but may also extend to conduct prior to that date. This is particularly evident in case of states *in statu nascendi*. There is no reason, in the circumstances of the dismemberment of the SFRY, to dispute the application of that general principle to the present case. Second, it is not the contention of Croatia that there was *de facto* identity between the FRY (Serbia and Montenegro) and the SFRY, as the FRY (Serbia and Montenegro) implies, and the arguments to that effect are largely irrelevant to the issues in question.

(a) The FRY (Serbia and Montenegro) is responsible as a State in statu nascendi for acts of genocide committed in Croatia prior to 27 April 1992

3.19. The FRY (Serbia and Montenegro) offers two alternative arguments to counter the claim of its responsibility as a State *in statu nascendi*. The first is that there is "no established concept of states *in statu nascendi*, and there is no established rule on liability of 'states *in statu nascendi*' in international law". The second is that "the '*in statu nascendi*' concept is misplaced in the context of the dissolution of the SFRY and the emergence of the FRY."[12] Quite apart from the fact that both these arguments plainly pertain to the merits of the case, both are wrong, as will now be demonstrated.

(i) It is well established that a State may be responsible for conduct prior to the formal establishment of the State

3.20. The FRY (Serbia and Montenegro) has noted that the principle relied upon by Croatia is reflected in Article 10 of the ILC's Articles on the Responsibility of States for Internationally Wrongful Acts.[13] The ILC's Articles were adopted after Croatia submitted its Memorial, on 14 March 2001, and have now been taken note of and annexed to General Assembly Resolution 56/83 of 12 December 2001.

3.21. Article 10 (2) provides:

> "The conduct of a movement, insurrectional or other, which succeeds in establishing a new State in part of the territory of a pre-existing State or in a territory under its administration shall be considered an act of the new State under international law."

3.22. As the ILC Commentary makes clear, Article 10(2) was drafted in the light of the "general acceptance" of the principle in international law as reflected in arbitral decisions, State practice and the literature.[14] The principle has broad support.

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12 Preliminary Objections, p. 113.

13 UN Doc. A/CN.4/L.602/Rev.1 (2001).

14 Authorities cited by the ILC Commentary include the arbitral awards in the *Bolivar Railway Co claim* (R.I.A.A. vol. IX, p. 445 (1903) at p. 453), the *Puerto Cabello and Valencia Railway Co. claim* (R.I.A.A. vol. IX, p. 510 (1903) at p. 513), the *French Company of Venezuelan Railroads claim* (R.I.A.A. vol. X, p. 285 (1902) at p. 354), the *Dix case* (R.I.A.A. vol. IX, p. 119 (1902)), and the *Pinson case* (R.I.A.A. vol. V, p. 327 (1928) at p. 353). The principle has been affirmed in the work of the Preparatory Committee for the 1930 Codification Conference and has subsequently been reaffirmed in the case of *Minister of Defence, Namibia v. Mwandinghi* 1992 (2) SA 355, p. 360. It

3.23. The principle is also consistent with the approach taken by the Court in other contexts. In its 1971 *Namibia Opinion*, for example, the Court affirmed that "physical control of a territory, and not sovereignty or legitimacy of title, is the basis of State liability for acts affecting other States".[15] The approach points also to responsibility for acts occurring before formal statehood is declared, as one leading commentary has put it:

> "once statehood is firmly established, it is justifiable, both legally and practically, to assume the retroactive validation of the legal order during a period prior to general recognition as a state, when some degree of effective government existed.... [T]he principle of effectiveness dictates acceptance, for some legal purposes at least, of continuity before and after statehood is firmly established."[16]

3.24. The approach is easily justified. It may often be difficult to put a precise date upon the moment at which a State can be said to exist for purposes of international law, including its responsibility under international law. A formal proclamation, an act of recognition, or admission to membership in an international organisation may provide some evidence, but it is rare for a sufficient consensus of opinion to point decisively towards a particular day. The date on which a State formally declares its own existence should not necessarily be treated as the date upon which its international responsibility may be engaged. If otherwise, one would be conceding to States the possibility of unilaterally changing the scope of their international responsibility by choosing to delay or advance the date upon which, as it were, they 'bring themselves into existence'.

3.25. This factor is especially pertinent in the present case. The formal "proclamation" creating the FRY (Serbia and Montenegro) on 27 April 1992 did not create a State out of thin air. Rather, it formalised a set of social, economic and political arrangements which were, at that time, already largely in place, and which corresponded to the actual control that had already been exercised by the incipient government over the territory in question. In other words, the proclamation formalised a pre-existent situation. It would be wrong to take that date as the moment at which

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also finds analogous recognition in the cases of *Irish Free State v. Guaranty Safe Deposit Co.* Sup. Ct. NY County, May 1927, A.D. 1925/26, Case No. 77, p. 100 and *Fogarty and Others v. O'Donoghue and Others* Sup. Ct. of the Irish Free State (17 Dec. 1925) A.D. (1925-6) Case No. 76, p. 98 (which itself followed an earlier string of cases including *King of the Two Sicilies v. Wilson* (1851) 1 Simon 301; *U.S.A. v. Prioleau* (1865) 35 L.J.Ch. 7; 2 H and M 559; *U.S.A. v. McRae* (1869) L.R. 8 Eq. 69; *Republic of Peru v. Dreyfus Bros. & Co.* (1888) 38 Ch. D. 348.

15 ICJ Rep. 1971, p. 54, para 118.

16 I. Brownlie, *Principles of Public International Law*, 5th ed., 1998, pp. 77-78.

international responsibility could be engaged and attributable to the FRY (Serbia and Montenegro). That responsibility should, rather, date from the moment at which the organs of what was later to become the FRY (Serbia and Montenegro) had cemented their separate existence from the rest of the SFRY and were engaged in activities which were of potential relevance at the international level. As indicated in the Memorial, that had plainly occurred well before 27 April 1992. After that date the persons responsible for the entity which became the FRY (Serbia and Montenegro) were directly involved in the acts and omissions on the territory of Croatia which gave rise to Croatia's Application, as Croatia's Memorial demonstrates.[17]

3.26. Croatia appreciates that to a significant extent these are questions of fact which are properly to be addressed at the merits phase. As to these facts the evidence put forward by Croatia is compelling, and has not been challenged by the FRY (Serbia and Montenegro). Since Croatia filed its Memorial further evidence has emerged (in the course of the ICTY proceedings involving Mr Milosevic) confirming the material and arguments put forward in Croatia's Memorial, and further demonstrating the direct involvement of Serbian authorities in those acts and omissions. The following items are put forward solely by way of example at this stage:

- The evidence of Milan Babic, who was the Prime Minister of the SAO Krajina government in 1991, which demonstrates the close ties between SAO Krajina, its 'government' and military units and the Serbian Army, Ministry of Defence, Ministry of the Interior and other Ministries of the Government of Serbia. He confirms *inter alia* that Serbia provided the "Serbian districts in Croatia" with military assistance in the form of funds, materials and equipment; that the JNA acted together with the SAO Krajina TO in the "defence" of certain municipalities; that the command structure of the armed factions in the area was run in parallel and "at the top of both lines was Slobodan Milosevic;" and that Serbian laws were applied in SAO Krajina and not the laws of Croatia. According to the witness, from August 1991, the JNA played the "command role" in "joint operations."[18]
- The evidence of Aleksander Vasiljevic, who was a Major General, in the SSNO (The Federal Secretariat for People's Defence), and from July 1990 to May 1992 was first Deputy, and then head of Security Administration,

