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YEAR 1993

Public sitting

held on Thursday 26 August 1993, at 3 p.m., at the Peace Palace,

President Sir Robert Jennings presiding

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

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

Requests for the Indication of Provisional Measures

No 2

VERBATIM RECORD

ANNEE 1993

Audience publique

tenue le jeudi 26 août 1993, à 15 heures, au Palais de la Paix,

sous la présidence de sir Robert Jennings, Président

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

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

Demandes en indication de mesures conservatoires

n° 2

COMPTE RENDU

0289R

Present:

President	Sir Robert Jennings
Vice-President	Oda
Judges	Schwebel
	Bedjaoui
	Ni
	Evensen
	Tarassov
	Guillaume
	Shahabuddeen
	Aguilar Mawdsley
	Weeramantry
	Ajibola
	Herczegh
Judges *ad hoc*	Lauterpacht
	Kreca
Registrar	Valencia-Ospina

Présents:

Sir Robert Jennings, Président
M. Oda, Vice-Président
MM. Schwebel
Bedjaoui
Ni
Evensen
Tarassov
Guillaume
Shahabuddeen
Aguilar Mawdsley
Weeramantry
Ajibola, juges
Herczegh, juges

Lauterpacht,
Kreca, juges *ad hoc*

M. Valencia-Ospina, Greffier

0289R

The Government of the Republic of Bosnia and Herzegovina is represented by: :

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

Mr. Francis A. Boyle, Professor of International Law,

as Agent;

Mr. Phon van den Biesen, Advocate,

Mr. Khawar Qureshi, Barrister, England,

as Advocates and Counsel;

Mr. Marc Weller, Assistant Lecturer in Law, University of Cambridge, Senior Research Fellow of St. Catharine's College, Cambridge,

as Counsel.

The Government of the Federal Republic of Yugoslavia (Serbia and Montenegro) is represented by:

Mr. Rodoljub Etinski, Professor at the School of Law, Novi Sad (Yugoslavia),

Mr. Djordje Lopicic (LL.C.), Chargé d'affaires a.i. of the Embassy of the Federal Republic of Yugoslavia to the Netherlands,

as Agents;

Mr. Shabtai Rosenne, Advocate from Jerusalem (Israel),

Mr. Miodrag Mitic (LL.C.), Chief Legal Adviser of the Federal Ministry of Foreign Affairs,

as Counsel and Advocates.

Le Gouvernement de la Bosnie-Herzégovine est représenté par :

S. Exc. M. Muhamed Sacirbey, ambassadeur et représentant permanent de la Bosnie-Herzégovine auprès de l'Organisation des Nations Unies,

M. Francis A. Boyle, professeur de droit international,

comme agent;

M. Phon van den Biesen, avocat,

M. Khawar Qureshi, avocat,

comme avocats et conseils;

M. Marc Weller, *Assistant Lecturer in Law* à l'Université de Cambridge et *Senior Research Fellow of St. Catharine's College*, Cambridge,

comme conseil.

Le Gouvernement de la République fédérative de Yougoslavie (Serbie et Monténégro) est représenté par :

M. Rodoljub Etinski, professeur à la Faculté de droit, Novi Sad (Yougoslavie),

M. Djordje Lopicic (LL.C.), chargé d'affaires a.i. de l'ambassade de la République fédérative de Yougoslavie aux Pays-Bas,

comme agents;

M. Shabtai Rosenne, avocat au barreau de Jerusalem (Israel),

M. Miodrag Mitic (LL.C.), conseiller juridique en chef du ministère fédéral des affaires étrangères,

comme conseils et avocats.

The PRESIDENT: Please be seated. Now we hear the Bosnian Reply. Mr. Sacirbey.

Mr. SACIRBEY: Thank you Mr. President. Mr. President, distinguished Members of the Court, I ask for your understanding because after my Reply I will have to leave for a meeting with the Ministry of this country, the Netherlands, and I will make my Reply rather short.

May it please the Court, I do not wish to strain your patience for too long in response to the comments of Mr. Mitic and Mr. Lopicic. I am the Permanent Representative of the Republic of Bosnia and Herzegovina before the United Nations. I am so accredited. I do not represent a former republic as I do not represent the so-called republic. Our republic represents, is represented, by Muslims, Serbs, Croats and others. We pride ourselves on being a pluralistic, multicultural society. The military that defends our country is one in which Serbs, Muslims and Croats serve to defend Serbs, Muslims and Croats. My own mission in New York has served Muslim, Croat, Jewish and other members. Bosnia and Herzegovina as a defined political and geographic unit has existed for approximately the last thousand years; as a kingdom, as a province, as an autonomist region or republic in the Ottoman Empire after the Hungarian Empire or the former Yugoslavia. In fact under the Berlin Congress it was given special status. Its borders have been well defined for at least the last century.

The questions that Mr. Mitic and Mr. Lopicic want to raise regarding our legitimacy in borders are in fact the motivation to promote the genocide that has been brought before this Court. I think they are rather irrelevant but the fact that they bring it before the Court I think is relevant.

The Serbian delegation wants to create the impression of a civil war when, in fact, this is a war of aggression and genocide. They want to talk about victims of all ethnicities - yes, many Serbs also suffer, many Serbs are murdered by fellow Serbs in the attempt to protect non-Serb neighbours or resist the fascist policies of their Government. Allegations of the victimization of individual Serbs are made to justify the crime of genocide by the Republics of Serbia and Montenegro.

