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YEAR 1996

Public sitting

held on Tuesday 30 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)),*

VERBATIM RECORD

ANNEE 1996

Audience publique

tenue le mardi 30 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
M. Parra-Aranguren, juges
MM. Lauterpacht
Kreća, juges *ad hoc*

M. Valencia-Ospina, Greffier

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As Deputy-Agent, Counsel and Advocate;

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

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

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

As Counsel and Advocates;

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Mr. Michiel Pestman, Attorney in Amsterdam,

As Counsellors;

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

As Assistants.

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

comme conseils.

The PRESIDENT: Please be seated. This morning the Court will resume its public hearings 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))*. I now give the floor to Professor Ian Brownlie.

Mr. BROWNLIE: Thank you, Mr. President.

Mr. President, distinguished Members of the Court, my final task in the first round is to address the Court on the fifth preliminary objection of Yugoslavia, namely, that there is no dispute between the parties falling within the provisions of Article IX of the Genocide Convention because at the material time Yugoslavia had no territorial jurisdiction in the relevant areas.

The elements of this argument can be summarized as follows:

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

(ii) The Genocide Convention does not provide for the responsibility of States for acts of genocide *as such*. The duties prescribed by the

Convention relate to "the prevention and punishment of the crime of genocide" when this crime is committed by individuals: and the provisions of Articles V and VI of the Convention, in our submission, make this abundantly clear.

These two considerations jointly and severally preclude the existence of jurisdiction *ratione materiae* in accordance with Article IX of the Genocide Convention.

Mr. President, the Memorial of the Applicant State is based upon a fundamentally erroneous construction of the Convention and, in consequence, the requests contained in the "Submissions" (Memorial, pp. 293-295) are based on allegations of State responsibility which fall outside the scope of the Convention and of its compromissory clause.

In simple terms, there is a lack of subject-matter jurisdiction because the Memorial relies upon allegations which do not fall within the subject-matter of the Genocide Convention. And consequently, there is no dispute for the purposes of Articles IX of the Genocide Convention.

There is a useful parallel with the outcome of the recent proceedings in this Court relating to the *Request for an Examination of the Situation in Accordance with Paragraph 63 of the Court's Judgment of 20 December 1974 in the* Nuclear Tests case. In his separate opinion in those proceedings Judge Shahabuddeen observed:

> "The law is clear that the Court cannot act unless there is a dispute before it, and then only within the limits of the dispute. The dispute which New Zealand referred to the Court in 1973 arose out of a claim by New Zealand which the Court found applied 'only to atmospheric tests, *not to any other form of testing*' (emphasis added). The Court would have been acting *ultra petita* in 1974 had it sought to adjudicate on the legality of underground tests (supposing it had been asked to do so), these being another form of testing. It is in respect of the legality of underground tests that New Zealand's present Request seeks relief. The matters sought to be so raised do not fall within the limits of the 1973 dispute by which the Court is still bound."

The finding of the majority of the Court was in essence on the same basis.

Mr. President, in the present case the provisions of the Genocide Convention extend to failures of a State to prevent or to punish acts of genocide committed within the confines of its territorial jurisdiction.

These provisions do not extend to the responsibility of a Contracting Party *as such* for acts of genocide but to responsibility for failure to prevent or to punish acts of genocide committed by individuals within its territory, or by individuals otherwise within its control.

The Nature of Responsibility for Breaches of the Convention

Mr. President, in elaborating upon the argument, I shall demonstrate to the Court that the Genocide Convention has at no stage been interpreted and applied in the manner urged upon this Court by the Applicant State.

The Memorial asserts that the Convention imposes a direct responsibility upon States for acts of genocide. And, Mr. President, there is simply no justification for this assertion. Secondly, the Applicant State fails to demonstrate the existence of any jurisdiction of the Federal Republic of Yugoslavia in Bosnia at the material time.

What, then is the correct interpretation of the Convention?

Travaux préparatoires

The *travaux* involve a series of eight stages involving various bodies and groups of experts. And I shall confine myself to the more significant phases of this elaborate process.

The genesis of the project to draft a convention on the prevention and punishment of genocide is to be found in General Assembly resolution 96 (I) adopted on 11 December 1946 in which the Economic and Social Council was requested to undertake the necessary studies. The

text of the resolution can be seen in the *Yearbook of the United Nations 1946-1947*, page 254.

In response the Council adopted resolution 47 (IV) of 28 March 1947 instructing the Secretary General:

> "*(a)* to undertake, with the assistance of experts in the field of international and criminal law, the necessary studies with a view to drawing up a draft convention in accordance with the resolution of the General Assembly; and *(b)* after consultation with the General Assembly Committee on the Development and Codification of International Law and, if feasible, the Commission on Human Rights and, after reference to all Member Governments for comments, to submit to the next session of the Economic and Social Council a draft convention on the crime of genocide" (*Yearbook of the United Nations* 1947-1948, p. 595).

The *Ad Hoc* Committee met from 5 April to 10 May 1948: see Report of the Committee and the Draft Convention drawn up by the Committee, E/794, 24 May 1948, and E/794/Corr. 1, 10 June 1948; *Yearbook of the United Nations*, 1947-1948, pp. 597-599.

The draft convention adopted and reported to the Economic and Social Council is closely related to the text of the Genocide Convention in its final form. In particular draft articles V, VI, and VII prefigure Articles IV, V and VI of the Convention respectively. The draft articles were adopted as follows:

"ARTICLE V

(Persons liable) Those committing genocide or any of the other acts enumerated in Article IV shall be punished whether they are Heads of State, public officials or private individuals.

ARTICLE VI

(Domestic legislation) The High Contracting Parties undertake to enact the necessary legislation in accordance with their constitutional procedures to give effect to the provisions of this Convention.

ARTICLE VII

(Jurisdiction) Persons charged with genocide or any of the other acts enumerated in Article IV shall be tried by a competent tribunal of the State in the territory of which the act was committed or by a competent international tribunal."

The debate in the Committee revealed a shared assumption that the criminal responsibility provided for in Article V related exclusively to individuals. In relation to Article VII all seven members of the Committee agreed to recognize the jurisdiction of the courts of the State on the territory of which the offence was committed (Doc. E/794, p. 29).

In this context, Mr. President, four Members of the Committee voted against the principle of universal jurisdiction. In the Report they use the phrase "universal repression". These four votes included those of France, the United States and the USSR (*ibid.*, pp.32-33).

The Summary Record of the meetings of the *Ad Hoc* Committee appears in Doc. E/AC.25/SR.1-27.

Discussions in the Economic and Social Council

After consideration in a plenary session of the Economic and Social Council (26 August 1948) the Council decided (resolution 153(VII)) to transmit the draft convention and the Report of the *Ad Hoc* Committee (E/794) to the third session of the General Assembly: Docs. E/SR.180, E/SR.201, E/SR.202, E.SR.218 and E/SR.219.

At its third session the General Assembly referred the Report of the *Ad Hoc* Committee to the Sixth Committee.

Discussions in the Sixth Committee, 29 October - 3 December 1948

The Sixth Committee spent fifty-one meetings discussing the draft convention and a number of amendments were adopted: see *Summary Records* of the Sixth Committee, 29 October - 3 December 1948.

The *Report of the Sixth Committee* (Doc. A/760 & Corr. 2) includes the text of the draft convention as approved by the Committee and recommended for adoption by the General Assembly. This text is identical with that of the Convention as approved by the General Assembly, given that amendments put forward at the 178th and 179th plenary meetings were rejected.

The key provisions as adopted by the Sixth Committee are as follows:

> "**Article IV**
>
> Persons committing genocide or any of the other acts enumerated in Article III shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals.
>
> **Article V**
>
> The Contracting Parties undertake to enact, in accordance with their respective Constitutions, the necessary legislation to give effect to the provisions of the present Convention and, in particular, to provide effective penalties for persons guilty of genocide or of any of the other acts enumerated in Article III.
>
> **Article VI**
>
> Persons charged with genocide or any of the other acts enumerated in Article III shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction."

The discussions in the Sixth Committee confirmed that the responsibility of the Contracting Parties was related to the duties to prevent and to punish acts of genocide committed by individuals within the territory of the respective Contracting Party.

Thus there was no question of direct responsibility of the State for acts of genocide.

Mr. President, this analysis is perfectly compatible with Article IX of the Convention, which provides as follows:

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

Now, of course, this provision includes disputes "relating to the responsibility of a State for genocide". Those words appear in Article IX. But of course the wording has to be construed together with the other substantive provisions of the Convention. It is individuals who are criminally liable, in accordance with the provisions of domestic law as applied by domestic courts. States are responsible not for breaches of criminal law but for failure to implement the duties to mobilize their domestic law to "prevent and punish" acts of genocide, committed by persons over whom they exercise control.

That, Mr. President, is why the Convention is entitled: "Convention on the Prevention and Punishment of the Crime of Genocide".

The duties to mobilize the domestic law of Contracting Parties, and to prevent and punish acts of genocide committed by individuals, are inevitably related to the exercise of legislative and enforcement jurisdiction within State territory. The principles of State responsibility require an ability to exercise control over the area concerned.

And this responsibility of the State to prevent and punish is a "civil" and not a "criminal" responsibility. As Nehemiah Robinson points out in his detailed study, this was the opinion of the majority of the Sixth Committee (*The Genocide Convention: A Commentary*, New York, 1960, pp. 101-102).

