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)

WRITTEN OBSERVATIONS

OF
BOSNIA AND HERZEGOVINA

on the

APPLICATION FOR REVISION OF THE JUDGMENT OF 11 JULY 1996

(Yugoslavia v. Bosnia and Herzegovina)

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3 December 2001

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INTRODUCTION

The procedure

1.1. On 23 April 2001 the Federal Republic of Yugoslavia (Yugoslavia) filed an *Application for Revision of the Judgment of 11 July 1996* basing itself on Article 61 of the Statute of the Court.

1.2. The President of the Court has fixed 3 December 2001 as the time-limit within which Bosnia and Herzegovina may submit its written observations with regards to the admissibility of the *Application for Revision* (see letter of the Acting Registrar dated 21 August 2001, no. 108816) .

1.3. The present *Written Observations* of Bosnia and Herzegovina are submitted in accordance with the time-limit set by the President of the Court.

1.4. Of course, Bosnia and Herzegovina will, in what follows, deal with the Application for Revision in detail. At the same time Bosnia and Herzegovina wants to, right away, draw the attention of the Court to one of the Court's earlier findings in this case, which finding in no way can be affected by the Application for Revision nor by the "Initiative":

> "The proceedings instituted before the Court are between two States whose territories are located within the former Socialist Federal Republic of Yugoslavia. That Republic signed the Genocide Convention on 11 December 1948 and deposited its instrument of ratification, without reservation, on 29 August 1950. At the time of the proclamation of the Federal Republic of Yugoslavia, on 27 April 1992, a formal declaration was adopted on its behalf to the effect that:
>
> > "The Federal Republic of Yugoslavia, continuing the State, international legal and political personality of the Socialist Federal Republic of Yugoslavia, shall strictly abide by all the commitments that the Socialist Federal Republic of Yugoslavia assumed internationally."

> This intention thus expressed by Yugoslavia to remain bound by the international treaties to which the former Yugoslavia was party was confirmed in an official Note of 27 April 1992 from the Permanent Mission of Yugoslavia to the United Nations, addressed to the Secretary-General. The court observes, furthermore, that is has not been contested that Yugoslavia was party to the Genocide Convention. Thus, Yugoslavia was bound by the provisions of the Convention on the date of the filing of the Application in the present case, namely, on 20 March 1993." (para. 17 of the Judgment on Preliminary Objections dated 11 July 1996)

These findings of the Court cannot be changed retroactively.

General assessment of Yugoslavia's Application

1.5. A frequently returning feature of the history of this case were the attempts of Yugoslavia to keep the case from reaching the stage of oral proceedings. At the point in time that all obstacles for that seemed to have disappeared Yugoslavia has submitted this Application for Revision (parallel to its so-called "Initiative" dated 4 May 2001).

1.6. In his letter to the Court dated 18 January 2001 Yugoslavia's Foreign Minister stated:

> "In the light of the fundamental change of policies as well as the new international position of the Federal Republic of Yugoslavia, my Government will have to undertake a careful review of Yugoslavia's position in our cases pending before the International Court of Justice".

and

> "The improvement of Yugoslavia's relations with Bosnia and Herzegovina might open the way for finding an amicable solution to all outstanding controversies."

The product of this "review of Yugoslavia's position" is not so much an attempt to realize "an amicable solution", but rather –in full conformity with the usual delaying strategy of Yugoslavia- a fresh attempt to keep the Court from reaching the oral proceedings phase of this case.

1.7. While being pleased with the improvement of the relations between both countries, the Government of Bosnia and Herzegovina cannot accept the implication of this statement in that the present procedure seems to oppose "an amicable solution of all outstanding controversies". It is the considered view of Bosnia and Herzegovina that a Judgment of the International Court of Justice on the Case brought before this Court by Bosnia and Herzegovina is an

indispensable part of the re-establishment of long-lasting amicable relations between the Parties. Only when all issues regarding the responsibility for acts of genocide committed against the non-Serbs in Bosnia and Herzegovina are clarified, can mental reservations disappear and full confidence between both States be fully restored.

1.8. Yugoslavia now takes the position that it has been wrong for many years about the true legal nature of its status and of its international relations (see a.o. para. 35 of the Application of 23 April 2001). The explanation for this "being wrong" is apparently to be found in the "lack of clarity" (see para. 17 of the Application) of its position and in the "uncertainties and dilemmas" regarding its position (see a.o. para. 8 of the Application).

1.9. Apparently, this "being wrong" –and nothing else– provides for the basis of the Application for Revision. It is to this presumption that Yugoslavia connects –retroactive– consequences for its being a party to the Statute of this Court and for its being a party to the Genocide Convention.

1.10. As will be demonstrated below (see Part III) in the view of Bosnia and Herzegovina it is clear that this Application does not nearly meet any of the conditions laid down in Article 61 of the Statute of the Court.
Moreover, Yugoslavia's behaviour since its proclamation on 27 April 1992 may from a legal point of view not be ignored (as Yugoslavia does). This behaviour in itself leads to the conclusion that this Application for Revision is inadmissible.

1.11. At the same time it should be stressed that what is at the centre of this Application for Revision is nothing more and nothing less than a substantial change, made by Yugoslavia, in its position regarding some issues which are related to questions of state-continuity and state-succession. This change of position (however practical and politically prudent this change may have been) has been made entirely voluntarily by Yugoslavia. For that reason alone this, voluntary and unilateral, change can never have a retroactive effect. This change of position can never, retroactively, take away nor change the legal basis from Yugoslavia's acting in the past, let alone that it could ever, unilaterally and retroactively, take away the basis on which Yugoslavia presented itself to this Court and to its Adversary in this case and, for that matter, in several other cases (*Yugoslavia v. Belgium, Canada, France, Germany, Italy, Netherlands, Portugal, United Kingdom*).

1.12. When Yugoslavia withdrew its counterclaims, obviously, Bosnia and Herzegovina did not have any objection whatsoever (vide Bosnia and Herzegovina's letter to the Court dated 12 July 2001). On the contrary, Bosnia and Herzegovina welcomed this step, which led

the President of the Court to his Order of 10 September 2001, placing on record the withdrawal by the Federal Republic of Yugoslavia of the counter-claims submitted by it in its Counter-Memorial. Of course, the fact that Bosnia and Herzegovina did not have any objection may in no way be construed as Bosnia and Herzegovina's acquiescence in the position that Yugoslavia has now taken regarding its UN-membership, its being a Party to the Statute and to the Genocide Convention.

Outline of the present Written Observations

1.13. In Part II of these Written Observations Bosnia and Herzegovina will explain that the issue at stake here falls outside the reach of Article 61 of the Statute, since there is no question of any new facts, as envisaged in this provision, having presented themselves, but there is rather and merely a change in the position of Yugoslavia regarding the issues involved.

1.14. In Part III of these Written Observations Bosnia and Herzegovina will demonstrate that, assuming *arguendo* that Article 61 may come into play, the Application for Revision fails to meet any of the criteria laid down in this provision.

1.15. In Part IV of these Written Observations Bosnia and Herzegovina will take the Court back to the positions adopted by Yugoslavia earlier in these proceedings with regards to its being bound by the Genocide Convention and will show that Yugoslavia is estopped in adopting its newly developed position.

1.16. In Part V of these Written Observations Bosnia and Herzegovina will establish that, in any event, the jurisdiction of the Court with regards to Bosnia's case is to be found in applying Article 35 para. 2 of the Statute of the Court.

1.17. In Part VI Bosnia and Herzegovina will present its submissions requesting the Court to declare the present Application not admissible.

PART II
A CHANGE OF POSITION

Initial position

2.1. The declaration adopted on 27 April 1992, proclaiming the Federal Republic of Yugoslavia (partly quoted above, para. 1.4.) contains the following language:

> "The Federal Republic of Yugoslavia, continuing the state, international legal and political personality of the Socialist Federal Republic of Yugoslavia, shall strictly abide by all the commitments that the SFR of Yugoslavia assumed internationally,
>
> At the same time, it is ready to fully respect the rights and interests of the Yugoslav Republics which declared independence. The recognition of the newly-formed states will follow after all the outstanding questions negotiated on within the Conference on Yugoslavia have been settled,
>
> Remaining bound by all obligations to international organizations and institutions whose member it is, the Federal Republic of Yugoslavia shall not obstruct the newly-formed states to join these organizations and institutions, particularly the United Nations and it specialized agencies." (the full text of this Declaration appears as Annex I to Yugoslavia's Application for Revision)

2.2. Through his note to the Secretary-General of the United Nations of the same date (27 April 1992) the Chargé d'affaires a.i. of the Permanent Mission of Yugoslavia to the United Nations. Amb. Dragomir Djokic, informed the UN of the following:

> "The Assembly of the Socialist Federal Republic of Yugoslavia, at its session held on 27 April 1992, promulgated the Constitution of the Federal Republic of Yugoslavia. Under the Constitution, on the basis of the continuing personality of Yugoslavia and the legitimate decisions by Serbia and Montenegro to continue to live together in Yugoslavia, the Socialist Federal Republic of Yugoslavia is transformed into the Federal Republic of Yugoslavia, consisting of the Republic of Serbia and the Republic of Montenegro.
>
> Strictly respecting the continuity of the international personality of Yugoslavia, the Federal Republic of Yugoslavia shall continue to fulfil all the rights

> conferred to, and obligations assumed by, the Socialist Federal Republic of Yugoslavia in international relations, including its membership in all international organizations and participation in international treaties ratified or acceded to by Yugoslavia." (the full text of this Note appears as Annex 2 to Yugoslavia's Application for Revision)

General Assembly

2.3. As the records of the United Nations show the issue of Yugoslavia's position was debated several times over a period of years. During the meeting of the General Assembly of 22 September 1992, which meeting led to the adoption of Resolution 47/1 of the same date (see for the text of this Resolution Annex 7 of Yugoslavia's Application for Revision) no clarity was given by any State nor obtained – although requested – by any State about the precise legal status of Yugoslavia vis-à-vis its membership of the United Nations.

2.4. The adopted Resolution clearly aimed at resolving an obvious difference of opinion between Yugoslavia at the one hand and the other former Yugoslav republics at the other hand about the consequences of the dissolution of the former Socialist Federal Republic of Yugoslavia. Clearly the Resolution, *deciding* "that the Federal Republic of Yugoslavia (Serbia and Montenegro) **should** apply for membership in the United Nations" (emphasis added), was aimed at bringing Yugoslavia on equal footing with the other States emerging from the former Yugoslavia. As Sir David Hannay (United Kingdom) put it on behalf of the sponsors of this Resolution:

> "In other words, as regards the need to submit an application for membership, the Federal Republic of Yugoslavia (Serbia and Montenegro) is in precisely the same position as other components of the former Socialist Federal Republic of Yugoslavia." (A47/PV.7, page 142, Annex 1)

Thus, the resolution was inspired by, in itself perfectly acceptable, political motives and not by considerations of legal necessity. The Yugoslavia, through its then Prime Minister Panić, did not pronounce clear objections, rather concern, against this Resolution (A47/PV.7, pages 145-152, Annex 2).
Other representatives were unclear about the meaning of the Resolution or explicitly requested clarifications.

2.5. Croatia characterized the Resolution as "the expulsion of Serbia and Montenegro from the General Assembly" and stipulated

> "For us, this is an act that both resolves the legal dilemma of the status of the former Yugoslav States and clarifies the succession of States in the area.
> (...)
> Croatia is a sponsor of the draft resolution and will vote for it in the belief that it will play a pivotal role in resolving the issue of succession (...)" (A/47/pv. 7, pages 152, 153-155, Annex 3).