I am not here to defend any paramilitary unit or any individual responsible for crimes. Those individuals, if in fact they are responsible, will be brought before the War Crimes Tribunal when it is established in The Hague. I am here to speak on behalf of the Government, that actively represents all ethnicities and demands the protection of all members of our society of all ethnicities. I also represent a Government whose population unfortunately is the victim of genocide.

We cannot and should not in any way compare independent acts of violence to a systematic campaign of genocide promoted and executed by the Serbian and Montenegran Government and its agents in the Republic of Bosnia and Herzegovina. Dr. Karadzic, an agent supported by the Republic of Serbia and Montenegro in our country, has said that Muslims and Serbs are like cats and dogs - they cannot live together. The promotion of the politics of ethnic purity in fact is a tool of this genocide. What is unfortunate in fact is that this Court is being used by individuals like Mr. Mitic and Mr. Lopicic to promote so-called evidence unsubstantiated and frequently fabricated regarding crimes against Serbs but in fact also to promote and fuel the fires of ethnic hatred and fascism that are now the basis for the crime of genocide in the Republic of Bosnia and Herzegovina.

Thank you, your Honours, may I now introduce Professor Boyle who will continue with the Reply on behalf of the Republic of Bosnia and Herzegovina. I again ask for your kind understanding.

The PRESIDENT: Thank you Mr. Sacirbey. Professor Boyle.

Mr. BOYLE: Mr. President, distinguished Members of the International Court, may it please the Court, first at this time I wish to reserve our right to respond in writing to the two questions posed by Judge Bola Ajibola and also by Judge Lauterpacht. Obviously they are complicated questions and we will do our best to have a written response, within the time-frame indicated, by sometime tomorrow morning.

Mr. President, in your introductory comments you mentioned that since the filing of our second request on 27 July I transmitted a considerable number of communications and documents to the Court. Maybe I should give an explanation as to this way of proceeding. I mentioned that communicating with my Government in Sarajevo is seriously troubled, if not almost impossible, because of the ongoing illegal criminal acts being perpetrated by the Respondent on a daily basis. Basically there is a satellite phone and that is it. That is the only way you can communicate, I can communicate, with Sarajevo.

It is also a matter of public record that soon after I filed the request for provisional measures with the Court in The Hague on 27 July 1993, I travelled to Geneva to advise our President and Foreign Minister on matters of international law relating to the very existence of our State and our membership, continuing right to membership in the United Nations Organization. This fact can be verified by reference to my communications of 6 and 7 August among others, to the Court. Due to the gravity of the situation in Geneva, I would be the first to admit

that my communications to the Court after 27 July were not the models of elegance, clarity, and precision that I would have preferred. But they were the best I could do under some very difficult circumstances.

Be that as it may, it was always my intention that all the communications I have filed with the Court since 27 July were intended at the time of filing to be submitted in support of our second request for provisional measures of 27 July and I hereby firmly reassert that intention and most respectfully request the Court to consider all of my communications after 27 July to be considered in support of our second request for provisional measures.

This way of proceeding is fully consistent with and supported by Article 74, paragraph 3, of the Rules of Court which provides: "... The Court *shall receive* and take into account *any observations* that may be presented to it before the closure of the oral proceedings." (Emphasis added.) All my communications and submissions since 27 July clearly fall within the terms of this provision and should be fully and completely taken into account by the Court when you retire to deliberate on our second request for provisional measures. It should also include our recent memorandum on establishing the imputability of the Respondent for the conduct of Serb military, paramilitary and militia forces in Bosnia and Herzegovina in direct violation of provisional measure A (2) of 8 April 1993. As we heard this morning, the Respondent continuous to deny their responsibility for this behaviour even up until today. So, of course, we need a memorandum on that matter.

As for our memorandum on Articles 8 and 9 of the Genocide Convention, Respondent has continued to contest those issues of jurisdiction as well. Again we are seeking to clarify these weighty issues of jurisdiction for the Court as soon as possible in the best manner we can.

Now, I want to get into the second point raised by Professor Rosenne, that somehow the fact that we have already succeeded in making one request for provisional measures should preclude us from making a successive request, if the circumstances so warrant.

Well, first there is no provision within the Statute or the Rules of Court that prevents us from making a separate second request.

Article 41 of the Statute does not in any way limit the number or extent of measures which can be granted, nor does it state that only one

request is permissible; the use of the word "any" enforces this conclusion.

Article 41 prefaces the granting of measures upon the circumstances of the situation presented to the Court. Clearly, upon a change of circumstances, the Court is entitled to consider the situation yet once again. And in our second request as amended and supplemented we have established, I believe conclusively, beyond a reasonable doubt, that the situation has definitively changed. The Court Order has been violated from the moment it has been issued. The Security Council has done nothing to enforce it. On 13 May 1993 the Respondent itself and its Agents openly and publicly admit it and endorse and improve this campaign of genocide and many of the other facts and arguments that we have adduced during the course of these proceedings. So, the doctrine of *res judicata* is not applicable where there is a material change in circumstances, and we submit that that supports our second request for provisional measures. Indeed, I want to assure you I just did not file the request because I had nothing better to do. I am not getting paid here for representing Bosnia, it is a *pro bono* case. I came here on the instructions of my Government to prevent the partition of the State of Bosnia, and I am not here to take up your time as a publicity stunt or propaganda stunt or anything like that. This is a serious legal issue. There are people going to get away with partitioning us and dividing us and exterminating us and are eliminating our membership in the United Nations Organization. That is the issue the Judges are going to have to face in this case.

