Non-Corrigé
Uncorrected

Traduction
Translation

CR 96/11 (traduction)*

CR 96/11 (translation)

Vendredi 3 mai 1996 (15 heures)

Friday 3 May 1996 (3 p.m.)

*Afin d'accélérer la distribution de la traduction des compte rendus, une partie des citations d'ouvrages ou d'articles de doctrine est reproduite dans la langue originale et sera traduite ultérieurement.

The PRESIDENT: Please be seated. The hearing is resumed in the
8 case concerning the *Application of the Genocide Convention*, continuing this afternoon with the second round of oral arguments. It is now the turn of the representatives of Bosnia-Herzegovina to speak and I call upon His Excellency Mr. Muhamed Sacirbey.

M. SACIRBEY : Je vous remercie, Monsieur le Président. Les membres de notre équipe et moi-même avons noté que vous avez dit hier que M. Schwebel était souffrant et nous lui souhaitons tous un prompt rétablissement. Nous savons qu'il n'a pas été en mesure d'être présent à l'audience.

Monsieur le Président, Messieurs de la Cour, je répondrai brièvement à certaines des déclarations faites hier.

Je le fais quelque peu à contrecœur. Ni les conseils ni moi-même avons l'intention de répondre du tac au tac aux déclarations dénuées de tout fondement et provocatrices faites au nom de l'Etat défendeur ou de les réfuter point par point.

Il est dans une certaine mesure regrettable que M. Perazić ait cherché dans sa déclaration à réitérer des motifs sur lesquels le défendeur a insisté violemment et furieusement, dans le contexte de cette affaire, et même ailleurs.

Nous ne chercherons pas à vous imposer un rappel de faits qui parlent clairement d'eux-mêmes.

D'une manière générale, je suis très inquiet en ce qui concerne la présente affaire et vivement préoccupé au sujet de la sincérité de l'engagement de l'Etat défendeur à l'égard des accords de Dayton/Paris, si je m'en tiens à l'exposé révélateur de M. Perazić. Pourquoi l'Etat défendeur continue-t-il de considérer que la Bosnie-Herzégovine doit être

dénommée, selon ses propres termes, la «prétendue Bosnie-Herzégovine» ?

9 Pourquoi le défendeur met-il en question le statut de la Bosnie en tant qu'Etat ?

Alors que le reste de la communauté internationale, y compris l'Organisation des Nations Unies, reconnaît la validité et la légitimité de l'indépendance et de la qualité d'Etat de la Bosnie-Herzégovine, les autorités de Belgrade, au nom desquelles s'est exprimé hier M. Perazić, ne le font évidemment pas.

Alors que le reste de la communauté internationale reconnaît que la République socialiste fédérative de Yougoslavie a «cessé d'exister» et que toutes les anciennes républiques, y compris la Bosnie-Herzégovine, et la République fédérative de Yougoslavie, sont des successeurs dans des conditions d'égalité, Belgrade qualifie avec assurance toutes les autres républiques d'Etats sécessionnistes ou «rebelles» illégaux et prétend assumer seule leur continuité.

Permettez-moi de revenir sur le terme «rebelle». M. Perazić admet sans vergogne que la JNA avait livré une *bataille* contre ceux qu'il avait qualifiés de «forces rebelles», à savoir les dirigeants, reconnus sur le plan international, de la Bosnie, et partant, son peuple. Il est intéressant de noter qu'il n'a jamais jugé bon de nous dire quand son gouvernement a considéré que la Bosnie-Herzégovine ne méritait plus d'être qualifiée d'Etat rebelle.

Bien entendu, cela pourrait être assez difficile pour la République fédérative de Yougoslavie, puisque même après qu'elle eut annoncé son retrait officiel de Bosnie-Herzégovine, essentiellement les mêmes soldats, les mêmes officiers, portant les mêmes uniformes, dotés des mêmes armes, de la même logistique, de la même structure de commandement stratégique, du même soutien et défense aériens provenant du territoire

de la Serbie et Monténégro, recrutés et rémunérés par la République fédérative de Yougoslavie, ont continué de mener une guerre sans relâche et sans merci contre cet Etat «rebelle» et son peuple.

De fait, compte tenu des éléments de preuve accablants qui existent, dont certains d'entre eux ont déjà été évoqués devant vous, je trouve que les observations de M. Perazić constituent un aveu étonnant, provoqué par l'attitude arrogante dont il a fait preuve.

Permettez-moi aussi d'examiner très brièvement un autre argument avancé par M. Brownlie, à savoir que les événements en Bosnie-Herzégovine constituaient une guerre civile.

Il est révélateur de noter que ni M. Brownlie, ni un membre quelconque de l'équipe du défendeur, n'a jugé utile de contester en aucune façon que les actes horribles constituant un génocide, et qu'en fait un génocide, ont effectivement été commis en Bosnie-Herzégovine. Ils semblent au contraire aussi soutenir que les Musulmans de Bosnie-Herzégovine avaient provoqué le génocide, qu'ils l'avaient même recherché, que la Bosnie est un Etat rebelle et que ce qui s'était passé en Bosnie était une guerre civile. Outre leur incohérence évidente et leur inexactitude outrageante, ces déclarations n'ont aucun rapport avec la question de la compétence.

Comme on pouvait le prévoir, M. Brownlie a cherché en recourant à des procédés rhétoriques à nous reprocher de ne pas avoir réfuté ses sources qui, selon ce qu'il voulait nous faire croire, prouveraient d'une manière indiscutable le bien-fondé de son affirmation selon laquelle le conflit en Bosnie-Herzégovine était une guerre civile.

Même si la question de savoir si le conflit en Bosnie-Herzégovine était une guerre civile doit être tranchée, elle ne peut l'être normalement qu'à la phase du fond. La Partie adverse pense-t-elle

réellement que nous allons mordre à l'hameçon et nous prêter à sa stratégie de diversion en considérant comme sérieux et définitif leur recueil de déclarations et d'opinions en leur faveur qu'ils ont citées ?

Néanmoins, je suis convaincu que la Cour me pardonnera d'abuser de son temps en citant les déclarations faites devant le Conseil de sécurité concernant la nature et la responsabilité de la guerre, qui répondent de manière plus éloquente aux déclarations de MM. Brownlie, Perazić et Etinski que je ne pourrais le faire dans mon propre exposé.

J'appelle l'attention de la Cour sur une déclaration des plus claires concernant la participation de la République fédérative de Yougoslavie au conflit dans mon pays, faite devant le Conseil de sécurité au cours du débat tenu en mai 1992 lorsque des sanctions ont été imposées pour la première fois à l'encontre de la République fédérative de Yougoslavie, après, soit dit en passant, qu'elle eut déclaré qu'elle ne disposait pas de troupes en Bosnie-Herzégovine. Selon le procès-verbal, ce débat a eu lieu le 30 mai 1992. Sir David Hannay, le représentant permanent du Royaume-Uni et mon ancien collègue, a indiqué, comme cela ressort clairement de la page 42 de ce procès-verbal, ce qui suit :

> «Cela dit, nul doute n'est possible quant à la question de savoir qui porte principalement la responsabilité dans cette affaire. Ce sont les autorités civiles et militaires de Belgrade. C'est une réalité qu'on ne peut esquiver. Il est inutile de prétendre qu'elles n'ont rien à voir dans les événements en Bosnie-Herzégovine. Les lanceurs de roquettes multiples ne viennent pas des granges des paysans serbes. Ils viennent de l'armée nationale yougoslave. Ils sont armés de munitions qui proviennent des stocks de munitions de l'armée. Ils sont alimentés et payés par cette armée. C'est de là qu'ils viennent. ... les autorités de Belgrade ... nous prennent vraiment pour des imbéciles.»

Au cours du même débat, M. Budai (Hongrie), a déclaré comme il est indiqué aux pages 14, 15 et 16 du procès-verbal de cette séance :

> «Les éléments de l'armée nationale yougoslave (JNA) laissés sur place ne sont pas sous l'autorité du Gouvernement de

Bosnie-Herzégovine; leurs armes n'ont pas été placées sous surveillance ou contrôle internationaux réels. Les expulsions forcées de personnes se poursuivent, et les tentatives de modification de la composition ethnique de la population n'ont pas été abandonnées.

...

Nous savons tous très bien qui porte l'écrasante responsabilité de cette évolution de la crise en Bosnie-Herzégovine. En dépit des efforts diplomatiques et des initiatives entreprises par les organisations régionales européennes et autres, les dirigeants de Belgrade n'ont pas modifié leur attitude.»

A la page 31 du même procès-verbal, le représentant de la Belgique, l'ambassadeur Noterdaeme, s'exprimant également au nom de l'Union européenne, a déclaré :

«Pour la Belgique, la responsabilité de Belgrade dans la crise bosniaque est en effet écrasante. Cette responsabilité nous a été suffisamment corroborée par différentes sources, notamment par le Secrétariat de notre organisation, pour qu'il ne soit plus nécessaire d'y revenir.»

12

A la page 27 du même procès-verbal, l'ambassadeur Arria (Venezuela) a rappelé que la Bosnie avait été admise en fait au sein de l'Organisation des Nations Unies plusieurs semaines auparavant, et avait été reconnue en tant qu'Etat indépendant, et il a fait la déclaration suivante :

«La responsabilité des sanctions qui entreront en vigueur leur incombe entièrement, étant donné qu'ils n'ont pas répondu à l'appel du Conseil de sécurité exprimé dans la résolution 751 (1992) ni aux appels de la Communauté européenne. Au mépris total de l'opinion publique internationale, ils ont considérablement étendu la zone de leurs attaques contre la Bosnie-Herzégovine à Dubrovnik et à d'autres parties de la Croatie.

Ce projet de résolution sanctionne et condamne de façon définitive le comportement d'un Etat qui, en abusant de sa puissance militaire, foule aux pieds, écrase et viole la souveraineté d'un Etat Membre de notre organisation, la Bosnie-Herzégovine. Il ne s'agit pas d'un problème interne de l'ex-Yougoslavie.»

Aux pages 32 et suivantes de ce même procès-verbal, il est indiqué que l'ambassadeur Perkins des Etats-Unis a déclaré :

> «Les Etats-Unis, la Communauté européenne, la Conférence sur la sécurité et la coopération en Europe et le Conseil de sécurité - par les mesures qu'il prend aujourd'hui - envoient un message clair au régime serbe et aux forces qu'il soutient en Bosnie-Herzégovine et en Croatie.»

> «Par son agression contre la Bosnie-Herzégovine et la Croatie et par la répression qu'il exerce en Serbie, le régime serbe ne peut que se condamner lui-même à un traitement de plus en plus sévère de la part d'un monde uni dans son opposition à l'agression serbe.»

> «Il doit cesser la campagne de terreur qu'il mène contre les populations civiles de Bosnie-Herzégovine et de Croatie.»

Ces sanctions, comme je l'ai déjà dit, ont été imposées le 30 mai 1992 et levées que trois ans plus tard.

Au cours du même débat, M. Vorontsov, le représentant de la Fédération de Russie, a déclaré, comme il est indiqué aux pages 36 et 37 de ce même procès-verbal :

> «la Russie fait tout ce qu'elle peut pour renforcer les liens traditionnels d'amitié et de coopération avec les peuples yougoslaves, rétablir la paix sur leur territoire et garantir leur liberté et leur indépendance. C'est l'objectif visé par les mesures sans précédent que nous avons prises récemment en ce qui concerne la Serbie, la Croatie et tous les Etats souverains qui se sont formés sur le territoire de l'ancienne Yougoslavie.»

13

> «Jusqu'à présent, Belgrade n'a toutefois pas tenu compte des conseils et des mises en garde plus qu'il n'a satisfait aux exigences de la communauté internationale. D'où les sanctions qu'elle s'est vu imposer par les Nations Unies. En votant en faveur de ces sanctions, la Russie s'acquitte de ses obligations en tant que membre permanent du Conseil de sécurité au regard du maintien de la paix et de la sécurité internationales.»

Comme le sait bien la Cour, le Conseil de sécurité a confirmé à plusieurs reprises les sanctions imposées contre la République fédérative de Yougoslavie. Dans son débat du 17 avril 1993, au cours duquel le Conseil a renforcé les sanctions antérieures, mon ancien collègue,

l'ambassadeur Mérimée, représentant de la France, a déclaré, comme il est indiqué aux pages 7 et 8 du procès-verbal de la séance tenue à cette date, ce qui suit :

> «Je me félicite donc que notre Conseil réuni ce soir s'apprête à prendre une décision sur le projet mis au point par ma délégation et plusieurs de ses partenaires au Conseil, projet visant à renforcer les sanctions contre la République fédérative de Yougoslavie (Serbie et Monténégro) ... Cela constitue en effet pour la communauté internationale la bonne réponse ... pour faire face au défi des autorités de Belgrade et des éléments serbes qu'elles soutiennent en Bosnie d'une manière manifeste.
>
> ...
>
> Après des mois et des mois de refus par les Serbes de coopérer avec la communauté internationale, d'atermoiements, de prises de gages sur le terrain, elle marque, en renforçant les dispositions de la résolution 757 (1992), l'établissement d'un isolement économique et financier total de la Serbie.
>
> ...
>
> Les autorités de Belgrade doivent être conscientes que la communauté internationale ne faiblira pas.»

Je m'abstiendrai d'abuser encore plus du temps précieux de la Cour pour répondre aux autres déclarations enflammées et dénuées de tout fondement faites par le représentant de la République fédérative de Yougoslavie hier et j'espère que vous voudrez bien m'excuser d'avoir consacré tant de temps à ces citations.

Je me dois de faire une dernière observation. L'agent du défendeur affirme que le document présenté de manière erronée devant la Cour comme étant un rapport de la commission d'experts des Nations Unies était le produit d'un «malentendu» entre son auteur qui refuse d'en porter la responsabilité et M. Sherif Bassiouni. M. Bassiouni a manifestement vu la situation de manière différente, et dans sa lettre datée du 29 avril 1996, il n'a laissé aucun doute lorsqu'il a affirmé que «le document avait été distribué d'une manière frauduleuse»; la réponse du

14

défendeur fait clairement ressortir la méthode singulière qu'il a adoptée dans cette affaire, ainsi que son attitude au sujet de la responsabilité du conflit dont il est à l'origine, à savoir, faire retomber le blâme sur d'autres et diluer les responsabilités.

De la même manière, M. Etinski a rendu encore plus difficile la position manifestement insoutenable du défendeur en assimilant un malentendu à une fraude, et la claire responsabilité des auteurs concernés à une erreur mutuelle entre l'auteur lui-même et M. Bassiouni.

Dans les mêmes conditions, il a assimilé le génocide à quelques morts inexpliquées, et la culpabilité unilatérale à une responsabilité égale.