The Bosnian representative also took an outspoken position :

> "(...) the former Socialist Federal Republic of Yugoslavia has ceased to exist. Serbia and Montenegro are not legally entitled to succeed to the position of the former Socialist Federal Republic of Yugoslavia"

and implied the main goal of the Resolution by stating:

> "We are hopeful that our actions here this evening will not only establish an orderly succession for the former Yugoslavia, but also help promote peace, basic human rights and stability in our region." (A/47/pv. 7, page 157, Annex 4)

2.6. Others raised various doubts and questions; for example the Representative of Ghana observed:

> "In anticipation of the situation that now faces our Organization, in which a Member State has undergone territorial or constitutional changes, the General Assembly determined in 1947 that as a general rule such a State should not cease to be a Member simply by virtue of such changes. We wish to read into that determination the desire to promote universality in the membership of our Organization." (A/47/pv.7, pages 158-160, Annex 5)

He added:

> "The draft resolution before us does not reflect any principled position in terms of the Charter. (...)
> The draft resolution before us may be pragmatic, but it cannot be said to be principled, logical or consistent to the extent that it allows for Yugoslav participation in the work of our Organization, other than that of the General Assembly." (A/47/pv.7, page 161, Annex 6, see also Zimbabwe A/47/pv.7, pages 162-163, Annex 7)

The Representative of Zambia also had problems with the proposed Resolution:

> "We also found that the sponsors lacked transparency in so far as their actual intentions were concerned in the sense that, instead of using the provisions of

> the Charter that are adequate to allow either the expulsion or suspension of a member State or its rights, a much more clever formula was found to evade this particular issue, through some clever drafting of a resolution that went through the Security Council process.
> (...)
> We are concerned that the draft resolution before us is not based on the relevant provisions of the Charter. We are also of the view that the argument that Yugoslavia cannot automatically continue the membership of the former Socialist Federal Republic of Yugoslavia in the United Nations is defective and unsustainable.
> (...)
> Our analysis of the text, and in particular its operative paragraph 1, reveals that the effect of this draft resolution is in fact to expel Yugoslavia, which is a Member State." (A/47/pv.7, pages 171-173, Annex 8)

The Representative of Tanzania concluded:

> "The draft resolution if thus based wholly on political considerations." (A/47/pv.7, pages 176-177, Annex 9)

The Representative of Hungary explained, that it was for political reasons, that Hungary would support the Resolution:

> "In political terms – and I emphasize political – the draft resolution submitted is in reality only the logical result of the judgement which the international community has constantly brought to bear on the situation that has emerged in the field, a judgement that has been reflected in a number of resolutions adopted by the Security Council, namely, that the primary responsibility for the bloody events that have been laying waste the territory of the former Yugoslavia for a year and a half must undeniably be borne by the authorities in Belgrade." (A/47/pv.7, page 182, Annex 10)

2.7. The Representative of Mexico, after the vote, explained why Mexico did not support the Resolution:

> "Moreover, we are concerned that the text of the resolution contains nothing that would indicate its basis in law. The Charter of the United Nations makes no provision for the issue of the breakup and subsequent succession of States. On previous occasions the Security Council has, therefore, tacitly recognized the automatic replacement of the whole by one part, or has admitted the new Members that emerged from the breakup.
>
> The resolution just adopted is of a different kind; it finds no support in Articles 4, 5 or 6 of the Charter, dealing with the conditions for membership in the united Nations and with suspension or expulsion therefrom. Thus, it has shortcomings from the legal standpoint which we find of concern at a time when the

> rapid changes in the political map of the world compel us to be careful to preserve the rules of international law." (A/47/pv.7, page 188, Annex 11, see also Guatemala, A/47/pv.7, page 191, Annex 12, and Trinidad and Tobago, A/47/pv.7, pages 192-193, Annex 13)

2.8. If one thing becomes clear from the above, it is that the majority of the General Assembly, including Bosnia and Herzegovina, desired that the Yugoslav succession issues would be resolved in a specific, practical, manner, which manner was defined in political rather than in legal terms. This is confirmed by the Legal Counsel to the United Nations, who in his letter of 29 September 1992 states that "the only practical consequence that the resolution draws is that the Federal Republic of Yugoslavia (Serbia and Montenegro) can no longer participate in the work of the General Assembly. (...) On the other hand, the resolution neither terminates nor suspends Yugoslavia's membership in the Organization. (...) The admission to the United Nations of a new Yugoslavia under Article 4 of the Charter will terminate the situation created by resolution 47/1." (emphasis in the original; see for the full text of this letter Annex 9 to Yugoslavia's Application for Revision)
In other words, in the view of the Legal Counsel an admission to the United States would resolve the outstanding issues and would put an end to the 'non-participatory' status of Yugoslavia.

2.9. At the time, however, Yugoslavia would not accept this approach and explicitly stuck with its position that Yugoslavia would be the sole continuator of the SYugoslavia, a position which was not acceptable -based on perfectly sound political considerations- to the other States which had emerged from the former Yugoslavia, and which position –as appears from the vote on the resolution- was not acceptable to the majority of the General Assembly either.

2.10. This discussion continued for several years and came also up in 1994 during the 23rd meeting of the States Parties to the U.N. International Convention on the Elimination of all Forms of Racial Discrimination and again -also in 1994- during the 18th and19th meeting of the States parties to the International Covenant on Civil and Political Rights. Here also the precise position of Yugoslavia did not altogether become clear, although again a majority of the States Parties voted in favour of the proposal that Yugoslavia should not *participate* in these meetings. Following below are just a few quotations from the minutes of these meetings demonstrating the unclearness:

The representative of Slovenia:

> "(...) reiterating the position of his delegation on participation by the Federal Republic of Yugoslavia (Serbia and Montenegro), said that it considered all successor States to the former Yugoslavia to be equal. The question of their membership in the United Nations should be resolved by the Security Council and the General Assembly. Participation by the Federal Republic of Yugoslavia could in no way prejudge the result of the *discussions on termination of its membership.*" (CERD/SP/SR.23, page 3, emphasis added, Annex 14)

The Temporary Chairman of this meeting (Mr. Fleischhauer, Legal Counsel) observed that

> "He was unaware of any decision that would deprive the Federal Republic of Yugoslavia (Serbia and Montenegro) of membership in a treaty body." (CERD/SP/SR.23, page 4, Annex 15)

The representative of Belgium (on behalf of the EU-Member States), supported by Australia and the Nordic countries

> "(...) said that the vote of the delegations concerned was without prejudice to their position regarding the status of the Federal Republic of Yugoslavia (Serbia and Montenegro) vis-à-vis the Covenant or the other international obligations of the former Socialist Federal Republic of Yugoslavia. Those delegations were of the view that the Federal Republic of Yugoslavia (Serbia and Montenegro) should abide by the obligations arising under the Covenant." (CCPR/SP/SR.18, page 7, Annex 16)

2.11. During all of these various debates Yugoslavia time and again stipulated that it would continue to honor *its* international commitments, which commitments it willfully inherited and accepted from the former Yugoslavia (CERD/SP/50, Annex 17, CERD/SP/53, Annex 18, CERD/SP/54 Annex 19, CCPR/SP/SR.18, Annex20 and CCPR/SP/SR.19, Annex 21).

Yugoslavia's position during the current proceedings

2.12. During the present proceedings before the International Court of Justice Yugoslavia has consequently taken its being a party to the Convention on the Prevention and Punishment of the Crime of Genocide (1948) as the basis for its position.

2.13. For example in its response to Bosnia's request for the indication of Provisional Measures on 1 April 1993 Yugoslavia stated:

> "(...)The Court should reject the proposed provisional measures under paragraphs 2 – 6 above, taking into account that these measures are outside Article 9 of the Convention on the Prevention and Punishment of the Crime of Genocide and that therefore the Court is not competent to decide upon them. (...)" (page 3, §5)

and it continued:

> "6. The Government of the Federal Republic of Yugoslavia avails itself of this opportunity to inform the Court that is does not accept the competence of the Court in any request of the Applicant which is outside the Convention on the Prevention and Punishment of the Crime of Genocide. This is without prejudice to the final decision of the Yugoslav Government to be party to the dispute submitted by the "Republic of Bosnia and Herzegovina". (page 3, §6)

2.14. During the oral proceedings on 3 April 1993 the representative of Yugoslavia stated:

> "(...) The Federal Republic of Yugoslavia does not consent to any extension of the jurisdiction of the Court beyond what is strictly stipulated in the [Genocide] Convention itself." (CR 93/13, page 16)

> "(...) It is attempting to abuse the threshold jurisdiction of the Court to indicate provisional measures of protection in order to obtain an ad interim judgment on the merits, notwithstanding that in our submission in this case the admittedly low threshold jurisdiction under the unusual compromissory clause of the Genocide Convention has not been reached." (page 25)

> "(...) In relation to provisional measures of protection, the competence of the Court is established by Article 36, paragraph 1, of the Statute, read together with Article IX of the Convention as the point of departure, followed by Article 41 of the Statute and the discretion which Article 41 confers on the Court, a discretion which, I might add, as all other discretionary powers conferred on the Court, must be exercised judicially. No amendment can be made to the Charter and Statute of the Court by another treaty." (page 30/31)

> "With regard to the first aspect, I have already attempted to show, I hope to the satisfaction of the Court, that to the extent that Article IX of the Convention supplies a basis for the jurisdiction of the Court, that jurisdiction is limited to events which occurred after the participation of Bosnia and Herzegovina in the Genocide Convention became effective. (...)" (page 34)

2.15. On 9 August 1993 Yugoslavia submitted a Request for the indication of Provisional Measures:

> "3. Reserving all rights of objections to the jurisdiction of the Court and to the admissibility of the Application, the Federal Republic of Yugoslavia requests the Court, according to Article 41 of the Statute and Article 73, para. 1, and Article 75, para. 3 of the Rules of the Court, to indicate the following provisional measure:
>
> The Government of the so-called Republic of Bosnia and Herzegovina should immediately, in pursuance of its obligation under 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 against the Serb group." (§3, page 2/3)

> "5. Reasons of the Request vis-à-vis International Law.
> The so-called Republic of Bosnia and Herzegovina, as the alleged party of the Genocide Convention, has the obligation under its Article 1 to prevent the crime of genocide and to punish the perpetrators. However, it is apparent that the so-called Republic of Bosnia and Herzegovina has been, and continues to be, in breach of the said obligation. It has not prevented the commission of the crime of genocide on the territory under its control." (§5, page 4)

2.16. At the end of the oral proceedings of 25 and 26 August 1993 the Agent of Yugoslavia presented submissions, requesting the Court a.o.:

> "Wishing to protect its rights by making the so-called Republic of Bosnia and Herzegovina to fulfil all its obligations concerning the protection of the Serb ethnic group according to the Genocide Convention,
>
> the Federal Republic of Yugoslavia asks the Court to indicate the following provisional measure:
>
> The Government of the so-called Republic of Bosnia-Herzegovina should immediately, in pursuance of its obligation under 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 against the Serb ethnic group";

2.17. Given the clear and repeated position taken by Yugoslavia, the Court observed in its Order of 13 September 1993:

> "25. Whereas in its Order of 8 April 1993 the Court considered that Article IX of the Genocide Convention, to which both the Applicant and the Respondent are parties, (...)"

In the following stages of the proceedings Yugoslavia never objected to this observation of the Court until it changed its position in its Application for Revision of 23 April 2001.

