INTERNATIONAL COURT OF JUSTICE

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

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

MEMORIAL
OF THE GOVERNMENT OF THE REPUBLIC OF BOSNIA AND HERZEGOVINA

15 April 1994

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PART 1

INTRODUCTION

CHAPTER 1.1
THE LEGAL ISSUES AT STAKE ARE OF TRANSCENDENT IMPORTANCE

1.1.0.1 By Application filed in the Registry of the Court on 20 March 1993, the Republic of Bosnia and Herzegovina instituted proceedings against the Federal Republic of Yugoslavia (Serbia and Montenegro), invoking the jurisdiction of the Court by reference to Article IX of the Convention on the Prevention and Punishment of the Crime of Genocide, adopted by the General Assembly of the United Nations on 9 December 1948 [entered into force Jan. 12, 1961.78 U.N.T.S. 277].

1.1.0.2 In its Application, Bosnia and Herzegovina indicated what it regarded as its causes of action, for which it sought measures of interim relief [*Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Provisional Measures, Order of 8 April 1993*, I.C.J. *Reports* 1993, p. 3; id. *Order of 13 September 1993*, I.C.J. *Reports* 1993, p. 325].

1.1.0.3 In its Application of 20 March 1993, Bosnia and Herzegovina averred as follows: "Not since the end of the Second World War and the revelations of the horrors of Nazi Germany's 'Final Solution' has Europe witnessed the utter destruction of a People, for no other reason than that they belong to a particular national, ethnical, racial and religious group as such. The

abominable crimes taking place in the Republic of Bosnia and Herzegovina at this time can be called by only one name: genocide." It warned of "the destruction of the Bosnian People" and asserted that the "People and State of Bosnia and Herzegovina have suffered and are now suffering from the effects of genocide imposed upon them by Yugoslavia (Serbia and Montenegro)" [Application, 20 March 1993, pp. 1-2]. This remains the heart and soul of the case as presented to this Court by the Applicant.

1.1.0.4 Although the Court, by Order of 8 April 1993, ordered that provisional measures be taken by the Federal Republic of Yugoslavia (Serbia and Montenegro) to deter and stop acts of genocide, these acts have not ceased. Although the Order of 8 April 1993 indicated that the "Government of the Federal Republic of Yugoslavia (Serbia and Montenegro) should immediately, in pursuance of its undertaking in the Convention on the Prevention and Punishment of the Crime of Genocide of 9 December 1948, take all measures within its power to prevent commission of the crime of genocide" these measures have not been taken, [*op. cit.*, para. 52].

1.1.0.5 Although the Court, in this same Order, also indicated that the "Government of the Federal Republic of Yugoslavia (Serbia and Montenegro) should in particular ensure that any military, paramilitary or irregular armed units which may be directed or supported by it, as well as any organizations and persons which may be subject to its control, direction or influence, do not commit any acts of genocide, of conspiracy to commit genocide, of direct and public incitement to commit genocide, or of complicity to incite genocide, whether directed against the Muslim population of Bosnia and Herzegovina or any other national, ethnical, racial

or religious group. . ." these acts, which were then being committed, continued unabated, to the horror of the entire world [*id.*, para 52].

1.1.0.6 A second request for provisional measures was filed by the Applicant with the Registry of the Court on 27 July 1993. Although the Court, in an Order of 13 September 1993, reaffirmed and strengthened these indications of provisional measures [*op. cit.*, para. 61], they continued to be flouted by the Government of the Federal Republic of Yugoslavia (Serbia and Montenegro) and by persons and organizations on whose behalf that Government incurs legal liability.

1.1.0.7 Bosnia and Herzegovina thus now presents its written pleadings to the Court in circumstances as egregious as these that provoked its Application of 20 March 1993. The recital of facts in Chapter 2 will demonstrate the continuous, unmodified course of genocide on which the Federal Republic of Yugoslavia (Serbia and Montenegro) has embarked and from which it has not been deterred: not by world public opinion, not by the horrific reports of impartial observers, not by the overwhelming majorities that have supported resolutions in United Nations organs and their subsidiary bodies and not even by two Orders of this Court.

1.1.0.8 It is with an all too well-founded sense of despair that Bosnia and Herzegovina returns once more to the bar of the Court to plead its case for relief and redress.Such despair, however, is mingled with hope, for it is evident that this Court itself now stands with the parties to this case before the bar of history. It is called upon to respond to an historic challenge. This will be the World Court's first opportunity to infuse the force of life

into the black-letter text of the Genocide Convention and to deploy it, as intended, against those resurgent tides of inhumanity which, until recently, had been thought to have receded forever. This litigation can have but one redeeming aspect.It is within the power of the Court to lift the Genocide Convention from the dusty abstraction of law libraries and pious museums and deploy it as an effective shield for present and future generations.By demonstrating unequivocally that the Convention has a powerful contemporary meaning and an evident, unshakable intent this Court cannot revive the approximately 200,000 to 250,000 human beings who already have died; but it may help to stop the killing of others, now and in the future.

1.1.0.9 The horrors of the past two years are captured in the concluding words of Matthew Arnold's 1867 poem, Dover Beach:

> And we are here as on a darkling plain
> Swept with confused alarms of struggle and flight
> Where ignorant armies clash by night.

But, uniquely, the I.C.J. has the moral authority and competence to send out a blazing signal beam: bright enough to illumine that darkling plain, reveal the shadows of its culpable actors across the carnage they have wrought and show to all decent humanity the still-standing standard of the law to which all may yet repair.

CHAPTER 1.2

SHARPENING THE FOCUS

1.2.0.1 This Court made clear in its Order of 13 September 1993, that "great suffering and loss of life has been sustained by the population of Bosnia

and Herzegovina in circumstances which shock the conscience of mankind" [*op. cit.* p. 348, para. 52].It noted "the persistence of conflicts on the territory of Bosnia and Herzegovina and the commission of heinous acts in the course of those conflicts" [*id.* para. 53]. The Court also has said that the "heinous acts" that "shock the conscience of mankind" are of such a nature "as might form the subject-matter of a judgment of the Court in the exercise of its jurisdiction under Article IX of [the Genocide] Convention. . . ." [*id.* p. 344, para. 344].Given the urgent need for a judicial rendering of a decision as to this central issue, Bosnia and Herzegovina has determined, in its written pleadings, to focus exclusively on the issues arising out of the Convention. It thereby seeks to assist the Court by clearing away other issues that might obscure the main task.

1.2.0.2 In adopting this course of pleadings, Bosnia and Herzegovina in no way relinquishes its right to pursue in appropriate forums any other legal issues and remedies arising out of the events in the former Yugoslavia. This *caveat* applies also to several issues raised in the preceding applications for provisional measures.For the purposes of this case, however, Bosnia and Herzegovina responds with alacrity to the opportunity to demonstrate to the satisfaction of this Court that the events that form the subject matter of this action constitute genocide, conspiracy and incitement to commit genocide, complicity in genocide and a failure to prevent and punish genocide, that is, violations of Articles I, II and III of the Convention, over which the Court undisputably has jurisdiction by operation of Article IX.

CHAPTER 1.3

THE WRONGS ALLEGED

1.3.0.1 The Federal Republic of Yugoslavia (Serbia and Montenegro) is bound by the international legal obligations set forth in the Genocide Convention, by specifically having accepted the obligations previously incurred by the Socialist Federal Republic of Yugoslavia [*see* below, Part 4]. This is further confirmed by its recognition of Article IX as a basis of jurisdiction and asserted counter-application by the Federal Republic of Yugoslavia (Serbia and Montenegro) in the Provisional Measures phase of this case. The acts which constitute genocide are set out in Article II of the Genocide Convention. Article I establishes the obligation to prevent and punish genocide. Article III further defines corollary acts which are also prohibited under the Convention. These acts have occurred and continue to occur in violation of their explicit prohibition in international law. This violation constitutes the substantive cause of the action being brought by Bosnia and Herzegovina.

1.3.0.2 That these acts of genocide have occurred, as well as conspiracy, incitement and complicity, will be demonstrated by a preponderance of evidence, as is appropriate in a civil action against a State before this Court under Article IX of the Convention. The *travaux* of Article IX make clear that the drafters intended this Article to give rise to a civil action such as is herein brought.

1.3.0.3 As the Genocide Convention requires a showing of "intent" to commit genocide, this, too, will be demonstrated by a preponderance of evidence.However, the authorities of States, like natural persons, must be

presumed to intend the natural consequences of their acts, particularly when, these consequences having already occurred, those acts are then repeated.It is not necessary to demonstrate the state of mind of each perpetrator of each of the provable acts in order to establish necessary intent.

1.3.0.4 Bosnia and Herzegovina will demonstrate that the savage acts of murder, maiming, rape, torture and forcible removal of persons was not the random detritus of warfare but that specific persons were targeted precisely on account of their adherence to an ethnical or religious group and that attacks on these groups was precisely a means to attain the end of clearing entire areas of their Muslim population.

1.3.0.5 Bosnia and Herzegovina will demonstrate that, while a proportion of these acts were committed by Bosnian Serbs, many of such persons or groups were acting under the authority, guidance or influence and with the assistance of the authorities of the Federal Republic of Yugoslavia (Serbia and Montenegro) and that these authorities may be held in law to have tolerated or aided and abetted these acts specifically prohibited in Article III of the Convention. Indeed, some or most of the persons referred to as Bosnian Serbs are persons whose origins are not at all in the territory of Bosnia and Herzegovina but have entered the conflict to fight for a Greater Serbia.

1.3.0.6 Bosnia and Herzegovina will also demonstrate that other acts of genocide were committed by persons and groups directly under the jurisdiction or authority of the Federal Republic of Yugoslavia (Serbia and Montenegro). To this end, the published or reported evidence of witnesses, officials or

representatives of intergovernmental and non-governmental organizations and the accounts of reputable media will be presented to the Court.

1.3.0.7 Since most of these events occurred in a period and place of intense military and paramilitary conflict, the rules guiding this presentation of evidence are those established by this Court.Specifically, Bosnia and Herzegovina will rely primarily on the rules set out in the Corfu Channel case [*Corfu Channel, Merits, Judgment*, I.C.J. *Reports* 1949, p. 4] and the Nicaragua case [*Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. U.S.A.), Merits, Judgment*, I.C.J. *Reports* 1986, p. 14] to guide its presentation of the best available evidence as well as to apprise the Federal Republic of Yugoslavia (Serbia and Montenegro) of its duty to present such relevant evidence as is primarily accessible to its authorities.

1.3.0.8 The Federal Republic of Yugoslavia (Serbia and Montenegro) is bound by the prohibition of acts of genocide set forth in Article II of the Convention, as well as the corollary acts enumerated in Article III.But it is also bound by Article I, which requires States "to prevent and to punish" persons within their jurisdiction who commit the prohibited acts, whether or not the State or its organs participated in or aided their commission.Yet, there are no reports of any Serbs within the jurisdiction of Yugoslavia (Serbia and Montenegro) having been convicted under the Yugoslav law giving domestic effect to Articles II and III of the Convention, despite the extraordinarily high incidence of commission of these prohibited acts in areas under the de facto jurisdiction, control or exclusive influence of the Federal authorities.From this, Bosnia and Herzegovina will invite the Court to infer that the obligation assumed under Article I to "prevent or punish"

has not been carried out with *bona fide* diligence by the authorities of the Federal Republic of Yugoslavia (Serbia and Montenegro).

1.3.0.9 In sum, Bosnia and Herzegovina submits that it has been the victim of genocide and corollary acts, that these acts are prohibited in international law, that they were committed by and/or are attributable to the Federal Republic of Yugoslavia (Serbia and Montenegro) and that this State is bound by the conventional law on genocide to cease and desist from such acts, compensate its victims and make restitution for such injuries as the Republic of Bosnia and Herzegovina has incurred as a consequence of these illegal acts.

CHAPTER 1.4
PLAN OF MEMORIAL

1.4.0.1 The present Memorial will begin, in Part 2, with a recital of the facts and of the supporting evidence. This priority is dictated by the centrality of the facts to the pleadings in this case. In Part 3 there follows a survey of the confirmation of the existence of a campaign of genocide by authoritative international organs.

1.4.0.2 Part 4 will demonstrate that this Court has jurisdiction to hear and to determine this case under Article IX of the Genocide Convention and that the substance of the dispute meets the applicable test of admissibility.

1.4.0.3 Next, Part 5 of the Memorial will seek to demonstrate that the facts proven by the evidence presented in Part 2 meet the legal standards established in

the Convention's definition of prohibited acts. This will be done by recourse to the Convention's text, its travaux, and the penumbra of other multilateral instruments or draft treaties which deal in part with genocide and corollary prohibited acts, or with other matters relevant to the definition and prohibition of these acts.

1.4.0.4 In Part 6, the Memorial will demonstrate that these acts are attributable to the Federal Republic of Yugoslavia (Serbia and Montenegro). This will be done by recourse to the evolving law of state responsibility, including relevant case and customary law, by reference to the conclusions of U.N. organs, subsidiary bodies and experts. These have determined that acts of genocide and corollary acts occurring in Bosnia and Herzegovina are attributable to the Government of the Federal Republic of Yugoslavia (Serbia and Montenegro).

1.4.0.5 In Part 7, Bosnia and Herzegovina will state its submissions and state the remedies it seeks, in damages, restitution and declaratory relief.

PART 2

THE FACTS

CHAPTER 2.1

INTRODUCTION

2.1.0.1 Since late 1991, Bosnia and Herzegovina has been the scene for acts of violence and destruction, the evil brutality of which has been calculated and aimed by Serbs to eliminate the lives, liberty, dignity, religion and culture of the Muslim and Croat people of Bosnia and Herzegovina.

2.1.0.2 The people and culture of Bosnia and Herzegovina have been a living example of the ideal of ethnic and religious tolerance and co-existence. Indeed, during the Spanish inquisition around 1492, many Jews escaped persecution and were granted safe haven by the Ottoman Emperors in Bosnia and Herzegovina, ultimately enabling them to form a thriving community therein.

2.1.0.3 Furthermore, whilst the statistics (produced by a population census in 1991) show that the population of Bosnia and Herzegovina consists of 31.3 % Serbs, 43.7 % Muslims, 17.3% Croats and 7.7% Yugoslavs (ie nationally undeclared), ethnic diversity is amply displayed by the fact that around 30% of marriages in Bosnia and Herzegovina take place between different ethnic groups.

2.1.0.4 However, the cunning picture painted by Yugoslavia (Serbia and Montenegro) is of a Bosnia and Herzegovina which is, and always has been


AUSTRIA
HUNGARY
ITALY
SLOVENIA
Ljubljana
Zagreb
CROATIA
Osijek
VOJVODINA
ROMANIA
ISTRIA
SLAVONIA
Novi Sad
SREM
Belgrade
LIKA
BOSNIA-HERCEGOVINA
Zadar
Knin
Sarajevo
SERBIA
Split
DALMATIA
Mostar
SANDZAK
Dubrovnik
(Ragusa)
MONTENEGRO
Pristina
KOSOVO
BULGARIA
Kotor
Skopje
MACEDONIA
GREECE
ALBANIA
POST-1945 YUGOSLAVIA:
REPUBLICS, AUTONOMOUS
PROVINCES, HISTORIC
REGIONS AND CITIES

diseased by terminal ethnic and religious hatred and division. This is used to conceal and disguise its naked territorial and nationalistic ambitions.

2.1.0.5 The collapse of communism during the late 1980's brought with it a desire on the part of many of the republics of the Socialist Federal Republic of Yugoslavia to seek nationhood [*see* map on page 12] of former SFRY with its former constituent republics]. Serbia, traditionally the strongest of the Republics, sought to militarily crush these desires unsuccessfully in Slovenia in June 1991, partially in Croatia during that year (where JNA (Yugoslavian National Army) and Serb paramilitary forces seized almost 30% of the territory in ferocious and destructive fighting), and most violently in Bosnia and Herzegovina from late 1991 until the present.

2.1.0.6 This Memorial cannot hope to catalogue the full extent of suffering and destruction inflicted upon the people, territory and culture of Bosnia and Herzegovina by Yugoslavian (Serbian and Montenegran), JNA, Bosnian Serb, Serbian paramilitary and other Serb(ian) forces, (hereinafter collectively referred to as the "Serb forces"), which are or were at all material times under the command and control, or were supplied, supported, encouraged and/or aided and abetted by the leaders of Yugoslavia/Serbia and Montenegro ("the leaders"), who could have prevented or curtailed the actions of such forces.

2.1.0.7 Instead of genuinely seeking to prevent or punish such acts, the leaders effectively chose to adopt or acquiesce in them, whilst sometimes seeking at the same time to officially distance themselves from the brutality being perpetrated to serve their ends, by publicly stating that the acts were the results of a civil war, and centuries old ethnic tensions.

2.1.0.8 This Memorial can but seek do justice to the memory of the victims of the horrors perpetrated in the name of Serbian ethnic purity and for the sake of a Greater Serbia. However, figures which are widely accepted indicate that the total number of people killed, mainly Muslim but also Croat is around a quarter of a million, of a total population of around 4.5 million. This takes into account the fact that the bodies of many victims are still undiscovered. Documented figures compiled by the Bosnia and Herzegovina Institute for Public Health in February 1994 (from April 1992), and others shed some light upon the extent of suffering caused by the acts of the Serb forces:

142,334 deaths (of whom 16,510 were children)

161,755 wounded (of whom 33,734 were children)

72,282 seriously wounded (of whom 18,056 were children)

20,000 rapes at least

2.6 million refugees at least

500 Mosques destroyed at least.

These data are compiled from 61 municipalities and represent approximately 65% of the total.

2.1.0.9 Although Croats have suffered at the hands of the Serb forces, the vast majority of the victims have been Muslims, who have been subjected to a systematic and terrifying campaign of killing, rape, torture and destruction. In their desire to "cleanse" strategically important areas of Bosnia and Herzegovina to create an ethnically pure Serbian territory, the Serb forces have used means and methods such as systematic rape and concentration camps.

2.1.0.10 Whilst it is acknowledged that this Memorial cannot comprehensively catalogue and deal with the full extent of the acts committed by the Serb

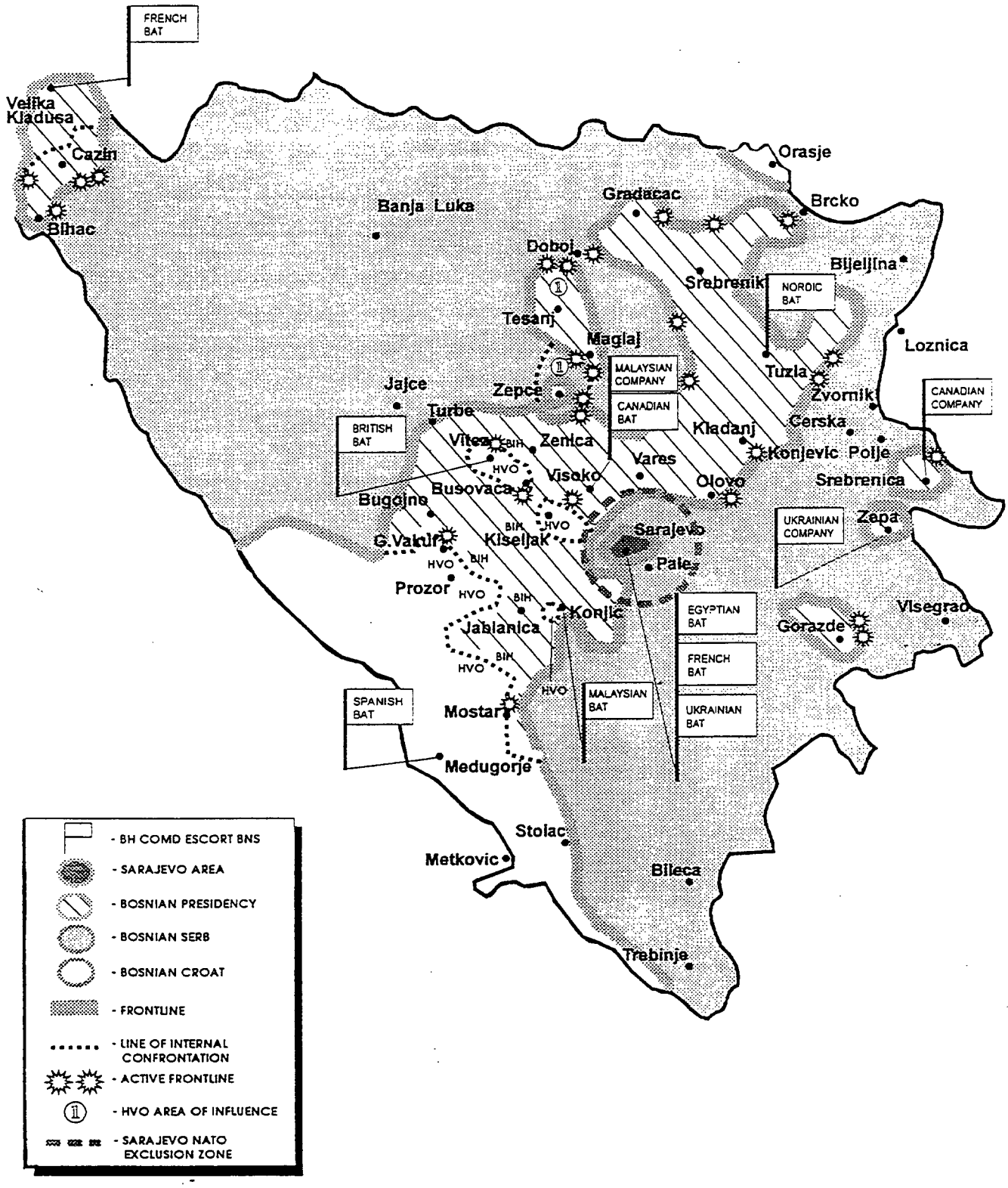
forces, the Court's attention is drawn to the fact that such acts have been shown day after day on television worldwide, and extensively reported in newspapers throughout the world.

2.1.0.11 Furthermore, as a consequence of such acts, Serb forces occupy around 70% of the territory of Bosnia and Herzegovina. Most of the worst acts were perpetrated upon such territory, particularly in North, Northwestern, and Eastern Bosnia, commencing around the borders with Serbia and Montenegro. The rapid and planned nature of the occupation of territory by Serb forces can be illustrated by the map on page 16 of this Memorial which show the areas which have been occupied as a result of their acts. Access to such areas is extremely difficult if not impossible due to the unwillingess of the Serb forces to allow outside observers, and obtaining information therefrom more so.

2.1.0.12 This part of the Memorial will draw upon sources which have been able to carry out investigations, such as the Special Rapporteur to the United Nations Human Rights Commission, the United States Department of State, respected Non Governmental Organisations such as Amnesty International and Helsinki Watch, and respected media sources.

2.1.0.13 In Chapter 2.2 below, specific acts will be referred to by way of example. At Chapter 2.3, the context for such acts will be outlined.

BOSNIA AND HERZEGOVINA FRONTLINES



1 March 1994

This map is not to be taken as necessarily representing the views of the UN on boundaries or political status.

CHAPTER 2.2

THE ACTS WHICH SHOCK THE CONSCIENCE OF MANKIND

2.2.0.1 Part 5 of the Memorial deals with the interpretation, application and effect of the Genocide Convention 1948 ("The Convention") to the acts of the Serb forces. Hereinbelow, examples of the following categories of acts committed by Serb forces, mainly but not exclusively directed against the Muslim population of Bosnia Herzegovina are referred to:

Section 2.2.1 The Use of Concentration Camps

Section 2.2.2 Killing

Section 2.2.3 Torture

Section 2.2.4 Rape

Section 2.2.5 Expelling of people and destruction of property, homes, places of worship and cultural objects

Section 2.2.6 The creation of destructive living conditions - shelling, starvation and intimidation of the population.

Section 2.2.1

Concentration camps

2.2.1.1 From early 1992 onwards, the Serb forces extensively used concentration camps within which they carried out multiple killings, rapes, torture and starvation, predominantly against Muslim Bosnians. At least 170 of such camps were identified in which tens of thousands of Bosnians, mainly Muslims, were imprisoned. The names and locations of the identified camps are shown on the map and tables below.

Concentration Camps and Prisons on the Territory of Bosnia and Hercegovina

Legend

O Sarajevo	**Municipality**
③	**Number of concentration camps and prisons in the Municipality**
121-125	**Number of camp on the key**

List of Concentration Camps and Prisons on the Territory of Bosnia and Hercegovina with Approximate Numbers of Prisoners and Detainees

No.	Location of camp/prison	Number of prisoners/detainees	Number of prisoners/ detainees killed	Number of prisoners/ detainees (Oct. '92)
I	II	III	IV	V
1.	Sarajevo - KPD "Butmir" - Kula	30.000	preko 600	500-550
2.	Sarajevo - Vojne kasarne u Lukavici			
3.	Sarajevo - prostorije MZ Vraca	preko 27.000	preko 500	
4.	Sarajevo - Grbavica (Lenjinova 6)			26
5.	Sarajevo - više garaža i podruma na Grbavici			300
6.	Semizovac - Vojna kasarna	7.000		840
7.	Semizovac - Betonski bunker	preko 50		30
8.	Semizovac - Svrake (privatna kuća)			
9.	Vogošća - Ugostiteljski objekat "Kod Sonje"		preko 100	
10.	Vogošća - Betonski bunker			620
11.	Vogošća - Sportski centar			1.750
12.	Vogošća - Tunel Krivoglavci			950
13.	Vogošća - fabričke hale			
14.	Vogošća - pojedine privatne kuće			
15.	Vogošća - podrumske prostorije Stanice milicije			
16.	Vogošća - Vulkanizerska radnja na vogošćanskoj petlji			
17.	Ilidža - Stara zgrada Doma zdravlja	preko 300		520
18.	Ilidža - Stanica milicije			150
19.	Ilidža - Sportsko rekreativni centar	preko 30.000		
20.	Ilidža - Kamp "Lužani"			650.
21.	Ilidža - zgrada Crvenog krsta			400
22.	Ilidža - skladište Energoinvesta u Blažuju			1.100
23.	Ilidža - Kasindo			
24.	Rajlovac -Kasarna Vojnog aerodroma			
25.	Rajlovac -Distributivni centar			2.200
26.	Rajlovac -Kasarna Butile		preko 100	730
27.	Rajlovac -Skladište goriva Energopetrol			740
28.	Hadžići - Kulturno sportski centar	preko 300		2.500
29.	Ilijaš - Osnovna škola "27. juli"			450
30.	Ilijaš - Industrijska škola			
31.	Ilijaš - Stara zgrada Željezničke stanice			
32.	Ilijaš - Skladište lne			660
33.	Ilijaš - Stara veća jama u Podlugovima			
34.	Ilijaš - Baraka stare OS "Vlado Vuković" u Podlugovima	oko 100		750
35.	Ilijaš - Hala pogona MIK u Podlugovima			
36.	Ilijaš - Betonski bunker uz rijeku Stavnju u Podlugovima			
37.	Pale - Sportska dvorana	preko 20.000		2.500
38.	Pale - Kino sala			
39.	Pale - Dom kulture			
40.	Pale - Koran			
41.	Sokolac - Prostorije Psihijatrijske bolnice			
42.	Sokolac - Fiskulturna sala			
43.	Sokolac - Punkt zimske službe u Podromaniji			
44.	Sokolac - Pogoni KTK "Visoko" u Knežini			
45.	Zvornik - Karakaj (Tvornica glinice)	3.000	preko 400	1.500
46.	Zvornik - Karakaj (Tehnički centar)	700	400	
47.	Zvornik - Stadion Divić			400
48.	Zvornik - Seoski dom u Čelopeku			
49.	Zvornik - Selo Pilice			
50.	Kalesija - Selo Osmanci			
51.	Bratunac - Stadion FK "Bratstvo"	7.000 - 8.000	preko 2.000	
52.	Bratunac - Sportska dvorana OŠ "Vuk Karadžić"			910
53.	Vlasenica - Logor Sušica	oko 3.000	preko 1.000	1.200
54.	Vlasenica - Osnovna škola			
55.	Srebrenica - Nova Kasaba			
56.	Višegrad - Stanica milicije			
57.	Višegrad - Sportski centar		preko 1.000	1.630
58.	Višegrad-hotel "Bikavac			
59.	Višegrad-hotel "Vilina vlas"-višegradska banja			
60.	Višegrad-Objekat Hidrocentrale			

61.	Vatrogasni dom			
62.	Višegrad-Vojna kasarna u Požarnici			
63.	Višegrad-Vojna kasarna u Vardištu			
64.	Višegrad-Vojna kasarna			
65.	Višegrad-OŠ "Hasan Veletović"			
66.	Višegrad-OŠ "Želimir Željić" u Prelovu			
67.	Višegrad-Srednjoškolski centar			
68.	Rudo-Stara željeznička stanica			
69.	Rudo-Vojna kasarna			
70.	Rogatica-Srednjoškolski centar "Veliko Vlahović"			
71.	Rogatica-Kamp Podosoi			2.300
72.	Rogatica-OŠ "Ragib Džindo"	preko 500		
73.	Rogatica-Sladara			
74.	Rogatica-Stara OŠ na Borikama			
75.	Rogatica-Crkveni dom			
76.	Foča-Kazneno-popravni dom	preko 10.000	preko 1.000	2.500
77.	Foča-Kazneno-popravni dom Velečevo			
78.	Cainiče-Logor na Mostinii			
79.	Bijeljina-Vojna kasarna			1.320
80.	Bijeljina-Selo Batkovići			oko 4.000
81.	Majevica			860
82.	Ugljevik			600
83.	Ugljevik-Termoelektrana			7.000
84.	Lopare			
85.	Sekovići (ženski logor)	800		
86.	Lukavac-Karanovac			350
87.	Brčko-Luka		preko 3.000	5.000
88.	Brčko-Autobaza "Laser"			
89.	Brčko-Restoran "Vesfalija"			
90.	Brčko-Brezovo polje			5.000
91.	Brčko-Fudbalski stadion			
92.	Brčko-Osnovna škola u Lončarima			
93.	Doboj-Vojna kasarna			
94.	Doboj-Rukometni stadion	4.000		
95.	Doboj-Kazneno-popravni dom "Sprečа"			
96.	Doboj-Železnička stanica			
97.	Doboj-Srednjoškolski centar			
98.	Doboj-Vojna kasarna u Ševarlijama			70

99.	Doboj-Sportsko-rekreativni centar "Ozren"			1.400
100.	Teslić-Stadion "Proleter"			
101.	Teslić-Lječilište "Banja Vrućica"			
102.	Teslić-Pribinić (na obroncima planine Borije)			500
103.	Prijedor			
104.	Prijedor-Brezina			
105.	Prijedor-Tukovi			
106.	Prijedor-Kratelj			oko 3.000
107.	Prijedor-Karan			
108.	Prijedor-Manjača			oko 10.000
109.	Prijedor-Omarska			oko 8.000
110.	Prijedor-Tomašica			
111.	Prijedor-Trnopolje			oko 5.000
112.	Prijedor-Čela			220
113.	Prijedor-Kebljani			
114.	Prijedor-Brezičani			2.000
115.	Prijedor-Tvornica Keraterm			oko 4.000
116.	Prijedor-Sportski centar			2.600
117.	Prijedor-Rudnik Ljubija			2.300
118.	Prijedor-Sivac			238
119.	Prijedor- Senkovac			
120.	Prijedor - Majdan			
121.	Sanski Most - Sportska dvorana			preko 2.000
122.	Sanski Most - Logor "Krinks"		preko 100	
123.	Sanski Most - Logor "Betonirka"		preko 100	
124.	Bosanski Novi - Stadion			preko 6.000
125.	Bosanski Novi - Mjesni hotel			
126.	Bosanski Petrovac - Jasikovac			
127.	Bosanski Petrovac - Selo Vrtoče			
128.	Drvar - Selo Prekaja			
129.	Bosanska Krupa - Osnovna škola u selu Jasenice			
130.	Bosanska Krupa - Osnovna škola u selu Suvaji			
131.	Bosanska Krupa - OŠ "Petar Kočić"	3.000		4.000
132.	Bosanska Krupa - Osnovna škola u selu Gorinji			
133.	Kotor Varoš - Pilana			
134.	Kotor Varoš - Srednjoškolski centar			
135.	Kotor Varoš - Stari sud			
136.	Kotor Varoš - Osnovna škola "Bratstvo i jedinstvo"			

137.	Kotor Varoš - Maslovare			
138.	Stara Gradiška - Kazneno popravni dom			1.500
139.	Bihać - Vojna kasarna u Ripču	preko 200		
140.	Bihać - Selo Račići			
141.	Bihać - Otoka kod Ripča	preko 100		
142.	Bihać - Osnovna škola u Orašcu			
143.	Bihać - Traktorska stanica u Ripču	preko 140		
144.	Šipovo - Staro Šipovo			1.500
145.	Banja Luka			
146.	Banja Luka - Kazneno popravni dom "Tiniica"			980
147.	Glamoč - Stadion			
148.	Donji Vakuf - Magacin "Vrbaspromet"			860
149.	Donji Vakuf - Magacinske prostorije štaba TO			440
150.	Trebinje - Vojni zatvor			1.490
151.	Nevesinje - Tvornica alata "TA"			
152.	Gacko - Avtovac			oko 1.000
153.	Gacko - Fazlagića kula			
154.	Gacko - Podrumski prostori Termoelektrane "Gacko"			
155.	Bileća - Vojna kasarna			2.600
156.	Kalinovik - Barutni magacin		34	oko 120
157.	Kalinovik - Osnovna škola u Jelašcu		oko 300	240
158.	Konjic - Boračko jezero			
159.	Zavidovići - Selo Milievići			

List of Concentration Camps and Prisons on the Territory of Serbia and Montenegro in which Citizens of Bosnia and Hercegovina are held

No.	Location of camp/prison	Number of prisoners/detainees	Number of prisoners/detainees killed	Number of prisoners/detainees (Oct. '92)
I	II	III	IV	V
1.	Loznica - Sportsko rekreativni centar			1.380
2.	Beograd - Batajnica			2.200
3.	Beograd - Kasarna "4. juli"			2.500
4.	Niš - Vojni logor			1.540
5.	Subotica - Sabirni centar			5.000
6.	Aleksinac - Zatvoreni rudnik		oko 2.000	12.000
7.	Šabac - "Zorka"			1.460
8.	Bor - Borski Rudnik			2.500
9.	Sremska Mitrovica			
10.	Sremska Mitrovica - Fruška Gora			
11.	Mokra Gora - u blizini Užica			3.000
12.	Prijepolje			480
13.	Baošići - u blizini Herceg-Novog			350
14.	Nikšić			

2.2.1.2 Of all these camps, at least 14 of which were in Serbia proper, some of the most notorious were at Manjaca (Banja Luka - Northern Bosnia), Prijedor (Keraterm - Northern Bosnia), Prijedor (Omarska - Northern Bosnia), Prijedor (Trnopolje - Northern Bosnia) and Brcko (Luka - Northern Bosnia).

2.2.1.3 In all these and other camps, Bosnian people were treated in a manner which is so shocking as to almost defy description. Some examples are described below.

(a) Prijedor - (Omarska - Northern Bosnia)

2.2.1.4 In this camp operated by Serb forces (which had previously been an open ore mine) [Helsinki Watch - War Crimes in Bosnia Hercegovina (April 1993) Volume II p. 87, para. 1], during a three month period after April 1992, between 10 to 20 people were killed every day. The victims were buried in open pits, disused mines, or their bodies dumped in a nearby lake [United States Department of State Dispatch [16 November 1992, p. 804]. In total, it is estimated that around 11,000 civilans were held at this camp without any lawful justification, of whom between 1200 and 2000 were killed in a three month period [*The Second Submission to the Security Council made by Canada*, 30 June 1993, p. 15 (S/26016)].

2.2.1.5 On one night in July 1992, a total of 200 people were killed [*Submission from the Permanent Representative of Austria to the United Nations*

Secretary General, 5 March 1993, based upon testimonies gathered by the Austrian authorities, esp. at pp. 16 to 22 (S/25377)].

2.2.1.6 A witness who was apprehended by Serb forces in Prijedor and imprisoned in the camp has described how he was forced to carry the bodies of dead prisoners. He estimated that he helped to transport or bury 10 to 20 persons each day, and that during a 9 week period of imprisonment, he was forced to participate in the burial of between 700-800 bodies [*The Third Submission of the Government of the United States of America to the United Nations Secretary General* attached to a letter dated 5 November 1992 ("Third US Submission") p.6 (S/24791)].

2.2.1.7 Muslim intellectuals, professionals and clergymen or leaders were especially targeted for execution [*The Report on the situation of human rights in the territory of former Yugoslavia prepared by Mr. Tadeusz Mazowiecki, Special Rapporteur of the Commission on Human Rights* ("The Rapporteur") 17 November 1992, p. 13, para. 31 (A/47/666 - S/24809)].

2.2.1.8 A 30 year old Muslim male who was imprisoned for 9 weeks in this camp described some of the scenes he witnessed at the camp during his captivity;

> "Guards frequently beat people with thick electrical cables, often so badly that they could not stand afterwards; in administering these beatings, guards would hit prisoners in specific places on their bodies, often the kidneys, in an effort to rupture important internal organs.
>
> Prisoners were forced to run across broken glass in their bare feet; when they fell, guards would beat them with nightsticks and iron bars.

> As a punishment administered in front of a group of prisoners, a guard cut off the testicles of a prisoner with a knife; one prisoner was forced, under threat of being executed, to bite off the testicles of another prisoner with his teeth.
>
> The only water that prisoners had to drink was from a river contaminated by discharges from an iron mine; the water was yellow, the prisoners urine ran red." [US Department of State Dispatch Bureau of Public Affairs, 16 November 1992, p. 829 Col. 3].

2.2.1.9 Physical torture, mutilation, starvation and sexual abuse were common place in this and other camps. A 52 year old Muslim cleric described how he was interned at the camp for 75 days:

> "during which time he was beaten regularly until he bled. The cleric witnessed several public beatings and sexual torture in the camp. He said that several men had been forced to have intercourse with each other, and that guards cut off some prisoner's hands and penises as a punishment and to frighten the other men." [*Second US Submission*, p. 10, para. 1 (S/24705)].

2.2.1.10 The Human Rights Organisation, Helsinki Watch, has identified and named the individuals from the Serb forces who were in command of this camp [Helsinki Watch - Prosecute Now, 1 August 1993 (Issue 12), p. 15]. When pressure was applied by the World community upon the Serb forces to close this camp, they purported to do so in August 1992, but in reality transferred the prisoners to other camps such as the one located in Mānjaca [*Third US Submission*, 10 November 1992, p. 4, para. 4 (S/24791)].

(b) Prijedor (Keraterm - Northern Bosnia)

2.2.1.11 This Serb operated camp was on the site of a ceramics factory, outside the city of Prijedor. In the case of this, as in other concentration camps, a story of torture, starvation, mutilation and killing is told by eye witnesses. The camp was operated from around May 1992 until August 1992, when media attention forced the Serbs to close it.

2.2.1.12 In reality, again the Serbs forces merely transferred around 1500 individuals who were being held here to the camp at Trnopolje before the arrival of the Red Cross. [*Sixth US Submission,* 10 March 1993 p. 5 (S/25393)].

2.2.1.13 One witness, a 38 year old male resident of Hambarine described the scene when he arrived at the camp by bus after being detained by Serb soldiers on 20th July 1992:

> "All the men in the bus got out, and we had to put our hands up in the air. One by one, we went to the porter. They took all our belongings, and we were taken to a larger room, which already housed prisoners. There were about 300 of us in there. More buses kept arriving. We were able to see through the windows, which had bars on them. Pallets were on the floor, and a thin metal sheet of corrugated steel was on the walls. The room appeared to have been some type of warehouse. We already were crowding against the walls, but they kept putting more men inside. By the afternoon, an additional one hundred men came. We were given no food or water. Eventually, four hundred men crowded into a room of about one hundred square meters". [Helsinki Watch, "War Crimes in Bosnia-Herzegovina", April 1993, Volume II, p. 122].

2.2.1.14 Another witness, Haris, a 56 year old painter from the village of Hambarine described beatings he suffered, and scenes he witnessed:

> "Every night, guards would read ten to fifteen names from a list. These men were then taken from the room and returned later in awful condition. They were bloody, their bones were broken and they were falling down, vomiting blood and fainting. By morning, some would be dead..very few survived [the beatings]....They beat us with ..one-and-a-half meter long iron bars..From time to time, we were forced to line up and to lie on the ground with our faces in the blood and dirt. The soldiers would then walk between us with sticks and bars, beating people. I had lost a lot of weight in Keraterm, and my ribs were protruding through my skin. One soldier pulled me up by the hair, reached over, grabbed my rib and snapped it." [*id.*, pp. 123 to 124].

2.2.1.15 One particularly horrific mass execution took place in the early hours of 25 July 1992. A 38 year old witness from Hambarine (identified as AH in his statement) described the scene:

> "On [Friday July 24th]...at about 8.00pm, while we were drinking the water, they took out about 20 or thirty people. The worst beatings took place then. People came back with broken heads and ribs. People cried and screamed. Some in the room tried to save them and cried for water. Some were already hallucinating from the heat, and a ruckus ensued. The guards started screaming that they would shoot us. A general panic gripped the room. The door was large and made of thin aluminum sheet. Then they started shooting from the other side of the door with machine guns and automatic weapons. People started to fall to the floor. The shots were fired at random and they pierced the door. I lost consciousness then."

He was wounded, and showed his wounds to the Helsinki Watch representative. He went on to describe the aftermath:

> "In the morning, I awoke and saw dead bodies on the concrete floor. There were so many bodies that you had to walk over them. A few stayed alive but most of them were

killed or wounded. People were moaning and the guards broke down the door...They said that they were looking for the leaders of the riot..About twenty men were taken out...I heard shots and screams. I also heard trucks pulling up outside...I would guess that there were about 140 dead and about forty or fifty wounded...

Then those of us who remained in the room were taken outside. We had to keep our hands up in the air...We stayed there until the "Serbian Army" and police officers came and started to beat us, one by one with the butts of their guns. I couldn't look up.. but I heard gunshots occasionally...

During this time the temperature was increasing outside. We were on the concrete all day and some asked for water. They then plugged in a fireman's hose and hosed us down for about thirty minutes. Since then I have had problems with my hearing...We figured that about thirty or forty had been killed on the concrete. They took us back to the same room, but they had taken out the wooden pallets. They [probably] took them out to wash the blood off and when we got there we had no pallets. I think they gave us water and some bread then but I can't really remember."

This account has been confirmed by other witnesses [Helsinki Watch *id.*, pp. 124 to 126, the account of the witness named Haris; also *Second US Submission*, 23 October 1992, p. 5, para. 3 (S/24705); *Third US Submission*, 10 November 1992, pp. 4-6 - the accounts of three different witnesses (S/24791)].

(c) Brcko (Luka - Northeastern Bosnia)

2.2.1.16 The camp was operated between May and July 1992 by Serbian forces who had earlier taken control of the area [see *The Guardian*, Ian Traynor 5 May 1992; *Third US Submission,* 10 November 1992, p. 7 (S/24791)]. Torture,

starvation and killings were commonplace at this camp, which was housed in a warehouse and brick factory [*id.*, see also *The Rapporteur's Report* 10 February 1993, p. 15, para. 63 (E/CN.4/1993/50)].

2.2.1.17 During its period of operation, around 2,000 to 3,000 Muslim men, women and children were murdered [*Second US Submission,* 23 October 1992, p. 6 (S/24705)]. Most of the killing was carried out by Serb paramilitary forces led by Selijko Raznjatovic (Arkan) and Vojislav Šešelj, who are both leading politicians in Yugoslavia (Serbia and Montenegro). [The United States Department of States Dispatch of the Bureau of Public Affairs ("The Dispatch"), 2 November 1992, p. 803].

2.2.1.18 The bodies of the victims were disposed of in various ways. Some were buried in a mass grave. Others were thrown into the Sava river, having been dismembered in some cases. [*Seventh US Submission*, 9 April 1993, p. 30 (S/25586)]. Some were also destroyed at a meat processing plant, and others were burned in nearby factory furnaces [*Third Submission* , p. 7 para. 4 and p. 9; *Seventh US Submission,* p. 16, para. 3 (S/24791)].

2.2.2.19 The Third US Submission refers to witness testimony of treatment and conditions at the camp:

> "One example was an individual who had his ears cut off with a knife by a Specijalci soldier. As he grabbed for his ears in pain, a young woman cut off his genitalia with an instrument called a "spoon". As he fell forward and lay on the ground, he was shot in the head by a guard. In other instances, ears and noses were cut off and eyes gouged out. Knives were used to cut into the skin of internees all the way to the bone; some fingers were cut off entirely. All was done in front of other internees.

> Beatings with clubs were common. A Specialji soldier used a wooden club with metal protruding from it to kill several people. He forced internees to lick the blood from the metal studs.
>
> Approximately 10 to 15 Chetniks, Yugoslav Federal Specijalci, and Serbian police were involved during the daily occurrences, but some participated on a more regular basis...
>
> There was also a torture room at Luka-Brcko camp. Those tortured were either killed immediately after being tortured or were left to bleed and, if they did not die in two to four days on their own, were shot to death. They were left lying in their own blood in the living areas and other internees were not allowed to help in any way..." [p. 8 (S/24791)].

2.2.1.20 Women were also brought to the camp and raped by the Serb soldiers, some girls being as young as 12 years old [*Third US Submission*, p. 9, para. 2; also *Seventh US Submission*, p. 7, para. 2, and p. 21, para. 3; *The Rapporteur's Report*, 10 February 1993, p. 15, para. 63 (E/CN.4/1993/50)].

2.2.1.21 These camps and the others which were operated by the Serb forces served one purpose - to destroy the life, will, dignity, and existence of the Muslim people of Bosnia Herzegovina. The systematic nature in which the Muslim victims were apprehended after Serb forces took control of a particular area, and their subsequent treatment point to a specific policy to achieve their destruction.

Section 2.2.2

Killing

2.2.2.1 The destruction of mainly Muslim life is a necessary part of the military and ethnocentric strategy of the Serb forces. The scale in which this took place, and is still taking place, is such that an estimated quarter of a million of Muslims in Bosnia and Herzegovina have become its deathly victims.

2.2.2.2 At the beginning of April 1992, more than 1,000 Muslim civilians were killed by Serb paramilitary forces in Bijeljina. [*Report to the United Nations submitted by the Permanent Representative of Canada,* 10 March 1993, p. 14 (S/25392)].

2.2.2.3 Around 15,000 Muslims from the villages in the region of Gornja Sanica, Bijeljina, Budelj, Velagici, Pudin Han, Krasulja and Hrikovac (who comprised 95% of the total population in this region) were either killed, incarcerated or forced to work in the fields [*Human Rights Committee Report*, 27 April 1993, p. 13 (CCPR/C/89)].

2.2.2.4 The Rapporteur, referred to the systematic elimination of the Muslim population by Serb forces:

> "There used to be six mountain villages called Hambarine, Rizvanovic, Rakovcani, Sredice, Carakovo and Bisceni near Kozarac in north-west Bosnia and Herzegovina. When Serbian forces took these villages around May 1992 three quarters of the 4,500 inhabitants are reported to have been executed. ..A boy aged 16..[together] with a neighbour..witnessed the death of his uncle, 61 years old, and a neighbour aged 58: "They made them punch each other's head before hanging them from a bridge" [10 February 1993,E/CN.4/1993/50, para. 39].

2.2.2.5 The deliberate shelling of civilians was often resorted to by the Serb forces. Whilst this took place wherever Serb forces were present, the most widely reported examples are the destruction of Srebenica, Gorazde and the relentless bombardment of the bastion of Bosnian culture and tolerance, Sarajevo.

2.2.2.6 Before the Serb forces began their attack on Bosnia and Herzegovina, Srebrenica had a population of 7,000. By early March 1993, this had become around 60,000 with the influx of Muslims who had been driven from their homes in the surrounding villages. Of this population, 20 to 30 persons were dying each day of starvation alone, as the Serb forces surrounding Srebrenica refused to allow any food or medical supplies to go through. [*The Periodic Report of the Rapporteur*, 5 May 1993, p. 8, para. 30 to 40 (E/CN.4/1994/3)].

Moreover, the wretched existence of the people trapped inside Srebrenica was made even more doomridden by the continued shelling by Serb forces, some being fired from across the border in Serbia [*Seventh US Submission,* p. 25 (S/25586)].

2.2.2.7 During one particular incident on 12 April 1993, at least 15 children were killed whilst playing football in a school yard, with a six year old boy being instantly decapitated. One UNHCR who witnessed the shelling stated;

> "I will never be able to convey the sheer horror of the atrocity I witnessed..Suffice it to say that I did not look forward to closing my eyes at night for fear that I would relive the images of a nightmare that was not a dream."

2.2.2.8 With the water and electricity supplies having been cut off by the Serb forces, Srebrenica was described in April 1993 by members of United

Nations Security Council Mission visiting the besieged town as "an open jail" where Serbian forces were planning "slow motion genocide". [*Eighth US Submission*, 16 June 1993, pp. 25 and 29 (S/25969)].

2.2.2.9 Elsewhere, the picture was the same. On 16 May 1992, at least 83 Muslim civilians, including eleven children and sixteen elderly persons were executed by Serbian paramilitary forces. [Helsinki Watch, *War Crimes in Bosnia-Hercegovina*, August 1992 p. 7].

2.2.2.10 On 21 May 1992, a mass murder of Muslim patients at the Zvornik Medical Centre took place to make way for wounded Serbian soldiers. A former employee recounted how he watched 36 adult patients being forced outside and shot on the hospital grounds. As for the children:

> "Shortly thereafter, uniformed and non-uniformed Serbian soldiers moved through the pediatric centre breaking the necks and bones of the 27 remaining Muslim children, the only children left as patients at the hospital. Two soldiers forced him to watch for about 15 minutes, during which time about 10 or 15 of the children were slaughtered. Some were infants. The oldest were about five years old. The witness said that a Serbian surgeon, who also stood by helpless, later went insane." [*Third US Submission*, 5 November 1992, p. 10 (S/24791)].

2.2.2.11 On or around 25 May 1992, Serbian artillery began to shell the town of Kozarac, followed by an attack by tanks and infantry. The town was virtually destroyed and of the population of 15,000, around 5,000 are estimated to have been executed by the Serb forces. [*The Rapporteur's Report*, 17 November 1992, p. 8 para. (d) (S/24809)]; also *Fourth US Submission,* 8 December 1992, p. 9, para. 4 (A/47/666 S/24809); see also

Ian TRAYNOR "How they wiped out Kozarac" *The Guardian* 17 October 1992, p. 23].

2.2.2.12 The Rapporteur also refers to events in Prijedor:

> "(e) The night of 29 May tanks and infantry took up position around Prijedor...When the attack began, Serbs from the village guided the tanks to the homes of certain Muslims, and the inhabitants were asked to come out and show their identity documents. Many of those who did were summarily executed. According to witnesses, some 200 residents of a single street (Partisan St.) were executed, and a hundred homes were destroyed. During the attack the local radio continued to call for the surrender of arms, yet not one shot had been fired by the Muslims.
>
> (f) When the artillery barrage stopped around noon, groups of extremists, probably under the control of ARKAN, began executing people, taking their victims to the street and slitting their throats, according to witnesses. The bodies of the dead were carried away by trucks, which left a trail of blood..In the aftermath, houses which had been too badly damaged were bulldozed, and their foundations covered with fresh earth. Five mosques were destroyed, and the Muslim cemetry was razed...
>
> (i) In September the last remaining mosque in Prijedor, and the Catholic church, were destroyed by explosions 10 minutes apart.."[Report, 17 November 1992, p. 9 (S/24809)].

[*see* also *Second US Submission*, 22 October 1992, p. 8 para. 3, where it is estimated by witnesses that about 3,000 to 5,000 people were buried in a mass grave around the town of Prijedor (S/24705)].

2.2.2.13 A 21 year old Serbian fighter has given his own account of the killings committed by him, describing how he shot dead 10 members of a Muslim family in late June in Ahatovic:

> "It was taken for granted among us that they should be killed. So when somebody said "Shoot", I swung around and pulled the trigger, three times on automatic fire. I remember the little girl with the red dress hiding behind her granny"

This fighter also described how he raped and killed Muslim women, and how in July 1992, he had seen 30 men from Donja Bioca being shot and loaded, in some cases whilst still alive, into a furnace at a steel plant at Ilijas, a town north of Vogosca. [The United States Department of State Dispatch Bureau of Public Affairs, 28 December 1992, p. 919, 2nd Column; also *The Guardian* "Slaughter in the name of Serbia", 23 December 1992].

