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YEAR 1996

Public sitting

held on Monday 29 April 1996, at 10 a.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 lundi 29 avril 1996, à 10 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
	Vice-President	Schwebel
	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
M. Schwebel, Vice-Président
MM. Oda
Guillaume
Shahabuddeen
Weeramantry
Ranjeva
Herczegh
Shi
Koroma
Vereshchetin
Ferrari Bravo
Parra-Aranguren, juges
MM. Lauterpacht
Kreća, juges *ad hoc*

M. Valencia-Ospina, Greffier

The Government of Bosnia and Herzegovina is represented by:

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Mr. Phon van den Biesen Esq.;

Mr. Khawar M. Qureshi Esq.;

Mr. Marc Weller M.A.L.D.;

Mr. Alain Pellet;

Mr. Thomas M. Franck;

Mrs. Brigitte Stern.

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

H.E. Mr. Rodoljub Etinski, Chief Legal Adviser in the Ministry of Foreign Affairs of the Federal Republic of Yugoslavia and Professor of International Law, Novi Sad University;

Mr. Djordje Lopicic, Chargé d'Affaires of the Embassy of the Federal Republic of Yugoslavia, The Hague,

as Agents;

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,

H.E. M. Shabtai Rosenne, Ambassador,

Mr. Gravro Perazic, Professor of International Law, Podgorica University,

as Counsel.

Le Gouvernement de la Bosnie-Herzégovine est representé par :

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

M. Phon van den Biesen;

M. Khawar M. Qureshi;

M. Marc Weller, M.A.L.D.;

M. Alain Pellet, professeur;

M. Thomas M. Franck, professeur;

Mme Brigitte Stern, professeur.

Le Gouvernement de la Yougoslavie (Serbie et Monténégro) est représentée par :

M. Rodoljub Etinski, conseiller juridique principal au ministère des affaires étrangères de la République fédérative de Yougoslavie (Serbie et Monténégro), professeur de droit international à l'Université de Novi Sad,

M. Djordje Lopicic, chargé d'affaires à l'ambassade de la République fédérative de Yougoslavie (Serbie et Monténégro) à La Haye,

comme agents;

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

M. Eric Suy, professeur à l'Université catholique de Louvain (K.U.L.), ancien Secrétaire général adjoint et conseiller juridique de l'Organisation des Nations Unies,

comme conseils et avocats;

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 je vous prie. L'audience est ouverte. La Cour est aujourd'hui réunie, conformément au paragraphe 4 de l'article 79 de son Règlement, pour entendre les exposés oraux des Parties sur les exceptions préliminaires soulevées par la République fédérative de Yougoslavie (Serbie et Monténégro) 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))*.

Deux membres de la Cour, M. Fleischhauer et Mme Higgins, m'ont fait savoir qu'ayant antérieurement connu, en leur qualité, respectivement, de conseiller juridique des Nations Unies et de membre du Comité des droits de l'homme des Nations Unies, de certaines questions susceptibles d'être pertinentes aux fins de la présente affaire, ils estimaient ne pas pouvoir participer à celle-ci, conformément aux dispositions applicables du Statut de la Cour. Je rappellerai par ailleurs que la Cour ne comptant pas sur le siège de juge de la nationalité des Parties, chacune d'elles a fait usage du droit que lui confère le paragraphe 3 de l'article 31 du Statut de désigner un juge *ad hoc*; ceux-ci ont été dûment installés lors d'une phase antérieure de l'affaire.

L'instance a été introduite le 20 mars 1993 par le dépôt au Greffe de la Cour d'une requête de la République de Bosnie-Herzégovine (que je dénommerai ci-après, par commodité, la «Bosnie-Herzégovine») contre la République fédérative de Yougoslavie (Serbie et Monténégro) (que je dénommerai ci-après, par commodité, la «Yougoslavie») au sujet d'un différend concernant d'une part une série de violations alléguées de la convention pour la prévention et la répression du crime de génocide du 9 décembre 1948, que la Partie demanderesse impute à la Partie défenderesse, et d'autre part diverses questions qui, selon la Partie

demanderesse, seraient liées à ces violations. La requête invoque comme base de compétence l'article IX de la convention sur le génocide.

A la même date, la Bosnie-Herzégovine a présenté une demande en indication de mesures conservatoires. Le 31 mars 1993, l'agent de la Bosnie-Herzégovine a déposé au Greffe un document daté du 8 juin 1992 constituant, de l'avis de son gouvernement, une base de compétence de la Cour s'ajoutant à celle indiquée dans la requête. Dans des observations écrites présentées le 1er avril 1993, la Yougoslavie a également recommandé à la Cour d'indiquer des mesures conservatoires. Par une ordonnance en date du 8 avril 1993, la Cour, après avoir entendu les Parties, a indiqué certaines mesures conservatoires devant être prises par la Yougoslavie, et a indiqué en outre que les deux Parties devaient ne prendre aucune mesure et veiller à ce qu'il n'en soit prise aucune, qui soit de nature à aggraver ou étendre le différend existant sur la prévention et la répression du crime de génocide, ou à en rendre la solution plus difficile.

Le 27 juillet 1993, la Bosnie-Herzégovine a déposé une deuxième demande en indication de mesures conservatoires; et, par une série de communications ultérieures, elle a fait savoir qu'elle entendait modifier ou compléter cette demande, ainsi que, dans certains cas, la requête (y compris la base de compétence qui y était invoquée). Le 5 avril 1993, le Président de la Cour a adressé un message aux deux Parties, conformément au paragraphe 4 de l'article 74 du Règlement qui l'autorise à ce faire, en attendant que la Cour se réunisse, et il a «invité les parties à agir de manière que toute ordonnance de la Cour sur la demande en indication de mesures conservatoires puisse avoir les effets voulus». Le 10 août 1993, la Yougoslavie a à son tour déposé une demande en indication de mesures conservatoires. Par une ordonnance en date du

13 septembre 1993, la Cour, après avoir entendu les Parties, a réaffirmé les mesures indiquées dans son ordonnance du 8 avril 1993 et a déclaré que ces mesures devaient être immédiatement et effectivement mises en œuvre.

Par une ordonnance du 16 avril 1993, le Président de la Cour avait fixé au 15 octobre 1993 la date d'expiration du délai pour le dépôt du mémoire de la Bosnie-Herzégovine et au 15 avril 1994 la date d'expiration du délai pour le dépôt du contre-mémoire de la Yougoslavie. A la demande de la Bosnie-Herzégovine, la date d'expiration du délai pour le dépôt du mémoire a été reportée au 15 avril 1994, par une ordonnance du Vice-Président en date du 7 octobre 1993; la date d'expiration du délai pour le dépôt du contre-mémoire a été reportée, par la même ordonnance, au 15 avril 1995. Le mémoire de la Bosnie-Herzégovine a été déposé dans le délai ainsi prorogé. A la demande de l'agent de la Yougoslavie, la date d'expiration du délai pour le dépôt du contre-mémoire a été reportée au 30 juin 1995, par une ordonnance du Président en date du 21 mars 1995.

Dans le délai ainsi prorogé, la Yougoslavie a déposé certaines exceptions préliminaires, ainsi que l'y autorise le paragraphe 1 de l'article 79 du Règlement de la Cour. Les deux premières exceptions présentées par le Gouvernement yougoslave portent sur la recevabilité de la requête et les cinq dernières sur la compétence de la Cour pour connaître de l'affaire. La procédure à suivre après le dépôt d'exceptions préliminaires est régie par le paragraphe 3 de l'article 79 du Règlement; conformément à cette disposition, dès réception par le Greffe de l'acte introductif de l'exception, la procédure sur le fond a été suspendue et une procédure particulière devait être organisée pour permettre à la Cour d'examiner ces exceptions. Par une ordonnance en date du 14 juillet 1995, le Président de la Cour a fixé au

14 novembre 1995 la date d'expiration du délai dans lequel la Bosnie-Herzégovine pourrait présenter un exposé écrit contenant ses observations et conclusions sur les exceptions préliminaires soulevées par la Yougoslavie. Dans le délai ainsi fixé, la Bosnie-Herzégovine a déposé un tel exposé, au terme duquel elle prie la Cour :

«- de rejeter et écarter les exceptions préliminaires de la Yougoslavie (Serbie et Monténégro); et

- de dire et juger :

i) que la Cour a compétence à l'égard des conclusions présentées dans le mémoire de la Bosnie-Herzégovine; et

ii) que ces conclusions sont recevables».

Conformément au paragraphe 4 de l'article 79 du Règlement, il appartient maintenant à la Cour d'entendre les Parties sur les questions afférentes à sa compétence et à la recevabilité de la requête. Je note la présence à l'audience des agents des deux Parties. Aux fins de la procédure orale sur les exceptions préliminaires, il reviendra à l'agent de la Yougoslavie de s'exprimer en premier.

Toutefois, avant de lui donner la parole, je dois annoncer que, après s'être renseignée auprès des Parties, la Cour a décidé, conformément au paragraphe 2 de l'article 53 de son Règlement, de rendre accessibles au public les pièces de procédure et documents y annexés déposés jusqu'ici dans la présente instance.

Je donne maintenant la parole à M. Etinski, agent de la Yougoslavie.

Mr. ETINSKI: Mr. President, distinguished Members of the Court, may it please the Court, at the outset I would like to extend my congratulations to the International Court of Justice on the occasion of its fiftieth anniversary. The number of the cases before the Court has increased considerably in the last decade. This fact provides telling

evidence that the confidence of States in the Court has heightened and that many States increasingly perceive it as the most reliable institution available for dispute settlement. I am confident that the Court will continue to contribute to the strengthening of legality in relations among States also in the future. It is my pleasure to be able to state that a number of my countrymen participated in the work of the Court. Messrs. Jovanovic and Novakovic were Deputy-Judges in the Permanent Court of International Justice and Mr. Zoricic served as a judge to the International Court of Justice.

I should like also to congratulate the Members of the Court elected after my appearance before the Court in August 1993.