So, clearly, I believe, as long as there has been a change in circumstances, and there has, and if you read our second request, it is very clear that the plan to partition us was really what set things in

motion. This is further supported by the fact that Article 75, paragraph 3, of the Rules of Court allows a party whose request for the indication of provisional measures has been rejected, to make a fresh request in the same case, if it is "based on new facts". Well, it seems to me that if you make a request and you lose and the Rules say that you can go back in again if there are fresh facts, certainly if you make a request and you win, the other side pays no attention to the Judgment, ups the ante the Security Council refuses to enforce the Judgment, the situation gets far worse and then we are being threatened with having our lives as an independent State and UN Member extinguished, then of course where else can we go for relief but to the World Court? And that is exactly what we did.

Furthermore, on the *proprio motu* point, we believe that the power conferred upon the Court under Article 75, paragraph 1, of the Rules enables it to grant measures *proprio motu* and I was a bit surprised that Professor Rosenne's argument that for you to grant the provisional measures *proprio motu* would be *ultra vires* your powers. Now as an advocate I do not think I want to be one telling the International Court of Justice that the application of your own Rules is going to be beyond your own powers. I have a jurisprudential problem with that, I could see that with some lower court, but not the International Court of Justice.

So, again we submit that a change of circumstances, and in our case a fundamental change, not just fresh facts, a fundamental change in circumstances that would materially extinguish us as a State and as a people, is what precipitated our request for a new round of provisional measures.

Finally, we submit that the circumstances of this case involving genocide are so grave and so serious that unless the situation is kept

under active review by the Court, daily review, the situation will and indeed has deteriorated significantly to the point where the exercise of substantive jurisdiction by the Court in this case will prove to be impossible. Literally impossible. And we will be eliminated as a people and as a State. And again, I have explained to you the grave difficulties I have in being able to get instructions from my Government to file a document and come over here to address these issues. I do not know if I will be able to do this again. Not due to any lack or fault on our own, but due to what the Respondent is doing to us on a day-in and day-out basis. And if you do not adopt some regime *proprio motu* to keep this case under active control and review, you will see us slowly destroyed and eliminated right before your eyes. Just what happened to the Jewish people from 1939-45. That is exactly what is being contemplated for the people of Bosnia and Herzegovina and the only difference between us and the Jews is our UN Membership, our UN Statehood, and the only people who can really protect that are the Members of this Court. As we know the Security Council is a political body, they do not decide in accordance with the rule of law, they decide matters in accordance with *real politik*, great power politics, and that is exactly what we have seen. Disagreements among the great powers when it comes to how to deal to protect Bosnia and Herzegovina. So, what we are looking for here, is a legal resolution of the dispute. We believe that our cause is just and that any fair-minded, objective judge, that would look at our case, would agree with us. May be not a hundred percent, but on most of the issues.

Now, this gets to the problem raised by Professor Rosenne, both orally and in writing, about Article 59 of the Statute of the Court. Now, with these measures are they intended to be binding upon third party States that are not parties to this litigation. And the answer is no. Indeed I drafted them expressly for that purpose to make it clear that they would not be binding on third party States.

The measures in Article I of the Genocide Convention oblige all Contracting Parties to take steps to prevent and to punish the commission of acts of genocide. We all agree on that. And there is a reciprocal nature of the treaty obligations, under certainly the Genocide Convention, meaning that the obligations upon one Contracting Party confer a correlative right upon all the Contracting Parties to the Convention that requires the obligations to be fulfilled.

What sets genocide apart from all the other treaties that we are familiar with is that, as we know, the Convention entails an obligation to prevent and punish genocide which is *erga omnes* and therefore of supreme importance, to use the famous language of the *Barcelona Traction* case. Again, this is reinforced by the fact that the very first Article of the Convention states that Contracting Parties have an obligation to prevent and punish the crime of genocide and these obligations are *erga omnes*, everyone against all States. And that sets the Genocide Convention apart from almost any other treaty that you dealt with here in the Court, except perhaps the United Nations Charter itself.

So, because of the supreme importance of the Genocide Convention, because it establishes obligations *erga omnes*, there has to be a way whereby rights under the Treaty can be clarified in a situation such as Bosnia and Herzegovina. We have seen our rights put up to the highest bidder in the Security Council. I have been there myself. I have seen

it happen. So, we are not going to get our rights protected at the Council, I can assure you of that. We will be carved up by the great Powers and eaten for breakfast unless the Court acts. So, we are coming here to the Court to ask you to clarify - not decide, but to clarify - what are our rights under these unique circumstances invoking Statute Article 41, provisional measures, which you can do. You can adopt any provisional measures you want. We are not asking for an advisory opinion, nor are we asking you to order any other State to do anything. What the other Contracting Parties to the Genocide Convention do or do not do is up to them. Right?

But we believe that if the Court clarifies our right under Article I, then the obligation will be undeniable for the other members of the United Nations, and especially of the Security Council, that they must act to prevent genocide as required by Article I. And, as I said before, I believe it is the case today that 12 Members, at least, of the Security Council are likewise Parties to the Genocide Convention. So we believe that a clarification of our rights under these circumstances by the Court in provisional measures would go a long way to help stopping the genocide in Bosnia and Herzegovina.

