SEPARATE OPINION OF JUDGE SHAHABUDDEEN

I would like to explain my support for the judgment of the Court on two points, namely, treaty succession and *forum prorogatum*.

TREATY SUCCESSION

The course taken by the Court in its judgment makes it unnecessary to consider whether Bosnia and Herzegovina was a party to the Genocide Convention as from the date of its independence. However, as this point was closely argued and is the subject of some attention, I propose to say a word on it.

I think that the more general arguments as to succession to treaties may be put aside in favour of an approach based on the special characteristics of the Genocide Convention. In the case of the *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, the Court likewise considered that the "solution of [the] problems" which arose there "must be found in the special characteristics of the Genocide Convention" (*I.C.J. Reports 1951*, p. 23). The fact that the Genocide Convention provided for the possibility of cessation or denunciation did not affect its special character as found by the Court. It observed:

> "The origins of the Convention show that it was the intention of the United Nations to condemn and punish genocide as 'a crime under international law' involving a denial of the right of existence of entire human groups, a denial which shocks the conscience of mankind and results in great losses to humanity, and which is contrary to moral law and to the spirit and aims of the United Nations (Resolution 96 (I) of the General Assembly, December 11th, 1946). The first consequence arising from this conception is that the principles underlying the Convention are principles which are recognized by civilized nations as binding on States, even without any conventional obligation. A second consequence is the universal character both of the condemnation of genocide and of the co-operation required 'in order to liberate mankind from such an odious scourge' (Preamble to the Convention). The Genocide Convention was therefore intended by the General Assembly and by the contracting parties to be definitely universal in scope." *(Ibid.)*

Thus, the universality of the Convention attached both to the principles underlying the Convention and to "the co-operation required 'in

order to liberate mankind from such an odious scourge'". Obviously, universality as regards co-operation could not be achieved without universality of participation. The Court recognized this when it noted "the clearly universal character of the United Nations under whose auspices the Convention was concluded, and the very wide degree of participation envisaged by Article XI of the Convention" (*I.C.J. Reports 1951*, p. 21). In a famous passage, it said:

> "The objects of such a convention must also be considered. The Convention was manifestly adopted for a purely humanitarian and civilizing purpose. It is indeed difficult to imagine a convention that might have this dual character to a greater degree, since its object on the one hand is to safeguard the very existence of certain human groups and on the other to confirm and endorse the most elementary principles of morality. In such a convention the contracting States do not have any interests of their own; they merely have, one and all, a common interest, namely, the accomplishment of those high purposes which are the *raison d'être* of the convention. Consequently, in a convention of this type one cannot speak of individual advantages or disadvantages to States, or of the maintenance of a perfect contractual balance between rights and duties. The high ideals which inspired the Convention provide, by virtue of the common will of the parties, the foundation and measure of all its provisions." (*Ibid.*, p. 23.)

It added:

> "The object and purpose of the Genocide Convention imply that it was the intention of the General Assembly and of the States which adopted it that as many States as possible should participate." (*Ibid.*, p. 24.)

If the arguments of Yugoslavia are correct, they lead in one way or another, so far as a successor State such as Bosnia and Herzegovina is concerned, to the introduction of an inescapable time-gap in the protection which the Genocide Convention previously afforded to all of the "human groups" comprised in the former Socialist Federal Republic of Yugoslavia. There could be many long and single days during such a time-gap when, for all practical purposes, that protection is no longer heard of. It is difficult to appreciate how the inevitability of such a break in protection could be consistent with a Convention the object of which was "on the one hand . . . to safeguard the very existence of certain human groups and on the other to confirm and endorse the most elementary principles of morality".

I think that the object and purpose of the Genocide Convention required parties to observe it in such a way as to avoid the creation of such a break in the protection which it afforded. The Convention could not be read as meaning that a party, which was bound under the Convention to apply its jurisdictional provisions for the protection of the "human

groups" inhabiting a given area, was allowed to regard itself as liberated from those provisions in relation to a successor State by reason of the fact that that particular area was now comprised within the territory of the successor State; such a party would continue to be bound by those provisions in relation to other parties in respect of the same "human groups" while being inconsistently free in relation to the successor State within whose territory breaches of the Convention are allegedly being perpetrated by it.

To 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. The necessary consensual bond is completed when the successor State decides to avail itself of the undertaking by regarding itself as a party to the treaty. It is not in dispute that, one way or another, Yugoslavia is a party to the Convention. Yugoslavia has therefore to be regarded as bound by a unilateral undertaking to treat Bosnia and Herzegovina (being a successor State) as having been a party to the Convention as from the date of its independence.

It may be said that this approach presents existing parties with problems of retroactivity and uncertainty of status of successor States in so far as the precise position taken by the latter may not emerge until some time after the dates of their independence. The answer is, I think, provided by recourse to the jurisprudence of the Court in the *Right of Passage over Indian Territory* case: the problems in question would be the result of the scheme of the Genocide Convention which parties to the Convention accepted when they accepted the Convention. Since Yugoslavia considers itself a party to the Convention, it is bound by the scheme. Consequently, it has to regard Bosnia and Herzegovina as a party to the Convention as from the date of its independence irrespective of possible difficulties.

The foregoing conclusion is reinforced by the following consideration. The Court would be correct in accepting the generally prevailing view that even Yugoslavia is not a continuation of the international personality of the previous Socialist Federal Republic of Yugoslavia but is a new State and therefore itself a successor State. If, as no one disputes, Yugoslavia is correct in regarding itself as having always been a party to the Convention, this by parity of reasoning applies equally to the case of Bosnia and Herzegovina.