I take this opportunity to reiterate our request that the name of my country be used properly. The Security Council resolutions from November 1995 onwards refer to "the Federal Republic of Yugoslavia". The appellation of the Federal Republic of Yugoslavia is also used in the General Framework Agreement for Peace in Bosnia and Herzegovina, signed in Paris on 14 December 1995. Accordingly, I see no reason whatsoever why the Court should depart from this practice. This means that the bracketed addition of "Serbia and Montenegro" should be left out. In any case, I reserve the position of my country on this question. Mr. President, the Federal Republic of Yugoslavia upholds the Preliminary Objections submitted to the Court in writing in June 1995. Nevertheless some changes are necessary. The Court will be aware, after the successful conclusion of the Proximity Peace Talks in Wright-Patterson Air Force Base in Dayton, Ohio, the General Framework Agreement for Peace in Bosnia and Herzegovina was signed in Paris on 14 December 1995. Eleven Annexes have been added to this Agreement, dealing with various issues. The new Constitution of Bosnia and Herzegovina is contained in

Annex 4. According to Article I of this Constitution, Bosnia and Herzegovina consists of two Entities, the Republic of Srpska and the Federation of Bosnia and Herzegovina. This Constitution also provides for the protection of human rights and fundamental freedoms. In addition, the Republic of Bosnia and Herzegovina, the Federation of Bosnia and Herzegovina and the Republic of Srpska also concluded the Agreement on Human Rights, contained in Annex 6. This Agreement provides for special mechanisms for the protection of human rights and fundamental freedoms.

In accordance with Article X of the General Framework Agreement the two Parties have recognized each other. These developments have made redundant some of the arguments presented within our fourth Preliminary Objection and we desist from the fourth Preliminary Objection. The mutual recognition in Paris on 14 December 1995 has raised the question of whether a multilateral agreement is applicable to Parties that do not recognize each other.

By the conclusion of the General Framework Agreement for Peace in Bosnia and Herzegovina in Paris on 14 December 1995, the legal situation has changed substantially. The Republic of Srpska has become one of the two constituent entities of Bosnia and Herzegovina. Elections and the constitution of new central organs are expected to take place in which the Republic of Srpska will also be represented. Bearing that in mind, we proposed by our Note sent to the Court on 30 January 1996 that this oral hearing be postponed until that time when the conditions would have been created for both entities of Bosnia and Herzegovina to be legitimately represented before the Court for, in the existing conditions the Agent of the Applicant can only have the mandate which is both highly contingent and, in constitutional terms, problematical.

Mr. President, in its statement the Applicant presented some unfounded contentions related to the merits of the case, and not to the Preliminary Objections. We consider that these transgress the bounds of procedural propriety and plead with the Court not to consider them.

Mr. Mitić will present our objection to the effect that Bosnia and Herzegovina has not obtained independent Statehood in conformity with the principle of equality and self-determination of peoples and that, therefore, it could not succeed to the Genocide Convention. It is a rule of general international law that a notification of succession to treaties of a predecessor State is reserved for newly independent States that obtain their independence in conformity with the principle of equal rights and self-determination of peoples.

The Applicant contends that the Constitution of the Socialist Federal Republic of Yugoslavia from 1974 provided for the right of the Yugoslav Republics to self-determination and secession. Furthermore, the Applicant contends that the secession of Bosnia and Herzegovina was carried out in accordance with the constitutional provisions. Alternatively, the Applicant considers that at the time of the secession of Bosnia and Herzegovina the Socialist Federal Republic of Yugoslavia ceased to exist, i.e. that its central organs no longer functioned. None of these contentions is correct. The Constitution of the Socialist Federal Republic of Yugoslavia from 1974 provided for no right of the Yugoslav Republics to self-determination and secession. It is true that the introductory principle refers to the right of peoples to self-determination and secession, but as a right on the basis of which the pre-World War II Yugoslavia was rearranged after World War II. As a matter of fact, proceeding from that right, the unitary pre-World War II Yugoslavia was transformed into a federation. In any case, according to

the said constitutional principle, the subjects of the right were the peoples, not the Republics, of the Socialist Federal Republic of Yugoslavia. It is a matter of public knowledge that three peoples live in Bosnia and Herzegovina.

All the decisions related to the secession of Bosnia and Herzegovina were adopted by the outvoting of the representatives of the Serbian people. At that time there existed a constitutional mechanism, aimed at preventing this course of events. 1990 Amendment LXX, paragraph 10, to the Constitution of Bosnia and Herzegovina of 1974 provided for the setting up of the Council on the Questions of the Realization of the Equality of the Peoples and Nationalities of Bosnia and Herzegovina. At the request of at least 20 MPs of the Assembly of Bosnia and Herzegovina, each question relevant to the equality of the peoples and nationalities of Bosnia and Herzegovina was to be considered by the said Council before a final decision was adopted by the Assembly. Decisions in the Council were to be taken by agreement of an equal number of representatives of each people. Besides, a proposal resulting from such a decision in the Council was to be decided by a two-third majority in the Assembly. However, notwithstanding the said Amendment, this Council was never established. It is strange indeed that the Applicant should contend that the acts of secession were carried out in accordance with the constitutional provisions of Bosnia and Herzegovina. All relevant acts of secession had been carried out by the end of May 1992.

In this connection, the Applicant refers to the Opinions of the Badinter Commission. In many respects, the Opinions of this Commission are problematic, to say the least, and certainly legally non-binding. We reject many positions of this Commission, in particular, the one to the effect that the Socialist Federal Republic of Yugoslavia ceased to exist.

Yet, even according to the Opinions of this Commission, the Socialist Federal Republic of Yugoslavia did exist at the time when the acts of the secession of Bosnia and Herzegovina were being carried out. The federal organs were still functioning, admittedly in a changed composition, but these changes had been brought about by the recall of the representatives of the secessionist Republics. We maintain that the secession of Bosnia and Herzegovina was not in conformity with the principle of equal rights and self-determination of peoples. It was not so for two reasons: it violated the territorial integrity of the Socialist Federal Republic of Yugoslavia and it breached the rights of the Serbian people in Bosnia and Herzegovina. Mr. Mitić will speak on this matter in greater detail.

Considering the limited time available to me, I submit to present in very short terms only the basic elements of our Preliminary Objections that the other members of our delegation will present more exhaustively.

Our objection as to the overstepping of the competence of Mr. Alija Izetbegović to authorize the filing of the Application will be presented by the co-agent Mr. Lopičić. This objection of ours is quite simple. Bosnia and Herzegovina had, and still shares, a collective Head of State - the Presidency. The decision on the filing of the Application should have been taken by the Presidency. However, the decision was not taken by the Presidency, but by the President of the Presidency. He was not authorized to take that decision; he was only authorized to signed a decision to this effect by the Presidency. I maintain that this is not a technical problem, but a question of substance. Mr. Lopičić will speak on this matter in greater detail.

Professor Suy will present the arguments related to succession, aimed at proving that the Genocide Convention was not operative between the Parties in dispute, i.e. that it was not applicable to the Parties in

dispute from 8 March 1992 even if the Court was to establish that Bosnia and Herzegovina succeeded to the Genocide Convention. Professor Suy will give an overview of the current practice and new opinions which corroborate our position that the rule of automatic succession as an international custom does not exist. Furthermore, Professor Suy will explain the practice and theory according to which multilateral treaties are not applicable between States which do not recognize each other.

At the time referred to in the Application a civil war was being fought in Bosnia and Herzegovina. The parties to the civil war were the Muslim forces under the command of Mr. Alija Izetbegović, the armed forces of the Republic of Srpska and the armed forces of the Croatian Herceg-Bosna. Besides, the Muslim forces under the command of Mr. Fikret Abdić also took part in this civil strife, fighting the Muslim forces under the command of Mr. Alija Izetbegović. The Federal Republic of Yugoslavia took no part in this civil war and did not have territorial jurisdiction in Bosnia and Herzegovina. Bearing this in mind, we can conclude that there do not exist the necessary conditions for the emergence of a dispute between the two Parties within the terms of Article IX of the Genocide Convention. The arguments on these issues will be presented by Mr. Brownlie.

And finally, I myself will address the question as to when the Genocide Convention could be applicable between the Parties if the Court were to establish that Bosnia and Herzegovina succeeded to the Genocide Convention and will then present the final submissions.

Mr. President,

I now kindly call on you to give the floor to Mr. Mitić.

Thank you, Mr. President.

Mr. PRESIDENT: Thank you very much Your Excellency for your introductory statement. I now give the floor to Mr. Miodrag Mitić.

Mr. MITIĆ: Thank you Mr. President. Mr. President, distinguished Members of the Court, may it please the Court. Allow me, Mr. President, to proceed to the third preliminary objection of the Federal Republic of Yugoslavia. Without prejudice to our contention that the entry of multilateral treaties by notification of succession is reserved exclusively for newly independent States born in the process of decolonization, in our third preliminary objection we maintain that the Applicant could not succeed to the Genocide Convention because the acquisition of its independent statehood had not been in conformity with the principle of equal rights and self-determination of peoples. The Applicant replies

- that the right to secession was provided for by the Constitution of the Socialist Federal Republic of Yugoslavia from 1974;
- that the secession was done in accordance with the constitutional regulations;
- i.e., that at the time of the secession of Bosnia and Herzegovina the Socialist Federal Republic of Yugoslavia ceased to exist and that Bosnia and Herzegovina had no other choice but to declare independence.

None of these claims is accurate. Our third objection consists of the following elements:

(1) there exists a rule of customary international law according to which a new State cannot succeed to international treaties if the establishment of its independent statehood was not in conformity with the principle of equal rights and self-determination of peoples;

(2) the secession of Bosnia and Herzegovina was not in conformity with the principle of equal rights and self-determination of peoples;

(3) the denial of the rights of the Serbian people up until the signing of the General Framework Agreement for Peace in Bosnia and Herzegovina and the non-recognition of the Republic of Srpska as one of the entities of Bosnia and Herzegovina was not in conformity with the principle of equal rights and self-determination of peoples;

(4) the premature recognition of Bosnia and Herzegovina was an act of interference in the internal affairs of the Socialist Federal Republic of Yugoslavia, which was not in conformity with the principle of equal rights and self-determination of peoples; and

(5) therefore, the Republic of Bosnia and Herzegovina could not succeed to the Convention on the Prevention and Punishment of the Crime of Genocide.