True, we are not asking for a final judgment, as Professor Rosenne said. If you read through our Application, you will see we have asked for monetary damages. We all know that will be many years down the line, *if* we get there, and Professor Rosenne kept insisting upon following the proper procedure, filing the right document. Well, that is great, when you are there murdering and killing the men, women and children on the other side and then you insist on the proper procedure and say come back a year from now. And then, you know, we might look into your

document. This is not what is happening. We are being wiped out right there in front of your eyes on TV, you can read it in the pages of your newspapers, and we are asking this Court to do something about it.

So, again, I argue that we are not asking you to issue an order here that is going to bind anyone except the Parties to this case which would be the case under the Statute. But we are asking for clarification of our rights which we can then use in the Security Council and the General Assembly and elsewhere to prevent the crime of genocide against our people.

Now, let us look at it another way. Suppose you still have problems with this argument. You say but they still aren't parties to the litigation. Well, what would my response be? My response would be to tell my Government, fine. Then I will sue all 100-plus Parties to the Genocide Convention. And you know from my letter of accreditation I have the power to do it. I don't have the instructions but I have the power.

Now think of that for a minute. I have a word processor and a computer and a secretary and large numbers of students who are willing to crank out applications for me. Now, do you realistically want me to have to go back home and start cranking out three or four applications a day until I have sued 102 or 103 States and dragged them all in this Court and accuse them of failure to prevent genocide under Article I? And for many of them, conspiracy to commit genocide under Article III and complicity to commit genocide under Article III? I have a very good case against most of them for that. But you could imagine what it might look like. We would have to hold these proceedings in a football stadium and not in this Peace Palace if you are telling me I have to sue 100-105 States and make them all parties to this lawsuit before you are going to get into the question of Article I.

Now that, I believe, is what is at stake here with respect to this obligation *erga omnes*. It seems to me that when we are dealing with a treaty such as the Genocide Convention - a sacred Convention: we would all agree with that; one of the foundation-stones of the post-World War II era; it underpins the entire international human rights treaty régime that we know of - when we are dealing with a treaty of that nature we should be able to come to this Court and basically litigate those issues that need to be litigated without necessarily having to join all the Parties to the Genocide Convention.

As you know we have not made claims under all Articles of the Genocide Convention. We have only made those claims where we believe we have sufficient credible evidence. We are not taking a shotgun approach here. We are acting, we think, on the basis of evidence in the public record that we have been able to obtain through objective outside neutral sources, which is unlike what you have heard here from the Respondent manufactured by their own war criminals. They admit, the armed and commando units there of the Republic of Srpska, whose President, Radovan Karadzic, is acknowledged as a major international war criminal. That is where they are getting their evidence. So, again, you should certainly reject their request for provisional measures.

I just wanted to comment briefly, since it came up, on the so-called 8 June 1992 letter. Again, I know you think you have heard enough of it, but we did not fully address the issue the last time around because it did not come to our attention until shortly before I introduced it into evidence.

On 24 August 1993 the Respondent took an amazing new position on the letter. They now are willing to accept that it exists, that it might have some consequences one way or the other, but they are saying: you really cannot take us seriously, you cannot take it at our word. The letter, they say, does not reflect the legal position of the Federal Republic of Yugoslavia because the two Presidents of Serbia and Montenegro who signed the letter were not entitled to do so. So according to the arguments made by the Respondent, the President of Serbia and the President of Montenegro basically acted beyond the scope of their authority when they signed these letters to the Badinter Commission, Lord Carrington, etc., etc. Well again, as an advocate, I would have a hard time saying that my bosses acted beyond the scope of their authority, especially if one of my bosses was Mr. Milosevic. But that apparently is what they are prepared to say.

But the two Presidents stated in an official public letter printed on the letterhead of the Federal Reublic of Yugoslavia in the language that I have quoted before: "the Federal Republic of Yugoslavia takes the position". Well, certainly this new argument, which I find to be extraordinary, is consistent with the Respondent's attitude taken all along to any official document. They do not take seriously the United Nations Charter; the London Agreement, resolutions of the Security Council, the General Assembly, they do not take seriously; the Genocide Convention, they do not take seriously; this Court's Order of

8 April, they do not take seriously; and so on. So I ask the Court the question: how can you take anything they tell you seriously when they won't even stand by their own letters signed by their own Presidents? How can you attribute any credibility at all to anything they tell you about their so-called evidence in support of their request against us?

Professor Rosenne devoted a good deal of time to the 1919 Treaty of Saint-Germain in his written observations and also his oral observations. And we know he says, why did we not plead it first in the Application? Well there is no requirement that you have to plead everything in the Application. You do your best and under the circumstances of genocide that was going on at that time, I did my best in drafting that Application in ten days, and clearly genocide to me seemed to be the way to go to get the jurisdiction of the Court straightaway. But as we made clear in that Application, we fully intended to argue in brief other questions of jurisdiction as we went along, and that memorandum on that Treaty was filed shortly after it was produced.

Now if you look at the argument, it is kind of silly isn't it. picking technical little lawyers' scriveners' points. The Treaty is in two chapters: the first protects minorities, the second refers to continuity of treaties.