2.18. In its Preliminary Objections of 25 June 1995, which would have been the proper moment to deny its being a part to the Genocide Convention, Yugoslavia offered various jurisdictional objections, but did not take the position that it was not a party to nor bound by the Genocide Convention. Yugoslavia, on the contrary, proceeded by submitting counter-claims in its Counter-Memorial, which were entirely based on the position taken by Yugoslavia that it indeed is a party to this Convention.

2.19. In its Judgment of 11 July 1996 the Court, therefore, judged:

> "17. The proceedings instituted before the Court are between two States whose territories are located within the former Socialist Federal Republic of Yugoslavia. That Republic signed the Genocide Convention on 11 December 1948 and deposited its instrument of ratification, without reservation, on 29 August 1950. At the time of the proclamation of the Federal Republic of Yugoslavia, on 27 April 1992, a formal declaration was adopted on its behalf to the effect that:
>
> > "The Federal Republic of Yugoslavia, continuing the State, international legal and political personality of the Socialist Federal Republic of Yugoslavia, shall strictly abide by all the commitments that the Socialist Federal Republic of Yugoslavia assumed internationally."
>
> This intention thus expressed by Yugoslavia to remain bound by the international treaties to which the former Yugoslavia was party was confirmed in an official Note of 27 April 1992 from the Permanent Mission of Yugoslavia to the United Nations, addressed to the Secretary-General. The Court observes, furthermore, that it has not been contested that Yugoslavia was party to the Genocide Convention. Thus, Yugoslavia was bound by the provisions of the Convention on the date of the filing of the Application in the present case, namely, on 20 March 1993."

2.20. The Court, in this same Judgment, further observed:

> "34. Having reached the conclusion that it has jurisdiction in the present case, both *ratione personae* and *ratione materiae* on the basis of Article IX of the Genocide Convention, it remains for the Court to specify the scope of that jurisdiction *ratione temporis*. In its sixth and seventh preliminary objections, Yugoslavia, basing its contention on the principle of the non-retroactivity of legal acts, has indeed asserted as a subsidiary argument that, even though the Court might have jurisdiction on the basis of the Convention, it could only deal with events subsequent to the different dates on which the Convention might have become applica-

> ble as between the Parties. In this regard, the Court will confine itself to the observation that the Genocide Convention — and in particular Article IX — does not contain any clause the object or effect of which is to limit in such manner the scope of its jurisdiction *ratione temporis*, and nor did the Parties themselves make any reservation to that end, either to the Convention or on the occasion of the signature of the Dayton-Paris Agreement. The Court thus finds that it has jurisdiction in this case to give effect to the Genocide Convention with regard to the relevant facts which have occurred since the beginning of the conflict which took place in Bosnia-Herzegovina. This finding is, moreover, in accordance with the object and purpose of the Convention as defined by the Court in 1951 and referred to above (see paragraph 31 above). As a result, the Court considers that it must reject Yugoslavia's sixth and seventh preliminary objections."

Dayton-Paris Agreement

2.21. Indeed, at the time the Dayton-Paris Agreement was negotiated the Genocide Convention was part of the deliberations between the parties. No reservations whatsoever were agreed upon. On the contrary the parties explicitly stipulated to respect and guarantee the rights and freedoms set forth in many specific international conventions and agreed to comply with the provisions of those treaties:

> "Article VII. Recognizing that the observance of human rights and the protection of refugees and displaced persons are of vital importance in achieving a lasting peace, the Parties agree to and shall comply fully with the provisions concerning human rights set forth in Chapter One of the Agreement at Annex 6, as well as the provisions concerning refugees and displaced persons set forth in Chapter One of the Agreement at Annex 7." (A/50/790, S/1995/999)

The Genocide Convention appears as the very first Treaty on the list of treaties referred to in Chapter 1 of the Agreement at Annex 6. The Dayton-Paris Agreement was concluded in November-December 1995.

Conclusion

2.22. It is clear from the above, summarized, history that Yugoslavia kept to a consequent position regarding its being bound by the same international conventions as to which the SFRY was a party. However, Yugoslavia seems now to be trying to, retroactively, make this commitment purely conditional. The 'condition' being that other parties to the same treaties would have to accept Yugoslavia's view regarding its being the sole continuator of the SFRY.

Apart from the practical problems involved in this approach (i.e. how many State parties accepting this condition would be sufficient to create an effective binding, or should *all* parties to a certain treaty explicitly accept the condition before the treaty would become binding to the Yugoslavia and what would be the precise effect of such a 'conditional membership' if the condition is not explicitly accepted nor rejected?), there does not seem to be any basis in law to sustain this position.

2.23. The fact of the matter is that Yugoslavia kept to a position, which may even have been defendable if the other new States emerging from the former Yugoslavia would -sooner or later- have been willing to accept it. In other words: the Yugoslavia position could have turned out to be the internationally accepted one.

2.24. However, the latter did not materialize and therefore Yugoslavia was wise enough to fundamentally change its position, which change was applauded by the international community and which change definitely will help Yugoslavia in the creation of constructive bilateral relations with other States including Bosnia and Herzegovina.
However, a change in position cannot have a retroactive effect on international relations if the retroactivity is not explicitly accepted by other States involved. Bosnia and Herzegovina welcomes the mentioned change of position, but does not accept any retroactive effect of this change as far as the current ICJ-proceedings are concerned.

PART III
ARTICLE 61 OF THE STATUTE

Introduction

3.1. Article 61 of the Statute reads as follows:

> "1. An application for revision of a judgment may be made only when it is based upon the discovery of some fact of such a nature as to be a decisive factor, which fact was, when the judgment was given, unknown to the Court and also to the party claiming revision, always provided that such ignorance was not due to negligence.
>
> 2. The proceedings for revision shall be opened by a judgment of the Court expressly recording the existence of the new fact, recognizing that it has such a character as to lay the case open to revision, and declaring the application admissible on this ground.
>
> 3. The Court may require previous compliance with the terms of the judgment before it admits proceedings in revision.
>
> 4. The application for revision must be made at latest within six months of the discovery of the new fact.
>
> 5. No application for revision may be made after the lapse of ten years from the date of the judgment."

3.2. In this Part of the present Written Observations Bosnia and Herzegovina will demonstrate that the Application for Revision of 23 April 2001 does not meet the criteria set forth in Article 61 of the Statute.

A previously unknown fact

3.3. Yugoslavia is not exactly clear about the precise nature of the *fact*, as required by article 61, which would provide for the basis for its recourse to article 61. In itself this is not surprising. As follows from the above Part II, the situation discussed here is not about (the

discovery of) previously unknown facts but about a State changing its position: Yugoslavia for many years chose to conduct its foreign policy, its international relations and its legal actions on the basis of the presumption that it would be the sole continuator of Yugoslavia. In doing so Yugoslavia repeatedly stipulated its intention to remain bound by the international treaties to which the SFRY was party. Only recently Yugoslavia changed its position and undertook to put an end to the for many years ongoing debate on its membership of the United Nations by submitting a membership application.
Now that a change in position forms the heart of the matter and not the discovery of a previously unknown fact, Article 61 of the Statute does not come into play at all.
For this reason alone the Application for Revision should be declared inadmissible.

3.4. Assuming, *arguendo*, that indeed some fact and not a change of position constitutes the heart of this matter, then the question arises what exactly would be the relevant fact.

3.5. In its Application for Revision Yugoslavia states:

> "The decision of the General Assembly of 1 November 2000 finally dismissed the dilemmas and uncertainties, and put an end to the theory that the FRY may have been a Member of the United Nations before 1 November 2000 "continuing the State, international legal and political personality of the SFRY". A new fact took shape. The FRY became a new Member of the United Nations (clearly implying that it was not a Member earlier)." (para. 19 on page 26)

There is no basis in fact nor in law for any of the assumptions made here by Yugoslavia. The General Assembly did not pronounce itself on "the dilemmas and uncertainties" nor on "the theory that Yugoslavia may have been a Member of the United Nations before 1 November 2000.". The only thing one can safely assume is that the General Assembly did nothing more and nothing less than what the Legal Counsel stipulated already in his letter dated 29 September 1992:

> "The admission to the United Nations of a new Yugoslavia under Article 4 of the Charter will terminate the situation created by resolution 47/1."(see for the full text of this letter Annex 9 to Yugoslavia's Application for Revision).

The fact that "the situation created by resolution 47/1" could be "terminated" was clearly known to the Court. At the time the Judgment on Yugoslavia's Preliminary Objections was delivered this very same "situation" was the prevailing one and, rightly, the Court took its decision accordingly.

3.6. Now Yugoslavia takes the position that by the decision of the General Assembly of 1 November 2000 "[a] new fact took shape". Whatever may be precisely meant here, the decision of the General Assembly does not come near to being a 'new fact' in the sense of Article 61 of the Statute of the Court. This provision requires that the fact was "when the judgment was given, unknown to the Court and also to the party claiming revision"; this implies that *a fortiori* the fact in question actually did exist "when the judgment was given". Obviously, the decision of 1 November 2000 did not exist on 11 July 1996 and therefore in itself does not qualify for the application of Article 61 of the Statute.

3.7. If the General Assembly decision of 1 November 2000 does not constitute the new fact then, again *arguendo*, Yugoslavia's-not-being-a-member of the United Nations would have to be the new fact on which the Application for Revision is based. This also seems to be Yugoslavia's approach in para. 23 of its Application for Revision, where reference to this is made by calling this "an unequivocal fact". However -apart from the fact that Yugoslavia's *non*-membership from 27 April 1992 until 1 November 2000 has not as such been established- it is not possible to construe this as a previously unknown fact (unknown to the Court and also to the party claiming revision). Yugoslavia has at all relevant times been well aware of the debate about its membership, during which debate many States, among them Bosnia and Herzegovina, took the position that Yugoslavia should apply for membership of the United Nations (see Part II above, see also General Assembly Resolution 47/1 (1992), UN Doc. A/RES/47/229 (produced as Annex 7 to Yugoslavia's Application for Revision)).

3.8. One may look at this in various ways:

- Assuming that Bosnia and Herzegovina at the time, indeed, was right in assuming that Yugoslavia was not (yet) a member of the United Nations (see its letter to the Secretary General of 25 September 1992 (A/47/474), Annex 22), then the position taken by Yugoslavia now, which comes down to a mere statement "after all you (Bosnia and Herzegovina) were right and I (Yugoslavia) was wrong" does not create a new fact.
- Assuming that Bosnia and Herzegovina at the time was not right and that Yugoslavia was, indeed, only prohibited to *participate* in the work of the General Assembly, which is to be distinguished from membership termination or membership suspension, then the "new fact" claimed here by Yugoslavia (the alleged not-being-a-member of the UN) indeed did not occur.
- Assuming that the situation was, indeed, objectively unclear and could have been resolved in various ways (one of them being Yugoslavia's applying for membership) then, indeed, all parties involved were entitled to act upon the "intention thus expressed by Yugoslavia to remain bound by the international treaties to which the

former Yugoslavia was party" as was concluded by the Court in its Judgment of 11 July 1996 (para. 17; see further Part IV below). It is this intention, to which the Court explicitly referred rather than to issues regarding Yugoslavia's being or not being a Member of the United Nations. In other words the Court did not base its Judgment on jurisdiction on any fact related to UN-Membership questions.

Whatever assumption one would prefer, the conclusion for all of them is the same: there is no "new fact" as envisaged in Article 61 of the Statute on which an Application for Revision could effectively be based.

