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THE HAGUE

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Public sitting

held on Thursday 2 May 1996, at 3 p.m., at the Peace Palace,

President Bedjaoui presiding

in the case concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide

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

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VERBATIM RECORD

ANNEE 1996

Audience publique

tenue le jeudi 2 mai 1996, à 15 heures, au Palais de la Paix,

sous la présidence de M. Bedjaoui, Président

en l'affaire de l'Application de la convention pour la prévention et la répression du crime de génocide

(Bosnie-Herzégovine c. Yougoslavie (Serbie et Monténégro))

COMPTE RENDU

Present:	President	Bedjaoui
	Judges	Oda
		Guillaume
		Shahabuddeen
		Weeramantry
		Ranjeva
		Herczegh
		Shi
		Koroma
		Vereshchetin
		Ferrari Bravo
		Parra-Aranguren
	Judges *ad hoc*	Lauterpacht
		Kreća
	Registrar	Valencia-Ospina

Présents : M. Bedjaoui, Président
MM. Oda
Guillaume
Shahabuddeen
Weeramantry
Ranjeva
Herczegh
Shi
Koroma
Vereshchetin
Ferrari Bravo
M.Parra-Aranguren, juges
MM. Lauterpacht
Kreća, juges *ad hoc*

M. Valencia-Ospina, Greffier

The Government of Bosnia and Herzegovina is represented by:

H.E. Mr. Muhamed Sacirbey, Ambassador and Permanent Representative of the Republic of Bosnia and Herzegovina to the United Nations,

As Agent;

Mr. Phon van den Biesen, Attorney in Amsterdam,

As Deputy-Agent, Counsel and Advocate;

Mr. Thomas Franck, Professor at the School of Law, New York University; Director, Center for International Studies;

Mr. Alain Pellet, Professor, University of Paris X-Nanterre and Institute of Political Studies Paris,

Ms. Brigitte Stern, Professor, University of Paris I (Panthéon, Sorbonne),

As Counsel and Advocates;

Mr. Khawar M. Qureshi, Barrister in London, Lecturer in Law, King's College, London,

Mr. Vasvija Vidović, Minister-Counsellor with the Embassy of Bosnia and Herzegovina in Brussels, Representative of the Republic of Bosnia and Herzegovina at the International Criminal Tribunal for the former Yugoslavia

Mr. Marc Weller, Assistant Director of Studies, Centre for International Studies, University of Cambridge, Member of the Faculty of Law of the University of Cambridge,

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Mr. Pierre Bodeau, Research Assistant/Tutor, University of Paris X-Nanterre,

Mr. Michiel Pestman, Attorney in Amsterdam,

As Counsellors;

Mr. Hervé Ascensio, Research Assistant/Tutor, University of Paris X-Nanterre,
Ms. Marieke Dremth,
Ms. Froana Hoff,
Mr. Michael Kellogg,
Mr. Harold Kocken,
Ms. Nathalie Lintvelt,
Mr. Sam Muller,
Mr. Joop Nijssen,
Mr. Eelco Szabó,

As Assistants.

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M. Hervé Ascencio, allocataire-moniteur à l'Université de Paris X-Nanterre,
Mme Marieke Drenth,
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M. Harold Kocken,
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Mr. Ian Brownlie, C.B.E., F.B.A., Queen's Counsel, Chichele Professor of Public International Law,

Mr. Miodrag Mitic, Assistant Federal Minister for Foreign Affairs of the Federal Republic of Yugoslavia (Ret.),

Mr. Eric Suy, Professor in the Catholic University of Leuven, formerly Under-Secretary-General and Legal Counsel of the United Nations,

as Counsel and Advocates;

Mr. Stevan Djordjevic, Professor of International Law, Belgrade University,

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M. Miodrag Mitic, ancien ministre adjoint des affaires étrangères de la République fédérative de Yougoslavie (Serbie et Monténégro),

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M. Stevan Djordjevic, professeur de droit international à l'Université de Belgrade,

M. Shabtai Rosenne, ambassadeur,

M. Gavro Perazic, professeur de droit international à l'Université Podgorica,

comme conseils.

Le PRESIDENT : Veuillez vous asseoir. La Cour reprend ses audiences de plaidoiries dans cette affaire relative à la *Convention sur le génocide* en ouvrant cet après-midi le second tour de plaidoiries. La Yougoslavie s'exprimera la première. Nous avons appelé à la barre le professeur Ian Brownlie. Je voudrais vous signaler que le Vice-Président qui est légèrement souffrant regrette de ne pouvoir participer à la présente séance de cet après-midi. Je donne donc la parole au Professeur Ian Brownlie.

Mr. BROWNLIE: Thank you, Mr. President.

Mr. President, Distinguished Members of the Court,

The Forensic Approach Adopted by the Applicant State

Before I approach my main tasks this afternoon, it is necessary to remind the Court of the eccentricities of the forensic style and general approach adopted by the delegation on the other side.

First, there was a general avoidance of specifics. The tactic was to make a comment upon one item in a series, a comment which did not touch on the substance of things, and then to ignore the series of items as a whole. This was Professor Franck's way of dealing with the significant literature on the subject. The point at issue, that is, the territorial scope of application of the Genocide Convention, was for the most part ignored. We were told that the piece in the *Yale Law Journal* was unimportant and that reference should be made to "the most highly qualified publicists". But we were also told that the Applicant's lawyers had no duty to examine the literature. "Why should we?" said Professor Franck.

Secondly, the other side deliberately ignores the fact that Article IX of the Convention is a compromissory clause and does not create responsibilities *in vacuo*.

Thirdly, the Applicant State has spent very little time or effort in addressing the content of the preliminary objections in relation to the provisions of Article IX. And Mr. President, in yesterday's proceedings it was 12.25 before Article IX was referred to.

Fourthly, there was a general tendency to avoid referring to Articles IV, V and VI of the Genocide Convention. These are, no doubt, inconvenient for the other side in that they provide a clear indication as to the conditions in which the Convention is applicable.

Fifthly, there is a general dislike of resort to specific demonstration, and this was evidenced by appeals to the Court to decide issues as the Applicant wishes, why, because the answer is "obvious".

I shall now move on to address specific issues, and first of all, the question of the existence of a dispute.

The Existence of a Dispute

Yesterday counsel for the Applicant assured the Court that a "dispute" exists for the purposes of Article IX and he quoted the classical definition from the *Mavrommatis Palestine Concessions* case.

But the difficulty, Mr. President, is that counsel for the Applicant then refers to the alleged types of liability which fall outside the provisions of the Convention and which therefore cannot involve disputes falling within the provisions of Article IX.

And here the *ad hoc* jurisprudential style of the Applicant State comes into play. Professor Franck offered the Court a series of alleged violations of the Convention "by the Respondent". The first of these was

"that Respondent has committed genocide" and Articles I, II and III of the Convention were relied upon.

But these provisions refer exclusively to the acts of individuals. The *travaux* makes this clear, and so do the provisions of Article IV which are as follows:

> "Persons committing genocide or any of the other acts enumerated in Article III shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals."

The subject-matter of the alleged violations does not represent a dispute within the provisions of Article IX.

The same is true of Professor Franck's other offerings. Thus Article IV is invoked as the basis of the alleged violation: "that persons for whom the Respondent is legally responsible have committed or aided such acts of genocide". Mr. President, that is a travesty of the provisions of Article IV. These can only be applied in conjunction with the provisions of Article III to which it expressly refers. Article IV makes it clear that State responsibility is not involved. What is involved is the criminal responsibility of individuals.

The result is that Professor Franck has provided a series of formulations of alleged "disputes" which conspicuously fall outside the provisions of Article IX.

Issues of State Responsibility

The reasoning offered to the Court in relation to the question of the existence of a dispute reveals the fundamental confusion behind the thinking of the Applicant concerning the Genocide Convention.

Professor Franck has said that the issue of civil or criminal responsibility is perfectly clear, that the Memorial (pp. 209-213) make

this clear, and that of course the remedy envisaged by Article IX is civil.

Such generalities do not alter the fact that both in the Memorial and in the speech of Professor Franck the Convention is consistently misapplied.

Thus in the Memorial there are assertions of direct responsibility on the part of Yugoslavia for acts of genocide. This appears at pages 186-188 of the Memorial. Again, at pages 200-204, Article IX is relied on as the basis for assertions of State responsibility for acts of genocide. And the same is true of the Submissions.

This major confusion also affects much of Professor Franck's speech. Although affirming the civil nature of responsibility under the Convention, his practical applications involve assertions of direct responsibility of the Contracting parties to the Convention for criminal acts. This appears for example in paragraph 6 of his speech and also in the various sections devoted to conspiracy, complicity and incitement.