It is clear from Article 16 that it applies to the entire Treaty as a whole, not merely the second chapter. Article 16 contains provisions on the official language of the Treaty and on the procedure for ratification. These are obviously matters that relate to the entire Treaty. Also paragraph 1 of Article 16 covers "all rights and privileges afforded by the foregoing Articles" and Article 11 is a foregoing Article. I submit that had the parties intended to limit this to

Chapter II only, they could have written "all rights and privileges accorded by the Articles of this Chapter", which of course they did not do.

So it seems to me one should assume from the reasonable ordinary language of this Treaty "the foregoing" refers to all previous Articles of the Treaty, and indeed the Vienna Convention, Article 31, says, "a treaty is to be interpreted in light of its object and purpose". And certainly the primary object and purpose of this Treaty was to protect minorities and partciularly Muslims. That is what the Treaty says.

In reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, the Advisory Opinion of this Court, page 23, the Court indicated that a treaty with a "humanitarian and civilizing purpose" should in particular be interpreted to achieve the purpose. And I am not saying that this Treaty is today as important as the Genocide Convention, but it was certainly a very significant breakthrough for the protection of human rights as group rights back in 1919.

The Respondent then argues that the Serb-Croat-Slovene Treaty has "disappeared as part of the Versailles system". Well maybe the Versailles system disappeared but the Treaty did not. The Treaty is still there. No event has occurred to affect its validity. Indeed, the language quoted by the Respondent from the Vice-President of the Court, Judge Oda, does not refer specifically to the Treaty itself but to the post-World War I Minorities treaty régime as a group. And the United Nations Secretariat made it clear in its Study of these treaties that the question of the validity of each treaty must be examined individually no matter what happened to the so-called régime or Versailles system, or call it what you want.

The Respondent then argues that the 1950 United Nations Secretariat Study of the Legal Validity of the Undertakings concerning Minorities does not support the proposition that the Serb-Croat-Slovene Treaty is still in force. But the fact again that the system no longer existed has no relevance to the question of the continuing validity of the Treaty itself, this particular minority treaty.

Then the Respondent refers to the Study's reference to those minorities that assisted Yugoslavia's enemies and suggested that the "Muslim religious minority" was one of those minorities. First, the Study did not specify any particular minorities. So there is no reason to believe that the Secretariat was referring to the "Muslim religious minority". Also I personally am not aware of any evidence that would support the Respondent's factual claim that Bosnian Muslims assisted the former Yugoslav's enemies during the Second World War. But again this issue is not relevant as a basis for the termination of a treaty.

Then the Respondent quotes a 1951 memorandum of the United Nations Secretariat where it stated with reference to the 1950 Study that the Secretariat's opinion that "the minorities system had ceased to exist was not based solely on the ground of the League's extinction". But again this language refers to the system, namely, the enforcement system, and not to the treaty obligations themselves. The Secretariat made no blanket statement that all minority treaties were invalid.

Moreover, we cited the Secretariat Study only as confirmation of the contemporary validity of the Serb-Croat-Slovene Treaty. Even if the Study was not valid as of 1950, this would not be definitive. Treaties remained in force, *pactas sunt servanda*, until actions specified in the Vienna Convention on the Law of Treaties occur.

And even the United Nations Secretary-General does not have the authority to terminate treaties in force; that is the job of this Court, not the UN Secretariat. Again, the Respondent objects to our contention that the United Nations assumed League functions regarding the Minority Treaties but the Respondent is silent on the language quoted by us from the Secretariat's 1950 Study. There, it stated that the United Nations did assume League functions under these Treaties and specifically that United Nations organs would consider complaints by minorities of violation of their rights under these treaties. Again, the Respondent challenges our reference to a Sixth Committee discussion in 1953, where the United Kingdom delegate indicated that League functions under another treaty, the Slavery Convention, had automatically passed to the United Nations. The Respondent quotes an entire paragraph from the Sixth Committee discussion and states that nothing in that text supports our position.

But the issue in the paragraph quoted by the Respondent was that of whether the new instrument, referred to there as a protocol, needed to be adopted to transfer League functions to the United Nations. The United Kingdom delegate said that no such protocol was needed because such a transfer had already occurred automatically. So, in fact, the quoted language supports the proposition for which we cited it.

The Respondent finally argues that there is no analogy between the United Nations assumption of the League's mandate function and the assumption of the League's minority protection function. The Respondent says that the League Assembly made provision for the future of the mandates but not for the future of minority protection. But this is factually incorrect. By its resolution of 18 April 1946, the League of

Nations Assembly accepted the United Nations General Assembly's proposal as reflected in resolution 24(I) to assume the League's minority protection function.

The Respondent argues our references to the Vienna Convention are inappropriate, but the provisions of the Vienna Convention are widely taken as reflecting customary international law as determined by this Court itself. The Respondent argues that the 1919 Treaty was "terminated by mutual informal agreement of the parties". Well no such concept exists in the Law of Treaties or in the Vienna Convention as "mutual informal agreement" to terminate a treaty, especially one protecting minorities, a human rights treaty. The Respondent then takes the preposterous position that the 1919 Treaty was somehow superseded by the International Covenant on Civil and Political Rights. Well, the International Covenant provides protections for individuals, it does not provide for the group rights afforded by the 1919 Treaty. But that does not mean that the later Treaty at all either intended to, or was intended to, supervene the earlier Treaty.