1. There exists the customary rule which makes the succession of a new State to international treaties conditional on the request that the new State has achieved its independence in conformity with the principle of equal rights and self-determination of peoples.

This international custom evolved in the practice of decolonization concerning the succession of States to international treaties. All new States that were born in the process of decolonization based their independence precisely on the consistent application of the principle of equal rights and self-determination of peoples. And the practice of succession constitutes one form of the realization of this principle. This customary rule was reflected in Article 6 of the Vienna Convention on Succession of States in respect of Treaties which reads:

> "The present Convention applies only to the effects of succession of States occurring in conformity with international law and, in particular, the principles of international law embodied in the Charter of the United Nations."

Let me quote here the words of Mr. Bedjaoui, speaking as a Member of the International Law Commission:

> "Article 6 merely stipulates that the draft applied only to lawful succession, to the exclusion of any form of unlawful succession. There was, therefore, no question of possible rights and obligations of successor States which had effected a territorial change to its own advantage in breach of international law and, more especially, of the United Nations Charter. The irregularity of the acquisition of a territory would be in no way effaced if the successor State applied the provisions of the draft. Hence it was not a matter of denying rights or obligations to such a State, but of treating it as a non-successor State." (*YILC*, 1974, Vol. I, p. 79, para. 40.)

The Applicant does not deny the existence of this rule. On the contrary, from paragraph 3.61 of the Statement (p. 79) it is clear that the Applicant is agreed to the existence of this rule.

2. The secession of Bosnia and Herzegovina was not in conformity with the principle of equal rights and self-determination of peoples. The Bosnia and Herzegovina lacked the capacity for self-determination.

This contention of ours contains four elements:

2.1. The right to unilateral and violent secession did not exist in the internal law of the Socialist Federal Republic of Yugoslavia;

2.2. The decision on secession was not taken in accordance with the constitutional law in force at that time in Bosnia and Herzegovina:

2.3. The Socialist Federal Republic of Yugoslavia existed as a subject of international law and its central organs functioned at the time of the secession of Bosnia and Herzegovina;

2.4. The right to secession is contrary to the territorial integrity of States which is an essential element of the principle of equal rights and self-determination of peoples.

2.1. The right of unilateral and violent secession did not exist in the internal law of the Social Federal Republic of Yugoslavia.

The contention of the Applicant presented in the Statement, (p. 49, para. 3.2) that "under the Constitution of the Socialist Federal Republic of Yugoslavia, the Republic of Herzegovina was entitled to opt for independent statehood" is wrong. The Applicant bases this contention on certain provisions of the Constitution of the Socialist Federal Republic of Yugoslavia from 1974, but it interprets these provisions of that constitution erroneously. To begin with, the Applicant quotes the following basic principle of the Constitution of the Socialist Federal Republic of Yugoslavia from 1974:

> "The nations of Yugoslavia, proceeding from the right of every nation to self-determination, including the right to secession, on the basis of their will freely expressed in the common struggle of all nations and nationalities in the national Liberation War and Socialist Revolution, and in conformity with their historic aspirations, aware that further consolidation of their brotherhood and unity is in the common interest, united, together with the nationalities with which they live, in a federal republic of free and equal nations and nationalities and founded a socialist federal community of working people, the Socialist Federal Republic of Yugoslavia."

In the same paragraph of the Statement the Applicant refers to the division of authority between the Federation and federal units under the 1974 Constitution and concludes: "The Republics always retain the right to self-determination, including, in express terms, 'the right to secession'." This conclusion is wrong. The 1974 Constitution does not provide for the right of the Republics to self-determination and to secession, but for the right of a people to self-determination. This is the essential difference which is of particular importance precisely in the case of Bosnia and Herzegovina which was constituted as a Republic of three equal peoples: Serbs, Muslims and Croats. Besides, the said basic principle of the 1974 Constitution refers to the right of peoples to

self-determination, including the right to secession, as the legal basis on which the pre-World War II Yugoslavia was reorganized during World War Two into a socialist and federal State. Accordingly, proceeding from the said right, the Yugoslav peoples opted for the said internal system. The whole provision is written in the past tense. I have to remark here that the translation of the quoted constitutional principle into English is incorrect. The Applicant used the present perfect tense (have . . . united . . . founded) erroneously. The original text of the Constitution uses the tense which indicates that the verbal notion expressed by that tense refers to the past.

Nowhere in the Constitution of 1974 is it provided that any of the Yugoslav nations or Republics has the right to secession, and that it may, whenever it decides so, secede from Yugoslavia. It is true that by the constitutional changes of 1974, the Yugoslav Federation was very decentralized. However, this does not mean that the Republics became States in the sense of international law. The changes that were carried out in 1974 were inspired by the socialistic ideas of the socialization of the State and of self-management and not by an intention to transform federal units into States in the international legal sense.

In an attempt to prove that the federal units were States, in page 50, paragraph 3.2, of the Statement, the Applicant invokes Article 3 of the Constitution of the Socialist Federal Republic of Yugoslavia and states: "States based on the sovereignty of the people."

The Applicant quoted said Article 3 of the 1974 Federal Constitution very stintingly indeed.

The entire text of Article 3 of the Federal Constitution of 1974 reads:

> "The Socialist Republics are States based on the sovereignty of the people and the power of, and self-management by, the working class and all working people, and are socialist, self-managing democratic communities of the working people and citizens, and of nations and nationalities having equal rights." (The Applicant presented this provision in Annex 3.3 to its Statement.)

Accordingly, the constitutional definition of the federal units - socialist Republics - was much more complex than what is claimed by the Applicant. The federal units which were called socialist Republics and were defined as States and self-managing democratic communities of the working class and all the working people and citizens, nations and nationalities had no international legal attributes of statehood, i.e., treaty capacity, international representation, membership in international organizations and others. Only the Federation possessed these attributes. Consequently, it is not possible to conclude on the basis of this decentralization that the federal units had the right to a unilateral and violent secession.

The Amendments to the Constitution of the Socialist Republic of Bosnia and Herzegovina of 1990, referred to by the Applicant in paragraph 3.7 of the statement brought no substantial changes in this sense, either. According to Amendment LX,

> "Socialist Republic of Bosnia and Herzegovina is a democratic sovereign State of equal citizens, peoples of Bosnia and Herzegovina - Muslims, Serbs and Croats and the other peoples and nationalities who live in the Republic." (The Applicant presented this provision in Annex 2.5 to the Statement.)

The Socialist Republic of Bosnia and Herzegovina did not become a State in the sense of international law as a result of this Amendment and it was not given the right to secession. It will be seen later on that not even the Badinter Commission considered that Amendment LX to the Constitution of the Socialist Republic of Bosnia and Herzegovina from

1990 could provide a basis for the declaration of the independent statehood of Bosnia and Herzegovina. The best evidence is Amendment LXIX from 1990 according to which:

> "Political organizations and actions designed to violently overthrow of the Constitutional System, violate the territorial integrity and independence of the Socialist Federal Republic of Yugoslavia and the sovereignty and territorial integrity of the Socialist Republic of Bosnia and Herzegovina violate all rights guaranteed by this Constitution and shall be prohibited." (The Applicant presented this provision in Annex 2.5 to its Statement).

With the support of foreign elements, the Party of Democratic Action and the Croatian Democratic Community did precisely what was prohibited by this Amendment.

2.2. The decisions on secession were not taken in accordance with the constitutional law in force at the time in Bosnia and Herzegovina:

In page 53, paragraph 3.9, of the Statement of the Applicant it is said: "This does, however, obviously not preclude political change achieved in accordance with the constitution, in particular in accordance with the explicit right to self-determination and secession." There existed no right to secession. Clear evidence to that effect is provided by Amendment LXIX. Besides, the relevant decisions related to secession were not taken in accordance with the constitutional law in force at the time.

The adoption of the decision to hold a referendum was a gross violation of the Constitution of the Socialist Republic of Bosnia and Herzegovina. 1990 Amendment LXX, paragraph 10, to the Constitution of the Republic of Bosnia and Herzegovina provided for the setting up of the Council on the Questions of the Realization of the Equality of the Peoples and Nationalities of Bosnia and Herzegovina. In Annex 2.5 to its Statement, the Applicant presented the text of Amendment LXX, paragraph 10. However, only a part of the text was presented. The most

important parts of the text have been omitted. In our Annexes to Preliminary Objections, on page 814, we have presented a photostat copy of Official Gazette No. 21 of the Socialist Republic of Bosnia and Herzegovina of 31 July 1990 in which Amendment LXX was published. The full text of paragraph 10 of Amendment LXX reads:

> "The Council on the Questions of the Realization of the Equality of the Peoples and Nationalities of Bosnia and Herzegovina shall be set up in the Assembly of the Socialist Republic of Bosnia and Herzegovina. As members of the Council shall be elected, an even number of MPs from the ranks of the members of the peoples of Bosnia and Herzegovina - Muslims, Serbs and Croats, a corresponding number of MPs from the ranks of the members of other peoples and nationalities and others living in Bosnia and Herzegovina. The Council shall decide *on the basis of agreement between the members from the ranks of all peoples and nationalities*. The composition, scope and manner of work of the Council shall be regulated by the law to be brought by a two-third majority of the overall number of MPs in the Assembly of the Socialist Republic of Bosnia and Herzegovina.
>
> The Council shall consider in particular the questions related to: the equality of language and script; organization and activities of cultural institutions having special importance for the expression and affirmation of national characteristics of individual peoples and nationalities and the adoption of rules and regulations ensuring the realization of the constitutional provisions which expressly establish the principles of equality of peoples and nationalities.
>
> The Council shall necessarily consider the question of the equality of peoples and nationalities at the initiative of MPs in the Assembly of the Socialist Republic of Bosnia and Herzegovina. If at least 20 MPs consider that the equality of peoples and nationalities has been violated by the proposed rules and regulations or any other act, the proposal to be decided by the Assembly of the Socialist Republic of Bosnia and Herzegovina shall be determined by the Council.
>
> The Assembly of the Socialist Republic of Bosnia and Herzegovina shall decide on the questions of interest for the realization of equality of the peoples and nationalities of Bosnia and Herzegovina at the proposal of the Council in a special procedure established by the Rules of Procedure of the Assembly of the Socialist Republic of Bosnia and Herzegovina by the two-third majority of the overall number of MPs."