Perhaps the most serious confusion derives from the insistence that Article IX is a substantive provision. It is not. It is a straightforward compromissory clause. In all this there is an almost endearing arrogance in the forensic approach of the other side.

The *travaux* are relied upon but not in detail because that would reveal the true picture.

As for the literature, we still have to ask why it is that all these experts, covering a span of some years failed to see what we are now told is "obvious". And yet the views offered by Professor Franck stand in splendid isolation.

It is, at the least, a pity that his view is not supported by the *Yale Law Journal*, Professor Kunz, Jean Graven, Judge Manley Hudson,

Dr. Whiteman of the State Department, Professor Sibert, Dr. Robinson, the Sorensen *Manual* or Professor Shaw.

It can also be recalled that the one serious authority relied upon, the 9th ed. of Oppenheim, by Jennings and Watts, does not support the Applicant's position when the full passage is examined.

No attempt was made to rehabilitate this citation of Oppenheim. As Professor Franck would no doubt say, 'Why should we?'

And, Mr. President, I can only hope that Christopher Columbus, Ibn Battuta and other travellers spent more time in the libraries before setting out on their journeys than our colleagues opposite. After all, the Application is dated 20 March 1993, and a Memorial has been filed.

Genocide as an Offence *Erga Omnes*

Counsel for the Applicant also invokes the principle that genocide involves a peremptory norm and that, consequently, all acts of genocide, wherever committed, constitute a violation actionable by any other party to the Convention.

Mr. President, in my submission this argument faces two substantial obstacles.

In the first place, it confuses the issue of *locus standi* with the different question of the territorial application of the Convention and of its applicability in general.

Secondly, the invocation of peremptory norms does not absolve the Court, which is a court of law, from a normal determination of its competence and of the justiciability of the issues presented in the Application.

The truth of my second proposition is attested by the decision of the Court in the *East Timor* case.

And if I could remind the Court of the relevant passage. The Court said:

> "However, Portugal puts forward an additional argument aiming to show that the principle formulated by the Court in the case concerning *Monetary Gold Removed from Rome in 1943* is not applicable in the present case. It maintains, in effect, that the rights which Australia allegedly breached were rights *erga omnes* and that accordingly Portugal could require it, individually, to respect them regardless of whether or not another State had conducted itself in a similarly unlawful manner."

And the Court continues;

> "In the Court's view, Portugal's assertion that the right of peoples to self-determination, as it evolved from the Charter and from United Nations practice, has an *erga omnes* character, is irreproachable. The principle of self-determination of peoples has been recognized by the United Nations Charter and in the jurisprudence of the Court (see *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971*, pp. 31-32, paras. 52-53; *Western Sahara, Advisory Opinion, I.C.J. Reports 1975*, pp. 31-33, paras. 54-5);
>
> It is one of the essential principles of international law. However, the Court considers that the *erga omnes* character of a norm and the rule of consent to jurisdiction are two different things. Whatever the nature of the obligations invoked, the Court could not rule on the lawfulness of the conduct of a State when its judgment would imply an evaluation of the lawfulness of the conduct of another State which is not a party to the case. Where this is so, the Court cannot act, even if the right in question is a right *erga omnes*." (*I.C.J. Reports 1995*, p. 102, para. 29.)

The issue there was, of course, the effect on the rights of Third States. Here it is the argument that the compromissory clause should be given a distorted application by reason of the principle of *erga omnes*.

Territorial Applicability of the Convention

I shall move now to the fifth preliminary objection of Yugoslavia, namely, that there is no dispute between the Parties falling within the provisions of Article IX of the Genocide Convention because at the

material time Yugoslavia had no territorial jurisdiction in the relevant areas.

The Genocide Convention can only apply when the State concerned has territorial jurisdiction in the areas in which the breaches of the Convention are alleged to have occurred. The key provisions of the Convention involve the duty of States "to prevent and to punish the crime of genocide" (Art. I), the enactment of the necessary legislation to give effect to the Convention, and the trial of persons charged with genocide "by a competent tribunal of the State in the territory of which the act was committed" (Art. VI). It is my submission that the Respondent State did not have territorial jurisdiction or control, either for enforcement purposes or for prescriptive purposes, in the relevant areas in the period to which the Application relates.

The Applicant State has signally failed to address this issue effectively in these oral hearings.

The actual provisions have been treated as secondary to various general principles none of which can override the text of the Convention and the evidence of the *travaux*. In general the Convention has been reconstructed and reduced so that it now consists, in the eyes of the Applicant State, only of Article III and Article IX.

The responsibility involved is in fact of the normal type and it can only relate to breaches of the provisions of the Convention. The provisions are only applicable to the territory of the State or the territory within its control.

Article IX, the jurisdictional clause, cannot be used as a gateway to liabilities not envisaged in the actual provisions of the Convention.

The First Preliminary Objection: the Civil War Issue

Next I shall consider the response of the other side to the first preliminary objection of the Respondent State.

This is based on the fact that at the material time a civil war existed in Bosnia and that the key elements adduced by the Memorial relate to civil strife. Consequently, there is no dispute between Bosnia and Yugoslavia for the purposes of Article IX of the Genocide Convention, and this is apparent on the face of the Application and the Memorial.

Mr. President, Members of the Court, the response of the other side to this objection to the admissibility of the claim has verged upon the inarticulate. The main point is not whether or not there was a civil war as such, but that the Federal Republic of Yugoslavia was not a party to the armed conflict.

In this connection, as elsewhere, the approach of the Applicant State has been, in forensic terms, very eccentric.

In my role as counsel, I introduced seven items of evidence. The response of my learned colleague, Professor Pellet, was to criticize the status of one of the seven items, and to ignore the others.

In other words, the other side has made no effort to challenge either the veracity or the expertise of the following:

- The opinion of Lord Owen, one of the leading figures on the diplomatic stage at the material time, and Co-Chairman of the International Conference for the Former Yugoslavia.

- The opinion of the former Mission Head, the United Nations Protection Forces.

- The opinion of the Director of the Defence Intelligence Agency, the United States Defence Department.

- Keesing's Press Digest, *Record of World Events*, and

- The opinion of the German Federal Minister of Justice speaking in her official capacity.

As I have said, counsel for the Applicant made no attempt to challenge either the veracity or expertise of these sources.

Moreover, Professor Franck ended up observing: "Of course, there was a civil war in Bosnia and Herzegovina."

Again, the relevant United Nations documents demonstrate that Yugoslavia was not a party to the armed conflict within Bosnia and, once again, the other side has made no attempt to comment upon the specific documents adduced by the Respondent State.

It is to be hoped that at least in the second round counsel for the Applicant State can find the time to comment upon the substance of the specific documents invoked by the Respondent State. It would be a great pity if we were all to depart on new journeys of discovery on Friday without having heard that response.

There is very substantial evidence that the conflict was a series of civil wars to which Yugoslavia was not a party. No effective contradiction has been offered by the other side.

In this context I would say a final word about the *Tadić* case in the Appeals Chamber. In his speech Professor Franck criticized the reference to this decision on behalf of the Applicant State. He said:

> "Contrary to the Respondent's analysis of that Decision, the Appeals Chamber did *not* decide that the war in Bosnia and Herzegovina was purely internal. Rather, it held that 'the International Tribunal has jurisdiction over the acts alleged in the indictment,' including genocide 'regardless of whether they occurred within an internal or an international armed conflict'."

The point here, Mr. President, is that the careful analysis produced by the Appeals Chamber, which I quoted (CR 96/7, pp. 44-45), clearly

does not accept that the Bosnian Serbs were acting as the agents of Yugoslavia.

Preliminary and Pre-preliminary Objections: The Standard of Proof

Mr. President, I turn finally to a question which must face the tribunal in proceedings of this kind. The question is: according to which standard of proof should the issue of competence be decided?

No doubt the State objecting has an initial burden of proof, but at the end of the day, the Court is bound to make a final determination of its jurisdiction and of its competence in general. Such a determination must be based upon all the relevant legal issues taken in conjunction.

Included among those legal issues are questions of mixed fact and law, such as the existence or not of any territorial jurisdiction of Yugoslavia at the material time and in the relevant areas.

In our submission the Applicant State has failed to provide a prima facie basis, either in law or in fact, for a decision that a dispute exists in accordance with the provisions of Article IX. The Applicant State has failed to provide sufficient evidence to contradict the evidence adduced by the Respondent State to the effect that the events to which the Application refers related to an armed conflict to which Yugoslavia was not a party.

Alternatively, and independently of this first proposition, the Application and the Memorial do not reveal the existence of a dispute to which the provisions of the Genocide Convention are applicable and this in our submission was amply confirmed yesterday by the analysis placed on the record by Professor Franck.