Monsieur le Président, en conclusion j'aimerais saisir cette occasion pour faire savoir à la Cour qu'hier, conformément à leur engagement de respecter l'Etat de droit et leurs obligations internationales, les autorités de mon pays ont arrêté deux Musulmans bosniaques contre lesquels le Tribunal pénal international avait délivré des actes de mise en accusation il y a environ un mois.

Il est important de noter que M. Cassese, Président du Tribunal pénal international, a adressé il y a quelques jours seulement au Conseil de sécurité une demande concernant les mesures à prendre pour répondre à l'inexécution par la République fédérative de Yougoslavie de son obligation d'arrêter et d'extrader les personnes mises en accusation il y a presqu'un an. Dans sa lettre au Président du Conseil de sécurité datée du 24 avril 1996, M. Cassese a cité la transcription d'une audience tenue le 28 mars 1996, dans une affaire concernant trois Serbes, au cours de laquelle le procureur a déclaré que la République fédérative de Yougoslavie avait

15 «encouragé, soutenu et continué à rémunérer un criminel de guerre mis en accusation [Sljivancanin] et de le maintenir dans ses fonctions d'officier supérieur dans l'armée, et si ... les informations sont exactes, il est même aujourd'hui chargé de former des élèves officiers. Y a-t-il une manière plus flagrante de montrer leur méconnaissance et même leur mépris à l'égard de leurs obligations en tant qu'Etat Membre de l'Organisation des Nations Unies, obligations que la République fédérative de Yougoslavie a récemment réaffirmées en concluant les accords de Dayton.»

Ces mots ont été prononcés par le procureur, M. Goldstone. Nous avons et continuerons d'avoir foi dans la justice et dans l'état de droit. Nous continuons d'œuvrer en faveur de la réconciliation et de la paix. Nos citoyens pensent que notre confiance est solidement établie.

Enfin, j'aimerais conclure mon exposé en exprimant mes remerciements à la Cour et à son personnel pour le concours et l'assistance qu'ils nous ont accordés au cours de la présentation de notre requête et tout au long de cette semaine.

J'aimerais maintenant demander à la Cour de bien vouloir appeler à la barre M. Thomas Franck. Je vous remercie beaucoup.

Le PRESIDENT : Je vous remercie beaucoup de votre exposé et je donne maintenant la parole à M. Franck

M. FRANCK : Merci Monsieur le Président, Messieurs de la Cour.

1. Je me propose de répondre très brièvement aux arguments de la Partie adverse au nom de la Bosnie-Herzégovine en traitant des deux points suivants.

2. *Premièrement*, l'article IX de la convention sur le génocide confère-t-il à la Cour compétence pour connaître des différends entre les Etats parties à la convention ? Lorsqu'un différend a trait à des prétendues violations de la convention et à la responsabilité des Etats à raison de telles violations, la Cour peut-elle connaître d'un tel

différend ? En résumé, il s'agit de la question de la *responsabilité des Etats et de la responsabilité civile*.

3. *Deuxièmement*, la requête de la Bosnie-Herzégovine indique-t-elle objectivement les motifs sur lesquels se fonde la défense, comme le prescrit l'article IX ? C'est-à-dire existe-t-il des «différends entre les parties contractantes relatifs à l'interprétation, l'application ou l'exécution de la présente convention, y compris ceux relatifs à la responsabilité d'un Etat en matière de génocide ou de l'un quelconque des autres actes énumérés à l'article III» ? Il s'agit de la question de savoir s'il existe un *différend juridiquement fondé*.

4. Je vais donc traiter tout d'abord de la question de la responsabilité des Etats au regard de la convention. Examinons une fois de plus si la convention autorise la Cour à dire, sur la base d'éléments de preuve, qu'il existe une responsabilité des Etats à raison d'une violation d'obligations juridiques. Selon M. Brownlie, la Cour doit donner une interprétation étroite des termes essentiels de l'article IX : l'expression «responsabilité d'un Etat en matière de génocide ou de l'un quelconque des autres actes énumérés à l'article III» - c'est-à-dire l'entente, l'incitation directe, la tentative et la complicité. Cette phrase doit être, de l'avis de la Yougoslavie, interprétée étroitement par la Cour, car les Etats ne sont responsables, selon M. Brownlie, que de leur obligation de faire appel à leur droit interne pour «prévenir et punir» les actes de génocide, commis par des personnes sur lesquelles ils exercent leur contrôle» (CR 96/7, p. ..). En d'autres termes, selon cette interprétation, l'article IX ne confère à la Cour qu'une compétence pour se prononcer sur les différends découlant de l'article I de la convention. Bien entendu, la Bosnie a, à propos de l'article I, un différend avec la République fédérative reposant expressément sur le fait

qu'elle n'a pas prévenu le génocide et n'a pas puni les actes individuels qu'elle s'est abstenue d'empêcher. J'espère que l'agent adjoint et moi-même avons déjà établi *prima facie* le bien-fondé de notre argumentation à ce sujet à la fois en fait et en droit. Nous avons demandé instamment à la Cour de tenir compte, à cet égard, des solides conclusions de différentes chambres du Tribunal pénal international pour l'ex-Yougoslavie. Nous avons aussi prié la Cour de tenir compte du fait
17 que le défendeur ne s'est manifestement pas acquitté des obligations que lui impose l'article VI et le chapitre VII de la Charte des Nations Unies de remettre pour qu'elles puissent être jugées les personnes dûment mises en accusation par le Tribunal pénal international. Néanmoins, la Bosnie n'admet nullement la proposition selon laquelle la compétence de la Cour en vertu de l'article IX est limitée aux griefs dirigés contre la Yougoslavie parce qu'elle s'est abstenue de «prévenir et punir» les crimes prévus par l'article I. Cela ne semble pas ressortir de toute interprétation possible de l'article IX, ni des travaux. Il s'agit d'une sorte de pavillon de complaisance, fabriqué de toutes pièces par ceux qui l'arborent.

5. Au contraire, l'article IX confère sans ambiguïté à la Cour compétence pour se prononcer sur la *responsabilité d'un Etat* en matière de génocide, l'entente en vue de commettre le génocide, l'incitation, la complicité, etc. De fait, le défendeur cherche aussi à passer sous silence l'article III que l'article IX rend expressément applicable au comportement des Etats, ainsi que des particuliers. Rien dans le libellé de l'article IX ni dans les travaux ne permet d'écarter une telle compétence. Au contraire, l'article IX fait que l'article III est expressément applicable par la Cour pour déterminer la responsabilité d'un Etat partie.

6. L'interprétation du défendeur tend à remplacer cette suppression radicale d'une partie de la convention par l'adjonction de deux phrases entièrement nouvelles. Je viens de citer l'une d'entre elles : le fait de ne pas prévenir le génocide «commis par des personnes sur lesquelles ils exercent leur contrôle». Cette limitation de responsabilité n'apparaît nulle part dans le texte de la convention. En introduisant une telle limitation, le conseil cherche à faire en sorte que la Cour réduise la portée de l'obligation imposée par la convention aux Etats de prévenir et de punir de tels actes en limitant cette obligation aux «personnes sur lesquelles ils exercent leur contrôle» (CR 96/7, p. ..). Le défendeur cherche ainsi à éluder la responsabilité, ou à instituer une responsabilité du fait d'autrui, à l'égard des personnes qui ont incité, aidé, et dirigé sans nécessairement contrôler de tels actes, bien que leur comportement illicite aurait pu être empêché par les autorités de Belgrade. A la phase du fond, nous démontrerons que le Gouvernement yougoslave était coupable à chacun de ces titres et que la responsabilité de l'Etat s'attachait un tel comportement.

7. Pour paraphraser ce qu'avait dit un juge à la Cour suprême des Etats-Unis, une personne qui met le feu à un théâtre bondé est responsable des dommages occasionnés par la panique qui en a résulté, qu'il ait ou non «exercé un contrôle» sur les personnes qui s'enfuyaient. Le conseil a ajouté une autre mise en garde à l'article I : la seule obligation de l'Etat au regard de la convention est de prévenir et de punir les individus auteurs des actes incriminés «se trouvant sur le territoire de l'Etat» *(ibid.)*. Cette invention s'explique par la déclaration dénuée de tout fondement selon laquelle les «principes de la responsabilité des Etats exigent une capacité d'exercer un contrôle dans la région concernée». Il n'existe pas le moindre élément, si l'on s'en

tient au texte et non aux travaux, permettant d'étayer l'introduction d'une telle limitation de territorialité à l'égard de l'obligation de prévenir le génocide ou d'en punir les auteurs. La pratique constante des tribunaux, depuis l'affaire de la *Fonderie de Trail* jusqu'à celle du *Nicaragua*, a été de reconnaître la responsabilité des Etats à raison des actes illicites commis, ou dont les principaux effets s'étendent, en dehors des régions sur lesquelles ils exercent un contrôle légal ou même matériel. Toutefois, M. Brownlie aurait voulu nous faire croire que «la convention sur le génocide ne peut s'appliquer que lorsque l'Etat concerné exerce une compétence territoriale dans les régions où les violations de la convention se seraient produites» (plaidoirie du 2 mai, p. 10, version préliminaire). En tout état de cause, les forces de la Yougoslavie exerçaient leur contrôle sur de vastes régions de la Bosnie où se sont produits les actes de génocide. Et nous démontrerons cela à la phase du fond.

8. Les efforts de la République fédérative de Yougoslavie de réduire la responsabilité des Etats à une version amputée de l'article I, en supprimant discrètement les articles II, III et IV, ne peuvent être sérieux, étant donné le pouvoir spécifique conféré à la Cour par l'article IX d'exercer une compétence beaucoup plus étendue à l'égard des violations de la responsabilité des Etats. On nous a reproché de nous en tenir uniquement aux termes stricts de la convention, et aux travaux clairs consacrés à l'article IX, et on nous a dit de passer plus de temps à la bibliothèque. M. Brownlie critique en particulier la Bosnie car nous n'avons pas commenté toutes les sources qu'il a citées pour étayer ses améliorations remarquables du texte de la convention. Une plus grande diligence, déclare-t-il, nous aurait conduits à nous rendre compte que la responsabilité des Etats au regard de l'article IX est limitée à

une petite catégorie d'actes illicites : lorsqu'un Etat s'est abstenu d'exercer sa juridiction pénale interne pour mettre fin aux infractions commises sur son propre territoire par ses propres nationaux. Ces interprétations démontrent, insiste-t-il, que les dispositions de la convention «n'engagent pas à la responsabilité d'une partie contractante en tant que telle à raison d'actes de génocide, mais sa responsabilité pour ne pas avoir prévenu ou puni les actes de génocide commis par des particuliers sur son territoire ou par des particuliers relevant d'elle à tout autre titre» (CR 96/7, p. ..). Il nous accuse de ne pas avoir montré beaucoup d'ardeur dans nos recherches doctrinales, alors que nous pensons être seulement coupables d'un excès de charité.

9. Il nous reproche de ne pas avoir lu l'ouvrage de l'éminent auteur Nehemia Robinson. Nous avons bien lu M. Robinson. Voici ce qu'il disait dans son étude de 1960 :

> «L'obligation des parties de soumettre des différends à la Cour internationale de Justice a une portée assez large : elle comprend non seulement l'interprétation des dispositions de la convention, mais également son application (notamment dans des affaires où sa non-application est invoquée) et l'accomplissement des obligations imposées par la convention. Ces dernières comprendraient l'obligation de prendre les mesures législatives nécessaires (article V), d'extrader les coupables (article VII), et de poursuivre les auteurs d'actes punissables en vertu de la convention (article VI). *En outre, de tels différends peuvent porter sur la responsabilité d'un Etat à raison d'actes de génocide ou de tout autre acte punissable* ... Comme cela a été dit à maintes reprises, le génocide ne pourrait que très rarement être commis si l'Etat n'y participait pas ou ne le tolérait pas; si la convention ne devait pas prévoir de mesures contre de tels actes, elle ne pourrait accomplir son but.» (N. Robinson, *The Genocide Convention*, p. 101 (1960); les italiques sont de nous.)

20

Dans son ouvrage, M. Robinson relate ce que la Bosnie elle-même a dit en détail dans son mémoire du 15 avril 1995, en faisant observer que certains Etats étaient opposés à la reconnaissance de la responsabilité civile des Etats dans les violations de la convention, mais indique que

les partisans de ce nouveau motif d'action ont insisté et l'ont finalement emporté. Leur insistance a été motivée par les raisons qui ont été si clairement énoncées par sir Gerald Fitzmaurice. Je ne citerai que la dernière phrase de son brillant raisonnement que j'ai exposé en entier dans ma première plaidoirie :

> «la disposition tendant à soumettre les actes de génocide à la Cour internationale de Justice, et ... l'inclusion de l'idée de la responsabilité internationale des Etats et des gouvernements, était nécessaire pour établir une convention efficace sur le génocide».

10. Cette idée avait des adversaires, mais ceux-ci ne l'ont pas emporté. En outre, l'opposition venait en grande partie des Etats qui voulaient créer immédiatement un tribunal pénal, doté d'une compétence sur les régimes qui avaient commis de tels crimes. La France était au début l'un des Etats qui y étaient le plus favorable. Comme vous le savez, le compromis consistait à créer à la fois une obligation juridique de la part des Etats d'engager des poursuites pénales contre des particuliers devant leurs tribunaux internes (convention, art. IV), *et également* d'établir une responsabilité civile invocable par des Etats contre d'autres Etats devant la Cour internationale de Justice (*documents officiels de l'Assemblée générale, Sixième Commission, comptes rendus analytiques*, 21 septembre - 10 décembre 1948; *ibid.*, p. 339).

11. Compte tenu de la clarté manifeste du texte et de l'intention évidente manifestée exprimée par les parties au cours des travaux, est-il vraiment utile d'abuser encore du temps de la Cour en continuant à analyser ces documents ? Permettez-moi de dire à la Cour qu'aucune des sources citées, quelque soit leur importance, ne confirme en rien la proposition selon laquelle l'article IX ne confère aucune compétence à la Cour sauf dans le cas où un Etat s'abstient de prévenir de tels crimes ou de poursuivre ses propres nationaux qui en sont responsables. Et cela

constitue, et uniquement cela, la proposition pour laquelle ils ont cité ces documents.

12. M. Manlay Hudson, pour citer un autre exemple d'un auteur faisant autorité apprécié par la Cour, dans son analyse annuelle des travaux de la Cour internationale de Justice, reconnaît simplement comme nous tous que l'article IX prévoit une voie d'action *pénale* contre les Etats. Toutefois, il n'exclut pas expressément «qu'un différend concernant la responsabilité des Etats peut être un différend quant à l'application de la convention». Il a estimé qu'un tel différend serait plus susceptible d'être régi «par le droit international général» (M. Hudson, «The Twenty-Ninth Year of the World Court», 45 *Am. J. Int. L.* 33-34 (1951)). Un tel droit international général comprendrait aujourd'hui certainement toutes les obligations spécifiques des Etats énoncées aux articles I à VII de la convention sur le génocide.

