INTERNATIONAL COURT OF JUSTICE

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

(Bosnia and Herzegovina v. Yugoslavia (Serbia and Montenegro))

STATEMENT

OF THE GOVERNMENT OF
THE REPUBLIC OF
BOSNIA AND HERZEGOVINA

on
Preliminary Objections

14 November 1995

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INTRODUCTION

Preliminary remarks

1. On 26 June 1995, Yugoslavia (Serbia and Montenegro) filed Preliminary Objections, ostensibly in accordance with Article 79 of the Rules of Court.

2. By an Order of 14 July 1995, the President of the Court has fixed 14 November 1995 as the time-limit within which the Republic of Bosnia and Herzegovina may present a written statement of its observations and submissions on the Preliminary Objections raised by Yugoslavia (Serbia and Montenegro) in this case.

3. This Written Statement of the Republic of Bosnia and Herzegovina is presented in accordance with the Order of the President of the Court.

4. The Government of Bosnia and Herzegovina will respond in turn to each of the seven preliminary objections made by Yugoslavia (Serbia and Montenegro). But, to begin with, it deems it necessary to deal briefly with the general character of the Preliminary Objections and with Yugoslavia (Serbia and Montenegro)'s approach to the facts.

5. The cavalier and frivolous nature of the content and presentation of the preliminary objections by Yugoslavia (Serbia and Montenegro) presents an embarrassing dilemma for the Applicant: whether to respond seriously and at length to every irrelevant assertion of fact and each evidently erroneous assertion of law, at the risk of offending this Court by explicating that

which is self-evident to its Members, or to simply ignore most of the contents of the Preliminary Objections.

Bosnia and Herzegovina has decide to take the middle course of addressing the principal points raised in the Preliminary Objections without unduly straining the Court's patience by elaborately demonstrating that which is obvious to all but the Respondent.

General assessment of the Preliminary Objections

6. To its greatest regret the Government of Bosnia and Herzegovina must note that the Preliminary Objections made by Yugoslavia (Serbia and Montenegro) on 26 June 1995 are far from corresponding to what is expected from a State appearing before the International Court of Justice and shows the Respondent State's disrespect both for the Applicant and for the Court itself. Unfortunately, it is not an exaggeration to say that the circumstances in which they have been drafted as well as their content make a mockery of the proceedings before the World Court.

7. As is well known to the Court, the Republic of Bosnia and Herzegovina filed in the Registry an Application instituting proceedings against Yugoslavia (Serbia and Montenegro) on 20 March 1993. On the same day, it filed a request for the indication of provisional measures under Article 41 of the Statute of the Court.

8. After the public hearings held on 1 and 2 April 1993, the Court issued an Order on provisional measures on 8 April 1993. In this Order, the Court:

i) considered that

"Article IX of the Genocide Convention, to which both Bosnia-Herzegovina and Yugoslavia are parties, thus appears to the Court to afford a basis on which the jurisdiction of the Court might be founded to the extent that the subject-matter of the dispute relates to "the interpretation, application or fulfillment" of the convention, including disputes "relating to the responsibility of a State for genocide or for any of the other acts enumerated in article III" of the Convention" [I.C.J. *Reports* 1993, p. 16];

ii) noted that, "in the circumstances brought to its attention", there existed "a grave risk of acts of genocide being committed" [*ibid.*, p. 22], and that:

> "the crime of genocide "shocks the conscience of mankind, results in great losses to humanity and is contrary to moral law and to the spirit and aims of the United Nations", in the words of General Assembly resolution 96(I) of 11 December 1946 on "the Crime of Genocide", which the Court recalled in its Advisory Opinion on Reservations on the Convention on Genocide [I.C.J. *Reports* 1951, p. 23]" [*ibid.*, p. 23];

iii) and indicated provisional measures that the Government of Yugoslavia (Serbia and Montenegro) should take in pursuance of its undertaking in the Convention on the Prevention and Punishment of the Crime of Genocide of 9 December 1948 [para. 52.A, *ibid.*, p. 24] and that both States should take not to aggravate or extend the existing dispute [para. 52.B, *ibid.*].

9. Yugoslavia (Serbia and Montenegro) having failed to comply with these measures, Bosnia and Herzegovina filed on 27 July 1993 a second request under Article 41 of the Statute. Pending the hearings, fixed at the date of 25 August 1993, the President of the Court, in accordance with Article 74, paragraph 4 of the Rules, urged the Parties

> "to take all and any measures that may be within their power to prevent any commission, continuance or encouragement of the heinous international crime of genocide" [letter of 5 August 1993 - see I.C.J. *Reports* 1993, p. 334].

And, on 10 August 1993, Yugoslavia (Serbia and Montenegro) filed in turn a request for the indication of a provisional measure, against Bosnia and Herzegovina "in pursuance of its obligation under the Convention and the Prevention of the Crime of Genocide of 9 December 1948" [see *ibid.*].

10. By its Order of 13 September 1993, the Court did not find "that the circumstances, as they now present themselves to the Court, are such as to require a more specific indication of measures addressed to Bosnia-Herzegovina" than that indicated under paragraph 52.B of its previous Order [*ibid.*, p. 348]. The Court, however, considered that the grave risk which it apprehended had "been deepened by the persistence of conflicts on the territory of Bosnia-Herzegovina and the commission of heinous acts in the course of those conflicts" [*ibid.*] and that this perilous situation demanded

> "not an indication of provisional measures additional to those indicated by the Court's Order of 8 April 1993 (...), but immediate and effective implementation of those measures" [*ibid.*, p. 349].

11. Although Yugoslavia (Serbia and Montenegro) has complied no more with this second Order as it did in respect to the first one, Bosnia and Herzegovina abstained from requesting new provisional measures.

12. Due to the dramatic situation in the country and the difficulty of handling an important legal case before the World Court in such a situation, the Government of Bosnia and Herzegovina was forced to ask for extension of time for the filing of its Memorial, which, in conformity with an Order of

the Vice-President of the Court of 7 October 1993, was deposited in the Registry on 15 April 1994.

13. Invoking a so-called failure by Bosnia and Herzegovina to meet the requirements of Article 43 of the Statute and Articles 50 and 51 of the Rules of the Court, the Agent of Yugoslavia (Serbia and Montenegro), by a Memorandum dated 9 May 1994, sought to invoke Article 53 of the Statute or alternatively, asked for a re-submission of the Memorial with a new set of annexes. Although the Registrar had made clear that most of these complaints were ill-founded [see letters of 19 May 1994 and 30 June 1994, **Annexes 1-3**], it asked the Agent of Bosnia and Herzegovina to annex at least the relevant annexes of the documents cited [letter of 30 June 1994].

14. Although, in the view of the Government of Bosnia and Herzegovina, such a request imposed on it an undue burden quite in contrast with the usual practice followed by the Parties before the Court, a burden all the more heavy in the circumstances prevailing in its country, it decided to answer positively in order to cut short any delay on the part of Yugoslavia (Serbia and Montenegro). On 3 January 1995 complete sets of additional Annexes (7 volumes) embodying all documents cited in the Memorial, including those published and easily available, were deposited with the Registry.

15. This did not impede, but on the contrary was a pretext for, the Agent of Yugoslavia (Serbia and Montenegro) to request on 9 February 1995 **[Annex 4]** a new seven months extension of the time limit for the filing of the Counter-Memorial, which had been fixed by the Vice-President's Order of 7 October 1993 to 15 April 1995 **[Annex 5]**. By letter of 8 March 1995 **[Annex 6]**, the Agent of the Republic of Bosnia and Herzegovina strongly

protested against this unfounded request and, by an Order of 21 March 1995, the President of the Court extended to 30 June 1995 the time-limit for the filing of the Counter-Memorial **[Annex 7]**.

16. On 26 June 1995, Yugoslavia (Serbia and Montenegro) filed in the Registry its Preliminary Objections, a one hundred and forty five double-spaced pages, eighty-three of which are devoted to an entirely irrelevant and misleading presentation of "Facts".

17. This result has been achieved after fourteen and a half months, to which must be added another period of nearly thirteen more months since the presentation of the Application, during which the Government of Yugoslavia (Serbia and Montenegro) had ample time to prepare its argument on the jurisdiction of the Court or the admissibility of the Application. Very unfortunately, such a behaviour shows that the Respondent does not take the present proceedings seriously and treats with contempt, not only the Applicant State and the Court itself, but also the very substance of the case which concerns a human tragedy, probably the gravest ever submitted to the World Court, a case on an international crime which "shocks the conscience of mankind, results in great losses to humanity (...) and is contrary to moral law and to the spirit and aims of the United Nations" in the words of the General Assembly, quoted by the Court in its Orders of 8 April 1993 and 13 September 1993 [I.C.J. *Reports* 1993, pp. 23 and 348].

General observations on the content of the Preliminary Objections

18. According to Article 79, paragraph 2, of the Rules of the Court :

> "The preliminary objection shall set out the facts and the law on which the objection is based, the submissions and a list of the documents in support: it shall mention any evidence which the party may desire to produce. Copies of the supporting documents shall be attached".

19. Only technically at best, Yugoslavia (Serbia and Montenegro)'s Preliminary Objections feign to comply with these requirements.

In particular :

- Yugoslavia (Serbia and Montenegro) devotes more than half of its Preliminary Objections to a long presentation of "facts" which is both irrelevant and erroneous, based, if at all, on inaccurate evidence; the Government of Bosnia and Herzegovina will deal with this aspect of the Preliminary Objections later in this introduction [see *below*, para. 29 *et seq.*];

- the "law" in support of the long list of seven preliminary objections consists of purely gratuitous, and more often than not obscure, assertions without any attempt of legal reasoning.

20. In this respect, it is extraordinary and shocking that not the slightest attempt is made to answer Bosnia and Herzegovina's argument regarding the jurisdiction of the Court and the admissibility of the Application. As a matter of fact, during the proceedings, Yugoslavia (Serbia and Montenegro) had adopted an ambiguous attitude, both implying consent to the Court's

jurisdiction and disputing it. As a matter of precaution, the Memorial of the Government of the Republic of Bosnia and Herzegovina devotes consequently a full Section of 60 pages to "Jurisdiction and Admissibility" [Part 4, pp. 129-183].

21. Yugoslavia (Serbia and Montenegro) does not even attempt to rebut it. Even more extraordinary: in all, it cites only nine times the Bosnian Memorial, three times without any precise reference to a particular paragraph.

22. It goes without saying that the Government of Bosnia and Herzegovina fully maintains its presentation and respectfully refers the Judges of the Court to its argument in Part 4 of the Memorial, which must be considered as an integral part of this Written Statement. Contrary to the Preliminary Objections, Part 4 of the Memorial, seriously addresses the - not always serious - objections hinted at by Yugoslavia (Serbia and Montenegro) during the provisional phase, some of which had been noted by the Court in its Orders of 8 April and 13 September 1993. Yugoslavia (Serbia and Montenegro) does nothing of this kind, which seems to show that it has surrendered its previous claims as to the lack of jurisdiction of the Court and the inadmissibility of the Application, and that it tries to substitute for them, new and even more artificial and capricious objections.

23. It must also be noted in addition that, during the proceedings relating to the interim measures, Bosnia and Herzegovina had invoked several other grounds for the jurisdiction of the Court. It had, in particular,

- presented to the Court a letter, dated 8 June 1992, and addressed to the President of the Arbitration Commission of the International Conference for Peace in the former Yugoslavia, in which the Presidents of Serbia and Montenegro challenged the Commission's competence to give an advisory opinion and added:

> "The Federal Republic of Yugoslavia holds the view that all legal disputes which cannot be settled by agreement between the Federal Republic of Yugoslavia and the former Yugoslav republics should be taken to the International Court of Justice as the principal judicial organ of the United Nations" [see I.C.J. *Reports* 1993, pp. 16-18 and pp. 340-341].

- based itself also on Article 11 (Chapter I) of the Treaty of Saint Germain of 10 September 1919 on the Protection of Minorities in the Kingdom of the Serbs, Croats and Slovenes [*ibid.*, pp. 339-340];
- and invoked the principle of *forum prorogatum*, since Yugoslavia (Serbia and Montenegro), not only appeared in Court but also,
  1°) has already expressly accepted the jurisdiction of the Court on the basis of Article IX of the 1948 Convention during the proceedings on interim measures [see Memorial, pp. 154-158 and 178]; and
  2°) has itself requested provisional measures regarding so called "acts of genocide" attributed (erroneously) to the Government of Bosnia and Herzegovina, a request which can only be based on Article IX of the Genocide Convention [see *above*, para. 9 and Memorial, p. 132].

24. In its 1993 Orders, the Court expressed doubts as to the first two additional grounds of jurisdiction on a *prima facie* basis; but it expressly recalled that its decision at that stage,

"in no way prejudges the question of the jurisdiction of the Court to deal with the merits of the case, or any questions relating to the admissibility of the Application (...) and leaves unaffected the right of the Governments of Bosnia and Herzegovina and Yugoslavia to submit arguments in respect of those questions" [I.C.J. *Reports* 1993, p. 23 and p. 349].

25. Accordingly, in its Memorial, the Government of Bosnia and Herzegovina expressed

> "the firm conviction (...) that if studied carefully, the additional basis it offered for the jurisdiction of the Court would prove well-founded" [*para.* 4.1.0.9, p. 132].

It maintains wholly this view and as the Respondent State has not deemed it necessary to challenge it, there is no need to develop it further.

26. However, as an exception to its total neglect of the argument made by Bosnia and Herzegovina, Yugoslavia (Serbia and Montenegro) writes, in paragraph 1 of the Introduction to its Preliminary Objections :

> "The Applicant requests the Court to base its jurisdiction on Article IX of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide (hereafter: the 1948 Genocide Convention). Bearing this in mind, the FR of Yugoslavia is hereby submitting its preliminary objections. The Applicant cannot make his [*sic*] retention of this request conditional upon the FR of Yugoslavia's renunciation of its right to raise preliminary objections. In case the FR of Yugoslavia submits preliminary objections, the Applicant cannot invoke other possible grounds for the jurisdiction of the Court and proceed to submit new requests, as set out in para. 4.1.0.9. of the Memorial [p. 132] and para. 4.2.4.5 of the Memorial [p. 178]. This would mean a revision of the Memorial and the formulation of a new case, which is not permitted in this procedure. Before initiating the procedure and in the course of proceedings the FR of Yugoslavia had

not accepted the jurisdiction of the Court over this case" [p. 3].

27. The Respondent mixes two different things here:

In the first place, Bosnia and Herzegovina has indeed reserved its right to invoke, besides Article IX of the 1948 Genocide Convention,

> "all or some of the other existing titles of jurisdiction" [Memorial, p. 295].

this, it maintains wholly. As explained above, jurisdiction of the Court to deal with its submissions could be based jointly or severally on:

- Article IX of the Convention,
- forum prorogatum,
- Article 11 of the Treaty of Saint Germain,
- and the letter of 8 June 1992;

and, as the Permanent Court recalled:

> "The multiplicity of agreements concluded accepting the compulsory jurisdiction is evidence that the Contracting Parties intended to open new ways of access to the Court rather than to close old ways or to allow them to cancel each other out with the ultimate result that no jurisdiction would remain" [*The Electricity of Sofia and Bulgaria* (Preliminary Objection), Series A/B, n°77, p. 76, **Annex 8**].

In any case, if any one of the bases of jurisdiction invoked by Bosnia and Herzegovina is accepted by the Respondent State - as it was the case during the previous proceedings concerning Article IX of the Convention - or otherwise found well founded by the Court, there is no need to consider the question of additional grounds of jurisdiction and the Court is not being invited to do so [see e.g., I.C.J., *Judgment* of 3 February 1994, *Case concerning the Territorial Dispute*, I.C.J. *Reports* 1994, p. 15, **Annex 9**].

Secondly, Bosnia and Herzegovina also reserves its right

"to revive all or some of its previous submissions and requests" [Memorial, p. 295].

This must of course be understood if the Court recognizes a basis of competence which goes beyond Article IX of the Genocide Convention. In this respect, Yugoslavia (Serbia and Montenegro) is wrong when it asserts that

"this would mean a revision of the Memorial and the formulation of a new case, which is not permitted in this procedure" [see *above*, para. 26]:

A case is not defined by the Memorial but by the Application [cf. I.C.J., *Judgment* of 15 June 1962, Case concerning the Temple of Preah Vihear, I.C.J. *Reports* 1962, p. 36, **Annex 10**]. This being said, as explained in the Memorial,

"Bosnia and Herzegovina has determined, in its written pleadings, to focus exclusively on the issues arising out of the Convention. It thereby seeks to assist the Court by clearing away other issues that might obscure the main task" [*para.* 1.2.0.1., p. 5].

The Government of Bosnia and Herzegovina has not changed its mind.

28. Consequently, Bosnia and Herzegovina

i) will not discuss in the present Written Statement points which have not been tackled by Yugoslavia (Serbia and Montenegro) and respectfully refers the Court to the relevant points of its Memorial and to its previous pleadings;

ii) integrally maintains that the jurisdiction of the Court to deal with its submission is based, alternatively and/or jointly on four different grounds [*above*, para. 27];

iii) still intends to sharpen the focus of the dispute to the most important matter: the heinous crime of genocide constituted by the abhorrent

practice of "ethnic cleansing" and other acts intended to destroy in whole or in part the population, culture and religion of non-Serbian Bosnia and Herzegovina; the scope of the dispute thus conceived has been exposed in the Memorial [pp. 176-183].

Yugoslavia (Serbia and Montenegro)'s approach to the facts

29. The Government of the Republic of Bosnia and Herzegovina notes that the Preliminary Objections as submitted by Yugoslavia (Serbia and Montenegro) contain 83 pages of "Facts" (out of a total of 145 pages), supported by two volumes of annexes of 976 pages, in which Yugoslavia (Serbia and Montenegro) asserts a history of Bosnia and Herzegovina, a survey of so-called historical genocidal acts against Serbs from the fourteenth century onwards, and an assessment of the years immediately before the outbreak of the war in Bosnia and Herzegovina.

30. The Government of the Republic of Bosnia and Herzegovina also notes that Yugoslavia (Serbia and Montenegro), in submitting such facts, has not seen fit to devote one word in trying to respond to the substantial facts as they have been presented by the Government of the Republic of Bosnia and Herzegovina in its Memorial of 15 April 1994.

31. More specifically, whereas the Government of the Republic of Bosnia and Herzegovina has regard to the strictly defined nature of Preliminary Objections, nevertheless Yugoslavia (Serbia and Montenegro) has not seen fit to refer to Part 2 of the Bosnian Memorial nor has it denied the extensive outline of Yugoslavia's involvement in the genocidal acts as presented in the Memorial.

Also Yugoslavia (Serbia and Montenegro) has not even seen fit to briefly respond to the outline regarding the attributability of the genocidal acts to Yugoslavia (Serbia and Montenegro) as presented in Part 6 of the Bosnian Memorial.

32. In a sense, this would have been proper, since the preliminary phase should be, logically, mainly devoted to a legal discussion relating to the jurisdiction of the Court and the admissibility of the Application. Nevertheless, given that the Preliminary Objections are almost entirely based on facts presented by Yugoslavia (Serbia and Montenegro) and of its perception of these facts, while these facts touch the same issues as discussed in the Bosnian Memorial, one would have expected that Yugoslavia (Serbia and Montenegro) would have referred to these points of the Memorial whilst presenting its Preliminary Objections.

33. On the contrary, Yugoslavia (Serbia and Montenegro) offers a presentation of "facts" of its own, which is, for a large part, devoid of any relevance both in the present phase and in relation to the substance of the case. It is, in this respect, quite amazing to discover that Yugoslavia (Serbia and Montenegro) devotes

- four pages to facts going back to the tenth century with a view to establishing that the Serbs were the original population in Bosnia and were victims of Turkish oppression [pp. 7 to 10];
- one and a half page to explaining that Muslims were considered as a minority inside the Kingdom of Serbs, Croats and Slovenes [pp. 11-12 - see also para. 1.17.2, at p. 86];

- eight pages to the "genocide committed against the Serbs in Bosnia and Herzegovina during the Second World War" by the Croatian Ustashas [pp. 12-20 - see also para. 1.17.3., at p. 86];

If this all can prove anything at all, it can only be that Yugoslavia (Serbia and Montenegro) strives to rake up the past, and it confirms a perception that its heinous policy of "ethnic cleansing" only aims at getting an unjust revenge on innocent populations and at realizing a "Great Serbia" to the detriment of the non-Serb populations [see Memorial, pp. 59-61].

34. The remainder of the "facts" consist of an "ethnic" presentation glorifying the Bosnian Serbs and showing the entirely partial and biased approach adopted by Yugoslavia (Serbia and Montenegro). Moreover, the Government of the Republic of Bosnia and Herzegovina submits that the facts presented in the Preliminary Objections almost invariably do not correspond with reality. Indeed, most of the Yugoslav allegations are not supported by any evidence at all. If any documentary support is offered, it is derived from sources which - in most cases - cannot be considered to be independent on any view.