Mr. President, I would like to thank you and your colleagues for your patience through both rounds of these proceedings and I would ask you to give the floor to my friend and colleague, Professor Eric Suy.

Mr. PRESIDENT: I thank you very much Professor Ian Brownlie for your statement. I give now the floor to Professor Eric Suy.

REPLIQUE RELATIVE A LA SUCCESSION D'ETATS EN MATIERE DE TRAITES

M. SUY : Merci Monsieur le Président.

Monsieur le Président, Messieurs les Membres de la Cour, je voudrais faire quelques brèves observations à propos de la présentation faite hier après-midi par ma collègue Mme Stern à propos de la problématique de la succession d'Etats en matière de traités. Ce faisant, je suivrai pour autant que possible la structure de l'exposé de Mme Stern.

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1) Il y a tout d'abord l'objection de la République fédérale de Yougoslavie du 15 juin 1993, objection à la notification de succession par la Bosnie-Herzégovine à la convention sur le génocide.

a) La Bosnie-Herzégovine se pose d'abord la question de savoir pour quels motifs la Yougoslavie n'a fait aucune objection aux notifications de succession à la convention sur le génocide émanant d'autres Etats nés sur le territoire de l'ex-Yougoslavie. Mme Stern relève également l'absence d'objection aux notifications de succession de la Bosnie-Herzégovine concernant, notamment, les pactes des Nations Unies sur les droits de l'homme.

Selon la Bosnie-Herzégovine, la Yougoslavie voulait ainsi se soustraire au mécanisme de l'article IX de la convention sur le génocide. Ceci serait illustré par le fait que cette objection est intervenue plus de deux mois après l'ordonnance de votre Cour en indication de mesures conservatoires du 8 avril 1993.

La raison de l'absence d'objection contre les autres déclarations de succession est, en effet, que la Bosnie-Herzégovine avait introduit une

requête devant votre Cour sur la base de l'article IX de la convention. Une absence d'objection aurait pu être interprétée comme une reconnaissance implicite de la Bosnie-Herzégovine. Ce risque n'existait pas pour les autres républiques non reconnues par la Yougoslavie.

b) C'est à tort aussi, que la Bosnie-Herzégovine s'est prévalue du contenu de l'objection formulée par la Yougoslavie.

Dans la note en question, la Yougoslavie affirme que la Bosnie-Herzégovine est tenue de respecter les règles applicables à la prévention et la répression du crime de génocide en vertu du droit international général. Cela veut dire qu'il existe, indépendamment de la convention, une obligation de prévenir et de réprimer le crime de génocide commis par les individus.

Mais la Yougoslavie insiste que l'article IX n'est pas une disposition du droit international général. En tant qu'elle a trait au règlement judiciaire obligatoire des différends, cette clause a un caractère purement contractuel. Je me réfère une fois encore à l'analyse de sir Humphrey Waldock, que j'ai citée lors de ma première plaidoirie. Vous vous rappellerez que pour sir Humphrey les clauses contractuelles excluent la succession automatique dans les traités-loi.

2) Il est faux de prétendre que la Yougoslavie veut empêcher la Bosnie-Herzégovine de participer à la convention sur le génocide. Nous avons dit dans notre plaidoirie que la Bosnie-Herzégovine peut, par l'acte d'engagement unilatéral, devenir partie à la convention sur le génocide. Mais cet engagement ne saurait avoir des effets juridiques entre Etats qui ne se reconnaissent pas mutuellement.

3) J'en viens maintenant à *l'argument selon lequel il y aurait continuité automatique à une convention universelle de protection des droits de l'homme* les plus fondamentaux.

J'ai, lors de ma première plaidoirie, montré que la règle de la succession automatique n'est pas d'application générale. Mme Stern ne l'a pas réellement contesté. Je relève brièvement que, contrairement à ce qu'affirme ma collègue, les avis 1 et 9 de la commission Badinter n'établissent nullement que la Yougoslavie aurait consenti à l'application de la convention sur la succession d'Etats en matière de traités. La commission Badinter se réfère uniquement, notamment dans l'avis n° 9, aux *principes de droit international* incorporés dans la convention. Ces principes, qui plus est, ne devaient constituer qu'une base pour les discussions entre les parties.

La Bosnie-Herzégovine prétend toutefois que la succession automatique vaudrait pour les conventions universelles en matière des droits de l'homme. La Yougoslavie le conteste. C'est donc sur cette prétendue exception que nous devons nous concentrer.

a) Mme Stern considère comme particulièrement significative, et preuve d'une *opinio juris*, la position adoptée à la cinquième réunion des *présidents des organes* créés en vertu d'instruments relatifs aux droits de l'homme, qui s'est tenue fin septembre 1994. La position de cette réunion de présidents appelle trois remarques.

Premièrement, à la fin du rapport, de cette réunion des présidents, nous lisons la phrase suivante :

> «Les présidents ont fait observer toutefois *qu'à leur avis* les Etats successeurs étaient automatiquement liés par les obligations découlant des instruments internationaux relatifs aux droits de l'homme à compter de leur date respective d'indépendance et que le respect de ces obligations ne devait pas dépendre d'une déclaration de confirmation faite par le Gouvernement de l'Etat successeur.» (Etat des pactes relatifs aux droits de l'homme, *Succession d'Etats en matière de traités internationaux relatifs aux droits de l'homme*; rapport du Secrétaire général, E/CN.4/1995/80, par. 10.)

Ce passage, Monsieur le Président, mérite une lecture très attentive.

De la part des présidents des comités, les termes «à leur avis» ont une signification toute particulière. Ils impliquent que les opinions exprimées ne reflètent que l'avis personnel des présidents de ces organes. Emanant d'experts siégeant à titre individuel et personnel, ces opinions ne sauraient certainement être considérées comme des éléments pouvant servir comme preuve d'une *opinio juris* attribuée à des Etats.

Deuxièmement, les présidents de ces organes (de ces comités créés par les conventions sur les droits de l'homme) expriment tout d'abord leur *préoccupation* qu'un certain nombre d'Etats successeurs n'avaient pas encore officiellement confirmé leur succession au Secrétaire général. Or, pourquoi se préoccuper de l'absence d'une confirmation de succession s'il y a, comme le prétend la Bosnie-Herzégovine, une succession automatique ?

Enfin, les présidents de ces comités de ces organes invitent tous les Etats successeurs qui ne l'avaient pas encore fait «à confirmer dès que possible *leur adhésion par succession* à ces instruments» (les italiques sont de nous).

b) Ceci nous mène à la *Commission des droits de l'homme*, qui a également été citée par Mme Stern. La Commission a «encouragé les Etats à confirmer officiellement qu'ils demeuraient liés par les obligations contractées au titre de traités internationaux relatifs aux droits de l'homme».

Mais nonobstant ces exhortations et ces affirmations de confirmation, il reste que les Etats successeurs qui ne notifient pas leur confirmation ne sont pas mentionnés par le Secrétaire général comme étant parties aux conventions multilatérales, même sur les droits de l'homme (voir E/CN.4/1995/80, p. 12, annexe).

Enfin, Monsieur le Président, il convient d'apprécier à leur juste

portée ces déclarations des organes des droits de l'homme. La formule utilisée, est très exactement la suivante, que

> «les Etats successeurs étaient automatiquement liés *par les obligations découlant des instruments internationaux* relatifs aux droits de l'homme à compter de leur date respective d'indépendance» (E/CN.4/1995/80).

Il est donc question seulement des *obligations* qui *découlent* de ces instruments. Il n'est pas dit, que ces Etats sont *parties* aux traités. Cette distinction s'explique du fait que ces obligations découlant des pactes sont des obligations de droit international général.

c) Un *tout petit* mot encore, Monsieur le Président, sur le *Comité des droits de l'homme*. Mme Stern a dit à ce sujet - et je cite très littéralement :

> «Au moment de la présentation du rapport de la Bosnie sur les atrocités commises sur son territoire, *la présidente du Comité des droits de l'homme, Rosalyn Higgins*, a pris acte de ce que la présence de la délégation bosniaque et la soumission de son rapport témoignaient bien de la *continuité automatique*, indépendamment de toute notification...»

Cette affirmation figurait déjà dans le *Statement* de la Bosnie-Herzégovine, novembre de l'an dernier, à la page 74, au paragraphe 3.50. Il y est référé au document CCPR/C/SR.1200, du 9 novembre 1992, page 5, paragraphe 14.

Monsieur le Président, il s'agit là d'une ahurissante distorsion des faits.

D'abord, contrairement à ce qu'affirme la Bosnie-Herzégovine, le président du Comité des droits de l'homme n'était pas Mme Higgins, mais Fausto Pocar - comme il ressort, est-il utile de le dire, de la page de garde du document précité qui se trouve dans les annexes n° 3.53.