2.2.2.14 Amnesty International investigated events in and around the Serb controlled town of Bosanski Petrovac between April and November 1992. By September 1992, the Muslim population (at least 20% of the total) had gone from this town. From April 1992 onwards, the Serb forces had begun killing Muslims deliberately and arbitrarily:

> "Although the scale and chronology of abuses has varied in different areas, Amnesty International considers that the events in Bosanki Petrovac are broadly representative of the patterns of gross abuses committed across Bosnia-Herzegovina in the process of the forcible expulsion of thousands of Muslims from their homes." [Amnesty International, Bosnia-Herzegovina - a Wound to the Soul, January 1993, p. 2, para. 2].

2.2.2.15 The Serb forces were merciless in the implementation of their policies. Even Serbs who refused to cooperate with them were not spared. The Rapporteur referred to executions of such people:

> "..for example in Teslic on 2 June 1992 when three Serbs were reportedly killed for refusing to co-operate with the Yugoslav National Peoples' Army (JNA) and Serbian ..militia in persecuting Muslims and Croats. It has also been reported that the Serbian Neskovic family, accused of hiding Muslims, as well as a commander of the Serbian police were killed because they opposed the killing of Muslims in Bratunac and the surrounding area."[Report, 10 February 1993, para. 22 (E/CN.4/1993/50)].

2.2.2.16 On 5 May 1992, a 41 year old Muslim woman witnessed the execution of a Serbian civilian by Serbian soldiers wearing the insignias of the Chetniks [Serb paramilitaries] and the Yugoslav army in the area near Sarajevo airport. All residents were ordered out of their homes, and Serbs and Muslims were told to stand in separate lines:

> "One Serb, a 50 year-old man known as "Ljubo", refused to be separated from his Muslim neighbours...the Serbian soldiers..dragged him to the ground, and five or six of them beat him until he was dead." [*Fourth US Submission*, 7 December 1992, p. 10, para. 3 (S/24918)].

2.2.2.17 The Serbian intent against the Muslim people was also evidenced in their elimination of mosques, libraries and other Muslim religious sites. They were also particularly brutal with Muslim clerics. In the Second US Submission, reference is made to the killing of Imam Mustafa Mojkanovic of Bratunac. He was

> "tortured before thousands of Muslim women, children and elderly at the town's soccer stadium, according to Imam Efardi Espahic of Tuzla. Serb guards ordered the cleric to

> cross himself. When [he] refused, they beat him, stuffed his mouth with sawdust and beer, and then slit his throat.
>
> The Muslim mufti of Zagreb, Sevko Omarbasic, has said that by the end of July [1992] the Serbs had executed 37 imams."[*Second US Submission*, 23 October 1992, p. 8 (S/24705)].

2.2.2.18 A 48 year old Muslim from Sanica Donja, near Kljuc described how he saw the decapitation of about 100 men by JNA forces in early July 1992, after they had occupied that town:

> "regular [JNA] troops again re-entered [Sanica Donja]..Starting at one end of the village and going from house to house, they took all the men hostage and used them as a human screen as they went through the village.
>
> The witness believes that these JNA forces were from the Sixth Krajina Brigade headquartered at Palanka...
>
> The roughly 32 men were ...loaded into a canvas-covered truck.. [which] stopped at the Ojedinostovo school in Tomina...Male prisoners were brought out of the school three at a time and were walked over to three other soldiers near the trucks. These soldiers laid the prisoners down and cut off their heads with a curved knife about 30 centimeters long. Four men in civilian clothes, apparently prisoners, then loaded the heads onto one truck and the decapitated corpses into the other.." [*Sixth US Submission*, 10 March 1993 p. 10 (S/25393)].

2.2.2.19 In Banja Luka, a Serb controlled area in Northern Bosnia, Serb forces are still killing, wounding and intimidating Muslims and Croats. The Rapporteur recently stated that the Serb authorities in Banja Luka had removed physical traces of the presence of the Muslim community with the demolition of all of the municipality's 202 mosques. On 15 December 1993, the remains of the 16th century Ferhadpasina mosque and four other

mosques/mausoleums were razed, and the site of the mosque is presently being used as a car park [*6th Report*, 21 February 1994, p. 5, para. 13 (E/CN.4/1994/110)].

2.2.2.20 Even though the majority of the population of Muslims has been systematically driven out of Banja Luka and its environs, the killing, rape and intimidation of those few who remained has continued unabated at the hands of the Serb forces who control the area. Commenting upon the ever present threat to Muslims and Croats in Banja Luka, Joran Bjallerstedt, the UN High Commissioner for Refugees' chief protection officer for Yugoslavia and its former republics stated in early 1994;

> "We are seeing a pattern of atrocities, and it is getting worse..our only solution in this case is to move people out of the area. Hundreds of people's lives are at stake." [*International Herald Tribune*, 28 March 1994.].

2.2.2.21 The above examples are a very small selection of the many thousands of testimonies which have been collected, and the many reports which have been produced. Yet they all point to a policy of killing being implemented by the Serb forces predominantly against the Muslim people, but also against the Croats and anyone else who dared to stand in their way.

Section 2.2.3

Torture

2.2.3.1 Starvation, humiliation, sexual assaults including rape and buggery, physical violence and pyschological attack against mainly Muslims but also Croats were all too common in areas where Serb forces had control. The concentration camps were not the only scenes of such calculated barbarity.

2.2.3.2 Around 30 May 1992, the town of Prijedor having been attacked by Serb forces, a number of Muslim men were taken to the offices of the Secretariat of Internal Affairs (SUP), where they were detained, beaten, tortured and some were killed. One man related his ordeal:

> "In SUP Serb soldiers pierced my skull with the gun breech. We were all mercilessly beaten; Serbs ordered us to face the wall so that we could not see who was beating us. There were about one hundred Serb soldiers in the room "interrogating" and beating us". [*The Second Submission of the Government of Canada* to the United Nations, 29 June 1993, p. 16 para. 2.13 (S/26016)].

2.2.3.3 On 20 July 1992, Serb soldiers rounded up the Muslim men living in the village of Biscani:

> "They were forced to lie down in the center of town on asphalt. Serb soldiers beat them with iron bars, and forced them to sing patriotic Serbian songs."
>
> "The most prominent women in the village, about 100, were brought together. As the women were told to disperse, they were shot in the back. The bodies of the women lay in the road for four days until Serb trucks came to collect them." [The United States Department of State Dispatch Bureau of Public Affairs, 2 November 1992, p. 803].

2.2.3.4 A 20 year old Muslim who had earlier fled from Hambarine after it had been attacked by Serb forces fell victim to them later. He described how on July 20, Serbs came to arrest all men over the age of 15 from Biscani, where he had been staying in his uncles house:

> "Judging by their accents and the style of caps which they wore, the witness believes that his captors were Montenegrins.

> ..the soldiers ordered the eight men, who had lined up in pairs, to begin beating the man next to them in the line. The witness was on the end of the line and standing next to his father, so he was being ordered to begin beating his father..
>
> After a short while, the man in the pair next to the witness refused the soldiers' exhortations to beat his son more fiercely. One of the soldiers then marched the man off the road and into the ditch where he shot him.
>
> By the end of the ordeal, six of the men either refused or were unable to continue beating their kin, and were executed. The witness and the youngest in the group managed to persuade the soldiers to spare them by lying and pleading that they were only 18 years old. The soldiers, however, did beat the two boys badly, and the witness lost a tooth."[*Sixth US Submission*, 10 March 1993, page 3, para. 4 (S/25393)].

2.2.3.5 In the Seventh US Submission, the testimony of three Muslim men from Bileca aged 33, 35 and 39 is related. They witnessed the rounding up of the entire Muslim population of their village, placement of the men in detention centers, and the final "ethnic cleansing" of Bileca by local Serbian authorities:

> "The 35 year old witness described how 50 men were singled out for physical abuse at the detention center in Bilica. each night the police would enter the camp and conduct "telephone" torture. This method consisted of delivering 40 volt electrical shocks through a telephone wire affixed to their fingers. Each time the phone was dialed, the prisoners received massive electric shocks." [*Seventh US Submission*, 12 April 1993, p. 15 (S/25586)].

2.2.3.6 Hospitals were also used as torture camps by the Serb forces. Muslim survivors of an earlier massacre by Serb forces at Vlasica were interned in

the Paprikovac Optical Hospital on the outskirts of Banja Luka, which was being used at the time by Serb forces in the region:

> "The four subjects had been found wandering separately in the woods several days after the mass murder at Vlasica.. [and were] turned over to Serbian military forces..
> Nightly, wounded Serbian soldiers from elsewhere in the hospital, as well as guards, beat them with cable wires and police batons [every day]..
> The prisoners received a slice of bread a day, with some broth. They were given almost no pure water to drink, but they were forced to drink urine regularly. All four had hospital discharge papers that claimed that they had been treated for internal injuries and chronic heart disease. The prisoners, however, said that they had never received even so much as an aspirin...
> A 16 year old Muslim student....on being checked into the "hospital", was beaten 20 times on his kidneys by the military police..During his month [there] he was fed one slice of bread each day, was rarely given pure water to drink, and dropped in weight from 68 to only 50 kilogrammes. Every morning and evening, the guards forced the prisoners to drink a glass of urine."[*Third US Submission*, 5 november 1992, pp. 11 and 12 (S/24791)].

2.2.3.7 On 11th June 1992 a 24 year old Muslim agricultural technician from Kotor Varos was arrested by Serbian soldiers who were wearing uniforms bearing white eagles:

> "At the [Koza Proletaria] fur factory, a guard put a rifle in the witness' mouth and lifted him off the floor. Another guard pulled out two of his upper teeth with pliers. He said he and 100 other men were beaten for eight days and forced to perform sexual acts on each other..
>
> His room measured only about 2.5 by 3.5 metres, yet sometimes as many as 70 men were crammed into it. Serbian guards played loud music as they beat prisoners in the adjoining rooms and in the yard. The room was filthy. They

ate spoiled, mouldy food, and had no access to toilet facilities. Ten to 15 men had diarrhoea at any one time. The prisoners' skin turned yellow from jaundice. He spent over three months in such conditions without ever taking a bath or washing his clothes.

On 10 October, the witness and two other Muslims were exchanged for one Serb. Three Serbian guards, whom he recognised, brought him to the courthouse yard where they beat him viciously, they tied his arms and legs together like a sheep and forced him to baa. Later they tied him to a Land Rover jeep and drove to the hospital, with the witness running behind the vehicle. Upon arrival, they forced him to crawl, baa and eat grass, and then they told him to throw up the grass because it was Serbian grass.

One guard brought some very acidic gun-cleaning oil and made the witness drink half a litre of it. He began to have stomach convulsions immediately. A second pulled up his sleeve and extinguished eight cigarettes on his arm. Soon afterward he was released to Muslim forces in the village of Vecic." [*Fourth US Submission*, 8 December 1992, p. 12, para. 5 (S/24918)].

2.2.3.8 The Rapporteur also referred to reports of torture of hundreds of Muslims who had been detained by Serb forces in Bratunac, Eastern Bosnia on 9th May 1992:

"500 to 600 men were detained in the hall of an elementary school there. Those who could not fit inside were reportedly shot with automatic weapons in front of the hall. Beatings were reportedly carried out according to lists naming those most influential in the community. Between 30 and 50 people reportedly died from their injuries the first night while nine others suffocated in the crush as the 500-600 detainees struggled to escape the beatings. An imam was allegedly beaten and stabbed to death in front of the 500-600 prisoners after refusing to take the Christian faith and raise three fingers in the Serb manner. After three days of beatings the group was transferred to Pale, where ill-treatment continued

until they were exchanged. It is alleged that before they left Pale, the detainees were tied in groups of 10 and had to pass between lines of soldiers who beat them with cables, clubs and iron batons." [*Report*, 10 February 1993, p. 15, para. 65, (E/CN.4/1993/50)].

2.2.3.9 The sheer scale and systematic nature of the campaign of torture perpetrated by Serb forces against Muslims was designed to subjugate, and ultimately eliminate them as a people in those areas where Serb forces exercised control.

Section 2.2.4

RAPE

2.2.4.1 The depths of depravity to which the Serb forces plunged in their desire for an "ethnically pure" Serb area involved the rape of girls as young as 7, and women as old as 70 [*see, inter alia*, The United States Department of State Dispatch Bureau of Public Affairs, Report on War Crimes - former Yugoslavia; Maggie O'Kane "Forgotten Women of Serb rape camps", *The Guardian*, 19 December 1992; "A Pattern of Rape", *Newsweek* 4 January 1993].

2.2.4.2 Amnesty International in its Report "Bosnia - Herzegovina Rape and sexual abuse by armed forces" dated January 1993 referred to some incidents of rape. At page 12, details of the account of a 17 year old rape victim are given. She was taken by Serbs wearing JNA uniforms and held for three months together with around 100 women. During her detention,

she and the others were repeatedly raped and told that they would bear Serbian children.

2.2.4.3 The Sixth US Submission refers to the testimony of a 32 year old Muslim woman from the Teslic area. She sought refuge in a Serbian Red Cross refugee camp, but was taken from there and repeatedly raped by armed Serbian soldiers whose uniforms bore the initial "SMP" upon them. She saw soldiers coming nearly every day to take away women in the evenings. [Sixth US Submission, 9 March 1993, p. 23 (S/25393)]
Further, the account of a 15 year old Muslim rape victim is given. After her town (Teslic) was captured by Serb forces, she was taken by Serb soldiers to a small motel complex along with other women:

> "The whole motel complex perimeter was fenced off with barbed wire. Hundreds of men, women and children were prisoners ...
>
> ..the witness..said that the soldiers "raped us every night". Most nights, 20 soldiers came to the motel. The female prisoners were forced to strip, then to cook for the soldiers and to serve them. Each girl or young woman was raped by several soldiers, with several victims in one room at a time. The witness experienced and saw so many rapes that she could not give an estimate of the number.." [*id.*, p. 17].

2.2.4.4 In its submission to the Security Council, Austria also referred to rapes of women in the concentration camp at Prijedor: Trnopolje [6 March 1993, p. 39 and p. 42 (S/24377)].

2.2.4.5 Serbian soldiers brutally raped 40 Muslim women from Brezovo Polje, north of Sarajevo during the course of a bus journey to Caparde [*see* United States Department of State Dispatch - Bureau of Public Affairs, 2

November 1992, p. 804; also see the Dispatch of 16 November 1992, for an account where one of the victims told a reporter in late August that her Serbian abductor said he was under orders to rape].

2.2.4.6 The fact that rape was being used as a weapon by the Serbs, conscious of the stigma that this would create for a Muslim woman, is confirmed by the account of a 21 year old Serb fighter, Borislav Herak. He stated that he:

> "had made visits every three or four days to a motel and restaurant complex outside Vogosca, located seven miles north of Sarajevo, known as Sonja Cafe, which had been converted into a prison for Muslim women. He identified the "prison commander", who he said had established a "system" for the Serbian fighters to rape and kill the women interned there. He and his companions were encouraged to go to the Sonja Cafe by military commanders because raping Muslim women was "good for raising the fighters' morale". They were further told by the prison commander:
>
> "You can do with the women what you like. You can take them away from here - we don't have enough food for them anyway - and don't bring them back."" [*Fourth US Submission* 8 December 1992 at p. 7, para. 6 (S/24918); also *The Guardian*, 3 December 1992].

Two Serb deserters also stated that they had been ordered to rape and murder women [*Newsweek*, 4 January 1993, p. 28, Column 4, para. 3].

2.2.4.7 The Serb tactics also involved imprisoning raped women until they had reached an advanced stage of pregancy:

> "[in September 1992] At least 150 Muslim women and teen-age girls - some as young as 14 - who have crossed into Bosnian Government held areas of Sarajevo are in advanced stages of pregnancy, reportedly after being raped by Serbian nationalist fighters and after being imprisoned for months afterward in an attempt to keep them from terminating their pregnancies.

A 15 year old Muslim girl told the BBC that she had been seized by Serbian fighters in May in the Serb-held Sarajevo district of Grbavica. She said she had been held in a small room with about 20 other girls where they were ordered to undress:

"We refused, then they beat us and tore our clothes off. They pushed us on the floor. Two of the men held me down while two others raped me. I shouted at them and tried to fight back but it was no use. As they raped me they said they'd make sure I gave birth to a Serbian baby, and they kept repeating that during the rest of the time that they kept me there." [*Third US Submission*, 5 November 1992 (S/24791)].

2.2.4.8 Amnesty International found that

"[while others had been abused]: Muslim women have been the chief victims and the main perpetrators have been members of Serbian armed forces. The available evidence indicates that in some cases the rape of women has been carried out in an organised or systematic way, with the deliberate detention of women for the purpose of rape and sexual abuse. Incidents involving the sexual abuse of women appear to fit into a wider pattern of warfare, characterised by intimidation and abuses against Muslims and Croats which have led thousands to flee or to be compliant when expelled from their home areas out of fear of further violations". [*Report*, Bosnia-Herzegovina Rape and sexual abuse by armed forces, January 1993, p. 1].

2.2.4.1 Maggie O' Kane referred to interviews with rape victims who had managed to reach refugee camps at Zenica. She describes one rape victim´s ordeal which had been held at Trnoljpe, where around 2,500 to 3,000 women had been taken to be raped between mid-May and June 1992:

"Sejma Alukic was a machinist, aged 34, who worked in the sawmills near Foca. She was kept in the camp at Trnopolje

and was one of five women in the camp who told the same story of mass rape by Serbian soldiers.
She has long blonde hair and waves her hands as she speaks in an agitated, urgent tone:
"The soldiers came in [to the room in the camp] at about 10, after the electricity had been switched off, and shone the torches in the girls' faces to find the ones they wanted. Then they took them out. Nobody resisted or struggled, as they told us they would put a bullet in our head."
During the months Sejma was kept at Trnopolje camp, about five girls and women were taken nightly from each of the 30 classrooms in the primary school where they were held and brought to the "Dip Jela" sawmill about three miles from the camp. The women were raped in the 17 offices attached to the sawmill:

"There were more than 100 of us taken every night. It got worse when they lost a battle - then they came wanting more.." [Maggie O' Kane, "Forgotten Women of the Serb Rape Camps", The Guardian, December 1992].

[*See* also United States Department of State Dispatch, 8 February 1993, p. 76 for the account of a doctor who witnessed the raping and beating of Muslim women by Serb forces at the Trnopolje concentration camp].

2.2.4.2 The Report of an investigative mission into the treatment of Muslim women in Bosnia and Herzegovina was submitted to the European Community Foreign Ministers by Dame Anne Warburton . It stated:

"9...That Muslim women form the vast majority of the victims of rape is explicable in terms of the intensity and pattern of the conflict. The thrust of ..Serb attacks have concentrated on areas with a large Muslim population such as the Brcko region (44 per cent Muslim), the Drina valley (Zvornik - 60 per cent, Bratunac - 64 per cent, Srebenica - 74 per cent, Visegrad - 63 per cent, Gorazde - 70 per cent and Foca - 51 per cent) and the Prijedor area (44 per cent

Muslim) in an effort to carve out ethnically homogenous territory between Serbia and the Serbian areas of occupied Bosnia and Herzegovina and Croatia....[refers to fact that others were mistreated to a far lesser extent]

10. ... Approximately 70 per cent of Bosnia and Herzegovinian territory is in Serbian control and it is extremely difficult for the international agencies to work in these areas. UNHCR estimates that over 2.6 million persons were displaced by November 1992...

13....On the basis of its investigations the mission is satisfied that the rape of Muslim women has been - and perhaps still is - perpetrated on a wide scale and in such a way as to be part of a clearly recognizable pattern, sufficient to form an important element of war strategy.

14...The most reasoned estimates suggested to the mission place the number of victims at around 20,000...[and] suggested a possible figure of 1,000 pregnancies...

19. Throughout its work,...the delegation frequently heard ..that a repeated feature of Serbian attacks on Muslim towns and villages was the use of rape, often in public, or the threat of rape, as a weapon of war to force the population to leave their homes..accompanied or followed by the destruction of homes, mosques and churches. The mission saw examples of statements and documents from Serbian sources which very clearly put such actions in the context of an expansionist strategy.." [*see* Letter dated 3 February 1993 from the Permanent Representative of Denmark to the United Nations (S/25240)].

Section 2.2.5

Expelling of people and destruction of property

2.2.5.1 The strategy of Serb forces not only involved direct violence to Muslims and also Croats. Rather, it was often preceded by severe shelling of a town or village, the indiscriminate killing and devastation being designed to cause maximum disruption, such that people were forced to leave their homes. Upon doing so, traces of Muslim and also Croat presence, in the form of churches and mosques were obliterated. If lucky, the fleeing population escaped with their lives. More often, they encountered the Serb forces, and were intimidated, imprisoned, raped, tortured or killed by them.

2.2.5.2 The use of such a clinical term as "ethnic cleansing" to describe such intense brutality and inhumanity serves to demonstrate the depravity of the Serb forces, their complete disregard for human life, liberty and the values which underpin all forms of civilised behaviour [*see* ICCPR Human Rights Committee, 27 April 1993, p. 13, para. 37, p. 14, para. 51 (CCPR/C/89)].

2.2.5.3 In late April and early May 1992, Serb forces attacked the city of Mostar, destroying at least 13 mosques, and causing the civilian population to flee. In one particular incident, the joint operation technique of the JNA and Serb paramilitary forces is amply borne out:

> "..on May 1 [1992], a JNA unit approached two apartment houses belonging to the cigarette factory and located on its grounds. They opened fire with machine guns. A resident called the United Nations and Red Cross offices located in the "HIT" department store; shortly after, one JNA Special Forces soldier wearing a camouflage uniform with a black scarf tied around his head and two Airborne Military

policemen arrived. The witness judged by their accent that they were from Montenegro. The Special Forces soldier kicked in an apartment door and, threatening the occupants, asked about the phone call to the UN representative. A short time later, a group of JNA soldiers arrived and began to tear apart the apartment searching for weapons.

The following evening, a group of Serbian civilians wearing paramilitary uniforms came to the two apartment buildings and took away 10 men. A senior paramilitary officer told his men they could choose any women they wanted for their entertainment. Many apartments in both buildings were set on fire by tracer rounds fired by tanks of the unit." [*Sixth US Submission*, 9 March 1993, p. 28, (S/25393)].

[*See* also Helsinki Watch - War Crimes In Bosnia-Hercegovina (August 1992) p. 35 *et seq.*].

2.2.5.4 In the take over of Visegrad (Eastern Bosnia), JNA forces from Serbia played a pivotal role. Massive movements of troops and equipment from Serbia into Bosnia and Herzegovina were witnessed by many independent observers [*see;* Ian Traynor, *The Guardian* 14, 15 and 16 April 1992; Blaine Harden, *The Washington Post* 15 and 16 April 1992.

2.2.5.5 Shortly after they had taken over the town, the Serb forces embarked upon their all too familiar orgy of death and destruction. The Rapporteur referred to the account of a Muslim pensioner who in mid-April 1992:

> "watched for 36 hours from the window of her house as Serb forces executed groups of people on the old Visegrad bridge. Victims were either pushed off the bridge and shot in the water, or shot and then pushed. Groups of people were reportedly picked up and killed on the bridge every 30-60 minutes. The witness managed to leave the town but had to cross the bridge to do so. She vividly describes walking through the remains of victims as she crossed it. The Special

> Rapporteur has been informed that, due to the many atrocities which have taken place along its banks as it winds its way through Foca, Bratunac and Bijeljina in central and Eastern Bosnia, the river is locally known as the river of death." [*Report*, 10 February 1993, p. 10, para. 35 (E/CN.4/1993/50)].

2.2.5.6 In June 1992 large scale killing, expulsion and mistreatment of the Muslim and Croat population of Kozluk, near Zvornik took place by Serb forces. Before the town was captured Serb forces carried out executions of civilians, and heavy bombardment took place from the Gucevo mountains across the border in Serbia. [*Seventh US Submission*, 22 September 1992, p. 31, para. 6 (S/24583)]; see also *Fifth US Submission,* 26 January 1993, p. 6 (S/25171), which refers to some of the events which took place during this time].

2.2.5.7 Local Serb forces were re-enforced by regular tank and infantry units which came from Valjevo, Sabac, Loznica, Novi Sad, and Titovo Uzice in Serbia. When the Serb forces took the town, the mistreatment ensued [*Fourth US Submission*, 7 December 1992, 9-10; *Seventh US Submission* , 12 April 1993 p. 31 (S/25586)].]

2.2.5.8 In the Eighth US Submission the account of events witnessed on 8 April 1992 by a 64 year old Muslim man from Zvornik is relayed:

> "The "chetniks" [nationalist Serbs] burned about 200 houses. As people were forced out of their houses, they were directed to stay in a group in front of a large house. Two Muslim men...were killed in their homes, after which the corpses were brought out and burned. In all, about 76 people were killed, mostly in their basements...
> After a few days, ...the Serbian forces began to use a bulldozer to dig large pits in the Muslim cemetries southwest

of Zvornik proper. The witness saw buses and trucks dumping an undetermined number of bodies into these pits up to three times a day.." [*Eighth US Submission*, 16 June 1993, p. 20 para. 5 [S/25969].

2.2.5.9 Those who were not killed were expelled by the Serb forces and the Yugoslav authorities, as the Rapporteur related:

> "The towns were sealed by Serb forces. Muslim families were told that they had six hours to pack their belongings and to go to a certain gathering point. In the case of Zvornik, it was a farmyard. At these gathering points, the names of the deportees were put on a list, and everyone was individually ordered to sign this list. They were informed that by their signature they "voluntarily" gave up all their belongings. The deportees were then ordered, some at gunpoint, to board buses and trucks and later trains until they arrived at Palic (Vojvodina) where they were put up at the local camp site. Although the deportees apparently did not so request, they were provided with Yugoslav passports after photographers came to the camp site for this purpose. For some deportees, the issuing authority of their Yugoslav passport was "MUP (Ministry of Internal Affairs) of the Republic of Serbia, Secretariat in Subotica". Deportees reported that between 26 June and 1 July 1992 there were about 1,200 persons from Kozluk and another 1,800 from Zvornik at the Palic campsite. After being taken to the border, these persons were admitted to Hungary as refugees". [*Report* 10 February 1993, p. 22, para. 99 (E/CN.4/1993/50)].

2.2.5.10 The vilage of Ripac, near Bihac was also the scene of destruction. After having mainly cleared the area of its Muslim population, Serb forces imposed strict controls on the movements of those remaining:

> "[the Serb forces had] issued special passes,..introducing the so-called "new police registers"...In Bosanska Otoka, where the corpses of dead civilan victims still lie in the streets, the

> aggressor has plundered and destroyed the apartment houses of the Muslim refugees. According to witnesses held as hostages by [Serb forces]...Muslim houses now house Serbian families, while the cadastre files are being altered as far as the owners are concerned." [ICCPR *Human Rights Committee*, 27 April 1993, p. 12, para. 43 (CCPR/C/89)].

2.2.5.11 In May 1992, the village of Borajno in the Cajnice district was emptied of its Muslim population, as witnessed by a 60 year old Muslim who described the events:

> "On May 10, Serbian forces from Plejvlja, across the border in Montenegro, came to Boranjo asking everyone to surrender their weapons. On May 14, the soldiers ordered the Muslims to move to the other side of the village, at which time the Serbs bombed the empty houses. The next morning, the soldiers began shooting in the air and, by 3:00pm, the commander of one of the local Serbian units ordered the Musli to leave the village.
>
> The villagers ran into the woods. Immediately thereafter, the Serbian forces started bombing the woods from the mountains. The witness was able to return to Borajno on May 18, but he found the village deserted." [*Eighth US Submission,* 18 June 1993, p. 34 (S/25969)].

2.2.5.12 On 25 May 1992, the town of Sanski Most (40km west of Banja Luka) was surrounded by Serb forces with tanks and armoured vehicles. The whole of the next day, the town was bombed and houses were systematically destroyed. An ultimatum was given for the population to surrender, requiring that Muslims and Croats should mark their houses by affixing white sheets to the roof. After some of the population had surrendered the marked properties were shelled, looted and burned by Serb forces including

JNA troops. [*Second Canadian Submission*, 30 June 1993, p. 17 (S/26016); also *Seventh US Submission*, 12 April 1993, p. 33 (S/25586)].

2.2.5.13 In Bosanska Dubica, the Muslim and Croat population was intimidated, and subject to random attack by Serb forces which controlled the area. The intmidation was effective in forcing Muslim and Croats to leave. However, they were only permitted to leave if they took their entire family with them. Moreover:

> "Before those willing to leave were permitted to do so, they were forced to sign documents stating that they would never come back. No reference was ever made in those documents to their possessions in the village, their houses in particular. The witness stated that they could either sell them at a ridiculous price or give the keys to the municipality for the duration of their absence which, after they had signed the ..documents, was supposedly for ever.." [The *Rapporteur's Report*, 28 August 1992 (E/CN.4/1992/S-1/9)].

2.2.5.14 In and around the village of Crska, near Konjevice Polje, on 2 March 1993, Serbian forces from the VJ (Yugoslav Army) advanced to take the village, obstructing the evacuation of Muslim women, children, the elderly and approximately 1,500 wounded, causing them to flee to the woods. They subsequently were exposed to deep snow and lack of food, causing many to perish. [*The Rapporteur's Report*, 5 May 1993, p. 4, para. 8, to p. 6, para. 17; also the *Seventh US Submission*, 2 April 1993, 26 (S/25586)]. One witness watching from the mountains where he had fled reported:

> "Serb forces entered Cerska village with infantry, then tanks and then armoured vehicles: "The houses had already been destroyed by shelling, but even if a piece of a roof was intact the Serbs would set it on fire so that everyone else could see." [*Rapporteur's Report, id*, p. 15, para. 15].

2.2.5.15 In Bijeljina on March 1993, in a pattern which was repeated in every area where the Serb forces exercised their brutal control, all six mosques were blown up and completely destroyed. BBC TV were able to film the aftermath of the devastation. [*Eighth US Submission*, 16 June 1993, p. 32, para. 6 (S/25969)].

2.2.5.16 The systematic and barbaric nature of all the acts which have been carried out by the Serb forces against the Muslim and Croat population, their homes and religions have but one objective, namely the creation of an ethnically pure Serb area with the exclusion of Muslims and Croats.

Section 2.2.6

The creation of destructive living conditions

2.2.6.1 In their desire to create ethnically pure Serbian areas, and to realise their nationalistic and territorial ambitions, the Serb forces used TV, Radio and Newspapers extensively to vilify Muslims and Croats. This in turn resulted in an atmosphere in which hatred initially led to discrimination in many areas including employment. Inevitably, this turned to violence against Muslims and Croats. For example, in Banja Luka (which had a population of 30,000 Muslims), a local leader of Serb forces stated on TV that there was room for only 1,000 Muslims, and that the other 29,000 would have to leave, "one way or another" [*Second US Submission*, 22 October 1992, p. 16, para. 5 (S/24705)].

2.2.6.2 Also, recently, the Rapporteur drew attention to the ever increasing use of the media by the authorities in Serbia to project racial and religious intolerance:

> "124. A primary area of concern for [The Rapporteur] is the incitement to national and religious hatred in public life and in the media. In public life leading political figures make inflammatory and threatening statements against minority groups on a regular basis...
>
> 125. The prevailing climate of ethnic and religious hatred is also encouraged through misinformation, censorship and indoctrination by the media (see E/CN.4/1994/47, paras. 176-179). In particular, the coverage of atrocities committed in....Bosnia and Herzegovina is selective and one-sided. the media denigrates Muslims and Islam through sensationalist and distorted accounts of historical and existing "crimes" which they have committed "against the Serbian people" while grave violations perpetrated against Muslims are either rarely reported or discounted as malicious accusations forming part of an "anti-Serbian conspiracy." The programming of State-controlled TV Belgrade regularly involves the demonization of certain ethnic and religious groups..." [*Sixth Report*, 21 February 1994, p. 21, paras. 124 and 125 (E/CN.4/1994/110)].

2.2.6.2 It is little surprise therefore, that the killing and persecution of Muslims has also been taking place in Yugoslavia (Serbia and Montenegro) proper since at least early 1992, when the State actively blesses, encourages and gives effect to religious hatred [*see* Helsinki Watch - War Crimes in Bosnia Hercegovina, (August 1992), pp. 81 to 89; also the *Sixth periodic Report of the Rapporteur,* 21 February 1993, pp. 24 to 26]. The areas in which Muslims and Croats have been especially targetted are Sandzak, Kosovo and Vojvodina.

2.2.6.3 Where the Serbs were unable to ruthlessly exterminate Muslims and Croats, they embarked upon destruction of these groups by attrition, as well as by intimidation. Those Muslims who lived in and still live in Serb dominated areas were forced to surrender their property, or lost their jobs. They were also subjected to gross violations of their freedom of movement.

2.2.6.4 In the case of Banja Luka and other places, the Rapporteur repeatedly drew attention to the extreme difficulties being faced by the Muslim population, subject to attack from the Serbs in control:

> "8. An escalation in the rate of "ethnic cleansing" has been observed in Banja Luka since late November 1993 and there has been a sharp rise in repossessions of apartments, whereby Muslim and Croat tenants are summarily evicted in violation of the [law]...Indeed it has been reported that a form of housing agency has been established in the municipality, which chooses accomodation for incoming Serb displaced persons, evicts Muslim or Croat residents and reputedly receives payment for its services in the form of possessions left behind by those who have been evicted....
>
> 9. Almost all non Serbs have now lost their jobs ..and it is estimated that only 3 per cent of non Serbs continue to hold employment....Dismissal is often without a legitimate reason, but frequently is "draft evasion"...Entire families of persons who have permanently settled in other countries can suffer in this way, as such emigrants may be deemed to be draft evaders...".[*Report*, 21 February 1993, p. 5, paras. 8 to 9 (E/CN.4/1994/100)].

2.2.6.5 Where the Serbs had succeeded in driving Muslims and Croats into one particular area, their terrified victims would be shelled and subject to sniper attack. On countless occassions, food and medical aid was denied to such people by the Serb forces, who deliberately blocked, and in some cases

destroyed international aid supplies to prevent them from reaching those whom they had trapped so wretchedly:

> "They [the authorities of Yugoslavia (Serbia and Montenegro)] have, for instance, insisted that fuel deliveries to Sarajevo and Tuzla only take place provided that the Serb authorities receive equal amounts, regardless of need (UNHCR refused to comply with this request). Also, on 10 December 1993, the Government of [Yugoslavia] (Serbia and Montenegro) refused to allow across its frontier a convoy with "winterization" equipment to [besieged] Goraze across its frontier." [*Sixth Periodic Report*, 21 February 1994, p. 13, para. 69 (E/CN.4/1994/110)].

2.2.6.6 Instances of these and other attempts to create destructive conditions to prevent the continued existence of Muslims and Croats are to be found in part of Bosnia and Herzegovina where the Serbs have not been able to eliminate the Muslim and Croat population.

2.2.6.7 For example, from the beginning of April 1992 until the present, Serb forces have effectively kept a stranglehold upon Sarajevo, the capital of Bosnia and Herzegovina. They have bombarded hospitals, schools, mosques, churches and civilian buildings in a deliberate manner [*Fourth US Submission*, 7 December 1992, p. 14 (S/24918)].

2.2.6.8 The Rapporteur commented upon the seige of Sarajevo by Serb forces:

> "17. ..The seige is another tactic used to force Muslims and ethnic Croatians to flee...Sarajevo..is shelled on a regular basis, in what appears to be a deliberate attempt to spread terror among the population. Snipers shoot innocent civilians..The mission ..was able to see the damage done to the hospital itself, which has been deliberately shelled on several occasions, despite the proper display of.. the Red Cross symbol. Cultural centres have also been targeted,

leading some observers to the belief that the attacking forces are determined to "kill" the city itself, and the traditions of tolerance and inter-ethnic harmony which it represents.

18. The civilian population lives in a constant state of anxiety, leaving their homes or shelters only when necessary. Any movement out of doors is hazardous, and many persons and families spend long periods in isolation. The public systems for distribution of electrical power and water no longer function. Food and other basic necessities are scarce, and depend on the airlift organised by UNHCR and protected by UNPROFOR. UNPROFOR barracks and headquarters, as well as the airport itself, have been among the principal targets of the shelling....Delivery of such humanitarian supplies as do arrive is problematic. All inhabitants of the city are seriously affected by the fighting and the siege.." [*Report*, 28 August 1992, p. 4, para. 17 (E/CN.4/1992/S-1/9)].

2.2.6.9 Yet, even though conditions deteriorated considerably after the Rapporteurs report, and even though people are still being killed by Serb snipers, the spirit of tolerance has not been broken. Even today, Serbs, Croats, Jew and Muslims live together as one in this city, as in other areas where the culture of Bosnia and Herzegovina has not been wounded by the destructive and divisive acts of the Serb forces.

2.2.6.10 The brief facts referred to above show the appalling nature of the policy of the Serb forces. Not only did they seek to eliminate Muslims, and also Croats, but were brutal with anyone who stood against their racist and brutal ideals. In short they sought to eliminate those who live for, and in some cases died for the right to exist as a Muslim, and also as a Croat within a Bosnia and Herzegovina whose life blood is tolerance and co-existence. The future of Bosnia and Herzegovina will bear witness to the

fact that, though the Serb forces tried to drain Bosnians of this life blood, it still runs deep. Bosnia and Herzegovina is, and always will be a beacon of tolerance, piercing through the dark mist of hatred and intolerance which seeks to extinguish it.

CHAPTER 2.3
THE CONTEXT OF THE ACTS

Section 2.3.1
The Ideology of Greater Serbia

2.3.1.1 The war in the Republic of Bosnia and Herzegovina partly originates from the breakdown of the communist regimes in Eastern Europe at the end of the 1980s. The breakdown of communism brought with it a desire on the part of many of the republics of the Socialist Federal Republic of Yugoslavia to seek nationhood. Serbia, traditionally the strongest of the Republics, sought to crush these desires militarily. To mobilise public opinion and to justify its military campaigns the Serbian leadership has frequently used nationalist rhetoric of the so-called Greater Serbian ideology. The roots of this Greater Serbian ideology go back to the early nineteenth century.

2.3.1.2 The first formulation of the Greater Serbian idea is generally attributed to Ilija Garasanin, Minister of Internal Affairs of Serbia in the government of Prince Aleksander Karadjordjevic. In 1844 Garasanin published a pamphlet

entitled *The Outline (The Program of Serbian foreign and national policy at the end of 1844)*. In this pamphlet he stated, *inter alia*:

> "... a plan must be constructed which does not limit Serbia to her present borders, but endeavours to absorb all the Serbian peoples around her."

and

> "Not only must the fundamental constitutional laws of Serbia be extended to Bosnia and Herzegovina, along with the administrative system of the Principality of Serbia, but a number of young Bosnians should be accepted into the Serbian officialdom to train them as political, financial, and legal specialists. Later these people would apply what they had learned in Serbia in their own countries, and put into practice the knowledge which they have gained. Here it must be observed that these young people should be specially supervised and educated in their work so that the redeeming idea of a general unification prevails and remains uppermost. This requisite cannot be sufficiently emphasised" [M. VUCKOVIC, *Program spoljne politike Ilija Garasina na koncu 1844 godine*, Belgrado, Delo XXXVIII, 1906, pp. 321-336].

2.3.1.3 After World War II the Greater Serbian sentiments were successfully suppressed by Tito's policy of divide and rule. After Tito's death however, the ideology of Greater Serbia started its revival. In 1986 the Serbian Academy of Arts and Sciences published a document, commonly referred to as the "1986 Memorandum". This memorandum, signed by approximately 200 prominent Belgrade intellectuals, focused public attention on the situation in Kosovo and accused the Albanian majority of genocide against the Serbs living in this Serbian province. Furthermore, it called for a Greater Serbia. The main promotors of the Greater Serbian revival, both members of the Serbian Academy, were Dobrica Cosic, current President of Yugoslavia (Serbia and Montenegro), and Jovan

Raskovic, former leader of the Serbian Democratic Party (SDS), as such predecessor of Radovan Karadzic, currently self-styled President the so-called "Srpska Republica" in the Republic of Bosnia and Herzegovina. Karadzic's allegiance to Greater Serbian ideals is unquestioned. On 16 March 1992, he remarked:

> "... that the Serbs can never be pacified unless their centuries-old aspirations to live in one state are fulfilled. Whether right now, or whether it will take a few years, I do not know, but they will be fulfilled none the less." [*Tanjug*, 1001 gmt, 16 March 1992; source: BBC Summary of World Broadcasts].

2.3.1.4 The 1986 Memorandum prepared the ideological ground for Slobodan Milosevic's grab for power in September 1987. On a wave of nationalist sentiment Milosevic assumed the leadership of the Serbian Communist Party. Since Milosevic's take-over, the ideology of Greater Serbia proved to be a useful tool to mobilise Serbian public opinion and to strengthen the power base of the Serbian dominated government in Belgrade. On 15 January 1991 for example, on a session of the Federal Presidency, Milosevic showed his familiarity with Greater Serbian ideas:

> "... we hold that each nation has the equal right to decide freely about its destiny. Such a right can be constrained solely by the same, equal right of other nations. As far as the Serbian people are concerned, they want to live in one state. Hence, divisions into several states which would seperate Serbian people and force them to live in different sovereign states is, from our point of view, unacceptable, that is -let me specify- out of the question." [*Tanjug*, 1939 gmt, 15 January 1991; source: BBC Summary of World Broadcasts].

Section 2.3.2

War in Slovenia and Croatia

2.3.2.1 On 25 June 1991, after a prolonged period of fruitless negotiations, Slovenia and Croatia declared their independence from the Socialist Federal Republic Yugoslavia. On 27 June 1991 the war in the former Yugoslavia started. In a final attempt to prevent the secession of Slovenia, which has a rather homogeneous population and no significant Serb minority, the Yugoslav People's Army (JNA) experienced a humiliating defeat in a war which lasted only ten days. On 7 July 1991, an agreement brokered by the European Community, the Brioni Accord, led to the withdrawal of the JNA from Slovenian territory. Contrary to what later happened in the Republic of Bosnia and Herzegovina, the JNA took all of their military equipment on their retreat.

2.3.2.2 When the Brioni Accord was signed the war in Croatia had already begun. Paramilitary forces from inside Serbia had been arming the local population in the predominantly Serb areas in Croatia, in an attempt to provoke fighting and provide the JNA with an excuse to intervene directly on the side of the Serbian paramilitary. The consequences of the armed intervention by the JNA were disastrous. In August 1991 JNA, artillery started to shell the city of Vukovar and by November the city was completely destroyed. At the same time, the JNA launched a large tank offensive from Bosnia and Herzegovina against targets in Croatia. With the help of the JNA, Serbian forces rapidly took control of 30 percent of the territory of Croatia. After a number of failed ceasefire initiatives, the Vance Peace Plan finally succeeded in putting an end to the hostilities in December 1991. The areas occupied by Serbian forces were designated as

United Nations Protected Areas (UNPA's) and 14 000 peacekeeping troops were deployed to guard the frontlines.

2.3.2.3 With the complete destruction of Vukovar and the siege of Dubrovnik as examples, the Croatian war for the first time clearly showed the full extent of Belgrade's nationalistic and expansive policies. By now, the political and military elite in Belgrade had fully realised it could not persuade the Croatian government to stay in a Yugoslav Federation. James GOW, a leading defence analyst and research fellow at the Centre for Defence Studies at King's College, University of London, has studied the situation in the former Yugoslavia extensively. On this point, GOW observed the following in a recent analysis:

> "The leaders in Belgrade seemed to have reached a turning point, adopting a new goal, the establishment of the borders of a "mini-Yugoslavia", comprising the key strategic infrastructure of the old Yugoslav state and areas and "reliable" populations; that is, Serb-dominated communities. The Siege of Dubrovnik, beginning in late September 1991, left no doubt -if there had been any earlier- about the shift in Serbian policy and the Serbian leadership's intention of establishing a new state". [James GOW, "One Year of War in Bosnia and Herzegovina", *RFE/RL Research Report*, Vol. 2, No. 23, 4 June 1993, p. 6; Annex 2-I].

2.3.2.4. The JNA campaign focused on points of strategic importance, such as the Konavli region in southern Dalmatia, near Dubrovnik. As there had been no fighting in these areas between Serbian paramilitary groups and Croatian forces, there was no need to intervene on behalf of the local Serb population. The area, however, was of vital importance to the JNA, as the coastal regions control the entrance to the naval base at Kotor in Montenegro. Because of international pressure to stop the fighting in

Croatia, which ultimately resulted in the Vance Peace Plan, the Serbian forces "failed to achieve all aims". This was admitted by Colonel General Zivota Panic, shortly before he replaced Colonel General Blagoje Adzic as chief of staff of the JNA [*Vojno Delo* (Yugoslav Army theoretical Journal), Nos 1-2, January-April 1992, pp. 222-223]. Notably, the JNA did not succeed in establishing a corridor between Western Slavonija, Banija, Kordun, Lika and Kninska Krajina on the one hand and Baranja and Eastern Slavonia on the other hand. Later, the establishment of a corridor to the Serb areas in Western Croatia would prove to be one of the objectives of the Serbian offensive in Bosnia and Herzegovina.

Section 2.3.3

The Yugoslav People's Army

2.3.3.1 The course of the war in Slovenia and Croatia showed that the interests and views of the military leadership of the JNA and those of the Serbian leaders in Belgrade almost entirely coincided. On this symbiotic relationship James GOW remarked the following:

> "Throughout the war [in Croatia], the JNA came increasingly and more overtly under the control of the Serbian political leadership. This gradual Serbian takeover was accomplished in two ways. The first involved elements at various levels within the military, who consciously shaped the army's role. These elements had already been actively fomenting unrest: for example, providing arms as well as support and cover to local Serbian rebels in Croatia. At the head of this movement was Major General Bozidar Stevanovic, who had been due to retire but who had been persuaded by "someone who was not no one" to withdraw his application for retirement and remain on active duty. It seems likely that that "someone" was Serbian President Milosevic.

> The second way in which Milosevic exercised influence on the JNA was through the four representatives of the Serbian camp in the collective federal Presidency, especially through federal Vice President Branko Kostic and the representative of the Serbian Republic in the collective federal Presidency, Borisav Jovic. Certainly, Kostic was key in influencing the political direction of the JNA actions in the conflict in Slovenia and Croatia and during the first weeks of the war in Bosnia and Herzegovina. The extent of his influence became apparent during the trial of former Yugoslav intelligence chief Colonel General Andrija Vasiljevic, when former federal Defense Minister General Veljko Kadijevic testified that Vasiljevic was being prosecuted for having executed orders that had come from Kostic." [James GOW, *op. cit.*, pp. 3-4].

2.3.3.2 On 30 December 1991, after the Vance Peace Plan had put an end to the fighting in Croatia, the Serbian dominated Federal Presidency in Belgrade ordered a major reorganisation of the JNA. This reorganisation is described by Dr. Milan VEGO in *Jane's Intelligence Review*, widely regarded as the world's most authoritative journal on military affairs [Milan VEGO, *Jane's Intelligence Review*, October 1992, p. 445; Annex 2-II]. Milan VEGO teaches East European history and politics as well as naval operational art in the United States of America.

One of the main aims of the reorganisation of the Federal Army was to secure Belgrade's grip on Bosnia and Herzegovina. In order to do so the Federal Presidency reestablished the 4th Military District with headquarters in Sarajevo. The newly created Military District was designated the largest part of Bosnia and Herzegovina, while the remaining parts of Bosnia and Herzegovina were assigned to the 1st Military District and the 2nd Military District. With the reorganisation of the JNA the number of troops in Bosnia and Herzegovina rose to 60 000. To ensure the loyalty and reliability of the

troops, the General Staff consciously appointed only Serbs and Montenegrens to crucial positions in the 4th and 2nd Military District. An illustrative example of the General Staff's determination to put the JNA under Serbian control is its decision to put the 37th Corps, based in Mostar (capital of Herzegovina), under the command of the 4th Military District in Sarajevo. This Corps, which was entirely manned by Serbian and Montenegrin reservists, would later be responsable for the shelling of Mostar. In this same period additional federal troops were moved into Bosnia and Herzegovina. Durig the early part of April 1992, massive movements of troops and equipment from Serbia into Bosnia and Herzegovina were witnessed by independent observers [*see* 2.2.5.4]. Consequently, JNA-presence in Bosnia and Herzegovina totalled approximately 95 000 troops, when the Republic of Bosnia and Herzegovina declared its independence in April 1992.

Section 2.3.4

RAM

2.3.4.1 While the JNA concentrated its troops in Bosnia and Herzegovina, an enormous covert operation was taking place. This operation, known by the acronym RAM, was organised from Belgrade by Mihalj Kertes, who in 1990 was Deputy Federal Minister of the Interior and head of the Yugoslav Secret Service. Kertes organised his operations in close cooperation with Jovica Stanisic, the Head of the Secret Service of the Serbian Ministry of the Interior.

> "D'après les rélévations d'un officier, analyste stratégique en service à l'Etat-major de l'armée fédérale, le plan RAM a été élaboré en février 1991. "Tandis que les quatre plans

Bedem[1] définissaient la répartition des foces armées sur les territoires de la Bosnie-Herzégovine et de la Croate, le plan RAM prévoit l'élargissement et le netoyage de cet espace de l'intérieur et la connexion des enclaves serbes dans cet espace". Le plan a été conçu après les consulations entre les chefs de l'Etat-major et Milosevic. Son but final est la réalisation de la Grande Serbie ou de l'Union des Etats serbes. Le plan prévoit le déploiement des réservistes serbes de l'armée fédérale en Herzégovine sous le prétexte de la "défense des populations serbes non armées de l'Herzégovine orientale (à majorité serbe) contre les attaques provenant des extrémistes de l'Herzégovine occidentale (à minorité serbe)". Des unités de tchetniks et la milice locale serbe provoqueront des troubles, l'armée occupera des positions stratégiques sous le prétexte de défendre la population des bandes de pillards ivres (organisées préalablement par l'armée elle-même) et prendra le contrôle de la Dalmatie méridionale, avec Dubrovnik et les îles. D'après le plan RAM, des grave désordres et des conflits interethniques provoqués par les milices serbes avec l'aide de l'armée empêcheront la proclamation de la souveraineté de la Bosnie-Herzégovine et, après la création de cinq régions serbes autonomes, finiront pas disloquer cette république. Les divers corps d'armée feront jonction, relieront la Krajina à l'Herzégovine et assureront l'occupation des villes croates de la côte. [*Le nettoyage ethnique: Documents historiques sur une idéologie serbe*, Mirko GRMEK, Marc GJIDARA, Neven SIMAC (eds.), Paris, 1993, pp. 299-300].

2.3.4.2 In order to reach its objectives, RAM entailed the supply of arms and ammunition to Serb communities in strategic parts of both Croatia and Bosnia and Herzegovina. To distribute these arms, which partly originated from stores of various police and JNA reserves, Kertes used an extensive network composed of members of the Serbian Democratic Party (SDS) and

[1]Bedem was another secret military program, elaborated in 1990. It was disclosed in *l'Evenement du Jeudi*, 4 July 1991. It was used after the Slovenian and Croatian independence in June 1991.

JNA officers. With the help of the Chief of the Directorate of Material Reserves (DMR), Dusan Mitevic, former head of Belgrade Television, several hundred thousand weapons were sent to Bosanska Krajina, eastern Herzegovina and Ramaniya, the mountainous area east of Sarajevo. The distribution of arms among Serb populations in Bosnia and Herzegovina is confirmed by Misha GLENNY, Central European correspondent of the BBC, in his widely acclaimed book on the war in the former Yugoslavia [Misha GLENNY, *The Fall of Yugoslavia*, London, 1993, p. 150; Annex 2-III].

2.3.4.3 In February 1992, the Zagreb newspaper *Vjesnik* published an article in which JNA officers admitted that they had armed the Serbian population of several villages in Bosnia.

> "At the demand of the Party of Democratic Action and the Croatian Democratic Community, the news conference in the Zavidovici Communal Assembly discussed the arming of the Serbian people in the local community of Dolac on 28 January. They were armed by the Yugoslav People's Army from the "4 July" barracks in Doboj. It was established that the Army has admitted arming the so-called Serbian volunteers. This has been documented by the minutes, as well as by the eye-witness testimonies of the Zavidovici Public Security Station employees. It was pointed out that ... the Serbian population in the local community of Gostavic was recently armed in a similar fashion. The representatives of the Zavidovici Communal Assembly visited Doboj and held talks with the commander of the barracks Lieutenant Hadzic, and with Major Corluk, who confirmed that they had handed the arms over to the Serbian population of Dolac in order to 'fill the ranks of its volunteer squad'. The volunteers from Dolac did not go to the barracks, but kept the arms at home." [*Vjesnik*, 1 February 1992, p.7; source: Foreign Broadcast Information Service (FBIS)].