This was expressly recognized by the UK Representative, Mr. Fitzmaurice, as he then was. The UK and Belgium were the authors of the joint amendment which gave rise to the reference "disputes relating to the responsibility of a State for any of the acts enumerated in Articles II and IV" (as the text was at this stage).

It is clear that the Sixth Committee did not regard this phrasing as connoting a criminal responsibility of the State.

The UK Representative stated that the responsibility envisaged in the joint amendment "was civil responsibility, not criminal responsibility": General Assembly, 3rd Session, Part I, Sixth Committee, 103rd Meeting, 12 November 1948, Doc. A/C.6/SR.103, p. 440; and see also Fitzmaurice, 104th Meeting, *ibid.*, p. 444; and 105th Meeting, *ibid.*, p. 460.

This was also the position of Charles Chaumont, the French Representative: 103rd Meeting, *ibid.*, p. 431. In the words of the *Summary Record*:

> "the representative of France was in no way opposed to the principle of the international responsibility of States as long as it was a matter of civil, and not criminal responsibility".

Similar views were expressed by Mr. Spiropoulos of Greece (103rd Meeting, *ibid.*, pp.432-33), Mr. Demesmin of Haiti (*ibid.*, p.436), and Mr. Ingles of the Philippines (104th Meeting, *ibid.*, p.442).

To this account may be added some reference to the debate on Article V of the draft convention during the 93rd Meeting of the Sixth Committee. This was the draft Article referring to the categories of individuals who would bear criminal responsibility for acts of genocide and this debate was conducted on the general assumption that the State as such did not bear criminal responsibility.

The *Summary Record* of the 93rd Meeting reports the opinion of the United States representative, Mr. Maktos, as follows:

> "Mr. MAKTOS (United States of America) wished to point out, in his capacity as chairman of the *Ad Hoc* Committee on Genocide, that it was not the French text of article V which had been taken as the basis when that article had been voted upon. At that time the Committee had thought the expression "heads of State" was nearer to the French word *gouvernants* than the word "rulers," which for example, would not include the President of the United States of America."

And then we come to the important passage for present purposes:

> "Mr. Maktos did not share the opinion of the United Kingdom representative that genocide could be committed by juridical entities, such as the State or the Government; in reality, genocide was always committed by individuals. It was one of the aims of the convention on genocide to organize the punishment of that crime. It was necessary to punish perpetrators of acts of genocide, and not to envisage measures such as the cessation of imputed acts or payment of compensation." (Doc. A/C.6/S.R.93, pp. 319-320.)

As I have already pointed out, Fitzmaurice, the U.K. representative, subsequently explained that the responsibility envisaged was "civil responsibility, not criminal responsibility".

So much for the *travaux préparatoires*.

Interpretation in the Doctrine

The analysis of the *travaux* I have offered to the Court is confirmed by the preponderance of authoritative opinion in the literature and this can be divided into two categories. The first consists of doctrine which is more or less contemporaneous with the adoption of the Genocide Convention on 9 December 1948.

Contemporaneous Doctrine

One of the first commentaries to appear is:

1. Anonymous. *Yale Law Journal*, Vol., 58 (1948-1949), pp. 1142-1160.

This "Commentary" emphasizes that: "Jurisdiction of the offense would be confined to a territorial basis, with States extraditing fleeing

offenders in accordance with their laws and treaties currently in force." (P. 1147.)

2. Josef Kunz, who was an influential commentator of that period, writing especially in the *American Journal*, and writing in the *American Journal* he focused upon what he called "the old-fashioned and traditional" aspects of the Convention. In the words of Joseph Kunz:

> "There is nothing revolutionary in the Convention. The new crimes merely are an addition to the *delicta juris gentium*, such as piracy, slave trade, counterfeiting and so on. The crimes under Articles II and III are 'crimes under international law', but not crimes against international law. These crimes are defined by international law; but individuals are only under a duty if and when the states enact the corresponding domestic legislation. The Convention gives criminal jurisdiction under its domestic law to the state in the territory of which the act was committed; in addition, as the Sixth Committee stated, Article VI 'does not affect the right of any state to bring to trial before its own tribunals any of its nationals for acts committed outside of the State'."

And Kunz continues:

> "The legal situation is, therefore, the following one. Each contracting party is bound to try in its domestic courts, under domestic law enacted in carrying out the Convention, any private individual, public official or constitutionally responsible ruler, whether a citizen or an alien, for any of the crimes of Articles II and III, committed in the territory of this state, whether against aliens or citizens; every contracting party is, further, entitled to try its own nationals for the same crimes committed abroad."

And he finishes:

> "That these crimes shall not be considered political crimes for the purposes of extradition is nothing new; and the parties pledge to grant extradition only 'in accordance with their laws and treaties in force'." (*American Journal*, Vol. 43 (1949), p. 745.)"

3. Jean Graven, in his course at the Hague Academy on "Les Crimes contre l'humanité", and he analysed the debate in the Sixth Committee on the nature of the State responsibility envisaged in the draft convention. In his opinion, the possibility of a criminal responsibility of the

State was excluded (*Recueil des Cours*, Vol. 76 (1950-I), pp. 507-511).

4. Writing in the *American Journal* in 1951, Judge Manley Hudson produced a detailed analysis of the provisions of Article IX of the Convention, the compromissory clause. In his words:

> "Insofar as this article provides for the settlement of disputes relating to the interpretation, application or fulfilment (in French, *exécution*) of the Convention, it is a stock provision not substantially unlike that found in many multipartite instruments.
>
> The article goes further, however, in 'including' among such disputes 'those relating to the responsibility of a State for genocide or any of the other acts enumerated in Article III'. As no other provision in the Convention deals expressly with state responsibility, it is difficult to see how a dispute concerning such responsibility can be *included* among disputes relating to the interpretation or application or fulfilment of the Convention. In view of the undertaking of the parties in Article I to prevent genocide, it is conceivable that a dispute as to state responsibility may be a dispute as to fulfilment of the Convention. Yet read as a whole, the Convention refers to the punishment of individuals only; the punishment of a state is not adumbrated in any way, and it is excluded from Article V by which the parties undertake to enact punitive legislation. Hence the 'responsibility of a State' referred to in Article IX is not criminal liability. [In the course of the drafting of the Convention by the Sixth Committee of the General Assembly, the Delegation of the United Kingdom withdrew its proposal to impose criminal responsibility on states (U.N. Doc. A/C.6/236) and supported the imposition of civil responsibility. General Assembly, 3rd Sess., Pt. I, *Official Records*, Sixth Committee, pp. 428,440.] Instead it is limited [that is the Convention], to the civil responsibility of a state, and such responsibility is governed, not by any provisions of the Convention, but by general international law." (*American Journal*, Vol. 45 (1951), pp. 33-34.)

And that passage which I have offered to the Court is reproduced in an important work of reference, the volumes of the *Digest of International Law* edited by Marjorie M. Whiteman, in Vol. 11, 1968, p. 857.

5. Item 5 is a long passage from the standard work in those days of Professor Sibert *Traité de droit international public*, published in Paris in 1951, p. 446).

In paragraph 284 on page 446 Sibert gives a list of what he regards as the weaknesses in the Convention and the fifth element of weakness which is *(e)* is the relevant point for the present purposes. And I leave the Court to see the relevant passage in the transcript.

> "**284. De quelques autres vices de la convention.** En réalité la convention rejette le principe des mesures internationales pour réprimer le crime. C'est là le plus grave de ses défauts. Il en est d'autres. Relevons ceux-ci: a) Les gouvernants, leurs agents, les simples particuliers ne sont pas seuls à commettre le crime de génocide: des *organisations terroristes* le peuvent préparer ou perpétrer. La Convention n'en dit mot. L'URSS avait proposé des mesures pour en paralyser l'activité: les USA s'y opposèrent sous le prétexte fallacieux des libertés fondamentales, de la liberté d'information, de presse, d'association, comme s'il pouvait y avoir liberté pour le crime de se préparer à sa guise. L'Egypte se rangea aux côtes des U.S.A. en invoquant que la proposition soviétique s'apparentait à la *propagande* en vue du génocide *dont la notion venait d'être reconnue trop vague pour figurer dans la convention; b) la convention (art. III) n'envisage pas la phase préparatoire* du génocide; *c) elle se désintéresse à peu près totalement de la lutte collective* qui pourtant s'impose pour le *prévenir*. Sans doute à l'article 1er de la convention les hautes parties contractantes s'engagent-elles à le punir et à le prévenir individuellement. Nulle part l'entraide internationale n'est ni moindrement organisée ni même prévue sérieusement aux fins de la *prévention collective:* on n'accomplit rien d'efficace en disant, comme le fait l'article VIII: `Toute partie contractante peut saisir les organes compétents des Nations Unies afin que ceux-ci prennent, conformément à la Charte des Nations Unies, les mesures qu'ils jugent appropriées pour la *prévention ... des actes de génocide': d) le génocide culturel et le génocide des groupes politiques ne sont pas inclus dans la convention*. Contre cet inexplicable ostracisme, les USA et la Chine (le 2 décembre 1948) ont vigoureusement protesté. Que la clause relative aux groupes politiques ait été au dernier moment rejetée de la façon la plus inattendue, c'est regrettable, disait le délégué chinois, en raison du fait que, dans le monde d'aujourd'hui, les conflits entre peuples sont largement fondés sur des éléments idéologiques dépassant les frontières nationales, raciales ou religieuses. Par là-même les groupes politiques ont, en tant que tels, plus besoin que tout autre groupement humain, d'être protégés; *e) la convention ne se précccupe pas de la responsabilité civile de l'Etat* pour cause de génocide. Son silence, à cet égard paraît donner gain de cause, bien à tort, à ceux qui étaient hostiles à une telle responsabilité, prétexte pris de ce que l'on ne saurait stigmatiser un Etat tout entier pour des actes dont seuls ses fonctionnaires ou gouvernants sont responsables. Pareil point de vue ne s'insurge-t-il pas, sans justification possible, à la fois contre: *a)* toute la jurisprudence des tribunaux

internationaux qui, depuis déjà longtemps, consacrent la responsabilité de la collectivité étatique pour les actes de ses gouvernants ou de ses agents quand ils méconnaissent le droit des gens et *b)* contre les mouvements jurisprudentiels ou législatifs de plus d'un pays qui soumettent de plus en plus la puissance publique elle-même à l'obligation de réparer au bénéfice de ses propres assujettis les dommages résultant des accomplissements illégaux de ses représentants ou de ses agents?