Ensuite et surtout, *ni* Mme Higgins, *ni* M. Pocar n'ont tenu les propos rapportés par la Bosnie-Herzégovine. Et je cite le document que je viens de mentionner notamment le paragraphe 14 :

> «Mme Higgins remercie la délégation de Bosnie-Herzégovine et considère sa présence comme la preuve que le Gouvernement de Bosnie-Herzégovine *s'estime tenu de faire appliquer le pacte sur son territoire*.» (Les italiques sont de nous.)

Et c'est tout.

Mme Higgins n'a fait *aucune* référence à la thèse de la succession automatique. Il n'en va pas autrement de M. Pocar, qui a seulement déclaré que : «Le Comité a estimé que tous les peuples de l'ancienne Yougoslavie avaient droit aux garanties prévues par le pacte.» (*Ibid.*, p. 2, par. 1.)

Je trouve regrettable que la Bosnie-Herzégovine doive avoir recours à de telles distorsions pour étayer sa thèse concernant la prétendue succession automatique.

La Yougoslavie soutient donc, Monsieur le Président, qu'il ne ressort pas de la pratique des organes des droits de l'homme que les Etats successeurs seraient parties aux traités sur les droits de l'homme à compter de leur indépendance. Ces déclarations signifient que le fait pour un Etat successeur de ne pas être partie à ces conventions, ne l'autorise pas à violer la coutume internationale.

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4) Je tiens encore, Monsieur le Président, à revenir sur la *distinction entre les conventions sur les droits de l'homme, et la convention sur le génocide, qui est une convention de droit international pénal* tout comme, par exemple, les nombreuses conventions sur la répression d'actes de terrorisme.

La Yougoslavie a relevé cette distinction pour montrer que les considérations invoquées pour soutenir la thèse de la succession automatique en matière de droits de l'homme ne peuvent, en tout état de cause, s'appliquer à la convention sur le génocide. Comme nous allons le

voir, cette distinction ne saurait choquer quelqu'un qui analyse la convention du point de vue de la technique juridique.

Précisons d'abord ce qui partage la Yougoslavie et la Bosnie-Herzégovine. La Bosnie-Herzégovine se prévaut du «caractère humanitaire» et du but civilisateur de la convention sur le génocide. Ce sont les expressions utilisées par votre Cour dans son avis de 1951. Elle se réfère donc aux objectifs de la convention, au sens le plus large du terme.

La Yougoslavie, en revanche, soutient que, à supposer qu'il puisse être question de succession automatique, un critère différent devrait être retenu, qui tient à l'objet du traité. J'en veux pour preuve l'analyse du professeur Rein Mullerson, qui se réfère à la *théorie des droits acquis*, et il dit :

> "human rights treaty obligations are not only obligations of a State vis-à-vis other States parties; rather, they are at the same time the foremost rights of individuals protected by relevant instruments" («The Continuity and Succession of States, by Reference to the Former USSR and Yugoslavia», *ICLQ*, 1993, p. 491).

La succession automatique devrait donc être fondée sur l'idée que les conventions sur les droits de l'homme créent des droits subjectifs - des droits acquis - en faveur des individus.

De toute évidence, ce critère présente l'avantage d'une plus grande objectivité. Selon la Yougoslavie, ce critère est également consacré par le Comité des droits de l'homme, qui a souligné que

> «tous les peuples qui occupent le territoire d'un nouvel Etat qui faisait partie de l'ex-Yougoslavie sont en droit de jouir les garanties prévues par le pacte» (E/CN.4/1995/80, p. 2, par. 3).

Or, Monsieur le Président, la convention sur le génocide ne contient aucune clause conférant des droits subjectifs aux individus. Les considérations qui pourraient éventuellement justifier une succession

automatique - qui sont des considérations de technique juridique - ne sont donc pas applicables à la convention sur le génocide.

Tout ceci est encore confirmé par les déclarations des organes des droits de l'homme cités par Mme Stern. Comme je l'ai déjà souligné, ces déclarations ne disent pas que les Etats successeurs sont *parties* aux conventions sur les droits de l'homme à compter de leur indépendance. Elles soulignent seulement que les Etats successeurs sont *liés par les obligations découlant de ces instruments internationaux*. Le principe des droits acquis contribue à expliquer cette nuance importante.

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5) Mme Stern a analysé, enfin, *l'effet de la déclaration de succession en l'absence de succession automatique*.

Tout d'abord, ma collègue s'est référée à l'auteur Marco Marcoff pour dire que la notification de succession n'est là que pour confirmer la continuité automatique et qu'elle ne serait qu'un «révélateur» de cette succession. Cette idée apparaît déjà dans le *Statement* de la Bosnie-Herzégovine (par. 6.9), où il est dit que la notification de succession du 29 décembre 1992 n'aurait aucune valeur juridique en elle-même, mais *informerait* la communauté internationale de la succession de la Bosnie-Herzégovine à la convention sur le génocide. Cette notification serait un «signal juridique» (*legal signal*) pour confirmer sa participation en tant que partie à la convention sur le génocide.

Si cette notification n'a aucune valeur juridique, comment peut-on en déduire un effet rétroactif jusqu'à la date de la déclaration d'indépendance ? Comment peut-elle créer des droits et des obligations à partir de cette date ? Sur ce point aussi, la thèse de la Bosnie-Herzégovine est remarquablement contradictoire.

Mme Stern a fait valoir aussi, que la Yougoslavie confond le droit,

et l'obligation de succéder. Je voudrais vous montrer, Monsieur le Président, que c'est au contraire la Bosnie-Herzégovine qui confond les deux hypothèses. Nous verrons que la Bosnie-Herzégovine transpose à l'hypothèse du *droit* de succéder, des considérations qui ne pourraient se justifier que pour une éventuelle *obligation* de succession.

Rappelons d'abord que j'ai développé, lors de ma première plaidoirie, deux thèses qui menaient à situer l'entrée en vigueur de la convention sur le génocide entre les Parties au présent litige en mars 1993.

Ces deux hypothèses sont inspirées d'une idée unique. Il s'agit d'éviter qu'un Etat partie à une convention soit lié *à son insu* et contre sa volonté vis-à-vis d'un autre Etat. Puisque la codification du droit de succession en matière de traités continue et continuera de soulever des controverses et des solutions contradictoires, il est important, à notre avis, qu'en cette matière on en revienne à l'application du droit des traités, qui lui est universellement reconnu, et qui fournit des réponses plus claires et plus logiques. Après tout, la succession en matière de traités n'est qu'un aspect tout particulier du droit des traités en général.

Mme Stern a passé sous silence ce problème cardinal. Elle a fait valoir uniquement que l'analyse de la Yougoslavie était «inadmissible», parce qu'il en résulterait un *time-gap* dans l'application des conventions.

Selon la Yougoslavie, cet argument du *time-gap* ne fonde aucunement la prétendue rétroactivité des déclarations de succession, par lesquelles un Etat consent *volontairement* à être lié par un traité.

En effet, dans la présente hypothèse, l'Etat successeur aurait le droit, mais non l'obligation, de devenir partie à un traité par succession. Il aurait donc la faculté de ne pas devenir partie à ce

traité. Il pourrait aussi choisir d'y adhérer. Rien ne garantirait donc l'application continue du traité, ni même l'absence de *time-gap*.

L'argument du *time-gap* est compatible seulement avec la thèse de la succession automatique qui, nous l'avons vu, n'est pas de droit.

La thèse de la Yougoslavie tient donc en deux points : premièrement, la succession automatique ne fait pas partie du droit en vigueur; deuxièmement, dès lors qu'il en est ainsi, l'argument tiré du time-gap est dépourvu de tout fondement. Il faut donc admettre qu'un Etat ne peut être lié à son insu vis-à-vis d'un autre Etat qui a fait une déclaration de succession.

Cette thèse, Monsieur le Président, n'est nullement contredite par la pratique invoquée par la Bosnie-Herzégovine. Rappelons une fois encore que les organes des conventions sur les droits de l'homme considèrent que l'Etat successeur *est lié par les obligations découlant du traité* à compter de la date de son indépendance. Ceci n'équivaut pas à dire que l'Etat successeur devient partie au traité à la même date.

En tout état de cause, rien ne s'oppose à ce que les Etats parties *conviennent implicitement* de reconnaître la qualité de partie à l'Etat successeur avec effet rétroactif. Il ne peut toutefois en être question que moyennant le consentement des autres parties au traité.

Je conclus donc qu'une analyse correcte des principes juridiques et de la pratique mènent à la conclusion, *premièrement*, qu'il n'y a pas de succession automatique dans la convention sur le génocide, et *deuxièmement*, qu'une déclaration de succession volontaire ne peut avoir d'effets rétroactifs.

