INTERNATIONAL COURT OF JUSTICE

CASE CONCERNING APPLICATION OF THE CONVENTION ON THE PREVENTION AND PUNISHMENT OF THE CRIME OF GENOCIDE
(CROATIA v. YUGOSLAVIA)

PRELIMINARY OBJECTIONS OF THE FEDERAL REPUBLIC OF YUGOSLAVIA

SEPTEMBER 2002

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Part I

SHORT SUMMARY OF THE RELIEF SOUGHT AND OF THE GROUNDS FOR RELIEF

1.1. On 2 July 1999 the Republic of Croatia (hereinafter: "Croatia") submitted an application to the International Court of Justice (hereinafter: "the Court") instituting proceedings against the Federal Republic of Yugoslavia (hereinafter: "FRY") for alleged violations of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide (hereinafter: "Genocide Convention") by the FRY. On 1 March 2001, Croatia submitted a Memorial in which one of the claims was omitted, while other allegations were further explained.

1.2. In its Memorial of 1 March 2001 (hereinafter: "Memorial") Croatia argues that the Court has jurisdiction pursuant to Article IX of the Genocide Convention and Article 36(1) of the Statute of the Court.

1.3. In these Preliminary Objections, the FRY submits that this honoured Court does not have jurisdiction over the FRY in the *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (hereinafter: "Croatia v. Yugoslavia"); and that Croatia's Application is inadmissible.

1.4. The FRY shall demonstrate that this honoured Court has no jurisdiction over the FRY in the present case. The FRY only became a Contracting Party to the Genocide Convention on 10 June 2001 and it never became bound by Article IX of this Convention.

1.5. The FRY shall also argue that, since it came into being on 27 April 1992, acts or omissions prior to 27 April 1992 cannot be considered as acts or omissions of the FRY, and cannot be attributed to the FRY, simply because there was no FRY before this date. Thus, it cannot be held responsible for acts or omissions which occurred before 27 April 1992. For these reasons, the Application is inadmissible as far as it refers to acts or omissions prior to 27 April 1992.

1.6. The Respondent shall finally argue that three specific claims of the Application are inadmissible, and – even if they had been admissible, *quid non* – they have become moot. These claims are:

- Taking effective steps to submit to trial persons like Mr. Slobodan Milošević;
- Providing information regarding the whereabouts of missing Croatian citizens; and
- Return of cultural property.

1.7. The position of the Respondent is that this honoured Court has no jurisdiction in this case, and that the claims submitted by the Applicant are inadmissible. Should the Court arrive at a different conclusion, the Respondent expressly reserves its right to bring counter-claims against the Applicant, regarding acts of genocide committed by the Applicant on the territory of the former Socialist Federal Republic of Yugoslavia (hereinafter: "SFRY").

Part II

BACKGROUND

2.1. The Applicant offered in its Memorial a view and an interpretation of the tragic sequence of events in the former Yugoslavia and in its successor states. A scrutiny of these submissions belongs to the merits. The Respondent expressly reserves its right to contest these allegations. Moreover, the Respondent reiterates its position that this honoured Court has no jurisdiction in this case, and that the Applicant's claims are inadmissible.

2.2. Without entering into a discussion of the allegations pertaining to the merits, the Respondent will briefly underline its position regarding the nature of the conflict, and this for the sole purpose of contributing towards a better understanding of the preliminary objections advanced in this submission.

2.3. The Respondent agrees with the Applicant that the death of "the long-term President of the Socialist Federal Republic of Yugoslavia, Josip Broz Tito" was the "starting point" of key events. Tito's departure from the scene opened the gates for many options, one of them being the dissolution of Yugoslavia. Here, the Respondent would like to add that the departure of Tito coincided with the beginning of the demise of communism in Eastern Europe. Political leaders in the SFRY were striving for a new foothold for their authority – and they found it in nationalism. After several decades in which ethnic and cultural diversity were reasonably protected and fostered,

slanderous types of ethnic intolerance broke loose. Hate speech aimed towards other ethnic groups became a common vehicle of political success.

2.4. The new Government of the FRY has no reason to deny that this venomous nationalism served as a stepping-stone to Mr. Milošević. The Respondent would merely wish to add that Serbian nationalism was not alone on the scene. Nationalist intolerance had also marked the rise of other leaders, notably of Mr. Franjo Tudjman in Croatia.

2.5. Within the escalating spiral of national intolerance, minorities found themselves in a particularly precarious position. Being a Croat in Serbia under Tito was not a disadvantage; it became one during the rule of Mr. Milošević. Likewise, in times of ostentatious and aggressive nationalism, Serbs in Croatia reacted with anxiety to the prospect of becoming a minority in Mr. Tudjman's Croatia, divorced from Yugoslavia.

2.6. The Applicant submits that the fears of the Serbs in Croatia were spurred by Mr. Milošević's propaganda. This is difficult to deny. One is compelled to add, however, that the fear and apprehension of Serbs in Croatia, and their reluctance to accept an independent Croatia as their home, were not fuelled solely by propaganda originating from Belgrade. This reluctance was also instigated by hostile stereotypes about Serbs in the Croatian media, and by Croatian authorities who challenged and impaired the right of ethnic Serbs to maintain their cultural identity, just as they challenged and impaired some of their basic human rights.

2.7. The political slogans which advocated Croatian independence typically excluded, rather than included, ethnic Serbs living in Croatia,

insisted on ethnic difference, and often contained animosity and slurs. To use just one characteristic illustration, in one of his campaign speeches, Mr. Tudjman found it helpful to emphasise: "*Thank God, my wife is neither a Serb nor a Jew.*"[1]

2.8. The tragic events which took place cannot be reduced to a one-dimensional conflict featuring one villain and one victim. It is important to stress that at the end of the sequence of tragic events, a Croatian state was, indeed, created, and was recognised internationally. The new government of the FRY is no exception; it also recognises the sovereign statehood of Croatia. At the same time, the Serbian minority was vanishing from Croatia as the Croatian State was being created. According to the 1991 population census there were 580,762 Serbs living in Croatia.[2] This number has been dramatically reduced. The main wave of exodus was prompted by "Operation Storm", which started on 4 August 1995.

2.9. The International Criminal Tribunal for the former Yugoslavia (hereinafter: "ICTY") issued indictments against Croatian generals for crimes against humanity committed against the Serbian population of Croatia – in particular during "Operation Storm". After this operation alone, approximately 200,000 Serbs were forced to leave Croatia. According to the ICTY indictment against the Croatian General Ante Gotovina:

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[1] See L. Silber and A. Little, *The Death of Yugoslavia*, BBC Books, London, 1995, p. 86 (Annex 1).

[2] Official data of the SFRY Federal Agency for Statistics (Savezni zavod za statistiku). See the Statistics Bulletin (Statistički bilten), No. 1934, Belgrade, 1992 (Annex 2) (figures referred to marked).

"Between 4 August 1995 and 15 November 1995, those who remained in, or returned to, their homes in weeks after the offensive were ultimately forced to flee the area as a result of continued killing, arson, looting, harassment, terror and threats of physical harm to person and property committed by Croatian forces. The cumulative effect of these unlawful acts was a large-scale deportation and/or displacement of an estimated 150,000 – 200,000 Krajina Serbs to Bosnia Herzegovina and Serbia."[3]

2.10. These data are corroborated by data of the UNHCR, according to which, in a contemplated period between 1 July 1995 and 31 December 1995 (which includes the period of "Operation Storm"), 195,703 refugees fled from Croatia to Yugoslavia.[4] According to the same UNHCR publication, the total number of Serbian refugees from Croatia who moved to the FRY between 1991 and 1996 was 281,642.[5] The Respondent notes that the FRY was not the only country of destination of Serbian refugees from Croatia. The UNHCR states:

"The largest movement of refugees to Serbia occurred in the second half of 1995 after the Croatian army launched an attack that eventually forced more than 180,000 Serbs from

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[3] See ICTY Indictment in the case Prosecutor v. Ante Gotovina IT-01-45, sec. 20, available at http://www.un.org/icty/indictment/english/got-ii010608e.htm.

[4] See the UNHCR publication *Census of Refugees and other War-Affected Persons in the Federal Republic of Yugoslavia*, Belgrade, 1996, p. 20 (Annex 3).

[5] See UNHCR, *op. cit.*, p. 22 (see Annex 3).

Croatia to flee their homes in the Krajina region in the world's single largest exodus."[6]

2.11. The official figures of the 2001 Croatian population census published on 17 June 2002 show a dramatic decrease in the number of Serbs. Between 1991 and 2001, about two-thirds of the Serbian population of Croatia disappeared. According to the 1991 population census, the number of Serbs in Croatia was 580,762 (or 12,2 %). According to the 2001 population census, the number of Serbs in Croatia is 201, 631 (or 4, 54%).[7]

[6] See UNHCR, *op. cit.*, p. 33 (see Annex 3).

[7] See data of the 2001 Croatian population census, made public on 17 June 2002, at: http://www.dzs.hr/Eng/Census/census2001.htm (Annex 4). The 1991 data are contained in the Bulletin of the SFRY Federal Agency for Statistics (Annex 2).

Part III

First Preliminary Objection

THE COURT LACKS JURISDICTION *RATIONAE PERSONAE*

3.1. The Applicant alleges that both Croatia and the FRY were bound by the Genocide Convention at the time of Croatia's Application, which was submitted on 2 July 1999 (Memorial: 6.06). Based on these allegations, the Applicant contends that the Court has jurisdiction over this dispute pursuant to Article IX of the Genocide Convention and Article 36(1) of the Statute of the Court (Memorial: 6.01).

3.2. The Applicant advanced the following arguments in support of its allegations:

(a) "*During the dissolution of the SFRY, Croatia as well as other successor states of the SFRY, including the FRY, became bound by the terms of the Genocide Convention.*

The basic principle in this regard is laid down in the terms of Article 34 of the Vienna Convention on State Succession in Respect of Treaties(...)" (Memorial: 6.06 and 6.07)

(b) "*[i]t is generally accepted that the population of a territory entitled to enjoy the protection of certain human rights flowing from basic human rights treaties may not be deprived of such rights by mere fact of the succession of a state in respect of that territory.*" (Memorial: 6.07)

3.3. The Applicant also submits that its position is supported by the Judgement of this Court of 11 July 1996 in the *Case Bosnia-Herzegovina v. Yugoslavia (Preliminary Objections)* (Memorial: 6.09).

3.4. The Applicant's allegations are unfounded. The Respondent will demonstrate that it did not become bound by the Genocide Convention in any way before 10 June 2001; and that it never became bound by Article IX of this Convention.

A. The FRY became a Contracting Party to the Genocide Convention by accession on 12 March 2001 (effective 10 June 2001); The FRY never became bound by Article IX of the Genocide Convention

3.5. The FRY became a member of the UN on 1 November 2000. After it became a Member of the United Nations, the FRY sent a notification of accession to the Genocide Convention on 8 March 2001[8], **which contains a reservation to Article IX**. The text of this Notification reads as follows:

> *"NOTIFICATION OF ACCESSION TO THE CONVENTION ON THE PREVENTION AND PUNISHMENT OF THE CRIME OF GENOCIDE (1948)*
>
> *WHEREAS the Federal Republic of Yugoslavia had declared on April 27, 1992, that 'the Federal Republic of Yugoslavia, continuing the State, international legal and political personality of the Socialist Federal Republic of Yugoslavia,*

[8] See Annex 5.

shall strictly abide by all the commitments that the Socialist Federal Republic of Yugoslavia assumed internationally',

WHEREAS this contention of continuity also included the assumption that the Federal Republic of Yugoslavia continued the membership in the United Nations of the Socialist Federal Republic of Yugoslavia,

WHEREAS the contention and assumption of continuity was eventually not accepted by the United Nations, nor was it accepted by other successor States of the Socialist Federal Republic of Yugoslavia, and thus it produced no effects,

FURTHERMORE this situation became finally clarified on November 1, 2000 when the Federal Republic of Yugoslavia was accepted as a new member State of the United Nations,

NOW it has been established that the Federal Republic of Yugoslavia has not succeeded on April 27, 1992, or on any later date, to treaty membership, rights and obligations of the Socialist Federal Republic of Yugoslavia in the Convention on the Prevention and Punishment of the Crime of Genocide on the assumption of continued membership in the United Nations and continued state, international legal and political personality of the Socialist Federal Republic of Yugoslavia,

THEREFORE, I am submitting on behalf of the Government of the Federal Republic of Yugoslavia this notification of accession to the Convention on the Prevention and Punishment of the Crime of Genocide, in pursuance of Article

XI of the said Convention and with the following reservation on Article IX of the said Convention: 'The Federal Republic of Yugoslavia does not consider itself bound by Article IX of the Convention on the Prevention and Punishment of the Crime of Genocide, and, therefore, before any dispute to which the Federal Republic of Yugoslavia is a party may be validly submitted to the jurisdiction of the International Court of Justice under this Article, the specific and explicit consent of the FRY is required in each case.'

(Signed by Goran Svilanović, Minister of Foreign Affairs, FRY)"

3.6. In a note dated 21 March 2001, the Secretary-General confirmed the receipt of the instrument of accession sent by the Government of the FRY. The note of the Secretary-General states:

"The above instrument was deposited with the Secretary-General on 12 March 2001, the date of its receipt.

Due note has been taken of the reservation contained in the instrument.

In accordance with Article XIII(3), the Convention ***will enter into force*** *for Yugoslavia on the ninetieth day following the date of deposit of the instrument, i.e., on* ***10 June 2001.***"[9] (emphasis added)

[9] See the full text of the Note of the Secretary-General in Annex 6.

3.7. The Secretary-General – acting in his capacity as depositary – thus accepted the accession of the FRY, and official records of the depositary state unequivocally that Yugoslavia acceded to the Genocide Convention on 12 March 2001.[10] According to Article XIII of the Convention, the accession of the FRY became effective on 10 June 2001.

3.8. The FRY never became bound by Article IX of the Genocide Convention.

B. Before it became a Contracting Party by accession the FRY could not become, and did not become, a Contracting Party to the Genocide Convention

B.1 The FRY was not even qualified to be a Contracting Party to the Genocide Convention before the Application was submitted, because it was not a Member of the UN and it never received an invitation in accordance with Article XI of the Genocide Convention

3.9. The FRY was not a Contracting Party to the Genocide Convention on, or before, 2 July 1999 (as alleged in the Application). Not every State can become a Contracting Party to the Genocide Convention. The Convention, of which the Secretary-General of the UN is the Depositary, is

[10] *Multilateral treaties deposited with the Secretary-General*, UN Treaty Website – www.untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/ chapterIV/treaty1.asp., visited on 7 Aug. 2002 (Annex 7).

unconditionally open to Members of the UN. Non-members have to receive an invitation. According to Article XI of the Convention:

> "*The present Convention shall be open until 31 December 1949 for signature on behalf of any member of the United Nations and of any non-member State to which an invitation to sign has been addressed by the General Assembly.*
>
> *(...)*
>
> *After 1 January 1950, the present Convention may be acceded to on behalf of any member of the United Nations and of any non-member State which has received an invitation as aforesaid. Instruments of accession shall be deposited with the Secretary General of the United Nations.*"

3.10. On 3 December 1949, the UN General Assembly issued a resolution by which it confirms the principle stated in Article XI and authorises the Secretary-General to dispatch specific invitations to any of those countries which are not Members of the UN and which meet certain criteria. According to the resolution, the General Assembly:

> "*Considering that it is desirable to send invitations to those non-member States which, by their participation in activities related to the United Nations, have expressed a desire to advance international cooperation,*

1. *Decides to request the Secretary-General to dispatch the invitations above mentioned to each non-member State which is or hereafter becomes an active member of one or more of the specialized agencies of the United Nations, or which is or hereafter becomes a Party to the Statute of the International Court of Justice.*"[11]

3.11. This resolution was observed and confirmed in practice. For example, on 20 December 1950, the Federal Republic of Germany received a specific invitation from the Secretary-General to join the Genocide Convention as a Contracting Party.[12]

3.12. It is now settled that the FRY was not a Member of the UN when the dissolution of the SFRY took place in 1992, and it is a plain fact that the FRY never received an invitation from either the General Assembly or from the Secretary-General to become a Contracting Party to the Genocide Convention. For these reasons, the FRY could not have become a Contracting Party to the Genocide Convention before it became a Member of the United Nations. Subsequent to it becoming a Member of the UN, the FRY acceded to the Genocide Convention, with reservation to Article IX.

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[11] See General Assembly Resolution 368 (IV) of 3 Dec. 1949.

[12] See H. H. Jescheck, *Die internationale Genocidium-Konvention vom 9. Dezember 1948 und die Lehre vom Völkerstrafrecht*, Zeitschrift für die gesamte Strafrechtswissenschaft, 1954, pp. 193-217 (Annex 8) (text referred to marked).