This was the most important constitutional provision guaranteeing the equality of the peoples and nationalities in Bosnia and Herzegovina.

This rule expressed the core of the principle of equality and self-determination of peoples in Bosnia and Herzegovina. Accordingly, it was provided that the questions concerning the equality of peoples be decided by agreement of an even number of representatives of all three peoples. Mr. Alija Izetbegović rejected each and every attempt at reaching agreement with the representatives of the Serbian people. This constitutional principle was grossly violated on the occasion of the adoption of the decision on holding a referendum. *Oslobodjenje* (Liberation) is a daily paper published in Sarajevo, Bosnia and Herzegovina. This is how *Oslobodjenje* of 26 January 1992 reported the adoption of the decision by the Assembly of the Socialist Republic of Bosnia and Herzegovina on holding the referendum:

> "The referendum of the citizens of Bosnia and Herzegovina on the future status of this Republic will be held on 29 February and 1 March 1992. The decision on referendum was adopted, unanimously early yesterday morning, after seventeen hours of discussion, by the Parliament of the Socialist Republic of Bosnia and Herzegovina, but without the presence of the MPs of the Serbian Democratic Party and the Serbian Renewal Movement. All the 130 present MPs voted: the MPs of the Party of Democratic Action and the Croatian Democratic Community, as well as the MPs of the opposition bloc, except the Liberal Party.
>
> The decision on referendum in Bosnia and Herzegovina was adopted at the extended session of the Parliament presided by the Vice-President of the Parliament of Bosnia and Herzegovina, Mr. Mariofil Ljubić. He was entrusted with this position at the request of the Club of the MPs of the Party of Democratic Action which all MPs present in the conference room supported by voting. Before that, the President of the Parliament of the Socialist Republic of Bosnia and Herzegovina, Momčilo Krajišnik, adjourned the session for the following day after the last interruption of the session he had presided over (stating that, according to the Rules of Procedures, the conditions for the continuation of the work had not concurred).
>
> This turnabout came about because of the failure of the three ruling Parliamentary parties to agree on the agenda supplement, i.e., the introduction of the proposal of the Presidency of the Socialist Republic of Bosnia and Herzegovina to adopt at this session the decision on a referendum of citizens. Many consultations were held because of which the

session was frequently interrupted and each time when the session was resumed it seemed that a solution was in sight. Particularly so in midnight hours when the Deputy Prime Minister of Bosnia and Herzegovina, Muhamed Čengić, proposed that 'first a detailed plan of the regionalization of the Republic be worked out and that only then a referendum be organized', but within a fixed period, to which the leader of the Serbian Democratic Party, Radovan Karadžić, also agreed who at one moment found himself at the rostrum together with Čengić.

'We have never been closer to an agreement than this time', said Karadžić to the applause of the MPs. The next interruption brought about another turnabout. Vlado Pandžić, Chairman of the Club of the Representatives of the Croatian Democratic Community, also said that he was glad that the agreement on a referendum was about to be reached. Only when Radovan Karadžić requested that the regionalization obligation be defined in a new constitution act (first regionalization, and then referendum), the President of the Party of Democratic Action, Alija Izetbegović, rejected any conditions regarding the referendum and said: 'We stick to what we have already proposed, and as far as discussion is concerned we can accept it'. Leaving the rostrum he criticized Krajišnik for the way in which he conducted the session.

At that moment it was obvious that all hopes in a successful outcome of the Karadžić-Čengić agreement had failed. Vojislav Maksimović, Chairman of the Club of the MPs of the Serbian Democratic Party said that any further discussion was purposeless and proposed, on behalf of all the MPs of the Serbian Democratic Party, that the proposal to take a decision on the referendum of the citizens be forwarded to the Council for Inter-Ethnic Equality. At this point this session of the Parliament was concluded for the MPs of the Serbian Democratic Party who, together with President Krajišnik, left the conference room. It was exactly 3.30 a.m."

By refusing to respect the request of the Serbian MPs to have the said Council declare itself on the question of the referendum on independence, the Assembly of Bosnia and Herzegovina grossly violated the constitutional provisions contained in Amendment LXX to the Constitution of the Socialist Republic of Bosnia and Herzegovina.

2.3. The Socialist Federal Republic of Yugoslavia as a subject of international law and its central organs functioned at the time of the secession of Bosnia and Herzegovina.

In page 51, paragraph 3.5, of its Statement, the Applicant goes on to say:

> "Even if the implementation of the right to independence had been subjected to a requirement of agreement of Federal or other bodies within the Constitutional system of the Socialist Federal Republic of Yugoslavia (which it was not), such a requirement would have been irrelevant in this case. When the Republic of Bosnia and Herzegovina activated its right to full independence, the organs of the former Socialist Federal Republic of Yugoslavia were no longer functioning. As the Badinter Commission confirmed in November 1991, the Socialist Federal Republic of Yugoslavia was already at that stage in a process of dissolution... Soon after the referendum on independence of 29 February/1 March 1992, the Arbitration Commission stated that this process had been concluded... The Republic of Bosnia and Herzegovina had therefore no option but to achieve its independence unilaterally, through the application of its own constitutional procedures..."

The quoted contention of the Applicant is not true at all. The first illegal acts through which the secession of Bosnia and Herzegovina began, were made on 14 October 1991 when the Assembly of the Socialist Republic of Bosnia and Herzegovina adopted the Platform on the Status of Bosnia-Herzegovina in the Future Set-up of the Yugoslav Community and the Memorandum (Letter of Intent). This was followed by the decisions of the Presidency and Government of the Socialist Republic of Bosnia and Herzegovina to submit a request for independence. On its session of 24 and 25 January 1992, the Assembly of the Socialist Republic of Bosnia and Herzegovina decided to organize a referendum of the citizens on independence. All those decisions were taken without the participation and against the will of the representatives of Bosnian Serbs in respective fora. The referendum was held on 29 February and 1 March 1992. In April and May 1992, armed formations under the control of the Muslim-Croat authorities in Bosnia and Herzegovina carried out armed attacks on the forces of the Yugoslav People's Army during their withdrawal from Bosnia and Herzegovina. The Yugoslav Federation and its organs did exist de jure and de facto throughout this period.

References to the Opinions of the Badinter Commission are wrong. It is true that in the Commission's Opinion No. 1 of 29 November 1991 it is said "that the Socialist Federal Republic of Yugoslavia is in the process of dissolution". But in this same Opinion it is also said: "Although the Socialist Federal Republic of Yugoslavia has until now retained its international personality,..." At the moment it communicated its first Opinion, the Badinter Commission noted that at that time the Socialist Federal Republic of Yugoslavia maintained its international personality. It was only in its Opinion No. 8 of 4 July 1992 that the Badinter Commission noted "that the process of dissolution of the Socialist Federal Republic of Yugoslavia referred to in Opinion No. 1 of 29 November 1991 is now complete and that the Socialist Federal Republic of Yugoslavia no longer exists". In the opinion of the Badinter Commission, the Socialist Federal Republic of Yugoslavia existed until 4 July 1992, although in the process of dissolution. Accordingly, even if the Badinter Commission Opinions had been correct and if they had stood the test of time, the Applicant cannot invoke them to corroborate its contention that the federal organs were no longer functioning and that "the Republic of Bosnia and Herzegovina had therefore no option but to achieve its independence unilaterally..." The federal organs were functioning during the entire period in which Bosnia and Herzegovina was taking unilateral secessionist acts. Admittedly, they were functioning in a changed composition, but the change of its composition was necessitated precisely by the acts of the secessionist Republics which recalled their representatives from federal organs. The contention of a Republic which recalls its representatives from federal organs that these federal organs are not functioning and that therefore the Federation no longer exists is untenable indeed. The Socialist Federal Republic of Yugoslavia did not cease to exist as a subject of international law.

Notwithstanding the contention, the fact is that a large number of the representatives of Bosnia and Herzegovina, Muslims and Croats included, did remain in the federal organs.

The Opinions of the Badinter Commission were problematical and in any event not legally binding. Besides, an opinion that a State is in the process of dissolution is not a legal but a political opinion. This opinion therefore constitutes no legal qualification of the existing state of affairs but an act of interference in the internal affairs of the Socialist Federal Republic of Yugoslavia. In fact, this Opinion encouraged the separatist forces in the Socialist Federal Republic of Yugoslavia.

Besides, an instant legal rule was created only for this case according to which the central organs had no right to use force to suppress separatist forces. This rule was never used before or after. The application of this rule to the Yugoslav Federation, as well as the premature recognition of the secessionist Republics, enabled the secessionist forces to succeed in their undertakings.

2.4. The right to secession is contrary to the territorial integrity of States which is an essential element of the principle of equal rights and self-determination of peoples.

By an unilateral and violent secession from the Yugoslav Federation, Bosnia and Herzegovina grossly violated the territorial integrity and sovereignty of Yugoslavia. There is no doubt that it was contrary to the obligations emanating from the principle of equal rights and self-determination of peoples. I quote the relevant provision contained in the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in Accordance with the Charter of the United Nations, adopted by the General Assembly on 24 October 1970, which reads:

> "Nothing in the foregoing paragraphs shall be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples as described above and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour."

The importance of this provision was pointed out also by the World Conference on Human Rights, held in Vienna in 1993, which reiterated this provision in paragraph 2 of the Vienna Declaration and Programme of Action. (UN Doc. A/CONF.157/24, Part I, 13 October 1993).