3.9. Not only Yugoslavia -as "the party claiming revision"- was at all relevant times aware of the debate on its membership of the United Nations, to the Court this debate was not unknown either. Already in its Order of 8 April 1993 the Court gave ample attention to the membership issue (paras. 14-18). It even considered that "the solution adopted is not free from legal difficulties" (para. 18). However, this "knowledge" of 8 April 1993 did not prevent the Court in its Orders of 8 April 1993 and 13 September 1993 to base its *prima facie* jurisdiction on Article IX of the Genocide Convention, nor did it prevent the Court in its Judgment of 11 July 1996 to base its definitive jurisdiction on Article IX of the Genocide Convention. The same was true in the Court's Orders of 1999 delivered in Yugoslavia's cases against several NATO-States (see further below in Part V).

3.10. Whatever way one may look at this, the situation that occurred in no way can effectively be construed as a fact, which "was, when the judgment was given, unknown to the Court and also to the party claiming revision".

"Ignorance not due to negligence"

3.11. The "ignorance" mentioned in para. 1 of Article 61 of the Statute obviously only refers to ignorance at the side of "the party claiming revision". If this ignorance comes into play here at all – which is most probably not the case since the details and peculiarities of the situation were *not un*known to the parties nor to the Court (see above, Part II and also paras. 3.3.-3.10.)– this ignorance at the side of Yugoslavia certainly was "due to negligence". Yugoslavia, knowing that its position was not accepted by a majority of the General Assembly, stuck to its position and bluntly refused to change this position until it drastically changed its government in the fall of 2000. The length of the period of "negligence" is reflected in the very letter through which Yugoslavia requested its admission to the United Nations:

> "... I have the honour to request the admission of the Federal Republic of Yugoslavia to the United Nations in light of implementation of the Security Council Resolution 777 (1992)" (see Annex 23 of the Application for Revision).

Only in the fall of the year 2000 Yugoslavia has taken to "implement" a Security Council Resolution adopted in September 1992. This belated "implementation" cannot be invoked as a 'new fact' by the very party who would have done better to take due account of this Resolution immediately after it became known to it, i.e. on 19 September 1992.

3.12. Here a situation similar to the one judged by the Court in the Tunisian case occurs:

> "The Court must therefore conclude that in the present case, the fact that the own interests to ascertain them, together signify that one of the essential conditions of admissibility of a request for revision laid down in paragraph 1 of Article 61 of the Statute, namely ignorance of a new fact not due to negligence, is lacking". (concession boundary co-ordinates were obtainable by Tunisia, and the fact that it was in its *Application for Revision and Interpretation of the Judgement of 24 February 1982 in the Case concerning the* Continental Shelf (Tunisia/Libyan Arab Jamahiriya) *(Tunisia v. Libyan Arab Jamahiriya), Judgement, I.C.J. Reports*, 1985, pp. 206-207, para. 27)

Here also the essential condition referred to by the Court is lacking.

"Discovery" of a previously unknown fact

3.13. Changing ones position, is by no means equal to discovering some previously unknown fact. Deciding, in the fall of 2000, to comply with the guidance provided in a Resolution adopted in September 1992 is by no means equal to discovering some previously unknown fact. In this case no previously unknown facts were to be "discovered", but Yugoslavia was called upon many times from 1992 onwards to take a position that would be acceptable to its neighbours and to the majority of the General Assembly.
Yugoslavia's belated response in no way constitutes a "discovery" of a previously unknown fact.

"A decisive factor"

3.14. *If* Yugoslavia, while submitting Preliminary Objections, would have claimed that at for this case relevant times it was not a party to the Genocide Convention this might have been a decisive factor with regards to the jurisdiction of the Court. However, not only did

Yugoslavia never do that, even within the context of its present Application for Revision Yugoslavia's proposition is entirely construed upon its stating that at for this case relevant times it was not a Member to the United Nations and, therefore, not a party to the Statute of the Court. Whatever the merits or relevance of that position may be, in itself this position does not suffice to demonstrate that, for those reasons, Yugoslavia was -on 11 July 1996- not bound to the provisions of the Genocide Convention including Article IX. For one thing its -recent- position regarding its UN membership does not take away the validity of the Court's conclusion with regards the "intention thus expressed by Yugoslavia to remain bound by the international treaties to which the former Yugoslavia was party" (Judgment of 11 July 1996, para. 17; see also Part IV below). In other words, the (recently changed) position of Yugoslavia regarding its membership of the United Nations or regarding its being a party to the Statute of the Court cannot be considered as a decisive factor as envisaged in Article 61 of the Statute with regards to the jurisdiction of the Court (see also Part V below). This is further demonstrated by the fact that, rightly so, the Judgment of the Court of 11 July 1996 did not depend on these circumstances either.

Prescription of six months

3.15. Paragraph 4 of Article 61 of the Statute provides for a prescription period of six months after the discovery of the new fact. Now that the Application for Revision was submitted on 23 April 2001, the 'discovery' must have taken place after 23 October 2000 for this Application to be admissible.

3.16. Since Yugoslavia apparently takes the position that its 'discovery" that it was not a member of the United Nations from 27 April 1992 onwards provides for the basis of its Application for Revision, the day on which this became Yugoslavia's position is the relevant date for the six months period. The letter of the President of Yugoslavia requesting admission to the United Nations was sent on 27 October 2000 (see Annex 23 to Yugoslavia's Application for Revision). It is entirely unlikely that the 'discovery' took place (only) on the same date or, for that matter, only in the few days before the 27th. This is not only unlikely, but this was, indeed, not the actual case.

3.17. The Program of the Democratic Opposition of Serbia, whose leader was the present President of Yugoslavia, Vojislav Kostunica, included the following section:

> " **The First Year of the New Government**
> 1. Return of Yugoslavia and Serbia to the world
> · Inclusion in all relevant international institutions, which will

provide immediate lifting of all sanctions, including the so-called "outer wall" of sanctions

· Immediate inclusion of Yugoslavia and Serbia in the Stability Pact for SouthEast Europe and access to important financial means for reconstruction and economic recovery of the country, secured by a regional funding conference

· Renewal of membership in the most important international financial organizations (the IMF, the World Bank), which will enable an access of our country to the world capital market and create conditions for serious foreign investments, essential for an economic reconstruction of the country

· Swift solution to the issue of succession with former Yugoslav republics and the acquisition of relevant finance on these bases

· Start-up of negotiations for the EU associate membership, entry to all relevant regional integrations, and free trade with SouthEast European countries

· Adjustment of economic legislation to prevailing world standards. (Source, Internet, see Annex 23)

This program is dated September 2000 (the elections took place on 24 September 2000) and clearly refers to the need to become a fully fledged member of the United Nations. This was also stressed –on 1 September 2000- by Presidential candidate Kostunica in a speech which he delivered on 1 September 2000:

"I pledge my word that,

if you elect me president of the FRY, (...)

I shall make every effort persistently and patiently to see our country a member of the OSCE, as one of those that created it, and rejoin the United Nations and leading world financial institutions." (Source Internet, see Annex 24)

This was further clarified and stressed by, the elected, President Kostunica in early October 2000 as is demonstrated in the News Analysis of the Media Center Belgrade:

"A QUICK RETURN TO THE UN (10/09/2000)

Since President Vojislav Kostunica has expressed readiness to apply for membership in the UN, the question of our status could be resolved in one day. After that could come membership in the IMF and the establishing of relations with other financial institutions, says Ljubisa Sekulic analyzing UN Secretary General Kofi Annan's call on FRY to apply for membership

The speed with which Yugoslavia will become a member of the United nations now depends only on the country itself.

> After Vojislav Kostunica was elected president, UN Secretary General Kofi Annan called on FRY to apply for membership. Kostunica's position is that FRY should do so. It is well known that the former government refused to apply for membership, insisting on continuity with SFRY.
>
> Since the UN General Assembly is currently in session, the procedure of FRY's acceptance could be completed very quickly. A session of the Security Council, which can meet at any time of day and night would come first, and then the matter would be handed to the General Assembly that could bring a Resolution on accepting FRY into UN membership the same day.
>
> The American ambassador to the UN Richard Holbrooke has already stated that there will be no problems if FRY appeals to that organization for membership. Montenegro's role in this matter will be of no great importance.
>
> Yugoslavia's membership in the UN would signify our return to the international community. (...)" (Source, Internet, see Annex 25)

It is clear that the "discovery" of the "new" fact took place long before the 23rd of October 2000, which means that the Application for Revision does not meet the prescription period of six months, as required by paragraph 4 of Article 61 of the Statute of the Court.

Conclusion

3.18. The following conclusions are to be drawn from the present Part:

i. Since the circumstances on which Yugoslavia bases its Application are to be defined as a mere change of position Article 61 of the Statute is not applicable with regards to Yugoslavia's Application. Therefore, the following conclusions may only be reached in a subsidiary mode.

ii. The situation that occurred, in no way can effectively be construed as a fact, which "was, when the judgment was given, unknown to the Court and also to the party claiming revision".

iii. The "ignorance" mentioned in para. 1 of Article 61 of the Statute certainly was "due to negligence" at Yugoslavia's side.

iv. Yugoslavia's belated response to the Security Council Reso;ution of September 1992 in no way constitutes a "discovery" (in the sense of para. 1 of Article 61 of the Statute) of a previously unknown fact.

v. The circumstances invoked by Yugoslavia are not to be considered as a "decisive factor" as foreseen in para. 1 of Article 61 of the Statute. This also follows from the fact that the Judgment of the Court of 11 July 1996 was not based on the (non-) existence of the circumstances invoked by Yugoslavia.

vi. In submitting this Application for Revision Yugoslavia has not complied with para.4 of Article 61 of the Statute, which provides for a six months' period of prescription.

Therefore, the Yugoslav Application for Revision does not fall within the terms of Article 61 of the Statute of the Court, while in any event none of the conditions of Article 61 of the Statute are met.

PART IV
YUGOSLAVIA IGNORES ITS OWN BEHAVIOUR AS A DECISIVE FACTOR

Introduction

4.1 In Part II of these Written Observations, Bosnia and Herzegovina has emphasized two of the main features of the present case:

- *first*, that, at the time of the Court's Judgment of 11 July 1996, the status of Yugoslavia in the United Nations was, if not debatable, at least debated and, certainly, as the Court noted in its Order of 8 April 1993, was "not free from legal difficulties" (*ICJ Rep.* 1993, p. 14, para. 18); and,

- *second*, that, in spite of these difficulties, or, as the Yugoslav *Application for Revision* now puts it (see e.g.: p. 10, para. 7 and 8 or p. 26, para. 19) of these "uncertainties", Yugoslavia firmly maintained, until very recently that it was the only "continuator" of the former SFRY - an opinion that Bosnia was not less consequent in challenging.

4.2 As stated in the *Application for Revision* itself: "The postulate of continuity was consistently maintained and reiterated by the former Government of the FRY" (p. 6, para. 5; see also p. 4, para. 4 or pp. 24-25, para. 18), while "[t]he FRY's claim to continuity was consistently denied by other successor States of the former SFRY" (*ibid.*, p. 7, para. 6). In the present proceedings, the Claimant now declares that "[a]fter the FRY was admitted as a new Member on 1 November 2000, the dilemmas have been resolved, and a period ended in which contradictory indications allowed different interpretations" (*ibid.*, p. 26, para. 19). In other words, Yugoslavia avails itself of its own mistake in order to question the validity of the 1996 Court's Judgment and to request its revision.

4.3 As Bosnia and Herzegovina has shown in the previous Part of this Statement, such a change of position (which is perfectly respectable in itself) cannot be considered as "the discovery of some fact as to be a decisive factor" for requesting the revision of a judgment in application of Article 61 of the Statute.

