Annexe to BHY 93/63

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13 August 1993

TO: The Judges of the International Court of Justice
The Peace Palace,
The Hague,
The Netherlands.

YOUR EXCELLENCIES:

I hereby amend:

(1). Our Application of 20th March 1993 ("The Application");

(2). Our Second Request for an Indication of Provisional Measures of 27th July 1993 ("The Second Request");

(3). Our outstanding Request for an immediate hearing of the Second Request by the Court;

(4). Our request made on Wednesday 4th August 1993, for an immediate order without hearing pursuant to our Second Request, in accordance with Article 75(1) of the Rules of the International Court of Justice;

by submitting that in addition to the jurisdictional bases that have already been set forth, the Court's jurisdiction is also grounded in a letter dated 8th June 1992, signed by Slobodan Milosevic and Momir Bulatovic, the respective Presidents of Serbia and Montenegro (Rump Yugoslavia). The letter is addressed to Mr. Robert Badinter, the President of the Arbitration Commission of the Conference on Yugoslavia.

At Paragraph 3 of the letter is an unequivocal acceptance of the jurisdiction of the International Court of Justice over all legal disputes between the former Yugoslav Republics, and Serbia and Montenegro (Rump Yugoslavia).

The reasons for the assertion of the Additional Basis of Jurisdiction can be found in the attached Memorandum, which is hereby incorporated by reference and made an integral part of this communication.

Respectfully submitted by,

Francis A. Boyle

Francis A. Boyle
Professor of International Law
General Agent for the Republic of Bosnia and Herzegovina before the International Court of Justice

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SUMMARY OF ARGUMENT

Yugoslavia (Serbia and Montenegro) Has Accepted the Court's Jurisdiction under Article 36(1) over all Legal Disputes Between the six former Yugoslav Republics arising from the Dissolution of Yugoslavia

1. On 31 March 1993 Bosnia-Herzegovina submitted to the Court a copy of a letter dated 8 June 1992, addressed to the President of the Arbitration Commission of the International Conference for Peace in Yugoslavia. The letter was sent and signed by Mr. Momir Bulatovic, President of the Republic of Montenegro, and Mr. Slobodan Milosevic, President of the Republic of Serbia.
It is on the basis of this letter that Bosnia-Herzegovina submits that this Court's jurisdiction is not limited to issues arising under the Genocide Convention. By its declaration of June 8, 1992, Yugoslavia (Serbia and Montenegro) has accepted the Court's jurisdiction over all legal disputes between any of the six former Yugoslavia Republics arising from the dissolution of the former Yugoslavia.

2. In August, 1991, the European Community and its member states agreed to convene an International Conference for Peace in Yugoslavia. This Conference was attended by the presidents of the six Yugoslavian republics, the president of the Federal Government of Yugoslavia, the president of the EC Council, and the representatives of the EC Commission and the EC member states. It established an arbitration commission, known as the Badinter Arbitration after its President, Monsieur Robert Badinter, as a forum for the six former Yugoslavian republics to resolve any differences arising from the dissolution of Yugoslavia. Conference on *Yugoslavia Arbitration Commission: Opinions on Questions Arising from the Dissolution of Yugoslavia*, 31 I.L.M. 1488 (1992).

3. On May 18, 1992, the chairman of the Conference for Peace in Yugoslavia, Lord Carrington, requested the Commission's opinion on three questions. The questions were:

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"1 - In terms of international law, is the Federal Republic of Yugoslavia a new State calling for recognition by the Member States of the European Community in accordance with the joint statement on Yugoslavia and the Guidelines on the recognition of new states in Eastern Europe and in the Soviet Union adopted by the Council of the European Communities on 16 December 1991?
2 - In its opinion No 1 of 29 November 1991 the Arbitration Commission was of the opinion "that the SFRY (was) in the process of dissolution". Can this dissolution now be regarded as complete?
3 - If this is the case, on what basis and by what means should the problems of the succession of states arising between the different states emerging from the SFRY be settled?" 31 I.L.M. 1518, 1519 (1992).