In her General Course on Public International Law at the Hague Academy of International Law, entitled "International Law and the Avoidance, Containment and Resolution of Disputes", held in 1991, Judge Rosalyn Higgins spoke very convincingly on, inter alia, self-determination beyond colonialism. On that occasion, she pointed out the importance of the provision that we quoted. Analysing the practice, she notices that this principle is complex and that some of its elements have a general application. In that connection, she writes:

> "This reality is a far cry from the position of certain writers, who assume that self-determination is only about independence; that independence is achieved by the end of colonialism; and that further independence can only be achieved through secession. Because they believe - correctly, in my opinion - that there is no legal right of secession where there is representative government - they conclude that there is no self-determination permitted in these circumstances. Much of this debate has centred around General Assembly resolution 2625 (XXV) . . ." (*Recueil des Cours*, Collected Courses of the Hague Academy of International Law (1991-V) Vol. 230, p. 162.)

On that occasion Judge Higgins quoted the cited paragraph of the resolution.

With your permission, I shall invoke one of the most comprehensive studies on self-determination of peoples: the monograph of Antonio Cassese

called *Self-Determination of Peoples, A Legal Reappraisal*, published in 1995. On page 269 of his book, Cassese says:

> "As in the case of the twelve Soviet republics, under international law the six Yugoslav republics had no right to external self-determination. In addition, no such right was proclaimed in the Yugoslav constitution."

Under external self-determination, the author, among others, means the right to secession. On the following page the author notes the following:

> "The achievement of independence by Slovenia, Croatia, Bosnia-Herzegovina, and Macedonia can therefore be seen as a revolutionary process that has taken place beyond the regulation of the existing body of laws."

3. The denial of the right of the Serb people up until the signing of the General Framework Agreement for Peace in Bosnia and Herzegovina and the non-recognition of the Republic of Srpska as one of the entities of Bosnia and Herzegovina was not in conformity with the principle of equal rights and self-determination of peoples.

I repeat here our conviction that the Opinions of the Badinter Commission were groundless and that they were the political acts misused as a basis for the interference in the internal affairs of the Socialist Federal Republic of Yugoslavia. However, even according to these erroneous Opinions, Bosnia and Herzegovina did not fulfil the conditions for the accession to independence. In its Opinion No. 4 of 11 January 1992, the Badinter Commission considered the request of the Minister for Foreign Affairs of the Socialist Republic of Bosnia and Herzegovina by which recognition of Bosnia and Herzegovina as a sovereign and independent State was requested. In it the Badinter Commission notes:

> "In the eyes of the Presidency and the Government of the SRBH the legal basis for the application for recognition is Amendment LX, added to the Constitution on 31 July 1990. This states that the Republic of Bosnia-Herzegovina is a 'sovereign democratic State of equal citizens, comprising the peoples of Bosnia-Herzegovina - Muslims, Serbs and Croats - and members of other peoples and other nationalities living on its territory'. This statement is essentially the same as Article 1 of the 1974 Constitution and makes no significant change in the law.

> Outside the institutional framework of the SRBH, on 10 November 1991 the 'Serbian people of Bosnia-Herzegovina' voted in a plebiscite for a 'common Yugoslav State'. On 21 December 1991 an 'Assembly of the Serbian people of Bosnia-Herzegovina' passed a resolution calling for the formation of a 'Serbian Republic of Bosnia-Herzegovina' in a federal Yugoslav State if the Muslim and Croat communities of Bosnia-Herzegovina decided to 'change their attitude towards Yugoslavia'. On 9 January 1992 this Assembly proclaimed the independence of a 'Serbian Republic of Bosnia-Herzegovina'.
>
> 4. In these circumstances the Arbitration Commission is of the opinion that the **will of the peoples** of Bosnia-Herzegovina to constitute the SRBH as a sovereign and independent State cannot be held to have been fully established.
>
> This assessment could be reviewed if appropriate guarantees were provided by the Republic applying for recognition, possibly by means of a referendum of all the citizens of the SRBH without distinction, carried out under international supervision."

Accordingly, the Badinter Commission did not support the position of the Presidency and Government of the Socialist Republic of Bosnia-Herzegovina that the legal basis for the acquisition of independent Statehood is to be found in Amendment LX to the Constitution of the SRBH.

It is obvious that the Badinter Commission had in mind the opposition of the Serbian people in Bosnia and Herzegovina to its constitution as an independent State outside Yugoslavia and that it was an obstacle to make an instantaneous recommendation for the recognition of Bosnia and Herzegovina. It therefore recommended that a referendum of all citizens of Bosnia and Herzegovina be held which would express the will of the peoples of Bosnia and Herzegovina. According to the official data of the Applicant only 63.4 per cent of the electorate participated in the referendum. Considering that one third of the population of Bosnia and Herzegovina were Serbs, we can conclude that the referendum was far below what has been requested by the Badinter Commission. The Badinter Commission may not have thought that literally all citizens should take part in the referendum, but it did request that all three peoples do so. This interpretation is based

on two reasons. First, the Badinter Commission said that the "**will of the peoples** of Bosnia-Herzegovina to constitute the SRBH as a sovereign and independent State cannot be held to have been fully established". It used the plural. Second, the Badinter Commission proposed a referendum of "all the citizens of the SRBH without distinction" as a sort of remedy for the unestablished will of the peoples. The only thing that this could mean was that the Badinter Commission expected that all three peoples take part in the referendum. This did not happen. It is beyond dispute that all Serbs or almost all Serbs in Bosnia and Herzegovina boycotted the referendum. Accordingly, such a referendum could not have been the basis for the change of the position of the Badinter Commission expressed in its Opinion No. 4.

Mr. President, as we now have a scheduled coffee break, with your permission I will stop delivering my statement and resume after the break. Thank you, Mr. President.

The PRESIDENT: Thank you, Mr. Mitić. The hearing is suspended for a break and the sitting will resume at 11.30 a.m.

The Court adjourned from 11.15 a.m. to 11.30 a.m.

The PRESIDENT: Please be seated. I give the floor to Mr. Mitić.

Mr. MITIC: Mr. President, distinguished Members of the Court, I want to point out that the relevant decisions of the Assembly, Government and the Presidency of Bosnia and Herzegovina were taken by the outvoting of the representatives of the Serbian people. For a very long time Mr. Alija Izetbegović showed no readiness for a reasonable compromise solution. On several occasions he even made sure that no compromise be reached between the Serbs and Muslims. As we said in paragraph 1.8.17 of

the preliminary objections, on 22 December 1991, the leadership of the Serbian Democratic Party proposed a comprehensive democratic transformation of Bosnia-Herzegovina into a confederation of three ethnic communities with three parliaments. During the talks held between the three parties the Serbian Democratic Party proposed that an integral Bosnia and Herzegovina be preserved as part of the Yugoslav Federation. Realizing that the two other parties were against this, the Serbian Democratic Party was prepared to respect the wish of Muslim and Croat representatives to "loosen" the ties with Yugoslavia or to completely secede from it.

> "For the sake of peace we are ready to accept Bosnia and Herzegovina as a confederation with three parliaments of the three ethnic communities, functioning without any mutual disturbances. This confederation would also have some common functions, which could make it possible for Bosnia and Herzegovina to be a link between Croatia and Yugoslavia. Thus, three entities, complementary or at least indifferent to each other, would be established in Bosnia and Herzegovina"

said Radovan Karadžić informing the Parliament of the Serbian people of negotiations between the three ethnic communities. Unfortunately, this proposal of the leadership of the Serbian Democratic Party was not accepted.

In paragraph 1.8.18 on page 45 of the Preliminary Objections we have presented the draft agreement prepared in 1991 by Mr. Radovan Karadžić, President of the Serbian Democratic Community, and Mr. Adil Zulfikarpašić, President of the Muslim Bosniac Organization, on relations between the Serbian and Muslim peoples. The conclusion and realization of this agreement were obstructed by Mr. Alija Izetbegović. It is clear that by his statement at the session of the Assembly of the Socialist Republic of Bosnia and Herzegovina on 25 January 1992 Mr. Alija Izetbegović threw out the agreement that was about to be reached between Mr. Radovan Karadžić, President of the Serbian Democratic Party, and Mr. Muhamed Ćengić, the

representative of the Party of Democratic Action to work out a detailed plan of the regionalization of the Republic first and only then organize a referendum. By refusing to make the referendum conditional on the regionalization of the Republic, Mr. Alija Izetbegović pushed Bosnia and Herzegovina down the slippery slope of civil war. After all three sides - Serbian, Muslim and Croat - accepted the Coutilhero plan for the regionalization of Bosnia and Herzegovina at the beginning of 1992, Mr. Izetbegović rejected it. The European Community plan, presented by Ambassador Coutilhero, representing the Community, was worked out before the outbreak of the civil war in Bosnia and Herzegovina and was aimed at forestalling the conflict. The plan provided for the creation of three constituent units (Serbian, Muslim and Croat), whereby each one of them would consist of a number of cantons. There should have been 14 cantons: five Serbian, five Muslim and four Croat.

Mr. Alija Izetbegović chose war to create a unitary and centralized State, violating the legitimate requests of the Serbian people in Bosnia and Herzegovina. It was only after three years of a terrible war in Bosnia and Herzegovina in which all three peoples levied war against each other that in Dayton, Ohio, on 21 November 1995, Mr. Alija Izetbegović accepted the territorial division of Bosnia and Herzegovina into two entities: the Republic of Srpska and the Federation of Bosnia and Herzegovina. There and then he accepted that the central organs of Bosnia and Herzegovina should have limited authority and that the entities should have very important competencies. He also agreed that each of the two entities could have special parallel relations with neighbouring States. Why did Mr. Alija Izetbegović hesitate so long to take this decision? There is no doubt that he could have taken it much earlier: there were many opportunities for such a decision.

Why was Mr. Alija Izetbegović opposed for so long to each and every regionalization of Bosnia and Herzegovina? Did he really believe that civil and multiethnic society is incompatible with any regionalization or similar constitutional devices despite the fact that there does exist a number of civil and multiethnic States in the world which have been regionalized or federalized precisely because a number of peoples live in them?

4. The premature recognition of Bosnia and Herzegovina was an act of interference into the internal affairs of the Socialist Federal Republic of Yugoslavia, which was not in conformity with the principle of equal rights and self-determination of peoples.