4.4 The purpose of the present Part is to show that, under more general principles of international law, such a position cannot be accepted either. In full knowledge of the "uncertainties" or "dilemmas" it now alleges, Yugoslavia has maintained before the Court's Judgment, during the pleading, and after the Judgment, that it was both a Member of the United Nations (and, therefore, a Party to the Court's Statute), and a Party to the Genocide Convention and, more specifically, it has also acquiesced in the jurisdiction of the Court under Article IX of the Convention. It cannot retract its former acquiescence and this acquiescence is not questioned by the so-called "new fact" it now invokes.

Yugoslavia has declared to be a Member of the United Nations and a Party to the Genocide Convention

4.5 In its *Application for Revision*, Yugoslavia exposes, rightly, that it has consistently maintained that it was the continuator of the former SFRY and, as such, a Member of the United Nations and a Party to the Genocide Convention (see e.g. pp. 4-6, para. 4 and 5; see also p. 13, para. 9). However, it claims that, since 1 November 2000, the date when it was admitted in the United Nations, it "became clear that from the moment the FRY was constituted on 27 April 1992, until 1 November 2000, the FRY was not a Member of the United Nations, it was not a State party to the Statute, and until 8 March 2001 it did not accede to membership of the Genocide Convention" to which it acceded at that date without accepting Article IX (*ibid.*, p. 50, para. 37). This new situation would retroactively apply and the Judgment of 11 July 1996 should be revised accordingly.

4.6 This conclusion cannot be accepted for numerous reasons. One of them is that Yugoslavia's readmission to the United Nations on 1 November 2000 does not necessarily mean nor imply that it was not a Member before that date. Moreover, in so doing, Yugoslavia completely ignores its own behaviour. Not only is this clearly incompatible with the requirement in Article 61 of the Court's Statute that the ignorance of the new fact alleged as a ground for revision of a judgment be "not due to negligence" (see above, para. 3.11.-3.12), but also this claim takes no account of the rules of general international law relating to acquiescence which stem from the general principle of good faith in international relations.

4.7 Whatever might have been the legal status of Yugoslavia at the time the Judgment was made, this State was, and still is, bound by its own statements. Suffice it to recall in this respect the fundamental principle authoritatively exposed by Vice-President Alfaro in the separate opinion he appended to the 1962 Judgment of the Court in the case concerning the *Temple of Preah Vihear*:

> "Whatever term or terms be employed to designate this principle such as it has been applied in the international sphere, its substance is always the same: inconsistency between claims or allegations put forward by a State, and its previous conduct in connection therewith, is not admissible (*allegans contraria non audiendus est*). Its purpose is always the same: a State must not be permitted to benefit by its own inconsistency to the prejudice of another State (*nemo potest mutare consilium suum in alterius injuriam*). ... Finally, the legal effect of the principle is always the same: the party which by its recognition, its representation, its declaration, its conduct or its silence has maintained an attitude manifestly contrary to the right it is claiming before an international tribunal is precluded from claiming that right (*venire contra factum proprium non valet*).
>
> "The acts or attitude of a state previous to and in relation with rights in dispute with another State may take the form of an express written agreement, declaration, representation or recognition, or else that of a conduct which implies consent to or agreement with a determined factual or juridical situation" (*ICJ Rep.* 1962, p. 40; see also Sir Gerald Fitzmaurice's separate opinion, *ibid.* p. 63; see Arbitral Award, 9 December 1966, *Andean Border*, *RIAA* XVI, p. 164).

4.8 As the Court itself explained in its celebrated *dictum* in the *Nuclear Tests* cases:

> "It is well recognized that declarations made by way of unilateral acts, concerning legal or factual situations, may well have the effect of creating legal obligations. When it is the intention of the State making the declaration that it should become bound according to its terms, that intention confers on the declaration the character of a legal undertaking, the State being thenceforth legally required to follow a course of conduct consistent with the declaration" (Judgments, 20 December 1974, *Australia v. France*, *ICJ Rep.* 1974, p. 267, para. 43; *New-Zealand v. France*, *ibid.*, p. 472, para. 46; see also PCIJ, Judgment, 5 April 1933, *Legal Status of Eastern Greenland*, *P.C.I.J.*, Series A/B, No. 53, pp. 68-69).

4.9 In Part II of the present Statement, Bosnia and Herzegovina has already quoted a number of unambiguous declarations by which Yugoslavia admitted that it was a Member of the United Nations and a Party to the Genocide Convention and Yugoslavia does not chal-

lenge this obvious fact. What it does, however, is to claim that it made these declarations on the assumption that it was the continuator of the former SFRY. But this is irrelevant for the present case. For two main reasons.

4.10 First, there is no doubt that, *at the present date*, it is clear that Yugoslavia is a Member of the United Nations and a Party to the Court's Statute and to the Genocide Convention not as the continuator of the former SFRY but as one of the successors of this State, among others. But, as stressed by Yugoslavia itself, *at the time of the Judgment*, the situation was not as clear and, for example, political decisions could have been made (and accepted by all interested parties) in an opposite direction. The Court could only decide in accordance with the situation prevailing then and could take at face value the declarations made by the Yugoslav Party.

4.11 Second, mistake is no excuse in international law. In the case concerning the *Temple of Preah Vihear*, Thailand invoked, in its preliminary objections, an error it would have committed when it made its optional declaration in 1950, in view of the 1959 Judgment of the Court in the *Israel v. Bulgaria* case. In its Judgment of 1961 on the preliminary objections of Thailand, the Court could not "see in the present case any factor which could, as it were *ex post* and retroactively, impair the reality of the consent Thailand admits and affirms she fully intended to give in 1950" (*ICJ Rep.* 1961, p. 30). Similarly, in the present case, the events which took place in 2000 can certainly not impair the reality of the declarations made in the early 1990s by Yugoslavia.

4.12 Still in the *Temple* case, at the merits stage, the Court also recalled:

> "It is an established rule of law that the plea of error cannot be allowed as an element vitiating consent if the party advancing it contributed by its own conduct to the error, or could have avoided it, or if the circumstances were such as to put that party on notice of a possible error" (Judgment, 15 June 1962, *ICJ Rep.* 1962, p. 26).

The applicability of this principle in the present case is clear: to say the least, the circumstances were such as to put Yugoslavia on notice of the error it now invokes. It certainly could have avoided it, and it clearly contributed to it by its own conduct.

4.13 The inescapable conclusion of this situation clearly is that, having proclaimed that it was a Member of the United Nations and a Party to the 1948 Convention, Yugoslavia cannot,

five years after the Judgment it puts in question was given, declare that, all things considered, it was wrong and did not appreciate the legal situation rightly.

4.14 Strictly speaking, it is probably not useful to refer to the doctrine of estoppel. As explained by Sir Gerald Fitzmaurice in the *Temple* case:

> "... in those cases where it can be shown that a party has, by conduct or otherwise, undertaken, or become bound by, an obligation, it is strictly not necessary or appropriate to invoke any rule of preclusion or estoppel, although the language of that rule is, in practice, often employed to describe the situation. Thus it may be said that A [Yugoslavia in the present case], having accepted a certain obligation, or having become bound by a certain instrument, cannot now be heard to deny the fact, to 'blow hot and cold'. True enough, A cannot be heard to deny it; but what this really means is simply that A is bound, and, being bound, cannot escape from the obligation merely by denying its existence" (*ICJ Rep.* 1962, p. 63).

4.15 However, in the present case, the conditions for an estoppel in the strict sense are fulfilled. Not only is Yugoslavia precluded from denying the applicability - at the relevant time - of the Genocide Convention, but also this acceptance has caused Bosnia and Herzegovina, in reliance of such conduct, to take this position into account in its legal argument (cf. ICJ, Judgment, 20 February 1969, *North Sea Continental Shelf, ICJ Rep.* 1969, p. 26, para. 30; see also, e.g.: D.W. Bowett, "Estoppel Before International Tribunals and its Relation to Acquiescence", *B.Y.B.I.L.*, 1957, pp. 176-202, especially at p. 177: "The rationale of estoppel is expressed in the maxim *allegans contraria non audiendus est*; its essential aim is to preclude a party from benefiting by its own inconsistency to the detriment of another party who has in good faith relied upon a representation of fact made by the former party"; or p. 188: "By the rule precluding inconsistent positions a party will be estopped from taking up a position on the fact of an issue inconsistent with that he has previously taken up on the same issue").

4.16 In the present case, both Bosnia and Herzegovina and the Court itself placed reliance on Yugoslavia's assertions.

4.17 Thus, as early as 1 April 1992, Bosnia and Herzegovina submitted "that the rump Yugoslavia has clearly expressed its intention to be bound by the terms of the Genocide Convention without reservation" (CR 93/12, p. 25, (Mr. Boyle). In its *Memorial*, Bosnia and Herzegovina showed that "Yugoslavia (Serbia and Montenegro) would also be bound by the Convention if it were considered as a 'continuator' of the former SFRY" (pp. 166-168, para.

4.2.2.24 to 4.2.2.31). Even more precisely, it indicated: "In the present case, Yugoslavia (Serbia and Montenegro) made clear that it considered itself bound by the Genocide Convention and that it considered that the Court has jurisdiction on the Basis of Article IX of said Convention. *It is on the basis of this assumption - and only on the basis of this assumption*, that, in the present Memorial, Bosnia and Herzegovina focuses exclusively on this title of jurisdiction" (p. 157, para. 4.2.2.7, italics added; see also, e.g., pp. 160-161, para. 4.2.2.12). And, during the hearings on the preliminary objections of Yugoslavia, Counsel for Bosnia and Herzegovina declared: "La Yougoslavie n'a jamais nié être partie à la convention sur le génocide et est tenue au respect de ses normes; aussi, je considérerais ce point comme acquis" (1 May 1996, CR 96/9, B. Stern, p. 13).

4.18 The Court's Judgment is based on the same assumption:

> "The proceedings instituted before the Court are between two States whose territories are located within the former Socialist Federal Republic of Yugoslavia. That Republic signed the Genocide Convention on 11 December 1948 and deposited its instrument of ratification, without reservation, on 29 August 1950. At the time of proclamation of the Federal Republic of Yugoslavia, on 27 April 1992, a formal declaration was adopted on its behalf to the effect that:
>
> "The Federal Republic of Yugoslavia, continuing the State, international legal and political personality of the Socialist Federal Republic of Yugoslavia, shall strictly abide by all the commitments that the Socialist Federal Republic of Yugoslavia assumed internationally"
>
> "This intention thus expressed by Yugoslavia to remain bound by the international treaties to which the former Yugoslavia was party was confirmed in an official Note of 27 April 1992 from the Permanent Mission of Yugoslavia addressed to the Secretary-General. The Court observes, furthermore, that it has not been contested that Yugoslavia was party to the Genocide Convention. Thus, Yugoslavia was bound by the provisions of the Convention on the date of the filing of the Application in the prsent case, namely, on 20 March 1993" (*ICJ Rep.* p. 610, para. 17; see also, Joint Declaration of Judges Shi and Vereshchetin, p. 632 or Judge Shahabuddeen's separate opinion, p. 636).

4.19 It is therefore evident that, whether on the ground of estoppel or on the basis of the more general principle of good faith, Yugoslavia is precluded to invoke its own "mistake" in interpreting the legal situation and, whatever the reasons for this change of opinion, it is certainly not a ground for requesting a revision of the Court Judgment of 1996.

4.20 It is also of some interest to note that, after the 1996 Judgment (but before its admission or readmission in the United Nations), Yugoslavia prevailed itself of its quality of party to the Genocide Convention.

4.21 On 26 April 1999, Yugoslavia made a declaration recognizing the compulsory jurisdiction of the Court pursuant to Article 36, paragraph 2, of the Statute of the Court.