35. Many of Yugoslavia (Serbia and Montenegro)'s allegations (which are themselves irrelevant) are supported by articles in *Politika*, a Serbian newspaper published in Belgrade. This newspaper, however, is firmly controlled by the government in Belgrade. In order to strengthen their control on *Politika*, Yugoslav authorities appointed a new deputy editor in March 1991. This appointment surprised the journalists working for *Politika*; their union vehemently protested against it:

> "The journalists' union said that there was no need for the unexpected overnight appointment of a deputy editor without prior consultation with the paper's editorial staff. The nomi-

> nation of Aleksandar Prljo, who was a high-ranking government official, proves that the ruling party is not willing to give in to the independent union and the majority of employees who are demanding that *Politika* remains a politically independent and unbiased paper" [*Politika*, "agreement instead of a fait accompli", 28 March 1991, **Annex 11**].

36. The concerns put forward by the journalists' union were shared by the President of the Serbian Democratic Party in Yugoslavia (Serbia and Montenegro) Dragoljub Micunovic, who at the time expressed his serious doubts on Prljo's appointment.

> "It was distressing to see how an institution like *Politika* was being used as an instrument of propaganda. This abuse has probably bolstered the loss of esteem for Serbian journalism and Serbian political culture", [..."with public help"...**Annex 12**].

37. Unfortunately, the journalists' protests have been in vain. Since Prljo's appointment as deputy editor, little has changed. *Politika* is still entirely government controlled and it cannot be considered to provide any serious, let alone independent, evidence in support of Yugoslavia (Serbia and Montenegro)'s assertions. The Government of the Republic of Bosnia and Herzegovina submits that even if the actions alleged in *Politika* took place and remarks reported therein were made (which is not accepted), they would be wholly irrelevant for the purposes of these Preliminary Objections.

38. In the Preliminary Objections reference is furthermore made to a periodical called *Novi Vox*, which is presented by Yugoslavia (Serbia and Montenegro) as in some way representing the Bosnian Government's views and policies. The Bosnian Government emphasizes that it strives to ensure

freedom of the press in Bosnia and Herzegovina and that there has been no relationship between the views and the policies of the Bosnian Government and the conduct of the editors of *Novi Vox*.

Moreover, only four issues of *Novi Vox* were ever released between the Spring and Winter of 1991, of which only three were distributed by its editors. Of each issue no more than an estimated 12,000 copies were produced. The distribution of the periodical was stopped due to criminal proceedings against its editors, which proceedings were initiated by the Prosecutor's Office of Sarajevo. Whilst the case was not pursued, the periodical has never been published since. The Government of Bosnia and Herzegovina contends that, even if the allegedly inflammatory remarks contained in *Novi Vox* were made, they would be wholly irrelevant for the purposes of these Preliminary Objections.

39. Also irrelevant and erroneous is the annexed account of the two attacks on civilians, which according to Yugoslavia (Serbia and Montenegro) were carried out by Muslim forces [Preliminary Objections, para. 1.6.10].

In the first shelling on 27 May 1992, at least sixteen people, while waiting in line to buy bread, were killed near the market on Vase Miskina Street. Bosnian Serbs immediately emphatically claimed that the attack was committed by Muslim or Croatian forces, in order to provoke international military intervention. Even though these claims were later taken up by western newspapers, UN investigators on the spot found no proof of these accusations. On the contrary, according to these investigators:

> "It appeared that the attack in which three mortar shells fell near a group of Serbs, Croats and Muslims waiting in line at a market to buy bread, was launched by Serbian units in the hills South of Sarajevo. About 12 hours before this mortar attack, artillery shells were also apparently fired from the same Southern hill where Serbian gunners had set up batter-

ies, hitting the main maternity hospital near Sarajevo's centre" [*Final Report of the Commission of Experts established pursuant to Security Council Resolution 780* (1992), S/1994-/674, 27 May 1994 and Annexes, Annex VI, Study of the Battle and Siege of Sarajevo, para. 275, **Annex 13**].

40. The second mortar attack, on Markale market, referred to in the Preliminary Objections [at para. 1.6.10 thereof] killed at least 66 people and wounded at least 197 others. This attack took place on 5 February 1994. Again the Bosnian Serbs claimed that this shell, which incidentally was only one of the 46 mortar shells that hit the city of Sarajevo that day, had been fired by Bosnian forces [*Final Report of the Commission of Experts established pursuant to Security Council Resolution 780* (1992), S/1994/6-74, 27 May 1994 and Annexes, Annex VI, Study of the Battle and Siege of Sarajevo, para. 3210, **Annex 14**]. After a first investigation, a senior US administration official said that Washington had "very little doubt" that Bosnian Serb forces fired the mortar shell [*ibidem*, para. 3220, **Annex 15**]. Bosnian Serb commander Manojlo Milovanović, however, denied Bosnian Serb responsibility claiming that "Serb positions are not that close, and we do not possess arms capable of causing such a massacre" [*ibidem*, para. 3212, **Annex 14**].

41. The UN set up a special commission to investigate the massacre. Its conclusions were published in the *Final Report of the Commission of Experts*:

> "Canadian Colonel Michel Gauthier, who headed the UN's five-member commission of inquiry on the market shelling, reported that the mortar bomb which hit the Sarajevo market on 5 February could have been fired by either besieging Bosnian Serbs or defending BiH forces. The five-member investigative team, backed by two technical experts, found

> that the market blast was caused by a single high-explosive bomb from a conventional, factory made 120 millimetre mortar. The precise location of the weapon that fired the round could not be established... "The distance or origin of fire overlapped each side of the confrontation line by 2,000 meters", Gauthier said. "Both parties are known to have 120mm, and the bombs go along with them. The team has no reason to believe that either party does not have access to this type of ammunition"." [*Final Report of the Commission of Experts established Security Council Resolution 780* (19-92), S/1994/674, 27 May 1994 and Annexes, Annex VI, Study of the Battle and Siege of Sarajevo, para. 3334, **Annex 16**].

Thus, the investigation of the commission was inconclusive. It has not been possible to attribute the attack to either of the parties involved in the war. In any case, Yugoslavia (Serbia and Montenegro)'s claims that the attack was carried out by Bosnian forces are not supported by the conclusions of the special UN commission of inquiry. If anything, the conclusions of the commission contradict Milovanović's assertion, that the Bosnian Serbs were not in the possession of the arms capable of such a mortar attack.

42. Furthermore, as a further example of the use of blatant propaganda material to establish "facts", which are themselves in any event irrelevant and erroneous, the Preliminary Objections rely upon a seemingly authoritative publication calling itself *Defense and Foreign Affairs Handbook 1994* [see Preliminary Objections at Annex Part I at pp. 410-416], which is supplemented by *The Defense & Foreign Affairs Strategic Policy*. These publications are used to support arguments, inter alia, concerning the blame for commencement of hostilities in Bosnia and Herzegovina [Preliminary Objections, para. 1.9.42], the unconstitutionality of the existence of Bosnia and Herzegovina [Preliminary Objections, para. 1.9.34], and the argument

that poison gas was used by the forces of the Bosnian Government [Preliminary Objections, para. 1.6.14].

43. Apart from the fact that none of these statements are relevant or are corroborated by independent sources, the *Defense and Foreign Affairs Handbook 1994* itself is open to serious criticism.

44. Both of the publications referred to above are often quoted in Serbian media sources, upon which they themselves rely for materials; hence a circular (and consequently mutually corroborating) chain is demonstrated in these publications. No independent or reputable intelligence or defense analyst or credible body of expert opinion attaches any weight or credence to these publications. *The Defense and Foreign Affairs Strategic Policy* describing itself as "The international journal of national management and national security arrangement". Indeed, as an example of the exaggerative nature of these journals, the Court is referred to information contained in the 1994 *Defense and Foreign Affairs Handbook*, and the 1994 text produced by the London based International Institute for Strategic Studies, *The Military Balance*, the latter being a journal whose reputation and credibility is well established. The figures refer to the Croatian Army Battle Order as follows **[Annex 17]**:

	HANDBOOK	MILITARY BALANCE
Personnel	167,000	100,000
Tanks	530	173
Combat Aircraft	70+	20
Air Force Personnel	5,000+	300

45. Allowing for margin of error, nevertheless the *Defense and Foreign Affairs Handbook 1994* clearly grossly inflates the military strength of Croatia. Whatever purpose may be served by this, it is not accuracy.

46. Indeed, one of the few independent journals remaining in Serbia, *Vreme*, investigated the publishers of both abovementioned publications. Annexed hereto is an article written by its editor Milos Vasic on 5th April 1993 titled "Propaganda War; English Serb Lovers" .

47. In the article, Mr. Vasic, himself of Serbian origin, describes the links of the publishers of the *Defense and Foreign Affairs Handbook* and *The Defense and Foreign Affairs Strategic Policy* with pro-Serbian interests and states:

> "*The Defense and Foreign Affairs Strategic Policy* is of marginal significance within specialist circles: that which is seen in the published text shows that *The Defense and Foreign Affairs Strategic Policy* does not rely very much on facts. That is, instead of the "field research" of which it boasts, *The Defense and Foreign Affairs Strategic Policy* sent its two employees to Belgrade to hold an interview with General Zivota Panic [then Chief of Staff of the Yugoslav Army] and to stock up on publications from "All the Serbs of the World" propaganda apparatus. The interview with General Panic was typical and predictable. The data (loosely called facts) come from fringe writings in propaganda pamphlets which the authors collected in Belgrade[...]" **[Annex 18]**.

48. As a further illustration of the use of irrelevant propaganda material as a vehicle to introduce erroneous facts, the Preliminary Objections make copious reference to a Mr. Yossef Bodansky, described therein at para. 1.6.16 as "the distinguished American expert on terrorism [...] who was

the Director of the US House of Republican Task Force on Terrorism and Unconventional Warfare [Incidentally, Mr. Bodansky's name also appears on the *Defense and Foreign Affairs Handbook 1994* as one of its main contributors].

49. Repeated reference [see *inter alia*, Preliminary Objections, paras. 1.6.14, 1.6.16 to 1.6.17] is made to *Target America*, a text written by Mr. Bodansky [Preliminary Objections, Annex part I pp. 290-295]. This is used to justify, *inter alia*, the assertions (uncorroborated by any independent source) that chlorine gas was used by Bosnian Government forces during combat and that an Islamic holy war was being waged in Bosnia-Herzegovina against the Serbs.

50. Apart from the fact that these assertions are both untrue and irrelevant, Mr. Bodansky is not of repute, nor is the Committee which he participated in officially approved of or authoritative as to the views of the administration of the United States of America. Indeed, his text, which is annexed to the Preliminary Objections, is not recognized or accepted by any independent body of expert opinion, let alone housed in the book depositories at the U.S. Library of Congress or the British Library, its obscure publishers having ceased trading soon after the book was published.

51. Whilst the Government of Bosnia and Herzegovina maintains that the factual materials contained in the Preliminary Objections are overwhelmingly erroneous and irrelevant, the above examples are placed before the Court as illustrations of the deficiencies therein.

52. Indeed, as for the perverse suggestion that ethnic or religious hatred emanates only from non-Serbian sources, the desire of the Bosnian Government and its leadership to maintain and preserve an ethnically and religious diverse and tolerant nation has been evident since well before the atrocities began to be committed against its people.

The scurrilous personal attack made in the Preliminary Objections upon the character of Mr. Alija Izetbegovic the President of the Presidency of the Republic of Bosnia and Herzegovina does not merit a response; nevertheless, some observations to demonstrate its fallacious nature will be made.

53. The Preliminary Objections refer to the President's writings in 1970, namely a document entitled the *Islamic Declaration* [at Annex Part 1, pages 171-240]. At pages 172-3, an introduction is annexed which is not part of the Declaration and does not seem to emanate from any recognised source. The President, a retired lawyer, was sent to prison in a trial during the Communist era, which the introduction itself at page 172 states was rightfully denounced (line 8) and which was assessed as "Stalinist" (line 14).

54. By taking quotes out of context, and emphasizing certain passages, the Preliminary Objections appear to portray the President as a man who is a religious extremist. Taken out of context and read in isolation, such an impression may be created, but would be at opposite ends from the truth.

55. One merely needs to read the *Islamic Declaration* (even the annexed version [at Annex Part 1, pages 171-240], although the translation is materially inaccurate) to establish this is incorrect. Whilst references are made in the text to various named States, not one reference is made to

Bosnia. A few illustrations from the Declaration are given by way of example:

"(THE EQUALITY OF PEOPLE)

[...] Two facts of paramount importance - the unity of God and the equality of all men - have been laid down by the Koran (the sacred text of Muslims) in such a clear and explicit way that they allow for only one, literal interpretation, there is no divinity but one God; there is no chosen nation, chosen race or chosen class - all men are equal [...] People must be distinguished between - if any distinction is to be made - primarily according to what they really are, meaning according to their spiritual and ethical value (the Koran, suras 49/13)" [page 200, last paragraph].
[...]

"(FREEDOM OF CONSCIENCE)

[...] However much puritan in morals it may be, Islam is, because of its openness to nature and joy, broad-minded, as testified to by the entire history of Islam. As it recognises God, but does not recognise any dogma or hierarchy, Islam cannot turn into a dictatorship and in it any form of inquisition or spiritual terror has been rendered impossible" [page 207 - 208 12th to 17th line].
[...]

"(CHRISTIANITY AND JUDAISM)

[Referring to Christianity and Islam] [...] the future could serve as an example of understanding and co-operation between two major religions to the benefit of all people and the human kind, as opposed to the past which witnessed their senseless intolerance and frictions [...] A similar principle underlies the attitude of Islam to Judaism. We have lived with the Jews for centuries and even created a culture, so that in certain cases a distinction between Islamic and Jewish elements in that culture is impossible to make with certainty" [page 229-230, page 230 12th line to 21st line].

56. Whatever interpretation one places upon the writings of the President, it is irrelevant for the purposes of the Preliminary Objections. The above extracts in any event speak for themselves.

57. It surely is not seriously being contended by Yugoslavia (Serbia and Montenegro) that the Declaration explained, let alone justified, these genocidal acts.

Yugoslavia (Serbia and Montenegro)'s involvement in the war in Bosnia and Herzegovina

58. In seeking to raise preliminary objections Yugoslavia (Serbia and Montenegro), inter alia, submits that:

- an international dispute between Yugoslavia (Serbia and Montenegro) and the Republic of Bosnia and Herzegovina has not existed at any material time, and,
- Yugoslavia (Serbia and Montenegro) has not carried out any act of authority and that, since April 1992, it had no jurisdiction over the territory of Bosnia and Herzegovina.

59. It is submitted that even if these were valid substantive issues, they need to be determined by the Court upon its judgement on the merits of this case and not at this stage.

60. Furthermore, the Republic of Bosnia and Herzegovina maintains its views on the attributability of the genocidal acts to Yugoslavia (Serbia and

Montenegro) - an issue which of course will be elaborated upon during the merits phase of these proceedings.

61. To properly inform the Court, the Government of the Republic of Bosnia and Herzegovina nevertheless considers it appropriate to state that the Belgrade authorities have been continuing and are continuing to give active support to the Serb perpetrators of genocidal acts in Bosnia and Herzegovina since the Memorial was filed on 15 April 1994.

62. The most recent example of this Belgrade involvement is the forced recruitment of Serbs in Serbia proper by Belgrade authorities. An example of such a recruitment took place in June and July 1995 and was effected on behalf of the Bosnian Serb leadership in Pale; the recruited Serbs were forcefully sent to Bosnia and Herzegovina to take part in the war against the non-Serb population of Bosnia and Herzegovina.

63. The forced recruitment of Serbs in Serbia proper did not pass unnoticed: Yugoslav media, like the newspaper *Vreme International*, covered this forced mobilisation, which was coordinated and carried out by the Ministry of Interior in Belgrade. On 26 June 1995 *Vreme International* published the story of Mirko Drljaca, who was injured and arrested while he was trying to break out of the fire brigade facility in Novi Sad, Yugoslavia (Serbia and Montegro). In this facility the forcefully mobilized Serbs were kept imprisoned while awaiting deportation to the battlefields in Bosnia and Herzegovina and the Serb-held territories in Croatia [*Vreme International*, "Tribute in blood", 26 June 1995, **Annex 19**]. Among others in this article, Serbia's President Milosevic' wife, Mijana Markovic, is quoted admitting that Drljaca was arrested:

> "According to Dr. Markovic, Mirko Drljaca and the man who we just described belong to "the group of the fighters for the Serbian cause in Bosnia and Srpska Krajina. He [i.e. Drljaca] lives in Belgrade, he did not spend one day in the war and he is not intending to do so." People like him are now being arrested on the streets, in apartments, companies, refugee camps, student houses, cars, restaurants and there are already five thousand of them captured and sent across the Drina river" [*ibid.* p. 14, last column].

64. As mentioned above, this recruitment of Serbs was organized by the Ministry of Interior in Belgrade. Men born on the territory of Bosnia and Herzegovina, but living in Yugoslavia (Serbia and Montenegro), were officially summoned to join the army of the so-called Republika Srpska in Bosnia and Herzegovina.

One of these persons who received such a summons issued by the authorities in Belgrade is Nemanja Crnogorac. On 29 June 1995 he was summoned in writing to report at the offices of the Ministry of Interior in Subotica in the north of Yugoslavia (Serbia and Montenegro). He was ordered to bring along his "personal hygiene articles" and warned that he "could be brought to the Police Headquarters" if he would not respond to the summons [The full text of the summons is annexed to this Statement **Annex 20**].

65. Also, the horrific attack upon and brutal takeover of Srebrenica in July 1995 clearly shows Belgrade involvement. The American newspaper *Newsday* of 12 August 1995 reports that western and Bosnian intelligence sources have evidence

> "that the commander of the Yugoslav army, general Momcilo Perisic, was on a mountaintop across the border in Yugoslavia, sending instructions and counsel to Gen. Ratko

> Mladic, the commander of Bosnian Serb military forces. The radio conversations, intercepted by intelligence agencies, took place before, during and after the battle for the enclave captured by the Serbs on July 11.
> "Mladic and Perisic conferred constantly about their strategy and what they were doing," said one of the western officials, who like all of the intelligence officers interviewed asked to remain unidentified. The officers said they are still analyzing the radio intercepts, but "Mladic is always asking Perisic about what he should be doing. This didn't surprise us, because they are the same rank, but Perisic was clearly in command and had the upper hand"" **[Annex 21]**.

Of course, these reports have been denied by Yugoslav officials. The Government of the Republic of Bosnia and Herzegovina intends, however, to produce further evidence on these issues during the course of the merits phase of these proceedings.

66. In this context it is relevant to note that General Mladic (the military leader of the so-called Bosnian Serbs) was recently indicted by the War Crimes Tribunal in The Hague for committing genocidal acts during the above-mentioned takeover of Srebrenica **[Annex 22]**.

67. Although in the context of this case, which concerns genocide, there is no relevance whatsoever as to the assertion that there actually is a civil war going on in Bosnia and Herzegovina, the Government of the Republic of Bosnia and Herzegovina is more than happy to address this question. The Government of the Republic of Bosnia and Herzegovina submits that this is not the case. The people of Bosnia and Herzegovina are made the victims of a war of aggression instigated, organised and/or facilitated and/or acquiesced in by the Belgrade authorities.

68. If one would accept that Yugoslavia (Serbia and Montenegro) did not, and does not, play any role whatsoever in the war in Bosnia and Herzegovina, it is impossible to explain why the Security Council of the United Nations has repeatedly imposed and continues to implement economic sanctions on Yugoslavia (Serbia and Montenegro). It is not very likely, to say the least, that the world community has erred during the last five years in its perception of Belgrade's role in the war in Bosnia and Herzegovina.

69. For the reasons outlined above, no attempt will be made to address specific comments on each and every factual assertion made in the Preliminary Objections. The Government of the Republic of Bosnia and Herzegovina submits that this is not only unnecessary, but also inappropriate, given the strict provisions of Article 79 (1) of the Rules of the Court, which require Preliminary Objections (and accordingly statements in response thereto) to relate to issues of jurisdiction and admissibility.

Scope and general scheme of this Statement

70. Given the nature of the Preliminary Objections of Yugoslavia (Serbia and Montenegro) it is both easy and difficult to respond. Easy since the Government of the Republic of Bosnia and Herzegovina submits that the Preliminary Objections raised by Yugoslavia (Serbia and Montenegro) lack any relevant and/or credible factual substance. Furthermore, the Preliminary Objections do not contain any substantive legal submissions relevant to the question of jurisdiction of the Court and/or the admissibility of the Application of the Government of the Republic of Bosnia and Herzegovina in accordance with Article 79 (1) of the Rules of the Court. Difficult

because the legal argument is so limited to bare assertions without any evidence or substance that it does not lend itself to serious rebuttal.

71. However, the Government of Bosnia and Herzegovina will briefly and successively tackle each of the seven preliminary objections raised by Yugoslavia (Serbia and Montenegro).

RESPONSE TO THE
FIRST
PRELIMINARY OBJECTION

1.1 The first Preliminary Objection raised by Yugoslavia (Serbia and Montenegro) reads as follows:

> "A.1. The existence of civil war at the material time renders the Application inadmissible" [Preliminary Objections, p. 91].