Tant de défauts dénoncés par plus d'une délégation ne pouvaient pas permettre qu'on donnât long crédit au texte né, dans un pénible enfantement, sur la colline de Chaillot en décembre 1948; aussi l'article 14 ne lui a-t-il assigné en principe qu'une durée de dix ans à partir de la date de son entrée en vigueur (avec prolongation possible, il est vrai, de cinq ans en cinq ans, sauf dénonciation avant l'expiration du terme).

Si l'on préfère l'efficacité aux textes spectaculaires on voudra mettre ce délai à profit pour reprendre à pied d'oeuvre une construction dans laquelle on ne peut voir qu'un point de départ sur la route ardue qui conduit au respect absolu des droits les plus sacrés de l'humanité."

The important point in my submission is that Professor Sibert takes the view that the Convention does not even impose civil responsibility on a State.

Subsequent Doctrine

Now I have given what I hope is a sufficiently substantial sample of contemporary literature to the Court. I now want, quite briefly, to look at some of the more important items of subsequent doctrine, subsequent commentary on the Convention. And I think the doctrine which has appeared subsequently amply confirms the analysis adopted in the contemporaneous commentaries.

1. The first item is the publication I have already referred to by Nehemiah Robinson, *The Genocide Convention: A Commentary*, which was published by the World Jewish Congress in New York in 1960. This is a meticulous and scholarly account of the preparation of the Convention together with an analysis of its provisions. In the examination of

Article IX, Dr. Robinson describes the fate of the original British proposal for the criminal responsibility of States and the appearance of the joint Anglo-Belgian proposal "which was regarded by the members of the Committee as involving civil responsibility" (pp. 99-106 of the study by Robinson and, in particular, at p. 102, footnote 6).

2. The second item of subsequent doctrine is the chapter contributed by Judge ODA to the excellent *Manual of Public International Law* edited by Max Sorensen and published in 1968.

Judge Oda describes the adoption of the Genocide Convention thus:

> "In another resolution adopted at the same time, the General Assembly declared that genocide was a crime under international law, for which the perpetrators, whether they were statesmen, public officials or private individuals were punishable (res. 96(I), 11 December 1946). It took steps to conclude a convention on the subject, and as a result, the Convention on the Prevention and Punishment of the Crime of Genocide, known as the Genocide Convention, was adopted by the General Assembly in 1948, and brought into force in 1951 (78 *UNTS*, 277). The contracting Parties declare in this Convention that genocide, whether committed in time of peace or in time of war, is a crime under international law, which they undertake to prevent and punish. It is laid down that those who are guilty of genocide must be punished whether they are constitutionally responsible rulers, public officials or private individuals. Genocide is defined in this Convention as acts committed with intent to destroy a national, ethnical, racial or religious group, by killing members of the group, causing serious bodily or mental harm to members of the group, deliberately inflicting on the group conditions of life calculated to bring about its physical destruction, imposing measures intended to prevent births within the group, or forcibly transferring children of the group to another group."

Judge Oda continues:

> "The contracting States are required to enact the necessary legislation to give effect to the provisions of the Convention, and, on the other hand, may call upon the competent organ of the United Nations to take appropriate action for the prevention and repression of genocide. Persons charged with genocide may under the terms of the Convention be tried, as a rule, by a competent tribunal of the State in the territory of which the act was committed, or by any international penal tribunal whose jurisdiction has been recognized by the States concerned. Use has not yet been made of this procedure for the establishment of a permanent international tribunal and there seem to be few

chances to effect this tribunal in the near future. In spite of certain practical difficulties, it may be of great importance that genocide is now considered a crime by individuals under international law and that its suppression is being seriously considered by the United Nations." (*Manual of Public International Law*, New York, 1968, p. 517.)

Mr. President, it is clear that the learned writer did not regard the Convention as creating a criminal responsibility of the contracting parties.

3. And one more element in the subsequent doctrine is the learned essay by Professor Malcolm Shaw, in the volume *International Law at a Time of Perplexity*, edited by Dinstein the Essays in Honour of Shabtai Rosenne (Dordrecht, 1989, p. 797). Professor Shaw reports the drafting of Article IX as follows:

"Of particular interest is the provision relating to the question of jurisdiction over State responsibility for genocide. This was included in an attempt to make the Convention more effective, although considerable opposition was expressed on the grounds of the controversial and vague nature of State responsibility in areas of international criminal law. The majority took the view that it was rather an issue of civil responsibility involving liability to pay damages. The question of States having to compensate their own nationals under an international legal rule also caused some interest in this connection, but without clarification or determination." (P. 818, Footnotes omitted.)

The Opinion of the United States in 1950

The analysis is further confirmed by the position adopted by the United States Government during the hearings on the Convention before a sub-committee of the Committee on Foreign Relations of the United States Senate. During the course of the hearings Dean Rusk, then Deputy Under-Secretary of State, gave the following analysis of the provisions of the Convention. And I quote:

"I should like to state here in general that the Convention does two things: It defines the crime of genocide, and it

obligates States to take measures to prevent and punish genocide within their respective territories.

Genocide, as defined in article II of the convention, consists of the commission of certain specified acts, such as killing or causing serious bodily harm to individuals who are members of a national, ethnical, racial or religious group, with the intent to destroy that group. The legislative history of article II shows that the United Nations negotiators felt that it should not be necessary that an entire human group be destroyed to constitute the crime of genocide; but rather that genocide meant the partial destruction of such a group with the intent to destroy the entire group concerned. In terms of practical application within the United States, genocide means the commission of such acts as killing members of a specified group and thus destroying a substantial portion of that group, as part of a plan to destroy that entire group within the territory of the United States. It can thus be readily seen that genocide, as defined in this Convention, has never occurred in the United States and is not likely to occur here in the future.

The purpose of the convention is, however, to provide for the prevention and punishment of the crime of genocide. The convention does not purport to substitute international responsibility for States' responsibility, but does obligate each State to take steps within its own borders to protect entire human groups in their right to live." (Whiteman, *op. cit., supra*, p. 860).

In this statement there is no indication whatsoever that the United States Government considers that the criminal responsibility of the State is involved in acceptance of the Genocide Convention.

Indeed, this position is in line with the views of the representatives in the Sixth Committee, and it reflects the very terms of the General Assembly resolution, which is the genesis of the whole project to draft a genocide convention. This is the resolution of 1946, and the material part of that resolution was as follows:

"THE GENERAL ASSEMBLY, THEREFORE,

AFFIRMS that genocide is a crime under international law which the civilized world condemns, and for the commission of which principals and accomplices - whether private individuals, public officials or statesmen, and whether the crime is committed on religious, racial, political or any other grounds - are punishable;

INVITES the Member States to enact the necessary legislation for the prevention and punishment of this crime;

RECOMMENDS that international co-operation be organized between States with a view to facilitating the speedy prevention and punishment of the crime of genocide, and, to this end,

REQUESTS the Economic and Social Council to undertake the necessary studies with a view to drawing up a draft convention on the crime of genocide to be submitted to the next regular session of the General Assembly."

In the same sources, both relating to the views of Governments and the doctrine, all these sources emphasize the link between the duties of the Contracting Parties and the territorial jurisdiction of the State concerned.

Failure of the Applicant State to prove its assertions concerning the application of the Convention

Mr. President, Members of the Court, in the Memorial the Applicant State fails to substantiate its assertions concerning the application of the Convention.

The Memorial (pp. 191-208) makes a series of legal assertions based upon a fundamental misconception of the text of the Convention and of its preparatory work.

The astonishing thing is that, in front of the Court, the other side essentially ignores the literature. It is ignored with the sole exception of a passage from the ninth edition of Oppenheim which, unhappily, is quoted out of context. The relevant passage in full will appear in the transcript. The passage I am about to read is the passage quoted in the Memorial.