2.3.4.4 In August 1991, the Federal Prime Minister, Ante Markovic, revealed the existence of RAM. At the same time, Markovic released a tape of a recorded telephone conversation between Slobodan Milosevic, in Belgrade, and Radovan Karadzic, in Banja Luka. In this telephone conversation, Milosevic informed Karadzic that a supply of arms would be put at the disposal of local Serbs through General Nikola Uzelac, commander of the JNA in Banja Luka. Moreover, Milosevic reassured Karadzic, by saying that, if necessary, Uzelac could also come to Karadzic's aid with air strikes [*see* Misha GLENNY, *op. cit.*, pp. 151; Stipe MESIC (translated as) *How we got rid of Yugoslavia*, Zagreb 1992, p. 236].

2.3.4.5 Kertes and Stanisic did not limit their covert operations to the arming of Serb communities. RAM also envisaged the creation of paramilitary units, which would serve to create the conditions in Croatia and Bosnia and Herzegovina necessary to justify the armed intervention of the JNA. Those units would also be used to terrorise Croatian and Muslim populations into fleeing from areas of strategic importance. The first paramilitary group set up by Kertes was the Serbian Volunteer Guard, or 'Serbian Tigers', led by Zeljko Raznjatovic, also known by his nom de guerre 'Arkan'. In addition, Kertes was instrumental in the creation of two other paramilitary groups, the 'White Eagles' (*Beli Orlovi*), headed by Mirko Jovic, founder and leader of the Serbian National Renewel (SNO), an extremist Serbian nationalist party of little political significance, and the 'Chetnik Movement', under the command of Vojslav Seselj, leader of the Serbian Radical Party (SRS). Seselj's SRS has been of crucial importance to Milosevic. After the 1992 elections, Milosevic's SPS remained in power thanks to the support of the Serbian Radical Party.

2.3.4.6 It is these paramilitary groups, mostly based in Serbia or Montenegro proper and acting under orders from Kertes, Stanisic and the Yugoslav Secret Service [*see* Misha GLENNY, *op. cit.*, p. 150], which are responsible for many of the atrocities which have been committed by the Serbs in the Republic of Bosnia and Herzegovina [*see e.g.* 2.2.1.17; 2.2.2.2; 2.2.2.16; 2.2.5.3; 2.2.5.8]. This is a fact which is widely acknowledged, even in the Federal Republic of Yugoslavia (Serbia and Montenegro). In December 1992, in the weeks preceding the parliamentary elections in Serbia, Serbian President Slobodan Milosevic accused Vojslav Seselj and other members of the SRS of being criminals. In response to these accusations however, Seselj emphasised Milosevic's responsibility:

> "Seselj ... greeted Milosevic's accusations with his own countercharges. While protesting that he was no criminal, Seselj noted that "the time has come to expose the chief mafioso of Serbia, and his name is Slobodan Milosevic ... Nothing could have been committed in this country without the president's having known about it". Seselj added that although he had committed no war atrocities, he would comply with any formal request to appear before an international war crimes tribunal in The Hague to answer allegations. At the same time he suggested that Milosevic was the real war criminal, adding, "I cannot see how I would go [to The Hague] without Slobodan Milosevic" [Prof. Stan MARKOTICH, "Serbia Prepares for Elections", *RFE/RL Report*, Vol. 2, No. 49, 10 December 1993, p. 16; Annex 2-IV].

2.3.4.7 At least some of these acts have been committed with arms supplied by the JNA, as has been admitted by Chetnik leader Vojslav Seselj in an interview in August 1991 [*Der Spiegel*, 5 August 1991, pp. 124-126]. Up to now, the paramilitary groups continue to freely recruit members in Serbia and Montenegro, as was also revealed by Seselj in the same interview. In no

way has the Yugoslav government sought to prevent or restrict the operation of the these forces. Quite the contrary, both Seselj and Raznjatovic are members of the Serbian parliament. Moreover, without the parliamentary support of Seselj's SRS Milosevic would not have been able to remain in power after the 1992 elections [Prof. Stan MARKOTICH, *op. cit.*, p. 15].

Section 2.3.5
The War in Bosnia and Herzegovina

2.3.5.1 In November 1991, multi-party elections were held in Bosnia and Herzegovina. On 28 February 1992, the day preceding the referendum on the independence of Bosnia and Herzegovina, the self styled leaders of Serbs within Bosnia and Herzegovina proclaimed the creation of the so-called "Serbian Republic of Bosnia and Herzegovina". In the referendum itself, held on 29 February 1992, the majority of the electorate (despite the boycott of many Serbs) voted in favour of independence. Following the result of the referendum, the Republic of Bosnia and Herzegovina officially declared its independence from the former Socialist Federal Republic of Yugoslavia in the beginning of April of the same year. Between 5 and 7 April 1992, the European Community and the United States of America recognised the Republic of Bosnia and Herzegovina as an independent State.

2.3.5.2 When the Republic of Bosnia and Herzegovina declared its independence, the war was already under way. In early March of the same year, Karadzic had threatened of the consequences if an independent Republic of Bosnia

and Herzegovina was demanded: "Northern Ireland would be a holiday resort in comparison with Bosnia-Hercegovina" [*Tanjug*, 1019 gmt, 2 March 1992, source: BBC Summary of World Broadcasts]. By that period, the JNA had become an instrument of the Serbian leadership, which had gained complete control of the Federal Presidency. The Federal Army closely cooperated with the paramilitary forces, set up and controlled by Kertes:

> "Irregular units, notably the "Tigers", formally known as the Serbian Volunteer Guard and led by the notorious Zeljko Raznjatovic (whose nom de guerre is Arkan), were also involved in preparations for the conflict in Bosnia and Herzegovina. Members of the guard, of whom many had criminal backgrounds, became the highly effective shock troops that entered Vukovar at the end of that siege, providing the army with the "professional" all-volunteer infantry previously unavailable to the conscript-based federal Yugoslav army. They were also vital to the blitzkrieg terror campaign during which the federal Yugoslav army seized large parts of northern and eastern Bosnia and Herzegovina in the spring of 1992. Between 27 March and 8 April of that year there were a number of crucial flash points. Arkan's "Tigers" in the north and the east and YPA [JNA] units in the south, the west, and the northwest initiated attacks (in the east these were from Serbia) to secure the main entry points into Bosnia and Herzegovina as well as major communication and logistics lines at Foca, Visegrad, Zvornik, Bijelina, Kupres, Bosanski, Brod and Derventa. In effect, this offensive left the core of the newly independent Bosnian state surrounded and under Serbian military control, much in the same manner that the Bosnian capital Sarajevo had been encircled by Serbian troops deployed on the hills around the city." [James GOW, *op. cit.*, p. 8].

2.3.5.3 The offensive carried out by the JNA and the irregular Serbian forces was not a chaotic and uncontrolled explosion of ethnic violence. On the

contrary, it was a well planned and thoroughly executed militairy campaign by one state against another. The speed and deadly efficiency of the Serbian attacks in the early days of the war in Bosnia, with the practically simultaneous commencement of hostilities both in Sarajevo and in several strategically important towns near the border with the Republics of Serbia and Montenegro, shows that these military actions were well coordinated. In other words, the events unfolding in Bosnia from April 1992 indicate a clear pattern of military actions. The arrival of irregular units from across the Serbian and Montenegrin border also fits in this pattern, which is not at all consistent with the notion of a civil war. The conviction, that a clear pattern can be distilled from the Serbian military actions, is shared by GOW:

> "Together with units positioned throughout Bosnia and Herzegovina, the federal Yugoslav army engaged in a series of attacks on towns located along the major communication routes throughout northern and eastern Bosnia and Herzegovina. During the two-month period from the end of March to the end of May 1992, the Serbian forces secured large parts of Bosnia and Herzegovina, accelerating its program of "ethnic cleansing" and driving out through campaigns of terror non-Serbs and "disloyal" Serbs in many areas. The Serbian success was attributable to surprise tactics and to an overwhelming superiority of armed force. In view of the speed with which they were implemented and the high level of coordination they revealed, these operations clearly had not been mounted spontaneously." [James GOW, *op. cit.*, p. 8].

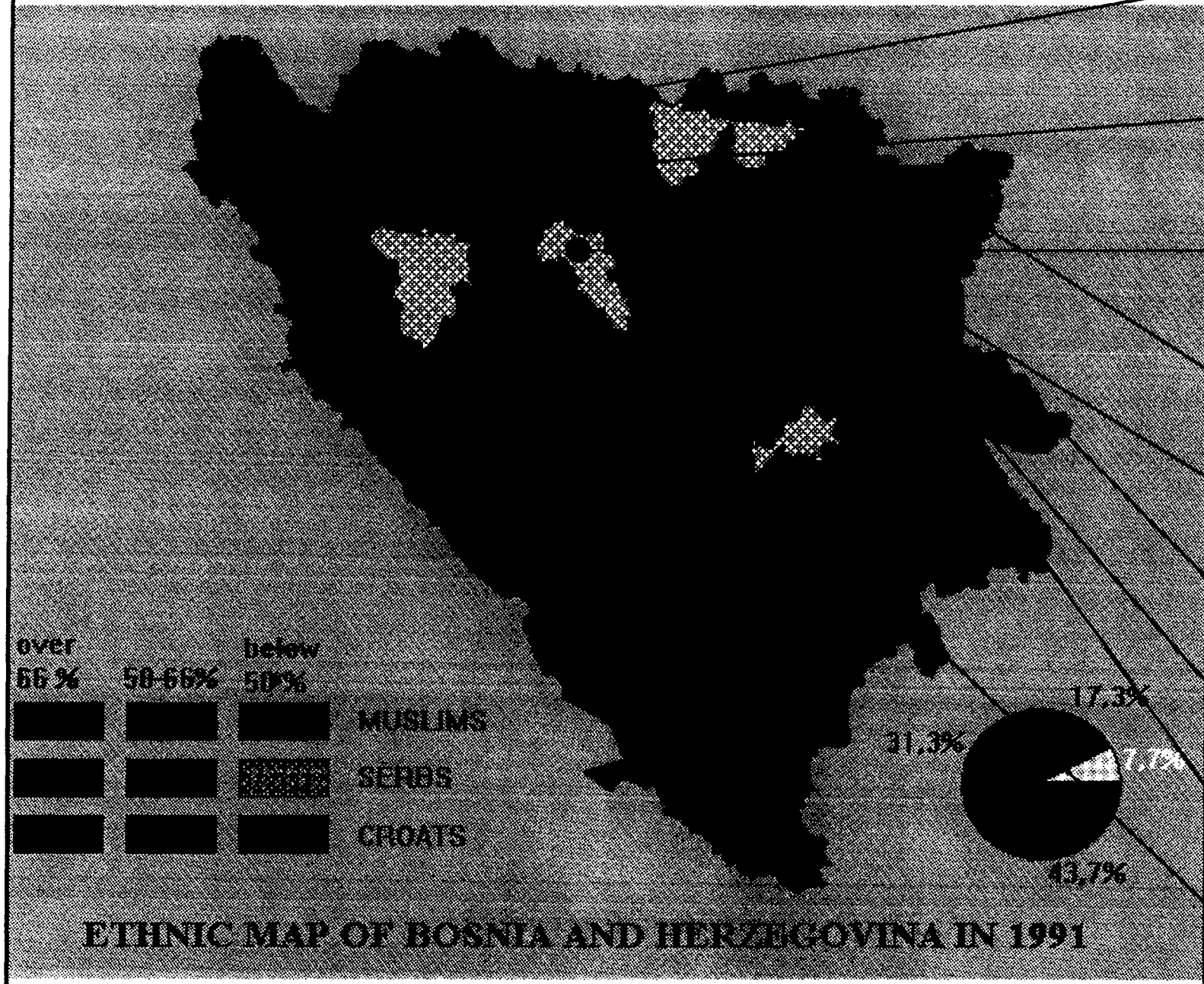
2.3.5.4 In order to guarantee a free flow of personnel and supplies between the Federal Republic of Yugoslavia (Serbia and Montenegro) and the Serbian communities in Croatia and Bosnia and Herzegovina the establishment of secure corridors, defended by the Serbian military, is an absolute military

imperitive. In its offensive the Serbian forces succeeded in establishing two corridors.

The offensive linked the Serb held areas in Western Croatia to the Federal Republic of Yugoslavia (Serbia and Montenegro), an objective which the Serbian forces had failed to achieve in the Croatian war, and it established an uninterrupted corridor in the east and the south-east of Bosnia and Herzegovina. However, the Serbian forces failed to link the Bosnian territory occupied in the south-east with the Serbian Krajina [see: Misha GLENNY, *op. cit.*, pp. 184-185].

2.3.5.5 At least part of these corridors, of necessity, run through areas which, until the beginning of the war were inhabited by a Muslim majority. It is in these areas that ethnic cleansing first occurred. In their desire to create an ethnically pure state, Serbian forces immediately started eliminating the predominant and large Muslim population in these areas. In the Eastern corridor for example, most of the Muslim population of the areas around Zvornik (with a muslim majority of 59-60%), Bratunac (63-64%), Visegrad (63-64%) and Foca (51%) was terrorised into fleeing [*see* 2.2.4.2]. The concentration camp of Brcko (Luka) [*see* 2.2.1.16 *et. seq.*], in which between May and July 1992 around 2,000 to 3,000 Muslims were killed, was located in an area of vital strategical importance. This area around Brcko is the weakest point of the northern corridor. In order to remove all traces of the Muslim population, the Serbian forces also demolished most religious buildings in these corridors [*see* 2.2.5; *see* the map on page 75 of this Memorial and *see* also the UNHCR-map on page 16].

AREAS WHERE ACTS OF GENOCIDE OCCURRED IN BOSNIA-HERCEGOVINA, SUMMER 1992



PREVIOUSLY MAJORITY MUSLIM AREAS WHERE NO MORE THAN A HANDFUL OF NON-SERBS NOW REMAIN

PRIJEDOR REGION
112, 543 PRE-WAR POPULATION,
44% MUSLIM, 6% CROAT,
42% SERB, 8% OTHER
ETHNIC CLEANSING BEGAN MAY 25

SANSKI MOST REGION
60,307 PRE-WAR POPULATION,
47% MUSLIM, 7% CROAT,
42% SERB, 4% OTHER.
ETHNIC CLEANSING BEGAN MAY 5

KOTOR VAROS REGION
36,853 PRE-WAR POPULATION,
30% MUSLIM, 29% CROAT,
38% SERB, 3% OTHER
ETHNIC CLEASNING BEGAN JUNE 11

CITY OF BRCKO
41,346 PRE-WAR POPULATION,
56% MUSLIM, 7% CROAT.
ETHNIC CLEASNING BEGAN MAY 5

ZVORNIK REGION
81,295 PRE-WAR POPULATION
59% MUSLIM MAJORITY
ETHNIC CLEANSING BEGAN APRIL 27

BRATUNAC REGION
33,619 PRE-WAR POPULATION
64% MUSLIM MAJORITY
ETHNIC CLEANSING BEGAN APRIL 7

VLASENICA REGION
33,942 PRE-WAR POPULATION
55% MUSLIM MAJORITY
ETHNIC CLEANSING BEGAN MAY 16

VISEGRAD REGION
21,199 PRE-WAR POPULATION
64% MUSLIM MAJORITY
ETHNIC CLEANSING BEGAN APRIL 14

FOCA REGION
40,513 PRE-WAR POPULATION
51% MUSLIM MAJORITY
ETHNIC CLEANSING BEGAN APRIL 12

Section 2.3.6

JNA's continued presence in the Republic of Bosnia and Herzegovina

2.3.6.1 On 27 April 1992 both the Presidency and the Government of Bosnia and Herzegovina ordered all Federal Army troops to leave the territory of the Republic. On the same day Serbia and Montenegro adopted a new Constitution, in which they decided to continue their life in common in Yugoslavia, and to reorganise the Socialist Federal Republic of Yugoslavia into the Federal Republic of Yugoslavia, consisting of the two Republics. On 4 May 1992, in apparent response to the Bosnian order, Belgrade announced the withdrawal of all JNA troops who were non-residents of the Republic of Bosnia and Herzegovina. At that time, JNA forces in Bosnia and Herzegovina totalled around 95 000 troops. Contrary to the announcement however, the Federal Presidency in Belgrade consequently withdrew only part of the 76 000 troops, who were non-resident of the Republic. By the end of May only about 14 000 men had left Bosnian territory to join the Yugoslav Army (VJ), which in accordance with the new Constitution had succeeded the Yugoslav People's Army (JNA). The remaining troops, numbering around 80 000, were transferred to the so-called Army of the Serbian Republic of Bosnia and Herzegovina [Milan VEGO, *op. cit.*, p. 445). The fact that almost all of the former JNA troops remained on Bosnian territory is confirmed by Serbian sources as well:

> "The decision of the Yugoslav federal authorities to withdraw the Yugoslav People's Army [JNA] from Bosnia-Herzegovina is the beginning of the realization of the Serb nation's decision on transferring the JNA units to the Serb territories, Tomislav Sipovic, member of the Government of the Serb Republic, said today at a news conference at the international press center of the Serb Republic of Bosnia-Herzegovina (at Ilidza near Sarajevo)... According to this decision, the JNA officially is abolished in Bosnia-

> Herzegovina... In practice, the JNA is not moving out, but is being transferred to Serb territory. The Army which up to now has been mainly Serb, will remain". [*Belgrade Tanjug Domestic Service*, 1223 gmt, 7 May 1992; source: Foreign Broadcast Information Service (FBIS), emphasis added].

2.3.6.2 On 30 May 1992, that is almost four weeks after the announced withdrawal of the JNA troops, the newly appointed commander of the Serb forces in Bosnia and Herzegovina Ratko Mladic accused Croatian armed forces of attacking Yugoslav soldiers, citizens of the Federal Republic of Yugoslavia (Serbia and Montenegro) on Bosnian territory.

> "The commander of the army of Bosnia-Hercegovina Serbs said that there must be no more attacks on Yugoslav Army soldiers, such as the attack in Sarajevo of two weeks ago or the recent massacre of an army column in the Bosnian town of Tuzla, where "of the 49 innocent soldiers and officers, citizens of the Federal Republic of Yugoslavia, six were shot dead and the others killed with blunt implement axes." [*Tanjug*, 1540 gmt, 30 May 1992; source: BBC Summary of World Broadcasts].

2.3.6.3 On 3 June 1992, in an interview by Vilmos V. Kovacs, Serbian Foreign Minister Vladislav Jovanovic confirmed that the Yugoslav Army had remained in the Republic of Bosnia and Herzegovina:

> "[Kovacs] The federal army is also in Bosnia-Herzegovina. [Jovanovic] The Yugoslav Army stayed in the republic because of the speedy recognition of the independence of Bosnia-Herzegovina. That is, because the recognition took place before the completion of the Bosnia-Hercegovina conference." [*Hungarian Radio*, Budapest 1630 gmt, 3 June 1992; source: BBC Summary of World Broadcasts].

2.3.6.4 The new recruits of the Serbian Army in the Republic of Bosnia and Herzegovina were not transferred emptyhanded. A large part of the former JNA's military potential was left in the hands of General Ratko Mladic, who had been appointed as commander of the the Serbian Army in Bosnia and Herzegovina on 9 May. General Mladic had ruthlessly distinguished himself as commander of the Knin Corps in the Serb controlled area of Croatia. In the war in Croatia, Mladic "became notorious for his barbaric treatment of the Croatian civilians and his threats to destroy the Croatian coastal city of Sibenik" [Milan VEGO, *op. cit.*, p. 446]. In a radio speech given on 14 July 1992 for *Radio Beograd Network* in Belgrade, Federal President Dobrica Cosic admitted and claimed full responsability for the following in his capacity as supreme commander of the VJ:

> "The war equipment of the Yugoslav People's Army has not only remained in the hands of the Army of the Serbian Republic of Bosnia and Herzegovina... The army of the Serbian Republic of Bosnia-Herzegovina was left with: 24 training-combat aircraft, 20 helicopters and four artillery battalions. They stayed at Banja Luka airport because the pilots and other crew members refused to move to the territory of the Federal Republic of Yugoslavia, because they are citizens of Bosnia-Herzegovina. Then, they were left with 300 tanks, 231 artillery pieces of various caliber and a large amount of infantry weapons and ammunition." ["President Adresses Federal Assembly", *Radio Beograd Network*, 0935 gmt, 14 July 1992; source: Foreign Broadcast Information Service (FBIS)].

2.3.6.5 On this military equipment, the red star insigna of the JNA was, whenever possible, exchanged for Serbian symbols and flags. The Serbian forces who occupied Sarajevo airport throughout the month of May, after the formal withdrawal of the JNA on 19 May 1992, used tanks on which the old JNA markings had been crudely repainted. This was confirmed by Milos

VASIC, editor of *Vreme*, a respected weekly magazine based in Belgrade, in his analyses of the war in the former Yugoslavia [Milos VASIC and Aleksander CIRIC, "No Way Out: The JNA and the Yugoslav Wars", *WarReport*, January 1993].

2.3.6.6 Despite the partial withdrawal of the JNA and the transfer of forces to the Serbian Army in Bosnia and Herzegovina, the command structure in the former federal army has not changed radically since the summer of 1991:

> "The operational chain of command in the federal army runs from the Supreme Defence Council (composed of the President of the Federal Republic of Yugoslavia and presidents of the republics of Serbia and Montenegro) through the General Staff in Belgrade to the commander of: 1st MD (Belgrade), 4th MD (Podgorica), the 'Army of the Serbian Republic of Bosnia and Herzegovina', the Naval District (Kumbor, Bay of Cattaro), Air Force and Air Defence Units. The commander of the 'Army of the Serbian Republic of Bosnia and Herzegovina is Lieutenant General Ratko Mladic, the former commander of the 9th Corps in Knin... His headquarters were recently moved from Pale (near Sarajevo) to more secure Han Pijesak (some 55 km northeast of Sarajevo). This headquarters is located in an underground bunker providing multichannel and secure communications to all subordinate corps commanders, the General Staff in Belgrade as well as the president of the Federal Republic of Yugoslavia."

and

> "Currently, the General Staff in Belgrade is obedient to President Milosevic. The Belgrade regime not only plans the actions of the Serbian forces in Bosnia and Herzegovina but also keeps these forces supplied with weapons, equipment, and ammunition. The commanders of the Serbian forces in that republic are assigned, promoted or dismissed from their posts by the General Staff in Belgrade, which in turn gets its

orders form President Milosevic." [Milan VEGO, *op. cit.*, pp. 445-446, 448].

2.3.6.7 Belgrade's influence on the Serbian Army in Bosnia and Herzegovina is strikingly exemplified by Ratko Mladic's military promotion. On 9 May 1992, that is, twelve days after the adoption of Yugoslavia's new Constitution and ten days after Belgrade had explicitely renounced any connection with the Serb forces in Bosnia and Herzegovina, the Yugoslav Presidency officially anounced that Mladic would be assuming the command of the Army of the so-called Serbian Republic of Bosnia and Herzegovina [Misha GLENNY, *op. cit.*, p. 201]. Belgrade's control of the Serb forces in Bosnia and Herzegovina was confirmed by Serbian officers in the Bosnian field who claimed that they could not ceasefire until they were told to do so by Belgrade. [*The Daily Telegraph*, 15 March 1993].

Section 2.3.7

Yugoslavia's continuing involvement

2.3.7.1 Contrary to Belgrade's repeated claims that it has stopped interferring in the Bosnian war after the withdrawal of the federal troops in May 1992, Belgrade's involvement in the war in the Republic of Bosnia and Herzegovina still continues. Since 27 April 1992 the Serb forces in Bosnia and Herzegovina have continuously received logistical support from the Federal Republic of Yugoslavia (Serbia and Montenegro). This is confirmed by Milan VEGO in *Jane's Intelligence Review*:

> "The Serbian forces have more than sufficient supplies of weapons and ammunition to continue fighting at the current level of intensity for more than two years according to some

> reports. The Serbian forces have control of almost two-thirds of the 250.000 tons of ammunition in the possession of the former federal army. Yet, these forces are highly dependent on other supplies, especially fuel for aircraft, tanks and armoured vehicles, and special equipment which can only come from Serbia and Montenegro. Thus, the Serbian forces are supplied both by the air and overland. Despite the UN sanctions, there are reports that literally hundreds of Serbian tractor-trailers, including oil tankers move daily over the roads from northwestern part of Serbia across the Drina River to Beijeljina and then to Banja Luka and other cities in western Bosnia. Other road communications to the Serbian forces also run across the Drina River at Loznica, Bralinac, and Visegrad. Another overland supply used to supply the Serbian forces runs from Scepan Polje (Montenegro) to Sarajevo." [Milan VEGO, *op. cit.*, p. 448].

On 16 November 1992, Radoman Bozovic, then Prime Minister of the Yugoslav Republic of Serbia, confirmed Yugoslavia's continuing involvement. The Belgrade based *Tanjug* news agency released the following report:

> "Bozovic on Monday [16 November 1992] took part in a talk show hosted by the Yugoslav news agency Tanjug. Asked about the announced stepping up of United Nations sanctions against Yugoslavia, Bozovic underscored that pressure, no matter how strong, cannot force Serbia to stop sending material and humanitarian aid to Serbs who are engaged in a civil war in neighbouring Bosnia-Hercegovina." [*Tanjug*, 1532 gmt, 16 November 1992; source: BBC Summary of World Broadcasts, emphasis added].

VEGO's observations and *Tanjug*'s report are completely consistent with two statements made by Lord Owen, co-chairman of the International Conference on the former Yugoslavia. In early December 1992, he remarked:

> "Serbia and Montenegro supply the oil and the spare parts. If they cut this off, the Serb military operation in Bosnia would grind to a hal within a week" [*The Guardian*, 5 December 1992].

In early 1993, he consequently called for selective bombing of road and bridges into Bosnia to prevent the Serbian government from continuing to supply the Serb forces.

2.3.7.2 In addition to the logistical support given to the Serb forces in Bosnia and Herzegovina, VJ troops and aircraft regularly cross the border to support the Serbian war effort in the Republic of Bosnia and Herzegovina. Since the withdrawal of the JNA, up to 20 000 VJ troops have on occasion been deployed on Bosnian territory [James GOW, *op. cit.*, p. 2]. Yugoslav air force jets were widely used in support of the Bosnian Serbs on the ground. These aircraft used air bases at Batajnica (near Belgrade), Nis, Ponikve (near Uzice), Pristina, and Podgorica for combat missions over the Republic of Bosnia and Herzegovina. Despite the United Nations ban on flights, MiG-23 fighter bombers were used to bomb targets in Bosnia from their bases in Serbia [Milan VEGO, *op. cit.*, p. 446].

2.3.7.3 In May 1992, Serbian forces from across the border in Montenegro emptied the village of Borajno in the Cajnice district of its Muslim population [*see* 2.2.63]. On 2 March 1993, VJ troops completely destroyed the village of Crska, near Kojnevice Polje [*see* 2.2.5.14]. Yugoslav troops operate from Serb-controlled territory in Bosnia, most notably the special forces commandos from the 63rd Airborne Brigade [*The Guardian*, 28 January 1994]. Early February 1994, western officials confirmed reports that Yugoslav undercover units had been routinely engaged in Bosnia [*The Guardian*, 2 February 1994].

2.3.7.4 In a number of cases, the VJ has deployed tanks and artillery, located in the Federal Republic of Yugoslavia (Seria and Montenegro), to support or cover Serb forces in Bosnia and Herzegovina. On 25 January 1993, the Yugoslav Army from the right bank of the river Drina, that is on Yugoslav territory, shelled positions of the Bosnian army across the river. On this occasion, Lieutenant-General Nikola Mandaric, commander of the First Army of the Yugoslav Army gave an interview to *Politika*. In his authoritative book on Yugoslavia, Misha GLENNY describes *Politika* as one of the "hollow vessels which Milosevic's bureaucracy filled with seductive nonsense" [Misha GLENNY, *op. cit.*, p. 44). In this interview Mandaric declared the following:

> "By the decree of the president of the republic and the Supreme Defense Council, the Yugoslav Army is deploying a part of its forces on the right bank of the River Drina to give assistance to the Army of the Serbian republic in the protection of the Serbian population from genocide... For the time being the assistance consists of a certain support of the Army of the Serbian republic and of preventing sabotage-terrorist groups from penetrating into the territory of Serbia and Yugoslavia, which is their intention, as we have learnt from the experience from Rudo and Visegrad. As for the desires of the Muslim and Ustasha forces to conquer this region on the left bank of the River Drina and populate it with Muslims, well, that will not work, and if we receive the orders we will cross the river to help the Serbian people." [*Politika*, 26 January 1993, p. 8; source: Foreign Broadcast Information Service].

2.3.7.5 In Serbia, officials of the Yugoslav Army have been involved in the forced conscription of Bosnian Serb refugees for the purpose of fighting with the Serb forces in Bosnia and Herzegovina:

> "According to UNHCR officials, at least 26 Bosnian Serb males of fighting age were rounded up at a refugee collection

centre in Kosovo recently. They were reportedly driven to the Bosnian border where they were handed over to Bosnian Serb authorities" [*The Independent*, London, 21 January 1994].

The forced conscription was later confirmed by other sources:

> "In another effort to bolster the Bosnian Serbs, the Yugoslav authorities have been summoning refugees into the breakaway army. Men of military age who have fled the fighting to refugee camps are being told to report to local Yugoslav military districts, according to the UN High Commissioner for Refugees. At the Yugoslav military offices, they are handed a form, stamped by the Bosnian Serbs' ministry of defence, headed: "The Fatherland is calling you". The notice orders the refugee to report to military centres in Serbia for duty in the Bosnian Serb army, adding that service is obligatory and that failure to appear will result in prosecution" [*The Guardian*, 28 January 1994].

Section 2.3.8

Yugoslavia (Serbia and Montenegro)'s public confirmations of its involvement

2.3.8.1 On several occasions, Serbian President Slobodan Milosevic admitted the Federal Republic of Yugoslavia (Serbia and Montenegro) continued giving extensive support to the Serb forces in Bosnia and Herzegovina, after the formal withdrawal of the Yugoslav People's Army (JNA) in May 1992. On 9 October 1992, Belgrade Televion broadcasted a recorded interview given to Milorad Vucelic, Director-General of Serbian Radio and Television, by the Serbian President:

> "[Vucelic] Mr President, it sometimes seems that one of the conditions to overcome the sanctions that might be worth complying with and that some superpowers perhaps want is

to stop helping - naturally, in a humanitarian and any other manner, I mean, taking care of that which is our constitutional duty - that is, to stop looking after the Serbs in Krajina and the Serbs in Bosnia-Hercegovina. Is such a political turnabout possible in Serbia while you are President of the Republic and while the current government is running Serbia?
[Milosevic] This is absolutely out of the question. They have nobody else to rely on but us. If we had even reduced the aid to them they would have found themselves in a very difficult situation. We do not have the right to do such a thing. These people are a part of our nation whom we are absolutely obliged to help. All these stories that some individuals are telling, namely that we can live well and happily and what concern of ours is it what is happening over there - well, if a nation is destroyed, then there is no freedom, prosperity or anything else for an individual either. All in all, we know to which individuals freedom, prosperity and other benefits might have applied, while they used to apply to the nations that were being destroyed or a subject of aggression, and they found an excuse for the aggression and for not offering resistance and for treason - not to use this overtly exploited word of our political vocabulary - therefore, I really do not see how this could be possible for Serbia. I believe that not a single government in Serbia should even think about it if it has even the slightest idea about state and national interests." [*Belgrade TV*, 2054 gmt, 9 October 1992; source: BBC Summary of World Broadcasts, emphasis added].

2.3.8.2 In early May 1993, the Republic of Serbia and the Federal Republic of Yugoslavia (Serbia and Montenegro) released the following official communiques following a meeting of the self-styled "parliament" of the so-called "Srpska Republika". The text of these communiques was submitted earlier within the request for the indication of provisional measures [*Request for the indication of Provisional Meaures of Protection submitted*

by the Government of the Republic of Bosnia and Herzegovina, 27 July 1993, pp. 43-45]:

> "Communique issued after the session of the Government of the Republic of Serbia
>
> The Government of the Republic of Serbia discussed the report, prepared by prime minister N. Sainovic, on the results of the negotiations process for peace in former Bosnia and Herzegovina, and of the session of the Serb Republic parliament.
> The Government reached the following conclusions:
> Firmly believing that a just battle for freedom and the equality of the Serbian people is being conducted in the Serb Republic, the Republic of Serbia has been unreservedly and generously helping the Serb Republic, in spite of the enormous problems it had to face due to the sanctions introduced against it by the un Security Council.
> At the same time, the Republic of Serbia greatly contributed to the peace within the UN efforts, with the intention of securing international guarantees for a just and honorable peace, ensuring the security, the territories and the constituent status of the Serbian people in Bosnia and Herzegovina.
> The government believes that such conditions have been met after the enhancement of the Vance-Owen Plan at the Athens meeting.
> Taking part in the session of the Serb Republic parliament S. Milosevic, President of the Republic of Serbia, N. Sainovic, Prime Minister of Serbia and Z. Lilic, President of the Serbian parliament, presented numerous element and facts, in order to help the deputies of the Serb Republic parliament approve the Vance-Owen Plan, not as a final solution, but certainly as a good basis for preventing, within the peace process, the loss of lives, as well as to ensure a lating peace and the just objectives of the Serbian people.
> The Government reached the conclusion that the decision of the Serb Republic parliament, i.e. to transfer the final decision regarding the Vance-Owen Plan to the people, represents an irresponsible act, since the people did not take

part in the negotiations that lasted several months, and they should not be used as a screen by the leaders faced with critical decisions, since the leaders are obliged to make decisions and to consequently answer to the people for their actions.

Since the conditions for space have been met, the Government also agreed, that any further economic depletion of the Republic of Serbia is now unjustified and unsupportable, and that future aid to the Serb Republic should be limited to food and medicines in such quantities as the competent ministries will determine. The Government of the Republic of Serbia also believes that, as the conditions for establishing peace have been reached, any further aid in funds, fuel, raw materials etc., provided until now with great sacrifices by the Republic of Serbia itself, is not justified any more.

The Republic of Serbia will always unreservedly offer shelter to the wounded, refugees, and all threatened persons from former Bosnia and Herzegovina, but it can not tolerate that certain officials from that area live comfortably and immodestly in Belgrade, while they offer only a harsh policy of sacrifices and poverty to the people of the Serb Republic.

The government of the Republic of Serbia underscores its deep appreciation for the efforts, intended to help the peace process in loco with political means and personal engagement, made by the Greek Government, and especially by Prime Minister Mitzotackis."

and

"Federal Government - Communique

The Government of the Federal Republic of Yugoslavia reviewed today the consequences resulting from the decision of the assembly of the Republic of Srpska at Pale not to accept the Vance-Owen Plan but to leave the final decision to the Serb people in Bosnia-Herzegovina to be taken at a referendum.

In this connection, the Government expressed its indignation and profound concern on account of such a decision and the possible course subsequent developments could take as well

as on account of the failure of the assembly of the Republic of Srpska to acknowledge the undeniable arguments advocated on behalf of the F.R.Y. By Presidents Cosic, Milosevic and Bulatovic.
Bearing in mind the immediate adverse effects of UN Security Council Resolution 820 on the economic power of the F.R.Y. And the social position of the majority of its citizens, the Federal Government is forced to adjust all future aid to the Republic of Srpska with its objective economic possibilities and to reduce it exclusively to contingents of food and medicaments.
The Federal Government has instructed the appropriate Ministeries to ensure the strict implementation of this decision" [emphasis added].

2.3.8.3 In the first communique, the Republic of Serbia proclaimed that the war in the Republic of Bosnia and Herzegovina is "a just battle for freedom and the equality of Serbian people". In order to support this battle, the Republic of Serbia "has been unreservedly and generously helping" the Bosnian Serbs. In the concluding part of the first communique, the Republic revealed the nature of this help. At the cost of its "economic depletion" the Republic of Serbia has been providing "funds, fuel, raw materials etc.".
In the second communique, which was provided as part of the same document in conjunction with each other, the Federal Republic of Yugoslavia (Serbia and Montenegro) also acknowledged that "aid" has been provided to the Serbs in the Republic of Bosnia and Herzegovina. With regard to this aid, the communique stated that "the Federal Government is forced ... to reduce it exclusively to contingents of food and medicaments". This clearly implies that assistance, other than food and medicaments, has been given.

2.3.8.4 On 11 May 1993, Slobodan Milosevic released a statement to the President of the Belgrade based *Tanjug* news agency, Slobodan Jovanovic, which is completely consistent with the two communiques:

> "In the past two years, the Republic of Serbia - by assisting Serbs outside Serbia - has forced its economy to make massive efforts and its citizens to make substantial sacrifices. These efforts and these sacrifices are now reaching the limits of endurance. *Most of the assistance was sent to people and fighters in Bosnia-Hercegovina*, but a substantial amount of aid was given to the 500,000 refugees in Serbia. At the same time, because of its solidarity with and assistance to the Serbs in Bosnia-Hercegovina, Serbia is subjected to brutal international sanctions. Today there can be no comparison between us and any other country in the world, or very few countries, in terms of the economic and general difficulties we face. Clearly, we were aware we would face these difficulties when deciding to provide assistance to Serbs who were at war.
>
> Now conditions for peace in Bosnia have been created. Following a year of war and long-term peace negotiations, the Serbs have gained their freedom and have regained the equality taken from them when the war started. Most of the territory in the former Bosnia-Hercegovina belongs now to Serb provinces. This is a sufficient reason to halt the war, and to remove further misunderstandings through negotiations and by peaceful means.
>
> The signing of the peace plan is an act of goodwill, which ends the war and opens up peaceful negotiations between the three warring sides in Bosnia and the neighbouring republics of former Yugoslavia and the international community. This is not an end to negotiations about relations between Serbs, Muslims and Croats, but it is an end to the war. Hence we in Yugoslavia and Serbia have appealed to the Serbs in Bosnia to support an end to the war and to embark on the road to peace by signing the plan. Serbs in Bosnia, as well as Serbs and all other citizens of Serbia, now really do need peace.

Serbia finds it difficult to sustain the burden of the great assistance which goes to Bosnia, and of the sanctions which have been imposed on Serbia because of its solidarity with the Serbs outside Serbia, and there is no reason for it to sustain the burden if the war in Bosnia stops. We have of course not excluded further humanitarian aid to the population of Bosnia-Hercegovina, but the people there will in peace-time become capable of rebuilding their economy and taking care of their own lives.

Serbia urgently needs peace in Bosnia. When the current great sacrifices are over and the sanctions are lifted, Serbia will soon recover - tensions will ease, the standard of living will increase, the burden of uncertainty and fear from war and poverty will be removed from the citizens. The interests of 10 million citizens of Serbia must now have priority. These interests cannot be made use of for the sake of some other interests, especially if these interests of Serbia's citizens are of vital importance and are in extreme jeopardy. Serbia has lent a great, great deal of assistance to the Serbs in Bosnia. Owing to that assistance they have achieved most of what they wanted. Now Serbia has to start taking care of itself - concentrating primarily on the revival and the development of its industry and economy, increasing the living standard of its citizens and protecting them from violence and crime which are also a consequence of the war and of the great and uncontrolled flow of people between the two republics. I therefore believe that support for the peace plan is real support for peace which is of the greatest vital importance for Serbia, for its citizens, for every citizen of Serbia. Only someone who is not moved by the interests of Serbia and its people, but by some other personal or group interests cannot see and not accept this. No one who considers the interests of Serbia and its citizens as subordinate to his own interests can count on our understanding and our support.

The decision on the peace plan concerns the interests of Yugoslavia, Serbia and Montenegro, Krajina [in Croatia] and the Serbian Republic [in Bosnia-Hercegovina], all citizens and the whole of the Serbian nation - not only the Assembly and the citizens of the Serbian Republic.

> I therefore believe that the decision on this cannot be made only by the citizens of the Serbian Republic, but by all the people's representatives elected to the parliaments of Yugoslavia, Serbia, Montenegro, Krajina and the Serbian Republic - equally and with full respect for the interests of their citizens and the Serbian nation for peace, freedom, equality, and against war and violence." [*Yugoslav Telegraph Service*, 1553 gmt, 11 May 1993; source: *BBC Summary of World Broadcasts*; emphasis added].

2.3.8.5 In this official statement, Milosevic admitted that the Federal Republic of Yugoslavia (Serbia and Montenegro) has lent "a great, great deal of assistance" to the Serbian "people and fighters" [emphasis added] in Bosnia and Herzegovina. As Milosevic's statement also clearly indicates, this "assistance to Serbs who were at war" was not limited to humanitarian aid:

> "There is no reason for it [Federal Republic of Yugoslavia (Serbia and Montenegro)] to sustain the burden [of the assistance] if the war in Bosnia stops. We have of course not excluded further humanitarian aid to the population of Bosnia-Hercegovina" [emphasis added].

This clearly implies that other, non-humanitarian, assistance has also been given to Bosnian Serbs. In his statement, Milosevic moreover acknowledged that this support given to the Serbian forces has been a decisive factor in the war in Bosnia and Herzegovina: "Owing to that assistance they [the Serbs in Bosnia] have achieved most of what they wanted", that is that "most of the territory in the former Bosnia-Hercegovina belongs now to Serb provinces". The influence of Greater Serbian ideology on Milosevic's political ideas is clearly visible in this statement. Milosevic refers several times to the common interests of "the Serbian nation", which includes all Serbs whether living in "Yugoslavia, Serbia and Montenegro, Krajina [in Croatia]" or in "the Serbian Republic [in Bosnia-Hercegovina]". In Milosevic's view, an end to the war is

acceptable, desirable and in the interests of "all citizens and the whole of the Serbian nation", now that " most of the territory in the former Bosnia-Hercegovina belongs ... to Serb provinces".

2.3.8.6 Very recently, on 16 March 1994, in spite of international outrage over the shelling of Sarajevo, the Federal Republic of Yugoslavia (Serbia and Montenegro) publicly and clearly interfered on behalf of the Serb forces surrounding the Bosnian capital. In response to NATO's threat dated 9 February 1994 to shell Serb artillery outside Sarajevo, the Federal Republic of Yugoslavia (Serbia and Montenegro) submitted an official Application at the International Court of Justice. In this Application against the Member States of NATO, the Federal Republic of Yugoslavia (Serbia and Montenegro) claimed that by "threatening to use force without the authorization of the Security Council and in the form of an ultimatum" the Member States have violated the United Nations Charter [I.C.J. *Press Communique: Yugoslavia applies to the International Court of Justice in a dispute with the Member States of NATO in respect of the threat of use of force by NATO*, No. 94/11, 21 March 1994]. By interfering on behalf of the Serb forces in the Republic of Bosnia and Herzegovina the Federal Republic of Yugoslavia (Serbia and Montenegro) acknowledged that it is far from neutral in the conflict. On the contrary, it apparently considered a threat against Serb forces in the Republic of Bosnia and Herzegovina as a threat against itself.

Moreover, Yugoslavia (Serbia and Montenegro) condoned and approved of the systematic destruction of Sarajevo, an act which on numerous occasions has been denounced by the entire international community.

Section 2.3.9

Conclusion

2.3.9.1 The Yugoslav offensive carried out in the months following the declaration of independence by Bosnia and Herzegovina was not a chaotic and uncontrolled explosion of ethnic violence. It was a well planned and thoroughly executed (military) campaign aimed at the conquest and control of as much strategically important territory as possible and at the same time aimed at the destruction of the predominant Muslim population of the territories involved.

The atrocities committed on the territory of the Republic of Bosnia and Herzegovina are therefore neither the result of some centuries-old hatred, nor a tragic 'by-product' of an 'old-fashioned' territorial and/or civil war. Quite the contrary, these atrocities are the ultimate and inevitable outcome of the Greater Serbian ideals as promoted by the Serbian leadership and their desire to create an ethnically pure Serbian state.

PART 3

AUTHORITATIVE INTERNATIONAL ORGANS CONFIRM THE EXISTENCE OF A CAMPAIGN OF GENOCIDE UNDERTAKEN BY THE FEDERAL REPUBLIC OF YUGOSLAVIA (SERBIA AND MONTENEGRO)

CHAPTER 3.1
THE LEGAL RELEVANCE OF THE PRONOUNCEMENTS OF UNITED NATIONS ORGANS

3.1.0.1 As was demonstrated in the preceding Part, a comprehensive campaign of genocide has been conducted and supported by JNA troops operating on the territory of the Republic of Bosnia and Herzegovina, and by other forces directed and supported by the Federal Republic of Yugoslavia (Serbia and Montenegro). This Part describes the international response to these activities, in particular by the organs of the United Nations.
Annexed to this Memorial are the most important UN-documents, being the relevant Security Council Resolutions [Annex 3-I] and the relevant General Assembly Resolutions [Annex 3-III].

3.1.0.2 According to Article VIII of the Genocide Convention: "[a]ny Contracting Party may call upon the competent organs of the United Nations to take such action under the Charter of the United Nations as they consider appropriate for the prevention and suppression of acts of genocide or any of

the other acts enumerated in Article III." The Convention therefore places the United Nations organs in a special position with respect to the application of the Genocide Convention, and the pronouncements of these organs are particularly persuasive when determining whether the provisions of the Convention are applicable to a certain situation, whether these provisions have been violated, and if there has been a violation, which entity is internationally responsible. The International Court of Justice may in turn wish to place particular emphasis on the pronouncements of the United Nations, of which it is the "principal judicial organ".

3.1.0.3 This Part first presents the resolutions and decisions of the United Nations Security Council, the organ which exercises primary responsibility for international peace and security. These resolutions and decisions were initially triggered by the armed actions and acts of intervention of the Federal Republic of Yugoslavia (Serbia and Montenegro). It was within the framework of this aggressive campaign, of course, that the acts of genocide have been committed, as is reflected in the pronouncements of the Council.

3.1.0.4 There then follows a presentation of authoritative determinations relating to the elements of the campaign of genocide, which reveal, according to objective international agencies, the systematic nature of the atrocities which have been committed and confirm that these acts amount to genocide, in line with the provisions of the Genocide Convention. These pronouncements were made by the United Nations General Assembly, the United Nations Commission on Human Rights and its Sub-commission and Special Rapporteur, the Human Rights Committee and the Vienna Conference on Human Rights, all of which are also undoubtedly "competent" in the sense of Article VIII of the Genocide Convention.

3.1.0.5 It would be impossible to relate the vast number of statements concerning genocide in the Republic of Bosnia and Herzegovina that were made by United Nations member States in UN and other bodies. Instead, individual submissions of governments to United Nations organs will only be quoted or cited where they may assist the Court in its understanding of the resolution or decision adopted by the organ in question. A more detailed analysis of these resolutions and decisions will be provided in Part 6, within the context of the analysis of attribution, along with further evidence on this point emanating from regional organizations and agencies.

CHAPTER 3.2
THE UNITED NATIONS SECURITY COUNCIL

3.2.0.1 Even before the Republic of Bosnia and Herzegovina was admitted to UN membership, the United Nations Security Council responded to the armed actions which were launched by the Federal Republic of Yugoslavia (Serbia and Montenegro) as part of the campaign of genocide that was to ensue. After having called for a cease-fire on 13 April 1992, which remained unheeded, it adopted a Presidential Statement, calling once more upon all "regular or irregular forces" to cease military operations and demanding that "all forms of interference from outside Bosnia-Herzegovina cease immediately" [S/23842, 24 April 1992]. The Council thus unanimously confirmed the existence of the element of external armed intervention in the developing crisis. The statement had been adopted without a debate in the Council, but several delegations to the United Nations communicated their legal appreciation of the situation to the Council. Hungary, for example, wrote to the Council that "the aggression against the sovereignty and the

territorial integrity of the Republic of Bosnia-Herzegovina, the violations of fundamental human rights, including the rights of ethnic and national minorities, in the areas controlled by the 'Yugoslav' Army and Serbian irregular forces, constitute a serious threat to peace and security in the whole Central and South-eastern European region." [S/23845, 26 April 1992]. Venezuela complained of "atrocities" which amounted to "inhuman acts of aggression by one country against another" [S/24377, 4 August 1992].

3.2.0.2 On 12 May 1992, when reporting to the Security Council, the UN Secretary-General reflected the widely held view that "what is happening is a concerted effort by the Serbs of Bosnia-Herzegovina, with the acquiescence of, and at least some support from, JNA, to create 'ethnically pure regions' ... The techniques used are the seizure and the intimidation of the non-Serb population" [S/23900, para. 5, 12 May 1992]. In addition to arrest and intimidation, the Secretary-General soon had to report on the direct use of armed force against civilians, including the besieging of cities as part of this strategy. He confirmed that the JNA was in some cases directly involved in such activities, linking it already at that stage to the direct killing of Muslims and the creation of conditions of life calculated to bring about their physical destruction [S/24000, para. 6, 26 May 1992].

3.2.0.3 Perhaps to pre-empt a strong response by the Security Council to this finding of the Secretary-General, the delegation of the Federal Republic of Yugoslavia (Serbia and Montenegro) asserted in a communication to the Council that it had, on 27 April, decided to "reduce the Army of Yugoslavia to the territory and citizens of Yugoslavia. As a result, all the citizens of the Federal Republic of Yugoslavia who had been in the YPA

(Yugoslav People's Army) [JNA] troops were withdrawn by 19 May 1992, together with their share of equipment and armaments" [S/24007, 27 May 1992]. The government of the Federal Republic of Yugoslavia (Serbia and Montenegro) thus officially confirmed that, at a minimum, the JNA had continued to operate within the Republic of Bosnia and Herzegovina and that it was equipping Bosnian citizens of Serb ethnicity with "their share" of military equipment. As was indicated in Part 2, this equipment included heavy weapons, command and control facilities, air-craft and other materiel, that is, precisely the instruments of warfare and terror which were used in the campaign against mostly Muslim civilians.

3.2.0.4 The fact that this transfer of arms and ammunition had actually occurred was confirmed by the United Nations Secretary-General [S/23844, para. 16, 24 April 1992]. In a subsequent report, the Secretary-General indicated that the "share" of men and equipment which was being transferred amounted to some 80 per cent of JNA strength [S/23900, para. 24, 12 May 1992]. In effect, therefore, it was confirmed that the JNA simply changed its designation, but remained, in terms of manpower, equipment and strategic direction, substantially the same instrument in the campaign of genocide that was being conducted by the Federal Republic of Yugoslavia (Serbia and Montenegro) and those affiliated with it.

3.2.0.5 The Security Council responded to the continuing participation of the Federal Republic of Yugoslavia (Serbia and Montenegro) in the hostilities by adopting Resolution 752 (1992) of 15 May 1992. The Council formally demanded that "all forms of interference from outside Bosnia-Herzegovina, including by units of the Yugoslav People's Army (JNA) as well as elements of the Croatian Army, cease immediately, and that

Bosnia-Herzegovina's neighbours take swift action to end such interference and respect the territorial integrity of Bosnia and Herzegovina". Hence, the Council confirmed that the JNA troops which, it was asserted by the Federal Republic of Yugoslavia (Serbia and Montenegro), were now nominally under local Serb command, continued to operate, in fact, as regular JNA forces. The Council therefore also demanded in Resolution 752 (1992) that the units of the JNA within the Republic of Bosnia and Herzegovina must either be withdrawn, or disbanded and disarmed with their weapons placed under effective international monitoring.

3.2.0.6 In Resolution 752 (1992) the Council also concerned itself with the activities of these forces, calling for an end to forcible expulsions of persons from the areas where they live, and "any attempt to change the ethnic composition of the population".

3.2.0.7 Some two weeks after the adoption of Resolution 752 (1992), the Secretary-General had to report to the Council that the situation had deteriorated even further. Serious violations of even the most basic humanitarian rules for the protection of the civilian population in armed conflict were being committed, he added. These acts had led to the "displacement of the civilian population from its towns and villages ... on a scale not seen in Europe since the Second World War" [S/24000, para. 5, 26 May 1992]. The Secretary-General continued by stating that there had also been "a grievous deterioration in the plight of civilians trapped in the cities besieged by various irregular forces and in some cases also by the Yugoslav People's Army (JNA)," confirming once more the existence of a genocidal campaign to destroy the mostly Muslim population, which was still continuing with the direct involvement of the JNA [*id.*, para. 6].