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[17] Memorial, paras 8.32 *et seq.*

[18] See Annex 5: Evidence of Milan Babic in proceedings before the International Criminal Tribunal for the former Yugoslavia, 19-21 November and 9 December 2002 (Extracts).

when he was pensioned off prematurely. In April 1999 he was appointed deputy head of the Army of Yugoslavia, a post he held until March 2000 when he was appointed advisor for security to the chief of the General Staff of the army, being pensioned from 31 December 2000. His testimony demonstrates *inter alia* the role and position of the JNA *vis a vis* the Territorial Defence; the JNA and its role in Croatia, including its role in Vukovar; the arming of Serbs in Croatia and the "financing" of the SAO Krajina "army" by Yugoslavia; and.[19]

- The evidence of Dragan Vasiljkovic, which demonstrates the close relationship and command structures of the JNA, the TO in the Krajina, and "volunteers".[20]

3.27. From October 1991 to 22 December 1991 Mr Milosav Dordevic was Chief of the Co-ordination Group for the SAO Krajina and worked for the Minister of Defence of Serbia. He was able to witness first hand the close connections between the Serbian leadership and the acts which occurred in Croatia in the autumn of 1991. In his Witness Statement in proceedings before the ICTY he confirms that the Presidency of the SFRY was, by October 1991, merely a "Rump Presidency".[21] He confirms that the Republics of Serbia and Montenegro were ordered by the Rump Presidency to provide "material support" for the JNA,[22] that logistical support was provided by the rump SFRY Federal Secretariat of Defence TO,[23] and that there were close ties between the Serbian Ministry of Defence and the TO of the SAO Krajina from the second half of 1991 onwards,[24] and between the Co-ordination Group of the Serbian Ministry of Defence and the TO of the SAO Krajina.[25] Mr Dordevic's witness statement provides clear evidence that the conduct of *inter alia* the Republic of Serbia is properly to be considered an act of the FRY, which was proclaimed from 27 April 1992.

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19 See Annex 6: Evidence of Aleksander Vasiljevic in proceedings before the International Criminal Tribunal for the former Yugoslavia, February 2003, (Extracts)

20 See Annex 8: Evidence of Dragan Vailjković in proceedings before the International Criminal Tribunal for the former Yugoslavia, February 2003, (Extracts).

21 See Annex 10: Witness Statement of Milosav Dordevic in proceedings before the International Criminal Tribunal for the former Yugoslavia, 6 March 2003 (Extracts), para 22.

22 *Ibid*, para 24.

23 *Ibid*, para 31.

24 *Ibid*, paras 32-42.

25 *Ibid*, paras 43-46.

3.28. Newly available evidence also confirms the facts put forward by Croatia in its Memorial showing that the Republic of Serbia and/or the rump SFRY provided financial and material support to Serb controlled districts in Croatia as early as 1991. That support was directed towards Serb military units as well as Serb civilian government organs that were established in those areas, and took the form of financial assistance, the provision of military equipment, food, personnel and expert assistance. The evidence strongly indicates that the funding for the Army of the Republika Srpska Krajina emerged from a single financing plan for all three Serb armies, the JNA (later the VJ), the Army of the Republika Srpska Krajina and the Army of the Republika Srpska. This is confirmed and set out in great detail in the Second Expert Report of Morten Torkildsen prepared in *Prosecutor v Slobodan Milosevic*, in proceedings before the ICTY.[26] His Report states clearly:

> "The accused Milosevic was the President of the Republic of Serbia from 1990-1997. According to documents obtained by [the Office of the Prosecutor], the government institutions of the Republic of Serbia provided and/or facilitated the provisions of the materials and funding needed by the Serb controlled districts during 1991 and 1992."[27]

The documentary evidence upon which Mr Torkildsen relies shows that as early as 18 September 1991 the SAO Krajina was requesting – and obtaining – large quantities of ammunition, equipment and supplies from the Minister of Defence for the Republic of Serbia. Mr Torkildsen is unequivocal in his conclusions:

> "These documents demonstrate that during the time period [of 1991 and 1992], the highest political and military leaders of the Republic of Serbia were closely involved in decisions to provide financing and materials to the Serb controlled districts in Croatia. [...] The President of the Republic of Serbia, the accused Milosevic, was personally involved in decisions to provide support to the Serb controlled districts in Croatia."[28]

3.29. To conclude, having regard to the findings of the Court in its 1996 judgment as to the applicability of the Genocide Convention and to the claims and evidence adduced by Croatia, the Court has jurisdiction to determine whether there was a breach of the Convention as a result of any

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[26] See Annex 11: Second Expert Report of Morten Torkildsen in proceedings before the International Criminal Tribunal for the former Yugoslavia (without Confidential Annex), 18 November 2002, at paras 5-10.

[27] *Ibid*, para 89.

[28] *Ibid*, para 92.

acts occurring during the conflict, whether they occurred before or after 27 April 1992, and Croatia's claims in this regard are admissible. All remaining issues concern the merits of the present case.

(ii) The in statu nascendi principle is fully applicable to the case of the FRY (Serbia and Montenegro)

3.30. The FRY (Serbia and Montenegro) claims that "the concept of states in *statu nascendi* is evidently not appropriate for this case".[29] Quite apart from the point that this issue evidently relates to the merits of the claim, the argument of the FRY (Serbia and Montenegro) does not benefit from any international legal justification, and is factually implausible.

3.31. The primary basis for this contention by the FRY (Serbia and Montenegro) is that the principle reflected in Article 10 of the ILC Articles on State Responsibility does not correspond to the facts or events leading to the establishment of the FRY (Serbia and Montenegro). The FRY (Serbia and Montenegro) suggests that Article 10 concerns only the position of "liberation or insurrection movements fighting for independence and eventually gaining control over a territory, which is a radically different setting from the context of the dissolution of the SFRY".[30] In support of this thesis it claims that there was no movement whose objective was to create the FRY (Serbia and Montenegro) within its present borders, but rather the ambitions of those concerned were more diverse (the creation of a Greater Serbia or a Serbian Krajina). It is evident here that the FRY (Serbia and Montenegro) is seeking to draw several fine distinctions based essentially on questions of fact and appreciation, in a context in which such distinctions are totally inappropriate. It is also evident that the argument raises issues of fact and law that go to the merits of the dispute and cannot be addressed at the preliminary objections phase.

3.32. In any event, it is evident that the phrase "insurrectional movement" was not intended to be understood in the narrow sense taken by the FRY (Serbia and Montenegro). The Commentary to Article 10 states that:

> "A comprehensive definition of the types of groups encompassed by the term "insurrectional movement" as used in article 10 is made difficult by the wide variety of forms which insurrectional movements may take in practice, according to whether there is relatively limited internal unrest, a genuine civil war situation, an

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[29] Preliminary Objections, p. 94.

[30] *Ibid.* pp. 96-7.

3.37. What matters, for purposes of applying the principle, is that the movement is ultimately cemented in the establishment of a new State and in which there is sufficient continuity in terms of personnel and organisation between the movement itself and the subsequent government.