> *"The International Court of Justice is given jurisdiction with regard to disputes relating to the interpretation, application and fulfilment of the Convention, including the responsibility of the parties for acts of genocide."*

That is where the quotation in the Memorial ends. The passage which follows, which will appear in the transcript, is this:

> "It is apparent that, to a considerable extent, the Convention amounts to a registration of protest against past misdeeds of individual or repression in future. Thus, as the punishment of acts of genocide is entrusted primarily to the municipal courts of the countries concerned, it is clear that such acts, if perpetrated in obedience to national legislation, must remain unpunished unless penalised by way of retroactive laws. On the other hand, the Convention obliges the parties to enact and keep in force legislation intended to prevent and suppress such acts, and any failure to measure up to that obligation is made subject to the jurisdiction of the International Court of Justice and of the United Nations."

It is our submission that the full quotation does not support the view adopted in the Memorial and that the full passage is in Oppenheim at page 994 and also in the transcript.

In the *Statement on Preliminary Objections* filed by the Applicant State only one paragraph is devoted to the literature on the Convention (p. 107, para. 5.19). The 9th edition of Oppenheim, Volume 1, is cited once again without adequate quotation.

This leaves, in that source, the *Statement on Preliminary Objections*, the quotation from Perlman, which refers to killings "by governments" and a reference to the work of Farhad Malekian. Unfortunately, Malekian refers exclusively to Perlman, and does not examine the literature otherwise. What this adds up to, Mr. President, is that the Government of Bosnia-Herzegovina has not seen fit to present a review of the literature as a whole.

The failure of the Applicant State to establish the applicability of the Convention to Yugoslavia in respect of Bosnia

Now, if I can bring the Court back to the precise content of the fifth preliminary objection of Yugoslavia. This consists essentially of four propositions.

First, the Convention can only apply in respect of a failure to prevent or punish acts of genocide committed within the territory of the Contracting Party.

Secondly, after the end of April 1992 the Federal Republic of Yugoslavia no longer exercised territorial jurisdiction in Bosnia.

Thirdly, in the result there can be no room for the application of the Convention in relation to alleged acts of genocide committed within Bosnia after the end of April 1992 vis-à-vis Yugoslavia.

Fourthly, it follows that there can be no dispute for the purposes of Article IX of the Convention, because there are no allegations relating to acts of the Yugoslav armed forces supposed to have taken place *prior* to the end of April 1992.

Yugoslavia has not exercised territorial jurisdiction within Bosnia since the end of April 1992

It is the position of Yugoslavia that after the end of April no territorial jurisdiction was exercised in Bosnia. After the end of April the Yugoslav National Army, the JNA forces, were withdrawing and so far as there was a continued presence, this was the result exclusively of the imposition of road blocks and attacks by local militia. The United Nations locally had to deal with the problem of what was known as "de-blocking".

The Bosnian Muslim leadership purported to declare independence on 6 March 1992 (see the Application, para. 14). By 27 April 1992 the Yugoslav Government had decided on a policy of withdrawal and on 4 May 1992 the Presidency took the decision to accelerate withdrawal. The Bosnian Memorial states that on 27 April 1992 the Bosnian Government "ordered all Federal Army troops to leave the territory of the Republic" (p. 77, para. 2.3.6.1).

As the Government of Yugoslavia has stated in its *Preliminary Objections*:

> "Since the end of April 1992, the FRY has not carried out any act of authority nor has it had any jurisdiction over the territory of the former Yugoslav Republic of Bosnia-Herzegovina." (P. 90, para. 1.17.19.)

On 27 April 1992 the Federal Republic of Yugoslavia was proclaimed, consisting of Serbia and Montenegro, within their existing frontiers.

The Bosnian Notice of Succession was backdated to 6 March 1992

In the present context it is relevant to recall the terms of the Bosnian Notice of Succession transmitted to the Secretary-General on 29 December 1992. These were as follows:

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

So this Notice of Succession constitutes a recognition by Bosnia that Yugoslavia would not remain responsible for the application of the Convention within Bosnia after it had become independent. And this point, of course, is presented on the basis that it is without prejudice to the position of Yugoslavia generally on the issue of State succession.

The Allegations of Genocide in the Memorial relate to events after the end of April 1992 with two exceptions

Mr. President, Members of the Court, the astonishing thing is that when the allegations contained in the Memorial are examined carefully it will be found that, with only two exceptions, they relate to events in May 1992 or later.

The two exceptions relate to events alleged to have occurred in April 1992 and yet there is no evidence that Yugoslav armed forces were involved (see Memorial, p. 49, para. 2.2.5.5 and p. 50, para. 2.2.5.8).

Both the Bosnian Application and the Memorial relate to acts alleged to have been committed by Irregular Forces

With very rare exceptions both the Application and the Memorial state that the alleged crimes were committed by paramilitary groups and not by members of the Yugoslav National Army (see Application, paras. 34-83, and Memorial, pp. 17-59).

There is a total failure to produce evidence that the command structure of Bosnian Serb forces was linked to that of the Yugoslav armed forces. And the Secretary-General's Report of 30 May 1992 (S/24049) clearly indicates the absence of a command structure as early as May 1992, in the light of the obvious independence of action of the commander of the Bosnian Serb forces.

The relevant paragraphs are as follows:

> "8. Uncertainty about who exercises political control over the Serb forces in Bosnia and Herzegovina has further complicated the situation. The Bosnia and Herzegovina Presidency had initially been reluctant to engage in talks on these and other issues with the leadership of the 'Serbian Republic of Bosnia and Herzegovina' and insisted upon direct talks with the Belgrade authorities instead. A senior JNA representative from Belgrade, General Nedeljko Boskovic, has conducted discussions with the Bosnia and Herzegovina Presidency, but it has become clear that his word is not binding on the commander of the army of the 'Serbian Republic of Bosnia and Herzegovina', General Mladić. Indeed, as indicated in paragraph 6 *(b)* above, Serb irregulars attacked a JNA convoy

withdrawing from a barracks at Sarajevo on 28 May under arrangements negotiated by General Boskovic. It also appears that the heavy shelling of Sarajevo on the night of 28/29 May took place on the orders of General Mladić in direct contravention of instructions issued by General Bosković and the JNA leadership in Belgrade.

9. Given the doubts that now exist about the ability of the authorities in Belgrade to influence General Mladić, who has left JNA, efforts have been made by UNPROFOR to appeal to him directly as well as through the political leadership of the 'Serbian Republic of Bosnia and Herzegovina'. As a result of these efforts General Mladić agreed on 30 May 1992 to stop the bombardment of Sarajevo. While it is my hope that the shelling of the city will not be resumed, it is also clear that the emergence of General Mladić and the forces under his command as independent actors apparently beyond the control of JNA greatly complicates the issues raised in paragraph 4 of Security Council resolution 752 (1992). President Izetbegović has recently indicated to senior UNPROFOR officers at Sarajevo his willingness to deal with General Mladić but not with the political leadership of the 'Serbian Republic of Bosnia and Herzegovina'."

In the absence of proof of the existence of a command structure linking the Bosnian Serb armed forces and the armed forces of Yugoslavia, there can be no question of the responsibility of Yugoslavia in any case. However, this view is hypothetical because, once Yugoslavia no longer exercised territorial jurisdiction, the Genocide Convention was *in limine* no longer applicable.

And the Court will no doubt bear in mind that, according to Bosnia, the Convention came into force for Bosnia with effect from 6 March 1992, and therefore on this view it was Bosnia which had the responsibility to prevent and punish genocide in the territory it claimed.

The existence of a dispute for the purposes of Article IX of the has the character of a preliminary question

As I have already had occasion to point out in relation to the first preliminary objection, the lack of applicability of the provisions of the Genocide Convention to the subject-matter of the Application produces a bar to the competence of the Court which can be classified in two ways.

In the first place the jurisdictional clause requires the existence of a dispute, and the absence of a relevant subject-matter constitutes a question of the ambit of the jurisdictional clause and therefore an issue of competence.

At the same time the absence of any legal dispute between the parties precedes competence and may be classified as a preliminary objection of a non-jurisdictional character. The nature of such an objection was explained by Sir Gerald Fitzmaurice in his separate opinion in the *Northern Cameroons* case as follows:

> "There are however other objections, not in the nature of objections to the competence of the Court, which can and strictly should be taken in *advance* of any question of competence. Thus a plea that the Application did not disclose the existence, properly speaking, of any legal dispute between the parties, must precede competence, for if there is no dispute, there is nothing in relation to which the Court can consider whether it is competent or not. It is for this reason that such a plea would be rather one of admissibility or receivability than of competence. In the present case, this particular ground of objection arose as one of competence, because the jurisdictional clause invoked, namely Article 19 of the Trust Agreement, itself required the existence of a dispute. But irrespective of the particular language of the jurisdictional clause, the requirement that there must be an actual dispute in the proper sense of the term, and not merely (for instance) a simple difference of opinion, is a general one, which must govern and limit the power of any tribunal to act. For reasons I shall give later, I consider that there was not, in this sense, a dispute in the present case." (*I.C.J. Reports 1963*, p. 105.)

Conclusions

Mr. President, distinguished Members of the Court, at this stage I can present my concluding submissions.

The first key element is the reliance by the Applicant State upon a compromissory clause in a standard-setting treaty. It must follow that the Court will apply the compromissory clause to the text of the treaty as concluded and not to an alternative version of the obligations of States not based upon the treaty which contains the compromissory clause.