3.2.0.8 On 30 May 1992, the Secretary-General once more certified to the Council that the requirement for a withdrawal of the JNA and of non-intervention had not been heeded [S/24049, paras. 5-9, 30 May 1992]. The Security Council responded with considerable decisiveness, imposing against the Federal Republic of Yugoslavia (Serbia and Montenegro), in Resolution 757 (1992) of 30 May 1992, comprehensive economic sanctions. In fact, the sanctions adopted already at that stage were on a par with, or even in excess of, those imposed against Iraq in 1990, evidencing the gravity with which the Council viewed the situation.

3.2.0.9 The Resolution formally deplored the failure of the authorities in the Federal Republic of Yugoslavia (Serbia and Montenegro) to comply with the demands contained in Resolution 752 (1992). The sanctions, adopted under Chapter VII of the Charter, are to apply "until the Security Council decides that the authorities in the Federal Republic of Yugoslavia (Serbia and Montenegro), including the Yugoslav People's Army (JNA), have taken effective measures to fulfil the requirement of resolution 752 (1992)", that is, *inter alia*, the demand to withdraw JNA forces, to cease acts of intervention and genocidal measures resulting in the change of the ethnic composition of the population and to cease obstructing humanitarian aid deliveries.

3.2.0.10 Resolution 757 (1992) was adopted by 13 votes to none, with two abstentions (China and Zimbabwe). Zimbabwe was opposed to the concept of economic sanctions as a matter of principle, but did not dispute the view held by the rest of the Council members with respect to acts of armed intervention and grave and systematic violations of humanitarian law undertaken by the Federal Republic of Yugoslavia (Serbia and

Montenegro). China formally confirmed that the requirement for a withdrawal of troops had not been complied with [S/PV.3082, 30 May 1992, p. 8]. The other delegations were also very forthright, several of them explicitly linking the acts of aggression perpetrated by the Federal Republic of Yugoslavia (Serbia and Montenegro) to "the undisguised efforts to create so-called nation-States, incorporating all people belonging to the same ethnic background, and the blatant use of force to achieve this aim through territorial conquest" [Hungary, *id.*, p. 16].

3.2.0.11 It should be noted that the sanctions established in Resolution 757 (1992) are in force to this day, thus confirming that, in the view of the Security Council, the Federal Republic of Yugoslavia (Serbia and Montenegro) continues to be in violation of the demands contained within it. Indeed, in Resolution 787 (1992) of 16 November 1992, the Security Council confirmed that any taking of territory by force or any practice of "ethnic cleansing" is unlawful and unacceptable, and once again demanded that all forms of interference, including the infiltration of irregular units and personnel, cease immediately. In consequence of the continuing violations, the Council tightened sanctions yet further in that resolution, and even authorized the use of military force for the implementation of its provisions relating to maritime traffic. In fact as late as 1993, the Secretary-General confirmed that the requirement of a withdrawal of JNA troops "has still not been fulfilled" [A/47/869, 18 January 1993] and, in the response to these and other continuing grave violations of the rights of the Republic of Bosnia and Herzegovina, the Council was constrained to toughen sanctions further still [Resolution 820 (1993), 17 April 1993].

3.2.0.12 In the summer of 1993, the Council proposed the establishment of a monitoring presence, to prevent the infiltration of military forces and equipment and other support for the Serb forces in the Republic of Bosnia and Herzegovina [Resolution 838 (1993), 10 June 1993]. Significantly, the Federal Republic of Yugoslavia (Serbia and Montenegro), despite its earlier indications that it would comply with such a request, rejected this plan, thus displaying once more its unwillingness to contemplate a disruption of the continued operations of its forces, and those supported by it, in the framework of the campaign of genocide in the Republic of Bosnia and Herzegovina.

3.2.0.13 One element of this continued participation relates to air support given to Bosnian Serb forces operating within the Republic of Bosnia and Herzegovina. On 9 October 1992, the Council adopted Resolution 781 (1992), which, in response to the use of Federal Republic of Yugoslavia (Serbia and Montenegro) air power, established a ban on military flights in the airspace of the Republic of Bosnia and Herzegovina. The UN Secretary-General was requested to report to the Council on compliance with the ban. Through the use of sophisticated surveillance equipment, and in collaboration with a regional defence agency, a very large number of violations was detected. Indeed, the Secretary-General was constrained to issue weekly reports detailing violations, which are now too numerous even to cite here. Most of the violations were committed by aircraft operating in conjunction with Serb forces. On 19 March 1993, the Secretary-General reported that three planes had attacked the villages in the vicinity of Srebrenica, where civilians had been trapped by encircling forces, dropping bombs. The planes were observed to retreat towards the territory of the Federal Republic of Yugoslavia (Serbia and Montenegro) after having

completed their attack [S/25444, 19 March 1993]. The Council strongly condemned this further violation (at the time 465 violations had been reported), and demanded from the Bosnian Serbs an immediate explanation of the aforementioned violations and particularly of the aerial bombardment. It also requested the Secretary-General to ensure that an investigation be made of the reported possible use of the territory of the Federal Republic of Yugoslavia (Serbia and Montenegro) to launch air attacks against the territory of the Republic of Bosnia and Herzegovina [S/25426, 17 March 1993]. The severity with which the Council viewed the air support given by the Federal Republic of Yugoslavia (Serbia and Montenegro) was underlined when it authorized UN member States to use force, under its authority, to ensure compliance with the flight ban [Resolution 816 (1993), 25 March 1993].

3.2.0.14 The Council also addressed specifically a number of individual elements of the campaign of genocide. In Resolution 798 (1992) of 21 December 1993, it strongly condemned the massive, organized and systematic detention and rape of women, in particular Muslim women, in Bosnia and Herzegovina. The Council also expressed deep concern at reports of abuses against civilians imprisoned in camps, prisons and detention centres and demanded unimpeded and continuous access to all camps, prisons and detention centres to be granted immediately to humanitarian organizations, and humane treatment for detainees, including adequate food, shelter and medical care. In so doing, as is evidenced in the relevant Council debates accompanying the adoption of the respective resolutions and decisions, it confirmed the existence of, and condemned, the practice of establishing concentration camps at which torture and arbitrary killings were conducted, mainly against Muslim civilians [*e.g.*, Presidential Statement S/24378, 4

August 1992; Resolution 770 (1992), 13 August 1992; Resolution 771 (1992), 13 August 1993; Presidential Statement S/26437, 14 September 1993].

3.2.0.15 The Council also addressed what is perhaps the most direct manifestation of the policy of genocide: the military attacks directed against civilians, including the bombardment and shelling of civilian centres and even concentrations of displaced persons, and the preclusion of humanitarian aid deliveries as a means of warfare against civilians. In August 1992, the Council responded to this strategy of genocide through mass killing and starvation of civilian populations which had been directed mainly at Muslims.

3.2.0.16 In Resolution 770 (1992), adopted formally under Chapter VII, it authorized the use of force for the purposes of the delivery of humanitarian assistance. The denial of humanitarian access, and the use of starvation of a civilian population as a means of warfare was strongly condemned in this and numerous subsequent Council Resolutions and Presidential statements, and in numerous submissions made by UN member states on the occasion of the adoption of these resolutions and statements. The delegate of Venezuela, for example, drew the attention of the Council members to the Convention on the Prevention and Punishment of the Crime of Genocide, reminding them that the Convention states that genocide means inflicting on a group of human beings conditions of life calculated to bring about its physical destruction in whole or in part. Article 54 of the 1977 Additional Protocol I to the Geneva Conventions, he added, also prohibits the destruction of infrastructures basic to life, such as electricity, drinking water, sewage and other basic public services. "Such are the acts today

being perpetrated in the Republic of Bosnia and Herzegovina," the Venezuelan delegate concluded [S/PV.3119, 6 October 1992, p. 9].

3.2.0.17 In Resolution 780 (1992) of 6 October 1992, the Council also confirmed the existence of widespread violations of humanitarian law in the context of the campaign of so-called ethnic cleansing, and the practice of "mass killings" in that context [also Resolution 808 (1883), 22 February 1993]. Later that month, the Council expressed its revulsion at the fact that even those civilians who had been subjected to so-called ethnic cleansing and were fleeing from the city of Jajce, were subjected to attacks from Serb forces [Presidential Statement, S/24788, 30 October 1992]. Atrocities of this kind, verified and condemned by the Council, confirm the existence of a strategy not only to remove members of an ethnic or religious groups from particular regions, but indeed to destroy them, even when attempting to escape. In November 1992, the Council reaffirmed that any taking of territory by force and through such practices is unlawful and unacceptable, insisting that all displaced persons be enabled to return in peace to their former homes [Resolution 787 (1992), 16 November 1993]. In the same resolution, the Council felt constrained to demand the cessation of outside interference, "including infiltration into the country of irregular units and personnel", once again confirming the existence of continuing involvement of the Federal Republic of Yugoslavia in these genocidal acts. This direct link was made even more apparent by the fact that the Council, once more, responded by adopting in that resolution further sanctions against the Federal Republic of Yugoslavia (Serbia and Montenegro).

3.2.0.18 As its demands for compliance remained unheeded, the Security Council gradually widened the mandate of the United Nations Protection Force

(UNPROFOR), initially to escort humanitarian aid convoys. Even then, these entirely humanitarian efforts, aimed at ensuring the very survival of the mostly Muslim populations, were consistently obstructed by Serb forces, leading the Council to adopt the desperate measure of air-drops, in its attempt to prevent the extermination of large segments of the population through starvation [Presidential Statement S/25334, 25 February 1993]. In March 1993, the Council was once more constrained to demand that "the killings and atrocities must stop", reaffirming that those guilty of crimes against international humanitarian law will be held individually responsible by the world community [Presidential Statement S/25361, 3 March 1993]. Subsequently, the Council affirmed that the crime of genocide was included in these violations of humanitarian law by adopting the Statute of the International Tribunal [see 3.2.0.21-22, 3.3.1.1].

3.2.0.19 In April 1993, the Council expressed its alarm at "the continued deliberate armed attacks and shelling of the innocent civilian population" by Serb forces grouped around Srebrenica, an enclave populated by mostly Muslim civilians and including large numbers of civilians, who had been forced to flee their homes in the face of the campaign of genocide. The Council responded to this practice of Serb forces of encircling mainly Muslim inhabited areas and then bombarding the civilian population and displaced persons therein, coupled with the denial of humanitarian access, by establishing the so-called safe havens, initially in Srebrenica, and later in other areas, including Sarajevo [Resolutions 819 (1993), 3 April 1993; 824 (1993), 6 May 1993]. It is noteworthy that the Council specifically referred to the first Interim Order issued by the International Court of Justice with respect to acts of genocide when adopting Resolution 819 (1883) concerning Srebrenica. In a further response to these acts, and referring

specifically to the related interference by way of "the activities carried out in violation of resolutions 757 (1882) and 787 (1882) between the territory of the Federal Republic of Yugoslavia (Serbia and Montenegro) and Serb-controlled areas in ... the Republic of Bosnia and Herzegovina," the Council adopted even further sanctions against the Federal Republic of Yugoslavia (Serbia and Montenegro) [Resolution 820 (1993), 17 April 1993].

3.2.0.20 The Council subsequently even authorized member states to use military force to enforce the security of the so-called safe havens, once again confirming through this action the gravity of the genocidal practice it was seeking to counter, [Resolution 836 (1993), 4 June 1993]. Significantly, in that very resolution, the Council once more demanded that "the Federal Republic of Yugoslavia (Serbia and Montenegro) immediately cease supply of military arms, equipment and services to Bosnian Serb paramilitary units", again linking the Federal Republic of Yugoslavia to the appalling acts of genocide that were being committed against the population and displaced persons in the so-called safe-areas.

3.2.0.21 The means and methods of genocide have also been addressed on the level of individual responsibility. In Resolution 771 (1992), the Council expressed grave alarm at forcible mass expulsions and deportations of civilians, imprisonment and abuse of civilians in detention centres, deliberate attacks on non-combatants, hospitals and ambulances, impeding the delivery of food and medical supplies to the civilian population and wanton devastation and destruction of property. It condemned these practices, including "ethnic cleansing", and determined that individual responsibility attaches to them. Accordingly, it requested member states

and humanitarian organizations to collate substantiated information relating to such activities. The Council followed up on this measure in Resolution 780 (1992), wherein it expressed once again its grave alarm at continuing reports of widespread violations of international humanitarian law, including mass killings and the continuance of the practice of "ethnic cleansing", and established a Commission of Experts to examine and analyze information related to the commission of such acts. As the Pakistani delegate explained during the Council debate on this resolution:

> "In the war in Bosnia, the systematic violation of human rights--the brutal campaign of "ethnic cleansing"--is not the consequence of the conflict, but its cause. The Security Council must respond resolutely to this genocidal campaign against the Bosnian people and particularly against the Muslims. It must act vigorously to stop the atrocities being committed against the Muslims, the like of which have not been witnessed since the holocaust." [S/PV.3136, 16 November 1992, at 31. Other delegations speaking in the debate specifically referred to genocide in the context of a campaign of territorial conquest and a war of aggression; *e.g.*, *id.*, pp. 53, 68].

3.2.0.22 In February 1993, the Council decided to establish an international tribunal for the prosecution of persons responsible of serious violations of humanitarian law committed in the territory of the former Yugoslavia [Resolution 808 (1993), 22 February 1993]. The statute of the tribunal, adopted in Resolution 827 (1993) of 25 May 1993, explicitly includes genocide in the category of crimes to be prosecuted. Again, in this context the Council highlighted what are in fact the same means of genocide that have been employed by the Federal Republic of Yugoslavia (Serbia and Montenegro) in the Republic of Bosnia and Herzegovina, when referring to "mass killings, massive, organized and systematic detention and rape of

women, and the continuance of the practice of "ethnic cleansing", including the acquisition and the holding of territory." [*id.*].

3.2.0.23 The actions of the Security Council were complemented by the activities of a wide range of other bodies operating within the framework of the United Nations, including the General Assembly, the Commission on Human Rights, its Sub-Commission and Special Rapporteur, the Human Rights Committee, the Committee on the Elimination of Racial Discrimination, and others. As will be further demonstrated in the Chapters that follow, many of these organs formally identified the atrocities committed in the Republic of Bosnia and Herzegovina as a consistent and, indeed, systematic, pattern of violations amounting to genocide involving the Federal Republic of Yugoslavia (Serbia and Montenegro).

CHAPTER 3.3
CONFIRMATION BY OTHER AUTHORITATIVE ORGANS THAT THE ACTS COMMITTED AMOUNT TO GENOCIDE

Section 3.3.1
The Genocide Convention is *prima facie* applicable

3.3.1.1 The applicability of all aspects of humanitarian law, including the full range of the Geneva law concerning international armed conflicts to the situation in the Republic of Bosnia and Herzegovina is not in doubt. The UN Security Council confirmed this fact as early as June 1992 [Resolution 764 (1992)], when it referred also to individual criminal responsibility for grave breaches of the Geneva Conventions. In addition to Resolutions 771

(1992) and 780 (1992), to which reference has been made above, the Statute of the International Tribunal established by the Security Council specifically includes the Genocide Convention and the concept of crimes against humanity as sources of law with respect to the situation in the former Yugoslavia. When making proposals for the drafting of the Statute of the Tribunal, France stated that it would seem "paradoxical" not to include genocide in its competence or, indeed "ethnic cleansing" [S/25266, p. 20]. Other proposals, such as the those put forward by Italy, the Organization of the Islamic Conference, Russia, the United States of America, and Canada, include the Genocide Convention as an instrument that is *prima facie* applicable [S/24300, 17 February 1993, S/25512, 2 April 1993, S/25537, 6 April 1993, S/25575, 12 April 1993, S/25594, 14 April 1993 respectively].

3.3.1.2 The Genocide Convention is also frequently cited in the Resolutions of the General Assembly, the United Nations Commission on Human Rights and its Sub-Commission, and the reports of United Nations Rapporteurs and other organs. These sources will be briefly considered in the following paragraphs.

Section 3.3.2

The United Nations General Assembly

3.3.2.1 The General Assembly, as early as 25 August 1992, when adopting Resolution 46/242, strongly condemned the "abhorrent practice of ethnic cleansing" which, in its view constitutes a grave and serious violation of international humanitarian law. It reflected the UN Secretary-General´s

finding of a concerted effort by the Serbs of Bosnia and Herzegovina, with the acquiescence of, and at least some support from, the Yugoslav People's Army, "to create 'ethnically pure' regions ... .". The Assembly identified summary and arbitrary executions, forced disappearances, torture, rape and cruel, inhuman and degrading treatment, as well as arbitrary arrest and detention as elements of this strategy. The systematic deployment of these techniques with the intent to extinguish in whole or in part the largely Muslim population to create "ethnically pure" regions, of course, amounts to the very definition of genocide [see below, Part 5].

3.3.2.2 The Assembly also condemned the violation of the sovereignty, territorial integrity and political independence of the Republic of Bosnia and Herzegovina, deeming this to be aggression, and demanded that this practice be brought to an end immediately and that further steps be taken, on an urgent basis, to stop the massive and forcible displacement of population from and within the Republic of Bosnia and Herzegovina. The Assembly thus linked external intervention with the genocidal acts it had described and condemned so vigorously. In Resolution 46/246 the General Assembly also confirmed that States "are to be held accountable for violations of human rights which their agents commit upon the territory of another state."

3.3.2.3 On 16 December 1992, the General Assembly adopted a declaration on "ethnic cleansing" once again condemning that practice and branding it a violation of humanitarian law, of which the Genocide Convention is a part [Resolution 47/80]. In a further pronouncement adopted two days later, Resolution 47/147, the Assembly again identified and condemned the following elements of the campaign of genocide, including "killings,

torture, beatings, rape, disappearances, destruction of houses, and other acts or threats of violence aimed at forcing individuals to leave their homes, as well as reports of violations of human rights in connection with detention," and "the indiscriminate shelling of cities and civilian areas, the systematic terrorization and murder of non-combatants, the destruction of vital services, the besieging of cities and the use of military force against civilian populations and relief operations". It found that as a result of these practices, "the Muslim population [is] threatened with virtual extermination", adding that the Serbian leadership in territories under their control in Bosnia and Herzegovina and "the Yugoslav Army and the political leadership of the Republic of Serbia bear primary responsibility for this reprehensible practice, which flagrantly violates the most fundamental principles of human rights". The Assembly further restated the obligation, which is also reflected in the Genocide Convention, to take appropriate steps to apprehend and punish those who are guilty of perpetrating or authorizing the violations. It also confirmed again that States are to be held accountable for violations "which their agents commit upon the territory of another State". As one delegate put it in the debate leading to the adoption of the resolution: "Serbia must be made to realize that by pursuing the policy of "ethnic cleansing" it has blatently violated the 1948 Convention on the Prevention and Punishment of the Crime of Genocide and therefore must be responsible for its crimes against humanity" [Bangladesh, A/47/PV.87, 15 December 1992, p. 46]. Reflecting this assessment, the Assembly, in Resolution 47/121, also adopted on 18 December 1992, once again expressed grave concern at what it termed "a consistent pattern of gross and systematic violations of human rights, a burgeoning refugee problem resulting from mass expulsions of defenceless civilians from their homes and the existence in Serbian Montenegran controlled areas of

concentration camps and detention centres, in pursuit of the abhorrent policy of "ethnic cleansing", which is a form of genocide".
The Assembly therefore formally and explicitly branded the campaign mounted as one of genocide [Resolution 47/121], for which "the Yugoslav Army and the political leadership of the Republic of Serbia bear primary responsibility" [Resolution 47/147]. The former resolution was adopted by 102 votes to none. The 57 abstentions can be explained with reference to certain provisions contained in the resolution, concerning political aspects of the continued application of Security Council Resolution 713 (1991). As the records of the debate in the Assembly reveal, there was no significant doubt as to the provisions concerning the existence of a campaign of aggression and genocide. Resolution 47/147 was adopted without a vote, evidencing universal consensus with respect to the findings it contains.

3.3.2.4 In a further resolution, the Assembly expressed outrage at the fact that rape was being used as a "systemic practice" and an "instrument of ethnic cleansing against the women and children in the areas of armed conflict in the former Yugoslavia, in particular against Muslim women and children in Bosnia and Herzegovina [48/143, 20 December 1993]. The Assembly clearly stated that "this heinous practice constitutes a deliberate weapon of war in fulfilling the policy of ethnic cleansing carried out by Serbian forces in Bosnia and Herzegovina", and in this context restated that "the abhorrent policy of ethnic cleansing [is] a form of genocide." The Assembly, in still another resolution, adopted at its 48th session, reaffirmed its "determination to prevent acts of genocide and crimes against humanity" in the context of "the continuation of aggression in Bosnia and Herzegovina", also referring to the links existing between the Federal Republic of Yugoslavia (Serbia and Montenegro) and Serb militias and paramilitary

groups responsible for such "massive, gross and systematic violations" [Resolution 48/88, 20 December 1993].

3.3.2.5 Also at the 48th session, the Assembly, on 20 December 1993, adopted Resolution 48/153. This resolution constitutes one further, authoritative determination of the existence of facts by the Assembly, the legal classification of these facts, and a determination as to international responsibility for these facts. The resolution was adopted unanimously and can be regarded as a concise and authoritative determination by the international community as such as to the legal situation obtaining in the Republic of Bosnia and Herzegovina.

3.3.2.6 In Resolution 48/153, the Assembly again identified and condemned the essential elements of the campaign of genocide, "which include killings, torture, beatings, arbitrary searches, rape, disappearances, destruction of houses and other acts or threats of violence aimed at forcing individuals to leave their homes," as well as violations of human rights in connection with detention (concentration camps). The Assembly further condemned the indiscriminate shelling of cities and civilian areas, "the sytematic terrorization and murder of non-combatants", the destruction of vital services and besieging of cities and the use of military force against civilian populations and relief operations by all sides, recognizing that the main responsibility lies with the Bosnian Serbs, who have used such tactics as a matter of policy, and the Bosnian Croats.

3.3.2.7 This catalogue of offences that were committed "systematically" and as a "matter of policy", was clearly and squarely identified as genocide by the Assembly, which recalled the finding it had made already in Resolution

47/121, to the effect that the campaign of so-called ethnic cleansing, in fact, "is a form of genocide". The unanimity of virtually all states of the world on this point was thus re-emphasized.

3.3.2.8 The Assembly further clarified the true identity of "the Bosnian Serbs", who have used genocidal tactics as a matter of policy, by "recognizing that the leadership in territory under the control of Serbs in the Republics of Bosnia and Herzegovina and Croatia, the commanders of Serb paramilitary forces and political and military leaders in the Federal Republic of Yugoslavia (Serbia and Montenegro) bear primary responsibility for most of these violations" [emphasis added]. Once again, this is nothing less than the unanimous assessment of the entire membership of the United Nations.

Section 3.3.3

The UN Commission on Human Rights and its Sub-Commission

3.3.3.1 On 13 August 1992, the Sub-Commission on Prevention of Discrimination and Protection of Minorities expressed its horror at, and total and unqualified condemnation of, so-called "ethnic cleansing", demanding that such policies and practices be immediately brought to an end [Decision 1992/103]. The following day, the United Nations Commission on Human Rights met in its first ever emergency Special Session, reflecting the dramatic urgency of the situation. It adopted a resolution expressing its "particular abhorrence" at the concept and practice of "ethnic cleansing" in Bosnia and Herzegovina, which "at a minimum entails deportations and forcible mass removal or expulsion of persons from their homes in flagrant violation of their national rights, which is aimed at the dislocation or

destruction of national, ethnic, racial or religious groups [Resolution 1992/S-1/1, 14 August 1992]. In this context the Commission specifically recalled that the former Yugoslavia was a party to the Genocide Convention and "condemns absolutely the concept and practice of "ethnic cleansing"." The Commission called upon all parties in the former Yugoslavia to fulfil their obligations, *inter alia*, under the Genocide Convention, affirming "that States are to be held accountable for violations of human rights which their agents commit upon the territory of another state".

At its second emergency session, the Commission specifically drew the attention of all states to the fact that the acts that were occurring in the Republic of Bosnia and Herzegovina constitute genocide, by calling upon them to consider "the extent" to which this was the case [Resolution 1992/S-2/1, 1 December 1992].

3.3.3.2 The UN Commission on Human Rights, at its 49th session in 1993, recalled its grave concern at the continuing, odious procedure of ethnic cleansing which in its view was the direct cause of the vast majority of human rights violations in the former Yugoslavia and whose principal victims are the Muslim population "virtually threatened by extermination". The Commission also recalled the General Assembly's finding that ethnic cleansing is a form of genocide [Resolution 1993/7, 23 February 1993]. The Commission adopted a further resolution on rape and abuse of women in the territory of the former Yugoslavia, once again condemning this practice as an element of a systematic practice of ethnic cleansing [Resolution 1993/8, 23 February 1993].

The Commission condemned in the strongest terms all these violations, recognizing "that the leadership in territory under the control of the Serbs in the Republics of Bosnia and Herzegovina and Croatia, the commanders

of Serb paramilitary forces and political and military leaders in the Federal Republic of Yugoslavia (Serbia and Montenegro) bear primary responsibility for most of these violations" [emphasis added]. The Commission also demanded that appropriate steps, in accordance with internationally recognized principles of due process, are taken, to apprehend and punish those who are guilty of perpetrating or authorizing the violations and to ensure that they would not recur.

3.3.3.3 Overall, therefore, the Commission on Human Rights, identified the systematic pattern of grave violations of human rights as falling squarely within the definition of genocide, and it found that the Federal Republic of Yugoslavia (Serbia and Montenegro) is primarily responsible.

3.3.3.4 In March of 1994, the Commission addressed again the genocidal practice of rape and abuse of women as an instrument of war, strangulation of cities in the Republic of Bosnia and Herzegovina, shelling and killing of civilians, torture, arbitrary executions, and enforced and involuntary disappearances. In this context, the Commission also denounced the continued deliberate and unlawful attacks and uses of military force against civilians and other protected persons, in particular:

-- the besieging of cities and other civilian areas, and the deliberate, murderous shelling thereof, particularly of the declared 'safe areas';
-- the systematic terrorization and murder of civilians and non-combatants;
-- the destruction of vital services;
-- the use of military force against relief organizations;
-- the intentional destruction of mosques, churches and other places of worship and the desecration of cemeteries;

-- other attacks upon civilians;

-- the forced conscription of internally displaced persons and of refugees in disregard of their protected status [E.CN.4/1994/L.80].

Section 3.3.4

The Special Rapporteur on Human Rights in Former Yugoslavia

3.3.4.1 At its first Special Session, the Commission on Human Rights appointed a Special Rapporteur, Mr Tadeusz Mazowiecki, who stated in his first report that:

> "6. Most of the territory of the former Yugoslavia, in particular Bosnia and Herzegovina, is at present the scene of massive and systematic violations of human rights, as well as serious grave violations of humanitarian law. Ethnic cleansing is the cause of most such violations.
> 7. ...the policy [of ethnic cleansing] has been openly pursued on the territory of those parts of Bosnia and Herzegovina and Croatia which are controlled by ethnic Serbs" [E/CN.4/1992/S-1/9, 28 August 1992].

3.3.4.2 The Special Rapporteur described the means of "ethnic cleansing" in detail, including the bombardment of civilian targets, of mosques, the systematic starvation of populations, arbitrary detentions and executions, etc. He placed emphasis on the "shelling of population centres and the cutting off of supplies of food and other essential goods", referring to "the most dramatic and well-known case of Sarajevo" which had led to the belief of some that "the attacking forces are determined to "kill the city itself" [*id.*, para. 17]. As far back as August 1992, the Special Rapporteur also illustrated this practice with reference to Bihac, in north-west Bosnia:

"... shelling occurs daily. There are no significant targets in the city ... . Fifty one-children have been killed there since the beginning of the war" [*id.*, para. 20].

3.3.4.3 In October 1992, the Special Rapporteur indicated that, in his view, the military conflict in Bosnia and Herzegovina is aimed at achieving "ethnic cleansing", and that the Muslim population, as the principal victims, "are virtually threatened with extermination". He shared the view of other observers that the principal objective of the military conflict in Bosnia and Herzegovina is the establishment of ethnically-homogeneous regions. Ethnic cleansing, in his view, does not appear to be the consequence of the war, but rather its goal. This goal, to a large extent, has already been achieved through the killings, beatings, rape, destruction of houses and threats, the Special Rapporteur added. Such practices had intensified in recent weeks and there was less and less resistance on the part of the non-Serbian population, increasing numbers of whom are ready to abandon everything and to flee their homeland. The Muslim and Croatian populations, in the territory controlled by Serbian authorities, he concluded, live under enormous pressure and terror. Hundreds of thousands of people are being forced to leave their homes and to abandon their belongings in order to save their lives [E/CN.4/1992/S-1/10, 27 October 1992].

3.3.4.4 The Special Rapporteur later confirmed that the principal agents of this campaign of "ethnic cleansing" were irregular paramilitary groups which had been armed and equipped with "very large stocks of military hardware" which had been previously held by the JNA and Belgrade authorities [A/47/666, paras. 14-15].

3.3.4.5 In February 1993, the Special Rapporteur submitted a further report, detailing the application of the practice of ethnic cleansing in a large number of individual instances, referring to the methods of beatings, torture, summary executions, expulsions, use of the siege and cutting off supplies of food, shelling of civilians, etc, and especially the "systematic nature" of these violations [A/48/92, para. 20]. In his conclusion, the Special Rapporteur confirmed once more that ethnic cleansing violates fundamental principles of international human rights and humanitarian law, also referring expressly to the Genocide Convention [A/48/92, para. 256].

3.3.4.5 In his most recent report, the Special Rapporteur confirms that the elements of the campaign of genocide he had described have continued into 1994 [E/CN.4/1994/110, 21 February 1994].

Section 3.3.5

The United Nations Commission of Experts

3.3.5.1 The Commission of Experts established in accordance with Resolution 780 (1992) of the United Nations Security Council confirmed in its report that:

> "Based on the many reports describing the policy and practices conducted in the former Yugoslavia, "ethnic cleansing" has been carried out by means of murder, torture, arbitrary arrest and detention, extra-judicial executions, rape and sexual assault, confinement of civilian population in ghetto areas, forcible removal, displacement and deportation of civilian population, deliberate military attacks or threats of attacks on civilians and civilian areas, and wanton destruction of property. Those practices constitute crimes against humanity and can be assimilated to specific war crimes. Furthermore, such acts could also fall within the

meaning of the Genocide Convention" [S/25274, para. 56, 10 February 1993].

3.3.5.2 Many submissions to the UN Commission of Experts and the UN Security Council also reflect the genocidal character of events in the Republic of Bosnia and Herzegovina. The submissions of the United States, for example, cover acts of wilful killing, torture of prisoners, abuse of civilians in detention centres, deliberate attacks on non-combatants and mass forcible expulsions and deportations. The report states that "the discrete incidents reported herein contain indications that they are part of a systematic campaign towards a single objective--the creation of an ethnically "pure" state" [S/24583, 23 September 1992, p. 2]. Similarly, France argued the following when making her submission:

> "The accounts thus testify to a process: occupation and destruction of a village, execution of some of the inhabitants, transfer of the others to camps where they are subjected to maltreatment and to very harsh conditions of detention, elimination of the most influential, and possible release or exchange of the others on condition that they abandon their property and declare that they will not return to their village. This process generally takes place in the context of a policy of ethnic cleansing" [S/24768, 5 November 1993, p. 2].

3.3.5.3 Slovenia indicated that among some 70,000 refugees on her territory, many had been eyewitnesses of torture, rape and other forms of violent, inhuman and humiliating treatment, many persons who where banished or deported from their homes, interned in concentration camps and deprived of their property which was confiscated or destroyed in the process of "ethnic cleansing", as well as persons who were deprived of urgent medial care due to attacks on hospitals and dispensaries. Numerous refugees had witnessed mass and individual killings and other violations of humanitarian

law. Such flagrant violations of international law, Slovenia continued, are evidence of "genocide as the result of the continued practice of "ethnic cleansing" " [S/24789, 9 November 1992, p. 2].

Section 3.3.6

The Vienna World Conference on Human Rights

3.3.6.1 The World Conference on Human Rights provided a unique forum for the authoritative expression of state practice and *opinio juris* relating to human rights and humanitarian law. The Conference was attended by representatives of 171 states and adopted by consensus a formal Declaration and Programme of Action which expressed dismay at massive violations of human rights, especially in the form of genocide, "ethnic cleansing" and systematic rape of women in war situations, creating mass exodus of refugees and displaced persons. The Conference decided, also unanimously, to appeal to the Security Council to "take the necessary measures to end the genocide taking place in Bosnia and Herzegovina, and in particular at Gorazde."

3.3.6.2 The Conference was therefore unanimous in declaring that the practice of so-called ethnic cleansing amounts to genocide. A further declaration on Bosnia and Herzegovina was adopted by 88 votes to 1, with 54 abstentions. The abstentions were largely due to the introduction into the resolution of paragraphs proposing specific ways of redressing the situation in the Republic of Bosnia and Herzegovina. In particular, several delegations were not persuaded of the propriety of using the World Conference to recommend policy to the Security Council. However, in the light of the

unanimous decision referred to above, the virtually unanimous support of all members of the international community for the following provisions of the declaration cannot be doubted:

> "The World Conference believes that the practice of ethnic cleansing resulting from Serbian aggression against the Muslim and Croat population in the Republic of Bosnia and Herzegovina constitutes genocide in violation of the Convention on the Prevention and Punishment of the Crime of Genocide.
>
> ...
>
> The World Conference strongly condemns Serbia-Montenegro, the Yugoslav Nations Army, the Serbian militia and the extremist elements in the Bosnian Croatian militia forces as perpetrators of these crimes" [A/Conf. 157/24 (part 1), p. 47].

Section 3.3.7

The Committee on Human Rights

3.3.7.0 In 1992, the Human Rights Committee established under the terms of the Covenant on Civil and Political Rights requested a report from the Government of Yugoslavia (Serbia and Montenegro), *inter alia*, on measures taken to prevent and combat the policy of "ethnic cleansing". The Committee, after having heard the report, observed "the existence of links between the nationalists [in Bosnia Herzegovina and Croatia] and Serbia which invalidated the Federal Government's claim to be exempt from responsibility". The Committee strongly deplored this situation [A/C.3/47/CRP.1, 20 November 1992; CCPR/C/79/Add. 16, 28 December 1992].

Section 3.3.8

The Committee on the Elimination of Racial Discrimination

3.3.8.0 The Committee on the Elimination of Racial Discrimination expressed grave concern about the massive, gross and systematic human rights violations occurring in the territory of Bosnia and Herzegovina, as well as practices of "ethnic cleansing", including forced population transfers, torture, rape, summary executions, the blockading of international humanitarian aid and the commission of atrocities for the purpose of instilling terror among the civilian population. The Committee expressed profound concern that the human rights violations occurring in the Republic of Bosnia and Herzegovina were being committed on the basis of "ethnic identity" for the purpose of attempting to create ethnically pure States. The Committee noted, in that context, with great concern that links existed between the Federal Republic of Yugoslavia (Serbia and Montenegro) and Serbian militias and paramilitary groups responsible for massive, gross and systematic violations of human rights in Bosnia and Herzegovina [A/48/18, paras. 467, 468, 537].

CHAPTER 3.4

INTERIM CONCLUSION

3.4.0.1 The organs of the United Nations, and of other competent international organizations, have clearly identified a consistent pattern of the gravest abuses of fundamental human rights and violations of elementary rules of humanitarian law, consisting of, *inter alia*:

-- the maintenance of concentration camps mainly for the purpose of detaining, raping, torturing and killing populations, in particular the Muslim population [*e.g.*, UN Security Council Resolutions 770 (1992), 771 (1992), 798 (1992), 820 (1993), 827 (1883); General Assembly Resolutions 46/242, 47/121, 47/147, 48/88, etc.];

-- the killing, and indeed mass killing, of mainly Muslims, including the attempts to exterminate large segments of mainly Muslim populations and internally displaced persons through direct military attack, including bombardment and shelling, and through the creation of conditions of life calculated to bring about their physical destruction, *inter alia*, by preventing the supply of vital humanitarian relief, the deprivation of essential services, such as water, heating and electricity, etc., and the use of torture and rape and other forms of attack and mistreatment causing serious bodily and mental harm to the mainly Muslim victims [Security Council Resolutions 557 (1992), 764 (1992), 770 (1992), 780 (1992), 787 (1992), 819 (1993), 824 (1993), 836 (1993), 859 (1993), General Assembly Resolutions 46/242, 47/121, 47/148, 48/88, etc.];

-- the systematic use of rape not only as a means to prevent births within the group, but, in a grotesque and indescribably cruel way, as a means to alienate a mother from the ethnic background of the child that was being conceived through rape [Security Council Resolutions 798 (1882), 820 (1993), 827 (1883), General Assembly Resolution 48/143, Commission on Human Rights Resolution 1993/8, etc.];

-- other measures to "change the ethnic composition of the population" [Security Council Resolutions 752 (1992), 757 (1992), etc.].

3.4.0.2 These types of acts, taken as individual categories and in their totality, fall squarely within the definition of genocide provided in Article II of the

Genocide Convention. This has been clearly confirmed by authoritative and objective international organs, reflecting views of the vast majority of states. The situation is not merely one of displacement of a population, but amounts to a consistent campaign conducted within the Republic of Bosnia and Herzegovina which is aimed at the destruction, in whole or in part, of the mainly Muslim population that is its target--a point which will be addressed in greater detail in Part 5 of this memorial [*e.g.*, General Assembly Resolution 47/121, restated in resolution 48/143].

3.4.0.3 Finally, the direct and active involvement, and indeed primary responsibility, of the Federal Republic of Yugoslavia (Serbia and Montenegro) has been confirmed throughout the resolutions and decisions summarized here - an issue which will be addressed further in Part 6.

PART 4

JURISDICTION AND ADMISSIBILITY

CHAPTER 4.1

INTRODUCTION

4.1.0.1 According to Article 38, paragraph 2, of the Rules of the Court, the Republic of Bosnia and Herzegovina has specified in its Application, as far as possible, the legal grounds upon which the jurisdiction of the Court is based. After a discussion devoted the "Jurisdiction of the Court" [paragraphs 88 to 100], it concluded:

> "Therefore, Bosnia and Herzegovina submits that the Court has jurisdiction to hear its claim against Yugoslavia (Serbia and Montenegro) arising under the Genocide Convention"; [para. 101].

4.1.0.2 Subsequently, during the proceedings relating to the Request for the indication of provisional measures, Bosnia and Herzegovina submitted two additional basis of jurisdiction of the Court in this case:

- a letter dated 8 June 1992, addressed to the President of the Arbitration Commission of the International Conference for Peace in Yugoslavia by the Presidents of the Republics of Montenegro and of Serbia, and
- the Treaty between the Allied and Associated Powers on the Protection of Minorities, signed at Saint-Germain-en-Laye on 10 September 1919.

4.1.0.3 While it, itself, lodged Requests for the indication of provisional measures, Yugoslavia (Serbia and Montenegro), quite inconsistently, challenged the admissibility of the Application and the jurisdiction of the Court, at least as far as it was based on the additional basis of jurisdiction invoked by Bosnia and Herzegovina.

4.1.0.4 In its Order of 8 April 1993, the Court recalled that:

> "... on a request for provisional measures the Court need not, before deciding whether or not to indicate them, finally satisfy itself that it has jurisdiction on the merits of the case, yet it ought not to indicate such measures unless the provisions invoked by the Applicant or found in the Statute appear, prima facie, to afford a basis on which the jurisdiction of the Court might be established" [*I.C.J. Reports 1993*, pp 11-12; *see* also *Order of 13 September 1993*, *id.*, pp 337 - 338].

4.1.0.5 In this same Order, the Court considered

- that it has been "scized of the case on the authority of a Head of State treated as such in the United Nations" and that it might "for the purposes of [those] proceedings on a request for provisional measures, accept the seisin as the act of that State" [*id.*, p. 11];
- that it did not need to determine definitely at that stage of the proceedings "whether or not Yugoslavia [was] a Member of the United Nations and as such a party to the Statute of the Court" [*id.*, p. 14] and that, in any event, "proceedings may validly be instituted by a State against a State which is a party" to a treaty containing a special provision providing for the jurisdiction of the Court even if it is not a party to the Statute [*id.*];

- that "... Article IX of the Genocide Convention, to which both Bosnia and Herzegovina and Yugoslavia are parties, [appeared] to the Court to afford a basis on which the jurisdiction of the Court might be founded to the extent that the subject-matter of the dispute relates to "the interpretation, application or fulfilment" of the Convention, including disputes "relating to the responsibility of a State for genocide or for any of the other acts enumerated in article III" of the Convention" [*id.*, p. 16];
- but that it was unable to regard the letter addressed on 8 June 1992, by the Presidents of the Republics of Montenegro and Serbia to the President of the Arbitration Commission of the International Conference for Peace in Yugoslavia "as constituting a *prima facie* basis of jurisdiction" [*id.*, p. 18].

4.1.0.6 In its Order of 13 September 1993, the Court declared its opinion on other additional basis of jurisdiction relied on by Bosnia and Herzegovina and considered in particular that the Treaty on the Protection of Minorities, signed at Saint-Germain-en-Laye on 10 September 1919 was, in any event, "irrelevant to [that] request for provisional measures" [*I.C.J. Reports 1993*, p. 340].

4.1.0.7 In conformity with the usual practice, in both Orders, the Court warned that the decision given in the proceedings on the Requests for the indication of provisional measures

> "... in no way [prejudged] the question of the jurisdiction of the Court to deal with the merits of the case, or any questions relating to the admissibility of the Application, or relating to the merits themselves, and leaves unaffected the right of the Governments of Bosnia and Herzegovina and

Yugoslavia to submit arguments in respect of those questions" [*I.C.J. Reports 1993*, p. 23 and p. 349].

4.1.0.8 Therefore, keeping in mind that the Court based itself only on *prima facie* findings, it appears to the Government of Bosnia and Herzegovina that it must establish in a more detailed way the admissibility of its Application and the jurisdiction of the Court and that it cannot only rely on these provisional findings.

4.1.0.9 It is the firm conviction of the Government of Bosnia and Herzegovina that, if studied carefully, the additional basis it offered for the jurisdiction of the Court would prove well-founded, and that the Court also has jurisdiction on the basis of *forum prorogatum*, to the extent that the specific requests made by the Respondent State, in particular in its letter of 1 April 1993, "overlap in kind with those of the Applicant" and "pass beyond the limits of the Genocide Convention" [Separate Opinion of Judge LAUTERPACHT, *I.C.J. Reports 1993*, p. 421].

4.1.0.10 However, there is no doubt that these grounds for the jurisdiction of the Court are less obvious and less indisputable than Article IX of the Convention on the Prevention and Punishment of the Crime of Genocide of 9 December 1948. Moreover, this Convention offers a sound basis of jurisdiction as regards the main submissions of Bosnia and Herzegovina which aim, first of all, to obtain a Judgment recognizing the responsibility of Yugoslavia (Serbia and Montenegro) for committing genocide and aiding and abetting others to commit such a crime, and for failing to prevent and punish genocide; and which also aim to obtain a Judgement giving grounds for relief, including restitution. It must also be noted that Yugoslavia

(Serbia and Montenegro) has, in fact, acquiesced to the jurisdiction of the Court on this basis.

4.1.0.11 Therefore, taking in consideration the *prima facie* findings of the Court in its Orders of 8 April and 13 September 1993, and the extreme urgency of a Judgment on the genocide perpetrated by Yugoslavia (Serbia and Montenegro), Bosnia and Herzegovina, hoping to avoid preliminary objections of a dilatory character, will concentrate, in the present Part, on the sole basis of jurisdiction residing in Article IX of the Genocide Convention (Chapter 4.2). It will then tackle very briefly the very artificial question of the admissibility of the Application (Chapter 4.3).

CHAPTER 4.2
JURISDICTION OF THE COURT

4.2.0.1 Although it has acquiesced to the Court's jurisdiction based on Article IX of the Genocide Convention, and is, indeed, bound by it, the Respondent State has underlined some alleged difficulties regarding the status of Bosnia and Herzegovina in respect of the Convention, and the Court itself has noted some other difficulties in respect of Yugoslavia (Serbia and Montenegro)'s status in relation to the Court's Statute. In fact, both States are bound by the Convention, and, therefore, the scope of the Court's jurisdiction in this regard must be clarified.

Section 4.2.1

Bosnia and Herzegovina is bound by the Genocide Convention

4.2.1.1 During the proceedings relating to the Requests for the indication of provisional measures, Yugoslavia (Serbia and Montenegro) seemed to question the international status of Bosnia and Herzegovina, and consequently its capacity to be a party to the Genocide Convention. None of these allegations is sustainable.

The international status of Bosnia and Herzegovina

a. The alleged absence of statehood of Bosnia and Herzegovina

4.2.1.2 Although never directly in the course of the present proceeding, Yugoslavia (Serbia and Montenegro) episodically insinuated that Bosnia and Herzegovina is not a State, in regard of criteria of statehood set up by international law. Thus, during the public sitting of 2 April 1993, the acting Agent of this country described Bosnia and Herzegovina as an "independent international entity" (sic) [CR 93/13, p. 14]. Further, in its Observations of 23 August 1993, Yugoslavia (Serbia and Montenegro) contested the right to self-determination of what is described as the "so-called Republic of Bosnia and Herzegovina" [p. 21] [*see* also CR 93/34, pp. 8, 10, 11 and 13].

4.2.1.3 Outside of this forum, Yugoslavia (Serbia and Montenegro) has made it plain that it did not consider Bosnia and Herzegovina as a State, in the sense of international law; for example, on 26 June 1992, Serbian President, Mr. S. MILOSEVIC declared, during a meeting with the

President of the European Conference for Peace in Yugoslavia that in his view the status of Bosnia and Herzegovina had to be determined in Belgrade [*New York Times*, 26 June 1992, p. 8).

4.2.1.4 Even though this is a purely political injurious and offensive posture, the Government of Bosnia and Herzegovina wishes to take the opportunity of the present case in order to refute such an insulting point of view, and is confident that the Court will definitely settle this very artificial question.

4.2.1.5 As the Arbitration Commission of the International Conference for Peace in former Yugoslavia (hereafter: "the Arbitration Commission") put it in its Opinion n°14, of 29 November 1991:

> ".... the State is commonly defined as a community which consists of a territory and a population subject to an organized political authority; (...) such a State is characterized by sovereignty" [I.L.M., 1992, vol. XXXI, p. 1495; *see* also Mixed Arbitral Tribunal, Germany-Poland, Award of 1 August 1929, *Deutsche Continental Gas-Gesellschaft*, Rec. T.A.M., IX, p. 336 and Article I of the *Convention on Rights and Duties of States* adopted at Montevideo by the Seventh Pan American Conference on 22 December 1933, A.J.I.L. 1934, n°28, suppl., p. 75].

4.2.1.6 There cannot exist the slightest doubt that these requirements are met in the present case.

4.2.1.7 Indeed, the Respondent State actively occupies itself in trying to break up Bosnia and Herzegovina's unity and to flout its sovereignty. Suffice it to recall in this respect that

> "Sovereignty in the relations between States signifies independence. Independence in regard to a portion of the

globe is the right to exercise therein, to the exclusion of any other State, the functions of a State ..." [Max HUBER, sole Arbitrator, Arbitral Award, 4 April 1928, *Island of Palmas* case, R.I.A.A. II, p. 838].

4.2.1.8 No one, except Yugoslavia (Serbia and Montenegro), denies this right to Bosnia and Herzegovina which, at the date of the drafting of this Memorial has been recognized by most Member States of the United Nations, including, as early as 7 April 1992, the United States of America and the European Community and its Member States, and which has been admitted in the United Nations on 22 May 1992.

4.2.1.9 Certainly, "the effects of recognition by other States are purely declaratory" [Arbitration Commission, Opinion n°1, prec. para. 4.17, p. 1495]. However, as admitted by the Arbitration Commission itself, such recognition by other States

> "... along with membership of international organizations, bears witness to these states' conviction that the political entity so recognized is a reality and confers on it certain rights and obligations under international law" [Opinion n°8, 4 July 1992, I.L.M. 1992, vol. XXXI, p. 1523; *see* also *e.g.* OPPENHEIM's *International Law*, 9th. ed. by Sir Robert JENNINGS and Sir Arthur WATTS, 1992, pp. 158-160].

4.2.1.10 The existence of the main elements in this respect has been summed up by the Arbitration Commission in its Opinion n°11 of 16 July 1993:

> "... in a referendum held on 29 February and 1 March 1992, the majority of the people of the Republic have expressed themselves in favour of a sovereign and independent Bosnia. The result of the referendum was officially promulgated on 6 March, and since that date, not withstanding the dramatic events that have occurred in Bosnia-Herzegovina, the constitutional authorities of the Republic have acted like

those of a sovereign State in order to maintain its territorial integrity and their full and exclusive powers" [I.L.M. 1993, p. 1588].

4.2.1.11 It is therefore absolutely unquestionable that Bosnia and Herzegovina is a State in the meaning of international law and, as a Member State of the United Nations, is a Party to the Statute of the Court and is, by way of consequence, entitled to bring a case before the Court in accordance with the Statute and with the requirements of the Rules of Court [*see* also below, paras. 4.2.1.25 *et seq.*].

b. The alleged "illegitimacy" of the Government of Bosnia and Herzegovina

4.2.1.12 As soon as its first written pleading, the Respondent State lodged "a preliminary objection with regard to the legitimacy of the Applicant", asserting that:

> "The "Government of the Republic of Bosnia-Herzegovina" and the "President of the Republic of Bosnia and Herzegovina", A. IZETBEGOVIC, have not been legally elected and do not represent all three constituent peoples and their legitimacy and mandate are disputed not only by representatives of the Serb people, but also of the Croat people, including some official organs of the "Republic of Bosnia and Herzegovina". In the negotiations on the crisis in the "Republic of Bosnia and Herzegovina, the bodies of the Geneva Conference and of the United Nations accept A.IZETBEGOVIC and the "Government of the Republic of Bosnia and Herzegovina" as partners only as representatives of the Muslim side, Dr. R. KARADZIC, as representative of the Serb side and M. BOBAN as representative of the Croat side. Even this illegal mandate of A.IZETBEGOVIC expired on 20 December 1992, which is well illustrated by the letter

of the President of the "Government of the Republic of Bosnia and Herzegovina", Mr. M. AKMADZIC, to the President of the United Nations Security Council and the President of the United States of America (Copies of the letters are enclosed herewith)", [Response to the first Request for the indication of provisional measures of protection submitted by the Government of the Republic of Bosnia and Herzegovina, 1 April 1993, para. 1, p. 1].

4.2.1.13 The Federal Republic of Yugoslavia (Serbia and Montenegro) reiterated these unusual views both during the written and oral phases of the proceedings that preceded the Court's Order of 13 September 1993 [*see e.g.*: Observations of 9 August 1993, para. 6, pp. 6-7 or CR 93/34, p. 16].

4.2.1.14 It is hardly necessary to specify that such an argument is not only entirely unfounded [*see infra* para. 4.2.1.19], it is also completely irrelevant.

4.2.1.15 The fundamental "postulate" [Shabtai ROSENNE, *The Law and Practice of the International Court*, 1985, p. 268] in respect of procedural capacity before the International Court of Justice is that, as stated in Article 34, paragraph 1, of the Statute,

"Only States may be parties in cases before the Court".

4.2.1.16 The alleged "legitimacy" or "illegitimacy" of the Government of a State bringing a case before the Court is therefore without any consequence in respect of standing in the I.C.J. and, as explained above [4.2.1.2 - 4.2.1.11], there can be no doubt that Bosnia and Herzegovina is a State according to international law. It is therefore entitled as such to refer a matter to the Court in conformity with its Statute and Rules.

4.2.1.17 This is an inescapable consequence of the fundamental principle of general international law according to which

> "Each State has the right freely to choose and develop its political, social, economic and cultural system" without external intervention. [General Assembly of the United Nations, *Declaration on Principles of International Law concerning Friendly Relations and Cooperation between States in accordance with the Charter of the United Nations*; Resolution 2625 (XXV), 24 October 1970],

As the Court said in its Judgment of 27 June 1986, the "domestic policy options" of a State "cannot justify on the legal plane" complaints by other States [I.C.J. *Reports* 1986, p. 133; *see* also Advisory Opinion, 16 October 1975, *Western Sahara Case*, I.C.J. *Reports* 1975, 43: "No rule of international law, in the view of the Court, requires the structure of a State to follow any particular pattern"; or Arbitration Commission, Opinion n°1, *op. cit.* para. 3.17, p. 1495, etc.].

4.2.1.18 It is, however, not a matter of surprise that Yugoslavia (Serbia and Montenegro) takes such a position. This is completely consistent with its constant intervention in the internal affairs of its neighbours, particularly the Republic of Bosnia and Herzegovina.