Until the cessation of civil war in Bosnia and Herzegovina the conditions for international recognition of Bosnia and Herzegovina were not fulfilled. The central organs of the Government of this Republic controlled a very small part of the territory of Bosnia and Herzegovina: part of Sarajevo, Bihać and part of central Bosnia. In fact four States existed in the territory of the former Socialist Republic of Bosnia and Herzegovina: the Republic of Srpska, the Republic of Bosnia and Herzegovina, Herceg-Bosna and the Republic of Western Bosnia. Considering that three States - the Republic of Srpska, Herceg-Bosna and the Republic of Western Bosnia - were continuously or sporadically in conflict with the Republic of Bosnia and Herzegovina, it is possible to say that up until the Dayton Agreement, the Republic of Bosnia and Herzegovina enjoyed the recognition of the international community but that the majority of its citizens, including Serbs, Croats and part of Muslims, led by Fikret Abdić, did not recognize it. It was only after the Agreement which was reached in Dayton, Ohio, on 21 November 1995, which included agreements on territorial division and constitutional arrangements, i.e., after its signing in Paris

on 14 December 1995, that the conditions concurred for the international recognition of Bosnia and Herzegovina.

Many statesmen and prominent personalities publicly said that the recognition of the Republic of Bosnia and Herzegovina had been made prematurely. In paragraphs 1.12.7 to 1.12.14. of our Preliminary Objections we pointed to the opinions of late President Mitterrand, United States Secretary of State Christopher, Chairman of the Foreign Policy Committee of the Russian Parliament Ambartsumov, Lord Carrington, former Italian Foreign Minister de Michelis, former French Foreign Minister Dumas and former United States Secretary of State Kissinger.

The acts of the premature recognition of the Republic of Bosnia and Herzegovina were not in conformity with the provisions of the principle of equal rights and self-determination of peoples.

Ending the presentation of the legal arguments related to the third Preliminary Objection, I would like to point out the following fact: The Federal Republic of Yugoslavia objected to the succession of the Republic of Bosnia and Herzegovina to the Convention on the Prevention and Punishment of the Crime of Genocide. On page 89 of the Multilateral Treaties deposited with the Secretary-General, Status as at 31 December 1994, the following notice is registered under No. 3:

> "On 15 June 1993, the Secretary-General received from the Government of Yugoslavia the following communication:
>
> 'Considering the fact that the replacement of sovereignty on the part of the territory of the Socialist Federal Republic of Yugoslavia previously comprising the Republic of Bosnia and Herzegovina was carried out contrary to the rules of international law, the Government of the Federal Republic of Yugoslavia herewith states that it does not consider the so-called Republic of Bosnia and Herzegovina a party to the (said Convention), but does consider that the so-called Republic of Bosnia and Herzegovina is bound by the obligations to respect the norms on preventing and punishing the crime of genocide in accordance with general international law irrespective of the Convention on the Prevention and Punishment of the Crime of Genocide."

The Federal Republic of Yugoslavia was not in the position to present this objection prior to the commencement of the dispute before the Court. As it is known, the Note of the Secretary-General of the United Nations notifying the parties to the Convention on the Prevention and Punishment of the Crime of Genocide of the alleged succession of Bosnia and Herzegovina to that Convention is dated 18 March 1993, and the Applicant submitted its Application on 20 March 1993, two days after. Bosnia and Herzegovina did not respond to this objection, which means that it accepted it.

Facts and Evidence Concerning the Third Preliminary Objections

The Applicant does not deny the fact that the Socialist Republic of Bosnia and Herzegovina had been adequately represented in the organs of the Federation in the period from World War Two until the moment it decided to recall its representatives from the organs of the Federation. The Applicant itself pointed out the fact that the Socialist Republic of Bosnia and Herzegovina had had very large competencies within the Yugoslav Federation.

The Applicant did not deny the fact that 1990 Amendment LXX, paragraph 10, to the Constitution of the Republic of Bosnia and Herzegovina provided for the setting up of the Council for the Questions of the Realization of the Equality of the Peoples and Nationalities of Bosnia and Herzegovina. The Applicant does not deny the fact that the Council was never established. In that connection it states two things.

In page 57, paragraph 3.16, of the Statement, the Applicant said:

> "As has been confirmed by the Constitutional Court of the Republic of Bosnia and Herzegovina, the fact that the Council never came into existence is of no relevance to the validity of the decision of the constitutional organs of the Republic of Bosnia and Herzegovina."

This is telling and sufficient evidence of the violation of the principle of the equality and self-determination of peoples. It was precisely the Council for the Questions of the Realization of the Equality of the Peoples and Nationalities of Bosnia and Herzegovina that ought to have ensured the realization of the principle of equality and self-determination of peoples in Bosnia and Herzegovina. If the Constitutional Court of Bosnia and Herzegovina said that the non-establishment of this Council was of no relevance for the decision of the Assembly of Bosnia and Herzegovina on the question of the greatest importance for the equality of its three peoples, it means that Bosnia and Herzegovina had desisted from respecting the principle of equal rights and self-determination of peoples.

The contention of the Applicant, presented in paragraph 3.16 of the Statement on page 57, according to which "a law on the establishment of such a Council was never adopted due to opposition from members of the Serbian Democratic Party in the Parliament" is absurd. The Applicant provides no evidence to corroborate this contention. When the Declaration on State Sovereignty and Indivisibility of the Republic of Bosnia and Herzegovina was considered on 26 February 1991, the MPs of the Serbian Democratic Party requested that, prior to deciding on this proposal of the Party of Democratic Action, the proposal be sent to the Council for the Questions of the Realization of the Equality of the Peoples and Nationalities of Bosnia and Herzegovina. However, Avdo Campara, General Secretary of the Assembly of the Socialist Republic of Bosnia and Herzegovina, replied that this Council had not been established despite the existence of the constitutional basis for its establishment. *Oslobodjenje* of Sarajevo reported it on 27 February 1991. This report has been submitted to the Court. When the Memorandum on Sovereignty (The Letter of Intent), proposed by the Party of Democratic Action, and the Platform on the

Position of Bosnia and Herzegovina and the Future Set-Up of the Yugoslav Community, proposed by the Presidency of the Socialist Republic of Bosnia and Herzegovina, were considered at the session of the Assembly of the Socialist Republic of Bosnia and Herzegovina on 14 October 1991, the MPs of the Serbian Democratic Party refused to decide on these documents, since the proposals had not been considered in the Council for the Questions of the Realization of the Equality of the Peoples and Nationalities of Bosnia and Herzegovina. It is absurd to aver that the MPs of the Serbian Democratic Party who requested the Council's involvement on 27 February and 14 October 1991 and on 25 January 1992 were against the adoption of a law on its establishment. May I note that even if they had been against it, they would not have been able to prevent the establishment of the Council because of the Muslim-Croat majority in the Assembly of Bosnia and Herzegovina. I therefore reject the contention of the Applicant, contained in paragraph 3.16 of the Statement. In the same paragraph it is further said: "As has been confirmed by the Constitutional Court of the Republic of Bosnia and Herzegovina, the fact that the Council never came into existence is of no relevance to the validity of the decisions of the constitutional organs of the Republic of Bosnia and Herzegovina." This is very telling evidence of the poor state of legality in the Republic of Bosnia and Herzegovina, as well as a clear indication of the degree of respect for the principle of equality of three nations by the organs of the Applicant. The chief cause of the civil war in Bosnia and Herzegovina is precisely the gross violations of the principle of equality of its three peoples, i.e., a callous snub of all, even compromise, requests of the representatives of the Serbian people.

The Applicant does not deny the parts of the "Islamic Declaration", the programmatic work of Mr. Alija Izetbegović, initially published

clandestinely in 1970, and then publicly in 1991. Consequently, the following quotations from the "Islamic Declaration" (the full text of the Declaration enclosed in the Annexes to the Preliminary Objections, Part I, pp. 197, 202, 219, 220) have not been denied.

> "The first and the most important of these conclusions is definitely the one about the incompatibility of Islam and non-Islamic systems. **There can be no peace nor co-existence between the 'Islamic faith' and 'non-Islamic' social and political institutions.** The failure of these institutions to function and the instability of regimes in Moslem countries, manifested in frequent changes and coups d'état are as a rule the consequence of their *a priori* opposition to Islam as the fundamental and guiding feeling of the people in these countries. Claiming for itself the right to regulate its own world, Islam clearly rules out any right or possibility of action of any foreign ideology on its turf. Namely, there is no room for the lay principle and the state should be an expression of the moral concepts of religion and supportive of them." (The bold type is ours.)
>
> "...
>
> Therefore, we must be preachers first and then soldiers. Our prime means are personal example, books and words. When will force be added to these means?
>
> The choice of the right moment is always a specific question and depends on a number of factors. Nevertheless, there is a general rule: Islamic order should and can approach the overtaking of rule as soon as it is morally and **numerically** strong enough **not only to overthrow the non-Islamic rule but to develop new Islamic rule**. This differentiation is important, since destruction and development do not require an equal level of psychological and material readiness.
>
> To act prematurely is equally as dangerous as to be late in taking the required action.
>
> The conquering of power on the basis of a favourable concurrence of events, without sufficient moral and psychological preparedness and without the required minimum of competent and developed personnel implies the realization of another coup and not an Islamic revolution (and a coup is a continuation of non-Islamic politics by other groups of people or on behalf of other principles). To be late in the overtaking of power means to deny oneself a very powerful means for achieving the aims of Islamic order and to give non-Islamic rule an opportunity to strike a blow to the movement and disperse its activists. For the latter case, recent history gives sufficient tragic and illustrative examples." (The bold type is ours.)

The Applicant does not deny the quotations from the "Islamic Declaration", but points out that there are some tenets of the Declaration that are not so extreme as the cited ones. One way or another, the quotations are telltale proof that Mr. Alija Izetbegović is not the man to be able to convince the Serbian people that he will stand for the rule of law, democracy, non-discrimination and respect for multi-ethnic diversity.