3.38. The emphasis, in other words, is upon the factual connection between the movement and the subsequent formation of a new State. This is underscored in paragraph 4 of the Commentary which points out that:

> "where the movement achieves its aims and either installs itself as the new government of the State or forms a new State in part of the territory of the pre-existing State... it would be anomalous if the new regime or new State could avoid responsibility for conduct earlier committed by it."[35]

3.39. As the Commentary indicates, it would be "anomalous" to preclude the responsibility of the FRY (Serbia and Montenegro) for conduct committed or authorised by the persons who went on to become the administration and officials of the State which emerged after 27 April 1992 as the FRY (Serbia and Montenegro). As Croatia makes clear in its Memorial, the FRY explicitly recognised the links between the former SFRY's state administration and officials of the Socialist Republic of Serbia and Socialist republic of Montenegro.[36] The FRY (Serbia and Montenegro) does not deny that these were the same people, and that they were carrying out the same policies. Nor has the FRY (Serbia and Montenegro) challenged the list of leading political and military figures illustrative of the personal continuity and connections between mid-1991 and the date upon which Croatia filed its Application, on 30 July 1999. That list may be found in Appendix 8, in Volume 5 of the Memorial.

3.40. In the context of the facts adduced by Croatia concerning the *de facto* assumption of governmental powers by the Serbian leadership, including control over the JNA and Serb paramilitary groups, there was a "seamless continuity in policy and practice on the part of the Serbian authorities located in Belgrade".[37] As the Croatian Memorial makes clear:

> "by [mid-1991] the only organised and functioning authorities on the territory of the former SFRY which possessed capacity to assume the responsibilities imposed by the Genocide Convention were the authorities of the six constituent Republics of the former

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35 ILC Commentary, para 4.

36 Memorial, para 8.45.

37 *Ibid*, para 8.43.

> SFRY. The process of dissolution was formally complete when the last successor state organised itself as a new State."[38]

The newly available evidence from the ICTY which is referred to above merely serves to confirm this point. The FRY (Serbia and Montenegro) cannot plausibly contend that it cannot be responsible – as a matter of legal principle – for acts committed, authorised, or encouraged by its government prior to 27 April 1992 because the SFRY only formally ceased to exist once the authorities in Belgrade had declared the existence of a new Federal Republic of Yugoslavia. The FRY's arguments are inconsistent with its insistence at that time (and up until October 2000) that it was constitutionally and politically the continuation of the former SFRY. Even if it is now accepted that there was no formal legal continuity between the SFRY and the FRY (Serbia and Montenegro) (a position which Croatia has consistently maintained), this does not displace the obvious inference that there was considerable *de facto* continuity in personnel and policies between a number of significant organs of the SFRY once they had fallen into the hands of the Serbian leadership and those of the FRY (Serbia and Montenegro) following its formal creation in April 1992.

(b) Croatia relies upon the control exercised by the Serbian Leadership over those responsible for the atrocities in question

3.41. The second ground upon which the FRY (Serbia and Montenegro) denies the "admissibility" of Croatia's claims as regards events prior to April 1992 is on the basis that there is no *de facto* identity between the FRY and the SFRY. As noted already, it is Croatia's primary submission that this question pertains to the merits of the present case and does not affect either the Court's jurisdiction over, or the admissibility of, the claim. Nonetheless, since the FRY (Serbia and Montenegro) spends a considerable amount of time on such questions in its Preliminary Objections, Croatia will respond directly to these arguments. It does so in the interests of responsiveness and without prejudice to its primary submission.

3.42. The FRY (Serbia and Montenegro) presents three arguments in support of its argument: 1) that the dissolution of the SFRY was an extended process that was only completed in July 1992; 2) that the key offices of the SFRY were not held by Serbs; and 3) that the ethnic or territorial origin of the office holders does not support the allegation of *de facto* identity of the SFRY with the FRY (Serbia and Montenegro).

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[38] *Ibid*, para 8.44.

3.43. The FRY (Serbia and Montenegro) misunderstands or misconceives Croatia's case. Croatia does not argue that there is *de facto* identity between the SFRY and the FRY (Serbia and Montenegro). Croatia's consistent position has been that the FRY (Serbia and Montenegro) is a successor State, alongside the other four successor States to the former SFRY. This position is now accepted by the FRY (Serbia and Montenegro). Beyond this, Croatia considers that during the events arising within the former SFRY after April 1991, the Serbian nationalist movement led by President Milosevic took control of several of the most significant political and military organs of the former SFRY including, most importantly, the JNA. Already by April 1991 the process of taking control of certain political and military organs of the SFRY had begun, so that these organs no longer represented the Federation as a whole, and could no longer be regarded as organs of the SFRY as such, which was in the process of dissolution and dismemberment. These organs became a *de facto* administration of Serbia, which formalised its position as the FRY (Serbia and Montenegro) after 27 April 1992. Croatia has provided ample evidence in its Memorial in support of this argument.[39] Since the Memorial was filed further evidence has emerged in support of Croatia's argument, in the proceedings before the ICTY in relation to Mr Milosevic. One example of such evidence may be found in the evidence provided by Ambassador Herbert Okun of the US Foreign Service.[40]

3.44. Croatia and the FRY (Serbia and Montenegro) do not appear to disagree that the dissolution of the SFRY was an extended process, or that its completion was confirmed by the Badinter Commission on 4 July 1992 (Opinion No. 8). The parties disagree, however, on the implications to be drawn from this process, which the Badinter Commission had already confirmed to be underway by 11 January 1992 (Opinion No. 1). The FRY (Serbia and Montenegro) considers that until the proclamation of the dissolution of the SFRY any act performed by individuals in the name of the SFRY may be attributable only to that entity. This ignores the facts that well before April 1992 the territory of the former SFRY had been partitioned and the Serbian leadership had effectively assumed control of the principal organs of the former SFRY. Croatia considers that the Badinter Commission merely declared and confirmed that which had already occurred.

3.45. The FRY (Serbia and Montenegro) seeks to shift the burden of responsibility on to an extinct State, the SFRY. This obscures the fact that the personnel controlling the relevant organs in the interim period

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[39] See e.g. Memorial, paras 2.105 - 2.112 and paras 3.02-3.03.

[40] See Annex 9: Evidence of Herbert Okun in proceedings before the International Criminal Tribunal for the former Yugoslavia, 26-28 February 2003, (Extracts).

subsequently assumed the same or similar positions in the government of the newly established FRY (Serbia and Montenegro). And it creates a gap in the protection afforded by the Genocide Convention, wholly inconsistent with the Court's 1996 judgment in *Bosnia and Herzegovina v. FRY*.[41]

3.46. The second and third arguments of the FRY (Serbia and Montenegro) concern the nationality of the persons that controlled the relevant organs (and in particular the JNA). These arguments are fully refuted by the evidence set forth in Croatia's Memorial,[42] which the FRY (Serbia and Montenegro) does not challenge. Once again, of course, they go to the merits of arguments as to control and attribution, and cannot be addressed at the preliminary objections phase of these proceedings. In any event, the Court has dealt directly with this point in its 1996 Judgment on Jurisdiction and Admissibility in *Bosnia and Herzegovina v. FRY*:

> "As regards the question whether Yugoslavia took part – directly or indirectly – in the conflict at issue, the Court would merely note that the Parties have radically differing viewpoints in this respect and that it cannot, at this stage in the proceedings, settle this question, which clearly belongs to the merits."[43]

The situation in respect of this application is no different.

