Bosna i Hercegovina
PREDSJEDNIŠTVO
Agent pred Međunarodnim sudom pravde u Haagu
Musala 9, Sarajevo, Bosna i Hercegovina
Tel.: (0387-33) 208-090
Fax.:(0387-33) 664-954

Bosnia and Herzegovina
PRESIDENCY
Agent of Bosnia and Herzegovina before the International Court of Justice
Musala 9, Sarajevo, Bosnia and Herzegovina
Tel.: (0387-33) 208-090
Fax.:(0387-33) 664-954

No: .....

Date: 3 December 2001

To the Registrar of the
International Court of Justice
Vredespaleis
2517 KJ Den Haag

Re: Bosnia and Herzegovina v. Yugoslavia

Dear Sir,

In the above-mentioned case the Agent of Yugoslavia has on 4 May 2001 submitted a so-called 'Initiative' to the Court requesting that the Court would reconsider *ex officio* its jurisdiction in this case.
In this letter Bosnia and Herzegovina provides the Court with its views regarding this 'Initiative'.

General observations

1. First of all Bosnia and Herzegovina recalls that by Judgment of 11 July 1996 the Court has established its jurisdiction in this case, while rejecting all Preliminary Objections raised by Yugoslavia. This Judgment is final (Article 60 Statute of the Court).

2. The Statute provides for an *exception* to this rule of Judgments being final: Article 61 opens up the possibility of submitting a request for Revision of any Judgment rendered by the Court. The conditions for this reopening of a closed, finalized and adjudged debate are well defined in this provision. Outside Article 61 the Statute does not provide for any other exceptions to the rule that Judgments, indeed, are final.

3. It is for this reason alone that the requests put forward through this 'Initiative' should be rejected out of hand, without further debate or consideration. Only in subsidiary sense, Bosnia and Herzegovina adds the following.

4. The 'Initiative', as far as its substance is concerned, is nothing less and nothing more than a request for Revision in disguise. This is not only clear from the contents of the 'Initiative', it becomes even clearer when compared to the Application for Revision, which was submitted by Yugoslavia in this very same case on 23 April 2001. The text of the 'Initiative' at one hand and of the Application for Revision at the other hand are 95% identical. The enclosed Memorandum produced by Bosnia and Herzegovina demonstrates the similarities and differences between the two documents. Presumably Yugoslavia is aware of the fact that the Application for Revision does not meet the standard laid down in Article 61 and therefore feels urged to take recourse to this self-designed, however non-existing, exception to the rule that Judgments are final. This is not acceptable. If the Application for Revision is declared inadmissible by the Court, or altogether rejected, that will be the end of the debate. The Statute, rightly so, does not provide for a Revision of earlier Judgments outside the limits laid down in Article 61 of the Statute.

enclosure 1

5. Bosnia and Herzegovina encloses a copy of its Written Observations with regards to the Application for Revision dated 3 December 2001. Also enclosed is a copy of the Annexes to these Written Observations. If the Court would contemplate to consider the contents of the 'Initiative', for which there is no basis in law, Bosnia and Herzegovina requests the Court to accept the contents of these Written Observations *mutatis mutandis* as part of Bosnia's response to the 'Initiative'.

enclosure 2
enclosure 3

The nature of a Judgment on Preliminary Objections

6. The following is also submitted by way of subsidiary arguments.

7. In section D of the 'Initiative' Yugoslavia sets out in stating that "[I]nterim judgments – like the one on Preliminary Objections – are by their nature more readily reviewable than final judgments." (page 50 of the 'Initiative'). There is no basis in fact nor in law to sustain this proposition. Why "by their nature" interim judgments would be "more readily reviewable" is not explained by Yugoslavia, while there is no reason to accept this peculiar statement.
   Besides that, it is not correct to define a Judgment on Preliminary Objections as an 'Interim Judgment'; usually this term is reserved for 'Interim Protection', which refers to an Order (not a Judgment) which the Court may give in response to a request for Provisional Measures. In any event the Rules of Court state perfectly clear that the decision on preliminary objections is given in the form of a **Judgment**, while the Rules do not provide for a basis for the suggestion that the value of this Judgment is to be appreciated differently than the value of a Judgment on the merits of a certain case. Therefore, there is no basis for Yugoslavia's proposition that this sort of judgment would be "more readily reviewable". On the contrary, as mentioned above, this Judgment is "final and without appeal" (Article 60 of the Statute).). Recently this was clearly confirmed

by the Court in its Judgment of 25 March 1999 in a case concerning precisely a Judgment on Preliminary Objections (*Request for Interpretation of the Judgment of 11 June 1998 in the case concerning the* Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria), Preliminary Objections)); the Court considered that "[t]he language and structure of Article 60 reflect the primacy of the principle of *res judicata*" (*ICJ Rep.* 1999, p. 36, para. 12).