4.22 On 29 April 1999, Yugoslavia filed ten Applications instituting procedure against ten Members States of NATO in the cases concerning *Legality of Use of Force*. In all of them Yugoslavia claimed to found the jurisdiction of the Court on Article IX of the Genocide Convention and, on the occasion of its requests for the indication of provisional measures, it prevailed itself of its membership in the United Nations (Orders of 2 June 1999, *Belgium*, para. 32; *Canada*, para. 31; *Netherlands*, para. 32; *Portugal*, para. 31; *Spain*, para. 27 and *United Kingdom*, para. 27). The Court did not consider this question, but it noted that it was not disputed that Yugoslavia as well as the Defendant States were parties to the Genocide Convention without reservation". (*Belgium*, para. 37, *Canada*, para. 36; *France*, para. 24; *Germany*, para. 24; *Italy*, para. 24; *Netherlands*, para. 37; *Spain*, para. 29; *United Kingdom*, para. 32 and *United States of America*, para. 21).

4.23 Being limited to "all disputes arising or which may arise after the signature of the present Declaration", the Yugoslav optional declaration is not a ground for jurisdiction in the present case. However, it clearly shows, and the posterior proceedings confirm, that, still three years after the 1996 Judgment, Yugoslavia was prevailing itself of its quality of party to the Court's Statute and to the Genocide Convention. It might be entitled to change its mind for the future; it is certainly not with regard to the past events, including the Judgment of 1996.

Yugoslavia has acquiesced in the jurisdiction of the Court on the basis of Article IX of the Genocide Convention

4.24 While it accepts that it maintained, until very recently, that it was both a Member of the United Nations and a party to the Genocide Convention (see para. 4.5 above), Yugoslavia omits to recall that, during the procedure before the Court, it also clearly admitted that the International Court had jurisdiction in the case introduced by Bosnia and Herzegovina on the ground of Article IX of the Genocide Convention.

4.25 Thus, as soon as in its memorandum of April the 1st. 1993, "the Government of the Federal Republic of Yugoslavia" availed itself

> "of this opportunity to inform the Court that it does not accept the competence of the Court in any request of the Applicant *which is outside the Convention on the Prevention and Punishment of the Crime of Genocide*" (italics added).

This clearly means that, *a contrario*, it admitted the competence of the Court within the limits of this Convention.

4.26 Similarly, during the oral hearings relating to the interim measures requested by Bosnia and Herzegovina, Professor Rosenne, then acting Agent for Yugoslavia, stated, on 2 April 1993:

> "The Federal Republic of Yugoslavia does not consent to any extension of the jurisdiction of the Court beyond what is strictly stipulated in the Convention itself" (CR 93/13, p. 16);
>
> "... to the extent that Article IX of the Convention supplies a basis for the jurisdiction of the Court, that jurisdiction is limited to events which occurred after the participation of Bosnia and Herzegovina in the Genocide Convention became effective" (*ibid.*, p. 34);
>
> "it [Yugoslavia] is not an unwilling Respondent as that expression is frequently used, because as I have indicated we do think that the jurisdiction of the Court is limited, but we are prepared to continue to litigate the case within the limits of the jurisdiction as we understand it" (*ibid.*, p. 54; see also Second Request for the Indication of Provisional Measures, 26 August 1993, CR 93/34, p. 48 (Mr. Rosenne)).

4.27 And, on 9 August 1993, Yugoslavia requested the Court to order interim measures on the ground of the 1948 Convention.

4.28 This was a clear acquiescence, a "pattern of acquiescences", of the jurisdiction of the Court based on Article IX of the Convention. As Judge Shabuddeen noted in his separate opinion appended to the Order of 13 September 1993, these declarations were "clear statements on the basic jurisdictional position taken by Yugoslavia" (*ICJ Rep.* 1993, p. 354).

4.29 In its written and oral pleadings before the Court, Bosnia and Herzegovina had drawn two series of consequences from these Yugoslav statements:

- in the first place, it noted that Yugoslavia had acquiesced in the jurisdiction of the Court on the basis of Article IX of the Genocide Convention;

- second, it suggested that, particularly in its request for provisional measures, Yugoslavia had gone further than this provision and given its consent to the exercise by the Court of a wider jurisdiction than that provided for in said provision

(see e.g.: *Memorial*, pp. 154-158, para. 4.2.2.2 to 4.2.2.8; *Statement on Preliminary Objections*, pp. 8-9, para. 23 and pp. 11-12, para. 27-28; Public Sittings, 1 May 1996, CR 96/8, pp. 75-85 and CR 96/11, pp. 42-55 (A. Pellet)).

4.30 In its Judgment of 11 July 1996 the Court took the following position on these two related but distinct arguments:

> "According to the first of those arguments, Yugoslavia, by various aspects of its conduct in the course of the incidental proceedings set in motion by the requests for the indication of provisional measures, had acquiesced in the jurisdiction of the Court on the basis of Article IX of the Genocide Convention. As the Court has already reached the conclusion that it has jurisdiction on the basis of that provision, it need no longer consider that question.
>
> "According to the second argument, as Yugoslavia, on 1 April 1993, itself called for the indication of provisional measures some of which were aimed at the preservation of rights not covered by the Genocide Convention, it was said, in accordance with the doctrine of *forum prorogatum* (*stricto sensu*), to have given its consent to the exercise by the Court, in the present case, of a wider jurisdiction than that provided for in Article IX of the Convention. Given the nature of both the provisional measures subsequently requested by Yugoslavia on 9 August 1993 – which were aimed exclusively at the preservation of rights conferred by the Genocide Convention – and the unequivocal declarations whereby Yugoslavia consistently contended during the subsequent proceedings that the Court lacked jurisdiction – whether on the basis of the Genocide Convention or on any other basis – the Court finds that it must confirm the provisional conclusion that it reached on that subject in its Order of 13 September 1993 (*Rep.* pp. 341-342, para. 34). The Court does not find that the Respondent has given in this case a "voluntary and indisputable" consent which would confer upon it a jurisdiction exceeding that which it has already acknowledged to have been conferred upon it by Article IX of the Genocide Convention" (*ICJ Rep.* 1996, pp. 620, para. 40)

(see also Judge Shahabuddeen's separate opinions, *ICJ Rep.* 1993, p. 354 and 1996, pp. 637-639; Judge Parra-Aranguren's separate opinion, *ICJ Rep.* 1996, p. 656, para. 1, and Judge Lauterpacht's separate opinions, *ICJ Rep.* 1993, pp. 416-421, para. 24-37 and 1996, p. 633).

4.31 It is certainly not the intention of Bosnia and Herzegovina to question these findings at this stage. However, a series of remarks must be made.

4.32 In the first place, it is to be noted that the Court has not taken any position concerning the first argument made by Bosnia and Herzegovina during the examination of the preliminary objections. Since it had satisfied itself that it had jurisdiction for other reasons, it has simply noted that it was superfluous to decide on the more specific question of acquiescence. Therefore, the issue has not been ruled and is not *res judicata.* And, if, against all possibility, the Court were to consider the change of situation invoked by Yugoslavia as constituting a "new fact" leading to the revision of its 1996 Judgment, it could, and should, examine this ground of its jurisdiction from this distinct perspective. In such an implausible circumstance, Bosnia and Herzegovina would maintain, in its entirety, the argument made in its previous pleadings and respectfully ask the Court to refer to the documents mentioned above under para. 4.29.

4.33 In such a case, it would become apparent that, whatever the legal status of Yugoslavia at the time, it was, and still is, bound by its own statements. In this respect, the legal principles exposed in the previous Section of the present Part would fully apply.

4.34 This is particularly true when a declaration recognizing the jurisdiction of the Court under Article IX is made by the representatives of a State before an international Court or Tribunal (see e.g.: Arbitral Award, 17 July 1986, *Filleting in the Gulf of Saint Lawrence between Canada and France*, *R.A.A.A.* XIX, p. 265). In the present case, the acquiescence in the Court's jurisdiction in accordance with Article IX of the Genocide Convention was made e.g. by the acting Agent of Yugoslavia (see above, para. 4.26).

4.35 As Yugoslavia clearly acquiesced in the jurisdiction of the Court "in the limits strictly stipulated in the Convention itself" (see above, para. 4.26), it is now precluded to challenge this jurisdiction within these limits and is estopped to do so.

Conclusion

4.36 The following conclusions are to be drawn from the present Part:

(i) Yugoslavia has expressly, clearly and consistently stated that it considered itself a Member of the United Nations and a Party to the Genocide Convention;

(ii) Having created and admitted this situation, Yugoslavia is precluded to change its position retroactively whether by virtue of acquiescence or of estoppel and

(iii) cannot prevail itself of this "mistake" which it could have easily avoided;

(iv) Subsidiarily, if the Court would find that the new situation invoked by Yugoslavia is a ground for revision, *quod non*, it should nevertheless decide that, Yugoslavia having acquiesced in the jurisdiction of the Court on the basis of Article IX of the Genocide Convention cannot now change its position.

PART V
THE COURT HAS JURISDICTION ON THE GROUND OF ARTICLE 35, PARA. 2, OF ITS STATUTE

Introduction

5.1 In the previous Parts of this Statement, Bosnia and Herzegovina has shown that Yugoslavia was a Party to the Court's Statute or that, in any case, this issue was irrelevant for the purpose of the present proceedings since the admission of Yugoslavia in the United Nations cannot be analysed as a new fact in the meaning of Article 61 of the Statute and since Yugoslavia cannot take advantage of its own wishful mistake and is estopped from invoking it before the Court at this stage. It will demonstrate in the present Part that the aforesaid issue is also irrelevant since, even if Yugoslavia were not a Party to the Court's Statute, the Court has jurisdiction under Article 35, paragraph 2.

5.2 According to this provision,

> "The conditions under which the Court shall be open to other States [*i.e.*: States other than the States parties to the present Statute] shall, *subject to the special provisions contained in the treaties in force*, be laid down by the Security Council, but in no case shall such conditions place the parties in a position of inequality before the Court".

5.3 The italicised phrase makes clear that the Court has jurisdiction in the present case under Article IX of the 1948 Genocide Convention, whether or not Yugoslavia was a Party to the Statute of the Court at the time of the Application. However, Bosnia and Herzegovina wishes to reiterate that this is only a subsidiary argument since it firmly maintains that Yugoslavia cannot depart now from its previously constant position that it *was* a Party.

Article 35, paragraph 2, provides, in any case, a basis for the jurisdiction of the Court

5.4 The Applicant in this case, postulates that, according to Article 35; paragraph 2, "[a]ccess [to the Court] is in principle possible to a State which is not a party to the Statute, but only on conditions laid down by the Security Council, and subject to special provisions contained in treaties in force" (*Application for Revision*, p. 34, para. 25). While the second proposition is correct - the jurisdiction of the Court is, indeed, "subject to special provisions contained in treaties in force" -, the first is untenable. It is contradicted by the very text of Article 35 and by the practice of the Court, including in the present case.

5.5 Suffice it to read genuinely the text of Paragraph 2 of Article 35 to find Yugoslavia's interpretation erroneous. This provision includes three elements:

- *first*, and this might be seen as the principle, it provides for access to the Court for non-party States under the conditions laid down by the Security Council;

- *second*, and this is the exception to the above mentioned principle, this is, however, "subject to the special provisions contained in treaties in force; and

- *third*, in *both* cases the equality of the Parties before the Court must be preserved.