3.47. Two points should, however, be made even at this stage. First, the FRY (Serbia and Montenegro) focuses upon organs whose functioning is wholly irrelevant to the claims at hand. No one has ever claimed that the SFRY Constitutional Court or the SFRY's ambassadors abroad were directly or indirectly involved in the acts or omissions which occurred on the territory of Croatia in the period after September 1991, or that their conduct has anything to do with the commission of acts amounting to genocide on the territory of Croatia.[44]

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41 ICJ Reports 1996 (II), p. 595.

42 Memorial, e.g. paras 2.105-2.112 and paras 3.02-3.03.

43 ICJ Rep. 1996, p. 595, para 31.

44 The FRY (Serbia and Montenegro) is highly selective in its choice of organs. It does not, for example, consider the leadership or affiliation of those JNA forces that were actually operating within Croatia at the relevant times, and it does not challenge the extensive evidence put forward by Croatia that those forces were essentially controlled by the Serbian leadership in Belgrade: Memorial, Chapter 3. Rather, the FRY (Serbia and Montenegro) focuses on those organs – such as the foreign ministry and the Constitutional Court – which are in no way implicated in the atrocities in question. Even admitting that the Constitutional Court did continue to function during that period, and even if its concern was to protect the constitutional system of the SFRY, this provides no assistance as to whether the FRY is responsible for acts of the JNA in Croatia at the time, or whether it actually controlled other significant organs of the SFRY. It is pertinent to note, in that regard, that the FRY adduces no evidence as

3.48. Second, that in choosing to focus upon those who were nominally in positions of authority, the FRY (Serbia and Montenegro) fails to reflect the realities of the situation, namely that in many cases control was actually exercised by other agents – agents who were, as Croatia has shown, acting on behalf of the Serbian nationalist movement and who were later to be associated directly with the formation of the FRY (Serbia and Montenegro). It is true that, formally speaking, at least two important federal positions were occupied by Croats (Mr Stjepan Mesić as President of the Presidency and Mr Ante Marković as Federal Prime Minister). It is equally apparent, however, that they had been stripped of all effective power by the middle of 1991, and in particular, their control over the JNA itself, as is fully outlined in the Memorial.[45] Their absence of control over the JNA is illustrated by the rocket attacks on the residence of the Presidency which occurred at Banski dvori on 7 October 1991.[46] It is notable that the FRY (Serbia and Montenegro) does not dispute the Croatian account of events as set forth in the Memorial.

3.49. Furthermore, the fact that, for purposes of diplomacy, the President of the SFRY still participated in meetings with representatives of the EC and others, or that some States still persisted in the view that the SFRY could be held together politically (as pointed out in the Preliminary Objections of the FRY (Serbia and Montenegro), pp. 101-3) is irrelevant. It has little or no bearing upon the realities of the situation (as evidenced by, for example, the EC's Declaration of 5 October 1991 stating that EC Ministers were not prepared to acknowledge decisions taken by a body which could not claim to speak for the whole of Yugoslavia)[47], and cannot detract from the facts that they had effectively no control over the conflict as it spread from one part of the SFRY to another, and that the JNA was ubiquitously involved in the conflict and in the genocidal acts which took place. The FRY (Serbia and Montenegro) does seem to admit, nevertheless, that even the more remote organs of the SFRY such as the personnel in the foreign missions and the Head of the SFRY mission to the UN in New York were replaced in 'early 1992', and in many cases before the FRY (Serbia and Montenegro) itself came into existence. This is another example of the process whereby organs of the SFRY were being systematically taken over by the Serb leadership – a process which, naturally, could not be achieved at a single moment in time and which in fact had been taking place for some considerable period.

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regards the extent to which the judgments of the Constitutional Court were respected or complied with.

45 Memorial, paras 2.105-2.112.

46 See newspaper articles from *Slobodna Dalmacija* (8 October 1991) and *Večernji list* (8 October 1991), Annex 7.

47 See Annex 12, EC Declaration concerning the SFRY Presidency, adopted at the Informal meeting of Ministers for Foreign Affairs Haarzuilens, 5 October 1991.

3.50. Despite the limited assertions and obfuscation of the FRY (Serbia and Montenegro) it is apparent that most of the evidence in Croatia's Memorial is substantially unchallenged by the FRY (Serbia and Montenegro). In particular, it does not dispute that the JNA was effectively controlled by the Serbian leadership (simply referring to the fact that the President (Stepjan Mesic) was formally and nominally the Commander in Chief). It does not dispute, for example, that organs and institutions of the former SFRY were ultimately taken over by Serbs, but simply refers to the fact that in some cases this did not occur until the beginning of 1992 (not, it will be noted, 27 April 1992). It provides very little evidence, furthermore, to dispute Croatia's allegations to the effect that the JNA itself was responsive to the Serbian leadership's control. In sum, there is little in the Preliminary Objections of the FRY (Serbia and Montenegro) which undermine the essential facts as presented by Croatia which point to its responsibility for the atrocities committed in the territory of Croatia.

3.51. Without wishing to labour the point, Croatia would again emphasise that all of these matters go to issues which cannot be properly addressed at the preliminary objections stage since they involve detailed issues of fact and since they plainly pertain to the merits.

(c) The Court has Jurisdiction in respect of the failure of the FRY (Serbia and Montenegro) to prevent and punish the violations of Articles II and III of the Convention, whenever they occurred

3.52. The claims of Croatia encompass the failure of the FRY (Serbia and Montenegro) to prevent and punish violations of Articles II and III of the Genocide Convention.

3.53. As Croatia's Memorial makes clear,[48] responsibility for violations of the Genocide Convention is imputed to the FRY (Serbia and Montenegro) on two main grounds. First, the genocidal acts in question are attributable to the FRY (Serbia and Montenegro).[49] Second, the FRY (Serbia and Montenegro) failed to prevent and punish violations of Articles II and III of the Genocide Convention.[50]

3.54. Article I of the Genocide Convention obliges States to take all steps within their power to ensure those within their jurisdiction, or subject to their control, do not commit acts of genocide. This imposes a positive obligation upon states to take the necessary steps not only to prevent acts of

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[48] Memorial, paras 8.32-8.70.

[49] *Ibid*, paras 8.32-8.55.

[50] *Ibid*, paras 8.56-8.70.

genocide taking place, but also to punish perpetrators. As Article IV of the Convention states:

> "Persons committing genocide or any of the other acts enumerated in Article III shall be punished, whether they are constitutionally responsible rulers, public officials or private citizens."

3.55. Despite the terms of Article IV, the FRY (Serbia and Montenegro) has taken no steps to try and punish perpetrators of any of the genocidal acts described in the Memorial. The acts in question were genocidal in character, whether or not the FRY (Serbia and Montenegro) was in existence or was legally responsible for them at the time they occurred. The impending dissolution of the SFRY did not render the conduct innocent, or change its character as criminal and genocidal: as this Court emphasised in 1951 and again in 1996, the prohibition of genocide is universal in character. The FRY (Serbia and Montenegro) failed to take any steps to try and punish the perpetrators of genocide, despite the fact that most of them were and remain known to the authorities and were and are on its territory or on territory under its control. This extends not only to those in high position, but also private persons (acting in the paramilitary groups), their leaders, and officers and soldiers of the JNA.