13. M. Marcel Sibert, dans son étude de 1951, regrette que la convention sur le génocide n'institue pas un droit d'intenter une action civile, mais reste silencieuse sur cette question. Il constate que cela va à l'encontre de

> «toute la jurisprudence des tribunaux internationaux qui, depuis déjà longtemps, consacrent la responsabilité de la collectivité étatique pour des actes de ses gouvernants ou de ses agents quand ils méconnaissent le droit des gens ...» (M. Sibert, *Le Droit de paix*, 446, 1951).

Que pouvons-nous dire de cela sinon que M. Sibert était en avance sur son temps, trop ambitieux en matière de droits de l'homme, ou peut-être trop pessimiste au sujet de la manière dont la convention serait appliquée dans la pratique. Il ressort clairement de son texte que s'il était membre de la Cour, il serait certainement favorable à une reconnaissance de sa compétence dans cette affaire, compte tenu de ce qu'il considère

comme la pratique constante des tribunaux internationaux à l'égard de la responsabilité des Etats à raison des violations des droits de l'homme.

14. M. Malcolm Shaw, dont le défendeur a si chaleureusement fait
22 l'éloge, n'adopte absolument aucune position contraire à l'interprétation de la Bosnie-Herzégovine en matière de responsabilité des Etats en vertu de l'article IX. Il fait remarquer dans son analyse de l'historique de l'article IX que

> «la disposition concernant la question de la compétence à l'égard de la responsabilité des Etats en matière de génocide présente un intérêt particulier. Elle s'inscrivait dans le cadre d'une tentative pour donner plus d'efficacité à la convention.» (M. Shaw, «Genocide in International Law», in *International Law at a Time of Perplexity*, Y. Dinstein, ed., p. 818.)

15. Je persiste à penser que bien que leur citation constitue un exercice d'un grand intérêt sur le plan scolastique, ces sources ne présentent pratiquement aucune utilité pour la Cour. Certaines d'entre elles sont ambiguës. D'autres ont été citées de manière erronée. Mais aucune ne contredit le sens clair de l'article IX. Il est certain qu'aucune de ces sources ne modifient le texte ou les travaux de l'article IX. Au sujet de cette disposition, le représentant des Etats-Unis à la Sixième Commission a déclaré en 1948 ce qui suit :

> «la responsabilité d'un Etat est utilisée dans le sens traditionnel de la responsabilité envers un autre Etat pour des dommages subis par des ressortissants de l'Etat auteur de la plainte en violation des principes de droit international»

et

> «l'exécution se rapporte aux différends dans lesquels les intérêts des nationaux de l'Etat auteur de la plainte sont en jeu» (11 Whiteman, *Digest of International Law* (US), p. 856).

Cette interprétation officielle d'une partie qui a joué un rôle important dans la rédaction de la convention, sera, je l'espère, considérée comme utile et intéressante pour faciliter son interprétation.

16. On peut également citer l'avis exprimé par M. Pescatore, représentant le Luxembourg à la Sixième Commission de l'Assemblée générale au cours des débats consacrés en 1948 à l'article IX. Il a également présenté la proposition de manière correcte. Il a dit ceci :

> «certains représentants ont déclaré que la notion de responsabilité ... était encore imprécise et qu'on ignorait qui pourrait faire valoir des droits à réparation à la suite d'un ... génocide ... Cette responsabilité existera chaque fois que le génocide aura été commis par un Etat sur le territoire d'un autre Etat. Dans ce cas, l'Etat qui aura subi des dommages aura un droit à réparation. L'amendement commun de la Belgique et du Royaume-Uni (qui est devenu l'article IX) [a-t-il déclaré] donne la possibilité à la Cour internationale de Justice de décider s'il y a lieu ou non d'accorder des dommages-intérêts et ce sera au demandeur de prouver le dommage subi.»

C'est cette opinion qui a motivé les auteurs de l'article IX et qui l'a emporté à la Sixième Commission (A/C 6/SR103, p. 14-15).

18. Monsieur le Président, je viens de vous citer des interprétations convaincantes des auteurs, les Etats qui ont façonné cet ensemble remarquable de dispositions juridiques. Dans la plupart des cas, les auteurs cités par mon éminent collègue ne traitent simplement pas de la question soumise à la Cour. Cette question est de savoir si la Bosnie peut intenter une action civile contre la République fédérative de Yougoslavie en vertu de l'article IX à raison des violations décrites dans notre mémoire et dans nos plaidoiries. Dans d'autres cas, les auteurs cités sont particulièrement mal interprétés. M. Kunz, qui est cité si largement par M. Brownlie (CR 96/7, p. ..) dit une chose pertinente, qui, toutefois, n'a pas été mentionnée dans les parties citées. Il déclare :

> «L'article IX vise expressément les différends concernant la responsabilité d'un Etat en matière de génocide ... seuls les Etats sont, selon les conditions générales de la responsabilité des Etats, responsables sur le plan international...» (J. Kunz, «Editorial», 43 *Am. J. Intl. L.* 746.)

Même l'étudiant anonyme de Yale fait simplement observer que les juridictions internes de chaque Etat sont limitées par leur compétence territoriale dans l'application des voies d'action pénales prévues par la convention, mais ne dit absolument rien au sujet de la limite territoriale de la responsabilité des Etats dans les actions civiles au titre de l'article IX.

18. Toutes les sources en conviennent : le texte de l'article IX, les travaux, y compris ceux cités par le défendeur, et singulièrement la plupart des éminents jurisconsultes mentionnés devant nous par le défendeur. Elles reconnaissent que l'article IX constitue une innovation remarquable et importante, conférant à la Cour une compétence illimitée à
24 l'égard de tout différend découlant de toute disposition de la convention et, en particulier, en ce qui concerne la responsabilité des Etats en matière de génocide, pour tous les actes qui s'y rapportent mentionnés à l'article III. Il n'y a tout simplement aucun malentendu possible.

19. Le second point que je vais maintenant aborder est la question soulevée par M. Brownlie de savoir si le demandeur a fait état d'un «*différend*» au sens de l'article IX. Dans sa seconde plaidoirie, il fait valoir que le demandeur

> «se réfère à de prétendus types de responsabilité qui ne relèvent pas des dispositions de la convention et qui ne peuvent donc mettre en cause des différends entrant dans le cadre des dispositions de l'article IX» (Brownlie, 2e tour de plaidoiries, 2 mai, p. ...; transcription non officielle).

20. Malheureusement, la République fédérative de Yougoslavie ne nous a pas donné la moindre indication sur le critère que devrait appliquer, selon elle, la Cour, pour déterminer si un «différend» existe. Elle n'a fait simplement que répéter maintes et maintes fois, que la Yougoslavie n'ayant pas violé un droit quelconque protégé par la convention, on peut dire qu'il n'existe aucun différend. La République fédérative de

Yougoslavie demande à la Cour d'admettre sa thèse consistant à dire que ses actes concernant la Bosnie ne violent pas la convention. Il s'ensuit qu'il ne peut y avoir de différend. Et comme il n'y a pas de différend, la Cour ne peut examiner à la phase du fond si les actes du défendeur violent la convention.

21. Or, Monsieur le Président, je ne suis pas un cartésien de formation, mais je peux me rendre compte qu'il y a quelque chose d'erroné dans cet argument. En effet, il existe bien un critère juridique pour déterminer l'existence d'un différend, mais comme le défendeur ne l'a pas indiqué lui-même, nous allons nous-mêmes le faire. Il existe un critère raisonnable élaboré par la Cour elle-même. Dans l'affaire de l'*Interprétation des traités de paix conclus avec la Bulgarie, la Hongrie et la Roumanie, première phase*, la Cour a déclaré qu'«il s'est donc produit une situation dans laquelle les points de vue des deux parties, quant à l'exécution ou à la non-exécution de certaines obligations découlant des traités, sont nettement opposés» et donc que «des différends internationaux se sont produits» (*C.I.J. Recueil 1950*, p. 74). Cette opinion était réaffirmée par la Cour en 1988 dans son avis consultatif concernant l'*Applicabilité de l'obligation d'arbitrage en vertu de la section 21 de l'accord du 26 juin 1947 relatif au siège de l'Organisation des Nations Unies*. Dans cette affaire, la Cour a fait observer que c'est l'affirmation *en droit d'une revendication* qui fait qu'un différend existe mais non la preuve du bien-fondé *des assertions de l'une ou l'autre partie* concernant cette revendication (*C.I.J. Recueil 1988*, p. 19-22). Comme la Cour l'a déclaré dans les affaires du *Sud-Ouest africain* en 1962, pour démontrer l'existence d'un différend, il suffit de prouver «que la réclamation de l'une des parties se heurte à l'opposition manifeste de l'autre» (*C.I.J. Recueil 1962*,

p. 328). Un différend existe lorsqu'une allégation concernant une violation, si elle est prouvée en fait, peut étayer d'une manière plausible cette allégation en droit, et si les parties sont manifestement opposées au sujet de la question en cause.

22. C'est l'élément de contradiction mutuelle entre les parties, non le bien-fondé ou non des assertions, qui constitue un différend. En 1995, dans l'affaire du *Timor oriental*, l'Australie, tout comme la Yougoslavie en l'espèce, a dans une de ses exceptions dit «qu'il n'existe pas véritablement de différend entre elle-même et le Portugal» (*Timor oriental, C.I.J. Recueil 1995,* p. 99). La Cour a rejeté cet argument en considérant qu'«*à tort ou à raison*, le Portugal a formulé des griefs en fait et en droit à l'encontre de l'Australie et celle-ci les a rejetés. Du fait de ce rejet, il existe un différend d'ordre juridique.» (*Ibid.*, p. 100; les italiques sont de nous.)

23. Bien entendu, la convention sur le génocide donne une idée claire des questions au sujet desquelles les Parties ont des positions contradictoires au regard de l'article IX. Elles doivent porter sur la question de savoir si la République fédérative de Yougoslavie a commis un génocide, si les Bosniaques ont été victimes de ce génocide, si la République fédérative et les éléments serbes de Bosnie s'étaient entendus pour commettre le génocide, si les autorités de Belgrade et d'autres Serbes avaient incité directement et publiquement à commettre le
26 génocide, et s'il existait une complicité dans le génocide commis en Bosnie. Les Parties sont absolument en désaccord sur tous ces points. Et elles ont des positions contradictoires au sujet de la question de savoir si la République fédérative de Yougoslavie s'est acquittée de son obligation de prévenir et de punir les actes de génocide. Quels que soient les éléments que les plaidoiries de cette semaine ont permis de

démontrer, elles ont certainement permis d'établir que les Parties étaient absolument en désaccord sur tout. Les questions qui les opposent totalement portent précisément sur des points de droit et de fait sur lesquels la Cour est compétente en vertu de l'article IX. *Ergo*, il existe donc un différend au sens de cette disposition.

24. La Bosnie soutient donc, en droit, qu'il existe un différend entre les Parties, que le différend concerne cette partie du droit en matière de responsabilité des Etats qui est développée aux articles I, II, III et IV de la convention sur le génocide, et que l'article IX confère à la Cour une compétence absolue et indiscutable pour connaître du différend ainsi que de le régler comme il convient. Bien entendu, cette décision doit être adoptée à la phase du fond et non, comme le voudrait le défendeur, à cette phase préliminaire.

25. Monsieur le Président, avant de vous prier de bien vouloir donner la parole à mon collègue Alain Pellet, puis-je me permettre de faire quelques observations personnelles. M. Brownlie, dans sa seconde plaidoirie, hier, a déclaré «en outre, M. Franck a conclu en disant : «bien entendu, il existait une guerre civile en Bosnie-Herzégovine» (p. .. de la plaidoirie, 2 mai 1996; transcription non officielle). Si nous examinons la page .. du compte rendu non corrigé du 1er mai 1996 (CR/96/9), vous constaterez qu'en fait j'avais dit que «Bien entendu, il existait une guerre en Bosnie-Herzégovine.» Nous travaillons tous dans des conditions difficiles, certes, et je sais que M. Brownlie ne voudrait pas que le compte rendu induise en erreur ceux qui auraient peut-être l'occasion de lire les mots sans doute trop faibles mais fermement ressentis que nous avons prononcés ici.

26. Monsieur le Président, Messieurs de la Cour, je vous remercie de votre aimable courtoisie et de toute l'attention que vous m'avez

accordée. Je sais que nous vous avons placés dans une situation presque insoutenable en présentant nos différentes demandes et je vous suis profondément reconnaissant de bien vouloir prendre en compte l'extrême urgence que nous attachons à cette affaire.

Le PRESIDENT : Je vous remercie beaucoup, Monsieur Franck, de votre exposé. J'appelle maintenant à la barre M. Alain Pellet.

Professor PELLET: Thank you very much, Mr. President.

Mr. President, Members of the Court,

1. It falls to me to reply to a number of points raised yesterday by Yugoslavia, mainly in the statements of Professor Brownlie and Mr. Etinski.

I shall deal with the following six questions in turn:

(1) what is the nature of the conflict which has ravaged Bosnia-Herzegovina; above all how relevant is this question, to which our adversaries attach so much importance in these proceedings?

(2) what impact does the *erga omnes* and peremptory character of the norms contained in the 1948 Convention have on the dispute between the Parties?

(3) does Bosnia-Herzegovina have the right to invoke bases for the jurisdiction of the Court other than Article IX of the 1948 Convention, and if so, what effect could this have on the consideration of the Bosnian claims with regard to:

(4) the letter from Presidents Milosević and Bulatović dated 8 June 1992;

28

(5) Article 11 of the 1919 Saint-Germain Treaty; and

(6) *forum prorogatum* (although let it be said here and now that in its arguments yesterday afternoon Yugoslavia presented the theses of Bosnia-Herzegovina in an unduly selective light)?

Mr. President, this will take me beyond a reasonable coffee-break, so please do not hesitate to interrupt me after any one of these points.

The first point is the nature of the conflict.

I. The nature of the conflict

2. Mr. President, in their oral arguments, our adversaries made much of one issue which, I must say, from this side of the bar appears to present no legal interest in relation to this case, and certainly presents not the slightest interest with regard to questions of jurisdiction and admissibility. The point is whether the conflict which has ravaged Bosnia-Herzegovina was an internal or an international war.

Mr. Mitić touched on this issue on Monday morning (cf. CR 96/5, pp. 35-36); Professor Brownlie devoted his entire statement on Monday to it (CR 96/6, pp. 33-51), and returned to it at length yesterday afternoon (CR 96/10, pp. .....), denouncing the "inarticulate" and "very eccentric" nature of the replies made by Bosnia-Herzegovina. Mr. President, I am sorry to disappoint my eminent adversary once again and to be, in his eyes, quite as "inarticulate" and "eccentric" as my colleague and friend Professor Thomas Franck, to whom I believe those remarks were directed.