4.2.1.19 In any event, its allegations are totally devoid of any substance. Suffice it to recall here that:

- by a referendum held on 29 February and 1 March 1992, the people of Bosnia and Herzegovina opted for the independence of their country, with the overwhelming majority of 99,4 per cent of the voting electors, the participation being of 63,4 per cent since many Serbs - but not all - had followed the voting boycott ordered by their self-styled leaders (ethnic Serbs make about 31 per cent of the

Republic's population). Although the referendum was held in disturbed circumstances, the legality and validity of the votes were not challenged and were confirmed by international observers;

- the collegial Presidency of the newly independent State was composed of seven democratically elected members - two Croat representatives, two muslim respresentatives, two Serb representatives and one other member representing other and undeclared citizens of the Republic; it is true that the Serb members of the Presidency have subsequently not participated in the Presidency, but this was their free - and deplorable - choice and, of course, nothing can be inferred from this fact regarding the legitimacy of the Government of Bosnia and Herzegovina;
- according to Article 220 of the Constitution of Bosnia and Herzegovina,

> "In case of war or state of emergency, the mandate of the Members of the Presidency and of the President shall be continued until such time as the conditions for new elections for the Presidency be met" [the original of this provision and an English translation have been sent to the Court by the Agent of Bosnia and Herzegovina on 22 August 1993],

there cannot be the slightest doubt that the conditions for the application of this provision have been met continuously since 20 December 1992, the date when the mandate of the current Presidency was, in principle, supposed to expire; and, of course, the manoeuvres of the Respondent State have played an important role in this dramatic situation;

- Mr. A.IZETBEGOVIC has constantly been recognized as the legal and legitimate President of the Republic of Bosnia and Herzegovina. It is of course true that, inside the International Conference on

Former Yugoslavia, other parties to the on-going conflict appear - including representatives of Yugoslavia (Serbia and Montenegro) - but, naturally, no legal conclusions can be drawn from this fact; it is merely a reflection of the very situation incited by the Respondent State.

4.2.1.20 As the Court found in its Order of 8 April 1993:

> "... the power of a Head of State to act on behalf of the State in its international relations is universally recognized, and reflected in, for example, Article 7, paragraph 2 (a), of the *Vienna Convention on the Law of Treaties*" [I.C.J. *Reports* 1993, p. 11; *see* also *Order* of 13 September 1993, I.C.J. *Reports* 1993, p. 337].

4.2.1.21 In the present case, the Application was signed by an Agent duly appointed by President IZETBEGOVIC, universally recognized as the legal and legitimate Head of the Applicant State by the international community, and whose existence cannot be denied. This was done in absolute conformity with Article 40 of the Rules of Court and with the usual practice in this respect [*see* Sh. ROSENNE, *op. cit.* para. 3.27, pp. 214-215, or Geneviève GUYOMAR, *Commentaire du Règlement de la Cour internationale de Justice* 1983, pp. 261-264].

4.2.1.22 It can therefore not be denied that the Application was lodged by a proper Applicant State, duly represented in conformity with the Rules of Court.

Bosnia and Herzegovina has succeeded the S.F.R.Y. to the Genocide Convention

4.2.1.23 During his pleading of 2 April 1993, Professor ROSENNE, the acting Agent of Yugoslavia (Serbia and Montenegro), alleged that

> "... no rule of contemporary international law (...) gives Bosnia the right to proclaim unilaterally, by means of a document called a notification of succession, that it is now a party to the Genocide Convention with effect from 6 March 1992, merely because Yugoslavia is a party to the Convention and because the Convention was applicable to what is now the territory of Bosnia and Herzegovina through the former Socialist Federal Republic of Yugoslavia" [CR 93/13, p. 14].

4.2.1.24 What this means is rather perplexing. It seems to imply that Yugoslavia (Serbia and Montenegro) denies that Bosnia and Herzegovina is a successor State to the former S.F.R.Y. and (or alternatively ?) that there exists no rule in contemporary international law empowering a successor State to succeed to multilateral treaties concluded by the predecessor State. Both assertions are completely erroneous.

Bosnia and Herzegovina is a successor State

4.2.1.25 That Bosnia and Herzegovina - as well as Yugoslavia (Serbia and Montenegro) [*see* 4.2.2.9, below] - is a successor State, is not subject to doubt.

4.2.1.26 According to the very widely accepted definition given in both *Vienna Conventions on Succession of States* of 1978 and 1983

> " "succession of States" means the replacement of one State by another in the responsibility for the international relations of territory";

and it is obvious that Bosnia and Herzegovina has replaced the former S.F.R.Y. for the international relations of what was the Federal Republic of Bosnia and Herzegovina before the dissolution of former Yugoslavia.

4.2.1.27 This situation was recognized as early as 7 April 1992, by the Security Council since, in its Resolution 749 (1992), it refers to Bosnia and Herzegovina as a distinct entity [*see* in this respect Drazen PETROVIC et Luigi CONDORELLI, *L'ONU et la crise yougoslave*, A.F.D.I. 1992, p. 35], which clearly implies that, at this date, "Yugoslavia" had ceased to represent Bosnia and Herzegovina in its international relations. Some time later, it demanded

> "That all forms of interference from outside Bosnia and Herzegovina, including by units of the Yugoslav People's Army (JNA) as well as elements of the Croatian Army, cease immediately, and that Bosnia and Herzegovina's neighbours take swift action to end such interference and respect the territorial integrity of Bosnia and Herzegovina" [Resolution 752 (1992) of 15 May 1992; *see* also Resolutions 757 (1992) of 30 May 1992, or 770 (1992) of 13 August 1992].

4.2.1.28 The General Assembly adopted the same position in Resolutions 46/242 of 25 August 1992, 47/121 of 18 December 1992 and 48/88 of 20 December 1993.

4.2.1.29 It is true that, in its first findings, the Arbitration Commission of the European, then called the International Conference on Former Yugoslavia, expressed some doubts regarding the status of Bosnia and Herzegovina as a

successor State of the S.F.R.Y. After it had established that "the Socialist Federal Republic of Yugoslavia [was] in the process of dissolution" [Opinion n°1, prec. para. 4.2.1.5, p. 1497], it considered, in Opinion n°4 of 11 January 1992, that

> "The will of the peoples of Bosnia and Herzegovina to constitute the Socialist Republic of Bosnia and Herzegovina as a sovereign and independent State cannot be held to have been fully established" [I.L.M., 1992, p. 1503].

But, after the referendum of 29 February and 1 March 1992, the Arbitration Commission noted that:

> "- the referendum proposed in Opinion n°4 was held in Bosnia-Herzegovina on 29 February and 1 March: a large majority of the population voted in favour of the Republic's independence; (...);
>
> "- most of the new states formed from the former Yugoslav Republics have recognized each other's independence, thus demonstrating that the authority of the federal state no longer holds way on the territory of the newly constituted states;
>
> "- the common federal bodies on which all the Yugoslav republics were represented no longer exist: no body of that type has functioned since;
>
> "- the former national territory and population of the SFRY are now entirely under the sovereign authority of the new states;
>
> "- Bosnia-Herzegovina, Croatia and Slovenia have been recognized by all the Member States of the European Community and by numerous other States, and were admitted to membership of the United Nations on 22 May 1992;

"- UN Security Council Resolutions n°752 and 757 (1992) contain a number of references to "the former SFRY"; (...);

"- the declaration adopted by the Lisbon European Council on 27 June makes express reference to "the former Yugoslavia".

The Arbitration Commission was therefore of the opinion

> "that the process of dissolution of the S.F.R.Y. referred to in Opinion n°1 of 29 November 1991 is now complete and that the S.F.R.Y. no longer exists" [Opinion n°8, prec. para. 4.2.1.9, p. 1523],

and, in its Opinion n°9, it stated expressly that:

> "New States have been created on the territory of the former S.F.R.Y. and replaced it. All are successor States to the former S.F.R.Y." [I.L.M. 1992, p. 1524],

moreover, in Opinion n°11, of 16 July 1993, it emphasized that 6 March 1992, the date when the result of the referendum was officially promulgated,

> "... must be considered the date on which Bosnia and Herzegovina succeeded the Socialist Federal Republic of Yugoslavia" [*op. cit.* para. 4.2.1.10, p. 1588].

4.2.1.30 Furthermore, the Republic of Bosnia and Herzegovina pariticipates fully in the Working Group of the International Conference on Former Yugoslavia where it is unanimously considered as a successor State of the S.F.R.Y. This participation has never been challenged, not even by Yugoslavia (Serbia and Montenegro).

4.2.1.31 It appears clearly that if the Respondent State has, during the previous proceedings in this case, attempted to cast some doubts on the status of Bosnia and Herzegovina as a successor State to S.F.R.Y., it has been a

purely procedural move: even during these proceedings it has, in fact, recognized that

> "Bosnia-Herzegovina is an independent international entity" [Professor ROSENNE's pleading, 2 April 1993, CR 93/13, p. 14],

and that

> "... the territory of the former Yugoslav Republics, with the exception of those of Serbia and Montenegro, no longer form part of that of the Federal Republic of Yugoslavia" [*id.*, 26 August 1993, CR 93/34, p. 13].

4.2.1.32 If this is true - and, indeed, it is true -, then it is crystal-clear that Bosnia and Herzegovina has replaced the former S.F.R.Y. in the international relations concerning its territory and is therefore a successor State.

Bosnia and Herzegovina is a Party to the Genocide Convention

4.2.1.33 In this very capacity it has succeeded the S.F.R.Y. as a Party to the 1948 Genocide Convention.

4.2.1.34 This was clearly acknowledged by Bosnia and Herzegovina in a note sent by the Minister for Foreign Affairs to the Secretary-General on 29 December 1992 [the text of which is printed below, para. 4.2.1.47].

4.2.1.35 The Respondent State seems to challenge this point on the ground that

- unilateral succession is, allegedly, only provided for in the *Vienna Convention on Succession of States in Respect of Treaties* of 23 August 1978, which has not entered into force and was, allegedly, only "evolved in order to deal with the problem of the effect of

decolonization" [Professor Sh. ROSENNE, 2 April 1993, CR 93/13, p. 15],

and that

- besides this, there is, allegedly, no rule of international law giving a right to a successor State to proclaim unilaterally that it is bound by a treaty to which the predecessor State was a Party [*see* above, para. 4.2.1.23].

4.2.1.36 It is true that the 1978 Convention is not yet in force, although it must be noted that the former S.F.R.Y. signed it on 6 February 1979 and deposited an instrument of ratification on 28 April 1980.

4.2.1.37 In return, it is clearly untrue that this Convention only deals "with the problem of the effect of decolonization on the treaty obligations of the former colonial powers and the newly - independent decolonized powers" [CR 93/13, p. 15]. This problem was, indeed, present in the mind of the drafters, but it was far from being addressed exclusively. Suffice it, in this respect, to read the text of the Convention itself: it applies, generally,

> "... to the effects of a succession of States occurring in conformity with international law, and, in particular, the principles of international law embodied in the Charter of the United Nations" [Article 6],

and it applies as well to "Succession in Respect of Part of Territory" [Part II], "Newly Independent States" [Part III] and "Uniting and Separation of States" [Part IV].

4.2.1.38 The distinction between rules applicable to succession in case of decolonization on the one hand and to other cases of succession is, nevertheless, extremely important in respect both of the Convention and of

general international law. Regarding the 1978 Convention, it follows from Article 2, paragraph 1 (f), that Part III only applies in case of decolonization since

> " "newly independent State" means a successor State the territory of which immediately before the date of the succession of States was a dependent territory for the international relations of which the predecessor State was responsible";

Bosnia and Herzegovina was clearly not in this situation; consequently only rules embodied in Part IV of the Convention are directly relevant.

4.2.1.39 The same also holds true with regard to contemporary general international law. Authorities have stressed that State practice in this respect " has been variable, often dependent on the very special circumstances of particular cases" [OPPENHEIM's 9th ed., *op. cit.*, para. 3.21., p. 210; *see* also Charles ROUSSEAU, *Droit international public*, tome III, Les compétences, Paris, 1977, pp. 484-487]. Some general trends nevertheless appear, in particular,

i) if it cannot be sustained that the 1978 Convention is pure codification, "les principes dont [elle s'inspire] ne sont cependant guère contestables" [NGUYEN QUOC Dinh, Patrick DAILLIER, Alain PELLET, *Droit international public*, 4th ed., 1992, p. 512]. Carefully drafted after learned discussions in the I.L.C. and founded on extensive studies of State practice, the Convention "conserve toute sa valeur en tant qu'instrument consolidant l'opinion juridique quant aux règles du droit international généralement admises en ce qui concerne la succession d'Etats en matière de traités" [I.L.C.

Yearbook 1974, vol. II, pt. 1, Report of the I.L.C. to the General Assembly, para. 63];

ii) there is a clear division between rules applying in cases of decolonization on the one hand, and in those cases not involving decolonization on the other hand; in the first case there is a need to exercise special care in preserving the absolutely free will of the new State, while this concern is less apparent in case of dissolution or of secession; this is reflected both in the 1978 Convention and by State practice. As has been explained, in the second case, "l'opération se déroule dans des conditions telles que, quelle que soit la rupture légale d'identité entre les Etats en cause, les successeurs peuvent difficilement passer pour de véritables tiers par rapport à leur prédécesseurs, qu'ils continuent plus ou moins (...). Cette particularité expique la règle générale applicable à de telles situations = le régime conventionnel du ou des prédécesseur(s) survit dans le chef du ou des successeur(s), dans ses limites spatiales originelles" [Jean COMBACAU et Serge SUR, *Droit international public*, Paris, 1993, p. 436].

4.2.1.40 It derives from these considerations that, in case of dissolution of a pre-existing State - which is the present hypothesis, even if this is wrongly challenged by the Respondent State -, the successor States are, as a matter of principle, bound by the treaties concluded by the predecessor State. The same would be true in case of succession even if, contrary to Yugoslavia (Serbia and Montenegro)'s allegations, the dismemberment of the former S.F.R.Y. cannot be assimilated to a series of secessions [*see* below, paras. 4.2.2.9 *et seq.*].

4.2.1.41 Generally speaking, "practice suggests that in many cases it will be appropriate to regard the former component parts of the "union State" as remaining bound by its treaties after its dissolution if those treaties were in force either for its whole territory or for that part of its territory which formed that component state" [OPPENHEIM'S 9th ed., *op. cit.*, para. 4.2.1.9, p. 220]. And, if practice leaves some room for discussion as regards bilateral treaties, it makes absolutely clear that "c'est la continuité des actes conventionnels qui a été habituellement consacrée par la pratique internationale en ce qui concerne les traités multilatéraux" [Ch. ROUSSEAU, *op. cit.*, para. 4.2.1.39, p. 502], since it is "logique de considérer que les dispositions des traités normatifs sont dans une large mesure indépendantes des vicissitudes auxquelles peuvent être soumis leurs signataires" [*id.*, p. 501, *see* also C. Wilfred JENKS, *State Succession in Respect of Law-Making Treaties*, B.Y.B.I.L., 1952, p. 105 or Marco G. MARCOFF, *Accession à l'indépendance et succession d'Etats aux traités internationaux*, Fribourg, 1969, pp. 155 et seq. or 276].

4.2.1.42 Automatic continuity is particularly well established in respect of conventions of a humanitarian character. Thus, although the authors of OPPENHEIM'S Treatise, 9th edition, are somewhat hesitant to admit succession in case of separation or secession, they recognize that "there is more room for the view that in case of separation resulting in the emergence of a new state the latter is bound by - or at least entitled to access to -general treaties of a "law-making" nature, especially those of a humanitarian character, previously binding it as a part of the state from which it has separated " [*op. cit.*, para. 4.2.1.9, p. 222], and they give several examples confirming this view [*id.*, pp. 222-223]. This principle is also exemplified at length by Dr. M.G. MARCOFF who, in his learned

study, establishes that automatic continuity *ex tunc* (*i.e.* from the very date of independence) has been consistently admitted for all humanitarian conventions including the 1949 Red-Cross Conventions [*op. cit.*, para. 4.2.1.41, pp. 303 *et seq.*]. And, in the commentary on its final draft on succession of States in respect of treaties, the I.L.C. expressly drew attention to the particular case of humanitarian conventions and called for continuity as far as they are concerned [Report, *op. cit.*, para. 4.2.1.39, paras. 76 to 78].

4.2.1.43 There is not the slightest doubt that the 1948 Genocide Convention has a humanitarian character. As the Court stated in its 1951 Advisory Opinion,

> "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 ..." [I.C.J. *Reports* 1951, p. 23].

Moreover, as stressed by the Court, a consequence of "the special characteristics of the Genocide Convention":

> "... is the universal character both of the condemnation of genocide and of the cooperation 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 to be definitely universal in scope" [*id.*].

4.2.1.44 These special features strengthen the general principle exposed in Article 34 of the 1978 *Convention on Succession of States in respect of Treaties* which, as seen above, purely codifies the contemporary practice of States. According to this provision:

> "When a part or parts of the territory of a State separate to form one or more States, whether or not the predecessor continues to exist:

"(a) any treaty in force at the date of the succession of States in respect of the entire territory of the predecessor State which has become a successor State continues in force in respect of each successor State so formed" [paragraph 1 - exceptions provided for in paragraph 2 (1) clearly do not apply in the present case].

4.2.1.45 The inescapable conclusion is therefore that all successor States of the former S.F.R.Y., including Bosnia and Herzegovina, have automatically succeeded it to the Genocide Convention which it had signed as early as 11 December 1948 and ratified, without reservation on 29 August 1950.

4.2.1.46 The question of the effects and scope of the notice of succession given by Bosnia and Herzegovina on 29 December 1992, is therefore of secondary importance.

4.2.1.47 As recalled in the Court's Order of 8 April 1993, [I.C.J. *Reports* 1993, p. 15], the notice of succession is drafted in the following terms:

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

4.2.1.48 Although it was, in no way, indispensable to establish that Bosnia and Herzegovina was bound by the Genocide Convention, this declaration bears witness to the will of the Applicant State to abide by the Convention. As Dr. M.G. MARCOFF put it:

"Des extériorisations de ce genre ne possèdent que la fonction de "révélateurs" du phénomène juridique de la succession, survenu au moment du changement de souveraineté" [*op. cit.*, para. 4.2.1.41, p 305].

4.2.1.49 As the Court noted in its Order of 8 April 1993, it may, however be stressed that, by his Depositary Notification to the parties to the Genocide Convention of 18 March 1993 (2),

> "... the Secretary-General has treated Bosnia-Herzegovina, not as acceding, but as succeeding to the Genocide Convention..." [I.C.J. *Reports* 1993, p 16].

4.2.1.50 Other States Parties have not reacted to this notification. This means that if Bosnia and Herzegovina was to be considered as a "Newly Independent State" in the meaning of the 1978 Convention - which is more than doubtfull (*see* above, para. 4.2.1.38) - it would, nevertheless, have succeeded to the former S.F.R.Y.'s membership to the Genocide Convention by which it is bound in any case.

4.2.1.51 It therefore appears that

i) the statehood of Bosnia and Herzegovina cannot be challenged;

ii) Bosnia and Herzegovina is a successor State to the former S.F.R.Y.;

iii) as such it has automatically succeeded it to the 1948 Convention on Genocide or, alternatively (and complementarily) it has established its acceptance of the Convention through its communication to the Secretary-General of 29 December 1992;

iv) this succession took place on 6 March 1992, the date of the succession of States;

v) Bosnia and Herzegovina could therefore lodge an Application on the basis of Article IX of the Genocide Convention; and

vi) this Application was made by the legitimate and legal Government.

Section 4.2.2

Yugoslavia (Serbia and Montenegro) is bound by the Genocide Convention

4.2.2.1 Yugoslavia (Serbia and Montenegro) has, in fact, if somewhat reluctantly, accepted the Court's jurisdiction on the basis of Article IX of the Genocide Convention in the present case. However, it must be stressed that, in any event, it has succeeded the former S.F.R.Y. to the Genocide Convention.

Yugoslavia (Serbia and Montenegro) has accepted the Court's jurisdiction on the basis of Article IX of the Genocide Convention

4.2.2.2 On several occasions during the proceedings relating to the Requests for the indication of provisional measures, the Respondent State "reserved its rights" regarding the jurisdiction of the Court and the admissibility of the Application, but on most of those occasions - indeed, virtually all of them - these purported "reservations" were expressly limited to the submissions made in the Application or in the Requests for the indication of provisional measures, which may have appeared to go beyond the scope of the Genocide Convention.

4.2.2.3 Thus:

i) In its letter of 1 April 1993, the Federal Minister of Foreign Affairs of Yugoslavia (Serbia and Montenegro) proposed himself various provisional measures (*see* below para. 4.2.2.4) and specified:

> "The Government of the Federal Republic of Yugoslavia avails 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*. 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" ".

Even if the exact meaning of the last sentence is not clear, it follows *a contrario* from the first sentence that the Respondent State accepts the competence of the Court as long as it is within the Genocide Convention.

ii) This interpretation was confirmed in the Observations of Yugoslavia (Serbia and Montenegro) dated 23 August 1993:

> "It is obvious that, by requiring provisional measures, on 1 April 1993, the intention of the FR of Yugoslavia was not to accept the jurisdiction of the Court whatsoever, or to an extent beyond what is strictly stipulated in the Genocide Convention".

iii) In these same observations, the Respondent State recalled the statement made by Professor Shabtai ROSENNE 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].

iv) During this same public sitting of the Court, the Acting Agent of the Respondent State declared:

> "... 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" [*id.*, p. 54].

v) And the way the Respondent State "understands" the limits of the Court's jurisdiction has been clearly explained in various occasions; as defined in the Genocide Convention:

"... our dispute [is] over the implementation of the *Convention on the Prevention and Punishment of the Crime of Genocide* [Professor Rodoljub ETINSKI, Agent of Yugoslavia (Serbia and Montenegro), 26 August 1993, CR 93/34, p. 16];

"There are some additional measures requested, but these go far beyond the application of the Genocide Convention, which is what this case is about..." [Professor Sh. ROSENNE, *id.*, p. 48].

4.2.2.4 Two specific episodes are of particular importance in this respect. Both on 1 April 1993 and on 23 August 1993, Yugoslavia (Serbia and Montenegro) made counter-claims in reply to Bosnia and Herzegovina's Requests for provisional measures. For reasons which have been explained above (para. 4.1.0.11) Bosnia and Herzegovina will refrain from stressing that these claims go well beyond the framework of the Genocide Convention, all the more as the Respondent State "reserved its rights" regarding the jurisdiction of the Court outside the scope of the 1948 Convention (even if the validity of such a "reservation" is a matter of great doubt). Nevertheless, these requests for provisional measures must have rested on some jurisdictional link between the Parties or, at the very least, there existed, in the opinion of the Government of Yugoslavia (Serbia and Montenegro), a *prima facie* basis on which the jurisdiction of the Court might be established. According to the declarations made by the Respondent State this basis is the Genocide Convention.

4.2.2.5 It is therefore clear that Yugoslavia (Serbia and Montenegro) is itself convinced that the Court has jurisdiction in the present case on the basis of Article IX of the 1948 Convention. It has publicly and repeatedly recognized this fact during the previous phases of the proceedings and it is undisputable that declarations made by representatives of a Party during a jurisdictional or arbitral procedure bind that Party [*see e.g.* the Arbitral Arward of 23 October 1985, Canada v. France, *Différend concernant le filetage à l'intérieur du Golfe du Saint-Laurent*, R.G.D.I.P. 1986, p. 756].

4.2.2.6 As the Court observed,

> "One of the basic principles governing the creation and performance of legal obligations, whatever their source, is the principle of good faith ... . Just as the very rule of *pacta sunt servanda* in the law of treaties is based on good faith, so is the binding character of an international obligation assumed by unilateral declaration. Hence interested States may take cognizance of unilateral declarations and place confidence in them, and are entitled to require that the obligation thus created be respected" [Judgment of 20 December 1974, *Nuclear Tests Case*, I.C.J. *Reports* 1974, p. 268; *see* also I.C.J. *Reports* 1988, p. 105].

4.2.2.7 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. It is therefore no longer open to the Respondent State "to go back upon that recognition and to challenge the validity" of this basis of jurisdiction [*cf.* I.C.J. *Reports* 1960,

p. 213]. As Sir Gerard FITZMAURICE explained in his dissenting opinion in the Case concerning the *Temple of Preah Vihear*:

> "(...) 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, 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". [I.C.J. *Reports* 1962, p. 63].

4.2.2.8 Therefore, having accepted Article IX of the Genocide Convention as a basis for the jurisdiction of the Court in the present case, Yugoslavia (Serbia and Montenegro) cannot now escape from the obligation deriving therefrom "simply by denying the existence". This consideration is essential and refutes all the objections that the Respondent State thought advisable to exude here and there: one may not blow hot and cold.

Yugoslavia (Serbia and Montenegro) has succeeded the S.F.R.Y. to the Genocide Convention

4.2.2.9 Independently from its acceptance of the jurisdiction of the Court in the present case on the basis of Article IX of the Genocide Convention, Yugoslavia (Serbia and Montenegro) does not deny that it is bound by the 1948 Convention, but it bases itself on a reasoning which is highly debatable from a legal point of view, since it alleges that it is the sole "continuator" of the former S.F.R.Y.

4.2.2.10 In the opinion of the Government of Bosnia and Herzegovina, such an allegation cannot be sustained, since the Respondent State is but one of the successor States of the former S.F.R.Y., exactly as are the four other States which have emerged from the dissolution of the predecessor State. However, for the purpose of the present proceeding, whether or not Yugoslavia (Serbia and Montenegro) is a successor or a "continuator", it is bound by the Genocide Convention.

Yugoslavia (Serbia and Montenegro) is a successor State to the former S.F.R.Y.

4.2.2.11 In the course of previous proceedings in the present case as well as in other forums, Yugoslavia (Serbia and Montenegro) claimed that it is the only continuator of the former S.F.R.Y. Thus, during his oral presentation of 26 August 1993, Mr. M. MITIC, Chief Legal Adviser of the Federal Ministry of Foreign Affairs, challenged the validity of independence of former federate Yugoslav Republics [CR 93/34, p. 8]. Moreover, it is on the basis of this alleged "continuity" that Yugoslavia (Serbia and Montenegro) considers itself to be bound by all international commitments undertaken by the former S.F.R.Y.

4.2.2.12 By a Declaration made on 27 April 1992, the Participants to the Joint Session of the S.F.R.Y. Assembly, the National Assembly of the Republic of Serbia and the Assembly of the Republic of Montenegro declared:

> "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 S.F.R of Yugloslavia assumed internationally in the past ... "[*see* I.C.J. *Reports* 1993, p. 15].

This was confirmed in an official note, dated the same day which was also the date when the Constitution of the new State of Yugoslavia (Serbia and Montenegro) was adopted, which note was sent by the Permanent Mission of "Yugoslavia" to the United Nations, to the Secretary-General, and published as an official document of the General Assembly:

> "Strictly respecting the continuity of the international personality of Yugoslavia, the Federal Republic of Yugoslavia shall continue to fulfil all the rights confered 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" [A/46/915, 7 May 1992].

Since then, this has been the constant posture adopted by the Respondent [*see e.g.* the Aide-Mémoire dated 14 January 1994 of the Government of the Federal Republic of Yugoslavia addressed to the Temporary Chairman of the 15th Meeting of States Parties to the International Convention on the Elimination of all Forms of Racial Discrimination, CERD/SP/50, Annex]. In the same spirit, it must be noted that when the Human Rights Committee of the United Nations requested the Government of Yugoslavia (Serbia and Montenegro) to submit a short report on serious breaches of the International Covenant on Civil and Political Rights, a delegation of Yugoslavia (Serbia and Montenegro) was sent to a meeting of the Committee on 6 November 1992:

> "The Committee welcomed the delegation, explaining that it regarded the submission of the report by the Government and the presence of the delegation as confirmation that the Federal Republic of Yugoslavia (Serbia and Montenegro) had succeeded, in respect of its territory, to the obligations undertaken under the International Covenant on Civil and Political Rights by the former Socialist Federal Republic of Yugoslavia." [*Comments of the Human Rights Committee*, A/C.3/CRP.1, 20 November 1992, para. 19].

4.2.2.13 While the Government of Bosnia and Herzegovina maintains that Yugoslavia (Serbia and Montenegro) cannot be the "continuator" of the former S.F.R.Y., nevertheless it fully accepts that it is a successor State exactly in the same way as the four other States which emerged from the dissolution of the former Yugoslavia, and that in either event it is bound by the Genocide Convention.

4.2.2.14 A great many facts derive from this undisputable conclusion:

- since 15 May 1992 [Resolution 752 (1992)], all Resolutions of the Security Council as well as of the General Assembly of the United Nations, mention "the former Yugoslavia", thus evidencing the conviction of the international community that the S.F.R.Y. no longer exists;
- this is also the opinion of the European Community [*see* the Declaration adopted by the Lisbon European Council on 27 June 1992], of the International Conference on the "Former Yugoslavia" [since the London Conference of 26-27 August 1992];
- and of the Arbitration Commission, which in several carefully considered opinions noted, first, that the S.F.R.Y. was "in the process of dissolution" [Opinion n°1, *op. cit.* para. 4.2.1.5, p. 1497], then that this process was completed, that the S.F.R.Y. no longer existed [Opinion n° 8, *op. cit.* para. 4.2.1.9], that "none of the successor states may (...) claim for itself alone the membership rights previously enjoyed by the former S.F.R.Y." [Opinion n° 9, *op. cit.* para. 4.2.1.29], and, in particular, that "the F.R.Y. (Serbia and Montenegro) is a new State which cannot be considered the sole successor [*sic*] to the S.F.R.Y." [Opinion n°10, 4 July 1992, I.L.M. 1992, p. 1526], the date of State succession being 27 April 1992 [Opinion n° 11, *op. cit.* para. 4.2.1.10];
- in its Resolution 757 of 30 May 1992, the Security Council pointed out that

  "... the claim by the Federal Republic of Yugoslavia (Serbia and Montenegro) to continue automatically the membership of the former Socialist Federal Republic of Yugoslavia in the United Nations has not been generally accepted";

- while, in Resolution 777 of 19 September 1992, it considered

"... that the State formerly known as the Socialist Federal Republic of Yugoslavia has ceased to exist".

4.2.2.15 All the five States which have emerged from the dissolution of the former S.F.R.Y. are therefore new States, each of them being its successor on their respective territories. The general rules of international law on State succession apply to each of them, including Yugoslavia (Serbia and Montenegro).

Yugoslavia (Serbia and Montenegro) is a party to the Genocide Convention

4.2.2.16 The previous remarks [paras. 4.2.2.9 - 4.2.2.15] have been made mainly for the sake of legal comprehensiveness. Whether Yugoslavia (Serbia and Montenegro) is in fact seen as a successor State to the former S.F.R.Y. or as its "continuator", the result is the same: either way it is a party to the 1948 Genocide Convention which had been ratified by the former S.F.R.Y. in 1950. For the convenience of legal argument, both hypothesis will be discussed separately.

Yugoslavia (Serbia and Montenegro) is bound by the Genocide Convention as a successor to the former S.F.R.Y.

4.2.2.17 As shown above [paras. 4.2.1.25 - 4.2.1.40] a successor State, in principle, succeeds to any treaty in force for the predecessor State at the date of the succession of States in respect of the entire territory of the predecessor State. This holds true in particular for humanitarian conventions.

4.2.2.18 The same reasoning which applies to Bosnia and Herzegovina [*see id.*] also applies to Yugoslavia (Serbia and Montenegro):

- both States are successors to the former S.F.R.Y.;
- the latter had become a Party to the Convention in 1950 and still was a Party at the date of the succession of States;
- the Genocide Convention has a humanitarian character and a universal vocation;
- therefore it continues in force automatically in respect of Yugoslavia (Serbia and Montenegro) as well as of Bosnia and Herzegovina.

4.2.2.19 Moreover, both States, by unambiguous declarations have formally accepted international obligations assumed by the former Yugoslavia - this has been done specifically in respect of the Genocide Convention (and of many other conventions and treaties) by Bosnia and Herzegovina [*see* above, para. 4.2.1.47] and in a general way by Yugoslavia (Serbia and Montenegro) through the Declarations made on 27 April 1992, by the Joint Meeting of the Assemblies of Serbia, Montenegro and the "Federal Yugoslav Republic" and by the Permanent Mission to the United Nations [*see* above, para. 4.2.2.12].

4.2.2.20 Indeed, in these same Declarations, the constituent legislative, executive and diplomatic organs of Yugoslavia (Serbia and Montenegro) also expressed their belief that the State they represent was continuing the international personality of the former S.F.R.Y., a statement which, in the opinion of the Government of Bosnia and Herzegovina is clearly erroneous [*see* above]. But nothing can be inferred, legally, from this statement.

4.2.2.21 In the first place, as shown above [para. 4.2.1.48] such a declaration is in no way indispensable to establish succession to a treaty to which the predecessor State [except for "Newly Independent States", i.e. decolonized States - *see* above, paras. 4.2.1.38 and 4.2.1.39] was a party, especially as regards conventions of a humanitarian character. In this case "continuity" is automatic and a declaration of succession only bears witness to the will of the successor State to abide by the treaty. It is worth recalling in this respect that the Human Rights Committee of the United Nations saw the submission of a report and the appearance of a delegation of Yugoslavia (Serbia and Montenegro) before it in November 1992, as a pure "confirmation" that this country "had succeeded, in respect of its territory, to the obligations of the former S.F.R.Y. [A/C.3/CRP.1: *see* above, para. 4.2.2.12].

4.2.2.22 In the second place, Yugoslavia (Serbia and Montenegro) could not transform an automatic succession according to general international well-established principles into a conditional succession, as it would be the case if it were accepted that it has succeeded the former S.F.R.Y. to the Genocide Convention only provided that it is a continuator State.

4.2.2.23 The clear conclusion is that Yugoslavia (Serbia and Montenegro) is a party to the Genocide Convention by virtue of the usual principles applicable to the succession of States in respect of treaties. Its declarations of 27 April 1992, might have reinforced its obligations in this respect but they could certainly not neutralize the application of those general principles.

Yugoslavia (Serbia and Montenegro) would also be bound by the Genocide Convention if it were considered as a "continuator" of the former S.F.R.Y.

4.2.2.24 The same conclusion obviously holds true if *arguendo* it is admitted that Yugoslavia (Serbia and Montenegro) is the sole continuator of the former S.F.R.Y., as it alleges to be.

4.2.2.25 In the first place it must be stressed that, according to this hypothesis, a declaration would have been entirely superfluous: to declare that a "continuator" State continues the rights and obligations of the predecessor is only to reflect the obvious.

4.2.2.26 Nevertheless, Yugoslavia (Serbia and Montenegro) did make such a declaration in the most formal and solemn manner [*see* above, para. 4.2.2.12].

4.2.2.27 According to the celebrated dictum of the Court in the *Nuclear Tests* case,

> "It is well recognized that declarations made by way of unilateral acts, concerning legal or factual situations, may have the effect of creating legal obligations. Declarations of this kind may be and often are, very specific. 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. An undertaking of this kind, if given publicity, and with an intent to be bound, even though not made within the context of international negotiations, is binding. In these circumstances, nothing in the nature of a quid pro quo nor any subsequent acceptance of the declaration, nor even any reply or reaction from other States, is required for the declaration to take effect, since such a requirement would be inconsistent with the strictly

unilateral nature of the juridical act by which the pronouncement by the State was made" [I.C.J. *Reports* 1974, p. 267].

4.2.2.28 In the present case, there can be no doubt that Declarations made both by the constituent Assembly of Yugoslavia (Serbia and Montenegro) and the Permanent Mission of that country to the United Nations, drafted in legal language, expressing formal international commitments, made publicly with an obvious intent to be bound, create legal obligations for that State.

4.2.2.29 The Respondent State has made public to all other States its intention to abide by all commitments of the former S.F.R.Y. Whatever its situation, it is now bound by these declarations which apply to the rights and obligations deriving from the Genocide Convention, as well as from all other treaties to which the S.F.R.Y. was a party.

4.2.2.30 Therefore, whether it is considered to be a "continuator" or a successor, Yugoslavia (Serbia and Montenegro) clearly is a party to the Genocide Convention by virtue of general principles of international law applicable in case of succession of States. Its will, as expressed in its Declarations of 27 April 1992, only reinforces this general conclusion.

4.2.2.31 It must be stressed in this respect that "Yugoslavia" - together with the other successor States to the former S.R.F.Y. - is listed as a State party to the 1948 Genocide Convention in the official United Nations publication entitled *Multilateral Treaties Deposited with the Secretary-General*; Status as at 31 December 1992 [ST/LEG/SER.E/11, New-York, 1993].

4.2.2.32 Both Parties to the present dispute also being parties to the Genocide Convention, their differences must be settled according to this treaty, including Article IX, which confers jurisdiction on the International Court of Justice. This provision has, moreover, been accepted by Yugoslavia (Serbia and Montenegro) as a valid title of jurisdiction in the present case.

Section 4.2.3

Yugoslavia (Serbia and Montenegro)'s status with regard to the Court's Statute

4.2.3.1 In its Order of 8 April 1993, the Court raised *proprio motu* the question of its jurisdiction *ratione personae*. It is respectfully submitted that the logic underpinning this question is as follows:

i) as a matter of principle,

"The Court shall be open to the States parties to the present Statute " [Article 35, paragraph 1, of the Court's Statute];

ii) as long as Yugoslavia (Serbia and Montenegro) cannot maintain that it is the sole "continuator" of the former Socialist Federal Republic of Yugoslavia, it could be sustained that the new State is no more a Member of the United Nations;

iii) in that case it would be no more a "State party to the Statute" and, therefore, the Application could be seen inadmissible [*see* I.C.J. *Reports* 1993, pp. 12 - 14].

4.2.3.2 As it has indicated above [paras 4.2.2.11 *et seq.*], the Government of Bosnia and Herzegovina maintains that the Respondent State cannot be considered to be the sole "continuator" of the former S.F.R.Y. But such a

finding does not imply that Yugoslavia (Serbia and Montenegro) is not a Party to the Statute of the Court. Such a position can not be sustained, whether it is a successor or a "continuator", as it alleges to be. Moreover, as the Court itself has anticipated, this problem is irrelevant as far as the Genocide Convention is concerned.

Membership to the Statute is not relevant in respect of Article IX of the Genocide Convention

4.2.3.3 As the Court noted in its Order of 8 April 1993, Article 35, paragraph 2, of the Statute provides:

> "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".

Therefore, as the Court put it,

> "... 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" [I.C.J. *Reports* 1993, p. 14].

4.2.3.4 The Permanent Court followed the same line of argument in the Wimbledon case: it recognized its jurisdiction to take cognizance of the Application made by Great-Britain, France, Italy and Japan against Germany on the sole basis of Article 386, paragraph 1, of the Treaty of Versailles, although Germany was not yet a Party to the Court's Statute [P.C.I.J., Judgment of 17 August 1923, *The Wimbledon Series A*, n° 1, p. 20].

4.2.3.5 Any other solution would deprive both the expression "... subject to the special provisions contained in treaties in force " (contained in Article 35, paragraph 2, of the Statute), and jurisdictional clauses of this kind, of any bearing. It would contradict the essential consensual character of the Court's jurisdiction and would be incompatible with the intent of the drafters of the Statute to open the Court's jurisdiction as widely as possible.

4.2.3.6 In the present case, the jurisdiction of the Court is based on Article IX of the 1948 Genocide Convention (that is a "special provision contained in a treaty in force"), to which both States are parties - together with many others. It would be paradoxical to admit that one of these States would not be bound by one of the very important provisions of this Convention and could, therefore escape control by an impartial third party while all other parties are bound and have assumed that all States parties had accepted the same obligation. This would amount to a kind of *de facto* reservation to which no objection could be possible.

4.2.3.7 It must be admitted that, like Bosnia and Herzegovina, Yugoslavia (Serbia and Montenegro) is bound by all the provisions of the Genocide Convention, including its Article IX, whether or not it is a Party to the Statute of the Court. It is therefore only for the sake of completeness that Bosnia and Herzegovina will now show that, in any event, the Respondent State is a Party to the Statute.

Yugoslavia (Serbia and Montenegro) is, in any event, a Party to the Court's Statute

4.2.3.8 As recalled earlier (para. 4.2.2.12), Yugoslavia (Serbia and Montenegro) made, on 27 April 1992, formal declarations, reiterated afterwards on several occasions, in which it stated that it would strictly abide by all the commitments that the former S.F.R.Y. assumed internationally in the past, "including its membership in all international organizations and participation in international treaties ratified or acceded to by Yugoslavia".

4.2.3.9 This was a clear commitment, which, certainly, binds Yugoslavia (Serbia and Montenegro), although it is legally superfluous since, whether it is a successor State to the former S.F.R.Y. which, indeed, it is - or its "continuator" - as it alleges to be - treaties in force in respect of the S.F.R.Y. continue in force after the former State has ceased to exist [*see* above 4.2.2.24 and further].

4.2.3.10 This reasoning also applies to the Statute of the Court (and the rights and obligations deriving therefrom) to which the S.F.R.Y. was a Party and by which Yugoslavia (Serbia and Montenegro) is now bound both by way of succession and because of its unambiguous declarations.

4.2.3.11 However, the question arises whether membership to the Statute goes alongside with membership to the United Nations, or if both instruments are autonomous. Since, according to Article 92 of the Charter, the Statute "forms an integral part of the Charter", it could be argued that a State which is not - or no more - a Member of the United Nations may not be a Party to the Statute. This, in turn, raises the question whether or not Yugoslavia (Serbia and Montenegro) is still a Member of the United Nations (although, as will be demonstrated below - paras. 4.2.3.20 - 4.2.3.23 - this last question is, eventually, probably irrelevant).

4.2.3.12 While Bosnia and Herzegovina has consistently been of the opinion that Yugoslavia (Serbia and Montenegro) cannot continue automatically the membership of the former S.F.R.Y. in the United Nations and that its continued membership should be terminated, it must be admitted that, in law, the situation is far from being clear in this respect.

4.2.3.13 Placing its reliance on Resolution 777 (1992) adopted by the Security Council on 19 September 1992, and Resolution 47/1 of the General Assembly of 22 September 1992, the Court leaves open the question of whether or not the Respondent State is a Party to the Statute [Order of 8 April 1993, I.C.J. *Reports* 1993, p. 14].

4.2.3.14 Although Bosnia and Herzegovina regrets it from a political point of view, it must be admitted that, in these Resolutions the governing bodies of the United Nations have not yet made a final decision regarding the status of Yugoslavia (Serbia and Montenegro) in the United Nations. No doubt, they have already decided that this State was not the sole continuator of the former S.F.R.Y. and "cannot continue automatically" its membership in the United Nations. But, in conformity with the recommendation made by the Security Council in its Resolution 777 (1992), the General Assembly has only decided

> "... that the Federal Republic of Yugoslavia (Serbia and Montenegro) should apply for membership in the United Nations and that it shall not participate in the work of the General Assembly" [Resolution 47/1, 22 September 1992]

4.2.3.15 But, on the other hand, as noted by the Under-Secretary-General and Legal Counsel of the United Nations in the letter he addressed to the Permanent

Representatives to the United Nations of Bosnia and Herzegovina and Croatia, Resolution 47/1:

> "... neither terminates nor suspends Yugoslavia's membership, in the Organization" [doc. A/47/485, annex, italics in the original text -*see* I.C.J. *Reports* 1993, p. 13].

In fact, Yugoslavia (Serbia and Montenegro) has kept on considering itself, and has acted as a Member of the United Nations, maintaining its Permanent Missions in New York and Geneva, swamping the Secretariat, the Security Council and the General Assembly with documents, many of which have been published as official documents of these bodies.

4.2.3.16 On his part, the Secretary General has also kept on treating Yugoslavia (Serbia and Montenegro) as a State Member. Following Resolution 47/1 of the General Assembly, the seat and nameplate of Yugoslavia

> "... remain as before, but in Assembly bodies representatives of the Federal Republic of Yugoslavia (Serbia and Montenegro) cannot sit behind the sign "Yugoslavia". Yugoslav missions at United Nations Headquarters and offices may continue to function and may receive and circulate documents. At Headquarters, the Secretariat will continue to fly the flag of the old Yugoslavia as it is the last flag of Yugoslavia used by the Secretariat. The Resolution does not take away the right of Yugoslavia to participate in the work of organs other than Assembly bodies. 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" [A/47/485 - *see* I.C.J. *Reports* 1993, pp. 13-14].

4.2.3.17 While, in the opinion of Bosnia and Herzegovina, Yugoslavia (Serbia and Montenegro) has no right to continued membership and should apply to membership like all other successor States to the former S.F.R.Y., the international community has accepted this situation. Yugoslavia (Serbia and

Montenegro) may not usurp the seat of the former S.F.R.Y. in the United Nations and, at one and the same time, deny that it is bound by the Charter.

4.2.3.18 Although the decision taken by the General Assembly in its Resolution 47/1, does not refer expressly to Article 5 of the Charter, the present legal situation of Yugoslavia (Serbia and Montenegro) is that of "a member of the United Nations against which preventive and enforcement action has been taken by the Security Council [and which has been] suspended from the exercise of the rights and privileges of membership by the General Assembly upon the recommendation of the Security Council". Such a situation has no bearing on the obligations of this State, deriving from the Charter and the Statute of the Court.

4.2.3.19 This consequence is acknowledged by Professor ROSENNE, who writes that suspension under Article 5 of the Charter

> "... is limited to suspension from the rights and privileges of membership, and the State concerned remains a member of the United Nations for all other purposes, and is bound by its obligations under the Charter and Statute. Action under this provision could, for example, deprive a State of its right to institute proceedings in the Court, without affecting its obligations should proceedings be introduced against it" [*op. cit.* para. 4.2.1.15, p. 277].

4.2.3.20 In any event, the Government of Bosnia and Herzegovina maintains that membership of the Charter on the one hand and of the Statute on the other, are not interrelated questions and that, even if Yugoslavia (Serbia and Montenegro) were not a Party to the Charter, it would remain bound by the Statute of the Court.

4.2.3.21 It must be kept in mind, in particular, that

i) "A State which is not a Member of the United Nations may become a party to the Statute of the International Court of Justice ..." [Article 93, paragraph 2, of the Charter]; and that

ii) conditions for amendment laid down by the Charter [Articles 108 and 109, paragraph 2] and by the Statute [Articles 69 and 70] are not exactly identical.

This shows that they are, in fact, different legal instruments.

4.2.3.22 It can be noted that several authorities, in view of these facts, have pointed out that withdrawal or expulsion from the United Nations does not imply that the concerned State ceases being bound by the Statute. Thus, Hans KELSEN wrote that:

> "... the Statute of the International Court of Justice, although an integral part of the Charter, is nevertheless a relatively independent instrument. It is subject to amendment procedure not identical with that to Charter. It is especially the fact that membership in the community constituted by the Statute is possible without membership in the "United Nations" which makes the interpretation possible that a Member of the United Nations may withdraw from the judicial community only or from the United Nations (in the narrower sense), remaining a party to the Statute. That it may become party to the Statute after having withdrawn from the United Nations cannot be doubted. If the right of withdrawal is considered to be a consequence of the Member's sovereignty, it is hardly possible to deny that a state may restrict the exercise of this right to any extent it likes". [Hans KELSEN, *The Law of the United Nations*, London, 1951, p. 134 ; *see.* also Shabtai ROSENNE *The International Court of Justice*, 1957, p. 227 ; the latter author expressed later a contrary view; *see op. cit.* para. 4.2.1.15, pp. 276-277].

4.2.3.23 It may probably be admitted that a State may withdraw from the Statute either simultaneously with a withdrawal from the United Nations. But there is no automaticity in this respect and, in the present case, Yugoslavia (Serbia and Montenegro) not only has not withdrawn from the Court's Statute but, on the contrary, it has proclaimed that it will abide by all the international commitments by the former S.F.R.Y. Among these commitments where those resulting from the Statute.

4.2.3.24 It can therefore be concluded that

i) Yugoslavia (Serbia and Montenegro), whether or not it is a Member of the United Nations, is a Party to the Statute of the Court and bound by all legal obligations deriving therefrom ; but that,

ii) in any event, the status of the Respondent State with regard to the Statute has no effect on the jurisdiction of the Court in relation to Article IX of the Genocide Convention of 1948.

Section 4.2.4

The scope of the jurisdiction of the Court *ratione materiae*

4.2.4.1 While Yugoslavia (Serbia and Montenegro) has never denied that it is a Party to the Genocide Convention and has accepted the Court's jurisdiction on the basis of Article IX of this Convention [*see* paras. 4.2.2.2 *et seq.*], it has insisted that it was "prepared to continue to litigate the case "within the limits of the jurisdiction as [it] understand[s] it" [*see* C.R. 93/13, p. 54], that is to say: in the framework of "what is strictly stipulated in the Convention itself" [*see id.*, p. 16 and *see* above, para. 4.2.2.3].

4.2.4.2 It is not questionable that the Court's jurisdiction is based on the consent of States but

> "The requirement of consent cannot be allowed to degenerate into a negation of consent or, what is the same thing, into a requirement of double consent, namely, of confirmation of consent already given" [I.C.J., *Case Concerning the Aerial Incident of 27 July 1955*, Joint dissenting opinion by Judges Sir Hersch LAUTERPACHT, Wellington Koo and Sir Percy SPENDER, I.C.J. *Reports* 1959, p. 187].

In other words, in the present case, Yugoslavia (Serbia and Montenegro) has consented to the Court's jurisdiction as a Party to the Genocide Convention and it may not, in the course of the proceedings, make its consent - and, consequently, the Court's jurisdiction - dependent on special rules of interpretation.

4.2.4.3 Article IX of the 1948 Convention is a clear basis for the jurisdiction of the Court; it must be interpreted neither "strictly" nor "widely", but in conformity with the usual rules of interpretation of treaties. In particular, in case of doubt, regarding clauses conferring jurisdiction

> "... the Court must, if it does not involve doing violence to their terms, be construed in a manner enabling the clauses themselves to have appropriate effects" [P.C.I.J., Order of 19 August 1992, *Free Zones case*, Series A, n°22, p. 13; *see* also I.C.J. *Reports* 1949, p. 24].

The Court's jurisdiction cannot be frustrated by unilateral restrictive interpretations given by one of the Parties. On the other hand, the Applicant State

> "... must establish a reasonable connection between the treaty and the claims submitted to the Court" [I.C.J., Judgement of 26 November 1984, *Case concerning Military and Paramilitary Activities in and against Nicaragua (Jurisdiction of the Court and Admissibility of the Application)*, I.C.J. *Reports* 1984, p. 427].

4.2.4.4 According to Article IX of the Convention on the Prevention and Punishment of the Crime of Genocide,

> "Disputes between the Contracting Parties relating to interpretation, application or fulfilment of the present Convention, including those relating to the responsibility of a State for genocide or for any of the other acts enumerated in Article III (3), shall be submitted to the International Court of Justice at the request of any of the parties to the dispute".

4.2.4.5 It is evident from Section IV of the Application made by the Republic of Bosnia and Herzegovina that the breaches by the Respondent State of its obligations under the Genocide Convention and its responsibility deriving therefrom were among the main submissions made by Bosnia and Herzegovina. They are the substance of points (a) and (q) of the Application and many other submissions are related to them, as will be demonstrated below. Moreover, as explained in Chapter 1 of the present Memorial, Bosnia and Herzegovina has limited its submissions to points having a "reasonable connection" with the Genocide Convention, subject to the formal reservation that it may take for granted that Yugoslavia (Serbia and Montenegro) has accepted the Court's jurisdiction on the basis of Article IX of this Convention.

4.2.4.6 It is, therefore, self-evident that this provision offers a clear basis for the jurisdiction of the Court in the present case.

4.2.4.7 Moreover, in its Order of 8 April 1993 and 13 September 1993, the Court has found that

> "... Article IX of the Genocide Convention, to which both Bosnia- Herzegovina and Yugoslavia (Serbia and Montenegro) are parties, (...) appears to the Court to afford a basis on which the jurisdiction of the Court might be

> founded to the extent that the subject-matter of the dispute relates to "the interpretation, application or fulfilment" of the Convention, including disputes "relating to the responsibility of a State for genocide or for any of the other acts enumerated in article III" of the Convention" [I.C.J. *Reports* 1993, p. 16 and p. 338; *see* also pp. 14 and 342].

4.2.4.8 Bosnia and Herzegovina does not dispute that, as far as the title of jurisdiction constituted by the Genocide Convention is concerned, the subject-matter of the dispute must be related to the Convention and to the responsibility deriving from breaches of this instrument. But, thus, conceived, this basis of jurisdiction is broader than it might seem at first sight and certainly much broader than Yugoslavia (Serbia and Montenegro) sees it [*see e.g.* its Observations of 23 August 1993, p. 15].