This first objection, holding that the existence of civil war in Bosnia and Herzegovina renders the application of the Republic of Bosnia and Herzegovina inadmissible, is entirely without merit.

1.2 The active participation of forces and personnel of Yugoslavia (Serbia and Montenegro) in the combat in Bosnia and Herzegovina, in the course of which genocide was committed, renders Yugoslavia (Serbia and Montenegro) a party to a "dispute" with the Republic of Bosnia and Herzegovina. As to such dispute between States Parties to the 1948 Genocide Convention, mandatory recourse to the International Court of Justice is provided by Convention Article IX. The Application therefore is entirely admissible.

1.3 The Respondent invites the Court to declare as a matter of law that the complaint of the Republic of Bosnia and Herzegovina is inadmissible because the acts complained of occurred in the course of a civil war in Bosnia and Herzegovina. The Respondent also invites the Court to declare the complaint inadmissible as a matter of fact because it contends (without any substance) that it is not the perpetrator of the acts alleged in the complaint.

1.4 The Court is respectfully requested to reject both contentions: the first as a matter of law and the second because it goes to the merits of the case.

1.5 The essence of the Republic of Bosnia and Herzegovina's case is that the horrendous acts of genocide, complained of, and enumerated in the Memorial of 15 April 1994, are attributable to Yugoslavia (Serbia and Montenegro). These contentions are well supported by evidence presented in Bosnia's Memorial and, whatever their ultimate merits and weight as determined by the Court, they provide ample foundation for the Applicant's invocation of Article IX of the Genocide Convention. If so, it follows that under Article IX of the Convention, the Applicant has presented a justiciable question admissible to this Court for determination on the merits.

1.6 This dispute falls squarely within the purview of Article IX of the Genocide Convention. The complaint brought thereunder is entirely admissible unless the law on which it is based is facially incorrect or the facts, if proven, would not entail culpability. The Applicant has demonstrated that its case is soundly based on fact and law: that atrocities were committed which amount to genocide. This position is fully confirmed by the Indictment issued on 25 July 1995 against Radovan Karadzic and Ratko Mladic which states that they "from April 1992, in the territory of the Republic of Bosnia and Herzegovina, by their acts and omissions, committed genocide" **[Annex 1.1**, para. 17.]. The details of their alleged genocide are set out in the indictment. These are sufficient to establish probable cause for conviction before the Tribunal and, consequently, are surely sufficient to establish *prima facie* evidence of genocide so as to give this Court jurisdiction over the subject matter for purposes of this civil complaint under Article IX of the Convention.

1.7 The applicable law is Article IX of the Genocide Convention which states:

> "Disputes between the Contracting Parties relating to the interpretation, application or fulfillment of the present Convention, including those relating to the responsibility of a State for genocide or for any of the other acts enumerated in Article III, shall be submitted to the International Court of Justice at the request of any of the parties to the dispute."

1.8 The Court, in interpreting a treaty text, employs the rules of interpretation restated in the case concerning the *Territorial Dispute (Libyan Arab Jamahiriya/Chad)*:

> "in accordance with customary international law, reflected in Article 31 of the 1969 Vienna Convention on the Law of Treaties, a treaty must be interpreted in good faith in accordance with the ordinary meaning to be given to its terms in their context and in the light of its object and purpose. Interpretation must be based upon the text of the treaty. As a supplementary measure recourse may be had to means of interpretation such as the preparatory work of the treaty and the circumstances of its conclusion" [I.C.J. *Reports* 1994, Judgment, pp. 21-22, para. 41, **Annex 1.2**. See also *Case Concerning Maritime Delimitation and Territorial Questions (Qatar v. Bahrain)*, Jurisdiction and Admissibility, Judgment of 15 February 1995, p. 18, para. 33.].

1.9 The Republic of Bosnia and Herzegovina, in its Memorial of 15 April 1994, has sought to aid the Court in its interpretation of Article IX of the Genocide Convention - notwithstanding the clarity of its text - by demonstrating through historic contextual evidence and preparatory work that the acts of which Bosnia and Herzegovina complains fall squarely within the purview of the Convention, that the Respondent's acts are precisely those the drafters sought to prohibit, and that the International Court is precisely the body invested with authority to resolve disputes arising out of conflict-

ing assertions regarding the culpability of alleged acts and the responsibility for such acts [Bosnia and Herzegovina Memorial of 15 April 1994, pp. 200-208, paras. 5.2.2.1-5.2.3.8.].

1.10 The Application of Bosnia and Herzegovina precisely turns on the extensively documented and substantiated claim that the Respondent authorities "have decided, organized and directed" and have at all material times participated in "organizing and directing the shameful policy of genocidal 'ethnic cleansing' with a view to achieving the chimerical dream of a 'Greater Serbia' by means of aggression" [Bosnia and Herzegovina Memorial, 15 April 1994, p. 186, para. 4.3.2.3.]. The Respondent nevertheless asks the Court to declare such a complaint non-justiciable because it asserts that the events occurred in a civil war. The Court should reject as a matter of law so manifestly erroneous an exception to the obligations imposed by the Convention. The Respondent asserts that the "circumstances which constitute the background [of the Applicant's case] are dominated by elements of civil strife and, consequently, no international dispute is involved over which the Court can properly exercise its competence" [Preliminary Objections, para. A.1.1., p. 91]. Even if, which Bosnia utterly rejects as a matter of fact, the crisis were one of civil strife alone, the Court should reject this untenable proposition of law which, if accepted, would destroy the Convention's ability to protect not only Bosnia but also other states that, in future, may be the victims of genocidal interference by malevolent external intervenors in situations of civil strife. Moreover, the Court will surely wish to confirm that the Genocide Convention extends to all parties the right to bring an action against a party in whose jurisdiction, or with whose participation, a violation is alleged, whether or

not that violation occurs in situations of internal violence, external aggression, or both.

1.11 In thus pleading, the Respondent appears to expect this Court to accept the extremely dangerous (as well as legally unsupported) proposition of law that civil wars, per se, do not implicate international law. The Respondent would have the Court dismiss as inadmissible alleged violations of international law by a state when those acts occur in the course of a civil war in another state. The Republic of Bosnia and Herzegovina urges the Court to reject this pernicious doctrine and to reiterate its own ruling that a complaint is cognizable in international law when a state intervenes in another state's civil war in support of an insurgent movement [*Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, 1986 I.C.J. *Reports* 14 at para. 292(3), Judgment of June 27. **Annex 1.3**]. This intervention may even be in the form of encouragement to the parties to the civil war to engage in acts amounting to genocide.

1.12 Of course this Court does not have general jurisdiction as between the parties to determine that aggression was committed by Yugoslavia (Serbia and Montenegro) against the Republic of Bosnia and Herzegovina. However, when such aggression uses as its method of operation the systematic and deliberate destruction of entire populations, through murder and terrorism designed to achieve the forced "ethnic cleansing" of vast territories, it amounts to the genocide prohibited by the Convention. It is thus specifically subject by the Genocide Convention to the jurisdiction of this Court.

1.13 Contrary to the Respondent's implicit assumption, the Genocide Convention not only prohibits acts occurring within one state but also trans-boundary genocide. The U.N. General Assembly, the U.N. Commission on Human Rights' Special Rapporteur, the C.S.C.E. and the Council of the European Community have each reached the same conclusion: that, to quote the Vienna World Conference on Human Rights, "Serbia-Montenegro" is a "perpetrator of a crime" which "constitutes genocide in violation of the Convention on the Prevention and Punishment of the Crime of Genocide" [*A/Conf.* 157/24 (Pt. 1), p. 47 and Memorial, 15 April 1994, p. 255, para. 6.2.2.11] by virtue of its trans-boundary acts in the Republic of Bosnia and Herzegovina in participating directly in acts of ethnic cleansing, rape, terror and murder through the instrumentality of the JNA and by fomenting, aiding and abetting such acts by the insurgent Serb forces in Bosnia and Herzegovina.

1.14 The Respondent in its Preliminary Objections would have this Court reject out of hand as inadmissible the Applicant's contention that it (Yugoslavia (Serbia and Montenegro)) aided and committed genocide in the Republic of Bosnia and Herzegovina. These denials of complicity, if taken seriously, go entirely to the merits of this case. The question whether or not Yugoslavia (Serbia and Montenegro) perpetrated the genocidal acts alleged in, and demonstrated by, the Bosnian Memorial of 15 April 1994 is precisely the issue to be determined by this Court at the Merits stage of this adjudication.

1.15 Furthermore, the Respondent asserts that the "protagonists in reality are four contending political elements within the territory of the former Republic of Bosnia and Herzegovina" [Preliminary Objections, p. 91, para.

A.1.2.]. Whether this is true, or whether, as the Applicant asserts [Memorial, 15 April 1994, pp. 59-94, sec. 2.3.1-2.3.9], the Respondent is directly and indirectly involved in the genocide that has accompanied the war on Bosnian territory, is precisely the issue to be determined by the Court at the merits stage of this litigation. To hold the case inadmissible, without first giving full consideration to the evidence of Yugoslav participation in the genocidal acts in Bosnia, would be to determine the Merits of the Applicant's allegations without providing the Applicant with a full hearing.

1.16 As Professor Shabtai Rosenne has succinctly summarized the procedural rule that has evolved from the Court's practice: there is a

> "fine...distinction between a preliminary objection, especially as to admissibility, and a defence to the merits. As a rough rule-of-thumb, it is probable that when the facts and arguments in support of the objection are substantially the same as the facts and arguments on which the merits of the case depend, or when to decide the objection would require decision on what, in the concrete case, are substantive aspects of the merits, the plea is not an objection but a defence to the merits" [Shabtai ROSENNE, *The Law and Practice of the International Court*, 2nd Rev'd. Ed., p. 459 and cases cited and considered on pp. 459-61 (1985), **Annex 1.4**].

1.17 The Republic of Bosnia and Herzegovina, at this (admissibility) stage merely asks the Court to determine that if it were demonstrable that acts amounting to genocide within the meaning of the 1948 Convention can be shown to have been committed with the participation, assistance, direction and/or encouragement of Yugoslavia (Serbia and Montenegro), then those acts by the Respondent can be denounced under the Genocide Convention. The Republic of Bosnia and Herzegovina also asks the Court to find that this could be so whether or not those acts occurred within the context of a

civil war in which other forces were also engaged. The Applicant, unlike the Respondent, makes no request to the Court to determine at this stage whether or not the alleged genocidal acts in Bosnia did occur, nor whether Yugoslavia (Serbia and Montenegro) was implicated in those acts in a manner and degree so as to constitute genocide. These are matters to be addressed at the Merits phase and, although Bosnia and Herzegovina is ready and anxious to enter this stage of the argument, it deplores the Respondent's effort to delay this case by raising such substantive issues (in however shallow a fashion) as part of its preliminary objections.

1.18 In other words, the admissibility issues raised by the Respondent are entirely irrelevant. This case is admissible because a well-founded complaint has been brought by a party to the Genocide Convention against another party under Article IX of that treaty. That the claim arises out of violations committed in the course of a civil war in no way renders the Convention inapplicable because those violations were perpetrated (or so the Applicant alleges and shall demonstrate) by, as also in concert with, the Respondent which is a party to the Convention. For the Court to sustain Serbia's First Objection in a preliminary stage of the process would render the Convention meaningless in the very circumstances - interference by a state in a neighboring state's civil conflict - in which, in the contemporary context, it is most likely (alas!) to be applicable.

1.19 The fact that this complaint is brought in the context of ongoing hostilities (and ongoing genocide) in no way - as the Respondent appears to suggest [Preliminary Objections, id. p. 91, para. A.1.1: "circumstances [...] dominated by elements of civil strife [where] consequently no international dispute is involved. . . ."] - makes the subject matter nonjusticiable and

thus inadmissible. To quote the Court's decision in the Jurisdiction and Admissibility phase of the *Nicaragua* case:

> "The Court is not being asked to bring an armed conflict to an end by nothing more than the power of its words" [*Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Jurisdiction and Admissibility, Judgment, I.C.J. *Reports* 1984, **Annex 1.5**, p. 392 at 437, para. 100].

Rather, the Court is being asked to define the law and determine the facts in order to contribute to the eventual resolution of this horrendous situation and to promote the historic process of healing among the parties.

RESPONSE TO THE SECOND PRELIMINARY OBJECTION

2.1 The authority of the recognised Government of Bosnia and Herzegovina to institute these proceedings is beyond question.

2.2 The second Preliminary Objection raised by Yugoslavia (Serbia and Montenegro) reads as follows:

> "A.2. Alija Izetbegovic was not competent to issue authorization for the initiation of proceedings before the Court" [Preliminary Objections, p. 92].

The Respondent alleges that Bosnia and Herzegovina's Application is inadmissible because these proceedings before the International Court of Justice were improperly instituted by the President in "overstepping his authority and violating a relevant provision of internal law" [Preliminary Objections, June, 1995, paras. A.2.1 and A.2.3-A.2.8, pp. 92-93].

2.3 Specifically, the Respondent asserts that "the letter of authorization for the initiation of proceedings and the appointment of agents was signed by Alija Izetbegovic, as the President of the Republic. . . ." [*Id.* para. A.2.4.]. This, the Respondent asserts is invalid authorisation "under the regulations of internal law" [*ibid.*].

2.4 It need hardly be said that the credentials of diplomats, agents and other representatives of the Republic of Bosnia and Herzegovina in the multiple international fora have everywhere been accepted as valid in accordance with applicable law and practice. This is as true of international organiza-

tions as of foreign governments. These credentials are signed by President Alija Izetbegovic. The Court should take judicial notice of this fact and dismiss the effort by the Respondent to challenge the validity of the process by which this case has been initiated by the Applicant.

2.5 It would surely be inappropriate for this Court to accept the mischievous invitation to enter upon an examination of the domestic politics or constitutional legitimacy of a government which has been universally recognized and whose diplomatic agents are everywhere duly accredited. Such efforts to review domestic constitutional legitimacy of governments have always been firmly rejected by courts and tribunals [*Great Britain v. Costa Rica*, 1923, *Reports International Arbitral Awards*, 1 at 369, 381. See also *Republic of Peru v. Dreyfus Brothers*, (1888) Supreme Court of Justice, Law Reports 1888, 348. **Annexes 2.1 and 2.2**].

2.6 The Republic of Bosnia and Herzegovina speaks as the Applicant in this action through its recognized governmental officials and authorized agents [Memorial of 15 April 1994, p. 141, paras. 4.2.1.20-4.2.1.21.]. The Court, like foreign states, is entitled to rely on the authenticity of the submissions made by Bosnia and Herzegovina's duly authorized officials and agents [*Status of Eastern Greenland*, *PCIJ*, 5 April 1933, *PCIJ*, Ser. A/B, No. 53, 22 AT 90-92. **Annex 2.3**].

2.7 In its Memorial of 15 April 1994, the Republic of Bosnia and Herzegovina has alluded to the fact [pp. 134-137, paras. 4.2.1.2-4.2.1-11] that its international status has been considered and confirmed by the Arbitration Commission of the International Conference for Peace in the former Yugoslavia. This position has constantly been reiterated by U.N. organs as,

for example, when the Security Council went on record as "profoundly shocked" by the "outrageous act of terrorism" that led to the killing of the Deputy Prime Minister of the Government of Bosnia and expressed its "sincere condolences" to the "people and Government of the Republic of Bosnia and Herzegovina" [*Presidential Statement on behalf of the Council*, 3159th mtg., 8 January 1993. 48 SCOR 1 (1993), Memorial, Annex 3-II, pp. 11-12].

2.8 In refusing to enter into a discourse on the internal constitutional legitimacy of its government the Applicant merely adheres to established international law which makes the issue frivolous [Cf. JENNINGS and WATTS, *Oppenheim's International Law*, 9th ed., vol. I, Pt. 1, p. 153: "constitutional legitimacy cannot be regarded as an established requirement for the recognition of governments." **Annex 2.4**]. It in no way concedes the accuracy of any part of the highly improper and false assault on its legitimacy in the Respondent's Second Preliminary Objections.

Having said that, there is, however, no reason for the Applicant not to invite the Court to take cognisance of the following facts, which establish that President Izetbegovic was duly appointed President of the Presidency of the Republic of Bosnia and Herzegovina and that he exercised his functions in accordance with the relevant constitutional procedures.

2.9 On 18-19 November 1990, the first democratic multi-party elections were held in the Socialist Republic of Bosnia and Herzegovina. The three largest parties, the Party for Democratic Action, the Croatian Democratic Union and the Serbian Democratic Party achieved a total of 202 out of 240 available parliamentary seats. Their representatives also obtained significant majorities in the elections for membership in the Presidency of the Socialist

Republic of Bosnia and Herzegovina. As a result of an alliance agreement among the parties, Alija Izetbegovic of the Party for Democratic Action was appointed President of the seven-member Presidency. Jure Pelivan of the Croatian Democratic Union became Prime Minister, and Momcilo Kraijsnik of the Serbian Democratic Party was elected President of the National Assembly. On 30 January 1991, the newly elected Assembly appointed a government representing the major parties [Preliminary Objections, paras. 1.7.1-1.7.5, pp. 36-37].

2.10 According to Amendment LXXIII [**Annex 2.5**, no. 1] of the Constitution of the Socialist Republic of Bosnia and Herzegovina, the members of the Presidency are elected for a term of four years [*Official Gazette* of the Socialist Republic of Bosnia and Herzegovina, No. 21\90, [**Annex 2.6**] now incorporated in Article 220 [**Annex 2.5**, no. 2] of the *Consolidated Constitution of the Republic of Bosnia and Herzegovina* [hereinafter: *Consolidated Constitution*], *Official Gazette* of the Socialist Republic of Bosnia and Herzegovina, No. 5/93, **Annex 2.9**]. The Presidency retains its mandate until new elections have been held at the end of its term [*ibid.*].

2.11 The President of the Presidency is elected from among its members, according to Article 351 [**Annex 2.5**, no. 3] of the *1974 Constitution* of the Socialist Republic of Bosnia and Herzegovina [**Annex 2.7**], which was then in force. This appointment was initially for a period of one year, with a possibility of renewal [Article 4 of Amendment LI [**Annex 2.5**, no. 4 and **Annex 2.8**], to the 1974 Constitution of the Socialist Republic of Bosnia and Herzegovina, *Official Gazette* No. 13\89 [**Annex 2.8**], corresponding to Article 220 [**Annex 2.5**, no. 5] of the *Consolidated Constitution*, **Annex 2.9**].

There is no constitutional requirement which would hold that the individual who achieved the highest number of votes in the elections for membership in the Presidency must be appointed President of the Presidency.

2.12 President Izetbegovic initially took up office in December 1990. In accordance with Amendment LI [**Annex 2.5**, no. 6][*Official Gazette* 13/89, **Annex 2.8**] of the new Operating Procedure of the Presidency of the Socialist Republic of Bosnia and Herzegovina, which took effect on 31 December 1991 and was adopted with the support of the Serb representatives, he was re-elected the following year, again with the support of the two Serb representatives on the Presidency, for another one-year term of office [*Official Gazette* of the Socialist Republic of Bosnia and Herzegovina, No. 37/91, **Annex 2.10**].

He was thus lawfully exercising the functions of his office in Spring of 1992, when war conditions broke out in the Republic of Bosnia and Herzegovina.

2.13 Article 358 [**Annex 2.5**, no. 7] of the *1974 Constitution* of the Socialist Republic of Bosnia and Herzegovina [**Annex 2.11**], as amended by Amendment LI [**Annex 2.8**] of 11 April 1989 [Now Article 220 [**Annex 2.5**, no. 9] of the *Consolidated Constitution*, adopted on 24 February 1993] reads as follows,

> "In case of war or a state of emergency, the mandate of the Members of the Presidency and of the President shall be continued until such time as the conditions for new elections for the Presidency are met" [Also reproduced in the Letter of the Agent of the Republic of Bosnia and Herzegovina to the International Court of Justice, 22 August 1993].

According to Article 350 [**Annex 2.5**, no. 10 and **Annex 2.11**] of the *1974 Constitution* of the Socialist Republic of Bosnia and Herzegovina [now

article 222 [**Annex 2.5**, no. 11] of the *Consolidated Constitution*, **Annex 2.9**], the Presidency is legally entitled to act in place of the Assembly when the Assembly, due to conditions of war, is unable to discharge its functions.

2.14 On 8 April 1992, the Presidency officially proclaimed a declaration [**Annex 2.5**, no. 12] concerning the imminent threat of war [*Official Gazette* of the Republic of Bosnia and Herzegovina, No. 1/92, **Annex 2.12**]. On 20 June 1992 the Presidency determined [**Annex 2.5**, no. 13] that there existed a state of war in accordance with the abovementioned provisions. These conditions have, unfortunately, prevailed to this day.