The text of the three questions was sent to the presidents of the Republics of Bosnia and Herzegovina, Croatia, Macedonia, Montenegro, Serbia and Slovenia and to the presidency of the Federal Republic of Yugoslavia, all of whom were asked to send a statement setting out in legal terms their respective positions on each of the three questions.

4. Yugoslavia (Serbia and Montenegro) challenged the Arbitration Commission's competence on these three questions posed by the chairman to the Commission through the aforementioned letter dated 8 June 1992. The two presidents made the following points:

" 1. FR Yugoslavia is not in accord with the idea that the Arbitration Commission, as the advisory organ of the Conference on Yugoslavia, should give its opinion on the matters listed in your letter.

The mandate of the European Community, as well as of the bodies operating under the auspices of the Conference, should be, as was stated in the Brioni Declaration, to provide assistance and facilitate the process of negotiation between the parties to the conflict.

2. It is the principled position of FR Yugoslavia that all questions involved in the overall settlement of the Yugoslav crisis should be resolved in an agreement between FR Yugoslavia and all the former Yugoslav republics.

3. FR Yugoslavia holds the view that all legal disputes which cannot be settled by agreement between FR Yugoslavia and the former Yugoslav republics should be taken to the International Court of Justice, as the principal judicial organ of the United Nations.

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> Accordingly, and in view of the fact that all the issues raised in your letter are of a legal nature, FR Yugoslavia proposes that in the event that agreement is not reached among the participants in the conference, **these questions should be adjudicated by the International Court of Justice**, in accordance with its Statute." (emphasis added)

The Badinter Commission determined in an interlocutory decision that it was competent to reply to the questions and responded to the questions in opinions 8, 9, and 10. *Opinions 8, 9, and 10 of the Badinter Commission*, 31 I.L.M. 1488, 1526 (1992).

5. The Republic of Bosnia and Herzegovina submits that this unequivocal statement, made by Yugoslavia (Serbia and Montenegro), is unconditional, immediate, and binding acceptance of the jurisdiction of the International Court of Justice over all legal disputes arising from the Yugoslav crisis. The declaration includes an acceptance of the Court's jurisdiction with respect to legal issues related to the three questions posed, including any legal issues arising from problems of state succession among successor states.

6. The declaration is unambiguous in language and intent. Yugoslavia (Serbia and Montenegro) refused to accept the Commission's authority to resolve legal disputes between the republics arising from the dissolution, but did agree to accept the Court's jurisdiction over such disputes. In terms of context, the declaration was a formal, public statement, in response to the chair of an international arbitration, on the proper forum for resolution of a defined set of issues between a defined set of parties. As such, it now cannot be dismissed as a general policy statement with no binding effect.

> "If State A by its conduct induces in State B the belief, which is acted upon, that State A will accept, or will not contest, the jurisdiction if State B brings a certain issue before the Court for decision, then State A ought not to be permitted, subsequently, to contest the jurisdiction of the Court when that issue is brought before the Court for decision." SHABTAI ROSENNE, THE LAW AND PRACTICE OF THE INTERNATIONAL COURT, 322 (2nd rev. ed. 1985).

Bosnia and Herzegovina, and the international community at large, reasonably relied on the declaration as an acceptance of the Court's jurisdiction with respect to all legal disputes between the republics arising from the Yugoslav crisis.

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7. International law does not require adherence to any set form or procedure for a state's unilateral declaration to create a legally binding obligation. More specifically: "[t]here are no formal requirements for an international agreement conferring jurisdiction on the Court, and the Court has deliberately kept this aspect elastic as part of its general policy of facilitating recourse to the judicial process. The important thing is that the Court should be satisfied that the parties are in agreement that it should decide the case, and not how that agreement is expressed. In fact this question will only arise of [sic] one of the parties should challenge the jurisdiction of the Court on the ground that no such agreement exists, a process for which a special procedure is established." SHABTAI ROSENNE, THE WORLD COURT: WHAT IT IS AND HOW IT WORKS, 85 (4th ed. 1989). "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." *Nuclear Tests (France v. Australia,)* 1974 I.C.J. 253, 267; *See also* articles 2(2), 3 and 11 of the Vienna Convention on the Law of Treaties, U.N. Doc. A/Conf. 39/27 at 289 (1969). In the *Nuclear Test* case, France was found to have made a legally binding promise when it issued a public press release announcing its intention to cease nuclear testing. After the statement, France was bound to act in a consistent manner with its announced intentions. The Court in the *Nuclear Test* case required two main elements for a declaration to be binding on the state making the declaration: a public statement and an intent to be bound. These unilaterally declared obligations do not require any response or reply from other states in order for the declaration to take effect. Once a unilateral declaration is made, it is subject to the obligation of good faith performance similar to the doctrine of *pacta sunt servanda* for treaty performance. *Id.* at 268.