4.2.4.9 Firstly, genocide as embodied in the 1948 Convention must be envisaged in a broad sense as is apparent from the *travaux préparatoires* and derives from the intents of the drafters and the Contracting Parties. This will be elaborated in Chapter 5 hereafter.

4.2.4.10 Secondly, if there can be no doubt that the Court has jurisdiction regarding the crime of genocide perpetrated by the Respondent State, its agents and its surrogates and all other wrongful acts enumerated in Article III of the Convention, it also has jurisdiction with respect to the consequences of such crimes. This is clearly implied by the reasoning of the Court in paragraph 42 of its second Order of 13 September 1993. In this paragraph, the Court explained that is was unable to accept, for the purpose of a request for the indication of provisional measures,

> "... that a "partition and dismemberment", or annexation of a sovereign State, could in itself constitute an act of genocide ..." [I.C.J. *Reports* 1993, p. 345].

But, at the same time, the Court makes plain that it is competent to deal with such a "partition and dismemberment", annexation or incorporation as far as it is a consequence of genocide [*id.*, pp. 345-346]. It is the Applicant's contention that this is the case and that the partition and dismemberment of Bosnia and Herzegovina and incorporation of large parts of this sovereign State in its own territory are the purpose and aim pursued by the Respondent State, and are therefore illegal consequences of the crime of genocide. Similarly, Bosnia and Herzegovina is entitled to oppose genocide by all possible means in the framework of its inherent right of self-defense and to benefit from the help and humanitarian assistance of other States and of the international community.

4.2.4.11 Thirdly, in the same spirit, "it must be borne in mind that the activities which may *prima facie* appear not to fall within" categories of conducts listed in Article III of the 1948 Convention "may in truth do so if such conduct can in fact be shown to cause, or contribute to, with sufficient directness, genocide or genocidal activity" [Separate Opinion of Judge LAUTERPACHT, I.C.J. *Reports* 1993, p. 413]. It is, in effect, clear that all acts of Yugoslavia (Serbia and Montenegro) which concur to committing genocide fall into the Court's jurisdiction on the basis of Article IX of the Genocide Convention; that clause gives jurisdiction to the Court over disputes relating to the "fulfilment" of the Convention; consequently, all acts concurring to the perpetration of the crime of genocide fall into the Court's jurisdiction. Thus, for example, breaches of the laws of war or illegal use of force by the Respondent State might be, as such, outside the Court's jurisdiction as provided for in the Convention, but if and insofar as

they have been accomplished in a view to commit genocide, they fall into its jurisdiction. As will be demonstrated in Chapters 5 and 6 below, this is indeed the case.

4.2.4.12 As this Court recognized in its 1951 Advisory Opinion relating to Reservations to the Convention on the prevention and punishment of the crime of genocide:

> "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 measures of all its provisions" [I.C.J. *Reports* 1951, p. 23].

4.2.4.13 Bosnia and Herzegovina will show in more detail below (Chapter 5) that genocide is an international wrongful act and, more specifically, a crime against the peace and security of mankind prohibited by a peremptory norm of general international law (*jus cogens*). This is clearly an obligation *erga omnes* as was expressly admitted by the Court in the *Case concerning the Barcelona Traction, Light and Power Company, Ltd. (New Application - Second Phase)*:

> "Such obligations derive, for example, in contemporary international law, from the outlawing of acts of aggression, and of genocide, and also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination. Some of the corresponding rights of protection have entered into the body of general international law [*Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion*; I.C.J. *Reports* 1951, p. 23]; others are conferred by international instruments of a universal or quasi-universal character" [I.C.J. *Reports* 1970, p. 32].

4.2.4.14 This finding has important consequences concerning the jurisdiction of the Court since:

> "[A]n essential distinction should be drawn between the obligations of a State towards the international community as a whole, and those arising vis-à-vis another State in the field of diplomatic protection. By their very nature the former are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection ..." [*id.*].

4.2.4.15 In other words, this means that any State has a "legal interest" in suing a State committing genocide (provided there exists a jurisdictional link between the two litigant States), whether the victims of the genocide are its own citizens or not and wherever the crime is committed. In the present case, this implies that Bosnia and Herzegovina could even sue Yugoslavia (Serbia and Montenegro) without having to prove that the victims are Bosnian and even if the acts of genocide are committed on the territory of third States or on the Respondent State's territory itself, serving to illustrate the importance of the Convention and its provisions.

4.2.4.16 It therefore appears that:

i) Article IX of the Genocide Convention constitutes a proper basis for the jurisdiction of the Court in the present case;

ii) this Article as well as the other relevant provisions of the Convention must be interpreted according to the usual rules of interpretation of treaties;

iii) the Court has jurisdiction to decide on all aspects of the dispute which have a reasonable connection with the Genocide Convention and, in particular, on all submissions relating to acts of the Respondent State which were used as means to commit, and/or aid in the commission of genocide and to all consequences of such acts;

iv) Genocide being a crime under international law, Bosnia and Herzegovina has a legal interest and right to sue Yugoslavia (Serbia and Montenegro) for all acts of genocide or assimilated conduct.

CHAPTER 4.3
ADMISSIBILITY OF THE APPLICATION

4.3.0.1 The Respondent State has not directly challenged the admissibility of the Application made by Bosnia and Herzegovina. However, on several occasions it has insinuated that there could exist some problems in this respect. Yugoslavia has hinted at two different points: firstly it seems to allege that the Court should avoid exercising its jurisdiction since other organs of the United Nations are dealing with the dispute; second, it claims that the dispute has exclusively an internal character. There is not the slightest ground for either one of these allegations.

Section 4.3.1

Irrelevance of the activities of other U.N. organs in respect of the present case

4.3.1.1 On several occasions during the proceedings concerning the requests for the indication of provisional measures, the Respondent State raised some objections based on the fact that the Security Council was seized of the case on the basis of Chapter VII of the Charter of the United Nations. As the Court noted in its first Order,

> "... Yugoslavia has drawn attention to the numerous Resolutions adopted by the United Nations Security Council concerning the situation in the former Yugoslavia, and to the fact that in that respect the Security Council has taken decisions on the basis of Article 25 of the Charter, and has indicated expressly that it is acting under Chapter VII of the Charter (...) Yugoslavia contends that so long as the Security Council is acting in accordance with Article 25 and under that Chapter, "it would be premature and inappropriate for the Court to indicate provisional measures, and certainly provisional measures of the type which have been requested" [I.C.J. *Reports* 1993, pp. 18 - 19 - *see* also statements by Professor ROSENNE, 2 April 1993, CR 93/13, pp. 19, 23 or 53; and the Observations of Yugoslavia (Serbia and Montenegro) of 9 August 1993, p. 13].

4.3.1.2 Although at least on one occasion, Yugoslavia (Serbia and Montenegro) expressly mentioned that "The Security Council remains actively seized of the whole question raised in the Application instituting these proceedings and in the Request for the indication of provisional measures" [CR 93/13, p. 19], it is not clear whether this objection was limited to the provisional measures requested by Bosnia and Herzegovina or if it was also supposed to be valid as regard the Application itself.

4.3.1.3 In any event, as the Court recalled in its Order of 8 April 1993,

> "... while there is in the Charter "a provision for a clear demarcation of functions between the General Assembly and the Security Council, in respect of any dispute or situation, that the former should not make any recommendation with regard to that dispute or situation unless the Security Council so requires, there is no similar provision anywhere in the Charter with respect to the Security Council and the Court. The Council has functions of a political nature assigned to it, whereas the Court exercises purely judicial functions. Both organs can therefore perform their separate but complementary functions with respect to the same events [*Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Jurisdiction and Admissibility, Judgment* I.C.J. *Reports* 1984, pp 434-435, para. 95] "[I.C.J. *Reports* 1993, p. 19].

4.3.1.4 This is a constant and well established jurisprudence of the Court [*cf.* Judgment of 24 May 1980, *Case concerning United States Diplomatic and Consular Staff in Tehran*, I.C.J. *Reports* 1980, pp. 20-22 - *see* also Alain PELLET, "Le glaive et la balance - Remarques sur le rôle de la C.I.J. en matière de maintien de la paix et de la sécurité internationale", in *International Law at a Time of Perplexity - Essays in Honour of Shabtai Rosenne*, 1989, pp 541-550] and it must be noted that, contrary to the Respondent State's allegations [*cf.* CR 93/13, p 23], in the Lockerbie case, the fact that the Security Council was acting on the basis of Chapter VII of the Charter has not prevented the Court from examining Requests for provisional measures (even if they were rejected on other grounds) [Orders of 14 April 1992, I.C.J. *Reports* 1992, p. 3 and p. 114].

Section 4.3.2

The alleged "internal" character of the dispute

4.3.2.1 In several occasions during the previous proceedings in this case, Yugoslavia (Serbia and Montenegro) insisted that "the situation which has developed in Bosnia and Herzegovina is a situation of civil war with all which that entails" [Pleading of Professor ROSENNE, 2 April 1993, CR 93/13, p. 52; *see* also the statement made by Mr. ZIVKOVIC, *id.*, pp. 6-8 and Observations of 9 August 1993, p. 11].

4.3.2.2 It is not clear if this insistence is supposed, in the mind of the Respondent State, to have any consequence regarding the admissibility of the Application. In any event, it has none.

4.3.2.3 The question whether or not Yugoslavia (Serbia and Montenegro) is involved in the genocide perpetrated against parts of the population of Bosnia and Herzegovina (as well as against Muslim population of the Respondent State itself) is precisely the main substantial issue in this case. It is the contention of the Applicant that Yugoslavia (Serbia and Montenegro) not only is involved in these dramatic events, but also is at their origin and that the authorities of Belgrade have decided, organized and directed and are organizing and directing the shameful policy of genocidal "ethnic cleansing" with a view to achieving the chimerical dream of a "Great Serbia" by means of aggression. The submission made in the Application, and (conditionally) restricted in the present Memorial, requests from the Court a Judgment declaring the responsibility of the Respondent State for these internationally wrongful acts and deciding that reparation/restitution is due for the damages these acts have caused.

4.3.2.4 It must be added that genocide and other related wrongful acts which have been committed by Yugoslavia (Serbia and Montenegro) according to the Government of Bosnia and Herzegovina amount to international crimes - in the sense international law gives to this expression (*see* Part 5 below). This follows clearly from Article 19 of the Draft Articles of the International Law Commission (I.L.C.) on State Responsibility, according to which

> "An internationally wrongful act which results from the breach by a State of an international obligation so essential for the protection of fundamental interests of the international community that its breach is recognized as a crime by that community as a whole constitutes an international crime" [paragraph 2].

Among these crimes, paragraph 3 of draft Article 19 lists

- aggression,
- "a serious breach of an international obligation of essential importance for safeguarding the right of self-determination of peoples", or
- "a serious breach on a widespread scale of an international obligation of essential importance for safeguarding the human being, such as those prohibiting slavery, genocide and apartheid", all of which are at stake in the present case either directly (genocide) or because they have been a consequence or a means of genocide. These crimes are international by essence.

4.3.2.5 At least two main conclusions can be drawn from the above considerations: first, the dispute brought before the Court by the Application of 20 March 1993, is, undisputably international; and, second, if the Respondent State were to deny such an obvious fact, the argument could not be held to be of a preliminary character; it is so evidently indissociable from the substance of the case that the Court would certainly have no other choice than to "...

find that the objection is so related to the merits, or to questions of fact or law touching the merits, that it cannot be considered separately without going into the merits" [I.C.J., Judgment of 24 July 1964, *Case concerning the Barcelona Traction Light and Power Company, Ltd, Preliminary Objections*, I.C.J. *Reports* 1964, p. 43].

CHAPTER 4.4
CONCLUSIONS

4.4.0.1 It is respectfully submitted that both litigant States are Parties to the Genocide Convention, of which Article IX provides a proper basis of jurisdiction and that no objection may, seriously, be raised against the admissibility of the Application.

4.4.0.2 However, it must be admitted that, in limiting itself to this basis of jurisdiction, the Government of Bosnia and Herzegovina has limited the scope of its Application (the formal submissions have, consequently, been modified).

4.4.0.3 Once again it wishes to make clear that it is still convinced that there exist other valid titles of jurisdiction but that, in view of the special circumstances and the urgence of the case, it has decided to focus on Article IX of the Genocide Convention which has been accepted as a valid title of jurisdiction by the Respondent State. If Yugoslavia (Serbia and Montenegro) does not reconsider its acceptance - which, in any event, it is not entitled to do - Bosnia and Herzegovina will confine itself to the matters related to the Genocide Convention during the following phases of

the proceedings; but if the Respondent State raises preliminary objections, the Government of Bosnia and Herzegovina reserves its rights to invoke all other existing titles of jurisdiction.

PART 5

THE ACTS PERPETRATED CONSTITUTE GENOCIDE AND ITS COROLLARIES

CHAPTER 5.1
THE CONVENTION'S ANTECEDENTS AND SPIRIT

Section 5.1.1
An offence *jus gentium*

5.1.1.1 Genocide is a crime which is defined in the 1948 Genocide Convention [*Convention on the Prevention and Punishment of the Crime of Genocide*, G.A. Res. 260(III) of 9 December 1948. 78 U.N.T.S. 277]. Although Article I of that Convention binds the "Contracting Parties...to prevent or to punish" this "crime under international law..." genocide had already been specified in the indictment of 8 October 1945 against major German war criminals [*Trial of the Major War Criminals before the International Military Tribunal*, Nuremberg, 14 November 1945 - 1 October 1946, Nuremberg, 1947, vol. I, pp. 43-44]. Moreover, a unanimous 1946 General Assembly resolution "affirms that genocide is a crime under international law...for the commission of which principals and accomplices...are punishable" [*Resolution on the Crime of Genocide*, G.A. Res. 96(I) of 11 December 1946].

5.1.1.2 This point is reiterated in G.A. Res. 180(II) in which the expression "crime against mankind" is used both to emphasize the global recognition that such activity is violative of the most basic provisions of the international canon and also to signal that genocide is not confined, as was the judgment pronounced at Nuremberg, to wartime crimes against the peace and security of mankind. [This peace and security category of offences the International Law Commission would later be called upon to codify. See ECOSOC Ad Hoc Committee on Genocide (hereinafter, *Ad Hoc Cttee*), *Report of the Committee and Draft Convention*, E/974, 24 May 1948, p. 7.]

5.1.1.3 The 1946 resolution, in its deliberate choice of the term "affirms," intended to signify beyond doubt that genocide was already recognized as a crime *jus gentium*. [According to the *Institutes of Justinian* I,2,1, *jus gentium* is "that law which natural reason has established among all men, that which is especially regarded by all."] By 1948, even before the Convention had been endorsed by the General Assembly and opened for signature and ratification, the international community thus had spoken unambiguously to assert that genocide was the quintessential instance of an act in violation of the law, obedience to which is recognized by all as *sine qua non* of membership in the civilized community of states and peoples.

5.1.1.4 That genocide has such a special status is manifest in the revulsion felt throughout the world, especially -- but by no means solely -- as a result of the activities of Hitler's minions. This has been recognized by the International Court of Justice. In its 1950 advisory opinion on reservations to the Genocide Convention, the Court said, "the principles underlying the Convention are principles which are recognized by civilized nations as

binding on States, even without any conventional obligation" [*Reservations to the Convention on Genocide, Advisory Opinion*: I.C.J. *Reports* 1951, p. 15 at 23].

5.1.1.5 The purpose of the 1948 Convention, therefore, was not to create a new crime but: 1) to define more precisely a binding set of legal obligations on States and individuals; 2) to provide the legal process by which those obligations and prohibitions could be enforced against persons; and 3) to ensure that disputes between States regarding their responsibilities under the Convention could be resolved by recourse to the International Court of Justice.

Section 5.1.2

Purposes and principles of the Genocide Convention

5.1.2.1 These purposes, as Bosnia and Herzegovina will demonstrate, are evident from the Convention's text and the *travaux preparatoires*, as well as by subsequent usage.

5.1.2.2 At the outset, however, it is useful to understand the spirit of the Convention. This is clarified by these prefatory words of the I.C.J.'s 1950 *Advisory Opinion*: "The origins and character of that Convention, the objects pursued by the General Assembly and the contracting parties, the relations which exist between the provisions of the Convention, *inter se*, and between those provisions and these objects, furnish elements of interpretation of the will of the General Assembly and the parties. The origins of the Convention show that it was the intention of the United

Nations to condemn and punish genocide as 'a crime under international law' involving a denial of the right of existence of entire human groups, a denial which shocks the conscience of mankind and results in great losses to humanity, and which is contrary to moral law and to the spirit and aims of the United Nations..." [*id.* at 23].

5.1.2.3 Continuing, this Court stated that 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...The high ideals which inspired the Convention provide, by virtue of the common will of the parties, the foundation and measure of all its provision" [*id.*].

5.1.2.4 Any effort to interpret the Convention in the spirit of the drafters and with their objectives in mind requires recourse to the *travaux preparatoires*. The International Court, in its 1950 *Reservation* Opinion has already made clear the relevance of the *travaux* and legislative history. For example, the Court in that case had observed that, although the Genocide Convention had been adopted unanimously by the General Assembly in plenary session, it "is nevertheless the result of a series of majority votes -- which may make it necessary for certain States to make reservations" [*Reservations*, Advisory Opinion, *id.* p. 91]. Moreover, although the Convention itself says nothing about reservations, the Court satisfied itself from the *travaux* "that an undertaking was reached within the General Assembly on the right to make reservations and that it is permitted to conclude therefrom that States,

becoming parties to the Convention, gave their assent thereto" [*id.* p. 91]. As the Court pointed out in the Advisory Opinion on the Genocide Convention, in interpreting a treaty so fraught with history and public policy, recourse to *travaux* and legislative history is an invaluable tool in understanding the meaning of bare words.

5.1.2.5 With those important strictures in mind -- that the Convention codifies pre-existing law and that this codification must be read in the light of the high principles and clear moral objective of the drafters and ratifiers of the text -- the applicant now turns to examine the provisions of the Convention which form the legal basis for the allegation of the Republic of Bosnia and Herzegovina. Bosnia and Herzegovina submits that the Federal Republic of Yugoslavia (Serbia and Montenegro) is in gross violation of its most solemn obligations under the Genocide Convention. Specifically, the Republic of Bosnia and Herzegovina alleges that the Federal Republic of Yugoslavia (Serbia and Montenegro) has committed genocide and, with complicity, has failed to prevent, has incited to, and has assisted the committing of genocide, and has failed to punish persons who have committed, or aided the committing of, these prohibited acts.

CHAPTER 5.2
THE CONVENTION'S COVERAGE

Section 5.2.1
What the 1948 Convention prohibits (Offences)

5.2.1.1 Article III of the Convention makes unlawful the following acts:

"(a) Genocide;
(b) Conspiracy to commit genocide;
(c) Direct and public incitement to commit genocide;
(d) Attempt to commit genocide;
(e) Complicity in genocide."

5.2.1.2 Bosnia and Herzegovina will demonstrate that all of these acts occurring in its territory [see S/RES/820 of 17 April 1993 which reaffirmed "the sovereignty, territorial integrity and political independence of the Republic of Bosnia and Herzegovina"] have been committed, are still being committed and ought to have been prevented, stopped and punished by the Federal Republic of Yugoslavia (Serbia and Montenegro). [The territorial integrity and independence of Bosnia and Herzegovina is reaffirmed in Security Council Resolution 820 of 17 April 1993.]

5.2.1.3 Genocide is defined in Article II as

"any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:
(a) Killing members of the group;
(b) Causing serious bodily or mental harm to members of the group;
(c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
(d) Imposing measures intended to prevent births within the group;
(e) Forcibly transferring children of the group to another group."

5.2.1.4 The definition of Genocide in the Convention precisely describes the events in Bosnia and Herzegovina today. As is set forth in Part 2 (Chapter 2.2),

according to reliable first-hand reports of observers on behalf of expert and impartial intergovernmental and nongovernmental organizations, hundreds of thousands of persons have been killed, tortured, raped and have been victimized by inflicting on them conditions of life calculated to bring about the physical destruction in whole or in part of the groups (ethnic, racial or religious) to which they belong. This is not random mayhem. As indicated in Part 3, the Special Rapporteur of the U.N. Commission on Human Rights, Mr. Tadeusz Mazowiecki, has reported that non-Serbs are by far the bulk of those being beaten, robbed, raped and forced to flee and that this is "undoubtedly related to the political objectives formulated and pursued by Serbian nationalists..." [A/47/666; S/24809, 17 November 1992, Annex, p. 6]. The General Assembly has registered its horror at the "widespread rape and abuse of women and children" and "in particular its systematic use against the Muslim women and children in Bosnia and Herzegovina by Serbian forces..." [General Assembly Resolution 48/143 of 20 December 1993]. Primarily the Muslim but also the Croat population of Bosnia and Herzegovina have been the victims of this deliberate campaign. This is no coincidence: the victims are selected on the basis of their religion, ethnicity or group identity.

5.2.1.5 Nor are these the acts of ordinary individual criminals. From the report of the Committee on the Elimination of Racial Discrimination, it is evident that "links existed between the Federal Republic of Yugoslavia (Serbia and Montenegro) and Serbian militias and paramilitary groups responsible for massive, gross and systematic violations of human rights in Bosnia and Herzegovina..." [GAOR, 48th Sess., Supp. No. 18 (A/48/18]. From the General Assembly of the United Nations, in December, 1993, has come an unqualified condemnation of "continued violation of the international

border" of Bosnia and Herzegovina "by Serbian forces" [G.A. Res. A/48/48 of 20 December 1993, para. 4] and the conclusion, by consensus, that the "principal victims" of the arbitrary detentions, summary executions, rape and torture "are the Muslim population threatened with virtual extermination..." [G.A. Res. A/48/153 of 20 December 1993, preamble]. The General Assembly also concluded that these horrendous acts are "tactics" used "as a matter of policy" [*id.* para. 6]. By whom? The General Assembly, also by consensus, concluded that, while there were violations by others, "the leadership in territory under the control of Serbs" in Bosnia and Herzegovina, "the commanders of Serb paramilitary forces and political and military leaders in the Federal Republic of Yugoslavia (Serbia and Montenegro) bear primary responsibility for most of these violations" [*id.* para. 4]. Thus the Special Rapporteur of the U.N. Commission on Human Rights [see E/CN.4/1992/S-1/9, 28 August 1992 et. seq.], the Sub-Commission on the Prevention of Discrimination and Protection of Minorities [see Res. 1992/103 of 13 August 1992], the Commission on Human Rights [see Res. 1992/S-1/1], and the General Assembly have all concluded that acts amounting to genocide have been and are being committed, with the vast preponderance of responsibility being attributable to Serb forces. Indeed, in Resolution 47/121 of 18 December 1992, the Assembly concluded that these acts constitute "a form of genocide." Likewise, the Commission of Experts established by the Security Council found that "such acts could also fall within the meaning of the Genocide Convention" [S/25274, para. 56]. Again, in 1994 the General Assembly was able to reach the conclusion not only that rape of Muslim women was being used as an "instrument of ethnic cleansing" but that "the abhorrent policy of 'ethnic cleansing' was a form of genocide" [A/RES/48/143, preamble and para. 2]. These conclusions of law and fact,

described at greater length in Part 3, are bound to be of great persuasive power in this Court.

5.2.1.6 This Court is now being asked to give applied meaning to the solemn purpose of the Genocide Convention. Fortunately for this great task, most of the terms used in Article II to define genocide are perfectly clear. There is no need to trace the history of "killing" or "causing bodily or mental harm" through the national jurisprudence of the drafting parties nor through the *travaux preparatoires*. There is no difficulty in connecting those words to the terrible reality of Bosnia and Herzegovina's ravishment which Part 2 of this Memorial has summarized. The instant part of the Memorial, instead, will focus on a few more ambiguous terms and concepts in the Convention's prohibitions as to which the *travaux* may cast light. Specifically, we shall seek to demonstrate:

1) who the drafters intended to make responsible for designated unlawful acts;
2) what responsibility States assumed under the Convention;
3) what standard of proof is required -- civil or criminal? -- in litigation based on State responsibility;
4) what is meant by Article II's term "destroy, in whole or in part"; and
5) what is the meaning of, and evidentiary standard applicable to, the Convention's Article II requirement that acts must have been "committed with intent..."

Section 5.2.2

Who the drafters intended to make responsible

5.2.2.1 The Convention's prohibitions and provisions for punishment of violators applies, under Article IV, to "persons" whether "constitutionally responsible rulers, public officials or private individuals."

5.2.2.2 The Convention, however, does not envisage only a need to address individual violators. Quite the contrary. Article IX expressly foresees another contingency firmly rooted in the drafters' recently endured history, namely: "responsibility of a State for genocide or for any of the other acts enumerated in Article III."

5.2.2.3 Thus the Convention defines genocide and corollary offences and establishes that these offences may be attributable to a broad range of individuals, high and low, *and also to States*. When the delict is that of a State, an "international wrong occurs where an international person acts in violation of an international legal duty." [Jennings and Watts, *Oppenheim's International Law*, 9th ed., Vol. I, part 1, p. 502, sec. 146 (1992).] The Republic of Bosnia and Herzegovina admits that the Federal Republic of Yugoslavia (Serbia and Montenegro) has "international personality." It will demonstrate, with evidence and law, that this international person has committed the wrongs defined by the Genocide Convention.

5.2.2.4 That Convention defines the conduct which constitutes the wrong it seeks to prohibit. First, under Article IX, a State may be guilty of genocide if it, or

its officials or agents, commit genocide as defined in Article II, or any of the concomitant acts, such as incitement, enumerated in Article III. Second, a State may be guilty of a breach of a most solemn legal obligation under the Convention's Articles I, IV, V and VI if it fails to employ the organs and instruments of its domestic jurisdiction to prohibit and prevent persons from committing acts of genocide. Third, a wrong is committed when a State, in violation of its duty under Articles I and VI, fails to bring to trial and punish persons who have committed any of the prohibited acts. In other words, states are not merely enjoined not to commit genocide through stated action, but they are actively to prohibit and prevent such acts and to punish those who perpetrate them.

5.2.2.5 That States have these responsibilities is clear on the face of the Convention's text, which provides, in Article IX, that "disputes regarding these aspects of responsibility of a State for genocide or for any of the other acts enumerated in Article III, shall be submitted to the International Court of Justice at the request of any of the parties to the dispute." It is under this provision that the Republic of Bosnia and Herzegovina charges the Federal Republic of Yugoslavia (Serbia and Montenegro) with committing and abetting genocide. It is also under this provision that the Republic of Bosnia and Herzegovina charges the Federal Republic of Yugoslavia (Serbia and Montenegro) with grave failure -- to use the terminology of Article IX of the Convention -- to secure the "application or fulfillment of the present Convention." Egregiously, they failed to prevent, prosecute and punish, in accordance with Articles I and IV to VI, the perpetrators of the wrongs enumerated in the Convention.

5.2.2.6 The responsibility which the Convention attaches directly to States -- as distinct from persons -- is no mere drafters' whim. On the contrary, the phrase "the responsibility of a State for genocide or any of the other acts enumerated in Article III" was the result of some of the most intense discussion of any part of the Convention. The phrase had not been included in the Secretariat's first draft, nor in the draft prepared by the Ad Hoc Committee of the Economic and Social Council [*Ad Hoc Cttee, op. cit.* p. 38 and asterisk footnote].

5.2.2.7 Even during the drafting phase, however, the sixth Committee of the General Assembly indicated its interest in bringing States directly to account. General Assembly Resolution 180(II) declares "that genocide is an international crime entailing national and international responsibility on the part of individuals and States..." [Preamble, *op. cit.*; emphasis added]. The theme that States must be made accountable was taken up, again, when the Ad Hoc Committee's draft was before the General Assembly's Sixth Committee [G.A.O.R., 6th Cttee, Summary Records, 21 September-10 December 1948. Hereinafter, *Sixth Cttee*]. There, the representative of France noted that "whether as perpetrator or as accomplice, the Government's responsibility was in all cases implicated" [*id.* at 146]. While France and a number of other States at first preferred the creation of an international criminal tribunal to try offending regimes [*id.* p. 339], a different approach, offered by Belgium, was ultimately adopted. It took into account that a world criminal court, authorized to try States as well as individuals, might not soon come into being. Thus, the summary record states: "the Belgian delegation had thought it preferable to have recourse to an already existing court, the International Court of Justice...which. . could

establish the non-fulfillment, by a State, of its obligation to punish the acts enumerated..." [*id.* p. 338].

5.2.2.8 In this Belgium was supported by the British, who, all along, had stressed as "the main issue...the responsibility of States for acts of genocide committed or tolerated by them" [*id.* p. 702]. The Sixth Committee adopted the Belgian-British amendment to what became Article IX only after much deliberation and by a vote of 23 to 13, with 8 abstentions [*id.* p. 447]. The words of the British representative, Sir Gerald (later Judge) Fitzmaurice, remain instructive:

> "When it became clear that genocide was being committed, any party to the convention could refer the matter to the International Court of Justice ...In accordance with Article 94 of the Charter, Member States were legally bound to comply with the decisions of the International Court. Furthermore, Article 94, paragraph 2 of the Charter provided that if a State failed to perform the obligations incumbent upon it under a judgment rendered by the Court, the other party might have recourse to the Security Council. The United Kingdom delegation had always taken into account the enormous practical difficulties of bringing rulers and heads of States to justice, except perhaps at the end of a war. In time of peace it was virtually impossible to exercise any effective international or national jurisdiction over rulers or heads of States. For that reason the United Kingdom delegation had felt that provision to refer acts of genocide to the International Court of Justice, and the inclusion of the idea of international responsibility of States or Governments, was necessary for the establishment of an effective convention on genocide." [*id.* p. 444]

5.2.2.9 Thus, it is absolutely clear from the *travaux* that the draft of Article IX was deliberately amended by the Assembly's Sixth Committee to include in the

Convention a specific provision making States, in addition to individuals and groups, liable for the prohibited acts.

Section 5.2.3

What responsibility the Convention imposes on State Parties

5.2.3.1 Of course, states are made responsible by the Convention [Article IX] for acts such as "genocide or any of the other acts enumerated" in Articles II and III. Additionally, States are liable for breach of the textual obligations set out in Articles I, IV, V and VI. As Mr. Kaeckenbeeck, the Belgian representative, expressed it, the effect of what became Article IX was also to give the I.C.J. jurisdiction to "establish the non-fulfillment, by a State, of its obligation to punish the acts enumerated..." [*id.* p. 338]. What are these obligations?

5.2.3.2 Article I obliges parties "to prevent and to punish" perpetrators of genocide. A State's failure to prevent the commission of acts of genocide thus is actionable under Article IX. Moreover, the duty to take preventive measures within the competence of the authorities is not confined solely to the territory within the sovereign jurisdiction of those authorities but extends also to areas over which they exercise *de facto* control or where they have the influence to prevent -- or even merely to make their best effort to try to prevent -- the occurrence of a human tragedy, especially when that tragedy is, at least in part, of those authorities' own making. Other aspects of this abject failure of the Federal Republic of Yugoslavia (Serbia and Montenegro) "to prevent and to punish" will be discussed in Part 5, below.

5.2.3.3 A State's failure to prevent and its failure to prosecute persons for violations of the Convention are wrongs under the Convention quite independently of whether or not the State itself participated in, or abetted the commission of those acts. The failure of the Federal Republic of Yugoslavia (Serbia and Montenegro) to convict a single Serbian in connection with the array of horrors set forth in Part 2 of this Memorial shocks the conscience but also establishes a *prima facie* violation of the duty, under Article VI of the Convention, to ensure that persons engaged in the enumerated acts "shall be punished" in accordance with laws enacted by states "to give effect to the provisions of the present Convention" [Article V]. While Yugoslavia, as most other state parties, has enacted such a law [Institute of Comparative Law, *Collection of Yugoslav Law*, vol. XI, Criminal Code (Beograd: 1964) ch. 11, Art. 124, p. 75. Annex 5-I] and, incidentally, made it also applicable to "a citizen of Yugoslavia when he commits abroad a criminal offence" [Criminal Code, *id.* ch. 8, Art. 93, pp. 62-63], legislative prohibition of genocide is not sufficient. Article VI of the Convention also requires the States parties to bring alleged perpetrators to trial in national courts. Moreover, States are required by Article IV to see that persons "committing genocide or any of the other acts enumerated in Article III shall be punished..." It is brought to the Court's attention that, as far away from the scene of the carnage as the Federal Republic of Germany, the authorities have tracked down and arrested a Serb, Dusko Tadic, as a suspect in the commission of torture and mutilation at the Serb detention camp of Omarska [*The New York Times*, Feb. 16, 1994, p. A4]. The failure of the Federal Republic of Yugoslavia (Serbia and Montenegro) to show similar diligence in carrying out its obligations constitutes a violation of the responsibility of the State as envisaged by Article IX and gives rise to a cause of action before this Court which is separate from the

allegation that the State itself has participated directly or indirectly in the prohibited acts.

5.2.3.4 The Convention may thus be seen to impose three obligations on States:

1) not to engage in genocide or the corollary acts described in Articles II and III of the Convention;

2) not to fail through negligence, lack of diligence, or sympathy with perpetrators of the prohibited acts, to do all within the State's power to prevent the commission of genocide by anyone acting under the authority, or within the *de jure* or *de facto* jurisdiction, of the State, or subject to the State's influence or control, direct or indirect;

and

3) not to fail through negligence, lack of diligence, or sympathy with perpetrators of the prohibited acts, to bring them to justice and, thereby, deter further acts of genocide or related crimes.

The Republic of Bosnia and Herzegovina urges the Court, after close examination of the facts asserted in this Memorial, to conclude as a matter of law that the Federal Republic of Yugoslavia (Serbia and Montenegro) has committed acts proscribed by the Convention, has failed in its duty to prevent commission of the proscribed acts and failed in its duty to bring to justice persons under its control or jurisdiction who have committed such acts.

5.2.3.5 The State responsibility provisions of the Convention are perfectly clear from the text. The State is prohibited from engaging in any of the acts enumerated in Articles II and III. And the State has the responsibility to investigate, bring to trial and prosecute persons who have committed genocide, or conspired, incited, attempted or engaged in complicity to

commit genocide. The Republic of Bosnia and Herzegovina submits that the Federal Republic of Yugoslavia (Serbia and Montenegro) has itself committed the enumerated prohibited acts, has failed to use due diligence to prevent their commission by the use of means at its disposal -- influence, resources, etc. -- to prevent persons from committing such acts, and has also patently failed in its duty to seek to apprehend, charge and convict those persons within its jurisdiction, or acting under its guidance, agency or authority, as to whom there is probable cause to believe that they may have committed prohibited acts.

5.2.3.6 This third aspect of State responsibility, too, was clearly envisaged by the drafters of the Convention. As the Netherlands' representative said in the debate of the Sixth Committee, the "responsibility of States" amendment proposed and approved at that time as a new part of Article IX "envisaged also the indirect responsibility of the State resulting from the leniency of national courts towards individuals or groups guilty of genocide" [*Sixth Cttee, op. cit.* p. 435].

5.2.3.7 In December, 1993, the U.N. General Assembly urged "the authorities of the Federal Republic of Yugoslavia (Serbia and Montenegro)" to "use their influence with the self-proclaimed Serbian authorities in Bosnia and Herzegovina" to end the terror of ethnic cleansing [G.A. Res. A/48/153 of 20 December 1993, para. 10]. The Court is asked to adopt the view of the General Assembly that the authorities in Belgrade had such influence and to conclude from the facts that they failed to use it to discharge their obligations under the Convention.

5.2.3.8 It is for this Court to bring the Federal Republic of Yugoslavia (Serbia and Montenegro) to account, to determine the extent of its Government's malfeasances and wrongful nonfeasances, and to afford relief to the victim. As is pointed out in the 9th edition of *Oppenheim* [*op. cit.* p. 994 (Vol. I, parts 2-4), sec. 434]: "The International Court of Justice is given jurisdiction with regard to disputes relating to the interpretation, application, and fulfillment of the Convention, including responsibility of the parties for acts of genocide." Before this Court, the Republic of Bosnia and Herzegovina thus asserts its right to relief both from the acts and the omissions of the Federal Republic of Yugoslavia (Serbia and Montenegro) which have made the population of Bosnia and Herzegovina endure the very fate which the Convention seeks to banish forever.

CHAPTER 5.3
EVIDENCE AND INFERENCE: MODES OF PROOF UNDER THE CONVENTION

Section 5.3.1
The facts and the Law

5.3.1.1 It will be readily apparent from the recital of facts in Part Two of this Memorial that the grim realities of murder, rape, maiming, destruction and terrorization of the Muslim population of Bosnia and Herzegovina establish a pattern of deliberate conduct that speaks for itself. It speaks of genocide. Various U.N. organs, commissions and experts have heard this. This Court, however, has a special responsibility to weigh with judicious prudence the evidence which, to a lay person, may make the case against

the Federal Republic of Yugoslavia (Serbia and Montenegro) seem self-evident. Fortunately, the *travaux* of the Genocide Convention make quite clear the applicable standard of proof which the drafters thought to be appropriate to the judicial weighing of evidence in cases such as this one.

Section 5.3.2

Civil or criminal action?

5.3.2.1 A cursory examination of the text can be misleading as to the applicable rules of evidence and onus of proof. Article I of the Genocide Convention speaks of genocide as a "crime under international law." For that matter, the International Law Commission, in its work on a Draft Code of Offences against the Peace and Security of Mankind [Draft Code of Offences against the Peace and Security of Mankind, YB ILC (1954), vol. 2, pp. 149-52, and *id.* (1982-present)], has also proposed to treat genocide as one of the categories of crimes the Code should cover. This can cause misunderstanding, because the present action is not criminal in nature and does not involve criminal procedure or rules of evidence and proof. The Genocide Convention, in describing genocide as "a crime in international law" does so for a limited, specific purpose: to assert that States, in ratifying the Convention, "undertake to prevent and to punish" the persons who commit such crimes. This provision does not purport to criminalize violations committed by States against other States. The Draft Code, too, is directed towards criminal proceedings to punish violations other than those committed by and against States. At present, this limitation is inescapable. As is observed by the Ninth edition of *Oppenheim's International Law*,

"There is no tribunal with appropriate international criminal jurisdiction over states" [*op. cit.* p. 535 (Vol. I, part 1), sec. 157].

5.3.2.2 A criminal prosecution normally requires the Court or jury to be convinced beyond a reasonable doubt that the accused has committed the alleged crime. This is because of the onerousness of the penalties that can ensue if the defendant is convicted (death, deprivation of liberty, etc.). It is also because a criminal trial arrays the majestic power of the State against an individual person. Neither of these justifications for requiring proof "beyond a reasonable doubt" apply in a case in which Bosnia and Herzegovina is asking for remedies no different in kind from those attendant upon any serious breach of a treaty and in which neither party -- certainly not Bosnia and Herzegovina -- is at an advantage vis-a-vis its adversary. The appropriate rules of evidence, therefore, are those commonly applicable to "civil" actions.

5.3.2.3 There is no need to speculate on this matter. Under the terms of the Genocide Convention and the Court's Statute, this <u>is</u> a civil action. The *travaux* make this clear. When the Belgian-British amendment to what became Article IX of the Convention was passed by the Sixth Committee of the Assembly and became part of the final draft, the Belgian representative addressed this important question. He observed that the I.C.J.'s "competence could not, of course, be extended to the penal sphere..." [*Sixth Cttee*, *op. cit.* p. 338]. Indeed, the Committee engaged in a spirited discussion of this point, which makes clear that most delegates were willing to endorse the introduction of "responsibility of a State" only insofar as this was understood to extend to <u>civil</u>, rather than criminal, responsibility. For example, M. Chaumont, the French representative, stated that France "was

in no way opposed to the principle of the international responsibility of States as long as it was a matter of civil, and not criminal, responsibility" [*id.* p. 431], a point on which he was fully reassured by the sponsors of the amendment to Article IX. The Netherlands' support for the amendment also depended on reassurance that civil responsibility was entailed [*id.* p. 435. See further debate on the civil/criminal issue, *id.* pp. 431-440]. The British co-sponsor [Fitzmaurice, *id.* p. 440] made the intent of the proposers absolutely clear: "the responsibility envisaged by the joint Belgian and United Kingdom amendment was the international responsibility of States following a violation of the convention. That was civil responsibility, not criminal responsibility" [*id.* p. 440.; emphasis added]. It was with this clearly in mind that the delegates voted for the important new provision establishing the notion of State responsibility for genocide.

5.3.2.4 In the international law of State responsibility, it is similarly acknowledged that the responsibility of states is analogous to civil responsibility in domestic legal systems, whereas the responsibility of individuals under international law is analogous to criminal responsibility in domestic systems. As then-Special Rapporteur Roberto Ago wrote in the I.L.C.'s Fifth Report on State Responsibility [Doc. A/CN.4/291 and Add 1 and 2, Yearbook of the International Law Commission, 1976, Vol. II, Pt. 1 (1977), p. 3]: "it would be a mistake to assimilate the right or duty accorded to certain States to punish individuals who have committed [war crimes, crimes against humanity and other crimes defined by international law] to the 'special form' of international responsibility applicable to the State in such cases" [*id.* p. 33, para. 101]. He added that "it seems clear to us that it would not be justifiable in any case to refer to a 'criminal' responsibility of the State" even when there is a basis for the applicability

of internationally-defined criminal penalties to individuals [*id.* p. 33, para. 101, n. 154]. Hypothetically, attaching criminal responsibility to actions of a State "might possibly be justified in cases in which the form of international responsibility applicable to the State itself would result in punitive action for purely punitive purposes" [*id.*]. That, however, is not this case. The Genocide Convention clearly does not envisage a criminal trial of States, certainly not before this tribunal.

5.3.2.5 In the present case, this seemingly theoretical issue has practical importance. Civil responsibility and criminal responsibility differ significantly both as to the requisite standards of proof and as to available remedies. The remedies sought from this Court are civil in nature. The question of the requisite evidentiary standard to be applied by this Court, however, is an important question of law which must be addressed for, on the answer to it depends the mode of presenting the Republic of Bosnia and Herzegovina's case.

5.3.2.6 While the text of Articles II-VI of the Convention makes clear that the Convention establishes a legal obligation of State parties to bring violators to account through the national criminal law, the law to be applied by the I.C.J. is the law of civil responsibility for the commission by a State of acts prohibited by the Convention and for failure to prosecute and punish persons under its control or jurisdiction who commit such acts. Thus, the appropriate evidentiary standard, generally recognized as such by national legal systems, is that of the balance of the evidence and, in the case of inferences, the balance of the probabilities. Moreover, while the responsibility for adducing evidence of wrongful acts rests with the party

alleging injury, that evidentiary onus may shift to the other party in certain circumstances, some of which arise in this case.

Section 5.3.3
Onus of proof and inferences in civil actions

5.3.3.1 The importance of recognizing the civil nature of this case, aside from the question of remedies, is that such recognition may affect the balance of evidence that the plaintiff must adduce in order to succeed.

5.3.3.2 In criminal proceedings, Article 14 of the U.N. Covenant on Civil and Political Rights restates what is everywhere accepted as the general rule, that: "Everyone charged with a criminal offence shall have the right to be presumed innocent until proven guilty." As the rapporteur's commentary on the Draft Statute for an International Criminal Tribunal has stated, it is the prosecutor, in a criminal trial, who "has the burden to prove every element of the crime beyond a reasonable doubt or in accordance with the standard for determining the guilt or innocence of the accused" [*Report of the International Law Commission on the work of its forty-fifth session*, G.A.O.R., Supp. No. 10 (A/48/10), p. 304].

5.3.3.3 This, however, is not the standard of proof in civil actions. In civil proceedings, after the accuser has presented clear evidence of certain essential facts, the court may deduce, or infer, from those facts certain additional elements because to do so fits with ordinary probablistic expectations. It then rests with the defendant to demonstrate that such deduction, inference or presumptions are unwarranted in the specific

instance. In criminal actions, too, some inferences may be permitted, but the onus of proof rarely, if ever, shifts to the defendant.

5.3.3.4 The facts Bosnia and Herzegovina presents in Part 2 of this Memorial call out for the Court to draw inferences and to require the defendant to rebut them. Inferences are logical deductions from demonstrable facts which correspond with "common experience" or "common sense." For example, almost all legal systems accept the drawing of some inferences in civil actions in accordance with what in the common law is known as the evidentiary principle of *res ipsa loquitur*: "the thing speaks for itself." [See, for example, A. Tunc, "Torts" in *International Encyclopaedia of Comparative Law*, vol. 11, ch. 13, pp. 34-38, where it is concluded, after a survey of common and civil law jurisdictions, that "it is, perhaps, better not to speak of a presumption of fault at all, but rather of its indirect proof by circumstantial evidence..." *id.* at 38, (J.A. Jolowitz, article author).] In French law, the drawing of inferences is permitted, where warranted by circumstances:

> "...La charge de la preuve imposée au ministère public ou à la partie civile est parfois allégée par l'existence de présomptions légales ou conclusions tirées par la loi de faits connus ou simples à établir. Fondées sur une probabilité imposée par l'expérience, elles jouent en matière pénale un rôle bien moins important qu'en matière civile; leur utilité est cependant indiscutable, car elles simplifient des preuves parfois très difficiles ou impossibles à rapporter.
> Les présomptions favorables à l'accusation facilitent d'ordinaire la preuve d'un des éléments de l'infraction.
> [Merle and Vitu, *Traité de droit criminel et de procédure penal* (4th ed.), Paris 1989, p. 162, para. 126. Annex 5-II].

5.3.3.5 The laws and practices of other legal systems also permit inferences to be drawn, and proven facts to be *prima facie* evidence of other unproven facts, sometimes even in criminal cases, but especially in civil cases where the burden of proof is not distributed so heavily in favor of the defendant. In the law of the Chinese People's Republic, even in a criminal case, the onus of proof may shift to a state functionary after it is shown that his or her property or expenditure clearly exceeds that person's legal income. Thus, the defendant may be ordered to explain its source and, if unable to do so, it will be inferred that the difference was illegally obtained [*Supplementary Regulations on the Punishment of the Crimes of Corruption and Bribery*, effective as of Jan. 21, 1988. *Chinese Judicial Dictionary* (Ji Lin People's Publishing House: 1991), p. 572. Annex 5-III]. Such inferences are more commonly made in civil cases. For example, in any Chinese civil action resulting from the collapse of "a building, or any other installation...its owner or manager shall bear civil liability unless he can prove himself not at fault" [*The General Principles of the Civil Law of the People's Republic of China*, effective as of January 1, 1987, Article 126. Annex 5-IV].

5.3.3.6 In one way or another, all legal systems permit a version of the inference from a proven fact to an unprovable one in certain circumstances, especially in civil actions. Germany accepts a "notion of *prima facie* proof, which is analogous to the [common law] doctrine of *res ipsa loquitur.*" Moreover, the doctrine of *Verkehrssicherungspflichten* states "that whoever by his activity or through his property establishes in everyday life a source of potential danger which is likely to affect the interests and rights of others, is obliged to ensure their protection against the risks thus created by

him" [B.S. Markesinis, *Comparative Introduction to the German Law of Tort*, 2nd ed. (Oxford: 1990) p. 64. Annex 5-V].

5.3.3.7 The extent to which, in a civil action, responsibility can be established by circumstantial evidence depends, in addition to "common sense," on the extent to which the relevant non-circumstantial evidence is unobtainable, or exclusively within the purview of the defendant. For example, has the Federal Republic of Yugoslavia (Serbia and Montenegro) made the requisite good-faith effort to bring to trial and punish persons guilty of the acts prohibited by the Convention? Evidence of such efforts exist, if at all, solely within the reach of the Federal Republic of Yugoslavia (Serbia and Montenegro). In the midst of a veritable sea of forbidden acts, it is for the party in the best position to do so to explain this dramatic incongruity. As this Court said in the Corfu Channel Case, "exclusive territorial control exercised by a State within its frontiers has a bearing upon the methods of proof available to establish the knowledge of that State as to such events. By reason of this exclusive control, the other State, the victim of a breach of international law, is often unable to furnish direct proof of facts giving rise to responsibility" [*Corfu Channel Case*, Judgment of April 9, 1949, I.C.J. *Reports* 1949, p. 4 at 18].

5.3.3.8 In this case, the Republic of Bosnia and Herzegovina will ask the Court to make inferential deductions from the patterns of proven facts. These inferences will go to the question of whether the Federal Republic of Yugoslavia (Serbia and Montenegro) has made the requisite good-faith effort to comply with its responsibility under Article VI of the Convention to prevent genocide as well as investigate, prosecute and punish genocide committed by persons in violation of the Convention and in violation of the

Court's two orders regarding provisional measures. For example, in view of the magnitude, duration and brutality of the killings, rapes, and similar acts and their geographical proximity to the territory of the Federal Republic of Yugoslavia (Serbia and Montenegro) that State can reasonably be required to rebut the inference of complicity and failure either to prevent or punish acts of genocide by presenting convincing evidence that its Government has made every reasonable and diligent effort to discharge its legal obligations.

5.3.3.9 Another kind of inference the Court will be asked to draw goes to the "intent" of the Federal Republic of Yugoslavia (Serbia and Montenegro) -- or persons aided by it or under its control -- in committing proven acts. [*see* below]

5.3.3.10 In its Order of 13 September 1993, this Court indicated as a provisional measure that "the Government of the Federal Republic of Yugoslavia (Serbia and Montenegro) should immediately, in pursuance of its undertaking in the Convention on the Prevention and Punishment of the Crime of Genocide of 9 December 1948, take all measures within its power to prevent commission of the crime of genocide" [Order of 13 September 1993, *Case concerning application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Bosnia and Herzegovina v. Yugoslavia (Serbia and Montenegro)), I.C.J. *Reports* 1993, p. 325 at 342, para. 37]. Was there a good-faith attempt at compliance? When examining whether the Federal Republic of Yugoslavia (Serbia and Montenegro) indeed has taken all measures within its power, this Court will be called upon to exercise its discretion in drawing inferences from the proven facts and to make deductions of law from demonstrated patterns of action or

inaction. The Court will also be called upon to determine which party in this action is better positioned to demonstrate the degree of good faith compliance the Court's order elicited from the Federal Republic of Yugoslavia (Serbia and Montenegro).

Section 5.3.4

The requisite standard: "to destroy in whole or in part"

5.3.4.1 Under the terms of Article II of the Convention, the offence of genocide is committed in respect of a "national, ethnical, racial or religious group as such" which a perpetrator seeks "to destroy in whole or in part..." It is not necessary that the facts proven should demonstrate the decimation of the entire group, or of most of its members. Against the background of the holocaust, the *travaux* of the Genocide Convention tell us that the drafters intended to make culpable the attempt to decimate, and not to stay the hand of the law until after the attempt had achieved partial or complete success.

5.3.4.2 "In whole or in part" was added to the draft of Article II. The ECOSOC *Ad Hoc* Committee's draft had defined genocide as "acts committed with intent to destroy a nation, racial, religious or political group." This was amended to add the further reference to "in whole or in part" before the word "destroy" [A/C.6/228. U.N. GAOR 3rd Sess., Pt. 1 (Sixth Cttee), 73rd Mtg.]. This change also goes to the question of the requisite threshold of carnage.

5.3.4.3 There is further evidence that the Sixth Committee deliberately sought to lower the threshold at which acts of victimization qualified as genocide.

Whereas the *Ad Hoc* Committee's draft had made definitive the "inflicting on members of the group measures or conditions of life causing their death" [U.N. Bulletin, December 15, 1948, p. 1012], the Sixth Committee substituted a different standard: "deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part" [*id.*]. Thus the Assembly's drafters twice inserted the "in whole or in part" formula to ensure that the quantity of transgression required to be established in order to constitute the offence should not delay the application of the Convention until the carnage had achieved its full consequence.

5.3.4.4 To the same end, Article III was extensively amended to create new offences not visualized by the *Ad Hoc* Committee's draft, including "conspiracy to commit genocide," "incitement," "attempt" and "complicity." The addition of these corollary offences is of much significance to the case presented by the Republic of Bosnia and Herzegovina, since these offences exist separate from the degree of "success" actually achieved in destroying the targeted group.