Finally, the Respondent claims that the Muslims of Bosnia-Herzegovina lost their status as a religious minority after World War II, becoming instead an ethnic minority. Now think of that, the Respondent has admitted in an official Court document that they stole the religion from these people, their religious identity - go back and read this document - they admit they deprived them of their religious identity as Muslims and said: well, now you only have an ethnic identity, and somehow they are asking you, this Court, to accept that theft and robbery of their relgious identity as somehow valid, either under their own law or international law. Well again, as the Muslims'

Ambassador Sacirbey pointed out, it always remained a group defined in part but not exclusively by their religion. That is why many of them are being killed today.

Next the Respondent argues that the 1919 Treaty applies only to the territory of Serbia and Montenegro but the Treaty was intended to protect Bosnian Muslims, that is the object and the purpose of the Treaty, and it contained detailed provisions for the protection of Muslims. This is a Treaty of a *humanitarian* character, it is not *limited* to territory, so as to make its guarantees to *people* meaningless. The Treaty applied to the people, protecting them was the object and purpose of the Treaty and these people are still there, despite the fact that the Respondent is wiping them out and killing them every day and has killed 200,000, raped 30,000-40,000 and driven 2-2$^{1}/_{2}$ million from their homes. Again, figures are imprecise for obvious reasons.

Now, Professor Rosenne's final point was that the invocation of the 1919 Treaty somehow magically transforms the jurisdictional basis of this Court to hear the case, and this is ridiculous. The Court will recall that in provisional measure A(2) of 8 April 1993, the Court ordered by 13 votes to 1

> "The Government of the Federal Republic of Yugoslavia (Serbia and Montenegro) should in particular ensure that any military, paramilitary or irregular armed units which may be directed or supported by it, as well as any organizations and persons which may be subject to its control, direction or influence, do not commit any acts of genocide, of conspiracy to commit genocide, of direct and public incitement to commit genocide, or of complicity in genocide, whether directed against the Muslim population of Bosnia and Herzegovina ..."

Now the Court will remember, as pointed out by Judge Tarassov, that I never specifically requested the Court to protect the Muslim population of Bosnia and Herzegovina by name. Nevertheless, under the monstrous circumstances of ongoing genocide against Bosnian Muslims by the

Respondent, the Court felt compelled to protect Bosnian Muslims specifically by name in provisional measure A(2) of its Order of 8 April and of course the Court rightly so acted by protecting Bosnian Muslims. As I have pointed out, however, they are not the only ones who are victims of genocide in Bosnia and Herzegovina. We have Muslims, Christians, Jews, Croats, Serbs - anyone who tries to maintain and assert their Bosnian citizenship is being killed for this reason.

Well, if the Court already has jurisdiction to protect Bosnian Muslims under the Genocide Convention, then the Court should also have jurisdiction to protect the same Bosnian Muslims under the 1919 Treaty of Saint-Germain. So, our invocation of the 1919 Treaty was intended to supplement, expand and amend the jurisdiction which we believe the Court already has. We should also note in this context that the case is not based exclusively on the Genocide Convention. The fact that the Court only mentioned the Genocide Convention in its 8 April Order cannot change the initial basis of our claims and, in paragraphs 130 to 134 of our Application it stated that the acts of genocide also constitute violations of the four Geneva Conventions (12 August 1949), Additional Protocol 1 (8 June 1977), the customary and conventional laws of war, including the Hague Regulations, and fundamental principles and rules of international humanitarian law and the Universal Declaration of Human Rights and, as I have intimated, we will be providing, when we get to submitting the Memorial to the Court, as of on or about 15 October, more detail on the rest of our jurisdictional claims with respect to these points.

But if we do not get our provisional measures, again I am telling you it is going to be impossible for us to argue our case on the merits to the Court. We are simply not going to be able to do it.

Finally, we have complied with Article 38, paragraph 2, of the Rules of Procedure which state, and this section was not quoted by Professor Rosenne

> "The Application shall specify as far as possible the legal grounds upon which the jurisdiction of the Court is said to be based."

We, in our Application, specified as far as possible under the circumstances of ongoing genocide what we thought jurisdiction was. We did the best job we could do under terrible circumstances, with very limited amounts of time, and that is exactly what we are still doing today. We are asking the Court to assist us here to present our claims, to allow us to argue our claims, to allow us to exercise our rights under the Statute, the Charter and the Rules of Court. And finally, we have the Court's ruling in the *Nicaragua* case, paragraph 80, "The Court considers that the fact that the 1956 Treaty was not involved in the Application as a title of jurisdiction does not in itself constitute a bar to reliance being placed upon it in the Memorial."

Well, we think the same should apply when it comes to a second round of provisional measures. If not for the developments since 8 April we would have continued going right ahead to prepare our Memorial. But somewhere in June we figured out the plan was to carve us up into three independent States and rob us of our UN membership and at that point I received instructions to start preparing another round of provisional measures. Now this is what happened.