8. The June 8 declaration was a public statement and as unequivocal in intent as the press release in the *Nuclear Test* case. The June 8 declaration was provided to the chairman of the Badinter Commission. Yugoslavia (Serbia and Montenegro) knew and intended that it would be freely circulated among the members of the

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Commission, the European Community, and the international community at large. In fact, it was the intention of Yugoslavia (Serbia and Montenegro) to inform all involved of its non-acceptance of the Badinter Commission's rulings and its sole acceptance of the jurisdiction of the International Court of Justice over all legal disputes arising from the Yugoslav crisis.

9. The language in the June 8 declaration referred to the International Court of Justice as the "principal judicial organ of the United Nations." Yugoslavia (Serbia and Montenegro) did so in stating that they had not agreed to the competency of the Badinter Commission over legal disputes. This reference to the superior authority of Court, therefore, was meant to buttress their stated position that any legal disputes were hence forward to be submitted to the Court; not merely that the two republics might submit such disputes at their discretion.

10. Having denied the competency of the Commission by accepting the jurisdiction of the Court, Yugoslavia (Serbia and Montenegro) would now deny its acceptance to evade any forum for resolution of these disputes.

11. This court has acknowledged that jurisdiction under Article 36(1) may be accepted by communiqué. In the *Aegean Sea* case, Greece filed an application with the ICJ, contending that both countries had consented to the jurisdiction of the Court based on a joint communiqué issued by the Prime Ministers of Greece and Turkey in Brussels on May 31, 1975. *Aegean Sea Continental Shelf Case* (Greece v. Turkey), 1978 I.C.J. 4. The unsigned communiqué was issued directly to the press during a press conference following a negotiation session *during ongoing and unresolved negotiations over their terms of a special agreement* between the two states to submit the continental shelf dispute to the court. The communiqué stated:

> [T]he two Prime Ministers...decided that those problems should be resolved peacefully by means of negotiations and as regards to the continental shelf of the Aegean Sea by the International Court at The Hague. They defined the general lines on the basis of which the forthcoming meetings of the representatives of the two governments would take place.

Id. at 40-41. The two Prime Ministers also decided to consider the opinions of experts concerning the continental shelf in conjunction with further negotiations. *Id.* at 43.

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12. The Court started its analysis by looking at the circumstances surrounding the communiqué. *Id.* at 42. After analyzing the content, circumstances and intentions of the parties, the ICJ held that the communiqué did not indicate an intent by the Turkish government to *unconditionally* submit its dispute to the ICJ as the dispute was to be submitted *jointly* and only after both parties had concluded their negotiations with agreement upon the terms of the compromis under negotiations. Because the aforementioned expert analysis and further negotiations had not yet taken place, the Court found that Greece's application was premature. *Id.* at 44.

13. The June 8 declaration is distinguishable from the joint communiqué in terms of content, the circumstances of its issuance, and the subsequent practice of the parties. In terms of content, the language of the June 8 declaration is strongly and unequivocally stated. The language in the *Aegean Sea* case was neither as definite nor as forceful. Moreover, the *Aegean Sea* communiqué was not signed or initialed by either Prime Minister. 1978 I.C.J. at 39. Although Article 11 of the Vienna Convention on Treaties does not require signature for international agreements to bind the parties, the fact that both presidents signed the June 8 declaration is further evidence of the formality of the document and the intention of the parties to be bound by it. There is no suggestion of any conditions on this acceptance. It is a formally declared, public statement accepting jurisdiction of the Court over a defined set of issues (all legal issues involved in the overall settlement of the Yugoslav crisis) between a defined set of parties (Yugoslavia (Serbia and Montenegro) and the former Yugoslav republics). As such, it is neither a general policy statement nor a general acceptance of the Court's jurisdiction over all legal disputes "in relation to any other state accepting the same obligation."