The second key element is the lack of application of the Genocide Convention to the subject-matter of the Request in the Application in light of the fact that Yugoslavia has not had any power to exercise jurisdiction over the territory of Bosnia-Herzegovina since the end of April 1992.

Furthermore, it is the contention of the Applicant State that since 6 March 1992 it is Bosnia, not Yugoslavia, which has had the responsibility to prevent and punish acts of genocide in the relevant area.

As a result, Mr. President, the Convention is inapplicable to the subject-matter of the Application. It follows that there is no dispute between Bosnia and Yugoslavia for the purposes of Article IX of the compromissory clause, and therefore the Court lacks competence.

Mr. President, I thank you and your colleagues for their patience. I would propose, respectfully, that it would be helpful if Mr. Etinski could start his speech after the coffee break, although this would be a slightly premature summoning of the coffee break. But I am in your hands, Sir.

The PRESIDENT: Thank you very much, Professor Ian Brownlie for your statement. The hearing is suspended for a break of 15 minutes and the sitting will resume at 11.15 a.m.

The Court adjourned from 11 a.m. to 11.15 a.m.

The PRESIDENT: Please be seated. The sitting is resumed and I give the floor to Mr. Rodoljub Etinski, Agent of Yugoslavia.

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

Professor Suy demonstrated yesterday very convincingly that the claim of the Applicant to the effect that the Genocide Convention had been operative between the Parties since 6 March 1992 was not based on law. In doing so, he has proved that, in case the Court finds that the Applicant is a party to this Convention, it was not applicable before 14 December 1995 or 29 March 1993 or 18 March 1993. As the last alternative Professor Suy claimed that it was applicable since 29 December 1992. Making every effort not to repeat the arguments of Professor Suy, I shall take this opportunity to refresh our memories of the preparatory work of the International Law Commission. Besides, I submit to draw your attention to certain acts of the former Yugoslav Republics by which they denied the rule of automatic succession.

Already at the first session of the Court in our case, Mr. Shabtai Rosenne, a member of the International Law Commission at the time when it prepared the Draft Convention on Succession of States in respect of Treaties, pointed out that the instrument of the notification of succession is reserved for the newly-independent States born in the process of decolonization. The majority of new States that emerged after 1990, not born in the process of decolonization, followed the main stream of international practice in this field and did not use the instrument of notification of succession. These States are all former Soviet Republics, Armenia, Azerbaijan, Estonia, Georgia, Kazakhstan, Kyrgyzstan, Latvia, Lithuania, Republic of Moldova, Tajikistan, Turkmenistan and Uzbekistan. All of them used accession. Only the Czech Republic, Slovakia and the former Yugoslav Republics used the notification of succession to enter into the multilateral treaties of the predecessor State. This has been a departure from the deep-rooted practice and I do not believe that the Court will see in it a sufficient

reason to uphold that the existing customary rules have changed. However, if the Court does find that this departure suffices to make the customary rules reserved for the newly-independent States born in the process of decolonization applicable to all new States, I plead the Court to take into account the following arguments:

(a) the clean slate principle has always been and it is now a part of general international law;

(b) the rules on notification of succession of States to multilateral treaties have been born in the practice of decolonization and they are codified by the United Nations Conference on Succession of States in respect of Treaties in 1977 and 1978;

(c) the rules on notification of succession, born in the process of decolonization, have been used after the United Nations Conference on Succession of States in Respect of Treaties, as general rules of international customary law;

(d) one significant rule among them is the rule on non-retroactive effects of the notification of succession;

(e) the Applicant has not proved that a rule of automatic succession exists as an international custom or as a rule binding on the Parties in dispute;

(f) the Applicant has denied the existence of the rule of automatic succession and its applicability to the Parties in dispute;

(g) accordingly, the succession of the Applicant to the Genocide Convention may be regulated by the customary rules reflected in Articles 16, 17, 22 and 23 of the Vienna Convention on Succession of States in respect of Treaties (hereafter the 1978 Vienna Convention).

(a) The clean-slate principle has always been and it is now a part of general international law

The clean-slate principle is presented in Article 15 of the Draft of the International Law Commission of 1974. The Commission had no doubt as to the customary origin and universal validity of this rule. In the Report of the International Law Commission on the work of its twenty-sixth session, 6 May - 26 July 1974 (Document A/9610/Rev. 1) it is said:

> "The majority of writers take the view, supported by State practice, that a newly independent State begins its life with a clean slate, except in regard to 'local' or 'real' obligations. The clean slate is generally recognized to be the 'traditional' view on the matter. It has been applied to earlier cases of newly independent States emerging either from former colonies (i.e., the United States of America; the Spanish American Republics) or from a process of secession or dismemberment (i.e., Belgium, Panama, Ireland, Poland, Czechoslovakia, Finland) ..." (*YILC*, 1974, Vol. II, Part One, p. 211.)

Supporting the Draft of the International Law Commission at the session of the United Nations Conference on Succession of States in respect of Treaties of 21 April 1977, the delegation of Madagascar, *inter alia*, said:

> "That the 'clean slate' principle was universally and unconditionally accepted was shown not only by paragraph (3) of the commentary to Article 15 (A/CONF.80/4, p. 52), which referred to that principle's traditional character, but also by the numerous and concordant instances of the practice in most States, which seemed also to indicate that the so-called continuity rule had hardly withstood the tests of time and practice." (United Nations Conference on Succession of States in respect of Treaties, first session, Vienna, 4 April-6 May 1977, *Official Records*, Vol. I, p. 160.)

Since all participants in the debate supported this principle, it was accepted and became Article 16 of the Convention which reads:

> "A newly independent State is not bound to maintain in force, or to become a party to, any treaty by reason only of the fact that at the date of the succession of States the treaty was in force in respect of the territory to which the succession of States relates."

After all, this provision reflects the main principle that a treaty cannot be binding on a State without its consent.

(b) **The rules on notification of succession of States to multilateral treaties have been born in the practice of decolonization and they are codified by the United Nations Conference on Succession of States in respect of Treaties in 1977 and 1978**

I shall examine for a while the rules contained in Articles 17, 22 and 23 of the 1978 Vienna Convention. These rules are presented in Part III of the 1978 Vienna Convention. I shall not examine all the rules from Part III, because only the said rules pertain to the case before the Court.

Thus, Article 17, paragraph 1, of the 1978 Vienna Convention reads:

> "Subject to paragraphs 2 and 3, a newly independent State may, by a notification of succession, establish its status as a party to any multilateral treaty which at the date of the succession of States was in force in respect of territory to which the succession of States relates."

The subsequent two paragraphs of the Article do not pertain to our case and I shall not examine them. In the Report of the International Law Commission on the work of its twenty-sixth session, 6 May-26 July 1974, the said rule is commented in the following way:

> "In the case of multilateral treaties in general, the entitlement of a newly independent State to become a party in its own name seems well settled, and is indeed implicit in the practice already discussed in the commentaries to Articles 8, 9 and 15 of this draft. As indicated in those commentaries, whenever a former dependency of a party to multilateral treaties of which the Secretary-General is the depositary emerges as an independent State, the Secretary-General addressed to it a letter inviting it to confirm whether it considers itself to be bound by the treaties in question. This letter is sent in all cases; that is, when the newly independent State has entered into a devolution agreement, when it has made a unilateral declaration of provisional application, and when it has given no indication as to its attitude in regard to its predecessor's treaties. The Secretary-General does not consult the other parties to the treaties before he writes to the newly independent State, nor does he seek the views of the other parties or await their reactions when he notifies them of any affirmative replies received from the newly independent State. He appears, therefore, to act upon the assumption that a newly

> independent State has the right, if it chooses, to notify the depositary of its continued participation in any general multilateral treaty which was applicable in respect of its territory prior to the succession. Furthermore, so far as is known, no existing party to a treaty has ever questioned the correctness of that assumption; while the newly independent States themselves have proceeded on the basis that they do indeed possess such a right of participation.
>
> The same appears, in general, to hold good for multilateral treaties which have depositaries other than the Secretary-General. Thus, the practice followed by the Swiss Government as depositary of the Convention for the Protection of Literary and Artistic Works and subsequent Acts of revision, and by the States concerned, seems clearly to acknowledge that successor States, newly independent, possess a right to consider themselves parties to these treaties in virtue of their predecessors' participation; and this is true also of the Geneva Humanitarian Conventions in regard to which the Swiss Federal Council is the depositary. The practice in regard to multilateral conventions of which the United States of America is depositary has equally been based on recognition of the right of a newly independent States to declare itself a party to the conventions on its own behalf. "(*YILC*, 1974, Vol. II, Part One, p. 215.)

I shall quote just one more sentence from the said Report of the International Law Commission, and it reads: "The newly independent State's right is rather to *notify its own consent to be considered as a separate party to the treaty*."

I quoted this sentence because I believe that it will help us understand the nature and effects of the notification of succession done by the Applicant. I would refer here your attention to the relevant part of the presentation of Professor Suy. Article 17 of the 1978 Vienna Convention only proclaims the customary rule born in the process of decolonization.

The rules contained in Article 22 of the 1978 Vienna Convention also express international customs. The relevant rules of Article 22 of the 1978 Vienna Convention related to the notification of succession read:

> "1. A notification of succession in respect of a multilateral treaty under Article 17 or 18 shall be made in writing.