3.56. Articles I and IV of the Genocide Convention impose continuing obligations on States parties, such that an obligation lies on each state party to bring perpetrators of genocide to justice irrespective of the time at which the conduct in question took place. Those obligations continue to be violated each day the FRY (Serbia and Montenegro) fails to take steps to prosecute and punish those it knows to be responsible for the acts in question. Thus, even if the Convention did not give rise to the direct responsibility of the FRY (Serbia and Montenegro) for the conduct in question by reason of the fact that it took place prior to the formal creation of the FRY (Serbia and Montenegro) in April 1992, this does not affect its responsibility subsequent to that date for failing to bring the perpetrators of those acts to justice.

CHAPTER 4

THE APPLICATION IS ADMISSIBLE AND IS NOT MOOT IN RELATION TO THE RELIEF SOUGHT IN RESPECT OF SUBMISSON TO TRIAL, MISSING PERSONS AND CULTURAL PROPERTY

4.1. The third preliminary objection of the FRY (Serbia and Montenegro) (which is made in the alternative to the first preliminary objection) is that parts of Croatia's claims are inadmissible and moot.[1] This claim is made in relation to Croatia's requests relating to:

- the submission to trial of certain persons within the jurisdiction of the FRY (Serbia and Montenegro);
- the provision of information as to the whereabouts of missing Croatian persons; and
- the return of cultural property.

For the reasons set out below Croatia submits that these claims are (with one exception) neither inadmissible nor moot and should be rejected by the Court.

SUBMISSION TO TRIAL OF RESPONSIBLE PERSONS

4.2. By its Submission 2 (a) Croatia requests the FRY (Serbia and Montenegro)

> "to take immediate and effective steps to submit to trial before appropriate judicial authority, those citizens or other persons within its jurisdiction who are suspected on probable grounds of having committed acts of genocide as referred to in paragraph (1) (a), or any of the other acts referred to in paragraph (1) (a) in particular Slobodan Milosevic the former President of the Federal Republic of Yugoslavia, and to ensure that those persons are duly punished for their crimes."

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1 Preliminary Objections, paras 5.5; 5.11; and 5.18.

In relation to this request the FRY (Serbia and Montenegro) makes two arguments. The first is that the Genocide Convention does not permit a claim to be made in respect of the responsibility of the FRY (Serbia and Montenegro) for a violation of the Convention, and that criminal proceedings against individuals are the appropriate basis for Croatia's claims. The second argument of the FRY (Serbia and Montenegro) is that Slobodan Milosevic has now been brought before the International Criminal Tribunal for Former Yugoslavia (ICTY) and that the request no longer has any object. Croatia submits that both arguments are without merit, unsupported by any authority and should be rejected by the Court.

4.3. With respect to the first argument, the full title of the Genocide Convention makes it clear that its purpose is the 'prevention and punishment' of genocide. Article I imposes a positive obligation on States parties to achieve this objective, and to that end requires criminal proceedings to be initiated against those accused of genocide. By Article VI such proceedings may take place before a competent tribunal of the State where the crime was committed (in this case, Croatia) or a competent international tribunal (in this case, the ICTY).[2] Croatia's case, and specifically this submission, is concerned with those persons who have not been surrendered for trial in Croatia or to the ICTY.

4.4. In the *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide,* Yugoslavia conceded that Article XI of the Genocide Convention covers 'the responsibility flowing from the failure of a State to fulfil its obligations of prevention and punishment as contemplated by Articles V, VI and VII.'[3] The Court accepted this proposition and made it clear that Article IX of the Genocide Convention 'does not exclude any form of State responsibility.'[4] There can be no doubt that Croatia's Application falls precisely within the framework envisaged by the Court. Specifically, it is Croatia's case that the failure of the FRY (Serbia and Montenegro) to submit all relevant persons for trial by a competent tribunal gives rise to its international responsibility under the Genocide Convention. In light of the Court's approach in its 1996 Judgment the position of the FRY (Serbia and Montenegro) is untenable.

4.5. With respect to the second argument, Croatia acknowledges the positive steps which have been taken by the FRY (Serbia and Montenegro)

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2 Statute of the ICTY, Articles 4 and 9. The ICTY has superiority over other tribunals with concurrent jurisdiction (Statute of the ICTY, Article 9 (2)).

3 *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide,* (Bosnia and Herzegovina v Yugoslavia) Preliminary Objections, 1996 ICJ Reports, p. 616, para 32.

4 *Ibid.*

to submit Slobodan Milosevic to the ICTY. Croatia also acknowledges with appreciation that the FRY (Serbia and Montenegro) has agreed an Act of Cooperation with the ICTY and that it has transferred certain other persons to the ICTY. In respect of these persons Croatia accepts that its submission 2(a) is now moot.

4.6. However, submission 2(a) was not directed solely to Mr Milosevic. It refers to Mr Milosevic "in particular". There are a regrettably large number of other persons who are understood to be within the jurisdiction of the FRY (Serbia and Montenegro) and who have not been handed over to the ICTY, or submitted to trial in the FRY (Serbia and Montenegro) or handed over to Croatia, in respect of acts or omissions giving rise to genocidal acts occurring in the territory of Croatia and which are the subject of these proceedings. These persons include JNA officers, amongst the clearest examples being the failure to punish Major Veselin Slivancanin for his conduct at the Vukovar hospital in November 1991, and the other JNA officers responsible for the JNA's offensive and "liberation" of Vukovar, who were decorated rather than punished. In respect of these persons, and others identified in the Memorial, Croatia's submission 2 (a) is certainly not moot.

4.7. The British-English meaning of the word 'moot' is that something is arguable or debatable, while the American-English meaning is that it is 'deprived of practical significance, made abstract or purely academic.'[5] It is in this latter sense that the Court has considered the question of mootness.[6] Thus mootness signifies that 'the circumstances are such that whichever way that question is answered, the result will be unaffected.'[7]

4.8. An issue may become moot in a number of ways. For example, if the Applicant State claims jurisdiction on a number of different grounds, once it has been established on one ground, to the extent that the other suggested grounds cover the same dispute they become moot.[8] An objection to

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5 Shabtai Rosenne, *The Law and Practice of the International Court* (2nd Rev. Ed 1985) 309, note 1.

6 Judge Fitzmaurice considered the American usage to denote "a case or claim which is or has become pointless and without object." *Northern Cameroons* (Cameroon v UK) 1963 ICJ Rep. p. 97, footnote 1 (Indv. Op. Judge Fitzmaurice).

7 Hugh Thirlway, 'Reflections on the Articulation of International Judicial Decisions and the Problem of "Mootness"', in Ronald St John Macdonald (ed.), *Essays in Honour of Wang Tieya* (1994) 789, 803.