One final point we did want to make about resolution 713 and the other resolutions following it - and this again is because it was brought up by the other side this morning - that is if you read resolution 713 and its successors, you will see that there is a difference. We have already pointed out 713 applies only to the former Yugoslavia which no longer exists and 713 does indeed contain a paragraph explicitly adopted under Chapter 7 of the Charter. The enforcement of security measures, enforcing measures by the Security Council, is a serious matter - very serious - and in the case of Bosnia and Herzegovina we are dealing with one of our most fundamental rights of all - the right of self defence. And yet somehow we were never even given a hearing on this - were we? Where was the due process of law here. In comparison even an aggressor State is given a hearing and a chance to change its policy before the action of sanctions. For example the case in Iraq or even the adoption of sanctions against the Respondent. They were given a threat, they had a hearing and finally sanctions were taken. But for us, these sanctions were imposed illegally even before we came into existence and we never had a hearing, they were just extended and also not on the basis of Chapter 7 of the Charter. Go back and read the appropriate Articles, particularly the ones I cited yesterday - resolution 727 is the crucial one - and there is no invocation of Chapter 7 to be found in this resolution. It is not in it. So it is purely oratory, and indeed as I suggested yesterday, the reason that resolution 727 was adopted was simply to give Mr. Vance some negotiating leverage, and that is it. With all due respect to Mr. Vance, I am not here criticizing Mr. Vance. He tried the best he could, but he was a gentleman dealing with a group of criminals, so of course he could not get too far. So please when you are looking at these resolutions, pay particular attention, as I tried to do

yesterday, to 727 which is said to apply to us; but if you read it it does not. It was never adopted under Chapter 7, so we are not asking the Court to order or strike down a Security Council resolution or anything like that. Again simply give a straight out clarification of what are our legal rights under the Genocide Convention with respect to the UN Charter. That is all we are asking you to do and we are accepting your framework of reference within the terms of the Genocide Convention itself, particularly Article I thereof.

This really brings to an end the comments I wanted to make this afternoon. But I would be remiss in my duties if I were not to set the record straight on the so-called Peace Conference with respect to Bosnia and Herzegovina.

The PRESIDENT: Professor Boyle, I do not want to interrupt you but we are running against time and if we go on much longer we shall be trespassing upon the time available for the Respondent to reply, and there is also a question to be asked.

Mr. BOYLE: That's fine.

The PRESIDENT: Professor Boyle I was not asking you to cease immediately. There is one thing I think you might make clear, after all the amendments and so on, the Court would like to know what is the final position of Bosnia. Am I right in supposing that in fact, as I think you indicated in your discussion yesterday, that you are still finally asking for each and every one of then ten provisional measures you asked for, as set out in your first application of 27 July.

Professor BOYLE: Yes.

Judge SCHWEBEL: Thank you, Mr. President.

I should like to ask the following questions of the Agent of the Republic of Bosnia and Herzegovina and in asking these questions I wish to make clear that I express no opinion on the merits or de-merits of proposals emanating from the Geneva negotiations or on the circumstances surrounding those negotiations.

The Genocide Convention defines genocide as acts committed with the intent to destroy, in whole or in part, a national, ethnical, racial or religious group by killing members of the group causing serious bodily or mental harm to the members of the group and related grave delictual acts. In view of the arguments of the Agent of the Republic of Bosnia and Herzegovina two questions arise.

1. Suppose *arguendo* that the result of the Geneva negotiations is agreement among all parties to replace the current constitutional structure of the Republic of Bosnia and Herzegovina with another constitutional structure: is the life of the current constitutional structure of the Republic of Bosnia and Herzegovina to be equated with the life of members of a national, ethnical, racial or religious group?

2. Suppose *arguendo* that the result of the Geneva negotiations is to reconstitute the Republic of Bosnia and Herzegovina as three constituent Republics - Muslim, Serb and Croatian, will such a re-constitution of itself be tantamount to genocide?

Thank you Mr. President.

The PRESIDENT: Thank you very much. This is an impromptu question in longhand. Perhaps we can promise that the two Parties will have the question, typed, as soon as possible. But would you like to reply to it now?

Mr. BOYLE: On your first question, Judge Schwebel. We went to Geneva and I was there for the time on the basis of a mandate that was from the EEC and United Nations Security Council resolutions demanding that the territorial integrity and the political independence of Bosnia-Herzegovina would be preserved. What we found out when we got there and we read the documents which I did for my President, and you have my report in your file, was that in fact the documents were drafted on the assumption that we would be carved up into three independent States. And as the Legal Adviser to the International Conference on the former Yugoslavia Chairman admitted this would create severe continuity problems for us at the United Nations Organization. Now on the basis of instructions I had received from my President and my Foreign Minister, I rejected this and tabled a counter-proposal based on the assumption that we would be having an internal reorganization into three constituent republics but one unified State that would continue our United Nations membership. And when I tabled that counter-offer to the International Conference on the former Yugoslavia lawyer I was basically threatened at United Nations Headquarters in Geneva, not personally, but on behalf of the State. I was told that if we did not accept the Owen-Stoltenberg Plan exactly the way it was drafted "the Security Council will tell you to go to hell". Now that was said to me, the General Agent for Bosnia and Herzegovina, and I was there in that capacity and the lawyer understood that, and I was told this in United Nations Headquarters. That is where negotiations stand today.

The Owen-Stoltenberg Agreement still calls for us to be carved up into three independent States and basically to create a severe continuity problem for us at the United Nations. And we have officially rejected that in letters by President Izetbegovic that have been on file at the Security Council and are on file with this Court.