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Touching on the wider problem concerning State succession to human rights treaties, I am not persuaded, for present purposes, to draw too sharp a distinction between the Genocide Convention (and in particular

its jurisdictional provisions) considered as a measure intended to prevent and punish conduct detrimental to the integrity of certain "human groups" and human rights treaties *stricto sensu*: basically they are all concerned with the rights of the human being — in the case of the Genocide Convention, with some of the most important human rights of all. The origins of the Convention lay in "the intention of the United Nations to condemn and punish genocide as 'a crime under international law' involving a denial of the right of existence of entire human groups"; consequently, the "object" of the Convention was to "safeguard the very existence of certain human groups". That object could not be achieved unless it included the safeguarding of the right to life in certain circumstances, ultimately through the jurisdictional provisions of the Convention. One writer, not unreasonably, described the Convention as "the first human rights instrument adopted by the United Nations" (Matthew Lippman, "The Drafting of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide", *Boston University International Law Journal*, 1985, Vol. 3, p. 1).

But to say that a treaty is a human rights treaty, while providing a possible foundation, does not necessarily indicate a precise juridical mechanism for treating it as being automatically succeeded to by a successor State consistently with the consensual character of treaty relationships. It is possible that such a juridical mechanism is furnished by drawing on the above-mentioned argument and proposing more generally that the effectuation of the object and purpose of such treaties, inclusive of the desideratum of avoiding operational gaps, will support a construction being placed upon them to the effect that they constitute the expression of a unilateral undertaking by existing parties to treat successor States as parties with effect from the date of emergence into independence. As suggested above, the consensual bond is completed when the successor State avails itself of the undertaking by deciding to regard itself as a party to the treaty.

This could provide an answer to the question whether there is automatic succession in the case of human rights treaties in general. However, I do not propose to express a definite opinion at this point on this complex and much disputed question. The construction referred to suffices, in my view, to answer the question in the case of the Genocide Convention in the light of the specific features of this particular instrument.

Forum Prorogatum

The Court has correctly held that, in the circumstances of the case, this doctrine does not enable jurisdiction to be founded on bases additional to that provided by Article IX of the Genocide Convention. As to jurisdiction under that provision, I agree with the Court in taking the position,

as I think it has, that the question of the applicability of the doctrine need not be considered. Counsel for Bosnia and Herzegovina submitted — rightly, I think — that the question which arose in the case of that provision was not one of *forum prorogatum*, but one as to whether Yugoslavia had acquiesced in the view that that provision was applicable. There is a distinction between acceptance of the jurisdiction provided for by the jurisdictional provision of a treaty on the basis that the provision itself does not apply and acceptance of the proposition that the jurisdictional provision itself applies. In the first case, the acceptance is the only basis of jurisdiction; in the second case, it is not, being merely an admission that the treaty applies. The latter is how I understood the position taken by counsel for Bosnia and Herzegovina (see CR 96/8, pp. 75-76, 79-80, 81-82, and CR 96/11, p. 52).

Moreover, I agree with what I understood to be also the position taken by counsel for Bosnia and Herzegovina, that is to say, that the doctrine of *forum prorogatum* does not come into play where the same jurisdiction exists under an applicable title of jurisdiction; *ex hypothesi*, the doctrine may be imported only where the jurisdiction in question does not otherwise exist (CR 96/8, p. 82). In this case, the Court having found that Article IX of the Genocide Convention applies as a treaty provision between the parties, there is neither need nor basis for having recourse to the doctrine in question in order to attract the jurisdiction provided for under that provision.

The positions so taken by counsel for Bosnia and Herzegovina accord with the fact that, in paragraph 34 of its Order of 13 September 1993, the Court did not understand that a question of *forum prorogatum* had been raised in respect of Article IX of the Convention; that understanding is retained in paragraph 40 of today's Judgment. The Court's understanding is consistent with the course of the arguments during both of the two previous phases of the case, namely, those of 1-2 April 1993 and those of 25-26 August 1993. (For the stage at which — towards the end of the second phase of the case — and for the circumstances in which the question of *forum prorogatum* was first raised, see *I.C.J. Reports 1993*, pp. 416-420, separate opinion of Judge *ad hoc* Lauterpacht.)

By way of comparison, it may be observed that in the *Corfu Channel* case the plea of *forum prorogatum* was raised, without loss of time, by the United Kingdom both in its written observations and in its oral arguments (see *I.C.J. Reports 1947-1948*, pp. 26 ff.; and *I.C.J. Pleadings, Corfu Channel*, Vol. II, pp. 15-18, particularly para. 9 *(g)* at p. 18, and Vol. III, pp. 36, 56 ff., 66 and 69). In the case of the *Anglo-Iranian Oil Co.*, the initiative was likewise taken, and taken immediately, by the United Kingdom, even though its contentions were not upheld (see *I.C.J. Reports 1952*, pp. 112-114, and *I.C.J. Pleadings, Anglo-Iranian Oil Co.*, pp. 517-518, 540, 544, 553-556, 594, 626, 630 ff.). Immediacy of response is important in appraising the understanding of the parties; *forum pro-*

rogatum rests ultimately on the same consensual foundations which underpin the jurisdiction of the Court.

These considerations support what I believe to be the position taken by the Court, that is to say, that Bosnia and Herzegovina is not relying — and correctly, I think — on *forum prorogatum* in relation to Article IX of the Genocide Convention.

(Signed) Mohamed SHAHABUDDEEN.