8 Conversely, "once it is established that the request for revision fails to meet one of the conditions for admissibility, the Court is not required to go further and investigate whether the other conditions are fulfilled." *Application for Revision and Interpretation of the Judgment of 24 February 1982 in the Case concerning the Continental Shelf* (Tunisia v Libyan Arab Jamahiriya) 1985 ICJ Rep. p. 207, para 29.

jurisdiction may be moot if the claim is held to be inadmissible.[9] Another basis for mootness is where the Court has before it cumulative questions and the answer to a subsequent question is dependent upon a particular answer to a prior question. The latter question becomes moot if that answer is not given.[10]

4.9. In the *Northern Cameroons Case* the Court considered the issue of mootness in the context of its judicial function. The Court held that its function is to state the law 'only in connection with concrete cases where there exists at the time of the adjudication an actual controversy involving a conflict of legal interests between the parties.' It is plain that in respect of the persons identified at paragraph 4.6 above there is an 'actual controversy'. The Court's approach is that its judgment 'must have some practical consequence in the sense that it can affect existing legal rights or obligations of the parties, thus removing uncertainty from their legal relations,'[11] and that it should be able to render a judgment which is 'capable of effective application.'[12]

4.10. In *Northern Cameroons*, the termination of the Trusteeship Agreement (the reason why any decision of the Court would have no potential practical effect) had occurred even before Cameroon's commencement of judicial proceedings, and had coincided with the definitive and irreversible transfer of the territory concerned to Nigeria, a transfer which corresponded to the expressed wishes of the population concerned. This is very far removed from the present situation, where issues of responsibility remain live and issues of trial and punishment are pressing. Nothing associated with the formal proclamation of the FRY on 27 April 1992 had "definitive legal effect" so far as the observance of the Genocide Convention is concerned. Nor is it the case that the grounds for the request have ceased to exist after the proceedings have commenced.[13] The majority of the Court found that this had occurred in the *Nuclear Tests*

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9 *Interhandel* (Switzerland v United States) 1959 ICJ Rep. p. 29 (the invocation of the Connally reservation was moot until the successful exhaustion of local remedies).

10 This was the position of the Arbitral Tribunal in the *Arbitral Award of 31 July 1989* (Guinea-Bissau v Senegal) 1991 ICJ Rep. p. 60, para 17; see Hugh Thirlway, "Reflections on the Articulation of International Judicial Decisions and the Problem of 'Mootness'", in Ronald St John Macdonald (ed.), Essays in Honour of Wang Tieya, 789, 793.

11 *Northern Cameroons* Case (Cameroon v UK) 1963 ICJ Rep. pp. 33-34.

12 Shabtai Rosenne, *The Law and Practice of the International Court* (2nd Rev. Ed 1985) 310.

13 *Prince of Pless Case* (Germany v Poland), Request for Interim Measures, PCIJ Ser. A/B:54, 150, 11 May 1933. The Court noted both that the grounds for the Application had ceased to exist and that the parties had agreed a settlement and thus to withdrawal of Germany's request.

case, ruling that in light of a unilateral declaration by France (to halt atmospheric nuclear testing) 'the claim advanced by Australia no longer has any object.' According to the Court 'any further finding would have no raison d'etre',[14] and the 'dispute has disappeared because the object of the claim has been achieved by other means.'[15] This is not the case in relation to those persons who have not yet been handed over by the FRY. It cannot be said that this is a case which would require the Court 'to deal with issues *in abstracto*' and where 'the object of the claim [has] clearly disappeared [and] there is nothing on which to give judgment.'[16]

4.11. The simple fact is that there remain persons who have not been submitted to trial either before a competent tribunal in Croatia, or before the ICTY in respect of the acts or omissions which are the subject of the present proceedings. There continues to be a dispute between the FRY (Serbia and Montenegro) and Croatia with respect to these persons. Croatia's claim continues to have a purpose and Croatia seeks to present its arguments on these points at the merits stage. Submission 2 (a) is accordingly not moot.

MISSING PERSONS

4.12. By its submission 2 (b) Croatia requests the FRY (Serbia and Montenegro):

> "to provide forthwith to the applicant all information within its possession or control as to the whereabouts of Croatian citizens who are missing as a result of the genocidal acts for which it is responsible, and generally to cooperate with the authorities of the Republic of Croatia to jointly ascertain the whereabouts of the said missing persons or their remains."

4.13. The FRY (Serbia and Montenegro) claims that this submission falls outside the terms of the Genocide Convention. It does not, however, provide any explanation or reasons for that claim.

4.14. In its Memorial Croatia set out its reasons why this submission falls squarely within the Convention.[17] The FRY (Serbia and Montenegro) has

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14 *Nuclear Tests Cases* (Australia v France) *1974 ICJ Reports*, para 56.

15 *Ibid.*, para 55.

16 *Ibid.*, para 59.

17 Memorial, paras 8.71 to 8.79. See also para 4.06 that sets out figures of missing persons from Eastern Slavonia; other references to missing persons are in paras 4.28, 4.36, 4.42,

not addressed those arguments. The current situation is fully set out in two letters of Colonel Grujić of the Bureau for Detained and Missing Persons of the Republic of Croatia, which are attached as Annexes 1 and 2 to these Written Observations. They confirm that the FRY (Serbia and Montenegro) has at its disposal information and documentation on a large number of missing persons, especially those detained in prisons and concentration camps in the FRY (Serbia and Montenegro) and in the former occupied territories of Croatia, and that to date the recovery of the remains of just 26 persons is attributable to the FRY (Serbia and Montenegro) pursuant to its cooperation with Croatia. 1309 persons remain unaccounted for.

4.15. As stated above, in its 1996 Judgment the Court accepted that proceedings relating to State responsibility for breach of the Genocide Convention are appropriate. Such proceedings may address also responsibility for disappearances, and the duty to provide information. A compromissory clause providing for the Court's jurisdiction – such as Article IX of the Genocide Convention – over a dispute about the interpretation and application of a treaty establishes the Court's jurisdiction to award appropriate remedies.[18] In the *Diplomatic and Consular Personnel Case*, for example, the Court's award was given in the context of a similar jurisdictional clause. The Court's order included termination of the detention of hostages, the provision of safe transport and – most pertinently for present purposes – the handover of property belonging the US embassy and consulates in Tehran.[19] Like the Optional Protocols to the Vienna Convention on Diplomatic Relations and the Vienna Convention on Consular Relations (which were at issue in the *Hostages Case)*, Article IX of the Genocide Convention does not limit the remedies which may be awarded. The FRY (Serbia and Montenegro) has not explained why the provision of information about the whereabouts of missing persons should not be an appropriate remedy, having regard to the need to give effect to the object and purpose of the Convention.[20] Croatia submits that the provision of this information – which relates to more than 1000 missing persons – is an entirely appropriate remedy.

4.43, 4.73, 4.94. With regard to other regions, see *inter alia* paras 5.04, 5.16, 5.34, 5.79, 5.83, 5.93, 5.111, 5.152, 5.160, 5.220, 5.237.

18 Christine Gray, *Judicial Remedies in International Law* (1990) p. 61.

19 *United States Diplomatic and Consular Staff in Tehran* (United States v Iran) 1980 ICJ Rep. p. 44, para 95.