3. Once again, if we did not follow Mr. Brownlie on the path he so incautiously followed, it is because this path does not lead to the discovery of a new world, as Thomas Franck wittily phrased it, but unfortunately and more mundanely to an impasse! Baldly put, in the view of Bosnia-Herzegovina, the question has no legal importance.

I even have some scruples, I must admit, in going back over this point, so obvious does it appear to us. It arises firstly and primarily from the clear, unambiguous terms of Article I of the 1948 Convention itself:

> "The Contracting Parties confirm 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 to punish."

A fortiori, it is quite clear that this applies whether genocide is committed in the context of or in connection with an armed internal or international conflict. This was also clearly stated by the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia in its decision of 2 October 1995, a decision which Professor Brownlie makes much of, I would add. Referring to "conventions concerning genocide and apartheid", the Appeals Chamber stated:

> "both . . . prohibit particular types of crimes against humanity regardless of any connection to armed conflict" (case no. IT-94-1-AR72, para. 140, p. 73; see also para. 45 of the Secretary-General's Report drawn up in pursuance of paragraph 2 of Security Council Resolution 808 (1993) presenting the draft Statute of the ICTY, document S/25704).

4. It is true that, in its intervention yesterday afternoon, our adversary appears to have realized that the ship he thought he had boarded had run aground before it had so much as left port. So, up with a fresh sail: "the main point is not whether or not there was a civil war as such, but that the Federal Republic of Yugoslavia was not a party to the armed conflict" (CR 96/10, p...). I fear that this will not be enough to get his ship under way.

Mr. President, I have three comments on this point, if I may.

5. Firstly, this in no way, but in no way, corresponds to the presentation made by the Respondent's same counsel last Monday (CR 96/6, pp. 33-34 and 38-42), nor does it correspond to what Yugoslavia

claimed in its first preliminary objection - presented in its written pleadings of June 1995 in the following terms: "The existence of a civil war at the material time renders the Application inadmissible." (Preliminary Objections, p. 91; see also p. 141.)

6. Secondly, my colleague's assertions are belied by even the most superficial observation of the facts and by even the most cursory reading of the available documentation. In particular, they are belied by the many, specific, consistent facts, as illustrated by the eloquent quotation made by counsel for Bosnia at these hearings, and particularly by my colleagues and friends, Phon van den Biesen and Thomas Franck, in their statements on Wednesday. I am surprised that Professor Brownlie did not hear them. In any event, so that my adversary need not "depart on new journeys of discovery without having heard the response" regarding the evidence (CR 96/10, p...), may I point out that he will find any number of useful references and quotations in the verbatim records for Wednesday, CR 96/8, pp. 42-48, and CR 96/9, pp. 58-60. There are a host of others. To save time, I shall give references to only a few examples, which the members of the Court may peruse at leisure:

- for example, the position taken by Mr. Mazowiecki, in his sixth periodic report (E/CN.4/1994/110, 21 February 1994, para. 154, p. 26);
- the position of the Commission on Human Rights, which has frequently condemned the repeated interventions of the Serbo-Montenegrin authorities and their support for the atrocities committed in Bosnia-Herzegovina (see footnote to resolutions 1993/7 of 23 February 1993 and 1994/75 of 9 March 1994);
- the position of Human Rights Committee which, acting on the basis of specific, consistent information, has strongly condemned the Government of the Federal Republic of Yugoslavia for the same actions

perpetrated both in Bosnia-Herzegovina and in Croatia, and which has deplored the refusal of this country to accept responsibility for these acts (28 December 1992, CCPR/C/79/Add.16, para. 7, p. 3; see also footnote, 20 November 1992, A/C.3/47/CRP.1, para. 24);

- I was also thinking of similar vigorous condemnations of Yugoslavia (Serbia and Montenegro) by the Security Council and the General Assembly (CR 96/8, pp. 42-48 and CR 96/9, pp. 58-60);
- or, of course, there come to mind several decisions of the International Criminal Tribunal for the former Yugoslavia which has highlighted - not only in the Tadić case, but also in the Nikolić and "Srebrenica" cases - the genocidal acts of the JNA on the territory of Bosnia-Herzegovina (for example, decision of Trial Chamber I of 20 October 1995 in the Nikolić case, IT-9462-R61, para. 30, p. 19; see also para. 28, p. 16 and Judge Riad's review of the indictment in the "Srebrenica", Karadžić and Mladić case, dated 16 November 1995, IT-95-18-I, pp. 4-5).

Mr. President, I do not think it necessary to carry on any further. Professor Brownlie ought, I believe, to be satisfied. All this - and the list could be considerably longer - richly establishes the involvement of the authorities of the Federal Republic of Yugoslavia, not only in the armed conflict taking place on the territory of Bosnia-Herzegovina, but also - and this is particularly relevant in this case - in the acts of genocide committed on the same territory.

7. Mr. President, this being so, I come to my third comment, which will be very brief. Paradoxically, despite what our adversaries say - paradoxically, as I truly believe that they themselves cannot make it add up - all this has no real relevance at this stage of the proceedings. Yugoslavia claims, wrongly, not to be involved in the atrocities

committed in Bosnia-Herzegovina. Bosnia-Herzegovina says otherwise, rightly I believe. As Thomas Franck said a short time ago, this is what constitutes the dispute. It will be for the Court to decide when it hears the case on the merits.

II. The *erga omnes* character of the provisions of the 1948 Convention

8. Mr. President, in his statement yesterday, Professor Brownlie also spoke briefly about the *erga omnes* character of the breach of international law constituted by the crime of genocide ("Genocide as an Offence *Erga Omnes*") (CR 96/10, pp. 12-13). Even though here again, for reasons to which I shall refer very briefly, the point is somewhat marginal in relation to the issues at stake in these proceedings, i.e., the jurisdiction of the Court and the admissibility of the Application, it seems useful to revert to them briefly.

If our adversary is to be believed, Bosnia-Herzegovina's position that the prohibition of genocide is a peremptory norm of general international law, and consequently that any State party to the Genocide Convention is entitled to refer to the Court violations of the Convention by any other party, wherever committed, comes up against two substantial obstacles:

> "In the first place, it confuses the issue of *locus standi* with the different question of the territorial application of the Convention and of its applicability in general.
>
> Secondly, the invocation of peremptory norms does not absolve the Court, which is a court of law, from a normal determination of its competence and of the justiciability of the issues presented in the Application." (CR 96/10, p. 12.)

9. Mr. President, I would like to take the second point first, if I may.

To prove his point, eminent counsel for Yugoslavia relies on the Court's Judgment of 30 June 1995 in the *East Timor* case, in which you considered that "the *erga omnes* character of a norm and the rule of consent to jurisdiction are two different things" (*I.C.J. Reports 1995*, p. 102). Members of the Court, it would ill become me to question this decision; moreover this is not the position of Bosnia-Herzegovina, which has never claimed that the Court has jurisdiction because the prohibition of genocide, like the principle of the right of peoples to self-determination, constitutes "one of the essential principles of contemporary international law" (*ibid.*). It is moreover for this reason that I said in beginning my review of this question that it was somewhat marginal in relation to the subject-matter of this phase of the proceedings.

34

10. However, even if the peremptory and *erga omnes* character of the principle - a character which Yugoslavia does not dare to deny - does not confer jurisdiction on the Court in this case, it is nonetheless important to our evaluation of the extent and scope of the Court's jurisdiction. This leads me to the first of the "substantial obstacles" mentioned by Professor Brownlie yesterday afternoon.

No, Mr. President, Bosnia-Herzegovina does not confuse the issue of *locus standi* with the different question of the applicability of the Convention, particularly its territorial application! We merely contend that, since the two States are bound by the Convention - and my distinguished colleague Professor Brigitte Stern will shortly show, as my other distinguished colleague Professor Thomas Franck has just shown, that the two Parties were indeed bound by the Convention - if therefore two States are bound by the Convention, and one State accuses the other of having committed acts of genocide, that State may refer the matter to

the Court on the basis of Article IX, without having to show that it has sustained a direct, personal injury arising from such acts of genocide. As the Court very clearly stated in the *Barcelona Traction* case, with express reference moreover to the outlawing of genocide, "in view of the importance of rights involved, all States can be held to have a legal interest in their protection" (Judgment of 5 February 1970, *I.C.J. Reports 1970*, p. 32). In other words, France might have seised the Court, Chad might have done so, Portugal might have done so as well, all of them without having to concern themselves with showing that their nationals or their territory were affected, on the sole ground that Article IX creates a jurisdictional link between Yugoslavia and each one of them (see for example, Joe Verhoeven, "Le crime de génocide, originalité et ambiguité" [The Crime of Genocide: Originality and Ambiguity], *RBDI 1991*, p. 14).

35

Of course, in the specific case of Bosnia-Herzegovina, the issue does not arise. Bosnia-Herzegovina was martyrized very directly in the persons of thousands, hundreds of thousands of its nationals, who were the victims on its territory of genocide committed by and abetted by Yugoslavia.

Nonetheless the *erga omnes* character of the obligations under the Convention of the States which are parties to the Convention and Parties to the present dispute, is of real importance. The consequences are *inter alia*:

(1) that the Applicant State may search out the Respondent's responsibility for acts of genocide it has committed both in the territory of third States - I am thinking of course of Croatia - and in Yugoslavia itself;

(2) that, in the same way, the Applicant State has *locus standi*, both on behalf of its own nationals who are victims of acts of genocide attributable to the Respondent, and to promote the protection of any other people who may be victims of the same acts, be they Yugoslavs or nationals of any third State; and

(3) that, as Brigitte Stern will shortly show, Bosnia-Herzegovina may claim compensation for all acts of genocide committed by the Federal Republic of Yugoslavia, irrespective of the date on which such acts were committed.

III. The various bases of the jurisdiction of the Court

36

11. Mr. President, this brings me to my third point: the various bases of the jurisdiction of the Court. Mr. President, in his statement yesterday afternoon, the Agent of the Federal Republic of Yugoslavia attempted to "neutralize" the bases of jurisdiction invoked by Bosnia-Herzegovina other than Article IX of the 1948 Convention. Mr. Etinski justified his Government's position in the following words:

> "The Applicant failed to present and document at the appropriate stage of the proceedings, i.e., at the time of the submission of the Memorial, the alleged additional bases of the jurisdiction of the Court, as well as the possible requests to be based on them, and we consider that it cannot do it now in this separate procedure related to the Preliminary Objections." (CR 96/10, p. 38, Mr. Etinski.)

The Respondent State is here asserting two very different things:

- on the one hand, that since the date on which the Memorial was filed, Bosnia-Herzegovina was debarred from invoking any basis of the Court's jurisdiction other than Article IX of the Genocide Convention;

- On the other, that it no longer has the right to amend its conclusions (I believe this is what Mr. Etinski is talking about when he

refers to "possible requests to be based on [the additional bases of the jurisdiction of the Court]").

Bosnia-Herzegovina cannot agree with either of these two points.

12. It is scarcely necessary to spend much time on the first point. At the sitting of last Wednesday I read out the relevant passage in the Judgment of the Court of 26 November 1984, which was reproduced in the Order of 13 September 1993. Mr. Etinski found it necessary to read it out again. I shall re-read one small part and I believe that this will dispose of the matter.

> "as the Court has recognized, 'An additional ground of jurisdiction may . . . be brought to the Court's attention' after the filing of the Application,
>
> 'and the Court may take it into account provided the Applicant makes it clear that it intends to proceed upon that basis . . . and provided also that the result is not to transform the dispute brought before the Court by the application into another dispute which is different in character . . . (*Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984*, p. 427, para. 80)'." (Order of 13 September 1993, *I.C.J. Reports 1993*, p. 339.)

The Agent of Yugoslavia did not recall this fact, but the Court in its Order of 8 April 1993 already found that the fact that the letter sent by the Montenegrin and Serb Presidents on 8 June 1992

> "was not invoked in the Application as a basis of jurisdiction does not in its itself constitute a bar to reliance being placed upon it in the further course of the proceedings (cf. *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), I.C.J. Reports 1984*, pp. 426-427, para. 80)".

The Court may therefore entertain the Application on the basis of any title of jurisdiction which was valid at the time when it was formulated - as is the case in respect of Article IX of the Saint-Germain Treaty, or the letter of the two Presidents dated 8 June 1992 - or on the basis of any other title of jurisdiction which might become valid at a

later time. This is the very foundation of the principle of *forum prorogatum*, as the Court recalled in the *Corfu Channel* case (*I.C.J. Reports 1947-1948, Judgement of 25 March 1948*, pp. 27-28).

Such a solution would appear to be necessary for at least three reasons:

(1) it would be absurd to oblige a State which has filed an application invoking a particular basis of jurisdiction to formulate an identical application on different grounds, on the pretext that these grounds were not initially invoked;

(2) any other interpretation would exclude even the possibility of *forum prorogatum*; the Respondent itself does not challenge this possibility, and one of the reasons why Article 38 of the Rules of Court invites the applicant to specify "as far as possible" the legal grounds on which the jurisdiction of the Court is said to be based is precisely in order to preserve the possibility of *forum prorogatum* (cf. Shabtai Rosenne, *The Law and Practice of the International Court*, Nijhoff, Dordrecht, 1985, p. 351, or Geneviève Guyomar, *Commentaire du Règlement de la Cour internationale de Justice*, [Annotated text of the Rules of Court of the International Court of Justice], Pédone, Paris, 1983, pp. 237-238);

(3) the second reason behind this form of words was the concern not to impose on States obligations which are not laid down in the Statute; however, Article 40 (1) of the Statute of the Court does not require the grounds of jurisdiction to be mentioned in the Application (cf. G. Guyomar, *ibid.*, pp. 235-236).

13. On the other hand, the Applicant is not entitled to use any further bases of jurisdiction that it invokes as a pretext for

transforming the dispute "into another dispute which is different in character" (cf. *Société commerciale de Belgique, P.C.I.J., Series A/B, No. 8*, p. 173; and *Nicaragua, I.C.J. Reports 1984, Judgement of 26 November 1984*, previously cited, p. 427; or *Order of 13 September 1993*, previously cited, p. 339). There is no conflict between the Parties as to the principle on this point. I repeat that Bosnia-Herzegovina has no intention of transforming the dispute in this way.

In its Memorial, Bosnia-Herzegovina stated very clearly that, whilst it reserved the possibility of invoking all relevant titles of jurisdiction, whatever the bases of the Court's jurisdiction, it intended in any event to focus exclusively on the claims made in its Application, relating to the application of the Genocide Convention and to acts of genocide (cf. Memorial, Chapter 1.2, "Sharpening the Focus", pp. 4-5 and Section 4.2.4, p. 176 *et seq*); speaking on behalf of Bosnia-Herzegovina, I reiterated this very clearly on Wednesday (cf. CR 96/8, p. 3).