B.2 Even if the FRY were qualified to become a Contracting Party to the Genocide Convention before the Application was submitted, it did not become a Contracting Party to this Convention on any possible grounds before 10 June 2001; and, to reiterate, the FRY never became bound by Article IX of the Genocide Convention

3.13. Neither of the alternative premises advanced by the Applicant (Memorial: 6.06 and 6.07)[13] can support the contention that the FRY became a Contracting Party to the Genocide Convention (and that it became bound by its Article IX) by succession.

In the following, it will be demonstrated that:

(a) the Vienna Convention on State Succession in respect of Treaties was not in force when the succession of the former SFRY occurred;

(b) the Vienna Convention on State Succession in respect of Treaties cannot be applied retroactively;

(c) the jurisdiction of the Court cannot be based on erroneous assumptions or declarations of continuity;

(d) the jurisdiction of the Court cannot be based on the theory of automatic succession with regard to human rights treaties;

(e) in particular, there cannot be, and there was no automatic succession regarding Article IX of the Genocide Convention;

[13] Cited in para. 3.2. of these Preliminary Objections.

(f) the allegation that the jurisdiction of the Court is based on Article IX of the Genocide Convention has no support in theories on acquired rights of the population of the successor State.

(a) The Vienna Convention on State Succession in respect of Treaties was not in force when succession occurred

3.14. The Memorial suggests that the FRY became a Contracting Party to the Genocide Convention by virtue of Article 34 of the 1978 Vienna Convention on State Succession in respect of Treaties (Memorial: 6.07). The Applicant did not argue – nor could it have argued – that Article 34 represented customary international law. Instead, the Applicant cites the text of Article 34 of the 1978 Vienna Convention, and relies on it. However, this Convention could not, and did not, apply to the succession of the SFRY, because it was not yet in force when the succession occurred.

3.15. Article 7(1) of this Convention makes it abundantly clear that the rules of the Convention apply solely in respect of a succession of States occurring after the entry into force of the Convention (which took place on 6 November 1996).[14] According to Article 7(1):

> "*Without prejudice to the application of any of the rules set forth in the present Convention to which the effects of the succession of States would be subject independently of the Convention, the Convention applies only in respect of a*

[14] See *Multilateral Treaties Deposited with the Secretary-General, Status as at 31 Dec. 2000,* Vol. II, Part I (United Nations Treaties), Chap. XXIII (The Law of Treaties), UN Doc. ST/LEG/SER.E/19, p. 275 (Annex 9).

succession of States which has occurred ***after the entry into force of the Convention*** *except as may be otherwise agreed.*" (emphasis added)

3.16. The succession of the FRY clearly occurred before that date. The exact dates on which various republics succeeded the SFRY may vary, but it is beyond doubt that with regard to the FRY succession took place **on 27 April 1992, i.e. on the date on which the FRY was formed.**

3.17. According to the definition adopted in the 1978 Vienna Convention itself, the

> "*[the] date of the succession of States' means the date upon which the successor State replaced the predecessor State in the responsibility for the international relations of the territory to which the succession of States relates*".[15]

The FRY clearly manifested that it took over responsibility for the international relations on its territory after April 1992 and before November 1996, by, *inter alia*, concluding a large number of treaties. Among these treaties concluded between April 1992 and November 1996 there are 108 bilateral agreements, including the Agreement on Normalization of Relations between the FRY and the Republic of Croatia.[16]

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[15] Article 2(1)(e) of the 1978 Vienna Convention on Succession of States in respect of Treaties.

[16] See *Agreement on Normalization of Relations between the FRY and the Republic of Croatia*, signed on 23 Aug. 1996; English text in UN Doc. A/51/318 – S/1996/706 (1996) (Annex 10).

3.18. Moreover, the fact that succession had taken place by 1992 has actually never been contested, and international documents have time and again reiterated this fact.

3.19. For example, the Badinter Arbitration Commission (*Commission d'Arbitrage de la conférence pour la Paix en Yougoslavie*), relied upon frequently by the Applicant, stresses in its Opinion No. 11:

> "*En conséquence, la Commission d'Arbitrage est d'avis:*
>
> – *que les dates auxquelles les Etats issus de l'ancienne R.S.F.Y. ont succédé à celle-ci sont les suivantes:*
>
> - *le 8 octobre 1991 pour la République de Croatie et la République de Slovénie,*
> - *le 17 Novembre 1991 pour l'ex-République yougoslave de Macédoine,*
> - *le 6 mars 1992 pour la République Bosnie-Herzégovine,*
> - *et le 27 avril 1992 pour la République fédérale de Yougoslavie (Serbie-Monténégro).*"[17]

3.20. The 1978 Vienna Convention on the Succession of States in respect of Treaties was clearly not in force at any of these dates, and could not govern the resolution of the issue of succession in respect of treaties.

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[17] Para. 10 of Opinion No. 11, reprinted in *RGDIP* 1993, vol. 97, No. 4, at p. 1105 (Annex 11).

Recognising this plain fact, no successor state of the former SFRY relied on Article 34 of the 1978 Vienna Convention for the purpose of succession of treaties. Instead, all successor states – including both Croatia and the FRY – decided to submit specific notifications of succession, or accession, to treaties to which the former SFRY had been a party.[18]

(b) No grounds for retroactive application of the 1978 Vienna Convention on State Succession in respect of Treaties

3.21. There is only one vehicle in the 1978 Vienna Convention which could conceivably allow its retroactive application, but this has clearly no relevance in this case. Article 7(2) of the 1978 Vienna Convention allows any State to make a declaration

> *"[t]hat it will apply the provisions of the present Convention in respect of its own succession which has occurred before the entry into force of the Convention."*

Such a declaration[19] would have been the sole way to extend the effectiveness of the Convention to the succession of the FRY. **Such a declaration was, however, never given by the FRY.**

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[18] Croatia submitted on 27 July 1992 a notification of succession accompanied by a specific list of multilateral treaties to which Croatia intended to succeed. See *Multilateral Treaties Deposited with the Secretary General*, "Historical Information", UN Treaty Website: http://untreaty.un.org/ENGLISH/bible/englishinternetbible/historicalinfo.asp, visited on 9 January 2002 (Annex 12).

[19] Such declarations were only given by the Czech Republic and Slovakia. The Declaration given by the Czech Republic reads:

(c) The jurisdiction of the Court cannot be based on erroneous assumptions or declarations of continuity

3.22. Applicant relies on a Declaration[20] adopted on 27 April 1992 at a joint session of the Assembly of the SFRY,[21] the National Assembly of the Republic of Serbia, and the Assembly of Montenegro. The Memorial of Croatia cites a part of this Declaration which stated:

> *"The Federal Republic of Yugoslavia, continuing the State international, legal and political personality of the Socialist Federal Republic of Yugoslavia, shall strictly abide by all the commitments that the Socialist Federal Republic of Yugoslavia assumed internationally*". (Memorial: 2.138)

In a footnote added to this citation, the Memorial stresses, however:

"Pursuant to Article 7, paragraph 2 and 3, of the Vienna Convention on Succession of States in respect of Treaties, adopted in Vienna on August 23, 1978, the Czech Republic declares that it will apply the provisions of the Convention in respect of its own succession of States which occurred before the entry into force of the Convention in relation to any other Contracting State of State Party to the Convention accepting the declaration.

The Czech Republic simultaneously declares its acceptance of the declaration made by the Slovak Republic at the time of its ratification of the Convention pursuant to Article 7, paragraph 2 and 3 thereof."

See *Multilateral Treaties Deposited with the Secretary General*, Status as at 31 Dec. 2000,Vol. II, Part I, Chap. XXIII, UN Doc. ST/LEG/SER.E/19, p. 275 (Annex 9).

[20] See the text of the Declaration in Annex 13.

[21] At that time, it was contested whether the SFRY Federal Assembly still existed.

"*Neither Croatia nor any of the other Republics of SFRY which became independent accept that FRY was the 'continuation' in a legal sense of the SFRY.*" (Memorial 2.138, footnote 220)

3.23.The Declaration of 27 April 1992 was brought to the attention of the United Nations by a Note. Relying on this Note and on the Declaration ("Proclamation"), Croatia asserts that

"*[t]he Note of 27 April 1992 referring to the FRY's proclamation can be treated as a notification of succession to the Genocide Convention.*" (Memorial: 6.09, footnote 9)

3.24. The Respondent will demonstrate that the Declaration of 27 April 1992, and the Note which accompanied it to the UN, did not intend to serve the purpose of treaty succession, and were not capable of serving this purpose.

There are three independent reasons, each of which is in itself sufficient to demonstrate that neither the Declaration nor the Note were instruments of succession:

- Neither the text nor the context of either the Declaration or of the Note give any support to the proposition that they were instruments of succession. Instead, they contradict this hypothesis;
- The Declaration and the Note did not and could not represent relevant treaty action, because they lacked specific reference to any treaty, and did not emanate from competent authority;

– Neither the Declaration nor the Note were perceived as instruments of succession.

The Respondent will further demonstrate that the claim actually advanced in the Declaration and in the Note (the claim to continuity, i.e. identity) remained unaccepted and without effects.

Neither the text nor the context of either the Declaration or of the Note give any support to the proposition that they were instruments of succession. Instead, they contradict this hypothesis.

3.25. There is absolutely nothing indicating succession in either the Declaration or in the Note. As a matter of fact, the word or notion of "succession" is completely missing from both the text and from the context of both the Declaration and of the Note. What is asserted, instead, is the view that the FRY continued the personality of the SFRY.

3.26. The Declaration purported to be an assertion of "views on policy objectives". In the text of the Declaration it was indicated that this was a Declaration of "the representatives of the people of the Republic of Serbia and the Republic of Montenegro" – at the end of the text, "the participants of the joint session" were identified as authors. The opening sentence of this Declaration stresses that the citizens of Serbia and Montenegro expressed their common will "to stay in the common state of Yugoslavia". The underlying political idea that guided the opinions expressed in the Declaration was clearly the perception that Yugoslavia continued to exist,

that the FRY was the same State as the SFRY, and that it continued the identity of the SFRY.

3.27. The explicitly stated purpose of the Declaration was to state the **views** of the participants on **policy objectives**. As stressed in the introductory part of the Declaration:

> "*Remaining strictly committed to the peaceful resolution of the Yugoslav crisis, wish to state in this Declaration their* ***views*** *on the basic, immediate and lasting* ***objectives of the policy*** *of their common state, and its relations with the former Yugoslav Republics.*" (emphasis added)

3.28. The first such "view" stated was the one that was cited and relied upon by the Applicant:

> "*The Federal Republic of Yugoslavia, continuing the State, international legal and political personality of the Socialist Federal Republic of Yugoslavia, shall strictly abide by all the commitments that the SFR of Yugoslavia assumed internationally.*"

3.29. Furthermore, the destination of the Declaration of 27 April 1992 was not the Depositary, but the President of the Security Council, consistent with the fact that this was a policy statement, rather than a treaty action.[22] The Declaration and the Note were transmitted by a letter of 6

[22] See the letter dated 27 Apr. 1992 from the Chargé d'affaires a.i. of the Permanent Mission of Yugoslavia to the UN addressed to the President of the Security Council, UN Doc. S/23877 (1992) (Annex 14).

May 1992 to the Secretary-General, asking the Secretary-General to circulate the Declaration and the Note "*as an official document of the General Assembly*".[23] This is again indicative of the fact that both the Declaration and the Note were political documents, rather than treaty action.

3.30. Even more importantly, just as the content of the Declaration, the content of the Note leaves no doubt whatsoever, and makes it crystal clear that the assumption on which the FRY asserted to continue the obligations of the SFRY was the assumption of continued personality (identity). The Note alleges that:

> "*[o]n the basis of the continuing personality of Yugoslavia and the legitimate decisions by Serbia and Montenegro to continue to live together in Yugoslavia, the Socialist Federal Republic of Yugoslavia is transformed into the Federal Republic of Yugoslavia, consisting of the Republic of Serbia and the Republic of Montenegro.*" (emphasis added)

3.31. Based on this allegation, and unequivocally stressing the proposition of continued personality as the sole basis for assuming the obligations of the SFRY, the Note states:

> "***Strictly respecting the continuity of the international personality of Yugoslavia,*** *the Federal Republic of*

[23] See the Letter dated 6 May 1992 from the Chargé d'affaires a. i. of the Permanent Mission of Yugoslavia to the United Nations, UN Doc. A/46/915 (1992) (Annex 15).

Yugoslavia shall continue to fulfill all the rights conferred to, and obligations assumed by, the Socialist Federal Republic of Yugoslavia in international relations, including its membership in all international organizations and participation in international treaties ratified or acceded to by Yugoslavia." (emphasis added)

In line with this assumption, the Note considered the FRY to be "a founding Member of the United Nations".[24]

The Declaration and the Note were policy statements (advancing a claim to continuity) rather than treaty action.

The Declaration and the Note did not and could not represent relevant treaty action, because they lacked specific reference to any treaty, and did not emanate from competent authority

3.32. Another reason why the Declaration and the Note were completly unsuited to bring about treaty action is that they **did not identify any treaty**. No specific treaty was either mentioned or referred to and no list of relevant treaties was added or appended either. In order to bring about succession, specific declarations or references to specific treaties are needed.

3.33. This has clearly been confirmed by the Secretary-General, acting as depositary of multilateral treaties. Taking a position on "general declarations of succession" the Secretary-General stresses:

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[24] Note dated 27 Apr. 1992 from the Permanent Mission of Yugoslavia to the United Nations (Annex 15).

"Frequently, newly independent States will submit to the Secretary-General "general" declarations of succession, usually requesting that the declaration be circulated to all States Members of the United Nations. The Secretary-General, duly complies with such a request (...) but ***does not consider such a declaration as a valid instrument of succession to any of the treaties deposited with him,*** *and he so informs the Government of the new State concerned. In so doing, the Secretary-General is guided by the following considerations.*

The deposit of an instrument of succession results in having the succeeding State become bound, in its own name, by the treaty to which the succession applies, with exactly the same rights and obligations as if that State had ratified or acceded to, or otherwise accepted, the treaty. Consequently, it has always been the position of the Secretary-General, in his capacity as depositary, to record a succeeding State as a party to a given treaty ***solely on the basis of a formal document*** *similar to instruments of ratification, accession, etc., that is, a* ***notification emanating from the Head of State, the Head of Government or the Minister for Foreign Affairs, which should specify the treaty or treaties by which the State concerned recognizes itself to be bound.***

General declarations are not sufficiently authoritative to have the States concerned listed as parties in the publication Multilateral Treaties Deposited with the Secretary-General."[25] (emphasis added)

3.34. The Declaration and the Note of 27 April 1992, were general declarations – not even "general declarations of succession", but general policy declarations. They did not refer to any treaty, and they did not emanate from any of the authorities considered by the Depositary to be competent authorities. At the end of the text of the Declaration "The participants of the joint session of the SFRY Assembly, the National Assembly of the Republic of Serbia, and the Assembly of the Republic of Montenegro" are indicated as authors. The Note emanated from the "Permanent Mission of the SFRY (FRY) to the United Nations". Both the Declaration and the Note were transmitted to the Secretary-General by a letter written by the Chargé d'affaires *ad interim* of the "Permanent Mission of Yugoslavia to the UN"[26], asking the Secretary General to distribute them as officials documents of the General Assembly. Thus, neither the Declaration nor the Note emanated from authorities recognised as competent authorities. For this additional reason, the Declaration and the Note could not bring about succession.

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[25] *Summary of Practice of the Secretary-General as Depositary of Multilateral Treaties*, paras. 303-305 (footnote omitted), at: http://untreaty.un.org/ENGLISH/summary.asp (Annex 16).

[26] See Annex 15.

The Declaration and the Note were by their content a claim to continuity, and they were also perceived as a claim to continuity rather than as a notification of succession

3.35. The Declaration and the Note have been perceived in accordance with their true content. They have been perceived as a claim, as an assertion that the FRY continued the personality of the former SFRY, and that it thus continued the membership of the former SFRY in the UN and other international organisations, and that it also continued treaty membership of the SFRY.

This proposition of continuity and its consequences were understood, but have not been accepted. Croatia and other former Yugoslav republics vigorously contested the assertion that the FRY continued the membership of the SFRY in the United Nations and in other international organisations, and contested that the FRY sustained the international standing, rights and obligations of the SFRY.