20 Sir Hersch Lauterpacht argued that the principle of effectiveness is paramount in determining remedies: "An interpretation which would confine the Court simply to recording that the Convention had been incorrectly applied ... without being able to lay down the conditions for the re-establishment of the treaty rights affected would be contrary to what would, prima facie, be the natural object of the clause;..." The Development of International Law by the International Court, 246.

4.16. The FRY (Serbia and Montenegro) claims that submission 2 (b) is also moot, because of the ongoing cooperation between the FRY (Serbia and Montenegro) and Croatia on establishing the whereabouts of missing persons. Such cooperation is reflected *inter alia* in a 1996 Protocol on Cooperation between the FRY Government Commission on Humanitarian Issues and Missing Persons and the Commission of the Croatian Government for Imprisoned and Missing Persons,[21] and the 1996 Agreement on the Normalization of the Relations between the FRY and the Republic of Croatia, as well as actions taken pursuant to these Agreements. The FRY (Serbia and Montenegro) claims that these agreements indicate that the 'proper framework for the remaining implementation is a not a dispute before the International Court of Justice', and that the submission is therefore inadmissible and moot.[22] Croatia does not agree.

4.17. The fact that two States have entered into cooperative arrangements which address a particular aspect of proceedings before the Court does not render that aspect of the proceedings moot. In the *Fisheries Jurisdiction Case,* for example, Iceland and the United Kingdom entered into an interim agreement after the Court determined it had jurisdiction. This gave the United Kingdom certain provisional guarantees. The agreement was silent as to the Court's jurisdiction or the question of any waiver of claims. In light of that fact the Court found it clear that the dispute continued. Nor was the agreement to be taken as a bar to the proceedings, or as intending to effect the legal position of either country in relation to its claim. As the Court put it:

> "The primary duty of the Court is to discharge its judicial function and it ought not therefore to refuse to adjudicate merely because the parties, while maintaining their legal positions, have entered into an agreement one of the objects of which was to prevent the continuation of incidents."[23]

4.18. The position is no different in the present case. The two 1996 Agreements entered into by Croatia and the FRY (Serbia and Montenegro) were not intended to – and they do not – in any way effect the admissibility of Croatia's Application. There is nothing in those agreements which purports to limit or inform the proceedings commenced by Croatia in July 1999. Indeed, the agreements pre-date these proceedings. With respect, it cannot plausibly be suggested that Croatia was precluded from bringing these claims by reason of agreements entered into three years earlier in relation to a related but juridically distinct matter.

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21 Preliminary Objections, Annex 53, 1996 Protocol, Arts. 2 and 5.

22 Preliminary Objections, para 5.11.

23 *Fisheries Jurisdiction Case* (United Kingdom v Iceland) 1974 ICJ Rep. p. 19, para 38.

4.19. Any different conclusion would undermine States' efforts to cooperate in parallel to these legal proceedings. The Court's case-law makes this clear. In the *Fisheries Jurisdiction Case*, for example, the Court considered that a decision not to give a judgment because the parties had concluded an interim agreement would discourage States from making their own arrangements, and that this would be contrary to the obligation of the peaceful settlement of disputes and the maintenance of international peace and security.[24]

4.20. Similarly, in the *LaGrand Case* the Court did not consider that either the execution of the LaGrand brothers or the assurances from the United States of the 'substantial measures' it was taking to prevent any recurrence rendered the case inadmissible or moot. The Court stated that

> "[i]f a State, in proceedings before this Court, repeatedly refers to substantial activities which it is carrying out in order to achieve compliance with certain obligations under a treaty, then this expresses a commitment to follow through with the efforts in this regard."[25]

Although the cooperation between the FRY (Serbia and Montenegro) and Croatia for the tracing of missing persons is not couched in terms of compliance with the Genocide Convention, the same principle is applicable. In *LaGrand* the Court also accepted that the United States' information could not 'provide an assurance that there will never again be a failure by the United States to observe the obligation of notification under Article 36 of the Vienna Convention.' It added that 'no State could give such a guarantee'.[26]

4.21. In this case there continues to be a dispute between the parties as to the interpretation and application of the Genocide Convention with respect to information on missing persons. Croatia's Application is for actual information on the whereabouts of the missing persons, not cooperation in obtaining that information.

4.22. Notwithstanding a degree of cooperation, the question of information about missing persons remains a pressing issue. Information which appears to be available to the FRY (Serbia and Montenegro) has not been provided, and the dispute therefore remains very much a live one. This is clear, for

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24 Judge Nagendra Singh considered that entering into interim agreements could never prevent the Court from pronouncing on the Applicant's submissions, otherwise this would penalise the State for attempting to avoid friction; *Fisheries Jurisdiction Case* (United Kingdom v Iceland) 1974 ICJ Rep. p. 42.

25 *LaGrand* case (Germany v United States) 2001 ICJ Rep., para 124.

26 *Ibid.*

example, from the two statements provided by Colonel Grujić, Head of the Bureau for Detained and Missing Persons of the Republic of Croatia. In his first statement Colonel Grujić makes it clear that a number of issues remain open with the FRY (Serbia and Montenegro), and that the FRY (Serbia and Montenegro) has at its disposal "the information and documentation on a larger number of missing persons, especially on the missing persons that were detained in prisons and concentration camps in the [FRY], [and] in the formerly occupied territories of the Republic of Croatia".[27] According to Colonel Grujić, as at 17 January 2003 a total of some 1309 persons were still missing.[28] A list of all missing persons is set out at Annex 3.

4.23. As in the *Fisheries Jurisdiction* case, the parties have recognised the need to make their own arrangements, in this instance motivated by the urgency of determining information about missing persons, in particular for the benefit of relatives. Such steps may assist in preventing further friction. However, the 1996 Protocol is limited to providing "available information".[29] It does not commit the FRY (Serbia and Montenegro) to ascertain the whereabouts of the missing persons pursuant to obligations under the Genocide Convention, as Croatia's Submission 2(b) calls on the Court to require. The arrangements are plainly without prejudice to the rights of the Parties, including in relation to obligations under the Genocide Convention.

4.24. Croatia does not allege or infer any lack of future cooperation on this matter by the FRY (Serbia and Montenegro). Nevertheless there can be no guarantee either that the Protocol will continue in force, or that the outcome of its application will be satisfactory and meet the object of Submission 2(b). In these circumstances, Submission 2 (b) continues to have a purpose; indeed in Croatia's respectful view it continues to have an important bearing on the outcome of the proceedings as a whole,[30] and for these reasons this aspect of Croatia's claim is not moot.

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27 Annex 1, Statement of Colonel Grujić, Bureau for Detained and Missing Persons, Republic of Croatia, 17 January 2003.

28 *Ibid.* See also Annex 2, Statement of Colonel Grujić, Bureau for Detained and Missing Persons, Republic of Croatia, 26 February 2003.

29 Preliminary Objections, Annex 53, 1996 Protocol, Arts. 2 and 5.

30 The joint dissenting opinion in *Nuclear Tests* noted that finding a case to be moot is another way of saying that the Applicant no longer has "any stake in the outcome" and will not argue the law and facts "with vigour." This in turn undermines the judicial process. This is not the position of Croatia; *Nuclear Tests Cases* (Australia v France) 1974 ICJ Reports, p. 323, para 24 (joint dissenting opinion).