Now, as for your second question, we have submitted and - Professor Rosenne made this point - maybe I did not make it clear, we are

saying that partition, annexation, is being done by means of genocide. That is part of the plan. Now, you liquidate a people and you steal their land and their possessions. The same thing was done to the Jews in Germany. Right. That is what is being done to us. The programme here is greater Serbia. Take our land and kill the people and move us out and grab it and keep it. In my opinion the internal structural reorganization that you suggested is pretty much what we proposed in our counter-offer in Geneva. Add, again, instructions of my President, I would have said, well, try to come up with a reasonable compromise here that would continue our existence as a unified State and a Member of the United Nations but would accept the notion of an internal reorganization, internally and constitutionally, on the basis of three constituent units - one for Muslims, one for Croats, one for Serbs. On the basis of those instructions I drafted a proposal that was then sent out under President Izetbegovic's name to the Co-Chairmen. That proposal has yet to be responded to by the Co-Chairmen and it is on file at the Security Council, it is on file here with the Court. We accepted the notion of an internal reorganization into three constituent units based on ethnicity, despite the fact that we felt it was a bad thing to do because it will lead to further acts of genocide, and here what should come to everyone's mind is India and Pakistan. Remember when the Indian su-continent was partitioned and how many people died as a result of that. And yesterday I cited the statistics by the official State Department Study that was at least recounted in the *New York Times*, they estimated that if this internal reorganization that you mention, that legally would keep our international personality, keep our United Nations membership, nevertheless would subject another million-and-a-half people or more to acts of ethnic cleansing. Our people live there all intermingled everywhere. So if you say: well,

here is the Muslim State, here is the Serb State and here is the Croat State, you are going to put 1-1$^{1}/_{2}$ million people on the move, and even more death and destruction and killing and genocide.

So the quick answer to your question is yes, although it is the position of our Government, we are prepared to accept it because the great Powers have said to us: well, we want you to do this. We have accepted it in principle somewhat reluctantly and I should point out that just recently three United States Government high-level officials in the State Department have resigned because they know full well what the consequences will be if the so-called internal reorganization is carried out.

I hope that answers your question adequately.

The PRESIDENT: Thank you very much, Professor Boyle. Now, when would you like us to return? Would it still be 5 o'clock or would you like us to come back at 5.10 p.m.?

Mr. ETINSKI: Mr. President, if you find it convenient, the time for a coffee break will be enough for the Yugoslav Party.

The PRESIDENT: So that 5 o'clock would be alright, would it?

Mr. ETINSKI: Well, I said the time for a coffee break - 15 to 30 minutes, no more.

The PRESIDENT: Thirty minutes from now?

Mr. ETINKSI: Yes.

The PRESIDENT: Quarter to five, shall we say? Thank you very much.

The Court adjourned from 4.15 to 4.45 p.m.

The PRESIDENT: Please be seated. Mr. Etinski.

Mr. ETINSKI: Mr. President, distinguished Members of the Court, may it please the Court.

Reserving all rights of objection to the jurisdiction of the Court and to the admissibility of the Application, and in view of the contents of the two written submissions dated 9 and 23 August 1993, and the statements of my distinguished colleagues, I would like to present the final comments.

In view of the claim of the Applicant State 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 State 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 State, the jurisdiction of the Court is also grounded on the Customary and Conventional International Law of War and International Humanitarian Law, including, but not limited to, the four Geneva Conventions of 1949, their First Additional Protocol of 1977, and the Hague Regulations on Land Warfare of 1907, and the Nuremberg Charter, Judgment and Principles, the Federal Republic of Yugoslavia asks the Court

to reject the said claim,

- because it is contrary to Article 36 of the Statute of the Court.

In view of the claim of the Applicant State 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,
- because the declaration was not in force on 31 March 1993, or
- because the condition contained in the declaration is not fulfilled.

The Federal Republic of Yugoslavia asks the Court

to reject all Provisional Measures requested by the Applicant State because the Court has no jurisdiction to indicate them;

- because they are not founded on the new legally relevant facts;
- because of the abuse of rights of the request for provisional measures;
- because they would cause irreparable prejudice to the rights of the Federal Republic of Yugoslavia that the so-called Republic of Bosnia and Herzegovina fulfils its obligations under the Genocide Convention concerning the Serb people in Bosnia and Herzegovina;
- because they look to the past not to the future;
- because they mean an interim judgment;
- because the qualification of the provisions of the Genocide Convention cannot be the subject-matter of the Provisional Measures; and
- because they are ill-founded on Article 75, paragraph 1, of the Rules of Court.

Wishing to protect its rights by making the so-called Republic of Bosnia and Herzegovina to fulfil all its obligations concerning the protection of the Serb ethnic group according to the Genocide Convention,

the Federal Republic of Yugoslavia asks the Court to indicate the following Provisional Measure:

The Government of the so-called Republic of Bosnia-Herzegovina should immediately, in pursuance of its obligation under the Convention on the Prevention and Punishment of the Crime of Genocide of 9 December 1948, take all measures within its power to prevent commission of the crime of genocide against the Serb ethnic group.

Thank you Mr. President.

The PRESIDENT: Thank you. That is the end of the Yugoslavia case?

Mr. ETINSKI: Yes.

The PRESIDENT: Very well. So, we come to the end of these oral proceedings which I now declare closed, subject to the usual condition of the Agents remaining available to the Court if needed at some juncture. The Court will now proceed to deliberate its decision and the date on which the Order will be read out in Court will be notified to the Parties in due course. Thank you very much.

The Court rose at 5.00 p.m.