Ceci, Monsieur le Président, Messieurs de la Cour, termine ma plaidoirie dans la présente affaire. Je m'en remets maintenant à la

justice, et vous remercie de l'attention que vous avez bien voulu m'accorder.

Le PRESIDENT : Je vous remercie Monsieur le professeur Eric Suy pour votre exposé et j'appelle à la barre Monsieur le professeur Perazic.

M. PERAZIC : Monsieur le Président, Messieurs les Juges.

Dans la pratique des relations internationales, dans la science du droit international et l'histoire diplomatique, ce cas est, bien sûr, exceptionnel, mais aussi difficile à comprendre. Hier on a dit que c'était la première fois dans l'histoire qu'un Etat est inculpé pour le génocide.

Comme l'a indiqué le professeur Brownlie dans son exposé, l'Etat de Bosnie-Herzégovine est né et vivait jusqu'aux accords de Dayton en une guerre civile. C'est pour cela que devant le nom de l'Etat de Bosnie-Herzégovine nous utilisons l'adjectif «prétendu». Ce n'est pas sans raison.

Nous avons le sentiment que cette guerre a été aidée par la communauté internationale, avant tout par une organisation régionale qui, elle, imposait le changement des frontières administratives en frontières étatiques et c'est ainsi que ces unités administratives sont devenues des Etats. En utilisant un vieux principe *uti possidetis*, appliqué depuis le début du siècle passé à l'occasion de la décolonisation, la communauté internationale a favorisé la collision entre le droit des peuples à l'autodétermination et le principe de l'intégrité territoriale de l'Etat. A cause du mélange ethnique dans cette république centrale de l'ancienne Yougoslavie, nous avons tous eu des conflits opposant les uns contre les autres. C'est ainsi qu'ont eu lieu les conflits des Serbes contre les

Croates et les Musulmans, des Musulmans contre les Croates, des Musulmans contre les Musulmans.

Ainsi, toutes les parties au conflit ont proclamé leurs Etats respectifs et s'efforçaient de les présenter comme légaux et légitimes.

La communauté internationale comptait de manière persistante seulement sur la Bosnie-Herzégovine comme l'unique Etat séparé de la Yougoslavie. Elle a proclamé son indépendance le 6 mars 1992, la Communauté européenne l'a reconnue le 6 avril 1992, elle est devenue membre de l'ONU le 22 mai 1992.

Monsieur le Président, Messieurs les Juges, nous savons tous que de nombreux Etats importants et capables comme tels restaient pendant des décennies en dehors de l'ONU pour à peine prendre leur siège auquel ils avaient droit, tandis que celui qui n'est pas encore né devient membre des Nations Unies. Comment pouvait-il être capable et disposé à remplir ses obligations qui découlent de la Charte des Nations Unies ? Tout cela a eu lieu au cours de la guerre civile qui était menée sur le fond ethnique et religieux.

A cette époque-là les parties au conflit concluent de différents arrangements militaires portant sur l'armistice, le mémorandum sur l'élargissement de l'application de la convention de Genève sur le droit humanitaire, sur l'échange des prisonniers, etc. A ce niveau-là se limitait la capacité contractuelle de toutes les trois parties au conflit. Donc, cet Etat ne disposait ni du *ius tractatum* ni du *ius representionis*. Dans cette période-là, la Yougoslavie, en tant que l'un des fondateurs de la Société des Nations ainsi que des Nations Unies se voit exclue de différents organes et organisations des Nations Unies.

Nous devons mentionner surtout, parmi quelques hommes d'Etat, lord Carrington qui à l'époque avait proposé le plan de la destruction de la

Yougoslavie en déclarant «l'erreur tragique de la reconnaissance de la Bosnie» mais malheureusement trop tard.

Cette guerre civile a été différente selon les Etats dans lesquels elle était menée. Au début, depuis le mois de mars 1992 jusqu'au mois de mai de la même année, à savoir jusqu'au retrait de l'armée populaire yougoslave de la Bosnie, les parties au conflit y étaient la Yougoslavie, d'une part, et le territoire rebelle, de l'autre. Donc, l'armée populaire yougoslave, comme toute autre armée dans le monde, selon la constitution du pays, défendait l'ordre constitutionnel et dans le premier temps s'efforçait de se trouver entre les parties au conflit pour empêcher le conflit entre-ethnique jusqu'au moment où elle a été attaquée par les forces rebelles. Depuis cette date, la guerre civile a continué sans l'armée populaire yougoslave entre les unités armées serbes d'un côté, et celles des Musulmans et Croates de l'autre, et entre-temps un conflit s'est produit entre ces dernières. Toutes ces sortes de guerre ont donc été de caractère non international, à savoir elles ont eu lieu à l'intérieur de la Yougoslavie et puis à l'intérieur de la Bosnie-Herzégovine.

Maintenant la question se pose de savoir si la requête de la Bosnie-Herzégovine a été alors adressée au bon endroit. Malheureusement, il existe dans le monde le doute provoqué par le fait que les premiers jours l'armée populaire yougoslave se trouvait sur le champ de bataille avec les buts de guerre que nous venons de mentionner. N'oublions pas que le système de mobilisation dans l'ancienne Yougoslavie, comme dans de nombreuses armées dans le monde, se fondait sur le principe territorial surtout en ce qui concerne la défense territoriale qui était plus massive et sous le commandement des autorités locales. Au moment de la décision sur la sécession, les membres de l'armée populaire yougoslave de

nationalité musulmane ont tout de suite fui dans les unités musulmanes et ceux de nationalité croate dans les unités croates. C'est parce que les partis musulman et croate ont déjà formé des unités illégales dans lesquelles se sont intégrés les déserteurs de l'armée populaire yougoslave. L'équipement militaire a connu le même sort. Musulmans et Croates luttaient pour démanteler la Yougoslavie et les Serbes pour la sauvegarder et y rester, afin de garder pour leur peuple le caractère constitutif en vue d'éviter que ce peuple ne devienne une minorité nationale, comme il était prévu dans une opinion de la commission Badinter.

On dit souvent que les Serbes ont occupé ces territoires. Nous, présents ici, dans cet honorable édifice, nous savons bien que même depuis l'instruction de Lieber datant de la moitié du dernier siècle, et jusqu'aux conventions de La Haye et de Genève, l'occupation ne peut concerner que le territoire d'un Etat étranger ennemi et non pas son propre territoire où on se trouve depuis des siècles.

Lors de la séance de la Cour le 1er mai 1996 le demandeur a indiqué plusieurs faits allégués qui devraient réfuter nos affirmations. Etant donné qu'il n'y a pas de temps pour en parler de manière plus détaillée, permettez-moi, Monsieur le Président, de faire quelques remarques seulement.

En ce qui concerne l'observation de M. Sacirbey selon laquelle la Bosnie est un Etat démocratique séculier avec une démocratie parlementaire, malheureusement les données que nous avons indiquées et que le demandeur a niées n'offrent aucun fondement à une telle conclusion. Cela est, entre autres, démontré aussi par des déclarations de membres de la plus haute autorité - présidence de la Bosnie-Herzégovine, de même que par des déclarations de l'ancien premier

ministre et ministre des affaires étrangères, M. Silajdzic. En formant l'objection à la demande du Gouvernement de la Bosnie-Herzégovine relative aux mesures provisoires, la Partie yougoslave a transmis à la Cour une photocopie des lettres de l'ancien premier ministre de la Bosnie-Herzégovine, M. Akamdzic, Croate, envoyées respectivement au président des Etats-Unis et au président du Conseil de sécurité des Nations unies, et dans lesquelles il affirme que M. Alija Izetbegovic n'a plus le mandat de président de la présidence étant donné que son mandat a depuis longtemps expiré et qu'il ne représente même pas la majorité du peuple musulman pour ne pas parler des peuples serbe et croate en Bosnie-Herzégovine. La question du mandat de M. Izetbegovic n'est pas seulement une question formelle. Elle symbolise l'usurpation de pouvoir en Bosnie-Herzégovine, contrairement à la volonté du peuple serbe et probablement du peuple croate et d'une bonne partie du peuple musulman en Bosnie-Herzégovine.