2.15 During times of war, membership of the Presidency is widened to include the President of the Parliament, the Prime Minister, and the Commander of the Territorial Defense Forces [Amendment LXXIII [**Annex 2.5**, no. 14 and **Annex 2.13**] to Article 350 [**Annex 2.5**, no. 15 and **Annex 2.11**] of the *1974 Constitution* of the Socialist Republic of Bosnia and Herzegovina, restated in Article 222 [**Annex 2.5**, no. 16 and **Annex 2.9**] of the *Consolidated Constitution*]. This provision was duly complied with [*Official Gazette* of the Republic of Bosnia and Herzegovina, No. 1/92, **Annex 2.12**].

2.16 According to Article 36 [**Annex 2.5**, no. 17] of the *Operating Procedure of the Presidency*, the quorum for the adoption of decisions of the Presidency is four [*Official Gazette* of the Socialist Republic of Bosnia and Herzegovina, No. 37/91, **Annex 2.14**]. Hence, even when the two Serb members of the Presidency boycotted, or attempted to obstruct the working of the Presidency, decisions could be adopted lawfully.

2.17 The Presidency is requested to seek to adopt decisions by consensus. However, if it is impossible to achieve consensus, then ordinary decisions can be taken by simple majority [Article 45 [**Annex 2.5**, no. 18] of the *Operating Procedure* of the Presidency, *Official Gazette*, No. 37/91, **Annex 2.14**]. Decisions concerning defense and State security, international relations and proposals for legislative action by the Assembly, including constitutional changes, can be adopted by at least five votes from among the seven-member Presidency [Article 46 [**Annex 2.5**, no. 19] of the *Operating Procedure* of the Presidency, *Official Gazette* No. 37/91, **Annex 2.14**]. Hence, decisions could be adopted validly in the absence of, or against the votes of, two members of the Presidency. Furthermore, after an imminent threat of war or state of war had been proclaimed, the Presidency was entitled to adopt all decisions by simple majority out of the total number of the Presidency. This also applies to decisions taken by the Presidency in place of the Assembly, in accordance with Article 350 [**Annex 2.5**, no. 20 and **Annex 2.7**] of the *1974 Constitution* of the Socialist Republic of Bosnia and Herzegovina [now article 222 [**Annex 2.5**, no. 21 and **Annex 2.9**] of the *Consolidated Constitution*], until the Assembly is able to discharge its functions [Decision [**Annex 2.5**, no. 22] of the Presidency concerning Change in the *Operating Procedure* for the Presidency of 25 May 1992, *Official Gazette* of the Republic of Bosnia and Herzegovina, No. 5/92, **Annex 2.15**].

2.18 The Presidency participates in the formulation and implementation of foreign policy in conjunction with the Assembly [Article 219 [**Annex 2.5**, no. 23] of the *Consolidated Constitution* of 24 February 1993, **Annex 2.9**]. The decision to bring the present action in the International Court of Justice was taken by the Presidency, in the exercise of its powers under Article

222 [**Annex 2.5**, no. 25 and **Annex 2.9**] of the *Consolidated Constitution* and pursuant to the declaration of a state of war of 20 June 1992. According to Article 20 of the *Operating Procedure* of the Presidency of 23 December 1991, the Presidency is represented by its President, who, according to Article 54 [**Annex 2.5**, no. 26] signs all acts of the Presidency in its name [*Official Gazette* of the Socialist Republic of Bosnia and Herzegovina, No. 37/91, **Annex 2.14**]. The President was thus duly authorized to instruct the then Agent for the Republic of Bosnia and Herzegovina to institute proceedings. He did so in the name of the Presidency which he represented, as is evidenced by the fact that the Letter appointing the initial co-agents for this case and endorsing the bringing of proceedings in this case, was written on the official stationary of the Presidency [Letter dated 19 March 1993 to the Registrar of the International Court of Justice, **Annex 2.16**].

2.19 Hence, on 20 March 1993, the time of filing of the present case in the International Court of Justice, the President and the Presidency exercised their functions lawfully, in accordance with the relevant constitutional provisions, including those relating to a state of war or emergency. As President of the Presidency, President Izetbegovic is legally entitled to represent the Republic of Bosnia and Herzegovina internationally in this matter.

2.20 As a matter of courtesy to the Court the Government of Bosnia and Herzegovina has provided the information in the above paras. 2.9 - 2.19. However, the Government of Bosnia and Herzegovina wishes to reiterate that in any case it is not for the Respondent, and for that matter not even for the

Court itself, to enter into an examination of the constitutional technicalities of the law of a sovereign State.

RESPONSE TO THE THIRD PRELIMINARY OBJECTION

3.1 The third Preliminary Objection raised by Yugoslavia (Serbia and Montenegro) reads as follows:

> "B.1. As it has flagrantly violated the principle of equal rights and self-determination of peoples, the Applicant State could not by notification of succession enter into the 1948 Genocide Convention" [Preliminary Objections, p. 95].

In this objection, the Respondent makes three points to ask the Court to declare the complaint beyond its jurisdiction: (1) that the Applicant state was constituted in contravention of its internal law, (2) that the Applicant state was constituted contrary to international law, and (3) the entry of the Applicant state into the 1948 Genocide Convention by notification of succession contravenes international law. Each of these contentions is false.

Under the Constitution of the Socialist Federal Republic of Yugoslavia, the Republic of Bosnia and Herzegovina was entitled to opt for independent statehood

3.2 The very first substantive provision of the *1974 Constitution* of the Socialist Federal Republic of Yugoslavia provided that:

> "The nations of Yugoslavia, proceeding from the right of every nation to *self determination, including the right to secession*, on the basis of their will freely expressed in the common struggle of all nations and nationalities in the national Liberation War and Socialist Revolution, and in conformity with their historic aspirations, aware that further consolidation of their brotherhood and unity is in the com-

> mon interest, have, together with the nationalities with which they live, united in a federal republic of free and equal nations and nationalities and founded a socialist federal community of working people, the Socialist Federal Republic of Yugoslavia [*Constitution of the Socialist Federal Republic of Yugoslavia*, Basic Principles, Section I, **Annex 3.1**, emphasis added].

This statement reflects the entire structure of the Constitution of the former Socialist Federal Republic of Yugoslavia. Sovereignty and the right to exercise public powers are in principle retained by the individual Republics. The Federal organs only exercise powers specifically assigned to them [e.g. Article 281 of the *Constitution of the former Socialist Federal Republic of Yugoslavia*, **Annex 3.2**]. The Republics always retain the right to self-determination, including, in express terms, "the right to secession" [*Basic Principles*, Section I, **Annex 3.1**].

This understanding of the Federal structure was also reflected in Article 3 of the Federal Constitution, which confirmed that the Republics are

> "**States** based on the **sovereignty** of the people" [Constitution of the Socialist Federal Republic of Yugoslavia, Article 3, **Annex 3.3**, emphasis added].

The constitutions of the individual republics also emphasised the sovereign personality of the Federal Republics. Thus, the 1974 Constitution of the Socialist Republic of Bosnia and Herzegovina confirmed in Article 1 its Status as "a socialist democratic **state**" [**Annex 3.4**, emphasis added].

3.3 When the Republic of Bosnia and Herzegovina acted in accordance with the inherent right of self determination and began the process of translating the sovereignty of its people into formal independence, it was entitled to do so unilaterally, in accordance with the freely expressed will of the representatives of its people. The right to secession was clearly expressed in the

Federal Constitution and no restrictions or conditions were attached to the exercise of this right [*ibid.*].

3.4 Article 5 of the *Constitution of the Socialist Federal Republic of Yugoslavia* **[Annex 3.5]**, relating to the possible changes of frontiers of the Socialist Federal Republic of Yugoslavia is not relevant in this context. It does not concern itself with secession, but instead contemplates the case of territorial adjustments in relations between the former Socialist Federal Republic and neighboring states **[Annex 3.6]**. Neither does Article 237 of the *Constitution of the Socialist Federal Republic of Yugoslavia* constitute a bar to the exercise of the right to secession. It concerns exclusively the administration of national defense against external aggression, as is indicated in the heading of that section of the constitution, and in the articles which follow [concerning, for example, capitulation to foreign forces, etc.]. Finally, it is absurd to invoke Articles 116 and 124 of the Criminal Code of the former Socialist Federal Republic of Yugoslavia [Preliminary Objections, para. B.1.1.5, p. 97]. These provisions explicitly refer to "violent or unconstitutional secession" and "armed rebellion" or individuals, and are thus entirely unrelated to the exercise by the Republic of its constitutional rights.

3.5 Even if the implementation of the right to independence had been subjected to a requirement of agreement of Federal or other bodies within the Constitutional system of the Socialist Federal Republic of Yugoslavia (which it was not), such a requirement would have been irrelevant in this case. When the Republic of Bosnia and Herzegovina activated its right to full independence, the Organs of the former Socialist Federal Republic of Yugoslavia were no longer functioning. As the Badinter Commission confirmed in November 1991, the Socialist Federal Republic of Yugoslavia was already

at that stage in a process of dissolution [Opinion No. 1, 31 I.L.M. 1494 **Annex 3.7**]. Soon after the referendum on independence of 29 February/1 March 1992, the Arbitration Commission stated that this process had been concluded, the independence of at least Slovenia and Croatia having been widely recognized [Also see Badinter Commission, Opinion No. 8, 31 I.L.M. 1521, **Annex 3.8**]. The Republic of Bosnia and Herzegovina had therefore no option but to achieve its independence unilaterally, through the application of its own constitutional procedures. The Federal Republic of Yugoslavia (Serbia and Montenegro) adopted a similar approach when it purported to constitute itself on 27 April 1992.

3.6 Legislative power in the Republic is exercised by the Assembly, or parliament, which is composed of representatives elected through universal suffrage. According to Article 416 [**Annex 2.5**, no. 27, **Annex 3.9**] of the *1974 Constitution* of the Socialist Republic of Bosnia and Herzegovina, now Article 268 [**Annex 2.5**, no. 28 and **Annex 3.10**] of the Consolidated Constitution, changes to the Constitution are adopted by two-thirds majority vote at a joint session of the Chambers of the Assembly.

3.7 This Procedure was followed on 31 July 1990, when a joint session of the Chambers of the Assembly adopted Amendment LX [**Annex 2.5**, no. 29 and **Annex 2.6**] to the Constitution of the Socialist Republic of Bosnia and Herzegovina. That amendment confirms that the Republic is "a democratic sovereign State of equal citizens".

3.8 Contrary to the assertions of Yugoslavia (Serbia and Montenegro) [Preliminary Objections para. B.1.1.8, pp. 98-99], the sovereign rights of the Republic, including the right to secession, are not restricted, but, on the

contrary, confirmed in Article 252 [**Annex 2.5**, no. 30 and **Annex 3.11**] of the *1974 Constitution* of the Socialist Republic of Bosnia and Herzegovina. That article affirms once again that sovereignty is also vested in the Republic of Bosnia and Herzegovina. Moreover, Article 252 of the Constitution of the Socialist Republic of Bosnia and Herzegovina mirrored Article 237 of the Constitution of the former Socialist Federal Republic of Yugoslavia, which clearly related to the defense of the Federal Republic from external aggression, being part of the Chapter VI of the Constitution on "National Defense". It is not connected with the constitutionally guaranteed right of unincumbered secession.

3.9 It is true that Amendment LXIX [**Annex 2.5**, no. 31 and **Annex 3.12**] to the Constitution of the Socialist Republic of Bosnia and Herzegovina of 1990 proscribes organizations and actions designed to achieve the "violent overthrow" of the constitutional system of the Socialist Federal Republic of Yugoslavia [Preliminary Objections, para. B.1.1.9, p. 99].
This does, however, obviously not preclude political change achieved in accordance with the constitution, in particular in accordance with the explicit right to self-determination and secession. In the present case accession to independence was decided through a democratic referendum.

3.10 The status of the Republic of Bosnia and Herzegovina as a democratic sovereign state of equal citizens was confirmed in the Platform on the Position of Bosnia and Herzegovina and Future Arrangements of the Yugoslav Community, adopted by the Assembly on 14 October 1991. As the Platform did not purport to constitute a constitutional amendment, or even to amount to binding legislation, a simple majority was sufficient for its adoption [Preliminary Objections, Annexes p. 816]. The Platform was

accompanied by a Letter of Intent, also adopted by the Assembly on 14 October [**Annex 3.13**]. That Letter confirmed the view of the Assembly that the unilateral adoption of a new Constitution by the Republic of Serbia, and the holding of referenda by Slovenia, Croatia and Macedonia have

> "essentially and irretrievably changed the constitution of Yugoslavia and created a new legal and factual state" [Letter of Intent, para. 1].

It is affirmed that constitutional Amendment LX, relating to the status of the Republic of Bosnia and Herzegovina as a "democratic sovereign state of equal citizens" would "permanently define the constitutional status of Bosnia and Herzegovina" in its internal and international relations [*ibid.*]. As will be discussed below, this Letter of Intent was, however, not in the nature of a formal constitutional amendment or even of a binding legislative act.

3.11 The decision of the Presidency of the Republic to seek the recognition of the European Community, its member States and other States was taken also lawfully [Reproduced in Preliminary Objections, Annexes p. 711]. The same considerations relating to the functioning and powers of the Presidency apply as are put forward above, in paras. 2.9 to 2.20.

3.12 In the light of the advice provided by the Badinter Arbitration Commission [Opinion No. 4. 11 January 1992, 31 I.L.M. 1501, **Annex 3.14**] the Assembly, on 25 January 1992, decided to call for a referendum on independence, to be held on 29 February/1 March 1992. This decision was made in accordance with Article 152 [**Annex 2.5**, no. 32 and **Annex 3.15**] of the *1974 Constitution* of the Socialist Republic of Bosnia and Herzegovina, and Article 5, item 9, of Amendment LXXI [**Annex 2.5**, no. 33 and **Annex 2.13**] to the *1974 Constitution* of the Socialist Republic of Bosnia

and Herzegovina and, according to articles 3 and 26 of the Referendum Act of 1977, as amended in 1991, and Article 115 **[Annex 2.5**, no. 34] of the Operating Procedure of Assembly [Official Gazette of the Socialist Republic of Bosnia and Herzegovina, No. 8/91, **Annex 3.16]**.

The question put in the referendum was:

> Are you for a sovereign and independent Bosnia and Herzegovina as a state of equal citizens and peoples of Bosnia and Herzegovina, Muslims, Serbs and Croats, and members of other nations who live in Bosnia, yes or no? **[Annex 2.5**, no. D1, D2 and **Annex 3.17]**

The decision to call for a referendum, and the previous decisions of the Presidency and Assembly relating to the emerging independence of the Republic were all adopted validly. Contrary to the submissions of Yugoslavia (Serbia and Montenegro) [Preliminary Objections, paras. B.1.1.10-B.1.1.14, pp. 99-102], there was no special legal requirement which would have precluded the taking of any such decisions in the absence of support from the majority of Serb delegates in the Assembly.

3.13 Articles 19-22 **[Annex 2.5**, no. 35 and **Annex 3.18]** of the Constitutional Law of 31 July 1990 on the Application of Amendments LIX to LXXIX of the Constitution of the former Socialist Republic of Bosnia and Herzegovina provide for the proportional representation of the nationalities and peoples of the Republic of Bosnia and Herzegovina (Muslims, Serbs and Croats or members of other nationalities) in the Assembly. However, the articles do not require the agreement of the representatives of all nationalities for the adoption of valid decisions by the constitutional organs of the Republic, such as the calling for a referendum or the request for recognition [Preliminary Objections, para. B.1.1.11, pp. 100-101].

3.14 The Platform on the status of Bosnia and Herzegovina and the accompanying Letter of Intent adopted by the Assembly on 14 October 1991, was nothing more than a declaration of policy. It did not purport to introduce new binding legal procedures for the adoption of decisions of the Assembly [Preliminary Objections, para. B.1.1.11, pp. 100-101, and annexes p. 816]. Its programmatic nature is confirmed by the language used within it, the fact that many of the policy proposals are conditioned upon future developments and, indeed, the very title of the "Letter of Intent" which was adopted concurrently with the Platform.

Even if the Platform or the Letter of Intent had introduced new procedures for decision-making for the Assembly into the constitution, then this procedure would only have applied to decisions arrived at after the adoption of these two documents. However, neither the Platform nor the Declaration of Intent could have constituted constitutional amendments which would have been necessary in order to introduce a new legal requirement of consent of the representatives of all peoples or nationalities in the Republic in order to facilitate the adoption of valid decisions by the constitutional organs of the Republic. Indeed they do not even have the status of ordinary legislation, as is evidenced by the failure to promulgate the Platform and Letter of Intent as a law. Instead, these decisions were expressly based on Article 113 [**Annex 2.5**, no. 36 and **Annex 3.16**] of the Operating Procedure of the Assembly, which provides for the issuing of non-binding declarations by the Assembly.

3.15 Even if there existed a constitutional requirement precluding decision-making by the Assembly against the opposition of certain groupings of representatives in relation to matters "regarding the most essential issues of equality of all nations and nationalities living in the Republic" [Preliminary

Objections, Annexes p. 816], this would not have precluded the adoption of decisions concerning the independence of the Republic of Bosnia and Herzegovina. The Republic of Bosnia and Herzegovina has ensured the unaltered continuation of equal rights of all nations and nationalities in the Republic with the greatest zeal throughout the process of gaining independence.

3.16 It should also be noted that Item 3 of the Platform rules out the alteration of the boundaries of the Republic, unless this decision is supported by a majority of two-thirds of the electorate [Preliminary Objections p. 102 and Annexes, p. 816]. This Provision would conflict with the unconstitutional attempt of a segment of the population of the Republic of Bosnia and Herzegovina to change the boundaries of the Republic, for example by purporting to secede violently from the Republic. However, it is the Government of the Republic of Bosnia and Herzegovina which has consistently attempted to maintain the boundaries of the Republic, even in the fact of external aggression and armed intervention and the purported establishment of the so-called Srepska Republic.]

3.16 Amendment LXX [**Annex 2.5**, no. 37 and **Annex 3.19**] to the Constitution of the former Socialist Republic of Bosnia and Herzegovina does foresee the creation of a Council for National Equality. However, a law on the establishment of such a Council was never adopted due to opposition from members of the Serb Democratic Party in the Parliament. As has been confirmed by the Constitutional Court of the Republic of Bosnia and Herzegovina, the fact that the Council never came into existence is of no relevance to the validity of the decisions of the constitutional organs of the Republic of Bosnia and Herzegovina.

3.17 Even if, up to the point of referendum, the exercise of the right to self-determination had been tainted by a failure to observe constitutional provisions (which was not the case), the referendum itself would have constituted a sufficient legal basis on which to base a claim for the implementation of the right to self-determination. As was indicated above, according to both the Constitution of the Socialist Federal Republic of Bosnia and Herzegovina and the Constitution of the Republic of Bosnia and Herzegovina, sovereignty is vested in the people of the Republic. The referendum manifested the sovereign will of the people in a direct and legally incontestable way.

3.18 The referendum did not exclude ethnic Serbs. Indeed, efforts were made to ensure that all individuals eligible to vote would be able to do so without undue influence or pressure being exercised. The result of 99.4 percent of those participating in the referendum overwhelmingly endorsed the decision. The Constitution does not require the participation of the entire potential electorate in a referendum. There is also no provision which would require a level of participation beyond the 63.4 percent of the potential electorate that was achieved.

3.19 Contrary to the submission of Yugoslavia (Serbian and Montenegro) [Preliminary Objections, para. B.1.1.14, p. 102], the result of the referendum was officially promulgated on 6 March 1992 by the Election Committee of the Republic **[Annex 3.20]**. The validity of the referendum result was confirmed by the EC and its member States and numerous other States which recognized the Republic of Bosnia and Herzegovina within a short period after the publication of the result.

3.20 The transformation towards full independence was therefore conducted in full compliance with internal law.

In any case, here again, the Government of the Republic of Bosnia and Herzegovina has provided the above information to the Court in order not to let an argument made by Yugoslavia (Serbia and Montenegro) unanswered. It holds, nevertheless, that this argument is entirely irrelevant since it is based on internal law and it is the function of the Court "to decide in accordance with international law"; no rule of international law demands that a new State comes to independence in accordance with the national law of the predecessor State which would be hardly feasible in most cases! Also, in this respect the arguments put forward by the Respondent are very unusual.

In breaking away from the Socialist Federal Republic of Yugoslavia the Republic of Bosnia and Herzegovina violated no norm of international law: certainly not the rules applicable to self-determination

3.21 The Respondent has sought to suggest that in its secession from the Socialist Federal Republic of Yugoslavia, Bosnia and Herzegovina violated the principle of equal rights and self-determination of peoples. The Respondent seeks to justify this bold assertion by arguing that international law does not extend the right of self-determination to "federal units as such..." [Preliminary Objections, para. B.1.2.3, p. 103]. The Respondent also argues that Bosnians are not "a 'people' entitled to self-determination" [*Ibid.* para. B.1.2.4. See also para. B.1.2.17 which asserts that the right of self-determination does not vitiate the right of territorial integrity.].