MISSING CULTURAL PROPERTY

4.25. In its Submission 2 (c) Croatia requests the FRY (Serbia and Montenegro) to return:

> "[a]ny items of cultural property within its jurisdiction or control which were seized in the course of the genocidal acts for which it is responsible."

4.26. The FRY (Serbia and Montenegro) asserts that it is impossible 'to stretch the alleged jurisdiction regarding genocide to property claims regarding objects of art' and that the claim is therefore inadmissible.[31] As set out in the Memorial, Article II of the Genocide Convention makes it clear that genocide entails the intentional destruction in whole or in part of a group, defined in national, ethnical, racial or religious terms, as a distinct social entity. Physical destruction through killings and serious bodily harm to members of the group is readily understood as genocide. In Croatia's view it is also recognised that genocide may also be committed through destruction of a group's cultural identity. As the ICTY has put it:

> "The physical destruction of a group is the most obvious method, but one may also conceive of destroying a group through purposeful eradication of its culture and identity resulting in the eventual extinction of the group as an entity distinct from the remainder of the community."[32]

4.27. The original concept of genocide has a broad meaning encompassing 'all acts designed to destroy the social and/or cultural bases of a group'.[33] The Trial Chamber of the ICTY has noted that 'where there is physical or biological destruction there are often simultaneous attacks on the cultural and religious property and symbols of the targeted group as well, attacks which may legitimately be considered as evidence of an intent to physically destroy the group.' In its Memorial Croatia provided ample evidence to establish that Croatian cultural property was destroyed or removed in the course of the genocidal acts that occurred on the territory of Croatia after the summer of 1991.[34] This evidence has not been challenged by the FRY (Serbia and Montenegro). To the contrary, the FRY (Serbia and

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31 Preliminary Objections, para 5.12.

32 *Prosecutor v Radislav Krstic*, "Srebrenica-Drina Corps", IT-98-33, judgment of 2 August, 2001, para 574.

33 *Ibid.*, para 575.

34 For such references in Eastern Slavonia see e.g. Memorial, paras 4.36; 4.55; 4.57; 4.92; 4.104; 4.108; 4.120 and 4.150 (Vukovar). For references to other areas see paras 5.12 (Western Slavonia); 5.35; 5.76 (Banovina); 5.87; 5.135 (Kordun and Lika); 5.186; 5.201 (Dalmatia); 5.219 and 5.236, 5.237 and 5.241 (Dubrovnik). For a list of areas where cultural property was looted or destroyed, Memorial, Vol 5, Appendix 7.

Montenegro) accepts that "it is indeed true that some objects of cultural property which belong to Croatia came under "[the] jurisdiction or control" of the FRY (Serbia and Montenegro).[35]

4.28. A determination of the extent of such movements of cultural property from Croatia to the FRY (Serbia and Montenegro) can only be decided at the merits stage of these proceedings. At that stage there will be a decision on the facts as to whether there was genocidal intent in the transfer of such works of art to Yugoslavia or whether removals were for their safety during the conflict, as the FRY (Serbia and Montenegro) claims.[36] Plainly the argument of the FRY (Serbia and Montenegro) that Submission 2(c) is moot cannot be right. The FRY (Serbia and Montenegro) accepts that where the rightful owners of cultural property are in Croatia, that property should be returned to Croatia. There is no dispute between the parties that Croatian cultural property remains in the FRY and has not been returned. The subject has been on the agenda of discussions between FRY (Serbia and Montenegro) and Croatia. Croatia acknowledges that some important works have been returned, including the Bauer collection. In addition, religious works taken from Serb Orthodox churches within Croatia can only be returned when such churches are again operational within Croatia, and negotiations are in process with respect to such items of cultural property. Accordingly the FRY (Serbia and Montenegro) argues that the return of cultural property can be determined by the FRY (Serbia and Montenegro) and Croatia without the need for a decision of the Court.

4.29. Croatia does not agree. As in the case of missing persons, the fact that there has been some cooperation (which Croatia welcomes) between the FRY (Serbia and Montenegro) and Croatia on the return of cultural property cannot mean that no cause of action lies under the Genocide Convention or that the Application is inadmissible by reason of mootness. The submissions Croatia has made with respect to the non-mootness of the issue of the whereabouts of missing persons, are equally applicable to the return of cultural property and art. The statement of Minister Dr. Antun Vujić confirms that a large number of artefacts are still missing. For example, 8225 museum exhibits have been affected, of which more than 5000 have been misappropriated or looted and more than 2000 destroyed. These numbers do not include damage to the Vukovar City Museum, with more than 14,000 items still missing (559 works of art, out of the total of 2568, are missing from the Bauer Collection and Art Gallery, and of the

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35 Preliminary Objections, para 5.12.

36 *Ibid.*, para 5.13.

original ethnographic collection of 1325 exhibits from the Vukovar City Museum only 8 items remain).[37] Minister Dr. Vujić's letter also states that

> "FRY or Serbia and Montenegro have not admitted their responsibility for the damage caused to the Croatian cultural property and that no concrete legislative, administrative or other measures have been taken for remedying the damage or for complete restitution. Instead arguments are being put forward designed to justify illegal seizure, taking away, alienation and devastation of the Croatian cultural heritage."[38]

4.30. There continues to be a dispute about the return of these objects, and Croatia considers that a judgment of the Court would have practical effect in confirming the obligation of the FRY (Serbia and Montenegro) to account for and return all the missing artefacts. The Court is not being asked to provide merely a basis for political action. It is being called to consider the actual legal rights of the Parties involved[39] in the aftermath of the events in Croatia after the summer of 1991.

4.31. For these reasons, Submission 2 (c) is admissible. Determinations as to the proper interpretation of the Genocide Convention, its application to the facts and the appropriate remedies flowing therefrom will be a matter for the proceedings on the merits.

CONCLUSIONS

4.32. In sum, Croatia's Submissions 2 (a), (b) and (c) are all appropriate claims under the Genocide Convention. They are not moot, either in the sense that there is no longer any existing dispute between the parties, or that there is no practical outcome of any award. Full argument on these submissions will be a matter for the merits stage of the litigation, and for the Court's eventual decision on the merits in the light of the facts it finds to have been established. These issues are not to be prejudged at the stage of preliminary objections under the guise of "admissibility".

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37 Annex 4, Statement of Dr Antun Vujić, Minister, Ministry of Culture, Republic of Croatia, 1 April 2003.

38 *Ibid.*

39 *Northern Cameroons* (Cameroon v UK) 1963 ICJ Rep. p. 37.

SUBMISSIONS

On the basis of the facts and legal arguments presented in these Written Observations, the Republic of Croatia respectfully requests the International Court of Justice to reject the First, Second and Third Preliminary Objections of the FRY (Serbia and Montenegro) (with the exception of that part of the Second Preliminary Objection which relates to the claim concerning the submission to trial of Mr Slobodan Milosevic), and accordingly to adjudge and declare that it has jurisdiction to adjudicate upon the Application filed by the Republic of Croatia on 2 July 1999.

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Agent for the Republic of Croatia

Zagreb, 29 April 2003

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Annex 12: EC Declaration concerning the SFRY Presidency, adopted at the Informal meeting of Ministers for Foreign Affairs Haarzuilens, 5 October 1991