14. In terms of the circumstances surrounding its issuance, the June 8 declaration was a response to three specific questions in formal international arbitration proceedings conducted by the Conference for Peace in Yugoslavia Arbitration Commission.

Thus it was a formal statement of the legal position of Yugoslavia (Serbia and Montenegro) on the international forum they accepted as having *exclusive* jurisdiction over the legal disputes delineated. Unlike the communiqué in the

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Aegean Sea case, it was not a general policy statement, but an immediate and unqualified commitment to the jurisdiction of the Court. In contrast, communications prior to and subsequent to the communiqué in the *Aegean Sea* case suggested that the questions involved had not been clarified and that the communiqué was one step in the continuing process of negotiation of a special agreement; therefore, it was not "an immediate and unqualified commitment to accept the submission of the dispute to the Court unilaterally by Application." 1978 I.C.J. at 43. While requesting the Court to exercise jurisdiction in the case, the Greek government even admitted that another agreement was necessary to establish the terms prior to adjudication by the International Court of Justice. *Id.* at 11. Because the issues were far from clear, the Court found that Turkey did not consent to adjudication without further agreements that would outline the disputed issues.

15. In tone and content, the June 8 declaration is virtually identical to the standard language utilized in treaties by which the parties agree to submit all legal disputes arising under the relevant treaty to the Court if the issues cannot be resolved by agreement. Yugoslavia (Serbia and Montenegro)'s acceptance of the jurisdiction of the International Court of Justice was not contingent upon later agreements but was immediately effective upon issuance. The declaration established by the Conference was the final stage of negotiation prior to adjudicatic of any unresolved legal issues by the International Court of Justice.

16. The formality of the international arbitration process in this case is another distinguishing factor. The letter was a formal statement to the international community generally and to the other former Yugoslavian republics specifically. The formality of the proceedings in which the letter was issued and distributed demonstrates the binding nature of the obligation to the international community.

17. Subsequent communications and practice are also relevant in demonstrating the binding nature of the June 8 declaration. In *Temple of Preah Vihear* (Cambodia v. Thailand), 1961 I.C.J. 9, 22, the Court looked at the context and subsequent circumstances surrounding a Thai declaration to determine that Thailand intended to give the Court jurisdiction. Also in the *Aegean Sea* case several communications entered into evidence contradicted the Greek government's interpretation of the

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communiqué. These communications indicated that Turkey had expressed reluctance to have the dispute immediately heard by the court. The Court considered these other writings to interpret Turkey's intent. The inconsistency of the statements caused the court to find that Turkey did not intend to accept the jurisdiction of the International Court of Justice. 1978 I.C.J. at 44.

18. In this case, there are no communications that contradict interpretation of the letter as acceptance of the Court's jurisdiction. Yugoslavia (Serbia and Montenegro) contested its acceptance of jurisdiction only when called upon to respond to Applicant's statement of jurisdiction in the oral arguments on preliminary relief. This position, however, is not acceptable under international law: "[W]hen consent has been given, it may not be withdrawn, at least if another State has acted on the basis thereof and has instituted proceedings before the Court." SHABTAI ROSENNE, THE LAW AND PRACTICE OF THE INTERNATIONAL COURT, 322 (2nd rev. ed. 1985).

19. In short, the declaration in this case differs from that in the *Aegean Sea* case in virtually every respect. The ICJ should find, after analyzing the content and circumstances of the June 8 letter that it is an immediate and unconditional commitment by Yugoslavia (Serbia and Montenegro) to submit all unresolved legal disputes arising from the Yugoslav crisis to the Court's jurisdiction.