2. If the notification of succession is not signed by the Head of State, Head of Government or Minister for Foreign Affairs, the representative of the State communicating it may be called upon to produce full powers.

3. Unless the treaty otherwise provides, the notification of succession shall:

(a) be transmitted by the newly independent State to the depositary, or, if there is no depositary, to the parties or the contracting States;

(b) be considered to be made by the newly independent State on the date on which it is received by the depositary or, if there is no depositary, on the date on which it is received by all the parties or, as the case may be, by all the contracting States.

4. ...

5. Subject to the provisions of the treaty, the notification of succession or the communication made in connection therewith shall be considered as received by the State for which it is intended only when the latter State has been informed by the depositary."

In the Report of the International Law Commission on the work of its twenty-sixth session, 6 May-26 July 1974, it is, *inter alia*, said:

"An indication of the practice of the Secretary-General in the matter may be found in the letter which he addresses to newly independent States inquiring as to their intentions concerning treaties of which he is the depositary. This letter contains the following passage:

Under this practice, the new States generally acknowledge themselves to be bound by such treaties *through a formal notification addressed to the Secretary-General by the Head of the State or Government or by the Minister for Foreign Affairs.*" (*YILC*, 1974, Vol. II, Part One, p. 230.)

(c) Rules on notification of succession, born in the process of decolonization, have been used after the United Nations Conference on Succession of States in respect of Treaties as general rules of international customary law

With your permission, I shall proceed to present the practice of States after the United Nations Conference on Succession of States in respect of Treaties. As it is known, all States that emerged in the territory of the former Soviet Union used exclusively accession as the

manner of entering multilateral treaties. They are Armenia, Azerbaijan, Estonia, Georgia, Kazakhstan, Kyrgyzstan, Latvia, Lithuania, Republic of Moldova, Tajikistan, Turkmenistan and Uzbekistan. If we look at the last United Nations publication of Multilateral Treaties Deposited with the Secretary-General, Status as at 31 December 1994 (ST/LEG/SER.E/13), we shall see that all these States entered international conventions on human rights and other multilateral treaties by way of accession. None of them considered that it was bound by the rule of automatic succession as provided by Article 34 of the 1978 Vienna Convention. No State protested the attitude of the former Soviet Republics. On that account we can conclude that there exists no legal consciousness of the binding force of the rule of automatic succession, i.e., of the existence of this rule as a customary rule. On the contrary, the practice described has confirmed the further validity of the principle of clean slate.

In a letter dated 16 February 1993, to which a list of multilateral treaties was added, that the Secretary-General received on 22 February 1993, the Government of the Czech Republic notified that:

> "In conformity with the valid principles of international law and to the extent defined by it, the Czech Republic, as a successor State to the Czech and Slovak Federal Republic, considers itself bound, as of 1 January 1993, i.e., the date of the dissolution of the Czech and Slovak Federal Republic, by multilateral international treaties to which the Czech and Slovak Federal Republic was a party on that date, including reservations and declarations to their provisions made earlier by the Czech and Slovak Federal Republic.
>
> **The Government of the Czech Republic has examined multilateral treaties, the list of which is attached to this letter. (The Government of the Czech Republic) considers to be bound by these treaties as well as by all reservations and declarations to them by virtue of succession as of 1 January 1993.**
>
> The Czech Republic, in accordance with the well-established principles of international law, recognizes signatures made by the Czech and Slovak Federal Republic in respect of all signed

treaties as if they were made by itself." (The bold type is ours.)

Subsequently, a letter dated 19 May 1993 and also accompanied by a list of multilateral treaties deposited with the Secretary-General, was received by the Secretary-General on 28 May 1993, from the Government of the Slovak Republic by which it notified its succession to treaties of the predecessor State.

These letters were published on pages 8 and 9 of the United Nations publication of Multilateral Treaties Deposited with the Secretary-General, Status as at 31 December 1994. These two States did not succeed to all the treaties to which the predecessor State had been a party. They had considered the treaties of the predecessor State and decided to which to succeed. Thus, for instance, the Slovak Republic did not succeed to the International Convention against Apartheid in Sports of 10 December 1985, to which Czechoslovakia was a party. The Czech Republic did not succeed to the Convention and Statute on the Freedom of Transit to which Czechoslovakia was a party (see Multilateral Treaties Deposited with the Secretary-General as at 31 December 1994, pp. 189, 989). Neither State succeeded to the International Coffee Agreement (*ibid.*, pp. 704-714), International Sugar Agreement (*ibid.*, p. 715), International Cocoa Agreement (*ibid.*, pp. 721, 730, 735, 762, 808), International Tin Agreement (*ibid.*, p. 733) and the International Natural Rubber Agreement (*ibid.*, p. 753). It can be concluded that these two States did not consider that they became parties to all the treaties of the predecessor State automatically. They considered that they could enter them by way of succession and decide freely which of them to enter. They did it by notifying its succession to chosen treaties. Accordingly, they notified their successions to each multilateral treaty separately,

citing the names of the treaties in a list enclosed to the statement of succession. In doing so, they acted in conformity with the rules contained in Articles 16, 17, 22 and 23 of the 1978 Vienna Convention.

Without discussing the question of whether the seceded Yugoslav Republics obtained independent Statehood in conformity with the principle of equality and self-determination of peoples and when indeed they obtained independence, I can say that they behaved in the manner very similar to the Czech and Slovak Republics. They notified their successions to individual treaties of the predecessor State to the depositaries of multilateral treaties.

Slovenia sent its Note on 1 July 1992, which the Secretary-General of the United Nations received on 6 July 1992 by which Slovenia informed him

> "that it considers itself bound by the treaties listed below 'by virtue of succession on the Socialist Federal Republic of Yugoslavia in respect of the territory of the Republic of Slovenia', with effect from 25 June 1991, the date on which Slovenia assumed responsibility for its international relations" (United Nations, C.N.240.1992. Treaties, Depositary Notification).

A list of treaties is attached. The list does not include all multilateral treaties to which the predecessor State is a party. Thus, Slovenia did not succeed to the Optional Protocol to the Vienna Convention on Diplomatic Relations concerning Acquisition of Nationality, done at Vienna on 18 April 1961 (see Multilateral Treaties Deposited with the Secretary-General, Status as at 31 December 1994, p. 65), International Convention against Apartheid in Sports, adopted by the General Assembly of the United Nations on 10 December 1985 (*ibid.*, p. 189), Convention on Road Signs and Signals, concluded at Vienna on 8 November 1968 (*ibid.*, p. 568), Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages, opened for

signature at New York on 10 December 1962 (*ibid.*, p. 674) and to some others.

Slovenia acceded on 16 July 1993 to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted by the General Assembly of the United Nations on 10 December 1984 (*ibid.*, p. 177) although the predecessor State is a party to this Convention so that the conditions for succession did exist. Slovenia acceded to all treaties concluded under the auspices of the Council of Europe to which the predecessor State is a party (see Chart showing signatures and ratifications of Conventions and Agreements concluded within the Council of Europe).

Croatia notified its succession to a great many multilateral treaties of the predecessor State, the depositary of which is the Secretary-General of the United Nations. However, Croatia did not succeed to some of these treaties. Thus, for instance, it did not succeed to the Optional Protocol to the Vienna Convention on Diplomatic Relations concerning the Compulsory Settlement of Disputes, done at Vienna on 18 April 1961 (*ibid.*, p. 66), International Agreement for the Establishment of the University for Peace, adopted by the General Assembly of the United Nations on 5 December 1980 (*ibid.*, p. 655) or to the International Convention Against the Taking of Hostages, adopted by the General Assembly of the United Nations on 17 December 1979 (*ibid.*, p. 688). Croatia acceded to all treaties of the predecessor State concluded within the Council of Europe (see Chart showing signatures and ratifications of Conventions and Agreements concluded within the Council of Europe).

Macedonia behaved in the same manner. It notified succession to some multilateral treaties of the predecessor State, the depositary of which

is the Secretary-General of the United Nations. However, Macedonia did not succeed to some of these treaties. Thus, Macedonia did not succeed to the International Convention against Apartheid in Sports, adopted by the General Assembly of the United Nations on 10 December 1985 (*ibid.*, p. 189), Agreement for the Suppression of the Circulation of Obscene Publications, signed at Paris on 4 May 1910 and amended by the Protocol signed at Lake Success, New York, on 4 May 1949 (*ibid.*, p. 315) or the International Convention on the Harmonization of Frontier Controls of Goods, concluded at Geneva on 21 October 1982 (*ibid.*, p. 427) and some others.

Macedonia acceded to the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, concluded at Vienna on 20 December 1988 to which the predecessor State is a party (*ibid.*, P. 281). It acceded to the treaties concluded within the Council of Europe to which the predecessor State is a party (see Chart showing signatures and ratifications of Conventions and Agreements concluded within the Council of Europe).

The practice of Bosnia and Herzegovina was explained in the Preliminary Objections, submitted to the Court in June 1995, on pages 122 to 124.

In the meantime, certain changes have occurred. Bosnia and Herzegovina acceded to some Conventions concluded within the Council of Europe to which the predecessor State was a party. Accordingly, it should be noted that Bosnia and Herzegovina did not succeed to these Conventions; it acceded to them. Thus, it acceded, for instance, to the European Cultural Convention on 29 December 1995, Convention for the Protection of the Architectural Heritage of Europe on 1 April 1995, European Convention on the Protection of the Archaeological Heritage on

30 March 1995 and the Anti-Doping Convention on 1 February 1995. Bosnia and Herzegovina acceded to 16 Conventions concluded within the European Council in which the predecessor State is a party (see Chart showing signatures and ratifications of Conventions and Agreements concluded within the Council of Europe).