14. This means, very clearly, not only that there no question of going beyond the claims contained in the Application, but also that Bosnia-Herzegovina renounces all claims which are not directly linked to the genocide committed or abetted by Yugoslavia.

On the other hand, the Respondent State is not entitled to reproach Bosnia-Herzegovina with having relied on all valid titles which might establish the jurisdiction of the Court for this purpose. The main title of jurisdiction is of course Article IX of the 1948 Convention, but other titles include recognition of the jurisdiction of the Court in other instruments or by "acts conclusively establishing [consent]" on the part of the Respondent State. As I said the day before yesterday, this might present a degree of interest, enabling the Court to make findings on some

of the ways and means used by Yugoslavia to perpetrate the genocide of which it stands accused, and particularly its recourse to a war of aggression during which it seriously violated the 1949 Geneva Conventions and the 1977 Protocols I and II.

In the opinion of the Bosnian Government, the Court might proceed in this way on the basis of Article IX alone. Nevertheless, as Judge Lauterpacht stated in his separate opinion appended to the Order of 13 September 1995,

> "it must be borne in mind that conduct which may prima facie appear not to fall within those categories [of acts enumerated in Article III of the 1948 Convention] may in truth do so if such conduct can in fact be shown to cause, or contribute to, with sufficient directness, genocide or genocidal activity" (*I.C.J. Reports 1993*, p. 413).

The possibility of relying on bases of jurisdiction other than Article IX of the Convention would at least simplify matters in this respect and would avoid futile arguments between the Parties as to whether such conduct is or is not linked "with sufficient directness" to the Convention. It must be understood, I repeat, that Bosnia-Herzegovina has no intention of protracting its submissions unduly.

Mr. President, I can carry on or take a break here, as you wish.

The PRESIDENT: Please continue.

Mr. PELLET: I come now to my fourth point, i.e., the letter of 8 June 1992.

IV. The letter of 8 June 1992

15. Mr. President, yesterday afternoon the Agent of Yugoslavia devoted part of his statement to the letter sent on 8 June 1992 by the Presidents of Montenegro and Serbia, on behalf of the Federal Republic of Yugoslavia, to the President of the Arbitration Commission of the

International Conference for Peace in Yugoslavia. After quoting *in extenso* the relevant passages of the Orders of the Court of 8 April and 13 September 1993, Mr. Etinski concluded:

> "The letter of 8 June 1992 was addressed to the President of the Arbitration Commission and it referred to the concrete situation. This declaration was not drawn up *in abstracto, erga omnes* and without specific timing. It was the expression of the political opinions of the two Presidents that all disputes, concerning the matters raised by the letter of 3 June 1992, should be resolved in a peaceful manner and, if agreement is not possible, by judicial settlement. In addition, according to the general rules of international law, this letter cannot be seen as a treaty offer or a unilateral declaration of the Federal Republic of Yugoslavia." (CR 96/10, p. .)

16. In its Order of 8 April 1993, the Court raised several

41 questions. Did the letter:

- constitute an "immediate commitment", binding on Yugoslavia, to accept unconditionally the unilateral submission to the Court of a wide range of legal disputes;
- or was it intended "as a commitment solely to submission to the Court of the three questions raised by the Chairman of the Committee [i.e., the President of the Arbitration Commission]" (by the by, these questions were raised by the Chairman of the Conference, Lord Carrington, and the President of the Arbitration Commission, Mr. Badinter, did no more than transmit it);
- lastly, the Court raised the question as to whether it was no more than "the enunciation of a general policy of favouring judicial settlement, which did not embody an offer or commitment" (*I.C.J. Reports 1993*, p. 18).

Naturally, Yugoslavia opts for the third possibility.

Mr. President, it is wrong to do so.

17. In order to avoid any ambiguity, the simplest thing is to use the text of the letter itself. It is written in Serbo-Croat, a language I do not know. I shall therefore not venture to read the original text, and shall merely recall the crucial passages of the letter in the English translation done by Professor Anne Henderson of the William and Mary College of Williamsburg. These passages read as follows:

> "The Federal Republic of Yugoslavia takes the position that those legal disputes which cannot be resolved through agreement of the Federal Republic of Yugoslavia and the former Yugoslav Republics must be submitted to the jurisdiction of the International Court of Justice as the principal Court organization of the UN.
>
> Therefore, keeping in mind the fact that the questions your letter raised were of a legal nature, the Federal Republic of Yugoslavia proposes that if agreement on these questions cannot be reached among the participants of the conference, they be resolved before the International Court of Justice in accordance with the Statute of that Court." (CR 93/33, p. 32.)

42

18. A reading of these passages seems to me to suffice to eliminate the uncertainties mentioned in the Order of 8 April 1993. Each of the two paragraphs I have just read fully carries out one of the first two functions envisaged by the Court:

- the second paragraph constitutes a specific suggestion for submitting the three questions raised by Lord Carrington to the Court. It is of no direct concern to us here; it is merely an illustration of the first of these paragraphs;
- the first paragraph constitutes a firm commitment to accept that disputes between Yugoslavia and the former Yugoslav Republics "must be submitted" to the International Court of Justice - however this can only be a proposal since effective submission necessarily depends on the acceptance of those other States.

In its Written Observations of 24 August 1993, to which Mr. Etinski referred in his statement yesterday, Yugoslavia stressed that "All delegations opted for the Badinter Commission" (para. 34, p. 21); it was referring to the other four States formed from the breakup of the former Yugoslavia. The Respondent is partly right, but it confuses matters somewhat and draws the wrong conclusions from its findings:

Firstly, "opting" for the Badinter Commission concerned only issues in respect of the succession of States; however, the Yugoslav offer was much more general, the second paragraph which I have quoted being, I repeat, merely an illustration of the first.

Secondly, it is clear moreover that Bosnia-Herzegovina for its part

43 "opted for the Court" on the central issue of genocide;

Thirdly, in addition, Yugoslavia's own reasoning confirms that the letter of 8 June 1992 must be interpreted as a firm offer to submit to the jurisdiction of the Court.

19. Contrary to the position adopted by Yugoslavia in its oral arguments of April 1993 (cf. CR 93/13, p. 29), it is not a matter of whether the parties reached an agreement to submit the dispute to the Court, as they did in the case concerning the *Aegean Sea Continental Shelf (Judgment of 8 December 1978, I.C.J. Reports 1978,* p. 44) or the case concerning *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Judgment of 15 February 1995, I.C.J. Reports 1995,* p. 23). It is rather a matter of whether the unilateral declaration by Yugoslavia committed that State at international level. If this question is answered in the affirmative, there is no doubt that Bosnia-Herzegovina could submit the dispute to the Court unilaterally since, in line with the Court's well-known *dictum* in the *Nuclear Tests* case,

"It is well recognized that declarations made by way of unilateral acts, concerning legal or factual situations, may have the effect of creating legal obligations . . . When it is the intention of the State making the declaration that it should become bound according to its terms, that intention confers on the declaration the character of a legal undertaking, the State being thenceforth legally required to follow a course of conduct consistent with the declaration. An undertaking of this kind, if given publicly, and with an intent to be bound, even though not made within the context of international negotiations, is binding." (*Judgment of 20 December 1974, I.C.J. Reports 1974*, p. 267 and 472.)

20. These conditions have been met in this case:

- Yugoslavia has clearly stated that the disputes between itself and other States formed from the break-up of the former Socialist Federal Republic of Yugoslavia should be submitted to the Court, if no agreement is possible;
- this intention was expressed publicly and must be analyzed as an offer made to the four other States concerned, and Yugoslavia cannot withdraw this offer if one of these States accepts it, as in this case. Once again, we are not talking here of an agreement, but of a unilateral act on the part of Yugoslavia;
- thirdly: this legal commitment is all the more firm in that it was made in the course of proceedings which were not judicial but were at least quasi-arbitral. Such a declaration is obviously binding on the State in whose name it is made (cf. Arbitral Award of 17 July 1986 in the case concerning *Filleting in the Saint-Lawrence Gulf, RGDIP* 1986, p. 756);
- lastly, it would not be acceptable for a State to object to the jurisdiction of an organ of dispute settlement, in offering to settle disputes before the World Court, only to reject the Court's jurisdiction subsequently when it is "taken at its word". Such an attitude obviously runs counter to the principle of good faith which ought to govern relations between sovereign States, and runs counter

to the dignity of the Court and that of the other organs of dispute settlement to which the Court was preferred.

21. Several factors bear witness to the desire on the part of the Federal Republic of Yugoslavia to commit itself:

- firstly, the double signature of the Presidents of the Presidencies of the two parts of this State;
- then the solemn tone of the introductory phrase: "The Federal Republic of Yugoslavia takes the position that . . .";
- or the word "declaration", which was thrice used by the Yugoslav Agent in his submissions of 26 August 1993 to describe the letter of 8 June 1992 (CR 93/35, p. 34);
- or the fact that in the same circumstances and again yesterday the agent of Yugoslavia challenged the applicability of this text, on the dual pretext that it was not "in force on 31 March 1993" (without however explaining why - and this means in any event that it was "in force" before or after . . .), and that "the condition contained in the declaration is not fulfilled" (*ibid.*) : *a contrario* this means that if this condition is met, Yugoslavia accepts that the Court has jurisdiction on that basis.

22. What condition are we talking about? We are saying that the Parties find it impossible to reach agreement concerning a dispute (the letter refers to "disputes which cannot be resolved through agreement"). It is clear that the condition is met in this case. The obligation to negotiate to which Yugoslavia subordinates its offer to appear before the Court, like any obligation of this type, cannot be absolute. As the Court recalled in the case concerning the *North Sea Continental Shelf*, "[the parties] are under an obligation so to conduct themselves that the negotiations are meaningful" (*I.C.J. Reports 1969*, p. 47); this cannot

be so when, as in this case, one of the Parties, in the words of the 1969 Judgment, not only "insists upon its own position without contemplating any modification of it" (*ibid.*), but even refuses to admit that a problem exists. This applies to Yugoslavia which, as the Agent of Bosnia-Herzegovina recalled a short time ago, denies any involvement in the genocide perpetrated against non-Serb populations in the former Yugoslavia.

There can therefore be no doubt that negotiations would be totally futile and that the sole condition to which Yugoslavia, on its own admission, subordinated its "declaration" of 8 June 1992 must be considered to have been met. This unilateral commitment therefore also founds the jurisdiction of the Court to entertain the Application by Bosnia-Herzegovina.

46

Shall I go on?

The PRESIDENT: Thank you, Professor. You will have quite enough time; I will give you the time you require to expound your last point after the break which the Court will now take. The hearing is suspended.

The Court adjourned from 4.35 to 4.45 p.m.

The PRESIDENT: Please be seated. Professor Pellet, you have the floor again to finish your statement.

Mr. PELLET: I am coming to the end, I promise. Thank you, Mr. President.

Mr. President, you said that I had one point left, but in fact I have two, one concerning Article 11 of the Saint-Germain Treaty of 10 September 1919, and the second concerning *forum prorogatum*. However, since I believe that the Bosnian team is running a little bit late, I do

not think that I will go into Article 11 of the Saint-Germain Treaty of 10 September 1919 in detail, and will merely seek to summarize it very briefly. Firstly, let me say that Bosnia-Herzegovina maintains that basis of jurisdiction, and that that basis of jurisdiction does not have the effect of transforming the dispute into another type of dispute, since the most elementary minority right protected under the Saint-Germain Treaty is that of not being a victim of genocide. Subsequently I shall remind the Court that the validity of this Treaty has been affirmed by the United Nations organs, as was stated by Bosnia-Herzegovina in the memorandum of 6 August 1993 in which it first referred to this Treaty. Lastly, I shall recall that the machinery guaranteeing the rights of minorities under Article 11 of the Saint-Germain Treaty involved the intervention of the Council of the League of Nations and its members. As the Court accepted with regard to the monitoring of the obligations of the mandatory Powers in the *South-West Africa* cases, this type of monitoring machinery was bequeathed by the Council of the League of Nations to the General Assembly. It therefore appears legitimate to consider that the privileges, to term them thus, accorded to members of the Council of the League of Nations have been bequeathed to the General Assembly of the United Nations, of which Bosnia-Herzegovina is a member.

Mr. President, after this brief summary I come to my last point.

V. Forum prorogatum and the acquiescence of Yugoslavia

22. Mr. President, Mr. Etinski devoted almost half his statement yesterday afternoon to the question of *forum prorogatum* (CR 96/10, p. ...). The Government of Bosnia-Herzegovina holds him to be mistaken in law and in fact.

23. Firstly, in fact.

The Agent of Yugoslavia accuses me of having quoted "the statement of Shabtai Rosenne" "on several occasions" (CR 96/10, p. ...). Mr. President, this is totally incorrect. In speaking of *forum prorogatum* I neither quoted nor even mentioned at any time the statements of Ambassador Rosenne (cf. CR 96/8, p. 78-79); I referred to them only in relation to acquiescence in the jurisdiction of the Court on the basis of Article IX of the 1948 Convention (cf. *ibid.*, p. 80-81). This is quite a different matter and I shall touch on it again when I finish.

48

At this point we are dealing with *forum prorogatum stricto sensu*, i.e., the principle that the jurisdiction of the Court may result from any "act conclusively establishing [consent]" by the Respondent State and particularly its conduct after the Application is filed if such conduct involves "an element of consent regarding the jurisdiction of the Court" (*Anglo-Iranian Oil Co., Preliminary Objection, Judgment of 22 July 1952, I.C.J. Reports 1952*, p. 114). In this respect, the "act conclusively establishing [consent]" which founds the jurisdiction of the Court is constituted not by any declarations that were made or that might have been made by Mr. Rosenne in the oral arguments presented in April 1993, but by the simple fact that Yugoslavia submitted a request for the indication of provisional measures on 1 April 1993.

24. With your permission Mr. President, it may perhaps be not unhelpful to re-read a few extracts from this request:

> "The Yugoslav Government welcomes the readiness of the International Court of Justice to discuss the need of ordering provisional measures to bring to an end inter-ethnic and inter-religious armed conflicts within the territory of the 'Republic of Bosnia and Herzegovina' and in this context, recommends that the Court, pursuant to Article 41 of its Statute and Article 33 of its Rules of Procedure, orders the application of provisional measures, in particular: ... ";

there follows a long list of measures including: compliance with the cease-fire of 28 March 1993 - which is of no interest today; several measures linked to the alleged "ethnic cleansing" of Serbs in Bosnia-Herzegovina - which comes under the Genocide Convention; and, to quote the terms of the Yugoslav request once again:

> " - to direct the authorities under the control of Izetbegovic [sic] to respect the Geneva Conventions for the Protection of Victims of War of 1949 and the 1977 Protocols thereof ..."

For those purposes, Yugoslavia therefore clearly and distinctly accepted the jurisdiction of the Court.

