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To The Judges of the International Court of Justice
The Peace Palace
The Hague
The Netherlands

Your Excellencies:

I hereby amend:

- (1) Our Application of 20 March 1993;
- (2) Our Second Request for an Indication of Provisional Measures of 27 July 1993;
- (3) Our Outstanding Request for an immediate hearing of the Second Request by the Court;
- (4) Our Request Made on Wednesday, 4 August 1993, for an immediate Order without hearing pursuant to our Second Request, in accordance with Article 75(1) of the Rules of the International Court of Justice;

by submitting that in addition to the jurisdictional bases that have already been set forth in this case, that the Court's jurisdiction is also grounded in the Customary and Conventional International Laws of War and International Humanitarian Law, including but not limited to the Four Geneva Conventions of 1949, their First Additional Protocol of 1977, the Hague Regulations on Land Warfare of 1907, and the Nuremberg Charter, Judgment, and Principles. The reasons for the assertion of these additional bases of jurisdiction can be found in the attached Memorandum, which is hereby incorporated by reference and made an integral part of this communication.

Respectfully submitted by,

Francis A. Boyle

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

10 August 1993

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The Interrelation Between Prohibitions of Genocide and Violations
of the Law of War, Crimes Against Humanity and Human Rights

Genocide involves two elements: (1) an "intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such" [Genocide Convention, Art. II], and (2) certain listed acts, methods or tactics contained in paragraphs a-e of Article II of the Convention (i.e., (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, or (e) forcibly transferring children of the group to another group). There is simply no doubt that the latter acts or tactics, if committed during an armed conflict, can also constitute war crimes or "crimes against humanity." Similarly, such acts can constitute infractions of human rights law as such. Thus, one can often discover an interrelated prohibition based on several international norms.

For example, while recognizing that its mandate "required" application of Geneva law (i.e., the 1949 Geneva Conventions and the Protocols thereto) and "international humanitarian law," the Commission of Experts Established Pursuant to Security Council Resolution 780 (1992) nonetheless emphasized in its Interim Report of January 1993 "that the applicable rules include the prohibition of genocide, as codified in the Genocide Convention, as well as fundamental norms of human rights law," adding: "While the latter have been embodied, and elaborated, in treaties to which the former Yugoslavia was a party, their applicability to the parties to the various armed conflicts in the region may be deemed to derive from their character as peremptory norms of international law." Interim Report of the Commission of Experts Established Pursuant to Security Council Resolution 789 (1992), para. 46,

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contained in Letter Dated 9 February 1993 from the Secretary-General Addressed to the President of the Security Council, U.N. Doc. S/25274, Annex, 10 Feb. 1993 [hereinafter cited as Commission Report]. See also *id.* at para. 39 ("Other international agreements relevant to the armed conflicts in the territory of the former Yugoslavia include...[the] 'Genocide' Convention). The Commission also noted "that fundamental rules of human rights law often are materially identical to rules of the law of armed conflict," adding: "It is therefore possible for the same act to be a war crime and a crime against humanity." Commission Report, *supra*, at para. 50. More specifically, the Commission affirmed: "'Ethnic cleansing' is contrary to international law...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." Commission Report, *supra*, at paras. 55-56. See also U.N. G.A. res. 47/121 of 18 Dec. 1992 (ethnic cleansing "is a form of genocide").

Such interrelations in normative prohibition have also been recognized by judicial tribunals. In "The Justice Case," United States v. Altstoetter et al., III Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No. 10, 1946-1949, 3, 979, the Opinion and Judgement affirmed: "As the prime illustration of a crime against humanity...we cite 'genocide'... 'whether the crime is committed on religious, racial, political or any other grounds'...." In *Attorney General of Israel v. Eichmann*, 36 Int'l L. Rep. 277, 287-89, 294-97 (1968) (Israel, Supreme Court 1962), the Supreme Court of Israel recognized that the "crime against humanity...may be seen as extending also to the other three categories[e.g., "crime against the Jewish People" which corresponds with "Genocide," which was also stated to be "nothing but the gravest type of 'crime against humanity...,'" and the category "war crime"]," and added "it is clear that many of the acts included in the one category overlap those in the other category[i.e., crimes against humanity and war crimes]" and "[a]ll this goes to show that these categories of

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crimes, especially the first three, are interdependent, and we may therefore...group them within the broad category of 'crimes against humanity'." The Court also declared that "all acts of persecution, deportation and murder in which the accused took part, as we have found in discussing crimes against the Jewish people [i.e., genocide] and crimes against humanity, are ipso facto also war crimes...." Id. In *Quinn v. Robinson*, 783 F.2d 776, 799-801 (9th Cir. 1986), a U.S. circuit court also recognized these interrelations while adding: "Crimes against humanity, such as genocide, violate international law and constitute an 'abuse of sovereignty'...."