Without prejudging in this way other relevant questions, including the legality of the acquisition of independent statehood, as well as the real date of the acquisition of independence, we can note that the former Yugoslav Republics entered the majority of international treaties of the predecessor State by virtue or succession or accession. They did not enter some of these treaties at all. Accordingly, they did not consider to have been bound by multilateral treaties of the predecessor State or by international conventions on human rights, nor did they consider that they had entered them by automatic succession. They saw succession as a legal possibility of becoming the parties to the treaties of the predecessor State and used it accordingly. It was exactly that they behaved in accordance with the rules contained in Articles 16, 17, 22 and 23 of the 1978 Vienna Convention.

***(d)* The rule on non-retroactive effects of the notification of succession**

Let me give a short account of how the International Law Commission resolved the question of the retroactive effect of the notification of succession. Prominent members of the International Law Commission opposed the idea of the retroactive effect of succession. Mr. Bedjaoui, a member of the Commission at that time, said:

> "It followed that the effective application of a treaty immediately after the creation of a State depended not on a customary rule, but on the expressed will of that State and of the other States parties to the treaty. Under those conditions, there could be no presumption of continuity or retroactivity. Personally, I am in favour of the principle of non-retroactivity of treaties, as stated in Article 28 of the Vienna Convention.

> Retroactivity could, of course, be presumed, as an exception to that principle, in the special case where a new State notifies its succession under Article 7. But uncertainty would persist until the new State had expressed its will, and it might ultimately refuse to consider itself bound by the treaty. I therefore hope the Commission will not introduce the concept of retroactivity into the draft." (*YILC*, 1972, Vol. I, p. 107, paras. 21, 23.)

The retroactive effects of the Note of succession were opposed also by Mr. Yasseen (see *YILC*, 1972, Vol. I, p. 106, para. 4), Mr. Ushakov (see *YILC*, 1974, Vol. I, p. 242, para. 41), Mr. Hambro (see *YILC*, 1974, Vol. I, p. 242, para. 35), Sir Francis Vallat (see *YILC*, 1974, Vol. I, p. 43, para. 52, 53), Mr. Rossides (see *YILC*, 1972, Vol. I, p. 105, para. 88) and Mr. Kearney (see *YILC*, 1972, Vol. I, p. 105, para. 91).

In resolving this problem, the International Law Commission proposed the following solution in the 1972 Draft for Article 18:

> "1. Unless a treaty otherwise provides or it is otherwise agreed, a newly independent State which makes a notification of succession under Article 12 or 13 shall be considered a party or, as the case may be, contracting State to the treaty:
>
> *(a)* On its receipt by the depositary; or
>
> *(b)* If there is no depositary, on its receipt by the parties or, as the case may be, contracting States.
>
> 2. When under paragraph 1 a newly independent State is considered a party to a treaty which was in force at the date of the succession of States, the treaty is considered as being in force in respect of that State from the date of the succession of States unless;
>
> *(a)* The treaty otherwise provides;
>
> *(b)* In the case of a treaty which falls under Article 12, paragraph 3, a later date is agreed by all the parties;
>
> *(c)* In the case of other treaties, the notification of succession specifies a later date.
>
> 3. ..." (*YILC*, 1972, Vol. II, p. 269.)

Accordingly, the International Law Commission differentiated between the date of the receipt of the notification of succession by the

depositary as the date when a new State becomes a party and the date of succession as the date since when a treaty is in force in respect of a new State. States criticized the proposed solution from the point of view of the non-acceptability of the retroactivity of the notification of succession.

> "The United Kingdom said that where a newly independent State made a notification of succession some considerable time after independence, other States might, in good faith, have acted in the meantime on the assumption that the treaty was not applicable between them and the newly independent State. Should the newly independent State insist upon the date of independence as the effective date, the other States would presumably not be open to allegations of breach for having failed to apply the treaty in the meantime. This aspect of the question was not dealt with in the Commission's proposals ..." (*YILC*, 1974, Vol. II, Part One, p. 56, para. 310.)

The United States Government, also criticizes the quoted proposal of the International Law Commission referring to the problem of retroactivity (*YILC*, 1974, Vol. II, Part I, p. 56, para. 310).

Bearing in mind the observations of the said States, the International Law Commission redrafted the provisions of Article 18 of the Draft in the way as present Article 23 of the 1978 Vienna Convention reads. Here is how the said rule contained at that time in Article 22 of the Draft was explained in the Report of the International Law Commission on the work of its twenty-sixth session 6 May - 26 July 1974 (Doc. A/9610/Rev.1). It, *inter alia*, reads:

> "(7) The 1972 text of the article[1] provided that, while a newly independent State which makes a notification of succession to a treaty which was in force at the date of the succession of States would be considered a *party* to the treaty *on the receipt of the notification* (former paragraph 1), the treaty would be considered as being *in force* in respect of that newly independent State from *the date of the succession of States* subject to certain specific exceptions (former paragraph 2). The comments of delegations and Governments on Articles 12, 13 and

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[1]Article 18 of the 1972 Draft.

18 of the 1972 Draft called the attention of the Commission to a number of problems that would be created by these provisions.

(8) Article 18 of the 1972 Draft would have given retroactive effect to a notification of succession by a newly independent State so that, even if the notification of succession was delayed for a long period after the date of the succession of States, a multilateral treaty would as a general rule be regarded as in force between that State and other parties with effect from the date of the succession of States. In this respect, other parties to the treaty would have had no choice, but the newly independent State would have been able to choose a later date if the retroactive application of the treaty was inconvenient from its point of view. At the present session, several members of the Commission observed that if this were the rule it would create an impossible legal position for the States parties to the treaty which would not know during the interim period whether or not they were obliged to apply the treaty in respect of the newly independent State. Such a State might make a notification of succession years after the date of the succession of States and, in these circumstances, a party to the treaty might be held to be responsible retroactively for breach of the treaty.

(9) In this connection, some members of the Commission thought that there was an inherent contradiction between paragraphs 1 and 2 of Article 18 of the 1972 Draft because by definition a party to a treaty means one for which the treaty is in force and, according to paragraph 1, a newly independent State would only become a party from the date of making of the notification of succession while, according to paragraph 2, the treaty would be considered as in force in respect of the newly independent State from the date of the succession of States. Other members expressed the view that paragraph 1 did not entirely accord with the practice of the Secretary-General, who normally regarded a newly independent State as a party to the treaty from the date of the succession of States and not from the date of the making of a notification of succession.

(10) In the light of such considerations, the Commission concluded that Article 18 of the 1972 Draft should be redrafted so as to provide for the element of continuity consistent with the concept of a succession of States, bearing in mind the legal nexus between a multilateral treaty and the territory of the newly independent State at the date of succession. It decided that this could be done by providing in principle that the newly independent State making a notification of succession with respect to a multilateral treaty should be regarded as a *party* from the date of the succession of States.

(11) On the other hand, the Commission considered that some provisions should be adopted to avoid the unsatisfactory consequences which would result from giving retroactive effect to the notification of succession so far as concerned the rights and obligations under the treaty as between the newly

> independent State and the parties to it... the Commission concluded that the most satisfactory solution would be to regard the operation of the treaty as suspended between the date of a succession of a State and the date of the making of the notification of succession. The Commission considered that if the States concerned wished to apply the treaty during the interim period this could normally be done by means of provisional application in accordance with Article 26 ..." (*YILC*, 1974, Vol. II, Part One, p. 235.)

The International Law Commission was in the position to resolve the conflict between the practice that the newly-independent States considered themselves bound by multilateral treaties to which they succeeded and the general rule on non-retroactivity. Even though it sought a solution of this conflict in general legal principles, i.e., in legal logic, the solution that was eventually found was rested also on the international practice of the provisional application of the treaties of the predecessor State, initiated by the Note of Tanganyika from 1961 which was subsequently accepted by a large number of countries. The practice of the provisional application of treaties was contradictory to the idea of having multilateral treaties be applicable between a newly-independent State and other States Parties since the moment of succession on the basis of the notification of succession. If they had considered so, these States would certainly not have notified the provisional application of treaties. The customary rule created by the said practice is expressed in Article 27 of the 1978 Vienna Convention which reads:

> "1. If, at the date of the succession of States, a multilateral treaty was in force in respect of the territory to which the succession of States relates and the newly independent State gives notice of its intention that the treaty should be applied provisionally in respect of its territory, that treaty shall apply provisionally between the newly independent State and any party which expressly so agrees or by reason of its conduct is to be considered as having so agreed.
>
> 2. . . ."

Accordingly, the relevant rules of Article 23 of the 1978 Vienna Convention related to the effects of a notification of succession are based on the general principle and they reflect the international custom. They read:

> "1. Unless the treaty otherwise provides or it is otherwise agreed, a newly independent State which makes a notification of succession under Article 17 or Article 18, paragraph 2, shall be considered a party to the treaty from the date of the succession of States or from the date of entry into force of the treaty, whichever is the later date.
>
> 2. Nevertheless, the operation of the treaty shall be considered as suspended as between the newly independent State and the other parties to the treaty until the date of the making of the notification of succession except in so far as that treaty may be applied provisionally in accordance with Article 27 or as may be otherwise agreed.
>
> 3. . . ."