3.36. To cite one example, on 16 February 1994, in a letter[27] addressed to the Secretary General, the Permanent Representative of Croatia to the United Nations takes a position on the "*[d]eclaration adopted on 27 April 1992 at the joint session of the National Assembly of the Republic of Serbia and the Assembly of the Republic of Montenegro*". This letter cites

[27] See UN Doc. S/1994/198 (1994) (Annex 17).

the Declaration, explains why did Croatia not react earlier, and underlines in no uncertain terms that Croatia opposes the claim to continuity formulated in the Declaration:

> "*The Republic of Croatia strongly objects to the pretension of the Federal Republic of Yugoslavia (Serbia and Montenegro) to continue the state, international, legal and political personality of the former Socialist Federal Republic of Yugoslavia.*"

3.37. The same letter makes it clear that Croatia rejected even the hypothesis that the Declaration could have had effects of a notification of succession. The letter adds (in the conditional tense), that Croatia would only accept a notification of succession, if such a notification were to be given:

> "*[i]f* ***the Federal Republic of Yugoslavia (Serbia and Montenegro) expressed its intention*** *to be considered, in respect of its territory, a party,* ***by virtue of succession*** *to the Socialist Federal Republic of Yugoslavia, to treaties of the predecessor State with effect from 27 April 1992, the date on which the Federal Republic of Yugoslavia (Serbia and Montenegro) as a new State, assumed responsibility for its international relations, the Republic of Croatia* ***would*** *fully respect that notification of succession.*"[28] (emphasis added)

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[28] *Ibid.*

Obviously, Croatia did not perceive the Declaration, or the Note, as a notification of succession – or as an act having the effects of a notification of succession.

3.38. A year later, in a letter of 30 January 1995, Croatia still refers to notification of succession as a step that **could** be taken in the future, and reiterates its position, according to which Croatia **would** consider a notification of succession if the FRY **were to** give such a notification. This, again, implies that in Croatia's view such a notification of succession was not given by the Declaration or by the Note of 27 April 1992; and that neither did the FRY become a Contracting Party to multilateral treaties to which the former SFRY was a party in any other way. The letter states:

> "***Should*** *the Federal Republic of Yugoslavia (Serbia and Montenegro)* ***express its intention to be considered a party, by virtue of succession****, to the multilateral treaties of the predecessor State with effect as of 27 April 1992, the date on which the Federal Republic of Yugoslavia (Serbia and Montenegro) as a new State, assumed responsibility for its international relations, the Republic of Croatia* ***would*** *take note of that notification of succession.*"[29] (emphasis added)

3.39. Depositary practice also confirms that neither the Declaration nor the Note of 27 April 1992 have ever been treated as an instrument of succession. Before it became clear that the FRY only became a Member of

[29] See UN Doc. A/50/75 – E/1995/10 (1995) (Annex 18).

the United Nations on 1 November 2000, depositary practice did show "Yugoslavia" as a member State of the UN and as a contracting party to treaties. This practice may have created ambiguities, and the appearance of membership – yet the only appearance which could have been created was that of a **continued** membership. The date written beside the membership of "Yugoslavia" was always the one on which the **former Yugoslavia** (and not the FRY) had become a Member of the UN, or a contracting party to a treaty. Had succession been contemplated, the date indicated would have been that of the succession, such as it is today with respect to the FRY, with respect to Croatia, and other member States. Until the FRY became a Member of the UN in November 2000, "Yugoslavia" was listed as a Member of the UN from 26 June 1945; this may have created the appearance of the FRY continuing the personality of the former SFRY, but **this could not have created even the appearance of membership of a successor State which came into being on 27 April 1992.**

3.40. Likewise, before the situation regarding the FRY was clarified, "Yugoslavia" was listed as a Contracting Party to the Genocide Convention, stating the date of signature as 11 December 1948, and the date of ratification as 29 August 1950.[30] The same survey indicates that Croatia became a Contracting Party on 12 October 1992 by succession.[31] Again, the reference to "Yugoslavia" as a Contracting Party since 1950

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[30] *Multilateral Treaties deposited with the Secretary-General, Status as at 31 Dec. 2000*, Vol. I, Part I (United Nations Treaties), Chap. IV (Human Rights), UN Doc. ST/LEG/SER.E/19, p. 132.(Annex 19)

[31] *Ibid.*, p. 131.

may have created the appearance of the continued existence of a "Yugoslavia" as a Contracting Party, but **it could not have supported in any way the hypothesis, or even the appearance that, by declaration, automatically, or otherwise, the FRY had became a Contracting Party by way of succession.**

3.41. By now, the situation has been clarified. In the publication "Multilateral Treaties Deposited with the Secretary-General", in section "Historical Information"[32] the Depositary offers explanation, **showing that the Declaration and the Note were clearly perceived as a claim to continuity.**

3.42. It is stated in the "Historical Information" that:

> "*Yugoslavia came into being on 27 April 1992 following the promulgation of the constitution of the Federal Republic of Yugoslavia on that day. Yugoslavia nevertheless advised the Secretary-General on 27 April 1992 that it claimed to continue the international legal personality of the former Yugoslavia. Yugoslavia accordingly claimed to be a member of those international organizations of which the former Yugoslavia had been a member.* ***It also claimed that all those treaty acts that had been performed by the former Yugoslavia were directly attributable to it, as being the same State (...) Bosnia and Herzegovina, Croatia, Slovenia and***

[32] *Multilateral Treaties Deposited with the Secretary-General*, "Historical Information", UN Treaty Website, at: http://untreaty.un.org/ENGLISH/bible/englishinternetbible/historicalinfo.asp, visited on 9 Jan. 2002. See Annex 12.

the former Yugoslav Republic of Macedonia... [o]bjected to this claim." (emphasis added)

Thus, the pretention expressed in both the Declaration and the Note was that of identity (continued personality) – and this is how it was perceived. These documents were **not** meant to **make** the FRY a member of the UN, or to **make** it a party to treaties. Both documents expressed instead a political aspiration to continuity (identity). The assertion of identity (continued personality) endeavours to confirm a perceived state of affairs – the FRY is the same person as the former Yugoslavia, and accordingly, the FRY **remains** a member of the UN and **remains** a party to treaties ratified by the former Yugoslavia – rather than pretending to create commitments, rights or obligations.

The Declaration and the Note were not meant to be treaty action, they were not perceived to be treaty action – and they were no treaty action.

The claim actually advanced in the Declaration and in the Note (the claim to continuity, i.e. identity) remained unaccepted and without effects.

3.43. The attempt of the former Government of the FRY to be "accepted as a continuation of the international legal personality of the former SFRY", and to assume membership of international organisations and to treaties on this ground failed. The political "views" expressed in the Declaration of 27 April 1992, and in the Note by which this Declaration

was presented to the UN, could not, and did not, change this fact. State succession did, of course, take place, but not on the grounds, and according to the terms, of a declaration which was not meant to be, and could not be considered to be, a declaration of succession. It was clearly a declaration of continuity. In the Declaration of 27 April 1992 the FRY did not claim, and did not even suggest that it would be a member of international organisations, or that it would be bound by treaties, **otherwise but on the assumption of continuing the personality of the SFRY.**

3.44. The FRY's claim that it remained a member of international organisations and party to treaties continuing the State, international legal and political personality of the Socialist Federal Republic of Yugoslavia did receive some encouragement, there were uncertainties and mixed responses, but no conclusive acceptance.

3.45. In this situation, the new Government of the FRY took the sole remaining course of action. On 27 October 2000, President Koštunica addressed a letter to the Secretary-General requesting admission of the FRY to membership of the United Nations.[33] Upon recommendation of the Security Council, the General Assembly decided on 1 November 2000 to admit the FRY to membership of the United Nations.[34]

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[33] See Annex 20.

[34] See Security Council Resolution 1326 (2000) and General Assembly Resolution 55/12 (2000) (Annex 21).

3.46. The decision of the General Assembly of 1 November 2000 finally resolved the dilemmas and uncertainties, and closed the door to the possibility that the FRY may have been a Member of the United Nations before 1 November 2000. The FRY became a **new** Member of the United Nations – clearly implying that it had not hitherto been a Member.

3.47. The FRY was admitted as a **new** Member on 1 November 2000, and so ended the period in which contradictory indications allowed different interpretations. All that remained was the unequivocal fact that the FRY did not continue the personality of the SFRY, and had not been a Member of the UN before 1 November 2000. According to the most recent List of Member States published by the UN (updated on 18 December 2000), "Yugoslavia" appears as a Member State, with the date of admission indicated as 1 November 2000. An explanatory note states:

> "*The Socialist Federal Republic of Yugoslavia was an original Member of the United Nations, the Charter having been signed on its behalf on 26 June 1945 and ratified 19 October 1945, until its dissolution following the establishment and subsequent admission* ***as new members*** *of Bosnia and Herzegovina, Croatia, the Republic of Slovenia, the former Yugoslav Republic of Macedonia, and* ***the Federal Republic of Yugoslavia***. (emphasis added)

The Federal Republic of Yugoslavia was admitted as a Member of the United Nations by General Assembly resolution A/RES/55/12 of 1 November 2000."[35]

3.48. Following admission, the Legal Counsel of the United Nations invited the FRY to decide whether or not to assume the rights and obligations of the former SFRY in international treaties. In his letter of 8 December 2000,[36] the Legal Counsel states:

"*It is the Legal Counsel's view that the Federal Republic of Yugoslavia should* ***now undertake treaty actions****, as appropriate, in relation to the treaties concerned,* ***if its intention is to assume the relevant legal rights and obligations as a successor State.***" (emphasis added)

3.49. It is important to add that the letter of the Legal Counsel was accompanied by a list of treaties with respect to which the FRY, in order to become a party, should undertake treaty action. **This list included the Genocide Convention**. Thereby it became confirmed that the FRY was not a party to the Genocide Convention before. Thus, in December 2000 the FRY was in a position to choose whether to succeed or acceed or whether instead not to succeed (nor to acceed) to treaties to which the former Yugoslavia was a party.

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[35] See at www.un.org/Overview/unmember.html; see Annex 22.

[36] See Annex 23.

3.50. Before November 2000, in the list of treaty actions published by the Depositary, the short name "Yugoslavia" was used for both the former Yugoslavia and for the FRY. This created a situation which was rightly characterised by this Court as "not free from legal difficulties".[37] Now as it has become clear that the FRY's claim to continuity remained unsuccessful, treaty actions of the former Yugoslavia are not listed anymore under a designation which could be confounded with the FRY. In the "Historical Information" published by the Secretary-General as depositary it is now explained that:

> *"Treaty actions undertaken by Yugoslavia are now listed in this publication against the designation "Yugoslavia".*
>
> *Treaty actions undertaken by the former Yugoslavia appear in footnotes, against the designation 'former Yugoslavia'."*[38]

3.51. ***In short***, the Declaration of 27 April 1992, the Note by which it was submitted to the UN, the reaction of the Depositary, and the unresolved status of Yugoslavia in the UN, did create dilemmas as to whether the FRY did or did not continue the personality, membership in the UN and treaty membership of the SFRY. However, this Declaration, the Note, and the practice of the Depositary never even suggested (but rather contradicted) membership of the FRY by succession to the treaties to which the former

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[37] *Court Order of 8 Apr. 1993, I.C.J. Reports 1993,* p. 14.

[38] See Annex 23.

SFRY was a party. Today it is clear that the FRY did not continue the personality, UN membership and treaty membership of the SFRY. The FRY became a new member of the UN on 1 November 2000; it became a Contracting Party to the Genocide Convention by accession on 10 June 2001 – with reservation to Article IX.

(d) The jurisdiction of the Court cannot be based on the theory of automatic succession of treaties

3.52. As demonstrated above, the Respondent has never given a notification of succession to the Genocide Convention.

3.53. It will now be further demonstrated that the Respondent never became bound by the Genocide Convention by automatic succession, since no such rule existed prior to the enactment of the 1978 Vienna Convention on State Succession in respect of Treaties, nor has such a rule since developed. This is confirmed by:

(1) the drafting history of the 1978 Vienna Convention;

(2) the practice of the Legal Counsel of the United Nations;

(3) the absence of the prerequisites to establishing a rule on automatic succession of human rights treaties;

(4) relevant State practice;

(5) depositary practice; and

(6) State practice (including that of the Applicant itself) with regard to the former SFRY.

(1) The drafting history of the 1978 Vienna Convention on State Succession in respect of Treaties demonstrates that the proposition of automatic succession of human rights treaties was not recognised in international law

3.54. During the preparatory work of the International Law Commission for the 1977/78 Diplomatic Conference at which the Vienna Convention on State Succession in respect of Treaties was finally adopted, the International Law Commission considered whether the principle of automatic succession should apply to law-making treaties such as, for example, the 1949 Geneva Conventions. Such a proposition was not accepted. The International Law Commission, after having devoted considerable time to the issue, stated in that regard that

> "*it was not the practice for the principle of continuance to be applied (...)*"[39]

Indeed, the conclusion reached by the International Law Commission was that

> "*the evidence of State practice appeared to be unequivocally in conflict with the thesis that a newly independent State is under an obligation to consider itself bound by a general law-making treaty applicable in respect of its territory prior to independence.*"[40]

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[39] See *Yearbook of the International Law Commission* (hereafter: "*YbILC*"), 1974, Vol. II. No. 1, p. 43. (Annex 24)

[40] *Ibid.*

3.55. The International Law Commission further analysed State practice with respect to the 1949 Geneva Conventions, and found that while a number of States had notified their succession, a large number of States had also become parties by way of accession[41], which clearly contradicts the proposition of automatic succession.

3.56. In particular the International Law Commission stressed the point that law-making treaties cannot be subjected to a regime of automatic succession since

> "*such treaties may contain purely contractual provisions such as, for example, a provision for the* ***compulsory adjudication of disputes***."[42] (emphasis added)

3.57. Accordingly, the International Law Commission did not include in its draft articles any specific provision relating to automatic succession with regard to the category of law-making treaties, which – if introduced – might have also covered the Genocide Convention.

3.58. During the 1977-1978 Vienna Diplomatic Conference, similar proposals contemplating automatic succession regarding law-making

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[41] *Ibid,* pp. 43-44.

[42] *Ibid.*, p. 44.

treaties submitted by the USSR and the Netherlands[43] were withdrawn, when it became obvious that they would not receive sufficient support.[44]

(2) Practice of the Legal Counsel of the United Nations

3.59. This approach is also in line with the view taken by the Legal Counsel, who in 1976 had already stated with regard to the Geneva Convention relating to the Status of Refugees that:

> *"(...) it is the practice of the Secretary-General, as depositary of international agreements, to consider the would-be successor State as a party to an agreement only after a notification of succession specifically mentioning the agreement succeeded to has been deposited with him. (...) Failing succession, the normal means of participation explicitly provided for by the 1951 Convention and the 1967 Protocol (namely accession) is still available to the State concerned."*[45]

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[43] See *United Nations, Conference on Succession of States in respect of Treaties, Off. Rec., Vol. III, Documents of the Conference*, docs. A/CONF.80/C.1/L.22 & A/CONF.80/C.1/L.35, pp. 112-113 (Annex 25).

[44] M. Yasseen, "La Convention de Vienne sur la succession d'Etats en matière de traités", *AFDI*, 1978, p. 59, at p. 107 (Annex 26).

[45] See *United Nations Juridical Yearbook*, 1976, p. 219 (Annex 27).

(3) Prerequisites to establishing a rule on automatic succession of human rights treaties were never met

3.60. As demonstrated above, until 1978 no rule of automatic succession with regard to human rights treaties was established. The Respondent submits that in the relevant period between 1978 and 1992, i.e. in less than fifteen years, **no** rule of customary international law providing for such automatic succession was developed either.

3.61. In the well-known holding of this Court in the *North Sea Continental Shelf Case*, the Court stated with regard to a similarly short period of eleven years, i.e. the period between 1958 and 1969:

> *"Although the passage of only a short period of time is not necessarily, or of itself, a bar to the formation of a new rule of customary international law (...), an indispensable requirement would be that within the period in question, short though it might be,* ***State practice, including that of States whose interests are specially affected, should have been both extensive and virtually uniform*** *(...)."*[46] (emphasis added)

3.62. This standard was clearly not attained, nor could it be in the present case. The State practice which has developed is far from being "virtually uniform", neither has it been extensive. Moreover, State practice in general,

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[46] *North Sea Continental Shelf (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands), Judgement of 20 Feb. 1969, I.C.J. Reports 1969*, p. 43, para. 74.

and State practice regarding the FRY in particular, have **contradicted** the proposition of automatic succession.

3.63. It has to be noted first, that in the case of treaty succession with regard to human rights treaties, there was almost no State practice whatsoever until the early 1990s, given that an extremely small number of cases of State succession arose between 1978 and 1990.

3.64. The existing State practice, and in particular the practice of successor States (the "*States whose interests are specially affected*"), does not support the proposition of automatic succession. To the contrary, relevant State practice offers backing to the position that human rights treaties are **not** subject to automatic succession.

(4) Relevant State practice after the adoption of the 1978 Vienna Convention on State Succession in respect of Treaties supports the view that human rights treaties are not subject to automatic succession

Practice with regard to the successor States of the former USSR

3.65. The practice of successor States of the former USSR is not "virtually uniform", and contradicts the theory of automatic succession. Some States submitted specific notifications of succession, some others have taken no position. Most importantly, a large number of successor States which came into existence on the territory of the former USSR have **acceded** to the various human rights treaties such as:

- the International Covenant on Civil and Political Rights[47],
- the International Covenant on Economic, Social and Cultural Rights[48],
- the Convention on the Elimination of All Forms of Discrimination against Women[49],
- the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment[50],
- the Convention on the Rights of the Child[51],

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[47] The following countries have become Contracting Parties by way of *accession*: ***Armenia*** (23 June 1993), ***Azerbaijan*** (13 Aug. 1992), ***Georgia*** (3 May 1994), ***Kyrgyzstan*** (7 Oct. 1994), ***Moldova*** (26 Jan. 1993), ***Tajikistan*** (4 Jan. 1999), ***Turkmenistan*** (1 May 1997) ***Uzbekistan*** (28 Sep. 1995).