3.22 There is no need to join the Respondent in a disquisition on these contentious assertions regarding the international law of self-determination. Whether or not Bosnia, at the time of its secession, had a right to self-determination is irrelevant because: (1) it is now a recognized, sovereign state, and (2) even if, *arguendo*, it were supposed that it had no right to self-determination in international law, international law certainly did not prohibit its achieving the status of an independent state at the occasion of the disintegration of the Former Socialist Federal Republic of Yugoslavia.

3.23 By admitting the new state of Bosnia and Herzegovina to membership, the United Nations implicitly recognized the absence of any legal bar to its achieving the status of an independent state, just as it had earlier accepted the re-emergence of Syria upon the dissolution of the former Federal United Arab Republic [see R. Young, *"The State of Syria: Old or New?"* 56 *American International Law Journal*, 482 (1962). **Annex 3.21**], and the expulsion of Singapore from the Federation of Malaysia [S/RES/213 of 20 September 1965, **Annex 3.22**]. More recently the United Nations has welcomed former Soviet Republics [see *Alma Ata Declaration and Decision by CIS Heads of State Council*, 21 December 1991, U.N. *Doc.* S/23329 (1991), **Annex 3.23**], the Czech Republic [S.C. Res. 801 (1993) and G.A. Res. 47/221 (1993), **Annexes 3.24 and 3.25**], Slovakia [S.C. Res. 800 (1993) and G.A. Res. 47/222 (1993), **Annexes 3.26 and 3.27**], and Eritrea [S.C. Res. 828 (1993) and G.A. Res. 47/230 ((1993), **Annexes 3.28 and 3.27**]. The U.N. has also admitted other former Yugoslav federal states [see, e.g., the membership of the former Yugoslav Republic of Macedonia, S.C. Res. 817 (1993) and G.A. Res. 47/225 (1993), **Annexes 3.30 and 3.29**]. Obviously, international law does not prohibit either multiple succession or secession as means of achieving independent statehood *unless* it is

accomplished through external intervention. Accordingly, the Federal Republic of Yugoslavia's Preliminary Objections [paras. B.1.2.8-B.1.2.12, pp. 106-109] should be rejected as irrelevant as a matter of law.

3.24 Indeed, international law imposes very few constraints on the right to become independent. However, the prime example of such a constraint is the bar to recognition of a secession brought about by the intervention of an external party. Thus, the Security Council has refused to recognize the secession of the Turkish (northern) Cypriot Republic precisely to avoid legitimating a secession brought about by external intervention [Cf. S.C. Res. 716 of 11 October 1991, **Annex 3.32**]. This constraint has indeed been violated in the former Republic of Yugoslavia, not by Bosnia and Herzegovina, but by the self-proclaimed Serbian Republic in Bosnia.

3.25 Accordingly, the self-proclaimed Serbian Republic in Bosnia (Republika Srpska), established by the intervention of the Respondent, has been denied any recognition by sovereign States and international organizations precisely because it was established by external intervention.

3.26 It is indicative of the vacuity of the Respondent's Preliminary Objections that, after asserting at length the right of the Yugoslavia (Serbia and Montenegro) to "territorial integrity" and seeking thereby to demonstrate the illegality of Bosnia and Herzegovina's act of proclaiming independence, the Respondent [para. B.1.2.19, p. 112 of Preliminary Objections] has the effrontery to claim that "the authorities in Sarajevo have by their acts violated, also, the principle of equal rights and self-determination of peoples against the Serbs living in the territory of the former Yugoslav republic of Bosnia-Herzegovina" [*ibid.*]. In other words, while the United

Nations and almost all sovereign states have recognized the sovereignty of the Republic of Bosnia and Herzegovina, the Respondent wishes this Court to find that recognition of sovereignty to be violative of international law; and while the U.N. and all states have refused to recognize the secession and sovereignty of the putative Serb Republic in Bosnia, established by genocide and aided and abetted in its inception by Yugoslavia (Serbia and Montenegro), nevertheless the Respondent wishes this Court to recognize the right of the Bosnian Serbs to secession and self-determination [See *id.* para. B.1.2.33-34, 38-39.]. It is inconceivable that the Court would accede to either request in any circumstances, but most especially not as a basis for sustaining a bar to its jurisdiction in this case.

The alleged violation of the law of State succession

3.27 The third part of the third preliminary objection has been summarised by the Federal Republic of Yugoslavia (Serbia and Montenegro) as follows:

> " The entry of the Applicant State into the 1948 Genocide Convention by notification of succession contravenes international law" [Preliminary Objections, p. 116, B.1.3.].

The Government of Bosnia and Herzegovina will show that this part of the third preliminary objection is, -as the two first aspects are, as has been already demonstrated,- entirely without merit, and that as a successor State to the former Socialist Federal Republic of Yugoslavia, the Republic of Bosnia and Herzegovina has succeeded as a party to the Genocide Convention.

3.28 It should be noted that the former Socialist Federal Republic of Yugoslavia has signed the Genocide Convention on 6 February 1979 and has ratified that convention on 28 April 1980 [Memorial, 15 April 1994, p. 147,

4.2.1.36]. It should be noted also that Bosnia and Herzegovina has replaced the former Socialist Federal Republic of Yugoslavia in the international relations of its territory, and is therefore a successor State [Memorial, 15 April 1994, p. 142 to 146, 4.1.1.25 to 4.2.1.32]. Since these points have not been contested by Yugoslavia (Serbia and Montenegro) in its Preliminary Objections, it is not necessary to address these issues again.

3.29 As a successor State, the Applicant State will prove that it was legally entitled to become a party to the Genocide Convention, contrary to the statements of the Respondent State, according to which "(t)he entry of the Applicant State into the 1948 Genocide Convention by notification of succession contravenes international law" [Preliminary Objections, p. 116, B.1.3].

3.30 It is not contested that the Vienna Convention on the Succession of States in respect of Treaties [doc. A./CONF/.80/31, **Annex 3.33**] has not entered into force, and therefore can only be applied inasmuch as its dispositions state customary rules of international law, or have been chosen by the parties as the law to be applied. Article 34 of this Convention reads:

> "1. When a part or parts of the territory of a State separate to form one or more States, whether or not the predecessor State continues to exist:
>
> a. any treaty in force at the date of succession of States in respect of the entire territory of the predecessor State continues in force in respect of each successor State so formed.
>
> b. any treaty in force at the date of the succession of States in respect only of that part of the territory of the predecessor State which has become a successor State continues in respect of that successor State.
>
> Paragraph 1 does not apply if:
>
> a. the States concerned otherwise agree; or

b. it appears from the treaty or is otherwise established that the application of the treaty in respect of the successor State would be incompatible with the object and the purpose of the treaty or would radically change the conditions for its operation."

In this article, the rule laid down by the Convention on Succession of States in respect of Treaties has been quite clearly stated: it is the rule of automatic succession to treaties, whether there is a dissolution or a separation.

3.31 If the confused assertions of the Respondent State are properly understood, the main purpose of this part of the third preliminary objection is to try to deny the customary value of the aforementioned Article 34 of the Convention on Succession of States in respect of Treaties, embodying the rule of automatic succession. In this endeavour - which the Applicant State submits is entirely without merit - the Federal Republic of Yugoslavia (Serbia and Montenegro) refers to the discussions at the International Law Commission at the time of drafting of the Convention on Succession of States in respect of Treaties [Preliminary Objections, p. 118, B.1.4.1], to a lengthy comment of a citation of Oppenheim's Treatise [Preliminary Objections, pp. 118-120, B.1.4.2], as well as to recent State practice [Preliminary Objections, 15 June 1995, pp. 120-125, B.1.4.4. to B.1.4.7]. All of these references, according to Yugoslavia (Serbia and Montenegro), tend to support the view that the international rule in the case of succession of States is the clean slate rule. According to the Republic of Bosnia and Herzegovina, all these aforementioned references are either entirely irrelevant, based on wrong information, or are totally misrepresented.

3.32 Although the Republic of Bosnia and Herzegovina objects to the Respondents analysis of the existing rule in case of succession to treaties -which in Bosnia and Herzegovina's view is the rule of automatic continuity - it is not necessary to enter into a prolonged debate on that issue. The Government of Bosnia and Herzegovina will show that it was entitled, as a successor State to the former Socialist Federal Republic of Yugoslavia to enter into the Genocide Convention, whatever the international rule is. This result is reached if the applicable rule is that of automatic continuity, which Bosnia and Herzegovina affirms is the existing rule of international law applicable to the present case. Under that rule, of course, the Republic of Bosnia and Herzegovina was entitled to become a party to the Genocide Convention. However, even if the applicable principle were the clean slate rule, which Yugoslavia (Serbia and Montenegro) claims is the applicable rule of international law, the result would be the same. In other words, under that rule Bosnia and Herzegovina would also be entitled to become a party to the Genocide Convention. It is clear that even under the "clean slate" rule no State can prevent a successor State wishing to do so from becoming a party to a multilateral treaty such as the Genocide Convention to which its predecessor State was a party.

3.33 The Republic of Bosnia and Herzegovina could properly base its response upon an examination of the two alternative hypotheses. However, it will go one step further and demonstrate that, in its opinion, automatic continuity clearly is, in any case, the prevailing rule in international law applying to succession to multilateral conventions on human rights, like the Genocide Convention.

Bosnia and Herzegovina has become a party to the Genocide Convention, by application of the rule of automatic succession to multilateral conventions on human rights

3.34 Bosnia and Herzegovina submits that it succeeded automatically to the Socialist Federal Republic of Yugoslavia as a party to the Genocide Convention, by application of the international rule of automatic succession to multilateral conventions on human rights. To that effect, the Republic of Bosnia and Herzegovina will demonstrate that:

(i) the customary rule of automatic continuity applies to a multilateral convention such as the Genocide Convention.

(ii) there are no specific circumstances to justify the setting aside of the rule of automatic continuity in the present case.

(iii) the rule of automatic succession, even if non customary - *quod non* - applies in the present case, by agreement.

(i) the customary rule of automatic continuity applies to a multilateral convention like the Genocide Convention.

3.35 The Applicant-State submits that multilateral conventions on human rights are automatically succeeded to, unless there is a clear statement to the contrary. Even if it were not accepted that succession *ipso jure* to treaties in general is a customary rule of international law, this principle clearly applies to multilateral conventions concerning human rights and humanitarian matters. This has already been mentioned in the Memorial, where it was stated:

> "Automatic continuity is particularly well established in respect of conventions of humanitarian character" [Memorial, p. 150].

This is supported by extensive legal authority and can be clearly demonstrated by the practice of States and international organisations as well as by the history of the drafting of the Conventions on Succession of States.

3.36 For multilateral treaties of the type of the Genocide Convention the importance for the interests of the international community as a whole of continuity in their respect, in case of succession of States, need not be underlined. The fact that the rule of automatic continuity is even more important for universal treaties than for treaties in general, has been frequently underlined in legal writings.

3.37 Even an advocate of the "clean slate" rule such as Professor Ian BROWNLIE, admits that this rule cannot apply to certain types of universal treaties, when he writes:

> "To the general rule of non-transmissibility (the "clean slate" doctrine) certain important exceptions are often stated to exist. These may now be considered.
>
> (I) *Treaties evidencing rules of general international law...*
>
> (II) *"Objective regimes" and localised treaties in general...*
>
> (III) *Boundary treaties...*
>
> (IV) *Certain other categories.*
>
> The majority of writers are of the view that no other exceptions exist. However, a number of authorities consider that in the case of general multilateral or "law-making" treaties there is such a transmission" [*Principles of public international law,* Oxford, Clarendon Press, 1990, 4th edition, **Annex 3.34**, p. 670, emphasis added; see also Charles DE VISSCHER, *Theory and Reality in Public International Law,* P.E. CORBETT trans. rev. ed. 1968, **Annex 3.35,** p. 179; Mohammed BEDJAOUI, Problèmes récents de succession d'Etats dans les Etats nouveaux, *Recueil des cours*, 1970-II-130, **Annex 3.36**, p. 526, emphasis added].

The Genocide Convention is *par excellence* one of these conventions.

3.38 Moreover, there is extensive authority which evidences respect of the automatic continuity rule for multilateral conventions on human rights. In his well-known monography, *Accession à l'indépendance et succession d'Etats aux traités internationaux*, Professor M. MARCOFF encompassed the existence of this principle of automatic continuity for all humanitarian conventions. As an example, he referred to the automatic continuity of the 1949 Red Cross Conventions [Fribourg, 1969, **Annex 3.37,** p. 303 *et seq.*]. To the same effect, Professor Detlev VAGT, referring to codification treaties, described as ranging "from the Vienna Conventions on Diplomatic and Consular Relations, to the Genocide Convention and the International Covenant on Civil and Political Rights", wrote: "(t)here is little persuasive force to a state's claim that it is entitled to free itself from such an obligation because of a state succession problem" [State Succession: The Codifier's View, *Virginia Journal of International Law*, 1993, **Annex 3.38,** p. 290; see also for Yugoslavia (Serbia and Montenegro)'s position, OBRADOVIC, *Metunarodni Problemi*, (*International Affairs*), no. 1-2, July 1992, **Annex 3.39**].

3.39 Furthermore, State practice confirms abundantly that the international rule applicable to multilateral treaties of a universal character, like the Genocide Convention, is the rule of automatic succession.

3.40 Indeed, at the beginning of the century, examples can be found which show the specificity of human rights treaties. As stated in the commentary of the International Law Commission relating to multilateral treaties:

> "the Irish Free State seems in general to have established itself as a party by means of accession, not succession, although it is true that the Irish State appears to have acknowledged its status as a party to the 1906 Red Cross Convention on the basis of the United Kingdom's ratification of the Convention of 16 April 1907" [*UN Conference on Succession of States in respect of Treaties*, A/CONF.80/13, Vol. III, **Annex 3.40**, p. 92, §16].

It is quite clear from this example, that, even when not generally followed by a given State, the rule of automatic succession applies to multilateral human rights conventions.

3.41 The practice of States at the time of decolonisation has followed the same pattern. At the time of the drafting of the Convention on Succession of States in respect of Treaties, which stated the "clean slate" rule for newly independent States, several representatives pointed out, that in all instances these newly independent States had used their right to succeed to universal treaties. For example, the Netherlands' delegate declared that: "(h)is delegation knew of no case in which a newly independent state had subsequently ceased to be a party to a multilateral treaty open to universal participation" [*UN Conference on Succession of States in respect of Treaties*, A/CONF.80/16, vol I, 24th meeting, 22 April 1977, **Annex 3.41**, p. 162, 56; see also declaration of the Swedish delegate, id., 23rd meeting, 25 April 1977, **Annex 3.42**, p. 177, §2]. Equally, Mrs Bokor-Szego (Hungary) declared full subscription to the "clean slate" rule, but added that "an analysis of State practice revealed a customary rule to the effect that treaties of universal character continued in force" [*UN Conference on Succession of States in respect of Treaties*, A/CONF.80/16, vol I, 24th meeting, 22 April 1977, **Annex 3.43**, p. 167, §25, emphasis added]. In the case of Algeria, although it preferred in general to use accession to multi-

lateral treaties to which France was a party, nevertheless it succeeded to treaties of a humanitarian character or of general interest [MARCOFF, *Accession à l'indépendance et succession d' Etats aux traités internationaux*, Fribourg, 1969, **Annex 3.44** p. 163]. Also, Switzerland showed its attitude in favour of automatic succession to multilateral, and especially humanitarian, treaties through its practice as a depository of the Geneva Conventions. It considered all new states as bound by these conventions on their accession to international life, unless they made a declaration to the contrary [COURTIER, Accession does nouveaux Etats Africains aux Conventions de Geneve, *AFDI*, 1961, **Annex 3.45**, p. 760-761].

3.42 Taking this general State practice into account, the Soviet delegation proposed an amendment to the "clean slate" rule - embodied as far as newly independent States were concerned in the Convention on the Succession of States in respect of Treaties - for treaties of a universal character described as follows:

> "Treaties of a universal character were the out-come of international co-operation and embodied generally accepted principles and rules concerning contemporary international relations. The purpose of these treaties was to strengthen the legal order in international relations in important spheres; for example, the maintenance of international peace and security; the development of economic co-operation; *the struggle against genocide...*" [*UN Conference on Succession of States in respect of Treaties*, A/CONF.80/16, vol. I, 24th meeting, 22 April 1977, **Annex 3.46**, p. 163, §2, emphasis added].

The Genocide Convention was clearly referred to in this description. In fact, it appears from the debates that all the delegates agreed on the idea of automatic succession to universal treaties like the Genocide Convention. The reason why this amendment was not adopted was merely the impossibility of reaching agreement on what treaties were of a universal character.

(Some delegates, for example, raised the question whether or not the Nuclear Non-Proliferation Treaty was really such a treaty).

3.43 However, there can be no dispute about the universal character of the Genocide Convention. This was underlined by the International Court of Justice, when it declared that

> "the special characteristic of the Genocide Convention (...) is the universal character both of the condemnation of genocide and the cooperation required "in order to liberate mankind from such a scourge" [*Preamble of the Convention*]. The Genocide Convention was therefore intended by the General Assembly to be definitely universal in scope" [I.C.J. *Reports*, 1951, **Annex 3.47**, p. 23].

3.44 The practice to-day concerning multilateral conventions on human rights is also in complete agreement with the rule of automatic succession. Switzerland which is a depository of many of these important universal conventions on human rights and humanitarian questions, when it acts in that capacity, considers that automatic succession is possible through a unilateral notification of succession, which suffices to make the new State party to the treaty. This means that no consultation of the other parties is necessary, no objection of another party is possible. This practice results from the interests of the international community as a whole, which requires that such universal treaties, especially the treaties of protection of human rights, are applied as widely as possible [*CAHDI*(93)14, **Annex 3.48**]. This means, in particular, that it would consider an objection like the one raised by the Respondent State against the notification of succession of Bosnia and Herzegovina, as devoid of any legal effect whatsoever.

3.45 In the discussions of the CAHDI - Committee of Legal Advisers on Public International Law of the Council of Europe - succession of States is one of the current issues on the agenda. The representatives of the different participant States have presented the respective positions of their States concerning the prevailing rules in case of State succession. In the recent meetings, and as recently as in March 1995, the President of the Committee summarised the discussions between the experts, which can be analysed as the *opinio juris* of the members of the Council of Europe, in saying that there should be at least a presumption of automatic continuity for multilateral treaties, especially when they are related to human rights [*CAHDI*(95)-5, **Annex 3.49**].

3.46 That practice is especially apparent and well rooted in the different international organisations and bodies dealing with human rights. The Secretary-General of the United Nations in a recent document [Doc. E/CN.4/1995-/80, 28 November 1994, **Annex 3.50**] restated the position taken by the chairpersons of the human rights treaty bodies, in their fifth meeting, held from 19 to 23 September 1994:

> "They encouraged all the successor States to make formal notifications of their succession to the human rights treaties. But, at the same time, they emphasized that such a notification was not a legal pre-requisite in order to be bound by these treaties:
> "The chairpersons emphasized, however, that they were of the view that successor States were automatically bound by obligations under international human rights instruments from the respective date of independence and that observance of the obligations should not depend on a declaration of confirmation made by the government of the successor State." [p. 4, emphasis added].

3.47 One of the human rights bodies referred to by the Secretary-General, the Commission on Human Rights, adopted several resolutions, in which it emphasized "the special nature of the human rights treaties aimed at the protection and promotion of human rights and fundamental freedoms". The most recent one, adopted on 24 February 1995 [E/CN.4/1995/18, **Annex 3.51**] can be cited here:

> "Emphasizing once again the special importance of the observance of universal norms and standards on human rights for the maintenance of stability and the rule of law in any State...
> Welcoming the progress made in the confirmation by some successor States of their obligations under international human rights treaties;
> Reiterates its call to successor States which have not yet done so to confirm [emphasis added] to appropriate depositories that they continue [emphasis added] to be bound by obligations under international human rights treaties."

The language used, especially the words "confirmation" and "to confirm" shows abundantly that the States are *de lege lata* under a duty to succeed automatically to the predecessor State for the human rights treaties.

3.48 Another of the human rights bodies referred to by the Secretary-General, the Human Rights Committee, has shown the same approach. It also places emphasis on the existence of the rule of automatic succession for the multilateral conventions on human rights. Shocked by the horrific events taking place in Bosnia and Herzegovina, the Human Rights Committee asked, on 7 October 1992, the Governments of Bosnia and Herzegovina, of Croatia and of Yugoslavia (Serbia and Montenegro) to send a report concerning the persons that were now respectively under their jurisdiction. Moreover, it insisted upon the necessity of an automatic succession to the

Covenant on Civil and Political Rights, which, like the Genocide Convention, is a multilateral convention on human rights:

> "Le Comité a estimé que tous les peuples de l'ancienne Yougoslavie avaient droit aux garanties prévues par le Pacte et il a donc agi en vertu does dispositions de l'article 40 du Pacte" [CCPR/C/SR.1200, 9 November 1992, p. 2, §1, **Annex 3.52**].