The notification of succession produces legal effects in conformity with the rules contained in Article 23 of the Vienna Convention. Regardless of the moment from which the successor State considers itself bound with respect to a treaty, the treaty is inapplicable between the successor State and other Parties to that treaty before the successor State notifies its succession to the depositary of the treaty. International practice, as well as the basic premises of the law of treaties are opposed to the retroactive effect of the notification of succession. The international conventions on human rights are no exception.

(e) The Applicant has not proved that a rule of automatic succession exists as an international custom or as a rule binding on the Parties in dispute

Yesterday, Professor Suy showed that the Applicant had not proved the existence of this rule as an international custom. On this occasion, I would like to refer only to very relevant points.

In paragraphs 3.48 to 3.51 of its Statement, the Applicant refers to the submission of the report of the Republic of Bosnia and Herzegovina to the Human Rights Committee, at the request of the Committee in the period before it notified its succession to the Covenant on Civil and Political Rights. It was an exception. Other States did not respond to the same request of the Human Rights Committee. Thus, in paragraph 5, of the Report of the Secretary-General "Succession of States in respect of International Human Rights Treaties" (E/CN. 4/1995/80) of 28 November 1994 it is said:

> "At its forty-seventh session (March/April 1993), the Committee, stated that all the people within the territory of a former State party to the Covenant, remain entitled to the guarantees of the Covenant and that, in particular, Armenia, Georgia, Kazakhstan, Kyrgyzstan, Tajikistan, the Former Yugoslav Republic of Macedonia, Turkmenistan and Uzbekistan were bound by their obligations under the Covenant as from the date of their independence. Consequently, it noted that reports under Article 40 became due and requested, in notes verbale dated 28 May 1992 addressed to the Ministers for Foreign Affairs of those States, that such reports be submitted to it. **No reports have been sent to the Committee in reply to that request. However, since the closure of the Committee's forty-seventh session, Armenia and Georgia have acceded to the Covenant, and the Former Yugoslav Republic of Macedonia have succeeded to it.**" (The bold type is ours.)

It is clear that the majority of the new successor States do not accept the position of the experts in the Human Rights Committee.

There exists no agreement between the Parties in dispute on the application of the rule of automatic succession. The Applicant contends that there exists an agreement between the secessionist Republics and the Federal Republic of Yugoslavia on the application of the rule of automatic succession. As evidence to that effect, in paragraph 3.6.3 of its Statement (p. 80) the Applicant presented a sentence from Opinion No. 9 of the Badinter Commission which reads:

> "The succession of States is governed by the principles of international law embodied in the Vienna Convention of

> 28 August 1978 and 8 April 1983, which all Republics have agreed should be the foundation for discussion between them."

There exists no agreement between the parties in dispute on the application of the rule of automatic succession. The quoted sentence cannot be taken as appropriate evidence of such an agreement, either. After all, the sentence refers to the principles of international law embodied in the 1978 Vienna Convention and not to the application of the rules contained in all the Articles of the Convention. The rule contained in Article 34 of the 1978 Vienna Convention is the rule *de lege ferenda*, and not the principle of international law. As I have shown, the 1978 Vienna Convention contains two principles of international law, the clean slate principle and the rule of non-retroactivity of notification of succession. Accordingly, if there does exist an agreement on the application of the principles of international law embodied in the 1978 Vienna Convention, only the said two principles are applicable to the case.

(f) The Applicant has denied the existence of the rule of automatic succession and its applicability between the Parties in dispute

Mr. President, the secessionist Yugoslav Republics, Bosnia-Herzegovina included, denied the existence of the rule of automatic succession and its validity between the Federal Republic of Yugoslavia and themselves.

At the 13th Meeting of the Commission on Human Rights, Mr. Bijedić, Permanent Representative of the Republic of Bosnia-Herzegovina to the United Nations Office at Geneva, criticized:

> "the Secretary-General's report on the succession of States in respect of international human rights treaties (E/CN. 4/1995/80), which listed the dates of receipt of instruments of accession or ratification of human rights treaties by States successor to, *inter alia*, the former Yugoslavia showed the dates of receipt of such instruments from the former Socialist Federal Republic of Yugoslavia as those relating to the Federal Republic

> of Yugoslavia (Serbia and Montenegro), listed as "Yugoslavia". ... His Government strongly objected to the claim of the Federal Republic of Yugoslavia (Serbia and Montenegro) to the personality of the former Socialist Federal Republic of Yugoslavia, **since none of the States emerging therefrom had been accorded the right of automatic succession** ... (the bold type is ours) it had failed to submit notification of its succession to the multilateral treaties to which the former Socialist Federal Republic of Yugoslavia was a party, a procedure duly complied with by Bosnia-Herzegovina, Croatia, Slovenia and the Former Yugoslav Republic of Macedonia ... Existing inaccuracies in the United Nations documents should be rectified by inserting the words "the former" before "Yugoslavia" in all cases where the Socialist Federal Republic of Yugoslavia was meant, unless and until the Federal Republic of Yugoslavia (Serbia and Montenegro) completed the succession procedure. A letter to that effect was being sent to the Secretary-General of the United Nations for distribution as an official document." (Cited from the United Nations document E/CN.4/1995/SR. 13, of 14 February 1995, p. 17, paras. 79, 80 and 81.)

On the same count, the Representative of Slovenia sent a letter to the Secretary-General of the United Nations, published as United Nations document E/CN.4/1995/122 of 7 February 1995, in which it is, *inter alia*, said:

> "Slovenia wishes to point out that "Yugoslavia" ceased to exist and, consequently, ceased to be a party to the human rights treaties. All of its successor States, including "Federal Republic of Yugoslavia (Serbia and Montenegro)", are new States and can be considered parties to the treaties **only on the basis of the notification of succession**." (The bold type is ours.)

The Permanent Representative of the Former Yugoslav Republic of Macedonia wrote in connection with the same matter, denying the existence of any legal basis for considering the Federal Republic of Yugoslavia the automatic successor in the international treaties of the Socialist Federal Republic of Yugoslavia. His letter was published as United Nations document A/50/78, E/1995/11 of 2 February 1995.

A letter to the Secretary-General of the United Nations was extended also by the Permanent Representative of the Republic of Croatia, in which, *inter alia*, it said:

"In this sense, the representatives of the Federal Republic of Yugoslavia (Serbia and Montenegro) have been prevented from participating in international meetings and conferences of States parties to multilateral treaties in respect of which the Secretary-General acts as depositary ... **as the Federal Republic of Yugoslavia (Serbia and Montenegro) had not acted according to international rules on the succession of States. Namely, the Federal Republic of Yugoslavia (Serbia and Montenegro) has repeatedly tried to participate in international forums as a State party without having notified its succession.**" (The bold type is ours.)

This letter was published as United Nations document A/50/75, E/1995/10 of 31 January 1995.

Accordingly, the position of the said States is that the Federal Republic of Yugoslavia is a new successor State, just as they are, and that it is necessary that it should notify succession to human rights conventions to be a party to them. As it is well known, the Federal Republic of Yugoslavia does not consider itself as a new State. I have presented the said objections of the former Yugoslav Republics only to show that neither of them, including the Applicant, believes that the rule of automatic succession really exists and that it is binding on them and the Federal Republic of Yugoslavia.

(g) **Accordingly, the succession of the Applicant to the Genocide Convention may be regulated by the customary rules reflected in Articles 17, 22 and 23 of the 1978 Vienna Convention**

Mr. President and distinguished Members of the Court, may I recall that in paragraph 92 of the Application it is said:

"This effective date for the Notice of Succession is in accordance with the normal rules of customary international law relating to State succession with respect to treaties. These rules have been codified in Articles 17, 22, 23 and 34, among others, of the Vienna Convention on Succession of States in respect of Treaties of 23 August 1978. The former Yugoslavia signed this Vienna Convention on 6 February 1979, and deposited an instrument of ratification for this Vienna Convention on 28 April 1980. Therefore, Bosnia and Herzegovina has been a Party to the Genocide Convention (without any reservation) from 6 March 1992." (Application Instituting Proceedings, filed to the Registrar of the Court on 20 March 1993, p. 110.)

Provided the Court finds that the Applicant is a party to the Genocide Convention and that the customary rules, reserved for newly independent States, born in the process of decolonization, have become applicable to all new States, we agree that rules contained in Articles 17, 22 and 23 of the 1978 Vienna Convention are applicable to the relations between the Federal Republic of Yugoslavia and the Applicant State. In this case, the Genocide Convention was not operative between the Parties before 29 December 1992.

Mr. President, this statement concludes the presentation of our pleadings and I thank you and the Members of the Court for your attention. With your permission, I vote to submit our final submissions at the end of the second round. Thank you.

The PRESIDENT: I thank very much the Agent, H.E. Mr. Rodoljub Etinski, for his statement. That concludes the oral arguments of Yugoslavia. The Court will now adjourn and will resume its session tomorrow, Wednesday 1 May 1996 at 10 a.m., to hear the oral arguments of Bosnia-Herzegovina.

The Court rose at 12.20 p.m.