[48] The following countries have become Contracting Parties by way of *accession*: ***Armenia*** (13 Sep. 1993), ***Azerbaijan*** (13 Aug. 1992), ***Georgia*** (3 May 1994), ***Kyrgyzstan*** (7 Oct. 1994), ***Moldova*** (26 Jan. 1993), ***Tajikistan*** (4 Jan. 1999), ***Turkmenistan*** (1 May 1997), ***Uzbekistan*** (28 Sep. 1995).

[49] The following countries have become Contracting Parties by way of *accession*: ***Armenia*** (13 Sep. 1993), ***Azerbaijan*** (10 July 1995), ***Georgia*** (26 Oct. 1994), ***Kazakhstan*** (26 Aug. 1998), ***Kyrgyzstan*** (10 Feb. 1997), ***Moldova*** (1 July 1994), ***Tajikistan*** (26 Oct. 1993), ***Turkmenistan*** (1 May 1997), ***Uzbekistan*** (19 July 1995).

[50] The following countries have become Contracting Parties by way of *accession*: ***Armenia*** (13 Sep. 1993), ***Azerbaijan*** (16 Aug. 1996), ***Georgia*** (26 Oct. 1994), ***Kazakhstan*** (26 August 1998), ***Kyrgyzstan*** (5 Sep. 1997), ***Moldova*** (28 Nov. 1995), ***Tajikistan*** (11 Jan. 1995), ***Turkmenistan*** (25 June 1999), ***Uzbekistan*** (28 Sep. 1995).

[51] The following countries have become Contracting Parties by way of *accession*: ***Armenia*** (23 June 1993), ***Azerbaijan*** (13 Aug. 1992), ***Kyrgyzstan*** (7 Oct. 1994), ***Moldova*** (26 Jan. 1993), ***Tajikistan*** (26 Oct. 1993), ***Turkmenistan*** (20 Sep. 1993), ***Uzbekistan*** (29 June 1994).

- the Convention on the Elimination of All Forms of Racial Discrimination[52],

- the Convention on the Non-applicability of Statutory Limitations to War Crimes and Crimes against Humanity[53],

- the International Convention on the Suppression and Punishment of the Crime of Apartheid[54].

All of these treaties had previously been ratified by the USSR. This confirms that the successor States of the USSR have not become bound by the various human rights treaties by way of automatic succession.

The same position was taken with respect to the Genocide Convention. (See *infra* 3.71-3.73 focusing on specific State practice with regard to the Genocide Convention.)

3.66. Practice of third States confirms the conclusion that there is no automatic succession with regard to human rights treaties. *Inter alia*, the Respondent would like to draw to the attention of the honoured Court a

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[52] The following countries have become Contracting Parties by way of *accession*: ***Armenia*** (23 June 1993), ***Azerbaijan*** (16 Aug. 1996), ***Georgia*** (2 June 1999), ***Kazakhstan*** (26 Aug.1998), ***Kyrgyzstan*** (5 Sep. 1997), ***Moldova*** (26 Jan. 1993), ***Tajikistan*** (11 Jan. 1995), ***Turkmenistan*** (29 Sep. 1994), ***Uzbekistan*** (28 Sep. 1995).

[53] The following countries have become Contracting Parties by way of *accession*: ***Armenia*** (23 June 1993), ***Azerbaijan*** (16 Aug. 1996), ***Georgia*** (31 Mar. 1995), ***Moldova*** (26 Jan. 1993).

[54] The following countries have become Contracting Parties by way of *accession*: ***Armenia*** (23 June 1993), ***Azerbaijan*** (16 Aug. 1996), ***Kyrgyzstan*** (5 Sep. 1997).

decision of the Swiss Federal Court (Tribunal Fédéral) which found that Kazakhstan had not succeeded to the International Covenant on Civil and Political Rights (hereinafter: "ICCPR") due to a lack of a notification of succession. The decision stated:

> *"(...) la République du Kazakhstan est, juridiquement, l'un des Etats successeurs de l'ancienne Union des Républiques socialistes soviétiques (URSS) (...). En tant qu'Etat successeur de l'ancienne URSS, la République du Kazakhstan est libre d'exprimer* ***ou non*** *son consentement à être liée par les traités auxquels l'Etat dont elle est issue est partie. L'expression de ce consentement peut prendre la forme d'une simple déclaration de succession. (...) Jusqu'ici, le Kazakhstan n'a pas exprimé, selon les modalités décrites, son consentement à être lié par le Pacte ONU II ou par la Convention des Nations-Unies contre la torture et les autres traitements ou peines inhumains, cruels ou dégradants, du 10 décembre 1984 (...)."*[55](emphasis added).

Practice in the case of German reunification

3.67. The practice of the Federal Republic of Germany (hereinafter: "FRG") also indicates that those human rights treaties to which only the former German Democratic Republic (hereinafter: "GDR") had been a contracting party did not continue to be in force on the territory of the former GDR after the said territory had become part of the FRG. This

[55] See BGE, vol. 123 II, p. 511, at pp. 518-519.

practice therefore contradicts the perception of the theory of acquired rights as outlined by the Applicant.

3.68. In particular it has to be noted that the GDR had already ratified the United Nations Convention against Torture in 1987[56] whilst the FRG ratified it only on 31 October 1990. Yet both the reply by the German representative to the Committee against Torture made during its 48th session[57] and the first German report on the implementation of the Convention[58] imply that the previous ratification by the GDR did not continue to have effect on the territory of the former GDR. Accordingly, the FRG had thereby taken the position that the principle of automatic succession to human rights treaties did not apply.

3.69. The fact that the FRG did not and does not consider itself bound by human rights treaties previously ratified by the former GDR is further confirmed by the practice of the FRG with regard to the International Convention on the Suppression and Punishment of the Crime of Apartheid, which had been ratified by the former GDR in 1974.[59] This Convention is

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[56] See *Multilateral Treaties deposited with the Secretary-General*, Part I (United Nations Treaties), Chap. IV (Human Rights) – notes 6 and 7 of the text appearing at: http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterIV/treaty12.asp. visited on 12 Aug. 2002 (Annex 28).

[57] *Report of the Committee against Torture, Official Records of the General Assembly, Forty-Eighth Session, Suppl. No. 44*, Doc. A/48/44 (1993), p. 30.

[58] See UN Doc. CAT/C/12/Add.1, of 17 Mar. 1992, p. 1.

[59] See *Multilateral Treaties deposited with the Secretary-General*, Part I (United Nations treaties), Chap. IV (Human Rights) – n. 1 of the text appearing at: http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterIV/treaty8.asp. visited on 12 Aug. 2002 (Annex 29).

not mentioned in the official German listing of treaties in force, thus confirming the position of the FRG that treaty obligations under the International Convention on the Suppression and Punishment of the Crime of Apartheid – which, like the Genocide Convention, establishes an international crime (in this case the crime of apartheid) – had not been inherited, not even with regard to the territory and the population of the former GDR.

Practice of newly independent States, in particular with regard to the Geneva Convention relating to the Status of Refugees

3.70. Respondent reiterates that until 1990 state practice regarding automatic succession was scarce. More examples exist for the period after 1990, but their number is still limited – and they do not lend support to the idea of automatic succession. It has to be noted that a very high number of newly independent States – although they had been in a position to notify their succession with regard to the Geneva Convention relating to the Status of Refugees, have instead – both before and after 1978 – *acceded* to it.

The States concerned include Papua New Guinea[60], the former French dependent territories Burkina Faso, Cambodia, Chad , Gabon, Madagascar and Mauritania[61] as well as the former British dependent territories

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[60] ***Australia*** had effective 22 January 1954 extended the Genocide Convention to Papua New Guinea; still ***Papua New Guinea*** acceded to the Convention as of 17 July 1986.

[61] ***France*** had effective 23 June 1954 extended the applicability of the Genocide Convention to its dependent territories; still ***Burkina Faso*** acceded on 18 June 1980, Cambodia on October 1992, ***Chad*** on 19 August 1981, ***Gabon*** on 27 April 1964, ***Madagascar*** on 18 December 1967; and ***Mauritania*** on 5 May 1987.

Bahamas, Belize, Dominica, Kenya, Seychelles, Solomon Islands, United Republic of Tanzania and Zimbabwe[62].

Specific practice with regard to the Genocide Convention

3.71. With regard specifically to the Genocide Convention, there is also ample State practice that contradicts the idea of automatic succession, given that a great number of successor States have **acceded** to the Convention. Other successor States either gave specific notifications of succession or have undertaken no treaty action whatsoever. All this clearly shows an absence of a uniform, or even prevailing practice. The existing practice gives no support to, but rather contradicts, the proposition of automatic succession.

3.72. Successor States which acceded to the Genocide Convention include: Rwanda[63], Tonga[64], Algeria[65], Bangladesh[66], the majority of the

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[62] The ***United Kingdom*** had effective 11 March 1954 extended the applicability of the Genocide Convention to its dependent territories; still the ***Bahamas*** acceded on 15 September 1993, ***Belize*** on 27 June 1990, ***Dominica*** on 17 February 1994, ***Kenya*** on 16 May 1966, the ***Seychelles*** on 23 April 1980, the ***Solomon Islands*** on 28 February 1995; the ***United Republic of Tanzania*** on 12 May 1964; and ***Zimbabwe*** on 25 August 1981.

[63] By declaration dated 13 Mar. 1952 ***Belgium*** had extended the applicability of the Genocide Convention to the Trust Territory of Rwanda-Burundi; still ***Rwanda*** acceded on 16 Apr. 1975.

[64] By declaration dated 2 June 1970 ***the United Kingdom of Great Britain and Northern Ireland*** had extended the applicability of the Genocide Convention to the Kingdom of Tonga; still ***Tonga*** acceded on 16 Feb. 1972.

[65] The Genocide Convention had entered into force with regard to ***France*** on 14 Oct. 1950; ***Algeria*** acceded to the Convention on 31 Oct. 1963.

[66] ***Pakistan*** had ratified the Genocide Convention by 12 Oct. 1957; ***Bangladesh*** acceded on 5 Oct. 1998.

successor States of the USSR, (i.e. Azerbaijan, Armenia, Georgia, Kazakhstan, Kyrgyzstan, Moldova, Uzbekistan)[67] and the Respondent itself.

3.73. It is of particular importance that – with the only exception of Croatia and Bosnia and Herzegovina with regard to the accession of the FRY – no other contracting party to the Genocide Convention has until today ever objected to accessions by successor States to the Genocide Convention. Moreover, **the Applicant itself has acquiesced in such practice, with regard to seven such accessions by successor States of the former USSR, which have taken place after Croatia itself had become a contracting party to the Genocide Convention.**

(5) Depositary practice

3.74. Depositary practice similarly indicates that the principle of automatic succession does not apply to human rights treaties.

Practice of the Swiss Government as depositary of the Geneva Conventions of 1949 and its Additional Protocols

3.75. The Swiss Government has consistently taken the position that, in order for a successor State to be listed as a contracting party of either the

[67] The following countries have become contracting parties by way of accession: ***Azerbaijan*** (16 Aug. 1996), ***Armenia*** (23 June 1993), ***Georgia*** (11 Oct. 1993), ***Kazakhstan*** (26 Aug. 1998), ***Kyrgyzstan*** (5 Sep. 1997), ***Moldova*** (26 Jan. 1993), ***Uzbekistan*** (9 Sep. 1999).

Tajikistan and ***Turkmenistan*** have taken no treaty action whatsoever.

Belarus and ***Ukraine*** had become contracting parties of their own right in 1954. ***Estonia***, ***Latvia*** and ***Lithuania*** do not consider themselves to be successor States of the USSR.

four Geneva Conventions of 1949 or one of its Additional Protocols, the said State must have submitted a specific notification referring to the treaties to which the respective State wanted to succeed. The Swiss Government considers that, in this respect, no distinction can be made between different kinds of multilateral treaties. This is confirmed by a statement with regard to the practice of Switzerland from the (then) Legal Adviser of the Swiss Government L. Caflisch:

> "Elle[68] n'opère à cet égard aucune distinction selon la nature ou l'objet du traité. En matière de succession d'Etats aux conventions de Génève. La pratique du dépositaire suisse est identique à celle qu'il observe pour d'autres traités ouverts à l'ensemble de la communauté internationale, telle, par exemple, la Convention sur le commerce international des espèces de faune et de flore sauvages menacées d'extinction (CITES)."[69]

Practice of the French Government as depositary of the 1925 Geneva Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases

3.76. Quite similarly, the French Government, acting in its function as depositary of the 1925 Geneva Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, has considered a

[68] This refers to Switzerland (footnote added).

[69] L. Caflisch, "La pratique suisse en matière de droit international public 1996", *SZIER* 1997, p. 637, at p. 684 (Annex 30).

successor State to be bound by the said treaty only if it had previously submitted a specific notification of succession with regard to that treaty.[70]

Practice of the United Nations Secretary-General as depositary

3.77. The same is true for the United Nations Secretary-General. Indeed, it is the considered view of the Secretary-General that even if a successor State had either entered into a so-called devolution agreement or submitted a general notification of succession, it could **not** be regarded as a contracting party by virtue of succession.[71]

(6) State practice with regard to the former SFRY contradicts the proposition of automatic succession

3.78. State practice of the States whose interests are specially affected – i.e. State practice in the case of the dissolution of the former SFRY – clearly contradicts the proposition of automatic succession. The Applicant itself (together with other successor States of the former Yugoslavia) has consistently opposed the suggestion that the FRY could have become a contracting party to human rights treaties by way of automatic succession.

3.79. Croatia is relying on one scholarly article in support of the concept of automatic succession in the realm of human rights treaties. This is the

[70] See CAHDI "La pratique de la France dépositaire de traités multilateraux en matière de succession d'Etats", *CAHDI* (94) 8, p. 2 (Annex 31).

[71] See Annex 16.

article by M. Kamminga, "State Succession in Respect of Human Rights Treaties". In this very article Mr. Kamminga reveals that Croatia has consistently **opposed** the proposition that the FRY became a member of human rights treaties by automatic succession. In Kamminga's words:

> "*Croatia, Bosnia-Herzegovina and Slovenia have argued that the FRY cannot be regarded as a party to treaties such as the International Covenant on Civil and Political Rights, the International Convention on the Elimination of all Forms of Racial Discrimination and the Convention on the Elimination of Discrimination against Women. They base this conclusion on the argument that, on the one hand, the FRY cannot automatically continue the legal personality of the SFRY and, on the other hand, the FRY refused to formally succeed to these treaties. Because this approach has prevailed at meetings of State parties of these treaties the FRY has been barred from attending them.*"[72]

3.80. Indeed, Croatia (together with Bosnia-Herzegovina and Slovenia) repeatedly and consistently argued that the FRY could not be regarded as a party to treaties because the FRY could not automatically continue the legal personality of the SFRY, and because the FRY did not submit a formal notification of succession. **This logic clearly excludes automatic succession.**

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[72] M. T. Kamminga, "State Succession in Respect of Human Rights Treaties", 7 *EJIL* (1996), p. 469, at p. 477 (Annex 32).

3.81. Already in 1993, Croatia takes a clear-cut general position. In a letter dated 23 August 1993 from the Croatian Minister of Foreign Affairs addressed to the President of the Security Council, Croatia argues that the FRY "has not been automatically accepted" to international treaties, since "the depositaries consider it as just one of the successor States", and concludes:

> "*As a result of the dissolution of the former State, the country known as the Federal Republic of Yugoslavia (Serbia and Montenegro) will have to deposit an instrument of succession to all the international treaties it wishes to continue to be a party to.*"[73]

3.82. The same argument was raised repeatedly, and in particular in connection with human rights treaties. To give an illustration of the argument, in its *Aide Mémoire* of 14 January 1994, the Permanent Mission of Croatia to the United Nations stressed:

> "*Since the so-called 'Federal Republic of Yugoslavia' (Serbia and Montenegro)* ***has not notified the Secretary General of its succession*** *to the International Convention on the Elimination of all Forms of Racial Discrimination as one of the successor states of the former SFRY,* ***it cannot be considered as one of the parties to the said convention.*** *Therefore, as a non-party, the said delegation has no right to participate at the fifteenth meeting of the State Parties to the*

[73] See UN Doc. S/26349 (1993) (Annex 33).

International Convention on the Elimination of All Forms of Racial Discrimination."[74] (emphasis added)

3.83. As a result of such initiatives and actions, the FRY was barred from attending meetings of States parties to treaties. This pattern can be demonstrated through many examples.