The Applicant objects to our use of some sources that it claims to be unreliable. Thus, in paragraphs 48 to 50 of its Statement, the Applicant criticizes the reports of Yossef Bodansky as unreliable. However, Bodansky wrote of the participation of mujaheddins in the civil war in Bosnia and Herzegovina and of the supply of arms and terrorist experts to Sarajevo by Tehran. Does the Applicant continue to deny the veracity of these claims in the face of these facts? Before the beginning of the Rome Conference on 17 February 1996, the media worldwide reported the arrest of a group of terrorists, foreign citizens, in the vicinity of Sarajevo who were said to have had links with some of the members of the Government in Sarajevo. After the arrival of IFOR in Bosnia and Herzegovina, the United States Government expressed its concern on several occasions over the presence of mujaheddins in Bosnia and Herzegovina and demanded that they leave Bosnia and Herzegovina.

The Applicant did not deny our contentions related to the founding of three national parties in the Socialist Republic of Bosnia and Herzegovina: Serbian Democratic Party, Croatian Democratic Community and the Muslim Party of Democratic Action nor the fact that these parties had won the greatest number of seats at the first multi-party elections in 1990.

The Applicant does not deny that the youth magazine *Novi Vox* (the relevant parts of the magazine are enclosed in the Annexes to the Preliminary Objections, Part II, p. 475) was published in Sarajevo which

carried, *inter alia*, the following poem in its third edition for October 1991:

> "Dear Mother, I am going to plant willows,
> On which we will hang the Serbs.
> Dear Mother, I am going to sharpen bayonets.
> We will soon fill the pits again.
> Dear Mother, prepare salad for us.
> Invite our Croat brothers too.
> When our banners unite
> All Serbs will end up in graves."

During World War Two the slogan "Serbs on Willows" was popular among the Ustashe (World War Two fascist armed formations in the Independent State of Croatia). The Applicant invokes the freedom of the press and claims that the magazine did not reflect the views and policies of the Bosnian Government and that the reporting of *Novi Vox* is irrelevant for the Preliminary Objections (pp. 16 and 17, para. 38, of the Statement).

The Applicant does not deny most of our claims presented in connection with the rebellion by members of the Party of Democratic Action and the Croatian Democratic Community in the Republican Government against the Socialist Federal Republic of Yugoslavia and the pressures on the Serbian people in Bosnia and Herzegovina on pages 47 to 72 of the Preliminary Objections. It does not deny the setting up of Muslim armed formations during 1991 and at the beginning of 1992, not does it deny the terrorist attacks carried out by the Muslim armed formations on the forces of the Yugoslav People's Army in Sarajevo and in other places in Bosnia and Herzegovina in April and May which we presented in our Preliminary Objections. Also, the Applicant does not deny that intensive armed conflicts took place between Muslim and Croatian forces during 1993 which ended by the creation of the Muslim-Croat federation. It does not deny the almost continuous conflict of the Muslim armed formations under the command of Mr. Alija Izetbegović and the Muslim armed formations under the command

of Mr. Fikret Abdić which took place in Western Bosnia and ended in the military defeat of the forces under Fikret Abdić.

The Applicant objects that we have devoted several pages of the Preliminary Objections to historical facts. We did not do it for reasons attributed to us by the Applicant. As a matter of fact, from the first written submissions of the Applicant one could get an impression that Muslims and Catholics lived in idyllic conditions in Bosnia and Herzegovina until 1991 when 1,300,000 Serbs came over from Serbia as agents and surrogates of the government in Belgrade with an intention to cause trouble. Accordingly, the Applicant compelled us to point to the fact that the Serbs had lived in Bosnia and Herzegovina as a people also before 1991 and, let it be noted, for at least ten centuries. The Applicant also compelled us to say that the Serbs in Bosnia and Herzegovina had not refused to remain in a unitary independent State because they had received such an order from Belgrade, but because they still remembered very vividly the genocide that the Serbian people had suffered at the hands of Croatian-Muslim fascist forces in World War II and because of the political changes that began in 1990 which I pointed out in my statement. The facts that I have drawn your attention to were the root causes the Serbian people in Bosnia and Herzegovina were guided with to reject a unitary and centralized Bosnia and Herzegovina outside Yugoslavia.

Mr. President, without prejudice to our contention that notification of succession is reserved for newly independent States, born in the process of decolonization, I submit to make the following conclusion:

- The Applicant could not succeed to the Genocide Convention because the acquisition of its independent Statehood had not been in conformity with the principle of equal rights and self-determination of peoples.

Thank you, Mr. President.

Mr. PRESIDENT: Thank you very much, Mr. Mitić and now I give the floor to Mr. George Lopičić, Co-Agent.

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

I now proceed to present the second preliminary objection of the Federal Republic of Yugoslavia. It is quite simple. Bosnia and Herzegovina had a collective Head of State: the Presidency. The decision to initiate proceedings before the International Court of Justice could have been taken by the Presidency. The decision was not taken by the Presidency, but by Mr. Alija Izetbegović who was the President of the Presidency. He was authorized to sign a decision of the Presidency, but not to take it.

Quite a small number of facts are relevant for this objection and they are easy to ascertain. Mr. Izetbegović signed the letter forwarded to the Registrar of the International Court of Justice, dated 19 March 1993. By this letter Mr. Izetbegović informs the Registrar that Bosnia and Herzegovina has nominated its Agents. He writes in the letter that their first act will be to initiate proceedings against Yugoslavia because of the violation of the Convention on the Prevention and Punishment of the Crime of Genocide. The letter was signed by Mr. Izetbegović and under his name is the name of his position the "President of the Republic of Bosnia and Herzegovina". This letter is enclosed to the documents of the case. The exact name of the position of Mr. Izetbegović should have read "President of the Presidency of the Republic of Bosnia and Herzegovina". Presumably, Mr. Izetbegović wanted to be the President of the Republic, but he was not. He was only the President of the Presidency of the Republic of Bosnia and Herzegovina. Accordingly, Mr. Izetbegović was not the President of the

Republic, but he behaved as though he was. We now arrive to the substance of our objection. According to the constitutional regulations of the Applicant State, a decision to nominate agents and initiate proceedings before the Court could have been taken by the Presidency of Bosnia and Herzegovina. This decision could not have been taken by Mr. Izetbegović. He could only sign such a decision. The decision to nominate agents and initiate proceedings before the Court was not taken by the Presidency of Bosnia and Herzegovina, but by the President of the Presidency, which was outside the competence of Mr. Izetbegović.

The Statement of the Government of Bosnia and Herzegovina on preliminary objections of 14 November 1995 (pp. 47-48, para. 2.20) reads:

> "the Government of Bosnia and Herzegovina wishes to reiterate that in any case it is not for the Respondent, and for that matter not even for the Court itself, to enter into an examination of the constitutional technicalities of the law of a sovereign State".

The Applicant State reduces this problem to "constitutional technicalities". However, the usurpation of power by one man and his taking of decisions outside his competence cannot certainly be qualified by "constitutional technicalities". One of the serious reasons because of which the Serbian people in Bosnia and Herzegovina did not want to remain in a unitary Bosnia and Herzegovina was exactly this behaviour of Mr. Izetbegović who took foreign policy decisions single-handedly on behalf of the Presidency of the Republic.

After all, it was not only the Serbian people in Bosnia and Herzegovina who had problems with the autocratic proclivities of Mr. Izetbegović. In February 1995 five of the seven members of the Presidency of Bosnia and Herzegovina issued a Statement denouncing the attempt of Mr. Izetbegović to transform Bosnia-Herzegovina into a one-party Islamic State. The signatories said that army units were exposed to

ideological pressures and the abuse of religious feelings by some of their members. The protest was signed by Mr. Nijaz Duraković, a Muslim, Mr. Stjepan Kljujić, a Croat, Mr. Ivo Komšić, a Croat, Mrs. Tatjana Ljujić-Mijatović and Mr. Mirko Pejanović, Serbs. The other two members of the Presidency were Mr. Alija Izetbegović and Mr. Ejup Ganić, Muslims (Robert Fox, "Islamic Indoctrination of Army Splits Bosnian Leadership", *Daily Telegraph*, 6 February 1995, Annex, p. 288).

On pages 40 to 48 of its Statement, the Applicant State avers that, according to the constitutional regulations, the Presidency of Bosnia and Herzegovina was competent to take such a decision and that the President of the Presidency was authorized to sign such a decision. I do not deny this. I simply state that the Presidency did not take such a decision and that it was taken by the President of the Presidency, which is contrary to the constitutional regulations. It was very simple for the Applicant State to deny my contention by forwarding a copy of the decision of the Presidency. Had the Presidency taken the decision in dispute, it would have certainly been registered somewhere. However, the Applicant State did not submit any evidence that the decision in dispute had indeed been taken by the Presidency of the Republic. In page 46, paragraph 2.18, of the Statement of the Applicant State, it is said:

> "The decision to bring the present action in the International Court of Justice was taken by the Presidency, in the exercise of its powers under Article 222 of the Consolidated Constitution . . ."

This assertion remains unproved. I contend that the decision was not taken by the Presidency. If the decision was indeed taken by the Presidency, I call on the Applicant State to provide evidence to that effect. In the same paragraph on page 47 of its Statement, the Applicant State goes on to say:

> "According to Article 20 of the Operating Procedure of the Presidency of 23 December 1991, the Presidency is represented by its President, who, according to Article 54 signs all acts of the Presidency in its name."

I agree with this contention of the Applicant State. But now, the Applicant State makes a wrong conclusion:

> "The President was thus duly authorized to instruct the then Agent for the Republic of Bosnia and Herzegovina to institute proceedings. He did it in the name of the Presidency which he represented . . ."

The President of the Presidency was not authorized "to instruct the then Agent of the Republic of Bosnia and Herzegovina to institute proceedings". Authorized to do so was the Presidency, while the President of the Presidency was authorized to sign such a decision of the Presidency. Accordingly, the President of the Presidency was not authorized to take such a decision on behalf of the Presidency. Accordingly, it is to be concluded that, in taking the decision to institute the proceedings, Mr. Izetbegović grossly exceeded his authority and that the Application is therefore inadmissible.

In paragraph A.2.5 on page 93 of the Preliminary Objections of June 1995 we said that

> "Alija Izetbegović was not appointed as President of the Presidency in a legal manner. At the general and direct elections held in the Socialist Republic of Bosnia and Herzegovina in 1990, he won 879,266 votes, whereas Mr. Fikret Abdić won 1,045,539 votes. Having won more votes, Mr. Abdić should have become the President of the Presidency."