M. Sacirbey allègue que la Bosnie-Herzégovine a accepté toutes les initiatives de paix appropriées, mais il ne conteste pas et ne confirme pas non plus notre affirmation que le Gouvernement de la République de Bosnie-Herzégovine a refusé une des premières initiatives de la Communauté européenne, le soi-disant plan Cutiliero et ceci à l'époque où le conflit armé ne s'était pas encore produit, ce qui a plus tard entraîné des conséquences catastrophiques pour l'ensemble de la population de la Bosnie-Herzégovine

Pour ce qui est de notre exposé sur le principe des droits égaux et de l'autodétermination des peuples, la question de savoir si la Yougoslavie était ou non le champion dans ses efforts déployés en vue de l'autodétermination des peuples n'a aucune importance. Le fait est que la Yougoslavie, comme d'ailleurs la communauté internationale jusqu'à la

crise yougoslave, était contre une sécession unilatérale et faite par la force, ce qui correspondait non seulement à sa compréhension du droit international, mais aussi à son système constitutionnel et juridique. Le demandeur n'a avancé aucun argument ni l'opinion des milieux scientifiques qui nie la position démontrée sur ce principe. En conséquence, nous continuons à affirmer que l'accession à l'indépendance de la Bosnie-Herzégovine n'est pas en conformité avec le droit international, à savoir avec le principe de l'égalité en droit et de l'autodétermination des peuples. Nous répétons : il n' y a pas d'auteur sérieux dans le domaine du droit international qui affirme que la Bosnie-Herzégovine a eu le droit à la sécession et que la sécession ait été faite sans violations sérieuses du droit international. La sécession de force de quelques anciennes républiques yougoslaves et la reconnaissance de leur indépendance resteront un des précédents sérieux dans le développement de la communauté internationale, avec les conséquences d'une portée imprévisible.

Mme Stern considère que les événements historiques ne contribuent pas à la compréhension des problèmes. Bien que le défendeur n'ait pas analysé l'histoire en détails, il considère que celle-ci et surtout l'histoire de la deuxième guerre mondiale et du génocide qui a été perpétré contre le peuple serbe, souvent contre les mêmes familles et dans les mêmes régions et endroits, avec les menaces de la même coalition croato-musulmane pendant la sécession faite par la force, n'a pu rester sans influence sur les rapports dans la population et sur la résistance de la population serbe. Attribuer aux Serbes la vengeance pour les événements du passé n'est pas du tout correct. Merci, Monsieur le Président.

Le PRESIDENT : Je vous remercie, Monsieur Perazic, pour votre exposé. La Cour observera maintenant une pause d'une quinzaine de minutes.

L'audience est suspendue de 16 h 10 à 16 h 45.

Le PRESIDENT : Je vous prie de vous asseoir. L'audience est reprise et j'appelle à la barre S. Exc. M. Etinski, agent de la Yougoslavie.

Mr. ETINSKI: Thank you, Mr. President.

Mr. President, Distinguished Members of the Court.

At yesterday's session many unfounded contentions were made which went beyond the framework of our Preliminary Objections. I therefore submit not to make them the subject-matter of my presentation today.

As the Court is well aware, the first request for the extension of the time limit fixed by the Court for the filing of the Memorial was made by the Applicant. The Court had ordered a six-month time limit, but at the request of the Applicant it extended it to another six months. Nevertheless, the Applicant contended yesterday that the Federal Republic of Yugoslavia wishes to prolong the proceedings. The filing of the Preliminary Objections was not motivated by the desire to prolong the proceedings, rather, it was motivated by the desire to stop the proceedings. It could not be qualified as an abuse of rights.

At the beginning of yesterday's session we also were witness to an exercise in grandstanding. Pointedly, the Agent of the Applicant read the letter that Mr. Sherif Bassiouni had sent to him. In addition, he informed the Court that he had enclosed two other letters: the letter of Mr. Hans Corell, United Nations Under-Secretary-General for Legal Affairs, of 24 October 1994 to Mr. David Erne and the letter of Mr.

Sherif Bassiouni of 24 July 1994 also to Mr. David Erne. The other letter reads:

"Dear David:

To my great surprise I received from two sources a copy of your report to this Institute. The report's cover, which is attached, is on United Nations stationery. The placement of my name under the title suggests that I am the report's author. The report has been distributed to officials of foreign governments and to members of the press without authorization. As you know, the report was prepared subject to a confidentiality agreement. Furthermore, the report is not an official document of the United Nations nor of the Commission of Experts. Therefore, I view its distributions and misrepresentations as a very serious matter. If you have any knowledge concerning the distribution of the document, I would appreciate your informing me immediately and taking immediate action to prevent the further dissemination of the document.

Sincerely yours,
M. Sherif Bassiouni
Professor of Law."

I regret very much indeed that this misunderstanding should have occurred between Messrs. Bassiouni and Erne of which I was not aware. However, this is not the only case that a United Nations employee has disclaimed an objective and honest report.

Considering that no new important argument was presented in yesterday's hearing concerning the alleged succession of the Applicant to the Genocide Convention. I continue to maintain the arguments of the Federal Republic of Yugoslavia submitted in the first-round hearing.

The Applicant holds in reserve certain matters which it considers could provide additional bases of the jurisdiction of the Court and it brings them up occasionally before the Court or indicates that it might do so. It submitted the alleged additional bases of the jurisdiction of the Court in its two requests for the indication of provisional measures. The Applicant did not specify the additional basis in the Application, nor did it explain it specifically in the Memorial.

In paragraphs 4.1.0.9 and 4.1.0.10 of the Memorial, page 132, the Applicant says:

> "It is 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 has also jurisdiction on the basis of *forum prorogatum*, to the extent that 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" ...
>
> 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 ..."

Accordingly, the Applicant itself says that these bases of the jurisdiction of the Court are less obvious and less indisputable.

Furthermore, in paragraph 4.2.4.5, page 178, of the Memorial, the Applicant says:

> "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 obligation 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 has accepted the Court's jurisdiction on the basis of Article IX of this Convention."

As the Applicant provided no new argument in connection with the alleged new additional bases of the jurisdiction of the Court, it left no possibility to the Respondent for new commentaries. For, all the alleged additional bases of the jurisdiction of the Court were the subject-matter of the comment and rejection by the Respondent in the procedure related to the indication of the provisional measures of protection.

However, in paragraphs, 23, 25, 27 and 28 of the Statement of 14 November 1995, the Applicant reverses to the alleged additional bases of

the jurisdiction of the Court. Bosnia and Herzegovina reserves again "its right to revive all or some of the previous submissions and requests" and goes on to say that it "integrally maintains that the jurisdiction of the Court to deal with its submissions is based, alternatively and/or jointly on four different grounds."

In connection with the alleged additional bases of its jurisdiction, in its Order of 13 September 1993, the Court said:

> "Whereas the Agent of the Applicant has, both in its Application instituting proceedings and in its second request for the indication of provisional measures, reserved "the right to revise, supplement or amend" the Application and the request respectively; whereas in reliance on these reservations, by letters dated 6 August, 10 August and 13 August 1993, he submitted that the Court's jurisdiction is grounded not only on the jurisdictional bases previously put forward but also on certain additional texts, specified in the letters referred to."
>
> Whereas the Applicant cannot, simply by reserving 'the right to revise, supplement or amend' its Application or requests for provisional measures, confer on itself a right to invoke additional grounds of jurisdiction, not referred to in the Application instituting proceedings; whereas it will be for the Court, at an appropriate stage of the proceedings, to determine, if necessary, the validity of such claims; whereas however, as the Court has recognized, 'An additional ground of jurisdiction may ... be brought to the Court's attention' after the filing of the Application,
>
> > 'and the Court may take it into account provided the Applicant makes it clear that it intends to proceed upon that basis ... and provided also that the result is not to transform the dispute brought before the Court by the application into another dispute which is different in character ...' (*Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984*, p. 427, para. 80)."
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> *Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Provisional Measures, Order of 13 September 1993, I.C.J. Reports 1993*, paras. 27, 28, pp. 338, 339.)

The Applicant has not continued the dispute on the basis of the alleged additional grounds of jurisdiction. On the contrary, Bosnia and

Herzegovina has clearly confined itself to the requests which it considers to have the basis for the jurisdiction of the Court in Article IX of the Genocide Convention. Other alleged bases of the jurisdiction of the Court are held in reserve by the Applicant, hopeful that the Court might accept some of them, so that the Applicant could then "revive all or some of its previous submissions and requests". The Applicant repeated this possibility yesterday.

This attitude of the Applicant transgresses the bounds of fair litigation, it is unacceptable and we reject it. The Applicant failed to present any document at the appropriate stage of the proceedings, i.e., at the time of the submission of the Memorial, the alleged additional bases of the jurisdiction of the Court, as well as the possible requests to be based on them, and we consider that it cannot do it now in this separate procedure related to the Preliminary Objections. The attempt to do so, would certainly transgress the bounds of procedural propriety and we reject each and every additional ground of jurisdiction and continue to maintain our arguments that we presented in the incidental procedures related to the indication of provisional measures in which the Applicant presented the alleged additional bases of jurisdiction.