25. Yugoslavia defends itself in two ways.

Firstly by stating: "it is quite clear ... that Mr. Rosenne has reserved all our rights [this is the Agent of Yugoslavia speaking] concerning the jurisdiction of the Court" (CR 96/10, p. ...).

Mr. President, as we have seen, this is not accurate. Yugoslavia's request for the indication of provisional measures of 1 April 1993 was not qualified by any reservations and the Judgment of the Court of 22 July 1952 in the case concerning the *Anglo-Iranian Oil Co.* is of no help to Yugoslavia. The measures of defence invoked by Iran and on which the United Kingdom relied in order to affirm the existence of *forum prorogatum* were clearly designated by the Respondent as "[measures of defence] which it would be necessary to examine only if Iran's Objection to the jurisdiction were rejected" as the Court expressly noted (*I.C.J. Reports 1952*, p. 114). There is nothing of the sort in this case. As for Mr. Rosenne, he made no reservations at all on this point (cf. CR 93/13, *passim*).

As for the contention reiterated yesterday by the Agent of Yugoslavia, namely that

> "[i]n paragraph 3 of its Request for the indication of provisional measures of 9 August 1993, the Federal Republic of Yugoslavia reserved all the rights of objection to the jurisdiction of the Court and the admissibility of the Application" (CR 96/10, p . . .),

it has no significance. As I believe I showed in my statement on Wednesday (cf. CR 96/8, p. 76-77), it concerns a different phase of the case and, even if such a "reservation" were to have any legal effect, which is more than doubtful, it would only have such an effect with regard to the requests put forward in the memorandum of August 1993 and

50 in no way with regard to those made on 1 April 1993, requests which clearly show that Yugoslavia considered that the Court had jurisdiction to rule on the claims formulated in the requests.

26. Mr. President, coming now to the errors of law made by Mr Etinski, it is difficult to see how a State can both request the indication of provisional measures and question the jurisdiction of the Court to deal with its request.

As I showed on Wednesday (CR 96/8, pp. 77-78), without the Agent of Yugoslavia deeming it helpful or possible to challenge my assertions, the jurisdiction of the Court to rule on a request for the indication of provisional measures is an incidental jurisdiction. It presupposes that the Court has jurisdiction in the main issue (cf. Shigeru Oda, "Provisional Measures; the Practice of the International Court of Justice", in V. Lowe and M. Fitzmaurice eds., *Fifty Years of the International Court of Justice - Essays in Honour of Sir Robert Jennings*, Cambridge University Press, 1996, p. 554). No doubt it is true that, at the stage of indicating provisional measures, the Court merely has to find that it has *prima facie* jurisdiction and it is also true that, after more extensive consideration, it may happen that the Court finds that it lacks jurisdiction to entertain the Application.

This is what happened in the case concerning the *Anglo-Iranian Oil Co.* as my adversary correctly noted yesterday (CR 96/10, p . . .). However, this has no relevance to the point at issue. What is this point? It is not a matter of whether the Court rules, eventually, that it has jurisdiction or has no jurisdiction, it is a matter of establishing whether the Respondent accepts that it has.

In submitting its request of 1 April 1993, Yugoslavia showed that it
51 accepted this - at least in relation to the questions forming the subject-matter of the claims in its memorandum. It cannot today retract its expression of this acceptance, which bore witness to its consent to the jurisdiction of the Court, whatever the reasons: a feeling that it was moreover bound for reasons of pure expediency. To paraphrase Sir Gerald Fitzmaurice in his separate opinion appended to the Judgment of 1962 in the case concerning the *Temple of Preah Vihear*, "having accepted a certain obligation, or having become bound by a certain instrument [it] cannot now be heard to deny the fact, to blow hot and cold" (*I.C.J. Reports 1962*, p. 63).

27. It is true that Mr. Etinski advanced one argument, a single one, which went against this reasoning: he stated that it would run counter to the principle of equality of the Parties (CR 96/10, p . . .). Mr. President, this too is incorrect, for it is like saying that a party which accepts the jurisdiction of the Court and a State which refuses to accept it are not "equal" before the Court! They are equal, of course, but they are equal with a different status: applicant for the first; respondent for the second. There is nothing to prevent the respondent from accepting the jurisdiction of the Court and from becoming in turn an applicant, for example, by formulating counter-claims or requests for the indication of provisional measures. However, the second party cannot

have its cake and eat it, it cannot refuse the jurisdiction of the Court on matters which disturb it and accept its jurisdiction on matters which suit it.

28. Under these conditions, it is obvious that Bosnia-Herzegovina can do no more than contend that you, the Members of the Court, have jurisdiction to make findings to the full extent implied by the Yugoslav requests of 1 April 1993, which cover both the breaches of the 1949 Geneva Conventions and the 1977 Protocols and the breaches of the 1948 Convention. However, Mr. President, there is more to be said with regard to the latter Convention. I explained this point at some length last Wednesday (CR 96/8, pp. 79-83) but the other Party has apparently not found it necessary to come back to this point again.

52

Only apparently, however, and this is why I have to say a few words to round off the subject.

Still with reference to Mr. Etinski, in his oral arguments yesterday afternoon, Mr. Etinski confused what I said about *forum prorogatum* on the one hand (CR 96/8, pp. 75-79) and about acquiescence in the jurisdiction of the Court on the basis of Article IX of the Genocide Convention on the other (*ibid.* pp. 79-83). I do not know whether the Agent of Yugoslavia did so in good faith or deliberately, but in either case, it seems useful to clarify matters.

These are two points which are clearly not completely unrelated but which nevertheless are quite distinct. In the first case, that of *forum prorogatum*, the jurisdiction of the Court is based on the "act conclusively establishing [consent]" constituted by Yugoslavia's request for the indication of provisional measures of 1 April 1993. I have just spoken at some length on this subject. The second point, acquiescence, concerns the declarations made on behalf of Yugoslavia during the

proceedings, declarations by which Yugoslavia expressly recognized the jurisdiction of the Court on the basis of Article IX of the 1948 Convention.

It is concerning this second aspect of the matter that Mr. Etinski's comment, which I have just noted, worries me. In his statement on 2 April 1993, Mr. Rosenne effectively added a caveat to the acceptance by Yugoslavia of the jurisdiction of the Court (reiterated on at least three occasions - cf. CR 93/13, pp. 16, 34 and 54), a caveat which the Agent of Yugoslavia read out at the hearing yesterday afternoon. I will remind you of the text (Mr. Etinski having carefully "forgotten" the beginning):

53

> "The problem starts with the following words of Article IX. I would not at this stage dispute that all the words of Article IX from 'fulfilment of the present Convention' to 'acts enumerated in Article [III]' relate to the merits of the case, and we are not concerned with that now, beyond reserving all our rights as to how we shall deal with the jurisdiction of the Court and the merits when the times comes." (*Ibid.*, p. 18.)

I would remind you that this was Mr. Rosenne speaking.

This somewhat obscure passage invites three comments:

- firstly, contrary to what the Agent of Yugoslavia peremptorily stated yesterday, it is not too clear "that Mr. Rosenne has reserved all [Yugoslavia's] rights concerning the jurisdiction of the Court" (CR 96/10, p. 40); it is the reverse of his statement which is "quite clear" (*ibid.*) In his statement Ambassador Rosenne, speaking on behalf of Yugoslavia, frequently recognized the jurisdiction of the Court on the basis of Article IX. On the other hand, he expressed doubts as to the exact scope of this provision - and this is precisely what he does in the passage I have just quoted. In other words, Yugoslavia accepts the jurisdiction of the Court but is at odds with Bosnia-Herzegovina as to the exact scope of Article IX. This is confirmed by another passage in

the same speech, which I also quoted on Wednesday (CR 96/8, p. 81). In this passage, the Respondent's Agent stated:

> "we do think that the jurisdiction of the Court is limited, but we are prepared to continue to litigate the case within the limits of the jurisdiction as we understand it" (CR 93/13, p. 54).

54

- Secondly, even if the passage taken from Mr. Rosenne's speech which I quoted earlier might be interpreted as meaning in these precise circumstances that Yugoslavia had intended "to reserve the right" to question its acceptance of the jurisdiction of the Court on the basis of Article IX of the Convention, nothing could be inferred from this in legal terms. As I said yesterday, this is a "cock and bull story" and "giving and withholding is worthless" (cf. CR 96/8, p. 9-80).

- Thirdly and lastly, on Wednesday I also referred to many other instances of acquiescence by Yugoslavia in the jurisdiction of the Court on the basis of Article IX, instances of acquiescence which were not qualified by any caveat or reservation (cf. CR 96/8, p. 80-81).

Members of the Court, this brings us back to the same conclusion, that the Federal Republic of Yugoslavia clearly, formally and frequently acquiesced in the jurisdiction of the Court on the basis of Article IX. It no longer has the right to rescind this acquiescence. This disposes of all the petty, specious arguments that it has developed in the course of the hearings since the beginning of the week, in a bid to escape from the judgment of the Court.

29. Mr. President, it cannot escape your judgment - and this is fortunate; it is fortunate for Bosnia-Herzegovina; it is fortunate for the hundreds of thousands of victims of the genocide it committed and in which it abetted and who cry out for justice; it is fortunate too for the re-establishment of peace in this war-torn part of Europe.

As Professor Antonio Cassese, President of the International Criminal Tribunal for the former Yugoslavia wrote in his first report to the Security Council, quoting Hegel, "*fiat justitia ne pereat mundus* (let justice be done or the world will perish)" (ICTY, *Yearbook* 1994, para. 18, p. 91).

55

Mr. President, Members of the Court, thank you very much indeed for your patience. Mr. President, may I request you to give the floor to Professor Brigitte Stern.

The PRESIDENT: Thank you, Professor, for your statement. I now call upon Professor Brigitte Stern.

Professor STERN: Mr. President, Members of the Court, I come before you once again, in order to take a fresh look at the problems of succession of States in relation to the position of Bosnia within the framework of the Genocide Convention. I shall in fact be speaking quite briefly, as it seemed to me that Professor Eric Suy, counsel for the Government of Yugoslavia, acquiesced yesterday not only in the structure of the arguments that I had presented on behalf of the Government of Bosnia, but also to a very large extent in their substance.

I accordingly propose, in my first section, to attempt to draw up an inventory of the problems of succession of States, for which I shall begin by recording the points of agreement, before reverting, at slightly greater length, to the outstanding points of disagreement.

However, in a second phase, I should like to make some comments upon the strange image of the Genocide Convention that has gradually taken shape in the course of the oral presentations by our adversaries. This second point actually seems to me to be a great deal more important, as it touches on the very concept formed by the Federal Republic of

Yugoslavia of the structure of the international community, of which your Court is the highest judicial body.

I. THE INVENTORY

56

A. The Points of Agreement

These are relatively numerous and I will show, in the first place, that some of them result implicitly from the absence of any reply by Yugoslavia to certain statements forcefully expressed by Bosnia-Herzegovina.

1. The Apprehensiveness of Yugoslavia at the Prospect of a Judgment of the Court

The first point of agreement seems to have come about with regard to the apprehensiveness of the Federal Republic of Yugoslavia at the prospect of a judgment of the Court.

Accordingly, Mr. President, it is as well to begin by drawing the Court's attention to the fact that the Respondent has not attempted to deny that its whole strategy can be explained by its apprehensiveness at the prospect of a judgment.

One the counsel for the Government of Yugoslavia went so far as to say very clearly that what Yugoslavia was aiming at, was not a dilatory strategy merely delaying the delivery of the judgment, but that it rather wanted to stop the case. It did not say to win the case, but *to stop the case*. It doubtless knows only too well what it risks by agreeing to submit to your judgment. Instead of confronting the Genocide Convention with its head held high, the Federal Republic of Yugoslavia prefers to avoid a confrontation of those actions with the fundamental norms laid down by that Genocide Convention.

57

2. The Impossibility of a State's Preventing another State from Succeeding to the Genocide Convention

In the second place, both Parties are in agreement as to the impossibility of a State's preventing another State from succeeding to the Genocide Convention.

I shall read out again what Professor Suy had to say on that subject:

> "Yugoslavia shares the view that no State may prevent a successor State, should the latter so desire, from becoming party to a multilateral convention, such as the Genocide Convention, to which the predecessor State was party." (CR 96/6, p. 6.)

Bosnia takes note of that acknowledgment which, in itself, suffices to confer jurisdiction upon the Court.

Of course, the Respondent subsequently attempts to moderate its statement, but is quite unable to do so.

Other points of agreement result from the explicit acknowledgment - this time by Yugoslavia - of certain positions previously taken by the Government of Bosnia.

3. The Explanation of the Unique Character of Yugoslavia's Objection to Bosnia's Notification of Succession to the Genocide Convention

This applies to the explanation of what I emphasized at some length as being the unique character of Yugoslavia's objection to the notification of Bosnia's succession to the Genocide Convention.

I pointed out that, in my view, the only reason for that objection derived from the existence of Article IX. Not only did the Respondent fail to refute that analysis: it expressly confirmed it. I shall once again read out that completely unambiguous admission by Professor Suy. This is what he has to say:

> "The reason for the lack of any objection to the other declarations of succession is, *in fact*, that Bosnia-Herzegovina

had filed an Application with this Court on the basis of Article IX of the Convention." (CR 96/10, p. . . .; emphasis added.)

58

Is there any more cynical way of acknowledging that that objection was not a response to a long-term legal policy, but to an opportunist policy of a short-term nature?

Certain points of agreement are, after all, concealed behind apparent disagreements, whose sole aim is to throw the Court into confusion.

I shall, for example, stress a number of points upon which, in the absence of objections or where objections are extremely superficial, it seems to me that the Respondent fully agrees with the positions that we have put forward.

4. The Analysis of the *Opinio Juris* of the Chairpersons of Bodies for the Protection of Human Rights

In the first place, we shall see that the Respondent agrees with the analysis presented by the Government of Bosnia with respect to the *opinio juris* of the chairpersons of bodies for the protection of human rights.

I shall not dwell upon this point, as no element worthy of refutation has been submitted, no element which could serve to weaken the impact of that evident *opinio juris* in favour of automatic continuity.

Neither is it worth my while to refute the affirmation according to which this was a personal opinion, as the experts of the Committees were no more than representatives of Governments. They did however express their agreement in their capacity of cogs in the machinery for the protection of human rights - in the same way as you, as Judges of the Court, express your separate or dissenting opinions.

59

Neither is it worth refuting the implication of the Secretary-General's appeal for a confirmation of a succession, in an

attempt to say that, since a confirmation was called for - well, that means there had been no succession. Everybody knows that a confirmation is always useful, as it serves to promote the security of international relations and their transparency.

5. The Analysis of the Practice of the Commission on Human Rights

The Government of the Republic of Yugoslavia likewise agrees, as I see it, with the analysis of the practice of the Commission of Human Rights as presented by Bosnia.