In paragraph 2.11 on page 44 of its Statement, the Applicant State does not deny this fact and states instead:

> "There is no constitutional requirement which would hold that the individual who achieved the highest number of votes in the elections for membership in the Presidency must be appointed President of the Presidency."

This is perhaps true, but is not politically logical. In any case, I believe that Mr. Abdić regrets now very much that he ceded his position of

the President of the Presidency to Mr. Izetbegović. At the time he did so, he was a member of the Party of Democratic Action whose leader was Mr. Izetbegović. It was probably on this account that he ceded his position to his party leader. However, soon after, he discovered the Muslim fundamentalist intentions of Mr. Izetbegović and this was the cause of their political split. At the first Congress of the Party of Democratic Action on 1 December 1991, Mr. Abdić said that nobody in Bosnia and Herzegovina had the right to do anything that would be to the detriment of the Muslim people, but also to the detriment of any other people and opposed the absolutist government of Mr. Izetbegović. The political leanings of Mr. Izetbegović accounted for the parting of ways between Mr. Abdić and Mr. Izetbegović. The political split between these two men evolved into an armed conflict between the Muslims of Western Bosnia who supported Mr. Abdić and the armed forces under the command of Mr. Izetbegović. Out of this conflict emerged and existed for a time as an independent State the Republic of Western Bosnia. During 1995, the armed forces under the command of Mr. Izetbegović defeated this independent unit of their Muslim opponents. Dozens of thousands of people fled the area and they have not returned home yet for fear of reprisals. Mr. Abdić also lives outside Bosnia and Herzegovina. The Government of Mr. Izetbegović requested his extradition, accusing him of armed rebellion. The attitude of the Government of Mr. Izetbegović towards Mr. Abdić is well illustrated by a report carried recently by International Herald Tribune to the effect that the Muslim Government of Bosnia and Herzegovina sent small commando units to kill or capture renegade Muslim leader Fikret Abdić, in exile in Croatia. Four men and a women, some of them formerly employed by the Bosnian police, were arrested in Croatia on 8 April 1996 (Chris Hedges, "Bosnians Are Using Iran-Trained Hit Squads", *International Herald Tribune*,

16 April 1996, p. 1). Accordingly, there is no doubt in my mind that Mr. Abdić now regrets his decision to cede his position to his party leader. Had he not done that, the developments in Bosnia and Herzegovina would probably have taken a different course.

Thank you, Mr. President.

The PRESIDENT: Thank you Your Excellency for your statement.

Maintenant, je me tourne vers M. Suy pour lui offrir un choix. Vous disposons d'un peu de temps avant 13 heures, est-ce qu'il souhaite prendre tout de suite la parole pour son exposé oral ou est-ce qu'il préfère le faire cet après-midi?

M. SUY : Je suis entre vos mains, M. le Président, donc je pourrais donner maintenant l'introduction.

Le PRESIDENT : Parfait, je vous remercie et vous appelle à la barre.

M. SUY : Monsieur le Président, Madame et Messieurs de la Cour, j'ai l'honneur de présenter la partie de la plaidoirie de la République fédérale de Yougoslavie portant sur les exceptions préliminaires ayant trait au problème de la succession d'Etats en matière de traités. La République fédérale de Yougoslavie estime que la Bosnie-Herzégovine, au moment des faits qui font l'objet de la présente affaire, n'était pas partie à la convention sur la prévention et la répression du crime de génocide du 9 décembre 1948 dont elle invoque l'article IX comme fondement de la compétence de votre Cour. A l'appui de cette thèse, la République fédérale de Yougoslavie invoque trois raisons : *primo*, il n'y a pas eu de succession automatique de la République de Bosnie-Herzégovine dans la convention sur le génocide. *Secundo*, la convention sur le génocide n'est entrée en

vigueur entre les Parties que lors des accords de Dayton de 1995 et ceci pour une double raison : d'abord, la simple notification de succession par un ou plusieurs Etats successeurs ne lie pas l'Etat prédécesseur dans ses relations avec l'Etat ou les Etats successeurs. En l'occurrence, l'applicabilité de la convention entre les Parties n'a été établie que par les accords de Dayton. Ensuite, estimant que la déclaration d'indépendance de la République de Bosnie-Herzégovine était contraire aux normes du droit international, comme vient de vous l'expliquer M. Mitić, la République fédérative de Yougoslavie n'a pas reconnu la Bosnie-Herzégovine avant les accords de Dayton de 1995. La Bosnie-Herzégovine n'a pas n'a pas non plus reconnu la République fédérale de Yougoslavie avant ces accords de Dayton. La Bosnie-Herzégovine ne peut donc pas invoquer la convention sur le génocide dans ses relations avec la Yougoslavie en ce qui concerne les faits antérieurs à la reconnaissance mutuelle des deux Parties au présent litige. Et *tertio*, mais à titre tout à fait subsidiaire, la convention sur le génocide a pu entrer en vigueur entre les Parties au plus tôt en mars 1993. La notification de succession n'est qu'une notification d'adhésion à laquelle s'appliquent les dispositions conventionnelles. En tout état de cause, la convention sur le génocide ne pouvait entrer en vigueur entre les Parties avant que la déclaration de succession faite par la Bosnie-Herzégovine ne soit notifiée à la République fédérale de Yougoslavie.

Mais avant de développer ces thèses, il nous semble indispensable de procéder à une brève analyse de la genèse du droit international en matière de génocide. Suite aux exactions commises par les nazis avant et pendant la deuxième guerre mondiale, tant en Allemagne que dans les territoires occupés dont la Yougoslavie à cette époque, et qui consistaient notamment à éliminer en masse des personnes en raison de leur appartenance à une race

ou de leur conviction politique, les personnes responsables de ces actes ont été condamnées pour avoir commis des crimes contre l'humanité. Le Tribunal international militaire de Nuremberg a été mis en place par l'accord de Londres du 8 août 1945 concernant la poursuite et les châtiments des grands criminels de guerre. L'article 6 du statut du Tribunal de Nuremberg définit trois types d'infractions internationales à savoir les crimes contre la paix, les crimes de guerre et les crimes contre l'humanité. Il est intéressant de noter que le Tribunal a insisté sur le fait que ces crimes sont commis par des personnes et non pas par des entités abstraites. Le respect du droit international humanitaire exige la condamnation d'individus. Lors de sa première session, l'Assemblée générale de l'Organisation des Nations Unies a adopté deux résolutions dans lesquelles elle affirme et elle confirme les principes du droit international reconnus par le statut du Tribunal de Nuremberg ainsi que par les jugements de ce tribunal. Quelques années plus tard la Commission du droit international de l'ONU adopte un texte intitulé «Principes de droit international consacrés par le statut du Tribunal de Nuremberg et dans le jugement de ce tribunal». Ce texte parle également du principe de la responsabilité individuelle car il mentionne dans son principe n° 1 «tout auteur d'un acte qui constitue un crime de droit international est responsable de ce chef et passible de châtiment». La convention sur la prévention et la suppression du crime de génocide de 1948 a exactement la même portée. Elle appartient à ce qu'il est convenu d'appeler le droit pénal international. Les Etats parties à cette convention s'engagent à prendre des mesures internes afin de prévenir et de réprimer les actes de génocide tels que définis dans l'article III de la convention. Ces mesures concernent une législation pénale nécessaire afin de mettre en œuvre les dispositions de la convention dans le droit interne, je le répète. La

convention et les mesures de mise en œuvre qu'elle prescrit visent des individus. Il y a donc deux raisons principales pour conclure que la convention de 1948 concerne seulement les crimes de génocide commis par des individus. En premier lieu, les dispositions matérielles de la convention, notamment les articles I à VII, ont trait à la prévention et la punition de certains actes commis par des personnes. En deuxième lieu, les articles XIV et XV concernant la durée, concernant la dénonciation et concernant la terminaison de la convention excluent que celle-ci soit considérée comme une convention reflétant des règles de droit international général. Et c'est ici qu'intervient la question de l'interprétation de l'article IX de la convention. Relisons attentivement cet article. Il prévoit que

> «les différends entre les Parties Contractantes relatifs à l'interprétation, l'application ou l'exécution de la présente convention y compris ceux relatifs à la responsabilité d'un Etat en matière de génocide ou de l'un quelconque des autres actes énumérés à l'article III seront soumis à la Cour internationale de Justice».

Contrairement à ce que prétend la Bosnie-Herzégovine on ne peut nullement en déduire que la convention serait applicable au génocide commis par un Etat.

Il est primordial à notre avis que la convention utilise les termes «y compris» plutôt que «ainsi que». Ceci signifie que l'article IX en se référant à la responsabilité de l'Etat n'étend pas la compétence de la Cour telle qu'elle ressort de la première partie de l'article IX.

En se référant à la responsabilité de l'Etat l'article IX ne fait que préciser la portée des termes précédant les mots «y compris». Compte tenu des articles I à VII, ces termes ont incontestablement trait aux actes de génocide commis par des individus. La responsabilité de l'Etat telle qu'elle est envisagée à l'article IX est donc celle résultant des

manquements de l'Etat aux obligations explicitées dans les articles I à VII concernant le génocide commis par des individus. Il s'agit donc d'une responsabilité pour omission, pour le fait de ne pas avoir réagi face à un génocide commis par des individus.

C'est partant de cette constatation, Monsieur le Président, que je tiens à aborder maintenant et peut-être ce sera pour cet après-midi, mais je suis entre vos mains, l'examen des exceptions préliminaires de la République fédérale de Yougoslavie relatives à la succession d'Etats.

Dans la suite de cet exposé j'ai trois grandes parties, et, avec votre permission, Monsieur le Président, je voudrais arrêter ici parce que autrement je devrais déchirer la première partie de mes arguments. Je suis entre vos mains, je vous remercie.

Le PRESIDENT : Merci, M. le professeur. La séance est suspendue jusqu'à cet après-midi à 15 heures où je vous donnerai la parole pour poursuivre.

L'audience est levée à 12 h 37.