5.6 When a legal text is obvious, there is no room for extrapolation. As the Permanent Court explained:

> "The Court's task is clearly defined. Having before it a clause which leaves little to be desired in the nature of clearness, it is bound to apply this clause as it stands without considering whether other provisions might with advantage have been added to or substituted for it" (PCIJ, Advisory Opinion, 15 September 1923, *Acquisition of Polish Nationality*, Series B, N° 7, p. 20; see also, e.g.: PCIJ, Advisory Opinion, 8 December 1927, *European Commission of the Danube*, Series B, N° 14, p. 28 or ICJ, 3 Feb. 1994, *Territorial Dispute*, *ICJ Rep.* 1994, p. 25, para. 51).

This fundamental principle of interpretation is also in line with Article 31, paragraph 1, of the 1969 Vienna Convention on the Law of Treaties.

5.7 According to Yugoslavia, application of Article 35, paragraph 2, would be conditioned by a formal declaration made in accordance with Resolution 9 (1946) of the Security Council of 15 October 1946 (see *Application for Revision*, pp. 34-36, para. 25). Such an interpretation ignores the clear text of this provision: the conditions laid down by the Security Council are "*subject to* the special provisions contained in treaties in force" - and the French text might be even clearer: "*sous réserve* des dispositions particulières des traités en vigueur...". It flows from this unambiguous text that when a treaty in force provides for the jurisdiction of the Court, such a provision prevails over and neutralizes the application of the Security Council resolution. It is also to be noted that the Security Council resolution 9 (1946) itself carefully recalls that it is "*subject to the provisions*" of Article 35, paragraph 2 (para. 1 of the preamble).

5.8 Moreover, the interpretation proposed by Yugoslavia would make the phrase "subject to the special provisions contained in treaties in force" entirely meaningless since those special treaty provisions would have no effect at all and would be "subject to the special declaration provided for in the Security Council resolution" - which is the exact opposite of the text of Article 35, paragraph 2. One cannot invert the meaning of a clear provision by means of interpretation.

5.9 Such an interpretation would also be incompatible with the rule of effectiveness as expressed by the general maxim of interpretation *ut res magis valeat quam pereat* (cf. ICJ, Judgment, 9 April 949, *Corfu Channel*, *ICJ Rep.* 1949, p. 24 or Judgment, 3 February 1994, *Territorial Dispute*, *ICJ Rep.* 1994, p. 23, para. 47). In particular, the words "but in no case..." would be deprived of any significance: "in no case", clearly implies that the two previous hypothesis are distinct; one "case" is constituted by the conditions laid down by the Security Council, the other by the special provisions in the treaties in force.

5.10 Similarly, all jurisdictional provisions in treaties concluded by non-Members States of the United Nations would be deprived of any bearing, at least inasmuch these States would not have made the special declaration contemplated by the 1946 resolution of the Security Council. *This* would introduce a serious inequality between the Parties to the treaties in question depending on whether they are Members of the United Nations or not. In particular, the application of such provisions would arbitrarily depend on the "double consent" expressed by the non-Members, in the treaty first, and, second, in the declaration.

5.11 Yugoslavia alleges that "[i]t is evident that inequality would emerge if some parties to proceedings before the Court would not be bound by conditions which parties to the Statute

already accepted" (*Application for Revision*, pp. 40-41, para. 29); in particular, Article 94 of the Charter would bind the Members of the United Nations, not the non-Members States (*ibid.*, p. 40, para. 29).

5.12 But this begs the question: the Statute itself provides for a possibility for non-Members States to submit disputes to the ICJ and Bosnia and Herzegovina fails to see why and how the fact that a case is submitted by a non-Member State by virtue of a treaty in force and not of a unilateral declaration as envisaged by Security Council resolution 9 (1946) would change the picture in this respect: it goes without saying that, by becoming a party to such a treaty, a State accepts that the jurisdiction of the Court be exercized in conformity with its Statute which guarantees a perfect equality between the Parties to a case. It also accepts the binding character of the judgment in conformity with articles 59 and 60 of the Statute, which Article 94, paragraph 1, of the Charter simply reaffirms. And, concerning paragraph 2 of this provision, by contrast with paragraph 1, it is not limited to the Members of the United Nations.

5.13 In conformity with the consistent practice of both the Permanent Court and the present Court, "there is no occasion to resort to preparatory work if the text of a convention is sufficiently clear in itself" (ICJ, Advisory Opinion, 12 December 1947, *Conditions of Membership in the United Nations*, *ICJ Rep.* 1947-1948, p. 63; see also e.g., PCIJ, Advisory Opinion, 8 December 1927, *European Commission of the Danube*, Series B, N° 14, p. 31 or PCIJ, Judgment, 24 June 1932, *Interpretation of the Statute of Memel (Preliminary Objection)*, Series A/B, N° 47, p. 249).

5.14 Notwithstanding this well established principle, Yugoslavia emphasizes the "drafting history of the Statute" (*Application for Revision*, p. 41, para. 41) and embraces the very restrictive interpretation given by Ambassador Rosenne, a former Counsel of Yugoslavia (*ibid.*, pp. 41-42, para. 41). According to this writer, 'in force' meant that the treaty had to be in force on the date of entry into force of the Statute of the Permanent Court" (*The Law and Practice of the International Court 1920-1996*, vol. II, *Jurisdiction*, Nijhoff, The Hague/Boston/London, 1997, p. 629) and it would now mean: "treaties that were *in force* on the date when the Statute entered into force, that is 24 October 1945" (*ibid.*, p. 630).

5.15 This interpretation lays upon a strange mixture of two different methods of interpretation, that of "fixed reference" (*renvoi fixe*) referring to contemporary events at the time of the conclusion of the treaty - in the present case, Rosenne "locks" the meaning of the reference to treaties in force at the time of the entry into force of the Statute - with that of "mobile

reference" (*renvoi mobile*) according to which the interpretation must take into account the law as it has developed since the conclusion of the treaty - in the present case, Rosenne includes the treaties in force in 1945 while acknowledging that Article 35, paragraph 2, of the Statute of the present Court remained "substantially identical with the corresponding provision in the Statute of the Permanent Court" (*ibid.*, p. 628, fn. 47).

5.16 Yugoslavia further insists that this limited meaning was also confirmed by Judges Anzilotti and Huber" during the discussion on the Revision of the Rules of the Permanent Court (*Application for Revision*, p. 42, para. 30). What Yugoslavia omits to recall is that this view was challenged and that the discussion proved entirely inconclusive. The draft discussed was based on the opposite view according to which the expression "treaties in force" means the treaties in force at the time of the seizin of the Court. Given the opposing views expressed during the discussion, "(...) it was agreed that the question in what cases the declaration [of the non-party State, provided for in the resolution of the Council of the League of Nations of 17 May 1922, which was the predecessor of the Security Council of 1946] was necessary should be left open. The Court would decide in each case as it arose. If in a given case no declaration was made, the other Party to the case could make an objection on that ground upon which it would be for the Court to decide." (PCIJ, Series E- n° 3, p. 198).

5.17 The "limited" interpretation suggested by Yugoslavia does not fit with the genuine text of Article 35, paragraph 2, which does not include any word comforting such a restrictive meaning of the words "treaties in force". If the drafters of the Statute had so wished, they could have included such a provision as "treaties in force at the time of entry into force of the present Statute"; but they did not. Moreover, Article 36, paragraph 1, also uses this same expression ("treaties and conventions in force") and nobody has ever suggested that this expression would be limited to "treaties that were *in force* on the date when the Statute entered into force". Rosenne himself notes in this respect: "The expression *treaties in force* appears in Articles 35, 36 and 37 of the Statute. This normally means that the treaty must be in force between the parties when the proceedings are instituted". Since (contrary to Article 37) the text and context of this expression in Article 35 does not express or imply any restriction or distinction, there is no room for it.

5.18 It is remarkable that, in its Order of 8 April 1993 on the Request of Bosnia and Herzegovina for the indication of provisional measures, the Court itself considered:

> "Whereas Article 35 of the Statute, after providing that the Court shall be open to the parties to the Statute, continues:

> "2. The conditions under which the Court shall be open to other States shall, subject to the special provisions contained in treaties in force, be laid down by the Security Council, but in no case shall such conditions place the parties in a position of inequality before the Court";
>
> "Whereas the Court therefore considers that proceedings may validly be instituted by a State against a State which is a party to such a special provision in a treaty in force, but is not party to the Statute, and independently of the conditions laid down by the Security Council in its resolution 9 of 1946 (cf. *S.S. "Wimbledon", P.C.I.J. 1923, Series A, No. 1*, p. 6); whereas a compromissory clause in a multilateral convention, such as Article IX of the Genocide Convention relied on by Bosnia-Herzegovina in the present case, could, in the view of the Court, be regarded prima facie as a special provision contained in a treaty in force; whereas accordingly if Bosnia-Herzegovina and Yugoslavia are both parties to the Genocide Convention, disputes to which Article IX applies are in any event prima facie within the jurisdiction *ratione personae* of the Court" (*ICJ Rep.* 1993, p. 14, para. 19).

5.19 Indeed, this solution was adopted on a *prima facie* basis and does not prejudge the final position of the Court regarding its jurisdiction. However, it should be noted that:

- this argument was made by the Court *proprio motu*, which clearly shows that it did not ignore the issue;
- no Judge appended an opinion or a declaration expressing a doubt on its cogency;
- in its Order of 13 September 1993, the Court reiterated that Article IX of the Genocide Convention was a provision on which its jurisdiction might be founded (cf. *ICJ Rep.* 1993, p. 338, para. 25 and p. 342, para. 36), again without any Judge (including Judge *ad hoc* Kreća) dissenting on this particular point; and
- in its Judgment of 11 July 1996 on the preliminary objections raised by Yugoslavia, the Court noted that "all the conditions are now fulfilled to found the jurisdiction of the Court *ratione personae*" (*ICJ Rep.* 1996, p. 613, para. 26), thus ratifying its *prima facie* reasoning of 1993
- against which Yugoslavia had raised no objection at least in relation with Article 35, paragraph 2, in spite of the already very artificial character of its preliminary objections;
- again, no Judge, including Judge *ad hoc* Kreća, appended any dissent in this respect.

5.20 As recalled by the Court in its Order of 8 April 1993 (*supra*, para. 5.17), this same line of argument was followed by the Permanent Court in the *Wimbledon* case. It recognized

its jurisdiction to decide the case made by the Applicant States (Great-Britain, France, Italy and Japan against Germany on the sole basis of Article 386, paragraph 1, of the Treaty of Versailles, while the Defendant was not yet a Party to the Court's Statute (PCIJ, Judgment, 17 August 1923, Series A, N° 1, pp. 20 and 35). It is true that, in this case, the Treaty of Versailles had entered into force before the adoption of the Statute, but, at no place in its Judgment, the Court stresses or even mentions this circumstance. The same holds true concerning the *German Interests in Polish Upper Silesia* where the Court expressed no doubt concerning its jurisdiction (expressly based on Article 35 of its Statute) while the Defendant, Poland, was not a Party to the Protocol instituting the PCIJ (Judgment, 25 August 1925, Series A, N° 6, p. 11).

5.21 It results from the above that the jurisdiction of the Court in the case *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* is not dependent upon the Membership of Yugoslavia in the United Nations at the time when the Application was filed by Bosnia and Herzegovina or at the time of the Judgment itself. Whether or not Yugoslavia was a Member at the relevant time is irrelevant: supposing it were not, the Court would, nevertheless have jurisdiction on the ground of Article 35, paragraph 2, of its Statute. As a result, it is also evident that Yugoslavia's admission (or re-admission) in the United Nations in 2001 has no bearing on the present case; nor has the "clarification" this admission supposedly brought to the legal situation.