3.49 In conformity with that request, the Government of Bosnia-Herzegovina presented a report to the Committee at the meeting of the 46th session, on 9 November 1992. M. Filipovic, representative of Bosnia and Herzegovina, presented the situation in the territories controlled by his Government, as well as the situation in the parts controlled by the Serbian aggressor, where the situation was described in the following terms:

> "L'un does crimes les plus terribles de l'histoire moderne est en train de se commettre sur le territoire de la Bosnie-Herzegovine [...] Does événements inimaginables ont lieu dans ce pays: arrestations et exécutions massives, déportations de centaines de milliers de personnes, internement dans does camps de concentration et does centres de détention" [CCPR-/C/SR.1200, 9 November 1992, **Annex 3.52** p. 2, §4].

3.50 After the presentation of his report the President of the Human Rights Committee, Professor Rosalyn Higgins, drew attention to the fact that the mere presence of the Bosnian delegation was a proof in itself, independently of any formal notification of succession, that Bosnia and Herzegovina was automatically bound by the Covenant from the date of its independence [CCPR/C/SR.1200, 9 November 1992, **Annex 3.52**, p. 5, §14]. In fact, it is only subsequently, on 1 September 1993, that Bosnia and Herzegovina formally confirmed the self-evident fact that it was bound by the Covenant from the date of its independence, namely on 6 March 1992 [See General

Assembly, Official Documents, 49th session, Supp. N° 40 (A/49/40), volume I, *Report of the Human Rights Committee*, p. 11-12, §48, **Annex 3.53**]. The Committee adopted that same position as to the automatic succession to the Covenant on Civil and Political Rights from the date of independence for all the successor States born from the former Yugoslavia or the former Czechoslovakia.

(ii) there are no specific circumstances to justify the setting aside of the rule of automatic succession of Bosnia and Herzegovina to the Genocide Convention.

3.51 The Respondent State invokes two different reasons why the rule of automatic succession, even if admitted to exist, should however not apply to the present case: the first reason is said to be the wording of the note on succession of 29 December 1992; the second reason is said to be the fact that Bosnia and Herzegovina came into existence in violation of international law. None of these two reasons has the slightest merit and they must both be summarily dismissed.

3.52 The Government of Bosnia and Herzegovina submits that the notification of succession of December 1992 is in accordance with the rule of automatic succession. The notification of succession of the Applicant State reads as follows:

> "The Government of the Republic of Bosnia and Herzegovina, having considered the Convention on the Prevention and Punishment of the Crime of Genocide of 9 December 1948, to which the former Socialist Federal Republic of Yugoslavia was a party, wishes to succeed to the same and undertakes carefully to perform and carry out all the stipulations therein contained with effect from 6 March 1992, the

date on which the Republic of Bosnia and Herzegovina became independent."

The Respondent State tries to interpret the notification of succession made by Bosnia and Herzegovina to the effect that it sets aside the principle of automatic continuity of treaties, which continuity is what it precisely intended to enforce. This is a very provocative and unwarranted way of reasoning and shows either a complete lack of understanding of the basic concepts of international law, or bad faith in the interpretative process.

3.53 It is uncontested that automatic succession does not mean absolute succession: it does not necessarily mean succession to all and every treaty entered into by the predecessor State, but it implies:

- that as a general rule, there is an automatic succession to treaties, which means a succession that takes place *ipso jure*, without any necessity of action from the new State,
- that as an exception to this general rule, there is no automatic succession in certain specified cases.

3.54 There are four situations, according to Article 34 of the Convention on Succession of States in respect of Treaties, in which the general rule of automatic continuity does not apply.

3.55 The first exception to the rule of automatic continuity occurs if the State concerned explicitly States that it should not apply.

The present case is no such exception, as Bosnia and Herzegovina intends the continuity principle to apply, and rejects absolutely the assertion that the rule of automatic succession be set aside, as far as the Genocide Convention is concerned, as well as for all other multilateral treaties.

3.56 The second exception to the rule of automatic continuity applies where the initial treaty was limited to a part of the territory only, in which case the principle of continuity has naturally to be set aside for all the other parts of the territory.

There is no pretension to the effect that the Genocide Convention was not applicable in the whole territory of what was formerly the Socialist Federal Republic of Yugoslavia, so this exception could not possibly apply in this case.

3.57 The third exception to the rule of automatic continuity is when the continuity of the treaty would be incompatible with the object and the purpose of the treaty.

This is not the situation with the Genocide Convention. It is quite evident, on the contrary, that it is the non-continuity of the treaty which would be incompatible with the object and the purpose of the treaty. This fact has been indirectly, but quite clearly, recognised by Yugoslavia (Serbia and Montenegro) itself, when it purported to object to the notification of succession of the Republic of Bosnia and Herzegovina in the following terms:

> "the Government of the Federal Republic of Yugoslavia herewith states that it does not consider the so-called Republic of Bosnia and Herzegovina a party to the Convention, but does consider that the so-called Republic of Bosnia and Herzegovina is bound by the obligation to respect the norms on preventing and punishing the crime of genocide in accordance with general international law, irrespective of the Convention for the Prevention and Punishment of the Crime of Genocide" [*Multilateral Treaties deposited with the Secretary-General,* Status as at 31 December 1994, p. 89, note 3, **Annex 3.54**].

It is self-evident that the maintenance in force of the Genocide Convention could in no possible way be analysed as contravening the object and the purpose of that convention.

3.58 The fourth exception to the rule of automatic continuity applies where application of the treaty by the successor State would radically change the conditions for its operation.

The same line of reasoning as presented above applies equally here. It is therefore impossible to avoid the application of the rule of automatic continuity to the Genocide Convention on the basis of changed circumstances.

3.59 As none of the stated exceptions apply, the general rule of automatic continuity of multilateral conventions on human rights is applicable in this case. Other exceptions is do not exist in international law. The inescapable result is that the Applicant State has automatically succeeded to the Genocide Convention.

3.60 In order to avoid this inescapable consequence, the Respondent State resorts to a last hope strategy: it attempts to use the notification of succession to prove that there has been no automatic succession. This "bootstraps" reasoning cannot be accepted. It has been underlined already that automatic succession means that the succession occurs *ipso facto*, without any need for an official act of the successor State. As underlined previously in the Memorial [p. 152, 4.2.1.45], the notification of succession was not required, and therefore its analysis is of secondary importance: it was but confirmatory of the situation that existed in international law, on the day that Bosnia and Herzegovina became independent. It is true that considering

the need for security in international relations, it has become more and more often the practice of States to make a formal notification of succession, if only to acknowledge that none of the exceptions permitting the setting aside of the rule of continuity applies. Of course, such a notification of succession as has been made by the Republic of Bosnia and Herzegovina, whose purpose is to reinforce the continuity, by making expressly known *urbi et orbi* that the successor State is bound by the treaties obligations of its predecessor, can in no way be analysed as opposing the principle of continuity, a result that would follow from the Respondent's thesis. The note of December 1992 properly understood and interpreted was an acknowledgement of the fact that Bosnia and Herzegovina has succeeded the Socialist Federal Republic of Yugoslavia as a party to the Genocide Convention, as has already been noted in the Memorial [see p. 146, 4.2.1.34].

3.61 Moreover, the Republic of Bosnia and Herzegovina reiterates that it was created in accordance with general principles of international law, and that the general rules governing a succession of State are applicable to it. The non-illegal character of the creation of Bosnia and Herzegovina has been thoroughly discussed above, and it is not necessary to restate what is self-evident: this country was created in a process of dissolution of a State, and has been internationally recognised and admitted to the United Nations. This proves, beyond doubt, that the events that gave birth to the Applicant State, have been conducted in conformity with international law, and in particular with the principles of international law as embodied in the Charter of the United Nations, as required by Article 6 of the Vienna Convention on the Succession of States in respect of Treaties. The inescapable result is that the customary rule of automatic succession applies to the

multilateral treaties to which the former Socialist Federal Republic of Yugoslavia was a party.

3.62 Consequently, the Applicant State respectfully invites the Court to apply the well-established and fundamental rule of automatic succession to the present case which provides that Bosnia and Herzegovina succeeded automatically to the Genocide Convention, without being possibly prevented to do so by any obstruction from the Respondent State.

(iii) the rule of automatic continuity, even if not customary - *quod non* -, applies by agreement

3.63 As has been acknowledged in Opinion n° 1 and Opinion n° 9 of the Badinter Commission, the various States, created through the dissolution of former Socialist Federal Republic of Yugoslavia, have explicitly agreed to apply the rule of automatic continuity. An extract of the last cited opinion can be made here:

> "the succession of states is governed by the principles of international law embodied in the Vienna Convention of 28 August 1978 and 8 April 1983, which all Republics have agreed should be the foundation for discussion between them" [Paris, 4 July 1992, 31 *I.L.M.*, 1992, vol. XXXI, p. 1524, **Annex 3.55**].

Even if the "clean slate" rule were applicable, the Applicant State was entitled to enter the 1948 Genocide Convention by notification of succession

3.64 As formerly mentioned, the Respondent insists on the application of the "clean slate" principle to this specific case. This was not the traditional

position of the former Yugoslavia, as its representative at the conference of codification of the Convention on the Succession of States in respect of Treaties adopted a position in favor of the rule of automatic continuity. In particular, Article 34 (which was then Article 33) received the agreement of Yugoslavia: "Mr. Sahovic (Yugoslavia) said that his delegation found Article 33 acceptable [...] The International Law Commission had been right to provide, in paragraph 3, for the exceptional application of the "clean slate" rule" [*UN Conference on Succession of States in respect of Treaties*, A/CONF.80/16, vol.II, 48th meeting, 8 August 1978, **Annex 3.56,** p. 105, §15, emphasis added].

3.65 Even *arguendo* admitting the Respondent's newly adopted position in favour of the "clean slate" rule, the Applicant State would according to the overwhelming interpretation of the "clean slate" principle, be entitled to enter the Genocide Convention by way of a notification of succession.

3.66 However, before demonstrating this and whilst maintaining that these questions are not of pivotal significance, the Government of Bosnia and Herzegovina feels compelled to point at all the inaccuracies, mistakes and erroneous assertions made by Yugoslavia (Serbia and Montenegro), in its failed endeavour to prove the general existence of the "clean slate" rule as the principle to be applied in all cases of succession of States.

3.67 Firstly, the general interpretation given to the recent practice supposedly in favor of the "clean slate" rule seems a very isolated interpretation. In general, legal authorities have adopted the same analysis as Professor Oscar SCHACHTER, who, when reviewing the recent practice, summarised it quite differently from the Respondent State. He considered that "the

experience thus far with respect to the cases of the former Soviet Union and the former Yugoslavia, supports a general presumption of continuity" [State Succession: The Once and the Future Law, *Virginia Journal of International Law*, 1993, **Annex 3.57,** p. 257].

3.68 Secondly, although the facts referred to by the Respondent are irrelevant, the Applicant State feels compelled to point at all the multiple inaccuracies and copious use of outdated information, that can be found in the Preliminary Objections, which evidence a lack of respect for the proceedings that take place before the World Court.

3.69 For example, contrary to what is stated by the Respondent, both the States established in the territory of the former Czechoslovakia as well as in the former Socialist Federal Republic of Yugoslavia entered into the multilateral treaties of the predecessor State by means of succession. It is totally untrue to assert that the Czech Republic and the Republic of Slovakia entered into the treaties of the predecessor State by means of accession. This may well explain why there is not a single example given by the Respondent in support of its gratuitous assertion that the Czech Republic and the Republic of Slovakia have entered multilateral treaties not deposited with the Secretary-General mainly by accession [Preliminary Objections, p. 121, B.1.4.5.]. On the contrary, in the Proclamation of the Czech National Council to all Parliaments and Nations of the World, the principle of succession to all treaties is clearly marked:

> "The Czech Republic as of January 1, 1993 in accordance with the principles of international law and within its framework recognises the provisions and obligations of all multilateral and bilateral trea ties and agreements to which the CSFR was a party as of that date" [Letter dated 31 December 1992 from the Permanent Representative of Czechoslova-

kia to the U.N., UN Doc. A/47/848. 31 Dec. 1992, **Annex 3.58]**.

The same is true of the Proclamation of the National Council of the Slovak Republic to the Parliaments and Peoples of the World:

> "The Slovak Republic assumes all the obligations vested with the CSFR until December 31, 1992" **[Annex 3.59]**.

3.70 The same is also true as far as the Socialist Federal Republic of Yugoslavia is concerned. It would be totally wrong to assert that the new States which were created in the territory of the former Socialist Federal Republic of Yugoslavia entered into the treaties of the predecessor State, by means of accession. Again, this may explain why there is not a single example given by the Respondent of the new States created in the territory of the former Socialist Federal Republic of Yugoslavia entering into multilateral treaties deposited with the Secretary-General by means of accession.

3.71 It would be tedious and unnecessary to enumerate all the conventions, agreements and treaties to which (for example) Bosnia and Herzegovina, Slovakia, Croatia, the Former Republic of Macedonia have entered by means of a notification of succession [*Multilateral Treaties deposited with the Secretary-General,* Status as at 31 December 1994 **[Annex 3.60]**; see also for the Conventions on human rights exclusively, Etat does pactes internationaux relatifs aux droits de l'homme, *Succession d'Etats en matière de traités internationaux relatifs aux droits de l'homme*, 28 november 1994, E/CN.4/1995/80, **Annex 3.61]**.

3.72 Also, it must be pointed out that the assertion that the "1948 Convention on the Prevention and Punishment of the Crime of Genocide has not been entered into by the Former Republic of Macedonia" [Preliminary Objec-

tions, p. 122, B.1.4.6.], is plainly not true, as this State made a notification of succession on 18 January 1994, that is before the filing of the Preliminary Objections.

3.73 Moreover, besides being irrelevant, the long list of treaties (which are mainly of a commercial character) given by the Respondent, for which Bosnia and Herzegovina has supposedly not made a notification of succession, is completely wrong and outdated, as the Republic of Bosnia and Herzegovina has in fact sent a notification of succession for almost all the treaties cited by the Respondent. For example, the Republic of Bosnia and Herzegovina has sent a notification of succession for:

- the Optional Protocol to the Vienna Convention on Diplomatic Relations concerning the Acquisition of Nationality, on 12 January 1994,
- the Customs Convention on Containers, on 12 January 1994,
- the Customs Convention on the Temporary Importation of Road Vehicles, on 12 January 1994,
- the European Convention on the Customs Treatment of Pallets used in International Transport, on 12 January 1994,
- the Convention on Road Signs and Signals, on 12 January 1994,
- the European Convention concerning the Crew of Vehicles Engaged in International Road Transport (AERT), on 12 January 1994,
- the Agreement of International Carriage of Perishable Foodstuffs and on Special Equipment to be used for such Carriage (ATP), on 12 January 1994,
- the Agreement for Facilitating the International Circulation of Visual and Auditory Material on Educational, Scientific and Cultural Character, on 12 January 1994,

- and so on... [*Multilateral Treaties deposited with the Secretary-General,* Status as at 31 December 1994, **Annex 3.62**].

All of this information was plainly available when the Respondent prepared the Preliminary Objections and, surprisingly enough, it apparently was not aware of this.

3.74 Even more importantly, the Respondent seems to have completely misunderstood the true meaning of the "clean slate" rule embodied in Article 17 of the Convention on Succession of States in respect of Treaties. Article 17 reads:

> "Subject to paragraph 2 and 3, a newly independent State may, by notification of succession, establish its status as a party to any multilateral treaty which at the date of the succession of States was in force in respect of the territory to which the succession of States relates [**Annex 3.33**]."

3.75 The true meaning of the *tabula rasa* principle results clearly from the commentary of the International Law Commission concerning Article 17 (formerly Article 16):

> "modern depository and State practice... does appear to support the conclusion that a newly independent State has a *right of option* to be a party to certain categories of multilateral treaties in virtue of its character as a successor State. A distinction must, however, be drawn in this connection between multilateral treaties in general and multilateral treaties of a restricted character, for it is only in regard to the former that a newly independent State appears to have an actual right of option to establish itself as a party *independently of the consent of the other States parties and quite apart from the final clauses of the treaty"* [Draft articles, Doc A/CONF.80/4, vol. III, **Annex 3.63**, p. 44, §2, International Law Commission's emphasis].

This means that the other parties cannot object to the new State's participation to the treaties of its predecessor. As clearly stated by Mr. Museux, the French representative, "(i)t should be noted that the "clean slate" rule was not an absolute rule: it conferred a right to succeed" [*UN Conference on Succession of States in respect of Treaties*, A/CONF.80/16, vol II, 40th meeting, 2nd August 1978, p. 55, **Annex 3.64**, §46, emphasis added]. This is also the interpretation of the Commission, which refers in its commentary to the draft articles to the "clean slate" principle, in the sense that when a State has a clean slate this means that "it is under no obligation to accept the continuance in force of its predecessor's treaties" [*UN Conference on Succession of States in respect of Treaties*, A/CONf.80/4, vol. III, **Annex 3.65**, p. 92, I.L.C.'s emphasis; see also Oppenheim's Treatise, *International Law*, 9° ed., vol. I, Sir Robert JENNINGS and Arthur WATTS, 1992, **Annex 3.66**, pp. 222-223].

3.76 The result of these statements is that the "clean slate" rule means that a State would have no obligation to succeed, while it would have a right to do so. It is also clear that the Genocide Convention is not a multilateral treaty of a restricted character, for which this right to succeed would not exist, but is a treaty of a universal character *par excellence*, for which a right of option would exist were the "clean slate" rule applicable, which it is not.

3.77 Consequently, even if Bosnia-Herzegovina had no obligation to succeed - *quod non* - it had at least a right to succeed, and no other State, including Yugoslavia (Serbia and Montenegro), could prevent it from being a party to the Genocide Convention. Bosnia and Herzegovina accordingly invites the Court to reject the assertion of the Respondent State to the effect that the

notification of succession contravened international law, and that Bosnia and Herzegovina is not a successor to the Genocide Convention.

RESPONSE TO THE
FOURTH
PRELIMINARY OBJECTION

4.1 As Bosnia and Herzegovina has demonstrated in the introduction of this Written Statement, Yugoslavia (Serbia and Montenegro)'s Preliminary objections are grounded on unsubstantiated and chaotic allegations of law. The Court may well take the view that in its presentation of its fourth preliminary objection, Yugoslavia (Serbia and Montenegro) breaks its own record of confusion and abstruseness.

4.2 This so-called "Fourth preliminary objection" is submitted as follows:

> "As it was recognized in contravention of the rules of international law and as there are four States in existence on the territory of the former Yugoslav republic of Bosnia-Herzegovina, the so-called Republic of Bosnia-Herzegovina is not a Party to the 1948 Genocide Convention" [Preliminary Objections, B.2, p. 127].

These allegations are followed by one page and a half of gloss in which Yugoslavia (Serbia and Montenegro) offers no legal ground for its submission.

4.3 If one tries to give some meaning to these obscure allegations, it might be assumed that Yugoslavia (Serbia and Montenegro) here makes three different assertions:

i) Bosnia and Herzegovina should not have been internationally recognized;

ii) There now exist four different States on the territory of the former Yugoslav Republic of Bosnia and Herzegovina;

iii) Therefore Bosnia and Herzegovina is not a Party to the 1948 Genocide Convention.

4.4 As will be briefly shown hereafter, the two first propositions are erroneous and devoid of any substance. But independently of their falsity, there is clearly a *non sequitur* between points i) and ii) on the one hand and point iii) on the other hand Bosnia and Herzegovina fails to understand the link between the questions of recognition and of the asserted existence of four States on the territory of the former Yugoslav Republic of Bosnia and Herzegovina on the one hand, and the problem of succession to the Genocide Convention on the other hand.

Irrelevance and falsity of the argument based on the asserted existence of four "States" within the border of the former Yugoslav Republic of Bosnia and Herzegovina

4.5 Yugoslavia (Serbia and Montenegro)'s assertion that there would exist four States within the border of the former Yugoslav Republic of Bosnia and Herzegovina is grossly erroneous. In any case, it has strictly no legal (or other) relevance in respect of succession to the Genocide Convention.

4.6 As provided for in Article 34 of the 1978 Convention on Succession of States in respect of Treaties:

> "When a part or parts of the territory of a State separate to form one or more States, whether or not the predecessor continues to exist:
>
> (a) any treaty in force at the date of the succession of States in respect of the entire territory of the predecessor State which has become a successor State

> continues in respect of each successor State so formed" [**Annex 4.1**, emphasis added].

It can, therefore, not be doubted that whether the dissolution of former Yugoslavia has resulted into the creation of five new States or more is absolutely irrelevant as to the application of the rules relating to succession of States.

4.7 However, Bosnia and Herzegovina cannot accept Yugoslavia (Serbia and Montenegro)'s assertions according to which there would exist, on the territory of the former Yugoslav Republic of Bosnia and Herzegovina, three other "new States (...) truly independent from the central authority" [Preliminary Objections, B.2.4, p. 128]. As explained in the Bosnian Memorial [see *e.g.*: pp. 71-94] and in the present Written Statement [para. 4.10], challenges to the authority of the Government of Bosnia and Herzegovina were organised and directed from Belgrade, whose intervention in internal affairs of Bosnia and Herzegovina has been constantly condemned by the international community.