3.84. For example, in Croatia's *Aide-Mémoire* sent to be circulated at the 13th Meeting of the State Parties to the ICCPR, Croatia stressed that:

> "*Since the Federal Republic of Yugoslavia (Serbia and Montenegro)* ***has not notified the Secretary-General of its succession*** *to the International Covenant on Civil and Political Rights as one of the successor States of the former Socialist Federal Republic of Yugoslavia,* ***it cannot be considered to be a party to the said Covenant.*** *Therefore, as a non-party, the said delegation has no right to participate in the thirteenth meeting of States parties to the International Covenant on Civil and Political Rights.*"[75] (emphasis added)

3.85. During the 18th Meeting of States parties to the International Covenant on Civil and Political Rights on 16 March 1994, Mr. Šaćirbej proposed on behalf of Bosnia-Herzegovina

> "*[t]hat the State parties should decide that the Federal Republic of Yugoslavia (Serbia and Montenegro) should not*

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[74] See UN Doc. CERD/SP/51 (1994), p. 3 (Annex 34).

[75] See UN Doc. CCPR/SP/40 (1994), p. 3 (Annex 35).

participate in the work of the Meeting of the States parties to the Covenant."[76]

Mr. Matešić, the representative of Croatia, added that

"*If the Federal Republic of Yugoslavia (Serbia and Montenegro) wished to be considered a party to the Covenant, it must notify the Secretary-General, in his capacity as depositary of international treaties, of its succession as one of the successor States of the former Socialist Federal Republic of Yugoslavia. Currently it was not a party thereto, and thus had no right to participate in the Meeting.*"[77]

Following these arguments, Bosnia-Herzegovina's proposal to exclude the FRY from the Meeting was adopted by 51 votes for, 1 against and 20 abstentions.[78]

3.86. This sequence of arguments and events was repeated on a number of occasions. During the 19th Meeting of the States Parties to the International Covenant on Civil and Political Rights, Mr. Mišić, the representative of Bosnia-Herzegovina proposed that

"*the State Parties should decide that the Federal Republic of Yugoslavia (Serbia and Montenegro) should not participate in*

[76] See UN Doc. CCPR/SP/SR.18 (1994), p. 3, para. 2 (Annex 36).

[77] *Ibidem*, p. 6, para. 21.

[78] *Ibidem*, p. 7, para. 23.

the work of the meeting of the States Parties to the Covenant"[79].

This proposal was endorsed and further explained by the representative of Croatia (Mr. Matešić), who stated that the FRY

> "*[h]ad not notified the Secretary-General, in his capacity as the depositary of international treaties, of its accession to the Covenant. That State therefore, should not be allowed to participate in the meetings of State parties.*"[80]

The motion of Bosnia-Herzegovina was adopted, and the FRY was barred from participating in the Meeting.[81]

3.87. In all of these cases, the proposition of automatic succession would have yielded a different conclusion (namely that the FRY should, indeed, have attended meetings of State Parties). Yet Croatia has, along with other member States of human rights treaties, repeatedly asserted the opposite view, stating that the FRY could not have acquired treaty membership in human rights treaties (to which the SFRY was a member) without formal notification of accession or succession – and this is the view which prevailed.

3.88. Finally, the Respondent draws attention of the Court to a letter dated 30 January 1995 from the Permanent Representative of Croatia to the

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[79] See UN Doc. CCPR/SP/SR.19 (1994), at p. 3 (Annex 37).

[80] *Ibidem*, at p. 4.

[81] *Ibidem*, p. 8.

UN[82], a letter which represents a summary of the Applicant's position taken regarding the issue of the possible membership of the FRY to human rights treaties. This letter was addressed to the Secretary-General in his capacity as depositary of multilateral treaties, commenting on a document regarding the "*status of succession, accession or ratification of human rights treaties by States successors to the former Yugoslavia, the former Soviet Union, and the former Czechoslovakia*". In this letter Croatia "strongly objects" to the listing of "Yugoslavia" as a party to human rights treaties, since this designation might be interpreted as a reference to the FRY. The letter reiterates that "*[i]n accordance with the relevant resolutions of the Security Council (...) and the General Assembly (...) and general rules of international law on the succession of States...*", the FRY could not be considered automatic successor of the former SFRY with respect to multilateral treaties. The Croatian letter recalls that

> "*[t]he representatives of the Federal Republic of Yugoslavia (Serbia and Montenegro) have been prevented from participating in international meetings and conferences of State parties to multilateral treaties in respect of which the Secretary-General acts as depositary (i.e. Convention on Prohibitions and restrictions of the Use of Certain Conventional Weapons which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects, Convention on the Rights of the Child, International Convention on Elimination of All Forms of Racial*

[82] See UN Doc. A/50/75 – E/1995/10 (Annex 18).

Discrimination, International Covenant on Civil and Political rights, etc.) as the Federal Republic of Yugoslavia (Serbia and Montenegro) ***had not acted according to international rules of succession of States. Namely, the Federal Republic of Yugoslavia (Serbia and Montenegro) had tried to participate in international forums as a State party without having notified its succession...***" (emphasis added)

Croatia stresses later on in the same letter:

"***Should*** *the Federal Republic of Yugoslavia (Serbia and Montenegro)* ***express its intention to be considered a party,*** *by virtue of succession, to the multilateral treaties of the predecessor State with effect as of 27 April 1992, the date on which the Federal Republic of Yugoslavia (Serbia and Montenegro), as a new State, assumed responsibility for its international relations, the Republic of Croatia* ***would*** *take note of that notification of succession.*" (emphasis added)

3.89. It is beyond doubt that Croatia – along with other successor States – consistently and unequivocally denied that the FRY could have become a contracting party to human rights treaties, otherwise but by a specific notification. It is also clear that the notification expected by Croatia was a notification of succession. Such a notification was not given by the FRY.

3.90. The former Government of the FRY did argue that the FRY continued to be a member of the UN and a contracting party of treaties to which the SFRY had been a party (including human rights treaties); but it

did so consistently and exclusively on the basis of the assumption of continuing the personality of the SFRY, which assumption proved to be an erroneous one. The FRY did not claim or purport to be a member of treaties by way of succession.

3.91. At the same time, Croatia's declarations were given exactly in the context of succession. Croatia clearly and consistently denied that the FRY could have become a member State of treaties by way of automatic succession, emphasizing and repeating that the FRY could not be considered to be a party to human rights treaties without a formal notification of succession. This position was not a position taken on the basis of some flawed assumption. The logic of the denial of automatic succession was not based on a perception of the dissolution of the SFRY which would have proved to be a misperception. There was no misunderstanding of any kind. Having in mind the interpretation of the dissolution of the SFRY that eventually proved to be the correct one, Croatia emphatically denied the possibility of automatic succession to human rights treaties. Croatia, therefore, cannot now, in good faith, assert the opposite.

(e) Even if the automatic succession of rules of human rights treaties were a generally accepted principle, this could not include the rule of Article IX of the Genocide Convention

3.92. The Respondent will now demonstrate that, even if it did indeed become bound, *quid non*, by the Genocide Convention by virtue of

automatic succession, such succession could only extend to the substantive guarantees of the Convention, and cannot include Article IX of the Convention. This conclusion is inevitable because:

- firstly, instruments providing for the peaceful settlement of disputes are not subject to automatic succession; and
- secondly, treaty clauses providing for the jurisdiction of international supervisory mechanisms can be separated from the substantive provisions of the treaty.

Instruments providing for the peaceful settlement of disputes are not subject to automatic succession

3.93. In 1947, the Legal Counsel of the United Nations stated that:

> "*(...) it has been clear that* no *succession occurs in regard to rights and duties of the old State which arise from political treaties such as treaties (...) of pacific settlement.*"[83]

3.94. As already mentioned, this approach was also adopted by the International Law Commission during its work on the codification of the law on State succession with regard to treaties. It did not create a specific category of so-called law-making treaties which would have been made subject to the principle of automatic succession specifically since

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[83] Quoted by O. Schachter, "The Development of International Law through the Legal Opinions of the United Nations Secretariat", *BYIL*, 1948, p. 91, at p. 106 (Annex 38).

"such treaties may contain purely contractual provisions such as, for example, ***a provision for the compulsory adjudication of disputes****."*[84] (emphasis added)

3.95. This view was also further confirmed by a decision of the Pakistani Supreme Court which stated that:

"(...) as a general rule a new State so formed will succeed to rights and obligations arising only under treaties specifically relating to its territories (...) ***but not to rights and obligations under treaties affecting the State (...) e.g. treaties of (...) arbitration*** *(...)"*[85] (emphasis added)

3.96. Such position that contractual obligations regarding the settlement of disputes, which are essentially political obligations, are not transmissible under international law is also confirmed by the view of eminent authors. According to D. P. O'Connell, one of the leading authorities in the field, the question as to whether treaty obligations devolve depends on their respective subject-matter. O'Connell takes note of the fact that treaties are ranging in subject-matter from renunciation of war and peaceful settlement

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[84] See Annex 24, p. 44.

[85] Supreme Court of Pakistan, *Yangtze (London) Ltd. v. Barlas Brothers (Karachi) and co.*, Judgement of 6 June 1961 (see Materials on State Succession, United Nations Legal Series Doc. ST/LEG/SER.B/14, p. 137 et seq.; also quoted in *Statement of the Government of India in Continuance of its Statement* of 28 May 1973 and in *Answer to Pakistan's Letter of 25 May 1973, I.C.J. Pleadings, Trial of Pakistani Prisoners of War (Pakistan v. India), 1973,* p. 139, at pp. 147-148).

of international disputes, through copyright and counterfeiting, to weights and measures, and points out:

> "*Clearly not all these treaties are transmissible: no State has acknowledged its succession to the General Act for the Pacific Settlement of International Disputes.*"[86]

3.97. Thus, both practice and considered scholarly opinion clearly show that treaty clauses providing for peaceful settlement of disputes are not subject to automatic succession. The Respondent therefore submits that Article IX of the Genocide Convention is not subject to the principle of automatic succession and that the FRY is accordingly not bound by it, even if the Court finds, *quid non,* that the substantive provisions of the Genocide Convention are subject to the principle of automatic treaty succession.

> *The issue of succession with regard to Article IX of the Genocide Convention can be separated from an assumed automatic succession with regard to the substantive provisions of the Convention*

3.98. D. P. O'Connell states that the transmissible portions of a treaty may be severed from the intransmissible ones, if the two portions

(a) deal with separate subject-matters;

(b) do not depend upon each other; and

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[86] D. P. O'Connell, *State Succession in Municipal Law and International Law*, Vol. II, Cambridge, 1967, p. 213 (footnote omitted) (Annex 39).

(c) are not inseparably connected in the scheme of treaty performance.[87]

He concludes by giving a convincing example:

"An arbitration clause in a dispositive treaty could be regarded as ancillary and severable."[88]

3.99. All three of the conditions described by O'Connell are fulfilled with regard to Article IX of the Genocide Convention.

3.100. Articles I through VIII deal with the definition of genocide, the substantive obligations of the parties to punish the crime of genocide and the co-operation of the Contracting Parties. In clear contrast thereto, Article IX deals neither with individual rights nor with the co-operation of States parties. Instead it grants the International Court of Justice jurisdiction for resolving disputes between the Contracting Parties that accepted such jurisdiction, addressing thereby a completely different area.

3.101. The different provisions of the Genocide Convention neither depend on each other nor are they inseparably connected in the scheme of treaty performance. Indeed the substantive provisions of the Genocide Convention retain their normative value and may be enforced by regular mechanisms provided by international law.

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[87] *Ibid.*, p. 301.

[88] *Ibid.*

3.102. Thus, even if this Court should find – contrary to the position of the Respondent – that the FRY became a Contracting Party to the Genocide Convention by virtue of automatic succession, such succession would only cover the substantive obligations contained in the Convention but not its Article IX.

3.103. The principle of separation, and the need for separating substantive principles from jurisdictional provisions, were clearly confirmed in the Order of the Court of 10 July 2002 in the *Case concerning Armed Activities on the Territory of the Congo – New Application: 2002 (Democratic Republic of the Congo v. Rwanda).*[89] In paragraph 71 of this Order – referring to underlying principles rather than to specific treaty provisions – the Court stated that the principles underlying the Genocide Convention

> "*are principles recognized by civilized nations as binding on States, even without any conventional obligation.*"

The Court also pointed out – citing its 1951 Advisory Opinion – that

> "*the rights and obligations enshrined by the Convention are rights and obligations* erga omnes."

But the Court added right away, and in no uncertain terms that jurisdiction is a different thing. The Court also stressed in the same paragraph 71 of the Order that:

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[89] *Court Order of 10 July 2002*, at:
http://www.icj-cij.org/icjwww/idocket/icrw/icrworder/icrw_iorders_20020710.pdf.

> *"[i]t has jurisdiction in respect of States only to the extent that they have consented thereto; and whereas, when a compromissory clause in a treaty provides for the Court's jurisdiction, that jurisdiction exists only in respect of the parties to the treaty who are bound by that clause and within the limits set in that clause;"*[90]

The Court further stressed in paragraph 72, that the Genocide Convention does not prohibit reservations, and that a reservation to Article IX

> *"does not bear on the substance of the law, but only on the Court's jurisdiction; whereas therefore it does not appear contrary to the object and purpose of the Convention."*[91]

(f) The alleged jurisdiction based on Article IX has no support in theories on acquired rights of the population of the successor State

3.104. Endeavouring to present theories which might justify its position, the Applicant also refers to the concept of acquired rights (Memorial: 6.07). The authority the Applicant relies on, is an article by M. Kamminga. Explaining his argument that human rights treaties may not be affected by State succession, M. Kamminga, the author quoted by the Applicant, endeavours to find support in

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[90] *Ibid.*, pp. 25-26, para. 71.

[91] *Ibid.*, p. 26, para. 72.

> *"[t]he doctrine of acquired rights, as applied by the Permanent Court of International Justice in the German Settlers case."*[92]

3.105. The Respondent submits that the German Settlers case offers no support to the position of the Applicant for several reasons. First of all, the German Settlers case does not contemplate at all succession of rights acquired under treaties. Instead, the issue was whether private rights of individuals acquired by contracts in which the other side was a State (Germany) would continue to exist after change of sovereignty. The main issue was formulated very clearly:

> *"The principal question with which the Court is now confronted is the following: The sovereignty and the ownership of State property having changed, is the settler who had concluded a* Rentengutsvertrag *with the Prussian State entitled to claim from the Polish Government as the new owner the execution of the contract, including the completion of the transfer by* Auflassung*?"*[93]

3.106. The impact of the 28 June 1919 Versailles Peace Treaty and of the "Minority Treaty" (signed on the same day) was also considered, but no one suggested that the rights at issue would have been acquired under these

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[92] Kamminga, *op. cit.*, p. 472 (Annex 32).

[93] Advisory opinion given by the P.C.I.J. on 10 Sep. 1923 on certain questions relating to settlers of German origin in the territory ceded by Germany to Poland, *P.C.I.J. Ser. B No. 6*, p. 35.

treaties. The P.C.I.J. took note of the circumstance that the contracts (*Rentengutsverträge* and *Pachtverträge*) concluded before the Armistice of 11 November 1918 allowing possession of German settlers brought about "Germanisation" of certain territories, and also noted that "*[d]e-Germanization would result from requiring the settlers in question to abandon their homes*". The P.C.I.J. added:

> "*But, although such a measure may be comprehensible, it is precisely what the Minorities Treaty was intended to prevent.*"[94]

The P.C.I.J. further stressed:

> "*But the political motive originally connected with the Rentengutsvertäge does not in any way deprive them of their character as contracts under civil law, (...)*"[95]

3.107. As Kamminga recognises himself, the P.C.I.J. only dealt with a specific category of rights, different from those which are at issue in the present case. The German Settlers case dealt with **private rights (property rights)** acquired under the respective domestic law of the predecessor State. As stated in the Opinion:

> "*Private rights acquired under existing law do not cease on a change of sovereignty. No one denies that the German Civil Law, both substantive and adjective, has continued without*

[94] *Ibid.*, pp. 25-26.

[95] *Ibid.*, p. 39.

interruption to operate in the territory in question. It can hardly be maintained that, although the law survives, private rights acquired under it have perished.(...)"[96]

3.108. It is clear that the P.C.I.J. did not identify a general rule of succession of any acquired rights – and it did not deal at all with treaty succession, or succession of rights acquired under treaties. The context of the P.C.I.J. advisory opinion is such that it can have no bearing on human rights treaties. Explaining what "private rights" mean in this context, O'Connell makes it clear that:

"*Acquired rights, therefore, as understood in international law, are any rights, corporeal or incorporeal, properly vested in a natural or juristic person, and of an assessable monetary value.*"[97]

This concept of acquired rights has no relevance in the present case.

Applicant's argument focusing on continued human rights of the population of the successor State cannot support the proposition of automatic succession including Article IX

3.109. Searching for a foothold for jurisdiction, the Applicant advances the following proposition in line with the concept of acquired rights:

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[96] *Ibid.*, p. 36.

[97] D. P. O'Connell, *op. cit.*, Vol. I (Internal Relations), 1967, p. 245 (Annex 40).