8. On page 50 of the 'Initiative', Yugoslavia goes on to suggest that "[T]he Court may **return** to this issue [of jurisdiction] any time, **upon initiative**, or *proprio motu*. In the ICAO Council Appeal case the Court **emphasized**: (...)" (bold print added). As evidence for this proposition Yugoslavia refers to the Judgment of this Court of 18 August 1972 in the Case concerning the Appeal relating to the Jurisdiction of the ICAO Council. However, this Judgment does not provide for any support whatsoever for Yugoslavia's proposition:
   - First, in the ICAO-case there was no question that the Court was 'returning' to the jurisdiction-issue; the issue had not been addressed before;
   - Second, in the ICAO-case there was no question of a so-called 'initiative';
   - Third, in the ICAO-case there was no question of the Court *emphasizing* that it may *return* to the jurisdiction issue *proprio motu*.
   - Fourth, in the ICAO-case the Court explicitly pointed out that "it is desirable that jurisdictional objections should be put forward as preliminary objections".

   Neither in the ICAO-Council Appeal case nor, for that matter, anywhere else there is any support to be found for Yugoslavia's suggestions that the Court would have to revisit this issue whenever questions about jurisdiction come up one way or the other. Apart from that Yugoslavia is wrong in assuming that 'always' in the quoted section of the ICAO-Judgment would be the same as 'continuously', which it is not.
   Yugoslavia, therefore, erroneously pretends that there would be some principle (page 51 of the 'Initiative') compelling the Court to revisit jurisdiction questions on a continued basis.

The other Yugoslav-cases pending before the Court

9. The following is also submitted by ways of subsidiary arguments.

10. Yugoslavia notes that currently it is involved in three (better: ten) cases before this Court, referring to the case against Yugoslavia filed by Croatia and to the cases filed by Yugoslavia itself against various member-States of NATO. Whatever the precise meaning of this not so clear reference may be, the main point here is that it is part of the jurisdictional system under which this Court functions that the question of jurisdiction is judged on it merits separately in each separate case. This way the Court is able to take into account in each case the peculiarities that are specifically relevant to

the jurisdiction question in each separate case. There is no reason whatsoever why the Court in these three (better: ten) cases should try and come to one single Judgment on jurisdiction for all of these cases regardless of the position taken by each of the States (including Yugoslavia) in each of these separate cases and regardless of the circumstances in each of these separate cases. All of this is also reflected in Article 59 of the Statute which states:

> "The decision of the Court has no binding force except between the parties and in respect of that particular case".

Also from the perspective of this provision there is no basis for Yugoslavia's request to the Court to reconsider its jurisdiction in the light of the other cases mentioned by Yugoslavia.

11. For that matter, Bosnia notes that – if any consistency would be at stake here – it would have been minimally consistent for Yugoslavia to notify the Court and the State parties involved that it, in the 'NATO cases', withdraws its reference to the Genocide Convention as a basis for jurisdiction. Yugoslavia has not done so, which makes its calling for consistency even more difficult to comprehend.

Conclusion

All of the above leads to the conclusion that there is no basis in fact nor in law to honour this so-called 'Initiative'. Bosnia and Herzegovina, therefore requests the Court to inform both parties involved in this case:

- that it responds in the negative to the request embodied in the 'Initiative';
- that it will not entertain any request for Revision other than the one submitted by Yugoslavia on 23 April 2001;
- that the Court rejects the propositions contained in the 'Initiative'.

Accept, Sir, the assurances of my highest esteem.

Kasim Trnka

Prof.Dr. Kasim Trnka
Agent of Bosnia and Herzegovina
before the International Court of Justice

Enclosure I

MEMORANDUM
on differences between the Application for Revision of 23 April 2001 and the "Initiative" of 4 May 2001

CONTENTS (pages i, ii (and iii))

1. Part A and B are the same in both documents.

2. The main differences are to be found in Part C, especially in the headings and sub-headings.

3. The Initiative (further: **I**) has a separate section D on admissibility. (the admissibility-issue regarding the Revision (further: **R**) is addressed in Part C of **R**.

4. Part D of **R** is the same as Part E of **I**.

5. Part E of R is the same as Part F of **I**.

Text (pages 1-52 (R) and 1-55 (I)

6. The terminology used in both documents is "Applicant" in **R** and "The FRY" in **I**. Along the same lines the words "Application" (**R**) and "Submission" (**I**) are used.

Part A

7. §1 and §3 are the same in both documents. The same is true for §2 except that in **R** the issue of admissibility is linked to Article 61 of the Statute, while in **I** the admissibility-issue is linked to the *ex officio*-practice of the Court.

Part B

8. Part B is entirely the same in both documents.

Part C

9. §22 in **R** discusses Article 61 of the Statute and provides some interpretation on this of this Article.

10. §23 of **R** is identical to §22 and §23 of **I** (except for the first sentences of the latter).

11. §24-§35 of **R** are identical to §24-§35 of **I** (except for the subheadings).

Part D

12. The part D which is to be found in **I** is not to be found at all in **R**.

Final parts

13. Part D of **R** is identical to part E of **I**.

14. Part E of **R** is almost entirely identical to part F of **I**.

Annexes

15. The annexes to both documents are entirely identical.