Similarly, the U.N. General Assembly has declared that the crime of genocide defined in the 1948 Convention also constitutes a crime against humanity. U.N. G.A. Res. 2391, 23 U.N. GAOR, Supp. (No. 18) 40, U.N. Doc. A/7218 (1968). Indeed, the history of the drafting of the Genocide Convention confirms the widespread expectation that genocide is a crime against humanity and has legally relevant roots in the Nuremberg prosecutions. See, e.g., 1948-49 Yearbook of the United Nations 957 (Government of the United States reference to Nuremberg as background), (Government of Saudi Arabia proposal [U.N. Doc. A/C.6/86 of 27 Nov. 1946] recognizing genocide as crime against humanity); 3 U.N. GAOR, pt. I (Sixth Committee), at 4 (63rd Meeting, 30 Sept. 1948) (Government of the United States statement that Nuremberg decision covers acts of genocide "committed during, or in connection with war"); id. at 38 (67th Meeting, 5 Oct. 1948) (Government of Brazil recognition that "genocide committed in time of war had particular legal characteristics which had already been defined at Nuremberg under the heading of crimes against humanity."); 3 U.N. GAOR, pt. I (Sixth Committee), at 228 (27 Oct. 1948) (Government of Yugoslavia statement about Nuremberg trial and background re: genocide); id. at 184-85 (82nd Meeting, 23 Oct. 1948) (Government of Yugoslavia recognition that genocide related to instance of Nazi disbursement of a Slav majority from a certain part of Yugoslavia in order to establish a German majority there,

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forcing Slavs to abandon their homes); *id.* at 104 (74th Meeting, 14 Oct. 1948) (statement of the Soviet Union: "It was during the Nuremberg trials that the term genocide was used for the first time, in particular in the Bill of Indictment and the reasons adduced for the sentence, where it was defined as follows: extermination of racial and religious groups in the occupied territories.").

Moreover, the new U.S. Restatement (Third) of the Foreign Relations Law of the United States (1987) recognizes that genocide is a violation of the customary international law of human rights. *Id.* at Section 702(a), adding "genocide was in fact considered a 'crime against humanity' in the indictments brought under the Nuremberg Charter, the principles of which were affirmed by the United Nations General Assembly...." *Id.*, Section 702, Reporters' Note 3. Although writing before the term "genocide" was coined, Johann Bluntschli also wrote in 1866 that "inter-necine wars and wars of annihilation against nations or races susceptible of existence and culture constitute a violation of the law of war...." Bluntschli on the Law of War and Neutrality--A Translation From His Code of International Law 15, para. 26 (Francis Lieber trans.) (at U.S. Army T.J.A.G. School, ICL Library). See also Jordan J. Paust & Albert P. Blaustein, "War Crimes Jurisdiction and Due Process: The Bangladesh Experience," *Vanderbilt J. Transnational Law* 1, 21-22 (1978) ("There is ample evidence of a customary, inherited expectation that genocide was actually prohibited as a violation of the customary international law of war."); Louis Henkin, Richard C. Pugh, Oscar Schachter & Hans Smit, *International Law* 986 (2 ed. 1987) ("The Nuremberg Charter applied a customary international law of human rights in charging that Nazi war criminals, *inter alia*, with 'crimes against humanity'...The U.N. Charter codifies that customary law and renders applicable to all states at least such human rights law as was invoked at Nuremberg."); Telford Taylor, *Final Report to the Secretary of the Army on the Nuremberg War Crimes Trials Under Control Council Law No. 10*, at 65 (1949) ("crimes against

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humanity'..., when committed..., these were also 'war crimes.'"); id. at 225 ("in the 'Einsatzgruppen Case' [regarding] the Jewish exterminations...it was charged that these murders constituted not only 'war crimes' but also 'crimes against humanity.'").