The 1948 Convention was in force between the Parties at the relevant time

5.22 According to Article 35, paragraph 2, the Court is open to States which are not parties to the Statute "subject to the special provisions contained in treaties in force", provided that the Parties are not placed "in a position of inequality before the Court".

5.23 It is not disputed between the Parties that Article IX of the Genocide Convention is a special provision providing for the jurisdiction of the Court. It reads as follows:

> "Disputes between the Contracting Parties relating to the interpretation, application or fulfilment of the present Convention, including those relating to the responsibility of a state for genocide or for any 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".

5.24 Nor can it be sustained that this provision creates an inequality between the Parties. As explained above (para. 5.10), it would only do so if it were interpreted as suggested by Yugoslavia: if Article IX were to be applicable to States not Members to the Statute only if and when they make a special declaration in accordance with resolution 9 (1946) of the Security Council, then, a paradoxical situation would take place where the Parties to the Statute would be bound by the mere fact of having ratified the 1948 Convention, while the States not Parties to the Statute would be free to give effect or not to Article IX at their own discretion.

5.25 This also confirms that Yugoslavia's position holding that the expression "treaties in force" in Article 35, paragraph 2, of the Statute must be interpreted as applying only to the treaties in force in 1945 is untenable: this interpretation would imply that a State which is not a Party to the Statute, or which ceases to be so, is not - or no more - bound by Article IX, even without any express reservation. This is irreconcilable with the text and the spirit of Article IX - and would, moreover, draw to absurd consequences in the case of treaties prohibiting reservations to their jurisdictional clauses.

5.26 The only issue still to be clarified is whether or not the Genocide Convention must be considered as a "treaty in force" between the Parties at the relevant time.

5.27 But, in reality, this point has been clarified in the Judgment of the Court concerning the preliminary objections raised by Yugoslavia, three of which were precisely devoted to trying to establish that the Convention was not in force between the Parties when the Application was made (third, sixth and seventh preliminary objections - see *ICJ Rep.* 1996, pp. 607-608). The Court clearly rejected these three objections by fourteen votes to one (*ibid.*, p. 623, para. 47 (1) (c)).

5.28 It is highly relevant that, at no point in its Judgment, either in the motives or in the *dispositif*, the Court did affirm or even hinted at the fact that Yugoslavia was, at the time, a Party to its Statute. This point, which is the core of the Application for Revision, is simply not a ground for the decision and cannot therefore be a ground for its revision. It is purely and simply irrelevant (see above, Part III).

5.29 Concerning the participation of Yugoslavia in the Genocide Convention itself, the Court clearly observed - without referring to the membership of Yugoslavia in the United Nations - that "it has not been contested that Yugoslavia was party to the Genocide Convention. Thus, Yugoslavia was bound by the provisions of the Convention on the date of the filing of the Application in the present case, namely, on 20 March 1993" (*ICJ Rep.* 1996, p. 610, para.

17). This is also accepted by Judge *ad hoc* Kreća in his dissenting opinion, although through a different mode of reasoning (*ibid.*, p. 756, para. 91) since he bases himself on the claim of Yugoslavia to be the only continuator of the former SFRY. But this dissent as such shows that the majority of the Court (all Judges participating in the Judgment except the Yugoslav *ad hoc* Judge) were of the opinion that this fact, again invoked by Yugoslavia in the present proceeding, was not the *ratio decidendi* of the Judgment. Therefore, even if the admission of Yugoslavia to the United Nations on 1st November 2000 had "clarified" the legal situation in making clear that Yugoslavia was not the "continuator" of the former SFRY but only one of its successors, this has no relation with the 1996 Judgment which was not based on the erroneous assumption made by Yugoslavia.

5.30 More recently, the Court, in its Orders of 2 June 1999, on the Yugoslav Requests for the Indication of Provisional Measures in the cases concerning *Legality of Use of Force*, reiterated that it was "not disputed that (...) Yugoslavia [is party] to the Genocide Convention without reservation" and considered that

> "Article IX of the Convention accordingly appears to constitute 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 fulfilment' of the Convention..." (Convention accordingly appears to constitute 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 fulfilment' of the Convention..." (*Yugoslavia v. Belgium*, para. 37; see also *Canada*, para. 36; *Germany*, para. 24; *France*, para. 24; *Italy*, para. 24; *Netherlands*, para. 37; *Spain*, para. 29; *United Kingdom*, para. 32 and *United States of America*, para. 21).

5.31 Again, in none of these cases, the Court did mention in this respect the fact that Yugoslavia was, or was not, party to its Statute. And this is all the more significant now that in several of these cases, the Defendant States had raised the argument that Yugoslavia was "not a party to the Statute of the Court" (see *Belgium*, para. 31; *Canada*, para. 30; *Netherlands*, para. 31; *Portugal*, para. 30; *Spain*, para. 26 and *United Kingdom*, para. 26), while Yugoslavia itself,

> "referring to the position of the Secretariat, as expressed in a letter dated 29 September 1992 from the Legal Counsel of the Organization, and to the latter's subsequent practice, contends for its part that General Assembly resolution 47/1 '[neither] terminate[d] nor suspend[ed] Yugoslavia's membership in the Organization', and that the said resolution did not take away from Yugoslavia '[its] right to

participate in the work of organs other than Assembly bodies'(*Belgium*, para. 32; *Canada*, para. 32; *Netherlands*, para. 32; *Portugal*, para. 32; *Spain*, para. 27; *United Kingdom*, para. 27).

5.32 Then, not only Yugoslavia availed itself of its membership in the United Nations (see above para. 4.22), but also, this shows that the Court, although it was perfectly aware of the doubts concerning the statute of Yugoslavia within the United Nations, considered that this issue was of no relevance for the basis of its jurisdiction offered by Article IX of the Genocide Convention.

5.33 Moreover, even if it could be maintained that Yugoslavia was not bound by the multilateral treaties which it had formally accepted by its formal statements (see above, para. 2.1-2.2), *quod non*, this would not apply to the Genocide Convention given its specific purpose.

5.34 In its Judgment of 11 July 1996, the Court has not expressly taken a position concerning this issue. Recalling its celebrated *dicta* in its Advisory Opinion of 28 May 1951 relating to the *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* (*ICJ Rep.* 1996, pp. 611-612, para. 22), it simply declared:

> "Without prejudice as to whether or not the principle of 'automatic succession' applies in the case of certain types of international treaties or conventions, the Court does not consider it necessary, in order to decide on its jurisdiction in this case, to make a determination on the legal issues concerning State succession in respect to treaties which have been raised by the Parties" (*ibid.*, p. 612, para. 23).

5.35 Judge Shabuddeen, nevertheless, expressed his conviction that "[t]o effectuate its object and purpose, the Convention would fall to be construed as implying the expression of a unilateral undertaking by each party to the Convention to treat successor States as continuing as from independence any status which the predecessor State had as a party to the Convention" (Separate Opinion, *ibid.*, p. 636). For his part, Judge Weeramantry concluded his separate opinion by stating that "there is a automatic succession to so vital a human rights convention as the Genocide Convention" (*ibid.*, p. 654).

5.36 It is the firm opinion of the Republic of Bosnia and Herzegovina that the present proceedings should not be an occasion to re-open the case which has been decided with *res judicata* force in the 1996 Judgment, as Yugoslavia tries to do. However, if, against all possibility, the Court were inclined to consider that the Application for Revision introduced by Yugosla-

via were admissible and that, five years later, the Applicant could go back to the Court to simply repudiate its repeated declarations, then Bosnia and Herzegovina would respectfully request the Court to consider all its previous written and oral pleadings establishing the principle of automatic succession to the Genocide Convention as an integral part of the present Statement (see e.g.: *Memorial of Bosnia and Herzegovina*, pp. 163-168, para. 4.2.2.16 to 4.2.2.32; *Statement of Bosnia and Herzegovina on Preliminary Objections*, pp. 66-80, para. 3.34-3.63; Public Sittings, 1 May 1996, CR 96/9, pp. 20-30 (B. Stern) and 3 May 1996, CR 96/11, pp. 55-77 (B. Stern)).

5.37 In this respect, it should be kept in mind that, in deciding on the ground of automatic succession to the Genocide Convention, the Court would not infringe the *res judicata* principle nor the provisions of Articles 59 and 60 of its Statute since, as recalled above (para. 5.30), the 1996 Judgment does not take any position on this point.

5.38 However, the Government of Bosnia and Herzegovina is also firmly convinced that such a re-opening of the case is excluded: as demonstrated in Part III above, there is no new fact which would justify the implementation of Article 61 of the Court's Statute and Yugoslavia's change of position is certainly not such a new fact.

5.39 The Applicant State in the present proceeding tries to take advantage of its late notification of accession to the Genocide Convention, which took place on 8 March 2001. It alleges that "Accession has no retroactive effect. Even if it had a retroactive effect, this cannot possibly encompass the compromissory clause in Article IX of the Genocide Convention, **because the FRY never accepted Article IX, and the FRY's accession did not encompass Article IX**" (*Application for Revision*, p. 44, para. 41 - bold letters in the original text).

5.40 There are strong doubts that such a notification of "accession" and the reservation it includes is a valid one:

- it contradicts all the previous declarations made by Yugoslavia, which is bound by them either by virtue of an estoppel or, simply, because it had formally acquiesced that it was a party to the Genocide Convention (see Part IV, above);

- as Yugoslavia was a party to the Genocide Convention, it cannot formulate a reservation several years after it became bound; according to Articles 2 (1) (d) and 19 of the 1969 Vienna Convention on the Law of Treaties a reservation may only be formulated "when signing, ratifying, accepting, approving or acceding to a treaty";

- in any case, such a reservation is not opposable to Bosnia and Herzegovina which will formally object to it as it is entitled under Articles 20 and 23 of the Vienna Convention;

- this is *a fortiori* so if, as is the position of Bosnia and Herzegovina, the principle of automatic succession applies to the Genocide Convention.

5.41 Whatever the validity of this reservation it can certainly not, as Yugoslavia itself recognizes, have a retroactive effect. When the Court passed its Judgment, on 11 July 1996, it decided in accordance with the contemporary situation prevailing *then*. And, *at the time*, the alleged reservation did not exist. Yugoslavia cannot invoke, as a decisive factor, a self-serving "fact" which it has artificially created five years later in view of requesting the revision of a final judgment.

Conclusion

5.42 As Bosnia and Herzegovina has shown in the present Part:

(i) Article IX of the Genocide Convention is a "special provision" within the meaning of Article 35, paragraph 2, of the Court's Statute;

(ii) the 1948 Convention is a "treaty in force" within the meaning of this same provision;

(iii) therefore, Article IX of this Convention provides a sufficient ground for the jurisdiction of the Court in the case concerning *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*;

(iv) this conclusion does not depend on the question whether or not Yugoslavia was a Member of the United Nations and a Party to the Court's Statute at the time of the Judgment; and

(v) Yugoslavia cannot put forward its 2001 reservation to the Genocide Convention - admitting this reservation could be a valid one, *quod non* - in order to challenge the Court's Judgment of 1996.

PART VI
SUBMISSIONS

In consideration of the foregoing, the Government of Bosnia and Herzegovina requests the Court to adjudge and declare that the Application for Revision of the Judgment of 11 July 1996, submitted by the Federal Republic of Yugoslavia on 23 April 2001, is not admissible.

3 December 2001

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

CORRIGENDUM

On page 57 of the Written Observations of Bosnia and Herzegovina dated 3 December 2001

"the Government of Bosnia and Herzegovina"

should be read as

"Bosnia and Herzegovina".