4.8 Thus, as early as 30 May 1992, Security Council Resolution 752 (1992):

> "3. Demands that all forms of interference from outside Bosnia-Herzegovina, including by units of the Yugoslav People's Army (JNA) as well as elements of the Croatian Army cease immediately, and that Bosnia-Herzegovina's neighbours take swift action to end such interference and respect the territorial integrity of Bosnia-Herzegovina" [Memorial, Annexes, part. 3, annex 1; see also, e.g.: resolutions 787 (1992), 16 Nov. 1992 or 819 (1993), 16 April 1993; or General Assembly resolution 46/242, 25 August 1992, Memorial, Annexes, vol. I, Annex 3-III].

Then, after having condemned "the failure of the authorities in the Federal Republic of Yugoslavia (Serbia and Montenegro), including the Yugoslav

People's Army (JNA), to take effective measures to fulfil the requirements of resolution 752 (1992)", the Security Council, "acting under Chapter VII of the Charter of the United Nations", imposed sanctions upon Yugoslavia (Serbia and Montenegro) by its resolution 757 (1992) of 30 May 1992 [Memorial, Annexes, part 3, annex 1; see also e.g.: resolutions 820 (1992) of 17 April 1993, 838 (1993) of 10 June 1993, *ibid.* or 943 (1994) of 23 September 1994, **Annex 4.2** to the present Written Statement].

4.9 The Security Council also insisted on "the need to restore the full sovereignty, territorial integrity and political independence of the Republic of Bosnia and Herzegovina" [Resolution 836 (1993) of 4 June 1993, Memorial, Annexes, part. 3, annex 1] and affirmed the continuing relevance of:

> "(a) The sovereignty, territorial integrity and political independence of the Republic of Bosnia and Herzegovina" [resolution 859 of 24 August 1993, *ibid*; see also resolutions 871 (1993) of 4 October 1993, 900 (1994) of 4 March 1994, *ibid*, 913 (1994) of 22 April 1994 or 942 (1994) of 23 Sept. 1994, 998 (1995) of 21 April 1995, 1004 (1995) of 12 July 1995 or 1010 (1995) of 10 August 1995, **Annexes 4.3-4.7** to the present Written Statement].

These statements, having been made under Chapter VII of the United Nations Charter, are declarative of the law and have binding force for all States [cf. Articles 25 and 103 of the Charter - see I.C.J., *Orders* of 14 April 1992, *Cases concerning Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie*, I.C.J. *Reports* 1992, pp. 15 and 126, **Annexes 4.8 and 4.9**].

4.10 In the same vein, the General Assembly, in its resolution 46/242 of 25 August 1992:

"Reaffirming the necessity of respecting the sovereignty, territorial integrity, political independence and national unity of the Republic of Bosnia and Herzegovina, and rejecting any attempt to change the boundaries of that Republic (...);

2. Demands (...) that all forms of interference from outside the Republic of Bosnia and Herzegovina cease immediately;

3. Demands further that those units of the Yugoslav People's Army and elements of the Croatian Army now in Bosnia and Herzegovina must either be withdrawn, or be subject to the authority of the Government of Bosnia and Herzegovina (...);

4. Reaffirms its support for the Government and people of the Republic of Bosnia and Herzegovina in their just struggle to safeguard their sovereignty, political independence, territorial integrity and unity" [Memorial, Annexes, vol. I, Annex 3-III].

4.11 The General Assembly strongly reaffirmed its views in resolution 47/121 of 18 December 1992 where,

"Strongly condemning Serbia and Montenegro and their surrogates in the Republic of Bosnia and Herzegovina for their continued non-compliance with all relevant United Nations resolutions (...),

1. Reaffirms its support for the Government and people of the Republic of Bosnia and Herzegovina in their just struggle to safeguard their sovereignty, political independence, territorial integrity and unity;

2. Strongly condemns Serbia, Montenegro and Serbian forces in the Republic of Bosnia and Herzegovina for violation of the sovereignty, territorial integrity and political independence of the Republic of Bosnia and Herzegovina, and their non-compliance with existing

resolutions of the Security Council and the General Assembly, as well as the London Peace Accords of 25 August 1992;

3. Demands that Serbia and Montenegro and Serbian forces in the Republic of Bosnia and Herzegovina immediately ceases their aggressive acts and hostility and comply fully and unconditionally with the relevant resolutions of the Security Council, in particular resolutions 752 (1992) of 15 May 1992, 757 (1992) of 30 May 1992, 770 (1992) and 771 (1992) of 13 August 1992, 781 (1992) of 9 October 1992, and 787 (1992) of 16 November 1992, General Assembly resolution 46/242 and the London Peace Accords of 25 August 1992;

4. Demands that, in accordance with Security Council resolution 752 (1992), all elements of the Yugoslav People's Army still in the territory of the Republic of Bosnia and Herzegovina must be withdrawn immediately, or be subject to the authority of the Government of the Republic of Bosnia and Herzegovina, or be disbanded and disarmed with their weapons placed under effective United Nations control;" [*ibid.*, emphasis added; see also resolutions 48/88 of 20 December 1993, *ibid.* and 49/10 of 3 November 1994, Memorial, Annex 3-III, p. 121].

4.12 It cannot therefore be doubted that, both in fact and in law, only one State exists within the borders of the former Yugoslav republic of Bosnia and Herzegovina. This State is the Republic of Bosnia and Herzegovina, a Party to the 1948 Genocide Convention for the reasons explained in the Memorial and recalled above [paras. 4.5 to 4.7]. Moreover, Yugoslavia (Serbia and Montenegro) has not seriously disputed these reasons.

Irrelevance and falsity of Yugoslavia (Serbia and Montenegro)'s assertions concerning international recognition of the Republic of Bosnia and Herzegovina

4.13 In its resolution 49/10, the General Assembly stated

> "Reaffirming once again that, as the Republic of Bosnia and Herzegovina is a sovereign, independent State and a Member of the United Nations, it is entitled to all rights provided for in the Charter of the United Nations, including the right to self-defence under Article 51 thereof" **[Annex 4.10]**.

There is no doubt that this statement corresponds with the legal reality: Bosnia and Herzegovina is a sovereign and independent State and has been recognised as such by the international community as is shown, for example, by its admission to the United Nations [cf. General Assembly, Resolution 46/237 of 22 May 1992, **Annex 4.11**].

4.14 The Government of the Republic of Bosnia and Herzegovina does not ignore that "the effects of recognition by other States are purely declaratory" [Arbitration Commission of the International Conference for Peace in former Yugoslavia, Opinion n°1, 29 November 1991, *I.L.M.* 1992, vol. XXXI, p. 1495, Memorial, Annexes, Part. 4, annex 5], as well as membership in the United Nations. However, as admitted by the Arbitration Commission of the International Conference for former Yugoslavia,

> "... while recognition of a State by other States has only declarative value, such recognition, along with membership of international organisations, bears witness to these States' conviction that the political entity so recognized is a reality and confers on it certain rights and obligations under international law" [Opinion n°8, 4 July 1992, *I.L.M.* 1992, p. 1523, Memorial, Annex 19].

4.15 In the present case, 95 States have formally recognized Bosnia and Herzegovina and 64 States have established diplomatic relations with Bosnia and Herzegovina **[Annex 4.12 and 4.13]**, while being completely aware of the problems encountered by its central Government to exercise its authority on parts of her territory, since, with the decisive encouragement and aid of the Respondent State, a minority of its population has entered into rebellion. Yugoslavia (Serbia and Montenegro) is certainly not well advised in invoking the partial lack of territorial control of the Bosnian Government on her territory, a situation it itself created, to challenge Bosnia and Herzegovina's statehood.

4.16 As the Arbitration Commission recalled,

> "... in a referendum held on 29 February and 1 March 1992, the majority of the people of the Republic have expressed themselves in favour of a sovereign and independent Bosnia. The result of the referendum was officially promulgated on 6 March, and, since that date, notwithstanding the dramatic events that have occurred in Bosnia-Herzegovina, the constitutional authorities of the Republic have acted like those of a sovereign State in order to maintain its territorial integrity and their full and exclusive powers" [Opinion n°11, 16 July 1993, *I.L.M.* 1993, p. 1588, Memorial, Annex 8].

And, for their part, the General Assembly and the Security Council of the United Nations have constantly proclaimed the right of the State of Bosnia and Herzegovina to "sovereignty, political independence, territorial integrity and unity" in her recognized borders while firmly condemning Yugoslavia (Serbia and Montenegro)'s intervention [see above, paras. 4.8-4.12].

4.17 It can therefore certainly not be sustained seriously that challenges to central authority in Bosnia and Herzegovina or refusal of a multi-ethnic and multicultural State by a minority of the population - indeed not a majority

as Yugoslavia (Serbia and Montenegro) wrongly asserts [Preliminary Objections, para. B.2.4, p. 128] are in any sense bars to statehood, international recognition and rights to succeed the Socialist Federal Republic of Yugoslavia of Bosnia and Herzegovina.

4.18 In any case, it has to be stressed that recognition of States and succession to multilateral treaties are entirely different topics. Yugoslavia (Serbia and Montenegro) does not cite any authority or precedent in support of its claim that, absent recognition or in case of premature recognition - *quod non* -

> "consequently, the so-called Republic of Bosnia-Herzegovina cannot enter into the 1948 Genocide Convention by succession" [Preliminary Objections, para. B.2.7, p. 129]

and there is certainly no ground for such an assertion. Moreover, it is a well established rule of international law that participation to multilateral conventions is independent from recognition [cf. *Oppenheim's International Law*, 9th edition by sir Robert JENNINGS and sir Arthur WATTS, London, 1992, p. 170, **Annex 4.14**; Paul REUTER, *Introduction au droit des traités*, Paris, 1985, p. 69, **Annex 4.15**; P. DAILLIER et A. PELLET, *Droit international public* (NGUYEN QUOC Dinh), Paris, 1994, p. 541, **Annex 4.16**; Joe VERHOEVEN, *La reconnaissance internationale dans la pratique contemporaine*, Paris, 1975, p. 430, **Annex 4.17**]. And, as is apparent from principles embodied in Article 34 of the Vienna Convention on Succession of States in respect of Treaties, succession to treaties in cases of secession or dissolution has nothing to do with recognition by other States.

4.19 Consequently, Yugoslavia (Serbia and Montenegro)'s fourth preliminary objection is ill-founded and neither the erroneous assertion that four "States" would be in existence on the territory of the former Yugoslav republic

of Bosnia and Herzegovina, nor its false allegations concerning the recognition of Bosnia and Herzegovina are bars to the jurisdiction of the Court in this case.

RESPONSE TO THE

FIFTH

PRELIMINARY OBJECTION

5.1 According to Yugoslavia (Serbia and Montenegro)'s fifth preliminary objection:

> "There is no dispute between the parties which would be covered by Article IX of the 1948 Genocide Convention" [Preliminary Objections, p. 129].

This allegation is based on two assertions, both of which are clearly groundless:

i) The 1948 Genocide Convention could "only apply when the State concerned has territorial jurisdiction in the areas in which the breaches of the Convention are alleged to have occurred" [*ibid.*, C.1, p. 129];

ii) "The duties prescribed by the Convention relate to "the prevention and punishment of the crime of genocide", when this crime is committed by individuals", not by States [*ibid.*, C.2, p. 130].

5.2 In its Memorial, Bosnia and Herzegovina has dealt, in some detail, with

> "The scope of the jurisdiction of the Court ratione materiae" [*paras.* 4.2.4.1 to 4.2.4.16, pp. 176-183; see also Chapters 5.1 and 5.2., pp. 191-208].

It does not seem necessary to repeat this argument here, especially not since Yugoslavia (Serbia and Montenegro) has not even tried to refute it. Suffice it to show that the Genocide Convention is limited neither to the territory of the Respondent State, nor to acts committed by individuals.

Non-territoriality of the Genocide Convention

5.3 Only one provision of the 1948 Convention provides for a limited territorial application of the Convention: in conformity with the usual principles of criminal international law, the first sentence of Article VI states that

> "Persons charged with genocide or any of the other acts enumerated in Article IV shall be tried by a competent tribunal of the State in the territory of which the act was committed [...]" (emphasis added).

However the second sentence of this same provision adds an element of internationality since it also foresees trials

> "by such international penal tribunal as may have jurisdiction..." (in the present case, the International Criminal Tribunal for the former Yugoslavia).

5.4 As for the rest, not a single provision in the Convention, including Articles I and V cited by the Respondent State, mentions or alludes to a possible limited territorial application. To the contrary, in accordance with the text of Resolution 96 (I) of the General Assembly of 11 December 1946, as recalled in paragraph 3 of the Preamble, it organizes international cooperation

> "between States with a view to facilitating the speedy prevention and punishment of the crime of genocide" **[Annex 5.1]**.

Consequently, in conformity with Article I, States have an absolutely general and unlimited obligation to take effective measures in order to prevent and to punish the crime of genocide, wherever it is committed and, *a fortiori*, not to commit themselves the acts prohibited by Articles II and III whether on their own territory or anywhere else.

5.5 This interpretation, which conforms to the clear meaning of the text of the Convention, is all the more inescapable, given that, as the Court explained in its Advisory Opinion of 28 May 1951,

> "The origins and character of that Convention, the objects pursued by the General Assembly and the contracting parties, the relations which exist between the provisions of the Convention, inter se, and between those and these objects, furnish elements of interpretation of the will of the General Assembly and the parties. The origins of the Convention show that it was the intention of the United Nations to condemn and punish genocide as "a crime under international law" involving a denial of the right of existence of entire human groups, a denial which shocks the conscience of mankind and results in great losses to humanity, and which is contrary to moral law and to the spirit and aims of the United Nations" [Resolution 96(I) of the General Assembly, December 11th, 1946].
>
> The first consequence arising from this conception is that the principles underlying the Convention are principles which are recognized by civilized nations as binding on States, even without any conventional obligation. A second consequence is the universal character both of the condemnation of genocide and of the co-operation required "in order to liberate mankind from such an odious scourge" [Preamble to the Convention]. The Genocide Convention was therefore intended by the General Assembly and by the contracting parties to be definitely universal in scope. It was in fact approved on December 9th, 1948, by a resolution which was unanimously adopted by fifty-six States.
>
> The objects of such a convention must also be considered.
> The Convention was manifestly adopted for a purely humanitarian and civilizing purpose. It is indeed difficult to imagine a convention that might have this dual character to a greater degree, since its object on the one hand is to safeguard the very existence of certain human groups and on the other to confirm and endorse the most elementary principles of morality. In such a convention the contracting States do not have any interests of their own; they merely have, one and all, a common interest, namely, the accomplishment of those high purposes which are the raison d'être of the convention.

> Consequently, in a convention of this type one cannot speak of individual advantages or disadvantages to States, or of the maintenance of a perfect contractual balance between rights and duties. The high ideals which inspired the Convention provide, by virtue of the common will of the parties, the foundation and measure of all its provisions" [I.C.J. *Reports* 1951, p. 23, **Annex 5.2**].

This leaves no room open to any doubt as to the general scope of the Convention and the impossibility of affording it a restrictive sense according to which, States would be bound only if they have territorial jurisdiction in the relevant areas, as Yugoslavia (Serbia and Montenegro) claims.

5.6 It must be noted that in both its Orders on the indication of interim measures of 8 April and 13 September 1993, the Court has clearly impugned beforehand the interpretation of the Convention now asserted by Yugoslavia (Serbia and Montenegro).

5.7 In its Order of 8 April 1993, the Court indicated unanimously that:

> "The Government of the Federal Republic of Yugoslavia (Serbia and Montenegro) should immediately, in pursuance of its undertaking in the Convention on the Prevention and Punishment of the Crime of Genocide of 9 December 1948, take all measures within its power to prevent commission of the crime of genocide;"

and, by 13 votes to 1, that:

> "The Government of the Federal Republic of Yugoslavia (Serbia and Montenegro) should in particular ensure that any military, paramilitary or irregular armed units which may be directed or supported by it, as well as any organizations and persons which may be subject to its control, direction or influence, do not commit any acts of genocide, of conspiracy to commit genocide, of direct and public incitement to commit genocide, or of complicity of genocide, whether directed against the Muslim population of Bosnia and Herzegovina or

against any other national, ethnical, racial or religious group" [I.C.J. *Reports*, 1993, p. 24],

thus showing that Yugoslavia (Serbia and Montenegro) was bound by the Convention even if the relevant acts were committed on the territory of Bosnia and Herzegovina, if these acts were under its control.

5.8 Significantly, the overwhelming majority of the Court was not convinced by the views expressed by Judge Tarassov in an appended dissenting declaration, in which he stated that the "Yugoslav government" could not be held responsible when persons accused to commit or incite genocide

> "are not its citizens and not within its territorial jurisdiction" [*ibid.*, p. 27].

5.9 In its Order of 13 September 1993, the Court has reaffirmed the provisional measures it had previously indicated [I.C.J. *Reports* 1993, pp. 349-350], making even clearer that the aim was:

> "to prevent commission of the crime of genocide in the territory of Bosnia-Herzegovina" [*ibid.*, p. 349, emphasis added].

5.10 For their part, intergovernmental organs of the United Nations have constantly expressed the view that:

> "States are to be held accountable for violations of human rights which their agents commit upon the territory of another State" [G.A., Resolution 46/242, 25 August 1992, Memorial, Annexes, Annex 3-III, emphasis added; see also resolutions 47/147, of 18 December 1992, Annexes, Part.3, Annex 3, Commission on Human Rights, Resolutions 1992/S1/1 of 14 August 1992 and 1992/S-2/1 of 1 December 1992, *ibid.*, Annexes 12 and 13],

and, even more explicitly, that:

> "States are to be held accountable for violations of human rights which their agents commit upon their own territory or the territory of another State" [*ibid.*, Annex 3; emphasis added],

a general principle which applies to genocide, and in accordance with which the 1948 Convention must be interpreted.

5.11 As Judge E. Lauterpacht put it in his Separate Opinion appended to the second Order of 1993,

> "Obviously, an absolutely territorial view of the duty to prevent genocide would not make sense since this would mean that a Party, though obliged to prevent genocide within its own territory, is not obliged to prevent it in territory which it invades and occupies. That would be nonsense. So there is an obligation, at any rate for a State involved in a conflict, to concern itself with the prevention of genocide outside its territory" [I.C.J. *Reports*, 1993, p. 444].

As Bosnia and Herzegovina precisely contends that Yugoslavia (Serbia and Montenegro) is directly involved in the acts of genocide and the related acts committed on the territory of Bosnia and Herzegovina, it is probably superfluous to discuss the second question raised by Judge Lauterpacht, whether the 1948 Convention requires "every Party positively to prevent genocide wherever it occurs" [*ibid*].

5.12 It is therefore respectfully submitted that the application of the 1948 Genocide Convention is not limited to the territory on which the Respondent State has jurisdiction and that, in any case, in the present case, the problem is irrelevant since, precisely, Yugoslavia (Serbia and Montenegro) has usurped important aspects of jurisdiction in interfering in the internal affairs of Bosnia and Herzegovina, has violated her territorial integrity, and has committed genocide and aided and abetted the commission of genocide

on her territory. Moreover, the Government of Bosnia and Herzegovina also submits that Yugoslavia (Serbia and Montenegro) has also violated the 1948 Convention by failing to try the criminals present on its territory (as it should have in conformity with Article VI) and by using its territory, and letting its territory being used, in order to commit genocide against non-Serb populations and to be used as a back base for the genocide committed on the territory of Bosnia and Herzegovina.

The responsibility of States under the Genocide Convention

5.13 Without any substance, Yugoslavia (Serbia and Montenogro) asserts that

> "The duties [of States] prescribed by the Convention relate [only] to "the prevention and punishment of the crime of genocide" when this crime is committed by individuals: the provisions of Articles IV, V, VI and VII make this abundantly clear" [Preliminary Objections, C.2, p. 130].

5.14 It is indeed true that these provisions impose obvious legal duties upon each State Party to the Convention:

- an obligation to try persons charged with genocide and other related crimes in their tribunals [Article VI], and
- a duty to extradite or prosecute (*aut dedere, aut judicare*) [Article VII].

The failure of Yugoslavia (Serbia and Montenegro) to comply with these obligations (or at least with the duties embodied in Articles VI and VII) and, more generally, to abide by its commitment to prevent and to punish acts of genocide and related acts, is, indeed, part of the present case and is expressly included in paragraph 4 of the final Submissions made by Bosnia and Herzegovina in her Memorial [at p. 294], while paragraphs 5 to 7

draw the consequences for the breaches of the Convention, including this failure to prevent and to punish.

5.15 However, it is obvious that the obligations of States stemming from the Convention are not limited to this duty. It would, indeed, be quite odd that States would be bound by a duty to prevent and to punish genocide but would be at liberty to commit genocide themselves!

5.16 This is not only a logical impossibility; the clear text of the Convention makes plain that it is not so. Article VIII encourages the Contracting parties to

> "call upon the competent organs of the United Nations to take such actions under the Charter of the United Nations as they consider appropriate for the prevention and suppression of acts of genocide or any of the other acts enumerated in Article III".