5.3.4.5 Why were these changes introduced in the later stages of the drafting process? It has been widely commented by experts that "le génocide qui mène à l'extermination d'un groupe n'est pas forcément l'assassinat immédiat d'un certain nombre d'êtres humains" [S. Plawski, *Etude des Principes Fondamentaux du Droit International Penal* (Paris: 1972), p. 115]. Raphael Lemkin, the originator of the term "genocide" and one of the expert drafters of the Secretary-General's draft text made clear that "genocide does not necessarily mean the immediate destruction of a nation" but, rather, "...a coordinated plan of different actions aiming at the

destruction of the essential foundations of the life of national groups" [R. Lemkin, *Axis Rule in Occupied Europe* (Washington: 1944), p. 79. Annex 5-VI].

5.3.4.6 The drafters of the Convention were aware of the history of Hitler's European empire and its several approaches to the destruction of subordinated non-Aryan races. Some were to be entirely annihilated by mass killing, while others were to be destroyed more gradually and piecemeal. It was the representative of the Government of Yugoslavia who pointed out, as an instance of genocide, the deliberate German policy, during the occupation of his country, to disperse the Slav majority from certain areas in order to establish there a new German population. Mr. Bartos put it succinctly: "Genocide could be committed by forcing members of a group to abandon their homes" [3 U.N. GAOR, Pt. 1 (Sixth Cttee) at 184-85 (82nd Mtg., 23 October 1948)]. Such efforts inevitably were then, and are now, accomplished by violence and terror in which only some part of a group is killed, maimed, tortured or raped in order to have the intended effect on the group as a whole. What the Convention sought to do was to make punishable the genocidal enterprise whether directed at an entire group, or only at part of it; whether it was successful in achieving total eradication or only partially so.

5.3.4.7 This aspect of the *travaux* has been confirmed by a study prepared in 1978 by the Special Rapporteur, Nicodeme Ruhashyankiko, appointed to report to the Commission on Human Rights Subcommission on Prevention of Discrimination and Protection of Minorities [E/CN.2/416, 4 July 1978. Hereinafter, *Ruhashyankiko Report*]. This study concluded that the Legal Committee of the General Assembly, in its review and revision of the draft

convention, had given the matter considerable attention. Thus, on "the question of the extent to which a group must be destroyed before an act committed with that end in view can be termed genocide, it was generally agreed during the debate in the Sixth Committee, that it was not necessary for the act to be aimed at the group in its entirety. It was sufficient that an act of genocide should have as its purpose the partial destruction of a group. Accordingly, an amendment (A/C.6/228) proposing the insertion of the words 'in whole or in part' in the draft of the *Ad Hoc* Committee was adopted. The evident purpose of the amendment was to make it clear that it was not necessary to kill all the members of a group in order to commit genocide" [G.A.O.R., 3rd Sess., Pt. 1, 6th Cttee, 73rd mtg.]. The Commentary of the U.S. Government on the Draft Convention expressed the common view that it "is obviously not intended that groups must be totally destroyed before the crime of genocide exists" [A/401/Add.2, 18 October 1947, p. 2].

5.3.4.8 Indeed, during the Convention's drafting, the Sixth Committee spent considerable time debating the rather febrile issue of whether genocide could be committed against a single person [*id.* p. 15, para. 54]. The intent of the drafters, it is evident from the *travaux*, was to designate as genocide acts which aimed to destroy a group -- whether by attrition or by even more radical and instantaneous means, whether all at once or in gradual increments.

5.3.4.9 It is thus not necessary to demonstrate that the killing of Bosnian Muslims and the corollary crimes committed against them either succeeded in, or even intended, the total eradication of this group. The threshold of the crime defined in the 1948 Convention is reached when "a large number of

persons" [*id.*] have been targeted because of their membership in a specific ethnic group.

5.3.4.10 What constitutes a group targeted for genocide? The words of Article II are clear enough. The *travaux* reveal, however, that the Sixth Committee changed the wording of Article II from the *Ad Hoc* Committee's version: "intent to destroy a nation" to "intent to destroy, in whole or in part, a national group." The intent of the drafters, in making this change of terminology, according to the Ruhashyankiko study, was to refer "not to persons who were citizens of or held passports issued by a given State, but to those having a certain culture, language and traditional way of life peculiar to a nation but living within another State" [*id.* p. 291, para. 59. See A/C.3/L.1212]. The State of Bosnia and Herzegovina is made up of several national and religious groups. The revised text thus deliberately, with great prescience, brought the definition of acts constituting genocide into exact conformity with the nature of the tragedy occurring in our time to the Muslims of Bosnia as well as to other groups sharing the Republic of Bosnia and Herzegovina's ideal of a multicultural state in which various national groups live peaceably together.

Section 5.3.5

What is meant in Article II by "intent"?

5.3.5.1 Article II of the Genocide Convention defines genocide as consisting of one of the acts enumerated in that Article "committed with intent to destroy..." a designated group in whole or in part. This "intent" requirement would create undeniable problems in the present case if it were read to require

that the Republic of Bosnia and Herzegovina must demonstrate the individual or collective state of mind of the perpetrators of the atrocities some of which have been reported in Part 2 of this Memorial.

5.3.5.2 However, it is important to bear in mind this Court's instruction, in its 1951 Advisory Opinion, to read the Convention in the light of its high moral principles and crucial objectives. Also relevant is this Memorial's discussion of the appropriate civil evidentiary standard applicable to proof of "acts" under the Convention in general. It is impossible to conclude from this context that proof based on direct evidence of a genocidal master-plan could be expected as a necessary condition to the Convention's being applied in circumstances such as those now prevailing in the territories of the former Yugoslavia.

5.3.5.3 The matter was put in perspective some years ago by the philosopher and social historian, Jean-Paul Sartre, who noted that the Convention "was tacitly referring to memories which were still fresh" of Hitler and his associates' "proclaimed...intent to exterminate the Jews." But Sartre hastened to point out that few governments would be so demonic as to proclaim such intentions. Thus, he asked, would it not be possible, indeed necessary, "by studying the facts objectively, to discover implicit in them such a genocidal intention"? [J.-P. Sartre, "On Genocide," in Falk, Kolko and Lifton, *Crimes of War* (New York: 1971) p. 534. Annex 5-VII].

5.3.5.4 In this matter, the *travaux* do not speak with great clarity. The *Ruhashyankiko Report* concludes that, in the Assembly's Sixth Committee, different proponents of the "intent" clause championed it for different reasons. Some saw it as a barrier to a defence based on failure to carry out

the intended genocide i.e. that the intent, together with some acts, would suffice regardless of their success or failure [*Ruhashyankiko Report*, *op. cit.* pp. 25-27, paras. 96-106]. Others supported the inclusion of an "intent" clause in order to distinguish genocide from "ordinary" killing, that is, murder not motivated by group hatred which was punishable under ordinary criminal law or the laws of war. The purpose of some proponents was to fill what appeared to them a gap in the law demonstrated by the Nuremberg Trials, at which the mass persecution of persons based on invincible hatred of a nationality, ethnicity, etc. was not held punishable except when committed in connection with objective crimes of aggressive war-making [*id.* p. 26, para. 100].

5.3.5.5 Whatever the motives of the proponents of the "intent" proviso, the drafters did try to make clear that they did not wish to create a loophole through which mass-perpetrators of unspeakable crimes could escape simply by not speaking of their purpose. For example, they eventually deleted the term "premeditated" found in the *Ad Hoc* Committee draft of Article II [Special Committee, E/794, p. 5. *See* J. Graven, "Les Crimes Contre L'Humanité," Recueil des Cours 1950/I, 427 at 494]. They did this in order not to risk "restraining in an unjustified manner the criminal character of the offence" [*id.* at 495]. Moreover, as the Netherlands representative observed during discussion of the Secretariat's draft of the Convention on 22 April 1948, it must be "established beyond doubt...that so-called camouflaged genocide will equally be punishable; this covers cases in which the defendant might plead that the incriminated action, although it did in fact lead to the destruction or frustration of a group, was not aimed against that group. Only...coincidence, the defendant might contend...led to the unintended

result that the group was destroyed or hampered in its existence or development" [U.N. Doc. E/623/Add 3, 22 April 1948, p. 2].

5.3.5.6 Moreover, the Sixth Committee, in active debate, treated intent as a matter quite different from motive [*Ruhashyankiko* Report, *op. cit.* p. 26, para. 101-105]. Ruhashyankiko has observed that, during the drafting stage there were proponents of including a "motive" standard in Article II. It is instructive to understand why their view did not carry. "In opposition to the above-mentioned proposal" he notes, "it was argued that a statement of motive would result in a definition which would allow the guilty parties to claim that they had not acted under the impulse of one of the motives held to be necessary to prove genocide." [*id.* p. 26, para. 104]. The deletion of a "motive" element thus clearly demonstrates the Sixth Committee's determination to make sure that it would not be necessary in future to establish that perpetrators harbored the sort of deliberate plan of mass-murder based on group-hatreds that had characterized the Nazi regime and which that regime had publicly proclaimed as a matter of state policy.

5.3.5.7 The *Ruhashyankiko* Report has also noted the point made previously in this Part of the Memorial: that Article IX raises a question of the civil responsibility of a State [*id.* pp. 84-85, paras. 324-328]. In cases of civil responsibility, the rule generally followed by civilized states is that an actor is presumed to intend the natural consequences of his or her acts. Thus the culpable intent of a state charged with genocide under Article IX of the Convention would appear to be demonstrable by evidence of a pattern of acts the natural and actual consequence of which is "the destruction in whole or in part of a national, ethnical, racial or religious group, as such." Such "constructive intent" is presumed and need not be proven by the

plaintiff. Rather, it must be disproved by the party whose acts, or patterns of acts, have been demonstrated. The actor will be presumed to have intended the natural consequence: that is, the destruction, in whole or in part, of a national group, until the presumption is rebutted by the balance of evidence to the contrary. As was stated in the 13 September 1993 separate opinion of *ad hoc* Judge Lauterpacht in the interim measures phase of the present case: "At the very least, the effect of the evidence is to shift the burden of proof completely to the Respondent" [*op. cit.* p. 431, para. 67].

5.3.5.8 This very conclusion was also reached by a second study, the 1985 report of the Human Rights Commission's Special Rapporteur, analyzing the Genocide Convention for the Commission on Human Rights. "The relative proportionate scale of the actual or attempted destruction of a group" Mr. Whitaker has written, "by any of the means listed in Articles II and III of the Convention, is certainly strong evidence to prove the necessary intent to destroy a group, in whole or in part" [E/CN.4/Sub.2/1985/6, 2 July 1985, p. 16, para. 29]. His report concludes: "Not all genocidal regimes are likely to be as thoroughly documented as the Nazi one was. It is suggested that a court should be able to infer the necessary intent from sufficient evidence, and that in certain cases this would include actions or omissions of such a degree of criminal negligence or recklessness that the defendant must reasonably be assumed to have been aware of the consequences of his conduct" [*id.* p. 19, para. 39].

5.3.5.9 From the facts marshalled in Part 2 of this Memorial it is readily apparent that this is precisely such a case, one that warrants the drawing of such presumptive inferences about genocidal intent. It is thus worth noting that,

in 1948, the representative of Yugoslavia, addressing the Sixth Committee of the General Assembly, foresaw the necessity, in just such circumstances as have now arisen, to draw presumptive deductions from a pattern of facts. He held "that any crime committed against certain groups must be defined as genocide, even if it was unpremeditated" and observed with obvious distaste that "in the United States, for example, charges of lynching had been dismissed on the ground that premeditation had not been established" [*Sixth Cttee, op. cit.* p. 82]. He insisted that the text should make the duty of "suppression of genocide dependent" not "upon a subjective psychological condition" but, rather "upon the fact of the criminal act alone" [*id.* p. 88]. Otherwise, the law "would allow many cases of genocide to go unpunished" [*id.*].

5.3.5.10 The Yugoslav Criminal Code, incidentally, adopts approximately this same position. Whereas Chapter XI, article 124, of the Code incorporates Article II of the Genocide Convention into the domestic law of Yugoslavia, including the "intent" clause, Chapter II of the Code [Art. 7(2)] explains the role of intent thus: "A criminal offence is committed with intent when the perpetrator was conscious of his deed and wanted its commission; or when he was conscious that a prohibited consequence might result from his act or omission and consented to its occurring" [Annex 5-VIII].

5.3.5.11 It is the contention of the Republic of Bosnia and Herzegovina that the Government of the Federal Republic of Yugoslavia (Serbia and Montenegro) could not but have been conscious that a prohibited consequence might result from its acts or omissions, namely, the destruction of significant portions of the Muslim population of Bosnia, and that it nevertheless aided, consented to, and failed to investigate or punish

these acts. From the fact, scope and circumstance of that destruction the necessary constructive intent can be inferred, whether or not clear evidence can be produced by the Applicant State of an actual *animus* by the Respondent State to destroy a group in whole or in part.

5.3.5.12 Such inferences, specifically, of intent to commit an act, drawn from actions of a perpetrator, are not unique to the laws of Yugoslavia but, on the contrary, are commonly incorporated in legal systems. In the jurisprudence of the United States, "permissive inferences" may be drawn, even in a criminal case, and the more readily in civil actions. The Supreme Court has held that the drawing of permissive inferences of intent (as opposed to a "mandatory presumption" of intent) does not violate a defendant's constitutional rights [*Francis v. Franklin*, 471 U.S. 307 at 314 (1985); see also *Ulster County Court v. Allen*, 442 U.S. 140 at 157 (1979)]. In the U.S. Supreme Court's view, a "permissive inference" is like a "presumption" which, in turn, "may constitute prima facie evidence" [*Turner v. United States*, 396 U.S. 398, 402 n. 2 (1969)]. Such *prima facie* evidence may be regarded in U.S. courts as warranting a permissive inference "unless the defendant explains...to the satisfaction of the jury" [*id.* at 402]. The test used is that "the presumed fact is more likely than not to flow from the proved fact on which it is made to depend" [*Leary v. United States*, 395 U.S. 6 at 36 (1969)]. In civil rights litigation, where civil actions for damages may lie for intentional discrimination, the U.S. Supreme Court has held that once a *prima facie* case of discrimination has been established on the facts -- for example, that plaintiff was discharged from employment for no evident reason -- the burden shifts to the defendant to produce "an explanation to rebut the *prima facie* case -- i.e. the burden of 'producing evidence' that the adverse...actions were taken for

a legitimate, nondiscriminatory reason'" [*St. Mary's Honor Center v. Hicks*, 113 S.Ct. 2742 at 2747 (1993)]. In other words, once the fact of harm has been shown by the plaintiff, it is up to the defendant to demonstrate reasons "which, if believed by the trier of fact, would support a finding that unlawful discrimination was not the cause of the [harmful] action" [*id.* at 2746. Emphasis in original].

5.3.5.13 Similarly, in this case, the patterns of killing, rape, maiming and terrorizing, being proven as facts, should be taken by this Court to create a *prima facie* case of genocide, leaving the perpetrator with the burden of demonstrating to the satisfaction of this Court that there was no "intent to destroy in whole or in part" the community which has in fact been shown to have been shattered.

5.3.5.14 In civil law systems, too, liability in important categories of cases may be found in accordance with a presumption of fault or a principle of strict liability which shifts the onus of proof to the defendant after a *prima facie* case has been made by the plaintiff. Thus proof of non-negligence or of non-intent may have to be offered by the defendant after the plaintiff has demonstrated the occurrence of an act which, in the nature of things, probably could not have occurred in the absence of such intent (*dol* or *dolus*) or negligence (*faute*, *culpa*) [I. Brownlie, *System of the Law of Nations, State Responsibility*, Part I (Oxford: 1983), p. 44. Annex 5-IX; Mazeaud et Tunc, *Traité theorique et pratique de la responsabilité civile*, 6th ed., ch. 4].

5.3.5.15 In English law, "intention to injure" is proven once it is demonstrated that the defendant has willfully caused an injury, without any necessity to

demonstrate malicious intent [*Wilkinson v. Downton* (1897), 2 Q.B. 57 at 58-59]. English tort law, while it makes intention an element in many forms of wrong, generally treats intent restrictively as the intent to harm, not as requiring proof of malice or motive [Dias and Markesinis, *Tort Law* (Oxford: 1984), pp. 169-200. Annex 5-X]. Moreover, a defendant's recklessness in the face of possible injury may be sufficient to establish intent, *prima facie* or on the basis of *res ipsa loquitur*. It is sufficient to show that a reasonable person would have anticipated tortious consequences flowing from demonstrable acts or omissions that are not, in themselves, tortious [*Clerk and Lindsell on Torts* (London: 1989), pp. 42-50, 564-577. Annex 5-XI]. Moreover, "where the thing is shown to be under the management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendant, that the accident arose from want of care" [*Scott v. London and St. Katherine Docks* (1865), 3 H.&C. 596 at 601]. Put succinctly, in English law as elsewhere, a person may be presumed to intend the natural and probable consequences of his or her acts [*see* R. v. Moloney (H. of L.), 1 A.E. 25 at 1038 (1985)].

5.3.5.16 In Canada, this rule has been formulated to mean "a man is usually able to foresee what are the natural consequences of his acts, so it is, as a rule, reasonable to infer that he did foresee them and intend them" [D. Stuart, *Canadian Criminal Law* (Toronto: 1982), p. 121. See also *Buzzanga and Durocher* (1979), 49 C.C.C.(2d) 369 (Ont. C.A.): "Since people are usually able to foresee the consequences of their acts, if a person does an act likely to produce certain consequences it is, in general, reasonable to assume that the accused also foresaw the probable consequences of his act

and if he, nevertheless, acted so as to produce those consequences, that he intended them." *id.* at 387].

CHAPTER 5.4
PROHIBITED ACTS OTHER THAN GENOCIDE

Section 5.4.1
Conspiracy

5.4.1.1 The Ad Hoc Committee had observed that conspiracy should be a separate offence "in view of the gravity of the crime of genocide and of the fact that in practice genocide is a collective crime, presupposing the collaboration of a greater or smaller number of persons [U.N. Doc. E/794, 24 May 1948, Report of the Committee and Draft Convention Drawn Up By the Committee, Dr. Karim Azkoul, Rapporteur, p. 20]. In the Sixth Committee, the only difficulty about the concept of complicity concerned whether it could best be rendered in French laws as "entente en vue de l'accomplissement de genocide" or by the term "complot" [*Sixth Cttee, op. cit.* pp. 211-12]. The provision was easily adopted by 41 votes to 0 with 4 abstentions [*id.* p. 212]. The facts set out in Part 2 of this Memorial demonstrate the existence in fact of such a conspiracy to commit genocide between persons under the jurisdiction of the Federal Republic of Yugoslavia (Serbia and Montenegro) and irregular Serbian forces and other persons in Bosnia.

Section 5.4.2

Incitement

5.4.2.1 In the Ad Hoc Committee, the United States had insisted on the insertion of the term "direct" before "incitement" and had explained that the two words must be read to be "of a nature to create an imminent danger that it would result in the commission" of genocide itself [E/794, *Ad Hoc Cttee*, *op. cit.* p. 21]. Despite U.S. opposition, on constitutional grounds, the enumeration of "incitement" as a separate corollary act prohibited by the Convention was stressed by the majority both of the ECOSOC Ad Hoc Committee and the General Assembly's Sixth Committee. In the words of the Polish representative, Mr. (later, Judge) Manfred Lachs: "Victims of genocide could derive but meager satisfaction from seeing the guilty persons brought to justice after the crime had been committed; it would be better to prevent the crime from being committed...Incitement to genocide was one of those typical cases in which the law should intervene at a very early stage" [*Sixth Cttee*, *op. cit.* p. 215]. The French representative, M. Spanien, added that the issue of freedom of speech raised by the U.S. "was not convincing...It was precisely in connection with genocide that the suppression of propaganda was absolutely essential" [*id.* p. 216]. Mr. Federspiel, the representative of Denmark, added that "the stage of incitement" was "the most dangerous stage" and that it must be enumerated as a prohibited act [*id.* p. 220]. Mr. Manini y Rios, representing Uruguay, added that "history showed that the majority of cases of genocide had been preceded by a violent campaign of incitement" [*id.* p. 222]. The facts set out in Part 2 of this Memorial demonstrate the existence in fact of such incitement to commit genocide by persons in authority or under the jurisdiction of the Federal Republic of Yugoslavia (Serbia and Montenegro).

Section 5.4.3

Attempt

5.4.3.1 The term "attempt" as a prohibited act connected with, but separate from, another prohibited act is commonly recognized and employed to some extent by all legal systems. The enumeration of "attempt" as a prohibited act in the Genocide Convention elicited no discussion in the drafting stages. The facts set out in Part 2 of this Memorial demonstrate, in fact, the numerous incidents in which genocide has been attempted.

Section 5.4.4

Complicity

5.4.4.1 In the Ad Hoc Committee, the adoption of complicity as an act prohibited by the Convention had been unanimous [E/794, *Ad Hoc Cttee*, *op. cit.* p. 21]. In the General Assembly's Sixth Committee, Luxembourg offered an amendment to the Ad Hoc draft which made it clear that complicity applied only to acts of genocide itself and not to conspiracy, incitement and attempt [*Sixth Cttee*, *op. cit.* p. 254]. He used the occasion to define complicity to mean, as it did in his state's law, "the rendering of accessory or secondary aid, or simply of facilities, to the perpetrator of an offence" [*id.*]. This appears to be the definition accepted by the representatives of States in the Committee. [*see*, for example, M. Chaumont representing France, *id.* p. 255. To the same effect see M. Houard (Belgium) *id.* p. 256, Mr. Fitzmaurice (U.K.) *id.*, Mr. Abdoh (Iran) *id.* p. 258.]

5.4.4.2 The 1978 Report of the International Law Commission, commenting on its work on State responsibility, has noted that, in its own draft of Article 27, "complicity" may take the form of "assistance" such as the "provision of weapons or other supplies to assist another State to commit genocide" [Yearbook of the International Law Commission, 1978, vol. II, Pt 2, p. 285]. However, mere tolerance or benevolent neglect may also suffice. This restates the principle of complicity as it is used in the common law, where it originates. Complicity liability often is a form of vicarious liability. This embodies "a superintendence rationale whereby" for example, "employers are held responsible for their employees' criminal transgressions through a deemed failure to exercise proper control and authority over their employees" [K.J.M. Smith, *A Modern Treatise on the Law of Criminal Complicity* (Oxford: 1991) p. 8]. The same definition would be applicable to civil vicarious liability. Where a government has a legal duty to protect persons against violation of their rights under international law by other persons within that government's jurisdiction, this Court has clearly established that "inaction" by the Government itself constitutes a serious violation of that State's legal obligation, whether or not the persons acting unlawfully were doing so in explicit complicity or as agents of the Government [*U.S. Diplomatic and Consular Staff in Teheran, Judgment*, I.C.J. Reports 1980, p. 3, at 32-33, paras. 66-68].

5.4.4.3 In its Order of 13 September 1993, this Court made clear that the "government of the Federal Republic of Yugoslavia (Serbia and Montenegro) should in particular ensure that any military, paramilitary or irregular armed units which may be directed or supported by it, as well as any organizations and persons which may be subject to its control, direction or influence, do not commit any acts of genocide, of conspiracy to commit

genocide, of direct and public incitement to commit genocide, or of complicity in genocide, whether directed at the Muslim population of Bosnia and Herzegovina or against any other national, ethnical, racial or religious group" [Order of 13 September, 1993, *op. cit.* pp. 342-43, para. 37]. This adumbration of the terms of Article III shows that the Court is quite clear as to the plain meaning of these terms as they apply to the situation in the former Yugoslavia. The facts set out in Part 2 of this Memorial indicate that there has been continuing complicity by the Federal Republic of Yugoslavia (Serbia and Montenegro) with persons and groups of persons committing genocide in the Republic of Bosnia and Herzegovina.

CHAPTER 5.5
PROGRESSIVE DEVELOPMENT OF THE DEFINITION AND PROHIBITION OF GENOCIDE

Section 5.5.1
Developments prior to the Convention's coming into force

5.5.1.1 As we observed in section 5.1 above, the concept of genocide as an extremely grave and unlawful act precedes the coming into force of the Genocide Convention. It was a wrong known to the Tribunal at Nuremberg and expressed by the General Assembly as early as 1946 [G.A. Res. 96(I) of 11 December 1946]. Indeed, this Court, in its Order of 13 September 1993, echoes its own exact words to describe genocide in its 1950 advisory opinion. In 1950, this Court defined genocide as a denial of a group's right to exist "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" [*Reservations to the Convention on Genocide*, *op. cit.* p. 23]. In 1993 this Court noted the "great suffering and loss of life" in Bosnia and Herzegovina "in circumstances which shock the conscience of mankind and flagrantly conflict with moral law and the spirit and aims of the United Nations" [*Order of 13 September*, *op. cit.* p. 348, para. 52]. The choice, in 1993, of the verbal formula used by the Court in 1950 to describe genocide is not, of course, a coincidence.

Section 5.5.2

Further definition: I.L.C. draft articles on state responsibility

5.5.2.1 Article 19 of the International Law Commission's Draft Articles on State Responsibility classifies genocide as "an international crime" recognized as such by "the international community...as a whole..." [Draft Articles on State Responsibility, Report of the International Law Commission to the General Assembly, 35 U.N. GAOR Supp. No. 10 at 49, 59-68. U.N. Doc. A/35/10 (1980)]. It further notes that an international crime such as genocide, is an "international wrongful act which results from the breach by a State of [an] international obligation...essential for the protection of fundamental interests of the international community..." [*id.*]. As noted in para. 5.3.2.3, above, the term "criminal" is used here to denote several matters irrelevant to this litigation. Among them are the duty of States to criminalize acts of genocide committed by persons over whom they have jurisdiction. What is relevant to this case is the I.L.C. Draft Article's recognition that 1) genocide may be committed by a State as such, and 2) that this constitutes a "wrongful act" that takes the form of a State's breach

of a fundamental treaty obligation. Thus the draft confirms Bosnia and Herzegovina's claim that the Genocide Convention's Article IX is applicable to States, as a wrong effected by the breach of a fundamental, inescapable treaty obligation, for which States may be held responsible by this Court. This confirms the universal acceptance of the prohibition of genocide as attaining the level of paramountcy that international law classifies as *jus cogens*. [See ILC Jearbook, 1966, vol. 2, pp. 248-249.]

Section 5.5.3

Further definition: Convention on the non-applicability of statutory limitations to war crimes and crimes against humanity

5.5.3.1 This Convention was adopted and opened for signature by the General Assembly in 1968 [U.N. Doc. A/RES/2391(XXIII) of 9 December 1968. I.L.M. vol. VIII, p. 68 (1969). Entered into Force 1970]. It links genocide as defined by the Convention with other crimes against humanity as defined by "the Charter of the International Military Tribunal, Nürnberg, of 8 August 1945 and confirmed by resolutions 3(I) of 13 February 1946 and 95(I) of 11 December 1946 of the General Assembly..." [*id.* Art. I(b)] and, specifically, refers to "eviction by armed attack or occupation" as well as "inhuman acts resulting from the policy of apartheid" [*id.*]. While the laws of the Nuremberg Tribunal and the laws pertaining to apartheid are separate from the Genocide Convention, it is apparent that, together, these three increasingly are recognized as part of a skein of international law prohibiting the collective hate-driven decimation of groups of persons on account of their group affiliation.

5.5.3.2 The symbiosis between the Statutory Limitations Convention and the Genocide Convention is further underscored by Article II of the former, which makes it applicable, in terms very similar to the Genocide Convention, to "principals or accomplices," defined as persons who "participate in or who directly incite others to the commission of any of those crimes, or who conspire to commit them, irrespective of the degree of completion" and which applies also "to the representatives of State authority who tolerate their commission." This adumbrates the terms used in Article III of the Genocide Convention, providing a fuller, yet consistent textuality.

Section 5.5.4

Further definition: I.L.C. Draft Code of Offences against the Peace and Security of Mankind

5.5.4.1 The Draft Code, as adopted on first reading by the International Law Commission in 1991, makes genocide committed by persons a criminal offence using the definition provided by the Genocide Convention [Draft Code of Crimes Against the Peace and Security of Mankind. Art. 19. Report of the International Law Commission on the work of its forty-third session. G.A.O.R. Supp. No. 10 (A/46/10), p. 261]. That merely confirms, and consolidates with other offences, what the Genocide Convention already makes actionable. But the Draft Code does expand the Convention's text. The Draft makes clear that the prohibited act of "deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part" -- the language of Article II of the Convention -- also "covered deportation when carried out with the

intent to destroy the groups in whole or in part" [*id.* p. 262]. Deportation, in this context, refers to the involuntary removing and dispersal of a population, not to a means of transportation. It would surely be irrelevant whether "deportation" was carried out by putting persons in cattle-cars destined for distant territories in order to make a place "Juden-rein" or by creating the conditions of terror which would cause thousands of persons of a group to flee on foot in order to make a territory "clean" of Muslims.

Section 5.5.5

Further definition: I.L.C. Draft Statute of an International Criminal Tribunal

5.5.5.1 This Draft Statute gives the proposed Criminal Tribunal jurisdiction to try persons for enumerated crimes, the first of which is genocide [Draft Statute for an International Criminal Tribunal and Commentaries Thereto, Part 2, Art. 22(a). Report of the International Law Commission on its 45th Session, U.N. GAOR, 48th Sess., Annex, Part B at 258. U.N. Doc. A/48/10 (1993)]. The applicable law in such a case is the definition of "genocide and related crimes" set out in Articles II and III of the Convention [*id.*].

5.5.5.2 This provision evidences the intention of the international community to give effect to the Genocide Convention in all applicable cases involving criminal culpability and to do so by the creation of a new international tribunal, first envisaged by the drafters of the Convention, with jurisdiction over acts of persons. The effect of such a Statute's coming into force would be to complete the jurisdictional triad envisaged by the drafters, i.e.:

1) national tribunals with criminal jurisdiction over individuals accused of enumerated prohibited acts incorporated into national law; 2) an international tribunal with general criminal jurisdiction over all individuals accused of prohibited acts enumerated in the Convention; and 3) the International Court of Justice with jurisdiction in civil actions brought by one State party to the Genocide Convention against another alleging the latter's civil responsibility for the prohibited acts enumerated, *inter alia*, in Articles II and III, as well as civil liability for the consequences of the wrongful acts.

Section 5.5.6

Further definition: the Yugoslav War Crimes Tribunal

5.5.6.1 This tribunal [its full title is "International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991"] was created by a decision of the Security Council, acting under the powers vested in it by Chapter VII of the U.N. Charter pursuant to its determination that the situation in the former Yugoslavia constitutes a threat to, and a breach of, the peace. The Council decided that an "international tribunal shall be established for the prosecution of persons responsible for serious violations of international law committed in the territory of the former Yugoslavia since 1991" [Security Council Resolution 808 (1993) of 22 February 1993].

5.5.6.2 The ex-Yugoslavia Tribunal is specifically authorized in Article 4 of its Statute "to prosecute persons committing genocide" as defined in

paragraphs 2 and 3 of the Statute. Paragraph 2 precisely incorporates the enumeration of prohibited acts in Article II of the Genocide Convention and paragraph 3 equally precisely incorporates the language of the enumeration in the Convention's Article III. Thus, while the Yugoslav Tribunal is different in its origins from this Court, being based on a Security Council Resolution rather than a treaty, and although its jurisdiction is very different, being criminal and being confined to acts committed in the former Yugoslavia, nevertheless, the Tribunal's mandate has relevance to this case. First, it demonstrates the continuing universal importance attached to the Genocide Convention and its definition and enumeration of acts and omissions in the Convention's Articles as definitive of genocide and its corollary offences. Second, it reaffirms the universality and premier importance of the principles and purposes embodied in the Convention.

5.5.6.3 While this incorporation of the key provisions of the Genocide Convention in the Statute of the ex-Yugoslavia Tribunal reenforces the law of the Convention, it also elaborates the earlier definition. For example, the Tribunal's new jurisdiction to try persons (it has none over States as such) extends to the determining of "individual criminal responsibility" [*op. cit.* Art. 7]. Responsibility, the Statute then continues, attaches to any "person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime" including, specifically, genocide [*id.*]. This is consistent with, yet helpfully adumbrates the text of Convention Article III. There are also provisions for attributing to a superior responsibility for acts of a subordinate "if he knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof" [*id.*

Art. 7(3)]. This clarifies the State's duty to "prevent or punish" as established in Article I of the Genocide Convention. While these provisions adumbrate the Convention's definition of culpability for genocide, they do so in a context that makes clear the Security Council's intent to do no more than make clear the law as already stated in the Convention, the law applicable to both parties in this litigation.

5.5.6.4 Moreover, while the jurisdiction of the ex-Yugoslavia Tribunal is limited to criminal acts committed by persons, such provisions of the Tribunal's Statute as pertain to criminal responsibility of persons should be seen as *ipso facto* applicable to the civil responsibility of States under Article IX of the Convention.

5.5.6.5 It should also be noted that, while the Statute of the Tribunal represents the best effort of the Security Council to bring the Genocide Convention, as well as other international law, to bear in practice upon one specific instance (the ex-Yugoslavia), and, as such, is likely to be an invaluable aid to this Court in construing the Convention, the reciprocal is equally true. What this Court decides about the issues raised in this case regarding such matters as the duty to prevent and to punish, definition of intent, applicable rules of evidence and onus of proof, the definition of acts enumerated in Articles II and III of the Convention, and the law pertaining to complicity and attributability: all this will have utmost significance in shaping the jurisprudence of the Tribunal.

PART 6

THE GENOCIDE AND ITS COROLLARIES ARE ATTRIBUTABLE TO YUGOSLAVIA (SERBIA AND MONTENEGRO)

CHAPTER 6.1
INTRODUCTION

6.1.0.1 As demonstrated in Part 5 above, genocide is being committed in Bosnia and Herzegovina. Therefore, the Genocide Convention is applicable. Moreover, as explained in that chapter [Section 5.2.3], the Convention imposes on State Parties two different kinds of obligations:

i) not to engage in genocide, and the related acts enumerated in Article III thereof (conspiracy, incitement, attempt and complicity) and,

ii) to prevent genocide and punish the perpetrators.

6.1.0.2 So far as individuals are concerned, criminal law, whether national or international, is applicable, and to be enforced either by criminal national Courts or "by such international penal tribunal as may have jurisdiction" [Article VI], in the present case the International Criminal Tribunal for the Former Yugoslavia created by Resolution 827 (1993) of the Security Council.

6.1.0.3 But this is not so regarding State Parties to the Convention. If a dispute arises between them, Article IX gives jurisdiction to the International Court of Justice "whose function", according to Article 38 of the Statute, "is to decide in accordance with international law". Therefore, in the present case, the responsibility of Yugoslavia (Serbia and Montenegro) must be determined in accordance with the principles of general international law applicable to State responsibility.

6.1.0.4 The basic principle in this field is exposed in Article 3 of Part One of the Draft Articles adopted by the International Law Commission on first reading in 1980:

> "*Article 3.* Elements of an internationally wrongful act of a State
> There is an internationally wrongful act of a State when:
> (a) conduct consisting of an action or omission is attributable to the State under international law; and
> (b) that conduct constitutes a breach of an international obligation of the State."

6.1.0.5 It is therefore not enough that there exists a breach of an international obligation as, indeed, violation of the Genocide Convention is. It is also necessary that this breach be "attributable" (imputable) to a State. Notwithstanding what has been said above [Section 5.3.3] about the burden of proof in the law of international responsibility, Bosnia and Herzegovina will show that the very serious breaches of international law detailed in this Memorial are attributable to Yugoslavia (Serbia and Montenegro).

6.1.0.6 The very carefully drafted Articles of the I.L.C.'s draft codify the applicable rules in this respect. The general overview is as follows:

- Draft Articles 5 and 6 confirm the principle that the conduct of its organs is attributable to the State, whatever their position in the organization of the State;
- the same holds true for other entities empowered to exercise elements of the governmental authority [Article 7];
- and for persons acting in fact on behalf of the State [Article 8], even persons acting *ultra vires*;
- and Articles 27 and 28 provide for the responsibility of a State which is implicated in the internationally wrongful act of another State.

6.1.0.7 Seen in the light of these principles, the responsibility of Yugoslavia (Serbia and Montenegro) adressed in this part of the memorial is as follows:

- first, it has participated directly in the crime of genocide by its own organs [Chapter 6.2];
- second, it has committed genocide through its agents and surrogates, acting on its behalf in Bosnia and Herzegovina, including the so-called "Srpska Republika" [Chapter 6.3];
- third, it has aided and abetted groups and individuals in the crime of genocide [Chapter 6.4];
- fourth, it has failed to prevent genocide and to punish its perpetrators [Chapter 6.5].

CHAPTER 6.2

THE ORGANS OF YUGOSLAVIA (SERBIA AND MONTENEGRO) HAVE COMMITTED THE ACTS OF GENOCIDE

6.2.0.1 Although the Government in Belgrade announced, on 4 May 1992, the withdrawal of the JNA from Bosnia and Herzegovina, it is undoubtable that the direct involvement of Yugoslavia (Serbia and Montenegro) through its own organs and, in particular, its Army, in the commission of genocide carried on uninterrupted after this date. This direct and continuing participation of Yugoslavia (Serbia and Montenegro) in the genocide has been acknowledged by international organizations, both at global and regional levels, and by many individual states. These facts and findings entail the unescapable conclusion that the responsibility of Yugoslavia (Serbia and Montenegro) is implied by the internationally wrongful acts of its own organs.

Section 6.2.1

Reminder of the relevant facts

6.2.1.1 As has been shown in Part 2 above, and more particularly in Chapter 3 of that Part, the Government of Belgrade are not only involved in the perpetration of the crime of genocide against the Muslim and Croatian population of the Republic of Bosnia and Herzegovina (and of parts of its own population) but this genocide has been entirely devised and planned by that Government and, in a large part, perpetrated by its own organs. In this perpetration the "Yugoslavia National Army" (JNA) which was later constituted as the "Yugoslav Army" (VJ) played a major role.

6.2.1.2 In this respect, two periods must be envisaged separately: namely, before and after May 1992.

Before May 1992

6.2.1.3 As explained above [para. 2.3.3.2], at the very beginning of the year 1992, the JNA was the object of a major reorganization which resulted in a spectacular increase of the number of troops in Bosnia and Herzegovina, which swelled to 95,000. This reallocation of troops was clearly aimed at putting into operation the "RAM" covert operation plan, the purpose of which was to realize the "Greater Serbia" [*see* Section 2.3.4 above].

6.2.1.4 RAM was the origin both of the arming of the Serb population in Bosnia and Herzegovina, and of the creation of the first paramilitary groups both in Bosnia and Herzegovina itself and in Serbia and Montenegro. This creation was condoned and strongly supported by the authorities in Belgrade.

6.2.1.5 As explained in Parts 2, 3 and 5, the beginning of 1992 was also the time when the atrocities against the Muslim and Croatian population in Bosnia and Herzegovina began to be committed on a large scale: creation of concentration camps, massive expulsions, killings, beatings, internments, rapes, attacks on Muslim villages, etc. [*see e.g.*: 2.2.1.4; 2.2.2.2; 2.2.5.3; 2.2.5.5]. All these acts - and many others - were perpetrated directly by the Yugoslav National Army alone or with the aid of paramilitary groups armed, controlled and commanded by Serbian officers or officials, among whom the notorious "Commander Arkan" or V. Šešelj, both soon to be

elected a Member of the Serbian Parliament [*see e.g.* 2.2.1.17; 2.2.2.2; 2.2.2.16; 2.2.5.3; 2.2.5.8].

After May 1992

6.2.1.6 On 4 May 1992, the Government in Belgrade announced the withdrawal of JNA troops from Bosnia and Herzegovina. As will be explained later, this announcement was only designed to escape condemnation by the international community and to justify the assertion that events in Bosnia and Herzegovina constitute a "civil war". This assertion is entirely untenable. However this announcement was a clear recognition of the massive presence of Serbian troops on the spot until that date.

6.2.1.7 According to the Respondent, "on 5 June 1992, the last Yugoslav soldier left the territory of Bosnia and Herzegovina" [Mr Etinski; public session of 26 August 1993, CR 93/34, p. 12]. Very unfortunately, this statement is untrue. In fact only about 14,000 men on a total of 76,000 troops who were non-residents of Bosnia and Herzegovina were withdrawn; the remaining 80,000 men were transferred to the Army of the so-called "Serbian Republic of Bosnia and Herzegovina" [the initial name of the "Serpska Republic"] [*see* para. 2.3.6.1 above] which is a mere creature of Yugoslavia (Serbia and Montenegro) [*see* below] and the decisions kept on being made in Belgrade from where the orders came [*see* para. 2.3.6.6 above]. Moreover, the JNA had supplied the paramilitary forces in Bosnia and Herzegovina with weapons and part of the soldiers continued to operate under the uniforms and insignias of the JNA.

6.2.1.8 The record shows a massive continued involvement of former JNA troops in the atrocities commited on a larger scale after May 1992 [*see e.g.* 2.2.2.15; 2.2.2.18; 2.2.5.3; 2.2.5.12; 2.2.5.14].

6.2.1.9 The Federal Republic of Yugoslavia (Serbia and Montenegro) continued to be directly involved in the atrocities perpetrated in the Republic of Bosnia and Herzegovina, although, in the light of the establishment of the so-called "Srpska Republika", this involvement took a different form.

6.2.1.10 First, the VJ as such remained present in Bosnia and Herzegovina and its members took direct and active part in the atrocities committed against the Muslim and Croatian population. Thus, for example, commanders of concentration camps have been and are very often officers of the VJ [*see* Section 2.2.1], so are the "interrogators".

6.2.1.11 Second, it must also be kept in mind that genocide is committed by Yugoslavia (Serbia and Montenegro) not only in Bosnia and Herzegovina but that "ethnic cleansing" is also committed on its own territory or in Croatia. In this respect, the situation in Sandjak must particularly be stressed. As early as August 1992, Mr. Tadeusz Mazowiecki, the Special Rapporteur of the Commission on Human Rights, noted that:

> "In the region bordering Bosnia and Herzegovina classical methods of ethnic cleansing are employed. Houses pertaining to Muslims have been burned and mosques destroyed by terrorist attacks in the cities of Pljevlja, Prijepolje and Priboj. The presence of various military and paramilitary groups in the area, due to the proximity of the conflict in Bosnia, has increased the sense of insecurity afflicting the Muslim population. An estimated 70,000 Muslims are reported to have left the region since the beginning of the

conflict." [*Second Report*, Oct. 1992, E/CN. 4/1992/S.1/10, para. 23, p. 7; emphasis added].

In his Sixth Report, Mr Mazowiecki again notes that, in the same region:

> "There is a considerable amount of information of abductions, the destruction of homes through arson and the use of explosives, and the general harassment of Muslims, including beatings and torture by the police...." [21 February 1994, E/CN.4/1994/110, para. 144, p. 24].

6.2.1.12 Third, there is ample evidence of continued crossing of the borders by troops coming from Serbia and Montenegro and shelling of Muslim towns and villages in Bosnia and Herzegovina. [see e.g. 2.3.7.2.; 2.3.7.3; 2.3.7.4].

Section 6.2.2

Recognition of these facts by the international community

6.2.2.1 The direct participation of Yugoslavia (Serbia and Montenegro) in the crime of genocide has been widely acknowledged both by the international community through the organs of the United Nations and in other international forums and by individual States. This has been demonstrated in detail in Part 3 and will only need to be reviewed again briefly at this stage.

6.2.2.2 Neither the Security Council, nor the General Assembly, nor the Secretary-General have been misled by the declarations made by Yugoslavia (Serbia and Montenegro) that it was not involved in the perpetration of the crime of genocide or that it had withdrawn its troops from the territory of Bosnia and Herzegovina.

6.2.2.3 Eight days after the announcement by the Government in Belgrade that it would withdraw the JNA from Bosnia and Herzegovina, the Secretary-General expressed serious doubts about the reality of this announcement and noted that the JNA was in fact supporting the policy of ethnic cleansing [*see* S/23900, 12 May 1992, para. 5]. And, as early as 15 May 1992, the Security Council demanded "that all forms of interference from outside Bosnia and Herzegovina, including by units of the Yugoslav People's Army (J.N.A.] (...) cease immediately" [Resolution 752 (1992); emphasis added]. Fifteen days later it had to deplore that "the demands in Resolution 752 (1992) have not been complied with" and it condemned

> "the failure of the authorities in the Federal Republic of Yugoslavia (Serbia and Montenegro) including the Yugoslav People's Army (JNA), to take effective measures to fulfil the requirements of Resolution 752 (1992)"

and consequently, acting under Chapter VII of the Charter of the United Nations it imposed sanctions against Yugoslavia (Serbia and Montenegro), whose direct responsibility for the tragic events in Bosnia and Herzegovina was thus clearly recognized [Resolution 757 (1992)]. Sanctions were reinforced by Resolutions 787 (1992) of 16 November 1992 and 820 (1993) of 17 April 1993. In June [*see* Resolution 762 (1992)] and October [*see* Resolution 786 (1992)], the Council formally noted that the JNA was still

present in Bosnia and Herzegovina. As late as 1993, the Secretary-General confirmed that the requirement of a withdrawal of JNA troops "has still not been fulfilled" [A/47/869].

6.2.2.4 For its parts, in August 1992, the General Assembly demanded that

> "..those units of the Yugoslav People's Army and elements of the Croatian Army now in Bosnia and Herzegovina must either be withdrawn, or be subject to the authority of the Government of Bosnia and Herzegovina, or be disbanded and disarmed with their weapons placed under effective international monitoring, and requests the Secretary-General to consider without delay what kind of international assistance could be provided in this connection" [Resolution 46/242, para. 3].

6.2.2.5 On 18 December 1992, the General Assembly in its Resolution 47/121

> "2. *Strongly condemns* Serbia, Montenegro and Serbian forces in the Republic of Bosnia and Herzegovina for violation of the sovereignty, territorial integrity and political independence of the Republic of Bosnia and Herzegovina, and their non-compliance with existing Resolutions of the Security Council and the General Assembly, as well as the London Peace Accords of 25 August 1992;
>
> 3. *Demands* that Serbia and Montenegro and Serbian forces in the Republic of Bosnia and Herzegovina immediately cease their aggressive acts and hostility and comply fully and unconditionally with the relevant Resolutions of the Security Council, in particular Resolutions 752 (1992) of 15 May 1992, 757 (1992) of 30 May 1992, 770 (1992) and 771 (1992) of 13 August 1992. 781 (1992) of 9 October 1992, and 787 (1992) of 16 November 1992, General Assembly Resolution 46/242 and the London Peace Accords of 25 August 1992;

4. *Demands* that, in accordance with Security Council Resolution 752 (1992), all elements of the Yugoslav People´s Army still in the territory of the Republic of Bosnia and Herzegovina must be withdrawn immediately, or be subject to the authority of the Government of the Republic of Bosnia and Herzegovina, or be disbanded and disarmed with their weapons placed under effective United Nations control."

In another Resolution adopted the same day, the Assembly condemned

> "... in the strongest possible terms the abhorrent practice of "ethnic cleaning", and recognized that the Serbian leadership in territories under their control in Bosnia and Herzegovina, the Yugoslav Army and the political leadership of the Republic of Serbia bear primary responsibility for this reprehensive practice, which flagrantly violates the most fundamental principles of human rights" [Resolution 47/147].

6.2.2.6 These firm condemnations were reiterated in Resolution 48/88 of 20 December 1993 in which, moreover, the General Assembly

> "Condemns vigorously the violations of the human rights of the Bosnian people and of international humanitarian law committed by parties to the conflict, especially those committed as policy by Serbia and Montenegro and the Bosnian Serbs, who have done so fragrantly and on a massive scale" (...);

and declares itself

> "Deeply alarmed by the continuing systematic abuses committed against Albanians, Bosnians, Hungarians and Croatians, and others in Kosovo, Sandzak and Vojvodina respectively, by the authorities of Serbia and Montenegro ..." [emphasis added].

This pronouncement was further amplified in a following General Assembly Resolution of the same date [48/153]. These thus constitute a unique legal

determinination by the body reflecting virtually the views of the international community as such.

6.2.2.7 In the same spirit the Commission on Human rights insisted, in February 1993 that Yugoslavia (Serbia and Montenegro) together with the Serb paramilitary forces "bear primary responsibility" for most of the violations of human rights and international humanitarian law in the former Yugoslavia [Resolution 7 (1993), 23 February 1993, para. 8].

Outside the United Nations

6.2.2.8 The responsibility of Yugoslavia (Serbia and Montenegro) for the "ethnic cleansing" and the genocide committed in former Yugoslavia and more particularly in Bosnia and Herzegovina has also been stressed in other forums.

6.2.2.9 Thus, the C.S.C.E. has found that

> "... primary responsibility for the conflict in Bosnia and Herzegovina lies with the present leaders of Serbia and Montenegro and with the Serbian forces operating in Bosnia and Herzegovina".

In the view of the C.S.C.E., these authorities continue to pursue territorial gain through the use of force and to violate basic human rights standards through the odious practice of "ethnic cleansing", and other brutalities affecting many parts of the former Yugoslavia [Declaration of the Third Meeting of the C.S.C.E. Council, Stockholm, 15 December 1992]. In further confirmation of the view that the Government of Yugoslavia (Serbia and Montenegro) is internationally responsible for "ethnic cleansing" and

genocide, the C.S.C.E. has taken the unprecedented step of excluding that State from the C.S.C.E.

6.2.2.10 The European Community, for its part, repeatedly and consistently deplored and condemned the situation in Bosnia for which, in its view,

> "... by far the greatest share of the responsibility falls on the Serbian leadership and the Yugoslav Army controlled by it." [European Council Declaration on Former Yugoslavia, Lisbon, 27 June 1992, F/S/24200, 29 June 1992].

6.2.2.11 The World Conference on Human Rights held in Vienna in June 1993 also adopted a declaration on Bosnia and Herzegovina in which it

> "... strongly condemns Serbia - Montenegro, the Yugoslav National Army, the Serbian militia and the extremist elements in the Bosnian Croatian militia forces as perpetrators of these crimes"

that is:

> "... the practice of ethnic cleansing resulting from Serbian aggression against the Muslim and Croat population in the Republic of Bosnia and Herzegovina [which] constitutes genocide in violation of the Convention on the Prevention and Punishment of the Crime of Genocide". [A/Conf. 157/24 (part 1), p. 47, emphasis added].

6.2.2.12 Many individual States also expressed the view that Yugoslavia (Serbia and Montenegro) bears the main responsibility for the genocide committed in the Former Yugoslavia and more particularly in Bosnia and Herzegovina. It is not possible within the confines of this Memorial to reproduce this vast amoujnt of State Practice. The legal determinations of States are of course evidenced in the submissions to the UN - and other bodies, whoen debating the adoption of resolutions and decisions cited and qouted above. These resolutions and decisions in themselves represent the chrystallisation of this virtually unanimous State Practice.

Section 6.2.3

Legal consequences

6.2.3.1 As the General Assembly recalled in its Resolution 46/242 of 25 August 1992,

> "States are to be accountable for violations of human rights which their agents commit upon the territory of another State" [*see* also Resolution 1992/S-1/1 of the Human Rights Commission, para. 11].

6.2.3.2 This is the mere application of the basic principle of the international law of State responsibility as codified in Article 5 of Part 1 of the I.L.C.'s draft according to which

> "... conduct of any State organ having that status under the internal law of that State shall be considered as an act of the State concerned under international law, provided that organ was acting in that capacity in the case in question".

6.2.3.3 In the present case, there can be no doubt that the Yugoslav National Army (JNA), which bears responsibility for the acts of genocide in former Yugoslavia and particularly in Bosnia and Herzegovina, is a "State organ" of Yugoslavia (Serbia and Montenegro). Moreover, this was explicitly provided for in Article 240 of the 1974 Constitution of the Former Socialist Federal Republic of Yugoslavia which remained in force in Serbia and Montenegro until 27 April 1992. The VJ assumes this very function in Yugoslavia (Serbia and Montenegro) after that date.

6.2.3.4 There also is no doubting that the JNA, later the VJ, acted and is acting in its capacity as an organ of Yugoslavia (Serbia and Montenegro) in this

case. As shown in Chapter 2 of the present Memorial, the "operational chain of command" of the Yugoslav Army has not been changed since 1991 and is centered in Belgrade, including that for all military operations in Bosnia and Herzegovina [para. 2.3.6.6]. There is no sign that the Government in Belgrade ever disapproved or disowned the behavior of its armed forces, or has attempted to restrain it.