"Moreover, it is generally accepted that the population of a territory entitled to enjoy the protection of certain human rights flowing from the basic human rights treaties may not be deprived of such rights by the mere fact of the succession of a state in respect of that territory." (Memorial: 6.07)

The Respondent has already demonstrated above that the proposition of automatic succession – and that of automatic succession with regard to Article IX in particular – are not accepted in international law. The concept of continuing human rights of the population of a successor State does not lend any additional support to the assertion of jurisdiction on the grounds of Article IX of the Genocide Convention.

3.110. The obvious aim of Applicant's argument is to show that the FRY remained bound by the Genocide Convention, and by Article IX in particular, even after it became a separate state, distinct from its predecessor, the SFRY. However, the argument – in addition to being totally contrary to the position repeatedly advanced by Croatia regarding the issue of the membership of the FRY in human rights treaties[98] – has no foothold in established rules of international law; the Applicant did not even attempt to demonstrate "general acceptance". Moreover, the argument, even if one were to adopt it, simply does not yield the intended conclusion.

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[98] See above, paras. 3.78-3.91.

3.111. The line of reasoning suggested by the Applicant is shifting the focus of attention from the equities of States to the equities of the population. Such a focus tends to find a way around established considerations, such as the principle that treaty obligations in international law have to be anchored in the consent of States. By-passing this principle is a most consequential proposition. The argument is based on respectable concerns, but it remains to be tested – and has not (or at least, not yet) become a rule of international law. Moreover, the Respondent will demonstrate that even if international law were to adopt the proposition that human rights enjoyed by the population of a certain territory continue to be available to that population after State succession, **this could not serve as a foothold for the jurisdiction of the Court in this case**.

3.112. Even if one were to accept the focus on population, and the proposition of continued protection of human rights flowing from treaties and acquired by the population of a certain territory, this only makes sense if one contemplates the **substantive rights** accorded to the population by the relevant provisions of human rights treaties. Human rights of the population have nothing to do with the technical structure of treaties, including techniques of notification, official languages (none of which may be the language of the given population), or modalities of dispute settlement between States. In other words, the logical inference from the suggested approach (even if it were an accepted one) cannot be the *en bloc* succession of treaties, but rather the continuation of substantive human rights. Article IX does not formulate a substantive human right, rather it establishes a specific jurisdictional avenue, which is added to other

jurisdictional options provided by national and international law (the number of which has been increasing in recent years).

3.113. It is important to add that Article IX never became a generally accepted principle. It does not formulate a basic human right, rather it formulates one of the options regarding the peaceful settlement of disputes among States. Even among States that have ratified the Genocide Convention, adherence to this jurisdictional avenue remains simply one of the possible options (rather than becoming a generally accepted rule). This is confirmed by the fact that a significant number of Contacting Parties – including the Respondent – entered reservations with regard to Article IX to the Genocide Convention, and thus have not become bound by the said provision.[99]

3.114. Moreover, if one precisely follows the focus and the argument suggested by the Applicant in the case of the succession of the FRY, one comes to the following deduction. While the territory of the FRY (Serbia and Montenegro) belonged to the SFRY, its population enjoyed "the protection of certain human rights flowing from human rights treaties" ratified by the SFRY (including the protection against genocide). The

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[99] A reservation to Article IX was made by Albania, Algeria, Argentina, Bahrain, Bangladesh, Belarus, Bulgaria, China, Czechoslovakia, Hungary, India, Malaysia, Morocco, Mongolia, Philippines, Poland, Romania, Rwanda, Russia, Singapore, Spain, Ukraine, United States of America, Venezuela, Viet Nam, Yemen, and the FRY.

At this date, a reservation to Article IX is maintained by Algeria, Argentina, Bahrain, Bangladesh, China, India, Malaysia, Morocco, Philippines, Rwanda, Singapore, Spain, United States of America, Venezuela, Viet Nam, Yemen, and the FRY (Annex 7).

argument goes that "by the mere fact of succession of a state in respect of that territory" (i.e. the territory that upon succession became the territory of the FRY) the population of the successor State should not be deprived from protection of human rights acquired while that territory belonged to the SFRY. This clearly means that **the population of the FRY** should not be deprived of such protection.

3.115. This is exactly the understanding explained by Croatia itself and by other successor States of the former SFRY. In a Note Verbale presented on 20 April 1998 to the UN Commission on Human Rights on behalf of the Permanent Missions of Bosnia-Herzegovina, the Republic of Croatia, the Republic of Macedonia, and the Republic of Slovenia, it was stressed:

> "*Consequently FRY should notify its succession to all relevant international instruments including human rights instruments as was done by other successor states.*
>
> *All succeeding states are nevertheless obliged to protect and respect human rights* ***of their citizens*** *at the level that has been achieved at the time of dissolution of the former state, having in mind principles of international customary law and universality of human rights.*"[100] (emphasis added)

This confirms again Croatia's position that a notification of succession is needed in order to succeed treaty membership. Furthermore, it is stated in no uncertain terms what is meant by continuation of "acquired rights" (i.e.

[100] Note Verbale dated 20 Apr. 1998, UN Doc. E/CN.4/1998/171 (1998) (Annex 41).

human rights achieved at the time of dissolution of the former State). It is suggested that what succeeding States are "nevertheless" (in the absence of treaty membership) obliged to protect and respect, are human rights **of their citizens** (in the case of the FRY, the citizens of the FRY) in accordance with general human rights standards.

3.116. Even if one were to accept this line of reasoning, this has simply nothing to do with Article IX. **Article IX provides no rights to the population of the successor State (the FRY).** Rather, it provides a specific procedural avenue for other States in disputes against the FRY regarding interpretation, application or fulfilment of the Convention. The claim submitted by the Applicant also seeks reparations to be paid by the population of the successor State. Being a respondent confronted with such a claim is hardly an entitlement to "*enjoy the protection of certain human rights flowing from human rights treaties.*"

3.117. The line of reasoning offered by the Applicant simply does not yield the intended conclusion. The fact is that the procedural avenue formulated in Article IX may only be established by an express and special undertaking of successor States; it is clearly not a human right accorded to the population of the successor State (the FRY).

It follows that:

a) **The FRY became a member State of the UN on 1 November 2000. Before it became a Member of the UN the FRY could not have become a Contracting Party to the Genocide**

Convention without a specific invitation extended by the General Assembly or by the Secretary-General. Such an invitation was never extended to the FRY. After it became a member State of the UN, on 10 June 2001 the FRY became a Contracting Party to the Genocide Convention by accession, without becoming bound by Article IX, since the Notification of Accession contained a clear reservation to Article IX.

b) The FRY never became a Contracting Party to the Genocide Convention by virtue of Article 34 of the 1978 Vienna Convention on State Succession in respect of Treaties, because this Convention applies solely to successions which occurred after the entry into force of the Convention. The FRY succeeded the SFRY in 1992, while the Convention came into force in 1996. Furthermore, there is clearly no basis for retroactive application of the 1978 Vienna Convention regarding the FRY.

c) The FRY never became a Contracting Party to the Genocide Convention as a result of the Declaration "of the representatives of the people of the Republic of Serbia and the Republic of Montenegro", or of the Note of the "Permanent Mission of the Socialist Federal Republic of Yugoslavia (Federal Republic of Yugoslavia)". The Declaration and the Note of 27 April 1992 were policy statements rather than treaty actions. Furthermore, they

cannot have consequences regarding treaties, because they did not contain any reference to any named treaty, and because they did not emanate from competent authorities. Even if these policy statements were pertinent, they did not claim or imply succession, their substance and content were merely an expression of the aspiration of the representatives of Serbia and Montenegro to automatically continue the international legal personality of the SFRY. This claim was strongly and consistently opposed by Croatia and by other successor States. The claim to continuity proposed by the Declaration and by the Note was eventually rejected and failed to produce effects.

d) The FRY did not become a Contracting Party to the Genocide Convention on grounds of automatic succession. Automatic succession with regard to human rights treaties is not a generally accepted rule; it is rather a contested proposition. State practice and depositary practice have not endorsed this proposition. State practice regarding the succession of the former SFRY, including State practice of Croatia – and State practice with respect to human rights treaties in particular – has clearly rejected the proposition of automatic succession.

e) Furthermore, even if automatic succession of human rights treaties were a generally accepted rule, *quid non*, and even if

human rights pertaining to the population of a territory were to continue automatically after State succession, this would not and could not encompass Article IX of the Genocide Convention. Instruments providing for peaceful settlement of disputes are not subject to automatic succession. Article IX is by its nature intransmissible, and may be severed from transmissible portions of the treaty. Moreover, the norm contained in Article IX is not generally accepted, not even among Contracting Parties to the Convention. Furthermore, Article IX does not formulate substantive human rights of the population of the FRY; it would instead provide a specific procedural avenue to other States in disputes against the FRY.

f) The FRY became a Member of the UN on 1 November 2000. The FRY joined the Genocide Convention as a new State by a notification of accession dated 12 March 2001. This notification of accession includes an unequivocal reservation to Article IX. The FRY never became bound by Article IX of the Genocide Convention. Accordingly, the jurisdiction of the Court in this case cannot be based on Article IX of the Genocide Convention. Since no other basis of jurisdiction was alleged – or could have been alleged – the Respondent maintains that the Court has no jurisdiction in this case.

Part IV

Second Preliminary Objection

THE APPLICATION IS INADMISSIBLE AS FAR AS IT REFERS TO ACTS OR OMISSIONS PRIOR TO 27 APRIL 1992

4.1. The gravest incidents described by the Applicant took place before the FRY came into existence. The Memorial puts the dates of the Vukovar tragedy between 25 August 1991 and 20 November 1991 (Memorial: 4.147, 4.153, 4.158, 4.161 4.164, 4.173.); the dates of the shelling of the Dubrovnik area are stated as falling between 1 October 1991 and the end of 1991 (Memorial: 5.235). It is not contested that these events, which had a central significance in the unfolding of the drama on the territory of the present-day Croatia, took place in the second half of 1991. These tragic events had many victims, and the question of liability logically emerges. What is certain is that liability can only be tied to such persons that **existed** at the time when the alleged misdeed took place. Acts or omissions which took place before the FRY came into existence cannot possibly be attributed to the FRY.

A. The FRY did not exist before 27 April 1992

The allegation that it was a "state *in statu nascendi*" is without foundation

4.2. The Applicant tries to overcome this obvious impediment to admissibility by advancing the proposition that the FRY was a State "in

statu nascendi from mid-1991" (Memorial: 1.22). This has, however, not been demonstrated. Furthermore, the way it is described by authorities referred to in the Memorial, the concept of states in *statu nascendi* is evidently not appropriate for this case.

4.3. The Applicant seeks support for its proposition in Article 10 of the ILC Draft Articles on State Responsibility, and in a brief passage from Professor Brownlie's *Principles of Public International Law* (Memorial: 8.42).

4.4. Irrespective of the question as to whether the authorities referred to above could, in principle, provide sufficient guidance to settle a dispute, in the actual case these authorities do **not** lend support to the proposition that the FRY may be liable for acts or omissions which took place before the FRY was formed.

4.5. The Memorial of Croatia relies on ***Draft*** Articles on which the ILC was working. Since the Memorial was submitted, the Draft Articles have been redrafted. In the July 2001 version[101], Article 10 on which the Applicant relies reads as follows:

> "*Conduct of an insurrectional or other movement*
>
> *1. The conduct of an insurrectional or other movement which becomes the new government of a State shall be considered an act of that State under international law.*
>
> *2. The conduct of a movement, insurrectional or other, which succeeds in establishing a new State in part of the*

[101] See UN Doc. A/CN.4/L.602/rev.1.

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. (...)"

4.6. The rules of the present ILC Draft are not generally recognised norms of customary international law (certainly not at this moment, and it is uncertain whether they would become such norms in the future). But even if they were, they could not serve as a basis for the proposition advanced by the Applicant. The context of the ILC Draft is completely different from the pattern of events in the former Yugoslavia.

4.7. The Memorial relies on Draft Article 10(2), which deals with movements which succeeded in establishing a **new State**. It refers to "*the conduct of any movement which succeeds in establishing a new state on certain territory*" (Memorial: 8.33). These are not the exact words of the present Draft Article 10(2), but the difference is not critical. Citing Draft Article 10, the Applicant argues that a conduct involving a breach of an international obligation may be attributable to a State if this was a conduct of a movement which succeeded in establishing a new State, even if the conduct took place before the definitive establishment of the new State (Memorial: 8.33).

4.8. This argument is misplaced in the Yugoslav context. According to the commentary which accompanies Draft Article 10 in the 2001 ILC Report, paragraph 2 of Article 10 addresses the scenario

"[w]here the structures of the insurrectional or other revolutionary movement become those of a new State,

constituted by ***secession or decolonization*** *in part of the territory which was previously subject to the sovereignty or administration of the predecessor State.*"[102] (emphasis added)

The context of the ILC draft article is completely different from the pattern of events that led to the creation of the FRY. The conceptual framework and the notions on which this framework was built ("insurrectional or other revolutionary movement", "secession or decolonization") are simply not corresponding. Serbia and Montenegro were no colonies, and did not want to secede. Moreover, following the position suggested by the Applicant, the question arises as to **which insurrectional or other movement** one should consider, and on what territory one should focus. There was no movement during the Yugoslav crisis (insurrectional or similar), which endeavoured to establish a new state **on the territory of the FRY.**

4.9. The passage quoted by the Applicant from Professor Brownlie, only confirms that the *in statu nascendi* concept is not matching in this case. Applicant quotes Professor Brownlie stating that

> "*[s]tates not infrequently first appear as independent belligerent entities under a political authority which may be called and function effectively as a provisional government. (...)*" (Memorial: 8.42)

It is clear that – as with the ILC Draft Articles – the context is that of liberation or insurrection movements fighting for independence and

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[102] *Report of the International Law Commission, Official Records of the GA, Fifty-Sixth Session, Suppl. No. 10*, UN doc. A/56/10 (2001), p. 114 (Annex 42).

eventually gaining control over a territory, which is a radically different setting from the context of the dissolution of the SFRY, and the establishment of the FRY. No movement was fighting for the independence of the FRY.

4.10. These differences become even more clear if one considers a description given by Professor Brownlie just one sentence before the passage quoted by the Applicant. The subsection of Brownlie's book dealing with states in *statu nascendi* starts with the following observation:

> "*A political community with considerable viability controlling a certain area of territory and having statehood as its objective may go through a period of travail before that objective has been achieved.*"[103]

4.11. This is logical, but completely unfitting to the case of the FRY. No movement or "political community" in the Yugoslav conflict had as its objective the creation of the FRY.

4.12. The independence of a State which would have encompassed the present territory of the FRY was neither the stated goal nor the secret aim of any of the participants of the conflict. The creation of the FRY was not on the banner of any "insurrectional or other" movement; there was no party to the conflict which would have adopted this objective. Trying to bridge the obvious gap, the Applicant submits a rather confusing

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[103] I. Brownlie, *Principles of Public International Law*, 5th Edition, Oxford 1998, p. 77 (Annex 43).

construction. It suggests that the JNA (Army of the SFRY) operated as de facto Serbian Army, promoting Serbian interests. (Memorial: 3.02). According to the Applicant these interests included "*the ambitions of the FRY which was at that point* in statu nascendi *for a 'Greater Serbia'*" (Memorial: 3.02) Again, the elements are just not fitting. According to the ILC Draft, or according to the citation from the Brownlie treatise, the objective of the movement is, of course, statehood **of the state which is *in statu nascendi.*** According to the construct suggested by the Memorial, there was a State *in statu nascendi* (the FRY), but its objective was the statehood of **another territory**, that of a "Greater Serbia".

The precepts of the *in statu nascendi* concept just cannot be fitted to the actual sequence of facts which marked the dissolution of the SFRY and the creation of the FRY.

4.13. The Memorial also refers to the insurgent movement of Serbs in Croatia (Krajina Serbs), stating that they were in complicity with Mr. Milošević, and that they were part of the "Milošević scheme". The definition used in Article 10(2) of the ILC Draft Articles and the quotation from Professor Brownlie's book would actually be much more relevant regarding the Serbian "Krajinas" – Serbian controlled regions which were established on the territory of Croatia (Memorial: 2.89, 2.90, 2.100, 2.115). Here – no matter how would one judge their cause – one could, indeed, speak of an "insurrectional movement" aspiring to statehood. But the state which the Krajina Serbs were aspiring for was evidently not the FRY (Serbia and Montenegro, which does **not** include the Krajinas) – and it is

also well known that these movements did not "succeed in establishing a new state".