FORUM PROROGATUM

A submission of the request for the indication of provisional measures of protection does not mean the consent to the jurisdiction of the Court

Yesterday, the Applicant contended that a submission of the request for the indication of provisional measures of protection implies a consent to the jurisdiction of the Court. This contention is not based on law.

The principal rule is that the decision of the Court on the provisional measures of protection is not conditional on its decision on jurisdiction. The proceedings on interim protection do not involve a definitive determination by the Court of the existence of jurisdiction for the purpose of Articles 36 and 37 of the Statute. Did it not happen in the *Anglo-Iranian Oil Co.*, case that the Court indicated provisional measures of protection, but still declared itself without jurisdiction? (*Anglo-Iranian Oil Co., Order of 5 July 1951, I.C.J. Reports 1951*, p. 89; *Anglo-Iranian Oil Co., Jurisdiction, Judgment of 22 July 1952, I.C.J. Reports 1952*, p. 93). The contention of the Applicant that the request for the indication of provisional measures implies a consent to the jurisdiction of the Court is contrary to the principle of the equality of Parties. In such a case, a party which considers from the very beginning that the Court has no jurisdiction would be bereft of a procedural instrument. In the case of interim protection, both parties are present before the Court subject to its Rules on incidental proceedings and the principle of equality dictates equal availability of interim protection without a procedural penalty. In addition, the Order of the Court concerning the indication of provisional measures does not prejudge the merits of a case. The duration of these measures is limited until the completion of such a case. A party acquires, nor is it denied, any right whatsoever by these measures. The request for such a measure has no relevance for a decision on the merits of a case. Consequently, there can be no effect of *forum prorogatum* in such a procedural framework.

Writing in *Non-Appearance before the International Court of Justice*, H.W.A. Thirlway said:

> "even the submission of arguments going beyond the jurisdictional question will only be liable to be read as a waiver of that question if, in the words of the P.C.I.J., it is

done 'without making reservations in regard to the question of jurisdiction', so that it can be 'regarded as an unequivocal indication of the desire of a State to obtain a decision on the merits' (*Upper Silesia, Minority Schools, C.P.I.J., Series A, No. 15*, p. 24)".

On several occasions, Professor Pellet quoted the statement of Shabtai Rosenne. Yet, he did so very selectively, leaving out the following and very relevant part of Mr. Rosenne's statement:

> "I would not at this stage dispute that all the words of Article IX from 'fulfilment of the present Convention' to 'acts enumerated in Article III' relate to the merits of the case, and we are not concerned with that now, beyond reserving all our rights as to how we shall deal with the jurisdiction of the Court and the merits when the time comes." (CR 93/13, p. 18.)

It is quite clear therefore that Mr. Rosenne has reserved all our rights concerning the jurisdiction of the Court.

Besides, in paragraph 12 of the Order of the Court of 8 April 1993, it is said:

> "Whereas in the written observations referred to in paragraph 9 above, Yugoslavia made what it termed a 'preliminary objection with regard to the legitimacy of the Applicant', claiming that neither the President of the Republic of Bosnia and Herzegovina, Mr. A. Izetbegovic, who appointed the Agents of that State and authorized the institution of the present proceedings, nor the Government of the Republic of Bosnia and Herzegovina, are legally elected; whereas Yugoslavia claims that the legitimacy and mandate of the Government and the President of the Republic of Bosnia and Herzegovina are disputed not only by representatives of the Serb people but also by representatives of the Croat people, and furthermore that the mandate of Mr. Izetbegovic expired on 20 December 1992, and was challenged on this ground by the Prime Minister of Bosnia-Herzegovina in a letter to the Chairman of the European Affairs Subcommittee of the United States Senate Foreign Relations Committee dated 24 February 1993, circulated, at the request of the Prime Minister of Bosnia-Herzegovina, by the Secretary-General of the United Nations as a document of the General Assembly and the Security Council."

Likewise, paragraph 24 of the same Order, reads:

> "Whereas Yugoslavia has disputed the validity and effect of the Notice of 29 December 1992, contending that no rule of general international law gives Bosnia-Herzegovina the right to proclaim unilaterally that it is now a party to the Genocide Convention merely because the former Socialist Federal Republic

of Yugoslavia was a party to the Convention and the Convention was thus applicable to what is now the territory of Bosnia-Herzegovina, that the 'declaration of succession' procedure provided for in the Vienna Convention on Succession of States in respect of Treaties (which Convention is not in force) was evolved for, and is applicable only in, cases of decolonization, and is therefore not open to Bosnia-Herzegovina; and that the Notice of 29 December 1992, if construed as an instrument of accession under Article XI of the Genocide Convention, can only 'become effective on the ninetieth day following the deposit of the instrument' in accordance with Article XIII of the Convention; whereas Yugoslavia concludes that the Court has jurisdiction under the Genocide Convention, if at all, only in respect of facts subsequent to the expiration of 90 days from the Notice of 29 December 1992."

In the proceedings on interim protection before the Court on 1 and 2 April 1993, the Federal Republic of Yugoslavia pointed out quite clearly that it does not accept the jurisdiction of the Court.

As to the doctrine of *forum prorogatum*, in its Order of 13 September 1993, the Court said:

"Whereas, in the context of the first request made by the Applicant for the indication of provisional measures, the Respondent also, by a communication of 1 April 1993, recommended that such measures, listed in paragraph 9 of the Court's Order of 8 April 1993, be indicated; whereas some of the measures so requested might be directed to the protection of rights going beyond those covered by the Genocide Convention; and whereas the question thus arises whether, by requesting such measures, the Respondent might have agreed that the Court should have a wider jurisdiction, in accordance with the doctrine known as that of *forum prorogatum*; whereas however the provisional measure requested by Yugoslavia in a subsequent request, dated 9 August 1993 (para. 12 above), was directed solely to protection of asserted rights under the Genocide Convention; whereas moreover the Respondent has constantly denied that the Court has jurisdiction to entertain the dispute, on the basis of that Convention or on any other basis; whereas in the circumstances the communication from Yugoslavia cannot, even *prima facie*, be interpreted as 'an unequivocal indication' of a 'voluntary and indisputable' acceptance of the Court's jurisdiction (cf. *Rights of Minorities in Upper Silesia (Minority Schools), P.C.I.J., Series A, No. 15*, p. 24; *Corfu Channel, Preliminary Objection, Judgment, I.C.J. Reports 1947-1948*, p. 27)." (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Provisional Measures, Order of 13 September 1993, I.C.J. Reports 1993*, pp. 341-342, para. 34.)

And indeed, ever since its first appearance before the Court, Yugoslavia has continually and consistently denied the jurisdiction of the Court on whatever ground. It has made no act with an intent to accept the jurisdiction of the Court.

In paragraph 3 of its Request for the indication of provisional measures of 8 August 1993, the Federal Republic of Yugoslavia reserved all the rights of objection to the jurisdiction of the Court and the admissibility of the Application. In submitting the Request for Indication of Provisional Measures at the session of the Court of 26 August 1993, I myself in my capacity as Agent of the Federal Republic of Yugoslavia reserved all rights of objection to the jurisdiction of the Court and the admissibility of the Application (CR 93/35, p. 33).

There do not exist the conditions to attribute to the Federal Republic of Yugoslavia the consent to the jurisdiction of the Court.

The Letter of the Two Presidents

In connection with the letter of the presidents of the two Yugoslav Republics of 8 June 1992, in its Order of 8 April 1992, the Court says:

> "Whereas however at the present stage of the proceedings, and on the basis of the information before the Court, it is by no means clear to the Court whether the letter of 8 June 1992 was intended as an 'immediate commitment' by the two Presidents, binding on Yugoslavia, to accept unconditionally the unilateral submission to the Court of a wide range of legal disputes (cf. *Aegean Sea Continental Shelf, I.C.J. Reports 1978*, p. 44. para. 108); or whether it was intended as a commitment solely to submission to the Court of the three questions raised by the Chairman of the Committee; or as no more than the enunciation of a general policy of favouring judicial settlement, which did not embody an offer or commitment; ..." *(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. 18, para. 31*)*.

In its subsequent Order of 13 September 1993, the Court reiterates:

> "Whereas the second of the additional bases of jurisdiction

> put forward by the Applicant is the letter, dated 8 June 1992, addressed to the President of the Arbitration Commission of the International Conference for Peace in Yugoslavia by Mr. Momir Bulatovic, President of the Republic of Montenegro, and Mr. Slobodan Milosević, President of the Republic of Serbia, already referred to in paragraph 26 above; whereas in its Order of 8 April 1993 the Court, after examining this letter, concluded that it was unable to regard it 'as constituting a *prima facie* basis of jurisdiction in the present case' (*I.C.J. Reports 1993*, p. 18, para. 32); whereas the Applicant has not put forward any new fact which might lead the Court to reopen the question; whereas the Applicant's submission on the point must be rejected; ..." (*I.C.J. Reports 1993*, p. 340, para. 32.)