Once again, Mr. President, I can only say what I think, namely, that the opposing Party is glossing over the fact that it cannot possibly disagree with the Government of Bosnia-Herzegovina, by taking refuge behind elaborations which seem to me to go much too far at times.

For instance, it is initially declared - in an attempt to refute the position of the Commission on Human Rights which says that there is automatic succession - it is declared to this Court that the form of words employed, according to which "States are automatically bound by obligations under international . . . instruments" (CR 96/10, p. ..) does not signify that they are parties to those instruments.

What does being a party to a treaty mean, other than that one is bound by obligations *under* that treaty?

It does not seem to me, Mr. President, that there is much point in pursuing these "side-tracks" at any length.

6. Analysis of the Practice of the Human Rights Committee

60 My last point is that the opposing Government is likewise in agreement with the analysis of the practice of the Human Rights Committee that is being presented by the Government of Bosnia.

In the first place, Professor Suy attempted to deny the impact of the practice of the Human Rights Committee, by saying that the Committee had asked Bosnia to confirm the continuity of the Covenant - but it is well known that a request for confirmation does not imply that there is no such continuity. The very term "confirmation" indicates on the contrary that such a continuity already exists. Professor Suy goes on to say - as if that confirmed Yugoslavia's argument whereas, as you will see, that quotation rather tends to invalidate it - Professor Suy goes on to make the following comments which I shall read out:

> "not until 1 September 1993 - in other words ten months after this recommendation by the Human Rights Committee - did the Secretary-General receive the Instrument of Succession of . . . Bosnia-Herzegovina" (CR 96/6, p. 10).

So we anticipate some major revelation; the confirmation comes six months after the event, does this mean that some time will elapse before Bosnia becomes bound? Not at all, as the Secretary-General did not declare that Bosnia was not bound until three months after the filing or give any other information of that kind, which would have shown that there was no continuity.

Professor Suy, what is more - and I would stress this - brings this argument to a close by adding that that confirmation took "effect from 6 May 1992 (the date of its proclamation of independence)".

We likewise note this statement on the record.

Lastly, it is with respect to the analysis of the practice of this Human Rights Committee that the Yugoslav Government engaged in a quite remarkable stylistic exercise, in which it accused the Government of Bosnia of having "engaged in a breathtaking distortion of the facts" (CR 96/10, p. . . .).

61

What crime has been committed by the Government of Bosnia?

In the first place, it committed the error of indicating that, at the time at which the Report of Bosnia was submitted to the Human Rights Committee by virtue of Article 40 - as I reminded you - that Committee was chaired by Mr. Fausto Pocar and not by Mrs. Rosalyn Higgins. With all due respect I must say that I do not see how that error, while obviously regrettable - Mrs. Rosalyn Higgins was a member of the Committee at that time, and personally welcomed the delegation of Bosnia, but was not chairman at that stage - it is however difficult to see how that error can occasion the collapse of the theoretical reasoning presented: the fact that the declarations relating to the continuity of Bosnia-Herzegovina's obligations were made by a man is not necessarily any less significant than if those same declarations had been made by a woman!

What is more, Rosalyn Higgins succeeded Mr. Pocar and the policy of the Human Rights Committee remained the same. One may for example, Mr. President, read in the last Report of the Commission on Human Rights to the Secretary-General, that

> "at its fifty-fifth session [i.e., very recently] (October-November 1995), the Human Rights Committee . . . took the view that human rights treaties devolved with territory, and that States continue to be bound by the obligations under the Covenant entered into by the predecessor State" (E/CN.4/1996/76, 4 January 1996, p. 2).

We are still looking for the "breathtaking distortion of the facts".

It is not enough to state, as did Professor Suy, that "I consider it regrettable that Bosnia-Herzegovina should have had to resort to such distortions to give support to its arguments", for those distortions

52 suddenly to exist!

Subsequently, the Government of Bosnia continued to try to destabilize the - extremely clear - practice of that Committee by

accusing the Bosnian Government of having put statements in the mouths of Committee members, that they did not make. It is extremely easy to reply to such assertions. In the first place, no exact quotation of the statements was made and it seems to me that when one quotes things one should put them in inverted commas - at least this is what I always tell my students and I try to keep to it myself. What is more the summary of the Committee's position as presented by Bosnia merely followed - and this only had to be checked - the summary given in the Report addressed to the Secretary-General by the Commission on Human Rights (E/CN/4/1995/80, 28 November 1994). I do not see how such a Report can fail to lay itself open to criticism.

We accordingly consider that the opposing Party subscribes to our analysis of the practice of the bodies concerned with matters of human rights.

Let us now move on to the points of disagreement.

B. The Points of Disagreement

1. The Date of Entry into Force of the Genocide Convention

These points seems to be less numerous but they are, as you will see, quite important all the same from a qualitative standpoint.

The first point of disagreement is the date of the entry into force of the Genocide Convention.

Bosnia-Herzegovina reasserts here before you, very clearly, what it has said already on a number of occasions, i.e., that the date of entry into force of the Genocide Convention was 6 March 1992.

Yugoslavia, for its part, has put forward a whole range of dates in a bid to extend the period of inapplicability of the Convention as far as possible.

63

I should like to deal with this range of dates one at a time and quickly remind the Court of what I have already said, and which has not been refuted.

- In the first place, it is clear that the date of entry into force of the Genocide Convention is not 14 December 1995, the date of the Dayton Agreements.

The bringing into force cannot have waited until the Dayton Agreements and mutual recognition to take its effect.

It will be recalled that the practice abundantly confirms the rule according to which two States which do not recognize each other may nonetheless be parties to multilateral treaties.

I shall content myself with calling to mind some examples with which you are all familiar. Israel and Syria, for example, are both parties to the Genocide Convention (ratification by Israel on 9 March 1950, and by Syria on 25 June 1955, multilateral treaties deposited with the Secretary-General (Statute) on 31 December 1994, ST/LEG/SER.E/13., pp. 83-84); and the same holds good for Greece and the former Yugoslav Republic of Macedonia, which are likewise both parties to the Genocide Convention (ratification by Greece on 8 December 1954 and by the former Yugoslav Republic of Macedonia on 18 January 1994, *idem.*, p. 84). It is moreover difficult to see why, in Yugoslavia's logic, if the Dayton Agreements are so important for the entry into force of the notification of succession, why the date is not 14 March 1996 - in other words, by virtue of the Convention, three months after the time at which the notification of accession became an operative legal instrument. This would be more logical within the framework of the presentation of Yugoslavia's argument. Perhaps if there had been a third round of oral arguments, the date would have been shifted even further?

Let us continue to narrow the range of possibilities.

- The date of entry into force of the Genocide Convention is not 29 March 1993, either.

That date, as you will doubtless remember, resulted from the analysis of the notification of succession as an accession. Neither Bosnia nor the Secretary-General consider that the act of succession may signify or have to be an act of accession. I shall accordingly not revert to this point.

- The date of entry into force of the Genocide Convention is not the date of the transmittal of the notification of succession, on 18 March 1992.

Here one may proceed by analogy to apply the Court's decision in a case concerning the *Right of Passage over Indian Territory*, in which it was indicated that the different optional declarations of acceptance of the compulsory jurisdiction of the Court did not create bilateral relations between the States.

- Lastly, neither is the date of entry into force of the Genocide Convention the date of notification of succession, 29 December 1993.

We already indicated during the first round of oral arguments that the international rule provides that the new State is not bound on the date on which it sends a notification of succession, but is bound as from the date of its independence.

If one accepts that the principle of automatic succession applies, it is of course only logical that there should be no gap and that the date of independence must be taken to apply.

However, even in cases in which the clean slate rule applies, i.e., essentially within the framework of decolonization, it has always been considered that a notification of succession took effect on the date of independence.

Legal theory has it that when a new State makes a notification of succession, it is bound as from the date of its independence. In particular, this is the position maintained by Professor Ian Brownlie, in a quotation to which Professor Suy most opportunely referred. Looking at the precedents relating to notifications of succession to multilateral treaties of a universal character, he declared that "the actual practice . . . indicates that the successor has an *option* [and the word option is stressed in the text by Professor Brownlie himself] to participate in such treaties in its own right irrespective of the provisions in final clauses of the treaty on conditions of participation" (*Principles of Public International Law,* Oxford, Clarendon Press, 1990, 4th ed., p. 670).

The practice likewise confirms that rule according to which succession takes effect on the date of independence.

This could be seen at the time of the various independences. I will only call to mind, at this point, the case of Algeria which, while it acceded to a large number of multilateral treaties, made a point of succeeding to France in respect of the multilateral Conventions on the protection of human rights and the humanitarian Conventions.

This has likewise been confirmed during the recent wave of successions of States. All the successor States, when making notifications of succession, indicated that those notifications took effect on the date of their independence. This was the case of the Czech Republic, the Slovak Republic, Croatia, Slovakia, the former Republic of

Macedonia and, of course, it is the case of Bosnia-Herzegovina. What is more, no State even dreamed of raising the slightest objection - other than the one with which we are now concerned, of course.

66

With respect to the recent practice to which reference has just been made, I would like to indicate briefly that Mr. Etinski attempted to show that the use of a notification of succession was reserved to those States that came into being in the course of the decolonization process. To prove this point he said that this had not been done in recent years and his reason was that none of the States of the former Soviet Union had made use of a notification of succession.

He told the Court that only the States of the former Czechoslovakia and the former Yugoslavia had made use of the notification of succession.

By comparing the number of States of the former Soviet Union - there are twelve of them - to the others - and there are six of them - he gets the impression that notification of succession is not the general practice.

I propose another reading - which seems to me more rational - and which as you will see, Mr. President, radically inverts the proportions of practice. That other reading is that there are now three procedures of succession in use and that, out of those three procedures of succession, two in any event have absolutely involved the notification of succession. The case of the former Soviet Union can be explained by the agreement among the States for one of them to assure continuity.

In any case, one cannot draw any conclusion from the recent practice that serves to invalidate - as Mr. Etinski attempted to do - the rule according to which notification takes effect as from the date on which a new State comes into being.

2. The content of the rule governing the succession of States in respect of multilateral treaties

67

This is another respect - and I told you there were two - in which disagreement persists with regard to the content of the rule governing the succession of States in respect of multilateral treaties.

It is no longer the right time - and it is not necessary as I have already stressed - for us to settle this question.

However, I should like to say once again, Mr. President, that the strategy of the Respondent's legal advisers has been to cause you to get lost, either voluntarily or because they were themselves lost in the labyrinth of problems posed by the succession of States. They have wandered off in all directions, they have gone along a number of paths, but all have led to a dead end, because they did not have Ariadne's thread. To get through the maze, one actually only needs one such thread - either the guiding thread of automatic continuity or the thread of the clean slate rule. However, if one jumps from one to the other, the skein becomes tangled and the real questions get lost along the way.

If one looks at the matter from the standpoint of automatic continuity, the applicability of the Genocide Convention is in no doubt. The real question then arises - if one adopts the standpoint of the Respondent - the real question that I raise is by what legal reasoning one can set aside the continuity intended by a State exercising its sovereignty within the framework of the clean slate rule. The Respondent is incapable of finding such a line of argument - and for a good reason - and has no recourse other than to create a permanent confusion, as I have just pointed out, between automatic continuity - within the framework of the theory of continuity - and deliberate continuity, within the framework of the clean slate rule. It seems to me that the Respondent

has still not given the Court any answer to the following question, which is decisive for your case:

On what basis, within the framework of the clean slate rule, can Yugoslavia refuse to allow any kind of effectiveness to Yugoslavia's declaration of continuity?

We still do not know why the Applicant cannot succeed within the framework of the clean slate rule, if it so desires.

It is, then, unusual for the real questions - in particular the question that I asked just now - to be raised.

II. THE CALLING INTO QUESTION OF THE NATURE OF THE CONVENTION

I should now like to deal, in a second point, with what I have called - for want of a better title - the calling into question of the nature of the Genocide Convention.

The points that I will be dealing with in this section are relatively new because this calling into question has seemed to me to become increasingly apparent in the course of the oral proceedings.

During my first intervention before you, I indicated that Yugoslavia was trying to disqualify the Genocide Convention by preventing it from being considered applicable, or by delaying its effects.

These two types of strategy - preventing the Convention from being applicable and delaying its effects - are strategies that I would describe as procedural attacks ... but they allow the integrity of the Convention to subsist.

To say that the Genocide Convention does not apply *ratione personae*, as they have done because Bosnia is seen as not being a party to it, has no directly adverse effect upon the Convention.

In the same way, to say that the Genocide Convention does not apply
59 *ratione temporis*, because Bosnia is not yet a party to it, has no directly adverse effect upon the Convention.

In other words, these initial analyses - which emerged above all from the written pleadings - have no adverse effect upon what I shall call the essence of the Convention; they only have an adverse effect upon its existence with regard to Bosnia.

Matters have developed very differently with respect to the conjugated assaults whose force has steadily increased in the course of the oral proceedings, and which do undermine the very nature of the Genocide Convention. We have witnessed nothing less than an attempt to distort the Convention, an attempted distortion which is presented in the form of three proposals, which the Government of Bosnia feels obliged to refute in the most categorical manner.

First proposal: the Genocide Convention is not a convention on human rights (so that there is no automatic continuity).

Second proposal: the clause of Article IX of the Genocide Convention is of a purely contractual character (so there is no automatic continuity).

Third proposal: the non-retroactivity of the notification of succession must be applied to the Genocide Convention (so there is no automatic continuity).

As I have very firmly stated, I shall refute these three proposals and I shall begin with the first, according to which the Genocide Convention is not, in Yugoslavia's view, a convention on human rights.

- ***The Genocide Convention is said not to be a convention on human rights***

70

The aim of such a statement - which seems to me to have been made for the first time in the oral proceedings and that Professor Suy persists in not considering to be at all shocking (CR 96/10, p. ...) is the following: doubtless becoming aware of the irrefutability of Bosnia's position according to which there is an automatic continuity for conventions on human rights, Yugoslavia has been unable to find more than one way of attempting to escape, in spite of everything, from the ascendency of the Genocide Convention, and that is by asserting that the Genocide Convention does not fall within the category of human rights conventions to which the rule of automatic continuity applies.

However, it can not that easily avoid being monitored by this Court under Article IX, merely by performing semantic pirouettes.

I am somewhat confused by being obliged to undertake a serious refutation of those verbal constructions. I shall say quite simply that:

(1) in the first place, Bosnia asserts that automatic continuity in fact applies to all the universal treaties that lay down general rules. This is stated in various passages of both the written and oral pleadings. Of course, the conventions protecting human rights are a perfect illustration of this type of universal treaties that lay down general rules. Moreover, if continuity does in fact apply to all the universal treaties laying down general rules, it does not suffice to give the Genocide Convention the status of a convention of international criminal law to set aside the rule of automatic succession merely by waving this magic wand;

(2) the same comment applies to a variation of the same idea which was put forward by the Respondent. Still basing its assertion - or so it

seems to me - upon the same premonition that it will be unable to convince the Court that automatic succession does not apply to conventions on human rights, Yugoslavia coldly declares that the Genocide Convention does not create any rights for individuals - and I quote Professor Suy who stated: "Mr. President, the Genocide Convention contains no clause conferring subjective rights upon individuals." (CR 96/10, p. ...)