6.2.3.5 A firm legal conclusion may therefore be drawn from this concurrent and impressive pattern of facts: Yugoslavia (Serbia and Montenegro) is directly responsible for its direct participation in the genocide committed against the Muslims (and other peoples (of Former Yugoslavia and, particularly)) of the Republic of Bosnia and Herzegovina and the findings of the Court in its Orders of April 8 and 13 September 1993, which were drafted in the conditional must be put in the indicative mood: the Government of the Federal Republic of Yugoslavia (Serbia and Montenegro) has not ensured that its military, paramilitary or irregular [but directly controlled) armed units have not committed acts of genocide, of conspiracy to commit genocide, of direct and public incitement to commit genocide, or of complicity in genocide whether directed against the Muslim population of Bosnia and Herzegovina or against any other national, ethnical, racial or religious group. Rather to the contrary, such acts have been committed by the organs of Yugoslavia (Serbia and Montenegro), particularly by its Army with the full knowledge and approbation of its Government. The Defendant State has therefore violated and is still violating its legal obligation as undertaken in the Convention on the Prevention and Punishment of the Crime of Genocide of 9 December 1948. It therefore implicates its international responsibility.

CHAPTER 6.3

THE AGENTS, SURROGATES AND OTHER PERSONS ACTING ON BEHALF OF YUGOSLAVIA HAVE PARTICIPATED IN THE GENOCIDE

6.3.0.1 It has been a *leitmotif* of the Representatives of Yugoslavia (Serbia and Montenegro) during the proceedings relating to the Requests for the indication of provisional measures that the Applicant was unable "to see a distinction between the actions and the standpoints of the Federal Government of Yugoslavia itself, and the actions and the standpoints of the Serbs in Bosnia- Herzegovina" [Professor Rosenne, Public Sitting of Friday 2 April 1993, CR 93-13, p. 52; *see* also *e.g.* ibid., pp. 7 - 8 or 33; CR 93-94, p. 15 or Observations of 9 August 1993, p. 9, etc.].

6.3.0.2. There is, however, no confusion at all; or, rather, if there is confusion, it results from the behaviour of Yugoslavia (Serbia and Montenegro) itself since this State has established its *de facto* sovereignty on extensive territories belonging to the Republic of Bosnia and Herzegovina where it acts as the real ruler, either directly [*see* Chapter 6.2, above], or through the so-called "Srpska Republika" or other groups or individuals which are, in fact, acting on its behalf. According to well established principles of international law [Section 6.3.1], the internationally wrongful acts committed by such persons or groups entail the responsibility of Yugoslavia (Serbia and Montenegro) [Section 6.3.3].

Section 6.3.1

The applicable law

6.3.1.1 The principle codified in Article 8 of Part I of the I.L.C. draft on State Responsibility must be interpreted widely. According to this provision:

> "*Article 8. Attribution to the State of the conduct of persons acting in fact on behalf of the State*
>
> The conduct of a person or group of persons shall also be considered as an act of the State under international law if:
> (a) it is established that such persons or group of persons was in fact acting on behalf of that State; or
> (b) such person or group of persons was in fact exercising elements of the governmental authority in the absence of the official authorities and in circumstances which justified the exercise of those elements of authority."

Commenting on this provision, the then Special Rapporteur wrote:

> "The attribution to the State, as a subject of international law, of the conduct of persons who are in fact operating on its behalf or at its instigation (though without having acquired the status of organs, either of the State itself or of a separate official institution providing a public service or performing a public function) is unanimously upheld by the writers on international law who have dealt with this question." [R. AGO, *Third Report on State Responsibility, I.L.C. Yearbook 1971*, vol. II, Part I, p. 266]

Judge AGO also noted:

> "...private persons may be secretly appointed to carry out particular missions or tasks to which the organs of the State prefer not to assign regular State officials; people may be sent as so-called "volunteers" to help an insurrectional movement in a neighbouring country - and many more examples could be given." [*id.* p. 263].

6.3.1.2 These views are supported by unanimous doctrine. Although writers usually discuss the international use of force, it is obvious that the principles they describe may be transponed to other breaches of international law and apply in particular in case of genocide [*see e.g.* Hans WENBERG, "L´interdiction du recours a la force; le principe et les problemes qui se posent", Ree, des cours 1951-I, vol. 78, p. 68; Rosalyn HIGGINS, "The Legal Limits to the Use of Force by Sovereign States - United Nations Pratice", B. Yb. I.L., 1961, p. 278 *et seq.*; Ian BROWNLIE, International Law and the Use of Force by States, 1963, p. 361; RIFAAT, International Agression, 1979, p. 217; etc.].

6.3.1.3 Therefore, the Government of the Republic of Bosnia and Herzegovina submits that the authorities of the so-called "Srpska Republika", its "Army" and its other "organs" as well as other groups and individuals directly controlled by the Government of Belgrade have acted and are acting exclusively on behalf of Yugoslavia (Serbia and Montenegro). Their internationally wrongful acts and, in particular, their participation in the acts of genocide, entail therefore the responsibility of the latter.

Section 6.3.2

Reminder of the relevant facts

6.3.2.1 On 28 March 1992, one day after the declaration of independence by the Republic of Bosnia and Herzegovina, Serbian extremist leaders in Bosnia and Herzegovina proclaimed a so-called "Serbian Republic of Bosnia-Herzegovina", subsequently the "Srpska Republika", whose forces, seemingly, took over the JNA and Serbian and Montenegran police forces.

But this was only for the sake of appearances: the Republic of Bosnia and Herzegovina had been universally recognized and admitted in the United Nations; Yugoslavia (Serbia and Montenegro) had been condemned by the Security Council and the General Assembly for its continuing interference in the new sovereign State, its direct involvement in the policy of "ethnic cleansing" and its violations of the territorial integrity of its neighbour States. It then apparently decided to withdraw and to act under the screen of a puppet entity entirely at its disposal. Moreover, for obvious reasons, it wanted to claim that events in Bosnia and Herzegovina amounted to pure civil war.

6.3.2.2 In fact, nothing changed. The authorities of the supposed "new State" continued to take their orders from Belgrade; the JNA continued, under a new name, its campaign of genocide with not only the aid, but under the control of, and with substantial supplies from Yugoslavia (Serbia and Montenegro).

6.3.2.3 As shown in Section 2.3.6 above, the "decision" that the Government in Belgrade claims to have made in May 1992 was, in fact, never implemented and the major part of JNA troops remained in Bosnia and Herzegovina, only changing uniforms and insignias - and not even that in all cases. Moreover:

- the officers continued to be appointed by Belgrade, including the "Commander in Chief of the Serbian Army in Bosnia and Herzegovina", General Ratko MLADIC, who was appointed after this so-called decision of "withdrawal", and is still at his post. Before being appointed in Bosnia and Herzegovina, Mladic

ruthlessly distinguished himself as the leader of the Serb forces in Croatia.

- Most of JNA's military equipment was left in Bosnia and Herzegovina, as expressly proclaimed by President Cosic in the declaration to the Yugoslav Federal Assembly [*see* above, para. 2.3.6.4], and military supplies have, since then, continuously been sent from Serbia to those parts of the Republic of Bosnia and Herzegovina controlled by Serbian extremists [*see* above, para. 2.3.7.1]; and
- the so-called "army of the Srpska Republika" receives its orders exclusively from the "Yugoslav Supreme Defence Council" (composed of the President of Yugoslavia (Serbia and Montenegro) and Presidents of the Republics of Serbia and Montenegro), the General Staff in Belgrade [*see* above, para. 2.3.6.6].

6.3.2.4 Concretely, it does not really matter therefore whether atrocities are committed overtly by the JNA, later VJ, or by the "Army" and the police of the so-called "Srpska Republika" they are interchangeable; the atrocities are committed by men who wear different uniforms, but are under the same command.

6.3.2.5 It can therefore be safely concluded that all the acts of genocide, the shocking reality of which has been established in Parts 2 and 5 above, which have been committed by the forces of the so-called "Srpska Republika" were in fact committed on behalf of Yugoslavia (Serbian and Montenegro).

6.3.2.6 It is highly significant in this respect that both Yugoslavia (Serbia and Montenegro) and the so-called "Srpska Republika" behave clearly in a way indicating that the latter is not an independent State, or indeed a *quasi*-sovereign entity of any kind. Thus, in the meetings of the International Conference on Former Yugoslavia, the representatives of the so-called "Srpska Republika" sit with the delegation of Yugoslavia (Serbia and Montenegro). In the same way, it must be noted that the Application to the I.C.J. made by Yugoslavia (Serbia and Montenegro) as recent as 16 March 1994, challenges the validity of the decisions taken at a meeting of the North Atlantic Council on 9 February 1994, the aim of which is to protect the territory of Bosnia and Herzegovina. This shows in the clearest way that Yugoslavia (Serbia and Montenegro) considers the part of Bosnia and Herzegovina it controls through the so-called "Srpska Republika" as part of its own territory [*see* para. 2.3.8.6].

The conduct of the so-called "Srpska Republika" entails Yugoslavia (Serbia and Montenegro)'s responsibility

6.3.2.7 It is evident from the facts that the entity which calls itself "Srpska Republika" does not exist as a State and, indeed, has no legal existence at all.

6.3.2.8 As recalled by the Arbitration Commission of the International Conference on Former Yugoslavia:

> "... the State is commonly defined as a community which consists of a territory and a population subject to an organized political authority; (...) such a state is

characterized by sovereignty" [Opinion no. 1, I.L.M. 1992, vol. XXXI, p. 1495].

It might be admitted that the so-called "Srpska Republika" - which has not been recognized by any State, not even, at least *de jure* by Yugoslavia (Serbia and Montenegro) - could avail itself of a "territory" [although ill-defined] and a "population" [although the result of ethnic cleansing, that is a conduct clearly impermissible under international law and in contradiction with international *ius cogens*]; but it has neither an "organized political authority" nor sovereignty in the meaning these words have in international law.

As the Badinter Commission confirmed, the Serb population of Bosnia and Herzegovina is not a self determination entity entitled to independence and statehood. It is of course intitled to the enjoyment of a wide range of human and minority rights, but not to armed secession. In this particular case, purported creation of statehood came about as the result of the unlawful use of force by the Federal Republic of Yugoslavia (Serbia and Montenegro), and of the genocidal practice of ethnic cleansing. As the United Nations Security Council has made clear in numerous other cases, the creation or maintenance of an entity purporting to be a state in violation of the prohibition of the use of force, or all other rules of *jus cogens*, such as the prohibition of apartheid, and it is submitted, the obligation not to perpetrate genocide, cannot have legal consequences. Therefore, even as the so-called Serb Republic were to exercise some sort of effective authority, this would not endow it with international legal status. It remains a surrogate of the Federal Republic of Yugoslavia (Serbia and Montenegro).

6.3.2.9 The "government" of this so-called "State" is entirely in the hands of the Government in Belgrade, it has no effectivity whatsoever, and no authority except by the grace of their masters in Belgrade.

Section 6.3.3

Legal consequences

6.3.3.1 In such conditions there is no question of sovereignty. According to Judge Max HUBER celebrated *dictum*:

> "Sovereignty in the relations between States signifies independence. Independence in regard to a portion of the globe is the right to exercise therein, to the exclusion of any other State, the functions of a State",[*Island of Palmas Arbitration*, 1928, *R.I.A.A.* II, p. 838].

As recalled in OPPENHEIM's 9th edition, "Sovereignty is supreme authority, which on the international plane means (...] legal authority which is not in law dependant on any other earthly authority" [*op. cit.*, p. 122]. In the present case, the authority of the so-called "Srpska Republika" is entirely dependent on the Government in Belgrade and it cannot, therefore, claim statehood.

6.3.3.2 However, it can be added in passing that even if this entity were a State - which it is not -, Yugoslavia (Serbia and Montenegro) would, nevertheless be responsible for the genocide committed by the organs of this so-called "State" or by persons acting on its behalf. In effect, as declared in Article 28, paragraph 1, of the First Part of the I.L.C.'s Draft on State Responsibility:

> "An internationally wrongful act committed by a State in a field of activity in which that state is subject to the power of

direction and control of another State entails the international responsibility of that other State" [*see* also Article 12, paragraph 2].

[*see* also, *a contrario*, the Arbitral award of November 1923 *in re* Brown, *R.I.A.A.*, Vol. VI, pp. 120 *et. seq.*, a case largely taken into consideration by the I.L.C. - *see I.L.C. Yearbook* 1979, vol. II, part II, p. 106].

In the present case, it is clear that if the so-called "Srpska Republika" were a State and could be held as such to be the perpetrator of the crime of genocide on the territory it controls, it would, nevertheless have been "subject to the power of direction and control" of Yugoslavia (Serbia and Montenegro) whose responsibility would therefore be entailed. This would be an hypothesis of "indirect responsibility" in the meaning of Judge AGO's separate opinion in the *Case concerning Military and Paramilitary Activities in and against Nicaragua:*

> "The situations which can be correctly termed cases of indirect responsibility are those in which one State that, in certain circumstances, exerts control over the actions of another can be held responsible for an internationally wrongful act committed by and imputable to that second State. The question that arises in such cases is not that of the imputability to a State of the conduct of persons and groups that do not form part of its official apparatus, but that of the transfer to a State of the international responsibility incurred through an act imputable to another State." [I.C.J. *Reports*, 1986, p. 189].

6.3.3.3 If Yugoslavia (Serbia and Montenegro) would be responsible for the conduct of the so-called "Srpska Republika" if this entity were a State, *a fortiori* this holds true if, as it is this case, it is not a State but a mere *de facto* artificial entity emanating from Belgrade.

6.3.3.4 Indeed, if the authorities of the so-called "Srpska Republika" cannot claim statehood - and, in the view of the Government of Bosnia and Herzegovina, they certainly cannot -, they are but agents and surrogates of Yugoslavia (Serbia and Montenegro). This is in contrast with the facts of the first phase in the *Hostages* case, where

> "no suggestion [had] been made that the militants, when they executed their attack on the Embassy, had any form of official status as recognized "agents" or organs of the Iranian State" [I.C.J. *Reports*, 1980, p. 29].

In the present case, the behaviour of the Government of Yugoslavia (Serbia and Montenegro) shows that, from the very beginning, the authorities of the so-called "Srpska Republika" have been "agents" of Yugoslavia (Serbia and Montenegro) "for whose acts [this] State itself [is] internationally responsible" [*see id.*, p. 35]. Also in contrast with the facts in *Nicaragua vs. United States*, Yugoslavia (Serbia and Montenegro) is in "effective control of the military or paramilitary operations "of the so-called "Army of the Serbian Republic of Bosnia and Herzegovina" [*see* I.C.J. *Reports*, 1986, p. 65].

6.3.3.5 Although international jurisprudence does not reflect the same gross character of events that are evident in the present case [*see* the Report of the I.L.C. to the General Assembly in 1974 *I.C.J. Yearbook* 1974, vol. II, 1st Part, commentary on Art. 8, paras. 4 and 5, Article 8.a], the I.L.C.'s Draft Articles on state Responsibility are entirely relevant in the present case [cited above, para. 6.3.1.1].

The so-called "Srpska Republika" is but a "group of persons" acting in fact on behalf of the State of Yugoslavia (Serbia and Montenegro), and this applies, of course, to all of its "organs" and "agents".

6.3.3.6 Moreover, as explained before [para. 6.3.3.2], if this entity were a State, its conduct would, nevertheless, entail Yugoslavia (Serbia and Montenegro)'s responsibility. It is therefore unthinkable that, as it is not even a State operating under the umbrella of "Yugoslavian" sovereignty, the wrongful acts of this entity would not be attributable to Yugoslavia (Serbia and Montenegro).

6.3.3.7 Consequently, all the atrocities committed by this so-called "State", by its organs and its agents or by any other persons or groups of persons acting in fact on behalf of Yugoslavia (Serbia and Montenegro) against the Muslim and other non-Serb population on the territory of the so-called "Srpska Republic" must be attributed to Yugoslavia (Serbia and Montenegro).

As showed in Part 5 above, these acts amount, without any doubt to genocide.

CHAPTER 6.4

YUGOSLAVIA (SERBIA AND MONTENEGRO) HAS AIDED AND ABETTED GROUPS AND INDIVIDUALS IN THE ACTS OF GENOCIDE

6.4.0.1 In its Order of 8 April 1993, the Court indicated that

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

commit genocide, or of complicity in genocide, whether directed against the Muslim population of Bosnia and Herzegovina or against any other national, ethnical, racial or religious groups" [I.C.J. *Report* 1993, p. 24]. This was reiterated in the Order of 13 September 1993 [*id.* p. 349].

6.4.0.2 In a situation of international armed conflict, inextricable as is the situation prevailing in the former Yugoslavia, it is not always easy to determine precisely who are the wrongdoers and to make a clear distinction between the internationally wrongful acts committed directly by Yugoslavia (Serbia and Montenegro), its organs, its agents and its surrogates on the one hand, and those committed by "organizations and persons (....) subject to its control, direction or influence". This is all the more difficult now that most of the evidence is situated either in Yugoslavia (Serbia and Montenegro) proper or in that part of the territory of Bosnia and Herzegovina under its control. "By reason of this exclusive control, the other State [in the present case, Bosnia and Herzegovina], the victim of a breach of international law, is often unable to furnish direct proof of facts giving rise to responsibility" [*Corfu Channel Case*, I.C.J. *Reports* 1949, p. 18], and, in particular, to determine the real legal nature of the perpetrations.

6.4.0.3 In this particular case, the United Nations Security Council, and other authoritative international organs, have left no doubt whatsoever, as to who is internationally responsible for the launching and sustaining of the campaign of armed force and genocide in the territory of the Republic of Bosnia and Herzegovina. As has been indicated in Part 3, the international community even adopted the most comprehensive sanctions regime to date against that perpetrator: the Federal Republic of Yugoslavia (Serbia and Montenegro).

6.4.0.4 Having established the responsibility of the Federal Republic of Yugoslavia (Serbia and Montenegro) for acts of genocide perpetrated directly by its own organs and its surrogates, the legal analysis will now turn to responsibility incurred for aiding and abetting individuals and groups operating in the Republic of Bosnia and Herzegovina.

Section 6.4.1

The applicable law

6.4.1.1 The principle that a State entails its responsibility when it aids groups or persons to commit an international wrongful act finds broad support in the international jurisprudence. It goes as far back as the historic *Alabama Claims Arbitration* in which the U.S./Great Britain Arbitral Tribunal decided, in 1872, Great Britain had entailed its own responsibility in having fitted out, armed, equipped and supplied Confederate cruisers. [Moore, *History and Digest of the International Arbitrations to which the United States has been a Party*, vol. I, p. 653]. More recently the I.C.J. has decided that Iran's responsibility was entailed in the *Hostages Case*, both because, in a first phase, it had not prevented the acts of the "militants" [*see* above para. 6.2.3.6] and because, during the second phase, they were acting on behalf of the state, under "the seal of official government approval" (I.C.J. *Reports* 1980, pp. 33-35, at p. 34). In the same line, in its judgement of 27 June 1986, the Court decided:

> "that the United States of America, by training, arming, equipping, financing and supplying the contra forces or otherwise encouraging, supporting and aiding military and paramilitary activities in and against Nicaragua, has acted, against the Republic of Nicaragua, in breach of its obligation

> under customary international law not to intervene in the affairs of another State" [I.C.J. *Reports* 1986, p. 146].

and that the United States was "under a duty immediately to cease and to refrain form all such acts" and "under an obligation to make reparation to the Republic of Nicaragua for all injury caused to Nicaragua by these breaches" [*id.* p. 149].

6.4.1.2 It is all the more certain in the present case that Yugoslavia (Serbia and Montenegro) entails its responsibility for breaches of the Genocide Convention for aiding and abetting groups and individuals in genocide, that Article III of the said Convention defines as "punishable" not only genocide itself, but also "conspiracy to commit genocide", "direct and public incitement to commit genocide", "attempt to commit genocide" and "complicity in genocide". All these acts have been defined in Part 5 above. Moreover, it can be noted that Article 7 of the Statute of the International Criminal Tribunal for Former Yugoslavia adopted by Resolution 827 (1993) of the Security Council of 25 May 1993, holds responsible for the crimes enumerated in Articles 2 to 5 - including genocide (Article 4), "a person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of those crimes" (emphasis added).

6.4.1.3 Probably, the Court offered the best definition of "complicity" and other related acts in its judgment in the *Nicaragua case*. The Court suggested that it was material in determining the unlawfulness of encouraging the commission of acts

> "...to consider whether that encouragement was offered to persons in circumstances where the commission of such acts was likely or foreseeable" [I.C.J. *Reports* 1986, p. 130].

6.4.1.4 In this judgment, the Court considered the allegations of Nicaragua according to which the military and paramilitary actions launched in and against Nicaragua would be "essentially the acts of the United States". The Court recalled

> "If such a finding of the imputability of the acts of the *contras* to the United States were to be made, no question would arise of mere complicity in those acts, or of incitement of the *contras* to commit them." [I.C.J. *Reports* 1986, p. 64].

However,

> "The Court has taken the view .... that United States participation, even if preponderant or decisive, in the financing, organizing, training, supplying and equipping of the *contras*, the selection of its military or paramilitary targets, and the planning of the whole of its operation, is still insufficient in itself, on the basis of the evidence in the possession of the Court, for the purpose of attributing to the United States the acts committed by the *contras* in the course of their military of paramilitary operations in Nicaragua. All the forms of United States participation mentioned above, and even the general control by the respondent State over a force with a high degree of dependency on it, would not in themselves mean, without further evidence, that the United States directed or enforced the perpetration of the acts contrary to human rights and humanitarian law alleged by the applicant State. Such acts could well be committed by members of the *contras* without the control of the United States. For this conduct to give rise to legal responsibility of the United States, it would in principle have to be proved that that State had effective control of the military or paramilitary operations in the course of which the alleged violations were committed." [*id.*, pp. 64-65].

Consequently,

> "The Court does not consider that the assistance given by the United States to the *contras* warrants the conclusion that these forces are subject to the United States to such an extent

that any acts they have committed are imputable to that State. It takes the view that the *contras* remain responsible for their acts, and that the United States is not responsible for the acts of the *contras*, but for its own conduct vis-à-vis Nicaragua, including conduct related to the acts of the *contras*. What the Court has to investigate is not the complaints relating to alleged violations of humanitarian laws by the *contras*, regarded by Nicaragua as imputable to the United States, but rather unlawful acts for which the United States may be responsible directly in connection with the activities of the *contras*. The lawfulness or otherwise of such acts of the United States is a question different from the violations of humanitarian law of which the *contras* may or may not have been guilty. It is for this reason that the Court does not have to determine whether the violations of humanitarian law attributed to the *contras* were in fact committed by them. At the same time, the question whether the United States Government was, or must have been, aware at the relevant time that allegations of breaches of humanitarian law were being made against the *contras* is relevant to an assessment of the lawfulness of the action of the United States." [*id.*, p. 65].

Section 6.4.2

Reminder of the relevant facts

6.4.2.1 It is clear from the record that Yugoslavia (Serbia and Montenegro) has been "omnipresent in the genocide". This "omnipresence" has been - and still is - reflected by the presence on the spot of its organs, including the JNA, then the VJ, and its agents and surrogates, including the co-called "Srpska Republika" and also - by the incitement and ideological background it has offered to all those participating in the genocide, which amount to a conspiracy to commit genocide,

- by training, arming, equipping, financing and supplying the groups and individuals committing genocide, and
- by infiltration into the territory of Bosnia and Herzegovina of irregular forces.

6.4.2.2 Chapter 3 of Part 2 has presented the (historical) context in which the genocide is being perpetrated. It is crystal-clear that the ideology of Greater Serbia [Section 2.3.1] has constituted the general background and a constant source of inspiration for those who commit genocidal acts. Indeed, a State cannot be held repsonsible for an ideology as such. But things change when it makes it an official ideology, and spreads it through the media which it entirely controls, censoring all contrary views. As Mr. Tadeusz Mazowiecki, the Special Rapporteur of the Commission on Human Rights stressed in his "Sixth Report on the situation of human rights in the territory of the former Yugoslavia", with respect to Serbia:

> "A primary area of concern for the Special Rapporteur is the incitement to national and religious hatred in public life and in the media. In public life, leading political figures make inflammatory and threatening statements against minority groups on a regular basis. On several occasions, for instance, the leader of the Serbian Radical Party, Mr. Vojislav Šešelj, has suggested that the Hungarian and Albanian minorities should be expelled from Vojvodina and Kosovo, respectively. The incitement to hatred by political leaders was particularly widespread during the campaigns leading to the parliamentary elections in December 1993. The use of demagogic methods in order to intensify and manipulate irrational fears and prejudices among the electorate appears to be an important means of gaining votes.
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> "The prevailing climate of ethnic and religious hatred is also encouraged through misinformation, censorship and indoctrination by the media (*see* E/CN.4/1994/47, paras.

176-179). In particular, the coverage of atrocities committed in the conflict between Serbs and Muslims in Bosnia and Herzegovina is selective and one-sided. The media denigrates Muslims and Islam through sensationalist and distorted account of historical and existing "crimes" which they have committed "against the Serbian people" while grave violations perpetrated against Muslims are either rarely reported or discounted as malicious accusations forming part of an "anti-Serbian conspiracy". The programming of the State-controlled TV Belgrade regularly involves the demonization of certain ethnic and religious groups. In this respect, a particularly disturbing broadcast is the programme Iskre i varnice nedelja" [E/CN.4/1994/110, 21 February 1994, paras. 124 and 125, p. 21; on Montenegro, see *id.*, para. 149, p. 25).

6.4.2.3 Incitement to ethnic and religious hatred and genocide is combined with strategic plans aiming at realizing the "Greater Serbia" through killing, deportation, expulsion, ill-treatment or rape of non-Serbs and, particularly, members of the Muslim population. The most well-known and systematic of these plans is "RAM" [*see* above section 2.3.4] which has effectively been brought into operation. It is worth noting, for example, that on 21 July 1993, General Ratko MLADIC openly declared:

> "Things are moving very well, according to plan". [*New York Times*, 22 July 1993, emphasis added]

6.4.2.4 In execution of the RAM plan, the JNA began to transfer arms to Serbian communities in Bosnia and Herzegovina [*see* above, paras. 2.3.4.2; 2.3.4.3] and these supplies in arms continued and even intensified after the independence of Bosnia and Herzegovina, together with supplies in equipment, food, etc. [*see* paras. 2.3.7.1; 3.2.0.13 above, or the facts listed in the Separate Opinion of Judge LAUTERPACHT, I.C.J. *Reports* 1993, pp. 428-429].

6.4.2.5 Moreover, as recalled in Part 2 above, in addition to arms supplies and logistical support given by Yugoslavia (Serbia and Montenegro) to the "Bosnian Serbs", VJ troops and aircraft regularly cross the border while paramilitary groups are formed, equipped and trained in Serbia and Montenegro [*see e.g.* para. 2.3.7.2 *et seq.*].

Section 6.4.3

Recognition of these facts by the international community

6.4.3.1 The aiding and abetting of Yugoslavia (Serbia and Montenegro) in the genocide has been widely acknowledged by the international community together and complementary with the condemnation of this State for its direct participation in the acts of genocide [*see* above Section 6.2.2]. This has been done in and outside the United Nations.

6.4.3.2 In multiple resolutions, the Security Council insisted that Yugoslavia (Serbia and Montenegro) must cease its aid to paramilitary groups operating in Bosnia and Herzegovina:

- in resolution 787 (1992, it

  "*Demands* that all forms of interference from outside the Republic of Bosnia and Herzegovina <u>including infiltration into the country of irregular units and personnel</u>, cease immediately..." [16 November 1992, emphasis added];

- in resolution 819 (1993), it

  "*Demands* that the Federal Republic of Yugoslavia (Serbia and Montenegro) immediately cease <u>the supply of military arms, equipment and services to the Bosnian Serb</u>

paramilitary units in the Republic of Bosnia and Herzegovina" [16 April 1993, emphasis added];

- in resolution 820 (1993) adopted the following day, it expresses "its condemnation of all the activities carried out in violation of resolutions 757 (1992) and 787 (1992) between the territory of the Federal Republic of Yugoslavia (Serbia and Montenegro) and Serb-controlled areas in the Republic of Croatia and the Republic of Bosnia and Herzegovina" (emphasis added) and strengthened the sanctions against Yugoslavia (Serbia and Montenegro) in order to impede these activities [*see* also Resolution 838 (1993) of 10 June 1993], etc.

Thus the Council both strongly condemned the acts of "Bosnian Serbs" and the aid given to them by Yugoslavia (Serbia and Montenegro).

6.4.3.3 In its most recent resolution, adopted on 20 December 1993, the General Assembly supports the position taken by the Security Council in this respect and

> "Requests the Security Council to follow and immediately implement its resolution 838 (1993) of 10 June 1993 to ensure that the Federal Republic of Yugoslavia (Serbia and Montenegro) immediately cease the supply of military arms, equipment and services to Bosnian Serb paramilitary units, as demanded in Security Council Resolution 819 (1993) of 16 April 1993." [Resolution 48/88].

6.4.3.4 Many other international organs stressed that Yugoslavia (Serbia and Montenegro) exercises a great influence on the "Bosnian Serbs". Thus, the Special Rapporteur of the Commission on Human Rights confirmed that irregular paramilitary groups which were very active in the "ethnic

cleansing" were armed and equipped with "very large stock of military hardware" supplied by the JNA [*cf.* A/47/666, paras. 14-15].

6.4.3.5 For their parts, the E.E.C. and the C.S.C.E. also acknowledged the influence of Yugoslavia (Serbia and Montenegro) on the forces operating in Bosnia and Herzegovina. Thus, in a statement on Bosnia-Herzegovina, the E.C. and its Member States, as early as 11 April 1992, called upon the

> "Serbian and Croatian Governments to exercise all their undoubted influence [to end the interference in the affairs of an independent Republic and to condemn publicly and unreservedly the use of force in Bosnia and Herzegovina" [E.P.C. Press Release 46/92, emphasis added],

- and, on 15 April 1992, the Representatives of the C.S.C.E. Participating States, during a Helsinki Follow-up Meeting,

> "condemned the Serbian irregulars and the JNA for violating the independence and territorial integrity of Bosnia-Herzegovina and the human rights of its people, and "urged the Government of Serbia to discontinue its support for such actions which, if continued, would constitute a pattern of clear, gross and uncorrected violation of CSCE commitments." [*see* Marc WELLER, "The International Response to the Dissolution of the Socialist Federal Republic of Yugoslavia", *A.J.I.L.* 1992, no. 3, p. 598].

6.4.3.6 Perhaps the most convincing analysis in this respect is contained in the Comments of the Human Rights Committee after the hearing of a delegation form Yugoslavia (Serbia and Montenegro) on 4 November 1992. Placing itself exclusively on legal ground,

> "The Committee observed that the means deployed and the interests involved demonstrated the existence of links between the nationalists and Serbia which invalidated the Federal Government's claim to be exempt from responsibility."

"The Committee strongly deplored this situation and regretted the refusal of the Federal Government to acknowledge its responsibility for such acts on the ground that they were committed outside its territory."
"The Committee firmly urged the Federal Government to put an end to this intolerable situation for the observance of human rights, and to refrain from any support for those committing such acts, including in territory outside the Federal Republic of Yugoslavia (Serbia and Montenegro). It called upon the Government to show a clear political will and effectively to dissociate itself from the Serbian nationalist movements by totally repudiating their ideology and condemning their schemes. The Committee considers that a show of unwavering firmness on this point would deprive the extremists of support that is essential to them." [A/C.3/47/CRP.1, 20 November 1992, paras. 21, 23 and 24, pp. 8-9].

6.4.3.7 These statements are self-explanatory and bear witness of the conviction of the international community that, by a large diversity of means, Yugoslavia (Serbia and Montenegro) has aided and abetted in the genocide.

Section 6.4.4

Recognition of these facts by Yugoslavia (Serbia and Montenegro) itself

6.4.4.1 During the previous proceedings in this case, Yugoslavia (Serbia and Montenegro) denied its involvement in the genocide committed against non-Serb populations in Bosnia-Herzegovina and elsewhere in former Yugoslavia. It stated in particular that it did "not have a single soldier on the territory of the "Republic of Bosnia and Herzegovina", that it did not "military support any side in this international armed conflict" (emphasis

added) - which it also qualified as pure "civil war"... - and that it did "not support, in any way, the committing of serious crimes that are being done" in Bosnia and Herzegovina [Mr. ZIVKOVIC, public session of 2 April 1993, CR 93/13, p. 7; see also Dr. MITIC, 26 August 1993, CR 93/34, p. 15]. These pious statements are entirely denied by formal and concordant declarations made by the highest ranking officials in Yugoslavia (Serbia and Montenegro), such as Slobodan Milosevic, and by their surrogates in Bosnia and Herzegovina [*see* Section 2.3.8].

6.4.4.2 It is worth noting in particular that Dr. Radovan KARADZIC, the leader of the so-called "Srpska Republika" declared, on 23 June 1993, in statements reported by the BBC, that:

> "At this moment the Serbian Army and the Serbian nation play a role of a subsitute UN Protection Force, by allowing the civilians and the army of the Croatian Herceg-Bosna onto the territory, helping them and allowing them to return if they want to, or to proceed further." [*BBC*, June 23, 1993].

6.4.4.3 Even more important, this clear recognition of Serbian aid is corroborated by formal statements made by the highest authorities in Serbia and Yugoslavia (Serbia and Montenegro). Three documents are of particular importance in this respect:

- the Communiqué made public by the Government of Serbia, in early May 1993 [*see* 2.3.8.2; 2.3.8.3]
- the Communiqué of the Federal Government, also released in early May [*id.*]; and
- the Statement made by President Slobodan MILOSEVIC of Serbia on 11 May 1993 [*see* 2.3.8.4; 2.3.8.5].

Ample quotations of these documents have been made above and the most relevant passages are also quoted in Judges SHAHABUDDEEN and

LAUTERPACHT Separate Opinions of 13 September 1993 [I.C.J. *Reports* 1993, pp. 362-363 and 428-429].

6.4.4.4 These statements constitute clear recognitions that Yugoslavia (Serbia and Montenegro) has massively aided the "Bosnian Serb forces", those which were committing genocide:

- they recognize that Yugoslavia (Serbia and Montenegro) "has been unreservedly and generously helping the Serb Republic";
- they admit that "most of the assistance was sent to people and fighters in Bosnia-Herzegovina" (emphasis added);
- they reaffirm "the just objectives of the Serbian people"; and
- they state that "owing to this assistance, (the Serbs in Bosnia) have achieved most of what they wanted".

6.4.4.5 It could certainly not be expected that the Government authorities in Belgrade acknowledge formally their aiding and abetting in genocide. But it is remarkable that, by these statements, they formally recognize that they have, during two years at least, aided those who fight in Bosnia-Herzegovina and, as explained in Parts 2 and 5 above, there cannot be the slightest doubt that these "fighters" are the perpetrators of the genocide. Yugoslavia (Serbia and Montenegro) has been "generously helping" them, while being fully aware of what was going on.

Section 6.4.5

Legal consequences

6.4.5.1 In the present case, it is clear that Yugoslavia (Serbia and Montenegro) is the only power in that part of Bosnia and Herzegovina under Serbian control, as explained in Chapters 2 and 3 of the present Part. However, and keeping in mind the difficulty of proof [*see* above, para. 6.4.0.2], even if certain groups or individuals participating in the genocide, are acting on a relatively autonomous basis - which in the view of the Applicant State is not the case -, then, according to the principles laid down by the Court in its 1986 judgment [*see* above para. 6.4.1.4] Yugoslavia (Serbia and Montenegro) would be responsible for its own internationally wrongful acts in connection with the acts of genocide as related acts of those groups and individuals. This requirement has been fully satisfied in this case.

The facts which are outlined in this Memorial, as widely acknowledged by the international community [Part 3, Section 6.4.3] and as acknowledged by Yugoslavia (Serbia and Montenegro) itself [2.3.8; Section 6.4.4] make it perfectly clear that Yugoslavia (Serbia and Montenegro) has aided and abetted groups and individuals in the in this case related acts of genocide. Therefore, Yugoslavia (Serbia and Montenegro)'s international responsibility is clearly implicated.

CHAPTER 6.5

YUGOSLAVIA (SERBIA AND MONTENEGRO)'S FAILURE TO PREVENT AND PUNISH GENOCIDE

Section 6.5.1

The applicable law

6.5.1.1 As explained above, the 1948 Convention does not only require States not to commit genocide directly and/or through its organs, agents or surrogates - an obligation which has been violated by Yugoslavia (Serbia and Montenegro) - it also puts an obligation on them to prohibit and prevent acts of genocide and related acts and to punish their perpetrators. Yugoslavia (Serbia and Montenegro) has not complied with either of these obligations. These failures give rise to a cause of action separate from the one based on the commission of genocide [*see* para. 5.2.3.3].

6.5.1.2 Indeed the obligations to prevent and punish the act of genocide are the very "object and purpose" of the Convention, in the meaning these terms have in the 1969 Vienna Convention on the Law of Treaties. The official title of the 1948 Convention is: "Convention on the Prevention and Punishment of the Crime of Genocide", and Article I is drafted as follows:

> "The Contracting Parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish" [emphasis added],

while Articles IV to VI detail the meaning of "punishment" [see above par. 5.2.3.3].

In non-preventing the genocide and non-punishing its perpetrators, Yugoslavia (Serbia and Montenegro), whatever its own direct responsibility

in this crime, has deprived the Convention of its object and purpose [*see* I.C.J., Judgement of 27 June 1986, *Case concerning Military and Paramilitary Activities in and against Nicaragua*, I.C.J. *Reports* 1986, pp. 136-138].

6.5.1.3 It can be added that, independently of any treaty provisions, it is well established in general customary international law that an "internationally wrongful act" consists either of an "action" or of an "omission" "attributable to the State under international law" [Article 3 of Part One of the I.L.C.'s draft on State responsibility). This is a mere codification of a firmly established principle [*see* R. AGO, 3rd Report on State responsibility, *I.L.C. Yearbook*, 1971, vol. II, Part I, para. 56; see also I.C.J. Judgement of 9 April 1949, *Corfu Channel case*, I.C.J. *Reports* 1949, pp. 22-23 or Judgment of 24 May 1980, *Case concerning United States Diplomatic and Consular Staff in Tehran*, I.C.J. *Reports* 1980, pp. 30-33].

Section 6.5.2

Yugoslavia (Serbia and Montenegro)'s failure to act (*i.e.* to prevent and to punish)

6.5.2.1 In this last judgment, the Court noted, in respect of the first phase of the events it described (during which the "militants" could not be considered as the agents of the Iranian Governenment) that the Iranian authorities:

> "(a) were fully aware of their obligations under the conventions in force to take appropriate steps to protect the premises of the United States Embassy and its diplomatic and consular staff from any attack and from <u>any infringement of</u>

their inviolability, and to ensure the security of such other persons as might be present on the said premises;"
"(b) were fully aware, as a result of the appeals for help made by the United States Embassy, of the urgent need for action on their part;"
"(c) had the means at their disposal to perform their obligations:"
"(d) completely failed to comply with these obligations". [*id.* pp. 32-33].

6.5.2.2 The same holds true in the present case.

The Government in Belgrade were fully aware of their obligations under the 1948 Convention to prevent genocide and punish the perpetrators. It must be noted in this respect that Yugoslavia (Serbia and Montenegro) itself, during the previous proceedings in this case, made counterclaims by which it requested the Court, *inter alia*,

> "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"
> [Observations of 9 August 1993, para. 3, pp. 2-3],

thus showing that is was perfectly aware of the obligation of prevention bearing on the States parties to the Convention. In any case, this obligation - which, once again, is the very "object and purpose" of the Convention to which Yugoslavia (Serbia and Montenegro) is a Party - has been recalled, again and again, by

- the Security Council [*see e.g.*: resolutions 771 (1992) of 13 August 1992; 787 (1992) of 16 November 1992; 819 (1993) of 16 April 1993; etc.];

- the General Assembly [*see e.g.*: Resolutions 46/242 of 25 August 1992, para. 7; 47/80 of 16 December 1992; 47/147 of 18 December 1992, paras. 9 and 16; 48/88 of 20 December 1993].

The Court itself, in its Order of 8 April 1993, recalled unanimously that:

> "The Government of the Federal Republic of Yugoslavia (Serbia and Montenegro) should immediately, in pursuance of its undertaking in the Convention on the Prevention and Punishment of the Crime of Genocide of 9 December 1948, take all measures within its power to prevent commission of the crime of genocide". [I.C.J. *Reports* 1993, p. 24; *see* also the Order of 13 September 1993, *id.*, p. 349].

Consequently, Yugoslavia (Serbia and Montenegro) was certainly not unaware of the obligations of prevention and punishment incumbent on it on the basis of the Genocide Convention.

6.4.2.3 The Belgrade Government were also "fully aware of the urgent need for action on their part" as meant by the Court in the aforementioned Judgement [I.C.J. *Reports*, 1980, p. 33]. Since the acts constituting genocide have been committed by them and by the Yugoslav army or by their agents and surrogates in Bosnia and Herzegovina, they certainly cannot allege that they were not aware of these acts while a multitude of international bodies has stressed, at least from the summer of 1992, the extreme urgency to react [*see* above par. 6.2.3.5]. Moreover, as Judge SHAHABUDDEEN has noted in the Separate Opinion he has appended to the Court's order of 13 September 1993, it is, to say the least, very strange that "Yugoslavia neither affirms nor denies" that the Serbs have been committing genocide [I.C.J. *Reports* 1993, p. 363] while they could not ignore this fact and while they had themselves made a Request for the indication of provisional measures [*see* above para. 6.2.3.6] which by way of definition implies a real urgency [*see* Article 74, paragraph 1 of the

Rules of Court or the Order of 29 July 1991 in the *Case concerning Passage through the Great Belt*, I.C.J. *Reports* 1991, p. 12 *et seq.*]

6.5.2.4 There can be no more doubt that the authorities of Yugoslavia (Serbia and Montenegro) "had the means at their disposal to perform their obligations" as meant by the Court in the aforementioned Judgement [I.C.J. *Reports* 1980, p. 33] to prevent and punish genocide. The Government in Belgrade is not known to be weak. Right to the contrary, it appears clearly as having very strong powers, not to say that it is purely and simply a dictatorship. It is therefore unlikely that its organs and, in particular, its armed forces could have acted contrary to its will and commands all the more as the atrocities committed on its behalf are not isolated facts or "*bavures*", but are committed massively and on a large scale. Moreover, as shown above, the authorities of the so-called "Srpska Republika" are entirely in the hands of the Government in Belgrade and it also controls and massively aids the paramilitary forces acting on the territory of Bosnia and Herzegovina which are entirely dependant upon its aid and supply.

6.4.2.5 Moreover, the geographical configuration of the region must also be taken into consideration [*see* I.C.J. Judgment of 19 April 1949, *The Corfu Channel Case*, I.C.J. *Reports* 1949, pp. 20-23]. Yugoslavia (Serbia and Montenegro) is a neighbour State of Bosnia and Herzegovina, it has therefore a special duty not to let its territory be used for perpetrating internationally wrongful acts and is in a position to prevent these acts more easily than remote States.

6.4.2.6 It must also be noted that Yugoslavia (Serbia and Montenegro) could certainly not invoke any legal impediment regarding the punishment of

perpetrators of the act of genocide: provisions of Article II and III of the 1948 Convention have been included in the same wording in the Yugoslav Penal Code, still in force in Yugoslavia (Serbia and Montenegro).

6.4.2.7 Therefore it is clear that the Government of Yugoslavia (Serbia and Montenegro) were aware of their obligations to prevent and to punish under the Genocide Convention and of the urgent need for action on their part, and that they had the means at their disposal to perform their obligations. However, they "completely failed to comply with these obligations" [I.C.J. *Reports* 1980, p. 33]. This is quite apparent from the record of the relevant facts and it is not useful to recite here again the hideous list of atrocities committed by Yugoslavia (Serbia and Montenegro) [*see* Chapter 2.2]. Suffice it to say that "nothing was attempted (by the authorities in Belgrade) to prevent the disaster" [I.C.J. *Reports* 1980, p. 23], nor have they, at any time, whether during the previous proceedings in this case or in other forums, alleged that they have taken even a first step in order to prevent the genocide which they knew was - and still is - committed in the neighbour territory of Bosnia and Herzegovina.

6.4.2.8 In the present case, the duty of the States Parties to the 1948 Convention to prevent and punish is all the more compelling now that genocide is not a "usual" internationally wrongful act, not a mere "delict". As demonstrated in Part 5 above it is "an offence *jus gentium*", a "crime under international law" [*see* paras. 5.1.1.1 *et seq*, *see* also para. 4.2.4.13]. And it is admitted that such crimes have "special consequences" in international law (see Roberto AGO, 5th Report on State Responsibility, *I.L.C. Yearbook* 1976, vol. II, Part I, pp. 79-154; see also Gartano ARANGIO-RUIZ, 5th Report

on State Responsibility, A/CN.4/453/Add. 2, 8 June 1992]. One of these consequences is the special obligation not to thelp the actor of the breach and an "intensification" of justifiable counter-measures [*see* W. RIPHAGEN, 4th Report on State Responsibility, *I.L.C. Yearbook* 1983, vol. II, Part I, paras. 53 *et seq*; see also G. ARANGIO-RUIZ, *op. cit.*, Add. 3, 24 June 1993, paras. 118 *et seq.*].

6.4.2.9 This points to a clear answer to a question raised by Judge LAUTERPACHT in the Separate Opinion he appended to the Court's Order of 3 September 1993:

> "Obviously, an absolutely territorial view of the duty to prevent genocide would not make sense since this would mean that a party, though obliged to prevent genocide within its own territory, is not obliged to prevent it in territory which it invades and occupies. That would be nonsense. So there is an obligation, at any rate for a State involved in a conflict, to concern itself with the prevention of genocide outside its territory."
>
> "But does the duty of prevention that rests upon a party in respect of its own conduct, or that of persons subject to its authority or control, outside its territory also mean that every party is under an obligation individually and actively to intervene to prevent genocide outside its territory when committed by or under the authority of some other party?" [I.C.J. *Reports* 1993, p. 444].

Thus it appears that Judge LAUTERPACHT makes a distinction between two different situations: the case when a State is directly involved in a conflict and when there can be no doubt that the obligation to prevent applies strictly, and the second case when the State is not directly involved in the conflict and where the writer seems to have some doubt about the legal requirement of prevention.

6.4.2.10 A definitive answer to this question is probably not necessary in the present case since it is quite obvious that Yugoslavia (Serbia and Montgenegro) is directly involved in the conflict. It is, indeed, the only State involved, it is in direct control of that part of the territory of Bosnia and Herzegovina where genocide is committed and it has an indisputable duty to prevent it. However, even in the second situation, Article I of the Convention, which is drafted in absolutely general terms, provides for an obligation to all States Parties to prevent and punish genocide, this is a consequence of genocide being defined as a crime under international law.

6.4.2.11 It can also be noted that the Penal Code of Yugoslavia (Serbia and Montenegro), Article 93, provides for the punishment of "a citizen of Yugoslavia when he commits a criminal offence abroad [*see* above para. 5.2.2.3]. This shows that this state has not a "territorial conception of criminal law".

6.4.2.12 In its Order of 13 September 1993, the Court stated that

> "...while taking into account, *inter alia*, the replies of the two Parties to a question put to them at the hearings as to what steps had been taken by them "to ensure compliance with the Court's Order of 8 April 1993", is not satisfied that all that might have been done has been done to prevent commission of the crime of genocide in the territory of Bosnia-Herzegovina, and to ensure that no action is taken which may aggravate or extend the existing dispute or render it more difficult of solutions". [I.C.J. *Reports* 1993, pp. 348-349]

Although this statement is drafted generally, it is clear that it adresses itself to the Respondent State as is clear in the light of the Opinions appended by individual judges [*see e.g.*: Judge SHAHABUDDEEN, p. 364; Judge WEERAMANTRY, pp. 273 and 381; Judge TARASSOV, pp. 450-451]. It

is therefore clear that the Court considered that Yugoslavia (Serbia and Montenegro) had not complied with its duty to prevent genocide, at least during this period between 8 April and 13 September 1993. Very unfortunately, this situation has remained unchanged since then.

CHAPTER 6.6
CONCLUSION

In view of the arguments exposed above, it can be firmly concluded that Yugoslavia (Serbia and Montenegro) has been, and is, in breach of its obligations under the 1948 Genocide Convention in many respects:

i) it has not prevented genocide while it was perfectly aware of this crime being committed both on its own territory and in the neighbour State of Bosnia and Herzegovina; while it had the means to prevent it;

ii) it has not punished the perpetrators of genocide although they are entirely under its exclusive control; but

iii) on the contrary, its own organs, and agents, have themselves committed, and are still committing genocide;

iv) they have been and still are accomplices of the acts of genocide;

v) including the so-called "Srpska Republika" and Yugoslavia (Serbia and Montenegro)'s other surrogates which are acting under its entire control and on its behalf on the territory of Bosnia and Herzegovina; and

vi) it has aided and abetted in the planning, the preparation and the execution of genocide.

PART 7

SUBMISSIONS

On the basis of the evidence and legal arguments presented in this Memorial, the Republic of Bosnia and Herzegovina,

Requests the International Court of Justice to adjudge and declare,

1. That the Federal Republic of Yugoslavia (Serbia and Montenegro), directly, or through the use of its surrogates, has violated and is violating the Convention on the Prevention and Punishment of the Crime of Genocide, by destroying in part, and attempting to destroy in whole, national, ethnical or religious groups within the, but not limited to the, territory of the Republic of Bosnia and Herzegovina, including in particular the Muslim population, by

- killing members of the group;
- causing deliberate bodily or mental harm to members of the group;
- deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- imposing measures intended to prevent births within the group.

2. That the Federal Republic of Yugoslavia (Serbia and Montenegro) has violated and is violating the Convention on the Prevention and Punishment of the Crime of Genocide by conspiring to commit genocide, by complicity in genocide, by attempting to commit genocide and by incitement to commit genocide;

3. That the Federal Republic of Yugoslavia (Serbia and Montenegro) has violated and is violating the Convention on the Prevention and Punishment of the Crime of Genocide by aiding and abetting individuals and groups engaged in acts of genocide;

4. That the Federal Republic of Yugoslavia (Serbia and Montenegro) has violated and is violating the Convention on the Prevention and Punishment of the Crime of Genocide by virtue of having failed to prevent and to punish acts of genocide;

5. That the Federal Republic of Yugoslavia (Serbia and Montenegro) must immediately cease the above conduct and take immediate and effective steps to ensure full compliance with its obligations under the Convention on the Prevention and Punishment of the Crime of Genocide;

6. That the Federal Republic of Yugoslavia (Serbia and Montenegro) must wipe out the consequences of its international wrongful acts and must restore the situation existing before the violations of the Convention on the Prevention and Punishment of the Crime of Genocide were committed;

7. That, as a result of the international responsibility incurred for the above violations of the Convention on the Prevention and Punishment of the Crime of Genocide, the Federal Republic of Yugoslavia (Serbia and Montenegro) is required to pay, and the Republic of Bosnia and Herzegovina is entitled to receive, in its own right and as *parens patriae* for its citizens, full compensation for the damages and losses caused, in the amount to be determined by the Court in a subsequent phase of the proceedings in this case.

The Republic of Bosnia and Herzegovina reserves its right to supplement or amend its submissions in the light of further pleadings.

The Republic of Bosnia and Herzegovina also respectfully draws the attention of the Court to the fact that it has not reiterated, at this point, several of the requests it made in its Application, on the formal assumption that the Federal Republic of Yugoslavia (Serbia and Montenegro) has accepted the jurisdiction of this Court under the terms of the Convention on the Prevention and Punishment of the Crime of Genocide. If the Respondent were to reconsider its acceptance of the jurisdiction of the Court under the terms of that Convention - which it is, in any event, not entitled to do - the Government of Bosnia and Herzegovina reserves its right to invoke also all or some of the other existing titles of jurisdiction and to revive all or some of its previous submissions and requests.

The Hague, 15 April 1994

Muhamed SACIRBEY
Agent of the Government of the
Republic of Bosnia and Herzegovina

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AMSTERDAM 3 januari 1995

ONZE REF. ahj/gs

Re.: Bosnia and Herzegovina / Yugoslavia (Serbia and Montenegro)

Sir,

With reference to the letter dated 29 December 1994 of the Agent of Bosnia and Herzegovina, I herewith send you the Additional Annexes (seven Volumes per set).

In the Table of Contents of each Volume data printed in bold indicate corrections, which we were able to make while putting together the Additional Annexes.
For your information I include a brief version of the Table of Contents, in which only the corrected items are listed.

Accept, Sir the assurances of my highest esteem,

i.a.

A.H.J. van den Biesen

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Annexes to Part 2

Annexes to Part 3

Note: the Annexes 3-I, 3-II and 3-III, which were annexed to the Memorial dated 15 April 1994, are annexed again; this time as photocopies of the original documents

Annexes to Part 4

Annexes to Part 5