B. No de facto identity between the FRY (Serbia and Montenegro) and the SFRY

4.14. The Memorial argues that the federal authorities of the SFRY, authorities of the Republic of Serbia, and Serbian insurgents in Croatia, were indeed one and the same party to the conflict (Memorial: 3.01, 8.40, etc.). The Respondent submits that this was not the case, and no identity can be assumed between the former SFRY and the FRY. It shall be demonstrated in the following paragraphs[104] that in 1991, and even in 1992, authorities of the SFRY (such as the Government, the Constitutional Court, diplomatic service) included office holders from all constituent republics, including Bosnia-Herzegovina, Macedonia, Slovenia, and Croatia. The aims and the considerations of these office holders were not, and could not have been, the same. The majority of these office holders ceased to be in office once the FRY was created, and did not even become citizens or residents of the FRY.

4.15. The Applicant alleges that from mid-1991

> "*[a]nd in particular from October 1991, the relevant organs of the government and other federal authorities of the SFRY ceased to function as such and became de facto organs and*

[104] See below paras. 4.17. ff.

authorities of the emerging FRY acting under direct control of the Serbian leadership..." (Memorial: 8.40)

This is not substantiated by the actual facts and events. The Respondent shall demonstrate that in 1991 and early 1992 federal authorities continued to function, their structure was not reduced to Serbian office holders, and their acts were not acts undertaken in simple furtherance of Serbian or Montenegrin interests.

B.1 The dissolution of the SFRY was an extended process – its completion was only confirmed in July 1992

4.16. As late as 29 November 1991, Opinion No. 1 of the Badinter Commission stated that "the SFRY is in the process of dissolution" ("*la République fédérative de Yougoslavie est engagée dans un processus de dissolution*")[105]. This was a long and complicated process during which constituent republics and provinces were still represented in federal institutions, while federal authorities enjoyed some international support, and showed resistance to instrumentalisation. It was only on **4 July 1992** that the Badinter Commission formulated in its Opinion No. 8 the following position:

> "*En conséquence, la Commission d'Arbitrage est d'avis:*
>
> *que le processus de dissolution da la R.S.F.Y. mentionné dans l'Avis No. 1 du 29 Novembre 1991 est arrivé à son terme et qu'il faut constater que la R.S.F.Y n'existe plus.*"[106]

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[105] Annex 11.

[106] *RGDIP* 1993, vol. 97, No. 2, at p. 590 (Annex 11).

Before the dissolution was completed, the efficiency of federal institutions may have been gradually impaired, leaving more and more manoeuvring room outside constitutional structures. But the federal institutions were still functioning, the SFRY still existed.

B.2 In 1991 key offices of the SFRY were not held by Serbs; these offices were functioning, often resisting Mr. Milošević, and they were co-operating with the international community

4.17. During 1991, the most important federal officials, i.e. the President of the SFRY Presidency, (Mr. Stipe Mesić – now President of Croatia), the Federal Prime Minister (Mr. Ante Marković), and the Foreign Minister (Mr. Budimir Lončar), were Croats. Quite obviously, the most important offices – and the most important office holders – were not, as stated in the Memorial (8.40) "*de facto* organs and authorities of the emerging FRY under direct control of the Serbian leadership".

4.18. It may very well be that Mr. Milošević tried to establish control over the Yugoslav institutions. Yet, this was not an easy task to accomplish. The Memorial admits that during the March 1991 session of the Presidency of the SFRY, Federal Defence Minister General Kadijević requested that the Presidency of the SFRY proclaim a state of emergency. The Memorial confirms that the request was not adopted. The Memorial suggests that the request "was apparently a result of the March 1991 events in Pakrac", in Croatia (Memorial: 3.32). As a matter of fact, it is more

likely that the request for a state of emergency was prompted by massive anti-Milošević demonstrations in Belgrade on 9 March 1991.[107] This demonstration of the Serbian opposition prompted clashes with the police, and JNA tanks were eventually deployed against several hundreds of thousands of Belgrade demonstrators. Following this, on 12 March 1991, the request for a state of emergency was submitted. It is clear that Mr. Milošević had influence over some members of the Federal Presidency, but this was insufficient. It is important to add that the dividing lines among the members of the Federal Presidency did not coincide with ethnic affiliation. The crucial vote **against** the request (and thus, against Milošević) was cast by a Bosnian Serb, Mr. Bogić Bogićević.[108]

4.19. In June 1991 the European Community still expressed optimism regarding the ability of Yugoslav political actors to keep the events in Yugoslavia under control. According to an EC Statement of 8 June 1991:

> "*The Community and its member States have noted with satisfaction the outcome of the meeting of the six Presidents of the Republics, held June 6, in Sarajevo. This is an encouraging step towards return to constitutional order and a*

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[107] Indeed, this was the interpretation given by Mr. Stipe Mesić, member of the Presidency from Croatia, see L. Silber and A. Little, *The Death of Yugoslavia*, BBC Books, London 1995, at p. 125 (Annex 1).

[108] These facts are uncontested. Among many sources confirming this sequence of events, see L. Silber and A. Little, *ibid.*, at pp. 125-126 (Annex 1).

peaceful dialogue on the future of structures in Yugoslavia."[109]

4.20. In 1991 – and to a lesser extent at the beginning of 1992 – the SFRY was still functioning, and the maintenance of the SFRY in some form was still a relevant option. On 7 July 1991 the "Brioni Accord" (Declaration of the EC Troika and the Parties Directly Concerned with the Yugoslav Crisis[110]) very much relied on the Presidency of the SFRY, and stressed as one of the principles which "will have to be fully followed" that:

"– *the Collegiate Presidency must exercise its full capacity and play its political and constitutional role, notably with regard to the Federal Armed Forces.*"[111]

4.21. On 1 September 1991, in order to stop the armed conflicts in Croatia, a cease-fire was signed in Belgrade. The signatories included the Presidents of all six constituent republics, the Presidency of the SFRY, and Mr. A. Marković, the Federal Prime Minister, in addition to Mr. Hans van den Broek, on behalf of the EC. Mr. Stipe Mesić, the President of the Presidency of the SFRY (and member from Croatia) signed this Agreement "for the Presidency of the SFRY, acting also in capacity of Collective Supreme Commander of the Armed Forces".[112] Once more, the SFRY

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[109] EC Press Release P.54/91, published in *Yugoslavia Through Documents – From its Creation to its Dissolution*, ed. by Snežana Trifunovska, Martinus Nijhoff 1994, p. 286 (Annex 44).

[110] Trifunovska, *op. cit.*, pp. 311-315 (Annex 44).

[111] Trifunovska, *op. cit.*, p. 312 (Annex 44).

[112] Trifunovska, *op. cit.*, p. 335 (Annex 44).

clearly appears as an actor which is different, and has a different position from the Serbian leadership. The person acting on behalf of the "Collective Supreme Commander of the Armed Forces" of the SFRY was the representative of Croatia.

(a) In the SFRY diplomacy constituent republics other than Serbia and Montenegro were fairly represented in 1991 and early 1992

4.22. The SFRY diplomacy was still active in the second half of 1991, and it was by no means a simple *alter ego* of the Serbian diplomacy. The Foreign Minister was Mr. Budimir Lončar (from Croatia). The Head of the SFRY Mission to the UN in New York was Mr. Darko Šilović (from Croatia); he was recalled as late as 12 March 1992.[113]

4.23. In 1991, and in early 1992, the SFRY had 41 ambassadors from republics other than Serbia and Montenegro.[114]

(b) In 1991 and in early 1992, the composition of the Constitutional Court of the SFRY was not Serb dominated; and its functioning was not characterised by a pro-Serb bias

4.24. The Constitutional Court of Yugoslavia (SFRY) was also still active in 1991 and early 1992. In this period, a growing number of legislative acts in Croatia and Slovenia in particular, but also in Serbia, began to contest the constitutional system of the SFRY. In 1991 and 1992,

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[113] See the Survey presented by the Personal and Legal Service of the FRY Federal Ministry of Foreign Affairs, dated 27 Nov. 2001 (Annex 45).

[114] *Ibid.*

the Constitutional Court of Yugoslavia rendered many decisions in which these acts were declared unconstitutional. Many, but by no means all of them, were Croatian or Slovenian acts. In a very significant number of decisions (**as many as 24 in 1991 alone!**), the Constitutional Court of Yugoslavia decided that **Serbian** acts were unconstitutional.[115]

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[115] These are the following decisions: (1) Decision of the Constitutional Court of Yugoslavia No. II-U-87/90 of 19 Feb. 1991, published in the Official Gazette of the SFRY No. 37/91; (2) Decision of the Constitutional Court of Yugoslavia No. IU-108/1-90 of 14 Mar. 1991, Off. Gaz. of the SFRY No. 50/91; (3) Decision of the Constitutional Court of Yugoslavia No. IU-130/1-90 of 10 Apr. 1991,Off. Gaz. of the SFRY No. 40/91; (4) Decision of the Constitutional Court of Yugoslavia No. IU-78/1-90 of 10 Apr. 1991, Off. Gaz. of the SFRY No. 45/91; (5) Decision of the Constitutional Court of Yugoslavia No. IIU-103/90 of 10 Apr. 1991, Off. Gaz. of the SFRY No. 45/91; (6) Decision of the Constitutional Court of Yugoslavia No. II-U-101/90 of 10 Apr. 1991, Off. Gaz. of the SFRY No. 59/91; (7) Decision of the Constitutional Court of Yugoslavia No. IU-11/1-91 of 24 Apr. 1991, Off. Gaz. of the SFRY No. 44/91; (8) Decision of the Constitutional Court of Yugoslavia No. IU-131/1-90 of 24 Apr. 1991, Off. Gaz. of the SFRY No. 44/91; (9) Decision of the Constitutional Court of Yugoslavia No. II-U-9/91 of 24 Apr. 1991, Off. Gaz. of the SFRY No. 45/91; (10) Decision of the Constitutional Court of Yugoslavia No. IU-128/1-90 of 14 May 1991, Off. Gaz. of the SFRY No. 44/91; (11) Decision of the Constitutional Court of Yugoslavia No. IU-84/1-90 of 14 May 1991, Off. Gaz. of the SFRY No. 50/91; (12) Decision of the Constitutional Court of Yugoslavia No. II-U-121/90, 113/90 and II-U-120/90, 112/90 of 29 May 1991, Off. Gaz. of the SFRY No. 51/91; (13) Decision of the Constitutional Court of Yugoslavia No. II-U-104/90 of 12 June 1991, Off. Gaz. of the SFRY No. 57/91; (14) Decision of the Constitutional Court of Yugoslavia No. IU-124/1-90 of 10 July 1991, Off. Gaz. of the SFRY No. 62/91; (15) Decision of the Constitutional Court of Yugoslavia No. IU-125/1-90, IU-125/2-90, IU-125/3-90, IU-125/4-90, IU-125/5-90, IU-125/6-90, IU-6/1-91 and IU-10/1-91 of 10 July 1991, Off. Gaz. of the SFRY No. 62/91; (16) Decision of the Constitutional Court of Yugoslavia No. II-U-102/90 of 10 July 1991, Off. Gaz. of the SFRY No. 62/91; (17) Decision of the

4.25. Without entering into a detailed analysis of the decisions of the Constitutional Court of the SFRY in 1991 and in early 1992, the Respondent would like to highlight some unambiguous patterns:

a) In 1991 and early 1992, the Constitutional Court of Yugoslavia was clearly trying to protect the constitutional system **of the SFRY**, rather than fostering or even allowing an "FRY in *statu nascendi*";

b) the composition of the Constitutional Court of Yugoslavia still reflected the SFRY – judges who participated in the rendering of

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Constitutional Court of Yugoslavia No. IU-66/1-91 of 11 Sep. 1991, Off. Gaz. of the SFRY No. 77/91; (18) Decision of the Constitutional Court of Yugoslavia No. IIU-10/91 of 2 Oct. 1991, Off. Gaz. of the SFRY No. 1/92; (19) Decision of the Constitutional Court of Yugoslavia No. IU-83/1-91 of 16 Oct. 1991, Off. Gaz. of the SFRY No. 86/91; (20) Decision of the Constitutional Court of Yugoslavia No. IIU-66/91 of 23 Oct. 1991, Off. Gaz. of the SFRY No. 3/92; (21) Decision of the Constitutional Court of Yugoslavia No. IIU-106/90 of 23 Oct. 1991, Off. Gaz. of the SFRY No. 13/92; (22) Decision of the Constitutional Court of Yugoslavia No. IU-72/1-91 of 24 Oct. 1991, Off. Gaz. of the SFRY No. 2/92; (23) Decision of the Constitutional Court of Yugoslavia No. IU-58/1-90 of 11 Dec. 1991, Off. Gaz. of the SFRY No. 25/92; (24) Decision of the Constitutional Court of Yugoslavia No. II-U-41/91 of 24 Dec. 1991, Off. Gaz. of the SFRY No. 16/92.

(Since the Respondent does not intend to analyse the content of these decisions, and does not rely on specific arguments, but merely wants to demonstrate that the Constitutional Court of Yugoslavia rendered a most significant number of decisions against Serbian acts and interests – and since these decisions are a matter of public record – the Respondent is not submitting at this moment the text of these decisions as annexes. The Respondent will, of course, promptly prepare such annexes, if such a request were to be made.)

these decisions were not from Serbia and Montenegro alone, neither were they ethnic Serbs and Montenegrins alone;

c) in most of these cases, the initiative (for declaring Croatian, Serbian, or other acts as unconstitutional) came from the Federal Government, whose Prime Minister was Mr. Ante Marković, a Croat from Croatia.

4.26. The Constitutional Court of the SFRY was composed of fourteen judges: two from each of the six republics, and one from each of the two provinces within Serbia (Vojvodina[116] and Kosovo[117]). Until 27 April 1992, the Constitutional Court of Yugoslavia functioned at near to full composition. Until 1 August 1991 all fourteen judges remained in office. Eleven out of fourteen judges stayed in office until the termination of the SFRY, i.e. until the founding of the FRY on 27 April 1992.[118]

In the following paragraphs the Respondent offers a few examples of decisions in 1991 and 1992.

4.27. In 1991, in the same manner as other Republics, Serbia also attempted to channel more funds into its own budget (instead of

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[116] The rights of the Autonomous Province of Vojvodina were radically curtailed under Milošević, but it still maintained the right to nominate judges to the Constitutional Court of the SFRY.

[117] Like Vojvodina, Kosovo also kept the entitlement of sending judges to the Constitutional Court of Yugoslavia, although the autonomy of Kosovo was drastically reduced under Milošević.

[118] See in Annex 46 the Survey ("Pregled") issued by the Constitutional Court of Yugoslavia on 14 Nov. 2001.

channelling them to the budget of the Federation). The Federal Government under Mr. Ante Marković submitted initiatives to the Constitutional Court of Yugoslavia, asking the Court to declare these acts unconstitutional. In most cases, the Court ruled that these Serbian acts were, indeed, unconstitutional. For example, on 16 October 1991 – acting upon initiative of the Federal Government – the Constitutional Court of the SFRY found that the 1991 Serbian act which provided for the channelling of the turnover tax into the Serbian (rather than into the SFRY) budget, was unconstitutional.[119]

4.28. In the same vein (and again upon initiative of the Federal Government), the Constitutional Court of Yugoslavia held on 23 October 1991, that the provisions of another 1991 Serbian act – which directed revenue from customs and import taxes to the Serbian rather than to the Federal budget – were unconstitutional.[120]

4.29. On 12 January 1992, the Constitutional Court of Yugoslavia declared unconstitutional a Croatian act by which several federal acts pertaining to economic organisations were taken over as acts of the Republic of Croatia (thus asserting Croatian legislative competence over matters which were regulated by federal acts).[121]

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[119] Decision of the Constitutional Court of the SFRY No. IU-83/1-91 of 16 Oct. 1991, Off. Gaz. of the SFRY No. 86/91 of 29 Nov. 1991, pp. 1363-1364 (Annex 47).

[120] Decision of the Constitutional Court of Yugoslavia No. IIU-66/91, Off. Gaz. of the SFRY No. 3/92 of 10 Jan. 1992, pp. 29-30 (Annex 48).

[121] Decision of the Constitutional Court of Yugoslavia No. IU 184/1-91, Off. Gaz. of the SFRY No. 19/1992 of 20 Mar. 1992, pp. 285-286 (Annex 49).

4.30. As late as in February 1992, the Constitutional Court of Yugoslavia was still endeavouring to uphold the Constitution of the SFRY, and on 12 February 1992 it declared unconstitutional the Croatian act which gave to the Croatian Government powers to enact provisional measures for the protection of Croatian economic interests.[122]

4.31. In 1991 and in early 1992, the Constitutional Court of the SFRY was not Serb dominated. It was not a simple instrument of Serbian interests either. In the critical period, both Croatian and Serbian authorities endeavoured to defy and disregard federal norms and procedures. The Constitutional Court of the SFRY challenged and resisted such endeavours.

B.3 Territorial or ethnic origin of office holders in the SFRY cannot and does not support the allegation of a de facto identity of the SFRY with the FRY

4.32. The Memorial contends that from October 1991 federal authorities of the SFRY were

> "*acting under the direct control of the Serbian leadership, embodied in particular in the President of Serbia, but extending also to relevant officials in Ministries of Defense and Interior.*" (Memorial: 8.40/b)

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[122] Decision of the Constitutional Court of Yugoslavia, No. IU 9/1-91, Off. Gaz. of the SFRY No. 19/92 of 20 Mar. 1992, pp. 286-287 (Annex 50).