Even the Government of Yugoslavia (Serbia and Montenegro) formally admits, and is now therefore estopped to deny, that "genocide" can be "carried out by the commission of very serious war crimes which are [also] in violation of the obligation not to infringe upon the essential human rights," and that these certainly can involve violations of the "Geneva Conventions for the Protection of Victims of War of 1949 and the 1977 Additional Protocols thereof...." See Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia (Serbia and Montenegro)), Request for the Indication of Provisional Measures, I.C.J. 3, 9-10, para. 9 (emphasis added). Thus, the Parties are in agreement that prohibitions of genocide, the laws of war, and deprivations of basic human rights are interrelated, especially in the context of the armed conflict(s) in the former Yugoslavia. Thus also, the Parties are clearly in agreement that such an interrelationship is legally relevant to (and "relates" to) "the interpretation, application or fulfillment of the" Genocide Convention within the meaning of Article IX of the Convention, although they disagree with respect to certain facts and specific applications.

Additionally, this Court has rightly recognized that "moral and humanitarian principles" are the "basis" for the Genocide Convention, that such "high ideals...provide...the foundation and measure of all its provisions," and "that 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. 15, 23-24 (1951) (emphasis added). Thus, humanitarian principles reflected, for example, in

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the 1949 Geneva Conventions and the Protocols thereto (which constitute modern conventional and customary humanitarian law binding on the Parties) as well as the 1907 Hague Convention (see infra) provide and relate to not merely the "basis," "foundation," or object and purpose of the Genocide Convention, but also, in the words of this Court, "provide" an appropriate "measure of all its provisions." At a minimum, each draws from and informs the other. As such, humanitarian principles are legally relevant to (and relate to) "the interpretation, application or fulfillment" of the Genocide Convention.

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Breaches of Humanitarian Norms

Nearly every humanitarian norm has been violated. Here, we merely highlight certain offenses.

Rape

In its Interim Report, the Commission of Experts has affirmed: "Acts such as rape, enforced prostitution or any form of sexual assault against women are explicitly prohibited in the relevant treaties in force. Superiors who authorize or tolerate the commission of such acts or who fail to take all practicable measures to prevent or suppress them are also culpable." Commission Report, supra, at p. 17, para. 59.

The Commission of Experts also noted that rape and sexual assault have been used as part of a strategy of "ethnic cleansing," that "[t]hose practices constitute crimes against humanity and can be assimilated to specific war crimes," and that "such acts could also fall within the meaning of the Genocide Convention." Commission Report, supra, at p. 16, para. 56. The experts are correct, and the crimes do fall within the Genocide Convention when used as part of such a heinous scheme.

In the 1919 list of customary war crimes prepared by the Responsibilities Commission of the Paris Peace Conference, "rape" is listed as crime number 5. "Abduction of girls and women for the purpose of enforced prostitution" is also listed therein as crime number 6. Other listed crimes can be related to the use of rape in a systematic manner or on a widespread scale as a tactic. Such related crimes include: "systematic terrorism"(no. 1), "Torture of civilians"(no. 3), "Internment of civilians under inhuman conditions"(no. 8), "Imposition of collective penalties"(no. 17), and "Indiscriminate mass arrests"(no. 33). Members of the Commission, most notably, included "Serbia"(U.S., British Empire, France, Italy, Japan, Belgium, Greece, Poland, Roumania, Serbia).

Rape is also expressly proscribed in Geneva law. Article 27 of the 1949 Geneva Civilian Convention expressly prohibits rape, and more. Article 76(1) of Protocol I and Article 4(2) (3) of

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Protocol II similarly proscribe rape. And numerous other provisions of Geneva law are relevant to the outlawry of rape. See, e.g., common article 3, para. 1, including subparas. a and c thereof; Geneva Civilian Convention, arts. 16, 31, 32, 33, 147; Protocol I, arts. 51(2), 75(1), (2)(a), (b), (d); Protocol II, art. 13(1), (2). See also Theodor Meron, Rape as a Crime Under International Humanitarian Law, 87 Am. J. Int'l L. 424 (1993). Such prohibitions are customary, and there are numerous other references to or supports for such a customary prohibition (e.g., the 1907 Hague Convention No. IV, Annex, art. 46). See, e.g., Meron, supra, at 425-28, and references cited.

Rape used as a tactic or method of committing what amounts to genocide is proscribed indirectly under paragraphs b, c, and d of Article II of the Genocide Convention. For example, rape as a tactic or method of genocide has been perpetrated in a manner "[c]ausing serious bodily or mental harm to members of the group" (para. b), "[d]eliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part" (para. c), and "[i]mposing measures intended to prevent births within the group" (para. d).