And, above all, Article IX provides for the seizin of the I.C.J. in case of

> "[d]isputes between the Contracting Parties relating to the interpretation or fulfillment of the present Convention, <u>including those relating to the responsibility of a State for genocide or for any of the other acts enumerated in Article III</u>" [emphasis added].

5.17 In its <u>Memorial</u>, Bosnia and Herzegovina has described, in some details, the *travaux préparatoires* of this provision [see Sections 5.2.2 and 5.2.3, pp. 200-208]. It follows from them that

i) the drafters were anxious to create a compulsory jurisdiction for cases when <u>a State</u> is charged with genocide;

ii) they decided to make a distinction between trials of individuals - which belong to national Courts or a future international tribunal -

and proceedings against States responsible for genocide or related acts; and,

iii) in the latter case, they gave competence to the International Court of Justice.

Although the matter was discussed at length, this outcome is in keeping with Resolution 180 (III) relating to the "Draft Convention on genocide", adopted by the General Assembly on 21 November 1947 and according to which:

> "genocide is an international crime entailing national and international responsibility on the part of individuals and States" [Memorial, Annexes, Part 5, Vol. I, Annex 12 - emphasis added].

This is also in keeping with the origins, character, objects and purpose of the Convention as described by the Court in its 1951 Advisory Opinion [see above, para. 5.5].

5.18 It may be noted that the organs of the United Nations have endorsed this self-evident interpretation. Thus, the General Assembly and the Commission on Human Rights, while insisting on the individual responsibility of persons participating in the abhorrent practice of "ethnic cleansing" ["which is a form of genocide" as recalled by the General Assembly in Resolution 47/121, of 18 December 1992 - Memorial, Annexes, Annex 3-III], have also acknowledged that

> "States are to be held accountable for violations of human rights which their agents commit upon the territory of another State" [see *e.g.*: General Assembly, Resolutions 47/147, of 18 December 1992 or 48/153, of 20 December 1993, Memorial, Annexes, Part 3, annex 3, these resolutions expressly indicate in their preamble that the General Assembly is "guided by the purposes and principles of [...] the Convention on the Prevention and Punishment of the Crime of Genocide"; see also Commission on Human Rights, Reso-

lutions 1992/S-1/1, of 14 August 1992, 1992/S-2/1, of 1 December 1992 or 1993/7 of 23 February 1993, *ibid.*, annexes 11, 13 and 14].

It can also be noted that these resolutions lay stress upon the special responsibility of Serbia and Montenegro in "the violations of the human rights of the Bosnian people and of international humanitarian law" which they "committed as policy" [General Assembly, Resolution 48/88, of 20 December 1993, *ibid.*, annex 3; see also Resolutions 47/121, prec., and Commission on Human Rights, Resolutions 199/S-2/1 and 1993/7, prec.].

5.19 It can therefore not be seriously sustained that the 1948 Convention applies only to individual responsibility for genocide and related acts. Such a claim lies on

> "a completely erroneous interpretation. The Convention clearly covers mass killings or persecutions by, or at the instance, of governments" [Philip B. PERLMAN, "The Genocide Convention", *Nebraska Law Review*, 1950, n°1, **Annex 5.3**, p. 6; see also: sir Robert JENNINGS and sir Arthur WATTS, *OPPENHEIM'S International Law*, London, 9th ed., 1992, vol.I, **Annex 5.4**, p. 994; Farhad MALEXIAN, *International Criminal Law*, Uppsala, 1991, Vol. I, p. 317, **Annex 5.5**].

5.20 Consequently, the Court has jurisdiction to examine not only Yugoslavia (Serbia and Montenegro)'s failure to prevent and to punish acts of genocide, but also its violations of Articles II and III of the 1948 Convention as required in Submissions 1, 2 and 3 of Bosnia and Herzegovina's Memorial. Therefore, its fifth objection must necessarily be dismissed.

RESPONSE TO THE

SIXTH

PRELIMINARY OBJECTION

6.1 The sixth Preliminary Objection raised by Yugoslavia (Serbia and Montenegro) reads as follows:

> D.1. In case the Court qualifies the Note of Succession as accession, the 1948 Genocide Convention has been in force between the parties since 29 March 1993" [Preliminary Objections p. 131].

6.2 The sixth and seventh Preliminary objections should, in a sense, be read together, as their clear and intended purpose is to evade the application of the Genocide Convention to the most horrendous facts of genocide that took place during the worst period of "ethnic cleansing", that is in the year 1992, in the Republic of Bosnia and Herzegovina. As far as the date of "entry into force" of the Genocide Convention towards the Republic of Bosnia and Herzegovina is concerned, the Respondent State seeks to adopt a two fold demonstration:

- the notification of succession should be considered, in fact, according to Yugoslavia (Serbia and Montenegro), as a notification of accession; therefore, the normal procedure provided for in Article 13 of the convention applies, and the Genocide Convention would then only be operative between the two parties as of 29 March 1993, that is thirty days after the notification made by the Republic of Bosnia and Herzegovina: this is the purpose of the sixth Preliminary objection.
- in the alternative, if the Court does not accept this qualification, and considers the notification of succession for what it is, then Yugosla-

via (Serbia and Montenegro) asserts the Genocide Convention to be operative between the two parties only from the date of that notification, that is 29 December 1992: this is the object of the seventh Preliminary objection, which will be dealt with later.

6.3 The Applicant State rejects both of these pretensions, which are in clear contradiction with general State practice and the almost unanimous legal authorities. Its answer is also two-fold:

- the notification of succession is not a notification of accession, as will be shown in the refutation of the sixth Preliminary objection;
- the notification of succession takes effect on the date of independence, as will be demonstrated in the answer to the seventh Preliminary objection.

6.4 It can be emphasized here that, if the Court were to follow the line of reasoning presented by the Respondent State, it would mean that, unless a successor State issues a notification of succession on the very same day of its accession to sovereignty, a gap would automatically appear in the application to its territory of the universal conventions on human rights and of a humanitarian character. The drastic character of the consequences of the rule that supposedly exists according to Yugoslavia (Serbia and Montenegro), show that this whole reasoning must be rejected. Therefore, the Court is respectfully invited to reject these contentions asserted by the Respondent, as contained in the sixth and seventh Preliminary objections, concerning the date as of which the Republic of Bosnia and Herzegovina is bound by the Genocide Convention, and accordingly to rule that the Genocide Convention is in force between the parties since 6 March 1992.

6.5 In its sixth Preliminary objection, the Federal Republic of Yugoslavia (Serbia and Montenegro) asks the Court to decide that the notification of succession is not a notification of succession, but is in fact a notification of accession, with the consequence that the Genocide Convention would only be in force between the parties since 29 March 1993:

> "Should the Court...qualify the notification of succession as accession, the 1948 Genocide Convention would take effect for the parties, pursuant to Art.XIII of this Convention ninety days after the deposition of instruments, i.e. on 29 March 1992 [sic]. In that case, the Court would have jurisdiction as of that date" [Preliminary Objections, 15 June 1995, p. 132, D.1.5].

6.6 It is Bosnia and Herzegovina's contention that, contrary to the Respondent States bold assertion, the notification of succession cannot be transformed into a notification of accession. There is absolutely no reason why the notification of succession of the Republic of Bosnia and Herzegovina, clearly framed as such, should or could be "mutated" and considered as a notification of accession. In fact, the Secretary-General of the United Nations has treated it as a notification of succession, as recognised by the International Court of Justice:

> " the Court observes that the Secretary-General has treated Bosnia-Herzegovina, not as acceding, but as succeeding to the Genocide Convention" [Order of 8 April 1993, I.C.J. *Reports* 1993, p. 16, §25].

6.7 Needless to say that it is self-evident that the notification of succession cannot be considered as a notification of accession, as seems even to result involuntarily from the Respondent State's own writings, when it affirms that

> "(t)he Federal Republic of Yugoslavia does not see any possibility for the Notification of Succession whereby the so-called Republic of Bosnia and Herzegovina intended to enter into the Genocide Conven(t)ion to be considered as its accession to this Convention" [Preliminary Objections, June 1995, p. 131, D.1.3].

6.8 Furthermore, the Applicant State also strongly resists here the very perverse interpretation that the Respondent tries to give of its Memorial concerning its note of December 1992, when it suggests that the Republic of Bosnia and Herzegovina would have accepted that this note be considered as an accession [Preliminary Objections, p. 132, D.1.3]. Never has the Republic of Bosnia and Herzegovina accepted such an amalgam; what the Applicant State has said is that it

> "has automatically succeeded (the former SFRY) to the 1948 Convention on Genocide, or alternatively (and complementary) it has established its acceptance of the Convention through its communication to the Secretary-General of 29 December 1992" [Memorial, p. 153, 4.2.1.51].

This summary of Bosnia and Herzegovina's position cited by the Respondent State must not be misinterpreted as it has been by Yugoslavia (Serbia and Montenegro), but must be read in the light of the preceding explanations. These explanations were quite clearly presented in the Memorial [pp. 152-153, 4.21.45 to 4.2.1.50]. Regrettably it seems necessary to re-iterate Bosnia and Herzegovina's position, in order to refute the misconceived interpretation presented by the Respondent State.

6.9 The central assertion of the Republic of Bosnia and Herzegovina is that the notification of succession is unnecessary. It results from this assumption, that basically Bosnia and Herzegovina affirmed that it "has automatically succeeded" [*supra*] to the Genocide Convention. However, the Republic of

Bosnia and Herzegovina maintains also "alternatively (and complementary)" that at the same time and in addition to the automatic succession, it is also possible to consider that the note of December 1992 "has established its acceptance of the convention", which means that it has acknowledged its participation in the convention. In other words, the Applicant State has proposed two readings of the notification of succession. First, that it had no legal value in itself, but just informed the international community of the succession of Bosnia and Herzegovina to the Genocide Convention. Second, that it was a legal sign to confirm its participation as a Party to the Genocide Convention. Never has the Applicant agreed, as stated by the Respondent, that its notification of succession could be analysed as an accession, with the discontinuity implied by that last procedure.

6.10 Therefore, the Republic of Bosnia and Herzegovina requests the Court to reject the sixth Preliminary objection. In other words, the Court is asked to reject the whimsical analysis made by Yugoslavia (Serbia and Montenegro) of Bosnia and Herzegovina's note of December 1992, and to recognise the notification of succession registered by the Secretary-General of the United Nations for what it is, i.e. a notification of succession.

RESPONSE TO THE SEVENTH PRELIMINARY OBJECTION

7.1 The seventh Preliminary objection of Yugoslavia (Serbia and Montenegro) has, as already stated, the same purpose as the sixth: to exclude from consideration by the Court Yugoslavia (Serbia and Montenegro)'s responsibility for the massive acts of genocide committed during 1992, one of the worst periods of "ethnic cleansing". The seventh Preliminary objection reads as follows:

> "Should the Court conclude that the entry of the so-called Republic of Bosnia-Herzegovina by succession into the 1948 Genocide Convention was valid for any reason, this Convention would be operative between the parties as of 29 December 1992" [Preliminary Objections, 15 June 1995, p. 133, D.2].

7.2 The Applicant State respectfully asks the Court to reject this strange analysis of the consequences of a notification of succession and to apply the generally accepted rule of international law, according to which a notification of succession takes effect on the date of the accession to statehood. It is absolutely beyond doubt that State practice before the adoption of the Vienna Convention on Succession of States in respect of Treaties, as well as after its adoption, has been remarkably uniform in considering that the date of the succession to treaties is the date of the State's creation.

7.3 The general position of the international community on that issue was succinctly summarised by the Italian delegate at the conference of codification of the Convention on Succession of States in respect of Treaties,

during the discussion of the "clean slate" rule applicable to the newly independent States:

> "With regard to multilateral treaties, article 16 (which became article 17 in the final text), provided that the successor State was entitled to become a Party to any treaty of that kind. That was the effect of succession independent [...] of the final clauses of the treaty" [*UN Conference on Succession of States in respect of Treaties*, A/CONF.80/16, vol I, 24th meeting, 22 April 1977, p. 169, §44, **Annex 7.1**, emphasis added].

7.4 The International Law Commission has also quite clearly stated that a notification of succession takes effect on the date of independence of the successor State. In its commentary of the draft articles, the International Law Commission in dealing with the effects of a notification of succession, - Article 23, then Article 22 - wrote:

> "The treaty practice appears to confirm that, on making a notification of succession, a newly independent State is to be considered as being a Party to the treaty *from the date of independence*" [Draft articles, Doc A/CONF.80/4, *Vol. III*, p. 62, §2, **Annex 7.2**, ILC's emphasis].

And, lest any doubt could remain, the commentary addresses the question of the consequences of the existence of periods of delay provided for in certain treaties on the date of coming into force of such a treaty for the new State. It is difficult to be clearer in its wording, which rejects completely the thesis put forward by the Respondent State. The International Law Commission stated that:

> "period(s) of delay are not treated as relevant to notifications of succession in the depository practice of the Secretary-General. It therefore seems as if the notion of continuity, inherent in "succession", has been regarded as excluding the application to notifications of succession of treaty provisions imposing a period of delay for the entry into force for a

particular State of a treaty upon deposit of an instrument giving its consent to be bound even if the treaty is already in force generally" [Draft articles, Doc A/CN.4/Ser.A/1974-/Add. 1 (part. 1), **Annex 7.3,** p. 241, Art. 22, para. 2, emphasis added].

7.5 The practice of the Secretary-General acting as a depository, as noted by the International Law Commission, has been in complete conformity with the principle of continuity of conventional obligations from the date of creation of the successor State.

7.6 This practice of the Secretary-General has been followed also by States when acting in the same capacity of depository, as acknowledged in this same commentary: "(i)n the case of the Geneva Humanitarian Conventions, the rule now followed by the Swiss Federal Council is that a newly independent State which transmits a notification of succession is to be considered as a Party from the date on which it attained independence" [Draft articles, Doc A/CONF.80/4, *Vol. III*, **Annex 7.3**, p. 63, §4].

7.8 The positions adopted by recent successor States are also completely in line with the existing practice. This practice, for example, has been quite clearly followed by the Czech Republic and the Republic of Slovakia. In a letter dated 16 February 1993, to the Secretary-General of the United Nations the Government of the Czech Republic stated that:

> "In conformity with the valid principles of international law and to the extent defined by it, the Czech Republic, as a successor State to the Czech and Slovak Federal Republic, considers itself bound, as of 1 January 1993, i.e. the date of the dissolution of the Czech and Slovak Federal Republic, by multilateral international treaties to which the Czech and Slovak Federal Republic was a Party on that date [...]" [*Mul-*

tilateral treaties deposited with the Secretary-General, Status as at 31 December 1994, **Annex 7.4**, p. 8, emphasis added].

Subsequently, in a letter deposited on 19 May 1993, the Government of the Slovak Republic notified that:

> "In accordance with the relevant principles and rules of international law and to the extent defined by it, the Slovak Republic, as a successor State, born from the dissolution of the Czech and Slovak Federal Republic, considers itself bound, as of January 1, 1993, i.e. the date on which the Slovak Republic assumed responsibility for its international relations, by multilateral treaties to which the Czech and Slovak Federal Republic was a Party as of 31 December 1992..." [*Multilateral treaties deposited with the Secretary-General,* Status as at 31 December 1994, **Annex 7.4**, p. 8, emphasis added].

7.9 The same practice has been generally followed by all the States created in the territory of the former Socialist Federal Republic of Yugoslavia that is, Bosnia and Herzegovina, Croatia, Slovenia, Macedonia, as well as the Socialist Federal Republic of Yugoslavia, which have been considered as bound without interruption by the general multilateral conventions. For example, on 1 July 1992 the Government of Slovenia informed the Secretary-General that it considered itself bound, since its declaration of independence on 25 June 1991, to 55 multilateral treaties, as a successor State to the former Socialist Federal Republic of Yugoslavia [Doc. E/CN.4/1994/-68, 22 november 1993, **Annex 7.5**, p. 4].

7.10 More specifically, as far as the Genocide Convention is concerned, all successor States to the former Socialist Federal Republic of Yugoslavia have considered themselves as being bound since the date of independence Slovenia made a notification of succession to the Genocide Convention on 6

July 1992, as having effect from the date of its independence, on 8 October 1991 Croatia acted exactly in the same manner, sending a notification of succession to the Genocide Convention on 12 October 1992, with effect from the date of accession to sovereignty, also on 8 October 1991. Macedonia sent a notification of succession on 18 January 1994, to take effect on the date of its accession to sovereignty, on 6 March 1992. As far as Yugoslavia (Serbia and Montenegro) is concerned, the date of its succession to the former Socialist Federal Republic of Yugoslavia is 27 April 1992, the day of the adoption of a new constitution by the entity formed of the former Republic of Serbia and the former Republic of Montenegro, as acknowledged by the Badinter Commission [Opinion n° 11, 16 July 1993, *I.L.M.*, 1992, vol. XXXI, **Annex 7.6**, p. 1587].

7.11 This practice is so generally accepted that it is unnecessary to enter into a discussion raised by the Respondent State on the rule set forth in Article 18 of the draft Convention on the Succession of States in respect of Treaties, concerning the suspension of treaties for newly independent States. This rule itself has never become a positive rule of international law [Preliminary Objections, p. 133-134, D.2.2, D.2.3, D.2.4]. This aforementioned discussion relates to another problem than State succession, and to another category of States than Bosnia and Herzegovina. Nor is it necessary to discuss the totally irrelevant issue of the provisional application of treaties by newly independent States, which has really nothing to do with the question in discussion here [Preliminary Objections, p. 134, D.2.5.], as again these developments concern a different issue than the question raised here and a specific category of States, that is newly independent States. Piling up dates and dates, references and references, together with totally irrelevant issues will not help convincing the Court. What, for example, one

may ask, is the relevance to the questions raised by the Respondent of the date of the succession of Bosnia and Herzegovina to the Genocide Convention, of the fact that Mauritius, a newly independent State, has sent a note on temporary application of treaties on March 12, 1968, and has entered the Vienna Convention on Diplomatic and Consular Relations adopted on 18 April 1961, by a notification of succession on 18 July 1969? Obviously the answer is: "absolutely none".

7.12 Legal authorities are also of the view that, when a succession occurs and a notification of succession has been issued, the State is bound from the date of the succession, to the obligations of its predecessor. This position can even be found in an authority cited by the Respondent State, supposedly in support of its views [Preliminary Objections, p. 118, B.1.4.1.]. Discussing the precedents relating to notifications of succession, as far as a general multilateral treaty is concerned, which is the case of the Genocide Convention, Professor Ian BROWNLIE's opinion is that,

> "the actual practice[...] indicates that the successor has an option to participate in such a treaty in its own right irrespective of the provisions of the final clauses of the treaty on conditions of participation" [*Principles of Public International Law,* Oxford, Clarendon Press, 1990, 4th edition, **Annex 7.7**, p. 670, emphasis added].

In other words, Professor Ian BROWNLIE's writings, contrary to Respondent's suggestions, support the contention of the Applicant State that it had a right to succeed automatically to the Socialist Federal Republic of Yugoslavia as a Party to the Genocide Convention, without interruption and irrespective of the final provisions, [See also, P.K. MENON, *The Succession of States in respect of Treaties, State Property, Archives and Debts,* The Edwin Mellen Press, 1992, **Annex 7.8**, p. 32; Rein MÜLLERSON,

The Continuity and Succession of States by reference to the former USSR and Yugoslavia, *ICLQ*, vol.42, **Annex 7.9**, p. 489].

7.13 Consequently, it cannot be seriously contended that it is a customary rule of international law that, in case of a notification of succession, the rule of automatic continuity implies that the new State is bound from the date of its creation. One can even wonder if all this debate is relevant and whether it would not be possible to lodge a complaint against Yugoslavia (Serbia and Montenegro) quite independently from the date on which Bosnia and Herzegovina succeeded the former Socialist Federal Republic of Yugoslavia to the Genocide Convention.

For the Republic of Bosnia and Herzegovina, the date of creation is 6 March 1992. In Opinion n° 11 rendered by the Badinter Commission, it was clearly stated that the date on which the referendum's results were promulgated, that is 6 March 1992,

> "must be considered the date on which Bosnia and Herzegovina succeeded the Socialist Federal Republic of Yugoslavia" [16 July 1993, *I.L.M.*, Vol. XXXII, 1992, **Annex 7.10**, p. 1588].

Therefore, the Republic of Bosnia and Herzegovina respectfully invites the Court to conclude that it succeeded to the former Yugoslavia as a Party to the Genocide Convention on 6 March 1992.

SUBMISSIONS

In consideration of the foregoing, the Government of the Republic of Bosnia and Herzegovina requests the Court:

- to reject and dismiss the Preliminary Objections of Yugoslavia (Serbia and Montenegro); and
- to adjudge and declare:
  - (i) that the Court has jurisdiction in respect of the submissions presented in the Memorial of Bosnia and Herzegovina; and
  - (ii) that the submissions are admissible.

The Hague, 14 November 1995

Muhamed SACIRBEY
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