The said letter does not imply the consent of the Federal Republic of Yugoslavia to the jurisdiction of the Court. The declaration of the Presidents of the two Republics is only a political statement with no legal effects. It should be considered in the context of the circumstances in which it was made. The letter of 8 June 1992 referred to a letter which the President of the Arbitration Commission had addressed, on 3 June 1992, to the Presidents of the Republics of the so-called Bosnia-Herzegovina, Croatia, Macedonia, Montenegro, Serbia and Slovenia and to the Presidency of the Federal Republic of Yugoslavia. The declaration of the two Presidents contains their reply to the question, made by the President of the Arbitration Commission in his letter of 3 June 1992, which reads as follows:

> "on what basis and by what means should the problems of the succession of States arising between the different States emerging from the Socialist Federal Republic of Yugoslavia be settled?"

The question resulted in the said declaration which should be considered only within the framework of this question. The letter of 8 June 1992 was addressed to the President of the Arbitration Commission and it referred to the concrete situation. This declaration was not drawn up *in abstracto, erga omnes* and without a specific timing. It was

the expression of the political opinions of the two Presidents that all disputes, concerning the matters raised by the letter of 3 June 1992, should be resolved in a peaceful manner and, if agreement is not possible, by judicial settlement. In addition, according to the general rules of international law, this letter cannot be seen as a treaty offer or a unilateral declaration of the Federal Republic of Yugoslavia. Our arguments to this effect were presented in the Observations of the Federal Republic of Yugoslavia concerning the Request for Indication of Provisional Measures of 27 and 29 July, 4, 6, 7, 8, 10 and 13 August 1993 that we forwarded to the Court in August 1993. As Professor Pellet presented no convincing counter-argument in his statement yesterday, we uphold our arguments presented in August 1993.

It is not clear at all how the Treaty between the Allied and Associated Powers and the Kingdom of the Serbs, Croats and Slovenes (protection of Humanities), signed at St. Germain-en-Laye on 10 September 1919 is related to the present case. In any case, we uphold what we have said in the aforementioned observations.

Mr. President, distinguished Members of the Court, with your permission I will now present our final submissions.

The Federal Republic of Yugoslavia asks the Court to adjudge and declare:

First Preliminary Objection

Whereas the events in Bosnia and Herzegovina to which the Application refers constituted a civil war, no international dispute exists within the terms of Article IX of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, consequently,

the Application of Bosnia and Herzegovina is not admissible.

Second Preliminary Objection

Whereas Mr. Alija Izetbegovic did not serve as the President of the Republic at the time when he granted the authorization to initiate proceedings and whereas the decision to initiate proceedings was not taken either by the Presidency or the Government as the competent organs, the authorization for the initiation and conduct of proceedings was granted in violation of the rules of internal law of fundamental significance, consequently,

the Application by Bosnia-Herzegovina is not admissible.

Third Preliminary Objection

Whereas Bosnia and Herzegovina has not established its independent statehood in conformity with the principle of equal rights and self-determination of peoples and for that reason could not succeed to the 1948 Convention on the Prevention and Punishment of the Crime of Genocide,

Whereas Bosnia-Herzegovina has not become a party to the 1948 Convention on the Prevention and Punishment of the Crime of Genocide in accordance with the provisions of the Convention itself,

Bosnia and Herzegovina is not a party to the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, consequently

the Court lacks the competence over the case.

Fifth Preliminary Objection

Whereas the case in point is an internal conflict between three sides in which the Federal Republic of Yugoslavia was not taking part and whereas the Federal Republic of Yugoslavia did not exercise any jurisdiction within the region of Bosnia and Herzegovina at the material time,

Whereas the Memorial of the Applicant State is based upon a fundamentally erroneous interpretation of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide and, in consequence the claims contained in the "Submissions" are based on allegations of State responsibility which fall outside the scope of the Convention and of its compromissory clause,

There is no international dispute under Article IX of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, consequently,

the Court lacks the competence over the case.

If the Court does not accept any of the above-mentioned Preliminary Objections, then we ask the Court to consider further the sixth and seventh preliminary objections.

Sixth Preliminary Objection

Without prejudice to the above exposed Preliminary Objections, whereas the two Parties recognized each other on 14 December 1995, the 1948 Convention on the Prevention and Punishment of the Crime of Genocide was not operative between them prior to 14 December 1995, consequently,

the Court lacks the competence before 14 December 1995 over the case.

Alternatively and without prejudice to the above exposed Preliminary Objections, whereas the Notification of Succession, dated 29 December 1992, whereby Bosnia-Herzegovina expressed the intention to enter into the 1948 Convention on the Prevention and Punishment of the Crime of Genocide can only produce the effect of accession to the Convention,

the Court lacks competence over this case before 29 March 1993 and, thus, the Applicant's claims pertaining to the alleged acts or facts which occurred prior to that date do not fall within the competence of the Court.

In case the Court refuses to adopt the above Preliminary Objections

Seventh Preliminary Objection

If the Applicant State's Notification of Succession, dated 29 December 1992, is construed as having an effect of the Applicant State becoming a party to the 1948 Convention on the Prevention and Punishment of the Crime of Genocide from 6 March 1992 and whereas the Secretary-General of the United Nations sent to the parties of the said Convention the Note dated 18 March 1993, informing of the said succession, according to the rule of general international law, the 1948 Convention on the Prevention and Punishment of the Crime of Genocide would not be operative between the Parties prior to 18 March 1993 and, consequently, this would not confer the competence on the Court in

respect of events occurring prior to 18 March 1993, consequently,

the Applicant's claims pertaining to the alleged acts or fact which occurred prior to 18 March 1993 do not fall with the competence of the Court.

As a final alternative,

If the Applicant State's Notification of Succession, dated 29 December 1992, is construed as having the effect of the Applicant State becoming a party to the Convention on the Prevention and Punishment of the Crime of Genocide from 6 March 1992, according to the rule of general international law, the 1948 Convention on the Prevention and Punishment of the Crime of Genocide would not be operative between the Parties prior to 29 December 1992, consequently, this would not confer competence on the Court in respect of events occurring prior to 29 December 1992, consequently,

the Applicant's claims pertaining to the alleged acts or facts which occurred prior to 29 December 1992 do not fall within the competence of the Court.

Objections on Alleged Additional Bases of Jurisdiction

In view of the claim of the Applicant to base the jurisdiction of the Court under Articles XI and XVI of the Treaty between Allied and Associated Powers and the Kingdom of Serbs, Croats and Slovenes, signed at Saint-Germain-en-Laye on 10 September 1919, the Federal Republic of

Yugoslavia asks the Court

to reject the said claim,

- because the Treaty between Allied and Associated Powers and the Kingdom of Serbs, Croats and Slovenes signed at Saint-Germain-en-Laye on 10 September 1919 is not in force; and
- because the Applicant is not entitled to invoke the jurisdiction of the Court according to Articles XI and XVI of the Treaty.

In view of the claim of the Applicant to establish the jurisdiction of the Court on the basis of the letter of 8 June 1992, sent by the Presidents of the two Yugoslav Republics, Serbia and Montenegro, Mr. Slobodan Milosevic and Mr. Momir Bulatovic, to the President of the Arbitration Commission of the Conference on Yugoslavia, the Federal Republic of Yugoslavia asks the Court

to reject the said claim,

- because the declaration contained in the letter of 8 June 1992 cannot be understood as a declaration of the Federal Republic of Yugoslavia according to rules of international law; and
- because the declaration was not in force on 31 March 1993 and later.

In view of the claim of the Applicant State to establish the jurisdiction of the Court on the basis of the doctrine of *forum prorogatum*, the Federal Republic of Yugoslavia asks the Court

to reject the said claim

- because the request for indication of provisional measures of protection does not imply a consent to the jurisdiction of the Court; and
- because the conditions for the application of the doctrine of *forum prorogatum* are not fulfilled.

Thank you, Mr. President and distinguished Members of the Court. We have completed our submissions. Thank you for your attention.

Le PRESIDENT : Je vous remercie, Excellence, aussi bien pour votre exposé que pour les conclusions finales que vous venez d'articuler il y a un instant au nom de la Yougoslavie. Je remercie également les autres membres de la représentation yougoslave qui ont contribué à éclairer la Cour. Ainsi s'achève le second tour de plaidoiries de la Yougoslavie. La Cour poursuivra demain, vendredi à 15 heures, ses audiences pour entendre la Bosnie-Herzégovine en son second tour de plaidoiries. L'audience est levée.

L'audience est levée à 17 h 30.