71

A few lines previously, he had used a more specific vocabulary, when he said that the Genocide Convention does not create "subjective rights - acquired rights - in favour of individuals" (CR 96/10, p. ...).

I am well aware, Mr. President, Members of the Court, that as the poet so aptly expressed it, "nothing is ever acquired by man, neither his strength, nor his weakness, nor his life ...". However can one, without even raising a eyebrow, maintain at the end of the twentieth century, which is so concerned with the protection of human rights, that the people living on this earth have no acquired right not to be the victims of a genocide? The mere formulation of such a question makes one shudder!

In order to reinforce that somewhat original argument - not to qualify it in moral terms - Professor Eric Suy most inaptly quotes from the writings of Professor Rein Müllerson. Quite simply, he stops the quotation from one of his articles too soon and I must - so that Professor Müllerson may not be considered as an accomplice in such a negative construction of human rights - give a fairly extensive quotation from what he said. This is his statement, seven lines after the quotation given by Eric Suy:

> "The population of most States enjoy these rights and though in many States which are parties to such treaties human rights are violated, participation in the treaties and the use

of their respective monitoring mechanisms help both to remedy situations where rights have been violated and to prevent new and grave violations." ("The Continuity and Succession of States by Reference to the Former USSR and Yugoslavia", *ICLQ*, 1993, p. 491.)

72

The matter is, then, clear: the human rights conventions described in such terms provide for rights for individuals and for machinery to be implemented to monitor the observance of those rights. Rights and the monitoring of those rights. The aim of that monitoring is to make sure that reparation is available to those who have been victims of a violation of their rights and to prevent any future violations.

This gives a framework for an analysis into which the Genocide Convention fits perfectly: it provides that individuals are entitled not to be murdered, are entitled not to have to undergo any assault upon their physical or mental integrity, are entitled not to be subjected to living conditions such as to lead to the destruction of the group to which they belong ... and I maintain that this right is a subjective right of individuals. What is more, the Genocide Convention provides for a whole series of monitoring mechanisms: monitoring by national courts, monitoring by the International Court of Justice, monitoring by an international criminal court - once such a court has been brought into being. Moreover, the finality of that monitoring is also the twofold objective indicated by Rein Müllerson; to provide a remedy for violations and to prevent future violations.

This means that there is not the slightest reasonable basis upon which one can assert that the Convention on Human Rights is not a convention for the protection of human rights, that the Genocide Convention is not a convention for the protection of human rights and, for that reason, is to be exempted from the rule of automatic succession.

- ***Monitoring under Article IX of the Genocide Convention is said to be of a purely contractual character***

73

The second statement that I should like forcefully to refute is that monitoring under Article IX of the Genocide Convention is of a purely contractual character.

The second statement which, once again, seems to me to have been presented for the first time during the oral proceedings, has exactly the same impact as the analysis that we have just made, i.e., the point of analyzing Article IX in a contractual manner, is to contend that automatic succession would apply to the provisions laying down general rules but would not apply to the clauses relating to dispute settlement.

By attempting to bilateralize the clause of Article IX, Professor Suy is doubtless attempting to minimizing the impact of the - fundamental - judicial monitoring included in that Article. Does he not go so far as to qualify the Genocide Convention as a "Convention which is allegedly of universal application"? (CR 96/6; Eng. Trans. p. 14).

I shall reply by referring to your Court, on the one hand to the 1951 Advisory Opinion on the *Genocide Convention* and on the other to the Judgment to the case concerning the *Right of Passage over Indian Territory*.

In the 1951 Advisory Opinion - to which lengthy references have been made and to which I shall not revert - it is very frequently stated that it relates to a universal convention, and the Court has never given the slightest indication of any need to distinguish between legislative and contractual clauses.

The Judgment on the preliminary objections raised in the *Right of Passage* case likewise seems to me to be most significant.

74 It may be recalled that the Government of Portugal filed optional declarations of acceptance of the compulsory jurisdiction of the Court on 19 December 1955, and that it filed an application against India by virtue of that declaration three days later, on 22 December.

As India did not receive the notification until somewhat later - I shall not go into the dates in order to avoid wasting time - but after the seisin of the Court, attempted to exploit that situation in order to have the application of Portugal declared inadmissible. The idea underlying its reasoning was the following: as the Government of India had been unable to file an application against Portugal before having ascertained that Portugal had filed a declaration of acceptance, that meant that, in that case, India could only institute proceedings before the Court on 9 January 1956 or, at the earliest, on 30 December 1955, when it had been informed of that declaration of acceptance. Inversely, India could have filed the application once its own declaration had been deposited. Portugal accordingly contended that there had been an infringement of the exchange of intentions to carry out the contract, and that this meant that India's declaration could not take effect as from the date of that deposition, and that it would only have been operational if the intentions of the two States had coincided.

The Court very firmly rejected that analysis. It indicated that the network of declarations of acceptance of the jurisdiction of the Court could not be analyzed as a network of bilateral relations, but on the contrary constituted an integrated network, a system aimed at an objective of general interest.

Although it is somewhat long, I should like to read out a relevant passage from the Judgment in the case concerning the *Right of Passage, Preliminary Objections*:

"The Court considers that, by the deposit of its Declaration of Acceptance with the Secretary-General, the accepting State becomes a Party to the system of the Optional Clause in relation to the other declarant States, with all the rights and obligations deriding from Article 36. The
75 contractual relation between the Parties and the compulsory jurisdiction of the Court resulting therefrom are established, '*ipso facto* and without special agreement', by the fact of the making of the Declaration. Accordingly, every State which makes a Declaration of Acceptance must be deemed to take into account the possibility that, under the Statute, it may at any time find itself subjected to the obligations of the Optional Clause in relation to a new Signature as the result of the deposit by that Signatory of a Declaration of Acceptance." (*I.C.J. Reports* 1957, p. 146.)

It seems to me that the system of Article IX can be analyzed in exactly the same way. The Federal Republic does not have to have received notification of the succession of Bosnia, for the compromissory clause of Article IX to be operative in relation to Yugoslavia. And there is, I believe, no possible basis for contracturalizing Article IX in order to exempt it from automatic continuity.

- ***The non-retroactivity of the notification of succession should be applied to the Genocide Convention***

One last point upon which I would like to state my firm opposition to the claims of the opposing Party is the statement according to which the non-retroactivity of the notification of succession should be applied to the Genocide Convention.

With that proposal, we are perhaps moving onto the most strange, the most disturbing or our adversary's submissions.

I would like, therefore, to give the reasons which lead me to say that that statement on the non-retroactivity of the notification of succession was made for reasons that seem to me to be hard to acknowledge.

Professor Suy actually says that the notification of succession cannot be retroactive, cannot take effect at the time of independence.

Why? Ah well, he says, because the States parties to a convention, who
76 do not really know whether a new State is bound before it effects its notification, may find themselves bound without their knowledge. I will quote from what Professor Suy actually said, namely:

> "According to Bosnia-Herzegovina thesis, all States parties of the 1948 Convention, including Yugoslavia, would have been bound by treaty to Bosnia-Herzegovina without their knowledge." (CR 96/6; Eng. Trans., p. 22.)

Does this suggest that what Yugoslavia is complaining about, is that it did not know that it could not commit crimes of genocide in Bosnia with impunity?

This interpretation seems, moreover, to be borne out by subsequent excerpts from a commentary of the International Law Commission, which is so characteristic that I should like to read it out, even if it is not given in full. It says that:

> "the intended recipient, still unaware of a notification or communication, might in all innocence commit an act which infringed the legal rights of the State making it".

It is clear that the International Law Commission could only be referring to economic rights, and that it is impossible to transfer that reasoning to obligations *erga omnes*.

If we were actually to transpose that reasoning, that would imply that non-retroactivity has to be imposed in this case, as if this were not the case Yugoslavia, before having knowledge of the notification of Bosnia, could well violate the Genocide Convention *in all innocence*.

However, Mr. President, Members of the Court, I have not finished with retroactivity.

I should like to make a few concluding comments on that subject.
77 These tend to show that all the efforts of Yugoslavia to delay entry into force of the Genocide Convention with regard to Bosnia are bound to fail.

More particularly, the idea according to which one cannot accept the retroactivity of the notification of succession is completely useless.

What in fact is Yugoslavia telling us, now that it thinks that it has managed to remove from the jurisdiction of the Court all the massacres that took place in Bosnia, including Srebrenica?

It tells us that, thanks to Dayton, the Genocide Convention is currently in force, i.e., as from 14 December 1995. That means, and any lawyer will agree, that the compromissory clause of Article IX is currently in force.

Let us look for a minute at that compromissory clause.

We know that a *compromis* always, by definition, provides for the exercise of jurisdiction by arbitrators, with respect of facts that occurred before the *compromis* came into being.

We also know that unless there is an express specification to the contrary, optional declarations of acceptance of compulsory jurisdiction cover those facts that occured before they were deposited.

It is not clear why the compromissory clause, if one accepts - and Yugoslavia does accept - that it is currently in force, could not enable your Court to supervise compliance with the rules of the Genocide Convention, which nobody denies to have been applicable since it first came into being.

Lastly, and in order to remove any doubts as to your jurisdiction, I must add that the existence today, when the case is before this Court, of a valid basis of jurisdiction recognized explicitly by the two Parties, obliterates what Yugoslavia has incessantly denounced as being the Court's lack of jurisdiction to deal with this Application.

Mr. President, Members of the Court, this brings me to the end of my arguments on the succession of States, but I should like to add that

Bosnia-Herzegovina, drawing an inference from what I have just said, anticipates that you will ultimately inform it that you are ready to hear its case.

It is vital that Bosnia be able to present its complaints to this Court.

And since, during these oral arguments, there have been discussions on contributions to the legal theory, not of an unknown warrier but by an unknown student, I should like to borrow the conclusion to my statement from one of my students, Ian Jurovitz, who is currently writing a thesis under my supervision on the concept of a crime against humanity.

Reflecting on the immense challenge posed by the need to reconcile different peoples after an ordeal like the one undergone by Bosnia, he wrote that "Peace can be made among Nations, but there can be no peace between crimes and humanity."

I thank you, Mr. President, and would ask you to call upon the co-Agent, Mr. Phon van den Biesen, who will present the submissions of Bosnia-Herzegovina.

The PRESIDENT: I thank you, Professor Brigitte Stern, for your statement and call upon Mr. Phon van den Biesen, to present the submissions.

M. van den BIESEN: Monsieur le Président, Messieurs les Membres de la Cour,

A la fin de cette procédure orale, j'ai l'honneur de présenter, en guise de conclusion, quelques observations au nom du Gouvernement de la Bosnie-Herzégovine.

Tout au long de cette semaine, nous avons, longuement, peut-être trop longuement, démontré à la Cour qu'il n'existe aucun fondement, tant en

fait qu'en droit, pour que celle-ci fasse droit à l'une ou l'autre des exceptions soulevées par l'Etat défendeur. Par ailleurs, l'Etat défendeur a apporté la démonstration qu'il ne prend pas cette affaire au
79 sérieux, qu'il ne prend pas au sérieux l'Etat demandeur et, de ce fait, qu'il ne prend pas non plus au sérieux la Cour elle-même.

Au cours de cette semaine nous avons, de façon concise, peut-être trop concise, compte tenu de l'énormité des faits, démontré à la Cour que cette affaire est bien une affaire de génocide. Cependant l'Etat défendeur n'a pas jugé approprié de consacrer un seul mot aux faits que nous avons relatés. De plus, les représentants de la Yougoslavie n'ont pas montré, de quelque manière que ce soit, la moindre compassion pour les victimes de l'immense tragédie qu'a connue la Bosnie-Herzégovine. L'Etat défendeur s'est borné faussement à déclarer : «Nous ne sommes pour rien dans cette tragédie», démontrant par là-même ce qu'est sa position : «Nous n'avons cure de cette tragédie.»

Nous sommes persuadés que la Cour prendra ses distances avec cette forme extrême de cynisme, lorsqu'elle examinera cette affaire.

Nous avons parcouru bien du chemin, et ce au prix de plusieurs tentatives, pour déterminer le contenu juridique de ces exceptions préliminaires. Nous avons tenté de les traiter de la façon que l'on est en droit d'attendre d'un Etat qui se présente devant la Cour. Nous ne doutons pas que ce que la Cour fera correspond à ce qui est, depuis le début, pour le peuple bosniaque, l'essence même de cette affaire : que
80 justice lui soit rendue là où trop d'injustices ont été commises.

Conclusions finales

Considérant ce qui a été exposé par la Bosnie-Herzégovine dans toutes ses conclusions écrites antérieures et ce qui a été affirmé par les représentants de cet Etat au cours de la procédure orale de cette

semaine, le Gouvernement de la Bosnie-Herzégovine prie respectueusement la Cour

1) de dire et juger que la République fédérative de Yougoslavie a abusé du droit de soulever des exceptions préliminaires que prévoit le paragraphe 6 de l'article 36 du Statut de la Cour et l'article 79 de son Règlement;

2) de rejeter les exceptions préliminaires de la République fédérative de Yougoslavie; et

3) de dire et juger

i) que la Cour est compétente sur la base des divers motifs qui ont été exposés dans nos conclusions écrites antérieures et qui ont été plus amplement démontrés au cours de la présente procédure orale au regard des conclusions présentées dans le mémoire de la Bosnie-Herzégovine et

ii) que ces conclusions sont recevables.

Je vous remercie de l'attention que vous avez bien voulu réserver à nos plaidoiries.

The PRESIDENT: I thank you, Mr. van den Biesen, for your statement and for the final submissions that you have just presented on behalf of Bosnia-Herzegovina. I should also like to thank all the members of the Bosnian team who have assisted the Court by shedding light on the case. This brings to an end the second round of oral arguments by Bosnia-Herzegovina, and at the same time concludes the whole of these proceedings that have been under way since Monday, 29 April. I thank the agents, counsel and advocates of the two Parties for the assistance that they have given to the Court and for the spirit of courtesy that they have manifested throughout these hearings. In accordance with the usual

practice, I shall ask the two Agents to remain at the disposal of the Court for any further information the Court may require in order to carry out its task, and subject to that proviso, I declare closed the oral proceedings in the case concerning the *Application of the Genocide Convention*. The Court will now withdraw to deliberate on the case and the agents will in due course be notified of the date when the Judgment will be delivered. The Court having no other business on its agenda, the sitting is now closed.

The Court rose at 6.05 p.m.