It is very difficult to follow the notion and concept of "Serbian leadership", when it implies, in addition to leaders of the Republic of Serbia, leaders of the SFRY, many of whom were not from Serbia. In order to make this argument more plausible, the Applicant suggests that one should focus solely on the "relevant" federal functions – implicitly excluding from the concept of "relevant functions", among others, the functions of the President of the Presidency, of the Prime Minister, of the Foreign Minister, or of the Minister of Justice. This is, of course, difficult to accept, but even if one were to adopt the focus suggested by the Applicant, one would find leaders who were not from Serbia but from other republics.

4.33. For example, the Federal National Defence Secretary at that time – who was singled out in the Memorial – was General Veljko Kadijević from Croatia. What makes him a "Serbian leader"? Ethnic origin may have been a possible implied added criterion. Could this define "Serbian leadership", and give reason for speculations that the SFRY was under the control of "Serbian leadership"? Let us state for the record, the ethnic origin of Mr. Kadijević is actually mixed: Serbian and Croatian. [123] The Memorial views General Kadijević as an exponent of Serbian interests. The Respondent does not intend to take a position regarding the deeds, or the inclinations of

[123] Mr. Kadijević was born on 21 Nov. 1925 in Croatia. His father was Mr. Dušan Kadijević (an ethnic Serb from Croatia) his mother was Ms. Janja Patrlj (an ethnic Croat from Croatia). In his memoirs, Kadijević states: "*There have been speculations about my national affiliation. My father is a Serb, my mother is a Croat... By my conviction I am a Yugoslav. Notwithstanding what is happening and what will happen, I shall remain the same.*" (V. Kadijevic, Moje vidjenje raspada /My View of the Dissolution/ Beograd, 1993, p. 151) (Annex 51) (translated text marked).

General Kadijević. The question is that of the link towards the (future) FRY – and this is difficult to follow, let alone to accept. Could Kadijević – an SFRY general from Croatia – be considered a protagonist of the "FRY in *statu nascendi*" because one of his parents was a Serb?

4.34. During many of the tragic events described in the Memorial, the President of the Presidency of the SFRY, and the Head of the Collective Supreme Commander of the Yugoslav Armed Forces was Mr. Stipe Mesić, the representative of Croatia (and the current President of Croatia). Until his resignation on 20 December 1991, the Federal Prime Minister of the SFRY was Mr. Ante Marković, a Croat from Croatia.[124] Until December 1991, the Minister of Foreign Affairs was Mr. Budimir Lončar (also a Croat from Croatia), while the Minister of Justice was Mr. Vlado Kambovski fom Macedonia.

4.35. The Respondent does not try to suggest that Mr. Mesić, Mr. Marković, Mr. Lončar or Mr. Kambovski should be regarded as the persons responsible for the misdeeds in Croatia. Such a proposition would be incorrect – and possibly even cynical. The point is that in the violent turmoil that took place on the territory of the former Yugoslavia, one cannot simply establish truth and justice by tying consequences and responsibility to functions, structures, or entities.

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[124] Mr. Ante Marković was Prime Minister of the SFRY until 20 December 1991 when he resigned (this is confirmed in Appendix 5 to the Memorial on p. 21) The Official Gazette of the SFRY of 20 Dec. 1991 still published decrees signed by Prime Minister Marković on 17 Dec. 1991 (Annex 52).

4.36. The Army which held Vukovar and Dubrovnik under siege in 1991 was the Army of the SFRY, not the Army of the FRY. Individuals who comitted misdeeds during the conflict are liable, no matter in which army they were, and no matter whether they became citizens of the FRY, of Croatia, or of some other successor State. Croatia consistently argued that the FRY was not identical with the SFRY, but that it was simply one of its five equal successors. This position became a generally accepted one. The FRY came into being on 27 April 1992, and is responsible for its own acts or omissions since that date.

It follows that:

Until 27 April 1992 the FRY did not exist.

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 "*in statu nascendi*" concept is misplaced in the context of the dissolution of the SFRY and of the emergence of the FRY.

The concept referred to by the Applicant, even if it were enshrined in a rule of international law, is incompatible with the pattern of facts of this case.

Moreover, one simply cannot predate the emergence of the FRY by alleging its identity with the SFRY. The SFRY was neither *de jure,* nor *de facto* identical with the FRY. The territory was different. Federal authorities were not identical with Serbian or Montenegrin authorities. The affiliation of office holders cannot create or change state identity, but even if it could, the actual data contradicts the point the Applicant tries to make. Until the end of 1991, most of the key office holders who represented the SFRY, were not from Serbia, and were not Serbs. It is thus not possible to reduce the SFRY and the institutions of the SFRY to Serbia and Montenegro (or to the future

FRY) on the grounds of either territorial affiliation or of ethnic origin of office holders.

Furthermore, no movement, no aim of insurrection, no secession, no de facto situation was formalized by the creation of the FRY.

The FRY is not identical with the SFRY. It is one of its five equal sucessors.

The FRY cannot be responsible for acts or omissions which took place before the FRY came into being.

Part V

Third Preliminary Objection

SOME OF THE APPLICANT'S SPECIFIC SUBMISSIONS ARE PER SE INADMISSIBLE AND MOOT

A. The request to submit Mr. Milošević to trial "before appropriate judicial authority" is inadmissible and moot

5.1. In its closing submission 2/a, the Applicant requests the FRY

> "*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)(b) in particular Slobodan Milošević the former President of the Federal Republic of Yugoslavia, and to ensure that those persons are duly punished for their crimes.*" (Submission 2/a, Memorial: page 414)

5.2. Individual indictments have, indeed, been issued by the prosecutor of the International Criminal Tribunal for the former Yugoslavia (hereinafter: "ICTY") against both FRY and Croatian actors. Since the Memorial was submitted, an indictment was issued (in October 2001)

against Mr. Milošević "*acting alone and in concert with other members of the joint criminal enterprise.*"[125] The crimes ascribed to Mr. Milošević and others in relation to the territory of Croatia include crimes against humanity, breaches of the Geneva conventions and violations of the laws or customs of war – but not genocide. In no cases has the ICTY indicted anyone for the crime of genocide allegedly committed in Croatia. (Even if it had, individual responsibility and intent of a natural person are a completely different matter and cannot be equated with State responsibility and intent of a State.)

5.3. The Respondent submits that, while it is perfectly legitimate to seek effective prosecution and punishment of those who committed crimes during the hostilities in the former Yugoslavia, the appropriate setting for the raising of these issues are not the present proceedings before this Court, where the alleged (and contested) jurisdiction and procedural framework is set by Article IX of the Genocide Convention.

5.4. Moreover, Mr. Milošević **was** overthrown by the citizens of the FRY during the autumn of 2000, he **was** arrested by the new Yugoslav authorities in April 2001, and **was** transferred to the ICTY on 28 June 2001. Mr. Milošević is now in The Hague, in the custody of the ICTY. On 11 April 2002 the FRY enacted an Act on Cooperation with the Hague Tribunal. After this Act was adopted, a number of persons have been

[125] ICTY, Indictment of Oct. 2001 in the case Prosecutor v. Slobodan Milošević, IT-01-50-I, sec. 26 – see at: http://www.un.org/icty/ indictment/english/mil-ii011008e.htm.

transferred to the ICTY by the FRY authorities, and a number of persons residing in the FRY and indicted by the ICTY have voluntarily surrendered. These persons include General Mrkšić accused for acts during the siege of Vukovar, and Mr. Milan Martić accused for the shelling of Zagreb.

5.5. For these reasons, the Applicant's submission 2(a) is inadmissible and moot.

B. The request to provide information on the whereabouts of missing Croatian citizens is inadmissible and moot

5.6. The next specific submission of Croatia is the request

> "*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;*" (Submission 2/b, Memorial: p. 414)

5.7. This is also a request which falls outside the scope of the Genocide Convention – and which has, in addition, become moot. It is true that several years after the end of the armed conflict there are still Croatian citizens missing, just as there are missing Yugoslav citizens. The new Government of the FRY is co-operating with Croatia in establishing the

whereabouts of these missing persons. As a matter of fact, co-operation started even before the new Government of the FRY took office. An Agreement on co-operation in the search for missing persons was already reached between Mr. Milutinović, Foreign Minister of the FRY, and Mr. Granić, Foreign Minister of Croatia on 17 November 1995 in Dayton, Ohio. In the process of the implementation of this Agreement, on 17 April 1996 the Commission of the FRY Government on Humanitarian Issues and Missing Persons on one side, and the Commission of the Croatian Government for Imprisoned and Missing Persons on the other side, signed a "Protocol on Cooperation".[126] This Protocol provides for a mutual obligation to exchange data about missing persons (Article 2), and also provides for a mutual release of prisoners of war, detained officers, soldiers and civilians (Article 3).

5.8. On 23 August 1996, an "Agreement on Normalization of the Relations between the FRY and the Republic of Croatia"[127] was concluded, which provided for a speedy process of exchange of information on missing persons. Article 6 of this Agreement makes it absolutely clear that the exchange of information about missing persons is an obligation of "**both parties**".[128]

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[126] See the text of this Protocol (Annex 53).

[127] See Annex 10.

[128] According to Article 6: "The Contracting Parties undertake to speed up forthwith the process of solving the questions of missing persons, and both Contracting Parties shall immediately exchange all available information about these persons."

5.9. Since then considerable progress has been made. In accordance with the Protocol on Cooperation of 17 April 1996, Croatian and FRY commissions held eight joint meetings since November 1996 (in most cases with the participation of the representatives of the International Red Cross). During these meetings, the FRY handed over to the Croatian side 1093 complete protocols about persons who perished during the Vukovar military operations.[129]

5.10. The task is a difficult one, there were some mutual reproaches for less than full co-operation, but bona fide efforts have undeniably been made. The International Committee of the Red Cross (ICRC) and the ICTY are also engaged in this task, and both the FRY and Croatia are currently co-operating with the ICRC and the ICTY. Recently, on 7 November 2001, Mr. Maksim Korać, President of the FRY Commission for Humanitarian Issues and Missing Persons, and Colonel Ivan Grujić, President of the Croatian Commission for Detained and Missing Persons, signed Minutes of a meeting which took place in Belgrade on 6-7 November 2001, at which the representatives of the ICRC and of the International Committee for Missing Persons were present. These Minutes show most considerable progress and a high level of understanding.[130]

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[129] See a letter by Mr. Maksim Korać, President of the Commission of the FRY Government for Humanitarian Issues and Missing Persons of 29 Nov. 2001, addressed to the FRY Ministry of Foreign Affairs. This letter refers to eight joint meetings, and states that 1093 protocols have been handed over to the Croatian side (Annex 54).

[130] For the text of the Minutes see Annex 55.

5.11. During years of mutual work, neither Croatia nor the FRY proposed or even hinted that the established avenue of ongoing co-operation regarding missing persons (i.e. co-operation of two State commissions with the participation of international humanitarian organisations) were inappropriate, or that some international mechanism was required to replace or supplement it. The proper framework for the remaining implementation is not a dispute before the International Court of Justice. This submission of the Applicant is inadmissible and moot.

C. The request for return of items of cultural property is inadmissible and moot

5.12. A further specific submission of Croatia is the request for the return of

> "*[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;*" (Submission 2/c, Memorial, p. 414)

The Respondent stresses that one cannot possibly stretch the alleged jurisdiction regarding genocide to property claims regarding objects of art. This claim is, thus, inadmissible.

5.13. The Respondent notes that it is indeed true that some objects of cultural property which belong to Croatia came under "[the] jurisdiction or control" of the FRY. These objects came to Yugoslavia during the years of hostilities. There may be conflicting interpretations regarding the manner in

which these objects arrived in the FRY. According to the Yugoslav explanation, these objects were evacuated and brought under safe shelter from devastated and unprotected areas (which in 1991 were still within the same country). This explanation is not an uncontested one. However, whichever interpretation is correct, for the present Government of the FRY it is beyond debate that cultural property which has its rightful owners in Croatia should be returned to Croatia.

5.14. Some dilemmas have arisen merely with respect to sacral objects taken from a number of Serbian orthodox churches in Croatia. As these churches were destroyed, damaged, or abandoned, sacral objects were brought to the territory of the FRY. The Serbian Orthodox Church claims to be the owner of these objects, but it is willing to return them to where they came from, i.e. to Serbian orthodox churches in Croatia after these churches become capable of resuming their intended function. In line with its position, the FRY has been engaged in bona fide negotiations with respect to the return of these items of cultural property to Croatia.

5.15. The issue of return of cultural property was on the agenda of several discussions between Yugoslav and Croatian representatives.[131] It is uncontested that the objects taken from Croatia (mostly from Vukovar)

[131] Such discussions took place, for example on 25 May 2001 between FRY Foreign Minister Mr. Svilanović and Croatian Foreign Minister Mr. Picula in Split; on 18 and 19 Sep. in Belgrade, between FRY Assistant Foreign Minister Ms. Joksimović and Croatian Assistant Foreign Minister Mr. Paro.

were in appropriate custody and under due care in the City Museum in Novi Sad, and in the Museum of Vojvodina. This was confirmed by Mr. Imhoff, on behalf of a fact finding commission of the Council of Europe.[132] For a while, the remaining difference was in the perceived sequence of steps. According to one proposition, the return of cultural property should have been the subject of a cultural agreement between the FRY and Croatia (this was the Yugoslav position as stated in the proposed Cooperation Agreement between the FRY and Croatia in the Domains of Culture and Education, presented to the Croatian side on 12 June 2001). The Croatian side defended the position that the FRY should first return the "Bauer Collection", as a separate act outside other arrangements.

5.16. These minor differences in approach did **not** yield a deadlock. On 11 November 2001, Mr. Goran Svilanović, Foreign Minister of the FRY, and Mr. Tonino Picula, Foreign Minister of Croatia, issued a Joint Statement in New York. In this Statement it is stressed:

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[132] Council of Europe, Parliamentary Assembly, "War damage to the cultural heritage in Croatia and Bosnia-Herzegovina", Seventh information report, Doc. 7308, 15 May 1995. The relevant findings of the fact-finding mission lead by Mr. Imhoff are in paras. 33-43. In para. 33 it is stressed e.g. "*The thousands of VMM objects and items, mainly archeological ceramic fragments, deposited in museum are in suitable environment, well organized into well-used space, apparently correctly recorded, kept professionally, and handled carefully.*" (VMM – "Vukovar Municipal Museum"). Regarding the Bauer collection, paragraph 39 of the Report states "*The several hundred paintings and works of art are being given careful curatorial attention. Their physical handling seems to be correct and done carefully.*" (The full text of the report is in Annex 56).

"As result of encouraging advances in co-operation between experts of institutions from both countries, the Ministers announced the urgent return of Vukovar's art collections, and discussed about the commencement of negotiations for the Agreement on Cultural Co-operation, and about the return of cultural heritage to the Serbs and the Serbian Orthodox Church in Croatia."[133]

5.17. As announced, "urgent return of Vukovar's art collections" took place. On 13 December 2001, not only the "Bauer collection", but other objects of cultural property belonging to Vukovar museums and galleries, as well as objects of art and sacral objects belonging to catholic churches and to one orthodox church, were duly returned to Croatia – and this has been properly confirmed by Croatian authorities.[134] It is clear that Yugoslav and Croatian authorities are perfectly capable of bringing this question to a satisfactory resolution.

5.18. For these reasons, Applicant's submission 2/c is inadmissible and moot.

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[133] Pre-last paragraph of the Joint Statement Picula-Svilanović of 11 Nov. 2001 (Annex 57).

[134] See the Minutes of the work of the group of experts of 10 Dec. 2001, and the Addendum of 13 Dec. 2001 (Annex 58).

It follows that:

The Applicant's submissions regarding

- **the taking of effective steps to submit to trial persons like Mr. Milošević,**
- **providing information regarding the whereabouts of missing Croatian citizens, and**
- **return of cultural property,**

are inadmissible, and have become moot.

CONCLUDING SUBMISSIONS

For the reasons advanced above, the Federal Republic of Yugoslavia is asking the Court:

to uphold the First Preliminary Objection and to adjudge and declare that it lacks jurisdiction over the claims brought against the Federal Republic of Yugoslavia by the Republic of Croatia.

Or, in the alternative,

a) **to uphold the Second Preliminary Objection and to adjudge and declare that claims based on acts or omissions which took place before the FRY came into being (i.e. before 27 April 1992) are inadmissible;**

and

b) **to uphold the Third Preliminary Objection, and to adjudge and declare that specific claims referring to:**

- **taking effective steps to submit to trial Mr. Milošević and other persons,**
- **providing information regarding the whereabouts of missing Croatian citizens, and**
- **return of cultural property,**

are inadmissible and moot.

The Respondent reserves its right to supplement or amend its submissions in the light of further pleadings.

September 2002

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